COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

IMMUNITÉS ET PROCÉDURES PÉNALES

(GUINÉE ÉQUATORIALE c. FRANCE)

DEMANDE EN INDICATION
DE MESURES CONSERVATOIRES

ORDONNANCE DU 7 DÉCEMBRE 2016

2016

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

IMMUNITIES AND CRIMINAL PROCEEDINGS

(EQUATORIAL GUINEA *v.* FRANCE)

REQUEST FOR THE INDICATION
OF PROVISIONAL MEASURES

ORDER OF 7 DECEMBER 2016

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7 December 2016

IMMUNITIES AND CRIMINAL PROCEEDINGS

(EQUATORIAL GUINEA *v.* FRANCE)

REQUEST FOR THE INDICATION
OF PROVISIONAL MEASURES

ORDER

Present: *Vice-President* YUSUF, *Acting President*; *President* ABRAHAM; *Judges* OWADA, TOMKA, BENNOUNA, CANÇADO TRINDADE, GREENWOOD, XUE, DONOGHUE, GAJA, SEBUTINDE, BHANDARI, ROBINSON, CRAWFORD, GEVORGIAN; *Judge* ad hoc KATEKA; *Registrar* COUVREUR.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Articles 41 and 48 of the Statute of the Court and Articles 73, 74 and 75 of the Rules of Court,

Makes the following Order:

Whereas:

1. On 13 June 2016, the Government of the Republic of Equatorial Guinea (hereinafter "Equatorial Guinea") filed in the Registry of the Court an Application instituting proceedings against the French Republic (hereinafter "France") with regard to a dispute concerning

> "the immunity from criminal jurisdiction of the Second Vice-President of the Republic of Equatorial Guinea in charge of Defence

and State Security [Mr. Teodoro Nguema Obiang Mangue], and the legal status of the building which houses the Embassy of Equatorial Guinea, both as premises of the diplomatic mission and as State property".

2. At the end of its Application, Equatorial Guinea

"respectfully requests the Court:

(a) With regard to the French Republic's failure to respect the sovereignty of the Republic of Equatorial Guinea,

(i) to adjudge and declare that the French Republic has breached its obligation to respect the principles of the sovereign equality of States and non-interference in the internal affairs of another State, owed to the Republic of Equatorial Guinea in accordance with international law, by permitting its courts to initiate criminal legal proceedings against the Second Vice-President of Equatorial Guinea for alleged offences which, even if they were established, *quod non*, would fall solely within the jurisdiction of the courts of Equatorial Guinea, and by allowing its courts to order the attachment of a building belonging to the Republic of Equatorial Guinea and used for the purposes of that country's diplomatic mission in France;

(b) With regard to the Second Vice-President of the Republic of Equatorial Guinea in charge of Defence and State Security,

(i) to adjudge and declare that, by initiating criminal proceedings against the Second Vice-President of the Republic of Equatorial Guinea in charge of Defence and State Security, His Excellency Mr. Teodoro Nguema Obiang Mangue, the French Republic has acted and is continuing to act in violation of its obligations under international law, notably the United Nations Convention against Transnational Organized Crime and general international law;

(ii) to order the French Republic to take all necessary measures to put an end to any ongoing proceedings against the Second Vice-President of the Republic of Equatorial Guinea in charge of Defence and State Security;

(iii) to order the French Republic to take all necessary measures to prevent further violations of the immunity of the Second Vice-President of Equatorial Guinea in charge of Defence and State Security and to ensure, in particular, that its courts do not initiate any criminal proceedings against the Second Vice-President of the Republic of Equatorial Guinea in the future;

(c) With regard to the building located at 42 Avenue Foch in Paris,

(i) to adjudge and declare that, by attaching the building located at 42 Avenue Foch in Paris, the property of the Republic of

Equatorial Guinea and used for the purposes of that country's diplomatic mission in France, the French Republic is in breach of its obligations under international law, notably the Vienna Convention on Diplomatic Relations and the United Nations Convention [against Transnational Organized Crime], as well as general international law;

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

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

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

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

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

4. In accordance with Article 40, paragraph 2, of the Statute of the Court, the Registrar immediately communicated the Application to the French Government. He also notified the Secretary-General of the United Nations of this filing.

5. Pending the notification provided for by Article 40, paragraph 3, of the Statute by transmission of the printed bilingual text of the Application to the Members of the United Nations through the Secretary-General, the Registrar informed those States of the filing of the Application and its subject.

6. Since the Court included upon the Bench no judge of the nationality of Equatorial Guinea, the latter proceeded to exercise the right conferred upon it by Article 31, paragraph 2, of the Statute to choose a judge *ad hoc* to sit in the case; it chose Mr. James Kateka.

7. By an Order dated 1 July 2016, the Court fixed 3 January 2017 and 3 July 2017 as the respective time-limits for the filing of a Memorial by Equatorial Guinea and a Counter-Memorial by France.

8. On 29 September 2016, Equatorial Guinea submitted a Request for the indication of provisional measures, referring to Article 41 of the Statute and to Articles 73, 74 and 75 of the Rules of Court.

9. At the end of its request for the indication of provisional measures, Equatorial Guinea asks the Court, "pending its judgment on the merits, to indicate the following provisional measures:

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

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

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

10. Equatorial Guinea also requested "the President of the Court, as provided for in Article 74, paragraph 4, of the Rules of Court, to call upon France to act in such a way as will enable any order the Court may make on the request for provisional measures to have its appropriate effect".

11. The Registrar immediately transmitted a copy of the Request for the indication of provisional measures to the French Government, in accordance with Article 73, paragraph 2, of the Rules of Court. He also notified the Secretary-General of the United Nations of this filing.

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

13. A copy of that letter was transmitted, for information, to the Government of Equatorial Guinea.

14. By letters dated 3 October 2016, the Registrar informed the Parties that, pursuant to Article 74, paragraph 3, of the Rules, the Court had fixed 17, 18 and 19 October 2016 as the dates for the oral proceedings on the request for the indication of provisional measures.

15. On 14 October 2016, France submitted to the Court several documents related to the case.

16. At the public hearings held on 17, 18 and 19 October 2016, oral observations on the request for the indication of provisional measures were presented by:

On behalf of Equatorial Guinea:	H.E. Mr. Carmelo Nvono Nca, Mr. Jean-Charles Tchikaya, Sir Michael Wood, Mr. Maurice Kamto.
On behalf of France:	Mr. François Alabrune, Mr. Alain Pellet, Mr. Hervé Ascensio.

17. At the end of its second round of oral observations, Equatorial Guinea asked the Court to indicate the following provisional measures:

> "On the basis of the facts and law set out in our Request of 29 September 2016, and in the course of the present hearing, Equatorial Guinea respectfully asks the Court, pending its judgment on the merits, to indicate the following provisional measures:
>
> *(a)* that France suspend all the criminal proceedings brought against the Vice-President of the Republic of Equatorial Guinea, and refrain from launching new proceedings against him, which might aggravate or extend the dispute submitted to the Court;
>
> *(b)* that France ensure that the building located at 42 Avenue Foch in Paris is treated as premises of Equatorial Guinea's diplomatic mission in France and, in particular, assure its inviolability, and that those premises, together with their furnishings and other property thereon, or previously thereon, are protected from any intrusion or damage, any search, requisition, attachment, confiscation or any other measure of constraint;
>
> *(c)* that France refrain from taking any other measure that might cause prejudice to the rights claimed by Equatorial Guinea and/or aggravate or extend the dispute submitted to the Court, or compromise the implementation of any decision which the Court might render."

18. At the end of its second round of oral observations, France made the following statement:

> "For the reasons explained by its representatives at the hearings on the request for the indication of provisional measures in the case concerning *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France)*, the French Republic asks the Court:
>
> (i) to remove the case from its List;
>
> (ii) or, failing that, to reject all the requests for provisional measures made by Equatorial Guinea."

19. During the hearings, questions were put by certain Members of the Court to Equatorial Guinea, to which replies were given in writing. Avail-

ing itself of the possibility given to it by the Court, France submitted written comments on Equatorial Guinea's replies to those questions.

* * *

I. Factual Background

20. Beginning in 2007, certain associations and private individuals lodged complaints with the Paris public prosecutor against certain African Heads of State and members of their families in respect of allegations of "misappropriation of public funds in their country of origin, the proceeds of which have allegedly been invested in France".

21. One of these complaints, filed on 2 December 2008 by the association Transparency International France, was declared admissible by the French courts, and a judicial investigation was opened in respect of the handling of misappropriated public funds, complicity in the misappropriation of public funds, misuse of corporate assets and complicity in misuse of corporate assets, and concealment of each of these offences. The investigation focused, in particular, on the methods used to finance the acquisition of movable and immovable assets in France by several individuals, including the son of the President of Equatorial Guinea, Mr. Teodoro Nguema Obiang Mangue, who was at the time Minister for Agriculture and Forestry of Equatorial Guinea.

22. The investigations more specifically concerned the way in which Mr. Teodoro Nguema Obiang Mangue acquired various objects of considerable value and a building located at 42 Avenue Foch in Paris. On 28 September 2011, cars belonging to Mr. Teodoro Nguema Obiang Mangue, that were parked at 42 Avenue Foch, were attached and removed by the police. On 14, 15 and 16 February 2012, searches of the building at 42 Avenue Foch were conducted, during which additional items were attached and removed. The investigating judge considered that the investigations had shown, *inter alia*, that the building had been wholly or partly paid for out of the proceeds of the offences under investigation and that its real owner was Mr. Teodoro Nguema Obiang Mangue. He consequently ordered the attachment *(saisie pénale immobilière)* of the building on 19 July 2012. This decision was subsequently upheld by the *Chambre de l'instruction*, before which Mr. Teodoro Nguema Obiang Mangue had lodged an appeal.

23. As part of the investigation, the police questioned a number of individuals. In particular, they sought to question Mr. Teodoro Nguema Obiang Mangue on two occasions in 2012. Mr. Teodoro Nguema Obiang Mangue, who became Second Vice-President of Equatorial Guinea in charge of Defence and State Security on 21 May 2012, maintained that he was immune from the jurisdiction of the French Courts and declined to appear.

24. An arrest warrant was issued against Mr. Teodoro Nguema Obiang Mangue on 13 July 2012. He challenged this measure before the *Chambre de l'instruction*, but that court took the view that he was not entitled to any form of immunity from criminal process in respect of acts allegedly committed by him in France in his private capacity. It further noted that he had refused to appear or to respond to the summonses sent to him.

25. Since they were unable to question him, the French judicial authorities, by a request dated 14 November 2013, sought international mutual assistance in criminal matters from the Equatorial Guinean judicial authorities, under Article 18 of the Convention against Transnational Organized Crime, asking them to transmit a summons to Mr. Teodoro Nguema Obiang Mangue to attend a first appearance.

26. The judicial authorities of Equatorial Guinea accepted the request for mutual assistance on 4 March 2014. They then executed that request and, on 18 March 2014, following a hearing held in Malabo, Equatorial Guinea, in which the French investigating judges participated by videolink, Mr. Teodoro Nguema Obiang Mangue was indicted by the French judiciary

> "for having in Paris and on national territory during 1997 and until October 2011 . . . assisted in making hidden investments or in converting the direct or indirect proceeds of a felony or misdemeanour . . . by acquiring a number of movable and immovable assets and paying for a number of services".

On 19 March 2014, a notice cancelling the summons *(avis de cessation de recherches)* for Mr. Teodoro Nguema Obiang Mangue was issued by the French investigating judge.

27. On 31 July 2014, Mr. Teodoro Nguema Obiang Mangue applied to the *Chambre de l'instruction de la Cour d'appel* to annul the indictment, on the ground that he enjoyed immunity from jurisdiction in his capacity as Second Vice-President of Equatorial Guinea in charge of Defence and State Security. However, the *Cour d'appel* rejected his application by a judgment of 11 August 2015. The *Cour de cassation*, by a judgment of 15 December 2015, rejected the argument that Mr. Teodoro Nguema Obiang Mangue enjoyed immunity and upheld the indictment.

28. The investigation was declared to be completed and, on 23 May 2016, the Financial Prosecutor filed final submissions "seeking separation of the complaints, their dismissal or their referral to the *Tribunal correctionnel*". On 5 September 2016, the investigating judges of the Paris *Tribunal de grande instance* ordered the referral of Mr. Teodoro Nguema Obiang Mangue — who, by a presidential decree of 21 June 2016, had been appointed as the Vice-President of Equatorial Guinea in charge of Defence and State Security — for trial before the *Tribunal Correctionnel* for alleged offences committed between 1997 and October 2011. On

21 September 2016, the Financial Prosecutor issued a summons ordering Mr. Teodoro Nguema Obiang Mangue to appear before the 32nd *Chambre correctionnelle* of the Paris *Tribunal correctionnel* on 24 October 2016 for a "hearing on the merits".

29. The Assistant Financial Prosecutor subsequently informed Mr. Teodoro Nguema Obiang Mangue's counsel, in an e-mail dated 26 September 2016, that the hearing was merely intended to "raise a procedural issue". He explained that, having noted an irregularity (namely, that the operative part of the referral order did not mention the relevant texts setting out the criminalization and punishment of offences), the Public Prosecutor's Office was of the view that the *Tribunal correctionnel* should settle that issue before addressing the merits of the case.

30. On 24 October 2016, the *Tribunal correctionnel* sent the proceedings back to the Public Prosecutor's Office so that it could return the case to the investigating judge for the purpose of regularizing the referral order; it also stated that the trial hearings would be held from 2 to 12 January 2017.

II. Prima Facie Jurisdiction

31. The Court may indicate provisional measures only if the provisions relied on by the Applicant appear, prima facie, to afford a basis on which its jurisdiction could be founded, but need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case (see, for example, *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia), Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014*, p. 151, para. 18).

32. In the present case, Equatorial Guinea seeks to found the jurisdiction of the Court, first, on Article 35 of the Convention against Transnational Organized Crime, and, second, on the Optional Protocol to the Vienna Convention on Diplomatic Relations (see paragraph 3 above). However, at the hearings, Equatorial Guinea relied only upon Article 35 in respect of its claim regarding the immunity of Mr. Teodoro Nguema Obiang Mangue. The Court will therefore proceed on the basis that the Optional Protocol to the Vienna Convention is invoked by Equatorial Guinea only in relation to the claim regarding the alleged inviolability of the premises at 42 Avenue Foch.

33. The Court must therefore first seek to determine whether the jurisdictional clauses contained in these instruments do indeed confer upon it prima facie jurisdiction to rule on the merits, enabling it — if the other necessary conditions are fulfilled — to indicate provisional measures.

34. Equatorial Guinea and France ratified the Convention against Transnational Organized Crime on 7 February 2003 and 29 October 2002, respectively. Neither of them entered reservations to that instru-

ment, which came into force on 29 September 2003. Further, Equatorial Guinea and France have been parties to the Vienna Convention on Diplomatic Relations (hereinafter the "Vienna Convention") since 29 September 1976 and 30 January 1971 respectively, and to the Optional Protocol since 4 December 2014 and 30 January 1971, respectively. Neither Equatorial Guinea nor France entered reservations to the Protocol.

35. Article 35 of the Convention against Transnational Organized Crime provides that:

> "1. States Parties shall endeavour to settle disputes concerning the interpretation or application of this Convention through negotiation.
>
> 2. Any dispute between two or more States Parties concerning the interpretation or application of this Convention that cannot be settled through negotiation within a reasonable time shall, at the request of one of those States Parties, be submitted to arbitration. If, six months after the date of the request for arbitration, those States Parties are unable to agree on the organization of the arbitration, any one of those States Parties may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court."

36. As regards the Optional Protocol to the Vienna Convention, its first three articles read as follows:

> "*Article I*
>
> Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.
>
> *Article II*
>
> The parties may agree, within a period of two months after one party has notified its opinion to the other that a dispute exists, to resort not to the International Court of Justice but to an arbitral tribunal. After the expiry of the said period, either party may bring the dispute before the Court by an application.
>
> *Article III*
>
> 1. Within the same period of two months, the parties may agree to adopt a conciliation procedure before resorting to the International Court of Justice.
>
> 2. The conciliation commission shall make its recommendations within five months after its appointment. If its recommendations are

not accepted by the parties to the dispute within two months after they have been delivered, either party may bring the dispute before the Court by an application."

37. The Court notes that both Article 35, paragraph 2, of the Convention against Transnational Organized Crime and Article I of the Optional Protocol make the Court's jurisdiction conditional on the existence of a dispute arising out of the interpretation or application of the Convention to which they relate. At this stage of the proceedings, the Court must first establish whether, prima facie, such a dispute existed on the date the Application was filed, since, as a general rule, it is on that date, according to the jurisprudence of the Court, that its jurisdiction must be determined (see *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 148, para. 46).

38. The Court also notes that the Convention against Transnational Organized Crime sets out procedural requirements with which the parties must comply after a dispute arises in order for the Court to have jurisdiction. Under Article 35, paragraph 2, of that instrument, the dispute referred to the Court must be a dispute that "cannot be settled through negotiation within a reasonable time". That provision also states that the dispute must be submitted to arbitration at the request of one of the parties to the dispute and that it may be referred to the Court only if the parties are unable to agree on the organization of the arbitration within six months of the date of the request.

39. Article I of the Optional Protocol does not impose any procedural requirements. However, Articles II and III of that instrument provide that parties may resort to alternative methods of dispute settlement, namely arbitration and conciliation; in such circumstances, the seisin of the Court is subject to certain preconditions.

40. The Court therefore will have to consider these different procedural aspects of the Convention against Transnational Organized Crime and of the Optional Protocol, if it considers that there exists, prima facie, a dispute arising out of "the interpretation or application" of the conventions concerned.

(1) The Convention against Transnational Organized Crime

41. Equatorial Guinea asserts that a dispute exists between the Parties concerning the application of Article 4 of the Convention against Transnational Organized Crime. That provision, entitled "Protection of sovereignty", reads as follows:

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

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

42. In its Request for the indication of provisional measures, Equatorial Guinea contends that "[t]he personal immunity of the Vice-President" and "the inviolability of the building" located at 42 Avenue Foch in Paris "derive from the principles of sovereign equality of States and non-interference in States' internal affairs", principles to which reference is explicitly made in Article 4, paragraph 1, of the Convention. While it accepts that the claim in respect of the building at 42 Avenue Foch and the one relating to the immunity of the Vice-President are closely linked in the criminal proceedings instituted in France, Equatorial Guinea maintains that jurisdiction in respect of one claim is not dependent upon jurisdiction in respect of the other.

43. According to Equatorial Guinea, Article 4 of the Convention is not merely a "general guideline", in light of which the other provisions of the Convention should be interpreted. The principles of sovereign equality and non-intervention to which that Article refers encompass important rules of customary or general international law, in particular those relating to the immunities of States and the immunity of certain holders of high-ranking office in the State. In the Applicant's view, the rules in question are binding on States when they apply the Convention as they are embodied in the above-mentioned principles. Equatorial Guinea thus claims that, when initiating proceedings against the Vice-President of Equatorial Guinea, France was obliged, in applying the Convention — and in particular Articles 6 (Criminalization of the laundering of proceeds of crime), 12 (Confiscation and seizure), 14 (Disposal of confiscated proceeds of crime or property) and 18 (Mutual legal assistance) thereof — to respect the rules relating to the immunity *ratione personae* of the Vice-President of Equatorial Guinea, deriving from Article 4 of that instrument. It adds that the provision on the basis of which France initiated proceedings against the Vice-President of Equatorial Guinea (Article 324-1 of the French Penal Code) represents implementing legislation for the Convention.

*

44. For its part, France denies the existence of a dispute concerning the application of the Convention, and, consequently, that the Court has jurisdiction. In its view, the reference in Article 4 to the principles of sovereign equality and territorial integrity of States, and to that of non-intervention in the domestic affairs of other States, indicates the manner in which the other provisions of the Convention must be applied. France thus maintains that Article 4, paragraph 1, is merely a "general guide-

line . . . which clarifies the manner in which the other provisions of the treaty should be implemented"; it does not give rise to autonomous legal obligations.

45. France adds that the provisions of the Convention which Equatorial Guinea claims were not implemented in accordance with the principles set out in Article 4 of that instrument (Arts. 6, 12, 14 and 18), for the most part (Arts. 6, 12 and 14) do nothing more than oblige States to legislate or regulate. As regards Article 18 of the Convention, France notes that it requested mutual legal assistance from Equatorial Guinea in this case and that the latter raised not the slightest objection on the basis of the rules relating to the immunity *ratione personae* of its Vice-President. France further observes that the proceedings against Mr. Teodoro Nguema Obiang Mangue were instituted not on the basis of the Convention, but under provisions of the French Penal Code, provisions which "were in no way adopted to give effect to the Convention", since French criminal legislation was already "in complete conformity with the obligations laid down by the . . . Convention".

46. Consequently, France considers that the Court has no jurisdiction, on the basis of Article 35, paragraph 2, of the said Convention, to entertain Equatorial Guinea's requests concerning the alleged violation of its sovereignty and the purported interference by France in its domestic affairs. In particular, it asserts that the Court has no jurisdiction to entertain Equatorial Guinea's requests relating to the immunity *ratione personae* claimed by Mr. Teodoro Nguema Obiang Mangue.

* *

47. It is clear from the case file that the Parties have expressed differing views on Article 4 of the Convention against Transnational Organized Crime. Nonetheless, in order to determine, even prima facie, whether a dispute within the meaning of Article 35, paragraph 2, of the Convention exists, the Court cannot limit itself to noting that one of the Parties maintains that the Convention applies, while the other denies it. It must ascertain whether the acts complained of by Equatorial Guinea are prima facie capable of falling within the provisions of that instrument and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain pursuant to Article 35, paragraph 2, of the Convention (see *Legality of Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 137, para. 38).

48. The Court notes that the obligations under the Convention consist mainly in requiring the States parties to introduce in their domestic legislation provisions criminalizing certain transnational offences — such as participation in an organized criminal group (Art. 5), laundering the proceeds of crime (Art. 6), the active or passive corruption of public officials

(Art. 8) and the obstruction of justice (Art. 23) — and to take measures aimed at combatting these crimes (notably measures to combat money laundering (Art. 7), measures against corruption (Art. 9), measures to enable confiscation and seizure (Art. 12), as well as the disposal of confiscated proceeds of crime or property (Art. 14)). An international co-operation mechanism is also provided for with regard to these crimes (international co-operation for purposes of confiscation (Art. 13), extradition (Art. 16), transfer of sentenced persons (Art. 17), mutual legal assistance (Art. 18) and joint investigations (Art. 19)). Under the terms of the Convention, the States parties must, if they have not already done so, legislate against the transnational offences set out in the said instrument and participate in the international co-operation mechanism referred to therein.

49. The purpose of Article 4 of the Convention is to ensure that the States parties to the Convention perform their obligations in accordance with the principles of sovereign equality, territorial integrity of States and non-intervention in the domestic affairs of other States. The provision does not appear to create new rules concerning the immunities of holders of high-ranking office in the State or incorporate rules of customary international law concerning those immunities. Accordingly, any dispute which might arise with regard to "the interpretation or application" of Article 4 of the Convention could relate only to the manner in which the States parties perform their obligations under that Convention. It appears to the Court, however, that the alleged dispute does not relate to the manner in which France performed its obligations under Articles 6, 12, 14 and 18 of the Convention, invoked by Equatorial Guinea. The alleged dispute, rather, appears to concern a distinct issue, namely whether the Vice-President of Equatorial Guinea enjoys immunity *ratione personae* under customary international law and, if so, whether France has violated that immunity by instituting proceedings against him.

50. Consequently, the Court considers that, prima facie, a dispute capable of falling within the provisions of the Convention against Transnational Organized Crime and therefore concerning the interpretation or the application of Article 4 of that Convention does not exist between the Parties. Thus, it does not have prima facie jurisdiction under Article 35, paragraph 2, of that instrument to entertain Equatorial Guinea's request relating to the immunity of Mr. Teodoro Nguema Obiang Mangue. It is therefore not necessary for it to examine whether the procedural conditions set out in that provision are met (see paragraph 38). As the Convention is the only instrument which Equatorial Guinea invoked as a basis for jurisdiction in relation to the claimed immunity of Mr. Teodoro Nguema Obiang Mangue, it follows from the above finding that the Court cannot indicate provisional measures of protection in relation to that claimed immunity.

(2) The Optional Protocol to the Vienna Convention on Diplomatic Relations

51. Equatorial Guinea also claims that a dispute exists between the Parties regarding the application of Article 22 of the Vienna Convention, which reads as follows:

> "1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.
>
> 2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.
>
> 3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution."

52. Equatorial Guinea contends that France, in the proceedings against Mr. Teodoro Nguema Obiang Mangue, has disregarded the legal status of the building located at 42 Avenue Foch in Paris "as premises of its diplomatic mission in France".

53. The Applicant claims that, on 4 October 2011, it informed the French Ministry of Foreign Affairs that for a number of years it had had the building located at 42 Avenue Foch at its disposal and that it used the building "for the performance of the functions of its diplomatic mission without having given [the Ministry's] services official notification thereof". It contends that it has since consistently affirmed the diplomatic status of the building through no less than some 30 diplomatic exchanges.

54. Equatorial Guinea maintains that, notwithstanding the immunity that the building on Avenue Foch should enjoy under the Vienna Convention, it was searched on four occasions between 2011 and 2016, and was attached *(saisie pénale immobilière)* on 19 July 2012.

55. The Applicant thus considers that, "by failing to recognize the building as the premises of the diplomatic mission", France has breached its obligations owed to Equatorial Guinea under the Vienna Convention, in particular Article 22 thereof.

56. Equatorial Guinea stresses that it has protested consistently and that it has, at the same time, sought to settle the dispute through negotiation, conciliation or arbitration. In this regard, it refers to a memorandum dated 26 October 2015, in which it transmitted to France an "offer of conciliation and arbitration", on the basis, in particular, of Articles I and II of the Optional Protocol to the Vienna Convention. Equatorial Guinea asserts that it reiterated that offer in a Note Verbale dated 6 January 2016, in which it renewed its commitment to finding a diplomatic solution to the dispute arising from the so-called "ill-gotten gains" case. Lastly, Equatorial Guinea recalls that, on 2 February 2016, it transmitted

to France a memorandum setting out its position on the questions forming the subject of the dispute and that, on that occasion, it once again reiterated its offer of settlement through conciliation and arbitration. The Applicant states that, on 17 March 2016, the French Ministry of Foreign Affairs responded that it was "unable to accept the offer of settlement" on the grounds that "the facts mentioned . . . [had] been the subject of court decisions in France and [remained] the subject of ongoing legal proceedings".

57. Equatorial Guinea considers that, in light of the foregoing, the Court has jurisdiction under the Optional Protocol. In its Application, Equatorial Guinea contended that the Court had jurisdiction under Article I of that instrument and that Articles II and III thereof did not restrict its right to bring these proceedings before the Court.

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58. France, for its part, contends that the building located at 42 Avenue Foch cannot be considered as housing the premises of Equatorial Guinea's mission in France. It points out that, prior to the Note Verbale from the Embassy of Equatorial Guinea dated 4 October 2011 (see paragraph 53 above), the Protocol Department of the French Ministry of Foreign Affairs had never been informed of the existence of those premises; that not a single piece of correspondence from the Embassy was ever sent to the Ministry from that address; that the Embassy of Equatorial Guinea had not requested any particular measures — concerning protection, in particular — in relation to those premises; and that no requests for tax exemption for them were ever presented, "as [had been done] for the only Embassy premises known to the French authorities, and which are located at another address: 29 Boulevard de Courcelles". France explains that the French Ministry of Foreign Affairs had therefore replied to Equatorial Guinea, on 11 October 2011, "that it did not consider the building to form part of the premises of the diplomatic mission".

59. France further states that several items of correspondence show that the manner in which the use of the building was subsequently presented varied. According to France, it was not until 27 July 2012 that Equatorial Guinea described the premises of 42 Avenue Foch as housing, as from that date, the diplomatic mission itself. At the hearings, France acknowledged that the Embassy offices of Equatorial Guinea seemed to have been transferred to that address at that time. It nonetheless stated, in its comments on Equatorial Guinea's replies to the questions put by judges at the hearings, that the French Ministry of Foreign Affairs had "consistently" recalled that it did not consider the building to form part of the premises of Equatorial Guinea's diplomatic mission "even when the French authorities consented to occasional protection measures for that building".

60. As regards the searches carried out in the building in question, France states that they were conducted at the request of the French judi-

cial authorities, in the context of a lawful procedure, and that they took place only in 2011 and 2012. It maintains that, since that time, there have been no measures of constraint in connection with the building, nor any intrusion therein. Regarding the attachment *(saisie pénale immobilière)* of the building, France asserts that it has "only a provisional effect" and that it was justified by the fact that the investigations had revealed that the building at 42 Avenue Foch had, in all likelihood, been wholly or partly acquired with the proceeds from the offences falling within the scope of the judicial investigation into Mr. Teodoro Nguema Obiang Mangue.

61. The Respondent considers, moreover, that the "finding that the Court lacks prima facie jurisdiction" to rule, on the basis of the Convention against Transnational Organized Crime, on Equatorial Guinea's requests with regard to the alleged immunities of Mr. Teodoro Nguema Obiang Mangue "impacts" on the fate of its requests in respect of the building at 42 Avenue Foch. It explains that there is "no risk of the building being confiscated or sold until Mr. [Teodoro Nguema] Obiang [Mangue] has been definitively convicted of money laundering". Since the Court, in France's view, does not have prima facie jurisdiction over the requests relating to the alleged immunities of the Vice-President of Equatorial Guinea, it also lacks jurisdiction over the requests relating to the building located on 42 Avenue Foch.

62. Lastly, as regards Equatorial Guinea's offer of conciliation and arbitration, France confirms that it could not pursue it because, under the principle of the independence of the judiciary, and owing to the fact that French criminal law does not allow for proceedings to be stopped by way of a compromise, the French Government had no means of putting an end to the criminal proceedings against Mr. Teodoro Nguema Obiang Mangue.

* *

63. The Court recalls that Article I of the Optional Protocol provides that the Court has jurisdiction over disputes relating to the interpretation or application of the Vienna Convention (see paragraph 36 above).

64. It further recalls that Articles II and III of the Optional Protocol provide that the parties may agree, within a period of two months after one party has notified its opinion to the other that a dispute exists, to resort to arbitration or conciliation. After the expiry of that period, either party may bring the dispute before the Court by an application. However, as the Court had occasion to note in the case concerning *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran)*, the terms of the said Articles II and III,

> "when read in conjunction with those of Article I and with the Preamble to the Protoco[l], make it crystal clear that they are not to be

> understood as laying down a precondition of the applicability of the precise and categorical provision contained in Article I establishing the compulsory jurisdiction of the Court in respect of disputes arising out of the interpretation or application of the Vienna Convention" (*Judgment, I.C.J. Reports 1980*, pp. 25-26, para. 48).

The Court then specified as follows:

> "Articles II and III provide only that, as a substitute for recourse to the Court, the parties *may agree* upon resort either to arbitration or to conciliation. It follows, first, that Articles II and III have no application unless recourse to arbitration or conciliation has been proposed by one of the parties to the dispute and the other has expressed its readiness to consider the proposal. Secondly, it follows that only then may the provisions in those articles regarding a two months' period come into play, and function as a time-limit upon the conclusion of the agreement as to the organization of the alternative procedure." (*Ibid.*, p. 26, para. 48 (emphasis in the original).)

In the present case, the Court notes that, while Equatorial Guinea did indeed propose to France recourse to conciliation or arbitration, France did not express its readiness to consider that proposal; the Respondent even expressly stated that it could not pursue it. Articles II and III of the Protocol thus in no way affect any jurisdiction the Court might have under Article I.

65. In light of the foregoing, the Court will examine only Article I of the Protocol in determining whether it has prima facie jurisdiction to entertain the merits of Equatorial Guinea's claim relating to the building located at 42 Avenue Foch. It will accordingly ascertain whether, on the date the Application was filed, a dispute arising out of the interpretation or application of the Vienna Convention appeared to exist between the Parties.

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

67. In order to determine whether it has jurisdiction — even prima facie — the Court must also ascertain whether such a dispute is one over which it might have jurisdiction *ratione materiae* on the basis of Article I of the Optional Protocol. In this regard, the Court notes that the rights apparently

at issue may fall within the scope of Article 22 of the Vienna Convention, which guarantees the inviolability of diplomatic premises, and that the acts alleged by the Applicant in respect of the building on Avenue Foch appear to be capable of contravening such rights. Indeed, the premises which, according to Equatorial Guinea, house its diplomatic mission in France were searched on several occasions and were attached *(saisie pénale immobilière)*; they could also be subject to other measures of a similar nature.

68. The aforementioned elements sufficiently establish, at this stage, the existence between the Parties of a dispute capable of falling within the provisions of the Vienna Convention and concerning the interpretation or application of Article 22 thereof.

69. Consequently, the Court considers that it has prima facie jurisdiction under Article I of the Optional Protocol to the Vienna Convention to entertain this dispute. It is of the view that it may, on this basis, examine Equatorial Guinea's request for the indication of provisional measures, in so far as it concerns the inviolability of the building located at 42 Avenue Foch in Paris.

* * *

70. The Court has held in the past that where there is a manifest lack of jurisdiction, it can remove the case from the List at the provisional measures stage (*Legality of Use of Force (Yugoslavia* v. *Spain), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (II)*, p. 773, para. 35; *Legality of Use of Force (Yugoslavia* v. *United States of America), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (II)*, p. 925, para. 29). Conversely, where there is no such manifest lack of jurisdiction, the Court cannot remove the case at that stage (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Provisional Measures, Order of 10 July 2002, I.C.J. Reports 2002*, p. 249, para. 91). In the present case, there being no manifest lack of jurisdiction, the Court cannot accede to France's request that the case be removed from the List.

III. The Rights whose Protection Is Sought and the Measures Requested

71. The power of the Court to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights claimed by the parties in a case, pending its decision on the merits thereof. It follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by it to belong to either party. Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by the party requesting such measures are at least plausible (see, for example, *Questions relating to the Seizure and*

Detention of Certain Documents and Data (Timor-Leste v. *Australia), Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014*, p. 152, para. 22).

72. Moreover, a link must exist between the rights which form the subject of the proceedings before the Court on the merits of the case and the provisional measures being sought (*ibid.*, para. 23).

* *

73. Equatorial Guinea maintains that the rights that it is seeking to protect are: (i) the right to respect for the principles of sovereign equality and non-intervention, as provided for by Article 4 of the Convention against Transnational Organized Crime; (ii) the right to respect for the rules of immunity that derive from fundamental principles of the international legal order, in particular the immunity *ratione personae* of certain holders of high-ranking office in a State, and the immunity from enforcement enjoyed by States in regard to their property; and (iii) the right to respect for the inviolability of the premises of its diplomatic mission, as provided for by the Vienna Convention.

74. Having found that it does not have prima facie jurisdiction to entertain the alleged violations of the Convention against Transnational Organized Crime, the Court will address only Equatorial Guinea's alleged right to "the inviolability of the premises of its diplomatic mission", in respect of which Article 22 of the Vienna Convention is invoked.

75. In this regard, France contends that the building on Avenue Foch does not fall within the category of "premises of the [diplomatic] mission" of Equatorial Guinea in Paris and that it was "disguised", in haste and with a certain amount of improvisation, either as the Embassy of Equatorial Guinea in France, or as the residence of the Permanent Delegate to UNESCO. In this regard, France refers in particular to a letter dated 14 February 2012 addressed to the President of the French Republic by the President of the Republic of Equatorial Guinea, in which the latter indicated that the Permanent Representative to UNESCO resided at that time in the building in question. According to the Respondent, Equatorial Guinea's allegations cannot hide the fact that the building never legally acquired the status of "premises of the mission". Therefore, claiming that this amounts to "legal window-dressing", France argues that to recognize the building as an "office of the mission" would be "to sanction a fait accompli resulting from a[n] . . . abuse of right".

76. Moreover, with regard to Equatorial Guinea's request for provisional measures concerning furnishings and other property which were in the building and which were seized and removed from it (see paragraph 22 above), this has no relation, according to France, with the use of the building for the purposes of the diplomatic mission and "is unrelated to the subject-matter of the dispute".

* *

77. The Court notes that Equatorial Guinea maintains that it acquired the building located at 42 Avenue Foch on 15 September 2011 and has used it for its diplomatic mission in France as from 4 October 2011, which the Applicant claims to have indicated to the Respondent on several occasions. The Court further notes that Equatorial Guinea contends that, since that date, the building in question has been searched a number of times and has been attached *(saisie pénale immobilière)* — acts which, in the view of the Applicant, infringe the inviolability of those premises.

78. At this stage of the proceedings, the Court is not called upon to determine definitively whether the right which Equatorial Guinea wishes to see protected exists; it need only decide whether the right claimed by Equatorial Guinea on the merits, and for which it is seeking protection, is plausible (See *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia), Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014*, p. 153, para. 26).

79. Given that the right to the inviolability of diplomatic premises is a right contained in Article 22 of the Vienna Convention, that Equatorial Guinea claims that it has used the building in question as premises of its diplomatic mission in France since 4 October 2011, and that France acknowledges that, from the summer of 2012, certain services of the Embassy of Equatorial Guinea appear to have been transferred to 42 Avenue Foch (see paragraph 59 above), it appears that Equatorial Guinea has a plausible right to ensure that the premises which it claims are used for the purposes of its mission are accorded the protections required by Article 22 of the Vienna Convention.

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80. The Court now turns to the issue of the link between the rights claimed and the provisional measures requested.

81. The purpose of the provisional measures sought by Equatorial Guinea in point *(b)* of the submissions which it presented at the end of the oral proceedings is:

> "that France ensure that the building located at 42 Avenue Foch in Paris is treated as premises of Equatorial Guinea's diplomatic mission in France and, in particular, assure its inviolability, and that those premises, together with their furnishings and other property thereon, or previously thereon, are protected from any intrusion or damage, any search, requisition, attachment, confiscation or any other measure of constraint" (see paragraph 17 above).

The Court considers that, by their very nature, these measures are aimed at protecting the right to the inviolability of the building which Equatorial Guinea presents as housing the premises of its diplomatic mission in France. It concludes that a link exists between the right claimed by Equatorial Guinea and the provisional measures being sought.

IV. Risk of Irreparable Prejudice and Urgency

82. The Court, pursuant to Article 41 of its Statute, has the power to indicate provisional measures when irreparable prejudice could be caused to rights which are the subject of judicial proceedings (see, for example, *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia), Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014*, p. 154, para. 31).

83. However, the power of the Court to indicate provisional measures will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to the rights in dispute before the Court gives its final decision (*ibid.*, para. 32). The Court must therefore consider whether such a risk exists at this stage of the proceedings.

* *

84. Equatorial Guinea maintains that there is a "serious risk of irreparable prejudice to [its] rights . . . with regard to the building located at 42 Avenue Foch in Paris". It contends, first, that because Mr. Teodoro Nguema Obiang Mangue has been referred before the *Tribunal correctionnel*, the building is now exposed, as a result of the order of attachment *(saisie pénale immobilière)*, to a risk of judicial confiscation which could occur at any moment. It follows, according to Equatorial Guinea, that the building could be sold at auction and the diplomatic mission could be evicted. Equatorial Guinea also submits that there is a permanent risk of intrusion, either by the police and the French judicial authorities, or by private individuals, which affects its Embassy's capacity to conduct its daily activities.

85. Equatorial Guinea considers that there is urgency in so far as, notwithstanding the raising of a "procedural issue" at the hearing on 24 October 2016 (see paragraph 29), the referral to the *Tribunal correctionnel* is "irrevocable". Since a trial is, in its view, "inevitab[le]", the confiscation of the property could occur at any moment.

*

86. France, for its part, contends that there is no risk of imminent confiscation of the building located at 42 Avenue Foch. It points out that under French law attachment of property *(saisie pénale immobilière)* has only a provisional effect: the owner of the building cannot sell it, but he may continue to use it freely until the courts have issued a final ruling on the merits of the case. France explains that, under French criminal law, confiscation is an additional penalty which could only potentially be ordered, in the light of the circumstances of the case, if Mr. Teodoro Nguema Obiang Mangue was sentenced to at least one year's imprisonment. In other words, it could not be ordered by the *Tribunal*

correctionnel without the defendant first having been found guilty, and it could not be put into effect until all avenues of appeal have been exhausted. Accordingly, any final decision on confiscation would not be rendered for several years.

87. In response to the arguments advanced by Equatorial Guinea with regard to the hearing on 24 October 2016, France asserts that the sole purpose of that hearing was to remedy the fact that there was no reference to the texts setting out the criminalization and punishment of offences in the referral order, and that the scheduling of the hearing does not create any urgency or engender any prejudice of any kind.

* *

88. As the Court has previously observed (see paragraph 66 above), the record before the Court shows that France does not accept that the building forms part of the premises of Equatorial Guinea's diplomatic mission in France, and refuses to grant it the immunity — and thus the corresponding protection — afforded to such premises under the Vienna Convention. Consequently, there is a continuous risk of intrusion.

89. The Court has noted above (see paragraph 77) that the building located at 42 Avenue Foch has already been searched a number of times in the context of the proceedings brought against Mr. Teodoro Nguema Obiang Mangue. While the Parties disagree as to whether any searches have been conducted recently, they recognize that such acts did indeed occur in 2011 and 2012. Given that it is possible — as France has moreover indicated — that, during the hearing on the merits, the *Tribunal correctionnel* may, of its own initiative or at the request of a party, request further investigation or an expert opinion, it is not inconceivable that the building on Avenue Foch will be searched again. If that were to happen, and if it were established that the building houses the premises of Equatorial Guinea's diplomatic mission, the daily activities of that mission — the representation of a sovereign State — would risk being seriously impeded, as a result, for example, of the presence of police officers or the seizure of documents, some of which might be highly confidential.

90. It follows from the foregoing that there is a real risk of irreparable prejudice to the right to inviolability of the premises that Equatorial Guinea presents as being used as the premises of its diplomatic mission in France. Indeed, any infringement of the inviolability of the premises may not be capable of remedy, since it might not be possible to restore the situation to the *status quo ante*. Furthermore, that risk is imminent, in so far as the acts likely to cause such a prejudice to the rights claimed by Equatorial Guinea could occur at any moment. The criterion of urgency is therefore also satisfied in the present case.

91. The Court recalls that Equatorial Guinea also asks the Court to indicate provisional measures in respect of items previously located on the premises of 42 Avenue Foch (see paragraph 17 above), some of which

have been removed by French authorities (see paragraph 22 above). As to these items, the Court observes that Equatorial Guinea failed to demonstrate the risk of irreparable prejudice and the urgency that the Court has identified in respect of the premises at 42 Avenue Foch (see paragraph 90 above). Accordingly, it finds no basis to indicate provisional measures in respect of these items.

V. Conclusion and Measures to Be Adopted

92. The Court concludes from all the above considerations that the conditions required by its Statute for it to indicate provisional measures in respect of the building located at 42 Avenue Foch in Paris have been met. It is therefore appropriate for the Court to indicate certain measures in order to protect the rights claimed by Equatorial Guinea in this regard pending its final decision.

93. The Court recalls that it has the power, under its Statute, when a request for provisional measures has been made, to indicate measures that are in whole or in part other than those requested. Article 75, paragraph 2, of the Rules of Court specifically refers to this power of the Court. The Court has already exercised this power on several occasions in the past (see, for example, *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia), Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014*, p. 159, para. 49).

94. In the present case, having considered the terms of the provisional measures requested by Equatorial Guinea, the Court finds that the measures to be indicated need not be identical to those requested. The Court is of the view that, pending a final decision in the case, the premises presented as housing the diplomatic mission of Equatorial Guinea at 42 Avenue Foch in Paris should enjoy treatment equivalent to that required by Article 22 of the Vienna Convention, in order to ensure their inviolability.

95. With regard to the attachment *(saisie pénale immobilière)* of the building at 42 Avenue Foch and the risk of confiscation, the Court notes that there is a risk that such confiscation may occur before the date on which the Court reaches its final decision. In order to preserve the respective rights of either Party, the execution of any measure of confiscation is to be stayed until the Court takes that decision.

96. The Court recalls that Equatorial Guinea has requested it to indicate measures aimed at ensuring the non-aggravation of the dispute. When it is indicating provisional measures for the purpose of preserving specific rights, the Court also possesses the power to indicate provisional measures with a view to preventing the aggravation or extension of the dispute whenever it considers that the circumstances so require (*Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the* Tem-

ple of Preah Vihear (Cambodia *v.* Thailand) *(Cambodia* v. *Thailand), Provisional Measures, Order of 18 July 2011, I.C.J. Reports 2011 (II)*, pp. 551-552, para. 59). In this case, however, given the measures it has decided to take, the Court does not deem it necessary to indicate additional measures aimed at ensuring the non-aggravation of the dispute.

* * *

97. The Court reaffirms that its "orders on provisional measures under Article 41 [of the Statute] have binding effect" (*LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 506, para. 109) and thus create international legal obligations for any party to whom the provisional measures are addressed.

* * *

98. The decision given in the present proceedings in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the admissibility of the Application or to the merits themselves. It leaves unaffected the right of the Governments of Equatorial Guinea and France to submit arguments in respect of those questions.

* * *

99. For these reasons,

THE COURT,

I. Unanimously,

Indicates the following provisional measures:

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

II. Unanimously,

Rejects the request of France to remove the case from the General List.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this seventh day of December two thousand

and sixteen, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Equatorial Guinea and the Government of the French Republic.

(Signed) Abdulqawi A. YUSUF,
Vice-President.

(Signed) Philippe COUVREUR,
Registrar.

Judge XUE appends a separate opinion to the Order of the Court; Judges GAJA and GEVORGIAN append declarations to the Order of the Court; Judge ad hoc KATEKA appends a separate opinion to the Order of the Court.

(Initialled) A.A.Y.
(Initialled) Ph.C.

SEPARATE OPINION OF JUDGE XUE

1. Much to my regret, I wish at this preliminary stage to place on record my reservation to the Court's interpretation, albeit not yet definitive, of Article 4 of the United Nations Convention against Transnational Organized Crime (hereinafter "the Convention").

2. Article 4 of the Convention provides that "States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-interference in the domestic affairs of other States".

3. The Parties give differing interpretations to this Article. Notwithstanding such difference, the Court notes that in order to found its jurisdiction *ratione materiae*, prima facie, to entertain the case pursuant to Article 35, paragraph 2, of the Convention, it must ascertain whether the acts alleged by Equatorial Guinea against France appear to fall within the provisions of that instrument. Regarding the meaning of Article 4, the Court in paragraph 49 of the Order states the following:

> "49. The purpose of Article 4 of the Convention is to ensure that the States parties to the Convention perform their obligations in accordance with the principles of sovereign equality, territorial integrity of States and non-intervention in the domestic affairs of other States. The provision does not appear to create new rules concerning the immunities of holders of high-ranking office in the State or incorporate rules of customary international law concerning those immunities. Accordingly, any dispute which might arise with regard to 'the interpretation or application' of Article 4 of the Convention could relate only to the manner in which the States parties perform their obligations under that Convention. It appears to the Court, however, that the alleged dispute does not relate to the manner in which France performed its obligations under Articles 6, 12, 14 and 18 of the Convention, invoked by Equatorial Guinea. The alleged dispute, rather, appears to concern a distinct issue, namely whether the Vice-President of Equatorial Guinea enjoys immunity *ratione personae* under customary international law and, if so, whether France has violated that immunity by instituting proceedings against him."

4. This interpretation, in my view, begs a number of questions. First, the intention of the States parties, as reflected in the *travaux préparatoires* of Article 4, not to create new rules of immunities of customary international law in the Convention cannot be interpreted to mean that the exist-

ing rules on the same subject-matter are precluded in the application of the Convention. On the contrary, as a guideline, Article 4 provides a legal framework within which the other provisions are to be implemented. What is governed under the principle of sovereign equality of States under general international law should remain intact and applicable, when circumstances of a case so require. Rules of jurisdictional immunity of State and its property and jurisdictional immunity of high-ranking officials in foreign courts are, among others, two relevant régimes that directly derive from that principle.

5. Secondly, the question of jurisdictional immunity *ratione personae* bears on "the manner" in which a State party performs its obligations under the Convention. It is no less relevant to the principle of sovereign equality than an operation being conducted in a foreign territory. In the present case, Mr. Teodoro Nguema Obiang Mangue is a foreign national holding high-ranking office in his country. Although all the acts alleged by Equatorial Guinea were carried out in the French territory and under the French internal law, the essence of the dispute between the Parties is the applicability of the Convention.

6. Thirdly, whether an incumbent President or a Vice-President of a State enjoys jurisdictional immunity in foreign courts under customary international law is not a "distinct issue" that does not fall within the provisions of the Convention. In implementing its obligations under Article 6 (criminalization of laundering of the proceeds of crime), Article 12 (measures to enable confiscation and seizure), Article 14 (disposal of confiscated proceeds of crime or property), and Article 18 (mutual legal assistance), a State party may have to act differently if rules of jurisdictional immunities apply. The dispute in the present case appears to concern that very question.

7. Given the above considerations, I maintain the view that the Court has, prima facie, jurisdiction under Article 35, paragraph 2, of the Convention.

(Signed) XUE Hanqin.

DECLARATION OF JUDGE GAJA

Over the years the Court has increased the transparency of its deliberations. In its judgments, the Court records in the operative part *(dispositif)* all the main decisions, whether it accepts or rejects the requests of the Parties. Moreover, it gives the names of the judges who voted in favour or against each decision. However, when it comes to orders on provisional measures, transparency is still wanting. The Court states in the *dispositif* the decisions which grant, possibly in a modified form, the requests of one of the Parties, but, when it indicates some measures, it does not record in the operative part the rejection of other requests. No reference is made by the Court in any part of the order to the opinions of individual judges with regard to the rejection of these requests.

Following this practice, in the present Order the *dispositif* only specifies the measures indicated by the Court, or more accurately most of them, since the indicated deferment of the execution of any measure of confiscation concerning the building at 42 Avenue Foch in Paris, which is stated in paragraph 95 of the Order, is hardly covered by the *dispositif*. What appears to be missing in particular is the decision on the request concerning the immunity of Mr. Teodoro Nguema Obiang Mangue from criminal jurisdiction, although the matter is discussed in a large part of the reasons. This way of proceeding may allow the Court, as in the case of the present Order, to reach unanimity in all the votes stated in the Order. However, it cannot hide that, as some individual opinions attached to the Order show, divergent views were expressed concerning the request for immunity.

It may be excessive to suggest that all the decisions concerning even minor requests of provisional measures should be recorded in the *dispositif*. However, when a large part of an order is devoted to discussing a certain issue, it would be reasonable, in the interest of greater transparency, for the Court to give due emphasis to its decision on that issue and state which judges were in favour and which were against.

(Signed) Giorgio GAJA.

DECLARATION OF JUDGE GEVORGIAN

Clarification on paragraph 49 of the Order — Relation between Article 4 of the Palermo Convention and the principles of international law referred to therein — Immunities ratione personae *derive from the principle of sovereign equality of States.*

1. I concur with the conclusions and reasoning of the Order. At the same time, I find it necessary to clarify my views on the relation between Article 4 of the Palermo Convention and the principles of international law referred to therein.

2. According to the first paragraph of this provision, "States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States." Paragraph 49 of the Order indicates that this provision "does not appear to create new rules concerning the immunities of holders of high-ranking office in the State or incorporate rules of customary international law concerning those immunities". In my understanding, this statement does not mean that rules of immunity of State officials from foreign criminal jurisdiction do not derive from the principles mentioned in Article 4 of the Palermo Convention. In fact, the opposite is true: such immunities are deeply entrenched in the principle of sovereign equality. As the International Law Commission has indicated in its commentary to Article 4 of the Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction (dealing with the scope of immunity *ratione personae*), "the purpose of immunity *ratione personae* . . . relates . . . to protection of the sovereign equality of the State" (ILC Commentary on Draft Article 4, provisionally adopted by the Commission at the Sixty-Fifth Session, UN doc. A/68/10, p. 69, para. 6 of the Commentary). A similar finding has been made by this Court with regard to State immunities[1].

[1] "The Court considers that the rule of State immunity occupies an important place in international law and international relations. It derives from the principle of sovereign equality of States, which, as Article 2, paragraph 1, of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order. This principle has to be viewed together with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory. Exceptions to the immunity of the State represent a departure from the principle of sovereign equality. Immunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it." (*Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012 (I)*, pp. 123-124, para. 57.)

3. Thus, in my understanding, the above-mentioned statement made in paragraph 49 does not refer to the link between immunities and sovereign equality, but rather to the link between the principles of international law mentioned in Article 4 of the Palermo Convention and the Convention itself. So from this perspective, in the present case I share the finding made in paragraph 49 that the alleged dispute brought by Equatorial Guinea "does not relate to the manner in which France performed its obligations under Articles 6, 12, 14 and 18" of the Palermo Convention.

(Signed) Kirill GEVORGIAN.

SEPARATE OPINION OF JUDGE *AD HOC* KATEKA

1. I voted in favour of the *dispositif* although I find the provisional measure indicated to be inadequate. Crucially, I do not agree with the Court's conclusion in paragraph 50, namely, that, prima facie, a dispute capable of falling within the provisions of the Convention against Transnational Organized Crime (Palermo Convention) and therefore concerning the interpretation or the application of Article 4 of that Convention does not exist between the Parties. I shall explain my disagreement with the reasoning and conclusion of the Court on prima facie jurisdiction regarding the Palermo Convention. I shall then briefly consider the other requirements for the indication of provisional measures before concluding with a few remarks on the provisional measure that the Court has indicated.

2. The Court rightly states that it may indicate provisional measures only if the provisions relied on by the Applicant appear, prima facie to afford a basis on which its jurisdiction could be founded, but need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case (Order, para. 31, citing *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor Leste* v. *Australia), Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014*, p. 151, para. 18). This is the first condition for granting provisional measures. The second condition is that the rights asserted by a party should be at least plausible[1], and a link must exist between the rights which form the subject of the proceedings before the Court on the merits of the case and the provisional measures being sought[2]. The third condition is that of urgency, in the sense that there is a real and imminent risk that irreparable prejudice may be caused to the rights in dispute before the Court has given its final decision[3].

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[1] *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the* Temple of Preah Vihear (Cambodia *v.* Thailand) *(Cambodia* v. *Thailand), Provisional Measures, Order of 18 July 2011, I.C.J. Reports 2011 (II)*, p. 545, para. 33; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 18, para. 53; *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures, Order of 28 May 2009*, *I.C.J. Reports 2009*, p. 151, paras. 56-57.

[2] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 18, para. 54; *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 151, para. 56.

[3] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 21,

Prima Facie Jurisdiction

3. Prima facie jurisdiction is one of the well-established conditions for the Court to grant provisional measures. It is one of the requirements for the preservation of the respective rights of the parties, pursuant to Article 41 of the Court's Statute. While the Court has discretion whether or not to grant provisional measures, it normally grants such measures, unless the absence of jurisdiction is manifest. Owing to the short time frame for the consideration of provisional measures, there is no detailed argument of fact and law at this stage of the case.

4. I shall not discuss in detail the question of the relationship between prima facie jurisdiction and substantive jurisdiction (on the merits). There is controversy on how far the Court can trespass on the merits in its consideration of prima facie jurisdiction. In the process of indicating measures of protection, the Court may encroach on the rights of the other party and interfere with the latter's sovereign rights and hence prejudge the merits. Thus some judges have argued that when the Court indicates provisional measures, it should have reached the provisional conviction based on a summary examination of the material before it, that it has jurisdiction on the merits *Aegean Sea Continental Shelf (Greece* v. *Turkey), Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976*, pp. 24-25, separate opinion of Judge Mosler). In the case concerning *Passage through the Great Belt (Finland* v. *Denmark)*, the Court refers to Denmark's contention that for provisional measures to be granted it is essential that Finland be able to substantiate the right it claims to a point where a reasonable prospect of success in the main case exists (*Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*, p. 17). Judge Shahabuddeen in his separate opinion in the *Passage through the Great Belt* argues that in his view, Finland was obliged to show a prima facie case in the sense of demonstrating a possibility of existence of the specific right of passage claimed (*ibid.*, p. 31).

5. Some commentators have argued in favour of the independence of the provisional measures proceedings from the mainline case proceedings. In this regard, Rosenne observes that the Court can indicate provisional measures without the presence of judges *ad hoc* even if they have been appointed (Shabtai Rosenne, *The Law and Practice of the International Court 1920-2005*, Vol. III, p. 1443). The same author has argued that the Court cannot speculate as to the merits of the case at the stage of provisional measures (*ibid.*, p. 1425). Thus the Court should avoid the drawback of raising the bar for the existence of prima facie jurisdiction. I am of the opinion that the threshold for prima facie jurisdiction is low.

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para. 64; *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures*, *Order of 28 May 2009, I.C.J. Reports 2009*, pp. 152-153, para. 62.

6. In my view, the Court's summary consideration of the applicability of Article 4 of the Palermo Convention has fallen short of the requisite examination of the question. The Order refers to 13 articles of the Palermo Convention and notes that the obligations under the Convention consist mainly in requiring the States parties to introduce in their domestic legislation provisions criminalizing certain transnational offences (Order, para. 48). The Court states that the purpose of Article 4 of the Convention is to ensure that the States parties to the Convention perform their obligations in accordance with the principles of sovereign equality, territorial integrity of States and non-intervention in the domestic affairs of other States (*ibid.*, para. 49). The Court adds that the provision does not appear to create new rules of customary international law concerning the immunities of holders of high-ranking office in the State or incorporate rules of customary international law concerning those immunities.

7. It is observed that the Court reaches the above position after making a brief summary of the views of the Parties in paragraphs 41 to 46 of the Order. The Court states that the Parties have expressed differing views on Article 4 of the Palermo Convention. But it does not analyse the relevant views of the Applicant in the oral observations before agreeing with the Respondent that any dispute which might arise with regard to "the interpretation or application" of Article 4 of the Convention could relate only to the *manner* in which the States parties perform their obligations under the Convention.

8. In view of the importance and relevance of paragraph 49 to the Court's reasoning it is worth citing the rest of its text. In this paragraph, the Court continues that

> "[i]t appears to the Court, however, that the alleged dispute does not relate to the manner in which France performed its obligations under Articles 6, 12, 14 and 18 of the Convention, invoked by Equatorial Guinea. The alleged dispute, rather, appears to concern a distinct issue, namely whether the Vice-President of Equatorial Guinea enjoys immunity *ratione personae* under customary international law and, if so, whether France has violated that immunity by instituting proceedings against him.» *(Ibid.)*

Then the Court states, as I already indicated in paragraph 1 above that, prima facie, a dispute capable of falling within the provisions of the Palermo Convention and therefore concerning the interpretation or the application of Article 4 of that Convention does not exist between the Parties. The Court then concludes that it does not have prima facie jurisdiction under Article 35, paragraph 2, of the Palermo Convention to entertain Equatorial Guinea's request relating to the immunity of Mr. Teodoro Nguema Obiang Mangue, the Vice-President of Equatorial Guinea.

9. I do not share the Court's view that Article 4 of the Palermo Convention relates only to the manner in which States parties perform their obligations under that Convention. Nor do I agree with the Court's view

that Article 4 does not incorporate rules of customary international law concerning the immunities of holders of high-ranking office in the State. I have referred to the first condition of prima facie jurisdiction which I shall elaborate on by analysing the Palermo Convention.

10. In its consideration of the requirement of prima facie jurisdiction, the Court has interpreted Article 4 to relate only to the manner in which States parties perform their obligations under the Convention. In my view, the Court has not explored Article 4 in its proper context. The Court has not considered the article itself or any of the other articles of the Palermo Convention to any considerable extent. The Court merely cites 13 provisions of the Palermo Convention and then observes that these articles concern the obligations of States parties to criminalize certain transnational crimes (Order, para. 49). As also indicated above, the Court did not deal at length with the views of the Parties made during the oral observations.

11. At the outset it is noted that the legislative history of Article 4 of the Palermo Convention shows that its paragraph 1 is based on Article 2, paragraph 2, of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (Vienna Convention). Article 4 of the Palermo Convention has the title of "Protection of sovereignty" while Article 2 of the Vienna Convention has the title of "Scope of the Convention". This provision as proposed by Canada and Mexico in document E/CONF/82.C.1/L.1 read: "Nothing in this Convention derogates from the principles of the sovereign equality and territorial integrity of States or that of non-intervention in the domestic affairs of States" (Official Records of the UN Conference for the Adoption of a Convention against Illicit Drugs and Psychotropic Substances, Vienna, 25 November-20 December 1988, UN doc. E/CONF.82/16, Vol. 1). This two-power draft was under the title of scope. In the case of the Palermo Convention, the scope of application is to be found in Article 3 titled "Scope of application". Subparagraph 1 of Article 2 of the Vienna Convention is on the purpose of the Convention. In the case of the Palermo Convention the purpose of the Convention is in Article 1.

12. I am citing these articles in order to show that caution should be taken when comparing the two Conventions even where there is similarity of language in the Conventions' provisions. Thus, even though the language of Article 4, subparagraph 1, of the Palermo Convention is similar to that of Article 2, subparagraph 2, of the Vienna Convention, the two should be looked at by taking into account the relevant circumstances. The drafters of the Palermo Convention were aware that Article 2 (2) of the Vienna Convention has the title of "scope". The fact that they did not adopt the Vienna approach shows that they intended to put a different interpretation to Article 4. In my view, that article is self-standing and can be the basis of obligations for States parties.

13. In the case of Article 4 of the Palermo Convention, the "Legislative Guides for the Implementation of the UN Convention against Transna-

tional Organized Crime and the Protocol Thereto" states that "Article 4 is the primary vehicle for protection of national sovereignty in carrying out the terms of the Convention. Its provisions are self-explanatory." (United Nations, 2005, E.05.V.2, p. 16, para. 33.) On the other hand, the "Commentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988", particularly to Article 2, subparagraph 2, referring to the principles of sovereign equality and territorial integrity states that

> "It would be futile to attempt to draw up a comprehensive catalogue of possible violations of those principles that might result from any arbitrary, indiscriminate application of specific provisions of the Convention. Occurrences that are open to dispute will have to be approached and resolved on a case-by-case basis in the light of the development of international law, taking into account the particular circumstances of each incident." (United Nations, 1998, E/CN.7/590, p. 46, para. 2.18.)

Hence the context is very important when interpreting the two similar provisions to be found in the two Conventions. It bears stressing that Article 4 of the Palermo Convention appears under the title of "Protection of sovereignty" and not under "Scope of the Convention" as in the Vienna Convention. This difference is not accidental but is a deliberate change in the Palermo Convention which was adopted in the year 2000, twelve years after the Vienna Convention.

14. Article 4 provides as follows:

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

15. In the present case, the relevant provision is Article 4, subparagraph 1. In this regard, the Parties have shown differences in their interpretation of that provision.

16. Equatorial Guinea argues that its claims for respect for the principles of sovereign equality and of non-intervention, and the rules of State immunity that derive from these principles, in particular the immunity from foreign criminal jurisdiction of certain holders of high-ranking office in the State are based on the terms of Article 4 of the Palermo Convention. Equatorial Guinea adds that this article has the effect of incorporating these fundamental principles of the international legal order into the Convention. In Equatorial Guinea's view Article 4 establishes a treaty obliga-

tion to respect these principles when implementing the Convention[4]. Equatorial Guinea stresses that in entertaining criminal proceedings against the Vice-President of Equatorial Guinea, France is prosecuting an alleged crime the criminalization of which is explicitly required by Article 4 of the Palermo Convention. It adds that France is also seeking to implement other provisions of the Convention, for example, Article 12 (Confiscation and seizure), Article 14 (Disposal of confiscated proceeds of crime or property) and Article 18 (Mutual legal assistance)[5].

17. For its part, France argues that Article 4 is a general guideline which clarifies the manner in which the other provisions of the treaty should be implemented. It adds that the object and purpose of the Palermo Convention is not to protect the sovereignty of the States parties in a general sense; nor is it to codify the prohibition of intervention in the internal affairs of other States[6]. France stresses that the reference to these principles in Article 6 indicates the manner in which the other provisions must be applied; it can be used to interpret them, but in no way can it serve as an autonomous basis of the Court's jurisdiction. While contending that the proceedings against the Vice-President were not initiated on the basis of the Palermo Convention[7], France concedes that its request for mutual legal assistance (Article 18 of the Convention) to Equatorial Guinea was done on the basis of the Convention[8].

18. The Vice-President of Equatorial Guinea is charged, *inter alia*, with money laundering, complicity in money laundering, handling of misappropriated public funds, complicity in the misappropriation of public funds, misuse of corporate assets and complicity in misuse of corporate assets and concealment of each of these offences. Thus, France, in some of these charges, is prosecuting an alleged crime, the criminalization of which is required by Article 6 of the Palermo Convention — criminalization of the laundering of proceeds of crime. This title to Article 6, according to the interpretative notes, set out in the "*Travaux Préparatoires* of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto", is understood to be equivalent to "money laundering" (United Nations, 2006, 06.V.5, p. 62). This crime falls within the scope of application of the Palermo Convention under Article 3 (1), because it is not only an offence established in accordance with one of the offences listed, namely that of "laundering the proceeds of crime" under Article 6 of the Convention, but is also a "serious crime"[9], among offences established in accordance with Articles 5, 6, 8 and 23 of the Convention.

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[4] CR 2016/16, p. 11, paras. 11-13.
[5] *Ibid.*, p. 13, para 18.
[6] CR 2016/15, pp. 21-22, paras. 11-12.
[7] *Ibid.*, p. 22, para 13.
[8] Request for the indication of provisional measures by the Republic of Equatorial Guinea, Annex 1, Referral Order of 5 September 2016, p. 29.
[9] Which means conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty, Article 2 *(b)* of the Palermo Convention.

19. In my view this crime of money laundering falls into the category of crimes that are transnational in nature — Article 3 (1) *(b)* — because of the involvement of several companies from different countries, such as Equatorial Guinea (for example, Somagui Forrestal), five companies from Switzerland[10], and several companies based in France (such as Sarl Foch Services). Regarding the requirement of an "organized criminal group", which is defined as a structured group of three or more persons — Article 2 *(a)* — it is noted that some of the offences brought against the Vice-President include "complicity" in money laundering. According to the *Oxford English Dictionary*, "complicity" means the fact or condition of being involved *with others* in an unlawful activity. Thus the criterion for an "organized criminal group" is met because it takes more than one person for there to be complicity. In case of any doubt, the situation is clarified by the interpretative notes of Article 2 *(a)*, concerning organized criminal group, which are set out in the "*Travaux Préparatoires* of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto (United Nations, 2006, 06.V.5, p. 62). The notes state that the inclusion of a specific number of persons in the definition of organized criminal group would not prejudice the rights of States parties pursuant to Article 34 (3) of the Palermo Convention. That article states that "[e]ach State party may adopt more strict or severe measures than those provided for by the Convention for preventing and combating transnational organized crime". One can infer from this analysis of the Palermo Convention that fewer persons than those mentioned in Article 2 *(a)* would not affect the application of the Convention. Hence, Article 4 whether on its own or in combination with other articles of the Convention, such as Article 6, provides the basis for the Court's jurisdiction.

20. As for the procedural conditions set out in Article 35 (2) of the Palermo Convention (Order, para. 38), I am of the view that these conditions are met because France categorically refused to negotiate with Equatorial Guinea for the settlement of the dispute in spite of the numerous offers by the Applicant to settle the dispute. Paragraph 56 of the Order refers to Equatorial Guinea's Application[11] concerning the diplomatic exchanges aimed at settling the dispute. It is stated clearly that on 17 March 2016, the French Ministry of Foreign Affairs responded that it was "unable to accept the offer of settlement by the means proposed by the Republic of Equatorial Guinea" on the grounds that "the facts mentioned . . . have been the subject of court decisions in France and remain the subject of ongoing legal proceedings"[12].

[10] It is alleged by the indictment that these companies belong to the Vice-President as sole shareholder.

[11] Application instituting proceedings filed on 13 June 2016 by the Republic of Equatorial Guinea, against the French Republic.

[12] *Ibid.*, Ann. 13.

21. In light of the above, I am of the opinion that, prima facie, a dispute capable of falling within the provisions of the Palermo Convention and thus concerning the interpretation or application of Article 4 of the Convention, exists between the Parties. Pursuant to Article 35 (2) the Court should have entertained the request by Equatorial Guinea relating to the immunity *ratione personae* of the Vice-President.

22. As the Court examined only the question of prima facie jurisdiction, I shall briefly look at the other requirements for the indication of provisional measures in order to complete the picture.

Plausible Character of the Alleged Rights and Their Link to the Measures Sought

23. The second condition that has to be met for the granting of provisional measures is that the rights asserted by a party should be at least plausible[13]. Equatorial Guinea argues that the Vice-President enjoys immunity *ratione personae* in his capacity of being in charge of National Defence and State Security and as such the criminal proceedings against him constitute a violation of international law. This request reflects the claim that the proceedings in France violate Equatorial Guinea's right to respect for the principles of sovereign equality and non-intervention from which the right to respect for the immunity its Vice-President derives[14]. It is observed that the status of the immunity of the Vice-President is a matter for the merits. It suffices for the purposes of the provisional measures stage, to assess whether this right exists plausibly.

24. The immunity of the Vice-President of Equatorial Guinea flows from the principles of sovereign equality and non-intervention as established in Article 4 of the Palermo Convention. In the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)* case, it was held that:

> "in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, *such as* the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal" (*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, pp. 20-21, para. 51 (emphasis added)).

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[13] *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the* Temple of Preah Vihear (Cambodia *v.* Thailand) *(Cambodia* v. *Thailand) Provisional Measures, Order of 18 July 2011, I.C.J. Reports 2011 (II)*, p. 545, para. 33; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 18, para. 53; *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 151, paras. 56-57.

[14] CR 2016/14, p. 25, para. 18.

This dictum was reaffirmed in the *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France)* case, which reiterated that "certain holders of high-ranking office in a State . . . enjoy immunities from jurisdiction in other States" (*Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, pp. 236-237, para. 170).

25. The Vice-President of Equatorial Guinea is number two in the Government. He is above the Prime Minister. He is thus entitled to immunity *ratione personae*. I am of the view that the provisional measures requested by Equatorial Guinea are linked to the rights which are the object of the case. The request to suspend the criminal proceedings reflects the claim that these proceedings violate the right to respect the principles reflected in Article 4 of the Palermo Convention. Therefore there is a plausible right to immunity for the Vice-President under the Palermo Convention.

Risk of Irreparable Prejudice and Urgency

26. The final criterion that has to be met in order for the Court to indicate provisional measures is that of urgency, in the sense that there is a real and imminent risk that irreparable prejudice may be caused to the right in dispute before the Court has given its final decision[15]. Given that the Court has prima facie jurisdiction on this issue and that the Vice-President indeed enjoys immunity *ratione personae* from criminal jurisdiction as a "holder of high-ranking office in a State", it will now be shown that there is a real and imminent risk that irreparable prejudice may be caused to this immunity.

27. It is clear that there is a real and imminent risk that irreparable prejudice will be caused to the rights in dispute. Following the Order of 5 September 2016 by the investigating judges, the Paris *Tribunal correctionnel* has fixed dates in January 2017 for the criminal trial against the Vice-President. Counsel for France during the oral observations gave an explanation of the French criminal proceedings. He contended that the trial in France would take years. The appeal process was long in France. He speculated that the Vice-President may not be summoned to appear in person; that he may not be given a custodial sentence. Such arguments do not take away the fact that the Vice-President will be tried in contravention of his immunity *ratione personae*. Irreparable prejudice will be done to the rights of Equatorial Guinea.

[15] *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia), Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014*, p. 154, para. 32; *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, pp. 152-153, para. 62.

28. In its oral observations, France attempted to downplay the position of the Vice-President and his functions. Counsel ranked the Vice-President along with other Ministers. He argued that the Vice-President's functions are not the same as those of the Minister for Foreign Affairs. But as already explained above the Vice-President is number two in the Government. Being in charge of defence and State security indicates that these portfolios are aspects of foreign policy. His functions require him to travel often. His functions would thus be compromised by the ongoing criminal proceedings. It is clear from the decision of 24 October 2016 that the criminal proceedings will continue early next year. There is urgency and the rights of Equatorial Guinea will suffer irreparable prejudice if the measure requested is not ordered.

The Provisional Measure Indicated by the Court

29. The Court has indicated a provisional measure concerning the premises of the diplomatic mission of Equatorial Guinea. The measure states that

> "France shall, pending a final decision in the case, take all measures at its disposal to ensure that the premises presented as housing the diplomatic mission of Equatorial Guinea at 42 Avenue Foch in Paris enjoy treatment *equivalent* to that required by Article 22 of the Vienna Convention on Diplomatic Relations, in order to ensure their inviolability" (Order, para. 99; emphasis added).

30. I find the way the measure is framed to be inadequate. I do not understand the meaning of the term "equivalent". Does it imply treatment less than is required by the 1961 Vienna Convention? Article 22 of the Vienna Convention is very clear. The premises of the mission shall be inviolable. The provision adds that the receiving State is under a special duty to take all appropriate steps to protect the mission against any intrusion. In paragraph 89 of the Order, the Court notes that the premises of the Embassy have been searched a number of times in the context of the proceedings brought against the Vice-President and that "it is not inconceivable that the building on Avenue Foch will be searched again". Given this possibility the Court should have issued a measure that is unequivocal as requested by Equatorial Guinea (*ibid.*, para. 17), namely, that "France ensure that the building located at 42 Avenue Foch in Paris is treated as premises of Equatorial Guinea's diplomatic mission in France and, in particular, assure its inviolability . . .".

(*Signed*) James L. Kateka.