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INTRODUCTORY NOTE TO IMMUNITIES AND CRIMINAL JURISDICTION (EQUATORIAL GUINEA V. FRANCE): PRELIMINARY OBJECTIONS (I.C.J.)

BY MARTINS PAPARINSKIS*

[June 6, 2018]

Introduction

On June 6, 2018, the International Court of Justice (Court) rendered a judgment on preliminary objections in the case of *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*.[1] France had made three preliminary objections: two related to the Court's jurisdiction on the basis of, respectively, United Nations Convention Against Transnational Organized Crime (Palermo Convention) and the Optional Protocol to the Vienna Convention on Diplomatic Protection (VCDR) concerning the Compulsory Settlement of Disputes (Optional Protocol), and the third challenged admissibility for abuse of process and abuse of rights. The Court accepted the first objection regarding jurisdiction on the basis of the Palermo Convention and rejected the other two. This judgment is an important contribution to the development of international law, both regarding the particular instruments at issue and broader questions of law of treaties and international dispute settlement.

Background

The dispute arose from criminal proceedings instituted in France against Mr. Teodoro Nguema Obiang Mangue that were ongoing in French courts on June 13, 2016, when Equatorial Guinea filed its application.[2] The proceedings originated in a complaint lodged by Transparency International France with the Paris public prosecutor in 2008 in respect of allegations of misappropriations of public funds in Equatorial Guinea, the proceeds of which had allegedly been invested in France. The investigation focused on the methods used to finance the acquisition of assets in France by several individuals, including Mr. Obiang Mangue, the son of the president of Equatorial Guinea, and more specifically the way in which he had acquired valuable objects and a building located at 42 Avenue Foch in Paris.[3]

Two aspects of the investigation raised issues of international law for Equatorial Guinea. First, it took the view that the search and eventual attachment of the building as well as the associated seizure of certain items breached VCDR because the building was being used for its diplomatic mission.[4] Second, the French courts had denied the *ratione personae* immunity from jurisdiction that Mr. Obiang Mangue was entitled to as (since 2012) second vice-president of Equatorial Guinea in charge of defence and state security, implicating the Palermo Convention.[5] In December 2016, pursuant to Equatorial Guinea's request for provisional measures, the Court unanimously ordered France to ensure that 42 Avenue Foch enjoyed treatment equivalent to that required by Article 22 VCDR[6] (while finding no prima facie jurisdiction under the Palermo Convention).[7]

Judgment

Palermo Convention

France first objected that the Court did not have jurisdiction on the basis of the Palermo Convention because the dispute did not concern its interpretation and application. Equatorial Guinea relied on Article 4 of the Palermo Convention ("Protection of sovereignty"), and particularly Article 4(1), according to which:

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

Its argument was two-pronged: first, the claim relating to immunities of states and state officials fell within the provisions of Article 4; second, the domestic legislation of France had overextended jurisdiction in a manner inconsistent with Article 4, when read in conjunction with certain other provisions.[8]

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The Court, by 11 votes to 4, upheld France's first objection. Article 4(1), while imposing an obligation, did "not refer to the customary international rules, including State immunity, that derive from sovereign equality but to the principle of sovereign equality itself."[9] Having reviewed a variety of interpretative materials, the Court concluded that Article 4 did not incorporate custom relating to immunities of states and state officials.[10] The second prong of Equatorial Guinea's argument was also dismissed. The particular provisions of the Palermo Convention emphasized in submissions helped to coordinate but did not direct the actions of states parties, the scope of action taken in its implementation was limited, and the alleged overextension of jurisdiction was not capable of falling within its provisions.[11] Four judges disagreed, arguing in a substantial joint dissenting opinion that Article 4(1) was best read as "a compendious way of saying that acts, such as a breach of foreign State immunity, are a breach of the principle of sovereign equality," and that the Court had failed to recognize its overreaching and pervasive effect that permeated throughout the Convention.[12]

Optional Protocol

France also objected to the Court's jurisdiction under the Optional Protocol, arguing that the dispute was properly about the character of the building at 42 Avenue Foch in Paris as diplomatic premises and not about the inviolability regime of diplomatic premises in Article 22 VCDR. The Court unanimously rejected this objection: where, as in this case, there was a difference of opinion as to whether a building qualified as "premises of the mission" and whether it should be accorded respective protection, a dispute fell within the scope of VCDR (including regarding movable property within the building).[13]

Abuse of Process and Abuse of Rights

The final preliminary objection related to abuse of process and abuse of rights, due to alleged inconstancies in Equatorial Guinea's conduct regarding the contested building and political appointments, as well as the way in which the claim was brought. The Court drew a distinction between abuse of process—an objection to admissibility that goes to the procedure before a court or tribunal—and abuse of rights—not a matter of admissibility when the establishment of the right in question was properly a matter for the merits.[14] The objection of abuse of process could be upheld only in exceptional circumstances, and the Court (Judge Donoghue dissenting) did not find the present case to be one of those.[15] Consequently, by 15 votes to 1, the Court declared that it had jurisdiction on the basis of the Optional Protocol and that the claim was admissible.

Conclusion

The judgment is helpful in confirming certain smaller points. One example is the plausible expectation that an objection to jurisdiction will likely succeed if a request for provisional measures has not satisfied the threshold of prima facie jurisdiction (a consideration that may affect pleading strategy). But there are five points on which the contribution to development of international law is significant: concept of a treaty obligation, interpretation of treaties and general international law, interpretation and other treaty instruments, implementation of treaties and domestic law, and abuse of process in international dispute settlement. I will address them in turn.

First, the Court makes an important distinction between a treaty provision that imposes an obligation, even if general and vague in content, and one that is merely aspirational in character.[16] Second, the discussion of the interaction between Article 4(1) of the Palermo Convention and custom and general principles brings a very important interpretative argument to a new level of quality.[17] Third, materials relating to another treaty are treated as relevant for interpretation of the Palermo Convention because Article 4(1) had been "transposed" from there: an important proposition, even if it is not made clear whether "transposition" falls under the general rule or supplementary means of interpretation.[18] Fourth, the broad statement that a state can give effect to a treaty by using preexisting legislation is important for primary rules in various fields of international law, particularly international criminal law, and associated dispute settlement.[19] Fifth, the Court offers its view on the scope of the terms "abuse of process" and "abuse of rights"[20] (familiar in other fields of international adjudication),[21] contributing to the discussion of the important question of whether it is appropriate for a party to put itself purposefully within the jurisdictional boundaries of an international adjudicator.

ENDNOTES

1 Immunities and Criminal Jurisdiction (Eq. Guinea v. France), Preliminary Objections, 2018 ICJ Rep. (June 6) [hereinafter Judgment], https://www.icj-cij.org/files/case-related/163/163-20180606-JUD-01-00-EN.pdf. The French text is authoritative. Opinions of Judges were written in English and translated into French, except for Judge Abraham, whose opinion was written in French and translated into English. I will refer to the English text and translation throughout this note.

2 Judgment, *supra* note 1, ¶ 67.

3 *Id.* ¶¶ 23–25.

4 *Id.* ¶¶ 25–28, 70.

5 *Id.* ¶¶ 29–34, 68–69.

6 Immunities and Criminal Jurisdiction (Eq. Guinea v. France), Provisional Measures, 2016 ICJ REP. 1148 (Dec. 7) ¶¶ 94–95 [hereinafter Order], https://www.icj-cij.org/files/case-related/163/163-20161207-ORD-01-00-EN.pdf. The French court accepted that it was therefore impossible to execute the confiscation of the building, Judgment, *supra* note 1, ¶¶ 39–40.

7 Order, *supra* note 6, ¶ 50. *But see id.*, Separate Opinion of Judge Xue, 1173; Separate Opinion of Judge *ad hoc* Kateka, 1178 ¶¶ 3–21.

8 Judgment, *supra* note 1, ¶¶ 77–85.

9 *Id.* ¶ 93.

10 *Id.* ¶¶ 94–102.

11 *Id.* ¶¶ 113–117; Declaration of Judge Owada, ¶¶ 5–13 [hereinafter Owada], https://www.icj-cij.org/files/case-related/163/163-20180606-JUD-01-02-EN.pdf.

12 Judgment, *supra* note 1, Joint Dissenting Opinion of Vice-President Xue, Judges Sebutinde and Robinson and Judge *ad hoc* Kateka, ¶ 49, and further ¶¶ 18–57 [hereinafter Joint Dissenting Opinion], https://www.icj-cij.org/files/case-related/163/163-20180606-JUD-01-01-EN.pdf. Judge Gevorgian, who voted with the majority, seemed sympathetic to the substantive point but was concerned about expanding the Court's jurisdiction by artificial linkage of the Palermo Convention with incidental points of international law, *id.*, Separate Opinion of Judge Gevorgian, ¶¶ 4–9, https://www.icj-cij.org/files/case-related/163/163-20180606-JUD-01-07-EN.pdf.

13 Judgment, *supra* note 1, ¶¶ 129–138. *See also id.*, Declaration of Judge Gaja, https://www.icj-cij.org/files/case-related/163/163-20180606-JUD-01-05-EN.pdf (noting that Article 22 of VCDR and accordingly the Optional Protocol did not cover the dispute over ownership of the building).

14 Judgment, *supra* note 1, ¶¶ 150–151. *See also* Owada, *supra* note 11, ¶¶ 14–21 (on the limits of preliminary objections).

15 Judgment, *supra* note 1, ¶ 150; Dissenting Opinion of Judge Donoghue [hereinafter Donoghue], https://www.icj-cij.org/files/case-related/163/163-20180606-JUD-01-04-EN.pdf.

16 Judgment, *supra* note 1, ¶ 92; Declaration of Judge Crawford, ¶ 4 [hereinafter Crawford], https://www.icj-cij.org/files/case-related/163/163-20180606-JUD-01-06-EN.pdf.

17 *See* Judgment, *supra* note 1, ¶¶ 94–102; Joint Dissenting Opinion, *supra* note 12, ¶¶ 18–49; Owada, *supra* note 11, ¶¶ 2–4; Separate Opinion of Judge Abraham, https://www.icj-cij.org/files/case-related/163/163-20180606-JUD-01-03-EN.pdf; Crawford, *supra* note 16.

18 Judgment, *supra* note 1, ¶¶ 99–101; Abraham, *id.*, ¶¶ 20–23; Crawford, *supra* note 16, ¶¶ 5–7. *Also* an apparently broader argument in Joint Dissenting Opinion, *supra* note 12, ¶¶ 45–48.

19 Judgment, *supra* note 1, ¶ 113.

20 Donoghue, *supra* note 15, ¶¶ 3–4.

21 Owada, *supra* note 11, ¶ 18.

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IMMUNITIES AND CRIMINAL JURISDICTION (EQUATORIAL GUINEA V. FRANCE): PRELIMINARY OBJECTIONS (I.C.J.)*

[June 6, 2018]

INTERNATIONAL COURT OF JUSTICE

YEAR 2018

2018
6 June
General List
No. 163

6 June 2018

IMMUNITIES AND CRIMINAL PROCEEDINGS

(EQUATORIAL GUINEA *v.* FRANCE)

PRELIMINARY OBJECTIONS

Factual background.

*

Bases of jurisdiction invoked — Article 35 of the Palermo Convention — Article I of the Optional Protocol to the Vienna Convention.

*

Subject-matter of the dispute.

Aspect of dispute for which Equatorial Guinea invokes Palermo Convention — Disagreement on whether Mr. Obiang Mangue is immune from jurisdiction as consequence of principles referred to in Article 4 of Convention — Differing views on whether building at 42 Avenue Foch in Paris is immune from measures of constraint as consequence of principles referred to in Article 4 of Convention — Disagreement on whether France breached Article 4 read in conjunction with Articles 6 and 15 by establishing jurisdiction over predicate offences.

Aspect of dispute for which Equatorial Guinea invokes Optional Protocol — Disagreement on whether building at 42 Avenue Foch in Paris constitutes part of premises of mission of Equatorial Guinea in France and is thus entitled to protection under Article 22 of the Vienna Convention — Disagreement on whether France's actions in relation to building breached Article 22.

* This text was reproduced and reformatted from the text available at the International Court of Justice website (visited October 20, 2018), https://www.icj-cij.org/en/case/163.

Assertions by Equatorial Guinea under Palermo Convention concerning obligations to consult and co-operate — Not included in submissions in Memorial — Considered by Court as additional arguments, not distinct claims under Palermo Convention.

*

The first preliminary objection: Jurisdiction under the Palermo Convention.

Procedural requirements set out in Article 35 of the Convention — Requirements satisfied.

The alleged breach by France of the rules on immunities of States and State officials — Interpretation of Article 4 of Palermo Convention — Purpose of Article 4 — Ordinary meaning of Article 4 (1) — Context of Article 4 (1) — Article 4 (1) read in light of object and purpose of the Convention — Court concludes that Article 4 does not incorporate customary international rules on immunities of States and State officials — Interpretation confirmed by travaux préparatoires *— Aspect of dispute concerning asserted immunity of Vice-President and immunity claimed for building from measures of constraint as State property does not concern interpretation or application of Palermo Convention — Court lacks jurisdiction in relation to this aspect of dispute.*

The alleged overextension of jurisdiction by France — Question whether criminalization of money laundering by France and its establishment of jurisdiction over that offence concerns the interpretation or application of the Palermo Convention — Definition of "predicate offence" in Article 2 (h) *of the Convention — Obligation in Article 6 (2) that States seek to establish criminal offences in relation to the widest range of predicate offences, including offences committed outside jurisdiction of the State party — Obligation in Article 15 to adopt such measures as may be necessary to establish jurisdiction over Convention offences — Violations complained of by Equatorial Guinea not capable of falling within Articles 6 and 15 of Palermo Convention — Court lacks jurisdiction in relation to this aspect of dispute.*

Court lacks jurisdiction pursuant to Palermo Convention to entertain Equatorial Guinea's Application — First preliminary objection upheld.

*

The second preliminary objection: Jurisdiction under the Optional Protocol to the Vienna Convention.

Proposal by Equatorial Guinea to have recourse to conciliation or arbitration not pursued by France — Articles II and III of Optional Protocol do not affect any jurisdiction under Article I.

Question whether this aspect of the dispute arises out of interpretation or application of Vienna Convention, as required by Article I of Optional Protocol — Definition of "premises of the mission" in Article 1 (i) *of the Vienna Convention — Régime of inviolability, protection and immunity for such premises in Article 22 of the Vienna Convention — Difference of opinion exists as to whether building at 42 Avenue Foch in Paris qualifies as "premises of the mission" and whether it should be accorded protection under Article 22 — Such aspect of the dispute arises out of the interpretation or application of the Vienna Convention within meaning of Article I of the Optional Protocol and falls within scope of Vienna Convention — Movable property present in the building — Court has jurisdiction to entertain the dispute relating to the status of the building at 42 Avenue Foch in Paris as diplomatic premises, including any claims relating to the furnishings and other property present on the premises — Second preliminary objection dismissed.*

*

The third preliminary objection: Abuse of process and abuse of rights.

Objection properly characterized as relating to admissibility.

Abuse of process — Procedural question that can be considered at preliminary phase — Clear evidence required — Such evidence has not been presented — Abuse of process only bars proceedings in exceptional circumstances — No exceptional circumstances in the present case.

Abuse of rights — Cannot be invoked as a ground of inadmissibility when the establishment of the right in question is a matter for the merits — Any argument in relation to abuse of rights to be considered at the merits phase.

Third preliminary objection dismissed.

*

General conclusions.

JUDGMENT

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

In the case concerning immunities and criminal proceedings,

between

the Republic of Equatorial Guinea,

represented by

H.E. Mr. Carmelo Nvono Nca, Ambassador of the Republic of Equatorial Guinea to the Kingdom of Belgium and the Kingdom of the Netherlands,

as Agent;

Mr. Juan Olo Mba, Minister Delegate for Justice of the Republic of Equatorial Guinea,

Ms Rimme Bosio Riokale, State Secretary of the Republic of Equatorial Guinea,

H.E. Mr. Miguel Oyono Ndong, Ambassador of the Republic of Equatorial Guinea to France,

H.E. Mr. Lázaro Ekua, Ambassador of the Republic of Equatorial Guinea to Switzerland and Permanent Representative to the United Nations Office and other international organizations in Geneva,

Mr. Sergio Abeso Tomo, former President of the Supreme Court of Justice of the Republic of Equatorial Guinea,

as Members of the Delegation;

Mr. Maurice Kamto, Professor at the University of Yaoundé II (Cameroon), member of the Paris Bar, member and former chairman of the International Law Commission,

Mr. Jean-Charles Tchikaya, member of the Bordeaux Bar,

Sir Michael Wood, K.C.M.G., member of the International Law Commission, member of the English Bar,

as Counsel and Advocates;

Mr. Alfredo Crosato Neumann, Graduate Institute of International and Development Studies of Geneva,

Mr. Francisco Evuy Nguema Mikue, *avocat* of the Republic of Equatorial Guinea,

Mr. Francisco Moro Nve Obono, *avocat* of the Republic of Equatorial Guinea,

Mr. Didier Rebut, Professor at the University Paris 2 Panthéon-Assas,

Mr. Omri Sender, George Washington University Law School, member of the Israel Bar,

Mr. Alain-Guy Tachou-Sipowo, lecturer at McGill University and Université Laval,

as Counsel;

Ms Emilia Ndoho, secretary at the Embassy of Equatorial Guinea to the Kingdom of Belgium and the Kingdom of the Netherlands,
as Assistant,

and

the French Republic,

represented by

Mr. François Alabrune, Director of Legal Affairs, Ministry for Europe and Foreign Affairs,

as Agent;

Mr. Pierre Boussaroque, Deputy-Director of Legal Affairs, Ministry for Europe and Foreign Affairs,

as Deputy-Agent;

Mr. Alain Pellet, Emeritus Professor at the University Paris Nanterre, former member and former Chairman of the International Law Commission, member of the Institut de droit international,

Mr. Hervé Ascensio, Professor at the University Paris 1 Panthéon-Sorbonne,

Mr. Pierre Bodeau-Livinec, Professor at the University Paris Nanterre,

Mr. Mathias Forteau, Professor at the University Paris Nanterre,

Ms Maryline Grange, lecturer in Public Law at the Jean Monnet University in Saint Etienne, University of Lyon,

as Counsel;

Mr. Ludovic Legrand, Legal Consultant, Directorate of Legal Affairs, Ministry for Europe and Foreign Affairs,

Mr. Julien Boissise, Legal Consultant, Directorate of Legal Affairs, Ministry for Europe and Foreign Affairs,

as Assistant Counsel;

Ms Flavie Le Sueur, Head of the Office of Economic, Financial and Social Law, the Environment and Public Health, Directorate of Criminal Affairs and Pardons, Ministry of Justice,

Ms Diarra Dime Labille, Legal Counsellor, Embassy of France in the Netherlands,

as Advisers,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

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

concerning the Compulsory Settlement of Disputes, of 18 April 1961 (hereinafter the "Optional Protocol to the Vienna Convention").

3. Pursuant to Article 40, paragraph 2, of the Statute of the Court, the Application was immediately communicated to the French Government; and, in accordance with paragraph 3 of that Article, all States entitled to appear before the Court were notified of the filing of the Application.

4. 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.

5. 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. The Memorial of Equatorial Guinea was filed within the time-limit thus prescribed.

6. On 29 September 2016, referring to Article 41 of the Statute and to Articles 73, 74 and 75 of the Rules of Court, Equatorial Guinea submitted a Request for the indication of provisional measures, asking that France suspend all the criminal proceedings brought against the Vice-President of Equatorial Guinea; 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 France refrain from taking any other measure that might aggravate or extend the dispute submitted to the Court.

7. Equatorial Guinea also requested that "the President of the Court, as provided for in Article 74, paragraph 4, of the Rules of Court . . . 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".

8. 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.

9. By a letter dated 3 October 2016, the Vice-President of the Court, acting as President in the case, and referring to Article 74, paragraph 4, of the Rules of Court, drew the attention of France "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".

10. By an Order of 7 December 2016, the Court, having heard the Parties, indicated the following provisional measures:

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

11. In accordance with Article 43, paragraph 1, of the Rules of Court, the Registrar addressed to States parties to the Palermo Convention the notification provided for in Article 63, paragraph 1, of the Statute; he also addressed to the European Union, as party to that Convention, the notification provided for in Article 43, paragraph 2, of the Rules. In addition, in accordance with Article 69, paragraph 3, of the Rules of Court, the Registrar addressed to the United Nations, through its Secretary-General, the notification provided for in Article 34, paragraph 3, of the Statute.

By a letter dated 28 April 2017, the Director-General of the European Commission's Legal Service informed the Court that the European Union did not intend to submit observations under Article 43, paragraph 2, of the Rules of Court concerning the construction of the Palermo Convention.

12. Pursuant to Article 43, paragraph 1, of the Rules of Court, the Registrar also addressed to States parties to the Vienna Convention on Diplomatic Relations (hereinafter the "Vienna Convention"), and to States parties to the Optional Protocol to the Vienna Convention, the notification provided for in Article 63, paragraph 1, of the Statute.

13. On 31 March 2017, within the time-limit prescribed by Article 79, paragraph 1, of the Rules of Court, France raised preliminary objections to the jurisdiction of the Court. Consequently, by an Order of 5 April 2017, the

Court, noting that, by virtue of Article 79, paragraph 5, of the Rules, the proceedings on the merits were suspended, fixed 31 July 2017 as the time-limit within which Equatorial Guinea could present a written statement of its observations and submissions on the preliminary objections raised by France. Equatorial Guinea filed such a statement within the time-limit so prescribed, and the case thus became ready for hearing in respect of the preliminary objections.

14. By a letter dated 9 February 2018, the Agent of France, relying on Article 56 of the Rules of Court, transmitted to the Court a certified copy of a judgment rendered by the *Tribunal correctionnel de Paris*, dated 27 October 2017. As provided for in paragraph 1 of that Article, the document was communicated to Equatorial Guinea. By a Note Verbale dated 14 February 2018, the Embassy of Equatorial Guinea to the Kingdom of the Netherlands informed the Court that Equatorial Guinea had no objection to the document being produced in the case. The Court took note of the agreement of the Parties and the Registrar, by letters dated 19 February 2018, informed the Parties that the said document could be produced.

15. Pursuant to Article 53, paragraph 2, of the Rules of Court, the Court, after ascertaining the views of the Parties, decided that copies of the written pleadings, including the Memorial of Equatorial Guinea, and the documents annexed would be made accessible to the public on the opening of the oral proceedings.

16. Public hearings on the preliminary objections raised by France were held from Monday 19 February to Friday 23 February 2018, at which the Court heard the oral arguments and replies of:

For France:	Mr. François Alabrune, Mr. Hervé Ascensio, Mr. Pierre Bodeau-Livinec, Mr. Alain Pellet.
For Equatorial Guinea:	H.E. Mr. Carmelo Nvono Nca, Sir Michael Wood, Mr. Jean-Charles Tchikaya, Mr. Maurice Kamto.

17. At the hearings, a Member of the Court put a question to France, to which a reply and comments on that reply were given orally.

*

18. In the Application, the following claims were made by the Republic of Equatorial Guinea:

> "In light of the foregoing, 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, 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."

19. In the written proceedings on the merits, the following submissions were presented on behalf of the Government of Equatorial Guinea in its Memorial:

"For the reasons set out in this Memorial, the Republic of Equatorial Guinea respectfully requests the International Court of Justice:

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

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

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

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

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

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

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

(i) to adjudge and declare that, by attaching the building located at 42 Avenue Foch in Paris, the property of the Republic of Equatorial Guinea and used for the purposes of that country's diplomatic mission in France, the French Republic is in breach of its obligations under international law, notably the Vienna Convention on Diplomatic Relations and the United Nations Convention against Transnational Organized Crime, as well as general international law;

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

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

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

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

20. In the Preliminary Objections, the following submissions were presented on behalf of the Government of the French Republic:

> "For the reasons set out in these preliminary objections, and for any such others as might be put forward in the subsequent proceedings or raised *proprio motu*, the French Republic respectfully requests the International Court of Justice to decide that it lacks jurisdiction to rule on the Application filed by the Republic of Equatorial Guinea on 13 June 2016."

21. In the Written Statement of its Observations and Submissions on the Preliminary Objections, the following submissions were presented on behalf of the Government of the Republic of Equatorial Guinea:

> "For the reasons set out above, the Republic of Equatorial Guinea respectfully requests the Court:
>
> (1) to reject the preliminary objections of France; and
>
> (2) to declare that it has jurisdiction to rule on the Application of Equatorial Guinea."

22. At the oral proceedings on the preliminary objections, the following submissions were presented by the Parties:

On behalf of the Government of the French Republic,

at the hearing of 21 February 2018:

> "For the reasons developed in its preliminary objections and set out by its representatives at the hearings on the preliminary objections in the case concerning *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France)*, the French Republic respectfully requests the Court to decide:
>
> (i) that it lacks jurisdiction to rule on the Application filed by the Republic of Equatorial Guinea on 13 June 2016; and
>
> (ii) that the Application is inadmissible."

On behalf of the Government of the Republic of Equatorial Guinea,

at the hearing of 23 February 2018:

> "On the basis of the facts and law set out in our observations on the preliminary objections raised by the French Republic, and in the course of the present hearing, Equatorial Guinea respectfully requests the Court:
>
> (i) to reject the preliminary objections of France; and
>
> (ii) to declare that it has jurisdiction to rule on the Application of Equatorial Guinea."

*

* *

I. FACTUAL BACKGROUND

23. Beginning in 2007, a number of 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 had allegedly been invested in France.

24. 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 "handling misappropriated public funds", "complicity in handling misappropriated public funds, complicity in the misappropriation of public funds, money laundering, complicity in money laundering, misuse of corporate assets, complicity in misuse of corporate assets, breach of trust, complicity in breach of trust and concealment of each of these offences". Two investigating judges of the *Tribunal de grande instance de Paris* were assigned on 1 December 2010 to conduct the investigation. The investigation focused, in particular, on the methods used to finance the acquisition of movable and immovable assets in France by several individuals, including Mr. Teodoro Nguema Obiang Mangue, the son of the President of Equatorial Guinea, who was at the time *Ministre d'Etat* for Agriculture and Forestry of Equatorial Guinea.

25. The investigation 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, investigators conducted an initial on-site inspection at 42 Avenue Foch in Paris and seized luxury vehicles, which belonged to Mr. Teodoro Nguema Obiang Mangue and were parked on the premises. While they were there, the Ambassador of Equatorial Guinea and a French lawyer representing that State arrived to protest the operations under way, invoking the sovereignty of Equatorial Guinea. On 3 October 2011, the investigators seized additional luxury vehicles belonging to Mr. Teodoro Nguema Obiang Mangue in neighbouring parking lots. On 4 October 2011, the Embassy of Equatorial Guinea in France sent a Note Verbale to the French Ministry of Foreign and

European Affairs (hereinafter "Ministry of Foreign Affairs"[1]) stating that Equatorial Guinea had previously acquired the building located at 42 Avenue Foch in Paris, which was being used for its diplomatic mission. On 5 October 2011, the investigators returned to 42 Avenue Foch in Paris, where they noted the presence of two signs marked "Republic of Equatorial Guinea — Embassy premises", which, according to the investigators, had been posted on the front door of the building the day before. By Notes Verbales dated 11 October 2011, the French Ministry of Foreign Affairs indicated to the Embassy of Equatorial Guinea and to the investigating judges that it considered that the building at 42 Avenue Foch in Paris did not form part of the premises of Equatorial Guinea's diplomatic mission, a position France maintained thereafter despite the repeated protestations of Equatorial Guinea.

26. By a Note Verbale dated 17 October 2011, the Embassy of Equatorial Guinea informed the French Ministry of Foreign Affairs that the "official residence of [Equatorial Guinea's] Permanent Delegate to UNESCO [wa]s on the premises of the diplomatic mission located at 40-42 avenue Foch, 75016, Paris". By a Note Verbale to the Embassy of Equatorial Guinea dated 31 October 2011, the French Ministry of Foreign Affairs reiterated that the building at 42 Avenue Foch in Paris was "not a part of the mission's premises, ha[d] never been recognized as such, and accordingly [wa]s subject to ordinary law".

27. From 14 to 23 February 2012, further searches of the building at 42 Avenue Foch in Paris were conducted, during which additional items were seized and removed. These actions were again contested by Equatorial Guinea, in particular in a Note Verbale dated 14 February 2012 invoking protection under the Vienna Convention for the official residence of the Permanent Delegate to UNESCO. By a Note Verbale dated 12 March 2012, Equatorial Guinea asserted that the premises at 42 Avenue Foch in Paris were used for the performance of the functions of its diplomatic mission in France. The French Ministry of Foreign Affairs responded on 28 March 2012, referring to its "constant practice" with respect to the recognition of the status of "premises of the mission" and reiterating that the building located at 42 Avenue Foch in Paris could not be considered part of the diplomatic mission of Equatorial Guinea.

28. An investigating judge assigned to the case found, *inter alia*, that the building at 42 Avenue Foch in Paris 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 of the building *(saisie pénale immobilière)* on 19 July 2012. This decision was subsequently upheld by the *Chambre de l'instruction de la Cour d'appel de Paris*, before which Mr. Teodoro Nguema Obiang Mangue had lodged an appeal. By a Note Verbale dated 27 July 2012, the Embassy of Equatorial Guinea in France informed the Protocol Department of the French Ministry of Foreign Affairs that "as from Friday 27 July 2012, the Embassy's offices are located at 42 avenue Foch, Paris (16th arr.), a building which it is henceforth using for the performance of the functions of its diplomatic mission in France".

29. 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 entitled to immunity from jurisdiction and declined to appear before the French courts.

30. 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 de la Cour d'appel de Paris*, but that court took the view that he was not entitled to any form of immunity from criminal jurisdiction 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.

31. Since they were unable to question him, the French judicial authorities, by a request dated 14 November 2013, sought mutual legal assistance in criminal matters, under the Palermo Convention, from the Equatorial Guinean judicial authorities, asking them to transmit to Mr. Teodoro Nguema Obiang Mangue a summons of first appearance.

32. The judicial authorities of Equatorial Guinea accepted the request for mutual legal assistance on 4 March 2014. They then executed that request. On 18 March 2014, a hearing was held in Malabo, Equatorial Guinea, in which the French investigating judges participated by video link. Subsequently, 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 search *(avis de cessation de recherches)* for Mr. Teodoro Nguema Obiang Mangue was issued by one of the French investigating judges.

33. On 31 July 2014, Mr. Teodoro Nguema Obiang Mangue applied to the *Chambre de l'instruction de la Cour d'appel de Paris* to annul the indictment, on the ground that he was entitled to 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. Mr. Teodoro Nguema Obiang Mangue having seised the *Cour de cassation*, that court, by a judgment of 15 December 2015, rejected the argument that he was entitled to immunity and upheld the indictment.

34. The investigation was declared to be completed and, on 23 May 2016, the Financial Prosecutor filed final submissions seeking in particular that Mr. Teodoro Nguema Obiang Mangue be tried for money laundering offences. On 13 June 2016, Equatorial Guinea filed its Application before this Court (see paragraph 1 above). On 5 September 2016, the investigating judges of the *Tribunal de grande instance de Paris* 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 National Defence and State Security — for trial before the *Tribunal correctionnel de Paris* for alleged offences committed in France 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 *Tribunal correctionnel de Paris* on 24 October 2016 for a "hearing on the merits".

35. 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 provisions setting out the criminalization and punishment of offences), the Public Prosecutor's Office was of the view that the *Tribunal correctionnel de Paris* should settle that issue before addressing the merits of the case.

36. As stated above (see paragraph 6), Equatorial Guinea submitted to the Court a request for the indication of provisional measures on 29 September 2016.

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

38. By an Order of 7 December 2016, the Court indicated provisional measures (see paragraph 10 above).

39. On 2 January 2017, a hearing on the merits took place before the *Tribunal correctionnel de Paris*, in the absence of Mr. Teodoro Nguema Obiang Mangue, who was represented by his counsel. The President of the tribunal noted, *inter alia*, that, pursuant to the Court's Order of 7 December 2016, any confiscation measure that might be directed against the building located at 42 Avenue Foch in Paris could not be executed until the conclusion of the international judicial proceedings. At the request of the defence lawyers, the tribunal also decided to defer the start of the trial to 19 June 2017.

40. The hearings on the merits of the case before the *Tribunal correctionnel de Paris* were held from 19 June to 6 July 2017. The tribunal delivered its judgment on 27 October 2017, in which it found Mr. Teodoro Nguema Obiang Mangue guilty of money laundering offences committed in France between 1997 and October 2011. He was sentenced to a three-year suspended prison term and a suspended fine of €30 million. The tribunal also ordered the confiscation of all the assets seized during the judicial investigation and of the attached building at 42 Avenue Foch in Paris. Regarding the confiscation of this building, the tribunal, referring to the Court's Order of 7 December 2016 indicating provisional measures, stated that "the . . . proceedings [pending before the International Court of Justice] make the execution of any measure of confiscation by the French State impossible, but not the imposition of that penalty".

41. Following delivery of the judgment, Mr. Teodoro Nguema Obiang Mangue lodged an appeal against his conviction with the *Cour d'appel de Paris*. This appeal having a suspensive effect, no steps have been taken to enforce the sentences handed down to Mr. Teodoro Nguema Obiang Mangue.

II. BASES OF JURISDICTION INVOKED

42. The Court recalls that its jurisdiction is based on the consent of the parties and is confined to the extent accepted by them (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 32, para. 65 and p. 39, para. 88).

43. Equatorial Guinea invokes two bases for the Court's jurisdiction. The first of these is the Palermo Convention, which entered into force on 29 September 2003 and was ratified by France on 29 October 2002 and by Equatorial Guinea on 7 February 2003. The second of these is the Optional Protocol to the Vienna Convention, which entered into force on 24 April 1964 and was ratified by France on 31 December 1970 and acceded to by Equatorial Guinea on 4 November 2014. Both States are also party to the Vienna Convention, which entered into force on 24 April 1964, and which France ratified on 31 December 1970 and Equatorial Guinea acceded to on 30 August 1976.

44. Article 35 of the Palermo Convention provides in its relevant part:

> "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."

45. Article I of the Optional Protocol to the Vienna Convention provides:

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

46. The Court recalls that, in order for it to determine whether a dispute is one concerning the interpretation or application of a given treaty, it

> "cannot limit itself to noting that one of the Parties maintains that such a dispute exists, and the other denies it. It must ascertain whether the violations [alleged] . . . do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain" (*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 810, para. 16).

47. Before addressing the preliminary objections of France, it is necessary for the Court to determine the subject-matter of the dispute.

III. SUBJECT-MATTER OF THE DISPUTE

48. Article 40, paragraph 1, of the Statute and Article 38, paragraph 1, of the Rules of Court require an applicant to indicate the "subject of the dispute" in the application. Furthermore, the Rules of Court require that the application "specify the precise nature of the claim, together with a succinct statement of the facts and grounds on which the claim is based" (Article 38, paragraph 2, of the Rules) and that the memorial include a statement of the "relevant facts" (Article 49, paragraph 1, of the Rules). However, it is for the Court itself to determine on an objective basis the subject-matter of the dispute between the parties, by isolating the real issue in the case and identifying the object of the claim. In doing so, the Court examines the application as well as the written and oral pleadings

of the parties, while giving particular attention to the formulation of the dispute chosen by the applicant (*Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015 (II)*, p. 602, para. 26; *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 848, para. 38). It takes account of the facts that the applicant presents as the basis for its claim. The matter is one of substance, not of form.

* *

49. The Court recalls that, in its Application filed on 13 June 2016, Equatorial Guinea states that the dispute between the Parties arises from certain ongoing criminal proceedings in France and concerns

> "the immunity from criminal jurisdiction of the Second Vice-President of the Republic of Equatorial Guinea in charge of Defence and State Security, and the legal status of the building which houses the Embassy of Equatorial Guinea in France, both as premises of the diplomatic mission and as State property.

The criminal proceedings against the Second Vice-President constitute a violation of the immunity to which he is entitled under international law and interfere with the exercise of his official functions as a holder of high–ranking office in the State of Equatorial Guinea. To date, these proceedings have also resulted, *inter alia*, in the attachment of the building located at 42 Avenue Foch in Paris, which is the property of Equatorial Guinea and used for the purposes of its diplomatic mission in France. These proceedings violate the Vienna Convention on Diplomatic Relations of 18 April 1961, the United Nations Convention against Transnational Organized Crime of 15 November 2000, and general international law."

50. The Application also states 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".

51. Furthermore, Equatorial Guinea states in its Memorial that

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

*

52. Equatorial Guinea's claims based on the Palermo Convention concern, first, France's alleged violation of the immunity from foreign criminal jurisdiction of Mr. Teodoro Nguema Obiang Mangue, who is currently Vice-President of the Republic of Equatorial Guinea in charge of National Defence and State Security. Secondly, the claims relate to France's alleged overextension of its criminal jurisdiction over predicate offences associated with the crime of money laundering. Thirdly, the claims pertain to France's alleged failure to respect the immunity of the building at 42 Avenue Foch in Paris as State property of Equatorial Guinea.

53. Equatorial Guinea's claim based on the Vienna Convention concerns France's alleged failure to respect the inviolability of the building at 42 Avenue Foch in Paris as premises of Equatorial Guinea's diplomatic mission. Equatorial Guinea makes the following arguments in support of its claims.

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54. Regarding Mr. Teodoro Nguema Obiang Mangue, Equatorial Guinea states that, although he was that country's *Ministre d'Etat* for Agriculture and Forestry when criminal proceedings were first initiated before the French courts, he has assumed new responsibilities since his appointment to the high-ranking office of Second Vice–President of Equatorial Guinea in charge of Defence and State Security on 21 May 2012, and of Vice–President of Equatorial Guinea in charge of National Defence and State Security on 21 June 2016. According to Equatorial Guinea, the nature of his new functions requires France to respect his personal immunity in conformity with customary international law, in particular as he is called upon to travel abroad on behalf of his Government in order to perform those functions effectively. Equatorial Guinea argues that the conduct of criminal proceedings against Mr. Teodoro Nguema Obiang Mangue in France "constitute[s] a violation of the immunity *[ratione personae]* to which he is entitled under international law and interfere[s] with the exercise of his official functions as a holder of high-ranking office in the State of Equatorial Guinea". It further contends that France's conduct in this regard amounts to a violation of "the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States" to which Article 4 of the Palermo Convention refers.

55. Regarding its claim that the Respondent has overextended its criminal jurisdiction, Equatorial Guinea argues that France has

> "unilaterally gone beyond the bounds of its criminal jurisdiction to entertain and characterize alleged criminal offences (the predicate offences associated with money laundering) which are said to have been committed in the territory of Equatorial Guinea, by nationals of Equatorial Guinea, and whose victims are Equatorial Guineans or the State of Equatorial Guinea".

The Applicant considers that the predicate offences in question are, by their nature, offences whose sole victim would be the State of Equatorial Guinea, and that consequently, "only the State of Equatorial Guinea is competent to take cognizance of them and in a position to determine whether they have been committed". Equatorial Guinea states further that its Public Prosecutor investigated the alleged predicate offences and found that there were no such offences committed in the territory of Equatorial Guinea. According to Equatorial Guinea, Article 4 of the Palermo Convention requires that any characterization of predicate offences must be carried out in a manner consistent with the principles of sovereign equality and non-intervention in the internal affairs of another State. Consequently, it contends, France's unilateral determination that the alleged predicate offences of misuse of corporate assets, misappropriation of public funds, breach of trust and corruption were in fact committed in Equatorial Guinea amounts to a violation of the principles of sovereign equality and non-intervention in the internal affairs of another State reflected in Article 4 of the Palermo Convention.

56. Regarding its claim concerning the status of the building at 42 Avenue Foch in Paris as State property, Equatorial Guinea asserts that Mr. Teodoro Nguema Obiang Mangue previously owned that building in his private capacity, having been since 18 December 2004 the sole shareholder of the five Swiss companies that owned the building. However, according to Equatorial Guinea, the building became State property on 15 September 2011, when Mr. Teodoro Nguema Obiang Mangue transferred all his shareholder rights therein to the State of Equatorial Guinea. The Applicant further states that the transfer of the building to the State of Equatorial Guinea was duly recorded and registered by the relevant French authorities on 17 October 2011. Equatorial Guinea argues that France, by failing to recognize the building at 42 Avenue Foch in Paris as property belonging to the State of Equatorial Guinea with effect from 15 September 2011 and by failing to ensure that no measures of constraint, such as attachment, or execution are taken by the forum State against that building, is in violation of the customary international rules governing immunities of States, State officials and State property, flowing from the principles referred to in Article 4 of the Palermo Convention.

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57. Regarding its claim concerning the status of the building at 42 Avenue Foch in Paris as premises of its diplomatic mission in France, which is based on the Vienna Convention, the Applicant contends that France, by failing to guarantee the inviolability, protection and immunity of that building, is in violation of its obligation under Article 22 of that Convention.

58. Equatorial Guinea states that the building at 42 Avenue Foch in Paris "acquired diplomatic status" as of 4 October 2011 and that its diplomatic mission in France transferred all its offices to that building in July 2012. Equatorial Guinea further states that, in its Note Verbale of 4 October 2011 (see paragraph 25 above), it informed the Protocol Department of the French Ministry of Foreign Affairs that:

> "[s]ince the building forms part of the premises of the diplomatic mission, pursuant to Article 1 of the Vienna Convention . . . the Republic of Equatorial Guinea wishes to give you official notification so that the French State can ensure the protection of those premises, in accordance with Article 22 of the said Convention".

Equatorial Guinea contends that it has since then consistently affirmed the diplomatic status of the building through several diplomatic exchanges. The Applicant adds that France's own position in relation to the building has not been consistent in that, since the dispute arose, it has allowed the French authorities to go to the building at 42 Avenue Foch in Paris to obtain a visa to enter Equatorial Guinea; French tax authorities have collected the taxes payable in relation to the transfer of the building from Mr. Teodoro Nguema Obiang Mangue to the State of Equatorial Guinea; and France dispatched a security team to the building on the occasion of the presidential elections held in April 2016 in Equatorial Guinea. Equatorial Guinea thus claims that the building that serves as the premises of its diplomatic mission in France enjoys inviolability, protection and immunity under Article 22 of the Vienna Convention.

59. Equatorial Guinea further states that French authorities entered and searched the said building on numerous occasions between 28 September 2011 and 23 February 2012, and ordered its attachment *(saisie pénale immobilière)* on 19 July 2012 and confiscation on 27 October 2017.

* *

60. For its part, France objects to the jurisdiction of the Court to entertain Equatorial Guinea's claims, first, under the Palermo Convention and, second, under the Optional Protocol to the Vienna Convention, on the grounds that those claims concern "the alleged violation of very broad principles of international law, which Equatorial Guinea attempts to link artificially" to the two Conventions that it invokes as bases of jurisdiction. France further objects to the jurisdiction of the Court on the grounds that Equatorial Guinea's "submissions in both its Application and its Memorial go far beyond the subject–matter of the dispute" as defined by Equatorial Guinea itself.

61. Recalling the decision of the Court in its Order on provisional measures of 7 December 2016, France submits that the alleged dispute, as earlier identified by the Court, does not relate to the manner in which France performed its obligations under the Palermo Convention but appears rather "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". According to France, the Court's jurisdiction must be assessed within the strict limits of the subject-matter of the dispute as thus described in Equatorial Guinea's Application and Memorial and as delineated by the Conventions on which it seeks to establish that jurisdiction. France further objects to the jurisdiction of the Court and the admissibility of the Application on the grounds that Equatorial Guinea's claims amount to an abuse of process and abuse of rights.

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62. France raises several arguments in relation to Equatorial Guinea's claims brought pursuant to the Palermo Convention. First, France states that the purpose of that Convention is to "promote co-operation to prevent and combat

transnational organized crime more effectively". It contends that the Convention "is in no way intended to organize in a general way, the legal relations between States in light of the principles mentioned [in Article 4 thereof], and, in particular, does not seek to create a system of immunities, or establish the status of property belonging to the States parties". France argues further that, by contending that Article 4 of the Palermo Convention "contains an 'independent obligation' to comply with customary international law in general", Equatorial Guinea unduly confuses the obligations under the Convention with the manner in which they must be performed, thereby attempting to ascribe to the Convention an object it does not have and artificially broadening the scope of the consent given by virtue of Article 35, paragraph 2, thereof. France adds that since the Applicant does not accuse it of failing to criminalize the offences mentioned in the Palermo Convention in its domestic legislation, or of failing to establish domestic jurisdiction over those offences, or of failing to co-operate judicially, no question of the interpretation or application of a conventional obligation is at issue.

63. Second, France states that while the conventional obligations require domestic laws to conform with the Palermo Convention, the implementation of domestic legislation still falls under the sovereignty over penal matters of the States parties to that Convention. France argues that the fact that the criminal proceedings against Mr. Teodoro Nguema Obiang Mangue for the offence of money laundering were commenced on the basis of French domestic law does not "place those proceedings within the scope of the conventional obligations". The Respondent contends in particular that Equatorial Guinea has failed to demonstrate how France has breached its conventional obligations under the various articles of the Palermo Convention cited by Equatorial Guinea (such as Articles 3, 4, 6, 11, 12, 14, 15 and 18). France accordingly argues that Equatorial Guinea's claims in no way concern the application or interpretation of any of the provisions of that Convention.

64. Third, in response to Equatorial Guinea's claim that France has "unilaterally gone beyond the bounds of its criminal jurisdiction" by entertaining and characterizing the predicate offences associated with money laundering, France states that it has complied with its obligation under Article 6 to criminalize the laundering of the proceeds of crime and to provide for punishment for the offence of money laundering domestically. France also states that Article 15 of the Palermo Convention obligates a State party to "adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance [with the Convention]", and argues that it has in fact complied with this conventional obligation in its domestic legislation. France further argues that Article 15 relates to adjudicative jurisdiction, rather than to immunities, and that immunity is not a question of jurisdiction, but of the exercise of that jurisdiction. Accordingly, the two questions must be carefully distinguished.

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65. France also objects to the Court's jurisdiction under the Optional Protocol to the Vienna Convention to entertain Equatorial Guinea's claim concerning the legal status of the building at 42 Avenue Foch in Paris as premises of its diplomatic mission in France, on the ground that French authorities have never recognized the building at 42 Avenue Foch in Paris as Equatorial Guinea's diplomatic mission. Whilst France agrees that premises used for the purposes of a diplomatic mission should enjoy immunity and inviolability under the Vienna Convention, it argues that the inviolability régime in Article 22 "can only be applied and implemented if it has previously been established that the premises in question do indeed enjoy diplomatic status". According to France therefore, the real dispute between the Parties, which falls outside the scope of the Vienna Convention and of the Court's jurisdiction, is whether, at the time of the events of which Equatorial Guinea complains in its Application, that building should — or should not — have been regarded as being used for the purposes of Equatorial Guinea's mission in France.

66. Moreover, France contends that "the Vienna Convention contains no rules specifying the modalities or procedure for identifying the premises of a diplomatic mission and, therefore, for determining whether the Article 22 régime applies to a given building". The Respondent maintains that this question too falls outside the scope of that Convention and thus, outside the jurisdiction of the Court.

* *

67. The Court notes that the dispute between the Parties arose from criminal proceedings instituted in France against Mr. Teodoro Nguema Obiang Mangue and that those criminal proceedings were ongoing in French courts on 13 June 2016, when Equatorial Guinea filed its Application with the Court. The facts of the case and submissions of the Parties narrated above indicate that there are several distinct claims over which the Parties hold opposing views and which form the subject-matter of the dispute. For convenience, these will be described under the bases of jurisdiction that Equatorial Guinea invokes for each claim.

68. The aspect of the dispute for which Equatorial Guinea invokes the Palermo Convention as the title of jurisdiction involves various claims on which the Parties have expressed differing views in their written and oral pleadings. First, they disagree on whether, as a consequence of the principles of sovereign equality and non-intervention in the internal affairs of another State, to which Article 4 of the Palermo Convention refers, Mr. Teodoro Nguema Obiang Mangue, as Vice-President of Equatorial Guinea in charge of National Defence and State Security, is immune from foreign criminal jurisdiction. Second, they hold differing views on whether, as a consequence of the principles referred to in Article 4 of the Palermo Convention, the building at 42 Avenue Foch in Paris is immune from measures of constraint. Third, they differ on whether, by establishing its jurisdiction over the predicate offences associated with the offence of money laundering, France exceeded its criminal jurisdiction and breached its conventional obligation under Article 4 read in conjunction with Articles 6 and 15 of the Palermo Convention.

69. The Court will ascertain whether this aspect of the dispute between the Parties described above is capable of falling within the provisions of the Palermo Convention and whether, as a consequence, it is one which the Court has jurisdiction to entertain under the Palermo Convention. This will be dealt with in Part IV of the Judgment.

70. The aspect of the dispute for which Equatorial Guinea invokes the Optional Protocol to the Vienna Convention as the title of jurisdiction involves two claims on which the Parties have expressed differing views. First, they disagree on whether the building at 42 Avenue Foch in Paris constitutes part of the premises of the mission of Equatorial Guinea in France and is thus entitled to the treatment afforded for such premises under Article 22 of the Vienna Convention. They also disagree on whether France, by the action of its authorities in relation to the building, is in breach of its obligations under Article 22. The Court will ascertain whether this aspect of the dispute between the Parties is capable of falling within the Vienna Convention, and consequently whether it is one which the Court has jurisdiction to entertain under the Optional Protocol to the Vienna Convention. This will be dealt with in Part V of the Judgment.

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71. Aside from the claims outlined above, the Court notes that Equatorial Guinea has made certain assertions under the Palermo Convention as the title of jurisdiction. Equatorial Guinea argues that France has failed to perform its obligations of consultation and of co-operation under Article 15, paragraph 5 and Article 18, respectively, of the Palermo Convention in a manner consistent with the principles of sovereign equality, territorial integrity and non-intervention in the internal affairs of other States, to which Article 4 refers. It contends that its Public Prosecutor investigated the predicate offences associated with the offence of money laundering and alleged to have been committed in Equatorial Guinea, but found that no such offences were ever committed. The Applicant claims that, although this information was communicated to the relevant French authorities, they ignored that information and proceeded to indict Mr. Teodoro Nguema Obiang Mangue with money laundering in France. Equatorial Guinea submits that it has what it describes as exclusive jurisdiction under the Palermo Convention to determine whether the alleged predicate offences were committed. Consequently, it maintains that France was under an obligation to take the report of Equatorial Guinea's Public Prosecutor into account in accordance with the obligations to consult and co-operate under the Palermo Convention, and also to defer to the outcome of that report in accordance with the principles of sovereign equality and non-intervention by "put[ting] an end to the criminal proceedings".

72. France responds that these assertions were not raised in Equatorial Guinea's Application and moreover, that they are an attempt by the Applicant to broaden the subject-matter of the dispute between the Parties. France further submits that the obligation to co-operate under Article 15, paragraph 5, of the Palermo Convention does not require a State party to put an end to proceedings at the request of another State, and that neither the obligation to consult under Article 15, paragraph 5, nor the obligation to co-operate under Article 18, can be construed as

having an impact on the jurisdiction of the French courts to prosecute acts of money laundering committed within French territory.

73. The Court observes that Equatorial Guinea mentions the conventional obligations to consult and co-operate for the first time in its Memorial. However, in its submissions in the Memorial, Equatorial Guinea makes no reference to claims related to an alleged failure to comply with the obligations to consult and co-operate. Accordingly, the Court is of the view that such assertions can only be considered as additional arguments which do not constitute distinct claims made under the Palermo Convention.

IV. THE FIRST PRELIMINARY OBJECTION: JURISDICTION UNDER THE PALERMO CONVENTION

74. France's first preliminary objection is that the Court lacks jurisdiction under the Palermo Convention because the dispute between itself and Equatorial Guinea, as submitted to the Court, does not concern the interpretation or application of that Convention.

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75. As a preliminary matter, the Court notes that Article 35 of the Palermo Convention lays down certain procedural requirements before a State party may refer a dispute to the Court. States parties are required to attempt to negotiate settlement of the dispute for a reasonable time, then to proceed to arbitration should one of the States parties involved so request, and to attempt, for a period of six months from the request to arbitrate, to organize that arbitration.

76. The Court further notes that Equatorial Guinea and France have exchanged Notes Verbales in relation to the prosecution of Mr. Teodoro Nguema Obiang Mangue and the building at 42 Avenue Foch in Paris and that they held a meeting in January 2016 to discuss the dispute. Equatorial Guinea proposed arbitration between the two Parties on 26 October 2015. That offer, which was made more than six months before the filing of Equatorial Guinea's Application on 13 June 2016, was reiterated in Notes Verbales dated 6 January 2016 and 2 February 2016. By Note Verbale of 17 March 2016, France responded by indicating that "the facts mentioned in [Equatorial Guinea's] Note Verbale have been the subject of court decisions in France and remain the subject of ongoing legal proceedings". It concluded that France is "unable to accept the offer of settlement by the means proposed by the Republic of Equatorial Guinea". The Court is therefore satisfied that the procedural requirements of Article 35 had been complied with prior to the filing of Equatorial Guinea's Application.

* *

77. The Court now turns to the question whether the aspect of the dispute described in paragraph 68 falls within the provisions of the Palermo Convention. Equatorial Guinea argues that this aspect of the dispute raises issues related to the interpretation and application of Article 4 read in conjunction with other articles of the Convention.

78. Article 4 of the Palermo Convention 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."

* *

79. France maintains that Article 4 does not incorporate the rules of customary international law, in particular those concerning immunities of States and State officials. France further contends that there is no dispute between the Parties calling into question any of the obligations under the Convention.

80. In response to the allegation that it had overextended its jurisdiction to cover offences which fall within the exclusive jurisdiction of Equatorial Guinea, France argues that the Convention recognizes no exclusive jurisdiction of Equatorial Guinea.

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81. Equatorial Guinea relies on Article 4 in two ways. First, it argues that the rules relating to the immunity *ratione personae* of certain holders of high-ranking office and the immunity from execution of State property flow directly from the principles of sovereign equality and non-intervention referred to in Article 4. It maintains that Article 4 imposes a treaty obligation to respect the customary international rules relating to immunities of States and State officials when applying the Palermo Convention. Relying on this interpretation of Article 4, Equatorial Guinea asserts that France has failed to carry out various obligations pursuant to the Palermo Convention in a manner that is consistent with Article 4, by failing to respect the immunity to which the Vice-President is entitled and the immunity of the building at 42 Avenue Foch in Paris from measures of constraint as State property.

82. Second, Equatorial Guinea relies on the principles expressly referred to in Article 4, asserting that France has failed to carry out various obligations under the Palermo Convention in a manner consistent with those principles. In particular, Equatorial Guinea argues that France has violated Article 4 by asserting jurisdiction pursuant to Articles 6 and 15 of the Palermo Convention over alleged offences which fall exclusively within the jurisdiction of Equatorial Guinea's courts.

83. Equatorial Guinea concedes that Article 4 does not require respect for the principles of sovereign equality and non-intervention (including the rules on immunities of States and State officials which it claims flow from those principles) in a general sense. It does not seek to dissociate Article 4 from the Convention's other provisions. Rather, it argues that respect for those principles becomes a treaty obligation for a State party when it is applying the other provisions of the Convention. Equatorial Guinea alleges that France has violated Article 4 in the implementation of Article 6 (Criminalization of the laundering of proceeds of crime), Article 11 (Prosecution, adjudication and sanctions), Article 12 (Confiscation and seizure), Article 14 (Disposal of confiscated proceeds of crime or property), Article 15 (Jurisdiction) and Article 18 (Mutual legal assistance).

* *

84. The Court will first proceed to examine Article 4 to determine whether the claim by Equatorial Guinea relating to the immunities of States and State officials falls within the provisions of Article 4. Unless the Court finds that this is the case, the aspect of the dispute between the Parties in relation to the asserted immunities of the Vice-President of Equatorial Guinea and the building at 42 Avenue Foch in Paris as State property cannot be said to concern the interpretation or application of the Palermo Convention.

85. Second, the Court will consider Equatorial Guinea's argument that France has violated Article 4 of the Convention by failing to carry out its obligations relating to the criminalization of money laundering and the establishment of its jurisdiction over that offence (pursuant to Articles 6 and 15) in a manner consistent with the principles of sovereign equality and non-intervention referred to in Article 4. The Court will determine whether the actions by France of which Equatorial Guinea complains are capable of falling within the provisions of the Palermo Convention. Unless the Court finds that this is the case, the aspect of the dispute between the Parties in relation to France's alleged overextension of jurisdiction cannot be said to concern the interpretation or application of the Palermo Convention.

A. The alleged breach by France of the rules on immunities of States and State officials

86. The factual background to the prosecution in France of Mr. Teodoro Nguema Obiang Mangue is recalled above at paragraphs 23 to 41.

87. France views Article 4 as a general clause recalling fundamental principles of international law, one which establishes an aim or objective rather than an independent obligation. In this regard, France refers to Article I of the Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran (hereinafter the "Treaty of Amity"), which France identifies as the same kind of "conventional formulation" as Article 4. It recalls that in *Oil Platforms*, the Court found that Article I of the Treaty of Amity had to be regarded as fixing "an objective, in the light of which the other Treaty provisions are to be interpreted and applied" (*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 814, para. 28).

88. France argues that the Palermo Convention is not intended to organize in a general way the legal relations between States in light of the principles of sovereign equality, territorial integrity and non-intervention, nor to create a system of immunities or establish the status of property belonging to States parties. It further argues that Article 4 (2) is a reformulation in a negative form of the principle of territorial integrity mentioned in Article 4 (1), in the context of judicial co-operation.

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89. As the Court has recalled, Equatorial Guinea argues that Mr. Teodoro Nguema Obiang Mangue is entitled to immunity *ratione personae* from criminal prosecution in French courts and that the building at 42 Avenue Foch in Paris is State property which is immune from measures of execution by France (see paragraphs 54 and 56).

90. Equatorial Guinea claims that the customary international rules on immunities of States and State officials, and on the immunity of State property from execution, are incorporated into Article 4 through the reference in that article to the principles of sovereign equality and non-intervention. In its written pleadings Equatorial Guinea states that "the rules concerning the immunities to which States are entitled before foreign courts" are "*embodied* in the principle of sovereign equality" (emphasis added). At the oral hearings, Equatorial Guinea asserted that the "rules of international law on the immunity of States, their officials and their property . . . are *contained within* the principles referred to in Article 4" (emphasis added). Equatorial Guinea further maintains that Article 4 (2) must be regarded as providing additional protection for State sovereignty and that it does not limit the scope of Article 4 (1).

* *

91. Pursuant to customary international law, as reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, the provisions of the Palermo Convention must be interpreted in good faith in accordance with the ordinary meaning to be given to their terms in their context and in light of the object and purpose of the Convention. To confirm the meaning resulting from that process, or to remove ambiguity or obscurity, or to avoid a manifestly absurd or unreasonable result, recourse may be had to the supplementary means of interpretation which include the preparatory work of the Convention and the circumstances of its conclusion (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, pp. 109-110, para. 160).

92. Article 4 (1) stipulates that "States Parties shall carry out their obligations under [the Palermo] Convention in a manner consistent with the principles" to which it refers. The Court considers that the word "shall" imposes an obligation on States parties. Article 4 (1) is not preambular in character, nor does it merely formulate a general aim, as the Court held that Article I of the Treaty of Amity did in *Oil Platforms*. However, Article 4 is not independent of the other provisions of the Convention. Its purpose is to ensure that the States parties to the Convention perform their obligations in accordance with the principles of sovereign equality, territorial integrity and non-intervention in the domestic affairs of other States.

93. As the Court has previously observed, the rules of State immunity derive from the principle of sovereign equality of States (*Jurisdictional Immunities of the State (Germany* v. *Italy: Greece Intervening), Judgment, I.C.J. Reports 2012 (I)*, pp. 123–124, para. 57). However, Article 4 does not refer to the customary international rules, including State immunity, that derive from sovereign equality but to the principle of sovereign equality itself. Article 4 refers only to general principles of international law. In its ordinary meaning, Article 4 (1) does not impose, through its

reference to sovereign equality, an obligation on States parties to act in a manner consistent with the many rules of international law which protect sovereignty in general, as well as all the qualifications to those rules.

94. Article 4 (1) is to be read in its context. Article 4 (2) of the Palermo Convention states that "[n]othing in [the] 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". Article 4 (2) does not refer to the customary international rules on immunities of States and State officials. Moreover, none of the provisions of the Palermo Convention relates expressly to the immunities of States and State officials.

95. Article 4 (1) is also to be read in light of the object and purpose of the Convention. That object and purpose, stated in Article 1, is the promotion of co-operation to prevent and combat transnational organized crime more effectively. The interpretation of Article 4 advanced by Equatorial Guinea, whereby the customary rules relating to immunities of States and State officials are incorporated into the Convention as conventional obligations, is unrelated to the stated object and purpose of the Palermo Convention.

96. The Court concludes that, in its ordinary meaning, Article 4, read in its context and in light of the object and purpose of the Convention, does not incorporate the customary international rules on immunities of States and State officials. This interpretation is confirmed by the *travaux préparatoires* of the Palermo Convention. The *Ad Hoc* Committee on the Elaboration of a Convention against Transnational Organized Crime met over the course of thirteen sessions between January 1999 and February 2004 in its elaboration of the Convention and its Protocols. So far as the record shows, during this process, no reference was made to immunities of States and State officials in relation to the drafting of Article 4.

97. The records of the preparatory meetings of the *Ad Hoc* Committee indicate that the issue of State immunity was raised twice with regard to other provisions. First, a proposal to include an article covering measures against corruption by, *inter alia*, foreign public officials led some delegations to raise concerns about the immunities accorded by international instruments to some of those officials. The proposal was not retained in the final text of the Convention.

98. Second, the issue of immunity of State property was raised in the context of a proposal by Singapore to include a provision dealing with State immunity from execution in the article relating to confiscation and seizure (now Article 12 of the Palermo Convention). This proposal was likewise not retained in the final text of the Convention. Instead it was agreed that the *travaux préparatoires* should indicate the following in the interpretative notes to Article 12:

> "interpretation of article 12 should take into account the principle in international law that property belonging to a foreign State and used for non-commercial purposes may not be confiscated except with the consent of the foreign State. It is not the intention of the Convention to restrict the rules that apply to diplomatic or State immunity, including that of international organizations." (*travaux préparatoires*, p. 115).

The interpretative note specifies that the Palermo Convention does not restrict the rules that apply to State immunity. The note does not relate to Article 4 of the Palermo Convention and does not suggest that these rules are incorporated by reference into the Palermo Convention.

99. Article 4 (1) of the Palermo Convention was transposed from Article 2 (2) of the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (hereinafter the "Convention against Illicit Traffic in Narcotic Drugs"). Article 4 (1) of the Palermo Convention is identical to Article 2 (2) of the Convention against Illicit Traffic in Narcotic Drugs, while Article 4 (2) of the Palermo Convention is very similar to Article 2 (3) of the Convention against Illicit Traffic in Narcotic Drugs. The Commentary to the Convention against Illicit Traffic in Narcotic Drugs, in relation to Article 2 (2), is therefore relevant to the Court's examination of Article 4 of the Palermo Convention.

100. The Commentary notes that Article 2 (2) of the Convention against Illicit Traffic in Narcotic Drugs "reiterates universally accepted and well-established principles of international law concerning the sovereign equality and territorial integrity of States and non-intervention in the domestic affairs of States" (Commentary, para. 2.12). According to the Commentary, the rationale for restating these principles in Article 2 is that the Convention against Illicit Traffic in Narcotic Drugs "goes much further than previous drug control treaties in matters of law enforcement and

mutual legal assistance" (Commentary, para. 2.13). Again the focus is on law enforcement and mutual legal assistance, not immunity.

101. The purpose of the Convention against Illicit Traffic in Narcotic Drugs, set out in Article 2 of that Convention, is the promotion of co-operation among States parties to effectively address illicit trafficking in narcotic drugs and psychotropic substances having an international dimension. The Convention against Illicit Traffic in Narcotic Drugs does not include a provision protecting the State immunity of individuals suspected of drug trafficking. The protection of the sovereignty, territorial integrity and domestic jurisdiction of a State is the purpose of Article 2 (2) of the Convention against Illicit Traffic in Narcotic Drugs. Article 4 (1) of the Palermo Convention shares that purpose. Neither of these provisions is concerned with the related, but separate, question of the immunities of individuals, or of State property, in foreign territory.

102. In light of the above, the Court concludes that Article 4 does not incorporate the customary international rules relating to immunities of States and State officials. Therefore, the aspect of the dispute between the Parties relating to the asserted immunity of the Vice-President of Equatorial Guinea and the immunity claimed for the building at 42 Avenue Foch in Paris from measures of constraint as State property does not concern the interpretation or application of the Palermo Convention. Consequently, the Court lacks jurisdiction in relation to this aspect of the dispute. The Court notes that its determination that Article 4 does not incorporate the customary international rules relating to immunities of States and State officials is without prejudice to the continued application of those rules.

103. Equatorial Guinea raises a further claim based on the Palermo Convention which does not depend on the view of Article 4 as incorporating the rules relating to immunities of States and State officials. The Court will now address this claim.

B. The alleged overextension of jurisdiction by France

104. Equatorial Guinea asserts that the French legislation that criminalizes money laundering and establishes France's jurisdiction over that offence (pursuant to Articles 6 and 15 of the Palermo Convention), as interpreted and applied by French courts, does not respect the principles of sovereign equality and non-intervention. Therefore, Equatorial Guinea contends that the French legislation is not in harmony with Article 4 of the Convention. Equatorial Guinea maintains that the Court has jurisdiction in relation to this aspect of its dispute with France because these actions by France fall within the scope of the Palermo Convention.

105. As recalled above, France contends that there is no dispute between the Parties calling into question any of the obligations under the Convention.

106. The Court must determine whether the aspect of the dispute between the Parties relating to France's criminalization of money laundering and its establishment of jurisdiction over that offence, as described above, "concerns the interpretation or application" of the Palermo Convention. To do so, the Court must ascertain whether the alleged violations by France complained of by Equatorial Guinea are capable of falling within the provisions of the Palermo Convention and whether, as a consequence, this aspect of the dispute is one which the Court has jurisdiction to entertain pursuant to Article 35, paragraph 2, of the Convention (see paragraph 46 above).

107. Article 6 of the Palermo Convention states in its relevant part:

"*Criminalization of the laundering of proceeds of crime*

1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

   (*a*) (i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;

(ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;

(*b*) Subject to the basic concepts of its legal system:

(i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;

(ii) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.

2. For purposes of implementing or applying paragraph 1 of this article:

(*a*) Each State Party shall seek to apply paragraph 1 of this article to the widest range of predicate offences;

(*b*) Each State Party shall include as predicate offences all serious crime as defined in article 2 of this Convention and the offences established in accordance with articles 5, 8 and 23 of this Convention. In the case of States Parties whose legislation sets out a list of specific predicate offences, they shall, at a minimum, include in such list a comprehensive range of offences associated with organized criminal groups;

(*c*) For the purposes of subparagraph *(b)*, predicate offences shall include offences committed both within and outside the jurisdiction of the State Party in question. However, offences committed outside the jurisdiction of a State Party shall constitute predicate offences only when the relevant conduct is a criminal offence under the domestic law of the State where it is committed and would be a criminal offence under the domestic law of the State Party implementing or applying this article had it been committed there".

108. The relevant part of Article 15 of the Palermo Convention is worded as follows:

"*Jurisdiction*

1. Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with articles 5, 6, 8 and 23 of this Convention when:

(*a*) The offence is committed in the territory of that State Party . . . . . .

2. Without prejudice to norms of general international law, this Convention does not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law."

* *

109. France concedes that Article 6 imposes an obligation on States parties to the Convention to criminalize money laundering in their domestic legislation. It submits that it has complied with that obligation since the offence of money laundering is provided for, and is punishable, under the French Penal Code. It points out that Equatorial Guinea is not challenging the conformity of French legislation with the Convention obligation to criminalize behaviour. France maintains that its legislation in the matter of money laundering and the establishment of jurisdiction over that offence was adequate at the time it ratified the Palermo Convention. It points out that it did not need to enact specific legislation to implement the Convention.

110. In relation to Equatorial Guinea's argument as to the extent of France's jurisdiction, France asserts that the proceedings against Mr. Teodoro Nguema Obiang Mangue do not involve the extraterritorial extension of the jurisdiction of the French courts, as the criminal proceedings only concern acts committed on French territory. France asserts furthermore that the dispute between the Parties, as defined in Equatorial Guinea's Application, does not relate to the establishment by France of its jurisdiction over Convention offences.

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111. Equatorial Guinea does not claim that French law has failed to criminalize money laundering pursuant to Article 6, nor that France has failed to establish its criminal jurisdiction to enable the prosecution of money laundering pursuant to Article 15. Rather, according to Equatorial Guinea, France's legislation implementing Articles 6 and 15 is incompatible with the principles of sovereign equality and non-intervention referred to in Article 4.

112. Equatorial Guinea argues that France has failed to respect the principles of sovereign equality and non-intervention, as prescribed by Article 4, by permitting its courts to initiate criminal proceedings in relation to alleged offences which, even if they were established, would fall solely within the jurisdiction of the courts of Equatorial Guinea. In particular, Equatorial Guinea asserts that France has overextended its jurisdiction, pursuant to Article 15 of the Palermo Convention, to cover predicate offences allegedly committed in Equatorial Guinea by and against nationals of Equatorial Guinea or against the Equatorial Guinean State.

* *

113. In the Court's view, a State can give effect to a treaty by using pre-existing legislation and there can be a dispute as to the implementation of that treaty through such legislation. Consequently, even if France did not enact specific legislation to comply with the requirements of the Palermo Convention, this would not be decisive for the purposes of the application of the Convention and therefore for the jurisdiction of the Court with regard to such a dispute.

114. On the other hand, in assessing whether France was implementing the Convention in taking action against Mr. Teodoro Nguema Obiang Mangue, it is relevant to note that the Palermo Convention recognizes that the definition of offences and related legal rules and procedures is a matter for the domestic law of the prosecuting State. Specifically, Article 11 (6) provides that:

> "Nothing contained in this Convention shall affect the principle that the description of the offences established in accordance with this Convention and of the applicable legal defences or other legal principles controlling the lawfulness of conduct is reserved to the domestic law of a State Party and that such offences shall be prosecuted and punished in accordance with that law."

In accordance with that general principle, the Convention helps to co-ordinate but does not direct the actions of States parties in the exercise of their domestic jurisdiction. Articles 12 (9), 13 (4), 14 (1), 14 (2) and 15 (6) are also relevant in this regard: they similarly provide that States parties are free to implement the convention obligations contained in these provisions in accordance with their domestic law. The scope of action taken in the implementation of the Convention is therefore limited.

* *

115. The Court now turns to the issue of France's alleged overextension of jurisdiction in relation to the predicate offences of money laundering. The Court notes that Article 2 *(h)* of the Palermo Convention defines "predicate offence" as "any offence as a result of which proceeds have been generated that may become the subject of an offence as defined in article 6 of this Convention". Article 6 (2) imposes an obligation on States parties to "seek to" establish criminal offences as set out in Article 6 (1) in relation to the "widest range of predicate offences", including offences committed outside the jurisdiction of the State party. The obligation is limited by Article 6(2)*(c)*. Pursuant to that provision, predicate offences committed outside the jurisdiction of a State party may only relate to

conduct that is a criminal offence under the domestic law of the State where the conduct occurs. That conduct must also constitute a criminal offence under the domestic law of the State party adopting the measures pursuant to Article 6, had the conduct occurred there.

116. The Court observes that Article 6 (2) *(c)* is not concerned with the question whether any particular individual has committed a predicate offence abroad, but with the distinct prior question whether the alleged conduct abroad constitutes a criminal offence under the domestic law of the State where it occurred. The Court further observes that Article 6 (2) *(c)* of the Palermo Convention does not provide for the exclusive jurisdiction of the State on whose territory such an offence was committed. It is for each State party to adopt measures to criminalize the Convention offences as required by Article 6, including "the widest range" of predicate offences inside and outside the jurisdiction of that State party. It is also for each State party to adopt such measures as may be necessary to establish their jurisdiction over Convention offences pursuant to Article 15. This is in accordance with the principle stated in Article 15 (6) of the Palermo Convention, which provides that "[w]ithout prejudice to norms of general international law", the Convention does not exclude the exercise of any criminal jurisdiction established by a State party in accordance with its domestic law.

117. For these reasons, the Court finds that the alleged violations complained of by Equatorial Guinea are not capable of falling within the provisions of the Palermo Convention, notably Articles 6 and 15. The Court therefore lacks jurisdiction to entertain the aspect of the dispute relating to France's alleged overextension of jurisdiction.

* *

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

119. The Court's conclusion in relation to France's first preliminary objection makes it unnecessary to make any further determinations regarding the scope or content of the obligations on States parties pursuant to Article 4 of the Palermo Convention (see paragraph 102).

V. THE SECOND PRELIMINARY OBJECTION: JURISDICTION UNDER THE OPTIONAL PROTOCOL TO THE VIENNA CONVENTION

120. The Court recalls that the aspect of the dispute between the Parties, in respect of which Equatorial Guinea invokes the Optional Protocol to the Vienna Convention as the title of jurisdiction, concerns whether the building at 42 Avenue Foch, Paris, constitutes part of the premises of the mission of Equatorial Guinea in France and is thus entitled to the treatment provided for under Article 22 of the Vienna Convention. It also concerns whether France, by the actions of its authorities in relation to the building, is in breach of its obligation under Article 22 (see paragraph 70 above). Equatorial Guinea seeks to found the Court's jurisdiction under Article I of the Optional Protocol to the Vienna Convention, the text of which is quoted in paragraph 45 above.

121. The Court further recalls that Articles II and III of the Optional Protocol to the Vienna Convention provide that parties to a dispute arising out of the interpretation or application of the Vienna Convention 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 rather to arbitration or conciliation. After the expiry of that period, either party may bring the dispute before the Court by an application. As the Court has previously noted, the terms of Articles II and III

> "when read in conjunction with those of Article I and with the Preamble to the Protocols, 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" (*United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, I.C.J. Reports 1980*, pp. 25-26, para. 48).

The Court explained further that

> "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.)

122. As the Court noted in paragraph 76 above, Equatorial Guinea proposed to France to have recourse to conciliation or arbitration. However, France did not express its readiness to consider that proposal and, instead, expressly stated that it could not pursue it. Thus, Articles II and III of Optional Protocol to the Vienna Convention in no way affect any jurisdiction the Court might have under Article I thereof (*Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016 (II)*, p. 1164, para. 64). In light of the foregoing, the Court will examine, on the basis of Article I of the Optional Protocol to the Vienna Convention, whether the aspect of the dispute relating to the status of the building at 42 Avenue Foch in Paris as diplomatic premises of Equatorial Guinea (see paragraphs 70 and 120 above) is one arising out of the interpretation or application of the Vienna Convention and, consequently, whether it is one that falls within the scope of Article I.

* *

123. The Court recalls that France objects to the Court's jurisdiction under Article I of the Optional Protocol to the Vienna Convention on the grounds that the dispute relating to the status of the building at 42 Avenue Foch in Paris as diplomatic premises of Equatorial Guinea is not one arising out of the interpretation or application of the Vienna Convention (see paragraph 65 above). The Court also recalls France's argument that the inviolability régime in Article 22 "can only be applied and implemented if it has previously been established that the premises in question do indeed enjoy diplomatic status". Furthermore, France argues that the French authorities have never recognized the building at 42 Avenue Foch in Paris as Equatorial Guinea's diplomatic mission. Thus, the real dispute between the Parties, according to France, is whether at the time of its search and seizure, that building should or should not have been regarded as being used for the purposes of Equatorial Guinea's mission in France (see paragraph 65 above). The Respondent maintains that this dispute falls outside the scope of the Vienna Convention and is consequently outside the Court's jurisdiction.

124. France states that, in a Note Verbale of 28 March 2012, it reminded Equatorial Guinea of the constant practice in France regarding the recognition of premises of a diplomatic mission. In this Note Verbale, the Protocol Department of the Ministry of Foreign Affairs stated:

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

125. France maintains that, since it has never recognized the building as forming part of the premises of Equatorial Guinea's diplomatic mission in accordance with its "constant practice", the building does not enjoy the régime of protection guaranteed under Article 22 of the Vienna Convention.

126. France further argues that the term "premises of the mission" referred to in Article 1 *(i)* of the Vienna Convention is "essentially descriptive" and not prescriptive because "it does not stipulate the modalities or procedures for establishing that a building does indeed fall into the category of diplomatic premises". France adds that Article 22, while setting out the legal régime for diplomatic premises, contains no reference to any criteria or procedures for acquiring diplomatic status. Accordingly, France contends that, since the Vienna Convention contains no provision stipulating the conditions under which a building may be characterized as diplomatic premises, the matter falls outside the scope of that Convention and, in accordance with the Preamble, "the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention".

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127. Equatorial Guinea maintains that the dispute relating to the legal status of the building at 42 Avenue Foch in Paris, as diplomatic premises of Equatorial Guinea, is one arising out of "the interpretation and application of several provisions of the [Vienna Convention], including but not limited to Article 1 *(i)* and Article 22", and that, accordingly, the Court has jurisdiction, under the Optional Protocol to the Vienna Convention, to entertain it. The Applicant contends in particular, that the building forms part of the premises of Equatorial Guinea's diplomatic mission within the meaning of Article 1 *(i)* of the Vienna Convention, and that as such, it should benefit from the régime of inviolability and immunity from search and seizure provided for under that Convention. In this regard the Court recalls Equatorial Guinea's arguments in support of its position that the building forms part of its diplomatic mission (see paragraphs 57–58 above).

128. Equatorial Guinea argues that Article 1 *(i)* of the Vienna Convention is not merely "descriptive" as maintained by France, but is also "declaratory" in that "[a]s soon as a building is designated for the purposes of a diplomatic mission by the sending State — at least in the absence of clear and undisputed conditions imposed by the receiving State on all sending States, without discrimination — the receiving State must recognize its inviolability". Furthermore, whilst the Applicant recognizes that some countries adopt domestic procedures "subject[ing] the assignment of the premises of a diplomatic mission to the approval of the receiving State", it submits that France does not have any special legislation on State immunity or diplomatic missions.

* *

129. The Court recalls that both France and Equatorial Guinea are parties to the Vienna Convention and are also parties to the Optional Protocol (see paragraph 43 above). The Court further recalls that the Vienna Convention is a treaty on the "diplomatic intercourse, privileges and immunities" of States parties and that "the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States" (see Preamble to the Vienna Convention). Article 1 *(i)* of the Vienna Convention provides:

> "For the purpose of the present Convention, the following expressions shall have the following meanings hereunder assigned to them:
>
> . . . . . .
>
> (i) The 'premises of the mission' are the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission."

130. Article 22 of the Vienna Convention provides:

> "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."

131. In order to establish jurisdiction over the aspect of the dispute identified by the Court in paragraph 70 above, the Court is required to determine whether that aspect of the dispute is one that arises out of the interpretation or application of the Vienna Convention, as required by the provisions of Article I of the Optional Protocol to the Vienna Convention (see paragraph 45 above). Making that determination requires an analysis of the relevant terms of the Vienna Convention in accordance with the rules of customary international law on the interpretation of treaties, as described above in paragraph 91.

132. Article 1 *(i)* of the Vienna Convention is prefaced by the following sentence: "For the purpose of the present Convention, the following expressions shall have the meanings hereunder assigned to them". Article 1 *(i)* of the Vienna Convention thus does no more than to define what constitutes "premises of the mission", a phrase used later in Article 22. For the purposes of the Vienna Convention, a building or part of a building "used for the purposes of [a diplomatic] mission", including the residence of the head of mission, is considered "premises of the mission", regardless of ownership.

133. Article 22 of the Vienna Convention provides a régime of inviolability, protection and immunity for "premises of [a diplomatic] mission" by obligating the receiving State, *inter alia*, to refrain from entering such premises without the consent of the head of mission, and to protect those premises against intrusion, damage or disturbance of the peace of the mission by agents of the receiving State. The Article also guarantees immunity from search, requisition, attachment or execution for the premises of the mission, their furnishings and other property thereon, as well as means of transportation of the mission.

134. Where, as in this case, there is a difference of opinion as to whether or not the building at 42 Avenue Foch in Paris, which Equatorial Guinea claims is "used for the purposes of its diplomatic mission", qualifies as "premises of the mission" and, consequently, whether it should be accorded or denied protection under Article 22, this aspect of the dispute can be said to "aris[e] out of the interpretation or application of the Vienna Convention" within the meaning of Article I of the Optional Protocol to the said Convention. The Court therefore finds that this aspect of the dispute falls within the scope of the Vienna Convention.

135. In light of the above, the Court concludes that it has jurisdiction under Article I of the Optional Protocol to the Vienna Convention to entertain the aspect of the dispute.

136. It now remains for the Court to determine the extent of its jurisdiction. France argues in the alternative that, should the Court find that it does have jurisdiction to entertain Equatorial Guinea's claim relating to the status of the building at 42 Avenue Foch in Paris as diplomatic premises, that jurisdiction "would be strictly limited to an examination of the lawfulness of the attachment of the building . . . to the exclusion of any question relating to the movable property present in the building before its attachment on 19 July 2012".

137. Although the Court has held that an applicant may not introduce during the course of the proceedings a new claim which would have the effect of transforming the subject-matter of the dispute originally brought before it (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 695, para. 108), it is not persuaded that Equatorial Guinea, in advancing its argument regarding movable property seized from the premises at 42 Avenue Foch in Paris, has introduced a new claim into the proceedings. The aspect of the dispute as identified by the Court in paragraph 70 above relates to the inviolability and immunity of the premises in question as a legal consequence of diplomatic status.

The Parties agree that Article 22 of the Vienna Convention provides for the régime of inviolability of buildings which have the status of diplomatic premises. Under Article 22, paragraph 3, it is not only the premises of the mission but also "their furnishings and other property thereon and the means of transport of the mission" that are immune from search, requisition, attachment or execution. The Court considers that any claims relating to movable property present on the premises at 42 Avenue Foch in Paris, and resulting from the alleged violation of the immunity to which the building is said to be entitled, fall within the subject-matter of the dispute and that as such the Court is competent to entertain them.

138. The Court thus concludes that it has jurisdiction to entertain the aspect of the dispute relating to the status of the building, including any claims relating to the furnishings and other property present on the premises at 42 Avenue Foch in Paris. France's second preliminary objection is consequently dismissed.

VI. THE THIRD PRELIMINARY OBJECTION: ABUSE OF PROCESS AND ABUSE OF RIGHTS

139. In its Preliminary Objections, France denies that the Court has jurisdiction, *inter alia*, on the ground that "Equatorial Guinea's claim seeks to consolidate an abuse of rights". It refers to "a necessary corollary of the principle of good faith, in the form of both an abuse of process and an abuse of rights". France argues that Equatorial Guinea's conduct was an abuse of rights and that its seisin of the Court was an abuse of process. In the oral proceedings, France contended that, regardless of whether the Court viewed its argument relating to abuse of rights and abuse of process as a matter of jurisdiction or admissibility, the Court should decline to hear the dispute between the Parties on the merits.

140. As to abuse of rights, France refers to inconsistencies in correspondence sent and statements made by Equatorial Guinea regarding the date of acquisition by Equatorial Guinea of the building at 42 Avenue Foch in Paris and the use to which it was put. France argues that Equatorial Guinea had "suddenly and unexpectedly" transformed a private residence into premises of its mission and had appointed "its owner", Mr. Teodoro Nguema Obiang Mangue, "to increasingly eminent political positions" as the French investigation proceeded. France alleges that Equatorial Guinea's objective was to shield Mr. Teodoro Nguema Obiang Mangue and the premises from the pending criminal proceedings. France further contends in its written pleadings that the President of Equatorial Guinea "explicitly acknowledged that the reason for invoking the diplomatic nature of the building located at 42 Avenue Foch [in Paris] was to protect the building from criminal proceedings". In a letter dated 14 February 2012, addressed to the French President, the President of Equatorial Guinea had indicated that "due to the pressures on [Mr. Teodoro Nguema Obiang Mangue] as a result of the supposed unlawful acquisition of assets, he decided to resell the said building [at 42 Avenue Foch in Paris] to the Government of . . . Equatorial Guinea".

141. As to abuse of process, France argues that Equatorial Guinea's Application by which it seised the Court constitutes an abuse of process because it was submitted "in the manifest absence of any legal remedy and with the aim of covering abuses of rights committed in other respects".

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142. In its Written Statement, Equatorial Guinea submits that the allegation of abuse of rights "raises issues pertaining to the merits that cannot be addressed in these incidental proceedings" and formally denies that there had been any abuse of rights on its part.

143. In regard to France's allegation of abuse of process, Equatorial Guinea contends that it seised the Court in good faith and in accordance with the conditions and requirements of the Conventions on which it bases the Court's jurisdiction. Equatorial Guinea further argues that France is seeking to dissuade Equatorial Guinea from settling a dispute by judicial means and that it is established jurisprudence that seising the Court, even immediately after accepting the Court's jurisdiction, does not constitute an abuse of process. Finally, Equatorial Guinea maintains that it is "perfectly legitimate" for it to seise the Court with the aim of putting an end to the criminal proceedings brought before the French courts against its Vice-President because Equatorial Guinea considers that the French courts are exercising jurisdiction contrary to international law.

* *

144. The Court will consider France's objection only in relation to the Vienna Convention, since it has found that it lacks jurisdiction under the Palermo Convention (see paragraph 118 above).

145. In the Court's view, France's third preliminary objection is properly characterized as a claim relating to admissibility. This is reflected in the final submissions of France, which refer not only to lack of jurisdiction but also to the inadmissibility of the Application.

146. In the case law of the Court and its predecessor, a distinction has been drawn between abuse of rights and abuse of process. Although the basic concept of an abuse may be the same, the consequences of an abuse of rights or an abuse of process may be different.

147. On several occasions before the Permanent Court of International Justice, abuse of rights was pleaded and rejected at the merits phase for want of sufficient proof. For example, in *Certain German Interests in Polish Upper Silesia*, the Court said:

> "Germany undoubtedly retained until the actual transfer of sovereignty the right to dispose of her property, and only a misuse of this right could endow an act of alienation with the character of a breach of the Treaty; such misuse cannot be presumed, and it rests with the party who states that there has been such misuse to prove his statement." (*Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, p. 30.)

148. In *Arbitral Award of 31 July 1989 (Guinea-Bissau* v. *Senegal)*, this Court was faced with an argument relating to abuse of process. Senegal argued that

> "Guinea-Bissau's Application is inadmissible, insofar as it seeks to use the declaration of President Barberis for the purpose of casting doubt on the validity of the Award . . . Senegal argues that that declaration is not part of the Award, and therefore that any attempt by Guinea-Bissau to make use of it for that purpose 'must be regarded as an abuse of process aimed at depriving Senegal of the rights belonging to it under the Award'. Senegal also contends that the remedies sought are disproportionate to the grounds invoked and that the proceedings have been brought for the purpose of delaying the final solution of the dispute." (*Judgment, I.C.J. Reports 1991*, p. 63. para. 26.)

The Court rejected the argument on the basis that "Guinea-Bissau's Application has been properly presented in the framework of its right to have recourse to the Court in the circumstances of the case" (*ibid*., p. 63, para. 27).

149. In *Certain Phosphate Lands in Nauru*, Australia argued that Nauru had failed to act consistently and in good faith in relation to rehabilitation of the phosphate lands and that the Court "in exercise of its discretion, and in order to uphold judicial propriety should . . . decline to hear the Nauruan claims" (*Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 255, para. 37). The Court held that

> "the Application by Nauru has been properly submitted in the framework of the remedies open to it. At the present stage, the Court is not called upon to weigh the possible consequences of the conduct of Nauru with respect to the merits of the case. It need merely note that such conduct does not amount to an abuse of process." (*Ibid*., p. 255, para. 38.)

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

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

152. For these reasons, the Court does not consider Equatorial Guinea's present claim inadmissible on grounds of abuse of process or abuse of rights. France's third preliminary objection is therefore dismissed.

VII. GENERAL CONCLUSIONS

153. The Court concludes that it lacks jurisdiction pursuant to the Palermo Convention to entertain Equatorial Guinea's Application. The Court further concludes that it has jurisdiction pursuant to the Optional Protocol to the Vienna Convention to entertain the submissions of Equatorial Guinea relating to the status of the building at 42 Avenue Foch in Paris as diplomatic premises, including any claims relating to the seizure of certain furnishings and other property present on the above-mentioned premises. Finally, the Court finds that Equatorial Guinea's Application is not inadmissible on grounds of abuse of process or abuse of rights.

*

* *

154. For these reasons,

THE COURT,

(1) By eleven votes to four,

Upholds the first preliminary objection raised by the French Republic that the Court lacks jurisdiction on the basis of Article 35 of the United Nations Convention against Transnational Organized Crime;

> IN FAVOUR: *President* Yusuf; *Judges* Owada, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Bhandari, Crawford, Gevorgian, Salam;
>
> AGAINST: *Vice-President* Xue; *Judges* Sebutinde, Robinson; *Judge* ad hoc Kateka;

(2) Unanimously,

Rejects the second preliminary objection raised by the French Republic that the Court lacks jurisdiction on the basis of the Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes;

(3) By fourteen votes to one,

Rejects the third preliminary objection raised by the French Republic that the Application is inadmissible for abuse of process or abuse of rights;

> IN FAVOUR: *President* Yusuf; *Vice-President* Xue; *Judges* Owada, Abraham, Bennouna, Cançado Trindade, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian, Salam; *Judge* ad hoc Kateka;
>
> AGAINST: *Judge* Donoghue;

(4) By fourteen votes to one,

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

> IN FAVOUR: *President* Yusuf; *Vice-President* Xue; *Judges* Owada, Abraham, Bennouna, Cançado Trindade, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian, Salam; *Judge* ad hoc Kateka;
>
> AGAINST: *Judge* Donoghue.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this sixth day of June, two thousand and eighteen, 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, respectively.

(Signed) Abdulqawi Ahmed Yusuf,
President.

(Signed) Philippe Couvreur,
Registrar.

Vice-President XUE, Judges SEBUTINDE, ROBINSON and Judge *ad hoc* KATEKA append a joint dissenting opinion to the Judgment of the Court; Judge OWADA appends a declaration to the Judgment of the Court; Judge ABRAHAM appends a separate opinion to the Judgment of the Court; Judge DONOGHUE appends a dissenting opinion to the Judgment of the Court; Judges GAJA and CRAWFORD append declarations to the Judgment of the Court; Judge GEVORGIAN appends a separate opinion to the Judgment of the Court.

(Initialled) A.A.Y.

(Initialled) Ph.C.

JOINT DISSENTING OPINION OF VICE-PRESIDENT XUE, JUDGES SEBUTINDE AND ROBINSON AND JUDGE *AD HOC* KATEKA

Jurisdiction under the United Nations Convention against Transnational Organized Crime (Palermo Convention) — Dispute concerning the interpretation or application of the Palermo Convention — Overarching and pervasive effect of Article 4 (1) of the Palermo Convention — Principle of sovereign equality of States has a discrete value — Article 4 (1) is not set aside by other provisions of the Convention which leave matters to domestic law — Sovereign equality of States in other international instruments — Par in parem non habet imperium *— Intrinsic linkage with the customary international rules on foreign State immunities — Principle sets limits for the performance of other obligations under the Palermo Convention — Articles 6, 11, 12, 14, 15 and 18 — Performance must be consistent with the principle of sovereign equality — The Court has jurisdiction.*

Palermo Convention — Jurisdiction ratione materiae *— Subject-matter of the dispute — Matter for objective determination by the Court and integral part of the Court's judicial function — Court has not precisely identified the subject-matter of the dispute.*

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1. With much regret, we have voted against the conclusion in point 1 of paragraph 154 of the Judgment. In this joint dissent, we explain the legal reasoning behind our vote. In particular, we disagree with the majority's finding in paragraph 102 of the Judgment that "the aspect of the dispute between the Parties relating to the asserted immunity of the Vice-President of Equatorial Guinea and the immunity claimed for the building at 42 Avenue Foch from measures of constraint as State property does not concern the interpretation or application of the Palermo Convention", a finding that has led the Court to conclude that it lacks jurisdiction on the basis of Article 35 of that Convention to entertain Equatorial Guinea's Application. Our views reflected in this opinion do not in any way reflect our respective views on the merits of the case.

2. There are four areas of disagreement between the majority and ourselves.

3. First, we are of the view that the majority have failed to recognize the overarching and pervasive effect of Article 4 (1), in particular the principle of sovereign equality in the Palermo Convention. The requirement under the Article that States parties shall carry out their obligations under this Convention in a manner consistent with the said principle permeates throughout the Convention and affects every single obligation that it imposes on States parties. The Article is not set aside by any other provision of the Convention, not even those that leave certain matters to domestic law.

4. Second, the majority wrongly treat the three principles referred to in Article 4 (1) in some ways as a composite whole; yet, in our view, each of those principles has a discrete effect in its own way for the interpretation and application of the Convention. By doing so, the majority have failed to appreciate that sovereign equality of States is a discrete principle that impacts the interpretation and application of the Convention in ways that are different from or additional to the other two principles, namely, territorial integrity of States and non-intervention in the domestic affairs of other States.

5. Third, the majority's finding that questions relating to the asserted immunities of the Vice-President of Equatorial Guinea and of the building at 42 Avenue Foch as State property are not capable of falling within the provisions of the Palermo Convention deprives the principle of sovereign equality of States of its appropriate effect in dealing with cases involving questions of the immunities of high-ranking State officials and State property from foreign criminal jurisdiction under the Convention. This finding is not in conformity with the rules of treaty interpretation.

6. Fourth, in identifying various issues on which the Parties have expressed opposing views the majority have failed to precisely identify the subject-matter of the dispute. The evidence and documents before the Court demonstrate that the Parties are clearly divided by the following question which, in our view, constitutes the subject-matter of the dispute under the Palermo Convention. That question is whether France, by prosecuting the Vice-President of Equatorial Guinea for the offence of money laundering and by imposing measures of constraint on the building at 42 Avenue Foch, Paris, which Equatorial Guinea claims is State property, acted in a manner consistent with the principles of sovereign equality, territorial integrity and non-intervention in the domestic affairs of another State. In our view, this dispute inevitably concerns the interpretation and application of the Palermo Convention within the meaning of Article 35 thereof.

I. THE SUBJECT-MATTER OF THE DISPUTE

7. In its Order of 7 December 2016 on Provisional Measures, the Court identified on a prima facie basis that the alleged dispute between the Parties concerned 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 (see *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 December 2016*, p. 1160, para. 49).

8. At this preliminary objections stage, instead of ascertaining precisely the subject-matter of the dispute, the majority have referred to a series of claims on which the Parties hold differing views, leaving it unclear whether there is a single dispute with three strands or three separate disputes. The Judgment merely states in paragraph 68:

> "The aspect of the dispute for which Equatorial Guinea invokes the Palermo Convention as the title of jurisdiction involves various claims on which the Parties have expressed differing views in their written and oral pleadings. First, they disagree on whether, as a consequence of the principles of sovereign equality and non-intervention in the internal affairs of another State, to which Article 4 of the Palermo Convention refers, Mr. Teodoro Nguema Obiang Mangue, as Vice-President of Equatorial Guinea in charge of National Defence and State Security, is immune from foreign criminal jurisdiction. Second, they hold differing views on whether, as a consequence of the principles referred to in Article 4 of the Palermo Convention, the building at 42 Avenue Foch is immune from measures of constraint. Third, they differ on whether, by establishing its jurisdiction over the predicate offences associated with the offence of money laundering, France exceeded its criminal jurisdiction and breached its conventional obligation under Article 4 read in conjunction with Articles 6 and 15 of the Palermo Convention."

9. Moreover, by dividing the dispute into various claims, the Court has not discharged its obligation to objectively determine the dispute by isolating the real issue. This failure is all the more concerning as "[t]his determination is an integral part of the Court's judicial function" (see *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 874, para. 138). The majority's approach gives rise to an uncertainty, if not confusion, as to what constitutes the dispute in this case. At this stage of the proceedings, as a consequence of the failure to precisely identify the subject-matter of the dispute by isolating the real issue in the case, the majority have failed to identify or have avoided identifying the relevant criteria for determining whether the dispute falls within the provisions of the Palermo Convention.

10. According to the jurisprudence of the Court, the subject-matter of a dispute is a matter for "objective determination" by the Court on the basis of the application, the parties' arguments, final submissions, public statements, and all other pertinent evidence. The Court has stressed that this determination is done by "isolat[ing] the real issue in the case and . . . identify[ing] the object of the claim" (*Obligation to Negotiate Access to the Pacific Ocean (Bolivia*

v. *Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015 (II)*, p. 602, para. 26). In the present case, the Parties made express reference to the applicability of Article 4 of the Palermo Convention.

11. Upon the examination of the Application, the Parties' arguments, final submissions and all the relevant evidence before the Court, we can determine that the subject-matter of the dispute is whether France, by prosecuting the Vice-President of Equatorial Guinea for the offence of money laundering, and by imposing measures of constraint on the State property of Equatorial Guinea, acted in a manner consistent with the principles of sovereign equality, territorial integrity of States and non-intervention in the domestic affairs of another State. It is on the basis of that dispute that the Court would on the merits determine in particular, whether the manner in which France has discharged its obligations under the Palermo Convention is consistent with the principle of sovereign equality of States set out in Article 4 (1) thereof. In our view, this dispute falls within the provisions of the Palermo Convention and meets the jurisdictional requirement of Article 35 (2) of that Convention.

12. The majority take the view that the claims on which the Parties hold opposing views are not capable of falling within the provisions of the Convention. Therefore, the Court lacks jurisdiction on the basis of Article 35 of the Palermo Convention. The main reason for this view is that no provision in the Palermo Convention expressly refers to the customary rules of immunity. We disagree with that conclusion.

13. In international legal practice it is not uncommon that, in the interpretation and application of an international convention, rules of customary international law or norms of general international law may become applicable even though not expressly mentioned in the particular convention. A dispute arising therefrom is, and remains, a treaty issue. For example, in a case concerning diplomatic protection, a dispute may arise as to whether local remedies have been exhausted. Even if the relevant convention makes no reference to the exhaustion of local remedies, that customary rule would, nevertheless, necessarily be entailed in the context of treaty interpretation and application. In *Elettronica Sicula*, the United States of America had sought to espouse a claim for diplomatic protection on behalf of two American companies. However, Italy objected to the case's admissibility on the basis that the companies had failed to exhaust local remedies in Italy, prior to the United States of America's institution of the case before the Court. The United States of America argued that the rule on exhaustion of local remedies was not applicable to the case as Article XXVI, the compromissory clause, of the 1948 Treaty of Friendship, Commerce and Navigation (FCN Treaty) between Italy and the United States of America, did not expressly refer to the exhaustion of local remedies rule. It maintained that, had the parties to the FCN Treaty intended the exhaustion of local remedies rule to apply, express words to that effect would have been included in Article XXVI. In that regard, it also referred to the Economic Co-operation Agreement concluded between the same parties and in the same year, where it was expressly provided that neither of the two governments would espouse a claim pursuant to the Agreement until its national had exhausted the remedies available to him in the administrative and judicial tribunals of the country in which the claim arose. The Chamber of the Court rejected the United States of America's argument. It stated:

> "The Chamber has no doubt that the parties to a treaty can therein either agree that the local remedies rule shall not apply to claims based on alleged breaches of that treaty; or confirm that it shall apply. Yet the Chamber finds itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so." (*Elettronica Sicula S.p.A. (ELSI) (United States of America* v. *Italy), Judgment, I.C.J. Reports 1989*, p. 42, para. 50.)

14. Following *Elettronica Sicula*, in the context of this case the important customary rules on foreign State immunity, which are necessarily entailed in the principle of sovereign equality of States mentioned in Article 4 (1) of the Palermo Convention, should not be dispensed with "in the absence of any words making clear an intention to do so". Article 4 of the Palermo Convention is a substantive clause with specific treaty obligations contained therein. As will be illustrated later, alleged violations of Article 4 fall squarely within the scope of Article 35 of the Convention and consequently, within the Court's jurisdiction *ratione materiae*.

II. THE SCOPE AND PURPOSE OF THE CONVENTION

15. In determining whether the dispute between the Parties falls within the scope of the Palermo Convention, the majority give three reasons relating to the scope and purpose of the Convention to reject Equatorial Guinea's claim. Firstly, they are of the view that as Article 4 does not expressly refer to the customary international rules, it does not impose an obligation on States parties to act in a manner consistent with the many rules of international law which protect sovereignty in general, as well as all the qualifications to those rules. The majority also state that Article 4 only refers to general principles of international law. Secondly, none of the provisions of the Convention relates expressly to the immunities of States and State officials. Thirdly, the object and purpose of the Convention is the promotion of co-operation to prevent and combat transnational organized crime more effectively. The interpretation of Article 4 that customary rules on State immunity are incorporated into the Convention as conventional obligations, as advanced by Equatorial Guinea, is unrelated to the stated object and purpose of the Palermo Convention. As will be shown below, these reasons are unconvincing.

16. Article 1 of the Palermo Convention states that "the purpose of this Convention is to promote cooperation to prevent and combat transnational organized crime more effectively". In order to achieve this purpose, the Convention obliges States parties to criminalize and prosecute certain acts, to establish jurisdiction over certain offences, to extradite persons for certain crimes, to render mutual legal assistance and generally, to co-operate with one another "to enhance the effectiveness of law enforcement action to combat" transnational organized crime. It is against the background of that co-operative framework that Article 4 was adopted as follows:

"*Article 4. Protection of Sovereignty*

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

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

17. The relationship between the principle of sovereign equality of States, from which the rules on State immunity are derived, and the purpose of the Convention is obvious: the co-operation that the Palermo Convention seeks between States parties must be built on mutual respect of each other's sovereignty in accordance with international law. Such co-operation would be thwarted if, in the endeavour to prevent and combat transnational organized crime, persons of high-ranking office entitled to jurisdictional immunities are prosecuted in a foreign State. Equally, co-operation would be thwarted if State property, immune from measures of constraint, is confiscated by a foreign State as part of the punishment for the crime of money laundering. Such legal actions would likely provoke retaliatory responses from that foreign State and be perceived by other States parties as compromising international co-operation, contrary the object and purpose of the Convention. The reference in Article 4 (1) to the principle of sovereign equality is therefore indispensable for the efficient operation of the co-operative system established by the Convention, and the majority's interpretation of that provision could have a chilling effect on inter-State co-operation.

III. THE INTERPRETATION OF THE OBLIGATION UNDER ARTICLE 4 (1)

18. The majority have given a rather narrow interpretation of the meaning of Article 4 (1). They misunderstand the reach of the principle of sovereign equality of States in the context of this case. They adopt an approach that suggests that in their view, Article 4 (1) is limited by the provisions of Article 4 (2), which stress the principle of non-intervention. Since neither that Article, nor the Convention as a whole, refers to the customary rules on immunities, they conclude that the Convention does not address the question of immunities. Accordingly, the majority's position is that customary rules on State immunity are unrelated to the Convention's object of the promotion of co-operation to prevent and combat transnational organized crime more effectively.

19. This interpretation is questionable. Within the terms of Article 4 (1), among the three principles mentioned, the principle of sovereign equality has a discrete effect and function in the particular context of the Palermo Convention.

20. At the San Francisco Conference, the phrase "sovereign equality" in Article 2 (1) of the United Nations Charter was adopted as a "new term" denoting, according to an interpretative statement, (i) that States are juridically equal; (ii) that they enjoy the rights inherent in their full sovereignty; (iii) that the personality of the State is respected, as well as its territorial integrity and political independence; (iv) that the State should, under the international order, comply faithfully with its international duties and obligations (see Bruno Simma et al. (eds.), *The Charter of the United Nations: A Commentary*, Third Edition, Oxford University Press, 2012, p. 153, fn. 115).

21. Since that time, it has been clear that the term "sovereign equality of States", primarily meant to emphasize the right to equality in law for all States, contains several specific elements.

22. The 1970 United Nations General Assembly resolution 2625, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States (hereinafter the "Friendly Relations Declaration"), accepted as reflecting customary international law, identifies six elements as included in the principle of sovereign equality of States, as follows:

(*a*) States are juridically equal;

(*b*) each State enjoys the rights inherent in full sovereignty;

(*c*) each State has the duty to respect the personality of other States;

(*d*) the territorial integrity and political independence of the State are inviolable;

(*e*) each State has the right freely to choose and develop its political, social, economic and cultural systems;

(*f*) each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States.

The two additional elements are *(d)* and *(e)* above. More interestingly, the Declaration includes as a separate obligation provisions on the duty not to intervene in matters within the domestic jurisdiction of any State in accordance with the United Nations Charter.

23. The following points may be made about the treatment of the principle of sovereign equality of States in the 1945 Interpretative Statement and the Friendly Relations Declaration. Firstly, the enjoyment by each State of the rights inherent in full sovereignty and the inviolability of the territorial integrity and political independence of States are set out as separate elements. Secondly, although the Friendly Relations Declaration does not expressly include or mention State immunity, the elements that States are juridically equal and enjoy the rights inherent in full sovereignty, common to both instruments, entail sovereign immunities from the jurisdiction of foreign courts. Thirdly, the immunity of States is the quintessence of a rule of customary international law that reflects the principle of sovereign equality of States.

24. The prevailing notion in the principle of sovereign equality is the equality of States as members of the international community. The intrinsic linkage between the rules of State immunity and the principle of sovereign equality has been, time and again, confirmed in the progressive development and codification process of the International Law Commission (see, for example, Commentary on Article 5, Draft Articles on Jurisdictional Immunities of States and Their Property, *Yearbook of the International Law Commission (YILC)*, 1991, Vol. II (Part Two), pp. 22-23; Commentary to draft Article 6 provisionally adopted by the International Law Commission at the Thirty-second Session, *YILC*, 1980, Vol. II (Part Two), pp. 142-157). In its Commentary on Article 4, Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction, the International Law Commission stated, "the purpose of immunity *ratione personae* relates to protection of the sovereign equality of the State" (Commentary on draft Article 4 provisionally adopted by the International Law Commission at the Sixty-fifth Session, *Report of the International Law Commission, Sixty-fifth Session*, United Nations doc. A/68/10, p. 69, para. 6).

25. This position is also reaffirmed by judicial decisions. In *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece Intervening)*, the Court held that the rule of State immunity "derives from the principle of sovereign equality of States, which, as Article 2, paragraph 1, of the Charter . . . makes clear, is one of the fundamental principles of the international legal order" (*Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012 (I)*, p. 123, para. 57). Further, the European Court of Human Rights (ECHR) in *Al-Adsani* noted that "sovereign immunity is a concept of international law, developed out of the principle *par in parem non habet imperium*, by virtue of which one State shall not be subject to the jurisdiction of another State" (*Al-Adsani* v. *The United Kingdom*, application No. 35763/97, [2001] ECHR 752, judgment of 21 November 2001, p. 17, para. 54). Indeed, the Latin tag *par in parem non habet imperium* literally means that equals do not have sovereignty over each other. There is therefore both a substantive and nominal relationship between the rule of foreign State immunity and the principle of sovereign equality of States.

26. Another problem with the majority's interpretation of Article 4 (1) relates to the meaning of the term "in a manner consistent with". In the majority's view, Article 4 (1) could not be understood as imposing, "through its reference to sovereign equality, an obligation on States parties to act in a manner consistent with the many rules of international law which protect sovereignty in general, as well as all the qualifications to those rules". This interpretation has failed to recognize the link between the substance of that principle and the manner in which State parties discharge their treaty obligations.

27. This interpretation is erroneous in two aspects. In the first place, the principle of sovereign equality, alongside the other two principles, is not just a general principle in the Convention, but a substantive requirement that sets the limits for States parties in undertaking their conventional obligations. What is contained in the principle, as discussed above, is not determined by the treaty provisions per se, but by general international law, including relevant rules of customary international law. The term "in a manner consistent with" imposes a duty on States parties to discharge the obligations under the Convention in a particular way. Notably, this requirement relates not to some, but to all the obligations under the Convention. That is to say, it is a conventional requirement. To determine whether the manner in which a State party has discharged its treaty obligations under the Palermo Convention is consistent with the principle of sovereign equality, one can only do so at the merits stage, by examining the specific acts complained of in light of that principle. This is exactly what Equatorial Guinea has, in its Application, requested the Court to do.

28. Secondly, State immunity, like the immunity accorded to ambassadors and members of a diplomatic mission, is jurisdictional in nature. Sovereign States are immune from the jurisdiction of other States. When the high-ranking officials of a State are prosecuted within the territory of another State, or when State property belonging to one State and located in the territory of another State becomes the subject of a dispute or is liable to seizure or attachment or confiscation, questions of State immunity arise. That is to say, when criminal proceedings are instituted against a person who is entitled to immunity under international law, or measures of constraint may be directed at the property of a foreign State without the consent of that State, the prosecuting State should abstain from instituting such proceedings and from imposing such measures of constraint. Failure to do so would be regarded as inconsistent with the principle of sovereign equality of States. This intrinsic connection between the principle of sovereign equality and rules of State immunity may not be expressly reflected in Article 4 (1) of the Palermo Convention, just as in *Elettronica Sicula*, the FCN Treaty did not expressly connect diplomatic protection with the customary rule of exhaustion of local remedies. In this way, Article 4 (1) ensures that the manner in which the treaty obligations are discharged can be meaningfully examined in the light of the principles set out in Article 4 of the Convention.

29. Although the three principles mentioned in Article 4 (1) overlap, clearly the drafters saw them as performing different functions; otherwise they would have used one, e.g. sovereign equality, territorial integrity, or non-intervention. It is the principles of territorial integrity and non-intervention that provide the greatest safeguard against intervention in the territory of another State. It follows, therefore, that the term sovereign equality has a meaning that is either different from, or additional to the other two principles. In carrying out international co-operation against transnational organized crime, to observe the principle of sovereign equality, a State party must abstain from exercising jurisdiction, whether judicial or administrative, whenever the rules of State immunity become applicable. This requirement applies to both territorial jurisdiction as well as personal jurisdiction.

30. It is as well to comment here on the majority's observation that the principles in Article 4 (1) could not be understood as imposing "through its reference to sovereign equality, an obligation on States parties to act in a manner consistent with the many rules of international law which protect sovereignty in general, as well as all the qualifications to those rules". It goes without saying that it could not be contended that the three principles have that effect. Rather, the effect of the three principles is that only those rules of customary international law that are relevant to the interpretation and application of the Convention become applicable as conventional rules. In particular, by virtue of the principle of sovereign equality of States, the customary rules relating to foreign State immunity are incorporated into the Convention because the question at issue is the immunity of a high-ranking State official.

31. In paragraph 93, the majority hold that Article 4 "refers only to general principles of international law". However, such principles include the rules of customary international law. Indeed, it is those rules that give substance to the general principles of international law. Consequently, the principle of sovereign equality will as a general principle of international law necessarily embody the customary rules on foreign State immunity with which they have an organic relationship.

32. The ordinary meaning of Article 4 (1) could not be clearer. What the principle of sovereign equality entails in the context of the Convention and in the light of its object and purpose is that, in undertaking their treaty obligations to prevent and combat transnational organized crime, States parties are limited in their jurisdiction by the rules of State immunity.

33. In light of the object and purpose of the Convention, Article 4 (1) should be interpreted as requiring States parties to carry out their obligations under the Convention in a manner consistent with the customary rules governing State immunity, reflected in the principle of sovereign equality of States, in order to achieve the co-operation necessary to combat transnational organized crime. Consequently, the application of the customary rules of foreign State immunity as conventional obligations is related to the stated object and purpose of the Palermo Convention. As demonstrated below, the *travaux préparatoires* of Article 4 (1) confirm our understanding and interpretation of that article.

34. The majority note that, so far as the record shows, during the drafting process, no reference was made to immunities of States and State officials in relation to the drafting of Article 4. They cite two occasions where State immunity was raised. On the first occasion, there was a proposal to include an article covering measures against corruption by foreign public officials, international civil servants and judges or officials of an international court as draft Article 4 (3), but it was not retained in the final text of the Convention. On the second occasion, Singapore proposed a provision dealing with State immunity from execution in the article relating to confiscation and seizure. The proposal was not retained in the final text of the Convention However, the following Interpretative Note was included in the *travaux*:

> "*(a)* The interpretation of article 12 should take into account the principle in international law that property belonging to a foreign State and used for non-commercial purposes may not be confiscated except with the consent of the foreign State. It is not the intention of the convention to restrict the rules that apply to diplomatic or State immunity, including that of international organizations." (*Travaux préparatoires*, p. 115; see also Report of the *Ad Hoc* Committee on the work of its First to Eleventh Sessions, United Nations doc. A/55/383/Add. 1, p. 5, para. 21.)

35. The majority finds in paragraph 98 that the interpretative note attached to Article 12 on confiscation and seizure does not relate to Article 4, nor does it suggest that these rules are incorporated by reference into the Palermo Convention. We disagree with that conclusion.

36. In our view, the majority's reading of the *travaux* does not fully reflect the discussions in the drafting process. To better understand the *travaux*, it is necessary to go back to some original documents. During the Fourth Session of the *Ad Hoc* Committee on the Elaboration of a Convention against Transnational Organized Crime, France submitted a proposal to add a paragraph to Article 4 as a separate provision (*Ad Hoc* Committee, Fourth Session, Proposals and contributions received from Governments on the draft United Nations Convention against Transnational Organized Crime, France: revised draft of Article 4*ter*, United Nations doc. A/AC.254/L.28, 28 June 1999), which reads:

> "Any State Party that has not yet done so shall, in conformity with its international obligations . . . take measures to make punishable the conduct referred to in paragraph 2 . . . [of this article] . . . involving:
>
> (*a*) A foreign public official;
>
> (*b*) An international civil servant;
>
> (*c*) A judge or official of an international court."

37. Owing to opposition to this draft by some States, Belgium proposed a compromise draft at the Sixth Session in the following terms: "Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences conduct referred to in paragraph 1 of this article involving a foreign public official or international civil servant." (*Ad Hoc* Committee, Seventh Session, Revised Draft United Nations Convention against Transnational Organized Crime, United Nations doc. A/AC.254/4/Rev.6, 24 December 1999, p. 13, draft Article 4*ter* (2), fn. 66).

38. This draft was adopted in the final text of Article 8, paragraph 2, of the Palermo Convention:

> "*Article 8. Criminalization of corruption*
>
> . . . . . .
>
> 2. Each State party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences conduct referred to in paragraph 1 of this article involving a foreign public official or international civil servant. Likewise, each State Party shall consider establishing as criminal offences other forms of corruption."

39. This record is revealing for two reasons. First, the drafters were fully aware that there could be cases where persons who may be entitled to jurisdictional immunities are allegedly involved in the criminal offences referred to in the Palermo Convention. To ensure that such State officials or officials of international organizations are liable to prosecution, it is necessary to remove their privilege to immunities, if any. France's proposal was intended to serve that purpose. As the *travaux* show, owing to the concerns raised by some delegations about the immunities accorded by international instruments to some of those officials, this proposal was not accepted. This means that the issue of State immunities remains alive and relevant to the interpretation and application of the Palermo Convention. Secondly, the fact that France's proposal was not retained and Belgium's proposal was only retained as a clause requiring States parties to "consider adopting" measures to criminalize corruption involving foreign public officials and international civil servants, proves, contrary to the majority's reading, that the rules of foreign State immunity are not left outside the Convention; they remain applicable. Therefore, cases of corruption by high-ranking officials of foreign States will be governed by the customary rules of foreign State immunity derived from the principle of sovereign equality of States under Article 4.

40. The requirement in Article 8 (2) that States parties consider adopting measures to criminalize corruption by a foreign public official or international civil servant by itself suffices to show that the issue of foreign State immunity was in the forefront of the minds of the parties to the Palermo Convention.

41. Our interpretation is further supported by the record of the meeting on the second occasion where the issue of immunities was raised by Singapore during the *Ad Hoc* Committee's deliberations. Instead of accepting Singapore's proposal, the Committee agreed to include the aforesaid Interpretative Note in the *travaux* (see paragraph 34 above). Obviously, this Note reveals that the drafters did consider that in the application of the Convention the issue of immunity could be relevant. Although Singapore's proposal related specifically to Article 12, the understanding in the Interpretative Note is based on the fundamental requirement laid down in Article 4 (1) that impacts the Convention as a whole. As the *Ad Hoc* Committee pointed out, the Convention did not intend to restrict the rules of State immunity. The non-retention of Singapore's proposal in the final draft of the Convention can only mean that States parties could not reach an agreement to insert a provision that precludes the applicability of immunity rules in the context of

co-operating to combat transnational organized crime and that that question continued to be governed by the rules of customary international law.

42. These *travaux* unmistakably show that the question of immunities of foreign State officials was an important consideration in the drafting of the Palermo Convention. The *travaux* buttress the reading of Article 4 (1) of the Palermo Convention as establishing a conventional link between the principle of sovereign equality and the customary rules of State immunity.

43. It will be recalled that the second sentence of the interpretative note to Article 12 of the Palermo Convention reads as follows, "[i]t is not the intention of the Convention to restrict the rules that apply to diplomatic or State immunity, including that of international organizations". The majority's analysis of this sentence regrettably reveals a fundamental misunderstanding of the purpose of a saving provision, which is what the second sentence is. The purpose of a saving provision is to preserve rights and claims that would otherwise be lost. Thus, when the *travaux* say that it is not the intention of the Convention to restrict the rules that apply to diplomatic or State immunity, they mean that those rules are preserved, that is, they are saved for application whenever, as is the case here, it becomes necessary to rely on them. The significance of this very important second sentence is that it saves for application not only the rule providing for the non-confiscation of foreign State property, specifically addressed by Article 12, but all the other rules of customary international law relating to foreign State immunity. Those rules undoubtedly include the immunity from prosecution of a high-ranking official of a foreign State. Thus, the second sentence of the interpretative note has the effect of saving or preserving the applicability of the rules of State immunity to the *entirety* of the Convention.

44. The plain reading of Article 4 (1) is that a State party, in carrying out its obligations under the Convention, is bound to respect the rules of State immunity as an expression of the principle of sovereign equality.

IV. RELEVANT INTERNATIONAL INSTRUMENTS

45. Article 4 (1) of the Palermo Convention is worded in the same way as Article 2 (2) of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (hereinafter "1988 Drugs Convention"). Article 4 (2) of the Palermo Convention is worded in the same way as Article 2 (3) of the 1988 Drugs Convention. The United Nations Commentary on the principle of sovereign equality in Article 2 of the 1988 Drugs Convention leaves no doubt as to the very serious purpose served by that provision, relating to the wider purpose of the Palermo Convention, i.e. to promote co-operation to prevent and combat transnational organized crime. This purpose could not be achieved were it merely exhortatory, as France appears to suggest. It is explained that the provision was inserted because the 1988 Drugs Convention went further than its predecessor drug treaties in matters of law enforcement and mutual legal assistance. After giving examples of acts that would infringe the principle of sovereign equality of States, it concludes that "it would be futile to attempt to draw up a comprehensive catalogue of possible violations of those principles that might result from an arbitrary, indiscriminate application of specific provisions of the Convention" (*Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988*, 20 December 1988, United Nations doc. E/CN.7/590, p. 46, para. 2.18).

46. The 1997 International Convention for the Suppression of Terrorist Bombings contains in Article 17 a provision similar to Article 4 (1), and in Article 18 a provision similar to Article 4 (2) of the Palermo Convention. In 1999, the International Convention for the Suppression of the Financing of Terrorism was adopted. It contains in Article 20 a provision similar to Article 4 (1) of the Palermo Convention and in Article 22 a provision similar to Article 4 (2) of the Palermo Convention.

47. A provision similar to Article 4 (1) is also to be found in the 2003 United Nations Convention against Corruption (hereinafter "the Corruption Convention"), Article 4 (1) of which is captioned and worded in the same way as Article 4 (1) of the Palermo Convention. Article 16 of the Corruption Convention is devoted to bribery of foreign public officials. The *travaux préparatoires* explain that Article 16 was not intended to derogate from the immunities that those officials enjoy under international law (*Travaux préparatoires* of the negotiations for the elaboration of the United Nations Convention against Corruption, p. 174, fn. 15). The *travaux* relating to that article reads:

> "this article is not intended to affect any immunities that foreign public officials or officials of public international organizations may enjoy in accordance with international law. The States parties noted the relevance of immunities in this context and encouraged public international organizations to waive such immunities in appropriate cases".

48. From the time the principle of sovereign equality of States was included in the 1988 Drugs Convention to the time of its inclusion in the 1997 International Convention for the Suppression of Terrorist Bombings, the 1999 International Convention for the Suppression of the Financing of Terrorism, the 2000 Palermo Convention and the 2003 Corruption Convention, that principle has functioned as a conventional troubleshooter to keep in check the conduct of States in the exercise of their jurisdiction, whether territorial or extraterritorial. It serves as a standard against which the conduct of States is to be measured in the discharge of their treaty obligations.

49. Now we see clearly the function of the reference to the principle of sovereign equality of States: it is a compendious way of saying that acts, such as a breach of foreign State immunity, are a breach of the principle of sovereign equality of States as laid down in Article 4 (1). It therefore follows that a dispute relating to jurisdictional immunity in the application of the Palermo Convention falls within the scope of Article 35 of that Convention.

V. THE OVERARCHING AND PERVASIVE EFFECT OF ARTICLE 4 (1) ON THE OTHER PROVISIONS

50. Article 4 (1) imposes an obligation that is overarching and pervasive in that it requires States parties to carry out their obligations in accordance with the principles of sovereign equality, territorial integrity and non-intervention in internal affairs. It is only one of two articles in the Convention that explicitly imposes an obligation that relates to all the obligations of States parties under the Convention. The other provision is Article 34 (1), which requires States parties to adopt the measures necessary to ensure the implementation of their obligations under the Convention. The impact of Article 4 (1) is all-embracing. Any provision of the Convention that requires States parties to act in a certain way is impacted by Article 4 (1). An easy or simple way of identifying these Articles is their use of the word "shall", which ordinarily has a mandatory connotation.

51. One of the means employed by the Convention to achieve its purpose of combating transnational organized crime is, as is made clear in Article 3 (1), "the prevention, investigation and *prosecution*" (emphasis added) of certain offences. The prosecution of persons for offences covered by the Convention is perhaps the most important tool in the fight against transnational organized crime. However, the Convention is an international agreement among sovereign States, all of whom have their own laws and procedures relating to the prosecution of crimes. There is clearly a limit beyond which the Convention cannot go in seeking to impose requirements that might interfere with the independence of the judiciary and the principle of prosecutorial discretion that exists in most countries. But any international convention dealing with the criminalization of certain conduct will seek to establish some fundamental principles and standards that will bind States parties in the exercise of their criminal jurisdiction. Naturally, these principles and standards would have been a matter for intense debate in the negotiating process. One such principle is the sovereign equality of States.

52. The overarching effect of the principle of sovereign equality in Article 4 (1) impacts on all the obligations in the Convention, even those contained in the provisions reserving certain matters to domestic law. When Articles 5 and 6 require States parties to adopt measures to criminalize certain activities, the measures adopted and implemented must be consistent with the principle of sovereign equality. Similarly, when under Article 15 (6) States exercise jurisdiction established in accordance with their domestic law, that exercise must be consistent with the principle of sovereign equality of States not only on account of the reference to general international law in the paragraph itself, but also by reason of the overarching and pervasive effect of Article 4.

53. The majority place great reliance on Article 11 (6) to underscore the role of domestic law in the case against Mr. Teodoro Nguema Obiang Mangue in French courts. Article 11 (6) reads:

> "Nothing contained in this Convention shall affect the principle that the description of the offences established in accordance with this Convention and of the applicable legal defences or

> other legal principles controlling the lawfulness of conduct is reserved to the domestic law of a State Party and that such offences shall be prosecuted and punished in accordance with that law."

Although the matters specified in this paragraph are reserved to domestic law, there is nothing in the Convention that indicates that the principles in Article 4 (1) would not apply to this paragraph. In fact, the effect of Article 4 (1) is that in describing the offences established in accordance with the Convention and setting out the applicable legal defences, a State party must ensure that its acts are not inconsistent with these basic principles and the relevant rules of foreign State immunities contained therein.

54. The same situation exists in relation to Article 12 (9) which provides that "[n]othing contained in this article shall affect the principle that the measures to which it refers shall be defined and implemented in accordance with and subject to the provisions of the domestic law of a State Party". Here again, as in Article 11 (6), when the Convention is read as a whole, it becomes clear that in implementing Article 12 (9), States parties are not relieved of the obligation to ensure that the measures that they adopt to enable confiscation are consistent with the rules of State immunity as an expression of the principle of sovereign equality. Moreover, that conclusion is strengthened by the *travaux* which clarify that the rules relating to diplomatic or State immunity must be taken into account in relation to the confiscation of State property.

55. The majority's approach to the interpretation of Article 11 (6) is open to question. The very fact that the paragraph goes out of its way to identify specific aspects of criminal law as reserved for the domestic law of a State party suggests that there may be aspects of domestic criminal law that are strictly governed by the Convention, e.g. under Article 12 (6), States parties are obliged to empower their courts to order the seizure of bank, financial or commercial records. Similarly, they are also obliged not to decline to do so on the ground of bank secrecy. These provisions of Article 12 (6) are sufficient to contradict the majority's conclusion in paragraph 114 of the Judgment that "[i]n accordance with that general principle, the Convention helps to co-ordinate but does not direct the actions of States parties in the exercise of their domestic jurisdiction". States parties are directed by the Convention and are left with no discretionary power in the exercise of their domestic jurisdiction in relation to these matters. If, for example, a State party refused to provide another State party with any bank, financial or commercial records on the grounds that it had, by reason of bank secrecy, not taken the necessary action to empower its courts to order those records to be made available, that State would clearly be in breach of Article 12 (6).

56. In fact, a proper reading of the Convention shows that the application of domestic law to the matters reserved by Article 11 (6) for that law may be affected by other provisions in the Convention. Thus, even though Article 11 (6) reserves to a State party the description of legal defences, a State party in response to a request from another State party for the disclosure of financial records in a bank, could not by virtue of the very specific obligation in Article 12 (6), plead that Article 11 (6) makes the description of legal defences a matter for domestic law, and that that law has a provision on bank secrecy preventing that disclosure. The requested State party would be in breach of the Convention, because when the Convention is read as a whole, it is clear that in relation to the disclosure of financial records, the provisions of Article 11 (6) are to be read as subject to Article 12 (6). This conclusion is strengthened by the provision in Article 18 (8) prohibiting State parties from declining to render mutual legal assistance on the ground of bank secrecy. It therefore becomes patent that, with regard to bank, financial or commercial records, the Palermo Convention is no mere harmonizer of legislation of States parties as France argued, nor a mere co-ordinator of the actions of States parties, as the majority argues. No doubt the Convention adopts this approach because bank secrecy would be one of the main, if not the main, obstacle to the achievement of the international co-operative framework it establishes in the fight against transnational organized crime. In short, the majority have exaggerated the freedom that is left to States parties in implementing the Convention in their domestic law. Nowhere is this more evident than by the inclusion of Article 12 (9) as one of five provisions reserving certain matters to domestic law. This is indeed ironical since, as we have seen, in discharging its obligations under Article 12, a State party's freedom in relation to bank, financial or commercial records is severely limited by Article 12 (6) of the Convention. It is of course correct that Article 12 (9) has the effect which it states. However, in referring to Article 12 (9), the majority appear to have been unaware of the constraining effect of Article 12 (6).

57. By the same token, the requirement in Article 4 (1) establishes an overarching obligation that applies even to Article 11 (6). Therefore, in describing the offences criminalized in accordance with the Convention, and the applicable legal defences, States parties still remain subject to the obligation under Article 4 (1) to do so in a manner consistent with the rules governing foreign State immunity as an expression of the principle of sovereign equality of States. There is nothing in the Convention that relieves a State party of that obligation.

VI. ARTICLES RELIED ON BY EQUATORIAL GUINEA AS ESTABLISHING A DISPUTE BETWEEN THE PARTIES UNDER THE PALERMO CONVENTION

58. We now proceed to examine Equatorial Guinea's claims that the present case concerns the interpretation and application of Article 4 of the Palermo Convention read in conjunction with several provisions of the Convention, namely Articles 6, 11, 12, 14, 15 and 18.

59. We note that the majority, in examining the various articles invoked by Equatorial Guinea, have distinguished between Articles 6 and 15 on the one hand, and Articles 11, 12, 14 and 18 on the other. In respect of all its claims, Equatorial Guinea has relied on the principle of sovereign equality of States set out in Article 4 (1) when read in conjunction with these articles.

60. Article 6 relates to criminalization of the laundering of proceeds of crime. It reads: "Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally".

61. Article 6 obliges States parties to adopt legislation criminalizing money laundering. Mr. Teodoro Nguema Obiang Mangue has been prosecuted for money laundering. The prosecution of Mr. Teodoro Nguema Obiang Mangue constitutes an exercise of criminal jurisdiction established by France in accordance with its laws. That exercise, in the view of Equatorial Guinea, breaches Article 15 (6) in that it contravenes the rules under general and customary international law concerning foreign State immunity, derived from the principle of the sovereign equality of States enshrined in Article 4 (1). France disagrees with that claim. There is, therefore, a disagreement between the Parties concerning the interpretation or application of the Palermo Convention.

62. With regard to Article 11 on prosecution, adjudication and sanctions, the Parties hold opposing views on the application of Article 11 (2) and (6) of the Palermo Convention. Article 11 (2) obliges States parties to "endeavour to ensure that any discretionary legal powers under [their] domestic law relating to . . . prosecution . . . are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences". The obligation under this paragraph is mandatory, albeit it is an obligation to endeavour to ensure that prosecutorial discretionary powers are exercised in a particular way, and for a particular purpose. The Parties differ as to whether this obligation is subject to the provisions of Article 4 (1), particularly the principle of sovereign equality, on the basis of which the rules of State immunity apply. In the view of Equatorial Guinea, the discharge of the obligations under Article 11 (2) is tied to the overarching requirement in Article 4 (1), while France does not accept that Article 11 (2) imposes any obligation to prosecute and disagrees with Equatorial Guinea's reading of the significance of Article 4 (1). Their differing opinions clearly concern the interpretation and application of the Palermo Convention.

63. Article 12 concerns confiscation and seizure. In the view of Equatorial Guinea, under Article 4 (1), in discharging its obligations under this article, France is obliged to respect the customary rules of State immunity by exempting Equatorial Guinea from measures of constraint against its State property located in France. France does not accept Equatorial Guinea's reading of Article 4 (1) and its relationship with Article 12. France contends that once a State has adopted rules in its domestic law that enable the proceeds of crime to be confiscated, it has complied with its obligation under the Palermo Convention. By taking measures of attachment, seizure and confiscation against the building at 42 Avenue Foch, France claims that it was applying its domestic law, not the Convention. In our view, there are opposing views between the Parties as to the interpretation and application of Article 12 and its relationship with Article 4 (1). In any event, even if Article 12 is stripped of any connection with Article 4 and operates independently, there would still be an issue of immunity under this Article because the *travaux*, as

we have seen, preserve the continued application of the rules of State immunity. The Parties obviously maintain differing views about the question of the immunity of the building at 42 Avenue Foch from measures of constraint.

64. With regard to Article 14 concerning the disposal of confiscated proceeds of crime or property, the Parties hold opposing views on France's disposal of its confiscated objects found at the building at 42 Avenue Foch. Following the reasoning set out in the above paragraph, the issue between the Parties concerns the interpretation and application of Article 14 read in conjunction with Article 4 of the Palermo Convention.

65. Article 15 deals with the obligation on States parties to establish their jurisdiction over certain offences. The most important provision in this Article is paragraph 6, which reads, "[w]ithout prejudice to norms of general international law, this Convention does not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law". The majority have not addressed the significance of Article 15 (6). It is clear that Article 15 (6) does not prevent France from exercising any criminal jurisdiction that it has established in accordance with its domestic law. However, three points must be noted with regard to this provision. First, States parties are under the obligation to ensure that the exercise of their criminal jurisdiction does not prejudice "norms of general international law", one of which is the rules on foreign State immunity. Second — and this is relevant to France's assertion that it has always acted within its territory — it is equally clear that the provision applies to any criminal jurisdiction, whether territorial or extraterritorial. Finally, the issue of immunity can be examined under the norms of general international law. The Parties hold opposing views as to whether the exercise of criminal jurisdiction by the French courts by the initiation and conduct of criminal proceedings against Mr. Teodoro Nguema Obiang Mangue is in compliance with "norms of general international law" under Article 15 (6) and whether such norms include the rules of State immunity.

66. Article 15 (5) concerns the obligation to consult and Article 18 deals with mutual legal assistance. Equatorial Guinea's claims that, since 2010, France has failed to take into account information provided by Equatorial Guinea's authorities regarding the investigation and prosecution of Mr. Teodoro Nguema Mangue, that "none of the predicate offences alleged had been committed in Equatorial Guinea" and that the assets attached by the French courts were lawfully acquired. On that basis, Equatorial Guinea argues that France was obliged to accept Equatorial Guinea's findings that no predicate offences were committed on Equatorial Guinea's territory and, consequently, to terminate the criminal proceedings against the Vice-President.

67. France alleges that Equatorial Guinea's claim falls outside the scope of the dispute. France argues that although its request for mutual legal assistance expressly referred to the Palermo Convention, there was no dispute regarding this article given that Equatorial Guinea complied with this request. France contends that it complied with its obligation to consult and that the obligation does not require the State party to put an end to criminal proceedings.

68. The Parties hold opposing views as to whether France, pursuant to Articles 15 (5) and 18, is obliged to accept Equatorial Guinea's findings that no predicate offences were committed on Equatorial Guinea's territory and consequently to terminate the criminal proceedings against the Vice-President. In this regard, we disagree with the observation of the Court at paragraph 73 of the Judgment that Equatorial Guinea's assertions can only be considered as additional arguments which do not constitute distinct claims under the Palermo Convention.

69. France has argued that in the criminal proceedings against Mr. Teodoro Nguema Obiang Mangue, it acted exclusively on the basis of its own law and not on the basis of the Convention. This argument is untenable. In the first place, it is accepted that France made a request for mutual legal assistance from Equatorial Guinea. Since this request was made by France expressly on the basis of the Palermo Convention, it is beyond question that in relation to that request, at any rate, France acted on the basis of the Palermo Convention. More importantly, a State party that has ratified the Palermo Convention is bound by the provisions of that Convention by virtue of that ratification, not because its domestic legislation pre-dated or post-dated the Convention. For that matter every State party to the Palermo Convention is expected to carry out its criminal prosecutions under its own domestic legislation. It would be absurd to conclude that only those States parties whose domestic criminal legislation post-dates the Convention are bound by that Convention.

70. France has also argued that it had existing legislation in place and therefore, did not need to enact legislation to implement the Convention. As a matter of treaty law, once the Palermo Convention entered into force for France, it became bound by its provisions.

CONCLUSION

71. We conclude that the subject-matter of the dispute for which the Applicant invoked the Palermo Convention as a basis of Jurisdiction, is whether France, by prosecuting the Vice-President of Equatorial Guinea for the offence of money laundering and by imposing measures of constraint on the building at 42 Avenue Foch, which Equatorial Guinea claims is State property, acted in a manner consistent with the principles of sovereign equality, territorial integrity and non-intervention in the internal affairs of another State. This dispute inevitably concerns the interpretation and application of the Palermo Convention within the meaning of Article 35 thereof and the Court should have found that it has jurisdiction to entertain it.

72. We find inconceivable the notion that the prosecution of a high-ranking official, the Vice-President of a State party to the Palermo Convention, in a foreign State that is also party to the Palermo Convention, does not raise the question of foreign State immunity in the context of a Convention that enshrines the principle of sovereign equality of States in the discharge of the obligations it imposes on States parties. At the very least, the Court should have availed itself of the opportunity to hear the Parties on the merits, before summarily dismissing this important issue.

73. We are concerned that the judgment might have the effect of making high-ranking foreign officials who are entitled to immunity more susceptible to the exercise of criminal jurisdiction by foreign courts thereby undermining the principle of sovereign equality of States.

74. This joint dissent is an expression of our views on the Court's jurisdiction in this case brought by Equatorial Guinea against France. It is not to be seen as in any way reflecting our views on the merits of the case instituted against Mr. Teodoro Nguema Obiang Mangue by the French authorities.

(Signed) XUE Hanqin.

(Signed) Julia SEBUTINDE.

(Signed) Patrick ROBINSON.

(Signed) James KATEKA.

DECLARATION OF JUDGE OWADA

1. While I have voted in favour of all the *dispositifs* as contained in paragraph 154 of the Judgment, I wish to elaborate on some salient points of the Judgment, with a view to adding clarity to what I wanted to convey through the language of the Judgment. First, I wish to show how I have come to the conclusion that France's first preliminary objection be upheld, especially in the context of the alleged violations by France of the provisions other than Article 4 of the Palermo Convention; second, I wish to put my own view on why the conclusion of the Judgment that France's third preliminary objection is to be rejected is justified, in particular in view of the essential nature of this objection in relationship to the specific structure of preliminary objections as stipulated in Article 79, paragraph 9, of the Rules of Court as revised in 1978 from the original formulation.

(A) The relevance of Article 4 of the Palermo Convention to the alleged violation

(1) The scope of obligations of Article 4 as such

2. The relevance of Article 4 to the alleged violation of the Convention as claimed by Equatorial Guinea is, in my view, twofold. First, I concur with paragraph 102 of the Judgment that "Article 4 does not incorporate the customary international rules relating to immunities of States and State officials". The Court did not accept the argument advanced by the Applicant that Article 4 had the legal effect of amounting to the so-called "incorporation by reference" of customary rules of international law. This term, when used as a technical legal term, means, according to the *Black's Law Dictionary*, "[t]he method of making one document of any kind become a part of another separate document by referring to the former in the latter, and declaring that the former shall be taken and considered as a part of the latter as if it were fully set out therein" (*Black's Law Dictionary* (5th ed., 1979), p. 690). As the Judgment clearly demonstrates in its interpretation of Article 4 in accordance with its ordinary meaning, I agree that Article 4 does not amount to a provision that justifies the legal effect of such "incorporation by reference".

3. Second, however, this is not the end of the story in relation to the issue of relevance of Article 4 claimed by Equatorial Guinea. The aforementioned finding of the Judgment does not free the Court from its task of scrutinizing Equatorial Guinea's claims based on provisions other than Article 4 of the Convention, in the context of the legal obligation arising under Article 4 as defined by the Judgment. The Judgment clearly accepted that, Article 4 (1) of the Palermo Convention, unlike Article I of the Treaty of Amity between Iran and the United States, which was interpreted by the Court in the case concerning *Oil Platforms* as "preambular in character merely formulating a general aim", imposes a legal obligation on States parties to perform other obligations of the Convention "in a manner consistent with the principles [as referred to therein]" (paragraph 92 of the Judgment). Thus, some of the Applicant's claims based on the provisions other than Article 4 of the Convention have been advanced independently of Equatorial Guinea's specific interpretation of Article 4 based on the doctrine of "incorporation by reference". Given this latter obligation prescribed by Article 4, the provisions other than Article 4, such as Articles 6, 7, 8 and 25, read in conjunction with Article 4 as interpreted by the Court, will thus become relevant in evaluating France's acts complained of by Equatorial Guinea.

4. The principles of sovereign equality and non-intervention referred to in Article 4 (1) of the Convention are not intended to have the effect of incorporating the specific rules of customary international law relating to immunities. Neither the *travaux préparatoires* of Article 4 (1) of the Palermo Convention, nor those of Article 2 of the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, which "inspire[d]" Article 4 of the Palermo Convention, indicate otherwise (see United Nations (1988), *United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substance, Vienna, 25 November-20 December 1988, Official Records,* Vol. II, pp. 155-156, 171, 176-177). This means that States parties to the Palermo Convention are obligated to carry out their obligations under Articles 6, 7, 8, 15 and 25 of the Convention "in a manner consistent with the principles of sovereign equality and non-intervention". The question is, therefore, in deciding on the jurisdiction conferred upon the Court under Article 35 of the Palermo Convention, to determine whether there is a dispute concerning "the interpretation or application [of these articles] of this Convention" and to determine whether the acts of France complained of by Equatorial Guinea do or do not fall within the scope of Articles 6 and 15 of the Convention *read in conjunction with Article 4 as interpreted by the Judgment*.

(2) Articles 5, 6, 8 and 23, read in conjunction with Article 4

5. To identify the scope of the jurisdiction conferred upon the Court under Article 35 of the Palermo Convention, it is necessary to examine the nature and the scope of the obligations prescribed by the provisions of the Convention, where "interpretation or application is at issue" between the parties as "subject-matter of the dispute". It is important to take note of the fact that the Palermo Convention was adopted by State parties "convinced of the urgent need to strengthen cooperation to prevent and combat such activities more effectively at the national, regional and international levels" (United Nations doc. A/RES/55/25, 15 November 2000). The purpose of the Convention is clearly set out in its Article 1 as "promot[ing] cooperation to prevent and combat transnational organized crime more effectively".

6. In implementation of this approach to these "predicate crimes", the Palermo Convention obligates States to "*criminalize these crimes* in their respective domestic legal systems", thus establishing a level playing field for strengthening international cooperation under the Convention, rather than a more traditional approach of "international legislation" (e.g. the Genocide Convention of 1949), by which State parties are obligated directly by the participation in the Convention to carry out (i.e. to exercise jurisdiction over) the obligation to prevent and punish the criminals in their respective domestic legal system.

7. This interpretation is confirmed by the *travaux préparatoires*. The record of discussion in the *Ad Hoc* Committee on the Elaboration of a Convention against Transnational Organized Crime shows that several delegations raised concern that the draft article on jurisdiction "could be understood to allow States Parties to apply their domestic laws to the territory of other States". In response, it was pointed out that what became Article 4 (1) "emphasized the principles of sovereign equality, territorial integrity and non-intervention in the domestic affairs of other States and that those principles applied also to any exercise of jurisdiction" (United Nations doc. A/AC.254/4/Rev.4, p. 20, fn. 102). Indeed, the focus was on what became Article 4 as a safeguard against intervention on the territory of another State.

8. A series provisions for the mechanism of international co-operation, in the implementation of this obligation to criminalize these offences and to establish jurisdiction, such as extradition (Article 16), transfer of sentenced persons (Article 17), mutual legal assistance (Article 18), and joint investigations (Article 20) follow these series of provisions which obligates States parties to establish the criminalization of offences under the Convention (such as Article 6) and to establish jurisdiction over them (such as Article 15). The structure of the Convention thus indicates that the Palermo Convention requires the States parties to adopt legislative, administrative, or judicial measures *to establish their jurisdictions* over these offences, without directly concerning itself with the actual modalities of its exercise.

9. This construction contrasts with some other international conventions that oblige States parties to prevent or punish crimes prescribed under the conventions. For instance, Article I of the Convention on the Prevention and Punishment of the Crime of Genocide (1949) obligates the contracting parties "to prevent and to punish" genocide, as a crime under international law. Article 2, paragraph 1, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) obligates each State party to "take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction". Unlike these conventions, the obligations under the Palermo Convention is essentially addressed to criminalizing offences and to establishing jurisdiction over them in their domestic legal systems. The prevention and combatting of transnational organized crime is intended to be attained as a result of such international co-operation in establishing jurisdiction to "criminalize" these acts in their domestic legal systems.

10. This analysis leads me to conclude that the proper appreciation of the aforementioned nature of the Convention is crucial in determining the scope of the compromissory clause of the Palermo Convention contained in its Article 35 "concerning the interpretation or application" of the Palermo Convention. Since the relevant articles of the Convention is of the nature to obligate States parties to establish their jurisdictions over offences within their domestic legal systems by adopting legislative, administrative, or judicial measures, the actual exercise of such jurisdiction which is the actual subject-matter of the dispute in the present case (see Judgment, paragraph 67) cannot fall within the scope of the compromissory clause of this Convention.

11. Articles 5, 6, 8 and 23 obligate States parties both to prevent and combat the "predicate crime" predetermined by the Convention, by enacting legislative or other administrative, judicial measures *to criminalize* offences as defined in other provisions of the Convention, including offences committed "outside the jurisdiction of the State Party in question" under certain conditions (Article 6 (2) *(c)*). It is significant that Article 4 (1) functions here as a safeguard to allow a State party to establish its jurisdiction over criminal offences committed in the territory of another State, to the extent that it is carried out in a manner that can be regarded as consistent with the principles, *inter alia*, of sovereign equality and of non-intervention. In this respect, Article 6 (2) *(c)* of the Convention provides that

> "offences committed outside the jurisdiction of a State Party shall constitute predicate offences only when the relevant conduct is a criminal offence under the domestic law of the State where it is committed and would be a criminal offence under the domestic law of the State Party implementing or applying this article had it been committed there".

This sets the dual criminality requirement as the limitation on the prescriptive power of Article 6 in establishing jurisdiction over offences committed on the territory of another State. While there is no explicit reference to Article 4 (1), it seems clear that Article 6 (2) *(c)* is to be construed in a manner to reflect the spirit of Article 4 (1) which provides a safeguard against foreign intervention by way of extraterritorial jurisdiction. To the extent that a State party limits its exercise of criminal jurisdiction over offences of laundering of proceeds of crime committed abroad in conformity with the language of Article 6 (2) *(c)*, the State can be said to be under the obligation to carry out its obligation in a manner consistent with the principles of sovereign equality and non-intervention prescribed by Article 4 (1) of the Convention. This prescriptive of "dual criminality" can be said to set the limits of the establishment of jurisdiction in terms of the criminalization of the acts of money laundering as a category of crimes to be provided for in both jurisdictions. However, this does not mean that this extends to *the actual exercise of jurisdiction* on concrete acts of money laundering allegedly committed. It is possible, at any rate arguable, that it could constitute the crime of money laundering, which could be a question that could only be determined by examining the merits of the case, but not belonging to the scope of jurisdiction.

(3) Article 15 read in conjunction with Article 4

12. The same holds true with regard to Article 15 of the Convention, which allows a State party to establish its jurisdiction over offences committed in the territory of another State (Article 15 (2)). At first glance, this provision might appear to provide a basis for jurisdictional intervention on a foreign territory by way of establishing extraterritorial jurisdiction. Nevertheless, such capacity of a State party to extend its jurisdiction is circumscribed by Article 15 (2) *(c)* (i) and (ii), which allows the State to do so only when a certain offence is committed abroad, *inter alia*, "with a view to the commission of [a certain offence] within its territory". Put differently, the establishment of jurisdiction having an extraterritorial reach is permitted only to the extent that the effect of offences is directed against the territory of the State exercising such jurisdiction. Admittedly, this arrangement is explicitly linked with the principles referred to in Article 4 through the express qualification that it is "[s]ubject to article 4 of th[e] Convention" in the *chapeau* of Article 15 (2). It is to be noted, however, that the principle of sovereign equality which is contained in Article 4 and which is thus referenced by the qualifying language of Article 15 (2) is a general principle of international law. While it helps to identify the scope of the permissible exercise of jurisdiction based on the effect of offences committed abroad, it does not amount to the direct application of concrete rules that emerge from this principle in such a way as to affect the manner in which this extraterritorial jurisdiction has to be exercised.

13. Based on this analysis on the scope of Articles 6 and 15 read in conjunction with Article 4 of the Palermo Convention, it is my view that the conclusion reached by the Judgment is justified. To put it differently, these provisions deal only with the formal *establishment* (be it legislative, administrative or judicial), but not the actual *exercise*, of such jurisdiction by a judicial breach of the State parties, including concrete acts which allegedly may have a certain extraterritorial reach. In the present case, by comparison, the acts of the French court complained of by Equatorial Guinea is the initiation of the actual exercise of criminal proceedings against Mr. Teodoro Nguema Obiang Mangue, which is properly characterized as the *exercise* rather than the *establishment* of jurisdiction by France. Even if such exercise of criminal jurisdiction by France were to amount to an exercise of jurisdiction with a certain extraterritorial reach that arguably could constitute an internationally wrongful act, provided that Mr. Teodoro Nguema Obiang

Mangue were entitled to immunity as argued by Equatorial Guinea, such act cannot fall within the jurisdictional scope of these provisions for the purpose of determining the jurisdictional scope conferred upon the Court under Article 35 of the Convention.

(B) France's third preliminary objection based on "abuse of rights"

14. I concur with the *dispositif* contained in the Judgment which states that it simply "rejects" France's third preliminary objection. The Judgment does not declare that "[this] objection does not possess an exclusively preliminary character". The relevant part of the Judgment however does not explain in detail why the Court has not chosen the course to declare that the objection on alleged "abuse of rights" does not possess an exclusively preliminary character pursuant to Article 79, paragraph 9, of the Rules of Court. Paragraph 151 of the Judgment simply states that "abuse of rights cannot be invoked as a ground of inadmissibility when *the establishment of the right in question* is properly a matter for the merits" (emphasis added). In my view, this point would seem to require further elaboration on the reasoning of the Court on this point.

15. It often happens in a contentious case before the Court that a preliminary objection is raised either on the ground of the lack of jurisdiction or inadmissibility in circumstances where the existence of a substantive right at issue and the manner in which its exercise has been denied. In such situations it is sometimes hard to establish the issue of jurisdiction or admissibility of claim without an extensive examination in fact and in law of the merits of the case. Such an examination is very often neither feasible nor appropriate at an early stage of preliminary objections when the parties have no opportunity to elaborate respective arguments without getting into the merits. This is the *raison d'être* of Article 79, paragraph 9, of the Rules of Court, which provides, in addition to either to uphold or reject the objection raised, that the Court has the third option to declare that the objection at issue "does not possess an exclusively preliminary character". (See Eduardo Jiménez de Aréchaga, "The Amendments to the Rules of Procedure of the International Court of Justice", *American Journal of International Law*, Vol. 67 (1973), pp. 11–19.)

16. At a first glance, Equatorial Guinea's original alleged claims to the immunity of Mr. Teodoro Nguema Obiang Mangue and to the inviolability of the building located at 42 Avenue Foch in Paris and France's obligation thereto could appear to fall under such category. It could appear that it required a further extensive examination of the facts and the law surrounding the legal status of Mr. Obiang Mangue and the building in relation to the establishment of the jurisdiction of the Court on the basis of Article 35 of the Palermo Convention and Article I of the Optional Protocol to the Vienna Convention on Diplomatic Relations.

17. The Court however did not take this third course, as envisaged in Article 79, paragraph 9, of the Rules of Court, to declare that France's third objection did not possess an exclusively preliminary character. In essence, what is significant in France's argument on the abuse of rights is that France advances a thesis that Equatorial Guinea's claim in its entirety relates to the fundamental issue of the legal validity of Equatorial Guinea's claim as a "valid legal claim" that is capable of seising the Court as a legitimate claim. Thus, France argues that

> "it is not the individual elements which France has brought to this Court's attention, considered in isolation, that constitute an abuse of process. Taken as a whole, however, they establish that Equatorial Guinea's application to the Court is abusive, since it in fact forms part of a strategy to use the principle of diplomatic immunities as a contrivance for the benefit of an individual who is not a diplomat, and thereby to obstruct the criminal proceedings initiated against him in France and avoid the potential confiscation of the personal property he has acquired there" (CR 2018/2, p. 53, para. 21 (Pellet)).

In other words, the Applicant's claim, as understood and presented by France, has an essential legal flaw that vitiates the whole claim of Equatorial Guinea as a "valid claim" that can seize the Court, in light of the surrounding circumstances of the case. This is a "far cry" from the system of preliminary objection to jurisdiction or admissibility envisaged under Article 79 of the Rules of Court and cannot be said to fall within the framework of the system of preliminary objections provided under the Rules (Incidental Proceedings).

18. For an objection to be covered by Article 79, it is to be "an objection [that] must . . . possess a 'preliminary' character" (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom; Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgments, I.C.J. Reports 1998*, p. 26, para. 47). If an objection does not possess such a "preliminary" character, it cannot fall within the mechanism of preliminary objections provided for in Part III, Section D (Incidental Proceedings), Subsection 2 (Preliminary Objections) of the Rules of Court. Aside from the legal soundness of France's argument on this point, it is clear that this claim of France in the form in which it is presented by her can no longer be in its nature "a preliminary objection" in a procedural sense. In this legal situation the Judgment has no option to declare that such objection does not possess an "exclusively preliminary character" pursuant to paragraph 9 of Article 79. The examples of these "abuse of rights" cases as cited by France (*Phoenix Action, Ltd.* v. *The Czech Republic*, ICSID Case No. ARB/06/5, Award of 15 April 2009; *Renée Rose Levy and Grecitel S.A.* v. *Republic of Peru*, ICSID Case No. ARB/11/17, Award of 9 January 2015) also testify to the fact that the relevant arbitral tribunals accepted the argument of the Respondent not as a preliminary objection to be determined before proceeding to the merits, but as an issue that touches the very basis of the claims advanced by the Applicant. It is true that Article 79 is said to cover "any objection" raised by the parties, such objection must possess the effect that "will be, if the objection is upheld, to interrupt further proceedings in the case, and which it will therefore be appropriate for the Court to deal with before enquiring into the merits" (*Panevezys-Saldutiskis Railway (Estonia* v. *Lithuania), Preliminary Objections, Judgment, 1939, P.C.I.J., Series A/B, No. 76*, p. 16). This clearly is not the situation that the Court is faced with here.

19. Thus in the present case, I consider that France's objection based on the abuse of rights does not possess such a "preliminary" character. The alleged substantive right in question is Equatorial Guinea's right to the immunity *ratione personae* of the Vice-President in charge of National Defence and Security and to immunity and inviolability of the building located at 42 Avenue Foch in Paris. This has been challenged by France that such a claim is tarnished by the abuse of rights. According to France, the Applicant exploited such rights purely and exclusively for the purposes of manipulating the ostensible rights granted, with a view to shielding Mr. Teodoro Nguema Obiang Mangue and his properties from the French criminal proceedings. For France, such use of immunity and inviolability is nothing else than abusive because the purpose of privileges and immunities under the Vienna Convention, which is to safeguard the independence of the State and its representatives abroad, and not to benefit the individuals who enjoy them (Preliminary Objections of the French Republic, paras. 78-80), is completely ignored and manipulated to block the unlawful activities to be brought to justice.

20. The Judgment has found that there has not been enough evidence to establish this contention of France. However, whether this contention of France is justified or not is not the point at issue in the present situation. France's objection on abuse of rights to immunity and inviolability by Equatorial Guinea, if upheld, could arguably result in a total rejection of Equatorial Guinea's claim as an "invalid claim" rather than the procedural interruption of further proceedings of the present case before dealing with the merits aspects of the claim.

21. It is for these reasons that I joined the conclusion of the Court that France's third preliminary objection be rejected in its entirety, without passing any judgment on the validity of the contention of France in its third preliminary objection, which, if sustained, could have much wider legal implications.

(Signed) Hisashi Owada.

SEPARATE OPINION OF JUDGE ABRAHAM

[Translation]

Agreement with the operative part of the Judgment — Disagreement with the Court's reasoning in finding that the dispute does not fall within the scope ratione materiae *of Article 4 of the Palermo Convention — Agreement with the finding that Article 4 of the Convention does not incorporate the customary international rules relating to immunities of States and State officials — Unjustified distinction made by the Court between the rules relating to immunities and the other rules of customary international law that derive from the principles of sovereign equality, non-intervention and territorial integrity referred to in Article 4 — Absence of incorporation, by reference to those principles, of any customary international rule or principle into the Convention — The function of Article 4 to preserve the application of obligations that exist under customary international law.*

1. I agree with the general tenor of the present Judgment and voted in favour of all the paragraphs of the operative part. Indeed, in my view, the dispute submitted to the Court by Equatorial Guinea does not fall within the provisions of Article 35 of the United Nations Convention against Transnational Organized Crime (the "Palermo Convention"), because it does not concern "the interpretation or application of [the said] Convention", and therefore this clause cannot form the basis of the Court's jurisdiction in the present case; however, the Optional Protocol to the Vienna Convention on Diplomatic Relations does provide a jurisdictional basis on which the Court can entertain the Application in so far as it concerns the status of the building at 42 Avenue Foch, which is claimed by Equatorial Guinea to form part of the "premises of [its] diplomatic mission" in Paris and to benefit, as such, from the protections afforded to such premises by Article 22 of the Convention in question.

2. There is, however, one part of the Judgment's reasoning that I find needlessly complicated, at times rather obscure, and even, in certain respects, legally flawed. I refer here to the reasons underlying the finding that the dispute submitted to the Court does not fall within the scope *ratione materiae* of Article 4 of the Palermo Convention and, consequently, does not fall within the provisions of the compromissory clause of Article 35 of the same Convention.

I believe the Court could and should have followed a simpler line of reasoning that would have led it to the same conclusion by a different route, which I shall now describe.

3. To convince the Court that it had jurisdiction under Article 35 of the Palermo Convention to entertain the part of its Application relating to France's alleged violation of the immunities and protections which, in its view, are enjoyed by both its Vice-President and the building at 42 Avenue Foch, Equatorial Guinea did not claim that France had breached any of the specific obligations imposed on States parties by the Palermo Convention, namely by Articles 5 to 31 thereof, whose overall aim, as stated in Article 1, is to "promote cooperation to prevent and combat transnational organized crime more effectively".

4. It claimed that France had breached Article 4 of the Convention, which is a general provision appearing under the heading "Protection of sovereignty", and whose first paragraph, the one relied on by the Applicant, 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-intervention in the domestic affairs of other States". According to Equatorial Guinea, by initiating criminal proceedings against its Vice-President and by carrying out various searches and attachments in respect of the building and certain property at 42 Avenue Foch, France breached the principle of "sovereign equality . . . of States", which encompasses the rules of customary international law relating to the immunities of States, State property and State officials. Consequently, it alleges that there is a dispute relating to the Respondent's compliance with Article 4 of the Palermo Convention and thus falling within the provisions of the compromissory clause of Article 35. Equatorial Guinea admittedly accepts that Article 4 does not apply in isolation but must be combined with another provision (or other provisions) of the Convention, since it concerns instances where States "carry out their obligations under this Convention". However, the Applicant contends that, by initiating criminal proceedings against its Vice-President and attaching part of its property, France was acting with a view to implementing its obligations under the Convention and was therefore required to respect the principles mentioned in Article 4, which it failed to do. The Applicant of course accepts that the question whether France breached the principle of "sovereign equality" to its detriment is a matter for the merits, but it maintains that the fact that the Parties make conflicting claims in this regard is sufficient to characterize a dispute "concerning the

interpretation or application" of the Palermo Convention, which thus falls within the Court's jurisdiction by virtue of Article 35 of that Convention.

5. In my opinion, this reasoning is flawed. But neither for the reason invoked by France in support of its preliminary objection to jurisdiction, nor for the reasons adopted by the Court in its Judgment.

6. The Respondent contended that Article 4 of the Palermo Convention was a "general clause" comparable to the one at issue in the case concerning *Oil Platforms*, where the Court considered that Article I of the Treaty of Amity between the United States and Iran had to be regarded as "fixing an objective, in the light of which other Treaty provisions [were] to be interpreted and applied" (*(Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 814, para. 28), but which, in itself, had no prescriptive scope.

However — and on this point I agree with paragraph 92 of the Judgment — there is little in common between a provision such as the one at issue in the case concerning *Oil Platforms*, whereby it was proclaimed, by way of introduction to the Treaty, that "[t]here shall be firm and enduring peace and sincere friendship between the United States . . . and Iran", and a clause such as Article 4 of the Palermo Convention. In the latter instance, the idea is not to assert a purpose (if not to say an ideal) in light of which all the subsequent provisions are to be understood because it indicates to some extent their general orientation; rather, it is to fix certain limits on the obligations which ensue from the Convention and which are contained in the subsequent articles — limits which reflect the basic idea that the Convention does not authorize States parties to dispense with the rules imposed on them by customary international law with regard to sovereign equality of States, respect for territorial integrity and non-intervention in the domestic affairs of other States. In this sense, Article 4 of the Palermo Convention seems to me to have a prescriptive and operational scope (or, one might say, an *effet utile*) which far exceeds that of Article I of the Treaty of Amity at issue in the former case.

7. Even though, as I have said, I am not convinced by Equatorial Guinea's reasoning, I would rather the Court had not rejected it on the basis of the arguments in paragraphs 92 to 102 of the Judgment, which to my mind are hardly convincing. My own conclusion is also that "Article 4 does not incorporate the customary international rules relating to immunities of States and State officials" (para. 102), but for different reasons from those given in the Judgment.

8. The key question is whether and to what extent Article 4, in mentioning "the principles of sovereign equality and territorial integrity of States and . . . that of non-intervention in the domestic affairs of other States", has the effect of incorporating these principles (and thus, necessarily, the rules of customary international law that derive and are inseparable from those principles) into the Convention itself; that is to say, in other words, whether it has the effect of transforming customary obligations into conventional obligations, through the treaty's reference to custom.

9. The Judgment appears, generally, to answer this question in the affirmative, albeit not without a certain amount of ambiguity on this point.

It is, in any event, in that affirmative sense that paragraph 92 might be understood, where it is stated that Article 4 "*imposes an obligation* on States parties", in that "*[i]ts purpose is to ensure* that the States . . . perform their obligations in accordance with the principles" mentioned (my emphasis).

10. The Court's reasoning then appears to take a different direction, when it observes that Article 4 "refers only to general principles", rather than to specific customary international rules, and concludes that "[i]n its ordinary meaning, Article 4 (1) does not impose, through its reference to sovereign equality, an obligation on States parties to act in a manner consistent with the many rules of international law which protect sovereignty in general" (para. 93).

11. The reasoning thus focuses on the customary international rules relating to the immunities of States and State officials.

While acknowledging that "the rules of State immunity derive from the principle of sovereign equality of States", as the Court has found in a previous case, the Judgment pursues a line of reasoning which leads to the conclusion that the rules relating to immunities are not covered by the provision contained in the first paragraph of Article 4.

Two reasons are given in support of this conclusion: primarily, an interpretation of Article 4 that incorporates immunities as conventional obligations would be inconsistent with the object and purpose of the Convention as a whole, which is to promote co-operation to prevent and combat transnational organized crime more effectively; and, subsidiarily, an examination of the *travaux préparatoires* of the Palermo Convention shows that the intention of the drafters of Article 4 was neither to protect the immunities of States nor to incorporate, by reference, the rules relating to such immunities into the Convention.

Hence the conclusion set out in paragraph 102: "Article 4 does not incorporate the customary international rules relating to immunities of States and State officials".

12. The impression one may have in reading paragraphs 92 to 102 of the Judgment is that, in the Court's opinion, it may well be that certain rules of customary international law are "incorporated by reference" into the Convention, as a result of the reference made in Article 4, paragraph 1, to the principles of sovereign equality, non-intervention and territorial integrity (without the reader really knowing which ones), but, in any event, this is not true of the rules relating to immunities of States. Consequently, a dispute relating to one State party's respect for the immunities to which another State party is (allegedly) entitled under customary international law falls outside the scope of Article 35 *ratione materiae*, and the Court does not have jurisdiction to entertain it (even if the Respondent had acted with a view to implementing its obligations under Articles 5 *et seq*.).

13. I am of the opinion that the Court could and should have reached the same conclusion here without making any distinction between the rules relating to immunities and other rules of customary international law deriving from the three principles mentioned in Article 4, paragraph 1.

14. Indeed, Article 4, as a whole, is a safeguard clause. It aims neither to create (conventional) obligations for States parties, nor to incorporate, by reference, pre-existing rules of customary law into the Convention. It aims to clarify, by expressly formulating, an idea which might otherwise give rise to contention, namely that no provision of the Convention may be interpreted as authorizing (or *a fortiori* obligating) a State party, in applying the said Convention, to dispense with the rules that customary international law imposes on all States (whether or not they are parties to the Convention) with regard to sovereign equality, respect for territorial integrity and non-intervention in the domestic affairs of other States.

15. Thus understood, Article 4 undeniably has an *effet utile*, but it is not the one ascribed to it by Equatorial Guinea. Article 4 does not, in my view, incorporate into the Convention any rule or principle of customary international law, not the rules relating to immunities or any others. It states simply — though this may be of great importance in certain situations — that nothing in the Convention derogates from the rules of customary international law relating to certain fundamental principles that it sets forth; or, in other words, that the Convention does not affect the application of those rules or prejudice them (even in legal relations between States parties).

16. It follows that if a State, in implementing a particular obligation under the Convention, acted contrary to, for example, a customary rule deriving from the principle of non-intervention in the domestic affairs of other States, it could not legally justify its conduct by arguing that it was performing an obligation imposed on it by the Convention: Article 4, paragraph 1, would preclude such a justification. In this hypothetical scenario, the State would be in breach of its international legal obligations. However, this would be because it had violated general international law, not because it had violated the Convention, i.e. Article 4. Article 4 in itself is not the source of any obligations; it aims to preserve obligations which exist separately and are not conventional in nature.

17. What leads to this interpretation is, first of all, the argument the Judgment itself gives in paragraph 95, whose scope, however, it curiously limits to the rules relating to the immunities of States and State officials. The interpretation of Article 4 advanced by Equatorial Guinea, whereby the customary rules flowing from the principles mentioned in the first paragraph of that Article are incorporated into the instrument in question as conventional obligations, "is unrelated to the stated object and purpose of the Palermo Convention". What is true, according to the Judgment, of the rules relating to immunities is also true of all customary rules aiming to protect sovereign equality, territorial integrity or non-intervention: no more, no less. The object and purpose of the Convention are clearly stated in Article 1. They are, in essence, to better combat certain forms of transnational crime of particular concern through closer co-operation between States. It is understandable that, in negotiating this instrument, the States

wished to make clear, as a precaution, that the enhanced obligations they were establishing did not go so far as to make it possible to dispense with certain fundamental principles enshrined in general international law; it would be less understandable if they had sought to incorporate those principles by making them conventional obligations within an instrument which in no way had that raison d'être.

18. In my opinion, a reading of Article 4 as a whole points the same way. Whereas the first paragraph is drafted in positive terms ("States Parties shall carry out their obligations . . . in a manner consistent with the principles . . ."), paragraph 2 is quite clearly drafted in the standard form of a saving clause, i.e. in negative terms: "[n]othing 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".

19. It is clear that paragraph 2, as drafted, does not incorporate into the Convention the prohibitive rule that it sets out. It could be argued that, by contrast, paragraph 1 has a different scope, in that it has an "incorporating" effect, since it is formulated in positive terms. However, in my opinion, it is actually the opposite that is true, namely that paragraph 1 must be read, not in contrast with, but in light of paragraph 2. The idea set out in paragraph 2 is in fact nothing more than a particular aspect — whose importance justified it being emphasized — of the more general idea laid down in paragraph 1. For a State to undertake in the territory of another State the exercise of jurisdiction or performance of functions that are reserved for that other State by its domestic law would be contrary to the principles of sovereign equality and non-intervention in the domestic affairs of another State. Consequently, it would be inconsistent to ascribe any incorporating effect to paragraph 1, whereas paragraph 2 would be applied — as it surely must be — as a saving clause. The whole of Article 4 is inspired by a single notion.

20. Were it necessary, an examination of the *travaux préparatoires* would confirm this interpretation. Not the *travaux préparatoires* of the Palermo Convention directly, but rather the *travaux préparatoires* of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, since Article 4 of the former Convention was transposed from Article 2, paragraphs 2 and 3, of the latter.

21. The initial proposal, put forward notably by Canada and Mexico, for what was to become Article 2 of the Convention, included a second paragraph which stated that "[n]othing 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".

22. At the meeting of 13 December 1988, the United States delegate to the diplomatic conference proposed an amendment to that text, finding its tone too negative and therefore suggesting that it be redrafted in more positive terms ("[the US delegation] had accordingly redrafted the text with the aim of giving it a more positive mode of expression"). That is how paragraph 2 was presented in the form in which it was eventually adopted, which is identical to Article 4, paragraph 1, of the Palermo Convention. The Canadian and Mexican delegations, and those from a group of countries that had together originally sponsored the initial text, accepted the American proposal at the afternoon session the same day, for the basic reason that they did not see any substantial difference between their text and that proposed by the United States, and that it was preferable to avoid a long, pointless discussion which might have put the conference's outcome at risk (United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, 25 November-20 December 1988, Official Records Vol. I, pp. 97-98, paras. 2-3; Vol. II, p. 171, para. 5; p. 176, para. 4).

23. In sum, neither the United States delegation that proposed it, nor the other delegations that accepted it, saw in the "more positive" terms of the text which became Article 2, paragraph 2, of the Convention against Illicit Traffic in Narcotic Drugs, and subsequently Article 4, paragraph 1, of the Palermo Convention, anything substantially different from a traditional saving clause, whose purpose is to state that the Convention does not derogate from (or is without prejudice to) the rules of customary international law.

24. If the Court had adopted this interpretation of Article 4, there would have been no need for it to devote long arguments (paras. 104 to 117) to another of Equatorial Guinea's claims, according to which France had also violated that Article, since it had breached both the principle of sovereign equality of States and that of non-intervention in overextending the jurisdiction of its criminal courts, by the way in which it criminalized the offence of money laundering in its domestic law, as Article 6 required it to do, and defined the jurisdiction of its courts to entertain such an offence, in performance of Article 15.

25. Rather than responding that Article 4 does not incorporate into the Convention any of the principles to which it refers, as I believe it should have done, and being unable to rely on the reasoning that it had very specifically devoted to the customary rules relating to immunities — so as to exclude them from the scope of Article 4 — the Court takes a different direction here. It justifies its refusal to find that it has jurisdiction to entertain this aspect of the case on the ground that, by criminalizing money laundering and delineating its courts' jurisdiction to entertain it (too broadly, according to Equatorial Guinea), France did not act with a view to implementing its obligations under the Palermo Convention. In this regard, I shall simply say, with all due respect, that the demonstration is laborious.

26. The foregoing reservations do not, of course, as I stated at the outset, prevent me from fully supporting all the conclusions reached in the Judgment, both on the objection to jurisdiction relating to the Palermo Convention, which the Court upholds, and on the objection relating to the Optional Protocol to the Vienna Convention, which, in my opinion, it rightly rejects.

(Signed) Ronny ABRAHAM.

DISSENTING OPINION OF JUDGE DONOGHUE

Admissibility — Integrity of the judicial function of the Court — Abuse of process — Abuse of rights.

1. The Court today concludes that it has jurisdiction on the basis of the Optional Protocol to the Vienna Convention on Diplomatic Relations (the "Optional Protocol") in respect of the Applicant's claim that the building at 42 Avenue Foch in Paris (the "Building") qualifies as premises of the mission entitled to the treatment required by Article 22 of the Vienna Convention on Diplomatic Relations (the "Vienna Convention"). I agree. However, I have voted against subparagraphs (3) and (4) of paragraph 154 because I consider that this claim is inadmissible and that the Application should have been dismissed.

2. In its third preliminary objection (which the Court properly characterizes as an objection to admissibility), France calls for dismissal of the entire Application on the ground of its "abusive nature". Because the Court has concluded that it lacks jurisdiction pursuant to the United Nations Convention against Transnational Organized Crime, I address here only the admissibility of the Applicant's claim in relation to the Vienna Convention. I take no position here on the merits of that claim, nor do I express any view on whether Mr. Teodoro Nguema Obiang Mangue is guilty of the crimes with which he has been charged in France, a matter that is not for this Court to decide.

3. France refers both to "abuse of process" and "abuse of rights" in support of its third preliminary objection. These notions may have established meanings in certain national legal systems. However, I am not aware of any authoritative definition of either term in the context of international adjudication. The Court offers its views of the scope of these terms today.

4. The Court finds that the Application is "not inadmissible on grounds of abuse of process or abuse of rights" (para. 153). The Judgment treats "abuse of process" and "abuse of rights" as two separate notions.

According to the Court, an abuse of process "goes to the procedure before a court or tribunal and can be considered at the preliminary phase" of proceedings. The Judgment states that an application can be found inadmissible on the basis of "abuse of process" only when there is "clear evidence" and only in "exceptional circumstances" (para. 150). It does not find the Application to present such exceptional circumstances.

The Court considers that the "abuse of rights cannot be invoked as a ground of inadmissibility when the establishment of the right in question is properly a matter for the merits". It states that any argument regarding abuse of rights will be considered at the merits stage of the case (para. 151).

Thus, on the Court's reasoning, an allegation of abuse of process can be considered as a preliminary objection as to admissibility, but it is to be evaluated only with reference to procedure before the Court. On the other hand, according to the Court, an assertion of abuse of rights can have no bearing on the admissibility of a claim. It is only to be considered at the merits stage, when the Court decides whether the rights asserted by a party have been established.

The approach taken by the Court means that an applicant's conduct outside of this Court, on which it premises the assertion of certain rights, would not stand in the way of the admissibility of the application, no matter how abusive that conduct is.

5. By defining "abuse of process" and "abuse of rights" narrowly and by isolating each of these concepts from the other, I believe that the Court has overlooked the core of France's third preliminary objection:

> "it is not the individual elements which France has brought to this Court's attention, considered in isolation, that constitute an abuse of process. Taken as a whole, however, they establish that Equatorial Guinea's Application to the Court is abusive, since it in fact forms part of a strategy to use the principle of diplomatic immunities as a contrivance for the benefit of an individual who is not a diplomat, and thereby to obstruct the criminal proceedings initiated against him in France and avoid the potential confiscation of the personal property he has acquired there.
>
> . . . . . .
>
> France requests you to find that, by seising the Court, Equatorial Guinea has committed an abuse of process, the purpose of which is to have the Court provide cover for the applicant State's improper

and abusive use of the law of diplomatic immunities." (CR 2018/2, pp. 53-54, paras. 21, 24 (Pellet)[2].)

6. The Respondent refers to a "contrivance" by the Applicant that is part of a "strategy" that culminates in the seising of the Court. The Respondent's allegations raise this question: is the conduct in which the Applicant engaged as a predicate for the assertion of certain rights of such a character that the Court should not exercise its jurisdiction to determine whether the Applicant has those rights? This is a question of admissibility. Its answer does not call for a decision as to whether the rights asserted by Equatorial Guinea have been established (a matter for the merits).

7. Some questions of admissibility arise only when they are raised by a party. Other aspects of admissibility touch on the fundamental role and function of the principal judicial organ of the United Nations:

> "There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore. There may thus be an incompatibility between the desires of an applicant, or, indeed, of both the parties to a case, on the one hand, and on the other hand the duty of the Court to maintain its judicial character. The Court itself, and not the parties, must be the guardian of the Court's judicial integrity." (*Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 29.)

8. The allegations by France raise questions about whether the Court can consider the Application without compromising its judicial integrity. The Respondent's harsh words could perhaps be discounted as the hyperbole of oral advocacy, but the facts before the Court cannot be so easily set aside. The evidence that bears on the question of the admissibility (as framed in paragraph 6 above) is before the Court at this stage of the proceedings and is not in dispute. The relevant facts are evident on the face of documents submitted to the Court by the Applicant, including statements by representatives of the applicant State. I summarize those facts here.

9. Mr. Teodoro Nguema Obiang Mangue is the son of the President of Equatorial Guinea. In 2004, he became the sole shareholder of the Swiss companies that co-own the Building in Paris (Memorial of Equatorial Guinea, Vol. I, paras. 2.15–2.16). At that time, he was serving as Minister for Agriculture and Forestry of Equatorial Guinea (*ibid.*, Vol. I, para. 2.2). (As the Judgment notes, he was elevated to the position of Second Vice-President in charge of Defence and State Security in May 2012 (para. 29) and to Vice-President in charge of National Defence and State Security in June 2016 (para. 34).)

10. Mr. Teodoro Nguema Obiang Mangue is facing prosecution in France, triggered by a private complaint in 2008, to which investigating judges were assigned in December 2010 (Memorial of Equatorial Guinea, Vol. I, paras. 3.23, 3.29). The complaint alleges that various persons, including Mr. Teodoro Nguema Obiang Mangue, had acquired movable and immovable property in France using monies derived from the misappropriation of foreign public funds, including those of Equatorial Guinea (*ibid.*, Vol. I, paras. 3.19, 3.23, 3.30). In July 2011, the Public Prosecutor indicated to the investigating judges that "the facts under investigation . . . may be characterized only as money laundering or handling offences" and that "the laundering or handling in France of an asset obtained through an offense committed abroad by a foreign national and not subject to French law is punishable in France" (*ibid.*, Vol. II, p. 90 (Ann. 8)).

11. Beginning on 28 September 2011, in furtherance of these criminal proceedings, French authorities conducted a series of searches of the Building, during which they attached and took possession of a large amount of personal property (*ibid.*, Vol. I, para. 3.54). French authorities attached the Building itself on 19 July 2012 (*ibid.*, Vol. I, para. 4.24).

12. Also beginning in September 2011, the applicant State and Mr. Teodoro Nguema Obiang Mangue took a series of steps related to the Building:

(i) An agreement dated 15 September 2011 provides that Mr. Teodoro Nguema Obiang Mangue's shares in the Swiss companies that co-owned the Building were to be transferred to the State of Equatorial Guinea, which in turn was required to transfer the sum of €34 million into the bank account of EDUM S.L. in Malabo, Equatorial Guinea (*ibid*., Vol. I, paras. 2.17, 4.38; written replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue at

the public sitting held on 19 October 2016 at 5 p.m., Ann. 1, Arts. 1, 3 and 4). According to the judgment of the *Tribunal correctionnel de Paris* of 27 October 2017, EDUM S.L. is an Equatorial Guinean company through which Mr. Teodoro Nguema Obiang Mangue paid for his personal expenses (Judgment of the *Tribunal correctionnel de Paris* of 27 October 2017, p. 76).

(ii) Less than three weeks after the conclusion of the agreement transferring ownership of the Building, on 4 October 2011, the applicant State sent a diplomatic Note to the Foreign Ministry of France stating that it "has for a number of years owned" the Building (Memorial of Equatorial Guinea, Vol. III, p. 53 (Ann. 33); see also Vol. I, para. 4.4). That Note further asserted that the Building "forms part of the premises of the diplomatic mission," and thus is entitled to protection under Article 22 of the Vienna Convention (*ibid.*).

(iii) On 17 October 2011 Equatorial Guinea asserted in a Note Verbale to France that the Building was the official residence of the Permanent Delegate of Equatorial Guinea to UNESCO, Ms Mariola Bindang Obiang, who would also serve in the capacity of Chargée d'affaires *ad interim* of the diplomatic mission, also located at the Building (*ibid.*, Vol. III, p. 60 (Ann. 36); see also Vol. I, para. 4.9).

(iv) On 14 February 2012, in three communications to French authorities and one Note Verbale to UNESCO, Equatorial Guinea asserted that the Building was the residence of its Permanent Representative to UNESCO (*ibid.*, Vol. III, p. 62 (Ann. 37); Vol. III, p. 64 (Ann. 38); Vol. III, p. 66 (Ann. 39); Vol. III, p. 72 (Ann. 41); see also Vol. I, paras. 4.10-4.12).

(v) On 9 March 2012, the Embassy of Equatorial Guinea wrote to the Minister for Justice of France stating: "Since 15 September 2011 the Republic of Equatorial Guinea has been the owner of a property located at 40/42 Avenue Foch in Paris, assigned to its diplomatic mission and declared as such to the Ministry of Foreign and European Affairs by Note Verbale No. 365/11 of 4 October 2011" (*ibid*., Vol. III, p. 77 (Ann. 43)). Its 12 March 2012 Note Verbale to the Foreign Ministry was to the same effect (*ibid*., Vol. III, pp. 80-81 (Ann. 44)). Neither Note indicated that the Building was the residence of the Permanent Representative to UNESCO. (The Headquarters Agreement between UNESCO and France governs the privileges and immunities of personnel of permanent delegations to UNESCO and the status of buildings that serve as their residences or offices, and neither Party has suggested that the Court has jurisdiction to apply that Agreement in this case.)

(vi) In July 2012, eight days after French authorities issued an order of attachment *(saisie pénale immobilière)* in relation to the Building, Equatorial Guinea informed the Government of France that "as from Friday 27 July 2012, the Embassy's offices are located at 42 Avenue Foch, Paris (16th arr.), a building which it is henceforth using for the performance of the functions of its diplomatic mission in France". (*Ibid.*, Vol. III, p. 88 (Ann. 47); see also Vol. I, para. 4.25.)

13. The President of Equatorial Guinea stated the purpose of the above-described actions in a letter to his French counterpart dated 14 February 2012:

> "Your Excellency is not unaware of the fact that my son, Teodoro NGUEMA OBIANG MANGUE, lived in France, where he pursued his studies, from childhood until he reached adulthood. France was his preferred country and, as a young man, he purchased a residence in Paris; however, due to the pressures on him as a result of the supposed unlawful acquisition of assets, he decided to resell the said building to the Government of the Republic of Equatorial Guinea.
>
> At this time, the building in question is a property that was lawfully acquired by the Government of Equatorial Guinea and is currently used by the Representative to UNESCO, who is in charge of the Embassy's property. The said property is afforded legal and diplomatic protection under the Vienna Convention and the bilateral agreements signed by the two States.

> Unfortunately, that building is the subject of legal proceedings, apparently as a result of the unfounded complaints of certain NGOs, without any legal justification." (*Ibid.*, Vol. III, p. 66 (Ann. 39); see also Vol. I, para. 4.11.)

14. This evidence establishes that in 2004, Mr. Teodoro Nguema Obiang Mangue became the sole shareholder of the companies that co-own the Building, a valuable property in French territory. Since December 2010, he has been facing prosecution in France for money laundering (a means of shielding assets from law enforcement authorities). Thereafter, beginning in 2011, the applicant State has co-operated with Mr. Teodoro Nguema Obiang Mangue in a series of actions with respect to the Building. It has made a variety of assertions to French authorities about the use of the Building, on the basis of which it has invoked immunity and inviolability. If the steps taken by the Applicant are given effect, real property in France's territory that had been in the hands of an individual facing prosecution will be shielded from French authorities as inviolable mission premises that are "immune from search, requisition, attachment or execution" under Article 22 of the Vienna Convention. The sum of €34 million that was paid in exchange for that property is also beyond the reach of French law enforcement authorities, having been transferred to a bank account in Equatorial Guinea.

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

16. During the hearing on provisional measures, France stated that "the judicial police officers who conducted the searches of the building in 2012 found no official documents belonging to Equatorial Guinea or to its diplomatic mission in France" (CR 2016/15, p. 29, para. 25 (Pellet))[3]. Equatorial Guinea has not refuted this statement, nor has it indicated to the Court that embassy archives or other government documents were among the possessions attached or taken into possession by French authorities in their searches of the Building.

17. As the Court has observed, "there is no more fundamental prerequisite for the conduct of relations between States than the inviolability of diplomatic envoys and embassies" (*United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Provisional Measures, Order of 15 December 1979, I.C.J. Reports 1979*, p. 19, para. 38). Despite their importance to the functioning of diplomacy, the immunity and inviolability of diplomatic personnel and missions exist in uneasy tension with other interests of States and private parties. Every day, foreign ministry lawyers are in dialogue with counterparts in other capitals regarding the application of the Vienna Convention to particular cases. Differences inevitably emerge. The parties to the Optional Protocol have recognized that the Court is a suitable forum for addressing these differences. If the Court declines to decide a dispute arising under the Vienna Convention, despite having jurisdiction to do so, there will be no judicial resolution of the merits, an outcome that may be unsatisfactory to both Parties. It is only in "exceptional circumstances" — to echo the words used by the Court today — that the Court should refuse to exercise its jurisdiction over such a dispute.

18. The present case is such an exceptional circumstance. The sequence of actions taken by the applicant State is established by the documents submitted by the Applicant. The purpose of those actions, which was stated by the President of the applicant State, is manifest. The evidence regarding the character of the Applicant's conduct is conclusive, easily meeting the heightened standards of proof that the Court has suggested in certain circumstances (e.g. "clear and convincing evidence" (*Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia* v. *Greece), Judgment, I.C.J. Reports 2011 (II)*, p. 685, para. 132, quoting Arbitration on the *Tacna-Arica Question (Chile/Peru) (1925), RIAA*, Vol. II, p. 930)). The applicant State has told the Court nothing to suggest that its diplomatic functions were disrupted when French authorities entered the Building and initiated searches in September 2011, nor is there any indication that French authorities entered or attached the Building with such a purpose. The dismissal of this Application would pose no threat to diplomatic functions. On the other hand, the Court's decision today means that the applicant State will continue to benefit from the Court's Order on provisional measures of 7 December 2016 until the Court's Judgment on the merits.

19. Despite conclusive evidence of the character of the conduct in which the Applicant engaged as a predicate for its assertion of rights in this Court, the Court allows the case to proceed to the merits, as if this is yet another disagreement about the nuances of the régime of diplomatic immunity. To preserve the integrity of its judicial function, I believe that the Court should not have allowed itself to be used to further this effort by the Applicant. It should instead have upheld the third preliminary objection. Accordingly, I dissent.

(Signed) Joan E. DONOGHUE.

DECLARATION OF JUDGE GAJA

Premises of a diplomatic mission — Article 22 of the Vienna Convention on Diplomatic Relations — Whether Article 22 covers the issue of ownership of the building.

In section *(c)* of its submissions Equatorial Guinea complains about France's failure "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". I agree with the Judgment of the Court that the Optional Protocol to the Vienna Convention on Diplomatic Relations gives the Court jurisdiction over the part of the dispute between the Parties relating to the use of the building as premises of the diplomatic mission of Equatorial Guinea. However, the Judgment does not specify that the issue concerning the ownership of the building is not covered by the Optional Protocol.

When defining the premises of the diplomatic mission, Article 1 *(i)* of the Vienna Convention indicates that these are "the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission". Ownership of the premises does not necessarily belong to the sending State. Missions are often located on rented or leased property. Issues concerning the ownership of buildings that are used for a mission are regulated by the municipal law of the host State, unless the matter is governed by a treaty (this case is not relevant for present purposes).

When Article 22, paragraph 3, of the Vienna Convention sets out that "[t]he 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", it does not grant total immunity to the building. It only refers to forcible measures that interfere with the use of the building for the diplomatic mission.

Article 22, paragraph 1, of the Vienna Convention states that "[t]he premises of the mission shall be inviolable". It does not exclude that the mission should have to move out because of a change in the ownership of the property. The relevant provisions of the Vienna Convention do not imply that, once a building has been used for a diplomatic mission, the sending State is entitled to continue to use it indefinitely for that purpose. Ownership of the premises may change over time. Except for what may be provided for in a treaty, there is no obligation for the receiving State to let the sending State continue to use a specific building for its mission. Use of the premises will depend on contractual arrangements that the sending State may conclude with the owner. The sale of the property where the premises of a diplomatic mission are located could lawfully lead to terminating the use of the building for that purpose.

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

(Signed) Giorgio GAJA.

DECLARATION OF JUDGE CRAWFORD

Article 4 of the Palermo Convention — Article 4 (1) not merely a without prejudice clause — Article 4 (1) imposes an obligation in accordance with its terms — Article 4 as a safeguard against intervention on the territory of another State party — Legislative history of Article 4 of the Palermo Convention — Legislative history of Article 2 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988).

1. In this case, Equatorial Guinea relies on Article 4 of the Palermo Convention to attract the protection of certain rules of international law. Its principal argument is that Article 4 incorporates by reference the customary international rules relating to the immunities of States and State officials, since these derive from the principle of sovereign equality with which Article 4 (1) requires States parties to comply[4].

2. This argument assumes that Article 4 (1) gives legal effect, for the purposes of the application of the Palermo Convention, to the principles of customary international law to which it refers, namely sovereign equality, territorial integrity and non-intervention in the domestic affairs of other States. Strictly speaking, it was not necessary for the Court to decide whether this is so, since for the reasons given in paragraphs 92-102 of the Judgment, with which I fully agree, Article 4 does not incorporate the rules relating to the immunities of States and their officials. Moreover, it was a sufficient ground to reject Equatorial Guinea's separate argument based on exclusive jurisdiction to point out that neither Article 6 nor Article 15 of the Palermo Convention confer exclusive jurisdiction over predicate offences on the State where those offences were committed (see paragraphs 115-117 of the Judgment).

3. However, it has been suggested that Article 4 (1) is merely a without prejudice clause, which does not impose an obligation on States parties to the Palermo Convention to act in conformity with the principles of sovereign equality, territorial integrity and non-intervention in any event. If this were the case, it would have been a simpler and more direct ground for denying the Court's jurisdiction under the Palermo Convention, since it would have undercut the very assumption on which Equatorial Guinea's Article 4 arguments were based.

4. The Court has not taken this course, and in my view rightly not. Article 4 (1) on the face of it imposes an obligation; it is in mandatory language ("shall carry out their obligations") and the principles of sovereign equality, territorial integrity and non-intervention are established legal principles with a determinate content. In this as in other respects, Article 4 is quite unlike Article I of the Treaty of Amity which was considered in *Oil Platforms* (*Islamic Republic of Iran* v. *United States of America, Preliminary Objection, Judgment, I.C.J. Reports 1996 (II),* p. 803). Article I proclaimed "firm and enduring peace and sincere friendship" between the parties. It did not refer to any specific principles or rules of international law, but was aspirational in character.

5. The Palermo Convention, like the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, from which Article 4 (1) was transposed, has as its object to promote co-operation between States to facilitate effective measures to combat transboundary crime (see Article 1 of the Palermo Convention). However, States parties to the Palermo Convention were concerned to protect themselves against unwanted extraterritorial action by other States. This concern was expressed, for example, during a meeting of the Working Group on the implementation of the Naples Political Declaration and Global Action Plan against Organized Transnational Crime in April 1998. The Working Group, established by the United Nations Commission on Crime Prevention and Criminal Justice, discussed a report containing options for a convention against transnational organized crime, elaborated by the inter-sessional open-ended intergovernmental group of experts in Warsaw in February 1998. The Commission on Crime Prevention and Criminal Justice discussed the progress of the Working Group at its Seventh Session. Relevantly, the Report of that session says:

> "Prior to the closing of the meeting . . . [t]he representative of Colombia stated . . . [t]he purpose of the instrument would be to allow State parties to it to afford one another international cooperation and mutual legal assistance *with full respect of the principles embodied in the Charter of the United Nations, international law, national legislation and human rights* . . . The representative of Pakistan highlighted the need for the convention to define the term 'transnational organized crime', as well as to include a list of offences. That representative also maintained that, *in order to ensure its wide acceptability, the convention should take into account the principles of territorial integrity and*

> *sovereignty of States*." (Report on the Seventh Session, Supplement No. 10, Ann. III, United Nations doc. E/CN.15/1998/11, p. 79; emphasis added.)

6. In December 1998 an *Ad Hoc* Committee was established by the General Assembly for the purpose of elaborating a comprehensive international convention against transnational organized crime. The record of discussion in the *Ad Hoc* Committee shows that concern was expressed for the sovereignty and territorial integrity of States parties in the context of provisions relating to "special investigative techniques", "joint teams" to be used in law enforcement co-operation and the draft Article on jurisdiction. In relation to the draft Article on jurisdiction, several delegations raised concerns that it could be understood to allow States parties to apply their domestic laws to the territory of other States, for example, by carrying out investigative measures abroad. In response, it was pointed out that what became Article 4 (1) "emphasized the principles of sovereign equality, territorial integrity and non-intervention in the domestic affairs of other States and that those principles applied also to any exercise of jurisdiction". The focus was on what became Article 4 as a safeguard against intervention on the territory of another State, including by way of extraterritorial jurisdiction. The indications are that what became Article 4 (1) was seen by delegations involved in the drafting of the Palermo Convention as a necessary balance to the provisions of the Convention dealing with the effective suppression of transnational organized crime.

7. Support for this conclusion can also be gleaned from the history of Article 2 (2) of the 1988 Drugs Convention. Forty-two States framed a proposal for what became Article 2 (2) expressly as a without prejudice clause: "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." The United States expressed the view that "[t]he main difficulty . . . with that text was the prevailingly negative tone of the wording". The United States proposed an amendment "with the aim of giving it a more positive mode of expression". The proposal, ultimately adopted in Article 2 (2) of the 1988 Drugs Convention, provided that States parties "shall carry out their obligations" under the present Convention "in a manner consistent with the principles of sovereign equality and territorial integrity". The Commentary to the 1988 Drugs Convention records the suggestion that

> "in addition to including . . . safeguard clauses [in relation to national legal systems and domestic laws], it would be desirable to devise a separate article of general application, covering the whole Convention, which would *ensure* that the obligations assumed by parties would in no way infringe universally recognized legal principles such as the sovereign equality and territorial integrity of States" (Commentary, para. 2.1; emphasis added).

It is one thing to say that treaty provisions are without prejudice to some rule or principle of international law (and Article 12 (9) of the Palermo Convention does say this). It is quite another to ensure that that is the case.

8. Article 4 of the Palermo Convention was originally part of the Article relating to the "Scope of application" of the Convention. It was eventually placed as a separate clause, entitled "Protection of sovereignty". Although not decisive, this also suggests that Article 4 (1) is more than a "without prejudice" clause.

9. The legislative history of Article 4 of the Palermo Convention, and of Article 2 of the 1988 Drugs Convention, tends to confirm the conclusion to be drawn from the actual text of Article 4 (1), viz., that it imposes an obligation in accordance with its terms.

(Signed) James CRAWFORD.

SEPARATE OPINION OF JUDGE GEVORGIAN

France's first preliminary objection — Article 4 of the Palermo Convention — Sovereign equality includes immunities — Consequences of the Court's interpretation of Article 4 — Court's lack of jurisdiction ratione materiae *— Article 35, paragraph 2, of the Palermo Convention is limited in nature — State consent — Risks of expanding the Court's jurisdiction — State parties must respect immunities when implementing the Palermo Convention.*

1. I have voted in favour of upholding France's first preliminary objection according to which the Court has no jurisdiction under the Palermo Convention. In this separate opinion I would like to clarify my position on certain elements of the reasoning supporting the Court's conclusion.

2. The dispute that was before the Court involved various issues that are defined in paragraphs 67-73 of the Judgment. My main concern relates to the consequences of the Court's interpretation of Article 4 of the Palermo Convention, which supports its conclusion on the lack of jurisdiction *ratione materiae* to deal with France's alleged violations of the immunities of States and State officials.

3. The latter provision 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."

According to Equatorial Guinea, this provision has a general scope and must be interpreted in connection with the substantive provisions of the Palermo Convention. The reference to sovereign equality in paragraph 1 was intended to cover the protection of immunities; therefore, once it has been shown that France's acts were carried out in implementation of any of the substantive provisions of the Palermo Convention, the Court has jurisdiction *ratione materiae*. France challenges this interpretation and views Article 4 as a general "interpretative guideline" that does not incorporate any of the above-mentioned principles into the scope of the Convention.

4. The Court's jurisdiction under the Palermo Convention is based on Article 35, paragraph 2, which refers to "disputes concerning the interpretation and application" thereof. This provision, as any other compromissory clause, is limited to the substantive content of the treaty. As the Court affirmed in the second phase of the *South-West Africa* cases, "jurisdictional clauses are adjectival not substantive in their nature and effect . . . Jurisdictional clauses do not determine whether parties have substantive rights, but only whether, it they have them, they can vindicate them by recourse to a tribunal."[5] In the present case, the central question is whether the jurisdictional clause enshrined in Article 35, paragraph 2, entitles Equatorial Guinea to invoke the immunities of States and State officials before the Court. According to the Judgment,

> "the aspect of the dispute between the Parties relating to the asserted immunity of the Vice-President of Equatorial Guinea and the immunity claimed for the building at 42 Avenue Foch in Paris from measures of constraint as State property does not concern the interpretation or application of the Palermo Convention. Consequently, the Court lacks jurisdiction in relation to this aspect of the dispute."[6]

5. The Judgment bases this conclusion on the finding that "Article 4 does not incorporate the customary international rules relating to immunities of States and State officials"[7]. While it rightly asserts that immunities derive from the principle of sovereign equality enshrined in Article 4 of the Palermo Convention[8], it explains that such a provision

> "does not refer to the customary international rules, including State immunity, that derive from sovereign equality but to the principle of sovereign equality itself . . . In its ordinary meaning, Article 4(1) does not impose, through its reference to sovereign equality, an obligation on States parties to

> act in a manner consistent with the many rules of international law which protect sovereignty in general, as well as all the qualifications to those rules."[9]

6. In light of this conclusion, the Judgment affirms that it becomes "unnecessary to make any further determinations regarding the scope or content of the obligations on States parties pursuant to Article 4 of the Palermo Convention"[10].

7. In my opinion, the reference to sovereign equality made in Article 4 of the Palermo Convention was intended to include the protection of immunities of States and State officials, but does not fall within the scope of the provisions covered by the compromissory clause. This is reflected in the present Judgment when recalling that "the rules of State immunity derive from the principle of sovereign equality of States"[11].

8. However, it must be acknowledged that the scope of the compromissory clause is not as broad as the Applicant pretends. Given the broad nature of the principles of "sovereign equality, territorial integrity and non-intervention" mentioned in Article 4 of the Palermo Convention, incorporating all the customary rules encompassed by such principles may have the effect of undermining the principle of consent to the Court's jurisdiction reflected in Article 35, paragraph 2, thereof.

9. In particular, applicants might invoke the Court's jurisdiction *ratione materiae* by artificially linking a dispute concerning an incidental point of international law with the substantive provisions of the Palermo Convention. Accordingly, any dispute that is indirectly linked to any of the substantive provisions of the Palermo Convention would be a dispute "concerning" the latter. As a consequence, when the enforcement of one of its provisions is at stake, the Court would have jurisdiction over the many branches of international law that contain rules reflecting the principles of sovereign equality, territorial integrity and non-intervention. This would expand the Court's jurisdiction to matters in respect of which the State parties did not give their consent under Article 35, paragraph 2.

10. The Court's Judgment should not be read as in any way undermining the obligations concerning immunities that are binding on States parties to the Palermo Convention when they implement their obligations thereunder. This is reaffirmed in paragraph 102 of the Judgment, which states that the Court's finding on jurisdiction "is without prejudice to the continued application of those rules."[12] As the Court has found, there is a

> "fundamental distinction between the existence and binding force of obligations arising under international law and the existence of a court or tribunal with jurisdiction to resolve disputes about compliance with those obligations. The fact that there is not such a court or tribunal does not mean that the obligations do not exist. They retain their validity and legal force."[13]

More specifically with respect to the question of immunities of State officials, the Court has determined 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"[14].

Compliance with such an obligation is independent of the Court's lack of jurisdiction with respect to Article 4 of the Palermo Convention, and therefore remains of prime importance in the relations between States parties thereto.

(Signed) Kirill GEVORGIAN.

ENDNOTES

1 The relevant ministry was successively named "Ministry of Foreign and European Affairs" (2007-2012), "Ministry of Foreign Affairs and International Development" (2012-2017) and "Ministry of Europe and Foreign Affairs" (since 2017). For the purposes of the present Judgment, "Ministry of Foreign Affairs" will be used.

2 Footnotes omitted. All translations are by the Registry.

3 Footnotes omitted.

4 True, Equatorial Guinea did not actually use the term "incorporation by reference", resorting instead to synonyms such as "contained within the principles referred to in Article 4" (CR 2018/3, p. 28, para. 1 (Wood); *ibid.*, p. 30, para. 8 (Wood)), or "part and parcel of the principles of sovereign equality and non-intervention" (CR 2018/5, p. 21, para. 16 (Wood)). It was more an argument of incorporation by inference.

5 *South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Second Phase, Judgment, I.C.J. Reports 1966*, p. 39, paras. 64-65.

6 Judgment, para. 102.

7 *Ibid*.

8 *Ibid*., para. 93.

9 *Ibid*.

10 *Ibid*., para. 119.

11 *Ibid*., para. 93.

12 Judgment, para. 102.

13 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 104, para. 148.

14 *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.