

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

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**I. Introduction**

On 6 June 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)*.<sup>1</sup> 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 development of international law, both regarding the particular instruments at issue and broader questions of law of treaties and international dispute settlement.

**II. Background**

The dispute arose from criminal proceedings instituted in France against Mr. Teodoro Nguema Obiang Mangue that were ongoing in French courts on 13 June 2016, when Equatorial Guinea filed its application.<sup>2</sup> 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. Teodoro Nguema 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.<sup>3</sup>

Two aspects of the investigation raised, for Equatorial Guinea, issues of international law. First, the search and eventual attachment of the building as well as associated seizure of certain items

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breached VCDR because the building was being used for its diplomatic mission.<sup>4</sup> Secondly, the French courts had denied the *ratione personae* immunity from jurisdiction that Mr. Teodoro Nguema 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.<sup>5</sup> 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<sup>6</sup> (while finding no *prima facie* jurisdiction under the Palermo Convention).<sup>7</sup>

### III. 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; secondly, the domestic legislation of France had overextended jurisdiction in a manner inconsistent with Article 4, when read in conjunction with certain other provisions.<sup>8</sup>

The Court, by eleven votes to four, 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.'<sup>9</sup> 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.<sup>10</sup> The second prong of the Equatorial Guinea's argument was also dismissed. The particular provisions of the Palermo Convention emphasised in submissions helped to co-ordinate 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.<sup>11</sup> 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 recognise its overreaching and pervasive effect that permeated throughout the Convention.<sup>12</sup>

#### *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 régime 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).<sup>13</sup>

#### *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.<sup>14</sup> 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.<sup>15</sup> Consequently, by fifteen votes to one, the Court declared that it had jurisdiction on the basis of the Optional Protocol and that the claim was admissible.

## **IV. 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 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 merely aspirational in character.<sup>16</sup> Secondly, the discussion of the interaction between Article 4(1) of the Palermo Convention and custom and general principles brings to a new level of quality a very important interpretative argument.<sup>17</sup> Thirdly, 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.<sup>18</sup> Fourthly, the broad statement that a State can give effect to a treaty by using pre-existing legislation is important for primary rules in various fields of international law, particularly international criminal law, and associated dispute settlement.<sup>19</sup> Fifthly, the Court offers its view on the scope of terms ‘abuse of process’ and ‘abuse of rights’<sup>20</sup> (familiar in other fields of international adjudication),<sup>21</sup> 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.

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<sup>1</sup> 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.

<sup>2</sup> Judgment, *supra* note 1, ¶ 67.

<sup>3</sup> *Id.* ¶ 23-25.

<sup>4</sup> *Id.* ¶ 25-28, 70.

<sup>5</sup> *Id.* ¶ 29-34, 68-69.

<sup>6</sup> 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.

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

<sup>8</sup> Judgment, *supra* note 1, ¶ 77-85.

<sup>9</sup> *Id.*, ¶ 93.

<sup>10</sup> *Id.*, ¶ 94-102.

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

<sup>12</sup> 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, <https://www.icj-cij.org/files/case-related/163/163-20180606-JUD->

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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>.

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

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

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

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

<sup>17</sup> *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.

<sup>18</sup> 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.

<sup>19</sup> Judgment, *supra* note 1, ¶ 113.

<sup>20</sup> Donoghue, *supra* note 15, ¶ 3-4.

<sup>21</sup> Owada, *supra* note 11, ¶ 18.