

SEPARATE OPINION OF JUDGE XUE

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

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

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

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

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

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

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

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

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

(Signed) XUE Hanqin.
