**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.