

## DISSENTING OPINION OF VICE-PRESIDENT XUE

1. With much regret, I departed from the majority and voted against the decision on the jurisdiction of the Court with regard to the International Convention for the Suppression of the Financing of Terrorism (hereinafter the “ICSFT”). I firmly believe that the Court does not have jurisdiction under Article 24, paragraph 1, of the ICSFT in this case.

2. Ukraine’s claim as presented in its Application and Memorial, in my opinion, concerns more the alleged military and financial support by the Russian Federation to the armed groups in the course of armed conflict in eastern Ukraine, where violations of international humanitarian law may have occurred, than the Russian Federation’s failure in preventing and suppressing the financing of terrorism. The materials submitted by Ukraine do not present a plausible case that falls within the scope of the ICSFT.

3. Identification of the subject-matter of the dispute is essential for the Court to determine its jurisdiction *ratione materiae*. More often than not, a dispute arises from a complicated political context, where the legal question brought before the Court is mixed with various political aspects. That fact alone does not preclude the Court from founding its jurisdiction. As the Court pointed out in the case concerning *United States Diplomatic and Consular Staff in Tehran*, “legal disputes between sovereign States by their very nature are likely to occur in political contexts, and often form only one element in a wider and long-standing political dispute between the States concerned” (*Judgment, I.C.J. Reports 1980*, p. 20, para. 37). Moreover, “never has the view been put forward before that, because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between them” (*ibid.*). What the Court had to take into account when determining the question of jurisdiction was whether there was connection, legal or factual, between the “overall problem” in the context and the particular events that gave rise to the dispute, which precluded the separate examination of the applicant’s claims by the Court.

4. The essential element in this criterion is the separability of the claim from the overall problem. In determining the question of jurisdiction *ratione materiae*, either *proprio motu*, or at the request of a party, the Court has to ascertain whether the dispute can be detached or separated from the overall political context and presented as a self-standing issue, either in law or fact, capable of judicial settlement by the Court. When the dispute constitutes an inseparable part of the overall problem and any legal pronouncement by the Court on that particular dispute would necessarily step into the area beyond its jurisdiction, judicial prudence and self-restraint is required. In international judicial settlement of disputes between States, the question of jurisdiction is just as important as merits. This policy is designed and reflected in each and every aspect of the jurisdictional system of the Court.

5. The dispute between Ukraine and the Russian Federation arose from the internal armed conflict in eastern Ukraine. Acts alleged by Ukraine all took place during this period. Apparently, attacks that targeted civilians with the intention to create “terror” in the event of an armed conflict are serious violations of international humanitarian law and human rights law. To draw a clear legal distinction between such violations and the acts of terrorism alleged by Ukraine in the present context, however, is likely difficult, if not impossible. To characterize military and financial support from Russia’s side, by whomever possible, as terrorism financing, would inevitably bear the legal implication of defining the nature of the armed conflict in eastern Ukraine, which, in my view, extends well beyond the limit of the Court’s jurisdiction under the ICSFT. In other words, Ukraine’s allegations against the Russian Federation under the ICSFT bear an inseparable

connection with the overall situation of the ongoing armed conflict in eastern Ukraine. Factually, documents before the Court do not demonstrate that the alleged terrorism financing can be discretely examined without passing a judgment on the overall situation of the armed conflict in the area; Ukraine's claim under the ICSFT forms an integral part of the whole issue in eastern Ukraine. Judicially, the Court is not in a position to resolve the dispute as presented by Ukraine.

6. My second reason for upholding the Russian Federation's objection to the jurisdiction of the Court under Article 24, paragraph 1, of the ICSFT relates to the scope of the Convention. The term "any person" in Article 2, paragraph 1, of the ICSFT must be interpreted within the framework of the Convention to which States parties agreed to accept. Under Articles 3 and 7 of the ICSFT, State parties undertake to establish in their domestic law territorial, national and universal criminal jurisdiction over offences defined in Article 2, paragraph 1, thereof. As the Court recalls in the Judgment, the drafting history of the Convention demonstrates that the Convention only addresses offences committed by individuals and does not cover the financing by a State of acts of terrorism, which lies outside the scope of the Convention (Judgment, paragraph 59). During the proceedings this point was not contested between the Parties. This interpretation, however, becomes blurred when the meaning of the term "any person" in Article 2, paragraph 1, is given. According to the majority's view,

"[t]he Convention contains no exclusion of any category of persons. It applies both to persons who are acting in a private capacity and to those who are State agents. As the Court noted . . . State financing of acts of terrorism is outside the scope of the ICSFT; therefore, the commission by a State official of an offence described in Article 2 does not in itself engage the responsibility of the State concerned under the Convention. However, all States parties to the ICSFT are under an obligation to take appropriate measures to co-operate in the prevention and suppression of offences of financing acts of terrorism committed by whichever person. Should a State breach such an obligation, its responsibility under the Convention would arise." (Judgment, paragraph 61.)

This seemingly straightforward statement unfortunately cannot be sustained by the rules of State responsibility.

7. I agree that the term "any person" does not preclude State officials and there is no question about jurisdictional immunity. There are possible cases where a State official's act may invoke the application of the Convention. For example, when a State official of State A has allegedly committed an offence of terrorism financing to a group located in State B for conducting terrorist acts, State A, as a party to the ICSFT, is obliged to provide legal assistance to another State party, State B, and take measures to suppress the crime. If such State official is found in the territory of State C, State C has to take measures to bring him to criminal justice and provide legal assistance to State B, if the latter so requests. In either situation, no State act is alleged.

8. The situation in the present case is an entirely different one; every act of terrorism financing alleged by Ukraine points at the Russian Federation itself. In its Application, Ukraine requests the Court to adjudge and declare that

*"the Russian Federation, through its State organs, State agents, and other persons and entities exercising governmental authority, and through other agents acting on its instructions or under its direction and control, has violated its obligations under the Terrorism Financing Convention by:*

- (a) supplying funds, including in-kind *contributions of weapons and training*, to illegal armed groups that engage in acts of terrorism in Ukraine, including the DPR, the LPR, the Kharkiv Partisans, and associated groups and individuals, in violation of Article 18” (emphasis added).

Although Ukraine subsequently deleted this submission in the Memorial, instead, accusing the Russian Federation of allowing and encouraging its own officials to finance terrorism, the substance of its claim under the ICSFT remains unchanged. Factually, Ukraine does not draw any distinction between its initial allegation of terrorism financing under the Russian Federation’s instruction and direction, and its subsequent claim based on the Russian Federation’s permission and encouragement. It is evident that what Ukraine has in mind is primarily the State responsibility of the Russian Federation for the acts done by its officials or agencies, or acts allegedly instructed or directed by the Russian Federation. This intention can be observed from Ukraine’s Memorial, where it states that “[w]hen a State allows or encourages its own officials to finance terrorism, it *necessarily* fails to take all ‘practicable measures’ to prevent the financing of terrorism” (emphasis added). Apparently, this is a case concerning the allegations of the financing by a State of terrorist acts, which, as the Court stated in the Judgment, is explicitly precluded from the scope of the ICSFT.

9. By virtue of the rules of attribution for the invocation of State responsibility, acts done by State officials in the exercise of their functions and acts instructed or directed by the State are regarded as acts of the State in international law. In case the acts alleged by Ukraine were proven, it would be the Russian Federation as the State that should be held responsible for such acts under international law, regardless of individual criminal responsibility under domestic law. The Court should not simply, by relying on Ukraine’s amendment of its submissions, come to the conclusion that this case is not about State’s financing of terrorist acts without examining the relevant elements of the scope of the Convention, such as the term “funds”, and the nature of the alleged acts in light of Article 2, paragraph 1, of the Convention. By narrowly focusing on the obligations in preventing and suppressing terrorism financing, the Court not just unduly expands the scope of its jurisdiction *ratione materiae*, but also creates confusion and uncertainty in the law of State responsibility.

10. Moreover, in the present case, the question whether or not the Russian Federation allowed or encouraged military and financial support to the armed groups in eastern Ukraine is not a matter for the Court to consider, as it falls outside the scope of its jurisdiction under the ICSFT. Should the case proceed to the merits phase, however, the Court may find itself in a position where it has to pronounce on the above question, which, in my view, may raise the issue of judicial propriety.

11. Judicial policy requires the Court to avoid unnecessary prolongation of the legal process if the case does not present itself as plausible. Proper identification of the subject-matter of the dispute that falls within the scope of the jurisdiction *ratione materiae* of the Court is essential for the purposes of good administration of justice and judicial economy. Loose expansion of the scope of the Court’s jurisdiction will not be conducive to the peaceful settlement of international disputes, when judicial restraint is clearly called for under the circumstances. To allow this case to proceed to the merits phase, in my view, would neither serve the object and purpose of the ICSFT, nor contribute to the peace process in the region.

(Signed) XUE Hanqin.

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