SEPARATE OPINION OF JUDGE ABRAHAM

[Translation]

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

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

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

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

3. To convince the Court that it had jurisdiction under Article 35 of the Palermo Convention to entertain the part of its Application relating to France's alleged violation of the immunities and protections which, in its view, are enjoyed by both its Vice-President and the building at

42 Avenue Foch, Equatorial Guinea did not claim that France had breached any of the specific obligations imposed on States parties by the Palermo Convention, namely by Articles 5 to 31 thereof, whose overall aim, as stated in Article 1, is to "promote co-operation to prevent and combat transnational organized crime more effectively".

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

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

6. The Respondent contended that Article 4 of the Palermo Convention was a "general clause" comparable to the one at issue in the case concerning *Oil Platforms (Islamic Republic of Iran* v. *United States of America)*, where the Court considered that Article I of the Treaty of Amity between the United States and Iran had to be regarded as "fixing an objective, in the light of which other Treaty provisions [were]

to be interpreted and applied" (*Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 814, para. 28), but which, in itself, had no prescriptive scope.

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

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

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

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

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

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

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

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

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

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

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

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

14. Indeed, Article 4, as a whole, is a safeguard clause. It aims neither to create (conventional) obligations for States parties, nor to incorporate, by reference, pre-existing rules of customary law into the Convention. It

aims to clarify, by expressly formulating, an idea which might otherwise give rise to contention, namely that no provision of the Convention may be interpreted as authorizing (or *a fortiori* obligating) a State party, in applying the said Convention, to dispense with the rules that customary international law imposes on all States (whether or not they are parties to the Convention) with regard to sovereign equality, respect for territorial integrity and non-intervention in the domestic affairs of other States.

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

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

17. What leads to this interpretation is, first of all, the argument the Judgment itself gives in paragraph 95, whose scope, however, it curiously limits to the rules relating to the immunities of States and State officials. The interpretation of Article 4 advanced by Equatorial Guinea, whereby the customary rules flowing from the principles mentioned in the first paragraph of that Article are incorporated into the instrument in question as conventional obligations, "is unrelated to the stated object and purpose of the Palermo Convention". What is true, according to the Judgment, of the rules relating to immunities is also true of all customary rules aiming to protect sovereign equality, territorial integrity or non-intervention: no more, no less. The object and purpose of the Convention are clearly stated in Article 1. They are, in essence, to better combat certain forms of transnational crime of particular concern through closer co-operation between States. It is understandable that, in negotiating this instrument, the States wished to make clear, as a precaution, that the enhanced obligations they were establishing did not go so far as to make

it possible to dispense with certain fundamental principles enshrined in general international law; it would be less understandable if they had sought to incorporate those principles by making them conventional obligations within an instrument which in no way had that raison d'être.

18. In my opinion, a reading of Article 4 as a whole points the same way. Whereas the first paragraph is drafted in positive terms ("States Parties shall carry out their obligations . . . in a manner consistent with the principles . . ."), paragraph 2 is quite clearly drafted in the standard form of a saving clause, i.e. in negative terms: "[n]othing in this Convention entitles a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law".

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

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

21. The initial proposal, put forward notably by Canada and Mexico, for what was to become Article 2 of the Convention, included a second paragraph which stated that "[n]othing in this Convention derogates from the principles of the sovereign equality and territorial integrity of States or that of non-intervention in the domestic affairs of States".

22. At the meeting of 13 December 1988, the United States delegate to the diplomatic conference proposed an amendment to that text, finding its

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

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

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

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

26. The foregoing reservations do not, of course, as I stated at the outset, prevent me from fully supporting all the conclusions reached in the

Judgment, both on the objection to jurisdiction relating to the Palermo Convention, which the Court upholds, and on the objection relating to the Optional Protocol to the Vienna Convention, which, in my opinion, it rightly rejects.

(Signed) Ronny ABRAHAM.