

DECLARATION OF JUDGE CRAWFORD

Article 4 of the Palermo Convention — Article 4 (1) not merely a without prejudice clause — Article 4 (1) imposes an obligation in accordance with its terms — Article 4 as a safeguard against intervention on the territory of another State party — Legislative history of Article 4 of the Palermo Convention — Legislative history of Article 2 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988).

1. In this case, Equatorial Guinea relies on Article 4 of the Palermo Convention to attract the protection of certain rules of international law. Its principal argument is that Article 4 incorporates by reference the customary international rules relating to the immunities of States and State officials, since these derive from the principle of sovereign equality with which Article 4 (1) requires States parties to comply¹.

2. This argument assumes that Article 4 (1) gives legal effect, for the purposes of the application of the Palermo Convention, to the principles of customary international law to which it refers, namely sovereign equality, territorial integrity and non-intervention in the domestic affairs of other States. Strictly speaking, it was not necessary for the Court to decide whether this is so, since for the reasons given in paragraphs 92-102 of the Judgment, with which I fully agree, Article 4 does not incorporate the rules relating to the immunities of States and their officials. Moreover, it was a sufficient ground to reject Equatorial Guinea's separate argument based on exclusive jurisdiction to point out that neither Article 6 nor Article 15 of the Palermo Convention confer exclusive jurisdiction over predicate offences on the State where those offences were committed (see paragraphs 115-117 of the Judgment).

3. However, it has been suggested that Article 4 (1) is merely a without prejudice clause, which does not impose an obligation on States parties to the Palermo Convention to act in conformity with the principles of sovereign equality, territorial integrity and non-intervention in any event. If this were the case, it would have been a simpler and more direct ground for denying the Court's jurisdiction under the Palermo Convention, since

¹ True, Equatorial Guinea did not actually use the term "incorporation by reference", resorting instead to synonyms such as "contained within the principles referred to in Article 4" (CR 2018/3, p. 28, para. 1 (Wood); *ibid.*, p. 30, para. 8 (Wood)), or "part and parcel of the principles of sovereign equality and non-intervention" (CR 2018/5, p. 21, para. 16 (Wood)). It was more an argument of incorporation by inference.

it would have undercut the very assumption on which Equatorial Guinea's Article 4 arguments were based.

4. The Court has not taken this course, and in my view rightly not. Article 4 (1) on the face of it imposes an obligation; it is in mandatory language ("shall carry out their obligations") and the principles of sovereign equality, territorial integrity and non-intervention are established legal principles with a determinate content. In this as in other respects, Article 4 is quite unlike Article I of the Treaty of Amity which was considered in *Oil Platforms (Islamic Republic of Iran v. United States of America)*, *Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 803. Article I proclaimed "firm and enduring peace and sincere friendship" between the parties. It did not refer to any specific principles or rules of international law, but was aspirational in character.

5. The Palermo Convention, like the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, from which Article 4 (1) was transposed, has as its object to promote co-operation between States to facilitate effective measures to combat transboundary crime (see Article 1 of the Palermo Convention). However, States parties to the Palermo Convention were concerned to protect themselves against unwanted extraterritorial action by other States. This concern was expressed, for example, during a meeting of the Working Group on the Implementation of the Naples Political Declaration and Global Action Plan against Organized Transnational Crime in April 1998. The Working Group, established by the United Nations Commission on Crime Prevention and Criminal Justice, discussed a report containing options for a convention against transnational organized crime, elaborated by the inter-sessional open-ended intergovernmental group of experts in Warsaw in February 1998. The Commission on Crime Prevention and Criminal Justice discussed the progress of the Working Group at its Seventh Session. Relevantly, the Report of that session says:

"Prior to the closing of the meeting . . . [t]he representative of Colombia stated . . . [t]he purpose of the instrument would be to allow State parties to it to afford one another international co-operation and mutual legal assistance *with full respect of the principles embodied in the Charter of the United Nations, international law, national legislation and human rights* . . . The representative of Pakistan highlighted the need for the convention to define the term 'transnational organized crime', as well as to include a list of offences. That representative also maintained that, *in order to ensure its wide acceptability, the convention should take into account the principles of territorial integrity and sovereignty of States.*" (Report on the Seventh Session,

Supplement No. 10, United Nations doc. E/CN.15/1998/11, Ann. III, p. 80; emphasis added.)

6. In December 1998 an *Ad Hoc* Committee was established by the General Assembly for the purpose of elaborating a comprehensive international convention against transnational organized crime. The record of discussion in the *Ad Hoc* Committee shows that concern was expressed for the sovereignty and territorial integrity of States parties in the context of provisions relating to “special investigative techniques”, “joint teams” to be used in law enforcement co-operation and the draft Article on jurisdiction. In relation to the draft Article on jurisdiction, several delegations raised concerns that it could be understood to allow States parties to apply their domestic laws to the territory of other States, for example, by carrying out investigative measures abroad. In response, it was pointed out that what became Article 4 (1) “emphasized the principles of sovereign equality, territorial integrity and non-intervention in the domestic affairs of other States and that those principles applied also to any exercise of jurisdiction”. The focus was on what became Article 4 as a safeguard against intervention on the territory of another State, including by way of extraterritorial jurisdiction. The indications are that what became Article 4 (1) was seen by delegations involved in the drafting of the Palermo Convention as a necessary balance to the provisions of the Convention dealing with the effective suppression of transnational organized crime.

7. Support for this conclusion can also be gleaned from the history of Article 2 (2) of the 1988 Drugs Convention. Forty-two States framed a proposal for what became Article 2 (2) expressly as a without prejudice clause: “Nothing 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.” The United States expressed the view that “[t]he main difficulty . . . with that text was the prevalingly negative tone of the wording”. The United States proposed an amendment “with the aim of giving it a more positive mode of expression”. The proposal, ultimately adopted in Article 2 (2) of the 1988 Drugs Convention, provided that States parties “shall carry out their obligations” under the present Convention “in a manner consistent with the principles of sovereign equality and territorial integrity”. The Commentary to the 1988 Drugs Convention records the suggestion that

“in addition to including . . . safeguard clauses [in relation to national legal systems and domestic laws], it would be desirable to devise a separate article of general application, covering the whole Convention, which would *ensure* that the obligations assumed by parties would in no way infringe universally recognized legal principles such as the sovereign equality and territorial integrity of States” (Commentary, para. 2.1; emphasis added).

It is one thing to say that treaty provisions are without prejudice to some rule or principle of international law (and Article 12 (9) of the Palermo Convention does say this). It is quite another to ensure that that is the case.

8. Article 4 of the Palermo Convention was originally part of the article relating to the “Scope of application” of the Convention. It was eventually placed as a separate clause, entitled “Protection of sovereignty”. Although not decisive, this also suggests that Article 4 (1) is more than a “without prejudice” clause.

9. The legislative history of Article 4 of the Palermo Convention, and of Article 2 of the 1988 Drugs Convention, tends to confirm the conclusion to be drawn from the actual text of Article 4 (1), viz., that it imposes an obligation in accordance with its terms.

(Signed) James CRAWFORD.
