SEPARATE OPINION OF JUDGE *AD HOC* POCAR

Jurisdiction ratione materiae *of the Court on the basis of the ICSFT — Interpretation of Article 2 of the ICSFT — State responsibility under the ICSFT for not having taken appropriate measures to prevent and suppress the offence described in Article 2 — Agreement with the interpretation of the term "any person" of Article 2 — Inclusive interpretation of the term "any person" supported by the object and purpose of the ICSFT and the international practice in the conclusion of similar treaties — Different reasoning to conclude that the interpretation of the definition of "funds" of Article 1 should be left to the merits — Definition of assets is closely related to the facts and is therefore a matter for the merits.*

1. I concur with the Judgment of the Court and with its decision to reject the preliminary objections of the Russian Federation in this case. Therefore, I would only briefly clarify my position on a couple of issues, which have been largely debated between the Parties, concerning the jurisdiction *ratione materiae* of the Court.

2. Following its jurisprudence, the Court has recalled that

> "in order to determine the Court's jurisdiction *ratione materiae* under a compromissory clause concerning disputes relating to the interpretation or application of a treaty, it is necessary to ascertain whether the acts of which the applicant complains 'fall within the provisions' of the treaty containing the clause. This may require the interpretation of the provisions that define the scope of the treaty" (Judgment, paragraph 57).

Consequently, the Court has proceeded to give an interpretation of some of the provisions that define the scope of the International Convention for the Suppression of the Financing of Terrorism (hereinafter "ICSFT"), with a view to establishing, in particular, (I) whether the financing by a State of an act prohibited under paragraph 1 *(a)* and *(b)* of Article 2 may constitute an offence under Article 2, paragraph 1, and (II) whether Article 2 covers the perpetration of the offence of financing terrorism as described in Article 2, paragraph 1, by a private individual or also by a State official. By contrast, on another issue (III) — the interpretation of the definition of the term "funds" under Article 1, paragraph 1, of the ICSFT — the Court observed that "this issue relating to the scope of the ICSFT [did not] need [to] be addressed at the present stage of the proceedings" (Judgment, paragraph 62).

I. State financing and the ICSFT

3. On the first question the Court concludes that, since the ICSFT addresses offences committed by individuals, and Article 4 requires each State party to establish the offence set forth in Article 2 as a criminal offence under its domestic law and to make that offence punishable by appropriate penalties, the financing by a State of such an offence "is not addressed by the ICSFT", and "[i]t lies outside the scope of the Convention" (Judgment, paragraph 59). I agree with this conclusion. A convention imposing on States parties the obligation to criminalize in their legislation a specific individual conduct, and to prevent and suppress it, inevitably presupposes that the States accepting the convention would not engage themselves in that conduct. Thus, imposing on them a corresponding obligation under the convention could appear superfluous.

4. However, should a State directly commit the offence described in Article 2, its responsibility would nevertheless be engaged under the Convention, not for the commission of the offence as such, but for not having taken appropriate measures for preventing and suppressing it. In any event, even if the conduct of a State lies outside the scope of the ICSFT, that State may still be responsible under customary international law for the commission of the offence. Furthermore, any other competent jurisdiction could rely, as the case may be, on the findings made by the Court as evidence for adjudicating a claim based on State responsibility under international law.

II. Financing of acts of terrorism by State officials

5. On the second question mentioned above, whether the perpetration by a State official of the offence of financing terrorism as described in Article 2, paragraph 1, of the ICSFT is covered by the said provision, the Court concludes that the expression "any person" "covers individuals comprehensively", and that "the Convention contains no exclusion of any category of persons", notably not of State agents (Judgment, paragraph 61). Therefore, "all States parties to the ICSFT are under an obligation to take appropriate measures and to co-operate in the prevention and suppression of offences of financing acts of terrorism committed by whichever person". Although this matter has been the subject of an intense and articulated discussion between the Parties, I find that the Court's conclusion is obvious and compelling.

6. To reach that conclusion, the Court explicitly relies on the ordinary meaning of the expression "any person" referred to in Article 2, paragraph 1, of the ICSFT. While this reference is certainly sufficient, I am of the view that the Court's conclusion is also strongly supported by an analysis of the object and purpose of the ICSFT, in accordance with the general rule of interpretation set forth in Article 31 of the Vienna Convention on the Law of Treaties, as well as by international practice in the conclusion of similar treaties.

7. Firstly, the object and purpose of the ICSFT is to prevent and suppress the financing of terrorism through the criminalization by State parties of the conduct of any person who provides or collects funds with the intention that they should be used, or in the knowledge that they are to be used, in full or in part, in order to carry out: *(a)* acts which constitute offences within the scope of and as defined in a list of other treaties, and *(b)* certain other acts against civilians or persons not taking part in the hostilities in a situation of armed conflict, which constitute violations of international humanitarian law. In light of this object and purpose of the Convention, it would be inherently contradictory to impose on States parties the obligation to take appropriate measures and to co-operate to prevent and suppress the commission of the offence of financing terrorism as described in Article 2, paragraph 1, and at the same time to exclude that obligation by letting States parties free not to do so when their State officials are involved. It has to be recalled in this regard that, since any prevention or suppression activity will have to be carried out by State officials, a legal recognition of their impunity would inevitably and definitely hamper a successful implementation of the purpose of the Convention. Thus, an exclusion of State officials from the scope of the expression "any person" would plainly contradict not only the text of Article 2, paragraph 1, but also the object and purpose of the ICSFT.

8. Secondly, this reading of Article 2 of the ICSFT is confirmed by international practice in the conclusion of similar treaties providing for the criminalization of unlawful conduct by individuals.

9. This is certainly the case for treaties that impose on States parties to criminalize acts that are commonly qualified as being terrorist acts, like the conventions and protocols referred to in Article 2, paragraph 1 *(a)*, and listed in the Annex to the ICSFT. Most of them use the same expression "any person" or, in a couple of cases (Nos. 3 and 5 of the Annex), the expression "offender" without any further qualification, and without any exclusion of State officials. Thus, the provision for criminal jurisdiction also over crimes committed by public officials is by no means inconsistent with international practice. Rather, that practice even shows that, when a restriction is made, it goes the other way around and excludes private individuals from the scope of the criminal rule, by limiting the establishment of individual criminal responsibility to public officials. In this respect, e.g. the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, concluded on 10 December 1984, defines the crime of torture as being punishable, for the purposes of the Convention, "when . . . pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity" (Article 1, paragraph 1).

10. An unrestricted approach as to the qualification of the perpetrators has also been adopted by the conventions that impose on States parties the obligation to criminalize violations of international humanitarian law, as are the acts referred to in Article 2, paragraph 1 *(b)*, of the ICSFT. In this respect, the relevant provisions of each of the four Geneva Conventions of 12 April 1949 and of Additional Protocol I of 8 June 1977, which institute the régime of the so-called "grave breaches", provide that the State parties thereto "undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article" (Article 146, first paragraph of Geneva Convention IV. An identical provision is enshrined in the other three Conventions: Article 49 of GC I, Article 50 of GC II; Article 129 of GC III). No restriction is made as to the qualifications of those persons. However, as the Conventions and Additional Protocol I only refer to violations committed in international armed conflicts, the perpetrators will normally be State officials rather than private individuals. Again, if a restriction is made, it concerns the criminalization of act(s) committed by private persons, not by State officials.

11. Finally, it has to be recalled that a conclusion restricting the criminal responsibility of State officials as compared with that of private individuals would also go against domestic State practice in enacting criminal legislation. Domestic criminal laws of a democratic State do not make any distinction as to the qualification of perpetrators and, when they do, it is to provide that the qualification of public official is to be regarded as an aggravating circumstance for the purposes of the punishment of the author of the criminal activity at issue.

12. I conclude that both the ordinary meaning of the text and the object and purpose of the Convention, as well as the international practice of States in drafting similar treaties, show unequivocally that the expression "any person" contained in Article 2, paragraph 1, of the ICSFT must be understood as comprising private individuals and State officials.

III. Interpretation of the definition of "funds" is for the merits

13. Coming now to the third issue mentioned above, i.e. the interpretation of the definition of "funds" under Article 1, paragraph 1, of the ICSFT, the Court recalls that this term is defined in the said provision as meaning

> "assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including, but not limited to, bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts, letters of credit".

14. The Court addresses the issue of the interpretation of this definition by stating in its Judgment:

> "This definition covers many kinds of financial instruments and includes also other assets. Since no specific objection to the Court's jurisdiction was made by the Russian Federation with regard to the scope of the term 'funds' and in particular to the reference in Ukraine's submissions to the provision of weapons, this issue relating to the scope of the ICSFT need not be addressed at the present stage of the proceedings. However, the interpretation of the definition of 'funds' could be relevant, as appropriate, at the stage of an examination of the merits." (Judgment, paragraph 62.)

15. I agree with the conclusion of the Court that the interpretation of the definition of "funds" is to be left to the stage of an examination of the merits. However, it seems to me that the reasons for reaching that conclusion should have been different. In paragraph 62 of the Judgment, the Court seems to infer that the question of the interpretation of the term "funds" is an issue that could have been the object of a preliminary objection if it had been raised by the Russian Federation, as relating to the scope of the ICSFT and thus possibly affecting the jurisdiction of the Court *ratione materiae*. I do not believe this is the case. First, it may be misleading to state succinctly that the definition of "funds" contained in Article 1, paragraph 1, of the ICSFT "covers many kinds of financial instruments and includes *also* other assets" (emphasis added). This provision, actually, refers principally to "assets of every kind, whether tangible or intangible, movable or immovable, however acquired" and refers to legal documents and instruments only as they may evidence title to such assets; these documents may also include, but are not to be limited to financial instruments. Thus, the provision puts the accent on assets, not on financial instruments, which may come into consideration only as evidence of the entitlement to assets. Considering further that the list of financial instruments is unlimited, in no case these legal documents and financial instruments may play a role in circumscribing the scope of the Convention.

16. As to the assets, the definition provided in paragraph 1 of Article 1 is also unlimited, as the provision refers to "assets of every kind". In other terms, the issue is not to establish what kind of assets are included in the definition, but whether the ones used in a concrete situation are suitable to be used for committing the acts described in Article 2, paragraph 1 *(a)* and *(b)*, of the ICSFT. The issue is therefore to establish which assets were actually provided or collected with the intention or the knowledge that they were to be used for unlawful purposes as described in Article 2, paragraph 1 *(a)* and *(b)*. With regard to the existence of the requisite intention of the perpetrator, this issue raises problems of law but especially of fact that are properly a matter for the merits of the case.

17. I note, with respect to questions concerning the existence of the requisite mental elements, that the Court concludes that they "do not affect the scope of the Convention and therefore are not relevant to the Court's jurisdiction *ratione materiae*" (Judgment, paragraph 63). In my opinion, the Court should have adopted a similar reasoning as far as the interpretation of the notion of "funds" is concerned.

18. In conclusion, correctly, in my view, the Russian Federation did not raise the issue of the definition of "funds" to object to the jurisdiction of the Court. Had it done so such objection should have been rejected for the reasons expressed above.

(Signed) Fausto POCAR.

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