DECLARATION OF JUDGE OWADA

1. While I have voted in favour of all the *dispositifs* as contained in paragraph 154 of the Judgment, I wish to elaborate on some salient points of the Judgment, with a view to adding clarity to what I wanted to convey through the language of the Judgment. First, I wish to show how I have come to the conclusion that France's first preliminary objection be upheld, especially in the context of the alleged violations by France of the provisions other than Article 4 of the Palermo Convention; second, I wish to put my own view on why the conclusion of the Judgment that France's third preliminary objection is to be rejected is justified, in particular in view of the essential nature of this objection in relationship to the specific structure of preliminary objections as stipulated in Article 79, paragraph 9, of the Rules of Court as revised in 1978 from the original formulation.

(A) The relevance of Article 4 of the Palermo Convention to the alleged violation

(1) The scope of obligations of Article 4 as such

2. The relevance of Article 4 to the alleged violation of the Convention as claimed by Equatorial Guinea is, in my view, twofold. First, I concur with paragraph 102 of the Judgment that "Article 4 does not incorporate the customary international rules relating to immunities of States and State officials". The Court did not accept the argument advanced by the Applicant that Article 4 had the legal effect of amounting to the so-called "incorporation by reference" of customary rules of international law. This term, when used as a technical legal term, means, according to the *Black's Law Dictionary*, "[t]he method of making one document of any kind become a part of another separate document by referring to the former in the latter, and declaring that the former shall be taken and considered as a part of the latter as if it were fully set out therein" (*Black's Law Dictionary* (5th ed., 1979), p. 690). As the Judgment clearly demonstrates in its interpretation of Article 4 in accordance with its ordinary meaning, I agree that Article 4 does not amount to a provision that justifies the legal effect of such "incorporation by reference".

3. Second, however, this is not the end of the story in relation to the issue of relevance of Article 4 claimed by Equatorial Guinea. The aforementioned finding of the Judgment does not free the Court from its task of scrutinizing Equatorial Guinea's claims based on provisions other than Article 4 of the Convention, in the context of the legal obligation arising under Article 4 as defined by the Judgment. The Judgment clearly accepted that, Article 4 (1) of the Palermo Convention, unlike Article I of the Treaty of Amity between Iran and the United States, which was interpreted by the Court in the case concerning *Oil Platforms* as "preambular in character merely formulating a general aim", imposes a legal obligation on States parties to perform other obligations of the Convention "in a manner consistent with the principles [as referred to therein]" (paragraph 92 of the Judgment). Thus, some of the Applicant's claims based on the provisions other than Article 4 of the Convention have been advanced independently of Equatorial Guinea's specific interpretation of Article 4 based on the doctrine of "incorporation by reference". Given this latter obligation prescribed by Article 4, the provisions other than Article 4, such as Articles 6, 7, 8 and 25, read in conjunction with Article 4 as interpreted by the Court, will thus become relevant in evaluating France's acts complained of by Equatorial Guinea.

4. The principles of sovereign equality and non-intervention referred to in Article 4 (1) of the Convention are not intended to have the effect of incorporating the specific rules of customary international law relating to immunities. Neither the *travaux préparatoires* of Article 4 (1) of the Palermo Convention, nor those of Article 2 of the Convention against Illicit Traffic in Narcotic

Drugs and Psychotropic Substances of 1988, which "inspire[d]" Article 4 of the Palermo Convention, indicate otherwise (see United Nations (1988), *United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substance, Vienna, 25 November-20 December 1988, Official Records*, Vol. II, pp. 155-156, 171, 176-177). This means that States parties to the Palermo Convention are obligated to carry out their obligations under Articles 6, 7, 8, 15 and 25 of the Convention "in a manner consistent with the principles of sovereign equality and non-intervention". The question is, therefore, in deciding on the jurisdiction conferred upon the Court under Article 35 of the Palermo Convention, to determine whether there is a dispute concerning "the interpretation or application [of these articles] of this Convention" and to determine whether the acts of France complained of by Equatorial Guinea do or do not fall within the scope of Articles 6 and 15 of the Convention *read in conjunction with Article 4 as interpreted by the Judgment*.

(2) Articles 5, 6, 8 and 23, read in conjunction with Article 4

5. To identify the scope of the jurisdiction conferred upon the Court under Article 35 of the Palermo Convention, it is necessary to examine the nature and the scope of the obligations prescribed by the provisions of the Convention, where "interpretation or application is at issue" between the parties as "subject-matter of the dispute". It is important to take note of the fact that the Palermo Convention was adopted by State parties "convinced of the urgent need to strengthen cooperation to prevent and combat such activities more effectively at the national, regional and international levels" (United Nations doc. A/RES/55/25, 15 November 2000). The purpose of the Convention is clearly set out in its Article 1 as "promot[ing] cooperation to prevent and combat transnational organized crime more effectively".

6. In implementation of this approach to these "predicate crimes", the Palermo Convention obligates States to "*criminalize these crimes* in their respective domestic legal systems", thus establishing a level playing field for strengthening international cooperation under the Convention, rather than a more traditional approach of "international legislation" (e.g. the Genocide Convention of 1949), by which State parties are obligated directly by the participation in the Convention to carry out (i.e. to exercise jurisdiction over) the obligation to prevent and punish the criminals in their respective domestic legal system.

7. This interpretation is confirmed by the *travaux préparatoires*. The record of discussion in the *Ad Hoc* Committee on the Elaboration of a Convention against Transnational Organized Crime shows that several delegations raised concern that the draft article on jurisdiction "could be understood to allow States Parties to apply their domestic laws to the territory of other States". 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" (United Nations doc. A/AC.254/4/Rev.4, p. 20, fn. 102). Indeed, the focus was on what became Article 4 as a safeguard against intervention on the territory of another State.

8. A series provisions for the mechanism of international co-operation, in the implementation of this obligation to criminalize these offences and to establish jurisdiction, such as extradition (Article 16), transfer of sentenced persons (Article 17), mutual legal assistance (Article 18), and joint investigations (Article 20) follow these series of provisions which obligates States parties to establish the criminalization of offences under the Convention (such as Article 6) and to establish jurisdiction over them (such as Article 15). The structure of the Convention thus indicates that the Palermo Convention requires the States parties to adopt legislative, administrative, or judicial

measures *to establish their jurisdictions* over these offences, without directly concerning itself with the actual modalities of its exercise.

9. This construction contrasts with some other international conventions that oblige States parties to prevent or punish crimes prescribed under the conventions. For instance, Article I of the Convention on the Prevention and Punishment of the Crime of Genocide (1949) obligates the contracting parties "to prevent and to punish" genocide, as a crime under international law. Article 2, paragraph 1, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) obligates each State party to "take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction". Unlike these conventions, the obligations under the Palermo Convention is essentially addressed to criminalizing offences and to establishing jurisdiction over them in their domestic legal systems. The prevention and combatting of transnational organized crime is intended to be attained as a result of such international co-operation in establishing jurisdiction to "criminalize" these acts in their domestic legal systems.

10. This analysis leads me to conclude that the proper appreciation of the aforementioned nature of the Convention is crucial in determining the scope of the compromissory clause of the Palermo Convention contained in its Article 35 "concerning the interpretation or application" of the Palermo Convention. Since the relevant articles of the Convention is of the nature to obligate States parties to establish their jurisdictions over offences within their domestic legal systems by adopting legislative, administrative, or judicial measures, the actual exercise of such jurisdiction which is the actual subject-matter of the dispute in the present case (see Judgment, paragraph 67) cannot fall within the scope of the compromissory clause of this Convention.

11. Articles 5, 6, 8 and 23 obligate States parties both to prevent and combat the "predicate crime" predetermined by the Convention, by enacting legislative or other administrative, judicial measures *to criminalize* offences as defined in other provisions of the Convention, including offences committed "outside the jurisdiction of the State Party in question" under certain conditions (Article 6 (2) *(c)*). It is significant that Article 4 (1) functions here as a safeguard to allow a State party to establish its jurisdiction over criminal offences committed in the territory of another State, to the extent that it is carried out in a manner that can be regarded as consistent with the principles, *inter alia*, of sovereign equality and of non-intervention. In this respect, Article 6 (2) *(c)* of the Convention provides that

> "offences committed outside the jurisdiction of a State Party shall constitute predicate offences only when the relevant conduct is a criminal offence under the domestic law of the State where it is committed and would be a criminal offence under the domestic law of the State Party implementing or applying this article had it been committed there".

This sets the dual criminality requirement as the limitation on the prescriptive power of Article 6 in establishing jurisdiction over offences committed on the territory of another State. While there is no explicit reference to Article 4 (1), it seems clear that Article 6 (2) *(c)* is to be construed in a manner to reflect the spirit of Article 4 (1) which provides a safeguard against foreign intervention by way of extraterritorial jurisdiction. To the extent that a State party limits its exercise of criminal jurisdiction over offences of laundering of proceeds of crime committed abroad in conformity with the language of Article 6 (2) *(c)*, the State can be said to be under the obligation to carry out its obligation in a manner consistent with the principles of sovereign equality and non-intervention prescribed by Article 4 (1) of the Convention. This prescriptive of "dual criminality" can be said to set the limits of the establishment of jurisdiction in terms of the criminalization of the acts of money laundering as a category of crimes to be provided for in both jurisdictions. However, this

does not mean that this extends to *the actual exercise of jurisdiction* on concrete acts of money laundering allegedly committed. It is possible, at any rate arguable, that it could constitute the crime of money laundering, which could be a question that could only be determined by examining the merits of the case, but not belonging to the scope of jurisdiction.

(3) Article 15 read in conjunction with Article 4

12. The same holds true with regard to Article 15 of the Convention, which allows a State party to establish its jurisdiction over offences committed in the territory of another State (Article 15 (2)). At first glance, this provision might appear to provide a basis for jurisdictional intervention on a foreign territory by way of establishing extraterritorial jurisdiction. Nevertheless, such capacity of a State party to extend its jurisdiction is circumscribed by Article 15 (2) *(c)* (i) and (ii), which allows the State to do so only when a certain offence is committed abroad, *inter alia*, "with a view to the commission of [a certain offence] within its territory". Put differently, the establishment of jurisdiction having an extraterritorial reach is permitted only to the extent that the effect of offences is directed against the territory of the State exercising such jurisdiction. Admittedly, this arrangement is explicitly linked with the principles referred to in Article 4 through the express qualification that it is "[s]ubject to article 4 of th[e] Convention" in the *chapeau* of Article 15 (2). It is to be noted, however, that the principle of sovereign equality which is contained in Article 4 and which is thus referenced by the qualifying language of Article 15 (2) is a general principle of international law. While it helps to identify the scope of the permissible exercise of jurisdiction based on the effect of offences committed abroad, it does not amount to the direct application of concrete rules that emerge from this principle in such a way as to affect the manner in which this extraterritorial jurisdiction has to be exercised.

13. Based on this analysis on the scope of Articles 6 and 15 read in conjunction with Article 4 of the Palermo Convention, it is my view that the conclusion reached by the Judgment is justified. To put it differently, these provisions deal only with the formal *establishment* (be it legislative, administrative or judicial), but not the actual *exercise*, of such jurisdiction by a judicial breach of the State parties, including concrete acts which allegedly may have a certain extraterritorial reach. In the present case, by comparison, the acts of the French court complained of by Equatorial Guinea is the initiation of the actual exercise of criminal proceedings against Mr. Teodoro Nguema Obiang Mangue, which is properly characterized as the *exercise* rather than the *establishment* of jurisdiction by France. Even if such exercise of criminal jurisdiction by France were to amount to an exercise of jurisdiction with a certain extraterritorial reach that arguably could constitute an internationally wrongful act, provided that Mr. Teodoro Nguema Obiang Mangue were entitled to immunity as argued by Equatorial Guinea, such act cannot fall within the jurisdictional scope of these provisions for the purpose of determining the jurisdictional scope conferred upon the Court under Article 35 of the Convention.

(B) France's third preliminary objection based on "abuse of rights"

14. I concur with the *dispositif* contained in the Judgment which states that it simply "rejects" France's third preliminary objection. The Judgment does not declare that "[this] objection does not possess an exclusively preliminary character". The relevant part of the Judgment however does not explain in detail why the Court has not chosen the course to declare that the objection on alleged "abuse of rights" does not possess an exclusively preliminary character pursuant to Article 79, paragraph 9, of the Rules of Court. Paragraph 151 of the Judgment simply states that "abuse of rights cannot be invoked as a ground of inadmissibility when *the establishment of the right in question* is properly a matter for the merits" (emphasis added). In my view, this point would seem to require further elaboration on the reasoning of the Court on this point.

15. It often happens in a contentious case before the Court that a preliminary objection is raised either on the ground of the lack of jurisdiction or inadmissibility in circumstances where the existence of a substantive right at issue and the manner in which its exercise has been denied. In such situations it is sometimes hard to establish the issue of jurisdiction or admissibility of claim without an extensive examination in fact and in law of the merits of the case. Such an examination is very often neither feasible nor appropriate at an early stage of preliminary objections when the parties have no opportunity to elaborate respective arguments without getting into the merits. This is the *raison d'être* of Article 79, paragraph 9, of the Rules of Court, which provides, in addition to either to uphold or reject the objection raised, that the Court has the third option to declare that the objection at issue "does not possess an exclusively preliminary character". (See Eduardo Jiménez de Aréchaga, "The Amendments to the Rules of Procedure of the International Court of Justice", *American Journal of International Law*, Vol. 67 (1973), pp. 11-19.)

16. At a first glance, Equatorial Guinea's original alleged claims to the immunity of Mr. Teodoro Nguema Obiang Mangue and to the inviolability of the building located at 42 Avenue Foch in Paris and France's obligation thereto could appear to fall under such category. It could appear that it required a further extensive examination of the facts and the law surrounding the legal status of Mr. Obiang Mangue and the building in relation to the establishment of the jurisdiction of the Court on the basis of Article 35 of the Palermo Convention and Article I of the Optional Protocol to the Vienna Convention on Diplomatic Relations.

17. The Court however did not take this third course, as envisaged in Article 79, paragraph 9, of the Rules of Court, to declare that France's third objection did not possess an exclusively preliminary character. In essence, what is significant in France's argument on the abuse of rights is that France advances a thesis that Equatorial Guinea's claim in its entirety relates to the fundamental issue of the legal validity of Equatorial Guinea's claim as a "valid legal claim" that is capable of seising the Court as a legitimate claim. Thus, France argues that

> "it is not the individual elements which France has brought to this Court's attention, considered in isolation, that constitute an abuse of process. Taken as a whole, however, they establish that Equatorial Guinea's application to the Court is abusive, since it in fact forms part of a strategy to use the principle of diplomatic immunities as a contrivance for the benefit of an individual who is not a diplomat, and thereby to obstruct the criminal proceedings initiated against him in France and avoid the potential confiscation of the personal property he has acquired there" (CR 2018/2, p. 53, para. 21 (Pellet)).

In other words, the Applicant's claim, as understood and presented by France, has an essential legal flaw that vitiates the whole claim of Equatorial Guinea as a "valid claim" that can seize the Court, in light of the surrounding circumstances of the case. This is a "far cry" from the system of preliminary objection to jurisdiction or admissibility envisaged under Article 79 of the Rules of Court and cannot be said to fall within the framework of the system of preliminary objections provided under the Rules (Incidental Proceedings).

18. For an objection to be covered by Article 79, it is to be "an objection [that] must . . . possess a 'preliminary' character" (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom; Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgments, I.C.J. Reports 1998*, p. 26, para. 47). If an objection does not possess such a "preliminary" character, it cannot fall within the mechanism of preliminary objections provided for in Part III, Section D (Incidental Proceedings), Subsection 2 (Preliminary Objections) of the Rules of Court. Aside from the legal soundness of France's argument on this point, it is clear that this

claim of France in the form in which it is presented by her can no longer be in its nature "a preliminary objection" in a procedural sense. In this legal situation the Judgment has no option to declare that such objection does not possess an "exclusively preliminary character" pursuant to paragraph 9 of Article 79. The examples of these "abuse of rights" cases as cited by France (*Phoenix Action, Ltd.* v. *The Czech Republic*, ICSID Case No. ARB/06/5, Award of 15 April 2009; *Renée Rose Levy and Grecitel S.A.* v. *Republic of Peru*, ICSID Case No. ARB/11/17, Award of 9 January 2015) also testify to the fact that the relevant arbitral tribunals accepted the argument of the Respondent not as a preliminary objection to be determined before proceeding to the merits, but as an issue that touches the very basis of the claims advanced by the Applicant. It is true that Article 79 is said to cover "any objection" raised by the parties, such objection must possess the effect that "will be, if the objection is upheld, to interrupt further proceedings in the case, and which it will therefore be appropriate for the Court to deal with before enquiring into the merits" (*Panevezys-Saldutiskis Railway (Estonia* v. *Lithuania), Preliminary Objections, Judgment, 1939, P.C.I.J., Series A/B, No. 76*, p. 16). This clearly is not the situation that the Court is faced with here.

19. Thus in the present case, I consider that France's objection based on the abuse of rights does not possess such a "preliminary" character. The alleged substantive right in question is Equatorial Guinea's right to the immunity *ratione personae* of the Vice-President in charge of National Defence and Security and to immunity and inviolability of the building located at 42 Avenue Foch in Paris. This has been challenged by France that such a claim is tarnished by the abuse of rights. According to France, the Applicant exploited such rights purely and exclusively for the purposes of manipulating the ostensible rights granted, with a view to shielding Mr. Teodoro Nguema Obiang Mangue and his properties from the French criminal proceedings. For France, such use of immunity and inviolability is nothing else than abusive because the purpose of privileges and immunities under the Vienna Convention, which is to safeguard the independence of the State and its representatives abroad, and not to benefit the individuals who enjoy them (Preliminary Objections of the French Republic, paras. 78-80), is completely ignored and manipulated to block the unlawful activities to be brought to justice.

20. The Judgment has found that there has not been enough evidence to establish this contention of France. However, whether this contention of France is justified or not is not the point at issue in the present situation. France's objection on abuse of rights to immunity and inviolability by Equatorial Guinea, if upheld, could arguably result in a total rejection of Equatorial Guinea's claim as an "invalid claim" rather than the procedural interruption of further proceedings of the present case before dealing with the merits aspects of the claim.

21. It is for these reasons that I joined the conclusion of the Court that France's third preliminary objection be rejected in its entirety, without passing any judgment on the validity of the contention of France in its third preliminary objection, which, if sustained, could have much wider legal implications.

(Signed) Hisashi OWADA.