SEPARATE OPINION OF JUDGE *AD HOC* KATEKA

1. I voted in favour of the *dispositif* although I find the provisional measure indicated to be inadequate. Crucially, I do not agree with the Court's conclusion in paragraph 50, namely, that, prima facie, a dispute capable of falling within the provisions of the Convention against Transnational Organized Crime (Palermo Convention) and therefore concerning the interpretation or the application of Article 4 of that Convention does not exist between the Parties. I shall explain my disagreement with the reasoning and conclusion of the Court on prima facie jurisdiction regarding the Palermo Convention. I shall then briefly consider the other requirements for the indication of provisional measures before concluding with a few remarks on the provisional measure that the Court has indicated.

2. The Court rightly states that it may indicate provisional measures only if the provisions relied on by the Applicant appear, prima facie to afford a basis on which its jurisdiction could be founded, but need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case (Order, para. 31, citing *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor Leste* v. *Australia), Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014*, p. 151, para. 18). This is the first condition for granting provisional measures. The second condition is that the rights asserted by a party should be at least plausible[1], and a link must exist between the rights which form the subject of the proceedings before the Court on the merits of the case and the provisional measures being sought[2]. The third condition is that of urgency, in the sense that there is a real and imminent risk that irreparable prejudice may be caused to the rights in dispute before the Court has given its final decision[3].

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[1] *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the* Temple of Preah Vihear (Cambodia *v.* Thailand) *(Cambodia* v. *Thailand), Provisional Measures, Order of 18 July 2011, I.C.J. Reports 2011 (II)*, p. 545, para. 33; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 18, para. 53; *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures, Order of 28 May 2009*, *I.C.J. Reports 2009*, p. 151, paras. 56-57.

[2] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 18, para. 54; *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 151, para. 56.

[3] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 21,

Prima Facie Jurisdiction

3. Prima facie jurisdiction is one of the well-established conditions for the Court to grant provisional measures. It is one of the requirements for the preservation of the respective rights of the parties, pursuant to Article 41 of the Court's Statute. While the Court has discretion whether or not to grant provisional measures, it normally grants such measures, unless the absence of jurisdiction is manifest. Owing to the short time frame for the consideration of provisional measures, there is no detailed argument of fact and law at this stage of the case.

4. I shall not discuss in detail the question of the relationship between prima facie jurisdiction and substantive jurisdiction (on the merits). There is controversy on how far the Court can trespass on the merits in its consideration of prima facie jurisdiction. In the process of indicating measures of protection, the Court may encroach on the rights of the other party and interfere with the latter's sovereign rights and hence prejudge the merits. Thus some judges have argued that when the Court indicates provisional measures, it should have reached the provisional conviction based on a summary examination of the material before it, that it has jurisdiction on the merits *Aegean Sea Continental Shelf (Greece* v. *Turkey), Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976*, pp. 24-25, separate opinion of Judge Mosler). In the case concerning *Passage through the Great Belt (Finland* v. *Denmark)*, the Court refers to Denmark's contention that for provisional measures to be granted it is essential that Finland be able to substantiate the right it claims to a point where a reasonable prospect of success in the main case exists (*Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*, p. 17). Judge Shahabuddeen in his separate opinion in the *Passage through the Great Belt* argues that in his view, Finland was obliged to show a prima facie case in the sense of demonstrating a possibility of existence of the specific right of passage claimed (*ibid.*, p. 31).

5. Some commentators have argued in favour of the independence of the provisional measures proceedings from the mainline case proceedings. In this regard, Rosenne observes that the Court can indicate provisional measures without the presence of judges *ad hoc* even if they have been appointed (Shabtai Rosenne, *The Law and Practice of the International Court 1920-2005*, Vol. III, p. 1443). The same author has argued that the Court cannot speculate as to the merits of the case at the stage of provisional measures (*ibid.*, p. 1425). Thus the Court should avoid the drawback of raising the bar for the existence of prima facie jurisdiction. I am of the opinion that the threshold for prima facie jurisdiction is low.

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para. 64; *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures*, *Order of 28 May 2009, I.C.J. Reports 2009*, pp. 152-153, para. 62.

6. In my view, the Court's summary consideration of the applicability of Article 4 of the Palermo Convention has fallen short of the requisite examination of the question. The Order refers to 13 articles of the Palermo Convention and notes that the obligations under the Convention consist mainly in requiring the States parties to introduce in their domestic legislation provisions criminalizing certain transnational offences (Order, para. 48). The Court states that the purpose of Article 4 of the Convention is to ensure that the States parties to the Convention perform their obligations in accordance with the principles of sovereign equality, territorial integrity of States and non-intervention in the domestic affairs of other States (*ibid.*, para. 49). The Court adds that the provision does not appear to create new rules of customary international law concerning the immunities of holders of high-ranking office in the State or incorporate rules of customary international law concerning those immunities.

7. It is observed that the Court reaches the above position after making a brief summary of the views of the Parties in paragraphs 41 to 46 of the Order. The Court states that the Parties have expressed differing views on Article 4 of the Palermo Convention. But it does not analyse the relevant views of the Applicant in the oral observations before agreeing with the Respondent that any dispute which might arise with regard to "the interpretation or application" of Article 4 of the Convention could relate only to the *manner* in which the States parties perform their obligations under the Convention.

8. In view of the importance and relevance of paragraph 49 to the Court's reasoning it is worth citing the rest of its text. In this paragraph, the Court continues that

> "[i]t appears to the Court, however, that the alleged dispute does not relate to the manner in which France performed its obligations under Articles 6, 12, 14 and 18 of the Convention, invoked by Equatorial Guinea. The alleged dispute, rather, appears to concern a distinct issue, namely whether the Vice-President of Equatorial Guinea enjoys immunity *ratione personae* under customary international law and, if so, whether France has violated that immunity by instituting proceedings against him.» *(Ibid.)*

Then the Court states, as I already indicated in paragraph 1 above that, prima facie, a dispute capable of falling within the provisions of the Palermo Convention and therefore concerning the interpretation or the application of Article 4 of that Convention does not exist between the Parties. The Court then concludes that it does not have prima facie jurisdiction under Article 35, paragraph 2, of the Palermo Convention to entertain Equatorial Guinea's request relating to the immunity of Mr. Teodoro Nguema Obiang Mangue, the Vice-President of Equatorial Guinea.

9. I do not share the Court's view that Article 4 of the Palermo Convention relates only to the manner in which States parties perform their obligations under that Convention. Nor do I agree with the Court's view

that Article 4 does not incorporate rules of customary international law concerning the immunities of holders of high-ranking office in the State. I have referred to the first condition of prima facie jurisdiction which I shall elaborate on by analysing the Palermo Convention.

10. In its consideration of the requirement of prima facie jurisdiction, the Court has interpreted Article 4 to relate only to the manner in which States parties perform their obligations under the Convention. In my view, the Court has not explored Article 4 in its proper context. The Court has not considered the article itself or any of the other articles of the Palermo Convention to any considerable extent. The Court merely cites 13 provisions of the Palermo Convention and then observes that these articles concern the obligations of States parties to criminalize certain transnational crimes (Order, para. 49). As also indicated above, the Court did not deal at length with the views of the Parties made during the oral observations.

11. At the outset it is noted that the legislative history of Article 4 of the Palermo Convention shows that its paragraph 1 is based on Article 2, paragraph 2, of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (Vienna Convention). Article 4 of the Palermo Convention has the title of "Protection of sovereignty" while Article 2 of the Vienna Convention has the title of "Scope of the Convention". This provision as proposed by Canada and Mexico in document E/CONF/82.C.1/L.1 read: "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" (Official Records of the UN Conference for the Adoption of a Convention against Illicit Drugs and Psychotropic Substances, Vienna, 25 November-20 December 1988, UN doc. E/CONF.82/16, Vol. 1). This two-power draft was under the title of scope. In the case of the Palermo Convention, the scope of application is to be found in Article 3 titled "Scope of application". Subparagraph 1 of Article 2 of the Vienna Convention is on the purpose of the Convention. In the case of the Palermo Convention the purpose of the Convention is in Article 1.

12. I am citing these articles in order to show that caution should be taken when comparing the two Conventions even where there is similarity of language in the Conventions' provisions. Thus, even though the language of Article 4, subparagraph 1, of the Palermo Convention is similar to that of Article 2, subparagraph 2, of the Vienna Convention, the two should be looked at by taking into account the relevant circumstances. The drafters of the Palermo Convention were aware that Article 2 (2) of the Vienna Convention has the title of "scope". The fact that they did not adopt the Vienna approach shows that they intended to put a different interpretation to Article 4. In my view, that article is self-standing and can be the basis of obligations for States parties.

13. In the case of Article 4 of the Palermo Convention, the "Legislative Guides for the Implementation of the UN Convention against Transna-

tional Organized Crime and the Protocol Thereto" states that "Article 4 is the primary vehicle for protection of national sovereignty in carrying out the terms of the Convention. Its provisions are self-explanatory." (United Nations, 2005, E.05.V.2, p. 16, para. 33.) On the other hand, the "Commentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988", particularly to Article 2, subparagraph 2, referring to the principles of sovereign equality and territorial integrity states that

> "It would be futile to attempt to draw up a comprehensive catalogue of possible violations of those principles that might result from any arbitrary, indiscriminate application of specific provisions of the Convention. Occurrences that are open to dispute will have to be approached and resolved on a case-by-case basis in the light of the development of international law, taking into account the particular circumstances of each incident." (United Nations, 1998, E/CN.7/590, p. 46, para. 2.18.)

Hence the context is very important when interpreting the two similar provisions to be found in the two Conventions. It bears stressing that Article 4 of the Palermo Convention appears under the title of "Protection of sovereignty" and not under "Scope of the Convention" as in the Vienna Convention. This difference is not accidental but is a deliberate change in the Palermo Convention which was adopted in the year 2000, twelve years after the Vienna Convention.

14. Article 4 provides as follows:

> "*Protection of sovereignty*
>
> 1. 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.
> 2. Nothing 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."

15. In the present case, the relevant provision is Article 4, subparagraph 1. In this regard, the Parties have shown differences in their interpretation of that provision.

16. Equatorial Guinea argues that its claims for respect for the principles of sovereign equality and of non-intervention, and the rules of State immunity that derive from these principles, in particular the immunity from foreign criminal jurisdiction of certain holders of high-ranking office in the State are based on the terms of Article 4 of the Palermo Convention. Equatorial Guinea adds that this article has the effect of incorporating these fundamental principles of the international legal order into the Convention. In Equatorial Guinea's view Article 4 establishes a treaty obliga-

tion to respect these principles when implementing the Convention[4]. Equatorial Guinea stresses that in entertaining criminal proceedings against the Vice-President of Equatorial Guinea, France is prosecuting an alleged crime the criminalization of which is explicitly required by Article 4 of the Palermo Convention. It adds that France is also seeking to implement other provisions of the Convention, for example, Article 12 (Confiscation and seizure), Article 14 (Disposal of confiscated proceeds of crime or property) and Article 18 (Mutual legal assistance)[5].

17. For its part, France argues that Article 4 is a general guideline which clarifies the manner in which the other provisions of the treaty should be implemented. It adds that the object and purpose of the Palermo Convention is not to protect the sovereignty of the States parties in a general sense; nor is it to codify the prohibition of intervention in the internal affairs of other States[6]. France stresses that the reference to these principles in Article 6 indicates the manner in which the other provisions must be applied; it can be used to interpret them, but in no way can it serve as an autonomous basis of the Court's jurisdiction. While contending that the proceedings against the Vice-President were not initiated on the basis of the Palermo Convention[7], France concedes that its request for mutual legal assistance (Article 18 of the Convention) to Equatorial Guinea was done on the basis of the Convention[8].

18. The Vice-President of Equatorial Guinea is charged, *inter alia*, with money laundering, complicity in money laundering, handling of misappropriated public funds, complicity in the misappropriation of public funds, misuse of corporate assets and complicity in misuse of corporate assets and concealment of each of these offences. Thus, France, in some of these charges, is prosecuting an alleged crime, the criminalization of which is required by Article 6 of the Palermo Convention — criminalization of the laundering of proceeds of crime. This title to Article 6, according to the interpretative notes, set out in the "*Travaux Préparatoires* of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto", is understood to be equivalent to "money laundering" (United Nations, 2006, 06.V.5, p. 62). This crime falls within the scope of application of the Palermo Convention under Article 3 (1), because it is not only an offence established in accordance with one of the offences listed, namely that of "laundering the proceeds of crime" under Article 6 of the Convention, but is also a "serious crime"[9], among offences established in accordance with Articles 5, 6, 8 and 23 of the Convention.

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[4] CR 2016/16, p. 11, paras. 11-13.
[5] *Ibid.*, p. 13, para 18.
[6] CR 2016/15, pp. 21-22, paras. 11-12.
[7] *Ibid.*, p. 22, para 13.
[8] Request for the indication of provisional measures by the Republic of Equatorial Guinea, Annex 1, Referral Order of 5 September 2016, p. 29.
[9] Which means conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty, Article 2 *(b)* of the Palermo Convention.

19. In my view this crime of money laundering falls into the category of crimes that are transnational in nature — Article 3 (1) *(b)* — because of the involvement of several companies from different countries, such as Equatorial Guinea (for example, Somagui Forrestal), five companies from Switzerland[10], and several companies based in France (such as Sarl Foch Services). Regarding the requirement of an "organized criminal group", which is defined as a structured group of three or more persons — Article 2 *(a)* — it is noted that some of the offences brought against the Vice-President include "complicity" in money laundering. According to the *Oxford English Dictionary*, "complicity" means the fact or condition of being involved *with others* in an unlawful activity. Thus the criterion for an "organized criminal group" is met because it takes more than one person for there to be complicity. In case of any doubt, the situation is clarified by the interpretative notes of Article 2 *(a)*, concerning organized criminal group, which are set out in the "*Travaux Préparatoires* of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto (United Nations, 2006, 06.V.5, p. 62). The notes state that the inclusion of a specific number of persons in the definition of organized criminal group would not prejudice the rights of States parties pursuant to Article 34 (3) of the Palermo Convention. That article states that "[e]ach State party may adopt more strict or severe measures than those provided for by the Convention for preventing and combating transnational organized crime". One can infer from this analysis of the Palermo Convention that fewer persons than those mentioned in Article 2 *(a)* would not affect the application of the Convention. Hence, Article 4 whether on its own or in combination with other articles of the Convention, such as Article 6, provides the basis for the Court's jurisdiction.

20. As for the procedural conditions set out in Article 35 (2) of the Palermo Convention (Order, para. 38), I am of the view that these conditions are met because France categorically refused to negotiate with Equatorial Guinea for the settlement of the dispute in spite of the numerous offers by the Applicant to settle the dispute. Paragraph 56 of the Order refers to Equatorial Guinea's Application[11] concerning the diplomatic exchanges aimed at settling the dispute. It is stated clearly that on 17 March 2016, the French Ministry of Foreign Affairs responded that it was "unable to accept the offer of settlement by the means proposed by the Republic of Equatorial Guinea" on the grounds that "the facts mentioned . . . have been the subject of court decisions in France and remain the subject of ongoing legal proceedings"[12].

[10] It is alleged by the indictment that these companies belong to the Vice-President as sole shareholder.

[11] Application instituting proceedings filed on 13 June 2016 by the Republic of Equatorial Guinea, against the French Republic.

[12] *Ibid.*, Ann. 13.

21. In light of the above, I am of the opinion that, prima facie, a dispute capable of falling within the provisions of the Palermo Convention and thus concerning the interpretation or application of Article 4 of the Convention, exists between the Parties. Pursuant to Article 35 (2) the Court should have entertained the request by Equatorial Guinea relating to the immunity *ratione personae* of the Vice-President.

22. As the Court examined only the question of prima facie jurisdiction, I shall briefly look at the other requirements for the indication of provisional measures in order to complete the picture.

Plausible Character of the Alleged Rights and Their Link to the Measures Sought

23. The second condition that has to be met for the granting of provisional measures is that the rights asserted by a party should be at least plausible[13]. Equatorial Guinea argues that the Vice-President enjoys immunity *ratione personae* in his capacity of being in charge of National Defence and State Security and as such the criminal proceedings against him constitute a violation of international law. This request reflects the claim that the proceedings in France violate Equatorial Guinea's right to respect for the principles of sovereign equality and non-intervention from which the right to respect for the immunity its Vice-President derives[14]. It is observed that the status of the immunity of the Vice-President is a matter for the merits. It suffices for the purposes of the provisional measures stage, to assess whether this right exists plausibly.

24. The immunity of the Vice-President of Equatorial Guinea flows from the principles of sovereign equality and non-intervention as established in Article 4 of the Palermo Convention. In the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)* case, it was held that:

> "in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, *such as* the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal" (*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, pp. 20-21, para. 51 (emphasis added)).

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[13] *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the* Temple of Preah Vihear (Cambodia *v.* Thailand) *(Cambodia* v. *Thailand) Provisional Measures, Order of 18 July 2011, I.C.J. Reports 2011 (II)*, p. 545, para. 33; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 18, para. 53; *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 151, paras. 56-57.

[14] CR 2016/14, p. 25, para. 18.

This dictum was reaffirmed in the *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France)* case, which reiterated that "certain holders of high-ranking office in a State . . . enjoy immunities from jurisdiction in other States" (*Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, pp. 236-237, para. 170).

25. The Vice-President of Equatorial Guinea is number two in the Government. He is above the Prime Minister. He is thus entitled to immunity *ratione personae*. I am of the view that the provisional measures requested by Equatorial Guinea are linked to the rights which are the object of the case. The request to suspend the criminal proceedings reflects the claim that these proceedings violate the right to respect the principles reflected in Article 4 of the Palermo Convention. Therefore there is a plausible right to immunity for the Vice-President under the Palermo Convention.

Risk of Irreparable Prejudice and Urgency

26. The final criterion that has to be met in order for the Court to indicate provisional measures is that of urgency, in the sense that there is a real and imminent risk that irreparable prejudice may be caused to the right in dispute before the Court has given its final decision[15]. Given that the Court has prima facie jurisdiction on this issue and that the Vice-President indeed enjoys immunity *ratione personae* from criminal jurisdiction as a "holder of high-ranking office in a State", it will now be shown that there is a real and imminent risk that irreparable prejudice may be caused to this immunity.

27. It is clear that there is a real and imminent risk that irreparable prejudice will be caused to the rights in dispute. Following the Order of 5 September 2016 by the investigating judges, the Paris *Tribunal correctionnel* has fixed dates in January 2017 for the criminal trial against the Vice-President. Counsel for France during the oral observations gave an explanation of the French criminal proceedings. He contended that the trial in France would take years. The appeal process was long in France. He speculated that the Vice-President may not be summoned to appear in person; that he may not be given a custodial sentence. Such arguments do not take away the fact that the Vice-President will be tried in contravention of his immunity *ratione personae*. Irreparable prejudice will be done to the rights of Equatorial Guinea.

[15] *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia), Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014*, p. 154, para. 32; *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, pp. 152-153, para. 62.

28. In its oral observations, France attempted to downplay the position of the Vice-President and his functions. Counsel ranked the Vice-President along with other Ministers. He argued that the Vice-President's functions are not the same as those of the Minister for Foreign Affairs. But as already explained above the Vice-President is number two in the Government. Being in charge of defence and State security indicates that these portfolios are aspects of foreign policy. His functions require him to travel often. His functions would thus be compromised by the ongoing criminal proceedings. It is clear from the decision of 24 October 2016 that the criminal proceedings will continue early next year. There is urgency and the rights of Equatorial Guinea will suffer irreparable prejudice if the measure requested is not ordered.

The Provisional Measure Indicated by the Court

29. The Court has indicated a provisional measure concerning the premises of the diplomatic mission of Equatorial Guinea. The measure states that

> "France shall, pending a final decision in the case, take all measures at its disposal to ensure that the premises presented as housing the diplomatic mission of Equatorial Guinea at 42 Avenue Foch in Paris enjoy treatment *equivalent* to that required by Article 22 of the Vienna Convention on Diplomatic Relations, in order to ensure their inviolability" (Order, para. 99; emphasis added).

30. I find the way the measure is framed to be inadequate. I do not understand the meaning of the term "equivalent". Does it imply treatment less than is required by the 1961 Vienna Convention? Article 22 of the Vienna Convention is very clear. The premises of the mission shall be inviolable. The provision adds that the receiving State is under a special duty to take all appropriate steps to protect the mission against any intrusion. In paragraph 89 of the Order, the Court notes that the premises of the Embassy have been searched a number of times in the context of the proceedings brought against the Vice-President and that "it is not inconceivable that the building on Avenue Foch will be searched again". Given this possibility the Court should have issued a measure that is unequivocal as requested by Equatorial Guinea (*ibid.*, para. 17), namely, that "France ensure that the building located at 42 Avenue Foch in Paris is treated as premises of Equatorial Guinea's diplomatic mission in France and, in particular, assure its inviolability . . .".

(*Signed*) James L. Kateka.