SEPARATE OPINION OF JUDGE YUSUF

I voted against the operative paragraph of the Order due to its legally unsound approach — The approach is regrettably arbitrary in passing over the necessary decision on the Court's prima facie jurisdiction — While the different conditions for provisional measures are cumulative, there are some interrelationships among them — Prima facie jurisdiction is a precondition for the determination of all other conditions — The finding that Equatorial Guinea does not possess a plausible right to the return of the building constitutes a misinterpretation of Article 57, paragraph 3 (c)*, of the Merida Convention — This provision does not prescribe "possibilities" — It establishes the elements of the obligation for the requested State party — Only an obligation can create corresponding rights for the requesting State party — The requested State party must give priority to at least one of those elements — The finding also prejudges the merits and prematurely disposes of the entire case presented by Equatorial Guinea — An order on provisional measures is used by the Court to dismiss the most important substantive right claimed by an applicant not only in its request for such measures but also in its application.*

I. INTRODUCTION

1. Is it a judicial "innovation" or a temporary glitch in the jurisprudence of the Court? The question may be asked regarding the decision of the Court in the present Order for the following reasons. One: an applicant comes before the Court with a request for the indication of provisional measures, the respondent objects, *inter alia*, because of the Court's lack of jurisdiction. The Court goes ahead and rules on the request without ascertaining whether it has jurisdiction or not. Glitch or "innovation"? Two: an order on provisional measures is used by the Court to dismiss, through misconstrued plausibility of rights, the most important substantive right claimed by an applicant not only in its request for such measures but also in its application, thus prejudging the merits and practically disposing of the entire case without explicitly stating that. Glitch or "innovation"? Similar episodes have occurred recently in the Orders of the Court in *Embassy of Mexico in Quito (Mexico* v. *Ecuador)* and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in Sudan (Sudan* v. *United Arab Emirates)*. In these cases, also, the question could be asked: was it judicial "innovation" or a temporary glitch? I personally hope they were a temporary jurisprudential glitch because nobody wishes to see the Court come up with a legally unsound judicial "innovation" instead of its normally solid and consistent jurisprudence. This is particularly important in the case of orders on provisional measures.

2. In the present case, I voted against the operative paragraph of the Order due to its legally unsound approach. Two reasons stand out. First, I find the Court's approach regrettably arbitrary in passing over the necessary decision on its prima facie jurisdiction, which is a precondition for the exercise of the Court's power under Article 41, paragraph 1, of the Statute (see Section II). Secondly, I am of the view that the finding of the Court that Equatorial Guinea does not possess a plausible right to the return of the building constitutes a misinterpretation of Article 57, paragraph 3 *(c)*, of the United Nations Convention against Corruption adopted by the General Assembly on 31 October 2003 (hereinafter the "Merida Convention" or the "Convention") and that it also prejudges the merits and prematurely disposes of the entire case presented by Equatorial Guinea (see Section III).

II. ABSENCE OF DECISION ON PRIMA FACIE JURISDICTION

3. Pursuant to Article 41, paragraph 1, of the Statute of the Court, the Court "shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party". In particular, on a request for provisional measures, the Court "ought not to indicate such measures unless the provisions invoked by the

Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded" (see, for example, *Nuclear Tests (Australia* v. *France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973*, p. 101, para. 13; *Nuclear Tests (New Zealand* v. *France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973*, p. 137, para. 14).

4. Even when the requested provisional measures are rejected because of the absence of one of the conditions for their indication — such as the plausibility of the right for which the protection is sought, or the risk of irreparable prejudice and urgency — a discussion of prima facie jurisdiction remains indispensable, as it is a precondition for the Court's exercise of its power under Article 41, paragraph 1, of the Statute. For instance, in its Order of 14 June 2019 on provisional measures in the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates)*, although the Court rejected the provisional measures requested by the United Arab Emirates solely on the ground of plausibility, it nonetheless devoted two paragraphs to the examination of its jurisdiction prima facie (*I.C.J. Reports 2019 (I)*, p. 367, paras. 15-16, and pp. 369-371, paras. 25-28). Likewise, in *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation)*, while the Court dismissed the provisional measures requested by Ukraine under the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999 (hereinafter the "ICSFT") on the sole ground that the evidence did not afford a sufficient basis to establish the plausibility of the rights claimed by the applicant, it nevertheless found that, prima facie, it had jurisdiction pursuant to Article 24, paragraph 1, of the ICSFT (*Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, p. 126, para. 62, and pp. 131-132, paras. 75-76).

5. The only exception so far was in the Order of 23 May 2024 on provisional measures in the case concerning *Embassy of Mexico in Quito (Mexico* v. *Ecuador)*, in which the Court decided to confine its reasoning to a single condition for the indication of provisional measures — namely urgency (*I.C.J. Reports 2024 (II)*, pp. 621-623, paras. 28-35). Nonetheless, as Judge Nolte observed in his declaration, while the different conditions for provisional measures are cumulative, there are some interrelationships among the conditions — they build and depend on each other. In particular, prima facie jurisdiction is a precondition for the determination of all other conditions and hence cannot be ignored and superseded by the finding of absence of other conditions (see *ibid.*, declaration of Judge Nolte, pp. 629 and 630-231, paras. 2 and 5).

6. The status of prima facie jurisdiction as a precondition finds expression in the Court's earlier decisions prior to its crystallization in *Nuclear Tests (Australia* v. *France)* and *Nuclear Tests (New Zealand* v. *France)* in 1973 (see paragraph 3 above). In *Anglo-Iranian Oil Co. (United Kingdom* v. *Iran)*, the very first case where provisional measures were indicated, the Court stated in its Order of 5 July in 1951 that "it cannot be accepted *a priori* that a claim based on such a complaint falls completely outside the scope of international jurisdiction" (*Interim Protection, Order of 5 July 1951, I.C.J. Reports 1951*, p. 93). In its second and third cases where provisional measures were indicated, namely *Fisheries Jurisdiction (United Kingdom* v. *Iceland)* and *(Federal Republic of Germany* v. *Iceland)* in 1972, the Court considered:

> "Whereas on a request for provisional measures the Court need not, before indicating them, finally satisfy itself that it has jurisdiction on the merits of the case, yet it ought not to act under Article 41 of the Statute if the absence of jurisdiction on the merits is manifest." (*Fisheries Jurisdiction (United Kingdom* v. *Iceland), Interim Protection, Order of 17 August 1972, I.C.J. Reports 1972*, p. 15, para. 15; *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Interim Protection, Order of 17 August 1972, I.C.J. Reports 1972*, p. 33, para. 16.)

7. In the present case, Equatorial Guinea made extensive submissions on prima facie jurisdiction, including the prior negotiation requirement and existence of a dispute (CR 2025/13, pp. 26-34, paras. 1-30 (Francisco Moro Nve Obono)). France, on the other hand, raised objections because of the absence, in its view, of a dispute between the parties under the Merida Convention (CR 2025/14, pp. 20-21, paras. 8-10 (Hervé Ascensio)) and because of the lack of satisfaction of the prior negotiation requirements under Article 66 of the Convention (*ibid.,* p. 21, paras. 11-12 (Hervé Ascensio)). Nevertheless, the Court decided to overlook the necessity to ascertain in the first place whether it had prima facie jurisdiction in the present case and to act as though there was no requirement for it to decide on its jurisdiction before ruling on the request of Equatorial Guinea. Let us hope it is a temporary glitch. There is nothing to indicate that the Court could have assumed that it had automatic jurisdiction.

III. MISINTERPRETATION OF ARTICLE 57, PARAGRAPH 3 *(C)*, OF THE CONVENTION AND PREJUDGMENT OF THE MERITS AND OF THE FINAL OUTCOME OF THE ENTIRE CASE

A. Misinterpretation of Article 57, paragraph 3 *(c)*

8. With regard to the plausibility of rights requirement for the indication of provisional measures, it is a well-established jurisprudence of the Court that the Court is not called upon to determine definitively whether the rights which the applicant wishes to see protected exist. Rather, it need only decide whether the rights claimed by the applicant on the merits, and for which it is seeking protection, are plausible (see, for example, *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016 (II)*, p. 1167, para. 78; *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. 153, para. 26). In particular, in cases where a compromissory clause of a treaty has been invoked, the asserted rights must be "grounded in a possible interpretation" of the relevant instrument (*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. 152, para. 60).

9. In the present Order, the Court in paragraph 49 addresses what it refers to as the "three possibilities" under Article 57, paragraph 3 *(c)*, of the Convention — "(i) the return of such property to the requesting State party; (ii) the return of such property to its prior legitimate owners; or (iii) the provision of compensation to the victims of the crime". By referring to "possibilities", the Court is actually saying that there are no obligations under Article 57, paragraph 3 *(c)*, of the Convention, but only possibilities of action to be envisaged by the requested State party. If, as asserted by the Court, only various "possibilities" were provided for under Article 57, paragraph 3 *(c)*, of the Convention, there would actually be no corresponding rights for the requesting State party. Equatorial Guinea could not, in such a case, be expected to demonstrate that it possesses a possible right to the return of the building, as stated in the Order. Possibilities cannot have corresponding rights. It is only obligations that have corresponding rights in law.

10. Moreover, the reasoning of the Court completely ignores the *chapeau* of Article 57, paragraph 3 *(c)*, which provides that the requested State party "shall", "[i]n all other cases, give priority consideration to" one of the alternative elements of its obligation indicated therein. Indeed, this obligation may be fulfilled by the requested State party by returning confiscated property to the requesting State party, or by returning such property to its prior legitimate owners or by compensating the victims of the crime. However, these are all elements of the same obligation prescribed by Article 57, paragraph 3 *(c)*, and the requested State party is under an obligation to give priority to at least one of them. It cannot, however, reject them or ignore them. It has a limited discretionary power.

Therefore, the indication of such priority by the requested State is, in my view, subject to subsequent negotiations and discussions by the two States or to judicial review.

11. I find it therefore surprising that the Court misinterprets a clear obligation in the Convention as "possibilities", which have no legal meaning, and on that basis rejects Equatorial Guinea's right to request the return of the building under Article 57, paragraph 3 *(c)*. Of course, the requested State may give priority to an alternative element, but that is only a bounded discretion and cannot be interpreted to mean that the requesting State does not possess a right to the return of the building, which is one of the elements indicated in the provision, or waive the obligation of the requested State under this provision of the Convention. It should also be recalled that Article 51 of the Convention — which is the first provision of Chapter V and is entitled "General Provision" — clearly provides that "[t]he return of assets pursuant to this chapter is a fundamental principle of this Convention, and States Parties shall afford one another the widest measure of cooperation and assistance in this regard". The Court seems to have overlooked this general provision in the context of which Article 57, paragraph 3 *(c)*, must also be interpreted.

B. Prejudging the merits of the case and its final outcome

12. The relatively flexible threshold of the plausibility of rights requirement is consistent with the nature of incidental proceedings, in which the merits of the case ought not to be prejudged at this stage. It is also evidenced by the fact that the Court has seldom rejected requests for provisional measures solely on that basis. In the few instances it has done so, the rejection stemmed either from a lack of evidence indicating the plausibility of factual elements related to the asserted rights, or from the circumstance that the request made by the respondent State bore a remote link to the rights at issue in the dispute.

13. In *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan* v. *Armenia)*, the Court declined certain requested provisional measures by Azerbaijan in relation to landmines solely on the ground of plausibility, finding that it did not "consider that CERD plausibly imposes any obligation on Armenia to take measures to enable Azerbaijan to undertake demining or to cease and desist from planting landmines". Nevertheless, the Court explained that this was because Azerbaijan had not placed before the Court

> "evidence indicating that Armenia's alleged conduct with respect to landmines has 'the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing', of rights of persons of Azerbaijani national or ethnic origin" (*Provisional Measures, Order of 7 December 2021, I.C.J. Reports 2021*, p. 425, para. 53).

14. Likewise, in *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation)*, the Court declined those provisional measures as requested by Ukraine under the ICSFT solely on the basis of plausibility, considering that "Ukraine has not put before the Court evidence which affords a sufficient basis to find it plausible that these elements are present" (*Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, pp. 131-132, paras. 75-76). These were, however, factual elements and not legal ones.

15. On the other hand, in the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates)*, when the United Arab Emirates in turn submitted a request for the indication of provisional measures for its

procedural rights and non-aggravation of the dispute, the Court observed that the first and second provisional measures requested by the United Arab Emirates did not concern a plausible right under the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965. It also decided that the third and fourth provisional measures could only be indicated as an addition to specific measures indicated by the Court to protect rights of the parties (*Provisional Measures, Order of 14 June 2019, I.C.J. Reports 2019 (I)*, pp. 369-371, paras. 25-28).

16. In the present case, however, the Court reaches the conclusion in paragraph 50 of the Order that "Equatorial Guinea has not demonstrated . . . that it possesses a plausible right to the return of the building located at 42 avenue Foch in Paris, on the basis of the provision it invokes in that respect". This constitutes a finding of law under Article 57 of the Merida Convention. It should be recalled that Article 57 forms not only the basis of the provisional measures requested by Equatorial Guinea but also the central provision underlying the proceedings instituted by Equatorial Guinea. In its Application instituting proceedings dated 29 September 2022, the substantive section addressing France's alleged breach of its obligations under the Convention is grounded in Article 57. Moreover, the submissions set out at the conclusion of the Application seek the return of the building located at 42 avenue Foch — a request that is inherently linked to, and indispensable for, the provisional measures concerning its non-sale. In this regard, the conclusion of the Order and its reasoning in paragraphs 49 and 50 not only misinterpret Article 57, paragraph 3 *(c)*, but also prejudge the merits. In effect, by finding, already at this stage of the proceedings, that the most important substantive right claimed by Equatorial Guinea in its Application is not plausible without examining any facts or evidence and by misreading the relevant provisions of the Convention, the Order virtually dismisses the case in its entirety.

17. In deciding to rely solely on the plausibility of rights as a condition for the indication of provisional measures and in concluding that Equatorial Guinea does not possess a plausible right to the return of the building located at 42 avenue Foch in Paris, the Court has practically disposed of the case in its entirety. This is the first time that the Court disposes of the merits of a case through an order on provisional measures. It is somehow similar to the decision of the Court in the Order on provisional measures in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in Sudan (Sudan* v. *United Arab Emirates)*, in which the Court decided to use its lack of prima facie jurisdiction not only to deny a hearing of the parties on jurisdiction but also to remove the entire case from the List (*Provisional Measures, Order of 5 May 2025*, paras. 35 and 37). In both instances we have not only a departure, through these Orders, from the established jurisprudence of the Court, but also a disregard for the proper limits of the exercise of the statutory power to indicate provisional measures. Is it a temporary glitch or a judicial "innovation"? Time will tell.

(Signed) Abdulqawi Ahmed YUSUF.