

## DECLARATION OF JUDGE NOLTE

1. I agree with the decision of the Court to reject the present Request for the indication of provisional measures. I write separately to make one observation on the reasoning of the Order.

2. The Court finds that Article 57, paragraph 3 (*c*), of the Convention against Corruption “suggests that the requested State party has some discretion as to the course of action ultimately adopted” and it “observes that the return of the confiscated property to the requesting State party is, as a general rule, only one of the possibilities to which the requested State party ‘shall . . . give priority consideration’ in performing the obligation incumbent upon it under Article 57, paragraph 3 (*c*)” (Order, para. 49).

3. The inclusion of the phrase “as a general rule” indicates that there may be situations in which the discretion normally available to the competent authority of the requested State to choose between the different courses of action envisaged in Article 57, paragraph 3 (*c*), is limited to the extent that only one of these possibilities may reasonably be exercised under the circumstances. It is accepted in various domestic legal systems that the power of a competent public authority to exercise discretion is subject to considerations of reasonableness or proportionality<sup>1</sup>. Such considerations may, in certain cases or situations, lead to the conclusion that only one of the generally available courses of action is reasonable or proportionate under the circumstances.

4. In making this observation, I do not wish to express a position on whether such a case or situation is present here. This is a question that may be relevant at the merits stage. For the purposes of the present phase of the proceedings, it is, in my view, sufficient for the Court to have found, after “closely examining the [factual and legal] arguments of the Parties”, “that Equatorial Guinea has not demonstrated, in the course of these incidental proceedings concerning the indication of provisional measures, that it possesses”, under the circumstances, “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” (Order, para. 50).

(Signed) Georg NOLTE.

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<sup>1</sup> See e.g. Hanna Wilberg, “Judicial Review of Administrative Reasoning Processes”, in *The Oxford Handbook of Comparative Administrative Law*, Cane et al. (eds.), Oxford University Press, 2020, pp. 859-874; Jud Mathews, “Reasonableness and Proportionality”, *ibid.*, p. 918.