SEPARATE OPINION OF JUDGE OWADA

1. I have voted in favour of the Order in support of all points contained in its operative paragraph 106. I also agree with the Court's decision not to grant Ukraine's request for provisional measures concerning the International Convention for the Suppression of the Financing of Terrorism (ICSFT). Nevertheless, I have arrived at the same conclusion of the Order on the ICSFT through a different path. In particular, it is my considered view that the rights claimed by Ukraine under the ICSFT are plausible, but that there is no real and imminent risk at this moment that irreparable prejudice will be caused to those rights.

I. The Nature of the Conditions for Provisional Measures

2. While the term "plausible" has come to be accepted as a standard term for referring to a certain element within the purview of an examination of whether provisional measures can be granted or not, a proper understanding of the nature of the plausibility requirement should start with an examination of what Article 41, paragraph 1, of the Statute of the Court provided on this issue. This paragraph provides: "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."

3. The rationale of this provision is explained in the recent Order on the Request for the indication of provisional measures of protection in the *Georgia* v. *Russia* case of 2008 as follows:

> "the power of the Court to indicate provisional measures under Article 41 of the Statute of the Court has its object the preservation of the respective rights of the parties pending the decision of the Court, in order to ensure that irreparable prejudice shall not be caused to rights which are the subject of dispute in judicial proceedings; . . . it follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by the Court to belong either to the Applicant or to the Respondent" (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008*, pp. 388-389, para. 118).

4. While a facile analogy of this legal institution with similar institutions in private law should naturally be carefully avoided, given that the specific purposes for which a legal institution similar in name could be considerably different, it is important to recognize that the *rationale* for this institution introduced in the Statute of the Court finds resonance in similar institutions stipulated in a number of domestic legal systems, such as the institution of an "interlocutory injunction" under common law. In the doctrine of common law it is explained that the usual purpose of an interlocutory injunction is "to preserve the *status quo* until the rights of the parties have been determined in the action". To grant such an injunction, the principal elements to be applied are summarized as follows: (1) the plaintiff must establish that he had *a good arguable claim* to the right he seeks to protect; (2) it is enough that the plaintiff shows that there is *a serious question to be tried*; and (3) if the plaintiff satisfies these tests, the grant or refusal of an injunction is a matter of *the Court's discretion* on the balance of convenience" (*The Supreme Court Practice, 1995*, Vol. 1, Part 1, (London, 1994), p. 514; emphasis added). The precise requirements for provisional relief, naturally, vary across different legal systems, but the rationale for this institution can be regarded as being aptly summarized in this formulation.

5. As far as the jurisprudence of this Court is concerned, the Court has consistently held that "(1) it may indicate provisional measures if certain requirements, such as the provisions relied on by the Applicant appear, prima facie, to afford a basis on which its jurisdiction could be founded" (see *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016 (II)*, p. 1155, para. 31); (2) "the rights asserted by the party requesting provisional measures are at least plausible in the sense that a link must exist between the rights which form the subject of the proceedings and the provisional measures being sought" (see *ibid.*, pp. 1165-1166, paras. 71-72); (3) "irreparable prejudice can be caused to the rights which are the subject of judicial proceedings" (see *ibid.*, p. 1168, para. 82); and (4) "there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to the rights before the Court gives its final decision" (see *ibid.*, para. 83).

6. While all these elements are required in order for the Court to be able to indicate provisional measures, a distinction could be observed between the first two elements (prima facie jurisdiction and plausibility) and the last two elements (risk of irreparable prejudice and urgency) in their legal character.

7. The first two requirements relate to the scope of the legal framework in which the Court is entitled to exercise its power under Article 41 to indicate provisional measures. Thus, in order for the Court to be able to indicate provisional measures that "preserve the respective rights of either party" the Court must ascertain that jurisdiction to deal with the alleged rights exists, at least prima facie, on the basis of the Convention in ques-

tion, and that the rights whose protection is sought must exist on the basis of the provisions prescribed in the Convention. There must be a link between the rights whose protection is sought and the measures requested. These are legal requirements that the Court must satisfy before exercising its power to indicate provisional measures of protection.

8. The last two requirements, on the other hand, belong to the *discretionary power* that the Court can exercise in determining whether to indicate provisional measures or not. They flow directly from the Court's power to indicate provisional measures "if it considers that circumstances so require". On these questions the Court has the discretion to determine what these circumstances are, but such power does not extend to the first two requirements which are prescribed by the legal scope of the institution.

9. This distinction is not merely academic. It carries significant consequences in relation to the thesis that provisional measures of protection should not amount to a prejudgment of the case. There is no question that the Court's Order on the indication of provisional measures should never prejudge and determine any question relating to the final determination on jurisdiction of the Court, the admissibility of the Application, and especially any aspect of the merits of the dispute. The first two requirements thus should carry a great weight in order to avoid the danger of falling into a prejudgment and an infringement of their final decision, at the stage of these preliminary proceedings, which is incidental to the main proceedings on the merits.

II. The Standard of Plausibility

10. In light of this understanding on the nature of the conditions for provisional measures, the so-called "test of plausibility" of the existence of the asserted rights — which, in my view, is a shorthand term to refer to the condition that "a link must exist between the right whose protection is sought and the measures requested — cannot and should not be as high as it would be the case with the test of "prima facie case" for the existence of such asserted rights. This low requirement of the threshold should only be obvious, if regard is had to the point that the determination on whether the rights are plausible should not prejudge the merits of the dispute. In other words, it could and should merely indicate whether there is some arguable possibility — be it high or low — that the asserted rights exist, justifying the exercise of the Court's power to indicate provisional measures. If, on the other hand, this standard were too high, a determination on whether the right is plausible could risk resulting in a prejudgment of the merits of the dispute. A negative determination that the rights in question would not be plausible, could suggest a conclusion at this stage that the asserted rights could not exist under the Convention, leading to a conclusion, in fact if not in law, that the Court would be prevented, from embarking upon further examination of the legal validity of the

asserted rights under the Convention in question. Such prejudgment would clearly be inappropriate in light of the fact that, at the stage of provisional measures, the parties have not had sufficient opportunity to furnish all the evidence to establish their arguments in full, nor the Court has had sufficient opportunity to consider the totality of the evidence and arguments that the parties would like to present at the merits stage.

11. The correctness of this understanding on the standard of plausibility is borne out by the jurisprudence of the Court. Although the Court formally introduced this requirement into its Order as an express terminology for the first time in *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. 57), it is my understanding that this formal introduction did nothing more than making explicit what had long been implicit in the jurisprudence of the Court and its predecessor, the PCIJ. Over the course of this implicit and explicit history of the issue of "plausibility" in the jurisprudence of the Court and its predecessor, the requirement of plausibility has been consistently understood to be at a reasonable level in light of the nature of the exercise.

12. This understanding can already be seen in the discussion of the issue in the PCIJ days, such as in the case concerning *Polish Agrarian Reform and German Minority [Germany* v. *Poland]* before the Permanent Court of International Justice. In his opinion to the Order on interim measures of protection in that case, Judge Anzilotti remarked:

> "If the *summaria cognitio*, which is characteristic of a procedure of this kind, enabled us to take into account the *possibility* of the right claimed by the German Government, and the *possibility* of the danger to which that right was exposed, I should find it difficult to imagine any request for the indication of interim measures more just, more opportune or more appropriate than the one which we are considering." (*Interim Measures of Protection, Order of 29 July 1933, P.C.I.J., Series A/B, No. 58*, p. 181; emphasis in the original.)

13. The same understanding can also be seen much more recently in the case concerning *Passage through the Great Belt (Finland* v. *Denmark)* before this Court. In his opinion to the Order on provisional measures, Judge Shahabuddeen, after exhaustively analysing the precedents of this Court and its predecessor, stated on this point as follows:

> "[I]n measuring the danger of prejudgment, it has to be borne in mind that what the Court is considering is not whether the right sought to be preserved definitively exists, but whether the requesting State has shown *any possibility* of its existence." (*Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*, p. 30; emphasis added.)

14. Admittedly, when the Court introduced the plausibility requirement in express terms in *Questions relating to the Obligation to Prosecute or Extradite*, the choice of the word "plausible" may not have made the standard sufficiently precise. The term "plausible" is not a term of art that exists in the legal science but a term used in common life, as signifying "seeming reasonable and probable" and could be held to be synonymous to "likely, believable", as well as "specious, meretricious" (*Oxford Dictionary* and *Thesaurus*). The *Oxford English Dictionary* defines "plausible" as "seeming reasonable, probable, or truthful; convincing, believable". The *Merriam-Webster Dictionary* defines it as "superficially fair, reasonable, or valuable but often specious; superficially pleasing or persuasive; appearing worthy of belief". And the *Larousse Dictionary* defines *"plausible"* as *"qui semble pouvoir être admis, accepté, tenu pour vrai"*. As a result, the word alone could be seen as indicating a low or high standard.

15. Nevertheless, the Court's choice of the word "plausible" reveals that the Court at the very least wished to distinguish it from the "prima facie" standard that applies for jurisdiction. As Judge Shahabuddeen noted in the *Passage through the Great Belt (Finland* v. *Denmark)*:

> "Judge Anzilotti's formula, referred to above, appears to be potentially less productive of any risk of prejudgment than the prima facie test, as commonly understood; and I prefer it." (*Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*, p. 36.)

16. It is important to note that the Court's jurisprudence on the requirement since the Order in *Questions relating to the Obligation to Prosecute or Extradite*, when this terminology was introduced, reveals that the standard applied has always been fairly low. This can be seen first and foremost by the fact that, aside from the present Order, the Court has always found the rights in question to be plausible. Today is the first time that the Court has found that a right does not meet the plausibility requirement.

17. In the recent case law, the Court has employed languages indicating a standard of plausibility that has been adopted above in explaining why certain rights were "plausible". In *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, the Court held that the right in question was plausible because it was "grounded in a *possible interpretation*" of the Convention against Torture (*Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 152, para. 60, emphasis added). And in *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia)*, the Court held that one

of the rights in question was plausible because it *"might be derived"* from the principle of the sovereign equality of States (*Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014*, p. 153, para. 27, emphasis added). The use of the words "possible" and "might" confirms that the standard is fairly low.

18. Moreover, at least, on one occasion the Court seems to have suggested that the degree of certainty required to find a right plausible could be thus lower than fifty per cent in the context of the asserted rights of the opposing party. In *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)*, the Court held:

> "Whereas it appears to the Court, after a careful examination of the evidence and arguments presented by the Parties, that the title to sovereignty claimed by Costa Rica over the entirety of Isla Portillos is plausible; whereas the Court is not called upon to rule on the plausibility of the title to sovereignty over the disputed territory advanced by Nicaragua." (*Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 19, para. 58.)

19. If "plausibility" were to imply a degree of certainty greater than fifty per cent, then a finding that Costa Rica's claim was plausible would necessarily imply that Nicaragua's claim was not plausible. Therefore, based on this passage, the Court appeared to consider that "plausibility" could be a certainty of fifty per cent or less.

20. In light of this jurisprudence, and in light of the nature of this requirement of so-called "plausibility" as discussed above, it is my considered view that the standard of plausibility is, and must be, fairly low. The question to be asked should therefore be that of whether an asserted right is "possible" or "arguable" that it exists.

III. The Plausibility of the Rights Asserted by Ukraine under the ICSFT

21. Applying this analysis, I come to the conclusion that the rights asserted by Ukraine concerning the ICSFT should be held to be plausible.

22. I agree with the Court's finding that "the obligations under Article 18 and the corresponding rights are premised on the acts identified in Article 2" in this final analysis. However, I do not accept the view of the majority that, in the same paragraph,

> "in the context of a request for the indication of provisional measures, a State party to the Convention [ICSFT] may rely on Article 18 to require another State party to co-operate with it in the prevention of

> certain types of acts *only if it is plausible that such acts constitute offences under Article 2 of the ICSFT*" (Order, para. 74, emphasis added)

and that

> "in order to determine whether the rights for which Ukraine seeks protection are at least plausible, it is necessary to ascertain whether there are sufficient reasons for considering that the other elements set out in Article 2, paragraph 1, such as the elements of intention or knowledge noted above [. . .] and the element of purpose specified in Article 2, paragraph 1 *(b)*, are present" (*ibid.*, para. 75).

23. In my view, such determination would prejudge the merits. What is required at this stage is to determine merely whether it is "possible" or "arguable" that the asserted rights arguably fall within the scope of Article 2 of the ICSFT in accordance with the arguments presented by the requesting party. In my opinion, this determination does not require a detailed examination of whether the requirements of intention, knowledge, and purpose as prescribed in Article 2 have been met. Such an examination would require a thorough analysis of the evidence that would go well beyond what is required at this stage of the proceedings.

24. It may be true that Ukraine has not furnished in the course of the present proceedings conclusive evidence that the requirements of intention, knowledge, and purpose are satisfied. But at this early stage of the proceedings, the Court should not expect Ukraine to have done so. All that Ukraine should be required to show is that its asserted rights under the ICSFT are at least "possible" or "arguable". And I think that Ukraine has provided sufficient material to allow the Court to reach this conclusion.

IV. Real and Imminent Risk of Irreparable Prejudice

25. While it is my view that the rights asserted by Ukraine under the ICSFT are plausible, I believe that the assessment by the Court of the factual elements involved with respect to the last two elements mentioned above (see para. 6 above) may well be different. As mentioned above, the risk of prejudgment does not lie there with respect to the last two requirements, the fate of which will depend upon the discretionary determination of the Court on whether at this stage of the proceedings, the Court recognizes that there is a need and imminent risk to the rights asserted in light of the assessment to be made by the Court in the present situation. It is entirely within the Court's discretion, in assessing whether there is real and imminent risk, to take into account such elements as intention, knowledge and purpose specified in Article 2 of the ICSFT as relevant factors. It cannot be denied that in light of the ongoing fluid

situation in eastern Ukraine, many uncertainties persist as to whether the flow of financing as well as military supplies from one place to another is taking place, if so by whom and for what purpose. On the basis of this reasoning, I am prepared to accept that there is no real and imminent risk that irreparable prejudice will be caused to the rights asserted by Ukraine under the ICSFT.

26. I am further prepared to accept that any prejudice that would be caused to the rights in question could not be said to be irreparable. The rights in question are basically the rights of Ukraine to require the Russian Federation to co-operate in the prevention of the financing of terrorism. Because of the very nature of such rights, any prejudice to such rights cannot be said to be irreparable at this stage to the extent that Ukraine may still meaningfully demand the Russian Federation to seek for full co-operation in good faith to implement its obligation under Article 18 for the future.

27. In this sense a finding of the Court that there is no real and imminent risk of irreparable prejudice could not affect the Court's final determination on whether the rights in question exist. This finding by the Court would not prejudge the merits of the dispute and could not amount to a prejudgment on the case, as different from a finding of the Court on the issue relating to the jurisdiction or a finding of the Court deny the "plausibility" of the rights asserted by the requesting party.

(*Signed*) Hisashi OWADA.