SEPARATE OPINION OF JUDGE BHANDARI

A. Introduction

1. I am in agreement with the Court's Order to indicate provisional measures in respect of the International Convention on the Suppression of All Forms of Racial Discrimination (CERD)[1]. However, I feel compelled to write this separate opinion in order to clarify my views concerning the Court's decision not to indicate provisional measures in relation to the International Convention for the Suppression of the Financing of Terrorism (ICSFT)[2]. In the facts and circumstances of the case, on the preliminary examination of the evidence provided by both Parties, I am of the view that the Court ought to have indicated provisional measures in relation to the ICSFT also.

2. In this opinion, I will deal both with the breaches of the ICSFT as alleged by Ukraine, and with the response of the Russian Federation, in order to ascertain whether a case has been made for the indication of provisional measures under Article 41 of the Statute.

3. Ukraine invoked its rights under Article 18 of the ICSFT. Article 18 reads as follows:

> "1. States Parties shall cooperate in the prevention of the offences set forth in article 2 by taking all practicable measures, *inter alia*, by adapting their domestic legislation, if necessary, to prevent and counter preparations in their respective territories for the commission of those offences within or outside their territories, including:
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> *(a)* Measures to prohibit in their territories illegal activities of persons and organizations that knowingly encourage, instigate, organize or engage in the commission of offences set forth in article 2;
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> *(b)* Measures requiring financial institutions and other professions involved in financial transactions to utilize the most efficient measures available for the identification of their usual or occasional customers, as well as customers in whose interest accounts

[1] 660 United Nations, *Treaty Series (UNTS)* 195.
[2] 2178 *UNTS* 197.

are opened, and to pay special attention to unusual or suspicious transactions and report transactions suspected of stemming from a criminal activity. For this purpose, States Parties shall consider:

(i) Adopting regulations prohibiting the opening of accounts the holders or beneficiaries of which are unidentified or unidentifiable, and measures to ensure that such institutions verify the identity of the real owners of such transactions;

(ii) With respect to the identification of legal entities, requiring financial institutions, when necessary, to take measures to verify the legal existence and the structure of the customer by obtaining, either from a public register or from the customer or both, proof of incorporation, including information concerning the customer's name, legal form, address, directors and provisions regulating the power to bind the entity;

(iii) Adopting regulations imposing on financial institutions the obligation to report promptly to the competent authorities all complex, unusual large transactions and unusual patterns of transactions, which have no apparent economic or obviously lawful purpose, without fear of assuming criminal or civil liability for breach of any restriction on disclosure of information if they report their suspicions in good faith;

(iv) Requiring financial institutions to maintain, for at least five years, all necessary records on transactions, both domestic or international.

2. States Parties shall further cooperate in the prevention of offences set forth in article 2 by considering:

(a) Measures for the supervision, including, for example, the licensing, of all money-transmission agencies;

(b) Feasible measures to detect or monitor the physical cross-border transportation of cash and bearer negotiable instruments, subject to strict safeguards to ensure proper use of information and without impeding in any way the freedom of capital movements.

3. States Parties shall further cooperate in the prevention of the offences set forth in article 2 by exchanging accurate and verified information in accordance with their domestic law and coordinating administrative and other measures taken, as appropriate, to prevent the commission of offences set forth in article 2, in particular by:

(a) Establishing and maintaining channels of communication between their competent agencies and services to facilitate the secure and rapid exchange of information concerning all aspects of offences set forth in article 2;

(b) Cooperating with one another in conducting inquiries, with respect to the offences set forth in article 2, concerning:

(i) The identity, whereabouts and activities of persons in respect of whom reasonable suspicion exists that they are involved in such offences;

(ii) The movement of funds relating to the commission of such offences.

4. States Parties may exchange information through the International Criminal Police Organization (Interpol)."

4. In its Order, the Court found that "Article 18 should be read together with Article 2 of the ICSFT because under Article 18 States parties must co-operate in the prevention of the offences set forth in Article 2"[3]. Therefore, the obligation under Article 18 to co-operate to prevent terrorism financing only arises if the acts alleged by Ukraine plausibly fall within the scope of Article 2. Article 2 reads as follows:

"1. Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

(a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or

(b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

2. *(a)* On depositing its instrument of ratification, acceptance, approval or accession, a State Party which is not a party to a treaty listed in the annex may declare that, in the application of this Convention to the State Party, the treaty shall be deemed not to be included in the annex referred to in paragraph 1, subparagraph *(a)*. The declaration shall cease to have effect as soon as the treaty enters into force for the State Party, which shall notify the depositary of this fact;

(b) When a State Party ceases to be a party to a treaty listed in the annex, it may make a declaration as provided for in this article, with respect to that treaty.

[3] Order, para. 73.

3. For an act to constitute an offence set forth in paragraph 1, it shall not be necessary that the funds were actually used to carry out an offence referred to in paragraph 1, subparagraphs *(a)* or *(b)*.

4. Any person also commits an offence if that person attempts to commit an offence as set forth in paragraph 1 of this article.

5. Any person also commits an offence if that person:

(a) Participates as an accomplice in an offence as set forth in paragraph 1 or 4 of this article;

(b) Organizes or directs others to commit an offence as set forth in paragraph 1 or 4 of this article;

(c) Contributes to the commission of one or more offences as set forth in paragraphs 1 or 4 of this article by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of an offence as set forth in paragraph 1 of this article; or

(ii) Be made in the knowledge of the intention of the group to commit an offence as set forth in paragraph 1 of this article."

5. Ukraine requested the Court to find that the requirements for the indication of provisional measures in accordance with Article 41 of the Statute are met in the facts and circumstances of the case[4].

6. In the opinion, I will examine each requirement for the indication of provisional measures in turn. First, I will discuss prima facie jurisdiction. Second, I will examine plausibility, with specific reference to whether the acts alleged by Ukraine fall within the scope of Article 2 of the ICSFT. Third, I will turn to the existence of a real and imminent risk of irreparable prejudice. Fourth, I will examine the presence of a link between the rights invoked by Ukraine and the provisional measures requested. In the present case, both Parties adduced extensive evidence to the Court in order to show that the requirements for the indication of provisional measures were or were not met. It is of paramount importance to preliminarily examine such evidence for it to be subsequently appraised in accordance with the test laid down in the Court's jurisprudence for indicating provisional measures.

[4] CR 2017/1, p. 24, para. 18 (Zerkal).

B. The Procedural Preconditions for Indicating Provisional Measures

7. In order to examine the treaty provisions relied upon by Ukraine to found the Court's jurisdiction, it is essential to outline the test for prima facie jurisdiction. In its 2016 Order on provisional measures in *Equatorial Guinea* v. *France*, the Court stated that, in order to find that it had prima facie jurisdiction, it:

> "must ascertain whether the acts complained of by Equatorial Guinea are prima facie capable of falling within the provisions of [the Convention against Transnational Organized Crime (CTOC)] and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain"[5].

In that case, the Court found that "prima facie, a dispute capable of falling within the provisions of the [CTOC] and therefore concerning the interpretation or the application of Article 4 of that Convention does not exist between the Parties"[6].

8. The situation before the Court in *Equatorial Guinea* v. *France* is similar to the situation before the Court in the present case. Ukraine alleged that certain acts amount to terrorism as defined in Article 2 of the ICSFT, while the Russian Federation denied that they do, and, as a consequence, stated that such acts fall outside the scope of that provision. The Russian Federation's obligation to co-operate to prevent terrorism financing under Article 18 of the ICSFT would thus not be engaged. In this case, Ukraine relied on Article 24 of the ICSFT for the purposes of prima facie jurisdiction. Article 24 of the ICSFT reads as follows:

> "1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation within a reasonable time shall, at the request of one of them, be submitted to arbitration. If, within six months from the date of the request for arbitration, the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice, by application, in conformity with the Statute of the Court.
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> 2. Each State may at the time of signature, ratification, acceptance or approval of this Convention or accession thereto declare that it

[5] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016 (II)*, p. 1159, para. 47. See also Convention against Transnational Organized Crime, 2225 *UNTS* 209.

[6] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016 (II)*, p. 1160, para. 50.

> does not consider itself bound by paragraph 1. The other States Parties shall not be bound by paragraph 1 with respect to any State Party which has made such a reservation.
>
> 3. Any State which has made a reservation in accordance with paragraph 2 may at any time withdraw that reservation by notification to the Secretary-General of the United Nations."

Under this provision, in order for the Court to have jurisdiction, there must be (i) a dispute; (ii) that has not been settled "through negotiation within a reasonable time"; and (iii) a request for arbitration and no agreement regarding the organization of an arbitration within six months of the first request. I will examine the evidence submitted by the Parties in respect of these three elements.

9. Ukraine argued that "[g]iven the two-year history of negotiations between the Parties to resolve their dispute over the interpretation and application of the Terrorism Financing Convention . . . and given the lack of agreement on the organization of arbitration, prima facie jurisdiction may readily be found"[7]. According to Ukraine,

> "the dispute had crystallized long before. In a diplomatic note dated 28 July 2014, Ukraine gave notice that it considered the Russian Federation to be violating the Terrorism Financing Convention. In further correspondence and in-person negotiations, Ukraine continued, repeatedly, to inform the Russian Federation of the nature of its claims."[8]

10. In its written documents, Ukraine submitted, regarding the existence of a dispute, the Notes Verbales exchanged between the Parties from June 2014 until recently. Such Notes Verbales concern both the interpretation of the ICSFT, and requests to negotiate in regard to their respective obligations arising under the ICSFT[9]. In the Court's jurisprudence, a dispute is defined as a "disagreement on a point of law or fact, a conflict of legal views or interests between two persons"[10]. In *Georgia* v. *Russia*, the Court stated that that "[a]n express specification [concerning the subject-matter of the dispute] would remove any doubt about one State's understanding of the subject-matter in issue"[11]. Ukraine's Notes

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[7] CR 2017/1, p. 35, para. 3 (Cheek).

[8] *Ibid.*, para. 4 (Cheek).

[9] E.g., Note Verbale dated 28 July 2014, Annex 85, Documents in support of Ukraine's Request for provisional measures; see also the Notes Verbales contained in Annexes 86-100 of the Documents in support of Ukraine's Request for provisional measures.

[10] *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11.

[11] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 85, para. 30.

Verbales specifically refer to the ICSFT, as well as specific acts it believed to fall under the ICSFT, engaging the Russian Federation's obligations. For example, in a Note Verbale dated 28 July 2014, Ukraine stated that "under the 1999 International Convention for the Suppression of the Financing of Terrorism the Russian Side must take measures as necessary . . . in order to investigate" the alleged financing of terrorism in eastern Ukraine[12].

11. Concerning the negotiations between the Parties to settle their dispute, Ukraine contended that:

> "Ukraine spent nearly two years attempting to settle this dispute with the Russian Federation. Over that period of time,. . . the Parties exchanged 40 diplomatic notes and participated in four rounds of bilateral negotiations. Unfortunately, the Russian Federation largely ignored Ukraine's claims and refused to discuss issues that Ukraine views as central to the dispute."[13]

Ukraine also submitted that it sent a request to initiate an arbitration concerning potential ICSFT violations by the Russian Federation, but:

> "[t]he Parties were then unable to agree on the organization of an arbitration in the six-month period provided by the Convention. For the first two months of that period, Ukraine's request for arbitration simply received no response. Russia finally did respond, and eventually the Parties met twice and exchanged correspondence concerning their respective proposals. By the end of the six-month period, however, differences between the Parties remained."[14]

12. Ukraine contended that the Parties attempted to resolve their dispute through negotiation but failed to do so "within a reasonable time"[15]. Ukraine submitted evidence contending that the Parties have engaged in four rounds of negotiations regarding their obligations under the ICSFT between 2015 and 2016[16]. Concerning the failure of such negotiations and its aftermath, Ukraine argued that a request to arbitrate was communicated to the Russian Federation, and an agreement on the composition of the arbitration was not reached within six months of Ukraine's first request. On 16 April 2016, Ukraine submitted a Note Verbale requesting the Russian Federation to submit a proposal regarding

[12] Note Verbale dated 28 July 2014, Ann. 85, Documents in support of Ukraine's Request for provisional measures.

[13] CR 2017/1, p. 36, para. 7 (Cheek).

[14] *Ibid.*, p. 37, para. 10 (Cheek).

[15] Article 24, ICSFT.

[16] Note Verbale dated 19 April 2016, Ann. 28, Documents in support of Ukraine's Request for provisional measures (noting that negotiations were held on 22 January 2015, 2 July 2015, 29 October 2015, and 17 March 2016).

the establishment of an arbitration in accordance with Article 24 of the ICSFT[17].

13. The Russian Federation argued that the events Ukraine relied on for invoking the ICSFT, particularly in the context of Article 18, could not fall under the ICSFT, and thus that a dispute did not exist between the Parties[18]. However, this shows that at a prima facie level the Parties appear to be in disagreement regarding mutual legal obligations that are "positively opposed by the other"[19]. Concerning the negotiation attempts under the ICSFT, the Russian Federation argued that these negotiations were not conducted in good faith, and "without any kind of willingness to engage in a meaningful discussion . . . on issues falling within the scope of the ICSFT"[20]. The Russian Federation also argued that Ukraine "consistently came forward with allegations well beyond the scope of the ICSFT", most notably with allegations concerning the use of force[21]. While the Russian Federation argued that the negotiations were not conducted in good faith[22], the validity of this argument cannot be assessed by the Court at this stage in the proceedings without prejudging the decisions to be made in the subsequent phases of the case. At this stage Ukraine must simply show that the Parties made "some attempt" at negotiation that subsequently failed[23]. The Russian Federation argued that the request to arbitrate was not genuine, as Ukraine took the position that an *ad hoc* chamber at the Court should be created to adjudicate the dispute[24]. However, examining whether Ukraine's attempt to arbitrate was genuine, or whether the proposal to refer the dispute to an *ad hoc* Chamber of the Court could satisfy the arbitration requirement, is improper at this stage of the proceedings.

14. The preliminary examination of the evidence before the Court shows that the three conditions for the Court to have prima facie jurisdiction under Article 24 of the ICSFT are met. First, regarding the existence of a dispute, Ukraine submitted numerous Notes Verbales exchanged by the Parties from June 2014 until recently, which concern both the interpretation of the ICSFT, and requests to negotiate with respect to their respective obligations arising under the

[17] Note Verbale dated 19 April 2016, Ann. 28, Documents in support of Ukraine's Request for provisional measures.

[18] CR 2017/2, p. 16, para. 2 (Rogachev).

[19] *South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328.

[20] CR 2017/2, p. 47, para. 61 (Zimmermann).

[21] *Ibid.*, para. 62.

[22] *Ibid.*

[23] *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*, p. 388, para. 114.

[24] CR 2017/2, p. 48, para. 68 (Zimmermann).

ICSFT[25]. Second, Ukraine has prima facie shown that the Parties attempted to resolve their dispute through negotiation but failed to do so "within a reasonable time". The Parties have engaged in four rounds of negotiations regarding their obligations under the ICSFT between 2015 and 2016[26]. As Ukraine must simply show that the Parties undertook "some attempt"[27] at negotiation that subsequently failed, the requirement to engage in negotiations is satisfied for purposes of prima facie jurisdiction. Third, Ukraine has prima facie shown that a request to arbitrate was communicated to the Russian Federation, and an agreement on the composition of the arbitration was not reached within six months of Ukraine's first request. On 16 April 2016, Ukraine submitted a Note Verbale requesting the Russian Federation to submit a proposal regarding the establishment of an arbitration in accordance with Article 24 of the ICSFT[28]. The fact that Ukraine made an "explicit offer . . . to have recourse to arbitration"[29] is sufficient for establishing prima facie jurisdiction at this stage.

C. Whether the Acts Alleged by Ukraine Fall within the Scope of the ICSFT

15. A principal issue that faces the Court is whether the acts alleged by Ukraine fall within the scope of the ICSFT. Specifically, the question is whether the acts Ukraine alleged could amount to terrorism, as defined in Article 2 of the ICSFT. In its Order, the Court assessed this matter by applying the plausibility test.

1. The Plausibility Test

16. The Court introduced the plausibility requirement in the aftermath of *LaGrand*. As developed since its first appearance in *Belgium* v. *Senegal*[30], the plausibility test entails a two-step examination by the Court:

[25] E.g., Note Verbale dated 28 July 2014, Annex 85, Documents in support of Ukraine's Request for provisional measures; see also Annexes 86-100 of the Documents in support of Ukraine's Request for provisional measures.

[26] Note Verbale dated 19 April 2016, Ann. 28, Documents in support of Ukraine's Request for provisional measures (noting that negotiations were held on 22 January 2015, 2 July 2015, 29 October 2015, and 17 March 2016).

[27] *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*, p. 388, para. 114.

[28] Note Verbale dated 19 April 2016, Ann. 28, Documents in support of Ukraine's Request for provisional measures.

[29] *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. 150, para. 52.

[30] *Ibid.*, p. 151, para. 57.

first, whether the rights asserted by the applicant State exist in the abstract; second, whether the applicant State holds such rights in the circumstances of the case. The applicant State does not need to show that it has good chances to succeed on the merits, the so-called *fumus boni iuris*[31]. Conversely, the applicant State must show that the rights it invokes are not manifestly unfounded, the so-called *fumus non mali iuris*[32].

2. The Financing of Alleged Acts of Terrorism

17. Ukraine contended that the *travaux préparatoires* reflect that terrorism financing by State actors is covered by the ICSFT[33]. It clarified that the ICSFT does not cover terrorist acts carried out by State actors, but simply terrorism financing by State actors, and that it would be a "twisted reading . . . to assume that a State can simply look the other way if its own public organs and officials are engaged in the financing of terrorism"[34]. While the Court is likely to analyse whether the ICSFT covers terrorism financing by State actors in the further stages of the proceedings, to make such a legal determination at this stage would prejudge the merits of the case.

18. Pursuant to Article 2, it must be determined whether there exist instances of terrorism financing falling within the scope of the Convention. While Ukraine submitted evidence of the transmission of cash to armed groups in eastern Ukraine[35], it also relied on evidence regarding the transmission of weapons. Ukraine submitted various pieces of evidence. For instance, a *New York Times* article reported that certain separatist groups solicit donations through their websites, and that "[a]n examination . . . of the groups' websites, social media postings and other records found more than a dozen groups in Russia that are raising money for the separatists, aiding a conflict that has killed more than 6,400 people"[36]. The article also reported that "[a]ccording to their own online appeals, the organizations have directed that donations be made via State-owned or State-controlled banks in Russia, including the country's largest, Sberbank, or credit cards issued by those banks, some branded

[31] This was the version of the plausibility test wrongly suggested by the Russian Federation, see CR 2017/2, p. 23, para. 6 (Wordsworth); *ibid.*, p. 25, para. 10 (Wordsworth); *ibid.*, p. 30, para. 22 (Wordsworth); CR 2017/4, p. 21, para. 37 (Wordsworth); *ibid.*, p. 25, para. 55 (Wordsworth).

[32] On this point, see *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*, separate opinion of Judge Abraham, pp. 140-141, para. 10.

[33] CR 2017/3, p. 21, para. 22 (Koh); *ibid.*, pp. 46-49, paras. 36-45 (Cheek).

[34] *Ibid.*, p. 47, para. 40 (Cheek).

[35] Jo Becker and Steven Lee Myers, "Russian Groups Crowdfund the War in Ukraine", *The New York Times*, 11 June 2015, Ann. 51, Documents in support of Ukraine's Request for provisional measures.

[36] *Ibid.*

with MasterCard and Visa logos"[37]. In this regard, the Russian Federation "which strictly regulates nongovernmental organizations to monitor opposition political activity, has done little to stop the fundraising"[38]. Moreover, a report of the Atlantic Council stated that

> "[s]eparatist forces have been relying on a steady flow of Russian supplies, including heavy weapons such as tanks, armored personnel carriers, artillery, and advanced anti-aircraft systems, including the Buk surface-to-air missile system . . . that shot down Malaysia Airlines Flight 17 in July 2014"[39].

19. In an affidavit submitted by Ukraine and dated 27 February 2017, Colonel V. V. Skibitskyi stated that there is a continuous flow of weaponry from the territory of the Russian Federation into Ukraine. He stated that "[b]ased on . . . intelligence reports gathered in the regular operations of my office, I have personal knowledge of the supply of weapons by the Russian Federation"[40]. According to Colonel Skibitskyi, "the only way weapons can get to [the Donetsk People's Republic (DPR)] and [the Luhansk People's Republic (LPR)] is through the uncontrolled part of the Russian-Ukrainian border in Luhansk and Donetsk Oblasts"[41].

20. The Russian Federation questioned whether the ICSFT covers terrorism financing by State actors, or whether it is limited to terrorism financing by private individuals. The Russian Federation argued that the Convention's *travaux préparatoires* suggest that the ICSFT excludes State actors and State responsibility from its scope, and that it was intended by the drafters to cover only terrorism financing by private individuals. According to the Russian Federation,

> "the text of the ICSFT is largely based on a working document originally submitted by France . . . That French draft convention had contained in its Article 5, paragraph 5, a specific provision on State responsibility, which stated that . . .: '[t]he provisions of this article cannot have the effect of calling into question the responsibility of the State as a legal entity.'"[42]

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[37] Cf. note 35 *supra*.

[38] *Ibid.*

[39] The Atlantic Council, *Hiding in Plain Sight*, May 2015, Ann. 44, Documents in support of Ukraine's Request for provisional measures.

[40] Affidavit of Testimony of Colonel V. V. Skibitskyi, 27 February 2017, Ann. 79, Documents in support of Ukraine's Request for provisional measures.

[41] *Ibid.*

[42] CR 2017/2, p. 41, paras. 27-28 (Zimmermann).

3. Intent or Knowledge

21. Article 2 of the ICSFT requires that a private individual provide funds with the knowledge or intent that they might be used for acts defined in Article 2. The Russian Federation argued that such knowledge or intent was not shown by Ukraine, and thus that the instances of financing Ukraine relies upon do not fall within the scope of the ICSFT[43]. On this issue, the Court found that "Ukraine has not put . . . evidence which affords a sufficient basis to find it plausible that these elements are present"[44]. However, the Court's finding does not seem entirely warranted based on the assessment of the evidence on record.

22. The question of whether funds were supplied with the requisite intent is delicate, and one that the Court must assess with prudence in order to leave the merits of the dispute untouched. At this stage it must only be shown that individuals allegedly financing terrorism had at least knowledge that the funds might be used for carrying out acts defined in Article 2 of the ICSFT. Knowledge in this case could be inferred from a pattern of behaviour, namely previous actions that could plausibly fall under Article 2, thus putting individuals allegedly financing terrorism "on notice" regarding how funds may be used should they be provided. In this case, such individuals were "on notice" that civilians may be deliberately targeted in order to spread terror following the shooting of civilian aircraft MH17 in July 2014. Additionally, such individuals were also "on notice" that the DPR and LPR were engaging in shelling in civilian areas indiscriminately and, perhaps, intentionally, which put them "on notice" that funds may be used in the future for a similar purpose. Ukraine submitted reputable news reports indicating that individuals allegedly financing armed groups in eastern Ukraine continued to do so despite being "on notice" as to the potential use of the funds provided[45]. Ukraine also submitted that the so-called "Buratino", a weapon that fires indiscriminately, was provided to armed groups in eastern Ukraine[46].

23. The evidence as submitted by Ukraine affords a basis on which the Court could have found that "funds" have been plausibly provided to the DPR and LPR with intent or knowledge that they would be used, or are

[43] CR 2007/2, p. 24, para. 7 (Wordsworth).

[44] Order, para. 75.

[45] Jo Becker and Steven Lee Myers, "Russian Groups Crowdfund the War in Ukraine", *The New York Times*, 11 June 2015, Ann. 51, Documents in support of Ukraine's Request for provisional measures; "Sergei Mironov Received a Thank You Letter from the Head of the LPR Valery Bolotov", Ann. 58, Documents in support of Ukraine's Request for provisional measures.

[46] BBC News, "Ukraine Rebels Have Powerful New Russian-made Rockets — OSCE", 2 October 2015, Ann. 47, Documents in support of Ukraine's Request for provisional measures.

to be used, to carry out the acts referred to in subparagraph *(b)* of Article 2 (1).

4. Attacks on Civilians

24. The Russian Federation argued that the incidents Ukraine relied on could not fall under the definition of terrorism in Article 2 of the ICSFT, and, at most, could amount to violations of international humanitarian law (IHL)[47]. However, at this point the Court need only determine that it is not manifestly unfounded that the acts, evidence of which was provided by Ukraine, might fall within the scope of the ICSFT. What the definition of terrorism under Article 2 exactly covers should not be decided at this time, as it would prejudge the merits of the case. For instance, wading too deeply into the *travaux préparatoires* of the Convention, as the Russian Federation suggested[48], is inappropriate at this stage of the proceedings.

25. In its oral submissions, Ukraine argued that in and around the territory controlled by the DPR and LPR there is a pattern of attacks on civilians. Speaking of the escalation of violence in Avdiivka, Ukraine stated that "[a]s a result of indiscriminate shellings, the city has suffered widespread destruction of residential buildings and critical infrastructure, leaving civilians without electricity, water supplies, and even heat, at harsh temperatures far below zero"[49]. Similarly, speaking of Avdiivka and Mariupol it contended that "[o]nly weeks after Ukraine filed its Application in this Court, Russian-supplied rockets rained down on civilians living in the town of Avdiivka. The civilians of Mariupol, already victims of large-scale terrorism, live in fear"[50]. With respect to violence in Mariupol, Ukraine argued that "[t]he United Nations Under-Secretary-General confirmed to the Security Council that the civilian population had been 'knowingly targeted'"[51]. Moreover, Ukraine also stated that:

> "[t]he destruction of Flight MH17 with a Russian Buk system did not stop Russian financing of terrorism. With that continued support, we suffered an attack on a bus at Volnovakha. A mere two weeks later, Mariupol was bombarded, and Kramatorsk a few weeks after that. In Kharkiv, a peaceful population was terrified by a string of bombings. These were not isolated incidents, but the result of Russia's sponsorship of terrorism."[52]

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[47] CR 2017/2, p. 17, paras. 5-8 (Rogachev).
[48] *Ibid.*, p. 41, para. 26 (Zimmermann).
[49] CR 2017/1, p. 22, para. 7 (Zerkal).
[50] *Ibid.*, p. 25, para. 1 (Koh).
[51] *Ibid.*, p. 28, para. 12 (Koh).
[52] *Ibid.*, p. 22, para. 8 (Zerkal).

26. According to Ukraine,

> "[o]ver the last decade Russia's interference in Ukrainian affairs has steadily escalated. It reached dangerous levels in 2014. Russia decided to intervene in Ukraine militarily; sponsor illegal groups that commit acts of terrorism on Ukrainian soil; and violate the human rights of millions of people of Ukraine. Including, for too many, their right to life."[53]

In relation to the shooting down of Flight MH17, Ukraine argued that

> "Russian-supported fighters ruthlessly shot it down over eastern Ukraine, murdering 298 innocent civilians, including citizens from many . . . nations . . .. The MH17 shoot-down was nothing less than an attack on humanity: nationals of the Netherlands, Australia, Belgium, Canada, Germany, Indonesia, Malaysia, New Zealand, the Philippines, the United Kingdom, and the United States of America were all killed."[54]

In addition, Ukraine argued that violence on civilians spread well beyond the immediate conflict zone. It argued that

> "[a]s 2014 turned into 2015, Russian-financed terrorists launched a concerted bombing campaign against Kharkiv, Ukraine's second-largest city, far from active hostilities. In November 2014, Russian-backed terrorists struck a nightclub popular with supporters of the Revolution of Dignity. Three months later, they carried out a deadly attack on a peaceful parade and rally."[55]

27. In its written documents, Ukraine submitted that the DPR and LPR forces indiscriminately bombarded civilian areas and deliberately attacked the civilian population far from military targets. One example is the well-documented destruction of civilian aircraft MH17[56]. In that case, the aircraft, entirely boarded with civilians, was shot down in a heavily trafficked civilian-only fly zone, well above the airspace used by Ukrainian military aircrafts, as reported in the Dutch Safety Board's investiga-

[53] CR 2017/1, p. 23, para. 13 (Zerkal).
[54] *Ibid.*, p. 25, para. 10 (Koh).
[55] *Ibid.*, pp. 28-29, para. 13 (Koh).
[56] The destruction of Flight MH17 plausibly falls within the scope of the 1971 Montreal Convention (974 *UNTS* 177). By virtue of Article 1 of the ICSFT, which incorporates offences under the 1971 Montreal Convention within the scope of the ICSFT, the destruction of Flight MH17 also falls within the scope of the definition of terrorism under the ICSFT.

tive report[57]. Ukraine also submitted evidence regarding a rocket blast hitting a civilian bus in Volnovakha, killing 12 persons and injuring 17 others[58]. The OSCE report stated that:

> "A Grad rocket struck close to a civilian bus when it stopped at a Ukrainian Armed Forces checkpoint approximately 2 km north of Volnovakha . . .. The [Special Monitoring Mission (SMM)] arrived at the location of the incident at 17:45hrs and . . . witnessed the removal of two of the dead from the bus. The bus had shrapnel damage consistent with a nearby rocket impact, estimated by the SMM to be 12-15 metres from the side of the bus. The SMM visited the Volnovakha hospital where the staff confirmed that ten persons on the bus were killed instantly, while two died later in the hospital. Another 17 passengers were injured."[59]

28. Furthermore, the OSCE reported of shelling in residential areas of Mariupol. According to the report:

> "The SMM in government-controlled Mariupol heard at its location incoming massed Multi-Launch Rocket System (MLRS) attacks from a north-east direction, consisting of an extremely heavy barrage lasting 35 seconds. Twenty minutes later the SMM received information from the Joint Centre for Control and Co-ordination (JCCC) in Mariupol and other sources, that shelling had occurred in the area of Olimpiiska Street, in Ordzhonikidzevskyi district, 8.5 km north-east of Mariupol city centre, approximately 400 metres from a Ukrainian Armed Forces checkpoint . . .. The SMM observed in an area of 1.6 km by 1.1 km, including an open market, multiple impacts on buildings, retail shops, homes and a school. The SMM observed cars

[57] Dutch Safety Board, "Crash of Malaysian Airlines MH17: Hrabove, Ukraine", 17 July 2014, October 2015, Ann. 34, Documents in support of Ukraine's Request for provisional measures.

[58] Organization for Security and Co-operation in Europe (OSCE), *Latest from OSCE Special Monitoring Mission (SMM) to Ukraine Based on Information Received as of 18:00 (Kiev time), 13 January 2015*, 14 January 2015, Ann. 13, Documents in support of Ukraine's Request for provisional measures; OSCE, *Latest from OSCE Special Monitoring Mission (SMM) to Ukraine Based on Information Received as of 18:00 (Kiev time), 16 January 2015*, 17 January 2015, Ann. 14, Documents in support of Ukraine's Request for provisional measures.

[59] OSCE, *Latest from OSCE Special Monitoring Mission (SMM) to Ukraine Based on Information Received as of 18:00 (Kiev time), 13 January 2015*, 14 January 2015, Ann. 13, Documents in support of Ukraine's Request for provisional measures.

> on fire and windows facing the north-eastern side of a nine-storey building shattered. The SMM was able to count 19 rocket strikes and is certain there are more. Four hospitals and the emergency service in the city informed the SMM that at least 20 people died and 75 people were injured and hospitalized."[60]

In February 2017, the OSCE also reported that civilian monitors were targeted.[61] The United Nations Under-Secretary for Political Affairs classified the bombings in Mariupol as incidents of "knowingly targeting" civilians[62]. Additionally, in February 2017 comments of the OSCE Special Monitoring Mission in Ukraine reported of artillery, mortar, and MLRS strikes in and around residential areas on both sides of the conflict line[63]. Whether such attacks and shelling took place in the vicinity of military targets, which might justify them under IHL, is a question to be determined at the merits stage of the proceedings.

29. The UN Office of the High Commissioner for Human Rights (OHCHR) also reported of summary killings and arbitrary executions in eastern Ukraine. The report on accountability for killings in Ukraine from January 2014 to May 2016 stated that

> "[o]n 18 April 2014, the bodies of Horlivka city councillor, Mr. Volodymyr Rybak, and of a student and Maidan activist, Mr. Yurii Popravko, were found in the river of Kazennyi Torets, near the settlement of Raigorodok (Sloviansk district, Donetsk region), bearing signs of torture. According to the forensic expertise, before his death, Rybak was tied; his abdomen ripped off, and he was thrown into the water. On 28 April, the body of a student and Maidan activist, Mr. Yurii Diakovskyi, was recovered from the river at the same site, also bearing signs of torture."[64]

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[60] OSCE, *Spot Report by OSCE SMM to Ukraine, 24 January 2015: Shelling Incident on Olimpiiska Street in Mariupol*, 24 January 2015, Ann. 21, Documents in support of Ukraine's Request for provisional measures.

[61] OSCE, *OSCE Chief Monitor in Ukraine Condemns Targeting of Monitors and Seizure of Unmanned Aerial Vehicle*, 24 February 2017, Ann. 18, Documents in support of Ukraine's Request for provisional measures.

[62] UN doc. S/PV.7368, 26 January 2015, Ann. 4, Documents in support of Ukraine's Request for provisional measures.

[63] Transcript of Alexander Hug, Principal Deputy Chief Monitor of the OSCE Special Monitoring Mission to Ukraine, Ann. 22, Documents in support of Ukraine's Request for provisional measures.

[64] OHCHR, *Accountability for Killing in eastern Ukraine from January 2014 to May 2016* (2016), para. 33, Ann. 6, Documents in support of Ukraine's Request for provisional measures.

The OHCHR reported also that:

> "[o]n 8 June 2014, in the town of Sloviansk then controlled by armed groups, the parishioners of the evangelical church 'Transfiguration of Christ' were holding the Sunday worship. By the end of the worship, armed men arrived at the church yard, designated four cars, and ordered their owners to come forward and have a talk with them. The deacons, Mr. Viktor Bradarskyi and Mr. Volodymyr Velichko, and two sons of the church's Head — Mr. Albert Pavenko and Mr. Ruvim Pavenko — came forward. The armed men forced them to get into their own cars and drove away."[65]

The bodies of the above-mentioned persons were later found, alongside bodies of other people. They

> "displayed multiple gunshot wounds and signs of torture. The other bodies belonged to victims of executions ordered by the 'martial court' of the 'Donetsk people's republic' in Sloviansk and individuals who either died or was killed during the armed hostilities in the town."[66]

5. Intimidation of the Population

30. Ukraine also cited several instances of intimidation of the local population. In June 2014, the OHCHR reported a pattern of "systematic persecution" against civil society in areas controlled by the DPR and LPR, aimed at suppressing support for Ukrainian unity[67]. The OHCHR specifically reported that the systematic persecution of activists, journalists, and councillors led to a spreading of fear in the Donetsk and Luhansk regions due to "an increasing number of acts of intimidation and violence by armed groups, targeting 'ordinary' people who support Ukrainian unity or who openly oppose either of the two 'people's republics'"[68]. This was reported again by the OHCHR in 2016: the interviewees, largely activists, journalists, and local community leaders, stated that they were targeted by the armed groups, and believed it was due to their pro-Ukraine positions[69].

31. In its oral submissions, the Russian Federation argued that the acts mentioned by Ukraine could not fall within the scope of the ICSFT, and

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[65] Cf. note 64 *supra*, para. 39.

[66] *Ibid.*, para. 41.

[67] OHCHR, *Report on the Human Rights Situation in Ukraine*, 15 June 2014, Ann. 7, Documents in support of Ukraine's Request for provisional measures.

[68] *Ibid.*

[69] OHCHR, *Report on the Human Rights Situation in Ukraine 16 February-15 May 2016* (2016), Ann. 8, Documents in support of Ukraine's Request for provisional measures.

therefore could not be considered to be acts of terrorism. However, the Russian Federation did not deny that the events to which Ukraine referred took place. For instance, it argued that "most of the civilian casualties are in the DPR and the LPR, and multiple sources confirm that Ukrainian armed forces are themselves responsible for numerous acts of indiscriminate shelling"[70], pointing out that "[s]hould the Applicant's approach to the applicability of the ICSFT be accepted, Ukraine's own conduct would constitute a central feature of these very proceedings"[71]. According to the Russian Federation, "about 40 per cent of all expenses of the DPR/LPR-controlled territories are covered by trade, taxes and other financing by Ukraine"[72]. Concerning the shooting down of Flight MH17, the Russian Federation submitted that:

> "[t]he investigation of this tragedy is still ongoing. Russia has co-operated extensively with the Dutch Safety Board (DSB) and the Joint Investigative Team (JIT), in particular by providing them with the assistance requested. The Russian authorities and experts have expressed disagreement with the findings of the DSB and the JIT20, and note that much evidence was left untouched by the investigators as, for example, recorded by two Dutch journalists who recently visited the accident site."[73]

In relation to the Ukrainian contention that there is a continuous flow of arms from the Russian Federation into the DPR and LPR-controlled territories, it was argued that

> "the primary source of weapons and ammunition to the military of the DPR and the LPR are stockpiles inherited by Ukraine in 1991 from the Soviet Army that was formerly tasked to hold off the entire NATO. A lot of these stockpiles were deposited in the old mines of Donbass and later captured by rebels. Another source of weapons was the retreating Ukrainian army itself."[74]

32. The Russian Federation principally argued that the OSCE and OHCHR reports submitted by Ukraine do not make any connection between the shelling of civilian areas and terrorism. In respect of the OHCHR report concerning accountability for killings in Ukraine from January 2014 to May 2016, the Russian Federation contended that "civilian casualties [were] caused by 'indiscriminate shelling' on

[70] CR 2017/2, p. 17, para. 6 (Rogachev).
[71] *Ibid.*, p. 18, para. 7 (Rogachev).
[72] *Ibid.*, p. 19, para. 13 (Rogachev).
[73] *Ibid.*, pp. 19-20, para. 14 (Rogachev).
[74] *Ibid.*, pp. 20-21, para. 19 (Rogachev).

areas controlled by both sides, not terrorism"[75]. Similarly, it was argued that

> "when the Court goes through the multiple reports of the OHCHR, the OSCE and the [International Committee of the Red Cross (ICRC)], it will see that the acts of indiscriminate shelling by all parties to the conflict in East Ukraine are never characterized as acts of 'terrorism'. Instead, these acts are characterized by the OHCHR and the ICRC as violations of the IHL principles of distinction, proportionality and precaution."[76]

Moreover, the Russian Federation argued that the shelling of civilians alleged by Ukraine was not the sole responsibility of the DPR and LPR forces, but also of Ukraine's military. However, these arguments do not show that the acts alleged by Ukraine cannot be terrorist acts under the ICSFT, but simply that they could also be regarded as IHL violations committed by both Parties to the conflict in eastern Ukraine.

6. Examination of the Evidence in regard to Plausibility

33. The part of the Court's Order dedicated to the plausibility of the rights invoked by Ukraine under the ICSFT could have benefitted from a closer discussion of the evidence submitted by the Parties. The evidence presented by Ukraine effectively shows that the elements set out in Article 2 of the ICSFT are met, and therefore that the acts alleged by Ukraine plausibly amount to terrorism under the Convention. Ukraine submitted evidence of the continuous flow of weapons, which could plausibly be considered to be "funds" across the Russian-Ukrainian border. Article 1 of the ICSFT states that funds are "assets of any kind, whether tangible or intangible, movable or immovable". This appears to encompass "funds" other than financial assets, which might include weapons. At this stage, a careful examination of the exact definition of "funds" would be inappropriate, as it would prejudge the Court's decision in the later stages of the proceedings. The Court should have just noted, at this stage, that the Convention plausibly covers items such as weapons in its definition of "funds". In any event, Ukraine also provided evidence of financial assets being transferred through the Russian banking system, thanks to the DPR and LPR's reliance on online appeals for financial contributions.

[75] CR 2017/2, p. 25, para. 14 (Wordsworth).
[76] *Ibid.*, pp. 25-26, para. 15 (Wordsworth).

34. The provision of "funds" through the State-owned banks in the Russian Federation is also instrumental to plausibly showing that "funds" are provided with the requisite intent or knowledge that they will be used or are to be used in order to commit one of the offences in Article 2. As stated above, knowledge in this case could be inferred from a pattern of behaviour relating to the indiscriminate targeting of civilians. This would put potential individuals providing "funds" on notice that such "funds" may be used to carry out acts falling within the scope of Article 2 of the ICSFT.

35. Moreover, it is plausible that the acts Ukraine alleged were aimed at targeting civilians or persons not taking direct part in hostilities. The evidence put forward by Ukraine plausibly shows that weapons are used which fire indiscriminately, and that certain attacks have seemingly been carried out in areas far removed from military objectives. Instances of this were the shooting down of Flight MH17, the attack on the bus in Volnovakha, the attacks in Mariupol's residential areas, as well as the attack in a night club in Kharkiv. The targets of such attacks, namely civilians and persons not taking direct parts in hostilities, plausibly show that they were "intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict", within the terms of Article 2.

36. Finally, Ukraine's evidence also demonstrated that the "purpose of such act[s], by [their] nature or context, is to intimidate a population". I referred to a pattern of targeting civilians and persons not taking direct part in hostilities, in areas far removed from military objectives. At this stage in the proceedings, such a pattern is sufficient to plausibly show that the acts alleged by Ukraine have the purpose of intimidating the population. More detailed determinations are inappropriate at this stage, and should only be made in the subsequent phases of the proceedings.

37. By adducing evidence that the acts alleged by it are capable of falling within the scope of the ICSFT, Ukraine has demonstrated that the plausibility requirement for indicating provisional measures is satisfied.

D. The Existence of a Real and Imminent Risk of Irreparable Prejudice to the Rights Invoked by Ukraine

38. In the Court's jurisprudence, irreparable prejudice and urgency are compounded into one single requirement, namely that there must be an "imminent risk that irreparable prejudice may be caused to the rights in

dispute before the Court has given its final decision"[77]. Appraising irreparable prejudice and urgency is closely connected to the facts of a case. According to the Court's most recent orders on provisional measures, prejudice to a State's rights is "irreparable" if, without indicating provisional measures pending the Court's judgment disposing of a case, it would be impossible to restore the *status quo ante* once the dispute is finally settled[78]. Clear cases of irreparable prejudice are the so-called "death penalty cases", such as *LaGrand* and *Avena*, in which it would be impossible to restore a State's rights under the Vienna Convention on Consular Relations (VCCR) once the individual whose consular assistance was denied has been executed[79].

39. In *Georgia* v. *Russia*, the Court found that "the power of the Court to indicate provisional measures will be exercised only if there is urgency in the sense that there is a real risk that action prejudicial to the rights of either party might be taken before the Court has given its final decision"[80]. The Court, in assessing whether urgency exists in the circumstances of a case, must determine whether the acts allegedly carried out by the respondent State might create a situation in which it would be impossible to restore the rights of the applicant State to the *status quo ante*. In this perspective, the possibility to suffer irreparable prejudice is a precondition of urgency, as there cannot be urgency if the acts allegedly carried out by the respondent State are not capable of causing irreparable prejudice to the rights of the applicant State.

40. The ICSFT aims to assist States in combating terrorism financing. Article 18 requires States to "take all practicable measures . . . to prevent and counter preparations in their respective territories for the commission of those offences within or outside their territories". However, it is logically unsound to state that, while a State has an obligation *to co-operate*

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[77] *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. 548, para. 47.

[78] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016 (II)*, p. 1169, para. 90; *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.

[79] *LaGrand (Germany* v. *United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999 (I)*, p. 15, para. 24; *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Provisional Measures, Order of 5 February 2003, I.C.J. Reports 2003*, p. 91, para. 55. See also 596 *UNTS* 261.

[80] *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*, p. 392, para. 129. See also *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. 62.

to prevent terrorism financing, it does not also have an obligation *to prevent* terrorism financing. Although it is not necessary, at the present stage of the proceedings, to make definitive findings in this regard, it is possible that the former obligation is a corollary of the latter. While Article 18 of the ICSFT only refers to an obligation of co-operation to prevent, it could also be read to entail an obligation to prevent, which could thus be seen to be incumbent upon the States party to the ICSFT. To state otherwise would deprive the provision under Article 18 of the ICSFT of *effet utile*.

41. Ukraine alleged that the Russian Federation failed to "take all practicable measures" to co-operate under the ICSFT, and has allowed its territory to serve as a conduit for the financing of terrorism in eastern Ukraine. As already detailed above, there have been numerous civilian deaths, including the attack on civilian Flight MH17, intense shelling in Avdiivka, Mariupol and Kramatorsk, attacks on a civilian bus at a checkpoint in Volnovakha, as well as numerous others. Besides constituting a loss for humanity, every civilian death amounts to irreparable prejudice to the rights of Ukraine to seek compliance by the Russian Federation both with its obligation *to co-operate to prevent* terrorism financing, and with its obligation *to prevent* terrorism financing. From this perspective, it must be concluded that the rights of Ukraine are suffering and are likely to suffer irreparable prejudice before the Court may hand down the judgment disposing of the case.

42. From the point of view of irreparable prejudice, the present case resembles *LaGrand*. In that case, Germany invoked Article 36, paragraph 1 *(b)*, of the VCCR as the rights it sought to protect on the merits[81]. That provision confers on individuals the right, to be informed "without delay of [the] rights under this subparagraph", namely that the consular post of the State of nationality of foreign individuals be informed of their detention. The Court found that Walter LaGrand's "execution would cause irreparable harm to the rights claimed by Germany in this particular case"[82]. Although it did not say so explicitly, the Court found that there was irreparable prejudice since, as Germany had argued[83], it would not have been possible to restore the *status quo ante* after Walter LaGrand's death. First, the present case also concerns the loss of human life, which, similarly to *LaGrand*, makes it is impossible to restore the *status quo ante*. Second, similarly to *LaGrand*, in the present case a State argued that a right it plausibly holds under international law could be

[81] *LaGrand (Germany* v. *United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999 (I)*, p. 14, para. 16.
[82] *Ibid.*, p. 15, para. 24.
[83] *Ibid.*, p. 12, para. 8.

irreparably prejudiced by acts aimed at depriving individuals of their life. Third, similarly to *LaGrand*, the Court is asked to protect the rights of a State, not the rights of an individual, and the loss of human life would be the cause of irreparable prejudice to the State's right. Consistency in the Court's jurisprudence would require in this instance a decision similar to the one in *LaGrand*.

43. Ukraine alleged that urgency exists particularly in light of the recent escalation of violence in Avdiivka. The OSCE, the ICRC, and reliable news agencies have reported on the increase in violence in civilian areas in Avdiivka since early 2017, as well as on incidents of indiscriminate shelling in the town's residential areas[84]. Alexander Hug, Principal Deputy Chief Monitor of the OSCE Special Monitoring Mission to Ukraine, noted that it was the worst violence the area has seen in months[85]. Such violence has led to violations of the Minsk II Package of Measures by both sides of the conflict[86]. In addition to the increase in violence, there are several reports that OSCE representatives have not had full access to conflict areas, as well as border regions, in order to sufficiently monitor the situation. For example, one OSCE report highlighted that monitors were blocked by LPR members from accessing an area close to the Russian

[84] Transcript of Alexander Hug, Principal Deputy Chief Monitor of the OSCE Special Monitoring Mission to Ukraine, Ann. 22, Documents in support of Ukraine's Request for provisional measures; ICRC, *ICRC Warns of Deteriorating Humanitarian Situation amid Intensifying Hostilities in Eastern Ukraine*, 2 February 2017, Ann. 42, Documents in support of Ukraine's Request for provisional measures; "Avdiivka Civilian Caught in Crossfire as Clashes Rage: Thousands without Heating or Electricity in Town of Avdiivka as Ukrainian Troops and Rebels Remain Locked in Fighting", *Al Jazeera*, 5 February 2017, Ann. 45, Documents in support of Ukraine's Request for provisional measures; Christian Borys, "'Everything Is Destroyed': On the Ground as Latest Surge of Deadly Violence Strikes Eastern Ukraine", *The Independent*, 4 February 2017, Ann. 48, Documents in support of Ukraine's Request for provisional measures; Christian Borys, "Losing Everything in Ukraine: As Violence Escalates in Eastern Ukraine Front, One Family Copes with Losing Their Livelihood in the Shelling", *Al Jazeera*, 5 February 2017, Ann. 49, Documents in support of Ukraine's Request for provisional measures; John Wendle, "Avdiivka, evacuating again as fighting escalates — Civilians in Avdiivka wonder if they will survive the cold nights and random, incessant shelling", *Al Jazeera*, 8 February 2017, Ann. 52, Documents in support of Ukraine's Request for provisional measures.

[85] Transcript of Alexander Hug, Principal Deputy Chief Monitor of the OSCE Special Monitoring Mission to Ukraine, Ann. 22, Documents in support of Ukraine's Request for provisional measures.

[86] *Ibid.*

border[87]. Moreover, an affidavit dated 15 February 2017 from an interrogated DPR member also reported that areas of the border are used as gateways for transporting weapons[88]. Both sides of the eastern Ukrainian conflict have restricted access to conflict areas, raising concerns that the situation cannot sufficiently be monitored. This raises hurdles for the assessment of the urgency of the situation. However, the need to stop the documented violence involving the civilian population leads me to conclude that there is grave urgency in the circumstances of the case. The Court held in *Georgia* v. *Russia* that a situation could be urgent if it is "unstable and could rapidly change"[89]. The events in eastern Ukraine, and especially those in Avdiivka, are perfect examples of an "unstable" situation that could "rapidly change". This justifies the finding that the urgency of the situation requires the indication of provisional measures by the Court.

44. The Minsk II Package of Measures does not remove a real and imminent risk of irreparable prejudice, as argued by the Russian Federation[90]. First, international observers such as the OSCE and the OHCHR have reported of violations of the Minsk II Package of Measures by both Parties. Second, the Court's jurisprudence shows that the existence of binding international obligations incumbent upon the States party to a case before it does not remove real and imminent risk of irreparable prejudice. For example, in *Timor-Leste* v. *Australia* the Court found that there was a real and imminent risk of irreparable prejudice despite the Attorney-General of Australia having made a solemn undertaking, binding on its State under international law, that the documents seized from Timor-Leste's lawyer would not be used except for reasons of national security[91]. In the present case it is not yet clear whether the Minsk II Package of Measures could be considered to be a binding treaty, and therefore contain binding international obligations. The Security Council merely *endorsed* it, which conveys that it has not acquired binding force by virtue of being included in a Security Council resolution under Arti-

[87] OSCE, *Latest from OSCE Special Monitoring Mission (SMM) to Ukraine Based on Information Received as 27 September 2015*, 28 September 2015, Ann. 15, Documents in support of Ukraine's Request for provisional measures.

[88] Record of Interrogation of Detained Anonymous Soldier No. 1 Self-Proclaimed "Donetsk People's Republic", Security Service of Ukraine, 15 February 2017, Ann. 30, Documents in support of Ukraine's Request for provisional measures.

[89] *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*, p. 396, para. 143.

[90] CR 2017/2, p. 50, para. 76 (Zimmermann).

[91] *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*, pp. 158-159, paras. 46-48.

cle 25 of the United Nations Charter; moreover, Security Council resolution 2202 (2015) was not taken under Chapter VII. *A fortiori*, it should not be seen as the reason removing a real and imminent risk of irreparable prejudice in the circumstances of this case.

E. The Link between the Provisional Measures Granted and the Rights which Ukraine Seeks to Protect

45. In its 2011 Order on provisional measures in *Certain Activities*, the Court held that "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"[92]. *Arbitral Award of 31 July 1989* was the only case in which the Court refused to grant provisional measures owing to the absence of a link between the provisional measures requested and the rights whose protection the applicant State sought. Guinea-Bissau instituted proceedings against Senegal arguing that the arbitral award of 31 July 1989[93], which had settled the maritime delimitation dispute between the two States, was invalid as a matter of international law. Pending the Court's judgment, Guinea-Bissau asked for provisional measures to be indicated under Article 41 of the Statute, requesting only that Senegal "abstain in the disputed area from any act or action of any kind whatever, during the whole duration of the proceedings until the decision is given by the Court"[94]. The Court found that:

> "the Application . . . asks the Court to pass upon the existence and validity of the award [of 31 July 1989] but does not ask the Court to pass upon the respective rights of the Parties in the maritime areas in question; . . . accordingly the alleged rights sought to be made the subject of provisional measures are not the subject of the proceedings before the Court on the merits of the case"[95].

The only provisional measure requested by Guinea-Bissau was not linked to the rights claimed in the main proceedings, which concerned the valid-

[92] *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.

[93] *Delimitation of the Maritime Boundary between Guinea-Bissau and Senegal (Guinea-Bissau/Senegal), Award of 31 July 1989, RIAA*, Vol. XX, p. 119.

[94] *Arbitral Award of 31 July 1989 (Guinea-Bissau* v. *Senegal), Provisional Measures, Order of 2 March 1990, I.C.J. Reports 1990*, p. 65, para. 3.

[95] *Ibid.*, p. 70, para. 26.

ity of the arbitral award of 31 July 1989. Therefore, Guinea-Bissau's request for provisional measures was denied.

46. In the present case, the provisional measures requested by Ukraine in relation to the ICSFT are all linked to the right claimed on the merits, which concerns co-operation to prevent terrorism financing. Some of the provisional measures requested by Ukraine could be seen to touch upon the merits of the dispute. However, the Court could have indicated some of the provisional measures requested. For example, the Court could have indicated a provisional measure requiring both the Russian Federation and Ukraine to co-operate to effectively control the Russian-Ukrainian border in order to monitor and prevent the transfer of "funds" for the commission of acts plausibly amounting to terrorism. Furthermore, the Court could have reminded both Parties of their treaty obligation to co-operate under Article 18 of the ICSFT, and perhaps given some concrete guidance on how to implement such a provisional measure.

F. Conclusion

47. The preliminary examination of the entire evidence on record affords a sufficient basis to arrive at a plausible view that all elements under Article 2 of the ICSFT are satisfied in this case. Therefore, the Court ought to have indicated provisional measures in relation to the ICSFT.

(Signed) Dalveer Bhandari.