SEPARATE OPINION OF JUDGE *AD HOC* POCAR

1. I have voted with the majority in favour of the indication of all provisional measures concerning the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), as well as of the provisional measure asking both Parties to refrain from any action which might aggravate or extend the dispute. I must however put on record that I would have seen it necessary and appropriate to indicate provisional measures also with regard to the International Convention for the Suppression of the Financing of Terrorism (ICSFT). In particular, I cannot share the view that the required threshold of plausibility is not met for the indication of at least some of the provisional measures requested by Ukraine with respect to this Convention (1). I also have concerns regarding the implications of the present Order for the good administration of justice (2). Finally, I wish to further clarify why the shooting-down of Flight MH17 was not examined in detail by the Court (3).

1. Plausibility of the Rights Asserted by Ukraine

2. The Court states, in its decision, that

> "the obligations under Article 18 [of the Convention] and the corresponding rights are premised on the acts identified in Article 2, namely the provision or collection of funds with the intention that they should be used or in the knowledge that they are to be used in order to carry out acts set out in paragraphs 1 *(a)* and 1 *(b)* of this Article" (Order, para. 74).

While acknowledging that, in the present case, the acts to which Ukraine refers — namely, the bombing of peaceful marchers in Kharkiv, the bombardment of Mariupol, the attacks on Volnovakha and Kramatorsk, and the shooting-down of Malaysia Airlines Flight MH17 — have given rise to the death and injury of a large number of civilians, the Court answers negatively the question "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 (see Order, para. 74), and the element of purpose specified in Article 2, paragraph 1 *(b)*, are present", and concludes that "[a]t this stage of the proceedings, Ukraine has not put before the Court evidence which affords a sufficient basis to find it plausible that these elements are present" (*ibid.*, para. 75).

3. The Court's conclusion that the rights claimed by Ukraine under the ICSFT are not plausible is the consequence of a brief reasoning which I have difficulties to share in light of the elements present in the record of this case. In my view, it is plausible that the indiscriminate attacks alleged by Ukraine are intended to spread terror, and that the persons providing funds to those who conducted these attacks had knowledge that such funds were to be used for that purpose. The record shows that there are numerous occurrences of attacks on civilians, reported by reliable international organizations, and that these attacks have no discernible significance in military advantage terms. As the existence of "knowledge" and "purpose" may usually be determined only through circumstantial evidence, the frequency of the attacks on civilians and the wide availability of official reports thereon make it at least plausible that the providers of funds were aware that these might likely be used for such attacks and not only for attacks against military targets. Additionally, as to the purpose of the attacks, the intent to spread terror has been regarded by international criminal jurisprudence as the only reasonable inference to be drawn from indiscriminate attacks when repeated and bearing no military advantage (see *Prosecutor* v. *Stanislav Galić*, ICTY Case No. IT-98-29-T, Trial Judgment, 5 December 2003, para. 593), or carried out at sites known to be frequented by civilians during their daily activities (see *Prosecutor* v. *Dragomir Milošević*, ICTY Case No. IT-98-29/1-T, Trial Judgment, 12 December 2007, para. 881). If such a conclusion has been affirmed in determining the "primary purpose" of an attack under Article 51, paragraph 2, and Article 13, paragraph 2, of Additional Protocols I and II of 8 June 1977 respectively, it is at least plausible that such inference may be drawn when the mere "purpose" of the attack has to be determined under Article 2, paragraph 1 *(b)*, of the ICSFT.

4. I must conclude that, in light of the information in the record of this case, the threshold of the plausibility test required for the indication of provisional measures is positively met in this case. I would therefore have favoured the indication of a provisional measure requesting the Russian Federation to provide Ukraine with the full co-operation required by Article 18 of the ICSFT, including by exercising appropriate control over its borders, in order to prevent any offences within the meaning of that convention from being committed.

2. Risks for the Good Administration of Justice

5. Regarding the plausibility test itself, I do not question that some level of verification that the rights claimed by the applicant are not patently non-existent must be encouraged, in order to avoid an abuse of the provisional measures' procedure and to give due regard to the rights of the respondent. The Court has fully embraced this notion when it explicitly added the plausibility test to its examination of requests for the indication of provisional measures.

6. However, the Court has never clearly defined the standard to be reached for rights to be deemed plausible, as was already noted by Judge Abraham, in his separate opinion in the *Pulp Mills* case (*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, p. 140, para. 10). In that respect, Judge Sepúlveda-Amor expressed his concerns in the *Certain Activities* case, when he asked the following question:

> "Are States which request the indication of provisional measures expected to show prima facie the validity of their claims on the merits, or is *fumus non mali juris* sufficient, i.e., is it enough to ascertain that the claimed rights are not patently non-existent according to the information available to the Court? Does it suffice to demonstrate the *possibility* or *reasonableness* of the existence of a right, or is *probability* the relevant standard?" (*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)*, separate opinion of Judge Sepúlveda-Amor, p. 37, para. 12.)

7. I concur with his view that these are not "academic subtleties"; rather this lack of clarity, as he foresaw, has practical implications in how the parties plead in requests for the indication of provisional measures and

> "might ultimately encourage States seeking interim protection to over-address the substance of the dispute at an early stage and, as a result, overburden proceedings under Article 41 of the Statute with matters that should actually be dealt with by the Court when adjudicating on the merits" (*ibid.*, p. 38, para. 15).

8. The present case will only reinforce such risk of encouraging parties to excessively argue the merits. The Court has indeed concluded that "Ukraine has not put before the Court evidence which affords a sufficient basis to find it plausible that these elements are present" (Order, para. 75). Such statement begs the question as to the level of evidence required.

More generally, it blurs the distinction between the provisional measures phase and the merits, which can have serious consequences in terms of good administration of justice. In particular, in a situation where the evidence to prove intent and purpose will be circumstantial, how can parties know the extent of the case that they have to bring forward when requesting the indication of provisional measures? Would it not be wiser and safer for them to present the totality of their arguments and evidence at such an early stage? One can wonder how the Court expects parties, in the future, to reconcile such jurisprudence and Practice Direction XI, which reads:

> "In the oral pleadings on requests for the indication of provisional measures parties should limit themselves to what is relevant to the criteria for the indication of provisional measures as stipulated in the Statute, Rules and jurisprudence of the Court. They should not enter into the merits of the case beyond what is strictly necessary for that purpose."

9. In turn, for the Court, an avalanche of materials and evidence which arguably should be reserved for the merits, could overburden it and put a strain on its ability to indicate, promptly, measures of an urgent nature. Delays are to be avoided in the indication of provisional measures, but so too are procedures not giving the Court sufficient time to process large quantities of evidence.

3. Question of the Flight MH17

10. A significant part of Ukraine's case under the ICSFT relates to the shooting-down of Malaysia Airlines Flight MH17. This question was however not addressed in detail in the current stage of proceedings. While I agree with the reasons behind such restraint, I consider that the Order could have benefited from further clarification.

11. There is no doubt that the Parties' arguments regarding this dramatic event did not need to be fully developed at the stage of provisional measures. Indeed, following the closure of the airspace over eastern Ukraine in July 2014, there is no urgency with respect to civilian aircrafts. For that simple reason, the Court was not asked to include the shooting-down of Flight MH17 in its analysis.

12. In the preliminary section of the Order, the Court introduces the context of the present case, with the fighting in eastern Ukraine and the destruction of Flight MH17. The Court very succinctly declares that "the

case before the Court is limited in scope. In respect of the eastern part of its territory, Ukraine has brought proceedings only under the ICSFT." (Order, par. 16.) This statement of fact is undeniable as cases brought before the Court under a compromissory clause are limited in scope to the subject-matter of the relevant convention.

13. However, in my view, what this statement cannot mean is that, without any in-depth analysis of the ICSFT and without careful examination of the evidence, the Court has reached a conclusion regarding the applicability of the Convention. The case under the ICSFT refers to both the shooting-down of Flight MH17 and indiscriminate shelling on the ground, which may fall under Article 2, paragraph 1, letters *(a)* and *(b)* respectively. To avoid any misunderstanding, the Court could have made clear that it needs not, at this stage of the proceedings and for the reason of lack of urgency outlined above, examine the applicability of letter *(a)*, and hence of the Montreal Convention, to the shooting-down of Flight MH17.

(Signed) Fausto POCAR.