SEPARATE OPINION OF JUDGE BHANDARI

Interpretation of Article 1 (1) of the International Convention for the Suppression of the Financing of Terrorism — Definition of "funds" — Meaning of "assets of every kind" — Term "assets of every kind" includes weapons.

1. I disagree with the Court's interpretation of Article 1 (1) of the International Convention for the Suppression of the Financing of Terrorism ("ICSFT"). In my opinion, the term "funds", as defined in that provision, includes weapons[1], and the Court errs in finding that the definition does not include them. As the Judgment makes clear, the interpretation of this term is determinative of parts of Ukraine's claims under Articles 9 (1), 12 (1), and 18 (1) of the ICSFT[2]. I reach my conclusion for the following reasons.

2. Article 1 (1) of the ICSFT provides:

> "For the purposes of this Convention:
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> 1. 'Funds' means assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including, but not limited to, bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts, letters of credit."

3. Article 31 (1) of the Vienna Convention on the Law of Treaties ("VCLT") provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". Article 31 (4) of the VCLT provides that "[a] special meaning shall be given to a term if it is established that the parties so intended".

[1] This separate opinion refers primarily to "weapons". For the purposes of this separate opinion, that term, unless otherwise specified, includes ammunition and military equipment, which the Judgment in certain passages refers to as separate categories.

[2] Judgment, paras. 106, 128 and 144.

4. Here, the parties to the ICSFT intended to give a special meaning to the term "funds" because they provided a definition of that term in Article 1 (1) "for the purposes of this Convention"[3]. Indeed, Article 1 (1) uses the verb "means". That special meaning must consequently be the starting-point for any interpretation of the term "funds", given that an intended special meaning "*shall* be *given* to a term"[4]. The focus of interpretation must therefore be on the parties' intended special meaning, which is the text following the verb "means" in Article 1 (1).

5. The Court collapses the term "funds" and the special meaning that the parties to the ICSFT give to that term. The Court refers to Article 31 (4) of the VCLT, but it subsequently interprets the term "funds" when in fact it should be interpreting the special meaning the parties to the ICSFT intended to give to that term. The Court variously interprets the terms "funds" and "assets of every kind", demonstrating the conflation of the defined term and its special meaning[5].

6. Article 1 (1) provides that "funds means assets of every kind". One could stop here. The term "assets of every kind" means assets of *every* kind. An interpretation "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" within the meaning of Article 31 (1) of the VCLT leads to this conclusion. In paragraph 48 of the Judgment, the Court itself refers to the "ordinary meaning of the definition of 'funds' under the ICSFT". Yet the Court is departing from this ordinary meaning. It is difficult to see how even the context of the term "assets of every kind" or the object and purpose of the ICSFT could justify a wholesale departure from the ordinary meaning of those words[6]. An asset is a resource or possession with economic value. Airplanes and cars are assets. Industrial equipment and company inventory are assets. It is therefore no surprise that defence contractors and firearm manufacturers, for example, list inventory (including raw materials, works-in-progress and finished goods, which in the case of such companies obviously comprise weapons) under the heading of "total assets" on their annual balance sheets. The Court here is not deciding

[3] See Richard Gardiner, *Treaty Interpretation*, p. 339 (Second ed., 2015) ("The most common way in which a special meaning is indicated is by including a definition article in a treaty.").

[4] See also *Regina* v. *Immigration Officer at Prague Airport,* ex parte *European Roma Rights Centre and Others*, 2005, 2 AC–1, p. 31, para. 18.

[5] It is not clear why, in paragraph 49, the Court suddenly uses the term "resources" in its conclusion that "the term 'funds' as used in Article 1, paragraph 1, of the ICSFT, is confined to resources that possess a financial or monetary character and does not extend to the means used to commit acts of terrorism", when in fact "funds" is defined by reference to "assets".

[6] See e.g. *Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, p. 8 ("[T]he first duty of a tribunal which

between competing meanings but is rather seeking to narrow a single meaning. However, the Judgment offers no satisfactory explanation for its highly selective conclusion that weapons, of all economically valuable goods, are not assets for the purpose of Article 1 (1).

7. The Court concludes that the definition of funds in Article 1 (1) only includes limited categories of assets and does not include weapons. However, the Court's interpretation is misguided. In paragraph 47 of the Judgment, the Court states, referring to the types of assets listed in Article 1 (1):

> "Thus, while the phrase 'assets of every kind' is an expansive one, the documents or instruments listed in the definition are ordinarily used for the purpose of evidencing title or interest only to certain types of assets, such as currency, bank accounts, shares or bonds."

8. The paragraph represents an attempt to fit an interpretation into a text that cannot support it. "Funds" is defined as "assets of every kind, whether tangible or intangible, movable or immovable". The definition of funds also includes "legal documents or instruments in any form . . . evidencing title to, or interest in, such assets [i.e. assets of every kind]". The list of financial and other instruments that follows provides examples of *documents or instruments* evidencing title or interest in assets of every kind. These examples do not, by contrast, limit or determine the scope of the term "assets of any kind". Moreover, it makes little sense to speak of "assets retained for their monetary value", since an asset is defined as a resource with an economic value that can be possessed or owned.

9. The Court's interpretation of the list in Article 1 (1) is similarly questionable. In paragraph 48, after addressing the list of financial and other instruments noted above, the Court states:

> "The Court notes that the use of the phrase 'but not limited to' in Article 1, paragraph 1, suggests that the term 'funds' covers more than traditional financial assets. The term also extends to a broad range of assets that are exchangeable or used for their monetary value. For instance, precious metals or minerals such as gold or diamonds, artwork, energy resources such as oil, and digital assets such as cryptocurrency may fall within the ordinary meaning of the definition of 'funds' under the ICSFT where such assets are provided for their monetary value and not as means of committing acts of terrorism.

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is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur.").

> In addition, the definition in Article 1 specifically refers to 'immovable' assets, suggesting that 'funds' may include the provision of land or real estate."

10. The above interpretation of the phrase "but not limited to" does not seem correct. The text of paragraph 47 makes it clear that the list of financial and other instruments provides examples of "documents or instruments" rather than examples of "assets of every kind". The words "but not limited to" introduce the list of "legal documents or instruments" evidencing title or interest. It is therefore inconsistent with the wording of Article 1 (1) and the Court's own understanding of this list to suggest, as the Court does, that the phrase "but not limited to" relates to "assets of every kind", let alone to "funds", rather than to "legal documents or instruments". The positioning of the phrase "but not limited to" makes its meaning clear:

> "*legal documents or instruments* in any form, including electronic or digital, evidencing title to, or interest in, such assets, *including, but not limited to*, bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts, letters of credit" (emphasis added).

11. The Court states in paragraph 48: "[T]he term 'funds' covers more than traditional financial assets. The term also extends to a broad range of assets that are exchangeable or used for their monetary value". The passage provides no definition of "traditional financial assets". More importantly, the Court's interpretation is ultimately self-defeating. Weapons are also assets that can be sold and thereby exchanged for their monetary value. To suggest that weapons cannot be exchanged for their monetary value is incorrect. A car can be sold and thereby exchanged for its monetary value. The same is true of industrial equipment, furniture, and many other goods. The same is also true of weapons. The Court's conclusion in paragraph 49 that "the term 'funds' as used in Article 1, paragraph 1, of the ICSFT, is confined to resources that possess a financial or monetary character and does not extend to the means used to commit acts of terrorism" is therefore not defensible. Weapons would obviously fall within the category of "assets of every kind" even as that term is understood by the Court.

12. In fact, weapons in particular could conceivably even have more value to a terrorist organization than their cash equivalent, because owning and possessing the weapons eliminates transaction costs associated with sourcing weapons or with possible restrictions on obtaining them. Yet, despite the fact that weapons could, for these reasons, have greater value to terrorists than their cash equivalent, the Court treats only the provision of the latter as terrorist financing. Providing weapons could, however, also be payment in kind that frees up existing resources for other uses. It seems arbitrary that a transfer of barrels of oil could amount to terrorist financing, as paragraph 48 suggests when referring specifically to oil, but that a transfer of crates of ammunition cannot.

13. This is not an outlier view. For example, the Financial Action Task Force, to the work of which the Court refers with approval in paragraph 93 of the Judgment in a different context, stated in its 2019 "Terrorist Financing Risk Assessment Guidance":

> "While assessments may take different forms, a [terrorist financing] risk assessment should generally cover all aspects of raising, moving, storing and using funds or other *assets* (including goods, vehicles, *weapons* etc.) to meet the needs of a terrorist or terrorist organisation."[7]

The Organisation for Economic Co-operation and Development has similarly stated:

> "The [Financial Action Task Force] defines terrorist financing as the 'financing of terrorist acts, and of terrorists and terrorist organisations.' It can also involve the facilitation of terrorist acts using *other assets* or *stores of value* (such as oil and natural resources, *property*, legal documents, financial instruments, etc.). The financing can also take place indirectly by storing value in different types of *non-financial tangible* or intangible assets."[8]

14. The Court in paragraph 48 has referred to a selective list of commodities and goods. Unfortunately, the Court overlooks the fact that commodities

[7] Financial Action Task Force, "Terrorist Financing Risk Assessment Guidance", p. 9 (2019) (emphasis added).

[8] Organisation for Economic Co-operation and Development, "Money Laundering and Terrorist Financing Awareness Handbook for Tax Examiners and Tax Auditors", p. 21 (2019) (emphasis added).

are not only frequently traded in the form of derivative contracts on financial markets but are also underlying physical goods. Certain commodities, in particular crude oil, can be traded on more liquid markets than others. That, however, cannot be a distinguishing criterion, and the Court does not refer to it as one. Pricing is not uniform, either. There are different benchmarks for pricing crude oil, and there are few well-established benchmarks for diamonds (whether rough or cut). When it comes to artwork, to which the Court also specifically refers as an example of an asset falling within Article 1 (1), valuation and pricing can be extraordinarily difficult or arbitrary, or even impossible. To suggest, therefore, that oil, diamonds, and artwork have a well-defined value that can easily be converted into money at a well-defined price, whereas weapons do not and cannot, reflects a very basic and incomplete understanding of economic value in particular and of the concept of an asset in general.

15. The Court at best glosses over and at worst ignores one of the most critical parts of the definition in Article 1 (1). The words "whether tangible or intangible, movable or immovable" should prove the death knell for any suggestion that the phrase "assets of any kind" does not include weapons. It strains the text to suggest that "funds", as defined in Article 1 (1), cannot include weapons when the definition specifically includes "tangible" and "moveable" assets — terms that typically refer to chattel property. Equally importantly, though, an "immovable" asset refers to real estate or land. If "assets of any kind" can include a house, an apartment or land, no matter what its value or what liabilities or burdens might be associated with it, why can it not include weapons? In any event, the reference in Article 1 (1) to "immovable" assets does not merely "suggest[]", as the Court states in paragraph 48, that "funds" can include land or real estate. It says so specifically.

16. In its Judgment on preliminary objections, the Court already proceeded on the basis of a broad interpretation of Article 1 (1), stating that "[t]his definition [in Article 1 (1)] covers many kinds of financial instruments and includes also other assets" (*Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019 (II)*, p. 586, para. 62). The Court made no qualification to what these "other assets" might or might not include.

17. The phrase "where such assets are provided for their monetary value and not as a means of committing acts of terrorism" in paragraph 48 introduces a new, unsupported dimension. The words "where such assets are provided for" suggest that one and the same asset could either be "funds" or not be "funds" depending on the intention of the providing party. That is in tension with the text of Article 1 (1), which provides an objective definition of "funds", and with Article 2 (1), which treats funds and intention separately. Article 2 (1) refers to a person who "provides or collects *funds* with the *intention* that they should be used or in the knowledge that they are to be used" (emphasis added) in specified ways.

18. There is an additional conceptual problem in the Court's overall conclusion, in paragraphs 52 and 53. In paragraph 53, the Court

> "concludes that the term 'funds', as defined in Article 1 of the ICSFT and used in Article 2 of the ICSFT, refers to resources provided or collected for their monetary and financial value and does not include the means used to commit acts of terrorism, including weapons or training camps".

However, this passage assumes that the categories of resources provided for their monetary and financial value, on the one hand, and means used to commit acts of terrorism, on the other, are mutually exclusive. The Judgment does not establish this. An asset can be provided or collected for its monetary and financial value and at the same time be a means to commit an act of terrorism. For example, gasoline is a commodity, like crude oil, and it is traded on commodities exchanges according to benchmark prices. Gasoline would therefore, on the Court's understanding, be an asset that falls within the scope of Article 1 (1) that could be provided for its "monetary or financial value". This is because it is what the Court calls an "energy resource". At the same time, a terrorist group could use gasoline in vehicles where those vehicles are a "means used to commit acts of terrorism". Further, Article 1 (1) does not define weapons. Some commodities traded on financial markets, such as certain petroleum products or steel, for example, could serve as components for weapons. Examples such as these lay bare the rickety foundations of the purported dichotomy between assets provided for their monetary or financial value and those provided as a means to commit an act of terrorism.

19. The Court states in paragraph 49 of the Judgment that the context in which the term "funds" is used in certain other provisions of the ICSFT "suggests that the term 'funds' covers different forms of monetary or financial support" and that the ICSFT "is concerned with financial or monetary

transactions". As indicated above, the context is relevant to the meaning of a term, but it cannot change that meaning entirely. Again, it is hard to see how "assets of every kind" could mean anything other than assets of *every* kind. Moreover — even on the Court's own interpretation and, again, as noted above — the transfer of weapons could constitute payment in kind and fall under the rubric of financial or monetary transactions. In fact, if anything, the context suggests the opposite to the Court's interpretation. Where the term "assets of every kind" appears as the definition of "funds" in a treaty designed to prevent the transfer of funds to terrorists, who carry out their acts with weapons, the context suggests that "assets of every kind" should precisely include weapons.

20. The Court states, in paragraph 50 of the Judgment, that the ICSFT's object and purpose support its conclusion. That does not seem correct. Under Article 31 of the VCLT, any construction of Article 1 (1) should be in accordance with the ICSFT's object and purpose, which, according to its preamble, appears to be to "prevent and counteract . . . the financing of terrorists and terrorist organizations". The Court's statement in paragraph 50 that "the object of the ICSFT is not to suppress and prevent support for terrorism in general, but rather to prevent and suppress a specific form of support, namely its financing" seems wide of the mark. The more defensible understanding of the ICSFT's object and purpose — again, this is a treaty concerned with preventing the funding of *terrorists* — is that the Convention covers not only financial instruments or certain categories of assets but also weapons that a terrorist group would otherwise have to purchase and that might even be of greater value to terrorists than their cash equivalent. The Court states in paragraph 50 that "[t]he title of the ICSFT, which refers to 'the Suppression of the Financing of Terrorism', also suggests that that Convention specifically concerns the financing aspect of terrorism". It refers to similar wording in the preamble. However, the choice of the word "financing" in the title of the treaty and its preamble does not and cannot change the meaning of Article 1 (1). Indeed, the word financing does not appear a single time in the operative part of the ICSFT. The treaty uses the word "funds" throughout its operative provisions, which, of course, the parties specifically define to mean "assets of every kind".

21. The Court states in paragraph 51 that "[t]he *travaux préparatoires* confirm [its] interpretation of the term 'funds'". They do not "confirm" this interpretation. At best, they could point either way. The Court states in paragraph 51 that "[t]he record of the negotiations appears to indicate that the concern of the drafters was that international law did not provide means for tracing and effectively punishing those who contribute finances to terrorist organizations". The Court also states in paragraph 51 that "[p]roposals made

by delegations regarding the text of what became Article 1 of the ICSFT . . . expressed a focus on the issue of financial or monetary support". However, certain delegations' proposals on the definition of funds or financing at certain stages in the negotiations reflected a broader focus, given that some such proposals referred to support that was broader than financial or monetary[9].

(Signed) Dalveer BHANDARI.

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[9] Switzerland, for example, submitted a proposal under which "financing" would have included "[a]ny direct transfer of funds, assets *or* other property to a person or organization", UN doc. A/AC.252/1999/WP.1 (emphasis added); Australia submitted a proposal under which "financing" would have meant "the provision of funds *or* assets directly or indirectly and by whatever means to another person or organization", UN doc. A/AC.252/1999/WP.9 (emphasis added); Japan submitted a proposal under which "funds" would have meant "*any* form of pecuniary benefit", UN doc. A/AC.252/1999/WP.10 (emphasis added). (A pecuniary benefit is one that can be evaluated in monetary terms, which the provision of weapons, for example, can.) Finally, the United Kingdom submitted a proposal under which "funds" would have meant "cash *or* any other property, tangible *or* intangible, however acquired". UN doc. A/AC.252/1999/WP.20/Rev.1 (emphasis added).