Corrigé
Corrected

*CR 2017/3*

**International Court of Justice**

**THE HAGUE**

**Cour internationale de Justice**

**LA HAYE**

**YEAR 2017**

***Public sitting***

***held on Wednesday 8 March 2017, at 10 a.m., at the Peace Palace,***

***President Abraham presiding,***

***in the case concerning* 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)**

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**VERBATIM RECORD**

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**ANNÉE 2017**

***Audience publique***

***tenue le mercredi 8 mars 2017, à 10 heures, au Palais de la Paix,***

***sous la présidence de M. Abraham, président,***

***dans l'affaire relative à l'*Application de la convention internationale pour la répression du financement du terrorisme et de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Ukraine c. Fédération de Russie)**

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**COMPTE RENDU**

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| *Present:* | President | Abraham |
| | Vice-President | Yusuf |
| | Judges | Owada |
| | | Tomka |
| | | Bennouna |
| | | Cançado Trindade |
| | | Greenwood |
| | | Xue |
| | | Donoghue |
| | | Gaja |
| | | Sebutinde |
| | | Bhandari |
| | | Robinson |
| | | Crawford |
| | Judges *ad hoc* | Pocar |
| | | Skotnikov |
| | Registrar | Couvreur |

*Présents :* M. Abraham, président
M. Yusuf, vice-président
MM. Owada
Tomka
Bennouna
Cançado Trindade
Greenwood
Mmes Xue
Donoghue
M. Gaja
Mme Sebutinde
MM. Bhandari
Robinson
Crawford, juges
MM. Pocar
Skotnikov, juges *ad hoc*

M. Couvreur, greffier

***The Government of Ukraine is represented by:***

H.E. Ms Olena Zerkal, Deputy Foreign Minister of Ukraine,

*as Agent;*

Mr. Vsevolod Chentsov, Ministry of Foreign Affairs of Ukraine, Director-General for the European Union,

*as Co-Agent;*

Mr. Harold Hongju Koh, Sterling Professor of International Law, member of the Bars of New York and the District of Columbia,

Ms Marney Cheek, Covington & Burling LLP, member of the Bar of the District of Columbia,

Mr. Jonathan Gimblett, Covington & Burling LLP, member of the Bars of the District of Columbia and Virginia,

Mr. David M. Zionts, Covington & Burling LLP, member of the Bars of the Supreme Court of the United States and the District of Columbia,

*as Counsel and Advocates;*

Mr. Volodymyr Shkilevych, Covington & Burling LLP, member of the Bar of New York,

Ms Catherine Gibson, Covington & Burling LLP, member of the Bars of the District of Columbia and the North Carolina State,

Ms Tina Thomas, Covington & Burling LLP, member of the Bars of the District of Columbia and New York,

Ms Oksana Zolotaryova, Directorate-General for International Law, Ministry of Foreign Affairs of Ukraine,

Mr. Andrii Pasichnyk, Counsellor, Embassy of Ukraine in the United States of America,

*as Counsel;*

Mr. Roman Andarak, Counsellor, Mission of Ukraine to the European Union,

Ms Lali Moroz, Second Secretary, Embassy of Ukraine in the Kingdom of the Netherlands,

Mrs. Alona Dovgan, Second Secretary, Director-General for International Law, Ministry of Foreign Affairs of Ukraine,

Mr. Oleksii Kriukov, National Police of Ukraine,

Mr. Yevhen Rohachov, National Police of Ukraine,

Mr. Mykola Hovorukha, Office of the Prosecutor General of Ukraine,

Mr. Oleksandr Tkachuk, Security Service of Ukraine,

***Le Gouvernement de l'Ukraine est représenté par :***

S. Exc. Mme Olena Zerkal, vice-ministre des affaires étrangères de l'Ukraine,

*comme agent ;*

M. Vsevolod Chentsov, directeur général pour l'Union européenne au ministère des affaires étrangères de l'Ukraine,

*comme coagent ;*

M. Harold Hongju Koh, professeur de droit international, titulaire de la chaire Sterling, membre des barreaux de New York et du district de Columbia,

Mme Marney Cheek, cabinet Covington & Burling LLP, membre du barreau du district de Columbia,

M. Jonathan Gimblett, cabinet Covington & Burling LLP, membre des barreaux du district de Columbia et de Virginie,

M. David M. Zionts, cabinet Covington & Burling LLP, membre des barreaux de la Cour suprême des Etats-Unis d'Amérique et du district de Columbia,

*comme conseils et avocats ;*

M. Volodymyr Shkilevych, cabinet Covington & Burling LLP, membre du barreau de New York,

Mme Catherine Gibson, cabinet Covington & Burling LLP, membre des barreaux du district de Columbia et de l'Etat de Caroline du Nord,

Mme Tina Thomas, cabinet Covington & Burling LLP, membre des barreaux du district de Columbia et de New York,

Mme Oksana Zolotaryova, direction générale du droit international au ministère des affaires étrangères de l'Ukraine,

M. Andrii Pasichnyk, conseiller à l'ambassade d'Ukraine aux Etats-Unis d'Amérique,

*comme conseils ;*

M. Roman Andarak, conseiller à la mission de l'Ukraine auprès de l'Union européenne,

Mme Lali Moroz, deuxième secrétaire à l'ambassade d'Ukraine au Royaume des Pays-Bas,

Mme Alona Dovgan, deuxième secrétaire, direction générale du droit international au ministère des affaires étrangères de l'Ukraine,

M. Oleksii Kriukov, police nationale de l'Ukraine,

M. Yevhen Rohachov, police nationale de l'Ukraine,

M. Mykola Hovorukha, bureau du procureur général de l'Ukraine,

M. Oleksandr Tkachuk, service de sécurité de l'Ukraine,

Mr. Bohdan Tyvodar, Security Service of Ukraine,

Mr. Vadym Skibitskyi, Ministry of Defence of Ukraine,

Mr. Ihor Zhovkva, Administration of the President of Ukraine,

Mr. Bohdan Kryklyvenko, Office of the Ukrainian Parliament Commissioner for Human Rights,

Mr. Herman Haluschchenko, International Law Agency,

Mr. Taras Kachka, Advisor of the Minister for Foreign Affairs of Ukraine,

Ms Gabriela Vasquez, cabinet Covington & Burling LLP,

*as Advisers.*

***The Government of the Russian Federation is represented by:***

H.E. Mr. Roman Kolodkin, Director, Legal Department, Ministry of Foreign Affairs of the Russian Federation,

Mr. Grigory Lukiyantsev, Deputy Director, Department for Humanitarian Co-operation and Human Rights, Ministry of Foreign Affairs of the Russian Federation,

Mr. Ilya Rogachev, Director, Department of New Challenges and Threats, Ministry of Foreign Affairs of the Russian Federation,

*as Agents;*

Mr. Mathias Forteau, Professor at the University Paris Nanterre,

Mr. Samuel Wordsworth, Q.C., member of the English Bar, member of the Paris Bar, Essex Court Chambers,

Mr. Andreas Zimmerman***n***, LL.M. (Harvard), Professor of International Law at the University of Potsdam, Director of the Postdam Center of Human Rights, Member of the Permanent Court of Arbitration,

*as Counsel and Advocates;*

Mr. Sean Aughey, member of the English Bar, 11KBW,

Ms Tessa Barsac, Master, University Paris Nanterre,

Ms Jelena Bäumler, LL.M., Junior Professor of International Law at the University of Rostock,

Mr. Alain Pellet, Emeritus Professor at the University Paris Nanterre, Former Chairperson, International Law Commission, member of the Institut de droit international,

Ms Maria Suchkova, LL.M., member of the Saint Petersburg Bar, Ivanyan & Partners,

Mr. Michael Swainston, Q.C., member of the English Bar, Brick Court Chambers,

Mr. Vasily Torkanovsky, member of the Saint Petersburg Bar, Ivanyan & Partners,

M. Bohdan Tyvodar, service de sécurité de l'Ukraine,

M. Vadym Skibitskyi, ministère de la défense de l'Ukraine,

M. Ihor Zhovkva, services du président de l'Ukraine,

M. Bohdan Kryklyvenko, bureau du commissaire aux droits de l'homme du Parlement ukrainien,

M. Herman Haluschchenko, agence pour le droit international,

M. Taras Kachka, conseiller du ministère des affaires étrangères de l'Ukraine,

Mme Gabriela Vasquez, Covington & Burling LLP,

*comme conseillers.*

***Le Gouvernement de la Fédération de Russie est représenté par :***

S. Exc. M. Roman Kolodkin, directeur du département juridique du ministère des affaires étrangères de la Fédération de Russie,

M. Grigory Lukiyantsev, directeur adjoint du département pour la coopération humanitaire et les droits de l'homme du ministère des affaires étrangères de la Fédération de Russie,

M. Ilya Rogachev, directeur du département des nouveaux défis et menaces du ministère des affaires étrangères de la Fédération de Russie,

*comme agents ;*

M. Mathias Forteau, professeur à l'Université Paris Nanterre,

M. Samuel Wordsworth, Q.C., membre des barreaux d'Angleterre et de Paris, cabinet Essex Court Chambers,

M. Andreas Zimmerman***n***, LL.M. (Université de Harvard), professeur de droit international à l'Université de Potsdam, directeur du centre des droits de l'homme de l'Université de Postdam, membre de la Cour permanente d'arbitrage,

*comme conseils et avocats ;*

M. Sean Aughey, membre du barreau d'Angleterre, 11KBW,

Mme Tessa Barsac, master, Université Paris Nanterre,

Mme Jelena Bäumler, LL.M., professeur assistant de droit international à l'Université de Rostock,

M. Alain Pellet, professeur émérite à l'Université Paris Nanterre, ancien président de la Commission du droit international, membre de l'Institut de droit international,

Mme Maria Suchkova, LL.M., membre du barreau de Saint-Pétersbourg, cabinet Ivanyan & Partners,

M. Michael Swainston, Q.C., membre du barreau d'Angleterre, Brick Court Chambers,

M. Vasily Torkanovsky, membre du barreau de Saint-Pétersbourg, cabinet Ivanyan & Partners,

Mr. Sergey Usoskin, member of the Saint Petersburg Bar,

*as Counsel;*

Mr. Andrey Anokhin, Deputy Head of Main Investigations Directorate, Investigative Committee of the Russian Federation,

Mr. Mikhail Averyanov, Third Secretary, Second CIS Department, Ministry of Foreign Affairs of the Russian Federation,

Ms Olga Chekrizova, Second Secretary, Department for Humanitarian Co-operation and Human Rights, Ministry of Foreign Affairs of the Russian Federation,

Ms Natalya Elina, Director, Department of Claim and Judicial Work, Ministry of Defence of the Russian Federation,

Mr. Alexander Girin, Expert, Ministry of Defence of the Russian Federation,

Ms Victoria Goncharova, Third Secretary, Embassy of the Russian Federation in the Kingdom of the Netherlands,

Mr. Denis Gordienko, Head of Section, Department of Claim and Judicial Work, Ministry of Defence of the Russian Federation,

Ms Anastasia Gorlanova, Junior Officer, Legal Department, Ministry of Foreign Affairs of the Russian Federation,

Mr. Konstantin Kosorukov, Acting Head of Division, Legal Department, Ministry of Foreign Affairs of the Russian Federation,

Ms Olga Kuksina, Expert, International Department, Ministry of Education and Science of the Russian Federation,

Mr. Petr Litvishko, Deputy Head of International Co-operation Directorate, Investigative Committee of the Russian Federation,

Mr. Vladimir Lysenko, Principal Counsellor, Second CIS Department, Ministry of Foreign Affairs of the Russian Federation,

Mr. Ivan Medvedev, Third Secretary, Department for New Challenges and Threats, Ministry of Foreign Affairs of the Russian Federation,

Ms Daria Mosina, Attaché, Department for Humanitarian Co-operation and Human Rights, Ministry of Foreign Affairs of the Russian Federation,

Mr. Mikhail Petrosyan, Third Secretary, Legal Department, Ministry of Foreign Affairs of the Russian Federation,

Mr. Grigoriy Prozukin, Deputy Head of Directorate, Main Investigations Directorate, Investigative Committee of the Russian Federation,

Mr. Dmitry Savelyev, Head of Directorate, Federal Agency for Ethnic Affairs of the Russian Federation,

Mr. Sergey Shatov, Expert, Ministry of Defence of the Russian Federation,

M. Sergey Usoskin, membre du barreau de Saint-Pétersbourg,

*comme conseils ;*

M. Andrey Anokhin, chef adjoint de la direction principale des enquêtes du comité d'enquête de la Fédération de Russie,

M. Mikhail Averyanov, troisième secrétaire au deuxième département de la Communauté d'Etats indépendants du ministère des affaires étrangères de la Fédération de Russie,

Mme Olga Chekrizova, deuxième secrétaire au département pour la coopération humanitaire et les droits de l'homme du ministère des affaires étrangères de la Fédération de Russie,

Mme Natalya Elina, directrice du département des réclamations et des questions judiciaires du ministère de la défense de la Fédération de Russie,

M. Alexander Girin, expert au ministère de la défense de la Fédération de Russie,

Mme Victoria Goncharova, troisième secrétaire à l'ambassade de la Fédération de Russie au Royaume des Pays-Bas,

M. Denis Gordienko, chef de section au département des réclamations et des questions judiciaires du ministère de la défense de la Fédération de Russie,

Mme Anastasia Gorlanova, administrateur auxiliaire au département juridique du ministère des affaires étrangères de la Fédération de Russie,

M. Kostantin Kosorukov, chef de division par intérim au département juridique du ministère des affaires étrangères de la Fédération de Russie,

Mme Olga Kuksina, experte au département international du ministère de l'éducation et des sciences de la Fédération de Russie,

M. Petr Litvishko, chef adjoint de la direction de la coopération internationale du comité d'enquête de la Fédération de Russie,

M. Vladimir Lysenko, conseiller principal au deuxième département de la Communauté d'Etats indépendants du ministère des affaires étrangères de la Fédération de Russie,

M. Ivan Medvedev, troisième secrétaire au département des nouveaux défis et menaces du ministère des affaires étrangères de la Fédération de Russie,

Mme Daria Mosina, attachée au département pour la coopération humanitaire et les droits de l'homme du ministère des affaires étrangères de la Fédération de Russie,

M. Mikhail Petrosyan, troisième secrétaire au département juridique du ministère des affaires étrangères de la Fédération de Russie,

M. Grigoriy Prozukin, chef adjoint de la direction principale des enquêtes du comité d'enquête de la Fédération de Russie,

M. Dmitry Savelyev, chef de direction au bureau fédéral pour les affaire ethniques de la Fédération de Russie,

M. Sergey Shatov, expert au ministère de la défense de la Fédération de Russie,

Ms Elena Semykina, Secretary, Ivanyan & Partners,

Ms Elena Stepanova, Senior Prosecutor, General Department of International Legal Co-operation, Prosecutor General's Office of the Russian Federation,

Ms Elena Struchkova, Head of Section, Department of Claim and Judicial Work, Ministry of Defence of the Russian Federation,

Mr. Alexey Trofimenkov, Second Secretary, Legal Department, Ministry of Foreign Affairs of the Russian Federation,

Mrs. Maria Zabolotskaya, Head of Division, Legal Department, Ministry of Foreign Affairs of the Russian Federation,

Mr. Alexey Zhafyarov, Deputy Head of Department, Prosecutor General's Office of the Russian Federation,

Mr. Vadim Zapivakhin, Expert, Ministry of Defence of the Russian Federation,

Mr. Alexander Velichko, Expert, Federal Financial Monitoring Service of the Russian Federation,

*as Advisers*.

Mme Elena Semykina, secrétaire, cabinet Ivanyan & Partners,

Mme Elena Stepanova, substitut du procureur, département général de la coopération juridique international du bureau du procureur général de la Fédération de Russie,

Mme Elena Struchkova, chef de section au département des réclamations et des questions judiciaires du ministère de la défense de la Fédération de Russie,

M. Alexey Trofimenkov, deuxième secrétaire au département juridique du ministère des affaires étrangères de la Fédération de Russie,

Mme Maria Zabolotskaya, chef de division au département juridique du ministère des affaires étrangères de la Fédération de Russie,

M. Alexey Zhafyarov, chef de département adjoint au bureau du procureur général de la Fédération de Russie,

M. Vadim Zapivakhin, expert au ministère de la défense de la Fédération de Russie,

M. Alexander Velichko, expert au service fédéral de surveillance financière de la Fédération de Russie,

*comme conseillers*.

Le PRESIDENT : Veuillez vous asseoir. L'audience est ouverte. La Cour se réunit aujourd'hui pour entendre le second tour d'observations orales de l'Ukraine sur sa demande en indication de mesures conservatoires.

J'appelle à la barre M. le professeur Koh. Monsieur le professeur, vous avez la parole.

Mr. KOH:

## OVERVIEW OF UKRAINE'S REBUTTAL ARGUMENTS

### I. INTRODUCTION

1. Mr. President and Members of the Court, it is my great honour again to come before this Court on behalf of Ukraine. In seeking provisional measures, Ukraine simply asks this Court to insist that Russia keep its treaty commitments under the Terrorism Financing and Race Discrimination Conventions. As we explained on Monday, Russia has turned its legal obligations on its head. In eastern Ukraine, Russia claims to forbid terrorism financing, then finances terror. In Crimea, Russia claims to eliminate all forms of racial and ethnic discrimination, then engages in a campaign of cultural erasure against non-Russian ethnic groups.

2. In our opening presentation, Ukraine demonstrated that it meets the three-part test for indicating provisional measures: *first:* that this Court has prima facie jurisdiction under both the Terrorism Financing and Racial Discrimination Conventions; *second:* that there is a link between plausible treaty rights at issue on the merits and the provisional measures now being sought; and *third:* that there is manifest urgency in this Court's indication of provisional measures. Absent your order, the dangerous and unstable situation in both eastern Ukraine and Crimea can only worsen. As we established on Monday, Russia's violations of rights under these two treaties have already resulted in fatalities and other injuries to Ukraine's vulnerable civilian population, and caused the displacement of some 1.7 million Ukrainian citizens.

3. These facts present a paradigm case for the Court indicating provisional measures. Such an order would impose no burden beyond those legal obligations that Russia has already accepted. If, as Russia claimed yesterday, it is in fact obeying both treaties, it would suffer no inconvenience from your issuing the requested provisional measures. Your interim order is necessary to ensure

that rights that are protected by international law will not be further destroyed while this Court deliberates.

## II. OVERVIEW OF RUSSIA'S CASE

4. Mr. President, Members of the Court, in its opening presentation, Russia challenged Ukraine's request by twisting the law and distorting the facts. Russia's Agent opened by saying that this case seeks to merge two disparate cases, concerning terrorism financing in eastern Ukraine and violations of the Race Discrimination Convention in Crimea. But in fact as I noted in my opening presentation, the treaty violations here stem from one common source: the Russian Federation's profound contempt, during the course of its illegal intervention, for the human rights of the Ukrainian people. We do not ask you to pass on the merits of this case. Nor do we — or will we — ask you to determine the legality of Russia's aggression or to confirm Ukraine's sovereignty over Crimea, notwithstanding the staged "referendum". But it does not take deep investigation of the merits, only your thoughtful, preliminary legal reading of the two Conventions at issue and your grasp of certain key facts, to see why provisional measures are warranted.

5. Today, I will explain why we face an urgent situation in Ukraine that creates — in the words of the *Belgium* v. *Senegal* case — "a real and imminent risk that irreparable prejudice may be caused to the rights in dispute before the Court has given its final decision"[1]. My colleague Mr. David Zionts will then explain why this Court plainly has prima facie jurisdiction. Ms Marney Cheek and Mr. Jonathan Gimblett will then clarify why the rights threatened here — which are protected by the Terrorism Financing Convention and the CERD — are not only "at least plausible", but would be addressed by the specific provisional measures we request. Finally, Ukraine's Agent, Minister Zerkal will close by reiterating our solemn Request for provisional measures.

[1]See *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; see also *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. 537, para. 47; emphasis added.

**A. The Terrorism Financing Convention**

6. Yesterday, in a remarkable display of legal gymnastics, Russia's counsel asked you to read two treaties that squarely bar terrorism financing and all forms of racial discrimination to allow those acts. Mr. Wordsworth argued that somehow, in times of armed conflict, the Terrorism Financing Convention does not bar Russia from sending lethal weapons to Russian-backed armed groups in eastern Ukraine. This is so, he suggested, even when those groups then deliberately use those weapons to target and attack innocent civilians in peaceful Ukrainian cities, and even when they fire Russian-supplied missiles to shoot civilian airliners out of the sky, killing nearly 300 civilians, including three tiny infants.

7. If you listened carefully to Mr. Wordsworth's presentation, you heard the dog that did not bark. Mr. Wordsworth never denied an absolutely critical fact: *that Russia has been knowingly supplying lethal weapons to groups that attack civilians in eastern Ukraine.* By his silence, he apparently conceded that such weapons supply is happening, but because of multiple intent requirements that he then imposed on the Convention's language, he claimed that the provision of such lethal weapons did not rise to the level of a Convention violation. In seeking to minimize its legal violations in eastern Ukraine, Russia's counsel sought to brush aside — but did not ultimately deny — undisputed facts offered by Ukraine in its opening presentation, which have been authoritatively found by the United Nations Secretary-General, the United Nations High Commissioner for Human Rights, OSCE monitors, the Dutch Safety Board, reputable human rights groups and respected investigative journalists.

8. When there is "armed conflict", Mr. Wordsworth suggested, there cannot be "terrorism". Even indiscriminate acts of shelling innocent civilians "are not correctly — or even to the standard of reasonable possibility" he claimed, "characterized as terrorist acts within" the meaning of Article 2 of the Terrorism Financing Convention[2]. But on its face, this is not a plausible reading of Article 2. That provision makes it an offence under the Convention if a person "by any means" "provides . . . funds" — defined as "assets of every kind", tangible or intangible[3] — "in the knowledge that they are to be used, in full or in part, . . . to carry out"

[2]CR 2017/2, p. 25, para. 12 (Wordsworth).

[3]FT Convention, Art. 1.1.

> *(a)* a violation, *inter alia* [of the Montreal Convention which bars unlawful acts against the safety of civil aviation, or]
>
> *(b)* "[a]ny other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking . . . 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 . . ."

9. So on its face, Article 2.1 *(a)* renders Russia providing Buk missile launchers to fighters who would shoot down the civilian aircraft MH17 a flagrant offence under the Convention. On its face, Article 2.1 *(b)* equally makes it an offence under the Convention for Russia to provide Grad missiles to fire upon civilian neighbourhoods in Volnovakha, Mariupol, Kramatorsk, Kharkiv, and Avdiivka when in context, such launches inevitably have the effect of intimidating and demoralizing the civilian population of those areas.

10. Mr. Wordsworth claimed that in times of armed conflict, international humanitarian law (or IHL) is the sole "body of law [that] prohibits the spread of terror among the civilian population"[4]. But as my colleague Ms Cheek noted in her opening presentation, "the Convention recognizes that acts of terrorism and a state of armed conflict are not mutually exclusive"[5]. And by defining a terrorist act as one, in Article 2.1 *(b)* "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*", that Article makes clear that — even in times of armed conflict — civilians living far from conflict zones who are not taking an active part in hostilities can still be victims of terrorist attacks financed by external suppliers of war materiel. As Ms Cheek noted, under the Convention, "certain acts committed within a situation of armed conflict — like bombarding residential neighbourhoods, or targeting a peaceful unity rally — can amount to terrorism under the Convention". And she made clear Ukraine's position that "[t]he same group may be guilty of acts of terrorism against civilians, but also carry out attacks on military targets that would not fall within the Convention"[6]. Thus, the fact that the Donetsk People's Republic (or DPR) may engage in armed conflict with Ukrainian forces in active war zones in no way exonerates Russia from liability under the Convention when it provides rockets to fighters who then launch them

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[4]CR 2017/2, p. 26, para. 16 (Wordsworth).

[5]CR 2017/1, p. 41, para. 26 (Cheek).

[6]*Ibid.*, para. 28 (Cheek).

indiscriminately to kill civilians and those who are not taking part in active hostilities in residential neighbourhoods far from "hot battlefields".

11. Mr. President, Members of the Court: attacking civilians for political ends is terrorism, whether or not an armed conflict is ongoing. Russia's proxies in Ukraine both fight Ukraine's armed forces and conduct terrorism against civilians, as defined in the Convention, intimidating the Ukrainian people to give in to their demands. Under the Terrorism Financing Convention, "terrorism" means mainly attacking *civilians*. The Russian Federation has committed itself to prevent the financing of such terrorism, but then allows a terror campaign to be funded from its territory, and actively supplies the illegal armed groups that ruthlessly target the Ukrainian people.

12. Mr. Wordsworth makes two further assertions that deserve rebuttal. First, because the International Committee of the Red Cross (ICRC) reminded us after the January 2015 Volnovakha bombing that under international humanitarian law, "indiscriminate attacks are prohibited", he concludes that "the ICRC has not suggested that the acts of shelling of populated areas by all parties to the conflict may constitute acts of terrorism . . ."[7]. But again he misleads by suggesting that armed conflict and acts of terrorism cannot coexist. We all know, for example, that the United States engaged in an armed conflict with Al Qaeda in Afghanistan after 11 September 2001, but when in December 2009, an Al Qaeda operative set off a bomb in his underwear aboard a civilian airliner landing in Detroit, far from the active theatres of armed conflict, that constituted, instead, an act of terrorism.

13. Second, Mr. Wordsworth makes the bold allegation that "the indiscriminate shelling that appears to be such a feature of this conflict is at least as much down to acts of, or attributable, to Ukraine"[8]. Of course this is a matter of considerable doubt and factual dispute, which surely will be the subject of evidentiary debate as this case proceeds to the merits. But any fair-minded observer of the eastern Ukraine situation knows that the overwhelming victims of such indiscriminate attacks have been Ukrainian civilians[9]. And make no mistake: the Government of Ukraine takes its obligations under international law seriously. It has prosecuted, for example, the

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[7]CR 2017/2, p. 27, para. 19 (Wordsworth).

[8]*Ibid.*, p. 28, para. 20.

[9]CR 2017/1, pp. 46-47, paras. 42-45 (Cheek).

volunteer battalions mentioned by the other side for crimes against civilians. And although Ukraine cannot now be expected to answer in detail each of the great many baseless factual allegations that Russia peppered throughout its presentation just 24 hours ago, we will have occasion to do so later in these proceedings. For now, the only issue properly before you is Ukraine's urgent Request for the Indication of Provisional Measures, and the pressing need to secure protection for the Ukrainian people.

14. Regrettably in armed conflict, some civilian casualties cannot be avoided. But that does not mean that International Humanitarian Law (IHL) is the only relevant law occupying the field, or that IHL precludes all other relevant bodies of law like the Terrorism Financing Convention. Nor does it mean, or can it mean, as Mr. Wordsworth seemed to imply, that a neighbouring State may supply weapons to an illegal armed group that indiscriminately shells civilian areas, on the mere pretext that a possible military objective might be spotted somewhere nearby. When Russia's proxies have just been raining down rockets on Avdiivka from within residential areas, it is ironic to say the least, for Russia to focus on photographs of tanks *defending* a Ukrainian city from armed groups.

15. Yet another red herring is Russia's repeated, misleading reference to the ongoing Minsk Process as an impediment to this Court's grant of provisional measures under the Terrorism Financing Convention. Mr. Wordsworth finds it "inconceivable" that the Parties or the Security Council would have agreed to the pardon and amnesty provision for events in the Donetsk and Luhansk regions "if the acts of indiscriminate shelling on which Ukraine now focuses were truly acts of terrorism"[10]. Professor Zimmermann adds "Russia submits that there is an imperative need to demonstrate sensitivity to the ongoing political processes, and that the Court should refrain from indicating measures, which would undermine such processes . . ."[11]. But Ukraine did not agree to such an amnesty, which in any event excluded grave breaches. Certainly no amnesty agreement was ever intended to foreclose prosecution for the perpetrators of the MH17 shoot-down or other heinous terrorist acts. Ukraine has made clear that it does not consider the DPR or LPR to be official parties to the Minsk process, although historically it is quite common for States to negotiate

[10]CR 2017/2, pp. 30-31, para. 26 (Wordsworth).

[11]*Ibid.*, p. 51, para. 84 (Zimmermann).

with terrorist groups — as Colombia did with the FARC for many years — in an effort to reach a peaceful resolution to a longstanding conflict[12].

16. Professor Zimmermann never explains precisely how provisional measures would interfere with the Minsk process. To the contrary, if anything, the judicial relief Ukraine requests would bring Russia into compliance with its Minsk obligations. More broadly, this Court has heard this argument before, and not been moved. More than three decades ago, during the provisional measures hearings in *Nicaragua* v. *United States*, the Respondent asked this Court to deny Nicaragua's Request for Provisional Measures for a number of "compelling reasons" relating to then-ongoing "Contadora Process". As with the Minsk process, the Respondent argued that Applicant's Request for the Indication of Provisional Measures directly implicated rights and interests of other states involved in that regional process. The Court proceeded to reject Respondent's claim and nonetheless award provisional measures, agreeing with the Applicant that "the Court is not required to decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, and that the Court should not decline an essentially judicial task merely because the question before the Court is intertwined with political questions"[13]. Similarly, here, Ukraine disputes the relevance of the Minsk Process to this proceeding because its claims of terrorism financing against the Russian Federation cannot be resolved through that process. Nor, as this Court instructed more than three decades ago in the *Nicaragua* case, should the Court decline an essentially judicial task, merely because the legal question before the Court — the availability of provisional measures under two conventions — may bear some relation to a broader ongoing political dialogue.

17. Perhaps the most startling piece of legal gymnastics in Russia's opening presentation, was Professor Zimmermann's ingenious extraction from the text of Article 18 of the Terrorism Financing Convention of an elaborate *seven-part cumulative test* for when States actually have a legal obligation to co-operate to prevent terrorism[14]. The key aspect or element of his ornate

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[12]See e.g., Neumann, Peter R., "Negotiating with Terrorists", *Foreign Affairs* (Jan./Feb. 2007), https://www.foreignaffairs.com/articles/2007-01-01/negotiating-terrorists.

[13]*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Provisional Measures, Order of 10 May 1984, I.C.J. Reports 1984*, p. 186, para. 38.

[14]CR 2017/2, p. 45, para. 54 (Zimmermann).

multi-pronged test was his claim that the Terrorism Financing Convention was never intended to address State action, as opposed to individual violators. Professor Zimmermann seeks to support what he concedes is a "holistic" claim by a detailed structural comparison of the text of the Terrorism Financing Convention with the Genocide Convention. But again, the plain language of Article 18.1 of the Terrorism Financing Convention, which is before you, makes clear that "States shall co-operate in the prevention of offences set forth in Article 2 by taking all practicable measures . . . to prevent and counter preparations in their respective territories for the commission of those offenses within or outside their territories . . .".

18. In effect, Professor Zimmermann would now amend this text, the text of Article 18.1 to insert the word "private" before the phrase "commission of those offenses" within or outside their territories. Only the private commission of those offences would be forbidden. Yet the thrust of this Court's broader reasoning in the *Bosnia Genocide* case which can be illustrated by inserting into the Court's language the words "terrorism financing" for "genocide" as used in its judgment.

> "It would be paradoxical if States were . . . under an obligation to prevent, so far as within their power, commission of [terrorism financing] by persons over whom they have a certain influence, but *were not forbidden to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law*. In short, the obligation to prevent [terrorism financing] necessarily implies the prohibition of the commission of [terrorism financing]."[15]

19. To accept Professor Zimmermann's novel reading of the Convention as not reaching state-sponsored terrorism would perversely allow private actors to funnel funds to collusive government entities to support terrorist acts, while shielding that terrorism financing from scrutiny under the Convention.

20. But even assuming direct State responsibility were not implicated, Russia may still be held responsible under the Convention for its failure to prevent any individuals, including those employed by its Government — who under Article 2 plainly constitute "any person . . . providing or collecting funds" for terrorism — from providing financing to armed groups who attack civilians in the eastern Ukraine. If Russia knows of particular individuals within its territory who, for example, aided the movement of the Buk missile launcher into Ukraine and back to Russia again

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[15] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro, Judgment, I.C.J. Reports 2007 (I)*, p. 113, para. 166; emphasis added.

after the MH17 shoot-down — which you saw with your own eyes — Russia has obligations to investigate and prosecute them under various provisions of the Convention. And if it knows such individuals are *still* providing powerful weapons to the same groups, Russia must take "all practicable measures" to stop them. For a country such as Russia, simply controlling its own borders to block the flow of Buk missiles and Grad rockets into Ukraine would constitute an eminently "practicable measure".

21. In short, notwithstanding Mr. Wordsworth's and Professor Zimmermann's novel legal theories, Russia cannot so easily escape its obligations under the Terrorism Financing Convention. If individuals within the Federation, inside or outside the Government, gave support to armed groups committing terrorist acts in eastern Ukraine, Russia is directly liable under the Terrorism Financing Convention. Under the international law of State responsibility, "[t]he conduct of an organ of a State" — for example, Russian governmental actors who may have provided the Buk launcher to the armed groups in eastern Ukraine — in the words of the International Law Commission "shall be considered an act of the State under international law if the organ . . . acts in that capacity, even if it exceeds its authority or convenes instructions"[16]. If Russia claims that it did not know of such activities, it has still nevertheless violated its treaty duties to investigate, seize assets, prosecute or extradite the responsible parties. And if, despite repeated requests by Ukraine and the Joint Investigative Team, Russia has not afforded Ukraine "the greatest measure of assistance in connection with criminal investigation or criminal or extradition proceedings" in respect of, for example, the shoot-down of MH17, Russia still remains in violation of its Terrorism Financing Convention obligations.

22. In the end, Professor Zimmermann conceded that his elaborate seven-part test erects an extremely, if not impossibly, "high threshold in order to eventually find a violation of Articel 18"[17]. Nevertheless, he closed by concluding, without irony, that "[i]t might very well be advisable to, in the future, eventually adopt a comprehensive convention against terrorism". His point, after all, is that in 1999, 187 States parties could not possibly have meant to deny *themselves* the right to

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[16]International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, 53d Sess., Nov. 2001, Art. 7.

[17]CR 2017/2, p. 46, para. 54 (Zimmermann).

finance terrorism when they negotiated for years to adopt a comprehensive treaty that they nevertheless chose to give the sweeping title of "International Convention for the Suppression of the Financing of Terrorism".

23. When all is said and done, this Court can draw at least one simple conclusion from Mr. Wordsworth's and Professor Zimmermann's presentations: that for purposes of Article 24 (1) of the Terrorism Financing Convention, a dispute plainly exists "between two . . . States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation within a reasonable time". But that is not a reason for the Court to deny provisional measures to Ukraine. Rather, it is a reason for the Court now to indicate those measures, to take jurisdiction and then to proceed to the merits of the dispute.

**B. The Convention for the Elimination of All Forms of Racial Discrimination**

24. Similarly, Russia distorts the facts and twists the law when it claims that it did not violate the Convention for Elimination of All Forms of Racial Discrimination (CERD) in Crimea. The Russian Federation has no lawful basis to occupy Crimea. But so long as it does, it is legally bound to respect the multi-ethnic population that lives there. Ukraine's claim under the CERD simply ask that Russia keep its commitment not to discriminate on grounds of race and ethnicity. In his presentation later this morning, my colleague Mr. Gimblett will address a series of factual assertions made yesterday by Russia's Agent and counsel that were either false, misleading or beside the point.

25. In Ukraine's opening presentation, we established how occupation authorities in Crimea have installed a policy of "russification" that inflicts collective punishment and pervasive discrimination against other cultures. Together, these acts amount to a *campaign of cultural erasure*: a concerted effort to deny non-Russian groups their cultural identities. By promoting ethnic Russian dominance, Russia targets for discrimination non-Russian groups, particularly the Crimean Tatar and ethnic Ukrainian populations. These facts have been widely documented by authoritative human rights organizations.

26. Just a few months ago, the United Nations condemned the persistent pattern of discrimination in occupied Crimea. But yesterday apart from the Agent's breath-taking praise

yesterday for Russia's "great effort to promote the harmonious development of all ethnic groups in Crimea"[18], you heard no plausible defence of Russia's campaign of cultural erasure — its concerted effort to intimidate Crimean Tatars and ethnic Ukrainians; to disappear and kidnap Tatar leaders without serious investigation; to exile or persecute Crimean Tatar leaders; to dismantle the Tatar media; and to ban the Mejlis, culturally significant Ukrainian gatherings and Ukrainian language schools.

27. In his presentation yesterday, Professor Forteau engaged in legal gymnastics that would twist that treaty out of shape. His misstatements of law distort the expansive goals of the Convention for the Elimination of All Forms of Racial Discrimination. Strangely, he claimed that the CERD does not forbid the cultural erasure by Russian authorities of the language, culture, and political independence of Crimean Tatars and ethnic Ukrainians because, he said, not all of these acts of persecution against the Tatars were "based on" race. They were instead, he suggested, motivated by some other reason. As Professor Forteau put it in his presentation at paragraph 15 and we translate:

> "It does not suffice, then, to allege that a prejudice has been suffered by someone or that one of his rights has been infringed. It must be shown that this prejudice or this infringement of a right *is of a discriminatory nature*. Ukraine must therefore establish that Russia had adopted these measures that affect in a discriminatory manner the Tatar and Ukrainian communities *in comparison with the fate reserved for other residents of Crimea*."[19]

28. Simply put, Professor Forteau's defence to the claim of Russian discrimination in Crimea is that Russia is actually violating human rights on an equal-opportunity basis. As if to underscore his own point, Professor Forteau curiously seeks to defend Russia's performance as a party to the CERD by noting the four times that the CERD Committee has had to meet in emergency session with regard to Russia's discriminatory practices[20]. Professor Forteau concludes from this sorry history that the role of the CERD Committee — which the Russian Federation has conspicuously ignored — suggests that this Court has no business granting provisional measures with regard to Russia's discriminatory conduct in Crimea.

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[18]CR 2017/2, p. 54, para. 5 (Lukiyantsev).

[19]*Ibid.*, pp. 67-68, para.15 (Forteau); emphasis in original.

[20]*Ibid.*, pp. 76-77, para. 37.

29. Of course, in *Georgia* v. *Russia*, the Court granted provisional measures against similar Russian arguments. In the *Georgia* v. *Russia* Provisional Measures Order, this Court recognized that neither of the parties had brought their issues to the attention of the CERD Committee[21]. But that did not prevent the Court from finding prima facie jurisdiction[22]. On its face, the plain language of Article 11 (1) of the CERD underscores that recourse to the CERD Committee is optional: "If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it *may* bring the matter to the attention of the Committee." Not it must, but it may. And as Article 22's plain language clearly suggests, before a party can refer a dispute to this Court, it must demonstrate either that the dispute has "not [been] settled by negotiation *or*" that the dispute has not been settled "by the procedure expressly provided in" the CERD, namely, referral to the CERD Committee[23]. Significantly, in its final Judgment in *Georgia* v. *Russia*, the Court did not see fit to revisit this holding[24].

30. In sum, in Crimea, while claiming to meet its obligations under the Convention on the Elimination of All Forms of Racial Discrimination, Russia has engaged in a campaign of cultural erasure against non-Russian ethnic groups. These treaty violations reflect an ongoing pattern and practice of assault upon the human rights in Ukraine that we ask this Court to halt.

31. Professor Forteau, like Mr. Wordsworth and Professor Zimmermann, would have this Court adopt an ornate "cumulative" set — he called them — "cumulative" set of preconditions before it could take jurisdiction under Article 22. But with respect, the wide difference between Russia's and Ukraine's legal interpretations of the CERD suggest that this Court should draw the opposite conclusion: that for purposes of Article 22, "[a]ny dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled

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[21] *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, paras. 116-117.

[22] *Ibid.*, para. 117.

[23] *Ibid.*, para. 116; emphasis added.

[24] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment of 1 April 2011, I.C.J. Reports 2011*, p. 59, para. 133.

> ("Leaving aside the question of whether the two modes of peaceful resolution are alternative or cumulative, the Court notes that Article 22 of CERD qualifies the right to submit 'a dispute' to the jurisdiction of the Court by the words "which is not settled" by the means of peaceful resolution specified therein.")

by negotiation or by the procedures" provided in the CERD may now be referred to this Court. Given the disparity between the two countries' reading of the CERD, a dispute clearly exists "between two or more States Parties concerning the interpretation or application of this Convention which" this Court should now appropriately address. As my colleague Mr. Zionts will show, Ukraine negotiated in good faith and fully exhausted remedies before coming before you at this hearing. The fact that such a wide disagreement exists regarding how the CERD should be interpreted and applied is only another reason why this Court should indicate provisional measures for Ukraine, then proceed to take jurisdiction over the merits.

### C. The urgency of the situation in Ukraine

32. Mr. President, Members of the Court: in short, this Court faces a tragic and urgent situation. In my presentation today, I have not dignified Russia's mischaracterization of the Revolution of Dignity with a response. But Russia's brutal response to that Revolution of Dignity has brought about an interrelated campaign of human rights violations on its own soil. International law cannot tolerate support for the State sponsorship of indiscriminate targeting of civilians and cultural erasure by a nation that claims to forbid terrorism financing and racial discrimination.

33. As Ukraine's recounting of the facts on the ground has demonstrated, the situation is urgent, in both eastern Ukraine and Crimea. As in the previous request brought here against Russia by Georgia, this Court should indicate provisional measures because: one, the circumstances are "unstable and could rapidly change"; two, there is a manifestly "vulnerable" population in need of your protection — the innocent civilians of Ukraine; three, because there is an "ongoing tension" without any "overall settlement to [an ongoing] conflict"[25]; and four, because attacks and similar "incidents have occurred on various occasions . . . leading to fatalities, injuries and the displacement of local inhabitants"[26]. As in the recent case of *Equatorial Guinea* v. *France*, provisional measures are necessary because not only have past violations of international law

[25]See *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.

[26]*Request for Interpretation of the Judgment of 15 June 1962 in Temple of Preah Vihear (Cambodia* v. *Thailand), Provisional Measures, Order of 18 July 2011, I.C.J. Reports 2011 (II)*, p. 550, para. 53.

occurred, it is "not inconceivable" that they will recur if provisional measures are not soon indicated[27].

34. Professor Zimmermann claims that there is no urgency. Why? Because MH17 has already been destroyed[28] and the attacks on civilians that Ukraine refers took place months ago. But in so saying, he conspicuously ignores the facts that unless Russia is ordered to police its borders, more dangerous weapons could arrive again in eastern Ukraine tomorrow, and that the horrible attack on civilians in Avdiivka is only weeks old.

35. In closing, let me reiterate that Ukraine has not sought to bring all of Russia's many violations of international law before this Court. Ukraine has not come here seeking either relief for Russia's acts of territorial aggression in violation of the United Nations Charter, or to seek confirmation of Ukraine's sovereignty over Crimea. Your task today is not to determine the merits of the claims Ukraine has brought; it is not to determine whether these treaties have been violated, or even whether you have jurisdiction. Your only task is to decide whether Ukraine should be afforded temporary measures of protection while this case proceeds.

36. But, Your Excellencies, perhaps the most illuminating aspect of yesterday's opening Russian presentations was what it revealed about Russia's broader attitudes toward this Court and rules of international law. The legal acrobatics you have heard from Russia's clever counsel all mask an apparent conviction that the international rules that apply to other nations simply do not apply to Russia. All Ukraine asks is for this Court to invoke its legal authority to protect innocent Ukrainian civilians threatened by indiscriminate terrorist attacks and cultural erasure. Without provisional measures from this Court, the Russian Federation will continue to play by its own rules and do the opposite of what these two Conventions requires, and innocent Ukrainian civilians will pay the price.

37. Mr. President, Members of the Court: Ukraine asks you to order Russia to stop the flow of weapons and assistance across its borders to groups that launch terrorist attacks against civilians and to cease its campaign of cultural erasure. Let me repeat what I said in my opening remarks: if

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[27] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures*, Order of 7 December 2016, para. 89.

[28] CR 2017/2, p. 51, para. 86 (Zimmermann).

Russia is not committing these illegal acts, it would suffer absolutely no inconvenience by refraining from doing them while this case proceeds. If Russia will not refrain, it must be because its behaviour is neither innocent nor legal.

38. Your Excellencies, I have explained why the correct legal reading of these two treaties, and a basic grasp of the relevant facts establishes the urgency for the indication of provisional measures here. From Ukraine's perspective, this Court's award of provisional measures will be a matter of life or death for many innocent people. With that, Mr. President, I ask you to invite Mr. David Zionts to the podium, to explain why this Court has prima facie jurisdiction.

Le PRESIDENT : Merci, Monsieur le professeur. Je donne maintenant la parole à M. David Zionts.

Mr. ZIONTS:

## PRIMA FACIE JURISDICTION

1. Mr. President, distinguished Members of this Court, I am honoured to appear before you on behalf of Ukraine. I will respond to the arguments of the Russian Federation that the Court lacks jurisdiction even on a prima facie basis.

### I. Substantive negotiations

2. Yesterday you heard counsel for the Russian Federation deliver arguments that would, at best, belong in their preliminary objections. Their argument was both intensely factual and quite provocative: that for more than two years Ukraine engaged in negotiations in form only, and did so in bad faith. Though the inquiry Russia suggests is unprecedented, it will be free to advance that argument. Just not yet. At this stage, all the Court needs to do is to satisfy itself of its jurisdiction as a prima facie matter. The type of argument Russia wishes to present has no place at the provisional measures stage.

3. Let me begin with what is not contested — and it is a lot. The Russian Federation does not dispute the tremendous flurry of diplomatic correspondence exchanged between the Parties. It does not dispute that the subject of these notes was *explicitly* Ukraine's claims under the two treaties at issue. The Russian Federation does not dispute that the Parties held four in-person

negotiating sessions specifically addressed to the Terrorism Financing Convention. It does not dispute that the Parties held three separate sessions concerning the CERD. And finally, despite this extensive negotiating history, Russia does not point to any meaningful progress made between the Parties.

4. These points of agreement are more than sufficient to establish this Court's jurisdiction as a prima facie matter. The Court's decision on provisional measures in *Belgium* v. *Senegal* is instructive. I will quote from paragraph 50 of that order: "[A]t the stage of considering prima facie jurisdiction, it is *sufficient* for the Court to note that an *attempt* has been made by Belgium to negotiate."[29] An attempt is sufficient. And Belgium's attempt was much less robust than Ukraine's: Belgium exchanged correspondence over a period of just eight months, and never held any in-depth, in-person negotiation[30]. If that suffices as an attempt to negotiate, surely Ukraine's much more significant efforts, over a much longer period of time, are sufficient to establish prima facie jurisdiction.

5. Contrast Ukraine's case, and Belgium's for that matter, with the negotiations in *Georgia* v. *Russia*. As the Court ultimately concluded at the preliminary objections stage of that case, a dispute under the CERD arose on 9 August 2008[31]. Georgia filed its Application in this Court on *12* August 2008 — three days later[32]. Between those three days, Georgia did not mention the CERD once[33]. There is simply no comparison between three days of non-negotiation, and two years of extensive, yet fruitless, negotiations. And yet: at the provisional measures stage in *Georgia*, this Court was *still* able to satisfy itself of prima facie jurisdiction.

6. The Russian Federation would have this Court, at the provisional measures stage, inspect an extensive negotiating record for signs that Ukraine was not sufficiently committed to reaching resolution. This line of inquiry is not only unheard of at the provisional measures stage. We have

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[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. 50; emphasis added.

[30] *Questions Relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012*, pp. 433-35, 446, paras. 24-26, 58.

[31] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008*, pp. 386-387, paras. 111-112.

[32] *Ibid.*, p. 353, para. 1.

[33] *Ibid.*, p. 381, para. 98; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Judgment, I.C.J. Reports 2011*, pp. 85, 120, paras. 30, 113.

not found a single decision of this Court at *any* stage of proceedings scrutinizing a lengthy record of negotiations for alleged bad faith of the party claiming the Court's jurisdiction. The Court should pause over the implications of what Russia alleges. It is saying that Ukraine went through the motions of negotiating these disputes for two years, without any desire to actually resolve them. That would be a remarkable amount of time, attention, and resources to devote to a charade. Russia's proposed inquiry would also be burdensome and unworkable for the Court, presumably requiring it to weigh competing accounts of what actually happened in many negotiating sessions. Needless to say, Ukraine does not consider the unilateral assertions you heard yesterday to be a faithful rendition of what transpired between the Parties.

7. There is a much simpler explanation for why two years of negotiations went nowhere: the Parties simply could not find common ground. The negotiations under both the Terrorism Financing Convention and the CERD settled into a predictable routine. Ukraine would raise substantive issues in diplomatic Notes. Russia would fail to respond in kind. Ukraine would lay out these issues again in person. The Russian Federation would say little in response, sometimes offering denials, more often ignoring key issues or refusing outright to discuss them. When the Parties met in person, the Russian Federation would attempt to bog down the agenda with unhelpful general discussions and miscellaneous objections of its own. When the Parties would meet again, Ukraine would largely be forced back to the starting blocks. Again, Ukraine would be forced to summarize its concerns, and again Russia would offer little in response. By the end of this process, the Parties were no closer to resolving their dispute. Indeed, the Russian Federation continued to insist that no dispute under the Conventions even existed. To put it mildly, that is not an encouraging sign that disputes under these Conventions were susceptible to resolution by negotiation.

8. I already mentioned this Court's standard for establishing prima facie jurisdiction as just an "attempt" to negotiate. Even if it were appropriate for Russia to argue the ultimate question of jurisdiction, there is no obligation to continue negotiations after they become futile. The Court in its merits decision in *Belgium* v. *Senegal* emphasized that when there is "no change in the respective positions of the Parties", continued negotiations "could not lead to the settlement of the

dispute"[34]. As this Court's predecessor put it in the *Mavrommatis Palestine Concessions* case, when a party "refuses . . . to give way", there can be "no doubt that the dispute cannot be settled by diplomatic negotiation"[35]. The negotiation process between Ukraine and Russia continued for more than two years, with no evolution of Russia's position, no "giving way", and not even a recognition that there was a dispute worth negotiating. Ukraine could only conclude that there was no possibility for the negotiations to productively be continued.

9. If there could be any doubt about this, surely that has been dispelled by this very hearing. Compare what you have heard from these two sides. Ukraine and Russia cannot agree on basic legal and factual premises underlying these disputes. It was the same story during the negotiations, except that Russia is only now forthcoming about many of its positions. Throughout this process, the Parties have been no closer to common ground than what has appeared before you this week.

10. Again, we submit that any detailed examination of the record of negotiations is at best premature. Indeed, on what, according to Russia, should this Court base a decision that Ukraine clearly failed to negotiate in good faith? An unrepresentative sample of diplomatic Notes it put into the record without comment, and counsel's unilateral characterization of several negotiating sessions.

11. Allow me to briefly address some of the more specific charges you heard yesterday.

12. Mr. Rogachev refers to a few statements by Ukrainian politicians in the press concerning Ukraine's legal strategy in responding to Russian violations of international law[36]. This is a red herring. The proper focus should be on Ukraine's actions. Those actions show diligent efforts to negotiate over the course of two years, and the opposite of a rush to this Court.

13. Moreover, one can fairly expect a high-level official to simplify matters of this nature in statements for public consumption. The people of Ukraine are, unsurprisingly, quite invested in these disputes, and expect to know what their government is doing about them. Letting Ukrainians know there was a path to the International Court of Justice was important. Should every statement

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[34] *Questions Relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012*, p. 446, para. 59; see also *South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 345 ("impasse" shown by "examination of the views, propositions and arguments *consistently maintained* by the two opposing sides") (emphasis added).

[35] *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 13; emphasis omitted.

[36] CR 2017/2, p. 21, para. 21 (Rogachev).

have been accompanied by a discussion of the relevant compromissory clause? Should the Prime Minister have lectured his constituents on the possibility of a negotiated resolution, however unlikely that seemed given Russia's posture and conduct? It would be quite a lot to ask of a lay audience to appreciate the niceties of the jurisdictional régimes under these particular treaties. Considered in light of the actual record of negotiations, the public statements to which Mr. Rogachev referred simply reflect the reality that this Court was always the final recourse for resolution of the dispute between Ukraine and Russia. Nothing was pre-judged.

14. Professor Zimmerman said yesterday that "almost each and every of Ukraine's diplomatic Notes" included irrelevant material concerning the use of force[37]. But Russia has not provided you with "each and every" note, just a select few that it believes serves its point. We did not intend to burden the Court with the full negotiating record given the stage of proceedings, but in light of such arguments, we are submitting that record today.

15. Professor Zimmerman also faults Ukraine for "condemn[ing]" Russia's sponsorship of terrorism and "strongly urg[ing]" it to stop[38]. Ukraine's language simply reflected the seriousness of the situation. It cannot be the case that in order to negotiate over Russia's financing of terrorism in good faith, Ukraine was bound not to accuse Russia of financing terrorism.

16. Finally, Professors Zimmerman and Forteau both accuse Ukraine of failing to provide adequate documentation of its claims[39]. But Ukraine did make detailed presentations at the negotiating sessions, and also relied, as it does in this Court, on significant, credible, publicly available information[40]. Moreover, it is not clear how more information could have persuaded Russia when it declared that key issues Ukraine wished to raise were not appropriate subjects for the negotiation, or simply refused to discuss them[41].

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[37]CR 2017/2, p. 47, para. 62 (Zimmermann).

[38]*Ibid*., para. 63.

[39]*Ibid*., pp. 47-48, para. 65; CR 2017/2, p. 67, para. 12 (Forteau).

[40]See, e.g., Ukraine Note Verbale No. 72/22-194/510-2006 to the Russian Federation, dated 17 Aug. 2015 at 4-5; Ukraine Note Verbale No. 72/22-620-967 to the Russian Federation, dated 24 April 2015 at 1; Ukraine Note Verbale No. 72/22-194/510-1973 to the Russian Federation, dated 18 Aug. 2016 at 3.

[41]See, e.g., Ukraine Note Verbale No. 72/22-620-2894 to the Russian Federation, dated 23 Nov. 2015 at 1-2; Ukraine Note Verbale No. 72/22-610-915 to the Russian Federation, dated 13 April 2016 at 2.

17. The allegations of bad faith raised specifically in connection with the CERD can similarly be dismissed. First, Professor Forteau accuses Ukraine of failing to provide sufficient time for negotiating sessions[42]. In large part, any perceived shortage of time can be attributed to Russia's insistence that negotiations cover topics plainly unrelated to the present dispute, such as Russia's preferred version of Ukraine's long history with the Tatar community[43]. Moreover, if the Russian Federation felt that it was being cut short in these negotiating sessions, why was Russia unwilling to express written views, as Ukraine repeatedly did over the course of two years?

18. Second, Professor Forteau, perhaps understanding his client's disinterest in this negotiation process, claims that Ukraine never made clear that its claims were urgent[44]. One example — though there are others — shows that this is wrong. When Russian authorities banned the Mejlis, Ukraine objected on "*an urgent basis*" to this escalation in Russia's discrimination[45]. Russia declined to treat the matter urgently. In fact, though Ukraine has raised the treatment of the Mejlis in these negotiations since 2014[46], it is one of many issues on which the Russian Federation has simply never responded.

19. Under both Conventions, Ukraine's efforts to negotiate were substantial and in good faith. Russia has supplied no basis to conclude otherwise, particularly at the provisional measures stage.

## II. Arbitration

20. Members of the Court, Russia makes similar arguments concerning the arbitration precondition under the Terrorism Financing Convention, and those fail for similar reasons. Russia does not and cannot dispute that Ukraine requested to submit the dispute to arbitration. Neither can Russia claim that there was agreement on organization of the arbitration within the prescribed six-month period. That is all the Convention requires before the jurisdiction of this Court may be

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[42]CR 2017/2, p. 67, para. 12 (Forteau); see also CR 2017/2, p. 62, para. 42 (Lukyantsev).

[43]Russian Federation Note Verbale No. 4413 to Ukraine, dated 25 April 2016 at 2.

[44]CR 2017/2, p. 75, para. 36 (Forteau).

[45]Ukraine Note Verbale No. 72/22-194-510-1023 to the Russian Federation, dated 26 April 2016 at 1 (emphasis added).

[46]See, e.g., Ukraine Note Verbale No. 72/22-620-3070 to the Russian Federation, dated 15 Dec. 2014 at 2; Ukraine Note Verbale No. 72/22-194/510-839 to the Russian Federation, dated 5 April 2016 at 1.

invoked pursuant to Article 24 (1): one, a request, and two, a lack of agreement within the time provided.

21. Again Professor Zimmerman makes the serious charge of bad faith. Russia thinks the failure to reach agreement on organization of arbitration is, unsurprisingly, Ukraine's fault. We of course disagree, and I will say a few words about why. But I ask the Court not to lose sight of the main point, which is that this too is irrelevant. The Convention does not contemplate pointing fingers about why agreement could not be reached. It does not say that to establish jurisdiction, this Court must evaluate the Parties' respective preferences for organizing the arbitration. And such an inquiry would certainly not be appropriate when evaluating only prima facie jurisdiction.

22. But I will briefly answer Professor Zimmerman's charge nonetheless. He did not dispute the point Ms Cheek made on Monday that Ukraine's request for arbitration was met with complete silence for two months[47]. When Russia eventually responded, it insisted there was not even a dispute under the Convention, but Russia offered to discuss "issues concerning setting up" the arbitration at a meeting it suggested should be held a month later[48]. So three months elapsed — half of the prescribed period — with no progress. Six months is already a short period of time to reach agreement, and Russia wasted half of it.

23. When Russia did finally agree to talk, Ukraine laid out a proposal for constituting the arbitration through the mechanism of an *ad hoc* Chamber of this Court[49]. Professor Zimmerman considers it, and I quote, "obvious[]" that this would not really be an arbitration[50]. The obviousness of that proposition might surprise your former colleague Judge Oda, who has been emphatic that an *ad hoc* chamber is, and I quote, "essentially an arbitral tribunal"[51]. There are other views, to be sure, but this Court does not need to take sides. The point is that Ukraine cannot be said to have made a bad-faith proposal when it was following Judge Oda's view. Moreover, though Ukraine

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[47]Ukraine Note Verbale No. 72/22-610-954 to the Russian Federation, dated 19 April 2016 at 2.

[48]Russian Federation Note Verbale No. 8808 to Ukraine, dated 23 June 2016 at 1.

[49]Ukraine Note Verbale No. 72/22-620-2049 to the Russian Federation, dated 31 August 2016 at 2.

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

[51]*Application for Revision of the Judgment of 11 September 1992 in the Case concerning the* Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) *(El Salvador* v. *Honduras), Formation of Chamber, Order of 27 November 2002*, declaration of Judge Oda, *I.C.J. Reports 2002*, p. 622, para. 5; *Frontier Dispute (Benin/Niger), Formation of Chamber, Order of 27 November 2002*, declaration of Judge Oda, *I.C.J. Reports 2002*, p. 616; see also Judge Shigeruy Oda, "The Contentious Jurisdiction of the Court", in *The International Court of Justice Viewed From The Bench Vol. 244 (1976-1993)* (1993), pp. 59–60.

first mentioned this proposal on 4 August 2016, Russia stated that it was "review[ing]" it in September[52], and only in October decided to reject it, eventually reaching the view you are now told is "obvious"[53]. And consider the six-month clock: that was three months of unexplained Russian delay, then another two months to reject Ukraine's idea.

24. Professor Zimmerman says that he "would have expected Ukraine to submit concrete text proposals for an arbitration agreement", but that only Russia "time and again, submitted full drafts for an arbitration agreement"[54]. Under this Court's *Belgium* decision however, Ukraine was permitted to "defer proposals" until "a positive response is given in principle"[55]. When Russia eventually provided what was arguably a positive response, Ukraine raised its *ad hoc* chamber suggestion. Ukraine considered one of the virtues of that proposal to be that this Court's rules would be available, making it substantially easier to reach final agreement for parties that have had great difficulty reaching agreement between themselves. But Ukraine did not insist on that proposal, and Russia did indeed submit its own draft rules[56]. It should be noted, however, that it did so roughly two weeks before the end of the six-month period. It should also be noted that the draft was not, as Professor Zimmerman describes it, a "full" one[57]. The draft was unclear on fundamental matters, such as how the tribunal would be appointed. It is also not correct to say, as Professor Zimmerman does, that Russia never received "any specific comments"[58]. Russia has submitted a transcript of a meeting in late October that reflects just such comments presented by Ukraine[59].

25. Professor Zimmerman's charge of bad faith does not mention Ukraine's willingness to extend the talks past the six-month mark, to attempt to bridge the remaining differences within the context of Russia's proposal. Professor Zimmerman refers to one request Ukraine made,

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[52]Russian Federation Note Verbale No. 13322 to Ukraine, dated 19 September 2016 at 3.

[53]Russian Federation Note Verbale No. 14426 to Ukraine, dated 3 October 2016 at 2.

[54]CR 2017/2, p. 49, para. 72 (Zimmermann) emphasis omitted.

[55] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 447, para. 61.

[56]Russian Federation Note Verbale No. 14426 to Ukraine, dated 3 October 2016.

[57]CR 2017/2, p. 49, para. 72 (Zimmermann).

[58]*Ibid.*

[59]See, e.g., Russian Federation Dossier, Vol. II (Ann. 2).

concerning the enforcement of an award. Given the difficulties between the Parties, it was reasonable for Ukraine to worry about how an award would be enforced. In any case, there were other important areas of disagreement which Professor Zimmerman did not mention. Ukraine does not suggest that Russia was obliged to accept all of Ukraine's proposals. The point is just that there was no agreement within six months. The drafters of the Convention anticipated that this could happen, and this is why they provided for referral to this Court.

## III. **CERD Committee**

26. Finally Mr. President, Members of the Court: with respect to the CERD, Professor Forteau argues that before referring its claims to this Court, Ukraine was obliged *both* to exhaust bilateral negotiations, *and* to attempt proceedings before the CERD committee[60]. Little needs to be said of that argument at this stage, where again the only question is prima facie jurisdiction. No recourse to the CERD Committee was attempted in the *Georgia* case, but as Professor Koh mentioned, that fact did not prevent this Court granting provisional measures.

27. Professor Forteau attempts to avoid that problem by arguing that this Court's reasoning in *Georgia* in 2011, and I quote in translation, "confirmed" Russia's position that the Article 22 preconditions are cumulative[61]. But how could it "confirm" that point when, as Professor Forteau must acknowledge, the Court expressly "le[ft] aside" that issue[62]? Six Members of the Court did address this question, and all six disagreed with Russia's position: the conditions are alternative, and if negotiations are exhausted, it is not necessary to then refer the matter to the CERD Committee[63] and only then approach this Court. In light of the text, object, and purpose of Article 22, we do not believe Professor Forteau has the correct reading of the treaty. But for today it suffices to note that the so-called "cumulative" position, having been rejected by every Member

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[60]CR 2017/2, pp. 65-66, para. 9 (Forteau).

[61]*Ibid*., paras. 6-7.

[62]*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. 125, para. 133; see also *ibid*., p. 140, para. 183.

[63]*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment*, joint dissenting opinion of President Owada, Judges Simma, Abraham and Donoghue, and Judge *ad hoc* Gaja, pp. 154-57, paras. 41-47; *ibid*., dissenting opinion of Judge Cançado Trindade, pp. 288, 291, paras. 109, 116.

of the Court to decide it, cannot be so clearly correct as to defeat this Court's jurisdiction as a prima facie matter.

## IV. Conclusion

28. Mr. President, I would like to make one final point that applies to Russia's arguments on all of these jurisdictional issues. It is of course important to enforce the treaty-based prerequisites to referring disputes to this Court, something that the applicant in the *Georgia* case did not take sufficiently seriously. But to accept Russia's argument here would be to swing the pendulum wildly in the other direction. States would be rewarded for engaging in gamesmanship to draw out unproductive negotiations, and successfully steer clear of judicial intervention. When a State has consented to this Court's jurisdiction, it should not be able to unilaterally defeat that jurisdiction through its negotiating tactics. Numerous treaties contemplate the ultimate resolution of disputes by this judicial body. The Russian Federation's approach to these jurisdictional questions would diminish this Court's role, and make the promise of judicial resolution of disputes illusory. Ukraine, conscious of this Court's precedents, in no way rushed to court. It has already delayed its quest for justice. Ukraine should not now be told that justice must also be denied.

29. Mr. President, that concludes my presentation. I ask you to invite my colleague Ms Marney Cheek to the podium, to address Ukraine's provisional measures requests under the Terrorism Financing Convention.

Le PRESIDENT : Merci. Je donne à présent la parole à Mme Marney Cheek pour sa plaidoirie.

Ms CHEEK:

### PROVISIONAL MEASURES REQUESTS RELATED TO THE TERRORISM FINANCING CONVENTION

1. Mr. President, and distinguished Members of the Court, I will now address the Russian Federation's presentation on the Terrorism Financing Convention in more detail than you heard from Professor Koh earlier this morning, focusing in particular on the plausible rights Ukraine asserts under the Terrorism Financing Convention.

2. What is quite clear after the Russian Federation's presentation yesterday is that there is a disagreement between the Parties on both the interpretation and the application of the Terrorism Financing Convention. There were also several loose references yesterday to "apparent" facts. And I will now turn my attention to these questions of both law and fact.

**A. The definition of a terrorist act derives from the Convention itself**

3. On Monday, Ukraine focused the Court on the definition of a terrorist act under Article 2 (1) *(b)* of the Convention, noting that the Convention recognizes that acts of terrorism and a state of armed conflict are not mutually exclusive. Yesterday, Mr. Wordsworth argued that some of the terrorist acts of which Ukraine complains — particularly the shelling of civilians in Volnovakha, Mariupol, and Kramatorsk — are simply examples of indiscriminate shelling in an armed conflict zone that falls outside of the Terrorism Financing Convention[64].

4. Mr. Wordsworth turned your attention to the Additional Protocols to the Geneva Conventions to support Russia's view that acts of violence — "the primary purpose of which is to spread terror among the civilian population" — cannot possibly qualify as terrorist acts under the Terrorism Financing Convention[65].

5. In doing so Mr. Wordsworth characterized the Terrorism Financing Convention as "different to, and in certain respects more stringent than" international humanitarian law's rules governing military action targeting civilians[66]. Ukraine would agree that the obligations under the Terrorism Financing Convention are fundamentally different than the obligations under international humanitarian law (IHL). Ukraine would fundamentally disagree, however, that somehow the definition of a terrorist act in the Terrorism Financing Convention is simply a "more stringent" definition of terror as defined in the IHL context. The Terrorism Financing Convention is different, because it addresses the financing of terrorism, a topic not covered at all by the laws governing armed conflict. The obligations Russia has under the Terrorism Financing Convention derive from the text of the Convention itself; and it is the language of the Convention that is relevant to the Court's assessment of the plausibility of Ukraine's claims.

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[64]CR 2017/2, pp. 25-33, paras. 12-33 (Wordsworth).

[65]*Ibid.*, p. 24, para. 9 (Wordsworth).

[66]*Ibid.*

6. I return again to the plain language of the treaty under which Ukraine has asserted its claims. The definition of a terrorist act under Article 2 (1) *(b) does apply* in situations of armed conflict, *as long as those attacked are not actively engaged in armed conflict*.

7. While the plain meaning of the text is clear, the *travaux préparatoires* confirms that parties involved in an armed conflict also can engage in terrorist acts. We heard of France's first draft of the Convention yesterday. The first draft of the Convention contained language that is identical to that used in the International Convention for the Suppression of Terrorist Bombings, which excludes "the activities of armed forces during an armed conflict"[67] from that Convention.

8. The drafters of the Terrorism Financing Convention, however, decided not to include such a provision. The Special Tribunal for Lebanon has examined this question. That tribunal concluded that the Terrorism Financing Convention is not a more "stringent" rule as suggested by Mr. Wordsworth, but simply different. The Terrorism Financing Convention, according to the Special Tribunal for Lebanon, addresses an issue — the financing of terrorism — where international humanitarian law was insufficient:

> "[R]atif[ying] the Convention for the Suppression of the Financing of Terrorism without making any reservation, thereby accept[s] the notion that the financing of persons or groups attacking innocent civilians in time of armed conflict, as well as, in consequence, the perpetration of such attacks, may be categorised as 'terrorism'."[68]

9. Mr. Wordsworth also implied that because no international human rights agency has declared these shelling incidents to be terrorism, that those acts can therefore not possibly qualify as acts of terrorism under the Convention. For example, Ukraine relies on reports of the United Nations High Commissioner for Human Rights and the International Committee of the Red Cross. We agree with Mr. Wordsworth when he noted that "these organizations are looking at the conflict through the prism of IHL"[69]. Ukraine, however, cites these documents simply as evidence that the events Ukraine asserts happened as a matter of fact; the determination of whether these

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[67] Alain Dejammet, Permanent Representative of France to the United Nations, Letter to the Secretary-General of the United Nations dated 4 Nov. 1998; Draft international convention for the suppression of terrorist financing, UN doc. A/C.6/53/9, 4 Nov. 1998.

[68] *Prosecutor* v. *Ayyash et al.*, Case No. STL-11-01, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Special Tribunal for Lebanon, 16 Feb. 2011, pp. 70-71, para. 108.

[69] CR 2017/2, p. 26, para. 16 (Wordsworth).

acts are terrorist acts under the Convention is a legal determination that is beyond the mandate of those agencies, but not of this Court.

### B. In multiple respects, Ukraine's claims are plausible with regard to the Terrorism Financing Convention's intent requirements.

10. Another point on which we agree with Mr. Wordsworth, at least in part, is that the act of financing terrorism has particular knowledge and intent requirements. First, under the Convention's broad residual definition of terrorism, the underlying act must be intended to harm civilians. Second, that act must have a purpose of intimidation or coercion, though that purpose can be inferred from the circumstances. And third, the party providing support must have knowledge that its support will be used to engage in terrorism, though it only needs to be "in part".

11. Mr. Wordsworth would give each of these standards the narrowest possible construction. Our interpretation, by contrast, comports with how these concepts are understood under international law. At this stage, it is at least plausible to say that the egregious acts that we have identified fall within the Convention.

#### (a) *Intent to cause death or serious injury to civilians*

12. First, Mr. Wordsworth contends that none of these acts even plausibly involves an intent to harm civilians[70]. All of his arguments on this point concern incidents of indiscriminate shelling, but some of the incidents we have discussed are clearly targeted at civilians. There is no question, for example, that there was no military target anywhere in the vicinity of the peaceful marchers gathered in Kharkiv. Likewise, according to the United Nations Under-Secretary-General, the bombardment of Mariupol "knowingly targeted civilians"[71]. We did not hear a reasoned explanation from Mr. Wordsworth for why these attackers did not intend — at least plausibly, which is our standard today — to cause death to civilians.

13. But even with respect to indiscriminate shelling, the intent element is satisfied. There are different types of "intent"; the Terrorism Financing Convention does not say which it adopts. It is therefore appropriate to consider how that term is used in related contexts in international law. An

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[70]CR 2017/2, pp. 33-34, paras. 34-36 (Wordsworth).

[71]United Nations, *Official Records of the Security Council*, 7368th Meeting, p. 2, UN doc. S/PV.7368, 26 Jan. 2015, statement of Jeffrey Feltman, United Nations Under-Secretary-General for Political Affairs (Ann. 4).

obvious place to look is the Rome Statute of the International Criminal Court, which also deals with internationally criminalized conduct and was drafted at approximately the same time. The Rome Statute defines "intent" to mean that one "means to cause [a] consequence *or is aware that it will occur in the ordinary course of events*"[72].

14. The International Committee of the Red Cross, in its seminal *Commentary* to Protocol I to the Geneva Convention, provides a similar definition. "Intent", it says, "encompasses the concepts of 'wrongful intent' or '*recklessness*,' . . . the attitude of an agent who, without being certain of a particular result, accepts the possibility of it happening"[73].

15. Consistent with this definition of intent, it is well established elsewhere in international criminal law that an indiscriminate attack can be considered to be "directed against" the civilian population. The case of *Prosecutor* v. *Galić* before the Yugoslav Tribunal, to which Mr. Wordsworth referred yesterday, is instructive. That case concerned, not unlike what Ukraine has experienced, a "campaign of artillery and mortar shelling onto civilian areas of Sarajevo and upon its civilian population"[74]. The Trial Chamber noted the widespread view that "means of combat which cannot discriminate between civilians and civilian objects and military objectives are tantamount to *direct targeting of civilians*"[75]. The Appeals Chamber confirmed that an "indiscriminate attack" can, at least in some circumstances, be considered as a direct attack against civilians[76].

16. These concepts make perfect sense in the context of the Terrorism Financing Convention's undefined requirement of "intent". In fact, though there is limited judicial practice interpreting the treaty, the Italian Supreme Court of Cassation has persuasively rejected Russia's narrow view. That court addressed an argument similar to Mr. Wordsworth's, and found it not just wrong, but "clearly at odds with the explicit provision[s] of the" Terrorism Financing Convention.

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[72]Rome Statute of the International Criminal Court, entered into force 1 July 2002, Article 30 (2) *(b)*.

[73]International Committee of the Red Cross, *Commentary of 1987 on Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)* (1987), para. 3474, available at https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=7BBCFC2D471A1EAAC12563CD00437805.

[74]*Prosecutor* v. *Galić*, Case No. ICTY 98-29-T, Trial Chamber Judgment, 5 Dec. 2003, p. iii.

[75]*Ibid.*, para. 57 and n.101.

[76]*Prosecutor* v. *Galić*, Case No. ICTY 98-29-T, Appeals Chamber Judgment, 30 Nov. 2006, paras. 131-132; see also *Prosecutor* v. *Strugar*, Case No. ICTY 01-42-T, Appeals Chamber Judgment, 17 July 2008, para. 270 (Appeals Chamber found that such an attack on civilians "through recklessness" qualifies as "indirect *intent*").

Under the Convention's intent standard, the court held, "an action against a military objective must also be regarded as terrorism if the particular circumstances show beyond any doubt that serious harm to the life and integrity of the civilian population are *inevitable*, creating fear and panic among the local people"[77].

17. The court provided an example that resonates with Mr. Wordsworth's claim that it is not terrorism to bombard a line-up of civilian vehicles at a checkpoint, because there happen to be soldiers manning that checkpoint for those vehicles to cross. The court explained:

> "A simple example is an attack using explosives against a military vehicle in a crowded market. In a situation of this kind, an interpretative approach that would see the joint presence of military and civilian victims as an element sufficient in itself to deny the terrorist nature of the act undoubtedly lacks coherence and rationality, as it is clear that the certainty (and not the mere possibility or probability) of serious harm inflicted on civilians shows unequivocally that the committing of an *intentional* and specific act marked by an *intent* to engage in the action and achieve the particular results that constitute terrorist purposes."[78]

18. Of course, the reason we are here is so that this Court, and not any other, can provide an authoritative interpretation of the Convention. But this decision, together with the broader international law definition of "intent," should give the Court ample comfort that Ukraine has articulated a plausible interpretation of the Convention's "intent" requirement.

**(b)** ***Purpose to intimidate or compel***

19. As Mr. Wordsworth also raised, the residual definition of terrorism under Article 2 (1) *(b)* requires that the attacker have a purpose of "intimidat[ing] a population", or "compel[ling] a government or an international organization to do or abstain from doing any act"[79]. He did not address, however, the drafters' recognition that such a purpose will not always be announced by those who commit terrorism, and therefore it *can be* inferred by the act's "nature or context".

20. Mr. Wordsworth mentioned that the attacks on civilians in the winter of 2015 occurred shortly before the Minsk Agreement. In fact, in the spring of 2015, the DPR and LPR were seeking

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[77] *Italy* v. *Abdelaziz and ors*, Final Appeal Judgment, No. 1072, 2007, 17 Guida al Diritto 90, ILDC 559, Supreme Court of Cassation, Italy, 17 Jan. 2007, as reported in Oxford Reports on International Law, para. 4.1 (emphasis added).

[78] *Ibid.* (Emphasis added.)

[79] CR 2017/2, p. 24, para. 8 (Wordsworth).

to impose specific constitutional amendments on Ukraine. The attacks we have discussed thus would naturally intimidate Ukrainian civilians, *and* they arose in the context of a group that was seeking political concessions from their Government.

21. This conclusion is not just plausible, but the most likely one. What great military advantage would these fighters have gained by eliminating a checkpoint for civilian traffic near Volnovakha, not especially close to the contact line? The terror sowed among civilians traveling near their homes in their own country likely had a much greater effect. All Mr. Wordsworth could muster is that the bombardment of a residential neighbourhood appears to have been near the checkpoint[80]. Mr. Wordsworth is mistaken on that. And on the facts, he is similarly mistaken with regard to Kramatorsk. Contrary to Mr. Wordsworth's assertion yesterday, Kramatorsk and the residential area that was bombarded was not 200-300 m from a Ukrainian military compound, but the nearest Ukrainian base is approximately 5 km away. Even if one wants to disagree about the location of these shellings, the most natural inference from context is that this attack was meant to instill fear and extract concessions, not to eliminate a checkpoint.

22. Let me also briefly mention Mr. Wordsworth's inference that "on 22 January 2015 . . . when a trolley bus was hit at Kuprina Street in Donetsk City", that Ukraine armed forces were responsible for this attack[81]. In fact, the OSCE Spot Report cited does not attribute this shelling to Ukrainian armed forces, and it was later reported that Ukrainian forces were located too far from the spot to be responsible for this attack[82].

23. The attacks on which Ukraine has focused meet both the intent and purpose requirements laid out in the Convention's residual definition of terrorism. And that includes the attack on Flight MH17. As I noted on Monday, and Mr. Wordsworth did not contest, the Dutch Safety Board (DSB) found that Ukraine reserved the level of 26,000 ft and below for military aircraft, with civil aviation directed to an altitude above 32,000 ft[83]. MH17 was one of 160 civilian aircraft in this portion of the sky above eastern Ukraine on the date of the attack. As the Dutch Safety

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[80]CR 2017/2, p. 31, para. 29 (Wordsworth).

[81]*Ibid.*, p. 32, para. 31 (Wordsworth).

[82]"Donetsk trolleybus explosion blows Ukraine peace negotiations apart", *The Guardian*, 22 Jan. 2015, available at https://www.theguardian.com/world/2015/jan/22/donetsk-trolleybus-explosion-peace-negotiations-russia-ukraine.

[83]CR 2017/1, p. 44, para. 34 (Cheek); see DSB Report, pp. 10-11 (Ann. 34).

Board also found, "there were no military aircraft in the sector through which flight MH17 flew[84]. Just as the DPR must have been well aware of the line-up of civilian cars at Volnovakha, so too it must have been aware that it was firing dangerous weapons recklessly and indiscriminately, at a minimum, at a heavily trafficked civilian airway.

24. But there is an alternate, and just as plausible, path to concluding that the attack on MH17 implicates the Convention. That is the Convention's incorporation of offences under other treaties, including the Montreal Convention.

25. By its terms, the shoot-down of MH17 violated the Montreal Convention. Article 1 of that Convention defines the relevant offence as "unlawfully and intentionally . . . destroy[ing] an aircraft in service". There is no question that DPR fighters acted unlawfully in firing a Russian-supplied Buk at an aircraft, intending to destroy it. The term "intentional" refers to intent to destroy an aircraft, not to destroy an aircraft of a particular type. The Convention's limitation to civilian aviation arises separately, under Article 4, which excludes "military aircraft" from its scope. If the DPR had actually hit a military aircraft, the Montreal Convention would not apply for this reason. But it did not. They intentionally destroyed an aircraft, and Article 1 of the Montreal Convention is satisfied.

26. Even if somehow Article 1's intent requirement were read as modifying the condition in Article 4, it still would not follow that recklessly firing in the direction of civilian air traffic is permissible. As the former Principal Legal Officer of the International Civil Aviation Organization has noted, Article 1's "intent" requirement is not met by "negligence", but may well be met where the attacker "was aware that [the harmful] result may occur", a matter the drafters left undecided for "interpretation by the Courts of law"[85]. A similar argument was advanced to this Court in the case concerning the *Aerial Incident of 3 July 1988*, relating to what the United States claimed was an accidental destruction of a civilian airliner. Iran contended that the United States' gross

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[84]DSB Report, p. 38 (Ann. 34).

[85]Michael Milde, *Essential Air and Space Law: International Air Law and ICAO* (2d ed. 2012), pp. 242-243,

> "Some elements of [Art. 1] require more detailed interpretation based on the true intentions of the drafters . . . The act must be 'intentional' — this specific offence under the Montreal Convention cannot be committed by negligence; the Conference did not discuss whether the intention must be 'direct' (i.e., true intent to cause the harmful result) or whether an 'indirect' or 'eventual' interest would suffice (the offender did not intend to cause the harmful result but was aware that such result may occur and that did not stop him from acting) — that would be left to interpretation by the Courts of law."

recklessness was sufficient to hold the United States responsible[86]. Rather than test its counter-arguments, the United States settled that case with Iran. Ukraine's view of the Montreal Convention can thus hardly be said to be novel or implausible.

27. I will pause briefly here to address some of the factual inaccuracies presented by the Russian Federation in Mr. Rogachev's presentation yesterday. You will recall that a five-country joint investigative team has been engaged in an extensive examination of the downing of MH17. Mr. Rogachev attempted to discredit the Joint Investigative Team and the Dutch Safety Board findings, citing a recent trip by two Dutch journalists to the crash site in Ukraine[87]. He said, "much evidence was left untouched by the investigators as, for example, recorded by two Dutch journalists who recently visited the accident site"[88]. The Russian Federation, cited to RT — also known as Russia Today, a State-owned news site, which appears on your screen: that is paragraph 14 of the transcript. On your screen is also a letter of 16 February 2017 from the Minister of Security and Justice of the Netherlands, Stef Blok, to the House of Representatives of the Netherlands, and Blok writes regarding their investigation into the journalist's discovery. Towards the end of his letter on the subject he says: "[the journalist] is unable to substantiate his earlier claims that there was much more to be found. The many hours of video footage he shot on location as a journalist and showed to the investigation team did not show any human remains or personal belongings." This is just one of many documents that The Russian Federation has submitted in these proceedings that does not hold up to scrutiny. In this particular case, given that the Russian Federation has impeded the MH17 investigation and vetoed a United Nations Security Council resolution regarding the creation of an international tribunal, it has long pushed an alternative view of events.

**(c)** ***Russia's knowledge***

28. Finally, there is a question of knowledge among whoever finances such acts of terrorism, whether it was private Russian financiers, public officials, or the Russian Federation itself. Little more needs to be said here. Mr. Wordsworth asserts that there is "no evidence . . . plausible or

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[86]*Aerial Incident of 3 July 1988 (Islamic Republic of Iran* v. *United States of America), Memorial of the Islamic Republic of Iran* (24 July 1990), pp. 243-45.

[87]CR 2017/2, pp. 19-20, para. 14 (Rogachev).

[88]*Ibid.*

otherwise", of Russia's knowledge[89]. But he ignores the very strong evidence Ukraine put forward that Russia knew the types of activities the DPR and similar groups would engage in with the support being provided. Mr. Wordsworth mentioned yesterday that the UNHCHR report of 15 June 2014 could not have provided Russia with the knowledge that the DPR engaged in indiscriminate shelling of Ukrainian cities. But that was not the point for which the document was put forward. The point which Mr. Wordsworth did not dispute is that the UNHCHR reported that DPR and other groups were "targeting ordinary people who support Ukrainian unity" with "acts of intimidation and violence"[90]. The UNHCHR may not have explicitly predicted the shelling of Ukrainian residential areas, but it most certainly put Members of the United Nations on notice that ordinary citizens were in the DPR's sights.

29. Targeted violence against civilians, based on their political views, is terrorism — even under Mr. Wordsworth's cramped definition. And as Russia enhanced these groups' capabilities, the attacks on civilians grew correspondingly deadly. The Court can readily conclude that the Russian Federation had knowledge of this inevitable result of its actions.

LE PRESIDENT : Madame, je crois que le moment est venu de faire la pause d'usage de 15 minutes après laquelle vous pourrez reprendre et terminer votre exposé.

*La séance est suspendue de 11 h 35 à 11 h 55.*

Le PRESIDENT : Veuillez vous asseoir. Madame, je vous rends la parole pour la poursuite de votre exposé.

Ms CHEEK :

### C. The Minsk process is not affected by this Court's indication of provisional measures

30. Mr. President, Members of the Court, as Professor Koh mentioned earlier this morning, the Minsk Process is not an impediment to this Court indicating provisional measures in this case.

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[89]CR 2017/2, p. 34, para. 37 (Wordsworth).

[90]*Ibid.*, p. 27, para. 18 (Wordsworth); Office of the United Nations High Commissioner for Human Rights, "Report on Human Rights Situation in Ukraine", 15 June 2014, para. 207 (Ann. 7); see Office of the United Nations High Commissioner for Human Rights, "Accountability for Killing in Ukraine from January 2014 to May 2016" (2016), p. 33 (Ann. 6).

In addition to the points outlined by Professor Koh, it may be helpful to understand what the Minsk Process actually is, particularly given the Russian Federation's mischaracterization that "the DPR and the LPR, which Ukraine now wants to stigmatize as terrorists, signed the Minsk Agreements and are represented in the Trilateral group where Ukraine's Government continues to engage with them"[91].

31. The official members of the Trilateral Contact Group, formed in June 2014 to facilitate the end of hostilities in eastern Ukraine, were Ukraine, the Russian Federation and the Organization for Security and Co-operation in Europe (OSCE). These three parties negotiated the Minsk Protocol (also referred to as "Minsk I") on 19 September 2014. Minsk I affirmatively states in the preamble that "the Trilateral Contact Group, consisting of the representatives of Ukraine, the Russian Federation and the [OSCE], reached an understanding with respect to the need to implement" steps to stop hostilities in eastern Ukraine. The leaders of France, Germany, Russia and Ukraine (also known as the "Normandy Four" format) negotiated Minsk II on 12 February 2015. It is not correct to consider so-called "representatives" of the DPR and the LPR as official parties to those negotiations. Based on Minsk II, the OSCE deployed monitors on the ground in eastern Ukraine, and Ukraine remains committed to the Minsk Process and its attempts to stop hostilities in eastern Ukraine.

32. But contrary to the inferences that the Russian Federation asks you to draw, there is no reason why peace cannot be pursued through the Minsk Process while at the same time Ukraine seeks provisional measures from this Court. The Russian Federation is incorrect that somehow all of the terrorist incidents we are concerned with occurred prior to Minsk II. As we know, the Kharkiv bombing occurred on 22 February 2015, 10 days after the signing of Minsk II. Since the signing of Minsk II, those based in Russia have continued to send money and weapons across the border. The reality is that we find ourselves here today because the Russian Federation is independently violating the Terrorism Financing Convention.

33. Professor Zimmermann asserted that provisional measures would interfere with the Minsk process by denying humanitarian assistance to those in eastern Ukraine[92]. This is simply not

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[91] CR 2017/2, p. 18, para. 11 (Rogachev).

[92] *Ibid.*, p. 52, para. 88 (Zimmerman).

the case. A provisional measure to "exercise appropriate control over its border to prevent further acts of terrorism financing, including the supply of weapons" does not implicate humanitarian relief. It is true that weapons are being smuggled into eastern Ukraine under the guise of humanitarian aid, as the witness testimony on your screens describes. It is also true that Russia does not allow "humanitarian convoys" to be inspected by the International Committee of the Red Cross, and that much of its border is not accessible to the OSCE. That said, true humanitarian aid could not be used for terrorism, and so would not be slowed in the least as the result of the measures requested.

34. If anything, the provisional measures requested here would help support the Minsk Process. For example, one of the package of measures which is on your screen is the: "Withdrawal of all foreign armed formations, military equipment, as well as mercenaries from the territory of Ukraine under monitoring of the OSCE. Disarmament of all illegal groups."

35. To reiterate, the provisional measures sought here today relate directly to the financing of terrorism claims under the Terrorism Financing Convention; and they would in no way "interfere with" the Minsk II package of measures.

**D. Direct responsibility under the Terrorism Financing Convention**

36. Let me next turn to Professor Zimmermann's argument that the Russian Federation can never be found directly liable for the financing of terrorist acts under the Terrorism Financing Convention. Professor Koh addressed this earlier, but I will make a few additional points. Once again, the very language of the Terrorism Financing Convention provides the answer. State Parties — which we all can agree includes the Russian Federation — shall co-operate in the prevention of the offences in Article 2 "*by taking all practicable measures*". "Taking all practicable measures" is a very broad obligation. And Article 18 continues. "to prevent and counter preparations in their respective territories for the commission of those offences". This is not an obligation that is limited to MLAT requests. Article 18 (1), by its plain terms and context, requires more. As to MLAT requests however, I would note that Mr. Rogachev insisted that the Russian Federation has executed on 69 of 79 Ukrainian MLAT requests in criminal proceedings

related to acts of terrorism[93]. Ukraine has submitted 51 requests, 18 of which were responded to in a reasonable time. We do not know where Russia gets its figures.

37. Professor Koh referenced the *Bosnia Genocide* case, noting that the Court's logic in that case — that "the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide"[94], equally applies in the Terrorism Financing Convention context. In response, Professor Zimmermann argued that Articles IV and IX of the Genocide Convention provide the basis for the obligation on States not to commit genocide. He argued that because no similar provisions exist in the Financing Terrorism Convention, no similar obligation exists on States not to finance terrorism.

38. While an interesting theory, the Court made clear in its *Bosnia Genocide* decision that it relied on Article I of the Genocide Convention, *not* the compromissory clause in Article IX, to reach its conclusion that the treaty imposes a substantive obligation on States not to commit genocide themselves: "Since Article IX is essentially a jurisdictional provision, the Court considers that it should first ascertain whether the substantive obligation on States not to commit genocide may flow from the other provisions of the Convention."[95]

39. Only *after* reaching its conclusion on jurisdiction under Article I did the Court find that the compromissory clause confirmed the conclusion that it had reached based on the duty to prevent under Article I. Furthermore, *Bosnia Genocide* made no mention of Article IV whatsoever in reaching its conclusion.

40. Given that Article 18 mandates that a State take "all practicable measures" "to prevent and counter preparations . . . for the commission of those offences", it would be a twisted reading indeed 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. Surely when a State actively engages in financing terrorism, it is failing to undertake "practical measures . . . to prevent and counter preparations in their respective territories for the commission of those offences". Again, the duty to prevent carries meaning only if the State is prohibited from doing the very thing it is meant to prevent.

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[93]CR 2017/2, p. 21, para. 20 (Rogachev).

[94]*Bosnia Genocide* case, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 113, para. 166.

[95]*Ibid.*

41. Further, negotiating parties know how to exclude a State's activities from a treaty's scope. For example, the Bombings Convention expressly excludes military activities from its scope, as I mentioned earlier.

42. Professor Zimmerman also repeatedly referred to "State terrorism", and the views of the co-ordinator of the *ad hoc* Committee on the Draft Comprehensive Convention against Terrorism and the views of some States that "State terrorism" should be excluded from the draft. It is true that the question of State responsibility for *terrorism itself* — State terrorism — was not covered by the Terrorism Financing Convention, and may, at a future time, be covered by an aspirational comprehensive agreement on terrorism. But it was not the State *financing* of terrorism that remained unresolved during the negotiations of the Terrorism Financing Convention. Rather, the issue of acts of terrorism carried out directly by a State was left for another day. Many delegations expressed concern that the Convention did not cover such forms of terrorism and found it to be a significant gap[96]. But that says nothing to a State's responsibility to not finance terrorism under the Terrorism Financing Convention.

43. Ukraine agrees that State terrorism is excluded from the scope of the Convention. What Ukraine does not agree with is that State *financing* of terrorism is excluded.

44. Finally, Professor Zimmermann took the Court to Article 4 of the Terrorism Financing Convention in an effort to show that the Convention only addresses private behaviour[97]. Article 4 simply says that State parties should adopt measures to establish criminal offences for the offences in Article 2. But there is no support for the contention that, per Article 4, the Convention "deals only with the relationship of a given contracting State with private individuals"[98], as Professor Zimmermann asserted. To the contrary, by its very terms, the Convention applies to "*[a]ny* person". Further, the French delegation, as the drafters of the Convention, stated that the Convention covered all forms of financing, including both "'unlawful' means (such as

[96]United Nations, *Official Records of the General Assembly* (UNGAOR), Fifty-fourth Session, 34th Meeting, paras. 10 and 30, UN doc. A/C.6/54/SR.34, p. 4, 16 Nov. 1999, Sudan; *id*. at pp. 3-4, Iraq; *id*. at p. 5, Pakistan.

[97]CR 2017/2, p. 40, paras. 20-21 (Zimmermann).

[98]*Ibid.*, p. 40, para. 21 (Zimmermann).

racketeering) and 'lawful' means (such as private and *public financing*, financing provided by associations, etc.)"[99].

### E. Other acts of financing terrorism

45. The Russian Federation spent a great deal of time yesterday on the indiscriminate shelling of civilian areas. These are not, however, the only claims that Ukraine has asserted under Article 18. Ukraine has raised bombings well outside the conflict zone, including the tragic bombing in Kharkiv. Ukraine has raised monetary transfers from Russia to groups carrying out terrorist acts in eastern Ukraine. There is no evidence that the Russian Federation has done anything to stop public officials or private citizens from directly or indirectly, and in some cases quite publicly, funding groups engaging in terrorism. Even apart from the indiscriminate attacks meant to intimidate the population, Ukraine has put forward plausible claims and plausible violations of Article 18 that justify the indication of provisional measures.

### F. Urgency

46. Mr. President, Members of the Court, let me end with the question of urgency and return to Avdiivka. I raised Avdiivka on Monday with regards to urgency. There is shelling of residential areas in Avdiivka, which is of grave concern. I would note that that the BBC video shown by the Russian Federation yesterday, in the first instance, was not properly on the record, and in accordance with the Court's practice directives — I assume it is not formally part of the record in any case — but it did show tanks with OSCE monitors, and it is unclear what was happening in that footage. But what is indisputable is that the situation in Avdiivka indicates a spike in violence which makes the situation very urgent indeed.

47. An OHCHR report that was just published on Monday 6 March 2017, states that, "[i]n February 2017, OHCHR recorded 73 conflict-related casualties (11 killed and 62 injured) — the highest numbers since August 2016"[100]. And recall that Mr. Alexander Hug, the Deputy Chief Monitor of the OSCE's Special Monitoring Mission, called this "the worst fighting we've seen in

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[99]United Nations General Assembly *ad hoc* Committee established by General Assembly res. 51/210 of 17 Dec. 1996, Third session, 15-26 March 1999, Report, UNGAOR, Fifty-fourth Session, Supp. No. 37, UN doc. A/54/37, p. 3, 1999; emphasis added.

[100]OHCHR, *Conflict-Related Civilian Casualties in Ukraine*, 6 March 2017.

Ukraine since 2014 and early 2015"[101], the time period of Kramatorsk, Volnovakha, Mariupol, and Kharkiv.

48. Weapons continue to flow across the border, and fighting intensifies. The notion that other terrorist attacks are in the offing based on the past pattern of 2014-2015 is unfortunately more than plausible, it is virtually inevitable.

49. Mr. President, I would now ask that you call upon my colleague, Mr. Jonathan Gimblett, to address issues related to the CERD.

Le PRESIDENT : Merci, Madame. Je donne maintenant la parole à M. Gimblett.

Mr. GIMBLETT:

## PROVISIONAL MEASURES RELATING TO UKRAINE'S CLAIMS UNDER THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

### I. INTRODUCTION

1. Mr. President, distinguished Members of the Court. I will address the Russian Federation submissions yesterday concerning the International Convention on the Elimination on all forms of Racial Discrimination (CERD). Yesterday you heard the Russian Federation try to paint an alternative reality in Crimea to that described in Ukraine's Application and corroborated in the reporting of countless independent observers. As I will explain today, the rosy picture painted by the Russian Federation — in which the grateful non-Russian communities of Crimea are nurtured by benevolent occupation authorities — is simply false.

2. But, before I address the inaccuracies in Russia's presentation, it is important to reiterate what Professor Koh has already said. You do not need to choose between the competing versions of reality that have been presented to you at this hearing in order to decide whether provisional measures should be indicated. The Court's well-established standard for indicating provisional measures requires only that prima facie jurisdiction exists; that the requested provisional measures

[101]Christian Borys, "'Everything is Destroyed': On the Ground As Latest Surge of Deadly Violence Strikes Eastern Ukraine", *The Independent*, 4 Feb. 2017, available at http://www.independent.co.uk/news/world/europe/ukraine-violence-war-conflict-russia-rebels-separatists-a7562811.html (Annex 48); see also Transcript of Alexander Hug, Principal Deputy Chief Monitor of the OSCE Special Monitoring Mission to Ukraine, Weekly Updates from the OSCE Special Monitoring Mission, 3 Feb. 2017, available at http://uacrisis.org/52200-osce-smm-11 (Annex 22).

relate to plausible rights asserted in the Application; and that those rights need to be protected from irreparable damage while the case is pending. You do not need to enter into, let alone decide, the merits of this case to conclude that a plausible right needs protection. In the words of your decision in *Belgium* v. *Senegal*, it is sufficient if the rights claimed are "grounded in a possible interpretation" of the treaty invoked[102]. In this case that standard is far surpassed.

3. I will address three issues. First, I will show that the Russian Federation's version of reality cannot be trusted. Second, I will demonstrate that Ukraine's claims are more than plausible. And third, I will explain that there is an urgent need for provisional measures to protect Ukraine's rights under the CERD.

## II. THE INACCURACIES IN RUSSIA'S ACCOUNT

4. Russia's alternative reality has two components. First, Russia argues that the Crimean Tatars were discriminated against by the Ukrainian State prior to the unlawful occupation of Crimea by the Russian Federation. Second, it asserts, in the words of Mr. Lukiyantsev, that "Russia undertakes great efforts to promote the harmonious development of all ethnic groups in Crimea"[103]. I will address both components in turn.

### A. Ukraine's Treatment of Crimean Tatars

5. Typical of its questionable approach to evidence in this proceeding, Russia's argument that Ukraine discriminated against the Crimean Tatars prior to 2014 is based on a hotchpotch of selective quotes from international organization documents at tab 9 of Volume I of its Dossier of documents. Russia has not provided the source documents to this Court. And a quick perusal of the cited documents shows that Russia has taken certain sentences out of context in order to convey a misleading impression.

6. Russia continued with that approach in its presentation yesterday. To give just one example, Mr. Lukiyantsev, quoted a 2016 CERD Committee document at tab 36 of Russia's

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[102] *Question 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. 60.

[103] CR 2017/2, p. 54, para. 5 (Lukiyantsev).

judges' folder yesterday[104]. The quoted text purported to show that Crimean Tatars "who went to regions under the authority of [the State Party] 'face difficulties with regard to access to employment, social services and education and lack support'". The full text of the document reveals that, immediately before the quoted language, the Committee noted the "measures taken by [Ukraine] to protect Crimean Tatars in particular those who fled Crimea after 2014"[105]. Those Crimean Tatars, of course, were fleeing an unlawful Russian occupation. If Ukraine has struggled to provide them with jobs, social services and education, that may be because they form only a small part of the approximately 1.7 million people who are internally displaced in Ukraine as a result of the illegal Russian interventions in that country.

7. After the selectively quoted language, the Committee expressed its concern that "Crimean Tatars who returned may face difficulties to preserve their language, culture and identity"[106]. It is not surprising that the Committee had this concern for Crimean Tatars returning to Crimea, given the policy of discrimination enacted by the Russian occupation authorities, as described in the Application and recognized by the United Nations General Assembly.

8. I do not have time to detail all the inaccuracies in Russia's portrayal of Ukraine's treatment of the Crimean Tatars prior to 2014. To the extent that the Court finds it relevant, I would refer it to the full versions of the documents selectively excerpted by Russia. But, of course, the issue is utterly irrelevant because this case concerns Russia's violations of the CERD since its unlawful occupation of Crimea in February 2014, to which it is simply no defence to try to pick holes in Ukraine's prior record.

### B. Russia's Treatment of Crimean Tatars and Ethnic Ukrainians

9. Russia's description of its treatment of Crimean Tatars and ethnic Ukrainians in Crimea since February 2014 is equally unreliable.

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[104]CR 2017/2, p. 55, para. 9 (Lukiyantsev).

[105]United Nations Committee on the Elimination of Racial Discrimination, *Concluding Observations on the Twenty-Second and Twenty-Third Periodic Reports of Ukraine*, UN doc. No. CERD/C/UKR/CO/22-23 (4 Oct. 2016) (Ann. 153).

[106]*Ibid.*

**1. The Mejlis**

10. For example, Russia seeks to minimize the impact of its ban on the Mejlis by pointing out that "there are 30 other Crimean Tatar organizations in Crimea with more than 20,000 members"[107], that is a quote from their presentation yesterday. But the Office of the United Nations High Commissioner for Human Rights (OHCHR) has already rejected this line of argument. In its report for August to November 2016, the OHCHR states:

> "169. The Mejlis is viewed by many Crimean Tatars as a traditional organ of an indigenous people: its members, forming an executive body, were elected by the Kurultai, the Crimean Tatar's assembly. In addition to the national Mejlis — which has 33 members — there are about 2,500 regional and local Mejlis members in Crimea. While approximately 30 Crimean Tatar NGOs are currently registered in Crimea, none can be considered to have the same degree of representativeness and legitimacy as the Mejlis and Kurultai.[108]"

The broadly representative nature of the Mejlis of the Crimean Tatar People no doubt explains why, in its report for February to May 2016, the OHCHR stated that the ruling banning it "could be perceived as a collective punishment against the Crimean Tatar community"[109].

11. Mr. Lukiyantsev dutifully recounted the justifications adopted by the so-called Supreme Court of Crimea and the Russian Supreme Court for upholding the ban imposed on the Mejlis by Russian officials. Those justifications — many of which are rooted in events that took place before even Russia purported to apply its law to Crimea — appear pretextual. But the larger point here is that the Mejlis was banned pursuant to a "Law on Counteracting Extremist Activities" that has been widely criticized as inherently vague and susceptible to arbitrary application. For example, an opinion on the law adopted by the respected Venice Commission in 2012 concluded:

> "In the Commission's view, the Extremism Law, on account of its broad and imprecise wording, particularly insofar as the 'basic notions' defined by the Law — such as the definition of 'extremism', 'extremist actions', 'extremist organizations' or 'extremist materials' — are concerned, gives too wide discretion in its interpretation and application, thus leading to arbitrariness"[110].

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[107] CR 2017/2, pp. 61-62, para. 39 (Lukiyantsev).

[108] OHCHR, *Report on the Human Rights Situation in Ukraine* (16 Aug.–15 Nov. 2016), para. 169 (Ann. 10).

[109] *Ibid.*, para. 188 (Ann. 8).

[110] Council of Europe, European Commission for Democracy through Law (Venice Commission), Opinion on the Federal Law on Combating Extremist Activity of the Russian Federation, No. CDL-AD(2012)016 (20 June 2012), para. 74 (Ann. 148).

12. Russia's Extremism Law has been wheeled out time and time again and in a discriminatory fashion to repress political expression by non-Russian communities Crimean Tatar institutions and individuals. As the OHCHR report for February to May 2016 commented:

> "Anti-extremism and anti-terrorism laws have been used to criminalize non-violent behaviour and stifle dissenting opinion . . . The majority of victims have been Crimean Tatars and Ukrainians who publicly opposed Crimea's unrecognized 'accession' to the Russian Federation. On the other hand, human rights abuses committed by paramilitary groups, such as the Crimean self-defense, remain unpunished".[111]

**2. Disappearances**

13. The Russian Federation's response on disappearances of members of the Crimean Tatar community is equally suspect. Reporting the kidnapping of Ervin Ibragimov in May 2016, the OHCHR stated that it was the tenth case it had recorded since March 2014 "of a person missing in circumstances, which could indicate the existence of political motivations"[112]. The Russian Federation's assurance yesterday that law enforcement authorities had established the whereabouts of 63 missing Crimean Tatars out of 78 registered cases in 2015 and 2016 misses the point[113]. First, Russia produces no evidence to back up its assertion, expecting the Court to take it on faith. Second, the statistic relates only to 2015 and 2016, not to 2014 when many of the disappearances occurred. And third, by focusing on the broader category of all missing persons, the statistic tells us nothing about the ten politically-motivated cases identified by the OHCHR, many or all of which might be among the 12 apparently unresolved cases. Notably, the Russian authorities do not claim to have resolved the disappearances of Crimean Tartar activists Reshat Ametov in 2014 and Mr. Ibragimov himself in 2016, despite the fact that both were caught on film — Mr. Ametov's in broad daylight[114].

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[111] OHCHR, *Report on the Human Rights Situation in Ukraine* (16 February –15 May 2016), para. 8 (Ann. 146).

[112] OHCHR, *Report on the Human Rights Situation in Ukraine* (16 May –15 August 2016), para. 154 (Ann. 9).

[113] CR 2017/2, pp. 59-60, para. 30 (Lukiyantsev).

[114] See OHCHR, *Report on the Human Rights Situation in Ukraine* (16 May-15 August 2016), para. 154 (Ann. 9) (describing Ibragimov's disappearance); OHCHR, *Report on the Human Rights Situation in Ukraine* (16 February-15 May 2016), para. 180 (Ann. 8) ("There has been no progress in investigations into the death of Crimean Tatar activist Reshat Ametov, who was killed in March 2014.").

**3. Restrictions on Media**

14. Similarly, the Russian Federation represents that non-Russian media outlets face no discrimination in Crimea. For this they point to a table at tab 4 of their Dossier of documents purporting to show 86 registered media outlets publishing in the Crimean Tatar and Ukrainian languages. This, of course, does not address the fact that the Russian occupation authorities required all media outlets in Crimea to re-register with the authorities on 1 April 2015, giving themselves the ability to exclude any whose content they disliked[115]. A Council of Europe update on the situation dated 15 February 2017 indicates that many Crimean Tatar-language media outlets simply did not receive new licenses, despite submitting several applications[116]. These included major players like the TV channel ATR - a Crimean Tartar TV channel - and its affiliates and the newspaper *Avdet*. What is more, a check on a sample of the websites of newspapers listed in the Russian Federation's table indicates that as of today many are publishing only in the Russian language: that is true, for example, of the publications listed in rows 5, 15, 25 and 34-40 of the table.

**4. Restrictions on Education**

15. On Ukrainian-language education, Russia contended yesterday that Ukraine has its numbers wrong. But in both its opening oral submission and its Application, Ukraine has relied on international organization reporting. Specifically, recent reports of the OHCHR on the Human Rights Situation in Ukraine have confirmed the "continuous decline of Ukrainian as a language of instruction"[117]. The OHCHR has substantiated this conclusion with precise figures regarding the number of Crimean school children educated in Ukrainian for the previous three school years, which Ukraine quotes in its application[118].

16. The Russian Federation asks you to rely instead on a press release from the Russian Ministry of Education and an unverified list of schools that purportedly offer at least some classes

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[115]Council of Europe Media Freedom Alert, *Forced Closure of Crimean Tatar-Language Media Outlets* (updated 17 February 2017) (Ann. 149).

[116]*Ibid.*

[117]OHCHR, *Report on the Human Rights Situation in Ukraine* (16 August–15 November 2016), para. 179 (Ann. 10).

[118]OHCHR, *Report on the Human Rights Situation in Ukraine* (16 August–15 November 2015), para. 157 (Ann. 154); Application of Ukraine, para. 117.

in Ukrainian[119]. But the credibility of those sources is undermined by a document Russia submitted to UNESCO in April 2015 with figures remarkably similar to those reported by the OHCHR[120]. That document is at Annex 155 of Ukraine's supplementary submission of supporting documents.

**5. Use of Ukrainian and Tatar as Official Languages**

17. Professeur Forteau invokes as evidence of the respect for non-Russian communities, first, a decree of President Putin of 21 April 2014[121] and, second, the establishment of Crimean Tatar and Ukrainian as official languages in the new constitution of Crimea adopted the same month[122]. But we know from the practice of the Soviet Union that there can be a wide gulf between what is written in law and what happens on the ground. The evidence proffered by the Russian Federation to back up Professeur Forteau's statement is a case in point. Tab 7 of the Russian Dossier of documents contains several photographs purporting to show that official buildings bear signage in the Crimean Tartar and Ukrainian languages, as well as in Russian. But, again, this is a selective and misleading body of evidence. Annexes 143, 144 and 145 to Ukraine's supplementary submission of documents contain declarations covering photographs taken recently in Simferopol, Yalta and Kerch that tell a very different story: a series of government buildings with signage in the Russian language only. An example is on the screen now.

## III. THE RUSSIAN FEDERATION HAS NOT SHOWN THAT THE RIGHTS UKRAINE ASSERTS ARE IMPLAUSIBLE

18. It should be clear by now that the Russian Federation's portrayal of life in Crimea for non-Russian groups is unreliable, to say the least. Russia fares no better with its attempt to suggest that Ukraine has not met its burden to show the rights it asserts are plausible.

19. Russia's main tactic in this respect is to misstate Ukraine's burden. Professeur Forteau cites the Judgment in the *Genocide* case between Serbia and Montenegro and Bosnia and Herzegovina for the proposition that "the Court requires proof at a high level of certainty

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[119]CR 2017/2, p. 64, para. 3 (Forteau).

[120]Russian Delegation to UNESCO, Information on the situation in the Republic of Crimea (the Russian Federation) within the scope of UNESCO competence as of April 8, 2015 (14 April 2015) (Ann. 155).

[121]CR 2017/2, p. 71, para. 28 (Forteau).

[122]*Ibid.*, p. 72, para. 30 (Forteau).

appropriate to the seriousness of the allegation"[123]. But, of course, that standard, invoked on the merits in the *Genocide* case, is wholly inapplicable here, where we are concerned with an application for provisional measures. At this stage of proceedings, the Court recognizes that, as Judge Greenwood put it in his declaration in *Costa Rica* v. *Nicaragua*: "it is not possible for the parties to deploy, or the Court to consider, the detailed evidence or arguments on legal issues which are required at the stage of ruling on jurisdiction or the merits"[124].

20. At this stage, the Court focuses on whether the rights asserted are at least plausible. What is therefore needed to be shown, in the words of *Belgium* v. *Senegal*, is that "the rights asserted" are "grounded in a possible interpretation of the Convention"[125].

21. Ukraine has done that. That racial discrimination is being committed by the Russian authorities against the Crimean Tatar and ethnic Ukrainian communities in Crimea is plausible on its face. First, the Russian Federation has a motive and a track record in this respect. As Mr. Chubarov's statement recalls, Stalin's deportation of the Crimean Tatars from the peninsula in 1944 was followed by a concerted policy of russification. Following Russia's purported annexation of Crimea in 2014, in the face of opposition from both the Crimean Tatar and ethnic Ukrainian communities, it is more than plausible that a similar policy is being pursued and that the Crimean Tatar and ethnic Ukrainian cultures are perceived as the chief obstacles to Russian dominance on the peninsular[126].

22. Second, a policy of discrimination is rendered plausible by the scope of the measures taken against members of the Crimean Tatar and ethnic Ukrainian communities, and their tendency collectively to suppress separate cultural identity. If a few Crimean Tatars are subjected to arbitrary searches scattered over a three year period, it may be possible to say that an inference of racial discrimination is implausible. But when the leading members of the Crimean Tatar community have been subjected simultaneously and persistently over that period to restrictions on

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[123]CR 2017/2, p. 71, para. 24 (Forteau).

[124]*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011*, declaration of Judge Greenwood, *I.C.J. Reports 2011 (I)*, p. 46, para. 2.

[125]*Question 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. 60.

[126]See Affidavit of Testimony of Refat Chubarov (21 February 2017) (Ann. 81).

political and cultural expression and freedom of opinion, as well as to arbitrary searches and detention, an inference of discrimination becomes more than plausible.

23. Third, the tendency of many of the measures cited in Ukraine's application to harm the Crimean Tatar and ethnic Ukrainian communities as a whole, also makes it plausible that they are directed to the communities on a racial basis rather than at particular individuals. Such is the case with the exile or imprisonment imposed on Crimean Tatar leaders since 2014, the ban on the Mejlis, the suppression of independent Crimean Tatar and ethnic Ukrainian media, and the restrictions placed on Crimean Tatar and ethnic Ukrainian education.

24. And fourth, the distinction drawn between these communities and others in Crimea reinforces the plausibility of Ukraine's claims. As previously noted, the OHCHR has commented on how Russia's extremism laws have been used primarily against Crimean Tatars and ethnic Ukrainians, while human rights abuses by other groups have gone unpunished[127]. The retroactive use of Russian law to prosecute Crimean Tatars for acts committed before Russia purported to apply its law in Crimea is another example of non-Russian communities being targeted for exceptional treatment. Such has been the case with Akhtem Chiygoz, Deputy Chairman of the Mejlis, imprisoned for participation in a demonstration outside the Crimean Parliament on 26 February 2014, long before the purported referendum on independence[128]. Pro-Russian demonstrators who were involved in the same incident escaped prosecution. Such also has been the case with the Mejlis itself, whose pre-2014 activities were invoked by the Crimean and Russian courts in support of a ban on its activities[129].

25. If all that were not enough, however, the volume of independent observers who have concluded that Russian conduct in Crimea constitutes discrimination is sufficient by itself to render Ukraine's claims plausible. Prime among them, of course, is the United Nations General Assembly, whose resolution 71/205 specifically condemning discrimination against the Crimean

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[127]OHCHR, *Report on the Human Rights Situation in Ukraine* (16 Feb. - 15 May 2016), para. 8, (Ann. 146).

[128]Affidavit of Testimony of Valeriya Lutkovska (27 February 2017), para. 4 *(d)* (Ann. 83).

[129]Decision of the Supreme Court of the Republic of Crimea of 26 April 2016, judges' folder of the Russian Federation, tab 56 (discussing events of 2004 and February 2014).

Tatar and ethnic Ukrainian communities I quoted during Ukraine's opening oral submission[130]. But this resolution does not stand alone, just last week the United States Department of State published its Human Rights Report for 2016. The country report for Ukraine, included at Annex 151 in Ukraine's supplemental submission, observes that: "Occupation authorities deprived members of certain groups, particularly ethnic Ukrainians and Crimean Tatars, of fundamental civil liberties, including the freedom to express their nationality and ethnicity, subjecting them to systematic discrimination."[131]

26. Similarly, in a resolution of 12 May 2016, the European Parliament pointed out:

> "[T]he ban on the Mejlis of the Crimean Tatar People, which is the legitimate and recognised representative body of the indigenous people of Crimea, will provide fertile ground for stigmatising the Crimean Tatars, further discriminating against them and violating their human rights and basic civil liberties, and is an attempt to expel them from Crimea, which is their historic motherland . . ."

27. I could continue to cite governmental and non-governmental observers who have studied Russia's actions in Crimea and have concluded that it is engaged in discrimination against the Crimean Tatar and ethnic Ukrainian communities, but the underlining point is clear. Ukraine has plainly established that the rights it asserts under the CERD are more than plausible.

## IV. PROVISIONAL MEASURES ARE URGENTLY NEEDED

28. I would like next to address the Russian Federation's remarkable argument that there is no urgent need for provisional measures because Ukraine took the time to negotiate with Russia before bringing this dispute before the Court[132].

29. The Russian Federation plainly wishes to have it both ways. On the one hand, when it suits its jurisdictional argument, Russia argues that Ukraine proceeded with improper haste to terminate negotiations. But when it comes to the urgent need for provisional measures, it insists that Ukraine should have referred the dispute to this Court sooner.

30. The truth, of course, as Mr. Zionts explained, is that Ukraine took the requirements of Article 22 with due seriousness. Ukraine made a genuine effort to resolve this dispute by

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[130]United Nations General Assembly resolution 71/205, UN doc. A/RES/71/205, Situation of Human Rights in the Autonomous Republic of Crimea and the City of Sevastopol (Ukraine) (19 December 2016) (Ann. 3).

[131]United States Department of State, *Ukraine 2016 Human Rights Report* (2006), p 61 (Ann. 151).

[132]CR 2017/2, p. 75, para. 36 (Forteau).

negotiation, as this Court's jurisprudence requires. It is simply not credible for the Russian Federation to try to turn that effort on its head as an indicator of lack of urgency.

31. In reality, the situation is urgent, for all the reasons I explained during Ukraine's opening submission. Serious violations of the CERD have already been committed and continue to be committed by the Russian Federation. Further violations will almost certainly be committed by Russia in future if the Court does not grant interim measures of relief. These violations will be suffered by a vulnerable population, stripped of the protections formerly afforded by the institutions of the Ukrainian State and, in the case of the Crimean Tatars, by the Mejlis. And the harm will be irreparable as the needs of the ethnic Ukrainian and Crimean Tatar communities go unrepresented and unmet and their separate cultural identities wither. For all these reasons, Ukraine urges the Court to indicate the provisional measures that Ukraine has requested under the CERD.

32. The Russian Federation's suggestion that the first two requested provisional measures are in some way improper because they reiterate Russia's obligations under the Convention is, of course, disproved by the Court's practice in its previous case under the CERD[133]. In that, case, *Georgia* v. *Russia*, the Court ordered that the parties "refrain from any act of racial discrimination against persons, groups of persons or institutions. That is effectively identical to the second provisional measure that Ukraine requests the Court to order of Russia. Ukraine's first request, that Russia be ordered to refrain from any action which might aggravate or extend the dispute, is regularly ordered by this Court in all sorts of circumstances. Russia's concerns are groundless.

## V. CONCLUSION

33. Mr. President, Members of the Court, that concludes my presentation. I would kindly ask you now, Mr. President, to give the floor to Ms Olena Zerkal, the Agent of Ukraine, who will conclude Ukraine's second round of oral submissions.

Le PRESIDENT : Merci, Monsieur. Je donne à présent la parole à S. Exc. Mme Olena Zerkal, agent de l'Ukraine. Excellence, vous avez la parole.

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[133]CR 2017/2, pp. 63-64, para. 2 (Forteau).

Ms ZERKAL:

**CONCLUSIONS AND UKRAINE'S SUBMISSIONS**

1. Mr. President, distinguished Members of the Court, I will make concluding remarks and summaries of Ukraine's submission for indication of provisional measures.

2. During these hearings Ukraine has abundantly demonstrated that the current situation in the country remains dangerous and requires urgent judicial action and interference of this Court to protect the Ukrainian people. Ukraine is appearing today before this distinguished Court to seek measures of protection to halt the ongoing financing of terrorism and cultural erasure instigated by the Russian Federation.

3. The Russian Federation's support of illegal armed groups in eastern Ukraine, and the unlawful occupation of Crimea, have already caused irreparable harm to Ukrainian people, including in thousands of civilian deaths and the displacement of approximately two million people. This unjustifiable suffering endured by the people of Ukraine demands accountability under international law. But this question is for another day.

4. Mr. President, Members of the Court, my country is standing here today to seek urgent assistance from this Court not to resolve numerous claims Ukraine has for the Russian Federation's for flagrant violations of international law, but to put an urgent measure to protect, to save thousands, if not millions of innocent lives, and provide desperately needed safeguards to the Ukrainian people in the east of Ukraine and occupied Crimea.

5. The civilian populations of Ukraine, including in particular eastern Ukraine and Crimea, are extremely vulnerable and require the Court's immediate protection.

6.The situation in eastern Ukraine remains unstable and subject to rapid change. The conflict in the region has been ongoing for almost three years without resolution, and there have been numerous attacks of terrorism against civilians throughout this period. Absent measures to prevent this continuing conduct, there is a significant risk that the civilian population will face more terrorist violence.

7. In Crimea, the Russian Federation's policy of cultural erasure through discrimination remains similarly ongoing and unrelenting. The Crimean Tatar and ethnic Ukrainian communities

face continuous harassment, abuse, and restrictions. Absent measures to prevent this continuing conduct, these vulnerable groups will face further acts of discrimination, and a significant risk that the Russian policy of erasing their distinct cultural identities will succeed.

8. Due to the real and imminent threat to the Ukrainian population, Ukraine is seeking the urgent assistance of this Court in the form of provisional measures — to protect the rights of Ukraine and its people.

9. With respect to the Terrorism Financing Convention, Ukraine requests that the Court order the following provisional measures:

*(a)* The Russian Federation shall refrain from any action which might aggravate or extend the dispute under the Terrorism Financing Convention before the Court or make this dispute more difficult to resolve.

*(b)* The Russian Federation shall exercise appropriate control over its border to prevent further acts of terrorism financing, including the supply of weapons from the territory of the Russian Federation to the territory of Ukraine.

*(c)* The Russian Federation shall halt and prevent all transfers from the territory of the Russian Federation of money, weapons, vehicles, equipment, training, or personnel to groups that have engaged in acts of terrorism against civilians in Ukraine, or that the Russian Federation knows may in the future engage in acts of terrorism against civilians in Ukraine, including but not limited to the "Donetsk People's Republic", the "Luhansk People's Republic", the "Kharkiv Partisans", and associated groups and individuals.

*(d)* The Russian Federation shall take all measures at its disposal to ensure that any groups operating in Ukraine that have previously received transfers from the territory of the Russian Federation of money, weapons, vehicles, equipment, training, or personnel will refrain from carrying out acts of terrorism against civilians in Ukraine.

10. In respect to the CERD, Ukraine requests that the Court order the following provisional measures:

*(a)* The Russian Federation shall refrain from any action which might aggravate or extend the dispute under CERD before the Court or make it more difficult to resolve.

*(b)* The Russian Federation shall refrain from any act of racial discrimination against persons, groups of persons, or institutions in the territory under its effective control, including the Crimean peninsula.

*(c)* The Russian Federation shall cease and desist from acts of political and cultural suppression against the Crimean Tatar people, including suspending the decree banning the Mejlis of the Crimean Tatar People and refraining from enforcement of this decree and any similar measures, while this case is pending.

*(d)* The Russian Federation shall take all necessary steps to halt the disappearance of Crimean Tatar individuals and to promptly investigate those disappearances that have already occurred.

*(e)* The Russian Federation shall cease and desist from acts of political and cultural suppression against the ethnic Ukrainian people in Crimea, including suspending restrictions on Ukrainian-language education and respecting ethnic Ukrainian language and educational rights, while this case is pending.

11. Mr. President and Members of the Court, on behalf of the Government and people of Ukraine, I thank you for your attention to this urgent matter. I now rest my case.

Le PRESIDENT : Excellence, je vous remercie. Ainsi s'achève le second tour d'observations orales de l'Ukraine. La Cour se réunira de nouveau demain, à 10 heures, pour entendre le second tour d'observations orales de la Fédération de Russie. L'audience est levée.

*L'audience est levée à 12 h 50.*

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