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CR 2017/4

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2017

Public sitting

held on Thursday 9 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)**

VERBATIM RECORD

ANNÉE 2017

Audience publique

tenue le jeudi 9 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)**

COMPTE RENDU

Present:	President	Abraham
	Vice-President	Yusuf
	Judges	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. 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 Zimmermann, 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 Zimmermann, 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 ce matin pour entendre le second tour d'observations orales de la Fédération de Russie sur la demande en indication de mesures conservatoires présentée par l'Ukraine. Le juge Owada, pour des raisons qu'il m'a dûment fait connaître, est empêché de siéger ce matin. C'est, je crois, à M. Wordsworth qu'il revient de commencer aujourd'hui les plaidoiries de la Fédération de Russie. Monsieur Wordsworth, vous avez la parole.

Mr. WORDSWORTH :

ABSENCE OF PLAUSIBLE RIGHTS

1. Mr. President, Members of the Court, I will be addressing the submissions made by Professor Koh and Ms Marney Cheek yesterday to the effect that Ukraine has put forward a plausible case of breach of the International Convention for the Suppression of the Financing of Terrorism (ICSFT).

1. Points on which no comeback

2. It is useful to identify up front the points that I made on Tuesday as to which there has been no comeback.

3. First, on the relevant test for plausibility, there was no response at all, and nor could there be. It is understood now to be common ground that the Court cannot accept at face value the facts as alleged by Ukraine, and that the Court must be satisfied that the arguments that Ukraine makes are sufficiently serious on the merits, and all the more so here where the allegations are of a particular gravity[1].

4. All that was said was that Russia is engaging in "legal gymnastics"[2]. That is not correct. Russia is simply referring to the long-established requirement of plausibility, and seeking to apply that test by reference to the evidentiary materials that Ukraine has put before the Court.

5. Secondly, there was no comeback on the fact that, according to Ukraine's own evidence, Ukraine itself is at least as engaged in acts of indiscriminate shelling that cause multiple civilian

[1]CR 2017/2, pp. 22-23, paras. 2-6 (Wordsworth).

[2]CR 2017/3, p. 14, para. 6 (Koh).

deaths and injuries. Not a single point was made in response to either the many OHCHR maps or the OHCHR data that show that civilian casualties from indiscriminate shelling are in fact higher on the DPR/LPR-controlled side of the contact line[3].

6. This is all Professor Koh had to say:

> "Of course this is a matter of considerable doubt and factual dispute, which will surely 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."[4]

7. In other words, Professor Koh sought to duck the issue entirely, resorting to what a "fair-minded observer" might think, albeit presumably a fair-minded observer who did not have access to or was unwilling to read the OHCHR materials that are of central relevance to this issue. Perhaps a point was being made on nationality of the victims I simply don't know. It matters not. The critical issue for today is that there is no answer to the point that Ukraine is at least as engaged in the alleged acts of indiscriminate shelling that it now seeks to characterize as terrorism. And it is an important point. It places a strong question mark next to Ukraine's current characterization, and it has not been able, even to begin, to displace that question mark.

8. As to Ms Marney Cheek, she too said nothing whatsoever about the OHCHR maps and civilian casualty figures. With respect to the multiple OSCE reports that we have put before the Court showing that shells causing civilian death and serious injury in the area controlled by the LPR/DPR came from the areas controlled by Ukraine's armed forces, i.e., from the west, she challenged just one instance. This concerned the shelling that hit a trolley bus in Donetsk on 22 January 2015, killing many civilians, and she said that "the OSCE report cited does not attribute this shelling to Ukrainian forces"[5]. Well, this is what the report says:

> "The SMM, that is the OSCE monitor on the ground, observed two craters. . . At 11:00 hrs the SMM conducted a crater analysis on both craters, and determined that the rounds that caused the two craters had been fired from a north-western direction. The SMM also determined that the weapon(s) used was most likely either a mortar or an artillery piece."[6]

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[3]CR 2017/2, pp. 28-30 , paras. 21-22 (Wordsworth).

[4]CR 2017/3, p. 16, para. 13 (Koh).

[5]CR 2017/3, p. 41, para. 22 (Cheek).

[6]Spot report by the OSCE Special Monitoring Mission to Ukraine (SMM): Shelling incident on Kuprina Street in Donetsk City, 22 January 2015.

9. Here is the OHCHR map covering a period later in 2015, showing the contact line which had not moved materially, so you can see where "north-west" of Donetsk is. It is plainly quite irrelevant that no specific mention is made by the OSCE of Ukrainian troops. The direction of fire says all that's needed to be said. Ms Marney Cheek also referred to a *Guardian* article where Ukraine is reported as denying responsibility, for what that is worth, and also that the bus may have been out of mortar range[7]. But again that tells one nothing. The OSCE says that the bus was hit by mortar or artillery.

10. And the key point anyway is that this is all she had to say. There was nothing whatsoever said about the excerpts from the OSCE reports that are at tab 2***4*** of Russia's judges' folder, which show how indiscriminate shelling in the DPR/LPR-controlled areas has come from the north or west, i.e., the direction from which shelling by Ukrainian armed forces would come[8]. There was not even a bare denial that there had been multiple civilian casualties caused by indiscriminate shelling from Ukraine's armed forces. Ukraine merely sought to pass the issue on to a merits phase.

11. Third point on which there was no comeback: the fact that neither the ICRC, nor the OHCHR, nor the OSCE has characterized the acts of indiscriminate shelling at the centre of Ukraine's Request as terrorism[9]. All that Ukraine was able to say, through Ms Marney Cheek, is as follows:

> "Ukraine, however, cites these documents simply as evidence that the events Ukraine asserts happened as a matter of fact; the determination of whether these acts are terrorist acts under the Convention is a legal determination that is beyond the mandate of those agencies, but not of this Court."[10]

12. Well, there are two points to make here.

13. First, if the OHCHR and other documents are cited by Ukraine simply as evidence of what "happened as a matter of fact", then Ukraine is accepting, as for present purposes it must, that the many instances of indiscriminate shelling by Ukraine that are recorded by the OHCHR happened as a matter of fact. One could take as an example the multiple civilian deaths resulting

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[7]CR 2017/3, p. 41, para. 22 (Cheek).

[8]CR 2017/2, p. 28, para. 21 *(a)* (Wordsworth).

[9]CR 2017/2, pp. 26-27, paras. 16-19 (Wordsworth).

[10] CR 2017/3, pp. 37-38, para. 9 (Cheek).

from the shelling of the checkpoint at Olenivka on 27 April 2016, as to which Ms Marney Cheek had nothing to say yesterday, and as to which the OHCHR records that the mortar rounds were fired from the west, indicating the responsibility of the Ukrainian armed forces[11].

14. Secondly, Ms Marney Cheek is anyway quite wrong. It is plain that the OHCHR and in particular the ICRC *are* making characterizations as to acts within the armed conflict in full knowledge of the applicable legal framework, and are describing acts and making recommendations accordingly. Their characterizations are not of course legally binding, but they do reflect what these organizations see as happening on the ground. If, in particular, the ICRC considered that these events concerned acts of terror, it can be reasonably expected that they would say so.

2. Legal context for application of plausibility test in this case

15. I move on to the legal context against which plausibility must be assessed.

16. As a first point, it was said — repeatedly — yesterday that Russia's position is that, because there is an ongoing armed conflict, the ICSFT is inapplicable. For example, Professor Koh portrayed me as saying in the first round that, in times of armed conflict, IHL is "the sole 'body of law [that] prohibits the spread of terror among the civilian population'"[12]. Well you can see from the extract up on the screen that I said nothing of the sort, but was merely making the point that the OHCHR and the ICRC will be looking at the conflict through the prism of IHL[13].

17. There was a similar mischaracterization of our argument by Ms Marney Cheek[14]. I took the Court to Article 2 (1) *(b)* and Article 21 ICSFT to make the point that the ICSFT offence of terrorism uses language that is materially different to Article 51 (2) API and Article 13 (2) APII not, of course, to say that the ICSFT could not apply where International Humanitarian Law provisions also applied[15]. Russia has taken no point as to the potential applicability of the ICSFT in an armed conflict, and it is telling that Ukraine should be using its limited time to

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[11]CR 2017/2, p. 29, para. 21 *(c)* and p. 31, para. 28 (Wordsworth).

[12]CR 2017/3, p. 15, para. 10 (Koh). See also p. 16, para. 12: "But again he misleads by suggesting that armed conflict and acts of terrorism cannot coexist."

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

[14]CR 2017/3, p. 36, para. 4 (Cheek).

[15]CR 2017/2, p. 24, para. 9 (Wordsworth).

mischaracterize what has been said — instead of seeking to challenge the points that were actually being made.

18. This brings me to Article 2 (1) of the Convention, where there was some discussion yesterday as to the specific language, but I think it was ultimately accepted that the language of Article 2 (1) is materially different to, and in certain respects more stringent than, Article 51 (2) API and 13 (2) of APII — so far as requiring intent to cause death or serious bodily injury to a civilian and, separately, that "*the* purpose" must be to intimidate a population or to compel a government or an international organization to do or abstain from doing any act[16]. Ms Marney Cheek did however repeatedly refer to Article 2 (1) as requiring "*a* purpose"[17], which did not fit well with her position that the focus should be on the "plain language" of the Convention[18].

19. In fact, Ms Marney Cheek did not refer to the plain language of Article 2 (1) at all, but sought to introduce different sources of law, seemingly in an attempt to water down the specific definition of a terrorist act under Article 2 (1) ICSFT. Particular attention was paid by her to a contention that "intent" includes "recklessness"[19]. But the existence of specific intent to cause death or serious bodily injury to civilians is only the first of the two independent limbs of the definition of a terrorist act under Article 2 (1) ICSFT. And you heard little or *nothing* yesterday about the second, crucial, requirement in relation to the specific *purpose* of the alleged act.

20. For example, you were taken to the definition of intent in the Rome Statute, but that hardly assists Ukraine[20]. The Rome Statute has no relevance at all to the specific purpose requirement for terrorism. The Rome Statute makes no reference to terror, as there was a deliberate decision to exclude terror offences from the jurisdiction of the International Criminal Court (ICC). So the Rome Statute is in no sense "an obvious place to look" as you were told, quite inaccurately, yesterday[21].

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[16]CR 2017/2, p. 24, para. 9 (Wordsworth).

[17]CR 2017/3, p. 38, para. 10 and p. 40, para. 19 (Cheek).

[18]CR 2017/3, pp. 36-37, para. 5-6 (Cheek).

[19]CR 2017/3, pp. 38-40, paras. 13-18 (Cheek).

[20]CR 2017/3, pp. 38-39, para. 13 (Cheek).

[21]CR 2017/3, p. 39, para. 13 (Cheek).

21. Let me deal with *Galić*[22], which was said to be "instructive" and said to concern a campaign of artillery and mortar shelling onto civilian areas "not unlike what Ukraine has experienced"[23]. That is a very problematic statement, and it suggests that Ukraine has no wish to put a fair picture of the events on which it relies before you.

22. *Galić* of course concerned the siege of Sarajevo. The sniping and shelling at issue in *Galić* went on for 44 months (according to the indictment); it concerned a relentless campaign comprising many thousands of individual acts of shelling and sniping, against civilians everywhere within one city, as for example one sees from paragraph 584 of the Trial Chamber judgement:

> "All residents of ABiH-held areas of Sarajevo who appeared before this Trial Chamber testified to the effect that no civilian activity and no areas of Sarajevo held by the ABiH seemed to be safe from sniping or shelling attacks from SRK-held territory. The Majority heard reliable evidence that civilians were targeted during funerals, in ambulances, in hospitals, on trams, on buses, when driving or cycling, at home, while tending gardens or fires or clearing rubbish in the city.
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> . . . . . .
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> The most populated areas of Sarajevo seemed to be particularly subject to indiscriminate or random shelling attacks. Hadzic testified about every single part of Dobrinja, a very populated neighbourhood, exposed to severe shelling originating from SRK-controlled territory."[24]

23. So two points.

24. First, this, one must thankfully say, is quite "*unlike* what Ukraine has experienced". Ukraine has pointed to four isolated events of allegedly indiscriminate shelling at Mariupol, Kramatorsk, Volnovahka and Avdiivka, at all of which there does appear to have been a military target, and I will come back to that shortly.

25. Secondly, the passages of the Trial Chamber and Appeal Chamber judgements that Ms Marney Cheek took you to yesterday did not concern indiscriminate acts and the spread of terror, but rather the quite separate offences with respect to direct attacks on civilians[25]. Thus, at paragraph 132 of the Appeal Chamber judgement, to which Ms Marney Cheek referred, the Appeal Chamber said: "In principle, the Trial Chamber was entitled to determine on a case by case basis

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[22]*Prosecutor* v. *Stanislav Galić*, Case No. IT-98-29-T, Judgement and Opinion, 5 Dec. 2003; *Prosecutor* v. *Stanislav Galić*, Case No. IT-98-29-A, Judgement, 30 Nov. 2006.

[23]CR 2017/3, p. 39, para. 15 (Cheek).

[24]*Prosecutor* v. *Stanislav Galić*, Case No. IT-98-29-T, Judgement and Opinion, 5 Dec. 2003, para. 593.

[25]CR 2017/3, p. 39, para. 15 (Cheek).

that the indiscriminate character of an attack can assist it in determining whether the attack was directed against the civilian population."[26]

26. Of course separately from the spread of terror, IHL prohibits wilfully "making the civilian population or individual civilians the object of attack": that is Article 85 of API. And it was in this quite different context that the Appeal Chamber, agreeing with the Trial Chamber, found that the notion of wrongful intent encompasses recklessness[27]. There is, however, no reference to "recklessness" in the passage of the judgements addressing the distinct offence of spreading terror[28].

27. So what is happening here is that you are being taken to the parts of *Galić* which at best could be relevant only to the first part of Article 2 (1), intent to cause death or ~~***civilian***~~ ***serious*** injury to a civilian. As to the reference to indiscriminate attacks in the context of the Appeal Chamber's consideration of the offences in relation to terror, you were not taken to this, presumably because the Appeal Chamber stresses: "the primary concern . . . is that those acts or threats of violence be committed with the specific intent to spread terror among the civilian population."[29]

28. There is no suggestion that recklessness would suffice with respect to that "specific intent". And of course this is exactly what you would expect. If recklessness were sufficient with respect to the intent to kill and injure civilians *and likewise* with respect to the purpose of spreading terror, then the separate prohibition of indiscriminate shelling would simply start to transmute into the specific prohibition of the spread of terror.

29. Thus, and this is why we referred to *Galić* and *Dragomir Milošević*[30] in the first round, the International Criminal Tribunal for the former Yugoslavia (ICTY) cases demonstrate how the legally separate prohibitions of indiscriminate shelling and spreading terror are not to be conflated.

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[26]*Prosecutor* v. *Stanislav Galić*, Case No. IT-98-29-A, Judgement, 30 Nov. 2006, para. 132.

[27]*Prosecutor* v. *Stanislav Galić*, Case No. IT-98-29-A, Judgement, 30 Nov. 2006, para. 140; *Prosecutor* v. *Stanislav Galić*, Case No. IT-98-29-T, Judgement and Opinion, 5 Dec. 2003, para. 54.

[28]See *Prosecutor* v. *Stanislav Galić*, Case No. IT-98-29-A, Judgement, 30 Nov. 2006, paras. 79-109.

[29]*Prosecutor* v. *Stanislav Galić*, Case No. IT-98-29-A, Judgement, 30 Nov. 2006, para. 102.

[30]*Prosecutor* v. *Dragomir Milošević*, Case No. IT-98-29/1-A, Judgement, 12 Nov. 2009.

30. Another useful ICTY case for the specific purpose of provisional measures is *Gotovina*. This concerned "a massive artillery assault on Knin" and artillery fire "directed on civilian targets" in various other towns and villages by the Croatian armed forces in August 1995[31]. While Gotovina was indicted for the offence of persecution on political, racial and religious grounds, as well as various other offences, the Prosecutor did not include a charge of spreading terror. This is of obvious importance for today's purposes as the test applied by the ICTY Prosecutor for indictment is close to that of plausibility. Pursuant to Rule 47 (B) of the ICTY Rules of Procedure and Evidence, the test for an indictment is whether there is "sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal"[32].

31. It follows from the Prosecutor's decision not to indict Gotovina for the offence of spreading terror that the acts of indiscriminate shelling — which appear to have been far more extensive than anything Ukraine has referred you to — were not considered to amount to terrorist acts, not even to the extent of there being sufficient evidence to provide reasonable grounds for believing so. And, as the Court has recently confirmed in the *Croatian Genocide* case, the fact that certain acts were not prosecuted before the ICTY as a specific crime is of particular legal significance[33].

32. As to the decision of the Italian Supreme Court of Cassation in *Abdelaziz*[34], the question there was whether the accused was right to claim that "in a situation of armed conflict, so-called Kamikaze suicide actions, when committed against military objectives, cannot be regarded as terrorism, even if causing serious damage and spreading fear among the civilian population"[35]. The context is quite different, and it is anyway not Russia's case that the mere presence of a military objective is always determinative of the question whether a given attack may amount to a terrorist

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[31] *Prosecutor* v. *Ante Gotovina*, ICTY Case No: IT-01-45-I, Indictment, 21 May 2001, paras. 43-44.

[32] ICTY Rules of Procedure and Evidence, IT/32/Rev.50, The Hague, 8 July 2015, Rule 47 (B).

[33] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)*, Judgment of 3 February 2015, para. 187.

[34] *Italy* v. *Abdelaziz and ors*, Final Appeal Judgment, No. 1072, (2007) 17 Guida al Diritto 90, ILDC 559 (IT 2007), 17 January 2007, Supreme Court of Cassation; 1st Criminal Section. See CR 2017/3, pp. 39-40, paras. 16-18.

[35] *Ibid.*, para. 4.1.

act. For example, the existence of certain military objectives in Sarajevo did not preclude the relentless shelling campaign from constituting an act of terror.

33. The Article 2 (1) *(b)* question is — was there the requisite intent to kill or harm civilians for the purpose of intimidation or compulsion? There is, however, a real issue with the reasoning of the Italian court in this respect. As to the second important limb of the test, i.e., purpose, the court said: "an act against a military objective must also be regarded as terrorism if the particular circumstances show beyond any doubt that harm to the life and physical well-being of the civilian population are inevitable, creating fear and panic amongst the local people"[36].

34. That reasoning does not take into account the entirety of Article 2 (1) *(b)*, and it is also inconsistent with the widely accepted proposition that the fear among civilians which naturally occurs during armed hostilities must be distinguished from spreading terror. As the Trial Chamber explained in *Milošević*:

> "The Trial Chamber also notes that the crime of terror only covers acts or threats of violence which are specifically intended to spread terror among the civilian population. It must be established that the terror goes beyond the fear that is only the accompanying effect of the activities of armed forces in armed conflict. . . . The Trial Chamber notes that a certain degree of fear and intimidation among the civilian population is present in nearly every armed conflict. The closer the theatre of war is to the civilian population, the more it will suffer from fear and intimidation. This is particularly the case in an armed conflict conducted in an urban environment, where even legitimate attacks against combatants may result in intense fear and intimidation among the civilian population, but to constitute terror, an intent to instil fear beyond this level is required."[37]

35. As I explained on Tuesday[38], and will return to shortly, in each of the four isolated incidents of alleged indiscriminate shelling — at Mariupol, Volnovakha, Kramatorsk, and now Avdiivka — there appears to have been some form of military objective. The existence of such military objectives is a pertinent factor in assessing whether Ukraine has demonstrated, as it must, a plausible case of specific intent and specific purpose as is required by Article 2 (1) of the ICSFT. And this is all the more so since Ukraine's case is that *both* of those requirements must be inferred from the allegedly indiscriminate nature of the shelling. As to this, the Court will recall its general

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[36] *Italy* v. *Abdelaziz and ors*, Final Appeal Judgment, No. 1072, (2007) 17 Guida al Diritto 90, ILDC 559 (IT 2007), 17 January 2007, Supreme Court of Cassation; 1st Criminal Section, para. 4.1.

[37] *Prosecutor* v. *Dragomir Milošević*, Case No. IT-98-29/1-T, Judgement of 12 December 2007, para. 888.

[38] CR 2017/2, p. 31, paras. 27-30 (Wordsworth).

approach that, where there is no direct proof that prohibited acts have taken place with the required subjective element, in order to infer such intention from a pattern of conduct, it is necessary that that is the only inference that could reasonably be drawn[39].

36. Reference was also made by Ms Marney Cheek to a passage from the decision of the Special Tribunal for Lebanon (STL) in *Ayyash*[40]. This was said to confirm that the ICSFT "is not more 'stringent' . . . but simply different" in that IHL is not concerned with a prohibition on the financing of terrorism[41]. Well, it is very difficult to see what that point adds as it is manifest from the very wording of Article 2 (1), and indeed the Convention's title, that it is concerned with financing.

3. Individual incidents relied upon

37. I turn once more to the individual events that are relied upon to show a plausible case on breach of Article 2 (1).

38. First, Volnovakha and Mariupol: Ms Marney Cheek did not engage with the point that I was making[42], which was that the bus at Volnovakha was struck whilst stopped at a Ukrainian Army checkpoint[43] — you see the OSCE statement on the screen — and that regrettably all parties, including Ukraine, appeared to be treating military checkpoints as targets[44]. She speculated that such an attack could be part of a campaign to obtain political concessions, but not a single document — whether from the OHCHR, the OSCE, or indeed any Ukrainian or other news source, or any other source — was relied on as support[45]. As I understood it, the same speculation was being made with respect to the events at Mariupol[46]. No mention was made of the fact that the

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[39]*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)*, Judgment of 3 February 2015, para. 148.

[40]*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.

[41]CR 2017/3, p. 37, para. 8 (Cheek).

[42]CR 2017/2, p. 31, para. 28 (Wordsworth).

[43]Spot report by the OSCE Special Monitoring Mission (SMM) to Ukraine, 14 January 2015: 12 civilians killed and 17 wounded when a rocket exploded close to a civilian bus near Volnovakha, Kyiv, 14 Jan. 2015.

[44]See, e.g., OHCHR Report on the human rights situation in Ukraine, 16 February to 15 May 2016, para. 20. See also Spot Report by the OSCE SMM to Ukraine: Shelling in Olenivka, Kyiv, 28 April 2016.

[45]CR 2017/3, pp. 40-41, para. 20 (Cheek).

[46]CR 2017/3, p. 41, para. 21 (Cheek).

OSCE considered it appropriate in its spot report to record twice that the incident took place approximately 400 m from a Ukrainian armed forces checkpoint[47].

39. Instead, reference was made to a statement by the United Nations Under-Secretary-General for Political Affairs to the effect that Mariupol was a targeted attack[48]. He did not however suggest there had been an act of terrorism, and of course the Secretary-General himself had characterized the event as "indiscriminate" shelling[49].

40. Secondly, Kramatorsk, where it is said that I was mistaken to say that the shelling incident was 200-300 m away from a Ukrainian military compound in Lenin Street[50]. Well, here is what the OSCE spot report to which I was referring says:

> "On 10 February at 11:51 hrs, the SMM heard a powerful explosion in Kramatorsk . . .. From their position at Kramatorsk Boulevard #41, the SMM assessed that the sound of the explosion came from approximately 1.5 kilometres south-east, near Kramatorsk airport (where the Ukrainian authorities have deployed an 'Anti-terrorist Operation' (ATO) base)."

This is the base to which Ms Marney Cheek referred. And there is then a reference in the spot report to blasts around Kramatorsk Boulevard. But you see then that the report continues to deal with Lenin Street, where "[t]he SMM spotted a second set of unexploded ordnance . . ., which landed behind the house on the yard side . . . [reference to the site] located 2.5 km north-east of Kramatorsk Boulevard #50." And then: "At 12:45hrs, at the entrance of a Ukrainian military compound on Lenin Street, the SMM saw a member of uniformed Ukrainian Armed Forces personnel lying on the ground, not moving."[51] My reference to 200-300 m from an Ukrainian military compound was, as was plain from what I was saying, made by reference to shelling at or near Lenin Street.

41. It may suit Ukraine to focus only on the Ukrainian military base at the airport, not the Ukrainian military compound within the city, but its existence cannot just be ignored.

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[47]See Spot report by the OSCE SMM to Ukraine, 24 January 2015: Shelling Incident on Olimpiiska Street in Mariupol, Mariupol, 24 Jan. 2015.

[48]CR 2017/3, p.38, para. 12 (Cheek), citing United Nations Security Council Official Record, 7368th meeting., UN doc. S/PV.7368, 26 Jan. 2015, Ukraine's Documents, Ann. 4.

[49]Spokesman for the United Nations Secretary-General Ban Ki-moon, Statement Attributable to the United Nations Secretary-General Ban Ki-moon on Ukraine, 24 Jan. 2015, Ukraine's Documents, Ann. 1.

[50]CR 2017/3, p. 41, para. 21 (Cheek).

[51]Spot report by the OSCE SMM to Ukraine: Shelling in Kramatorsk, 10 February 2015, Kramatorsk, 10 Feb. 2015.

42. I turn to the recent events of Avdiivka. The point I was making on Tuesday, and to which there was no answer yesterday, was that the order of events was as follows: (1) Ukraine moves tanks to residential areas in Avdiivka in breach of the agreed withdrawal lines; (2) there is then shelling of those areas in Avdiivka by DPR/LPR armed groups[52]. Professor Koh said that it was "ironic" that Russia was focusing on photographs showing ~~***Russian***~~ ***Ukrainian*** tanks "defending" the city[53]. That was studiously to ignore the chronology of events as it appears from the OSCE reports and the BBC, and to ignore Ukraine's violations of the withdrawal lines to which the OSCE repeatedly refers.

43. The situation at Avdiivka was portrayed as one of great urgency yesterday. Curiously, you were not in fact shown the current picture but, as of early February when these events occurred the urgent action needed was that Ukraine should remove its armed forces from residential areas in Avdiivka.

44. All Ms Marney Cheek had to say was that the BBC video footage that we showed you was not properly on the record[54]. That is not a good point. The first Russia knew of Ukraine's reliance on events at Avdiivka was Monday's hearing[55], and it was responding accordingly in trying to put reliable evidence of the facts before you, in particular of the relevant chronology — from the OSCE and the BBC. It is regrettable, but telling, that Ukraine should seek to discourage you from looking at such evidence.

4. Security Council resolution 2202 (2015)

45. I wish to come back to resolution 2202 (2015), and its endorsement of the amnesty and pardon in the Minsk Package of measures. These are of obvious importance so far as concerns whether the events of indiscriminate shelling on which Ukraine relies can plausibly be characterized as terrorism. The only person to address this was Professor Koh, who said: "Ukraine did not agree to such an amnesty, which excluded grave breaches. Certainly no amnesty agreement

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[52]CR 2017/2, pp. 32-33, paras. 32-33 (Wordsworth).

[53]CR 2017/3, p. 17, para. 14 (Koh).

[54]CR 2017/3, p. 49, para. 46 (Cheek).

[55]CR 2017/1, p. 22, para. 7 (Zerkal).

was ever intended to foreclose prosecution for the perpetrators of the MH17 shoot-down or other heinous terrorist acts"[56].

46. Three points to make.

47. First, I referred to resolution 2202 only in the context of Ukraine's case that alleged acts of indiscriminate shelling, including at Kramatorsk, Volnovakha and Mariupol, are to be equated with terrorism[57]. Those events preceded resolution 2202, and it is self-evident that all would have them in mind. I did not refer to resolution 2202 in the context of Flight MH17 to which it is not relevant.

48. In this respect, the preamble of resolution 2202 expressly reaffirms resolution 2166 (2014), which demanded that those responsible for the shooting down of MH17 be held to account. Consistent with this, it is plain from the meeting record that MH17 was not intended to be caught by resolution 2202. This is what was said, for example, by the United Kingdom representative:

> "The resolution we have adopted today reaffirms resolution 2166 (2014) on the downing of Malaysia Airlines Flight MH-17, in which the Council demanded that those responsible be held to account and that all States cooperate with the efforts to establish accountability. Let me be clear that the amnesty provided for in the Minsk package does not apply to those who may be found responsible for that dreadful crime."[58]

49. And this leads to the second point. This is all that was said. There was no suggestion that anything else was to be excluded from the scope of the resolution. And that is the critical point. It is indeed inconceivable that there would be Security Council endorsement for an amnesty in respect of alleged indiscriminate shelling that had taken place in the months immediately prior to this resolution, in fact in the weeks immediately prior to this resolution — at Kramatorsk, Volnovakha and Mariupol, but also similar acts for which Ukraine's armed forces were allegedly responsible, such as the shelling at ~~***Caprina***~~ ***Kuprina*** Street in Donetsk — if these had been or could plausibly be regarded as terrorism.

50. Professor Koh asserted that Ukraine did not agree to such an amnesty[59]. But that is not supported by any evidence, whether by means of a statement by Ukraine at the time that the Minsk

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[56]CR 2017/3, p. 17, para. 15 (Koh).

[57]CR 2017/2, pp. 30-31, paras. 24-26 (Wordsworth).

[58]S/PV.7384, 17 Feb. 2015, p. 3. See also the statement of the representative for New Zealand, at p. 7.

[59]CR 2017/3, p. 17, para. 15 (Koh).

Package of measures was agreed or by a statement before the Security Council. The Package of measures says what it says; that it was agreed to by Ukraine; it cannot now be recast to suit the confines of the way Ukraine now wishes to present its legal claims before you.

51. The simple point is the Minsk Package of measures and the Security Council's endorsement confirm the conclusion that can safely be drawn from a closer look at the alleged acts of indiscriminate shelling now said to constitute terrorism by Ukraine alone — that there is no plausible case of terrorism before you.

52. There was an attempt by Professor Koh to say that the big point was that it is said by Ukraine, there is said to be evidence that Russia has supplied weaponry to the DPR and the LPR[60]. And that leads to two points.

53. First, Russia contests this and also points to the unreliability of Ukraine's evidence. The Honourable Agent for Russia will return to this briefly a little later.

54. Secondly, Professor Koh neglected to address the critical point for this hearing. As we said in the first round, wholly non-specific evidence on supply of weaponry in an ongoing armed conflict cannot assist the Court because it does not begin to engage with the Article 2 requirement that funds be supplied with the knowledge or intent that they are to be used for specifically terrorist acts.

5. Knowledge

55. I turn then to that issue of knowledge or intent, as to which Ukraine must also make a plausible showing. Here, you are asked to engage in an exercise of joining a series of supposed dots. You are shown a document said to show the supply of funds to the DPR or LPR, and you are asked to infer that the funds are provided with the knowledge or intent that they will be used, in full or in part, for a terrorist act. For example, you were shown on the screen on Monday a letter from the Head of the LPR to Russian MP Sergey Mironov, thanking the latter for assistance, and this was put forward as evidence of the funding of terrorism[61]. The only basis for that could be Ukraine's unsupported assertion that the LPR engages in acts of terror, made on the basis that the

[60]CR 2017/3, p. 14, para. 7 (Koh).

[61]CR 2017/1, p. 47, para. 47 (Cheek).

LPR has allegedly engaged in acts of indiscriminate shelling, acts for which Ukraine itself is at least as equally responsible on the basis of its own evidence.

56. There was reference yesterday to "the very strong evidence put forward that Russia knew the types of activities the DPR and similar groups would engage in with the support being provided"[62], but once again the only document cited in support was the OHCHR report of 15 June 2014. But that solitary document concerns underlying allegations that form no part of Ukraine's Request and no part of its specific allegations of breach of the ICSFT at section IV of its Application. The passage relied on concerns abductions and detentions[63]; it has nothing to do with indiscriminate shelling or any other form of alleged terrorist activity in the Request. How then was it to provide a basis for knowledge of terrorist intent with respect to the acts that are the subject matter of the Request and that, moreover, were agreed by Ukraine to be the subject of a pardon and amnesty, as endorsed by the Security Council? Indeed, Ukraine has not even troubled to answer the obvious question as to how alleged abduction or detention fits within the killing or serious bodily injury requirement that defines the scope of application of Article 2 (1) *(b)* of the Convention.

57. As to Kharkiv, there was no come back on my point as to the flimsy evidentiary basis for alleged financing by Russia or by Russian nationals with the requisite knowledge[64]. Moreover, the bombing of 22 February 2015 was raised by Ukraine in diplomatic correspondence only on 15 September 2015. Russia subsequently confirmed "its interest in receiving from the Ukrainian Party the concrete materials containing evidential data in support of the declarations made. Although the matter was discussed by the Parties during the third round of negotiations, Ukraine failed to provide any additional information[65].

58. I turn to the allegation that Russia provided the weaponry used to shoot down Flight MH17 with the knowledge that this weaponry would be used for a terrorist act.

59. There are three points I wish to make.

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[62]CR 2017/3, p. 44, para. 30 (Cheek).

[63]OHCHR, Report on the human rights situation in Ukraine, 15 June 2014, Ukraine's Documents, Ann. 7.

[64]CR 2017/2, p. 35, paras. 38-39 (Wordsworth).

[65]See Ukraine's diplomatic Note No. 72/22-620-915, 13 April 2016.

60. First, Professor Koh floated the possibility of an entirely new Ukrainian case with respect to Flight MH17. He said:

> "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 after the MH17 which you saw with your own eyes Russia has obligations to investigate and prosecute them under various provisions of the Convention"[66].

But Ukraine's case, as set out in the clearest of terms in its Application[67], its Request[68], and on Monday morning[69], is that Russia itself financed the shooting down of Flight MH17. This is a telling attempt to reformulate the claim on the hoof — following our response on Tuesday to Ukraine's allegations. If Ukraine wishes to make different allegations of breach with respect to Article 2 (1) of the Convention, it will have to tell Russia what those allegations are before Russia can respond.

61. Secondly, Ms Marney Cheek elected to focus the greater part of her argument on the question of whether the shooting down of MH17 could plausibly be an act of intentional destruction of a civilian aircraft within the Montreal Convention[70]. But that is to address an argument that I did not make.

62. Thirdly, as to the point that I did make, which was that there is no evidentiary basis whatsoever for the deeply serious allegation that Russia supplied the alleged weapon with the requisite knowledge or intent[71], there was no answer at all. I invite the Court to read with great care the transcript of Ms Marney Cheek's section on "knowledge" at pages 43-44 of yesterday's transcript[72]. There is no mention of Flight MH17; there is no mention of page 5 of the Joint Investigation Team (JIT) presentation of September 2016 or of the JIT video that Russia lodged with the Court on Tuesday both of which, as I said in the first round, make it quite plain that, if the JIT evidence were to be relied upon, it shows that whoever was allegedly supplying the Buk

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[66]CR 2017/3, pp. 19-20, para. 20 (Koh).

[67]Application, para. 126.

[68]Request, para. 7 *(a)*.

[69]CR 2017/1, p. 27, para. 9 (Koh); p. 44, para. 34 (Cheek); p. 47, para. 48 (Cheek).

[70]CR 2017/3, pp. 42-43, paras. 24-26 (Cheek).

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

[72]CR 2017/3, pp. 43-44, paras. 28-29 (Cheek).

launcher was acting solely in response to, and for the purposes of defending against, a series of armed attacks by Ukrainian Military Air Force.

63. How and why, one wonders, can such a serious allegation be put before this Court on day one as if it were the very centrepiece of the case, and then, by the time of the second round, there is not a word said in response to the points on the key requirement of knowledge that the opposing counsel has actually made?

64. In any event, it is not just that there is no plausible case in relation to breach by Russia with respect to the tragic shooting down of Flight MH17. If account is to be taken of the entirety of the JIT material on which Ukraine relies, which must be taken as containing Ukraine's factual allegations, the Court also lacks jurisdiction prima facie. On that basis, the facts, even as alleged by Ukraine do not fall within the Convention.

6. No plausible case on Article 18 ICSFT

65. I move to the absence of a plausible case on breach of Article 18, as to which there was, again, no response at all to the point I made on Tuesday, that is, that Russia is being alleged to engage in a bad faith charade on co-operation. Well, there is no evidence to support that. The only specific complaint made was as follows:

> "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. Ukraine has submitted 51 requests, 18 of which were responded to in a reasonable time. We do not know where Russia gets its figures."[73]

66. This is notably cautious wording. It is not said how many MLAs have been executed by Russia, or indeed there is no reference to the number to which Ukraine has received a response. Rather, the complaint appears to have distilled down to the issue of whether responses have been received in what Ukraine considers to be — without any details of any kind — a "reasonable time".

67. Mr. President, Members of the Court, I thank you for your kind attention, and I ask you to call Professor Zimmermann to continue Russia's submissions on the ICSFT.

Le PRESIDENT : Merci. Je donne à présent la parole à M. le professeur Zimmermann.

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[73] CR 2017/3, pp. 46-47, para. 36 (Cheek).

Mr. ZIMMERMANN:

I. Introduction

1. Merci Monsieur le Président. Monsieur le Président, Mesdames et Messieurs de la Cour, following up on Mr. Wordsworth I will now return to the issue of the Court's prima facie jurisdiction under Article 24 of the International Convention for the Suppression of the Financing of Terrorism (ICSFT).

2. I will in particular deal with Ukraine's arguments as to the scope of the ICSFT, and namely the issue whether it covers matters of State responsibility of a State itself purportedly providing funds for alleged acts of terrorism.

3. Let me once again reiterate that this issue — and that obviously includes the applicability of Article 18 ICSFT — only arises provided acts of terrorism, as narrowly defined in Article 2 of the Convention have occurred, and further provided that funds were provided either with the intention, or with the knowledge, that they are to be used to carry out specific terrorist acts.

4. But let me now start with the issue of the fulfilment of the formal, still not less important, requirements of negotiations laid down in Article 24 ICSFT, namely the obligation to try to set up an arbitral tribunal.

II. Lack of any bona fide attempt to set up an arbitral tribunal

5. I note first, in this regard that the reference, made by counsel for Ukraine yesterday[74], to the provisional measures phase of *Belgium* v. *Senegal*[75] is misleading.

6. In that case, as the Court is aware, Belgium had submitted a proposal for arbitration, as required by the applicable compromissory clause, while the other party simply did not react. It was in these peculiar circumstances that the Court stated that any *specific* proposal is only required once a response had been given — and indeed how could it be otherwise.

7. But that is not the situation at hand given that the Parties had already been in quite close contact on the matter.

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[74]CR 2017/3, p. 27, para. 4 (Zionts).

[75]*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. 139, paras. 50-52.

8. Indeed, as the Court has confirmed in *Congo* v. *Rwanda*,

> "existence of such disagreement [on the set up of an arbitration] can follow only from a proposal for arbitration by the applicant, to which the respondent has made no answer or which it has expressed its intention not to accept"[76].

9. Instead in our case, it was — as I have previously noted[77] — the Russian Federation that, once the negotiations on a possible arbitration had started, submitted very concrete and broad text proposals as to both the envisaged arbitration agreement, and possible rules of procedure.

10. This brings me back to Ukraine's proposal to immediately bring the case before the Court rather before an arbitral tribunal by way of the creation of an *ad hoc* chamber of the Court, be it only to thereby allegedly fulfilling the requirement laid down in Article 24 of the ICSFT that there must be a disagreement about the "organization of the arbitration".

11. Counsel for Ukraine tried to rely for that purpose on statements by a long-time former Member of the Bench, Judge Oda[78], which statements I am afraid to say, he entirely misconstrued.

12. Judge Oda had characterized — and rightly so I might say — an *ad hoc* chamber as "*essentially* an arbitral tribunal" simply in order to stress the influence parties to a case have under Article 17 paragraph two of the Rules of the Court when it comes to the composition of the respective chamber[79]. This is brought out by Judge Oda himself, when stating that "parties in dispute [can] choose either an *ad hoc* chamber . . . or an arbitration . . ."[80]. Either — or: that is what Judge Oda said.

13. That stands in line with the statement by the then President of the *ad hoc* Chamber in *Gulf of Maine*, who unequivocally confirmed that «[*l]a chambre est la Cour*»[81].

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[76] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 40, para. para. 91, referring to *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 17, para. 21; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 122, para. 20.

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

[78] CR 2017/3, pp. 32-33, para. 23 (Zionts).

[79] *Ibid.*

[80] *Recueil des cours* (1993-VII), p. 59.

[81] *I.C.J. Pleadings, Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Vol. VI, pp. 4-5.

14. This fact is further made abundantly clear by Article 27 of the Court's Statute, and accordingly such chamber cannot be regarded as an arbitral tribunal within the meaning of Article 24 of the compromissory clause in this case.

15. Thus, in essence, Ukraine never engaged in negotiations about the organization of arbitration when it referred to seising this Court by setting up an *ad hoc* Chamber of this Court.

16. Russia in turn had expressly pointed Ukraine to the fact that its, Ukraine's, insistence on this point, and I quote from a Russian diplomatic Note, "would undermine the very nature of the negotiations, which would not be regarded as negotiations on the organization of arbitration, and the request of the Ukrainian Side to submit the dispute for arbitration would not be regarded as such within the meaning of Article 24 of the ICSFT *ab initio*"[82]. But that was to no avail.

17. But Ukraine tells you that all this does not matter anyhow, because there is, it claims, no requirement of a bona fide attempt to negotiate in that regard. As Ukraine's counsel implied: it simply suffices to let the clock tick[83]. If that were true, that truly would empty Article 24 of the ICSFT of all of its very content and purpose.

18. Let me also note in passing that Ukraine had nothing to say about the issue of the proposed enforcement of a future *arbitral award* by the Security Council, nor about its proposal to do so at variance with the voting requirements prescribed by the Charter[84], which enforcement mechanism Ukraine had also considered to constitute one of its mandatory core principles on which the Parties had to agree, it claimed.

19. Let me now move on to the scope of the ICSFT and its interpretation especially as far as the notion of State-sponsored terrorism is concerned, before then addressing in more detail Article 18 of the ICSFT.

III. Interpretation of the ISCFT

20. Mr. President, before doing so, I believe it is in order to first clarify some matters of terminology given that it seems that there might have been some confusion as to the notion of State responsibility which is, or rather is not, covered by the ICSFT. In doing so, one has to determine

[82]Diplomatic Note by Russia 14426/dng, Dossier, Vol. III.1, tab. 1.

[83]CR 2017/3, pp. 31-34, paras. 20 in fine, 21 and 23 (Zionts).

[84]CR 2017/2, p. 49, para. 71 (Zimmermann).

first what are, to use the International Law Commission (ILC)'s terminology on the matter, the primary rules contained in the ICSFT.

21. For one, and it seems there is consensus between the parties on that, matters of a State allegedly committing *itself* acts of terrorism are beyond the scope of the ICSFT[85].

22. The Russian Federation additionally submits that the obligation to not finance alleged terrorist acts, when such financing is provided by a State (and accordingly by its organs) does *not* form part of the primary obligations contained in the ICSFT — and I believe we have by now submitted ample evidence for such proposition, and I will adduce more in the minutes to come.

23. Accordingly, any act by a person, the acts of which are attributable to a State under regular rules of State responsibility do, in Russia's view, not constitute treaty violations under the ICSFT. Accordingly, a State does not incur responsibility *under the ICSFT* for such acts either. To state the obvious, this does not mean, however, that a State may not incur responsibility for such acts as constituting violations of customary international law — and namely possibly for violations of the principle of non-intervention. But that is, as the Court has confirmed time and again, a completely separate matter.

24. Mr. President, as you will recall it was during my first round speech two days ago that I have already referred to Articles 4, 5 and 24 of the ICSFT in particular, as well as to the ICSFT's drafting history to demonstrate that the ICSFT does not cover issues of State responsibility for a State itself allegedly financing acts of terrorism.

25. I have also shown that this result is, besides, confirmed

— by a comparison of Article 24 of the ICSFT with Article IX of the Genocide Convention,

— by the ongoing negotiation process on a comprehensive convention on terrorism,

as well as

— by subsequent State practice implementing the ICSFT, to which I will return in more detail soon.

[85]See CR 2017/3, p. 48, para. 43 (Cheek).

26. Let me first note that Ukraine has deliberately decided not to engage with some of these questions, and certainly has not engaged with the very wording and the drafting history of Article 5 of the ICSFT, nor indeed with the matter of subsequent State practice.

27. Mr. President, Ukraine has done so I assume because, for Ukraine at least, the case is very simple and straight-forward, almost banal it seems, and that is why, in its view, no legal gymnastics of whatever kind is required[86]. Let me apologize already at this stage that maybe, things are not so easy as they were portrayed, and that therefore I might have to take you through some more of such "legal gymnastics", namely by engaging in treaty interpretation as laid out in your own jurisprudence.

28. As Ukraine puts it, those 187 States that have so far acceded to what Professor Koh referred to as the "comprehensive"[87] "Terrorism Financing Convention"[88], have thereby simply accepted Ukraine's interpretation of the ICSFT.

29. Accordingly, each and every one of those 187 States, that would provide material support to a non-state actor involved in a non-international armed conflict, where the insurgents then commit violations of international humanitarian law (IHL), such as indiscriminate shellings, would be subject to the Court's compulsory jurisdiction under Article 24 of the ICSFT, and be subject of a determination of being a State-sponsor of terrorism.

30. But why be concerned, tells Professor Koh the Court, there is no need to worry since States have freely accepted such treaty-based obligation.

31. Professor Koh, at the same time, was, however, so kind to also remind all of us of your *Nicaragua* v. *United States of America* Judgment, be it only for some other reason[89]. In *Nicaragua*, the Court obviously found not only that insurgents involved in an armed conflict, the Contras, had been financially supported by the United States[90]. The Court also found in *Nicaragua* that those armed groups had committed serious violations of common Article 3 of the four Geneva

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[86]CR 2017/3, p. 14, para. 6 (Koh).

[87]*Ibid.*, pp. 20-21, para. 22 (Koh).

[88]*Ibid.*, p. 18, para. 17 (Koh).

[89]*Ibid.*, p. 18, para. 16 (Koh).

[90]*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 61, para. 106.

Conventions[91], which certainly in Ukraine's reading of the ICSFT, would amount to acts of terror within the meaning of Article 2 (1) *(b)* of the ICSFT.

32. In Ukraine's view, therefore, such Nicaragua-type of situation, if it were to occur today, would then be an almost clear-cut case to be brought before you under Article 24 of the ICSFT without the need for the Court anymore to either rely on Article 36 (2) declarations, nor to rely on any kind of a bilateral treaty in order to be able to exercise jurisdiction.

33. Thus, according to Ukraine, those 187 States that have ratified the ICSFT — except for those few that made reservations to Article 24 of the ICSFT[92] — have thereby accepted your jurisdiction on such matters — and have allegedly thus also accepted to be subject to the possibility of provisional measures provided there is a plausible case on such facts.

34. Is such an interpretation of the ICSFT truly plausible? Is that the broad content of the ICSFT, agreed after lengthy and very controversial negotiations?

35. Mr. President, let me remind you — as I have already demonstrated two days ago — of the fact that the very issue of the inclusion of the concept of "State-sponsored" terrorism continues to constitute *the* stumbling block as far as the ongoing negotiations on a possible future comprehensive convention on terrorism are concerned[93].

36. But Ukraine, once again, has a simple answer to that: States should not be concerned since, in any case, that very issue has already been decided, given that States have already accepted such concept, including the Court's jurisdiction on the matter, when they ratified, as Professor Koh put it, the "comprehensive Terrorism Financing Convention".

37. I am simply wondering, quite frankly, what Legal Advisers, currently participating in the negotiating process as members of the General Assembly's 6th Committee, would make out of such, as Ukraine puts it, "plain" proposition[94].

38. It is against this general background that I will now show that the limited interpretation of the ICSFT, as I have submitted it, is fully in line with the very object and purpose of the ICSFT.

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[91] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 114, para 220.

[92] Out of the 187 states that ratified the Convention, 42 states made a declaration according to Art. 24 para. 2, see https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-11&chapter=18&clang=_en.

[93] See CR 2017/2, pp. 42-43, paras 34-38 (Zimmermann).

[94] CR 2017/3, p. 37, para. 6 (Cheek).

1. Object and purpose of the ICSFT

39. Ukraine has claimed that the ICSFT's object and purpose would be defeated were it not to cover issues of State responsibility for financing acts of terrorism[95]. This broad, and largely unsubstantiated claim is however contradicted by a careful analysis of the very text of the ICSFT. Let me, once again, start by considering the ICSFT text, starting with its very preamble.

(a) ***Preamble of the ICSFT***

40. As confirmed in the Court's jurisprudence the object and purpose of the given treaty is not the least brought out by the preamble of a given treaty[96].

41. Yet, the preamble of the ICSFT confirms that the said convention was concluded with the view to provide for "the suppression [of terrorism] *through the prosecution and punishment of its perpetrators*"[97].

42. This stated goal of the Convention, being indicative of the ICSFT's object and purpose, therefore inherently focuses on individual criminal responsibility, rather than embracing the concept of State responsibility.

43. Besides, the preamble of the ICSFT also refers to the need to "enhance international cooperation among States"[98].

44. Hence, the perceived aim is to have States co-operating in combating acts of terrorism, which once again presupposes that such acts of financing terror covered by the ICSFT are committed by private individuals.

45. And let me now move on to the very title of the Convention.

(b) ***Title of the ICSFT***

46. And let me start with a brief observation. Ukraine, throughout its pleadings, has referred to the ICSFT as "the Terrorism Financing Convention"[99]. This is both telling as well as misleading in itself. Obviously, the narrow title of the ICSFT, namely the International Convention for the

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[95]CR 2017/3, p. 47, para. 40 (Cheek).

[96]Richard K. Gardiner, *Treaty Interpretation* (2010), p. 217 with further references.

[97]ICSFT, Preambular, para. 12.

[98]*Ibid.*

[99]See, *inter alia*, CR 2017/3 (Koh), heading before para. 6.

Suppression of the *Financing of* Terrorism, constitutes "the obvious starting point for identifying the ambit of [the] treaty"[100].

47. What is more is that the very purpose of a treaty — as you have confirmed most recently in your latest Judgment in the *Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya)* case — "may be indicated by its title"[101].

48. As a matter of fact, as already the Beagle Channel award had confirmed, such title delimits the "intention of the Treaty as a whole . . ."[102].

49. Obviously therefore, given its title, the purpose of the ICSFT is *not* — contrary to what Ukraine tries to imply — to cover the financing of terrorism *tout court*. Rather, the treaty obliges States to merely *suppress the financing of* terrorism. That very wording — "suppression of the financing", "la répression du financement du terrorisme" — in turn presupposes that the ambit of the ICSFT relates to situations where *individuals or another entity*, distinct from the contracting party and its organs, is engaged in the financing of terrorism, which acts of private financing the contracting parties of the ICSFT are then supposed to suppress.

50. *A contrario*, this also means that acts by a contracting party itself, or by any of its organs or entities for which it bears State responsibility under general international law, do not come within the ambit of the ICSFT.

51. This limited understanding of the ICSFT's object and purpose, which is brought out already by its own very title, is further confirmed by a comparison of the very restrictive title of the ICSFT with other similar treaty titles, the relevance of such a comparison having been confirmed by the Court in its Judgment on Preliminary Objections in the *Oil Platforms* case[103].

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[100]Richard K. Gardiner, *Treaty Interpretation* (2010), pp. 200-201.

[101]*Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya), Preliminary Objections, Judgment of 2 February 2017*, para. 70; see also *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections, Judgment of 17 March 2016*, para. 39; *Certain Norwegian Loans (France* v. *Norway), Judgment, I.C.J. Reports 1957*, p. 24).

[102]*Beagle Channel (Chile* v. *Argentina) Arbitration*, ILR 52 (1979) 131, para. 18; see also *Siemens A.G.* v. *The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 Aug. 2004, para. 81, which stated that in its interpretation of the underlying treaty "[t]he Tribunal shall be guided by the purpose of the Treaty as expressed in its title" (footnotes omitted).

[103]*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 819, para. 47.

52. As a matter of fact, the title of the "*European* Convention on the *Suppression of Terrorism*" could indicate that this treaty was meant to be broader in nature than the ICSFT, given that its title relates generally to the *suppression of terrorism*, rather than merely to the suppression of its *financing*, like the ICSFT does.

53. Yet, *even* the European Convention on the *Suppression of Terrorism* does not cover alleged acts of terrorism for which a contracting party bears international responsibility. Rather, just like the ICSFT, it merely provides for the obligation to counter acts committed by private actors only.

54. The same holds true for the Inter-American Convention against Terrorism, which — despite its even broader title, Inter-American Convention against Terrorism — again merely relates to, and entails, obligations to penalize and prevent terrorist activities by private actors, such acts not being attributable to the respective State party.

55. Mr. President, is it then really plausible to argue that the object and purpose of the ICSFT, as well as its scope, was meant to extend far beyond the one of the European Convention, and far beyond that of the Inter-American Convention to also cover acts of States financing alleged acts of terrorism? And that this were the case despite the fact that already the ICSFT's title is significantly more limited in scope?

56. And, Mr. President, I assume that this also puts to rest the claim made by Professor Koh as to the alleged "sweeping title" of the ICSFT[104].

2. The alleged missing exclusion clause

57. That immediately brings me to my next point, to the point made by Ms Cheek yesterday, namely, as she then put it, that "negotiating States know how to *exclude* a State's activities from a treaty's scope"[105].

58. Ukraine's argument goes, that had States truly wanted to exclude matters of State responsibility from the realm of the ICSFT, they would have provided for a specific clause, saying so. But that argument, as our colleagues representing Ukraine would probably put it, is a "red

[104]CR 2017/3, p. 21, para. 22 (Koh).

[105]CR 2017/3, p. 48, para. 41 (Cheek); emphasis added.

herring". The issue is not whether States wanted to allegedly "exclude" State activities from the scope of the ICSFT, but rather whether they wanted to *include* acts by States into the scope of the ICSFT at the first place.

59. And it is this latter question that has to be answered, and has to be answered by applying regular rules of treaty interpretation. And, obviously, a treaty's drafting history forms an important part of it, in particular in such a sensitive area of international law, with which I have already dealt with quite extensively[106], but which, again, Ukraine only addressed on the margins, if at all.

60. For the sake of completeness, I will however now deal with one instance where Ukraine did engage with the ICSFT's *travaux préparatoires*.

3. Drafting history revisited

61. Yesterday, Ms Cheek referred you to a statement by the French delegation according to which the future convention was meant to cover "all forms of financing, including [private and public financing]"[107].

62. Unfortunately, however, an incomplete picture was presented to the Court about that part of the ICSFT's drafting history.

63. Indeed, France had initially proposed to define "financing" in what is now Article 1, paragraph 2 of the ICSFT as any contribution be they "public or private"[108] — and that was the point made by Ms Cheek yesterday to confirm her claim that State funding of alleged terrorist acts are indeed covered by the ICSFT. And she would be right — provided this proposal had been retained.

64. Yet, it suffices to note that, as you can see by reading Article 1 of the ICSFT as adopted, that the reference to public contributions, public financing, was *not* retained. And that deletion of any reference to "public funding" has to be seen in the context of the parallel deletion of the French draft Article 5, paragraph 5.

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[106]CR 2017/2, p. 39, para. 18 and p. 41, para. 27, ff. (Zimmermann).

[107]CR 2017/3, para. 44 (Cheek), making reference to A/54/37, p. 3.

[108]UN doc. A/C.6/53/9, p. 3, Art. 1.

65. As you will recall from my first round speech[109], draft Article 5, paragraph 5 — if also retained — *would* have provided for a savings clause on matters of State responsibility. Yet, just like the reference to "public financing" in what is now Article 1 of the ICSFT, draft Article 5, paragraph 5, was also deleted, because — whether we like it or not — matters of State responsibility were considered not to be appropriately addressed by the future ICSFT.

66. Before moving on to subsequent State practice let me now say some additional words on the judgment of the Special Tribunal on Lebanon (STL) in the *Ayyash* case to which Ms Cheek has referred.

4. Decision of the Special Tribunal for Lebanon in *Prosecutor* v. *Ayyash*

67. Obviously, Mr. Wordsworth, has already shown its limited relevance, if at all. However, and in any way, it is also the STL's understanding that the ICSFT constitutes exclusively a criminal law enforcement instrument.

68. For one, the STL stated that the ICSFT "is a veritable litmus test for the attitude of States *towards criminalising terrorism*"[110] rather than an issue of a State themselves purportedly supporting alleged terrorist acts. In the view of the STL's Appeals Chamber, the ICSFT regulates criminal responsibility by governing "activities that otherwise would go unpunished (either by criminal law or by IHL)"[111]. But therefore does not govern matters of State responsibility even when seen from the perspective of the STL.

5. Subsequent State practice implementing the ICSFT

69. Let me now come back in somewhat more detail to the question how States perceived the content of the ISCFT, when submitting this treaty for approval by their national parliaments to which I had already briefly alluded to during my first round of oral pleadings.

70. Mr. President, the limited understanding of the scope of the ICSFT, which is already, as has been shown by the result of a careful and in-depth analysis of the Convention's very text and its drafting history, rather than being based on broad assumptions what the content of the ICSFT ought

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[109]CR 2017/2, p. 41, paras. 28-29 (Zimmermann).

[110]*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, p. 71, para. 108.

[111]*Ibid.*

to be, is further confirmed by the practice of States submitting the Convention for ratification by their parliaments — and I will limit myself for lack of time to provide you with some examples only, but I can assure you there are plenty more.

71. When submitting the Convention to their respective parliaments, States described the ICSFT's object and purpose as obliging State parties to criminalize the private financing of terrorism, to undertake acts to prevent such private funding, and to co-operate with other State parties according to the concept of *aut dedere aut judicare*.

72. Australia, which may serve as an example for a number of other States, noted in that regard that the ICSFT "obliging State Parties to criminalise . . . the . . . collection of funds for the purpose of committing terrorist acts and to cooperate with other State Parties in the prevention, detection, investigation and prosecution of terrorist financing"[112].

73. In the same vein, the United States Government understood the ICSFT to: "require . . . States Parties to criminalize under their domestic laws certain types of criminal offenses, and also requires parties to extradite or submit for prosecution persons accused of committing or aiding in the commission of such offenses"[113].

74. And again in the same vein, the British Government merely proposed a set of changes to its domestic criminal law thereby: "enabl[ing] the UK to meet its obligations under the . . . provisions of these [Suppression of Terrorism] Conventions, *which are common to earlier international counter-terrorism Conventions*."

75. Finally, Switzerland similarly understood the ICSFT to exclusively being an instrument to counter private criminal acts. As stated in the official document submitting the ICSFT for ratification:

> "les Etats doivent ériger . . . les infractions couvertes par cette convention . . . En outre, la Convention institue un système cohérent et complet de coopération internationale régissant les domaines de l'extradition, de l'entraide judiciaire et du transfèrement de personnes condamnées . . ."[114]

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[112]Australia, National Interest Analysis, 28 June 2002, para. 5.

[113]United States, Letter of Submittal, Department of State, Washington, 3 October 2000, p. VI.

[114]Switzerland, Message relatif aux conventions internationales pour la répression du financement du terrorisme et pour la répression des attentats terroristes à l'explosif ainsi qu'à la modification du code pénal et à l'adaptation d'autres lois fédérales, 26 June 2002, p. 12.

76. What is brought out by these examples is that States implementing the ICSFT perceived it as a criminal law instrument addressing individual behaviour, but not one governing State action vis-à-vis other States.

77. And that indeed is also how the International Monetary Fund sees the ICSFT when stating in its guide on the implementation of the ICSFT that

> "[t]he Convention contains three . . . obligations for states parties. First, states parties must establish the offense of financing of terrorist acts in their criminal legislation. Second, they must engage in wide-ranging cooperation with other states parties and provide them with legal assistance in the matters covered by the Convention. Third, they must enact certain requirements concerning the role of financial institutions in the detection and reporting of evidence of financing of terrorist acts."[115]

78. And that now brings me to your 1996 and 2007 Judgments in the *Bosnian Genocide* case and to Ukraine's claim that a direct responsibility of a State for itself financing acts prohibited by the ICSFT is inherent in the obligation to co-operate to prevent laid down in Article 18 of the Convention.

6. Article 18 of the ICSFT and the Court's *Bosnian Genocide* Judgments

79. Such reliance is however unfounded for several reasons, each of which individually would suffice to set aside the reliance by Ukraine on your jurisprudence in the *Bosnian Genocide* case to support its overbroad interpretation of the ICSFT generally, and its Article 18 in particular.

80. For one, when circumscribing the scope of the obligation to prevent genocide in 2007, the Court was very careful to underline that "[t]he content of the duty to prevent varies from one instrument to another, according to the wording of the relevant provisions, and depending on the nature of the acts to be prevented"[116].

81. Accordingly, the Court "confine[d] itself to determining the specific scope of the duty to prevent *in the Genocide Convention*"[117], as well as its legal consequences.

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[115] International Monetary Fund, *Suppressing the Financing of Terrorism: A Handbook for Legislative Drafting* (2003), p. 5.

[116] *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. 220, para. 429.

[117] *Ibid.*; emphasis added.

82. What is more is that the Court stressed that it did not "purport to establish a general jurisprudence applicable to all cases where a treaty instrument, or other binding legal norm, includes an obligation for States to prevent certain acts"[118].

83. As a matter of fact, let me recall that Article 18 does *not* — unlike the Genocide Convention — oblige contracting parties to generally prevent the financing of terrorist activities.

84. Rather State parties of the ICSFT are only obliged "*to cooperate in* the prevention" of certain specific acts, respectively are merely obliged to co-operate in the prevention "by considering" to take certain action. This textual difference alone suffices in line with your jurisprudence to show that a mechanic transposition of the Court's 2007 holding by replacing genocide — *le crime des crimes* — by the financing of alleged terrorist acts as Professor Koh literally did[119] — such mechanic transposition is inappropriate and misplaced.

85. Besides, the Court based its 2007 finding that the Genocide Convention covers matter of State responsibility *inter alia* on the fact that the Genocide Convention categorizes genocide as "a *crime* under international law"[120], "un *crime* du droits des gens". Yet, unlike the Genocide Convention, the ICSFT simply does not contain such a characterization.

86. Moreover, unlike as in the case of the Genocide Convention, there seems to be nothing paradoxical in limiting the scope of the ICSFT to issues of individual and corporate responsibility, as Article 5 confirms. Rather, it is only such a narrow interpretation that would keep the ICSFT fully in line with the other manifold suppression treaties dealing with mutual criminal assistance.

87. Put otherwise, interpreting the ICSFT in the way the Applicant wants the Court to interpret it would mean that all the other conventions which aim at suppressing certain acts by obliging States parties to undertake measures to prevent the respective acts would have to be understood in exactly the same manner.

88. Beyond, there lies nothing extraordinary in the fact that issues of State responsibility are excluded from the scope of the ICSFT, since the issue of State responsibility for financing acts of

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[118] *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. 220, para. 429.

[119] CR 2017/3, p. 19, para. 18 (Koh).

[120] *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.

terrorism would obviously continue to be governed by other rules of international law, and namely by the prohibition of non-intervention, as confirmed by the Court's jurisprudence[121].

89. Finally, the extension of the scope of application of the *Genocide* Convention to also cover issues of State responsibility was justified by the fact that the notion and the concept of genocide for purposes of individual responsibility on the one hand, and for purposes of State responsibility on the other hand, are identical. What is more is that there is also identity between the notion of genocide in customary international law and under the Genocide Convention.

90. In contrast, when it comes to the notion of terrorism, and specifically the obligation to suppress the financing of terrorist acts, the ICSFT constitutes more than a mere codification of pre-existing rules of customary international law, as confirmed by the jurisprudence of the STL[122] to which Ukraine itself referred.

91. Hence, extending the scope of the Convention to also cover matters of State responsibility for States financing alleged terrorist acts, would involve a codification of international law as far as the principle of non-intervention and related issues of *jus ad bellum* are concerned — and submitting those issues to the Court's jurisdiction under Article 24 of the ICSFT — which bold steps the negotiating States had, as previously shown, simply not wanted to take when adopting the ICSFT.

92. Let me finally address the issue of the ICSFT's compromissory clause. While it is obviously true that such clauses cannot give rise to, or deny substantive rights[123], the substantive clauses of a treaty have nevertheless to be construed in harmony and coherent with its compromissory clause — as the Court itself has done twice in the *Bosnian Genocide* case in both in 1996[124] and then again in 2007[125].

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[121] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 106, paras. 202, ff.

[122] *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 February 2011), pp. 70-72, paras. 108-109.

[123] *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; see also CR 2017/3, p. 47, paras. 38-39 (Cheek).

[124] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996*, p. 616, para. 32.

[125] *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.

93. Hence, the fact that Article 24 of the ICSFT, unlike Article IX of the Genocide Convention, deliberately does not encompass issues of State responsibility for a State allegedly financing terrorist acts must be taken at face value and into account when making a finding as to whether — or rather not — issues of State responsibility are covered by the substantive provisions of the ICSFT.

94. Besides, as previously mentioned already two days ago[126], Article IV of the Genocide Convention — as well as the lack of a parallel provision in the ICSFT — with its specific reference to organs of a State committing treaty violations must be also taken at face value, as the Court did already in 1996[127], actually contrary to what Ms Cheek claimed[128].

95. On the whole therefore, while Article I of the Genocide Convention read in conjunction with Articles IV and IX of the Genocide Convention was rightly perceived by the Court as providing for State responsibility under the Genocide Convention, Article 18 of the ICSFT in turn cannot serve as a magic key providing for State responsibility for alleged acts of financing terrorism well beyond the parameters of the text of the ICSFT.

IV. Urgency

96. Let me very briefly turn to urgency. As far as urgency is concerned, I can be brief, and simply remind the Court that it ought only be concerned with urgency based on plausibly alleged violations of the ICSFT as such but not be concerned with alleged violations of IHL as such, which are beyond the scope of the Court's prima facie jurisdiction and which therefore cannot be the reason for urgency for purposes of these very proceedings.

97. Mr. President, let me conclude.

V. Concluding remarks

98. Let there be no doubt: if Ukraine was correct *Nicaragua*-type of cases involving the provision of financial support to insurgents, which might commit violations of IHL, could become

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[126]CR 2017/2, p. 38, paras. 12-13 (Zimmermann).

[127]*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996*, p. 616, para. 32.

[128]CR 2017/3, p. 47, para. 39 (Cheek).

a matter of routine, be it with regard to the support of non-State actors in Syria, or be it elsewhere throughout the world.

99. The same might be true for a scenario like the one that was adjudicated by the Arbitral Tribunal in the *Rainbow Warrior* case[129].

100. Mr. President, Members of the Court, in Ukraine's reading, Article 24 of the ICSFT would therefore become a skeleton key widely opening the jurisdictional gates of the Peace Palace covering broad areas of international law.

101. Let me therefore respectfully remind you of the prudent words of President Jiménez de Aréchaga that the Court's power under Article 41 of the Statute does not consist in a general police power over the maintenance of international peace, or in a general competence to settle disputes[130], but that they are meant — and meant only — to preserve the rights of both Parties within the specific limits of the Court's jurisdiction as circumscribed by a given compromissory clause and that is Article 24 of the ICSFT in the case in hand.

102. This concludes my argument. Thank you very much for your attention Mr. President, Members of the Court.

Le PRESIDENT : Merci, Monsieur le professeur. Je crois que le moment est venu de faire, comme il est d'usage, une pause qui durera 15 minutes. La séance est suspendue.

L'audience est suspendue de 11 h 35 à 11 h 55.

Le PRESIDENT : Veuillez vous asseoir. Je donne maintenant la parole au professeur Forteau.

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[129]Case concerning the difference between New Zealand and France concerning the interpretation and application of two agreements, concluded on 9 July 1986 between two States and which related to the problems arising from the Rainbow Warrior Affair, Decision of 30 April 1990, *UNRIAA*, Vol. XX, p. 215.

[130]*Aegean Sea Continental Shelf (Greece* v. *Turkey), Interim Protection, Order of 11 September 1976*; sep. op. of President Jiminéz de Aréchaga, *I.C.J. Reports 1976*, p. 16.

M. FORTEAU :

LA DEMANDE RELATIVE À LA CONVENTION INTERNATIONALE SUR L'ÉLIMINATION DE TOUTES LES FORMES DE DISCRIMINATION RACIALE

1. Monsieur le président, Mesdames et Messieurs de la Cour, je dispose ce matin d'un peu plus de temps que mardi, ce qui me permettra de parler à un rythme plus satisfaisant pour les interprètes, les membres de la Cour et le Greffe, auxquels je présente mes plus vives excuses pour la cadence un peu trop énergique de ma précédente plaidoirie.

2. Monsieur le président, avant d'en venir aux questions qui divisent encore les Parties en ce qui concerne la convention CIEDR, permettez-moi de commencer par souligner qu'il existe un point d'accord entre elles : il n'y a pas de différend quant au fait que, quel que soit le statut de la Crimée, la Russie doit appliquer la convention CIEDR sur ce territoire[131]. Cela, du même coup, prive d'effet les deux premières demandes de mesures conservatoires de l'Ukraine.

3. Cette précision étant faite, j'en viens au cœur du débat entre les Parties. Comme j'avais eu l'occasion de le souligner mardi, les accusations portées par l'Ukraine contre la Russie présentent un caractère d'une exceptionnelle gravité et c'est au regard de ces accusations que la Cour doit mesurer s'il convient d'imposer des mesures conservatoires. Toute mesure conservatoire que la Cour pourrait prononcer dans ce volet de l'affaire serait nécessairement interprétée et commentée à la lumière de cette grave accusation, à laquelle un certain crédit serait ainsi donné. Telle est la raison pour laquelle il est nécessaire que la Cour s'assure, avec rigueur, de la plausibilité des accusations ukrainiennes.

4. L'Ukraine de son côté vous demande de vous prononcer les yeux bandés. Comme les conseils de l'Ukraine l'ont répété à plusieurs reprises hier — au point de jeter un doute sérieux sur la crédibilité qu'eux-mêmes accordent à leur demande, la Cour devrait adopter un standard très peu exigeant pour apprécier à la fois sa compétence *prima facie* et les conditions posées à l'imposition de mesures conservatoires. Vous devriez uniquement déterminer si l'interprétation proposée par le demandeur de la convention CIEDR est plausible, sans vous intéresser aux faits de l'affaire. Ainsi, selon M. Gimblett, «You do not need to enter into … the merits of this case to conclude that a

[131] CR 2017/3, p. 21, par. 24 (Koh) ; CR 2017/2, p. 54, par. 4 (agent).

plausible right needs protection»[132]. Pareille affirmation est évidemment contraire à votre jurisprudence qui indique qu'au stade des mesures conservatoires, il vous appartient de déterminer si *les circonstances* exigent l'imposition de telles mesures[133], ce qui exige de s'assurer de la plausibilité des demandes formulées.

5. En la présente instance, l'examen de la demande de l'Ukraine telle que celle-ci l'a étayée conduit à conclure que ce seuil n'est pas atteint.

6. Pour rappel, l'objet de la demande de l'Ukraine n'est pas de faire constater l'existence d'une discrimination en particulier — une discrimination par exemple dans l'accès à un type d'emploi, ou une discrimination dans les règles applicables en matière d'héritage, qui exigerait de la Cour qu'elle adopte une mesure conservatoire précise, visant à sauvegarder un droit particulier qui serait en litige. Ce que demande l'Ukraine est de *nature* bien différente : l'Ukraine allègue que la Russie se livrerait à une campagne systématique d'annihilation culturelle des populations tatare et ukrainienne de Crimée.

7. Le professeur Koh a confirmé hier que tel est bien l'objet de la demande de l'Ukraine ; selon lui, il existerait «a policy of «russification»», «that inflicts collective punishment and pervasive discrimination against other cultures»[134] ; cette campagne systématique constituerait selon l'Ukraine «un effort *concerté*» («a concerted effort») de «suppression» de ces communautés[135].

8. Ces graves accusations se retrouvent dans la demande en indication de mesures conservatoires. Ce que l'Ukraine demande à la Cour, ce n'est pas de mettre fin à une pratique particulière de discrimination, c'est de mettre fin aux prétendus «acts of political and cultural *suppression* against» les communautés tatares et ukrainiennes de Crimée.

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[132] CR 2017/3, p. 51, par. 2 (Gimblett).

[133] Voir notamment, *Questions concernant l'obligation de poursuivre ou d'extrader (Belgique c. Sénégal), mesures conservatoires, ordonnance du 28 mai 2009, C.I.J. Recueil 2009*, p. 156, par. 76.

[134] CR 2017/3, p. 21, par. 25 (Koh).

[135] *Ibid*., et p. 21-22, par. 26.

9. Dans ces circonstances, et n'en déplaise à M. Gimblett[136], le standard de preuve établi par la Cour pour des accusations d'une telle gravité s'applique dans le cadre de l'examen du test de plausibilité.

10. D'évidence — et j'aurais l'occasion d'y revenir en détail — ce test n'est pas rempli en l'espèce : peut-on soutenir qu'une campagne systématique d'annihilation culturelle serait en cours en Crimée alors que, comme je l'ai rappelé mardi, l'éducation en tatare et ukrainien est assurée dans de nombreuses écoles et universités et que plus de 80 médias sont autorisés à émettre en langues tatare et ukrainienne en Crimée ? Comment réconcilier les allégations ukrainiennes avec les mesures constitutionnelles, législatives et administratives qui ont été adoptées depuis 2014 pour assurer la protection des droits des communautés tatare et ukrainienne, y compris par le biais de l'inscription dans la Constitution de la Crimée de ces langues comme langues officielles de la Crimée ? La seule réponse fournie par l'Ukraine hier aux éléments présentés mardi par la Russie a consisté à affirmer péremptoirement que «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»[137] et à faire part d'une série de spéculations censées permettre d'établir que le seuil de plausibilité serait atteint en l'espèce[138]. Je laisse le soin à la Cour d'apprécier la valeur de ces arguments.

11. Le seul document présenté par l'Ukraine hier pour contester l'existence de ces acquis constitutionnels, législatifs et administratifs est une photo montrant qu'un écriteau à l'entrée d'un bâtiment ne serait pas encore traduit dans les trois langues officielles de la Crimée[139]. Il se trouve cependant que ce bâtiment n'est pas un bâtiment officiel. Le fait que l'Ukraine n'ait pas produit d'autre document confirme *a contrario* que la règle des trois langues officielles est effectivement respectée en pratique, comme le prouvaient déjà les nombreux documents soumis par la Russie mardi[140].

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[136] CR 2017/3, p. 56-57, par. 19 (Gimblett).

[137] CR 2017/3, p. 56, par. 17 (Gimblett).

[138] *Ibid*., par. 21 et suiv.

[139] CR 2017/3, p. 56, par. 17 (Gimblett).

[140] Dossier of Documents submitted by the Russian Federation in connection with Ukraine's Request for the indication of provisional measures, vol. I, onglet n° 7, sous-onglets n^{os} 6-12.

12. Au bénéfice de ces remarques préliminaires, je souhaiterais ce matin revenir sur quatre points en particulier en réponse aux arguments présentés hier par l'Ukraine : tout d'abord, je dirai quelques mots très brefs sur l'objet et le champ d'application de la convention CIEDR avant de revenir plus en détail sur chacune des deux conditions préalables découlant de l'article 22 de la convention et, enfin, sur les raisons pour lesquelles il n'est ni nécessaire ni possible de prononcer en l'espèce des mesures conservatoires.

I. OBJET ET CHAMP D'APPLICATION DE LA CONVENTION CIEDR

13. Le professeur Koh a fait semblant hier de mal comprendre les précisions que j'ai pu apporter mardi quant au champ d'application de la convention CIEDR. Contrairement à ce qu'il a affirmé[141], la Russie n'a nullement admis avoir violé des droits de l'homme en Crimée. Le point pertinent est le suivant : la convention CIEDR n'est ni les pactes internationaux de 1966 ni la convention européenne des droits de l'homme, auxquels les deux Etats sont parties d'ailleurs, et qui comportent leurs propres mécanismes de contrôle. La convention CIEDR n'est pas davantage un instrument visant à renforcer et promouvoir les droits des minorités. Cette convention CIEDR a un objet nettement délimité : elle vise à l'élimination des discriminations raciales. Cela emporte une conséquence importante. La compétence de la Cour en l'espèce se limite aux griefs selon lesquels il y aurait eu, dans la jouissance de certains droits, une discrimination.

14. Il semble que l'Ukraine ait réalisé hier que tel était l'objet précis de la convention. L'Ukraine a admis en effet qu'il lui fallait établir l'existence d'une différence de traitement *entre des communautés différentes* pour pouvoir se prévaloir de la convention. Mais le fait est qu'à ce jour, l'Ukraine n'a apporté aucun élément démontrant une telle différence de traitement. L'Ukraine s'est contentée d'alléguer des violations de droits de l'homme, sous une forme souvent sujette à caution. Ainsi, le professeur Koh a accusé lundi la Russie d'avoir eu recours contre un responsable tatar à «a barbaric Soviet-era practice, subjecting a Tatar leader to involuntary psychiatric detention»[142]. Mais il semblerait que cette procédure existe également en Ukraine.

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[141] CR 2017/3, p. 22, par. 27-28 (Koh).

[142] CR 2017/1, p. 33, par. 28 (Koh).

Cette procédure consiste en ce qu'un juge peut ordonner un examen psychiatrique d'une personne qui est sujette à enquête pénale lorsque son état le justifie.

15. Le seul argument avancé hier par l'Ukraine sur le terrain de la discrimination a consisté à citer un extrait d'un rapport de mai 2016, qui allègue que certains groupes paramilitaires auraient échappé à des poursuites pour extrémisme alors que des activistes tatars auraient, eux, été poursuivis[143]. Le principe de non-discrimination ne peut cependant servir à légitimer l'impunité lorsqu'un comportement mérite une sanction. En tout état de cause, j'ai cité mardi un rapport récent de plus de 100 pages qui montre que la législation extrémiste est appliquée sans discrimination[144]. L'Ukraine a préféré quant à elle ne pas commenter ce document hier.

II. LA CONDITION DE NÉGOCIATION PRÉALABLE

16. J'en viens à la question des négociations préalables. Je me concentrerai ce matin sur les points qui sont particulièrement importants à ce stade de l'instance.

17. Premièrement[145], il résulte des échanges diplomatiques entre les deux Parties que celles-ci n'ont pas abordé tous les éléments qui font l'objet de la requête de l'Ukraine. Cela signifie, au regard de votre jurisprudence, que la condition de négociation préalable ne peut pas être considérée comme remplie.

18. Tout d'abord, l'Ukraine n'a jamais formulé, dans aucune des notes diplomatiques échangées entre 2014 et 2016, l'accusation selon laquelle la Russie se livrerait à une campagne systématique d'annihilation culturelle de certaines communautés. Cette grave accusation, qui est au centre de la demande de l'Ukraine, n'est apparue pour la première fois que dans la requête.

19. Ensuite, les notes diplomatiques de l'Ukraine ont uniquement invoqué les articles 2 et 5 de la convention, comme M. Gimblett l'a lui-même remarqué lundi dernier[146]. Or, dans sa requête, l'Ukraine a également évoqué les articles 3, 4 et 6 de la convention et formulé des griefs sur leur

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[143] CR 2017/3, p. 54, par. 12 (Gimblett).

[144] Voir, par exemple, Xenophobia, Freedom of Conscience and Anti-Extremism in Russia in 2015 : A collection of annual reports by the SOVA Center for Information and Analysis, 2016 (http ://www.sova-center.ru/files/books/pe16-text.pdf).

[145] Voir CR 2017/3, p. 26-27, par. 3 (Zionts).

[146] CR 2017/1, p. 54, par. 3 (Gimblett).

base[147]. La demande de mesures conservatoires sollicite également la protection des droits découlant des articles 3, 4 et 6[148]. N'ayant pas été invoqués avant la requête, ces articles et les obligations qu'ils contiennent n'ont pas pu faire l'objet de négociations préalables.

20. Cela jette du même coup un doute sur la portée exacte des mesures conservatoires demandées par l'Ukraine. Celle-ci a expressément demandé, dans sa demande écrite en mesures conservatoires, à ce que ces mesures protègent ses droits en vertu des articles 2, 3, 4, 5 et 6, mais il n'y a eu aucune négociation préalable sur les articles 3, 4 et 6. Mardi, M. Gimblett nous a dit que la demande de l'Ukraine repose sur «many articles of the CERD» mais qu'il se concentrerait uniquement sur les articles 2 et 5, les seuls articles qu'il a ensuite invoqués[149]. A défaut de clarification apportée par l'Ukraine quant aux droits exacts dont elle demande la protection, la Cour n'est pas en mesure de se prononcer clairement sur sa demande.

21. La deuxième remarque importante concerne le standard applicable en la matière. Les conseils de l'Ukraine ont fait fond hier sur l'ordonnance rendue par la Cour en 2008 dans l'affaire *Géorgie c. Russie*. Mais, outre que les faits de cette affaire n'ont rien de comparable à ceux de la présente affaire, comme je l'ai indiqué mardi, il se trouve que, depuis 2008, la Cour a eu l'occasion d'examiner en détail le régime applicable aux préconditions fixées par l'article 22 de la convention CIEDR et, en particulier, la condition de négociation préalable. La situation n'est donc plus la même qu'en 2008. Il faut désormais tenir compte des importantes précisions apportées par la Cour dans son arrêt de 2011 dans l'affaire *Géorgie c. Russie* et dans les développements ultérieurs de sa jurisprudence.

22. Troisièmement, la manière dont l'Ukraine s'est comportée durant les négociations confirme qu'elle n'estimait pas que ses demandes appelaient une réponse urgente ou exigeaient que des mesures soient prises urgemment pour protéger provisoirement ses droits. Pour ne prendre que quelques exemples[150] :

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[147] Requête de l'Ukraine, par. 132-133.

[148] Demande en indication de mesures conservatoires de l'Ukraine, par. 17.

[149] CR 2017/1, p. 56, par. 8 (Gimblett).

[150] Voir Documents submitted by the Russian Federation in connection with Ukraine's Request for the indication of provisional measures, n° 11.

i) dans sa note verbale du 1er décembre 2014, l'Ukraine a informé la Russie qu'elle estimait avoir d'ores et déjà épuisé la condition de négociation préalable[151] ; pourtant, l'Ukraine a accepté de prolonger les échanges et discussions pendant deux ans, sans à aucun moment préciser que ses droits en vertu de la convention risquaient de manière imminente de subir un préjudice irréparable ;

ii) l'Ukraine a laissé passer un laps de temps parfois considérable entre deux échanges diplomatiques ; ainsi, après la session de discussion d'avril 2015, l'Ukraine n'a repris le fil du dialogue qu'en août 2015, soit quatre mois plus tard[152] ;

iii) dans cette note verbale du 17 août 2015, l'Ukraine n'a de nouveau invoqué aucune urgence : au contraire, elle a rappelé que les deux Parties «agreed to continue working on overcoming the differences, through at least one more round of negotiations» (nous sommes le 17 août 2015) ;

iv) il faudra attendre plusieurs mois pour que l'Ukraine envoie une nouvelle note verbale : dans la note du 5 avril 2016, l'Ukraine propose que les négociations continuent et que se tienne une deuxième réunion de discussions, là encore sans invoquer le moindre risque imminent de préjudice irréparable[153] ;

v) la même attitude sera suivie par l'Ukraine dans sa *dernière* note en date du 7 octobre 2016 : aucune urgence ne fut invoquée et, au contraire — et je le souligne —, *l'Ukraine proposa de continuer les consultations*[154].

23. M. Zionts a toutefois prétendu hier que l'Ukraine aurait plusieurs fois indiqué qu'il y avait urgence, mais il n'a cité qu'un seul exemple, qui n'est guère probant[155]. Dans la note du 25 avril 2016, soit il y a presque un an, l'Ukraine aurait selon lui objecté, sur une base urgente, à l'interdiction du Majlis. Mais ce que cette note montre en réalité, c'est que l'Ukraine a seulement demandé à la Russie d'être prête à fournir des commentaires sur ce point lors de la prochaine session de discussions. Et dans les notes diplomatiques qui ont suivi, l'Ukraine n'a pas demandé à

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[151] Voir la note n° 72/22-620-2946 du 1er décembre 2014.

[152] Voir la note no 72/22-194/510-2006 du 17 août 2015.

[153] Voir la note no 72/22-194/510-839 du 5 avril 2016.

[154] Voir la note no 72/22-663-2302 du 7 octobre 2016.

[155] CR 2017/3, p. 31, par. 18 (Zionts).

la Russie de suspendre la mesure d'interdiction du Majlis. Ceci jette un doute sur l'allégation de l'Ukraine selon laquelle, désormais, il y aurait urgence à le faire.

III. LA DEUXIÈME PRÉCONDITION DE L'ARTICLE 22

24. Avec votre permission, Monsieur le président, il me faut maintenant revenir sur l'importante question relative à la deuxième précondition qui découle de l'article 22 de la convention CIEDR.

25. Hier, le professeur Koh a soutenu sur ce point que le fait que l'article 11 prévoit que le comité CIEDR «peut» être saisi de plaintes interétatiques signifie que sa saisine n'est pas une condition préalable à la compétence de la Cour[156]. L'argument est sans fondement. L'article 11 donne la possibilité à un Etat de déclencher la procédure de plainte interétatique. Ses rédacteurs ne pouvaient évidemment pas lui faire dire que, lorsqu'un Etat partie estime qu'une autre Etat partie viole la convention, il «doit» alors saisir le comité. Une clause *obligeant* les Etats parties à saisir un mécanisme de règlement des différends eût été un précédent bien surprenant ! Comme chacun le sait, la question juridique pertinente est de savoir si *l'article 22*, et non l'article 11, oblige à faire recours au comité avant la saisine de la Cour.

26. M. Zionts a tenté de répondre à cette question, mais de manière pour le moins surprenante.

27. Il a d'abord affirmé que la position de la Russie exposée dans l'affaire *Géorgie c. Russie*, selon laquelle les deux conditions sont cumulatives, aurait été «been rejected by every member of the Court to decide on it»[157]. Il est vrai que, au stade de la compétence dans cette affaire, certains membres de la Cour ont considéré dans leurs opinions que l'article 22 devait plutôt s'interpréter comme imposant deux conditions alternatives et pas cumulatives. Mais sept autres membres de la Cour ont quant à eux estimé que la Cour aurait dû également appliquer la deuxième précondition dans cette affaire *au stade des mesures conservatoires*. Ceux-ci ont en particulier pointé le fait qu'il existe une procédure d'urgence devant le comité CIEDR qui lui permet «d'intervenir avec

[156] CR 2017/3, p. 23, par. 29 (Koh).

[157] CR 2017/3, p. 34-35, par. 27 (Zionts).

plus d'efficacité en cas de violation de la convention»[158]. Cela montre, au minimum, que la question du recours préalable au comité CIEDR se pose sérieusement, et qu'elle ne peut être balayée d'un revers de la main comme le fait l'Ukraine.

28. L'Ukraine soutient pourtant que «Little needs to be said of that argument at this stage, where again the only question is *prima facie* jurisdiction.»[159] Monsieur le président, je vous avouerai avoir perdu ici le fil de l'argumentation ukrainienne. D'un côté, l'Ukraine consacre une plaidoirie entière à la question des négociations alors qu'elle estime avoir satisfait cette condition. De l'autre, elle estime ne rien devoir dire du tout sur le recours préalable au comité, alors qu'elle admet n'avoir même pas cherché à épuiser cette condition préalable.

29. La seule indication fournie par l'Ukraine hier est qu'elle «ne croit pas» que la Russie «has the correct reading of [article 22]»[160]. Mais, Monsieur le président, c'est précisément la question. Cette réponse de l'Ukraine est d'autant plus insuffisante que la «lecture» ukrainienne de l'article 22 est lourde de conséquences. Si la Russie comprend bien, l'Ukraine reprend à son compte la position juridique qui avait été celle du demandeur dans l'affaire *Géorgie c. Russie*. Selon cette position, cela ne poserait aucune difficulté de court-circuiter le comité CIEDR en acceptant qu'un Etat puisse porter directement sa prétention devant la Cour internationale de Justice.

30. Ne pas donner cependant son effet utile à la deuxième précondition de l'article 22 reviendrait à porter atteinte à la volonté des auteurs de la convention de limiter le recours à la Cour, volonté dont la Cour a elle-même pris note dans son arrêt de 2011[161]. Cela priverait également de tout effet utile la procédure de plainte interétatique expressément introduite aux articles 11 à 13 de la convention, alors que, en 2011, la Cour a insisté sur le nécessaire respect du principe de l'effet utile[162]. Cela affecterait gravement enfin la compétence du comité CIEDR et, plus largement,

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[158] *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), mesures conservatoires, ordonnance du 15 octobre 2008,* opinion dissidente commune de M. le juge Al-Khasawneh, vice-président, et de MM. les juges Ranjeva, Shi, Koroma, Tomka, Bennouna et Skotnikov, *C.I.J. Recueil 2008*, p. 404, par. 18.

[159] CR 2017/3, p. 34, par. 26 (Zionts).

[160] CR 2017/3, p. 34, par. 27 (Zionts).

[161] CR 2017/2, p. 65, par. 6 (Forteau).

[162] *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), exceptions préliminaires, arrêt, C.I.J. Recueil 2011 (I)*, p. 125, par. 133.

l'équilibre institutionnel établi par la convention CIEDR. Or, comme votre Cour l'a souligné en 2010 dans l'affaire *Diallo*, il appartient à la Cour d'accorder une «grande considération» à la pratique de «tout organe indépendant spécialement établi en vue de superviser l'application d['un] traité»[163]. Cette «grande considération» est un élément utile pour éviter la fragmentation du droit international et les appréciations ou interprétations divergentes d'une même convention. Elle est d'autant plus requise ici que la convention CIEDR présente la particularité d'avoir institué une procédure de plainte interétatique devant un tel comité.

31. Court-circuiter le comité CIEDR dans la présente affaire est d'autant moins envisageable par ailleurs que, d'une part, il assure depuis de nombreuses années le suivi du sort réservé aux communautés de Crimée ; d'autre part — et je parle au présent —, il *est* saisi, depuis l'été dernier, du rapport périodique de la Russie, sur lequel le dialogue institutionnel va s'ouvrir en août prochain avec le comité.

IV. LES CONDITIONS NE SONT PAS REMPLIES POUR L'IMPOSITION DE MESURES CONSERVATOIRES

32. En admettant *(quod non)* que la Cour ait compétence *prima facie* sur le fondement de l'article 22 de la convention, les circonstances ne sont pas telles que des mesures conservatoires devraient être prononcées.

33. A ce titre, il convient de souligner d'abord que les mesures demandées par l'Ukraine sont soit d'un très grand flou, soit clairement excessives.

34. S'agissant du premier point, il est difficile de saisir exactement quelles mesures l'Ukraine souhaiterait voir adopter par la Cour. A aucun moment en effet, l'Ukraine n'a défini ce qu'elle entend concrètement par sa demande visant à obtenir la cessation des «acts of political and cultural suppression». En ce qui concerne par exemple la question des disparitions, dans la mesure où la dernière disparition remonte à mai 2016 et où celle-ci n'a pas été attribuée à la Russie, il est difficile de comprendre la portée exacte de la demande de l'Ukraine. Pour prendre un autre exemple, qui concerne la langue ukrainienne, l'incertitude est également totale quant à ce que l'Ukraine demande exactement : s'agit-il de modifier le système suivant lequel les familles

[163] *Ahmadou Sadio Diallo (République de Guinée c. République démocratique du Congo), fond, arrêt, C.I.J. Recueil 2010 (II)*, p. 664, par. 66.

émettent leurs vœux en ce qui concerne la langue d'étude de leurs enfants ? S'agit-il d'augmenter le nombre d'enseignants ou de classes en langue ukrainienne ? En ce qui concerne les médias, plus de 80 d'entre eux ont été autorisés à émettre en Crimée en langues tatare et ukrainienne. Que demande, concrètement, en guise de mesures conservatoires, l'Ukraine sur ce point pour protéger ses droits ? L'incertitude est totale en la matière.

35. Par exception, dans le cas du Majlis, l'Ukraine sollicite de la Cour une demande précisément définie. L'Ukraine exige en effet la suspension de l'interdiction du Majlis. Mais une telle demande ne peut pas être ordonnée par la Cour, pour au moins trois raisons.

36. Tout d'abord, l'interdiction du Majlis ne repose sur aucun motif de discrimination raciale. Elle tombe donc en dehors du champ de la convention.

37. Par ailleurs, c'est un principe bien établi dans la jurisprudence de la Cour que sa décision sur les mesures conservatoires «doit laisser intact le droit de chacune des Parties de contester les faits allégués contre elle, ainsi que la responsabilité qui lui est imputée quand à ces faits»[164]. Ordonner la suspension du décret interdisant le Majlis reviendrait à l'inverse à préjuger le fond de l'affaire, en estimant que cette interdiction ne serait pas fondée sur des motifs objectifs et raisonnables et serait en réalité exclusivement motivée par une volonté de discrimination raciale, volonté au demeurant que l'Ukraine n'a même pas tenté d'établir ; l'Ukraine s'est contentée de conjectures, selon lesquelles la lutte contre l'extrémisme ne serait qu'un prétexte déguisant d'autres motifs.

38. Enfin, il convient de prendre en considération les conséquences qu'aurait une telle suspension.

39. La décision de la Cour suprême de Crimée, qui a confirmé l'interdiction et qui figure à l'onglet n° 56 du dossier des juges déposé par la Russie mardi dernier, détaille les motifs qui ont conduit les autorités à estimer que le Majlis se livrait à des activités extrémistes en Crimée. Ces motifs sont sérieusement étayés par la Cour suprême de Crimée, qui, de la page 11 à la page 19 de la décision, dresse en particulier la liste des déclarations publiques faites par des responsables du Majlis, déclarations qui sont disponibles sur Internet, comme la Cour le relève pour chaque

[164] *Application de la convention pour la prévention et la répression du crime de génocide, mesures conservatoires, ordonnance du 8 avril 1993, C.I.J. Recueil 1993*, p. 22, par. 44.

déclaration. Le contenu de ces déclarations est explicite : les dirigeants du Majlis ont qualifié ceux qui ne luttent pas contre la Russie de collaborateurs, ont encouragé à déclarer la guerre à la Russie, ont estimé que leur objectif est de libérer la Crimée en mettant en place un blocus, ont appelé à la cessation de tout commerce, y compris la fourniture de l'électricité, avec la Crimée, et ont même assumé le fait que, à travers le blocus mis en place, «we, as activists, as the Mejlis, created a humanitarian catastrophe in Crimea»[165]. M. Gimblett a relevé par ailleurs que les motifs d'interdiction du Majlis remontent également à des actes qui ont pu être commis avant 2014[166], ce qui avait conduit l'Ukraine elle-même à prendre des mesures contre le Majlis[167].

40. Dans ses rapports de décembre 2015 et de mars 2016, qui concernent la période critique relative à l'interdiction du Majlis, le haut-commissaire des droits de l'homme des Nations Unies avait exprimé ses plus vives inquiétudes quant aux conséquences du blocus contre la Crimée et aux violations des droits qui l'ont accompagné — en particulier parce que les personnes qui ont mis en œuvre ce blocus se sont substituées aux autorités compétentes de manière illégale[168]. Dans son rapport de mars 2016, le haut-commissaire écrit par ailleurs ceci : «The «civil blockade» was operated by *activists* who illegally performed law enforcement functions, and was marked by some human rights abuses.»[169] A la lumière de ces éléments, il est difficile de prétendre que la Russie n'était manifestement pas en droit d'interdire le Majlis et de prendre les mesures nécessaires à la protection de l'ordre public.

41. Dans son rapport de décembre 2016, le haut-commissaire aux droits de l'homme est revenu sur ces événements, en détaillant les raisons pour lesquelles la loi contre l'extrémisme a été appliquée. Il n'a pas prétendu à cette occasion qu'il y aurait eu là un exemple de discrimination raciale. M. Gimblett a affirmé hier toutefois que cette loi contre l'extrémisme serait «arbitraire»

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[165] Décision de la Cour suprême de Crimée (29 septembre 2016), onglet n° 56 du dossier des juges déposé par la Russie, p. 18.

[166] CR 2017/3, p. 53, par. 11 et p. 58, par. 24 (Gimblett).

[167] CR 2017/2, p. 60-61, par. 34-35 (agent).

[168] Haut-Commissariat des Nations Unies aux droits de l'homme, rapport sur la situation des droits de l'homme en Ukraine – 16 août au 15 novembre 2015, par. 143-146 ; Haut-Commissariat des Nations Unies aux droits de l'homme, rapport sur la situation des droits de l'homme en Ukraine – 16 novembre 2015 au 15 février 2016, par. 197-200 (http ://www.ohchr.org/EN/Countries/ENACARegion/Pages/UAReports.aspx#navigation).

[169] Haut-Commissariat des Nations Unies aux droits de l'homme, rapport sur la situation des droits de l'homme en Ukraine – 16 novembre 2015 au 15 février 2016, par. 197.

car elle serait trop large dans sa définition[170]. Cet argument, en supposant qu'il soit fondé, n'a aucune pertinence en l'espèce : une loi arbitraire ne peut de toutes manières tomber sous le champ de la convention CIEDR que si elle est mise en œuvre de manière discriminatoire pour des raisons raciales, ce qui n'est pas le cas en l'espèce.

42. Le haut-commissaire aux droits de l'homme a par ailleurs indiqué ceci dans son rapport de décembre 2016 à propos de la détention de deux personnes ayant participé à ces activités extrémistes :

> «Le 10 octobre, une «cour» de Crimée a prolongé jusqu'au 10 décembre la détention provisoire de Yevhen Panov et Andrii Zaktei, un autre suspect arrêté. Plus tôt, en août, la Cour européenne des droits de l'homme avait refusé d'ordonner l'extradition de Yheven Panov vers l'Ukraine, comme le demandait sa famille qui invoquait l'article 39 du Règlement de la Cour [qui concerne les mesures conservatoires] et le risque de torture en détention. La Cour européenne a plutôt accepté la position de la Fédération de Russie selon laquelle les autorités russes examineront les plaintes de l'accusé et enquêteront sur les conditions dans lesquelles il a subi des blessures.»[171]

43. Ce passage du rapport du haut-commissaire est important à deux points de vue :

i) il montre que, contrairement aux spéculations de l'Ukraine, il n'y a pas lieu de présumer par principe que la Russie ne respecte pas ses engagements internationaux en matière de droits de l'homme en Crimée ;

ii) il montre également que le respect des droits de l'homme en Crimée est strictement contrôlé par la Cour européenne des droits de l'homme, notamment par le biais du recours possible, mais refusé en l'espèce, aux mesures conservatoires.

44. Dans le même rapport de décembre 2016 et toujours en ce qui concerne la lutte contre l'extrémisme, le haut-commissaire a fait état de «sérieuses inquiétudes» en ce qui concerne les «poursuites contre les membres du Hizb ut-Tahrir de Crimée» dont certains sont des Tatars de Crimée[172]. Le haut-commissaire n'a toutefois pas précisé en quoi consistaient ces inquiétudes. Je rappellerai à cet égard que cette organisation est interdite et a été considérée par la Cour européenne des droits de l'homme (CEDH) comme extrémiste. L'Ukraine n'a pas commenté hier

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[170] CR 2017/3, p. 53, par. 11 (Gimblett).

[171] Haut-Commissariat des Nations Unies aux droits de l'homme, rapport sur la situation des droits de l'homme en Ukraine – 16 août au 15 novembre 2016, dossier de plaidoiries de l'Ukraine (annexe 32), par. 161.

[172] *Ibid*., par. 164.

les deux arrêts de la CEDH que j'avais cités mardi. Ces arrêts sont pourtant fort intéressants, les demandeurs dans ces affaires ont vu leur plainte déclarée inadmissible par la Cour au motif — et c'est un motif que la Cour ne retient qu'en de très rares occasions — que la nature des activités du Hizb ut-Tahrir lui interdisait de formuler la moindre plainte devant la CEDH dès lors que ses activités doivent être vues comme visant à la destruction des droits et libertés prévus par la convention[173]. Il s'agit d'une application de l'article 17 de la convention européenne des droits de l'homme.

45. Pour conclure sur ce point, dans son rapport de décembre 2016, le haut-commissaire n'a exprimé aucune critique quant à la décision de la Cour suprême de Crimée d'interdire le Majlis. Il a certes remarqué que, selon lui, aucune des 30 ONG tatares de Crimée n'ont le «même degré de représentativité et de légitimité que le Majlis et le Kurultai»[174], mais il n'a pas condamné pour autant la décision d'interdiction[175]. Cet extrait montre d'ailleurs que le Majlis n'est pas considéré comme la seule entité susceptible de représenter les Tatars ; par ailleurs, le Kurultai, lui, n'a pas été interdit. Certes, dans un rapport présenté six mois plus tôt, dont M. Gimblett se prévaut[176], le haut-commissaire avait relevé que l'interdiction du Majlis «could be perceived as a collective punishment against the Crimean Tatar community». Mais ce constat factuel, exprimé d'ailleurs en termes hypothétiques et subjectifs, n'implique certainement pas à lui seul que l'interdiction du Majlis constituerait un cas de discrimination raciale.

46. Au vu de l'ensemble de ces circonstances, rien ne justifie donc la suspension de l'interdiction du Majlis. Au contraire, une telle mesure aurait de graves conséquences pour la sécurité de la Crimée, tout en préjugeant gravement les droits de la Russie au fond — à supposer que la Cour ait compétence en l'espèce, ce qui n'est pas le cas.

47. Permettez-moi maintenant, Monsieur le président, de revenir sur une dernière série d'affirmations avancées hier par l'Ukraine en relation avec la plausibilité de sa demande. Le

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[173] Voir CEDH, *Hizb ut-Tahrir et autres c. Allemagne*, n° 31098/98 (12 juin 2012) ; *Kasymakhunov et Saybatalov c. Russie*, n° 26261/05 et 26377/06 (14 mars 2013).

[174] Haut-Commissariat des Nations Unies aux droits de l'homme, rapport sur la situation des droits de l'homme en Ukraine – 16 août au 15 novembre 2016, dossier de plaidoiries de l'Ukraine, par. 169.

[175] Haut-Commissariat des Nations Unies aux droits de l'homme, rapport sur la situation des droits de l'homme en Ukraine – 16 août au 15 novembre 2016, par. 167-169.

[176] CR 2017/3, p. 53, par. 10 (Gimblett).

leitmotiv de l'Ukraine a été de vous recommander de ne pas trop regarder les faits ni le fond de l'affaire. Elle a estimé qu'il suffisait à la Cour de s'en tenir à ce qui figure dans la résolution de l'Assemblée générale des Nations Unies de décembre 2016 en guise d'établissement des faits. Monsieur le président, cela ne saurait évidemment suffire au moment de décider si la Cour doit imposer par voie de mesures conservatoires des obligations contraignantes à un Etat souverain. L'Assemblée générale n'est pas un organe d'établissement des faits ; par ailleurs, la résolution en cause avait, à l'évidence, un caractère politique marqué ; elle n'a été adoptée que par 70 Etats tandis que 26 ont voté contre et 77 se sont abstenus.

48. En tout état de cause, la résolution de l'Assemblée générale a été rédigée *avant* la remise du dernier rapport du haut-commissaire des Nations Unies aux droits de l'homme. Dans ce rapport soumis en décembre 2016, le haut-commissaire indique en effet que le 15 novembre 2016, la Troisième Commission de l'Assemblée générale avait déjà adopté la résolution en question[177]. Ceci emporte deux conséquences : la première est que le haut-commissaire a soumis son rapport en ayant connaissance du contenu de cette résolution, dont il était en mesure de confirmer les conclusions dans son rapport si elles correspondaient aux informations qu'il avait collectées ; la seconde est que le rapport du haut-commissaire de décembre 2016 est le document le plus récent. Ce rapport ne saurait certes être décisif au regard des critères fixés par votre jurisprudence en matière de preuve, lesquels favorisent les documents établis par des personnes ayant une connaissance directe des faits ou bien établis selon une méthodologie judiciaire rigoureuse[178]. Le contenu de ce rapport est toutefois intéressant à plusieurs titres.

49. Les éléments suivants sont particulièrement éclairants :

i) les paragraphes 155 à 181 du rapport qui sont dédiés à l'examen de la situation en Crimée ne contiennent pas une seule fois le terme «discrimination» ;

[177] Haut-Commissariat des Nations Unies aux droits de l'homme, rapport sur la situation des droits de l'homme en Ukraine – 16 août au 15 novembre 2016, par. 155.

[178] *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Serbie-et-Monténégro), arrêt, C.I.J. Recueil 2007 (I)*, p. 130. par. 213 et p. 135, par. 227.

ii) le terme discrimination figure en revanche plusieurs fois dans d'autres sections du rapport, mais dans les passages qui concernent les mesures à prendre par les autorités ukrainiennes[179] ;

iii) dans la partie du rapport consacrée aux mesures à prendre par l'Ukraine, il y a même une section entière dédiée aux droits des minorités et à la discrimination[180] ; dans la partie du rapport consacrée à la Crimée, il y a également une section sur les droits des minorités, mais celle-ci ne vise pas la discrimination et demeure complètement muette à son sujet ;

iv) ledit rapport ne mentionne par ailleurs à aucun endroit l'idée qu'une campagne d'annihilation culturelle serait en cours. Nul doute que si tel était le cas, le haut-commissaire l'aurait mentionné ;

v) aux paragraphes 170 et 171, le haut-commissaire s'inquiète en revanche des «barrières juridiques et administratives disproportionnées imposées *par l'Ukraine* [qui] encouragent la corruption et limitent la liberté de mouvement » entre l'Ukraine continentale et la Crimée et souligne que cette question est devenue «particulièrement aiguë» ; il fait état sur ce point de «plaintes répétées, tant de la part des habitants de l'Ukraine continentale que de la Crimée» ;

vi) dans la section consacrée à la Crimée, le rapport passe par ailleurs en revue le respect de plusieurs droits de l'homme, dont le droit à un procès équitable et les droits des détenus, sans à aucun moment faire état de la moindre allégation de discrimination raciale dans la jouissance de ces droits ;

vii) certes, au paragraphe 178, le haut-commissaire évoque des rapports qui auraient circulé sur des pressions et des fouilles contre des militants tatars de Crimée et des membres du Majlis, mais il précise que cela concerne des personnes «qui préconisaient un boycott des élections» ;

viii) la dernière partie de la section du rapport portant sur la Crimée aborde, en trois paragraphes (179 à 181), le droit à l'éducation. Le haut-commissaire y constate tout

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[179] Haut-Commissariat des Nations Unies aux droits de l'homme, rapport sur la situation des droits de l'homme en Ukraine – 16 août au 15 novembre 2016, voir en particulier par. 152-154.

[180] *Ibid.*

d'abord que «les parents tatars de Crimée semblent adopter la possibilité d'éduquer leurs enfants en langue tatare de Crimée» ; il avance ensuite des chiffres sur ce point précis, en citant une organisation non gouvernementale tatare de Crimée, qui démontrent que la langue tatare est enseignée en Crimée à près de 1000 élèves, étant précisé qu'il y a une école de plus qu'en 2014 qui enseigne cette langue ; il ne fait état par ailleurs d'aucune préoccupation à propos de l'éducation en langue tatare ; en ce qui concerne l'ukrainien comme langue d'éducation, le haut-commissaire se contente de confirmer qu'il est en «déclin continu» depuis mars 2014 ; à aucun moment cependant le haut-commissaire ne prétend que ce serait en raison de «restrictions» imposées par les autorités de Crimée — contrairement à ce qu'a affirmé mardi l'Ukraine[181]. Le seul commentaire qu'il formule consiste à citer les autorités de Crimée selon lesquelles ce déclin peut être attribué à un «manque d'intérêt pour l'enseignement en ukrainien parmi les parents» ; je précise en passant sur ce point qu'il n'y a aucune contradiction entre le rapport soumis par la Russie à l'UNESCO en avril 2015, le rapport du haut-commissaire et les statistiques fournies à la Cour par la Russie en ce qui concerne la liste des écoles en langue ukrainienne[182] ; il se trouve simplement que ce dernier document, à la différence des deux autres, ne porte pas seulement sur les élèves qui ne sont éduqués qu'en langue ukrainienne ;

ix) J'ajouterai, toujours en relation avec les questions éducatives, que c'est à tort que M. Gimblett a accusé la Russie d'avoir mal cité le rapport du comité CIEDR sur l'Ukraine de 2016[183]. La Russie maintient sa citation, qui montre que les Tatars de Crimée qui se rendent *en Ukraine* rencontrent de sérieuses difficultés, notamment en termes d'accès à l'éducation dans leur langue. Ce document est d'autant plus important qu'il contient les observations finales du comité CIEDR sur l'Ukraine adoptées le 23 août dernier[184].

50. Enfin, il est tout aussi important de relever ce que le rapport de décembre 2016 du haut-commissaire ne contient pas :

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[181] CR 2017/1, p. 62, par. 24 (Gimblett).

[182] CR 2017/3, p. 55-56, par. 16 (Gimblett).

[183] CR 2017/3, p. 51-52, par. 6-8 (Gimblett).

[184] CERD/C/UKR/CO/22-23, 4 octobre 2016, disponible à l'adresse : http ://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD/C/UKR/CO/22-23&Lang=Fr.

i) il ne contient aucune allégation en ce qui concerne une prétendue campagne de meurtres, d'enlèvements ou de disparitions ; il ne fait état par ailleurs d'aucune allégation relative à de prétendues absences d'enquête sur les disparitions survenues dans le passé ; M. Gimblett a noté hier à cet égard que les autorités russes «do not claim to have resolved the disappearances of Crimean Tatar activists Reshat Ametov in 2014 and Mr. Ibragimov himself in 2016»[185]. De fait, ces enquêtes sont toujours en cours et M. Gimblett n'a pas prétendu qu'elles ne seraient pas ou qu'elles n'auraient pas été initiées ou menées ;

ii) le rapport du haut-commissaire ne contient par ailleurs aucune allégation en ce qui concerne la prétendue suppression des médias. Il est intéressant d'ailleurs de constater l'évolution de la demande ukrainienne sur ce point. Au premier tour de plaidoiries, l'Ukraine avait plaidé que les médias tatars et ukrainiens auraient été «démantelés»[186] et «supprimés»[187] en Crimée — termes qui correspondent aux mesures conservatoires sollicitées par l'Ukraine et qui visent à la protéger contre toute «suppression» politique et culturelle. M. Gimblett s'est fait hier plus prudent en n'invoquant que les «restrictions» imposées aux médias, ce qui constitue une modification importante de la demande ukrainienne[188] certainement motivée par les informations présentées par la Russie à la Cour. M. Gimblett s'est limité sur ce point à soutenir que des médias comme ATR ou *Avdet* n'auraient pas obtenu le droit de diffuser en Crimée[189]. Le fait est que ATR et *Avdet* n'ont pas réintroduit de nouvelles demandes d'enregistrement depuis 2015. Et cela ne les prive pas d'accès à la Crimée : ATR diffuse librement ses émissions en Crimée depuis l'Ukraine, comme le montrent plusieurs offres commerciales disponibles, notamment sur Internet, qui offrent cet accès en Crimée ; quant au journal *Avdet*, il continue d'être publié dans la capitale de Crimée ainsi que sur Internet où le journal est disponible en tatare, en russe et en anglais[190] ;

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[185] CR 2017/3, p. 54, par. 13 (Gimblett).

[186] CR 2017/1, p. 29-30, par. 17 (Koh).

[187] CR 2017/1, p. 30, par. 19 (Koh).

[188] CR 2017/3, p. 55, par. 14, intitulé du point 3 (Gimblett).

[189] *Ibid*.

[190] www.avdet.org.

iii) Le rapport du haut-commissaire de décembre 2016 ne contient enfin aucune mention d'une quelconque suppression ou restriction de droits culturels.

51. Tout ceci conduit, Mesdames et Messieurs de la Cour, à une conclusion fort simple : les circonstances de la présente affaire ne sont manifestement ni celles de l'affaire *Géorgie c. Russie*, ni celles dramatiques et tragiques qu'a tenté de décrire hier le demandeur de manière peu convaincante. Dans ces circonstances, la demande en mesures conservatoires de l'Ukraine ne peut être acceptée.

52. Monsieur le président, ceci met un terme à ma présentation de ce matin. Mesdames et Messieurs les juges, je vous remercie sincèrement de votre écoute. Je vous serais reconnaissant, Monsieur le président, de bien vouloir appeler maintenant à cette barre M. Roman Kolodkin, agent de la Russie.

Le PRESIDENT : Merci, Monsieur le professeur. Je donne la parole à S. Exc. M. Roman Kolodkin, agent de la Russie.

Mr. KOLODKIN:

1. Mr. President, distinguished Members of the Court: concluding today's presentations, I will provide a summary of our position and deliver the final submission of the Russian Federation.

2. As we stated at the outset of our pleadings, there are two completely different cases brought before the Court, which Ukraine artificially merged in an effort to stigmatize the Donetsk and Lugansk People's Republics as terrorists and the Russian Federation as a "supporter of terrorists" and as a "persecutor" of ethnic minorities.

3. This stigmatization, if endorsed by the Court, will serve Ukraine to justify its so-called anti-terrorist operation, which is being waged already for almost three years against these entities and in fact against the population of the regions that constitute these entities.

4. It appears obvious that Ukraine hopes that the tragic picture of the situation in the Ukraine's east will cast its shadow on the situation in Crimea, and thus will stimulate the Court to order provisional measures with respect to the Crimea-related claims. Ukraine in the past two days

has often used the word "similarity", when turning to the situation in Crimea, yet there is no similarity at all.

5. On Tuesday, I stated that Ukraine's purpose was to seek this Court's decision on an alleged use of force by Russia[191] — a matter beyond the Court's jurisdiction. In reply to my statement Professor Koh said: "*Nor do we — or will we — ask you to determine the legality of Russia's aggression*"[192]. Ms Zerkal echoed his words[193]. However, hours later in an interview she had this to say:

> "[C]urrently we request provisional measures. The Court will consider the request and adopt its own decision. Possibly, the wording in this decision will not be the one that we request. However, the fact of legal recognition of the violation by Russia of these two international law instruments is very important for us, as in fact, recognition of that role, of that aggression that Russia conducts on the territory of Ukraine . . ."[194]

6. The simple question is which of these two positions of Ukraine is its true position?

7. Yesterday, Ukraine disputed the relevance of the Minsk process to the present proceedings, and stated that it did not consider the DPR and LPR to be "official parties" to this process[195]. This argument, however, misses the point. The fact is that the representatives of those whom Ukraine calls terrorists signed not only both Minsk Agreements, but also a number of Minsk process arrangements including a quite recent one — Framework Decision of the Trilateral Contact Group relating to disengagement of forces and hardware[196].

8. Ukraine engages with both entities within the Trilateral Contact Group and its working groups, established under the Minsk Agreements. A meeting of one of those working groups took

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[191]CR 2017/2, p.12, para.3 (Kolodkin).

[192]CR 2017/3, p.13, para. 4 (Koh).

[193]CR 2017/3, p.61, para. 4 (Zerkal).

[194]Interview of E. Zerkal to Hromadske TV, 8 March 2017, available at https://www.youtube.com/watch?v=TbGlzu3RmLs ("Тому що зараз ми вимагаємо запобіжні заходи. Суд розглядає ці запобіжні заходи і приймає своє власне рішення. Можливо, формулювання в цьому рішенні будуть не такі, як ми вимагаємо. Але сам факт юридичного визнання порушення Росією цих двох міжнародно-правових документів для нас є дуже важливим як, фактично, визнання цієї ролі, цієї агресії, яку Росія проводить на території України по відношенню до українських громадян").

[195]CR 2017/3, p.17, para. 15 (Koh).

[196]Reported in, Special Representative of the OSCE Chairperson-in-Office in Ukraine Sajdik welcomes Framework Decision on Disengagement of Forces and Hardware, 21 Sep. 2016, available at (http://www.osce.org/cio/266331.

place just eight days ago, on 1 March. The representatives of the OSCE, Ukraine, Russia and those whom Ukraine calls terrorists, all participated[197].

9. Mr. President, Russia takes its obligations under both treaties seriously. At the same time, Ukraine's repeated suggestions that this should support the indication of provisional measures, since compliance with such provisional measures would be "simple", does not provide a legal basis for the indication of provisional measures. It is not the function of provisional measures to remind States of their obligations.

10. Notwithstanding the fact that the two cases are indeed different, when it comes to provisional measures, the same well-established test must be met in both cases. As we have demonstrated during the pleadings, Ukraine's request fails to satisfy this test in both cases.

11. I will not recapitulate each aspect of Russia's position, but will address a few important points.

12. With respect to the ICSFT these are as follows:

— First, in over 800 pages of documents submitted by Ukraine to the Court, you will not find a single statement of an international organization or body, or indeed a State other than Ukraine, characterizing the incidents which Ukraine relies on as terrorism or as financing of terrorism. International organizations and the whole world perceive the events in eastern Ukraine as an armed conflict and the actions of the parties to it as what they are: as acts of war. Consequently, Ukraine is alone in seeking to characterize the incidents it relies on as terrorism and the financing of terrorism.

— Second, as was demonstrated by our counsel, there is no basis for the Court to exercise even prima facie jurisdiction in this case.

— Third, there is no risk of irreparable harm and no urgency with respect to the rights of Ukraine specifically under the ICSFT.

13. I would also like to address shortly the issue of the evidence relied upon by Ukraine with respect to the so-called flow of weapons. This is not a point critical to the Court's determination of the current issues, but we do this to register our very genuine concern. On Tuesday, Mr. Rogachev

[197]Press Statement of Special Representative of OSCE Chairperson-in-Office Sajdik after meeting of the Trilateral Contact Group on 1 March 2017, 2 March 2017, available at http://www.osce.org/cio/302416.

drew your attention to Russia's submissions to the European Court of Human Rights (ECHR) where it demonstrated that Ukraine had provided fabricated evidence as to allegedly Russian-supplied weapons[198]. In this submission Russia showed, for example, how Ukraine had mocked up its own paintwork on a Grad launcher to suggest it was Russian, and that Russian military symbols had been painted over to obscure its origin[199], and how boxes of military equipment had been decorated to suggest Russian supply[200]. We have heard no response before the ECHR, although Ukraine has had more than a year to consider it, and we heard no response on Wednesday either. Under such circumstances Ukraine's evidence should be subjected to close scrutiny, and cannot be taken at face value. This approach is particularly appropriate since the application has not been prepared on an urgent basis and, in fact, Ukraine has been preparing it for two years.

14. Moving next to the request Ukraine bases on the CERD, I would like to make the following points.

15. Ukraine asks the Court not to believe Russia, not to believe many statements of residents of Crimea, but to rely solely on the documents of international organizations, and also, as we learned yesterday — the United States State Department. We have already pointed out the fact that the General Assembly resolution is a political document, adopted by a split vote with two thirds of the United Nations members either voting against or abstaining. In fact, even two States voting in favor of the resolution expressly disassociated themselves from the paragraphs of the resolution on Crimean Tatars. We also mentioned that international bodies to the reports of which Ukraine refers, have no presence in Crimea, and therefore probative value of the reports is diminished in this case. Anyway, these reports do not refer to a "campaign of cultural erasure" of national minorities alleged by Ukraine.

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[198]CR 2017/2, p. 20 para. 16.

[199]*Ukraine* v. *Russia*, app. no. 20958/14, Observations of the Russian Government on admissibility, Dossier of documents of the Russian Federation, 31 Dec. 2015, Vol. II, tab. 9, paras. 322-329.

[200]*Ibid.*, paras. 268-287.

16. Moreover Ukraine did not dispute that it used inaccurate information, trying to prove that there was an exodus of people of Crimea. The weakness of Ukraine's allegations is illustrated by the many allusions in the statements of its team to the 1944 illegal deportation, which has no relation to the present case.

17. Ukraine has been engaged for years in the practice of discrimination of Crimean Tatars, and now it continues with this practice on the territory under its authority. It also supports a blockade, which has a high toll on the residents of Crimea, whom Ukraine pretends to protect.

18. It is for this reason that we have invited the Court, applying the plausibility test, to look a little deeper into the facts, of course with the full understanding that this is not the merits stage. Given the "alternative reality" Ukraine construed, such an inquiry is necessary.

19. As demonstrated in our pleadings today and on Tuesday, Ukraine's allegations under the CERD are not plausible. Nor does the Court have even prima facie jurisdiction. Finally, Ukraine has failed to demonstrate either risk of irreparable prejudice or urgency.

20. Mr. President, before making our final submission I would like to make one more remark. Ukraine repeatedly claimed that the purpose of its request is to protect the vulnerable population, and in particular those in the east of Ukraine, for whom the provisional measures as claimed by Ukraine, are a "matter of life or death"[201].

21. At the same time, the OHCHR issues reports, submitted by Ukraine to the Court, that record Ukraine's armed forces, including volunteer battalions, engaging in indiscriminate shelling that leads to numerous civilian casualties in the east of Ukraine[202]. Neither Professor Koh, nor Ms Cheek had any answer to this. Those reports are coming from the OHCHR, who have presence on the ground. Similarly documented in those reports are numerous instances of Ukraine's armed

[201]CR 2017/3, p. 26, para. 38 (Koh).

[202]E.g. OHCHR, Report on the Human Rights Situation in Ukraine, 16 May to 15 Aug. 2015, paras. 31-32; OHCHR, Report on the Human Rights Situation in Ukraine, 16 Aug. to 15 Nov. 2016, p. 4 and p. 10 para. 23.

forces, including volunteer battalions, and Ukraine's Security Service, engaging in extra-judicial executions[203], torture[204], and enforced disappearances[205]. And the list of crimes thus reported could be continued.

22. Then the simple question arises: how could the State implicated in such ruthless actions against its own population claim that it seeks protection for these people and ask for justice in the principle judicial body of the United Nations?

23. The situation in eastern Ukraine is tragic, but to protect its population, Ukraine should begin to implement in earnest the Minsk Agreements that are widely recognized as the only uncontested solution to the conflict.

24. Mr. President, our final submission is as follows:

> "In accordance with Article 60 of the Rules of the Court for the reasons explained during these hearings the Russian Federation requests the Court to reject the request for the indication of provisional measures submitted by Ukraine."

25. In conclusion, I would like to thank heartily the Registrar and his staff for their services during these proceedings, not forgetting the interpreters for their excellent translation in sometimes difficult circumstances. And, of course, we thank you, distinguished Members of the Court for your patient attention.

Thank you, Mr. President.

Le PRESIDENT : Je vous remercie, Excellence. Voilà qui clôt cette série d'audiences. Il me reste à remercier les représentants des deux Parties pour l'aide qu'ils ont apportée à la Cour en lui présentant leurs observations orales au cours de ces quatre audiences. Conformément à la pratique, je prierai les agents de bien vouloir rester à la disposition de la Cour.

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[203]E.g. OHCHR, Report on the Human Rights Situation in Ukraine, 16 Feb. to 15 May 2015, paras. 37-40; OHCHR, Report on the Human Rights Situation in Ukraine, 16 May to 15 Aug. 2015, paras. 31-32.

[204]E.g. OHCHR, Report on the Human Rights Situation in Ukraine, 1 Dec. 2014 to 15 Feb. 2015, paras. 37-40; OHCHR, Report on the Human Rights Situation in Ukraine, 16 Feb. to 15 May 2015, paras. 42-46; OHCHR, Report on the Human Rights Situation in Ukraine, 16 Aug. – 15 Nov. 2015, paras. 43-44; OHCHR, Report on the Human Rights Situation in Ukraine, 16 Nov. 2015-15 Feb. 2016, paras. 46-48.

[205]E.g. OHCHR, Report on the Human Rights Situation in Ukraine, 1 Dec. 2014 to 15 Feb. 2015, paras. 37; OHCHR, Report on the Human Rights Situation in Ukraine, 16 Feb. to 15 May 2015, paras. 42.

La Cour rendra son ordonnance sur la demande en indication de mesures conservatoires dès que possible. Les agents des Parties seront avisés en temps utile de la date à laquelle elle en donnera lecture en audience publique.

La Cour n'étant saisie d'aucune autre question aujourd'hui, l'audience est levée.

L'audience est levée à 12 h 55.

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