INTERNATIONAL COURT OF JUSTICE

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)

WRITTEN STATEMENT
OF OBSERVATIONS AND SUBMISSIONS
ON THE PRELIMINARY OBJECTIONS OF THE RUSSIAN FEDERATION

SUBMITTED BY UKRAINE

14 JANUARY 2019

TABLE OF CONTENTS

PART I: INTRODUCTION

1. Pursuant to this Court's Order of 17 September 2018, Ukraine submits this Written Statement of Observations and Submissions on the Preliminary Objections of the Russian Federation.

2. On 16 January 2017, Ukraine filed an Application Instituting Proceedings against the Russian Federation, bringing to this Court disputes under the International Convention for the Suppression of the Financing of Terrorism ("ICSFT") and the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD"). That same day, Ukraine filed a Request for the Indication of Provisional Measures, and on 19 April 2017, this Court adopted an Order deciding that it *prima facie* had jurisdiction over Ukraine's claims under both treaties, and indicating certain Provisional Measures.[1] In accordance with the Order of 12 May 2017, Ukraine filed its Memorial and accompanying annexes on 12 June 2018. The Russian Federation filed Preliminary Objections on 12 September 2018. Ukraine now respectfully presents its Written Statement of Observations and Submissions on the Preliminary Objections of the Russian Federation, all of which should be rejected.

[1] *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), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, pp. 126, 140–41, paras. 62, 106 [hereinafter *Provisional Measures Order of 19 April 2017*].

Chapter 1. INTRODUCTORY COMMENTS ON RUSSIA'S PRELIMINARY OBJECTIONS AND STRUCTURE OF UKRAINE'S WRITTEN STATEMENT

3. The Russian Federation has consented to the jurisdiction of this Court to resolve disputes concerning the "interpretation or application" of the ICSFT and the CERD. Ukraine and the Russian Federation have serious disputes concerning the interpretation and application of both of these treaties. In order to resolve these disputes peacefully, Ukraine has appropriately applied to this Court for relief.

4. Ukraine's Memorial, accompanied by a voluminous evidentiary record, demonstrated that Russia has violated obligations expressly created by these treaties. In violation of Article 18 of the ICSFT, for example, the Russian Federation has refused to take practicable measures to prevent the commission of terrorism financing offences by any person. Instead, Russia has allowed numerous persons — both private persons and its own officials — to supply powerful weapons and other assistance to groups engaged in terrorism in Ukraine. In violation of Article 2 of the CERD, the Russian Federation has perpetrated a campaign of discrimination against the Crimean Tatar and Ukrainian communities of Crimea. Ukraine's claims that Russia has violated these and other provisions of the ICSFT and the CERD are squarely within the jurisdiction of the Court to adjudicate.

5. Faced with the possibility of having to account for its actions in a court of law, the Russian Federation now seeks to inappropriately narrow its consent to submit disputes to this Court. That attempt fails, as Russia makes a series of arguments that have no basis in law.

6. First, Russia seeks to place insuperable obstacles to the seisin of the Court. According to Russia, two years of fruitless negotiations under both the ICSFT and CERD, during which Russia was uncooperative and unwilling to engage on the substance of the disputes raised by Ukraine, was not a sufficient effort by Ukraine to resolve these disputes by negotiation. And with respect to the CERD, Russia would rewrite the treaty to require Ukraine to follow up those futile efforts at negotiation with an equally futile attempt at voluntary, non-binding conciliation.

7. Second, Russia seeks to escape the terms of the treaties that are before the Court. The ICSFT, for example, plainly requires Russia to prevent the commission of terrorism financing offences by "any person." Yet to justify an absurd outcome — that a convention to end the financing of terrorism leaves untouched the financing of terrorism by a subset of persons with official government duties — Russia argues that the word "any" does not really mean "any," but, rather, "some." Similarly, in aid of its above-mentioned effort to indefinitely delay the presentation of any CERD dispute to this Court, Russia maintains that the word "or" actually means "and." The Court should not entertain this attempt to contort the words of these Conventions, in contravention of the treaties' stated purposes. Under Russia's interpretations, a convention for the suppression of the financing of terrorism would tolerate the financing of terrorism, and a convention for the elimination of all forms of racial discrimination would permit well-defined ethnic communities to suffer repeated depredations.

8. Third, at the heart of Russia's Preliminary Objections lies Russia's assertions that Ukraine's claims are factually incorrect. Ukraine strenuously rejects any suggestion that the claims advanced in its Memorial, accompanied by tens of thousands of pages of evidence, are somehow unsubstantiated, or in Russia's words not "plausible." But it is fundamentally inappropriate, and an abuse of this Court's rules and the due process owed Ukraine, for Russia to use its right to file preliminary objections as a pretext to argue the merits of the case. The few objections Russia has raised that appropriately concern admissibility or jurisdiction are groundless and should be dismissed. But that is no excuse for a procedurally invalid attempt to convert the preliminary objections stage of these proceedings into the merits phase of the case.

9. Ukraine's Written Statement of Observations and Submissions, submitted herein, together with its Memorial and the annexes that accompany it, demonstrate conclusively that Ukraine's claims are admissible and that the Court has jurisdiction to hear those claims. This Written Statement is organized as follows:

10. As a preliminary matter, **Chapter 2** of this Introductory Part addresses an overarching flaw in Russia's Preliminary Objections: Russia improperly attempts to convert the preliminary objections phase of the proceedings into the merits phase, asking this Court not only to resolve disputes concerning the interpretation of the ICSFT, but to weigh Ukraine's evidence and decide factual disputes in Russia's favor. Chapter 2 also addresses Russia's mischaracterizations of this Court's Order indicating Provisional Measures in this case.

11. **Part II** of Ukraine's Written Statement sets out Ukraine's responses to Russia's Preliminary Objections alleging that the Court lacks jurisdiction over the claims under the ICSFT. **Chapter 3** demonstrates that Ukraine has exhausted the preconditions of seisin of the Court under ICSFT Article 24(1). It summarizes Ukraine's attempts to negotiate a resolution of the dispute with Russia, despite Russia's lack of cooperation and disinterest in entering into meaningful negotiations. It also summarizes Ukraine's unsuccessful attempts to reach agreement on arbitration of the dispute, an agreement that was not reached within the six-month time period expressly provided for in Article 24(1).

12. **Chapter 4** addresses Russia's effort to avoid some (though not all) of Ukraine's claims insofar as they relate to terrorism financing by Russian officials. The Chapter first explains that the determination of the proper scope of Russia's duties under Article 18 of the ICSFT is a question for the merits. Nonetheless, in the event the Court decides to address this interpretive dispute at this stage, Ukraine shows that Article 18 imposes on Russia an obligation to take all practicable measures to prevent acts of terrorism financing committed by "any person," without qualification, including persons acting in both a private and public capacity.

13. In **Chapter 5**, Ukraine shows that the meaning of the various elements of an Article 2 terrorism financing offense, as well the factual question of whether such offences have been committed here, are issues for the merits. Chapter 5 continues by addressing Russia's artificially narrow interpretations of certain elements of the Article 2 offence, and its definition of underlying acts of terrorism. Finally, without prejudice to its position that Russia's factual arguments concern the merits and are entirely inappropriate at this stage,

Ukraine addresses the serious errors made by Russia in its misleading and unprincipled presentation of the facts of the case.

14. **Part III** of Ukraine's Written Statement sets out Ukraine's responses to Russia's Preliminary Objections that the Court lacks jurisdiction over Ukraine's claims under the CERD, and that those claims are inadmissible. **Chapter 6** addresses several of Russia's objections which all argue that Ukraine has not alleged claims capable of falling within the provisions of the CERD. These objections have no validity: the dispute Ukraine has brought plainly concerns the interpretation and application of the CERD. In some cases Russia misstates the nature of Ukraine's allegations; elsewhere, Russia's assertion that Ukraine relies on rights outside the scope of the CERD reflects disputes over the interpretation of the treaty that are within the Court's jurisdiction and should be addressed on the merits. The remainder of Russia's objections are impermissible attacks on the veracity of the facts alleged by Ukraine, which have no place at the stage of the proceedings.

15. **Chapter 7** addresses Russia's core jurisdictional objection: that Article 22 requires a disputing party both to negotiate and to exhaust the CERD Committee's conciliation procedure before having recourse from this Court. This objection is based on an implausible interpretation of Article 22 that would require this Court to read "or" as meaning "and," a counter-intuitive interpretation that is in acute tension with core tenets of treaty interpretation. The Chapter explains why the Court should reject Russia's interpretation of Article 22, as well as its fallback argument that the more than two years Ukraine spent trying to engage Russia in negotiations do not constitute a genuine attempt to negotiate.

16. **Chapter 8** responds to Russia's sole objection to the admissibility of Ukraine's CERD claims — that local remedies must have been exhausted before Ukraine filed its Application. The authorities on which this objection relies relate exclusively to situations in which a State espouses a claim on behalf of one of its citizens. The rule does not apply to the present case where the claims are brought explicitly in Ukraine's own name, not on behalf of individuals, and those claims challenge a general pattern of conduct injuring hundreds of thousands of Ukrainian nationals in Crimea.

* * *

17. The Russian Federation's Preliminary Objections have no merit. Ukraine urges the Court to reject them promptly so that this case can proceed to the merits and eventually grant relief for the countless Ukrainian citizens who have suffered, and continue to suffer, as a result of Russia's treaty violations in Crimea and eastern Ukraine.

Chapter 2. RUSSIA IMPROPERLY ATTEMPTS TO CONVERT THE PRELIMINARY OBJECTIONS STAGE INTO PROCEEDINGS ON THE MERITS

18. Under the Rules of the Court, objections appropriate for consideration at a preliminary stage are those related "to the jurisdiction of the Court or to the admissibility of the application."[2] The Rules further provide that upon filing of preliminary objections, "the proceedings on the merits shall be suspended."[3] Yet most of Russia's Preliminary Objections instead improperly ask the Court to address the merits of the Parties' dispute concerning the interpretation and application of the ICSFT and the CERD.

19. Only a few of Russia's objections are procedurally appropriate. Its arguments concerning the steps taken by Ukraine prior to invoking the Court's jurisdiction under Article 24(1) of the ICSFT and Article 22 of the CERD, for instance, are appropriately advanced at this preliminary stage. Russia has, however, already invoked these objections unsuccessfully at the Provisional Measures proceedings; in its Order, the Court indicated that Ukraine has satisfied the procedural conditions for seisin of the Court.[4] Thus, rather than limit itself to making true jurisdictional objections that are inconsistent with what the Court has previously said, Russia has launched a broad challenge to the merits of Ukraine's case, under the guise of an argument that Ukraine's claims are "not capable of falling within" the ICSFT and the CERD.

20. In its Memorial, Ukraine presented detailed and substantiated claims that Russia violated specific provisions of both the ICSFT and the CERD. These provisions unquestionably impose duties on Russia, and Ukraine's claims are rooted in those duties.[5]

---

[2] Rules of the Court, art. 79(1).

[3] *Ibid.*, art. 79(5).

[4] *See Provisional Measures Order of 19 April 2017*, para. 59 (noting that "Ukraine and the Russian Federation engaged in negotiations regarding the question of the latter's compliance with its substantive obligations under CERD" and that "these issues had not been resolved by negotiations"); *ibid.*, para. 52 (same for disputes under the ICSFT); *ibid.*, para. 53 (finding that "within six months from the date of the arbitration request [related to disputes under ICSFT], the Parties were unable to reach an agreement on its organization").

[5] *See, e.g.*, Russia's Objections, para. 127 ("Article 18 obliges States to cooperate in the prevention of Article 2 offences."); *ibid.*, para. 328 ("Article 5(e) of CERD . . . refer[s] to the 'right to equal participation in cultural activities.'").

However, Russia argues that Ukraine has misinterpreted the scope of Russia's obligations, such that Ukraine's allegations do not constitute violations of the ICSFT or the CERD. These disagreements constitute interpretive disputes between the Parties, which are properly addressed by this Court at the merits stage of these proceedings, not at the preliminary objections stage.

21. But even if the Court considered it appropriate to resolve at this stage disputes concerning the interpretation of the ICSFT and the CERD, that could only be done on the basis of the facts as Ukraine has alleged them. Consistent with this Court's practice, all questions of fact are to be assumed in Ukraine's favor at this stage of the proceedings.

22. Russia, however, asks the Court to follow a wholly novel and unsupported path. It insists that the Court should not only resolve interpretive disputes concerning the ICSFT and the CERD, but should also assess the strength of Ukraine's evidence and, on that basis, make determinations about the "plausibility" of Ukraine's factual contentions. The Court has never done this, and it should reject Russia's invitation to transform preliminary objections into a merits phase.

A. Russia's Preliminary Objections Regarding the Scope of Its Obligations Under the ICSFT and the CERD Are Merits Issues

23. Article 24 of the ICSFT states that "[a]ny dispute between two or more States Parties concerning the interpretation or application of this Convention" may be referred to this Court, provided that the dispute has not been settled through negotiation or arbitration.[6] Article 22 of the CERD similarly provides that States Parties may refer "[a]ny dispute . . . with respect to the interpretation or application of this Convention" to the Court, as long as it has not been settled through negotiations or CERD Committee procedures.[7]

[6] ICSFT, art. 24(1).

[7] CERD, art. 22.

24. According to the ordinary meaning of these compromissory clauses, States Parties to either Convention may bring to this Court any dispute that concerns how the treaties are interpreted *or* applied. This Court has jurisdiction to decide any such dispute, whether the matters in dispute concern the application of the treaty, the interpretation of the treaty, or, as here, both.

25. There is undoubtedly a dispute between Ukraine and Russia regarding the interpretation or application of the ICSFT and the CERD. Ukraine contends that Russia has violated Articles 8, 9, 10, 12, and 18 of the ICSFT and Articles 2, 4, 5, 6, and 7 of the CERD. Russia does not deny that it has obligations under each of these treaty provisions. Instead, it attempts to interpret the treaties in a manner designed to narrow the scope of its obligations. According to Russia, the Court must provide a definitive interpretation of the ICSFT and the CERD at this preliminary objections phase of the proceedings, in order to decide whether it has jurisdiction.[8] But that is contrary to the plain terms of those treaties' compromissory clauses, according to which the Court does have jurisdiction to resolve interpretive disputes, as long as any prerequisites required by the applicable treaty are met. The interpretive disputes related to the scope and content of Russia's obligations are therefore rightly resolved during the merits phase.

26. The Court rejected an approach similar to the one now proposed by Russia in addressing an interpretive dispute raised in the *Bosnian Genocide Case*. That case concerned the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention"), which provides that disputes "relating to the interpretation, application or fulfilment" of the Genocide Convention may be submitted to the Court.[9] At the preliminary

---

[8] *See, e.g.*, Russia's Objections, paras. 22, 302.

[9] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment of 11 July 1996, I.C.J. Reports 1996*, p. 614, para. 27 [hereinafter *Bosnian Genocide Case, Judgment of 11 July 1996*] (citing Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 U.N.T.S. 277, art. IX).

objections stage, the Federal Republic of Yugoslavia advanced a narrow interpretation of its duty to prevent genocide, arguing that questions of responsbility for genocide committed by State actors were not within the treaty.[10] The Court did not enter into that interpretive dispute at the preliminary objections stage. Instead, the Court concluded that it had jurisdiction because "the Parties not only differ with respect to the facts of the case, their imputability and the applicability to them of the provisions of the Genocide Convention, but are moreover in *disagreement with respect to the meaning and legal scope* of several of those provisions."[11] When it later reached the merits, the Court observed that the arguments concerning the scope of the duty to prevent genocide under the treaty had been "left by the Court for resolution at the merits stage."[12]

27. The Court has in other cases, in the context of different treaties, engaged in treaty interpretation to ensure that the obligations allegedly breached do in fact exist. For example, in *Immunities and Criminal Proceedings*, Equatorial Guinea purported to assert a claim that France had violated Article 4 of the United Nations Convention Against Transnational Crime ("Palermo Convention"). Article 4(1) provides that "States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States."[13] Equatorial Guinea claimed that Article 4 "incorporated" into the Palermo Convention "the customary international rules on immunities of States and State officials," and that France, by violating those rules of customary international law, also

---

[10] *Bosnian Genocide Case, Judgment of 11 July 1996*, para. 32.

[11] *Ibid.*, para. 33 (emphasis added).

[12] *See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment of 26 February 2007, I.C.J. Reports 2007*, p. 107, para. 152.

[13] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections,* Judgment of 6 June 2018, p. 25, para. 78 [hereinafter *Immunities and Criminal Proceedings*, Judgment of 6 June 2018] (citing United Nations Convention Against Transnational Crime, 12 December 2000, 2225 U.N.T.S. 209, art. 4(1)).

violated an obligation imposed by Article 4.[14] The Court, however, concluded that "Article 4 does not incorporate" these rules, which were therefore not obligations under the Palermo Convention.[15] Thus, the jurisdictional problem in *Immunities and Criminal Proceedings* was that the applicant State claimed a breach of a treaty obligation that did not exist. In this case, like in *Bosnian Genocide Case*, Ukraine's claims are based on obligations that exist under the ICSFT and the CERD; questions related to the scope of those obligations are properly resolved during the merits phase. Yet Russia has nevertheless chosen to raise interpretive disputes at this stage of the proceedings in order to claim it has not breached those obligations.

28. Russia relies on the Court's decision in *Oil Platforms*, where the Court chose to address certain limited questions of interpretation at the preliminary objections phase. *Oil Platforms*, however, concerned a bilateral treaty of friendship, commerce, and navigation that had already been interpreted by the Court, and should be viewed in that light.[16] The ICSFT and the CERD are multilateral conventions, and both impose obligations that (among other things) are required to be implemented in States' domestic laws. This Court's resolution of interpretive questions about provisions of these treaties, though not binding on non-parties to the case, would naturally be of great interest to other States. In such circumstances, the Court should leave questions of interpretation to the merits phase, consistent with the language of the compromissory clauses, rather than delivering an interpretation without having first confirmed that the Court has jurisdiction to hear the dispute. The Court's interpretation is an *exercise* of its jurisdiction, jurisdiction that expressly encompasses the resolution disputes concerning interpretation.

29. Russia's various interpretive arguments undeniably reflect, in the words of the Court in the *Bosnian Genocide Case*, "disagreement with respect to the meaning and legal

---

[14] *Ibid*., paras. 89–90.

[15] *Ibid*., para. 102.

[16] *See generally United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment of 24 May 1980, I.C.J. Reports 1980*, p. 3.

scope of several . . . provisions" of the ICSFT and the CERD.[17] Accordingly, resolution of those disagreements falls squarely within this Court's jurisdiction over disputes concerning "the *interpretation* or application" of those two treaties.[18]

B. In Considering Whether the Disputes Are Capable of Falling Within the Treaties, the Court Should Accept *Pro Tem* the Veracity of Ukraine's Factual Allegations

30. This Court should resolve the Parties' interpretive disputes at the merits stage, consistent with the compromissory clauses of the ICSFT and the CERD, which confer on the Court jurisdiction over disputes concerning both interpretation and application. If the Court does consider Russia's arguments that Ukraine's claims are not "capable of falling within" the treaties, it should do so on the basis that the facts as claimed by Ukraine are assumed to be true.

31. In the cases where it has been necessary for the Court to interpret a treaty to decide whether the claims are "capable of falling within" it,[19] the Court has followed an approach adopted in *Oil Platforms*. The Court assesses the claim's legal plausibility, examining the legal basis for the claim by accepting the applicant State's factual allegations as true. Contrary to what Russia suggests, this does not involve any inquiry into the facts.[20]

32. This approach is summarized in the opinion of Judge Higgins in *Oil Platforms*, which Russia identifies as articulating the legal standard for preliminary objections.[21] Judge Higgins observes that "[t]he only way in which . . . it can be determined whether the claims of [the applicant] are sufficiently plausibly based upon the . . . [t]reaty is to accept *pro tem* the

---

[17] *Bosnian Genocide Case, Judgment of 11 July 1996*, para. 33.

[18] *See* ICSFT, art. 24(1) (emphasis added); CERD, art. 22 (emphasis added).

[19] *Immunities and Criminal Proceedings*, Judgment of 6 June 2018, para. 85.

[20] *See infra*, Part I, Chapter 2, Section B(1).

[21] *See* Russia's Objections, para. 34 note 23.

facts as alleged by [the applicant] to be true."[22] Under this methodology, the Court thus determines "whether the facts *as claimed by the applicant* might give [rise] to a violation of a specified provision."[23] And it does so regardless of "whether the facts are in fact correct" or "whether they do constitute a violation," which are "all matters for the merits."[24] With all of the applicant's factual claims accepted as true for purposes of the analysis, the Court then evaluates the legal basis of the claim in the treaty invoked.

33. Russia fails to follow this approach. Instead, it asks the Court to inquire into the merits of Ukraine's factual claims,[25] a request that has no basis in this Court's jurisprudence and is incompatible with the purpose of considering jurisdictional objections at a preliminary stage.

34. According to the novel framework it proposes, Russia asks the Court to closely review Ukraine's facts and assess the strength of its evidence, in order to determine whether Ukraine has put forward a "plausible" factual case. It compounds this error by conflating the Court's Provisional Measures inquiry with the Court's examination of Russia's Preliminary Objections, and it misrepresents the nature of the Court's Provisional Measures Order and its relevance to the Preliminary Objections that Russia presents. But the issue at the present stage is not whether Ukraine has established a factual case that the Court deems "plausible"; it is whether the Court has jurisdiction to decide Ukraine's claims, accepting the facts as alleged by Ukraine. Even if the Court were to adopt the test in *Oil Platforms* as applicable to the compromissory clauses of the ICSFT and the CERD, and to resolve interpretive disputes now in order to determine whether Ukraine raises legal claims that fall within the scope of the

---

[22] *See Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment of 12 December 1996*, *Separate Opinion of Judge Higgins*, *I.C.J. Reports 1996*, p. 856, para. 32 [hereinafter *Oil Platforms, Judgment of 12 December 1996*].

[23] *Oil Platforms (Islamic Republic of Iran* v. *United States), Counter-Claim, Order of 10 March 1998, Separate Opinion of Judge Higgins, I.C.J. Reports 1998*, p. 219 (emphasis added).

[24] *Ibid.*

[25] *See* Russia's Objections, para. 22.

treaties, it would not be appropriate at this stage of the proceedings to examine the veracity of Ukraine's factual allegations.

1. Russia's Factual Arguments Are Improper and Inconsistent with This Court's Methodology in Deciding Preliminary Objections

35. Throughout its Preliminary Objections, Russia repeatedly asks the Court to weigh the strength of Ukraine's evidence, contending that the Court must "[s]atisfy itself that the facts pleaded and the evidence relied on by the applicant State plausibly support" Ukraine's claims.[26] For example, to argue that there were no acts of terrorism in Ukraine within the meaning of ICSFT Article 2(1)(b), Russia enters into quintessentially factual questions of intent.[27] It even, remarkably, introduces its own evidence, such as articles posted on an anti-Ukraine propaganda website, to allegedly undermine the credibility of certain witness testimony Ukraine has introduced.[28] Similarly, Russia improperly denigrates Ukraine's evidence showing discrimination against Crimean Tatars and Ukrainians in violation of the CERD. With regard to the CERD, Russia complains that Ukraine has not provided enough "statistical data," disputes the reliability of specific pieces of evidence, and again introduces its own evidence.[29]

36. Russia identifies no case in which the Court, at the preliminary objections stage, has scrutinized the applicant State's evidentiary submissions (much less permitted the respondent State to introduce its own evidence, as Russia attempts), or made factual determinations, in order to assess whether the evidence "plausibly support[s]" the applicant's

---

[26] *Ibid.*

[27] *See ibid.*, Chapters III–IV.

[28] *See ibid.*, para. 118 & note 167 (relying heavily on materials from a website called "Anti-Fashist Information Agency," which appears to be dedicated to spreading misinformation about Ukraine).

[29] *See ibid.*, paras. 337–38, 346–50.

claims.[30] The decisions of this Court cited by Russia concern the *legal* plausibility of a claim.[31] To the extent it is appropriate in a particular case to consider a claim's legal plausibility, the accepted methodology of the Court "is to accept *pro tem* the facts as alleged by [the applicant]."[32] That is incompatible with Russia's request that the Court prematurely weigh Ukraine's evidence.

37. Russia's novel proposal for a factual inquiry betrays an effort to prematurely inject merits issues into the preliminary objections stage. The purpose of considering jurisdictional and admissibility objections in a preliminary phase is to allow the Court to determine the scope of its jurisdiction without requiring the Court to conduct a full analysis of the facts of the case (or to hold a complete hearing on those facts). Under the Rules of the Court, the filing of preliminary objections suspends proceedings on the merits, and the Court will not decide objections that lack an "exclusively preliminary character."[33] The Court has repeatedly declined to rule on objections that are not exclusively preliminary, deferring for the merits phase of the proceedings questions that are so intertwined with a case's merits that the

---

[30] *See ibid.*, para. 22.

[31] *See, e.g.*, *Judgments of the Administrative Tribunal of the International Labour Organisation upon Complaints Made Against the United Nations Educational, Scientific and Cultural Organization*, *Advisory Opinion of 23 October 1956, I.C.J. Reports 1956*, p. 89 (examining whether the International Labour Organization's Administrative Tribunal had jurisdiction over a complaint based on that Tribunal's statute, and holding that "it is not required that the facts alleged should necessarily lead to the results alleged by the complainants," as "[a]ny such requirement would confuse the question of jurisdiction with that of the substance"); *Ambatielos Case (Greece* v. *United Kingdom), Merits: Obligation to Arbitrate, Judgment of 19 May 1953, I.C.J. Reports 1953*, p. 18 (examining the legal, rather than factual, plausibility of Greece's claims under the relevant treaty).

[32] *Oil Platforms, Judgment of 12 December 1996, Separate Opinion of Judge Higgins*, para. 32.

[33] Rules of the Court, arts. 79(5), (9).

Court's decision would "determine the dispute, or some elements thereof, on the merits."[34] Russia's approach is not only inconsistent with these rules,[35] but it would defeat the efficiencies of addressing jurisdictional issues at a preliminary phase. To apply Russia's proposed standard, the Court would have to delve deeply into the factual record (which in this case is ample), and afford the applicant State a full opportunity to defend its case on the merits against the respondent State's critiques. Plainly, this would lead to the merits and preliminary objections phases of the case to collapse into one.

38. By proposing an entirely new methodology, Russia in effect asks the Court to decide the merits, by weighing the strength of evidence and resolving factual disputes. Russia is of course entitled to dispute Ukraine's factual contentions, but the appropriate time to do that is during the merits phase of these proceedings, not preliminary objections.

2. Russia Inaccurately Characterizes the Relationship Between Its Preliminary Objections and the Court's Decision on Provisional Measures

39. In advancing its procedurally improper attack on the facts as alleged by Ukraine,[36] Russia seeks to link its factual arguments to the Court's Provisional Measures Order in this case. That suggestion is doubly flawed: it misunderstands the relationship between provisional measures and preliminary objections, and it mischaracterizes the import of the specific provisional measures indicated by the Court.

---

[34] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment of 13 December 2007, I.C.J. Reports 2007*, p. 852, para. 51; *see also 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 of 27 February 1998, I.C.J. Reports 1998,* pp. 28–29, para. 50 [hereinafter *Lockerbie, Preliminary Objections Judgment*] (declining to consider an objection because "[i]f the Court were to rule on that objection, it would . . . inevitably be ruling on the merits").

[35] *See* Rules of the Court, art. 79(9).

[36] Russia's Objections, para. 22.

40. Russia's flawed request for a factual inquiry is based in part on a flawed analogy between preliminary objections and provisional measures. When ruling on a request for the indication of provisional measures, the Court first assesses its jurisdiction on a *prima facie* basis, which requires it to "ascertain whether 'the acts complained of by [the applicant] are prima facie capable of falling within the provisions of'" the treaty.[37] The Court then separately considers whether "the rights asserted by the party requesting [provisional] measures are at least plausible."[38] This inquiry, which involves a limited and initial assessment of the merits, is unique to the provisional measures context. It highlights that the question of "plausibility" is a separate question from whether the claims are "capable of falling within the treaty," and thus does not concern the Court's jurisdiction.

41. It is unsurprising that questions of factual plausibility play a role in deciding requests for provisional measures but not at the preliminary objections stage. When the Court indicates provisional measures, it is exercising its authority to compel States to take action or refrain from acting, as "orders on provisional measures under Article 41 [of the Court's Statute] have binding effect."[39] As it did in the Provisional Measures phase of these proceedings, the Court appropriately previews the merits of a case (albeit not on a full record), and assures itself that (on the basis of that limited record) the applicant State has plausible claims against the respondent State, before imposing binding obligations on that State. Nothing similar occurs at the preliminary objections stage. The Court must simply determine

---

[37] *See Provisional Measures Order of 19 April 2017*, para. 22 (quoting *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France)*, *Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016*, p. 1155, para. 47).

[38] *See Provisional Measures Order of 19 April 2017,* paras. 63–64.

[39] *LaGrand Case (Germany* v. *United States of America), Judgment of 27 June 2001, I.C.J. Reports 2001,* p. 506, para. 109; *see also* Letter from Philippe Couvreur, Registrar, International Court of Justice, to Olena Zerkal, Agent of Ukraine before the International Court of Justice, dated 18 July 2018 ("[T]he Court wishes to remind the Parties of the binding nature of the provisional measures indicated in its Order of 19 April 2017.").

whether it is prevented from hearing a case for reasons of jurisdiction or admissibility, without issuing any binding relief.

42. It is telling that Russia largely disregards the portions of the Provisional Measures Order that are most relevant here: the Court's rejection of Russia's jurisdictional arguments concerning resolution of the disputes by negotiation and, in the case of the ICSFT, arbitration.[40] Russia instead focuses on the Court's review of plausibility on the limited record available to it at the Provisional Measures proceeding. Russia's characterizations of that Order in its Preliminary Objections are both irrelevant and incorrect.

43. According to Russia, Ukraine's claims under the ICSFT, as presented in the Memorial, "rest upon essentially the same evidential foundation" that was presented at the Provisional Measures stage.[41] That is an utterly surprising assertion, and one that is patently false. At the Provisional Measures stage, Ukraine took heed of the Court's direction to "not enter into the merits of the case beyond what is strictly necessary,"[42] and was conscious that "it is not possible for the parties to deploy, or the Court to consider, the detailed evidence or arguments on legal issues which are required at the stage of ruling on jurisdiction or the merits."[43] In its Memorial, Ukraine has now presented an extraordinary level of evidence, including expert reports, witness statements, and documentary records, that were not a part of the Provisional Measures record. Ukraine has also had the opportunity to present in detail its legal arguments beyond what was possible in the limited oral pleadings of the Provisional

---

[40] *Provisional Measures Order of 19 April 2017*, paras. 52–54 (discussing the ICSFT); *ibid.*, paras. 59–61 (discussing the CERD); *see also infra*, Part II, Chapter 3, and Part III, Chapter 7.

[41] Russia's Objections, para. 21.

[42] Practice Directions of the Court, Direction XI.

[43] *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, Declaration of Judge Greenwood, I.C.J. Reports 2011,* p. 46, para. 2. Further, commenting on Ukraine's submissions in this case, Judge Pocar noted the incongruity between, on the one hand, the Court's directive to limit the amount of materials filed, and, on the other, the Court's conclusion that Ukraine had not produced sufficient evidence on some issues to merit a provisional measures indication. *See Provisional Measures Order of 19 April 2017*, *Separate Opinion of Judge* ad hoc *Pocar*, paras. 5–9.

Measures stage. It is not at all credible for Russia to suggest that the record Ukraine has presented in its merits case is "essentially the same."

44. Russia further asserts that the Court found "that Ukraine had largely failed to put forward plausible claims for breach of CERD."[44] That is equally false. The Court in fact found that Ukraine *had* put forward plausible claims concerning Russia's ban on the Mejlis and its limitations on Ukrainian educational rights.[45] It then exercised its wide discretion not to address other aspects of Ukraine's CERD claims.[46] Nowhere did the Court suggest, much less decide, that it considered any aspect of Ukraine's CERD claims to lack plausibility. Moreover, as with Ukraine's claims under the ICSFT, its claims under the CERD are now supported by a much more extensive evidentiary record.

45. Accordingly, Russia's effort to obtain some advantage from the Court's Provisional Measures Order should not be entertained.

* * *

46. In sum, the Court has jurisdiction over the interpretive disputes Russia raises regarding the meaning and scope of various ICSFT and CERD provisions. These disputes fall squarely within the compromissory clauses of both Conventions, and the Court may consider and resolve them at the merits stage. If, however, the Court decides to interpret the ICSFT and the CERD at the preliminary objections stage for purposes of establishing its jurisdiction, Ukraine's factual allegations are to be assumed true. Russia's extensive arguments about the

---

[44] Russia's Objections, para. 3.

[45] *See Provisional Measures Order of 19 April 2017*, paras. 82–83.

[46] *See* Statute of the Court, art. 41(1) ("The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party."); *see also Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Provisional Measures, Order of 10 July 2002, Declaration of Judge Elaraby, I.C.J. Reports 2002*, p. 260, para. 3 (noting that "the Court is vested with a wide scope of discretion to decide on the circumstances warranting the indication of provisional measures").

facts should be rejected as nothing more than an improper attempt to argue the merits at the preliminary objections phase.

PART II: THE COURT HAS JURISDICTION OVER UKRAINE'S CLAIMS UNDER THE TERRORISM FINANCING CONVENTION

47. Ukraine documented in its Memorial that Russia has turned its obligations under the ICSFT on their head. Russia has failed to take practicable measures to prevent terrorism financing, in violation Article 18. Russia has not identified, detected, frozen, and seized funds used for terrorism financing, in violation of Article 8. Russia has failed to investigate and prosecute or extradite perpetrators of terrorism financing, in violation of Articles 9 and 10. And Russia has failed to provide Ukraine with the greatest measure of assistance in connection with investigations of terrorism financing, in violation of Article 12.

48. As the backdrop for these violations of the ICSFT, Ukraine's Memorial demonstrated how Russian proxies in Ukraine, including the Donetsk People's Republic ("DPR"), Luhansk People's Republic ("LPR"), Kharkiv Partisans, and other groups, have engaged in a pattern of terrorist acts. This pattern began when the DPR and LPR targeted political opponents for violence and intimidation; it quickly escalated to the shoot-down of a civilian airliner, Malaysia Airlines Flight 17 ("MH17"); continued with the bombardment of civilian areas using Grad and Smerch multi-launch rocket systems ("MLRS"); and in parallel, included a string of bombing attacks against civilian targets in Ukrainian cities far from the front lines. Chapter 1 of the Memorial set forth in detail the evidence of these acts, and Chapter 4 described how they constituted acts of terrorism within the meaning of ICSFT Articles 2(1)(a) and 2(1)(b).

49. Ukraine's Memorial further documented how Russian officials, individuals, and entities have transferred vast quantities of weapons and other funds to these groups, operated training camps to support them, and facilitated financial fundraising efforts on their behalf. Many of the weapons provided to Russia's proxies in Ukraine by Russian officials were used in the specific terrorist acts documented in the Memorial, including the Buk missile system used to shoot down Flight MH17, the powerful MLRS used to bombard civilian areas, and the military-grade mines used to terrorize Kharkiv. At the same time, prominent Russian nationals, such as wealthy businessman Konstantin Malofeev, was integral to financing the perpetrators of these acts, and private online fundraising efforts openly proliferated on

Russian territory. Chapter 2 of the Memorial set forth in detail the evidence concerning this financing of terrorism, and Chapter 5 demonstrated that these Russian officials and other nationals committed terrorism financing offences within the meaning of ICSFT Article 2.

50. Finally, Ukraine's Memorial demonstrated Russia's responsibility for violations of the ICSFT in connection with these numerous acts of terrorism financing. Russia failed to prevent its own officials from financing terrorism, encouraged terrorism financing by private individuals, refused to police its border with Ukraine to stop public and private actors alike from sending weapons and other funds across the border to groups engaged in terrorism, and failed to stop the open fundraising on its territory in support of the DPR and LPR — all in violation of Russia's express obligation to take practicable measures to prevent the financing of terrorism under ICSFT Article 18. And by ignoring express Ukrainian warnings about terrorism fundraising and requests to freeze or seize assets used for that fundraising, failing to investigate and prosecute or extradite the perpetrators of terrorism financing offences, and failing to provide meaningful assistance to Ukraine in connection with criminal investigations into the financing of terrorism, Russia has violated its other cooperation obligations under ICSFT Articles 8, 9, 10, and 12. Chapter 3 of the Memorial set forth in detail the evidence of Russia's malfeasance, and Chapter 6 showed how Russia's actions and inactions caused it to breach the ICSFT.

51. In its Preliminary Objections, Russia seeks to escape responsibility for these violations by making every possible attempt to evade its consent to jurisdiction of this Court pursuant to the ICSFT's compromissory clause. Russia mischaracterizes Ukraine's claims, makes baseless allegations, argues factual issues that can only be addressed during the merits phase, and construes the provisions of the ICSFT in ways that bear no relation to their ordinary meaning and would render them both ineffective and contrary to the treaty's fundamental purpose.

52. As exhaustively documented in its Memorial, Ukraine has presented serious and well-substantiated violations of the ICSFT, and disputes that concern the interpretation and application of that treaty. For two years, Ukraine attempted without any progress to settle

these disputes with the Russian Federation, and spent more than six months attempting to reach agreement with Russia on the organization of an arbitration. However, Russia was never willing to engage with Ukraine in a serious manner, and these efforts led nowhere. As Article 24(1) of ICSFT specifically contemplates, Ukraine has thus turned to this Court. As described in detail below, Russia's attempts to avoid the jurisdiction of this Court through its Preliminary Objections fail as a matter of law.

Chapter 3. UKRAINE HAS EXHAUSTED THE PRECONDITIONS OF SEISIN OF THE COURT UNDER ICSFT ARTICLE 24(1)

53. Ukraine invokes the jurisdiction of this Court to resolve its dispute with the Russian Federation concerning the ICSFT pursuant to that treaty's compromissory clause, Article 24, paragraph 1, which provides:

> Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation within a reasonable time shall, at the request of one of them, be submitted to arbitration. If, within six months from the date of the request for arbitration, the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice, by application, in conformity with the Statute of the Court.[47]

54. Article 24(1) thus requires, first, that the dispute cannot be settled by negotiation "within a reasonable time," and second, that the parties "are unable to agree on the organization of an arbitration within six months." Both of those conditions are met here. As this Chapter demonstrates, Ukraine pursued negotiations with Russia for two years, which under the circumstances was well past the minimum requirement of a "reasonable" time period. Ukraine continued in its attempts to negotiate a resolution to the dispute despite Russia's lack of cooperation and the unproductive nature of those talks. Ukraine then attempted to agree on the organization of an arbitration, without achieving success within six months of its request for arbitration. For these reasons, Russia's objections are groundless.

A. The Dispute Could Not Be Settled Through Negotiation Within a Reasonable Time

55. This Court has already found that the "facts demonstrate that . . . Ukraine and the Russian Federation had engaged in negotiations concerning the latter's compliance with its substantive obligations under the ICSFT," and that "[i]t appears from the facts on the record

---

[47] ICSFT, art. 24(1).

that these issues could not then be resolved by negotiations."[48] Russia nonetheless contends that Ukraine did not satisfy the negotiation requirement of Article 24(1). Section A(1) below explains the nature of that negotiation requirement. In Section A(2), Ukraine shows that its pursuit of negotiations for more than two years, with no progress toward settling the dispute, more than satisfied the requirements of Article 24(1). In Section A(3), Ukraine addresses the Russian Federation's baseless allegations that Ukraine acted in bad faith.

1. The Nature of the Requirement in Article 24(1) to Attempt to Settle the Dispute Through Negotiation

56. Under ICSFT Article 24, paragraph 1, a dispute that "cannot be settled through negotiation within a reasonable time" is subject to mandatory dispute resolution.[49] Ukraine accepts that this formulation imposes on disputing parties an obligation to attempt to negotiate before referring a dispute concerning the interpretation or application of the ICSFT to an arbitral tribunal or the Court. In the Court's past cases involving a compromissory clause that includes a negotiation precondition, the Court has asked (1) whether a disputing party "genuinely attempted to engage in negotiations with [the other,] with a view to resolving their dispute"[50]; and (2) whether that disputing "party pursued these negotiations as far as possible with a view to settling the dispute," until "the negotiations failed, became futile, or reached a deadlock."[51] The negotiation precondition in Article 24(1) of the ICSFT is, however, different in one respect from otherwise similar compromissory clauses that this Court has previously

---

[48] *Provisional Measures Order of 19 April 2017*, para. 52.

[49] ICSFT, art. 24(1).

[50] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)*, *Preliminary Objections, Judgment of 1 April 2011, I.C.J. Reports 2011,* pp. 96–98, para 162 [hereinafter *Georgia v. Russia, Preliminary Objections*].

[51] *Georgia v. Russia*, *Preliminary Objections*, para. 162.

interpreted: the ICSFT explicitly limits the need to pursue negotiations to "a reasonable time,"[52] a time frame that has undoubtedly been met in this case.

a. Genuine Attempt to Settle the Dispute by Negotiation

57. The first step in the Court's analysis is to ascertain whether there has been "a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute."[53] In *Georgia v. Russia*, the Court distinguished negotiations from mere protests or disputations, and noted that the subject-matter of the negotiations "must relate to the subject-matter of the dispute . . . [and] . . . concern the substantive obligations contained in the treaty in question."[54] The Russian Federation itself took the position in that case that "the duration of negotiations" is relevant in evaluating whether or not negotiations have genuinely been attempted.[55]

58. The Court has never found that a State that has engaged in prolonged negotiations has nonetheless not attempted to settle the dispute by negotiation. Rather, the Court has found that no negotiation was attempted only on extreme facts such as the ones present in *Georgia v. Russia*. There, the Court found that Georgia first gave Russia notice of a dispute concerning the interpretation or application of the CERD on 9 August 2008, and submitted its Application to the Court on 12 August 2008 — leaving just three days during which negotiations could have been attempted.[56] During those three days, the parties only made unilateral statements at press briefings and before the U.N. Security Council, which the Court did not consider to constitute "an attempt at negotiating these matters."[57] By contrast,

---

[52] ICSFT, art. 24(1).

[53] *Georgia v. Russia*, *Preliminary Objections*, para. 157.

[54] *Ibid.*, para. 161.

[55] *Ibid.*, para. 150.

[56] *Ibid.*, paras. 113, 168.

[57] *Ibid.*, para. 181; *see also ibid.*, paras. 109, 112, 172–176.

in *Belgium v. Senegal,* several exchanges of correspondence and various meetings over a period of eight months was enough for the Court to conclude that Belgium made a "genuine attempt" to enter into negotiations with Senegal.[58]

b. The Limitation of Negotiations to a "Reasonable Time"

59. The Russian Federation's position is that once negotiations are attempted, they must be continued to the point of futility.[59] This position is based on an assumption that Article 24(1) of the ICSFT is identical to the compromissory clauses this Court has previously construed.[60] Russia ignores, however, the specific language of Article 24(1) expressly limiting the requirement of negotiation to "a reasonable time." Under the plain terms of the ICSFT, if negotiations do not lead to settlement of the dispute within a reasonable time, there is no requirement to continue pursuing them, even if negotiations might be said not to have reached the point of deadlock or futility.

60. To be clear, where negotiations go beyond a reasonable time with no progress, the futility standard will generally be met as well. And, as discussed below, Ukraine has amply satisfied any requirement to negotiate to the point of futility. But in applying Article 24(1) of the ICSFT, the Court may rely on the express "reasonable time" limitation to find that the negotiation precondition has been entirely discharged.

---

[58] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment of 20 July 2012, I.C.J. Reports 2012,* pp. 445–447, paras. 57–60 [hereinafter *Belgium v. Senegal, Judgment of 20 July 2012*] (also considering relevant that Belgium framed its insistence on Senegalese compliance in terms of the Convention Against Torture); *see also Right of Passage over Indian Territory (Portugal* v. *India), Preliminary Objections, Judgment of November 26th, 1957, I.C.J. Reports 1957* , pp. 148–149 (exchange of diplomatic correspondence constituted negotiations).

[59] Russia's Objections, para. 233.

[60] Russia's Objections, para. 232.

61. As a matter of ordinary meaning, something is reasonable when it is "appropriate for the circumstances."[61] The Court has thus recognized that "what is reasonable and equitable in any given case must depend on its particular circumstances."[62] Reasonableness is a matter of context. Here, the circumstances consist of grave matters of security and safety of civilian life. A "reasonable" time period in which to continue pursuing negotiations must be defined in relation to these circumstances.

c. Pursuit of Negotiations as Far as Possible

62. In the context of compromissory clauses where the requirement of negotiation is not expressly time-limited, the Court has nonetheless recognized that a disputing party need only "pursue[] these negotiations as far as possible with a view to settling the dispute."[63] Such preconditions have been met "when there has been a failure of negotiations, or when negotiations have become futile or deadlocked."[64]

---

[61] Oxford English Dictionary, *reasonable* (online ed., 2018), paras. 1, 7(a), *available at* https://bit.ly/2SpQiai.

[62] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion of 20 December 1980, I.C.J. Reports 1980,* p. 73, para 49.

[63] *Georgia v. Russia*, *Preliminary Objections*, para 162.

[64] *Ibid.*, para. 159; *ibid.*, para. 162 (explaining that to make a determination whether Georgia pursued these negotiations as far as possible with a view to settling the dispute "the Court would ascertain whether the negotiations failed, became futile, or reached a deadlock"); *see also Mavrommatis Palestine Concessions*, Judgment on Preliminary Objections, 30 August 1924, P.C.I.J. Rep. Series A – No. 2, p. 13 [hereinafter *Mavrommatis*] (holding that "it may suffice that a discussion should have been commenced, and this discussion may have been very short; this will be the case if a dead lock is reached, or if finally a point is reached at which one of the Parties definitely declares himself unable, or refuses, to give way, and there can therefore be no doubt that *the dispute cannot be settled by diplomatic negotiation*").

63. Whether negotiations have "failed or become futile or deadlocked, are essentially questions of fact 'for consideration in each case.'"[65] One circumstance that has led the Court to conclude the dispute could not be settled by negotiation is where the respondent maintained that there was no dispute under the applicable convention, such that "in the Respondent's view, there was nothing to be settled by negotiation."[66] Another is where "the pleadings of the Parties," showing that "their basic positions have not subsequently evolved[,] confirms that negotiations did not and could not lead to the settlement of the dispute."[67] The Permanent Court of International Justice explained in *Mavrommatis Palestine Concessions* that international courts "cannot disregard, amongst other considerations, the views of the States concerned, who are in the best position to judge as to political reasons which may prevent the settlement of a given dispute by diplomatic negotiation."[68]

---

[65] *Georgia v. Russia, Preliminary Objections*, para. 160 (quotations omitted); *see also South West Africa Cases (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment of 21 December 1962, I.C.J. Reports, p. 319*, p. 345 [hereinafter *South West Africa Cases, Preliminary Objections*] (explaining that "[i]t is immaterial and unnecessary to enquire what the different and opposing views were which brought about the deadlock in the past negotiations"); *Mavrommatis*, p. 13. (noting that the "the question of the importance and chances of success of diplomatic negotiations is essentially a relative one").

[66] *Lockerbie, Preliminary Objections Judgment*, para. 20.

[67] *Belgium v. Senegal, Judgment of 20 July 2012,* para. 59; *ibid.*, para. 57 ("The requirement could not be understood as referring to a theoretical impossibility of reaching a settlement. It rather implies that, as the Court noted with regard to a similarly worded provision, '*no reasonable probability exists that further negotiations would lead to a settlement*.'" (emphasis added) (citing *South West Africa Cases, Preliminary Objections*, p. 345 (explaining that "[t]he fact that . . . both the written pleadings and oral arguments of the Parties in the present proceedings have clearly confirmed the continuance of this deadlock, compel a conclusion that no reasonable probability exists that further negotiations would lead to a settlement").

[68] *Mavrommatis*, p. 13; *see also* Michel Virally, *Souveraineté des Etats et autorité du droit, in* PANORAMA DU DROIT INTERNATIONAL CONTEMPORAIN: COURS GÉNÉRAL DE DROIT INTERNATIONAL PUBLIC, COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW, VOL. 183 (1983), p. 240 ("[I]n assuming an obligation to negotiate, a State reserves the right to disagree — and therefore the right to prevent a settlement — on the sole condition that it acts in good faith, which may be difficult to verify.") (in original French: "[E]n assumant une obligation de négocier, l'Etat se réserve le droit au désaccord — donc le droit d'empêcher le règlement — à la seule condition de se comporter de bonne foi, ce qui peut difficilement être contrôlé.") (Ukraine's Written Statement, Annex 67).

2. Ukraine Satisfied the Negotiation Precondition of Article 24(1)

64. This Court's previous recognition that Ukraine satisfied the negotiation requirement of Article 24(1) was correct, and should now be confirmed.[69]

a. Ukraine Genuinely Attempted to Engage in Discussions with the Russian Federation with a View to Resolving the Dispute

65. Ukraine explicitly brought to the Russian Federation's attention its concerns that Russia was violating the ICSFT. On 28 July 2014, Ukraine transmitted to the Russian Federation a *note verbale* proposing "to conduct negotiations on the interpretation and implementation of the [ICSFT]."[70] Russia obstructed this process and made it difficult to agree on even the logistics of holding negotiations, and insisted on agenda items not relevant to the Parties' dispute.[71] Nonetheless, after five months of diplomatic exchanges simply about the venue for, and agenda of, negotiations, Ukraine agreed to Russia's demands on these topics, expressing its "intentions and real desire to resolve the pending dispute through negotiations in the spirit of constructive dialogue."[72]

---

[69] *See Provisional Measures Order of 19 April 2017*, para. 52.

[70] Ukrainian Note Verbale No. 72/22-484-1964 to the Russian Federation Ministry of Foreign Affairs (28 July 2014) (Ukraine's Memorial, Annex 368).

[71] Russian Federation Note Verbale No. 13355 to the Embassy of Ukraine in Moscow (14 October 2014) (suggesting moving location of negotiations to Moscow and responding three days before Ukraine's proposed negotiating date) (Ukraine's Memorial, Annex 373); Russian Federation Note Verbale No. 14587 to the Embassy of Ukraine in Moscow (24 November 2014) (ignoring Ukraine's compromise proposals of Geneva and Strasbourg as negotiating locations and suggesting Minsk; proposing to discuss the "security situation for Russian citizens in Kyiv and for Ukrainian citizens in Moscow (including diplomatic personnel)") (Ukraine's Memorial, Annex 375); Russian Federation Note Verbale No. 16599 to the Embassy of Ukraine in Moscow (17 December 2014) (rejecting Ukraine's preferred location for negotiations in Strasbourg as a neutral location, and insisting on Minsk) (Ukraine's Written Statement, Annex 23); Russian Federation Note Verbale No. 17131 to the Embassy of Ukraine in Moscow (29 December 2014) (insisting "on amending the agenda of the consultations with an item on strengthening security of the diplomatic missions against terrorist attacks") (Ukraine's Written Statement, Annex 25).

[72] Ukrainian Note Verbale No. 72/22-620-3114 to the Russian Federation Ministry of Foreign Affairs (19 December 2014) (Ukraine's Written Statement, Annex 24).

66. Ukraine has gone much further than even the facts of the *Belgium v. Senegal* case in its effort to negotiate its dispute with Russia concerning the ICSFT. In *Belgium v. Senegal*, the parties engaged in diplomatic exchanges and conducted various meetings over the course of eight months, and the Court considered that sufficient.[73] In this case, Ukraine sent more than 20 diplomatic notes and engaged in four in-person negotiating sessions over a period of two years.

67. As in *Belgium v. Senegal*, Ukraine specifically raised Russia's compliance with its obligations under the ICSFT, both in its diplomatic correspondence and during the meetings.[74] The Russian Federation acknowledged that Ukraine was requesting negotiations on the interpretation and application of the ICSFT, and recognized that this was the purpose of the four negotiating sessions held by the Parties.[75] Ukraine's efforts to negotiate with Russia also went well beyond Georgia's minimal actions in its CERD dispute with the Russian

---

[73] *Belgium v. Senegal, Judgment of 20 July 2012*, paras. 57–59.

[74] *Compare Belgium v. Senegal, Judgment of 20 July 2012*, para. 58 ("Belgium expressly stated that it was acting within the framework of the negotiating process under Article 30 of the Convention against Torture in [its] Notes Verbales . . . ."), *with, e.g.*, Ukrainian Note Verbale No. 72/22-620-2087 to the Russian Federation Ministry of Foreign Affairs (12 August 2014) (invoking the ICSFT and informing Russia about Russian nationals who smuggled weapons for terrorist activities of the DPR and collected funds with the intention that they be used for terrorist activities in Ukraine) (Ukraine's Memorial, Annex 369); Ukrainian Note Verbale No. 72/22-620-2221 to the Russian Federation Ministry of Foreign Affairs (29 August 2014) (invoking the ICSFT and identifying Russian nationals who used bank accounts for financing of terrorist activities in Ukraine and calling on Russia to comply with its obligations under the ICSFT) (Ukraine's Memorial, Annex 371); Ukrainian Note Verbale No. 72/22-620-967 to the Russian Federation Ministry of Foreign Affairs (24 April 2015) (summarizing the first round of in-person negotiations, in which Ukraine raised claims concerning Russian support for terrorist activities, produced facts showing the same, and addressed Russia's responsibility for these acts under the ICSFT) (Ukraine's Written Statement, Annex 30).

[75] *See, e.g.*, Russian Federation Note Verbale No. 10471 to the Embassy of Ukraine in Moscow (15 August 2014) (confirming the "readiness of the Russian side to hold negotiations on the interpretation and implementation of the [ICSFT] dated December 9, 1999") (Ukraine's Written Statement, Annex 18); Russian Federation Note Verbale No. 13355 to the Embassy of Ukraine in Moscow (14 October 2014) ("accept[ing] for consideration the topics suggested by the Ukrainian side for discussion at consultations on interpretation and implementation of the [ICSFT]") (Ukraine's Memorial, Annex 373).

Federation, where Georgia made statements at a press briefing and a U.N. Security Council meeting, over the course of just three days, without expressly invoking the CERD.[76]

68. Among Ukraine's many efforts to resolve its dispute through negotiation, Ukraine raised the movement of Russian military equipment across the Russia–Ukraine border[77]; provided information concerning Russian nationals and their bank accounts implicated in financing of terrorism in Ukraine[78]; referenced statements of Russian nationals about financing terrorist activities in Ukraine[79]; raised facts concerning the shelling of civilians near Volnovakha,[80] Mariupol,[81] and Kramatorsk[82] with Russian-supplied weapons; provided details, facts, and supporting documents concerning the shoot-down of a civilian aircraft with

---

[76] *See Georgia v. Russia*, paras. 171–184.

[77] *See, e.g.*, Ukrainian Note Verbale No. 72/22-620-2185 to the Russian Federation Ministry of Foreign Affairs (22 August 2014) (Ukraine's Memorial, Annex 370); Ukrainian Note Verbale No. 72/22-620-2406 to the Russian Federation Ministry of Foreign Affairs (24 September 2014) (Ukraine's Written Statement, Annex 19); Ukrainian Note Verbale No. 72/22-620-2732 to the Russian Federation Ministry of Foreign Affairs (4 November 2014) (Ukraine's Written Statement, Annex 21); Ukrainian Note Verbale No. 72/22-620-352 to the Russian Federation Ministry of Foreign Affairs (13 February 2015) (Ukraine's Written Statement, Annex 28).

[78] *See* Ukrainian Note Verbale No. 72/22-620-2221 to the Russian Federation Ministry of Foreign Affairs (29 August 2014) (identifying Russian nationals who used bank accounts for financing of terrorist activities in Ukraine and calling on Russia to comply with its obligations under the ICSFT) (Ukraine's Memorial, Annex 371).

[79] *See* Ukrainian Note Verbale No. 610/22-110-504 to the Russian Federation Ministry of Foreign Affairs (2 April 2015) (concerning statements by V. Yefimov, which prove the financing and support of terrorist activity in Ukraine) (Ukraine's Written Statement, Annex 29); Ukrainian Note Verbale No. 72/22-620-264 to the Russian Federation Ministry of Foreign Affairs (10 February 2016) (concerning terrorist bombing against civilians during unity rally in Kharkiv by Ukrainian citizens with support from Russian authorities) (Ukraine's Written Statement, Annex 41).

[80] *See* Ukrainian Note Verbale No. 72/22-620-351 to the Russian Federation Ministry of Foreign Affairs (13 February 2015) (noting that the DPR launched attacks near Volnovakha using Russian military ammunition) (Ukraine's Written Statement, Annex 27).

[81] *See* Ukrainian Note Verbale No. 72/22-620-1069 to the Russian Federation Ministry of Foreign Affairs (7 May 2015) (concerning the shelling of civilians in Mariupol, facts, and circumstances of the attack) (Ukraine's Written Statement, Annex 31).

[82] *See* Ukrainian Note Verbale No. 72/22-484-1103 to the Russian Federation Ministry of Foreign Affairs (12 May 2015) (concerning the shelling attacks on civilians in Kramatorsk, Mariupol, and Volnovakha and noting Russia's responsibility for suppling weapons used in the attacks) (Ukraine's Written Statement, Annex 33).

a Russian-supplied Buk missile[83]; and addressed the large-scale supply of weapons and provision of funds for terrorist acts in Ukraine.[84] Ukraine attempted to discuss all of these issues with the Russian Federation during the Parties' several rounds of in-person negotiating sessions.[85] The Russian Federation specifically acknowledged Ukraine's efforts by "express[ing] gratitude to the Ukrainian Party for all information provided that may be relevant to the [ICSFT]."[86] These numerous diplomatic exchanges and meetings confirm that Ukraine made a genuine attempt to engage in negotiations with the Russian Federation, with a view to resolving the dispute concerning the interpretation or application of the ICSFT.

---

[83] *See, e.g.*, Ukrainian Note Verbale No. 72/22-620-2604 to the Russian Federation Ministry of Foreign Affairs (23 October 2015) (noting that Malaysian Airlines Flight 17 was downed by a warhead from DPR territory and fell near Hrabove, Ukraine) (Ukraine's Written Statement, Annex 37); Ukrainian Note Verbale No. 72/22-620-2894 to the Russian Federation Ministry of Foreign Affairs (23 November 2015) (asking the Russian Federation to address four questions, which Ukraine had presented in its diplomatic note and during the negotiation) (Ukraine's Written Statement, Annex 39). *See also* Ukrainian Note Verbale No. 72/22-620-533 to the Russian Federation Ministry of Foreign Affairs (29 February 2016) (Ukraine's Written Statement, Annex 42).

[84] *See, e.g.*, Ukrainian Note Verbale No. 72/22-620-2185 to the Russian Federation Ministry of Foreign Affairs (22 August 2014) (referencing journalist statements and reports regarding the supply of weapons and provision of funds) (Ukraine's Memorial, Annex 370); Ukrainian Note Verbale No. 72/22-620-2406 to the Russian Federation Ministry of Foreign Affairs (24 September 2014) (referencing a Russian servicemen statement admitting the same) (Ukraine's Written Statement, Annex 19); Ukrainian Note Verbale No. 72/22-620-2732 to the Russian Federation Ministry of Foreign Affairs (4 November 2014) (referencing Russian politician statements and press publications concerning the same) (Ukraine's Written Statement, Annex 21). *See also* Ukrainian Note Verbale No. 72/22-620-352 to the Russian Federation Ministry of Foreign Affairs (13 February 2015) (referencing Russian ministry report concerning the same) (Ukraine's Written Statement, Annex 28).

[85] Ukrainian Note Verbale No. 72/22-620-967 to the Russian Federation Ministry of Foreign Affairs (24 April 2015) (summarizing the first round of in-person negotiations, in which Ukraine raised claims concerning Russian support for terrorist activities, produced facts showing the same, and addressed Russia's responsibility for these acts under the ICSFT) (Ukraine's Written Statement, Annex 30); Ukrainian Note Verbale No. 72/22-620-2894 to the Russian Federation Ministry of Foreign Affairs (23 November 2015) (summarizing further negotiation sessions) (Ukraine's Written Statement, Annex 39); Ukrainian Note Verbale No. 72/22-610-915 to the Russian Federation Ministry of Foreign Affairs (13 April 2016) (same) (Ukraine's Written Statement, Annex 44).

[86] Russian Federation Note Verbale No. 10448 to the Embassy of Ukraine in Moscow (31 July 2015) (Ukraine's Memorial, Annex 376).

b. Ukraine Engaged in Negotiations with the Russian Federation for More than a Reasonable Time

69. Although further negotiations would certainly have been futile, as explained below, Ukraine's obligation under Article 24(1) of the ICSFT was to pursue negotiations for "a reasonable time." In this instance, Ukraine continued negotiations with Russia for two years, despite the fact that no progress was being made. Concurrent with the negotiations, moreover, the dispute was worsening, as Ukraine was facing an onslaught of terrorist acts financed from Russia. For example, the attack on a civilian checkpoint near Volnovakha, using a Russian BM-21 Grad system, occurred shortly before the first round of negotiations. The deadly bombardment of Mariupol was carried out two days after that session, followed weeks later by the bombing of a patriotic march in Kharkiv. Throughout the entirety of the negotiating period, Russian weapons and money continued to be delivered to groups engaged in terrorist acts in Ukraine.

70. Under such circumstances, it is not reasonable to expect Ukraine to have continued negotiations for an extended period of time. When one State seeks to negotiate and the other responds by failing to prevent its officials and other nationals from supporting violent acts of terrorism, a State may reasonably conclude that such dire circumstances render continued negotiations unproductive. Under such extreme circumstances, a State may appropriately conclude that the "reasonable time" for negotiations is short, and much shorter than the two years Ukraine allowed in a sincere attempt to resolve the dispute. Even Russia acknowledges that the two years of negotiation participated in by Ukraine "may satisfy the reasonable time requirement of Article 24(1)of the ICSFT," admitting that it lacks any basis for its objection apart from its tenuous claims of "bad faith" by Ukraine.[87]

[87] Russia's Objections, para. 240.

c. Russia Confirmed That Negotiations Had Failed by Refusing to Discuss Important Aspects of the Dispute, to Acknowledge the Existence of the Dispute, or to Modify Its Position

71. Through two years of diplomatic exchanges and meetings, Russia never really engaged in true negotiations; Russia was willing to sit in a room with Ukraine, but never meaningfully engaged with the substance of the matters Ukraine sought to negotiate.

72. As an initial matter, Russia's delays and procedural tactics made it difficult to engage in negotiations at all. For example, Russia dismissed Ukraine's proposals of venues for talks,[88] rescheduled the dates for negotiations shortly before a meeting, and delayed responding to Ukraine's requests for meetings until after Ukraine's proposed dates had passed.[89]

---

[88] *See, e.g.*, Russian Federation Note Verbale No. 13355 to the Embassy of Ukraine in Moscow (14 October 2014) (suggesting moving location of negotiations from Kyiv to Moscow due to attack on Russian Embassy) (Ukraine's Memorial, Annex 373); Ukrainian Note Verbale No. 72/23-620-2674 to the Russian Federation Ministry of Foreign Affairs (29 October 2014) (suggesting Kyiv, Geneva, Vienna, and Strasbourg as alternatives to Moscow) (Ukraine's Written Statement, Annex 20); Russian Federation Note Verbale No. 14587 to the Embassy of Ukraine in Moscow (24 November 2014) (ignoring Ukraine's compromise proposals of Geneva and Strasbourg as negotiating locations, instead suggesting Minsk) (Ukraine's Memorial, Annex 375); Ukrainian Note Verbale No. 72/22-620-3008 to the Russian Federation Ministry of Foreign Affairs (8 December 2014) (third attempt to schedule a round of negotiations, Ukraine proposed that negotiations be held on 22 December 2014 in Strasbourg) (Ukraine's Written Statement, Annex 22); Russian Federation Note Verbale No. 16599 to the Embassy of Ukraine in Moscow (17 December 2014) (rejecting Ukraine's preferred location for negotiations in Strasbourg and insisting on Minsk) (Ukraine's Written Statement, Annex 23); Ukrainian Note Verbale No. 72/22-620-3114 to the Russian Federation Ministry of Foreign Affairs (19 December 2014) (Ukraine agrees to Minsk) (Ukraine's Written Statement, Annex 24).

[89] *See, e.g.*, Russian Federation Note Verbale No. 13355 to the Embassy of Ukraine in Moscow (14 October 2014) (responding only three days before Ukraine's proposed negotiating date) (Ukraine's Memorial, Annex 373); Ukrainian Note Verbale No. 72/23-620-2674 to the Russian Federation Ministry of Foreign Affairs (29 October 2014) (proposing 20 November 2014 for negotiations) (Ukraine's Written Statement, Annex 20); Russian Federation Note Verbale No. 14587 to the Embassy of Ukraine in Moscow (24 November 2014) (not responding until 24 November 2014, four days *after* Ukraine's proposed negotiating date) (Ukraine's Memorial, Annex 375); Ukrainian Note Verbale No. 72/22-620-967 to the Russian Federation Ministry of Foreign Affairs (24 April 2015) (proposing meeting for the second round of negotiations during the week of 11 May 2015) (Ukraine's Written Statement, Annex 30); Russian Federation Note Verbale No. 6392 to the Embassy of Ukraine in Moscow (8 May 2015) (seeking to push the date for the second round of negotiations to 15 June 2015, nearly a month after Ukraine's proposed date) (Ukraine's Written Statement, Annex 32).

73. Even as Russia obstructed Ukraine's requests to meet, it largely ignored Ukraine's attempts to raise issues through diplomatic correspondence. The Russian Federation failed to respond substantively to the vast majority of the Ukrainian diplomatic notes raising substantive issues under the ICSFT. For example, although Ukraine sent more than twenty diplomatic notes concerning violations of the ICSFT,[90] Russia addressed substantive matters in only five notes.[91] Only one of those five notes addressed issues Ukraine had raised, and even then it addressed just a fraction of the issues.[92]

74. Russia's attitude in the in-person meetings was no better, as it refused to discuss important aspects of the dispute.[93] For example, at one negotiating session, Russia refused to discuss any issues related to the supply of Russian weapons into Ukraine, or to discuss the shelling of civilians at Volnovakha, Mariupol, and Kramatorsk.[94] At another, Russia stated that it had not given its "consent" to discuss the important matter of the shoot-

---

[90] *See, e.g.*, Ukrainian Note Verbale No. 72/22-620-2605 to the Russian Federation Ministry of Foreign Affairs (23 October 2015) (summarizing the scope of notifications made to Russia) (Ukraine's Written Statement, Annex 38).

[91] *See* Russian Federation Note Verbale No. 9070 to the Embassy of Ukraine in Moscow (30 June 2015) (informing that Russia believes the Euromaidan protests in Kyiv qualify as offenses under the ICSFT) (Ukraine's Written Statement, Annex 35); Russian Federation Note Verbale No. 10448 to the Embassy of Ukraine in Moscow (31 July 2015) (providing cursory and incomplete responses to Ukraine's previously submitted *notes verbale*) (Ukraine's Memorial, Annex 376); Russian Federation Note Verbale No. 384 to the Embassy of Ukraine in Moscow (25 January 2016) (requesting specific documents supporting the inclusion of MH-17 in negotiations) (Ukraine's Written Statement, Annex 40); Russian Federation Note Verbale No. 3219 to the Embassy of Ukraine in Moscow (4 March 2016) (addressing Ukraine's claims concerning terrorist bombings) (Ukraine's Written Statement, Annex 43); Russian Federation Note Verbale No. 8808 to the Embassy of Ukraine in Moscow (23 June 2016) (stating that Russia does not see any grounds for a dispute concerning interpretation or application of the Convention) (Ukraine's Memorial, Annex 379).

[92] *See* Russian Federation Note Verbale No. 10448 to the Embassy of Ukraine in Moscow (31 July 2015) (Ukraine's Memorial, Annex 376).

[93] *See, e.g.*, Ukrainian Note Verbale No. 72/22-620-967 to the Russian Federation Ministry of Foreign Affairs (24 April 2015) (drawing the attention of the Russian Side to its unconstructive negotiation position and proposing that the Russian Side express it objections in writing) (Ukraine's Written Statement, Annex 30).

[94] *See, e.g.*, Ukrainian Note Verbale No. 72/22-620-2894 to the Russian Federation Ministry of Foreign Affairs (23 November 2015) (Ukraine's Written Statement, Annex 39).

down of Flight MH17, and that it was not "persuade[d]" that the issue — financing of an act of terrorism of global impact — was even within the scope of the negotiations.[95]

75. Most glaringly, Russia refused to discuss the ultimate question Ukraine sought to negotiate: Russia's responsibility for breaches of the ICSFT. When Russia did respond to the facts and claims presented by Ukraine, it dismissed them without explanation as "fictitious information and unsubstantiated accusations."[96] Russia further objected to Ukraine raising claims of breaches at all, claiming that Ukraine's "ton[e]" was unproductive and that its claims were "groundless."[97] After four rounds of negotiation — without engaging on the substance of the events giving rise to the dispute raised by Ukraine — Russia expressly asserted that it "does not see any grounds for a dispute concerning the interpretation or application of the [ICSFT]."[98]

76. There was no doubt by the end of this process that Ukraine and the Russian Federation had reached "a deadlock," and that further attempts to negotiate would be "futile."[99] No progress had been made, and there had been no change in the respective positions of the Parties. Russia refused to discuss important aspects of the dispute, and after two years of negotiations Russia denied even the *existence* of a dispute concerning the

---

[95] Ukrainian Note Verbale No. 72/22-610-915 to the Russian Federation Ministry of Foreign Affairs (13 April 2016) (Ukraine's Written Statement, Annex 44).

[96] Russian Federation Note Verbale No. 13457 to the Embassy of Ukraine in Moscow (15 October 2015) (Ukraine's Memorial, Annex 377); *see also* Russian Federation Note Verbale No. 3219 to the Embassy of Ukraine in Moscow (4 March 2016) (calling the allegations "fictional information and unfounded") (Ukraine's Written Statement, Annex 43).

[97] Ukrainian Note Verbale No. 72/22-620-967 to the Russian Federation Ministry of Foreign Affairs (24 April 2015) (summarizing Russia's position) (Ukraine's Written Statement, Annex 30).

[98] Russian Federation Note Verbale No. 8808 to the Embassy of Ukraine in Moscow (23 June 2016) (Ukraine's Memorial, Annex 379). *See Lockerbie, Preliminary Objections Judgment*, paras. 20, 21 (observing that the Respondents had always maintained that there was no dispute under the applicable convention and that, "for that reason, in the Respondent's view, there was nothing to be settled by negotiation").

[99] *South West Africa Cases, Preliminary Objections Judgment*, p. 345; *Georgia v. Russia*, *Preliminary Objections*, para. 159.

ICSFT.[100] As this Court recognized in the *Aerial Incident at Lockerbie* case, it is impossible to settle a dispute by negotiation when one of the parties denies that there is a dispute.[101] Moreover, the pleadings now before the Court confirm the unbridgeable gap between the Parties, another fact the Court has recognized as showing that further negotiations would have been futile.[102] It takes two parties to negotiate, and after two years of Ukraine's unsuccessful attempts to engage with Russia, there was no doubt that a negotiated resolution to the dispute was impossible.

3. Russia's Allegations that Ukraine Acted in Bad Faith During the Negotiations Are Unsupported and Baseless

77. Notwithstanding Ukraine's concerted efforts to negotiate the dispute, and the complete lack of progress made by the Parties over the course of two years, Russia makes the baseless allegation that Ukraine failed to negotiate in good faith.[103] The failure to reach agreement is of course not a basis to ascribe bad faith to either party to the negotiations. Rather, as stated in the award in the *Tacna-Arica Question* arbitration, for there to be bad faith in negotiations, "[t]here must be found an intent to frustrate the [negotiations]" and a "purpose to prevent any reasonable agreement."[104] "[I]t is plain that such a purpose should not be lightly imputed," and that a "finding of the existence of bad faith should be supported

---

[100] *See* Russian Federation Note Verbale No. 8808 to the Embassy of Ukraine in Moscow (23 June 2016) (Ukraine's Memorial, Annex 379).

[101] *Lockerbie, Preliminary Objections*, paras. 20, 21.

[102] *Belgium v. Senegal, Judgment of 20 July 2012*, para. 59 (noting the "[t]he fact that, as results from the pleadings of the Parties, their basic positions have not subsequently evolved confirms that negotiations did not and could not lead to the settlement of the dispute"); *South West Africa Cases, Preliminary Objections*, p. 345 (explaining that "[t]he fact that . . . both the written pleadings and oral arguments of the Parties in the present proceedings have clearly confirmed the continuance of this deadlock, compel a conclusion that no reasonable probability exists that further negotiations would lead to a settlement").

[103] Russia's Objections, paras. 241–257.

[104] Arbitration of the *Tacna-Arica Question (Chile, Peru)*, 4 March 1925, II RIAA, p. 930 [hereinafter *Tacna-Arica Question*].

not by disputable inferences but by clear and convincing evidence which compels such a conclusion."[105] Russia does not come close to meeting this high threshold. To the contrary, as set forth above, it was the Russian Federation that did not negotiate in good faith, given its consistent refusal to discuss the merits of Ukraine's claims, or even to acknowledge the existence of a dispute.

78. The Russian Federation bases its serious accusation on the fact that some of Ukraine's diplomatic correspondence relating to the ICSFT also included allegations of aggression.[106] The Parties do, of course, have a dispute concerning Russia's aggression against Ukraine, in addition to their dispute concerning the interpretation or application of the ICSFT. This Court has recognized that States may have different types of disputes under different treaties or rules of international law.[107] There is no rule preventing Ukraine from raising more than one dispute in the course of the same correspondence. Moreover, before any in-person negotiations began, Ukraine explained to the Russian Federation that Ukraine's statements concerning aggression and the use of force were distinct from the subject of negotiations under the ICSFT.[108]

79. Russia also complains of diplomatic notes constituting "mere protests and disputations," but most of these predate direct negotiations under the ICSFT, and were a valid notification to Russia side about the existence of the dispute. The Russian Federation's

---

[105] *Ibid.*, p. 930; *see also Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece), Judgment of 5 December 2011, I.C.J. Reports 2011,* p. 685*,* para. 132 (holding that "[a]s for the proof required for finding of the existence of bad faith . . . 'something more must appear than the failure of particular negotiations'" (quoting *Tacna-Arica Question*, p. 930)).

[106] Russia's Objections, paras. 241–244.

[107] G*eorgia v. Russia*, *Preliminary Objections*, para. 170; *cf. Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objections, Judgment of 24 September 2015, I.C.J. Reports 2015,* p. 595, para. 32 ("As the Court has observed in the past, applications that are submitted to the Court often present a particular dispute that arises in the context of a broader disagreement between parties. . . . The Court considers that, . . . a distinction must be drawn between that [broader disagreement] and the related but distinct dispute presented by the Application . . . .").

[108] Ukrainian Note Verbale No. 72/22-620-3114 to the Russian Federation Ministry of Foreign Affairs (19 December 2014) (Ukraine's Written Statement, Annex 24).

characterization of Ukraine's diplomatic correspondence as "simply expecting Russia to fulfil Ukraine's demands" is misleading. Russia cannot credibly complain that Ukraine was at fault because it insisted on Russia ceasing its violations of the ICSFT, offering appropriate assurances and guarantees of non-repetition, and making full reparation for the injury caused by its acts.[109] Had the Russian Federation been negotiating in good faith it would have provided an explanation of why it believed its conduct did not violate the ICSFT. The Russian Federation never did so, refused to discuss important aspects of Ukraine's claims, and denied the existence of the dispute altogether.[110]

80. Russia also has no valid basis for objecting to Ukraine's practice of summarizing the outcomes of negotiating sessions.[111] Russia provides absolutely no support for its claim that such summaries are "in contravention of diplomatic practices."[112] Rather, given the sensitive nature of the matters in dispute, Ukraine considered it important to maintain a contemporaneous record of the Parties' positions. Doing so is far preferable to the approach Russia takes in its pleadings, where it simply makes assertions about the

---

[109] *See, e.g.*, Ukrainian Note Verbale No. 72/22-620-351 to the Russian Federation Ministry of Foreign Affairs (13 February 2015) (Ukraine's Written Statement, Annex 27); Ukrainian Note Verbale No. 72/22-620-352 of the to the Russian Federation Ministry of Foreign Affairs (13 February 2015) (Ukraine's Written Statement, Annex 28); Ukrainian Note Verbale No. 610/22-110-504 to the Russian Federation Ministry of Foreign Affairs (2 April 2015) (noting statements by V. Yefimov, which prove the financing and support of terrorist activity in Ukraine) (Ukraine's Written Statement, Annex 29); Ukrainian Note Verbale No. 72/22-620-1069 to the Russian Federation Ministry of Foreign Affairs (7 May 2015) (Ukraine's Written Statement, Annex 31); Ukrainian Note Verbale No. 72/22-484-1103 to the Russian Federation Ministry of Foreign Affairs (12 May 2015) (Ukraine's Written Statement, Annex 33); Ukrainian Note Verbale No. 72/22-620-2604 to the Russian Federation Ministry of Foreign Affairs (23 October 2015) (Ukraine's Written Statement, Annex 37); Ukrainian Note Verbale No. 72/22-620-2894 to the Russian Federation Ministry of Foreign Affairs (23 November 2015) (Ukraine's Written Statement, Annex 39).

[110] *See supra*, paras. 71–76.

[111] Russia's Objections, para. 244.

[112] Russia's Objections, para. 244*; see also* Russian Federation Note Verbale No. 8395 to the Embassy of Ukraine in Moscow (17 June 2015) (Ukraine's Written Statement, Annex 34).

negotiations without citing any contemporaneous records or witness statements.[113] Moreover, Ukraine consistently invited Russia to identify any inaccuracies in its summaries,[114] and Russia never did so.[115]

81. Finally, the Russian Federation claims that Ukraine was dismissive of Russia's legitimate interests.[116] This complaint makes little sense. An obligation to negotiate does not require any party to compromise its own interests, or, in the words of the arbitrator in the *Tacna-Arica Question* arbitration, "to make an agreement unsatisfactory to itself."[117]

82. In any event, Ukraine repeatedly did accede to some Russian requests related to the negotiations, including Minsk as the proposed venue for talks, Russia's proposed agenda, and timing for negotiating sessions.[118] Contrary to the Russian Federation's assertions, Ukraine engaged in discussions with Russia concerning alleged bombings of four transmission towers located in the Kherson region of Ukraine and attacks on Russian diplomatic missions in Ukraine, even though there was no apparent link between these Russian allegations and the ICSFT dispute that Ukraine was attempting to negotiate.[119]

---

[113] *Cf.* Rules of the Court, art. 79(4) (requiring that preliminary objections "shall mention any evidence which the party may desire to produce").

[114] *See, e.g.*, Ukrainian Note Verbale No. 72/22-620-1481 to the Russian Federation Ministry of Foreign Affairs (27 June 2016) (Ukraine's Written Statement, Annex 45).

[115] *See* Russian Federation Note Verbale No. 8395 to the Embassy of Ukraine in Moscow (17 June 2015) (Ukraine's Written Statement, Annex 34).

[116] Russia's Objections, paras. 245–249.

[117] *Tacna-Arica Question*, p. 929; *see also* Arbitration of the *Affaire du lac Lanoux (Espagne v. France)*, 16 November 1957, XII RIAA, p. 315.

[118] Ukrainian Note Verbale No. 72/22-620-3114 to the Russian Federation Ministry of Foreign Affairs (19 December 2014) (Ukraine agreeing to Minsk as the location of negotiations) (Ukraine's Written Statement, Annex 24); Ukrainian Note Verbale No. 72/22-620-2583 to the Russian Federation Ministry of Foreign Affairs (22 October 2015) (accepting Russia's proposal for the third round of negotiations on October 29 in Minsk) (Ukraine's Written Statement, Annex 36); Ukrainian Note Verbale No. 72/22-620-48 to the Russian Federation Ministry of Foreign Affairs (13 January 2015) (confirming Ukraine's readiness to negotiations on 22 January 2014, in Minsk) (Ukraine's Written Statement, Annex 26).

[119] *See, e.g.*, Ukrainian Note Verbale No. 72/22-610-915 to the Russian Federation Ministry of Foreign Affairs (13 April 2016) (Ukraine's Written Statement, Annex 44).

Similarly, although Ukraine was under no obligation to treat bilateral negotiations as akin to a judicial proceeding with detailed evidentiary submissions, Ukraine did in fact provide the Russian Federation with evidentiary support for Ukraine's position.[120] In short, Russia's allegations of bad faith are entirely without support.

B. The Parties Were Not Able to Agree on the Organization of an Arbitration Within Six Months of Ukraine's Request for Arbitration

83. As set forth above, Article 24(1) of the ICSFT provides that, if the dispute cannot be settled by negotiation within a reasonable time, one of the disputing parties may request that the dispute be submitted to arbitration. After such a request, "[i]f, within six months from the date of the request for arbitration, the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice."[121]

84. After negotiations between Ukraine and Russia failed, Ukraine requested that the Parties' dispute be submitted to arbitration, but no agreement on the organization of the arbitration was reached within the six-month period. On these points there is no disagreement.[122] According to the plain terms of Article 24(1), the arbitration precondition is satisfied: "within six months from the date of the request for arbitration, the parties [we]re unable to agree on the organization of the arbitration," so Ukraine "may refer the dispute to the International Court of Justice." The rationale of this provision is based upon the assumption that, when it has been clarified that the dispute can only be settled by recourse to a judicial mechanism, the parties may prefer to submit their case to an arbitral tribunal rather than to the International Court of Justice. Of course, both lead to a compulsory decision in

---

[120] *See, e.g.*, Ukrainian Note Verbale No. 72/22-610-915 to the Russian Federation Ministry of Foreign Affairs (13 April 2016) (providing open source evidence and detailed Security Service statements) (Ukraine's Written Statement, Annex 44); Ukrainian Note No. 72-22-620-2604 to the Russian Federation Ministry of Foreign Affairs (23 October 2015) (providing evidence of Russian involvement in the financing of the downing of MH-17) (Ukraine's Written Statement, Annex 37).

[121] ICSFT, art. 24(1).

[122] Russia's Objections, paras. 269–270, 287–289.

the form of an award, in the first case, or a judgment, in the second case. But there may be reasons that the parties to a dispute may wish to submit their dispute to an arbitration procedure. In this context, Article 24(1) obligates the applicant to request the submission of the dispute to arbitration, and offers an opportunity to the defending party to accept it if it so wishes, but under the condition that the organization of the arbitration is agreed within six months. If this is not the case — and here it has not been the case — then the applicant can submit its claims to the Court.

85. Russia nonetheless raises various objections to the way Ukraine approached issues concerning the organization of the arbitration. Under a straightforward interpretation of Article 24(1), there is no reason for the Court to assess fault. Albeit in a different context, the Court's logic in the *Case Concerning the Alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights* applies. There, the Court found that the words of a compromissory clause were "descriptive in character," thus requiring the Court to simply "focus on the fact" of whether agreement was reached; "there is no need for the Court to examine whether [the failure to reach agreement] . . . is due to the conduct of one party or the other."[123] Similarly here, the clause "the parties are unable to agree on the organization of the arbitration" is descriptive in character, so there is no need to examine the conduct of the parties in attempting to reach such an agreement. Nevertheless, as Section B(1) below explains, if the Court considers it necessary to find fault, it is Russia that prevented the Parties from reaching agreement. Section B(2) demonstrates that the Parties did not, in fact, reach an agreement. Section B(3) then refutes Russia's claim that Ukraine approached discussions concerning the organization of the arbitration in bad faith.

[123] *Alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America), Provisional Measures*, Order of 3 October 2018, para. 50 [hereinafter *Iran v. U.S.,* Provisional Measures Order of 3 October 2018].

1. Russia's Conduct Made It Impossible to Agree on Organization of the Arbitration in Six Months

86. Reaching agreement on the details of an arbitration takes time, particularly for States locked in a contentious dispute. But this difficult task becomes impossible if one side refuses to engage in a timely manner. Here, Russia's dilatory behavior effectively precluded the Parties from reaching agreement within the time period established by the Convention. Russia omits mention of these facts, which show its own responsibility for the lack of agreement on organization of the arbitration.

87. On 19 April 2016, Ukraine requested by *note verbale* that the dispute between it and Russia "be submitted to arbitration."[124] The Court has already recognized that "Ukraine submitted a request for arbitration to the Russian Federation" on this date, and Russia does not dispute that fact.[125]

88. Russia fails to mention, however, that it made no response to Ukraine's request until more than two months later, on 23 June 2016.[126] Russia thus allowed one-third of the Convention's six-month time period to elapse before even acknowledging Ukraine's request to submit the dispute to arbitration. When it eventually responded, Russia offered to meet a month later, in late July, to "discuss issues concerning setting up arbitration."[127] The meeting was ultimately held on 4 August 2016.[128] Thus, solely as a result of Russia's delays, three

---

[124] ICSFT, art. 24(1); Ukrainian Note Verbale No. 72/22-610-954 to the Russian Federation Ministry of Foreign Affairs (19 April 2016) (noting that Ukraine "request[ed]" to "submit the dispute to arbitration") (Ukraine's Memorial, Annex 378).

[125] *Provisional Measures Order of 19 April 2017*, para. 53; *see generally* Russia's Objections, Chapter VI, Section II(B).

[126] *See* Russian Federation Note Verbale No. 8808 to the Embassy of Ukraine in Moscow (23 June 2016) (Ukraine's Memorial, Annex 379).

[127] *Ibid.*

[128] *See, e.g.*, Ukrainian Note Verbale No. 72/22-610-2049 to the Russian Federation Ministry of Foreign Affairs (31 August 2016) (Ukraine's Memorial, Annex 380).

months elapsed before the Parties engaged in any substantive consultations about the organization of the arbitration.

89. Even after Russia finally agreed to meet, with less than three months remaining of the six-month period, Russia continued to obstruct productive consultations. Ukraine was justifiably concerned by Russia's recent record of refusing to participate in arbitrations to which it had previously consented,[129] so it sought assurances that Russia was in fact prepared to settle the Parties' dispute by arbitration.[130] At the August meeting, Russia would not allay these concerns. It referred only to Ukraine's "unilateral" ability to commence arbitration, and refused Ukraine's express request to state that it would participate in an arbitration.[131] In addition to declining to agree to participate in an arbitration, Russia at this meeting offered no response to Ukraine's initial views on the organization of the arbitration.[132]

90. Russia continued to delay. On 19 September — now with five months elapsed since Ukraine's request — Russia sent a diplomatic note that (1) again declined to say expressly that Russia would participate in an arbitration, and (2) announced that it was only just

---

[129] *See, e.g.*, The Ministry of Foreign Affairs of the Russian Federation, Information and Press Department Statement No. 2079-23-10-2013, *Comment By the Information and Press Department of the Russian Ministry of Foreign Affairs Regarding the Situation Around the Arctic Sunrise* (23 October 2013) (noting that Russia "does not accept the arbitration procedure in the case concerning the Arctic Sunrise, and also that it does not intend to participate in the Tribunal proceedings connected to the issue") (Ukraine's Written Statement, Annex 54); *Aeroport Belbek LLC and Mr. Igor Valerievich Kolomoisky* v. *The Russian Federation*, PCA Case No. 2015-07, Press Release of 6 January 2016 (noting that Russia would not participate and that "[b]y letter[] . . . , the Russian Federation indicated, *inter alia*, that . . . it 'does not recognize the jurisdiction of an international arbitral tribunal at the [PCA] in settlement of the [Claimants' claims]'") (Ukraine's Written Statement, Annex 7).

[130] *See, e.g.*, Ukrainian Note Verbale No. 72/22-620-2049 to the Russian Federation Ministry of Foreign Affairs (31 August 2016) (Ukraine's Memorial, Annex 380); Ukrainian Note Verbale No. 72/22-663-2234 to the Russian Federation Ministry of Foreign Affairs (29 September 2016) (Ukraine's Written Statement, Annex 47).

[131] *See* Ukrainian Note Verbale No. 72/22-620-2049 to the Russian Federation Ministry of Foreign Affairs (31 August 2016) (Ukraine's Memorial, Annex 380).

[132] *Ibid.*

beginning to "review [Ukraine's] ideas carefully."[133] It was only on 10 October that Russia finally stated its agreement to participate in an arbitration of the dispute.[134] At this point there was just over a week left in the six-month period to reach agreement on the organization of the arbitration.

91. Nonetheless, Ukraine was still willing to meet with Russia, and the Parties finally came to the table on 18 October 2016, one day before the six-month time period for the negotiations on the organization of the arbitration was set to expire. But at this meeting it became apparent that no agreement could be reached within the six-month time period, as the Russian delegation informed Ukraine that any agreement on the organization of the arbitration would require approval from the State Duma (Russia's parliament).[135] The Russian delegation informed Ukraine that Duma approval would cause additional delay, that it "would be difficult" to say how long that process might take, and noted that it "it w[ould] take some time."[136] Moreover, according to the draft arbitration agreement that Russia proposed, Ukraine would have been barred from bringing its case before the Court even if the Duma indefinitely delayed its ratification of the arbitration agreement, leaving Ukraine with no recourse at all to dispute resolution.[137]

92. Thus, Russia's dilatory conduct throughout the six-month period, and its refusal to even confirm that it would actively participate in any arbitration between the Parties

---

[133] Russian Federation Note Verbale No. 13322 to the Embassy of Ukraine in Moscow (19 September 2016) (Ukraine's Written Statement, Annex 46).

[134] *See* Russian Federation Note Verbale No. 12566 to the Embassy of Ukraine in Moscow (10 October 2016) (Ukraine's Written Statement, Annex 49).

[135] Transcript of Arbitration Organization Negotiations Between Ukraine and the Russian Federation, Minsk, 18 October 2016, pp. 3, 21–22 (Kolodkin) (Ukraine's Written Statement, Annex 50).

[136] *Ibid.*, pp. 3, 32 (Ukraine's Written Statement, Annex 50).

[137] *See* Russian Federation Note Verbale No. 14426 to the Embassy of Ukraine in Moscow (3 October 2016) (attaching a draft arbitration agreement wherein Article 4 "[o]bligat[ed] [the Parties] not to commence proceedings before the International Court of Justice" and Article 5 provided that the agreement would enter into force upon notification of ratification, except for Article 4, which would enter into force on the date of signing of the agreement) (Ukraine's Written Statement, Annex 48).

until a week before the six-month period lapsed, made it impossible to reach agreement during the specific time frame specified in Article 24.

2. The Parties Were Unable to Agree on the Organization of the Arbitration

93. Notwithstanding all of these delays, the Parties did hold meaningful consultations at the 18 October meeting. At the meeting and then again in writing, Ukraine presented detailed proposals seeking to reach agreement on the key points of organization of an arbitration.[138] But the Parties did not reach agreement on important issues.

94. Russia argues that "there was substantial agreement between the Parties" and that, therefore, "the precondition that the Parties were 'unable to agree on the organization of the arbitration' is not satisfied."[139] But to support this argument, Russia does not provide evidence of an actual agreement between the Parties. Rather, it lists a number of points on which it agreed *to consider* Ukraine's proposals.[140] What Russia characterizes as "substantial agreement" on the organization of the arbitration was, in reality, just agreement to "discuss the details" further,[141] to "not reject" a proposal,[142] and "to consider the Ukrainian position."[143]

---

[138] *See* Ukrainian Note Verbale No. 72/22-194/510-2518 to the Russian Federation Ministry of Foreign Affairs (2 November 2016) (addressing the number of arbitrators, appointing authority, participation commitments, bifurcation of proceedings, governing law, transparency, cost, timing, the availability of provisional measures, and the ability for third States to intervene) (Ukraine's Memorial, Annex 382).

[139] Russia's Objections, para. 283.

[140] Specifically, instead of agreeing to terms, Russia stated that "[t]he Parties had . . . agreed on the need to discuss the details of [transparency] further," that they "had not reached a deadlock as Ukraine did not reject an appointment authority," that "Russia was ready to consider the UNCLOS Annex VII model," that "Russia was also open to consider Ukraine's proposal" on provisional measures, and that "Russia said it would consider such proposal [on bifurcation] in an open manner." Russia's Objections, paras. 284–287.

[141] *Ibid.*, para. 284.

[142] *Ibid.*, para. 285 ("While the Parties had not yet discussed the appointment mechanism in detail, the negotiations on that issue did not fail and had not reached a deadlock as Ukraine did not reject an appointment authority and suggested the ICJ President as such an authority, whereas Russia simply proposed several options . . . .").

[143] *Ibid.*, para. 288.

And Russia concedes that no agreement was ever reached on any of the key issues regarding organization of an arbitration (1) the appointing authority, (2) provisional measures powers, (3) bifurcation, (4) transparency, or (5) the ability of third States to intervene.[144] Its Preliminary Objections further confirm that the Parties remained in substantive disagreement on (6) the administering authority of the arbitration, (7) the timing of the arbitration, (8) its governing rules, (9) the consequences of non-participation, and (10) cost efficiency provisions.[145]

95. The question under Article 24(1) is whether the parties are able to "agree on the organization of the arbitration" within six months, not whether they "agree to consider" their respective proposals for some undefined period of time beyond six months. Russia's claim of "agreement" ignores the reality of the situation.

96. Recognizing that no agreement had been reached – a fact that by itself demonstrates that resort to this Court was appropriate –Russia argues that negotiations over a potential arbitration "had not reached a deadlock."[146] Whether or not this is correct, the argument disregards the unambiguous language of the Convention. Article 24(1) sets a six-month period in which organization of the arbitration should be agreed upon; there is no language that suggests a requirement to continue negotiating beyond six months if deadlock has not been reached. Reading such a requirement into the Convention would only reward Russia for delaying the agreement beyond the six-month period. Having frustrated meaningful consultations for nearly all of the six-month period, Russia would be able to unilaterally extend the time allotted by the clear text of the treaty for an indefinite period, claiming "deadlock has not yet been reached," thereby further delaying the final resolution of the dispute intended by the treaty. That is plainly not a correct reading of Article 24(1).

---

[144] *Ibid.*, paras. 285–288.

[145] *Ibid.*, paras. 287–290.

[146] Russia's Objections, para. 285.

3. Russia's Claim that Ukraine Did Not Attempt in Good Faith to Reach Agreement on the Organization of an Arbitration Is Unsupported by the Record

97. As explained above, the question for the Court concerning arbitration is simply one of fact: whether the Parties were able to reach agreement. Whether the lack of agreement was "due to the conduct of one party or the other" is not relevant.[147] Russia nonetheless blames Ukraine for failure to reach agreement, arguing that "Ukraine made no *good faith* attempt to organise an arbitration," "did not engage in genuine negotiations," and "did not negotiate *bona fide*."[148]

98. To the extent such an inquiry is appropriate at all — and it is not, because there is no requirement to "negotiate" an arbitration in the text of the ICSFT, and as noted above Russia made it impossible to reach agreement within the required six-month period — the inquiry is a limited one. As explained above, there would at least have to be "clear and convincing evidence which compels" a finding of "bad faith."[149] Moreover, as with the question of futility of negotiations, it is the States concerned rather than the Court "who are in the best position to judge" the reasons for failure to reach agreement on arbitration.[150] Russia cannot come close to making a clear and convincing showing of bad faith on the part of Ukraine. Everything it points to reflects reasonable disagreements between the Parties, if not bad faith by Russia.

---

[147] *Iran v. U.S.,* Provisional Measures Order of 3 October 2018, para. 50.

[148] Russia's Objections, paras. 258, 274, 277 (emphasis added).

[149] *See supra,* para. 77 and accompanying notes; *Application of the Interim Accord of 13 September 1995 (Macedonia* v. *Greece), Judgment of 5 December 2011, I.C.J. Reports 2011,* p. 644, para. 132 (quoting *Tacna-Arica Question*, p. 930); *see also Dispute Regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment of 13 July 2009, I.C.J. Reports 2009,* p. 213, para. 150 (holding that "[a]s a general rule" of international law, a State's "good faith must be presumed").

[150] *Mavrommatis*, p. 15.

99. For example, Russia dwells at length on Ukraine's supposed "insist[ence]" on referring the dispute to an *ad hoc* chamber of the International Court of Justice.[151] Ukraine's proposal was simply one option among others. And contrary to Russia's mischaracterizations, Ukraine did not "insist" that Russia accept this approach.[152] Rather, Ukraine proposed a set of core principles for organization of the arbitration that it expressly framed as an alternative to an *ad hoc* chamber.[153] This proposal was distinct in various ways from the rules governing an *ad hoc* chamber, and addressed the number of arbitrators, appointing authority, participation commitments, bifurcation of proceedings, governing law, transparency, cost, timing, the availability of provisional measures, and the ability for third States to intervene.[154] The notion that Ukraine "insisted" on an *ad hoc* chamber is flatly at odds with the record.

100. Russia also faults Ukraine for preferring to discuss first the core principles of an arbitration agreement, rather than proceed directly to a detailed draft text.[155] There is no support for the notion that such an approach is in bad faith. To the contrary, first seeking

---

[151] Russia's Objections, paras. 258, 265.

[152] One Member of this Court has expressed the view that an *ad hoc* chamber is "essentially an arbitral tribunal." *E.g.*, *Frontier Dispute (Benin* v. *Niger), Formation of the Chamber, Declaration of Judge Oda of 27 November 2002, I.C.J. Reports 2002*, p. 616. To be clear, the Court has no need to agree or disagree with Judge Oda's position on the nature of an *ad hoc* chamber. The point is simply that Ukraine proposed an *ad hoc* Chamber, in combination with other proposals, in good faith.

[153] *See* Ukrainian Note Verbale No. 72/22-194/510-2518 to the Russian Federation Ministry of Foreign Affairs (2 November 2016) (explaining that Ukraine's proposal was "[a]bsent an agreement" on an *ad hoc* chamber) (Ukraine's Memorial, Annex 382).

[154] *See ibid.*

[155] Russia's Objections, paras. 274–275, 277.

agreement over core principles before proceeding to the details of a draft agreement is a well-recognized international practice.[156]

101. Russia also mischaracterizes Ukraine's effort to secure agreement on core principles to govern the arbitration. Russia asserts that by identifying "'core principles on which Ukraine believes the Parties must agree'," Ukraine "insist[ed] on non-negotiable *sine qua non* conditions that it would not contemplate modification of in light of Russia's interests."[157] This is misleading – read in context, it is clear that Ukraine was articulating the general *subjects* on which the Parties should first strive to reach agreement. As stated in Ukraine's *note verbale* following the 18 October meeting:

> Before discussing further a potential agreement and rules governing the organization of the arbitration, given that the two sides are far apart on certain fundamental issues, the Ukrainian Side considers it advisable to first attempt to reach agreement on core principles concerning the organization of the arbitration. As promised at the conclusion of the meeting in The Hague, this note elaborates the core principles on which Ukraine believes the Parties must agree.[158]

Ukraine never suggested that its specific proposals on those subjects could not be changed. But, as explained above,[159] even if Ukraine had taken a more rigid position, doing so would not have been in bad faith. An obligation to allow for six months to reach an agreement on the

---

[156] *See, e.g.*, Frances Mautner-Markhof, International Institute for Applied Systems Analysis, PROCESSES OF INTERNATIONAL NEGOTIATIONS (1989), p. 265 (noting that "Soviet negotiators" typically "insist[ed] on an 'agreement in principle' before negotiating the details of the agreement" because, as the chief Soviet negotiator in the nuclear test ban negotiations explained, doing otherwise is "proposing to work on the details before agreeing on the foundation. This is tantamount to putting up a building without a foundation or framework. Such a building will, however, collapse while it is still under construction." (citations omitted)) (Ukraine's Written Statement, Annex 69).

[157] Russia's Objections, para. 275.

[158] *See* Ukrainian Note Verbale No. 72/22-194/510-2518 to the Russian Federation Ministry of Foreign Affairs (2 November 2016) (Ukraine's Memorial, Annex 382). *See also* Transcript of Arbitration Organization Negotiations Between Ukraine and the Russian Federation, Minsk, 18 October 2016, pp. 1, 7, 19, 30, 33, 40, 41, 48 (discussing the core principles on which Ukraine believed the Parties should agree before moving to a detailed text) (Ukraine's Written Statement, Annex 50).

[159] *See supra*, paras. 77, 81.

organization of an arbitration does not require a Party to capitulate to the other Party or reach any particular type of compromise.[160] And this is why, if there is no consensus reached on an arbitration procedure, the requesting Party can turn to the Court.

102. Finally, there is no basis to Russia's suggestion that it was in bad faith for Ukraine to insist on mechanisms to ensure Russia's participation in the arbitration.[161] Russia feigns offense at the suggestion "that Russia would not participate in the arbitral proceedings."[162] But as noted above, Russia's recent practice suggested that it might do exactly that.[163] It was not unreasonable for Ukraine to seek to build into any arbitration agreement mechanisms that would mitigate problems arising from the very real possibility of Russia's non-participation.

103. For all of these reasons, Ukraine takes strong exception to Russia's suggestion that it acted in bad faith before turning to the Court. Again, in Ukraine's view there is no need to ascribe fault to anyone before concluding that the arbitration precondition was satisfied, but if any Party to these negotiations acted *male fide*, it was Russia. Under all of these circumstances, there is absolutely no basis for Russia to suggest that Ukraine did not genuinely attempt to reach agreement on the organization of the arbitration in good faith.

---

[160] *Cf. Tacna-Arica Question*, pp., 921, 933 (noting that parties are free to "make proposals, and to object to the other's proposals, so long as they acted in good faith").

[161] Russia's Objections, paras. 274, 276.

[162] Russia's Objections, para. 276.

[163] *See supra*, para. 89.

Chapter 4. RUSSIA CANNOT OBJECT TO THE COURT'S JURISDICTION ON THE GROUND THAT THE ICSFT DOES NOT REQUIRE STATES TO PREVENT ACTS OF TERRORISM FINANCING COMMITTED BY STATE OFFICIALS

104. In Chapter V of its Preliminary Objections, Russia attempts to narrow the scope of its duties under the ICSFT in order to defeat some, though not all, of Ukraine's claims. As set forth in the Memorial, Ukraine's evidence shows that numerous Russian persons — both private actors and public officials — have financed terrorism in Ukraine.[164] Ukraine claims that Russia has breached several provisions of the ICSFT in relation to these acts of terrorism financing.[165] Russia's Preliminary Objections do not address Ukraine's claims insofar as they relate to the financing of terrorism by private actors, thus conceding that those claims do fall within the ICSFT. Russia makes the improbable claim, however, that the Convention is not concerned with the financing of terrorism by public officials, and therefore imposes on Russia no obligations with respect to such financing.

105. Russia's objection cannot be squared with a straightforward interpretation of the text of the ICSFT. Under Article 18, States have an obligation to take all practicable measures to prevent terrorism financing offences covered by Article 2. In turn, Article 2 offences may be committed by "any person," without qualification. Thus, if a State fails to take practicable measures to prevent acts of terrorism financing by any person, whether that person acts in a private or public capacity, the State breaches Article 18.

106. To resist this straightforward interpretation, Russia insists that "[w]hen the ICSFT speaks of 'persons' it means private persons only."[166] But that argument, advanced with little explanation and no support at all, defies the plain terms of the ICSFT. It simultaneously undermines the Convention's object and purpose: a treaty expressly aimed at the prevention and suppression of the financing of terrorism by any person would be read to *leave unaddressed* the financing of terrorism by *some* persons. It would be paradoxical if an

---

[164] *See* Ukraine's Memorial, Chapter 5.

[165] *See ibid.*, Chapter 6.

[166] Russia's Objections, para. 212.

obligation to take all practicable measures to prevent terrorism financing were read to exclude the most practicable measure available to a State, *i.e.*, to control the actions of its own officials who seek to finance terrorism.

107. Apart from unilaterally inserting a word into the ICSFT that is not there, Russia shifts focus from the Convention altogether to general questions of international law. Russia avoids responding to Ukraine's claimed ICSFT violations and instead reframes its objection as an issue of state responsibility. Specifically, instead of engaging on the scope of Russia's treaty-based responsibility under Article 18 to "take all practicable measures" to prevent the commission of terrorism financing offenses by "any person," public or private, Russia focuses instead on a general question of international law: whether it is directly responsible for acts of terrorism financing that are attributable to the State under the rules of State responsibility. But in so doing, Russia fails meaningfully to address the question of treaty interpretation at issue in this case: how to interpret the term "any person," found in Article 2.

108. As set forth below, the proper interpretation of "any person," and the effect of this interpretation on the scope of the Article 18 duty to prevent, is a question this Court should address during the merits phase. It is not the proper subject of preliminary objections. But, if the Court does address the Parties' interpretive dispute now, it should adhere to the ICSFT's straightforward, ordinary meaning, and reject Russia's attempts to re-write the treaty in order to evade responsibility.

A. Russia's Narrow Interpretation of Its Duty to Prevent the Financing of Terrorism Is a Question for the Merits

109. Russia does not dispute that Article 18, one of the provisions on which Ukraine's claims are based, imposes an obligation to take all practicable measures to prevent the commission of terrorism financing offences. The Parties further agree that Article 2 defines those offenses, and provides that they may be committed by "any person." Russia's objection is founded on its implausibly narrow interpretation that the words "any person," as used in Article 2, do not literally mean any person, but only persons acting in a private capacity.

110. As elaborated in Chapter 2, this is the type of interpretive dispute that falls squarely within the Court's jurisdiction to resolve "[a]ny dispute between two or more States Parties concerning the *interpretation* or application of this Convention."[167] The most relevant precedent for the type of preliminary objection Russia attempts is the objection made in the *Bosnian Genocide Case*. There, the Federal Republic of Yugoslavia argued that "the responsibility of a State for an act of genocide perpetrated by the State itself would be excluded from the scope of the [Genocide] Convention."[168] The Court considered that the parties were "in disagreement with respect to the meaning and legal scope" of specific Genocide Convention provisions, including the scope of the duty to prevent.[169] The Court therefore left that interpretive dispute "for resolution at the merits stage."[170] Here too, Ukraine and Russia are in disagreement over the "meaning and legal scope" of specific provisions of the ICSFT, in particular, the meaning of the phrase "any person" in Article 2. That is likewise a question for resolution at the merits stage.

111. This conclusion is especially warranted because the Parties have no meaningful dispute concerning the existence of the obligation that Ukraine claims Russia has violated: an obligation to prevent the financing of terrorism under Article 18. Article 2 simply defines the extent of the obligations placed on States Parties in Article 18 and elsewhere in the Convention. The Parties' disagreement over the meaning of "any person" in Article 2 does not call into question that there is a dispute properly before this Court related to Russia's obligations under Article 18.

112. But even if Russia's objection did concern the jurisdiction of the Court, it still should not be entertained at this stage, because it "does not possess an exclusively preliminary

---

[167] ICSFT, art. 24(1) (emphasis added).

[168] *Bosnian Genocide Case, Judgment of 11 July 1996*, para. 32.

[169] *Ibid.*, para. 33.

[170] *Bosnian Genocide Case, Judgment of 26 February 2007*, para. 152.

character."[171] The ultimate focus of Ukraine's Article 18 claim is not on any specific terrorism financing offence committed in violation of Article 2, though Ukraine has identified many. The focus of Ukraine's Article 18 claim is on the practicable measures Russia was required to take to *prevent* such terrorism financing offences. Ukraine challenges, for example, Russia's failure to police its border, a practicable measure that could have prevented terrorism financing by any person, whether acting in a public or private capacity.[172] Moreover, even if the Court were to accept Russia's argument that "any person" excludes persons acting in an official capacity, and even if it were possible to separate the portions of Ukraine's claims that relate to different types of persons, it would still be premature to decide this objection. Ukraine has put forward evidence showing that Russian State officials have committed acts of terrorism financing, but under Russia's interpretation it would be necessary for the Court to determine whether those individuals were acting in their official capacity, a question that could only be decided on the merits, even assuming the correctness of Russia's flawed interpretation.[173]

113. For all of these reasons, it is premature for the Court to address this objection at this stage.

B. Russia Mischaracterizes Ukraine's Claim Under Article 18, and Confuses the Duty to Prevent Under Article 18 with a Duty Not to Commit

114. If, however, the Court addresses Russia's objection now, it is important to clarify the nature of Ukraine's claim, which is that Russia violated its duty to prevent under

---

[171] Rules of the Court, art. 79(9).

[172] *See, e.g.*, Ukraine's Memorial, Chapter 6(A)(3) (discussing the practicable measure of securing and policing Russia's border).

[173] *See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment of 18 November 2008, I.C.J. Reports 2008*, p. 460, paras. 129–130 (deciding that an objection was not of an exclusively preliminary character because "[i]n order to be in a position to make any findings on each of these issues, the Court will need to have more elements before it").

Article 18 of the ICSFT. Ukraine claims that Russia has violated its obligation to take all practicable measures to *prevent* the commission of terrorism financing offenses (Article 18) by "any person" (Article 2). The phrase "any person" in Article 2 is used without qualification, and on its face contains no exclusion for persons that act in an official capacity. Accordingly, Russia's Article 18 duty to prevent applies to acts of terrorism financing committed by persons acting in any capacity, private or public.

115. Russia almost entirely ignores Ukraine's claim of violations of the express Article 18 duty to prevent.[174] Instead, Russia addresses a distinct argument that the ICSFT might directly impose on States an obligation not to commit terrorism financing.[175] Russia devotes dozens of pages in its Preliminary Objections to refuting such a claim. Its thesis is that the ICSFT "does not regulate the alleged responsibility of a State for *engaging* or *participating* in acts of terrorism financing."[176] According to Russia, if the Convention had been intended to directly regulate the actions of States, it would have said specifically that States "shall refrain from" or "undertake not to commit" the financing of terrorism.[177] With a further leap of logic, Russia infers that the absence of such language *also* means that the Convention's express duty to prevent cannot relate to the acts of persons exercising State authority.[178]

116. Russia thus conflates two distinct types of duty: a duty not to commit, and a duty to prevent. It is well-established in international law that *both* types of duty present a basis for a State to incur responsibility in relation to acts of public officials. The commentary to the Articles on State Responsibility, for example, highlights this distinction in explaining

---

[174] Russia also asserts that Ukraine makes this argument "for the first time in its Memorial." *See* Russia's Objections, para. 210. That is false. *See* Ukraine's Application, para. 129(d) (claiming that Russia has violated the ICSFT by failing to take practicable measures to "prevent terrorism financing offenses as defined by Article 2, committed by numerous Russian officials, organizations, and citizens").

[175] *See* Russia's Objections, Chapter 5, paras. 126–227.

[176] *Ibid.*, para. 25 (emphasis added).

[177] *Ibid.*, para. 179–180.

[178] *Ibid.*, paras. 179–180, 206–207, 213.

that individual responsibility for international crimes is complementary to States incurring responsibility in relation to such acts. The commentary notes two different ways in which such responsibility might arise: "it will often be the case that the State itself is responsible for the acts in question *or for failure to prevent or punish them*."[179]

117. The Convention Against Torture ("CAT") is a case in point. Nowhere does the CAT prescribe that States "shall refrain from" or "undertake not to commit" torture[180] — which Russia believes is the "language" that must be used for a treaty to "address[] persons whose conduct is attributable to a State."[181] Instead, the CAT (similar to the ICSFT) imposes as its principal obligation on States a duty to take "effective . . . measures to prevent acts of torture."[182] As the Committee Against Torture has explained, "States parties [to the CAT] are obligated to adopt effective measures to *prevent public authorities and other persons acting in an official capacity* from directly committing . . . acts of torture."[183] The CAT thus illustrates how a treaty may impose a duty to prevent State actors from committing unlawful acts, without imposing on the State itself an express duty "to refrain from" or "not to commit" — words that Russia incorrectly contends are required for a treaty to reach State actors.

---

[179] Report of the International Law Commission on the Work of Its Fifty-Third Session, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, 53rd Session, U.N. Doc. No. A/56/10 (23 April–1 June, 2 July–10 August 2001), art. 42 & commentary, pp. 117–119, para. 5, *reproduced in* YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 2001, vol. II, art. 58 & commentary, para. 3 (emphasis added) [hereinafter Draft Articles on Responsibility of States] (Ukraine's Memorial, Annex 279).

[180] *See* Marko Milanovic, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY (2011), p. 212 (observing that the CAT "does not expressly say that the state as such has the negative obligation not to torture individuals") (Ukraine's Written Statement, Annex 75).

[181] Russia's Objections, para. 213.

[182] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 U.N.T.S. 85, art. 2(1) [hereinafter Convention against Torture].

[183] Committee against Torture, *General Comment No. 2 on Implementation of Article 2 by States Parties*, CAT Doc. No. CAT/C/GC/2 (24 January 2008), para. 17 (emphasis added) (Ukraine's Memorial, Annex 286).

118. A duty to prevent public officials from engaging in certain acts, and a duty not to undertake such acts, can produce responsibility for the State under similar circumstances. If a State instructs one of its officials to commit the proscribed act, it would violate either type of duty: the duty not to commit because the official's unlawful act would be attributable to the State;[184] and the duty to prevent because the State would of course not be taking measures to prevent the unlawful act'. At the same time, a duty to prevent and a duty not to commit are not coterminous, and can lead to different outcomes. For example, under a duty not to commit, a State would be responsible for wrongful acts of a State official even if those acts are unauthorized or contravene instructions.[185] By contrast, whether an unauthorized act by a State official results in the State being responsible for breaching a duty to prevent depends upon the adequacy of the preventive measures taken, even if ultimately unsuccessful.[186]

119. Russia's conflation of distinct concepts in international law is central to its objection: its argument is wholly dependent on the false premise that the duty to prevent and the duty not to commit are identical. There is no question that Article 18 imposes on States a duty to prevent all acts of terrorism financing committed in violation of Article 2. Nor is there any question that, reading Articles 18 and 2 together, this obligation applies to acts of terrorism financing committed by "any person." But Russia offers no interpretation, grounded in accepted methods of treaty interpretation, that explains why this duty to prevent should

---

[184] *See generally* Draft Articles on Responsibility of States, Chapter II, arts. 4–11 (Ukraine's Memorial, Annex 279).

[185] *See ibid.*, art. 7.

[186] Similarly, a failed State with limited capacity might be unable to prevent all State officials from committing wrongful acts, which would lead to breach of an obligation not to commit such acts, but not necessarily of a duty to prevent them. *Compare* Chiara Giorgetti, A PRINCIPLED APPROACH TO STATE FAILURE: INTERNATIONAL COMMUNITY ACTIONS IN EMERGENCY SITUATIONS (2010), p. 69 note 73 ("State inability or failure is not an accepted circumstance that precludes wrongfulness in international law.") (Ukraine's Written Statement, Annex 73), *with* Federica I. Paddeu, *Use of Force against Non-State Actors and the Circumstance Precluding Wrongfulness of Self-Defence*, Leiden Journal of International Law, vol. 30 (2017), p. 109 note 98 ("Due diligence obligations are obligations of means, not of result, and are premised on the capacity of the State, in the circumstances, to engage in that conduct.") (Ukraine's Written Statement, Annex 78).

exclude terrorism financing offences committed by those persons the State can most easily prevent from committing such illegal acts, namely its own public officials.

120. Instead, Russia's thesis is that because "State responsibility" is allegedly not covered by the Convention, an implied exception for "official persons" must be read into the plain meaning of Articles 18 and 2. But vague generalizations about "State responsibility" being beyond the treaty's scope do not provide any basis to defy the clear operation of the treaty's text. Rather, Articles 18 and 2 should be interpreted on their own terms, according to their ordinary meaning, in good faith and in context, and consistent with the Convention's object and purpose. As discussed below, Ukraine's claims fall squarely within those provisions.

C. Ukraine's Claim that Russia Has Failed to Take Practicable Measures to Prevent Acts of Terrorism Financing by Any Person Falls Within Article 18 of the ICSFT

1. Article 18 Imposes a Duty on States to Prevent Any Act of Terrorism Financing Covered by Article 2

121. The scope of the Article 18 duty to prevent is apparent from the provision's ordinary meaning. Article 18 defines *what* States are required to prevent: "the commission of" the "offences set forth in article 2." And it defines *how* States are required to prevent them: "by taking all practicable measures."[187]

122. The obligation to take "all practicable measures" is broad and expansive. Russia does not meaningfully contest this point. Ukraine's Memorial described several measures Russia failed to take, and Russia does not contend that any of them fall outside the scope of the term "practicable measures." Nonetheless, Russia does suggest in passing that the scope of Article 18 may be more limited than the plain terms of its text indicate. At times,

[187] ICSFT, art. 18(1).

Russia ascribes to the ICSFT the "limited character [of a] law enforcement instrument,"[188] and refers to the practicable measures required by Article 18 as simply encompassing "law enforcement measures, financial regulations, or exchange of information procedures."[189] But the treaty does not say "all practicable law enforcement measures." Russia would turn Article 18 into a passive obligation, where simply adopting certain law enforcement measures on paper would be sufficient to discharge a State's duties under the ICSFT. Such a limited interpretation contravenes the language of the treaty itself.

123. According to its plain meaning, "taking all practicable measures" means taking every feasible measure to prevent terrorism financing, law enforcement or otherwise. If a measure is feasible, and if it has the capacity to prevent the commission of Article 2 offenses, the State is obligated to take the measure. This reading is further supported by the structure of Article 18, which goes on to describe various measures that the obligation "*includ[es].*"[190] To say that the obligation "includes" undertaking certain measures signifies a non-exhaustive list, context which underscores the broad nature of the obligation to take all measures that are practicable.

124. The ICSFT's preamble provides further relevant context in interpreting Article 18. The preamble underscores the breadth of Article 18's obligation to prevent, by stressing the need to adopt "effective measures for the prevention of the financing of terrorism, *as well as* for its suppression through the prosecution and punishment of its perpetration."[191] While law enforcement actions are of obvious importance in the ICSFT, its preamble makes clear that obligations concerning investigating and prosecuting terrorism financing offenses exist alongside a broader set of obligations requiring proactive measures to prevent those offenses

---

[188] Russia's Objections, para. 135.

[189] *Ibid.*, para. 127 ("The ICSFT is thus a law enforcement instrument which is not concerned with State responsibility for (allegedly) financing acts of terrorism.").

[190] ICSFT, art. 18(1).

[191] *Ibid.*, preamble.

from occurring at all. Numerous provisions of the ICSFT describe specific law enforcement actions the parties to the Convention are obligated to undertake.[192] Article 18 complements those measures by focusing on the broader goal — prevention of terrorism financing — and would serve no purpose if the scope of that duty to prevent were already covered by the ICSFT's separate suppression, investigation, prosecution, and punishment provisions.

125. Notwithstanding its occasional attempts to minimize the scope of Article 18, Russia does not argue that the measures highlighted in Ukraine's Memorial were not practicable, or would not have been effective at preventing the commission of terrorism financing offences. In its Memorial, Ukraine identified several practicable measures that Russia could have taken, but did not take, to prevent terrorism financing by any person. Russia does not dispute that all of the following measures would have been "practicable" and therefore would fall under the measures required by Article 18:

- First, Russia has failed to take the most obvious and practicable measure of preventing terrorism financing within its territory: instructing its own officials not to finance terrorism.[193]

- Second, Russia has failed to take the practicable measure of policing its border to ensure weapons and other funds provided by any person, public or private, do not enter Ukrainian territory and reach illegal armed groups.[194]

- Third, Russia has failed to monitor and disrupt fundraising networks within its territory, including but not limited to financial networks associated with DPR, LPR, and other illegal armed groups engaged in terrorism in Ukraine. [195]

- Fourth, Russia has failed to discourage terrorism financing by third parties. A State that permits terrorism financing by public officials cannot credibly deter

[192] *See, e.g.*, *ibid.*, arts. 8–12.

[193] *See* Ukraine's Memorial, paras. 299–308.

[194] *See ibid.*, paras. 312–315.

[195] *See ibid.*, paras. 316–318.

> private persons in its territory from financing terrorism, but rather sends the message that such activities are acceptable.[196]

126. Russia does not dispute that each of these measures is "practicable" within the meaning of Article 18. Nor does Russia challenge the Convention's application to Ukraine's claims insofar as they relate to Russia's duty to prevent acts of terrorism by private persons, which represents an important facet of Ukraine's claim.[197] All Russia meaningfully contests is the scope of what must be prevented, *i.e.*, "the offences set forth in article 2." Specifically, Russia denies that persons acting in an official capacity qualify as "any person" subject to the Article 2 offence. As set forth below, however, any person means *any* person, including those persons most directly within the State's power to prevent — namely those persons who hold an official government position. Nothing in the ICSFT absolves Russia of its responsibility to take all practicable measures to prevent terrorism financing by such persons.

2. An Offence Under Article 2 of the Convention May Be Committed by "Any Person," Without Regard to that Person's Public or Private Status

127. Russia's main effort to limit the scope of the duty to prevent is to exclude from Article 18's ambit acts of terrorism financing committed by a subset of persons. By its plain terms, Article 18 requires Russia to take practicable measures to prevent the commission of "offences set forth in article 2."[198] Article 2 offenses, in turn, may be committed by "[a]ny person."[199] Without any textual analysis or application of the principles of treaty interpretation, however, Russia asserts that "[w]hen the ICSFT speaks of 'persons' it means *private* persons only."[200] This is pure *ipse dixit* — without any basis, Russia simply inserts into Article 2 a word, "private," that is not there. Under settled principles of treaty

---

[196] *See ibid.*, paras. 309–311.

[197] *See ibid.*, paras. 200, 270–271, 274, 277–278, 297–298.

[198] ICSFT, art. 18(1).

[199] *Ibid.*, art. 2.

[200] Russia's Objections, para. 212 (emphasis added).

interpretation, "any person" means exactly that, "any person," including persons who hold public positions and may or may not be acting in an official capacity.

128. In its attempt to justify its position, Russia is compelled resort to a methodologically infirm approach to treaty interpretation. Russia attempts to invert established interpretive principles, skipping over the primary means of interpretation under the Vienna Convention on the Law of Treaties ("Vienna Convention"). Russia does not even attempt a textual analysis of the phrase. Instead, it focuses primarily on the *travaux préparatoires* and other supplemental sources to argue that the general concept of "State responsibility" was not contemplated by the drafters.[201] Yet Russia, in addition to its failure to grapple with the treaty's express duty to prevent, offers no analysis of the ordinary meaning of the term "any person," read in good faith and in its context, and in light of the ICSFT's object and purpose.[202] Russia's arguments relying on supplemental sources of interpretation also fail on their own terms, and are addressed further below. An appropriate consideration of text, context, object and purpose, relevant rules of international law applicable between the parties, and, if needed, various supplementary means of interpretation, including the *travaux préparatoires*, all demonstrate that Russia's duty to prevent acts of terrorism financing includes preventing acts committed by official persons.

a. Ukraine's Interpretation Flows from the Ordinary Meaning of the Treaty's Terms, Read in Good Faith

129. Article 2, which defines the offenses States have a duty to prevent, provides that "[a]ny person" may commit an offense.[203] The ordinary meaning of the term "any person" is broad and contains no exceptions: "any" means "any," a word that describes members of "a

---

[201] *See ibid.*, paras. 136–174, 185–188.

[202] As noted above, Russia offers one conclusory statement regarding the textual interpretation of the term "any person": "[w]hen the ICSFT speaks of 'persons' it means private persons only." *Ibid.*, para. 212.

[203] ICSFT, art. 2.

particular group or class *without distinction or limitation*."[204] The French text of the ICSFT, which uses the phrase "*toute personne*," is equally broad. A reference to "*toute*" personne, without distinction or limitation, covers all persons, whether they act in a private or public capacity. Russia's interpretation does violence to the plain meaning of the text, by reading "any person" to mean only *some* persons. Such an interpretation is transparently flawed.

130. The leading commentaries on the ICSFT reflect the ordinary meaning of "any person," as referring to all persons without exclusion. Anthony Aust explains that "any person" in the ICSFT "encompasses anyone, whether private individuals or public or government officials."[205] Marja Lehto, the head of Finland's delegation during the negotiation of the ICSFT, agrees that textually, the phrase "any person" would "apply to any natural persons with no distinction between representatives and agents of a state, on the one hand, and private individuals, on the other."[206] Russia does not address these commentaries.[207]

131. As noted by Aust,[208] previous counter-terrorism conventions have been interpreted consistent with Ukraine's interpretation of the phrase "any person." The

---

[204] Oxford English Dictionary, *any* (online ed., 2018), *accessed at* https://bit.ly/2EQcOoN (emphasis added).

[205] Anthony Aust, *Counter-Terrorism — A New Approach: The International Convention for the Suppression of the Financing of Terrorism*, Max Planck Yearbook of United Nations Law, Vol. 5, (2001), p. 294 [hereinafter Aust] (Ukraine's Memorial, Annex 485).

[206] Marja Lehto, INDIRECT RESPONSIBILITY FOR TERRORIST ACTS (2009), p. 17 [hereinafter Lehto] (Ukraine's Memorial, Annex 490).

[207] Instead, the sole support Russia offers for its interpretation is an article by a practitioner that does not even address the meaning of "any person," but simply notes that the Convention focuses on acts committed by persons ("visent plutôt les actes commis par des 'personnes'"). *See* Yas Banifatemi, *La Lutte Contre le Financement du Terrorisme International*, Annuaire Français de Droit International, Vol. 48 (2002), p. 107 (as cited in Russia's Objections, para. 212 note 252).

[208] Aust, p. 294 (Ukraine's Memorial, Annex 485).

consistent practice of States in using the phrase "any person" in other treaties to include public officials further illustrates that this is the ordinary meaning of the term.[209]

132. For example, the drafters of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (the "Montreal Convention")[210] expressly recognized that the offenses defined in Article 1 of that Convention, applicable to "[a]ny person,"[211] could be "perpetrated by an employee of a State."[212] As the United Kingdom has previously explained to this Court, "State agents committing offences under the Montreal Convention" are encompassed by the Convention.[213]

133. The *travaux préparatoires* of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation also reflect the common view among treaty negotiators that the phrase "[a]ny person" encompasses persons acting in an official capacity.[214] The Report of the Ad Hoc Preparatory Committee of that treaty discusses a Kuwaiti proposal for a provision expressly providing that the Convention would apply to

---

[209] *See Kasikili/Sedudu Island (Botswana/Namibia), Judgment of 13 December 1999, I.C.J. Reports 1999*, pp. 1062–63, para. 27 (looking to international legal usage to determine the ordinary meaning of words in a treaty).

[210] Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 23 September 1971, 974 U.N.T.S. 177 [hereinafter Montreal Convention].

[211] *Ibid.*, art. 1.

[212] International Civil Aviation Organization, Minutes, International Conference on Air Law, Montreal, September 1971, Fourth Meeting of the Commission of the Whole, contained in Vol. 1 Doc 9081-LC/170-1 (1971), p. 46, paras. 38–39 (Ukraine's Written Statement, Annex 8). Similarly, a United States criminal statute implementing the Convention "appl[ies] to governmental actors . . . as well as to private persons and groups." Memorandum Opinion for the Deputy Attorney General of the United States, *United States Assistance to Countries that Shoot Down Civil Aircraft Involved in Drug Trafficking* (14 July 1994), p. 153 (Ukraine's Written Statement, Annex 55).

[213] *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom)*, Counter-Memorial of the United Kingdom, p. 34, para. 3.38.

[214] Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 10 March 1992, 1678 U.N.T.S. 221, art. 3.

persons acting "on behalf of a Government."[215] The Report explains that "most" delegations considered that the Convention already covered this situation, as "the opening phrase of paragraph 1 clearly referred to 'any person' without qualification and that this applied to any person whether such person was acting on his or her own, or on behalf of another person or entity."[216] In fact, several delegations were concerned that "an express reference to Governments" in the Maritime Navigation Convention could complicate the interpretation of "any person" in the Montreal Convention, leading to the incorrect inference that the Montreal Convention did not address public officials.[217] Thus, numerous delegations "questioned the need for [the] specific provision" proposed by Kuwait, and the proposal was not accepted.[218]

134. The International Convention Against the Taking of Hostages, which likewise addresses offences committed by "[a]ny person,"[219] has been interpreted the same way. Professor Ben Saul's commentary for the United Nations explains that it is "an offence for 'any' person to commit hostage-taking under article 1 of the Convention and there is no exception for any actor (State or non-State)."[220]

---

[215] International Maritime Organization, *Report of the Ad Hoc Preparatory Committee on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, IMO Doc. PCUA 2/5 (18–22 May 1987), p. 12, para. 65 (Ukraine's Written Statement, Annex 9).

[216] *Ibid.*, p. 12, para. 66.

[217] *Ibid.*

[218] *Ibid.*; *see also* Glen Plant, *The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, International Comparative Law Quarterly, Vol. 39 (1990), p. 33 ("Before the diplomatic conference the Kuwaiti delegation suggested an alternative preambular reference to State-sponsored acts, but this was also resisted on the ground that it was unnecessary, since the acts covered by the Convention are expressed to be acts committed by 'any person,' and this includes, as a matter of course, acts of a person sponsored by a State.") (Ukraine's Written Statement, Annex 70).

[219] International Convention Against the Taking of Hostages, 17 December 1979, 1316 U.N.T.S. 205, art. 1.

[220] Ben Saul, *International Convention Against the Taking of Hostages*, United Nations Audiovisual Library of International Law (2014), p. 3 (Ukraine's Memorial, Annex 493); *see also R., ex parte Pinochet v. Bartle and ors,* [2000] United Kingdom House of Lords, Vol. 17 (24 March 1999) (proceeding on the assumption that the Hostage Taking Convention, like the Convention against Torture, covers the acts of State officials) (Ukraine's Written Statement, Annex 56).

135. The same phrase, "any person," is used to define offences under the International Convention for the Suppression of Terrorist Bombings, and the International Convention for the Suppression of Acts of Nuclear Terrorism. Both of these treaties explicitly exclude acts "undertaken by military forces of a State in the exercise of their official duties."[221] If "any person" already excluded State officials, then any person belonging to the "military forces of a State" would not come within the scope of the Convention to begin with. A further exclusion of such persons would be redundant and without purpose. Interpreting the "military force" exclusion according to the principle of effectiveness, the phrase "any person" in these treaties cannot be read to include an implicit exclusion for all State officials.[222] This point was emphasized by the Swiss government in its ratification of the Bombing Convention, considering it "clear" that some State officials, such as members of an intelligence service acting in peacetime, could be prosecuted for offences under the Convention.[223]

136. Thus, for the drafters of the ICSFT, there was a readily available clause that could have been inserted to exclude some or all of the government officials covered by "any person," but they chose not to use one. Notably, many of the persons responsible for acts of

---

[221] International Convention for the Suppression of Terrorist Bombings, 15 December 1997, 2149 U.N.T.S. 256, arts. 2, 19; International Convention for the Suppression of Acts of Nuclear Terrorism, 13 April 2006, 2445 U.N.T.S. 89, arts. 2, 4.

[222] *See 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, I.C.J. Reports 2016*, p. 120, para. 41. ("[T]he interpretation of a treaty should seek to give effect to every term in that treaty," such "that no provision should be interpreted in a way that renders it devoid of purport or effect.").

[223] Objet du Conseil Fédéral 02.052, *Conventions des Nations Unies pour la répression du financement du terrorisme et des attentats terroristes à l'explosif, Ratification*: *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*, Feuille fédérale n° 32 du 13 août 2002 (26 Juin 2002), pp. 5053–5054 ("Il en ressort clairement que les activités de forces armées ou de civils au service des forces armées (p. ex. en tant que membres d'un service de renseignement militaire) qui ne sont pas jugées en fonction du droit international humanitaire peuvent, le cas échéant, donner lieu à des poursuites pénales, notamment s'ils violent des dispositions légales en temps de paix.") (Ukraine's Written Statement, Annex 60).

terrorism financing in Ukraine are a part of the Russian military.[224] Russia seeks to exclude them from the Convention even though the Convention *does not include* the "military forces" exclusion used in other treaties.

137. Practice under the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons shows that this treaty similarly encompasses offenses perpetrated by State officials.[225] In observations transmitted to the U.N. General Assembly, the Republic of Korea alleged that persons acting "under instructions of North Korean authorities," including members of the North Korean Army, had set off a bomb, injuring several government officials.[226] The Republic of Korea asserted that this and other similar acts, where the perpetrators acted on behalf of a State, constituted offences under the Convention.[227]

138. Even beyond the context of these suppression treaties, there is widespread international practice treating public officials as belonging to the category of "persons." For example, the Convention against Torture, the United Nations Convention against Corruption,

---

[224] *See, e.g.*, Ukraine's Memorial, paras. 133, 156, 161, 275–276, 287, 289, 291.

[225] The Convention is a suppression convention (and one of the conventions listed as an annex to the ICSFT), but it does not use the term "any person" in the same manner in defining the principal offense; instead, it creates a generally applicable offense, without exception for any class of potential offender. *See* Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, 14 December 1973, 1035 U.N.T.S. 167, art. 2.

[226] C*ommunications Received from the Republic of Korea, dated 25 November 1983: Observations on the Question of Measures to Prevent International Terrorism*, Addendum to the Report of the Secretary General, U.N. Doc. A/38/355/Add.2 (29 November 1983), paras. 4–5 (Ukraine's Written Statement, Annex 10).

[227] *See ibid.*, para. 7; *see also* Kimberley N. Trapp, STATE RESPONSIBILITY FOR INTERNATIONAL TERRORISM (2011), p. 161 (Ukraine's Written Statement, Annex 74).

and the Articles on State Responsibility all refer to individuals exercising official authority as "persons."[228]

139. The international legal usage of the phrase "any person" simply confirms what is common sense. Any speaker would understand that "any" means *any*, and "toute" means *toute*, without qualification. Nor has Russia identified a single example in which the phrase "any person" in a treaty has been interpreted to implicitly exclude State officials.

140. Instead, Russia simply warns that according "any person" its ordinary meaning would be "unprecedented and untenable," because "it would necessarily apply to a whole series of suppression conventions with compromissory clauses that address private actors."[229] But it is Russia that takes an unprecedented position in seeking to create an implicit exception to the broad and unqualified phrase "any person" in Article 2 of the ICSFT. As just illustrated, the phrase "any person" is not used to "address private actors" only, and Russia offers no evidence to support that view. Russia specifically identifies the Bombing Convention and the Nuclear Terrorism Convention as treaties where it would be problematic to apply the offences to State officials.[230] But the drafters of these treaties already confronted that issue, and crafted a *partial* exclusion for certain State officials (members of military forces). Russia's reading would give those exclusions no purpose, contradicting the principle of effectiveness in treaty interpretation.

141. The well-established ordinary meaning of "any person" is further bolstered by the need to interpret the language of treaties in good faith.[231] Russia's interpretation is in conflict with the text itself, adding the word "private" to qualify a phrase ("any person") that

---

[228] Convention against Torture, art. 1 (addressing torture by a "person acting in an official capacity"); United Nations Convention against Corruption, 31 October 2003, 2349 U.N.T.S. 41, art. 2 (defining a public official as "any person" holding State office); Draft Articles on Responsibility of States, arts. 4–5, 7–9 (referring to individuals exercising official authority as "persons") (Ukraine's Memorial, Annex 279).

[229] Russia's Objections, para. 225.

[230] *See ibid.*, para. 225 note 264.

[231] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, art. 31(1) [hereinafter VCLT].

on its face has no qualification. It would be especially odd to read such an implicit qualification into the words of the treaty so as to *allow State officials to finance terrorism*. It cannot be a good faith interpretation of the treaty's text to read an implicit exception into the phrase "any person," in order to excuse States from their obligations to prevent State officials from financing terrorism, to investigate terrorism financing by State officials, and to prosecute State officials that finance terrorism.

b. Reading "Any Person" in Context Further Supports Its Ordinary Meaning as Containing No Implicit Exception for Public Officials

142. The context of the phrase "any person" further indicates that the term refers to all types of persons, whether acting in a private or public capacity. The phrase "any person" appears at the beginning of Article 2(1) and defines who is capable of committing a terrorism financing offence. Later in that same provision, Article 2(1)(b) creates a catch-all definition of terrorist acts, and requires that such acts be intended to cause death or harm to "a civilian, or [] *any other person* not taking an active part in the hostilities in a situation of armed conflict."[232] The phrase "any other person" in this clause is distinguished from "civilians," plainly referring to members of a State's military. Indeed, the *travaux préparatoires* confirm that the phrase "any other person not taking an active part in the hostilities" was "intended to cover . . . off-duty military forces of a State."[233] The use of the phrase "any other person" in Article 2(1)(b) to include State officials reinforces an interpretation of the similar phrase "any person" in Article 2(1) that also encompasses State officials.[234]

---

[232] ICSFT, art. 2(1)(b) (emphasis added).

[233] *Measures to Eliminate International Terrorism, dated 26 October 1999*, Annex III to the Report of the Working Group, U.N. Doc A/C.6/54/L.2 (26 October 1999), para. 86 [hereinafter Report of the Working Group, U.N. Doc. A/C.6/54/L.2] (Ukraine's Memorial, Annex 277).

[234] ICSFT, art. 2(1); *see* Richard Gardiner, TREATY INTERPRETATION (2d ed., 2015), p. 209 ("It is a general principle in interpretation of a well-drafted document to expect the same term to have the same meaning throughout a single instrument.") (Ukraine's Written Statement, Annex 85).

143. Article 20 provides additional context that supports Ukraine's plain text reading of "any person." That provision requires States Parties to act consistently with the principles of sovereignty, territorial integrity, and non-intervention.[235] A State that declines to prevent its own officials from funding terrorist acts in the territory of other States does not act consistently with those principles. To be clear, Ukraine does not (as Russia suggests) claim that Russia has breached Article 20; it simply observes that the principles reflected in Article 20 are consistent with a straightforward interpretation of the text of Articles 18 and 2. This Court has previously considered such provisions as "throw[ing] light on the interpretation of the other Treaty provisions," even if not capable of being the basis for a claim "taken in isolation."[236]

144. Russia disregards the most relevant context, described above, for interpreting the phrase "any person" in Article 2. Instead it makes a simplistic argument about the title of the treaty, suggesting that a treaty with the word "suppression" in its name must be concerned solely with suppression of the acts of private persons. There is no reason why the concept of "suppression" would not include suppressing unlawful acts by "any person," State officials and private persons alike. Such an understanding is clear from the uniform practice noted above, in which the phrase "any person" in "suppression" treaties is understood to include State officials.[237] In any case, as described more fully below, the preamble to the ICSFT — which is

---

[235] ICSFT, art. 20.

[236] *Oil Platforms, Judgment of 12 December 1996,* para. 31. Because Article 20 is relevant only as context, and as just one among many reasons supporting Ukraine's interpretation, Russia's reliance on *Equatorial Guinea v. France* is misplaced. Russia's Objections, paras. 170–174. There the Court rejected a claim that was founded wholly on a provision like Article 20, not the use of such a provision simply as context informing the interpretation of other parts of the treaty. *Immunities and Criminal Proceedings, Judgment of 6 June 2018*, paras. 90–102.

[237] *See supra*, paras. 131–138. Moreover, Russia's argument that Article 4 is "typical for suppression conventions dealing with . . . crimes committed by private individuals," in that it "deals with the relationship of a State party with private individuals," is equally unpersuasive. Russia's Objections, paras. 145–147. An obligation to criminalize acts of terrorism financing is not mutually exclusive with broader duties to *prevent* such acts.

arguably more relevant than its title[238] — shows that the Convention is not solely concerned with suppression. It is concerned with "the *prevention* of the financing of terrorism, *as well as* for its suppression through the prosecution and punishment of its perpetrators."[239]

c. Interpreting "Any Person" According to Its Ordinary Meaning Best Advances the Object and Purpose of the ICSFT

145. Ukraine's interpretation of "any person" as not implicitly excluding State officials is also the interpretation most faithful to the object and purpose of the ICSFT, as reflected in its preamble.[240] The preamble demonstrates that States Parties considered terrorism financing "a matter of grave concern," and they expressed an "urgent need to enhance international cooperation among States in devising and adopting effective measures for the prevention of the financing of terrorism."[241]

146. In announcing this purpose, the States Parties plainly understood that terrorism financing by State actors constituted an important facet of the problem addressed by the Convention. The preamble demonstrates that the ICSFT was driven, in part, by the General Assembly's calls to action in Resolution 51/210 and the U.N. Declaration on Measures to Eliminate International Terrorism.[242] Both of these instruments address all forms of terrorism financing, expressly including the financing of terrorism by State actors.[243] The

---

[238] The Vienna Convention on the Law of Treaties expressly refers to a treaty's preamble as part of the context relevant to treaty interpretation, while not mentioning a treaty's title. *See* VCLT, art. 31(2).

[239] ICSFT, preamble (emphasis added).

[240] Russia acknowledges that "the Court has deduced a treaty's purpose from its preamble." Russia's Objections, para. 134 (citing *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, *Judgment of 17 December 2002, I.C.J. Reports 2002*, p. 652, para. 51).

[241] ICSFT, preamble.

[242] *Ibid.*

[243] U.N. General Assembly Resolution 51/210, U.N. Doc. A/RES/51/210, *Measures to Eliminate International Terrorism* (17 December 1996) (Ukraine's Memorial, Annex 278); U.N. General Assembly Resolution 49/60, U.N. Doc. A/RES/49/60, *Measures to Eliminate International Terrorism* (9 December 1994) (annexing *Declaration on Measures to Eliminate International Terrorism*) (Ukraine's Memorial, Annex 273).

international community continues to focus on this important aspect of the problem; for example, the Financial Action Task Force ("FATF") treats "politically exposed persons," *i.e.*, individuals "entrusted with a prominent public function," as a particular risk for "conducting activit[ies] related to terrorist financing."[244] The FATF has also, in a report to which Russia contributed, observed that "the funding of terrorism, or the resourcing of a terrorist entity, by any state, is incompatible with adherence to FATF standards and principles, as well as the International Convention for the Suppression of the Financing of Terrorism," and that State sponsorship of terrorism "is a longstanding terrorist financing threat" that "fundamentally undermines" international efforts to disrupt terrorism financing.[245]

147. Thus, it would have been remarkable for States Parties, well aware that the involvement of State actors was a significant part of the problem of terrorism financing, to have adopted a treaty that entirely disregarded the issue. It would be especially remarkable to read an *implicit* limitation into the phrase "any person," and thus an *implicit* limitation on the scope of the Article 18 duty to prevent, in order to preclude the normal operation of the treaty's language from addressing terrorism financing by State officials, a well-understood and recognized facet of the problem.[246]

148. Russia's artificial narrowing of "any person" in Article 2 of the ICSFT would also threaten the objectives of the Convention well beyond limiting the Article 18 duty to prevent. The offences under Article 2 are the focal point for the Convention's other core

---

[244] Financial Action Task Force, POLITICALLY EXPOSED PERSONS (RECOMMENDATIONS 12 AND 22) (June 2013), p. 3, para. 1 (Ukraine's Written Statement, Annex 5).

[245] Financial Action Task Force, EMERGING TERRORIST FINANCING RISKS (October 2015), p. 7 note 1, p. 20 (Ukraine's Written Statement, Annex 6).

[246] Russia misunderstands Ukraine's argument, wrongly accusing it of attempting to "convert such resolutions into binding treaties in their *entirety*." Russia's Objections, para. 139 (emphasis added). These U.N. instruments are of course not directly incorporated into the Convention. Rather, the preamble's invocation of these U.N. instruments underscores that when the drafters of the treaty set out to address the urgent problem of terrorism financing, they were well aware that this problem included financing by State actors. *See also infra*, para. 165 (discussing French ratification materials addressing both the public and private aspects of the terrorism financing problem).

obligations, such as the obligations to investigate and prosecute or extradite under Articles 9, 10, 11, and 12. If Russia's interpretation of "any person" were correct, States would be under no obligation even to prosecute or extradite public officials that commit terrorism financing offences. Russia appears to recognize that this would be an absurd result. It attempts to defuse the natural implication of its argument by asserting that its interpretation of "any person" as limited to "private persons" is "especially the case with Article 18."[247] But the scope of Articles 9 through 12 (among others) depends on the scope of "the offences set forth in article 2," no less than Article 18 does.[248] Rather than accept the conclusion that the phrase "any person" does not exclude public officials, Russia attempts to avoid some of the implausible results of its approach by inventing a distinction among different articles of the ICSFT that has no foundation in its text.

149. Finally and significantly, Russia concedes that "States are prohibited under general international law from financing terrorism."[249] That recognition suggests there would be even less reason to limit Article 2 offences to solely private persons, so as to absolve States

---

[247] Russia's Objections, para. 212.

[248] *See, e.g.*, ICSFT, art. 9 ("Upon receiving information that a person who has committed or who is alleged to have committed an offence set forth in article 2 may be present in its territory, the State Party concerned shall take such measures as may be necessary under its domestic law to investigate the facts contained in the information."); *ibid.*, art. 10 ("The State Party in the territory of which the alleged offender is present shall, in cases to which article 7 applies [which pertains to establishing domestic jurisdiction over offenses set forth in article 2], if it does not extradite that person, be obliged . . . to submit the case without undue delay to its competent authorities for the purpose of prosecution . . . in accordance with the laws of that State."); *ibid.*, art. 11 ("The offences set forth in article 2 shall be deemed to be included as extraditable offences in any extradition treaty existing between any of the States Parties before the entry into force of this Convention."); *ibid.*, art. 12 ("States Parties shall afford one another the greatest measure of assistance in connection with criminal investigations or criminal or extradition proceedings in respect of the offences set forth in article 2, including assistance in obtaining evidence in their possession necessary for the proceedings."). *See also ibid.*, art. 8(1)–8(2) ("1. Each State Party shall take appropriate measures, in accordance with its domestic legal principles, for the identification, detection and freezing or seizure of any funds used or allocated for the purpose of committing the offences set forth in article 2 as well as the proceeds derived from such offences, for purposes of possible forfeiture. 2. Each State Party shall take appropriate measures, in accordance with its domestic legal principles, for the forfeiture of funds used or allocated for the purpose of committing the offences set forth in article 2 and the proceeds derived from such offences.").

[249] Russia's Objections, para. 227.

of the duty to prevent and punish acts of terrorism financing by State officials. Russia suggests that such a limitation exists simply to avoid dispute resolution on the matter, subject to Article 24(1).[250] But this would not have been a compelling reason to (implicitly) exclude State actors from the ICSFT, as the treaty permitted States to opt out of Article 24(1) dispute resolution.

d. Ukraine's Interpretation Is Supported by Relevant Rules of International Law Applicable Between the Parties

150. The Vienna Convention calls for the consideration of relevant rules of international law between parties when interpreting a treaty.[251] U.N. Security Council Resolution 1373 ("UNSCR 1373") is the most relevant rule of international law applicable to both Ukraine and Russia (and every other member of the United Nations) concerning the ICSFT's obligation to prevent terrorism financing by any person. UNSCR 1373 requires States to *"prevent and suppress* the financing of terrorist attacks," and to "prohibit their *nationals* or *any persons and entities* within their territories from making any funds, financial assets or economic resources or financial or other related services available" for terrorism financing.[252]

151. Russia contends that the duty to prevent in UNSCR 1373 addresses only the acts of private individuals, and that State financing of terrorism is addressed by a separate duty to "refrain."[253] But the duties to *prevent* and *refrain* present inherently distinct obligations that can both address State actors, and the U.N. Security Council has not followed Russia's bifurcated approach of treating one as focused exclusively on private actors, and exclusively on public. In 2005, the Security Council unanimously, and with Russia's support, expressed concern at "evidence pointing at the involvement of . . . Syrian officials in" the

---

[250] *See ibid.*, para. 129.

[251] VCLT, art. 31(3)(c).

[252] U.N. Security Council Resolution 1373, U.N. Doc. S/RES/1373 (28 September 2001) (emphasis added).

[253] Russia's Objections, para. 183.

terrorist bombing of Lebanese Prime minister Rafiq Hariri.[254] The Security Council "determine[d] that the involvement of any State in this terrorist act would constitute a serious violation by that State of its obligations to work to *prevent and refrain* from supporting terrorism, in accordance in particular with [Resolutions 1373 and 1566]."[255] Thus, the Council understood that the obligation to "prevent" acts of terrorism financing in UNSCR 1373, and not just the obligation to "refrain," extends to the acts of public officials.[256] This understanding is consistent with Ukraine's interpretation of the duty under Article 18 to *prevent* acts of terrorism financing by *any* person, without qualification.

* * *

152. When interpreted pursuant to the general means of interpretation prescribed by Article 31 of the Vienna Convention, the correct interpretation of the phrase "any person" is clear and unambiguous: "any person" refers to *all* persons, without limitation or qualification, and without any implicit exclusion for persons acting in an official capacity.

3. Supplementary Means of Interpretation Confirm that the Duty to Prevent Acts of Terrorist Financing Committed by "Any Person" Includes Acts Committed by Persons Acting in an Official Capacity

153. Disregarding settled principles of treaty interpretation, Russia avoids discussing the ordinary meaning of the phrase "any person," read in good faith and in context, and in light of the object and purpose of the Convention, as required by Article 31 of the Vienna Convention. Instead, Russia proceeds directly to negotiating and ratification histories, which are relevant as supplementary sources of interpretation only where the meaning of the text is

---

[254] U.N. Security Council Resolution 1636, U.N. Doc. S/RES/1636 (31 October 2005).

[255] *Ibid.* (emphasis added); *see also* U.N. Security Council Resolution 1373, U.N. Doc. S/RES/1373 (28 September 2001) (deciding that "all States shall" "[p]revent and suppress the financing of terrorist acts," and "[p]revent those who finance . . . terrorist acts from using their respective territories for those purposes against other States or their citizens").

[256] Russia implies that reading the terms "prevent" and "refrain" this way would render them superfluous. Russia's Objections, para. 183. This is not the case; the obligation to *refrain* encompasses an affirmative obligation to "suppress[] recruitment of members of terrorist groups." This obligation is distinct from the duty to "prevent and suppress the financing of terrorist acts" under the Resolution. U.N. Security Council Resolution 1373, U.N. Doc. S/RES/1373 (28 September 2001).

ambiguous or manifestly absurd. Russia's approach is flawed. The scope of Russia's duty to prevent under Article 18, and the meaning of "any person" under Article 2, are not ambiguous, and it is not manifestly absurd to require States to prevent acts of terrorism financing by all persons in whatever capacity they act. To the contrary, it is *Russia's* attempt to re-write the words of the treaty that would have an absurd result, creating a serious gap in the treaty's ability to address the problem of terrorism financing. Thus, the only purpose of supplementary means of interpretation in this case is "to confirm the meaning resulting from the application of article 31 [of the Vienna Convention]."[257] Here, the ICSFT's *travaux préparatoires* and other supplementary sources do confirm the interpretation set forth above. Indeed, though Russia strains to rely on materials that have limited, if any, relevance, it omits mention of the most significant point emerging from the negotiating materials: recognition by the drafters that the Convention was expressly intended to cover both "private" *and* "public" financing of terrorism.

a. The *Travaux Préparatoires* Confirm that States Are Required to Take Practicable Measures to Prevent Acts of Terrorism Financing by Both Private Actors and State Officials

154. The most relevant part of the ICSFT's negotiating record concerns the introduction of a revised draft of the text by France, which played a leading role in the drafting process, in the spring of 1999. The French draft was materially identical, in the respects relevant here, to the final version: Article 2 defined terrorism financing offences as capable of being committed by "any person," and Article 17 (which became Article 18) included a duty to cooperate in the prevention of Article 2 offences by taking all practicable measures.[258] France introduced this draft with a working paper that summarized the draft's key provisions, explaining that the "means of financing" encompassed by the Convention included "both

---

[257] VCLT, art. 32.

[258] *See Draft International Convention for the Suppression of the Financing of Terrorism: Working Document Submitted by France,* U.N. Doc. A/AC.252/L.7 (11 March 1999), arts. 2, 17 (Ukraine's Written Statement, Annex 11).

'unlawful' means (such as racketeering) and 'lawful' means (such as private financing, *public or semi-public financing*, or financing provided by associations)."[259] The corresponding report of the Ad Hoc Committee recounts that "it was pointed out" that "all means of financing were covered within the scope of the convention," including "public financing."[260]

155. This explanation confirms that "public financing" — which is how an act of terrorism financing perpetrated by a State official would be described — is covered by the Convention. Yet Russia does not mention it. Nor does it identify any other portion of the *travaux préparatoires* that sheds light on the interpretive questions relevant to Ukraine's claims: the meaning of the phrase "any person" in Article 2, and the scope of the Article 18 duty to prevent terrorism financing by any person.

156. Instead, Russia repeats its mistake of confusing the duty to prevent, which is express in Article 18, with a distinct notion of "State responsibility" for breach of an obligation on the State not to commit terrorism financing. Russia's selections from the preparatory materials at most deal with this latter issue, although even on that question they shed little light. They have no relevance at all to Ukraine's claim that Russia has violated its Article 18 duty to prevent terrorism financing by any person.

157. Russia dwells at length on the deletion of a proposed paragraph 5 from Article 5 of the ICSFT.[261] That is an unusual focus, given that Article 5 is not a basis for any of Ukraine's

---

[259] *Addendum to Draft International Convention for the Suppression of the Financing of Terrorism: Working Document Submitted by France,* U.N. Doc. A/AC.252/L.7/Add.1 and Corr.1 (11 March 1999) (French-language text), para. 4 (emphasis added) ("[T]ous les moyens de financement sont inclus dans le champ de cette convention, tant ceux 'illégaux' (racket) que 'légaux' (financements privés, *publics ou semi-publics*, associatifs).") (Ukraine's Written Statement, Annex 12).

[260] *Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996*, U.N. Doc. A/54/37 (5 May 1999), para. 28 [hereinafter Ad Hoc Committee Report, U.N. Doc. A/54/37] (Ukraine's Written Statement, Annex 13).

[261] *See* Russia's Objections, paras. 154–159.

claims.[262] Rather, it addresses the technical issue that some States do not recognize criminal liability for corporate entities, and so requires that "a legal entity located in [the State's] territory or organized under its laws" must be capable of being held responsible for offences under Article 2 in either "criminal, civil or administrative" proceedings.[263] The proposed paragraph 5 that was ultimately not included would have simply confirmed that Article 5 did not "call[] into question the responsibility of the State as a legal entity."[264] But that was ultimately unnecessary, since it is obvious that a legal entity "located in . . . or organized under [the] laws of" a State is not a reference to the State itself, or a requirement that the State subject itself to "criminal, civil or administrative" proceedings in its own domestic courts.[265]

158. Russia nonetheless focuses on a cursory note in the negotiating record that "[s]ome delegations suggested the deletion of paragraph 5" because "the concept of State responsibility, as understood in general international law, was beyond the scope of the draft Convention."[266] Russia argues that paragraph 5's ultimate deletion colors not just the proper interpretation of Article 5, but compels reading the ICSFT as a whole as not imposing any obligation on States not to engage in terrorism financing.[267] That is an aggressive inference to draw from a vague reference to "the concept of State responsibility" in a debate over a savings clause in Article 5. But more fundamentally, it is irrelevant to Ukraine's claim, which is *not* grounded in general notions of State responsibility, but in the treaty's express duty to prevent

---

[262] Contrary to Russia's contention, Article 5's requirements concerning legal entities says nothing about State responsibility under the ICSFT, let alone about the scope of a State's Article 18 duty to prevent or the meaning of "any person" in Article 2, which is the basis of Ukraine's claim. *See ibid.*, paras. 149–153.

[263] ICSFT, art. 5(1).

[264] *Draft International Convention for the Suppression of the Financing of Terrorism: Working Document Submitted by France,* U.N. Doc. A/AC.252/L.7 (11 March 1999), art. 5(5) (Ukraine's Written Statement, Annex 11).

[265] ICSFT, art. 5(1).

[266] *See* Ad Hoc Committee Report, U.N. Doc. A/54/37, Annex IV, p. 60, para. 46 (Ukraine's Written Statement, Annex 13).

[267] *See* Russia's Objections, paras. 154–159.

acts of terrorism financing by "any person," without exclusion.[268] The strong inference Russia attempts to draw from the deletion of proposed Article 5(5) is particularly implausible given that *the same negotiating document* reflects the parties' understanding that the Convention would cover "public financing."[269]

159. Russia's other arguments based on the negotiating record are similarly unavailing and irrelevant. Russia argues that the parties rejected two proposals, from the Group of South Pacific Countries and France, because those proposals would have implied that the Convention encompassed State responsibility for terrorism financing.[270] The former provision would have prohibited States from assisting others with agreements to commit offenses,[271] whereas the latter would have barred States from involvement in contracts or agreements to commit offenses.[272] Even if the rejection of these amendments could be considered relevant to whether the ICSFT encompasses direct State responsibility (a proposition that is far from clear), it says nothing about the Article 18 duty to prevent, or the meaning of "any person."

160. Russia also notes that Papua New Guinea proposed a provision that would have made clear that the ICSFT did not apply to financing that is part of an agreement between States "[to perform] . . . international obligation[s] recognized by international law," and that India proposed a requirement that States refrain from financing terrorism.[273] There is no

---

[268] *See supra,* Part II, Chapter 4, Section B (explaining the distinction between a duty not to undertake prohibited acts and a duty to prevent any person, including State officials, from committing those acts).

[269] *See* Ad Hoc Committee Report, U.N. Doc. A/54/37, p. 3, para. 28 (Ukraine's Written Statement, Annex 13). *See also supra,* paras. 154–155.

[270] *See* Russia's Objections, paras. 160–167.

[271] *See* Ad Hoc Committee Report, U.N. Doc. A/54/37, Annex III, pp. 33–34 (Ukraine's Written Statement, Annex 13).

[272] *See ibid.*, Annex III, p. 50–51.

[273] Russia's Objections, paras. 143, 168–169; *see also* Ad Hoc Committee Report, U.N. Doc. A/54/37, Annex III, pp. 43, 50–51 (Ukraine's Written Statement, Annex 13).

record of debate or discussion regarding the reasons for rejecting either proposal,[274] so Russia's attempt to draw inferences from their rejection is especially speculative and inappropriate.[275] But the more fundamental point is, again, that Russia conflates a potential prohibition on State financing with the ICSFT's express duty to prevent acts of terrorism financing by "any person."[276]

161. Finally, Russia contends that various statements of States throughout the negotiations bolster its position. However, each of the statements cited by Russia relates to State responsibility for financing of terrorism or — even further afield — State responsibility for terrorism itself.[277] These references are thus similarly beside the point.

---

[274] *See generally* Ad Hoc Committee Report, U.N. Doc. A/54/37 (Ukraine's Written Statement, Annex 13).

[275] *See Case of the S.S. "Lotus" (France* v. *Turkey),* Judgment No. 9, 7 September 1927, P.C.I.J. Reporter Series A — No. 10, pp. 16–17 (noting that the rationales for two parties' rejections of a proposal "are unknown and might have been unconnected with the arguments now advanced"); *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar* v. *Bahrain), Jurisdiction and Admissibility, Judgment of 15 February 1995, I.C.J. Reports 1995*, pp. 21–22, para. 41 [hereinafter *Qatar v. Bahrain*] (stating that the *travaux préparatoires* were incomplete and that "whatever may have been the motives of each of the Parties, the Court can only confine itself to the actual terms of the [*travaux préparatoires*]").

[276] Russia also points to an earlier Indian proposal for an "International Convention on the Suppression of Terrorism," which had included a provision prohibiting States from directly engaging in terrorist financing. Russia's Objections, paras. 136–37. However, this draft was not, as stated by Russia, "the starting point" for the ICSFT; rather, it is more easily viewed as a precursor to the Comprehensive Convention on International Terrorism. In any case, Russia's arguments regarding this proposal similarly center on State responsibility, rather than the duty to prevent, and are thus irrelevant.

[277] *See ibid.*, paras. 140–41 (citing Summary Record of the 34th Meeting of the Sixth Committee, U.N. Doc. A/C.6/54/SR.34 (17 April 2000) (statement of Sudan), p. 3–4, para. 16–17 (Ukraine's Written Statement, Annex 15); Summary Record of the 33rd Meeting of the Sixth Committee, U.N. Doc. A/C.6/54/SR.33 (2 December 1999) (statement of Syria), p. 7, para. 40 (Ukraine's Written Statement, Annex 14); Summary Record of the 32nd Meeting of the Sixth Committee, U.N. Doc. A/C.6/54/SR.32 (18 May 2000) (statement of Cuba), p. 9, para. 57 (Ukraine's Written Statement, Annex 16)).

b. States' Ratification Materials Further Confirm the Parties' Understanding that the Duty to Prevent Acts of Terrorism Financing Committed by Any Person Includes Acts Committed by Persons Acting in a Public Capacity

162. Russia wrongly contends that the ratification materials of certain States undermine Ukraine's argument that the duty to prevent terrorism financing encompasses acts taken by public officials.[278] To the contrary, these materials further confirm Ukraine's interpretation that the ICSFT imposes a duty on States to prevent terrorism financing by any person, including State officials.[279]

163. During the ratification process in the United States, an exchange between the U.S. State Department and then-Senator Joseph Biden demonstrated awareness that assistance to terrorist groups by State actors is within the scope of the Convention. Senator Biden asked the U.S. State Department if the Convention would bar U.S. provision of "financial support to the Northern Alliance and to other anti-Taliban groups" in Afghanistan.[280] Had States understood the Convention the way Russia portrays it now, the answer to this question would have been simple and obvious: that the Convention has no application to questions of governmental assistance at all. But that was not the answer. Instead the U.S. State Department responded that "U.S. Government assistance mentioned in the question would not be covered by the Convention, since the groups identified in the question are not engaged in [activities covered by Article 2 of the ICSFT]."[281] In other words, U.S. assistance to the Northern Alliance was permissible as a factual matter, but solely because of the nature of the Northern Alliance, *not* because the Convention was irrelevant to questions of State support.

---

[278] *See* Russia's Objections, paras. 185–188.

[279] As Russia recognizes, State ratification history can be consulted as a supplemental means of interpretation. *See, e.g.*, *Oil Platforms, Judgment of 12 December 1996*, pp. 803 *et seq*.

[280] *United States Senate Executive Report No. 107-2, 107th Congress, First Session*, U.S. Government Publishing Office (27 November 2001) p. 47 (Ukraine's Written Statement, Annex 59).

[281] *Ibid*., p. 48.

The U.S. State Department assumed the ICSFT *did* impose obligations concerning terrorism financing by State actors.

164. The U.S. State Department exhibited the same understanding in response to another question by Senator Biden concerning the relationship between the ICSFT and UNSCR 1373.[282] The U.S. State Department explained that "[o]nce the Financing Convention is in force, we anticipate that these instruments will complement and support each other. UNSCR 1373 will provide a basis for challenging any States *that have not become party* to the Convention to *refrain from providing support* to terrorists and to take steps to prevent terrorist financing in their territories."[283] This answer reveals the United States' view that for States that *have* become a party, the Convention itself was available as a basis to challenge the financing of terrorism by State actors.

165. French ratification materials support the same conclusion that the Convention imposes obligations concerning terrorism financing by State actors — contrary to Russia's misleading portrayal of these materials. Russia asserts that the Foreign Affairs Commission of the French Assemblée nationale "stressed that ordinary crimes, such as drug trafficking or hostage taking," were the principal problems faced by the drafters, "*as opposed to* the 1970s and 1980s when the main sources were acts committed by certain States."[284] That misstates what the document says. After noting that "most" of the money for terrorism came from States in the 1970s and 1980s, the Assemblée nationale report stated that now the sources are "more diversified" ("les sources sont beaucoup *plus diversifiées*").[285] And later in the same section,

---

[282] *Ibid.*, pp. 48–49. UNSCR 1373 is discussed in further detail in the preceding Section. *See supra*, paras. 150–151.

[283] *Ibid.*, p. 49 (emphasis added).

[284] Russia's Objections, para. 186 (emphasis added).

[285] Foreign Affairs Commission of the French National Assembly, Document Assemblée nationale No. 3367, *Rapport No. 3367 de M. René Mangin, fait au nom de la commission des affaires étrangères sur le projet de loi, adopté par le Sénat, autorisant la ratification de la Convention internationale pour la répression du financement du terrorisme* (7 November 2001) p. 4 (Ukraine's Written Statement, Annex 58).

the report addressed the "complex links" between terrorist organizations and numerous other actors, including "political regimes."[286] Far from taking the position that private financing of terrorism had *replaced* financing by State actors, as Russia suggests, the Assemblée nationale report makes clear that *both* were problems addressed by the Convention.

166. Thus, the ratification materials most relevant to the application of the duty to prevent terrorism financing to State actors illustrate that States Parties indeed contemplated the application of the Convention to such circumstances.[287] By contrast, all Russia has discovered in its survey of ratification materials, including those of Australia, the United Kingdom, Switzerland, and Germany, are references to the ICSFT's "law enforcement nature."[288] As noted above, the treaty's preamble establishes that the ICSFT is aimed both at the suppression of criminal acts of terrorism financing, *and* the prevention of such criminal

---

[286] *Ibid.,* p. 5 ("Des liens complexes s'établissent entre organisations terroristes, *régimes politiques*, organisations mafieuses, guérillas, organisations nationalistes ou organisations fondamentalistes religieuses, liens qu'il est souvent difficile de démêler."; "Complex links are established between terrorist organizations, political regimes, mafia organizations, guerrillas, nationalist organizations, or religious fundamentalist organizations, which are often difficult to unravel.").

[287] Under France's implementing statute of the ICSFT, the criminal offense of terrorism financing applies to *any* person, including State officials acting in their public capacity. *See generally* Code pénal français, art. 421-2-2 (Ukraine's Written Statement, Annex 65). Moreover, French law criminalizes acts by State officials that are 'clearly illegal,' even when ordered by a legitimate State authority. *See ibid.*, art. 122-4 ("N'est pas pénalement responsable la personne qui accomplit un acte commandé par l'autorité légitime, sauf si cet acte est manifestement illégal") (Ukraine's Written Statement, Annex 64); *see also* Constitution de la République française, art. 68-1 ("Les membres du Gouvernement sont pénalement responsables des actes accomplis dans l'exercice de leurs fonctions et qualifiés crimes ou délits au moment où ils ont été commis.") (Ukraine's Written Statement, Annex 66).

[288] *See* Russia's Objections, paras. 185–186 (citing Australia Department of Foreign Affairs and Trade, *National Interest Analysis of 18 June 2002*, *reprinted in* Australian Year Book of International Law, Vol. 23 (2004), p. 95 (Ukraine's Written Statement, Annex 61); Drucksache 15/1507, *Draft Law on the United Nations International Convention for the Suppression of the Financing of Terrorism of 9 December 1999*, printed by the German Bundestag, 15th Electoral Term (2 September 2003), p. 24 (Russia's Objections, Annex 8); Objet du Conseil Fédéral 02.052, *Conventions des Nations Unies pour la répression du financement du terrorisme et des attentats terroristes à l'explosif, Ratification*: *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*, Feuille fédérale n° 32 du 13 août 2002 (26 Juin 2002), p. 5025 (Ukraine's Written Statement, Annex 60); *Explanatory Notes to Terrorism Act 2000*, prepared by the United Kingdom Home Office and the Northern Ireland Office (20 July 2000), para. 57 (Ukraine's Written Statement, Annex 57)).

acts. In fact, the Russian Ministry of Foreign Affairs, in a statement upon signing the ICSFT, recognized that State Parties have an obligation to "prevent *and* suppress financial support for terrorism."[289] And whether the obligation in question concerns prevention of the offence before it is committed, or law enforcement after it is committed, none of the materials identified by Russia speak to the question of *who* commits the offence — *i.e.*, "any person," without qualification.

167. Indeed, Russia's own ratification materials — which it conspicuously does not mention — underscore the sweeping ambitions of the treaty to "become one of the more effective factors in the concerted efforts by the international community to prevent and eliminate the terrorist threat."[290] The Russian government explicitly recognized that "[k]ey to the Convention is the article stipulating that any person commits an offence [under article 2]."[291] It is implausible to conclude that a Convention with the sweeping objective of eradicating the financing of terrorism, with its "key" provision defining the offence of terrorism financing as applying to "any person," could somehow support a loophole allowing some persons to continue financing terrorism.

c. Russia's Reliance on Three Regional Treaties to Which Russia and Ukraine Are Not Party, and an Incomplete Draft Comprehensive Convention on International Terrorism, Have No Relevance

168. Russia invokes three regional terrorism treaties – the Arab Convention on the Suppression of Terrorism of 22 April 1999 ("Arab Convention"),[292] the Organization of African

---

[289] Statement of the Ministry of Foreign Affairs of the Russian Federation About Russia's Signing the International Convention for the Suppression of the Financing of Terrorism (6 April 2000) (emphasis added) (Ukraine's Written Statement, Annex 52).

[290] *Ibid.*

[291] Statement of the Ministry of Foreign Affairs of the Russian Federation About the Convention for the Suppression of the Financing of Terrorism (13 April 2000) (Ukraine's Written Statement, Annex 53).

[292] Arab Convention on the Suppression of Terrorism of 22 April 1999, *reprinted in* INTERNATIONAL INSTRUMENTS RELATED TO THE PREVENTION AND SUPPRESSION OF INTERNATIONAL TERRORISM (United Nations ed., 2008), pp. 178 *et seq.*, *accessed at* https://bit.ly/2Am7Z3A.

Unity Convention on the Prevention and Combatting of Terrorism of 14 April 1999 ("OAU Convention"),[293] and the Organization of Islamic Cooperation Convention on Combating International Terrorism of 1 July 1999 ("OIC Convention")[294] — as somehow informing the proper interpretation of the ICSFT. Russia notes that these regional treaties include both a duty to prevent and a duty not to commit, and argues that this demonstrates, *a contrario*, that ICSFT Article 18 was not meant to encompass State financing of terrorism.[295] Russia does not explain how a single region's treaty could modify the interpretation of a previously-concluded *universal* treaty on terrorism financing, a theory that has no basis in the Vienna Convention.[296] But in any event, these regional treaties simply illustrate the distinction between a duty not to undertake acts of terrorism financing, and the duty at issue here: *to prevent* "any person," including State officials, from engaging in terrorism financing.

169. Russia also invokes the Convention of the Cooperation Council for the Arab States of the Gulf on Combating Terrorism of 4 May 2004 ("GCC Convention"), which requires parties to "prevent their nationals and public and private institutions or individuals" from

---

[293] Organization of African Unity Convention on the Prevention and Combating of Terrorism, 1 July 1999, 2219 U.N.T.S. 179.

[294] Convention of the Organisation of the Islamic Conference on Combating International Terrorism of 1 July 1999, *reprinted in* Annex to Resolution No. 59/26-P, Organisation of the Islamic Conference, *accessed at* https://bit.ly/2SqOk9J.

[295] Russia's Objections, paras. 175–181.

[296] *See* VCLT, art. 31(3)(c) (permitting consideration of "relevant rules of international law *applicable in the relations between the parties*" (emphasis added)). Russia argues that this Court took a similar comparative approach in *Croatia v. Serbia*, where it referenced "a regional convention to interpret the temporal scope of the Genocide Convention." Russia's Objections, para. 175 note 210 (citing *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment of 3 February 2015, I.C.J. Reports 2015*, pp. 50–51, para. 96). But that regional convention, unlike the ones Russia invokes here, was applicable to Croatia and Serbia, and so incorporated "relevant rules of international law applicable in the relations between parties." VCLT, art. 31(3)(c).

financing terrorism.[297] Russia insists that if the drafters of the ICSFT intended it to apply to public officials, they would have chosen the same language the GCC chose several years later.[298] Leaving aside the irrelevance of a later-in-time regional treaty in interpreting the ICSFT, the GCC language actually confirms Ukraine's argument that there is no difficulty in a duty to prevent applying to public officials. The drafters of the ICSFT accomplished the same result by using the phrase "any person," a phrase that had been recognized in the past to encompass State officials.[299]

170. Russia also relies inappropriately on negotiating materials for the draft Comprehensive Convention on International Terrorism ("draft CCIT"). Nothing in the Vienna Convention suggests the *travaux préparatoires* of an *incomplete* treaty, still in the negotiation process, could be of any relevance to treaty interpretation. Even if the draft CCIT were relevant, Russia misunderstands and misconstrues the negotiating materials, which provide no relevant insight into the scope of the ICSFT.

171. Russia asserts that State responsibility for committing terrorism remains the most important unresolved issue in the negotiations of the draft CCIT.[300] It similarly refers to various comments made about "State terrorism."[301] Again, Russia's argument conflates the potential for State responsibility for committing acts of terrorism financing, and the ICSFT's express duty to *prevent* terrorism financing by any person, including public officials.[302] The

---

[297] Convention of the Cooperation Council for the Arab States of the Gulf on Combating Terrorism of 4 May 2004, *reprinted in* INTERNATIONAL INSTRUMENTS RELATED TO THE PREVENTION AND SUPPRESSION OF INTERNATIONAL TERRORISM (United Nations ed., 2008), pp. 259 *et seq*., *accessed at* https://bit.ly/2Am7Z3A.

[298] Russia's Objections, paras. 222–224.

[299] *See supra,* paras. 131–138.

[300] Russia's Objections, para. 189.

[301] *Ibid*., paras. 192–194, 198.

[302] *See supra*, Part II, Chapter 4, Section B.

question of State responsibility for *committing acts of terrorism* (and not just financing) is even further afield.[303]

172. Most remarkably, Russia points to Ukraine's statement before the Sixth Committee of the General Assembly, and claims it stands for the idea that "so far no global instrument exists" to prohibit States from "supporting and financing terrorism."[304] In fact one does, the ICSFT, to which both Ukraine and Russia are States Parties. In the quoted statement, Ukraine simply reaffirmed the importance of holding "to account not only individuals and organizations *but also* States responsible for . . . directly or indirectly supporting terrorist activities."[305] Ukraine's remark that the draft CCIT would be an "important addition to the existing international legal counter-terrorism framework" merely confirms the importance of *that comprehensive convention*.[306] Moreover, in the remarks quoted by Russia, Ukraine specifically noted its pending case in the International Court of Justice under the ICSFT. It cannot be credibly suggested that Ukraine's statement implied the ICSFT itself does not encompass a duty to prevent terrorism financing by State officials, when the statement itself clearly embraces the claims currently being pursued in this Court.

* * *

173. In sum, Russia's heavy reliance on supplemental means of interpretation is both methodologically inappropriate and unconvincing on the merits. To the extent resort to

---

[303] Russia's Objections, paras. 189, 192–196, 198. State terrorism and State responsibility for committing acts of terrorism are issues distinct from State sponsorship of terrorism and State responsibility for terrorism financing. Moreover, each of these issues is irrelevant to a discussion of Russia's obligation *to prevent* acts of terrorism financing.

[304] *Ibid.*, para. 190–191.

[305] Summary Record of the 2nd Meeting of the Sixth Committee, U.N. Doc. A/C.6/72/SR.2 (23 October 2017) (statement of Ukraine), p. 9, para. 51 (emphasis added) (Ukraine's Written Statement, Annex 17).

[306] *Ibid.*

the supplementary means of interpretation prescribed by Article 32 of the Vienna Convention is appropriate here, those sources confirm Ukraine's interpretation.

4. This Court's Interpretation of the Genocide Convention Further Supports Ukraine's Interpretation that the Duty to Prevent Acts of Terrorism Financing Committed by Any Person Includes Acts Committed by Persons Acting in a Public Capacity

174. In the *Bosnian Genocide Case*, this Court, interpreting the Genocide Convention, held that "the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide."[307] The Court concluded that it would be "paradoxical" for the duty to prevent not to encompass the acts of "persons over whom" the State has "firm control," *i.e.*, persons who are agents of the State.[308]

175. It would be similarly paradoxical to exclude State officials from the scope of Russia's obligation under the ICSFT to prevent acts of terrorism financing. This conclusion is even more straightforward in the case of the ICSFT than under the Genocide Convention. In the *Bosnian Genocide Case*, the Court observed that the Genocide Convention did not "*expressis verbis*" cover State acts of genocide, yet it still concluded that such acts violate the Convention.[309] Here, by contrast, the ICSFT *does* "*expressis verbis*" create an obligation to prevent acts of terrorism financing by "[a]ny person," without qualification.[310]

176. The Genocide Convention does not specify to whom the crime of genocide applies, including whether it may be committed by "any person." Moreover, the text of the duty to prevent in the Genocide Convention is not as detailed as the ICSFT's, which explicitly requires States to take practicable measures to prevent the crime of terrorism financing that

---

[307] *Bosnian Genocide Case, Judgment of 26 February 2007*, para. 166.

[308] *Ibid.*

[309] *Ibid.*

[310] ICSFT, art. 2.

the Convention defines in detail.[311] The text of the ICSFT thus creates an offence that squarely applies to the acts of State officials,[312] and just as clearly imposes a duty to prevent those acts. It would be even more "paradoxical" here to accept Russia's proposal to read an atextual, implicit *limitation* on the scope of the duty to prevent, such that States would have no obligations in connection with State actors financing terrorism.[313] As the Court has noted, State officials are the "persons over whom" the State has the most "firm control."[314] It makes no sense to excuse States from preventing terrorism financing offences by the persons over whom they have the *most* control.

177. Russia attempts to distinguish the Genocide Convention by stressing that the crime of genocide is characterized as a "crime under international law."[315] But even if terrorism financing is not defined as a "crime under international law," States Parties to the ICSFT determined that terrorism financing was a crime that is a "matter of grave concern to the international community as a whole."[316] Russia's emphasis on whether one crime is more grave than the other is misplaced; the point is that for such a serious violation, States could not possibly have intended to tolerate State involvement in those violations. It is hard to

---

[311] Russia alleges that a distinction between a "duty not to commit" and a "duty to prevent" in *Bosnia Genocide* confirms that the obligation to prevent only extends to the acts of private individuals. Russia's Objections, paras. 214–218. To the contrary, *Bosnia Genocide* explicitly states, without qualification, that "a State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of . . . a serious risk that genocide will be committed." *Bosnian Genocide Case, Judgment of 26 February 2007*, para. 431. The ICSFT makes the scope of the duty to prevent even clearer by requiring States to take practicable measures to prevent violations of ICSFT Article 2 by "any person."

[312] *See supra*, Part II, Chapter 4, Section C(2)(a).

[313] *Bosnian Genocide Case*, *Judgment of 26 February 2007*, para. 166.

[314] *Ibid.*

[315] Russia's Objections, para. 204.

[316] ICSFT, preamble.

imagine a legitimate reason States could have had to preserve a prerogative for their officials to finance terrorism.[317]

178. Russia also attempts to distinguish the Genocide Convention on the ground that the scope of its compromissory clause is "fundamentally different."[318] But the Court in the *Bosnian Genocide Case* expressly stated that its interpretation was not based on Article IX of the Genocide Convention, its compromissory clause. The Court explained that because Article IX was "essentially a jurisdictional provision," it must "ascertain" whether a "substantive obligation" could be found within any of "the other provisions of the Convention."[319]

179. Finally, Russia argues that because Article IV of the Genocide Convention contemplates the commission of genocide by "constitutionally responsible rulers and public officials," and the ICSFT does not contain any similar provision, the ICSFT must not contemplate liability for the acts of public officials.[320] But this is another illogical inference. The ICSFT *does* contemplate acts of terrorism financing by public officials: it defines the offence of terrorism financing by using the phrase "any person," which by its plain terms and international usage includes public officials. The Court's reasoning in the *Bosnian Genocide Case* simply confirms the paradoxical nature of Russia's argument: States would be required to do everything in their power to prevent private actors from financing terrorism, but do not need to do anything at all to prevent public actors from financing terrorism. It is striking that Russia would have the Court rewrite the plain terms of the ICSFT – changing "any person" to "any private person" – to create the paradoxical result that States Parties must adopt all

---

[317] *See* Russia's Objections, para. 227 ("States are prohibited under general international law from financing terrorism.").

[318] *Ibid.*, para. 200.

[319] *Bosnian Genocide Case, Judgment of 26 February 2007*, para. 166.

[320] Russia's Objections, para. 203. *See also Bosnian Genocide Cas*e, *Judgment of 26 February 2007*, para. 144.

practicable measures to prevent private actors from doing what they license their own officials to do.

Chapter 5. RUSSIA'S ARGUMENT THAT UKRAINE HAS NOT ESTABLISHED TERRORISM FINANCING OFFENSES UNDER ICSFT ARTICLE 2 IS NOT A PROPER PRELIMINARY OBJECTION, AND IN ANY EVENT IS INCORRECT

180. As discussed at the beginning of this Part, Ukraine's Memorial established Russia's serious violations of the ICSFT. First, Ukraine demonstrated that Russia's proxies in Ukraine engaged in a pattern of terrorist acts within the meaning of Article 2(1)(a) and 2(1)(b).[321] Second, Ukraine showed that Russian State officials and private actors located in Russia knowingly financed these acts of terrorism within the meaning of Article 2(1).[322] Third, Ukraine explained that Russia violated several requirements in relation to this terrorism financing, including (but not limited to) its Article 18 duty to prevent terrorism financing by any person.[323]

181. A significant portion of Russia's Preliminary Objections goes not to the jurisdiction of this Court to hear Ukraine's case, but instead challenges the evidence Ukraine has put forward to demonstrate that the elements of Article 2 terrorism financing offences are met. Russia maintains that its proxies in Ukraine did not commit acts of terrorism. Russia also appears to suggest, though more obliquely, that no Russian officials or nationals knew that the funds they provided would be used for terrorism.

182. These are fundamentally factual arguments that are not the proper subject of preliminary objections. As explained in Section A, the arguments Russia makes concerning whether Article 2 offences were committed are quintessentially merits questions, and should be considered at the merits stage. Section B explains that, if interpretive disputes are resolved at this stage of the proceedings, Ukraine's interpretation of the mental elements of an Article 2(1) offense is correct, as is its interpretation of the elements of acts of terrorism under Article 2(1)(a) and 2(1)(b). Finally, without prejudice to Ukraine's position that the factual disputes

---

[321] *See* Ukraine's Memorial, Chapter 4.

[322] *See ibid.*, Chapter 5.

[323] *See ibid.*, Chapter 6.

raised by Russia are entirely outside the scope of proper preliminary objections, Section C responds to some of Russia's most egregious mischaracterizations of the facts.

A. Russia's Arguments that Ukraine Has Not Proved Certain Elements of Article 2 Offenses Are Merits Questions that Are Not of an Exclusively Preliminary Character

183. Russia's various arguments that Ukraine has not proved the elements of Article 2 offenses are merits arguments. They do not concern the jurisdiction of the Court or the admissibility of the Application, and so cannot be considered at the preliminary objections stage.

184. First, as explained in Chapter 2, Russia's arguments about the proper interpretation of the knowledge requirement of Article 2(1), and the elements of acts of terrorism under Article 2(1)(a) and 2(1)(b), are merits issues. It is particularly inappropriate for Russia to frame its interpretive arguments concerning Article 2 as preliminary objections, as Ukraine's claim is not that Russia has violated Article 2 of ICSFT. Rather, Ukraine argues that Russia has violated ICSFT Article 18 and other related cooperation obligations. The presence of terrorist acts in Ukraine, and the commission of terrorism financing offences in relation to those acts, are relevant to Ukraine's claim, but they are not the central point: Ukraine's claim of violations of Article 18 do not turn on findings concerning specific acts of terrorism or terrorism financing. The proper interpretation of Article 2 is thus particularly a merits question. It does not bear on whether Ukraine's claims under Article 18 (or other non-Article 2 provisions) are capable of falling within the ICSFT.

185. Second, even if considered, although Russia frames some of its arguments as questions of treaty interpretation,[324] many are in reality questions of fact, or so closely intertwined with the facts that they do not possess an exclusively preliminary character.

[324] *See* Russia's Objections, Chapter 3.

Determinations of intent or knowledge, for example, are fundamentally questions of fact.[325] Russia's purported legal arguments about the elements of Article 2(1)(a) and 2(1)(b) offenses are inseparable from the factual questions this Court will ultimately need to resolve, and thus should not be considered in the abstract. Moreover, while Russia suggests that the Parties differ in their interpretation of Article 2(1)'s knowledge standard, Russia's argument once again reduces to another attempt to argue the facts. As discussed further below, Russia does not dispute that providing funds to a group known to engage in terrorist acts is sufficient to meet Article 2(1)'s knowledge standard. Instead, Russia maintains that the terrorist actions of its proxies were not sufficiently well known — yet another question of fact.

186. More broadly, Russia's treaty interpretation arguments are largely academic at this stage, because Ukraine's factual allegations meet even Russia's overly stringent interpretations. For example, Russia is incorrect that the word "intended" in the ICSFT can only be satisfied by the highest degree of intent (*dolus directus*). Nonetheless, the facts provided by Ukraine concerning each incident of shelling of civilians meet that high standard of intent.[326] Similarly, Russia is incorrect that the intent requirement of the Montreal Convention (relevant to the shoot-down of Flight MH17) requires intention as to the civilian status of the aircraft. But under the facts provided by Ukraine that must be accepted *pro tem* at this stage of the proceedings, including an expert opinion that Russia never acknowledges, intention as to civilian status is established. The Court has no reason to engage in questions of treaty interpretation now that would not defeat Ukraine's claims even if Russia's interpretation were correct. In fact, depending on the Court's view of the facts at the merits

---

[325] *See* International Law Commission, *Second Report on State Responsibility*, UN Doc. No. A/CN 4/ 425 and Add. I, *in* YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1989, Vol. II, Part One, p. 53, para. 178 ("The question whether wilful intent or any degree of *culpa* is present in a given instance is a question of fact, just as the very existence of an act of a State is a question of fact."); Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Chamber I Judgment (2 September 1998), paras. 167–169 (declaring as a "[f]actual [f]inding[]" that "the acts of violence which took place in Rwanda . . . were committed with the intent to destroy the Tutsi population"); Prosectuor v. Naletilić & Martinović, ICTY Case No. IT-98-34-A, Appeals Chamber Judgment (3 May 2006), para. 572 (recalling that "the question of whether . . . beatings were committed with discriminatory intent" is a matter to be decided by the "trier of fact").

[326] Ukraine's Memorial, paras. 227–28, 236–38, 246–48, 256.

stage, some of these interpretive disputes may not need to be resolved at all. It is therefore more efficient for the Court to refrain from resolving these interpretive disputes at this phase, even apart from Ukraine's view that interpretive disputes are for the merits.

187. Finally, and perhaps most egregiously, Russia makes numerous factual arguments about whether Ukraine has sufficiently proven the commission of acts of terrorism covered by ICSFT Article 2. Factual disputes pervade Russia's arguments about the acts of terrorism highlighted by Ukraine. Beyond the problem that such arguments are entirely inappropriate at this stage, Russia's cardinal error is to assert that Ukraine's factual claims are implausible while simply ignoring much of the copious evidence Ukraine has advanced to support those claims. But even Russia's slanted and selective presentation of the facts is rife with errors, on top of constituting an inappropriate attempt to argue the merits.

188. For example, Russia questions whether a pattern of killings in the Donbas had the purpose of intimidating a population, despite the conclusion of U.N. monitors from the Office of the High Commissioner for Human Rights ("OHCHR") that these killings were part of a "reign of intimidation and terror."[327] Similarly, Ukraine has put forward significant evidence showing that horrific shelling attacks on civilian areas were targeted at those civilian areas, but Russia contests that evidence and maintains that its proxies had military reasons for their actions.[328] And to avoid Ukraine's claims concerning a string of bombings in Kharkiv and elsewhere, Russia's sole response is to contest the credibility of certain aspects of Ukraine's evidence, which it does by referring the Court to propaganda websites.[329] These are all plainly merits arguments, not preliminary objections. Proceedings on the merits have been suspended and Ukraine's factual allegations must be assumed to be true at this preliminary

---

[327] OHCHR, *Report on the Human Rights Situation in Ukraine* (15 July 2014), para. 26 (Ukraine's Memorial, Annex 296).

[328] *See infra*, Chapter 5, Section C(3).

[329] *See infra*, Chapter 5, Section C(4).

stage.[330] Under the Court's rules, Russia is not permitted to advance its incomplete, misleading, and unfounded factual arguments under the guise of preliminary objections.

189. In short, Russia's interpretive arguments are questions for the merits, its factual arguments are particularly inappropriate, and there is no reason to address now Russia's Preliminary Objections that require the Court to reach judgments about the facts underlying Ukraine's claims. The question of whether Ukraine has established the various elements of Article 2 offences is for the merits, not preliminary objections.

B. Ukraine's Memorial Correctly Set Forth the Mental Elements of Terrorism Financing Under Article 2(1), and the Elements of Acts of Terrorism Under Article 2(1)(a) and 2(1)(b)

190. If the Court nonetheless decides to interpret the various elements of terrorism financing at this stage, it should reject Russia's exceedingly restrictive interpretations. Ukraine first addresses the requirement that a perpetrator of an Article 2 offence must act knowingly, and then the elements of the underlying terrorist acts.

1. Ukraine's Memorial Correctly Set Forth the Standard for Establishing the Knowing Financing of Terrorism Under Article 2(1)

191. Article 2 of the ICSFT provides that "[a]ny person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out" acts of terrorism, as further defined. Ukraine's Memorial presented evidence showing that numerous Russian officials and private Russian nationals and entities provided funds to groups engaged in terrorism in Ukraine.[331] Russia's Preliminary Objections do not challenge Ukraine's evidence that these persons in fact supplied weapons, money, and other support to illegal armed groups

[330] *See supra*, Chapter 2.

[331] Ukraine's Memorial, Chapter 5, Section A.

in Ukraine. Neither does Russia disagree that "funds" under Article 1 of the ICSFT is a broad term covering all property, including weapons.

192. Ukraine's Memorial also demonstrated that these Russian officials and other nationals knew that these funds were to be used to carry out acts of terrorism, within the meaning of Article 2 of the ICSFT.[332] The Memorial explained that the acts of groups like the DPR and LPR, acts which meet the ICSFT's definition of terrorism, were well-known to the Russian officials and other nationals that financed them. Ukraine further identified evidence showing that Russian officials in particular knew how these groups would use funds supplied to them, including in relation to particular acts of terrorism.

193. Russia's position on the knowledge element is unclear. It largely avoids addressing the facts raised by Ukraine. Unlike its approach to the existence of acts of terrorism, Russia's Preliminary Objections include no section challenging the plausibility of Ukraine's allegations of knowledge.[333] Instead, Russia purports to disagree with what it calls "Ukraine's interpretation of 'knowledge.'"[334] At times in its Preliminary Objections, Russia suggests that Article 2(1) requires the financier to know to a "certainty" that its funds will be earmarked for use in terrorist acts.[335]

194. But Russia is, understandably, unwilling to commit itself to such an extreme interpretation. Russia thus conspicuously declines to take a position on the core of Ukraine's interpretation. Specifically, as explained by Marja Lehto, who led Finland's delegation at the treaty negotiations, "the financing of *a group which has notoriously committed terrorist acts* would meet the requirements of paragraph 1" of Article 2.[336] Russia acknowledges this

---

[332] *Ibid.*, Chapter 5, Section B.

[333] *See* Russia's Objections, Chapter 4 ("No Plausible Allegation of *Terrorism* Within the Meaning of Article 2(1) of the ICSFT" (emphasis in original)).

[334] *Ibid.*, p. 23.

[335] *Ibid.*, para. 48.

[336] Lehto, p. 289 (Ukraine's Memorial, Annex 490); Ukraine's Memorial, para. 281.

interpretation of Article 2(1) — and expressly refuses to take a position on "[w]hether that is correct or not."[337]

195. Russia thus does not attempt to refute Ukraine's interpretation, or to advance a competing one. Its objection is in reality a factual one, though even Russia's factual disagreement is not stated clearly. Russia suggests that the terrorist acts of its proxies in Ukraine were not sufficiently notorious to establish knowledge on the part of the persons supplying those groups with funds.[338] That is a merits argument that is not properly the subject of a preliminary objection. Moreover, Russia does not even address the facts raised by Ukraine showing that Russian officials, in particular, had strong knowledge concerning the operations of their proxies in Ukraine, including in relation to the acts of terrorism raised by Ukraine.

a. As Russia Does Not Dispute, Providing Funds to Groups Known to Commit Terrorist Acts Satisfies the Knowledge Standard of Article 2(1)

196. Without expressly contesting Ukraine's interpretation of Article 2(1)'s knowledge standard as a legal matter, Russia does imply that the parties disagree on the interpretation of that standard. To the extent the Court chooses to address this interpretive question at this phase of the proceedings, Ukraine briefly addresses its proper interpretation here.

197. The treaty requires the perpetrator of a terrorism financing offence to have "knowledge that [the funds] are to be used, in full or in part, in order to carry out" acts of terrorism. Russia presents the word "knowledge" and the phrase "are to be used" as if they are separate,[339] but as this Court has noted, it is the expression as a whole that must be

---

[337] Russia's Objections, para. 54.

[338] *Ibid.*

[339] *Ibid.*, pp. 20–21 (separately discussing "knowledge" and "that they [the funds] are to be used").

interpreted rather than each word in isolation.[340] Read according to its ordinary meaning, in good faith and in context, and according to the treaty's object and purpose, the knowledge requirement of Article 2(1) is satisfied by knowledge that the recipient of funds commits terrorist acts.

198. The Convention explicitly recognizes that many terrorist groups "also have or claim to have charitable, social or cultural goals," or "are also engaged in unlawful activities such as illicit arms trafficking, drug dealing and racketeering."[341] Knowledge of how such a group will use funds provided to it is inherently uncertain, a problem exacerbated by the fungibility of money and weapons. A financier could always insist that the funds *might* be used for the terrorist organization's non-terrorist activities, such as charitable purposes, business activities, or hostilities against combatants.

199. Under no sensible reading of the treaty could that be a defense to financing terrorism. Providing funds to groups that engage in terrorism necessarily enhances their ability to commit further terrorist attacks. Even if the specific funds are used for some non-terrorist purpose, the donation frees up other resources to be put towards the planning, preparation, and execution of terrorist acts. As a matter of ordinary meaning, the perpetrator is understood to know that funds provided to such a group are to be used for the commission of terrorist acts.[342]

200. Any other interpretation "would be contrary to one of the fundamental principles of interpretation of treaties, consistently upheld by international jurisprudence,

---

[340] *Qatar v. Bahrain*, para. 35 (analyzing "expression[s]" or "phrase[s]" for their "most ordinary meaning," taking into account the "form of words and . . . the logical implications of the expression").

[341] ICSFT, preamble.

[342] Ukraine's Memorial, paras. 280–84.

namely that of effectiveness . . . ."[343] If the treaty were interpreted to require certainty that the specific funds provided will be directed toward a terrorist act, it would rarely (if ever) be possible to establish the commission of an Article 2 offence. Since the entire architecture of the treaty hinges on the Article 2 offence, such a self-defeating construction of Article 2(1) would deprive the ICSFT of effectiveness.

201. The context of Article 2 as a whole reinforces that provision of funds to a group known to commit terrorist acts establishes an offence. Article 2(1) requires only knowledge that the funds are to be used "in full *or in part*, in order to carry out" terrorism.[344] This highlights the drafters' awareness that a financier will generally not have perfect certainty about how fungible funds will be used.

202. Similarly, Article 2(3) specifies that "it shall not be necessary that the funds were actually used to carry out" an act of terrorism, reinforcing that a financier need not know the particular terrorist act for which the funds will be used. As Lehto explains, "[w]hile paragraph 3 does not broaden or limit the constitutive elements of the crime, *it confirms in more explicit terms what is already contained in the definition of the offence*," *i.e.*, that terrorist financing is "a prospective crime" that by its nature "may – or may not – lead to terrorist violence."[345] Aust likewise emphasizes that "para. 3 avoids the need to prove that the accused knew the precise destination of the funds or that they would be used to finance a particular terrorist act . . . or even a specific category of terrorist act."[346] It follows that reading paragraph (1) in context with paragraph (3) further underscores that financing of terrorism in

---

[343] *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment of 3 February 1994, I.C.J. Reports 1994*, p. 25, para. 51; *see also Qatar v. Bahrain*, para. 35 (rejecting interpretation as "encounter[ing] serious difficulties" by "depriv[ing] [a] phrase of its effect").

[344] ICSFT, art. 2(1) (emphasis added).

[345] Lehto, p. 296 (emphasis added) (Ukraine's Memorial, Annex 490).

[346] Aust, p. 297 (Ukraine's Memorial, Annex 485).

violation of Article 2 can occur based on knowledge of the recipient's commission of terrorist acts in general.[347]

203. Ukraine's interpretation advances, rather than defeats, the object and purpose of the ICSFT. This precise point is made by Roberto Lavalle, Minister-Counsellor of the Permanent Mission of Guatemala to the United Nations and a member of the Sixth Committee when it considered the draft text of the ICSFT in 1999. Lavalle, writing shortly after the treaty was completed, emphasizes the "impossib[ility]" of linking "the particular provision of 'funds' with a particular terrorist act," and how these "difficulties will be compounded whenever a terrorist group or organization carries out activities, lawful or unlawful, other than terrorist acts."[348] It thus "does not normally make sense to speak of an intention or, *a fortiori*, of knowledge, that [funds] are to be used to carry out a specific act of terrorism or one of a specific type."[349] Accordingly, "regard being had to the importance attributed by article 31(1) of the Vienna Convention on the Law of Treaties to the 'object and purpose' of a treaty," Article 2(1) must be read so that "it is sufficient to prove that the recipient or recipients . . . of the 'funds' are terrorists," and "that that person was aware of this . . . ."[350]

204. Domestic courts of States Parties to the ICSFT have interpreted the knowledge requirement of Article 2 the same way. The Supreme Court of Denmark upheld terrorism financing convictions where it was established that the defendants provided money to the Fuerzas Armadas Revolucionarias de Colombia ("FARC"), knowing that the FARC generally

---

[347] *Ibid.* Russia mischaracterizes Ukraine's argument as reading Article 2(3) to alter the *mens rea* of Article 2(1). Russia's Objections, para. 53. Paragraph (3) simply provides relevant context, supporting what is already "obvious" from the definition of the offence in paragraph (1). Lehto, p. 296 (Ukraine's Memorial, Annex 490).

[348] Roberto Lavalle, *The International Convention for the Suppression of the Financing of Terrorism*, Heidelberg Journal of International Law, Vol. 60 (2000), p. 503 [hereinafter Lavalle] (Ukraine's Memorial, Annex 484).

[349] *Ibid.*

[350] *Ibid.*, pp. 503–504.

committed terrorist acts.[351] The French *Cour de Cassation* has held that, to prove terrorism financing, it is sufficient to demonstrate that the financier knowingly contributed to a terrorist organization.[352] U.S. courts, emphasizing the fungibility of funds, have held that "[a]nyone who knowingly contributes [even] to the nonviolent wing of an organization that he knows to engage in terrorism is knowingly contributing to the organization's terrorist activities."[353] And Canadian courts consider that "when a group has been identified as a terrorist entity," it is "difficult to argue that a financier was unaware that the amounts he has allocated to this group would be used, in full or in part to carry out terrorist actions."[354]

205. This State practice conforms with guidance by the U.N. Office on Drugs and Crime (UNODC), acting pursuant to its mandate to assist States in implementing the ICSFT. To illustrate the scope of the Article 2 offence, the UNODC describes a hypothetical person who collects donations for an organization, knowing that it "carries on both legitimate social

---

[351] "Fighters and Lovers Case," Case 399/2008, Supreme Court of Denmark (25 March 2009) [hereinafter "Fighters and Lovers Case"] (Ukraine's Memorial, Annex 476).

[352] French Cour de Cassation, Judgment of 21 May 2014, No. 13-83758 ("Attendu qu'en l'état de ces motifs reproduits partiellement aux moyens, qui établissent que *l'association Centre culturel kurde Ahmet Kaya a apporté, en connaissance de cause*, par ses organes ou ses représentants, en l'espèce par les dirigeants de fait identifiés ci-dessus, ayant agi pour son compte, *un soutien logistique et financier effectif à une organisation classée comme terroriste*, la cour d'appel a caractérisé en tous leurs éléments les infractions dont elle l'a déclarée coupable.") (emphasis added) (Ukraine's Memorial, Annex 477); *see also* French Cour de Cassation, Judgment of 12 April 2005, No. 04-84264 (Ukraine's Memorial, Annex 472). France's implementing statute of the ICSFT, Article 421-2-2 of the Code pénal, closely tracks the Convention's knowledge requirement ("[E]n sachant qu'ils sont destinés à être utilisés, en tout ou partie, en vue de commettre l'un quelconque des actes de terrorisme prévus au présent chapitre. . . .") (Ukraine's Memorial, Annex 1107).

[353] *Boim v. Holy Land Foundation for Relief & Development*, 549 F.3d 685 (Court of Appeals for the 7th Circuit of the United States, 2008), p. 698 (Ukraine's Memorial, Annex 474). The statute interpreted in *Boim*, 18 U.S.C. § 2339A, tracks the language of Article 2(1) of the ICSFT, criminalizing the provision of material support "knowing or intending that they are to be used" for covered acts of terrorism. United States Code: Crimes, 18 U.S.C. § 2339A, Providing Material Support to Terrorist (2009) (Ukraine's Memorial, Annex 475).

[354] *See* Bertrand Perrin, *L'incrimination du Financement du Terrorisme en Droits Canadien et Suisse*, Revue Générale de Droit, Vol. 42 (2012), p. 237 ("Cependant, lorsqu'un groupe a été inscrit comme entité terroriste, il est plus difficile pour un prévenu d'arguer qu'il ignorait que les montants qu'il lui a alloués seraient utilisés, partiellement ou totalement, en faveur du terrorisme.") (Ukraine's Memorial, Annex 492).

programmes and bomb attacks . . . ."[355] According to the hypothetical, the financier "hopes that they will be used for medical care for the community," but "knows the organization . . . may decide to use [the funds] for bomb attacks on civilians."[356] In such circumstances, the UNODC instructs, the "offence implementing the Convention *must*" punish this conduct.[357]

206. The *travaux préparatoires* confirm this interpretation of Article 2(1). A working document prepared by France explained that "[t]his convention is aimed both at 'those who give orders', who are aware of the use of the funds, and contributors, *who are aware of the terrorist nature of the aims and objectives of the whole or part of the association which they support* with their donations in cash or in kind . . . ."[358] In other words, knowledge of the group's overall terrorist activities, rather than the specific end use of particular funds, establishes the offence. Lehto further confirms that it was "recurrently mentioned in the negotiations" that the required knowledge under Article 2 would be met by "the funding of an organisation that carries out multiple activities of a political and social as well as military nature, and where it may not be possible for the financier to make a distinction between the different possible end uses . . . ."[359] Consistent with this understanding, the delegates rejected a proposal to exempt the provision of materials "also used for humanitarian purposes by the beneficiary person or organization," on the ground that this proposal "would unnecessarily limit the scope of the convention and diminish its effectiveness."[360]

---

[355] UNODC, LEGISLATIVE GUIDE TO THE UNIVERSAL LEGAL REGIME AGAINST TERRORISM (2008), p. 30 (Ukraine's Memorial, Annex 285).

[356] *Ibid.*, pp. 30–31.

[357] *Ibid.*, p. 31 (emphasis added). Russia weakly claims that the UNODC "does not assist Ukraine" because it does not purport to authoritatively interpret the Convention, Russia's Objections, para. 51, but its mandate does include "provid[ing] assistance in implementing such instruments [including ICSFT] to States, upon request." U.N. General Assembly Resolution No. 56/261, U.N. Doc. A/RES/56/261, *Plan of Action for the Implementation of the Vienna Declaration on Crimes and Justice: Meeting the Challenges of the Twenty-First Century* (15 April 2002), para. 24(a).

[358] France, *Working Document: Why an International Convention Against the Financing of Terrorism?, later reproduced as* U.N. doc. A/AC.252/L.7/Add.1 (March 11, 1999), p. 2, para. 5 (Ukraine's Memorial, Annex 275).

[359] Lehto, p. 293 (Ukraine's Memorial, Annex 490).

[360] Ad Hoc Committee Report, U.N. Doc. A/54/37, para. 9 (Ukraine's Written Statement, Annex 13).

b. Russia's Real Disagreement with Ukraine Does Not Concern the Interpretation of Article 2(1), but the Fact of Whether its Proxies Were Known to Commit Terrorist Acts

207. Against this backdrop, it is not surprising that Russia is unwilling to put forward an alternative interpretation of Article 2(1). If the above interpretation were not accepted, it would have the absurd result that even supplying funds to ISIS would not be covered by the Convention. In addition to its terrorist acts, ISIS engages in armed conflict against combatants, and performs quasi-governmental functions. A person who knowingly donates funds to ISIS could not know with certainty which ISIS activities that donation would support, whether civilian attacks, military offensives against the Iraqi army, or infrastructure works. But no one would dispute that such a donation is done with "knowledge that [the funds] are to be used" for terrorism under Article 2(1).

208. In order to avoid denying the obvious, Russia concedes that Article 2(1) may be satisfied through "financing of a group which has *notoriously* committed terrorist acts . . . ."[361] But it tempers that concession by insisting, without support, that "[s]uch notoriety" can be achieved only when the group is "designated by the UN Security Council," or "at least, by multiple States" (Russia does not say how many).[362] A terrorism designation is certainly one way to establish that a group is known to engage in terrorism, but there are many other ways for this fact to be known, and nothing in Article 2(1) limits the analysis to just one type of evidence of knowledge.

209. Russia's suggestion that designation of a group is *legally necessary* to establish knowledge makes especially little sense given the history of terrorism designations.

---

[361] Russia's Objections, para. 54 (*citing* Ukraine's Memorial, para. 281).

[362] *Ibid.*, paras. 54–55.

Designation of terrorist groups became common practice only after 11 September 2001.[363] The ICSFT was completed two years prior, so its drafters could not possibly have considered that proving an Article 2 offence would hinge on designations.[364]

210. Moreover, courts of States Parties have employed Ukraine's interpretation of Article 2(1) without relying on the fact of designation. In *Fighters and Lovers*, the Supreme Court of Denmark did not address whether the FARC or the PFLP were designated as terrorists by particular States, but relied on their well-known *actions*: the fact that the "FARC and PFLP have perpetrated serious attacks on a civilian population with the intent of terrorizing that population to a serious extent or to destabilize the fundamental political, constitutional, economic and social structures . . . ."[365] Similarly, in *Boim v. Holy Land Foundation for Relief & Development*, the U.S. Court of Appeals held that the defendant knowingly supported acts of terrorism by making donations to Hamas, relying not on that organization's designation but its acts — "as Hamas engages in violence [against civilians] as a declared goal of the organization, anyone who provides material support to it, knowing the organization's character, is punishable."[366]

---

[363] *See* U.N. Security Council Resolution 1373, U.N. Doc. S/RES/1373 (28 September 2001); Lee Jarvis & Tim Legrand, *The Proscription or Listing of Terrorist Organisations: Understanding, Assessment, and International Comparisons*, Terrorism and Political Violence, Vol. 30 (2018), pp. 200, 204 (noting that "the European Union established its own 'list of persons, groups and entities involved in terrorist acts and subject to restrictive measures' following the events of September 11, 2001," that "the attacks of 9/11 marked an immediate and pronounced transformation in the status of proscription worldwide," and that "[i]n Security Council Resolution 1373 . . . , the United Nations enjoined members states to institute mechanisms to quell the financing of and support for terrorism . . . [t]he legislative response was immediate") (Ukraine's Written Statement, Annex 86).

[364] Moreover, of the groups whose terrorist nature Russia concedes is "well-established" and notorious, only one is included on Russia's own terrorist designation list. Russia's Objections, para. 55 & note 62 (acknowledging that of the six terrorist organizations it describes as sufficiently well-recognized and notorious, five of them — FARC, PFLP, Hamas, PKK and ETA — are not designated by Russia).

[365] "Fighters and Lovers Case," p. 1 (Ukraine's Memorial, Annex 476).

[366] *Boim v. Holy Land Foundation for Relief & Development*, 549 F.3d 685 (Court of Appeals for the 7th Circuit of the United States, 2008), pp. 698, 700 (emphasis in original omitted) (Ukraine's Memorial, Annex 474).

211. At least since the Nuremburg Trials, international law has recognized that knowledge and *mens rea* generally can (and often must) be inferred from the circumstances.[367] Thus, contrary to Russia's suggestion, whether a particular group "has notoriously committed terrorist acts" is not a legal question but a factual one. In deciding whether the perpetrator knew that the group being financed commits terrorist acts (that is, acts as defined by Article 2(1)(a) and (b) of the ICSFT), the Court may consider the normal range of evidence and draw ordinary inferences. There will rarely be direct evidence of a perpetrator's knowledge (since the perpetrator has every reason to deny it). To the extent Russia means to deny the use of circumstantial evidence and inferences from context, such a deviation from accepted international law standards for proving knowledge is unsupported.[368]

c. Russia Does Not Address the Significant Evidence Supporting in Particular the Knowledge of the Russian Officials that Financed Terrorism in Ukraine

212. Finally, in light of the Russian Federation's inappropriate attempts to argue the facts at the preliminary objections stage, Ukraine brings to the Court's attention that Russia

---

[367] International Military Tribunal, *United States of America* v. *Alstötter, et al. ("The Justice Case")*, Law Reports of Trials of War Crimes, Vol. 3 (1951), pp. 1080–81 ("[g]eneral knowledge of the broad outlines" of a "pattern and plan of racial persecution" can be inferred from circumstantial evidence, such as public announcements by the Nazi leadership, Nazi laws and general news reporting); Prosecutor v. Tadić, ICTY Case No. IT-94-1-T, Trial Chamber Judgment (May 7, 1997), paras. 656–57 (knowledge of "a widespread or systematic attack on a civilian population" for crimes against humanity "is examined on an objective level and factually can be implied from the circumstances"); Prosecutor v. Kvočka et al., ICTY Case No. IT-98-30/1-T, Trial Chamber Judgment (2 November 2001), para. 324 ("Knowledge of the joint criminal enterprise can be inferred from such indicia as the position held by the accused, the amount of time spent in the camp, the function he performs, his movement throughout the camp, and any contact he has with detainees, staff personnel, or outsiders visiting the camp. Knowledge of the abuses could also be gained through ordinary senses."); International Criminal Court, *Elements of Crimes* (2011), p. 1, para. 3, *accessed at* https://bit.ly/2QXstde ("Existence of intent and knowledge can be inferred from relevant facts and circumstances.").

[368] Russia does not clearly articulate such an extreme position, but it does suggest that because the words "nature or context" are used in Article 2(1)(b), the nature or context of an act cannot be consulted in evaluating knowledge under Article 2(1). Russia's Objections, paras. 45–47. Article 2(1)(b) concerns acts committed by someone other than the perpetrator of the financing offence, and therefore explicitly establishes an objective standard for evaluating the nature of that third party's acts. Article 2(1) remains concerned with the perpetrator's actual knowledge, subject to normal means of proof of knowledge.

has not addressed a significant amount of evidence that Ukraine put forward in its Memorial. While it is *sufficient* that the recipient of Russian funds were notoriously committing acts of terrorism, that is not the extent of Ukraine's evidence. Ukraine's Memorial lays out evidence showing that Russian officials, in particular, had knowledge about the activities of their proxies in Ukraine, including knowledge about the specific uses of the weapons being provided.[369] Ukraine will not repeat that evidence here. But it is notable that Russia does not mention this evidence, or even attempt an argument that it is somehow insufficient to establish knowledge within the meaning of Article 2(1).

2. Ukraine's Memorial Correctly Set Forth the Elements of Acts of Terrorism Under Articles 2(1)(a) and 2(1)(b)

213. Ukraine's Memorial also correctly set forth the elements of acts of terrorism under ICSFT Article 2(1)(a) and 2(1)(b). If Russia's arguments for a different interpretation of these provisions are decided at this stage, they should be rejected.

a. Acts of Terrorism Under Article 2(1)(a) — The Bombings Convention

214. Article 2(1)(a) of the ICSFT incorporates as acts of terrorism violations of the International Convention for the Suppression of Terrorist Bombings ("ICSTB," or "Bombings Convention"). An individual commits an offense under ICSTB Article 2 if he "unlawfully and intentionally" (1) "delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility"; (2) "[w]ith the intent to cause death or serious bodily injury" or "[w]ith the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss."[370] Russia does

---

[369] *See* Ukraine's Memorial, Chapter 5, Section B.

[370] International Convention for the Suppression of Terrorist Bombings, 15 December 1997, 2149 U.N.T.S. 284, art. 2 [hereinafter "ICSTB"].

not suggest that the parties disagree on the interpretation of the elements of a terrorist bombing offence under Article 2 of the ICSTB.[371]

b. Acts of Terrorism Under Article 2(1)(a) – The Montreal Convention

215. Article 2(1)(a) of the ICSFT also incorporates as acts of terrorism violations of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation ("Montreal Convention"). To commit an offense under Article 1(1)(b) of the Montreal Convention, a person must unlawfully and intentionally destroy an aircraft in service, and that aircraft must be civilian. Under the ordinary meaning of Articles 1 and 4 of the Montreal Convention, in the context of the Convention's overall structure, the civilian or military status of the aircraft is a jurisdictional element of the offence, not subject to an intent requirement.

216. Article 1(1)(b) of the Montreal Convention provides: "Any person commits an offence if he unlawfully and intentionally: . . . (b) destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight . . . ."[372] Thus, the action that must be "intentional[]" is the "destroying [of] an aircraft in service." With minimal explanation, however, Russia argues that these words cannot be given their ordinary meaning. Instead, in Russia's view, the word "civilian" should be read into Article 1, so that its text is read to proscribe "intentionally . . . destroy[ing] *a civilian* aircraft in service."[373]

217. Russia's interpretation subverts the ordinary meaning of Article 1, which does not reference the status of the aircraft destroyed. The question of status is addressed in a separate provision, Article 4(1), which speaks in terms not of intention but of application of the Convention as a whole. Specifically, Article 4(1) provides that the treaty "shall not apply to aircraft used in military, customs or police services."[374] The text and structure of the

---

[371] *See* Russia's Objections, paras. 62–64.

[372] Montreal Convention, art. 1(1)(b).

[373] Russia's Objections, paras. 60–61.

[374] Montreal Convention, art. 4(1).

Convention thus establish that a violation occurs where the elements of Article 1 are met (intent to destroy an aircraft, and unlawful destruction of an aircraft), and the jurisdictional exclusion in Article 4 is not triggered (because an aircraft used in military, customs or police services was not destroyed).

218. Russia's sole argument in support of its interpretation is that the word "civilian" is somehow implicit in the phrase "aircraft in service" as used in Article 1.[375] That claim finds no support in the text of the Convention. Under Article 2(b), whether an aircraft is "in service" has nothing to do with the status of the aircraft, but rather concerns whether or not it is in use:

> [A]n aircraft is considered to be in service from the beginning of the preflight preparation of the aircraft by ground personnel or by the crew for a specific flight until twenty-four hours after any landing; the period of service shall, in any event, extend for the entire period during which the aircraft is in flight as defined in paragraph (a) of this Article.[376]

219. It is not unusual for treaty offences to include jurisdictional elements not subject to the requirement of *mens rea*. A case in point is the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents ("IPP Convention"), which governs attacks on "internationally protected persons" such as diplomats.[377] That treaty, like the Montreal Convention, is incorporated in Article 2(1)(a) of the ICSFT. Article 2(1)(a) of the IPP Convention sets forth the offense of "[t]he intentional

---

[375] Russia's Objections, para. 61.

[376] Montreal Convention, art. 2(b). Russia's citation to a statement of the Soviet Union's delegate during negotiations is taken out of context. Russia's Objections, para. 61 (citing International Civil Aviation Organization, Minutes, International Conference on Air Law, Montreal, September 1971, Fourth Meeting of the Commission of the Whole, contained in Vol. 1 Doc 9081-LC/170-1 (1971), p. 122, para. 7 (Russia's Objections, Annex 4)). The delegate was not discussing whether the status of the aircraft is part of the *mens rea* of an offense under the Convention. Rather, the delegate was emphasizing that the Convention should apply to "international and domestic" flights. International Civil Aviation Organization, Minutes, International Conference on Air Law, Montreal, September 1971, Fourth Meeting of the Commission of the Whole, contained in Vol. 1 Doc 9081-LC/170-1 (1971), p. 122, para. 7 (Russia's Objections, Annex 4).

[377] Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, 14 December 1973, 1035 U.N.T.S. 167 [hereinafter IPP Convention].

commission of . . . [a] murder, kidnapping or other attack upon the person or liberty of an internationally protected person."[378] Unlike the Montreal Convention, which addresses intent and status in separate articles, the IPP Convention includes the covered status (internationally protected person) within the article defining the offense. Even in that case, however, the IPP Convention has been interpreted to require only that the victim in fact has protected status; it does not require the attacker to *intend* to assault someone with that status.[379] The ICTY has similarly recognized that crimes under international law may include a "jurisdictional element," which must be met for the crime to have occurred, but which is "not 'a substantive element of the *mens rea*.'"[380]

220. Ukraine explained in its Memorial the distinction between jurisdictional elements of a crime and substantive elements subject to the *mens rea* requirement.[381] It further explained why the text of Article 4 of the Montreal Convention, read in context with Article 1, creates a jurisdictional element under accepted principles of treaty interpretation.[382] The Russian Federation has chosen not to answer the point.[383]

221. Reading the Convention according to its ordinary meaning, namely that the intent required is intent to destroy an aircraft in service, also best advances the Convention's object and purpose. The preamble to the Montreal Convention reflects that the "occurrence"

---

[378] *Ibid.*, art. 2(1)(a).

[379] *See* UNODC, LEGISLATIVE GUIDE TO THE UNIVERSAL ANTI-TERRORISM CONVENTIONS AND PROTOCOLS (2003), pp. 12–13, para. 30 (explaining that the victim's status is not subject to the mental element requirement because "[t]he necessary element of a criminal intent is supplied by the fact that an assault upon any person is a clearly criminal act, *malum in se*") (Ukraine's Memorial, Annex 284); *United States v. Murrillo,* 826 F.3d 152 (Court of Appeals for the 4th Circuit of the United States, 2016), pp. 158–59 (interpreting the U.S. implementing legislation for the IPP Convention and concluding that "[t]he victim's IPP status is . . . clearly intended to be a jurisdictional element of the murder offense," such that "a perpetrator need not know his victim's status in order to commit the crime of murdering an IPP") (Ukraine's Written Statement, Annex 62).

[380] Prosecutor v. Tadić, ICTY Case No. IT-94-1-A, Appeals Chamber Judgment (15 July 1999), para. 249.

[381] Ukraine's Memorial, para. 222.

[382] *Ibid.*

[383] *See* Russia's Objections, paras. 57–61.

of "unlawful acts against the safety of civil aviation" is "a matter of grave concern."[384] It further articulates the Convention's "purpose of deterring such acts."[385] Interpreting Article 1 of the Convention according to its ordinary meaning best deters unlawful acts that harm civilian aviation. There is no sound reason, by contrast, to excuse offenders who satisfy all the elements of Article 1, but who claim an intent only to attack a different type of aircraft.

222. Critically, in all cases no crime under Article 1 is committed unless the perpetrator acts "unlawfully."[386] Thus, anyone who is lawfully permitted to use surface-to-air missiles (such as members of a State's military) would generally not be culpable if they mistakenly, but in good faith, destroy a civilian aircraft while lawfully attempting to engage a military target. The drafters of the Convention had no reason to immunize perpetrators who murder innocent civilians in the course of acting *unlawfully*. A professed lack of intent makes little difference when the perpetrator acted illegally regardless. Indeed, those who would unlawfully fire on aircraft of any kind are likely to be indifferent to civilian life at a minimum, giving the drafters all the more reason to deter any such unlawful acts. Russia's narrow and atextual reading of Article 1 conflicts with the provision's ordinary meaning, and would not adequately deter "the occurrence" of attacks on civil aviation.[387]

223. But even if the word "civil" were inserted into Article 1, such that intent as to the civilian status of the aircraft were required, the meaning of "intent" would still encompass its normal usage in general international law. As explained by Professor Michael Milde, former Director of the Legal Bureau of ICAO, Article 1 of the Montreal Convention uses the term "intentionally" as a general matter, leaving it for further interpretation and without

---

[384] Montreal Convention, preamble.

[385] *Ibid.*

[386] *Ibid.*, art. 1.

[387] *Ibid.*, preamble.

necessarily limiting the concept to *dolus directus*.[388] Under these circumstances, it is especially appropriate to interpret that term in accordance with its general usage in international law, which as explained below encompasses various degrees of intent.[389]

c. Acts of Terrorism Covered by the Catch-All Definition of Terrorism in Article 2(1)(b)

224. In addition to incorporating violations of various conventions as terrorist acts through Article 2(1)(a), Article 2(1)(b) of the ICSFT creates a broad, general definition of terrorist acts that may not be financed.[390] An act falls under Article 2(1)(b) if it is (1) "intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict," and (2) the "purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act."[391] Each of these elements is addressed below.

i. The "Act Intended to Cause" Element of Article 2(1)(b) Concerns the Objective Destination of the Act, and to the Extent it Concerns the Intent of the Perpetrator, It Encompasses the Various Degrees of Intent Recognized in International Law

225. The first element of an act of terrorism under Article 2(1)(b) requires that the act be "intended to cause death or serious bodily injury to a civilian." The ICSFT does not

---

[388] Michael Milde, ESSENTIAL AIR AND SPACE LAW: INTERNATIONAL AIR LAW AND ICAO (2d ed., 2012), pp. 242–43 ("The act must be 'intentional' – this specific offence under the Montreal Convention cannot be committed by negligence; the Conference did not discuss whether the intention must be 'direct' (*i.e.*, true intent to cause the harmful result) or whether an 'indirect' or 'eventual' interest would suffice (the offender did not intend to cause the harmful result but was aware that such result may occur and that did not stop him from acting) – that would be left to interpretation by the Courts of law.") (Ukraine's Written Statement, Annex 76).

[389] *See infra*, paras. 229–231.

[390] ICSFT, art. 2(1)(b).

[391] *Ibid.*

define "intended to." Russia, however, advocates a restrictive definition, limiting the term "intended" to "'desired', 'aimed' or planned.'"[392] This is incorrect for several reasons.

226. First, Russia misinterprets the "intended to cause" element as a mental state requirement, when in fact it is concerned simply with the act itself. Article 2(1)(b) is dissimilar from provisions such as Article II of the Genocide Convention, which speaks of "acts committed *with the intent* to destroy," indicating that the appropriate inquiry is into the subjective mental state of the perpetrator.[393] Article 2(1)(b) of the ICSFT, by contrast, focuses on the act itself, and what that *act* is intended to cause. That is an objective inquiry; acts have natural consequences and destinations, but they do not have desires. Russia's interpretation of "intended" to mean "desired" simply does not work in the context of Article 2(1)(b): the phrase "an act desired to cause death" is nonsensical. With the proper focus on what the "act" is "intended to cause," the test to be applied must be an objective one, based on the ordinary consequences of such an act.

227. That is consistent with the ordinary meaning of the French phrase "acte destiné à," which is likewise concerned with the ordinary destination of the act. It is notable that Russia, in its Preliminary Objections, has addressed only "the term 'destiné à'" in the abstract — ignoring the ordinary meaning of the full phrase "*acte* destiné à."[394] The Russian text of the Convention is also instructive. When Article 2(1) of the paragraph refers to the mental state of the *financier*, it uses the Russian word "умышленно," which translates as "intentionally" or "wilfully."[395] By contrast, Article 2(1)(b) does not use that word, but uses the word

---

[392] Russia's Objections, para. 67.

[393] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 U.N.T.S. 277, art. II (emphasis added).

[394] Russia's Objections, para. 67 (emphasis added).

[395] ICSFT, art. 2(1) (authentic Russian text). *See also* Lingvo Universal Russian-to-English Dictionary, *умышленно* (software ed., 2018) (translating "умышленно" as, *inter alia*, "wilfully") (Ukraine's Written Statement, Annex 89).

"направленного," which translates as "aimed at" or "directed at."[396] The question of what an act is aimed or directed at is objective, not a question of the desires of the actor.[397]

228. The *travaux préparatoires* of the Genocide Convention highlight the distinction between a true mental element focused on the perpetrator, and an objective inquiry into the nature of the act. As noted, the Genocide Convention requires that the offender act "with the intent to destroy." In the negotiations, however, the Soviet delegate considered this requirement too stringent, and proposed to replace it with "*aimed at* the physical destruction."[398] Other delegates considered this a proposal to transform the mental state requirement into an "objective" criterion.[399] It is noteworthy that Article 2(1)(b) deviates from the Genocide Convention's focus on the mental state of the perpetrator, and instead tracks the old Soviet "aimed at" proposal to focus objectively on the act itself.

229. Second, even assuming that Article 2(1)(b) is concerned with the subjective mental state of the actor, rather than the objective destination of the act, Russia's interpretation would still fail. Since the ICSFT does not define the word "intended to" or "intent," the proper method for "determin[ing] the ordinary meaning of the words," as the Court has said in analogous circumstances, is "by reference to the most commonly used criteria in international law and practice."[400] In international law and practice, the ordinary

---

[396] ICSFT, art. 2(1) (authentic Russian text). *See also* Lingvo Universal Russian-to-English Dictionary, *направлять* (software ed., 2018) (translating "направлять," the relevant grammatical variant of "направленного" into English as, *inter alia*, "direct (*at, to*)" and "aim (*at*)") (Ukraine's Written Statement, Annex 88).

[397] *See, e.g.*, Prosecutor v. Karadžić, ICTY Case No. IT-95-5/18-T, Trial Chamber Judgment (24 March 2016), para. 454 (identifying various objective criteria for considering whether an attack is directed at a civilian population).

[398] Sixth Committee of the General Assembly, 73rd Meeting, *Continuation of the Consideration of the Draft Convention on Genocide: Report of the Economic and Social Council*, U.N. Doc. A/C.6/SR.73 (1948), p. 95 (emphasis added) (Ukraine's Written Statement, Annex 1).

[399] *Ibid.*, pp. 96–97.

[400] *See Kasikili/Sedudu Island (Botswana/Namibia), Judgment of 13 December 1999, I.C.J. Reports 1999*, p. 1063, para. 27.

meaning of "intent" is a broad concept. The word "intent" (or "*dolus*") is commonly used to describe different "degrees,"[401] including *dolus directus, dolus indirectus*, and *dolus eventualis*.[402] These degrees of intent encompass situations where the perpetrator desires the prohibited outcome, is aware that the outcome will occur in the ordinary course of events, or sees that his actions will likely produce that outcome and nonetheless willingly takes the risk. Professor Kai Ambos explains:

> With regard to the commission of international crimes mere negligence is in most cases insufficient. These crimes require a state of mind which in civil law jurisdictions is referred to as *dolus* or intent. *Dolus* exists in the following forms: *dolus*

---

[401] Albin Eser, *Mental Elements: Mistake of Fact and Mistake of Law*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (Antonio Cassese et al. eds., OUP 2002), pp. 905–906 (Ukraine's Written Statement, Annex 80).

[402] Lavalle, p. 499 ("This Latin term [*dolus eventualis*] (a French synonym for which is *insouciance*) designates the criminal offence committed by a person who, knowing that an act he plans to carry out involves the risk of (generally physical) damage to others, nonetheless carries out the act. In such cases one may consider that the actor has, indirectly, intended such harmful consequences as may arise from his behaviour. Thus the notion of *dolus eventualis* has been rendered in English by the expression 'oblique' or 'indirect' intention. Similarly Swiss criminal courts have considered that the concept of intention can encompass the *dolus eventualis*. But, whatever its nature, intention cannot exist without some degree of knowledge, for no criminal act takes place in a vacuum and, as has been pointed out by a well-known British author, 'an act is not intentional as to a circumstance of which the actor is ignorant,' which ties in with the German doctrine of *Tatbestandsvorsatz*. We are thus brought to the knowledge variant." (citations omitted)) (Ukraine's Memorial, Annex 484); Kai Ambos, TREATISE ON INTERNATIONAL CRIMINAL LAW, VOL. I: FOUNDATIONS AND GENERAL PART (2013), p. 267 (Ukraine's Written Statement, Annex 83); Glanville Williams, *Oblique Intention*, Cambridge Law Journal, Vol. 46 (1987), 421 (noting that the notion of oblique intent, as of 1987, had been accepted in Sweden, the United States' Model Penal Code, Canada, and England) (Ukraine's Written Statement, Annex 68).

> *directus* first degree (also called *dolus directus*), *dolus directus* second degree (or *dolus indirectus*) and *dolus eventualis*.[403]

230. Russia's own criminal code uses the word "intent" ("умышленно") to refer to the various degrees of *dolus* that are generally recognized. Article 25 of the Criminal Code of the Russian Federation provides that "[a]n act committed with direct or indirect intent shall be recognized as a crime committed intentionally."[404] The provision further recognizes that an act is "committed with indirect intent" if "the person realized the social danger of his actions," but "consciously allowed these consequences or treated them with indifference."[405] Russian law thus uses the concept of "intent" to cover all of the recognized degrees of *dolus*, including *dolus directus*, *dolus indirectus*, and *dolus eventualis* (although the Russian code essentially defines "indirect intent" broadly to encompass the latter two degrees of intent). It is not at all credible for Russia to argue before this Court that the ordinary meaning of "intent" is limited to "desire," when *its own laws* reflect a different meaning for that term.

---

[403] Kai Ambos and Steffen Wirth, *The Current Law of Crimes Against Humanity: An Analysis of UNTAET Regulation 15/2000*, Criminal Law Forum, Vol. 13 (2002), pp. 36–37 (Ukraine's Memorial, Annex 486). *See also* Sarah Finnin, *Mental Elements Under Article 30 of the Rome Statute of the International Criminal Court: A Comparative Analysis*, International and Comparative Law Quarterly, Vol. 61 (2012), p. 328 ("[D]omestic criminal law systems recognize different *gradations* or *degrees* of intent. The same goes for international criminal law. Each gradation or degree has two components: a cognitive component (the element of awareness) and a volitional component (the element of desire). What sets each gradation or degree of intent apart is the relative level of each component. . . . Civil law countries . . . recognize three gradations of intent: *dolus directus* in the first degree, *dolus directus* in the second degree and conditional intent (generally referred to as *dolus eventualis*).") (Ukraine's Written Statement, Annex 77).

[404] Criminal Code of the Russian Federation, art. 25 (Ukraine's Written Statement, Annex 51).

[405] *Ibid.*

231. Likewise, when international criminal tribunals have grappled with the term "intent," they have interpreted that term to cover intent in its various degrees.[406] The International Committee for the Red Cross, in its authoritative commentary on Additional Protocol I to the Geneva Conventions, similarly defines the concept of "intent" broadly, to include "the attitude of an agent who, without being certain of a particular result, accepts the possibility of it happening."[407] The Rome Statute, which is recognized as defining "intent" more narrowly than its general use,[408] nonetheless defines "intent" to include more than one

---

[406] *See, e.g.*, Prosecutor v. Stakić, ICTY Case No. IT-97-24-T, Trial Chamber II Judgment (31 July 2003), paras. 585–587 ("The Trial Chamber notes that prior case-law on this issue held that the intent to kill is a pre-requisite, but did not provide any further description of what is meant by 'intent to kill'. . . . Turning to the *mens rea* element of the crime, the Trial Chamber finds that both a *dolus directus* and a *dolus eventualis* are sufficient to establish the crime of murder under Article 3. In French and German law, the standard form of criminal homicide (*meurtre*, *Totschlag*) is defined simply as intentionally killing another human being. German law takes *dolus eventualis* as sufficient to constitute intentional killing."); Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-T, Trial Chamber II Judgment (21 May 1999), para. 139 ("[T]he standard of *mens rea* required [for murder as a crime against humanity] is intentional and premeditated killing. . . . The result is intended when it is the actor's purpose [*dolus directus*], or the actor is aware that it will occur in the ordinary course of events [*dolus indirectus*].").

[407] International Committee of the Red Cross, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (1987), p. 994, para. 3474 [hereinafter ICRC COMMENTARY] (commenting on Article 85) (Ukraine's Written Statement, Annex 79).

[408] Lehto, p. 284 (noting that Article 30 sets forth "an unusually strict standard" that may "exclude a lower standard" that "applies on the basis of customary law") (Ukraine's Memorial, Annex 490). *See also* William A. Schabas, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE (2d ed., OUP 2016), p. 627 ("The *Rome Statute* sets a demanding standard for the mental element . . . .") (Ukraine's Written Statement, Annex 84); Antonio Vallini, *Mens Rea*, *in* THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE (Antonio Cassese ed., 2009), p. 412 ("Both these psychological attitudes [in Rome Statute Article 30] are the subject of a specific definition. This provision applies only to the ICC jurisdiction; it does not codify previous customary law, and it is doubtful whether, in time, it may give rise to a general rule of ICL.") (Ukraine's Written Statement, Annex 82); *ibid.*, p. 414 (noting that "the ICC will have to depart from the case law of ad hoc tribunals" which interpret *mens rea* less restrictively).

degree of *dolus*, including in situations where the person "is aware that [a consequence] will occur in the ordinary course of events" (*dolus indirectus*).[409]

232. Consistent with this general understanding of the concept of "intent" in international law, States Parties to the ICSFT have interpreted the "act intended to cause" element of Article 2(1)(b) as encompassing the various degrees of *dolus*, rather than adopt Russia's restrictive definition limiting "intent" to "desire." For example, the Italian Supreme Court of Cassation has interpreted Article 2(1)(b) of the ICSFT to cover "an attack using explosives against a military vehicle in a crowded market," because the "specific circumstances of the event show that serious harm to life and the physical integrity of civilians are certain and unavoidable."[410] Similarly, the Supreme Court of Denmark has found that the FARC's use of "imprecise mortar shells in civilian areas, in which civilians became victims," was intended to harm and terrorize the civilian population.[411]

233. The ordinary meaning of "intent" is further supported by cases addressing the war crime of wilfully directing attacks on a civilian population, since "willfully" is used as a

---

[409] Rome Statute of the International Criminal Court, 17 July 1998, UN Doc. A/CONF.183/9, art. 30(2)(b) [hereinafter, Rome Statute]; Kai Ambos, TREATISE ON INTERNATIONAL CRIMINAL LAW, VOL. I: FOUNDATIONS AND GENERAL PART (2013), p. 275 ("The second category [of Rome Statute Article 30(2)(b)] establishes a cognitive standard which draws on the indirect or oblique intent of common law and the *dolus directus* in the second degree of civil law: the agent must be aware that the consequence 'will occur in the ordinary course of events'.") (Ukraine's Written Statement, Annex 83).

[410] *Italy v. Abdelaziz and ors*, Final Appeal Judgment, No. 1072, 2007, 17 Guida al Diritto 90, ILDC 559, Supreme Court of Cassation, Italy, 17 January 2007, paras. 4.1, 6.4 (Ukraine's Memorial, Annex 473). Russia misleadingly argues that the Italian Supreme Court limited "intended to cause" to "desire." Russia's Objections, para. 74. The Italian Supreme Court indicated that there must be a desire to cause *some* harm, but that could include harm to the hypothetical military vehicle, where the harm to civilians was intended under Article 2(1)(b), even if not the main objective. *Ibid.*, para. 4.1 (implying that the precise argument Russia is putting forth "lacks consistency and rationality").

[411] "Fighters and Lovers Case," pp. 1–2 (Ukraine's Memorial, Annex 476). This case applied Section 114 of the Danish Criminal Code, which was passed to implement the ICSFT and related anti-terrorism obligations. *See* Council of Europe Committee of Experts on Terrorism, *Profiles on Counter-Terrorist Capacity: Denmark* (April 2007), p. 1 (Ukraine's Written Statement, Annex 4).

synonym of "intentionally."[412] "[I]ndiscriminate attacks, that is to say, attacks which strike civilians or civilian objects and military objectives without distinction, may qualify as direct attacks against civilians."[413] This Court observed in its *Nuclear Weapons* Advisory Opinion, for example, that the "use [of] weapons that are incapable of distinguishing between civilian and military targets" constitutes "mak[ing] civilians the object of attack."[414] An attack that, as a matter of international law, makes the civilian population its object, is necessarily an act intended to cause harm to civilians, whatever may be said of the specific "desires" of the perpetrator.

234. Despite this international practice (and Russia's own domestic practice), Russia insists that intent is indeed limited to what the perpetrator subjectively desires. Its remaining arguments for such a standard, in addition to defying the ordinary meaning of "intent," are without merit.

235. First, Russia notes that "Article 2(1)(b) does not contain the formulation 'intention or knowledge'" as used in paragraph (1)'s statement of the mental elements for the financing offence.[415] From this, Russia infers that "the term 'intent' should not be interpreted expansively to encompass knowledge-based standards."[416] But that inference is not warranted

---

[412] *See generally* ICRC COMMENTARY, p. 994, para. 3474 (defining "wilfully" as meaning to act "consciously and with intent") (Ukraine's Written Statement, Annex 79); William A. Schabas, *Mens Rea and the International Criminal Tribunal for the Former Yugoslavia*, New England Law Review, Vol. 37 (2002), pp. 1020–1021 (Ukraine's Written Statement, Annex 72).

[413] Prosecutor v. Galić, ICTY Case No. IT-98-29-T, Trial Chamber Judgment (5 December 2003), para. 57; *see also* Prosecutor v. Martić, ICTY Case No. IT-95-11-T, Trial Chamber Judgment (12 June 2007), para. 472 (Martić fired indiscriminately at an area with both civilians and military targets; because he "knew of the effects of [his] weapon," he "willfully made the civilian population of Zagreb the object of [his] attack"). Under the ICTY Statute, the *mens rea* of directing attacks against a civilian population is "willfully," which is used synonymously with "intentionally." *See generally* William A. Schabas, *Mens Rea and the International Criminal Tribunal for the Former Yugoslavia*, New England Law Review, Vol. 37 (2002), pp. 1020–1021 (Ukraine's Written Statement, Annex 72).

[414] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, I.C.J. Reports 1996,* p. 257, para. 78.

[415] Russia's Objections, para. 68.

[416] *Ibid.*

given the common practice in international law to use the terms "intent" and "knowledge" in overlapping ways.[417] Moreover, paragraphs (1) and (1)(b) of Article 2 serve fundamentally different purposes and are not readily compared. Article 2(1) defines the actual offence under the Convention, and concerns the perpetrator's own mental state in relation to how *someone else* will use funds. That is distinct from Article 2(1)(b), which addresses the nature of the *act* committed by the third party. Confirming this distinction, both the French and Russian texts of the ICSFT use entirely different words to refer to the mental state of the financier under Article 2(1), and the objective consequences of the act in Article 2(1)(b).[418]

236. Second, Russia criticizes Ukraine for "rel[ying] principally on Article 30 of the Rome Statute," which Russia maintains is irrelevant because it "makes no reference to 'terrorism.'"[419] That is doubly wrong. Ukraine does not "principally" rely on Article 30, but merely cites it as one example of the general use of intent in international law; in fact, as noted above, the Rome Statute's definition of intent is *more restricted* than the ordinary usage of the term.[420] Yet it is still broader than Russia's artificially narrow interpretation.[421]

---

[417] *See* Rome Statute, art. 30 (defining "intent" to include "aware[ness] that [a consequence] will occur in the ordinary course of events," and defining "knowledge" to likewise include "awareness that . . . a consequence will occur in the ordinary course of events"). Indeed, it is entirely consistent to read the same overlapping standard to apply to Article 2(1)'s use of "intention" and "knowledge," with the two terms being used merely because they apply to two different consequences: " . . . intention that *they should be used* or in the knowledge that *they are to be used* . . . ." ICSFT, art. 2(1) (emphasis added).

[418] In French, Article 2(1) uses the phrase "dans l'intention," as compared to Article 2(1)(b) which uses the phrase "acte destiné à." Similarly, as noted above, the Russian text of Article 2(1) uses the word "умышленно" (intentional), whereas Article 2(1)(b) uses the word "направленного" (aimed or directed at).

[419] Russia's Objections, para. 70.

[420] *See supra*, para. 231.

[421] It is also irrelevant that the Rome Statute does not address terrorism. "Intent," as used in the first element of Article 2(1)(b), relates to the general act causing death or injury to a civilian. It does not relate to the terrorist purpose, which is a separate element. *See Prosecutor v. Ayyash et al.*, Special Tribunal for Lebanon Case No. STL-11-01, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (16 February 2011), para. 111 (noting that the crime of terrorism generally includes a general intent requirement, and separately "the special intent (*dolus specialis*) to spread fear or coerce an authority").

237. Finally, Russia asserts that the "appropriate reference point for ascertaining the meaning of an intentional act under Article 2(1) of the ICSFT is the well-established case law on the meaning of specific intent in the context of genocide."[422] That is not at all the appropriate reference point. As noted above, the Genocide Convention focuses on the mental state of the perpetrator (requiring that the act must be "committed with" a particular intent), whereas Article 2(1)(b) focuses on the objective nature of the act itself. In fact, as noted above, the text of Article 2(1)(b) is similar to the failed Soviet proposal to *lower* the standard for proving genocide.[423] Moreover, not only does the Genocide Convention, unlike Article 2(1)(b), create a mental state requirement, it creates a particularly heightened one, requiring an "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, *as such*."[424] As this Court noted in the *Bosnian Genocide Case*, it is "[t]he words 'as such'" that create the Genocide Convention's unusually stringent form of intent.[425] Despite their centrality, Russia conspicuously omits the words "as such" when it quotes the Genocide Convention.[426] Only the second prong of Article 2(1)(b), concerning the purpose to intimidate a population or compel a government, comes close to a specific intent standard, although even that element is less strict than the intent standard of the Genocide Convention, because it is expressly based on

---

[422] *See, e.g.*, Russia's Objections, para. 71. Russia misleadingly suggests that this comparison is supported by Lehto. *Ibid.*, para. 71 & note 86. Lehto simply observes that both the Genocide Convention and the ICSFT "rel[y] on intention." Lehto, pp. 291–292. Far from endorsing Russia's narrow interpretation of intent, Lehto maintains that the ICSFT adopts "*dolus eventualis*" as its "m*ens rea* standard." *Ibid.*, p. 291.

[423] *See supra*, para. 228.

[424] Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, 9 December 1948, art. II (emphasis added); *see also* Updated Statute of the International Criminal Tribunal for the Former Yugoslavia (September 2009), art. 4(2), *accessed at* https://bit.ly/1jqBtBH ("Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: . . . .").

[425] *Bosnian Genocide Case, Judgment 26 February 2007,* para. 187; *see also, e.g.*, Prosecutor v. Karadžić, ICTY Case No. IT-95-5/18-T, Trial Chamber Judgment (24 March 2016), para. 551 ("The term 'as such' has great significance as it shows that the crime of genocide requires intent to destroy a collection of people because of their particular group identity based on nationality, race, ethnicity, or religion.").

[426] Russia's Objections, para. 70.

"nature or context."[427] Ultimately, the treaty before the Court is the ICSFT, and Russia's attempts to distract attention from the actual language of that Convention must fail.

ii. The "Purpose" Element of Article 2(1)(b) Is Inferred from "Nature or Context," and Need Not Be the Sole Purpose

238. The second element of an act of terrorism under Article 2(1)(b) is that "the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act." The drafters included this element "so as to exclude ordinary crimes" from the definition of terrorism, a point that Russia accepts.[428]

239. Russia also concedes that the ordinary meaning of "nature or context" demonstrates that the required purpose can (and in fact should) be inferred from the circumstances.[429] Thus, it will often be appropriate to infer a purpose of intimidating a civilian population from the circumstances of an attack on a civilian area. The Italian Supreme Court of Cassation, interpreting ICSFT Article 2(1)(b), found that such an attack will "creat[e] fear and panic among the local people," thereby "achiev[ing] the particular results that constitute

---

[427] *See infra*, para. 246; *see also Prosecutor* v. *Ayyash et al.*, Special Tribunal for Lebanon Case No. STL-11-01, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (16 February 2011), para. 111 (noting that the crime of terrorism generally includes a general intent requirement, and separately "the special intent (*dolus specialis*) to spread fear or coerce an authority").

[428] Sixth Committee of the UN General Assembly, Working Group on the Measures to Eliminate International Terrorism, Report of the Working Group, U.N. Doc. A/C.6/54.L.2, Annex III, *Informal Summary of the Discussions in the Working Group, prepared by the Chairman* (26 October 1999), p. 62, para. 87 (Ukraine's Memorial, Annex 277); *see* Russia's Objections, paras. 78, 125.

[429] Russia's Objections, para. 77.

terrorist purposes."[430] Similarly, the Supreme Court of Denmark stated that acts including the use of "imprecise mortar shells in civilian areas" constitute a terrorist attack under its ICSFT implementing legislation.[431] Considering the analogous war crime of terrorism, the ICTY infers a purpose to spread terror from "both the actual infliction of terror and the indiscriminate nature of the attack."[432] And the U.N. Commission of Inquiry on Gaza observed that "indiscriminate" rocket attacks, using imprecise weapons that "raise[] the question as to what military advantage [the armed groups] could expect to obtain," support a purpose of spreading terror.[433]

240. Despite conceding the relevance of context, Russia insists that the perpetrator's prior acts cannot be considered relevant. Specifically, Russia argues that even if it is found that a group committed a string of attacks on civilians with the purpose to intimidate, that would not be relevant context for deciding that a later attack on civilians, by the same group,

---

[430] *Italy v. Abdelaziz and ors*, Final Appeal Judgment, No. 1072, 17 Guida al Diritto 90, Supreme Court of Cassation, Italy, 17 January 2007, para. 4.1 (Ukraine's Memorial, Annex 473) (interpreting Article 2(1)(b) of the ICSFT). Russia claims that the Italian Supreme Court's decision is of "no assistance" to Ukraine, because the court emphasized the "certainty (and not mere possibility or probability) of serious harm inflicted on civilians." Russia's Objections, para. 83 (citing *Italy v. Abdelaziz and ors*, Final Appeal Judgment, No. 1072, 17 Guida al Diritto 90, Supreme Court of Cassation, Italy, 17 January 2007, para. 4.1 (Ukraine's Memorial, Annex 473)). However, as discussed below, in all of the shelling attacks highlighted by Ukraine below, the perpetrators acted with at least *dolus indirectus*, which involves awareness that harm will occur in the ordinary course. *See infra*, para. 252.

[431] "Fighters and Lovers Case," pp. 1–2 (Ukraine's Memorial, Annex 476). Implementing Article 2(1)(b), section 114(1) of the Danish Criminal Code defines a terrorist attack as one that is committed "with the intent to frighten a population to a serious degree or to unlawfully coerce Danish or foreign public authorities or an international organisation to carry out or omit to carry out an act . . . ." Criminal Code of Denmark, section 114(1) (Ukraine's Written Statement, Annex 63). Russia's attempt to distinguish the case law of the Danish Supreme Court on the basis that the FARC and PFLP were designated terrorist organizations is beside the point; the Supreme Court focused on these organizations' *acts*, not their designations. *See also supra*, para. 210.

[432] Prosecutor v. Milošević, ICTY Case No. IT-98-29/1-A, Appeals Chamber Judgment (12 November 2009), para. 37. This legal point holds regardless of whether the particular facts of the *Milošević* case are "radically different" from the acts at issue in Ukraine, as alleged by Russia. Russia's Objections, para. 81.

[433] Report of the Detailed Findings of the Independent Commission of Inquiry Established Pursuant to Human Rights Council Resolution S-21/1, U.N. Doc. No. A/HRC/29/CRP.4 (23 June 2015), para. 99.

was committed with the same purpose.[434] This is both illogical and contrary to the ordinary meaning of the word "context," which includes, according to the Cambridge English Dictionary, "the influences and events related to a particular event or situation."[435] As Judge Shahabuddeen has observed, "evidence of prior crimes may be presented as part of the background against which a crime is charged," "[b]ackground evidence can establish motive," and such prior crimes "set[] a particular allegation in its proper *context*."[436]

241. Russia also largely ignores the alternate means of satisfying the second element of Article 2(1)(b): even if a purpose to intimidate is not established, the element can be satisfied by a purpose to "compel a government or an international organization to do or to abstain from doing any act." This purpose may likewise be inferred by nature or context. As explained by the Special Tribunal for Lebanon, "the terrorist's intent to coerce an authority or to terrorise a population will often derive from or be grounded in an underlying political or ideological purpose."[437] A purpose to compel a government may thus appropriately be inferred on the basis of the political or ideological goals of the organization that has attacked civilians. That is particularly the case when the timing of the attack — a factor Russia acknowledges is relevant "context"[438] — suggests that the attack would help the organization advance those goals. The significance of political or ideological objectives in the analysis is supported by the drafters' reason for including the purpose element of Article 2(1)(b), which Russia concedes is

---

[434] Russia's Objections, paras. 77, 107.

[435] Cambridge English Dictionary, *context* (online ed., 2018), *accessed at* https://bit.ly/2LFRxzj.

[436] Ngeze and Nahimana v. Prosecutor, ICTR Case Nos. 97-27-AR72 and ICTR 96-11-AR72, Appeals Chamber Decision on the Interlocutory Appeals, Separate Opinion of Judge Shahabuddeen (5 September 2000), paras. 18, 21 (emphasis added) (quotations and citations omitted).

[437] *Prosecutor* v. *Ayyash et al.*, Special Tribunal for Lebanon Case No. STL-11-01, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (16 February 2011), para. 106.

[438] Russia's Objections, para. 77.

to distinguish terrorism from "ordinary crimes" (*e.g.*, crimes done with a motive of profit or revenge).[439]

242. Russia's final attempt to inappropriately raise the bar to establish an act of terrorism under Article 2(1)(b) is to insist that intimidation or compulsion of a government be not just the purpose of the act, but the *sole* purpose. Yet the required terroristic purpose under Article 2(1)(b) need not be the sole purpose, as Russia claims.[440] The ordinary meaning of Article 2(1)(b) speaks only of the "purpose," not "sole purpose." Reading "sole" into Article 2(1)(b) would lead to plainly unreasonable results.[441] Many terrorist acts have dual purposes. For example, ISIS has committed numerous kidnappings with the dual purpose of both intimidating the population, and funding their general operations through ransom.[442] Russia's position would lead to the absurd result that a terrorist act that is plainly committed with the purpose to intimidate or to compel a government, but *also* with a separate purpose such as raising money, could not qualify as a terrorist act under Article 2(1)(b). That cannot be correct.

243. The context of the Convention as a whole reinforces that "purpose" does not mean "sole purpose." In both Article 13 and Article 14, the Convention specifies that particular grounds may not be "the sole ground" for refusing to act.[443] Where the drafters meant

---

[439] *Ibid.*, para. 78; *see also, e.g.*, M. Cherif Bassiouni, *Effective National and International Action Against Organized Crime and Terrorist Criminal Activities*, Emory International Law Review, Vol. 4 (1990), p. 10 ("What essentially distinguishes 'organized crime' and 'terrorism'" is that "[w]hile 'organized crime' is characterized by a profit motive, . . . 'terrorism' is characterized by an ideological motive.") (Ukraine's Written Statement, Annex 71).

[440] Russia's Objections, para. 76.

[441] *See Qatar v. Bahrain*, p. 19, para. 35 (adopting an interpretation of the treaty text based on the fact that "[a]ny other interpretation would encounter serious difficulties: it would deprive the phrase of its effect and could well, moreover, lead to an unreasonable result").

[442] CBS News, *"Multiple Kidnappings for Ransom" Funding ISIS, Source Says* (21 August 2014) (Ukraine's Written Statement, Annex 87).

[443] ICSFT, arts. 13, 14.

something to be "sole," they used the word "sole" — and did not do so in defining the purpose requirement of Article 2(1)(b).

244. Moreover, had the drafters meant to impose a "sole purpose" requirement, they would have said so explicitly to overcome the usual rule in international law, which dates back to the Nuremberg trials. In the well-known Zyklon B case, the tribunal convicted German businessmen who sold Zyklon B to the Nazi regime, knowing that it would be used in gas chambers. The prosecution did not argue, and the tribunal did not hold, that the primary purpose of the businessmen was anything other than to make a profit.[444] At the same time, from the fact that the businessmen continued to supply Zyklon B "in ever-increasing quantities"[445] after learning of the purpose to which it was put, it inferred that a *secondary purpose* of the businessmen was to encourage continued gassing of Jews, as that would align with their primary purpose of making a profit.[446] Similarly, as explained by the ICTY, the crime of torture requires an act undertaken for a prohibited purpose, but "[t]he prohibited purpose needs not be the sole or the main purpose of the act or omission in question."[447] "If

---

[444] International Military Tribunal, *Trial of Bruno Tesch and Two Others (The Zyklon B Case)*, Law Reports of Trials of War Crimes, Vol. 1, p. 94 (1947), p. 94 ("The case for the Prosecution was that knowingly to supply a commodity to a branch of the State which was using that commodity for the mass extermination of Allied civilian nationals was a war crime, and that the people who did it were war criminals for putting the means to commit the crime into the hands of those who actually carried it out.").

[445] *Ibid.*

[446] *See also* Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, Northwestern Journal of International Human Rights, Vol. 6 (2008), p. 312 ("The court accepted that the purpose of the defendant businessmen in selling Zyklon B, while knowing that it would be used in the gas chambers, was to make a profit. . . . Yet by supplying gas in the knowledge that it would be used to kill human beings, [the court] infer[red] that one of their purposes — admittedly secondary — was to encourage continued mass killings of Jews.") (Ukraine's Written Statement, Annex 81).

[447] Prosecutor v. Limaj et al., ICTY Case No. IT-03-66-T, Trial Chamber Judgment (30 November 2005), para. 239.

one prohibited purpose is fulfilled by the conduct, the fact that such conduct was also intended to achieve a non-listed purpose . . . is immaterial."[448]

245. This background explains why, to create a heightened standard for the war crime of terror under the Additional Protocol to the Geneva Convention, it was necessary to specify that the spreading of terror be the "primary purpose." "Primary purpose" is a *more* stringent standard than the purpose requirement of ICSFT Article 2(1)(b), not a lesser one as Russia claims.[449]

246. Finally, Russia briefly argues that purpose to intimidate or compel under Article 2(1)(b) must be the *only* reasonable inference based on the circumstances, a standard employed in the distinct context of inferring genocidal intent.[450] This argument, which concerns the proper evidentiary standard, is especially inappropriate to raise at the preliminary objections stage. Even if considered, however, the inclusion of the words "by its nature or context" in the ICSFT — not present in the Genocide Convention — defeats Russia's argument. These words show that the drafters of the ICSFT expressly anticipated proving terroristic purpose through circumstantial evidence. The very nature of the crime of terrorism financing, which requires evaluation of acts committed by third parties other than the financiers, highlights that circumstantial evidence generally will be vital to prove the offense. In light of the different language of the ICSFT, and the different role played by the purpose requirement, it would make no sense to import into the ICSFT the Genocide Convention's more stringent standard limiting the use of circumstantial evidence to prove genocidal intent.

---

[448]Prosecutor v. Kunarac at el., ICTY Case Nos. IT-96-23 & 23/1, Appeals Chamber Judgment (June 12, 2002), para. 155.

[449] Russia's Objections, para. 76.

[450] *Ibid.*, para. 71.

C. Russia's Factual Arguments Are Entirely Inappropriate, and in any Event Are Unfounded

247. Russia's Preliminary Objections devote nearly 30 pages of text, and another 40 pages of annexes, to factual arguments disputing Ukraine's allegations that acts of terrorism have occurred in Ukraine. In advancing these factual disputes, Russia appears to forget that proceedings on the merits have been suspended. And it ignores the settled rule that at the preliminary objections stage, the applicant State's factual allegations are to be assumed true — not scrutinized for alleged implausibility.

248. Russia's factual arguments thus have no place at the preliminary objections phase. It would be fundamentally unfair to expect Ukraine to present its full merits case now in response to Russia's Preliminary Objections, simply in order to proceed to the actual merits phase. Indeed, it would likely be impossible for Ukraine to adequately present its full merits case in the limited time available at a preliminary objections hearing. Ukraine will therefore not repeat the extensive case it made in its Memorial, large portions of which Russia has ignored.

249. At the same time, Ukraine cannot let pass unremarked Russia's skewed and misleading presentation of the facts. To be clear, Ukraine makes the responsive points below without prejudice to Ukraine's position that Russia's factual arguments cannot appropriately be considered, and do not purport to address every factual issue Russia seeks to litigate at this preliminary stage. Ukraine does not, in this Written Statement, present its full merits case. Here Ukraine briefly reviews some of the most egregious errors Russia has made in its inaccurate presentation of the facts. Taking Ukraine's evidence and factual allegations true, as must be done, Ukraine has more than plausibly established a pattern of terrorist acts within the meaning of Article 2(1)(a) and 2(1)(b) that have been committed by Russia's proxies in Ukraine.

1. The DPR and LPR Engaged in a Pattern of Targeting Civilians to Maintain a "Reign of Intimidation and Terror" in the Donbas, Constituting Acts of Terrorism Under Article 2(1)(b)

250. Ukraine's Memorial documented that as early as the spring of 2014, the DPR and LPR launched a campaign of killings targeting civilians, in what the OHCHR determined to be "a reign of intimidation and terror to maintain their position of control."[451] There can be no serious question that acts targeting civilians, often political opponents, and with the purpose of inflicting a reign of terror on a population, meet all the elements of Article 2(1)(b). Russia's attempts to avoid this conclusion are not credible:

- Russia largely ignores Ukraine's evidence, and does not even address the high-profile abduction, torture, and murder of Horlivka town councilor Volodymyr Rybak in response to his raising of the Ukrainian flag.[452]

- Russia accuses Ukraine of human rights violations in the course of its Anti-Terrorist Operation.[453] These allegations have no relevance to Ukraine's claims, and are particularly inappropriate to be raised at this stage. Ukraine notes, however, that it is only Russia's proxies that have been found to perpetrate a "reign of intimidation and terror."[454]

- Russia makes the similarly irrelevant point that the OHCHR and OSCE did not make legal findings of acts of terrorism (though it does concede that the word "terror" was used to describe the actions of DPR and LPR). These organizations' mandate was fact-finding, not drawing legal conclusions.[455]

---

[451] Ukraine's Memorial, para. 53 (emphasis added) (citing OHCHR, *Report on Human Rights Situation in Ukraine* (15 July 2014), para. 26 (Ukraine's Memorial, Annex 256)).

[452] *Ibid.*, paras. 43–45, 211–216.

[453] Russia's Objections, paras. 120–23.

[454] *See supra*, note 451.

[455] OHCHR, *Report on the Human Rights Situation in Ukraine* (15 April 2014), para. 33 ("The objectives of the HRMMU are to: . . . establish facts and circumstances and conduct a mapping of alleged human rights violations committed in the course of the demonstrations and ensuing violence between November 2013 and February 2014 and to establish facts and circumstances related to potential violations of human rights committed during the course of the deployment.") (Ukraine's Memorial, Annex 762); OSCE Special Monitoring Mission to Ukraine, *Mandate* (last accessed 8 November 2018), *accessed at* https://bit.ly/2SpD2lT ("The Mission will gather information and report on the security situation, establish and report facts in response to specific incidents, including those concerning alleged violations of fundamental OSCE principles.").

Russia fails to explain how those facts do not meet the elements of Article 2(1)(b), whatever words were used by the monitors.

- Russia makes the incredible assertion that a pattern of killings, specifically targeting civilians for their political beliefs, is nothing more than "ordinary crimes."[456] It is not an "ordinary" crime to "target[] 'ordinary' people who support Ukrainian unity or who openly oppose the either of the two 'people's republics.'"[457] It is just as farcical for Russia to deny that its proxies lacked the "purpose to intimidate 'a *population'* at large,"[458] when the OHCHR specifically found that they "inflicted on *the populations* a reign of intimidation and terror to maintain their position of control."[459]

2. The Shoot-Down of Flight MH17 Violated the Montreal Convention and So Was an Act of Terrorism Under Article 2(1)(a)

251. Russia has elsewhere denied the international consensus on the cause of the destruction of Flight MH17.[460] In its Preliminary Objections, however, Russia does not dispute that (i) its DPR proxies shot down the civilian airliner, and (ii) Russian officials supplied the Buk missile system that was used. The facts as presented by Ukraine establish a violation of the Montreal Convention.

- Russia's only response is to assert that the perpetrators did not specifically intend to shoot down a *civilian* aircraft.[461] As explained above, intention as to civilian status is not required. Russia does not dispute that the DPR (i) intended to shoot down an aircraft, and (ii) that it acted unlawfully.

- Even under Russia's flawed interpretation, the facts as alleged by Ukraine establish that the DPR intended to destroy a civilian aircraft. Remarkably,

---

[456] Russia's Objections, para. 125.

[457] OHCHR, *Report on Human Rights Situation in Ukraine* (15 June 2014), para. 207 (Ukraine's Memorial, Annex 46).

[458] Russia's Objections, para. 125.

[459] OHCHR, *Report on Human Rights Situation in Ukraine* (15 July 2014), para. 26 (emphasis added) (Ukraine's Memorial, Annex 296).

[460] For example, at the Provisional Measures hearing, one of Russia's agents "expressed disagreement with the findings of the DSB and the JIT." *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 of Hearing on Provisional Measures Held 7 March 2017, CR 2017/2 (corrected), pp. 19–20, para. 14 (Rogachev).

[461] Russia's Objections, paras. 90–94.

Russia does not even mention the expert opinion of Dr. Anatolii Skorik, who explained that a Buk TELAR cannot distinguish military and civilian targets, and that using such a weapon without a combat control center is "extremely dangerous for civilian aircraft."[462] Russia does not dispute that it supplied the Buk TELAR only, without the combat control center that ordinarily accompanies it. As this Court has recognized, using a weapon that is "incapable of distinguishing between civilian and military targets" constitutes "mak[ing] civilians the object of attack."[463]

- Even accepting Russia's allegations that the DPR had military reasons for requesting surface-to-air missiles from their Russian sponsors,[464] the facts as alleged by Ukraine amply support the *dolus indirectus* degree of intent to destroy a civilian aircraft (and certainly *dolus eventualis*).

3. The DPR's Pattern of Shelling Civilian Areas Constitutes Acts of Terrorism Under Article 2(1)(b)

252. Russia similarly does not challenge Ukraine's evidence that its proxies carried out a string of horrific shelling attacks in civilian areas, killing scores of civilians. Instead, it makes factual arguments that these attacks were not intended to harm civilians, or committed with the purpose of intimidating the population or compelling a government. But Ukraine has assembled extensive evidence showing that each of the attacks was intended to kill civilians (even assuming that the stringent *dolus directus* standard is required), and had the purpose of intimidating a civilian population or compelling a government. Notably, this evidence includes detailed expert assessment by Lieutenant General Christopher Brown that Russia

---

[462] Expert Report of Anatolii Skorik (6 June 2018), paras. 28, 31 [hereinafter Skorik Report] (Ukraine's Memorial, Annex 12); Ukraine's Memorial, para. 74.

[463] *Legality of the Threat or Use of Nuclear Weapons*, *Advisory Opinion of 8 July 1996, I.C.J. Reports 1996*, p. 226, para. 78. The ICTY has addressed somewhat analogous facts where "soldiers shot [at a runway] without knowing whether the movements they saw on the runway were caused by civilians or soldiers dressed as civilians," concluding that such "indiscriminate firing" supported a conclusion of directing attacks on civilians and an "*intent* to spread terror among the civilian population." Prosecutor v. Galić, ICTY Case No. IT-98-29-T, Trial Chamber Judgment (5 December 2003), paras. 415–416; Prosecutor v. Galić, ICTY Case No. IT-98-29-A, Appeals Chamber Judgment (30 November 2006), paras. 108 & note 349, 131–32.

[464] Russia's Objections, paras. 91–94.

almost entirely ignores. Russia's slanted presentation of the facts makes several overarching errors:

- First, Russia incorrectly insists that the mere presence of some military object in the targeted area precludes a finding of intent and purpose.[465] Lieutenant General Brown considered the possible presence of military objects, and demonstrated that there are no plausible military explanations for these shelling attacks,[466] a point that Russia simply ignores. The "apparent absence of any possible military advantage" is evidence of intent to harm civilians and purpose to intimidate the population.[467]

- Second, although Ukraine's evidence satisfies the *dolus directus* standard for intent, Russia does not contest that the evidence demonstrates that the DPR acted at least with the *dolus indirectus* degree of intent. That alone establishes that the shelling attacks satisfy the "intent" element.[468]

- Third, Russia disregards the totality of the "nature or context" evidence showing the purpose to intimidate a civilian population. Russia attempts to exclude from consideration the highly relevant context of previous acts committed by the same groups.[469] The fact that Ukrainian cities were bombarded with Grad rockets by the same groups that had inflicted a "reign of

---

[465] *Ibid.*, para. 104.

[466] Expert Report of Lieutenant General Christopher Brown (5 June 2018), paras. 27, 38, 48–49, 58, 66–67, 84, 95 [hereinafter "Gen. Brown Report"] (Ukraine's Memorial, Annex 11).

[467] *Cf., e.g.*, Report of the Detailed Findings of the Independent Commission of Inquiry Established Pursuant to Human Rights Council Resolution S-21/1, U.N. doc. A/HRC/29/CRP.4 (23 June 2015), para. 99 ("apparent absence of any possible military advantage" can support a finding of purpose to "spread terror"); Prosecutor v. Martić, ICTY Case No. IT-95-11-T, Trial Chamber Judgment (12 June 2007), paras. 461, 472 (by indiscriminately firing at area where both civilian and military targets were present, Martić "willfully made the civilian population of Zagreb the object of his attack"). Russia is thus off base in suggesting that Ukraine is arguing the "proportionality" of the attacks. Russia's Objections, para. 106.

[468] *See supra*, paras. 229-233. Russia also claims generally that Ukraine "appears to conflate the separate IHL prohibitions on direct attacks . . . and indiscriminate attacks," or that passages from these cases are "of no assistance" because they did "not concern indiscriminate acts and the spread of terror, but rather separate offences with respect to direct attacks on civilians." Russia's Objections, para. 105. This is wrong. Ukraine draws on case law from each of these areas of law to inform the proper interpretation of different elements of Article 2(1)(b). It is entirely appropriate and indeed commonplace to draw on the *mens rea* of direct attacks on civilians to inform its interpretation of "intended to cause," for example, and to draw on case law on the *mens rea* of the war crime of spreading terror to inform its analysis of "the purpose" prong of Article 2(1)(b).

[469] Russia's Objections, para. 107.

terror" in the Donbas is certainly relevant context,[470] together with the egregious facts of the shellings themselves.[471]

- Fourth, Russia dismisses as "speculation" Ukraine's evidence showing that the DPR's actions had the purpose of compelling the Ukrainian government to make concessions.[472] This is not speculation at all, but precisely the type of inference to be made from the "nature or context" of the act. It is highly probative that these major civilian shelling events took place in the immediate vicinity of critical Minsk process consultations, at a time when they could exert maximal pressure on the Ukrainian government.[473]

a. The Volnovakha Shelling Attack

253. On 13 January 2015, the DPR launched a shelling attack in the vicinity of a civilian checkpoint ("the Buhas checkpoint"), killing 12 civilians and injuring 19 more.

- Russia's main response is to introduce new facts into the record to argue that Ukraine "treated checkpoints manned by armed forces as military targets."[474] But Ukraine's position is not that checkpoints can *never* be a military objective, but that *the Buhas checkpoint* — which played no role in the ongoing conflict — was not a military objective.[475] Considering all relevant circumstances, General Brown determined that "[t]here was no apparent military advantage in attacking the checkpoint."[476]

---

[470] *See supra*, para. 240 (explaining that context includes prior acts of the perpetrator).

[471] Russia also insists that Ukraine's evidence of purpose to intimidate is not on the same scale as that presented in the ICTY cases concerning the war crime of terror, suggesting that a prolonged "campaign" is a necessary element to such a finding. Russia's Objections, para. 103. However, in neither case did the ICTY purport to hold that only evidence of a "campaign" of attacks against civilians constitutes the war crime of terror. In *Prosecutor v. Galić*, in fact, the Trial Chamber stressed that "nothing said below should be taken to limit the jurisdiction of the Tribunal in other cases." Prosecutor v. Galić, ICTY Case No. IT-98-29-A, Appeals Chamber Judgment (30 November 2006), para. 88. That a purpose of spreading terror was found in an especially egregious case does not mean that the same purpose cannot exist on somewhat different facts. But even if multiple attacks were necessary, Ukraine's evidence meets that test. Three of the shelling attacks — Volnovakha, Maripuol, and Kramatorsk — took place within the span of a few weeks, and the shelling of Avdiivka was indeed a concerted campaign that lasted for more than a month.

[472] Russia's Objections, para. 110.

[473] *See* Ukraine's Memorial, paras. 21, 234, 244, 254.

[474] Russia's Objections, para. 111(c).

[475] *See* Ukraine's Memorial, paras. 78, 80–81.

[476] Gen. Brown Report, paras. 27, 38 (Ukraine's Memorial, Annex 11).

- Russia attempts to analogize the Buhas checkpoint to one at Olenivka, which it alleges Ukraine attacked.[477] Even assuming this is true, the OSCE found DPR "firing positions" in the close vicinity of that checkpoint.[478] Accordingly, there could have been a military reason for attacking the Olenivka checkpoint that was not present for the Volnovakha attack.

- Russia also selectively highlights intercepted telephone calls to make the point that the rockets were aimed at the checkpoint and not some other location.[479] That is entirely consistent with Ukraine's claim, which is that the DPR did indeed aim at the busy checkpoint, not to achieve a (non-existent) military advantage, but to strike the heavy civilian traffic known to be present.

b. The Mariupol Shelling Attack

254. Not long after the deadly Volnovakha attack, the DPR bombarded the residential Vostochnyi neighborhood of Mariupol, killing 30 civilians.

- Russia argues that the DPR's target in the attack was a checkpoint that was a military objective.[480] But it almost entirely ignores the compelling evidence to the contrary:

  - The United Nations Secretary-General for Political Affairs described the attack as "knowingly target[ing] a civilian population" in a city that "lies outside of the immediate conflict zone."[481]

---

[477] Russia's Objections, para. 111(c).

[478] OSCE, *Latest from the OSCE Special Monitoring Mission to Ukraine (SMM), Based on Information Received as of 19:30 hrs* (29 April 2016) (Ukraine's Written Statement, Annex 3). Another distinguishing feature is that the Olenivka checkpoint was attacked using 122m artillery guns. OSCE, *Spot Report by the OSCE Special Monitoring Mission to Ukraine (SMM): Shelling in Olenivka* (28 April 2016) (Ukraine's Written Statement, Annex 2). As General Brown explains, this is a much more precise weapon than the BM-21 Grad MLRS fired at the Volnovakha checkpoint. Gen. Brown Report, para. 85 (Ukraine's Memorial, Annex 11).

[479] Russia's Objections, para. 111(e).

[480] *Ibid.*, para. 112.

[481] U.N. Security Council Official Record, 7368th mtg. U.N. Doc. S/PV.7368 (26 January 2015), p. 2 (statement of Jeffrey Feltman, U.N. Under-Secretary-General for Political Affairs) (Ukraine's Memorial, Annex 307).

- The evening before the attack, DPR members discussed wanting to "crush" Vostochnyi.[482]

- The DPR shelled the Vostochnyi neighborhood a second time at 11:00, after it was apparent that civilians had been killed in the first wave.[483]

- In the aftermath, a DPR member welcomed the intimidation achieved by the bombardment, stating: "Let the f*cking bitches be more afraid."[484]

- General Brown addressed the checkpoint north of the Vostochnyi neighborhood, which Russia alleges was the real target,[485] and concluded that "[t]here was no apparent military advantage in attacking the northern checkpoint given that there was no ground assault in the wake of the attack."[486] General Brown also addressed Russia's "overflight" theory and found it not supported by the facts.[487]

- Ignoring all of this evidence, Russia selectively highlights one intercepted conversation, which it characterizes as "express[ing] shock and horror at the civilian casualties" from the first round of shelling at approximately 09:15.[488] However, the DPR continued shelling civilian targets in the Vostochnyi neighborhood *after* these alleged expressions of "shock and horror,"[489] and *the same* DPR member rejoiced that residents were "afraid."[490]

---

[482] Ukraine's Memorial, para. 93 (citing Witness Statement of Igor Evhenovych Yanovskyi (31 May 2018, para. 16 [hereinafter Yanovskyi Statement] (Ukraine's Memorial, Annex 5)); Intercepted Conversation Between Sergey Ponomarenko and Oleksandr Evdotiy (23 January 2015) (Ukraine's Memorial, Annex 418).

[483] *Ibid.*, paras. 94, 237 (citing Yanovskyi Statement, para. 13).

[484] Intercepted Conversation between Valeriy Kirsanov and Sergey Ponomarenko (24 January 2015) (emphasis added) (Ukraine's Memorial, Annex 415); Statement of Authentication, Volodymyr Piven, Senior Investigator, Main Investigation Office, Security Service of Ukraine (5 June 2018) (Ukraine's Memorial, Annex 185).

[485] Russia's Objections, para. 112.

[486] Gen. Brown Report, para. 58 (Ukraine's Memorial, Annex 11).

[487] *Ibid.*, para. 48 & note 60.

[488] Russia's Objections, para. 112(d).

[489] *Ibid.*, paras. 94 (noting the second shelling hit the Vostochniy neighborhood at 11:00, while the intercepted conversation cited by Russia occurred at 10:38); Intercepted Conversation between Valeriy Kirsanov and Sergey Ponomarenko (24 January 2015) (noting the conversation began at 10:38) (Ukraine's Memorial, Annex 414).

[490] Ukraine's Memorial, paras. 99, 241 (citing Intercepted Conversation between Valeriy Kirsanov and Sergey Ponomarenko (24 January 2015) (emphasis added) (Ukraine's Memorial, Annex 415), which occurred after the first shelling attack).

c. The Kramatorsk Shelling Attack

255. Following the bombardment of Mariupol, the DPR launched a cluster munitions attack on the city of Kramatorsk, far from the front lines, using the sophisticated BM-30 Smerch system.

- Russia has virtually no answer to Ukraine's evidence that this attack meets the elements of an act of terrorism under Article 2(1)(b). Its sole response is to refer to a "military compound" on Druzhby Street (formerly Lenin) in Kramatorsk.[491] Ukraine's evidence, however, demonstrated that this building was a military recruitment office.[492]

- General Brown considered the presence of this office, noted that it did not "appear to have been taking an active part in hostilities," and explained that it could not have been a plausible target of the BM-30 salvo.[493] As the ICTY has recognized, the mere presence of an administrative office allegedly associated with the military in a city does not "change the character of the population" from being "a civilian population."[494]

d. The Avdiivka Shelling Attacks

256. In January and February 2015, the DPR again bombarded the civilian population of Avdiivka with multiple shelling attacks.

- Russia's main response is to point to reports of Ukrainian Armed Forces military equipment and personnel stationed in Avdiivka.[495] All of the tanks mentioned in the article introduced by Russia were stationed on the edge of town, and Ukraine's Memorial acknowledged that there was a military presence

---

[491] Russia's Objections, para. 113.

[492] Witness Statement of Kyrylo Ihorevych Dvorskyi, para. 8 [hereinafter Dvorskyi Statement] (Ukraine's Memorial, Annex 3).

[493] Gen. Brown Expert Report, para. 67 (Ukraine's Memorial, Annex 11).

[494] Prosecutor v. Strugar, ICTY Case No. IT-01-42-T, Trial Chamber Judgment (31 January 2005), para. 284 (fact that "there may have been individuals in the Old Town on 6 December 1991 who were connected with the Croatian defending forces," or the presence of a building belonging to the "Crisis Staff," which the defense alleged was associated with the military, did not change the civilian character of the area).

[495] Russia's Objections, para. 115 (citing Bellingcat Investigation Team, *Ukrainian Tanks in Avdiivka Residential Area* (3 February 2017) (Russia's Objections, Annex 1)).

there.[496] As Ukraine further explained, these "military objectives do not explain the many rocket and mortar attacks *far from those military zones*."[497] Russia ignores General Brown's conclusion that many areas hit were "too far away from any UAF site to be plausibly considered to have been directed at military targets."[498]

- Russia makes the absurd argument that no purpose of intimidation can be inferred because a BBC correspondent described the people of Avdiivka as "resilien[t]."[499] Whether or not such evidence would be credited at the merits stage, it certainly does not make it *implausible* to conclude that a weeks-long campaign, targeting civilian areas, striking schools and hospitals, and creating what the OSCE called a humanitarian emergency, was done with the purpose to intimidate.

4. The Bombing Attacks in Ukrainian Cities Constitute Terrorist Acts Under ICSFT Article 2(1)(a)

257. Ukraine's Memorial included extensive evidence that Russian proxies committed a string a bombing attacks or attempted attacks targeting civilians — including the bombing of the Stena Rock Club, a peaceful rally for Ukrainian unity, and attempted assassinations of a pro-Ukrainian Member of Parliament and an NGO leader — in Kharkiv, Odesa, and Kyiv, peaceful cities far from any hostilities.[500]

- Russia's discussion of the bombings falls under the heading of its objection that there is "no plausible allegation of *terrorism* within the meaning of Article 2(1) of the ICSFT."[501] Yet Russia never explains how these bombings do not meet every element of an offence under the Bombings Convention, which they inarguably do.

- Instead, Russia claims that certain confession statements cited by Ukraine were "obtained by torture or ill-treatment" and have since been retracted.[502] This serious assertion is supported by a few news articles, primarily from a Russian

---

[496] Ukraine's Memorial, para. 112, Map 6.

[497] *Ibid.*, para. 256 (emphasis added).

[498] Gen. Brown Report, para. 95 (Ukraine's Memorial, Annex 11).

[499] Russia's Objections, para. 115.

[500] Ukraine's Memorial, Chapter 1, Section D.

[501] Russia's Objections, p. 23 (emphasis in original).

[502] *Ibid.*, para. 118.

propaganda website called "Anti-Fashist Information Agency."[503] Russia's questionable sourcing aside, it is entirely inappropriate to ask the Court to weigh credibility at the preliminary objections stage.

- Russia is in any event not correct in asserting that Ukraine relies "principally" on these confessions. For example, Ukraine has submitted a video made by Marina Kovtun, a member of the Kharkiv Partisans, filming her associate planting an SPM limpet mine — the sophisticated naval weapon that forensic analysis confirms was used in the Stena Pub bombing.[504] Ukraine has also shown that SPM limpet mines it seized in Kharkiv originated in Russia.[505]

258. In sum, Russia's factual arguments are entirely improper at the preliminary objections phase. Nevertheless, Ukraine has briefly addressed some of the more misleading and inaccurate allegations and arguments Russia has made in its presentation of the facts. Ukraine reiterates that the responsive points outlined above are without prejudice to its position that Russia's factual arguments cannot appropriately be considered, do not purport to address every factual issue raised by Russia, and certainly do not encompass Ukraine's full merits case.

* * *

259. All of Russia's Preliminary Objections alleging that the Court lacks jurisdiction over Ukraine's ICSFT claims should be rejected. Chapter 3 of this Written Statement demonstrated that Ukraine has satisfied all requirements of Article 24(1) prior to bringing this dispute to the Court. Russia's unpersuasive arguments to the contrary are its only true jurisdictional objections concerning the ICSFT claims; the remainder are simply attempts to argue the merits, whether on questions of interpretation or even disputing the facts of Ukraine's case. Nonetheless, Chapters 4 and 5 have demonstrated that Russia's remaining objections, if they are considered now, should be rejected as groundless. Chapter 4 explains that Russia's implausible theory that the ICSFT is not concerned with the financing of terrorism by public officials should be rejected; under a straightforward interpretation of the

---

[503] *Ibid.*, para. 118 & note 167.

[504] Ukraine's Memorial, para. 118 & note 231 (citing Kovtun Video of Malyshev Plant Bombing (video) (Ukraine's Memorial, Annex 693)); *ibid.*, para. 119.

[505] *Ibid.*, para. 165.

text of the Convention, Russia has a duty to prevent terrorism financing offences from being committed by "any person," a phrase used without qualification to mean exactly that – any person, whether acting in a private or public capacity. Chapter 5 shows that Ukraine's Memorial set forth the correct interpretation of the mental elements of terrorism financing under Article 2(1), and of the elements of the underlying acts of terrorism under Article 2(1)(a) and 2(1)(b). And although Russia's attempts to debate the facts of various acts of terrorism are entirely inappropriate at the preliminary objection stage, Ukraine has briefly highlighted the errors of Russia's misleading presentation of the facts. In sum, nothing in Russia's Preliminary Objections undermines the Court's jurisdiction to proceed to the merits of all of Ukraine's claims under the ICSFT.

PART III: THE COURT HAS JURISDICTION OVER UKRAINE'S CLAIMS UNDER THE RACIAL DISCRIMINATION CONVENTION

260. Ukraine demonstrated in its Memorial that Russia has treated its obligations under the CERD with contempt. Whereas the Convention calls upon all States Parties to pursue a "policy of eliminating racial discrimination in all its forms and promoting understanding among all races,"[506] Russia has done the opposite, adopting instead a policy of systematic discrimination against Crimean Tatars and Ukrainians in Crimea. In April 2017, the Court found the threat to human rights in Crimea sufficiently urgent to indicate binding provisional measures — measures which Russia has simply ignored. In its Preliminary Objections, Russia continues its assault on the Convention and on the authority of the Court, mischaracterizing Ukraine's claims and engaging in textual distortions that all but read access to this Court out of the CERD's dispute resolution provision.

261. The Court should not entertain this transparent attempt by Russia to evade responsibility for its treaty violations. The CERD embodies principles of non-discrimination that were long ago recognized as possessing *jus cogens* status. The Convention embodies the determination of the international community to "speedily eliminat[e] racial discrimination in all its forms and manifestations . . . ."[507] In service of that objective, Article 22 confers jurisdiction on this Court to resolve disputes concerning the interpretation or application of the Convention. The dispute presented in Ukraine's Application and Memorial unquestionably concerns such issues of interpretation and application. The Court has jurisdiction and should not hesitate to exercise it in this case.

262. Chapter 6 addresses Russia's unfounded contention that Ukraine's claims do not fall within the scope of the CERD and are in reality a vehicle for presenting the Court with a dispute over the status of Crimea. Chapter 7 demonstrates that Russia's attempt to read

---

[506] CERD, art. 2(1).

[507] CERD, preamble (emphasis added).

multiple preconditions to the Court's jurisdiction into the CERD's compromissory clause misinterprets the Convention and that, in any event, Ukraine made a more than sufficient attempt to settle this dispute by negotiation with Russia before referring it to the Court. Chapter 8 explains that Russia's assertion that Ukraine was required to exhaust local remedies misinterprets the Convention and fundamentally misstates the role of the local remedies rule.

Chapter 6. UKRAINE HAS STATED CLAIMS CAPABLE OF FALLING WITHIN THE PROVISIONS OF THE CERD

263. The Russian Federation begins its challenge to the Court's jurisdiction with a series of arguments stating in different ways the same proposition: the Court lacks jurisdiction *ratione materiae* because Ukraine's claims are not capable of falling within the provisions of the CERD. None of these arguments has merit.

264. Russia's opening gambit is to attack the totality of Ukraine's CERD claims, arguing that they do not in fact concern the interpretation or application of the Convention after all. Instead, Russia asserts, the "real issue in dispute" is the status of Crimea.[508] Russia's argument apparently seeks to make a virtue of its invasion and occupation of Crimea by interposing a supposed sovereignty dispute as a barrier to claims seeking to hold it accountable for its subsequent unlawful conduct in Crimea. The Court should reject this argument, which on its face is at odds both with the Court's jurisprudence and with the case Ukraine has actually pled.

265. Next, Russia makes a series of more targeted challenges to discrete aspects of Ukraine's case under the CERD, arguing that specific legal rights claimed by Ukraine do not fall within the scope of the Convention. Where these challenges are not based on mischaracterization of Ukraine's Memorial, they simply confirm the existence of a dispute over the interpretation of the CERD. Article 22 of the CERD expressly provides the Court with jurisdiction over such disputes concerning the interpretation of the Convention, which accordingly should be heard in the merits phase of this proceeding. To the extent the Court chooses to address those disputes now, it should resolve them in Ukraine's favor.

266. Finally, Russia takes issue with the facts alleged by Ukraine, asserting that they are insufficiently plausible to provide a basis for this Court's jurisdiction. This line of argument constitutes yet another improper invitation to the Court to enter the merits of the dispute by weighing factual evidence at the preliminary objections phase, and should likewise

---

[508] Russia's Objections, para. 295.

be rejected. The correct approach is for the Court to accept *pro tem* the facts alleged in the Memorial and to determine whether those facts "might give [rise] to a violation of a specified provision . . . ."[509] The Court should not indulge Russia's persistent and inappropriate desire to argue the facts in this preliminary phase.

A. The Dispute Before the Court Concerns the Interpretation and Application of the CERD

267. Russia asserts that Ukraine has invoked the CERD to create an "artificial" basis for the Court to exercise jurisdiction under Article 22,[510] and that "[t]he real issue in dispute between the Parties does not concern racial discrimination but the status of Crimea."[511] This argument is unfounded both in law and fact.

1. Russia Misapplies the Court's Jurisprudence on Identification of the Object of the Claim

268. Russia quotes selectively from the Court's past cases to give itself license to recharacterize Ukraine's case. The recharacterization it then proposes is based on a handful of out-of-context quotations from Ukraine's Application and Memorial, and statements outside these proceedings by certain Ukrainian public officials. But the Court's jurisprudence does not allow such self-serving cherry-picking. Instead, as the judgment in *Immunities and Criminal Proceedings*, partially quoted by Russia, explains:

> [I]t is for the Court itself to determine *on an objective basis* the subject-matter of the dispute between the parties, by isolating the real issue in the case and identifying the object of the claim. In doing so, the Court examines the application as well as the written and oral pleadings of the parties, *while giving particular attention to the formulation of the dispute chosen by the applicant*. It takes account of the facts that the applicant

---

[509] *Oil Platforms (Islamic Republic of Iran v. United States), Counter-Claim, Order of 10 March 1998, Separate Opinion of Judge Higgins, I.C.J. Reports 1998*, p. 219. *See supra*, Chapter 2.

[510] Russia's Objections, paras. 298–299.

[511] *Ibid.*, para. 295.

> presents as the basis for its claim. The matter is one of substance, not of form.[512]

269. When the question of the "real issue in the case" has arisen in practice, the Court has focused on whether the claims in question are "capable of falling within" the jurisdictional basis asserted for them.[513] Thus, for example, in *Immunities and Criminal Proceedings*, the Court declined to exercise jurisdiction over an official's entitlement to immunity because the customary international rules relating to immunities of States and State officials were not encompassed within the multilateral convention from which jurisdiction was claimed to derive.[514]

270. When the same exercise is undertaken here, it could not be plainer that the real issue in this case is the interpretation and application of the CERD.

2. The Object of Ukraine's Claims Is Resolution of a Dispute Concerning the Interpretation and Application of the CERD

271. Section A of Part III of Ukraine's Memorial describes a comprehensive campaign of racial discrimination in Crimea, directed by the Russian occupation authorities against the Crimean Tatar and Ukrainian communities. Section A sets out the background to that campaign, explaining the evolution of the relevant ethnic groups over the centuries, which includes in more recent years a history of cultural competition and outright inter-ethnic conflict, embodied most hauntingly in the mass deportation to Central Asia of Crimean Tatars and certain other ethnic groups by Stalin in 1944.

272. Turning to more recent history, Section A explains how the Russian invasion of Crimea in 2014 and its occupation by Russia since then has singled out the Crimean Tatar and Ukrainian communities as a whole as opponents of a new Russian-imposed order on the peninsula. The Section describes how the Russian authorities dealt with these communities

---

[512] *Immunities and Criminal Proceedings*, Judgment of 6 June 2018, para. 48 (emphasis added and internal citations omitted).

[513] *Ibid.*, para. 70.

[514] *Ibid.*, para. 102.

on a categorical basis in the context of the purported referendum held in Crimea on 16 March 2014. That included the mass branding of Ukrainians as fascists and the unsuccessful effort of President Putin to court Crimean Tatar support for annexation though former Mejlis leader Mustafa Dzhemilev.

273. Subsequent to this background discussion, Section A describes in detail the various components of a discriminatory campaign unleashed against the Crimean Tatar and Ukrainian communities as collective punishment in the wake of the referendum. Those components include a campaign of disappearances, murders, abductions and torture aimed principally against the Crimean Tatar and Ukrainian communities; the political suppression of the Crimean Tatar people, including their representative institutions; arbitrary searches and detention targeting the Crimean Tatar community; the forcing of Russian citizenship and subsequent discrimination against non-Russians, again disproportionately affecting the Crimean Tatar and Ukrainian communities; the suppression of culturally significant gatherings, affecting disproportionately Crimean Tatar and Ukrainian gatherings; restrictions and harassment directed at Crimean Tatar and Ukrainian media outlets; the degradation of Crimean Tatar and Ukrainian cultural heritage; and the suppression of minority education rights, and in particular restrictions placed on education in the Crimean Tatar and Ukrainian languages. In each instance, the Memorial alleges that the Crimean Tatar and Ukrainian communities as a whole have been affected by the discriminatory acts of the Russian Federation.

274. Section B of Part III of the Memorial explains how this conduct falls under specific provisions of the CERD, showing on an article-by-article basis how that conduct has resulted in the nullification or impairment of the human rights and fundamental freedoms of the Crimean Tatar and Ukrainian communities. And in Part IV of the Memorial Ukraine asks the Court to adjudge and declare that Articles 2, 4, 5, 6, and 7 of the CERD have been violated by the aforementioned conduct, and to order that the Russian Federation cease these violations and assure to the Crimean Tatar and Ukrainian communities the specific rights guaranteed to them under the Convention.

275. It is self-evident that Ukraine's CERD claims have as their object the resolution of a dispute with Russia over the interpretation and application of the Convention in Crimea. The rights invoked by Ukraine all arise under the CERD. The remedies that Ukraine seeks all aim to vindicate rights arising under the CERD. Viewed in an objective manner, the subject matter of the dispute — the real issue in the case — is the interpretation and application of the CERD, over which this Court undeniably has jurisdiction.

3. Russia's Attempt to Recharacterize Ukraine's Case Fails

276. Instead of focusing on the substance of Ukraine's CERD claims, as the Court's jurisprudence requires, Russia asserts that those claims are not really CERD claims at all, but rather "a vehicle for submitting the dispute on the status of Crimea to the Court."[515] The only evidence that Russia presents to back up this assertion, however, consists of fragmentary quotes from Ukraine's Memorial referring to Russia's unlawful invasion and occupation in 2014 — facts that are relevant simply as the backdrop to Russia's campaign of racial discrimination — a few statements by Ukrainian public officials, and the pendency of other international legal actions launched by Ukraine against Russia since 2014. None of these facts divest this Court of jurisdiction over Ukraine's CERD claims.

277. Russia's argument confuses factual background with legal claims asserted under the Convention. Russia cannot point to a single place in Ukraine's Application or Memorial where, in connection with its CERD claims, Ukraine asks the Court to rule on or grant relief for violations of international law by the Russian Federation other than the breach of its obligations under the CERD.[516] Neither the substance of this case nor the relief requested concern the status of Crimea, even if Russia's unlawful intervention there is a necessary part

---

[515] Russia's Objections, para. 306.

[516] *See Obligation to Negotiate Access to the Pacific Ocean* (*Bolivia* v. *Chile), Preliminary Objection, Judgment of 24 September 2015, I.C.J. Reports 2015*, p. 592, paras. 31–32 (dismissing Chile's argument that the true subject-matter of Bolivia's claim was territorial sovereignty and the character of Bolivia's access to the Pacific Ocean, *inter alia* because the Application did not ask the Court to adjudge and declare that Bolivia had a sovereign right of access).

of the story in explaining the roots of the subsequent campaign of racial discrimination against the Crimean Tatar and Ukrainian communities.

278. Ukraine is required to set out that context to assist the Court in its understanding of the background to the substantive violations of the CERD for which Ukraine seeks relief. In doing so, Ukraine is not prohibited from describing Russia's actions consistent with the overwhelming consensus of the international community that has condemned Russia's occupation of Crimea.[517] But Ukraine's description of Russia's conduct in 2014 as unlawful does not change the substance of its CERD claims, because Ukraine does not seek relief in this proceeding for Russia's prior acts of aggression.[518] Russia's bald assertion that "the very relief sought by Ukraine under CERD revolves around 'the illegal Russian occupation of Crimea'" and that "[s]uch relief and the corresponding claims do not fall within the jurisdiction of the Court" is therefore incorrect.[519]

279. A determination that Russia is violating the CERD does not require any determination, implicit or otherwise, about the legality of the occupation. Whether or not Russia is illegally occupying Crimea, it is unquestionably present there and exercising effective

---

[517] *See, e.g.*, U.N. General Assembly Resolution No. 71/205, U.N. Doc. A/RES/71/205, *Situation of Human Rights in the Autonomous Republic of Crimea and the City of Sevastopol (Ukraine)* (19 December 2016) [hereinafter UNGA Resolution No. 71/205] ("*Condemning* the temporary occupation of part of the territory of Ukraine — [Crimea] — by the Russian Federation, and reaffirming the non-recognition of its annexation.") (Ukraine's Written Statement, Annex 91).

[518] Similarly, for contextual reasons Ukraine refers in several instances to Russia's violations of the international humanitarian law prohibition on the extension of an occupying power's laws to an occupied territory. Ukraine does not, however, ask the Court to rule or to grant relief with respect to such violations. To the extent Ukraine seeks relief in relation to such laws, it is solely on the basis of their discriminatory effect or application. Accordingly, such references to international humanitarian law do not alter the real issue in the case, which remains the interpretation and application of the CERD. *See also infra* para. 285.

[519] Russia's Objections, para. 306. In the alternative, if Russia means instead that it is sufficient to preclude the Court's jurisdiction that the alleged CERD violations occur in the context of an illegal occupation, that position must be rejected. A claim by Russia that its prior unlawful acts in Crimea rendered it immune from the Court's scrutiny for subsequent violations of the CERD would not be a good faith interpretation of Article 22.

control over the region. Indeed, Russia itself does not deny, albeit on a different legal basis, that it has obligations under the CERD in Crimea.

280. Russia's quotation of Ukrainian public officials prove nothing. "As the Court has observed in the past, applications that are submitted to the Court often present a particular dispute that arises in the context of a broader disagreement between parties."[520] In *Georgia v. Russia*, for example, the Court found that Georgian claims that were "primarily claims about the allegedly unlawful use of force" nonetheless established the existence of a dispute under the CERD because "they also expressly referred to alleged ethnic cleansing by Russian forces."[521] Similarly, Ukrainian officials' stated desire "to return Crimea through international legal mechanisms"[522] does not divest this Court of jurisdiction to consider systematic acts of racial discrimination committed by Russia against Crimean Tatars and Ukrainians in Crimea.

281. It is certainly the case that Ukraine has a broader dispute with Russia concerning its unlawful aggression in Crimea and has sought Russia's consent to the submission of that dispute to this Court, as Ukraine is within its rights to do. Russia has refused to provide that consent. The Memorial expressly affirms, however, that not every aspect of Ukraine's dispute with Russia is before the Court in this proceeding, and that Ukraine in this case only asks the Court "to hold the Russian Federation accountable for its systematic breaches of its obligations under the ICSFT and the CERD . . . ."[523] The Court has frequently

---

[520] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objections, Judgment of 24 September 2015, I.C.J. Reports 2015*, p. 592, para. 32.

[521] *Georgia v. Russia*, *Preliminary Objections*, para. 113.

[522] Russia's Objections, para. 295 (quoting the President of Ukraine).

[523] Ukraine's Memorial, para. 22.

exercised its jurisdiction to address a discrete dispute between parties to a broader conflict, where other issues in dispute remained outside its jurisdiction.[524]

282. In sum, this dispute relates to the interpretation and application of the CERD, matters over which the Court possesses jurisdiction. Russia's assertion that this case is really about the status of Crimea lacks credibility and should be rejected.

B. The Court Has Jurisdiction Over the Interpretive Disputes Identified by Russia

283. Russia next asserts that "Ukraine invokes rights or obligations that are not rights or obligations under CERD."[525] Much of this objection is based on a transparent misstatement of Ukraine's claims. To the extent it is not, the objection merely confirms the existence of a number of disputes between the parties concerning the interpretation of the CERD touching upon limited aspects of Ukraine's claims. As explained in Chapter 2, the Court has jurisdiction over such interpretive disputes under Article 22 and accordingly they should be addressed in the merits phase. To the extent that the Court considers it necessary to enter into those disputes now, it should assume *pro tem* the veracity of Ukraine's factual allegations and resolve the interpretive issues in Ukraine's favor.

---

[524] *See, e.g.*, *Bosnian Genocide Case, Judgment of 11 July 1996,* para. 31 (exercising jurisdiction notwithstanding that the claim under Article IX of the Genocide Convention arose in the context of a wider and more complex dispute over the legal status of territory and armed conflict); *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment of 20 December 1988, I.C.J. Reports 1988*, p. 69, para. 96 (exercising jurisdiction over a bilateral dispute between Nicaragua and Honduras, even though part of a regional dispute involving other States that was mostly beyond the scope of the Court's jurisdiction).

[525] Russia's Objections, p. 154.

1. Russia Misstates Ukraine's Claims

284. Two of the examples of Ukraine's alleged misinterpretation of the scope of CERD obligations cited in this section of Russia's Preliminary Objections can be readily dismissed as based on misstatement of the nature of Ukraine's claims.

285. First, Russia complains about a number of references in the Memorial to the introduction of Russia's own laws in Crimea in violation of international humanitarian law ("IHL"). Russia broadly and inaccurately claims that Ukraine equates the extension of these laws into Crimea with a violation of the CERD.[526] The text of the Memorial makes clear, however, that Ukraine refers to this practice — which has been condemned by the U.N. General Assembly[527] — for contextual reasons: namely, to describe the *means* by which Russia has prosecuted its campaign of discrimination in Crimea.[528] For example, Russia mischaracterizes Ukraine's claim concerning freedom of peaceful assembly as alleging no more than that Russia introduced its own laws on public gatherings in Crimea and applied them to gatherings planned by the Crimean Tatar community. In actuality, however, Ukraine asserts that after introducing its repressive laws governing public gatherings, Russia "then applied those laws discriminatorily to deny Crimean Tatars and Ukrainians an opportunity to commemorate culturally important events equal to that afforded the ethnic Russian community."[529] The CERD violation here, as elsewhere, does not stem from Russia's violation of IHL, but from the fact that these laws have been applied discriminatorily and employed by Russia as "a means of repressing the Crimean Tatar and Ukrainian communities" in Crimea.[530] While Ukraine

---

[526] *Ibid.*, para. 321.

[527] UNGA Resolution No. 71/205 (Ukraine's Written Statement, Annex 91).

[528] *See, e.g.*, Ukraine's Memorial, para. 385 ("The Russian Federation used the opening created by Article 23 of the Law of Admission to apply to Crimea a battery of repressive laws that could then be used selectively to deny the Crimean Tatar and Ukrainian communities equal enjoyment of their civic, cultural and other human rights.").

[529] *Ibid.*, para. 481.

[530] *Ibid.*, para. 387.

correctly notes that the application of these laws violated IHL, the CERD violation — which stems from their discriminatory application, would arise whether or not IHL was also implicated.

286. Russia also incorrectly asserts that "Ukraine seeks to include religion within the scope of CERD," based on references in the Memorial to the Russian authorities invoking alleged religious extremism as grounds for targeting certain Crimean Tatar individuals.[531] This distorts the claim actually put forward in the Memorial. Ukraine explained there that supposed religious extremism is being used as a *pretext* for arbitrary searches and detentions that, in actuality, are part of a broader strategy of collective punishment directed at the Crimean Tatar and Ukrainian communities.[532] Consistent with this, Ukraine's submissions do not request that the Court make any decision or grant any relief related to discrimination on religious grounds.

2. The Interpretive Disputes Identified by Russia Should Be Addressed on the Merits

287. Russia's remaining claims that Ukraine has misinterpreted the scope of CERD obligations do no more than confirm that there is a dispute between the parties over the interpretation of the CERD. Thus:

---

[531] Russia's Objections, para. 332.

[532] *See, e.g.*, Ukraine's Memorial, para. 391 ("The FSB and police have targeted the Crimean Tatar community in particular for arbitrary search and detentions at homes and businesses, often under the guise of looking for religious extremist materials."); *ibid.*, para. 449 ("[T]he frequency with which Russian authorities are using this accusation [of Islamic extremism] to justify their searches and detentions of Crimean Tatar individuals strongly suggests that it is a pretext for discrimination"); *ibid.*, para. 595 ("The broader Crimean Tatar community has been subjected to a pattern of similarly arbitrary searches and detentions on the pretext of rooting out religious extremism."); *ibid.*, para. 608 (noting that Russia's use of anti-extremism laws "to justify searches for so-called religious extremist materials is plainly pretextual, given that the Crimean Tatar community has traditionally adhered to a moderate, not an extreme or violent, form of Islam.").

- There is an interpretive dispute between the parties over whether the CERD protects the right of indigenous peoples to maintain their own representative institutions, such as the Mejlis of the Crimean Tatar People.[533]

- The parties disagree on whether the CERD protects the right of ethnic minorities to education in their own languages.[534]

- In the context of interpreting the meaning of Article 5(d)(ii) of the CERD (governing discrimination with respect to the right to leave any country, including one's own, and to return to one's country), Russia disagrees that Article 49 of the Fourth Geneva Convention constitutes a relevant rule of international law applicable in the relations between the parties, pursuant to Article 31(3)(c) of the VCLT.[535]

- Finally, Ukraine and Russia disagree about whether and to what extent Articles 1(2) and 1(3) of the CERD, limiting the application of the Convention in relation to issues of citizenship and nationality, are relevant to Ukraine's claims based on Russia's forcing of citizenship on the inhabitants of Crimea.[536]

288. As explained in Chapter 2, each of these disputes is appropriately addressed in the merits phase of this proceeding.[537] Article 22 of the CERD unambiguously provides the Court with jurisdiction to decide disputes between the parties over the interpretation of the treaty. Further consideration of these interpretive disputes in the current preliminary phase is accordingly both unnecessary and inappropriate.

3. If the Court Addresses These Interpretive Disputes at This Stage, It Should Decide Them in Ukraine's Favor

289. As addressed in Chapter 2, the Court should refrain from engaging in treaty interpretation during this preliminary phase, particularly when the treaty in question is a multilateral convention and a decision on questions of treaty interpretation has ramifications for all States Parties who agreed to a compromissory clause that referred questions of "interpretation and application" to this Court. However, if the Court does decide to address

---

[533] Russia's Objections, para. 328.

[534] *Ibid.*, para. 329.

[535] *Ibid.*, para. 322(a).

[536] *Ibid.*, paras. 322(b), 326.

[537] *See supra*, Chapter 2.

one or more of these interpretive disputes in this phase, it should decide them in Ukraine's favor.

290. The right of indigenous people to maintain their own representative institutions. In its Order on Provisional Measures of 19 April 2017, the Court already found with regard to the banning of the Mejlis by the Russian authorities that "it is plausible that the acts complained of constitute acts of racial discrimination under the Convention."[538] Russia offers no evidence or argumentation in its Preliminary Objections that would justify taking a different view at the current stage of the proceedings.[539] Russia asserts that "CERD does not offer a special protection to the representative rights of national minorities . . . ."[540] But, even if Russia were correct (which it is not) and the Mejlis' right to exist as an institution were not protected by the CERD, the CERD is still violated when the Mejlis is subjected to discriminatory treatment based on its unique importance to the Crimean Tatar people. As just one example, Article 5 is violated when any of the specific rights enumerated therein are burdened by measures based on ethnicity. The Memorial expressly alleges that Russia's treatment of the Mejlis has so burdened rights protected by Article 5, including for example the right to equal treatment before tribunals[541] and the right to effective protection and remedies against acts of racial discrimination.[542]

291. The right of ethnic groups to education in their own language. Again, the Court has already found in its Provisional Measures Order that it is plausible that restrictions on education in the Ukrainian language in Crimea violate rights protected by the CERD.[543] Again,

---

[538] *Provisional Measures Order of 19 April 2017*, para. 82. *See ibid.*, para. 83 ("[I]t appears that some of the acts complained of by Ukraine fulfil this condition of plausibility. This is the case with respect to the banning of the *Mejlis* and the alleged restriction on the educational rights of ethnic Ukrainians.").

[539] *See* Russia's Objections, para. 328.

[540] *Ibid.*

[541] *See* Ukraine's Memorial, para. 608.

[542] *See ibid.*, para. 635.

[543] *See* Order on Provisional Measures, *supra* note 538.

Russia provides no good reason why the Court should take a different view now. Article 5(e)(5) of the CERD provides broadly for equality before the law in the enjoyment of the right to education and training.[544] In a Convention specifically designed to eliminate discrimination on racial or ethnic grounds, the preamble of which refers to the importance of "human rights and fundamental freedoms . . . without distinction as to . . . language," Article 5(e)(v) protects the right of ethnic groups to education in their own languages.[545] Moreover, Russia itself admits that the 1960 UNESCO Convention against Discrimination in Education specifically recognizes the "right of members of national minorities to carry on their own educational activities, including the maintenance of schools and, depending on the educational policy of each state, *the use or the teaching of their own language* . . . ."[546] As previously noted, Article 1(1) of the CERD brings within the scope of the Convention's protections all human rights and fundamental freedoms. To the extent that the right identified in the UNESCO Convention must be balanced against the need for "members of these minorities [to] understand[] the culture and language of the community as a whole,"[547] that calls for factual determinations that are properly reserved for the merits phase.

292. Right to return to one's country, Article 5(d)(ii). Ukraine's Memorial explains that one of the relevant rules of international law applicable in the relations between the parties which should be taken into account in interpreting the CERD is the prohibition in IHL on deporting protected persons from occupied territory.[548] Russia disagrees and claims that such references to IHL "challenge the current status of Crimea."[549] But whether Crimea is now

---

[544] CERD, art. 5(e)(v).

[545] *Ibid.*, preamble.

[546] Russia's Objections, para. 331 (some emphases omitted) (quoting UNESCO Convention Against Discrimination in Education, art. 5.1(c)).

[547] *Ibid.* (emphasis omitted).

[548] Ukraine's Memorial, para. 614 (citing *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Fourth Geneva Convention), 12 August 1949, 75 U.N.T.S. 287, art. 49).

[549] Russia's Objections, paras. 322(a) and 326.

part of the Russian Federation's sovereign territory, as Russia wrongly claims, does not alter the conclusion that Russia has violated Article 5(d)(ii). If Russia's unfounded view of the status of Crimea were correct, the exclusion orders issued to Mustafa Dzhemilev and others would prevent them from returning to their own country — which, in Russia's view, is Russia. If, as the international community recognizes, Crimea remains part of Ukraine[550] and Russia only exercises effective control there as an occupying power,[551] the exclusion orders are deportations from occupied territory. In that case, Article 49 of the Fourth Geneva Convention – which relates to the same type of human right as that covered by CERD Article 5(d)(ii), but specifically in the context of occupation – is highly relevant and Article 5(d)(ii) should be interpreted in light of and consistent with it. This conclusion is further supported by the way in which CERD Article (1)(1) brings within the scope of the Convention discrimination with respect to *all* "human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."[552] Freedom from deportation from one's homeland by an occupying power qualifies as a human right or fundamental freedom, and its denial on a racial or ethnic basis – as Ukraine alleges to have occurred in Crimea – therefore constitutes a violation of the CERD.

293. Applicability of CERD Articles 1(2) and 1(3) to Ukraine's forced citizenship claims. Ukraine's Memorial alleges that the process by which Russia forced its own nationality on the inhabitants of Crimea, and the subsequent enforcement of laws that discriminate against non-Russians, disproportionately and adversely affect Crimean Tatars and

---

[550] U.N. General Assembly Resolution No. 68/262, U.N. Doc. A/RES/68/262 *Territorial Integrity of Ukraine* (1 April 2014) (calling upon "all States, international organizations and specialized agencies not to recognize any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol on the basis of the [16 March 2014] referendum and to refrain from any action or dealing that might be interpreted as recognizing any such altered status.") (Ukraine's Memorial, Annex 43).

[551] U.N. General Assembly Resolution 71/205, para. 2(a) (urging the Russian Federation "[t]o uphold all of its obligations under applicable international law as an occupying Power") (Ukraine's Written Statement, Annex 91).

[552] Ukraine's Memorial, p. 346 & note 1251.

Ukrainians, who are more likely to lack Russian citizenship or not be recognized as permanent residents of Crimea. Russia asserts that such claims relating to citizenship and nationality are outside the Convention's scope of application by virtue of Articles 1(2) and 1(3). But Article 1(3) expressly permits the Convention to be "interpreted as affecting . . . the legal provisions of States Parties concerning nationality, citizenship or naturalization" when "such provisions . . . discriminate against *any particular nationality*."[553] Ukraine's Memorial alleges that the provisions of the Law on Admission granting Russian citizenship to "citizens of Ukraine and stateless persons permanently residing in the territory of the Republic of Crimea or the federal city of Sevastopol" had just such a discriminatory effect.[554] Moreover, Articles 1(2) and 1(3) as they relate to forced citizenship should be read consistently with Article 45 of the Fourth Geneva Convention which prohibits the forcing of citizenship on the inhabitants of occupied territory.[555] Both the U.N. General Assembly[556] and the Office of the High Commissioner for Human Rights[557] have found IHL to be in operation in Crimea. To interpret Article 1(2) of the CERD as excluding from the scope of the Convention discrimination that also could constitute a violation of IHL would not be a good faith interpretation of the treaty language.

* * *

294. Russia's challenges to discrete components of Ukraine's CERD claims do not undermine, but rather confirm this Court's jurisdiction. Some of Russia's objections can be dismissed now because they misrepresent Ukraine's actual claims. Others relate to genuine

---

[553] CERD, art. 1(3).

[554] Ukraine's Memorial, para. 383 (quoting Article 4 of the Law on Admission and stating that "this provision would have a profound discriminatory effect on Crimean Tatars and Ukrainians.").

[555] *See, e.g.*, Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex, Regulations Concerning the Laws and Customs of War on Land, The Hague (18 October 1907), art. 45 ("It is forbidden to compel the inhabitants of occupied territory to swear allegiance to the hostile Power.") (Ukraine's Memorial, Annex 979); *see also* Ukraine's Memorial, para. 613 & n. 1249.

[556] *See supra*, note 551.

[557] *See, e.g.*, OHCHR, *Report on the Human Rights Situation in Ukraine* (16 August to 15 November 2018), para. 95 ("The Russian Federation continued to apply its laws in Crimea and the city of Sevastopol in violation of its obligation under international humanitarian law to respect the legislation of the occupied territory.") (Ukraine's Written Statement, Annex 90).

disputes over the interpretation of the Convention and are properly addressed in the merits phase. But even if the Court were to address those interpretive disputes now, and even if it were to agree with Russia's interpretations (which it should not), each one of them affects only a small fraction of the claims that Ukraine has brought under the CERD.

C. Russia's Attack on the Factual Plausibility of Ukraine's Claims Relates to the Merits and Is Not an Appropriate Ground for a Preliminary Objection

295. As explained in Chapter 2, Russia's attack on the factual plausibility of Ukraine's claims is an inappropriate attempt to import merits issues into this preliminary phase of the proceedings. The only issue at this stage is "whether the facts as claimed by the applicant might give [rise] to a violation of a specified provision."[558] Whether the facts are correct and whether they constitute a violation of the CERD are matters for the merits.[559]

1. The Facts Alleged by Ukraine Are Capable of Giving Rise to Violations of the CERD

296. As an initial matter, the facts alleged by Ukraine *are* capable of violating multiple provisions of the CERD. Ukraine has alleged that the Crimean Tatar and Ukrainian communities form distinct ethnic groups within Crimea. Ukraine further alleges that, since the Russian invasion of Crimea, those groups have been labeled by the Russian authorities as obstacles to their plan to integrate the Crimean peninsula into the Russian Federation and targeted at a community-wide level for unfavorable treatment impairing human rights and fundamental freedoms protected by the Convention.

297. The Memorial describes numerous fields of activity within which the Crimean Tatar and Ukrainian communities have been treated less favorably than other ethnic groups in Crimea:

---

[558] *See supra*, Chapter 2, para. 32.

[559] *Ibid.*

- Disappearances, murders, abductions, and torture disproportionately affecting members of the Crimean Tatar and Ukrainian communities.[560]

- Political suppression of the Crimean Tatar community, including the persecution of the community's political leaders and the banning of the Mejlis.[561]

- Arbitrary searches and detentions targeting members of the Crimean Tatar community.[562]

- The forcing of Russian citizenship on the inhabitants of Crimea and subsequent discrimination against non-Russians.[563]

- Suppression of culturally significant gatherings.[564]

- Media restrictions and harassment.[565]

- Degradation of cultural heritage.[566]

---

[560] *See* Ukraine's Memorial, Chapter 9A, para 392 *et seq*. *See also ibid*., para. 393 ("These acts of violence and the physical harm that has resulted were based on a racial or ethnic distinction, in that they targeted members of the two communities known to oppose Russia's annexation of Crimea, with the purpose and/or effect of intimidating those communities into submission.").

[561] *See ibid*., Chapter 9B, para. 412 *et seq*. *See also ibid*., para. 413 ("[T]he measures taken against the Mejlis and against individual Crimean Tatar leaders were part of a strategy targeting the Crimean Tatar community as a whole.").

[562] *See ibid*., Chapter 9C, para. 442 *et seq*. *See also ibid*., para. 454 ("By carrying out this pervasive pattern of searches, the Russian Federation undermines the Crimean Tatar community's basic sense of safety and belonging in their indigenous homeland.").

[563] *See ibid*., Chapter 9D, para. 455 *et seq*. *See also ibid*., para. 476 ("[T]he application of Russia's nationality, residency and immigration laws in occupied Crimea . . . leads to disproportionate enforcement of these laws against members of the Crimean Tatar and Ukrainian communities in Crimea . . . .").

[564] *See ibid*., Chapter 10A, para. 480 *et seq*. *See also ibid*., para 481 (Russia "applied [its] laws discriminatorily to deny Crimean Tatars and Ukrainians an opportunity to commemorate culturally important events equal to that afforded the ethnic Russian community.").

[565] *See ibid*., Chapter 10B, para. 505 *et seq*. *See also ibid*., para. 506 ("The apparent purpose and unquestionable effect of these measures has been to burden the free speech rights of the Crimean Tatar and Ukrainian communities in particular.").

[566] *See ibid*., Chapter 10C, para. 522 *et seq*. *See also ibid*., para. 522 ("The Crimean Tatar and Ukrainian communities have also suffered a more general assault on their respective cultural heritage.").

- Suppression of minority education rights.[567]

In some of these fields of activity — such as suppression of minority education rights — the unfavorable treatment has been applied at a community-wide level, targeting the entire ethnic group as such. In others — such as arbitrary searches and detentions or media restrictions and harassment — the treatment has been applied exclusively or disproportionately to Crimean Tatar and Ukrainian individuals or entities, and the effects have been felt across the communities in question.[568]

298. These factual allegations, which must be accepted as true at this stage, are more than capable of giving rise to violations of the CERD. Article 1 of the Convention includes within the definition of racial discrimination distinctions that are "based on race, colour, descent, or national or ethnic origin . . . ." Ukraine alleges that all of the unfavorable treatment summarized above results from a policy targeting the Crimean Tatar and Ukrainian communities as such:[569] a distinction based on national or ethnic origin.

299. Article 1's definition of racial discrimination further requires that the distinction have "the purpose or effect of nullifying or impairing the recognition, enjoyment, or exercise on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life." Chapters 11 and 12 of the Memorial describe on an article by article basis how the unfavorable treatment directed at the Crimean Tatar and Ukrainian communities violates the CERD.

---

[567] *See ibid.*, Chapter 10D, para. 533 *et seq*. *See also ibid.*, para. 534 ("The unquestionable purpose and effect of these measures has been to exclude Ukrainian and Crimean Tatar culture and history from education as a general matter, as well as to decrease the quality and availability of education specific to the Ukrainian and Crimean Tatar communities in Crimea.").

[568] *See supra*, notes 570–575.

[569] *See, e.g.*, Ukraine's Memorial, para. 346 (describing a two-part strategy directed at the Crimean Tatar and Ukrainian communities).

2. Russia's Criticisms of Ukraine's Evidence Are Not Relevant to Whether the Claims Are Capable of Giving Rise to Violations

300. Russia makes a number of criticisms of Ukraine's evidence, but none of them are relevant to the only inquiry concerning the factual allegations that is appropriate at this stage of the case: whether the facts alleged are capable of giving rise to violations of the CERD. Instead, Russia effectively invites the Court to decide issues that are for the merits, after a complete merits hearing on a full evidentiary record, and that are not properly within the scope of preliminary objections.

301. For example, Russia takes issue with Ukraine's account of the ethnic identity of the Crimean Tatar and Ukrainian communities.[570] But the bases on which individuals self-identify as being of a particular nationality or ethnicity are self-evidently factual in nature, and Russia will have ample opportunity in the merits phase to develop its own evidentiary record on this issue. Notably, Russia does not question Ukraine's basic allegation, which is that Crimean Tatars and Ukrainians are distinct ethnic groups in Crimea. Nor could it, when Russia's own census classifies Crimean Tatars and Ukrainians as distinct groups within the Crimean population.[571]

302. Russia next criticizes Ukraine for failing to submit statistical evidence to support its allegations of differential treatment.[572] The argument is perhaps not surprising, given that Russia is the only party in this case currently in a position to collect statistical data on the specific areas of discrimination described in the Memorial. Neither is there any support for the notion that statistical data is necessary to prove discrimination under the Convention. But Russia's argument is also completely irrelevant at this stage, where the allegations are

---

[570] Russia's Objections, paras. 311–320.

[571] *See* Ukraine's Memorial, para. 580.

[572] Russia's Objections, para. 346.

accepted *pro tem* as true and the only question is whether those allegations are capable of giving rise to a treaty violation.

303. Russia's main argument, however, appears to be that its conduct in Crimea cannot be racial discrimination within the meaning of the Convention if it is motivated by a desire to eliminate political opposition.[573] This argument, however, rests, once again, on an attempt to dispute Ukraine's factual allegations. Russia acknowledges, for example, that the Memorial alleges that Russia has engaged in a systematic campaign of racial discrimination against the Crimean Tatar and Ukrainian communities aimed at the cultural erasure of those ethnic groups.[574] But it asks the Court to ignore that allegation because "[t]here is no plausible evidence of the requisite intent or purpose in the present case."[575] Based on its own selective reading of the Memorial and supporting exhibits, Russia instead proposes to substitute its preferred allegation — that the conduct described in the Memorial "relate[s] instead to alleged political opposition, by a number of persons of different origins, to the change of status of Crimea."[576] This whole exercise is a transparent attempt to argue the facts and has no place in a preliminary objections proceeding. The question at this stage is whether the facts alleged by Ukraine — not Russia's reformulation of them — are capable of giving rise to violations of the CERD.

304. The tension that Russia sees between Ukraine's allegation of a campaign of racial discrimination and the crushing of political opposition is a product of its own misreading of the Memorial. In reality, there is no inconsistency between the two. As explained above, Ukraine alleges that the Crimean Tatar and Ukrainian communities were singled out for unfavorable treatment precisely *because* of those communities' general hostility towards Russia's annexation of Crimea. It is entirely to be expected, therefore, that a campaign of racial

---

[573] *Ibid.*, para. 351.

[574] *Ibid.*, para. 350.

[575] *Ibid.*, para. 358.

[576] *Ibid.*, para. 351.

discrimination against these communities will frequently overlap with measures against individuals or entities expressing opposition to annexation or support for Ukrainian rule.[577]

305. Article 1(1) defines racial discrimination as including *all* distinctions based on ethnicity that have the purpose or effect of impairing human rights and fundamental freedoms. Ukraine is not required to prove discriminatory intent. Whatever Russia's motivation, when it adopts measures that target or disproportionately affect the Crimean Tatar and Ukrainian communities and those measures impair the human rights and fundamental freedoms of those communities, it has engaged in racial discrimination. Ukraine does not allege that individuals who happen to be Crimean Tatars or Ukrainians are being persecuted for their political views, but rather that Russia is collectively punishing the Crimean Tatar and Ukrainian communities based on its identification of those communities as a whole as hostile to annexation. The existence of an underlying political reason for a policy of discrimination towards the Crimean Tatar and Ukrainian communities does not make that policy any less racial discrimination within the meaning of the Convention.

* * *

306. The Court should reject Russia's invitation to wade into the merits in this preliminary phase, a tactic designed to divert the Court from the weakness of Russia's Preliminary Objections that do relate to jurisdiction and admissibility. Those objections are dealt with in the next two chapters.

[577] *See, e.g.*, Witness Statement of Anna Andriyevska (Ukraine's Memorial, Annex 14).

Chapter 7. UKRAINE HAS SATISFIED ALL THE REQUIREMENTS FOR THE EXERCISE OF THE COURT'S JURISDICTION OVER THIS DISPUTE

307. The Russian Federation's core objection to Ukraine's claims under the CERD is that Ukraine failed to satisfy the preconditions to this Court's jurisdiction that Russia reads into Article 22 of the Convention. That provision states that "[a]ny dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to" this Court.[578] But under Russia's contorted reading of the Convention it is not enough that Ukraine spent more than two years seeking to settle this case by negotiation with Russia before referring this dispute to the Court. Russia does not think it sufficient that Ukraine sent 11 diplomatic notes detailing Russia's violations of the CERD before filing its Application, none of which received a response, nor that Russia declined to address the substance of Ukraine's claims in three face-to-face negotiating meetings. Instead, Russia asks the Court to accept that, after this unsuccessful attempt at negotiation, Ukraine was obliged to undertake a further non-binding dispute settlement procedure before referring its dispute to the Court.[579] This Court gave no credence to this argument when it indicated provisional measures in April 2017,[580] and it deserves no credence now.

308. Under Russia's misreading of Article 22, after bilateral negotiations failed, that provision required Ukraine to refer the matter to the CERD Committee for conciliation under a lengthy inter-State complaints procedure beginning with a six-month waiting period to allow for further negotiation of a dispute incapable of being settled by negotiation. Meanwhile, Russia would have been able to continue with its systematic campaign of discrimination against the Crimean Tatar and Ukrainian communities in Crimea free from international

---

[578] CERD, art. 22 (emphasis added).

[579] *See, e.g.,* Russia's Objections, para. 361.

[580] *See, e.g., Provisional Measures Order of 19 April 2017*, para. 106.

judicial scrutiny. A situation that this Court considered urgent enough to warrant the indication of provisional measures in April 2017[581] would doubtless still be awaiting the recommendations of an *ad hoc* Conciliation Commission — recommendations that Russia would have been at liberty to reject.

309. To reach this nonsensical result, Russia offers a contorted interpretation of Article 22 that requires the Court to read "or" as meaning "and."[582] Only through such linguistic gymnastics can the Convention be read as requiring disputing parties to postpone judicial resolution of their disputes while negotiating to futility, then negotiating again, and then entering non-binding conciliation. On its face, Russia's interpretation of Article 22 is incompatible with a Convention that was designed to serve the goal of "speedily eliminating racial discrimination in all its forms and manifestations."[583]

310. Russia's view that a State must exhaust two distinct avenues of dispute resolution prior to seeking resolution by the Court presupposes that Article 22 creates preconditions at all. The Court has previously divided on that question, though, in Ukraine's view, Article 22 is best read as imposing no preconditions to this Court's jurisdiction over disputes concerning the interpretation and application of the CERD.[584] But, if a precondition exists, it is singular — either negotiation *or* the alternative of conciliation under the CERD Committee procedures.

311. Section A of this Chapter explains why Russia's improbable interpretation of Article 22 is inconsistent with the interpretive test set out in the Vienna Convention.[585] Section B demonstrates that Russia' secondary argument — that Ukraine's efforts over more than two years were not a sufficient attempt to negotiate — is also incorrect.

---

[581] *Ibid.* , para. 106.

[582] *See, e.g.,* Russia's Objections, paras. 376–378.

[583] CERD, preamble.

[584] *See infra*, Part III, Chapter 7, Section A(6).

[585] VCLT, arts. 31 and 32.

A. Article 22 Does Not Require Recourse to the Voluntary CERD Committee Inter-State Complaints Procedure

312. Russia's reading of Article 22 as imposing two sequential preconditions to the Court's jurisdiction fails every element of the interpretive test set out in Article 31(1) of the Vienna Convention — that treaty language be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[586] As explained in this Section, Russia's interpretation is in tension with the ordinary meaning of the word "or," the context of Article 22 and the Convention as a whole, and the object and purpose of the CERD. If recourse to the *travaux préparatoires* were needed pursuant to Article 32 of the Vienna Convention, which it is not, Russia's interpretation of Article 22 also finds no support in the negotiating history of the Convention.

313. As the majority and dissenting opinions in *Georgia v. Russia* reflect, there are reasonable arguments to be made for interpreting Article 22 as imposing either no preconditions to the Court's jurisdiction at all, or a single precondition. What Article 22, properly interpreted, cannot and should not accommodate is the proposition now advanced by Russia: that a treaty committed to the speedy elimination of racial discrimination would create multiple sequential obstacles to this Court's power to hear disputes arising under it.

1. The Ordinary Meaning of "Or" Is to Establish a Choice Between Two Alternatives

314. In determining the ordinary meaning of Article 22, the use of "or" separating "negotiation" and "the procedures expressly provided for in this Convention" is significant. The Oxford English Dictionary's primary definition of "or" is disjunctive: the word is "[u]sed to coordinate two (or more) sentence elements between which there is an alternative."[587]

---

[586] VCLT, art. 31(1).

[587] Oxford English Dictionary, *or* (online ed., 2018), *accessed at* https://bit.ly/2Tb5jN0.

Other leading English dictionaries, published on both sides of the Atlantic, agree.[588] The Chinese, Russian, French and Spanish official versions of the CERD all render this phrase of Article 22 using words the primary meaning of which is disjunctive.[589] The most natural reading of Article 22, therefore, is that "or" coordinates two alternatives, namely that "negotiation" and the "procedures expressly provided for in this Convention" are two non-judicial options for resolving a dispute before referral to the Court.[590]

315. Russia argues, however, that, in the phrase in question, "or" is used to separate two types of pre-judicial settlement procedures, *both* of which must be used before a State Party can refer a dispute to the Court.[591] Under this approach, "or" would not be read according to its ordinary meaning of separating two alternatives, or even in the sense of "and/or," but rather as "and." Notably, Russia is unable to cite a single case interpreting "or,"

---

[588] *See, e.g.*, Merriam-Webster Dictionary, *or* (online ed., 2018), *accessed at* https://bit.ly/2VeY5cU (first defining "or" as "a function word to indicate an alternative . . ., the equivalent or substitutive character of two words or phrases . . ., or approximation or uncertainty"); Collins English Dictionary, *or* (online ed., 2018), *accessed at* https://bit.ly/2CEILPp (first English definition: "used to join alternatives").

[589] *See, e.g.*, Larousse Dictionnaire Français, *ou* (online ed., 2018), *accessed at* https://bit.ly/2Vh7b8I (first definition: "L'alternative; soit : Son père ou sa mère l'accompagnera:"); Royal Spanish Academy Dictionary of the Spanish Language, *o* (online ed., 2018) (first definition: "It denotes difference, separation, or alternative between two or more persons, things or ideas") (Ukraine's Written Statement, Annex 129); The Explanatory Dictionary of the Russian Language, *или* (Sergey Ivanovich Ozhegov ed., 2011), p. 586 \ (first definition: "Connects [...] homogeneous parts of a sentence that are mutually exclusive") (Ukraine's Written Statement, Annex 127; Xinhua Dictionary of the Chinese Language, *或* (11th ed., 2011), p. 210 (first definition: "Conjunction, represents choice: agree ~ disagree") (Ukraine's Written Statement, Annex 128).

[590] *See Georgia v. Russia, Preliminary Objections*, *Dissenting Opinion of Judge Cançado Trindade*, para. 116 ("[T]he conjunction 'or' indicates that the draftsmen of the CERD Convention clearly considered 'negotiation' or 'the procedures expressly provided for in this Convention' as alternatives.").

[591] *See, e.g.,* Russia's Objections, para. 361, 373-410.

when used in treaty language comparable to Article 22, in the manner it advocates here.[592] What is clear, however, is that the most common meaning of "or" is disjunctive.[593] All other relevant factors under the Vienna Convention's interpretive rule confirm that this is the meaning that "or" should be accorded in Article 22.

---

[592] Contrary to Russia's assertion, the Grand Chamber of the Court of Justice of the European Communities did not read "or" as "and" in a case that Russia wrongly cites in support of its own, more restrictive interpretation of Article 22. *See* European Court of Justice Case No. C-304/02, *Commission of the European Communities* v. *French Republic,* Judgment of 10 July 2005, p. I-6345, paras. 82–83 (interpreting language allowing for imposition of "a lump sum or penalty payment" as permitting a court to impose a lump sum or penalty payment, or both). That case is not relevant here in any event, as the Grand Chamber was interpreting a European Union regulation and not an international treaty and employed a teleological approach rather than the interpretive test of the Vienna Convention.

Russia's reliance on the *South China Sea Arbitration* is also misplaced. The sentence at issue in that case was different in structure from Article 22, including use of a double negative, creating a "negative overall sentence structure," which supported the tribunal's conclusion that the use of "or" in the sentence imposed a cumulative requirement. *South China Sea Arbitration (The Republic of Philippines* v. *The People's Republic of China)*, PCA Case No. 2013-19, Award (12 July 2016), pp. 209–211, paras. 493–499 (interpreting Article 121(3) of UNCLOS, which provides "[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.").

Russia's reliance on scattered and questionable references in U.N. documents and treatises which it construes as consistent with its interpretation of Article 22 only underlines the paucity of support for its approach. *See* Russia's Objections, paras. 380–381, note 515 (citing United Nations, Handbook on the Peaceful Settlement of Disputes between States (1992), p. 22, para. 70; U.N. General Assembly, Official Records, 72nd Session, *Supplement No. 10, Report of the International Law Commission: Sixty-ninth Session* (1 May–2 June and 3 July–4 August 2017), U.N. Doc. A/72/10, p. 117, note 585; Ruth Mackenzie, Cesare Romano, Philippe Sands & Yuval Shany eds., Manual on International Courts and Tribunals (2d ed., OUP 2010) p. 435; Manfred Nowak & Elizabeth McArthur, The United Nations Convention against Torture: A Commentary (OUP 2008), pp. 861–862).). None of these sources interpret Article 22 pursuant to the Vienna Convention's interpretive rule, as the Court must do.

[593] *See, e.g.*, *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134 (Supreme Court of the United States, 2018) (interpreting the meaning of the second use of the word "or" in the phrase "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements" and concluding that, in this case, "context favor[ed] the *ordinary disjunctive meaning* of 'or'") (emphasis added) (Ukraine's Written Statement, Annex 123).

2. The Context of Article 22 Confirms that "Or" Should Be Accorded Its Ordinary Meaning

316. Within its Preliminary Objections, Russia overlooks numerous contextual elements that are in tension with its unusual reading of "or" in Article 22 and which, in some cases, render it absurd.

317. First, the CERD Committee procedures referred to in Article 22 are expressly voluntary.[594] If they were to be considered mandatory in instances where the parties wanted to preserve the option of recourse to the Court, the Convention provisions describing the procedures would surely have said as much.[595]

318. Second, the CERD inter-State complaints procedure already provides for a six-month period before referral to the CERD Committee for the disputing parties to attempt to "adjust" the matter in dispute to their mutual satisfaction by "negotiation or by any other procedure open to them."[596] It would be absurd to read Article 22 as requiring disputing States Parties, as a precondition to the Court's jurisdiction, to first negotiate for an unspecified amount of time and then renegotiate for six months before a mandatory referral to the CERD Committee. *Vice versa*, it would be no less absurd to read Article 22 as requiring six months

---

[594] CERD, art. 11(1) ("If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it *may* bring the matter to the attention of the Committee.") (emphasis added).

[595] Russia's description of the CERD inter-state complaints procedure as "mandatory" is misleading. Russia's Objections, para. 404. It is more accurate to say that, because the procedure is contained within the Convention itself, it is automatically available to States Parties, without the need to separately opt into a complaints mechanism. But nothing about this feature of the CERD places an obligation on States Parties to use the procedure.

[596] CERD, art. 11(2).

of negotiation as a precondition to voluntary conciliation, an unsuccessful referral to the CERD Committee, and then further negotiation for an unspecified period.[597]

319. The drafters knew how to be precise when establishing cumulative or sequential preconditions to a procedural remedy. Article 11, for example, lays out clearly several steps that must be taken in order by the disputing parties, before a dispute may be referred to an *ad hoc* Conciliation Commission.[598] If the drafters had wanted to layer the CERD Committee procedure on top of negotiation as a precondition to referral of a dispute to the Court, it could have adopted a similar approach in Article 22, for example by making clear that, once negotiations were exhausted, the disputing parties could immediately have recourse to the CERD Committee, in the manner foreseen by the final clause of Article 11(3).

320. Third, Russia's interpretation deprives Article 22's reference to disputes concerning the interpretation of the Convention of effect. Under Article 11, the CERD Committee is competent to examine complaints by a State Party "that another State Party is *not giving effect to the provisions of this Convention*."[599] The competence of the CERD

---

[597] While ignoring this fatal defect in its argument, Russia incorrectly asserts that an interpretation of Article 22 requiring an applicant State to resort either to negotiation "or" the CERD Committee procedure deprives the reference to "the procedures expressly provided for in this Convention" of meaning. *See* Russia's Objections, para. 383. On the contrary, the inclusion of this language within Article 22 serves to coordinate that dispute resolution provision with the inter-State complaints procedure provided for at Articles 11 to 13 of the CERD. It does so by making it clear that a party that has voluntarily availed itself of the CERD Committee procedure may refer the dispute in question to the Court, if it is not resolved by conciliation.

[598] For example, under Article 11(1), in the event that a State chooses to make use of the CERD inter-State complaints procedure, following notification to the Committee, the Committee must then provide this communication to the State Party concerned. Article 11(2) then establishes an express precondition to the referring State's right to return the matter to the Committee — the referring State must wait at least six months before it is permitted to refer a matter back to the Committee, provided, during that time, the matter has not otherwise been satisfactorily adjusted by negotiation or any other procedure. Further, in accordance with Article 11(3), the Committee itself may only deal with a matter referred back to it in accordance with Article 11(2), "after it has ascertained that all available domestic remedies have been invoked and exhausted." Under Article 12, it is only once these preconditions are satisfied and the Committee has "obtained and collated all the information it deems necessary" that it "shall appoint an *ad hoc* Conciliation Commission," which may then consider the matter and make recommendations.

[599] CERD, art. 11(1) (emphasis added).

Committee, therefore, is limited to complaints from States Parties about alleged violations of the CERD by another State Party. If, as Russia argues, the Court's jurisdiction under Article 22 requires exhaustion of the CERD inter-State complaints procedure, a dispute limited to interpretation of the Convention could never satisfy the preconditions to seisin of the Court.[600]

321. Fourth, the word "or" appears three times in Article 22. It is first used in reference to "[a]ny dispute between two *or* more States Parties."[601] Later it is used to classify the types of dispute to which the clause applies, namely disputes involving the "interpretation *or* application of this Convention."[602] In both instances, the word "or" is plainly used in its ordinary sense, as separating alternatives. Where the drafters have repeatedly used "or" in its ordinary sense earlier in Article 22, it is highly unlikely they would have used it a third time with a different meaning, without signaling such an intent. This could easily have been achieved, for example with the formulation: any dispute which is not settled by negotiation or, *if negotiations fail*, by the procedures expressly provided for in this Convention.[603] The italicized language was not included in the Convention.

322. Fifth, the placement of Article 22 within the CERD also weighs against Russia's interpretation. Had the CERD's drafters intended the Court's jurisdiction to be contingent upon the exhaustion of the CERD Committee procedures, they would have addressed the conditions under which a dispute could be referred unilaterally to the Court in Part II, which

---

[600] When Article 22 is read in light of the text of Article 11, it becomes clear that an interpretation of Article 22 as making recourse to the CERD Committee procedures mandatory prior to seisin of the Court would rob Article 22's reference to "interpretation" of its effect.

[601] CERD, art. 22 (emphasis added).

[602] CERD, art. 22 (emphasis added).

[603] The same is true of other official language versions of the CERD. For example, had the drafters intended a cumulative interpretation of Article 22 within the French text of the CERD, they should have used the following language: "Tout différend entre deux ou plusieurs Etats parties touchant l'interprétation ou l'application de la présente Convention qui n'aura pas été réglé par voie de négociation ***ni*** au moyen des procédures expressément prévues par ladite Convention sera porté, à la requête de toute partie au différend, devant la Cour internationale de Justice pour qu'elle statue à son sujet, à moins que les parties au différend ne conviennent d'un autre mode de règlement."

establishes the CERD Committee and defines its role. In so doing, they could also have easily adapted the CERD Committee procedure to avoid the many procedural contradictions that arise from Russia's reading of Article 22.[604] That the drafters chose not to do this, and instead located Article 22 among the Convention's final provisions in Part III, is strong evidence that Article 22 was never intended to make the CERD Committee procedure a mandatory precondition to the Court's jurisdiction.

323. The Court should not adopt an interpretation of Article 22 at variance with the ordinary meaning of "or" which also is in such tension with the surrounding context.

3. The Object and Purpose of the CERD Supports the Conclusion that Article 22 Does Not Require Recourse to the CERD Inter-State Complaints Procedure

324. Russia's interpretation of Article 22 also cannot be reconciled with the CERD's object and purpose of "speedily eliminating racial discrimination in all its forms and manifestations."[605]

325. The preamble to the CERD indicates that the States Parties intended that instrument to be an effective tool for promptly eliminating racial discrimination. The States Parties expressed alarm at continuing "manifestations of racial discrimination still in evidence in some areas of the world."[606] They recalled the U.N. Declaration on the Elimination of All Forms of Racial Discrimination of 1963 and committed themselves to follow through on the

---

[604] For example, if the drafters had intended that unilateral seisin only be available where two disputing parties had both negotiated and availed themselves of conciliation by the CERD Committee, a separate track could have been written into Part II allowing these successive steps to be taken in a streamlined fashion. Such a track might have specified, for example, that where the disputing parties had actually negotiated pursuant to Article 11(2), and then referred the matter back to the CERD Committee for conciliation, but the recommendations in the Committee report provided for in Article 13(2) were not accepted by all parties to the dispute, any one of them could refer the matter to the Court for resolution.

[605] CERD, preamble.

[606] *Ibid.*

Declaration's call for measures to "speedily eliminat[e] racial discrimination in all its forms and manifestations."[607]

326. An interpretation of Article 22 that creates cumulative procedural delays in the consideration of disputed matters cannot be reconciled with this object and purpose. Yet that is precisely what the interpretation urged by the Russian Federation would achieve. As the joint dissent in *Georgia v. Russia* observed, both negotiation and conciliation "depend[] on an understanding between the parties and their desire to seek a negotiated solution."[608] In either scenario, "a favourable outcome depends on the readiness of the parties to come to an agreement, in other words, on their willingness to negotiate."[609] Accordingly, requiring disputing parties to both negotiate and conciliate serves no purposes other than delay:

> "[W]here a State has already tried, without success, to negotiate directly with another State against which it has grievances, it would be senseless to require it to follow the special procedures in Part II [*i.e.*, Articles 11-13 of the CERD], unless a formalism inconsistent with the spirit of the text is to prevail. It would make even less sense to require a State which has unsuccessfully pursued the intricate procedure under Part II to undertake direct negotiations destined to fail before seising the Court."[610]

327. Russia wrongly accuses Ukraine of implying in its Memorial that "conciliation can[] be equated with mere bilateral negotiations."[611] But the fact that conciliation has features lacking in bilateral negotiation — in particular, the involvement of a third party able to recommend a settlement — is irrelevant to the question at issue here: whether requiring

---

[607] *Ibid.* (emphasis added).

[608] *Georgia v. Russia, Preliminary Objections, Joint Dissenting Opinion of President Owada, Judges Simma, Abraham and Donoghue, and Judge* ad hoc *Gaja,* p. 156, para. 43; *see also Conciliation Between the Democratic Republic of Timor-Leste and the Commonwealth of Australia,* PCA Case No. 2016-10, Report and Recommendations of The Compulsory Conciliation Commission (9 May 2018), p. 17, para. 51. ("Conciliation is not an adjudicatory proceeding, nor does a conciliation commission have the power to impose a legally binding solution on the parties; instead, a conciliation commission may make recommendations to the parties.").

[609] *Ibid.*

[610] *Ibid.*

[611] Russia's Objections, para. 384.

disputing parties to resort successively to two non-binding, non-judicial dispute resolution mechanisms, both of which depend for their success on the willingness of the parties to compromise and come to an agreement, is consistent with the object and purpose of the CERD to speedily eliminate racial discrimination. The obvious and correct answer is that it is not, and that is one more reason why the Court should not impose on Article 22 an unusual reading of the word "or" that also does not fit with the context in which it appears.

4. Russia's Interpretation of Article 22 Is Not Supported by Other Universal Human Rights Treaties

328. Russia's reliance on subsequent universal human rights treaties to support its reading of "or" as "and" in Article 22 is misplaced.[612] Russia does not explain to which part of the Vienna Convention interpretive process such treaties are relevant.[613] But Russia's analysis is flawed in any case.

329. By relying on treaties entered into following the CERD, Russia asks the Court to interpret Article 22 with the benefit of hindsight, rather than by reference to the precedents that the CERD's drafters would have had before them as they negotiated the text of the Convention. These precedents included numerous treaties that provided for unilateral seisin of the Court, without multiple intermediary steps. For example, Article 22 of the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, approved by the General Assembly on 2 December 1949, provided:

> If any dispute shall arise between the Parties to the present Convention relating to its interpretation or application and if such dispute cannot be settled by other means, the dispute shall,

---

[612] *Ibid.*, paras. 404–410.

[613] Subsequent treaties are not part of the context as defined in Article 31(2) of the Vienna Convention, nor are they among the sources listed in Article 31(3) that are to be taken into account, together with the context. VCLT, arts. 31(2), 31(3).

> at the request of any one of the Parties to the dispute, be referred to the International Court of Justice.[614]

Many other pre-CERD multilateral conventions negotiated under the auspices of the United Nations had dispute resolution provisions allowing a similarly direct route to the Court.[615]

330. By contrast, the four treaties that Russia cites to establish a supposed "three-step procedure" (negotiation, conciliation/arbitration, the Court) when unilateral seisin of the Court is permitted, were all concluded long after the adoption of the CERD in 1965 — the earliest in 1979.[616] Russia's retrospective reasoning provides no foundation for a counter-intuitive interpretation of Article 22 as some sort of fore-runner of those later treaties. It is far more likely that the CERD's drafters were guided by existing models that avoid multi-step preconditions to the Court's jurisdiction, than that they consciously chose to break the mold in order to set an example for subsequent treaties to be negotiated decades later.

---

[614] Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prosecution of Others, 2 December 1949, 96 U.N.T.S. 271, art. 22.

[615] *See, e.g.*, Genocide Convention, art. XI ("Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."); Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 137, art. 38 ("Any dispute between parties to this Convention relating to its interpretation or application, which cannot be settled by other means, shall be referred to the International Court of Justice at the request of any one of the parties to the dispute."); Convention on the Political Rights of Women, 31 March 1953, 193 U.N.T.S. 135, art. IX ("Any dispute which may arise between any two or more Contracting States concerning the interpretation or application of this Convention which is not settled by negotiation, shall at the request of anyone of the parties to the dispute he referred to the International Court of Justice for decision, unless they agree to another mode of settlement.").

[616] *See* Russia's Objections, paras. 404–410 (citing Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, 10 December 1984, 1465 U.N.T.S. 85, art. 30(1); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 18 December 1990, 2220 U.N.T.S. 3, art. 92(1); Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, 1249 U.N.T.S. 13, art. 29(1); International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, 2716 U.N.T.S. 3, art. 42(1)).

331. If anything, the examples of three-step dispute resolution provisions cited by Russia demonstrate Ukraine's point: where treaty drafters intend to establish sequential preconditions to the Court's jurisdiction, they are able to find unambiguous language to do so. Rather than asking the reader to read "or" as meaning "and," these later provisions leave no doubt that each step is a cumulative requirement. For example, Article 30 of the Convention against Torture, provides as follows:

> Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.[617]

332. Equally clear language is found in each of the three other conventions to which Russia refers. Far from these later treaties aiding Russia's interpretation, the absence of such language from Article 22 of the CERD is strong evidence that the drafters had no intention of establishing the three-step procedure for which Russia now argues.[618]

5. The *Travaux Préparatoires* Are Not Consistent with Russia's Interpretation

333. As shown above, the interpretive test prescribed by Article 31(1) of the Vienna Convention produces a clear result. Each of the ordinary meaning, the context, and the object and purpose of the treaty confirm that "or" means "or" in Article 22, not "and." Recourse to

---

[617] Convention Against Torture, art. 30(1).

[618] For this reason, Russia's reliance on the Court's case law interpreting these provisions does not assist them. *See* Russia's Objections, para. 408, note 561; *cf. Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 150, paras. 51-52; *Belgium v. Senegal, Judgment of 20 July 2012,* paras. 60–62 (interpreting Article 30 of the Convention Against Toruture); *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Provisional Measures, Order of 10 July 2002, I.C.J. Reports 2002*, pp. 38–39, para. 87 and p. 41, para. 92 (interpreting Article 29 of Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, 1249 U.N.T.S. 13).

the supplementary means of interpretation set out in Article 32 of the Vienna Convention is therefore not necessary or appropriate. Even if such recourse were needed, however, it would be of no assistance to Russia's case.

334. The negotiating history shows that the late addition to Article 22 of a reference to "the procedures expressly provided for in this Convention" was intended to make clear that voluntary submission to conciliation through the CERD Committee procedure was one option available to disputing parties before referral of the dispute to the Court. The reference was added to what became Article 22 of the Convention at a meeting of the Third Committee on 7 December 1965, as a result of an amendment offered by the Philippines, Ghana, and Mauritania (the "Three-Power Amendment").[619] The same three Powers had been influential in drafting the so-called measures of implementation, that were to become Part II of the Convention and which included a conciliation procedure for inter-State disputes.[620] It was therefore only natural that they would have wanted to make clear that States had the option of submitting to conciliation before referring disputes to the Court to be recognized in Article 22.

---

[619] *See* U.N. General Assembly, *Official Record of the Third Committee, 1367th Meeting*, U.N. Doc. A/C.3/SR.1367 (7 December 1965) (Ukraine's Written Statement, Annex 98); *see also* U.N. Economic and Social Council, *Draft International Convention on the Elimination of All Forms of Racial Discrimination, Suggestions for Final Clauses submitted by Officers of the Third Committee*, U.N. Doc. A/C.3/L.1237 (15 October 1965) (Ukraine's Written Statement, Annex 93); U.N. Economic and Social Council, *Draft International Convention on the Elimination of All Forms of Racial Discrimination, Ghana, Mauritania, and Philippines: amendments to the suggestions for final clauses submitted by the Officers of the Third Committee (A/C.3/L.1237)*, U.N. Doc. A/C.3/L.1313 (30 November 1965) (Ukraine's Written Statement, Annex 97).

[620] U.N. General Assembly, *Ghana, Mauritania and Philippines: articles relating to measures of implementation to be added to the provisions of the draft International Convention on the Elimination of All Forms of Racial Discrimination adopted by the Commission on Human Rights*, U.N. Doc, A/C.3/L.1291 (18 November 1965) (Ukraine's Written Statement, Annex 96); *see also* U.N. Economic and Social Council, *Draft International Convention on the Elimination of All Forms of Racial Discrimination, Mr. Ingles: Proposed Measures of Implementation*, U.N. Doc. E/CN.4/Sub.2/L.321 (17 January 1964), art. 2 (Ukraine's Written Statement, Annex 92); U.N. General Assembly, *Draft International Convention on the Elimination of All Forms of Racial Discrimination, Ghana: revised amendments to document A/C.3/L.1221*, U.N. Doc. A/C.3/L.1274/REV.1 (12 November 1965) (Ukraine's Written Statement, Annex 95).

335. The limited ambition behind the Three-Power Amendment explains why other members of the Third Committee considered it an uncontroversial proposal that served only to clarify the text.[621] For example, the amendment was presented by the Ghanaian representative as "self-explanatory" and merely a "simple refer[ence] to the procedures provided for in the Convention,"[622] a sentiment echoed by other delegates.[623] This interpretation is also consistent with the views of other delegates who remarked upon the "considerable latitude" provided by Article 22, under which States Parties "could," (not "must") "resort to negotiation and other modes of settlement."[624]

336. As with its misreading of the text of Article 22, Russia offers a contorted reading of the *travaux préparatoires* and one that is in tension with contextual evidence. According to Russia, the Three-Power Amendment was intended to make unilateral referral to the Court more palatable to the supporters of a proposed Polish amendment to the text of the putative Article 22, that would have replaced reference to "the request of any of the parties to a dispute"

---

[621] *See, e.g., Georgia v. Russia, Preliminary Objections*, *Joint Dissenting Opinion of President Owada, Judges Simma, Abraham and Donoghue, and Judge* ad hoc *Gaja,* p. 157, para. 47 ("More likely, the amendment was intended to make clear that recourse to these special procedures figured among the possible avenues for negotiated settlement. That is why it was regarded by the delegates as merely a 'useful addition or clarification' and was easily adopted, not as a change in the text to make it more restrictive but as a natural, and almost self-evident, clarification.")

[622] U.N. General Assembly, *Official Record of the Third Committee, 1367th Meeting*, U.N. Doc. A/C.3/SR.1367 (7 December 1965), p. 453, para. 29 (Ukraine's Written Statement, Annex 98).

[623] *See, e.g. Ibid.*, para. 40 (the Belgian delegate noting that the Three-Power Amendment "introduced a useful clarification"); *see also ibid.* p. 454, para. 38 (the French delegate expressing support for the Three-Power Amendment on the grounds that it "brought clause VIII into line with provisions already adopted in the matter of implementation").

[624] *Ibid.*, para. 25; *see also ibid.*, para. 39 (the Italian delegate referring to "great variety of admissible settlement procedures").

with "the request of all parties to a dispute."[625] This amendment would have required a further act of consent by the disputing States before a dispute could be referred to the Court. Russia appears to argue that the addition of a requirement to exhaust two successive pre-judicial settlement procedures was a concession to those States that insisted on such an additional act of consent.[626]

337. If Russia's interpretation of the *travaux préparatoires* were correct, one would expect to see clear evidence of the purported compromise in the statements of the various delegations to the Third Committee. Such evidence is, however, conspicuous by its absence.

338. The Ghanaian delegate's statement that the procedures provided in the Convention "should be used," reflects his close involvement in crafting those procedures and falls far short of suggesting that such procedures had now become mandatory for parties seeking recourse to the Court.[627] Nor did any of the other speakers — either from delegations supporting the Polish amendment or those opposing it — suggest that the Three-Power Amendment would require disputing parties to resort both to negotiation and to the CERD Committee procedures before they could refer a dispute to the Court. The previously-described statements praising the variety of settlement options that Article 22 offers disputing parties, cannot be reconciled with the rigid three-step process that Russia now reads into that provision.

---

[625] *See, e.g.*, Russia's Objections, p. 220; *see also* U.N. Economic and Social Council, *Draft International Convention on the Elimination of All Forms of Racial Discrimination, Poland: amendments to the suggestions for final clauses submitted by the Officers of the Third Committee (A/C.3/L.1237)* U.N. Doc. A/C.3/L.1272 (1 November 1965), p. 2 (Ukraine's Written Statement, Annex 94); U.N. Economic and Social Council, *Draft International Convention on the Elimination of All Forms of Racial Discrimination, Suggestions for Final Clauses submitted by Officers of the Third Committee*, U.N. Doc. A/C.3/L.1237 (15 October 1965) (Ukraine's Written Statement, Annex 93).

[626] *See, e.g.,* Russia's Objections, p. 220.

[627] U.N. General Assembly, *Official Record of the Third Committee, 1367th Meeting*, U.N. Doc. A/C.3/SR.1367 (7 December 1965), p. 453, para. 29 (Ukraine's Written Statement, Annex 98).

339. It is also telling that the supposed "*quid pro quo*"[628] represented by the Three-Power Amendment appears not to have lessened the hostility of Poland and likeminded States to the possibility of unilateral referral contained in Article 22 of the CERD. The Polish amendment was ultimately voted down by a margin of 37 votes to 26, with 26 abstentions.[629] The official record of the meeting does not record which way each State voted, but it is clear from the vote count that the Third Committee remained strongly divided on this issue.[630] The purported compromise Russia sees in Article 22 was even less successful in persuading States Parties to submit to the CERD's dispute resolution provision once the Convention had been adopted. More than 30 States Parties have entered reservations to Article 22, including not only States that presumably voted in favor of the Polish amendment in the Third Committee (*e.g.*, Poland and the Soviet Union) but also some that had opposed the amendment (*e.g.*, the United States).[631]

340. Although the *travaux préparatoires* are of no assistance to the Russian Federation's argument, the Court does not need to reach them to find that Ukraine was under no obligation to invoke the CERD Committee procedure before bringing its CERD claims to this forum. The ordinary textual meaning of "or," the context in Article 22 and the Convention as a whole, and the object and purpose of the CERD collectively contradict Russia's assertion that Article 22 creates not one, but two, preconditions to this Court's jurisdiction.

---

[628] Russia's Objections, p. 220.

[629] U.N. General Assembly, *Official Record of the Third Committee, 1367th Meeting*, U.N. Doc. A/C.3/SR.1367 (7 December 1965), p. 455 (Ukraine's Written Statement, Annex 98).

[630] Notably, the Ghanaian representative explained his country's abstention on the Polish amendment by reference to Ghana's position that disputes should generally only be referred to the Court "with the full consent of both parties," balanced against the importance his delegation placed on the Convention under negotiation. He did not suggest that Ghana's decision not to support Poland's amendment had been facilitated by a cumulative pre-condition to the Court's jurisdiction introduced by the successful Three-Power Amendment. U.N. General Assembly, *Official Record of the Third Committee, 1367th Meeting*, U.N. Doc. A/C.3/SR.1367 (7 December 1965), p. 455, para. 42 (Ukraine's Written Statement, Annex 98).

[631] *Status of the Convention on the Elimination of All Forms of Racial Discrimination*, United Nations Treaty Collection, *accessed at* https://bit.ly/2Q9J08H.

6. The Debate in *Georgia v. Russia* Over Whether Article 22 Creates Preconditions at All Further Counsels Against Treating Article 22 as Creating *Two* Preconditions

341. The Court has interpreted Article 22 of the CERD on one previous occasion, in *Georgia v. Russia*.[632] Since the Court found that Georgia had not attempted to resolve the dispute either through bilateral negotiation or the CERD Committee procedure, it did "not need to examine whether the two preconditions are cumulative or alternative."[633] It did, however, consider whether Article 22 of the CERD created preconditions at all, and on this question the Court was divided.

342. A majority of the Court found that Article 22 created preconditions to the Court's jurisdiction.[634] The majority's reasoning was based principally on the principle of effectiveness. Specifically, the majority was concerned that reading Article 22 as creating no precondition to the seisin of the Court would deprive the words "which is not settled" of utility, and similarly render the express choice of two modes of dispute settlement without meaning.[635]

343. The joint dissent in that case by five judges — President Owada, Judges Simma, Abraham and Donoghue, and Judge ad hoc Gaja — argued that "'effectiveness' is merely one argument which may point towards a particular interpretation, but it does not obviate the need to take into consideration other elements relevant to elucidating the meaning of the text."[636] The joint dissent pointed to the ordinary meaning of the text, as required by the Vienna Convention, noting that "the language 'any dispute which is not settled by' neither suggests

---

[632] *See generally Georgia v. Russia, Preliminary Objections*.

[633] *Ibid.*, para. 183.

[634] *Ibid.*, para. 141.

[635] *Ibid.* , paras. 133–134.

[636] *Georgia v. Russia, Preliminary Objections, Joint Dissenting Opinion of President Owada, Judges Simma, Abraham and Donoghue, and Judge ad hoc Gaja*, pp. 147–148, para. 22.

nor requires that an attempt at settlement must necessarily have been made before reference to the Court."[637]

344. The joint dissent also argued that the Court's jurisprudence with regard to compromissory clauses with wording similar to Article 22 was less than uniform.[638] The dissenting judges pointed in particular to previous cases in which the Court had interpreted treaties — including the 1955 Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran — with compromissory clauses permitting referral of disputes "not satisfactorily adjusted by diplomacy" as creating no preconditions at all to its jurisdiction.[639]

345. In its recent decision on provisional measures in *Alleged Violations of the 1955 Treaty of Amity, Economic Relations and Consular Rights*, the Court reaffirmed its previous interpretation of the phrase "not satisfactorily adjusted by diplomacy," finding that it was "descriptive in character" such that there was "no need for the Court to examine whether formal negotiations have been engaged in or whether the lack of diplomatic adjustment is due to the conduct of one party or the other."[640] Although the Court contrasted the language at issue in that case with Article 22 of the CERD, which it had previously found to "impose a legal obligation to negotiate prior to the seisin of the Court,"[641] the two compromissory clauses share a similar grammatical structure.

---

[637] *Ibid.,* p. 148, para. 23; *see generally ibid.,* pp. 148–150, para. 23–26. *See also*, *Georgia v. Russia, Preliminary Objections, Dissenting Opinion of Judge Cançado Trindade*, p. 60, para. 109 ("[Article 22] is a statement of pure verification of facts, and nowhere is there a 'precondition' implied or suggested in its wording, and certainly not in its spirit.").

[638] *Ibid.*, para. 27–33.

[639] *Ibid.*, para. 30 (citing the Court's decisions in the *Oil Platforms* case, in which the Court had considered whether Article XXI, paragraph 2, of the 1955 Treaty of Amity required diplomatic negotiations prior to seisin of the Court). *See Oil Platforms (Iran v. United States), Preliminary Objections, Judgment, I.C.J. Reports 1996*, p. 809, para. 15; *Oil Platforms (Iran v. United States), Merits, Judgment of 6 November 2003, I.C.J. Reports 2003*, pp. 210–211, para. 107. *See also Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Jurisdiction and Admissibility, Judgment, of 26 November 1984, I.C.J. Reports 1984*, p. 428, para. 83.

[640] *Iran v. U.S., Provisional Measures Order of 3 October 2018*, p. 14, para. 50.

[641] *Ibid.* (citing *Georgia v. Russia, Preliminary Objections*, p. 130, para. 148).

346. In Ukraine's view, the better reading of Article 22 is that it creates no precondition to the Court's jurisdiction to hear disputes concerning the interpretation or application of the Convention. Nonetheless, in reliance on the majority view in *Georgia v. Russia*, Ukraine spent more than two years seeking to resolve its dispute with Russia by negotiation before filing its Application in this case — efforts which are described in more detail in the following Section.

347. For the reasons set out above, however, there is no support in the text for the implausible interpretation of Article 22 advanced by Russia. In addition to the proper reading under Articles 31 and 32 of the Vienna Convention, the dialogue between the majority and joint dissenting opinion in *Georgia v. Russia* strongly counsels against Russia's approach. The primary ground on which the two opinions diverged was on whether the principle of effectiveness required reading Article 22 as creating a precondition, notwithstanding the joint dissent's analysis of the ordinary meaning. But, if the principle of effectiveness supports an interpretation of Article 22 as creating a precondition to the Court's jurisdiction, at most that principle warrants treating the provision as creating a single precondition; that is more than enough to prevent the language of Article 22 from being superfluous. Interpreting Article 22 as creating two, cumulative preconditions, as Russia argues, is patently unnecessary to give the language full effect. There is no cause for the Court to interpret a provision that is best read to create *no* preconditions as in fact creating *two* preconditions to the seisin of the Court.

* * *

348. The ordinary textual meaning of "or," the context in Article 22 and the Convention as a whole, the object and purpose of the CERD, and the majority view in *Georgia v. Russia* finding preconditions to the seisin of the Court, support the conclusion that Ukraine faced a choice: to negotiate or to use the CERD Committee procedures before referring its dispute to the Court. The next section will show that Ukraine has satisfied any such precondition by negotiating in good faith for over two years with Russia, until it was clear that further negotiation would be futile.

B. If Negotiation Is Required Before Seisin of the Court, Ukraine Has Amply Satisfied that Precondition

349. Ukraine invokes the jurisdiction of this Court to resolve its dispute with the Russian Federation concerning the CERD pursuant to that treaty's compromissory clause, Article 22.[642]

350. As explained in the first part of this Chapter, there are strong arguments that Article 22 creates no preconditions to the Court's jurisdiction. In view of the Court's decision in *Georgia v. Russia*, however, Ukraine nonetheless engaged in a good faith attempt to resolve the present dispute through bilateral negotiations before filing its Application. If the Court continues to interpret Article 22 as stating a requirement to engage in negotiations prior to seisin of the Court, then Ukraine has amply satisfied that requirement, as described below.

351. The nature of any negotiation requirement, its adequate form and substance, and the extent to which negotiation should be pursued have been discussed in more detail in Chapter 3. In its previous decisions, the Court has employed a two-step analysis when addressing compromissory clauses that include negotiation as a required mode of dispute settlement. First, the Court ascertains whether a disputing party "genuinely attempted to engage in negotiations with [the other,] with a view to resolving their dispute."[643] Second, the Court inquires whether that disputing party "pursued these negotiations as far as possible with a view to settling the dispute," until "the negotiations failed, became futile, or reached a deadlock."[644] The obligation to negotiate as far as possible is discharged if a deadlock has been reached; that is, under the circumstances, "no reasonable probability exists that further

---

[642] CERD, art. 22.

[643] *Georgia v. Russia, Preliminary Objections,* p. 134, para 162.

[644] *Ibid.*

negotiations would lead to a settlement."[645] The insistence of one party that no dispute exists under the Convention and the positions expressed by the parties in their pleadings are relevant to determining whether a settlement was possible.[646]

352. The following two subsections demonstrate respectively that Ukraine's efforts to engage with the Russian Federation concerning their dispute over the interpretation and application of the CERD amply satisfies both parts of this two-step inquiry. Ukraine's pursuit of negotiations for a period of more than two years, with absolutely no progress toward settling the dispute, is more than sufficient to satisfy the requirements of Article 22. The final subsection addresses Russia's unfounded claim that Ukraine conducted itself in bad faith during the negotiations.

1. Ukraine Genuinely Attempted to Engage Russia in Negotiations

353. In a diplomatic note dated 23 September 2014, Ukraine formally put the Russian Federation on notice that Russia was violating the CERD.[647] In its following note, dated 29 October 2014, Ukraine proposed that the two sides meet for face-to-face negotiations on 21 November 2014.[648] Russia's response to this invitation was to engage in foot-dragging and gamesmanship over the arrangements for negotiations. For example, no response was received from the Russian Federation until 27 November 2014, almost a week after the

---

[645] *South West Africa Cases, Preliminary Objections*, p. 345 (explaining that "[i]t is immaterial and unnecessary to enquire what the different and opposing views were which brought about the deadlock in the past negotiations . . . . The fact that a deadlock was reached in the collective negotiations in the past and the further fact that both the written pleadings and oral arguments of the Parties in the present proceedings have clearly confirmed the continuance of this deadlock, compel a conclusion that no reasonable probability exists that further negotiations would lead to a settlement").

[646] *See supra*, notes 101 and 102.

[647] Ukrainian Note Verbale No. 72/22-620-2403 to the Russian Federation Ministry of Foreign Affairs (23 September 2014) (alleging facts of discrimination against Crimean Tatars and offering to hold negotiation under the CERD) (Ukraine's Written Statement, Annex 99).

[648] Ukrainian Note Verbale No. 72/23-620-2673 to the Russian Federation Ministry of Foreign Affairs (29 October 2014) (proposing to hold negotiations on 21 November 2014) (Ukraine's Written Statement, Annex 102).

proposed date for the meeting and the response contained no explanation for the delay.[649] A subsequent note of 15 December 2014, proposing negotiations on 23 January 2015,[650] went unanswered until 11 March 2015.[651] Ukraine's proposal of a variety of neutral cities as the venue for the negotiations was met with the obviously unacceptable counter-offer of Simferopol, Crimea, and finally an obdurate insistence on Minsk.[652] Although Ukraine would have been justified in concluding that Russia had no genuine interest in negotiation and referring the dispute there and then to the Court, Ukraine persisted through six months of diplomatic exchanges until agreement was finally reached on the timing of a meeting in Minsk, even though Ukraine would have preferred a more neutral venue.[653]

354. Similarly, once negotiations began, Ukraine reasonably and in good faith tried to engage substantively with Russia concerning the dispute between the two States over the interpretation and application of the CERD. Ukraine provided the Russian Federation with extensive and detailed records of acts of racial discrimination against the Crimean Tatar and Ukrainian communities in Crimea, and solicited the Russian Federation's responses and

---

[649] Russian Federation Note No. 15642 to the Ukrainian Ministry of Foreign Affairs of Ukraine (27 November 2014) (Ukraine's Written Statement, Annex 103).

[650] Ukrainian Note Verbale No. 72/22-620-3069 to the Russian Federation Ministry of Foreign Affairs (15 December 2014) (Ukraine's Written Statement, Annex 104).

[651] Russian Federation Note Verbale No. 2697 to the Embassy of Ukraine in Moscow (11 March 2015) (Ukraine's Written Statement, Annex 106).

[652] *Ibid.* (suggesting to hold consultations in Simferopol, Crimea); Russian Federation Note No. 15642 to the Ukrainian Ministry of Foreign Affairs (27 November 2014) (suggesting Moscow or Minsk for negotiations) (Ukraine's Written Statement, Annex 103); Russian Federation Note Verbale No. 3962 to the Embassy of Ukraine in Moscow (16 October 2014) (insisting on holding negotiations in Minsk) (Ukraine's Written Statement, Annex 101).

[653] Ukrainian Note Verbale No. 72/22-620-705 to the Russian Federation Ministry of Foreign Affairs (30 March 2015) (agreeing to Minsk) (Ukraine's Written Statement, Annex 107).

explanations.[654] In three face-to-face negotiation sessions, Ukraine engaged with the Russian Federation on the facts and circumstances of specific discriminatory acts and again sought the Russian Federation's responses and explanations.[655] And Ukraine provided responses to the Russian Federation's questions concerning specific incidents, both during the meetings and in subsequent follow-up diplomatic correspondence.[656]

355. As detailed further in the next subsection, Ukraine's efforts to raise its concerns directly with the Russian Federation garnered no substantive response. Russia did not respond to any of the 11 diplomatic notes detailing conduct in violation of the CERD that

---

[654] *See, e.g.*, Ukrainian Note Verbale No. 72/22-620-2403 to the Russian Federation Ministry of Foreign Affairs (23 September 2014) (alleging facts of discrimination against Crimean Tatars, including members of *Mejlis* and *Kurultai*, and against ethnic Ukrainians) (Ukraine's Written Statement, Annex 99); Ukrainian Note Verbale No. 72/22-620-3070 to the Russian Federation Ministry of Foreign Affairs (15 December 2014) (alleging intimidation and persecution of ethnic Ukrainian and Crimean Tatar populations for using Ukrainian and the Crimean Tatar language and national symbols in public places; closure of Ukrainian-language schools in Crimea; restriction of the political and civil rights of the ethnic Ukrainian and Crimean Tatar populations; the imposition of Russian citizenship through coercion and intimidation, including persecution of those who refuse to assume Russian citizenship; and restriction of the right to freedom of thought, conscience, and religion) (Ukraine's Written Statement, Annex 105); Ukrainian Note Verbale No. 72/22-194/510-839 to the Russian Federation Ministry of Foreign Affairs (5 April 2016) (alleging disappearance and murder of Crimean Tatar individuals; political suppression of the Tatar community and their leaders; mass intimidation and invasion of property rights of Crimean Tatars; restrictions on the freedom of assembly; and restrictions on the right to education and training of Tatars and ethnic Ukrainians) (Ukraine's Written Statement, Annex 111); Ukrainian Note Verbale No. 72/22-194/510-1023 to the Russian Federation Ministry of Foreign Affairs (26 April 2016) (alleging ban of the Mejlis) (Ukraine's Written Statement, Annex 112); Ukrainian Note Verbale No. 72/22-194/510-2188 to the Russian Federation Ministry of Foreign Affairs (26 September 2016) (objecting to the Russian Federation's treatment of Deputy Chairman of the Mejlis of the Crimean Tatar People, Ilmi Umerov) (Ukraine's Written Statement, Annex 117).

[655] Ukrainian Note Verbale No. 72/22-194/510-2006 to the Russian Federation Ministry of Foreign Affairs (17 August 2015) (Ukraine's summary of the first round of negotiations) (Ukraine's Written Statement, Annex 109); Ukrainian Note Verbale No. 72/22-194/510-1973 to the Russian Federation Ministry of Foreign Affairs (18 August 2016) (Ukraine's summary of the second round of negotiations) (Ukraine's Written Statement, Annex 116).

[656] Ukrainian Note Verbale No. 72/22-194/510-2006 to the Russian Federation Ministry of Foreign Affairs (17 August 2015) (Ukraine's summary of the first round of negotiations) (Ukraine's Written Statement, Annex 109); Ukrainian Note Verbale No. 72/22-194/510-1973 to the Russian Federation Ministry of Foreign Affairs (18 August 2016) (Ukraine's summary of the meeting recording a member of the Russian delegation asking questions concerning specific incidents mentioned in Ukraine's diplomatic notes and Ukraine's responses) (Ukraine's Written Statement, Annex 116).

Ukraine sent prior to filing its Application. Nor did it address the substance of Ukraine's complaints at the negotiating sessions, preferring instead to propose extraneous agenda items that would consume much of the time set aside for discussion,[657] challenging the language used by Ukraine to frame its own complaints,[658] and never responding to the questions raised by Ukraine about Russia's acts of discrimination. Nonetheless, Ukraine persisted in its efforts to engage the Russian Federation, attending three fruitless face-to-face meetings in Minsk.[659] From the time of its initial invitation to engage in negotiations, Ukraine spent more than two years attempting to negotiate with Russia before instituting these proceedings.[660]

356. Under the Court's previous jurisprudence there can be no doubt that this record constitutes a genuine attempt to engage in negotiations before bringing this dispute to the Court. In *Belgium v. Senegal*, where the compromissory clause in question undoubtedly

---

[657] *See, e.g.*, Russian Federation Note Verbale No. 2697 to the Embassy of Ukraine in Moscow (11 March 2015) (proposing to discuss basics of international law prohibiting racial discrimination in the context of Russian-Ukrainian relations) (Ukraine's Written Statement, Annex 106);Russian Federation Note Verbale No. 4413 to the Embassy of Ukraine in Moscow (25 April 2016) (proposing discussion of the general framework of interpretation and application of the CERD, specifically in Crimea from 1992 through 2013) (Ukraine's Memorial, Annex 833); Ukrainian Note Verbale No. 72/22-194/510-1116 to the Russian Federation Ministry of Foreign Affairs (11 May 2016) (arguing that the general discussion proposed by the Russian Side would be an inefficient use of time and would distract from addressing the dispute between the parties) (Ukraine's Written Statement, Annex 113).

[658] Russian Federation Note Verbale No. 5774 to the Embassy of Ukraine in Moscow (27 May 2016) (insisting to "refrain from frequently used vague generalizations, for example 'and many others,' 'and other activities,' 'thousands of Ukrainians and Crimean Tatars'") (Ukraine's Written Statement, Annex 114). *See also* Ukrainian Note Verbale No. 72/22-194/510-1973 to the Russian Federation Ministry of Foreign Affairs (18 August 2016) (forwarding "a list of questions raised by the Russian delegation as they were noted by the Ukrainian delegation during the meeting with Ukraine's responses") (Ukraine's Written Statement, Annex 116).

[659] Ukrainian Note Verbale No. 72/22-194/510-2006 to the Russian Federation Ministry of Foreign Affairs (17 August 2015) (Ukraine's summary of the first round of negotiations) (Ukraine's Written Statement, Annex 109); Ukrainian Note Verbale No. 72/22-194/510-1973 to the Russian Federation Ministry of Foreign Affairs (18 August 2016) (Ukraine's summary of the second round of negotiations) (Ukraine's Written Statement, Annex 116); Ukrainian Note Verbale No. 72/6111-194/510-2474 to the Russian Federation Ministry of Foreign Affairs (28 October 2016) (proposing to hold the third round of negotiations on 1 December 2016) (Ukraine's Written Statement, Annex 119); Russian Federation Note Verbale No. 14453 to the Embassy of Ukraine in Moscow (29 December 2016) (confirming that negotiations took place on 1 December 2016) (Ukraine's Written Statement, Annex 121).

[660] The Application in this case was filed on 16 January 2017.

included a negotiation precondition,[661] the Court found that Belgium engaged in a genuine attempt to engage in discussions with Senegal based on "[s]everal exchanges of correspondence and various meetings" over the course of eight months.[662] Here, Ukraine has gone much further in its endeavor to engage Russia in negotiations over the Parties dispute concerning the interpretation and application of the CERD. As in the *Belgium v. Senegal* case, Ukraine specifically raised Russia's compliance with its obligations under the CERD in its diplomatic correspondence and during the meetings.[663] The Russian Federation acknowledged that Ukraine was requesting negotiations on the interpretation and application

[661] Belgium's claims arose under the Convention Against Torture, Article 30 of which permits referral to the Court of disputes that "cannot be settled through negotiation." *Belgium v. Senegal, Judgment of 20 July 2012,* para. 56.

[662] *See ibid*., para. 58.

[663] *Compare Belgium v. Senegal, Judgment of 20 July 2012,* para. 58 ("Belgium expressly stated that it was acting within the framework of the negotiating process under Article 30 of the Convention against Torture in [its] Notes Verbales . . . ."), *with, e.g*., Ukrainian Note Verbale No. 72/22-620-2403 to the Russian Federation Ministry of Foreign Affairs (23 September 2014) (alleging violation of the CERD through discrimination against Crimean Tatars, including members of the *Mejlis* and *Kurultai*, and Ukrainians) (Ukraine's Written Statement, Annex 99); Ukrainian Note Verbale No.72/22-620-3070 to the Russian Federation Ministry of Foreign Affairs (15 December 2014) (alleging violation of the CERD because of persecution of and Crimean Tatars and Ukrainians, closing of Ukrainian-language schools, restriction of the political and civil rights of Crimean Tatars and Ukrainians, imposition of Russian citizenship, and restriction of the right to freedom of thought, conscience and religion) (Ukraine's Written Statement, Annex 105); Ukrainian Note Verbale No. 72/22-194/510-2006 to the Russian Federation Ministry of Foreign Affairs (17 August 2015) (Ukraine's summary of the meeting recording a member of the Ukrainian delegation presenting evidence of "systematic and deliberate" violations of the CERD committed by the Russian Federation, as documented in previous diplomatic correspondence and with additional detail and "abundant evidence")(Ukraine's Written Statement, Annex 109); Ukrainian Note Verbale No. 72/22-194/510-1973 to the Russian Federation Ministry of Foreign Affairs (18 August 2016) (Ukraine's summary of the meeting recording a member of the Ukrainian delegation restating "the allegations [Ukraine] had made previously in its diplomatic correspondence and during the first round of negotiations and raised new allegations in support of its claims under the Convention") (Ukraine's Written Statement, Annex 116).

of the CERD, and recognized that this was the purpose of the three negotiating sessions held by the Parties.[664]

357. At the same time, the present case is completely unlike *Georgia v. Russia*, where the Court found that Georgia's statements at a press briefing and a Security Council meeting over the course of just three days were insufficient to constitute a genuine attempt to negotiate.[665] Ukraine has been meticulous about putting Russia on notice of the facts that it alleges constitute violations of the CERD and has given Russia innumerable opportunities to respond in writing or in person over a two-year period. If this history does not constitute a genuine attempt to engage in negotiations, it is hard to know what would qualify.

2. Ukraine Filed Its Application Only After It Became Clear that There Was No Realistic Prospect that Negotiations Would Resolve the Dispute

358. Notwithstanding early indications that Russia was not genuinely interested in engaging, Ukraine pursued the negotiations as far as possible for more than two years until it was absolutely clear that, in the words of the Court in *Belgium v. Senegal*, "negotiations did not and could not lead to the settlement of the dispute."[666] Only then did Ukraine file its Application in this proceeding.

---

[664] *See, e.g.*, Russian Federation Note Verbale No. 14279 to the Embassy of Ukraine in Moscow (16 October 2014) (expressing "readiness to conduct talks on the interpretation and application of the [CERD]") (Ukraine's Written Statement, Annex 100); Russian Federation Note Verbale No. 4413 to the Embassy of Ukraine in Moscow (25 April 2016) (emphasizing "its readiness to continue [with the second round of] consultations with the Ukrainian Side concerning issues related to the application of the [CERD]") (Ukraine's Memorial, Annex 833).

[665] *Georgia v. Russian Federation, Preliminary objections*, paras. 108–113, 172–176 (the Court examined (i) the statement of the Georgian President beginning with allegations about "Russia['s] . . . full scale military invasion" and "committ[ing] . . . ethnic cleansing"; (ii) the Georgian statements in the U.N. Security Council describing the armed activities in Georgia, extermination of the Georgian population, and urging the members of the Security Council to take actions against Russia; and (iii) the Russian minister's press conference statements dismissing Georgian claims)

[666] *Belgium v. Senegal, Judgment of 20 July 2012,* para. 59; *see also Mavrommatis,* p. 13 (when a party "refuses . . . to give way," there can be "no doubt that *the dispute cannot be settled by diplomatic negotiation*").

359. As detailed above, Russia's response to Ukraine's initial invitation to engage in negotiations was to engage in delay and procedural gamesmanship over the date and venue for talks.[667] Once agreement had finally been reached on these basic prerequisites for negotiations, Russia proposed agenda items with little or no connection to the dispute in hand, with the apparent intention of avoiding a detailed discussion of the specific abuses identified by Ukraine. For example, before the first negotiating meeting, Russia proposed to add to the agenda a general discussion of the "basics of international law prohibiting all forms of racial discrimination in the context of Russia–Ukraine relations."[668] During the course of the first negotiating meeting it became apparent that this proposal had been designed to consume available negotiating time with generalities, rather than discussion of the specific violations noticed by Ukraine. A series of speakers from numerous Russian agencies described at length basic aspects of the Russian legal system involved in enforcing legislation on racial discrimination, until the Ukrainian delegation insisted on moving on to discussion of the actual violations alleged by Ukraine.[669] At the second negotiating meeting, Russia insisted on continuing its general presentation, putting on several additional speakers, for a total of approximately 25 Russian speakers on general matters largely unresponsive to the alleged violations that the negotiations were supposed to be addressing.[670]

360. At no point during the more than two years of negotiations did the Russian Federation demonstrate a willingness to engage on the substance of Ukraine's claims. As

---

[667] *See supra*, para. 353 and sources cited in notes 663–666.

[668] Russian Federation Note Verbale No. 2697 to the Embassy of Ukraine in Moscow (11 March 2015) (Ukraine's Written Statement, Annex 106). *See also* Russian Federation Note Verbale No. 4413 to the Embassy of Ukraine in Moscow (25 April 2016) (proposing discussing the implementation of CERD in Crimea from 1992 through 2013) (Ukraine's Memorial, Annex 833).

[669] Ukrainian Note Verbale No. 72/22-194/510-2006 to the Russian Federation Ministry of Foreign Affairs (17 August 2015) (Ukraine's summary of the meeting recording Russia's overview of general implementation of the CERD) (Ukraine's Written Statement, Annex 109).

[670] Ukrainian Note Verbale No. 72/22-194/510-1973 to the Russian Federation Ministry of Foreign Affairs (18 August 2016) (Ukraine's summary of the meeting recording Russia's overview of general implementation of the CERD) (Ukraine's Written Statement, Annex 116).

noted, it failed to respond substantively to any of the 11 diplomatic notes that Ukraine sent detailing specific acts of discrimination in Crimea.[671] Although Russia sent Ukraine five diplomatic notes of its own relating to substantive CERD issues during this period, none of them related to Russia's actions in Crimea. Instead, each of those notes focused exclusively on Russia's own misplaced allegations regarding the Russian-speaking population and Russia's mass media in mainland Ukraine — allegations which are not the subject of the dispute that Ukraine sought to negotiate and that is now before the Court.[672]

361. Russia was no more willing to address Ukraine's concrete concerns in the face-to-face negotiating sessions, limiting its responses to general declarations and questions concerning the language in which Ukraine had framed its concerns. On the rare occasions on which information was promised concerning issues raised by Ukraine, Russia did not follow up.[673] Rather than providing concrete answers to the specific questions raised by Ukraine, the Russian delegation to the negotiating meetings repeatedly dismissed Ukraine's claims as

---

[671] *See, e.g.*, Russian Federation Note Verbale No. 4413 to the Embassy of Ukraine in Moscow (25 April 2016) (instead of addressing Ukraine's numerous and specific claims, urging Ukraine "to provide to the Russian Side more specific information and refrain from vague summaries") (Ukraine's Memorial, Annex 833).

[672] Russian Federation Note Verbale No. 8761 to the Embassy of Ukraine in Moscow (9 July 2015) (Ukraine's Written Statement, Annex 108); Russian Federation Note Verbale No. 5787 to the Embassy of Ukraine in Moscow (27 May 2016) (Ukraine's Written Statement, Annex 115); Russian Federation Note Verbale No. 13091 to the Embassy of Ukraine in Moscow (28 November 2016) (Ukraine's Written Statement, Annex 120); Russian Federation Note Verbale No. 14453 to the Embassy of Ukraine in Moscow (29 December 2016) (Ukraine's Written Statement, Annex 121); Russian Federation Note Verbale No. 14500 to the Embassy of Ukraine in Moscow (30 December 2016) (Ukraine's Written Statement, Annex 122).

[673] Ukrainian Note Verbale No. 72/22-194/510-839 to the Russian Federation Ministry of Foreign Affairs (5 April 2016) (referring to Russia's failure to provide any explanation and information on its judicial practice of seizures of alleged extremist literature from Crimean schools, libraries and mosques, despite agreeing to do so at the 8 April 2015 negotiations meeting) (Ukraine's Written Statement, Annex 34).

"generalizations"[674] and expressed "doubts that the alleged [claims] constituted a violation of the [CERD]."[675]

362. While Russia's lack of responsiveness in the negotiations was sufficient in itself to demonstrate the futility of continued discussion, Russia's continued and escalating discrimination against the Crimean Tatar and Ukrainian communities during the pendency of the negotiations confirmed that it had no interest in addressing Ukraine's concerns. For example, even though Ukraine had expressed concern in the preceding diplomatic correspondence about Russia's harassment of the Mejlis, just a month before the second round of negotiations the Russian authorities banned the activities of that representative institution altogether.[676] After the second round of negotiations, the Russian authorities published a list of some 6,000 alleged "terrorists" and "extremists" that included ethnic Ukrainian journalists.[677] Less than three months before the proposed date for the third round of negotiations, the Russian authorities in Crimea involuntarily confined Deputy Chairman of

---

[674] Russian Federation Note Verbale No. 5774 to the Embassy of Ukraine in Moscow (27 May 2016) (insisting that Ukraine "refrain from frequently used vague generalizations, for example 'and many others,' 'and other activities,' 'thousands of Ukrainians and Crimean Tatars'") (Ukraine's Written Statement, Annex 114).

[675] Ukrainian Note Verbale No. 72/22-194/510-2006 to the Russian Federation Ministry of Foreign Affairs (17 August 2015) (Ukraine's summary of the meeting recording a member of the Russian delegation noting that "competent bodies of the Russian Federation do not qualify the facts and events presented in the notes of the Foreign Ministry of Ukraine as acts of racial discrimination within the meaning of the Convention; denied any bias in the decisions made by its authorities concerning ethnic Ukrainians and Crimean Tatars or any signs that the Russian Federation violates the Convention") (Ukraine's Written Statement, Annex 109); Ukrainian Note Verbale No. 72/22-194/510-1973 to the Russian Federation Ministry of Foreign Affairs (18 August 2016) (Ukraine's summary of the meeting recording a member of the Russian delegation expressing doubts that the alleged disappearances of Crimean Tatars constitute a violation of the CERD) (Ukraine's Written Statement, Annex 116).

[676] Ukrainian Note Verbale No. 72/22-194/510-1023 to the Russian Federation Ministry of Foreign Affairs (26 April 2016) (Ukraine's Written Statement, Annex 112).

[677] Ukrainian Note Verbale No. 72/22-633-2302 to the Russian Federation Ministry of Foreign Affairs (7 October 2016) (reporting "Russia's Federal Financial Monitoring Service published a list of some 6,000 alleged 'terrorists' and 'extremists,' including Anna Andriyevskaya, the ethnic Ukrainian editor of the Center for Journalist Investigations") (Ukraine's Written Statement, Annex 118).

the Mejlis of the Crimean Tatar People, Ilmi Umerov, and ordered that he undergo a psychiatric evaluation.[678]

363. There was no doubt by the end of this unproductive process that Ukraine and the Russian Federation had reached "a deadlock," and that further attempts to negotiate would be futile.[679] No progress had been made, and there had been no change in the respective positions of the Parties. Russia's violations continued. Moreover, the pleadings now before the Court confirm that there was never any prospect of settling this dispute by negotiation. The Russian Federation's Preliminary Objections confirm that its position has not evolved since Ukraine first sought to engage it in negotiations more than four years ago. It continues to deny that its conduct raises any issues under the CERD and goes as far as to assert that Ukraine's claims are not even related to the Convention.[680] In its previous cases, the Court has found that the content of a respondent party's pleadings in the proceeding can support a finding that further negotiation would have been futile.[681] Such a finding is warranted here.

3. Russia's Allegations that Ukraine Acted in Bad Faith During the Negotiations Are Unsupported and Baseless

364. The Russian Federation's claim that Ukraine was not engaged in a genuine attempt to negotiate and was acting in bad faith cannot be credited. As noted above, bad faith

---

[678] Ukrainian Note Verbale No. 72/22-194/510-2188 to the Russian Federation Ministry of Foreign Affairs (26 September 2016) (objecting to the Russian Federation's treatment of Deputy Chairman of the Mejlis of the Crimean Tatar People, Ilmi Umerov) (Ukraine's Written Statement, Annex 117).

[679] *South West African Cases, Preliminary Objections*, p. 345.

[680] *See, e.g.*, Russia's Objections, paras. 294–295, 351.

[681] *Belgium v. Senegal*, *Judgment of 20 July 2012,* para. 59; *ibid.*, para. 57 ("There was no change in the respective positions of the Parties . . . during the period covered by the above exchanges. The fact that, as results from the pleadings of the Parties, their basic positions have not subsequently evolved confirms that negotiations did not and could not lead to the settlement of the dispute."); *South West Africa Cases, Preliminary Objections*, p. 345 (explaining that the "fact that both the written pleadings and oral arguments of the Parties in the present proceedings have clearly confirmed the continuance of this deadlock, compel a conclusion that no reasonable probability exists that further negotiations would lead to a settlement").

"should be supported not by disputable inferences but by clear and convincing evidence which compels such a conclusion."[682] Such evidence is utterly lacking here: to the contrary, as set forth above, it was the Russian Federation that did not negotiate in good faith, given its repeated refusal to engage on the merits of Ukraine's complaints.

365. Russia first objects that some of Ukraine's diplomatic correspondence relating to the CERD also included allegations of aggression and occupation.[683] This is the same objection dealt with above, in connection with the ICSFT claims.[684] Equally here, it has no merit. This Court's jurisprudence recognizes that States may simultaneously be engaged in a variety of disputes.[685] Nothing prevents Ukraine from raising more than one dispute in the course of the same correspondence.

366. Russia's complaint that Ukraine "sought to impose on [Russia] the consequences entailed by its alleged responsibility" is equally unfounded.[686] Ukraine's position was (and remains) that the Russian Federation was engaged in racial discrimination in Crimea – conduct that violates both the CERD and a *jus cogens* norm of international law.[687] As an injured State, and as a responsible member of the international community, Ukraine was entitled to insist on the cessation of that violation and that Russia accept the

---

[682] *See supra*, para. 77 and sources cited in note 105.

[683] Russia's Objections, para. 417.

[684] *See supra*, para 78.

[685] *See, e.g.*, *Georgia v. Russia, Preliminary Objections*, para. 170; *cf. Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Preliminary Objections, Judgment of 24 September 2015, I.C.J. Reports 2015,* p. 604, para. 32 ("As the Court has observed in the past, applications that are submitted to the Court often present a particular dispute that arises in the context of a broader disagreement between parties. . . . The Court considers that, . . . a distinction must be drawn between that [broader disagreement] and the related but distinct dispute presented by the Application . . . .").

[686] Russia's Objections, para. 416.

[687] *See, e.g.*, *Barcelona Traction, Light and Power Company, Limited, (New Application: 1962) (Belgium v. Spain), Second Phase, Judgment of 5 February 1970, I.C.J. Reports 1970,* p. 32, para. 34 (referring to obligations *erga omnes* in contemporary international law, including "the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination").

consequences of its actions under international law. Russia's suggestion that this could amount to bad faith reflects more on the lack of seriousness in its own position than on any alleged failure by Ukraine to engage in good faith negotiations.

367. The Russian Federation's criticism of the alleged brevity of the direct negotiations also lacks merit.[688] Contrary to the impression that Russia seeks to give, in each of the three negotiation sessions the Parties completed discussion of all agenda items actually related to the the CERD violations Ukraine had identified.[689] The only agenda items the Parties failed to exhaust fully were those lacking a direct connection to the current dispute, including items concerning general questions of treaty implementation and good practices and Russia's unfounded claims against Ukraine.[690] Russia's own diplomatic correspondence confirms that substantial discussion of the subject matter of this dispute occurred during the negotiating sessions.[691]

368. The Russian Federation mischaracterizes a public statement by the Agent for Ukraine as showing that Ukraine's intention from the start was to bring this dispute to the Court and that it had no interest in a negotiated outcome.[692] An honest reading of the statement supports the opposite conclusion, however: that Ukraine intended to pursue

---

[688] Russia's Objections, paras. 426–427.

[689] Ukrainian Note Verbale No. 72/22-194/510-2006 to the Russian Federation Ministry of Foreign Affairs (17 August 2015) (Ukraine's summary of the first round of negotiations) (Ukraine's Written Statement, Annex 109); Ukrainian Note Verbale No. 72/22-194/510-1973 to the Russian Federation Ministry of Foreign Affairs (18 August 2016) (Ukraine's summary of the second round of negotiations) (Ukraine's Written Statement, Annex 116).

[690] *Ibid.*

[691] Russian Federation Note Verbale No. 11812 to the Embassy of Ukraine in Moscow (28 September 2015) (protesting that the "large portion of this time, per suggestion of the Ukrainian Delegation, was spent on description of factual circumstances of events that might be related to implementation of the Convention") (Ukraine's Written Statement, Annex 110); Russian Federation Note Verbale No. 5774 to the Embassy of Ukraine in Moscow (27 May 2016) (complaining that during the previous round of consultations on 8 April 2015 the Ukrainian delegation "fully used the opportunity to present the materials and put questions orally") (Ukraine's Written Statement, Annex 114).

[692] Russia's Objections, para. 418 (quoting Interview with Olena Zerkal, "Which claims will Ukraine submit against Russia?", 27 January 2016 (Russia's Objections, Annex 3)).

negotiations with Russia as far as possible and not to suffer the fate of Georgia if, nevertheless, it ultimately had to refer the dispute to the Court.[693]

369. Nor is there any basis for the Russian Federation's objections to Ukraine's summaries of the negotiations.[694] Russia has failed to identify any inaccuracies in those summaries or to present evidence of its own to support an alternative version of what occurred at the negotiating meetings.

370. Finally, Russia makes the meritless claim that Ukraine did not identify during the negotiations every article of the CERD that it now relies on and did not then describe Russia's conduct as a systematic campaign of racial discrimination.[695] It is Ukraine's right to decide how to make its legal case after the termination of the negotiations, including how to label the overall course of conduct upon which Russia was engaged. Ukraine diligently put Russia on notice of each aspect of its conduct upon which Ukraine relies in its Memorial. In short, Russia's allegations of bad faith are entirely without support.

* * *

371. Over the course of more than two years, Ukraine pursued discussions with Russia in the face of evidence that Russia had no real interest in a negotiated settlement. The position that Russia asserts in these proceedings today shows not one iota of movement from the position it has taken from the very beginning of this dispute. It could not be clearer that to negotiate further while Russia persisted in its violations of the CERD would not only have been futile, but a disservice to the victims of Russia's campaign of racial discrimination in Crimea.

---

[693] *Ibid.* ("Georgia had to hold consultations with Russia in relation to every Article of the Convention, which, in its view, the Russians have breached. […] We are following the entire settlement procedure by the book."(as altered by the Russian Federation)).

[694] Russia's Objections, para. 425.

[695] Russia's Objections, paras. 428–429.

Chapter 8. THE LOCAL REMEDIES RULE HAS NO APPLICATION TO THIS CASE

372. In a final attempt to escape responsibility for its actions, the Russian Federation argues that Ukraine's claims under the CERD are inadmissible due to an alleged failure to exhaust local remedies. The Russian Federation claims that the local remedies rule applies because the case involves individual treaty rights and Part II of the Convention refers to exhaustion of local remedies.

373. This last objection verges on frivolous. The local remedies rule applies only when a State brings a claim on behalf of specific individuals or entities. It has no application here, where Ukraine's claims relate to a broad pattern of conduct by the Russian Federation in Crimea and Ukraine is asserting claims in its own right. The CERD does not require otherwise: the provisions Russia cites apply only in the context of a CERD Committee proceeding when a State Party brings a complaint on behalf of specific individuals.

A. Exhaustion of Local Remedies Is Not Required When a State Brings a Claim in its Own Right Relating to a Pattern of Violations by Another State Party

374. Russia's argument is based on a simple but flawed syllogism. First, Russia characterizes this Court's judgment in *Elettronica Sicula S.p.A. ("ELSI")* as holding that "the local remedies rule applies as a matter of principle . . . when individual treaty rights are invoked by the Applicant."[696] Noting the Court's observation in its Order on Provisional Measures in this case that the CERD is "intended to protect individuals from racial discrimination,"[697] Russia infers that any inter-State claim brought under the CERD must be an invocation of individual treaty rights and therefore subject to the local remedies rule. Russia claims that practice under certain other human rights treaties supports its conclusion that the local remedies rule applies to inter-State disputes.

---

[696] Russia's Objections, para. 447 (referring to *Elettronica Sicula S.p.A. ("ELSI") (United States of America v. Italy), Judgment of 20 July 1989, I.C.J. Reports 1989*, p. 42, para. 50).

[697] *Ibid.*, para. 446 (quoting *Provisional Measures Order of 19 April 2017,* para. 82).

375. Russia's objection mischaracterizes the Court's jurisprudence and misstates the role of the local remedies rule in customary international law. Contrary to the arguments put forward by Russia, *ELSI* does not stand for the proposition that the local remedies rule applies whenever a claim is raised under a treaty protecting individual rights. Instead, the Court's judgment in that case stands for the age-old principle that when a State asserts a claim on behalf of a specific individual, that individual must first have exhausted local remedies. Thus, in *ELSI*, the United States had espoused the claims of two U.S. companies — Raytheon and Machlett Laboratories, Inc. — arising from the requisitioning of the plant and assets of their wholly-owned Italian subsidiary by the local authorities in Palermo. As noted by the Court in its judgment:

> The case arises from a dispute which the Parties did not "satisfactorily adjust by diplomacy"; and that dispute was described in the 1974 United States claim made at the diplomatic level as a "claim of the Government of the United States of America on behalf of Raytheon Company and Machlett Laboratories, Incorporated". The Agent of the United States told the Chamber in the oral proceedings that "the United States seeks reparation for injuries suffered by Raytheon and Machlett."[698]

376. The scope of the local remedies rule is similarly limited when applied in relation to human rights treaties. When an individual brings his or her own claim, or when an individual claim is espoused by a State and prosecuted in an inter-State proceeding, the requirement to exhaust local remedies applies.[699] The cases that Russia cites from regional

---

[698] *Elettronica Sicula S.p.A. ("ELSI") (United States of America* v. *Italy), Judgment of 20 July 1989, I.C.J. Reports 1989*, p. 43, para. 51. To similar effect, in *Interhandel* the Court ruled that the local remedies rule applied where the Swiss government instituted international proceedings against the United States on behalf of a Swiss company whose claim was still pending in the U.S. courts. *Interhandel (Switzerland* v. *United States of America), Judgment of 21 March 1959, I.C.J. Reports, 1959*, p. 27 ("[T]he rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law.").

[699] Dinah Shelton, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW (3rd ed., 2015), p. 91–92 ("Exhaustion of local remedies is both a procedural criterion for the admissibility of an international claim, whether that claim proceeds as a matter of diplomatic protection or as an individual complaint,

human rights courts — five from the European Court of Human Rights,[700] five from the Inter-American Court of Human Rights[701] and three from the African Court on Human and Peoples' Rights[702] — all involve claims brought by individuals or by non-governmental organizations acting on their behalf. While consistent with the previously-described scope of the local remedies rule, they are irrelevant to the application of that rule in an inter-State proceeding such as this.

---

and the potential source of a substantive claim for denial of the right to a remedy.") (Ukraine's Written Statement, Annex 126).

[700] Russia's Objections, note 622, cites the following European Court of Human Rights cases: "*De Wilde, Ooms, and Versyp* v. *Belgium*, 12 European Courts of Human Rights (ser. A) (1971); *Van Oosterwijck* v. *Belgium*, 40 European Courts of Human Rights (ser. A) (1980); *Cardot* v. *France*, 200 European Courts of Human Rights (ser. A) (1991); *Ahmet Sadik* v. *Greece*, App. No. 18877/91, European Courts of Human Rights, Judgment on Preliminary Objections (15 November 1996); and *Beis* v. *Greece*, App. No. 22045/93, Judgment on Preliminary Objections (20 March 1997)."

[701] *Ibid.*, notes 623–625, cites the following Inter-American Court of Human Rights cases: "*Velásquez Rodríguez* v. *Honduras*, Preliminary Objections, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 1 (26 June 1987); *Velásquez Rodríguez* v. *Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4 (29 July 1988); *Cantoral-Benavides* v. *Peru*, Preliminary Objections, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 40 (3 September 1998); *Furlan and Family* v. *Argentina*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 246 (31 August 2012); and *Allan Randolph Brewer Carías* v. *Venezuela*, Preliminary Objections, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 278 (26 May 2014)."

[702] *Ibid.*, note 626, cites the following African Court on Human and Peoples' Rights cases: "*Lohé Issa Konaté* v. *Burkina Faso*, App. No. 004/2013, Judgment (5 December 2014); *Christopher Jonas* v. *Tanzania*, App. No. 011/2015, Judgment (28 September 2017); and *Association Pour le Progrès et la Défense des Droits des Femmes Maliennes (APDF) and the Institute for Human Rights and Development (IHRDA)* v. *Mali*, Application No. 046/2016, Judgment (11 May 2018)."

377. As the academic literature explains, the purpose of the exhaustion requirement in customary international law is to regulate *claims of individuals* against States.[703] By requiring the individual to resort to local courts first, the local remedies rule ensures that the respondent State is put on notice of the claim before it is raised to the international level, either by the individual himself or by a State asserting the right of diplomatic protection. The requirement also gives the respondent State an opportunity to resolve the matter directly, thereby minimizing the need for action at the international level.[704]

378. The fatal defect in Russia's argument that the local remedies rule applies in this dispute is that Ukraine has not brought this case to vindicate the human rights of a specific individual. Instead, Ukraine's claims challenge a broad pattern of conduct by the Russian Federation in Crimea amounting to a "systematic campaign of racial discrimination."[705] Far from espousing the claim of a specific individual, Ukraine has brought this case to put an end to violations of the Convention that affect hundreds of thousands of Crimean Tatars and Ukrainians across Crimea, as well as the many that have been forced to leave the peninsula for

---

[703] *See* Theodor Meron, *The Incidence of the Rule of Exhaustion of Local Remedies*, British Yearbook of International Law, Vol. 35 (1959), p. 100 ("In principle, that rule [of exhaustion of local remedies] is not applicable to all cases of State responsibility, but only to cases of diplomatic protection in which the State espouses the cause of its national and is proceeding in virtue of the right of diplomatic protection.") (Ukraine's Written Statement, Annex 124). *See also* A.A. Cançado Trindade, *Origin and Historical Development of the Rule of Exhaustion of Local Remedies in International Law*, Belgian Review of International Law, Vol. 12 (1976), p. 525 (recognizing that in all modern cases of the local remedies rule, "one had a claimant complaining of an injury suffered in another country and allegedly engaging the latter's responsibility . . . even if subsequently the claim was espoused by the sovereign or the State of the injured individual . . . the dispute remained originally one between an injured alien and the host State.") (Ukraine's Written Statement, Annex 125).

[704] *Interhandel (Switzerland* v. *United States of America), Judgment of 21 March 1959, I.C.J. Reports, 1959*, p. 27 ("Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system."). *See also* A.A. Cançado Trindade, *Origin and Historical Development of the Rule of Exhaustion of Local Remedies in International Law*, Belgian Review of International Law, Vol. 12 (1976), pp. 513–514 (noting that the development of the local remedies rule reflects "the assumed need to safeguard the sovereignty of States, or the desirability (on behalf of peaceful coexistence of States) to avoid as much as possible recourse to forceful measures in the settlement of international claims by insisting on the internal redress of wrongs within the State's own domestic legal system.") (Ukraine's Written Statement, Annex 125).

[705] *See, e.g.*, Ukraine's Memorial, para. 341.

other parts of Ukraine. Consistent with this, Ukraine's CERD-related submissions do not request relief specific to any individual or entity, but rather seek an end to Russia's practices in violation of the CERD, the adoption by Russia of measures consistent with its obligations under the treaty, and Russia's compliance with the Provisional Measures previously ordered by the Court.

379. Russia does not mention in its Preliminary Objections that the regional human rights courts whose jurisprudence it invokes recognize that there is no requirement to exhaust local remedies in such circumstances. The European Court of Human Rights summarized the distinction in its Decision on Admissibility in *Georgia v. Russia II*, a case of which Russia is undoubtedly aware:

> [T]he rule on exhaustion of domestic remedies as embodied in Article 35 § 1 of the [European] Convention applies in inter-State cases (Article 33) in the same way as it does to individual applications (Article 34) when the applicant State does no more than denounce a violation or violations allegedly suffered by individuals whose place, as it were, is taken by the State.
>
> On the other hand, and in principle, the rule does not apply where the applicant State complains of a practice as such, with the aim of preventing its continuance or recurrence, but does not ask the Court to give a decision on each of the cases put forward as proof or illustrations of that practice.[706]

380. The African Commission has established and followed a similar doctrine in its case law discussing the admissibility requirements of the African Charter. While Article 56(5) of the African Charter requires that communications be submitted only after local remedies

[706] *Georgia* v. *Russia,* App. No. 38263/08, European Courts of Human Rights, Decision on Admissibility (13 December 2011); *accord Ireland* v. *the United Kingdom*, European Court of Human Rights, Vol. 25 (series A) (1978), para. 159.

have been exhausted,[707] the Commission has "drawn a distinction between cases in which the complaint deals with violations against victims identified or named and those cases of serious and massive violations in which it may be impossible for the Complainants to identify all the victims."[708]

381. Perhaps more fundamentally, rather than espousing the claims of individuals, Ukraine brings its claims under the CERD in its own right, as explicitly set forth in the Memorial. Unlike in *ELSI* where the United States sought "reparation for injuries suffered by Raytheon and Machlett,"[709] the submissions demand that Russia "[p]ay Ukraine financial compensation, in its own right and as *parens patriae* for its citizens."[710] The rationale for the local remedies rule cannot apply in these circumstances. The principle of sovereign equality precludes any requirement that a State submit its own claims to the domestic courts of another

---

[707] African Charter on Human and Peoples' Rights, 27 June 1981, 1520 U.N.T.S. 217, art. 56(5) ("Communications relating to human and peoples' rights referred to in Article 55 received by the Commission, shall be considered if they . . . [a]re sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged").

[708] Amnesty International and Others v. Sudan, African Commission on Human and Peoples' Rights Communication Nos. 48/90, 50/91, 52/91, 89/93, Thirteenth Annual Activity Report: 1999–2000 (2000), African Human Rights Law Reports, Vol. 297 (1999), para. 30.

[709] *Elettronica Sicula S.p.A. ("ELSI") (United States of America* v. *Italy), Judgment of 20 July 1989, I.C.J. Reports 1989*, p. 43, para. 51.

[710] Ukraine's Memorial, para. 653(l). Ukraine seeks relief in its own right for a pattern of human rights violations by the Russian Federation. Ukraine is an injured State within the meaning of Article 42 of the Articles on State Responsibility and is entitled to invoke Russia's international responsibility for violations of international law which "specially affect" Ukraine. While Russia's breaches of CERD violates its responsibility to all States Parties, Ukraine is particularly injured as the breaches affect and victimize large numbers of its own citizens. This impact "distinguishes [Ukraine] from the generality of other States to which the obligation is owed." Draft Articles on Responsibility of States, art. 42 & commentary, p. 119, para. 5, (Ukraine's Memorial, Annex [279]); *see generally ibid.,* pp. 117–119.

State.[711] In this case, the need for notice and an opportunity for amicable settlement are met by the more than two years that Ukraine spent trying to engage the Russian Federation in negotiations prior to referring its claims under the CERD to the Court.[712]

382. In short, the Russian Federation utterly fails to show that the customary international law principle of exhaustion of local remedies has any relevance to this case.

B. Russia's Assertion that the CERD Requires Exhaustion of Local Remedies in this Case Misinterprets the Convention

383. The Russian Federation's arguments based on the text of the Convention are equally specious. Russia contends that specific references to the local remedies rule in Articles 11(3) and 14(7)(a) prove that "the local remedies rule applies to any claim under CERD."[713] However, both the structure of the Convention and the plain language of the two provisions contradict Russia's conclusion when applied to the case actually before the Court.

---

[711] Theodor Meron, *The Incidence of the Rule of Exhaustion of Local Remedies*, British Yearbook of International Law, Vol. 35 (1959), pp. 84–85 ("[T]he rule of local remedies . . . is not applicable to cases primarily based on a direct breach of international law, causing immediate injury by one State to another . . . The principal reason for the non-applicability of the rule of exhaustion of local remedies to cases of direct injury is that in such cases the injured State represents principally its own interests rather than the interests of its nationals and is the real claimant. It follows that a request by the respondent State that the claimant State should exhaust the legal remedies available in the former State would run counter to the principle *par in parem non habet imperium, non habet jurisdictionem*.") (Ukraine's Written Statement, Annex 124). *See also* A.A. Cançado Trindade, *Origin and Historical Development of the Rule of Exhaustion of Local Remedies in International Law*, Belgian Review of International Law, Vol. 12 (1976), p. 525 ("A dispute could also arise directly between two States . . . in which case one could hardly expect, by virtue of their very sovereignty, that one State would be bound to exhaust available remedies in the territory of the other.") (Ukraine's Written Statement, Annex 125).

[712] The Russian Federation also invokes other international human rights treaties in support of its position that the exhaustion requirement applies to all parties, including States. Russia's Objections, para. 454. But none of the treaties cited by Russia give grounds to believe that the local remedies rule would apply to claims brought by States based on their own injury. Russia is unble to cite a single example of a case brought under one of those treaties by a State acting on its own behalf in which the exhaustion requirement applied.

[713] Russia's Objections, para. 448.

384. Both of the Convention's references to the local remedies rule are contained in Part II of the Convention, describing the procedures of the CERD Committee. Article 11(3) requires that "all available domestic remedies" be "invoked and exhausted"[714] before a State refers back to the Committee a matter previously raised that the concerned parties have been unable to resolve through negotiation. If States Parties have agreed that the Committee may consider communications from individuals within their jurisdiction, Article 14(7)(a) requires such individuals to "exhaust[] all available domestic remedies"[715] before their communications may be considered.

385. It is obvious from the placement of these articles that they are intended to apply only to cases that are submitted for conciliation under the CERD Committee's procedures. Ukraine has brought the present case pursuant to the compromissory clause contained in Article 22 of the Convention, governing disputes concerning the interpretation or application of the Convention.[716] That article is located in Part III, which contains the Convention's final clauses, and makes no mention of a need to exhaust local remedies. It makes no sense to suggest that references to the local remedies rule among the Part II provisions governing a special conciliation procedure should govern a final clause on dispute resolution that applies generally to the entire subject matter of the Convention.

386. Further, even if Article 11(3) or 14(7)(a) could have any relevance to a dispute brought under Article 22, it is plain from the language of both provisions that they have no

---

[714] CERD, art. 11(3) ("The Committee shall deal with a matter referred to it in accordance with paragraph 2 of this article after it has ascertained that all available domestic remedies have been invoked and exhausted in the case, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged.").

[715] *Ibid.*, art. 14(7)(a) ("The Committee shall consider communications in the light of all information made available to it by the State Party concerned and by the petitioner. The Committee shall not consider any communication from a petitioner unless it has ascertained that the petitioner has exhausted all available domestic remedies. However, this shall not be the rule where the application of the remedies is unreasonably prolonged.")

[716] Ukraine's Application, paras. 22–23.

application to this particular dispute. As noted above, Article 11(3) requires only that "all available domestic remedies" be "invoked and exhausted." For the reasons discussed in the previous section, there are no available domestic remedies that could or should have been invoked or exhausted in relation to the present dispute.[717] As a sovereign State, Ukraine — to whom the claims belong — cannot be expected to submit itself to the domestic court system of a co-equal sovereign State.[718] And, even if that were not the case, submission of such a dispute to Russia's courts would be futile, as Ukraine could not expect a fair hearing of its allegation that Russia has engaged in a systematic campaign of racial discrimination affecting hundreds of thousands of Ukrainian citizens across multifarious fields of activity. As for Article 14(7)(a), by its terms it applies only to claims brought by individuals, which is not the case here.

387. Once examined in the context of Ukraine's claims before the Court, Russia's contention that local remedies should have been exhausted before Ukraine had recourse to the Court is utterly meritless. The Court should reject this objection to admissibility.

* * *

388. As with Ukraine's claims under the ICSFT, Russia's challenge to Ukraine's CERD claims lacks credibility. Much of Russia's argumentation is in reality an attempt to import the merits into this preliminary phase. Russia's bold assertion that this case is really about the status of Crimea rather than its own serial violations of the CERD bears no relation to the content of Ukraine's Memorial, which carefully enumerates Russia's CERD violations and frames its request for relief accordingly. Russia's core jurisdictional objection — that Ukraine was required to invoke the CERD Committee inter-State complaints procedure before referring a dispute to the Court — depends on a tortured interpretation of Article 22 in tension with every aspect of the Vienna Convention's interpretive test. And its fallback argument — that Ukraine did not make a genuine effort to negotiate a settlement — is belied by the more than two years Ukraine spent trying without success to obtain answers concerning the specific

[717] *See* Chapter 8(A).

[718] *See supra*, note 712.

CERD violations it had brought to Russia's attention. Finally, Russia's suggestion that the local remedies rule applies in this proceeding, brought by Ukraine in its own right, lacks any basis in international law.

PART IV: SUBMISSIONS

389. For the reasons set out in this Written Statement, Ukraine respectfully requests that the Court:

a. Dismiss the Preliminary Objections submitted by the Russian Federation in its submission dated 12 September 2018;

b. Adjudge and declare that it has jurisdiction to hear the claims in the Application submitted by Ukraine, dated 16 January 2017 and that such claims are admissible; and

c. Proceed to hear those claims on the merits.

14 January 2019,

_____

Ms. Olena Zerkal
Deputy Foreign Minister of Ukraine
Agent of Ukraine

CERTIFICATION

I hereby certify that the annexes are true copies of the documents referred to and that the translations provided are accurate.

14 January 2019,

_____

Ms. Olena Zerkal
Deputy Foreign Minister of Ukraine
Agent of Ukraine

TABLE OF CONTENTS

TO THE INDEX OF ANNEXES

Page

TABLE OF CONTENTS TO

THE VOLUME OF ANNEXES

Annexes

LIST OF ANNEXED DOCUMENTS

Volume I

I. ICSFT ANNEXES

A. INTERNATIONAL ORGANIZATION DOCUMENTS

1. United Nations

2. Organization for Security and Co-operation in Europe

3. Council of Europe

4. Financial Action Task Force

5. Permanent Court of Arbitration

6. International Civil Aviation Organization

7. International Maritime Organization

Annex 9. International Maritime Organization, *Report of the Ad Hoc Preparatory Committee on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, IMO Doc. PCUA 2/5 (18–22 May 1987)

B. TRAVAUX PRÉPARATOIRES

Annex 10. *Communications Received from the Republic of Korea, dated 25 November 1983: Observations on the Question of Measures to Prevent International Terrorism*, Addendum to the Report of the Secretary General, U.N. Doc. A/38/355/Add.2 (29 November 1983)

Annex 11. *Draft International Convention for the Suppression of the Financing of Terrorism: Working Document Submitted by France*, U.N. Doc. A/AC.252/L.7 (11 March 1999)

Annex 12. *Addendum to Draft International Convention for the Suppression of the Financing of Terrorism: Working Document Submitted by France,* U.N. Doc. A/AC.252/L.7/Add.1 and Corr.1 (11 March 1999) (French-language text)

Annex 13. *Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996*, U.N. Doc. No. A/54/37 (5 May 1999)

Annex 14. Summary Record of the 33rd Meeting of the Sixth Committee, U.N. Doc. A/C.6/54/SR.33 (2 December 1999) (statement of Syria)

Annex 15. Summary Record of the 34th Meeting of the Sixth Committee, U.N. Doc. A/C.6/54/SR.34 (17 April 2000) (statement of Sudan)

Annex 16. Summary Record of the 32nd Meeting of the Sixth Committee, U.N. Doc. A/C.6/54/SR.32 (18 May 2000) (statement of Cuba)

Annex 17. Summary Record of the 2nd Meeting of the Sixth Committee, U.N. Doc. A/C.6/72/SR.2 (23 October 2017) (statement of Ukraine)

C. DIPLOMATIC CORRESPONDENCE

Annex 18. Russian Federation Note Verbale No. 10471 to the Embassy of Ukraine in Moscow (15 August 2014)

Annex 19. Ukrainian Note Verbale No. 72/22-620-2406 to the Russian Federation Ministry of Foreign Affairs (24 September 2014)

Annex 20. Ukrainian Note Verbale No. 72/23-620-2674 to the Russian Federation Ministry of Foreign Affairs (29 October 2014)

Annex 21. Ukrainian Note Verbale No. 72/22-620-2732 to the Russian Federation Ministry of Foreign Affairs (4 November 2014)

Annex 22. Ukrainian Note Verbale No. 72/22-620-3008 to the Russian Federation Ministry of Foreign Affairs (8 December 2014)

F. THIRD-STATE JUDICIAL DECISIONS, LEGISLATION, AND GOVERNMENT DOCUMENTS

Annex 55. Memorandum Opinion for the Deputy Attorney General of the United States, *United States Assistance to Countries that Shoot Down Civil Aircraft Involved in Drug Trafficking* (14 July 1994)

Annex 56. *R., ex parte Pinochet v. Bartle and ors,* [2000] United Kingdom House of Lords, Vol. 17 (24 March 1999)

Annex 57. *Explanatory Notes to Terrorism Act 2000*, prepared by the United Kingdom Home Office and the Northern Ireland Office (20 July 2000)

Annex 58. Foreign Affairs Commission of the French National Assembly, Document Assemblée nationale No. 3367, *Rapport No. 3367 de M. René Mangin, fait au nom de la commission des affaires étrangères sur le projet de loi, adopté par le Sénat, autorisant la ratification de la Convention internationale pour la répression du financement du terrorisme* (7 November 2001)

Annex 59. *United States Senate Executive Report No. 107-2, 107th Congress, First Session*, U.S. Government Publishing Office (27 November 2001)

Annex 60. Objet du Conseil Fédéral 02.052, *Conventions des Nations Unies pour la répression du financement du terrorisme et des attentats terroristes à l'explosif, Ratification: 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*, Feuille fédérale n° 32 du 13 août 2002 (26 Juin 2002)

Annex 61. Australia Department of Foreign Affairs and Trade, *National Interest Analysis of 18 June 2002, reprinted in* Australian Year Book of International Law, Vol. 23 (2004)

Annex 62. *United States v. Murrillo*, 826 F.3d 152 (Court of Appeals for the 4th Circuit of the United States, 2016)

Annex 63. Criminal Code of Denmark, section 114

Annex 64. Code pénal français, art. 122-4

Annex 65. Code pénal français, art. 421-2-2

Annex 66. Constitution de la République française

G. SCHOLARLY AUTHORITIES

Annex 67. Michel Virally, *Souveraineté des Etats et autorité du droit, in* PANORAMA DU DROIT INTERNATIONAL CONTEMPORAIN: COURS GENERAL DE DROIT INTERNATIONAL PUBLIC, COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW, Vol. 183 (1983)

Annex 68. Glanville Williams, *Oblique Intention*, Cambridge Law Journal, Vol. 46 (1987)

Annex 69. Frances Mautner-Markhof, International Institute for Applied Systems Analysis, *Processes of International Negotiations* (1989)

Annex 70. Glen Plant, *The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, International Comparative Law Quarterly, Vol. 39 (1990)

Annex 71. M. Cherif Bassiouni, *Effective National and International Action Against Organized Crime and Terrorist Criminal Activities*, Emory International Law Review, Vol. 4 (1990)

Annex 72. William A. Schabas, *Mens Rea and the International Criminal Tribunal for the Former Yugoslavia*, New England Law Review, Vol. 37 (2002)

Annex 73. Chiara Giorgetti, A PRINCIPLED APPROACH TO STATE FAILURE: INTERNATIONAL COMMUNITY ACTIONS IN EMERGENCY SITUATIONS (2010)

Annex 74. Kimberley N. Trapp, STATE RESPONSIBILITY FOR INTERNATIONAL TERRORISM (2011)

Annex 75. Marko Milanovic, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY (2011)

Annex 76. Michael Milde, ESSENTIAL AIR AND SPACE LAW: INTERNATIONAL AIR LAW AND ICAO (2d ed., 2012)

Annex 77. Sarah Finnin, *Mental Elements Under Article 30 of the Rome Statute of the International Criminal Court: A Comparative Analysis*, International and Comparative Law Quarterly, Vol. 61 (2012)

Annex 78. Federica I. Paddeu, *Use of Force against Non-State Actors and the Circumstance Precluding Wrongfulness of Self-Defence*, Leiden Journal of International Law, Vol. 30 (2017)

Annex 79. International Committee of the Red Cross, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (1987)

Volume III

Annex 80. Albin Eser, *Mental Elements, in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (Antonio Cassese et al. eds., OUP 2002)

Annex 81. Doug Cassel, C*orporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, Northwestern Journal of International Human Rights, Vol. 6 (2008)

Annex 82. Antonio Vallini, *Mens Rea: Mistake of Fact and Mistake of Law, in* THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE (Antonio Cassese ed., 2009)

Annex 83. Kai Ambos, TREATISE ON INTERNATIONAL CRIMINAL LAW, VOL. I: FOUNDATIONS AND GENERAL PART (2013)

Annex 94. U.N. Economic and Social Council, *Draft International Convention on the Elimination of All Forms of Racial Discrimination, Poland: Amendments to the Suggestions for Final Clauses Submitted by the Officers of the Third Committee (A/C.3/L.1237)*, U.N. Doc. A/C.3/L.1272 (1 November 1965)

Annex 95. U.N. General Assembly, *Draft International Convention on the Elimination of All Forms of Racial Discrimination, Ghana: Revised Amendments to Document A/C.3/L.1221*, U.N. Doc. A/C.3/L.1274/REV.1 (12 November 1965)

Annex 96. U.N. General Assembly, *Ghana, Mauritania and Philippines: Articles Relating to Measures of Implementation to be added to the Provisions of the Draft International Convention on the Elimination of All Forms of Racial Discrimination Adopted by the Commission on Human Rights,* U.N. Doc, A/C.3/L.1291 (18 November 1965)

Annex 97. U.N. Economic and Social Council, *Draft International Convention on the Elimination of All Forms of Racial Discrimination, Ghana, Mauritania, and Philippines: Amendments to the Suggestions for Final Clauses Submitted by the Officers of the Third Committee (A/C.3/L.1237)*, U.N. Doc. A/C.3/L.1313 (30 November 1965)

Annex 98. U.N. General Assembly, Official Record of the Third Committee, 1367th Meeting, U.N. Doc. A/C.3/SR.1367 (7 December 1965)

C. DIPLOMATIC CORRESPONDENCE

Annex 99. Ukrainian Note Verbale No. 72/22-620-2403 to the Russian Federation Ministry of Foreign Affairs (23 September 2014)

Annex 100. Russian Federation Note Verbale No. 14279 to the Embassy of Ukraine in Moscow (16 October 2014)

Annex 101. Russian Federation Note Verbale No. 3962 to the Embassy of Ukraine in Moscow (16 October 2014)

Annex 102. Ukrainian Note Verbale No. 72/23-620-2673 to the Russian Federation Ministry of Foreign Affairs (29 October 2014)

Annex 103. Russian Federation Note Verbale No. 15642 to the Embassy of Ukraine in Moscow (27 November 2014)

Annex 104. Ukrainian Note Verbale No. 72/22-620-3069 to the Russian Federation Ministry of Foreign Affairs (15 December 2014)

Annex 105. Ukrainian Note Verbale No.72/22-620-3070 to the Russian Federation Ministry of Foreign Affairs (15 December 2014)

Annex 106. Russian Federation Note Verbale No. 2697 to the Embassy of Ukraine in Moscow (11 March 2015)

Annex 107. Ukrainian Note Verbale No. 72/22-620-705 to Russian Federation Ministry of Foreign Affairs (30 March 2015)

Annex 108. Russian Federation Note Verbale No. 8761 to the Embassy of Ukraine in Moscow (9 July 2015)

Annex 109. Ukrainian Note Verbale No. 72/22-194/510-2006 to the Russian Federation Ministry of Foreign Affairs (17 August 2015)

Annex 110. Russian Federation Note Verbale No. 11812 to the Embassy of Ukraine in Moscow (28 September 2015)

Annex 111. Ukrainian Note Verbale No. 72/22-194/510-839 to the Russian Federation Ministry of Foreign Affairs (5 April 2016)

Annex 112. Ukrainian Note Verbale No. 72/22-194/510-1023 to the Russian Federation Ministry of Foreign Affairs (26 April 2016)

Annex 113. Ukrainian Note Verbale No. 72/22-194/510-1116 to the Russian Federation Ministry of Foreign Affairs (11 May 2016)

Annex 114. Russian Federation Note Verbale No. 5774 to the Embassy of Ukraine in Moscow (27 May 2016)

Annex 115. Russian Federation Note Verbale No. 5787 to the Embassy of Ukraine in Moscow (27 May 2016)

Annex 116. Ukrainian Note Verbale No. 72/22-194/510-1973 to the Russian Federation Ministry of Foreign Affairs (18 August 2016)

Annex 117. Ukrainian Note Verbale No. 72/22-194/510-2188 to the Russian Federation Ministry of Foreign Affairs (26 September 2016)

Annex 118. Ukrainian Note Verbale No. 72/22-633-2302 to the Russian Federation Ministry of Foreign Affairs (7 October 2016)

Annex 119. Ukrainian Note Verbale No. 72/6111-194/510-2474 to the Russian Federation Ministry of Foreign Affairs (28 October 2016)

Annex 120. Russian Federation Note Verbale No. 13091 to the Embassy of Ukraine in Moscow (28 November 2016)

Annex 121. Russian Federation Note Verbale No. 14453 to the Embassy of Ukraine in Moscow (29 December 2016)

Annex 122. Russian Federation Note Verbale No. 14500 to the Embassy of Ukraine in Moscow (30 December 2016)

D. THIRD-STATE JUDICIAL DECISIONS, LEGISLATION, AND GOVERNMENT DOCUMENTS

Annex 123. *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134 (Supreme Court of the United States, 2018)

E. SCHOLARLY AUTHORITIES

Annex 124. Theodor Meron, *The Incidence of the Rule of Exhaustion of Local Remedies*, British Yearbook of International Law, Vol. 35 (1959)

Annex 125. A.A. Cançado Trindade, *Origin and Historical Development of the Rule of Exhaustion of Local Remedies in International Law*, Belgian Review of International Law, Vol. 12 (1976)

Annex 126. Dinah Shelton, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW (3rd ed., 2015)

F. OTHER PUBLICLY-AVAILABLE DOCUMENTS

Annex 127. The Explanatory Dictionary of the Russian Language, *или* (Sergey Ivanovich Ozhegov ed., 2011)

Annex 128. Xinhua Dictionary of the Chinese Language, *或* (11th ed., 2011)

Annex 129. Royal Spanish Academy Dictionary of the Spanish Language, *o* (online ed., 2018)