Corrigé
Corrected

CR 2019/10

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2019

Public sitting

held on Tuesday 4 June 2019, at 10 a.m., at the Peace Palace,

President Yusuf presiding,

***in the case concerning* Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine *v.* Russian Federation)**

Preliminary Objections

VERBATIM RECORD

ANNÉE 2019

Audience publique

tenue le mardi 4 juin 2019, à 10 heures, au Palais de la Paix,

sous la présidence de M. Yusuf, président,

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

Exceptions préliminaires

COMPTE RENDU

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

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

M. Couvreur, greffier

The Government of Ukraine is represented by:

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

as Agent;

H.E. Mr. Vsevelod Chentsov, Ambassador Extraordinary and Plenipotentiary of Ukraine to the Kingdom of the Netherlands,

as Co-Agent;

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

Mr. Jean Marc Thouvenin, Professor at the University of Paris Nanterre, Secretary-General of the Hague Academy of International Law,

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

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

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

as Counsel and Advocates;

Ms Oksana Zolotaryova, Acting Director, International Law Department, Ministry of Foreign Affairs of Ukraine,

Ms Clovis Trevino, Covington & Burling LLP, member of the Bars of the District of Columbia, Florida and New York,

Mr. Volodymyr Shkilevych, Covington & Burling LLP, member of the Bars of Ukraine and New York,

Mr. George M. Mackie, Covington & Burling LLP, member of the Bars of the District of Columbia and Virginia,

Ms Megan O'Neill, Covington & Burling LLP, member of the Bars of the District of Columbia and Texas,

as Counsel;

Mr. Taras Kachka, Adviser to the Foreign Minister, Ministry of Foreign Affairs of Ukraine,

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

Mr. Refat Chubarov, Head of the Mejlis of the Crimean Tatar People, People's Deputy of Ukraine,

Mr. Bohdan Tyvodar, Deputy Head of Division, Security Service of Ukraine,

Le Gouvernement de l'Ukraine est représenté par :

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

comme agent ;

S. Exc. M. Vsevelod Chentsov, ambassadeur extraordinaire et plénipotentiaire de l'Ukraine auprès du Royaume des Pays-Bas,

comme coagent ;

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

M. Jean-Marc Thouvenin, professeur à l'Université Paris Nanterre, secrétaire général de l'Académie de droit international de La Haye,

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

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

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

comme conseils et avocats ;

Mme Oksana Zolotaryova, directrice par intérim de la direction du droit international au ministère des affaires étrangères de l'Ukraine,

Mme Clovis Trevino, cabinet Covington & Burling LLP, membre des barreaux du district de Columbia, de Floride et de New York,

M. Volodymyr Shkilevych, cabinet Covington & Burling LLP, membre des barreaux d'Ukraine et de New York,

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

Mme Megan O'Neill, cabinet Covington & Burling LLP, membre des barreaux du district de Columbia et du Texas,

comme conseils ;

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

M. Roman Andarak, chef adjoint de la mission de l'Ukraine auprès de l'Union européenne,

M. Refat Chubarov, président du Majlis des Tatars de Crimée, député du peuple ukrainien,

M. Bohdan Tyvodar, chef adjoint de division au service de sécurité de l'Ukraine,

Mr. Ihor Yanovskyi, Head of Unit, Security Service of Ukraine,

Mr. Mykola Govorukha, Deputy Head of Unit, Prosecutor General's Office of Ukraine,

Ms Myroslava Krasnoborova, Liaison Prosecutor for Eurojust,

as Advisers;

Ms Katerina Gipenko, Ministry of Foreign Affairs of Ukraine,

Ms Valeriya Budakova, Ministry of Foreign Affairs of Ukraine,

Ms Olena Vashchenko, Consulate General of Ukraine in Istanbul,

Ms Sofia Shovikova, Embassy of Ukraine to the Netherlands,

Ms Olga Bondarenko, Embassy of Ukraine to the Netherlands,

Mr. Vitalii Stanzhytskyi, Ministry of Interior of Ukraine,

Ms Angela Gasca, Covington & Burling LLP,

Ms Rebecca Mooney, Covington & Burling LLP,

as Assistants.

The Government of the Russian Federation is represented by:

H.E. Mr. Dmitry Lobach, Ambassador-at-large, Ministry of Foreign Affairs of the Russian Federation,

Mr. Grigory Lukiyantsev, PhD, Special Representative of the Ministry of Foreign Affairs of the Russian Federation for Human Rights, Democracy and the Rule of Law, Deputy Director, Department for Humanitarian Co-operation and Human Rights, Ministry of Foreign Affairs of the Russian Federation,

as Agents;

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

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

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

Mr. Andreas Zimmermann, LLM (Harvard University), Professor of International Law at the University of Potsdam, Director of the Potsdam Centre of Human Rights, member of the Permanent Court of Arbitration and of the Human Rights Committee,

as Counsel and Advocates;

M. Ihor Yanovskyi, chef d'unité au service de sécurité de l'Ukraine,

M. Mykola Govorukha, chef adjoint d'unité au bureau du procureur général de l'Ukraine,

Mme Myroslava Krasnoborova, procureur de liaison à Eurojust,

comme conseillers ;

Mme Katerina Gipenko, ministère des affaires étrangères de l'Ukraine,

Mme Valeriya Budakova, ministère des affaires étrangères de l'Ukraine,

Mme Olena Vashchenko, consulat général d'Ukraine à Istanbul,

Mme Sofia Shovikova, ambassade d'Ukraine aux Pays-Bas,

Mme Olga Bondarenko, ambassade d'Ukraine aux Pays-Bas,

M. Vitalii Stanzhytskyi, ministère de l'intérieur de l'Ukraine,

Mme Angela Gasca, cabinet Covington & Burling LLP,

Mme Rebecca Mooney, cabinet Covington & Burling LLP,

comme assistants.

Le Gouvernement de la Fédération de Russie est représenté par :

S. Exc. M. Dmitry Lobach, ambassadeur itinérant, ministère des affaires étrangères de la Fédération de Russie,

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

comme agents ;

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

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

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

M. Andreas Zimmermann, LLM (Université de Harvard), professeur de droit international et directeur du centre des droits de l'homme de l'Université de Potsdam, membre de la Cour permanente d'arbitrage et du Comité des droits de l'homme,

comme conseils et avocats ;

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

Ms Tessa Barsac, consultant in international law, Master (University Paris Nanterre), LLM (Leiden University),

Mr. Jean-Baptiste Merlin, Doctorate in Law (University Paris Nanterre), consultant in public international law,

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

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

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

as Counsel;

Mr. Ayder Ablyatipov, Deputy Minister of Education, Science and Youth of the Republic of Crimea,

Mr. Andrey Anokhin, expert, Investigative Committee of the Russian Federation,

Mr. Mikhail Averyanov, Second Secretary, Permanent Mission of the Russian Federation to the Organization for Security and Co-operation in Europe,

Ms Héloïse Bajer-Pellet, member of the Paris Bar,

Ms Maria Barsukova, Third Secretary, Department for Humanitarian Co-operation and Human Rights, Ministry of Foreign Affairs of the Russian Federation,

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

Ms Ksenia Galkina, Third Secretary, Legal Department, Ministry of Foreign Affairs of the Russian Federation,

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

Ms Daria Golubkova, administrative assistant, Legal Department, Ministry of Foreign Affairs of the Russian Federation,

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

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

Ms Valeria Grishchenko, interpreter, Investigative Committee of the Russian Federation,

Mr. Denis Grunis, expert, Prosecutor General's Office of the Russian Federation,

Mr. Ruslan Kantur, Attaché, Department of New Challenges and Threats, Ministry of Foreign Affairs of the Russian Federation,

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

Mme Tessa Barsac, consultante en droit international, master (Université Paris Nanterre), LLM (Université de Leyde),

M. Jean-Baptiste Merlin, docteur en droit (Université Paris Nanterre), consultant en droit international public,

M. Michael Swainston, QC, membre du barreau d'Angleterre, cabinet Brick Court Chambers,

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

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

comme conseils ;

M. Ayder Ablyatipov, vice-ministre de l'éducation, des sciences et de la jeunesse de la République de Crimée,

M. Andrey Anokhin, expert au comité d'enquête de la Fédération de Russie,

M. Mikhail Averyanov, deuxième secrétaire, mission permanente de la Fédération de Russie auprès de l'Organisation pour la sécurité et la coopération en Europe,

M[e] Héloïse Bajer-Pellet, avocate au barreau de Paris,

Mme Maria Barsukova, troisième secrétaire au département pour la coopération humanitaire et les droits de l'homme du ministère des affaires étrangères de la Fédération de Russie,

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

Mme Ksenia Galkina, troisième secrétaire au département juridique du ministère des affaires étrangères de la Fédération de Russie,

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

Mme Daria Golubkova, assistante administrative au département juridique du ministère des affaires étrangères de la Fédération de Russie,

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

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

Mme Valeria Grishchenko, interprète, comité d'enquête de la Fédération de Russie,

M. Denis Grunis, expert au parquet général de la Fédération de Russie,

M. Ruslan Kantur, attaché au département de nouveaux défis et menaces du ministère des affaires étrangères de la Fédération de Russie,

Ms Svetlana Khomutova, expert, Federal Monitoring Service of the Russian Federation,

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

Ms Maria Kuzmina, Acting Head of Division, Second CIS Department, Ministry of Foreign Affairs of the Russian Federation,

Mr. Petr Litvishko, expert, Prosecutor General's Office of the Russian Federation,

Mr. Timur Makhmudov, Attaché, Legal Department, Ministry of Foreign Affairs of the Russian Federation,

Mr. Konstantin Pestchanenko, expert, Ministry of Defence of the Russian Federation,

Mr. Grigory Prozukin, expert, Investigative Committee of the Russian Federation,

Ms Sofia Sarenkova, Senior Associate, Ivanyan & Partners,

Ms Elena Semykina, paralegal, Ivanyan & Partners,

Ms Svetlana Shatalova, First Secretary, Legal Department, Ministry of Foreign Affairs of the Russian Federation,

Ms Angelina Shchukina, Junior Associate, Ivanyan & Partners,

Ms Kseniia Soloveva, Associate, Ivanyan & Partners,

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

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

as Advisers.

Mme Svetlana Khomutova, expert au service fédéral de surveillance financière de la Fédération de Russie,

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

Mme Maria Kuzmina, chef de division par intérim au deuxième département de la Communauté d'Etats indépendants du ministère des affaires étrangères de la Fédération de Russie,

M. Petr Litvishko, expert au parquet général de la Fédération de Russie,

M. Timur Makhmudov, attaché au département juridique du ministère des affaires étrangères de la Fédération de Russie,

M. Konstantin Pestchanenko, expert au ministère de la défense de la Fédération de Russie,

M. Grigory Prozukin, expert au comité d'enquête de la Fédération de Russie,

Mme Sofia Sarenkova, collaboratrice senior, cabinet Ivanyan & Partners,

Mme Elena Semykina, juriste, cabinet Ivanyan & Partners,

Mme Svetlana Shatalova, première secrétaire au département Juridique du ministère des affaires étrangères de la Fédération de Russie,

Mme Angelina Shchukina, collaboratrice junior, cabinet Ivanyan & Partners,

Mme Kseniia Soloveva, collaboratrice, cabinet Ivanyan & Partners,

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

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

comme conseillers.

Le PRESIDENT : Veuillez vous asseoir. L'audience est ouverte. La Cour se réunit ce matin pour entendre le premier tour d'observations orales de l'Ukraine. Je donne maintenant la parole à l'agent de l'Ukraine, S. Exc. Mme Olena Zerkal.

Vous avez la parole, Madame.

Ms ZERKAL:

INTRODUCTORY STATEMENT

1. Mr. President, Members of the Court, it is a great honour to appear before you on behalf of Ukraine.

2. Ukraine is a firm believer in this Court and the peaceful resolution of disputes. We came to this Court in 2017 in good faith to protect *our* rights and humanity. And this is the first case Ukraine has brought to the World Court. It means a lot for Ukraine, since we believe in international justice.

3. Mr. President, Members of the Court, while Ukraine asks *for your justice*, Russia fights hard to avoid your justice.

4. Russia presented yesterday its attitude towards international law. It is an attitude of *disrespect* towards the law and the people of Ukraine. It is an attitude of *delaying*, to avoid answering for its illegal conduct. It is an attitude of *distortion* of international law and the facts, to legitimize its behaviour. *And when all else fails*, Russia simply *denies what* the whole world *knows*.

5. We saw this attitude in this Court yesterday and two years ago at the hearings on provisional measures. We have seen this in every international forum for the last five years as well. Russia's violations of international law are many, but it seeks to avoid accountability *for all* of them. The result is a feeling of entitlement to disrespect the law, without consequence. Russia continues to *misrepresent* our case as politically motivated and artificial. Remarkably it describes the events in Ukraine as a coup d'état and civil war, and claims that the only dispute between our countries is about aggression and the application of international humanitarian law.

6. Our response to this typical Russian narrative is simple — we have no hidden agenda. We engaged in no distortion. The real nature of the case before you is about the interpretation and

application of two international treaties: 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). Full stop.

7. Mr. President, Members of the Court, let me present again the real nature of the case before you.

8. Russia's policy towards Ukraine has resulted in violations of the International Convention for the Suppression of the Financing of Terrorism. What did Russia do? Did Russia prevent the financing of terrorism in Ukraine? It did not. Did it investigate? It did not. Did it assist us in finding the perpetrators? It did not. As a result, MH17 was shot down. Bombs went off at parades and nightclubs. Rockets fell on residential districts. Hundreds were killed and injured. Thousands have been intimidated. Compliance by Russia with the ICSFT would have prevented this horrible damage.

9. In addition, following its unlawful occupation of Crimea, Russia launched the wide-ranging campaign of cultural erasure directed against the Crimean Tatar and Ukrainian communities. Russia has engaged in the collective punishment of whole ethnic groups in illegally occupied Crimea. People continue to be unlawfully detained and disappeared; the Mejlis is banned; culturally important gatherings are suppressed; education in the Crimean Tatar and Ukrainian languages is restricted; and the media from these disfavoured communities are intimidated. This constitutes a massive violation of the International Convention on the Elimination of All Forms of Racial Discrimination.

10. The sad irony is that Russia seeks to benefit from the very scale and complexity of its violations, in order to escape the scrutiny of any of them. Every time Russia is brought before an international tribunal, it tries to argue that the dispute is about something else. *Aggression. The law of war*. Russia hides behind these other sources of law, but with no intention to comply with them.

11. Mr. President, Members of the Court, it is common knowledge that Ukraine suffers from Russia's continuous aggression and its unlawful occupation of part of our territory. But that is not the claim we have brought to this Court.

12. This dispute is about the ICSFT and the CERD. Russia denies that we even have a dispute at all. It did this for two years in our negotiations. It did this at the provisional measures hearings. And it continues to do so today.

13. Consider the circumstances while Ukraine was trying to negotiate. Even as Russia refused to acknowledge the dispute, it did nothing to prevent Russian officials and other Russian persons from funding terrorism in Ukraine. For example, just two days after I returned from the first negotiating session, *Grad rocket launch systems* were delivered to Ukraine and used to terrorize the city of Mariupol.

14. Russia deliberately led those negotiations to a dead end, in the same fashion as it has done with the Minsk process. For the record — Ukraine and the Russian Federation are parties to the Minsk arrangements, not the so-called "LPR" and "DPR", as was wrongly said yesterday by Russia.

15. Russia's strategy of denial goes far beyond its conduct in negotiations with Ukraine. Yesterday, with regard to MH17, Russia's Agent mentioned the Joint Investigation Team's May 2018 Report. He said something incredible. I quote: "As stated by the JIT in 2018, there are still no answers to why the aircraft was shot down and who was responsible."[1] What he did not say was that the JIT determined that the BUK used to shoot down MH17 was supplied by the members of the 53rd Anti-Aircraft Missile Brigade from Kursk, Russia.

16. Russia also misleads the Court about its compliance with the *Court's Provisional Measures Order*. Standing before you, I must express Ukraine's dismay at Russia's lack of respect for a binding Order of this Court. The situation was urgent two years ago and it is even more urgent today. The Mejlis remains banned. Ukrainian-language education has all but disappeared in Crimea. The Crimean Tatar children are taught from new textbooks that seek to justify the mass deportation of their people by Stalin in 1944.

17. Moreover, Russia continues to this day to aggravate the situation and to multiply its unlawful actions. Just five days ago, Russian occupying authorities arrested two Crimean Tatar

[1] CR 2019/9, p. 19, para. 25 (Lobach).

children's rights activists, Lutfie Zudieva and Mumine Salieva, continuing its campaign of racial discrimination.

18. Russia does not want this Court to hear Ukraine's case on the merits. Instead, it tries to create an alternative reality and manipulate the facts. Let me be clear: the version of the facts you heard yesterday is nonsense. Russia demands to debate the facts *prematurely* this week, because it knows that on the merits, with full and proper consideration of all the evidence, Russia's behaviour cannot be defended.

19. But the only issue before you this week is jurisdiction.

20. Mr. President, Ukraine's advocates will make it clear that our case is properly before you. Professor Jean-Marc Thouvenin will address Russia's incorrect approach to preliminary objections on the ICSFT. And he will also explain how the treaty requires Russia to prevent the financing of terrorism by any person.

21. Ms Marney Cheek will demonstrate how Russia incorrectly interprets the offence of financing of terrorism. And she will respond to Russia's inappropriate factual arguments about the acts of terrorism alleged in Ukraine's Memorial.

22. Mr. David Zionts will then explain how Ukraine met every requirement under Article 24 before bringing its claims under the ICSFT.

23. Professor Harold Hongju Koh will next address the CERD dispute. He will correct Russia's effort to persuade you that the dispute is about something besides Russia's many violations of the CERD in Crimea.

24. Finally, Mr. Jonathan Gimblett will show how Ukraine has properly brought this case to the Court under Article 22.

25. Mr. President, Members of the Court, Ukraine will demonstrate that this Court has jurisdiction to hear Ukraine's claims under both treaties.

26. Ukraine is grateful for the Court's attention this morning. Mr. President, I ask you to call Professor Thouvenin to the podium.

Le PRESIDENT : Je remercie l'agent de l'Ukraine. Je donne à présent la parole au professeur Thouvenin. Vous avez la parole.

M. THOUVENIN : Merci beaucoup, Monsieur le président.

LA REQUÊTE UKRAINIENNE CONCERNANT LA CIRFT RELÈVE DE LA COMPÉTENCE *RATIONE MATERIAE* DE LA COUR

1. Monsieur le président, Mesdames et Messieurs les juges, c'est un privilège, et une grande responsabilité, de paraître devant vous afin de plaider la cause de l'Ukraine dans l'affaire qui l'oppose à son puissant voisin.

2. Comme l'agent de l'Ukraine vient de l'indiquer, il me revient de rappeler le sens de la requête ukrainienne relative à la convention internationale pour la répression du financement du terrorisme, et, de là, de souligner que l'exception d'incompétence soulevée par la Russie s'agissant de ce volet de la requête est dénuée de pertinence et ne saurait prospérer.

3. Je le ferai bien évidemment sans reprendre tous les arguments déjà développés par l'Ukraine dans ses écritures car tel n'est pas l'objet de ces audiences, que la Cour a eu la sagesse de vouloir brèves, comme doivent l'être les audiences sur les exceptions préliminaires, ce qui aura sans doute permis, en l'espèce, d'échapper à d'avantages de plaidoiries hors de propos, comme l'ont été un bon nombre de celles entendues hier.

I. Le différend soumis à la Cour

4. Monsieur le président, c'est de manière pour le moins frustre que la Russie a prétendu décrire dans ses écritures le différend relatif à la convention sur le financement du terrorisme[2]. A en croire la Russie, l'affaire porterait sur l'agression russe perpétrée dans l'est ukrainien[3], l'Ukraine prétendrait qu'il s'agirait d'une violation de la convention sur le financement du terrorisme[4], et chercherait à détourner l'article 24 de cette convention pour tenter de faire valoir devant la Cour des violations de règles de droit international à propos desquelles la convention ne dit rien[5]. La requête ukrainienne serait tellement extravagante que :

---

[2] EPR, par. 17–20.

[3] *Ibid.*, par. 17.

[4] *Ibid.*, par. 19.

[5] *Ibid.* ; voir aussi CR 2019/9, p. 15, par. 6–8 (Lobach) ; p. 20, par. 2 (Wordsworth).

> «On Ukraine's case almost any disagreement between States concerning alleged use of force or interference in internal affairs could be brought before the Court under Article 24 of the ICSFT»[6].

5. Mais il suffit de s'y reporter pour constater que la Russie a mal lu les écritures ukrainiennes, ce qui a été amplement confirmé par les plaidoiries d'hier, marquées par une grande confusion.

6. Certes, la Russie a agressé militairement l'Ukraine. C'est de notoriété publique, et chacun peut comprendre que la Russie soit mal à l'aise, pour dire le moins, à l'idée de devoir s'en justifier un jour devant la Cour mondiale.

7. Mais ce n'est pas du tout de cela dont la Cour est saisie dans la présente affaire. Comme l'agent de l'Ukraine vient de le rappeler, l'Ukraine ne demande *pas* à la Cour de juger que la Russie l'a agressée. Elle lui reproche, elle lui reproche «seulement», d'avoir violé la convention internationale pour la répression du financement du terrorisme et la convention internationale sur l'élimination de toutes les formes de discrimination raciale.

8. Il n'y a rien là d'exceptionnel. La Cour est habituée à n'être saisie que d'un aspect d'un désaccord plus large comme c'est le cas ici[7].

9. J'en viens donc au différend particulier dont la Cour est saisie dans l'affaire qui nous occupe, dans son volet relatif au financement du terrorisme. Il peut se décrire de la manière suivante :

— l'Ukraine reproche à la Russie d'avoir violé l'article 8 de la convention en omettant de prendre les dispositions que cet article lui impose de prendre pour identifier et détecter les fonds utilisés ou destinés à être alloués au financement du terrorisme en Ukraine, alors même que l'Ukraine

---

[6] EPR, par. 20.

[7] *Certains actifs iraniens (Iran c. Etats-Unis d'Amérique), exceptions préliminaires, arrêt du 13 février 2019*, par. 36, citant *Obligation de négocier un accès à l'océan Pacifique (Bolivie c. Chili), exception préliminaire, arrêt, C.I.J. Recueil 2015 (II)*, p. 604, par. 32 ; *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), exceptions préliminaires, arrêt, C.I.J. Recueil 2011 (I)*, p. 85–86, par. 32 ; *Actions armées frontalières et transfrontalières (Nicaragua c. Honduras), compétence et recevabilité, arrêt, C.I.J. Recueil 1988*, p. 91–92, par. 54 ; *Personnel diplomatique et consulaire des Etats-Unis à Téhéran (Etats-Unis d'Amérique c. Iran), arrêt, C.I.J. Recueil 1980*, p. 19–20, par. 36–37.

le lui avait demandé. Deux notes verbales illustratives de telles demandes sont reproduites aux onglets n[os] 3 et 4 du dossier des juges[8] ;

— il est reproché à la Russie d'avoir violé les articles 9 et 10 de la convention. Selon l'article 9, paragraphe 1 :

> «[l]orsqu'il est informé que l'auteur ou l'auteur présumé d'une infraction visée à l'article 2 pourrait se trouver sur son territoire, l'État Partie concerné prend les mesures qui peuvent être nécessaires conformément à sa législation interne pour enquêter sur les faits portés à sa connaissance.»

L'article 10 pose une obligation de poursuivre ou d'extrader les auteurs présumés d'infractions. L'Ukraine affirme que, alors même qu'elle le lui avait spécifiquement demandé, la Russie s'est abstenue d'enquêter sur les faits concernant les personnes qui, selon l'Ukraine, ont ou sont suspectées d'avoir participé au financement du terrorisme en Ukraine, et de s'être abstenue d'engager des poursuites[9]. La note verbale reproduite à l'onglet n° 4 du dossier des juges[10] fournit un exemple d'une telle demande demeurée sans suite, étant précisé qu'à la date de janvier 2015 ces demandes avaient porté sur au moins 36 faits de financement du terrorisme, comme rapporté dans la note verbale reproduite à l'onglet n° 5 du dossier des juges[11]. Pour toute réponse, la Russie s'est bornée à réclamer «des éléments de preuve afin d'apprécier le bien-fondé des griefs»[12]. Ceci, Monsieur le président, dénote une divergence profonde entre les Parties, sur l'interprétation de ce que signifie l'obligation qui pèse sur l'Etat requis au titre de l'article 9, qui est d'«enquêter sur les faits portés à sa connaissance» par l'Etat requérant[13], divergence qui, parmi bien d'autres, justifie amplement l'exercice par la Cour de sa compétence au fond ;

---

[8] Note verbale de l'Ukraine n° 72/22-620-2087 au ministère des affaires étrangères de la Fédération de Russie (12 août 2014), mémoire de l'Ukraine (MU), annexe 369 ; note verbale de l'Ukraine n° 72/22-620-2221 au ministère des affaires étrangères de la Fédération de Russie (29 août 2014), MU, annexe 371 ; voir également MU, par. 319–322 ; note verbale de l'Ukraine n° 72/22-620-2185 au ministère des affaires étrangères de la Fédération de Russie (22 août 2014), MU, annexe 370.

[9] Note verbale de l'Ukraine n° 72/23-620-2674 au ministère des affaires étrangères de la Fédération de Russie (29 octobre 2014), EEU, annexe 20 ; MU, par. 323–326.

[10] Note verbale de l'Ukraine n° 72/22-620-2221 au ministère des affaires étrangères de la Fédération de Russie (29 août 2014), MU, annexe 371.

[11] Note verbale de l'Ukraine n° 72/22-620-967 au ministère des affaires étrangères de la Fédération de Russie (24 avril 2015), EEU, annexe 30.

[12] EPR, par. 250-252 *[traduction du Greffe]*.

[13] Convention internationale pour la répression du financement du terrorisme (CIRFT), art. 9 1) ; voir également note verbale de l'Ukraine n° 72/23-620-2674 au ministère des affaires étrangères de la Fédération de Russie (29 octobre 2014), EEU, annexe 20.

— il est encore reproché à la Russie d'avoir violé l'article 12, paragraphe 1, de la convention, relatif à l'obligation des parties de s'accorder l'entraide judiciaire la plus large possible. Là encore, l'Ukraine a vainement sollicité l'aide de la Russie. Par exemple, dans une note verbale du 29 août 2014, l'Ukraine a saisi la Russie dans les termes suivants :

> «The information, which is available for Ukrainian Side, indicates a conscious, deliberate and illegal participation in the financing of terrorist activities on the territory of Ukraine of the following citizens of Russian Federation: …»[14]

Une liste de noms et d'indications pertinents suivait, puis l'Ukraine demandait à la Russie, entre autres :

> «to provide the greatest measure of assistance, including assistance in obtaining additional evidence in the possession of the Russian Side necessary for the investigation of the abovementioned facts» (en référence aux articles 12 et 18 de la convention)[15].

— il est enfin reproché à la Russie d'avoir gravement violé l'obligation que lui impose l'article 18 de la convention de coopérer avec l'Ukraine pour prévenir le financement du terrorisme, en ne prenant pas *toutes les mesures possibles* à cette fin[16]. L'Ukraine a sollicité cette coopération de manière répétée. La Russie aurait pu, elle aurait dû, mettre en œuvre les mesures les plus évidentes et parfaitement à sa portée dans ce genre de circonstances. La Russie aurait d'abord dû faire en sorte que ses propres agents publics, dont l'Ukraine avait indiqué qu'ils participaient au financement du terrorisme[17], cessent leurs infractions ; elle aurait aussi dû contrôler ses frontières pour empêcher les transferts de fonds, y compris d'armes, transitant par son territoire[18] ; elle aurait dû mettre en œuvre bien d'autres mesures, notamment pour contrôler les circuits financiers exploités par les financeurs du terrorisme. Mais elle n'a rien fait.

---

[14] Note verbale de l'Ukraine n° 72/22-620-2221 au ministère des affaires étrangères de la Fédération de Russie (29 août 2014), MU, annexe 371.

[15] *Ibid.*

[16] MU, par. 296–318.

[17] Voir, par exemple, note verbale de l'Ukraine n° 72/22-620-2406 au ministère des affaires étrangères de la Fédération de Russie (24 septembre 2014), EEU, annexe 19 ; note verbale de l'Ukraine n° 72/22-620-1069 au ministère des affaires étrangères de la Fédération de Russie (7 mai 2015), EEU, annexe 31 ; note verbale de l'Ukraine n° 72/22-484-1103 au ministère des affaires étrangères de la Fédération de Russie (12 mai 2015), EEU, annexe 33.

[18] MU, par. 312–315.

10. Monsieur le président, Mesdames et Messieurs les juges, voilà ce que l'Ukraine reproche à la Russie : inaction, passivité, omissions, attitude dilatoire, absence de coopération ; bref, un comportement en totale contradiction avec les obligations posées par la convention internationale pour la répression du financement du terrorisme. Ce sont là les griefs dont la Cour est saisie s'agissant de ce volet de l'affaire[19]. Hier, vous n'en avez presque rien entendu. Pas un mot, ou si peu[20]. On vous a parlé de tout, sauf de ce qui est pertinent aux fins de déterminer votre compétence, à savoir des griefs en cause dans la présente espèce.

II. L'exception d'incompétence soulevée par la Russie

11. J'en viens maintenant, Monsieur le président, Mesdames et Messieurs les juges, à l'exception d'incompétence *ratione materiae* soulevée par la Russie. Elle se décline en trois branches, de portée générale pour la première, limitée pour les deux suivantes.

A. L'exception préliminaire de non-plausibilité des faits allégués par l'Ukraine

12. Au titre de la première, que j'appellerai «l'exception préliminaire de non-plausibilité» des faits allégués, la Russie prétend que l'Ukraine n'aurait pas fourni de preuves permettant de considérer comme plausible que des actes de financement du terrorisme ont eu lieu au détriment de l'Ukraine[21]. La compétence *ratione materiae* en serait affectée.

13. *Bis repetita* ; le même argument avait été avancé par le défendeur[22] et sèchement rejeté par la Cour, dans le cadre de la procédure des mesures conservatoires[23]. La Cour avait constaté dans son ordonnance que les faits allégués par l'Ukraine : «suffis[ai]ent, à ce stade, à établir *prima facie* l'existence d'un différend entre les Parties concernant l'interprétation et l'application de la CIRFT»[24].

---

[19] MU, par. 653, lettres *a)* à *e)*.

[20] CR 2019/9, p. 44, par. 44 (Zimmermann).

[21] EPR, par. 28–37, 101 et suiv., notamment, par. 111–115, 118–119.

[22] *Application de la convention internationale pour la répression du financement du terrorisme et de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Ukraine c. Fédération de Russie), mesures conservatoires, ordonnance du 19 avril 2017, C.I.J. Recueil 2017,* p. 117–118, par. 29, et p. 128, par. 71.

[23] *Ibid.*, p. 118, par. 30–31.

[24] *Ibid*., par. 31.

14. La Russie avance à nouveau son argument de non-plausibilité, en s'appuyant d'ailleurs sur l'ordonnance que je viens de citer, comme si cette dernière, qui a considéré la compétence *prima facie* établie, posait une sorte de présomption d'absence de compétence[25]. C'est une curiosité… et au-delà de cette curiosité, la prétendue exception de non-plausibilité russe repose également sur deux graves erreurs de droit.

15. *En premier lieu*, il ne saurait être question pour la Cour d'évaluer la plausibilité des faits allégués par le demandeur en vue de décider à titre préliminaire de sa compétence *ratione materiae*.

16. ***Je sais*** bien que cette barre n'est pas le lieu opportun pour plaider de profondes banalités, mais la Russie me contraint de rappeler, Monsieur le président, Mesdames et Messieurs les juges, que les faits se décident au stade du fond. Lorsqu'une exception d'incompétence *ratione materiae* est soulevée — exception devenue très à la mode depuis l'affaire des *Plates-formes pétrolières*, la tâche de la Cour est seulement de rechercher si les actes dont le demandeur tire grief entrent dans les prévisions de la convention sur laquelle les demandes sont fondées. Pour ce faire, la Cour se borne, et je reprends ici les termes d'une opinion souvent citée, à «accept[er] provisoirement que les faits allégués [par le demandeur] sont vrais»[26], afin d'établir si ces faits «peuvent s'appliquer à une violation d'une disposition déterminée», sans se demander s'ils «sont avérés» ou «s'ils constituent vraiment une violation»[27]. A ce stade, il n'y a pas d'évaluation de la «plausibilité» des faits allégués, tout au contraire puisque la Cour les accepte provisoirement comme établis. M[e] Cheek reviendra dans un instant sur ce point.

17. Par contraste, dans le contexte très particulier des mesures conservatoires, la Cour est conduite à se «livr[er] à un contrôle [] restreint, de l'apparence de bon droit attribuable à la partie demanderesse»[28]. Mais la raison en est que les mesures conservatoires «interfèr[ent] nécessairement avec les droits souverains du défendeur, dont elle[s] limite[nt] l'exercice»[29], et

---

[25] EPR, par. 21 et 30.

[26] *Plates-formes pétrolières (République islamique d'Iran c. Etats-Unis d'Amérique), exception préliminaire, arrêt, C.I.J. Recueil 1996 (II)*, opinion individuelle de Mme la juge Higgins, p. 856, par. 32.

[27] *Plates-formes pétrolières (République islamique d'Iran c. Etats-Unis d'Amérique), demande reconventionnelle, ordonnance du 10 mars 1998, C.I.J. Recueil 1998*, opinion individuelle de Mme la juge Higgins, p. 219.

[28] *Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), mesures conservatoires, ordonnance du 13 juillet 2006, C.I.J. Recueil 2006*, opinion individuelle de M. le juge Abraham, p. 140, par. 9.

[29] *Ibid*., p. 139, par. 6.

qu'en conséquence il ne serait pas raisonnable que la Cour prenne de telles mesures sans s'être, au préalable, assurée que les allégations du demandeur paraissent plausibles *prima facie*. C'est donc parce que les mesures conservatoires sont obligatoires et qu'elles limitent la souveraineté du défendeur, que la Cour n'applique pas, lorsqu'elle officie comme juge de l'urgence, de «séparation tranchée entre les questions de fond et celles relatives à la protection provisoire»[30], et porte un regard sur «l'apparence de bon droit»[31].

18. Mais tel n'est pas le cas, n'en déplaise à M[e] Wordsworth[32], lorsqu'est soulevée une exception préliminaire d'incompétence, où la séparation entre les questions de fond et les questions de compétence demeure «tranchée», puisque, d'une part, la procédure sur le fond est suspendue[33], et, d'autre part, l'arrêt de la Cour se disant compétente n'affecte en rien les droits souverains du défendeur. Tout au contraire : dès lors que la compétence de la Cour est par définition fondée sur le consentement des Etats, lorsqu'elle se déclare compétente, la Cour ne fait rien d'autre que prendre acte de la volonté souveraine des Etats en litige.

19. ***Ceci rappelé***, la théorie russe selon laquelle il conviendrait d'évaluer dès à présent la plausibilité factuelle des infractions à l'interdiction du financement du terrorisme revient à demander à la Cour de trancher immédiatement des questions de fond, ce qu'elle ne peut pas faire au stade des exceptions préliminaires d'incompétence. De la présentation de M[e] Wordsworth d'hier[34], il ressort qu'aucune jurisprudence mentionnée ne valide cette thèse. Et pour cause : la Cour ne s'est jamais engagée dans une telle voie ; et il serait fâcheux qu'elle y songea, car cela porterait un grave dommage à l'intégrité du processus judiciaire et ferait injure au principe de bonne administration de la justice auquel la Cour attribue à très juste titre une importance capitale. Les faits se discutent au fond, au moment où les articles 57, 63, 65, entre autres, du règlement de procédure entrent en jeu.

---

[30] *Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), mesures conservatoires, ordonnance du 13 juillet 2006, C.I.J. Recueil 2006*, opinion individuelle de M. le juge Abraham, p. 140, par. 8.

[31] *Ibid.*, par. 9.

[32] CR 2019/9, p. 25, par. 21 (Wordsworth).

[33] Article 79, paragraphe 5, du Règlement de la Cour.

[34] CR 2019/9, p. 22-24, par. 13–20 (Wordsworth).

20. En l'espèce :

— la réalité ou non des infractions dont la Russie a plaidé hier, par l'intermédiaire de M[e] Wordsworth et du professeur Forteau qu'elles ne sont pas prouvées, est une pure question d'établissement des faits ;

— les Parties s'opposent manifestement sur l'existence de ces faits ;

— c'est donc au stade du fond, et au stade du fond seulement, que la Cour pourra décider de la réalité ou non de ces faits.

21. Comme l'a dit la Cour dans l'affaire du *Génocide*, et j'adapte les mots de la Cour au cas d'espèce — je prie la Cour de m'en excuser :

> «Pour ce qui est de la question de savoir si [il y a eu des faits de financement du terrorisme], la Cour se bornera à constater que les Parties soutiennent à cet égard des points de vue radicalement opposés et qu'elle ne saurait, à ce stade de la procédure, trancher cette question, qui relève clairement du fond.»[35]

22. *J'en viens à la seconde erreur de droit* commise par la Russie. Je rappelle que l'exception de non-plausibilité avancée par la Russie postule que la Cour devrait, à ce stade, interpréter l'article 2 de la convention. Mais dès lors que la Russie et l'Ukraine sont en désaccord profond sur le sens et la portée de cet article, il y a incontestablement un différend au sens de l'article 24 de la convention, et on voit mal comment la Cour pourrait à la fois se déclarer incompétente pour trancher un différend, et en même temps le trancher[36].

23. D'autant plus, Monsieur le président, Mesdames et Messieurs de la Cour, que l'Ukraine ne fait pas grief à la Russie d'avoir violé l'article 2 de la convention. Le différend relatif à son interprétation n'a donc pas à être tranché à ce stade puisque lorsque la compétence *ratione materiae* est contestée à titre préliminaire, la tâche de la Cour est seulement de vérifier si les griefs *allégués* entrent dans les prévisions de la convention. Il n'y a pas lieu de vérifier si des griefs qui ne sont pas allégués entrent dans lesdites prévisions.

---

[35] *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Yougoslavie), exceptions préliminaires, arrêt, C.I.J. Recueil 1996 (II)*, p. 615, par. 31.

[36] *Ibid.*, p. 616-617, par. 33.

B. L'exception relative à l'impossibilité d'engager la responsabilité de la Russie pour financement du terrorisme

24. Selon la deuxième branche de l'exception d'incompétence *ratione materiae*, la convention ne permettrait pas de mettre en cause la responsabilité de la Russie elle-même pour financement du terrorisme.

25. *Bis repetita*, c'est là encore un argument entendu, et sèchement rejeté, au stade des mesures conservatoires, comme sans pertinence pour la détermination de la compétence *ratione materiae* de la Cour. L'ordonnance indique :

> «A l'audience, la question … a été soulevée … de savoir si les actes de financement d'activités terroristes par l'Etat lui-même entraient dans le champ d'application de la CIRFT. Aux fins de déterminer s'il existe un différend concernant la convention, la Cour n'a pas à se prononcer de quelque façon que ce soit sur ces questions.»[37]

26. Il n'y a aucune raison que la Cour revienne sur cette ferme position, d'autant que l'Ukraine ne demande pas l'engagement de la responsabilité de la Russie pour violation de son obligation de ne pas financer le terrorisme en Ukraine. L'Ukraine ne reconnaît pas pour autant, contrairement à ce que le professeur Zimmermann croit comprendre[38], que la convention ne s'applique pas au financement du terrorisme par un Etat, mais elle a simplement décidé de concentrer ses demandes dans le cadre de la présente instance sur les violations de la convention dont j'ai rappelé la substance dans la première partie de ma plaidoirie.

C. L'exception préliminaire d'incompétence relative aux agents publics

27. Monsieur le président, Mesdames et Messieurs de la Cour, j'en viens à la troisième branche de l'exception préliminaire d'incompétence, relative aux seuls agents publics, laissant donc incontestée la compétence de la Cour pour ce qui touche aux personnes privées et aux personnes morales. La Russie prétend que l'article 2 de la convention ne viserait que les infractions de financement du terrorisme commis par des personnes privées, et demande donc à la Cour de se juger incompétente pour ce qui est des allégations ukrainiennes ayant rapport au financement du terrorisme par des agents publics[39]. Le professeur Zimmermann y est longuement revenu hier[40].

---

[37] *Application de la convention internationale pour la répression du financement du terrorisme et de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Ukraine c. Fédération de Russie), mesures conservatoires, ordonnance du 19 avril 2017, C.I.J. Recueil 2017*, p. 118, par. 31.

[38] CR 2019/9, p. 37, par. 5 ; p. 38, par. 14 ; et p. 39, par. 17 (Zimmermann).

[39] EPR, par. 212.

28. Cette exception repose sur la thèse erronée selon laquelle l'article 18 de la convention n'obligerait pas les Parties à coopérer pour prévenir le financement du terrorisme effectué par des personnes agissant en qualité d'agents publics.

29. Trois observations s'imposent ici.

1. Sur la nature de la thèse russe

30. *La première* porte sur la nature de cette thèse. A vrai dire, il est douteux qu'elle soit une exception préliminaire ou exclusivement préliminaire d'incompétence. A supposer même que la convention fasse une exception pour ce qui concerne le financement du terrorisme par des personnes agissant comme agents publics — *quod non*, la qualification d'une personne comme agissant en qualité d'agent public ou à titre privé nécessite d'évaluer les faits. Ce sont donc, pour chaque cas de financement du terrorisme, des questions qui relèvent du fond et qui devront être traitées, si elles doivent être traitées, au fond.

31. Au surplus, la thèse russe revient, en substance, à prétendre que la convention *exclut* de la compétence de la Cour les griefs relatifs au défaut de prévention d'actes de financement du terrorisme lorsqu'ils sont imputables à des personnes agissant comme agents ou personnels de l'Etat. Or, la convention ne prévoit aucune exclusion de cette nature. L'argument avancé par la Russie est donc au mieux une défense au fond visant à faire valoir l'absence d'illicéité de certains faits à raison des circonstances dans lesquelles ils se sont produits.

32. La Cour a déjà été confrontée à un argument du même ordre dans l'affaire des *Plates-formes pétrolières*, et plus récemment dans l'affaire de *Certains actifs iraniens*. Les Etats-Unis faisaient valoir que la Cour ne pouvait connaître de certains griefs parce qu'ils se rapportaient, selon le défendeur, à des matières visées par l'article XX du traité d'amitié et de commerce, lequel article dispose que le traité ne fait pas obstacle à l'adoption de certaines mesures. La Cour a observé que le traité ne contient aucune disposition excluant expressément certaines matières de sa compétence, et a conclu que l'exception américaine relevait d'une défense au fond[41]. Il en va de même ici : la convention n'exclut aucunement la compétence de la Cour lorsque le

---

[40] CR 2019/9, p. 36–46, par. 1-57 (Zimmermann).

[41] *Certains actifs iraniens (République islamique d'Iran c. Etats-Unis d'Amérique), exceptions préliminaires, arrêt du 13 février 2019*, par. 45–47.

différend fait référence à des faits impliquant des personnes qui sont agents publics, de sorte que l'exception qui s'y rapporte est, au mieux, une défense au fond, qui ne peut être débattue qu'au stade du fond.

2. Sur les termes «toute personne»

33. *Ma deuxième observation* porte sur les termes «toute personne» apparaissant dans l'article 2, paragraphe 1, de la convention.

34. La Russie voudrait que les termes «toute personne» — «any person» en anglais, signifient : «toute personne privée»[42]. Mais les mots du texte sont limpides : «Toute personne» signifie «*toute* personne», quel que soit l'emploi que cette personne occupe.

35. Je rappelle au demeurant que l'objet et le but de la convention, tels qu'ils sont clairement exposés dans son préambule, sont d'adopter des «mesures efficaces destinées à prévenir le financement du terrorisme ainsi qu'à le réprimer en poursuivant et punissant les auteurs». Ceci ne suggère aucunement que seul le financement du terrorisme par certaines personnes, les personnes privées, serait visé, mais tout au contraire que tout «auteur[illegible]» d'un tel financement doit faire l'objet d'une répression. C'est, selon le préambule, le «financement du terrorisme» qui est un «sujet qui préoccupe gravement la communauté internationale tout entière», et cette préoccupation ne se limite évidemment pas aux financements procurés par certaines personnes seulement.

36. Le contexte confirme qu'il n'y a pas lieu de s'écarter du sens ordinaire des termes «toute personne», comme l'Ukraine l'a déjà longuement démontré dans ses écritures auxquelles je me permets ***respectueusement*** de renvoyer[43].

37. J'y ajouterai trois éléments de contexte :

— premièrement, les paragraphes 4 et 5 de l'article 2 utilisent le terme «quiconque» comme synonyme de «toute personne» — quiconque se traduisant par «any person» dans la version anglaise. Or, le mot «quiconque», c'est-à-dire «qui que ce soit», ne saurait signifier *certaines* personnes seulement.

---

[42] EPR, par. 212.

[43] EEU, par. 142–144.

— deuxièmement, la convention pose expressément les limites de son champ d'application à son article 3 sans aucunement suggérer qu'elle ne s'applique pas aux agents publics et personnels de l'Etat.

— troisièmement, l'article 2 prévoit que «commet une infraction … toute personne qui … illicitement … fournit» un financement au terrorisme. Et, pour garantir que le financement du terrorisme ne soit pas «licite», l'article 4 requiert des Etats qu'ils prennent les mesures nécessaires pour «[é]riger en infraction pénale au regard de [leur] droit interne les infractions visées à l'article 2», et pour punir ces infractions de peines appropriées compte tenu de leur gravité. Si les agents publics étaient immunisés contre ces infractions, comme l'a prétendu la Russie hier à cette barre, ils pourraient financer le terrorisme sans violer le droit pénal, c'est-à-dire de manière licite. Au-delà de l'absurdité d'un tel résultat, la Cour voudra bien noter qu'à Moscou la Russie postule l'inverse de ce qu'elle allègue ici à La Haye. L'article 205, de son code pénal stipule en effet :

> «1. … financing of terrorism shall be punished by imprisonment for a term of five to ten years, with a fine of up to five hundred thousand rubles, or in the amount of the wage or other income of the convicted person for a period of up to three years …»
>
> 2. The same acts committed by a person using his official position shall be punishable by imprisonment for a term of eight to fifteen years with a fine in the amount of five hundred thousand to one million rubles, or in the amount of the wage or other income of the convicted person for a period of three to five years.»[44]

38. Il est inutile de commenter davantage. Les travaux préparatoires ne nécessitent pas d'y revenir, ils ont été suffisamment abordés dans les écritures. Quant à la pratique consacrée dans d'autres traités, elle converge sur l'évidence que «toute personne» veut dire «toute personne», sans aucunement exclure les agents publics ou personnels de l'Etat.

39. Par exemple, le principe V des Principes du droit international consacrés par le Statut du Tribunal de Nuremberg et dans le jugement de ce Tribunal vise toute personne, y compris bien évidemment les agents publics, lorsqu'il indique : «Toute personne accusée d'un crime de droit

[44] Code pénal de la Fédération de Russie, art. 205, MU, annexe 874.

international a droit à un procès équitable, tant en ce qui concerne les faits qu'en ce qui concerne le droit.»[45]

40. Autre exemple significatif, durant les débats qui se sont tenus dans le cadre de la rédaction de la convention pour la répression des actes illicites en matière de navigation maritime, alors que, comme on le voit maintenant à l'écran, dans le premier paragraphe, la délégation koweïtienne s'interrogeait sur le point de savoir si les termes «any person» «also applies to a person who commits an offence acting on behalf of a government», les autres délégations n'ont eu aucun doute sur le fait que, et je lis le second paragraphe — que vous voyez à l'écran : ««any person» without qualification … applied to any person whether such person was acting in his or her own, or on behalf of another person or entity»[46]. Ce qui visait naturellement les gouvernements.

41. La doctrine opine dans le même sens[47]. Du reste, Anthony Aust, qui avait représenté le Royaume-Uni durant les négociations de la convention, a contribué au sein du secrétariat du Commonwealth à la rédaction d'un guide très complet pour la mise en œuvre des conventions antiterroristes dont l'objet est d'aider les Etats à adhérer à ces conventions. Dans ce document, il est constaté, comme on le voit maintenant à l'écran : «As in the other conventions, [any person] means any natural person, whether acting in a private or public or governmental capacity.»[48]

42. La conclusion est, j'en conviens, fort simple pour un débat si long. Elle est que «toute personne» signifie «toute personne», ou «quiconque». Et ceci n'exclut nullement les agents publics ou les personnels de l'Etat, quoi qu'en dise le professeur Zimmermann, qui a d'ailleurs parlé de beaucoup de choses, mais si peu de la convention, qui est pourtant la seule qui nous intéresse ici.

---

[45] Principes du droit international consacrés par le Statut du Tribunal de Nuremberg et dans le jugement de ce Tribunal, *Annuaire de la Commission du droit international*, 1950, vol. II, consultable à l'adresse : http://legal.un.org/ilc/texts/instruments/french/draft_articles/7_1_1950.pdf.

[46] Organisation maritime internationale (OMI), Report of the *Ad Hoc* Preparatory Committee on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, document PCUA 2/5 (18–22 mai 1987), p. 12, par. 66 ; EEU, annexe 9.

[47] EEU, par. 130.

[48] Secrétariat du Commonwealth, Implementation Kits for the International Counter-Terrorism Conventions, p. 268, par. 9, consultable à l'adresse : http://thecommonwealth.org/sites/default/files/key_reform_pdfs/Implementation%20Kits%20for%20Terrorism%20Conventions_0.pdf.

3. Sur la distinction entre obligation de ne pas faire et obligation de prévenir

43. Ma *troisième* et dernière *observation* porte sur la distinction entre obligation de prévenir et obligation de ne pas faire. Monsieur le président, Mesdames et Messieurs de la Cour, il est tout d'abord inexact que la distinction entre, d'une part, l'obligation d'un Etat de coopérer en vue de prévenir le financement du terrorisme en application de l'article 18 de la convention et, d'autre part, son obligation de ne pas commettre de tels actes, conduise nécessairement à devoir exclure de la première catégorie toute obligation de prévention s'agissant des actes commis par des agents ou personnels de l'Etat, pour la raison qu'ils seraient «couverts» par l'obligation de ne pas commettre pesant sur l'Etat[49].

44. En l'espèce, l'obligation posée par l'article 18 de la convention de coopérer pour prévenir par tous moyens disponibles la commission par des agents publics de certains «actes criminels» de financement du terrorisme — «actes criminels», je reprends ici la qualification qu'en donne l'article 6 de la convention —, qui sont *des infractions en regard du droit interne* — ce sont les termes de l'article 4, alinéa *a)* de la convention —, est différente de l'obligation de l'Etat de ne pas commettre des actes de financement du terrorisme *contraires au droit international*. La première obligation, de moyens, nécessite une *action de prévention* pour éviter la commission d'un crime de droit commun ; la seconde obligation, qui est une obligation de résultat, impose *une abstention* de commettre un acte internationalement illicite.

45. Ce sont deux obligations différentes dont la violation entraîne deux types différents de responsabilité internationale : d'une part, la responsabilité pour ne pas avoir fait preuve de la diligence requise pour prévenir des crimes de droit interne ; d'autre part, la responsabilité pour avoir commis des actes illicites en droit international. Or, c'est la responsabilité de la Russie au titre de son obligation de prévention que l'Ukraine met en cause en la présente espèce, en référence à l'article 18 de la convention.

46. Monsieur le président, Mesdames et Messieurs les juges, pour conclure, la compétence *ratione materiae* de la Cour pour régler le différend que l'Ukraine lui a soumis en application de l'article 24 de la convention ne fait aucun doute, et l'exception soulevée par la Russie sera ou bien

[49] CR 2019/9, p. 41, par. 28–32 (Zimmermann).

rejetée comme sans pertinence, ou bien renvoyée au fond comme n'ayant pas un caractère exclusivement préliminaire.

47. Je vous remercie ***de m***'avoir patiemment écouté et vous demande maintenant, Monsieur le président, de bien vouloir appeler à la barre M[e] Marney Cheek.

Le PRESIDENT : Je remercie le professeur Thouvenin. J'invite à présent Mme Marney Cheek à prendre la parole. Vous avez la parole, Madame.

Ms CHEEK:

THE OFFENCE OF THE FINANCING OF TERRORISM UNDER ICSFT ARTICLE 2

I. The interpretation of ICSFT Article 2 is not properly before the Court

1. Mr. President, Members of the Court, it is an honour and a privilege to appear before you today representing Ukraine. I will address the Russian Federation's arguments under Article 2 of the ICSFT, and, given Russia's novel challenge to what it calls the "plausibility" of Ukraine's allegations of terrorism financing, I will briefly review Ukraine's evidence substantiating those allegations.

2. Let me first provide the Court with the proper frame of reference for approaching Russia's arguments related to Article 2.

3. Professor Thouvenin has outlined Ukraine's claims that Russia violated Articles 8, 9, 10, 12 and 18 of the Convention. As Professor Thouvenin also noted, those Articles make reference to offences — or alleged offences — as defined in Article 2 of the Convention. It is not appropriate to interpret ICSFT Article 2 at the preliminary objections stage of these proceedings for at least two independent reasons.

4. The first reason, as articulated by Professor Thouvenin, is that Ukraine does not engage Russia's responsibility under Article 2. Therefore, whether an offence of terrorism financing as defined in Article 2 has been committed or alleged, is a subsidiary issue to be addressed at the merits stage when determining whether Russia has violated Articles 8, 9, 10, 12 and 18 of the Convention.

5. Second, if Russia's preliminary objections related to the scope of Article 2 are not rejected because they present a question for the merits, it would be proper for the Court to determine, pursuant to Article 79 (9) of the Rules of Court, that Russia's Article 2-related objections do "not possess, in the circumstances of [this] case, an exclusively preliminary character"[50].

6. Reaching the question of what constitutes a terrorism financing offence under Article 2 would prematurely determine some elements of this dispute on the merits[51]. As the Court recently stated in *Certain Iranian Assets* and as is equally true here, the Court "does not have before it all of the facts necessary" to determine the questions posed to it[52]. One need only look at Russia's written pleadings and Mr. Wordsworth's presentation of yesterday to see that interpretation of Article 2 is intertwined with the merits of the dispute.

7. The Russian Federation, for example, has submitted a 20-page appendix to their pleadings, solely devoted to disputing issues related to various incidents of the shelling of civilians under Article 2 (1) *(b)* of the Convention. But the question of whether there were allegations of Article 2 terrorism financing offences at the time Ukraine sought assistance and co-operation from Russia under the Treaty, is intertwined with the merits question of whether Russia has breached its obligations to identify and seize funds (Article 8), to investigate (Article 9), to prosecute (Article 10), to provide assistance (Article 12) and to take all practicable measures to prevent the financing of terrorism (Article 18).

8. Therefore, whether the Court recognizes that it need not reach Article 2 because (1) Ukraine does not engage Russia's responsibility under Article 2 and so it is a subsidiary question properly left for the merits, or (2) the Court recognizes that questions related to Article 2 are not of an exclusively preliminary character, on either ground the Court should decline Russia's invitation at this preliminary objections phase of the proceedings both to decide the scope of Article 2 and to weigh the evidence related to it.

---

[50] Rules of Court, Art. 79 (9).

[51] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 852, para. 51; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 28–29, para. 50.

[52] *Certain Iranian Assets (Islamic Republic of Iran* v. *United Statements of America), Preliminary Objections, Judgment of 13 February 2019*, para. 97.

9. Nevertheless, I will spend the remainder of my time on these two topics. For the avoidance of doubt, that is not because Ukraine accepts that the interpretation of Article 2 is a preliminary question, but, rather, because Russia has spent considerable time on these interpretive issues. I also will address the inaccurate and incomplete factual assertions that Russia has presented to the Court in an unprecedented attempt to have the Court pass judgment on the merits of Ukraine's case at the preliminary objections phase of the proceedings.

10. As Judge Higgins noted in *Oil Platforms*, and to which Professor Thouvenin referred, at this preliminary objections phase of the proceedings, as the Applicant, the facts alleged by Ukraine are accepted to be true[53]. Despite Mr. Wordsworth's commentary yesterday, that should be uncontroversial. Ukraine does not simply label acts as terrorist acts, but Ukraine has alleged sufficient facts through hundreds of annexes to meet the elements of an offence of terrorism financing under Article 2.

11. As I discuss the interpretation of the elements of Article 2, I respectfully urge the Court to consider the following: under Ukraine's correct interpretation of Article 2, but, indeed, even under Russia's incorrect, restrictive reading of that provision, Ukraine has pled facts sufficient to establish terrorism financing offences under Article 2 of the Convention. An example of that evidence is at tab 10 of the judges' folder[54].

12. To be clear, it would be an affront to the proper administration of justice to accept Russia's unorthodox and undisciplined invitation at this jurisdictional phase of the proceedings to weigh the evidence of terrorism financing offences submitted to the Court. The full merits record is not before you, for good reason: the Court is to determine issues of a preliminary character when entertaining preliminary objections. Yet should the Court set aside its prior, long-standing practice

---

[53] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, separate opinion of Judge Higgins, p. 856, para. 32.

[54] See, e.g. Excerpts of Memorial and Annexes on the Mariupol Shelling Attack (MU, paras. 90-94, 97-99, 160-61, 236-44; Donetsk Region Main Directorate of the Ministry of Internal Affairs of Ukraine, All Necessary Measures Being Taken to Deal with the Consequences of Militants' Shelling of Mariupol, 25 Jan 2015, (MU, Ann. 91); Expert Report of Lieutenant General Christopher Brown, 5 June 2018, paras. 48-49, 58 (MU, Ann. 11); Ministry of Interior of Ukraine, Main Department of the National Guard of Ukraine Letter No. 27/6/2-3553 to the Ministry of Foreign Affairs of Ukraine, 31 May 2018 (MU, Ann. 183); Intercepted Conversation between Evdotiy ("Pepel") and Ponomarenko ("Terrorist") (18:00:22, 23 Jan. 2015) (MU, Ann. 418); Intercepted Conversation between Kirsanov and Ponomarenko ("Terrorist") (11:04:12, 24 Jan. 2015) (Ukraine's Memorial, Ann. 415); Viktoria Savitskaya, *Mariupol Recovers after Shelling*, LB.ua, 24 Jan. 2015 (MU, Ann. 556); Witness Statement of Igor Evhenovych Yanovskyi, 31 May 2018 (MU, Ann. 5); Intercepted Conversations of Maxim Vlasov, 23–24 Jan. 2015, pp. 1-8, 17-18 (MU, Ann. 408)); judges' folder, tab 10.

and instead merge preliminary and merits questions in a single proceeding, the Court will be compelled to conclude that on the complete record before it Ukraine has demonstrated that there were Article 2 offences committed or alleged at the time Russia's responsibility was engaged under Articles 8, 9, 10, 12 and 18 of the Convention.

II. The proper interpretation of ICSFT Article 2

13. I will now turn to the interpretation of Article 2 of the ICSFT, which defines the offence of financing terrorism.

14. Article 2 of the Convention has two core elements. First, Article 2 (1) requires that a financier have knowledge that funds provided will be used to commit terrorist acts. Second, Articles 2 (1) *(a)* and *(b)* define the relevant terrorist acts themselves. This second element covers a broad range of terrorist acts. It includes offences under nine treaties referenced in Article 2 (1) *(a)*, two of which are relevant here. But the parties to the Convention found that insufficient. They therefore included a general definition of terrorist acts in Article 2 (1) *(b)*.

A. The financier's knowledge under ICSFT Article 2 (1)

15. I will start with the first element of Article 2, the financier's knowledge. Article 2 (1) provides that any person commits a terrorism financing offence if that person provides funds "in the knowledge that they are to be used, in full or in part, in order to carry out" acts of terrorism.

16. What is the knowledge required of the financier of terrorism? A financier must have knowledge that the funds to be provided are used, in full or in part, to carry out terrorist acts. That requirement is satisfied if the financier is aware that he is providing funds to a group that commits acts of terrorism.

17. Mr. Wordsworth argued yesterday that the financier needs to know that particular funds will be used for a particular terrorist act. But money and weapons are inherently fungible. Groups that commit terrorist acts are unlikely to make it clear to an outsider, a financier, exactly how the funds provided will be used. Requiring certainty as to the end use of the funds therefore would undermine the object and purpose of the Convention by making only a small fraction of terrorist financing subject to the Convention's obligations.

18. The Convention also recognizes that groups that engage in terrorist acts often engage in other, non-terrorist activities. The preamble notes that groups engaged in terrorist acts often "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"[55].

19. There is overwhelming support among the international community and the State parties to the ICSFT for this approach. The United Nations Office on Drugs and Crime, for example, interprets Article 2 to cover any provision of funds to an organization known to "carr[y] on both legitimate social programmes and bomb attacks"[56]. That document is at tab 11 of the judges' folder. The courts of State parties to the ICSFT also have interpreted the knowledge requirement of Article 2 (1) the same way that Ukraine does[57]. Excerpts of some of those cases are at tab 12 of the judges' folder.

20. Russia does not appear to contest that a financier of terrorism under Article 2 (1) may fund groups that engage in both terrorist and non-terrorist activities. Yet Russia seeks to restrict terrorism financing to the knowing provision of funds to groups "designated by the UN Security Council" or "multiple States" as terrorists[58]. But that position is without support.

21. Nothing in the text of Article 2 (1) suggests that designation would be the only possible way to which a financier may have knowledge of a group's terrorist activities. Indeed, designation of terrorist groups became common practice only after 11 September 2001, two years after the conclusion of the ICSFT[59]. Designation, moreover, can be political, and controversial. The ICSFT, in contrast, establishes an objective standard focused not on the terrorist group, but on the act itself.

22. The practical implications of Russia's position also illustrate why it could not possibly be correct. If designation were the only way to establish that a group is known to engage in terrorism, that would mean that a financier could freely fund groups — even if it is widely known that that

---

[55] ICSFT, preamble.

[56] UNODC, Legislative Guide to the Universal Legal Regime Against Terrorism (2008), p. 30; MU, Ann. 285; judges folder, tab 11.

[57] "Fighters and Lovers Case", Case 399/2008, Supreme Court of Denmark, 25 March 2009; MU, Ann. 476, judges folder, tab 12; *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; MU, Ann. 474, judges folder, tab 12.

[58] PORF, pp. 25-26, paras. 54–55.

[59] See United Nations Security Council resolution 1373, UN doc. S/RES/1373, 28 Sept. 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 (WSU), Ann. 86).

group engages in terrorist acts — so long as that group has not been designated. A Convention designed to suppress terrorism financing cannot possibly be interpreted to permit that absurd result.

23. Before moving on to the second element of Article 2, it is worth observing that despite making extensive factual arguments on other topics, Russia does not address the evidence presented by Ukraine demonstrating that Russian persons financing the DPR, LPR, and other perpetrators in Ukraine had knowledge of those groups' terrorist activities. Ukraine has brought forward ample evidence that Russian officials and other Russian nationals who financed terrorism possessed the knowledge required by Article 2 (1)[60].

B. Commission of a covered terrorist act by the recipient of the financing

24. I will now turn to the second element of Article 2, the definition of a terrorist act. Russia devotes most of its arguments to this issue. Again, it is worth underscoring that the focus of the provision is not on the nature of the groups that commit these acts, or whether who commits a terrorist act has been designated as a terrorist organization. Nor do Articles 2 (1) *(a)* and *(b)* provide a universal definition of "terrorism". Instead, those Articles 2 (1) *(a)* and *(b)* define the acts of terrorism that may not be knowingly financed.

25. Article 2's definition of terrorist acts is broad and comprehensive. First, the ICSFT acknowledges in Article 2 (1) *(a)* that there are nine separate treaties that define relevant terrorist acts. And two of those treaties, the Montreal Convention and the Bombings Convention, are relevant to Ukraine's claims. But the ICSFT does not only look to those enumerated treaties. Rather, Article 2 (1) *(b)* of the Convention also includes a comprehensive definition of terrorist acts, meant to capture activity that goes beyond the enumerated treaty offences in Article 2 (1) *(a)*.

26. I will start with this general definition of terrorist acts under Article 2 (1) *(b)*. And I will then turn to the two treaty offences incorporated through Article 2 (1) *(a)* that are relevant to Ukraine's claims.

[60] See, e.g. MU, pp. 175-179, paras. 285-294.

1. Terrorist acts covered by ICSFT Article 2 (1) *(b)*

27. Article 2 (1) *(b)* covers, for example, the acts of torture and killing of civilians by the DPR and LPR, as well as those groups' shellings of civilian targets.

28. Covered acts of terrorism under Article 2 (1) *(b)* have two elements.

29. The first element of Article 2 (1) *(b)* is an "act intended to cause death or serious bodily injury to a civilian, or to any . . . person not taking an active part in the hostilities in a situation of armed conflict".

30. I would like to focus on the phrase "act intended to cause". The phrase "act intended to cause", based on its ordinary meaning, is an objective statement, referring to the ordinary consequences of an act. Contrary to what Mr. Wordsworth said yesterday, it does not speak to intention. The phrase "act intended to cause" is not a "mental element"[61]. "Acts" do not have mental states.

31. In French, for example, Article 2 (1) *(b)* speaks of "*acte destiné à*", referring to the natural destination of the act. This is in contrast to "*l'intention*" used to describe the intention of the financier in the Article 2 (1) chapeau.

32. The Russian text is also instructive. Article 2 (1) *(b)* uses the Russian word направленного (*napravlennogo*), which translates as "aimed at" or "directed at"[62]. That is distinct from the word умышленно (*umyshlenno*), which translates as "intentionally" and is the word used in the Article 2 (1) chapeau[63].

33. But even if an "act intended to cause" was treated as a mental element as Russia argues, the word "intended" would have to be given its ordinary meaning consistent with its usage in international law and practice, not the specialized intent standard used in the Genocide Convention, as Mr. Wordsworth argued yesterday[64]. In international law and across domestic legal systems, the concept of "intent", or *dolus*, encompasses varying degrees of intent, ranging from *dolus directus*, to *dolus indirectus*, to *dolus eventualis*. As Ukraine catalogued in its written pleadings, a series of

---

[61] PORF, p. 9, para. 23.

[62] ICSFT, Art. 2 (1) (authentic Russian text). See also Lingvo Universal Russian-to-English Dictionary, направлять (software ed., 2018); WSU, Ann. 88.

[63] ICSFT, Art. 2 (1) (authentic Russian text). See also Lingvo Universal Russian-to-English Dictionary, умышленно (software ed., 2018); WSU, Ann. 89.

[64] See *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999 (II)*, pp. 1062-1063, para. 27.

international law authorities recognize these different degrees of intent[65]. And Russia's assertion that Article 2 (1) *(b)* refers only to direct intent is unconvincing.

34. Indeed, as reflected on the screen, Russia's own Criminal Code reflects an understanding of intent as encompassing both direct and indirect intent. Article 25 of the Russian Criminal Code provides that "[a]n act committed with direct or indirect intent shall be recognized as a crime committed intentionally" and 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"[66]. That provision is also at tab 13 of the judges' folder.

35. Let's move to the second element of Article 2 (1) *(b)* and that 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".

36. Russia and Ukraine agree on two important points about this element of Article 2 (1) *(b)*: first, that it was included in order to distinguish terrorism from "ordinary crimes" and, second, that the phrase "nature or context" means purpose can be inferred from the circumstances.

37. Beyond this, however, Russia makes several different arguments, the only uniting theme of which is that they seem intended to make this second element virtually impossible to satisfy. And I will respond to a few of those arguments here.

38. Russia resists, for example, the inference that an attack on a civilian area has a purpose to intimidate[67]. Such an inference, however, has substantial support. The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, in interpreting the war crime of terror in the *Milošević* case, has inferred a purpose to spread terror from "both the actual infliction of terror

---

[65] See, e.g. WSU, paras. 229, 231-233; *Prosecutor* v. *Stakić*, ICTY Case No. IT-97-24-T, Trial Chamber II Judgment, 31 July 2003, paras. 585–587; *Prosecutor* v. *Kayishema & Ruzindana*, Case No. ICTR-95-1-T, Trial Chamber II Judgment, 21 May 1999, para. 139; Rome Statute of the International Criminal Court, 17 July 1998, UN doc. A/CONF.183/9, Art. 30 (2) *(b)*; 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 (MU, Ann. 486); Roberto Lavalle, "The International Convention for the Suppression of the Financing of Terrorism", 60 ZaöRV 491, 499 (MU, Ann. 484); Glanville Williams, "Oblique Intention", *Cambridge Law Journal*, Vol. 46 (1987), p. 421 (WSU, Ann. 68).

[66] Criminal Code of the Russian Federation, Art. 25 (WSU, Ann. 51); judges' folder, tab 13.

[67] PORF, pp. 41-42, para. 83.

and the indiscriminate nature of the attack"[68]. And that is at tab 14 of the judges' folder. Russia quoted the Trial Chamber in the *Milošević* case yesterday for the proposition that only sustained shelling campaigns can be considered those with a purpose to intimidate. That is not so. Neither chamber in *Milošević* found that a sustained shelling campaign was the only way to demonstrate a purpose to intimidate.

39. Russia also wants the Court to look at each act of terror highlighted by Ukraine in isolation. But a group's past actions committed with a purpose to intimidate civilians are relevant "context" under Article 2 (1) *(b)*[69]. As explained by Judge Shahabuddeen, while sitting on the International Criminal Tribunal for Rwanda, evidence of prior crimes "sets a particular allegation in its proper context"[70]. That is at tab 15 of the judges' folder.

40. In short, the Convention's definition of a covered terrorist act under Article 2 (1) *(b)* is comprehensive, not narrow, in scope.

2. Terrorist acts covered by ICSFT Article 2 (1) *(a)*: Montreal Convention

41. Let me now turn to the treaty offences incorporated into Article 2 pursuant to Article 2 (1) *(a)* of the Convention. I will focus on the Montreal Convention, which covers the DPR's notorious shoot-down of Flight MH17, and the Bombings Convention, which covers actions by the Kharkiv Partisans and others to bomb peaceful demonstrations and civilian gathering places and infrastructure in Ukraine.

42. An offence under Article 1 (1) *(b)* of the Montreal Convention is found where a person unlawfully and intentionally destroys an aircraft in service.

43. I note first that Russia has not addressed the unlawful requirement. There is no dispute that the DPR acted unlawfully when it fired at Flight MH17.

---

[68] *Prosecutor* v. *Milošević*, ICTY Case No. IT-98-29/1-A, Appeals Chamber Judgment, 12 Nov. 2009, para. 37 (judges' folder, tab 14); see also Report of the Detailed Findings of the Independent Commission of Inquiry Established Pursuant to Human Rights Council Resolution S-21/1, UN doc. No. A/HRC/29/CRP.4, 23 June 2015, para. 99; *Italy* v. *Abdelaziz and ors*, Final Appeal Judgment, No. 1072, 17 Guida al Diritto 90, Supreme Court of Cassation, Italy, 17 Jan. 2007, para. 4.1 (MU, Ann. 473).

[69] PORF, pp. 37-38, para. 77, pp. 55-56, para. 107.

[70] *Ngeze and Nahimana* v. *Prosecutor*, ICTR Case Nos. 97-27-AR72 and 96-11-AR72, Appeals Chamber Decision on the Interlocutory Appeals, 5 Sept. 2000, separate opinion of Judge Shahabuddeen, para. 21 (internal quotation marks and citations omitted); judges' folder, tab 15.

44. Russia's main argument is that the perpetrator of an offence under Article 1 (1) *(b)* of the Montreal Convention must intend not simply to destroy an aircraft in service, but must intend specifically to destroy a civilian aircraft[71].

45. However, the language of Article 1 (1) *(b)* of the Montreal Convention does not support Russia's view. The language of the Montreal Convention simply refers to a person who intentionally "destroys an aircraft in service". It does not include the word "civilian".

46. Rather, the civilian status of an aircraft is only relevant as a jurisdictional requirement. Article 4 (1) of the Montreal Convention addresses when the Convention applies, and when it does not. The Convention does not apply to aircraft used in military, customs or police services, but it does apply to civilian aircraft.

47. Finally, even if Russia's atextual interpretation were adopted and "civilian" read into the text of Article 1 (1) *(b)* of the Montreal Convention, the term "intentional" still has its normal meaning in international law. And this means that intent to destroy a civilian aircraft could be proved based on direct or indirect intent, just as the Russian Federation recognizes in its domestic criminal law, and not solely based on the direct intent standard that Russia is advocating for here.

3. Terrorist acts covered by ICSFT Article 2 (1) *(a)*: Bombings Convention

48. The second treaty incorporated through Article 2 (1) *(a)* that is relevant to Ukraine's claims is the Bombings Convention. Russia does not contest Ukraine's interpretation of the elements of the offence under this treaty[72]. It also does not dispute that the campaign of bombings targeting Kharkiv and other Ukrainian cities qualifies as offences under the Bombings Convention. I therefore will not spend any more time here.

III. Russia's inappropriate factual defences on the merits

49. Let me now turn to Russia's inappropriate request to this Court to assess the "plausibility" of Ukraine's evidence. There is no legal basis to engage in an exercise to determine the plausibility of Ukraine's evidence as a preliminary question at this stage of the proceedings.

---

[71] PORF, pp. 27-28, paras. 59-61.

[72] PORF, pp. 28-29, paras. 62-64.

50. However, it is worth noting that Russia claims that nothing has changed in the evidentiary record in this case since the provisional measures hearing. But it surely has not escaped the Court's attention that the record has changed in a material way. Ukraine's Memorial included hundreds of annexes, as well as fact witness and expert witness testimony in support of its contention that terrorist acts under Articles 2 (1) *(a)* and *(b)* of the Convention have been perpetrated on Ukrainian soil. The majority of this evidence was not before you on provisional measures.

51. To entertain Russia's request to weigh the factual record in this case related to the DPR and LPR's torture and killing of civilians, the shelling of civilian areas in Ukrainian cities, the shoot-down of Flight MH17, the bombings committed by the Kharkiv Partisans and other groups in Kharkiv, Kyiv and Odessa, in order to do so, the Court must weigh this voluminous body of evidence. To fail to do so would deny Ukraine the principled application of the law and the proper administration of justice that it seeks from the World Court. These questions of fact must therefore wait for the merits phase of this case, when the Court will hear from witnesses and experts and have the full record before it.

52. Indeed, in the limited time that I have left this morning, I cannot possibly go through all of Ukraine's evidence in an exhaustive fashion. Instead, I will walk the Court through several illustrative examples of Russia's false factual assertions that run throughout its pleadings, and how those assertions are flatly contradicted by the evidence already submitted to this Court by Ukraine. These examples also illustrate the nature of the disputed factual issues that would have to be resolved at this stage of the proceedings should the Court choose to abandon the long-held principle that Ukraine's factual allegations should be accepted as true at the preliminary objections phase of the case.

53. Let me also note that Russia's various allegations of shelling attacks or unlawful killings committed by the armed forces of Ukraine are adamantly denied by Ukraine. As these baseless factual allegations, however, are not relevant to Ukraine's claims here before you, I will not spend time addressing them this morning.

A. The DPR and LPR engaged in the torture and killing of civilians, including political opponents

54. As you will see on your screen, Russia contends that the DPR and LPR's torture and killing of civilians, including political opponents, were simply "ordinary crimes" which did not have the purpose to intimidate the population[73].

55. But the Office of the United Nations High Commissioner for Human Rights concluded precisely that: that these acts of torture and killings were an orchestrated "reign of intimidation and terror"[74] and "were additional means to terrorize the population"[75].

B. The DPR's repeated shelling attacks on Ukrainian cities

1. Volnovaka shelling attack

56. Let me now turn to the DPR's shelling attacks on the civilian population of Ukraine's cities. Russia asserts, quoting Ukraine's expert Lieutenant General Christopher Brown, that the shelling of a civilian checkpoint at Volnovakha might have had a military purpose because "the checkpoint could undoubtedly warn Ukrainian Armed Forces of any impending attack along the road to Volnovakha"[76].

57. But Russia quotes General Brown out of context. His actual conclusion was the opposite. General Brown concluded, based on all the circumstances, that he "[could] not identify any military justification for attacking the checkpoint"[77]. Excerpts of General Brown's Expert Report are at tab 17 in the judges' folder. A map of the Volnovakha shelling attack is on the screen and also at tab 18 of the judges' folder.

2. Mariupol shelling attack

58. Let me next turn to the shelling attack in Mariupol. Russia asserts that the DPR's real target in Mariupol was a checkpoint.

---

[73] PORF, p. 70, para. 125.

[74] MU, p. 26, para. 53 (emphasis added), citing OHCHR, Report on the Human Rights Situation in Ukraine, 15 July 2014, para. 26 (MU, Ann. 256).

[75] OHCHR, Report on the Human Rights Situation in Ukraine, 19 Sept. 2014, para. 16 (MU, Ann. 47).

[76] PORF, Table 3, pp. 265-266, quoting Expert Report of Lieutenant General Christopher Brown, 5 June 2018, para. 27 (hereinafter "Gen. Brown Report") (MU, Ann. 11).

[77] Gen. Brown Report, para. 27 (MU, Ann. 11; judges' folder, tab 17); see also *ibid.*, para. 38.

59. However, the evening before the attack, DPR members discussed wanting to "crush" the Vostochnyi neighbourhood of Mariupol[78]. The DPR shelled the Vostochnyi neighbourhood not once, but twice. The second time was at 11 a.m. — *after* civilians were killed in the first attack and *after* the intercept Mr. Wordsworth took you to yesterday[79]. And after that second attack which killed more civilians, the DPR celebrated that those in the Vostochnyi neighbourhood would be "more afraid"[80]. Mr. Wordsworth wants you to think this intercept simply references Ukrainian armed forces and not civilians. That is not correct. But his point, which Ukraine disputes, simply serves to highlight yet another example of a factual dispute that would have to be resolved at this stage of the proceedings that is more properly resolved at the merits. In any case, the real target was not a checkpoint. General Brown concluded that "[t]here was no apparent military advantage in attacking the northern checkpoint" identified by Russia[81]. A map showing the expected areas of impact if the northern checkpoint had in fact been targeted, shown against the actual areas of impact, is on the screen and also at tab 18 of the judges' folder.

3. Kramatorsk shelling attack

60. Regarding the Kramatorsk shelling attack, Russia claims that the residential neighbourhood in Kramatorsk was near a Ukrainian military building and that Ukraine did not mention this[82].

61. However, Ukraine squarely addressed this fact. Ukraine identified this building, which was a military recruitment office. General Brown noted that this same office and others did not "appear to have been taking an active part in hostilities", and thus General Brown concluded in his expert opinion that "[g]iven that [a] BM-30 would normally be used only when a target of strategic significance presented itself, its use against these minor installations in Kramatorsk would make no

---

[78] MU, para. 93, citing Witness Statement of Igor Evhenovych Yanovskyi, 31 May 2018, para. 16 (hereinafter "Yanovskyi Statement") (MU, Ann. 5); Intercepted Conversation Between Sergey Ponomarenko and Oleksandr Evdotiy, 23 Jan. 2015 (MU, Ann. 418).

[79] MU, para. 94, citing Yanovskyi Statement, para. 13 (MU, Ann. 5).

[80] *Ibid.*, para. 99, citing Intercepted Conversation between Valeriy Kirsanov and Sergey Ponomarenko, 24 Jan. 2015 (emphasis added) (MU, Ann. 415); Statement of Authentication, Volodymyr Piven, Senior Investigator, Main Investigation Office, Security Service of Ukraine, 5 June 2018 (MU, Ann. 185).

[81] Gen. Brown Report, para. 58 (MU, Ann. 11; judges' folder, tab 17).

[82] PORF, pp. 61-62, para. 113 *(b)*.

military sense"[83]. A map showing the expected areas of impact if the shelling in Kramatorsk had in fact been aimed at a military target, shown against the actual areas of impact in Kramatorsk, is on the screen and at tab 18 of the judges' folder.

4. Avdiivka shelling attacks

62. Turning to the Avdiivka shelling attacks, Russia claims that the DPR struck civilian areas only because the UAF had located military equipment and personnel there[84].

63. However, Russia ignores General Brown's expert opinion that "[m]any shelling attacks against residential areas were too far away from any UAF site to be plausibly considered to have been directed at military targets"[85]. A map showing the shelling impacts in Avdiivka is on the screen and also at tab 18 of your folder.

C. Shoot-down of Flight MH17

64. I will now turn to those acts that qualify as acts of terrorism under Article 2 (1) *(a)*, beginning with the shoot-down of Flight MH17 in violation of the Montreal Convention.

65. Russia's only response to Ukraine's evidence — which included an official report from the Dutch National Police investigating the shoot-down[86] — is to argue that the perpetrators did not specifically intend to shoot down a civilian aircraft[87].

66. As explained previously, the Montreal Convention does not require intention to shoot down a civilian aircraft. But even if intent as to the civilian status of the aircraft were required, Ukraine's evidence would still establish a violation. That evidence included a report by Dr. Anatolii Skorik, an expert in the Buk system, who explained that "[t]he technical capabilities of the Buk-M1 TELAR in autonomous mode do not make it possible to distinguish a civilian aircraft

[83] Gen. Brown Report, para. 67 (MU, Ann. 11; judges' folder, tab 17).

[84] PORF, pp. 62-64, para. 115.

[85] Gen. Brown Report, pp. 61-62, para. 95 (MU, Ann. 11; judges' folder, tab 17).

[86] Official Report of the Dutch National Police and accompanying annexes, 16 May 2018 (original in Dutch); MU, Ann. 41.

[87] PORF, pp. 45-47, paras. 90–94.

from a military one"[88]. Excerpts of Dr. Skorik's expert report are at tab 19 of your folder. This is another piece of new evidence in this case that Russia has chosen to ignore.

67. Russia does not dispute that the Buk-M1 TELAR was operating in autonomous mode. Firing at an aircraft in these circumstances at least satisfies indirect intent to shoot down a civilian aircraft. Russia does deny that the Buk was supplied to the DPR with the requisite knowledge. But surely members of the 53rd Anti-Aircraft Missile Brigade of the Russian Federation knew what Dr. Skorik knows; and that is, that they provided a Buk to the DPR without any means to distinguish between military and civilian aircraft.

D. Bombing attacks in Ukrainian cities

68. Finally, I will briefly address the bombing attacks in violation of the Bombings Convention. Russia had no response yesterday on the bombing attacks. For good reason.

69. Russia's only defence is to assert that Ukraine principally relies on confession statements, and Russia claims that some were "obtained by torture or ill-treatment" and have since been retracted[89].

70. Russia's support for that serious accusation? News articles from a Russia propaganda website called "Anti-Fashist Information Agency"[90]. Such so-called evidence is simply not credible.

71. But in any case, there is no doubt that the bombings happened. And the evidentiary record is not limited to interrogation transcripts and the evidentiary record shows that the weapons used in these attacks came from Russia. For example, Ukraine's evidence included a video taken by one of the perpetrators of her accomplice planting the bomb, and forensic analysis confirming

[88] Expert Report of Anatolii Skorik, 6 June 2018, para. 39 (MU, Ann. 12; judges' folder, tab 19); see also *ibid.*, paras. 28 and 31; MU, pp. 36-37, para. 74.

[89] PORF, p. 66, para. 118.

[90] PORF, p. 66, para. 118 and note 167, citing, e.g. Anti-Fashist News Agency, "'Activists' dictate sentences to the courts and the prosecutor's office. Lawyer Dmitry Tikhonenkov on the peculiarities of Ukrainian hybrid justice", 1 Nov. 2017 (PORF, Ann. 40); Anti-Fashist News Agency, "The accused of the explosion of the Stena Rock Pub, Marina Kovtun, has been tortured for three years by the SBU", 22 Nov. 2017 (PORF, Ann. 41); Anti-Fashist News Agency, "Terrorist attack at the Sports Palace in Kharkov in 2015 — guilty without guilt", 16 August 2017 (PORF, Ann. 38).

that the attacks were committed using a sophisticated, military-grade mine that could only have come from Russia[91].

72. In the judges' folder at tab 16 is a non-exhaustive list of these and other factual assertions made by Russia in its Preliminary Objections that are contradicted by the evidence already submitted to this Court by Ukraine.

73. The Court's role at this stage is to determine whether the breaches of which Ukraine complains fall within the scope of the Convention. The Court need not reach interpretive questions related to Article 2 to make that determination. But to the extent the Court chooses to parse Article 2 at this stage of the proceedings, under any reasonable interpretation of Article 2, Ukraine has alleged terrorism financing offences that underpin its claims against the Russian Federation.

74. Should the Court accept Russia's inappropriate invitation to refuse to treat Ukraine's alleged facts as true, if instead the Court chooses to examine the factual contentions at this preliminary stage of the proceedings, I remind the Court that Ukraine has submitted thousands of pages of evidence, witness statements, and expert opinions directly relevant to those factual issues. And that evidence supports the inescapable conclusion that terrorist acts were committed on Ukrainian territory.

75. Mr. President, Members of the Court, that concludes my presentation on Article 2 of the Convention and Russia's factual arguments related to terrorist acts. I would now ask that you call Mr. David Zionts to the podium to address Ukraine's satisfaction of all preconditions to this Court's jurisdiction under Article 24 (1) of the Convention.

Le PRESIDENT : Je remercie Mme Cheek. Avant d'inviter l'intervenant suivant à la barre, la Cour observera une pause de dix minutes. L'audience est suspendue.

L'audience est suspendue de 11 h 30 à 11 h 50.

[91] See, e.g. Kovtun video of Malysheev Plant bombing (video) (MU, Ann. 693); Witness Statement of Ivan Gavryliuk, 2 June 2018, paras. 38–40 (hereinafter "Gavrlyiuk Statement") (MU, Ann. 1); Expert Conclusion No. 557/2014, drafted by the Forensic Research Center, Ministry of Internal Affairs of Ukraine, Main Directorate of the Ministry of Internal Affairs of Ukraine in Kharkiv Region, 23 Mar. 2015, p. 17 (MU, Ann. 112); MU, para. 165, citing Central Missile and Artillery Directorate Of the Armed Forces of Ukraine, Letter No. 342/2/3618, 11 Mar. 2015, (MU, Ann. 110); Extract from Criminal Proceedings No. 22017220000000060 (22 Nov. 2014) (MU, Ann. 79); Gavryliuk Statement, paras. 38–40 (MU, Ann. 1).

Le PRESIDENT : Veuillez vous asseoir. L'audience reprend. Je donne maintenant la parole à M. Zionts. Vous avez la parole, monsieur.

Mr. ZIONTS:

UKRAINE'S SATISFACTION OF ALL PRECONDITIONS TO THE COURT'S JURISDICTION UNDER ICSFT ARTICLE 24 (1)

1. Thank you Mr. President, Members of the Court, it is an honour to address you today on behalf of Ukraine. As you have seen, Russia has decided to focus its preliminary objections on matters that are irrelevant to jurisdiction. I will discuss Russia's objection that *is* relevant to the Court's jurisdiction: its argument that Ukraine acted prematurely to bring this case to the Court, without meeting the requirements of Article 24 (1). Yet even though this objection does concern the Court's jurisdiction, yesterday Russia placed almost no emphasis on it. That is for good reason.

2. Article 24 (1) requires, first, that the dispute "cannot be settled through negotiation within a reasonable time", and second, that a request for arbitration is made, and "within six months from the date of the request for arbitration, the parties are unable to agree on the organization of the arbitration".

3. The Court has no need to revisit this issue at length. You have already rejected the very same Russian arguments, and found that both requirements are met. At paragraph 52 of the Order on Provisional Measures, the Court determined that the Parties "had engaged in negotiations" and that "[i]t appears from the facts on the record that these issues could not then be resolved by negotiations"[92]. At paragraph 53 of the same Order, the Court found that Ukraine requested arbitration, and that "[i]t appears that, within six months from the date of the arbitration request, the Parties were unable to reach agreement on its organization"[93].

4. Nothing has changed that could lead this Court to reach a different conclusion.

---

[92] *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*, p. 123, para. 52 (hereinafter "*Provisional Measures Order of 19 April 2017*").

[93] *Ibid.*, para. 53.

I. Ukraine made a genuine attempt to negotiate, but the dispute could not be settled by negotiation within a reasonable time

5. To briefly review, Ukraine has brought to the Court a dispute that for years has defied resolution. In 2014, Ukraine notified Russia of this dispute and asked for negotiations[94]. Over the next two years, Ukraine sent twenty diplomatic Notes and conducted four negotiating sessions with a Russian delegation[95].

6. Yesterday, Russia tried to sow doubt over whether these negotiations were really about the ICSFT. But when Russia agreed to those negotiations, it understood the subject. In a diplomatic Note, Russia expressly agreed "to hold negotiations on interpretation and implementation of the International Convention for the Suppression of the Financing of Terrorism"[96].

7. Russia also said yesterday that, in these negotiations, Ukraine "predominantly raised allegations of aggression and intervention"[97]. Again, the record flatly contradicts this. Ukraine continually raised specific concerns about Russia's violations of the ICSFT, catalogued vast numbers of terrorism financing offences[98], and identified specific treaty provisions Russia had breached in relation to those offences[99]. As for aggression, of course Russia has committed aggression, and Ukraine has rightfully objected to it on various occasions. But Ukraine could not have been clearer that *these negotiations* were not about aggression. As shown on your screen, in 2014, Ukraine addressed the very statements that Russia now refers to. Ukraine explained that such issues "are not related to the subject of negotiations proposed by Ukraine"[100].

---

[94] Ukrainian Note Verbale No. 72/22-484-1964 to the Russian Federation's Ministry of Foreign Affairs, 28 July 2014; MU, Ann. 368.

[95] Ukrainian Note Verbale No. 72/22-620-2605 to the Russian Federation's Ministry of Foreign Affairs, 23 Oct. 2015 (WSU, Ann. 38); WSU, para. 73.

[96] Russian Federation, Note Verbale No. 10471 to the Embassy of Ukraine in Moscow, 15 Aug. 2014; WSU, Ann. 18.

[97] CR 2019/9, p. 45, para. 49 (Zimmermann).

[98] See, e.g. Ukrainian Note Verbale No. 72/22-620-2732 to the Russian Federation's Ministry of Foreign Affairs, 4 Nov. 2014 (WSU, Ann. 21); Ukrainian Note Verbale No. 72/22-620-2406 to the Russian Federation's Ministry of Foreign Affairs, 24 Sept. 2014 (WSU, Ann. 19); Ukrainian Note Verbale No. 72/22-620-2185 to the Russian Federation's Ministry of Foreign Affairs, 22 Aug. 2014 (MU, Ann. 370); Ukrainian Note Verbale No. 72/22-620-264 to the Russian Federation's Ministry of Foreign Affairs, 10 Feb. 2016 (WSU, Ann. 41); Ukrainian Note Verbale No. 72/22-620-351 to the Russian Federation's Ministry of Foreign Affairs, 13 Feb. 2015 (WSU, Ann. 27); Ukrainian Note Verbale No. 72/22-620-2604 to the Russian Federation's Ministry of Foreign Affairs, 23 Oct. 2015 (WSU, Ann. 37).

[99] See, e.g. Ukrainian Note Verbale No. 72/22-484-1964 to the Russian Federation's Ministry of Foreign Affairs, 28 July 2014 (MU, Ann. 368); Ukrainian Note Verbale No. 72/22-620-2087 to the Russian Federation's Ministry of Foreign Affairs, 12 Aug. 2014 (MU, Ann. 369); Ukrainian Note Verbale No. 72/22-620-2221 to the Russian Federation's Ministry of Foreign Affairs, 29 Aug. 2014 (MU, Ann. 371).

[100] Ukrainian Note Verbale No. 72/22-620-3114 to the Russian Federation's Ministry of Foreign Affairs, 19 Dec. 2014; WSU, Ann. 24.

8. Russia's confusion about the nature of Ukraine's claims goes even deeper. As Professor Thouvenin described earlier, one of Russia's violations of the Convention (though not the only one) is that it failed to take measures to prevent the financing of terrorism, by public *and* private persons. Yesterday, Professor Zimmermann made it a central pillar of his presentation that supposedly, "Ukraine has changed course"[101]. According to Professor Zimmermann, Ukraine adopted a new argument in its Memorial and before that, had assumed "that the obligation to prevent under Article 18 only concerns the conduct of private individuals"[102]. Simply not true. When the Parties met to negotiate, Ukraine explained, and I quote from the summary of the negotiations: "The position of the Ukrainian delegation derives from the understanding that the provision of . . . Article 2 of the Convention [that] defines the subject of the offence within the meaning of the Convention also applies to officials and state authorities of the Russian Federation"[103]. In the course of those negotiations, Ukraine urged Russia to "cooperate in the prevention of the mentioned offences", i.e. Article 2 offences committed by both public and private persons[104]. When Ukraine brought this dispute to the Court, its Application claimed at paragraph 129 that Russia had failed to take measures to "prevent terrorism financing offences as defined by Article 2, committed by numerous *Russian officials*, organizations, and citizens"[105]. I would add that this Court, in its Provisional Measures Order, correctly understood that "Ukraine maintains that the Russian Federation has failed to take appropriate measures to prevent the financing of terrorism in Ukraine by public and private actors on the territory of the Russian Federation"[106].

9. Mr. President, Russia's apparent confusion — about aggression, about Ukraine's position on what "any person" means — is no fault of Ukraine's. But it does highlight an important fact: it was *Russia*, not Ukraine, that showed no interest in meaningful negotiations over the real dispute

---

[101] CR 2019/9, p. 38, para. 11 (Zimmermann).

[102] CR 2019/9, p. 38, para. 9 (Zimmermann).

[103] Ukrainian Note Verbale No. 72/22-620-967 to the Russian Federation's Ministry of Foreign Affairs, 24 Apr. 2015 (WSU, Ann. 30); see also Ukrainian Note Verbale No. 72/22-620-2529 to Russian Federation's Ministry of Foreign Affairs, 10 Oct. 2014 (MU, Ann. 372).

[104] Ukrainian Note Verbale No. 72/22-620-967 to the Russian Federation's Ministry of Foreign Affairs, 24 Apr. 2015; WSU, Ann. 30.

[105] Application of Ukraine, p. 38, para. 129; emphasis added.

[106] *Provisional Measures Order of 19 April 2017*, p. 118, para. 29.

raised by Ukraine. By the end of two years, Ukraine had shared enormous amounts of information relating specifically to the ICSFT[107]. Yet there was no progress. And in 2016, Russia made this remarkable statement, on your screen and in your folder at tab 20: "The Russian Side does not see any grounds for a dispute concerning the interpretation or application of the Convention"[108].

10. This was Russia's position after purporting to negotiate for two years. And what was true the day Ukraine filed its Application remains true to this day. On the eve of these hearings, the Russian Foreign Ministry announced that it would come to this Court and "deny the existence of a dispute in principle between two States regarding the two mentioned conventions"[109]. Russia makes this denial of a dispute concerning the ICSFT in the face of all the points of disagreement, on the law and on the facts, that have been catalogued already.

11. Consider this impasse in light of the Court's Judgment on Preliminary Objections in the *Lockerbie* case. There, the Court observed that "the Respondent has always maintained that the destruction of the Pan Am aircraft over Lockerbie did not give rise to any dispute between the Parties regarding the interpretation or application of the Montreal Convention"[110]. "Consequently", the Court concluded, "the alleged dispute between the Parties could not be settled by negotiation"[111].

12. The same is true here. A dispute that Russia denies even exists "cannot be settled through negotiation".

---

[107] See, e.g. Ukrainian Note Verbale No. 72/22-620-2087 to the Russian Federation's Ministry of Foreign Affairs, 12 Aug. 2014 (MU, Ann. 369); Ukrainian Note Verbale No. 72/22-620-2185 to the Russian Federation's Ministry of Foreign Affairs, 22 Aug. 2014 (MU, Ann. 370); Ukrainian Note Verbale No. 72/22-620-2406 to the Russian Federation's Ministry of Foreign Affairs, 24 Sept. 2014 (WSU, Ann. 19); Ukrainian Note Verbale No. 72/22-620-2406 to the Russian Federation's Ministry of Foreign Affairs, 24 Sept. 2014 (WSU, Ann. 19); Ukrainian Note Verbale No. 72/22-620-2732 to the Russian Federation's Ministry of Foreign Affairs, 4 Nov. 2014 (WSU, Ann. 21); Ukrainian Note Verbale No. 72/22-620-533 to the Russian Federation's Ministry of Foreign Affairs, 29 Feb. 2016 (WSU, Ann. 42).

[108] Russian Federation's Note Verbale No. 8808 to the Embassy of Ukraine in Moscow, 23 June 2016; MU, Ann. 379.

[109] On upcoming hearings in the case *Ukraine* v. *Russian Federation* in the UN International Court of Justice, press release, Ministry of Foreign Affairs of the Russian Federation, 2 June 2019, publicly available at: http://www.mid.ru/ru/foreign_policy/news//asset_publisher/cKNonkJE02Bw/content/id/3664996/pop_up?_101_INSTANCE_cKNonkJE02Bw_viewMode=print&_101_INSTANCE_cKNonkJE02Bw_qrIndex=0.; see also PORF, pp. 3-4, para. 5.

[110] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 17, para. 21 (hereinafter *"Lockerbie, Preliminary Objections Judgment"*).

[111] *Lockerbie, Preliminary Objections Judgment*, p. 17, para. 21.

II. The Parties were unable to agree to the organization of an arbitration within six months

13. Mr. President, Ukraine's effort to reach agreement on an arbitration met with similar Russian resistance. Two key facts are undisputed: (1) Ukraine requested arbitration on 19 April 2016[112]; (2) six months later, on 19 October, there was no agreement on the organization of that arbitration[113]. That, and that alone, shows that Article 24 (1) is satisfied.

14. This Court recently clarified in its Provisional Measures Order in *Iran* v. *United States* that if language in a compromissory clause is "descriptive in character", then "there is no need for the Court to examine whether" an outcome "is due to the conduct of one party or the other"[114]. That is the case with the arbitration clause of Article 24 (1). The words of that clause — "are unable to agree" — are unmistakably descriptive. Professor Zimmermann said yesterday that the Court should not apply the reasoning of *Iran* v. *United States* here, but offered no reasoned explanation for how those words are not descriptive[115].

15. But even assuming fault were relevant, it plainly does not lie with Ukraine. The slide on your screen illustrates how Russia chose to use the six-month period after Ukraine requested arbitration. Russia did not even respond for more than two months, and then proposed meeting a month after that, thus allowing half of the six-month time period to expire[116]. Even then, Russia evaded Ukraine's requests to agree that it would actually participate in an arbitration[117]. Only on 10 October did Russia state that it would[118]. At this point, 5 weeks and 21 days had passed since Ukraine had requested that the Parties agree to arbitration. Then, at a meeting of the Parties on

---

[112] *Provisional Measures Order of 19 April 2017*, p. 123, para. 53; Ukrainian Note Verbale No. 72/22-610-954 to the Russian Federation Ministry of Foreign Affairs, 19 Apr. 2016 (MU, Ann. 378).

[113] *Provisional Measures Order of 19 April 2017*, p. 123, para. 53; see e.g. WSU, pp. 154-155, para. 289.

[114] *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.

[115] CR 2019/9, p. 45, para. 53 (Zimmermann).

[116] WSU, pp. 44-45, para. 88; see also Russian Federation Note Verbale No. 8808 to the Embassy of Ukraine in Moscow, 23 June 2016 (MU, Ann. 379).

[117] See e.g. Ukrainian Note Verbale No. 72/22-620-2049 to the Russian Federation Ministry of Foreign Affairs, 31 Aug. 2016 (MU, Ann. 380); Ukrainian Note Verbale No. 72/22-663-2234 to the Russian Federation Ministry of Foreign Affairs, 29 Sept. 2016 (WSU, Ann. 47).

[118] Russian Federation Note Verbale No. 12566 to the Embassy of Ukraine in Moscow, 10 Oct. 2016 (WSU, Ann. 49); see also WSU, pp. 44-46, paras. 88-90.

18 October, the Russian delegation warned Ukraine that any agreement they reached would be subject to unpredictable delays because of Russia's internal procedures[119].

16. It is apparent, not just that the Parties were, as a matter of fact, unable to reach agreement on the organization of the arbitration — which is all that Article 24 (1) requires — but also that the reasons for this failure were beyond Ukraine's control. Russia squandered the entire six-month period and now tries to profit from its own delay to avoid this Court's jurisdiction.

17. Russia chose yesterday not to mention or explain these delays. Instead, it misstated the record. Ukraine had proposed, as one possibility, referring the dispute to an *ad hoc* chamber of this Court. According to Professor Zimmermann, "[t]he *ad hoc* chamber proposal . . . thus formed an essential part of Ukraine's overarching mandatory 'core principles'".

18. Yet this is demonstrably false. On your screen, and in your folder at tab 24, is a lengthy diplomatic Note outlining Ukraine's core principles for an arbitration. Ukraine considered it prudent to reach agreement on such principles before turning to a detailed text. It is clear on the face of this note that Ukraine presented an *ad hoc* chamber as just one option. Ukraine's "core principles" were for a distinct option: an arbitration *"absent an agreement"* on an *ad hoc* chamber[120]. Ukraine has not conceded, as Professor Zimmermann suggests, that there was some problem with Ukraine's proposal for an *ad hoc* chamber. The point is just irrelevant, because contrary to what you heard yesterday, Ukraine did not insist on this possibility, and presented a detailed alternative proposal.

III. The implications of Russia's argument

19. Let me close, Mr. President, by highlighting a fundamental point about Russia's objection. We are discussing a treaty to suppress the financing of terrorism. In ratifying it, Russia consented to this Court's jurisdiction to resolve disputes. The requirement that the parties first attempt to negotiate and arbitrate is a serious one, which is why Ukraine took them seriously, turning to this Court only after all other avenues failed. But the purpose of these requirements is not

---

[119] Transcript of Arbitration Organization Negotiations Between Ukraine and the Russian Federation, Minsk, 18 Oct. 2016, pp. 3, 30-33 (Kolodkin); WSU, Ann. 50.

[120] Ukrainian Note Verbale No. 72/22-194/510-2518 to the Russian Federation Ministry of Foreign Affairs, 2 Nov. 2016; MU, Ann. 382.

to create impossible obstacles to this Court ever resolving a dispute. If Russia's objection were accepted, it would be free to defy the Convention, obstruct meaningful negotiations, delay in responding to a request for arbitration, and in the end, escape the means of dispute resolution that it had agreed to.

20. Mr. President, Members of the Court, Ukraine has done everything that the treaty requires for its case under the ICSFT to be heard on the merits, as your Provisional Measures Order already found. I now request that you call Professor Koh to the podium, to address the Court's jurisdiction over the dispute concerning the CERD.

Le PRESIDENT : Je remercie M. Zionts. J'invite à présent le professeur Harold Koh à prendre la parole. Vous avez la parole.

Mr. KOH:

OVERVIEW OF UKRAINE'S CERD CLAIMS: CAMPAIGN OF CULTURAL ERASURE AS COLLECTIVE PUNISHMENT FOR OPPOSITION TO ANNEXATION BY THE CRIMEAN TATAR AND UKRAINIAN COMMUNITIES IN CRIMEA

RACIAL DISCRIMINATION, AS DEFINED UNDER CERD ARTICLE 1 (1), COVERS RUSSIA'S CONDUCT

1. Mr. President, Members of the Court, it is my privilege to appear before you again on behalf of Ukraine. Our case challenges not just Russia's pattern of financing terrorism, but also its support for discrimination within Ukraine. You have heard why the Court has jurisdiction over Ukraine's claims regarding the financing of terrorism. Let me explain why, despite Russia's arguments yesterday, this Court also plainly has jurisdiction to hear Ukraine's claims under the Convention on the Elimination of All Forms of Racial Discrimination — the "CERD".

2. Let me first summarize how the broad range of Russian conduct in Crimea violates the CERD; and second, rebut Russia's remarkable claim — repeated yesterday — that somehow the dispute with Ukraine regarding racial and ethnic discrimination does not concern the CERD at all.

3. My colleague Mr. Gimblett will then address Russia's baseless objection that Ukraine has failed to meet the preconditions for this Court's exercise of jurisdiction to hear disputes concerning the interpretation or application of the CERD.

I. Russia's discriminatory conduct in Crimea

4. As you have heard, at this stage our factual allegations detailed in our Memorial should be accepted as true. Following its unlawful 2014 occupation of Crimea — which we do not contest in this forum — Russia launched a wide-ranging *campaign of cultural erasure* directed against Crimean Tatar and Ukrainian communities on the Crimean peninsula. Both halves of this ongoing campaign fall under this Court's jurisdiction under the CERD.

5. First, Russia has comprehensively attacked the *political and civil rights* of Crimean Tatar and Ukrainian communities by systematically repressing their leaders and representative institutions. In particular, Russia has:

(a) Sponsored or condoned extreme violence — including abduction, torture, disappearance and murder — against activists from Crimean Tatar and Ukrainian communities while undertaking no serious investigation.

(b) *Second*, Russia has persecuted or forced into exile political and civic leaders of the Crimean Tatar people, including Mr. Refat Chubarov, who is in the courtroom today at counsel table as part of Ukraine's delegation.

(c) *Third*, Russia has outlawed the Mejlis, the sole legitimate representative body of the Crimean Tatar people, which Mr. Chubarov heads, declaring it to be an "extremist" organization. More than two years ago, this Court unanimously ordered Russia to "[r]efrain from maintaining or imposing limitations on the ability of the Crimean Tatar community to conserve its representative institutions, including the *Mejlis*". But even as I speak, Russia continues its blatantly illegal ban on the Mejlis, ignoring your unambiguous and binding Order.

(d) *Fourth*, Russia has employed fear tactics to intimidate and silence these communities. Russia's security force, the FSB, has detained and interrogated numerous Crimean Tatar individuals, who have been subjected to arbitrary searches in their schools, mosques and homes.

6. Russia's discriminatory campaign has a second dimension as well: the suppression of *cultural expression* by the Crimean Tatar and Ukrainian communities.

(a) *First*, Russia has introduced repressive laws governing public gatherings in occupied Crimea, then discriminated by allowing analogous pro-Russian gatherings for the ethnic Russian

community. By so doing, Russia has denied Crimean Tatars and Ukrainians their ability to commemorate events critical to their exercise of cultural rights.

(b) *Second*, Russia has suppressed the print and broadcast media that serve disfavoured communities. In occupied Crimea, Russia has imposed a re-registration requirement that arbitrarily denies licences to Crimean Tatar and Ukrainian media. Ukrainian television and media have been seized and shut down, and journalists employed by these disfavoured organizations harassed and branded as extremists, simply for expressing their own opinions.

(c) *Third*, Russia has dramatically restricted education in the Crimean Tatar and Ukrainian languages on the peninsula. During the 2013-2014 school year, nearly 13,000 children received a general education in the Ukrainian language, but just two school years later, after the Russian occupation, the number plummeted thirteen-fold — to less than 1,000 students. Today only one all-Ukrainian school is left in Crimea, compared to seven before the occupation. Crimean Tatar and Ukrainian language teaching schools and programmes have been closed. The supply of Crimean Tatar and Ukrainian language education has been dramatically reduced, and the content of that education has been "russified". Ukrainian language, literature and history have been expunged from the curriculum and new textbooks introduced to indoctrinate Crimean Tatar children into believing, among other myths, that somehow, Stalin was *justified* in committing crimes against the Crimean Tatar people.

7. Yesterday you heard a detailed presentation by Professor Forteau minimizing Ukraine's CERD case and denying with sweeping generalizations the existence of jurisdiction *ratione materiae*. Yet, as you noticed, Professor Forteau carefully avoided mentioning the words of the treaty, which entirely confirm that such jurisdiction exists. Indeed, as Ukraine's Memorial details, Russia's acts violate at least five major provisions of the CERD — Articles 2, 4, 5, 6 and 7:

(a) In Article 2 (1), Russia undertook "to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms". But Russia has done the opposite, adopting a policy in Crimea that systematically discriminates against Crimean Tatars and Ukrainians on ethnic grounds.

(i) In Article 2 (1) *(a)*, Russia undertook to "engage in no act or practice of racial discrimination against persons, groups of persons or institutions". Yet virtually every

Russian act ***or*** practice of discrimination identified in our Memorial breaks this commitment.

(ii) In Article 2 (1) *(b)*, Russia undertook "not to sponsor, defend or support racial discrimination by any persons or organizations". But Russia has done the opposite, actively using third persons and organizations — including local militia organizations — as tools to carry out its policy of racial discrimination.

(iii) In Article 2 (1) *(d)*, Russia agreed to "prohibit and bring to an end, by all appropriate means . . . racial discrimination by any persons, group or organization". Yet wherever possible, Russia has enabled and prolonged such racial discrimination by all available means.

(b) Article 4 requires Russia to refrain from promoting or inciting discrimination, and to condemn propaganda and organizations that are based on, or which attempt to justify, racial superiority. But again, Russia has done the opposite: actively inciting racial discrimination against the Crimean Tatar and Ukrainian communities in Crimea, as exemplified by its numerous acts of hate speech depicting Ukrainians as Nazis and Crimean Tatars as religious extremists.

(c) In Article 5, Russia undertook to "guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law". Yet as our Memorial details, Russia has done the opposite, repeatedly violating that pledge. One right that Article 5 *(b)* specifically recognizes is the "[t]he right to security of person and protection by the State against violence or bodily harm". But that has not been respected and the specific acts making up Russia's campaign of racial discrimination in Crimea violate on an ethnic basis almost every specific right enumerated in Article 5, political, civil, economic, social and cultural rights.

(d) Article 6 requires Russia to assure "everyone within [its] jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination". But instead of providing effective protection and remedies against racial discrimination, Russian courts have done the opposite: actively participating in this course of discriminatory conduct, including by banning the Mejlis and maintaining that ban in open defiance of this Court's Provisional Measures Order. And I note ironically, these are the

very courts that Professor Forteau said Ukraine was required to turn to, to "exhaust local remedies."

(e) Finally, in Article 7, Russia "undert[ook] to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view toward combating prejudices which lead to racial discrimination". Yet again, Russia has done the opposite — exacerbating the prejudices that lead to discrimination by restricting the educational rights of Crimean Tatar and Ukrainian communities, disallowing their public commemoration of culturally important events, and banning independent voices inside the Crimean Tatar and Ukrainian media.

8. Mr. President, Members of the Court, rather than accept responsibility for its actions, Russia has sought to evade accountability by employing a strategy of delay and diversion. It has deferred consideration of Ukraine's claims on the merits by interposing a series of flimsy preliminary objections. And it seeks to distract attention from its own gross violations of the CERD by claiming, remarkably, that the acts described in our Memorial cannot be considered "racial discrimination" after all.

9. But we all know this is nonsense. The definition of "racial discrimination" in the CERD is unambiguous and Ukraine's Memorial explains why Russia's actions satisfy it. If the concerted Russian pattern that I have just described — of scapegoating ethnic communities, denying them cultural and educational expression and political representation, inciting intimidation against them, then denying them judicial protection of the laws — do not charge a massive failure to honour Russia's treaty commitment to eliminate all forms of racial discrimination, it is hard to know what does.

10. Russia's wide-ranging attacks on civil and political rights and cultural expression to promote cultural erasure fall squarely within the two prongs of the definition of racial discrimination set forth in Article 1 (1) of the treaty:

(a) First, Ukraine has alleged that Russian authorities have used many tactics to draw a "distinction, exclusion, restriction or preference" between two racial or ethnic groups — the Crimean Tatar and Ukrainian communities — and the rest of Crimea's population. Some of Russia's practices and policies — expressly disfavouring education in the Crimean Tatar and

Ukrainian languages and prioritizing Russian-language education and culture — overtly single out the Crimean Tatar and Ukrainian communities. Other Russian policies and practices pretend to be of general application, instead they surreptitiously target the Crimean Tatar and Ukrainian communities. For example, in December 2014, the Russian occupation authorities required all Crimean mass media to reapply for licenses, but conducted that license-renewal process so as to heavily disadvantage those mass media entities who serve the Crimean Tatar and Ukrainian communities. In both cases, Russia drew distinctions or restrictions based on race or ethnic origin that are forbidden under Article 1 (1)[121].

(b) *Second*, Russia's policies and practices have been adopted with both the "purpose" and "effect" of impairing and nullifying the human rights and fundamental freedoms of the Crimean Tatar and Ukrainian communities. As our Memorial chronicles, the Russian authorities' comprehensive assault on the human rights and fundamental freedoms of those communities reflected a policy of *collective punishment* for the hostility those communities displayed towards Russia's annexation of Crimea.

11. For example:

(a) On 27 February 2014 — one day after the event pictured here, when Crimean Tatar and Ukrainian protesters confronted pro-Russian protesters in front of the Crimean parliament building in Simferopol, Russian military forces seized the parliament building and replaced Crimea's provincial administration with one led by the leader of the previously marginal Russian Unity Party. Russia went on to ban the Mejlis and to exile Crimean Tatar leaders like Mr. Chubarov from Crimea, with the punitive purpose and effect of depriving the Crimean Tatar community of its political leadership, in retaliation for their refusal to accept the annexation of their homeland.

(b) In the run-up to the unlawful referendum of 16 March 2014, the Russians orchestrated a hateful process of demonizing Ukrainians. This shocking poster supporting Russian rule — which, as you see, reads "March 16 we choose between Nazis or Russia" — is just one of many examples of Russia's aggressive campaign to equate Ukrainians with Nazis. Yet even while deploying

[121] CERD, General Recommendation 14, para. 1.

such fear tactics, the Russian Government sought to buy off Crimean Tatar opposition to annexation, privately promising favourable treatment to the members of that community who would support Russian rule. When the vast majority of Crimean Tatar community boycotted the referendum, the Russian occupation authorities shifted to their well-documented punitive policy of systematic repression.

(c) While there can be little doubt about the punitive motivation behind Russia's actions, this Court may find — contrary to Professor Forteau yesterday — that Russia systematically violated the CERD without definitively finding that Russia intended to discriminate. Article 1 (1) makes clear that the Convention targets both direct discrimination based on "purpose", and indirect discrimination based on "effect". So whether or not Ukraine proves that any *particular* Russian official had the purpose of impairing the human rights of these communities, Russia may still be held to account for its racial discrimination, so long as its officials adopted ethnic-based distinctions, *the effect of which* was to impair or burden the human rights of these groups. Both Professors Pellet and Forteau claimed that the CERD Committee needed to speak on interpretive questions; but when it did, the CERD Committee issued General Recommendation 14, located in your folders at tab 26 , which makes clear that "[a] distinction is contrary to the [CERD] if it has *either the purpose or the effect* of impairing particular rights and freedoms"[122], and that conduct will violate CERD if it "has an *unjustifiable disparate impact* upon a group distinguished by race, colour, descent, or national or ethnic origin"[123].

12. The presentations you heard yesterday said little about any of these treaty provisions. But Russia's massive violations amply meet the definition of racial discrimination set forth in Article 1 (1); its practices and policies violate Articles 2, 4, 5, 6 and 7. A "dispute" undeniably exists between these parties regarding the interpretation or application of these provisions to bar Russia's conduct, over which this Court can and must exercise jurisdiction pursuant to Article 22 of the Convention.

---

[122] General Recommendation 14, para. 1; MU, Ann. 788 (emphasis added).

[123] *Ibid*., para. 2; MU, Ann. 788 (emphasis added).

II. Russia's attempt to mischaracterize the dispute

13. Instead of explaining or defending its massive CERD violations, Russia's presentation yesterday sought to distract the Court by mischaracterizing the dispute in question as one that concerns not discrimination, but the legal status of Crimea. According to Russia, *none* of Ukraine's CERD claims concerns the interpretation of the application of the Convention, because somehow, Crimea is now Russian territory within which, apparently, Russian authorities are free to discriminate at will.

14. But it is not up to Russia to define the dispute Ukraine has brought before you. *This is a dispute about systematic discrimination against peoples, not about the status of a territory under international law.* Russia cannot point to a single place — not a single place — in Ukraine's submissions where we ask the Court either to rule on "the status of Crimea" or to grant relief for the many violations of international law that Russia has committed, apart from the wholesale breach of its numerous obligations to eliminate all forms of racial discrimination. And as Ukraine's Memorial makes clear, the remedies that Ukraine seeks all aim to vindicate rights that arise under the CERD.

15. Of course, these two countries also dispute the lawfulness of Russia's brazenness in aggression in Ukraine. This and other issues — including Russia's wide-ranging violations of the United Nations Convention on the Law of the Sea — can and are being addressed in different fora. But as this Court has held, "no provision of the Statute or Rules contemplates that the Court should decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important"[124].

16. In the *Bosnia Genocide* case, for example, this Court exercised jurisdiction over a human rights claim under the Genocide Convention [125], even though that claim plainly arose in the context of a wider, complex dispute over the legal status of territory and armed conflict. Similarly, in *Georgia* v. *Russia*, the Court found Georgian claims that were "primarily claims about the allegedly unlawful use of force" established the existence of a dispute under the CERD because

---

[124] *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 92, para. 54 (internal citations and quotations omitted).

[125] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 595.

"they also expressly referred to alleged ethnic cleansing by Russian forces"[126], thus creating a CERD dispute.

17. Under this Court's settled jurisprudence, then, the existence of a broader disagreement between the Parties does not preclude the existence of a distinct and justiciable dispute regarding interpretation of the CERD. The mere fact that Russia may have carried out its grossly discriminatory actions by means of — or in the context of — its illegal occupation of Crimea cannot excuse Russia's glaring CERD violations or free Russia to escape the Court's jurisdiction under the CERD.

18. Nor, for similar reasons, can Russia dodge this Court's jurisdiction — although its counsel tried again yesterday — by claiming that Ukraine's claims necessarily require the Court to decide that Crimea is occupied territory in which international humanitarian law (IHL) applies. As explained in our Written Observations and Memorial, Ukraine seeks no ruling on that question, and the Court may resolve this case without deciding it.

19. Mr. President, Members of the Court, it would be perverse indeed if Russia could invoke its *multiple* illegalities to bar judicial examination of perhaps its most *pervasive* illegality: its concerted campaign of racial discrimination in Crimea. The fact that Russia has also committed numerous violations of international humanitarian law is neither a barrier to nor a predicate for this Court to adjudicate Russia's many violations of international human rights law. As the Court found in *Democratic Republic of the Congo* v. *Uganda*, "both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration" in the context of armed conflict and violations of IHL[127]. Whether a dispute also exists between these two parties under IHL, cannot negate or extinguish your obligation to decide the dispute before you regarding Russia's widespread support for ethnic discrimination in Crimea.

20. To be sure, Russia has carried out many of its violations of the CERD by applying repressive laws. As the United Nations General Assembly and the Office of the High

---

[126] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 120, para. 113.

[127] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 243, para. 216 (quoting *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 178, para. 106).

Commissioner for Human Rights have found, Russia's extension of its laws to Crimea may also violate IHL[128]. But again, these multiple illegalities do not invite or require the Court to rule on anything *other* than the CERD violations that Ukraine has brought before you. Ukraine, here, makes no claim under IHL but should the Court desire, you are not precluded in your reasoning from addressing the relevance of IHL as a rule of international law applicable between these Parties, so long as the operative part of your Judgment does not go beyond the issues presented for decision by the Parties' submissions.

21. In sum, Russia cannot strip this Court of jurisdiction over Ukraine's claims of ethnic discrimination by mischaracterizing the dispute we have brought before you. Ukraine has submitted a legal dispute arising under various provisions of the CERD that is sufficient for the Court to exercise jurisdiction under Article 22.

III. Russia's additional objections to this Court's jurisdiction also fail

22. Finally, let me quickly dispense with the other unfounded arguments made by Professor Forteau yesterday arguing that Ukraine's claims do not raise violations of the CERD.

23. *First*, Professor Forteau claimed that the conduct alleged by Ukraine in its Memorial amounts to discrimination against individuals based on their political views, not race or ethnicity[129]. *Second*, Russia has argued that "Ukraine seeks to include religion within the scope of CERD" by "claim[ing] that Crimean Tatars are being targeted based on allegations of religious Muslim extremism"[130]. But Ukraine nowhere asks the Court to pass upon claims of either religious discrimination or political persecution. What we have alleged is that Russia is collectively punishing the Crimean Tatar and Ukrainian communities *based on* Russia's identification of these ethnic communities as a whole as hostile to annexation[131]. Russia is scapegoating ethnic groups, using political opposition and supposed religious extremism as its *pretext*[132]. With respect to both

---

[128] United Nations General Assembly resolution 72/190, UN doc. A/Res/72/190, Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine (19 December 2017) (Ann. 50); OHCHR, Report on the Human Rights Situation in Ukraine (16 August-15 November 2018), para. 95.

[129] PORF, pp. 135-136, para. 286.

[130] PORF, pp. 159-160, para. 332.

[131] WSU, p. 164, para. 305.

[132] WSU, p. 153, para. 286.

claims, it is Russia's *singling out* of the ethnic Crimean Tatar and Ukrainian communities — whether also for political or religious reasons — that renders their policies and practices "distinctions based on race" that violate the CERD, because they illegally burden these communities' human rights and fundamental freedoms "in the political . . . field of public life".

24. *Third and similarly*, Russia claims that this Court may not adjudicate Ukraine's allegations concerning the banning of the Mejlis, because the CERD "does not offer a special protection", he said, "to the representative rights of national minorities"[133]. What Professor Forteau failed to mention is that two years ago, the Court unanimously rejected his same argument in its Provisional Measures Order[134]. Ukraine claims no such special protection, only that the Russian authorities' concerted attacks on the Mejlis amounted to a forbidden distinction based on race or ethnicity under Article 1 (1), because the Mejlis has been singled out for repression in its capacity as a representative institution of the Crimean Tatar people. Once again, the singling out of the Mejlis for targeted attack by the Crimean and Russian courts constitutes an ethnically based distinction drawn with the purpose or effect of impairing the human rights and fundamental freedoms of the Crimean Tatar people.

25. Russia's fourth and fifth objections rest on similar misunderstandings. Professor Forteau argued that Russia's banning Crimean Tatar leaders from re-entering Crimea falls outside the CERD. Yet Russia's illegal annexation of Crimea neither nullifies its CERD obligations, nor immunizes them from judicial examination. Should this Court hold Russia to its assertion that Crimea is now part of the Russian Federation — an assertion rejected not just by Ukraine, but by the entire United Nations General Assembly in repeated resolutions reflecting the consensus of the international community — then Russia's claimed ban on Crimean Tatars re-entering what it now considers the Russian Federation must squarely violate CERD Article 5 *(d)* (ii), which guarantees equality before the law in the enjoyment of one's right to leave and return to *one's own* country. If instead the Court were to treat IHL as in force in Crimea, as the United Nations General Assembly and the Office of the High Commissioner for Human Rights have done, then Article 49 of the Fourth Geneva Convention would also prohibit Russia from deporting protected persons, such as

---

[133] PORF, p. 157, para. 328.

[134] *Provisional Measures Order of 19 April 2017*, p. 132, para. 79 and p. 135, para. 83.

the Crimean Tatar leaders affected here, from occupied territory within their own country. My point: either way, Russia is legally barred from banning the re-entry of Crimean Tatar leaders because it would deny Ukrainian citizens, on a racial or ethnic basis, their right to return home.

26. *Fifth and similarly*, Professor Forteau repeated yesterday that CERD Article 1 (2) — which excludes from the Convention's coverage "distinctions . . . made by a State Party to this Convention between citizens and non-citizens" — somehow frees Russia to force citizenship on some Crimean inhabitants and to discriminate against others[135]. What he failed to mention is the very next subsection of the CERD, Article 1 (3), which *preserves* application of the CERD's prohibitions to those legal provisions of State parties concerning nationality, citizenship or naturalization that discriminate against any particular nationality. So the reasoning is the same: should this Court hold Russia to its repeated claim that as the rightful sovereign over Crimea, its Law on Admission[136] lawfully conferred Russian citizenship on permanent residents of Crimea — the Court plainly also must have jurisdiction to determine whether the operation of that same law, along with Russia's other nationality laws, gives rise to racial discrimination forbidden by the CERD. Should the Court instead take notice of the operation of IHL in Crimea, then Russia's clear violation of Article 45 of the Fourth Hague Convention — which prohibits the forcing of citizenship on inhabitants of occupied territory — would draw ethnic distinctions that violate the CERD because they disadvantage non-citizens based on their nationality. Again, either way, the Court could find that Russia's conduct violates the CERD without ever passing judgment on the sovereignty of Crimea.

27. *Sixth*, Russia absurdly claims that Article 5 *(e)* (v) of the CERD does not protect the right of Crimean Tatars and Ukrainian citizens to be educated in their native language[137]. Again, this Court roundly rejected this claim in its Provisional Measures Order[138]. As I noted earlier, Article 1 (1) brings within the scope of the Convention's protection *all* "human rights and fundamental freedoms", not just those specifically mentioned in the Convention, including a right

---

[135] PORF, p. 156, para. 324.

[136] Federal Constitutional Law No. 6-FKZ of March 21, 2014 "On the Admission of the Republic of Crimea into the Russian Federation and the Formation of New Constituent Entities of the Russian Federation: The Republic of Crimea and the Federal City of Sevastopol", 21 March 2014 (the "Law on Admission") (MU, Ann. 888).

[137] PORF, pp. 158-159, para. 329.

[138] *Provisional Measures Order of 19 April 2017*, p. 135, paras. 82-83.

mentioned in the UNESCO Convention against Discrimination in Education: the "right of members of national minorities to carry on their own educational activities [with] *the use or the teaching of their own language*"[139].

28. *Finally,* Russia repeatedly attacks Ukraine's factual allegations as implausible. As Professor Thouvenin explained, the plausibility standard they propose is wholly inappropriate at this stage. On its face, any such factual challenges should be made at the merits. How individuals choose to self-identify as part of a nationality is obviously a question of fact. At the merits, Russia will have ample opportunity to develop its own evidentiary record[140]. But then, Russia will have to explain why its *own* census, conducted in Crimea in 2014, expressly recognized Crimean Tatar and Ukrainian as distinct ethnic identities. While Russia and Ukraine may disagree about precisely how those identities should be defined, the Court may take judicial notice that Russia has already conceded that these two ethnic groups live in Crimea, which is more than legally sufficient to establish this Court's jurisdiction to decide whether those groups have been unlawfully discriminated against.

IV. Conclusion

29. To conclude: yesterday, Professors Pellet and Forteau described an imaginary world where Russia is blameless, because the Race Discrimination treaty is toothless. Under their reading, cases brought to this Court should routinely be sent back to the CERD Committee, which itself has limited jurisdiction — they say — to interpret many issues that they deem to be outside the CERD Treaty. But Ukraine's submissions describe reality: Ukraine has presented a valid dispute concerning the interpretation or application of multiple provisions of the CERD. Ukraine's Memorial offers extensive factual proof that Russia has flatly violated core provisions it expressly promised to keep. That this Court has jurisdiction to decide this dispute under Article 22. And if Russia disagrees with either Ukraine's legal or factual analysis, the place to contest that analysis is on the merits.

---

[139] WSU, p. 156, para. 291.

[140] WSU, p. 162, para. 301.

30. To avoid answering for Russia's pervasive discrimination in Ukraine, in Crimea, Russia's advocates would instead recast Ukraine's case as about something other than racial discrimination. But enough is enough. It is long past time for Russia to answer for its violations. While the Russians delay and divert, real people suffer. For more than five years now, the Crimean Tatar and Ukrainian communities in Crimea have suffered daily at the hands of Russia's blatantly discriminatory and racist policies.

31. Mr. President, Members of the Court, these communities desperately need your protection. This Court should reject Russia's continuing effort to dodge judicial scrutiny and to avoid its solemn obligations under the Race Discrimination Convention.

32. With that, I ask you to call to the podium my colleague, Mr. Gimblett. Thank you.

Le PRESIDENT: Je remercie le professeur Koh et je donne la parole à M. Gimblett. Vous avez la parole.

Mr. GIMBLETT:

UKRAINE'S SATISFACTION OF ANY PRECONDITIONS TO THE COURT'S JURISDICTION OVER THE CERD DISPUTE

1. Mr. President, distinguished Members of the Court, it is an honour to appear before you on behalf of Ukraine. I will address Russia's various objections alleging that Ukraine has failed to meet procedural prerequisites to this Court's jurisdiction. As the last speaker for Ukraine today, I find myself in the same position as Professor Forteau yesterday, I have remarks that will last 30 minutes. With the Court's indulgence that will take me a few minutes past 1 p.m.

2. As Professor Koh has described, Crimean Tatars and Ukrainians in Crimea have for the last five years been subject to a comprehensive policy of racial discrimination at the hands of the Russian Federation. That policy has affected not just isolated individuals, but entire communities. It has impaired not just one or two discrete rights, but has undermined the enjoyment of rights touching almost all aspects of life — political and civil, economic, cultural and educational.

3. To avoid having to explain its actions, Russia seeks to create numerous obstacles to the Court's jurisdiction. First, in defiance of the ordinary meaning of the Convention's text, it seeks to extract not one but two preconditions from the Article 22 language allowing referral to this Court

of "[a]ny dispute . . . which is not settled by negotiation or by the procedures expressly provided for in this Convention". Next, Russia asks the Court to accept that the more than two years that Ukraine spent trying to negotiate with Russia over its CERD claims were insufficient to meet what it deems the negotiation requirement created by Article 22. And finally, it argues that Ukraine's claims of systematic racial discrimination should have been litigated through the Russian court system before Ukraine brought them before you.

4. If Russia's interpretation were correct, this Court's role would effectively be read out of the Convention. But each of these Russian contentions is wrong — as a matter of treaty interpretation where the meaning of Article 22 is concerned; as a matter of fact where the pre-application negotiations between the parties are concerned; and as a matter of legal principle where the supposed exhaustion requirement is concerned.

5. The larger issue here is Russia's obligation to eliminate racial discrimination, which is one of the most fundamental norms in international law and has been widely recognized as having *jus cogens* status[141]. The drafters of the CERD understood that racial discrimination was an urgent problem. That is why States parties joining the Convention resolved, in the language of its preamble, to "adopt all necessary measures for speedily eliminating racial discrimination in all its forms and manifestations". Consistent with that urgency, the Convention made this Court — the highest judicial organ of the United Nations — available to States parties to decide disputes concerning the interpretation or the application of the Convention.

6. The reason for the urgency felt by the Convention's drafters is well illustrated by the account Professor Koh has just given of Russia's policy of racial discrimination in Crimea since 2014. Lives have been lost; torture inflicted; whole peoples deprived of their representative institutions; independent media suppressed and more. And the policy continues to this day. Mr. President, Members of the Court, the elimination of racial discrimination, and the disfiguring effect it has on human life and liberties, remains as urgent today as it was in 1965. That is why the Court should be sceptical of Russia's attempt to persuade you that States parties seeking this Court's intervention are required first to jump through innumerable hoops.

---

[141] See, e.g. Fourth Report of the Special Rapporteur on Peremptory Norms of General International Law (*Jus Cogens*), Mr. Dire Tladi, UN doc. A/C.N.4/727, 31 Jan. 2019, paras. 91–101; see also *Barcelona Traction, Light and Power Company Limited (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, paras. 33–34.

I. Article 22 imposes at most one precondition to this Court's jurisdiction

7. Let me turn first to the interpretation of Article 22. Russia insists that this provision requires a complainant State both to negotiate and to use the multistep CERD Committee procedure before referring a dispute to this Court.

A. The Court's decision in *Georgia* v. *Russian Federation*

8. Russia first advanced this interpretation in the *Georgia* v. *Russia* case. A majority of the Court then interpreted Article 22 as imposing preconditions to its jurisdiction, reversing the view that the Court had expressed at provisional measures[142]. The majority, however, declined to determine whether such preconditions were alternative or cumulative[143]. Five judges subscribed to a joint dissent[144]. Another judge was moved to author a separate dissenting opinion addressing these questions[145].

9. Of course, Ukraine was not a party or intervener in *Georgia* v. *Russia* and so, under Article 59 of the Court's Statute, it is not bound by that ruling in the case that is now before you[146].

10. In Ukraine's view, the better interpretation of Article 22 is that it contains no preconditions to this Court's jurisdiction. But, if this Court interprets Article 22 as establishing preconditions, those preconditions are alternative, not cumulative. Russia's interpretation of Article 22 fails to satisfy any element of the general rule of interpretation reflected in Article 31 (1) of the Vienna Convention.

B. The ordinary meaning of the conjunction "or"

11. Starting with ordinary meaning, Russia's argument requires the Court to interpret the word "or" as meaning "and" in the phrase "any dispute . . . which is not settled by negotiation *or* by the procedures expressly provided for in the Convention". But "or" means "or" — in every

---

[142] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 128, para. 141; see also *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008*, p. 388, para. 114.

[143] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 140, para. 183.

[144] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, joint dissenting opinion of President Owada, Judges Simma, Abraham and Donoghue, and Judge *ad hoc* Gaja.

[145] *Ibid.*, dissenting opinion of Judge Cançado Trindade.

[146] Statute of the Court, Art. 59.

language version of the CERD, its ordinary meaning is disjunctive, creating a choice between alternative propositions.

12. Yesterday, Professor Pellet told you that, when it follows a negative, "'or' cannot mean 'alternatively'". But that is not correct. Consider, for example, this sentence: "Any customer who is not satisfied with her appetizer or main course may complain to the Manager." In this sentence, which bears a structural resemblance to Article 22, it is clear that the customer may complain if she is unsatisfied with only her appetizer or only her main course. In other words, there is one precondition to her ability to complain, not two.

13. The point here is that the meaning is driven by the context in which "or" appears. And in construing a human rights instrument, we should also have particular regard to the object and purpose of the Convention. In the case of the CERD, both elements dictate that "or" be given its disjunctive meaning, ***and*** not a cumulative one.

C. Article 22 in the context of the CERD

14. As for context, the Convention contains numerous indicators confirming the disjunctive meaning of "or" within the Article 22 phrase.

15. The first can be found within the text of Article 22 itself, where the word "or" appears three times. *First*, in reference to "[a]ny dispute between two *or* more States Parties". *Second*, to classify the types of disputes to which Article 22 applies, namely disputes involving "interpretation *or* application of th[e] Convention". In both instances, the word "or" is plainly used in its ordinary, disjunctive sense to separate two alternatives. On the third occasion, "or" dictates a choice between "negotiation" and "the procedures expressly provided for in this Convention". Russia suggests that, on this occasion only, "or" is used in a different, cumulative sense. But where the drafters have repeatedly used "or" in its ordinary sense, it is highly unlikely that they would have used it precisely the same way a third time in the same sentence with a different meaning.

16. Second contextual indicator: when Article 22 is read in the context of Articles 11 to 13, which set out the procedures to which Article 22 refers, it becomes obvious that any cumulative precondition would be hopelessly impractical. Article 11 lays out the steps that a State party must take when raising a complaint with the CERD Committee. When a State party brings a matter to

the attention of the Committee, Article 11 provides that the Committee will transmit this communication to the State concerned. Receipt by the latter triggers a six-month period for disputing parties to attempt to "adjust[]" the matter in dispute to their mutual satisfaction by "negotiation or by any other procedure open to them".

17. But, under Russia's reading of Article 22, the disputing States would be required, before entering the CERD Committee procedure, to have already exhausted an independent negotiation requirement. Russia's interpretation therefore leads to the absurd result that, in order to preserve their access to this Court, State parties are required to negotiate for an unspecified amount of time and then to *renegotiate* for six months before a referral to the CERD Committee. It is no answer to this problem to say, as Professor Pellet did yesterday, that the Article 11 negotiation period is an element of the conciliation procedure that must be distinguished from direct negotiations. The Convention is clear: Article 11 refers to bilateral negotiations and the conciliation process does not begin until that six-month period is over, the matter is referred back to the Committee and, pursuant to Article 12, the Chairman appoints an *ad hoc* conciliation commission.

18. Moving to my final contextual point, in *Georgia* v. *Russia* the majority gave decisive weight to the principle of effectiveness. But that principle does not support, and in fact weighs against, Russia's cumulative interpretation. In the *Georgia* case, the majority decided that the phrase "which is not settled" imposed preconditions, rather than merely calling for a factual determination[147]. The majority took the view that the phrase would be redundant if Article 22 did not create a precondition since, by definition, a dispute reaching the Court would not have already been settled[148]. It is important to note that the principle of effectiveness is satisfied if Article 22 creates only one precondition. Nothing in that principle requires the Court to read multiple preconditions into Article 22.

19. Russia falsely argues that Ukraine's interpretation of Article 22 renders redundant the words "[a]ny dispute . . . which is not settled . . . by the procedures expressly provided for in this

---

[147] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, pp. 125-126, paras. 133-134 and p. 128, para. 141.

[148] *Ibid.*, p. 126, para. 134.

Convention"[149]. But the inclusion of this language in Article 22 serves to co-ordinate that dispute resolution provision with the inter-State complaints procedure; it makes clear that a party that has voluntarily availed itself of the CERD Committee procedure may refer the dispute in question to the Court, if not resolved by conciliation. If Article 22 did not refer to "the procedures expressly provided for in this Convention", States parties that had undertaken the CERD Committee inter-State dispute procedure would have no further recourse if the disputants were unable to accept the recommendations of the Conciliation Commission.

20. In fact, the principle of effectiveness clearly supports the conclusion that recourse to the CERD Committee is optional. Article 22 gives this Court jurisdiction over two types of dispute — disputes concerning the interpretation and disputes concerning the application of the CERD. But, if recourse to the CERD Committee procedure was mandatory, an interpretive dispute could never reach this Court. That is because, under Article 11, the CERD Committee is only competent to examine complaints by a State party "that another State Party is not giving effect to the provisions of this Convention" — in other words, disputes concerning the application of the CERD. Russia's interpretation of Article 22 therefore deprives of effect the words "any dispute . . . with respect to the interpretation . . . of this Convention".

D. The significance of the CERD's object and purpose

21. Even if Russia's proposed interpretation of Article 22 could be squared with these contextual elements, it cannot be reconciled with the Convention's object and purpose of speedily eliminating racial discrimination.

22. Russia urges the Court to interpret Article 22 as imposing a three-step dispute resolution process under the CERD, starting with negotiation, proceeding through the CERD Committee and conciliation, before this Court can exercise jurisdiction over the dispute in question. But, as the joint dissent in *Georgia* v. *Russia* pointed out, both negotiation and conciliation "depend[] on an understanding between the parties and their desire to seek a negotiated solution"[150]. In either

[149] PORF, p. 193, para. 383.

[150] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, joint dissenting opinion of President Owada, Judges Simma, Abraham and Donoghue, and Judge *ad hoc* Gaja, p. 156, para. 43.

scenario, a "favourable outcome depends on the readiness of the parties to come to an agreement, in other words, on their willingness to negotiate"[151]. Requiring disputing parties to both negotiate and then conciliate therefore serves no purpose other than delay — precisely the kind of delay that Russia has engaged in here. As the joint dissent in *Georgia* v. *Russia* further observed:

> "[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, 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."[152]

23. In sum, Russia asks the Court to adopt an interpretation of Article 22 that departs from the ordinary meaning of "or", is totally at odds with the context in and around Article 22 and that undermines the object and purpose of the CERD as a whole. Under generally accepted principles of treaty interpretation, the result is clear: to the extent that Article 22 creates any precondition to this Court's jurisdiction, it is either to negotiate *or* to use the CERD Committee procedures. There is simply no way to read into these words an obligation to undertake both steps.

E. The *travaux préparatoires* to Article 22

24. Given the paucity of its arguments under the general rule of interpretation, it is not surprising that Russia's preliminary objections spend so much time on the *travaux préparatoires* to the CERD. This is a misguided effort in two respects. *First*, because application of the Article 31 (1) interpretative principles produces a clear and obvious result — "or" means "or". Recourse to the supplementary means of interpretation referred to in Article 32 is therefore unnecessary. *Second*, the *travaux* do not support the notion that the drafters intended to make negotiation and the CERD Committee procedures cumulative preconditions to this Court's jurisdiction. Russia argues that the drafters built a double precondition into Article 22 as a compromise between States that favoured unilateral referral of disputes to the Court and others that wanted both parties to consent first[153]. But there is simply no evidence of this imaginary

---

[151] *Ibid.*

[152] *Ibid.*

[153] PORF, p. 220; see also *ibid*., para. 402.

compromise in the record of the meeting at which Article 22 was amended to include reference to "the procedures expressly provided for in this Convention".

25. All that is spelt out in detail in Ukraine's written observations on jurisdiction[154]. Because there is no good reason to have recourse to supplementary means of interpretation, I will not go over that ground again today but will spend my remaining time on two final Russian objections.

II. Ukraine has satisfied any negotiation precondition in Article 22

26. Let me first reject Russia's assertion that Ukraine's extensive efforts to negotiate its dispute with Russia were somehow inadequate.

27. The Court had the full negotiating record before it during the provisional measures phase of this case. In relation to Ukraine's CERD claims, the Court stated in its Provisional Measures Order that

> "[t]hese facts demonstrate that, prior to the filing of the Application, Ukraine and the Russian Federation engaged in negotiations regarding the question of the latter's compliance with its substantive obligations under CERD. It appears from the record that these issues had not been resolved by negotiations at the time of the filing of the Application."[155]

28. At provisional measures, therefore, the Court found no reason to conclude that Ukraine had failed to satisfy a negotiation requirement in Article 22[156]. Nothing in the negotiating record has changed since then to require this Court to reach a different conclusion now.

29. The Court's jurisprudence establishes that, where a requirement to negotiate exists, a party must do no more than undertake "a genuine attempt . . . to engage in discussions with the other disputing party"[157]. There is no obligation to pursue such discussions beyond the point at which negotiations have become futile or deadlocked[158]. Ukraine's efforts to engage with Russia over a period of more than two years, including 13 diplomatic Notes and three face-to-face meetings devoted to its CERD claims, amply satisfy that standard.

---

[154] WSU, pp. 177-181, paras. 333-340.

[155] *Provisional Measures Order of 19 April 2017*, p. 125, para. 59.

[156] *Ibid.*

[157] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 132, para. 157.

[158] *Ibid.*, p. 131, para. 152, p. 134, para. 162.

30. *First*, these efforts plainly constitute a genuine attempt by Ukraine to engage in discussions with Russia. In the *Georgia* case, Russia itself argued that "direct discussions between the parties", of the kind with which this record is replete, constitute "the most obvious means" of attempting to settle a dispute by negotiation[159].

31. *Second*, at no point did Russia demonstrate a willingness to engage on the substance of Ukraine's claims. It would therefore have been futile for Ukraine to have pursued negotiations for longer. Russia failed to respond substantively to the information on CERD violations provided in Ukraine's diplomatic Notes, either in writing or at any of the three face-to-face meetings[160]. The only indication that Russia gave that it might be prepared to do so came in a diplomatic Note of 28 September 2015 confirming Russia's "readiness to provide the Ukrainian Party with the information related to the issues mentioned in the note of the MFA . . . dated August 17, 2015"[161]. ***And t***hat text is on your screens. But the information never came and, in April 2016, Ukraine had no choice but to ask for a further round of face-to-face negotiations. When those negotiations eventually took place, the Ukrainian delegation was again confronted with Russian stonewalling, even as Russia's violations of the CERD continued and accelerated in Crimea[162]. In its oral submissions yesterday, Russia continued to deny that a dispute under the CERD even exists. As Mr. Zionts has already reminded the Court, the *Lockerbie* case makes clear that it is impossible to settle a dispute by negotiation when one of the parties denies that a dispute even exists.

32. *Third*, the Court should dismiss Russia's nonsensical claim that Ukraine acted in bad faith because it insisted on Russia ceasing its violations of the CERD[163]. Good faith does not require that Ukraine drop its opposition to Russia's violations of a *jus cogens* norm of international law. The Russian Federation's criticism of the alleged brevity of the direct negotiations also lacks merit[164]. Contrary to the impression that Russia seeks to give, Russia's own diplomatic

---

[159] *Georgia* v. *Russia*, Preliminary Objections of the Russian Federation, para. 4.39; see also *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 131, para 151.

[160] WSU, pp. 188-189, para. 355.

[161] Russian Federation Note Verbale No. 11812 to the Embassy of Ukraine in Moscow, 28 Sept. 2015 (WSU, Ann. 110).

[162] WSU, pp. 194-195, para. 362.

[163] *Provisional Measures Order of 19 April 2017*, p. 117, para. 106.

[164] PORF, pp. 212-213, para. 426.

correspondence confirms that it received a full account of Ukraine's concerns about specific instances of discrimination at those meetings and that it had the opportunity to respond[165]. Russia's real complaint is that it was denied the opportunity to hijack the discussion with agenda items of its own choosing devoted to general discussion of practice under the Convention — a transparent attempt to divert attention away from the issues of real and immediate concern raised by Ukraine.

33. In sum, if Article 22 of the CERD establishes a negotiation precondition to the Court's jurisdiction, Ukraine has more than satisfied it. Any other conclusion would set the bar for accessing this Court's jurisdiction so high that it would effectively read judicial resolution of disputes out of the CERD and many other similarly worded conventions.

III. Ukraine was under no obligation to exhaust local remedies

34. Finally, the Court can readily dispense with Russia's last remarkable objection: that Ukraine cannot bring its claims to this Court unless local remedies in Russia have already been exhausted. At the preliminary objections hearing in *Georgia* v. *Russia*, counsel for one party rightly observed that

> "under general international law, the exhaustion-of-local-remedies rule operates in the context of diplomatic protection, but not that of inter-State disputes, as confirmed by, for example, the commentary to Article 14 *(c)* of the ILC draft articles on diplomatic protection"[166].

35. The party in question was the Russian Federation. The relevant quote can be found at page 42, paragraph 20, of the transcript at tab 28 of the judges' binder.

36. On that occasion, Russia was correct. It is a fundamental principle of international law that sovereign States are equal. When they act in their sovereign capacity, therefore, there can be no question of one State submitting itself to another's courts to have its rights determined.

37. It is clear here that Ukraine invokes its own rights under the Convention, rather than proceeding under a theory of diplomatic protection. Russia's campaign of cultural erasure is directed not at specific individuals, but rather at entire communities — specifically the Crimean

---

[165] Russian Federation Note Verbale No. 5774 to the Embassy of Ukraine in Moscow, 27 May 2016 (WSU, Ann. 114); Russian Federation Note Verbale No. 11812 to the Embassy of Ukraine in Moscow, 28 Sept. 2015 (WSU, Ann. 110).

[166] CR 2010/8, p. 47, para. 20 (Pellet).

Tatar and Ukrainian communities in Crimea. The systematic violation of the CERD by Russia therefore harms Ukraine as a State.

38. Yesterday, Professor Forteau described this as a reformulation of Ukraine's position that did not correspond to Ukraine's position in its Application and Memorial. But the Memorial is explicit that Ukraine brings this case to seek relief from State-level injury. At paragraph 22 it states that Russia's violations of the ICSFT and the CERD "have brought great harm to Ukraine and its citizens, and indeed the world"[167]. Ukraine's submissions similarly make clear that Ukraine seeks relief in its own right and on behalf of the collectivity of its citizens, and not for particular individuals. For example, submission *(l)* in the Memorial asks the Court to order Russia to "[p]ay Ukraine financial compensation, in its own right and as *parens patriae* for its citizens, for the harm Ukraine has suffered as a result of Russia's violations of the CERD"[168]. Accordingly, Ukraine was under no obligation arising from general international law to exhaust local remedies in relation to its CERD claims.

39. Nor does the Convention itself require otherwise: the provisions that Russia cites apply only in the context of a CERD Committee proceeding when a State party brings a complaint on behalf of specific individuals.

40. Russia contends that specific references to the local remedies rule in Articles 11 (3) and 14 (7) *(a)* prove that it applies to any claim under the CERD[169]. However, both the plain language of the two provisions and the structure of the Convention contradict Russia's conclusion when applied to this case.

41. As to the language, both of the articles in question require only that "all available domestic remedies" be exhausted. There are no available domestic remedies that could or should have been exhausted in relation to the present dispute. 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 before turning to this Court.

---

[167] WSU, p. 8, para. 22.

[168] MU, pp. 365-366, para. 654.

[169] PORF, p. 224, para. 448.

42. And, as concerns the Convention's structure, both of these articles are contained in Part II of the Convention, describing the procedures of the CERD Committee. But Ukraine has brought this case pursuant to the compromissory clause contained in Article 22 of the Convention, governing disputes concerning the interpretation or application of the Convention. 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.

43. Russia's decision to persist with such a transparently baseless preliminary objection is of a piece with its general approach, as described by Ukraine's Agent at the outset today — disrespect, delay, distortion, denial.

44. While Russia's failure to prevent support for terrorism in eastern Ukraine and its policy of racial discrimination in Crimea have inflicted untold suffering on Ukraine's population, much time has already been wasted getting even this far in the case before you. The people of Ukraine desperately need this Court's intervention. The Court should not delay in rejecting Russia's baseless preliminary objections and permitting Ukraine to be heard on the merits.

45. Mr. President, Members of the Court, I thank you for your attention. That brings to a conclusion the first round of Ukraine's oral submissions.

Le PRESIDENT : Je remercie M. Gimblett. Son intervention conclut l'audience de ce jour. La procédure orale consacrée aux exceptions préliminaires en l'affaire reprendra le jeudi 6 juin 2019 à 10 heures, aux fins du second tour d'observations orales de la Fédération de Russie. A l'issue de cette audience, la Fédération de Russie donnera lecture de ses conclusions. L'Ukraine présentera son second tour d'observations orales le vendredi 7 juin 2019, à 10 heures. A l'issue de cette audience, elle donnera à son tour lecture de ses conclusions. Chacune des Parties disposera, lors de ce second tour, d'un maximum de deux heures pour présenter ses observations.

Je rappellerai que, conformément au paragraphe 1 de l'article 60 du Règlement de la Cour, les exposés oraux du second tour devront être aussi brefs que possible. Le second tour de plaidoiries a pour objet de permettre à chacune des Parties de répondre aux arguments avancés oralement par l'autre Partie. Il ne doit donc pas constituer une répétition des présentations déjà

faites par les Parties, lesquelles ne sont, au demeurant, pas tenues d'utiliser l'intégralité du temps de parole qui leur est alloué. L'audience est levée.

L'audience est levée à 13 h 15.

_____