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CR 2019/11

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2019

Public sitting

held on Thursday 6 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 jeudi 6 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.

The PRESIDENT: Please be seated. The sitting is open. The Court meets this morning to hear the second round of oral statement of the Russian Federation. I will now call upon Mr. Wordsworth to take the floor. You have the floor.

Mr. WORDSWORTH:

INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF THE FINANCING OF TERRORISM

ABSENCE OF JURISDICTION UNDER ARTICLE 24 (1) ICSFT: THERE IS NO CASE ON FINANCING OF TERRORISM WITHIN ARTICLE 24 (1)

1. Mr. President, Members of the Court, I will be addressing the submissions made by Professor Thouvenin and Ms Cheek on Tuesday, challenging Russia's objections that Ukraine's ICSFT claim does not fall within Article 24 (1) because there is no plausible case of terrorism financing under Article 2 (1).

2. Ukraine's big point, which was put in a number of different ways, is that Russia is seeking impermissibly to bring merits issues before the Court at the jurisdictional phase. It is said that Russia's insistence on the need for a plausible claim is unsupported by the Court's jurisprudence, and leads to an outcome inconsistent with the Rules of Court, because it leads to the intertwining of issues of jurisdiction and the merits.

A. Plausibility at the preliminary objections phase

3. In addressing this point, it is useful to start with Russia's submissions on the basic architecture of the ICSFT, as to which there was and could be no challenge. Professor Thouvenin outlined Ukraine's claims under Articles 8-10, 12 and 18 of the Convention[1], and he sought to downplay the importance of Article 2 (1), as to which it was said that no claim is brought by Ukraine[2]. He could not challenge the basic point that Articles 8-10, and so on, are *only* engaged where there is at least plausibly an offence under Article 2 (1) of the Convention. This is what the Court stated in terms at the provisional measures phase with respect to Article 18, and the Court's analysis applies equally for all the provisions that Ukraine relies on. To recall: "a State party to the

[1] CR 2019/10, p. 17, para. 9 (Thouvenin).

[2] CR 2019/10, p. 23, para. 23 (Thouvenin); also p. 31, para. 5 (Cheek).

Convention may rely on Article 18 to require another State party to co-operate with it in the prevention of certain types of acts only if it is plausible that such acts constitute offences under Article 2 of the ICSFT"[3].

4. Ukraine sought to pass over this, but the basic point is incontrovertible: the provisions alleged to have been breached could only be engaged, and any resultant dispute could only fall within Article 24 (1), if there is a plausible case of terrorism financing with respect to which Ukraine has sought investigation, assistance and so on. The impression was given that this matter had somehow been decided against Russia at the provisional measures phase in the context of the consideration of jurisdiction prima facie[4]. But the Court was naturally enough focused on plausibility in the context of the provisional measures requirement on the existence of plausible rights[5], and its decision there on the absence of plausible rights is not somehow divested of its obvious relevance when it comes to the full consideration of the Court's jurisdiction.

5. For the Court to examine this issue of plausibility at the jurisdictional phase is consistent with, indeed mandated by, its past jurisprudence, but also, as we said in opening, by basic principle[6]. There was notably no response to the point that, if an applicant did not have to bring a plausible claim in order to establish jurisdiction, provisions such as Article 24 would be reduced to an open gateway to jurisdiction — through allegation by the applicant of whatever facts might fit within the given treaty, and by its stated interpretation of treaty provisions, however untenable[7].

6. It was nonetheless said that Russia is making two grave errors[8].

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[3] *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. 131, para. 74.

[4] CR 2019/10, p. 20, para. 13 (Thouvenin), referring to *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. 118, paras. 30-31.

[5] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, pp. 128-129, paras. 72-76.

[6] CR 2019/9, pp. 21-25, paras. 5-7 and 14-22 (Wordsworth).

[7] CR 2019/9, p. 24, para. 20 (Wordsworth).

[8] CR 2019/10, p. 21, para. 14 (Thouvenin).

7. First, it is said, facts are for the merits stage and that, by reference to the separate opinion of Judge Higgins in the *Oil Platforms* case, the Court should "accept *pro tem* the facts as alleged"[9]. But, as I indicated on Monday, it is important to see exactly what Judge Higgins was saying:

> "The only way in which, *in the present case*, it can be determined *whether the claims* of Iran *are sufficiently plausibly* based upon the 1955 Treaty is to accept *pro tem* the facts as alleged by Iran to be true and in that light to *interpret* Articles I, IV and X *for jurisdictional purposes* — that is to say, to see if on the basis of Iran's claims of fact there could occur a violation of one or more of them."[10]

8. Thus, as I said in opening, Judge Higgins was merely addressing the specific case before the Court, which concerned solely issues of interpretation[11]. Ukraine has elected not to engage with this point and, for no sound reason, to elevate an isolated dictum to the level of a generally accepted principle, although it finds no expression in the Court's jurisprudence. In a different case, such as where there is an attempt to shoehorn a case on use of force and international humanitarian law (IHL) in an armed conflict into the Genocide Convention or, as here, into the ICSFT, an examination of the correct legal characterization of the facts will be warranted[12].

9. And while Professor Thouvenin contended that "none of the jurisprudence cited [by Russia] supports this approach", he said not one word about the *Legality of Use of Force* case that we cited on Monday[13]; and it cannot seriously be suggested that the approach endorsed by the Court in that decision could "seriously damage the integrity of the judicial process and undermine the administration of justice"[14]. To the contrary: the approach of the Court in *Legality of Use of Force* reflects an all-important recognition by the Court of the need to take a look at the legal reality of the events that are put before the Court in a treaty context, in particular where a claimant must establish the existence of a *dolus specialis*, and thus to protect the judicial function through respecting the true extent to which States have consented to its jurisdiction.

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[9] CR 2019/10, p. 21, para. 16 (Thouvenin); also p. 10, para. 10 (Cheek); and WSU, para. 36.

[10] *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; emphasis added.

[11] CR 2019/9, p. 25, para. 21 (Wordsworth).

[12] CR 2019/9, p. 24, paras. 19-20 (Wordsworth).

[13] *Legality of Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 138, paras. 39-41.

[14] CR 2019/10, p. 22, para. 19 (Thouvenin).

10. Here, as in *Legality of Use of Force*, the context for the claim is fighting in an armed conflict; here, as in *Legality of Use of Force*, an attempt is being made to shoehorn events in that context into a treaty where they do not belong. And it would be positively inconsistent with the integrity of the judicial process to see that as all a matter solely for the merits and to approach the Convention as if there were no specific intention requirements in the Article 2 (1) offence on which all the other relevant provisions depend.

11. And, in this case, there is the added, quite exceptional, juridical fact that the Court has already looked at the relevant facts and made an initial finding that there is no plausible case of any Article 2 (1) offence so as to engage the asserted rights under Articles 8-10 and so on[15]. Yet Ukraine says you cannot take any of this on board because this is now a separate phase of the proceedings, and you cannot even look at the key provision of the Convention and you must go straight on to the merits.

12. It was suggested that this curious and unworkable result was all due to a distinction between an order for provisional measures and the order that would follow from a preliminary objections phase — that a finding of jurisdiction does not affect the sovereignty of the respondent State because that State will merely have been found to have consented to the proceedings[16]. But that simply begs the critical question of whether the respondent State has indeed consented, a question of manifest importance to States, and Professor Thouvenin did not dispute the point that consent must be "unequivocal"[17], meaning that the Court must examine the question very closely indeed.

13. And while Professor Thouvenin sought to adapt and apply the Court's approach to one of the disputed issues ***of*** the jurisdictional phase of the *Bosnian Genocide* case, that concerned the

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[15] *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. 131, para. 75. See CR 2019/9, p. 22, para. 11 (Wordsworth).

[16] CR 2019/10, pp. 21-22, paras. 17-18 (Thouvenin); CR 2019/9, p. 25, para. 22 (Wordsworth).

[17] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, p. 204, para. 62, citing, among other previous decisions, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 18.

issue of Yugoslavia's participation in the conflict, and had nothing to do with the correct legal characterization of the underlying facts concerning whether there had been a genocide[18].

14. And this leads me to the second of the two so-called "grave errors" identified by Professor Thouvenin. It was said that the Court cannot interpret Article 2 (1) at this stage because that would amount to determining a dispute concerning interpretation and application, and referring again to the *Bosnian Genocide* case, it was said that "it is difficult to see how the Court could at the same time find that it lacks jurisdiction to settle a dispute, while at the same time settling it"[19].

15. Well, if that is correct, the *Oil Platforms* case, where the Court held that it lacked jurisdiction to decide Iran's case on breach of Articles I and IV of the 1955 Treaty of Amity, having carried out a detailed interpretation of those provisions, and preferring the interpretation put forward by the United States, was wrongly decided[20]. And precisely the same would follow, for example, to the Court's decision this year on jurisdiction in the *Certain Iranian Assets* case.

16. And of course, where there is a provision confining the scope of jurisdiction to disputes concerning the interpretation or application of the given treaty, the Court can decide at the jurisdictional phase that a claimant's interpretation of the given provision is wrong, and that hence there is no plausible claim within the given treaty. Indeed, the point was emphasized by Judge Higgins in the very passage in her separate opinion in *Oil Platforms*, upon which Ukraine relies.

17. This case is no different. While Ukraine may not allege a breach of Article 2 (1) ICSFT, all of its claims depend on the plausible existence of an offence as exclusively defined in that provision, so it is critical for the Court to ascertain the meaning of Article 2 (1) for jurisdictional purposes. Put another way, once it is accepted — as Ukraine now appears to accept — that the Court can interpret, say, Article 18 for jurisdictional purposes, it follows inevitably that the same

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[18] CR 2019/10, p. 23, para. 22 (Thouvenin), referring to *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)*, pp. 615-616, para. 31.

[19] CR 2019/10, p. 22, para. 22 (Thouvenin), referring to *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)*, pp. 617-618, para. 33.

[20] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, pp. 812-816, paras. 24-36.

applies for Article 2 (1), to which Article 18 expressly refers, and without which Article 18 has no justiciable content, and is thus not applicable at all.

18. As to the attempt to draw a parallel between the present case and the joining of certain interpretative disputes to the merits in *Bosnian Genocide*, that is no way an analogous case. There was unquestionably a plausible claim of genocide so far as concerns the underlying facts, Serbia was not suggesting otherwise, and there was simply no need for the Court to consider the *Ambatielos* line of authority[21].

19. The present case is very different, and that must be why Ukraine felt it necessary, while asserting that there is no need for you to look at the facts at this stage, to spend a considerable amount of time encouraging you to look closely at elements of the facts[22], notably focusing on the four distinct episodes of shelling that were before the Court in 2017[23].

20. I will come back to that a little later, but note in this connection that Ukraine told you that Russia has "submitted a 20-page appendix . . . solely devoted to disputing issues related to various incidents of the shelling of civilians"[24]. Well, that is not correct. Tables 1 to 6 of the Appendix to Russia's Preliminary Objections simply set out the relevant OHCHR and other evidence before the Court.

21. Ms Cheek also suggested that it would be unfair, and not in the proper administration of justice, for you to "weigh the factual record in this case" at this stage[25]. This is curious since the overwhelming majority of the evidence currently before you is that advanced by Ukraine, which has not yet been tested by Russia. In other words, the evidentiary picture is currently at its highest, and in the best possible shape so far as concerns Ukraine. And, if that untested evidence does not disclose a plausible case of the financing of terrorism, the Court can be confident that this would still be the case if that same evidence were to be tested at a merits phase.

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[21] See the objections at *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)*, pp. 604-606, para. 7.

[22] See, e.g. CR 2019/10, p. 40, paras. 50-53 (Cheek).

[23] See, e.g. CR 2019/10, p. 32, para. 11 (Cheek).

[24] CR 2019/10, p. 31, para. 7 (Cheek).

[25] CR 2019/10, p. 40, para. 51 (Cheek); also p. 32, para. 12 (Cheek).

22. And, of course, if the Court decides at this stage that the facts before you do not plausibly concern financing of terrorism, that means that the case does not go to the merits. But that does not mean that the Court is cutting across the important distinction between issues that go to jurisdiction and those that go to the merits[26]. It is inherent in the nature of preliminary objections *ratione materiae* that, if a claim does not fall within the scope of the treaty, the matter will not go forward to the merits.

B. Ukraine's position on knowing financing under Article 2 (1)

23. I turn to what Ukraine said on Tuesday about the requirement of knowing financing under Article 2 (1). Four points.

24. First, Ukraine's presentation confirmed that it has abandoned its case on *intentional* financing and re-cast its case as one of *knowing* financing, and it did not and could not dispute the point that this demonstrates its acceptance of the distinction between knowledge and the more demanding standard of intention[27].

25. Second, there was also no comeback on our position that, pursuant to the ordinary meaning of the words used, and as confirmed in the analysis of the IMF Legal Department, the standard required by Article 2 (1) is *actual* knowledge[28]. The same applies so far as concerns what we said on Monday about context and also the *travaux*, which confirm that recklessness was specifically excluded as insufficient to establish knowledge for the purposes of Article 2 (1)[29].

26. Third, Ms Cheek's key point was that the requirement of knowledge "is satisfied if the financier is aware that he is providing funds to a group that commits acts of terrorism", and that I was wrong to argue "the financier needs to know that particular funds will be used for a particular terrorist act"[30]. The difficulty is that I made no such argument. My point, which was left unanswered, is that what is called the "core of Ukraine's interpretation" in its Observations is that knowing financing of terrorism encompasses "the financing of a group *which has notoriously*

[26] Cf. CR 2019/10, p. 31, paras. 5-6 (Cheek).

[27] CR 2019/9, pp. 26-27, para. 29 (Wordsworth); PORF, para. 42.

[28] CR 2019/9, pp. 27-28, para. 32 (Wordsworth).

[29] CR 2019/9, p. 27, para. 31 (Wordsworth).

[30] CR 2019/10, p. 33, paras. 16-17 (Cheek).

committed terrorist acts"[31]; and yet Ukraine is the only one saying that the DPR and LPR are to be recognized as terrorist organizations, so there can be no plausible case on notoriety[32].

27. Fourth, what is actually happening here is that Ukraine is seeking to back away from its own core position on what is required for knowing financing, and its own authority (Marja Lehto, who led Finland's delegation during the ICSFT negotiations), that — and here I quote both Ukraine and Lehto — "it 'must be assumed that the financing of a group which has notoriously committed terrorist acts would meet the requirements of paragraph 1' of Article 2"[33].

28. And, of course, this shift in position is an acknowledgement that Ukraine knows that it cannot state a plausible case that the DPR and LPR have notoriously committed terrorist acts. As we said in opening, not one of the OSCE, ICRC or OHCHR has ever characterized either the DPR or LPR as a terrorist organization, or the shooting down of Flight MH17 as a terrorist act, or the various shelling incidents as terrorist acts[34], and there was no challenge to that basic factual point on Tuesday. And the same point applies so far as concerns the absence of such a characterization from any other international organization, or indeed any State other than Ukraine. And so what was the core case on notoriety appears to have been dropped, albeit in silence, and with an attempt to distract your attention by a lengthy argument to the effect that designation as a terrorist organization would not be required for the requisite knowledge to be established. Well, maybe, but Russia was merely responding to how Ukraine previously put its case, and the point remains that Ukraine must somehow make a plausible showing of actual knowledge that funds "are to be used" for a terrorist act[35].

29. And, as to supposed knowledge that the DPR and LPR commit acts of terrorism, Ukraine has omitted to inform the Court that it publishes a very long list of persons identified by it as

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[31] WSU, para. 194, quoting M. Lehto, *Indirect Responsibility for Terrorist Acts*, 2009, p. 289, emphasis in original (MU, Ann. 490); see also WSU, para. 203.

[32] CR 2019/9, p. 28, paras. 33-35 (Wordsworth).

[33] MU, para. 289, quoting M. Lehto, *Indirect Responsibility for Terrorist Acts*, 2009, p. 289 (MU, Ann. 490); WSU, para. 194, quoting Lehto, p. 289; see also WSU, para. 203.

[34] CR 2019/9, p. 28, paras. 33-34 (Wordsworth), referring to by way of example Office of the United Nations High Commissioner for Human Rights (hereinafter "OHCHR"), Report on the Human Rights Situation in Ukraine, 15 July 2014 (MU, Ann. 296), paras. 2, 41; OHCHR, Report on the Human Rights Situation in Ukraine, 17 August 2014 (MU, Ann. 299), paras. 58, 7; OHCHR, Report on the Human Rights Situation in Ukraine, 6 February to 15 May 2017, at: https://www.ohchr.org/Documents/Countries/UA/UAReport18th_EN.pdf.

[35] CR 2019/10, pp. 34-35, paras. 20-22 (Cheek).

suspected of involvement in terrorism offences[36]. Yet this list contains no reference to the DPR or LPR or its leaders or, indeed, any of the names that were previously communicated to Russia (via MLA requests and during bilateral consultations) in connection with the events in Donbas.

30. Thus, there is no plausible case that those who supplied funds or weapons to the DPR or LPR would have known that they were financing terrorism by virtue of supposed knowledge that the DPR and LPR carry out terrorist acts.

31. Ms Cheek also said, pointing to Ukraine's Memorial, that "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 group . . . activities"[37]. But the points made there essentially come back to the question of whether events such as the shooting down of Flight MH17 and the shelling incidents were acts of terrorism, such that providing funds to those organizations would be financing of a group that engaged in terrorist acts[38].

C. Alleged financing of terrorism: Flight MH17

32. I turn to Ukraine's case on Flight MH17, and Ukraine has, once again, failed to engage with the central point that, accepting Ukraine's own evidence, whoever supplied the weapon did so in response to a request for assistance in defending against attacks by Ukrainian military aircraft. Ms Cheek said nothing about the JIT's finding to that effect or the alleged telephone intercept evidence, all of which highlight the absence of any plausible case of knowing financing of terrorism[39].

33. Although Ms Cheek sought to emphasize that Ukraine's Memorial "included hundreds of annexes, as well as fact witness and expert . . . testimony in support"[40], that is to pass over the question of what such evidence may plausibly show, as opposed to how many volumes a claimant may plausibly choose to fill; and, as it was put on Tuesday, Ukraine's case on knowing financing with respect to MH17 turns on two documents, neither of which is of any assistance to Ukraine.

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[36] See the "List of persons related to terrorist activity or persons to whom international sanctions apply", website of the State Financial Monitoring Service of Ukraine at http://www.sdfm.gov.ua/articles.php?cat_id=180&lang=en.

[37] CR 2019/10, p. 35, para. 23, referring to MU, paras. 285 to 294 (Cheek).

[38] CR 2019/9, p. 36, para. 59 (Wordsworth).

[39] CR 2019/9, pp. 25-26, paras. 25-28 (Wordsworth).

[40] CR 2019/10, paras. 10 and 50 (Cheek).

34. First, Ms Cheek sought to criticize Russia for not referring the Court to the JIT's view that the Buk used to shoot down Flight MH17 was supplied by Russian forces and came from Russia[41]. This fails entirely to engage with Russia's position. The question of who supplied the weapon is a heavily contested issue of fact, which is not relevant at the preliminary objections stage. What matters for present purposes is that, even if the JIT view on the origin of the Buk is assumed to be correct, this tells one nothing about the critical ICSFT question of whether whoever supplied the Buk did so knowing that it was going to be used for a terrorist act.

35. The ICSFT was not intended to, and does not, criminalize all instances of support for a party to an armed conflict — of course not.

36. Second, relying on the evidence of Ukraine's expert, it was said that there is a plausible case that the Russian nationals who allegedly supplied the Buk without its control centre knew that it could be used to shoot down a civil aircraft — because they knew that the weapon provided would be incapable of distinguishing between civil and military aircraft[42]. That also is of no assistance to Ukraine. The question under Article 2 (1) is whether there is knowledge, actual knowledge, that the funds "are to be used" to shoot down a civil aircraft, not knowledge that the funds "could be used", and still less knowledge that the funds "could be used inadvertently"[43].

37. As I explained on Monday, the context and *travaux* confirm that recklessness was specifically excluded as insufficient to establish knowing financing for the purpose of Article 2 (1)[44]. Similarly, as Russia explained in its Preliminary Objections in response to Ukraine's reliance on the Rome Convention, recklessness was also excluded from the scope of that Convention[45]. And there was no response on Tuesday to either point.

38. I would also note in passing that Ukraine's position in its Memorial is that anyone with access to the internet could have been following the flightpath of Flight MH17, so it is not clear why it is being presumed that those supplying the Buk would have thought that those operating the

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[41] CR 2019/10, p. 14, para. 15 (Cheek).

[42] CR 2019/10, pp. 43-44, paras. 66-67 (Cheek).

[43] See CR 2019/9, p. 27, para. 31 (Wordsworth).

[44] CR 2019/9, p. 27, para. 30 (Wordsworth).

[45] PORF, para. 70.

weapon would be incapable of distinguishing between military and civil flights in the immediate area[46].

39. As to the existence of a plausible terrorist act, Ms Cheek argued that, notwithstanding the unqualified terms of Article 4 of the Montreal Convention, the offence in Article 1 (1) *(b)* encompasses the unintentional shoot-down of a civil aircraft — because the word "civil" does not appear in that provision[47]. You already have our position on that point of interpretation[48], and I would just like to add one point.

40. In its Memorial and again in its Observations, Ukraine sought to draw a parallel between Article 1 (1) *(b)* of the Montreal Convention and the offence established by Article 2 (1) of the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, contending that there is no requirement for knowledge of the status of the victim as an internationally protected person[49].

41. Russia agrees that this is a useful reference point, but Ukraine did not take you to the relevant passage from the ILC Commentary on what was to become the 1973 Convention. There, it was explained that the Internationally Protected Persons offence was drafted with Article 1 (1) *(b)* of the Montreal Convention firmly in mind, as follows:

> "As it is indicated by the first sentence of paragraph 1, the acts listed in sub-paragraphs *(a)* to *(e)* are crimes when committed intentionally, regardless of motive. *The word 'intentional', which is similar to the requirement found in article 1 of the Montreal Convention, has been used both to make clear that the offender must be aware of the status as an internationally protected person enjoyed by the victim . . .*"[50]

And the second point is less important for current purposes.

42. In a 1974 article, Sir Michael Wood recorded that this position did not change during the debate in the Sixth Committee[51].

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[46] MU, paras. 71-72.

[47] CR 2019/10, p. 39, paras. 45-46 (Cheek).

[48] CR 2019/9, p. 29, para. 36 (Wordsworth).

[49] MU, para. 222; WSU, para. 219.

[50] International Law Commission, Draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons with commentaries (1972), *Yearbook of the International Law Commission*, 1972, Vol. II, p. 316, para. 8; emphasis added.

[51] See M. Wood, "The Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents", (Oct. 1974) 23 (4) *International and Comparative Law Quarterly* 791, p. 803. Cf. CR 2019/10, p. 39, para. 47 (Cheek).

43. And, for completeness, the Court is not assisted by the comments of the United Nations Office on Drugs and Crime on internationally protected persons, which Ukraine has presented in its Observations as concerning the 1973 Convention, but which in fact concern the domestic legislation of the Cook Islands, which expressly excludes the requirement of knowledge of the victim's internationally protected person status[52]. The same point applies to Ukraine's reference to a decision of a United States court, which also concerns the specifics of domestic legislation[53].

D. Alleged financing of terrorism: the four events of shelling

44. I turn to the four events of shelling during the armed conflict in eastern Ukraine, at Volnovakha, Mariupol, Kramatorsk and Avdeevka, and make two introductory points.

45. First, Ukraine could not and did not challenge Russia's point that the OHCHR, OSCE and ICRC have consistently characterized acts of shelling in eastern Ukraine as breaches of IHL, but *never* as acts of "terrorism"[54]. Likewise, it could not and did not challenge our point that this matters because these organizations are characterizing the acts of shelling in full knowledge of the specific IHL prohibition of acts spreading terror among the civilian population[55].

46. Second, there was no substantive engagement with Russia's point that, on the basis of the reports of the OHCHR, OSCE and ICRC, Ukraine is equally if not *more* responsible than the forces of the DPR and LPR for the loss of civilian life in the armed conflict as a result of indiscriminate shelling[56]. What you did hear, however, and for the first time, was a flat denial, accompanied only by a statement that Russia was making "baseless factual allegations"[57]. Now, it is useful to compare what Ms Cheek was saying last time she appeared before you in 2017. Referring to Ukraine's own reliance on the reports of the OHCHR and the ICRC at the provisional measures phase, she said

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[52] UNODC, Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols (2003), pp. 12-13, paras. 28-30 (MU, Ann. 284); Cf. WSU, para. 219.

[53] *United States* v. *Murillo*, 826 F.3d 152 (Court of Appeals for the 4th Circuit of the United States, 2016), pp. 158-159 (WSU, Ann. 62).

[54] CR 2019/9, p. 29, para. 40 (Wordsworth); PORF, pp. 48-50, para. 98.

[55] CR 2019/9, pp. 29-30, para. 40 (Wordsworth); Art. 13 (2), Additional Protocol to the Geneva Conventions of 12 August 1949 (APII); ICRC, *Study on Customary International Humanitarian Law: Rule 2. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited*, IHL database, available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule2. Cf. PORF, para. 98 *(c)* and fn. 134, referring to OSCE report concerning Kosovo.

[56] CR 2019/9, p. 30, para. 41 (Wordsworth); PORF, pp. 50-51, para. 99.

[57] CR 2019/10, p. 40, para. 53 (Cheek).

that Ukraine "cites these documents simply as evidence that the events Ukraine asserts happened as a matter of fact"[58].

47. Well, sadly, attempts to have one's cake and eat it appear to have become rather fashionable of late, but the United Kingdom's lack of success in its negotiations with Europe shows that such attempts do not succeed. Ukraine's Memorial and Observations contain dozens and dozens of references to the reports of the OHCHR, ICRC and OSCE, and it cannot suddenly ask you to ignore what those reports say, and blankly deny that the many instances of indiscriminate shelling by Ukraine that are recorded by the OHCHR happened as a matter of fact.

48. I turn, then, to Ukraine's attempt to interpret the specific intention requirement under Article 2 (1) *(b)* as broadly as possible by contending that an intent to cause death or serious bodily harm to civilians may be established by a showing of indirect intent or recklessness inferred from the objective circumstances. Ukraine elected not to engage with our point that the specific intent requirement in Article 2 (1) *(b)* is analogous to that of Article II of the Genocide Convention: in both there is an express requirement of intent, an express requirement of purpose, and these elements together establish a *dolus specialis* requirement, to be interpreted and applied consistent with the Court's approach in *Croatia* v. *Serbia*[59].

49. As to the meaning of the words "intended to" in Article 2 (1) *(b)*, there was no comeback to the simple point that where the Contracting Parties meant to refer to "knowledge" they did so expressly as in the chapeau to Article 2 (1). And, likewise, there was no comeback to the point that Article 2 (1) *(b)* states only that the purpose element may be established from the "nature and context"[60], words that Ukraine itself places much weight on[61], and that the *travaux* show that the Contracting Parties specifically rejected an approach to extend this approach to the establishment of intention[62].

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[58] CR 2017/3, p. 37, para. 9 (Cheek).

[59] CR 2019/9, p. 32, para. 46 (Wordsworth), referring to *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 67, para. 148. Cf. CR 2019/10, p. 36, para. 33 (Cheek).

[60] CR 2019/9, p. 27, para. 31 (Wordsworth).

[61] WSU, p. 129, para. 246.

[62] CR 2019/9, p. 27, para. 31 (Wordsworth). See also PORF, para. 47 citing UN doc. A/C.6/54/CRP.10, reproduced in Report of the Working Group, UN doc. A/C.6/54/L.2, 26 Oct. 1999, Ann. III, Informal summary of discussions in the Working Group, prepared by the Chairman, para. 98 (MU, Ann. 277).

50. Ms Cheek contended that "the word 'intended' would have to be given its ordinary meaning consistent with its usage in international law and practice"[63]. But the usual rules of interpretation apply and cannot be bypassed by reference to supposed general usage. *Kasikili/Sedudu* is, of course, not authority to the contrary and the passage relied on by Ukraine is taken out of context[64]. In any event, the sources relied on by Ukraine, such as the Guidance of the Financial Action Task Force and the Rome Statute, would not support a *mens rea* of recklessness, which is what Ukraine appears to wish to arrive at[65].

51. Ms Cheek also said that the phrase "act intended to cause death or serious bodily harm" "does not speak of intention" and that it cannot — because "'[a]cts' do not have mental states"[66]. That is not tenable. The ordinary meaning of the words used points only to the intent behind the act, that is the mental state of the perpetrator, not unspecified objective considerations. The French and Russian language texts do not lead to any different conclusion[67], and the Russian term used in fact implies direct intent or direct intent with a particular purpose, depending on the context, as appears from the table at tab 6.1 of your judges' folder.

52. Ms Cheek's reliance on the content of Russian domestic law is equally misconceived since it misses the point that the Convention requires States to transpose the core minimum *dolus specialis* requirement, but does not preclude them from adopting a broader domestic law standard of intent if they so wish[68]. That indeed is confirmed by the view of the IMF Legal Department that we included in the judges' folder on Monday[69].

53. And it follows from this obvious point that Ukraine's reference to Russia's legislation on terrorism financing is an irrelevance. In any event, however, Ukraine misstates the content of

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[63] CR 2019/10, p. 36, para. 33 (Cheek).

[64] Cf. CR 2019/10, p. 36, para. 33 and fn. 64 (Cheek); WSU, pp. 116-117, para. 229. See *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999 (II)*, p. 1061, paras. 22 and 27.

[65] PORF, pp. 22-23, para. 51 and pp. 31-32, para. 70.

[66] CR 2019/10, p. 36, paras. 29-30 (Cheek).

[67] Cf. CR 2019/10, p. 36, paras. 31-32 (Cheek).

[68] Cf. CR 2019/10, p. 37, para. 34 (Cheek); and see PORF, pp. 41-42, para. 83 *(b)*.

[69] CR 2019/9, p. 27, para. 32 (Wordsworth); International Monetary Fund, Legal Department, *Suppressing the Financing of Terrorism: A Handbook for Legislative Drafting* (2003), pp. 52-53, available at https://www.imf.org/external/pubs/nft/2003/SFTH/pdf/SFTH.pdf.

Russian law, focusing on the general definition of intent under its criminal code rather than the specific intent required to establish terrorism offences.

54. As regards the purpose element of the *dolus specialis* requirement under Article 2 (1) *(b)*, Ukraine now appears to say that it is always appropriate to draw "the inference that an attack on a civilian area has a purpose to intimidate"[70]. It is as if, in Ukraine's understanding, there were not three entirely separate and escalating IHL prohibitions of indiscriminate attacks on civilians, direct attacks and acts spreading terror[71]. And it is to be noted that there was then a selective quotation from a passage of the judgment of the Appeals Chamber in *Milošević*, which was presented as establishing a general principle. The Appeals Chamber, however, was naturally focused on the specific case before it, concerning the siege of Sarajevo, which involved continuous direct attacks against civilians as well as indiscriminate attacks, and as you can see on the screen, repeated incidents of sniping and shelling, direct and indiscriminate shelling, use of a particularly injurious weapon — the modified air bomb — and all for a period of 14 months[72].

55. It is also not correct to say that Russia's position is that "only sustained shelling campaigns can be considered those with a purpose to intimidate"[73]. Russia's actual point, which was entirely ignored, is that the siege of Sarajevo is the only episode that the ICTY has considered as entailing the spreading of terror, even plausibly so[74].

56. Ukraine asks the Court to look at all of the acts cumulatively, relying on a separate opinion from Judge Shahabuddeen[75]. But Judge Shahabuddeen was not suggesting that a series of separate engagements in an armed conflict, on separate dates and in separate locations, should be grouped together and characterized as relevant context alongside the earlier tragic shooting down of a civil airliner that was not even plausibly a terrorist act; and we invite the Court to look carefully at the illustrations given by him that identify how narrowly he was construing relevant

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[70] CR 2019/10, p. 37, para. 38 (Cheek).

[71] CR 2019/9, p. 32, para. 47 (Wordsworth).

[72] *Prosecutor* v. *Dragomir Milošević*, Case No. IT-98-29/1-A, Judgment, 12 Nov. 2009, para. 38. See also paras. 245 and 254.

[73] CR 2019/10, p. 38, para. 38 (Cheek).

[74] CR 2019/9, p. 33, para. 49 (Wordsworth).

[75] CR 2019/10, p. 38, para. 39 (Cheek). See also WSU, p. 131.

context[76]. The mere addition of military activities to other military activities does not result in terrorism, as indeed follows from the *Milošević* case[77].

57. Ukraine now places great weight on a single reference to "terror" by the OHCHR in its two reports of July and September 2014. That reference was in the specific context of killings and ill-treatment. Indeed, it is notable that Ukraine deployed at least one of these reports before you in 2017[78], but evidently did not think much of the passages then, as they were not even referred to, while now it seeks to build a large part of its case around them.

58. As to the four episodes of shelling, two involved checkpoints manned by armed personnel, and Ukraine did not dispute Russia's position that both sides to the armed conflict have treated such checkpoints as military targets and shelled them. I note that, as regards Mariupol, Ukraine has failed to refer the Court to its own witness evidence, which shows that the DPR/LPR forces were provided with the incorrect co-ordinates for the checkpoint[79]. As regards Kramatorsk, there was indisputably shelling of an anti-terrorist operation base at the airport; and, as to the shelling at Avdeevka, this town was then on the front line of the conflict zone, and Ms Cheek said nothing about the well-documented fact that Ukraine had positioned tanks in residential areas and fired from those locations, which had then been targeted by return fire.

59. And, stepping back, Russia's point is not just that it is Ukraine *alone* that is characterizing these four events as terrorism, and that these events are of a completely different nature to those events in an armed conflict found by the ICTY to amount to acts of spreading terror. In addition, as part of Ukraine's enthusiasm to ignore all the clearly stated reality checks that Russia has put before the Court, Ms Cheek said nothing at all about Ukraine's undertaking, as part of the Minsk "Package of Measures" to "ensure pardon and amnesty . . . of persons in connection with the events that took place in certain areas of the Donetsk and Luhansk regions of Ukraine"[80].

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[76] *Ngeze and Nahimana* v. *Prosecutor*, ICTR Case Nos. 97-27-AR72 and 96-11-AR72, Appeals Chamber Decision on the Interlocutory Appeals, separate opinion of Judge Shahabuddeen (5 Sept. 2000), para. 22 (Ukraine's judges' folder, tab 15).

[77] CR 2019/9, p. 33, para. 48 (Wordsworth), referring to *Prosecutor* v. *Milošević*, Trial Chamber Judgment, para. 888 (MU, Ann. 466). See also *Prosecutor* v. *Galić*, Trial Chamber Judgment, para. 103 (MU, Ann. 464).

[78] CR 2017/1, p. 48, para. 50 (Cheek); CR 2017/3, p. 43, para. 28 (Cheek).

[79] PORF, Table 4 in Appendix A, pp. 271-271; Signed Declaration of Valerii Kirsanov, Witness Interrogation Protocol, 25 Jan. 2015 (MU, Ann. 213).

[80] CR 2019/9, p. 31, para. 42 (Wordsworth); PORF, para. 100.

60. The shelling at Volnovakha and Mariupol took place on 13 and 24 January 2015 respectively, while the shelling at Kramatorsk took place on 10 February 2015. The Minsk Package, pursuant to which a ceasefire was agreed, and it was agreed that both Ukraine and the armed formations of the DPR and LPR would withdraw all their heavy weapons to create a security zone, was agreed on 12 February. The participants expressly had the recent shelling events — by Ukraine as well by the DPR and LPR — in mind, and they agreed to the pardon and amnesty.

61. It is not just that it appears inconceivable that Ukraine would have agreed to pardon and amnesty if it considered the events at Volnovakha, Mariupol and Kramatorsk to have been even plausibly "terrorist" acts. The further point is that, through resolution 2202 (2015), the Security Council called on "all parties to fully implement the 'Package of measures', including a comprehensive ceasefire as provided for therein"[81]. It is inconceivable that the Security Council would have called for implementation of, amongst other things, the pardon and amnesty, if the acts of indiscriminate shelling on which Ukraine now focuses were plausibly acts of terrorism.

62. And I note in passing here that, while the honourable Agent for Ukraine said on Tuesday that the DPR and LPR are not parties to the Minsk arrangements[82], they are signatories to the February 2015 "Package of Measures", as annexed to Security Council resolution 2202[83], and it is not contested that they were participants in the Minsk process, which is how we put it[84].

63. Finally, Ms Cheek referred to the bombing at Kharkiv and other Ukrainian cities. At the provisional measures phase, we made the point that the bombing at Kharkiv on 22 February 2015 was raised by Ukraine in diplomatic correspondence on 15 September 2015. Russia subsequently confirmed "its interest in receiving from the Ukrainian Party the concrete materials containing evidential data in support of the declarations made by the Ministry of Affairs". Although the matter was discussed by the Parties during the third round of negotiations, Ukraine failed to provide any additional information[85]. And that remains the case today.

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[81] United Nations Security Council resolution 2202 (2015), para. 3.

[82] CR 2019/10, p. 14, para. 14 (Zerkal).

[83] United Nations Security Council resolution 2202 (2015), para. 3.

[84] CR 2019/9, p. 28, para. 35 (Wordsworth).

[85] CR 2017/4, p. 26, para. 57 (Wordsworth), referring to diplomatic Note No. 3219/днв, 4 Mar. 2016, PORF, Ann. 1; Ukraine, diplomatic Note No. 72/22-620-915, 13 Apr. 2016, PORF, Ann. 1.

64. Mr. President, Members of the Court, I thank you for your attention, and ask that Professor Zimmermann be called to the Bar.

The PRESIDENT: I thank Mr. Wordsworth and I now invite Professor Zimmermann to take the floor. You have the floor.

Mr. ZIMMERMANN:

INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF THE FINANCING OF TERRORISM

ABSENCE OF JURISDICTION UNDER ARTICLE 24 (1) ICSFT: THE ICSFT DOES NOT ENCOMPASS THE FINANCING OF ALLEGED ACTS OF TERRORISM BY A STATE AND ITS ORGANS/PROCEDURAL PRECONDITIONS OF ARTICLE 24 ICSFT ARE NOT MET

I. Introduction

1. Mr. President, Members of the Court, let me start with five preliminary, yet important points.

2. *First*, it is worth mentioning that while Ukraine claimed that there exist no doubts as to the *scope* of the Court's jurisdiction under Article 24 ICSFT[86], nevertheless Professor Thouvenin thought it necessary to spend half of his time on the matter which fact in itself is telling, to say the least.

3. *Second*, let me also note at the outset that the reference, by counsel of Ukraine, to the purported confirmation, by the Court in its 2017 Order on Provisional Measures, of its jurisdiction under Article 24 ICSFT allegedly extending to matters of State responsibility, is nothing but a red herring[87]. In confirming the existence of a dispute under the ICSFT *as such*, and to do so on a prima facie basis only anyhow[88], the Court did obviously *not* make any determination as to the *scope* of its jurisdiction *ratione materiae*.

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[86] CR 2019/10, p. 24, paras. 24-26 (Thouvenin).

[87] CR 2019/10, p. 24, paras. 25-26 (Thouvenin).

[88] *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. 118, para. 31.

4. *Third*, and equally important, Ukraine has confirmed that in the current proceedings it no longer wishes to engage Russia's State responsibility for allegedly itself having financed acts of terrorism in Ukraine in the current proceedings[89].

5. *Fourth*, counsel for Ukraine had nothing to say on our arguments concerning the drafting history of the ICSFT[90] *and* — or should I say "or"? — on the Court's Judgment in the *Bosnian Genocide* case, which had very clearly drawn the distinction between an obligation not to commit and an obligation to prevent — both arising under international law[91].

6. Finally, *fifth*, Ukraine had nothing to say neither as to the fact that the ICSFT, in sharp contrast to other comparable conventions, contains no reference whatsoever to either public officials or public funds. If, as Ukraine wants you to believe, States intended to address action by their own State organs, why did the negotiating States then not make that clear by adding these simple words?

7. All those points make one wonder how well founded Ukraine's position is. But be that as it may, I will now address those points Ukraine *did* try to address.

II. Exclusively preliminary character of Russia's objection

8. Mr. President, two days ago, you heard Ukraine doubting the exclusively preliminary nature of Russia's objection as to the scope of the Court's jurisdiction under Article 24 ICSFT. But the Court's case law is clear. In principle, Russia is entitled to have its objection answered at this stage even if it may touch upon certain aspects of the merits[92].

9. Besides, Russia's objection relates exclusively to a pure question of law. No factual inquiry is required for the Court to rule on the scope of Article 18 and Article 2 ICSFT[93], nor is it necessary to decide, at this stage of the proceedings, whether the alleged conduct actually took place and who bears responsibility for it.

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[89] CR 2019/10, p. 24, para. 26 (Thouvenin).

[90] CR 2019/9, p. 38, para. 16 (Zimmermann), referencing PORF, paras. 130-174, in particular paras. 140, 154-158, 161-163, 166-169. See also CR 2019/9, p. 43, paras. 37-39 (Zimmermann).

[91] See CR 2019/9, pp. 41-42, paras. 28-32 (Zimmermann).

[92] See *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 852, para. 51.

[93] See *ibid.*

10. This approach is further confirmed by your 1996 Judgment in the *Bosnian Genocide* case where you did the exact opposite from what Ukraine wants you to do now. You — the Court — *did* engage with Yugoslavia's objection that the Genocide Convention does not cover matters of State responsibility, referencing Article IX and Article IV[94] of the Genocide Convention, rather than merging this objection by Serbia with the merits.

11. Ukraine attempted to counter this argument by relying on your jurisprudence in the *Oil Platforms* and the *Certain Iranian Assets* cases[95]. Yet, unlike in the cases mentioned, what is at stake here is neither any possible defence on the merits to be brought forward by Russia, nor any exclusionary clause curtailing the Court's jurisdiction. In contrast, what is at stake is merely the positive delimitation of the Court's substantive jurisdiction under Article 24 ICSFT, and of its limits.

12. Furthermore, you also found in the *Certain Iranian Assets* case that the question whether the Iran-United States Treaty of Amity protected a sovereign entity constituted a pure legal question, which accordingly needed not to be joined to the merits[96].

III. Scope of Article 2 ICSFT

13. Mr. President, let me now address the various arguments as to the scope of Article 2 ICSFT advanced by Ukraine. I start with an obvious remark, namely that, while the ordinary meaning of a given word constitutes the starting point of treaty interpretation, that is not the end of the story. I might also caution that, in particular, when it comes to sensitive issues such as the ones now before the Court, the willingness of States to enter into broad commitments, not *unequivocally* anchored in the text of a treaty, ought not to be interpreted extensively[97].

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[94] See *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. 616, para. 32.

[95] CR 2019/10, pp. 25-26, paras. 31-32 (Thouvenin), citing *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment of 13 February 2019*, paras. 45-47.

[96] *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment of 13 February 2019*, para. 91.

[97] See, *mutatis mutandis*, *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 237, para. 48.

14. That brings me to some of the more specific points. The reference by counsel for Ukraine to Article 3 ICSFT, which in his view, confirms the non-exclusion of State officials[98], constitutes a mere *petitio principii*. Obviously, if Russia's interpretation of Article 2 was the correct one, there was simply no need whatsoever to provide for an alleged "exclusion" of acts of public officials in Article 3. Or to put it otherwise: such a need could have only arisen if indeed Ukraine's interpretation of Article 2 was the correct one — but that is exactly the question to be still answered.

15. And the same holds true for the argument based on Article 4 ICSFT, obliging States parties to make *offences under Article 2* punishable[99]. ~~***Offences under Article 2.***~~ Article 4 is thus, once again, premised on the fact that an offence under Article 2 ICSFT has been committed at the first place. Article 4 therefore does not tell us anything — ~~***anything***~~ on the scope *ratione personae* of Article 2.

16. That brings me to the mistaken reliance, by Ukraine, on the domestic law of the Russian Federation. Ukraine invoked Article 205-1 of the Russian Criminal Code to suggest that Russia's legal position is inconsistent. As the IMF has confirmed, however, the ICSFT merely creates a minimum standard[100], while at the same time leaving it for States to also criminalize the financing of terrorist acts, including when committed by their own officials, if they do want to. Besides, the clause providing for the aggravated punishability of public officials constitutes a standard provision of domestic Russian criminal law.

17. What is even more is that Ukraine's own Criminal Code confirms a narrow reading of Article 2 ICSFT. On the one hand, Article 258-1, dealing with the "Involvement in a Terrorist Act" expressly covers the commission of such acts by public officials. In contrast thereto, however, Article 258-5, dealing specifically with the "Financing of Terrorism", and thus implementing the ICSFT, does *not* address the financing by public officials, thereby confirming that Article 2 ICSFT does not extend to public officials[101].

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[98] CR 2019/10, p. 26-27, para. 37 (Thouvenin).

[99] CR 2019/10, p. 27, para. 37 (Thouvenin).

[100] IMF Legal Department, Suppressing the Financing of Terrorism: A Handbook for Legislative Drafting (2003), p. 52, available at https://www.imf.org/external/pubs/nft/2003/SFTH/pdf/SFTH.pdf.

[101] English translation available at: https://www.legislationline.org/documents/action/popup/id/16257/preview.

18. Finally, Ukraine's view that the term "*any* person" — "*toute* personne" — in Article 2 has an unlimited scope is neither compatible with Article 5 ICSFT. Article 5 regulates, as the Court will recall, the liability of legal persons, "des personnes morales".

19. If, however, the term "any person" would have to be interpreted extensively, as Ukraine wants you to do, it would have been superfluous to then specifically address the liability of legal persons — **"**personnes morales**"** — since they could have then also *ipso facto* committed the offences, as defined in Article 2 ICSFT.

20. Yet, States understood that the term "any person" does not cover legal persons — and hence Article 5 was needed to *extend* the scope of the Convention to also cover those other persons. This has, *inter alia*, been recognized by the document of the Commonwealth Secretariat on which Ukraine itself relied so heavily in its own oral pleadings[102]. In contrast thereto, no similar extension of the scope of Article 2 ICSFT could be agreed upon during the negotiations as far as public officials are concerned.

21. That brings me now to the drafting history of the 1988 Convention for the Suppression of Unlawful Acts of Violence against the Safety of Maritime Navigation, the so-called "SUA Convention", which history — contrary to what Ukraine claimed[103] — supports rather than contradicts a narrow understanding of the "any person" clause contained in Article 2 ICSFT.

22. The SUA Convention, just like most of the various suppression conventions — and just like the ICSFT — contains in its Article 3 an "any person" clause identical to Article 2 ICSFT. During the negotiation process of the SUA Convention, Kuwait proposed to extend the draft provision to also cover "persons who commit an offence even if acting on behalf of a Government".[104]

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[102] CR 2019/10, p. 28, para. 28 (Thouvenin), quoting Commonwealth Secretariat, *Implementation Kits for the International Counter-Terrorism Conventions*, p. 268, para. 9, available at http://thecommonwealth.org/sites/default/files/key_reform_pdfs/Implementation%20Kits%20for%20Terrorism%20Conventions_0.pdf.

[103] CR 2019/10, p. 28, para. 40 (Thouvenin).

[104] Ad Hoc Preparatory Committee, Report on the Second Session, IMO Doc. PCUA 2/5, 2 June 1987, para. 65 (judges' folder, tab 7.2); Comments by Kuwait, IMO Doc. SUA/CONF.12, 17 Feb. 1988 (judges' folder, tab 3), available at http://www.imo.org/en/KnowledgeCentre/ReferencesAndArchives/IMO_Conferences_and_Meetings/SUA/Documents/SUA_CONF_12.pdf.

23. It is telling, as you can now see on the screen, that during the work of the Preparatory Committee negotiating the SUA Convention, *no* consensus could be reached whether or not the formula of "any persons" would also cover governmental officials[105].

24. Notably, a number of delegations saw the need to include an *express* provision on State officials since otherwise their acts would not be covered by the envisaged "any person" clause[106], while yet other States feared that extending the scope of the clause — extending it — to also cover public officials "might make the Convention less acceptable" to States[107].

25. This confirms the lack of agreement among States whether, *first*, indirect State responsibility should be addressed by such suppression conventions at the first place, and, *second*, if such "any person" clause covers public officials — or rather not.

26. What Ukraine now wants the Court to do is to simply disregard this lack of consensus among States as to a broad interpretation of the "any person" clause. Ukraine thereby also wants to extend this expansive interpretation to all nine suppression conventions listed in the annex to the ICSFT, and potentially to other suppression conventions as well, that contain an "any person" clause akin to Article 2 ICSFT.

27. Let me also remind the Court of the fact that any such broad interpretation is neither compatible with the understanding of the great number of African, OIC and Arab States that, apart from being parties to the ICSFT, are *simultaneously* parties of the Arab, African or Islamic conventions against terrorism[108].

28. Why then did these States, constituting a very considerable group among the contracting parties of the ICSFT, see the need to *expressly* extend the scope of those parallel regional conventions to also cover matters of State responsibility, if it would have simply sufficed to stick to the "all persons" clause allegedly, in Ukraine's view, covering already the behaviour of State officials? Why did they do it?

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[105] IMO doc. PCUA 2/5, 2 June 1987, paras. 65-67 (judges' folder, tab 7.2).

[106] *Ibid*., para. 67.

[107] *Ibid*., para. 68.

[108] PORF, paras. 175-182.

29. And why do other treaties such as the Genocide Convention or the United Nations Torture Convention then contain specific clauses to that effect?

30. Besides, if indeed State officials would have been meant to be covered by Article 2 ICSFT, one would have also expected that matters of State and personal immunity would have also been included, or at least been discussed, when drafting the Convention. Yet, the very fact that none of the various law enforcement conventions, including the ICSFT, even mention matters of immunity, nor have those been discussed when the ICSFT was negotiated, constitutes yet another important element confirming that the "any person" clause in Article 2 ICSFT does not encompass State officials.

31. Mr. President, I now move on to the argument based on the codification, by the International Law Commission (ILC), of the Nuremberg Principles, and namely its Principle V referring to "any person" having a right to a fair trial. It is once again obvious that this principle covers public officials — but this is the case because Principle III ***~~thereof~~***, of the Nuremberg Principles, *expressis verbis* confirms that the said principles also govern the behaviour of government officials. The situation under the ILC's text is thus *mutatis mutandis* identical to the one under the Genocide Convention and the Torture Convention to which I had previously referred[109], and which both — and unlike the ICFST — similarly contain explicit "public official" clauses.

32. Let me further note that the ILC's Nuremberg Principles, just like the Torture Convention or the Rome Statute, but in contrast to the ICSFT, contain a superior order clause[110], which, as previously shown, one may expect when an instrument also deals with acts of public officials[111].

33. Once again, therefore, the Nuremberg Principles confirm rather than contradict Russia's position as to the scope *ratione personae* of Article 2 ICSFT.

34. Ukraine's referral to the work of the ILC further provides me with an opportunity to mention the most recent ILC Draft Articles for a Convention on the Prevention and Punishment of

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[109] CR 2019/9, p. 38, para. 15 and *ibid*., p. 40, para. 24 (Zimmermann).

[110] Principle IV, *Yearbook of the International Law Commission*, 1950, Vol. II, para. 97 (judges' folder, tab 7.4).

[111] CR 2019/9, p. 40, paras. 25-26 (Zimmermann).

Crimes against Humanity[112]. The text confirms that the ILC, too, once again, agrees that issues of State responsibility and the criminalization of acts of public officials have to be addressed *expressis verbis* if those acts were to be covered by a given instrument. Accordingly, the said Draft Convention not only provides that States themselves may not engage in the commission of crimes against humanity[113], but also regulates the criminal responsibility of public officials, as well as the issue of superior orders — while, once again, all of these elements, as previously mentioned, are tellingly missing in the text of the ICSFT.

35. Ukraine's interpretation of Article 2 ICSFT can neither be reconciled with the 2013 Arms Trade Treaty (ATT). Under its Article 7 State parties are, *inter alia*, under an obligation to prevent the export of conventional weapons provided they will be used to "(iii) commit or facilitate an act constituting an offence under international conventions . . . relating to terrorism to which the exporting State is a Party".

36. This provision of the ATT would have been redundant, were States already under a pre-existing, ICSFT-based obligation with a largely identical content, namely were already under an ICSFT-based obligation to prevent their own State organs from transferring weapons to be possibly used for terrorist activities, as Ukraine claims should be the correct interpretation of Article 2 ICSFT.

37. This result is further confirmed by the 2006 General Assembly resolution, which lies at the outset of the negotiation process on the Arms Trade Treaty, and which, like individual countries such as Japan[114], had deplored the absence of common international standards for the transfer of conventional arms as a contributing factor to terrorism[115]. If, however, Ukraine's interpretation of the ICSFT, generally, and of its Article 2 in particular, were correct, there would not exist any such lacunae of generally accepted common treaty-based standards when it comes to the transfer of arms to terrorist groups by a State and its organs.

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[112] ILC, Fourth report on crimes against humanity, UN doc. A/CN.4/725, 18 Feb. 2019, paras. 117-118 and Annex, p. 129.

[113] ILC, Texts and titles of the draft preamble, the draft articles and the draft annex provisionally adopted by the Drafting Committee on second reading, UN doc. A/CN.4/L.935, 15 May 2019, Art. 3 (1) (judges' folder, tab 7.5).

[114] See Compilation of Views on Arms Trade Treaty, UN doc. A/CONF.217/2, 10 May 2012, p. 45, para. 4.

[115] United Nations, General Assembly resolution 61/89, 18 Dec. 2006, preamble, para. 9.

38. Members of the Court, as Tulio Treves, who himself had negotiated the 1988 SUA Convention on behalf of Italy and was a member of the Preparatory Committee, pointed out, it cannot be assumed that States would have treated obliquely the delicate question to include public officials in terrorism conventions[116].

39. Besides, whether State responsibility should be addressed, directly or indirectly, in the envisaged comprehensive convention on terrorism remains, as we all know unfortunately, one of the major stumbling stones during the ongoing negotiation process. Can one then truly assume, as Ukraine argues, that this very issue, that still divides States, has already been solved as part of the ICSFT — and has been solved almost *en passant*?

40. Mr. President, Members of the Court, I will now turn to the requirement to try to arbitrate ICSFT-related disputes before submitting them to the Court. As to the negotiation precondition, I refer — due to time restraints — to Russia's previous written and oral submissions[117].

IV. Lack of fulfilment of the arbitration precondition

41. *First*, Ukraine now argued that the arbitration precondition is merely "descriptive in character"[118]. But it suffices to refer to your Order of 19 April 2017, where you had unequivocally stated that Article 24 ICSFT requires that "Ukraine *attempted* to settle this dispute through arbitration"[119].

42. That brings me to my second point, namely Ukraine's claim that its *ad hoc* chamber proposal had just been "one option" and that its "core principles", on which it had insisted, were "distinct" from the *ad hoc* chamber proposal[120].

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[116] T. Treves, "The Rome Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation", in N. Ronzitti (ed.), *Maritime Terrorism and International Law*, 1990, pp. 69 *et seq.*, p. 90, fn. 88 (judges' folder, tab 7.6).

[117] PORF, paras. 230 *et seq.*

[118] CR 2019/10, p. 50, para. 14 (Zionts).

[119] *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. 121, para. 45; emphasis added.

[120] CR 2019/10, p. 51, para. 18 (Zionts).

43. Yet, in the very same Ukrainian Note Verbale you were shown two days ago Ukraine had confirmed that it "continue[d] to hold the view that an arbitration constituted through . . . an *ad hoc* chamber of the ICJ would be well-suited to satisfying these [core] principles"[121].

44. This is consistent with Ukraine's stance in the October 2016 consultations where its *ad hoc* chamber proposal was meant to implement at least six of its ten mandatory "core principles"[122].

45. Accordingly, the *ad hoc* chamber proposal was not just one option among others, but was one that was meant to satisfy Ukraine's non-negotiable "core principles" for arbitration. Yet, Russia was under no duty to accept judicial settlement through an *ad hoc* chamber of the Court as not constituting a method of arbitration.

V. Conclusion

46. Mr. President, Members of the Court, Ukraine wants you to interpret the ICSFT, and its compromissory clause, almost as a magic key that would widely open the jurisdictional gates of the Peace Palace covering broad areas of international law including the use of force purportedly amounting to acts of terrorism, and committed with equipment supplied by governmental authorities of third States.

47. Was that really the intention of the States negotiating the ICSFT?

48. Or was the ICSFT not rather meant to cut off support for terrorist organizations such as ISIS/Daesh by private groups and individuals?

49. Is it really reasonable to assume, as Ukraine wants you to believe, that States treated the issue of State financing of terrorist acts implicitly, and without even addressing the further consequences of any such implicit inclusion?

50. Monsieur le président, Mesdames et Messieurs de la Cour, ceci conclut ma présentation et le volet relatif à la convention internationale pour la répression du financement du terrorisme.

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[121] Note Verbale No. 72/22-194/510-2518 of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation, 2 Nov. 2016, postface to para. 10 (judges' folder, tab 7.7).

[122] MU, Ann. 50, p. 6 (transparency), p. 11 (qualifications of judges), p. 12 (cost efficiency), p. 24 (binding force of decision under United Nations Charter), p. 26 (bifurcation of proceedings), p. 29 (third-party intervention via Statute of the International Court of Justice, Arts. 62-63). See also Ukrainian Note Verbale No. 72/22-620-2049, 31 Aug. 2016 (judges' folder, tab 3.1).

51. Je vous remercie vivement de votre attention et vous serais reconnaissant, Monsieur le président, d'inviter à cette barre mon estimé collègue le professeur Alain Pellet qui abordera le volet CERD de l'affaire.

The PRESIDENT: I thank Professor Zimmermann and I give the floor to Professor Pellet. You have the floor.

M. PELLET :

CONVENTION INTERNATIONALE SUR L'ÉLIMINATION DE TOUTES LES FORMES DE DISCRIMINATION RACIALE

LE NON-RESPECT PAR L'UKRAINE DES PRÉCONDITIONS PROCÉDURALES POSÉES À L'ARTICLE 22 DE LA CONVENTION

1. Monsieur le président, Mesdames et Messieurs les juges, il m'appartient de répondre à deux des arguments avancés par M[e] Gimblett selon lesquels, d'une part, l'Ukraine aurait mené de bonne foi des négociations préalables à sa saisine de la Cour et, d'autre part, l'échec de ces négociations suffirait à satisfaire les conditions préalables énoncées à l'article 22 de la convention. Mathias Forteau répondra ensuite à notre contradicteur commun en ce qui concerne l'épuisement des recours internes ainsi qu'au professeur Harold Koh — et nous essaierons de faire ceci sans dépasser de plus de 10 minutes le temps qui nous est imparti…

The PRESIDENT: I hope you will not go beyond 5 minutes of the time allocated.

Mr. PELLET : We will try our best. But that is very kind of you, Mr. President.

I. Le simulacre de négociation invoqué par l'Ukraine

2. Avec votre permission, donc, Monsieur le président, je commencerai par le simulacre de négociation invoquée par l'Ukraine.

3. Sur ce point, mon contradicteur se prévaut d'abord de votre ordonnance en indication de mesures conservatoires du 19 avril 2017[123]. Certes, Mesdames et Messieurs de la Cour, vous avez constaté alors que des négociations avaient été apparemment menées ; mais il est à peine besoin de

[123] CR 2019/10, 72, par. 27-28 (Gimblett).

rappeler qu'il n'en a été ainsi que *prima facie* comme vous l'avez précisé au paragraphe 62 ; et vous avez ajouté, au paragraphe 105 : «La décision rendue en la présente procédure ne préjuge en rien la question de la compétence de la Cour pour connaître du fond de l'affaire, ni aucune question relative à la recevabilité de la requête ou au fond lui-même.» Et ce n'est pas là une simple formule rituelle comme en témoigne le précédent de l'affaire *Géorgie c. Russie*.

4. Mon contradicteur n'en invoque pas moins votre arrêt de 2011 pour affirmer que les efforts qu'aurait faits l'Ukraine «to engage with Russia over a period of more than two years» «plainly constitute a genuine attempt by Ukraine to engage in discussions with Russia»[124]. S'agissant d'une appréciation des faits propres à la présente instance, il est assez singulier de se référer à un arrêt antérieur.

5. Le troisième argument avancé par l'avocat de l'Ukraine repose sur la note verbale russe du 28 septembre 2015 — reproduite à l'onglet n° 8.1 de vos dossiers — dans laquelle la Russie «strengthens its willingness to continue consultations with the Ukrainian Party on the issues that might be related to application of the Convention»[125] (a passage omitted by Mr. Gimblett) and reiterates «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»»[126]. Il est pour le moins paradoxal de se fonder sur une note par laquelle la Russie confirmait avec force son souhait de poursuivre les consultations, et sa disponibilité à répondre positivement aux demandes ukrainiennes pour lui reprocher de se refuser à la négociation. De manière très significative, l'Ukraine s'est abstenue de répondre à cette note de bonne volonté de la Russie — peut-être parce qu'elle déjouait son calcul selon lequel la Russie ne se prêterait pas aux négociations. Ceci, alors même que la Partie russe avait témoigné de son ouverture et de sa volonté d'une négociation véritable durant la première réunion, dont rend compte (à sa façon) la note ukrainienne du 17 août 2015[127]. Quoi qu'il

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[124] CR 2019/10, p. 72-73 (Gimblett).

[125] Note verbale n° 11812-ii/dgptch du ministère des affaires étrangères de la Fédération de Russie à l'ambassade de l'Ukraine à Moscou, 28 septembre 2015 (EEU, annexe 110).

[126] CR 2019/10, p. 73, par. 31 (Gimblett).

[127] Note verbale n° 72/22-194/510-2006 du ministère des affaires étrangères de l'Ukraine au ministère des affaires étrangères de la Fédération de Russie, 17 août 2015 (EEU, annexe 109).

en soit, rien ne s'est produit jusqu'au 5 avril 2016[128]. Outre que ceci ne témoigne pas de l'urgence dont se prévaut la Partie ukrainienne, cela montre surtout que c'est, décidément, celle-ci — et non la Russie — qui ne souhaitait pas voir de véritables négociations s'engager, comme le confirment de nombreux éléments que j'avais énumérés lundi[129] et qui sont restés sans réponse.

6. Pourtant, Monsieur le président, ces éléments s'ajoutent à ceux que je viens de discuter (les seuls qu'a mentionnés l'avocat de l'Ukraine mardi matin) pour établir que si, en effet, il n'y a pas eu de négociations véritables, la responsabilité en incombe à la Partie ukrainienne qui ne peut maintenant s'en prévaloir pour se dispenser de remplir la première condition à laquelle l'article 22 subordonne la compétence de la Cour de céans.

II. L'indispensabilité des «procédures expressément prévues par la convention»

7. Mesdames et Messieurs les juges, il y a au moins un point sur lequel les Parties sont d'accord : l'Ukraine a saisi votre haute juridiction sans recourir aux «procédures expressément prévues par la convention» — pour reprendre une fois de plus le libellé de l'article 22. Or, nous maintenons, plus que jamais, que ce recours ne constitue pas une alternative à la négociation directe entre les Parties mais qu'il est, comme celle-ci, une autre condition préalable à la validité de votre saisine.

8. Et, quoi qu'en dise l'Ukraine, en insistant sur cette exigence, la Russie ne s'efforce pas «to dodge judicial scrutiny and to avoid its solemn obligations under the Race Discrimination Convention»[130]. Elle demande seulement que soient respectés la lettre et l'esprit de la convention CERD et, du même coup, le «principe fondamental du consentement à la juridiction» de la Cour[131]. J'ajoute qu'il n'en résulte en aucune manière que, ce faisant, «this Court's role would effectively be read out of the Convention»[132] : ce rôle sera simplement conforme à l'esprit dans lequel il a été conçu par les auteurs de cet instrument. Alors qu'en revanche, la lecture que fait l'Ukraine de

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[128] Note verbale n° 72/22-194/510-839 du ministère des affaires étrangères de l'Ukraine au ministère des affaires étrangères de la Fédération de Russie, 5 avril 2016 (EEU, annexe 111).

[129] CR 2019/9, p. 63-65, par. 32-35 (Pellet).

[130] CR 2019/10, p. 65, par. 31 (Koh).

[131] *Sahara occidental, avis consultatif, C.I.J. Recueil 1975*, p. 25, par. 33. Voir aussi notamment *Timor oriental (Portugal c. Australie), arrêt, C.I.J. Recueil 1995*, p. 101, par. 26.

[132] CR 2019/10, p. 66, par. 4 (Gimblett).

l'article 22 de la convention aurait assurément pour effet de priver complètement le Comité de toute fonction effective dans la procédure de règlement des différends interétatiques contrairement à la volonté des négociateurs.

9. Au bénéfice de ces remarques, je suivrai pas à pas la démarche de mon contradicteur.

A. La décision de la Cour dans *Géorgie c. Fédération de Russie*

10. D'abord donc la décision de la Cour dans l'affaire *Géorgie c. Russie*[133]. M. Gimblett relève à juste titre que cette décision ne lie pas l'Ukraine. Mais il semble faire grand cas du fait que six juges ont joint à l'arrêt l'exposé de leurs opinions dissidentes, dont une est commune à cinq d'entre eux. Je relève cependant que ces derniers, tout en estimant «douteuse» la position de la majorité sur le caractère préalable des conditions posées à l'article 22, conviennent que «cette interprétation n'est pas «manifestement absurde ou déraisonnable» au sens de la convention de Vienne»[134]. Au surplus, avec tout le respect que je dois et que j'ai pour les juges dissidents, un arrêt de la Cour est un arrêt quelle que soit la majorité à laquelle il a été rendu, fût-ce avec la voix prépondérante du président. Et il faut y regarder à deux fois avant de modifier une position expresse de la Cour, surtout lorsque comme en l'espèce cette position a été confirmée ensuite à plusieurs reprises[135] : «seules des raisons impérieuses pourraient conduire la Cour à s'écarter des solutions retenues dans [d]es décisions antérieures»[136].

B. Le sens ordinaire de la conjonction «ou»

11. J'en viens maintenant au sens de la conjonction «ou».

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[133] CR 2019/10, p. 67, par. 8-10 (Gimblett).

[134] *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)*, opinion dissidente commune de M. le juge Owada, président, et de MM. les juges Simma et Abraham, Mme la juge Donoghue et M. le juge *ad hoc* Gaja, p. 154, par. 38.

[135] Voir *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. 121, par. 46 ou p. 125, par. 59 ; et *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Qatar c. Emirats arabes unis), mesures conservatoires, ordonnance du 23 juillet 2018, C.I.J. Recueil 2018 (I)*, p. 417, par. 29.

[136] *Application de la convention pour la prévention et la répression du crime de génocide (Croatie c. Serbie), arrêt, C.I.J. Recueil 2015 (I)*, p. 429, par. 54.

12. ««Ou» signifie «ou»» ! M. Gimblett est si satisfait de sa robuste formule qu'il l'a répétée à deux reprises — ««or» means «or»»[137]... Assurément, Monsieur le président, et... «Brexit means Brexit» ! Le problème est que, au-delà de l'effet de manche un peu facile, le sens de la conjonction «ou» est à peu près aussi clair que celui de «Brexit».

13. Mon contradicteur admet néanmoins, plus raisonnablement, que «the meaning is driven by the context in which «or» appears»[138]. C'est reconnaître que sa signification n'est pas univoque.

14. L'exemple donné par M[e] Gimblett n'est pas sans intérêt, mais sa pertinence tient surtout au fait qu'il montre que, grammaticalement, notre insaisissable conjonction peut revêtir non pas deux, mais, au minimum, trois interprétations : «or» can mean «or», it can also mean «and», as well as «and/or». This is so when «[a]ny customer who is not satisfied with her appetizer or main course may complain to the Manager»[139]. Ici, «or», c'est «et/ou» car cette invitation à se plaindre vaut, à l'évidence, pour l'entrée *ou* le plat principal mais tout autant pour l'une *et* pour l'autre.

C. L'article 22 dans le contexte de la convention CERD

15. L'avocat de l'Ukraine a une vue sélective et contestable du contexte de l'article 22 de la convention CERD.

[Projection : Article 22 de la convention CERD]

16. Premier élément du contexte : l'article 22 lui-même. M. Gimblett relève à juste titre que la conjonction «ou» y figure à trois reprises :

— «Tout différend entre deux *ou* plusieurs Etats parties...» : ici, «ou» est alternatif : il peut s'agir aussi bien d'un différend entre deux Etats que d'un différend entre plusieurs Etats mais pas des deux situations à la fois ;

— [projection n° 1-2] «… touchant l'interprétation *ou* l'application de la présente convention...» : ici, en revanche, le différend peut toucher l'interprétation de la convention, ou son application, ou les deux ; nous sommes dans l'hypothèse du client râleur, celle du «et/ou» ;

— [projection n° 1-3] «qui n'aura *pas* été réglé par voie de négociation *ou* au moyen des procédures expressément prévues par ladite convention, sera porté ... devant la Cour

[137] CR 2019/10, p. 67 et 71, par. 11 et 26 (Gimblett).

[138] *Ibid.*, p. 68, par. 13.

[139] *Ibid.*, p. 68, par. 12.

internationale de Justice...» : ici, contrairement à ce qui est le cas des deux autres membres de phrase, nous sommes en présence d'une formulation négative ; on ne pouvait pas avoir recours à «et» pour la raison que j'ai déjà dite : on ne peut régler un même différend deux fois.

[Fin de la projection]

17. Et ce n'est sûrement pas parce que les deux membres de phrase précédents utilisent «ou» dans un certain sens que ce même sens doit être attribué à la troisième occurrence — et puis, quelle signification retenir puisque justement ces deux-là, elles-mêmes, diffèrent ? Il y a d'ailleurs dans la convention bien d'autres dispositions dans lesquelles «ou» suit des formulations négatives et dont le sens est indiscutablement cumulatif. Ainsi — pour prendre un seul exemple :

— l'article premier, paragraphe 2 : «La présente Convention ne s'applique pas aux distinctions, exclusions, restrictions ou préférences établies par un Etat partie...» ; ce sont évidemment les quatre actes ainsi énumérés qui sont visés, cumulativement.

— même chose avec l'article 2, alinéa *b)* ;

— même chose encore avec l'article 4 *c)*. Et ainsi de suite.

18. Dans le même esprit, je rappelle un argument que l'Ukraine avait avancé dans son exposé écrit et que M. Gimblett s'est bien gardé de reprendre à son compte mardi matin. Il consiste à affirmer que lorsque les rédacteurs de la convention CERD voulaient offrir une alternative, ils savaient parfaitement le faire — et de donner l'exemple de l'article 11 présenté comme établissant clairement une procédure en plusieurs étapes[140]. L'Ukraine s'est cependant bien gardée de citer la formule pertinente du paragraphe 2 aux termes duquel, dans le texte anglais : «If the matter is not adjusted to the satisfaction of both parties, *either* by bilateral negotiations *or* by any other procedure open to them … either State shall have the right*, et caetera*». En effet, ici, l'alternative est nette ; c'est «either … or». Mais, justement, il n'y a pas «either … or» dans le texte anglais de l'article 22. Pour sa part, le texte français se contente d'un «ou» dans les deux cas ; mais le contexte, renforcé par la version anglaise, ne laisse aucun doute sur le fait qu'ici, «ou» est alternatif, par contraste avec l'article 22. Et ai-je besoin de le rappeler : «Les termes d'un traité sont présumés avoir le même sens dans les divers textes authentiques»[141] ? Et l'interprétation que nous

[140] EEU, par. 319.

[141] Convention de Vienne sur le droit des traités, 26 mai 1969, art. 33, par. 3.

proposons est la seule qui permette de concilier le texte anglais et la version française, également authentiques.

19. Elle est aussi, quoique affirme la Partie ukrainienne (sans se donner réellement le mal de le démontrer[142]), la seule qui permette de donner un sens utile non pas à l'expression «qui n'aura pas été réglée» mais, comme je l'ai rappelé lundi[143], à la mention des «procédures expressément prévues par [la] Convention» — c'est-à-dire celles instituées par les articles 11 à 13.

20. La Partie ukrainienne n'a de cesse de critiquer âprement l'article 11 auquel renvoie l'article 22 : il en résulterait que toute précondition cumulative «serait désespérément impraticable»[144]. Je ne reviens pas sur ce que j'ai dit lundi au sujet de la longueur de la procédure[145] — à la fois moins dramatiquement lente que le prétend l'Ukraine et enfermée dans des délais dont certains sont fixes et qui, en tout cas, sont tous contrôlés par un organe tiers et indépendant. Au surplus, considération d'opportunité pour considération d'opportunité, il ne faut pas se focaliser exclusivement sur la longueur de la procédure, sa qualité importe au moins autant. Le Comité est un organe impartial, familier des questions qui font l'objet même de la convention. Les négociations menées sous son égide présentent sans aucun doute des avantages non seulement par rapport à des négociations purement bilatérales mais aussi dans la perspective d'une saisine ultérieure de la Cour dont la tâche se trouvera grandement facilitée. Et puis, encore une fois, l'intervention du Comité a été voulue par les auteurs de la convention qui l'ont institué en gardien de celle-ci ; le court-circuiter c'est, au-delà de la CERD, fragiliser l'ensemble des organes de contrôle des droits de l'homme.

21. Dernière cartouche tirée par mon contradicteur : si le recours au Comité était obligatoire, un différend relatif à l'interprétation de la convention ne pourrait jamais être soumis à la Cour puisque l'article 11, toujours lui, ne donne compétence au Comité qu'en cas de litige sur l'application de la convention[146]. L'objection me paraît assez théorique — d'abord parce qu'un tel différend relatif exclusivement à l'interprétation de la convention, est concrètement hautement

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[142] CR 2019/10, p. 69, par. 18 (Gimblett).

[143] CR 2019/9, p. 58, par. 17 (Pellet) ; et voir la note 176.

[144] CR 2019/10, p. 68, par. 16 (Gimblett).

[145] CR 2019/9, p. 61, par. 24-25 (Pellet).

[146] CR 2019/10, p. 70, par. 20 (Gimblett).

improbable ; ensuite parce que si, par impossible, une telle situation venait à survenir, il est difficilement envisageable que le Comité adopte une interprétation rigide de sa compétence et refuse de se prononcer.

D. Le but et l'objet de la convention CERD

22. Analysant le but et l'objet de la convention, M. Gimblett, se réclamant de l'autorité de l'opinion dissidente commune dans l'affaire *Géorgie c. Russie*, se polarise à nouveau exclusivement sur la question de la rapidité de la procédure[147]. Soit dit en passant, il me semble que l'Ukraine qui a insisté pour bénéficier d'un délai d'un an pour déposer son mémoire dans la présente affaire n'est pas très bien placée pour se prévaloir de l'urgence qu'elle invoque aujourd'hui de manière si pressante.

23. Par ailleurs, et *with all due respect* pour l'impressionnant «bouclier intellectuel» derrière lequel notre contradicteur s'abrite (cinq juges éminents — il est vrai que tous les juges le sont ! — dont quatre siègent dans la présente instance...), je pense qu'il est erroné de sous-estimer l'intérêt que peut présenter une procédure de conciliation par rapport à des négociations bilatérales ; et ce n'est pas parce que celles-ci ont échoué qu'un processus différent faisant intervenir un tiers qui, par définition, a la confiance des parties qui la lui ont manifestée en ratifiant la convention, soit superflu et ne puisse pas aboutir à une solution positive ; des exemples récents de conciliation en portent témoignage[148].

24. Selon la formule affectionnée par un ancien président de la République française[149] : «Il faut laisser le temps au temps.» Ceci non seulement pour préserver la fierté souveraine des Etats et permettre de trouver une solution aux différends dans une atmosphère apaisée, mais aussi dans l'intérêt même des personnes protégées par la convention : une solution acceptée de bonne grâce par l'Etat accusé d'actes de discrimination raciale, éventuellement accompagnée par des garanties dans ce domaine données par l'autre Partie, a des chances d'être plus effective qu'une issue judiciaire ressentie, peut-être à tort, comme injuste ou inappropriée. Et en disant ceci, je ne

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[147] *Ibid.*, p. 70-71, par. 22-23.

[148] Voir EPR, par. 384.

[149] M. Martin-Roland, *Il faut laisser le temps au temps : Les mots de François Mitterrand*, Presses de la Cité, 1995, 177 pages. Voir aussi M. Cervantes, *Don Quichotte de la Manche*, Lecou, 1853, p. 820.

sous-estime nullement le rôle de filet de sécurité que constitue la possibilité de saisir la Cour mondiale : non seulement cette éventualité garantit *in fine* qu'une solution sera donnée au différend mais aussi, et peut-être surtout, elle peut conduire les Etats en litige à s'accorder sur la recommandation que le Comité est appelé à faire.

25. Une chose encore : il me semble que nos contradicteurs confondent deux urgences : celle, générale, soulignée dans la convention elle-même, de mettre fin partout et toujours à la discrimination raciale, ce qui, cependant, ne peut se faire que dans le temps long ; celle qu'il y a à faire face à des solutions concrètes de discrimination raciale, dont je ne méconnais évidemment pas que, *lorsqu'elles sont établies*, elles doivent cesser le plus rapidement possible ; mais ceci ne saurait être une raison suffisante pour s'abstraire des garde-fous contre des demandes arbitraires qu'établit l'article 22 de la convention.

E. Les travaux préparatoires de l'article 22

26. Pour terminer donc, les travaux préparatoires. Comme l'avocat de l'Ukraine y a consacré un tout petit peu plus d'une minute, je n'ai pas l'intention de me montrer plus «gimblettien» que M. Gimblett, et je me bornerai à vous renvoyer, Mesdames et Messieurs les juges, à ce que nous en avons déjà dit[150]. J'attire seulement votre attention d'une façon spéciale sur le tableau résumant l'histoire de cette négociation qui se trouve sous l'onglet n° 5.1 de vos dossiers de lundi dernier.

27. Monsieur le président, il y a toujours quelque chose d'un peu théâtral dans les audiences qui se déroulent dans le décor solennel de ce grand hall de justice. Nos collègues de l'autre côté de la barre se sont distribués le beau rôle de donneurs de leçons et de champions des droits de l'homme. Mais la pièce qu'ils jouent est un peu trop manichéenne. C'est le cas même pour le problème, pourtant en apparence assez technique, dont j'ai traité : en bâclant des négociations sur l'objet prétendu d'un différend artificiel, forgé pour la circonstance, avec pour seul objectif de saisir la Cour ; en s'efforçant de court-circuiter l'organe institué pour contrôler, au premier chef, l'application de la convention et en garantir l'intégrité, il n'est pas certain que l'Ukraine rende service ni à votre haute juridiction, ni à la protection des droits de l'homme, ni à la cause que ses conseils prétendent défendre.

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[150] EPR, par. 387-403 ; CR 2019/9, p. 59-60, par. 20-22 (Pellet).

28. Mesdames et Messieurs les juges, je vous remercie vivement pour votre attention renouvelée. Monsieur le président, auriez-vous l'obligeance de donner la parole au professeur Mathias Forteau ?

Le PRESIDENT : Je remercie le professeur Pellet. Je donne la parole au professeur Forteau. Vous avez la parole.

M. FORTEAU : Merci, Monsieur le président.

CONVENTION INTERNATIONALE SUR L'ÉLIMINATION DE TOUTES LES FORMES DE DISCRIMINATION RACIALE

ABSENCE DE COMPÉTENCE *RATIONE MATERIAE* ET NON-ÉPUISEMENT DES VOIES DE RECOURS INTERNES

1. Monsieur le président, Mesdames et Messieurs de la Cour, j'aborderai successivement trois points dans ma présentation de ce matin : l'absence de plausibilité des demandes de l'Ukraine, son interprétation incorrecte de la convention et l'absence d'épuisement des voies de recours internes.

I. L'absence de plausibilité de la demande ukrainienne

2. En ce qui concerne le premier point, la stratégie de défense de l'Ukraine se limite à esquiver les difficultés : elle consiste à ne pas répondre aux objections soulevées par la Russie et à se contenter de répéter les allégations de ses écritures, comme si le fait de répéter celles-ci pouvait finir par les rendre plausibles. Le professeur Koh s'est ainsi contenté mardi de faire un résumé approximatif des écritures de l'Ukraine, sans autre référence à l'appui de ses réclamations et de ses affirmations que la projection de quelques photos (relatives d'ailleurs à des allégations déjà débattues au stade des mesures conservatoires), sans prendre la peine de répondre aux arguments exposés lundi.

3. Sa seule réponse a consisté à déclarer qu'il suffisait pour fonder la compétence de la Cour que les allégations de l'Ukraine, ses allégations factuelles, «be accepted as true»[151]. Trois remarques sur cette affirmation :

[151] CR 2019/10, p. 53, par. 4 (Koh).

a) elle n'est pas conforme à la jurisprudence de la Cour, laquelle exige à ce stade de l'instance un examen de la plausibilité des allégations du demandeur ;

b) cette affirmation est d'autant plus surprenante que la Cour a jugé *non plausibles* l'essentiel des réclamations de l'Ukraine au stade des mesures conservatoires ;

c) vous demander de croire l'Ukraine sur parole est d'autant plus problématique que les affirmations des conseils de l'Ukraine sont grossièrement erronées. Deux exemples :

i) Le professeur Koh a affirmé mardi que la Russie aurait supprimé les médias tatars et ukrainiens en Crimée[152]. Lors de la phase des mesures conservatoires, la Russie a cependant montré que ce n'était clairement pas le cas[153]. L'attestent, par exemple, la publication et la distribution sans interruption en Crimée depuis 1990, en édition imprimée et en ligne, du journal *Avdet*, dans lequel, en particulier, les opposants au changement de statut de la Crimée peuvent librement exprimer leurs opinions. Je ne saurais trop vous conseiller la consultation du site Internet de ce journal, qui est accessible en langue tatare, en russe et en anglais[154].

ii) Le professeur Koh a également affirmé que la Russie aurait «dramatically restricted education» dans les langues minoritaires de Crimée[155] : ceci est également manifestement démenti par les éléments portés à la connaissance de la Cour depuis la phase des mesures conservatoires, y compris le propre mémoire de l'Ukraine[156].

4. Plus fondamentalement, l'Ukraine n'a toujours apporté aucune réponse crédible à trois objections essentielles.

5. Premièrement, l'Ukraine continue de plaider qu'il ne lui appartient pas d'établir une quelconque intention discriminatoire — ce qui est une façon indirecte d'admettre qu'elle n'est pas en mesure d'étayer de manière plausible une telle intention. Le professeur Koh a affirmé mardi qu'il suffisait à l'Ukraine, pour fonder votre compétence, d'établir une discrimination indirecte,

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[152] *Ibid*., p. 54, par. 6 *b)* (Koh).

[153] CR 2017/4, p. 63, par. 50 ii) (Forteau). Voir aussi «List of Crimean Media Outlets in the Crimean Tatar and in the Ukrainian Language», annexe 4 du dossier de documents soumis par la Fédération de Russie en lien avec la demande de l'Ukraine en indication de mesures conservatoires, 3 mars 2017 (vol. I).

[154] https://avdet.org/en/.

[155] CR 2019/10, p. 54, par. 6 *c)* (Koh).

[156] EPR, par. 347-348 ; MU, par. 544.

fondée sur l'effet des mesures alléguées, sans avoir à établir leur but discriminatoire[157]. Mais ceci ne correspond pas à la demande que l'Ukraine a soumise à la Cour. Comme la Cour l'a constaté en 2017[158], la demande de l'Ukraine *en la présente instance* a un objet bien spécifique, et c'est par rapport *à celle-ci uniquement* que la Cour doit examiner sa compétence[159]. L'Ukraine demande à la Cour de constater que la Russie mènerait une *campagne* de discrimination raciale *systématique*[160]. Il s'agit là d'une accusation bien particulière, dont l'Ukraine doit établir à ce stade chaque élément de manière au moins plausible :

a) une «discrimination raciale systématique» constitue un «fait composite», c'est-à-dire un fait illicite autonome des violations individuelles qui le composent, et qu'il convient de prouver en tant que tel[161] ;

b) une discrimination raciale systématique suppose d'établir une intention dès lors que, selon la Commission du droit international (ci-après la «CDI»), «pour être considérée comme systématique, une violation doit avoir été commise de façon organisée et délibérée»[162] ;

c) l'Ukraine accuse dans le même sens la Russie de se livrer à une «politique» discriminatoire. C'est ce qu'a réaffirmé l'agent de l'Ukraine mardi en indiquant que la Russie aurait «launched [a] wide-ranging campaign of cultural erasure» en Crimée sous la forme d'un «collective punishment»[163] ; de son côté, le professeur Koh a accusé la Russie de «punitive policy of systematic repression»[164], d'une «concerted campaign»[165] ou encore de «blatantly discriminatory and racist policies»[166] ;

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[157] CR 2019/10, p. 58, par. 11 *c)* (Koh).

[158] *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. 33.

[159] CR 2019/9, p. 69, par. 13, et note 228 (Forteau) ; voir aussi *Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria), exceptions préliminaires, arrêt, C.I.J. Recueil 1998*, p. 321, par. 107.

[160] EEU, par. 378 ; CR 2019/10, p. 59, par. 14 (Koh).

[161] Projet d'articles sur la responsabilité de l'Etat pour fait internationalement illicite, *Annuaire de la Commission du droit international*, 2001, vol. II, deuxième partie, art. 15, commentaire, p. 65, par. 2, et p. 66, par. 6.

[162] *Ibid*., art. 40, commentaire, p. 121, par. 8.

[163] CR 2019/10, p. 13, par. 9 (Zerkal) ; voir aussi p. 57, par. 10 *b)* (Koh).

[164] *Ibid*., p. 58, par. 11 *b)* (Koh).

[165] *Ibid*., p. 60, par. 19 (Koh). Voir également p. 53, par. 5 *d)* («fear tactics»), et p. 56-57, par. 10 *a)* (Koh).

[166] *Ibid*., p. 65, par. 30 *in fine* (Koh). Voir aussi p. 56, par. 9 (Koh) ; p. 65, par. 2 : «comprehensive policy of racial discrimination » (Gimblett) ; p. 66, par. 3 : «Ukraine's claim of systematic racial discrimination» (Gimblett) ; p. 66, par. 6 (Gimblett).

d) à défaut pour l'Ukraine d'établir de manière plausible de si graves accusations — l'intention comprise, qui en fait partie intégrante, la Cour ne peut tout simplement pas avoir compétence en la présente affaire.

6. Deuxièmement, l'Ukraine n'a toujours pas établi de manière plausible une différence de traitement entre différentes communautés ethniques. Sur ce point, il manque un chaînon essentiel dans la réclamation de l'Ukraine. Mardi, le professeur Koh s'est contenté une fois encore de dresser une liste d'allégations de violations de droits civils, politiques, sociaux, économiques ou culturels. Mais la CERD n'est pas les Pactes de 1966 ni la convention européenne des droits de l'homme. Pour que la CERD trouve à s'appliquer, il faut qu'il y ait une discrimination *raciale* dans la jouissance des droits invoqués. Or, les éléments soumis à la Cour démontrent l'absence manifeste d'une telle différence de traitement[167].

7. Troisièmement, l'Ukraine continue de déguiser sous la forme d'allégations de discrimination raciale des allégations qui concernent essentiellement, en réalité, le statut politique de la Crimée. Cet élément est apparu très nettement mardi dans la plaidoirie du professeur Koh :

a) Il n'aura pas échappé à la Cour tout d'abord que l'intitulé de sa plaidoirie a trahi les intentions véritables du demandeur : cet intitulé invoque un prétendu «collective punishment», non pas pour des motifs raciaux, mais «for opposition to the annexation» of Crimea.

b) Certaines des projections à l'écran du professeur Koh trahissent la même intention : ce qu'il a mis en cause dans la projection n° 55, c'est l'opposition «to Russian Annexation» ; de même dans la projection n° 56, qui vise le «contrôle ukrainien» de la Crimée[168].

8. L'objet réel de la demande de l'Ukraine est confirmé encore par ce que le professeur Koh a dit de la définition des groupes ethniques. Il a affirmé tout d'abord — et ceci, la Russie ne l'a jamais contesté — que les Ukrainiens et les Tatars de Crimée constituent des groupes ethniques distincts[169]. Sans fondement en revanche est le fait de prétendre que la Russie punirait les Ukrainiens et les Tatars de Crimée «*based on Russia's identification of these ethnic communities as*

[167] CR 2017/2, p. 58-60, par. 24-30 (Lukiyantsev) ; EPR, par. 348.

[168] Voir également CR 2019/10, p. 57-58, par. 11 *a)* et *b)* (Koh).

[169] *Ibid*., p. 64, par. 28 (Koh).

a whole as hostile to annexation»[170]. Cette seconde affirmation est manifestement erronée. Comme le professeur Koh l'a reconnu lui-même en citant le recensement de 2014, la Russie n'a jamais défini ces groupes ethniques sur la base de leurs positions politiques sur le statut de la Crimée ; et pour cause : il lui serait impossible de le faire, puisque les membres de ces communautés ont des vues différentes sur le statut de la Crimée et ne peuvent donc pas être identifiés comme membres de groupes ethniques sur cette base politique — à supposer d'ailleurs que cela puisse être possible[171].

9. Pourquoi alors, se demandera la Cour, l'Ukraine s'échine-t-elle à toute force à définir ces groupes ethniques sur des bases politiques ? Tout simplement pour se donner les moyens de contester devant la Cour le changement de statut de la Crimée sous couvert d'une accusation artificielle de discrimination raciale. Si l'Ukraine prétend que ces groupes ethniques seraient, «dans leur ensemble», opposés au rattachement de la Crimée à la Russie, c'est afin de pouvoir en déduire, par un syllogisme apparent, que toute mesure prise contre les opposants à ce rattachement constituerait de ce fait même une discrimination raciale[172]. L'argument est de toute évidence vicié :

a) il l'est tout d'abord parce que de nombreux Ukrainiens et Tatars de Crimée soutiennent ou ne sont pas opposés au rattachement de la Crimée à la Russie[173] ;

b) si d'ailleurs la thèse de l'Ukraine avait la moindre vraisemblance, on s'expliquerait difficilement les mesures prises par la Russie depuis 2014 pour protéger et renforcer les droits des Ukrainiens et des Tatars de Crimée[174] ;

c) en sens inverse, la manière même dont l'Ukraine formule sa demande dans le mémoire montre que les mesures qu'elle allègue ne concernent pas uniquement des Ukrainiens ou des Tatars de Crimée[175]. Tout à fait significative également à cet égard est la déclaration suivante qui figure dans le rapport de l'Ukraine au Comité CERD soumis en juillet 2015 : l'Ukraine y prétend qu'en Crimée, «les Tatars de Crimée et les Ukrainiens sont victimes de discrimination, *de même*

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[170] CR 2019/10, p. 61, par. 23 (Koh) ; les italiques sont de nous.

[171] EPR, par. 311-319.

[172] CR 2019/10, p. 61-62, par. 23 (Koh) ; MU, par. 382.

[173] EPR, par. 319.

[174] CR 2017/2, p. 56-57, par. 13-15 (Lukiyantsev).

[175] CR 2019/9, p. 69, par. 11 *in fine* (Forteau).

que les personnes qui ont des opinions pro-ukrainiennes, quelle que soit leur origine nationale»[176]. Tout est dit ici : il ne s'agit pas de discrimination raciale ; l'objet des allégations de l'Ukraine, c'est l'opposition au changement de statut de la Crimée, *quelle que soit l'origine,* comme le dit l'Ukraine elle-même, *des personnes concernées* ;

d) l'équation «groupes ethniques» = «opposants au changement de statut de la Crimée» ne correspond ainsi à aucune réalité[177] ;

e) j'indiquerai par ailleurs que le cas de l'interdiction du Majlis est un exemple topique à cet égard : celui-ci a été interdit en raison d'activités extrémistes, pas pour des raisons raciales, ce que confirme la décision de la Cour suprême de Russie relative à son interdiction qui a relevé que le Majlis n'était pas la seule organisation défendant les intérêts de Tatars de Crimée et que les Tatars de Crimée continueraient malgré cette interdiction à être représentés[178] ; et de fait, d'autres entités continuent de représenter les Tatars de Crimée[179] ;

f) pour résumer, pour déclencher la compétence de la Cour sur le fondement de la CERD, l'Ukraine ne peut pas se contenter comme elle le fait de prétendre que des — j'insiste sur le *des* — personnes, dont des Tatars ou des Ukrainiens de Crimée, auraient prétendument fait l'objet de mesures en lien avec leur opposition au changement de statut de la Crimée ou en lien avec d'autres activités politiques[180]. Tel est le raccourci que l'Ukraine voudrait voir la Cour emprunter. Ce raccourci est très clairement une voie sans issue.

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[176] Comité pour l'élimination de la discrimination raciale, examen des rapports soumis par les Etats parties en application de l'article 9 de la convention, vingt-deuxième et vingt-troisième rapports périodiques des Etats parties attendus en 2014 — Ukraine, CERD/C/UKR/22-23, 5 octobre 2015, par. 9 ; les italiques sont de nous. Voir également Comité pour l'élimination de la discrimination raciale, compte-rendu analytique de la 2464e séance, 11 août 2016, CERD/C/SR.2464, par. 2 (anglais seulement) («Since the occupation of part of Ukraine's territory, there had been a rise in discrimination against Crimean Tatars *and other groups supporting the Ukrainian Government's cause*» ; les italiques sont de nous).

[177] MU, par. 382.

[178] Décision de la Cour suprême de la République de Crimée, 26 avril 2016, affaire n° 2a-3/2016, MU, annexe 913 ; Décision de la Cour suprême de Russie, division d'appel, 29 septembre 2016, affaire n° 127-АПГ16-4, MU, annexe 915 ; voir également la déclaration de M. le juge Tomka jointe à l'ordonnance en mesures conservatoires, *C.I.J. Recueil 2017*, p. 153-154, par. 9.

[179] Voir notamment les lettres de la Fédération de Russie au Greffe de la Cour : lettre du 7 juin 2018, par. 11-21 ; lettre du 21 juin 2018, p. 3 ; lettre du 18 janvier 2019, *passim*.

[180] Voir, par exemple, MU, par. 475.

II. Les réclamations de l'Ukraine reposent sur une interprétation incorrecte de la CERD

10. J'en viens aux problèmes d'interprétation de la CERD, et je pourrai être plus bref ici.

11. Pour ce qui touche au droit de revenir dans son pays, je dois avouer, avec tout le respect que je dois à mon éminent contradicteur, que j'ai éprouvé beaucoup de difficultés à m'y retrouver dans les méandres du raisonnement du professeur Koh[181]. Je ne vois toujours pas en quoi le fait d'autoriser ou de refuser à une personne à revenir en Crimée pourrait constituer, en tant que tel, un cas de discrimination raciale.

12. Tout aussi confuses ont été les explications de la Partie adverse sur la discrimination fondée sur la nationalité[182]. Le professeur Koh a plaidé que l'article 1 3) de la CERD permettrait de réintroduire la discrimination fondée sur la nationalité dans le champ de la CERD. Mais on ne voit pas en quoi la législation russe pourrait avoir le moindre effet discriminatoire «à l'égard d'une nationalité particulière» en l'espèce. Comme cela ressort du mémoire de l'Ukraine, d'une part, la législation russe laisse le choix d'accepter ou de refuser la nationalité russe ; d'autre part, elle n'introduit aucune discrimination entre nationalités étrangères[183].

13. En ce qui concerne maintenant les deux droits relatifs aux mesures conservatoires prononcées par la Cour en 2017 :

a) Le professeur Koh a décidé[184] de ne pas répondre aux éléments détaillés que j'avais portés à l'attention de la Cour lundi, qui établissent clairement l'absence d'un droit à l'éducation en langue minoritaire[185]. Dont acte.

b) Le professeur Koh a par ailleurs expressément confirmé que l'Ukraine renonçait à son interprétation selon laquelle la CERD garantirait un droit des groupes ethniques à des institutions représentatives[186]. Désormais, a-t-il déclaré, «Ukraine claims no such special protection»[187]. Dont acte également. C'est un abandon significatif, car la première mesure

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[181] CR 2019/10, p. 62-63, par. 25 (Koh).

[182] *Ibid*., p. 63, par. 26 (Koh).

[183] MU, par. 383.

[184] CR 2019/10, p. 63-64, par. 27 (Koh).

[185] CR 2019/9, p. 73-75, par. 24-28 (Forteau).

[186] EEU, par. 290.

[187] CR 2019/10, p. 62, par. 24 (Koh).

conservatoire prononcée par la Cour vise précisément à protéger ce prétendu droit «à conserver des institutions représentatives» dont l'Ukraine ne réclame désormais plus la protection spécifique[188]. La conséquence à en tirer est que cette mesure conservatoire est désormais privée d'objet.

III. L'absence d'épuisement des voies de recours internes

14. Il me reste, Monsieur le président, Mesdames et Messieurs de la Cour, à aborder brièvement la question de l'épuisement des voies de recours internes.

15. Maître Gimblett a commencé par faire grand cas d'un extrait des plaidoiries de la Russie dans l'affaire *Géorgie c. Russie*, affaire dans laquelle, je le souligne, la question de l'épuisement des voies de recours internes n'avait pas été soulevée[189]. L'extrait cité par M[e] Gimblett, qui est une remarque formulée en passant par un conseil de la Russie, ne dit nullement que l'épuisement des voies de recours internes ne s'appliquerait pas par principe aux recours interétatiques en vertu de la convention. Et, de fait, le conseil de la Russie aurait difficilement pu soutenir une telle position dès lors que l'article 11 impose explicitement, pour les recours interétatiques, un tel épuisement des voies de recours internes, comme l'admet d'ailleurs l'Ukraine[190]. Les travaux préparatoires de la CERD confirment au demeurant expressément et sans la moindre ambiguïté l'application de cette règle importante pour les recours interétatiques, et cela dans le but de «prevent a proliferation of complaints at the international level», considération qui vaut également devant la Cour[191].

16. Je relève par ailleurs que, toujours dans le même extrait des plaidoiries *Géorgie c. Russie*, un renvoi est opéré à l'article 14, troisième alinéa, du projet d'articles de la CDI sur la protection diplomatique. Cette disposition énonce que, dans le cadre du droit international général, lorsqu'une demande est mixte mais que, de manière prépondérante, elle vise à protéger des droits

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[188] *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. 135, par. 86, p. 139, par. 102, et p. 140, par. 106 *a)*.

[189] CR 2019/10, p. 74, par. 34-36 (Gimblett).

[190] EEU, par. 384.

[191] Troisième Commission, compte-rendu analytique de la 1353[e] séance, 24 novembre 1965, A/C.3/SR.1353, p. 370-374, par. 18-58, notamment par. 48 et par. 51 (anglais seulement).

individuels, il faut épuiser les voies de recours internes[192]. Il en résulte que, même si la CERD ne faisait pas référence expresse à cette règle, elle s'appliquerait de toute manière en l'espèce. La demande de l'Ukraine vise en effet avant tout à protéger les droits individuels de ceux qu'elle présente comme ses nationaux, comme cela ressort nettement des conclusions finales de la requête[193], ou des audiences sur les mesures conservatoires[194].

17. Et c'est bien entendu parce que l'Ukraine a pris conscience après le dépôt des exceptions préliminaires que ses réclamations étaient pour cette raison irrecevables qu'elle a modifié sa demande. Maître Gimblett a prétendu mardi que l'Ukraine n'aurait jamais varié de position et que son mémoire «is explicit that Ukraine brings this case to seek relief from State-level-injury»[195]. Mais ce n'est pas ce que disait le mémoire : le mémoire prétendait que l'Ukraine invoquait deux types de préjudice, «to Ukraine *and its citizens*»[196]. L'Ukraine ne peut donc plaider comme elle le fait désormais qu'elle n'aurait jamais fait autre chose que de porter une demande «expressément … en son nom propre, *et non pas* au nom de particuliers»[197]. La manipulation est grossière, et elle trompera d'autant moins la Cour que la lecture de la requête et du mémoire laisse clairement apparaître que la demande de l'Ukraine ne constitue rien d'autre qu'une addition d'allégations concernant de prétendus préjudices *individuels*.

18. Au demeurant, M[e] Gimblett n'a toujours pas expliqué à la Cour ce qui lui permet d'affirmer que «Ukraine invokes its own rights under the Convention»[198]. Trois brèves remarques sur ce point :

a) certes, tout d'abord, la CERD octroie un droit à tout Etat partie de déclencher un recours interétatique. Mais c'est un droit procédural — votre Cour parle d'un «droit de demander

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[192] Projet d'articles sur la protection diplomatique, *Annuaire de la Commission du droit international*, 2006, vol. II, deuxième partie, art. 14, commentaire, p. 45-46, par. 9-13.

[193] Requête introductive d'instance de l'Ukraine, par. 138 *k)* ; voir également les exemples de revendications de l'Ukraine liées à des individus en particulier in CR 2019/9, p. 75, note 262.

[194] Voir, par exemple, CR 2017/1, p. 33, par. 30 (Koh) ; EPR, par. 296.

[195] CR 2019/10, p. 75, par. 38 (Gimblett).

[196] MU, par. 22 ; les italiques sont de nous. Voir aussi, par exemple, MU, par. 654 *l)*.

[197] EEU, par. 16 ; les italiques sont de nous.

[198] CR 2019/10, p. 74, par. 37 (Gimblett).

l'exécution» des droits prévus par la CERD[199] ; il ne constitue pas en revanche un «droit substantiel propre» de l'Etat. Ce droit procédural vise à protéger les droits individuels garantis par la CERD, et c'est la raison pour laquelle il est conditionné à l'épuisement des voies de recours internes, de même que dans le cadre de la protection diplomatique, l'exercice de ce que l'on appelle le «droit propre» de l'Etat de faire valoir le droit international en la personne de ses ressortissants exige l'épuisement des voies de recours internes ;

b) les hypothèses dans lesquelles la Cour a reconnu par exception un droit propre permettant d'écarter la règle de l'épuisement des voies de recours internes sont uniquement celles dans lesquelles les règles invoquées au fond octroyaient un droit *substantiel* à l'Etat *distinct* des droits individuels : ce fut le cas, par exemple, dans l'affaire du *Mandat d'arrêt*, dans lequel l'Etat était directement atteint dans ses propres droits par les mesures prises contre *l'un de ses ministres*[200] ; de même dans l'affaire *Avena*, la Cour a considéré que l'article 36 de la convention de 1963 sur les relations consulaires octroie aux individus *et* à l'Etat des droits *substantiels*, *distincts*, même si interdépendants[201]. Rien de tel en ce qui concerne les dispositions de la CERD invoquées par l'Ukraine ;

c) il en résulte que, puisque les droits protégés par la CERD sont des droits individuels, leur protection sur le plan contentieux par le biais du recours interétatique suppose au préalable l'épuisement des voies de recours internes. L'article 11 le prévoit explicitement, et cela s'applique nécessairement devant la Cour.

19. Monsieur le président, Mesdames et Messieurs de la Cour, ceci conclut mon exposé. Je vous remercie de votre écoute attentive et je vous serais très reconnaissant, Monsieur le président, d'appeler au podium M. l'ambassadeur Lobach, agent de la Russie.

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[199] CR 2019/9, p. 77, par. 37, et note 269 (Forteau) ; *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), mesures conservatoires, ordonnance du 15 octobre 2008, C.I.J. Recueil 2008*, p. 392, par. 126 ; *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. 135, par. 81.

[200] *Mandat d'arrêt du 11 avril 2000 (République démocratique du Congo c. Belgique), arrêt, C.I.J. Recueil 2002*, p. 17, par. 40.

[201] *Avena et autres ressortissants mexicains (Mexique c. Etats-Unis d'Amérique), arrêt, C.I.J. Recueil 2004 (I)*, p. 35-36, par. 40. Voir également *LaGrand (Allemagne c. Etats-Unis d'Amérique), arrêt, C.I.J. Recueil 2001*, p. 491 et suiv., par. 73 et suiv.

The PRESIDENT: I thank Professor Forteau for his statement. I shall now give the floor to the Agent of the Russian Federation, His Excellency Mr. Dmitry Lobach. You have the floor.

Mr. LOBACH:

CLOSING STATEMENT OF THE AGENT OF THE RUSSIAN FEDERATION

1. Mr. President, Members of the Court, you have now heard the preliminary objections of the Russian Federation that the Court lacks jurisdiction over Ukraine's claims and that they are inadmissible.

2. It has always been the position of Russia that the case is Ukraine's artificial construct resulting from a merger of two completely different sets of factual circumstances, mixed with strained interpretations of the ICSFT and CERD, in the hope that at least some of the accusations against Russia will survive the preliminary objections phase.

3. Despite the difference between the two cases, Ukraine's claims share some fundamental jurisdictional flaws that by themselves should not allow them to proceed further.

4. First, they simply do not plausibly fall within the jurisdiction *ratione materiae* of the Court. Indeed, this Court itself found Ukraine's allegations in this case largely implausible. Ukraine has been unable to identify any international organization or State that supports its unfounded assertions that the DPR and LPR are terrorist organizations and that the events that Ukraine refers to constitute terrorism. Similarly, Ukraine has been unable to identify any claim by members of Ukrainian or Crimean Tatar communities of Crimea before the Russian courts complaining of racial discrimination.

5. Second, Ukraine's case did not get better with time. It even got worse. Indeed, Ukraine itself is no longer pursuing a number of critical claims under both the ICSFT and CERD it originally made — such as alleged State financing of terrorism and discrimination on religious grounds. Ukraine is constantly reframing its claims: it starts with allegations of a "deliberate campaign of cultural erasure"[202], replaces it with unintended discrimination[203] and comes back to

[202] Application of Ukraine, p. 2, para. 5.

[203] CR 2019/10, p. 58, para. 11 *(c)* (Koh).

"concerted campaign"[204]. It starts with claims of racial discrimination on behalf of individuals and ends up with claims in its own name.

6. The situation is not surprising, given that Ukraine's claims, in reality, do not concern the ICSFT or CERD, but rather constitute an attempt to bring any kind of case against Russia before the Court, with the real (and largely avowed) purpose to litigate its claims concerning the status of Crimea and the internal armed conflict in eastern Ukraine. Ukraine has strenuously denied it on Tuesday, but it is remarkable that Ukraine's Agent and counsel used the words "aggression", "occupation" and "annexation" 32 times.

7. There are two general points regarding the facts that I would like to make.

(a) First, consistent with the nature of the preliminary objections stage, Russia did not challenge many unfounded accusations and misstatement of facts. It does not mean, however, that Russia accepts them. I will come back to several points where we feel compelled to comment shortly.

(b) Second, you have heard repeated references to "thousands of pages of evidence"[205] Ukraine submitted. Surely, we are entitled to assume that on Tuesday Ukraine's experienced counsel, very familiar with the materials, have focused on Ukraine's best examples to illustrate the nature of its case under each Convention. We need not assume that Ukraine has a better case lurking somewhere in its hundreds of annexes. It is striking that, among those thousands of pages, Ukraine has failed to identify any that demonstrate indispensable elements of terrorism financing or racial discrimination.

8. One of Ukraine's key arguments, repeated time and again, is that the Court should allow Ukraine to have another go — decide on Russia's preliminary objections at the merits stage[206]. However, to use the words of Professor Koh, "enough is enough"[207]. Ukraine has had full opportunity to identify any acts of terrorism financing or racial discrimination if there were any, but it has failed.

9. Mr. President, I will say a few words specifically on Ukraine's case under the ICSFT.

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[204] CR 2019/10, p. 60, para. 19 (Koh).

[205] CR 2019/10, p. 45, para. 74 (Cheek); see also p. 32, para. 10 (Cheek).

[206] CR 2019/10, p. 31, para. 6 (Cheek).

[207] CR 2019/10, p. 65, para. 30 (Koh).

10. Here Ukraine's claims concern alleged violations of international humanitarian law in the framework of an internal armed conflict that Ukraine seeks to portray as terrorism. It is remarkable that Ukraine does not seriously dispute that its armed forces have repeatedly engaged in indiscriminate shelling of residential areas within the same conflict with devastating consequences. They gave rise to greater casualties among civilian population than those ascribed to the acts of the DPR and LPR.

11. Be that as it may, Ukraine's claims do not fall within the scope of the Court's jurisdiction under the ICSFT.

(a) First, the acts Ukraine relies on do not even plausibly constitute terrorism.

(b) Second, there is no plausible financing of terrorism. Ukraine has abandoned the case on intentional financing, and Ukraine has made no plausible showing of knowledge that funds allegedly provided would be used to finance terrorism. It attempts to portray the DPR and LPR as "notorious terrorist organizations", but it has not found any support for this alleged "notoriety", and so it backs away from its own characterization.

(c) Third, the ICSFT does not provide for State responsibility for financing of terrorism or for States' obligations with respect to public officials. Ukraine's claims concerning alleged actions of Russia and Russian public officials accordingly fall outside of the Court's jurisdiction.

(d) Moreover, Ukraine has failed to satisfy procedural preconditions for seising the Court.

12. Let me take a step back and look at the more general implications of Ukraine's overstretched interpretation of the ICSFT. On Ukraine's case, any time an armed group or, indeed, an army violates rules of international humanitarian law, it engages in terrorism. Once such an incident of so-called "terrorism" has been identified, any person that would provide any support to this group or army unit — whether ammunition, training or food — commits terrorism financing. If public officials of a foreign State participate, the State must prosecute its public officials. It is inconceivable that States have intended the ICSFT to have such an effect that would transform the Convention into a political instrument with unpredictable implications.

13. Regarding the tragedy of MH17, Russia truly regrets that Ukraine is persisting with its claim that this constituted knowing financing of terrorism for which Russia is responsible. For the record, according to the JIT — the source Ukraine relies on — the missile allegedly used to bring

down MH17 was manufactured in 1986[208]. Ukrainian army uses such missiles and had numerous Buk systems operating in the Donbas region. And, as to the JIT investigation, the Prime Minister of Malaysia has recently stated that the investigation lacks evidence and that "[the missile] could be [fired] by the rebels in Ukraine, it could be the Ukrainian Government because they too have the same missile". The Malaysian Premier also regretted that his country's experts were not given proper access to the investigation, which had "too much politics" and "concentrated on trying to pin it to the Russians"[209].

14. Mr. President, I now turn to Ukraine's claims under the CERD.

15. Again, Ukraine's attempts to portray itself as a champion of racial and ethnic equality ring hollow, when seen against the background of Ukraine's discrimination of Crimean Tatars before 2014 and the discriminatory policies adopted in and ultranationalist actions tolerated by Ukraine today[210].

16. Most importantly for this case, the Court does not have jurisdiction to consider Ukraine's claims for a number of reasons:

(a) First, Ukraine has failed to satisfy the cumulative preconditions for seising the Court. It did not engage in genuine negotiations with Russia. It did not have resort to the CERD Committee. Ukraine cannot ask the Court to disregard the procedures provided by the Convention because it finds them impractical. When a State becomes a party to the CERD it agrees to the process established there, even if some may criticize it.

(b) Second, Ukraine's claims do not concern racial discrimination and Ukraine's case as currently put — of systematic campaign of cultural erasure — is simply not supported by the facts Ukraine brought before you.

(c) Third, the Court does not have jurisdiction *ratione materiae* over claims based on rights the CERD does not cover.

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[208] Update in criminal investigation MH17 disaster, available at the official website of the Netherlands Police Service: https://www.politie.nl/en/news/2018/mei/24/update-in-criminal-investigation-mh17disaster.html.

[209] "Dr. M. Says Malaysia Wants Evidence to Show Russia Shot Down Flight MH17", *Malay Mail*, 30 May 2019, available at: https://www.malaymail.com/news/malaysia/2019/05/30/dr-m-says-malaysia-wants-evidence-to-show-russia-shot-down-flight-mh17/1757945.

[210] CR 2019/9, p. 49, para. 11, p. 50, para. 14 (Lukiyantsev).

(d) Finally, Ukraine's claims are inadmissible. Ukraine has not disputed that Russian law provides local remedies that have not been exhausted by the individuals whose rights Ukraine purportedly seeks to protect.

17. Members of the Court, Ukraine's interpretation of the CERD will transform the Convention into a general human rights instrument — it would make the reference to racial discrimination superfluous. On Ukraine's case, any time the rights of an individual are allegedly interfered with, a State can be brought before the Court and required to address any interference on the merits. Similarly, according to Ukraine's logic, political opposition within a State will become an ethnic group that can seek protection under the CERD.

18. The purpose of the preliminary objections proceedings is not to dispute evidence offered by Ukraine and therefore Russia has not contested its false and misleading allegations. But it is Ukraine, not Russia that seeks to — I quote Ukraine's Agent — "create an alternative reality"[211].

19. Three brief examples in this respect:

(a) In her opening statement, Ukraine's Agent claimed that detention of two Crimean residents reflects "campaign of racial discrimination"[212]. What was not mentioned is that they were taken to a police station to fulfil the formalities for an administrative fine for public display of symbols of Hizb ut-Tahrir, which is banned as an extremist organization in many countries[213].

(b) Ukraine's counsel showed you a slide claiming that broadcast media that serve Crimean Tatar and Ukrainian communities are suppressed[214], but did not tell you that those TV channels, as well as many others, are freely available in Crimea as a part of satellite packages.

(c) He also claimed that the "entire United Nations General Assembly" rejected Russia's position on Crimea in a resolution that reflected a "consensus of the international community"[215]. In fact, the resolutions on Crimea are not supported by two thirds of the United Nations Member States.

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[211] CR 2019/10, p. 15, para. 18 (Zerkal).

[212] CR 2019/10, p. 15, para. 17 (Zerkal).

[213] CR 2017/2, p. 69, para. 19 (Forteau).

[214] Ukraine's judges' folder, tab 1, p. 42.

[215] CR 2019/10, p. 62, para. 25 (Koh).

20. Finally, Ukraine's Agent attempted to introduce into this hearing the issue of compliance with the Court's Order on provisional measures. This is inappropriate — Russia has provided to the Court the information on the measures it took and is taking and I would just refer to the relevant letters in the Court's possession.

21. Mr. President, before coming to the submissions of the Russian Federation, let me make several concluding remarks.

22. Ukraine's stigmatization of the DPR and LPR as "terrorist organizations" does not help the peaceful resolution of the internal armed conflict in eastern Ukraine; Ukraine's serious yet fully unfounded allegations of "cultural erasure" risk seeding tensions between the Ukrainian and Crimean Tatar communities and Russian community in Crimea.

23. The recent change in the leadership of Ukraine clearly shows that the Ukrainian people rejected the policies of the former Ukrainian Government that initiated these proceedings. We hope that this change will contribute to the dialogue and resolution of these disagreements between our two countries.

24. Mr. President, allow me to express our gratitude to the Registrar of the Court and the staff of the Registry, who have been very helpful at all stages of these proceedings. We are also grateful to the interpreters for their hard and excellent work. And, of course, our most sincere gratitude to you, Mr. President, and to the Members of the Court, for the attention paid to the arguments of the Russian Federation.

25. I now have the honour to read out the final submission of the Russian Federation:

> "Having regard to the arguments set out in the Preliminary Objections of the Russian Federation and during the oral proceedings, the Russian Federation requests the Court to adjudge and declare that it lacks jurisdiction over the claims brought against the Russian Federation by Ukraine by its Application of 16 January 2017 and/or that Ukraine's claims are inadmissible."

26. Mr. President, Members of the Court, this concludes the Russian Federation's oral argument. Thank you for your kind attention.

The PRESIDENT: I thank the Agent of the Russian Federation. The Court takes note of the submissions which you have just read on behalf of your Government.

The Court will meet again tomorrow, Friday 7 June 2019, between 10 a.m. and 12 noon, to hear the second round of oral statements of Ukraine. The sitting is adjourned.

The Court rose at 12.10 p.m.

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