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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2019

Public sitting

held on Friday 7 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 vendredi 7 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

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The PRESIDENT: Please be seated. The sitting is open. The Court meets this morning to hear the second round of oral statements of Ukraine. I will now invite Professor Koh to take the floor. You have the floor.

Mr. KOH:

INTRODUCTORY STATEMENT

1. Mr. President, Members of the Court, it is my great honour to come before you again on behalf of Ukraine.

2. Russia's preliminary objections should be rejected and this case advanced to the merits . As we have shown, Russia has loudly committed itself to suppressing the financing of terrorism. But it freely allows a campaign of terror to be funded from its territory, refusing to take practicable measures, even as its own officials actively supply those who ruthlessly target the Ukrainian people. Russia has committed itself to eliminate all forms of racial discrimination, but then supports them in Crimea.

3. Let me briefly explain why *none* of Russia's objections should delay you further from reaching the merits. I have already answered Russia's core objection: that the "real" legal issue is its aggression in Crimea, which has been universally condemned. *But the dispute we have brought here is about the illegal financing of terrorism and systematic discrimination against peoples, nothing more.* Of course, Russia has engaged in a wider pattern of violations of international law, including international humanitarian law (IHL). But the only issues that Ukraine asks this Court to decide concern the interpretation or application of these two treaties, whether or not the Court chooses to take the reasoning of other bodies of law into account. Russia's multiple illegalities cannot immunize its specific treaty violations from judicial review. Nor can this Court decline to take cognizance of the ICSFT and the CERD dimensions of this "dispute merely because that dispute has other [dimensions], however important".

I. ICSFT

4. Russia's presentations on the ICSFT offer no coherent vision of the treaty, just a series of arguments constructed to avoid justice. Professor Zimmermann and Mr. Wordsworth never

persuasively answered the questions "who?", "what?" and "when?": whose actions are covered by the ICSFT? What acts are forbidden? And when do forbidden acts occur?

5. First, who is covered? My colleagues have fully rebutted Professor Zimmermann's manifestly false claim that the Terrorism Financing Convention was never intended to address State officials. In effect, he would rewrite the words of Article 2 so that "any person" says "*only private* persons". Under the ICSFT, he claims, States are free to finance terrorism, ignoring this Court's declaration in the *Bosnia Genocide* case that it would be "paradoxical" to read a treaty that requires States to prevent a serious crime not to also prohibit *States* from committing that same crime[1]. Professor Zimmermann falsely claimed that Ukraine initially shared his view, misleadingly quoting my remarks from Provisional Measures. But he conspicuously left out my words from that very same hearing, which said:

> "[E]ven assuming direct State responsibility were not implicated, Russia may still be held responsible under the Convention for its failure to prevent any individuals, *including those employed by its Government* — who under Article 2 plainly constitute 'any person . . . providing or collecting funds' for terrorism — from providing financing to armed groups who attack civilians in the eastern Ukraine"[2].

6. The Convention's plain words dictate that if Russia knows that "any person" — whether *public or private* — is financing terrorism, it must investigate, prosecute and prevent. But Russia does nothing. Incredibly, Russia's Agent claimed no one knows what happened to MH17, yet to this day Russia fails to co-operate in the investigation. And that investigation shows that members of the Russian military transported the Buk missile launcher into Ukraine and back to Russia again after MH17 was shot down. If Russia knew that "any person" was providing powerful weapons to the people who shot down that plane, it was obliged to take "all practicable measures" to stop them. For a country such as Russia, simply controlling its own borders to block the flow of Buk missiles, Grad rockets and military-grade mines into Ukraine would constitute an eminently "practicable measure".

7. For his part, Mr. Wordsworth tried to distract you with labels. He repeatedly noted — as if it mattered — that the so-called Donetsk People's Republic (DPR) and Luhansk People's Republic

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

[2] CR 2017/3, p. 19, para. 20 (Koh); emphasis added.

(LPR) are not designated "terrorist organizations". But this case is not about labels. The ICSFT does not speak in terms of organizations, designated or otherwise. It speaks of *acts*. As you know, there is much debate about what "terrorism" is and who should be designated on various lists of "terrorist organizations". But the ICSFT creates an objective standard that focuses on acts that are forbidden by the treaty. The role of this Court is to determine whether such forbidden acts occurred and to apply the law to them.

8. Yesterday, Mr. Wordsworth preferred to talk about anything but this normal judicial task. He said repeatedly that United Nations and OSCE monitors did not label particular acts as "terrorism". But for this case, that label is irrelevant: under the Convention, whether a third party characterizes an act as "terrorism" or a violation of IHL simply does not matter. It is *this* Court's mandate to decide, on the merits, whether acts covered by the treaty were committed, and whether "any person" financed them.

9. Mr. Wordsworth also conflates the questions of "what" and "when". When there is an "armed conflict", he said, what atrocities the Ukrainian people have suffered are just a "grim reality" that cannot be "terrorism"[3]. *But the ICSFT targets acts, not situations.* Russia flatly ignores the words of Article 2 (1) *(b)*, which define terrorist acts to include those acts "intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities *in a situation of armed conflict*" (emphasis added). So by stressing that a particular situation, an armed conflict, is going on, Mr. Wordsworth proves nothing. The specific acts raised by Ukraine meet the treaty's definition of terrorist *acts*, whoever does them and by whatever means.

10. Mr. Wordsworth continues to claim "both sides" are equally responsible for civilian casualties along the contact line[4], and this slide is shown on the left side of your screen. But Ukraine is not labelling every civilian casualty as "terrorism". There simply is no comparison between the terrorist acts at issue here and the Ukrainian armed forces' efforts to secure Ukrainian territory while striving to minimize civilian casualties. Ukraine has focused on numerous specific acts that meet the legal elements set out in the ICSFT. The fact that there is also an armed conflict

[3] CR 2019/9, p. 29, para. 40 (Wordsworth).

[4] CR 2019/9, p. 29, para. 40 (Wordsworth).

does not compel us to turn a blind eye to the use of rockets to bombard civilians in residential neighbourhoods away from "hot battlefields", as are in the starred cities on the right side of your screen. The presence of an administrative recruitment office in Kramatorsk provides no pretext to rain cluster munitions down on a city 50 km from the contact line. As specifically defined by the ICSFT, terrorist acts cover: a civilian plane — shot down from 33,000 ft; a bomb — ripping through a civilian parade in Kharkiv, Ukraine's second-largest city, far from the conflict; and as Ms Cheek will explain, an attack on a residential, civilian neighbourhood of Mariupol, "outside of the immediate conflict zone"[5]. How can Ukraine be denied a hearing to prove these treaty violations, on the grounds that — in Mr. Wordsworth's words — such acts cannot even "plausibly" be considered terrorism?

11. In short, Russia's advocates seek to construct an artificial reality that has no grounding in the ICSFT. In their imaginary world, Russia's comprehensive obligation to suppress the financing of terrorism requires only suppression of the *private* financing of terrorism. During conditions of armed conflict, attacks on innocent civilians to intimidate the population and extract political concessions are somehow not terrorism. The financing of terrorism is allowed so long as the perpetrators of those acts have not yet been officially labelled "terrorist organizations". And Russian officials are legally free to send lethal missiles across the border to people with well-known track records for killing civilians and intimidating the local population. At the appropriate time, Russia is free to advance this absurd reading, and to try to convince the Court to believe it. But for now, this Court need only conclude the obvious: a dispute plainly exists between the two States parties to the ICSFT concerning the interpretation or application of the treaty, over which this Court must now take jurisdiction and proceed to the merits.

II. CERD

12. In their presentations regarding the CERD, Professors Pellet and Forteau described yet another piece of this fantasy world: one in which Russia is in full compliance with the Convention, because its sweeping pledge to eliminate *all* forms of racial discrimination in fact requires Crimean Tatars and ethnic Ukrainians to tolerate many forms of racial discrimination. In this artificial

[5] United Nations, *Official Record of the Security Council*, 7368th Meeting, UN doc. S/PV.7368, 26 Jan. 2015, statement of Jeffrey Feltman, United Nations Under-Secretary-General for Political Affairs, p. 2; MU, Ann. 307.

reality, States injured by racial discrimination must read "or" to mean "and", watch their populations endure years of racial discrimination, overcome multiple, cumulative obstacles to get their case before this Court, only to be sent back to the CERD Committee to be told their claims were never really about race discrimination at all.

13. Professors Pellet and Forteau weakly deny that Russia's campaign of cultural erasure in Crimea is taking place. Professor Forteau argued that *Avdet*, a newspaper that specializes in reporting to the Crimean community, continues to be distributed but he never mentions *Avdet* was denied re-registration by Russia[6], that it now circulates only a fraction of its pre-registration circulation or that its editor has received multiple warnings from the FSB regarding so-called extremist publications[7]. He also misunderstood that Ukraine's argument was not that Russia has slashed Crimean language education — as it has done with respect to all Ukrainian education — but rather, that Russia has "russified" the content of Crimean language education.

14. Professor Forteau's defence seemed to be the CERD allows Russia to engage in such repression in Crimea, so long as it is not "systematic". He argued that the CERD does not forbid erasure by Russian authorities of the language, culture, and political independence of Crimean Tatars and ethnic Ukrainians because not all of these acts of persecution against the Tatars were "based on" race, but rather were motivated by the ethnic group's political opposition to annexation. But the motives behind Russia's acts do not matter as authoritative human rights organizations have documented[8], Russia has committed racial discrimination, under Article 1 (1) of the CERD, by the act of *singling out* these ethnic communities for discriminatory treatment, whatever the motive. What matters is not Russia's motive, it is its *singling out*, based on ethnicity, that renders the policies and practices described in Ukraine's submissions "distinctions based on race", which have the purpose or effect of nullifying those communities' human rights and fundamental freedoms "in the political . . . field of public life".

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[6] MU, para. 1082; RFE/RL, *The Editors of the Crimean Tatar Newspaper Are Summoned for Interrogations on Suspicion of Extremism*, 3 June 2014 (Ann. 1047).

[7] See Notice about the Inadmissibility of Violations of the Law, issued to Shevket Kaybullayev by the Federal Security Service of the Russian Federation, 3 June 2014 (Ann. 891); Official Notice dated 17 Sept. 2014, issued to Shevket Kaybullayev by the Federal Security Service of the Russian Federation (Ann. 897).

[8] See, e.g. Office of the United Nations High Commissioner for Human Rights (OHCHR), Report on the Human Rights Situation in Ukraine (16 August to 15 November 2018), para. 103 (WSU, Ann. 50).

15. Russia's continuing ban on the Mejlis — in defiance of this Court's binding Order — illustrates why Russia's conduct in Crimea constitutes racial discrimination. Professor Forteau spent much of this week telling this Court why it was wrong to grant the provisional measures, an Order that remains as necessary today as it was when it was issued two years ago. But he never mentioned Article 1 (1)'s definition of racial discrimination, instead making the irrelevant claim that the CERD does not specifically protect the collective right of minorities to their own political institutions. For purposes of the CERD, Russia's singling out the political rights of Crimean Tatars for comprehensive assault, including a ban on the Mejlis, constitutes the distinction based on ethnicity that has the purpose or effect of impairing rights previously enjoyed by that ethnic group, which makes it "racial discrimination" under Article 1 (1).

16. Russia attacks other discrete claims advanced by Ukraine — for example, the right to return to one's own country, and on the forcing of citizenship — claiming they assert rights not covered by the CERD. Of course, even if these discrete claims dropped from this case, a massive set of violations of the Convention would still remain for decision in the merits phase. Russia wrongly suggests that the CERD's protections extend only to those human rights that are specifically enumerated in the Convention itself. But the definition of racial discrimination in Article 1 (1) extends to "human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life". As the CERD Committee detailed in General Recommendation No. 20, Article 5 of the CERD guarantees the right to equality before the law with respect to a long and non-exhaustive list of specific rights[9].

17. Finally, Article 1 (1)'s text answers those who argue that Ukraine's CERD claims would open the floodgates to race discrimination. Under Article 1 (1)'s wording, an applicant can raise a CERD violation only when it can show: first, that the government's distinction is discriminatory; second, that it is based on race, ethnicity or another protected characteristic; third, that it operates with respect to a human right or fundamental freedom; fourth, that it singles out the minority community for unequal access to that right; and fifth, that the distinction has either the purpose or effect not just of marginally burdening, but impairing or nullifying, that minority group's rights.

[9] General Recommendation No. 20: Non-discriminatory implementation of rights and freedoms (Art. 5), 15 March 1996, para. 1 (General Comments).

18. In sum, while claiming to meet its obligations under the CERD in Crimea, Russia has engaged in a campaign of cultural erasure against Crimean Tatars and ethnic Ukrainians. This concerted effort includes disappearing, kidnapping, exiling and persecuting Crimean Tatar leaders, disadvantaging Tatar media, and banning the Mejlis, culturally significant Ukrainian gatherings and Ukrainian language schools. Ukraine has substantiated claims that these Russian actions violate five specific provisions of the CERD. And because, as I demonstrated last time, these claims are fully "capable of falling within" those CERD provisions, they fall within the scope of your jurisdiction.

III. Conclusion

19. Mr. President, Members of the Court, perhaps the most illuminating aspect of Russia's presentation is what it revealed about Russia's broader attitudes toward this Court and rules of international law. There is no clearer example than Russia's continuing disdain for your Provisional Measures Order regarding the Mejlis. The legal gymnastics you have heard all mask an apparent conviction that the international rules that apply to other nations simply do not apply to Russia. Unlike other nations, Russia can play by its own rules, and do what it wants: even when that is the exact *opposite* of what its solemn treaty commitments require.

20. But Mr. President, Members of the Court, this is not just about Russian power; innocent Ukrainian lives are at stake. Ukraine asks this Court to invoke its legal authority to protect those lives. Unless this Court acts decisively, innocent Ukrainian civilians will pay the price.

21. That concludes my introduction. My colleague Professor Thouvenin will return to Russia's misguided approach to these preliminary objections and its artificial narrowing of the ICSFT. Ms Cheek will respond to Russia's attempts to distort Article 2 of the ICSFT. Mr. Gimblett will rebut Russia's effort to place its wide-ranging campaign of racial discrimination beyond this Court's reach. Finally, Ukraine's Agent, Minister Zerkal will close, reiterating our solemn submission.

22. I thank you. I now ask that you call Professor Thouvenin to the podium.

The PRESIDENT: I thank Professor Koh and I now give the floor to Professor Thouvenin. Vous avez la parole, monsieur.

M. THOUVENIN : Merci beaucoup, Monsieur le président.

SUR L'EXCEPTION PRÉLIMINAIRE D'INTERPRÉTATION ET LA NOTION DE «TOUTE PERSONNE»

1. Monsieur le président, Mesdames et Messieurs les juges, deux questions juridiques divisent les Parties sur la manière dont la Cour devrait aborder sa fonction judiciaire dans le cadre des présentes exceptions préliminaires.

2. La première est de savoir si vous devriez vous pencher sur la plausibilité des faits de terrorisme, financement du terrorisme et de discrimination raciale, allégués par l'Ukraine, pour déterminer l'existence d'un différend relatif aux conventions CIRFT et CERD[10]. Maître Wordsworth n'a rien apporté de nouveau hier, insistant sur les positions déjà affirmées par la Russie et y renvoyant abondamment[11]. De son côté le professeur Zimmermann a souligné que l'ordonnance de la Cour de 2017 constate l'existence d'un différend «under the ICSFT as such», ce qui pourrait être vu comme une concession significative de la Partie adverse, qui pour le reste maintient ses positions[12].

3. Je ferai quatre brèves observations sur l'exception de plausibilité factuelle à laquelle la Russie arrime toute la présente procédure :

— Premièrement, l'arrêt sur les exceptions préliminaires dans l'affaire de la *Licéité de l'emploi de la force* à laquelle M[e] Wordsworth s'accroche vigoureusement ne dit rien qui soutienne sa thèse[13], laquelle demeure exclusivement fondée sur la pratique de la Cour agissant comme juge de l'urgence. Or, c'est une erreur de droit, qui plus est élémentaire, que de confondre la procédure d'urgence et les exceptions préliminaires[14] ; je note d'ailleurs qu'un avocat de la Russie affiche une opinion sainement dissidente par rapport à ses collègues en refusant de confondre les deux procédures[15].

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[10] CR 2019/9, p. 22–25, par. 14–22 (Wordsworth) ; CR 2019/10, p. 20–23, par. 12–23 (Thouvenin).

[11] CR 2019/11, p. 12–18, par. 3–22 (Wordsworth).

[12] *Ibid.*, p. 29, par. 19 (Zimmermann).

[13] *Ibid.*, p. 14–15, par. 9–10 (Wordsworth) ; CR 2019/9, p. 24, par. 20 (Wordsworth).

[14] CR 2019/10, p. 21–23, par. 15–20 (Thouvenin).

[15] CR 2019/9, p. 56, par. 11 (Pellet) ; CR 2019/11, p. 39–40, par. 3 (Pellet).

— Deuxièmement, il est, je crois, téméraire d'espérer gagner votre confiance en projetant à l'écran un extrait opportunément tronqué de votre propre ordonnance, comme l'a fait M[e] Wordsworth hier à propos de ce qu'il appelle la «basic architecture» de la CIRFT. Je n'y consacrerai pas grand-temps. Vous voyez projeté à l'écran ce dont il s'agit : le petit morceau de phrase escamoté change du tout au tout le sens du paragraphe.

> «un Etat partie à la convention ne peut se fonder sur l'article 18 pour exiger d'un autre Etat partie qu'il coopère avec lui en vie de prévenir un certain type d'actes que s'il est plausible que les actes en cause puissent constituer des infractions au sens de l'article 2 de la CIRFT».
>
> «a State party to the 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».[16]
>
> *«[D]ans le contexte d'une demande en indication de mesures conservatoires*, un Etat partie à la convention ne peut se fonder sur l'article 18 pour exiger d'un autre Etat partie qu'il coopère avec lui en vue de prévenir un certain type d'actes que s'il est plausible que les actes en cause puissent constituer des infractions au sens de l'article 2 de la CIRFT.»[17]

La «basic architecture» — chère à mon contradicteur et qui est le cœur de sa thèse — n'est donc qu'un banal tour de passe-passe d'avocat.

— Troisièmement, la seule «basic architecture» qui vaille en l'espèce est celle de l'article 24 de la convention, qui est la base de compétence invoquée par l'Ukraine — car, faut-il le souligner, ce ne sont ni l'article 18 ni l'article 2 qui sont les bases de compétence, mais l'article 24. Or, Mesdames et Messieurs les juges, on ne trouve rien dans cette disposition qui suggère que le consentement à votre compétence serait conditionné à un quelconque test de plausibilité des faits allégués.

— Enfin, quant à l'opinion de Mme la juge Higgins, ce n'est pas la trahir que de rappeler qu'elle postule comme un principe judiciaire cardinal que : «[c]e qui relève de la procédure au fond — et qui demeure intact, sans la moindre altération quand on aborde ainsi la question juridictionnelle —, c'est d'établir ce que sont exactement les faits»[18] ; or, ce que

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[16] CR 2019/11, p. 12–13, par. 3 (Wordsworth).

[17] *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. 131, par. 74 ; les italiques sont de nous.

[18] *Plates-formes pétrolières (République islamique d'Iran c. Etats-Unis d'Amérique), exception préliminaire, arrêt, C.I.J. Recueil 1996*, opinion individuelle de Mme la juge Higgins, p. 857, par. 34.

M[e] Wordworth ***suivi par*** le professeur Forteau vous demandent, c'est d'affirmer au stade des exceptions préliminaires «ce que sont exactement les faits». Autrement dit, ils vous objurguent de transformer la procédure incidente des exceptions préliminaires prévue à votre Statut en une procédure sommaire de rejet des requêtes qui n'existe pas à votre Statut.

4. Je me bornerai donc à répéter — et je m'en excuse auprès de la Cour, mais ce ne sera pas long : i) que l'exception préliminaire de non-plausibilité des faits forgée par M[e] Wordsworth, et à laquelle le professeur Forteau a adhéré, pour protéger la Russie du regard des juges sur ses illicéités, ne saurait être admise, ii) que si la Cour s'engageait dans une telle voie, ce serait une première[19], et iii) que prendre cette voie serait extrêmement fâcheux. L'Ukraine a pleine confiance en la Cour et sait que ceci ne se produira pas. Je ne prendrai donc pas davantage de votre précieux temps sur ce point.

5. La seconde pomme de discorde porte sur la question de savoir si vous devriez vous livrer dès à présent à l'interprétation définitive des conventions invoquées par l'Ukraine. Je clarifierai notre position à cet égard en prenant pour exemple la convention CIRFT, mais ce qui vaut pour la CIRFT vaut *mutatis mutandis* pour la CERD. L'Ukraine soutient que :

— premièrement, la Cour n'est pas appelée à interpréter l'article 2 de la CIRFT concernant la définition des actes terroristes ; il n'existe pas d'exception préliminaire d'interprétation ;

— deuxièmement, et à titre subsidiaire, la prétendue exception d'incompétence relative au financement du terrorisme par des agents publics n'est pas exclusivement préliminaire ;

— en tout état de cause et troisièmement, «toute personne» signifie — encore une fois je suis désolé de prendre le temps de la Cour sur des évidences — «toute personne».

[19] *Questions d'interprétation et d'application de la convention de Montréal de 1971 résultant de l'incident aérien de Lockerbie (Jamahiriya arabe libyenne c. Royaume-Uni), exceptions préliminaires, arrêt, C.I.J. Recueil 1998*, p. 28-29, par. 50 (citant *Barcelona Traction, Light and Power Company, Limited (nouvelle requête : 1962) (Belgique c. Espagne), exceptions préliminaires, arrêt, C.I.J. Recueil 1964*, p. 41, 46 ; *Pajzs, Csáky, Esterházy, arrêt, 1936, C.P.J.I. série A/B n[o] 68*, p. 9 ; *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), compétence et recevabilité, arrêt, C.I.J. Recueil 1984*, p. 425, par. 76 ; *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), fond, arrêt, C.I.J. Recueil 1986*, p. 31, par. 43 ; *Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria), exceptions préliminaires, arrêt, C.I.J. Recueil 1998*, p. 322–325, par. 112–117.

I. La Cour n'est pas appelée à interpréter à ce stade l'article 2 de la CIRFT concernant la définition des actes terroristes : inexistence d'une exception préliminaire d'interprétation

6. Monsieur le président, Mesdames et Messieurs les juges, devez-vous à ce stade interpréter, et définitivement, l'article 2 de la convention CIRFT ? La Russie suggère que c'est le cas[20] ; l'Ukraine dit que ce n'est pas le bon moment.

7. L'Ukraine considère en effet que l'interprétation d'un traité *in limine litis* ne s'impose pas pour la seule raison qu'il existe une controverse à cet égard entre les Parties. La notion «d'exception préliminaire d'interprétation», je l'ai déjà dit, n'existe pas. Tout au contraire, en principe, lorsqu'un différend s'est noué à propos de l'interprétation d'un traité, c'est au fond qu'il convient de le résoudre. C'est cette évidence que j'ai rappelée mardi[21], et qui a été sommairement critiquée jeudi[22].

8. En réalité, l'interprétation des clauses substantielles d'un traité au stade des exceptions préliminaires ne doit être entreprise par la Cour que lorsqu'elle est *nécessaire* à l'établissement de sa compétence *ratione materiae*[23]. Et une telle nécessité s'impose seulement dans le cas, et dans la seule mesure où, au regard du différend tel qu'il est porté devant la Cour, l'établissement de sa compétence pour en connaître est tributaire de cette interprétation.

9. Par contraste, l'interprétation desdites clauses substantielles n'est *pas* nécessaire au stade préliminaire si, quelle que soit cette interprétation, la compétence *ratione materiae* devra en tout état de cause être exercée par la Cour. Par exemple, dans les affaires iraniennes, la Cour n'a pas interprété tous les articles du traité de 1955, mais seulement ceux à propos desquels la controverse devait nécessairement être résolue pour déterminer si certaines allégations entraient dans les prévisions du traité.

10. En l'espèce, il n'y a objectivement aucune nécessité de procéder à l'interprétation des conventions litigieuses. Les réponses apportées aux deux questions suivantes conduisent à cette conclusion.

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[20] CR 2019/11, p. 16–17, par. 14–17 (Wordsworth).

[21] CR 2019/10, p. 23, par. 22 (Thouvenin).

[22] CR 2019/11, p. 16, par. 15–16 (Wordsworth).

[23] *Immunités et procédures pénales (Guinée équatoriale c. France), exceptions préliminaires, arrêt, C.I.J. Recueil 2018*, p. 328, par. 118–119.

11. Première question : quel est le différend ? C'est, par exemple, à déterminer l'objet du différend que la Cour a consacré ses premières analyses dans l'affaire *Guinée équatoriale c. France*[24]. Il s'agit d'une étape clef puisque la compétence *ratione materiae* conduit à se demander si ce différend entre dans les prévisions de la convention.

12. J'ai été conduit à rappeler la substance du différend mardi[25]. Il entre manifestement dans les prévisions de la convention[26]. La Russie ne m'a nullement contredit. Pas le moindre mot. Comme dirait le professeur Zimmermann, «it is telling»[27]. La Russie a bien entendu cherché à pervertir l'objet du différend[28], y compris en présentant l'Ukraine comme une vilaine complotiste cherchant à utiliser des portes dérobées («backdoor»)[29] et autres «leurres»[30] pour, à force de simulacres, faire engager la responsabilité de la Russie à propos de règles que la convention ne contiendrait pas[31], ou plus grotesque encore, pour avoir le plaisir de jouer une pièce de théâtre devant vous[32].

13. Mais aucun de ces mots ne changera les faits incontestés : le différend porté devant vous concerne la violation des articles 8, 9, 10, 12 et 18 de la convention CIRFT[33] par la Russie.

14. Deuxième question : ce différend entre-t-il dans les prévisions de la convention invoquée, ou bien pourrait-il ne pas y entrer, selon l'interprétation que la Cour retiendrait des dispositions contestées ? Cette question est tout aussi importante que la première, car ce n'est que dans la seconde hypothèse que la Cour devrait procéder immédiatement à l'interprétation des dispositions disputées. Votre pratique confirme cette saine méthodologie. Dans l'affaire *Guinée équatoriale c. France*, la Cour a procédé à l'interprétation de l'article 4 de la convention de Palerme uniquement parce que l'interprétation qu'elle devait retenir conditionnait l'existence ou

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[24] *Immunités et procédures pénales (Guinée équatoriale c. France), exceptions préliminaires, arrêt, C.I.J. Recueil 2018*, p. 308-317, par. 48–73.

[25] CR 2019/10, p. 16–20, par. 4–10 (Thouvenin).

[26] *Ibid.*

[27] CR 2019/11, p. 34, par. 23 (Zimmermann).

[28] CR 2019/9, p. 24, par. 20 (Wordsworth) ; voir aussi, par exemple, EPR, par. 175–184.

[29] CR 2019/9, p. 37, par. 4 (Zimmermann).

[30] *Ibid.*, p. 54, par. 7 (Pellet) ; voir aussi *ibid.*, p. 65, par. 35 (Pellet).

[31] *Ibid.*, p. 37, par. 4 et 6 (Zimmermann), p. 39, par. 20 (Zimmermann).

[32] CR 2019/11, p. 47, par. 27 (Pellet).

[33] CR 2019/10, p. 17–19, par. 9 (Thouvenin) ; MU, par. 653.

non de sa compétence pour connaître des allégations du demandeur relatives à la violation des immunités de l'Etat[34]. Dans l'affaire relative à *Certains actifs iraniens*, la Cour a procédé à l'interprétation des articles du traité qui, selon le demandeur, incorporaient les règles relatives à l'immunité de l'Etat, précisément parce que les allégations du demandeur portaient pour une part sur la violation des immunités de l'Iran[35] et que le défendeur soutenait que ces dispositions n'incorporaient pas les règles sur les immunités de l'Etat. La même logique est à l'œuvre dans les autres affaires où la Cour a été conduite à interpréter des clauses substantielles de traités au stade de la vérification de sa compétence.

15. Or, ce qui est tout à fait remarquable dans la présente espèce, est que le défendeur ne fait pas valoir, ni ne démontre, que *son* interprétation de l'article 2 priverait la Cour de sa compétence *ratione materiae*. Ce que la Russie persiste à prétendre est que les preuves avancées par l'Ukraine, *pas les faits allégués, pas les allégations, les preuves* de ces allégations, ne permettraient pas de considérer que ces faits sont établis de manière plausible[36]. Ceci ne saurait justifier une quelconque nécessité pour la Cour d'interpréter l'article 2 de la convention à ce stade. Comme M[e] Cheek l'a indiqué mardi sans être contredite[37], et pour reprendre les termes du paragraphe 186 des observations écrites de l'Ukraine, elles-mêmes restées sans réponse :

> «[L]es arguments que la Russie tire de l'interprétation des traités demeurent pour l'essentiel purement théoriques, puisque les allégations factuelles de l'Ukraine satisfont même à ces interprétations exagérément restrictives.»[38]

16. La Cour n'est pas confrontée à la nécessité d'interpréter l'article 2 à ce stade afin d'établir sa compétence *ratione materiae*, cette dernière étant établie indépendamment du point de savoir si c'est l'interprétation de la Russie, ou celle de l'Ukraine, qui est correcte. Le raisonnement que je viens d'esquisser vaut tout autant s'agissant de la CERD *mutatis mutandis*.

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[34] *Immunités et procédures pénales (Guinée équatoriale c. France), exceptions préliminaires, arrêt, C.I.J. Recueil 2018*, p. 319, par. 84–85.

[35] *Certains actifs iraniens (République islamique d'Iran c. Etats-Unis d'Amérique), exceptions préliminaires, arrêt du 13 février 2019*, par. 52–80.

[36] CR 2019/9, p. 25–26, par. 23 et 28 (Wordsworth), p. 29, par. 36 et 38 (Wordsworth), p. 34, par. 52–54 (Wordsworth).

[37] CR 2019/10, p. 32, par. 11 (Cheek).

[38] EEU, par. 186.

II. L'exception relative aux agents publics n'est pas exclusivement préliminaire

17. Monsieur le président, Mesdames et Messieurs les juges, à titre subsidiaire, et en tout état de cause, l'Ukraine maintient que l'exception relative aux agents publics n'est pas exclusivement préliminaire[39]. Avant d'y revenir brièvement, je relève que le professeur Zimmermann a bien voulu confirmer jeudi que «Russia's objection relates exclusively to a pure question of law»[40], ce qui confirme que l'exception préliminaire qu'il défend est une «exception préliminaire d'interprétation», ce qui n'existe tout simplement pas dans la pratique de la Cour.

18. Pour en venir à cette exception relative aux agents publics, je rappelle que ce que l'Ukraine reproche à la Russie est de n'avoir rien fait pour prévenir le financement d'actes terroristes commis par des «personnes». Parmi ces personnes, certaines exercent des emplois publics, mais ce n'est aucunement parce qu'***elles*** sont fonctionnaires que leurs actes ont été dénoncés par l'Ukraine à la Russie afin qu'elle agisse conformément à la convention. L'analogie proposée par mon contradicteur avec l'affaire du *Génocide* en Bosnie est donc erronée puisque, dans cette affaire, l'allégation fondamentale portait sur la commission du génocide par la Serbie[41].

19. L'argument russe relatif au fait que certaines personnes seraient exclues du champ de préoccupation de la convention n'est donc rien d'autre qu'une défense au fond. Du reste, la Cour constatera que le défendeur n'a même pas tenté de définir ce qu'il entend par «State officials». La traduction du Greffe retient les termes «représentants de l'Etat»[42]. Mais qu'est-ce que cela veut dire exactement ? Le Greffe n'a pas à se prononcer là-dessus ; c'est la Russie qui devrait proposer une interprétation. Elle ne le dit pas. Or, faute de cette précision élémentaire, on voit mal comment la Cour pourrait entrer, à ce stade, dans de telles considérations.

III. En tout état de cause, les agents publics ne sont pas exclus du champ de préoccupation de la convention

20. En tout état de cause, les agents publics ne sont pas exclus du champ de préoccupation de la convention.

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[39] CR 2019/10, p. 25–26, par. 30–32 (Thouvenin) ; p. 31, par. 5–8 (Cheek).

[40] CR 2019/11, p. 30, par. 9 (Zimmermann) ; voir aussi CR 2019/11, p. 31, par. 11 (Zimmermann).

[41] CR 2019/11, p. 31, par. 10 (Zimmermann).

[42] Voir, par exemple, EEU, par. 112 *[traduction du Greffe]*.

21. Sans répéter ce qui a déjà été dit, quatre observations pourront, je l'espère, éclairer les délibérations de la Cour, si tant est, *quod non*, que la Cour devait entrer dans ces considérations à ce stade préliminaire.

22. Premièrement, la Russie s'attache à ce que, selon elle, la convention ne dit pas. Et d'en inférer que «*sub silentio*», ce qui n'est pas expressément dit doit être considéré comme exclu[43]. Mais la convention n'est pas silencieuse puisqu'elle mentionne «toute personne»[44]. Sur *cela*, c'est-à-dire sur le texte de la convention, il y a un silence, révélateur, de la Russie, qui ne s'y intéresse que pour en pervertir le sens, comme pour ce qui concerne l'article 5 qui ne contredit nullement le sens ordinaire qu'il convient de reconnaître aux termes «toute personne»[45], contrairement à ce qui a été dit hier, mais se borne à préciser comment l'infraction s'applique aux personnes morales, simplement parce que, s'agissant des personnes morales, cela ne va pas de soi.

23. La Russie préfère regarder ce qui est dit dans d'autres conventions, et soutient que, comme c'est le cas dans ces autres conventions qui visent expressément les agents publics, si ces derniers avaient été visés au titre de l'article 2, la CIRFT l'aurait expressément indiqué[46]. Mais la convention sur la torture limite la torture qu'elle vise à des actes commis par des fonctionnaires ou des personnes agissant à titre officiel[47], et devait donc les viser expressément. Quant à la Convention sur le génocide, elle utilise une terminologie différente de la CIRFT.

24. Par contraste, la convention internationale pour la répression des attentats terroristes à l'explosif adoptée seulement deux ans avant la CIRFT vise «toute personne» à son article 2, paragraphe 1, et exclut expressément à son article 19 les faits commis par les forces armées opérant dans certaines conditions. Cet article 19 n'aurait aucun sens si «toute personne» signifiait «toute personne privée» seulement, comme le prétend avec insistance le défendeur. En outre, la pratique abondante s'agissant des conventions plus récentes prévoyant une obligation de prévention démontre que lorsqu'une catégorie relevant de la sphère publique doit être exclue de l'obligation de

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[43] CR 2019/9, p. 39, par. 21 (Zimmermann) ; CR 2019/11, p. 30, par. 6 (Zimmermann).

[44] CR 2019/10, p. 26–28, par. 33–42 (Thouvenin).

[45] CR 2019/11, p. 33, par. 18–20 (Zimmermann).

[46] CR 2019/9, p. 38, par. 15 (Zimmermann), p. 40, par. 24 (Zimmermann), p. 42, par. 33 (Zimmermann) ; CR 2019/11, p. 30, par. 6 (Zimmermann) ; p. 35, par. 29 (Zimmermann).

[47] CR 2019/9, p. 43, par. 41 (Zimmermann).

prévention, elle l'est *expressément*[48]. Le traité sur le commerce des armes, évoqué hier[49], va dans ce même sens puisque son article 2, paragraphe 3, exclut expressément de son champ d'application le «transport international par tout État Partie ou pour son compte d'armes classiques destinées à son usage, pour autant que ces armes restent sa propriété»[50].

25. Quant à la convention SUA[51], je confirme l'interprétation que j'en ai donnée mardi[52]. Du reste, c'est parce que la France, le Royaume-Uni, et les Etats-Unis en font la même lecture qu'ils ont introduit une «saving clause» dans le texte du protocole de 2005. Je lis le rapport du Sénat français sur cette «savings clause», rapport qui est publiquement accessible et reproduit à l'onglet n° 32 du dossier des juges :

> «La France, le Royaume-Uni et les États-Unis ont veillé à ce que figure dans cet article 3 *bis* une clause de sauvegarde (dite «saving clause») … introduite pour deux raisons :
>
> — … l'article 3 *bis* de la convention SUA 2005 prévoit que «commet une infraction … toute personne qui…» … Cette formulation générale risquait donc d'incriminer des activités effectuées par des États».
>
> — … l'article 3 *bis*, paragraphe 1, indique que «commet une infraction … toute personne qui … cette formulation risquait d'incriminer des transferts effectués par des États»»[53].

26. Deuxièmement, mon contradicteur a fait valoir lundi que si les fonctionnaires étaient visés par la CIRFT, cette dernière aurait dû prévoir que l'ordre d'un supérieur ne saurait justifier un crime de financement du terrorisme[54]. C'est l'exception de l'ordre du supérieur dont il est question. Mais c'est très exactement le principe inverse que la CIRFT a entendu faire prévaloir, car le démantèlement des réseaux de financement du terrorisme exige souvent de recourir à des agents

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[48] Convention de Londres sur la prévention de la pollution des mers résultant de l'immersion des déchets de 1972, art. VII, 4 ; voir aussi convention internationale pour la prévention de la pollution des eaux de la mer par les hydrocarbures de 1954, art. II, *d)* ; convention concernant la prévention des accidents du travail des gens de mer de 1970, art. 1.1.

[49] CR 2019/11, p. 36, par. 35–36 (Zimmermann).

[50] Traité sur le commerce des armes de 2003, art. 2 3).

[51] CR 2019/11, p. 33–34, par. 21–25 (Zimmermann).

[52] CR 2019/10, p. 28, par. 40 (Thouvenin).

[53] République française, Sénat, session ordinaire de 2016-2017, n° 549, projet de loi autorisant la ratification du protocole relatif à la convention pour la répression d'actes illicites contra la sécurité de la navigation maritime et du protocole relatif au protocole pour la répression d'actes illicites contre la sécurité des plates-formes fixes situées sur la plateau continental (10 mai 2017), accessible à l'adresse : https://www.senat.fr/leg/pjl16-549.html.

[54] CR 2019/9, p. 40, par. 25–26 (Zimmermann).

infiltrés, lesquels sont conduits à participer, pour les besoins de l'infiltration, au financement du terrorisme[55]. Comme l'indique le guide établi par le secrétariat du Commonwealth — que j'ai évoqué mardi dernier — durant les négociations : «it was agreed to include «unlawfully» since undercover police might wish to give money to suspected terrorists as part of a plan to infiltrate them»[56].

27. Troisièmement, et dernièrement, mon contradicteur vous a entraînés dans une lecture parfaitement erronée de l'arrêt rendu par votre Cour dans l'affaire du *Génocide* en Bosnie[57], pour lui faire dire que l'obligation de prévention qui pèse sur les Etats ne peut concerner que les personnes privées, tandis que ce serait la seule obligation de ne pas commettre qui pèserait sur les Etats eux-mêmes et leurs fonctionnaires[58].

28. C'est un argument clef de la thèse russe, déjà développé dans ses écritures[59], allégué lundi[60], et à nouveau mis en avant jeudi[61]. Il vise à vous convaincre.

Le PRESIDENT : Excusez-moi, Monsieur le professeur, il semble qu'il n'y a pas d'interprétation en anglais. Peut-être que nous avons un problème technique.

M. THOUVENIN : Je le décompte de mon temps de parole, si vous le permettez.

Le PRESIDENT : Vous pouvez le faire.

M. THOUVENIN : Dois-je faire un essai ?

Le PRESIDENT : Très bien, essayons de nouveau.

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[55] UNODC, Recueil de cas sur les affaires de terrorisme (2010), p. 39–40, par. 92, accessible à l'adresse : https://www.unodc.org/documents/terrorism/Digest_French.pdf.

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

[57] CR 2019/9, p. 41, par. 28–30 (Zimmermann).

[58] *Ibid*., p. 41, par. 31 (Zimmermann).

[59] EPR, par. 213–214.

[60] CR 2019/9, p. 41, par. 31 (Zimmermann).

[61] CR 2019/11, p. 30, par. 5 (Zimmermann).

M. THOUVENIN : Monsieur le président, puis-je continuer ? La traduction est-elle simultanée ?

Le PRESIDENT : Oui. Allez-y.

M. THOUVENIN : Où en étais-je ? Oui, l'affaire du *Génocide* en Bosnie. Mon contradicteur vous a donc expliqué une série de choses à propos de cet arrêt, à propos de l'obligation de prévention qui ne pourrait pas concerner les agents de l'Etat, lesquels seraient couverts par l'obligation de ne pas commettre qui pèse sur l'Etat. Et, selon mon contradicteur, l'arrêt de la Cour confirmerait cette thèse. Clef de voûte de la thèse russe, développée à de multiples reprises et qui vise à vous convaincre que dans le contexte de l'article 18 de la convention, qui pose une obligation de prévention, la notion de «toute personne» ne saurait viser des agents de l'Etat. On s'est plaint que je n'en dise rien. Je ne voulais pas être cruel, mais puisqu'on m'y enjoint.

29. Il est vrai que, comme le rappelle le professeur Zimmermann, dans son arrêt la Cour a vérifié d'abord si la Serbie était responsable d'actes génocidaires commis par ses organes, puis s'est tournée vers la question de savoir si la Serbie avait respecté son obligation de prévention d'actes génocidaires commis par d'autres personnes[62]. Mais il est grossièrement inexact d'en inférer que la Cour ***avait considéré*** que l'obligation de prévention ne peut concerner que d'autres personnes que les agents de l'Etat.

30. Il suffit de lire ce que dit *expressément* la Cour pour constater qu'elle ~~a~~ dit exactement l'inverse.

> «Si, en effet, un Etat est reconnu responsable d'un acte de génocide (en raison de ce que cet acte a été commis par une personne ou un organe dont le comportement lui est attribuable) ou de l'un des autres actes visés à l'article III de la Convention (pour la même raison), la question de savoir s'il a respecté son obligation de prévention au regard des mêmes faits se trouve dépourvue d'objet, car un Etat ne saurait, par construction logique, *avoir satisfait à l'obligation de prévenir un génocide auquel il aurait activement participé.*»[63]

31. Monsieur le président, Mesdames et Messieurs les juges, si un Etat ne peut pas, par construction logique, avoir satisfait à l'obligation de prévenir un génocide, auquel il aurait

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[62] CR 2019/9, p. 41, par. 29 (Zimmermann).

[63] *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Serbie-et-Monténégro), arrêt, C.I.J. Recueil 2007 (I)*, p. 201, par. 382 ; les italiques sont de nous.

activement participé, par le biais de ses organes, c'est, et c'est seulement, parce que l'obligation de prévention s'applique à ses organes, et pas seulement aux personnes privées. L'affaire du *Génocide* en Bosnie contredit donc cruellement la thèse centrale de mon contradicteur.

32. Trois points de conclusion, Monsieur le président :

— premièrement, l'exception préliminaire de plausibilité des faits forgée par la Russie n'existe pas en droit international ; pas davantage que l'exception préliminaire d'interprétation. Puisque l'exception préliminaire de la Russie n'est composée que de ces deux allégations, l'Ukraine soutient qu'elle devrait être rejetée ;

— deuxièmement, à titre subsidiaire, l'Ukraine soutient que l'exception relative aux agents publics n'est, *a minima*, pas exclusivement préliminaire ;

— troisièmement, si la Cour voulait absolument interpréter les termes «toute personne», l'Ukraine soutient que la Cour devrait leur donner leur sens ordinaire.

33. Je vous remercie, Monsieur le président, Mesdames et Messieurs les juges, de votre patiente attention et vous demande de bien vouloir appeler à la barre M^e^ Cheek.

The PRESIDENT: I thank Professor Thouvenin and I will now give the floor to Ms Marney Cheek. You have the floor, Madam.

Ms CHEEK:

THE OFFENCE OF THE FINANCING OF TERRORISM UNDER ICSFT ARTICLE 2

I. Introduction

1. Mr. President, Members of the Court. I have two tasks this morning. First, I will respond to Russia's arguments on the interpretation of Article 2 of the ICSFT. Second, I will demonstrate, contrary to Russia's contentions yesterday, that Ukraine has pled facts that plausibly satisfy the definition of a terrorism financing offence under Article 2.

II. Interpretation of Article 2 of the ICSFT

A. ICSFT 2 (1): Financier's knowledge

2. I will start with the knowledge requirement under Article 2 (1), that is, that a person "provides or collects funds . . . in the knowledge that they are to be used, in full or in part, in order to carry out" a terrorist act.

3. Russia admitted yesterday that Article 2 (1) does not require knowledge that specific funds will be used for specific terrorist acts[64]. Instead, it appears to embrace a quote by Finnish ICSFT negotiator Marja Lehto that "the financing of a group which has notoriously committed terrorist acts would meet the requirements of paragraph 1" of Article 2[65]. Russia states that if Ukraine agrees with Ms Lehto, then the only way to establish knowledge is if the groups which committed the terrorist acts have been labelled as terrorist organizations by the United Nations or others[66]. But this misses the point.

4. Mr. Wordsworth made two errors. First, Russia apparently agrees with Ukraine that this is one way to establish knowledge under Article 2 (1), but Russia goes further and suggests that it is the *only* way. That is not what Ms Lehto says, and Ukraine agrees with Ms Lehto, not with Russia.

5. Second, Mr. Wordsworth says that, if the DPR and LPR have not been labelled as terrorist organizations, Ukraine "cannot state a plausible case that the DPR and LPR have notoriously committed terrorist *acts*"[67]. But Ms Lehto's statement — and more importantly, Article 2 itself — does not focus on labels or designations. What matters is the acts themselves.

6. And what is a notorious act? It is an act that is well known. In Ukraine and in Russia especially, the torture and killing of Mr. Rybak as punishment for raising the Ukrainian flag over his town hall was covered by multiple news outlets[68]. When a self-proclaimed DPR leader says that civilians are targets and that "the goal is to 'immerse them in horror'", and this is reported by the

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[64] CR 2019/11, pp. 18-19, para. 26 (Wordsworth).

[65] Marja Lehto, Indirect Responsibility for Terrorist Acts (2009), p. 289 (MU, Ann. 490).

[66] CR 2019/11, pp. 18-19, paras. 26-28 (Wordsworth).

[67] CR 2019/11, p. 19, para. 28 (Wordsworth).

[68] See, e.g. MKRU, SBU: "'People's Mayor' Slavyansk discussed with an Officer of the GRU RF how to get rid of Deputy Rybak's corpse" (24 April 2014) (MU, Ann. 509); "Ukrainian Deputy Rybak was tortured and then drowned", MKRU (23 Apr. 2014) (MU, Ann. 508); "Leaders of the Outrages of the DNR", Tatyana Popova, *Ukrainska Pravda* (23 Sept. 2014) (MU, Ann. 544); "Terrorist Shot a Resident of Donetsk Region in front of his Family", *Unian* (18 May 2014) (MU, Ann. 516).

United Nations Human Rights Chief, that is notorious[69]. The shelling of a civilian checkpoint with Grad rockets, which the OSCE reported on and a United Nations Security Council statement condemned, was similarly well known[70]. That is particularly true in the immediate aftermath of the attack — which is when more Grad rockets were supplied for use against the people of Mariupol. And shortly after that attack, amidst an intense period of international diplomacy, another devastating attack on Kramatorsk. All well known[71]. Perhaps not in every State capital, but certainly well known in Moscow and Kyiv and the cities in between. The fact that the groups carrying out these notorious acts do not carry an international label of terrorist organization is beside the point.

7. Article 2 (1) does not mention designation. It focuses on knowledge that funds are to be used to commit acts of terrorism. And the broader context of Article 2 (1) is relevant to the interpretation of the knowledge requirement, where the text reflects that the funds provided are to be used "in full or in part". This context was important in the negotiations of the Convention.

8. A working document prepared by France, for example, explained that "[t]his convention is aimed both at 'those who give orders', who are aware of the use of the funds, and contributors, who are aware of the terrorist nature of the aims and objectives of the whole or part of the association which they support with their donations in cash or in kind"[72].

9. Returning to Ms Lehto, she has observed that it was "recurrently mentioned in the negotiations" that the required knowledge under Article 2 would be met by "the funding of an organisation that carries out multiple activities of a political and social as well as military nature,

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[69] OHCHR, "Intensified Fighting Putting at Risk Lives of People in Donetsk and Luhansk", Pillay (4 July 2014) (Ann. 295).

[70] United Nations Security Council, Security Council Press Statement on "Killing of Bus Passengers in Donetsk Region, Ukraine" (13 Jan. 2015) (MU, Ann. 305).

[71] See also, e.g. Maddie Smith, "Ten Civilians Killed in Ukrainian Bus Attack as Donetsk Airport Control Tower is Destroyed", VICE (13 Jan. 2015) (MU, Ann. 552); United Nations Security Council, Security Council Press Statement on Killing of Bus Passengers in Donetsk Region, Ukraine (13 Jan. 2015) (MU, Ann. 305); Human Rights Watch, Ukraine: "Rising Civilian Death Toll" (3 Feb. 2015) (MU, Ann. 1108); "Mariupol Recovers after Shelling", Viktoria Savitskaya, *LB.ua* (24 Jan. 2015) (MU, Ann. 556); "Ukraine Rebels Announce New Offensive as Rockets Kill 30", Oleksandr Stashevsky and Dmitry Zaks, *AFP* (24 Jan. 2015) (MU, Ann. 555); "Avdiivka, Evacuating Again as Fighting Escalates", John Wendle, *Al Jazeera* (8 Feb. 2017) (MU, Ann. 594); "Avdiivka Civilians Caught in Crossfire as Clashes Rage", *Al Jazeera* (5 Feb. 2017) (MU, Ann. 593); International Partnership for Human Rights, Attacks on Civilian Infrastructure in Eastern Ukraine, (2017) (MU, Ann. 454); United Nations, *Official Records of the Security Council*, 7876th Meeting, document S/PV.7876 (2 Feb. 2017) (MU, Ann. 315).

[72] France, Working Document*: "*Why an International Convention Against the Financing of Terrorism?"; later reproduced as UN doc. A/AC.252/L.7/Add.1 (March 11, 1999), p. 2, para. 5 (MU, Ann. 275).

and where it may not be possible for the financier to make a distinction between the different possible end uses"[73].

10. And that makes perfect sense because a financier can fund terrorism directly, by directly providing a bomb, or indirectly, by freeing up money that was originally committed towards other things but now can be used to buy a bomb.

11. Mr. Wordsworth yesterday kept repeating the phrase "actual knowledge" with regard to the knowledge requirement in Article 2 (1)[74]. The word "actual" is not referred to in the Convention. The only source where it is used is an IMF handbook which has no citations to support the proposition, and it is a source which Russia introduced into the record in this case only on Monday.

12. I presume that Mr. Wordsworth likes the language of the IMF handbook, as opposed to the language of the ICSFT, because he wishes to argue for the highest degree of knowledge. And that is Russia's strategy overall — every element must be interpreted as the highest possible bar, whether or not there is good support for that interpretation.

13. Further, contrary to Mr. Wordsworth's suggestion, the lack of an explicit reference to "nature or context" in Article 2 (1) does not suggest that the drafters of the Convention meant to contravene the widely accepted principle that knowledge is usually proved by the circumstances[75]. Article 2 (1) *(b)* refers to acts committed by someone other than the perpetrator of the financing offence. And in that situation, it was important to establish an objective standard for evaluating the third party's purpose, thus an express reference to nature or context.

14. The long and short of it is that there is international consensus as to how to interpret the knowledge requirement in Article 2 (1), and it does not support Mr. Wordsworth's heightened standard. The agencies and governments that are directly involved in the implementation and

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[73] Marja Lehto, Indirect Responsibility for Terrorist Acts (2009), p. 293 (MU, Ann. 490).

[74] See, e.g. CR 2019/9, p. 27, para. 30 (Wordsworth); CR 2019/11, p. 18, para. 25 (Wordsworth).

[75] See WSU, para. 211 and fn. 368; International Military Tribunal, *United States of America* v. *Alstötter, et al.* ("The Justice Case"), *Law Reports of Trials of War Crimes*, Vol. 3 (1951), pp. 1080–81; *Prosecutor* v. *Tadić*, ICTY case No. IT-94-1-T, Trial Chamber Judgment (May 7, 1997), paras. 656–57; see also *Prosecutor* v. *Kvočka et al.*, ICTY case No. IT-98-30/1-T, Trial Chamber Judgment (2 Nov. 2001), para. 324; International Criminal Court, Elements of Crimes (2011), p. 1, para. 3.

application of the Convention do not operate as if Mr. Wordsworth's heightened standard were the law.

15. Instead, the United Nations Office on Drugs and Crime (UNODC) advises that "the offence [of] implementing the Convention must also punish provision or collection of funds with the knowledge and willing acceptance of the possibility that they may be used for terrorist acts"[76].

16. Similarly, the Commonwealth Implementation Kit[77] defines the requirement this way: every person who provides or collects funds "with the intention that they should be used, or having reasonable grounds to believe that they are to be used, in full or in part"[78].

17. The Supreme Court of Denmark has held that knowing financing of terrorism was established where the perpetrators were "aware" that the funded groups were committing covered terrorist acts[79].

18. Similarly, US courts have held that "[a]nyone who knowingly contributes to the nonviolent wing of an organization that he knows to engage in terrorism is knowingly contributing to the organization's terrorist activities"[80].

19. Ultimately, Mr. Wordsworth's reasoning yesterday was circular. After making his various points, he conceded that Ukraine's knowledge argument, and I quote, "essentially come[s] 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 a group that engage[s] in terrorist acts"[81]. That is not Ukraine's only knowledge argument, but Ukraine does agree that that is a perfectly valid way of establishing knowledge. Ukraine also would include the well-known incidents of torturing and killing civilians that pre-dated the shoot down of MH17 and the shelling attacks. And, at the risk of repeating myself, Russia

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[76] UNODC, Legislative Guide to the Universal Legal Regime Against Terrorism (2008), p. 31 (MU, Ann. 285) (judges' folder, tab 11).

[77] CR 2019/11, p. 33, para. 20 (Zimmermann).

[78] Commonwealth Secretariat, Implementation Kits for the International Counter Terrorism Conventions, pp. 292-293, publicly available at http://thecommonwealth.org/sites/default/files/key_reform_pdfs/Implementation%20Kits%20for%20Terrorism%20Conventions_0.pdf.

[79] *Fighters and Lovers Case*, Case 399/2008 (Sup. Ct., Den., 25 Mar. 2009), p. 2 (MU, Ann. 476) (judges' folder, tab 12).

[80] *Boim* v. *Holy Land Found. for Relief & Dev.*, 549 F.3d, pp. 685 and 698 (7th Cir. 2008) (MU, Ann. 474) (judges' folder, tab 12).

[81] CR 2019/11, p. 20, para. 31 (Wordsworth).

has not challenged the facts alleged by Ukraine which establish knowledge on the basis of these and other incidents. Thus, Mr. Wordsworth ultimately confesses that Russia has no stand-alone knowledge argument; its argument depends on the Court accepting his argument that there were no underlying acts of terrorism.

20. So what we are left with is a question of fact. If the well-known killings of civilians by DPR and LPR fighters were acts of terrorism as defined by the Convention, then those who contributed to the DPR and LPR knew they were making contributions that would fund terrorist acts.

B. ICSFT Article 2 (1) *(a)*: the Bombings Convention and the Montreal Convention

21. With regard to the Bombings Convention, Russia acknowledges that the Parties do not have an interpretive dispute[82]. And despite all its creativity, it has come up with no argument to challenge the facts of these bombings, or their knowing financing. Yesterday Russia, for the first time in these proceedings[83], said that it asked Ukraine for additional evidence of the bombings in Kharkiv in diplomatic correspondence that preceded this case. Russia has never made an objection that negotiations on this issue were somehow not sufficient. Russia essentially concedes that all claims related to the financing of terrorist bombings will proceed to the merits.

22. Mr. Wordsworth did return to the Montreal Convention, but his attempt to find support for the proposition that the word "civilian" should be read into Article 1 (1) *(b)* of the Montreal Convention fails.

23. Mr. Wordsworth suggested that the ILC commentary on the Internationally Protected Persons Convention (hereinafter "IPP Convention") somehow proves that the Montreal Convention drafters meant to require intent as to the civilian status of the aircraft destroyed[84]. As you can see on your screen, the language of the two conventions is different. Article 2 (1) of the IPP Convention includes the status of the victim in the definition of the offence[85]. As I previously

[82] CR 2019/11, p. 28, para. 63 (Wordsworth).

[83] *Ibid.*

[84] *Ibid.*, p. 22, paras. 40-41 (Wordsworth).

[85] Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents, Art. 2 (1), 14 Dec. 1973, United Nations, *Treaty Series (UNTS)*, Vol. 1035, p. 167.

explained, the Montreal Convention does not. And in fact, despite this difference, States parties to the IPP Convention have treated status of the victim as a jurisdictional requirement, not part of the *mens rea*[86]. That conclusion is only more compelling for the Montreal Convention.

C. ICSFT Article 2 (1) *(b):* "act intended to cause"

24. Let me now turn to Article 2 (1) *(b)*. The best reading of the "act intended to cause" requirement is that it is not a mental element at all.

25. But again reaching for the highest bar possible, Mr. Wordsworth urged you to interpret "act intended to cause" as a requirement of "specific intent", or *dolus specialis*[87]. He said that under this standard, "desire" to kill civilians must be proved[88]. The basis of this argument is an analogy to the Genocide Convention[89].

26. But Mr. Wordsworth ignored two critical differences between the ICSFT and the Genocide Convention.

27. *First*, Article 2 of the Genocide Convention is written to create a subjective mental element: "committed with intent". In French, "dans l'intention"[90].

28. By contrast, Article 2 (1) *(b)* of the ICSFT is written objectively: "act intended to cause". In French, "acte destiné à".

29. In fact, when the Genocide Convention was negotiated, the Soviet delegation proposed to change the language of Article 2 to make it objective, and that proposal was rejected. But that objective language that did not make it into the Genocide Convention *is* reflected in Article 2 (1) *(b)* of the ICSFT[91].

30. *Second*, and importantly, the Genocide Convention requires intention to destroy a group "as such". Mr. Wordsworth did not mention those words. But they are critical. This Court

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[86] MU, para. 222.

[87] CR 2019/9, p. 32, paras. 45-46 (Wordsworth); CR 2019/11, p. 24, para. 48 (Wordsworth).

[88] CR 2019/9, p. 31, para. 44. (Wordsworth).

[89] *Ibid.*, para. 46 (Wordsworth).

[90] Convention on the Prevention and Punishment of the Crime of Genocide, 9 Dec. 1948, *UNTS*, Vol. 78, p. 277, Art. II (authentic English and French texts).

[91] See WSU, para. 228; Sixth Committee of the General Assembly, 73rd Meeting, Continuation of the Consideration of the Draft Convention on Genocide: Report of the Economic and Social Council, UN doc. A/C.6/SR.73 (1948), p. 95 (emphasis added) (WSU, Ann. 1).

emphasized the words "as such" in the *Bosnian Genocide* case when concluding that genocide must be committed with specific intent[92].

31. The ICTR has likewise stated that genocide is a "specific intent" crime because "[t]he 'destroying' has to be directed at the group *as such*"[93].

32. The basic point is this: "act intended to cause" is objective, which makes sense, because it refers to the act of a third party, not the Article 2 perpetrator. And even if it were a mental element, "intent" would include the normal direct and indirect degrees, just like it does in international tribunals, and just like it does in Russia.

D. ICSFT Article 2 (1) *(b)*: purpose of act, by nature or context, to intimidate or compel government action

33. There is little more to say about the "purpose to intimidate" language of Article 2 (1) *(b)*. The Convention says this is to be evaluated based on the "nature or context". The cases Ukraine cites, which Mr. Wordsworth attempts to distinguish, confirm that purpose to intimidate is heavily fact-specific. This is simply not the type of inquiry that should be performed at the preliminary objections phase of the case.

III. Ukraine has put forward facts that meet the elements of an Article 2 offence

34. Let me now turn to the factual evidence. Mr. Wordsworth made much of the fact that there is an armed conflict in eastern Ukraine, but as Professor Koh already noted, Article 2 (1) *(b)* makes plain that covered acts may occur in "situations of armed conflict".

35. This is not just Ukraine's view. International and regional courts, such as the Special Tribunal for Lebanon (STL) and the European Court of Justice, have interpreted Article 2 (1) *(b)* terrorist acts to apply in armed conflict, and have observed that these acts may qualify as both a violation of IHL and an act of terrorism[94].

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[92] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 121, para. 187.

[93] *Prosecutor* v. *Kayishema & Ruzindana*, Case No. ICTR-95-1-T, Judgement of 21 May 1999, para. 99 (emphasis in the original).

[94] *Prosecutor* v. *Ayyash et al.*, Case No. STL-11-01, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, pp. 70-71, para. 108 (STL, 16 Feb. 2011) (MU, Ann. 469); *Liberation Tigers of Tamil Eelam (LTTE)* v. *Council of the European Union, Judgment of the General Court (Sixth Chamber, Extended Composition)*, T-208/11, p. 5 (16 Oct. 2014) (MU, Ann. 471).

36. The Agent for Russia is wrong when he asserts that "[o]n Ukraine's case, any time an armed group or, indeed, an army violates rules of international humanitarian law, it engages in terrorism"[95]. That is not Ukraine's case.

37. Before moving on, let me briefly comment on Russia's suggestion that the acts of terrorism by those affiliated with the DPR and LPR cannot possibly qualify as terrorism because Ukraine has engaged in similar acts. That is a brazen assertion, with no evidence presented by Russia to support it.

38. Mr. Wordsworth points to a shelling incident involving a checkpoint at Olenivka and said that "*Ukraine* uses the same types of munitions in the same types of circumstance leading to more, not less, civilian casualties"[96]. This is false.

39. It is false that this attack involved the "same type[] of munitions[.]" The Olenivka checkpoint was attacked using 122-mm artillery guns[97]. General Brown explains that this is a much more precise weapon than the BM-21 Grad fired at the Volnovakha checkpoint[98].

40. It is also false that the attack involved "the same type[] of circumstances". The OSCE found DPR "firing positions" in the close vicinity of the Olenivka checkpoint[99]. There were no such firing positions in the vicinity of the Volnovakha checkpoint, which operated as a *de facto* civilian border crossing, and was attacked midday when traffic was known to be particularly heavy[100].

41. Finally, you heard from Mr. Wordsworth yesterday, and not for the first time, that "it appears inconceivable that Ukraine would have agreed to . . . amnesty if it considered the events at Volnovakha, Mariupol and Kramatorsk to have been even plausibly 'terrorist' acts"[101]. It appears that Mr. Wordsworth may not have all of the facts because Ukraine has not granted amnesty to

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[95] CR 2019/11, p. 60, para. 12 (Lobach).

[96] CR 2019/9, p. 34, para. 53 (Wordsworth); emphasis in the original.

[97] OSCE, Spot Report by the OSCE Special Monitoring Mission to Ukraine (SMM): Shelling in Olenivka (28 Apr. 2016) (WSU, Ann. 2).

[98] Expert Report of Lieutenant General Christopher Brown (5 June 2018), para. 85 (hereinafter "Gen. Brown Report") (MU, Ann. 11).

[99] OSCE, Latest from the OSCE Special Monitoring Mission to Ukraine (SMM), based on information received as of 19:30 hrs (29 Apr. 2016) (WSU, Ann. 3).

[100] MU, paras. 80-82, and accompanying annexes cited therein.

[101] CR 2019/11, p. 28, para. 61 (Wordsworth).

those who have committed terrorist acts. It should suffice to look at the record in this case, which includes witness statements from the lead investigators in Ukraine's criminal investigations into the shellings of Volnovakha, Mariupol and Kramatorsk[102].

42. While Russia did spend time yesterday commenting on the broader armed conflict in eastern Ukraine, with regard to the terrorist acts that are the focus of the case before you, Russia did not even attempt to rehabilitate its many unsupported factual assertions that Ukraine proved on Tuesday are contradicted by the record. Russia also chose not to engage directly with the extensive evidence Ukraine provided in the judges' folder regarding the Mariupol shelling attack.

43. Instead, Russia stated that Ukraine passed over the evidence regarding the shoot-down of MH17 and failed to engage with Russia's position. That is most certainly not the case.

A. Flight MH17

44. It is Russia, not Ukraine, that passes over the evidence related to the financiers' knowledge when providing the Buk TELAR to the DPR fighters. The evidence in the record shows the following:

45. First, the individuals who requested the Buk included Igor Girkin[103], who was already infamous for summary executions of civilians[104]. Three months earlier, in a well-publicized attack, DPR fighters abducted, tortured, murdered and mutilated a town councillor, Volodymyr Rybak, because he raised the Ukrainian flag[105]. This killing so obviously meets the elements of a terrorist act under Article 2 (1) *(b)* that Russia has never responded to. So when the Buk was supplied, it was in response to a request from men with an undisputed history of terrorist acts. How those men justified their request to their funders in Russia does not negate those facts.

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[102] See Witness Statement of Dmytro Volodymyrovych Zyuzia (29 May 2018), paras. 1-2, (MU, Ann. 6); Witness Statement of Igor Evhenovych Yanovskyi (31 May 2018), paras. 1-2 (MU, Ann. 5) (judges' folder, tab 10); Witness Statement of Kyrylo Ihorevych Dvorskyi (4 June 2018), paras. 1-2 (MU, Ann. 3).

[103] Intercepted Conversation between Igor Girkin, Viktor Anosov and Mykhaylo Sheremet (8 June 2014) (MU, Ann. 391); Confirmation of Authenticity, Senior Special Investigator with the Second Branch of the First Pre-Trial Investigations Department at the Main Investigations Directorate of the Security Service of Ukraine (4 June 2018) (MU, Ann. 184).

[104] Anna Shamanska, "Former Commander of Pro-Russian Separatists Says He Executed People Based on Stalin-Era Laws", *Radio Free Europe / Radio Liberty* (19 Jan. 2016) (MU, Ann. 587); OHCHR, Report on the Human Rights Situation in Ukraine (15 July 2014), para. 47 (MU, Ann. 296); MU, para. 46.

[105] MU, paras. 43-45, and accompanying annexes cited therein.

46. Second, the Buk TELAR was sent alone, without a combat control centre[106]. With a combat control centre, it is at least possible to differentiate civilian aircraft[107]. But without one, it is impossible[108]. They could have supplied the Buk with the equipment necessary to differentiate military from civilian targets, but they chose not to, knowing the consequences.

47. Third, the day the Buk was in transit to Ukraine, Russian aviation authorities closed civilian airspace on the Russian side of the border[109]. The implication is obvious: everyone involved in supplying the Buk knew they were introducing a weapon that would put civilian aircraft at grave risk.

48. What is the bottom line? It is that an indiscriminate weapon was knowingly provided to individuals who had an undisputed track record of terrorist acts against civilians, with full awareness of the consequences for civil aviation. That amply meets the knowledge requirement of Article 2 (1).

49. Let me also add that Mr. Wordsworth is not correct that Ukraine has abandoned a theory of intentional financing. Ukraine has focused on knowledge because that is easily satisfied and suffices. But the facts demonstrate intention as well. Recall Russia's own definition: an act is "committed intentionally" if "the person realized the social danger of his actions . . . but consciously allowed those consequences or treated them with indifference"[110]. Certainly that describes the provision of the Buk according to the facts I have just laid out.

B. Shelling attacks

50. Finally, I would like to briefly respond to Mr. Wordsworth's claim that Ukraine has not pled facts sufficient to meet Article 2 (1) *(b)* with regard to the shelling attacks[111]. Given that time is short, I will focus once again on Mariupol. Mariupol is a strategic port city located in

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[106] MU, para. 74 and accompanying annexes cited therein.

[107] Expert Report of Anatolii Skorik (6 June 2018), para. 34 (emphasis added) (MU, Ann. 12) (judges' folder, tab 19).

[108] *Ibid.*, paras. 28, 39.

[109] MU, para. 289 (citing Dutch Safety Board, "Crash of Malaysia Airlines Flight MH17" (17 July 2014), p. 180 (MU, Ann. 38)).

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

[111] CR 2019/11, p. 27, para. 58 (Wordsworth).

south-eastern Ukraine that is not near the contact line. It is the second largest city in the Donetsk region.

51. As for the "act intended to cause" prong of Article 2 (1) *(b)*, Ukraine's expert Lieutenant General Brown concluded, based on the overall circumstances of the attack, that the Vostochniy neighbourhood was the target of the attack[112], not the northern checkpoint as Russia has claimed[113].

52. There were no units of the Ukrainian armed forces deployed in Mariupol[114]; only National Guard personnel manned the checkpoint and performed tasks previously performed by police[115]; the northern checkpoint was too far from the residential areas shelled to plausibly have been the target[116]; and General Brown concluded that "[t]here was no apparent military advantage in attacking the northern checkpoint given that there was no ground assault in the wake of the attack"[117].

53. Moreover, the timeline on your screen illustrates that the attack on the residential neighbourhood could not have been a mistake, as Russia would have you believe. Russia's theory is that the DPR attacked the residential neighbourhood in error at 9.15 a.m. in the morning, realized it was a mistake, but then repeated the attack again at 11 a.m. in the morning, after the first so-called mistake. That is not credible, much less sufficient, to conclude that Ukraine's position is not even plausible.

54. The United Nations Under-Secretary-General for Political Affairs reached the same conclusion as General Brown, noting that "Mariupol lies outside of the immediate conflict zone. The conclusion can thus be drawn that the entity that fired these rockets knowingly targeted a civilian population"[118].

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[112] MU, para. 238.

[113] *Ibid.*

[114] Ministry of Interior of Ukraine, Main Department of the National Guard of Ukraine, Letter No. 27/6/2-3553 to the Ministry of Foreign Affairs of Ukraine, 31 May 2018, p. 1; MU, Ann. 183; judges' folder, tab 10.

[115] Gen. Brown Report, para. 49; MU, Ann. 11.

[116] Gen. Brown Report, para. 57.

[117] *Ibid.*, para. 58.

[118] United Nations, *Official Record of the Security Council*, 7368th meeting, UN doc. S/PV.7368, 26 Jan. 2015, p. 2, statement of Jeffrey Feltman, United Nations Under-Secretary-General for Political Affairs (MU, Ann. 307).

55. As for the second prong of Article 2 (1) *(b)*, a purpose to intimidate civilians or compel a government to act or abstain from acting, I have already brought your attention to the fact that DPR members celebrated the fear that the attack caused. Let me quickly highlight two additional pieces of evidence.

56. First, the DPR attacked the residential neighbourhood at a time designed to maximize its terrorizing impact — on a Saturday morning, when many civilians were likely either home with their families, or outside conducting their errands for the day[119].

57. Second, the DPR shelled Mariupol only a week before a planned Trilateral Contact Group meeting, comprised of representatives of the Russian Government, Ukrainian Government, and the OSCE to discuss a diplomatic resolution to the situation in eastern Ukraine[120]. Attacking civilians in close proximity to peace efforts is a classic terrorist strategy designed to maximize leverage at the bargaining table[121]. Thus, this political "context" further reinforces that the attack also was designed to coerce Ukrainian Government officials to accede to the DPR's political goals.

58. This strategy was not limited to Mariupol, but in fact was present for the Volnovakha and Kramatorsk shellings as well. It can hardly be a coincidence that these devastating civilian attacks happened at a period of heightened diplomatic efforts. Indeed, Russia concedes that the participants would have expressly had these recent shelling events in mind[122].

59. While I have focused in detail on the Mariupol shelling attack, Ukraine also put forward similar evidence for the shelling attacks in Volnovakha, Kramatorsk and Avdiivka, and they all qualify as acts of terrorism under Article 2 (1) *(b)*[123]. As for Mr. Wordsworth's brief reference to an anti-terrorist operation base at the Kramatorsk airport[124], the map Ukraine put before you earlier this week, as well General Brown's expert report, make clear that the airport was not the target of

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[119] MU, para. 242; Viktoria Savitskaya, "Mariupol Recovers after Shelling", LB.ua, 24 Jan. 2015, pp. 2, 4 (MU, Ann. 556).

[120] MU, para. 234; OSCE, Statement by the Chairmanship on the Trilateral Contact Group Consultations in Minsk on 31 January 2015, 1 Feb. 2015 (MU, Ann. 330).

[121] See, e.g. Michael G. Findley and Joseph K. Young, "Terrorism, Spoiling, and the Resolution of Civil Wars", *J. of Politics*, 2015, Vol. 77, No. 4, p. 1119; MU, Ann. 495.

[122] CR 2019/11, p. 28, para. 60 (Wordsworth).

[123] MU, paras. 37-48, 56-67, 226-234, 245-260.

[124] CR 2019/11, p. 27, para. 58 (Wordsworth).

the shelling attack that struck the residential neighbourhood[125]. Regarding Avdiivka, Mr. Wordsworth says that I did not address his claim about the presence of Ukrainian armed forces[126]. But apparently, he did not hear what I said earlier this week, which was that General Brown concluded that "[m]any shelling attacks against residential areas were too far away from any UAF site to be plausibly considered to have been directed at military targets"[127] in Avdiivka.

60. Finally, let me briefly recall the long, and not even exhaustive, list of disputed facts that I presented to the Court on Tuesday, which the Court would have to resolve in Russia's favour in order to grant its preliminary objection. You did not hear one word about that from Mr. Wordsworth yesterday. That silence speaks volumes.

Mr. President, Members of the Court, this concludes my presentation on Article 2. I now ask that you call Mr. Gimblett to the podium to address the CERD.

The PRESIDENT: I thank Ms Cheek for her statement. I now give the floor to Mr. Gimblett. You have the floor.

Mr. GIMBLETT:

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

1. Mr. President, distinguished Members of the Court, it is an honour to appear before you again on behalf of Ukraine.

2. I will respond to the remarks of Professors Pellet and Forteau concerning the supposed jurisdictional prerequisites to Ukraine's CERD claims.

I. Interpretation of Article 22

3. Let me begin with the interpretation of Article 22 and whether it imposes alternative or cumulative preconditions — or perhaps even no preconditions at all. And with regard to that last possibility, notwithstanding Russia's attempt yesterday to imply otherwise, Article 59 of the Statute of the Court leaves the Court entirely free to decide the issue anew here.

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[125] MU, Map 5; Gen. Brown Report, paras. 68 and 76 (MU, Ann. 11).

[126] CR 2019/11, p. 27, para. 58 (Wordsworth).

[127] Gen. Brown Report, para. 95; MU, Ann. 11.

A. Ordinary meaning

4. Starting with ordinary meaning, my opponent made an important concession yesterday. Having claimed on Monday that "or" can *never* have an alternative meaning when it comes after "not"[128], yesterday he agreed that context is important in determining "or's" meaning in a negative sentence structure[129]. This is critical because, as I will explain in a moment, Russia's advocate had no persuasive response to the many contextual arguments Ukraine has advanced in support of its disjunctive reading of "or" in the phrase at hand[130]. And still less was he able to reconcile his cumulative reading with the object and purpose of the Convention to speedily eliminate racial discrimination.

5. Before I move on to those issues, though, I need to make one more remark about Professor Pellet's exposition of the meaning of "or". He engaged in some further helpful development of the example I advanced on Tuesday: "Any customer who is not satisfied with her appetizer or main course may complain to the Manager."[131] According to Russia's advocate, this use of "or" effectively means "and/or"[132]. I agree with him on that. This use of "or" is not uncommon, but it remains a disjunctive, not a cumulative one. Indeed, you could say it represents a double disjunctive because "or" co-ordinates not two but three alternative propositions in this usage. In this example, the customer can complain about her appetizer, she can complain about her main course, or she can complain about both.

6. Assuming that Article 22 imposes any preconditions to the Court's jurisdiction, the third "or" in that provision can be understood in exactly the same way, as presenting a disputing party with three options. First, it can negotiate. Second, it can avail itself of the procedures provided for in the Convention. And, third, it can choose to do both, in either order. What Article 22 does not do, if "or" is read in this way, is to require a State both to negotiate and to go through the CERD Committee procedure.

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[128] CR 2019/9, p. 57, para. 14 (Pellet).

[129] CR 2019/11, p. 43, paras. 13–14 (Pellet).

[130] CR 2019/10, pp. 68–70 (Gimblett); see also WSU, paras. 316–323.

[131] CR 2019/10, p. 68, para. 12 (Gimblett).

[132] CR 2019/11, p. 43, para. 14 (Pellet).

B. Context

7. Let me turn now to context, and then to object and purpose. I argued on Tuesday that both factors weighed heavily in favour of giving "or" a disjunctive meaning in Article 22[133]. Russia has now conceded the importance of context in this analysis[134] but, strikingly, had no convincing response to the contextual problems I had argued its interpretation creates.

8. First, Professor Pellet tried to explain away the incongruity of his cumulative reading of the third "or" in Article 22 where "or" is previously used twice in the same sentence in its disjunctive meaning. He did so by arguing that the second "or" is really an "and/or"[135]. This distinction is of no assistance to Russia. As I have explained "and/or" is no less disjunctive — indeed, it is actually more so — than "or" in its ordinary disjunctive meaning. The fact remains that it would be highly unusual for the drafters of the CERD to use "or" twice in the Article 22 sentence with a disjunctive meaning and then use it a third time with a quite different cumulative meaning.

9. Another argument advanced by Russia on Monday could, I suppose, be considered a response of sorts to this contextual issue. The argument is that the cumulative precondition that, on Russia's hypothesis, the drafters were trying to write into Article 22 could not have been conveyed by using "and" and they were therefore constrained to use "or" instead[136]. According to my opposing counsel, it would have made no sense to refer to "[a]ny dispute . . . which is not settled by negotiation *and* by the procedures expressly provided for in this Convention"[137]. If that is correct, however, it does not support the inference that the drafters intended a cumulative precondition in the first place. If that was what the drafters wanted to convey, they could simply have chosen a different structure for the article which made the point unambiguously. For example, the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character uses the following language to indicate that consultations and conciliation are successive, sequential steps:

> "If the dispute is not disposed of as a result of the consultations referred to in article 84 within one month from the date of their inception, any State participating in

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[133] See CR 2019/10, pp. 68–71 (Gimblett).

[134] CR 2019/9, p. 57, para. 12 (Pellet); CR 2019/11, p. 43, paras. 13–14 (Pellet).

[135] CR 2019/11, p. 43, para. 16 (Pellet).

[136] CR 2019/9, pp. 57–58, para. 14 (Pellet); CR 2019/11, p. 44, para. 16 (Pellet).

[137] *Ibid.*

> the consultations may bring the dispute before a conciliation commission constituted in accordance with the provisions of this article by giving written notice to the Organization and to the other States participating in the consultations."[138]

10. It is easy to imagine a further sentence after this allowing referral to the International Court of Justice if the dispute is not resolved by conciliation.

11. My second contextual point on Tuesday was that Russia's cumulative reading of Article 22 leads to the absurd outcome of requiring disputing States to first negotiate for an unspecified amount of time and then to renegotiate for six months as part of the CERD Committee process[139]. On Tuesday, I explained that it was no answer to this problem to argue, as Russia's counsel did on Monday, that negotiations as part of a conciliation process are distinguishable from direct negotiations[140]. Even if such a distinction was meaningful, it does not correspond to Article 11 of the CERD, which clearly requires bilateral negotiations *before* a conciliation process is launched[141]. Yesterday, Russia ignored that response and doubled down on its original argument, its advocate saying that negotiations conducted under the aegis of the CERD Committee doubtless presented advantages compared to purely bilateral negotiations[142]. But that in no way answers my point that Article 11 makes clear that the six-month negotiation procedure it imposes does not implicate the CERD Committee. Rather, it is a negotiation that must be undertaken by the disputing parties alone, *before* a dispute can be referred back to the CERD Committee and a decision to launch a conciliation process can be taken.

12. The only other response Russia had on this issue yesterday was to try to change the subject, saying that it was important not to focus exclusively on the length of the process but also to consider its quality[143]. But that is no answer to the point Ukraine actually made — which is that the double negotiation requirement created by Russia's reading of Article 22 is a contextual problem that weighs heavily against that reading.

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[138] Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, 14 March 1975, Art. 85.

[139] CR 2019/10, pp. 68–69, para. 16 (Gimblett).

[140] CR 2019/10, p. 69, para. 17 (Gimblett); see also CR 2019/9, p. 58, para. 16 (Pellet).

[141] CERD, Art. 11 (2).

[142] CR 2019/11, p. 45, para. 20 (Pellet).

[143] *Ibid.*

13. Perhaps most striking was Russia's non-answer yesterday to Ukraine's third contextual argument — that a cumulative reading of Article 22 robs of any effect that article's provision for interpretive disputes to be referred to the Court. First, Professor Pellet tried to minimize the problem claiming that it was hard to imagine a purely interpretive dispute arising under the Convention[144]. But purely interpretive disputes are not uncommon, including in the jurisprudence of this Court, as, for example, *Rights of Nationals of the United States of America in Morocco* illustrates[145]. As the Permanent Court of International Justice observed in *Certain German Interests in Polish Upper Silesia*, "[t]here seems to be no reason why States should not be able to ask the Court to give an abstract interpretation of a treaty; rather would it appear that this is one of the most important functions which it can fulfil"[146].

14. Russia's only other response on this point yesterday was to deploy a hitherto unknown principle of treaty interpretation. In Professor Pellet's words, "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"[147].

15. Thus, according to what appears to be a new principle of ineffectiveness, an otherwise intractable contextual problem with a proposed treaty interpretation can be overcome by assuming that the language in question will simply be ignored in practice.

C. Object and purpose

16. So much for context. Russia also has not explained this week how its interpretation of Article 22 can be squared with the object and purpose of the CERD of "speedily eliminating racial discrimination in all its forms and manifestations". On Monday, Professor Pellet tried to duck that question by suggesting that the length of the process created by Russia's interpretation was "of no legal significance"[148]. But that misses the point. The practical implications of Russia's

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[144] CR 2019/11, pp. 45–46, para. 21 (Pellet).

[145] *Rights of Nationals of the United States of America in Morocco (France* v. *United States of America), Judgment, I.C.J. Reports 1952*, p. 176.

[146] *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7* pp. 18-19.

[147] CR 2019/11, p. 46, para. 21 (Pellet).

[148] CR 2019/9, p. 61, para. 24 (Pellet).

interpretation are highly relevant to the correct interpretation of Article 22 under the Vienna Convention, precisely because prolonged delay in accessing this Court is not compatible with the object and purpose of the CERD.

17. Russia's advocate also claimed on Monday that Articles 11 to 13 of the Convention established deadlines that limited the risk of the CERD Committee procedure unreasonably delaying access to this Court[149]. But that simply is not true. Articles 11 to 13 impose no time-limits at all upon the CERD Committee's own investigations, or the process of *ad hoc* conciliation envisaged by Article 12. Contrary to Russia's casual dismissal of the risks, there is no limit to the extent to which the CERD Committee procedure set out in Part II of the Convention could delay a referral to this Court by disputing parties.

18. Yesterday, Russia pivoted from these unconvincing arguments and sought instead to make a virtue of the lengthy delay its interpretation would impose on States parties seeking to avail themselves of this Court's jurisdiction. "Il faut laisser le temps au temps", Professor Pellet said — "time takes time"[150]. But that obviously does not reconcile Russia's interpretation of Article 22 with the object and purpose of the CERD, which emphasizes urgency, and not the healing properties of time.

19. Russia also argued yesterday that it would be a mistake to underestimate the interest that a conciliation procedure could present by comparison with bilateral negotiations[151]. That may well be right. But, if it is, that simply supports a reading of Article 22 as offering States parties a choice between the two, rather than requiring them to undertake two overlapping and mutually redundant settlement procedures in sequence, thereby delaying by years the judicial resolution of the dispute in question.

20. In sum, we end the week with Russia admitting the importance of context in interpreting Article 22, but with no persuasive Russian argument as to how either context or object and purpose can be squared with its reading of that provision. The Vienna Convention's general rule of

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[149] CR 2019/9, p. 61, para. 24 (Pellet).

[150] CR 2019/11, p. 46, para. 24 (Pellet).

[151] CR 2019/11, p. 46, para. 23 (Pellet).

interpretation squarely supports an interpretation of Article 22 as giving States parties a choice between negotiation and the CERD Committee procedure. Your analysis can end there.

II. *Travaux préparatoires*

21. It remains Ukraine's position that the Court does not need to have recourse to supplementary means of interpretation under Article 32 of the Vienna Convention in order to determine the meaning of Article 22. But, if the Court reviews the *travaux*, it will find no support for the interpretation that Russia wishes to impose on Article 22. Russia theorizes that the words "or by the procedures expressly provided for in this Convention" were added as a compromise, to reconcile opponents of this Court's compulsory jurisdiction to a compromissory clause that allowed *any* party to a dispute to refer it to the Court. But it cannot point to any statements by those involved in the drafting that actually say that.

22. The best Russia's advocate could muster on Monday was the statement of the Ghanaian representative, Mr. Lamptey, at the meeting of the Third Committee of the United Nations General Assembly on 7 December 1965 at which the Three-Power amendment proposed by the Philippines, Ghana and Mauritania was adopted. In the selected quote cited by Russia, Mr. Lamptey says: "Provision had been made in the draft Convention for machinery which should be used in the settlement of disputes before recourse was had to the International Court of Justice."[152]

23. This is hardly compelling evidence that the amendment was intended to make recourse to the CERD Committee mandatory for any State wishing to refer a dispute to the Court. It is even less persuasive when you see the surrounding statements by Mr. Lamptey, which Professor Pellet omitted from his slide 8 on Monday. Thus, immediately before the quote on which Russia focuses, Mr. Lamptey introduced the amendment by saying that it was "self-explanatory"[153]. And immediately afterwards, he goes on to say that "[t]he amendment simply referred to the procedure provided for in the Convention"[154].

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[152] United Nations, *Official Records of the General Assembly, Third Committee*, 1367th Meeting, doc. A/C.3/SR.1367, 7 Dec. 1965, p. 453, para. 29 (WSU, Ann. 98); see also CR 2019/9, p. 60, para. 22 (Pellet).

[153] United Nations, *Official Records of the General Assembly, Third Committee*, 1367th Meeting, doc. A/C.3/SR.1367, 7 Dec. 1965, p. 453, para. 29 (WSU, Ann. 98).

[154] *Ibid.*

24. The record of the 7 December 1965 Third Committee meeting is in your binders at tab 32. Numerous other statements in that record by delegates support the conclusion that the intention behind the Three-Power amendment was more prosaic than Russia suggests. According to the Belgian delegate, Mr. Cochaux, the amendment "introduced a useful clarification"[155]. Mr. Capatorti, the Italian delegate, supported the Three-Power language as "a useful addition"[156]. The French delegate, Mr. Boulet, said that it brought the clause "into line with provisions already adopted in the matter of implementation"[157].

25. These statements cannot be reconciled with the grand purpose that Russia ascribes to the Three-Power amendment. They are, however, fully explained if that amendment is understood as pursuing a more limited objective — that of making it clear that the Court was available not only to disputing States that had undertaken bilateral negotiations, but also States that had navigated the CERD Committee inter-State dispute procedure.

26. This reading finds support in the record of a meeting of the Third Committee just two weeks earlier, on 25 November 1965[158]. That meeting considered a joint proposal from the Three Powers for measures of implementation, which superseded an original proposal by the Philippines, a rival text proposed by Ghana, and amendments suggested by Mauritania. Notably, the earlier proposals by the Philippines and Ghana made clear that States parties would be able to refer disputes to the Court whether or not they had undertaken the CERD Committee conciliation procedure[159]. The combined Three-Power proposal, however, omitted this mention of the Court[160],

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[155] United Nations, *Official Records of the General Assembly, Third Committee*, 1367th Meeting, doc. A/C.3/SR.1367, 7 Dec. 1965, p. 454, para. 40 (WSU, Ann. 98)

[156] *Ibid.*, para. 39.

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

[158] United Nations, *Official Records of the General Assembly, Twentieth Session*, 1354th meeting, doc. A/C.3/SR.1354, 25 Nov. 1965.

[159] See United Nations Economic and Social Council, Draft International Convention on the Elimination of All Forms of Racial Discrimination, Mr. Ingles: Proposed Measures of Implementation, UN doc. E/CN.4/Sub.2/L.321, 17 Jan. 1964, Art. 18 (WSU, Ann. 92); United Nations General Assembly, Draft International Convention on the Elimination of Racial Discrimination, Philippines: articles relating to measures of implementation to be added to the provisions of the draft International Convention on the Elimination of All Forms of Racial Discrimination adopted by the Commission on Human Rights, UN doc. A/C.3/L.1221, 11 Oct. 1965, Art. 19; United Nations General Assembly, Draft International Convention on the Elimination of All Forms of Racial Discrimination, Ghana: Revised Amendments to Document A/C.3/L.1221, UN doc. A/C.3/L.1274/REV.1, 12 Nov. 1965, Art. IX (WSU, Ann. 95).

[160] United Nations Economic and Social Council, Draft International Convention on the Elimination of All Forms of Racial Discrimination, Ghana, Mauritania, and Philippines: amendments to the suggestions for final clauses submitted by the Officers of the Third Committee (A/C.3/L.1237), UN doc. A/C.3/L.1313, 30 Nov. 1965 (WSU, Ann. 97).

with the Ghanaian delegate noting that the issue of the Court's jurisdiction over disputes would be dealt with in the final provisions of the Convention[161]. Indeed, the United Nations Secretariat had already circulated to the Third Committee a set of proposed final provisions, including several variations of a dispute resolution provision providing for inter-State disputes to be referred to the Court at the initiative of the parties to a dispute[162].

27. The deletion of the reference to the Court from the measures of implementation proved controversial at the meeting of the Third Committee on 25 November[163]. The delegates of the United Kingdom, Belgium and Norway all expressly regretted its omission[164]. The Soviet delegate downplayed the change, arguing that disputing States retained the ability to submit a dispute to the Court by mutual consent at any time[165]. On the face of the record of that meeting, which is in your binders at tab 33, there is therefore a disagreement among at least four delegations as to the implications of deleting the reference to the Court in the measures of implementation.

28. Against that background, the modest language used on 7 December 1965 by supporters of the Three-Power amendment to add a reference to the CERD Committee procedures to Article 22 makes perfect sense. The amendment was "self-explanatory", as the Ghanaian delegate put it, because it did no more than make the Court available to States parties that had undertaken the CERD Committee procedure[166]. It was a "useful clarification", in the words of the Belgian delegate precisely because it left no doubt that parties for whom the CERD Committee machinery had failed to produce a resolution could still turn to the Court[167]. Or, as the French delegate put it,

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[161] United Nations, *Official Records of the General Assembly, Third Committee*, 1349th meeting, doc. A/C.3/SR.1349, 19 Nov. 1965, p. 348, para. 29.

[162] United Nations Economic and Social Council, Draft International Convention on the Elimination of All Forms of Racial Discrimination, Final Clauses, Working paper prepared by the Secretary-General, UN doc. E/CN.4/L.679, 17 Feb. 1964, pp. 15–16.

[163] United Nations, *Official Records of the General Assembly, Third Committee*, 1354th meeting, doc. A/C.3/SR.1354, 25 Nov. 1965.

[164] United Nations, *Official Records of the General Assembly, Third Committee*, 1354th meeting, doc. A/C.3/SR.1354, 25 Nov. 1965, p. 376, para. 24; *ibid.*, paras. 25, 36.

[165] United Nations, *Official Records of the General Assembly, Third Committee*, 1354th meeting, doc. A/C.3/SR.1354, 25 Nov. 1965, pp. 378–379, para. 53.

[166] United Nations, *Official Records of the General Assembly, Third Committee*, 1367th meeting, doc. A/C.3/SR.1367, 7 Dec. 1965, p. 453, para. 29 (WSU, Ann. 98).

[167] *Ibid.*, para. 40.

the amendment simply brought Article 22 "into line with provisions already adopted in the matter of implementation"[168].

29. I admit that this is a less interesting explanation of the negotiating history than that presented in Russia's papers and by its counsel this week. But, as the principle of logic known as Occam's Razor postulates, a simple and straightforward explanation is generally to be preferred over complex theories that require many assumptions.

III. Role of the CERD Committee

30. One of the assumptions that Russia has repeatedly asked the Court to make this week is that the CERD Committee was imbued by the drafters with an almost sacred role as what Professor Pellet described on Monday as "the guardian of the integrity of the Convention"[169]. Russia relies on this to suggest that it would run counter to the guiding principles of the CERD to allow inter-State disputes to reach the Court without being first filtered through the CERD Committee's inter-State complaints procedure. But, when viewed more closely, there is just no hard evidence that anyone intended the CERD Committee to play such a pre-eminent role.

31. The negotiating history, for example, shows that many delegations believed that measures of implementation were essential if the treaty was to amount to more than a series of high-minded declarative principles. As the delegate for the Côte d'Ivoire memorably stated in the Third Committee on 17 November, "without such measures the Convention would be like a body without a head or a worker without tools". The establishment of the CERD Committee was one aspect of the measures of implementation, but there is no evidence that it was regarded by the principal champions of such measures as being so central to the delivery of the Convention's objectives that its prerogatives were to be protected at all costs. Indeed, as I have already observed, both the Philippines' and the Ghanaian proposals for measures of implementation anticipated that States parties would be able to bring their disputes to this Court without first going through the CERD Committee procedure.

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

[169] CR 2019/9, pp. 60–61, para. 23 (Pellet); CR 2019/11, p. 45, para. 20 (Pellet).

32. It is clear from the negotiating history that the purpose of including measures of implementation within the CERD was to ensure the Convention was an effective tool in the fight against racial discrimination. Specifically, the supporters of such measures wanted there to be ongoing reporting of States parties' compliance with their obligations; they wanted mechanisms for the resolution of disputes between States under the Convention; and they wanted individuals to be able to have their own complaints heard. Russia's approach, which elevates the CERD Committee's supposed prerogatives above the practical needs of disputing States for effective judicial means of dispute resolution, is inconsistent with those practical purposes. It prioritizes bureaucratic purity to the detriment of the effective implementation of the terms of the Convention.

33. Russia's theory is also at odds with actual practice under the Convention. From the Convention's entry into force in 1969 until 2018 — almost half a century — the CERD Committee received no inter-State complaints, pursuant to the mechanism in Article 11. Even now, over a year on from the Committee's first receipt of such complaints, it has taken no decisions in any of those cases. As a press release from the Committee at the close last month of its most recent session announced:

> "The Committee had examined three interstate communications submitted under article 11 of the Convention . . . While it had held hearings on these communications, the Committee had decided not to take any decisions, due to the legal complexity of the issues broached and a lack of resources."[170]

34. In short, if this Court exercises jurisdiction in this case, it is not going to undermine an already-functioning and effective alternative mechanism for addressing inter-State disputes under the Convention. Nor will it open the floodgates for countless further inter-State disputes to reach this Court pursuant to Article 22. As Professor Koh has explained on Monday and again today, the circumstances of this case are exceptional, with literally hundreds of thousands of Crimean Tatars and Ukrainians in Crimea suffering the effects of a comprehensive campaign of racial discrimination against them. Ukraine's claims can and should be heard by this Court.

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[170] Office of the United Nations High Commissioner for Human Rights, Committee on the Elimination of Racial Discrimination Concludes its Ninety-Eight Session, 10 May 2019, available at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24601&LangID=E.

IV. Exhaustion of local remedies

35. Finally, I will respond briefly to what Professor Forteau had to say yesterday concerning Russia's remarkable claim that Ukraine's claims are barred because of a failure to exhaust local remedies.

36. Russia's advocate began by trying to distinguish the rather clear statement made by the Russian Federation in the *Georgia* proceedings, to which I drew attention on Tuesday[171], acknowledging that the exhaustion requirement applies only in the context of diplomatic protection. His point: Russia did not raise an exhaustion objection in the *Georgia* case[172]. That in itself is quite telling because there is no indication in the record of the *Georgia* proceedings that local remedies were indeed pursued before Georgia brought its claim to this Court. One can only surmise that it was less obvious to Russia's counsel then than now that the exhaustion principle could have any application to inter-State claims brought under Article 22 of the CERD. And with good reason. Russia's dogged pursuit of this untenable objection in the present proceedings only underlines its desperation to escape the Court's scrutiny.

37. Russia continued yesterday to misstate the record, continuing with its ill-advised argument that Ukraine has shifted its position since filing its Memorial in response to Russia's exhaustion objection[173]. That remains untrue. Contrary to Russia's claims, the Memorial does not seek relief from this Court on behalf of particular individuals. Let us look again at submission *(l)* from Ukraine's Memorial, which makes clear that Ukraine seeks relief "in its own right and as *parens patriae* for its citizens"[174]. Presumably, Russia would have you read "citizens" here as relating to specific identifiable individuals whose claims might be amenable to diplomatic protection. But it is rather obvious if you read the Memorial that this is not the case. Instead, the Memorial makes clear repeatedly that the victims of Russia's policy of discrimination are entire communities, namely the Crimean Tatar and Ukrainian ethnic groups in Crimea. Where a State acts on behalf of a collectivity of citizens in this way, it is acting in its capacity as a State, as the

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[171] CR 2019/10, p. 74, para. 34 (Gimblett).

[172] CR 2019/11, p. 55, para. 15 (Forteau).

[173] CR 2019/11, p. 56, para. 17 (Forteau).

[174] WSU, para. 654.

protector of the rights of its population as a whole, and not espousing claims belonging to one or more identifiable individuals.

38. It is also clear from submission *(l)* that Ukraine asserts its own injury in this case. Russia said yesterday that this cannot be so, because the only rights Ukraine possesses under the CERD are procedural and that any substantive obligations are owed only to individuals[175]. But that is contradicted by this Court's own jurisprudence. In the *Barcelona Traction* case, the Court recognized that the obligation not to discriminate on a racial basis is owed *erga omnes*[176]. Accordingly, every State is injured by Russia's violation of this *jus cogens* norm. Moreover, under Article 42 of the Articles on State Responsibility, Ukraine is entitled to invoke the Russian Federation's responsibility because it is specially affected by the breach of that obligation owed by Russia to all States[177]. The massive breaches of the CERD that Professor Koh has detailed are aimed almost exclusively at Ukraine's citizens, whether they be of Crimean Tatar or Ukrainian ethnicity.

39. In sum, it could not be clearer that this is not the sort of case involving identifiable individuals to which the principle of exhaustion of local remedies could apply. The Court should reject this baseless objection.

40. Mr. President, Members of the Court, that concludes my remarks. I respectfully request, Mr. President, that you now call the Agent of Ukraine, Her Excellency Olena Zerkal, to the podium. Thank you.

The PRESIDENT: I thank Mr. Gimblett for his statement. I now call upon the Agent of Ukraine, Her Excellency Ms Olena Zerkal, to take the floor. You have the floor, Madam.

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[175] CR 2019/11, pp. 56–57, para. 18 (Forteau).

[176] *Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, para. 34.

[177] Report of the International Law Commission on the Work of its Fifty-Third Session, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 53rd. Sess., UN doc. No. A/56/10, 23 Apr.–1 June, 2 July–10 Aug. 2001, Art. 42 and commentary, pp. 117–119.

Ms ZERKAL:

CONCLUDING REMARKS AND SUBMISSIONS

1. Mr. President, Members of the Court. I am honoured to conclude the oral pleadings of Ukraine and make our final submissions.

2. I will be brief, because there is no more to say. Russia has tried to change the subject, twisted the law and denied the facts. But Ukraine's claims are clear. The disputes are clear. Our good faith efforts to resolve them are clear. The Court's jurisdiction is clear.

3. Yesterday, we heard only more distractions. Mr. Wordsworth says you should declare that there was no terrorism in Ukraine, without considering the facts on the merits, just because various monitors did not use the word "terrorism". Professor Zimmermann admitted that Russia's own law prohibits the financing of terrorism by State officials[178]. But he thinks it is ridiculous for Ukraine to ask Russia to prevent such crimes.

4. Professor Pellet asked, apparently seriously, Ukraine to rely on Russia's "bonne grâce"[179]. He also suggested that Russia would consider unfair, and might not accept, a judicial decision of this Court[180]. And Professor Forteau decided that the Court's Provisional Measures Order has become "deprived of object"[181]. Apparently, Russia thinks it can decide for itself that binding orders are not binding. All this confirms what I said on Tuesday regarding Russia's attitude towards international law.

5. As for the Agent of Russia, he mocks the treaties we are here to discuss. Russia clearly does not see these treaties as important. So it assumes Ukraine has no interest in them, and only wanted to bring "any kind of case"[182]. This is not "any kind of case". It is a serious case, about serious violations of serious treaties. I am sorry that Russia does not take it seriously.

6. We have also heard a lot about the Minsk process. With the same passion as when Professor Pellet says that "or" means "and", Russia demands that three equals five. The working

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[178] CR 2019/11, p. 46, para. 16 (Zimmermann).

[179] CR 2019/11, p. 46, para. 24 (Pellet).

[180] *Ibid.*

[181] CR 2019/9, p. 38, para. 13 (Forteau).

[182] CR 2019/9, p. 38, para. 6 (Lobach).

group is called *Trilateral*[183], with Ukraine and Russia as parties and OSCE as facilitator. There are not five parties.

7. As duly noted by OHCHR in its report of August 2016 on the human rights situation in Ukraine, "[n]o amnesty can be given" for the most serious crimes and human rights violations[184]. And whatever Mr. Wordsworth says, amnesty for such crimes — like the acts of terrorism we are discussing here — was never under consideration within the Minsk process.

8. But this is all irrelevant. Russia's discussions of Minsk and amnesty are more distractions. As this Court said in *Nicaragua* v. *United States*, the Court has a responsibility to resolve legal disputes that are properly brought before it, even if the "question before the Court is intertwined with political questions"[185]. Whatever other disputes we have with Russia, there is a dispute under the ICSFT and CERD between Ukraine and Russia, and we have a right under the treaties for our claims to be heard.

9. We are also disappointed in Russia's attitude toward MH17. The evidence continues to mount. Every party to the JIT endorsed the conclusions of investigations presented so far. The investigation is nearing the end, and we are confident that indictments will follow. Individual justice is important. So is this case. MH17 is a tragic part of the story of financing of terrorism. That full story must be heard on the merits.

10. Finally, we are shocked that the Agent of the Russian Federation would stand before the World Court and comment on the internal affairs of my country. I can understand that Russia might be confused by a peaceful transfer of power after free and fair elections. For my part, I am confused by Russia's attitude. On Monday, Russia accused us of a "violent coup d'état". Yesterday it tried to use our elections against us. Let me explain it to those who doubt: I am here on the instructions of the President of Ukraine, with the clear mandate to defend the interest of Ukraine and seek justice for its people.

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[183] United Nations Security Council resolution 2202, UN doc. S/RES/2202 Ann. 1 (2015).

[184] OHCHR, Report on the Human Rights Situation in Ukraine (16 May to 15 August 2016), para. 73.

[185] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 439, para. 104.

11. As I said on Tuesday, Ukraine came here only as a last resort. Russia may feel entitled to bully its neighbours and seed instability in the world. But we are not required to stay silent while Russia violates treaties. We do not have to accept their manipulations.

12. All Ukraine asks in this Court of international law is the chance to be heard on merits.

13. Members of the Court, as Ukraine has now made its last statements of argument at this hearing, I have the honor to respectfully submit to the Court, pursuant to Article 60, paragraph 2, of its Rules, Ukraine's Final Submissions.

14. Ukraine respectfully requests that the Court:

a. Dismiss the Preliminary Objections submitted by the Russian Federation in its submission dated 12 September 2018;

b. Adjudge and declare that it has jurisdiction to hear the claims in the Application submitted by Ukraine, dated 16 January 2017, that such claims are admissible, and proceed to hear those claims on the merits; or

c. In the alternative, to adjudge and declare, in accordance with the provisions of Article 79, paragraph 9, of the Rules of Court that the objections submitted by the Russian Federation do not have an exclusively preliminary character.

15. This concludes Ukraine's oral pleadings and its submissions. Ukraine thanks the Court for its attention during these hearings.

16. I wish to express my gratitude to the Registry and its staff for their kind assistance in these proceedings; to the interpreters for their hard work; and finally, Mr. President, Members of the Court, thank you for your attention and serious consideration.

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

This brings us to the end of this week of hearings. I would like to thank the Agents, counsel and advocates of the two Parties for their statements. In accordance with the usual practice, I shall request both Agents to remain at the Court's disposal to provide any additional information the Court may require. With this proviso, I declare closed the oral proceedings on the preliminary objections raised by the Russian Federation 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)*. The Court will now retire for deliberation. The Agents of the Parties will be advised in due course as to the date on which the Court will deliver its Judgment.

As the Court has no other business today, the sitting is closed.

The Court rose at 12 noon.

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