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Summary
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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)

Summary of the Judgment of 8 November 2019

I. HISTORY OF THE PROCEEDINGS (PARAS. 1-22)

The Court begins by recalling that, on 16 January 2017, Ukraine filed in the Registry of the Court an Application instituting proceedings against the Russian Federation with regard to alleged violations by the latter of its obligations under the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999 (the "ICSFT") and the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965 ("CERD"). In its Application, Ukraine seeks to found the Court's jurisdiction on Article 24, paragraph 1, of the ICSFT and on Article 22 of CERD, on the basis of Article 36, paragraph 1, of the Statute of the Court.

The Court goes on to recall that, following the filing of a Request for the indication of provisional measures by Ukraine on the same day, by an Order of 19 April 2017, it indicated the following provisional measures:

> "(1) With regard to the situation in Crimea, the Russian Federation must, in accordance with its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination, (a) Refrain from maintaining or imposing limitations on the ability of the Crimean Tatar community to conserve its representative institutions, including the Mejlis; (b) Ensure the availability of education in the Ukrainian language; (2) Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve."

Finally, the Court recalls that, on 12 September 2018, the Russian Federation raised preliminary objections to the jurisdiction of the Court and the admissibility of the Application.

II. INTRODUCTION (PARAS. 23-37)

A. Subject-matter of the dispute (paras. 23-32)

The Court explains that the present proceedings were instituted by Ukraine following the events which occurred in eastern Ukraine and in Crimea from the spring of 2014. With regard to the events in eastern Ukraine, the Applicant has brought proceedings only under the ICSFT. With regard to the situation in Crimea, Ukraine's claims are based solely upon CERD. The Court observes that the Parties have expressed divergent views as to the subject-matter of the dispute brought by Ukraine before it.

The Court notes that one aspect of the subject-matter of the dispute is whether the Russian Federation had the obligation, under the ICSFT, to take measures and to co-operate in the prevention and suppression of the alleged financing of terrorism in the context of events in eastern Ukraine and, if so, whether the Russian Federation breached such an obligation. The other aspect of the subject-matter of the dispute is whether the Russian Federation breached its obligations under CERD through discriminatory measures allegedly taken against the Crimean Tatar and Ukrainian communities in Crimea.

B. Bases of jurisdiction invoked by Ukraine (paras. 33-37)

The Court recalls that its jurisdiction is based on the consent of the parties and is confined to the extent accepted by them. To establish the Court's jurisdiction in the present case, Ukraine invokes Article 24, paragraph 1, of the ICSFT and Article 22 of CERD. The first of these provisions reads as follows:

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

Article 22 of CERD provides that:

> "Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement."

The Court observes that the Russian Federation contests its jurisdiction to entertain the dispute, arguing in this regard that it is not one which the Court has jurisdiction ratione materiae to entertain, either under Article 24, paragraph 1, of the ICSFT or under Article 22 of CERD, and that the procedural preconditions set out in these provisions were not met by Ukraine before it seised the Court. The Respondent further contends that Ukraine's claims under CERD are inadmissible, since, in its view, available local remedies had not been exhausted before Ukraine filed its Application with the Court.

III. THE INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF THE FINANCING OF TERRORISM (PARAS. 38-77)

The Court begins by examining whether it has jurisdiction ratione materiae under Article 24, paragraph 1, of the ICSFT and whether the procedural preconditions set forth in that provision have been met.

A. Jurisdiction ratione materiae under the ICSFT (paras. 39-64)

The Court recalls that, in order to determine the Court's jurisdiction ratione materiae under a compromissory clause concerning disputes relating to the interpretation or application of a treaty, it is necessary to ascertain whether the acts of which the applicant complains "fall within the provisions" of the treaty containing the clause. This may require the interpretation of the provisions that define the scope of the treaty. In the present case, the ICFT has to be interpreted according to the rules contained in Articles 31 to 33 of the Vienna Convention on the Law of Treaties of 23 May 1969, to which both Ukraine and the Russian Federation are parties as of 1986.

The Court states that, at the present stage of the proceedings, an examination by it of the alleged wrongful acts or of the plausibility of the claims is not generally warranted. Its task is to consider the questions of law and fact that are relevant to the objection to its jurisdiction. It observes that the ICSFT imposes obligations on States parties with respect to offences committed by a person when "that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out" acts of terrorism as described in Article 2, paragraph 1 (a) and (b). As stated in the preamble, the purpose of the Convention is to adopt "effective measures for the prevention of the financing of terrorism, as well as for its suppression through the prosecution and punishment of its perpetrators". The ICSFT addresses offences committed by individuals. In particular, Article 4 requires each State party to the Convention to establish the offences set forth in Article 2 as criminal offences under its domestic law and to make those offences punishable by appropriate penalties. The financing by a State of acts of terrorism is not addressed by the ICSFT. However, it has never been contested that if a State commits a breach of its obligations under the ICSFT, its responsibility would be engaged. The Court adds that the conclusion that the financing by a State of acts of terrorism lies outside the scope of the ICSFT does not mean that it is lawful under international law. It recalls that, in resolution 1373 (2001), the United Nations Security Council, acting under Chapter VII of the Charter, decided that all States shall "[r]efrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts".

The Court notes that, when defining the perpetrators of offences of financing acts of terrorism, Article 2 of the ICSFT refers to "any person". According to its ordinary meaning, this term covers individuals comprehensively. The Convention applies both to persons who are acting in a private capacity and to those who are State agents. As the Court noted, State financing of acts of terrorism is outside the scope of the ICSFT; therefore, the commission by a State official of an offence described in Article 2 does not in itself engage the responsibility of the State concerned under the Convention. However, all States parties to the ICSFT are under an obligation to take appropriate measures and to co-operate in the prevention and suppression of offences of financing acts of terrorism committed by whichever person. Should a State breach such an obligation, its responsibility under the Convention would arise.

The Court observes that, as the title of the ICSFT indicates, the Convention specifically concerns the support given to acts of terrorism by financing them. Article 2, paragraph 1, refers to the provision or collection of "funds". It notes that since no specific objection to the Court's jurisdiction was made by the Russian Federation with regard to the scope of the term "funds", this issue relating to the scope of the ICSFT need not be addressed at the present stage of the

proceedings. The Court adds that an element of an offence under Article 2, paragraph 1, of the ICSFT is that the person concerned has provided funds "with the intention that they should be used or in the knowledge that they are to be used" to commit an act of terrorism. The existence of the requisite intention or knowledge raises complex issues of law and especially of fact that divide the Parties and are properly a matter for the merits. The same may be said of the question whether a specific act falls within the meaning of Article 2, paragraph 1 (a) or (b). This question is largely of a factual nature and is properly a matter for the merits of the case. The Court considers that, within the framework of the ICSFT, questions concerning the existence of the requisite mental elements do not affect the scope of the Convention and therefore are not relevant to the Court's jurisdiction ratione materiae.

In light of the above, the Court concludes that the objection raised by the Russian Federation to its jurisdiction ratione materiae under the ICSFT cannot be upheld.

B. Procedural preconditions under Article 24 of the ICSFT (paras. 65-77)

The Court must then ascertain whether the procedural preconditions set forth in Article 24, paragraph 1, of the ICSFT have been fulfilled. In this context, it examines whether the dispute between the Parties could not be settled through negotiation within a reasonable time and, if so, whether the Parties were unable to agree on the organization of an arbitration within six months from the date of the request for arbitration.

1. Whether the dispute between the Parties could not be settled through negotiation (paras. 66-70)

The Court considers that Article 24, paragraph 1, of the ICSFT requires, as a first procedural precondition to the Court's jurisdiction, that a State make a genuine attempt to settle through negotiation the dispute in question with the other State concerned. According to the same provision, the precondition of negotiation is met when the dispute "cannot be settled through negotiation within a reasonable time". As has previously been observed, "the subject-matter of the negotiations must relate to the subject-matter of the dispute which, in turn, must concern the substantive obligations contained in the treaty in question".

The Court recalls that, on 28 July 2014, Ukraine wrote a Note Verbale to the Russian Federation, stating that

> "under the provisions of the 1999 International Convention for the Suppression of the Financing of Terrorism, the Russian Party is under an obligation to take such measures, which may be necessary under its domestic law to investigate the facts contained in the information submitted by the Ukrainian Party, as well as to prosecute persons involved in financing of terrorism",

and proposing "to conduct negotiations on the issue of interpretation and application of the [ICSFT]". On 15 August 2014, the Russian Federation informed Ukraine of its "readiness to conduct negotiations on the issue of interpretation and application of the [ICSFT]". While exchanges of Notes and meetings between the Parties did not always focus on the interpretation or application of the ICSFT, negotiations over Ukraine's claims relating to this Convention were a substantial part. In particular, in a Note Verbale of 24 September 2014, Ukraine contended that

> "the Russian Side illegally, directly and indirectly, intentionally transfers military equipment, provides the funds for terrorists training on its territory, gives them material support and send[s] them to the territory of Ukraine for participation in the terrorist activities of the DPR and the LPR etc.".

On 24 November 2014, the Russian Federation contested that the acts alleged by Ukraine could constitute violations of the ICSFT, but accepted that the agenda for bilateral consultations include the "international legal basis for suppression of financing of terrorism as applicable to the Russian-Ukrainian relations". After that Note, several others followed; moreover, four meetings were held in Minsk, the last one on 17 March 2016. Little progress was made by the Parties during their negotiations. The Court therefore concludes that the dispute could not be settled through negotiation in what has to be regarded as a reasonable time and that the first precondition is accordingly met.

2. Whether the Parties were unable to agree on the organization of an arbitration (paras. 71-77)

The Court recalls that, nearly two years after the start of negotiations between the Parties over the dispute, Ukraine sent a Note Verbale on 19 April 2016, in which it stated that those negotiations had "failed" and that, "pursuant to Article 24, paragraph 1 of the Financing Terrorism Convention, [it] request[ed] the Russian Federation to submit the dispute to arbitration under terms to be agreed by mutual consent". Negotiations concerning the organization of the arbitration were subsequently held until a period of six months expired. During these negotiations, Ukraine also suggested to refer the dispute to a procedure other than arbitration, namely the submission of the dispute to a chamber of the Court. In any event, the Parties were unable to agree on the organization of the arbitration during the requisite period. The second precondition stated in Article 24, paragraph 1, of the ICSFT must thus be regarded as fulfilled.

The Court therefore considers that the procedural preconditions set forth in Article 24, paragraph 1, of the ICSFT were met. The Court thus has jurisdiction to entertain the claims made pursuant to that provision.

III. THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (PARAS. 78-133)

The Court then examines the Russian Federation's preliminary objections to the Court's jurisdiction and the admissibility of Ukraine's claims under CERD. It recalls that the Russian Federation argues that the Court lacks jurisdiction ratione materiae under CERD, and that the procedural preconditions to the Court's jurisdiction set out in Article 22 of the Convention are not met; the Russian Federation also argues that Ukraine's Application with regard to claims under CERD is inadmissible because local remedies had not been exhausted before the dispute was referred to the Court. The Court deals with each objection in turn.

A. Jurisdiction ratione materiae under CERD (paras. 79-97)

The Court explains that, in order to determine whether it has jurisdiction ratione materiae under CERD, it needs only to ascertain whether the measures of which Ukraine complains fall within the provisions of the Convention. In this respect, the Court notes that both Parties agree that Crimean Tatars and ethnic Ukrainians in Crimea constitute ethnic groups protected under CERD. Moreover, Articles 2, 4, 5, 6 and 7 of the Convention set out specific obligations in relation to the treatment of individuals on the basis of "race, colour, descent, or national or ethnic origin". Article 2, paragraph 1, of CERD contains a general obligation to pursue by all appropriate means a policy of eliminating racial discrimination and an obligation to engage in no act or practice of racial discrimination against persons, groups of persons or institutions. Article 5 imposes an obligation to prohibit and eliminate racial discrimination and to guarantee the right of everyone to equality before the law, notably in the enjoyment of rights mentioned therein, including political, civil, economic, social and cultural rights.

The Court, taking into account the broadly formulated rights and obligations contained in the Convention, including the obligations under Article 2, paragraph 1, and the non-exhaustive list of rights in Article 5, considers that the measures of which Ukraine complains — restrictions allegedly imposed on Crimean Tatars and ethnic Ukrainians in Crimea — are capable of having an adverse effect on the enjoyment of certain rights protected under CERD. These measures thus fall within the provisions of the Convention.

Consequently, the Court concludes that the claims of Ukraine fall within the provisions of CERD.

B. Procedural preconditions under Article 22 of CERD (paras. 98-121)

The Court turns to the examination of the procedural preconditions under Article 22 of the Convention.

1. The alternative or cumulative character of the procedural preconditions (paras. 99-113)

Pursuant to Article 22 of CERD, the Court states that it has jurisdiction to decide a dispute brought under the Convention, provided that such a dispute is "not settled by negotiation or by the procedures expressly provided for in this Convention". As the Court has previously found, "in their ordinary meaning, the terms of Article 22 of CERD . . . establish preconditions to be fulfilled before the seisin of the Court". In order to determine whether these preconditions are alternative or cumulative, the Court applies the rules of customary international law on treaty interpretation as reflected in Articles 31 to 33 of the Vienna Convention.

Concerning the text of Article 22 of CERD, the Court notes that the Parties expressed divergent views on the meaning of the word "or" in the phrase "not settled by negotiation or by the procedures expressly provided for in this Convention". The Court notes that the conjunction "or" appearing between "negotiation" and the "procedures expressly provided for in this Convention" is part of a clause which is introduced by the word "not", and thus formulated in the negative. While the conjunction "or" should generally be interpreted disjunctively if it appears as part of an affirmative clause, the same view cannot necessarily be taken when the same conjunction is part of a negative clause. Article 22 is an example of the latter. It follows that, in the relevant part of Article 22 of CERD, the conjunction "or" may have either disjunctive or conjunctive meaning. The Court therefore is of the view that while the word "or" may be interpreted disjunctively and envisage alternative procedural preconditions, this is not the only possible interpretation based on the text of Article 22.

Turning to the context of Article 22 of CERD, the Court notes that "negotiation" and the "procedures expressly provided for in [the] Convention" are two means to achieve the same objective, namely to settle a dispute by agreement. Both of these conditions rest on the States parties' willingness to seek an agreed settlement of their dispute. It follows that, should negotiation and the CERD Committee procedure be considered cumulative, States would have to try to negotiate an agreed solution to their dispute and, after negotiation has not been successful, take the matter before the CERD Committee for further negotiation, again in order to reach an agreed solution. The Court considers that the context of Article 22 of CERD does not support this interpretation. In the view of the Court, the context of Article 22 rather indicates that it would not be reasonable to require States parties which have already failed to reach an agreed settlement through negotiations to engage in an additional set of negotiations.

The Court considers that Article 22 of CERD must also be interpreted in light of the object and purpose of the Convention. Article 2, paragraph 1, of CERD provides that States parties to CERD undertake to eliminate racial discrimination "without delay". Articles 4 and 7 provide that

States parties undertake to eradicate incitement to racial discrimination and to combat prejudices leading to racial discrimination by adopting "immediate and positive measures" and "immediate and effective measures" respectively. The preamble to CERD further emphasizes the States' resolve to adopt all measures for eliminating racial discrimination "speedily". The Court considers that these provisions show the States parties' aim to eradicate all forms of racial discrimination effectively and promptly. In the Court's view, the achievement of such aims could be rendered more difficult if the procedural preconditions under Article 22 were cumulative.

The Court concludes that Article 22 of CERD imposes alternative preconditions to the Court's jurisdiction. Since the dispute between the Parties was not referred to the CERD Committee, the Court will only examine whether the Parties attempted to negotiate a settlement to their dispute.

2. Whether the Parties attempted to negotiate a settlement to their dispute under CERD (paras. 114-121)

The Court has already had the opportunity to examine the notion of "negotiation" under Article 22 of CERD. It has thus stated that

> "negotiations are distinct from mere protests or disputations. Negotiations entail more than the plain opposition of legal views or interests between two parties, or the existence of a series of accusations and rebuttals, or even the exchange of claims and directly opposed counter-claims. As such, the concept of 'negotiations' differs from the concept of 'dispute', and requires — at the very least — a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute."

The Court has also stated that "evidence of such an attempt to negotiate — or of the conduct of negotiations — does not require the reaching of an actual agreement between the disputing parties", and that "to meet the precondition of negotiation in the compromissory clause of a treaty, these negotiations must relate to the subject-matter of the treaty containing the compromissory clause". The Court has further held that "the precondition of negotiation is met only when there has been a failure of negotiations, or when negotiations have become futile or deadlocked".

The Court notes that Ukraine sent its first Note Verbale to the Russian Federation concerning alleged violations of CERD on 23 September 2014. In that Note, Ukraine listed a number of measures which, in its view, the Russian Federation was implementing in violation of the Convention, and the rights which such acts were allegedly violating, and went on to state that "the Ukrainian Side offers to the Russian Side to negotiate the use of [CERD], in particular, the implementation of international legal liability in accordance with international law". On 16 October 2014, the Russian Federation communicated to Ukraine its willingness to hold negotiations on the interpretation and application of CERD. On 29 October 2014, the Applicant sent a second Note Verbale to the Respondent, asking for face-to-face negotiations which it proposed to hold on 21 November 2014. The Russian Federation replied to this Note on 27 November 2014, after Ukraine's proposed date for the meeting had passed. Ukraine sent a third Note Verbale on 15 December 2014, proposing negotiations on 23 January 2015. The Russian Federation replied to this Note on 11 March 2015, after the date proposed by Ukraine for the negotiations had passed. Eventually, the Parties held three rounds of negotiation in Minsk between April 2015 and December 2016.

There are specific references to CERD in the Notes Verbales exchanged between the Parties, which also refer to the rights and obligations arising under that Convention. In those Notes, Ukraine set out its views concerning the alleged violations of the Convention, and the Russian Federation accordingly had a full opportunity to reply to such allegations. The Court is satisfied

that the subject-matter of such diplomatic exchanges related to the subject-matter of the dispute currently before the Court.

The Court observes that the negotiations between the Parties lasted for approximately two years and included both diplomatic correspondence and face-to-face meetings, which, in the Court's view, and despite the lack of success in reaching a negotiated solution, indicates that a genuine attempt at negotiation was made by Ukraine. Furthermore, the Court is of the opinion that, during their diplomatic exchanges, the Parties' respective positions remained substantially the same. The Court thus concludes that the negotiations between the Parties had become futile or deadlocked by the time Ukraine filed its Application under Article 22 of CERD.

Accordingly, the Court concludes that the procedural preconditions for it to have jurisdiction under Article 22 of CERD are satisfied in the circumstances of the present case. As a result, the Court has jurisdiction to consider the claims of Ukraine under CERD.

C. Admissibility (paras. 122-132)

Lastly, the Court turns to the objection raised by the Russian Federation to the admissibility of Ukraine's Application with regard to claims under CERD on the ground that Ukraine did not establish that local remedies had been exhausted before it seised the Court.

The Court recalls that local remedies must be previously exhausted as a matter of customary international law in cases in which a State brings a claim on behalf of one or more of its nationals.

The Court notes that, according to Ukraine, the Russian Federation has engaged in a sustained campaign of racial discrimination, carried out through acts repeated over an appreciable period of time starting in 2014, against the Crimean Tatar and Ukrainian communities in Crimea. The Court also notes that the individual instances to which Ukraine refers in its submissions emerge as illustrations of the acts by which the Russian Federation has allegedly engaged in a campaign of racial discrimination. It follows, in the view of the Court, that, in filing its Application under Article 22 of CERD, Ukraine does not adopt the cause of one or more of its nationals, but challenges, on the basis of CERD, the alleged pattern of conduct of the Russian Federation with regard to the treatment of the Crimean Tatar and Ukrainian communities in Crimea. In view of the above, the Court concludes that the rule of exhaustion of local remedies does not apply in the circumstances of the present case. This conclusion by the Court is without prejudice to the question of whether the Russian Federation has actually engaged in the campaign of racial discrimination alleged by Ukraine, thus breaching its obligations under CERD. This is a question which the Court will address at the merits stage of the proceedings.

The Court finds that the Russian Federation's objection to the admissibility of Ukraine's Application with regard to CERD must be rejected.

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The Court considers that it follows from the findings made above that the Russian Federation's objections to the jurisdiction of the Court under Article 22 of CERD and to the admissibility of Ukraine's Application with regard to CERD must be rejected. Accordingly, the Court concludes that it has jurisdiction to entertain the claims made by Ukraine under CERD and that Ukraine's Application with regard to those claims is admissible.

IV. OPERATIVE CLAUSE (PARA. 134)

For these reasons,

THE COURT,

(1) By thirteen votes to three,

Rejects the preliminary objection raised by the Russian Federation that the Court lacks jurisdiction on the basis of Article 24, paragraph 1, of the International Convention for the Suppression of the Financing of Terrorism;

IN FAVOUR: President Yusuf; Judges Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Salam, Iwasawa; Judge ad hoc Pocar;

AGAINST: Vice-President Xue; Judge Tomka; Judge ad hoc Skotnikov;

(2) By thirteen votes to three,

Finds that it has jurisdiction on the basis of Article 24, paragraph 1, of the International Convention for the Suppression of the Financing of Terrorism, to entertain the claims made by Ukraine under this Convention;

IN FAVOUR: President Yusuf; Judges Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Salam, Iwasawa; Judge ad hoc Pocar;

AGAINST: Vice-President Xue; Judge Tomka; Judge ad hoc Skotnikov;

(3) By fifteen votes to one,

Rejects the preliminary objection raised by the Russian Federation that the Court lacks jurisdiction on the basis of Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination;

IN FAVOUR: President Yusuf; Vice-President Xue; Judges Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Salam, Iwasawa; Judge ad hoc Pocar;

AGAINST: Judge ad hoc Skotnikov;

(4) Unanimously,

Rejects the preliminary objection raised by the Russian Federation to the admissibility of the Application of Ukraine in relation to the claims under the International Convention on the Elimination of All Forms of Racial Discrimination;

(5) By fifteen votes to one,

Finds that it has jurisdiction, on the basis of Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination, to entertain the claims made by Ukraine under this Convention, and that the Application in relation to those claims is admissible.

IN FAVOUR: President Yusuf; Vice-President Xue; Judges Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Salam, Iwasawa; Judge ad hoc Pocar;

AGAINST: Judge ad hoc Skotnikov.

Vice-President XUE appends a dissenting opinion to the Judgment of the Court; Judges TOMKA and CANÇADO TRINDADE append separate opinions to the Judgment of the Court; Judges DONOGHUE and ROBINSON append declarations to the Judgment of the Court; Judge ad hoc POCAR appends a separate opinion to the Judgment of the Court; Judge ad hoc SKOTNIKOV appends a dissenting opinion to the Judgment of the Court.

Dissenting opinion of Vice-President Xue

Vice-President Xue takes the view that the Court does not have jurisdiction under Article 24, paragraph 1, of the International Convention for the Suppression of the Financing of Terrorism ("ICFST") in this case.

In her opinion, Ukraine's claim as presented in its Application and Memorial concerns more the alleged military and financial support provided by the Russian Federation to the armed groups in the course of armed conflict in eastern Ukraine, where violations of international humanitarian law may have occurred, than the Russian Federation's failure in preventing and suppressing the financing of terrorism. She considers that the materials submitted by Ukraine do not present a plausible case that falls within the scope of the ICFST.

Vice-President Xue observes that identification of the subject-matter of the dispute is essential for the Court to determine its jurisdiction ratione materiae. More often than not, a dispute arises from a complicated political context, where the legal question brought before the Court is mixed with various political aspects. In her view, that fact alone does not preclude the Court from founding its jurisdiction. Recalling the Court's pronouncement in the case concerning United States Diplomatic and Consular Staff in Tehran, she notes that what the Court had to take into account when determining the question of jurisdiction was whether there was connection, legal or factual, between the "overall problem" in the context and the particular events that gave rise to the dispute, which precluded the separate examination of the applicant's claims by the Court.

Vice-President Xue considers that when the dispute constitutes an inseparable part of the overall problem and any legal pronouncement by the Court on that particular dispute would necessarily step into the area beyond its jurisdiction, judicial prudence and self-restraint is required. She emphasizes that in the international judicial settlement of disputes between States, the question of jurisdiction is just as important as merits. This policy is designed and reflected in each and every aspect of the jurisdictional system of the Court.

Vice-President Xue observes that acts alleged by Ukraine all took place during the internal armed conflict in eastern Ukraine. To characterize military and financial support from Russia's side, by whomever possible, as terrorism financing, would inevitably bear the legal implication of defining the nature of the armed conflict in eastern Ukraine, which, in her view, extends well beyond the limit of the Court's jurisdiction under the ICSFT. In other words, Ukraine's allegations against the Russian Federation under the ICSFT bear an inseparable connection with the overall situation of the ongoing armed conflict in eastern Ukraine. Factually, documents before the Court do not demonstrate that the alleged terrorism financing can be discretely examined without passing a judgment on the overall situation of the armed conflict in the area; Ukraine's claim under the ICSFT forms an integral part of the whole issue in eastern Ukraine. Judicially, the Court is not in a position to resolve the dispute as presented by Ukraine.

Vice-President Xue is also of the view that, in considering the scope of the ICSFT, the meaning given by the Court to the term "any person" in Article 2, paragraph 1, of the ICSFT cannot be sustained by the rules of State responsibility. In its Application, Ukraine requests the Court to adjudge and declare that

> "the Russian Federation, through its State organs, State agents, and other persons and entities exercising governmental authority, and through other agents acting on its instructions or under its direction and control, has violated its obligations under the Terrorism Financing Convention by:
>
> (a) supplying funds, including in-kind contributions of weapons and training, to illegal armed groups that engage in acts of terrorism in Ukraine, including the

> DPR, the LPR, the Kharkiv Partisans, and associated groups and individuals, in violation of Article 18" (emphasis added).

Although Ukraine subsequently deleted this submission in the Memorial, instead accusing the Russian Federation of allowing and encouraging its own officials to finance terrorism, the substance of its claim under the ICSFT remains unchanged. In her opinion, this is apparently a case concerning the allegations of the financing by a State of terrorist acts, which, as the Court stated in the Judgment, is explicitly precluded from the scope of the ICSFT.

Vice-President Xue considers that, in the present case, the question whether or not the Russian Federation allowed or encouraged military and financial support to the armed groups in eastern Ukraine falls outside the scope of the Court's jurisdiction under the ICSFT. Should the case proceed to the merits phase, the Court may find itself in a position where it has to pronounce on the above question, which, in her view, may raise the issue of judicial propriety.

Vice-President Xue emphasizes that judicial policy requires the Court to avoid unnecessary prolongation of the legal process if the case does not present itself as plausible. Proper identification of the subject-matter of the dispute that falls within the scope of the jurisdiction ratione materiae of the Court is essential for the purposes of good administration of justice and judicial economy. To allow this case to proceed to the merits phase, in her view, would neither serve the object and purpose of the ICSFT, nor contribute to the peace process in the region.

Separate opinion of Judge Tomka

Judge Tomka does not agree with the Court's conclusion that it has jurisdiction over Ukraine's claims arising under the International Convention for the Suppression of the Financing of Terrorism ("ICSFT"). He recalls that the ICSFT is a criminal law convention, establishing obligations for States in respect of the prevention and punishment of the financing of terrorism. The financing by a State of alleged acts of "terrorism", as the Court confirms, lies outside the scope of the Convention. Ukraine's claims, however, relate to the provision of arms and weapons. He does not consider that the Court has ascertained whether the acts alleged by Ukraine fall within the scope of the ICSFT, in accordance with the approach taken in the Oil Platforms case. For example, the Court does not evaluate whether the alleged supply of weapons falls within the scope of the word "funds" as used by the ICSFT. In Judge Tomka's view, it does not, and the Court therefore lacks jurisdiction over Ukraine's claims.

Similarly, Judge Tomka has doubts whether the Court has reasonably and sufficiently demonstrated that it has jurisdiction ratione materiae under the International Convention on the Elimination of All Forms of Racial Discrimination ("the CERD"), in view of the fact that the Court's discussion of the question comprises only three paragraphs of its Judgment. He considers that the Court should have expressly considered each of the preliminary objections of the Russian Federation, for example whether, under the CERD, there is an absolute right to education in one's native language. However, because certain of Ukraine's claims do fall within the scope of the CERD, Judge Tomka agrees that the Court does have jurisdiction ratione materiae over these claims.

Judge Tomka is not convinced by the Court's treatment of the question of the procedural preconditions for seising the Court contained in Article 22 of the CERD. He is of the view that the preconditions are cumulative. Judge Tomka considers that, read together, the terms "not" and "or" in the phrase "not settled by negotiation or by the procedures expressly provided for in this Convention" logically call for a cumulative reading. This is consistent with the context, which requires the conditions to be cumulative in order to preserve the effectiveness of the procedures foreseen in Articles 11 to 13 of the CERD. He considers this interpretation to be confirmed by the preparatory works of the CERD.

Finally, Judge Tomka considers that the Court has been needlessly imprecise in its description of breaches. He recalls that, consistently with the language of Article 36, paragraph 2 (c) of the Statute of the Court, the International Law Commission, in its work on State responsibility, determined that the language "breach of an international obligation" most accurately describes the subjective legal phenomenon which can give rise to a State's responsibility. Judge Tomka observes that the Court could have been more precise in this regard, rather than referring to breaches of a treaty or one of its provisions.

Separate opinion of Judge Cançado Trindade

1. In his separate opinion, composed of seven parts, Judge Cançado Trindade begins by observing that he has concurred with his vote to the adoption of the present Judgment, dismissing all preliminary objections in the present case. He then explains that he has reached the same decision of the International Court of Justice (ICJ), but on the basis of a distinct reasoning in respect of the selected points, which, in his perception, require further attention on the part of the Court. He thus finds it necessary to present his own reasoning in the present separate opinion.

2. He focuses his reasoning on the following points: (a) basis of jurisdiction: its importance for the protection of the vulnerable under United Nations human rights conventions; (b) the rationale of the compromissory clause of the CERD Convention (Article 22); (c) the rationale of the local remedies rule in the international safeguard of human rights: protection and redress, rather than exhaustion; (d) the relevance of jurisdiction in face of the need to secure protection to those in situations of vulnerability; and (e) concluding considerations, followed by an epilogue containing a recapitulation of all the points that he sustains in the present separate opinion.

3. Judge Cançado Trindade starts by outlining the rationale of United Nations human rights conventions, like CERD, with attention to focus on the relevance of the basis of jurisdiction for the protection of the vulnerable under human rights conventions. He adds that human rights conventions, like CERD, go beyond the outdated inter-State outlook, ascribing a central position to the individual victims, rather than to their States. In doing so — he proceeds — human rights conventions, like CERD, are turned to securing the effective protection of the rights of the human person, in light of the principle pro persona humana, pro victima (paras. 4-7).

4. In his perception, had the inter-State dimension not been surmounted, not much development would have taken place in the present domain of protection. In Judge Cançado Trindade's understanding, the realization of justice, with the judicial recognition of the sufferings of the victims, is an imperative, and careful account is to be taken of the needs of protection of persons in situations of vulnerability or defencelessness. He adds that the compromissory clause of a victim-oriented human rights convention, like CERD (Article 22), is related to the justiciables' right of access to justice; this requires a necessary humanist outlook, and not at all a State-centric and voluntarist one (paras. 11-20).

5. Judge Cançado Trindade ponders that, in the consideration of utmost vulnerability or defencelessness of the human person, the principle of humanity comes to the fore, and assumes a clear incidence in the protection of human beings in situations of the kind. He adds that the principle of humanity, which has met with judicial recognition, permeates human rights conventions, like CERD, and the whole corpus juris of protection of human beings. Judge Cançado Trindade stresses that the principle of humanity is in line with the long-standing jusnaturalist thinking (recta ratio); general principles of law enshrine common and superior values, shared by the international community as a whole.

6. Reiterating the position that he sustained in his dissenting opinion in the earlier ICJ's case of Application of the CERD Convention (2011), opposing Georgia to the Russian Federation, Judge Cançado Trindade stresses, in the cas d'espèce opposing Ukraine to the Russian Federation, that Article 22 of the CERD Convention in his view does not establish "preconditions" to the Court's jurisdiction (para. 27). In the present case, he adds, the ICJ does not sustain any of the preliminary objections, and correctly dismisses them all (para. 28).

7. The next point he makes is that the incidence of the local remedies rule in human rights protection is certainly distinct from its application in the practice of diplomatic protection of nationals abroad, there being nothing to hinder the application of that rule with greater or lesser rigour in such different domains (para. 31). Judge Cançado Trindade points out that we are here before a law of protection (droit de protection), where the local remedies rule has a rationale entirely distinct from the one in diplomatic protection: the former stresses redress, the latter outlines exhaustion (paras. 32-38). In his own words:

> "The rationale of the local remedies rule in human rights protection discloses the overriding importance of the element of redress, the provision of which being a matter of ordre public; what ultimately matters is the redress obtained for the wrongs complained of, and not the mechanical exhaustion of local remedies. (…)
>
> This law of protection of the rights of the human person, within the framework of which international and domestic law appear in constant interaction, is inspired by common superior values: this goes pari passu with an increasing emphasis on the State's duty to provide effective local remedies. (…)" (paras. 42-43).

8. Human beings protected by human rights conventions, like CERD — he proceeds — are their ultimate beneficiaries, even in an inter-State claim thereunder, as the present one. It is "necessary to keep in mind that the fundamental rights of human beings stand well above the States, which were historically created to secure those rights. After all, States exist for human beings, and not vice-versa" (para. 39). Judge Cançado Trindade then recalls that the prevalence of human beings over States marked presence in the writings of the "founding fathers" of the law of nations (in the sixteenth-seventeenth centuries), already attentive to the need of redress for the harm done to the human person (paras. 40-41 and 60-61).

9. The next part of his separate opinion turns attention to the relevance of jurisdiction in face of the need to secure protection to those in situations of vulnerability. He warns that human beings stand in need of protection against evil, they need protection ultimately against themselves. Furthermore, they stand in need of protection against arbitrariness, hence the importance of the imperative of access to justice lato sensu, the right to the Law (le droit au Droit, el derecho al Derecho), to secure the realization of justice also in situations of utmost human vulnerability (paras. 45-51).

10. Judge Cançado Trindade adds that fundamental principles of law conform the substratum of the jus necessarium (not a jus voluntarium) in the protection of human beings, expressing an idea of objective justice, in the line of jusnaturalist thinking. In his understanding, the basic foundations of the law of nations emanate ultimately from the universal juridical conscience (para. 54). Human beings are subjects of the law of nations, and attention is to remain turned to the victimized persons, rather than to inter-State susceptibilities.

11. In his own writing, "the basic posture is principiste, without making undue concessions to State voluntarism. The assertion of an objective law, beyond the 'will' of individual States, is, in my perception, a revival of jusnaturalist thinking" (para. 53). In Judge Cançado Trindade's understanding, overcoming the limitations of legal positivism, attention is to focus on the humane ends of States, emanating from recta ratio, as propounded by the jusnaturalist vision. Rights inherent to the human person are anterior and superior to the States.

12. Moreover, the concomitant expansion of international jurisdiction, responsibility, personality and capacity, rescues and enhances the position of the human person as subject of international law (paras. 68 and 78). The principle of humanity counts on judicial recognition in a corpus juris gentium oriented towards the victims, in the line of jusnaturalist thinking. The universal juridical conscience (recta ratio) necessarily prevails over the "will" of States, being the ultimate material source of the law of nations.

13. Judge Cançado Trindade concludes that the law of nations is thus endowed with universality. A judicial decision under human rights conventions, like CERD, calls for a reasoning going well beyond the strict inter-State dimension, with attention turned to victimized human beings, in pursuance of a humanist outlook. And the prevalence of the universal juridical conscience as the ultimate material source of the law of nations points to securing the realization of justice in any circumstances.

Declaration of Judge Donoghue

Judge Donoghue submits a declaration in which she sets out the reasons for her agreement with the Court's decision to reject the Respondent's preliminary objections to the Court's jurisdiction ratione materiae.

Declaration of Judge Robinson

1. In his declaration, Judge Robinson commences by stating that, although he has voted in favour of the operative paragraphs of the Judgment, he wishes to comment on two aspects. He addresses State responsibility and the references to acts of terrorism in the Judgment.

2. In respect of State responsibility, he examines and comments on paragraph 59 of the Judgment and observes that there is nothing in certain sentences of this paragraph to support the conclusion that State financing of terrorism is outside the scope of the International Convention for the Suppression of the Financing of Terrorism (the "Convention"). He argues that the result is that when the Judgment goes on in the seventh sentence of this paragraph to cite the preparatory work of the Convention as confirming its earlier conclusion, it is in reality seeking to confirm a finding that has no basis in an analysis of the text of the Convention.

3. Judge Robinson notes that preparatory work may be used to confirm the meaning of a term that results from the application of the general rule of interpretation set out in Article 31 of the Vienna Convention on the Law of Treaties (the "VCLT"). He observes that — since the relevant area of enquiry is the meaning of the term "any person" and the Court had not at this stage of its reasoning established the meaning of that term in accordance with the general rule of interpretation in Article 31 of the VCLT — there is no basis for recourse to the preparatory work to confirm the Court's conclusion that State financing of acts of terrorism is outside the scope of the Convention. He observes that in arriving at the finding that State financing of acts of terrorism is outside the

scope of the Convention, the Court has not grappled with the real issue in the case, that is, the meaning of the term "any person" and the impact, if any, that the resolution of this question has on the general rule of attribution to States of responsibility for the acts of their agents. One consequence of the Court's approach is that it renders questionable the finding in paragraph 61 that "the commission by a State official of an offence described in Article 2 does not in itself engage the responsibility of the State concerned under the Convention".

4. According to Judge Robinson, in adopting this line of reasoning, the Court appears to have put the proverbial cart before the horse, given that at this stage of its reasoning, it had not yet considered the meaning of the term "any person" in Article 2. He argues that when the Court does in fact analyse the meaning of that term, it correctly concludes that it covers both private individuals and State agents. Here the Court has interpreted the term "any person" in accordance with its ordinary meaning in its context and in light of the object and purpose of the Convention. But, by that time, it had already concluded that State financing was outside the scope of the Convention. By this approach the Court foreclosed itself from considering the impact that its conclusion that State agents are covered by the term "any person" has on its analysis of the question whether or not States are also covered by the Convention. According to Judge Robinson, in other words, the determination that State financing was outside the scope of the Convention should not have been made without the Court profiting from an analysis of the meaning of the term "any person". Further, he notes that in any event the preparatory work of the Convention is far from unequivocal in supporting the conclusion that State financing is outside the scope of the Convention.

5. Judge Robinson concludes that the Court has had recourse to the preparatory work of the Convention in circumstances not permitted by the customary rules of interpretation reflected in Articles 31 and 32 of the VCLT. Moreover, the Court has adopted a line of reasoning that does not establish that the financing by a State of acts constituting the offence under Article 2 is outside the scope of the Convention.

6. Turning to the references to acts of terrorism in the Judgment, Judge Robinson observes that the history of multilateral efforts to combat terrorism is marked by the failure to adopt any global treaty on the question (a failure principally explained by the difficulty in reaching agreement on a definition of terrorism). He expresses the view that the failure to adopt a multilateral treaty on international terrorism is mainly due to the difficulties that are encountered in defining that phenomenon. On the one hand, there are States whose approach is to concentrate only on the heinous nature of the acts which an international convention would proscribe. On the other hand, there are those countries which want to ensure that the underlying causes of terrorism would not be ignored in the adoption of any international instrument. According to Judge Robinson, in the view of these countries, a definition of terrorism should exclude from its ambit measures adopted by peoples in the struggle for national liberation, self-determination and independence. He notes that in light of the failure to adopt a multilateral treaty that defines international terrorism, States have concluded a large number of treaties at the global level, which take the simpler and less problematic approach of creating offences by identifying certain acts which are characterized as offences. He observes that all of these treaties carefully avoid using the term "terrorism" in defining the acts constituting the offences they create and that an examination of the nine treaties in the Annex referred to in Article 2 (1) (a) of the Convention shows that none of them describe the acts constituting the offence under the relevant treaty as terrorism. Rather, they, like the Convention, only prohibit specific acts. Significantly, even though the preamble of two of these conventions contain references to terrorism, there is absent from their articles — including the article creating the offence — any reference to terrorism. According to Judge Robinson, in that respect the Convention is similar to those conventions in that there is a reference to terrorism in the preamble but no such reference in the article creating the offence or in any other article. All the

treaties in the Annex were concluded in the shadow cast by the failure of the international community to agree on a definition of international terrorism. As such, they isolate acts to be criminalized as offences. However, in view of the failure to reach agreement on the definition of international terrorism, they avoid characterizing these acts as terrorism. For example, the Convention for the Suppression of Unlawful Seizure of Aircraft (1970) criminalizes the act of seizing an aircraft (commonly called hijacking) but does not characterize the unlawful seizure as terrorism, even though in ordinary parlance it would be so described. In the same vein the (1979) Convention against the Taking of Hostages only criminalizes the act of taking hostages and does not characterize that act as terrorism, although in colloquial parlance it would be so described.

7. Judge Robinson argues that the legal history shows that it is no mere happenstance that the Convention does not describe the offence in Article 2 as terrorism, even though its title and preamble refer to the phenomenon of terrorism. If during the negotiations Article 2 had been formulated to read "any person commits the offence of terrorism within the meaning of this Convention . . .", rather than "[a]ny person commits an offence within the meaning of this Convention", the draft Convention would more than likely have met with serious objections from several countries which would have wanted to carve out an exception in respect of peoples struggling for liberation, self-determination and independence. According to Judge Robinson, it is for this reason that the Court's finding in paragraph 63 is problematic. In that paragraph the Court finds that "[a]n element of an offence under Article 2, paragraph 1, of the ICSFT is that the person concerned has provided funds 'with the intention that they should be used or in the knowledge that they are to be used' to commit an act of terrorism". In his view, it is problematic because nowhere in any of the articles of the ICSFT and in particular, nowhere in Article 2 which creates the offence, is there any reference to "an act of terrorism". He observes that, of course it would be unobjectionable if the Judgment did not use terrorism as a term of art referring to the offence under Article 2. But here the reference to an "element of the offence", that is, "the intention" (the mens rea) that is required by Article 2, paragraph 1, to establish the offence makes it abundantly clear that by "an act of terrorism" what is meant is the offence established by the Convention. He notes that the Court should have followed the approach it took in the same paragraph when it referred to "an act fall[ing] within the meaning of Article 2, paragraph 1 (a) or (b)". He also observes that this comment applies to other parts of the Judgment where "terrorism" is used as a term of art referring to the offence under Article 2. In any event, if the phrase "act of terrorism" were to be retained in paragraph 63, the more appropriate formulation would be an act of financing terrorism.

Separate opinion of Judge ad hoc Pocar

In agreement with the decision of the majority to reject the preliminary objections raised by the Russian Federation, Judge ad hoc Pocar clarifies his position regarding the jurisdiction ratione materiae of the Court on three points.

Firstly, Judge ad hoc Pocar agrees with the conclusion of the Court that the financing by a State of an offence set forth under Article 2 of the ICSFT "lies outside the scope of the Convention"; he adds that the obligation to criminalize this offence in their legislation inevitably presupposes that States accept not to engage themselves in such conduct. He also notes that even if the conduct of a given State lies outside the scope of the ICSFT, that State may nevertheless be responsible under customary international law.

Secondly, Judge ad hoc Pocar explains that, in his view, the Court's comprehensive interpretation of the term "any person" contained in Article 2, paragraph 1, of the ICSFT is obvious from the ordinary meaning of the terms, as established by the Court, but it is also strongly supported by the object and purpose of the ICSFT, as well as by international practice in the conclusion of similar treaties.

Thirdly, although Judge ad hoc Pocar agrees with the conclusion of the Court that the interpretation of the definition of "funds" is to be left to the stage of an examination of the merits, he does not agree with the inference of the Court that the interpretation of this term might have affected the ratione materiae jurisdiction of the Court. He highlights that contrary to what the Court states, the definition of "funds" of Article 1, paragraph 1, puts the accent on assets, not on financial instruments. He adds that the list of financial instruments being unlimited, these legal documents and financial instruments cannot play a role in circumscribing the scope of the Convention. Finally, he points out that the issue related to the provision of "assets of every kind" is not to establish what kind of assets are included in the definition, but to establish which assets were actually provided or collected with the intention or the knowledge that they were to be used for unlawful purposes as described in Article 2, paragraph 1 (a) and (b). The question is therefore more related to the factual circumstances of the case.

Dissenting opinion of Judge ad hoc Skotnikov

1. Judge ad hoc Skotnikov regrets that he cannot support the decision of the Court that it has jurisdiction to adjudicate the case before it.

2. He recalls that the existence of jurisdiction is a question of law to be resolved in light of the relevant facts. The alleged facts need to be ascertained to the extent which is appropriate in a given case. Considering the Court's conclusion at the provisional measures stage — that all of Ukraine's claims as to the rights it sought to protect under the ICSFT and most of its claims under CERD were not plausible — Judge ad hoc Skotnikov is of the view that particular caution is required at the present to stage to determine whether the acts alleged by Ukraine fall within the respective provisions of the treaties Ukraine invokes. The Court has not exercised such caution, either regarding whether Ukraine's allegations relate to the offence of financing of terrorism as defined in the ICSFT or whether alleged measures amount to racial discrimination under CERD.

3. With respect to issues of law, Judge ad hoc Skotnikov notes that the Court's task at the preliminary objections stage is to resolve issues relating to the scope of the treaties in question. Concerning the scope of the ICSFT, Judge ad hoc Skotnikov considers that the Court fails to satisfy itself whether it has jurisdiction when it states that the issue relating to the scope of the term "funds" need not be resolved at this stage. He also does not agree with the Court's finding that persons acting as State agents fall within the scope of the ICSFT, in view of the Court's correct conclusion that the financing by a State of acts of terrorism lies outside the scope of the Convention.

4. Judge ad hoc Skotnikov regrets that the Court has failed to consider questions relating to the scope of the CERD. In particular, he points out that the right of the Crimean Tatar community to maintain its distinctive representative institutions does not fall within the scope of the Convention's definition of "racial discrimination". He also considers that the Court has not analysed whether the right Ukraine alleges to education in one's native language falls within the scope of CERD in the circumstances of the present case.

5. Judge ad hoc Skotnikov is not convinced by the Court's reasoning as to whether the preconditions contained in Article 22 of CERD are met, in view of the context and the travaux préparatoires of CERD.

6. Judge ad hoc Skotnikov considers that the present Judgment comes very close to implying that it is enough for an applicant to argue the existence of a connection, no matter how remote or artificial, between its factual allegations and the treaty it invokes, in order for the Court to be satisfied that it has jurisdiction ratione materiae under that treaty to entertain the case. This departure from the Court's case law is not, in his view, a welcome development.