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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2023

Public sitting

held on Thursday 8 June 2023, at 10 a.m., at the Peace Palace,

President Donoghue, 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)**

VERBATIM RECORD

ANNÉE 2023

Audience publique

tenue le jeudi 8 juin 2023, à 10 heures, au Palais de la Paix,

sous la présidence de M^me^ Donoghue, présidente,

***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)**

COMPTE RENDU

Present:	President	Donoghue
	Judges	Tomka
		Bennouna
		Yusuf
		Xue
		Sebutinde
		Bhandari
		Salam
		Iwasawa
		Nolte
		Charlesworth
`		Brant
	Judges *ad hoc*	Pocar
		Tuzmukhamedov
	Registrar	Gautier

Présents : M^me^ Donoghue, présidente
MM. Tomka
Bennouna
Yusuf
M^mes^ Xue
Sebutinde
MM. Bhandari
Salam
Iwasawa
Nolte
M^me^ Charlesworth
M. Brant, juges
MM. Pocar
Tuzmukhamedov, juges *ad hoc*

M. Gautier, greffier

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The PRESIDENT: Please be seated. The sitting is open. The Court meets today to hear the first round of oral argument of the Russian Federation.

For reasons duly made known to me, Judge Abraham is unable to be present on the Bench today.

I now give the floor to H.E. Mr. Alexander V. Shulgin, Agent of the Russian Federation. You have the floor, Your Excellency.

M. SHULGIN :

1. Madame la présidente, Mesdames et Messieurs les Membres distingués de la Cour, c'est pour moi un grand honneur et un privilège d'apparaître devant cette Cour au nom de la Fédération de Russie.

2. La Russie a beaucoup de respect pour la Cour internationale de Justice en tant qu'organe judiciaire principal des Nations Unies, qui représente les traditions et systèmes juridiques différents du monde entier. La Russie compte sur le règlement pacifique des différends conformément à la Charte des Nations Unies, y compris par le biais d'une procédure judiciaire juste et impartiale. Nous sommes fermement convaincus que la justice doit être rendue ouvertement et indépendamment des considérations politiques — en effet, la vérité doit être exprimée pour que la justice puisse se prévaloir. C'est dans cet esprit que mon pays s'est engagé de bonne foi dans ces procédures judiciaires relatives à deux conventions multilatérales de grande importance : la convention internationale pour la répression du financement du terrorisme (CIRFT) et la convention internationale sur l'élimination de toutes les formes de discrimination raciale (CIEDR).

3. Malheureusement, la vérité n'est pas toujours facile à établir. Aujourd'hui, à l'ère de l'information, la vérité semble parfois évidente et facilement accessible, tandis qu'en réalité elle est enveloppée par un brouillard politique épais créé par des campagnes d'information propagées et dominées par des États et des sociétés de média les plus puissants. Voilà qui rend la tâche judiciaire encore plus difficile qu'auparavant.

4. Madame la présidente, Mesdames et Messieurs les Membres distingués de la Cour, nous avons entendu le requérant au cours de ces audiences et nous n'avons plus de doutes quant à sa volonté d'assumer le rôle d'un accusateur en essayant de se présenter comme un protecteur des

peuples de la Crimée contre la discrimination, tout en accusant les Républiques populaires de Donetsk et de Lougansk d'être des organisations terroristes prétendument financées par la Russie. Cependant, rien ne pourrait être plus éloigné de la vérité.

5. En effet, Kiev n'a aucune autorité morale pour avancer de telles accusations. Ce régime est arrivé au pouvoir à la suite d'un coup d'État violent en 2014, arrivé sur les épaules des nationalistes, descendants directs des collaborateurs nazis de la seconde guerre mondiale. Le Gouvernement ukrainien actuel ne se cache pas pour acclamer et célébrer les criminels de guerre nazis en tant que héros de l'Ukraine.

6. Les groupes néonazis sur les épaules desquels repose le régime actuel de Kiev ont commencé par encourager les révoltes armées en Ukraine de l'Ouest, ceci bien avant les événements survenus à l'Est. Ils ont continué avec les violences du Maïdan à Kiev, ce qui avait pour effet de renverser à la fois le président et le Gouvernement légitimes de l'Ukraine. En conséquence, un nouveau « gouvernement des vainqueurs », avec des néonazis, des dirigeants du Maïdan et leurs collaborateurs à des postes clés en charge des forces armées, des forces de l'ordre et de la propagande, est arrivé au pouvoir. Ils ont continué à faire répandre la terreur dans tout le pays, tuant des dirigeants de l'opposition, des hommes politiques, des journalistes et des gens ordinaires qui osaient tout simplement exprimer leur défiance. À ceux qui s'opposaient, principalement dans les régions de l'Est, au Donbass, le régime a répondu en lançant une attaque armée massive, tout en essayant de les qualifier de « terroristes » pour justifier sa répression brutale.

7. Pendant sept ans, depuis le printemps 2014, ce régime a décimé le Donbass. Les tirs d'obus, les bombardements et les assassinats quotidiens ont fait des milliers de morts et des milliers de blessés parmi les civils, dont de nombreux étaient des enfants. Les soldats de Kiev et les bataillons « néonazis » ont utilisé les civils comme boucliers humains pour se protéger contre les représailles des forces du Donbass.

8. Ce que l'Ukraine cherche maintenant, c'est une décision de votre haute juridiction qui lui permettrait de traiter les habitants du Donbass en lutte pour leur survie comme « autant de terroristes ». Mais il est clair, il est généralement admis, que la situation dans le Donbass était un conflit armé sanglant entre le régime de Kiev et les Républiques de Donetsk et Lougansk, conflit régi

par le droit humanitaire. Outre l'Ukraine, personne n'a jamais considéré les Républiques comme des organisations terroristes.

9. Madame la présidente, Mesdames et Messieurs les Membres distingués de la Cour, au stade des mesures conservatoires, la Cour a estimé que les arguments de l'Ukraine concernant le financement du terrorisme n'étaient pas plausibles, étant donné que l'Ukraine a failli à sa tâche de démontrer que les actes auxquels elle se réfère pouvaient même être considérés comme des infractions au titre de l'article 2 de la CIRFT. Au stade juridictionnel et celui de la recevabilité, la Cour a décidé de reporter l'examen des principaux arguments de la Russie au fond, en particulier ceux relatifs à l'intention et à la connaissance. Aujourd'hui, nous allons vous montrer comment les revendications de l'Ukraine ne sont pas seulement implausibles — qui plus est, elles sont fondées sur des interprétations erronées du droit qui contredisent même le bon sens élémentaire, et basées soit sur des preuves factuelles fausses soit contraires à la propre position de l'Ukraine.

10. Il en va de même pour les allégations de l'Ukraine concernant la soi-disant « campagne systémique de discrimination raciale » à l'encontre des Ukrainiens et Tatars de Crimée. L'Ukraine, ayant commis des violations des droits des Criméens enregistrées depuis bien des années, se présente maintenant comme leur protectrice.

11. Il est d'autant plus hypocrite que Kiev, de concert avec le *Majlis*, a mis en place le blocus de la Crimée, coupant ainsi l'accès de la péninsule à l'eau, à la nourriture, à l'électricité, aux médicaments et à d'autres produits de première nécessité, au détriment de la population. Les membres du *Majlis* ont, de surcroît, fait détoner des explosifs pour détruire les lignes énergétiques menant à la Crimée, privant ainsi toute la population de Crimée d'électricité.

12. L'Ukraine cherche à présent des failles dans le système éducatif de Crimée tout en approuvant l'interdiction non seulement de l'enseignement en russe au-delà du cadre de l'école élémentaire, mais aussi de l'usage de la langue russe dans les médias et dans la vie publique nonobstant le fait que la langue russe en Ukraine, à la différence de la langue ukrainienne en Crimée, représente en soi une langue d'usage quotidien de la majorité de la population.

13. Les actions du régime de Kiev, contrairement à l'effervescence juridique de ses conseils, montrent que nos adversaires n'ont pas d'intérêt réel pour le bien-être des Criméens ou pour la lutte contre leur soi-disant « discrimination ». Le véritable objectif de Kiev n'est pas de lutter contre la

discrimination, mais de contester le statut de la Crimée, ce qui ne fait pas l'objet de la présente affaire, comme la Cour l'a affirmé dans son jugement de 2019.

14. Faisant preuve d'une mauvaise foi similaire dans le Donbass, l'Ukraine n'était pas intéressée par une solution pacifique. Les accords de Minsk étaient fondés sur l'idée d'un retour du Donbass sous le contrôle de l'Ukraine tout en respectant le désir de la population du Donbass de bénéficier d'une plus large autonomie. Aujourd'hui, il s'avère, selon les anciens dirigeants ukrainien, français et allemand qui les ont signés ou garantis, que ceux-ci — les accords de Minsk — n'avaient pas d'autre but que de donner à l'Ukraine le temps de s'armer pour une « solution militaire » de la question du Donbass. Kiev, hélas, n'a jamais eu l'intention de respecter ces accords. Son seul objectif était de conquérir le Donbass par la force.

15. Les actions de Kiev ont finalement contraint les Républiques populaires de Donetsk et de Lougansk à invoquer leur droit à l'autodétermination et à la légitime défense, y compris à la légitime défense collective, conformément aux dispositions de la Charte des Nations Unies et du droit international coutumier.

16. Cette affaire, bien entendu, ne concerne pas les événements les plus récents. Elle ne concerne en fait que les événements survenus entre 2014 et 2017. Néanmoins, puisque l'agent de l'Ukraine a accordé une telle attention à ce sujet, je dirai que c'est l'Ukraine qui a rejeté les accords de Minsk et qui a commencé les violences contre le Donbass, c'est aussi l'Ukraine qui a refusé toute solution négociée et a annoncé son souhait de « gagner sur le champ de bataille ». Ce sont les hauts fonctionnaires ukrainiens qui ont appelé à « tuer tous les Russes, les tuer partout ». Ils ont commencé à tuer des journalistes et des militants politiques non seulement en Ukraine, mais aussi en Russie. L'Ukraine a constamment recours à la propagande, aux mensonges flagrants et aux fausses accusations contre la Fédération de Russie. Même devant cette Cour, pendant la première journée des audiences, l'agent de l'Ukraine a déclaré : « aujourd'hui, la Russie a fait exploser un grand barrage situé à Nova Kakhovka ». En fait, c'est l'Ukraine qui l'a fait. Le régime de Kiev a non seulement lancé des attaques d'artillerie massives contre le barrage dans la nuit du 6 juin, mais il a aussi délibérément porté le niveau d'eau du réservoir de Kakhovka à un niveau critique en ouvrant les vannes de la centrale hydroélectrique de Dneprovsky.

17. Bien évidemment, nous savons tous pertinemment qui a poussé l'Ukraine sur la voie de la destruction, en la transformant en un chaudron de violence, et qui la soutient également en tant que mandataire pour mener une « guerre juridique » contre la Russie au sein même de cette Cour.

18. Nous nous présentons devant vous aujourd'hui pour démontrer que la requête déposée par l'Ukraine doit être rejetée en raison de l'absence totale de fondement juridique ainsi que de preuves factuelles. En fin de compte, ni la CIRFT ni la CIEDR n'ont absolument aucun rapport avec l'objet des désaccords actuels entre les deux pays et sont simplement utilisées par l'Ukraine « comme un moyen de porter un ensemble plus large de sujets devant la Cour ».

19. La nature artificielle de la présente affaire est également démontrée par le fait qu'elle comporte deux situations factuelles complètement différentes et, en fait, deux affaires bien distinctes. C'est pourquoi comme d'habitude nous avons organisé la plaidoirie d'aujourd'hui en deux parties. M. Kuzmin présentera nos objections concernant la CIRFT. Nos conseillers aborderont ensuite les arguments de manière plus détaillée. Ensuite, M[me] Zabolotskaya se penchera sur la CIEDR et d'autres conseillers de Russie aborderont les arguments juridiques et factuels.

20. Ceci étant dit, j'aimerais demander que la parole soit maintenant accordée à M. Kuzmin.

The PRESIDENT: I thank the Agent of the Russian Federation and I now give the floor to H.E. Mr Gennady Kuzmin, Agent of the Russian Federation. You have the floor, Excellency.

Mr KUZMIN:

1. Madam President, Members of the Court, it is a privilege to appear before you in order to introduce the Russian Federation's case on the ICSFT.

2. Ukraine's Agent said on Tuesday that Russia is here to pay tribute to international law. It is true. Russia respects international law and the Court as the principal judicial body of the United Nations.

3. But does Ukraine respect the Court? Apparently not. Otherwise, Ukraine wouldn't bring to this Court such allegations which have no basis in law or fact.

4. On Tuesday, counsel for Ukraine Mr Koh said something about a "big lie". There are certainly big lies involved, but they come from the Ukrainian side, which continuously attempts to

deceive this Court with false and/or incomplete information, even omitting or distorting its own evidence when it clearly contradicts Ukraine's claims.

5. Perhaps the biggest lie coming from Ukraine is that people fighting for survival are "terrorists".

6. After the extremely violent *coup d'état* and the attempt to kill the legitimate President of Ukraine, who was forced to flee the country, the Maidan régime unleashed a brutal crackdown on all dissenters, culminating in the horrible massacre in Odessa on 2 May 2014, when over 50 people were burned alive by Maidan régime[1]. That was not considered an act of terrorism, and has not been effectively investigated to this day.

7. The East of Ukraine rejected this hostile régime. Kiev responded by launching an armed attack against its own citizens, labelling it an "anti-terrorist operation". The attitude of the Maidan régime towards Donbass may be summarized by one quote from Deputy Prime Minister Reznikov: he called Donbass a "mentally ill territory" and "a cancerous tumor that must be cut out"[2].

8. Mr Koh asked — Who targeted the civilian population? The response is very simple — it was Ukraine that conducted most of the shellings in the Donbass conflict. This is confirmed by the very reports of UN and other bodies that Ukraine relies on[3]. The majority of civilian victims are on the side controlled by the Donbass Republics, shelled and bombed by Ukrainian armed forces. Please see the timeline of Ukrainian attacks.

9. In doing so Ukraine used the very same Grad and Smerch Multiple Launch Rocket System it claims are "inherently indiscriminate weapons". Russia provided an extensive, although by no means exhaustive list of such incidents in our Rejoinder.

10. When talking about shellings, Ukraine ignores the vast amount of evidence, including from its own side. For instance, with regard to Mariupol, Ukraine never mentions the interrogation of Kirsanov, who allegedly acted as a spotter for DPR, but deliberately supplied wrong co-ordinates of military objectives in the city. This is confirmed by materials presented by Ukraine in this Court, as

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[1] RU, paras. 455 and 524.

[2] 5th Channel, Rendezvous with Yanina Sokolova, Oleksiy Reznikov: "I do not follow Sivokh's reconciliation platform . . .", 31 Oct. 2020, available at https://youtu.be/5vkfOlKkuQk (judges' folder, tab 2.1).

[3] RR, para. 61.

well as by the decisions of Ukraine's own courts and publications of Ukrainian media[4]. Ukraine also constantly downplays the fact that it routinely located its armed forces in residential areas in order to use them [these areas] as human shields.

11. In the case of Kramatorsk, Ukraine concedes the presence of a high-value military target and Ukraine's own expert agrees that the Smerch Multiple Launch Rocket System was an "ideal tool for the job", the question only being the range of deviation of some of the rockets. Considering Ukraine itself routinely used Smerch to attack cities, with many civilian casualties, and never considered it terrorism, this is a moot point.

12. In Volnovakha, Ukraine absurdly claims the Bugas checkpoint is not a military object, even though its own legislation clearly says otherwise, as does the presence of military personnel, armoured vehicles, artillery, fortifications and minefields. Ukraine also completely ignores the evidence that shows how the attack could have been friendly fire or a deliberate provocation from the Ukrainian side.

13. Mr Koh also asked — Who did United Nations human rights monitors find was responsible for a reign of intimidation and terror? In fact, the very reports, that Ukraine cites, clearly state that it was Ukraine's so-called "anti-terrorist operation" that was largely the cause of "a climate of insecurity and fear" in Donbass[5]. The *UN* monitors say that the civilians "were caught in a crossfire" between Kiev government forces and the rebels[6]; that accusations of "financing of terrorism" against those supporting the eastern regions are "hate speech" and should not be used as a pretext for persecution[7]; that the Ukrainian Security Service was engaged in illegal arrests and forced disappearances of those who opposed the Maidan régime[8]; and that the "assisting communities in the east" is a "new civic spirit that will help drive the next phase of the much needed change in Ukraine"[9]. Finally the UN monitors urged all sides to lay down their arms and engage in

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[4] RR, paras. 386-392.

[5] OHCHR, "Intensified Fighting Putting at Risk Lives of People in Donetsk and Luhansk — Pillay", 4 July 2014 (MU, Ann. 295; judges' folder, tab 2.2).

[6] OHCHR, Report on Human Rights Situation in Ukraine, 15 June 2014, para. 207 (MU, Ann. 46; judges' folder, tab 2.3).

[7] OHCHR, Report on the Human Rights Situation in Ukraine, 15 July 2014, para. 17 (MU, Ann. 296; judges' folder, tab 2.4).

[8] *Ibid.*, para. 79.

[9] *Ibid.*, para. 20.

a peace process — which Ukraine stubbornly refused to do for eight years, despite concluding the Minsk Agreements[10].

14. Mr Koh also asked — who destroyed MH17? He seemed to think it is a rhetorical question, but it is not. What Ukraine failed to mention to this Court, was the presence and operation of numerous Ukrainian Buks in the Donbass zone of conflict on the day of the MH17 incident and in direct vicinity of the crash site. This is proven by the information from the Netherlands's authorities supplied to the Hague District Court[11]. Ukraine has failed to prove that the missile which allegedly shot down the aeroplane was of a newer type, and Russia has proven that this missile — remains of which were allegedly discovered during the JIT investigation — belonged to Ukrainian armed forces. Ukraine attempts to downplay the fact that the Ukrainian armed forces have previously already shot down a civilian airliner, killing all 78 people on board —and nobody was accused of terrorism or even brought to justice for murder, while Ukraine's own President has said that "mistakes happen, we are not the first and not the last". On Tuesday Ukraine even had the audacity to claim it was a "lawful act".

15. Ukraine's evidence that the alleged Buk came from the Russian Federation is extremely flimsy and replete with fakes, as we will demonstrate today. On Tuesday Ukraine had nothing to say on this matter and chose to ignore it completely.

16. Ukraine has also failed to prove any kind of terrorist intent with regard to MH17. On the contrary, even The Hague District Court, which otherwise displayed obvious bias against the DPR and favoured Ukraine, concluded that there has been no intent to shoot down a civilian aircraft[12], and

[10] OHCHR, "Intensified Fighting Putting at Risk Lives of People in Donetsk and Luhansk — Pillay", 4 July 2014, (MU, Ann. 295; judges' folder, tab 2.2).

[11] RR, paras. 318-320.

[12] District Court of The Hague, Case No. 09/748004-19, Judgment against I.V. Girkin, 17 Nov. 2022, paras. 6.2.5.3, 12.5.2 available at: https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:RBDHA:2022:14037&showbutton=true&keyword=09 %252f748004-19&idx=1%2F (judges's folder, tab 2.5).

that the Buk was procured and used for air defence purposes[13]. The Hague Court, the Dutch prosecution and the JIT[14] agreed that there was no evidence of terrorism or of a war crime.

17. Ukraine's arguments hinges on the Buk allegedly being an "indiscriminate weapon". This is an absurd claim even prima facie, since the Buk is of course a highly sophisticated precision-guided weapon system designed to accurately destroy specific targets. Ukraine brazenly distorts expert reports, completely ignoring the fact that experts agree that the Buk-TELAR does have the capability to distinguish civil aircraft from military and that the TELAR was originally designed to be capable of autonomous operation[15].

18. Mr Koh claimed that the Buk has been allegedly fired at "civilian-trafficked skies". He wants you to turn a blind eye to the fact that these skies were filled with Ukraine's own combat aircraft, constantly attacking the DPR's positions and bombing DPR cities, killing civilians including women and children[16]. Ukraine chose not to close the airspace over the zone of conflict to civilian traffic. This falls into the pattern of Ukraine actively using civilians as "human shields" to protect its own armed forces from rebel attacks.

19. At the end of the day, Ukraine's MH17 case boils down to nonsense, that it is lawful and unintentional for soldiers to shoot down civilian aircraft by mistake during peace time, but unlawful, intentional and a terrorist act to do so during a time of war, while believing the target to be an enemy military aircraft. This contradicts not only the black letter of the relevant instruments, but also the interpretation of the competent international bodies, the views of legal scholars and extensive State practice — all of which indicates that a mistaken downing of a civilian aircraft in time of war negates intent for the purposes of terrorism or war crime.

20. Ukraine's accusation of "terrorism financing" is all the more absurd as Ukraine itself continued to trade with DPR and LPR in coal, steel and even weapons[17].

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[13] Joint Investigation Team, Presentation of first results of the MH17 criminal investigation, 28 Sept. 2016, available at: https://www.prosecutionservice.nl/topics/mh17-plane-crash/criminal-investigation-jit-mh17/jit-presentation-first-results-mh17-criminal-investigation-28-9-2016 (RR, Ann. 391; judges' folder, tab 2.6).

[14] Joint Investigation Team, Report, Findings of the JIT MH17 investigation into the crew members of the Buk TELAR and those responsible in the chain of command, 8 Feb. 2023, p. 64, para. 7.2.1, available at: https://www.politie.nl/binaries/content/assets/politie/onderwerpen/mh17/report_jit-mh17_8-februari-2023_eng.pdf (RR, Ann. 392; judges' folder, tab 2.7).

[15] RR, paras. 300-316.

[16] RR, para. 61.

[17] RR, Chapter II, Section B.

21. Mr Koh said how Russia "did nothing" to co-operate with Ukraine. This is plain false. Russia engaged in lengthy correspondence and consultations with Ukraine which lasted for years. However, it was Ukraine which sabotaged its own co-operation requests, by wording them in a vague manner that did not allow for qualification under ICSFT, by rejecting Russia's requests for additional information, and by refusing to provide a list of requests relating to "terrorist financing". Ukraine did not even refer to ICSFT in its MLA requests[18]. Since 2014, Russia received around a thousand MLA requests from Ukraine and executed almost eight hundred of them. Of these, Ukraine selects only twelve as purportedly related to ICSFT as evidence of Russia "doing nothing". Ukraine also claims that Russia should have "trusted" Ukraine on its claims that DPR and LPR are terrorist organizations, instead of asking for some objective evidence of that being the case[19].

22. Today we will show that there was no basis for such trust at all, as Ukraine routinely used trumped-up charges of "terrorism" and its "financing" to persecute dissenters, and none of the incidents Ukraine brings to the Court are actually acts of terrorism. Finally, Ukraine itself has, on multiple occasions, rejected Russia's requests for legal assistance, including those regarding terrorism[20], on the grounds of sovereignty; in some cases, for instance concerning Hizb-ut-Tahrir, Ukraine openly stated that it did not "trust" Russia's qualification of this organization as terrorist and thus would not execute the requests.

23. The presentation of Russia's case on ICSFT will take place in the following order:

(a) Mr Michael Swainston KC will present Russia's position on intent and knowledge as requirements for the offence of terrorism financing under the ICSFT;

(b) Professor Hadi Azari will show how funds under the ICSFT do not include weapons;

(c) Professor Sienho Yee will clarify the interplay between ICSFT and international humanitarian law in time of armed conflict;

(d) Mr Swainston will return to show how Ukraine's allegations concerning MH17 have no basis in law and fact;

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[18] RR, para. 602.

[19] RR, para. 104.

[20] RR, para. 620.

(e) Mr Kirill Udovichenko will demonstrate the same with regard to allegations of shelling, bombing and killing;

(f) Mr Yee will return after the lunch break to show that Russia fully complied with its obligations on co-operation under ICSFT.

24. I thank you for your kind attention and request you, Madam President, to give the floor to Mr Michael Swainston.

The PRESIDENT: I thank the Agent of the Russian Federation. I now invite Mr Michael Swainston to address the Court. You have the floor, Sir.

Mr SWAINSTON:

SUBMISSIONS ON INTENT AND PROVISION

I. INTRODUCTION

1. Madam President, distinguished Members of the Court, it is an honour to present to you today part of Russia's answer to Ukraine's case under the International Convention for the Suppression of the Financing of Terrorism. Ukraine accuses Russia of the serious offence of terrorist financing and its trite law that with a serious offence the accuser must have a clear case in terms of the elements of the offence in law and the evidence must be compelling.

2. Ukraine's case therefore starts on unpromising ground because, generally, we will see that terrorism offences require a specific intent, such as to injure civilians for a political purpose. By contrast, Ukraine relies on a mistake, a mistake of targeting in relation to MH17. Ukraine relies on alleged shelling and bombing in the course of an armed conflict. But injury in armed conflict to civilians is inevitable. It does not point to terrorism. Sadly, it happens even where scrupulous efforts are made to follow international humanitarian law, which regulates conflict. Professor Jens Ohlin has pointed out the importance of that distinction between combatants and terrorists. What is at stake is nothing less than a distinction between the two. It is imperative to distinguish between terrorists who deliberately target civilians and soldiers who foresee that civilians will be killed as collateral damage while striking a military target. The former is a war crime, while the latter represents lawful conduct — and, of course, soldiers also make mistakes.

3. So a key issue in these proceedings is the *mens rea* required for the terrorist funding offence under Article 2 (1) of the ICSFT. The starting-point is what the treaties say, and here the ordinary meaning of the words in context and having regard to the object and purpose of the treaty — that is our slide 4.

4. When we look at Article 2 (1) of the ICSFT, it is entirely clear that it creates an offence requiring specific intention of the funder to fund terrorist crimes under Article 2 (1) *(a)* or terrorist acts under the catch-all provision in Article 2 (1) *(b)*.

5. Ukraine has cited former Ambassador Marja Lehto. But please see our next slide, slide 5. On *mens rea*, Ms Lehto agrees that intention is carefully set out and that specific intent on the part of the funder is required: "The perpetrator must have a specific intent that the funds will be used to commit crimes, or he or she must at least know that the funds are to be so used . . . the construction of the crime is not self-sufficient but relies on other instruments". We shall soon see that those other instruments also require specific intent on the part of the terrorists who are funded.

6. As regards the funder, the key word is "wilfully" — slide 6. Professor Aust has explained that "wilfully" was used to emphasize the requirement of specific intent in relation to funding[21]. It doubles up on the subsequent express requirements of intention or knowledge in Article 2 (1) and it is convenient to look at those requirements in Article 2 (1) *(b)*, the catch-all provision for terrorist acts, because that does not depend on the separate treaties listed in the annex.

7. Article 2 (1) *(b)* sets out requirements of specific intent at two levels, the funder and the funded terrorists:

(1) the funder must provide funds unlawfully and wilfully;

(2) with the intention or knowledge;

(3) that the people funded will carry out an act intended to injure a civilian or non-combatant; and

(4) the funder must also know that this is their intent and that the terrorists have a special purpose of intimidating a population or influencing a government or international organization.

[21] A. Aust, "Counter-Terrorism - A New Approach — The International Convention for the Suppression of the Financing of Terrorism", *Max Planck Yearbook of United Nations Law*, 5, 2001, pp. 295-296 (MU, Ann. 485).

Please note that all of this is specific direct subjective intention. The *only* concession to objectivity is the point that special political purpose can be derived from the nature or context of the planned act.

8. In Ukraine's opening submissions there was an error on this point. My learned friends focused on special political purpose and the objective element there, but then they proceeded as if it applied to all of the mental elements in Article 2 (1). And, with respect, that is obviously wrong. Political purpose is the only mental criterion where there is a concession to objectivity on the basis of nature of the act and context. The rest requires specific intent on the part of the funder and on the part of the terrorist.

9. There is significance in the fact that political purpose was singled out for an objective test based on the nature and context of the act. It shows that when the State parties wanted to move away from subjective intention they did so, expressly.

10. Article 2 (3) is very informative and important on the essential aspect of intent — see slide 10. It is critical to note that the entire offence of terrorist financing is complete when the financing is provided. There is no need for a terrorist offence or terrorist act to be completed. And indeed there may be none. On the contrary, the offence of funding terrorism is made out precisely because the funder intends or knows that the terrorists will carry out a terrorist act with terrorist intent.

11. In relation to the whole of Article 2 (1) — *(a)* and *(b)* — Ukraine says it would be odd if *mens rea* of the funder requires the funder to know the mental state of third parties — in other words, the funded terrorists. But, with respect, that is not odd at all. The whole offence is complete at the point of financing. It depends on the funder's knowledge of the terrorists' terrorist intent. It is exactly that knowledge that makes the funding dangerous.

12. So Article 2 (1) *(b)* requires clear, specific intention at the level of the funder and at the level of the terrorist.

13. The same applies in relation to the funding of terrorist offences under Article 2 (1) *(a)*. Article 2 (1) *(a)* says the funder must intend or know that one of the crimes in the listed treaties in the annex is going to be committed. This is a requirement for specific direct intent on the part of the funder, and the funder must know the criminal intent of the terrorists. Otherwise, clearly, the funder

does not know that a terrorist offence will be committed, because all of the relevant terrorist offences require specific criminal intent on the part of the terrorists.

14. Let us start with the Montreal Convention — slide 12. The offence catches a person who unlawfully *and intentionally* destroys an aircraft in service.

15. That raises the question: what kind of aircraft? The answer, from the plain words in context, is clear. First, the title of the Convention is: Convention for the Suppression of *Unlawful Acts Against the Safety of Civil Aviation*. The acts in question must be directed against civil aircraft.

16. The same point flows from the preamble, which you have at slide 15: "*Considering that unlawful acts against the safety of civil aviation* jeopardize the safety of persons and property". Again, this is unlawful acts directed at a civil aircraft.

17. In their submissions, my learned friends for Ukraine said the intention to destroy any aircraft was enough. The word "civil" was not in the Article. But it is in the Convention, in the title, and in the preamble, and it is the entire context.

18. Article 4 (1) puts the matter beyond doubt — slide 16. It provides: "This Convention *shall not apply to aircraft used in military*, customs or police *services*."

19. We give the overall result of all this at slide 17. The Convention creates an offence of specific intention and the intention plainly relates to a civil aircraft. There must be a specific intention to destroy a civil aircraft.

20. Now in its Reply, Ukraine says two things:

(1) First, "the status of the destroyed aircraft dictates whether the Convention applies". In other words, the type of aircraft is a jurisdictional point: we can wait and see whether the Montreal Convention applies depending on what kind of aircraft is shot down. That is their first point.

(2) Second, they say that the status of the aircraft is not part of intent.

21. But again, with respect, this is hopeless. We have seen that under Article 2 (3), the offence under the ICSFT is complete at the point of financing. There need not be any actual attack. It is therefore impossible to wait for a tragedy to happen with mistaken targeting and then retrospectively to decide that the ICSFT applies, because retrospectively, the shooting-down was within the Montreal Convention.

22. Ukraine proceeds to cite irrelevant authority for the notion that the *mens rea* requirements in Article 2 (1) are only jurisdictional (see Slide 20). Ukraine cites the *Tadic* case, a decision of the International Criminal Tribunal for the former Yugoslavia. But that Tribunal was dealing with Article 5 of that Tribunal's founding statute, which says: "The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict"[22] and various crimes are then listed.

23. But that is absolutely not our case. The founding statute did not create offences. It set out the jurisdiction of the Tribunal with respect to certain offences. Here, the ICSFT was creating the offence of terrorist financing. It did create that offence, and it did so with clear, express requirements of specific intent — at the level of the funder and at the level of the funded terrorists.

24. Moreover, it is clear in context that this specific intention covers the civilian status of the aircraft — we have seen that, with the title, the preamble and Article 4.

25. The International Law Commission (ILC) endorses that view at the highest level of international legal analysis and commentary (see Slide 19). We have cited the commentary on the 1972 Draft Articles on the Prevention and Punishment of Crimes Against Diplomatic Agents and Other Internationally Protected Persons. The commentary says:

> "The word 'intentional', which is similar to the requirement found in article 1 of the Montreal Convention, has been used . . . to make clear that the offender must be aware of the status as an internationally protected person enjoyed by the victim"[23].

26. So the ILC thought that under the Montreal Convention, intention takes in the status of the aircraft. There must be an intention to destroy a civil aircraft; the ICSFT does not cover mistakes.

27. The point on mistakes also appears from the *travaux* you see at paragraph 5.1 on the next slide. It refers to:

> "In some cases such an act would be inherently destructive or harmful and, *if intentionally done (and not through inadvertence or mere negligence*), would constitute an offence.[24]

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[22] *Prosecutor* v. *Tadic*, Case No. IT-94-1-A, Appeals Chamber Judgment, 15 July 1999 (MU, Ann. 463).

[23] International Law Commission, Draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons with commentaries, 1972, p. 316, para. 8, available at https://legal.un.org/ilc/texts/instruments/english/commentaries/9_4_1972.pdf.

[24] International Civil Aviation Organization: Proposal concerning interference against international civil aviation reproduced in International Legal Materials, Vol. 9, Issue 6, November 1970, para. 5.1 (judges' folder, tab 3.1).

28. This interpretation is also supported by the teachings of leading jurists which you can see on Slide 22. For example, Professor Trapp: "[t]he Montreal Convention requires States to prevent the unlawful and intentional destruction of a civil aircraft in service"[25].

29. No one was suggesting that mistakes in targeting should be treated as terrorism.

30. There is a broader point. No one suggests that military activities in the course of armed conflict should be treated as terrorism. On the contrary, Russia has drawn attention to widespread consensus that the old terrorism conventions like the ICSFT do not cover acts in armed conflict. And you see that at Slide 22. And, as set out in Slide 23, we have an ICAO comment:

> In ICAO, it has been widely understood that the aviation security instruments which criminalize certain acts are not applicable to the military activities mentioned above.[26]

According to the ICAO, that exclusion can be made clear by amendment in later terrorism conventions, but when it happens: "Such a clause would be considered as declaratory in nature."[27] The reason being there is already an implied military exclusion.

31. And that appears clearly as well from the Beijing Convention designed to replace the Montreal Convention. See Slide 24. At Article 5 (1), we have an express military exclusion, like that in the Montreal Convention at Article 4. We also have the ICAO consolidating amendment at Article 6 (2) and it says:

> "*The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law are not governed by this Convention*, and the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention."

The same point arises on the Beijing Protocol.

32. Madam President, distinguished judges, all of this reflects international consensus that bad targeting — especially in the course of armed conflict is not terrorism. One only has to look at the sadly growing list of instances where passenger planes are shot down by mistake to see that,

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[25] K. Trapp, *Use of Force against Civil Aircraft* (28 June 2011), available at https://www.ejiltalk.org/uses-of- force-against-civil-aircraft/.

[26] ICAO Legal Commission, Working paper A36-WP/12 LE/4, 14 August 2007, paras. 2.1.3.1–2.1.3.2, available at https://www.icao.int/Meetings/AMC/MA/Assembly%2036th%20Session/wp012_en.pdf.

[27] *Ibid*.

including, as we have heard, by Ukraine. None of these instances, none, has been regarded as terrorism by the international community.

33. In the *USS Vincennes* case, which reached this Court, the United States made very clear its view that the Convention did not catch military activities. We have set out their submissions at Slides 27 and 28. All the indications are that this view of military exclusion is generally held.

34. On Tuesday, Ukraine tried to avoid the problem of past examples of mistaken shooting by saying that, in all of these cases, the shooting was lawful, whereas anything done by the DPR was not. Ukraine relies upon the judgment of the Hague Court to say that DPR members did not have combatant immunity under international humanitarian law. But with respect, the Hague judgment is very strange on that point, because the Hague Court found that the conflict in east Ukraine was an international armed conflict. There, international humanitarian law plainly gives combatant immunity. With respect, one must consider the absurdity of Ukraine's position.

35. It comes to this: when a State destroys an aircraft in peacetime, by mistake, that is not terrorism under the Montreal Convention. But when a combatant does so in the heat and pressure of battle, it becomes terrorism. With respect, that makes no sense at all.

36. Ukraine places bad reliance on the decision of the Hague district court on the analogy of murder. They point out that the court considers that if A intends to murder B and murders C by mistake, that is no defence. It is still murder. But there is no analogy with our case. In domestic law, A cannot kill B or C. The position is different here — under the ICSFT — where there is an armed conflict. First, there is no terrorist intent when somebody fighting in an armed conflict makes a mistake. There is no terrorist intent when the mistake is made in peacetime or in conflict. And secondly, there is a general exclusion of military activities.

37. So that is the Montreal Convention. We need to look quickly at the ICSTB, the Terrorist Bombing Convention.

38. Ukraine ignores the requirements for specific intention there. Again:

> "Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally delivers etc. an explosive etc. in etc. a public place etc. (a) with the intent to cause death or serious bodily injury; or (b) with the intent to cause extensive destruction."

39. It is clear from the context that injury and damage relate to civilians and civilian infrastructure.

40. Ukraine also ignores the exclusion of military acts in this Convention, from the scope of terrorist bombing. It is only concerned with terrorism. We see the references in the title and preamble and there is an express exclusion of military activities in Article 19 (2):

> "The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention".

41. So both of the relevant treaties listed in the Annex creating predicate offences for terrorist financing require terrorist intent and they exclude military activity.

42. So how does Ukraine persist in its case?

43. Well first, it makes a general point to cloak its inability to deal with specific intention. It says that if specific intent is required — at the level of the funder and the funded, the offence will be difficult to prove. They say that is inconsistent with a broad object and purpose of suppressing terrorism. But with respect, that is not constructive. It assumes the conclusion. The offences created under the ICSFT and the listed conventions are very serious. It is entirely appropriate that they should depend on proof of serious criminal intent.

44 [merged with 45]. Next, Ukraine says: well, intention is not defined, so it can introduce different degrees of intention. But that, with respect, is not right. As we have seen, Ambassador Lehto observed, and it is plain for anyone to see, intention is carefully set out — and it is specific and it is direct. It has set a specific intent at the level of the funder and at the level of the funded terrorist. The only point left to objective assessment is special political purpose under Article 2 (1) *(b)* which can be gleaned from the nature or context of the Act. But that is a single instance, and it shows that when States wanted that, they used express words; and that position fits with what we have on Slide 37.

45. Other words — other definitions of intent —were considered. The United Kingdom said it should be sufficient if a person provides funds in circumstances where there is reasonable suspicion that they will be used for terrorist purposes, unless the person can prove otherwise. That was rejected.

46. We should also pick up a comment from the United Nations Office on Drugs and Crime at Slide 38. It addressed how to draft national law to reflect the ICSFT, and it made clear that specific intention or knowledge was required. So when national laws referred to "reasonable cause to suspect"

it points out at the end that there could be problems with requests for international assistance — last four lines.

47. Ukraine says it does not rely on the first limb of Article 2 (1) — intention that funds are to be used for terrorist offences or terrorist acts, intention that they should be used. We see that at Slide 39, Ukraine's Reply at footnote 110. Instead Ukraine relies on Russia's purported knowledge.

48. But this purported knowledge — Madam President, Members of the Court — turns out to be alleged knowledge of a risk, which Ukraine says is sufficient to found *dolus eventualis*. And that risk is said to come from two things. First, in relation to MH17, it comes from the suggestion that a Buk Telar is an indiscriminate weapon, creating a risk for civil aircraft. The second factor is said to be the notoriety of the DPR as a terrorist organisation from which terrorist acts could be expected. You have heard from Russia's Agent that that is an absurd description of the DPR. But both points are unsustainable.

49. Before we turn to them, we should note in parenthesis that Ukraine's case is confused at this point. Ukraine recognizes that recklessness is not sufficient. See its Reply, paragraph 109. Recklessness — in ordinary English — is the deliberate running of a risk.

50. And then, when Ukraine tries to turn knowledge of a risk into intent, it cites *Italy* v. *Abdelaziz*, Slide 42. That is relied upon for the example of an attack on a military vehicle in a market where civilians are present and it is said by the court that there was a certainty of serious harm to civilians and that is said to show that the act was motivated by terrorist intent. However, number one, this speaks of *certainty*, not risk. There is no analogy with Ukraine's case here. And secondly, there is no consideration of the exclusion of military activities in armed conflict. But anyway, the factual propositions for knowledge of risk do not stand up.

51. First, we should note that Ukraine says that the Buk was a Russian Buk with a trained Russian crew — we have that and the references at-Slide 44:

(1) The intercepts relied on at Slide 46

(2) The observations of a journalist at Slide 47, and

(3) The intercept confirming the arrival of a Buk Telar with a crew at Slide 48.

52. Please understand that Russia absolutely rejects all of this case. There was no Russian Buk. No Buk came from Russia. No crew for a Buk came from Russia. And we will see later that the evidence propping up this case is unsourced digital nonsense.

53. But nonetheless, for the purpose of legal argument, Ukraine says there was an experienced crew. And on Ukraine's own evidence, an experienced crew should be able to distinguish between an airliner and a military ground attack aircraft. See Slide 50, setting out words of Ukraine's own expert, Dr Skorik: "[a]n experienced Buk-M1 TELAR commander and operator can fairly accurately identify the target based on its parameters (dimensions, jet engines, if any)"[28].

54. The Court can take judicial notice that the dimensions in this case are very, very different[29].

55. Dr Skorik makes clear that the Buk Telar has an autonomous, independent mode. Slides 53 and 54 cover that. It has its own radar: "ar" in Telar means "and radar" for targeting.

56. And Russia's own expert agrees that a trained crew can identify military targets and they must do so as part of the procedure for firing. That is the evidence of Mr Bezborodko at Annex 6 to Russia's Rejoinder. He again describes how:

(1) Buk Telars have got their own radar.

(2) The Telar can track the speed, altitude and direction of a potential target and see its shape. The crew must assess the target type as part of the procedure for engaging a target.

(3) A Buk Telar fires a guided missile at a specific target which has been identified as a military one.

57. It absolutely follows that a Buk Telar is not an indiscriminate weapon and analogies with nuclear weapons are precisely irrelevant.

58. But there is another point on this. It is inconsistent with what Ukraine actually did. The Agent from Russia introduced a document from Netherlands Military Intelligence, which was asked whether MH17 was within range of a Buk when it was destroyed. Incidentally, it said no and we will see that later. The document, with English translation, is at Slides 57 to 61.

59. The important point to note from the English translation is that Ukraine had Buk Telar units in theatre, and if we can see the table, they are exactly the same Buk Telar units as are attributed in the table, at the bottom, to Russia. This is covering the whole region. We can also see that these

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[28] Expert Report of A. Skorik (UM, Ann. 6).

[29] Slides 51 and 52.

Buk Telar units were operating separately. And we know that because Dr Skorik —Ukraine's expert — said a complete system includes a command unit, a targeting unit and six Buk Telars. These are scattered and separate.

60. We also know that Ukraine issued a Notice to Airmen (NOTAM) setting a level for civil aviation of 32,000 ft when we know that Buks fly higher than that. How does that fit? What it shows is Ukraine knows full well that Buk-TELARs operating autonomously can discriminate. They are not indiscriminate weapons.

61. But, the crew of a Buk is human. Humans make mistakes, as Mr Bezborodko pointed out. It is wrong — and please do read his report — to say he said it was inevitable that civilian aircraft would be shot down. What he said was "mistakes happen". He also said they were "unavoidable" and he said it in the context of the USS *Vincennes*, but talking about surface-to-air missiles as a whole.

62. We have heard from the Agent how the Dutch criminal court did not find any terrorist intent on the part of the DPR to shoot down aircraft, and even the JIT ruled out a war crime because of the absence of specific intent. Note the language: "implausible"; "they did not intend to kill civilians"[30].

63. There was no basis for anticipating, even on Ukraine's fictional case, that a trained crew would make a mistake — just as in previous instances where mistakes were made

Provision

64. It is convenient to mention a point on provision in this context. On its fictional case, Ukraine says there was a Russian Buk with a Russian crew. The Buk-TELAR: belonged to the Russian army; it was under a Russian crew; it came from Russia; it returned to Russia.

65. That is nonsense, but that is what Ukraine says. None of that involves provision of anything. The only thing sought to be provided was "air cover" against military attack. Air cover is definitely not "funds", and it is definitely not any kind of asset.

66. But I return to the second way that Ukraine says that funders in Russia had knowledge of a risk of terrorist attacks.

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[30] Slides 64 and 65.

67. Ukraine talks about the reputation of the DPR as a terrorist organization. But only Ukraine says that. No other State says it. No other international body says it.

68. Ukraine relies on a report from the Office of the High Commissioner for Human Rights to the effect that the DPR "inflicted . . . a reign of intimidation and terror to maintain their position of control". Now, there are lots of problems with that that Russia has set out in writing, and please read them[31]. Notably, the OHCHR was not dealing with terrorism under the ICSFT. It uses the word "terror" often, including in relation to Ukraine and Ukraine's forces[32]. And it does not say that the DPR was specifically targeting civilians with ground-to-air missiles, or with shells or with bombs. On the contrary, it was careful to note that heavy shelling was coming from *both sides*[33] and it urged *all sides* to put down their arms and engage in dialogue[34]. The OHCHR also did not criticize aid to the east. It welcomed the "assisting [of] communities in the east"[35].

69. The point on the trained Russian crew on Ukraine's fictional case extends to this aspect of supposed intention through knowledge of risk. Ukraine talks about the reputation of the DPR, but that is irrelevant if on Ukraine's case the Buk-TELAR was in the hands of a trained Russian crew. Because whatever might be said about the reputation of the DPR, and all that has been said is completely unjustified, nobody could expect a trained Russian crew to make a mistake and shoot down the civilian airliner. But, as we have seen, mistakes happen.

70. So, on Ukraine's materials, Ukraine has totally failed to show an intention or knowledge of funding terrorism. There was nothing that amounts to intention or knowledge under the ICSFT Article 2 (1) and there was nothing that qualified as a terrorist offence or terrorist act under Article 2 (1) *(a)* or *(b)*.

71. I would like to make a last point which meshes with an observation of the Russian Agent. I have talked a lot about the fact that terrorist conventions do not cover armed conflict and military activities. We have seen the implied and express military exclusions.

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[31] Russia's Preliminary Objections para 98 et seq.; RCM at par. 10 and paras. 14 and 15; RR at para. 27 and 124.

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

[33] OHCHR, Report on the Human Rights Situation in Ukraine (15 July 2014), para. 12 (MU, Ann. 296).

[34] *Ibid.*

[35] *Ibid.,* para. 20.

72. Armed conflict is governed by international humanitarian law, and that is outside the jurisdiction of this Court, except that it can inform the interpretation of instruments that are before the Court. The reason for that lack of compulsory jurisdiction on international humanitarian law is a practical one. States do not support compulsory jurisdiction over armed conflict because, in times of armed conflict, there is a huge risk of propaganda and there is a real likelihood that the true facts will be lost in propaganda or the fog of war.

73. Anticipating my later submissions, there is a very great risk that that has happened here.

Those are my submissions, Madam President. I would invite you to give the floor to Professor Hadi Azari, who is going to deal with funds.

The PRESIDENT: I thank Mr Swainston, and I now give the floor to Professor Hadi Azari. You have the floor, Professor.

M. AZARI :

INTERPRÉTATION DU TERME « FONDS » DANS LA CIRFT

1. Merci beaucoup, Madame la présidente. Madame la présidente, Mesdames et Messieurs de la Cour, c'est pour moi un grand honneur que de paraître devant la plus haute juridiction internationale, afin de représenter certains aspects de la réponse de la Fédération de Russie dans cette affaire.

2. Une partie importante de l'argumentation de l'Ukraine, en particulier en ce qui concerne le tragique accident du MH17, ainsi que d'autres infractions terroristes alléguées, repose sur l'hypothèse que le terme « fonds », au sens du paragraphe 1 de l'article premier de la CIRFT, a une portée extrêmement large, en fait infinie. Pour l'Ukraine, le terme « fonds » couvre, je cite, « everything under the sun ». Je vais démontrer que cet argument est intenable, mais je ne serai pas très long car la question ne fait pas de grand débat.

3. Le terme « biens » dans le paragraphe 1 de l'article premier de la convention (qui apparaît sur votre écran) est limité à des catégories spécifiques d'actifs financiers qui ont une valeur intrinsèquement monétaire. Ils constituent des formes de paiement et peuvent être librement et légalement achetés, échangés et vendus.

4. L'Ukraine propose une lecture à moitié de cet article, vous invitant à ne lire que la première ligne, et à fermer les yeux sur le reste de cette disposition. Ce n'est pas une interprétation de bonne foi de l'article premier de la convention. La notion de « biens » doit être lue dans le contexte de la disposition — et d'autorité — dans son ensemble, et en particulier à la lumière des catégories spécifiques de biens qui y sont mentionnés, à savoir les crédits bancaires, les chèques de voyage, les chèques bancaires, les mandats, les actions, les titres, les obligations, les traites, les lettres de crédit, ainsi que les documents et les instruments attestant d'un titre de propriété ou d'un droit sur ces biens. Tous ces exemples se réfèrent exclusivement à des actifs qui présentent trois caractéristiques communes :

a) ils ont une valeur monétaire intrinsèque en tant que telle,

b) ils sont des formes de paiement, et

c) ils peuvent être librement et légalement achetés, échangés et vendus.

5. Ils ne sont que des exemples il est vrai, mais ils ont tous la même nature ! Est-ce anodin ? La réponse est non. En droit, rien n'est anodin. Une interprétation de bonne foi indique clairement que le terme « fonds » n'est censé englober que les instruments et les titres, qu'ils soient mobiliers ou immobiliers, dont la nature est similaire à celle des actifs explicitement énumérés au paragraphe 1 de l'article premier de la convention.

6. La définition vise à couvrir les éléments destinés à financer la perpétration d'activités terroristes, plutôt que les éléments qui sont eux-mêmes des moyens auxquels on a recours pour commettre ces mêmes actes terroristes.

7. Le titre de la convention fait expressément référence à la répression du « financement du terrorisme ». Monsieur le professeur Koh vous a dit que le titre n'y est pour rien ![36] Il a tort. La Cour regarde aussi l'intitulé du traité pour en déterminer le but et l'objet. Les exemples abondent ; pour n'en citer qu'un : dans votre arrêt sur les exceptions préliminaires rendu dans l'affaire *Certains actifs iraniens*, vous avez indiqué ce qui suit, je lis seulement la partie pertinente qui est soulignée : « Il en

[36] CR 2023/5, p. 32, par. 33 (Koh).

va de même de l'objet et du but du traité, tels qu'ils ressortent du préambule … et dont on peut aussi trouver une indication dans l'intitulé du traité. »[37]

8. Le mot « finance » ou l'adjectif « financier/financière » apparaît pas moins de 14 fois dans la convention de 1999. Le mot « arme », zéro fois ! « [L]a munition » nulle part ! Des termes avec des connotations militaires, jamais ! Pourtant l'Ukraine vous demande de les lire dans l'article premier de la convention. Mais peut-on sérieusement imaginer qu'une question aussi sensible que la réglementation de l'approvisionnement d'armes à des groupes terroristes soit traitée, comme le soutient l'Ukraine, de manière implicite et, en passant, comprise dans un terme qui n'a qu'une connotation économique et financière ?

9. Madame la présidente, Mesdames et Messieurs de la Cour, lorsque les États ont souhaité réglementer le transfert d'armes dans les conventions antiterroristes, ils ont abordé la question de manière explicite. Les exemples ne manquent pas. Dans notre cas, ils ont souhaité limiter le champ d'application de la convention au soutien financier ou économique au terrorisme. Or, il est un principe de base du droit international que nul ne peut mettre à la charge des États des obligations qu'ils n'ont pas consenties. Insérer la fourniture d'armes dans la sphère de l'article premier de la convention ira contre la volonté expresse des États parties à la convention qui n'ont pas voulu l'y incorporer. Cette volonté fut très clairement exprimée pendant les travaux qui ont abouti à l'adoption de la convention. En effet, pour la France, qui a proposé le premier texte, le « fonds » s'entendait comme suit (vous l'avez sur votre écran) :

> « "Fonds" s'entend de tout type de ressource financière, et notamment des espèces ou de la monnaie de tout État, des crédits bancaires, des chèques de voyage, chèques bancaires, mandats, actions, titres, obligations, traites, lettres de crédit, de tout autre instrument négociable sous quelque forme que ce soit, y compris sous forme électronique ou numérique. »[38]

10. D'autres États ont manifesté la même compréhension de ce terme pendant les travaux. Pour n'en citer qu'un, pour le Japon : « Par "Fonds" il faut entendre tout avantage pécuniaire. »[39]

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[37] *Certains actifs iraniens (République islamique d'Iran c. États-Unis d'Amérique), exceptions préliminaires, arrêt, C.I.J. Recueil 2019 (I)*, par. 91.

[38] Comité spécial créé par la résolution 51/210 de l'Assemblée générale en date du 17 décembre 1996, troisième session, Projet de convention internationale pour la répression du financement du terrorisme, document de travail présenté par la France, Nations Unies, doc. A/AC.252/L.7, 11 mars 1999 (onglet nº 4.1).

[39] Comité spécial créé par la résolution 51/210 de l'Assemblée générale en date du 17 décembre 1996, troisième session, Proposition soumise par le Japon, Nations Unies, doc. A/AC.252/1999/WP.10.

11. La volonté des États de limiter le champ d'application de la convention au soutien financier au terrorisme se déduit également des lois qu'ils ont adoptées afin de mettre en œuvre la convention de 1999. Là aussi, les exemples ne manquent pas. Pour n'en citer qu'un, le code pénal des Pays-Bas stipule, dans son article 421 (qui est sur votre écran), que commet l'infraction du financement du terrorisme

> « [a] person who deliberately provides himself or another with means or information or deliberately collects, acquires, possesses or provides another with objects which, wholly or partly, directly or indirectly, serve to offer financial support for commission of a terrorist crime »[40].

12. Nul besoin de souligner que l'objet — *object* — peut être mobilier ou immobilier, corporel ou incorporel. Mais il ne financera le terrorisme que s'il sert à offrir un soutien financier à la commission du terrorisme, pour emprunter les mots de la loi néerlandaise.

13. Le mot « fonds » ne doit pas être lu et compris dans le vide et de manière abstraite. Il est un élément d'un ensemble, d'un fragment d'un texte qui est la convention de 1999. Pour l'appréhender, d'autres dispositions de ce traité doivent être vues, car elles sont toutes des articulations de la même prescription. À cet égard, le préambule est d'une importance primordiale car l'objectif de la convention y est expressément mentionné. Il s'agit de réprimer spécifiquement le financement des activités terroristes plutôt que, plus généralement, de réprimer tout soutien aux activités terroristes. L'alinéa 7, ainsi que les alinéas 10 à 13 du préambule, plus les différents articles de la convention, y compris l'article 8, l'article 12, paragraphe 2), l'article 13 et l'article 18 de la convention, font tous référence au soutien financier au terrorisme.

14. Le fait que la CIRFT vise spécifiquement à assécher le soutien financier aux organisations terroristes est également confirmé par le fait que la résolution 1373 (2001) du Conseil de sécurité[41], décidée sur la base du chapitre VII de la Charte, qui reprend de manière quasiment intégrale plusieurs éléments essentiels du régime institué par la convention de 1999[42], opère une distinction claire et nette entre le financement du terrorisme et l'approvisionnement d'armes. Ils sont figurés aux deux

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[40] Code pénal des Pays-Bas, 27 août 2014, art. 421, par. 1, al. *a)*, disponible à l'adresse suivante : https://sherloc.unodc.org/cld/document/nld/1881/penal_code_of_the_netherlands.html.

[41] Nations Unies, résolution 1373 (2001) du Conseil de sécurité, doc. S/RES/1373, 28 septembre 2001 (onglet nº 4.5).

[42] P. Klein, *International Convention for the Suppression of Financing Terrorism*, United Nations Audiovisual Library of International Law, 2009 (onglet nº 4.3).

alinéas différents. Il en va de même en ce qui concerne la résolution 51/210 de l'Assemblée générale, qui est rappelée dans le paragraphe 7 du préambule de la convention[43].

15. Nombreux sont les États qui ont suivi la même approche, y compris l'Ukraine elle-même, pour qui l'armement et le financement du terrorisme sont traités dans deux articles différents et séparés du code pénal ukrainien. L'article 258-4 concerne l'armement et l'article 258-5 concerne le financement du terrorisme[44]. Le contenu cette dernière disposition rappelle la définition de financement du terrorisme consacrée par l'article premier de la CIRFT et cela ne surprend personne.

16. Madame la présidente, Mesdames et Messieurs les juges, cela conclut mes propos. Je vous remercie infiniment de votre attention et vous demande, Madame la présidente de bien vouloir appeler M. Yee à la barre.

The PRESIDENT: I thank Professor Azari. I now give the floor to Professor Sienho Yee. You have the floor, Professor.

Mr YEE:

THE RULES OF INTERNATIONAL HUMANITARIAN LAW ARE RELEVANT TO THE INTERPRETATION AND APPLICATION OF THE ICSFT

1. Madam President, distinguished Members and judges of the Court, it is a distinct privilege for me to appear before you today to participate in the peaceful settlement dispute before this august institution, and to do so on behalf of the Russian Federation. My task is to clarify Russia's position on the interplay between the ICSFT and IHL. It is indisputable and accepted by both Parties that there existed an armed conflict in the Donbass during the relevant period for the purposes of this case. That the existence of this armed conflict triggered the application of IHL is likewise indisputable. This, in turn, has significant implications for the present case for the interpretation and application of the ICSFT, and the conventions referred to therein, contrary to what Ukraine argues[45].

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[43] Nations Unies, résolution 51/210 de l'Assemblée générale, Mesures visant à éliminer le terrorisme international, doc. A/RES/51/210, 17 décembre 1999 (onglet nº 4.3).

[44] Code pénal de l'Ukraine tel qu'amendé le 21 mars 2023, articles 258, par. 4, et 258, par. 5, accessible à l'adresse suivante : https://zakon.rada.gov.ua/laws/show/2341-14#Text.

[45] RU, p. 64, fn. 175, and p. 7, para. 163.

2. Ukraine painted a picture of the ICSFT and IHL as separate and unconnected, or, in its own words, "distinct bodies" of international law[46]. On Tuesday counsel for Ukraine argued, essentially, that there is no conflict between the two bodies, because only the ICSFT addresses financing of terrorism and, for this reason, if a *lex specialis* has to be applied, it is the ICSFT and it is also the *lex posterior*. With respect, counsel is wrong. First, the ICSFT and IHL do not both deal with financing, but they do both deal with defining "terror". Second, the relationship between the two bodies of law is not subject to a guessing game, as counsel played, but has already been specified by Article 21 of the ICSFT, which counsel did not even mention once, not even once.

3. Article 21 expressly provides that:

> "Nothing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes of the Charter . . ., *international humanitarian law* and other relevant conventions." [Emphasis added.]

4. This Article weaves IHL into the ICSFT to form an integral applicable law and gives priority to IHL.

5. This relationship between the ICSFT and IHL is that depicted in Article 30 (2) of the Vienna Convention on the Law of Treaties (VCLT) or the customary rule reflected therein. That provision states that "[w]hen a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail". The ILC found

> "a number of treaties contain a clause in which the parties declare either that the treaty is not incompatible with, or that *it is not to affect, their obligations under another designated treaty* . . . They appear in any case of incompatibility *to give pre-eminence to the other treaty*" [emphasis added][47].

This led the ILC to propose what has become VCLT Article 30 (2).

6. This relationship reaches wider than treaties, as Article 21 of the ICSFT uses "international humanitarian law" to describe what the ICSFT is not to affect.

7. This much is confirmed by the *travaux préparatoires* of the ICSFT[48].

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[46] RU, p. 77, para. 163.

[47] ILC, Draft Articles on the Law of Treaties with commentaries, Commentary (4) to Article 26, 1966, Vol. II, p. 215 (tab 5.1).

[48] RR, paras. 158-159.

8. This approach follows closely the *Nuclear Weapons* Advisory Opinion. There, the Court decided:

> "In principle, the [ICCPR] right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities."[49]

9. Similarly, the Security Council has repeatedly reaffirmed: "Member States must ensure that any measures taken to counter terrorism comply with all their obligations under international law, in particular . . . international humanitarian law."[50]

10. It follows that in a situation of armed conflict, the ICSFT clearly does not affect rights, obligations and responsibilities under IHL. The ICSFT does not — and indeed cannot — criminalize conduct that is lawful under IHL. Thus, the ICRC has declared that "instruments aimed at combating terrorism should never define those acts as 'terrorist' that are governed by IHL and not prohibited by it when committed during armed conflict, such as attacks against military objectives or military personnel"[51].

11. Other provisions in the ICSFT and of the other treaties relied upon by Ukraine also confirm this position. Our colleagues have already discussed a few treaties, which I will not go into now.

12. Our reading is further confirmed by Article 2 (1) *(b)* of the ICSFT, which defines offences to include:

> "Any other act 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*, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act." [Emphasis added.]

13. During the treaty negotiations, concern was expressed that a broad definition of the protected persons "would involve difficulties with the application of humanitarian law and could lead to the situation where certain acts would be classified as terrorism when they would be

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[49] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 240, para. 25.

[50] See for example UN Security Council resolution No. 2178, 2014, preamble, pp. 1-2 (tab 5.2).

[51] ICRC, Report on International humanitarian law and the challenges of contemporary armed conflicts, Recommitting to protection in armed conflict on the 70th anniversary of the Geneva Conventions, 2019, p. 59, fn. 78 (tab 5.3).

acceptable under humanitarian law"[52]. To alleviate such concern, as the Counter-Memorial points out, "the interpretation of the ICSFT, including the interpretation of the mental elements of a terrorist act under Article 2 (1) *(b)* . . ., must take place in light, and against the background, of simultaneously applicable and closely related relevant standards of international law"[53].

14. Article 51 (2) of Additional Protocol I of 1977, dealing with international armed conflict, must also be taken into account. That provision provides that:

> "The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence *the primary purpose of which is to spread terror among the civilian population* are prohibited."[54] [Emphasis added.]

15. The exact same language is also found in Article 13 (2) of Additional Protocol II, which is shown to you on the screen, which I will not read.

16. Of great importance, this form of intent was emphasized during the treaty negotiations. The ICRC Commentary on Article 13 (2) states:

> "Any attack is likely to intimidate the civilian population. The attacks or threats concerned here are therefore those, the primary purpose of which is to spread terror, as one delegate stated during the debates at the Conference."[55]

17. This rule is considered to reflect customary international law according to an ICRC study[56].

18. Thus, the definition in Article 2 (1) *(b)* of the ICSFT should be read in conformity with the criteria for the war crime of terror under IHL. In a situation of armed conflict, only acts which have "spreading terror" as their "primary purpose" may fall under Article 2 (1) *(b)* of the ICSFT, and this firmly excludes incidental or collateral damage to civilians.

19. In fact, these were also the positions that Ukraine itself expressed during the negotiations leading to the adoption of the Additional Protocols[57].

20. Ukraine does not object to these positions of its own, of course, or the Russian Federation's description of them in the Counter-Memorial.

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[52] Working Group to Elaborate an International Convention for the Suppression of Acts of Nuclear Terrorism, Report No. A/C.6/54/L.2 on measures to eliminate international terrorism, 26 Oct. 1999, pp. 62-63, para. 102 (tab 5.5).

[53] CMR (ICSFT), para. 197.

[54] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Art. 51 (2) (tab 5.9).

[55] ICRC, Commentary of 1987 on Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, para. 4786 (tab 5.7).

[56] ICRC, Customary IHL, Rule 2 (tab 5.8).

[57] As described in CMR (ICSFT), para. 203.

21. The above reading of Article 21 of the ICSFT, and relevant provisions, is supported by the views of the ICRC Commentary, the UNODC and many scholars expressed in a variety of contexts, all in the judges' folders for your reference[58].

22. Downplaying the role of IHL, as Ukraine attempts to do[59], would "effectively criminalize war-fighting by non-State armed groups as terrorism", to borrow the UNODC's phrasing[60]. This would disincentivize non-State actors from complying with IHL. Since the acts being financed should not be considered "terrorism" in the first place, this will undermine the object and purpose of the ICSFT — effectively rewriting it to become a "Convention on the Suppression of General Financing of Non-State Groups".

23. In light of the above analysis, IHL is not "irrelevant" to the interpretation and application of the ICSFT. Article 2 (1) weaves IHL into the Convention to form an integral applicable law and gives priority to IHL. In a situation of armed conflict, only acts which have "spreading terror" as their "primary purpose" may fall under Article 2 (1) (b) of the ICSFT, and this clearly excludes incidental or collateral damage to civilians.

I believe this is an auspicious time for us to take a coffee break if the Court so wishes. I thank you, Madam President.

The PRESIDENT: I thank Professor Yee and, indeed, before I invite the next speaker to take the floor, the Court will observe a coffee break of 10 minutes. The sitting is suspended.

The Court adjourned from 11.40 a.m. to 11.55 a.m.

The PRESIDENT: Please be seated. The sitting is resumed. I shall now give the floor again to Mr Michael Swainston. You have the floor.

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[58] See RR, paras. 171-172, 175-179, and footnotes thereto.

[59] RU, para. 184.

[60] As quoted in Rejoinder, para. 177.

Mr SWAINSTON:

SUBMISSIONS ON MH17

Introduction

1. Madam President, I am grateful. It is again an honour to appear before you, this time to resist Ukraine's case on MH17.

2. We have seen that even on Ukraine's version of the facts, it cannot demonstrate terrorist financing as a matter of law. In any event, I submit to you now that Ukraine cannot prove its version of the facts on the materials that it has chosen to present.

3. We know that according to Ukraine, Russia sent a Buk-TELAR unit into Ukraine, manned by Russian soldiers, and that Buk-TELAR supposedly shot down MH17. And then the TELAR returned to Russia with its crew. I say again: Russia absolutely rejects that allegation. It did not happen. And so we must look very carefully at Ukraine's purported proof.

Ukraine's case on the facts: MH17

4. It should go without saying that a party alleging an offence of this kind must prove it with proper evidence. In a criminal case, the prosecutor must prove the provenance of that evidence. It must be tracked back to the *actus reus* of the offence charged.

5. At the same time, some kinds of evidence must be treated with very great caution. Digital evidence is open to manipulation. Because of that, international tribunals have been consistent in rejecting videos and intercepts with no provenance, no original data and no human corroboration of authenticity. Please see slide 2. We refer to some decisions of the Tribunal for the former Yugoslavia, and you see the quotes:

— "[f]actors such as authenticity and proof of authorship will naturally assume the greatest importance in the Trial Chamber's assessment of the weight to be attached"[61];

[61] *Prosecutor* v. *Naser Oric*, ICTY Trial Chamber II Order Concerning Guidelines on Evidence and the Conduct of Parties during Trial Proceeding, 21 October 2004, Guidelines on Evidence (III), iii.

— in *Prosecutor* v *Tolimir*, the Tribunal admitted evidence of intercepts but only after the intercept operators testified to describe the procedures that were followed in producing the intercepts. We have nothing like that from Ukraine[62].

At slide 3 we refer to:

— *Prosecutor* v *Renzaho*, again there the International Criminal Tribunal for Rwanda refused to admit audio evidence "due to lack of information about the recording and its provenance". And that was despite four witnesses claiming to identify the accused's voice. The point is, voices can be faked[63].

— Then we have *Case 001*, from the Extraordinary Chambers of the Courts of Cambodia. Video footage was excluded in part because "verification of the reliability of the footage, a pre-condition for its use as evidence, is unlikely to be obtained within a reasonable time"[64].

Evidence is not accepted without proof of provenance, and that especially applies to digital evidence.

6. Now, a preliminary point. In Ukraine's opening submissions, my learned friends for Ukraine said that Russia could not contest Ukraine's case on the facts because it had not done so before. That is not correct. Russia has contested all of Ukraine's case in open pleadings in the European Court of Human Rights and in this case. In its pleadings here, it has refused to accept Ukraine's digital material, in the form of the intercepts from Ukraine's Security Service (the SBU)[65].

7. Ukraine and, indeed, the Netherlands have been fully aware of Russia's objections to lack of provenance for years. They were also being examined in Strasbourg. But in the events that have happened, there can be no resolution there because Russia has left the Council of Europe. Under Article 26 (4), that is an end of things.

8. It is a matter of regret for Russia that the European Court of Human Rights has purported to continue with that case to a purported decision on admissibility. It is even more regrettable that the admissibility decision does not even summarize, let alone address, many of the points that I shall now draw to your attention.

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[62] *Prosecutor* v. *Tolimir*, ICTY Trial Chamber Judgment II, 12 December 2012, para. 63.

[63] *Prosecutor* v. *Renzaho*, ICTY Decision on Exclusion of Testimony and Admission of Exhibit, 20 March 2007 para. 1.

[64] *Case 001*, ECCC, Decision on the Vietnamese Film Footage Filed by the Co-Prosecutors and on Witnesses CP3/3/2 and CP3/3/3, 29 July 2009.

[65] CMR, para. 304, see also footnote 300.

9. For present purposes, the points exist, and they are or should be public on Russia's pleadings in Strasbourg and I am sure they will be in Russia's Rejoinder here.

10. Ukraine has always had the burden of proving its case in all relevant tribunals and it was for Ukraine to choose how to do that. And we respectfully submit: it cannot do that without addressing obvious identified deficiencies in its materials. Just as an example, it cannot rely on social media and intercepts to track a supposed Russian Buk from Russia into Ukraine and back again without providing original digital files. You cannot put forward a digital case without even providing the digital files.

11. There is a broader concern here. There are real points that have not been considered by any Court: not in The Hague Court, not in the European Court of Human Rights, which on any view had only reached the admissibility stage. Justice requires that all of us as professionals, including the Court, look carefully at Ukraine's purported evidence, and the problems with it. This is not a case for procedural games.

12. Ukraine relies on the work of the Dutch Safety Board to prove that MH17 was destroyed by a Buk missile with a 9N314M warhead. Just in parentheses, Russia has not agreed to resolution of facts by the Dutch Safety Board, so we must look at the evidence.

13. I start with the DSB's conclusions that a Russian Buk missile exploded outside the port side of the cockpit of MH17. There are real problems with the DSB's work.

1. Triangulation

14. Slide 6 shows how the DSB supposedly proved the explosion of a Buk on the port side of the cockpit by triangulating sound from the explosion to four different microphones in the cockpit. The difference in time allows calculation of the point of the explosion. That was the theory. The origin of the sound of the explosion is shown outside and slightly above the port side of the cockpit.

15. Unfortunately for the DSB and Ukraine, Russia's experts demonstrated in Strasbourg and here that this is a totally impossible analysis because of basic physics. And they are experts of the highest distinction[66].

[66] Expert Report of Oleg Vladimirovich Rudenko, Boris Ivanovich Goncharenko and Andrei Sergeevich Shurup (RR, Ann. 372).

(1) It was impossible to triangulate using sound, because there is no sound within tens of metres of an explosion.

(2) What there is, is a shockwave that moves very much faster than sound, destroying structure as it proceeds.

(3) What there also is, is random shrapnel, which again moves at many times the speed of sound. And again, it destroys things as it goes. That is the point of it.

16. Quite obviously therefore, any sound at any of the microphones in the cockpit would come from local destruction of the aircraft as a result of the shockwave and random shrapnel. It is impossible to do straight line triangulation assuming sound.

17. Consider what that means. It means that whilst the DSB produced a glossy report which is ostensibly convincing for a lay person, that triangulation was fiction. This is key analysis relied on supposedly to prove that a Russian missile exploded outside the cockpit.

2. Problems with bowties

18. Secondly, slide 8 — bowties. In order for the DSB — and indeed, Ukraine — to implicate Russia, they have to show that it was a missile with a 9N314M warhead, because that is the kind of missile in use by Russia that contains bowties. And here[67], you can see the bowties: they are vertical and between them are smaller, square elements. The point is, only this missile could be the Russian one. An older missile without bowties may well have come from Ukraine. And you have seen the point that on the Dutch Military Intelligence document, it was a Ukrainian Buk that was closest to MH17.

19. Now, the DSB made use of purported bowties but let us look at their provenance. The story begins with Mr Akkermans, a journalist at RTL. After bowties became an issue in the DSB investigation, Mr Akkermans claimed to have found one.

20. RTL produced a video of the find, we have got it at slides 11 and 12. Here is Mr Akkermans[68] — next slide[69] — there is the bowtie, lying on top of the wreckage of MH17, very

[67] Slide 9.

[68] Slide 11.

[69] Slide 12.

conveniently. But, see slide 13, that piece of wreckage landed the other way up. So that bowtie could not possibly have been discovered sitting on the other side of that piece of wreckage.

21. Now before this upside-down problem was discovered, the DSB used the Akkermans bowtie to persuade Almaz-Antey, the Russian manufacturer of the missile, that it must have been an 9N314M with bowties. Mr Malyshevskiy, a specialist there, made a presentation that cited the Akkermans bowtie front and centre — you have got it on slide 14. Almaz, maybe naively, took for granted what was said about provenance of physical evidence. And you have got Mr Malyshevskiy's witness statement in the Rejoinder at Annex 369[70].

22. Now, when the DSB encountered the upside-down problem, they quietly stopped relying on this bowtie. But there is no hint of any investigation by the DSB, the Dutch police, the JIT or anybody else into how and why that false bowtie was sought to be inserted into the DSB's work. Any proper investigation would have worried immediately that somebody had the animus of trying to blame Russia. There was no such concern at the DSB. Instead, it began to discover its own bowties.

23. In around July 2015, the DSB claimed to have found them in the bodies of the crew of the aircraft and in the cockpit — slide 15. But Russia pointed out two problems. First, the bowties were supposedly found long after the funerals of the crew[71]. We have given references to coverage of those.

24. Ukraine has not answered this point. There is nothing from the DSB. The argument would have to be that bowties were found earlier and only examined later. But given the total focus on missiles, proof of a Russian missile and anything significant, it is absurd to suggest that items, fragments, that did not look like parts of the aeroplane, would be left for later.

25. It does not help that between the draft DSB report and the final report, the DSB was thoroughly confused about where the bowties came from. The fragments are attributed to different bodies. We have another bowtie fragment supposedly discovered in the cockpit, but different locations were given for it. You see in the witness statement of Mr Malyshevskiy[72] and the schedule from Almaz.

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[70] Witness statement of Mikhail Malyshevskiy (RR, Ann. 369, judges' folder, tab 6.1).

[71] RR, para. 31 and footnote 1836.

[72] Witness Statement of Mikhail Malyshevskiy (RR, Ann. 369).

26. Now, there was a further problem with this cockpit fragment — we have that at slide 18. Scientific analysis showed that after the explosion of the warhead, the heavy bowties would lose mass, but there was a certain minimum mass. And the Netherlands National Aerospace Laboratory calculated that it was 5.67 g[73]. The NLR weighed this very piece and discovered that it was 5.5 g, and so the conclusion followed that it did not qualify as a potential bowtie.

27. The DSB ignored that. It proceeded to make this bowtie its star bowtie, even though the mass was inadequate. And the solution to the mass problem was extraordinary. This same fragment was falsely recorded in the final DSB report as having a greater mass: 5.5 g measured by the National Aerospace Laboratory became 6.1 g — a little over that laboratory's minimum. There has been no explanation whatsoever as to why the DSB falsely recorded this key piece of evidence.

3. Problems with penetration damage

28. Next, problems with penetration damage. The DSB relied on penetration damage to the port side of the cockpit. You see that overall there and you see lots of pieces of the port side fuselage at the cockpit. But where did these pieces come from?

29. Mr Bociurkiw, an OSCE observer, was very concerned about what happened to the cockpit on the ground[74]. We see that from slide 23, we have set out what he said. In summary, he said[75]: at first the cockpit was very much intact; then it was spread out; and men with uniforms were hacking at it with power saws.

30. See now slide 24. This shows that the men with power saws were members of Ukraine's State Emergency Services (SES). See also slide 25. This shows that by the time the cockpit wreckage was taken away, all of the port side of the cockpit was missing.

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[73] Netherlands Aerospace Centre (NLR), Presentation "Damage Investigation MH17" (RR, Ann. 367, judges' folder, tab 6.2).

[74] When asked at a JIT media presentation about the source of intercepts, Wilbert Paulissen (head of the National Investigative department of the Dutch police) first stated that the intercepts were "mainly" from a Ukrainian service. When pressed about his use of the word "mainly" and asked whether there were any other sources, he stated that they were all intercepts from Ukraine — see Ruptly, Translation of JIT Press Conference, Sept. 2016, available at: https://m.facebook.com/RTnews/videos/10154726285794411/.

[75] Slide 23 sets out what Mr Bociurkiw said: ". . . going almost daily to the cockpit scene, that has been the most stark in terms of how it's changed. When we first arrived there . . . the cockpit appears to have just slammed down into earth. It was pretty much intact. Over the days, we have seen that piece of cockpit kind of spread out like this. Day two, I believe it was there were actually men in uniform hacking into it with a power saw." https://www.youtube.com/watch?v=76PG9RQStFU at 2 minutes 45 seconds (Rejoinder paragraph 19, previously at Annex 13 to Russia's ECtHR Submission of December 2020)."

31. Note some chronology on that — see slide 26. The last physical evidence was collected between April and May 2015. Now let us see how the DSB recorded the relevant pieces — slide 27.

32. In the draft DSB report, July 2015, we have one black piece. Now see slide 28. The final DSB report appeared in October 2015. And by this stage the black pieces have multiplied. Now it is critical to notice that black in their scheme means no known provenance. So, on the face of it, we have a history of interference with critically important wreckage, and no proof of provenance.

33. It is very odd that there is no proof of provenance, given that Mr Bociurkiw, the OSCE observer, said that the cockpit was initially intact before mysterious men hacked at it with power tools. Those men from Ukraine's emergency services. But at any rate this is evidence without provenance which has been interfered with by Ukraine, and it is not proper evidence in this case. This point has been live for a long time, it has never been dealt with by Ukraine, they just put forward the DSB report as if that is dogma on everything.

34. There was another problem. Almaz-Antey did an experiment where they replicated a Buk M1 explosion, with the bowtie warhead, next to a similar aeroplane — slide 30[76].

35. Here, with a bowtie warhead in the position claimed by the DSB, we see a rash of bowtie holes. There were no bowtie holes on these mysterious pieces, said to represent the port side of the cockpit in the DSB report. Almaz-Antey concluded that the missile could not have been a modern missile with a bowtie warhead given the absence of bowtie holes. If there were a missile, it would need to be an older one from Soviet times — which only had the small square shrapnel and not the larger bowties. See on that Russia's Rejoinder, Annex 1, page 128. Now, that suggests a Ukrainian missile.

36. This affects other key points because shrapnel damage can give an indication of the orientation of the missile relative to the aircraft when it explodes and that allows calculation of the area where the missile was launched from. The latest work from Almaz shows that the DSB's assessment of the firing position does not work. See Slide 31 and the evidence referred to there.

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[76] Report of JSC Air and Space Defense Corporation "Almaz-Antey" on the results of studies related to the technical investigation into the crash of the Malaysian Airlines Boeing 777-200 9M-MRD (flight MH17), 2023, p. 79, clause 5.2.3 (RR, Ann. 1).

4. Problems with explosive traces

37. Next problem — explosive traces. The DSB claimed to have done swab tests for explosives.

38. But the draft report says that 500 swab tests were done on pieces of aeroplane wreckage and also on missile pieces. (The missile pieces emerged, with no provenance at all, very late in the day.) In the final report that 500 becomes 126 with no explanation and it makes no sense because, please imagine you are doing a proper scientific forensic investigation looking into an instant like this. How can you possibly lose that many swabs?

39. In the Conclusions of the final DSB report, it was said (at page 255) that "the missile parts . . . had traces of a type of explosive (i.e. RDX) that is similar to the traces found on the wreckage [of the aeroplane]".

40. But even within the DSB report just looking at that, it is not correct.

(1) The DSB draft report in July 2015 said (at paragraph 2.16.3): "500 swabs were taken . . . positive results were recorded [on the wreckage of the aeroplane] for RDX and TNT".

(2) The final report said 126 swab samples, and it said that positive results were recorded for RDX, TNT and PETN on the aeroplane parts, whereas only RDX was found on the missile part.

41. So that is all very odd. First, there was reluctance between the two reports to mention PETN, and we do not know how extensive those swab results for PETN were. We do know it is not a mistake because in the Dutch prosecutor's prosecution, he presented one page of the swab results and it shows that the aeroplane parts bore traces of PETN and its degradation products. You have that page of results at Slide 34— PETN up at the top.

42. The significance is this. PETN is not RDX. It is the terrorist explosive of choice when it comes to blowing up airliners. It was used by Richard Reid — the shoe bomber, and Umar Farouk Abdulmutallab — the underwear bomber.

43. There has been no explanation why the DSB has been inconsistent about the number of swab tests for explosives. There has been no explanation why it did not mention PETN in the draft report and there is no discussion of the potential significance of PETN. In practical effect, the DSB only explored a case against Russia, and that case was based on non-existent bowties and wreckage without provenance.

5. Tracking the Buk

44. The second part of Ukraine's case against Russia relies on alleged tracking of a Buk-TELAR from Russia and back again using social media. Ukraine relies on a Dutch National Police report, Bellingcat, a supposed collective of citizen journalists, and the work of the Joint Investigation Team — the JIT, and Russia was not a member of that. Again, Russia has not agreed to delegate fact-finding to any of those. Now these digital files were supposedly found on the internet or provided by Ukraine's Security Service, the SBU but there is no proper evidence of provenance or authenticity.

45. The pictures supposedly show the Buk unit at various points on the route. We can see that from the Dutch National Police report; and the pictures showing it stopped at various points.

46. All of these are digital media files and that digital media is malleable. Russia has asked for the original files for years now. They have not been produced by either the Ukraine or the Netherlands.

47. It is not just Russia that thought they were important. Please look at Slides 41-44: 41 is a document from the Australian Federal Police forensic department. They wanted the original files to do their own analysis and you can see their conclusion at Slide 45. This is in 2015.

48. Australia as a member of the JIT and the Austrialian Federal Police are not provided with original files. What they were provided with was clearly manipulated.

6. The Snizhne video

49. Next, the Snizhne video. One of the most disturbing parts of Ukraine's evidence concerns the Snizhne video — showing a Buk unit that supposedly moves up a hill or towards a hill, near Snizhne, to its firing position and it is said that it shot down MH17 from there. Again, Ukraine has provided no original data file, and the provenance is very strange.[77].

50. Eliott Higgins is supposed to have found it on a social media account. He founded Bellingcat, about three days before MH17 was destroyed. Mr. Higgins has said that he found the video on Youtube on 17 July 2014, the day of destruction of the aeroplane, but the original posting

[77] Expert Report Analyzing Videos from Social Media (RR, Ann. 361). Report on Expert Examination of a Video File for Any Signs of Falsification (RR, Ann. 362).

was taken down. No matter, says Mr. Higgins he had taken a copy of it and he says that he re-uploaded it onto Youtube the same day[78].

51. Fortunately for justice, the version first uploaded was preserved on an automated web service, and Russia's experts were able to study it. Their report is Rejoinder, Annex 362. Now comes an extraordinary revelation. The first version of the Snizhne video was encoded on 16 July 2014 — *the day before MH17 was destroyed*. You have that at Slides 47-48.

52. That is significant because, as we see Slide 49, the date of uploading on to Youtube gives the encoding date, even if the video is only published and released for public view, later[79]. Hence, one can have the date of 17 [July 2014] on the published version when you look at Youtube but, when you see the metadata of the original file, the encoding was on the 16th. This absolutely shows that the video existed before MH17 was destroyed and it *absolutely* shows that it cannot prove a Russian Buk moving to an alleged firing position.

53. Quite separately, there are lots of problems with the video. I am going to take those very shortly because time is short, but there is a hard line at the top of the video. Sorry, first of all, on this Slide 50, one of the bushes — vegetation — develops a hard vertical line as the Buk goes by, maybe indicating the edge of a superimposed layer of activity where the Buk moves. And then, Slides 51-52, there is a hard line across the video, just before the hill, and the Buk stops precisely there. In fact, the Buk stops with the propagandists who developed this kind of thing. We will come to that later. The Buk stops there, and the reason is that the forger did not have a view of the Buk giving its topside in order to take it up the hill.

54. There are also lots of technical issues, problems, with the video listed at Slide 53[80]. Please read that. Note that later versions of this video were better in quality than the first — better than the original. That does not happen with genuine evidence.

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[78]The Guardian, *MH17: missile launcher was in towns near crash site, videos suggest*, 20 July 2014, available at https://www.theguardian.com/world/2014/jul/20/malaysia-airlines-mh17-videos-missile-launcher-torez-snizhne (judge's folder; tab. 6.12).

[79] Report on Expert Examination of a Video File for Any Signs of Falsification, pp. 27-28. (RR, Ann. 362).

[80] Slide 53 states: "he BUK is shorter in some frames. There were differences between different versions. Later versions were better quality than the first. Uneven and artificial blurring. Different contrast at the same depth of field. Shadows are not consistent. Russia's Rejoinder Annexes 361, 362 — Expert Reports — Deployed in Strasbourg."

55. Evidently, the JIT was happy to rely on this video which has all the hallmarks of an information operation. The JIT said there were checks on everything digital, but obviously there were none, otherwise all of these points would have been seen and openly and fairly addressed.

56. As to provenance, the JIT, at best, have a secondary copy put up by Mr Higgins, but that does not authenticate the original video.

57. More generally, it was wrong for the JIT to accept anything from Mr Higgins or Bellingcat without answers to some very obvious questions. For example, who exactly is Mr Higgins? Does he have any relevant expertise? How did he in his personal career suddenly move from unemployment to expert blogger on chemical weapons in the Syria conflict?

58. Then come some really serious questions. Why was Bellingcat listed as a partner organization in the Integrity Initiative[81] (see slide 55)?

59. The Integrity Initiative seems to be a platform for information operations that was secretly funded by the British Government[82]. You see that on slide 56 and slide 57.

60. The funding went through the Institute for Statecraft, which is an opaque Scottish charity — it is difficult to find who is behind it — and its registered office — I will show you that at slide 58 — was a derelict factory in Scotland[83]. The Institute for Statecraft was run by one Christopher Donnelly — slides 59 and 60. You see his career: Mr Donnelly, on the face of it, was Special Adviser for Central and Eastern European Affairs for four NATO Secretaries General[84].

61. Bellingcat was also involved in other proposals for information projects like the Zinc Consortium[85] at slide 61. You see Bellingcat bottom left, next to Media Diversity, then the digital forensics lab, which is Atlantic Council, and that is adjacent to the rump of the bull. Another person involved in this Zinc project was Gordon MacMillan. We have his CV also. He was an executive of

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[81] Integrity Initiative handbook (judges' folder, tab. 6.4).

[82] Grant Agreement between Foreign and Commonwealth office and Chris Donnelly, Co-Director of the Institute for Statescraft, available at https://www.pdf-archive.com/2018/12/28/scan/scan.pdf (judges' folder, tab. 6.5).

[83] "Defending disinformation against democracy: the Integrity Initiative", *Politics and Insights*, available at https://politicsandinsights.org/2019/01/10/defending-disinformation-against-democracy-the-integrity-initiative/ (judges' folder, tab. 6.6).

[84] NATO Official Website, Chris Donnelly — NATO profile, available at https://www.nato.int/cv/is/sp-adv/donnelly.htm (judges' folder, tab. 6.7).

[85] Zinc Network, Technical Proposal: A network of NGOs, 31 Aug. 2018, available at: https://www.pdf-archive.com/2019/03/22/zinc-networktechnical-responsefinal/ (judges' folder, tab 6.8).

Twitter, but he was also a reservist in the British Army's 77 Brigade[86]. You can see that at slides 62 and 63. The 77 Brigade is the British army propaganda unit. Slide 64.

62. Now, any proper investigation, looking at matters objectively, might have been sceptical about the provenance of that video and they might have looked at points like that — not any of the august institutions on which Ukraine relies as evidence, without providing any of the underlying digital material.

7. Intercepts

63. Finally let us look quickly at intercepts. These supposedly show: rebels calling for air support; the sending of a Russian Buk-TELAR and crew; and surprise when it was realized that a civilian plane had been hit.

64. The first and most important intercepts were published by the SBU on 17 July 2014, but you see — slide 66 — again, this compendium was encoded the day before MH17 was shot down, on 16 July 2014.

65. Bellingcat admit that but they try to say, "Oh, there was a technical hitch with all MP4 files because of a problem with the standard used to encode them"[87].

66. Russia's experts, who again are very expert indeed, have rejected that for a list of technical reasons[88], which you have in Russia's Rejoinder at Annex 362. But there is a more prosaic point. This would have led to wrong dates on millions of MP4s for years and years and years, all around the world. That is absurd, and nowhere has Ukraine sought to prove Bellingcat's technical hitch. Again, this is a point that has been out there. Bellingcat is content to address it in some internet article, but Ukraine does not present that as evidence because, had it done so, it need only be presented to be seen as ridiculous.

67. A further point. One of the conversations was clearly manipulated by Ukraine's security service, the SBU — see slide 67. It was manufactured from an earlier intercept. The call involved

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[86] Middle East Eye, *Twitter executive for Middle East is British Army 'psyops' soldier*, 30 Sept. 2019, available at https://www.middleeasteye.net/news/twitter-executive-also-part-time-officer-uk-army-psychological-warfare-unit (judges' folder, tab. 6.9).

[87] Bellingcat, *A Post Mortem Of Russia's Claim That Crucial MH17 Video Evidence Was Falsified*, 10 Mar. 2020 (judges' folder, tab 6.11).

[88] Report on Expert Examination of a Video File for Any Signs of Falsification (RR, Ann. 362).

Mr Bezler and the conversation — the earlier conversation, much before MH17 — was about the shooting-down of a Sukhoi aeroplane. The SBU removed the reference to Sukhoi and presented this as relating to the shooting-down of MH17. Now, Mr Bezler sued Bellingcat in Russia for implicating him in the destruction of MH17. Madam President, distinguished Members of the Court, you would be forgiven for not noticing that because, curiously, it is not something that has featured in the Western press. Bellingcat was fully represented in those proceedings in Russia. It chose not to offer any defence and damages were awarded.

68. In Strasbourg, Russia also presented forensic evidence from a Malaysian expert, Mr Rosen, who showed all kinds of indications of manipulation — slide 69. None of that has been addressed.

8. Radar

69. Now, all of this is problematic when one takes into account also the radar evidence — slide 71.

70. If a Buk had been launched near Snizhne, it would have been seen in profile on three sweeps of the Ust-Donetsk radar. According to Almaz-Antey, that means there is a 99 per cent probability that it would have been seen. It follows there is a 99 per cent probability that no Buk was launched near Snizhne. Now, I am not going to go through it again, but that was the conclusion, if you look at the end of the English translation of the Dutch military intelligence document. There were no Buks in range.

9. Georgia

71. Now, I have pointed out what are obvious defects in the way that Ukraine has sought to prove its case. You cannot attempt to prove a criminal case without showing provenance of the evidence, and that goes for physical evidence. You cannot purport to prove it, a digital case, without providing the digital files. That should be an end of it. But of course some people say, when points like this emerge, "Oh, come on. Surely there could not be a conspiracy as big as this?" Well, actually, there could.

72. At Slides 85 to 87 you have some top secret documents from the Five Eyes military alliance. They were released by Edward Snowden and featured in the press. And the biggest Snowden revelation was *not* that the Five Eyes countries listen to everybody's phones. It was the way they

create fake material on social media, and you see the relevant social media identified: Twitter, Youtube, Facebook, Flickr. Then — next slide — they take it up from social media via blogging into the mainstream news. You recall that Mr Higgins emerged as a famous blogger on the Syria conflict and he has mediated much of the material including the Snizhne video — from a totally unknown source — into what he would like to present as the accepted narrative on MH17. Next slide, you see the purposes of all of this again, in Five Eyes training documents, and you see they include a false-flag operation[89].

73. Now in our written submissions, which I respectfully urge you to read, we drew attention to these documents in the *Georgia* v. *Russia* case where it was said that Russia launched an Iskander missile at the town square in Georgia, in Gori. And an expert British Colonel was called. It was put to him that that case relied entirely on videos that were defective and bits of alleged shrapnel, and it was put to him that this could be a digital confection. He said: "It is a contemporary flaw, in my view, of what happens. Yes. It's also used to great effect I might say."

74. Now, the short point for today is Ukraine has not proved its case. But the deeper point is no tribunal has looked at these matters. The DSB, JIT, police in the Netherlands have not done so. It would be entirely wrong to allow this situation to be used to great effect by Ukraine. Madam President, those are my submissions. I hand over to Mr Udovichenko, who will deal with some other alleged terrorist attacks.

The PRESIDENT: I thank Mr Swainston and I now invite Mr Kirill Udovichenko to address the Court. You have the floor.

[89] Disruption Operational Playbook (excerpt) (judges' folders, tab 6.10).

Mr UDOVICHENKO:

ICSFT SHELLING, BOMBING AND KILLING INCIDENTS

1. Madam President, distinguished Members of the Court, it is an honour for me to appear before you on behalf of the Russian Federation. My task today is to address the substance of Ukraine's claims concerning shelling, bombing and killing incidents.

2. As tragic as some of these events are, there is no way to find that these are acts of terrorism the funding of which would be prohibited by ICSFT. Rather they are unfortunate episodes of an armed conflict and concurrent civil strife in Ukraine. As I shall explain, Ukraine's failure to properly contextualize the incidents in question is fatal for its claims.

The shelling incidents do not constitute terrorism acts

3. Let us first deal with shelling incidents. Ukraine raises four isolated episodes that took place in Donbass over a period of three years: between 2015 and 2017 — near Volnovakha, Mariupol, Kramatorsk and Avdeyevka.

4. These places were among many towns affected by military conflict in Eastern Ukraine. Mr Kuzmin explained earlier today, that this conflict emerged when Ukraine started a heavy military operation, known as the ATO, against the people of Donbass.

5. Yet on Tuesday Ukraine pursued a well-known media strategy of labelling its military adversaries as "terrorists" and suggested that their ultimate goal is spreading terror against civilians.

6. This Ukrainian narrative can only succeed with those unfamiliar with the inherent horror of any armed conflict. We invite the Court to look into the incidents beyond the narrow black and white concepts advanced by Ukraine.

7. The acts in question did not constitute acts of terrorism within the meaning of Article 2 (1) *(b)* of the ICSFT for the following reasons:

— First, the persons involved targeted Ukrainian military objects;

— Second, there is no proof that there was an intent to cause damage to civilians;

— Third, the civilian casualties that occurred were largely caused by Ukraine's own conduct;

— Fourth, the evidence shows that the Republics attempted to minimise collateral damage during the armed conflict; and

— Finally, Ukraine's case is built on unreliable evidence.

8. Let us first look into what their targets of the shelling were. Although there is no compelling evidence that the attacks were actually carried out by the Republics, in each case, the shelling did aim specifically at military targets.

(a) In Volnovakha, the attack targeted a roadblock. Two days ago, Ukraine repeatedly called it a "civil checkpoint". Well, let us have a look at it. Would you call that a civilian object? Certainly not. The roadblock had armed personnel, armoured vehicles, fortifications, firing positions and a large net of trenches. Well, in fact, Ukraine's own officials called this large roadblock a military installation[90], and Ukraine's own legislation considers such roadblocks to be military objects that have both defensive and offensive functions[91]. The personnel deployed at the roadblock was from the Kiev-2 battalion of the Ukrainian armed forces. Ukraine has called this battalion a "police patrol unit that assisted the border guard". But it is difficult to see how soldiers armed with heavy machine guns, grenade launchers and heavy armoured vehicles could be associated with a police force. They are not. In fact, as demonstrated by General Samolenkov, Kiev-2 played a crucial role in the Ukrainian armed forces offence against the town of Dokuchayevsk[92]. Ukraine puts much emphasis on that a civil bus has been hit during the attack. But the vehicle was inside the roadblock when the shells hit the territory of the installation. General Samolenkov's expert witness shows that the bus would therefore have been an inevitable collateral in case of any assault against the military facility.

(b) In Mariupol, the attacks were aimed at Ukraine's defensive positions : a set of trenches and military checkpoints on the city border — clearly, a military fortification. Even Ukrainian authorities unanimously confirmed that the shelling targeted military objects.

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[90] Judges' folders, tab 7.1. Record of Review by SBU Captain V. Romanenko, 16 Jan. 2015, p. 2 (MU, Ann. 87).

[91] Judges' folders, tab 7.2. Order of the First Deputy Head of the Anti-Terrorist Center at the Security Service of Ukraine No. 27 on Temporary procedure for controlling the movement of persons, vehicles and cargo along the contact line within Donetsk and Lugansk regions, 22 Jan. 2015, clause 1.2 (Second Expert Report of Valery Alexeyevich Samolenkov, 10 Mar. 2023, (RR, Ann. 8), Exhibit M).

[92] Judges' folders, tab 7.4. Expert Report of Major General V.A. Samolenkov, 8 August 2021, para. 53-55, (CMR-1, Ann. 2).

(c) In Kramatorsk, as Ukraine's own expert agreed, the attack was aimed against the ATO command headquarters and military vehicles at Kramatorsk airfield. The attack destroyed multiple air force units, MLRS launchers and ammunition silos.

(d) In Avdeyevka, Ukraine again agrees that the attacks hit legitimate targets such as the Ukrainian armed forces' combat positions, artillery fire positions, supply routes, places for allocating troops and armoured vehicles. Remarkably, the Ukrainian forces chose to station those right inside residential areas or behind residential buildings.

9. In short, all four attacks had legitimate military targets. Professor Sienho Yee and Mr Swainston have explained that in the context of an armed conflict, it is the rules of IHL that govern the conduct of combatants. The ICSFT does not — and indeed cannot criminalize conduct that is lawful under IHL.

10. I then turn to my second and closely connected point: the lack of intent to cause death or serious bodily injury to a civilian within the meaning of Article 2 (1) *(b)* of the ICSFT. Since it cannot prove a specific terrorist intent, Ukraine had to come up with a creative but untenable theory. It argues that indiscriminate weapons were used in the attacks and, therefore, indirect intent to harm civilians could be inferred from this.

11. First, Mr Swainston has already explained that Article 2 (1) *(b)* of the ICSFT does not provide for indirect intent. Well, this should be the end of the matter.

12. Second, the weapons that were used in the shelling incidents — MLRS BM-21 Grad and BM-30 Smerch — are not prohibited or inherently indiscriminate[93]. They are widely used in hostilities around the world. Ukraine's own expert states that Smerch cluster munitions were "an ideal" weapon for the attack at the Kramatorsk airfield.

13. There are numerous reports that Ukraine used Grad, Smerch and other artillery to shell residential areas in Donbass[94]. In fact, just 9 days after the shelling hit the bus in Volnovakha a similar bus in Donetsk was hit by Ukrainian forces, killing 8 civilians and injuring 13. The Human

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[93] Judges' folder: tab 7.6, *Gotovina et al*., ICTY, IT-06-90, Appeals Chamber Judgment, 16 Nov. 2012, pp. 52-56, 84.

[94] Judges' folder: tab 7.7, Lostarmour, *Shelling of the Mirny and Gaevogo Quarters by Grad MLRS Units on 14 July 2014* (29 Nov. 2021) (Ann. 43 to Rejoinder); tab 7.8 RT, *"Still No Answer": Eighth Anniversary of Tragic Shelling of Children Beach in Zugres* (13 Aug. 2022), available at: https://russian.rt.com/ussr/article/1036237-zugres-plyaj-ukraina-obstrel-vsu-vosem-let (Ann. 47 to Rejoinder).

Rights Watch report documented multiple use of Grad, as well as heavy MLRS systems with cluster munitions by Ukraine to shell populated areas of the Republics, including Starobeshevo, Makeyevka, Ilovaysk and Novosvetlovka[95].

14. In fact, the OSCE report that during 2014-2017, many more civilians were killed or injured on the territory controlled by the Republics than at the territory controlled by Ukraine[96]. In other words, shelling by Ukrainian forces caused many more civilian casualties than any alleged shelling by their adversaries. If one assumes, as Ukraine suggests, that indiscriminate shelling can somehow qualify as an act of terrorism, it necessarily follows that Ukraine itself engaged in such "terrorism". And did so on a massive scale, being the prime terrorist in the conflict.

15. Ukraine provided what they call intercepts of communications between the Republic fighters. There is no evidence that these intercepts were genuine or complete.

16. However, even these records evidence that precautions were taken to avoid loss or injury of civilians resulting from the attacks:

(a) The DPR closed civilian traffic near Berezovoye and Volnovakha including on the day the roadblock was attacked[97]. If it were the DPR who attacked the roadblock and the intent was to harm civilians, why would they want to limit civilian traffic?

(b) In Mariupol, ranging shots and local observers were used to divert fire away from residential areas.

17. There is absolutely nothing in the intercepts that shows that the attacker ever intended to hit civilians or were indifferent to that. On the contrary, the intercepts related to the Mariupol shelling show that the attackers were shocked by unexpected hits on a civilian-populated area.

18. My third point is that civilian casualties resulted from Ukraine's forces' own impermissible defensive strategy. Kiev hid its military units inside or close to civil objects, used civilian vehicles to transport troops, and refrained from evacuating civilians from the surrounding areas. This tactic

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[95] Judges' folder: tab 7.9, Human Rights Watch, Ukraine: Unguided Rockets Killing Civilians, 24 Jul. 2014, available at: https://www.hrw.org/news/2014/07/24/ukraine-unguided-rockets-killing-civilians; tab 7.10, Human Rights Watch, Report, Ukraine: Widespread Use of Cluster Munitions, 20 Oct. 2014, available at: https://www.hrw.org/news/2014/10/20/ukraine-widespread-use-cluster-munitions.

[96] Judges' folder: tab 7.11, Counter-Memorial (ICSFT) of the Russian Federation, Appendix A, Table 2.

[97] Judges' folder: tab 7.12, Translation of the transcripts of the Intercepted Conversations of Yuriy Shpakov (16 Sept. 2016) (Ann. 430 to Memorial), conversation No. 11, at 12:13:25 on 13 Jan. 2015.

was effective. Ukraine waged war on Republics' territory and had high tolerance for collateral damage. While the opposing side could not risk hitting their family members, friends or neighbours who got separated by the frontline. Ukraine knew how to properly utilize this:

(a) In Volnovakha, Ukrainian forces arranged a civil checkpoint at the same place as its military checkpoint. Ukrainian forces deliberately conducted long searches to create waiting lines at this roadblock-checkpoint. Those wishing to pass had to undergo extreme danger by having to loiter around a military target in the centre of a large minefield. An explicit disregard for civilian safety inevitably led to tragic loss of innocent lives.

(b) In Mariupol, the Ukrainian forces dug their trenches and arranged defensive positions very close to the densely populated residential district called Vostochniy. Despite the obvious threat to the residents, they were not evacuated or placed in shelter.

(c) In Kramatorsk, although the size of the airfield allowed otherwise, the troops and tanks were stationed as close as possible to the bordering residential area. This was again an improper attempt to make the ATO personnel a collateral-risky target.

(d) In Avdeyevka, the Ukrainian forces hid their armour behind populated residential buildings. Literally at their backyard. Even though the frontline passed across the city and heavy battle was waged inside its suburbs, the residents were not evacuated. Thus, we repeatedly observe a clear pattern of Ukrainian human shield tactics.

19. My final point would be that Ukraine's case rests on totally unreliable evidence. There is absolutely no sense in what Ukraine defines as the purpose of the shelling incidents. The Minsk peaceful process could unlikely be affected by an individual case of shelling as it occurred against the background of a bloody full-scale armed conflict. You can see that only in the year 2014 Ukraine executed numerous attacks against civilians, opposing the Maidan government in Donbass and Ukraine.

20. Besides, the Avdeyevka incident happened long after the Minsk agreements were concluded. It is indicative that, according to Ukraine, it has been provoked by US administration entering office — something that literally happened on the other side of the world.

21. But the flaws of Ukraine's position transpire in smaller matters as well. Two days ago, Ukraine relied on an intercept which allegedly proves that a DPR commander cheered about the

shelling of Vostochniy district of Mariupol. However, this reaction does not have anything to do with the shelling of the city. The word Vostochniy here refers not to the Vostochniy residential area, but to the Vostochniy checkpoint, a military target which is 1.5 km away from the residential district. Both the military checkpoint and the residential area are referred to as Vostochniy.

22. Another intercept, the one that Ukraine presents as its central evidence, was supposed to show that the Republics intended to terrify the population. This one — no, it is just a text document typed in Microsoft Word with no audio provided. Well, let alone, given the context, the speaker clearly intends to terrify opposing military personnel, not civilians. He explicitly demonstrates compassion for the latter in the last sentence.

23. Further, the evidence provided by Ukraine suggests that at least some of the incidents were actually friendly fire. Ukraine's satellite imagery experts failed to establish any precise location whatsoever of the rocket launches. Instead, they suggested various potential firing positions. None of them stood the challenge of basic analysis of a competing expert report. We can see that Ukraine's experts rely on a few scorched landmarks or tyre trails for their calculations. However, these were captured on satellite images made long before the day of the attack or do not appear in these images until several days after the shelling. The tyre tracks that Ukraine attributes to January 2015 were already there in November 2014. And on the following slide, it is relevant to the shelling that occurred on 10 February 2015. Ukraine points us to the photo on the right: it was made 17 days after the incident. However, no such tracks could be found on the photo made on 12 February 2015, two days after the shelling. For obvious reasons, Ukraine's experts choose to ignore such clear mistakes. Without this manipulation Ukraine's case makes no sense. With it, Ukraine's case is simply a lie.

(a) The Volnovakha roadblock was at least 15 km away from Republic-controlled territory. Ukraine's own evidence showcases that it was hit by Grad rockets with spoiler rings[98]. This allowed General Samolenkov to determine that the firing position was located approximately 10 to 12 km north-east from the roadblock[99]. Hence the attack could not be carried out from the area,

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[98] Tab 7.13 Expert Opinion No. 16/8, drafted by Ukrainian Scientific Research Institute for Special Equipment and Forensic Expert Examinations, Security Service of Ukraine (7 May 2015) pp. 12, 15, and 16 (Memorial, Ann. 123).

[99] Tab 7.3. Second Expert Report of Valery Alexeyevich Samolenkov, 10 Mar. 2023, paras. 27, 79 (Ann. 8 to Rejoinder).

controlled by the Republics. Perhaps this is a matter of a friendly fire from Ukraine's own artillery. Ukraine's expert tried to rebut this by stating that there was no spoiler rings on the rockets. Without the rings, Grad rockets would reach up to 19 km; some Republic forces might have indeed been in that area. But Ukraine got caught in its own net. It concurrently submitted expert evidence showing that the rockets hitting the roadblock in fact had spoiler rings limiting their range of impact[100]. Hence friendly fire stands as the only plausible option.

(b) To bring charges to deliberately targeting civilian objects Ukraine presents the strikes on the Kramatorsk airfield and the impacts on residential areas of Kramatorsk as two different attacks. But Ukraine concealed all possible data on the damage done to the airfield. Otherwise this data would have undoubtedly confirmed that the airfield and the residential area suffered damage at the same time, and in course of a single shelling.

24. The arguments of Ukraine on shelling incidents fail to make a solid and credible case.

25. As a result, none of the shelling incidents were acts of terrorism within the meaning of Article 2 (1) *(b)* of the ICSFT.

Madam President, Members of the Court, may I please delay lunch for another 10 to 15 minutes to cover bombing and killing incidents?

The PRESIDENT: You may, please go ahead.

Mr UDOVICHENKO: Thank you very much.

Bombings and killings

26. I now move to the alleged bombing and killing incidents that Ukraine raises in this case. We will look at each incident in turn, but before we do that, two general comments are necessary. First, same as with the shelling incidents, Ukraine wants you to ignore the context in which these events may have taken place. That context again negates allegations of terrorism. The 2014 *coup d'état* in Kiev led not only to the armed conflict in Donbass. It also provoked civil strife and unrest elsewhere throughout Ukraine. Two political groups clashed: the Maidan supporters, who were

[100] Tab 7.13. Expert Opinion No. 16/8, drafted by Ukrainian Scientific Research Institute for Special Equipment and Forensic Expert Examinations, Security Service of Ukraine (7 May 2015) pp. 12, 15, and 16 (Memorial, Ann. 123).

mostly Ukrainian nationalists and radicals, and the Maidan opponents, who were mostly activists from Russian-speaking regions.

27. The Maidan supporters were quick to escalate violence: they bombed, burned houses and killed many anti-Maidan leaders. Most infamously they burned down the House of Labour Union in Odessa and killed opposing activists who hid there.

28. The breakout of violence was marked with radicals storming governmental buildings across the country while weaponizing themselves with firearms captured from police offices and military warehouses. Almost simultaneously, former member of parliament Oleg Kalashnikov and writer Oles Buzina were murdered in Kiev in April 2015. At the very same time, Donbass-born writer Sergei Sukhobok was savagely beaten to death[101]. None of these murders were properly investigated by Ukrainian authorities while the believed perpetrators were condoned and sheltered.

29. It is not surprising that the violence unleashed by the Maidan supporters led to civil violence in return. Ukraine descended to civil strife, whereas its various political groups pursued their own interests.

30. However, a civil strife like that cannot itself qualify as terrorism under the ICSFT or ICSTB. Terrorism has a clear purpose: to intimidate a population or to compel a government. Otherwise, the Maidan thugs would have been the first to be prosecuted as terrorists — which of course never happened.

31. Remarkably, in its presentation Ukraine relies on a far smaller number of the alleged incidents than in its previous submissions. For the sake of efficiency, I will address these particular cases, while leaving the written submissions to deal with the remaining allegations.

32. It is highly indicative that Ukraine failed to provide any credible link between the incidents and Russia. In fact, the only thing that actually ties them together is the active involvement of one particular Ukrainian agency — the Security Service of Ukraine, or the SBU. The SBU is notorious for its impermissible methods of law enforcement[102]. The OHCHR, Amnesty International and

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[101] Tab 7.14 OSCE, *OSCE Representative strongly condemns killing of journalist in Ukraine; calls on authorities to immediately investigate and to ensure journalists' safety* (16 Apr. 2015), available at: https://www.osce.org/fom/151321.

[102] Rejoinder, paras. 496-497; Tab 7.15 UN OHCHR Report, Arbitrary Detention, Torture and Ill-treatment in the Context of Armed Conflict in Eastern Ukraine, 2014-2021 (2 Jul. 2021), paras. 2, 4, 13, available at: https://www.ohchr.org/sites/default/files/Documents/Countries/UA/UkraineArbDetTorture_RU.pdf.

Human Rights Watch reported that since 2014 the SBU unlawfully detained, tortured and coerced confessions from political opponents. It also conducted extrajudicial executions and staged provocations[103].

33. Striving on the narrative of a so-called "Russian plot" was an easy way for the SBU to extract usual benefits: to expand its authority and importance, to foment anti-Russian hysteria and to promote certain politicians.

34. The underlying incidents of bombing and killings were skillfully used to serve the purposes of anti-Russian campaign. In fact, they became so notorious that at the end they were ultimately brought to the attention of the ICJ. Now it would be revealed that the incidents are no more than mystification. And those which are not lack any connection with Russia and never contained a terroristic intent in their essence.

35. The first incident concerns bombing of Stena Pub in Kharkov in 2014. Ukraine says that a Ukrainian Kharkov Partisans movement was behind the non-lethal explosion that injured several people in a pub that was used by Ukrainian ultra-right radical groups as a gathering point.

36. After a lengthy investigation, Ukraine is able to put forward only a single piece of evidence. A court decision of the Ukrainian court, based on a confession. A confession by Marina Kovtun, a 48-year-old garment worker, who was accused of bombing by the SBU. The confession was coerced and given without an attorney present. Her sister gives a graphic example of how it was extracted: "I saw her four weeks later in the jail through two glass panes and two bars, and one side of her face was just blue. I can imagine what happened to her then."[104]

37. While still in custody, Kovtun retracted her confession as done under torture and went on numerous hunger strikes.

38. Same pattern applied to all "Kharkov Partisans", who Ukraine tried to paint as terrorists. They all denied their involvement in the bombing[105]. They said that the explosion was staged, and

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[103] Rejoinder, paras. 496-497; Tab 7.15 UN OHCHR Report, Arbitrary Detention, Torture and Ill-treatment in the Context of Armed Conflict in Eastern Ukraine, 2014-2021 (2 Jul. 2021), paras. 2, 4, 13, available at: https://www.ohchr.org/sites/default/files/Documents/Countries/UA/UkraineArbDetTorture_RU.pdf.

[104] Tab 7.16 Korrespondent.net, *SSU Has Tortured Marina Kovtun Accused of Blowing up Stena Rock Pub for Three Years* (22 Nov. 2017) available at: https://blogs.korrespondent.net/blog/events/3909377/ (Rejoinder, Ann. 80).

[105] Tab 7.17 Polit.ru, *The "Kharkov Partisans" Disclaim Responsibility for Terrorist attack in Kharkov* (23 Feb. 2015), available at: https://polit.ru/news/2015/02/23/no_responsibility/ (Rejoinder, Ann. 79).

was staged on the orders of Ukraine's Interior Minister Arsen Avakov[106]. This enabled Mr Avakov to introduce the "anti-terrorist operation" régime in Kharkov, curtailing human rights and starting repressions against any suspected dissidents[107]. Given that the bombing was carried out in a small, crowded room, it is especially fortunate that the incident turned out to be non-lethal. Whoever planted the bomb did put a lot of professionalism into avoiding casualties. Much more than can be expected from a 48-year-old garment worker.

39. Next incident is the alleged bombing of the PrivatBank office in Kharkov. Here, the evidence that the incident was staged is even more overwhelming.

40. According to Ukraine, some military trained bomber fired an MRO-A grenade launcher into the bank office. The tube of the weapon — that is the empty shell left over after the grenade has been fired — was allegedly left at the crime scene.

41. A few observations are necessary at this stage. First, this so-called terrorist attack took place at night, when the bank was closed and there were no people inside or in the vicinity. So even in theory, no death or injury to civilians could have occurred. Lack of terrorist intent on the part of the purported attacker is obvious.

42. Secondly, again according to Ukraine, the rocket did not even detonate, and in fact has been safely removed afterwards from the bank office by the SBU. Apparently, SBU also "safely removed" an empty launch tube as no one has seen it ever since.

43. However, Russia's explosives expert explains that the attack as it is described by Ukraine is impossible in principle:

(a) An MRO-A rocket almost always detonates when it hits the object of attack or at least when someone attempts to touch it. It cannot be neutralized or removed from the site.

(b) Whereas the alleged attacker supposedly had military training, only a rookie unprofessional would fire a MRO-A rocket from a short distance into the second floor of the building. The rocket is not fit for such a close target: it would burst immediately and hurt the attacker.

44. Not a single person was harmed, and property damage was minimal. These surrounding circumstances once again point towards the incident being staged by the SBU.

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[106] *Ibid.*

[107] *Ibid.*

45. In any event, it entirely lacks the necessary prerequisites to be qualified as an offence under the ICSTB or ICSFT. It also lacks connection to Russia.

46. Ukraine attempts to cure this by arguing that the attack was performed by a uniquely Russian-produced weapon — the MRO-A "Borodach" grenade launcher. This connection is clearly far-stretched. There is a very similar — almost identical — weapon in service with the Ukrainian armed forces: the Shmel grenade launcher. Both weapons operate under the same principles, being in fact developed with the same Soviet technology. There is no physical evidence to suggest that the alleged bombing was made using specifically a Borodach, and not a Shmel.

47. In fact, even the testimony of the alleged perpetrator, as supplied by Ukraine, only mentions Shmel, and never Borodach[108].

48. Ukraine puts a lot of emphasis on the tube of the grenade launcher purportedly found at the scene of the incident. But such a tube was never produced. It exists only in the reports of the SBU. Anyway, such shells can be freely obtained in Ukraine, as they are no longer dangerous weapons but simply harmless pieces of metal. It could easily be purchased from different Ukrainian or Russian marketplaces selling military souvenirs.

49. Next is the bombing at the unity rally in Kharkov. Ukraine again relies as evidence on coerced confessions of Viktor Tetutsky, Sergey Bashlykov and Vladimir Dvornikov. However, they all retracted their confessions later as given under torture and without any attorney present. Details of coercion are again graphic: Dvornikov's multiple broken bones, in particular his ribs, as well as bruises, abrasions and other injuries resulted from the repeated use of physical violence against him[109].

50. The SBU beat these people and then subjected them to mock executions[110]. It is graceless for Ukraine to employ such evidence in the distinguished Court. We are confident that the Court would not base its judgment on a confession obtained through torture.

51. Ukraine tries to link various episodes to Russia by arguing that Russian mines were used. Again, this conclusion is far-stretched. These mines are either old Soviet-type mines or mines that

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[108] Judges' folder, tab 7.18, Record of interrogation of the accused Vasiliy Pushkarev, 31 Aug. 2015 (MU, Ann. 242).

[109] Judges' folder, tab 7.19, Witness Statement, 10 Mar. 2023, para. 23 (RR, Ann. 9).

[110] Judges' folder, tab 7.19, Witness Statement, 10 Mar. 2023, paras. 19, 22, 23, 26 (RR, Ann. 9).

are produced outside of Russia, which are in any case in service of the Ukrainian armed forces[111]. The mines could easily be obtained by SBU as well as become available to any ATO veteran. This year, only this year, 2023, the same mine was used in the attempt to assassinate a world-known Donbass writer Zakhar Prilepin — a pattern of SBU methods is thus consistent.

52. Finally, Ukraine speculates on the deaths of several farmers in the Donetsk region in 2014, including Valeriy Salo, and paints these tragic cases as a part of an alleged "intimidation campaign" by the DPR against the local population.

53. However, neither OHCHR, nor any other bodies have ever established that any summary executions took place in that region or that Salo's death was amongst those executions. Indeed, even the otherwise doubtful report of the Human Rights Commissioner[112] stresses that it is not clear what the motive behind the killing was. It could have been a common crime committed for personal reasons, for extortion or because of a business conflict. At the same time, Ukraine's law enforcement was unstable, many radicals were on the loose and the crime rate was highest in the Donetsk region. For example, in the same period a Russian photo correspondent Andrey Stenin and his two fellow colleagues were burned in a car in the Donetsk region.

54. Thus, what happened to Salo was not uncommon among farmers and private entrepreneurs there. Robberies against farmers, often ending in their murder, have occurred regularly throughout Ukraine in the past and continue to occur. It is regrettable that Ukrainian authorities could not protect citizens from crime and violence, but clearly there is no objective reason to blame Russia for Ukraine's own failures.

55. No demands were made by the alleged "terrorists", no statements or threats were issued, no clear purpose could have been seen through these acts and, finally, no signs of Russia's involvement. The bombing and killing incidents do not meet the specific purpose to intimidate "a population" at large as requested by Article 2 (1) *(b)* of the ICSFT, they do not rise beyond the level of ordinary crime to qualify as terrorism.

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[111] *Ibid.,* judges' folder, tab 7.20, *Sm.news*, "UAF uses MON-50, MON-100 and Claymore on drones" (24 Dec. 2022), available at https://sm.news/vs-ukrainy-nachali-ispolzovat-na-bespilotnikax-mon-50-mon-100-i-claymore-59590-u3t5/?ysclid=ldmzva075k431514547 (RR, Ann. 87).

[112] Judges' folder, tab 7.21 OHCHR, Report on Human Rights Situation in Ukraine (15 June 2014), para. 209, available at https://www.ohchr.org/sites/default/files/Documents/Countries/UA/HRMMUReport15June2014.pdf.

56. Madam President, Members of the Court, it is undisputed that there has been an armed conflict, a civil strife, and a crime outbreak in Ukraine. This led to appalling loss of civilian life. However, none of these tragic events create a plausible case for terrorism or terrorism financing under the ICSFT or ICSTB. My arguments are thus concluded. Thank you.

The PRESIDENT: I thank Mr Udovichenko, whose statement brings to an end this morning's session. The Court will meet again this afternoon, at 3 p.m., to hear the remainder of the first round of oral argument of the Russian Federation. The sitting is adjourned.

The Court rose at 1.10 p.m.