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CR 2023/9

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2023

Public sitting

held on Monday 12 June 2023, at 3 p.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 lundi 12 juin 2023, à 15 heures, au Palais de la Paix,

sous la présidence de Mme 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
		Abraham
		Yusuf
		Xue
		Sebutinde
		Bhandari
		Salam
		Iwasawa
		Nolte
		Charlesworth
`		Brant
	Judges *ad hoc*	Pocar
		Tuzmukhamedov
	Registrar	Gautier

____

Présents : Mme Donoghue, présidente
MM. Tomka
Abraham
Yusuf
Mmes Xue
Sebutinde
MM. Bhandari
Salam
Iwasawa
Nolte
Mme Charlesworth
M. Brant, juges
MM. Pocar
Tuzmukhamedov, juges *ad hoc*

M. Gautier, greffier

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HE Ms Oksana Zolotaryova, Director General for International Law, Ministry of Foreign Affairs of Ukraine,

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The PRESIDENT: Please be seated. The sitting is now open. The Court meets today to hear the second round of oral argument of Ukraine.

For reasons duly made known to me, Judge Bennouna is unable to be present on the Bench this afternoon.

I now call on Professor Jean-Marc Thouvenin. You have the floor, Professor.

M. THOUVENIN : Merci beaucoup, Madame la présidente.

LA NOTION DE « FONDS » ET L'ARTICLE 2 DE LA CIRFT

1. Madame la présidente, Mesdames et Messieurs les juges, je reviens devant vous pour évoquer la CIRFT — la convention pour la répression du financement du terrorisme.

I. LA POSTURE DE LA RUSSIE, CONFIRMÉE LORS DE L'AUDIENCE DE JEUDI, N'EST PAS CONFORME AUX ENGAGEMENTS PRIS PAR LES ÉTATS PARTIES À LA CIRFT

2. Vous avez entendu jeudi — nous pensions naïvement que vous en seriez épargnés — la théorie du complot otanien contre la Russie et contre le Donbas dès 2014[1]. La Russie se dit victime. Elle vous demande de la défendre en lui rendant justice.

3. Vous apprécierez.

4. J'en retiens que la Russie juge légale la terreur instaurée par les groupes armés séparatistes de l'est de l'Ukraine, parce que, selon elle, le régime issu du « coup d'État »[2] de Maïdan, le « régime de Kiev »[3], le « régime de Maidan »[4] comme ils disent, attentait à leur survie[5] en entreprenant de maintenir l'intégrité territoriale du pays.

5. Vous noterez que le préambule de la CIRFT rappelle l'engagement solennel des États Membres de l'ONU, y compris de la Russie, de condamner

> « catégoriquement comme criminels et injustifiables tous les actes, méthodes et pratiques terroristes, où qu'ils se produisent et quels qu'en soient les auteurs, … qui … menacent l'intégrité territoriale et la sécurité des États ».

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[1] CR 2023/7 (non corrigé), p. 16, par. 17 (Shulgin) ; *ibid.*, p. 53, par. 57-61 (Swainston).

[2] CR 2023/7, p. 13, par. 5 (Shulgin) ; *ibid.*, p. 17, par. 6 (Kuzmin), p. 63, par. 26 (Udovichenko) ; CR 2023/8, p. 29, par. 30 (Zabolotskaya).

[3] CR 2023/7, p. 13-15, par. 6, 8, 13, 16 (Shulgin).

[4] *Ibid.*, p. 17, par. 6-7 et p. 18-19, par. 13 (Kuzmin).

[5] *Ibid.*, p. 13-14, par. 8 (Shulgin) ; *ibid.*, p. 17, par. 5 (Kuzmin).

6. Je rappelle également l'article 6 de la CIRFT :

> « Chaque État Partie adopte les mesures qui peuvent être nécessaires … pour que les actes criminels relevant de la présente Convention ne puissent en aucune circonstance être justifiés par des considérations de nature politique ».

7. La Russie n'a pas condamné les actes du groupe armé RPD qui menaçaient ouvertement l'intégrité territoriale et la sécurité de l'Ukraine. Et elle a laissé ses agents publics et ses ressortissants financer leurs actes, parce qu'elle adhérait à l'objectif politique de ces actes[6], alors même que le groupe armé RPD, dont les actes de terreur étaient notoires, était reconnu publiquement comme terroriste par l'Ukraine dès le 16 mai 2014[7]. La Russie n'a rien fait. Elle l'assume car elle rejette le prétendu « régime de Kiev », dépeint comme « nazi »[8]. D'où ses efforts pour défendre l'indéfendable : des meurtres, un avion de ligne abattu, des bombardements de civils, des attentats à la bombe, et sa passivité coupable face au financement de cette barbarie.

8. Cette posture est aux antipodes de ce que réclame la CIRFT.

II. LA NOTION DE « FONDS » AU SENS DE LA CONVENTION

9. Madame la présidente, pour la Russie, les « fonds » définis dans la CIRFT se caractérisent exclusivement comme étant « librement et légalement achetés, échangés et vendus »[9]. Son objectif, transparent est d'exclure les armes. C'est une pure invention, sans aucun fondement, née de la seule imagination fertile des conseils de la Russie[10].

10. Pour servir sa cause, le conseil de la Russie a dénaturé devant vous des propositions de rédaction française[11] et japonaise[12] formulées durant les négociations de la CIRFT. Dans le document de travail français, les « fonds » n'incluaient pas, c'est vrai, les « autres biens » parce que ces derniers relevaient de la notion de « financement »[13]. L'article 2, dans ce projet, incriminait le

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[6] *Ibid.*, p. 17, par. 6 (Kuzmin).

[7] « Ukraine's prosecutor general classifies self-declared Donetsk and Luhansk republics as terrorist organizations », *Kyiv Post* (16 mai 2014).

[8] CR 2023/7, p. 13, par. 5-7 (Shulgin).

[9] *Ibid.*, p. 34, par. 3 (Azari).

[10] CMFR, partie I, p. 10, par. 30 ; DFR, p. 82, par. 183.

[11] CR 2023/7, p. 36, par. 9 (Azari).

[12] *Ibid.*, p. 36, par. 10 (Azari).

[13] Comité spécial créé par la résolution 51/210 de l'Assemblée générale en date du 17 décembre 1996, *Projet de convention internationale pour la répression du financement du terrorisme*, document de travail présenté par la France, 3e session, Nations Unies, doc. No. A/AC.252/L.7 (11 mars 1999) (dossier des juges, onglet no 2).

« financement » des actes, ce qui incluait la fourniture des fonds et autres biens. Dans le texte final, les fonds sont définis largement pour englober « tout autre bien ». En outre, il interdit la fourniture de fonds, contrairement — mais de manière cohérente — à la proposition française qui interdisait le « financement ».

11. N'en déplaise à la Russie, c'est donc un sens particulier qui a été donné au terme « fonds ». C'est le seul qui fait droit.

12. On a exhibé l'article 421, paragraphe 1, du code pénal néerlandais[14], en oubliant — petit tour de passe-passe classique — son paragraphe 2 qui se lit : « Objects are understood to mean all goods and all property rights. »[15]

13. Il faut savoir gré à la Russie de n'avoir pas fait valoir jeudi que le *commerce* des armes fait l'objet d'un *autre* traité[16]. Ç'aurait été sans espoir puisque la CIRFT ne porte pas sur le *commerce* de biens, mais sur leur *fourniture.* Bien sûr, la fourniture d'un bien peut être temporaire, le temps de perpétrer un acte interdit. Elle n'en est pas moins une infraction de financement du terrorisme, contrairement à ce qu'a suggéré le conseil de la Partie adverse jeudi[17].

14. Mais je reviens à la notion de « fonds » au sens de la CIRFT. Sa définition établit deux catégories.

15. La première est celle « des biens de toute nature ». Il s'agit de biens « corporels ou incorporels, mobiliers ou immobiliers, acquis par quelque moyen que ce soit ». Aucun doute n'est permis sur le sens et la portée de cette catégorie. Elle est large, expressément large. Elle couvre des « biens de *toute* nature ». Des armes entrent sans aucun doute dans cette catégorie. Il était donc inutile de faire un sort particulier aux armes : elles sont couvertes par la définition[18].

16. La seconde catégorie est distincte. Elle ne concerne pas des biens. Les deux catégories sont séparées par la conjonction « et ». La seconde catégorie s'ajoute, sans se substituer, à la première.

17. Elle comprend « des documents ou instruments juridiques, … qui attestent un droit de propriété ou un intérêt sur ces biens ». Par conséquent, en plus des biens de toute nature, elle ajoute

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[14] CR 2023/7, p. 37, par. 11-12 (Azari).

[15] Code pénal des Pays-Bas, 27 août 2014, art. 421, par. 2 (dossier des juges, onglet nº 3).

[16] CMFR, partie I, p. 21-23, par. 83-91 ; DFR, p. 89-90, par. 202-204.

[17] CR 2023/7, p. 32, par. 65-66 (Swainston).

[18] *Ibid.*, p. 36, par. 8 (Azari).

tous droits ou intérêts sur des biens de toute nature. Une liste exemplative de ce que vise cette seconde catégorie est indiquée.

18. Aucune règle d'interprétation ne permet de fusionner les deux catégories. Elles s'additionnent. La seconde ne désactive pas la première. Quant au titre de la convention, il n'a certainement pas un tel effet juridique[19]. Je note du reste que, dans le document de travail de la France, que la Russie utilise à mauvais escient, la notion de « financement » n'a pas le sens limité que la Russie en retient, mais englobe tout instrument monétaire ou financier ET tout autre biens de toute nature.

III. INTERPRÉTATION DE L'ARTICLE 2

19. Je me tourne vers l'article 2 de la CIRFT ; et ici un élément de réponse à la question du juge Nolte peut être donné en rappelant que cette disposition a créé ce qu'il est convenu d'appeler un « crime » international que les États parties doivent ériger en infraction pénale dans leurs ordres internes. L'Ukraine ne prétend pas que la Russie n'a pas respecté cette obligation. Et le rapport mentionné dans la question du juge Nolte semble indiquer que tel est le cas. Toute autre est la mise en œuvre de cette législation, qui est manifestement à géométrie variable, ce qu'atteste ce rapport. Mme Cheek y reviendra.

20. Nous avons entendu jeudi un florilège d'arguments erronés à propos de l'article 2. J'en commence la réfutation, Mme Cheek la terminera.

21. Le narratif russe est d'emblée erroné : « Ukraine accuses Russia of the serious offence of terrorist financing »[20]. Non, ce n'est pas l'affaire ici débattue.

A. « Intention spécifique » et acte « délibéré »

22. Deuxième erreur, la référence répétée aux termes « *specific* intent » en anglais, ou, en français, intention spécifique[21]. Il n'y en a aucune trace dans la CIRFT. Mon contradicteur affirme pourtant que l'article 2, paragraphe 1, exige « specific intention of the funder »[22], oubliant que le

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[19] *Ibid.*, p. 35-36, par. 7 (Azari).

[20] *Ibid.*, p. 22, par. 1 (Swainston).

[21] *Ibid.*, p. 22-23, par. 2-6 (Swainston).

[22] *Ibid.*, p. 23, par. 4-5 (Swainston).

texte prévoit le cas où l'apport des fonds est fait « en sachant qu'ils seront utilisés » d'une certaine manière. Or, « savoir » n'est pas réductible à une intention spécifique.

23. Troisième erreur : la Russie veut voir dans le caractère « délibéré » de l'acte de financement interdit — en anglais il s'agit du terme « wilfully » —, la preuve qu'il faudrait une « intention spécifique » de financer un acte visé aux alinéas *a)* ou *b)*[23]. Mais « délibérément » renvoie seulement au caractère volontaire de l'acte consistant à fournir des fonds, indépendamment de ce qui est financé. Les rédacteurs ont eu raison de formuler cette précision car une personne peut être contrainte, sous la menace ou l'emprise physique d'un tiers, de fournir des fonds en sachant qu'ils seront utilisés par des terroristes, sans pour autant le vouloir. Le mot « délibérément » a d'ailleurs été introduit pour exclure le paiement d'une rançon[24]. Dans un tel cas, l'acte ne sera pas « délibéré » et ne pourra être incriminé. « Wilfully » n'a pas d'autre fonction que de le préciser.

24. Quatrième erreur, la Russie affirme que l'alinéa *b)* de l'article 2, paragraphe 1, requiert une double « intention spécifique », celle du financeur, et celle des auteurs de l'acte terroriste[25], ajoutant que « the only concession to objectivity » faite dans le texte par la référence à la « nature ou [au] contexte » se rapporte à l'objectif politique de l'acte qu'il est interdit de financer[26].

25. Mais, d'une part, l'alinéa *b)* ne se lit pas : « tout acte *spécifiquement* destiné à tuer ou blesser grièvement » des civils. Il se lit « tout acte *destiné* à tuer ou blesser grièvement » des civils. D'autre part, l'alinéa *b)* ne vise aucunement les terrorises en tant que tels. Il vise des « *acte*[s] destiné[s] à tuer ou blesser grièvement » des civils. Les termes « acte destiné à » ne renvoient pas à une intention de l'auteur, mais à la destination de l'acte[27].

26. Par exemple, faire feu sur un civil est un acte destiné à tuer ou blesser ce civil, tout autant que faire feu sur une foule de civils, au sein de laquelle se trouvent quelques militaires, est un acte destiné à tuer des civils, en même temps que des militaires.

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[23] *Ibid.*, p. 23, par. 6 (Swainston).

[24] Assemblée générale des Nations Unies, Sixième Commission, *Mesures visant à éliminer le terrorisme international : Rapport du groupe de travail*, 54e session, Nations Unies, doc. A/C.6/54/L.2 (26 octobre 1999), p. 62, par. 67.

[25] CR 2023/7 (8 juin 2023), p. 23-24, par. 5, 7 (Swainston).

[26] *Ibid.*, p. 23-24, par. 7 (Swainston).

[27] CR 2023/5, p. 39, par. 15 (Thouvenin).

27. D'autre part, si ce que la Russie appelle la « only concession to objectivity »[28] se rapporte, dans le texte, à l'objectif politique de l'acte — terroriser ou contraindre —, c'est parce que, pour déterminer cet objectif, il faut en principe connaître l'intention de l'auteur. Or, dans le cadre de l'article 2, vérifier cette connaissance en référence à ce que le financeur sait effectivement est tout bonnement impossible, si ce n'est en tenant compte de la nature de l'acte financé et du contexte dans lequel il est commis. On retrouve la même logique par exemple à l'article 28 de la convention de Mérida. Par contraste, concernant la vérification que le financeur avait connaissance que l'acte financé était « destiné à tuer ou blesser » des civils, dès lors que la description de cet acte ne renvoie pas à l'intention de l'auteur mais seulement à la destination de l'acte — comme je viens de l'indiquer—, il était inutile de faire une « concession » à l'objectivité puisque l'objectivité est inhérente à la destination de l'acte.

B. Article 2, paragraphe 3

28. Cinquième erreur, l'article 2, *paragraphe 3*, ne confirme pas la thèse russe[29]. Il ressort au contraire de ce paragraphe que la connaissance de l'intention subjective de l'auteur de l'acte ne peut pas être un critère de l'infraction de financement puisque cette intention peut tout aussi bien être inexistante, dans le cas, par exemple, où la personne ou le groupe financé n'a pas *réellement* l'intention de commettre un acte qu'il est interdit de financer en utilisant les fonds fournis.

C. CIRFT et droit des conflits armés

29. Sixième erreur, et elle est plus grave, la Russie soutient à tort soumettre la convention au droit des conflits armés. Cinq réponses s'imposent ici.

30. Premièrement, la Russie suggère, en substance, que les États parties à la convention ont refusé d'incriminer le financement d'actes destinés à tuer ou blesser gravement des civils, lorsque les morts et blessés sont des dommages collatéraux d'actes visant à les contraindre, eux, les États, à accepter des revendications séparatistes portant atteinte à leur intégrité territoriale. Personne ne peut le croire. Les États rejettent avec force, dans le préambule que j'ai cité à l'instant, le financement des actes qui portent atteinte à leur intégrité territoriale. Et si certains ont fait valoir des préoccupations

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[28] CR 2023/7, p. 23-24, par. 7 (Swainston).

[29] *Ibid*., p. 24, par. 10 (Swainston).

humanitaires, elles étaient relatives au financement de l'aide humanitaire[30]. Personne, durant les négociations de la convention, n'a jamais prétendu à l'existence, en cas de conflit armé, d'un droit de tuer en frappant délibérément des zones peuplées de civils, dont les États auraient voulu « décriminaliser » le financement transnational. Mon contradicteur s'en offusque : « [t]his would disincentivize non-State actors from complying with international humanitarian law »[31]. Comme si interdire de fournir des armes, ou autres fonds, à des groupes armés séparatistes, en sachant qu'ils commettent des actes visés aux alinéas *a)* ou *b)*, pouvait avoir pour effet de les convaincre de ne pas respecter le droit humanitaire. C'est intenable.

31. Deuxièmement, j'ai expliqué mardi l'absence de conflit normatif entre les deux corps de normes, puisque seule la convention réprime le financement de certains actes qu'elle se borne à décrire[32]. La Russie répond : « the ICSFT and international humanitarian law do not both deal with financing, but they do both deal with defining "terror" »[33]. C'est inexact. La convention ne définit pas la « terreur ». Elle désigne les actes qu'elle interdit de financer.

32. Troisièmement, le lien avec les conflits armés est explicitement fait dans l'alinéa *b)*, qui couvre le financement des actes destinés à tuer ou blesser des personnes ne participant pas aux combats en temps de conflit armé, lorsque ces actes visent, entre autres, à contraindre le gouvernement. Le *droit* des conflits armés n'incrimine *pas* ce type d'actes comme terroriste. La CIRFT en interdit pourtant explicitement le financement. Ceci confirme sans équivoque que l'alinéa *b)* ne saurait s'interpréter restrictivement à la lumière du droit des conflits armés.

33. Quatrièmement, l'article 21 de la CIRFT actuellement projeté est une clause dite « sans préjudice ». Elle n'a pas d'autre portée que celle-là. Elle n'est pas comparable, par exemple, à l'article 4 de la convention de Palerme, dont le juge Crawford a bien expliqué qu'il n'est pas — cet article — une clause sans préjudice[34].

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[30] Assemblée générale des Nations Unies, Sixième Commission, *Mesures visant à éliminer le terrorisme international*, 54e session, Nations Unies, doc. A/C.6/54/L.2 (26 octobre 1999), p. 55, 57, par. 9, 85.

[31] CR 2023/7, p. 42, par. 22 (Yee).

[32] CR 2023/5, p. 44, par. 40 (Thouvenin).

[33] CR 2023/7, p. 39, par. 2 (Yee).

[34] *Immunités et procédures pénales (Guinée équatoriale c. France), exceptions préliminaires, arrêt, C.I.J. Recueil 2018 (I)*, déclaration du juge Crawford, p. 392-393, par. 7-8.

34. Bien sûr, cette disposition signifie que, en cas de contradiction entre les obligations de la convention et les obligations posées par le droit international humanitaire, la convention s'incline. Mais, précisément, la convention CIRFT n'a aucune incidence sur les obligations et responsabilités des individus en vertu du droit international humanitaire puisqu'elle n'incrimine pas les actes des alinéas *a)* et *b)*, elle se borne à les désigner comme non finançables. Il n'y a aucune incompatibilité possible. Du reste, le préambule, dans son dernier considérant, relève qu'aucune convention multilatérale ne traite expressément du financement du terrorisme.

35. La Russie voudrait au contraire que l'article 21 rende licite, en cas de conflit armé, ce que l'article 2, paragraphe 1, interdit. L'article 4 de la convention sur la répression des actes de terrorisme nucléaire, qui est une version amendée ou « modernisée », mais différente, de la clause, prouve que c'est intenable.

36. Dans cette disposition, l'équivalent du texte de l'article 21 — qui est surligné en gras — est complété, suivi d'un paragraphe 2 excluant l'application de la convention sur le terrorisme nucléaire aux situations de conflit armé. Or, une convention ne peut pas à la fois s'appliquer aux situations de conflits armés, et s'interpréter alors conformément au droit des conflits armés — c'est ce que la Russie infère de l'article 21 de la CIRFT —, et ne pas s'appliquer aux situations de conflit armé — c'est ce qui est posé à l'article 4, paragraphe 2, de la convention sur le terrorisme nucléaire. L'article 21 de la CIRFT est donc bien une clause sans préjudice et ça n'est que cela.

37. Cinquièmement, la Russie se réfère au paragraphe 25 de l'avis consultatif de votre Cour sur la question de la *Licéité de la menace ou de l'emploi d'armes nucléaires*[35].

38. Mais ce paragraphe, très connu, traite du point de savoir si un acte peut à la fois être régi par le droit international humanitaire et par une autre règle de protection des droits de l'homme. Or, dans notre affaire, aucun acte n'est à la fois régi par la CIRFT et par le droit des conflits armés.

39. J'ajoute que même s'il était vrai — *quod non* — que l'article 2, paragraphe 1, alinéa *b)* n'interdit pas le financement des actes qu'il décrit s'ils ne sont pas en même temps, dans une situation de conflit armé, incriminés par le droit international humanitaire[36], le fait est que les attaques visées

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[35] CR 2023/7, p. 40, par. 8 (Yee) (citant *Licéité de la menace ou de l'emploi d'armes nucléaires, avis consultatif, C.I.J. Recueil 1996 (I)*, p. 240, par. 25).

[36] CR 2023/7, p. 40-41, par. 13 (Yee).

par l'Ukraine au titre de cet alinéa *b)* ont délibérément pris des civils pour cible, ou, a minima, ont été indiscriminées.

40. Les attaques dénoncées par l'Ukraine sont donc à la fois par visée par l'alinéa *b)* — elles sont destinées à tuer des civils et à terroriser la population ou contraindre le gouvernement —, et inacceptables en droit des conflits armés. Sous quelque angle qu'on les regarde, elles ne pouvaient être légalement financées.

41. Me Cheek vous en dira davantage sur ce point.

D. Convention de Montréal — « intention »

42. Septième erreur : la Russie croit lire dans la convention de Montréal — je me tourne vers la convention de Montréal — que l'infraction de son article premier, paragraphe 2, n'est constituée que si son auteur a eu l'intention *spécifique* de détruire un « avion civil »[37]. C'est intenable.

43. L'article premier, alinéa *b)*, se lit : « Commet une infraction pénale toute personne qui illicitement et intentionnellement : … *b)* détruit un aéronef en service ». L'infraction n'est pas limitée aux aéronefs « civils ». Le titre, comme le préambule, utilise les termes « aviation civile », concept différent, plus large. Quant à l'article 4 de la convention de Montréal, dont la Russie fait grand cas, il exclut l'application de la convention aux seuls « aéronefs *utilisés à des fins* militaire, de douane, ou de police ». C'est l'utilisation, donc la *fonction* remplie par l'aéronef au moment du vol, fonction qui relève d'un service public, militaire ou civil puisque par exemple la police a un statut civil, qui conditionne l'exception. Comme l'écrivait un ancien juge et président de votre Cour, M. Gilbert Guillaume, « le critère ainsi retenu est celui de l'emploi »[38].

44. Or, la fonction remplie par un aéronef en vol ou son emploi sont par hypothèse inconnus, et impossible à connaître avec certitude, d'une personne au sol qui entreprend de l'abattre simplement en le voyant passer dans le ciel. L'avion peut ressembler à un transport de troupes, mais être affecté ce jour-là à un emploi civil, à une mission civile, par exemple humanitaire. Les aéronefs de l'armée

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[37] Voir *ibid.*, p. 25, par. 15-16 (Swainston).

[38] Gilbert Guillaume, « La Convention de La Haye du 16 décembre 1970 pour la répression de la capture illicite d'aéronefs », *Annuaire français de droit international*, vol. 16, p. 45, n. 34 (1970).

sont souvent utilisés pour des opérations qui n'ont rien de « militaire », par exemple pour des missions de sauvetage de naufragés en mer[39].

45. Et c'est bien parce que ce à quoi un aéronef sert est par hypothèse inconnu de la personne qui fait feu au moment où il passe dans le ciel que la convention de Montréal n'a pas limité l'infraction de l'article premier, alinéa *b)* à la destruction intentionnelle des seuls « aéronefs civils », qui ne sont d'ailleurs pas définis dans la convention. C'est bien la destruction intentionnelle d'un aéronef, quel qu'il soit, qui est incriminée par principe, parce que tout acte visant à détruire un aéronef en vol dont, par hypothèse, l'auteur ne connaît pas la fonction, ou ne la connaît pas avec certitude, porte atteinte à la sécurité de l'aviation civile. Cette incrimination s'inscrit très clairement dans la logique de prévention qui irrigue la convention de Montréal, laquelle vise, comme son nom l'indique, la sécurité de l'aviation civile, laquelle nécessite les plus grandes précautions. La convention de Montréal ne suggère aucune exception au profit de celui qui abat un avion civil par erreur.

46. Je le répète : ce qui doit être intentionnel dans la convention de Montréal, c'est d'abattre un avion. Tirer un missile sur un avion est un acte intentionnel de destruction d'un avion en service. Ceux qui déclenchent le feu peuvent louper la cible, mais ils ne peuvent pas commettre d'erreur : leur intention est de détruire un avion en service. Et celui qui fournit un système de missile Buk à des terroristes le fait en sachant pertinemment qu'il fournit des fonds destinés à abattre des avions.

E. « Clause d'exclusion implicite »

47. Huitième erreur : la Russie croit pouvoir lire dans les travaux de l'OACI l'affirmation que la convention de Montréal serait dotée d'une « clause d'exclusion implicite » concernant les actes commis par les forces armées[40]. Le document qui en attesterait est une note de travail de la commission juridique de l'Assemblée de l'OACI du 14 août 2007[41]. Cette note de travail s'inscrit

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[39] Voir par exemple « Un Puma du 1/44 Solenzara sauve trois réfugiés du navire humanitaire Ocean Viking », *Avions Légendaires* (11 novembre 2022), accessible à l'adresse suivante : https://www.avionslegendaires.net/2022/11/actu/un-puma-du-1-44-solenzara-sauve-trois-refugies-du-navire-humanitaire-ocean-viking/ ; *Avion de recherche et sauvetage – Kingfisher*, Index du cahier de référence des périodes de questions sur la défense nationale du Gouvernement du Canada (18 janvier 2021), accessible à l'adresse suivante : https://www.canada.ca/fr/ministere-defense-nationale/organisation/rapports-publications/divulgation-proactive/secd-situation-fac-19-avril-2021/documents-reference/avion-recherche-sauvetage-kingfisher.html.

[40] CR 2023/7, p. 27, par. 30 (Swainston).

[41] Commission juridique de l'OACI, *Actes ou délits qui inquiètent la communauté aéronautique internationale et qui ne sont pas prévus dans les instruments de droit aérien existants*, 36e session de l'Assemblée, A36-WP/12 (14 août 2007).

dans les travaux préparatoires qui aboutiront, en 2010, à la convention de Beijing que l'Ukraine n'a pas ratifiée.

48. Cette note de travail présente une liste des questions qui peuvent être résolues selon l'OACI par l'amendement des traités en vigueur. Au point 2.1.3.2, est évoquée une clause d'exclusion militaire qui stipulerait que la convention ne s'applique pas « aux activités des forces armées pendant un conflit armé, ni aux activités des forces militaires d'un État, dans l'exercice de leurs fonctions officielles »[42]. Le groupe d'étude recommande l'incorporation de cette clause dans les traités à venir, tout en affirmant qu'« [à] l'OACI, il a été largement entendu que les instruments de sûreté de l'aviation qui criminalisent certains actes ne sont pas applicables aux activités militaires mentionnées ci-dessus », et que l'insertion de cet amendement, de cette clause serait « considérée comme étant déclaratoire »[43].

49. On peut la lire. Mais rien n'est justifié en droit, dans cette note, par une solide et sérieuse interprétation de la convention de Montréal conformément aux règles d'interprétation de la convention sur le droit des traités. On ne le trouve pas.

50. J'ajoute que si, en pratique, des États ont fait valoir, au cas par cas, que la convention de Montréal ne s'applique pas aux actes de leurs forces armées régulières, ce qui a été la position affirmée, mais non jugée, par les États-Unis dans l'affaire de l'*Incident aérien du 3 juillet 1988*, il n'y a aucun cas de figure dans lequel les États auraient affirmé que les actes des groupes armés échappent à l'incrimination. Les États sont raisonnables. Ils se protègent : ils n'ont pas pour objectif de créer le chaos en décriminalisant les actes de n'importe quel groupe armé d'opposition.

51. Précisément, les séparatistes du RPD qui ont abattu le MH17 n'étaient pas des « forces armées pendant un conflit armé » mais un groupe armé de combattants illégaux. Ils ne bénéficiaient d'aucune immunité criminelle.

52. Sur ce point, la Partie adverse s'étonne de la position du tribunal de La Haye selon laquelle :

> « the Russian Federation exercised overall control over the DPR from mid-May 2014, at least until the crash of flight MH17. This means that the armed conflict, which was

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[42] *Ibid*., pt. 2.1.3.2.

[43] *Ibid.*

> non-international in geographic terms, was internationalized and was therefore an international armed conflict. »[44]

53. Ceci serait incompatible avec la conclusion de ce tribunal selon laquelle

> « [s]ince the DPR cannot be viewed as part of the armed forces of the Russian Federation, the members of the DPR also cannot be considered part of those armed forces. For that reason alone, then, they were not entitled to participate in hostilities and are therefore not entitled to immunity from prosecution. »[45]

54. Il n'y a évidemment strictement aucune incohérence. Et à supposer que la notion de « clause d'exclusion implicite » ait le moindre sens — *quod non* —, elle ne saurait valoir au profit d'un groupe armé de combattants illégaux, le RPD, qui agissait illégalement et sans bénéficier de la moindre immunité.

Ceci conclut ma présentation, Madame la présidente. Je vous remercie de votre patiente attention et vous prie d'appeler à la barre Me Cheek, qui continuera sur ma lancée.

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

Ms CHEEK:

THE RUSSIAN FEDERATION'S VIOLATIONS OF ITS ICSFT OBLIGATIONS CONCERNING TERRORISM FINANCING IN UKRAINE

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

I. THE RUSSIAN FEDERATION'S VIOLATIONS OF THE ICSFT AND EVIDENTIARY STANDARDS GOVERNING UKRAINE'S CLAIMS

2. Russia's failure to co-operate is indefensible, and so it tries to make it more difficult to prove a claim under the ICSFT. I will briefly clarify the correct approach, although Ukraine has proved its case under any standard.

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[44] Tribunal de La Haye, affaire nº 09-748004/19, 09-748005/19, 09-748007/19, 17 novembre 2022, par. 4.4.3.1.3 « The nature of the armed conflict » (dossier des juges, onglet nº 4).

[45] *Ibid.*, par. 4.4.3.1.4 « Combatant status ». Voir CR 2023/7, p. 28-29, par. 34-36 (Swainston).

3. According to Russia, Ukraine must prove terrorism financing offences by "fully conclusive evidence", in order to prevail on any of Ukraine's claims[46]. That is wrong for at least four reasons.

4. *First*, the Court has only applied such a standard to holding a State responsible for genocide, the "crime of crimes"[47]. Make no mistake, Russia's violations of the ICSFT are serious, but the issue in this case is not genocide.

5. *Second*, a "fully conclusive" standard is incompatible with the ICSFT's definition of an offence. The Convention addresses the knowing funding of a third party's bad acts, and it was drafted to address the unique nature of such an offence. For example, the third party's purpose is assessed objectively, based on "nature or context"[48]. It would disrupt the drafters' careful balance to superimpose, on top of Article 2, a "fully conclusive evidence" standard.

6. *Third*, the point of the ICSFT is to address cross-border financing[49]. Russia, not Ukraine, is best able to investigate the mental state of persons in Russia. It would not be a good-faith interpretation to require Ukraine to possess "fully conclusive evidence" on that question, especially when the other State refuses to co-operate.

7. *Fourth*, Russia's proposed standard does not fit with the treaty's specific obligations. Different obligations — investigating, taking preventive measures, freezing assets, prosecuting — are triggered by different levels of evidence. For example, under Article 9, if terrorism financing is alleged, a State must investigate the facts. If a State refuses, it violates Article 9. Conclusive proof of the terrorism financing offence is not relevant to such a violation of the ICSFT. Let me be clear: Russia is proposing a so-called "filter"[50] under which it could violate its obligations under the Convention but no claim can be brought to this Court, unless Ukraine also proves something in addition to the violation. There is no support for such a surprising rule in either the treaty or the jurisprudence of this Court.

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[46] CR 2023/8, p. 13, para. 6 (Yee); CMR-1, para. 13; RR, para. 30.

[47] William A. Schabas, *Introductory Note*, *Convention for the Prevention and Punishment of the Crime of Genocide*, United Nations Audiovisual Library of International Law (2008), p. 4, accessed at https://legal.un.org/avl/pdf/ha/cppcg/cppcg_e.pdf.

[48] CR 2023/5, pp. 40–41, paras. 20–22 (Thouvenin).

[49] ICSFT, Art. 3.

[50] CR 2023/8, p. 13, para. 6 (Yee).

8. I will return momentarily to the Article 2 offences in this case, but before I do so, I will address the interpretation of the ICSFT's co-operation obligations, the different evidentiary requirements that trigger each one, and Russia's egregious non-co-operation.

A. Article 8

9. First, under Article 8. Article 8 requires a State to take appropriate measures to freeze or seize funds. While the treaty does not specifically define a threshold for freezing, it cannot be conclusive proof. If terrorism financing is proved, a State must *seize* the funds. The standard for freezing, a temporary emergency measure, must be lower. That explains why international practice has converged on a "reasonable suspicion" standard[51]. The 2019 FATF report raised by Judge Nolte confirms that Russia has no trouble freezing funds on the basis of "sufficient grounds to suspect"[52]. Russia is not generally opposed to freezing funds on the basis of suspicion — it is only opposed to freezing funds used to finance terrorism in Ukraine.

10. As for the facts, Russia's main response is that there is no evidence that the DPR and LPR committed terrorist acts, and that Russian funders were exclusively providing humanitarian assistance. Ukraine has already explained how nothing could be further from the truth[53].

B. Articles 9 and 10

11. Moving to Article 9. Regarding Article 9, Russia complains of the "burden" of being required to "investigate even mere allegations"[54]. Yet that is exactly what Article 9 says Russia must do: if it "receiv[es] information" that a person "who is *alleged* to have committed an offence" is in its territory, Russia must "investigate the facts contained in the information". Russia focuses on the

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[51] See International Monetary Fund, Legal Department, *Suppressing the Financing of Terrorism: A handbook for Legislative Drafting* (2002), p. 147, accessed at https://www.imf.org/external/pubs/nft/2003/SFTH/pdf/SFTH.pdf; UK Legal and Constitutional Affairs Division of the Commonwealth Secretariat, *Implementation Kits for the International Counter-Terrorism Conventions*, p. 293; The Commonwealth Office of Civil and Criminal Justice Reform, *Model Legislative Provisions on Measures to Combat Terrorism* (Sept. 2002), p. 28; Government of Canada, *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, Ch. 17; The Statutes of the Republic of Singapore, Terrorism (Suppression of Financing) Act 2003, para. 11; Financial Action Task Force, *Special Recommendation III: Freezing and Confiscating Terrorist Assets (Text of the Special Recommendation and Interpretative Note)* (Oct. 2001, as updated, adopted, and published Feb. 2012) (MU, Ann. 360).

[52] Financial Action Task Force, *Anti-Money Laundering and Counter-Terrorist Financing Measures –Russian Federation, Fourth Round Mutual Evaluation Report* (Dec. 2019), p. 126, accessed at http://www.fatf-gafi.org/publications/mutualevaluations/documents/russian-federation2019.html (judges' folders, tab 5).

[53] CR 2023/6, pp. 13–14, paras. 66–70 (Cheek); MU, Chap. 2, Section F and accompanying sources; RU, paras. 330-333.

[54] CR 2023/8, p. 16, para. 16 (Yee).

word "information"[55], but that is exactly what Ukraine provided to Russia: information about the activities of the DPR, and information about their suspected funders[56].

12. Russia complains that Ukraine did not supply enough details about the DPR and the funders[57]. Regarding the DPR, Ukraine provided more than enough information to trigger Russia's obligation to investigate, particularly given the context: Russia could find even more details in United Nations reporting about these groups' targeting of civilians for purposes of intimidation and terror. As for the funders, Ukraine provided available details, which were often significant — even pointing to specific websites and social media posts used for terrorism financing[58].

13. Russia said on Thursday that it asked for more information and Ukraine was unresponsive[59]. That is simply not the case. Where Russia asked for more information, Ukraine provided it, in the form of at least six MLAT requests with additional details, and Ukraine continued sending MLAT requests with more factual data[60]. Ukraine is not the unresponsive party here.

14. For all of its complaints about Ukraine, Russia cannot defend its own record. As just one example, after two rounds of written pleadings and one round of oral pleadings, you still have not heard Russia explain why, for a year, it could not locate one of Russia's most prominent oligarchs[61]. Yet Russia assured this Court last week that it "investigated all allegations as thoroughly as possible"[62]. The Court can draw its own conclusions about Russia's thoroughness.

15. Given Russia's disinterest in investigating, it is no surprise that Russia did nothing to prosecute under Article 10. Among many other examples, Ukraine has identified specific Russian officials who, *after* the DPR attacked civilians at Volnovakha, provided the BM-21 systems to

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[55] CR 2023/8, pp. 17–18, paras. 18, 21 and 23 (Yee).

[56] MU, paras. 323–324; RU, paras. 334–347.

[57] CR 2023/8, p. 16, para. 18 (Yee); see also CMR-1, para. 545; RR, para. 571.

[58] CR 2023/6, pp. 12–14, paras. 64, 68–69 (Cheek); MU, Chap. 3. See also Ukrainian Note Verbale No. 72/22-620-2087 to Russian Federation's Ministry of Foreign Affairs (12 Aug. 2014) (MU, Ann. 369, judges' folders, tab 6).

[59] CR 2023/8, p. 17, paras. 18 (Yee).

[60] See e.g. Ukrainian Request for Legal Assistance Concerning Case No. 12014000000000292 (4 Sept. 2014) (MU, Ann. 400); Ukrainian Request for Legal Assistance Concerning Case No. 22014050000000015 (30 Sept. 2014) (MU, Ann. 401); Ukrainian Request for Legal Assistance Concerning Case No. 12014000000000293 (11 Nov. 2014) (MU, Ann. 404); Ukrainian Request for Legal Assistance Concerning Case No. 12014000000000291 (3 Dec. 2014) (MU, Ann. 405); Ukrainian Request for Legal Assistance Concerning Case No. 22015050000000021 (23 Mar. 2017) (MU, Ann. 431); Ukrainian Request for Legal Assistance Concerning Case No. 22015000000000001 (14 Nov. 2017) (MU, Ann. 433).

[61] See CR 2023/6 (6 June 2023), pp. 14–15, paras. 73–73 (Cheek).

[62] CR 2023/8, p. 17, para. 18 (Yee).

bombard Mariupol[63]. Given the open supply of money and weapons to persons targeting civilians in Ukraine, the only explanation for the lack of any prosecutions is that Russia did not care about enforcing its terrorism financing laws, as long as the terrorism being financed was in Ukraine.

C. Article 12

16. Regarding Article 12, Russia's arguments are adequately addressed in Ukraine's pleadings, so I will just respond to one point. Russia asserts that Ukraine's MLAT requests were "politically motivated" because they involved "Russia's prominent MPs and other high officials"[64]. The unfortunate reality is that high-level Russian officials appeared to be involved in terrorism financing. For instance, one request concerned Duma Vice-Chairman Vladimir Zhirinovsky, who supplied the LPR with a military vehicle, at the same time United Nations monitors were reporting on the LPR's reign of terror targeting civilians[65]. If Russia views an investigation into such conduct as "political", that only confirms its indifference to the lives of Ukrainian civilians.

17. Russia's final line of defence, mentioned in the first round of its oral pleadings, is that "Russia did something" because it allegedly "fully executed 777" of Ukraine's MLAT requests out of 814[66]. Ukraine's data indicates otherwise. According to Ukraine's Prosecutor's Office, from 2014 to 2020, Ukraine made 91 MLAT requests to Russia regarding terrorism financing offences in particular. Russia executed only 29, it refused to execute 58 and 4 were still pending as of 2020 and remain outstanding today.

D. Article 18

18. Turning finally to Article 18, the Court should take note of the undisputed facts that Russia ignored on Thursday. Russia did not instruct its officials to refrain from financing terrorism. It did not police its border, despite Ukraine's urgent pleas to do so. And it did nothing to disrupt the open fundraising networks happening on its territory. Nor does Russia suggest that such measures would

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[63] MU, paras. 159–161 and 276.

[64] CR 2023/8, p. 19, para. 29 (Yee).

[65] See MU, paras. 178, 198 and 276; Ukrainian Request for Legal Assistance Concerning Case No. 12014000000000292 (4 Sept. 2014) (MU, Ann. 400); Ukrainian Note Verbale No. 72/22-620-2529 to the Russian Federation's Ministry of Foreign Affairs (10 Oct. 2014) (MU, Ann. 372, judges' folders, tab 7).

[66] CR 2023/8, p. 23, para. 48 (Yee).

have been impractical or unduly burdensome. Russia's position is simply that Article 18 did not require it to take any practicable measures, beyond having a terrorism financing law on paper.

19. That is not a good-faith interpretation of an obligation to take "all practicable measures". It also cannot be reconciled with the Court's Judgment on preliminary objections, where this Court said: "all States parties to the ICSFT are under an obligation to take appropriate measures and to co-operate in the prevention and suppression of offences of financing acts of terrorism committed by whichever person"[67]. Your Court did not suggest that the obligation to take preventive measures is limited to enacting laws and regulations.

20. Moreover, such an absurd limitation does not follow from Article 18's references to States "adapting their domestic legislation". The treaty refers to this measure "inter alia" — among other things. As one legal dictionary notes, *inter alia* is commonly used "to specify one example out of many possibilities"[68]. Article 18 requires States to adapt their domestic legislation *among other* practicable measures to prevent terrorism financing. Counsel for Russia stated that the word *notamment* means "notably", but it can also mean "noting *among others*" or "for example"[69]. In light of the English text *inter alia* — "*notamment*" — does not mean "notably" in this context. Indeed, this Court in the *Aegean Sea* case rejected an argument based on the word *notamment* similar to Russia's put forward here[70].

21. The optional phrasing under Article 18 (2) also does not make it "superfluous" as Russia claims under Ukraine's reading of Article 18 (1). Depending on the risks a particular country faces, for example, it might be good practice to require "licensing" for "money-transmission agencies" but not a practicable measure that is required to prevent terrorism financing in that context. It does not follow that a State can avoid taking measures that are both practicable and critical to preventing terrorism financing in particular circumstances — like in this case, the simple measure of instructing state officials not to finance terrorism.

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[67] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019 (II)*, p. 585, para. 61; see also *ibid*., separate opinion of Judge Donoghue, p. 655, para. 19.

[68] ALM, *Law Dictionary*, "inter alia", accessed at https://dictionary.law.com/Default.aspx?selected=996.

[69] *Le Robert*, "notamment", accessed at https://dictionnaire.lerobert.com/definition/notamment.

[70] *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, pp. 22-23, paras. 54-55.

22. But there is a more fundamental point. The object and purpose of the Convention, as stated in the preamble, includes "adopting effective measures for the prevention of the financing of terrorism". Article 18 is the only provision expressly addressing prevention. Legislation is necessary for effective prevention, but it is certainly not sufficient. An obligation to adopt legislation, and do nothing else, would not come close to fulfilling the Convention's purpose.

23. The *travaux préparatoires* confirm that the drafters understood the phrase "[t]aking all practicable measures" to provide "flexibility"[71]. Drafters considered adding the phrase "or other appropriate measures" after "regulations", but considered that unnecessary — the phrase "taking all practicable measures" was already broad[72]. Quite possibly, no one foresaw the need to specify the particular measures at issue in this case, because no one foresaw that a State party would openly tolerate, and even embrace, terrorism financing. That said, the drafters chose all-encompassing language for Article 18, which is flexible enough to address the facts before you here.

24. Finally, I return to the question of what degree of evidence triggers the obligation to take practicable measures. As I have explained, there is no basis to import a "fully conclusive" evidentiary standard from *Bosnian Genocide*. But *Bosnian Genocide* does make a more relevant point: when a State has a "duty to act" to prevent something, its obligation "arise[s] at the instant that the State learns of, or should normally have learned of, the existence of a serious risk"[73]. This means, in the context of genocide, the State must act when persons are "reasonably suspected of harbouring specific intent"[74]. Article 18 of the ICSFT is a duty to act — by taking practicable measures. As long as Russia could reasonably suspect that persons in Russia were providing funds with the requisite knowledge, it had a duty to take practicable, preventive measures. By failing to do so, Russia violated Article 18[75].

25. Let me make one final point about Russia's complete lack of co-operation, in connection with Judge Nolte's question. The problem with Russia was not its *capacity* to prevent and suppress

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[71] Annex III, Report of the Working Group on Measures to Eliminate International Terrorism, 54th Session, UN doc. A/C.6/54/L.2, p. 80, para. 329 (26 Oct.1999) (MU, Ann. 277, judges' folders, tab 8).

[72] *Ibid.*

[73] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 222, para. 431.

[74] *Ibid.*

[75] See RU, paras. 51-52.

terrorism financing. Russia will no doubt claim vindication from the 2019 FATF report. The report does indeed show that Russia can be aggressive in response to terrorism financing — when it is the kind of terrorism Russia cares about. Nothing in the report speaks to terrorism financing in Ukraine, for a simple reason: the FATF's evaluation is "based on information provided by the country", as well as an on-site visit hosted by the country[76]. Russia would not acknowledge terrorism financing in Ukraine, and so never applied its impressive capabilities to such terrorism financing. Russia's failure to tell the FATF anything about its non-existent efforts to address terrorism financing in Ukraine does not exonerate Russia. It condemns Russia.

II. THE COMMISSION OF ARTICLE 2 OFFENCES BY RUSSIAN OFFICIALS AND OTHER PERSONS IN RUSSIA

26. Madam President, Members of the Court, that brings me to my other main topic: the commission of terrorism financing offences under Article 2. Even without Russia's co-operation, Ukraine has proved the commission of such offences.

27. Russia largely does not dispute the important facts: Russian persons provided funds, and the recipients carried out violent acts against civilians. Russia rests its case on the idea that the funders did not know how the funds would be used. But on both the law and the facts, Russia is wrong.

28. On the law, Russia focuses on establishing that "recklessness" is not the standard[77]. Ukraine agrees — the standard is knowledge. But Russia ignores the wide consensus on how this knowledge is proved[78]. Consider the United Nations Office on Drugs and Crime (UNODC) report, which Russia cites for the uncontroversial point that knowledge, not reasonable suspicion, is required[79], Russia ignores the report's illustration of knowledge: if a group engages in both bombings and social programmes, and a person provides funds knowing of both of these activities, knowledge is satisfied[80].

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[76] Financial Action Task Force, *Anti-Money Laundering and Counter-Terrorist Financing Measures – Russian Federation, Fourth Round Mutual Evaluation Report* (Dec. 2019), p. 13 (judges' folders, tab 5).

[77] CR 2023/7, p. 30, paras. 49-51 (Swainston).

[78] CR 2023/5, p. 46, paras. 47-49 (Thouvenin).

[79] CR 2023/7 (8 June 2023), p. 30, para. 47 (Swainston).

[80] UNODC, *Legislative Guide to the Universal Legal Regime Against Terrorism* (2008), pp. 30-31 (MU, Ann. 285, judges' folders, tab 9).

29. Russia's factual defence is just as unavailing. It is summed up in two words by Russia's counsel: "mistakes happen"[81]. According to Russia, United Nations monitors were wrong to conclude that the DPR and LPR targeted civilians in order to intimidate and control the population[82]. Civilians were just being murdered at random. According to Russia, it was perfectly safe to fire a Buk-TELAR at open skies without a combat control centre[83]. It was just bad luck that the first time the DPR fired the weapon, it destroyed a civilian aircraft[84]. According to Russia, it is perfectly natural to blanket Grad-rocket fire over a civilian-filled area because there is a small checkpoint playing no role in the hostilities[85]. According to Russia, a high-ranking United Nations official was wrong to say, at the Security Council, that a residential neighbourhood of Mariupol was knowingly targeted[86]. Several units just fired toward a city without bothering to check their target co-ordinates, according to Russia. According to Russia, when there is conflict in one part of a country, bombs will inevitably explode at nightclubs and peace rallies far away from the conflict[87]. And according to Russia, the funders of these acts could not possibly have known that these so-called mistakes would happen[88].

30. Madam President, Members of the Court, this is not a story of mistakes. This is a pattern. When Russian persons provided money and weapons to the perpetrators of these acts, they knew how these funds would be used: to add to a growing list of horrors.

A. Knowledge that the DPR and LPR were committing acts covered by Article 2 (1) *(a)* and *(b)* as part of a campaign of terror and intimidation

31. At this point little needs to be added about the notorious nature of the DPR and LPR's terrorist acts in the spring and summer of 2014[89]. Russia's response is that the pattern of targeting civilians based on perceived political views, as described by United Nations monitors, was instead

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[81] CR 2023/7, p. 33, para. 70 (Swainston).

[82] See e.g. *ibid.*, p. 18, para. 13 (Kuzmin); *ibid.*, p. 68, paras. 53-54 (Udovichenko).

[83] CR 2023/7, p. 31, paras. 56-58 (Swainston).

[84] CR 2023/7, pp. 32-33, paras. 62 and 70 (Swainston).

[85] CR 2023/7, pp. 57-58, paras. 8 *(a)*, 9 (Udovichenko).

[86] CR 2023/7, pp. 57-58, paras. 8 *(b)*, 9 (Udovichenko).

[87] CR 2023/7, pp. 63-64, 68, paras. 26-30, 56 (Udovichenko).

[88] See e.g. CR 2023/7, pp. 30, 32-33, paras. 49, 64, 70 (Swainston).

[89] See CR 2023/5, pp. 25-26, paras. 5-6 (Koh); *ibid.*, pp. 48-52, paras. 57-76 (Thouvenin).

just an epidemic of "common crime[s]"[90]. The argument refutes itself. Russia tries to distract from the OHCHR's conclusive findings by presenting a false equivalence with Ukraine's security forces. Ukraine's written pleadings have addressed Russia's misleading presentation of relevant United Nations reports[91]. It is rare that a country that has confronted terrorism can plead perfection, and United Nations monitors play an important role in highlighting areas for States to improve. But the fact remains, the monitors found only one side to "inflict[] on the populations a reign of intimidation and terror to maintain their position of control"[92].

32. That simple fact is critical. The DPR and LPR's acts were widely publicized. United Nations bodies and officials publicly identified the purpose behind those acts at the same time. These groups' acts certainly must have been known to Russia, where prominent Russians were openly raising money and delivering supplies to these groups[93].

33. It is backwards for Russia's counsel to note that United Nations monitors did "not say that the DPR was specifically targeting civilians with ground-to-air missiles, or with shells or with bombs"[94]. During those early days, in early 2014, the DPR and LPR were killing and intimidating civilians with the limited means at their disposal. That is why it was so important not to provide these groups with surface-to-air missiles, shells or bombs. In other words, it is why the ICSFT establishes a terrorism financing offence, and requires States to take all practicable measures to prevent such offences from being committed.

B. Knowing financing of the flight MH17 shoot-down

34. In the specific case of Flight MH17, Russia's failure to prevent terrorism financing led to 298 civilian deaths.

35. On Thursday, you were frankly subjected to a rambling conspiracy theory about this event, better suited to the darkest corners of the internet than in this Great Hall of Justice. Russia appears to

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[90] CR 2023/7, p. 68, para. 53 (Udovichenko).

[91] RU, para. 200.

[92] OHCHR, *Report on the Human Rights Situation in Ukraine* (15 July 2014), para. 26 (MU, Ann. 296, judges' folders, tab 10).

[93] See MU, paras. 175, 178.

[94] CR 2023/7, p. 33, para. 69 (Swainston).

be using this Court to try to appeal the ruling of the European Court of Human Rights. Yet the Strasbourg court's ruling is thorough and well reasoned, and it refutes Russia's convoluted narrative.

36. Regarding the Dutch Safety Board, the European Court of Human Rights noted that it followed ICAO standards and found "no evidence that the conclusions of the DSB were manipulated as part of an international conspiracy"[95]. Regarding intercepts, the Court concluded that there had been "a rigorous validation procedure" and they were "both reliable and authentic"[96]. And regarding video and image evidence, the Court found that Eliot Higgins and his organization were a "credible and serious" source, and that his investigative work was consistent with the independent conclusions of the JIT[97].

37. For its part, the Hague district court commissioned an analysis of the Snizhne video and other digital evidence "by Swedish forensic experts, who found no evidence of tampering"[98].

38. Ukraine has made its own extensive evidentiary submissions to this Court, to which Russia had no coherent response. Further, in appropriate circumstances, this Court has found highly persuasive the factual findings of other tribunals[99]. That is appropriate here, given the rigorous examination of the evidence by the European Court of Human Rights and the Hague district court. This Court should reject Russia's false narrative on MH17.

39. As Professor Thouvenin explained, when a person unlawfully and intentionally destroys an aircraft, specific intent to destroy a *civilian* aircraft is not required to establish a Montreal Convention offence. But even if it were, Russia on Thursday did not dispute that such intent is satisfied as long as the Buk-TELAR could not distinguish between military and civilian aircraft. And

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[95] *Ukraine and the Netherlands* v. *Russia*, ECtHR App. Nos. 8019/16, 43800/14, 28525/20 and 11055/22, Grand Chamber Judgment (30 Nov. 2022), paras. 469 and 496 (judges' folders, tab 11).

[96] *Ibid.*, para. 467.

[97] *Ibid.*, paras. 464, 472, 474; see also Bellingcat, "About", accessed at https://bellingcat-eu.com/about/ (judges' folders, tab 12); Philip Bump, "How to Turn a Tweet into Viable Evidence of a War Crime", *The Washington Post* (10 Mar. 2022) (judges' folders, tab 12).

[98] District court of The Hague, Case Nos. 09-748004/19, 09-748005/19, 09-748007/19, 17 Nov. 2022, para. 5.7 (judges' folders, tab 4).

[99] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, pp. 130-131, para. 213.

that is the case. Last week, Mr Zionts went into the evidence on this point in great detail[100]. You heard no meaningful rebuttal, because there is none[101].

40. Instead, Russia asserts that Ukraine "knows full well that Buk-TELARs operating autonomously can discriminate", apparently suggesting that Ukraine operates that weapon in the same way[102]. Russia relies on a blog post, which purports to reproduce part of a letter showing the location of certain Ukrainian Buk systems[103]. Yet nowhere does the letter, or the blog, suggest that Ukraine used Buk-TELARs in autonomous mode. The letter refers to Buk-M1 air-defence "systems", which Dr Skorik has explained refer to the full unit — not the TELAR alone[104]. Having conferred with Ukraine's expert, Dr Skorik, in fact, in 2014 and 2015, Ukraine did not operate Buk-TELARs in autonomous mode, and only used Buk systems to target drones in closed airspace below 7000 m. Dr Skorik would have testified to this point, had Russia submitted this purported evidence in a timely manner.

41. By firing a weapon that could not distinguish civilian from military aircraft, the DPR unlawfully and intentionally destroyed an aircraft in service, committing a Montreal Convention offence. The Russian officials who provided the Buk knew it was to be used to commit a terrorist act. Russia resists this conclusion on the basis that a trained crew was provided, who could not be expected "to make a mistake and shoot down the civilian airliner"[105]. But they did, in fact, immediately shoot down a civilian aircraft, proving the point: the Buk-TELAR could not distinguish. Dr Skorik explains that this limitation stems from the TELAR's "technical capabilities", not any lack of training[106]. Indeed, the crew is "trained to act automatically" to avoid the Buk-TELAR being identified and destroyed[107].

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[100] CR 2023/5, pp. 58-60, paras. 22-30 (Zionts).

[101] See CR 2023/7, p. 20, para. 17 (Kuzmin); *ibid.*, p. 31, paras. 54-58 (Swainston).

[102] CR 2023/7, p. 32, para. 61 (Swainston).

[103] CR 2023/7, p. 19, para. 14 (Kuzmin); *ibid.*, pp. 31-32, paras. 59-60 (Swainston); M. Van Der Werff, "MH17 properly investigated?", available at https://maxfromthewharf.com/5510-2/#DOC (RR, Ann. 396), judges' folders, tab 13); see RR, paras. 318-321.

[104] Skorik Report (6 June 2018), paras. 9, 18 (MU, Ann. 12, judges' folders, tab 14).

[105] CR 2023/7, p. 33, para. 70 (Swainston).

[106] Skorik Report, paras. 28, 39 (MU, Ann. 12, judges' folders, tab 14).

[107] *Ibid.*, para. 37.

42. Similarly, The Hague district court found that "[t]he mere fact that the Buk TELAR was ordered including a crew is totally insufficient" to escape criminal intent[108].

43. Sadly, it was all too predictable that the Buk-TELAR, a weapon incapable of distinguishing civilian aircraft, that was delivered to a group with a record of attacking civilians, would be used to destroy a civilian aircraft. This is not a case of "mistakes happen". It is a case of funds provided with the knowledge that they were to be used to commit acts covered by the ICSFT.

C. Knowing financing of shelling attacks on civilian areas

44. Russia also asks this Court to believe that repeated shelling attacks on civilians were mistake, after mistake, after mistake. Russia even blames Ukraine for these so-called mistakes, falsely alleging that Ukraine used "human shields"[109]. The evidence says otherwise: these were acts covered by Article 2 (1) *(b)* and Russian officials knowingly funded them.

45. Before turning to the specifics, I should emphasize that Russia has no answer to two fundamental points.

46. First, Russia has searched for any possible *post hoc* excuse for these attacks on civilians. Not once on Thursday did Russia answer the legally relevant question: what did the funders know? The answer: they knew the DPR attacked civilians well behind the contact line. They knew these attacks were loudly condemned by United Nations officials. Knowing this, Russian officials promptly supplied more of the same weapons. Russia's silence on this point is deafening.

47. Second, Russia ignores the context. According to Russia, Ukraine raises "isolated episodes that took place in Donbas over a period of three years"[110]. In fact, Volnovakha, Mariupol and Kramatorsk were attacked over a period of 30 days, at a high-stakes diplomatic moment. Article 2 (1) *(b)* tells us that context matters, and the context shows a purpose, at a minimum, of compelling the Ukrainian Government to act in this circumstance. Since Russia's counsel did not meaningfully address the "purpose" prong as it applied to the shellings, I will now focus my comments on the evidence showing that these were acts intended to cause civilian death.

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[108] District Court of The Hague, Case Nos. 09-748004/19, 09-748005/19, 09-748007/19, 17 Nov. 2022, paras. 6.2.5.3 (judges' folders, tab 4).

[109] CR 2023/7, pp. 57-58, para. 8 (Udovichenko).

[110] *Ibid.*, p. 57, para. 3 (Udovichenko).

1. Volnovakha

48. First, Volnovakha. Russia speculates that Ukraine might have attacked its own checkpoint. As the slide reflects, the record refutes that absurd suggestion.

49. Russia's main response is to label a civilian checkpoint a "military installation"[111]. If the Court looks at the screen, it can see what a front-line military installation looks like. This is what Russia's imagery expert analysed and described as a Ukrainian armed forces "strong point", more than 15 km north-east of the Buhas checkpoint, complete with infantry fighting vehicles, communications trenches and dug-out positions for armoured vehicles. This is image Bobkov figure 17[112]. Now compare that to a civilian checkpoint for inspecting vehicles along a roadway, at least 12 km behind the contact line[113].

50. On Thursday, Russia displayed a photograph taken more than three months before the Volnovakha attack at the Buhas checkpoint that, according to Russia's counsel, showed "heavy armoured vehicles" at the checkpoint[114]. It actually shows only one armoured vehicle, which Russia's own expert calls "*lightly* armoured", and describes it as used by police[115]. General Brown agrees that this vehicle is "typically" used for "internal security/policing roles"[116]. It hardly converts a civilian checkpoint into a target worthy of a hail of rockets from a BM-21.

51. In its focus on labels, Russia never engages with another key point: what military purpose was served by launching a Grad volley at this checkpoint? Russia does not say.

52. By accusing Ukraine of using a "human shield", Russia is effectively saying that Ukraine should have abandoned routine law enforcement functions along an important roadway connecting government and DPR-held territory. Or it is saying that officials manning such a checkpoint should be completely unarmed. That cannot be taken seriously. Russia's counsel even had the audacity to

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[111] *Ibid.*, p. 57, para. 8 (Udovichenko).

[112] Expert Report of Alexander Alekseevich Bobkov (8 Aug. 2021) (CMR-1, Ann. 1, fig. 17, judges' folders, tab 19).

[113] Gwilliam and Corbett Report, fig. 2 (RU, Ann. 2, judges' folders, tab 18).

[114] CR 2023/7, p. 58, para. 8 *(a)* (Udovichenko); Russian Federation, presentation (ICSFT slides) (8 June 2023), slide 218.

[115] Samolenkov First Report, para. 5, Addendum 2, para. 3, fig. 2 (CMR-1, Ann. 2).

[116] Brown Second Report, para. 8, fns. 17, 11 (RU, Ann. 1, judges' folders, tab 17).

allege on Thursday that Ukraine "deliberately" kept civilians in line longer than necessary to expose them to danger[117]. In support of that serious charge, Russia cited nothing at all.

53. Russia also cannot explain the choice of the BM-21 Grad weapon. Its counsel merely states that that weapon was not "inherently indiscriminate"[118]. But "inherently" is not the point. In an open area concentrated with troops, a BM-21 may be appropriate and sensible[119]. Against a small checkpoint, it is not just inappropriate, but ineffective[120]. As you can see on the screen, had the objective been to destroy the checkpoint, other weapons in the DPR's possession would not only have been more protective of civilians, but given the DPR a better chance of neutralizing the supposed military target[121]. Instead, the DPR decided to blanket a large area, filled with civilians, with rocket fire.

54. In short, Russia has no coherent military explanation for this attack. The only explanation remains that this was an act intended to cause civilian death.

2. Mariupol

55. Russia's attempt to explain away the shelling of a residential neighbourhood in Mariupol similarly fails. On Thursday, Russia abandoned its suggestion of technical malfunction[122].

56. Russia finally committed to a theory: on Thursday, they projected this image now on your screen, saying that this was the target — a so-called "military fortification" on the edge of the city — but, says Russia, the DPR just relied on bad co-ordinates[123].

57. In reality, these supposed fortifications, with the exception of the National Guard Checkpoint No. 4014 already addressed by Ukraine, are a set of empty trenches and ditches, with no

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[117] CR 2023/7, p. 60, para. 18 *(a)* (Udovichenko).

[118] *Ibid.*, p. 59, para. 12 (Udovichenko).

[119] Brown First Report, para. 28 (MU, Ann. 11).

[120] Brown Second Report, para. 16 (RU, Ann. 1).

[121] *Ibid.*

[122] CMR-1, para. 443; RR, para. 392.

[123] CR 2023/7, pp. 58-60, paras. 8 *(b)*, 10 and 18 *(a)* (Udovichenko); Russian Federation, presentation (ICSFT slides) (8 June 2023), slide 223.

evidence provided by Russia to the contrary[124]. Here again, Russia blames Ukraine, this time on the basis that Ukraine built some trenches and ditches to defend the city[125].

58. Russia's "bad co-ordinates" argument similarly does not add up. Russia's artillery expert admits the co-ordinates for the supposed "military facilities on the outskirts of the city" were "well known to the DPR"[126]. And intercepts from just two weeks earlier show DPR fighters carefully plotting and checking co-ordinates on a map before firing[127].

3. Kramatorsk

59. As with Mariupol, Russia appears to have abandoned its suggestion that the Kramatorsk attack can be explained by technical malfunction or error[128]. Instead, Russia again blames the victim. It says troops were positioned too close to the residential area, making an airfield outside the city a "collateral-risky" target[129]. But the military airfield and the residential area that was targeted were 5 km apart. Ukraine's expert has noted that the airfield could be a legitimate target, but Ukraine never said, as Russia's counsel suggested Thursday, that the Kramatorsk attack was solely focused on the airfield[130]. That is Russia's theory[131] and it is not supported by the evidence[132]. Any responsible operator of a BM-30 can discriminate at those distances.

60. What the evidence shows is that the airfield and residential area were separately attacked. As General Brown explained, while the airfield was also targeted, the spread of fire from that strike would not explain the spread of impacts in the residential area[133]. Russia again fails to demonstrate how multiple BM-30 rockets supposedly targeting an airfield overflew their target by up to 5 km and dispensed their cluster munitions over the city.

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[124] Gwilliam and Corbett Report, para. 61, fig. 27 (RU, Ann. 2, judges' folders, tab 18).

[125] CR 2023/7, p. 60, para. 18 *(a)* (Udovichenko).

[126] Samolenkov Second Report (10 Mar. 2023), para. 211 (RR, Ann. 8).

[127] Intercepted Conversations of Yuriy Shpakov (13 Jan. 2015), pp. 2-3 (MU, Ann. 430).

[128] CMR-1, para. 464; RR, para. 420.

[129] CR 2023/7, p. 58, para. 8 *(c)* (Udovichenko).

[130] MU, para. 100; RU, para 245.

[131] CR 2023/7, p. 58, para. 8 *(c)* (Udovichenko).

[132] Brown Second Report, para. 48 *(b)* (RU, Ann. 1).

[133] Brown Second Report, para. 42, figs. 17-18 (RU, Ann. 1).

4. Avdiivka

61. Finally, on Avdiivka, Russia continues to focus on military positions, which are undisputed — unlike the other attacks, Avdiivka was a front-line city. But that does not explain attacks on civilian homes in the northern residential area, or the choice of BM-21 Grads against the city. On Thursday, Russia again had no answer.

5. The shelling attacks are covered by Article 2 (1) *(b)* under any interpretation

62. Stepping back, Russia's excuses do not add up. If one volley of rockets had strayed off course and hit the outskirts of a town, perhaps one could say that "mistakes happen". If an important military target had been attacked with an appropriate weapon, and some civilians in the area were injured, perhaps that could be described as unintended and collateral damage. But that is not what happened. Russia twists itself into knots positing errors and malfunctions and mistakes, and it still cannot give a coherent military account of what happened. In this case, the simplest explanation is also the correct one: civilian areas outside the immediate conflict zone were repeatedly attacked because the DPR repeatedly targeted civilian areas. Russia does agree that deliberately targeting civilians satisfies Article 2 (1) *(b)*[134].

63. But even on Russia's strained explanations, these were acts intended to cause civilian death. As Professor Thouvenin explained, the phrase "act intended to cause" refers to the objective destination of an act, not the subjective intention of the actor, and an act may be intended to cause civilian death even if a military object is also attacked.

64. Professor Thouvenin also explained that international humanitarian law is not relevant to this analysis under the ICSFT. But even if it were, the result would be the same. Russia's counsel worries that Article 2 (1) *(b)* might cover acts that are "lawful" under international humanitarian law[135]. If that problem is real, there is a natural solution: exclude from Article 2 (1) *(b)* those acts — and *only* those acts — that are consistent with international humanitarian law. It defies logic to also exclude acts that *violate* international humanitarian law. Even on Russia's reasoning, if an act is "intended to cause death" to a civilian according to the ordinary meaning of those words, and violates international humanitarian law, there is no problem with Article 2 (1) *(b)* applying.

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[134] CMR-1, paras. 205, 207, 213; RR, para. 145.

[135] CR 2023/7, p. 40, para. 10 (Yee).

65. Now, let me briefly return to the shelling attacks with this framework in mind.

66. Russia's theory of Volnovakha is that the DPR intended to destroy a small checkpoint, deep behind the contact line, because it possessed small arms and one lightly armoured vehicle[136]. Yet it declined to use a more precise weapon, choosing instead a BM-21 Grad, knowing it would blanket the line-up of civilian cars with rocket-fire. That is exactly the sort of situation that the Italian Supreme Court of Cassation said, in *Abdelaziz,* would satisfy Article 2 (1) *(b)*[137]. The attack was also, at a minimum, indiscriminate under international humanitarian law. That follows from the choice of the BM-21 Grad, which in this context would "strike military objectives and civilian or civilian objects without distinction" in violation of Additional Protocol I, Article 51 (4) *(c)*[138]. Further, when Russia argues that the checkpoint had military *status*, it never explained what military *value* it had as a target. Attacking such an insignificant military target, which was certain to cause significant civilian casualties, is indiscriminate. In violation of Additional Protocol I, Article 51 (5) *(b)*, it was "expected to cause incidental loss of civilian life . . . which would be excessive in relation to the concrete and direct military advantage anticipated"[139]. Thus, even on Russia's explanation of the Volnovakha attack, it was an act intended to cause death to civilians that also violates international humanitarian law.

67. The same is true of the other attacks. In Mariupol, the explanation Russia has settled on is one that the DPR was "supplied wrong co-ordinates"[140]. Yet as General Brown explains, any responsible operator of a BM-21 Grad knows to conduct pre-firing checks, which would have caught any error[141]. If the DPR did not take that basic step, they fired blindly at a city. That is an indiscriminate attack under international humanitarian law, and an act intended to cause civilian death under the ICSFT.

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[136] Brown Second Report, para. 11 (RU, Ann. 1); Samolenkov First Report (8 Aug. 2021), para. 51 (CMR-1, Ann. 2).

[137] See *Italy* v. *Abdelaziz and ors*, Final Appeal Judgment, No. 1072, 2007, 17 Guida al Diritto 90, ILDC 559, Supreme Court of Cassation, Italy, 17 January 2007, paras. 4.1, 6.4 (MU, Ann. 473).

[138] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, Art. 51 (4) *(c)*.

[139] *Ibid.*, Art. 51 (5) *(b)*.

[140] CR 2023/7, p. 17, para. 10 (Udovichenko).

[141] Brown Second Report, para. 30 *(a)* (ii) (RU, Ann. 1).

68. The same point applies to Kramatorsk; on Russia's implausible "faulty rockets" theory, the defect would have been apparent upon loading the rockets, and continuing with the attack anyway would be indiscriminate[142].

69. On whatever standard the Court might apply, these were not mistakes — they were acts intended to cause civilian death.

D. Knowing financing of bombings in peaceful cities

70. I turn finally to the campaign of bombings in peaceful Ukrainian cities, on which Russia's position is hard to follow. At times, Russia's counsel appeared to suggest that deadly bombings were an understandable response to so-called "Maidan supporters". Other times, Russia's counsel treated the bombings as a hoax, saying it has been "revealed that the incidents are no more than mystification"[143]. Russian media is the only source that "reveals" this[144]. Suffice it to say that the OSCE monitors who arrived at the scenes of both the Stena Pub and rally bombings, reported no signs of anything staged[145].

71. When Russia is not proposing new conspiracy theories, it flatly misrepresents the evidence. According to Russia, Ukraine has put forward "only a single piece of evidence" connecting Russian persons to the Stena Pub bombing, which Russia describes as a "decision of the Ukrainian court, based on a confession"[146]. Russia is simply ignoring the full body of evidence, much of which Mr Zionts discussed last week[147].

72. Russia deploys the same tactic regarding the rally bombing that killed three civilians. Here as well, Russia says that Ukraine relies only on confessions, and here as well, that is not true[148].

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[142] *Ibid.,* para. 43 (RU, Ann. 1).

[143] CR 2023/8, p. 65, para. 34 (Udovichenko).

[144] *Ibid.*, paras. 36–38, fns. 99-100.

[145] OSCE, Latest from OSCE Special Monitoring Mission (SMM) to Ukraine, Based on Information Received as of 18:00 (Kyiv time) (10 Nov. 2014) (MU, Ann. 318, judges' folders, tab 22); OSCE, Latest from OSCE Special Monitoring Mission (SMM) to Ukraine Based on Information Received as of 18:00 (Kyiv time) (24 Feb. 2015) (MU, Ann. 335); OSCE, Spot Report by Special Monitoring Mission to Ukraine, 22 Feb. 2015: Explosion in Kharkiv at March Commemorating February 2014 Pro-Maidan Events (22 Feb. 2015) (MU, Ann. 334, judges' folders, tab 23). See also OHCHR, Report on the Human Rights Situation in Ukraine (16 Feb.–15 May 2015), para. 24 (MU, Ann. 768).

[146] CR 2023/8, p. 65, para. 36 (Udovichenko).

[147] CR 2023/5, pp. 66–67, paras. 55–59 (Zionts).

[148] CR 2023/8, p. 67, para. 49 (Udovichenko).

73. Let me be clear: Russia has put forward no credible evidence supporting its allegations of coerced confessions. A Russian press article is not reliable evidence[149]. Nor is the witness statement submitted in March 2023, with Russia's Rejoinder, by Olga Kobtseva, an LPR member who is sanctioned by various governments for her actions against the territorial integrity of Ukraine[150]. Among other problems, Ms Kobtseva does not claim first-hand knowledge of the subject of her testimony — her discussion of Ms Kovtun, for example, is a summary of what she read on Russian websites[151]. But laundering propaganda websites through a purported "witness statement" does not make the underlying evidence any more credible.

74. In any event, the Court does not need to address this issue. As Ukraine has established, there is sufficient evidence on the bombings, and of the financing of those bombings by Russian persons, independent of the confessions that Russia challenges. Indeed, as the merits of this case come to a close, Russia has still not addressed the key evidence before you. That evidence establishes the commission of numerous offences under Article 2 of the ICSFT, for the funding of terrorist bombings across Ukraine.

III. CONCLUSION: RUSSIA'S VIOLATIONS OF THE CONVENTION AND UTTER INDIFFERENCE TO THE LIVES OF UKRAINIAN CIVILIANS

75. Madam President, Members of the Court, the evidence presented by Ukraine is compelling and it speaks for itself. Russian persons knowingly financed terrorist acts in Ukraine. They supplied illegal armed groups with money, missiles and bombs, knowing that these funds would be used to kill, coerce and intimidate the civilian population.

76. Russia would ask this Court to believe that those sending funds to the DPR and LPR had no appreciation of the deadly acts being committed against Ukrainian civilians. Russia has asked this

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

[150] UK Treasury Office of Financial Sanctions Implementation, Consolidated List of Financial Sanctions Targets in the UK (22 May 2023), accessed at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1159960/Russia.pdf (judges' folders, tab 33); *Official Journal of the European Union*, Council Regulation (EU) 2022/580 of 8 April 2022 - amending Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (8 Apr. 2022), accessed at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2022:110:FULL&from=EN (judges' folders, tab 33); War & Sanctions, Along The Sanctioned Person, Along The Sanctioned Person: Kobtseva Olga Anatolyevna (24 May 2023), accessed at https://sanctions.nazk.gov.ua/en/sanction-person/4416/(judges' folders, tab 33); *Canada Gazette*, Regulations Amending the Special Economic Measures (Ukraine) Regulations: SOR/2022-87 (26 Apr. 2022), accessed at https://gazette.gc.ca/rp-pr/p2/2022/2022-05-11/html/sor-dors87-eng.html (judges' folders, tab 33).

[151] Witness Statement of Olga Anatolievna Kobtseva, 10 Mar. 2023, paras. 13–14 (RR, Ann. 9).

Court to believe that it had no obligation to police its border; it had no obligation to investigate fundraising activities by prominent Russian oligarchs and groups publicly raising funds on the internet; it had no obligation to freeze funds; and no obligation to tell its own officials not to finance terrorist acts. Wilful blindness is no defence at all.

77. But wilful blindness is the most generous interpretation of Russia's approach. Confronted with Ukraine's requests for assistance, Russia did not fulfil its international obligations to its neighbour. Instead, Russia did nothing. It did not investigate; it did not control its borders; it did not freeze or seize funds; and it did not prevent its own officials from financing covered acts. Russia did nothing to prevent and suppress terrorism financing. Russia has therefore violated the ICSFT and Ukraine asks this Court to hold Russia accountable.

Madam President, this concludes my remarks. Next would be Mr Gimblett to speak to the CERD.

The PRESIDENT: I thank Ms Cheek and I now invite Mr Jonathan Gimblett to address the Court. You have the floor, Sir.

Mr GIMBLETT:

THE RUSSIAN FEDERATION'S VIOLATIONS OF THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

1. Madam President, distinguished Members of the Court, it is an honour to appear before you again on behalf of Ukraine. Together with Professor Harold Koh, I will address Ukraine's claims under the Convention on the Elimination of All Forms of Racial Discrimination.

I. THE COURT SHOULD RULE ON UKRAINE'S CLAIMS, NOT RUSSIA'S MISCHARACTERIZATION OF THEM

2. The Russian Federation's opening oral submissions on 8 June were marked by the same distortion and diversion that we have seen throughout these proceedings. On the one hand, Russia engages in serial mischaracterization of Ukraine's claims so as to give itself targets to attack. On the other, Russia takes legal authorities out of context in an attempt to impose legal standards so exacting that the Convention would be rendered inapplicable to its conduct in Crimea. The Court should not indulge either of those tactics. It should rule on the claims as brought by Ukraine and not as

interpreted — or reinterpreted — by Russia for its own ends. And it should reject Russia's artificial attempts to import legal standards that have no place in the CERD.

3. Ukraine's claims are straightforward. In the Memorial, Ukraine describes a multitude of discriminatory acts taken by the Russian authorities that have had the purpose or effect of nullifying or impairing the human rights of two ethnic groups in Crimea: the Crimean Tatars and the Ukrainian community. It is Ukraine's case that those two ethnic groups have been targeted by Russia as collective punishment for their principled opposition to Russia's purported annexation of Crimea. Russia's discriminatory acts have occurred across multiple facets of the political and cultural lives of those communities. In addition to asking the Court to rule on those underlying violations, Ukraine therefore asks the Court to find that they form a broader pattern constituting a practice of racial discrimination in violation of Article 2 (1) *(a)* of the Convention.

4. Russia's numerous mischaracterizations of Ukraine's case begin with its attempt to present it as limited to the claim concerning an overall practice of discrimination, unmoored from the underlying violations which are in fact its predicate. Russia uses this distorted version of Ukraine's case to argue for an absurdly exacting standard of proof. Next, Russia falsely accuses Ukraine of recasting its case as one of indirect discrimination during the course of the written pleadings. That is incorrect: Ukraine has been clear from the outset that its case relies on both the discriminatory purpose and effect of Russia's conduct. But Russia's argument serves as a pretext for it to propose rigid requirements for proving indirect discrimination, accompanied by lax standards by which States may escape condemnation for measures that have a discriminatory effect along racial or ethnic lines. Third, Russia tries at every turn to read this case as being one about political discrimination lying beyond the scope of the CERD because it involves isolated acts against disfavoured individuals. What connects these acts, though, is a policy on Russia's part of neutralizing those voices capable of providing the Crimean Tatar and Ukrainian communities with political and intellectual leadership, whether by disappearing activists, banishing or arbitrarily detaining elected politicians, or by silencing the media that used to speak for those communities. Finally, Russia engages in serial mischaracterizations of Ukraine's underlying claims, asserting, for example, that Ukraine seeks to vindicate non-existent rights for indigenous peoples to have their own representative institutions and for minorities to be educated in their own languages.

Madam President, I am about to begin another section which will probably take about 15 minutes. I do not know if you would like to take the opportunity to go into recess for the coffee break.

The PRESIDENT: Thank you, Mr Gimblett. You may go ahead with your next section, which I see is section II in your written submission, and after that we can take a break. Thank you.

Mr GIMBLETT: Thank you, Madam President.

II. THE COURT SHOULD REJECT RUSSIA'S ATTEMPT TO IMPOSE A HEIGHTENED STANDARD OF PROOF AND EVIDENTIARY REQUIREMENTS

5. I will address each of these Russian diversionary tactics in turn, starting with Russia's use of mischaracterization to restrict the Court's jurisdiction and justify the application of a higher standard of proof and more restrictive evidentiary requirements.

6. Russia argued again on Thursday that the Court's jurisdiction is limited to ruling on whether Russia has engaged in a systematic campaign of racial discrimination against the Crimean Tatar and Ukrainian communities[152]. Russia asserts that it was only because Ukraine had alleged such a campaign that the Court rejected Russia's objection to admissibility on the grounds of non-exhaustion of domestic remedies[153]. But this misconstrues the Court's preliminary objections Judgment.

7. The Court's Judgment recognized that Ukraine alleged individual acts of racial discrimination, which together revealed a broader pattern of racial discrimination. As this Court wrote, "the individual instances to which Ukraine refers in its submissions emerge as illustrations of the acts by which the Russian Federation has allegedly engaged in a campaign of racial discrimination"[154]. Critically, the Court then concluded that Ukraine's challenge to the entire pattern of conduct confirmed that it was not adopting the cause of one or more of its nationals and, therefore, that the rule on exhaustion of local remedies was not applicable[155]. This conclusion aligned with the

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[152] See e.g. CR 2023/8, p. 32, para. 11 (Tchikaya) (unofficial translation).

[153] *Ibid.*, para. 10.

[154] *Preliminary Objections, Judgment, I.C.J. Reports 2019 (II)*, p. 606, para. 130.

[155] *Ibid.*; see also CR 2023/6, pp. 47-48, paras. 49-52 (Cheek).

point that Ukraine had made in its Written Statement of Observations and Submissions on the Preliminary Objections of the Russian Federation that "[f]ar from espousing the claim of a specific individual, Ukraine has brought this case to put an end to violations of the Convention that affect hundreds of thousands of Crimean Tatars and Ukrainians across Crimea"[156].

8. Russia's attempt to restrict the Court's jurisdiction to answering the ultimate question — whether Russia has engaged in a systematic campaign — puts the cart before the horse. In so doing, it seeks to deny those hundreds of thousands of victims of individual acts of discrimination the protection of the Convention. The Court should instead follow the common-sense approach of considering the predicate individual acts of discrimination alleged by Ukraine, before asking itself whether together those acts constitute a practice of racial discrimination forbidden by Article 2 (1) *(a)* of the Convention. Professor Koh will have more to say about that later.

9. On Thursday, Russia also relied on its artificially restricted reading of Ukraine's case to argue that "fully conclusive" evidence is required, a standard this Court has previously applied in cases involving genocide[157]. The Court has already heard Ukraine's position on this argument today, because — tellingly — Russia advances the very same argument in an effort to avoid its accountability under the ICSFT as well. But, as you heard from Ms Cheek earlier, Russia provides no basis to justify departing from the Court's usual requirement of "sufficient" or "convincing evidence" to prove serious claims falling short of genocide[158].

10. Russia's counsel asserted last Thursday that the heightened standard of proof advocated by Russia prevents the Court from inferring discriminatory "intent" should it ultimately find that Russia has engaged in multiple breaches of the Convention[159]. But in cases such as this, where relevant evidence is outside the applicant State's territorial control, this Court has long recognized

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[156] Ukraine's Written Statement of Observations and Submissions on the Preliminary Objections of the Russian Federation (WSU), para. 378.

[157] CR 2023/8, p. 33, para. 13, and p. 35, para. 27 (Tchikaya) (unofficial translation).

[158] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, paras. 72, 207, 208, 210, 211, 237, 246, 250, 334, and 342.

[159] CR 2023/8, p. 35, para. 26 (Tchikaya) (unofficial translation).

that the State that is not in a position to produce certain evidence "should be allowed a more liberal recourse to inferences of fact"[160].

11. Russia's insistence that Ukraine produce detailed statistical evidence and identify comparators, repeated by Mr Tchikaya on Thursday[161], is another example of Russia's efforts to impose unrealistically rigid evidentiary requirements. Russia's position seems to be that because statistics and comparators may be available and useful in some cases, they should be a requirement in all. Ukraine respectfully suggests that the Court should adopt a common-sense approach, recognizing that the availability and usefulness of such information depends on the specific context of the claim. In the present case, the Ukrainian Government has been temporarily excluded from Crimea and is therefore in no position to compile statistics, although it has proffered such analyses where the data exists — for example, to show the decline in the number of students being taught in the Ukrainian language[162]. Mr Tchikaya's claim that Ukraine "has produced no statistics to support its allegations"[163] is simply not true. Similarly, the viability of establishing discrimination with reference to a comparator depends on the particular claim. Again, though, Ukraine has offered such comparators where it makes sense to do so, for example, by contrasting the treatment of Crimean Tatar and Ukrainian gatherings with those organized by the Russian community in Crimea[164]. Other aspects of its claims, such as the banning of the *Mejlis*, have no analogue in the other communities present in Crimea.

12. Meanwhile, the Court should be wary of the loose statistical comparisons offered by the Russian Federation. As an illustrative example, Russia's counsel asserted on Thursday that it "provided the Court with statistical data comparisons between Crimea and the rest of Russia"[165] to

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[160] *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 18; see also CR 2023/6, pp. 51-52, para. 63 (Cheek).

[161] See CR 2023/8, p. 37, paras. 33–34 (Tchikaya) (unofficial translation).

[162] See e.g. RU, paras. 696–699; Kateryna Petrova, *Assessment of the Implementation of the State Policy on the Realization of the Right to Education for Children from Temporarily Occupied Crimea*, Center of Civil Education "Almenda" (2021); UNESCO, *Follow-Up to Decisions and Resolutions Adopted by the Executive Board and the General Conference at Their Previous Sessions*, UN doc. 196 EX/5, p. 68 (18 Mar. 2015); Education Statistics from Ministry of Education of Ukraine (MU, Ann. 735). See also MU, para. 540; Office of the United Nations High Commissioner for Human Rights, *Report on the Human Rights Situation in Ukraine* (16 Aug.–15 Nov. 2015), para. 157 (MU, Ann. 770); Permanent Delegation of the Russian Federation to UNESCO, *Information on the Situation in the Republic of Crimea (the Russian Federation) within the Scope of UNESCO Competence as of April 8, 2015* (14 Apr. 2015), p. 2 (MU, Ann. 785).

[163] CR 2023/8, p. 37, para. 34 (Tchikaya) (unofficial translation).

[164] MU, paras. 481, 492, 503–504.

[165] CR 2023/8, p. 68, para. 15 (Udovichenko).

prove that "that the number of public events that were banned in Crimea, or adjusted, is lower than in the other parts of Russia"[166]. This data is entirely irrelevant to whether or not Russia discriminated against the Crimean Tatars and Ukrainians in Crimea in banning their culturally significant gatherings. First, neither Russia's counsel nor the cited annex actually provides the number of prohibited gatherings of the specific ethnic groups in Crimea. Second, a comparison of the number of banned gatherings in all of Crimea against the number of banned gatherings in other regions of Russia does not indicate if a specific ethnic group's events were banned more frequently than others within a specific region, or account for the qualitative significance of the banned events to the ethnic group in question. That brings me to the end of that section, Madam President.

The PRESIDENT: Thank you, Mr Gimblett. In that case this would be a good time to adjourn for a coffee break of 10 minutes. The sitting is suspended.

The Court adjourned from 4.35 p.m. to 4.50 p.m.

The PRESIDENT: Please be seated. The sitting is resumed. I shall now give the floor back to Mr Gimblett to complete his presentation. You have the floor.

Mr GIMBLETT: Thank you, Madam President.

III. RUSSIA READS DISCRIMINATION IN EFFECT OUT OF THE CONVENTION

13. Let me turn next to the role played by discrimination in effect in this case. In *Qatar* v. *United Arab Emirates*, the Court confirmed that "the Convention prohibits all forms and manifestations of racial discrimination, whether arising from the purpose of a given restriction or from its effect"[167]. From the outset of these proceedings, Ukraine has made clear that it would rely on both purpose and effect to prove its case. Thus, in its Memorial, Ukraine wrote that, "[i]nstead of taking measures to eliminate racial discrimination, Russia has implemented measure after measure the purpose or effect of which is to generate racial discrimination"[168].

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[166] CR 2023/8, p. 68, para. 15 (Udovichenko).

[167] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 109, para. 112.

[168] MU, para. 587.

14. In her remarks last Tuesday, Ms Trevino explained that in certain instances of Russia's discrimination against the Crimean Tatars and Ukrainians in Crimea, a discriminatory purpose could be inferred directly from the circumstances and context in which the measures were taken. This was the case, for example, with disappearances[169] and the measures taken by Russia against the Crimean Tatar leadership[170]. In a further set of cases, for example, those relating to culturally significant gatherings, the primary finding of discrimination in effect provided a basis, when the measures were considered in their context, for an inference of discriminatory purpose[171].

15. Discrimination in effect incorporates the concept of indirect discrimination, where a facially neutral measure gives rise to an unjustifiable disparate impact along racial or ethnic lines. This understanding of the CERD's purpose or effect language is consistent with how the CERD has been interpreted by the CERD Committee and by countless commentators. For example, the CERD Committee's General Recommendation No. 14, adopted in 1994, stated that "[i]n seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin"[172].

16. Russia's presentation on Thursday, however, confirmed that Russia sees no place for discrimination in effect based on the disparate impact of a facially neutral measure. According to Russia's counsel, for example: "a disparity of results between ethnic groups does not in itself constitute racial discrimination, unless it is an objective consequence of a distinction, exclusion, restriction or preference based on race, colour, descent, national origin or ethnic origin"[173]. To similar effect, you heard Russia argue that "[r]acial discrimination is based on *differential* treatment"[174] and that "*equal* treatment does not . . . fall within the definition of racial discrimination"[175].

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[169] CR 2023/6, p. 56, para. 19 (Trevino).

[170] CR 2023/6, pp. 57–58, para. 25 (Trevino).

[171] CR 2023/6, p. 64, para. 56 (Trevino).

[172] CERD Committee, General Recommendation No. 14, para. 2 (MU, Ann. 788, judges' folder, tab 35).

[173] CR 2023/8, p. 39, para. 43 (Tchikaya) (unofficial translation).

[174] *Ibid.*, p. 38, para. 38 (emphasis added).

[175] *Ibid.*

17. But Russia's argument is deeply flawed. It is inconsistent with the plain text of the Convention, flatly contrary to the Convention's object and purpose, and is unsupported by the sources on which Russia itself relies.

18. First, Russia's argument is inconsistent with the text of Article 1 (1). Ms Cheek explained last week that the use of the disjunctive "or" in the phrase "purpose or effect" makes clear that the Convention protects against an act or practice that has the purpose of discrimination, as well as effects-based discrimination — which includes measures that are facially neutral, but give rise to a "distinction, exclusion, restriction or preference" in the form of an impermissibly disproportionate impact on a protected class[176].

19. As Professor Fredman has explained in her expert reports, discrimination in effect — which encompasses a concept of indirect discrimination — "recognises that equal treatment which has a disproportionate effect on a group defined by the enumerated grounds *is itself discriminatory*"[177]. Put another way, "[i]ndirect discrimination or *disparate impact focuses on inequality of results rather than inequality of treatment*"[178]. That should not be controversial.

20. Second, Russia's argument flies in the face of the Convention's object and purpose to eliminate *all forms* of racial discrimination. Under Russia's reading of the Convention, a facially neutral measure that results in a disproportionate prejudicial impact on the rights of a protected group would not constitute discrimination. To read out this protection, as Russia proposes, would rob the Convention of one of its most fundamental protections and would turn it from a potent weapon against racial discrimination into a discriminator's charter, allowing States to use facially neutral, but suspect, domestic legislation to target vulnerable groups. Ukraine has demonstrated in these proceedings how adeptly autocratic régimes like the modern Russian Federation can disguise a discriminatory scheme behind the façade of seemingly neutral laws. Russia's anti-extremism laws are a prime example of this and Professor Koh will have more to say about them shortly.

21. Third, nothing in the Court's jurisprudence supports Russia's restrictive interpretation of discrimination in effect, as that term is used, in Article 1 (1). Russia claims to find support for its

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[176] CR 2023/6, pp. 37-38, para. 11 (Cheek).

[177] First Fredman Report, para. 53 (MU, Ann. 22, judges' folder, tab 36) (emphasis added); see also CERD Committee, General Recommendation No. 32, para. 8 (MU, Ann. 790).

[178] First Fredman Report, para. 53 (MU, Ann. 22, judges' folder, tab 36) (emphasis added).

arguments in the decision of this Court's predecessor in *Minority Schools in Albania*[179], relying on that case to argue that the Permanent Court "expressly stated that equal treatment 'precludes discrimination of any kind'"[180]. Russia, however, takes the PCIJ's comment out of context. The Court's statement came in the context of its recognition that "equal treatment" encompasses both "equality in law" and "equality in fact"[181]. As Professor Fredman has explained, the PCIJ's "reference to inequality in fact is analogous to the reference in the CERD to the disparate effect of apparently equal treatment"[182].

22. Russia next argues that the Court's decision in *Qatar* v. *United Arab Emirates* supports its assertion that an applicant must establish a "causal link with an act of race-based differential treatment"[183]. In that case, the Court dismissed Qatar's claim of "indirect discrimination" on the facts[184]. However, the facts of that case were quite different from this one, involving measures based on current Qatari nationality, which the Court found to have only "collateral or secondary effects on persons born in Qatar or of Qatari parents, or on family members of Qatari citizens residing in the UAE"[185]. Here, by contrast, the disparate impact of which Ukraine complains falls directly on the Crimean Tatar and Ukrainian communities in Crimea that are at the heart of this case.

23. Accordingly, nothing prevents this Court from confirming the widely shared understanding that the CERD's prohibition on discrimination in effect encompasses prejudicial disparate impacts arising from facially neutral laws.

IV. ANY ALLEGED JUSTIFICATION OF DISCRIMINATION IN EFFECT MUST MEET A HIGH BAR

24. A final question to be addressed arises from Russia's claim, last Thursday, that measures undertaken with a legitimate aim do not constitute racial discrimination[186]. Ukraine is clear that there

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[179] CR 2023/8, p. 39, para. 40 (Tchikaya) (unofficial translation).

[180] *Ibid.*

[181] *Minority Schools in Albania, Advisory Opinion, 1935, P.C.I.J., Series A/B, No. 64*, p. 17.

[182] Second Fredman Report, para. 53 (RU, Ann. 5, judges' folder, tab 37).

[183] CR 2023/8, p. 40, para. 44 (Tchikaya) (unofficial translation).

[184] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 109, para. 112.

[185] *Ibid.*

[186] CR 2023/8, p. 42, para. 54 (Tchikaya) (unofficial translation).

is no room for such justification where a discriminatory purpose has been established[187]. A State alleged to have engaged in purposeful discrimination on racial grounds may seek to disprove the allegation of discriminatory purpose. But if it fails to do so, that is the end of the analysis and it will have been shown to have engaged in racial discrimination.

25. Where a measure is claimed to discriminate in effect, a question may arise as to whether the measure does not constitute racial discrimination because the disparate effect can be justified. As the CERD Committee wrote in General Recommendation 14, for example, "a differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate"[188]. In other words, a legitimate aim advanced by an accused State is relevant only to determining whether the disparate impact of its measures constitutes racial discrimination.

26. There is a wide gulf between the Parties on the standard the Court should apply when assessing a State's alleged justification for discrimination in effect. According to Russia, all that is required is that a given measure "can be reasonably justified or considered legitimate"[189]. As Mr Tchikaya put it last Thursday,

> "[j]ustifications may include . . . reasonable limitations on human and/or civil rights, as may be necessary in a democratic society, provided for by the applicable law and subject to due process, in order to protect public order against acts such as terrorism and extremism"[190].

27. Ukraine has explained that that is not the appropriate standard[191]. Consistent with the CERD Committee's General Recommendation 14, any disparate impact must be based on a "legitimate" justification when "judged against the objectives and purposes of the Convention"[192]. While the CERD Committee has provided limited further guidance as to how a State's alleged "justification" should be assessed, the applicable standard cannot be lower than the standard applied outside the context of the CERD, in assessing whether there have been permissible limitations on

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[187] CR 2023/6, p. 38, paras. 12-14 (Cheek).

[188] CERD Committee, General Recommendation No. 14, para. 2 (MU, Ann. 788, judges' folder, tab 35).

[189] CR 2023/8, p. 42, para. 54 (Tchikaya) (unofficial translation).

[190] CR 2023/8, p. 42, para. 55 (Tchikaya) (unofficial translation).

[191] CR 2023/6, pp. 39-40, paras. 17-20 (Cheek).

[192] CERD Committee, General Recommendation No. 14, para. 2 (MU, Ann. 788, judges' folder, tab 35); CERD Committee, General Recommendation No. 32, para. 8 (MU, Ann. 790).

other human rights that — unlike the prohibition on racial discrimination — are subject to derogation.

28. Prominent among those other standards is that applied by the Human Rights Committee (HRC) when considering limitations to human rights protected by the ICCPR. Ms Cheek explained that the HRC has set out a rigorous test that looks at whether the human rights intrusive measure is, among other things, "necessary", has a "genuine and identifiable legitimate aim" and conforms to the "(strict) principle of proportionality in that the expected benefit obtained towards serving the legitimate aim invoked outweighs any adverse impact upon human rights"[193]. Necessity in this context has been interpreted as entailing an obligation to choose the least intrusive measure from among equally effective measures[194]. Taken together, the HRC's standard is an objective assessment, requiring clear and objective proof and the standard is high.

29. The problem with Russia's standard is evident on its face: it is self-judging, giving wide latitude to limitations provided for in domestic law. The numerous ways in which Russia has abused its anti-extremism laws to discriminate against protected groups in Crimea demonstrates the dangers inherent in such an approach. In short, Russia has come nowhere close to satisfying the high bar for objectively justifying the disparate impact of its measures against the Crimean Tatar and ethnic Ukrainian communities in Crimea. Russia cannot simply hide behind its national laws to racially discriminate.

V. RUSSIA CANNOT AVOID RESPONSIBILITY FOR ITS DISCRIMINATORY ACTS BY MISCHARACTERIZING THEM AS "POLITICAL"

30. I turn now to Russia's attempt to portray Ukraine's claims as alleging political discrimination.

31. First, Ukraine takes note of Russia's statement last Thursday that "Russia has never maintained that racial discrimination can be justified by measures taken for political reasons"[195]. Ukraine interprets this statement as a belated admission that restrictions imposed by Russia on the

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[193] CR 2023/6, p. 39, para. 18 (Cheek) (citing Scheinin Report (14 Apr. 2022), para. 22 (RU, Ann. 7)); Human Rights Committee, General Comment No. 27, paras. 11, 14-15; Human Rights Committee, General Comment No. 37, paras. 37, 40-47.

[194] See Scheinin Report, para. 22 (RU, Ann. 7); Human Rights Committee, General Comment No. 27, paras. 11, 14; Human Rights Committee, General Comment No. 37, paras. 37, 40.

[195] CR 2023/8, p. 40, para. 50 (Tchikaya) (unofficial translation).

human rights of the Crimean Tatar and Ukrainian communities as punishment for their opposition to Russia's purported annexation of Crimea would qualify as racial discrimination under the Convention.

32. In its opening argument, however, Russia continued to accuse Ukraine of "seeking to broaden the concept of racial discrimination to include [political] opinions within the scope of the Convention"[196]. According to Russia, because "[p]olitical opinion . . . is not compatible with 'ethnic origin'" in its view, "allegations of discrimination based on political beliefs are not regulated by the Convention"[197].

33. Russia is mistaken in its characterization, for at least four reasons.

34. *First*, Ukraine does not define "ethnic groups" based on their political opinion. Rather, as stated in the Reply, "the political community (and therefore the collectivity of other citizens) with which [an individual] *most identifies* is a relevant factor in assigning ethnicity"[198]. As Professor Fredman has explained, as concerns the Ukrainian community, "a shared outlook with regards to Crimea remaining part of Ukraine's sovereign territory"[199] is a relevant — but not the only — marker of ethnicity[200].

35. *Second*, Russia's distortion of Ukraine's position on the definition of ethnic groups is of no consequence in any case because, as the Court observed in its preliminary objections Judgment, "both Parties agree that Crimean Tatars and ethnic Ukrainians in Crimea constitute ethnic groups protected under CERD"[201]. For the same reason, Russia's argument "that 'ethnicity' can[not] be defined . . . by reference to political opinions which are clearly not inherent in birth"[202] takes it nowhere. As Professor Koh explained on Tuesday last week, unlike *Qatar* v. *United Arab Emirates*, this case is about discrimination based on ethnic origin, directed against affected communities who are undeniably protected ethnic groups under the CERD.

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[196] CR 2023/8, pp. 40-41, para. 50 (Tchikaya) (unofficial translation).

[197] CR 2023/8, p. 41, para. 51 (Tchikaya) (unofficial translation).

[198] RU, para. 411 (citing Second Fredman Report, Section IV.B (RU, Ann. 5)).

[199] RU, para. 409.

[200] Second Fredman Report, para. 30 (RU, Ann. 5).

[201] *Preliminary Objections, Judgment, I.C.J. Reports 2019 (II)*, p. 595, para. 95.

[202] CR 2023/8, p. 41, para. 53 (Tchikaya) (unofficial translation).

36. *Third*, Russia wrongly claims that Ukraine differentiates between the so-called right and wrong members of ethnic groups in Crimea. For example, Russia is mistaken when it argues that Ukraine complains that the media outlets of the "so-called 'right' Crimean Tatars and Ukrainians" have been closed and their gatherings blocked[203]. Ukraine does not label members of ethnic groups in that way, even if the Russian Federation does. Instead, Ukraine has identified in its pleadings Crimean Tatar organizations funded by the Russian Government, created to spread Russian propaganda under the guise of ethnic cultural expression. For example, Russia claims that "Ukraine attacks the Millet Channel" as belonging to the so-called "wrong" Crimean Tatars[204]. But Ukraine does no such thing; rather it disputes that Millet is representative of the Crimean Tatar community when it is widely recognized to be a "pro-Kremlin propaganda tool", established by Russia to replace "independent Crimean Tatar news organizations"[205]. Separately, Russia continues to argue that the CERD does not protect media corporations, but that misses the point. Ukraine's claim in this regard relates to the right of the Crimean Tartar and Ukrainian communities to express themselves freely through independent media in their own native languages.

37. *Finally*, Russia argues that Ukraine's evidence of disappearances — and in particular the UNHCR reports — "suggest that the suspected disappearances were linked to the 'political affiliation or position' of those concerned, not their ethnic origin"[206]. But this is just another example of how Russia gets things backwards. The disappearance and murder of Reshat Ametov and the abduction and torture of Andrii Scheckun deprived the Crimean Tatar and Ukrainian communities respectively of current or potential future leaders. Those acts should accordingly be treated as discriminatory measures designed to force those ethnic groups into submission to the Russian occupiers, not crimes committed against individuals for political reasons.

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[203] CR 2023/8, p. 65, para. 4 (Udovichenko).

[204] CR 2023/8, p. 66, paras. 5-6 (Udovichenko).

[205] *Radio Free Europe/Radio Liberty*, "Pro-Russian Crimean Tatar TV Channel Starts Satellite Broadcasting" (1 Apr. 2016) (judges' folder, tab 38). See also David Axelrod, "Seven Years on from Annexation, Crimean Journalists are Under Threat", *openDemocracy* (1 May 2021) (judges' folder, tab 39); Anton Troianovski, "Vote — or Else: Crimea's Propaganda Machine Fans Fear in Closing Days of Putin's Campaign", *The Washington Post* (16 Mar. 2018) (judges' folder, tab 40); *Religious Information Service of Ukraine*, "'Russian authorities in Crimea turned construction of the cathedral mosque in Simferopol into a political project,' expert said" (22 Jan. 2020) (judges' folder, tab 41).

[206] CR 2023/8, p. 57, para. 56 (Azari) (unofficial translation).

VI. The Court should not be misled by Russia's mischaracterizations of Ukraine's individual claims

38. In the last part of my remarks, I will deal with Russia's mischaracterizations and misrepresentations of certain of Ukraine's individualized claims of racial discrimination. Professor Koh will be addressing the *Meijlis* so I will pass over that particular claim.

A. Searches and detentions

39. Moving on to searches and detentions, counsel for Russia claimed on Thursday that the Russian Federation's "anti-extremist legal arsenal . . . is based on the Shanghai Convention" and "complies with the standards enshrined in many international legal instruments"[207]. Professor Scheinin has already explained that this is entirely untrue, supported by the "many international human rights expert bodies that have repeatedly expressed their serious concerns about" Russia's anti-extremism laws[208].

40. Professor Azari also asserted that Russia's law enforcement measures are aimed at religious extremism and that Russia "rigorously controlled the appropriateness and the proportionality of the administrative and judicial police operations that it implemented"[209]. But this rosy picture conflicts with the findings of respected international bodies. On 13 January 2022, for example, the United Nations Working Group on Arbitrary Detention found that Server Mustafayev — a Crimean Tatar serving a 14-year prison sentence for his alleged involvement with an extremist organization — was arbitrarily detained in violation of international law. The Working Group observed that elements of the proceedings were "highly irregular", noting that the case was but one example that shared "a striking similarity" with other reported cases. The Working Group also found that Mr Mustafayev's detention amounted to "discrimination based on national, ethnic or social origin and religion", in breach of Article 26 of the ICCPR[210].

41. It is undisputed that, since Russia's occupation of Crimea, more than 70 Crimean Tatar individuals have been imprisoned based solely on their alleged association with allegedly extremist

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[207] CR 2023/8, p. 59, para. 65 (Azari) (unofficial translation).

[208] Scheinin Report (14 Apr. 2022), para. 35; *ibid.*, paras. 35 et seq. (RU, Ann. 7, judges' folder, tab 52).

[209] CR 2023/8, p. 59, para. 64 (Azari) (unofficial translation).

[210] United Nations Human Rights Council, Working Group on Arbitrary Detention, Opinion No. 56/2021 concerning Server Mustafayev (Russian Federation), UN doc. A/HRC/WGAD/2021/56 (13 Jan. 2022), paras. 75 and 98 (judges' folder, tab 44).

organizations[211]. The Russian authorities have used even the slightest indicia of any alleged association with these organizations as a basis for manifestly disproportionate law enforcement actions and shockingly lengthy sentences, ranging from between 7 and 19 years in prison.

B. Citizenship

42. On forced citizenship, Russia has continued its attempt to shoehorn Ukraine's claim into the "nationality" exceptions under Article 1 (2) and 1 (3) of the Convention. As Ukraine set forth in its written submissions, however, its case does not hinge on any legitimate distinction between citizens and non-citizens of Russia. Rather, it concerns how Russia's forcing of its own nationality on the population of occupied Crimea and its enforcement of related laws and regulations has particularly burdened the rights of the Crimean Tatar and Ukrainian communities, *regardless of whether* Russian nationality attached to them automatically or they were able to opt out[212].

43. In this regard, Russia's reliance on *Qatar* v. *United Arab Emirates* again is misplaced[213]. That case concerned a distinct legal question, namely whether discrimination based on a person's current nationality falls within the prohibition of racial discrimination within the meaning of the Convention. It did not address the discriminatory downstream effects of a forced citizenship régime on a CERD-protected group, the issue appropriately before this Court.

C. Enforced disappearances

44. Concerning enforced disappearances, counsel for Russia argued that "Ukraine has not even begun", in its words, to establish attribution of the confirmed cases of abductions, tortures and murders to Russia[214]. But Ukraine has already established that all of the enforced disappearances, murders or torture it discusses are attributable to Russia[215]. This is because those acts were either carried out by Russian State organs such as the Russian FSB, or military intelligence units such as

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[211] Press Statement, Ukrainian Helsinki Human Rights Union *et al.*, Statement by Human Rights Organizations Regarding Yet Another Sentence Against Crimean Tatars (17 Aug. 2021); Crimean Tatar Human Rights Group, Crimean Human Rights Situation Review (Dec. 2021), p. 5, accessed at https://crimeahrg.org/wp-content/uploads/2022/01/crimean-human-rights-group_dec_en.pdf.

[212] MU, para. 455; RU, paras. 546–548.

[213] CMR-2, para. 380.

[214] CR 2023/8, p. 58, paras. 58–59 (Azari) (unofficial translation).

[215] RU, Chap. 10 (D).

the GRU or by actors under Russian control such as the so-called Self Defense Forces of Crimea (the SDF), whose conduct Russia adopted as its own when it incorporated them into the law enforcement structure of Crimea[216] after the purported annexation of the peninsula. Even if the Court finds impediments to attributing conduct of the SDF to Russia as a general matter, such conduct is attributable to Russia in this case pursuant to Article 8 of the Articles on State Responsibility, because it was carried out on the instructions of, or under the direction or control of, the Russian Federation.

D. Education

45. Moving to education. On Thursday, Russia similarly misconstrued Ukraine's claim on education as relying on a right to education in a minority language[217], and misinterpreted *Minority Schools in Albania* to avoid addressing Ukraine's evidence of Russia's violation of the CERD's protections.

46. Ukraine has never argued that there is a general right to education in a minority language in the CERD. Whether such a right exists is irrelevant: it is sufficient to establish discrimination in violation of the CERD that Russia removed provision for existing minority language education from some ethnic groups and not from others[218].

47. Russia's counsel tried to distinguish *Minority Schools in Albania*, suggesting that the case dealt with specific treaty rights to an education system that are not at issue here[219].

48. But Russia misinterprets the Court's reasoning, which both acknowledged that "the Declaration of October 2nd, 1921, was designed to apply to Albania the general principles of the treaties for the protection of minorities"[220] and referred to its previous Advisory Opinion on discrimination in reaching its conclusion that "[t]here must be equality in fact as well as ostensible legal equality in the sense of the absence of discrimination in the words of the law"[221].

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[216] See *RT*, "Crimea Creates Own Military by Swearing in Self-Defense Units" (10 Mar. 2014); Olga Skrypnyk, "Legalization of 'Crimean Self-Defense'", The Crimean Human Rights Group (27 Nov. 2015).

[217] CR 2023/8, p. 51, para. 30 (Azari) (unofficial translation).

[218] *Minority Schools in Albania, Advisory Opinion, 1935, P.C.I.J., Series A/B, No. 64*, p. 20.

[219] CR 2023/8, p. 52, para. 32 (Azari) (unofficial translation).

[220] *Minority Schools in Albania, Advisory Opinion, 1935, P.C.I.J., Series A/B, No. 64*, p. 17.

[221] *Ibid.*, p. 19 (quoting *German Settlers in Poland, Advisory Opinion, 1923, P.C.I.J., Series B, No. 6*).

49. Ultimately, the PCIJ rejected Albania's position, noting that the closure of minority schools would destroy equality of treatment, for its effect would be to "deprive the minority of the institutions appropriate to its needs, whereas the majority would continue to have them supplied in the institutions created by the State"[222]. This holding is directly applicable to this case, where equal access to Russian-language education discriminates against Crimean Tatars and ethnic Ukrainians in fact. And, as recently as May 2023 — just last month — Russia reinforced the discriminatory effect of its educational measures by seizing and looting the last remnants of the Orthodox Church of Ukraine in Crimea, an institution whose private schools had long been a mainstay of Ukrainian-language teaching and culture in Crimea.

E. Cultural heritage

50. Finally, in its first oral pleading, Russia tried to diminish Ukraine's claim of cultural degradation as "a dispute in reality concerning the standards of construction and restoration of palaces and cultural buildings in Crimea"[223]. Russia also falsely portrayed itself as having an "unwavering commitment to preserving and promoting the cultural heritage of all who live in Russia, including Crimean Tatars and Ukrainians"[224]. In reality, though, Russia only supports those cultural activities it deems acceptable, while actively rooting out those ethnic groups' cultural practices, sites and narratives which it finds undesirable.

51. Ukraine's claim on cultural heritage is centred not just on the degradation of the historical features of the Khan's Palace, but also the forced closure of, or failure to preserve, ethnic Ukrainian or Crimean Tatar sites, burial grounds, cultural groups and other institutions[225]. Russia seeks to divert the Court from the central issue here, which is that Russia does not respect the ethnic communities' right to maintain their own cultural sites and practices; it only allows activities that spread its propaganda and revisionist history.

52. Consistent with this, Russia "promotes" a manipulated cultural narrative of its own design, while suppressing ethnic Ukrainians' attempts to maintain their own, independent cultural

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[222] *Minority Schools in Albania, Advisory Opinion, 1935, P.C.I.J., Series A/B, No. 64*, p. 20.

[223] CR 2023/8, p. 74, para. 17 (Tchikaya) (unofficial translation).

[224] *Ibid.*, p. 73, para. 8.

[225] See MU, Chap. 10 (C); RU, Chap. 16.

institutions. How else to explain the photo Russia included in its presentation on Thursday: a picture of a celebration of the birthday of Taras Shevchenko, the cultural father of the Ukrainian nation and renowned proponent of Ukrainian independence, with a backdrop of a Russian flag?

53. On Thursday, Russia's counsel made light of Ukraine's concerns over shortcomings in Russia's preservation of Crimean Tatar culture, including Russia's grossly negligent restoration of the Khan's Palace[226]. Russia hopes to sweep under the rug the damage it has done to the historical authenticity and cultural value of the complex, where the first *Qurultay* was held in 1917 and where members of the modern *Qurultay* swear their oaths of office[227].

54. The dismissive attitude of Russia's counsel towards the cultural icons of ethnic minorities in Crimea speaks for itself in the broader context of this case. It is emblematic of a broader Russian mindset, which condescends to, rather than values, the cultural contributions of non-Russian ethnic groups. That mindset helps explain why the refusal of the Crimean Tatar and the Ukrainian communities in Crimea to support Russia's purported annexation of the peninsula should have triggered such a furious reaction. Ukraine's pleadings in these proceedings document the collective punishments inflicted on those communities by the Russian occupation authorities. Professor Koh will reflect next on the broader picture that emerges from that conduct, including what can and should be done to bring it to an end and to ensure that it is never repeated.

55. Madam President, that concludes my remarks. I respectfully request that you now call Professor Koh to the podium.

The PRESIDENT: I thank Mr Gimblett and I now invite Professor Harold Hongju Koh to address the Court. You have the floor, Professor.

Mr KOH:

CLOSING REMARKS ON RUSSIA'S VIOLATIONS OF THE CERD AND THE COURT'S PROVISIONAL MEASURES ORDER

1. Madam President, Members of the Court, at this point, we must ask three questions.

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[226] CR 2023/8, p. 74, paras. 15–16 (Tchikaya) (unofficial translation).

[227] MU, para. 523; Ministry of Information Policy of Ukraine, *Save the Khan's Palace* (2018), p. 4 (MU, Ann. 734).

2. First, what do we see? For the last 16 months, we have all watched Russia massively violate the law, crush Ukrainian human rights and defend its actions with lies about the facts and the law. But last week, Russia's lawyers painted a fictional world in which Russia is blameless, because international law — and this Court — are toothless.

3. At a time when the International Criminal Court has issued an arrest warrant for Russia's President for war crimes, Russia's lawyers told you how many rubles Russia has spent in Crimea, repairing Khan's Palace and supporting Ukrainian dance ensembles[228]. What they did not tell you is how many rubles President Putin has spent to destroy Mariupol and Bakhmut, or to brutalize the inhabitants of Bucha, Irpin and Izyum. So who should we believe, Russia or our own eyes?

4. The second question: what have we proven? Ukraine brings claims under two treaties, but this is really one case: about Russia's grand contempt for international law that includes the ICSFT and the CERD.

5. Let me review our CERD case, using Russia's closing of the *Mejlis* and its six-year violation of your provisional measures Order to illustrate its pervasive disrespect for this Court.

6. Which raises our third and most critical question: what should this Court now do? Let me close by describing final relief that would be meaningful in response to Ukraine's submissions.

I. UKRAINE'S CASE UNDER THE CERD

7. For six years, Russia has pretended that its persistent pattern of discriminatory conduct cannot be considered "racial discrimination". But your preliminary objections Judgment recognized that Ukraine may "challenge[], on the basis of CERD, the *alleged pattern of conduct* of the Russian Federation with regard to the treatment of the Crimean Tatar and Ukrainian communities in Crimea"[229]. By proving numerous illustrative acts, Ukraine has established Russia's "pattern of conduct": a concerted campaign of scapegoating, disappearing, torturing, harassing, murdering and abusing Crimea's ethnic communities; inciting intimidation; denying them cultural and educational expression and political representation; then denying them judicial protection of the laws. Taken

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[228] See CR 2023/8, pp. 71-73, paras. 7, 11 (Tchikaya) (unofficial translation).

[229] *Preliminary Objections, Judgment, I.C.J. Reports 2019 (II)*, p. 606, para. 130 (emphasis added).

together, Russia's acts comprise a consistent pattern of punitive action against ethnic groups with discriminatory purpose and effect and without plausible justification.

8. Chapter 12 of our Memorial details how Russia's discrimination violates specific CERD provisions. Russia has conceded or silently affirmed most of these facts. But broadly speaking, its pattern of conduct violates at least the following CERD provisions.

9. Article 2: Russia undertook "to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms", but for the last nine years, it has done the opposite. Although Russia undertook to "engage in no act or practice of racial discrimination", almost every Russian act or practice has broken that promise. Russia undertook "not to sponsor, defend or support racial discrimination by any persons or organizations", but did the opposite, enlisting third persons and local militias in its campaign. Russia agreed to "prohibit and bring to an end, by all appropriate means . . . racial discrimination", but by all available means, it has enabled and prolonged such racial discrimination.

10. Article 4 requires Russia to refrain from promoting or inciting discrimination. But Russia has done the opposite: inciting racial discrimination against ethnic communities in Crimea with hate speech depicting Ukrainians as Nazis and Crimean Tatars as enemies in a war on extremism.

11. In Article 5, Russia undertook to "guarantee the right of everyone . . . to equality before the law". But Russia has belittled those guarantees, on an ethnic basis violating almost every right enumerated in that Article.

12. Article 6 requires Russia to assure "effective protection . . ., through the competent national tribunals and other State institutions, against . . . racial discrimination". But Russia's courts and prosecutors have instead pursued a pattern of discriminatory conduct to punish ethnic opponents and to close the *Mejlis*.

13. In Article 7, Russia "undert[ook] to adopt immediate and effective measures . . . to combat[] prejudices" in the fields of teaching, education, culture and information. Yet again, Russia did the opposite, restricting the educational rights of ethnic minorities, banning culturally important events, and silencing independent media voices.

II. RUSSIA'S CLOSING OF THE *MEJLIS* CONSTITUTES RACIAL DISCRIMINATION IN CRIMEA IN VIOLATION OF THE CERD

14. Russia's closing of the *Mejlis* exemplifies Russia's concerted discriminatory attack on the political and civil rights of Crimean ethnic groups[230].

15. As this detailed timeline shows — and Russia does not dispute it — in March 2014, President Putin called the first Chair of the *Mejlis*, Mr Dzhemilev, to solicit Crimean Tatars' support for Russia's takeover of Crimea. When he refused, Russia subjected him and other Crimean Tatar leaders to five-year entry bans under its anti-extremist laws.

16. When the Crimean Tatar community refused to bend the knee to Putin, Russia launched concerted, intentional acts to dismantle the *Mejlis*, harassing and abusing its members; targeting and convicting Crimean Tatars, including *Mejlis* Deputy Chair, Mr Chiygoz; subjecting prominent *Mejlis* members, like Mr Bariiev and his family, to terrifying home searches; and stopping and searching Mr Bariiev no fewer than 39 times as he travelled in and out of Crimea. Russia persecuted or forced into exile Crimean Tatar political leaders, including Mr Refat Chubarov.

17. Now Russia's counsel disingenuously claimed support from a statement made by Mr Chubarov many years ago[231]. What speaks loudest is that he has been in this courtroom throughout these hearings, including today, supporting Ukraine's case.

18. In September 2021, Russia's own FSB admitted this discriminatory pattern of conduct, boasting of these chilling statistics: 32 supporters convicted; 50 indicted; 306 brought to justice for administrative offences; 33 prohibited from entry; and on, and on[232].

19. Russia's oppression of the *Mejlis* is only intensifying. Just last year, numerous *Mejlis* members have been convicted, including Mr Nariman Dzhelyalov, the First Deputy Head of the *Mejlis*, who is serving a 17-year prison sentence[233].

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[230] Cf. CR 2023/8, p. 48, para. 18 (Azari) (unofficial translation).

[231] CR 2023/8, pp. 26-27, para. 18 (Zabolotskaya).

[232] *TASS*, "FSB Prevents 53 Anti-Russian Demonstrations by Mejlis in Crimea Over Five Years" (15 September 2021) (judges' folder, tab 50).

[233] *RFE/RL*, "Russia-Imposed Court in Crimea Sentences Crimean Tatar Leader to 17 Years in Prison" (21 September 2022); Halya Coynash, "Russia Sentences Crimean Tatar Mejlis Leader Nariman Dzhelyal to 17 Years in Revenge for Crimea Platform", Kharkiv Human Rights Protection Group (21 September 2022).

20. As OSCE monitors reported, Russian authorities raided the Crimea Foundation building and "confiscated" the entire property of the Crimea Fund and the *Mejlis*[234].

21. The *Mejlis'* significance has been recognized by United Nations bodies and regional organizations[235]. The United Nations General Assembly, the Office of the United Nations High Commissioner for Human Rights, the CERD Committee and the European Parliament all called for the ban to be lifted[236]. Even the sham legislature of Crimea recognized the *Qurultay* and the *Mejlis* as "bodies of national self-governance for the Crimean Tatar people"[237].

22. And Russia engaged in this discriminatory pattern of conduct based on pretextual national security justifications, such as anti-extremism, that are neither legitimate, necessary nor proportionate[238]. In 2016, the so-called Crimean prosecutor's office outlawed the *Mejlis* as an "extremiste" organization[239]. But as Professor Scheinin has explained, "a reference to national security . . . cannot justify a deviation from [CERD] and its absolute prohibition against racial discrimination"[240]. The extension of Russia's anti-extremism law "to Crimea in the context of the purported annexation . . . in itself entails a discriminatory 'purpose,' or . . . resulted in discriminatory 'effect,' both equally incompatible with the" CERD[241]. Thus, far from justifying Russia's attempt to discriminate in the face of non-derogable norms, its national security law constitutes compelling *evidence* of Russia's discriminatory purpose as applied in Crimea: to legitimate its blatant use of discriminatory tools.

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[234] See OSCE, Report of the Human Rights Assessment Mission on Crimea (6-18 July 2015) (17 September 2015), para. 232 (MU, Ann. 812); Interim Measures for Civil Suit No. 2-1688/2014 (MU, Ann. 929).

[235] CR 2023/6, p. 59, para. 30 (Trevino); cf. CR 2023/8, pp. 46–47, paras. 9-11 (Azari) (unofficial translation).

[236] UN General Assembly resolution 71/205, UN doc. A/RES/71/205, Situation of Human Rights in the Autonomous Republic of Crimea and the City of Sevestapol (Ukraine) (19 December 2016), para. 2 *(g)*; UN General Assembly resolution 72/190, UN doc. A/RES/72/190, Situation of Human Rights in the Autonomous Republic of Crimea and the City of Sevestapol, Ukraine (19 December 2017), para. 3 *(j)* (MU, Ann. 50); OHCHR, Report on the Human Rights Situation in Ukraine (16 May-15 August 2016), para. 177 (MU, Ann. 772); CERD Committee, Concluding Observations on the Russian Federation, CERD/C/RUS/CO/23-24 (20 September 2017), paras. 19-20 (MU, Ann. 804) (judges' folder, tab 51).

[237] Verkhovna Rada of the Autonomous Republic of Crimea, Resolution on Guarantees of the Restoration of the Rights of the Crimean Tatar People and Their Integration into the Crimean Community No. 1728-6/14 (11 March 2014) (excerpts) (CMR-2, Ann. 789).

[238] Cf. CR 2023/8, p. 49, para. 22 (Azari) (unofficial translation).

[239] Witness Statement of Eskender Bariiev, para. 34 (MU, Ann. 15).

[240] Scheinin Report, para. 28 (RU, Ann. 7, judges' folder, tab 52).

[241] Scheinin Report, para. 32 (judges' folder, tab 52).

23. As the Human Rights Committee, the Venice Commission[242] and the CERD Committee all warned, Russia has used its vague and broad anti-extremism laws, as here, "arbitrarily to silence individuals, in particular those belonging to groups vulnerable to discrimination, such as ethnic minorities"[243]. These laws "should be regarded as suspect", Professor Scheinin explained, because their "inherent features . . . make them into a mechanism for targeting. . . *any mobilization or activity of ethnic communities that could be perceived to indicate disloyalty to the central government*"[244]. As applied in Crimea, the real effect of Russia's anti-extremism laws has been to deprive the Crimean Tatar community of its political leadership, in retaliation for their refusal to accept Russia's claimed annexation.

24. Extensive record evidence proves that Russian authorities have weaponized law enforcement against ethnic minorities, using abusive measures against so-called "extremist members" of the Crimean Tatar community, NGOs, media outlets and other organizations[245].

25. So the pattern is clear: invoking the threat of extremism in Crimea is just another Russian excuse to weaponize the repressive apparatus of the State against disfavoured ethnic groups.

III. RUSSIA HAS VIOLATED THE PROVISIONAL MEASURES ORDER AND AGGRAVATED THE DISPUTE

26. Six years ago, your provisional measures ruling overwhelmingly ordered Russia to "[r]efrain from maintaining or imposing limitations on the ability of the Crimean Tatar community to conserve its representative institutions, including the *Mejlis*"[246]. Second, your Order unanimously required Russia to ensure the availability of education in the Ukrainian language in Crimea. And third, you unanimously ordered Russia to refrain from any acts that might aggravate or extend the dispute before the Court.

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[242] Council of Europe, European Commission for Democracy Through Law (Venice Commission), Opinion No. 660/2011 on the Federal Law on Combating Extremist Activity of the Russian Federation, CDL-AD(2012)016 (20 June 2012) (MU, Ann. 817); see also Scheinin Report, paras. 36-37 (RU, Ann. 7, judges' folder, tab 52).

[243] CERD Committee, Concluding Observations on the Russian Federation, CERD/C/RUS/CO/23-24 (20 September 2017), para. 11 (MU, Ann. 804, judges' folder, tab 51); see also CERD Committee, Concluding Observations on the Combined Twenty-Fifth and Twenty-Sixth Periodic Reports of the Russian Federation, CERD/C/RUS/CO/25-26 (1 June 2023), para. 20 (judges' folder, tab 34).

[244] Scheinin Report, para. 43 (RU, Ann. 7, judges' folder, tab 52) (emphasis added).

[245] RU, para. 520; see also CR 2023/6, p. 60, paras. 33-35 (Trevino).

[246] *Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, p. 140, para. 106 (1) *(a)*.

27. As the Court's Registrar confirmed to our Agent, in this very case, the Parties must comply with "the *binding nature* of the provisional measures indicated in the [Court's] Order"[247], a freestanding obligation of international law, independent of any duties Russia might have under the ICSFT or the CERD. And even Russia has acknowledged that "any issue relating to compliance with provisional measures of the Court is a matter to be decided at the merits phase", where we have now arrived[248].

28. From the moment you issued your provisional measures Order, Russia violated it. Russia essentially admitted in multiple letters to the Court that it has done nothing to revoke that ban[249]. But as Judge Crawford noted in his attached declaration, your Order "*requires that Russia refrain* from maintaining that ban"[250]. Incredibly, last week, Professor Azari told you that Russia did not defy your Order, because you only ordered Russia to act "in accordance with its obligations under CERD"[251]. And because, he claimed, Russia does not really have any meaningful obligations under the CERD, it could satisfy them by doing absolutely nothing to comply with your Order[252]. Simply put, Russia sees its obligations under your binding Order as entirely self-judging, a reading that would let any State before you ignore a provisional measures order for five years or more based solely on its belief that it might someday prevail on the merits.

29. You must, therefore, make explicit that the Russian authorities' concerted attacks violated your provisional measures Order by drawing a forbidden distinction in closing the *Mejlis* based on race or ethnicity under Article 6 and other provisions of the CERD, that we cite in our Memorial[253].

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[247] Letter from Mr Philippe Couvreur, Registrar of the International Court of Justice, to Ms Olena Zerkal, Agent of Ukraine, dated 18 July 2018 (emphasis added).

[248] Letter from Mr Jean-Pelé Fomété, Deputy-Registrar of the International Court of Justice, to Ms Olena Zerkal, Agent of Ukraine, dated 29 March 2019.

[249] See Letter from Mr Dmitry Lobach, Agent of the Russian Federation, et al., to Mr Philippe Couvreur, Registrar of the International Court of Justice, dated 7 June 2018; Letter from Mr Dmitry Lobach, Agent of the Russian Federation, et al., to Mr Philippe Couvreur, Registrar of the International Court of Justice, dated 21 June 2018; Letter from Mr Dmitry Lobach, Agent of the Russian Federation, et al., to Mr Philippe Couvreur, Registrar of the International Court of Justice, dated 18 January 2019.

[250] *Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, declaration of Judge Crawford, p. 215, para. 9 (emphasis added).

[251] CR 2023/8, p. 50, para. 26 (Azari) (unofficial translation).

[252] *Ibid.*

[253] MU, Chap. 12.

30. Russia has also baldly violated the second provisional measure, which required the continuing availability of Ukrainian language education. Since Russia took control of Crimea, the number of students receiving Ukrainian-language education has declined by nearly 100 per cent[254].

31. Third, Russia absurdly claims it has not aggravated the dispute before the Court, although it has recognized the independence of the so-called DPR and LPR, given them massive military assistance, denied the very existence of a Ukrainian people, and launched a campaign of aggression and atrocity against all Ukraine. As our Agent noted, Russia now even demands as part of its price for peace that Ukraine surrender its right to pursue peaceful dispute resolution before this Court: just another measure of its total disdain for this Court and international law.

32. Mr Zionts described the horrific explosion of a limpet mine at Stena Rock Pub in downtown Kharkiv. Last Tuesday — even while we were presenting Ukraine's case and despite your provisional measures Order — Stena Rock Pub was shelled again. What more proof do we need that the past has become prologue?

33. Russia could lift its ban on the *Mejlis* tomorrow. A simple administrative order could reopen Ukrainian-language schools. Russian authorities in Crimea could stop discriminating, bombing, shelling, killing. To paraphrase your language in the *LaGrand* case: "the various competent . . . authorities failed to take all the steps they could have taken to give effect to the Court's Order"[255]. By failing to take all measures at its disposal, [here, Russia] breached the obligation incumbent upon it under the Order indicating provisional measures issued on [19 April 2017][256].

IV. THIS COURT MUST GRANT MEANINGFUL FINAL RELIEF, IN LINE WITH UKRAINE'S SUBMISSIONS

34. Madam President, Members of the Court: after six years, we have finally reached the merits, which gives this Court the opportunity to demand Russia's accountability for its violation of the Terrorism Financing and Race Discrimination Conventions and your own binding provisional measures Order.

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[254] CR 2023/6, p. 66, para. 63 (Trevino).

[255] *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 508, para. 115.

[256] *Ibid.*, p. 515, para. 128 (5).

35. In these proceedings, Russia has challenged both your relevance and your legitimacy. But neither these treaties nor this Court can be treated so cavalierly. If you do not act decisively, Russia and other nations will conclude that in the face of a powerful nation, the rule of law — and this Court — mean nothing. Which brings me to my third and most crucial question: what would constitute meaningful relief you could award to uphold the rule of law in response to Ukraine's submissions?

36. This question lies at the heart of post-war international law. Russia believes it is above the law. How does an international court push a lawless nation to obey the law, when it has consistently flouted that court's lawful orders? By the final relief you award, how do you confirm that no one is above the law?

37. Ukraine's Co-Agent will shortly ask you to rule in three broad areas.

38. First, you must *declare Russia's violations* of these two treaties. This is the core judicial function: as an American court famously said, "it is the province and duty of the judicial department to say what the law is"[257]. Only you can set the correct legal standards under these two treaties.

39. Only you can make clear that, under the ICSFT, as we showed last week, Russia has done nothing. Only you can end Russia's charade by saying resoundingly that a State violates that treaty when it fails to investigate, prosecute or extradite perpetrators; fails to give fellow States the greatest measure of assistance and criminal investigation; and fails to take all practicable measures to counter the flow of assets of any kind by private and public actors to support terrorism.

40. Only you can make clear under the CERD that Russia purposefully engaged in a comprehensive practice of discrimination against the Crimean Tatar and ethnic Ukrainian communities in violation of CERD Article 2 (1) *(a)*. Only you can make clear that Russia cannot escape that liability by invoking such pretextual excuses as national security or anti-extremism. But declaring violations is not enough.

41. Second, you must *order compliance* with the terms of the two treaties by unequivocally directing Russia to cease and desist immediately from future violations, or face the consequences, monetary and otherwise. Once you have ruled, many other law enforcers within today's international

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[257] *Marbury* v. *Madison*, 5 U.S. 137, 177 (1803).

system can use your declarations of illegality to fill any enforcement gap. Only you can make clear that Russia has violated these treaties and that Russia's self-judging interpretation of the provisional measures Order is in breach of that Order, and establish a process to determine reparations for that breach.

42. Third, Ukraine's submissions already request an assessment of compensation at a subsequent phase of this case[258]. After adjudging and declaring that Russia bears international responsibility for internationally wrongful acts, you must order that it pay *full compensation* for: the shoot-down of MH17; bombings and shelling of civilians in Kharkiv, Mariupol, Kramatorsk, Volnavakha and Avdiivka; and its failure to prevent and investigate all other acts of terrorism caused by the Russian Federation or facilitated or supported by it through its financing of terrorism at issue in this case[259]. With respect to the CERD, you should ensure that Russia pays "full reparation for all victims of the Russian Federation's policy and pattern of discrimination in Russian-occupied Crimea"[260].

43. To ensure Russian accountability, "full reparation" cannot mean half measures; it must include financial compensation and moral damages for the harm that Ukraine has suffered, both in its own right and *parens patriae* for its citizens, to be assessed in a subsequent phase of this proceeding. Your own recent decisions guide you here: *Armed Activities on the Territory of the Congo* and *Certain Iranian Assets.* They provide the relevant precedence and the relevant language for your Judgment.

44. But given Russia's glaring history of non-co-operation in this very case, the impossibility of these two countries negotiating reparations while Russia is invading Ukraine — and the additional devastation that would surely follow if too much time elapsed before reparations were determined — your final judgment should fix a date certain for the Parties to file written submissions regarding the full reparations due to Ukraine for its breach of the treaties and your provisional measures Order.

45. Madam President, Members of the Court: every day, we witness Russia's contempt for the human rights of the Ukrainian people. But the path is finally clear for you, on the merits, to do what

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[258] See RU, para. 735 *(e)*, *(f)*, *(k)*, *(n)*.

[259] AU, para. 136 *(g)*-*(l)*.

[260] *Ibid.*, para. 138 *(k)*.

only this Court can do: declare Russia's violations; clarify the treaties' governing standards; order Russia to comply; and retain continuing jurisdiction to keep Russia's conduct under continuing judicial supervision, until full and fair compensation can be determined.

46. In the end, this is a case about Russia's past and Ukraine's future. Russia lives in the past and refuses to accept Ukraine's freedom. But Ukraine seeks to rise above these challenges to continue its long-term project of building a proud, democratic and free multi-ethnic nation. As part of that project, Ukraine fervently believes, as our Agent said, that "international law does matter"[261]. Your final Judgment will determine how it matters and whether Ukraine's faith in international law is warranted.

47. It is long past time for Russia to answer for its violations, to cease and desist, and to pay for the damages it has caused. Every day, Ukrainians and Crimean Tatars suffer. These innocent people desperately need your protection. We ask you to rule promptly and decisively, and by your actions, help restore respect for the promise of justice under international law.

48. Madam President, Members of the Court, I thank you and ask you to call to the podium our Co-Agent, Ms Zolotaryova, to present Ukraine's concluding statement and final submissions.

The PRESIDENT: I thank Professor Koh, and I now give the floor to Ms Oksana Zolotaryova, Co-Agent of Ukraine. You have the floor, Madam.

Ms ZOLOTARYOVA: Madam President, and before I start, I would like to kindly ask you to allow me to speak up to 10 minutes after 6 p.m.

The PRESIDENT: Go ahead.

Ms ZOLOTARYOVA: Thank you so much.

CONCLUDING STATEMENT AND FINAL SUBMISSIONS

1. Madam President, distinguished Members of the Court, I am honoured to conclude Ukraine's oral pleadings and make Ukraine's final submissions.

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[261] CR 2023/5, p. 24, para. 22 (Korynevych).

2. The Russian Federation's Agent brazenly stated in his opening remarks that "Russia has great respect for the International Court of Justice". But those are empty words coming from the representative of a State that continues to ignore two separate provisional measures Orders issued by this Court in proceedings brought by Ukraine. Nor has Russia displayed any respect with the false picture it has presented to the Court over the last week of the hearings.

3. As to Ukraine's claims under the CERD, the image Russia has tried to convey of multi-ethnic harmony in Crimea is no more than a Potemkin village — a façade constructed to make things look better than they really are.

4. In this false, idealized version of today's Crimea, Crimean Tatars and members of the Ukrainian community may freely hold cultural gatherings throughout the peninsula; their children have full access to education in Crimean Tatar and Ukrainian languages; their journalists and media can freely condemn the Russian occupation and not be killed, tortured or arrested; their cultural heritage is promoted and protected; and their rights to life and security of the person are respected.

5. But the facts expose Russia's Potemkin village as the sham it is: far from promoting a multi-ethnic society, Russia has imposed a state of fear and intimidation for Crimean Tatars and ethnic Ukrainians in Crimea, subjecting them to disappearances, kidnapping and torture. It has banned the central Crimean Tatar representative institution, the *Mejlis*, in addition to exiling and persecuting much of its leadership. Russia has also subjected Crimean Tatars to arbitrary searches and detentions in their homes and meeting places, shattering their sense of security in their homeland.

6. Russia has also erased the Crimean Tatar and Ukrainian language from Crimea's schools, blocked cultural gatherings meaningful to these communities, silenced their media and journalists, and degraded their cultural heritage, in an attempt to uproot their identity from the Crimean peninsula.

7. Russia's façade of equality cannot hide from the dire reality: Russia has imposed a régime of racial discrimination in Crimea, in violation of the CERD.

8. Russia also paints a false reality under the ICSFT. Russia, for example, would have this Court believe that a Russian military brigade did not send a Buk-TELAR into Ukraine; that this Buk-TELAR did not shoot down MH17; and that the DPR members who shot down Flight MH17 did nothing unlawful. But Russia cannot hide from the facts, from the independent investigations,

and from the other courts who have rejected its fake conspiracy theories. Confronted with those facts, Russia's Potemkin village is exposed for what it is: a false reality built on baseless propaganda.

9. I urge the Court to bear in mind the source and quality of Russia's evidence as it considers Russia's explanations of other issues — like why bombs landed on residential areas or exploded at peace rallies.

10. Russia would have this Court believe that "the civilian casualties that occurred were largely caused by Ukraine's own conduct". In Russia's false reality, it was Ukraine's fault that a bus full of pensioners was destroyed, killing 12 passengers and injuring 19 others, when the DPR fired BM-21 Grads at a vehicle inspection point more than 10 km behind the contact line; it was Ukraine's fault 30 civilians were killed and 118 more injured when the DPR launched 150 rockets into a residential district in Mariupol; it was Ukraine's fault when BM-30 Smerch cluster munitions rained down on a neighbourhood in Kramatorsk, more than 50 km from the contact line; and it was Ukraine's fault that civilians in Kharkiv were blown up for the crime of holding a rally. Russia's attempt to shift blame to Ukraine for these civilian deaths is clearly at odds with reality: Russian officials knowingly funded those terrorist acts.

11. On Thursday, Russia showed you a lot of graphics related to the number of civilian casualties in Donbas starting from 2014. Russia did not mention that the DPR has been condemned for firing from residential neighbourhoods[262]. More importantly, Russia did not show you any graphics about the quantity of civilian casualties from shelling, bombing and similar activities in Ukraine prior to 2014. Because there were none. Simply zero. Until Russian weapons started to fuel terror and conflict in Donbas.

12. Finally, we were shocked that the Agent of the Russian Federation would stand here before the World Court and accuse Ukraine of intentionally destroying the Nova Kakhovka dam and hydroelectric station in Kherson oblast, which were under the control of the Russian armed forces. Why would Ukraine flood its land, force tens of thousands of Ukrainians to leave their homes, and cause environmental havoc in its own territory, the greatest since the Chornobyl disaster back in 1986? This is absurd.

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[262] Office of the United Nations High Commissioner for Human Rights, Report on the Human Rights Situation in Ukraine (15 July 2014), para. 31.

13. Russia's false accusation only underscores how far Russia will go to hide, legitimize or justify its lawless conduct. Russia will not hesitate to fabricate lies, distort legal principles or engage in information warfare to defend actions that are indefensible.

14. On 7 March 2017, during the public hearings in this case, the Russian Agent stated that "the primary source of weapons and ammunition to the military of the DPR and the LPR are stockpiles . . . deposited in the old mines of Donbas". Nonsense. Just a few days ago, Russian counsel on this very podium stated that "[t]he Dutch Safety Board, the Joint Investigation Team, police in the Netherlands" have failed to prove the case on the downing of MH17. Equally absurd. Another Russian counsel stated that "Russia did something". An understatement, indeed. Russia has done a lot to build a wall of lies around the supply of weapons to Donbas. Russia has also done a lot to build Potemkin villages in occupied Crimea.

15. Who does Russia think it is to tell us who is a "good" Crimean Tatar, and who is extremist; who is a "good" Ukrainian, and who is a neo-Nazi? And picture it with its own Russian citizen, Aleksei "Totenkopf" Maksimov, permanent resident of Saint Petersburg, who is banned from entering Ukraine since 2013. Why is Russia coming up with these excuses? Because Russia knows that international law matters.

16. Ukraine has shown in its written and oral pleadings that Russia's false reality collapses when confronted with the overwhelming evidence of the Russian violation of the CERD and ICSFT. The Court has all the facts it needs to see through the Potemkin village Russia has erected, to hold Russia accountable for its serious violation of these treaties.

17. The Court should act now to provide accountability for the past, and protection for the future. While parts of our country are under Russian occupation, our people face discrimination every day. And once our territorial integrity is restored, any future relations must be based on Russia respecting international law, not allowing and promoting the financing of terrorism in Ukraine.

18. Madam President, Members of the Court, I stand here before the World Court to request protection of the basic human rights of Ukrainian people. We seek justice and accountability under international law.

FINAL SUBMISSIONS

"1. On the basis of the facts and legal arguments presented in its written and oral pleadings, Ukraine respectfully requests the Court to adjudge and declare:

ICSFT

a. The Russian Federation is responsible for violations of Article 18 of the ICSFT by failing to cooperate in the prevention of the terrorism financing offenses set forth in Article 2 by taking all practicable measures to prevent and counter preparations in its territory for the commission of those offenses within or outside its territory. Specifically, the Russian Federation has violated Article 18 by failing to take the practicable measures of: (i) preventing Russian state officials and agents from financing terrorism in Ukraine; (ii) discouraging public and private actors and other non-governmental third parties from financing terrorism in Ukraine; (iii) policing its border with Ukraine to stop the financing of terrorism; and (iv) monitoring and suspending banking activity and other fundraising activities undertaken by private and public actors on its territory to finance terrorism in Ukraine.

b. The Russian Federation is responsible for violations of Article 8 of the ICSFT by failing to identify and detect funds used or allocated for the purposes of financing terrorism in Ukraine, and by failing to freeze or seize funds used or allocated for the purpose of financing terrorism in Ukraine.

c. The Russian Federation has violated Articles 9 and 10 of the ICSFT by failing to investigate the facts concerning persons who have committed or are alleged to have committed terrorism financing in Ukraine, and to extradite or prosecute alleged offenders.

d. The Russian Federation has violated Article 12 of the ICSFT by failing to provide Ukraine the greatest measure of assistance in connection with criminal investigations in respect of terrorism financing offenses.

e. As a consequence of the Russian Federation's violations of the ICSFT, illegal armed groups in Ukraine have been provided with funds that enabled them to commit numerous acts of terrorism, including the shootdown of Flight MH17, the shelling of Volnovakha, Mariupol, Kramatorsk, and Avdiivka, the bombings of the Kharkiv unity march and Stena Rock Club, the attempted assassination of a Ukrainian member of Parliament, and others.

CERD

f. The Russian Federation has violated CERD Article 2 by engaging in numerous and pervasive acts of racial discrimination against the Crimean Tatar and Ukrainian communities in Crimea and by engaging in a policy and practice of racial discrimination against those communities.

g. The Russian Federation has further violated CERD Article 2 by sponsoring, defending or supporting racial discrimination by other persons or organizations against the Crimean Tatar and Ukrainian communities in Crimea.

h. The Russian Federation has violated CERD Article 4 by promoting and inciting racial discrimination against the Crimean Tatar and Ukrainian communities in Crimea.

i. The Russian Federation has violated CERD Article 5 by failing to guarantee the right of members of the Crimean Tatar and Ukrainian communities to equality before the law, notably in their enjoyment of (i) the right to equal treatment before the tribunals and all other organs administering justice; (ii) the right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution; (iii) political rights; (iv) other civil rights; and (v) economic, social and cultural rights.

j. The Russian Federation has violated CERD Article 6 by failing to assure the Crimean Tatar and Ukrainian communities in Crimea effective protection and remedies against acts of racial discrimination.

k. The Russian Federation has violated CERD Article 7 by failing to adopt immediate and effective measures in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination against the Crimean Tatar and Ukrainian communities in Crimea.

Provisional Measures Order

l. The Russian Federation has breached its obligations under the Order indicating provisional measures issued by the Court on 19 April 2017 by maintaining limitations on the ability of the Crimean Tatar community to conserve its representative institutions, including the *Mejlis*.

m. The Russian Federation has breached its obligations under the Order indicating provisional measures issued by the Court on 19 April 2017 by failing to ensure the availability of education in the Ukrainian language.

n. The Russian Federation has breached its obligations under the Order indicating provisional measures issued by the Court on 19 April 2017 by aggravating and extending the dispute and making it more difficult to resolve by recognizing the independence and sovereignty of the so-called DPR and LPR and engaging in acts of racial discrimination in the course of its renewed aggression against Ukraine.

2. The aforementioned acts constitute violations of the ICSFT, the CERD, and the Court's order on provisional measures, and are therefore internationally wrongful acts for which the Russian Federation bears international responsibility. The Russian Federation is therefore required to:

ICSFT

a. Cease immediately each of the above violations of ICSFT Articles 8, 9, 10, 12, and 18 and provide Ukraine with appropriate guarantees and public assurances that it will refrain from such actions in the future.

b. Take all practicable measures to prevent the commission of terrorism financing offenses in Ukraine, including in the oblasts purportedly annexed by the Russian Federation on September 30, including in particular (i) ensuring that Russian state officials or any other person under its jurisdiction do not provide weapons or other funds to groups engaged in terrorism in Ukraine; (ii) cease encouraging public and private actors and other nongovernmental third parties to finance terrorism in Ukraine; (iii) police Russia's border with Ukraine to stop any supply of weapons into Ukraine; and (iv) monitor and prohibit private and public transactions originating in Russian territory, or initiated by Russian nationals, that finance

terrorism in Ukraine, including by enforcing banking restrictions to block transactions for the benefit of groups engaged in terrorism in Ukraine.

c. Freeze or seize assets of persons suspected of supplying funds to groups engaged in terrorism in Ukraine, and cause the forfeiture of assets of persons found to have supplied funds to such groups.

d. Provide the greatest measure of assistance to Ukraine in connection with criminal investigations of suspected financers of terrorism.

e. Pay Ukraine financial compensation, in its own right and as *parens patriae* for its citizens, for the harm Ukraine has suffered as a result of Russia's violations of the ICSFT, including the harm suffered by its nationals injured by acts of terrorism that occurred as a consequence of the Russian Federation's ICSFT violations, with such compensation to be quantified in a separate phase of these proceedings.

f. Pay moral damages to Ukraine in an amount deemed appropriate by the Court, reflecting the seriousness of the Russian Federation's violations of the ICSFT, the quantum of which is to be determined in a separate phase of these proceedings.

CERD

g. Cease immediately each of the above violations of CERD Articles 2, 4, 5, 6, and 7, and provide Ukraine with appropriate guarantees and public assurances that it will refrain from such actions in the future.

h. Guarantee the right of members of the Crimean Tatar and Ukrainian communities to equality before the law, notably in the enjoyment of the human rights and fundamental freedoms protected by the Convention.

i. Assure to all residents of occupied Crimea effective protection and remedies against acts of racial discrimination.

j. Adopt immediate and effective measures in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination against the Crimean Tatar and Ukrainian communities in Crimea.

k. Pay Ukraine financial compensation and moral damages, in its own right and as *parens patriae* for its citizens, for the harm Ukraine has suffered as a result of Russia's violations of the CERD, including the harm suffered by victims as a result of the Russian Federation's violations of CERD Articles 2, 4, 5, 6 and 7, with such compensation to be quantified in a separate phase of these proceedings.

Provisional Measures Order

l. Provide full reparation for the harm caused for its actions, including restitution, financial compensation and moral damages, in its own right and as *parens patriae* for its citizens, for the harm Ukraine has suffered as a result of Russia's violations of the Court's Order of 19 April 2017, with such compensation to be quantified in a separate phase of these proceedings.

m. Regarding restitution: restore the Mejlis' activities in Crimea and its members and all their rights, including their properties, retroactive elimination of all Russian administrative and other measures contrary to the Court's Order and release of members of Mejlis currently in jail."

19. This concludes Ukraine's submissions.

20. As our Agent recalled, when "the World took half-measures, [it] led to half-peace which led to a total war". The Court must therefore grant Ukraine a full measure of justice. Given the circumstances, where Russia terrorizes the Ukrainian people and targets Ukrainian identity — thus rendering negotiations impossible, Ukraine respectfully requests that the Court fix in its Judgment the dates for the filing by the Parties of written submissions regarding the reparations due to Ukraine.

21. On behalf of Ukraine, allow me to thank the Registry for its assistance; I thank the interpreters of the Court and the Court's staff for their services during these proceedings; and finally, Madam President, distinguished Members of the Court, I thank you for your attention in this important matter.

22. We are in your hands.

The PRESIDENT: I thank the Co-Agent of Ukraine. The Court takes note of the final submissions which you have just read out on behalf of your Government. The Court will meet again on Wednesday 14 June 2023, at 3 p.m., to hear the second round of oral argument of the Russian Federation. At the end of that sitting, the Russian Federation will present its final submissions. The sitting is adjourned.

The Court rose at 6.10 p.m.

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