SEPARATE OPINION, PARTLY CONCURRING AND PARTLY DISSENTING, OF JUDGE *AD HOC* TUZMUKHAMEDOV

Lack of evidence of terrorism financing — Lack of proof of terrorist intent.

No violation of Article 9 of ICSFT in light of absence of terrorism financing — Threshold adopted by the Majority for Article 9 of ICSFT too low — The Respondent fulfilled its obligations under Article 9 of ICSFT.

The meaning of "funds" excludes weapons — Treaty interpretation — Judicial practice.

The "clean hands" doctrine — Conditions met to apply the doctrine for ICSFT and CERD.

Political views not an element of ethnic origin — Scope and limits of "indirect discrimination".

Dynamic in preference of language of school education in Crimea as an objective phenomenon — Lack of policy of racial discrimination.

Provisional measures Order — Ban on Mejlis *not in contravention of CERD.*

Provisional measures Order on non-aggravation — Outside of the scope of the dispute and addressed to both Parties.

Introduction

1. While I find myself in agreement with most of the Judgment's findings, there are several matters on which, much to my regret, I cannot agree with the Majority and/or their reasoning, as well as some instances where I believe additional elucidation should be in order, with regard to the case's history, the positions of the Parties or the approach of the Court. Hence, my opinion is in part dissenting, in part concurring and to a degree declaratory.

2. To begin with, I feel obliged to note the complexity of this case, which is effectively two cases rolled into one, each of those being uniquely broad, covering not only all conceivable aspects of the relevant conventions, but also

reaching well beyond into other matters of international law — including humanitarian law, human rights law, counter-terrorism law — as well as innumerable questions of fact. This might well be the single most massive case in ICJ history — in its complexity, entanglement and reach well beyond the scope of the two conventions.

3. Another important aspect of the case is its primacy: this is the first time that the Court pronounces itself on the merits regarding interpretation and application of the ICSFT and of CERD. Considering also the scope of the case — which is nothing short of all-encompassing — it is a landmark decision that will undoubtedly shape a significant part of the international legal landscape. Of course, this put a special burden of responsibility on judges, acting as pioneers without the guidance of prior decisions while exploring *terra incognita*.

4. I personally found all of this to be acutely true, having only entered these complex and lengthy proceedings at their final stage, thus arriving at a disadvantage. At the same time, perhaps it gave me an opportunity to look at the case from the viewpoint of common sense rather than being constrained by the intricacies of law and fact woven over the years of deliberations — before unavoidably immersing myself in those intricacies.

5. My conclusion, grounded in this common sense almost as much as in legal and factual considerations to be outlined below, is that there have been no instances of terrorism financing or of racial discrimination, nor any breach of the ICSFT or CERD. By and large, this conclusion was supported by the Court in its final Judgment, and I am privileged to have been part of the Bench that dealt with the case with impartiality and integrity regarding most of the issues involved.

6. As to the couple of rather minor "violations" which the Majority has elected to discover, in my view they are more of a symbolic nature, since they do not seem to be adequately supported by legal or factual grounds and fail to even pass the test of common sense. It is unfortunate to have to express myself in such terms; however, I firmly believe in the need to preserve and protect the World Court from "slings and arrows"[1] of political pressure, that Court being the primary international institution on whose impartiality, to a significant extent, hinges the fundamental principle of peaceful resolution of international disputes.

[1] William Shakespeare, *Hamlet, Prince of Denmark*, Act III, Scene I.

PART I — ICSFT

1. The Court Has Found No Evidence of Terrorism or Financing of Terrorism in This Case, and Rejected Ukraine's Claim that the DPR and LPR Were "Notorious Terrorist Organizations"

7. From the very beginning, Ukraine's ICSFT case seemed incredibly far-fetched. Of course, attempting to cast political and military opponents as "terrorists" is nothing new; but defending these claims in the World Court turned out to be a whole different matter.

8. As early as in 2017, at the provisional measures stage, the Court had stated that Ukraine's allegations regarding the ICSFT were implausible[2]. Ukraine's attempt to make the case about "State-sponsored terrorism"[3] did not even pass the preliminary objections phase and was rejected in 2019 for lack of jurisdiction. Now, after six years of litigation, and having considerably scaled down its allegations, Ukraine still failed to provide any evidence of "acts of terrorism" attributable to the Donetsk People's Republics (DPR) and Lugansk People's Republic (LPR) and "terrorism financing" by the Russian State or Russian persons.

9. One quote cited during the proceedings quite succinctly summarizes the essence of the case:

> "It is important to understand what precisely is at stake in this debate: nothing less than the distinction between the terrorist and the soldier. Although it is frequently said that one nation's freedom fighter is another's terrorist, neither ordinary morality nor international law takes this position. There are morally and legally relevant distinctions to be made between these actions, and failure to understand these distinctions risks undermining the very foundations of *jus in bello* . . . it is imperative that we continue to insist upon distinguishing between terrorists who deliberately target civilians and soldiers who foresee that civilians will be killed as collateral damage while striking a military target. The former is a war crime, while the latter represents lawful conduct."[4]

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[2] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, pp. 131-132, para. 75.

[3] See Application, Section B, pp. 26-56 and pp. 90 and 92, paras. 134-135.

[4] Jens D. Ohlin, "Targeting and the Concept of Intent", *Michigan Journal of International Law*, Vol. 35, Issue 1 (2013), p. 130. Available at: https://repository.law.umich.edu/mjil/vol35/iss1/4.

10. The DPR and LPR were not "terrorist organizations", but entities created by the people of Donbass to implement their right to self-determination, in response to the nationalistic régime seizing power in Kiev through an armed and violent coup in 2014. It was this new unelected Kiev Government, relying on neo-Nazi groups[5], which launched a military operation against Donbass to suppress the self-determination movement, thus igniting the internal armed conflict which served as the backdrop for this case.

11. The main incidents cast by Ukraine as "acts of terrorism" allegedly triggering the ICSFT occurred in the course of these hostilities and involved attacks against military targets (real or perceived). This fact presented a major obstacle for Ukraine to prove the necessary elements of a terrorism financing offence — the special terrorist intent to harm civilians for the purpose of spreading terror, and the intent or knowledge on behalf of the *financier* that the financing will go towards those goals.

12. The Court has steadfastly rejected all attempts by Ukraine to unduly expand the scope of the Convention through misinterpretation of its provisions regarding intent and knowledge. The relevant parts of the Judgment are very illustrative and leave little to add.

13. Failing to prove actual intent and knowledge, Ukraine resorted to claiming that the DPR and LPR were "notorious terrorist organizations" and thus Russia was obliged to act against them, even if Ukraine itself never supplied the relevant evidence of their "terrorist" nature. It is with regard to this claim that the Court made its fundamental finding on the absence of evidence that the DPR and LPR were engaged in terrorist activity:

> "[T]he Court notes that *it does not have sufficient evidence before it to characterize any of the armed groups implicated by Ukraine in the commission of the alleged predicate acts as groups notorious for committing such acts*. In the circumstances, the funder's knowledge that the funds are to be used to carry out a predicate act under Article 2 of the ICSFT cannot be inferred from the character of the recipient group"[6].

14. This conclusion is well founded. Out of all the fighting which took place in Donbass from 2014 (the start of the conflict between Kiev's unelected new Government and its opponents in Donbass) to 2017 (when

[5] *The New York Times*, "Islamic Units Help Ukraine Battle Rebels", 8 July 2015, Section A, p. 1: "[t]he Azov group, is openly neo-Nazi, using the 'Wolf's Hook' symbol associated with the SS".

[6] Judgment, para. 76 (emphasis added).

Ukraine submitted its Application to the Court), only four combat-related incidents were portrayed by Ukraine as "acts of terrorism": the downing of Flight MH17 and three episodes of shelling, respectively, of the Ukrainian military checkpoint at Volnovakha, the city of Mariupol and the city of Kramatorsk. Much of the case revolved around whether these incidents constituted predicate acts under the ICSFT.

15. Firstly, the Court did not determine that these attacks were even attributable to Donbass forces. Secondly, in all cases, there was a distinct lack of terrorist intent, even if proceeding from Ukraine's own materials.

16. The MH17 incident was, of course, Ukraine's "flagship case". However, its very prominence acted against Ukraine's efforts to paint it as a "terrorist attack". Ukraine's reliance on the findings of the Dutch investigation, the JIT group and the Hague District Court backfired, as none of these entities found evidence of terrorism or even a war crime in the event, but rather viewed it as a mistake of targeting in the heat of an ongoing armed conflict between Ukrainian and Donbass forces[7].

17. Had the Court chosen to examine this incident more deeply, it would have had to confront the numerous gaps and inconsistencies in the reports of the Dutch authorities and JIT, which seemed all too keen to put the blame on the DPR while exonerating Ukrainian forces. One such apparent lapse by those authorities was how utterly oblivious they were to evidence pointing towards possible Ukrainian involvement in the disaster, ranging from the decision not to close the airspace over the conflict zone, to the deployment of multiple active *Ukrainian* BUK anti-aircraft systems in that zone, including in the vicinity of the crash area (confirmed, *inter alia*, by the Netherlands' own intelligence service report on radar activity)[8], as well as the fact that the markings on the missile fragments allegedly found at the crash site indicated that it had been part of the Ukrainian armed forces inventory[9].

18. The JIT also ignored Ukraine's own notoriety for shooting down civilian airliners: in 2001 its armed forces, engaged in military exercises and firing live missiles, destroyed a Russian civilian airliner en route from Tel Aviv to Novosibirsk with a stopover in Sochi, killing all 77 passengers and crew on board. Back then, Ukraine's President Kuchma had said: "We

[7] Rejoinder of Russia [hereinafter "RR"], para. 123.
[8] *Ibid.*, para. 318.
[9] *Ibid.*, Appendix 2, para. 40 *(b).*

are not the first, nor the last; let's not make a tragedy out of this"[10]. Whether inadvertently or not, Mr Kuchma may have been referring to the shooting down of the Iranian civilian airliner by the USS *Vincennes* over the Gulf, killing all 290 people aboard[11]. Neither Ukraine, nor the United States have ever faced any international responsibility for these acts. Incredibly, during the hearings, Ukraine's counsel made the argument that Ukraine did not act unlawfully and its forces acted under "legal authority" when shooting down the Russian civilian airliner[12].

19. If Ukrainian air defence had previously managed to shoot down a civil aircraft in the perfect conditions of military exercises, how much more probable would such an event be in the fog of an actual ongoing armed conflict, with multiple BUK units actively seeking enemy targets in an airspace where warplanes mingled with civilian aircraft? This is exactly the reason why civil air traffic is normally shut down over conflict zones; but Ukraine chose not to do so to continue garnering payments for the use of its airspace by international civil aviation, hence airliners entering danger zones unbeknownst to their crews and likely becoming civilian shields for the Ukrainian air force against DPR's air defences. Other combat-related incidents referred to by the Applicant were even more clear-cut due to the presence of obvious military targets (the militarized checkpoint at frontline Buhas, which Ukraine chose to task with civilian traffic control; the Kramatorsk military airfield hosting a staff headquarters; the Ukrainian military positions in Mariupol and Avdeevka). Furthermore, even Ukraine's own evidence, such as alleged intercepts of communications and witness statements, pointed towards the absence of terrorist intent on behalf of DPR forces. Moreover, the attribution of the attacks to DPR remained in doubt.

20. The same can be said regarding the rest of the incidents (so-called "bombings", "killings" and "disappearances"): Ukraine has failed to prove both their attribution to the DPR and LPR and their allegedly "terrorist" nature. In fact, not a few of the incidents bore distinct hallmarks of staged

[10] *Parlamentskaya Gazeta* (*The Parliamentary Gazette*, in Russian), 4 October 2018, https://www.pnp.ru/social/leonid-kuchma-ne-nado-delat-iz-etogo-tragediyu.html (accessed on 17 January 2024); see also: https://www.youtube.com/watch?v=X8sosTxgHn4 (accessed on 17 January 2024).

[11] RR, para. 291 *(j)*.

[12] CR 2023/5, p. 56, para. 13 (Zionts).

operations by the Ukrainian Security Service (SBU), whose notoriety for such "false flags" is illustrated by the case of a journalist being reportedly "assassinated" by "Russian spies" only to emerge afterwards safe and sound, publicly declaring the entire stint to be an SBU operation[13]. One alleged "terrorist attack" involved a purported firing of an incendiary grenade launcher at a bank building — which for some reason happened at night, when the bank was closed and there were no people in the vicinity to be harmed by the act or witness it; moreover, the grenade did not even explode and was "extracted" by Ukrainian special services the next day (something technically impossible according to a munitions expert report presented to the Court)[14]. Other acts were blamed on Russia because the arms used were allegedly of Russian manufacture; however, they turned out to be generic Soviet-era weaponry now part of Ukrainian military inventory.

21. For the Court to go deep into an examination of all these incidents would undoubtedly have proven embarrassing to the Applicant. The Judgment merely glosses over them. Nevertheless, the fact remains that none of the incidents were found to be acts of terrorism, nor any evidence of terrorism financing was discovered by the Court.

22. The frivolity of the Applicant's allegations was further illustrated by reports of the Financial Action Task Force (FATF), the world's leading body charged with combating terrorism financing. The FATF had brushed aside Ukraine's complaints about Russia's alleged lack of co-operation concerning the DPR and LPR as pertaining to a "political dispute"[15] and rejected Ukraine's calls to "black-list" Russia. At the same time, the FATF criticized Ukraine for not providing sufficient evidence in its requests for assistance and co-operation[16]. Would it not follow that the FATF did not accept Ukraine's characterization of the DPR and LPR as terrorist organizations, nor was it aware of their "notoriety" as such[17]?

[13] *The Guardian*, "Arkady Babchenko Reveals He Faked His Death to Thwart Moscow Plot", 30 May 2018, accessible at: https://www.theguardian.com/world/2018/may/30/arkady-babchenko-reveals-he-faked-his-death-tothwart-moscow-plot.

[14] RR, Annex 5, para. 14.

[15] Financial Action Task Force, "Anti-Money Laundering and Counter-Terrorist Financing Measures — Russian Federation, Fourth Round Mutual Evaluation Report" (December 2019), p. 208, para. 616.

[16] Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL), "Anti-money laundering and counter-terrorist financing measures — Ukraine, Fifth Round Mutual Evaluation Report", 2017, p. 135, para. 595.

[17] CR 2023/10, pp. 48-51 (Kosorukov).

2. Absence of Terrorism Financing Should Have Excluded a Violation of Ancillary Obligations to Co-operate under Article 9

23. This is one of the Judgment's most puzzling parts: the decision to find a violation of an ancillary obligation of a treaty in the absence of a violation of the treaty's principal obligation.

24. The ICSFT, and by extension the agreement of the Respondent to be subject to ICJ jurisdiction with regard to the ICSFT, covers terrorism financing. Therefore, in matters unrelated to terrorism financing, the Convention does not apply. Yet the Majority has decided that, in this case, the Convention should apply and, moreover, be capable of being breached, even though the Court has not found a single instance of terrorism financing allegations advanced by Ukraine to be true, nor established any reason to *expect* that such allegations were true, since the DPR and LPR were not "notorious terrorist organizations".

25. Presumably a treaty cannot be rendered applicable simply on the basis of a *claim* by one State party that it is applicable — a claim that is later proven to be false. Apparently, the Majority believed otherwise.

26. It has been a long-standing staple of the Court's case law that fulfilment of subsidiary (ancillary, accessory) obligations, such as those on co-operation or prevention, is hinged upon the existence of predicate offences. The seminal example was provided by the Court in *Bosnian Genocide*:

> "*[A] State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed*. It is at the time when commission of the prohibited act (genocide or any of the other acts listed in Article III of the Convention) begins that the breach of an obligation of prevention occurs."[18] (Emphasis added.)

27. The Court then clarified the difference between circumstances when an obligation of prevention may be considered breached and circumstances when it merely arises:

> "This obviously does not mean that the obligation to prevent genocide only comes into being when perpetration of genocide commences; that would be absurd, since the whole point of the obligation is to prevent, or attempt to prevent, the occurrence of the act. In fact, *a State's obligation to prevent, and the corresponding duty to act, arise at the instant that*

[18] *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. 221-222, para. 431.

> *the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed*. From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent (*dolus specialis*), it is under a duty to make such use of these means as the circumstances permit. *However, if neither genocide nor any of the other acts listed in Article III of the Convention are ultimately carried out, then a State that omitted to act when it could have done so cannot be held responsible* a posteriori*, since the event did not happen which, under the rule set out above, must occur for there to be a violation of the obligation to prevent*."[19] (Emphasis added.)

28. This is in line with the International Law Commission's Articles on State Responsibility, according to which "[t]he breach of an international obligation requiring a State to prevent a given event occurs when the event occurs"[20].

29. All of the co-operation obligations in the ICSFT are ultimately aimed at preventing and punishing terrorism financing. They are, in effect, obligations to *co-operate in order to prevent and punish*. This is made clear not only from their wording and context, but directly from the explicit provision in the preamble of the Convention specifying its object and purpose:

> "The States Parties to this Convention,
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> . . . . . .
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> *Being convinced* of the urgent need to enhance international cooperation among States in devising and adopting effective measures for the *prevention of the financing of terrorism*, as well as for its *suppression through the prosecution and punishment* of its perpetrators,
>
> Have agreed as follows . . ." (emphasis added).

30. As such, these provisions all hinge upon the offence of terrorism financing, which in turn depends upon commission, or at least planning of, actual acts of terrorism (the criteria of intent and knowledge). To put it simply, if no terrorism financing occurred, then no obligations for its prevention or suppression could have been breached. Article 9, paragraph 1, specifically only covers situations involving "an offence set forth in article 2"; the absence of such an offence should have excluded the possibility of a breach of this provision.

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[19] *Ibid.*, p. 222, para. 431.

[20] International Law Commission's Articles on State Responsibility, Art. 14 (3), p. 59 (Supplement No. 10 (A/56/10), Chap. IV.E.1).

31. Even if, *quod non*, it *appeared* that terrorism financing might have occurred (which was not the case, as Ukraine failed to provide such evidence by any standard of sufficiency), the mere fact that it had not occurred in reality should have excluded the possibility of a breach of the co-operation obligation, due to the absence of the subject-matter of said co-operation.

32. In the present case, Ukraine has failed to produce convincing evidence of terrorism or terrorism financing. Normally, that would mean that no breach of subsidiary obligations by the respondent could be established. There can be no breach of the obligation to prevent or punish a crime, or to co-operate in order to prevent or punish, if no crime has been committed and the allegations were false from the outset.

33. Nevertheless, in the present case the Judgment states that

> "each provision of the ICSFT invoked by the Applicant imposes a distinct obligation upon States parties to that Convention. In each case, the Court must first ascertain the threshold of evidence of terrorism financing that must be met for an obligation under that provision of the ICSFT to arise. Such an evidentiary threshold may differ depending on the text of the provision under examination and the nature of the obligation it imposes."[21]

34. By stating that, the Judgment divorced the obligations to co-operate from the primary goal of the Convention to prevent and punish terrorism financing — in other words, from the very subject-matter of the Convention, making those obligations an end in themselves. The Court, rather its Majority, also seems to have stepped away from the previously drawn distinction between the arising of an obligation (*quod non*, as in my view no obligation has ever arisen under the ICSFT in the present case) and its capacity of being breached. Furthermore, by introducing a variable threshold of evidence, and by setting its bar so low as to be basically non-existent for triggering certain obligations, the Court has effectively held that obligations under a treaty may arise and be breached even in the absence of a violation of the treaty's subject-matter.

35. Summing up, the Court, by a majority, found a breach of an obligation ancillary to the principal obligation to combat terrorism financing, even though there had been no terrorism financing — or, in fact, terrorism — to combat. This decision appears to be at a significant deviation from the previous approach of the Court and it is not unlikely that it will have serious consequences for the future of international dispute resolution.

[21] Judgment, para. 84.

3. The Threshold Adopted by the Court with regard to Article 9 Was Far Too Low

36. Article 9, paragraph 1, of the ICSFT does not contain an *unconditional* obligation to investigate a person who has committed, or is alleged to have committed, a terrorism financing offence. It is, in fact, explicitly conditional upon the following factors:

(1) the offence should fall under Article 2, which contains the definition of terrorism financing — i.e. it is not sufficient to simply allege terrorism financing, the criteria of the definition should actually be met;

(2) measures to be taken are those that *may be necessary under domestic law* of the requested party;
(3) these measures only concern investigation of *facts* contained in the information.

37. All of these factors are required for Article 9 to be triggered; in my view, none of them have been shown to exist in the present case.

38. None of Ukraine's allegations met the requirements of Article 2 for the simple reason of absence of any terrorism financing in the first place.

39. Russia's domestic law required *sufficient evidence* to launch an investigation[22]; no such evidence was provided by Ukraine (and as these proceedings have demonstrated, Ukraine was never in possession of such evidence).

40. No *facts* were provided by Ukraine, rather there were only unsubstantiated claims regarding "terrorist activities" of the DPR and LPR — which were not accepted by this Court.

41. Furthermore, there was an important additional factor specific to the circumstances of the present case: the context of Ukraine's allegations suggested that they had a political rather than terrorism-combating purpose. After all, the allegations were aimed at the DPR and LPR and at the people supporting them — i.e. persons in direct political opposition to the Government in Kiev. International monitors such as the United Nations Office of the Human Commissioner for Human Rights (hereinafter OHCHR) have repeatedly raised concerns about the Ukrainian Government creating a "climate of fear" through repeated human rights violations, including enforced disappearances and false allegations of "terrorism financing", conducted by the Security Service of Ukraine (SBU)[23], the so-called

[22] See RR, paras. 565-566.

[23] Counter-Memorial of the Russian Federation (hereinafter "CMR"), Vol. I, para. 508; RR, paras. 23-24, 454 and 456. Sputnik International, "Incidents with Russian Reporters in Ukraine in 2014-2017" (31 August 2017), available at: https://sputniknews.com/europe/201708311056947334-russian-reporters-ukraine/ (RR, Annex 187). KHPG, "Ukraine follows

"volunteer battalions" (of neo-Nazi leaning), and other entities under the control of the Government in Kiev[24].

42. Due to the real danger of trumped-up charges of terrorism and terrorism financing being used as tools for political persecution, exercise of caution was not merely justified but required, in particular under human rights obligations. The European Court of Human Rights (ECtHR), specifically, on numerous occasions adjudicated that international legal assistance in the criminal law field was subordinate to human rights guarantees (rulings on cases involving the Russian Federation and other States parties to the European Convention on Human Rights)[25]. The Organization for Security and Co-operation in Europe (hereinafter the OSCE) warned that to ensure protection of human rights, the decision to start an investigation "must be based on *reasonable suspicion* that a terrorism-related offence, as defined in domestic law, has been committed" (emphasis

Russia in dubious 'State treason' arrests" (16 February 2015), available at: http://khpg.org/en/index.php?id=1423918032 (RR, Annex 189). TASS, "How Ukraine imposed sanctions on Russian individuals and entities" (20 March 2019), available at: https://tass.ru/info/6240919 (RR, Annex 306). Human Rights Watch, "Ukraine Foreign Journalists Barred or Expelled" (1 September 2017), available at: https://www.hrw.org/news/2017/09/01/ukraine-foreign-journalists-barred-or-expelled (RR, Annex 190). RIA Novosti, "Cases of harassment of journalists in Ukraine in 2014-2017" (19 June 2017), available at: https://ria.ru/20170619/1496819255.html (RR, Annex 307). *Ukrainska Pravda*, "Journalist Babchenko is alive, the murder is staged" (30 May 2018), available at: https://www.pravda.com.ua/rus/news/2018/05/30/7181836/ (RR, Annex 78). *The Guardian*, "Arkady Babchenko Reveals He Faked His Death to Thwart Moscow Plot" (30 May 2018), available at: https://www.theguardian.com/world/2018/may/30/arkady-babchenko-reveals-he-faked-his-death-to-thwart-moscow-plot (RR, Annex 93).

[24] RR, paras. 11-16, 27-28. Pictures.reuters.com, "Members of a 'Maidan' self-defence battalion take part in a training at a base of Ukraine's National Guard near Kiev" (31 March 2014), available at: https://pictures.reuters.com/archive/UKRAINE-CRISIS-GM1EA3V1ME601.html (RR, Annex 473). OHCHR, Report on the human rights situation in Ukraine (1 May to 15 August 2015), 8 September 2015, para. 123, available at: https://www.ohchr.org/sites/default/files/Documents/Countries/UA/11thOHCHRreportUkraine.pdf. *TSN*, "In Lvov protesters seize main law enforcement buildings and weapons arsenal" (19 February 2014), availableat:https://tsn.ua/ukrayina/u-lvovi-protestuvalniki-zahopili-golovni-budivli-silovikiv-ta-arsenal-zbroyi-335205.html (RR, Annex 398). *Unian.ua*, "Military warehouses with weapons burn in Lvov" (19 February 2014), available at: https://www.unian.ua/politics/886677-u-lvovi-goryat-viyskovi-skladi-zi-zbroeyu.html (RR, Annex 188). I. Lopatonok and O. Stone, "Ukraine on Fire", Documentary (2016), available at: https://watchdocumentaries.com/ukraine-on-fire/;See also *The World*, "Who Were the Maidan Snipers?" (14 March 2014), available at: https://theworld.org/stories/2014-03-14/who-were-maidan-snipers (RR, Annex 180); *BBC News Ukraine*, "The Maidan Shooting: a Participant's Account" (13 February 2015), available at: https://www.bbc.com/ukrainian/ukraine_in_russian/2015/02/150213_ru_s_maidan_shooting (RR, Annex 181).

[25] See: *Gaforov* v. *Russia*, ECtHR, Application No. 25404/09, Judgment of 21 October 2010, paras. 110-116; *Sultanov* v. *Russia*, ECtHR, Application No. 15303/09, Judgment of 4 November 2010, para. 57; *A. B.* v. *Russia*, ECtHR, Application No. 1439/06, Judgment of 14 October 2010, paras. 127-135; *Sidikovy* v. *Russia*, ECtHR, Application No. 73455/11, Judgment of 20 June 2013, paras. 129-138.

added)[26]. In addition, United Nations, General Assembly resolution 62/148 of 18 December 2007 ("Torture and other cruel, inhuman or degrading treatment or punishment" (doc. A/RES/62/148)) reads as follows:

> "The General Assembly,
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> . . . . . .
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> *Urges* States not to expel, return ('refouler'), extradite or in any other way transfer a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture, and recognizes that diplomatic assurances, where used, do not release States from their obligations under international human rights, humanitarian and refugee law, in particular the principle of non-refoulement".

43. In this context, regard should be had to a noteworthy and prudent statement in the Judgment that "*[c]redible information* . . . may give rise to the obligation to investigate" under Article 9, and that

> "Article 9 does not require the initiation of an investigation into *unsubstantiated allegations of terrorism financing. Requiring States parties to undertake such investigations would not be in line with the object and purpose of the ICSFT*"[27] (emphasis added).

44. I am in complete agreement with this position of the Court. However, the Majority veered away from this legally impeccable approach when formulating the level of evidence required to trigger Article 9 in the present case:

> "The threshold set by Article 9, paragraph 1, is relatively low. For the obligation to investigate to arise, Article 9, paragraph 1, requires only that a State party receive information that a person who has committed or who is 'alleged' to have committed the offence of terrorism financing may be present in its territory. In circumstances where the information only 'alleges' the commission of an offence under Article 2, it is not necessary that the commission of the offence be established. Indeed, it is precisely the purpose of an investigation to uncover the facts necessary to determine whether a criminal offence has been committed. All the details surrounding the alleged offence may not yet be known and the facts provided may therefore be general in nature."[28]

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[26] OSCE, Human Rights in Counter-Terrorism Investigations: A Practical Manual for Law Enforcement Officers, p. 46.

[27] Judgment, para. 104.

[28] *Ibid*., para. 103.

45. Hence, in the opinion of the Majority, it is sufficient to merely "allege" the commission of the offence under Article 2, and it is not necessary to present "facts" except those of a "general nature" (whatever that may mean). Whether these allegations are "credible" or "substantiated" does not seem to factor in anymore.

46. And then we come to the actual information provided by Ukraine. According to the Court, it included

> "a summary of the types of conduct allegedly undertaken by members of armed groups associated with the DPR and LPR that Ukraine considered to constitute predicate acts under the ICSFT, the names of several individuals suspected of terrorism financing, and details regarding the accounts used and the types of items purchased with the funds transferred"[29].

In other words, Ukraine simply claimed that the DPR and LPR were engaged in terrorist activity, named certain people whom it accused of financing the Republics, and gave their bank account data. Neither "substantiation" nor "credibility" of these claims was taken into account by the Majority conclusion that "such information met the relatively low threshold set by Article 9"[30]. The Majority also did not properly weigh in Ukraine's known practice of using trumped-up allegations of terrorism as a tool against political opponents.

47. To sum up and to reiterate:

— while the Court believes that only *substantiated* allegations of terrorism financing supported by *credible evidence* are capable of triggering Article 9;
— while the Court found *no evidence* of terrorism financing with regard to the DPR and LPR after six years of proceedings;
— while the Court found *no grounds* to consider the DPR and LPR to be "notorious terrorist organizations", so the mere reference to them as such could not have been sufficient;
— while Ukraine's Government was, in fact, notorious for using false allegations of terrorism and terrorism financing to persecute its political opponents;
— the Court, rather its Majority, has nevertheless found, in this case, that Ukraine's allegations which contained nothing more than *claims* that certain persons were engaged in financing terrorism — and provided no substantiation of those claims — were sufficient to trigger Article 9 of the ICSFT.

48. In other words, by merely *accusing* certain persons of terrorism financing, in a situation when neither a terrorist act nor terrorism financing

[29] *Ibid.*, para. 107.
[30] *Ibid.*

has actually occurred, Ukraine, in the opinion of the Majority, has managed to meet the threshold for engaging Article 9 for purposes of State responsibility.

49. In light of the Court's previously held position that the level of certainty should be appropriate to the seriousness of the allegation[31], I can only conclude that due to a practically non-existent level of certainty threshold adopted by the Court, the latter perceived Ukraine's allegation to be not at all serious. It is unfortunate that this was still considered by the Majority as sufficient to decide there was a breach of the ICSFT; however, the level of seriousness attributed by the Court to the allegation will surely colour this decision, as well.

50. This aspect of the Judgment may well lead to negative consequences, as lowering the threshold of State responsibility under Article 9 to a level that requires every State party to arrest its citizens and freeze their assets on the basis of manifestly unsubstantiated allegations from a foreign country creates a real danger of anti-terrorism provisions being abused for political persecution and harms genuine inter-State co-operation in the field of combating terrorism.

51. An impartial reader should be perplexed by a laconic narration of the positions of the Parties and the Court's reasoning in this part of the Judgment. Considering the importance of the case, and that this is the only part of the case where the Majority has actually discovered some kind of violation, its treatment deserved to be more meticulous. However, the part of the Judgment devoted to this sole "violation" is not even 1,700 words long, with the Respondent's counter-arguments summarized in a single paragraph and confined to only 220 words. Apparently, going deeper into the arguments of the Parties would have exposed the flimsy foundations of this decision.

4. In any Event, the Respondent Did Engage in Adequate Co-operation with the Applicant under Article 9

52. No less baffling would appear the Majority's apparent reluctance to consider the full spectrum of materials submitted by the Parties — materials which show that the Russian Federation had in fact engaged in sufficient co-operation with Ukraine in respect of Article 9. The Judgment fails to even properly summarize the arguments of the Respondent, electing to omit or making a mishmash of some of them, perhaps in order to decrease the visibility of challenges to its own position.

53. To begin with some context: in the relevant period of 2014-2017, Russia received around 1,000 requests from Ukraine for international legal

[31] *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. 90, para. 210.

co-operation, the vast majority of which were properly executed[32]. Of these requests, at least 91 (as claimed by Ukraine) were related to terrorism financing. Of these 91, Ukraine only brought 12 to the Court[33]. Of these 12, nine were rejected by the Court[34]. The remaining three Notes Verbales concerned 19 individuals, but Russia has supplied Ukraine with relevant information on most of those individuals, which leaves, by my estimate, only about five persons who could not be found or otherwise remained unidentified. It is therefore evident that the entire issue represented only a minuscule part of legal co-operation between Russia and Ukraine on criminal matters, even if limited to the field of combating terrorism financing. Furthermore, the Ukrainian Notes Verbales, neither by their form, content or channel of communication, represented proper requests for assistance under the relevant mutual legal assistance (MLA) treaties applicable in accordance with Article 12 (5) of the ICSFT[35].

54. This entire issue appears to boil down to Russia's alleged failure to identify some of the persons from a list of alleged offenders sent by Ukraine in two Notes Verbales in August 2014. While the Court confirms that Russia did respond to these Notes and did perform certain investigative measures, there are two aspects where the Court found Russia's conduct at odds with requirements of the ICSFT.

55. First, the Judgment noted

> "the amount of time that elapsed before the Russian Federation provided the aforementioned responses to the Ukrainian Notes Verbales. In this regard, the Court observes that the 2019 Mutual Evaluation Report issued by the FATF regarding the Russian Federation's anti-money laundering and counter-terrorist financing measures stated that the Russian Federation generally answers requests for mutual legal assistance 'within one to two months'" (Judgment, para. 110).

56. Second, the Judgment opined that

> "to the extent the Respondent encountered difficulties ascertaining the location or identity of some of the individuals named in the Ukrainian communications, it was required to seek to co-operate with Ukraine to undertake the necessary investigations and specify to Ukraine what further information may have been required" (Judgment, para. 110).

[32] CR 2023/7, p. 21, para. 21 (Kuzmin).
[33] CR 2023/10, p. 45, para. 12 (Yee).
[34] Judgment, para. 106.
[35] See RR, para. 570.

57. However, Russia *did* send requests to Ukraine for additional information and Russia's first response containing such a request came precisely "within one to two months" of the August 2014 Ukrainian Notes[36]. Specifically, in the Note Verbale of 14 October 2014 responding, *inter alia*, to Ukraine's Notes Verbales of 12 and 29 August 2014, Russia had asked for "factual data", information on Ukrainian criminal investigations, as well as stressing the need to observe proper channels and requirements under the applicable MLA treaty[37]. These requests were repeated in Russia's follow-up Note of 31 July 2015.

58. Importantly, these requests by Russia could very well be considered a form of *investigation* of Ukraine's alleged *facts*. Since Ukraine claimed that acts of terrorism and financing of terrorism had occurred, but did not substantiate these claims, it was all too logical for Russia to request further information, precisely to investigate these claims or to gather enough evidence for launching an investigation.

59. However, Ukraine did not respond to this or other requests for information, neither through diplomatic channels, nor MLA channels, nor during bilateral consultations between the Parties on this subject[38].

60. Thus, it was actually Ukraine which deliberately stalled co-operation with Russia by refusing to provide substantiating information that might have helped to identify the alleged perpetrators and investigate their alleged misdeeds. Russia reported to Ukraine on its inability to identify or locate some of the persons due to lack of data, which should be considered an effort to move forward representing a sufficient amount of co-operation, given the particular circumstances of the case.

61. In this light, even from a factual perspective, I cannot agree with the decision regarding a "breach" of obligation under Article 9 by the Respondent.

5. The Court Was Correct in Finding an Absence of Violation of Article 12

62. I agree with the Court's decision that there has been no violation of Article 12 by the Respondent. I should offer a few additional comments to that general statement.

63. Firstly, all three of the Ukrainian MLA requests addressed by the Court (dated 11 November 2014, 3 December 2014 and 28 July 2015) did not

[36] *Ibid*., para. 575.
[37] *Ibid*., para. 576.
[38] *Ibid*., para. 579.

refer to terrorism financing offences, nor to the ICSFT, but rather cited Article 258-3 of the Ukrainian Criminal Code, which covered "creation of terrorist organizations" — a matter outside the scope of the ICSFT. Neither did these requests conform to the requirements of applicable MLA treaties[39], such as the need for translation into the Russian language[40].

64. Secondly, while in *Djibouti* v. *France* the Court did note the insufficiency of a bare reference to an exception clause and the need for a "brief further explanation", it was not unconditional, but dependent upon the goal of allowing "the requested State to substantiate its good faith in refusing the request" and "enabl[ing] the requesting State to see if its letter rogatory could be modified so as to avoid the obstacles to implementation"[41]. In the case of France, the refusal was on the obscure grounds of "contravention to France's fundamental interests". Doubtlessly, such refusal needed further elucidation to be considered in good faith. In Russia's case, however, the refusals were on the basis of sovereignty and national security, and the applicability of these exceptions was self-evident: Ukraine's requests concerned the actions of deputees of the Russian State Duma (i.e. parliamentarians) and of the Chief of the General Staff of the Russian armed forces. There can be little doubt that such persons are directly related to the exercise of sovereign power and/or matters of national security, and there is little space for any further elucidation. Whereas in cases when grounds for refusal were less clear, the Russian authorities have provided more detailed explanations[42].

65. Thirdly, established practice between the Parties should be taken into account. Ukraine itself has repeatedly rejected Russian requests for legal assistance with essentially the same terse formulations when referring to the same grounds for refusal under MLA treaties[43].

66. Finally, regarding the timing of the replies, the scale of MLA correspondence between the two countries needs to be taken into account. Considering the amount of MLA requests Ukraine has been sending to Russia, including those allegedly concerning terrorism financing, and the complexity of the matters involved, it is not surprising that delays occasionally occurred.

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[39] See Protocol of 28 March 1997 to the Minsk Convention of 22 January 1993 on legal aid and legal relations in civil, family and criminal cases (RR, Annex 457).

[40] RR, para. 611.

[41] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, p. 231, para. 152.

[42] See, *inter alia*, Letter from the Office of the Prosecutor of the Russian Federation No. 82/1-5094-15 dated 7 February 2017 (RR, Annex 49); Letter from the Office of the Prosecutor General of the Russian Federation No. 82/1-2791-15, 25 September 2015 (RR, Annex 54).

[43] See RR, paras. 620-621.

6. The Court Was Correct in Establishing the Meaning of "Funds"

67. I concur with the Judgment's finding that "funds" do not encompass weapons within the meaning ascribed to the term by the Convention, but I feel the matter merits additional commentary.

68. There are two main elements essential for understanding terms in the interpretation of treaties: the ordinary meaning of the term and its special meaning for the purposes of the treaty[44].

69. The starting-point should be the meaning of the Convention's key term: "financing". Its "ordinary meaning" is "the money needed to do a particular thing, or the way of getting the money"[45]. The "ordinary meaning" of funds is "amount of money that has been saved or has been made available for a particular purpose"[46].

70. This understanding seems to have been shared by the authors of the Convention: according to its *travaux*, the initial draft by France explicitly defined "funds" as "any type of financial resource"[47] and a proposal by Japan — as "pecuniary benefit"[48] ("pecuniary" meaning "of or relating to money; consisting of or given or exacted in money or monetary payments"[49]).

71. The term "financial resources" was later replaced with "assets", and eventually the term "funds" was equated with "assets of every kind"[50]. There does not seem to be any indication that this replacement was meant to deviate from the original understanding of "funds" as limited to financial resources: a French proposal, for example, defined "assets/property of every kind" as "including but not limited to cash, bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts, letters of credit or any other negotiable instrument in any form, including electronic or digital form"[51]. Weapons were conspicuously absent from this list, which made it almost verbatim to the final text of the Convention. Quite to the contrary — suggestions to include, apart from "funds"/"assets", also "other property" understood to be "covering only arms, explosives and similar

[44] See, respectively, paragraphs 1 and 4 of Article 31 of the Vienna Convention on the Law of Treaties.

[45] *Cambridge Dictionary*. Available at https://dictionary.cambridge.org/dictionary/english/financing.

[46] *Oxford Dictionary*. Available at https://www.oxfordlearnersdictionaries.com/definition/english/fund_1. See RR, para. 186.

[47] Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, General Assembly, Official Records, Fifty-fourth Session, Supplement No. 37 (A/54/37), p. 15.

[48] *Ibid*., p. 28.

[49] See e.g. https://www.dictionary.com/browse/pecuniary; https://www.merriam-webster.com/dictionary/pecuniary, etc.

[50] "Measures to eliminate international terrorism: Report of the Working Group", UN doc. A/C.6/54/L.2, 26 October 1999, pp. 58-59, paras. 42-47.

[51] *Ibid*., p. 22.

goods"[52] were explicitly rejected, and the final text of the Convention lacks this language.

72. Thus, the ordinary meaning of the terms and the development history of the Convention support the view that funds and assets were both understood to mean financial resources, while supply of arms was considered to be distinct and not intended to fall under the Convention.

73. The structure and contents of the ICSFT also indicate that it was not designed to be a general treaty against any and all support of terrorism, but one specifically targeted against financial flows to terrorists.

74. The preamble, where normally the object and purpose of a treaty are formulated, sets the goal of the Convention to "prevent and counteract movements of funds suspected to be intended for terrorist purposes without impeding in any way the freedom of legitimate capital movements", while no mention of the freedom of trade in goods is made. In fact, the preamble directly mentions "illicit arms trafficking" as a different unlawful activity than terrorism financing, in which an organization that finances terrorism might "also" be engaged (but which the Convention is not intended to cover).

75. Furthermore, in Article 1, the "legal documents or instruments . . . evidencing title to, or interest in, such assets" only relate to purely financial resources ("bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts, letters of credit").

76. Finally, the Convention's entire section on international co-operation — including Articles 8, 12, 13 and 18 — does not include any measures specifically aimed against arms trafficking, while there are plenty of rules concerning financial assets (identification, detection and freezing or seizure; bank secrecy; fiscal offences; "money-transferring agencies", etc.)[53].

77. Considering the important role played by weapons in terrorist activity, it would be illogical to assume that the authors of the Convention have left such an obvious gap in its preambular and operative provisions.

78. While the FATF, OECD and other organizations have their own specific terminology, it does not necessarily coincide with the terms of inter-

[52] Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, General Assembly, Official Records, Fifty-fourth Session, Supplement No. 37 (A/54/37), p. 57.

[53] See RR, para. 191.

national treaties. The FATF, particularly, has noted that its recommendations aim to implement UN Security Council resolutions[54], which represent a wider range of obligations than specific treaties like the ICSFT. Even so, the FATF recommendations make a distinction between "funds" (which are defined similarly to the ICSFT definition) and "other assets"[55]; such "other assets" being understood to include "e.g. weapons or vehicles"[56].

79. The ICSFT is, of course, a United Nations Convention and should be interpreted as such. In UN Security Council resolutions devoted to combating terrorism, there is a difference between terrorism financing and supply of weapons to terrorists. When referring to the ICSFT, these UN Security Council resolutions only associate it with the former, not the latter[57]. The same approach is taken by UN counter-terrorism bodies, such as the United Nations Office on Drugs and Crime (UNODC), which provides a very illustrative example of this approach in its *Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols*:

> "The 1999 Financing of Terrorism Convention is only one aspect of a larger international effort to prevent, detect and suppress the financing and support of terrorism. Under Security Council resolution 1373 (2001), Member States are required to take measures not only against the financing of terrorism, but also against *other* forms of support, such as recruitment and *the supply of weapons*. The 1999 Financing of Terrorism Convention only prohibits the provision or collection of 'funds', meaning assets or evidence of title to assets. However, when legislation to implement the Convention is enacted, the resolution's requirement to suppress recruitment and *the supply of weapons should also be considered*."[58] (Emphasis added.)

80. UNODC, therefore, considers supply of weapons to fall under UN Security Council counter-terrorism resolutions, but not under the ICSFT.

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[54] Special Recommendation III: Freezing and Confiscating Terrorist Assets, Text of the Special Recommendation and Interpretative Note, October 2001.

[55] FATF Recommendations, p. 131.

[56] FATF Report: Terrorist Financing Risk Assessment Guidance (2019), available at: https://www.fatf-gafi.org/content/dam/fatf-gafi/guidance/Terrorist-Financing-Risk-Assessment-Guidance.pdf.

[57] RR, paras. 205-2013. CMR, Vol. I, paras. 93-100. Security Council resolution 1373 (2001), Security Council resolution 2370 (2017) and Security Council resolution 2462 (2019).

[58] UNODC, *Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols* (United Nations, 2003), p. 21, para. 49 (available at: https://www.unodc.org/pdf/crime/terrorism/explanatory_english2.pdf). See RR, para. 199.

81. National legislation likewise commonly draws a line between supply of weapons to terrorists and financing of terrorism. These are considered different criminal acts in the Russian Federation and other jurisdictions[59].

82. Summing up, my understanding is that while the term "assets of every kind" may create an impression that "funds" encompass anything that may have monetary value, the drafters of the Convention, aiming to cover *financing* and not every possible form of support, ascribed a more specific meaning to this term as only encompassing "every kind" of pecuniary (financial) resources. In contrast, the term "other property", viewed as a reference to weapons, was not included in the final text. The verity of this approach is upheld by State practice as reflected in Security Council resolutions and guiding documents of competent United Nations bodies such as UNODC.

83. In my opinion, this view is not contradictory to the task of combating terrorism. After all, the ICSFT is not the only international instrument active in this field: e.g. the Arms Trade Treaty was concluded in 2013 with the explicit aim "to prevent and eradicate the illicit trade in conventional arms and to prevent their diversion to the illicit market, or for unauthorized end use and end users, *including in the commission of terrorist acts*"[60] and, of course, all States remain obliged to implement the counter-terrorism resolutions of the UN Security Council.

7. The Court Missed an Opportunity to Apply the "Clean Hands" Doctrine, Choosing Instead to Destroy the Doctrine Itself

84. Yet another remarkable aspect of this case is the Majority's treatment of the "clean hands" doctrine. It is, of course, trite that this defence has long been a "black sheep" of Court practice and notoriously difficult to prove and apply (see Judgment, para. 37). However, the *possibility* of this defence was never brushed aside by the Court — at least not until now. Ironically, the present case is, in my opinion, an exemplary occasion of "unclean hands" shown by the Applicant, finally satisfying all of the criteria tentatively laid out in previous Court proceedings. The fact that the Court's Majority elected to end decades of uncertainty and completely eliminate the "clean hands" doctrine *as a concept*, rather than risk its application in the present case,

[59] See RR, paras. 218-222; Article 205.1 of the Criminal Code of the Russian Federation (Memorial of Ukraine (hereinafter "MU"), Annex 874); International Monetary Fund, Germany: Detailed assessment report on anti-money laundering and combating the financing of terrorism (March 2010), para. 207; H. Tofangsaz, "Criminalization of terrorist financing: from theory to practice", in *New Criminal Law Review*, Vol. 21 (1), p. 92.

[60] Arms Trade Treaty, preamble (emphasis added), available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVI-8&chapter=26&clang=_en.

speaks volumes. Indeed, on all previous occasions the Court was never forced to pronounce its position on the existence of the "clean hands" doctrine as a defence, since it could instead refer to some or all of these criteria being, in any event, unsatisfied. Apparently, in the present case such an option was not open to the Court and the choice was between exonerating Russia on the basis of Ukraine's "unclean hands" or elimination of the "clean hands" doctrine as such. The Majority chose the latter, neglecting to provide any concrete reasoning for its abrupt decision.

85. As a tribute to this venerable doctrine, which, by happenstance, had its swan song while I appeared on the Bench, I feel obliged to outline the reasons why it should have been applicable in the circumstances of the present case.

86. One might opine that Russia did not directly assert that Ukraine has, through its alleged conduct, violated its obligations under the ICSFT. What Russia did, however, was to show that Ukraine had been itself engaged in the conduct of which it accuses the Russian Federation, if not worse, and which it considers to be a violation of the ICSFT. For example, Russia has demonstrated that Ukraine had been supplying the DPR and LPR with funds, despite alleging them to be "notorious terrorist organizations"; that Ukrainian forces have been systematically shelling and bombing residential areas in Donbass (such shelling of civilian objects being considered by Ukraine as "terrorism"); that Ukraine had refused to fulfil MLA requests from Russia regarding certain persons and organizations on the basis of sovereignty or the fact that it did not consider such organizations to be of a terrorist nature; etc.

87. The fact that Russia itself did not consider funding the DPR and LPR to be terrorism financing, or actions committed by armed forces in time of war to be terrorism only because they might have caused damage to civilians, should not have excluded the possibility of a *quod non* argument — that is, assuming Ukraine's allegations be taken at face value, they should have been dismissed due to Ukraine being engaged in the same, or worse, kind of conduct. To rule otherwise would imply that "unclean hands" can only exist when the applicant is in breach of certain *other* rules of the relevant treaty that it accuses the respondent of breaching — or that the respondent would have to first concede that such actions as it is being accused of (and which the applicant is also engaged in) *are* a breach of the treaty, before raising the "clean hands" defence. Neither of these conditions were to be found in preceding Court practice regarding "clean hands".

88. The basics of the doctrine, which Russia invoked in its arguments, were laid down in the Judgment of 28 June 1937 rendered by the Permanent Court of International Justice (PCIJ) in the case concerning *Diversion of Water from the Meuse (Netherlands* v. *Belgium)*[61], as well as the ICJ cases concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*[62] and *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America)*, where traces of the "clean hands" doctrine application can be found[63].

89. In *Certain Iranian Assets*, the Court has indicated the following conditions for the "unclean hands" doctrine, as a defence on the merits, the absence of which "in any event" precluded its application:

(1) a wrong or misconduct must have been committed by the applicant or on its behalf;
(2) a nexus between the wrong or misconduct and the claims being made by the applicant must exist;
(3) there should be a sufficient level of connection between the wrong or misconduct and the applicant's claim, dependent on the circumstances of the case[64].

90. In that case, the applicant, Iran, when suggesting a definition for the conditions of applicability of the "clean hands" doctrine, elected to define them as follows: "when the claimant is engaged in 'precisely similar action, similar in fact and similar in law' as that of which it complains"[65].

91. In *Diversions of Water from the Meuse*, Judge Hudson defined the principle (which he couched in terms of general equity) as "that where two parties have assumed an identical or a reciprocal obligation" and that "one party . . . is engaged in a continuing non-performance of that obligation" while, at the same time, there is "a similar non-performance of that obligation by the other party"[66].

92. In my view, all these conditions are met in the present case. In contrast to *Certain Iranian Assets*, when there was no question of inconsistency between Iran's allegations and its own performance under the Treaty of

[61] RR, para. 44; *Diversion of Water from the Meuse, Judgment, 1937, P.C.I.J., Series A/B, No. 70*, p. 25.

[62] RR, para. 46; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, dissenting opinion of Judge Schwebel, p. 392, para. 268.

[63] RR, para. 47; *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019 (I)*, p. 44, para. 122.

[64] *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2023 (I)* p. 88, paras. 82-83.

[65] *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019 (I)*, p. 40, para. 121.

[66] *Diversion of Water from the Meuse, Judgment, 1937, P.C.I.J., Series A/B, No. 70*, individual opinion by Mr Hudson, p. 77.

Amity, the present case appears to be a textbook example of "unclean hands", where the applicant is actually committing the very same actions it accuses the respondent of, indeed on a larger scale, yet does not recognize these actions as being in breach of any international obligations, including those under the ICSFT.

(a) *Conditions were met for the "clean hands" doctrine to apply in this case*

(1) Ukraine committed actions that would qualify as "terrorism" and "terrorism financing" according to its own interpretation of these terms in the present case

93. According to Ukraine's counsel, Russia is "defending the indefensible"; Mr Thouvenin listed these "indefensible acts" as follows: "Hence its efforts to defend the indefensible: murders, a downed airliner, shellings, bombings of civilians, and its culpable passivity in the face of the financing of this barbarity."[67]

94. However, all of these acts (politically motivated murders, shooting down of a civilian airliner, shelling and bombings of residential areas, non-prosecution of what Ukraine considers "financing of terrorism") are attributable to Ukraine itself. Russia has provided the Court with factual evidence of the following actions by the Ukrainian Government:

— Repeated shelling by Ukrainian armed forces of residential areas in Donetsk, Lugansk and other Donbass cities, leading to thousands of civilian casualties. Ukraine used the same weapons systems (including Grad and Smerch MLRS) to conduct these attacks as it accuses DPR of using. The list of such shelling examples provided by Russia is much broader than the list of alleged shelling Ukraine blames DPR militia for[68].
— Killing of opposition figures, including the murders of journalists and firebombing of the Trade Union building in Odessa on 2 May 2014, when over 50 anti-Maidan activists were burned alive[69].
— The downing of a Russian civilian airliner by Ukrainian armed forces, killing 78 passengers and crew[70].

[67] CR 2023/9, p. 13 (Thouvenin).

[68] RR, para. 61; CR 2023/7, p. 17 (Kuzmin); slide 3 of the Kuzmin presentation; CR 2023/7, p. 63 (Udovichenko); slide 40 of the Udovichenko presentation.

[69] RR, para. 455; *The Guardian*, "Ukraine Clashes: Dozens Dead after Odessa Building Fire" (2 May 2014), available at: https://www.theguardian.com/world/2014/may/02/ukraine-dead-odessa-building-fire (RR, Annex 94).

[70] RR, para. 455; *Gazeta.ru*, "'Do Not Make a Tragedy out of This'. How Ukraine Shot Down a Russian Tu-154" (4 October 2021), available at: https://www.gazeta.ru/science/2021/10/03_a_14047363.shtml (RR, Annex 343). Expert report of Yuri Vladimirovich Bezborodko, 10 March 2023, paras. 60-63 (RR, Annex 6).

— Trade with the DPR and LPR in coal and other goods, thereby directly financing these supposedly "notorious terrorist organizations"[71].

— Creating a "climate of fear" through repeated human rights violations, including enforced disappearances and false allegations in "terrorism financing", conducted by the Security Service of Ukraine (SBU)[72], the so-called "volunteer battalions" (of neo-Nazi leaning) and other entities under the control of the Ukrainian Government[73].
— Using civilians as "human shields" by positioning military personnel and combat vehicles in close proximity to civilian objects[74].

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[71] Ukraine's coal trade with the DPR and LPR (RR, Appendix 1).

[72] CMR, Vol. I, para. 508. RR, paras. 23-24, 454 and 456; Sputnik International, "Incidents with Russian Reporters in Ukraine in 2014-2017" (31 August 2017), available at: https://sputniknews.com/europe/201708311056947334-russian-reporters-ukraine/ (RR, Annex 187). KHPG, "Ukraine follows Russia in dubious 'State treason' arrests" (16 February 2015), available at: http://khpg.org/en/index.php?id=1423918032 (RR, Annex 189). TASS, "How Ukraine imposed sanctions on Russian individuals and entities" (20 March 2019), available at: https://tass.ru/info/6240919 (RR, Annex 306). Human Rights Watch, "Ukraine Foreign Journalists Barred or Expelled" (1 September 2017), available at: https://www.hrw.org/news/2017/09/01/ukraine-foreign-journalists-barred-or-expelled (RR, Annex 190). RIA Novosti, "Cases of harassment of journalists in Ukraine in 2014-2017" (19 June 2017), available at: https://ria.ru/20170619/1496819255.html (RR, Annex 307). *Ukrainska Pravda*, "Journalist Babchenko is alive, the murder is staged" (30 May 2018), available at: https://www.pravda.com.ua/rus/news/2018/05/30/7181836/ (RR, Annex 78). *The Guardian*, "Arkady Babchenko Reveals He Faked His Death to Thwart Moscow Plot" (30 May 2018), available at: https://www.theguardian.com/world/2018/may/30/arkady-babchenko-reveals-he-faked-his-death-to-thwart-moscow-plot (RR, Annex 93).

[73] RR, paras. 11-16, 27-28. Pictures.reuters.com, "Members of a 'Maidan' self-defence battalion take part in a training at a base of Ukraine's National Guard near Kiev" (31 March 2014), available at: https://pictures.reuters.com/archive/UKRAINE-CRISIS-GM1EA3V1ME601.html (RR, Annex 473). OHCHR, Report on the human rights situation in Ukraine (16 May to 15 August 2015), 8 September 2015, para. 123, available at: https://www.ohchr.org/sites/default/files/Documents/Countries/UA/11thOHCHRreportUkraine.pdf. *TSN*, "In Lvov protesters seize main law enforcement buildings and weapons arsenal" (19 February 2014), available at: https://tsn.ua/ukrayina/u-lvovi-protestuvalniki-zahopili-golovni-budivli-silovikiv-ta-arsenal-zbroyi-335205.html (RR, Annex 398). *Unian.ua*, "Military warehouses with weapons burn in Lvov" (19 February 2014), available at: https://www.unian.ua/politics/886677-u-lvovi-goryat-viyskovi-skladi-zi-zbroeyu.html (RR, Annex 188). I. Lopatonok and O. Stone, "Ukraine on Fire", Documentary (2016), available at: https://watchdocumentaries.com/ukraine-on-fire/; see also *The World*, "Who Were the Maidan Snipers?" (14 March 2014), available at: https://theworld.org/stories/2014-03-14/who-were-maidan-snipers (RR, Annex 180); *BBC News Ukraine*, "The Maidan Shooting: a Participant's Account" (13 February 2015), available at: https://www.bbc.com/ukrainian/ukraine_in_russian/2015/02/150213_ru_s_maidan_shooting (RR, Annex 181).

[74] RR, paras. 63-77, 315 and 439; *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine* v. *Russian Federation)*, Preliminary Objections submitted by the Russian Federation, 1 October 2022, p. 32, note 102

— Lack of effective investigation of the above acts[75].

95. If Ukraine's interpretation of the ICSFT were to be accepted, then Ukraine itself ought to be considered in breach of the ICSFT, as well as other legally binding norms of international law, including international humanitarian law.

(2) There is a nexus between Ukraine's actions and Ukraine's claims

96. In the present case, Ukraine considers that:

— causing deaths of civilians by accident in the context of an armed conflict is "terrorism" and falls under Article 2 *(a)*, *(b)* of the ICSFT;

— deaths occurring as a result of civil strife between factions, triggered by the illegal coup in Kiev, to be "acts of terror";
— provision of "funds" (which in Ukraine's view constitute any assets) to the DPR and LPR is "financing of notorious terrorist organizations";

— effect of civil war causing "terror" among civilian population to be an indication of terrorism falling under the ICSFT.

97. This aligns with Ukraine's own actions listed above, which are of a similar (or even more aggravated) nature.

(3) There is sufficient connection between Ukraine's actions and Ukraine's claims

98. Both Ukraine's own actions and its claims against Russia concern the same situation and circumstances, or very similar circumstances. Ukraine's armed forces have repeatedly conducted attacks against residential areas, causing massive civilian casualties, in the same armed conflict and in the same geographic region (Donbass). Killings, enforced disappearances and other acts committed by Ukrainian government agents or private actors affiliated with the Government of Ukraine, which contributed to the "climate of fear" in Donbass, were done within the context of the same

(Statement by the Russian Federation on the false allegations against the Russian Federation made by Ukraine to cover-up its own violations of international law and military crimes against civilian population of Donbass as well as Kharkov, Kherson and Zaporozhye regions, 27 September 2022, available at: https://mid.ru/en/foreign_policy/news/themes/id/1831500/); Second Samolenkov report, paras. 373-374 (RR, Annex 8). Expert report of Yuri Vladimirovich Bezborodko, 10 March 2023, para. 51 *(c)* (RR, Annex 6).

[75] RR, paras. 14-15; I. Lopatonok and O. Stone, "Ukraine on Fire", Documentary (2016), available at: https://watchdocumentaries.com/ukraine-on-fire/; see also *The World*, "Who Were the Maidan Snipers?" (14 March 2014), available at: https://theworld.org/stories/2014-03-14/who-were-maidan-snipers (RR, Annex 180); *BBC News Ukraine*, "The Maidan Shooting: a Participant's Account" (13 February 2015), available at: https://www.bbc.com/ukrainian/ukraine_in_russian/2015/02/150213_ru_s_maidan_shooting (RR, Annex 181).

civil war and civil strife triggered by the 2014 Maidan coup. Ukraine has conducted extensive trade with the same entities — the DPR and LPR — that it accuses Russia of financing as "notorious terrorist organizations". The time frames of the events are also the same — ranging from spring of 2014 to early 2017. The connection is thus pervasive, encompassing *ratione loci*, *ratione temporis* and *ratione personae*.

99. Although the shooting down of the Russian civilian airliner by Ukrainian armed forces occurred under different historical circumstances, the connection with that incident is still strong: it was a result of armed forces conducting dangerous military activity in airspace from which civilian air traffic was not properly barred, which resulted in an erroneous downing of a civilian aircraft in lieu of the anticipated military target. Both the actor State (Ukraine) and the victim State (Russia) of that incident are Parties to the present proceedings, which also provides a connection.

(b) *Ukraine's claims that data provided by Russia is "propaganda" are invalid*

100. Russia has provided numerous sources, including those of Ukrainian and international origin. The list of such shelling examples provided in Russia's Rejoinder is much broader than the list of the alleged shelling Ukraine blames DPR militia for[76].

101. The Ukrainian armed forces have also never hesitated before using civilians as human shields. They deployed their troops and heavy weaponry in residential areas as well as in close vicinity to the socially important objects (schools, kindergartens, hospitals, etc.). They deliberately did this, *inter alia*, to provoke return fire and then groundlessly accuse the Donbass militia of "terrorism"[77]. Russia has provided ample evidence of such behaviour by Ukraine, including data from the OSCE's Special Monitoring Mission SMM to Ukraine [78]. In particular, the following was noted:

> "An SMM mini-UAV spotted on 29 March recently dug trenches about 40 m from a residential house on the south-eastern edge of Travneve (government-controlled, 51 km north-east of Donetsk)"[79].

[76] RR, para. 61.
[77] *Ibid*., para. 63.
[78] *Ibid*., paras. 61-70.
[79] Latest from the OSCE Special Monitoring Mission to Ukraine (SMM), based on information received as of 19:30, 30 March 2018, available at: https://www.osce.org/special-monitoring-mission-to-ukraine/376672.

> "Beyond withdrawal lines but outside designated storage sites, in government-controlled areas, on 22 May an SMM mini-UAV spotted three surface-to-air missile systems (9K35) about 50 m south-east of a school building in Tarasivka (43 km north-west of Donetsk) . . . In violation of withdrawal lines in government-controlled areas, on 21 May an SMM mini-UAV spotted two surface-to-air missile systems (9K35 *Strela-10*) in a residential area of Teple (31 km north of Luhansk) within 200 m of a civilian house, on 22 May an SMM mini-UAV spotted a surface-to-air missile system (9K35) about 2 km north-east of Teple, an SMM long-range UAV spotted two surface-to-air missile systems (9K33 *Osa*)"[80].

> "The SMM observed armoured combat vehicles and an anti-aircraft gun in the security zone. In government-controlled areas, the SMM saw on 20 April four infantry fighting vehicles (IFV) (BMP-2) and an armoured reconnaissance vehicle (BRDM-2) near Zolote-1/Soniachnyi, two IFVs (BMP-2) near Zolote, five IFVs (BMP-2) near Zolote-3/Stahanovets, an armoured reconnaissance vehicle (BRM-1K) near Zolote 2 (60 km west of Luhansk) . . . On 21 April, the SMM saw . . . three armoured reconnaissance vehicles (BRDM-2) and two IFVs (BMP-1) on flatbed trucks near Zolote . . . On 22 April, the SMM saw two IFVs (BMP-2) near Zolote . . ."[81].

102. Furthermore, Ukraine itself has openly admitted the veracity of such facts to the Court, including, *inter alia*, with regard to the town of Avdeyevka (Avdiivka), which Ukraine claims was shelled by DPR with an intent to target civilians: "on Avdiivka, Russia continues to focus on military positions, which are undisputed — unlike the other attacks, Avdiivka was a front-line city"[82].

103. These facts, therefore, could not have been dismissed out of hand as mere "propaganda" and had to be taken into consideration.

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[80] Latest from the OSCE Special Monitoring Mission to Ukraine (SMM), based on information received as of 19:30, 23 May 2018, available at: https://www.osce.org/special-monitoring-mission-to-ukraine/382423.

[81] Latest from the OSCE Special Monitoring Mission to Ukraine (SMM), based on information received as of 19:30, 22 April 2018, available at: https://www.osce.org/special-monitoring-mission-to-ukraine/378643.

[82] CR 2023/9, p. 39, para. 61 (Cheek).

(c) *Ukraine failed to disprove the data provided by Russia*

104. Ukraine had never even attempted to counter Russia's assertions regarding Ukraine's "unclean hands" on substance. Despite having the opportunity to prepare, after receiving Russia's written pleadings, a concrete rebuttal of Russia's alleged "propaganda", Ukraine nevertheless failed to do so[83]. This total lack of response speaks in favour of the validity of these facts.

(d) *Conclusion — the "clean hands" doctrine should have been applied in the present case*

105. Taking the above into consideration, the conditions for the application of the "clean hands" doctrine as a means of defence seemed to have been present: *inter alia*, the "connection" or "nexus" requirement seemed to be fulfilled: during the same time frame, in the same region, and with regard to the same entities, Ukraine was engaged in "precisely similar action, similar in fact and similar in law"[84], or — as the case may be — more damaging to the civilian population, than what it accused Russia of as allegedly a breach of the ICSFT, or as "predicate offences" with regard to the DPR and LPR.

106. Even though the doctrine is now apparently denied the status of a possible defence (unless a future judgment of the Court reverses this decision), one might still argue for its utility and practicability. Indeed, international law hinges to no small extent on the practice of States and their interpretation of legal norms. It is my view that, in a situation of legal uncertainty, it may be useful to apply the "clean hands" criteria to see whether the applicant, in fact, shares the same interpretation and application of these norms as the respondent, and thus argues its position in bad faith. This, in turn, might inform the position of the Court regarding its own interpretation of the law.

8. Regarding Remedies

107. Notably, the Court rejected all remedies requested by Ukraine ("cessation . . . of ongoing violations, guarantees and assurances of non-repetition, compensation and moral damages"[85]), beyond a formal declaration of a violation of Article 9, paragraph 1. Isn't it anything other than the apprehension of the shaky ground on which the Majority's position regarding Article 9 stands, and reluctance to implicate itself even further by providing tangible remedies? The Judgment's remark that Russia "continues to be

[83] See Judgment, para. 35.

[84] *Diversion of Water from the Meuse, Judgment, 1937, P.C.I.J., Series A/B, No. 70*, individual opinion by Mr Hudson, p. 78.

[85] Judgment, para. 148.

required under Article 9 of the Convention to undertake investigations into *sufficiently substantiated* allegations of acts of terrorism financing in eastern Ukraine" (emphasis added) should be interpreted in this light. The allegations presented by Ukraine were, of course, not *sufficiently substantiated*. They contained nothing more than dubious claims that the DPR and LPR were engaged in terrorist activities, claims which Ukraine failed to prove during these proceedings. Nor were these claims credible, considering Ukraine's tendency to use allegations of terrorism financing as a tool for political persecution, as recognized by international bodies such as the OHCHR.

108. Therefore, while I believe the declaration of violation to be improper, even in accordance with the Court's own criteria as expressed in this Judgment, it is appropriate that the Court did not award any further remedy to Ukraine.

PART II — CERD

1. The Court Properly Found No Evidence of Racial Discrimination regarding the Vast Majority of Ukraine's Allegations

109. Over the entire course of the proceedings, Ukraine has levelled at least 17 distinct allegations against Russia concerning CERD, claiming 47 (or so) incidents of "racial discrimination" with regard to Ukrainians and Crimean Tatars in Crimea. I agree with the Court's decision that Ukraine has failed to produce evidence of any racial discrimination regarding alleged "disappearances" and "murders", law enforcement measures, citizenship, cultural heritage, cultural institutions, culturally significant gatherings and media outlets, as well as every individual "incident" of discrimination alleged by Ukraine.

110. In total, no racial discrimination at all was discovered by the Court with regard to the Crimean Tatar people. As regards the Ukrainian people living in Crimea, no discrimination was found either, with the sole exception of school education in the Ukrainian language. This last finding was rather perplexing, since school education in the Ukrainian language is and has been available in Crimea, with Ukrainian being one of the Crimean State (official) languages protected by the Constitution of the Republic of Crimea and relevant legislation of the Russian Federation[86]; the Court itself confirms

[86] Constitution of the Republic of Crimea, Art. 10 (1), available on the official website of the Government of Crimea at https://rk.gov.ru/structure/acf7b684-df3d-4dbb-9662-454a9868eb72.

this in its Judgment[87]. Rather, the Majority found an issue with the fact that Crimeans in large numbers have, of their own will, switched the language of education of their children from Ukrainian to Russian after Crimea's reunification with Russia — which should not have come as a surprise, considering that Russian has always been the language of choice for the vast majority of the population of Crimea, and even during Ukraine's control over the peninsula most Crimeans — including most ethnic Ukrainians — preferred to receive education in Russian (as evidenced by Ukraine's own official statistics)[88].

111. I shall endeavour to shed some light on this matter further on, after a few remarks on other topics.

2. The Court Did Not Properly Support Ukraine's Attempt to Make Political Views an Element of "Ethnic Origin"

112. One of the most surprising clashes of opinions in the CERD case was a debate regarding the notions of "ethnic origin" and "ethnic group". In its effort to broaden the scope of the Convention, Ukraine argued that political views, such as those concerning the status of Crimea, were a part of Ukrainian and Crimean Tatar ethnicity[89]. In other words, according to the Applicant, those Ukrainians in Crimea and Crimean Tatars who supported Crimea's self-determination and joining the Russian Federation, were not "real" Ukrainians and Crimean Tatars, since all "true" Ukrainians and Crimean Tatars supported Crimea remaining part of Ukraine.

113. I found this entire line of argument to be highly dubious not only because of the plain meaning of the term "ethnic origin" and the Court's clear prior pronouncement that it is a "characteristic inherent at birth"[90] rather than acquired like political views, nor from the standpoint of elementary logic (Crimea only became part of an independent Ukraine in 1991, so any "ethnic link" of Crimean Tatars to Ukraine or of Ukrainians to Crimea made little sense), but also proceeding from the object and purpose of the

[87] Judgment, para. 394.

[88] *Statistical Yearbook of Ukraine for 2013* (State Statistics Committee of Ukraine, 2014), p. 415; see RR, Annex 490.

[89] See e.g. MU, para. 585.

[90] According to the Court's Judgment in the *Qatar* v. *United Arab Emirates* case it

> "observes that the definition of racial discrimination in the Convention includes 'national or ethnic origin'. These references to 'origin' denote, respectively, a person's bond to a national or ethnic group at birth, whereas nationality is a legal attribute which is within the discretionary power of the State and can change during a person's lifetime (*Nottebohm (Liechtenstein* v. *Guatemala), Second Phase, Judgment, I.C.J. Reports 1955*, pp. 20 and 23). The Court notes that the other elements of the definition of racial discrimination,

Convention itself. It would seem apparent that assigning the political views of certain members of an ethnic group to be an "inherent quality" of the group as a whole is an evil kind of stereotyping waiting to turn into something worse. Crimean Tatars have already suffered from similar stereotyping under Stalin; and then it was the Ukrainian Government that took an official position regarding the same ethnic group and painting part of that group as some kind of "ethnic traitors" based entirely on their political preferences. Likewise, hearing Ukraine's argument that a "frequently observed characteristic of ethnic groups is a desire to live together within a common political State"[91] raised questions not only about Ukraine's own inability to recognize the desire of mostly ethnic Russians of Crimea and Donbass to rejoin Russia, but also about the fate of those people in a "Ukrainian ethnostate".

114. Prudently, the Court found, in no uncertain terms, that "the political identity or the political position of a person or a group is not a relevant factor for the determination of their 'ethnic origin' within the meaning of Article 1, paragraph 1, of CERD"[92], thus putting an end to unwholesome speculations on this matter.

3. The Court Rightly Considered the Ban of the Mejlis *to Not Constitute Racial Discrimination*

115. From the very start of the proceedings, the question of the *Mejlis* ban was at the forefront of the CERD debate: it was the only concrete matter in the entire case on which the Court had deemed it appropriate to issue a specific provisional measure in 2017.

116. In my opinion, the Russian Federation has convincingly argued in its pleadings[93] that:

— neither the CERD nor other human rights instruments include a right of ethnic minority groups to establish and maintain their own representative institutions[94];

as set out in Article 1, paragraph 1, of the Convention, namely race, colour and descent, are also characteristics that are inherent at birth." (*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. 98, para. 81.)

[91] Reply of Ukraine (hereinafter "RU"), para. 410.
[92] Judgment, para. 200.
[93] CMR, Vol. II, paras. 131-250; RR, paras. 886-894 and 927-985.
[94] CMR, Vol. II, para. 138; RR, para. 944.

— the *Mejlis* and its former leaders represented hardly any of the Crimean Tatars during the entire period of this institution's existence[95];

— the *Mejlis* was not a representative body, but an executive body subordinate to the *Qurultay*[96];
— in any event, the Crimean Tatar community is represented by other bodies such as the *Qurultay*[97] and the Council of Crimean Tatars[98];

— the ban on the *Mejlis* was necessary to safeguard national security and public order against a grave and imminent peril (extremist activity)[99].

117. The Court has taken a lot of these arguments to heart and issued an appropriate decision worthy of quoting in its entirety:

> "[T]he Court is of the view that the *Mejlis* is neither the only, nor the primary institution representing the Crimean Tatar community . . . It suffices for the Court to observe that the *Mejlis* is the executive body of the *Qurultay* by which its members are elected and to which they remain responsible . . . The *Qurultay* . . . is elected directly by the Crimean Tatar people and, as Ukraine acknowledges, it is 'regarded by most Crimean Tatars as their representative body'. The *Qurultay* has not been banned, nor is there sufficient evidence before the Court that it has been effectively prevented by the authorities of the Russian Federation from fulfilling its role in representing the Crimean Tatar community. Therefore, the Court is not convinced that Ukraine has substantiated its claim that the ban on the *Mejlis* deprived the wider Crimean Tatar population of its representation."[100]

> "[T]he Court is not satisfied that Ukraine has convincingly established that, by adopting the ban of the *Mejlis*, authorities or institutions of the Russian Federation promoted or incited racial discrimination"[101].

> "[T]he Court observes that Ukraine did not establish that effective redress was denied by the Russian Federation. . .
>
> For these reasons the Court concludes that it has not been established that the Russian Federation has violated its obligations under CERD by imposing a ban on the *Mejlis*."[102]

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[95] RR, para. 937.
[96] *Ibid*., para. 931.
[97] *Ibid*.
[98] CMR (Vol. II), paras. 232-233; RR, para. 942.
[99] RR, paras. 972-984.
[100] Judgment, para. 269.
[101] *Ibid*., para. 273.
[102] *Ibid*., paras. 274-275.

118. While all those reasons are perfectly valid, the key factor in favour of considering the ban of the *Mejlis* to be lawful was its role in the blockade of Crimea. Regrettably, the Court, usually considerate of views of international bodies, chose to neglect the OHCHR reports on the human rights situation in Crimea which called attention to the actions of the *Mejlis* leadership (including Mustafa Dzhemiliev and Refat Chubarov), together with Ukrainian neo-Nazi armed groups ("Right Sector"), in organizing the blockade of trade routes, communications and water and electricity supply to Crimea[103], culminating in the bombing and destruction of power plant towers and high-voltage lines by which electricity was supplied from Ukraine to Crimea[104]. As a result of this total blockade, all of the Crimean population, including Crimean Tatars, suffered greatly from shortages of water, electricity, medicine, basic goods and other necessities. By this act alone the *Mejlis* had disavowed any representation of the interests of Crimean Tatars.

119. I thus support the Court's decision not to consider the ban of the *Mejlis* as racial discrimination. Should the Court have judged otherwise, it would have created a very problematic situation, when a body claiming to represent a certain ethnicity received carte blanche on violence, up to and including acts of extremism and terrorism, with any action to counter such activity running the risk of being declared a breach of the Convention. Certainly, such an outcome would be contrary to the interests of society as a whole and of the very ethnic groups these bodies claimed to represent.

4. The Court Was Correct in Dismissing Ukraine's Concept of "Indirect Discrimination"

120. Basic terms of the Convention that were challenged during the proceedings included the definition of racial discrimination itself. According to CERD's Article 1:

> "the term 'racial discrimination' shall mean any *distinction, exclusion, restriction or preference* based on race, colour, descent, or national or ethnic origin *which has the purpose or effect* of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life" (emphasis added).

[103] See OHCHR, Report on the human rights situation in Ukraine (16 August to 15 November 2015), paras. 16 and 143-146.

[104] Witness Statement of Ibraim Rishatovich Shirin (RR, Annex 11).

121. The first prong of the definition is "differentiation" (distinction, exclusion, restriction or preference) that is based on a protected quality. The purpose or effect of this differentiation (nullifying or impairing exercise of existing human rights on an equal footing) constitutes the second prong. Both are necessary for racial discrimination to occur. This rather obvious understanding is entrenched in legal doctrine[105]. Russia stood on this position, stressing the need to establish "differentiation of treatment" alongside an "unjustifiable disparate impact" in order to find racial discrimination[106]. Up to a certain point, Ukraine seemed to share that understanding: the Court itself in its 2019 Judgment on jurisdiction stated that "[i]t is the Applicant's position that these measures were *principally aimed* against the ethnic groups of Crimean Tatar and Ukrainian communities"[107].

122. However, in its apparent effort to artificially expand the scope of the Convention as much as possible, Ukraine advanced a particularly broad concept of "indirect discrimination", the key feature of which was rejecting the need to prove "differentiation of treatment" with regard to so-called "effects-based discrimination claims"[108] (thus removing the first prong of CERD's definition) and claiming that "equal treatment which has a disproportionate effect on a group defined by the enumerated grounds is itself discriminatory"[109]. Ukraine further claimed that it was not necessary to prove the existence of such "effect-based discrimination" by specific statistics[110].

123. However, this concept is clearly not rooted in the Convention[111]. The plain text of CERD and extensive history of its elaboration[112] show that it is

[105] For citations, see CMR, Vol. II, para. 97, including references to L. Hennebel and H. Tigroudja, *Traité de droit international des droits de l'homme*, Paris: Pedone, 2016, pp. 757 *et seq.*; L.-A. Sicilianos, "L'actualité et les potentialités de la Convention sur l'élimination de la discrimination raciale", *Revue trimestrielle des droits de l'homme*, Vol. 2005 (61), 2005, p. 873; I. Diaconu, *Racial Discrimination*, Eleven International Publishing, 2011, p. 33; RR, para. 826, with reference to N. Lerner, *The UN Convention on the Elimination of All Forms of Racial Discrimination*, Brill, 2015, p. 33.

[106] See, *inter alia*, CMR, Vol. II, paras. 97-98; RR, paras. 822-823.

[107] *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. 593, para. 88.

[108] Second Fredman report (RU, Annex 5), paras. 18-19.

[109] MU, Annex 22, p. 22, para. 53; RU, paras. 401-403, 421 and 619.

[110] RU, paras. 420-424.

[111] RR, paras. 842-844.

[112] *Ibid*., paras. 856-859, with reference to UN Commission on Human Rights, Report submitted to the Commission on Human Rights, 6 December 1947, E/CN.4/52, Section V; United Nations, "The Main Types and Causes of Discrimination, Memorandum Submitted by the Secretary-General", 1949, UN doc. E/CN.4/SUB.2/40/REV.1, esp. paras. 6-7.

precisely the goal of ensuring equal treatment of persons belonging to various protected groups that lies at the core of the Convention régime.

124. Ukraine's experts, conversely, called for "unequal treatment" in order "to achieve genuine equality"[113]. While the Convention in its Article 1 (4) does recognize the possibility of certain measures of so-called "positive discrimination", which it exempts from the notion of "racial discrimination", it nevertheless does not consider such measures to be mandatory — and neither did Ukraine accuse Russia of violating this provision of CERD. Moreover, according to CERD such measures must not "lead to the maintenance of separate rights for different racial groups" and "shall not be continued after the objectives for which they were taken have been achieved".

125. Judicial practice likewise did not support Ukraine's position. In *Qatar* v. *United Arab Emirates,* the Court has already rejected the concept of "indirect discrimination" even in a less radical form than the one advanced by Ukraine[114]. In *Minority Schools in Albania* and other related cases, the PCIJ distinctly stated that equal treatment (or "equality in law") "precludes discrimination of any kind", giving an interpretation of Article 4 of the Albanian Declaration (which is very close to Article 1 (1) of CERD) as stipulating "equality before the law", "régime of legal equality" and "equality of treatment"[115]. Similarly, Ukraine's reliance on General Recommendation XIV of the CERD Committee was to no avail: the document only confirmed that difference in treatment (or "distinction") was a necessary element of the definition of racial discrimination[116].

126. Thus, to even begin establishing discrimination, Ukraine would have had to first demonstrate distinction or other differentiation based on a protected quality. As the Court stated earlier in *Qatar* v. *United Arab Emirates*, CERD "was clearly not intended to cover every instance of differentiation between persons"[117]. Qatar's claim was rejected mainly because it concerned differentiation on the grounds of nationality which are not covered

[113] RR, para. 843.

[114] *Ibid.*, paras. 828 and 872-874, with reference to *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*, pp. 108-110, para. 112.

[115] *Ibid.*, paras. 45-855, with reference to *Minority Schools in Albania, Advisory Opinion, 1935, P.C.I.J., Series A/B, No. 64*, p. 19.

[116] See *ibid.*, paras. 29-830 and 870, including reference to CERD Committee's, General Recommendation XIV, Definition of Racial Discrimination (Forty-second session, 1993), UN doc. A/48/18, p. 114 (1994), para. 2 (MU, Annex 788).

[117] *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. 99, para. 87.

by the Convention; whereas Ukraine apparently did not provide any evidence of differentiation whatsoever[118].

127. The Court supported the two-prong approach in its Judgment:

> "'Racial discrimination' under Article 1, paragraph 1, of CERD thus consists of two elements. First, a 'distinction, exclusion, restriction or preference' must be 'based on' one of the prohibited grounds, namely, 'race, colour, descent, or national or ethnic origin'. Secondly, such a differentiation of treatment must have the 'purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights'."[119]

128. The Court further added that even when "a measure, despite being apparently neutral, produces a disparate adverse effect on the rights of a person or a group distinguished by race, colour, descent, or national or ethnic origin", it would still not constitute racial discrimination, by itself, if such an effect is not related to the prohibited grounds of discrimination set out in Article 1 (1): "Mere collateral or secondary effects on persons who are distinguished by one of the prohibited grounds do not, in and of themselves, constitute racial discrimination within the meaning of the Convention"[120].

129. Unfortunately, the Majority appeared not to follow these principles when dealing with the question of education, as will be shown in the following section.

5. The Majority Erred with respect to School Education in the Ukrainian Language

130. To begin with, the Judgment admits that CERD "does not include a general right to school education in a minority language"[121] and

> "[t]he fact that a State chooses to offer school education in only one language does not, in and of itself, give rise to discrimination under CERD against members of a national or ethnic minority who wish to have their children educated in their own language"[122].

Normally, that would be sufficient to conclude a lack of violation, since in the absence of a right there cannot be racial discrimination with regard to the exercise of that right.

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[118] RR, para. 874 and note 1188.
[119] Judgment, para. 195.
[120] *Ibid.*, para. 196.
[121] *Ibid.*, para. 354.
[122] *Ibid.*, para. 356.

131. However, access to education in Ukrainian was not even at issue in the present case. It is a fact that free public education in Ukrainian *is* available in Crimea and Ukrainian is one of Crimea's State languages.

132. In the eyes of the Majority, the real issue is different. According to the Judgment,

> "the prohibition of racial discrimination under Article 2, paragraph 1, *(a)* of CERD and the right to education under Article 5 *(e)* (v), may, under certain circumstances, set limits to *changes* in the provision of school education in the language of a national or ethnic minority" (emphasis added),

proceeding with the following explanation:

> "Structural changes with respect to the available language of instruction in schools may constitute discrimination prohibited under CERD if *the way in which they are implemented* produces a disparate adverse effect on the rights of a person or group distinguished by the grounds listed in Article 1, paragraph 1, of CERD . . . This would be the case, in particular, if a *change* in the education in a minority language available in public schools is implemented in such a way, including by means of informal pressure, as to make it unreasonably difficult for members of a national or ethnic group to ensure that their children, as part of their general right to education, do not suffer from *unduly burdensome discontinuities in their primary language of instruction*."[123] (Emphasis added.)

133. It is, firstly, difficult to understand how, in the absence of a right to education in a minority language, there can reasonably exist an arguable right not to subject education in a minority language to discontinuance. Despite the profound legal discussion on this particular topic during both the written proceedings and the oral hearings, the Majority refrains from grounding its position in any specific treaty provisions, case law, State practice or legal doctrine.

134. What is even more confusing, though, is how the Court applied this principle to the circumstances of the present case:

> "There was thus an 80 per cent decline in the number of students receiving an education in the Ukrainian language during the first year after 2014 and a further decline of 50 per cent by the following year. It is undisputed that no such decline has taken place with respect to school education in other languages, including the Crimean Tatar lan-

[123] *Ibid*., paras. 354 and 357.

guage. Such a sudden and steep decline produced a disparate adverse effect on the rights of ethnic Ukrainian children and their parents."[124]

. . . . . .

"Although the Court is unable to conclude, on the basis of the evidence presented, that parents have been subjected to harassment or manipulative conduct aimed at deterring them from articulating their preference, the Court is of the view that the Russian Federation has not demonstrated that it complied with its duty to protect the rights of ethnic Ukrainians from a disparate adverse effect based on their ethnic origin by taking measures to mitigate the pressure resulting from the exceptional 'reorientation of the Crimean educational system towards Russia' on parents whose children had until 2014 received their school education in the Ukrainian language."[125]

135. Thus, even in the absence of convincing evidence of any pressure on parents to educate their children in Russian rather than Ukrainian, the Majority, apparently, simply assumed that such a decline could *only* have taken place as a result of some kind of policy of racial discrimination pursued by the Respondent, and that by no means could this decline have occurred as simply an objective consequence of the Crimean population — already predominantly Russian and Russian-speaking — reverting to the ubiquitous use of the Russian language as a result of Crimea's return to Russia and cessation of Ukraine's educational policies aimed at overwhelmingly installing the Ukrainian language. In other words, the Majority failed to follow the Court's own position that "[m]ere collateral or secondary effects on persons who are distinguished by one of the prohibited grounds do not, in and of themselves, constitute racial discrimination within the meaning of the Convention"[126].

136. In so opining, the Majority has apparently paid little heed to the fact that selection of language of education in Crimea is a *voluntary choice* of the pupils and their parents. It appears that the Majority had difficulty believing that Crimeans would voluntarily choose to be educated in Russian and not in Ukrainian, that choice being rooted in their historical and cultural heritage and outlook for the future.

137. Neither was much weight given by the Majority to the opinion, though cited, of the OHCHR "that the main reasons for this decrease include a dominant Russian cultural environment and the departure of thousands of pro-Ukrainian Crimean residents to mainland Ukraine"[127].

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[124] *Ibid*., para. 359.
[125] *Ibid*., para. 363.
[126] *Ibid*., para. 196.
[127] *Ibid*., para. 361.

138. The Judgment also fails to mention that no law or other regulation in the Russian Federation prohibits Ukrainian-language private schools (despite *Minority Schools in Albania*, where solely access to private schools was in question, being so prominent in the proceedings).

139. The Court seems to have completely ignored the vast statistical evidence submitted by the Respondent, which showed how, according to Ukraine's own data, even during Ukrainian rule the majority of Crimeans still preferred to be educated in Russian — remarkably, even most of those who were ethnic Ukrainians, and despite Ukraine's own policy of promoting the Ukrainian language[128]. This mere fact ought to have indicated that there existed a strong preference for Russian-language education in Crimea.

140. Finally, it remains entirely unclear what "measures" the Russian Federation could have implemented beyond those it had already taken, i.e. making Ukrainian one of the State languages in Crimea and making free school education in Ukrainian available to all who so desired, unless the Majority expected Russia to force Crimean children to continue studying in Ukrainian when they and their parents desired to study in Russian.

141. The Judgment concludes that

> "To find whether the Russian Federation violated its obligations under CERD in the present case, the Court needs to determine if the violations found constitute a pattern of racial discrimination . . . The legislative and other practices of the Russian Federation with regard to school education in the Ukrainian language in Crimea applied to all children of Ukrainian ethnic origin whose parents wished them to be instructed in the Ukrainian language and thus did not merely concern individual cases. As such, it appears that this practice was intended to lead to a structural change in the educational system. The Court is therefore of the view that the conduct in question constitutes a pattern of racial discrimination."[129]

142. The Judgment, however, does not point out any particular "legislative and other practice" that would actually be stopping Crimeans from being educated in Ukrainian, if they so desire, either in a free public school or in a private institution. It seems that the mere fact of Crimeans flocking to study in Russian instead of Ukrainian is already considered by the Majority to be proof of a "pattern of racial discrimination". In other words, the "result" is considered to be evidence of a specific "cause", despite the abundance of alternative explanations and in contravention of the Court's own rejection of the "indirect discrimination" approach.

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[128] RR, Annex 490.
[129] Judgment, para. 369.

143. I cannot concur with this reasoning or conclusion. In my opinion, there is no evidence of any "pattern of racial discrimination" or "disparate effect" on existing human rights, or even adverse differentiation of treatment — on the contrary, the Ukrainian language enjoys in Crimea a constitutional status rarely awarded to minority languages in any country: that of a State (official) language, with the possibility for anyone to receive free education in Ukrainian in public schools. Compared to how other States parties to CERD regulate minority language education and especially how Ukraine itself treats the Russian language — subjecting it to elimination and erasure despite the vast number of ethnic Russians and Russian-speakers in Ukraine — the treatment of the Ukrainian language in Crimea is far more preferential. If that is what constitutes "racial discrimination" in the opinion of the Majority, then a lot of States parties will have to reflect on their education policies.

144. To make matters worse, the remedy formulated by the Court includes a vague and uncertain phrase that Russia "remains under an obligation to ensure that the system of instruction in the Ukrainian language gives due regard to the needs and reasonable expectations of children and parents of Ukrainian ethnic origin"[130]. First of all, CERD does not impose any obligations to serve undefined "needs and reasonable expectations" beyond the duty to uphold actually existing human rights obligations without racial discrimination. Secondly, the Russian system of education already gives such "due regard" by providing all Crimeans with the opportunity to educate their children in the Ukrainian language. This is confirmed by the Court's own decision that Russia conformed to the relevant part of the provisional measures Order. There is nothing more that could be done by Russia, and the Court never suggests any measure beyond those already undertaken by Russia to ensure access to education in the Ukrainian language. My conclusion is, therefore, that this phrase is only intended to address possible *new and prospective* educational reforms.

6. The "Clean Hands" Doctrine Was also Applicable to the CERD Case

145. The Respondent has provided extensive information on how Ukraine systematically violated the rights of Russians and other ethnic groups — including the Crimean Tatar community it now purports to protect[131]. Disturbingly, this policy seems to be a consequence of the current Kiev

[130] *Ibid.*, para. 373.
[131] RR, para. 678.

régime's leanings towards ideological continuity with the Organization of Ukrainian Nationalists (OUN) and the Ukrainian Insurgent Army (UPA) — infamous collaborators of Nazi Germany during World War II[132].

146. This historical background is essential both with regard to "clean hands" and to the general context of the CERD case.

147. After the defeat of Nazi Germany, the leaders, prominent members and fighters of the OUN and UPA, who were responsible for numerous war crimes[133] — including mass executions of prisoners of war and civilians, guarding Nazi concentration camps, Jewish pogroms, etc.[134] — emigrated abroad, continuing subversive activities aimed at Soviet Ukraine. With the collapse of the Soviet Union, these leaders and their descendants and adherents re-emerged in the newly independent Ukraine, creating neo-Nazi organizations which openly declared their succession to the OUN and UPA. The Respondent demonstrated how at least 15 radical neo-Nazi organizations have been created in Ukraine from 1991 to the present day, allying with each other and transforming into new neo-Nazi parties[135]. Some of them even openly adopted Nazi symbols (such as the *Wolfsangel*[136]) as their logos. Seemingly, Ukraine did nothing to prevent the growth of this neo-Nazi sentiment in Ukraine and effectively failed to ban dissemination of its fascist and racist ideas[137], rather creating a favourable environment for their flourishing, as illustrated by multiple examples offered by the Respondent[138].

148. Against this historical backdrop, it is unsurprising that the current Ukrainian Government is pursuing a policy of glorification of Nazism in violation of Article 4 of the CERD. Stepan Bandera and Roman Shukhevych — by far the most notorious of Nazi collaborators — have been awarded the title of Hero of Ukraine, as have many other members of the OUN-UPA[139]. Streets in Kiev and other cities of Ukraine have been renamed after them[140]. They are presented as heroes in school textbooks[141]. On 12 October 2007, Ukraine's President Viktor Yushchenko signed a decree on awarding Roman Shukhevych the title of Hero of Ukraine; on 10 January 2010, the same title was conferred on Stepan

[132] *Ibid*., para. 729.
[133] *Ibid*., para. 731.
[134] *Ibid*., para. 741.
[135] *Ibid*., para. 733.
[136] Wolf's Hook, see also note 5.
[137] RR, para. 695.
[138] *Ibid*., paras. 735, 749-750, 752 and 755-756.
[139] *Ibid*., para. 732.
[140] CR 2023/8, p. 29, para. 31 (Zabolotskaya).
[141] *Ibid*., para. 32.

Bandera[142]. Concurrently those disagreeing with neo-Nazi inclinations were suppressed by violent and military means, as evidenced not only by deadly attacks on protesters, as gruesomely proven by the burning alive of 48 opponents of the Maidan coup d'état in the building of the House of Trade Unions on 2 May 2014 in Odessa[143], but, on a more massive scale, by multiple loss of life inflicted on the civilian population of Donbass, predominantly ethnic Russians and Russian speakers, in the course of the so-called "Anti-Terrorist Operation" launched on 14 April 2014[144].

149. Other ethnic minorities in Ukraine have also been subjected to mistreatment and violence even before the so-called Euromaidan[145]. International monitoring mechanisms repeatedly reported on infringement of their cultural and educational rights[146]. Xenophobic and anti-Semitic sentiment has been growing for years[147]. Attacks on Jews, Roma, Africans and other national minorities have taken place systematically[148]. No effort to counter manifestations of xenophobia has been exerted by the Government, itself apparently supporting radical nationalism in Ukraine[149].

150. As with the ICSFT, Ukraine has not engaged substantively with the facts cited by Russia, *inter alia*, regarding Kiev's policy of glorification of Nazism contrary to Article 4 of the CERD, dismissing them as mere "Russian propaganda"[150]. Conversely, the Respondent, in support of its position, predominantly refers to Ukrainian and international sources, such as Ukraine's high-ranking officials' "scientific" works[151], documents of international organizations and monitoring institutions[152], Ukrainian and foreign mass media[153], as well as Ukraine's own legislation[154]. Indeed, concern about the resurgence of Nazism in Ukraine has been mounting for many years. Although fringe neo-Nazi movements may exist in various countries,

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[142] RR, para. 766, with reference to Decree of the President of Ukraine No. 46/2010, "On awarding S. Bandera the title of Hero of Ukraine", 10 January 2010, available at: https://zakon.rada.gov.ua/laws/show/46/2010#Text (Annex 331); Decree of the President of Ukraine No. 965/2007, "On awarding R. Shukhevych the title of Hero of Ukraine", 12 October 2007, available at: https://zakon rada.gov.ua/laws/show/965/2007#Text.

[143] RR, para. 758.
[144] *Ibid*., para. 759.
[145] *Ibid*., para. 684.
[146] *Ibid*., paras. 680 and 685-694.
[147] *Ibid*., paras. 695-703.
[148] *Ibid*., paras. 688-694.
[149] *Ibid*., paras. 774-781.
[150] CR 2023/6, p. 34, para. 46 (Koh).
[151] RR, paras. 742-753 and 756.
[152] *Ibid*., paras. 689, 690-693, 696, 699 and 743.
[153] *Ibid*., paras. 746, 753-754, 764 and 766.
[154] *Ibid*., paras. 755, 766, 772-774 and 783.

what makes Ukraine unique is that, perhaps for the first time in post-World War II history, such movements organized and led violent armed protests, successfully overthrew a legitimately elected government, installed their own régime, put their people in charge of military, security and propaganda bodies, launched a campaign of fear and intimidation against the general population, brutally murdered dissenters and even conducted a full-fledged military operation against a part of their own country where people of another ethnicity resisted the new régime, killing and injuring thousands of civilians in the process.

151. In view of the aforesaid, there are adequate grounds for the application of the "clean hands" doctrine as a defence on the merits, since Ukraine itself is engaged in acts which are contrary to the obligations under CERD aimed at combating Nazism in all its forms.

152. Furthermore, as shown by the Respondent, Ukraine has been conducting policies with regard to the Russian-speaking population which Ukraine itself considers contrary to CERD (such as removing Russian-language education from schools, including those in predominantly Russian-speaking areas).

153. Hence, as in the case of the ICSFT, Ukraine's claims under CERD should have been dismissed *in limine* due to "unclean hands" of the Applicant. Ukraine's own actions against its ethnic minorities appear to be much more severe than anything that Ukraine even alleged against Russia.

Part III — Provisional Measures Order

1. The Court Rightly Found No Violation of the Provisional Measures Order with regard to Education in the Ukrainian Language

154. I certainly concur with the Court's decision on this matter: taking note of a report by the UN OHCHR, according to which "instruction in Ukrainian was provided in one Ukrainian school and 13 Ukrainian classes in Russian schools attended by 318 children", the Court found that "instruction in the Ukrainian language was available after the adoption of the Order" and therefore the Russian Federation has not violated the Order in so far as it obliged it to "ensure the availability of education in the Ukrainian language"[155]. However, this decision, which is, of course, based on objective fact, further highlights the unfathomable stance of the Majority regarding a

[155] Judgment, paras. 394-395.

"violation" of CERD in respect of education in the Ukrainian language. It is difficult to comprehend how a right could be at the same time non-existent[156], upheld[157], and impaired (due to racial discrimination, no less)[158]. Yet all of these findings were made by the Majority in this Judgment regarding the same circumstances. It presumably leads to a bizarre conclusion — that a State party which actually provides its national minorities with freely accessible public education in their native language might find itself in violation of CERD, simply because its citizens elect not to use this right; and a State party that quashes the ethnic identity of minorities by eliminating all opportunities of education in their native languages would not be in violation, so long as it does so *gradually*.

155. One can only imagine the reasons behind this incongruous position other than that the Majority treading some unseen boundary between the aim of somehow implicating the Respondent and the need to avoid making a wider and far-reaching pronouncement which may also implicate other States parties. Whatever the reasons, though, the Court is now put into an untenable position: if it is ever faced with allegations against a State party that provides manifestly less language rights to ethnic minorities than Russia, it will be hard-pressed to follow the Majority's approach in this Judgment while keeping to the principles of impartiality and judicial integrity.

2. There Could Be No Violation of the Provisional Measures Order regarding the Ban on the Mejlis*, since the Court Found This Ban to Not Be in Contravention of CERD*

156. This is another surprising and inexplicable decision of the Majority that contradicts the Court's own position taken in the Judgment. The Court has, of course, decided that the ban on the *Mejlis* did not constitute racial discrimination and was not in violation of CERD[159]. All the more surprising that the Majority found a violation of a provisional measure concerning this same ban[160].

157. By itself, the provisional measure in respect of the *Mejlis* ban was definitely ill-founded: even prima facie, Russia had sufficient grounds for the

[156] *Ibid*., para. 354.
[157] *Ibid*., para. 394.
[158] *Ibid*., paras. 363 and 370.
[159] *Ibid*., paras. 272 and 275.
[160] *Ibid*., para. 392.

measure, considering that entity's non-representative character and overt involvement in acts that would, in practically any country, be qualified as criminal, extremist or even terrorist. Several judges have expressed their disagreement with this part of the Order, having provided convincing arguments[161]. However, that is not the primary issue now.

158. Even when issuing the provisional measures Order in 2017, the Court had been careful to indicate that the measure was to be implemented by Russia "in accordance with its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination"[162]. The Court has now found that Russia conformed to its obligations under CERD with respect to the *Mejlis*. Therefore, no violation of the provisional measures Order could have been established.

159. By adopting a decision that there *was* a violation of the Order, despite the Court's Judgment on the merits of the issue, the Majority seems to be attempting to use provisional measures as an *independent tool of assigning State responsibility*, completely divorced from whatever findings the Court might make on the merits. And since provisional measures operate on the principle of prima facie evaluation of *plausibility*, rather than establishing actual circumstances based on convincing evidence, this tool is immeasurably less balanced than the Court's final judgments, affording a wide discretion for decisions that have no actual bearing on law or fact.

160. This is, of course, in contravention of the Statute of the Court and the basic principles of justice, including international justice. Provisional measures have long been a controversial topic, with their binding character only affirmed by the Court relatively recently[163] and arguments being consistently raised against such binding force. According to the Statute, the sole purpose of a provisional measure is "to preserve the respective rights of either party", "[p]ending the final decision"[164]. If it turns out that a party to the dispute had no such right from the beginning, it only means that there had been no need for provisional measures, as the right was never in peril. It cannot mean that, despite being exonerated on the merits, the other party is still somehow "responsible" for not taking measures to preserve a right

[161] See declaration of Judge Tomka and separate opinion of Judge *ad hoc* Skotnikov in *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, pp. 150 and 222, respectively.

[162] *Ibid.*, p. 140, para. 106 (1).

[163] *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 506, para. 109.

[164] Statute of the Court, Art. 41, paras. 1-2.

that was either non-existent in the first place or successfully preserved (whichever way you look at it).

161. As a result, by taking such a clearly unjustified decision, the Majority has (perhaps inadvertently) undermined the very status of provisional measures that the Court sought to buttress in recent years. Indeed, if provisional measures orders are going to be used as an "alternative" way of assigning State responsibility, based on extremely vague and uncertain criteria that lead to conclusions which demonstrably fly in the face of reality, it will only serve to strengthen the non-acceptance among States of the binding character of such measures.

3. The Majority's Decision regarding the Provisional Measure on Non-aggravation Was Manifestly Ill-founded

162. If the Majority's decision regarding the provisional measure on the *Mejlis* ban is an attempt to expand the scope of provisional measures beyond the circumstances established by the Court, then the similar decision concerning non-aggravation seems to be an attempt to expand this scope beyond the subject-matter of the dispute and even the Convention itself.

163. In the view of the Majority, the Russian Federation's actions of recognizing the DPR and LPR and conducting a special military operation "severely undermined the basis for mutual trust and co-operation and thus made the dispute more difficult to resolve"[165].

164. To begin with, it seems self-evident that events of 2022 did not relate to the subject-matter of the present dispute, which is limited entirely to circumstances predating 2017 that were fundamentally different in nature. As set out in the 2017 provisional measures Order itself, "the case before the Court is limited in scope"[166].

165. Secondly, it is difficult to imagine how the events of 2022 could have "aggravated" or "interfered with" a dispute that had been brought by the Applicant to the Court in 2017, had already been under consideration for five years, and concluded with final hearings on the merits soon after these events transpired. It seems obvious that no new solution to the matters under dispute could have been discovered in these few months, that would not have been available during the previous years. And in reality, these events have had no noticeable impact on the Parties' legal reasoning or their representation at the Court.

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[165] Judgment, para. 397.

[166] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, p. 13, para. 16.

166. In *LaGrand*, on which the Court relies to support the binding character of provisional measures[167], no measure related to non-aggravation was issued. In *Georgia* v. *Russian Federation* (2008) the Court did issue such a measure — however, despite the applicant calling for a pronouncement of a violation of the order by the respondent, the Court did not even entertain these calls on substance and restricted itself, in its Judgment on jurisdiction and admissibility, to stating the following:

> "The Court in its Order of 15 October 2008 indicated certain provisional measures. *This Order ceases to be operative upon the delivery of this Judgment*. The Parties are under a duty to comply with their obligations under CERD, of which they were reminded in that Order."[168] (Emphasis added.)

167. This, in my view, is the true extent of the effect of a non-aggravation provisional measure after the case has been successfully concluded. There had been no "aggravation" of the *Georgia* v. *Russian Federation* dispute on CERD in 2008 (despite the military clash and tensions between the two countries), as there had been no "aggravation" of the ICSFT/CERD dispute in the present case.

168. Thirdly, the 2017 Order concerning non-aggravation was addressed to *both* Russia and Ukraine: "*Both Parties* shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve."[169] (Emphasis added.)

169. The Court, however, never even attempted to examine whether Ukraine was also complying with this provisional measure, despite Russia drawing attention to the fact that Ukraine continued its attacks on Donbass and consistently refused to implement the UN-backed peaceful solution to the crisis (the Minsk Agreements)[170], as well as Ukraine's refusal to enter into negotiations concerning a possible settlement between the Parties[171].

170. Summing up, the Majority's decision on this matter goes beyond the scope of the provisional measures Order, the scope of the entire case, even the scope of the Convention itself, and does not conform to the principle of

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[167] Judgment, para. 388.

[168] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 140, para. 186.

[169] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, p. 141, para. 106 (2).

[170] RR, paras. 29-32.

[171] *Ibid.*, para. 1253.

impartiality and equal treatment of the Parties. In any event, the Court does not afford Ukraine any specific remedy with regard to this decision, so it will have no particular impact on the current situation.

(Signed) Bakhtiyar TUZMUKHAMEDOV.

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