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Summary
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Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)

Request for the indication of provisional measures

I. INTRODUCTION (PARAS. 1-16)

The Court recalls that, on 16 January 2017, Ukraine instituted proceedings against the Russian Federation with regard to alleged violations of the International Convention for the Suppression of the Financing of Terrorism (ICSFT) and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). On the same day, Ukraine submitted a request for the indication of provisional measures, aimed at safeguarding the rights it claims under those two conventions pending the Court's decision on the merits.

With respect to the ICSFT, in paragraph 23 of its Request for the indication of provisional measures, Ukraine asked the Court to indicate the following provisional measures:

"(a) The Russian Federation shall refrain from any action which might aggravate or extend the dispute under the Terrorism Financing Convention before the Court or make this dispute more difficult to resolve.

(b) The Russian Federation shall exercise appropriate control over its border to prevent further acts of terrorism financing, including the supply of weapons from the territory of the Russian Federation to the territory of Ukraine.

(c) The Russian Federation shall halt and prevent all transfers from the territory of the Russian Federation of money, weapons, vehicles, equipment, training, or personnel to groups that have engaged in acts of terrorism against civilians in Ukraine, or that the Russian Federation knows may in the future engage in acts of terrorism against civilians in Ukraine, including but not limited to the 'Donetsk People's Republic', the 'Luhansk People's Republic', the 'Kharkiv Partisans', and associated groups and individuals.

(d) The Russian Federation shall take all measures at its disposal to ensure that any groups operating in Ukraine that have previously received transfers from the territory of the Russian Federation of money, weapons, vehicles, equipment, training, or personnel will refrain from carrying out acts of terrorism against civilians in Ukraine."

With respect to CERD, in paragraph 24 of its Request for the indication of provisional measures, Ukraine asked the Court to indicate the following provisional measures:

"(a) The Russian Federation shall refrain from any action which might aggravate or extend the dispute under CERD before the Court or make it more difficult to resolve.

(b) The Russian Federation shall refrain from any act of racial discrimination against persons, groups of persons, or institutions in the territory under its effective control, including the Crimean peninsula.

(c) The Russian Federation shall cease and desist from acts of political and cultural suppression against the Crimean Tatar people, including suspending the decree banning the Mejlis of the Crimean Tatar People and refraining from enforcement of this decree and any similar measures, while this case is pending.

(d) The Russian Federation shall take all necessary steps to halt the disappearance of Crimean Tatar individuals and to promptly investigate those disappearances that have already occurred.

(e) The Russian Federation shall cease and desist from acts of political and cultural suppression against the ethnic Ukrainian people in Crimea, including suspending restrictions on Ukrainian-language education and respecting ethnic Ukrainian language and educational rights, while this case is pending."

The Court is fully aware of the context in which the present case has been brought before it, in particular the fighting taking place in large parts of eastern Ukraine and the destruction, on 17 July 2014, of Malaysia Airlines Flight MH17 while it was flying over Ukrainian territory en route between Amsterdam and Kuala Lumpur, which have claimed a large number of lives. Nevertheless, the case before the Court is limited in scope. In respect of the events in the eastern part of its territory, Ukraine has brought proceedings only under the ICSFT. With regard to the events in Crimea, Ukraine's claim is based solely upon CERD and the Court is not called upon, as Ukraine expressly recognized, to rule upon any issue other than allegations of racial discrimination made by the latter.

II. PRIMA FACIE JURISDICTION (PARAS. 17-62)

The Court begins by observing that, when a request for the indication of provisional measures is submitted to it, it need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case. In the present case, it notes that Ukraine seeks to found the jurisdiction of the Court on Article 24, paragraph 1, of the ICSFT and on Article 22 of CERD. The Court must therefore first seek to determine whether the jurisdictional clauses contained in these instruments prima facie confer upon it jurisdiction to rule on the merits of the case, enabling it — if the other necessary conditions are fulfilled — to indicate provisional measures.

1. Existence of a dispute concerning the interpretation or application of the ICSFT and CERD (paras. 22-39)

After observing that Ukraine and the Russian Federation are parties to both conventions at issue in the present case, the Court points out that both Article 24, paragraph 1, of the ICSFT and Article 22 of CERD make the Court's jurisdiction conditional on the existence of a dispute arising out of the interpretation or application of the respective convention. At this stage of the proceedings, the Court must therefore examine (1) whether the record shows a disagreement on a

point of law or fact between the two States; and (2) whether that disagreement concerns "the interpretation or application" of the respective convention.

(a) The International Convention for the Suppression of the Financing of Terrorism (paras. 24-31)

The Court considers that, as it appears from the record of the proceedings, the Parties differ on the question of whether the events which occurred in eastern Ukraine starting from the spring of 2014 have given rise to issues relating to their rights and obligations under the ICSFT. It notes that Ukraine contends that the Russian Federation has failed to respect its obligations under Articles 8, 9, 10, 11, 12 and 18. In particular, Ukraine maintains that the Russian Federation has failed to take appropriate measures to prevent the financing of terrorism in Ukraine by public and private actors on the territory of the Russian Federation and that it has repeatedly refused to investigate, prosecute, or extradite "offenders within its territory brought to its attention by Ukraine". The Russian Federation positively denies that it has committed any of the violations set out above.

The Court considers that at least some of the allegations made by Ukraine appear to be capable of falling within the scope of the ICSFT ratione materiae. It is of the view that the above-mentioned elements are sufficient at this stage to establish prima facie the existence of a dispute between the Parties concerning the interpretation and application of the ICSFT. During the hearings, the question of the definition of "funds" in Article 1, paragraph 1, of the Convention was raised. The question was also raised whether acts of financing of terrorist activities by the State itself fall within the scope of the Convention. For the purposes of determining the existence of a dispute relating to the Convention, the Court considers that it does not need to make any pronouncement on these issues.

(b) The International Convention on the Elimination of All Forms of Racial Discrimination (paras. 32-39)

The Court considers that, as evidenced by the documents before it, the Parties differ on the question of whether the events which occurred in Crimea starting from late February 2014 have given rise to issues relating to their rights and obligations under CERD. The Court notes that Ukraine has claimed that the Russian Federation violated its obligations under this Convention by systematically discriminating against and mistreating the Crimean Tatars and ethnic Ukrainians in Crimea, suppressing the political and cultural expression of Crimean Tatar identity, banning the Mejlis, preventing Crimean Tatars and ethnic Ukrainians from gathering to celebrate and commemorate important cultural events, and by suppressing the Crimean Tatar language and Ukrainian-language education. The Russian Federation has positively denied that it has committed any of the violations set out above.

The Court is of the view that the acts referred to by Ukraine, in particular the banning of the Mejlis and the alleged restrictions upon the cultural and educational rights of Crimean Tatars and ethnic Ukrainians, appear to be capable of falling within the scope of CERD ratione materiae. In its opinion, the above-mentioned elements are sufficient at this stage to establish prima facie the existence of a dispute between the Parties concerning the interpretation and application of CERD.

2. Procedural preconditions (paras. 40-61)

The Court further notes that the ICSFT and CERD set out procedural preconditions to be fulfilled prior to the seisin of the Court. Thus, under Article 24, paragraph 1, of the ICSFT, a dispute that "cannot be settled through negotiation within a reasonable time" shall be submitted to arbitration at the request of one of the parties, and may be referred to the Court only if the parties are unable to agree on the organization of the arbitration within six months from the date of the

request. Under Article 22 of CERD, the dispute referred to the Court must be a dispute "not settled by negotiation or by the procedures expressly provided for in this Convention". In addition, Article 22 states that the dispute may be referred to the Court at the request of one of the parties thereto only if the parties have not agreed to another mode of settlement. The Court notes that neither Party contests that this latter condition is fulfilled in the case.

Regarding the negotiations to which both compromissory clauses refer, the Court observes that negotiations are distinct from mere protests or disputations and require a genuine attempt by one of the parties to engage in discussions with the other party, with a view to resolving the dispute. Where negotiations are attempted or have commenced, the precondition of negotiation is only met when the attempt to negotiate has been unsuccessful or where negotiations have failed, become futile or deadlocked. In order to meet the precondition of negotiation contained in the compromissory clause of a treaty, the subject-matter of the negotiations must relate to the subject-matter of the dispute, which, in turn, must concern the substantive obligations contained in the treaty in question.

At this stage of the proceedings, the Court first has to assess whether it appears that Ukraine genuinely attempted to engage in negotiations with the Russian Federation, with a view to resolving their dispute concerning the latter's compliance with its substantive obligations under the ICSFT and CERD, and whether Ukraine pursued these negotiations as far as possible. With regard to the dispute under the ICSFT, if the Court finds that negotiations took place but failed, it will also have to examine whether, prior to the seisin of the Court, Ukraine attempted to settle this dispute through arbitration, under the conditions provided for in Article 24, paragraph 1, of the Convention. With regard to CERD, along with the precondition of negotiation, Article 22 includes another precondition, namely the use of "the procedures expressly provided in the Convention". In this context, the Court will need to determine whether, for the purposes of its decision on the request for the indication of provisional measures, it is necessary to examine the question of the relationship between both preconditions and Ukraine's compliance with the second one.

(a) The International Convention for the Suppression of the Financing of Terrorism (paras. 47-54)

The Court notes that it appears from the record of the proceedings that issues relating to the application of the ICSFT with regard to the situation in eastern Ukraine have been raised in bilateral contacts and negotiations between the Parties. Diplomatic exchanges have taken place, in which Ukraine specifically referred to alleged breaches by the Russian Federation of its obligations under the ICSFT. Over a period of two years, the Parties also held four in-person negotiating sessions specifically addressed to the ICSFT. These facts demonstrate that, prior to the filing of the Application, Ukraine and the Russian Federation had engaged in negotiations concerning the latter's compliance with its substantive obligations under the ICSFT. It appears from the facts on the record that these issues could not then be resolved by negotiations.

With regard to the precondition relating to the submission of the dispute to arbitration, the Court notes that by a Note Verbale dated 19 April 2016, Ukraine submitted a request for arbitration to the Russian Federation. The Russian Federation responded by means of a Note Verbale dated 23 June 2016, in which it offered to discuss "issues concerning setting up" the arbitration at a meeting it suggested should be held a month later. By a Note Verbale dated 31 August 2016, Ukraine proposed to the Russian Federation to resort to the mechanism of an ad hoc chamber of this Court. In its Note Verbale to Ukraine, dated 3 October 2016, the Russian Federation rejected this proposal and submitted its own draft arbitration agreement and accompanying rules of procedure. At a meeting on 18 October 2016, the Parties discussed the organization of the arbitration but no agreement was reached. Further exchanges between the Parties did not resolve the impasse. It appears that, within six months from the date of the arbitration request, the Parties were unable to reach an agreement on its organization.

The Court is of the view that the above-mentioned elements are sufficient at this stage to establish, prima facie, that the procedural preconditions under Article 24, paragraph 1, of the ICSFT for the seisin of the Court have been met.

(b) The International Convention on the Elimination of All Forms of Racial Discrimination (paras. 55-61)

The Court recalls that it has earlier concluded that the terms of Article 22 of CERD established preconditions to be fulfilled before the seisin of the Court. It notes that, as evidenced by the record of the proceedings, issues relating to the application of that Convention with regard to the situation in Crimea have been raised in bilateral contacts and negotiations between the Parties, which have exchanged numerous diplomatic Notes and held three rounds of bilateral negotiations on this subject. These facts demonstrate that, prior to the filing of the Application, Ukraine and the Russian Federation engaged in negotiations regarding the question of the latter's compliance with its substantive obligations under CERD. It appears from the record that these issues had not been resolved by negotiations at the time of the filing of the Application.

Article 22 of CERD also refers to "the procedures expressly provided for" in the Convention. According to Article 11 of the Convention, "if a State Party considers that another State Party is not giving effect to the provisions of this Convention", the matter may be brought to the attention of the CERD Committee. Neither Party claims that the issues in dispute have been brought to the attention of the CERD Committee. Although both Parties agree that negotiations and recourse to the procedures referred to in Article 22 of CERD constitute preconditions to be fulfilled before the seisin of the Court, they disagree as to whether these preconditions are alternative or cumulative. The Court considers that it need not make a pronouncement on the issue at this stage of the proceedings. Consequently, the fact that Ukraine did not bring the matter before the CERD Committee does not prevent the Court from concluding that it does have prima facie jurisdiction.

The Court considers, in view of all of the foregoing, that the procedural preconditions under Article 22 of CERD for the seisin of the Court have, prima facie, been complied with.

3. Conclusion as to prima facie jurisdiction (para. 62)

In light of the foregoing, the Court considers that, prima facie, it has jurisdiction pursuant to Article 24, paragraph 1, of the ICSFT and Article 22 of CERD to deal with the case to the extent that the dispute between the Parties relates to the "interpretation or application" of the respective convention.

III. THE RIGHTS WHOSE PROTECTION IS SOUGHT AND THE MEASURES REQUESTED (PARAS. 63-86)

The Court recalls that its power to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights claimed by the parties in a case, pending its decision on the merits thereof. It follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by it to belong to either party. Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by the party requesting such measures are at least plausible. Moreover, a link must exist between the rights whose protection is sought and the provisional measures being requested.

1. The International Convention for the Suppression of the Financing of Terrorism (paras. 65-77)

The Court notes that the ICSFT imposes a number of obligations on States parties with regard to the prevention and suppression of the financing of terrorism. However, for the purposes of its request for the indication of provisional measures, Ukraine invokes its rights and the respective obligations of the Russian Federation solely under Article 18 of the Convention. Article 18 states in substance that States parties are obliged to co-operate to prevent the financing of terrorism, i.e., the provision or collection of funds with the intention that they should be used or in the knowledge that they are to be used in order to carry out acts of terrorism as defined in Article 2 of the Convention. Consequently, in the context of a request for the indication of provisional measures, a State party to the Convention may rely on Article 18 to require another State party to co-operate with it in the prevention of certain types of acts only if it is plausible that such acts constitute offences under Article 2 of the ICSFT.

The Court observes that the acts to which Ukraine refers have given rise to the death and injury of a large number of civilians. However, in order to determine whether the rights for which Ukraine seeks protection are at least plausible, it is necessary to ascertain whether there are sufficient reasons for considering that the elements set out in Article 2, such as intention and knowledge, as well as the element of purpose, are present. The Court is of the view that, at this stage of the proceedings, Ukraine has not put before it evidence which affords a sufficient basis to find it plausible that these elements are present. Therefore, it concludes that the conditions required for the indication of provisional measures in respect of the rights alleged by Ukraine on the basis of the ICSFT are not met. The Court points out that this conclusion is without prejudice to the Parties' obligation to comply with the requirements of the ICSFT, and, in particular, Article 18 thereof.

2. The International Convention on the Elimination of All Forms of Racial Discrimination (paras. 78-86)

The Court notes that CERD imposes a number of obligations on States parties with regard to the elimination of racial discrimination in all its forms and manifestations. For the purposes of CERD, the term "racial discrimination" includes discrimination on the basis of ethnic origin. The Court observes that there is a correlation between respect for individual rights, the obligations of States parties under CERD and the right of States parties to seek compliance therewith.

The Court notes that Articles 2 and 5 of CERD are intended to protect individuals from racial discrimination. Consequently, in the context of a request for the indication of provisional measures, a State party to CERD may avail itself of the rights under Articles 2 and 5 only if it is plausible that the acts complained of constitute acts of racial discrimination under the Convention. In the present case, on the basis of the evidence presented before the Court by the Parties, it appears that some of the acts complained of by Ukraine fulfil this condition of plausibility. This is the case with respect to the banning of the Mejlis and the alleged restrictions on the educational rights of ethnic Ukrainians.

The Court turns to the issue of the link between the rights claimed and the provisional measures requested. It observes that the provisional measures sought by Ukraine are aimed at preventing the Russian Federation from committing acts of racial discrimination against persons, groups of persons, or institutions in the Crimean peninsula (point (b)); preventing acts of political and cultural suppression against the Crimean Tatar people, including suspending the decree banning the Mejlis (point (c)); preventing the disappearance of Crimean Tatar individuals and ensuring prompt investigation of disappearances that have already occurred (point (d)); and preventing acts of political and cultural suppression against the ethnic Ukrainian people in Crimea, including suspending restrictions on Ukrainian-language education (point (e)). As the Court has

already recalled, there must be a link between the measures which are requested and the rights which are claimed to be at risk of irreparable prejudice. In the current proceedings, this is the case with respect to the measures aimed at safeguarding the rights of Ukraine under Articles 2 and 5 of CERD, with regard to the ability of the Crimean Tatar community to conserve its representative institutions and with regard to the need to ensure the availability of Ukrainian-language education in schools in Crimea.

IV. RISK OF IRREPARABLE PREJUDICE AND URGENCY (PARAS. 87-98)

Taking account of its earlier conclusion that the conditions required for the indication of provisional measures in respect of the rights invoked by Ukraine on the basis of the ICSFT are not met, the Court considers that the issue of the risk of irreparable prejudice and urgency arises only in relation to the provisional measures sought with regard to CERD.

The Court recalls that it has the power to indicate provisional measures when irreparable prejudice could be caused to rights which are the subject of judicial proceedings, but that this power will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to the rights in dispute before the Court gives its final decision.

The Court notes that certain rights in question in these proceedings, in particular the political, civil, economic, social and cultural rights stipulated in Article 5, paragraphs (c), (d) and (e) of CERD, are of such a nature that prejudice to them is capable of causing irreparable harm. Based on the information before it at this juncture, the Court is of the opinion that Crimean Tatars and ethnic Ukrainians in Crimea appear to remain vulnerable.

In this regard, the Court takes note of the report on the human rights situation in Ukraine (16 May to 15 August 2016), whereby the Office of the United Nations High Commissioner for Human Rights (OHCHR) acknowledged that "the ban on the Mejlis, which is a self-government body with quasi-executive functions, appears to deny the Crimean Tatars — an indigenous people of Crimea — the right to choose their representative institutions", as well as of the report on the human rights situation in Ukraine (16 August to 15 November 2016), in which the OHCHR explained that none of the Crimean Tatar NGOs currently registered in Crimea can be considered to have the same degree of representativeness and legitimacy as the Mejlis, elected by the Crimean Tatars' assembly, namely the Kurultai. The Court also takes note of the report of the OSCE Human Rights Assessment Mission on Crimea (6 to 18 July 2015), according to which "[e]ducation in and of the Ukrainian language is disappearing in Crimea through pressure on school administrations, teachers, parents and children to discontinue teaching in and of the Ukrainian language". The OHCHR has observed that "[t]he start of the 2016-2017 school year in Crimea and the city of Sevastopol confirmed the continuous decline of Ukrainian as a language of instruction" (report on the human rights situation in Ukraine (16 August to 15 November 2016)). These reports show, prima facie, that there have been restrictions in terms of the availability of Ukrainian-language education in Crimean schools.

The Court considers that there is an imminent risk that the acts, as set out above, could lead to irreparable prejudice to the rights invoked by Ukraine.

V. CONCLUSION AND MEASURES TO BE ADOPTED (PARAS. 99-105)

The Court concludes that the conditions required by its Statute for it to indicate provisional measures in respect of CERD are met. Reminding the Russian Federation of its duty to comply with its obligations under CERD, the Court considers that, with regard to the situation in Crimea, the Russian Federation must refrain, pending the final decision in the case, from maintaining or

imposing limitations on the ability of the Crimean Tatar community to conserve its representative institutions, including the Mejlis. In addition, the Russian Federation must ensure the availability of education in the Ukrainian language. The Court also deems it necessary to indicate a measure aimed at ensuring the non-aggravation of the dispute between the Parties.

With regard to the situation in eastern Ukraine, the Court reminds the Parties that the Security Council, in its resolution 2202 (2015), endorsed the "Package of Measures for the Implementation of the Minsk Agreements", adopted and signed in Minsk on 12 February 2015. The Court expects the Parties, through individual and joint efforts, to work for the full implementation of this "Package of Measures" in order to achieve a peaceful settlement of the conflict in the eastern regions of Ukraine.

VI. OPERATIVE CLAUSE (PARA. 106)

The full text of the final paragraph of the Order reads as follows:

"For these reasons,

THE COURT,

Indicates the following provisional measures,

(1) With regard to the situation in Crimea, the Russian Federation must, in accordance with its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination,

(a) By thirteen votes to three,

Refrain from maintaining or imposing limitations on the ability of the Crimean Tatar community to conserve its representative institutions, including the Mejlis;

IN FAVOUR: President ABRAHAM; Vice-President YUSUF; Judges OWADA, BENNOUNA, CANÇADO TRINDADE, GREENWOOD, DONOGHUE, GAJA, SEBUTINDE, BHANDARI, ROBINSON, CRAWFORD; Judge ad hoc POCAR;

AGAINST: Judges TOMKA, XUE; Judge ad hoc SKOTNIKOV;

(b) Unanimously,

Ensure the availability of education in the Ukrainian language;

(2) Unanimously,

Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve."

Judge OWADA appends a separate opinion to the Order of the Court; Judge TOMKA appends a declaration to the Order of the Court; Judges CANÇADO TRINDADE and BHANDARI append separate opinions to the Order of the Court; Judge CRAWFORD appends a declaration to the Order of the Court; Judges ad hoc POCAR and SKOTNIKOV append separate opinions to the Order of the Court.

Separate opinion of Judge Owada

In light of the rationale of the provisional measures and of the jurisprudence of the Court on this matter, the requirements for provisional measures consists of two categories, i.e., prima facie jurisdiction of the Court and the plausibility of rights asserted, which relate to the scope of the legal framework for the Court's exercise of its power under Article 41 of the Statute, while the other two requirements, i.e., the risk of irreparable prejudice and urgency, belong to the discretionary power of the Court to determine whether to indicate provisional measures or not.

Based on this understanding, the first two categories can only be a provisional determination, and the applicable standard, especially for the plausibility test must be fairly low. The relevant jurisprudence of the Court corroborates this, and the choice of the word "plausible" suggests that it is equivalent to "possible" or "arguable" that the rights asserted exists.

In the present case, the rights asserted by Ukraine under the ICSFT are plausible, the Court's proposition in its paragraph 74 that "a State party to the [ICSFT] may rely on Article 18 to require another State party to co-operate with it in the prevention of certain types of acts only if it is plausible that such acts constitute offences under Article 2 of the ICSFT" does not agree with the established jurisprudence. All that Ukraine should be required to show is that its asserted rights under the ICSFT are "plausible" or "arguable".

Nevertheless, Judge Owada considers that the requesting party has not met the test of the real and imminent risk of irreparable prejudice in the present case, since many uncertainties persist as to whether the flow of financing as well as military supplies from one place to another is taking place and if so by whom and for what purpose. Furthermore, the asserted rights under Article 18 of the ICSFT could not be said to be at imminent risk in the sense that irreparable prejudice cannot be said to exist at this stage as Ukraine may still meaningfully demand the Russian Federation to seek for co-operation in good faith to implement its obligation for the future. For these different reasons, Judge Owada concurs with the Court's decision not to grant provisional measures concerning the ICSFT.

Declaration of Judge Tomka

Although Judge Tomka agrees that the Russian Federation has certain obligations under the International Convention on the Elimination of All Forms of Racial Discrimination, he considers that the order made by the Court under point 1 (a) of the operative clause goes too far. He observes that the activities of the Mejlis were banned by order of the Supreme Court of Crimea, affirmed on appeal, due to alleged "extremist activities". He notes that the Court has given no consideration to the reasons for that ban which are elucidated in those decisions. Moreover, he observes that this Court does not act as a court of appeal from national courts and should not overturn domestic court decisions, in particular not at the stage of proceedings relating to requests for the indication of provisional measures.

Judge Tomka notes that the International Convention on the Elimination of All Forms of Racial Discrimination guarantees freedom from racial discrimination in the enjoyment of particular rights, but that the underlying rights are subject to possible limitations. He notes that the Court must, in considering whether to order provisional measures, weigh the parties' respective rights. While the Parties are in dispute regarding sovereignty over Crimea, an issue which is not before the Court, there is no dispute between the Parties as far as the applicability of the International Convention on the Elimination of All Forms of Racial Discrimination in that territory is concerned. Irrespective of the legal basis for the exercise of its control and jurisdiction in Crimea, the Russian Federation should be able to take measures necessary for public safety and security.

Finally, Judge Tomka considers that Ukraine did not establish that there was urgency in this case. He notes that Ukraine's claims are likely to be adjudicated in the next four years and that the Russian Federation pointed to the existence of other organizations that appear to be in a position to advance the interests of the Crimean Tatar community, at least to some extent, during the intervening period.

Separate opinion of Judge Cançado Trindade

1. In his separate opinion, composed of 12 parts, Judge Cançado Trindade begins by explaining that, although he has concurred with his vote to the adoption of the present Order indicating Provisional Measures of Protection, there are related issues underlying the present decision of the ICJ but left out of its reasoning, which he feels obliged to dwell upon, and to leave on the records the foundations of his own personal position thereon. Those issues are: (a) conceptual development of provisional measures of protection; (b) the test of vulnerability of segments of the population (human vulnerability in international case-law, and in the cas d'espèce); (c) utmost vulnerability of victims, further irreparable harm, and urgency of the situation; (d) the decisive test: human vulnerability over "plausibility" of rights; (e) the necessity and importance of provisional measures of protection in the cas d'espèce; (f) the concern of the international community with the living conditions of the population everywhere; (g) provisional measures, and the protection of the human person, beyond the strict inter-State dimension; (h) chronic violence and the tragedy of human vulnerability; (i) provisional measures, and the protection of people in territory; and (j) the autonomous legal regime of provisional measures of protection: duty of compliance with them, non-compliance and State responsibility, prompt determination of their breaches, and duty of reparation.

2. He begins by recalling the conceptual development of provisional measures of protection, and their gradual transposition from domestic into international (procedural) law, in the first half of the XXth century, in international arbitral and judicial practice (part II). Their juridical preventive character has thereby been clarified, singling out their relevance to the progressive development of international law itself. Judge Cançado Trindade ponders that "[p]rovisional measures of protection have indeed evolved historically, in my perception, from precautionary legal measures in domestic procedural law into jurisdictional guarantees of a preventive character in international procedural law, endowed with a truly tutelary character" (para. 4).

3. Furthermore, — he proceeds, — provisional measures of protection have paved the way for continuous monitoring, in prolonged situations of extreme gravity and urgency, seeking to avoid irreparable damage to persons, in particular those in a situation of great vulnerability, if not defencelessness (para. 5). It is thus important to keep on devoting attention to the conceptual development of the autonomous legal regime (para. 8) of those measures. In this respect, Judge Cançado Trindade recalls that, along the years (from 1999 up to the present), he has identified — in two international jurisdictions wherein such measures are endowed with a conventional basis — obligations emanating from provisional measures of protection per se, distinct from obligations eventually ensuing from a Judgment as to the merits (and reparations); furthermore, non-compliance with the former — as well as the latter — generates the responsibility of the State, with legal consequences.

4. The rights in provisional measures are not necessarily identical to those vindicated in the merits stage. The injured party or victim may, in Judge Cançado Trindade's perception, appear promptly in the realm of provisional measures of protection, in case of non-compliance with them. Accordingly, non-compliance with, or breach of, such measures, engages autonomously the international responsibility of the State at issue, within the domain of provisional measures of

protection, irrespective of the subsequent Judgments as to the merits of the concrete cases (para. 9). Hence the utmost importance of compliance with those measures for the realization of justice itself, and for the progressive development of international law, in face of the "increasing violence in the world today, everywhere"; there is thus need "to keep on enhancing the institute of provisional measures of protection" (para. 10).

5. The present case of the Application of the ICSFT Convention and of the CERD Convention, — he proceeds, referring to the ICJ's relevant jurisprudence constante, — is not the first one wherein the alleged vulnerability of segments of the population concerned is brought to the Court's attention, in its consideration of provisional measures of protection. The greater the human vulnerability, the greater the needs of protection of those affected by it. It is thus

> "significant that, in our times, cases pertaining to situations of extreme adversity or vulnerability of human beings have been brought to the attention of the ICJ as well as other international tribunals. This is, in my perception, a sign of the new paradigm of the humanized international law, the new jus gentium of our times, sensitive and attentive to the needs of protection of the human person in any circumstances of vulnerability. The case-law of international human rights tribunals is particularly illustrative in this respect" (para. 17, and cf. para. 53).

6. After reviewing such international case-law, Judge Cançado Trindade focuses on human vulnerability in the present case, a point raised in the Request for provisional measures in the cas d'espèce, in respect of the fundamental right to life and other basic rights of the members of the affected segments of the population (paras. 21-22). He recalls that, in the oral phase of the present proceedings (public hearings before the ICJ of 06-09.03.2017), the contending parties addressed, each one in its own way, the test of vulnerability of segments of the population, in face of massive internal displacement and other fatalities in the areas affected (paras. 23-26).

7. In addition, — he continues, — also "in the documents submitted to the ICJ by both parties, shortly before the public hearings, evidence was produced of the utmost vulnerability of segments of the local population (e.g., in eastern Ukraine)", for example, "several reports on the human rights situation in Ukraine (mainly of the Office of the United Nations High Commissioner for Human Rights, OHCHR), containing accounts of indiscriminate shelling of the civilian population from all sides" (para. 27, and cf. paras. 28-29 and 31-33). And he adds that, according to those reports,

> "For instance, indiscriminate shelling has struck and damaged residential buildings, hospitals, ambulances, schools, kindergartens, and a school football pitch. In addition to the attacks on schools (encompassing the military use of them), the OHCHR also reports attacks on churches (including on priests and parishioners). In some towns, up to 80 per cent of residential buildings and public facilities have been destroyed. Those injured and killed as a result of indiscriminate shelling have included women, children, and elderly people, among others" (para. 30).

8. There are also reports from other entities, e.g., the Organization for Security and Cooperation in Europe (OSCE), which refer to "ongoing hostilities, shelling and general insecurity", and "serious human rights violations", as the main reason for the massive internal displacement of persons in the areas affected (paras. 34-35). In face of the aforementioned indiscriminate shelling of civilians, bringing to the fore the high probability of further irreparable damage, and the urgency of the situation, the test of human vulnerability, in Judge Cançado Trindade's perception, paves the way, "even more cogently than the one of

'plausibility' of rights, for the indication of provisional measures of protection, whose ultimate beneficiaries, in the present circumstances, are human beings" (para. 36).

9. In his understanding, the misgivings of the use of the so-called "plausibility" test by the Court (paras. 37-38) end up "creating a difficulty or obstacle for the consideration and adoption of provisional measures of protection in relation to the dispute as a whole before the Court, encompassing both the ICSFT and the CERD Conventions, and extending to both Crimea and eastern Ukraine" (para. 39). He points out that this is not the first time within the ICJ that he deems it fit to warn against the uncertainties surrounding the so-called "plausibility" test (cf. para. 40).

10. He finds it regrettable that, along the present Order in the cas d'espèce,

> "the ICJ distracts attention from the key test of the vulnerability of victims (which it just briefly refers to, as in paras. 92 and 96) to the inconsistencies of so-called 'plausibility', whatever that might concretely mean. The rights to be protected in the cas d'espèce are rights ultimately of human beings (individually or in groups), to a far greater extent than rights of States" (para. 41).

And he adds:

> "The Court is here faced with a situation where the fundamental rights to life (and of living) and to the security and integrity of the person are at stake, in the circumstances of the cas d'espèce. The individuals concerned live (or survive) in a situation of great vulnerability. (. . .)
>
> The requirements for the granting of provisional measures of protection are the gravity of the situation, the urgency of the need of such measures, and the probability of irreparable harm. They are met in a situation like that of the cas d'espèce, putting at stake, in eastern Ukraine, the fundamental rights to life and to the security and integrity of the person, among others. They are insufficiently dealt with, or even eluded, in the present Court's Order, which, on the other hand, abounds in the aforementioned inconsistencies of invocation of the 'plausibility' test.
>
> As I have been sustaining along the years, time and time again, provisional measures of protection have an autonomous legal regime of their own. This being so, it is clear to me that human vulnerability is a test even more compelling than 'plausibility' of rights for the indication or ordering of provisional measures of protection. In so acknowledging and sustaining, one is contributing to the ongoing historical process of humanization of contemporary international law" (paras. 42-44).

11. In the present case of the Application of the ICSFT Convention and of the CERD Convention, in his understanding the Court is entitled and obliged, in view of the evidence produced before it, to indicate provisional measures of protection, on the basis of both the ICSFT Convention and of the CERD Convention (para. 45). At the stage of provisional measures, the Court cannot make definitive findings of fact nor findings of attribution of responsibility, — issues to be determined later on, at the stage of the merits; at the present stage, "the ICJ — as the International Court of Justice, — is under the duty to focus, on the basis of the evidence produced, on the protection of the vulnerable civilian population living (or surviving) in the areas concerned" (para. 46). This situation, — he proceeds, —

> "has been ongoing since 2014 and continues to result in fatalities, deaths and bodily injuries. There were and there continue to be armed incidents causing loss of life or

bodily injuries, which by their nature and gravity are inherently irreparable. There is urgency in the situation, and the Court is to protect the vulnerable segments of the population. The fact that after the two Minsk Agreements (of 05.09.2014 and 12.02.2015) the situation remains unstable, and the tensions and indiscriminate shelling (from all sides) are still ongoing, stresses the ICJ's duty to order provisional measures of protection.

For its part, the CERD Convention is a core U.N. human rights Convention intended to protect rights of the human person at intra-State level. Accordingly, concern for the protection of vulnerable segments of the population must inform the Court's finding that the test of human vulnerability here applies, requiring provisional measures of protection. To this end, there is prima facie jurisdiction under the CERD Convention (inter alia Articles 2 (1) and 5 (b)), as well as under the ICSFT Convention (Article 18, as related to Article 2), and undue and groundless obstacles to access to justice thereunder are to be discarded" (paras. 47-48, and cf. para. 49).

12. Judge Cançado Trindade adds that the application of International Humanitarian Law and that of the ICSFT and CERD Conventions "are not mutually-excluding, but rather, they reinforce each other in the factual context of the cas d'espèce, so as to secure the protection due to persons in situations of great vulnerability" (para. 50). In his perception, the circumstances of the cas d'espèce "call for a vue d'ensemble of the relevant provisions of the ICSFT and CERD Conventions, and ILHR and IHL in the exercise of hermeneutics. Other main organs of the United Nations (like the General Assembly and the Security Council) have likewise expressed their concerns with the circumstances of the cas d'espèce" (para. 51).

13. Judge Cançado Trindade then observes that, as on previous occasions, it so happens that, in face of the victimization of vulnerable segments of the population in an ongoing armed conflict or hostilities, one can behold the "approximations and convergences" between, and the concomitant application of, International Humanitarian Law and other international Conventions (of human rights and others), a situation, — he adds, — that

"clearly requires the recognition of the effects of the Convention at issue vis-à-vis others, simples particuliers (Drittwirkung). In the cas d'espèce, such is the case of the ICSFT and CERD Conventions: Drittwirkung has as incidence here, as both Conventions cover inter-individual relations as well, without thereby excluding the determination of State responsibility (even if by omission, a question for consideration at the subsequent stage of the merits)" (para. 52).

14. He further recalls, in a wider framework, that the cycle of World Conferences of the United Nations (along the nineties and beginning of the last decade), came significantly to disclose a common denominator, underlying the final documents they adopted, namely, "the recognition of the legitimacy of the concern of the international community as a whole with the conditions of living of the population everywhere" (para. 53). The II UN World Conference of Human Rights (Vienna, 1993), in particular, added an important element to this common denominator, namely, the special attention devoted to the vulnerable segments of the population everywhere; the protection of the vulnerable, in Judge Cançado Trindade's view, constitutes its great legacy (para. 54). The Declaration and Programme of Action of Vienna, final document adopted by the 1993 Vienna Conference, sought to concentrate special attention on persons suffering from discrimination and vulnerable groups, in greater need of protection. It much contributed to "the recognition of the centrality of victims in the present domain of protection", with special attention to their living conditions amidst great vulnerability (para. 55).

15. Part VIII of the present Separate Opinion is devoted to the protection, by means of provisional measures, of the fundamental rights of the human person, beyond the strict inter-State dimension (paras. 56-61). Judge Cançado Trindade ponders that the vulnerability of human life, — which has attracted attention of philosophers along the centuries, — assumes a dramatic dimension in face of persisting and chronic violence, and even of policies leading to it. Judge Cançado Trindade ponders that "[h]umanist thinking has always stood against that, and in defence of human life, and dignified conditions of living" (para. 62), — as exemplified by the reflections of the universal writer L. Tolstoi (paras. 62-67). In situations of generalized violence, — he proceeds, — attention is to be focused on the affected human beings, well beyond a strictly inter-State outlook (paras. 68 and 71), so as "to protect human life", pursuant to "a humanist outlook" (para. 69); provisional measures of protection are "truly tutelary" (para. 72), calling for "a more pro-active posture" on the part of the Court (para. 73).

16. Judge Cançado Trindade then stresses that the autonomous legal regime of provisional measures of protection

> "is configured by the rights to be protected (not necessarily identical to those vindicated later in the merits stage), by the obligations emanating from the provisional measures of protection, generating autonomously State responsibility, with its legal consequences, and by the presence of (potential) victims already at the stage of provisional measures of protection.
>
> As the cas d'espèce shows, the claimed rights to be protected encompass the fundamental rights of human beings, such as the right to life, the right to personal security and integrity, the right not to be forcefully displaced or evacuated from one's home. The duty of compliance with provisional measures of protection brings to the fore another element configuring their autonomous legal regime, (. . .) in its component elements, namely: non-compliance and the prompt engagement of State responsibility; prompt determination by the Court of breaches of provisional measures of protection; and the ensuing duty of reparation for damages resulting from those breaches" (paras. 74-75, and cf. paras. 77-81).

17. In this domain, — he continues, — "international case-law seems to be preceding legal doctrine", and this development portrays the relevance of the preventive dimension in contemporary international law; contemporary international tribunals are to foster this progressive development, "to the benefit of all the justiciables" (para. 82). This is a matter which requires "much reflection, from a humanist outlook" (para. 84). In the circumstances of the cas d'espèce, the decisive test, in his understanding, "is that of human vulnerability, rather than so-called 'plausibility' of rights" (para. 85). And he adds that

> "In face of the gravity of the situation, of urgency and risks of (further) irreparable damage, provisional measures of protection are required. Their indication is oriented by the principle pro persona humana, pro victima. Those measures bear witness to the current historical process of humanization of international law, which is irreversible. The protection of human beings in situations of great vulnerability has thus found expression at international law level in our times, as a sign of such historical process; yet, there remains a long way to go" (para. 85).

18. In his understanding, attention is to be concentrated on victims (including the potential ones), — be they individuals[1], groups of individuals[2], peoples or humankind[3], as subjects of international law, — and not on inter-State susceptibilities; he stresses that "[h]uman beings in vulnerability are the ultimate beneficiaries of provisional measures of protection, endowed nowadays with a truly tutelary character, as true jurisdictional guarantees of preventive character" (para. 86).

19. In the course of the proceedings leading to the adoption of the present Order, the situation of utmost vulnerability of segments of the population — calling for provisional measures of protection — was brought to the attention of the Court (part III, supra, and para. 87) and Judge Cançado Trindade finds, in conclusion, that it is

> "regrettable that such human vulnerability is not duly dealt with in the reasoning of the Court, nor expressly reflected in the dispositif of the present Order, where, — despite the constatation in that documentation of the situation of human vulnerability of segments of the population (e.g., under indiscriminate shelling), — the protection of the fundamental rights to life and to the security and integrity of the person is not even mentioned.
>
> Even so, point (2) of the dispositif, addressed to both contending Parties, and the only one covering the dispute as a whole before the Court (encompassing both the ICSFT and the CERD Conventions), in both Crimea and eastern Ukraine, in my understanding implicitly extends protection also to those fundamental rights, in ordering that '[b]oth Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve'.
>
> The principle of humanity comes to the fore. There are no restrictions ratione personae (e.g., attempting to focus exclusively on relations between States and individuals). International Conventions, like the two invoked in the present case (the ICSFT and the CERD Conventions), as I have already pointed out, have a Drittwirkung effect, they cover likewise inter-individual relations, without thereby excluding the subsequent consideration of State responsibility (as to the merits), even if by omission.
>
> After all, the principle of humanity permeates the whole corpus juris of contemporary international law (encompassing the converging trends of the International Law of Human Rights, International Humanitarian Law, International Law of Refugees, International Criminal Law). The principle of humanity has a clear incidence on the protection of persons in great vulnerability. The raison d'humanité prevails here over the raison d'État. Human beings stand in need, ultimately, of protection against evil, which lies within themselves" (paras. 88-91).

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[1] As he pointed out in his separate opinions of the A.S. Diallo case (Judgments of 30.11.2010, merits; and of 19.06.2012, reparations).

[2] As he sustained in his dissenting and separate opinions in the case of Questions Relating to the Obligation to Prosecute or Extradite (Order of 28.05.2009, and Judgment of 20.07.2012, respectively), as well as in his dissenting opinion in the case of the Application of the Convention against Genocide (Judgment of 03.02.2015).

[3] As he upheld in his three recent dissenting opinions in the three cases of the Obligations of Nuclear Disarmament (Judgments of 05.10.2016).

Separate opinion of Judge Bhandari

Judge Bhandari is in agreement with the Court's Order to indicate provisional measures in respect of the International Convention on the Suppression of All Forms of Racial Discrimination (CERD). However, he feels compelled to write a separate opinion in order to clarify his views concerning the Court's decision not to indicate provisional measures in relation to the International Convention for the Suppression of the Financing of Terrorism (ICSFT). In the facts and circumstances of the case, on the preliminary examination of the evidence provided by both Parties, Judge Bhandari is of the view that the Court ought to have indicated provisional measures in relation to the ICSFT.

In his opinion, Judge Bhandari deals both with the breaches of the ICSFT as alleged by Ukraine, and with the response of the Russian Federation, in order to ascertain whether a case has been made out for the indication of provisional measures.

In his opinion, Judge Bhandari examines each requirement for the indication of provisional measures in turn. First, he discusses prima facie jurisdiction. Second, he examines plausibility, with specific reference to whether the acts alleged by Ukraine fall within the scope of Article 2 of the ICSFT. Third, he turns to the existence of a real and imminent risk of irreparable prejudice. Fourth, he examines the presence of a link between the rights invoked by Ukraine and the provisional measures it requested. Since both Parties adduced extensive evidence to the Court in order to show that the requirements for the indication of provisional measures were or were not met, Judge Bhandari preliminarily examines such evidence in order to subsequently appraise it in accordance with the test laid down in the Court's jurisprudence for indicating provisional measures.

Concerning prima facie jurisdiction, Judge Bhandari is of the view that Ukraine adduced sufficient evidence to show that the requirements contained in the compromissory clause under Article 24 of the ICSFT are met. First, Ukraine demonstrated that a dispute prima facie exists between the Parties in relation to the ICSFT, by submitting numerous Notes Verbales showing the opposing views of the Parties concerning the Russian Federation's obligations under the Convention. Second, Ukraine showed that four rounds of negotiation were held between the Parties with respect to the ICSFT prior to filing the case with the Court. Third, Ukraine also showed that it sent a request for arbitration to the Russian Federation prior to filing the case with the Court. Accordingly, Judge Bhandari concludes that prima facie jurisdiction exists in respect of the ICSFT.

Concerning plausibility, Judge Bhandari agrees with the Court that the obligation under Article 18 of the ICSFT to co-operate to prevent terrorism financing only arises if the acts alleged by Ukraine plausibly fall within the scope of Article 2 of the ICSFT. Therefore, Judge Bhandari analyses the evidence adduced by both Parties with respect to the elements of the definition of terrorism under Article 2 of the ICSFT. Judge Bhandari is of the opinion that the evidence adduced by Ukraine is not effectively countered by the evidence submitted by the Russian Federation. According to him, the evidence shows that it is plausible that there has been a transfer of "funds" to armed groups in eastern Ukraine, and that such "funds" have been plausibly transferred with "intent or knowledge" that they would be used or were to be used to commit one of the offences under Article 2, paragraph 1 (b), of the ICSFT. Moreover, Judge Bhandari is of the opinion that the numerous events in eastern Ukraine resulting in the loss of human lives show that there plausibly exists a pattern of targeting civilians and persons not taking direct part in hostilities, which also shows that the acts alleged by Ukraine were plausibly committed with the purpose of intimidating the population. Judge Bhandari is of the view that Ukraine adduced sufficient evidence to show that the rights whose protection it invoked at this stage in the proceedings are plausible.

Concerning the real and imminent risk of irreparable prejudice, Judge Bhandari is of the view that the continuous loss of human life in eastern Ukraine would make it impossible to restore the status quo ante after the final disposal of the case by the Court. Judge Bhandari also believes

that the recent escalation of violence in eastern Ukraine, especially in Avdiivka, justifies a finding that the situation is urgent. Judge Bhandari also maintains that the provisional measures requested by Ukraine are linked to the rights whose protection it sought, and could therefore have been indicated by the Court.

Judge Bhandari concludes that, based on a preliminary examination of the evidence submitted by both Parties, the Court ought to have indicated provisional measures in relation to the ICSFT.

Declaration of Judge Crawford

Judge Crawford explained why the rights that the Court sought to protect by making a provisional measures order in relation to representative institutions of the Crimean Tatars, including the Mejlis, are plausible. He briefly described the modern history of the Sürgün, the collective expulsion of the Tatars from Crimea which was in effect from 1944 to 1989. He set out the key constitutional features of the main representative bodies of the Crimean Tatars, the Qurultay and the Mejlis, noting that the Mejlis have a particular representative role. The definition of racial discrimination may be met by a restriction that directly implicates a racial or ethnic group, even if it is not expressly based on those grounds. He noted that the banning of the Mejlis needed to be carefully justified given the historical persecution of the Crimean Tatars and the role of the Mejlis in advancing and protecting the rights of the people it represents at a time of disruption and change. At this stage, there was sufficient evidence to conclude that the measure in question plausibly affects rights under CERD.

Separate opinion of Judge ad hoc Pocar

Judge ad hoc Pocar has voted with the majority in favour of the indication of all provisional measures concerning the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), as well as of the provisional measure asking both Parties to refrain from any action which might aggravate or extend the dispute.

However, he cannot share the view that the required threshold of plausibility is not met for the indication of at least some of the provisional measures requested by Ukraine with respect to the International Convention for the Suppression of the Financing of Terrorism (ICSFT). In his view, it is plausible that the indiscriminate attacks alleged by Ukraine are intended to spread terror, and that the persons providing funds to those who conducted these attacks had knowledge that such funds were to be used for that purpose. He would therefore have favoured the indication of a provisional measure requesting the Russian Federation to provide Ukraine with the full co-operation required by Article 18 of the ICSFT, including by exercising appropriate control over its borders, in order to prevent any offences within the meaning of that convention from being committed.

Moreover, Judge ad hoc Pocar has concerns regarding the implications of the present Order for the good administration of justice. He wonders how parties, in the future, will, in light of the Court's decision, reconcile the need to provide sufficient evidence to prove their case on plausibility and Practice Direction XI. In his view, the risk that parties over-address the merits could also overburden the Court and endanger its ability to promptly indicate provisional measures.

Finally, Judge ad hoc Pocar wishes to further clarify why the shooting-down of flight MH17 was not examined in detail by the Court. He recalls that the case under the ICSFT refers to both the shooting-down of flight MH17 and indiscriminate shelling on the ground, which may fall under Article 2, paragraph 1, letters (a) and (b) respectively. To avoid any misunderstanding, he considers that the Court could have made clear that it needs not, at this stage of the proceedings and

due to lack of urgency — the airspace over eastern Ukraine being closed since July 2014 — examine the applicability of letter (a), and hence of the Montreal Convention, to the shooting-down of flight MH17.

Separate opinion of Judge ad hoc Skotnikov

1. Judge ad hoc Skotnikov concurs with the Court's conclusion that the conditions required by its Statute for the indication of provisional measures in respect of the rights alleged by Ukraine under the International Convention for the Suppression of the Financing of Terrorism are not met and supports the Court's decision not to indicate provisional measures on the basis of that Convention.

2. He explains that the right which Ukraine seeks to protect with respect to the Mejlis does not fall within the scope of the International Convention on the Elimination of all Forms of Racial Discrimination. In his view, the measure contained in paragraph 1 (a) of the operative clause may be seen as prejudging the merits. For these reasons, he voted against it.

3. As to the second provisional measure, which requests Russia to ensure the availability of education in the Ukrainian language, Judge ad hoc Skotnikov does not think that in this case the conditions of irreparable harm and urgency are met. However, he felt compelled to support this measure of general and non-controversial nature.

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