DISSENTING OPINION OF JUDGE *AD HOC* SKOTNIKOV

Regrettably, I cannot support the Court's decision that it has jurisdiction to adjudicate the present case.

1. The Court, in its Order of 19 April 2017 on provisional measures, came to the conclusion that the rights Ukraine sought to protect under the ICSFT were not plausible. Since rights, as such, as provided in a given treaty are *always* plausible, the Court's task was to examine, on a prima facie basis, the acts alleged by Ukraine in support of its claims. In paragraphs 74 and 75 of that Order, the Court stated:

> "74. . . . [I]n 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.
>
> 75. In the present case, 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 other elements set out in Article 2, paragraph 1, such as the elements of intention or knowledge noted above . . . and the element of purpose specified in Article 2, paragraph 1 *(b)*, are present. At this stage of the proceedings, Ukraine has not put before the Court *evidence* which affords a sufficient basis to find it plausible that these elements are present." (*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, paras. 74-75; emphasis added.)

Consequently, without addressing the issues of urgency or irreparable harm to the rights claimed, the Court decided 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" (*ibid.*, p. 132, para. 76). The conclusion that these rights are not plausible still stands.

2. In the present Judgment, the Court concludes that "[a]t the present stage of the proceedings, an examination by the Court of the alleged

wrongful acts or the plausibility of the claims is not generally warranted" (Judgment, para. 58). This statement implies that plausibility of facts is not relevant to an objection to the Court's jurisdiction and that even implausible claims could be entertained by it. In the same paragraph, the Court states that its "task, as reflected in Article 79 of the Rules of Court . . . is to consider the questions of law and fact that are relevant to the objection to its jurisdiction" *(ibid.)*. It is difficult to see how these two statements, appearing directly next to each other, are compatible. In any event, the Court did not consider the questions of factual evidence, in the case of either the ICSFT or CERD.

3. As the Court has noted, "[t]he existence of jurisdiction of the Court in a given case is . . . not a question of fact, but a question of law to be resolved in the light of the relevant facts. The determination of the facts may raise questions of proof." (*Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 76, para. 16.) The Rules of Court relating to preliminary objections repeatedly refer to the need to examine both questions of law and fact. Of course, the alleged facts need to be ascertained to the extent which is appropriate in a given case. Where the Court needs to assess *all the facts* pertaining to the merits in order to decide whether or not it has jurisdiction *ratione materiae*, it declares that the objection in question does not possess an exclusively preliminary character.

4. In the present circumstances, where the Court's finding of 2017, referenced above, remains in force, a decision as to whether the claims, which are based on the very same alleged facts, "do or do not fall within the provisions" (*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, pp. 809-810, para. 16) of the ICSFT required particular caution, which unfortunately has not been exercised. Had the Court exercised such caution, it would not have come to the conclusion that Ukraine's case meets the *Oil Platforms* test and that it has jurisdiction *ratione materiae* in the present case.

5. As to the questions of law, it is the Court's task at the preliminary objections stage to resolve the issues relating to the scope of the treaty in question and thereby determine the limits of its jurisdiction *ratione materiae*. This imperative is well established in the jurisprudence of the Court, according to which "the Court 'must . . . always be satisfied that it has jurisdiction, and must if necessary go into the matter *proprio motu*'" (*Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012 (I)*, p. 118, para. 40).

6. Unfortunately, the Court does not follow this well-established jurisprudence when it states that the issue relating to the scope of the term "funds" "need not be addressed at the present stage of the proceedings" (Judgment, para. 62). In the next sentence, the Court concludes that "the interpretation of the definition of 'funds' could be relevant, as appropri-

ate, at the stage of an examination of the merits" (Judgment, para. 62). Thus, this preliminary issue relating to the scope of the ICSFT is being transformed, without any justification, into an issue for the merits.

7. In paragraph 59 of the Judgment, the Court correctly states that the financing by a State of acts of terrorism is not addressed by the ICSFT and lies outside the scope of that Convention. In paragraph 61, the Court concludes that the commission by a State official of an offence under Article 2 does not engage the responsibility of the State concerned under the ICSFT. Since a State is an abstract entity, which acts through its officials, the above conclusions do not sit well with the Court's finding in the same paragraph that the Convention applies both to persons who are acting in a private capacity and those who are State agents. This finding also runs counter to the logic of the Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission (Report of the International Law Commission, Thirty-Third Session: United Nations, *Official Records of the General Assembly, Supplement No. 10*, doc. A/56/10).

8. In its Order of 19 April 2017, the Court stated that "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" (*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. 135, para. 82; emphasis added). The Court concluded that

> "[i]n 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." (*Ibid.*, para. 83; emphasis added.)

It is worth noting that, apart from these two issues, the Court in 2017 did not consider the rest of Ukraine's claims to be plausible. This is pertinent as to how the Court should examine the factual evidence which may be relevant to the issue of its jurisdiction. That is to say, some additional scrutiny is required. However, the Judgment, for example, does not even mention the fact that acts alleged by Ukraine, according to its own writings, occurred before the referendum on the question of the status of Crimea or shortly thereafter, and that the measures Ukraine alleges concerned activists who were opposed to the referendum. This, of course, raises an issue of jurisdiction *ratione temporis*. Further, it undermines Ukraine's own argument that those actions are covered by CERD. Had the Court engaged in a proper examination of relevant factual evidence, it probably would have reached different conclusions. However, the Court

decided not to do so (see Judgment, para. 94). After simply summarizing the arguments of the Parties on the questions of law and fact, the Court comes to a sweeping conclusion that, "taking into account the broadly formulated rights and obligations contained in the Convention, including the obligations under Article 2, paragraph 1, and the non-exhaustive list of rights in Article 5, . . . the measures of which Ukraine complains . . . fall within the provisions of the Convention" (*ibid.*, para. 96). This conclusion, summarily reached, is hardly satisfying.

9. Earlier in the Judgment, the Court recalled that the application of the *Oil Platforms* test "may require the interpretation of the provisions that define the scope of the treaty" (*ibid.*, para. 57). It is regrettable that the Court failed to consider questions relating to the scope of CERD.

10. I agree that the list of rights enumerated in Article 5 of the CERD is not exhaustive. However, at all times it must be shown that an alleged violation answers all the criteria in Article 1, paragraph 1, which reads as follows:

> "In this Convention, 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.)

This means that CERD could come into play only in the case of a discriminatory treatment of one group of the population in relation to another group or groups. Accordingly, I think that the issue of whether the Crimean Tatar community has a right to maintain its distinct representative institutions is not covered by Article 1, paragraph 1. The Court should have pronounced on this issue, which clearly relates to the scope of the Convention.

11. Similarly, the Court should have addressed as a preliminary issue the question as to whether the right to education in one's native language is covered by CERD. In this connection, I would observe that the States parties can *create* rights which are not expressly listed in CERD and yet bring those rights within the scope of its application. However, a State party's responsibility can be engaged only if the overarching principle of non-discrimination on the grounds mentioned in Article 1, paragraph 1, is breached.

12. It is obvious that no right to receive education in one's native language is mentioned in Article 5, paragraph *(e)* (v), of CERD. However, if such a right derives from the constitutional or other legal arrangements

existing in a given country, or a part of its territory (and the Ukrainian language is one of the three State languages in Crimea), a denial of this right to a particular group in relation to another group or groups could fall within the scope of CERD. However, this treatment, in order to fall under CERD, *must* be manifest, for example, taking the form of legislative or administrative action, which is clearly not the case. Possible fluctuations in student or school numbers (such as those invoked by Ukraine in the present case) are not relevant, as such fluctuations may result from factors other than discrimination on the grounds specified in CERD. Particular caution is required on the part of the Court, since no right to education in one's own language is established as such by CERD.

13. Finally, I am not convinced by the Court's reasoning as regards whether the preconditions contained in Article 22 of CERD are cumulative or alternative, since the Court conflates negotiation and conciliation, which are distinct modes of dispute settlement. This is reflected in paragraph 133 of its Judgment on preliminary objections in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)* (*I.C.J. Reports 2011 (I)*, p. 125) interpreting Article 22. Additionally, despite the appearance of the word "speedily" in the preamble of CERD, there is no indication from the context of Article 22 that the States parties intended dispute resolution under CERD, rather than the performance of the primary obligation to eliminate racism, to be as quick as possible. The Court's application in the present Judgment of the word "speedily" to Article 22 is at odds with its conclusion in *Georgia* v. *Russian Federation* that Article 22 imposes preconditions at all (*ibid.*, p. 141). The Court's surprising refusal to consider the *travaux préparatoires* of Article 22 departs from the approach taken in paragraph 142 of the Judgment in *Georgia* v. *Russian Federation*, where the Court examined the *travaux* of the same provision in view of the parties' extensive discussion of them (*ibid.*, p. 128). This incongruity is best explained by the fact that recourse to the *travaux* would, in this instance, serve to undermine rather than to confirm the Court's conclusion.

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

(*Signed*) Leonid SKOTNIKOV.