Corrigé
Corrected

CR 2017/2

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2017

Public sitting

held on Tuesday 7 March 2017, at 10 a.m., at the Peace Palace,

President Abraham presiding,

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

VERBATIM RECORD

ANNÉE 2017

Audience publique

tenue le mardi 7 mars 2017, à 10 heures, au Palais de la Paix,

sous la présidence de M. Abraham, président,

***dans l'affaire relative à l'*Application de la convention internationale pour la répression du financement du terrorisme et de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Ukraine c. Fédération de Russie)**

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Present:	President	Abraham
	Vice-President	Yusuf
	Judges	Owada
		Tomka
		Bennouna
		Cançado Trindade
		Greenwood
		Xue
		Donoghue
		Gaja
		Sebutinde
		Bhandari
		Robinson
		Crawford
	Judges *ad hoc*	Pocar
		Skotnikov
	Registrar	Couvreur

Présents : M. Abraham, président
M. Yusuf, vice-président
MM. Owada
Tomka
Bennouna
Cançado Trindade
Greenwood
Mmes Xue
Donoghue
M. Gaja
Mme Sebutinde
MM. Bhandari
Robinson
Crawford, juges
MM. Pocar
Skotnikov, juges *ad hoc*

M. Couvreur, greffier

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LE PRESIDENT : L'audience est ouverte. La Cour se réunit aujourd'hui pour entendre le premier tour d'observations orales de la Fédération de Russie sur la demande en indication de mesures conservatoires présentée par l'Ukraine. J'appelle à la barre l'agent de la Fédération de Russie, S. Exc. M. Roman Kolodkin. Excellence, vous avez la parole.

Mr. KOLODKIN:

1. Mr. President, distinguished Members of the Court, it is an honour for me to again address the Court on behalf of my country.

2. You have before you two different cases. One concerns alleged violations of the International Convention for the Suppression of the Financing of Terrorism (ICSFT) in eastern Ukraine, the other — alleged violations of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) in Crimea.

3. By submitting these two cases in one, Ukraine seeks artificially to merge two different situations governed by two different legal instruments, occurring in two different geographical regions. The goal is twofold: first, to involve the Court in adjudicating, even if only at the margins, the issues between Ukraine and Russia that are clearly beyond the Court's jurisdiction in this case, i.e., issues relating to the legality of the alleged use of force, State sovereignty, territorial integrity and self-determination; and second, to use the podium of the Court to stigmatize a substantial part of the Ukrainian population, self-organized in the form of the Donetsk and Lugansk Peoples Republics, or DPR and LPR, as terrorists, and Russia as a sponsor of terrorism and a "persecutor", to use the words from the yesterday's speech of Ukraine's counsel, of Crimean Tatars[1].

4. This goal has been made clear outside of the Court. President Poroshenko said that the purpose of the claim is to make "aggressor" "pay the price"[2]. In January 2016, Ms Zerkal, the Deputy Foreign Minister of Ukraine and the Honourable Agent for Ukraine, stated that "the

[1]CR 2017/1, p. 30, para. 17 (Koh).

[2]Poroshenko: Russia as an aggressor must be punished, *Ukrainska Pravda*, 24 Aug. 2016, "Aggressor must pay its price" Poroshenko ordered to file a suit in International Court of Justice, *Novoe vrema*, 16 Jan. 2017, tab 1 of the judges' folder.

recognition of Russia as a State-sponsor of terrorism by the ICJ may entail tectonic changes in geopolitics"[3].

5. Mr. President, Ukraine devotes a large part of its Application to the description of the political and historical context of the current situation. You heard more on this from Ukraine's Agent yesterday. There are many inaccuracies, and so I must say something.

6. In February 2014, a violent coup d'état took place in Kiev. It was preceded by a long face-off between the Government of Ukraine and opposition. The pretext was the decision by the Ukrainian government to suspend preparation for the signature of an Association Agreement with the European Union in order to explore further steps. The real problem was, however, created by their opposition in Ukraine, which confronted the people of Ukraine with a stark but fictitious choice: Ukraine moves ahead either with Europe or with Russia.

7. This false choice largely split the country. The predominantly Russian-speaking population of Ukraine's east and Crimea wished to secure their historic, economic and cultural ties with Russia, while not excluding at all co-operation with western Europe. Ukraine's west, by that time dominated by Ukrainian nationalists, instead wished to sever relations with Russia.

8. In early 2014 a wave of violence started in Ukraine's west and surged over the country. Extremist groups seized administrative buildings, police stations and military arsenals. Local authorities in the western Ukraine were overthrown[4]. Extremist armed groups came to Kiev. Protesters besieged the Cabinet of Ministers and attempted to storm the Presidential Administration. Organized violence against the police became widespread, thousands of radicals were throwing Molotov cocktails, and policemen were burning[5].

9. The leading forces in all this were ultranationalist organizations such as "Right sector" and "Svoboda", who trace their descent from Ukraine's ultranationalist actors notorious as accomplices in the heinous crimes of the Second World War.

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[3]MFA explained the delay in filing suits against Russia, *Ukrainska Pravda*, 28 Jan. 2016, see also Deputy Foreign Minister of Ukraine: The world is ready for the consideration of the violations of the UN Convention made by the Russian Federation, Gordonua.com, 30 Jan. 2016, tab 2 of the judges' folder.

[4]Photographs have been included in tab 3 of the judges' folder.

[5]See photographs at tab 4 of the judges' folder.

10. On 21 February 2014, an agreement to settle the crisis was signed by President Yanukovich and the opposition leaders. However, the protesters escalated the hostilities further and shooting started, leaving tens of people dead including at least 13 police officers and hundreds wounded[6].

11. On the night of 22 February, armed extremists stormed the government premises. President Yanukovich left Kiev in fear for his life.

12. Now under control of the coup d'état leaders, the Ukrainian parliament unconstitutionally deposed President Yanukovich, and appointed Maidan leader Turchinov as "Acting President". Instead of trying to establish a coalition government to de-escalate tensions, the new authorities fostered division with a "government of the victors".

13. One of the very first steps of the new Ukrainian parliament was to strip the Russian language of its official status in half of Ukraine's regions provided by law. This move was instantly criticized by the OSCE as heavily divisive[7], and was ultimately vetoed by the Acting President. However, the anti-Russian message from the authorities could not somehow evaporate.

14. The violent uprisings in western Ukraine and subsequent bloody coup d'état in Kiev sent a tremor throughout the country. Predominantly Russian-speaking regions in the east watched in growing fear as Ukrainian nationalists issued threats against those who opposed the coup. Anti-coup movements surged, protesting against the destruction of Ukraine's constitution, anti-Russian actions and hatred, and calling, in consequence, for autonomy and federalization. They also resented the denial of their human rights and widespread corruption[8]. Clashes with pro-coup extremists followed.

15. On 2 May 2014 pro-coup extremists attacked the public assembly in Odessa. Anti-coup protesters sought refuge in the Labour Union building but were burned alive there[9]. Police were present at the spot, but did not intervene. Total casualties numbered 48 dead and 226 injured. To this day, the perpetrators have not been brought to justice by Ukraine.

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[6]"Ukraine: a year after Euromaidan, justice delayed, justice denied". Amnesty International report, 2015, p. 4.

[7]Keynote presentation by Astrid Thors OSCE High Commissioner on National Minorities, to the OSCE Parliamentary Assembly Autumn Meeting, 3 Oct 2014, p. 4.

[8]OHCHR, "Report on the situation of human rights in Ukraine 15 June 2014", para. 327.

[9]Photographs are available at tab 7 of the judges' folder.

16. In April 2014, the Acting President launched the so-called "Anti-Terrorist Operation" (ATO) in Donbass. That led to the tragic civil war in the east of Ukraine. In addition to Ukraine's regular armed forces, the ATO involves the use of irregular "volunteer battalions" whose atrocities feature constantly in the reports of international organizations concerned, including the Office of the United Nations High Commissioner for Human Rights (OHCHR)[10].

17. Mr. President, Members of the Court, a brief word on Crimea. Ukraine has elected to devote an important part of its Application to the issue of sovereignty over Crimea. We disagree with what it has said and see it as inapposite given the confines of its case.

18. After being a part of Russia for 170 years, Crimea was transferred to Ukraine in 1954, when both Russia and Ukraine were part of the USSR. The people of Crimea were not consulted. When Ukraine proclaimed independence in 1991, the people of Crimea were not consulted, again. In 1995, Ukraine purported to abrogate the Crimean Constitution and the post of the President of Crimea, again without the consent of the Crimean people.

19. The horrific images of the so-called "peaceful protest" in the governmental quarters of Kiev, violence that escalated throughout Ukraine in the aftermath of the coup d'état, had a massive impact among Crimeans, leading to a general fear of an armed assault. Right-wing radicals were threatening to come to Crimea. Against this background and taking into account that the great majority of Crimeans wished to be part of Russia again, a referendum on the future of Crimea became the obvious choice for them.

20. Mr. President, I move back to the specific matters before you. The Russian Federation complies fully with its obligations under both treaties that are now relied upon by Ukraine. That does not mean, however, that, as was suggested by Ukraine yesterday, we should somehow accept the prescription of provisional measures. We see neither legal nor factual basis for such measures, which, in the case of ICSFT, would moreover cut across implementation of the Minsk Agreements, of which you heard nothing yesterday, but to which our counsel will return. Russia endorses the Minsk package of measures, as does the United Nations Security Council, and if Ukraine truly seeks peace, it must work towards the full implementation of that package of measures.

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[10]See e.g., OHCHR, "Report on the situation of human rights in Ukraine", UN doc. A/HRC/2775, 19 Sep. 2014, para. 23. OHCHR, "Report on the situation of human rights in Ukraine 16 Feb. 2016-15 May 2016", paras. 50, 56, and 150, tab 8 of the judges' folder.

21. Another oddity of yesterday, was how Ukraine made extensive allegations of violations of the Conventions by Russia, yet repeatedly — and I would say defensively — asked the Court not to go near the merits of its claims[11], essentially to take Ukraine's allegation at face value. Indeed, this is not the merits stage, but there is an obvious and important threshold of plausibility that Ukraine must meet.

22. Mr. President, Members of the Court, I now hand over to the second Agent of the Russian Federation, Mr. Ilia Rogachev, who will introduce our position on the ICSFT, and who will be followed by Mr. Wordsworth and Professor Zimmermann. We will then turn to the CERD, which will be introduced by Mr. Lukiyantsev, and completed by Professor Forteau.

23. Thank you for your attention. May I ask you to call Mr. Rogachev, to the podium?

Le PRESIDENT : Merci, Excellence. Je donne la parole à M. Ilya Rogachev, agent de la Fédération de Russie.

Mr. ROGACHEV:

1. Mr. President, distinguished Members of the Court. The events in Eastern Ukraine are unquestionably tragic and have led to significant civilian casualties. However, Ukraine is misleading the Court as to the true nature of those events. This true nature is of an armed conflict that is being waged by Ukrainian authorities, and by its armed forces, including irregular battalions, established by ultranationalists, against the people of Eastern Ukraine, self-organized in the DPR and the LPR, seeking to protect themselves from those who seized power through the violent *coup d'état* of 2014.

2. The serious nature of this underlying context is not to be conflated with the question of the applicability of the ICSFT — which covers only *specific* disputes concerning the *concrete* rights protected under that Convention, and only provided that certain preconditions have been satisfied. So far as concerns the ICSFT, what is required is specific acts of knowing or intentional financing of acts of terrorism. Professor Zimmermann will return to this shortly. These requirements cannot be met by one State characterizing armed groups in an armed conflict as terrorists.

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[11]E.g., CR 2017/1, p. 59, para. 13 (Gimblett) (referring back to presentation by Ms Marney Cheek).

3. Mr. President, it is an obvious starting point that *no* international body or organization seised of the current situation in East Ukraine qualifies the ongoing hostilities in terms of terrorism. Not surprisingly Ukraine fails to submit any document from any international organization, or any State other than Ukraine itself, characterizing the acts of the DPR and the LPR as terrorist acts.

4. In its Application, Request and in yesterday's statement, Ukraine failed even to allege any kind of "terrorist act" prior to the launch in April 2014 of the so-called "anti-terrorist" operation in the Eastern Ukraine. Already from that point "terrorism" was a cover-up for using force of arms to quell civil unrest. Now Ukraine uses the word "terrorism" as a pretext for seising this Court.

5. Certainly, during this conflict, instances of indiscriminate shelling and other humanitarian law violations by both sides are being reported. The main cause of civilian casualties — indiscriminate shelling — has been characterized as a violation of international humanitarian law[12].

6. Let us be clear — most of the civilian casualties are in the DPR and the LPR, and multiple sources confirm that Ukrainian armed forces are themselves responsible for numerous acts of indiscriminate shelling. Starting with the shelling of residential areas in Slavyansk in May 2014, many civilians were killed and wounded by shelling by Ukrainian armed forces, while residential buildings, hospitals and infrastructure were destroyed or damaged[13]. In December 2014, the OHCHR stated with respect to human rights and IHL violations by Ukraine in Eastern Ukraine that: "*limited progress* has been reported in the investigations initiated by the Ministry of Internal Affairs (MoIA), the Office of the Prosecutor General and the SBU into *more than 300 cases of indiscriminate shelling of residential areas* since the start of the year"[14]. Such indiscriminate

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[12]News Release 14/125, "Ukraine: ICRC calls in all sides to respect international humanitarian law", 23 July 2014, International Committee of the Red Cross, Dossier, Vol. III.1, tab II, available at https://www.icrc.org/eng/resources/documents/news-release/2014/07-23-ukraine-kiev-call-respect-ihl-repatriate-bodies-malaysian-airlines.htm; "ICRC: Ukrainian Conflict is Not International", *Russian Peacekeeper*, 10 Oct. 2014, available at http://peacekeeper.ru/en/?module=news&action=view&id=22517.

[13]"Civilians killed in shelling of Slavyansk residential area", RT, 26 May 2014, available at https://www.rt.com/news/161572-ukraine-slavyansk-shelling-civilian/); '"Slaughterhouse': Civilians die in Kiev's ruthless military attacks", RT, 27 May 2014, available at https://www.rt.com/news/161772-eastern-ukraine-attack-deaths/); "Kiev anti-terror operation takes toll on Slavyansk residents" by John Reed, *The Financial Times*, 11 June 2014; Shells hit hospital as Ukrainian army resumes strike on Slavyansk, RT, 30 May 2014, available at https://www.rt.com/news/162456-slavyansk-shelling-ukraine-army/); "Inside homes shattered by Ukraine's unofficial civil war: Destruction from weeks of fighting revealed as country's richest man calls for end to violence; Slavyansk suburb is left devastated by Ukrainian army shelling after a night of fighting with separatist rebels" by Damien Gayle, *The Daily Mail*, available at http://www.dailymail.co.uk/news/article-2633775/Inside-homes-shattered-Ukraines-unofficial-civil-war-Destruction-days-fighting-revealed-countrys-richest-man-calls-end-violence.html.

[14]Office of the United Nations of Human Rights, report on the situation of human rights in Ukraine, 15 Dec. 2014, para. 20, Dossier, Vol. III.1, tab II.

shelling by Ukraine has continued throughout the conflict, and is recorded in the reports of the OHCHR and the OSCE[15].

7. It is therefore incoherent for Ukraine to state that alleged acts of indiscriminate shelling by the opposition side constitute terrorism. Should the Applicant's approach to the applicability of the ICSFT be accepted, Ukraine's own conduct would constitute a central feature of these very proceedings.

8. For instance, reacting to the tragic incident near Volnovakha, which Ukraine cites in its Request as one of its specific examples of terrorist attacks allegedly sponsored by Russia, the ICRC called on all parties to refrain from harming civilians and to comply with *international humanitarian law*. There was no mention of terrorism by the ICRC[16].

9. Mr. President, in the context of the provisional measures orders that Ukraine is now seeking, it is important also to take into account the great efforts to resolve this conflict. On 12 February 2015, a significant step was taken to de-escalate the conflict — the Package of Measures for Implementation of the Minsk Agreements was signed. The Minsk Agreements are repeatedly referred to by international actors as the only uncontested solution to the conflict, and on 17 February 2015 the Package of Measures was formally endorsed by the United Nations Security Council[17].

10. And yet, both in its Application and its Request, Ukraine completely ignores the Minsk Agreements, and also the further arrangements reached within the Trilateral contact group established under the Agreements.

11. Mr. Wordsworth will return to some of the details of the Minsk process, but I would add for now that both, the DPR and the LPR, which Ukraine now wants to stigmatize as terrorists, signed the Minsk Agreements and are represented in the Trilateral group where Ukraine's Government continues to engage with them.

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[15] Judges' folder, tab 9.

[16] "Ukraine crisis: ICRC calls on all parties to spare civilians", ICRC, 20 Jan. 2015, available at http://www.icrc.org/en/document/ukraine-crisis-icrc-calls-all-parties-spare-civilians.

[17] United Nations Security Council resolution 2202 (2015) adopted on 17 Feb. 2015, Dossier, Vol. II, tab 6, available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2202%20%282015%29.

12. Mr. President, we all know that there are different places in the world where people and entities, being parties to non-international armed conflicts, are fighting with central governments. Stigmatizing these people and entities as "terrorists", and those who help them, as sponsors of terrorism could have dangerous consequences far beyond this case. As the ICRC has cautioned, the "branding" of non-State adversaries as terrorist: "may prove to be an obstacle to eventual peace negotiations or national reconciliation that are necessary in order to end an armed conflict and ensure peace"[18].

13. Economically, even more than in the political domain, Ukraine interacts with those whom it labels as "terrorists". While portraying Russia as a sponsor of terrorism Ukraine itself and entities under Ukraine's jurisdiction continued until very recently to trade and provide significant financial resources to entities operating under the Donbass *de facto* authorities. According to a member of the Ukrainian parliament, about 40 per cent of all expenses of the DPR/LPR-controlled territories are covered by trade, taxes and other financing by Ukraine[19]. The volume of economic exchanges is such that when on the 26 January 2017 nationalists blocked the railroad supply of coal from Donbass into the rest of Ukraine — exactly under the pretext of the need for the State itself to stop "financing terrorists in the East" — the Government had to declare an emergency situation in the whole country. Following its own logic, is Ukraine itself to be considered as a sponsor of terrorism?

14. Mr. President, at this stage I would like to address the tragic catastrophe of MH-17. The investigation of this tragedy is still ongoing. Russia has co-operated extensively with the Dutch Safety Board (DSB) and the Joint Investigative Team (JIT), in particular by providing them with the assistance requested. The Russian authorities and experts have expressed disagreement with the findings of the DSB and the JIT[20], and note that much evidence was left untouched by the

[18]International Humanitarian Law and the challenges of contemporary armed conflicts, ICRC 31IC/11/5.1.2, pp. 50-51, Dossier, Vol. III.1, tab 2.

[19]See judges' folder, tab 11.

[20]"Biased, low quality, full of omissions: Russia launches fresh attack on Dutch MH17 report", RT, 19 Jan. 2016, available at https://www.rt.com/news/329494-mh17-investigation-biased-omissions/); "Solid facts? 5 flaws that raise doubt over int'l MH17 criminal probe", RT, 29 Sept. 2016, available at https://www.rt.com/news/361006-mh17-jit-report-questions/).

investigators as, for example, recorded by two Dutch journalists who recently visited the accident site[21].

15. It should be noted that during the summer of 2014 the Ukrainian Army's anti-aircraft missile regiment No. 156, equipped with "BUK-M1" missile systems, was stationed in the zone of conflict. The regiment's headquarters and its first division were located in Avdiivka near Donestk, its second division in Mariupol and its third in Lugansk. In total the regiment was armed with 17 BUK-M1 SAMs, identical to the one identified by the JIT.

16. Here, a general point about Ukraine's evidence. In January 2016 Russia challenged similar material introduced by Ukraine in its applications against Russia in the European Court for Human Rights[22]. You have in your dossier extracts from Russia's relevant observations[23]. Ukraine has had more than a year to reply to the ECtHR but has not done so.

17. Nevertheless, for the purposes of this hearing it is enough to note that neither the DSB nor the JIT appear to be concluding that the civil airliner was shot down with malicious intent or, which is what matters most for today, that the equipment allegedly used was provided for that specific purpose.

18. For the action to fall under the Montreal Convention, the intention must have been to shoot down a civilian aircraft — as military and other government aircraft are expressly excluded from the scope of this Convention. For the ICSFT to apply, there must have been financing with the intent or knowledge that the funds allegedly provided be used for an act of terrorism against civilians. If attention is to be paid by this Court to the materials that are being relied upon by the JIT, those materials militate in fact strongly against the case being put before you in Ukraine's Application.

19. Mr. President, yesterday the Court has been told about "unabated flow of weaponry over the Russian-Ukrainian borders", which allegedly sustains the ongoing conflict. It has to be pointed out that the primary source of weapons and ammunition to the military of the DPR and the LPR are stockpiles inherited by Ukraine in 1991 from the Soviet Army that was formerly tasked to hold off

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[21]"Dutch journalists criticize MH17 probe results after finding 'many pieces' still at crash site", RT, 9 Jan. 2017, available at https://www.rt.com/news/373111-mh17-site-dutch-journalists/.

[22]Cf. *Ukraine* v. *Russia* (I) Application No. 20958/14; *Ukraine* v. *Russia* (V) Application No. 8019/16.

[23]Dossier, Vol. II, tab 9.

the entire NATO. A lot of these stockpiles were deposited in the old mines of Donbass and later captured by rebels. Another source of weapons was the retreating Ukrainian army itself.

20. Mr. President, I also wish to submit to you that, contrary to what you are being told by Ukraine, the Russian Federation did engage in co-operation with Ukraine concerning both its requests under Mutual Legal Assistance treaties (MLA) and its concerns expressed via other avenues (such as diplomatic correspondence). There have been many such MLA requests, but only one that specifically referred to the ICSFT. At the same time there were some 79 Ukrainian MLA requests, which, while relating to events in Eastern Ukraine in one way or another, did not relate to the alleged financing of terrorism. The Russian authorities have responded to 69 of these, and continue to work on the remaining 10, many of which were only recently received. Further, despite the requirement in Article 12 of the ICSFT that co-operation be carried out "in conformity with . . . any arrangements on mutual legal assistance or information exchange that may exist between [the Parties]", Ukraine never sent any MLA requests to Russia concerning a number of the cases which now feature prominently in the Application and the Request.

21. Mr. President, as I headed the Russian negotiating team during the consultations with Ukraine on the issues allegedly related to the ICSFT, I have to point out that Ukraine did not engage into this exercise *bona fide* but solely for the purpose of claiming to have exhausted the requirements of the dispute resolution procedure provided for by the Convention. From the very outset the intention was to take the Russian Federation to this Court. Numerous statements by high-ranking Ukrainian officials, including the then Prime-Minister A. Yatsenyuk, clearly testify to this effect. As early as January 2015, Mr. Yatsenyuk already declared Ukraine's purpose was "bringing Russia to the International Court of Justice", and the talks with the Russian side were merely "technical consultations"[24].

22. On several occasions we directly asked the Ukrainian delegation to substantiate why it thought that the ICSFT was applicable to the instances it recites now in front of the Court, hearing in return only that "the Russian Federation is unwilling to co-operate", just as you heard yesterday.

[24]See judges' folder, tab 10.

23. Mr. President, the simple point is that Ukraine's reliance on the ICSFT is misconceived and, as Mr. Wordsworth will now show, fails to satisfy the key requirement of plausibility.

24. Mr. President, Members of the Court, I thank you for your attention and ask you to call Mr. Wordsworth.

Le PRESIDENT : Merci, Excellence. Je donne à présent la parole à M. Wordsworth.

Mr. WORDSWORTH:

ABSENCE OF PLAUSIBLE RIGHTS

1. Mr. President, Members of the Court, it is an honour to appear before you, and to have been asked by the Russian Federation to address up front the issue of plausibility.

1. Plausibility: the applicable test

2. Ukraine accepts that a plausibility test is to be applied, but has said little about the nature of that test. I wish to make three points.

3. First, although we, of course, accept that the Court cannot now make any determination on matters of fact, it is a necessary corollary of the mandatory nature of a provisional measures order that there must be something more than acceptance at face value of the facts as alleged by Ukraine. As Judge Abraham has explained — as you can see this at paragraph 1 of my outline, which is at tab 13 of your judges' folder, which is regrettably so hot from the printer that it is not yet paginated — Judge Abraham said:

> "8. . . . It is now clear that the Court does not suggest: it orders. Yet, and this is the crucial point, it cannot order a State to conduct itself in a certain way simply because another State claims that such conduct is necessary to preserve its own rights, unless the Court has carried out some minimum review to determine whether the rights thus claimed actually exist and whether they are in danger of being violated — and irreparably so — in the absence of the provisional measures the Court has been asked to prescribe: thus, unless the Court has given some thought to the merits of the case."[25]

[25] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*, separate opinion of Judge Abraham, p. 140, para. 8. See also *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, separate opinion of Judge *ad hoc* Dugard, p. 62, para. 4.

4. And, later in the same separate opinion, Judge Abraham stated:

> "In my view, the most important point is that the Court must be satisfied that the arguments are sufficiently serious on the merits — failing which it cannot impede the exercise by the respondent to the request for provisional measures of its right to act as it sees fit, within the limits set by international law."[26]

5. Secondly, your attention was drawn yesterday to the declaration of Judge Greenwood at the first Provisional Measures phase in the *Certain Activities* case, but not to the passage where he gives detailed consideration to what is required to show plausibility. Referring back to, and agreeing with, the separate opinion of Judge Abraham in *Pulp Mills*, Judge Greenwood stated — this is at paragraph 2 of my outline — "that it cannot be sufficient for a party simply to assert that it has a right; it must have some prospect of success". Of course, as he explained, proceedings on provisional measures cannot be turned into a form of summary trial of the merits, but, he continued: "What is required is something more than assertion but less than proof; in other words, the party must show that there is at least a reasonable possibility that the right which it claims exists as a matter of law and will be adjudged to apply to that party's case."[27]

6. Third point: the Court's assessment of whether the materials before it are sufficient to establish a plausible case must take into account the gravity of the allegedly violations. It is well established that, at the merits stage, the Court's approach is "the graver the charge the more confidence must there be in the evidence relied on" [outline, para. 3][28]. That principle could not apply in a mechanistic way at the provisional measures phase but where, as here, allegations of a very particular gravity are being made, it is necessary that there be a commensurate focus on the specific rights and breaches asserted, and also on the evidence that has been put forward. And this is all the more so given that the underlying facts fall directly within a quite different body of law that is not relied upon, that is, of course, IHL.

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[26] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*, separate opinion of Judge Abraham, p. 141, para. 10.

[27] *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, declaration of Judge Greenwood, p. 47, para. 4.

[28] See, e.g., *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, separate opinion of Judge Higgins, p. 234, para. 33.

2. The specific rights asserted by Ukraine under the ICSFT are not plausible

7. Against this backdrop, I move on to the sole right that Ukraine asserts with respect to the Request, that is, the right to co-operation under Article 18 ICSFT — at paragraph 4 of my Outline.

8. Professor Zimmermann will return to this provision a little later, but for my purposes the important point is that the obligation of co-operation is linked back to the existence of offences under Article 2 ICSFT [see outline, para. 5]. The points that I need to bring out for now on Article 2.1 are:

(a) This provision — and the Convention as a whole — is concerned only with the suppression of financing of terrorism, that is the provision or collection of "funds with the intention that they should be used or in the knowledge that they are to be used" to carry out one of the specified terrorist acts as then defined in Articles 2.1 *(a)* and *(b)*. Knowledge or intent.

(b) As to those specified acts, there is a separate requirement of specific intent. So far as concerns Ukraine's allegations with respect to Flight MH17, Article 2.1 *(a)* incorporates the offences under the Montreal Convention, which comprise the unlawful and intentional destruction of a civilian aircraft. So far as concerns the other allegations of Ukraine, there is a requirement of both specific intent and purpose. Article 2 (1) *(b)* refers to:

> "*(b)* Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act." [on screen]

9. This is different to, and in certain respects more stringent than, the prohibition of spreading terror that is established in IHL, i.e., by Article 51 (2) API and 13 (2) APII — you can see those at outline, paragraph 6. And the differences must be deliberate, as it is plain from Article 2 (1) *(b)* and also Article 21 ICSFT [in outline, para. 7] that the drafters of the Convention had the rules of IHL firmly in mind when they drafted this provision. As a matter of IHL, the prohibition is of "acts or threats of violence the primary purpose of which is to spread terror among the civilian population". Unlike Article 2 (1) *(b)*, the IHL prohibition does not require specific intent to cause death or serious bodily injury to a civilian. In addition, the requirement of purpose under API and APII is qualified by the term "primary", while Article 2 (1) *(b)* is concerned solely with "the purpose" of the act, not primary purpose.

10. Pulling this together, Ukraine's Request must be supported by a plausible case —

(a) that the acts of shelling that are a principal feature of the Request constitute terrorism within the meaning of Article 2 (1);

(b) that any acts of terrorism were financed with the requisite knowledge or intent, as required by Article 2 (1);

(c) that rights in respect of co-operation under Article 18 have been violated by the Russian Federation; and, finally,

(d) that, so far as concerns the multiple allegations against Russia itself, the ICSFT is concerned with alleged financing of terrorism by a State.

11. I will take these in turn.

(a) ***No plausible allegation of terrorism within the meaning of Article 2 ICSFT***

12. And I start with the central point that the Request is primarily concerned with acts in an ongoing armed conflict that are not correctly — or even to the standard of reasonable possibility — characterized as terrorist acts within Article 2 (1) of the ICSFT[29].

13. It suited Ukraine, yesterday, to seek to conflate the legally distinct concepts of indiscriminate attacks and terrorism, whilst on occasion referring also to targeted acts. There is no legal or other basis for this conflation. As to the factual situation, according to the OHCHR report on "Accountability for killings in Ukraine from January 2014 to May 2016" [outline, para. 8 and judges' folder, tab 15]:

> "The vast majority of civilian casualties, recorded on the territories controlled by the Government of Ukraine and on those controlled by armed groups, were caused by the indiscriminate shelling of residential areas, in violation of the international humanitarian law principle of distinction."[30]

14. That is an important overview of a period in excess of two years that covers all the major acts on which Ukraine relies. According to the OHCHR: civilian casualties caused by "indiscriminate shelling" on areas controlled by both sides, not terrorism.

15. And when the Court goes through the multiple reports of the OHCHR, the OSCE and the ICRC, it will see that the acts of indiscriminate shelling by all parties to the conflict in East Ukraine

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[29]See Request, paras. 7 *(b)-(d)* and 8-10.

[30]At p. 3. See also para. 69 *(b)* to the same effect.

are never characterized as acts of "terrorism". Instead, these acts are characterized by the OHCHR and the ICRC as violations of the IHL principles of distinction, proportionality and precaution[31].

16. And this is significant. Although these organizations are looking at the conflict through the prism of IHL, that body of law, of course, prohibits the spread of terror amongst the civilian population[32]. The nature and scope of this prohibition, which is to be distinguished from the general prohibition of indiscriminate attacks, was considered and applied by the Appeals Chamber of the ICTY in *Galic*[33] and *Dragomir Milošević*[34]. And yet, no doubt quite deliberately, and notwithstanding the terminology that has been publicly and repeatedly adopted by Ukraine, the OHCHR and the ICRC never once speak of the spread of terror.

17. Two examples of what the OCHR is saying [see outline, para. 9 and judges' folder, tab 15]:

(i) The OHCHR 'Report on the human rights situation in Ukraine 16 May to 15 August 2015, para. 193 *(b)*, calls on "*all parties* involved in the hostilities in Donetsk and Luhansk regions: . . . To respect international humanitarian law, particularly by complying with the principles of distinction, proportionality and precaution and, in any situation, refraining from indiscriminate shelling of populated areas . . ."

(ii) The OHCHR Report covering 16 August to 15 November 2016, para. 224 *(d)-(e)* calls on "*all parties involved in the hostilities* in Donetsk and Luhansk regions [including the DPR and LPR to]:

. . . . . .

[31]OHCHR, "Report on the human rights situation in Ukraine 16 May to 15 August 2015", para. 193 *(b)*; OHCHR, "Report on the human rights situation in Ukraine 16 August to 15 November 2015", para. 185 *(b)*; OHCHR, "Report on the human rights situation in Ukraine 16 November 2015 to 15 February 2016", para. 214 *(b)*; OHCHR, report on "Accountability for killings in Ukraine from January 2014 to May 2016" at p. 3; OHCHR, "Report on the human rights situation in Ukraine 16 May to 15 August 2016, para. 209 *(b)*; OHCHR, "Report on the human rights situation in Ukraine 16 August to 15 November 2016", para. 224 *(d)-(f)*; ICRC, "Ukraine Crisis: ICRC calls on all parties to spare civilians", 20 January 2015; ICRC, "Ukraine crisis: Intensifying hostilities endanger civilian lives and infrastructure", 10 June 2016; ICRC, "ICRC warns of deteriorating humanitarian situation amid intensifying hostilities in eastern Ukraine", 2 February 2017, Ukraine's Dossier, Ann. 47.

[32]Article 51 (2), API; Article 13 (2) APII; ICRC, Study on Customary International Humanitarian Law, rule 2.

[33]*Prosecutor* v. *Galić*, Case No. IT-98-29-A, Judgement, 30 November 2006.

[34]*Prosecutor* v. *Dragomir Milošević*, Case No. IT-98-29/1-A, Judgement, 12 November 2009.

(d) Target only military objectives in line with binding legal obligations, prohibit indiscriminate attacks — which do not distinguish between civilians and fighters, and ensure that subordinates do not direct attacks against civilians;

(e) Avoid under all circumstances carrying out attacks that are expected to cause incidental loss of civilian life, injury to civilians and damage to civilian objects excessive to the anticipated concrete and direct military advantage . . .".

You will find those examples from what the OHCHR is saying at tab 15 of the judges' folder.

18. In passing the Court may recall that Ms Marney Cheek referred to paragraph 207 of the OHCHR report of June 2014 in support of Ukraine's point that Russia is sponsoring terrorism. But the passage relied on is in the section of the OHCHR report dealing with detention, and has nothing to do with alleged indiscriminate shelling or indeed any of the events on which Ukraine focused yesterday.

19. As to the ICRC, this too has not suggested that the acts of shelling of populated areas by all parties to the conflict may constitute acts of terrorism, whether under IHL or otherwise [see outline, para. 10 and judges' folder, tab 16]

(a) In January 2015, after the bus was struck near Volnovakha, with the terrible loss of life, the ICRC issued the following statement: "We once again call on all parties to refrain from harming civilians and to comply with international humanitarian law . . . In particular, we remind them that indiscriminate attacks are prohibited."[35]

(b) And in June 2016, the ICRC issued a statement that "When conducting military operations, constant care must be taken to spare the civilian population and civilian property. Under international humanitarian law, all those involved in the conflict must do their utmost to verify that targets are indeed military objectives."[36]

(c) There is an ICRC statement of 2 February 2017[37] to similar effect at Annex 42 of Ukraine's dossier.

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[35]ICRC, 'Ukraine Crisis: ICRC calls on all parties to spare civilians', 20 January 2015.

[36]ICRC, 'Ukraine crisis: Intensifying hostilities endanger civilian lives and infrastructure', 10 June 2016.

[37]ICRC, 'ICRC warns of deteriorating humanitarian situation amid intensifying hostilities in eastern Ukraine', 2 February 2017, Ukraine's Dossier, Ann. 47.

20. The Court will also have noted how these calls from the OHCHR and the ICRC have been addressed to all parties to the conflict. And it could not be otherwise. One of the striking features of the current Request is that the evidence that Ukraine has put before the Court suggests that the indiscriminate shelling that appears to be such a feature of this conflict is at least as much down to acts of, or attributable to, Ukraine.

21. Indeed, the evidence relied on by Ukraine shows that civilian casualties from the indiscriminate shelling of populated areas have been greater in territory controlled by the DPR and LPR [see outline, para. 11]. You heard not one word, yesterday, about the civilian casualties on the eastern side of the contact line. You were shown one specially generated map called "Major attacks on civilians" Ukraine's judges' folder, slide 18, on screen], and the apparent message was that shells are launched from the East and land in the West. There are, however, OHCHR maps and related data that show a different and far more reliable picture — civilian casualties caused by shelling either side of the contact line. But you were not taken to these [references outline, para. 11, and the first of these is at tab 17 of the judges' folder].

(a) See, first, the OHCHR Report of 16 May to 15 August 2015, which contains specific figures on civilian casualties from shelling at paragraphs 29 and 32: in the Government-controlled territory, 165 civilian casualties, including 41 killed; on the DPR/LPR-controlled territory, shelling cause 244 civilian casualties, including 69 killed. There was reference yesterday to OSCE crater analysis, and it is of obvious use in identifying the source of a given attack. We have put into the judges' folder, also at tab 17, excerpts from the OSCE reports that show how indiscriminate shelling in the DPR/LPR-controlled areas has come from the north or west, i.e., the direction from which shelling by Ukrainian armed forces would come[38].

(b) Moving forward, the OHCHR Report for the period 16 November 2015 to 15 February 2016, contains a Map 1, at page 5 [judges' folder, tab 18]. You can see the contact line in red, and

[38]See e.g., OSCE, 'Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 19:30 (Kyiv time), 27 May 2015', Kyiv, 28 May 2015; OSCE, 'Latest from OSCE Special Monitoring Mission (SMM) to Ukraine, based on information received as of 19:30hrs (Kyiv time), 12 Jun. 2015', Kyiv, 12 Jun. 2015; OSCE, 'Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 19:30 hrs (Kyiv time), 19 Jul. 2015', Kyiv, 20 Jul. 2015; OSCE, 'Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 19:30 hrs (Kyiv time), 30 Jul. 2015', Kyiv, 31 Jul. 2015; OSCE, 'Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 19:30 (Kyiv time), 2 Aug. 2015', Kyiv, 3 Aug. 2015; OSCE, 'Latest from OSCE Special Monitoring Mission (SMM) to Ukraine, based on information received as of 19:30 hrs (Kyiv time), 11 Aug. 2015', 12 Aug. 2015.

how civilian casualties have occurred on both sides of the contact line with, in fact, the greater number of civilian deaths on the DPR/LPR side of the line[39].

(c) The next OHCHR report, covering the period from 16 February to 15 May 2016, also contains a map (Map 2 at p. 5) showing a similar picture of shelling on both sides of the contact line, but with significant casualties caused by shelling from Ukraine's forces in the west. This is a tab 19 of your judges' folders. And, again, that is supported by the OSCE crater analysis[40]. For example, on 27 April 2016, four civilians were killed by shelling near a DPR checkpoint near Olenivka. The OSCE assessed the shells to have been fired from a west-south-west direction, i.e., from the territory held by Ukrainian armed forces.[41]

(d) Fourth document — the OHCHR report for 16 May to 15 August 2016, tab 20 of your judges' folder. The map, now on your screen, shows that civilian casualties during the reporting period were greater in territory controlled by the DPR and LPR, and the origin of the shelling is again supported by OSCE analysis of specific shelling incidents[42].

(e) Finally, the most recent OHCHR report, covering the period from August to November 2016, tab 21 of the judges' folder. Paragraph 4 states that "[i]n October, OHCHR recorded eight times more civilian casualties in armed group-controlled territories than in government-controlled areas of the conflict zone, indicating that civilians in territories controlled by the armed groups continue to be particularly at risk of injury and death." Again, the map shows that civilian casualties during the reporting period were greater in the territories controlled by

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[39]See e.g., OSCE, 'Latest from OSCE Special Monitoring Mission (SMM) to Ukraine, based on information received as of 19:30 hrs (Kyiv time), 7 Feb. 2016', 8 Feb. 2016. See also OSCE, 'Latest from OSCE Special Monitoring Mission (SMM) to Ukraine, based on information received as of 19:30 hrs (Kyiv time), 8 Feb. 2016', 9 Feb. 2016.

[40]See e.g., OSCE, "Latest from OSCE Special Monitoring Mission (SMM) to Ukraine, based on information received as of 19:30 hrs (Kyiv time), 23 February 2016", 24 Feb. 2016; OSCE, "Latest from OSCE Special Monitoring Mission (SMM) to Ukraine, based on information received as of 19:30 hrs (Kyiv time), 1 April 2016", 2 April 2016.

[41]See "Spot Report by the OSCE Special Monitoring Mission to Ukraine (SMM): Shelling in Olenivka", Kyiv, 28 April 2016. "Latest from OSCE Special Monitoring Mission (SMM) to Ukraine, based on information received as of 19:30 hrs (Kyiv time), 29 April 2016", 30 April 2016.

[42]See e.g., OSCE, "Latest from OSCE Special Monitoring Mission (SMM) to Ukraine, based on information received as of 19:30 hrs (Kyiv time), 25 May 2016", 26 May 2016; OSCE, "Latest from OSCE Special Monitoring Mission (SMM) to Ukraine, based on information received as of 19:30 hrs (Kyiv time), 26 June 2016", 27 June 2016; OSCE, "Latest from OSCE Special Monitoring Mission (SMM) to Ukraine, based on information received as of 19:30 hrs (Kyiv time), 1 August 2016", 2 Aug. 2016.

the DPR and LPR. And again, this is supported by OSCE analysis of specific shelling incidents[43].

22. So what, if any, conclusions can safely be drawn — for the purposes of this stage — from this grim set of facts as they appear from the OHCHR reports and other sources?

(a) First, there is an ongoing armed conflict in which there has been an appalling loss of civilian life, caused predominantly, according to the OHCHR, by indiscriminate shelling by all parties to the conflict.

(b) Secondly, it is Ukraine alone that is characterizing this as terrorism.

(c) Thirdly, if there were a plausible case of terrorism based on shelling in populated areas, it is one in which Ukraine would be centrally implicated.

23. That last point, of itself, does not answer the question of plausibility nor, in turn, of whether urgent measures should be ordered by this Court so as to protect civilians at risk from any breach of the ICSFT. However, the fact that Ukraine's own evidence shows it to be at least equally engaged in the acts of indiscriminate shelling that are such a strong feature of the Request does place a very important question mark next to the characterization that Ukraine — alone — places on these acts as acts of terrorism.

24. And with that question mark in mind, I wish to take the Court to the "Package of measures" agreed on 12 February 2015 and annexed to Security Council resolution 2202 (2015). The Court will recall that the specific events at Volnovahka, Mariupol and Kramatorsk that Ukraine has focused on yesterday all took place before this Package of measures was agreed.

25. At paragraph 5 of the package you see, the Parties agreed — and this is tab 22 of the judges' folders, paragraph 12 of my outline — to "[e]nsure pardon and amnesty by enacting the law prohibiting the prosecution and punishment of persons in connection with the events that took place in certain areas of the Donetsk and Luhansk regions of Ukraine."

26. Through resolution 2202 (2015), the Security Council called on "all parties to fully implement the 'Package of measures', including a comprehensive ceasefire as provided for therein"

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[43]OSCE, "Latest from OSCE Special Monitoring Mission (SMM) to Ukraine, based on information received as of 19:30 hrs (Kyiv time), 9 October 2016", 10 Oct. 2016; OSCE, "Latest from OSCE Special Monitoring Mission (SMM) to Ukraine, based on information received as of 19:30 hrs (Kyiv time), 11 October 2016", 12 Oct. 2016; OSCE, "Latest from OSCE Special Monitoring Mission (SMM) to Ukraine, based on information received as of 19:30 hrs (Kyiv time), 28 October 2016", 29 Oct. 2016.

It is inconceivable that the Parties would have agreed to such a pardon and amnesty, and that the Security Council would have called for implementation of, amongst other things, that pardon and amnesty, if the acts of indiscriminate shelling on which Ukraine now focuses were plausibly acts of terrorism.

27. And, consistent with the approach in the Package of measures and of the Security Council, when one looks further at these shelling attacks, it appears that in each case there was some form of military objective.

28. As to the loss of life near Volnovakha on 13 January 2015, the bus was stopped at a Ukrainian army checkpoint[44]. The evidence before the Court appears to show that — regrettably — both parties to the armed conflict have treated checkpoints manned by armed forces as military targets. To take one example of targeting of a checkpoint by Ukraine's armed forces, there is the incident of 27 April 2016 to which I have already referred. As the OHCHR report for that period records, and this is paragraph 14 of my outline:

> "On 27 April 2016, civilians waiting to cross a checkpoint in Olenivka village on the road between Mariupol and Donetsk city, were hit by shelling at night. Four civilians were killed and eight others were injured. According to OSCE crater analysis, the mortar rounds were fired from the west-south-westerly direction. This indicates the responsibility of the Ukrainian armed forces. The checkpoint is routinely — both during day and night time — surrounded by passenger vehicles waiting to cross the contact line"[45]. (Judges' folders, tab 23.)

29. As to the shelling in Mariupol on 24 January 2015, there is an OSCE "spot report" from which it may be deduced that the shelling was aimed at a Ukrainian armed forces checkpoint[46].

30. As to the shelling in Kramatorsk on 10 February 2015, it appears from the OSCE spot report that the shelling was within 200-300 metres of a Ukrainian military compound, located in Lenin Street[47].

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[44]"Spot report by the OSCE Special Monitoring Mission to Ukraine, 14 January 2015: 12 civilians killed and 17 wounded when a rocket exploded close to a civilian bus near Volnovakha", Kyiv, 14 Jan. 2015.

[45]OHCHR "Report on the human rights situation in Ukraine 16 February to 15 May 2016", para. 20. See also "Spot Report by the OSCE Special Monitoring Mission to Ukraine (SMM): Shelling in Olenivka", Kyiv, 28 Apr. 2016.

[46]See "Spot report by the OSCE Special Monitoring Mission to Ukraine (SMM), 24 January 2015: Shelling Incident on Olimpiiska Street in Mariupol", Mariupol, 24 Jan. 2015.

[47]"Spot report by the OSCE Special Monitoring Mission to Ukraine (SMM): Shelling in Kramatorsk, 10 February 2015", Kramatorsk, 10 Feb. 2015.

31. And the loss of civilian life in January-February 2015 was in no sense confined to areas controlled by Ukraine's armed forces. For example, on 22 January 2015, there were multiple civilian deaths and injuries when a trolley bus was hit at Kuprina Street in Donetsk City. A photograph of the scene is in your judges' folder at tab 23, and the details are to be found in an OSCE Spot Report: eight people killed, 13 injured[48] and reference to that is at tab 24, paragraph 7 of the judges' folder.

32. Before moving to the next head of plausibility, I wish to focus briefly on the shelling at Avdiivka said to have taken place within the week from 29 January to 5 February 2017, which was referred to yesterday as an example of "intimidation of civilians" and "a terrorist act". Notably, Ukraine has not submitted the OSCE reports for this period. So what do they show?.

(a) 29 January: there is fighting in the area around Avdiivka. The OSCE records that "[i]n violation of withdrawal lines, the SMM [that is the monitor] observed: in government-controlled areas, four tanks (T-64) west of Avdiivka travelling east."[49] The OSCE does not record any shelling in residential areas of Avdiivka.

(b) 30 January: the OSCE records various further tank movements by Ukraine's armed forces[50]. Again the OSCE does not record any shelling in residential areas of Avdiivka.

(c) 31 January: the OSCE records that, in violation of the withdrawal lines, Ukraine's armed forces are moving four tanks to Avdiivka[51]. The OSCE does not record any shelling in residential areas of Avdiivka, but it appears that the fighting was getting very close. An here is what was happening according to a BBC report that we located late last night [Show video][52]. We will lodge the Report with the Registry this afternoon, but you see the basic point. Ukrainian armed forces lodging themselves in Avdiivka in a residential area.

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[48]"Spot report by the OSCE Special Monitoring Mission to Ukraine (SMM): Shelling incident on Kuprina Street in Donetsk City", 22 Jan. 2015.

[49]"Latest from the OSCE Special Monitoring Mission to Ukraine (SMM), based on information received as of 19:30, 29 January 2017", 30 Jan. 2017.

[50]"Latest from the OSCE Special Monitoring Mission to Ukraine (SMM), based on information received as of 19:30, 30 January 2017", 31 Jan. 2017.

[51]"Latest from the OSCE Special Monitoring Mission to Ukraine (SMM), based on information received as of 19:30, 31 January 2017", 1 Feb. 2017.

[52]BBC News video, "Ukraine: Avdiivka, the front line of Europe's 'forgotten war'", 31 Jan. 2017.

(d) 1 February: the OSCE records that: "In violation of the respective withdrawal lines, in government-controlled areas the SMM observed . . . four tanks (T-64) parked behind a building in Avdiivka."[53] You can see the tanks, and the OSCE monitoring vehicles in the photograph in judges' folder at tab 23 and now on your screen. The OSCE also records that there was shelling in Avdiivka on that day.

(e) 2 February: this is the date when Mr. Nunn says that a shell hit the apartment in which he was staying. In a report by a source that Ukraine itself has relied on, Bellingcat, it is reported that there was artillery fire hitting the neighbouring apartment building to where Ukraine's tanks were parked[54].

(f) and then 3 February: the OSCE again records that: "In violation of the respective withdrawal lines, the SMM observed the following in government-controlled areas . . . four tanks (T-64s) in Avdiivka."[55]

33. So, the evidence in no sense points to any terrorist act. It points to fighting around Avdiivka, to Ukrainian tanks being positioned in a residential area in Avdiivka, and to Ukrainian armed forces then being targeted. This is not plausibly a matter for the ICSFT. The pertinence of IHL is by contrast self-evident.

(b) ***No plausible allegation of financing with specific intent or knowledge as required by Article 2 ICSFT***

34. I move on to the next element as to which Ukraine must make a plausible showing, namely financing with the knowledge or intent required by Article 2 (1).

35. What evidence was put forward yesterday? Ukraine's case is that funds or weaponry have been provided to the DPR or LPR. The honourable Agent for Russia has already pointed to certain evidentiary issues, but Ukraine's evidence on supply of weaponry in an ongoing armed conflict anyway does not assist the Court. Article 2 is concerned solely with funds supplied with the knowledge or intent that they are to be used for terrorist acts.

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[53] "Latest from the OSCE Special Monitoring Mission to Ukraine (SMM), based on information received as of 19:30, 1 February 2017", 2 Feb. 2017.

[54] "Ukrainian Tanks in Avdiivka Residential Area", Bellingcat, 3 Feb. 2017.

[55] 'Latest from the OSCE Special Monitoring Mission to Ukraine (SMM), based on information received as of 19:30, 3 Feb 2017', 5 Feb 2017.

36. Ukraine's Request ultimately rests on inference of the requisite knowledge from its characterization of acts of indiscriminate shelling as terrorism[56]. But, this characterization is unsound, and it is not adopted by the international organizations reporting on the conflict — organizations that are on the ground in eastern Ukraine and that are of course well-versed in the applicable law.

37. As to the appalling loss of life caused by the shooting down of Flight MH17 on 13 July 2014, there is no evidence before the Court, plausible or otherwise, that Russia provided weaponry to any party with the intent or knowledge that such weaponry be used to shoot down a civilian aircraft, as would of course be required under Article 2 (1).

(a) There was no such evidence in the JIT video extracts that you were shown yesterday. These concerned the alleged delivery of a weapon by Russia, nothing more. Moreover, Ukraine has elected not to put before you the contents of the alleged intercepts to which that JIT video referred which are on the very same JIT web page, and which show quite clearly that whoever was allegedly supplying this BUK was acting in response to a series of armed strikes by Ukraine's military aircraft. We will submit that to the Court this afternoon.

(b) For current purposes it is sufficient to take you to what the JIT was saying in its presentation of 28 September 2016. This is a document that was placed in Ukraine's judges' folder at tab 9, however it did not bring the relevant passage to your attention, although that passage is of central relevance to the case that is now being put before you on knowledge or intent.

> "In July 2014, heavy fighting was going on in the area southeast of Donetsk. The pro-Russian fighters were engaged in an offensive to force a passage to the border with the Russian Federation south of the conflict zone. During these fights, the Ukrainian army carried out many air strikes in order to stop this offensive. The pro-Russian fighters suffered greatly: there were many losses, both human and material. Intercepted telephone conversations show that during the days prior to 17 July, the pro-Russian fighters mentioned that they needed better air defence systems to defend themselves against these air strikes. In this respect, a BUK was discussed explicitly."

(c) So, and remarkably, you were not taken to the JIT material relevant for the purposes of Article 2 (1) — material that points solely to the supply of a BUK weapon to be used to counter air strikes by Ukrainian military aircraft. Now Russia has very serious reservations as to the reliability of the evidence that the JIT has been relying on; but, if account is to be taken of that

[56] Request, para. 7.

evidence, it points categorically to the absence of any knowledge or intent to finance the intentional destruction of a civilian aircraft.

38. Ms Marney Cheek also alleged yesterday that Russia was sponsoring terrorism in the form of bombings in the city of Kharkiv. Again, this is an allegation of extreme gravity, and all that was relied upon was a single press report, containing the comments of someone who claims to be the spokesman of the so-called Kharkiv Partisans.

39. Ukraine's Application focuses on the bombing in Kharkiv of 22 February 2015, killing three people and wounding fifteen others[57]. Ukraine claims there, without reference to any evidentiary materials, that this bombing "was supported by the Russian Federation". Notably, however, in the press report now relied on by Ukraine, the alleged spokesman says that this bombing was not carried out by the Kharkiv Partisans.

(c) ***No plausible violation of Article 18 of the ICSFT regarding co-operation over bombings***

40. This leads me to the case on plausible rights under Article 18. The essence of Ukraine's case here is that Russia has been engaging in a charade so far as concerns co-operation: while pretending to co-operate and to answer or to seek further information in relation to requests for assistance, Russia has, it is in substance it is being alleged by Ukraine, acted in manifest bad faith by directly instigating and sponsoring terrorism.

41. The Court is asked to infer from Ukraine's claims that (1) the armed groups in east Ukraine are engaging in acts of terrorism and (2) these acts are knowingly funded by Russia that (3) there has been a breach of Article 18. But there is no plausible basis for the first two elements, and the evidence before the Court simply does not make out a plausible case of the bad faith breach of Article 18 that Ukraine is contending for.

42. As to Russia's actual co-operation, I refer back to what has been said by the honourable Agent for Russia earlier today.

I move to the last issue of plausibility on which I will be very brief.

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[57] Application, para. 72.

(d) ***No plausible right to invoke state responsibility for allegedly financing terrorism***

43. The striking point in the case — alongside the absence of plausibility once the facts are examined in even a little detail — is that Ukraine is at least as engaged in the acts of indiscriminate shelling that it now wishes to portray as State-sponsored terrorism. This leads directly to a question as to whether the ICSFT is concerned at all with the prohibition of alleged acts of financing by the State per se. This is a matter that will now be addressed by Professor Zimmermann in the context of this Court's prima facie jurisdiction. But it follows from his submissions on this issue that the threshold of plausibility is likewise not met.

Mr. President, Members of the Court, I thank you for your attention, and I ask you to call on Professor Zimmermann to complete Russia's first round submissions on the ICSFT.

Le PRESIDENT : Merci. Je renouvelle ma demande adressée à tous les orateurs de ne pas s'exprimer trop vite pour permettre aux interprètes de faire correctement leur travail. Merci. Je donne à présent la parole au professeur Zimmermann.

M. ZIMMERMANN : Volontiers, Monsieur le président. Monsieur le président, Mesdames et Messieurs de la Cour, c'est un honneur d'apparaître de nouveau devant vous.

PROVISIONAL MEASURES UNDER THE INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF THE FINANCING OF TERRORISM

Introduction

1. I will now address:

— *first*, that the International Convention for the Suppression of the Financing of Terrorism (ICSFT) obliges States to *co-operate* in the punishment and prevention of the financing of terrorist acts committed by private actors, but that it does *not* cover matters of State responsibility for such alleged acts;

— *second*, that Ukraine has fulfilled neither its obligation to bona fide negotiate as to the alleged dispute concerning the interpretation or application of the ICSFT, nor that it has negotiated in good faith to set up an arbitral tribunal, as required by Article 24 of the Convention.

and that the Court accordingly lacks prima facie jurisdiction.

2. Additionally, I will also demonstrate

— *third*, that there is no "serious" or "real" risk of irreparable prejudice to specific rights arising under the ICSFT;

and that finally

— *fourth*, that there is no urgency as required by the Court's jurisprudence.

I. No prima facie jurisdiction for matters of State responsibility under Article 24 of the ICSFT

3. Members of the Court, the Court, in its recent Order on provisional measures in the case concerning *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France)*, on which Ukraine relied upon yesterday[58], was very careful in circumscribing the Court's jurisdiction in indicating provisional measures.

4. It confirmed that it has to enquire: "whether the acts complained of . . . are *prima facie* capable of falling within the provisions of that instrument and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain . . ."[59].

5. Accordingly, "any dispute which might arise with regard to 'the interpretation or application' of . . . the Convention could relate only to the manner in which the States parties perform their obligations under that Convention"[60].

1. Article 24 of the ICSFT confirms the exclusion of matters of State responsibility from the ambit of the ICSFT

6. Mr. President, Ukraine has, however, time and again, referred to alleged acts of financing *terrorism* by the Russian Federation "as a matter of state policy"[61]. Let me first note, that Ukraine has not come up with a plausible case for such allegations of terrorism — an issue Mr. Wordsworth has just addressed. I will now demonstrate that purported instances of a State itself allegedly financing acts prohibited by the ICSFT do not fall within its jurisdictional scope, as set out in Article 24.

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[58]CR 2017/1, para. 59 (Cheek).

[59]*Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Request for the Indication of Provisional Measures, Order of 7 December 2016*, para. 47.

[60]*Ibid.*, para. 49.

[61]See, e.g., Application of Ukraine, 16 Jan. 2017, para. 128 ; CR 2017/1, paras. 15, 16, 18, 51 and 54 (Cheek).

7. This result is, first and foremost, confirmed by the compromissory clause under which the case has been brought. Yesterday, you have heard Ukraine relying on your jurisprudence in the *Bosnian Genocide* case in order to claim that Article 24 of the ICSFT covers issues of State responsibility for financing terrorism[62].

8. What is striking, however — but what was unfortunately missing in Ukraine's pleading — is that the very wording of the two compromissory clauses, Article IX of the Genocide Convention on the one hand, and Article 24 of the ICSFT, are *fundamentally* different.

9. Let us therefore now have a careful look at both Article IX of the Genocide Convention itself, as well as how the Court — you — have interpreted Article IX of the Genocide Convention.

10. Article IX of the Genocide Convention makes it abundantly clear that disputes arising under the Genocide Convention include those relating — and I quote from Article IX — include disputes relating "to the responsibility of a State for genocide". Responsibility of a State. Article 24 in turn does *not* include any such reference to State responsibility.

11. This jurisdictional limitation in Article 24 of the ICSFT is clearly linked to the fact that the ICSFT does *not* contain a provision parallel to Article IV of the Genocide Convention.

12. As you will recall, Article IV of the Genocide Convention *expressis verbis* contemplates the commission of genocide by constitutionally responsible rulers and public officials. This provision, Article IV of the Genocide Convention, implies — fully in line with the Genocide Convention's compromissory clause — that the Genocide Convention encompasses, indeed, issues of State responsibility.

13. The ISCFT, in turn, does not — because it does not contain a provision akin to Article IV of the Genocide Convention.

14. Mr. President, the negotiations on what became the ICSFT started shortly after the Court's 1996 Judgment on preliminary objections in the *Bosnian Genocide* case. Already there, in 1996, the issue of the scope of the Court's jurisdiction under Article IX of the Genocide Convention, as far as State responsibility is concerned, had come up in the proceedings.

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[62]CR 2017/1, para. 19 (Cheek).

15. And already in your Judgment, you have relied on the wording of Article IX of the Genocide Convention, with its unequivocal reference to matters of State responsibility, in order to find that the Genocide Convention, indeed, also covers issues of State responsibility[63].

16. One cannot but assume that States, which soon thereafter, soon after 1996, became involved in the negotiations leading to the adoption of the ICSFT, were fully aware of the Court's then very recent Judgment, even more so one handed down in a politically and legally sensitive case.

17. Ukraine claims that the States negotiating the ICSFT indeed had the intention to have the ICSFT encompass issues of State responsibility for themselves financing acts of terrorism. Ukraine further claims that they had the intention to endow the Court with jurisdiction *ratione materiae* as to such issues. If that were true, it would have been most natural, to say the least, to indeed bring the wording of Article 24 of the ICSFT, which was in the process of being negotiated, *mutatis mutandis* in line with that of Article IX of the Genocide Convention, as it had just been interpreted by this very Court.

18. Yet, neither the first French draft convention, nor indeed *any* of the subsequent proposals leading to the adoption of Article 24 of the ICSFT ever contained such an idea. This was obviously due to the fact that the drafters of the future ICSFT did *not* contemplate the idea of the ICSFT encompassing issues of State responsibility for the financing of alleged terrorist acts.

19. Mr. President, let me now move on to more specific provisions of the ICSFT which shed further light on this limited scope of the convention. I will start with Article 4.

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[63] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 616, para. 32.

2. Specific provisions of the ICSFT confirm that matters of State responsibility are not covered by the ICSFT

(a) ***Article 4 of the ICSFT***

20. Article 4 constitutes a classical provision contained in almost every convention dealing with transnational organized crimes committed by private individuals[64]. It obliges States *to punish* the acts defined in Article 2 of the ICSFT.

21. Thus, by its very nature and content, Article 4 deals only with the relationship of a given contracting State with private individuals.

22. This limited character of the ICSFT is further confirmed by its Article 5.

(b) ***Article 5 of the ICSFT***

23. Article 5 provides for sanctions to be taken by contracting parties against legal entities responsible for acts prohibited under the ICSFT. As the phrase "organized under its laws" confirms in Article 5, this provision addresses the issue of sanctions for corporations and similar entities involved in financing terrorist acts.

24. What is even more important is that Article 5 specifically regulates the *criminal, civil or administrative* responsibility of such entities — without even mentioning with a single word issues of *State* responsibility. Indeed, Article 5, paragraph 2, contains a specific savings clause as to the responsibility *of individuals* — but that of individuals only.

25. In contrast, when it comes to matters of State responsibility for financing terrorism there is utter silence in Article 5 — and this silence alone is telling. And this silence mandates an

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[64] Cf. e.g.,

— Article 2 Convention on the Suppression of Unlawful Seizure of Aircraft;

— Article 5 International Convention for the Suppression of Acts of Nuclear Terrorism;

— Article 5 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Aviation;

— Article 4 International Convention for the Suppression of Terrorist Bombings;

— Article 6 European Convention on the Suppression of Terrorism;

— Article 5 Protocol to Prevent, Suppress and Punish Trafficking in Person s, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime;

— Article 5 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation.

argumentum e contrario that the ICSFT simply does not encompass issues of State responsibility with regard to the financing of terrorism.

26. This result, that I just put to you, is further unequivocally confirmed by the drafting history of Article 5.

27. As is well known, the text of the ICSFT is largely based on a working document originally submitted by France[65].

28. That French draft convention had contained in its Article 5, paragraph 5, a specific provision on State responsibility, which stated that — and you have it on your screens: "The provisions of this article cannot have the effect of calling into question the responsibility of the State as a legal entity."[66]

29. This French proposal was followed up by some further, basically identical, proposals[67]. All those proposals — if retained, and let me reiterate the "if" — if retained, would at least have provided some space for an argument that the ICSFT also encompasses issues of State responsibility. Yet, those proposals met with significant reluctance by many delegations since in the words of those delegations: "the concept of State responsibility, as understood in general international law, was beyond the scope of the draft Convention"[68].

30. And it was in light of this consideration that by the end of the day: "[i]t was decided to delete the original paragraph 5 [of draft Article 5] which dealt with the notion of State responsibility under international law, on the grounds that it fell outside the scope of the draft convention"[69].

31. This drafting, this unequivocal drafting history of Article 5 confirms that no consensus among the negotiating States could be reached that the future ICSFT should cover issues of State responsibility for a State itself financing alleged acts of terrorism.

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[65]UN doc. A/AC.252/b L. 7 and Corr.1.

[66]UN doc. A/AC.252/L.7; UN doc. A/54/37, Ann. II, p. 16.

[67]Cf. e.g., the proposal by Italy contained in A/AC.252/1999/WP.22: "The provisions of this article [i.e., draft Article 5] cannot be interpreted as affecting the question of the international responsibility of the State." as well as the revised proposal by France contained in A/AC.252/1999/WP.45 (revised proposal by France): "[5. No provision of this article can have the effect of calling into question the international responsibility of the State.]".

[68]Report of the *ad hoc* Committee established by United Nations General Assembly resolution 51/210 of 17 Dec. 1996, UN doc. A/54/37, p. 60, para. 46.

[69]UN doc. A/C.6/54/L.2, para. 127.

32. Obviously, the issue of State responsibility of a State itself allegedly sponsoring terrorist activities in another State, closely related to the concepts of non-intervention and *jus ad bellum* rules, while not covered by the ICSFT, continue to be governed by applicable rules of customary international law — but those rules, as you have confirmed in *Equatorial Guinea* are not within the bounds of the Court's jurisdiction under the treaty compromissory clause which is Article 24 ICSFT.

33. I would now like to focus your attention on the ongoing negotiation process as to a future comprehensive convention against terrorism. This process confirms that matters of State responsibility were not yet included in the ICSFT.

3. Ongoing debate on including matters of State responsibility in the Draft Comprehensive Convention against Terrorism

34. Whether or not matters of State responsibility ought to be covered by the future envisaged *comprehensive* convention against terrorism constitutes one of most important, if not the most important, of the so far unresolved issues during the negotiations. The main issue preventing the adoption of the draft convention thus concerns exactly the very same issue we are currently considering here today.

35. Yet, as the co-ordinator of the *ad hoc* Committee on the Draft Comprehensive Convention against Terrorism rightly noted:

> "the *individual* rather than the State had been at the centre of the efforts to draft a comprehensive convention. The core rationale for focusing on the individual had been that other fields of law — in particular the Charter of the United Nations, international humanitarian law and the law relating to the responsibility of States for internationally wrongful acts — adequately covered the obligations of States in situations where acts of violence were perpetrated by States or their agents."[70]

36. The co-ordinator went even further in emphasizing that the inclusion of the question of State responsibility could alter the entire approach followed in the *previous* counter-terrorism instruments so far, including the ICSFT, which is now at stake here. He, the co-ordinator, stated that: "an . . . inclusion of elements of 'State terrorism' . . . would imply revisiting the entire

[70]Statement of the co-ordinator of the *ad hoc* Committee on the Draft Comprehensive Convention against Terrorism, A/C.6/63/SR. 14 (2008), para. 41.

premise on which the Ad Hoc Committee had proceeded in developing those instruments"[71], those earlier instruments, including the ICSFT.

37. And the co-ordinator then further continued that "it was essential that the *acquis* of the draft convention as a law enforcement instrument *for ensuring individual criminal responsibility* on the basis of an extradite or prosecute regime should be preserved. *That was the approach that had been followed in the various other multilateral counter-terrorism instruments*"[72], obviously including the ICSFT.

38. It is thus, up to today, an unresolved issue, whether States will include matters of State responsibility in future terrorism suppression instruments.

39. What is certain, however, is that such matters were not yet included in the ICSFT, as confirmed by various statements of States also during the negotiation process leading to the adoption of the ICSFT.

40. Those States regretted that the ICSFT had "expressly exclude[ed] from the supposed definition of financing some of the actors which constituted the various links in the financing chain, namely . . . the State itself"[73].

41. And some other State similarly regretted that the ICSFT draft convention "made no mention of States, while State terrorism was a much more serious problem . . ."[74].

42. And what is more is that no other State objected to these very statements.

43. Besides, this limited understanding is also duly reflected in the explanatory reports of contracting parties submitting the ICSFT for approval by their respective national Parliaments[75].

44. On the whole, therefore, the text of the ICSFT, its drafting history, as well as subsequent practice, confirm that the ICSFT was meant, and meant only, to address State obligations towards private actors, rather than broadly regulating issues of State responsibility generally. Mr. President,

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[71] *Ibid.*, para. 49.

[72] *Ibid.*

[73] A/C.6/54/SR.32, p. 9, para. 57.

[74] A/C.6/54/SR.33, para. 40.

[75] Cf. *inter alia* as to Australia, National Interest Analysis, 28 June 2002, para. 5; US, Letter of Submittal, Department of State, Washington, 3 October 2000, p. VI; UK, Terrorism Act 2000, Explanatory note, 20 July 2000, p. 10, para. 57; Switzerland, Message relatif aux conventions internationales pour la répression du financement du terrorisme et pour la répression des attentats terroristes à l'explosif ainsi qu'à la modification du code pénal et à l'adaptation d'autres lois fédérales, 26 June 2002, p. 12.

that would end my part on State responsibility and it might be an appropriate time to take the usual break, but I am completely in your hands obviously.

Le PRESIDENT : Merci, Monsieur le professeur Zimmerman. Vous avez raison, le moment se prête à la pause traditionnelle de 15 minutes. La séance est suspendue.

L'audience est suspendue de 11 h 30 à 11 h 45.

Le PRESIDENT : Veuillez vous asseoir. M. le professeur Zimmermann, vous avez la parole.

M. ZIMMERMANN : Merci, Monsieur le président.

45. Mr. President, Members of the Court. Before the break, I did address the general scope of the ICSFT and showed that it does not cover issues of State responsibility, and that the Court, accordingly, does not have prima facie jurisdiction to deal with those issues. Let me now move on to the specific scope and content of Article 18 of the ICSFT on which Ukraine relies so heavily.

II. Content of Article 18 of the ICSFT

46. Unlike more generalized obligations the duty to prevent, as laid down in Article 18 of the ICSFT, is significantly limited and it is limited in various respects.

47. *First*, States are only under an obligation to *co-operate* in the prevention of the specific acts of financing criminalized by the ICSFT. Those private acts, as shown, of financing must take place with the requisite knowledge or intent of acts of terrorism, as narrowly defined in Article 2, paragraph 1, of the ICSFT. Put otherwise, Article 18 — unlike other suppression conventions, but also in contrast to the Genocide Convention — does not contain an obligation to prevent such acts per se.

48. *Second*, States are merely under an obligation to take all "practicable measures" which further limits the underlying obligation.

49. *Third*, the aforesaid obligation only applies as far as the prevention of preparations for acts prohibited by the ICSFT, and undertaken in their own respective territory are concerned, but does not apply beyond.

50. *Fourth*, a State party of the ICSFT may only be held responsible for breaching Article 18 if the acts prohibited by the Convention were actually committed[76], which — as previously shown by Mr. Wordsworth — has not been plausibly shown by Ukraine.

51. Finally, *fifth*, the obligation is only triggered, to paraphrase your Judgment in the *Bosnian Genocide* case "at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that [an act prohibited by the ICSFT] will be committed"[77].

52. Thus, taking a holistic look at these various limitations contained in Article 18, it becomes obvious that the underlying obligation to co-operate in order to prevent certain acts is, contrary to what Ukraine has claimed, a very specific one that cannot be compared in content and scope to Article I of the Genocide Convention.

53. As a matter of fact, and as confirmed by a mere reading of the very text of Article 18, read in conjunction with Article 2 of the ICSFT, the obligation to co-operate to prevent is accordingly only triggered if *seven* conditions are *cumulatively* fulfilled, namely provided that:

(1) States have become aware,

(2) of a serious risk,

(3) of private entities,

(4) located in their territory,

(5) which are about to *knowingly* provide or collect funds for acts, which acts

(6) are intended to cause death or injury to civilians not taking part in hostilities, and further provided that

(7) those acts to be financed in turn have the specific purpose to intimidate a population or compel a government.

54. Members of the Court, this constitutes an extremely high threshold in order to eventually find a violation of Article 18 of the ICSFT as far as the obligation to co-operate to prevent is

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[76]See *mutatis mutandis 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. 221, para. 431.

[77]*Ibid.*; see also *idem.*, p. 222, para. 432.

concerned, and Ukraine has to provide a plausible case, as required by your recent jurisprudence[78] with regard to each and every one of those seven requirements.

55. This brings me to my next point. I will now demonstrate that Ukraine has not fulfilled its obligation to bona fide negotiate required by Article 24 of the ICSFT, which constitutes yet another reason why the Court lacks prima facie jurisdiction.

III. Ukraine has not fulfilled its obligation to bona fide negotiate

1. Applicable standard

56. Members of the Court, Article 24 of the ICSFT contains a *cumulative* requirement to negotiate as to both the substance of an alleged dispute arising under the convention, and, should those negotiations fail, to then negotiate in good faith as to the possible set-up of an arbitral tribunal to eventually solve such dispute.

57. This confirms that the ICSFT perceives the Court as a last resort to which State parties may only turn once they have bona fide exhausted other possibilities of dispute settlement, and as the Court has confirmed, such words in a compromissory clause "must be given effect"[79].

58. To quote the Court, negotiations require "a genuine attempt . . . to engage in discussions with the other . . . party"[80]. Even where there exists "no express requirement that . . . parties negotiate in good faith, such obligation is implicit"[81].

59. At the same time, the requirement of bona fide negotiations is not satisfied if the party concerned "insist[ed] upon its own position without contemplating any modification of it"[82].

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[78] Cf. *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia), Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014*, p. 152, para. 22; *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 18, para. 53; *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Request for the Indication of Provisional Measures, Order of 7 December 2016*, para. 71.

[79] Cf. *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. 125, para. 133.

[80] *Ibid.*, p. 132, para. 157.

[81] *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia* v. *Greece), Judgment, I.C.J. Reports 2011 (II)*, p. 685, para. 131.

[82] *Ibid.*, p. 685, para. 132, quoting *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 47, para. 85; cf. also *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 67, para. 146.

60. It is against this background that I will now first demonstrate that Ukraine did not negotiate in good faith as to the substance of its alleged claim that the Russian Federation had allegedly violated its obligations under the ICSFT.

2. Lack of bona fide substantive negotiations on the part of Ukraine

61. Throughout the exchange of diplomatic Notes, the Ukrainian side constantly insisted on its own position without showing any kind of willingness to engage in a meaningful discussion with the Russian Federation on issues falling within the scope of the ICSFT.

62. In particular, Ukraine consistently came forward with allegations well beyond the scope of the ICSFT. As a matter of fact, almost each and every of Ukraine's diplomatic Notes — allegedly meant to address issues arising under the ICSFT, and under the ICSFT only — were closely interwoven with accusations against the Russian Federation connected to the prohibition of the use of force[83].

63. Besides, Ukraine was simply expecting Russia to fulfil Ukraine's demands by — and I am now quoting from the various diplomatic Notes of Ukraine — demands by "requir[ing]", "call[ing] upon", "strongly demand[ing]", "reiterat[ing] its calls" or "strongly urg[ing]" the Russian Federation to change its behaviour[84], while at the same time frequently per se "condem[ning]" such behaviour.

64. Those expressions were not even meant to further an atmosphere for bona fide negotiations. They rather aimed at escalating tensions between the Parties by bringing forward allegations unconnected with the ICSFT[85].

65. What is more is that the Russian Federation had on several occasions requested Ukraine to provide evidentiary material and comprehensive information and data in order to be able to verify Ukraine's claims and, should they have proven correct, take appropriate measures required by the ICSFT[86]. Yet, unfortunately, Ukraine did not follow up on such

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[83]See, e.g., Ukraine's diplomatic Notes Nos. 610/22-110/1591; 610/22-110-1804; 610/22-110/1827; 610/22-110/1833; 72/22-620-3008; 72/22-620-3114; 610/22-11043; 72/22-620-48 (constantly referring to alleged "acts of aggression" committed by the Russian Federation).

[84]See, e.g., Ukraine's diplomatic Notes Nos. 610/22-110/1591; 610/22-110/1695; 610/22-110-1798; 610/22-110-1804; 610/22-110-1805; 610/22-110-1827; 610/22-110-1833.

[85]As pointed out by Russia in its diplomatic Note 16599/dnv.

[86]See diplomatic Note No. 13355/dnv; No. 384/dnv.

requests[87] and, at some point, suddenly proclaimed "that further attempts to resolve the dispute through negotiations will be fruitless"[88], although the Parties were just in the course of agreeing on yet another round of negotiations, rendering the dialogue pointless already before the further discussions had even started.

3. Lack of bona fide negotiations on the set-up of an arbitration on the part of Ukraine

66. Mr. President, the very same holds true as far as the negotiations on the possible set-up of an arbitral tribunal is concerned.

67. Let me just focus, given time restraints, on three points, all of which suffice, however, to demonstrate that Ukraine had not entered into a bona fide effort to try to set up an arbitral tribunal as required by Article 24 of the ICSFT.

68. For one, Ukraine had, time and again, taken the position that an *ad hoc* chamber of this Court should be created which Ukraine perceived to constitute an arbitral tribunal within the meaning of Article 24 of the ICSFT[89]. Obviously, such position is incompatible with Article 27 of this Court's Statute[90]. Notwithstanding that the Russian Federation had informed Ukraine that such chamber could not constitute an arbitration within the meaning of Article 24 ICSFT, Ukraine nevertheless continued to raise the issue time and again.

69. A second issue related to the implementation and enforcement of a possible arbitral award. Ukraine had put forward as one of its fundamental negotiation positions on which in Ukraine's own words, "the parties *have to* agree"[91], the idea that any such award ought to be subject to the Security Council's powers under Article 94 of the United Nations Charter.

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[87]See No. 72/23-620-2674, No. 13457/dnv.

[88]See Ukraine's diplomatic Notes Nos. 72/22-620-954 and 72/22-620-1806.

[89]Ukrainian-Russian Bilateral Consultations of 18 Oct. 2016, statement by Jonathan Gimblett, judge's folder tab 27; a full transcript of the meeting can be found in the Dossier, Vol. II, tab. 2.

[90]Cf., *inter alia,* P. Palchetti, Art. 27, marginal note 3, in: A Zimmermann *et al.* (eds.), *The Statute of the International Court of Justice* (2nd ed., 2012).

[91]See Ukraine's "core principles" contained in "Document on ICSFT Organization of Arbitration by Ukraine," doc No. 72/22-194/510-2518 of 2 Nov. 2016, preface to para. 1, judge's folder, tab 26.

70. Yet, this provision, as you can now see, in obvious contrast to Article 13 paragraph 4 of the Covenant of the League, only provides for a role for the Security Council to enforce decisions of this Court, but *not* arbitral awards[92].

71. Besides, Ukraine had further insisted that with regard to any such action to be eventually taken by the Security Council the voting requirements, as laid down in the Charter for any action by the Security Council, ought to be disregarded[93]. Ukraine hereby effectively wanted to circumvent the relevant Charter provisions which enjoy supremacy vis-à-vis other treaty régimes by virtue of Article 103 of the Charter.

72. Finally, one would have expected *Ukraine* to submit concrete text proposals for an arbitration agreement given that it claimed a dispute had arisen under the ICSFT. Yet, it was the Russian Federation which, time and again, submitted full drafts for an arbitration agreement, and ensuing rules of procedure in which the Russian Federation addressed the concerns of Ukraine — and yet never received any specific comments[94] on such draft arbitration agreement.

73. I therefore respectfully submit to you that Ukraine perceived both, the obligation to negotiate on the merits of its claims, and the one to negotiate on the set up of an arbitral tribunal foreseen in Article 24 of the ICSFT as mere empty shells without any real meaning. It should not be rewarded by the Court for such attempt to circumvent the obligations Ukraine had entered into when it ratified the ICSFT.

74. This brings me now to the issue of a lack of "serious" or "real" risk of irreparable prejudice to specific rights under the ICSFT.

IV. Lack of "serious" or "real" risk of irreparable prejudice to specific rights under the ICSFT

75. In that regard, there are three important points that Ukraine unfortunately passed over yesterday.

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[92]Cf., K. Oellers-Frahm, Art. 94, marginal note 1, in: A Zimmermann *et al.* (eds.), *The Statute of the International Court of Justice* (2nd ed., 2012).

[93]See Ukraine's "core principles" contained in "Document on ICSFT Organization of Arbitration by Ukraine," Doc No. 72/22-194/510-2518 of 2 Nov. 2016, para. 6, judge's folder tab 26.

[94]See Exchange of diplomatic Notes, Dossier Vol. II, tab. 2 and especially Russia's Note No. 16866/dsng, Dossier Vol. III.1, tab 1.

76. *First*, all the incidents of indiscriminate shelling relied on by Ukraine in paragraph 7 of its request predate the Minsk II package of measures, which has already been addressed. While Minsk II might have not been fully implemented yet, it nevertheless remains a crucial factor when it comes to the assessment of risk in relation to a request for provisional measures that is based on specific events that *pre-date* this agreement. This is because it has had a very real impact on the ground in terms of reducing the number of deaths and injuries to civilians caused by indiscriminate shelling.

77. *Secondly*, however, and even more important there are ongoing attempts to bring about a durable ceasefire, and on 1 March 2017 there was a meeting of the Trilateral Contact group at which "the sides reiterated their commitment to the full withdrawal of heavy weapons"[95] from the relevant area.

78. Finally, *third*, specific steps have been taken to remove, or alleviate, the risk of certain of the acts that Ukraine complains of:

— As to the shooting down of MH17, since the closure of airspace over East Ukraine in July 2014 already, there is no ongoing risk to civilian aircraft anymore.

— As to the specific measure requested by Ukraine that "[t]he [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", there has in fact been an OSCE observation mission at two checkpoints (Donetsk and Gukovo) since late July 2014 which was established pursuant to an OSCE decision[96], following op on an invitation by the Russian Federation.

79. Accordingly, there is no risk of irreparable harm to rights specifically protected under the ICSFT, that is, the right not to be exposed to private funding of acts of terrorism, as narrowly defined by Article 2 of the ICSFT.

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[95] 'Press Statement of Special Representative of OSCE Chairperson-in-Office Sajdik after meeting of the Trilateral Contact Group on 1 March 2017', Minsk, 2 March 2017.

[96] OSCE, Decision No. 1130: Deployment of OSCE Observers to Two Russian Checkpoints on the Russian-Ukrainian Border, PC/DEC. 1130, Decision of 24 July 2014, judge's folder, tab 29.

80. What is more, the risk alleged by Ukraine does not take into account the significant political developments and changes which have taken place since February 2015, nor does it take into account Ukraine's own role in the risks on which it relies.

V. Lack of urgency

81. This brings me to the obviously closely related point on urgency. *First*, the issue of urgency must, just like the risk of irreparable harm, be considered by reference to the specific terms of Article 18 of the ICSFT on which Ukraine relies, i.e., there must be urgency with respect to inter-State co-operation with respect to the private financing of acts of terrorism.

82. And accordingly, it is not any alleged urgency with respect to the need for restraint in an ongoing armed conflict in which all parties appear to be in breach of IHL that is relevant, given that the Court's jurisdiction and the Court's prima facie jurisdiction under Article 24 of the ICSFT does not cover such violations of international humanitarian law, as such.

83. *Secondly*, there is no urgency anymore as far as the safe flight of civilian aircraft over eastern Ukraine is concerned. I have already addressed that.

84. *Thirdly*, the specific acts to which Ukraine refers at paragraph 7 of its Request all took place approximately two years ago.

85. *Fourth*, Russia submits that there is an imperative need to demonstrate sensitivity to the ongoing political processes, and that the Court should refrain from indicating measures, which would undermine such processes and/or have a negative effect on the affected population.

86. The Court's previous pronouncements indeed demonstrate that the Court takes into account, and does not interfere with, ongoing political processes, including before the Security Council, that seek a peaceful resolution of an armed conflict situation. Let me just refer you, by way of one example, to the *Cameroon* v. *Nigeria* case, where the Court took into account the fact that the Security Council had already called upon the parties to respect the previously agreed ceasefire[97].

[97] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996 (I),* pp. 23-24, paras. 45-49. See also *Aegean Sea Continental Shelf (Greece* v. *Turkey), Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976*, pp. 12-13, paras. 37-41.

87. In parallel, it is respectfully submitted that the Court ought to take into account, and not interfere with, the Minsk II package of measures. This is especially so since the Security Council remains seised of the situation in east Ukraine and has both "endorse[d]" the package of measures and called on all parties to "fully implement" them[98]. Indeed, Ukraine itself continues to seek a resolution of the conflict through the Security Council[99].

88. The Court should also refrain from ordering measures which would have a negative effect on the civilian population of the territories controlled by the LPR and DPR. For example, Ukraine specifically requests that "[t]he [Russian Federation] shall halt and prevent all transfers from the territory of the [Russian Federation] of money . . . vehicles, [or] equipment . . ." to the DPR and LPR[100]. Such measure, if adopted, would have a negative effect on the civilian population of the DPR and LPR. It would also undermine various aspects of implementation of the Minsk process given that Minsk I, paragraph 8, calls to "[a]dopt . . . measures aimed at improving the situation in Donbass"[101], while Minsk II, paragraph 7, confirms the need to "[e]nsure safe access, delivery, storage, and distribution of humanitarian assistance to those in need . . ."[102].

VI. Concluding remarks

89. Mr. President, members of the Court, let me conclude.

90. It might very well be advisable to, in the future, eventually adopt a comprehensive convention against terrorism. But that is a matter of the future development of international law, while the Court is bound to apply the current international *lex lata*, and namely the ICSFT as it currently stands.

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[98]Security Council Resolution 2202 (2015), 17 February 2015, UN Doc. S/RES/2202a (2015); UNSC, 'Security Council Press Statement on Deterioration of Situation in Donetsk Region, Ukraine', SC/12700, 31 January 2017, judge's folder, tab 28.

[99]See Security Council meeting of 2 February 2017 on letter dated 28 February 2014 from Permanent Representative of Ukraine to the United Nations addressed to the President of the Security Council (S/2014/136), S/PV/7876.

[100]Request for the Indication of Provisional Measures Submitted by Ukraine, para. 22 *(c)*.

[101]'Protocol on the results of consultations of the Trilateral Contact Group', Minsk, 5 September 2014 and 'Memorandum of 19 September outlining the parameters for the implementation of commitments of the Minsk Protocol of 5 September 2014' (collectively "Minsk I").

[102]'Package of Measures for the Implementation of the Minsk Agreement', Ann. I to Security Council Resolution 2202 (2015) ("Minsk II").

91. I submit to you that the very fact that the negotiations on such a comprehensive instrument have, at least so far, not led to any concrete result, is proof enough that States are not willing, or simply not able, to agree on such an instrument.

92. What Ukraine is now proposing to the Court is to, by way of interpretation and through the backdoor, turn the ICSFT into such a comprehensive convention that it was never meant to be.

93. Is that really what States had in mind when they negotiated, adopted and later ratified the ICSFT? Is that really what States had in mind?

94. Additionally, Ukraine attempts to have the Court adopt provisional measures on that basis

— in disregard of the narrow definition of terrorism contained in the ICSFT, in which regard Ukraine not even submitted a plausible case, as demonstrated by Mr. Wordsworth;

— in disregard of the procedural requirements of Article 24 of the ICSFT,

as well as finally also

— in disregard of the strict requirements for provisional measures developed in your jurisprudence.

95. Mr. President, this concludes Russia's first round of argument on Ukraine's request for provisional measures so far as concerns the ICSFT.

96. I would therefore now ask you, Mr. President, to be so kind and call upon the Agent of the Russian Federation, Mr. Luk*i*yantsev.

LE PRESIDENT : Je donne maintenant la parole à M. Lukiyantsev, agent de la Fédération de Russie.

Mr. LUKIYANTSEV: Mr. President, distinguished Members of the Court, it is a great honour for me to address this Court on behalf of my country.

INTRODUCTION

1. I will now address the second basis for the jurisdiction of this Court invoked by Ukraine — the International Convention on the Elimination of all forms of Racial Discrimination (CERD). Ukraine has requested the Court to impose provisional measures ostensibly "to protect

basic human rights" of the residents of Crimea from discrimination. However the text of the Request is full of terms such as "aggression", "occupation" or "illegal referendum"[103].

2. Moreover, whereas Ukraine is now seeking to invoke CERD with respect to Crimea, for years Ukraine has demonstrated a long-standing record of discrimination of Crimean Tatars in Crimea[104], and it continues with discrimination on the territory under its authority.

3. Ukraine has also condoned measures to discontinue the water supply to the peninsula in the agricultural season and also supports those who established the so-called "civil blockade"[105] and those who demolished electricity lines[106] supplying the peninsula. Ukraine now requests the Court to consider as discriminatory the ban on an organization whose leaders support and implement such measures[107].

4. All this shows that the goal of the application has nothing to do with CERD and the protection of human rights — it is about the status of Crimea, which is not relevant for this case brought under Article 22 of the Convention. Russia does not dispute the applicability of CERD in the territory of Crimea.

5. During the hearing we shall demonstrate that there are no plausible grounds to believe that the Russian Federation conducts a "campaign of cultural erasure" — a term invented and used only by the Applicant[108]. Russia undertakes great efforts to promote the harmonious development of all ethnic groups in Crimea. That stands in sharp contrast to how the situation was prior to 2014. Russia's efforts are undertaken despite the difficulties that Ukraine is seeking to impose by its measures against the residents of Crimea.

6. Professor Forteau will further explain why the Request does not meet applicable legal requirements.

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[103]The Request for Provisional Measures, paras. 1, 3 and 11.

[104]Tab 30.

[105]See tab. 31.

[106]See tab 31.

[107]The Request for Provisional Measures, para. 12.

[108]The Request for Provisional Measures, para. 11.

SITUATION IN CRIMEA PRIOR TO 2014

7. In its Application, Ukraine asserts that Crimean Tatars "witnessed a cultural re-birth under Ukrainian sovereignty"[109]. Moreover, in Ukraine's observations yesterday it was asserted that Crimean Tatars are particularly vulnerable since they have lost the protection of the Government of Ukraine[110], and that Ukraine has never been known for ethnic tensions[111].

8. These statements are not accurate. The CERD Committee repeatedly found that Ukraine had been discriminating Crimean Tatars for decades when Crimea was under its authority, as demonstrated by citations of the Committee in your folder[112].

9. Most recently in 2016 the CERD Committee concluded that Crimean Tatars who went to regions under the authority of Ukraine after 2014 "face difficulties with regard to access to employment, social services and education and lack support"[113]. The dubious record of Ukraine in protecting national minorities' rights in Crimea before 2014, or even currently on its territory, is further confirmed by the latest 16th Office of the High Commissioner for Human Rights (OHCHR) report on the situation in Ukraine[114].

CURRENT SITUATION IN CRIMEA

10. Mr. President, distinguished Members of the Court, Russia takes substantive measures to support the Crimean Tatar and Ukrainian communities and promote their culture in Crimea despite the financial crisis, despite efforts described above to impair access to basic commodities. I would submit that such efforts had never been undertaken in this territory.

11. According to the census conducted more than half a year after the March 2014 reunification with Russia, 277,336 Tatars, including Crimean Tatars and 344,515 Ukrainians live in Crimea — a picture clearly inconsistent with allegations of "cultural erasure" painted by

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[109] Application instituting proceedings (*Ukrain*e v. *Russian Federation)*, para. 85.

[110] CR 2017/1, para. 46 (Gimblett).

[111] CR 2017/1, para. 11 (Zerkal).

[112] Tab 30.

[113] Tab 36: Committee on the Elimination of Racial Discrimination. Concluding observations on the twenty-second and twenty-third periodic reports of Ukraine, adopted by the Committee at its ninetieth session (2-26 August 2016 (http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/UKR/CERD_C_UKR_CO_22-23_24987_E.pdf).

[114] Tab 37: Report on the human rights situation in Ukraine 16 August to 15 November 2016, published on 8 December 2016, (http://www.ohchr.org/Documents/Countries/UA/UAReport16th_EN.pdf).

Ukraine[115]. What is more in contrast with what the Court is asked to believe, more than 1 million citizens of Ukraine in total have moved to Russia after 2014. There are currently 2.***5*** million citizens of Ukraine on the territory of the Russian Federation[116].

12. Prominent leaders of the Crimean Tatar and the Ukrainian communities of Crimea explicitly disagree with the accusations of discrimination, stating that there is no oppression on ethnic grounds or interethnic conflicts in Crimea and that "the reunion of Crimea with Russia prompted the restoration of the historical justice that the Crimean Tatar people has awaited for 70 years"[117]. There is a number of statements and interviews of community leaders in Crimea[118], as well as of foreign nationals who visited Crimea on different occasions, that you will find in your folder[119].

13. For the first time a presidential decree was adopted on the rehabilitation of the Crimean Tatar people and providing support for their revival and development, granting them specific social benefits[120]. This measure has been long awaited by Crimean Tatars and had never been taken by Ukraine.

14. The Russian government has also approved the investment of 708 billion rubles (over 10 billion euros) into the development of Crimea in 2015-2020, with more than 10 billion rubles (over 150 million euros) specifically earmarked for the development of the Crimean Tatar community, including for organizing cultural events and publication of literature in the Crimean Tatar language[121].

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[115]Tab. 38: The results of 2014 population census in the Republic of Crimea and the city of Sevastopol, (http://www.gks.ru/free_doc/new_site/population/demo/perepis_krim/perepis_krim.html).

[116]Tab 39: Excerpt from the interview of O. Kirillova, Head of the Principal Department for Migration Issues of the Ministry of the Interior of the Russian Federation.

[117]Tab 40.

[118]Tab 40.

[119]Tab 44.

[120]Tab 45: Decree of the President of the Russian Federation No. 268 of 21.04.2014, "On rehabilitation of the Armenian, Bulgarian, Greek, Crimean Tatar and German Peoples and State support of their revival and development" http://kremlin.ru/acts/bank/38356.

[121]Tab 46: Measures taken on social development and arrangement of infrastructure of the repressed peoples' areas of compact settlement in accordance with, the Federal Target Program "Social-economic development of the Republic of Crimea and the city of Sevastopol until 2020" approved by the Decree of the Government of the Russian Federation on 11 August 2014 No. 790 (http://pravo.gov.ru/proxy/ips/?docbody=&nd=102357218).

15. One hundred and fifty Crimean Tatars have been elected to Crimean State organs as a result of the September 2014 elections. In the Ministry of the Interior of the Republic of Crimea, there are 56 per cent Russians, 29 per cent Ukrainians and 11 per cent Crimean Tatars. In the Prosecutor's office of the Republic of Crimea, there are 71 per cent Russians, 16 per cent Ukrainians and 10 per cent Crimean Tatars. The heads of the institutions of general education are 548 Russians, 180 Ukrainians and 48 Crimean Tatars. Teaching staff are 27,755 Russians, 4,996 Ukrainians, 5,552 Crimean Tatars.

CHARACTER OF UKRAINE'S APPLICATION

16. Mr. President, turning to the content of the Application currently before the Court, I would like, first of all, to draw the Court's attention to what is missing from it and from Ukraine's presentation yesterday.

17. Ukraine does not allege that any laws of the Russian Federation discriminate against Crimean Tatars or Ukrainians. Neither does Ukraine provide any examples of hate speech.

18. What is more striking is that Ukraine has failed to produce a single piece of primary evidence — whether documents or contemporary statements — supporting for instance allegations of ethnic-based intimidation. This is despite the fact that, according to the Applicant, Ukraine has been collecting evidence for years and, on Ukraine's case, had access to tens of thousands of Crimean residents who moved to Ukraine.

19. It is worth noting that the two affidavits that were included at the last moment in Ukraine's submission cannot be viewed as primary evidence. The affidavit of Mrs. Lutkovska is just another hearsay document[122], produced by a Ukrainian official. Mr. Chubarov is also a member of Ukrainian Parliament[123], whose affidavit in its major part relates to issues not relevant for this case — deportation of Crimean Tatars in the 1940s — or to circumstances he cannot have primary knowledge of.

[122] Affidavit of Testimony of V. Lutkovska (27 Feb. 2017), Ukrainian supporting documents (Ann. 83).

[123] Affidavit of Testimony of R. Chubarov (21 Feb. 2017), Ukrainian supporting documents (Ann. 81).

20. The Applicant relies heavily on the views of international organizations. However, it should be born in mind that the views on the status of Crimea often prejudge the attitude towards the situation in Crimea itself.

21. A number of documents of international organizations which, at first glance, address the human rights situation in Crimea are in fact mostly concerned with its status. An example of such a document is United Nations General Assembly resolution "On the human rights situation in Crimea", adopted by a split vote with almost two-thirds of the Member States either abstaining or voting against[124]. You will see that it contains such terminology as "occupation" which Ukraine put as the core issue of the resolution according to its own statement[125].

22. As to reports of OHCHR or OSCE relied upon by Ukraine, these institutions have no presence on the ground in Crimea, since Ukraine insists that they can visit the peninsula only as a part of Ukraine. In particular, the 16th OHCHR report on the situation in Ukraine is based on a total of 176 interviews[126], predominantly on Ukraine, not Crimea. The major part of the report as well as of these interviews relate to the situation in Ukraine, not Crimea.

23. The Russian Federation puts high trust in this Court, the main judicial organ of the United Nations that is called to solve legal disputes based on legal criteria and independent review of applicable facts.

24. The Court should approach with extreme caution information used in the application. Ukraine simply misstates the facts. The most glaring example is the number of Crimean Tatars living in Crimea.

25. In the Request it was asserted that the number of Crimean Tatars living on the peninsula has dropped catastrophically — more than five times — after the change of the status of Crimea — from 243,400 to 42,254[127]. If it were true, such a situation would indeed be tragic. But the

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[124]Resolution 71/205 adopted by the General Assembly on 19 December 2016. Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol (Ukraine) (http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/205).

[125]MFA Statement on the adoption of the UN resolution, "Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol (Ukraine)", (http://mfa.gov.ua/en/press-center/news/53305-zajava-mzs-shhodo-uhvalennya-rezolyuciji-ga-oon-stan-z-pravami-lyudini-u-avtonomnij-respublici-krim-ta-misti-sevastopoly-ukrajina).

[126]Para. 2, Report on the human rights situation in Ukraine 16 August to 15 November 2016, http://www.ohchr.org/Documents/Countries/UA/UAReport16th_EN.pdf.

[127]Request for Provisional Measures, para. 13.

Applicant has simply picked up on the wrong figures from the statistics, quoting the number of Tatars not of Crimean Tatar origin.

26. Yesterday the Applicant tried to adjust the numbers asserting that there are 230,000 Crimean Tatars[128], and quoted the wrong number again. There are 232,340 Crimean Tatars currently living in Crimea[129]. Moreover since Ukraine made the point that the difference between Crimean Tatars and Tatars is "a confusing distinction", we can quote the correct number of Tatars living in Crimea, which is 277,336. Thus, the overall number of Tatars currently living in Crimea is slightly higher than before 2014[130].

27. Yesterday Ukraine also quoted the number of Ukrainians in Crimea seeking to illustrate the "exodus" of Ukrainians from Crimea, and again misstated the numbers. There are not 291,603, but 344,515 Ukrainians in Crimea[131].

28. Statistical data provided by Ukraine regarding educational opportunities in Crimean Tatar and Ukrainian languages are also incomplete and misleading, as will be explained by Professor Forteau.

29. Another kind of information in the Application refers to certain individual alleged violations of human rights. However, to establish discrimination or a "campaign of cultural erasure" it cannot be enough to say that the person whose rights have allegedly been violated belongs to a certain ethnicity. Yet this is precisely what Ukraine does — it presents to the Court a number of incidents involving Crimean Tatars and Ukrainians and says that these by themselves demonstrate discrimination. This relates to instances of missing persons and also the law enforcement activities in the implementation of the law on fighting extremism, like searches and confiscation of literature that will be further addressed by Professor Forteau.

30. The Applicant also alleges that Russian authorities do nothing to investigate cases of missing persons, specifically of Crimean Tatar and Ukrainian origin. Allow me to provide several figures: in 2015 and 2016 law enforcement authorities established the whereabouts of 63 missing

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[128]CR 2017/1, para. 47 (Gimblett)

[129]Tab 38.

[130]Tab 38: The results of 2014 population census in the Republic of Crimea and the city of Sevastopol, (http://www.gks.ru/free_doc/new_site/population/demo/perepis_krim/perepis_krim.html)

[131]*Supra*, note 24.

Crimean Tatars (out of 78 registered cases) and 131 missing Ukrainians (out of 152 cases). During that same period the authorities established the whereabouts of 761 missing Russians (out of 869 registered cases). Hence, all cases of missing persons are being investigated, regardless of national or ethnic origin of those missing.

31. Now I will address the measure that is declared by Ukraine as the culmination of discrimination — the ban on the Mejlis as an extremist organization[132].

32. Ukraine seeks to portray the Mejlis as the sole representation of the Crimean Tatar people. The Mejlis was created by a delegation of representatives of the Crimean Tatar people, called Qurultay, in 1991, which assumed representation of the entire Crimean Tatar people. From the very beginning this organization was based on the exclusive claim of the Crimean Tatar people for self-determination in a sovereign State of Crimea[133]. This claim prompted an immediate reaction of the Supreme Council (the Parliament) of Crimea, which declared the Qurultay unconstitutional[134].

33. Both the Qurultay and the Mejlis consistently opposed themselves to State authorities[135]. One of the consequences of this position was that they have never registered under the laws of Ukraine. That tactic was clearly chosen to avoid responsibility and maintain a self-awarded status of "alternative authorities". Ukraine never recognized the Mejlis as a representative organ of the Crimean Tatars, nor the Crimean Tatars as an indigenous people. The Ukrainian Government took all these decisions after the change of status of Crimea[136].

34. Over time the Mejlis became more and more dependent on violent methods to attain its goals. In 1992 members of the Mejlis were involved in violent actions related to the dispute over land plots in Krasny Ray and also in front of the Supreme Council building leading to casualties[137]. At that time Mr. Dzhemilev declared mobilization and called for the formation of self-defense

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[132]Request for Provisional Measures, para. 12.

[133]Tab 48: Declaration of national sovereignty of the Crimean Tatar people of 28 June 1991, Vol. III, 2, Ann. 1.

[134]Tab 50.

[135]Tabs 49, 51, 52: Mejlis has adopted a Presidium Statement "On the situation in Crimea", Vol. III, 2, Ann. 6, Resolution of the second session of II Quraltay "On the activities of Mejlis of Crimean Tatar people in the period between June 1991 and July 1993", Vol. III, 2, 31 July 1993, Ann. 8.

[136]http://zakon1.rada.gov.ua/laws/show/1140-vii.

[137]Tabs 53 and 59.

units. As a result of these events the Supreme Council of Crimea adopted the decision declaring anti-constitutional "the activities of the Mejlis and its local branches aimed at raising political tensions and promoting of inter-ethnic hatred by organizing mass disorders and calls to overthrow local and state authorities"[138].

35. The then President of Ukraine Kravchuk condemned the violent unlawful actions of persons with extremist positions acting on behalf of the Mejlis, and noted that the Supreme Council of the Republic of Crimea and its structures are the only legal authorities in Crimea[139].

36. In 2014 the Mejlis continued with its violent tactics, now in new circumstances: first in front of the Supreme Council building on 26 February 2014, where the actions of the Mejlis members and supporters, including Mr. Chiygoz, resulted in 2 people dead and 79 injured. On 3 May 2014 a rally organized by Mr. Chubarov to meet Mr. Dzhemilev attacked the Crimean police, physically assaulting several policemen at the border checkpoint near the town of Armyansk. One protester even tried to run over police officers in his car[140].

37. After these events Mr. Chubarov and Mr. Dzhemilev continued their activities from Kiev. On 1 April 2015 Mr. Chubarov said that the "war will end"[141] for them only when Crimea returns to the Ukrainian state. In September 2015 the activists of the Mejlis and the "Right Sector" nationalists blocked the road checkpoints and the railroad, and then, in October and November, cut the supply of energy to Crimea by blowing up the electricity pylons, that had a dramatic effect on the peninsula[142].

38. President Poroshenko called the blockade an "action of public activists of the Crimean Tatar people", "the state authorities — the Ukrainian borders control officers and the Ministry of the Interior — received orders to secure public order and to prevent provocations"[143].

39. The decision to ban the Mejlis was a response to these violent actions and has nothing to do with the ethnicity of its members. Ukraine seeks to present this decision as depriving Crimean

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[138] Tab 54.

[139] Tab 55.

[140] Tab 56.

[141] Tab 56.

[142] Tab 31.

[143] Tab 31: "Poroshenko said that the aim of the blockade is the return of Crimea to Ukraine", 22 Sept. 2015, https://regnum.ru/news/polit/1975787.html.

Tatars of their only representation, which is not correct. The Court decision — by the highest judicial authority in Russia — introducing the ban specifically pointed out that there are 30 other Crimean Tatar organizations in Crimea with more than 20,000 members[144]. Many of these organizations oppose the Mejlis[145].

40. A request of the Applicant to suspend the ban on the Mejlis is indeed a measures, which is not only inappropriate — since it prejudices the issues that cannot be properly considered at this stage of the proceedings — but also will be seriously undermining the state security and public order.

LACK OF GENUINE NEGOTIATIONS

41. Mr. President, distinguished Members of the Court, Ukraine asserted that there had been genuine negotiations between Russia and Ukraine regarding the subject matter of the Application. In reality, Ukrainian officials have been quite clear that Ukraine did not intend to engage in bona fide negotiations and was just "going through the motions"[146].

42. As the Head of the Russian delegation I was present at all three rounds. Each time Ukraine proposed one-day consultations just for a few hours, despite Russia's suggestion to allocate more time. During two rounds a key member of the Ukrainian delegation excused herself even earlier, citing her busy schedule.

43. In December 2016, the Ukrainian delegation abruptly decided to end the consultations, for no apparent reason, and in January filed the Application to the Court. Neither during the last round of consultations in December 2016, nor indeed earlier, did Ukraine even mention that, in its view, the situation was gaining urgency. It did not refer to any particular fact or circumstances that, in its view, required urgent action.

44. Mr. President, distinguished Judges, coming towards the end of my statement I would like to reassure you that the Russian Federation, as a multi-ethnic State according to its Constitution, takes its obligations under the CERD seriously. The harmonious development of all ethnic communities is one of Russia's core national priorities. The Russian Federation is home to

[144]Tab 56.

[145]Tab 57.

[146]Tab 47.

significant Ukrainian and Tatar communities (according to the 2010 census there were more than 5,3 million Tatars and 1,9 million Ukrainians)[147]. The CERD Committee has never expressed any concern with respect to the implementation of their rights.

45. The latest periodic report of the Russian Federation to the CERD Committee, which includes the situation in Crimea, is due for consideration in August this year. We shall enter into dialogue with the Committee in order to follow up on any question which this treaty body established under the CERD could have with Russian policies and practices.

46. Let me conclude by quoting Emirali Ablaev - Mufti and Head of the Spiritual Council of Muslims of Crimea and Sevastopol (one of the most respected organizations of Crimean Tatars in Crimea), elected by the Qurultay in 1999, who said that "never in the last 200 years has there been such a positive attitude towards the Mufitiat of Muslims of Crimea"[148].

Monsieur le président, Mesdames et Messieurs de la Cour, je vous remercie pour votre attention. Monsieur le président, puis-je vous demander de bien vouloir donner la parole au professeur Forteau ?

LE PRESIDENT : Je vous remercie, Excellence. Je donne maintenant la parole à M. le professeur Forteau.

M. FORTEAU : Je vous remercie, Monsieur le président.

ABSENCE DE COMPÉTENCE *PRIMA FACIE* DE LA COUR ET ABSENCE DE FONDEMENT DES MESURES CONSERVATOIRES SOLLICITÉES PAR L'UKRAINE

1. Monsieur le président, Mesdames et Messieurs de la Cour, c'est un honneur et un privilège d'apparaître aujourd'hui devant vous. Il m'incombe ce matin de répondre à la demande en indication de mesures conservatoires relative à la convention CIEDR ; je le ferai à la lumière des importantes clarifications qui viennent d'être apportées.

2. Je commencerai par remarquer que les deux premières mesures conservatoires sollicitées par l'Ukraine[149] ne constituent en réalité qu'une réitération des obligations découlant de la

[147] All Russian census, 2010, http://www.gks.ru/free_doc/new_site/perepis2010/croc/perepis_itogi1612.htm.

[148] Tab 58.

[149] Voir la demande en indication de mesures conservatoires de l'Ukraine, par. 24 *a)* et *b)*.

convention, comme l'a admis d'ailleurs hier M. Gimblett[150]. Ces demandes sont donc privées d'objet propre et ne sauraient donner lieu à des mesures conservatoires. La réitération des obligations des Parties est d'autant moins requise en l'espèce que, à plusieurs reprises, la Russie a officiellement informé l'Ukraine qu'elle entendait bien en Crimée comme ailleurs respecter, de manière rigoureuse, ses engagements au titre de ladite convention[151]. Quant aux autres mesures sollicitées par l'Ukraine, elles ne relèvent pas *prima facie* de la compétence de la Cour, et en tout état de cause, elles ne répondent pas aux conditions fixées par votre jurisprudence.

I. La Cour n'a pas compétence, même *prima facie*, pour connaître de la demande ukrainienne

3. L'Ukraine entend fonder la compétence de la Cour sur l'article 22 de la convention CIEDR. Vous trouverez une copie du texte de la convention à l'onglet n° 60 du dossier des juges.

4. Pour que la Cour ait compétence sur le fondement de l'article 22, plusieurs conditions doivent être réunies. Votre jurisprudence est fermement établie et très stricte sur ce point. La Cour n'a compétence que si un différend existe au jour de l'introduction de l'instance[152], lequel différend doit être établi de manière objective[153] et doit relever *ratione materiae* de la base de compétence invoquée[154]. La Cour a jugé par ailleurs en 2011, dans l'affaire *Géorgie c. Russie*, que l'article 22 établit «des conditions préalables auxquelles il *doit* être satisfait avant toute saisine de la Cour»[155]. L'article 22 dispose en effet que seul peut être porté devant la Cour un différend «qui n'aura pas été réglé par voie de négociation ou au moyen des procédures expressément prévues par ladite convention».

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[150] CR 2017/1, p. 70, par. 50 (Gimblett).

[151] Voir, par exemple, la note diplomatique adressée par la Russie à l'Ukraine le 28 septembre 2015 (*in* Dossier of Documents submitted by the Russian Federation in connection with Ukraine's Request for the indication of provisional measures, No. 11-5).

[152] *Obligations relatives à des négociations concernant la cessation de la course aux armes nucléaires et le désarmement nucléaire, exceptions préliminaires*, arrêt du 5 octobre 2016, par. 42-43.

[153] *Ibid.*, par. 39.

[154] Voir *Plates-formes pétrolières (République islamique d'Iran c. Etats-Unis d'Amérique), exception préliminaire, arrêt, C.I.J. Recueil 1996 (II)*, p. 810, par. 16 ; *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), exceptions préliminaires, arrêt, C.I.J. Recueil 2011 (I)*, opinion individuelle de M. le juge Koroma, p. 185, par. 7.

[155] *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), exceptions préliminaires, arrêt, C.I.J. Recueil 2011 (I)*, p. 128, par. 141 (les italiques sont de nous).

5. Dans son arrêt de 2011, la Cour a défini avec précision les critères qui doivent être remplis pour que la première condition procédurale, celle de la négociation préalable, soit réputée satisfaite[156].

6. Dans le même arrêt, la Cour n'a pas pris expressément position sur le point de savoir si les deux préconditions visées à l'article 22 sont cumulatives ou alternatives[157]. La Cour a toutefois souligné — et c'est significatif — qu'à l'époque où la convention a été rédigée, «l'idée de consentir au règlement obligatoire des différends par la Cour n'était pas facilement acceptable pour nombre d'Etats», ce qui explique que

> «des limitations supplémentaires au recours au règlement judiciaire furent prévues — sous la forme de négociations préalables *et* d'autres procédures de règlement des différends non assorties de délais — dans le but de recueillir une plus large adhésion»[158].

7. Ceci vient confirmer la position défendue par la Russie dans l'affaire *Géorgie c. Russie* selon laquelle les deux préconditions de l'article 22 sont cumulatives. Nous nous permettons de vous renvoyer à cet égard aux passages pertinents des exceptions préliminaires de la Russie et de ses deux tours de plaidoiries orales de 2010, qui gardent toute leur pertinence aux fins de la présente affaire[159].

8. Bien entendu, à ce stade de l'instance, il s'agit seulement d'apprécier si la Cour a compétence *prima facie*. Mais au regard des clarifications apportées ces dernières années, il apparaît que cette compétence *prima facie* n'est pas établie en l'espèce, et cela pour trois séries de raisons.

9. Premièrement, l'Ukraine admet qu'elle n'a pas cherché avant de vous saisir à faire recours aux procédures expressément prévues par la convention et qu'elle n'a donc pas respecté la

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[156] *Ibid*., notamment p. 132, par. 157, et p. 134, par. 162. Voir également *Questions concernant l'obligation de poursuivre ou d'extrader (Belgique c. Sénégal), arrêt, C.I.J. Recueil 2012 (II)*, p. 446, par. 57.

[157] *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), exceptions préliminaires, arrêt, C.I.J. Recueil 2011 (I)*, p. 140, par. 183.

[158] *Ibid.* (Les italiques sont de nous.)

[159] *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), exceptions préliminaires, arrêt, C.I.J. Recueil 2011 (I),* par. 4.57-4.80 ; CR 2010/8, p. 53-60 (Pellet) ; CR 2010/10, p. 23-38 (Pellet). Voir également *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), mesures conservatoires, ordonnance du 15 octobre 2008, C.I.J. Recueil 2008*, opinion dissidente commune de M. le juge Al-Khasawneh, vice-président, et de MM. les juges Ranjeva, Shi, Koroma, Tomka, Bennouna et Skotnikov, p. 404, par. 18.

deuxième précondition fixée à l'article 22[160]. Il est surprenant à vrai dire que l'Ukraine n'ait pas saisi le comité CIEDR de ses allégations alors que les articles 11 à 13 de la convention organisent une procédure spécifique de plainte *interétatique* devant le comité. Il est tout aussi surprenant que l'Ukraine n'ait rien dit hier de cette précondition, alors qu'elle a été longuement débattue dans l'affaire *Géorgie c. Russie*[161]. Lors des échanges diplomatiques, la Russie avait d'ailleurs expressément rappelé à l'Ukraine le 27 novembre 20*1*4 qu'elle devait suivre cette procédure dont l'effet utile est évident en cas de différend entre Etats (voir document n° 61 du dossier des juges). Cette procédure permet notamment au comité puis à une commission de conciliation d'établir les faits en demandant si besoin est aux parties de fournir toute information pertinente, ce que le comité est au demeurant très bien placé pour faire dès lors qu'au titre de l'examen des rapports périodiques des Etats prévu à l'article 9 de la convention, il est pleinement informé des mesures adoptées par les Etats en application de la convention, mesures dont il assure le suivi régulier.

10. Qui plus est, le comité peut déclencher la procédure d'intervention d'urgence lorsqu'une situation exige «une attention immédiate pour empêcher ou limiter l'extension ou le nombre de violations graves de la Convention»[162]. Cette procédure d'urgence est précisément définie et vise à produire un plein effet, sur la base en particulier des directives adoptées sur ce point par le comité en 2007[163].

11. Dans la mesure où l'Ukraine n'a pas saisi le comité en vertu de l'article 22, la Cour n'a manifestement pas compétence en la présente affaire.

12. Deuxièmement, aucun élément ne démontre qu'il y aurait eu une «véritable tentative de négocier»[164]. Certes, pendant deux ans et demi, des échanges ont eu lieu entre les parties, sous la forme de notes verbales et de trois séries de réunions. Mais comme l'agent de la Russie vient de l'indiquer, l'Ukraine ne s'est engagée dans ce processus que de manière formelle ; elle s'est limitée

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[160] Voir requête, par. 23.

[161] *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), exceptions préliminaires, arrêt, C.I.J. Recueil 2011 (I)*, notamment p. 121, par. 119.

[162] Prévention de la discrimination raciale, alerte rapide et procédure d'urgence : document de travail adopté par le comité pour l'élimination de la discrimination raciale, A/48/18, annexe III, 1993, par. 8 ii).

[163] Directives applicables aux procédures d'alerte rapide et d'intervention d'urgence, Rapport annuel A/62/18, annexe, chap. III, 2007 ; voir aussi http ://www.ohchr.org/EN/HRBodies/CERD/Pages/EarlyWarning Procedure.aspx#about.

[164] *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), exceptions préliminaires, arrêt, C.I.J. Recueil 2011 (I)*, p. 133, par. 159.

à faire état d'un certain nombre d'accusations, qui n'ont cessé d'évoluer d'une note verbale à une autre, ce qui signifie — et c'est important — que les positions des deux parties n'ont pas pu jusqu'à maintenant être arrêtées définitivement sur les questions en litige[165]. L'Ukraine n'a par ailleurs pas pris la peine d'étayer ses accusations par des documents probants, ni de dédier le temps nécessaire à l'examen par les deux parties de ses allégations. Enfin, il résulte explicitement des derniers échanges entre les parties qu'elles n'avaient pas exclu la possibilité de négociations futures[166]. Dans ces circonstances, il est manifeste que la condition de négociation préalable telle qu'elle est circonscrite par votre jurisprudence n'est pas non plus remplie.

13. Troisièmement, la Cour ne peut ordonner de mesures conservatoires que «si les dispositions invoquées par le demandeur semblent *prima facie* constituer une base sur laquelle sa compétence pourrait être fondée»[167]. Il appartient donc à l'Ukraine de démontrer que, *prima facie*, les faits qu'elle allègue sont susceptibles de constituer des violations des dispositions de la convention CIEDR. Deux observations fondamentales s'imposent ici.

14. Tout d'abord, il est important de rappeler que la convention n'interdit que les *discriminations*. Cela signifie qu'une différence de traitement doit être établie pour que les dispositions de la convention trouvent à s'appliquer[168]. Cela signifie notamment que les différents droits visés dans les différents alinéas de l'article 5 de la convention ne sont pas protégés en soi, contrairement à la fausse impression qu'a voulu créer hier M. Gimblett[169] ; ce que protège la convention dans son article 5, c'est uniquement *l'absence de discrimination* «dans la jouissance» de ces droits.

15. Il ne suffit donc pas d'alléguer qu'un préjudice aurait été subi par une personne ou que l'un de ses droits aurait été atteint. Il faut démontrer que ce préjudice ou cette atteinte à un droit *est de nature discriminatoire*. Il appartient à ce titre à l'Ukraine d'établir que la Russie aurait adopté

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[165] Voir à cet égard *(a contrario) Questions concernant l'obligation de poursuivre ou d'extrader (Belgique c. Sénégal), arrêt, C.I.J. Recueil 2012 (II)*, p. 446, par. 59.

[166] Voir la note verbale du 28 septembre 2015 (*in* Dossier of Documents submitted by the Russian Federation in connection with Ukraine's Request for the indication of provisional measures, n° 11-5).

[167] *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), mesures conservatoires, ordonnance du 15 octobre 2008, C.I.J. Recueil 2008*, p. 377, par. 85.

[168] Voir CIEDR, recommandation générale XIV concernant le paragraphe 1 de l'article premier de la convention, quarante-deuxième session (1993), A/48/18, par. 2.

[169] CR 2017/1, p. 57, par. 11 (Gimblett).

des mesures qui affectent de manière discriminatoire les communautés tatares et ukrainiennes *en comparaison avec le sort réservé à d'autres résidents de la Crimée*. Le test de comparabilité est, de fait, au cœur du principe de non-discrimination[170].

16. Ensuite, la convention n'interdit les discriminations que pour autant qu'elles sont «fondées sur» un certain nombre de motifs limitativement énumérés à l'article 1, à savoir «la race, la couleur, l'ascendance ou l'origine nationale ou ethnique». Il appartient donc au demandeur de prouver que le motif de la différence de traitement, si elle existe, tient à la race ou l'origine nationale ou ethnique des personnes concernées. Toute différence de traitement reposant sur un autre motif n'est pas prohibée par la convention.

17. *Prima facie*, les mesures provisoires sollicitées par l'Ukraine ne tiennent pas compte de ces éléments. En ce qui concerne tout d'abord les droits découlant des articles 3, 4 et 6 de la convention dont l'Ukraine sollicite la protection à titre conservatoire[171], l'Ukraine n'a formulé aucune allégation précise ni soumis aucun élément factuel dans sa demande. L'Ukraine a gardé d'ailleurs hier le silence le plus complet sur ces trois dispositions. En ce qui concerne ensuite les articles 2 et 5 de la convention, l'Ukraine se contente de dresser une liste d'allégations de violations de droits de l'homme qui auraient affecté des personnes d'origine tatare ou ukrainienne. Mais à aucun moment l'Ukraine n'explique en quoi ces allégations seraient constitutives de *discrimination raciale*.

18. L'Ukraine affirme par exemple que les mesures préventives, d'enquête ou de poursuite pénale que les autorités russes ont été amenées à prendre contre certaines personnes ou entités tatares ou ukrainiennes relèveraient d'une campagne de discrimination raciale[172]. L'examen des statistiques disponibles dément toutefois l'existence d'une différence de traitement. Vous trouverez les statistiques pertinentes à l'onglet n° 62 du dossier des juges. Ce document montre que les personnes d'origine tatare ou ukrainienne n'ont pas fait l'objet en matière pénale d'un traitement discriminatoire par rapport aux autres habitants de la Crimée. Au contraire,

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[170] Voir L. Hennebel, H. Tigroudja, *Traité de droit international des droits de l'homme*, Pedone (Paris), 2016, p. 757 et suiv.

[171] Demande en indication de mesures conservatoires, par. 17.

[172] Voir requête, p. 24, sect. C, et par. 81.

proportionnellement, il apparaît qu'elles ont fait l'objet de moins de poursuites pénales que les autres habitants.

19. Les mesures de fouille, les mesures préventives ou les poursuites pénales que l'Ukraine reproche aux autorités de Crimée d'avoir diligentées contre certaines personnes d'origine tatare ou ukrainienne poursuivent par ailleurs un but légitime, à savoir la lutte contre l'extrémisme — lutte que la Russie mène partout sur son territoire contre toute personne impliquée dans de tels actes[173]. Dans la très grande majorité des cas, les mesures préventives et pénales ont visé des personnes ayant un lien avec l'organisation Hizb ut-Tahrir al-Islami, qui est considérée comme extrémiste par la Russie. Comme l'indiquent les documents soumis par l'Ukraine, les mesures prises par exemple tout récemment, en janvier dernier, contre MM. Kurbedinov et Polozov, dont l'Ukraine a prétendu hier qu'ils auraient fait l'objet de mesures d'arrestation discriminatoires[174], avaient un lien avec les activités de cette organisation[175]. Or, celle-ci est interdite en raison de ses discours et activités extrémistes, non seulement en Russie, mais également en Allemagne et dans plusieurs Etats arabes et asiatiques. A cet égard, la Cour notera sans doute avec intérêt que dans deux affaires récentes, l'une concernant l'Allemagne, l'une concernant la Russie, la Cour européenne des droits de l'homme a validé les mesures prises par les deux Etats contre cette organisation extrémiste en estimant que ses discours et activités étaient contraires tant à la lettre qu'à l'esprit de la convention européenne des droits de l'homme[176].

20. De même, rien ne permet de dire *prima facie*, que les mesures d'interdiction de manifester ou de se rassembler visées dans la requête de l'Ukraine[177] constitueraient, à supposer que les faits soient établis, une discrimination raciale. Les mesures prises dans le cadre de la lutte contre le séparatisme ou l'extrémisme, ou les interdictions de manifester dans certains endroits

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[173] Voir, par exemple, Xenophobia, Freedom of Conscience and Anti-Extremism in Russia in 2015 : A collection of annual reports by the SOVA Center for Information and Analysis, 2016 (http ://www.sova-center.ru/files/books/pe16-text.pdf), notamment p. 117-118.

[174] CR 2017/1, p. 66, par. 38-39 (Gimblett).

[175] Voir dossier à l'appui de la demande en indication de mesures conservatoires de l'Ukraine (annexe 41) ; dossier de plaidoiries (vol. II) de l'Ukraine, document n° 34.

[176] CEDH, *Hizb ut-Tahrir et autres c. Allemagne*, n° 31098/98 (12 juin 2012) ; *Kasymakhunov et Saybatalov c. Russie*, n° 26261/05 et 26377/06 (14 mars 2013).

[177] Voir requête de l'Ukraine, par. 100 à 102 et 109-110.

s'appliquent en Crimée, en vertu des règles en vigueur, à tous et à toute manifestation[178] ; et elles reposent par ailleurs sur un motif permis par la convention. L'Ukraine n'a avancé aucun élément tangible qui démontrerait que, lorsque ces mesures sont appliquées à des personnes d'origine tatare ou ukrainienne, elles le seraient de manière discriminatoire, en raison de l'origine raciale ou ethnique des personnes concernées.

Le PRESIDENT : Monsieur le professeur, je vous demanderai de poursuivre votre exposé avec une lenteur raisonnable dans l'intérêt des interprètes et donc de la Cour.

M. FORTEAU : Bien entendu, Monsieur le président, je respecterai scrupuleusement vos consignes.

II. Les mesures provisoires réclamées par l'Ukraine ne satisfont pas aux conditions requises

21. En admettant, Monsieur le président, que la Cour ait compétence *prima facie,* il faudrait de toute manière que les conditions permettant le prononcé de mesures conservatoires soient remplies. Or, elles ne le sont pas.

22. En ce qui concerne tout d'abord la plausibilité des droits invoqués, le contraste est saisissant entre, d'un côté, les graves accusations de l'Ukraine et de l'autre la réalité de la situation.

23. L'accusation de l'Ukraine, telle qu'elle a été réitérée à plus de vingt reprises hier, est de nature radicale : l'Ukraine accuse la Russie de procéder en Crimée à «l'annihilation culturelle des communautés non russophones par le biais d'une campagne systématique et continue de discrimination»[179]. L'objectif de cette prétendue campagne systématique d'annihilation culturelle serait de parvenir à ce que l'identité et la culture des ethnies non russes soient purement et simplement «supprimées»[180]. Selon l'Ukraine, la survie même de ces communautés serait donc menacée[181].

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[178] Voir ainsi le règlement 315 du 4 juillet 2016 du conseil des ministres de la République de Crimée (disponible — en langue russe — à l'adresse : rk.gov.ru/rus/file/pub/pub_298128.pdf).

[179] Voir demande en indication de mesures conservatoires, par. 3.

[180] Voir requête, par. 5, 13, 14 et 131 ; demande en indication de mesures conservatoires, par. 3, ainsi que par. 11 et 21.

[181] CR 2017/1, p. 25, par. 2, et p. 30, par. 19 (Koh).

24. Une telle accusation est d'une exceptionnelle gravité ; elle requiert, en application de votre jurisprudence, d'être prouvée «par des éléments ayant pleine force probante» et présentant «un degré élevé de certitude»[182]. Or, aucun des documents que l'Ukraine a soumis à la Cour, pas même la résolution de l'Assemblée générale de 2016 dont la Russie a déjà dit ce matin qu'elle n'était guère probante compte tenu de ses conditions d'adoption, aucun document ne relaie cette grave accusation.

25. Le fait est que sur le terrain, la situation des communautés non russophones en Crimée ne correspond aucunement à la présentation qu'en a proposée l'Ukraine hier.

26. Contrairement tout d'abord à ce qu'elle affirme[183], l'Ukraine n'a pas respecté les droits des communautés tatares avant 2014. De nombreux documents établis par des organismes indépendants ont ainsi dénoncé de 1992 à 2014 le sort réservé par l'Etat ukrainien aux minorités en général et aux Tatars de Crimée en particulier. Je vous renvoie sur ce point aux extraits pertinents des rapports des organismes de droits de l'homme qui figurent dans le dossier soumis par la Russie la semaine passée[184].

27. Depuis le changement de statut de la Crimée en 2014, plusieurs éléments attestent que la situation de ces communautés s'est améliorée.

28. Ainsi, le 21 avril 2014, un décret a été adopté par le président Vladimir Poutine qui porte en particulier sur la réhabilitation des Tatars de Crimée et sur l'aide de l'Etat pour leur renaissance et leur développement (ce décret figure à l'onglet n° 63 du dossier des juges). Ce décret vise, selon ses termes, à redresser une «injustice historique» et à «éliminer les conséquences de la déportation illégale» de cette population ainsi qu'à assurer la protection de ses droits et intérêts légitimes. Ce décret reconnaît en particulier la nécessité de dispenser une éducation dans la langue de cette communauté.

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[182] *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Serbie-et-Monténégro), arrêt, C.I.J. Recueil 2007 (I)*, p. 129-130, par. 209-210.

[183] Voir requête, par. 85.

[184] Voir dossier of Documents submitted by the Russian Federation in connection with Ukraine's Request for the indication of provisional measures, document n° 9.2.

29. De même, une loi du 10 décembre 2014 a défini des mesures de soutien social en sa faveur[185]. Le Gouvernement russe a également approuvé, en application d'une décision du 11 août 2014, un vaste programme fédéral de développement économique et social en sa faveur, comme l'agent de la Russie l'a exposé ce matin[186]. Le haut-commissaire des Nations Unies aux droits de l'homme a quant à lui constaté en août 2016 qu'un mémorial dédié à la mémoire des victimes tatares de déportation avait été inauguré par les autorités de Crimée[187].

30. Il importe également de souligner que la nouvelle Constitution de Crimée, adoptée le 11 avril 2014, érige les langues tatare mais aussi ukrainienne en langues officielles de la Crimée. C'est là une avancée importante pour la reconnaissance des droits de ces communautés et cette consécration constitutionnelle contredit l'allégation ukrainienne selon laquelle les droits culturels de ces communautés seraient menacés de disparaître. Cette évolution constitutionnelle est pleinement mise en œuvre aujourd'hui au plan administratif, comme l'attestent plusieurs documents soumis par la Russie[188].

31. Contrairement par ailleurs à ce qu'a affirmé hier l'Ukraine, selon qui la Russie serait en train «d'étrangler l'éducation»[189] des communautés non russophones, les droits éducatifs des communautés tatares et ukrainiennes sont protégés :

i) le haut-commissaire aux droits de l'homme des Nations Unies a relevé dans son rapport de novembre 2016 les progrès enregistrés en ce qui concerne le recours au tatar comme langue d'éducation dans les écoles de Crimée[190] ;

ii) l'Université fédérale de Crimée, qui représente le plus grand établissement d'enseignement supérieur, reconnaît les langues ukrainienne et tatare comme langues d'enseignement.

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[185] Voir Dossier of Documents submitted by the Russian Federation in connection with Ukraine's Request for the indication of provisional measures, document n° 2.

[186] *Ibid.*

[187] Dossier de plaidoiries de l'Ukraine (vol. II), onglet n° 26, Office of the United Nations High Commissioner for Human Rights, Report on the Human Rights Situation in Ukraine (16 May–15 August 2016), par. 164.

[188] Voir Dossier of Documents submitted by the Russian Federation in connection with Ukraine's Request for the indication of provisional measures, document n° 7.

[189] CR 2017/1, p. 69, par. 47 (Gimblett).

[190] Dossier de plaidoiries de l'Ukraine (vol. II), onglet n° 32, Office of the United Nations High Commissioner for Human Rights, Report on the Human Rights Situation in Ukraine (16 August–15 November 2016), par. 179-181.

C'est le cas aussi d'autres établissements reconnus, telle l'Université de formation des ingénieurs de Crimée[191] ;

iii) les chiffres avancés par l'Ukraine sont par ailleurs erronés en la matière ; l'Ukraine estime que l'éducation en langue ukrainienne serait pratiquement éliminée en Crimée, qu'il n'y aurait plus qu'une seule école dispensant une telle éducation et qu'avant 2014, il y aurait eu 12 000 élèves éduqués dans cette langue contre seulement 1000 aujourd'hui[192]. L'Ukraine oublie toutefois d'indiquer que ce dernier chiffre concerne uniquement les élèves dont l'éducation est menée exclusivement en langue ukrainienne. L'Ukraine compare ainsi ce qui n'est pas comparable. Vous trouverez dans le dossier des juges, à l'onglet n° 65, les chiffres pertinents : il existe aujourd'hui non pas une, mais une douzaine d'écoles offrant une éducation en langue ukrainienne ; et ce sont par ailleurs non pas moins de 1000, mais près de 13 000 élèves qui reçoivent des formes diverses d'éducation en langue ukrainienne ;

iv) on notera de même l'existence dans plusieurs villes de Crimée d'organisations nationales et culturelles ukrainiennes librement constituées en vertu du droit russe, comme le montre le document n° 66 du dossier des juges.

32. Les allégations de l'Ukraine selon lesquelles la Russie chercherait à empêcher les médias tatars ou ukrainiens de s'exprimer en Crimée est elle aussi contredite par les faits. Dans le dossier de documents soumis par la Russie la semaine passée, vous trouverez la liste des radios, chaînes de télévision et journaux en langues tatare et ukrainienne qui sont aujourd'hui enregistrés en Crimée : la liste en contient plus de 80[193]. Seuls quelques-uns de ces médias n'ont pas été enregistrés, mais leur dossier de demande n'était pas complet et rien ne les empêchait bien entendu de soumettre une nouvelle demande. L'Ukraine n'invoque à ce titre que des documents qui datent d'avril 2015[194] et elle ne prétend pas que, dans les deux dernières années, un média d'origine tatare ou ukrainienne aurait soumis une demande d'enregistrement qui aurait été refusée.

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[191] Voir Dossier of Documents submitted by the Russian Federation in connection with Ukraine's Request for the indication of provisional measures, documents n° 8.2 et 8.3.

[192] Demande en indication de mesures conservatoires, par. 14 ; CR 2017/1, p. 68, par. 45 (Gimblett).

[193] Voir Dossier of Documents submitted by the Russian Federation in connection with Ukraine's Request for the indication of provisional measures, document n° 4.

[194] Voir dossier à l'appui de la demande en indication de mesures conservatoires de l'Ukraine (annexes 39 et 57).

33.La condition du risque de préjudice irréparable aux droits du demandeur n'est pas davantage satisfaite. De ce point de vue, la situation ne présente aucun élément comparable avec celle qui prévalait dans l'affaire *Géorgie c. Russie*. Dans cette affaire, la Cour n'a ordonné de mesures conservatoires qu'en raison de la nature et du contexte très particuliers des faits de l'espèce[195], lesquels n'ont rien de comparable avec ceux de la présente affaire.

34. A aucun moment d'ailleurs durant les échanges diplomatiques avec la Russie, l'Ukraine n'a fait état d'un risque de préjudice irréparable. Cette attitude a été constante de la première note verbale de l'Ukraine du 23 septembre 2014 à sa dernière note en date du 7 octobre 2016.

35. L'Ukraine affirme toutefois désormais que les autorités russes seraient en train de se livrer à une pratique systématique de disparitions forcées et de meurtres — allégations qui donneraient lieu à préjudice irréparable[196]. L'agent de l'Ukraine a même accusé hier la Russie de «supprimer les groupes qu'elle considère comme ses ennemis»[197]. Je souhaiterais faire cinq remarques à cet égard :

i) tout d'abord, les documents sur lesquels l'Ukraine s'est fondée hier n'indiquent pas que la Russie serait en train de se livrer à une campagne de meurtres en Crimée ;

ii) en ce qui concerne ensuite les cas de disparition, les rapports du haut-commissaire aux droits de l'homme ou du procureur de la Cour pénale internationale, sur lesquels l'Ukraine s'appuie[198], ne prétendent pas que les disparitions survenues depuis 2014 s'expliqueraient par l'origine raciale ou ethnique des personnes concernées ;

iii) ces mêmes documents ne prétendent pas davantage que la Russie serait elle-même responsable de ces disparitions ;

iv) quant à l'allégation de l'Ukraine selon laquelle ces disparitions continuent[199] et devraient donc cesser[200], elle est contredite par les rapports du haut-commissaire aux droits de

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[195] *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), mesures conservatoires, ordonnance du 15 octobre 2008, C.I.J. Recueil 2008*, p. 396, par. 142-143.

[196] Requête, par. 14 et 103 ; demande en indication de mesures conservatoires de l'Ukraine, par. 12.

[197] CR 2017/1, p. 22, par. 9 (agent).

[198] Voir dossier de plaidoiries (vol. II) de l'Ukraine, documents n° 26, 32 et 39.

[199] CR 2017/1, p. 33, par. 28 (Koh).

[200] CR 2017/1, p. 70, par. 50 (Gimblett).

l'homme ; dans son rapport d'août 2016, celui-ci ne faisait état que d'un seul cas de disparition pour le premier semestre de l'année 2016[201] et, dans son dernier rapport, il n'a fait état d'aucun nouveau cas de disparition depuis mai 2016, ni plus largement d'aucune situation de mise en danger de la vie d'autrui[202] ;

v) l'Ukraine affirme enfin que les autorités de Crimée auraient refusé d'enquêter sur ces disparitions[203]. Comme l'agent de la Russie vient de l'indiquer, de telles enquêtes ont eu lieu et sont menées de manière approfondie et exhaustive. Cela a d'ailleurs été constaté par le haut-commissaire aux droits de l'homme des Nations Unies. Celui-ci a relevé dans son rapport d'août 2016 que, contrairement à ce qu'a affirmé hier M. Gimblett[204], une enquête a bel et bien été ouverte immédiatement après la disparition de M. Ibragimov en mai 2016[205]. S'agissant des cas plus anciens de disparition, le haut-commissaire a également relevé par exemple, dans le cas de M. Shaimardanov, que plusieurs centaines de témoins avaient été interrogés et que le dossier de l'enquête contenait 11 volumes de documents[206].

36. Aucune situation d'urgence n'existe enfin en l'espèce, contrairement à ce qu'affirme l'Ukraine[207]. Tout au long des deux années et demi de consultations entre les parties, l'Ukraine n'a d'ailleurs jamais fait état d'une quelconque urgence ou d'un risque imminent de préjudice. Tout à l'inverse, l'Ukraine s'est comportée comme si aucune urgence n'existait. Pour ne se limiter qu'à quelques exemples[208] :

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[201] Dossier de plaidoiries de l'Ukraine (vol. II), onglet n° 26, Office of the United Nations High Commissioner for Human Rights, Report on the Human Rights Situation in Ukraine (16 May–15 August 2016), par. 154.

[202] Dossier de plaidoiries de l'Ukraine (vol. II), onglet n° 32, Office of the United Nations High Commissioner for Human Rights, Report on the Human Rights Situation in Ukraine (16 August–15 November 2016), par. 155-181.

[203] CR 2017/1, p. 29-30, par. 17 (Koh).

[204] CR 2017/1, p. 66, par. 37 (Gimblett).

[205] Dossier de plaidoiries de l'Ukraine (vol. II), onglet n° 26, Office of the United Nations High Commissioner for Human Rights, Report on the Human Rights Situation in Ukraine (16 May–15 August 2016), par. 154.

[206] Dossier de plaidoiries de l'Ukraine (vol. II), onglet n° 26, Office of the United Nations High Commissioner for Human Rights, Report on the Human Rights Situation in Ukraine (16 May–15 August 2016), par. 156.

[207] Demande en indication de mesures conservatoires de l'Ukraine, par. 21.

[208] Voir documents submitted by the Russian Federation in connection with Ukraine's Request for the indication of provisional measures, document n° 11.

i) dans sa note verbale du 1er décembre 2014, l'Ukraine a informé la Russie qu'elle estimait avoir d'ores et déjà épuisé la condition de négociation préalable[209] ; pourtant, l'Ukraine n'a soumis aucune plainte au comité CIEDR et à la CIJ dans les deux années qui ont suivi ;

ii) dans d'autres notes verbales du 15 décembre 2014[210], du 30 mars 2015, du 17 août 2015, du 5 avril 2016 ou encore du 7 octobre 2016, l'Ukraine s'est comportée comme si aucune urgence n'était requise, par exemple en demandant à la Russie de répondre à ses griefs, non pas urgemment, mais «within reasonable time frames», en laissant s'espacer plusieurs mois entre plusieurs notes diplomatiques ou encore le 7 octobre 2016, en estimant que les parties devaient continuer les consultations. Et de manière remarquable, l'Ukraine n'a nullement prétendu hier que la situation se serait subitement aggravée ces dernières semaines par rapport à ce qu'elle était à la fin de l'année 2016.

37. Il est tout aussi probant de remarquer enfin que le comité CIEDR, qui est, je le souligne, l'«organe indépendant spécialement établi en vue de superviser l'application d[e ce] traité»[211] et qui est donc l'instance la plus compétente en la matière au sein des Nations Unies, n'a pas jugé nécessaire de déclencher la procédure d'intervention d'urgence comme il en a pourtant la possibilité à tout moment. Le comité a utilisé à quatre reprises cette procédure d'urgence à l'égard de la Russie — à chaque fois pour des faits qui n'ont aucun lien avec la présente affaire. Il l'a fait en mars ainsi qu'en septembre 2011, puis le 15 mai 2015, puis de nouveau le 26 janvier 2016[212]. A aucun moment en revanche le comité n'a déclenché cette procédure en ce qui concerne le cas de la Crimée, alors même qu'il assure le suivi de cette situation depuis plusieurs années. Le comité est saisi depuis longtemps en effet de la situation des communautés minoritaires en Crimée, notamment parce que, pendant de nombreuses années, leurs droits n'étaient pas respectés par l'Etat ukrainien. En août 2016, l'Ukraine a exposé au comité ses allégations relatives à la Crimée dans le cadre de l'examen de son rapport périodique[213]. Le comité est par ailleurs en train d'examiner le

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[209] Note no 72/22-620-2946 du 1er décembre 2014.

[210] Note no 72/22-620-3069 du 15 décembre 2014.

[211] *Ahmadou Sadio Diallo (République de Guinée c. République démocratique du Congo), arrêt, C.I.J. Recueil 2010 (II)*, p. 664, par. 66.

[212] Voir http ://www.ohchr.org/EN/HRBodies/CERD/Pages/EarlyWarningProcedure.aspx.

[213] Voir http ://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20370&LangID=E.

rapport périodique de la Russie, soumis l'an passé, pour lequel le dialogue va s'engager entre le comité et les autorités russes lors de la prochaine session du comité en août prochain. Dans ces circonstances, le fait que le comité, qui est l'organe le plus compétent en ce domaine et qui a tous les éléments d'information en mains, n'ait pas jugé nécessaire de déclencher la procédure d'urgence — alors qu'il l'a fait dans le passé en relation avec d'autres situations concernant la Russie — prive de toute crédibilité l'accusation de l'Ukraine selon laquelle les autorités russes seraient en train de se livrer en Crimée à une campagne systématique d'annihilation culturelle visant à supprimer les communautés tatares et ukrainiennes.

38. Monsieur le président, Mesdames et Messieurs de la Cour, ceci vient confirmer que dans cette affaire, il n'est pas possible, et il n'est pas nécessaire, d'indiquer de mesures conservatoires au titre de la convention CIEDR.

39. Ceci conclut, Monsieur le président, le premier tour de plaidoiries de la Fédération de Russie. Nous vous remercions, Mesdames et Messieurs de la Cour, de votre écoute patiente et attentive.

LE PRESIDENT : Merci, Monsieur le professeur. En effet, vos propos concluent le premier tour d'observations orales de la Fédération de Russie. La Cour se réunira de nouveau demain, mercredi 8 mars à 10 heures, pour entendre le second tour d'observations orales de l'Ukraine. L'audience est levée.

L'audience est levée à 13 heures.

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