INTERNATIONAL COURT OF JUSTICE

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)

PRELIMINARY OBJECTIONS

SUBMITTED BY THE RUSSIAN FEDERATION

Volume I

12 SEPTEMBER 2018

TABLE OF CONTENTS

PART I

INTRODUCTION

1. In accordance with the Court's Statute and Rules of Procedure, Russia submits these Preliminary Objections in which it requests the Court to find that it is without jurisdiction in respect of the claims submitted to the Court by Ukraine under the International Convention for the Suppression of the Financing of Terrorism ("ICSFT") and the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD") and that Ukraine's Application[1] is inadmissible.

2. In its Memorial, Ukraine accuses Russia of "a brazen and comprehensive assault on human rights in the territory of Ukraine",[2] "overt aggression",[3] "unlawful occupation" and "outright annexation",[4] "blatant violations of the UN Charter",[5] "supporting and arming illegal proxy groups" in Eastern Ukraine,[6] and carrying out a "campaign for hegemony in Ukraine [the common element of which] has been its disrespect for human rights and the rule of law".[7] The Court lacks jurisdiction to hear such claims (which are strenuously denied), and Ukraine is well aware of this. In an attempt to circumvent this obstacle, Ukraine has therefore asserted that, in carrying out an alleged campaign against human rights

---

1 *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),* Application instituting proceedings, 16 January 2017 ("Application").

2 *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation),* Memorial submitted by Ukraine, 12 June 2018 ("Memorial"), para. 1.

3 *Ibid.*, para. 11.

4 *Ibid.*, para. 14.

5 *Ibid.*, para. 15.

6 *Ibid.*, para. 16.

7 *Ibid.*, para. 22.

in the territory of Ukraine, Russia has "committed systematic violations of" the ICSFT and CERD and that it is entitled to invoke the compromissory clauses of these conventions.[8]

3. In making these assertions of "systematic violations", Ukraine ignores altogether the fact that, in its Order of 19 April 2017, the Court has already found that Ukraine failed in its provisional measures Request to put forward evidence affording a sufficient basis to find plausible the allegation of breach of the ICSFT,[9] and likewise that Ukraine had largely failed to put forward plausible claims for breach of CERD.[10] Yet it is against this unpromising background that Ukraine must now convince the Court that its claims are truly claims for breach of the ICSFT and CERD – as opposed to an inappropriate attempt at re-packaging the allegations of annexation or aggression with which Ukraine's Memorial is replete.[11]

4. The invocation of the ICSFT and CERD is, however, artificial. Ukraine has made plain its wish to bring its misplaced allegations of annexation and aggression before the Court or other tribunals,[12] and the current claims merely

---

[8] *Ibid.*, para. 1.

[9] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, p. 104 ("Order of 19 April 2017"), para. 75.

[10] See the Order of 19 April 2017, paras. 82-83, the condition of plausibility only being satisfied with respect to the banning of the Mejlis and the alleged restrictions on the educational rights of ethnic Ukrainians.

[11] As is well-established, it is the Court's duty to isolate the real issue in the case and to identify the object of the claim. See, e.g., *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 466, para. 30; see also *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests (New Zealand *v.* France) *Case, Order of 22 September 1995, I.C.J. Reports 1995*, p. 304, para. 55; *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 448, paras. 29-30.

[12] See President of Ukraine official website, "President: We will do everything to return Crimea via international legal mechanisms", 6 December 2015, available at

constitute one of Ukraine's attempts inappropriately to shoehorn those allegations into one or more treaties that provide for compulsory dispute settlement. Indeed, in the statement by the President of Ukraine announcing the commencement of the current proceedings, it was declared: "Russia must pay its price for the aggression."[13] And yet, as is manifest, the ICSFT and CERD concern respectively terrorism financing and racial discrimination, and cannot somehow become a home for misplaced allegations of aggression.

5. In **Part II** of this pleading, Russia demonstrates that the jurisdictional requirements of Article 24(1) of the ICSFT are not met. This provision establishes the Court's jurisdiction only with respect to disputes concerning the "interpretation or application of the Convention". As is consistent with the Court's Order of 19 April 2017, the correct position is that no such dispute has been brought before the Court. The allegation of terrorism financing is an extremely serious one, including with respect to the terrible loss of life on Flight MH17, and yet it has been put forward by Ukraine on the basis of substantially

---

http://www.president.gov.ua/en/news/zrobimo-vse-dlya-togo-shob-shlyahom-mizhnarodnih-pravovih-me-36441; Statement by the then Prime Minister of Ukraine A. Yatsenyuk, "Arseniy Yatsenyuk Reported on 10 main goals achieved by the Government in 100 days", 13 March 2015, available in Ukrainian at http://yatsenyuk.org.ua/ua/news/open/1746 (previously posted at the Government of Ukraine official website, but removed since) ("We will try Russia for aggression against Ukraine, violation of international law, military theft of the Ukrainian Crimea, establishing of a bloody "Russian world" in Donetsk and Lugansk. We begin the proceedings in the Hague tribunal, and the Ministry of Justice received relevant instructions to collect evidence") (Annex 2); Statement of the Delegation of Ukraine at the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization United Nations, 20 February 2018, available at http://ukraineun.org/en/press-center/303-statement-of-the-delegation-of-ukraine-at-the-special-committee-on-the-charter-of-the-united-nations-and-on-the-strengt… ("In this regard we are resorting to all means available to UN Members States to resolve the situation that arose as the result of the Russian military aggression against Ukraine").

[13] President of Ukraine official website, "President instructed the Ministry of Foreign Affairs to file a lawsuit against Russia to the UN International Court of Justice in the Hague: The Aggressor must pay its price", 16 January 2017, available at http://www.president.gov.ua/en/news/agresor-maye-zaplatiti-svoyu-cinu-prezident-doruchiv-mzs-per-39514.

the same evidence and incidents as to which the Court has already made a finding of lack of plausibility.

6. In **Chapter II**, Russia outlines the applicable test with respect to establishing the Court's jurisdiction *ratione materiae* under Article 24(1) of the ICSFT.

7. In **Chapter III**, consistent with the applicable test on jurisdiction *ratione materiae*, Russia interprets for jurisdictional purposes the key provision of the ICSFT that the Court is being asked to apply, Article 2(1). This provision defines the offence of financing terrorism, and is the prerequisite to the application of the Convention.[14]

8. In **Chapter IV**, Russia examines the allegations of financing of terrorism made by Ukraine, and explains that Ukraine has failed to put before the Court any substantially different or plausible case on the key elements of intention, knowledge and purpose. As a result, and in the absence of any plausible claims of intentional or knowing financing of terrorism, the correct position is that this Court lacks jurisdiction *ratione materiae* with respect to the claims brought by Ukraine for breach of the ICSFT.

9. In **Chapter V**, Russia explains that, in addition, the (alleged) responsibility of a State for itself engaging in acts of financing terrorism is not a matter regulated by the ICSFT. It follows that, as a separate matter, the Court lacks jurisdiction *ratione materiae* over the claims of Ukraine concerning such alleged responsibility of Russia – which are at the heart of Ukraine's case.

[14] As already identified by the Court at Order of 19 April 2017, para. 74.

10. Finally, in **Chapter VI**, Russia considers the jurisdictional requirements for the submission of a claim under Article 24(1) of the ICSFT (negotiation and subsequent failure to agree on the organisation of an arbitration), and establishes that in any event these have not been met.

11. In **Part III** of this pleading, Russia examines the requirements for jurisdiction under Article 22 of CERD and admissibility and establishes that these too have not been met by Ukraine. This is the case as far as jurisdiction *ratione materiae* is concerned, as well as the jurisdictional requirements under Article 22 of CERD and the lack of admissibility for non-exhaustion of local remedies.

12. In **Chapter VIII**, Russia examines the key provisions of CERD and explains that, by reference to the applicable test for jurisdiction *ratione materiae*, the Court lacks jurisdiction over the claims brought by Ukraine for breach of CERD. The real issue in the present case is the status of Crimea, which is not a CERD-related claim. In addition, Ukraine seriously distorts the scope of the rights protected under CERD, attempting to include among them compliance with international humanitarian law, differences of treatment on the basis of citizenship, education in native language, representative rights of national minorities, or religious discrimination. In any event, Ukraine's case that Russia is committing a systematic campaign of racial discrimination against, and a campaign of cultural erasure of, Crimean Tatars and Ukrainians is not plausible. Ukraine itself does not frame and substantiate the case in its Application and Memorial as a case of racial discrimination.

13. In **Chapter IX**, Russia considers the jurisdictional requirements for the submission of a claim under Article 22 of CERD: negotiation and recourse to the procedures expressly provided for in the Convention, i.e. recourse to the

Committee on the Elimination of Racial Discrimination ("CERD Committee"). These requirements have not been met.

14. Finally, in **Chapter X**, Russia explains that there is in any event a requirement of exhaustion of local remedies under CERD (as is common in human rights treaties), and that this requirement also has not been met. It follows that, as a separate matter to the above, the claim is inadmissible.

15. The Preliminary Objections conclude with Russia's formal Submission (**Part IV**).

16. It is emphasised that this pleading is confined to objections on jurisdiction and admissibility only. Insofar as certain matters of a factual nature are referred to herein, this is done solely for the purpose of Russia's contentions on jurisdiction and admissibility. Nothing in these Preliminary Objections should be interpreted as acceptance by Russia of any of the allegations put forward by Ukraine in its Application and Memorial.

PART II

ABSENCE OF JURISDICTION OF THE COURT UNDER THE ICSFT

CHAPTER I
INTRODUCTION

17. In its Application and its Memorial, Ukraine accuses Russia of "overt aggression"[15] and "supporting and arming illegal proxy groups"[16] in Eastern Ukraine. Such claims (which are strenuously denied) fall outside the scope of the Court's jurisdiction. Ukraine's invocation of the compromissory clause in Article 24 of the ICSFT is an artificial attempt to bring its misconceived allegations of aggression before the Court as alleged violations of the ICSFT.

18. Ukraine's real objective of bringing before the Court its misplaced allegations of aggression is readily apparent, for example, from the statement by the President of Ukraine on 16 January 2017 announcing the commencement, on the same day, of the current proceedings that "Russia must pay its price for the aggression."[17]

19. It is obvious that the ICSFT specifically and solely concerns terrorism financing, and that the Contracting States have given only limited consent to disputes of that nature being submitted to the Court.[18] The compromissory clause in Article 24 of the ICSFT cannot somehow be used as a vehicle to bring before

---

[15] Memorial, para. 11.

[16] *Ibid.*, para. 16; Application, para. 37.

[17] President of Ukraine official website, "President instructed the Ministry of Foreign Affairs to file a lawsuit against Russia to the UN International Court of Justice in The Hague: The aggressor must pay its price", 16 January 2017, available at http://www.president.gov.ua/en/news/agresor-maye-zaplatiti-svoyu-cinu-prezident-doruchiv-mzs-per-39514.

[18] Cf. *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, *Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 39, para. 88.

the Court different disputes concerning alleged violations of different rules of international law. Yet, this is precisely what Ukraine seeks to achieve, and its overly broad interpretation of the provisions of the ICSFT, and of the jurisdiction clause in Article 24 in particular, are to be seen through this lens and to be approached with caution.

20. On Ukraine's case almost any disagreement between States concerning alleged use of force or interference in internal affairs could be brought before the Court under Article 24 of the ICSFT without any other jurisdictional basis (such as a declaration under Article 36(2) of the Statute of the International Court of Justice or a special agreement).

21. Moreover, in its Order of 19 April 2017, the Court has already found that Ukraine failed in its Request for the indication of provisional measures to put forward evidence of plausible violations of the ICSFT. Yet, the same alleged violations maintained by Ukraine in its Memorial rest upon essentially the same evidential foundation, which the Court has previously considered to be insufficient.

22. As explained in **Chapter II**, the applicable test with respect to establishing the Court's jurisdiction *ratione materiae* under Article 24(1) of the ICSFT requires that the Court:

a. Interpret definitively, for jurisdictional purposes, the key provisions of the ICSFT that the Court is being asked to apply. That includes Article 2(1), which defines the offence of terrorism financing, the existence of which is a prerequisite to the application of the other provisions of the Convention.

b. Satisfy itself that the facts pleaded and the evidence relied on by the applicant State plausibly support the asserted characterisation of its claims as claims under the ICSFT, including with respect to the specific definition of the offence of terrorism financing under Article 2(1).

23. In **Chapter III**, Russia explains that, as regards the necessary mental elements of intention, knowledge and purpose, as follows from the ordinary meaning of the text in its context and from the *travaux préparatoires*:

a. The chapeau of Article 2(1) requires a showing that funds were provided or collected with the intention or knowledge that they are to be used to commit an act of terrorism within the meaning of Article 2(1). Both knowledge and intention are subjective concepts, and the requirement to know that the funds are to be used refers to knowledge of a certainty rather than a mere possibility or probability.

b. The definition of acts of terrorism under Article 2(1)(a) – read in conjunction with the specific treaties in Annex 1 which Ukraine relies on – and under Article 2(1)(b) requires specific direct intent. Contrary to Ukraine's contention, it is not sufficient to show indirect intent or recklessness.

c. The definition of a terrorist act under Article 2(1)(b) also requires that "the purpose" of the act "is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act." The requirement of "the purpose" to act for terrorist aims concerns the reason (singular) for a specific act, excludes *dolus*

eventualis and recklessness, and requires something more than the ordinary incident of fear and intimidation in armed conflict situations.

24. In **Chapter IV**, Russia demonstrates that Ukraine has failed to put before the Court any substantially different or plausible case on the key elements of intention, knowledge and purpose. As a result, this Court lacks jurisdiction *ratione materiae* over Ukraine's claims for breach of the ICSFT.

25. In **Chapter V**, Russia demonstrates that, contrary to Ukraine's contention, the ICSFT, being a traditional law enforcement instrument, does not regulate the alleged responsibility of a State for engaging or participating in acts of terrorism financing. That conclusion follows from the ordinary meaning of the text (including the title, the preamble and the provisions), in its context and in light of the object and purpose, as well as from the *travaux préparatoires* and from subsequent consideration by States of that very issue in the context of ongoing negotiations on a draft Comprehensive Convention on International Terrorism. Ukraine's reliance on the Court's reasoning in the *Bosnia Genocide* case is inapposite since that case concerned a very differently worded treaty imposing obligations of a substantially different character.

26. In **Chapter VI**, Russia shows that the procedural requirements contained in Article 24 of the ICSFT, namely the requirement to engage in *bona fide* negotiations, and to attempt to settle any dispute arising under the ICSFT by way of arbitration prior to seising the Court, have not been fulfilled with the result that the Court lacks jurisdiction for this reason also.

27. The present preliminary objections in the instant case should in no way be misinterpreted as Russia's assertion of a right to finance or support terrorism. In this respect, Russia reaffirms its unequivocal condemnation of all acts, methods

and practices of terrorism as criminal and unjustifiable, wherever and by whomever committed.

CHAPTER II
JURISDICTION *RATIONE MATERIAE* UNDER ARTICLE 24 OF THE ICSFT: THE TEST TO BE APPLIED

28. Pursuant to Article 24(1) of the ICSFT:

> "Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation within a reasonable time shall, at the request of one of them, be submitted to arbitration. If, within six months from the date of the request for arbitration, the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice, by application, in conformity with the Statute of the Court."

29. For the Court to have jurisdiction *ratione materiae* under Article 24(1), Ukraine must establish that the allegations that it makes fall within the provisions of the ICSFT that it seeks to invoke, namely Articles 8-10, 12 and 18. Each of those provisions only applies in respect of an offence or alleged offence under Article 2.[19] Thus, Ukraine must establish:

a. First, that the allegations made concern acts of terrorism within the meaning of Article 2(1)(a) or (b), including with respect to the requisite specific intent and purpose;

b. Second, that the allegations made concern the financing with the requisite specific knowledge or intent, as required by the chapeau of Article 2(1), of acts of terrorism. The case put before this Court by Ukraine is that "Russian officials and other Russian nationals knowingly financed terrorism in Ukraine";[20] and

[19] See also the Order of 19 April 2017, para. 74.
[20] Memorial, Chapter 5 (Title).

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

30. Ukraine must establish these jurisdictional requirements against the backdrop of the Order of 19 April 2017, where the Court found that Ukraine had not put forward a plausible case with respect to key elements of its case, notably the existence of the requisite elements of intention, knowledge and purpose.

31. As the Court held in its 1996 Judgment in *Oil Platforms*, where a claimant State seeks to found the jurisdiction of the Court on a treaty provision that confers jurisdiction only in respect of disputes concerning the interpretation or application of that treaty, the Court "cannot limit itself to noting that one of the Parties maintains that such a dispute exists, and the other denies it". Instead, at the preliminary objections stage, the Court must ascertain by reference to the specific treaty before it:

> "whether the violations of the [treaty] pleaded […] *do or do not* fall within the provisions of the [treaty] and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain".[21]

32. The same test was applied by the Court including in the *Bosnian Genocide* case.[22]

---

[21] *Oil Platforms (Islamic Republic of Iran v. United States of America)*, *Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803, para. 16 (emphasis added).

[22] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, I.C.J. Reports 1996*, p. 595, para. 30.

33. In the present case, the Court must therefore satisfy itself that the violations of the ICSFT that have been pleaded do indeed fall within the provisions of the ICSFT.

34. It is well-established that the Court is required, at the jurisdictional phase, to carry out a full interpretation of each of the relevant provisions of the given treaty. For example, in determining whether there was a dispute concerning the interpretation or application of the 1955 Treaty of Amity, in *Oil Platforms* the Court ruled on the scope of each provision that the claimant relied on and as to which interpretation was disputed.[23] In the current case, it is necessary to focus in particular on the interpretation of: Article 2(1) of the ICSFT, which is a prerequisite to the application of the Convention that there be an offence for the purposes of the ICSFT[24] (Chapter III below); and all parts of the ICSFT going to the question whether it applies to alleged financing of terrorism by a State (Chapter V below).

35. As a related matter, the Court has also consistently held that there must exist a close relationship between the facts alleged by the claimant State and the relevant treaty relied on as a basis of jurisdiction. The Court cannot, of course, enter into disputed questions of fact at the jurisdictional stage. It is, however, required to assess whether the evidence put forward by the applicant State plausibly supports the asserted characterisation of the pleaded facts as claims under the relevant treaty. For example:

---

[23] *Oil Platforms (Islamic Republic of Iran v. United States of America)*, *op. cit.*, paras. 27-49. See also Separate Opinion of Judge Higgins, para. 31: "Where the Court has to decide, on the basis of a treaty whose application and interpretation is contested, whether it has jurisdiction, that decision must be definitive. […] It does not suffice, in the making of this definitive decision, for the Court to decide that it has heard claims relating to the various articles that are 'arguable questions' or that are 'bona fide questions of interpretation' (each being suggestions advanced in this case)."

[24] As already identified by the Court at Order of 19 April 2017, para. 74.

a. In the *Ambatielos* case, the Court held that "[i]t is not enough for the claimant Government to establish a remote connection between the facts of the claim and the [treaty]." The arguments advanced must also be "of a sufficiently plausible character to warrant a conclusion that the claim is based on the [t]reaty."[25]

b. In its advisory opinion on *Judgments of the Administrative Tribunal of the ILO upon complaints made against the UNESCO*, the Court stated that "it is necessary that the complaint should indicate some genuine relationship between the complaint and the provisions invoked".[26]

c. Even with respect to jurisdiction *prima facie*, the Court held in its Orders of 2 June 1999 in *Legality of Use of Force*, that:

> "in order to determine, even prima facie, whether a dispute within the meaning of Article IX of the Genocide Convention exists, the Court cannot limit itself to noting that one of the Parties maintains that the Convention applies, while the other denies it; […] in the present case the Court must ascertain whether the breaches of the Convention alleged by Yugoslavia are 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 pursuant to Article IX".[27]

The Court recognised that an essential element of the offence of genocide is the specific intent to destroy a national, ethnic, racial or religious group. In its Application and Request for the indication of provisional measures, Yugoslavia alleged that the conduct of the Respondent States was intended to bring about the

---

[25] *Ambatielos case (merits: obligation to arbitrate), Judgment of May 19th, 1953, I.C.J. Reports 1953*, p. 18.

[26] *Judgments of the Administrative Tribunal of the ILO upon complaints made against the UNESCO, Advisory Opinion of October 23rd, 1956, I.C.J. Reports 1956*, p. 89.

[27] See, e.g., *Legality of Use of Force (Yugoslavia v. Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999,* p. 137, para. 38.

physical destruction of such a group. However, in order to establish even *prima facie* jurisdiction, it was not sufficient for Yugoslavia merely to make such an allegation as to intent. In circumstances where there had been no credible showing as to the existence as a matter of fact of specific intent, the Court found that it lacked *prima facie* jurisdiction:

> "whereas the threat or use of force against a State cannot in itself constitute an act of genocide within the meaning of Article II of the Genocide Convention; and whereas, in the opinion of the Court, it does not appear at the present stage of the proceedings that the bombings which form the subject of the Yugoslav Application 'indeed entail the element of intent, towards a group as such, required by the provision quoted above' […];
>
> 41. Whereas the Court is therefore not in a position to find, at this stage of the proceedings, that the acts imputed by Yugoslavia to the Respondent are capable of coming within the provisions of the Genocide Convention; and whereas Article IX of the Convention, invoked by Yugoslavia, cannot accordingly constitute a basis on which the jurisdiction of the Court could prima facie be founded in this case".[28]

This applies, *a fortiori*, at the jurisdictional stage, when jurisdiction must be established conclusively.

36. More generally, the Court held in *Fisheries Jurisdiction (Spain v. Canada)* that:

> "it is for the Court to determine from all the facts and taking into account all the arguments advanced by the Parties, "whether the force of the arguments militating in favour of jurisdiction is preponderant, and to 'ascertain whether an intention on the part of the Parties exists to confer jurisdiction upon it'".[29]

---

[28] *Ibid.,* p. 138, paras. 40-41.

[29] *Fisheries Jurisdiction (Spain v. Canada), Jurisdiction, Judgment, I.C.J. Reports 1998*, pp. 450-451, para. 37.

37. Thus, in order to establish jurisdiction for the purposes of Article 24(1) of the ICSFT, it is not sufficient for Ukraine merely to assert that Russia provided funds with the intention or knowledge that these be used in order to carry out a terrorist act within the meaning of the ICSFT. Ukraine has to convince the Court that it has put forward plausible claims of intentional or knowing financing of terrorism. Ukraine's failure to meet this threshold is addressed in detail in Chapter IV below.

CHAPTER III
INTERPRETATION OF ARTICLE 2(1) OF THE ICSFT

38. As already noted, each of Articles 8-10, 12 and 18 of the ICSFT only applies in respect of offences or alleged offences set forth in Article 2. For the purpose of determining whether it has jurisdiction *ratione materiae*, the Court thus has to interpret Article 2(1) of the ICSFT, which provides that:

> "1. Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:
>
> (a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or
>
> (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 and context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act."

39. Both within the chapeau of Article 2(1) and within the defined acts of terrorism there are specific requirements with respect to intention, knowledge and purpose. Russia considers these in turn.

Section I
The necessary mental elements with respect to terrorism financing

40. Article 2(1) – and, indeed, the Convention as a whole – is concerned only with the suppression of financing of terrorism, that is the unlawful and wilful 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). The mental element of the offence

of terrorism financing therefore performs a central role in the structure and application of the Convention.[30]

41. While the provision or collection of financing under Article 2(1) can be by direct or indirect means, this is further qualified by "unlawfully and wilfully", i.e. a lawful and/or inadvertent provision of funds would not fall within Article 2(1). The key mental requirements are then further spelled out as "intention" and "knowledge".

42. The case put before the Court by Ukraine in its Memorial is that Russian officials and other Russian nationals *knowingly* financed terrorism in Ukraine.[31] It thus appears that Ukraine accepts that, even on its own case, it could not meet a standard of intention. It also appears that it recognises that, as is anyway inevitable, the terms "intention" and "knowledge" are not synonyms in Article 2(1). Further, every term of a treaty must be interpreted in a way that gives it meaning and effect,[32] and if the term "intention" were interpreted as meaning or encompassing "knowledge", that would render the latter term redundant, which cannot have been intended.[33]

---

[30] See, e.g., the authority relied on by Ukraine: M. Lehto, *Indirect Responsibility for Terrorist Acts,* Martinus Nijhoff, 2009, p. 287 (Annex 490 to Memorial): "As article 2 has been formulated, […] it lays all the stress on the subjective side (intention or knowledge)". See also pp. 261 ("The mental element of terrorist financing has been defined carefully, and consists of several components"), 264 ("The criminal nature of terrorist financing relies heavily, if not exclusively, on the guilty mind of the perpetrator. For the purpose of the personal culpability of the financier, the connection is a mental one, created by the criminal knowledge or intention").

[31] See, e.g., Memorial, para. 26.

[32] As recognised in, e.g., *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 23, para. 47.

[33] Note also that where the ICSFT Parties wished to refer to the concept of "intention" alone, they did so. See Article 2(1)(b).

A. "KNOWLEDGE"

43. In light of the way that Ukraine has put its case, Russia focuses on what is meant by "knowledge" within Article 2(1).

44. Pursuant to its ordinary meaning, the term "knowledge" concerns the subjective mindset of the person who has collected or provided funds and refers to an awareness of a fact or situation.[34] There is no suggestion within the wording of Article 2(1) that "knowledge" is to be interpreted expansively to cover constructive knowledge, i.e. what the provider/collector ought to have known, and there is no basis for such an interpretation. This now appears to be accepted by Ukraine.[35]

45. The ordinary meaning is confirmed by the context. Whereas Article 2(1)(b) expressly states that "the purpose" of an act may be determined from the "nature or context" of that act, there is no equivalent with respect to the knowledge requirement in the chapeau to Article 2(1).

46. Although Ukraine has referred in its Memorial to the object and purpose and in particular the Preamble of the ICSFT in support of its over-broad reading of the mental elements in Article 2(1),[36] this is of little assistance. While, as Ukraine notes, the Preamble refers to the United Nations Member States' "unequivocal condemnation of all acts, methods and practices of terrorism as

---

[34] A. Stevenson (ed.), *Oxford Dictionary of English* (3rd ed.), Oxford University Press, 2010 (current online version: 2015), entry for "knowledge".

[35] Although, in its Application, at para. 56, Ukraine framed the standard as whether the alleged financier "knew or should have known" that funds were to be used to carry out terrorist acts, that broad formulation was not repeated in the Request for the indication of Provisional Measures and does not appear in its Memorial.

[36] See, e.g., Memorial, para. 281 and see also para. 207 with respect to Article 2(1)(b).

criminal and unjustifiable, wherever and by whomever committed",[37] this reference tells the interpreter nothing about what is considered under the ICSFT as constituting either an act of terrorism or the mental elements of the offence of terrorism financing, including knowledge.

47. Reference may more usefully be had to the *travaux préparatoires* to the ICSFT, where it is recorded that: "The need to establish a specific criminal intention on the part of those who supply the funds was underscored".[38] Consistent with that, a proposal to incorporate an evidentiary standard whereby the requisite knowledge or intention "shall be inferred from well-founded evidence or objective and actual circumstances" was not accepted in the final text.[39]

B. "THAT THEY [THE FUNDS] ARE TO BE USED"

48. The ordinary meaning of the phrase "knowledge that they *are to be used* […] to carry out" refers to knowledge of a certainty, rather than knowledge of a possibility, that the funds are to be used to carry out an act of terrorism under

---

[37] Memorial, p. 134, fn. 481.

[38] Report of the Working Group, UN Doc. A/C.6/54/L.2, 26 October 1999, Annex III, Informal summary of the discussions in the Working Group, prepared by the Chairman, p. 55, para. 9 (Annex 277 to Memorial).

[39] UN Doc. A/C.6/54/CRP.10, reproduced in Report of the Working Group, UN Doc. A/C.6/54/L.2, 26 October 1999, Annex III, Informal summary of the discussions in the Working Group, prepared by the Chairman, para. 98 (Annex 277 to Memorial).
It is also noted that, in the negotiation of the International Convention on the Suppression of Terrorist Bombings, 15 December 1997 ("ICSTB"), *UNTS*, vol. 2149, p. 256 (on which the ICSFT was largely modelled), various proposals were made to extend that offence to encompass "circumstances in which the person knew or should have known that his conduct would create" specified harm. However, none of those proposals were accepted and the final text contains no such extension. See, e.g., Report of the Ad Hoc Committee, UN Doc. A/52/37, 31 March 1997, Annex II, p. 22, Annex III, p. 33. Annex IV, p. 51, available at http://www.un.org/documents/ga/docs/52/plenary/a52-37.htm.

Article 2(1)(a) or (b).[40] If the drafters had intended to expand the concept of knowledge, they could readily have done so by using the phrase "may be used", "could be used", or "are likely to be used"; but they did not do so.[41]

49. As to the *travaux préparatoires* with respect to Article 2(1) of the ICSFT, none of the following proposals, each of which would have lowered the standard of knowledge, was accepted in the final text: (a) "will or could be used",[42] (b) "is or is likely to be used";[43] (c) "when there is a reasonable likelihood that the funds will be used for such purpose".[44]

---

[40] This ordinary meaning is supported by the authority Ukraine itself relies on: see M. Lehto, *Indirect Responsibility for Terrorist Acts,* Martinus Nijhoff, 2009, p. 285 (Annex 490 to Memorial): "The *chapeau* of article 2 of the Terrorist Financing Convention has been formulated in a way that would suggest a strict interpretation of the intent and knowledge requirements: "with the intention that they should be used, or in the knowledge that they are to be used" – […] after all, it does not say 'may be used'!". See also R. Lavalle, "The International Convention for the Suppression of the Financing of Terrorism", *Heidelberg Journal of International Law*, Vol. 60, 2000, pp. 498 (referring to "the nature of a certainty that they will be so used") and 502 (Annex 484 to Memorial).

[41] Cf. Article 2(1) of the ICSTB (to which reference is made under Article 2(1)(a) of the ICSFT), where the offence is defined by reference to the likelihood of harm occurring. This distinction is also drawn in the authority relied on by Ukraine: see M. Lehto, *Indirect Responsibility for Terrorist Acts*, Martinus Nijhoff, 2009, p. 286 (Annex 490 to Memorial).

[42] See United Nations General Assembly, 54th Session, *Official Records*, *Supplement No. 37,* Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, UN Doc. A/54/37, 5 May 1999, Annex IV, Informal summary of the discussion in the Working Group, prepared by the Rapporteur: first reading of draft articles 1 to 8, 12, paragraphs 3 and 4, and 17 on the basis of document A/AC.252/L.7, para. 18, available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N99/127/34/PDF/N9912734.pdf (Annex 5). Cf. the authority relied on by Ukraine suggesting that the phrase "or could be" may be read back into the final text of Article 2(1) notwithstanding the deliberate omission of precisely that phrase during the negotiations: M. Lehto, *Indirect Responsibility for Terrorist Acts,* Martinus Nijhoff, 2009, p. 303 (Annex 490 to Memorial); R. Lavalle, "The International Convention for the Suppression of the Financing of Terrorism", *Heidelberg Journal of International Law*, Vol. 60, 2000, pp. 499-500 and 504 (Annex 484 to Memorial).

[43] United Nations General Assembly, 54th Session, *Official Records*, *Supplement No. 37,* Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, UN Doc. A/54/37, 5 May 1999, p. 20, Annex III, p. 33, proposal submitted by Guatemala (A/AC.252/1999/WP.16), available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N99/127/34/PDF/N9912734.pdf (Annex 5).

[44] United Nations General Assembly, 54th Session, *Official Records*, *Supplement No. 37,* Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of

C. UKRAINE'S INTERPRETATION OF "KNOWLEDGE"

50. Ukraine has elected not to engage with the ordinary meaning of the words "in the knowledge that they are to be used" in their context.[45] Ukraine's aim is to accord "knowledge" the broadest possible meaning, in particular so that it covers recklessness, and so that knowledge is established where there is the financing of groups designated by Ukraine (alone) as terrorist organisations. The points Ukraine makes to this end are all unconvincing because, at best, the sources relied on concern financing of the most well-established terrorist organisations such as ISIS, whereas it is only Ukraine that considers the DPR and LPR to be "terrorist organisations".

51. Ukraine's reliance on Guidance issued by the Financial Action Task Force is misplaced.[46] The relevant Guidance (as well as the relevant recommendation and interpretive note to which it relates) concerns a standard which is not legally binding and which does not purport to interpret authoritatively Article 2(1) of the

---

17 December 1996, UN Doc. A/54/37, 5 May 1999, p. 20, Annex III, pp. 34-35, proposal submitted by the UK (A/AC.252/1999/WP.20), available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N99/127/34/PDF/N9912734.pdf (Annex 5). This language was omitted from a revised UK proposal without explanation: see pp. 35-36, revised proposal submitted by the UK (A/AC.252/1999/WP.20/Rev.1).

It is also noted that the phrase "are to be used" was substituted for the phrase "will be used". However, the change appears to have been one of form only and there is no suggestion that it was intended to entail any change in the standard of knowledge required. Compare: United Nations General Assembly, 54th Session, *Official Records*, *Supplement No. 37,* Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, UN Doc. A/54/37, 5 May 1999, p. 20, Annex II, Working Document submitted by France ("will or could be used"), available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N99/127/34/PDF/N9912734.pdf (Annex 5); Report of the Working Group, 26 October 1999 (A/C.6/54/L.2), Annex I, Revised text prepared by the Friends of the Chairman ("are to be used") (Annex 277 to Memorial).

[45] It should be noted that the authority relied on by Ukraine recognises that interpreting "knowledge" as encompassing *dolus eventualis* or recklessness "contrasts with the actual wording of paragraph 1" of Article 2 but instead suggests, without any convincing basis, that this expanded reading "would seem justified when reading the article as a whole": M. Lehto, *Indirect Responsibility for Terrorist Acts,* Martinus Nijhoff, 2009, p. 291 (Annex 490 to Memorial).

[46] Memorial, para. 282.

ICSFT.[47] Indeed, the FATF specifically recognises that the relevant definition of terrorist financing "deliberately goes beyond the obligations contained in the *Terrorist Financing Convention* by requiring countries to also criminalise the financing of terrorist organisations and individual terrorists on a broader basis, and without a link to a specific terrorist act or acts."[48] Further, FATF anyway adopts the position that the broader offence of terrorism financing defined in its recommendations excludes recklessness.[49] Similarly, the Legislative Guide prepared by the UN Office on Drugs and Crime ("UNODC") does not assist Ukraine since it also does not in any way purport to interpret authoritatively Article 2(1) of the ICSFT.[50]

52. Ukraine also emphasises that Article 2(1), of course, does not require knowledge that "*particular* funds will be used for *particular* terrorist acts".[51] However, that is of no assistance to Ukraine. Article 2(1) does require that a person must actually know that the funds are to be used for *some* terrorist act

---

[47] See Financial Action Task Force Mandate (2012-2020), 20 April 2012, para. 48 ("This Mandate is not intended to create any legal rights or obligations."), available at http://www.fatf-gafi.org/media/fatf/documents/FINAL%20FATF%20MANDATE%202012-2020.pdf.

[48] FATF, *Guidance on the criminalisation of terrorist financing (Recommendation 5)*, 2016, para. 18, available at http://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-Criminalising-Terrorist-Financing.pdf.

[49] *Ibid.*, para. 8: "For the requisite mental element (*mens rea*) of the offence, R.5/INR.5 requires *wilful* TF [terrorist financing] to be covered (i.e., where the conduct is deliberately committed with an unlawful intention). It does not require countries to criminalise TF as a strict liability offence […] reckless or negligent TF, or unwitting acts of TF" (emphasis in the original).

[50] The original mandate is set out in General Assembly resolution, *Plans of action for the implementation of the Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century*, 56/261, 15 April 2001, Annex, section VII.B, para. 24, and includes: "Take steps to raise awareness of the relevant international instruments, encourage States to sign and ratify such instruments and, where feasible, provide assistance in implementing such instruments to States, upon request." (available at http://undocs.org/A/RES/56/261). See also UNODC, *Legislative Guide to the Universal Legal Regime Against Terrorism*, 2008, p. v (Annex 285 to Memorial).

[51] Memorial, para. 280 (emphasis in the original). A similar conflation is made by the passage from M. Lehto, *Indirect Responsibility for Terrorist Acts,* Martinus Nijhoff, 2009, p. 293 (Annex 490 to Memorial) which is cited at Memorial, para. 281.

within the meaning of Article 2(1)(a) and (b). There is no basis for conflating these two separate questions.

53. Ukraine's reliance on Article 2(3) ICSFT, which states that it is not necessary that funds were actually used to carry out an offence referred to in subparagraph 1(a) or 1(b), is also misconceived; that provision is not in any way concerned with the required mental elements.[52]

54. Ukraine also contends that it "must be assumed that the financing of a group which has *notoriously* committed terrorist acts would meet the requirements of paragraph 1" of Article 2.[53] Whether that is correct or not, the point made is an irrelevance. Such notoriety will be satisfied in relation to entities and persons who have been designated by the UN Security Council as an associate of Al-Qaida, Usama bin Laden or the Taliban or pursuant to resolution 1373.[54] There has been no such designation and there is no equivalent notoriety so far as concerns the alleged perpetrators of terrorist acts in the present case.

---

[52] See also the authority relied on by Ukraine, M. Lehto, *Indirect Responsibility for Terrorist Acts,* Martinus Nijhoff, 2009, p. 296 (Annex 490 to Memorial).

[53] Memorial, para. 281, quoting M. Lehto, *Indirect Responsibility for Terrorist Acts,* Martinus Nijhoff, 2009, p. 289 (Annex 490 to Memorial) (emphasis added). See also p. 290: "For instance, financing a group that has been notoriously involved in aircraft hijacking or in the taking of hostages and that could be expected to continue such odious activities would satisfy the requirements of article 2."

[54] M. Lehto, *Indirect Responsibility for Terrorist Acts,* Martinus Nijhoff, 2009, p. 289 (Annex 490 to Memorial): "The existing lists of terrorist organisations, groups and individuals for the purposes of preventive asset-freezing spread such notoriety […]. Thus, the act of financing is less ambiguous where funds have been transferred to a proscribed organisation or to a person who has been listed as an associate of Al-Qaida, Usama bin Laden or the Taliban or on the basis of UN Security Council resolution 1373. In such cases it may be presumed that the financier has intended to finance terrorist activities." See also FATF, *Guidance on the criminalisation of terrorist financing (Recommendation 5)*, 2016, para. 26, suggesting that a country could consider designation by the Security Council or by *that* country as "a *prima facie* indication" (available at http://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-Criminalising-Terrorist-Financing.pdf).

55. For the same reason, Ukraine's contention that "States Parties also have interpreted the knowledge requirement of Article 2 as satisfied where the financier provides funds to groups known to commit acts of terrorism" is also of no assistance.[55] Each of the cases relied on concerned financing of a group or organisation which was designated as a terrorist group or organisation by competent international bodies or, at least, by multiple States, namely FARC and PFLP,[56] Hamas,[57] PKK,[58] ETA[59] and ISIS.[60] In such circumstances, on the basis of international and/or national designations, and in light of other evidence, consistent with the general approach in *Croatia v. Serbia*,[61] the relevant national tribunals drew the inference that the financier knew that the funds were to be used to carry out terrorist acts.[62] With the sole exception of Ukraine, no States or international organisations have designated DPR or LPR as terrorist organisations.

---

[55] Memorial, para. 283.

[56] Supreme Court of Denmark, *Fighters and Lovers Case*, Case No. 399/2008, Press release, 25 March 2009 (Annex 476 to Memorial). The evidence before the Court as to the terrorist nature of FARC and PFLP included UN materials: see pp. 1-2.

[57] *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 698 (7th Cir. 2008) (Annex 474 to Memorial). See, e.g., p. 700 noting that Hamas, which "engages in violence as a declared goal of the organization". See also pp. 693-694. It should also be noted that that case also concerned tortious liability, rather than criminal law, and the U.S. Court recognised that "knowledge and intent have lesser roles in tort law than in criminal law": see p. 692.

[58] French *Cour de cassation*, Case No. 13-83.758, Judgment, 21 May 2014 (Annex 477 to Memorial).

[59] French *Cour de cassation*, Case No. Z 04-84.264, Judgment, 12 April 2005 (Annex 472 to Memorial). For background see ECtHR, *Case of Herri Batasuna and Batasuna v. Spain,* ECtHR Applications nos. 25803/04 and 25817/04, Judgment, 30 June 2009.

[60] *Tribunal correctionnel de Paris*, 28 September 2017, in Nouvelobs, "Deux Ans de Prison Pour la Mère d'un Djihadiste : 'J'aurais Pu Sauver mon Fils'", 6/28 September 2017 (Annex 480 to Memorial).

[61] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)*, *Judgment*, *I.C.J. Reports 2015*, p. 67, para. 148.

[62] This is without prejudice to the fact that FARC, PFLP, Hamas, PKK and ETA are not included in the Unified federal list of organisations recognised as terrorist in accordance with the legislation of the Russian Federation.

Section II
The acts of terrorism within the meaning of Article 2(1)(a) of the ICSFT

56. The acts of terrorism in respect of which financing is prohibited are established by Articles 2(1)(a) and (b). Article 2(1)(a) concerns acts which constitute offences as established in the treaties in the annex to the ICSFT, including the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation ("Montreal Convention")[63] and the ICSTB[64] which are the only two treaties that Ukraine relies on.

A. MONTREAL CONVENTION

57. The specific offences covered by Article 2(1)(a) of the ICSFT include the offence of unlawfully and intentionally destroying a civilian aircraft under Article 1(1)(b) of the Montreal Convention. Ukraine relies on this provision in relation to the downing of Flight MH17.

58. Article 1(1)(b) of the Montreal Convention provides:

> "Any person commits an offence if he unlawfully and intentionally: […]
>
> (b) destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight".

59. Ukraine contends that the elements of the offence under Article 1(1)(b) are that "a person must (1) intend to destroy or damage an aircraft in service, (2) act unlawfully, and (3) destroy or cause damage to a civilian aircraft".[65] In other

---

[63] Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 23 September 1971, *UNTS*, Vol. 974, p. 178.

[64] International Convention for the Suppression of Terrorist Bombings, 15 December 1997, *UNTS*, Vol. 2149, p. 256.

[65] Memorial, para. 219.

words, it is sufficient on Ukraine's case that the intention be to destroy or damage a military aircraft as long as the actual damage or destruction is to a civilian aircraft. That is artificial and incorrect.

60. Article 1(1)(b) of the Montreal Convention refers to an "aircraft in service". That formula is defined in Article 2 and must be read in context, including most obviously in the context of Article 4(1) of the Montreal Convention, which provides:

> "The Convention shall not apply to aircraft used in military, customs or police services".

61. Plainly, the reference to an "aircraft in service" in Article 1(1)(b) does not encompass aircraft used in military, customs or police services.[66]

B. ICSTB

62. Ukraine contends that the bombings and attempted bombings in Kharkov, Kiev and Odessa amount to acts of terrorism under Article 2(1)(a) of the ICSFT read together with Article 2(1)(a) of the ICSTB.[67]

63. Article 2(1) of the ICSTB provides:

> "Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility:
>
> (a) With the intent to cause death or serious bodily injury; or

[66] As to the *travaux préparatoires*, see ICAO, "International Conference on Air Law, Montreal, September 1971", Vol. I, 1973, p. 122, para. 7 (Annex 4).

[67] Memorial, paras. 230, 266.

(b) With the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss."

64. Article 2(1) of the ICSTB thus contains a dual intention requirement: intentional delivery, etc., with the intent to cause death/serious bodily harm/extensive destruction. It is noted that, where the parties to the ICSTB wished to introduce any element of likelihood, they did so expressly in Article 1(b).

Section III
The acts of terrorism within the meaning of Article 2(1)(b) of the ICSFT

65. Article 2(1)(b) contains a requirement of both specific intent and purpose:

> "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 and context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act."[68]

66. It is noted at the outset that this definition of a terrorist act in Article 2(1)(b) is different to, and in certain respects more stringent than, the prohibition of spreading terror established in international humanitarian law ("IHL").[69] The differences must be deliberate: it is plain from Article 2(1)(b) and also

[68] Emphasis added.

[69] See Article 51(2), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts, 8 June 1977 (Protocol I), *UNTS*, Vol. 1125, p. 3 ("API"), and Article 13(2), Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts, 8 June 1977 (Protocol II), *UNTS*, Vol. 1125, p. 609 ("APII").

Article 21[70] of the ICSFT that the drafters of the Convention had the rules of IHL firmly in mind when they drafted this provision.

A. "INTENDED TO CAUSE DEATH OR SERIOUS BODILY INJURY TO A CIVILIAN […]"

67. Pursuant to its ordinary meaning, the term "intended" means "desired", "aimed" or "planned". There is no suggestion in the language of Article 2(1)(b) or otherwise that any different meaning was intended.[71] Ukraine suggests that the French version of the ICSFT, referring to "*tout autre acte destiné à tuer ou blesser grièvement un civil*" suggests a different and broader meaning.[72] There is no basis for this as the term "*destiné à*" has the same meaning as "intended to".[73] The same basic point applies so far as concerns the other authentic language versions of the text.[74]

68. As to the context, unlike the chapeau to Article 2(1), Article 2(1)(b) does not contain the formulation "intention or knowledge". The drafters evidently considered that knowledge is insufficient and that a more demanding mental

---

[70] Article 21 provides: "Nothing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes of the Charter of the United Nations, international humanitarian law and other relevant conventions".

[71] This ordinary meaning is supported by the authority Ukraine relies on: see M. Lehto, *Indirect Responsibility for Terrorist Acts,* Martinus Nijhoff, 2009, p. 266 (Annex 490 to Memorial), stating that the "intention" element of the chapeau of Article 2(1) requires that the financier must "want the contribution to be used for terrorist purposes". See also p. 283: "Intention in the sense of the will to bring about a certain result is always a subjective concept". See also R. Lavalle, "The International Convention for the Suppression of the Financing of Terrorism", *Heidelberg Journal of International Law*, Vol. 60, 2000, p. 498 (Annex 484 to Memorial), referring to "a desire (or conviction of the appropriateness) that the funds provided or collected be used for supporting an act of terrorism".

[72] Memorial, para. 206.

[73] See, e.g., Lexique Anglais-Français du Conseil de l'Europe (principalement juridique), Editions du Conseil de l'Europe, 2002, providing the term "*destiné à"* as a translation of "intended for".

[74] In Russian: «направленного на», in Spanish: "destinado a", in Arabic: «يهدف الى», in Chinese: "意图".

element must be satisfied. It follows that the term "intent" should not be interpreted expansively to encompass knowledge-based standards.

69. Ukraine does not focus on ordinary meaning or context. It asserts that the term "intention" has no single ordinary meaning in international law but "instead is a general term that describes various *mens rea*". According to Ukraine:

> "[i]ntent encompasses a desire to achieve the consequence of one's conduct (*dolus directus*), an awareness or knowledge that the consequence will occur in the ordinary course of events (*dolus indirectus*), or where one sees his action is likely to produce the consequence and nevertheless he willingly takes the risk of so acting (*dolus eventualis*)."[75]

It therefore follows that Ukraine inappropriately conflates the separate mental elements of knowledge and intention despite the formulation of Article 2(1)(b), which demonstrates that they cannot have been intended to have the same meaning.

70. As regards the object and purpose of the ICSFT, the references in the preamble to the "condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomever committed" sheds no light on the meaning of the term "intended" as a specific component of the definition of a terrorist act under Article 2(1)(b).[76] While Ukraine states that its expansive reading of the term "intention" is supported by "common usage in international law", it relies principally on Article 30 of the Rome Statute of the International

[75] Memorial, para. 206.
[76] Cf. Memorial, para. 207.

Criminal Court (the "Rome Statute").[77] Ukraine's reliance on that provision is misconceived:

a. Neither Ukraine nor Russia are a party to the Rome Statute.[78]

b. The Rome Statute makes no reference to "terrorism" because there was a deliberate decision to exclude terror offences from the jurisdiction of the ICC. The Rome Statute therefore has no relevance to the specific *mens rea* elements under the ICSFT (or, indeed, under IHL).[79]

c. Even if it were otherwise, Article 30 of the Rome Statute only applies "unless otherwise provided". In *Bemba,* Pre-Trial Chamber II explained that "there are certain crimes that are committed with a specific purpose or intent, and thus, requiring that the suspect not only fulfil their subjective elements, but also an additional one – known as specific intent or *dolus specialis*."[80] This is precisely the case in relation to the offences under the Rome Statute of intentionally directing attacks against the

---

[77] Cf. Memorial, para. 207. Ukraine also relies on a passage from the Appeals Chamber's Judgment in *Tadić*, made in a very different context, reasoning that *dolus eventualis* or "advertent recklessness" may be sufficient to establish criminal responsibility for participating in a common criminal purpose under customary international law and Article 7(1) of the Statute of the ICTY: see Memorial, para. 206, fn. 480, quoting ICTY, Appeals Chamber, *Prosecutor v. Tadić,* Case No. IT-94-1-A, Judgment, 15 July 1999, para. 200 (Annex 463 to Memorial). That statement is of no assistance to Ukraine since the ICSFT contains a separate provision specifically establishing an equivalent offence, Article 5, which is anyway not relied on by Ukraine.

[78] Rome Statute of the International Criminal Court, 17 July 1998, *UNTS*, Vol. 2187, p. 3. For status of the Rome Statute see https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10&chapter=18&clang=_en (accessed on 5 September 2018).

[79] In this respect, Ukraine's reference to the *Kasikili/Sedudu Island* case is inapposite: Cf. Memorial, para. 206. It could make no sense for the interpreter to look at sources of international law the coverage of which deliberately excludes the subject-matter on which the interpretation is sought.

[80] ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, para. 354.

civilian population and launching an attack in the knowledge that it will result in excessive civilian casualties,[81] and also in relation to the specific intent and purpose requirements under Article 2(1)(b) of the ICSFT.

d. It is also noted that Article 30 does not anyway support Ukraine's broad interpretation as the mental element of *dolus eventualis* (akin to the common law concept of recklessness) was deliberately excluded.[82]

71. A more appropriate reference point for ascertaining the meaning of an intentional act under Article 2(1) of the ICSFT is the well-established case law on the meaning of specific intent in the context of genocide,[83] to which regard must be had under the rule codified in Article 31(3)(c) of the Vienna Convention.[84] Although the context is different, as with the ICSFT, the Genocide Convention[85] is concerned with a specific intent requirement.[86]

---

[81] Rome Statute, Articles 8(2)(b)(i) and (iv).

[82] See ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, paras. 362-369; W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd ed., 2016), pp. 269-230. See also ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (2nd ed.), 2016, para. 2939, available at https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=21B052420B219A72C1257F7D00587FC3. This interpretation is correctly described as "widely shared" in an authority relied on by Ukraine: M. Lehto, *Indirect Responsibility for Terrorist Acts,* Martinus Nijhoff, 2009, p. 284 (Annex 490 to Memorial).

[83] This also applies to the meaning of the term "intention" in the chapeau to Article 2(1).

[84] Vienna Convention on the Law of Treaties, 23 May 1969, *UNTS*, vol. 1155, p. 331 ("VCLT").

[85] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, *UNTS*, vol. 78, p. 277 ("Genocide Convention").

[86] A comparison between the mental elements under Article 2 of the ICSFT and the Genocide Convention is also supported as "meaningful" by the authority relied on by Ukraine: see M. Lehto, *Indirect Responsibility for Terrorist Acts,* Martinus Nijhoff, 2009, pp. 291-292 (Annex 490 to Memorial).

a. In the *Bosnia Genocide* case, the Court referred to a "special or specific intent" to commit genocide as an "extreme form of wilful and deliberate acts designed to destroy a group or part of a group".[87]

b. The ICTY and ICTR have consistently held that the specific intent requirement expresses the volitional element in its highest form and is purpose-based, rather than knowledge-based.[88]

c. The Court has held that where there is no direct proof that prohibited acts have taken place with the required subjective element, in order to infer such an intention from a pattern of conduct, it is necessary that this is the only inference that could reasonably be drawn.[89]

72. As to other relevant rules of international law applicable in the relations between the Parties, the specific intent requirement in Article 2(1)(b) is more stringent than the corresponding requirement under the IHL prohibition on indiscriminate attacks which "may be expected" to cause civilian casualties which are excessive in relation to the anticipated military advantage.[90] The phrase

---

[87] *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*, p. 43, pp. 122-123, para. 188, citing ICTY, Trial Chamber, *Prosecutor v. Kupreškic et al.*, Case No. IT-95-16-T, Judgment, 14 January 2000, para. 636.

[88] ICTR, Trial Chamber, *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998, para. 498 ("demands that the perpetrator clearly seeks to produce the act charged", i.e., has "clear intent to cause the offence") (Annex 988 to Memorial); ICTY, Appeals Chamber, *Prosecutor v. Goran Jelisić*, Case No. IT-95-10-A, Judgment, 5 July 2001, para. 46 ("specific intent requires that the perpetrator […] seeks to achieve"; and ICTY, Trial Chamber, *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T, Judgment, 2 August 2001, para. 71 (referring to "the goal") (Annex 993 to Memorial) and *Krstić*, Appeals Chamber Judgment, Case No. IT-98-33-A, 19 April 2004, para. 134.

[89] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, *Judgment*, *I.C.J. Reports 2015*, p. 67, para. 148.

[90] Article 51(5)(b), API.

"may be expected", which is not used in Article 2(1)(b) of the ICSFT, incorporates an objective element.[91]

73. As at the provisional measures stage, Ukraine continues to conflate the legally distinct IHL prohibitions of direct attacks (i.e. attacks targeting the civilian population or individual civilians),[92] spreading terror (an aggravated form of direct attack with a specific intent),[93] and indiscriminate attacks (i.e. attacks involving the complete absence of targeting).[94] There is no legal or other basis for this conflation.

74. Ukraine also continues to rely on the reasoning of the Italian Supreme Court of Cassation in *Italy v. Abdelaziz*, that "an action against a military objective must also be regarded as terrorism if the particular circumstances show beyond any doubt that serious harm to the life and integrity of the civilian population are *inevitable*, creating fear and panic among the local people."[95] That is a very different case and it is of no assistance to Ukraine's case. That case

---

[91] ICTY, Trial Chamber, *Prosecutor v. Galić*, Case No. IT-98-29-T, Judgment, 5 December 2003, para. 58 (Annex 464 to Memorial).

[92] Article 51(2) API, Article 13(2) APII; ICRC, *Study on Customary International Humanitarian Law: Rule 1. The Principle of Distinction between Civilians and Combatants*, IHL database, available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule1.

[93] Article 51(2), API, Article 13(2) APII; ICRC, ICRC, *Study on Customary International Humanitarian Law: Rule 2. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited*, IHL database, available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule2. Regarding the relationship between the *mens rea* elements of the prohibitions on direct attacks and on spreading terror see: ICTY, Appeals Chamber, *Prosecutor* v. *Stanislav Galić*, Case No. IT-98-29-A, Judgment, 30 November 2006, para. 104; ICTY, Appeals Chamber, *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Judgment, 12 November 2009, para. 37 (Annex 467 to Memorial); ICTY, Trial Chamber, *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Judgment, 12 December 2007, para. 882 (Annex 466 to Memorial).

[94] Article 51(4), API.

[95] Italian Supreme Court of Cassation, 1st Criminal Section, *Italy v. Abdelaziz and ors*, Case No. 1072, (2007) 17 Guida al Diritto 90, Final Appeal Judgment, 17 January 2007, paras. 4.1 and 6.4 (Annex 473 to Memorial). See also para. 5.1 stating that such designation is not conclusive.

concerned financing of an organisation which had been designated a terrorist entity pursuant to Security Council resolution 1267 (1999).[96] The question was whether "in a situation of armed conflict, so-called Kamikaze suicide actions, when committed against military objectives, cannot be regarded as terrorism, even if causing serious damage and spreading fear among the civilian population."[97] The Supreme Court held that "it is clear that the certainty (and not simply the possibility or probability) of serious harm inflicted on civilians shows unequivocally that the committing of an intentional and specific act was prompted by a desire to cause the harm and to achieve the particular results that constitute terrorist aims."[98] Thus, the Supreme Court interpreted the standard of "intention" as one of *dolus directus* ("a desire") and reasoned that this may be inferred only from proof of "certainty" of serious harm to the civilian population. That undermines Ukraine's case that "intention" is to be interpreted broadly as also encompassing *dolus indirectus* and *dolus eventualis*.

B. "THE PURPOSE OF SUCH ACT, BY ITS NATURE AND CONTEXT IS TO INTIMIDATE A POPULATION, OR TO COMPEL A GOVERNMENT […]"

75. The definition of a terrorist act under Article 2(1)(b) requires that "the purpose" of an "act intended to cause death or serious bodily injury to a civilian" "is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act."

76. Pursuant to its ordinary meaning, the "purpose" of "such act" concerns the subjective reason for which that specific act is taken, and the phrase "the purpose" concerns *the* reason (singular) and is not qualified in any way.

---

[96] *Ibid.*, para. 5.
[97] *Ibid.*, para. 4.1.
[98] *Ibid.*, para. 4.1. See also para. 6.4, using the formulation "certain and unavoidable".

a. By contrast, the IHL prohibition on spreading terror under API and APII is concerned with the "primary purpose",[99] a difference that (again) must be deliberate since the drafters of the ICSFT had the rules of IHL in mind.

b. However, even that less stringent mental standard of "primary purpose" to spread terror requires "specific intent".[100] In *Galić*, the Trial Chamber held that, because it is a specific intent requirement, "primary purpose" "is to be understood as excluding *dolus eventualis* or recklessness. […] Thus the Prosecution is required to prove not only that the Accused accepted the likelihood that terror would result from the illegal acts – or, in other words, that he was aware of the possibility that terror would result – but that that was the result which he specifically intended."[101]

77. Article 2(1)(b) states that the purpose may be determined "by its nature and context". As regards the ordinary meaning of those terms:

---

[99] See, e.g., *Prosecutor v. Milošević*, Appeals Chamber Judgment, para. 37 (Annex 467 to Memorial): "While spreading terror must be the *primary* purpose of the acts or threats of violence, it need not be the only one"; *Prosecutor v. Milošević*, Trial Chamber Judgment, para. 879 (Annex 466 to Memorial): "'Primary' does not mean the infliction of terror is the only objective of the acts or threats of violence. Other purposes may exist simultaneously with the purpose of spreading terror among the civilian population, provided that the intent to spread terror is principal among the aims of the acts of violence. Perpetrators committing the crime of terror may have military, political or other goals."

[100] See *Prosecutor v. Galić*, Trial Chamber Judgment, para. 136 (Annex 464 to Memorial): "'Primary purpose' […] is to be understood as excluding *dolus eventualis* or recklessness from the intentional state specific to terror. Thus, the Prosecution is required to prove not only that the Accused accepted the likelihood that terror would result from the illegal acts – or, in other words, that he was aware of the possibility that terror would result – but that that was the result which he specifically intended. The crime of terror is a specific-intent crime."

[101] See *ibid.*, para. 136 (Annex 464 to Memorial); *Prosecutor v. Galić*, Appeals Chamber Judgment, para. 104; *Prosecutor v. Milošević*, Trial Chamber Judgment, para. 878 (Annex 466 to Memorial): *Prosecutor v. Milošević*, Appeals Chamber Judgment, para. 37 (Annex 467 to Memorial).

a. The term "nature" refers to the basic or inherent features, characters or qualities of a specific act.[102]

b. The term "context" refers to the circumstances that form the setting for that specific act.[103] To similar effect, the ICTY has held that the "primary purpose" (i.e. specific intent) of spreading terror may be inferred from such factors as the "nature, manner, timing and duration" of the specific acts or threats.[104]

78. As Ukraine recognises, the specific purpose requirement of intimidating a population or coercing a government is central to the definition of a terrorist act within the meaning of Article 2(1)(b); it is necessary "so as to exclude ordinary crimes".[105]

a. Whereas ordinary crimes are directed against individuals, the specific purpose requirement under Article 2(1)(b) concerns intimidation of "a population". The term "a population", pursuant to its ordinary meaning, refers to a significant grouping.[106]

b. Since such "ordinary" crimes include murder and causing serious bodily harm, which will naturally cause the victim (and others affected

[102] A. Stevenson (ed.), *Oxford Dictionary of English* (3rd ed.), Oxford University Press, 2010 (current online version: 2015), entry for "nature".
[103] *Ibid.*, entry for "context".
[104] *Prosecutor v. Galić*, Appeals Chamber Judgment, para. 104. See also *Prosecutor v. Milošević*, Trial Chamber Judgment, para. 881 (Annex 466 to Memorial): "attacks during cease-fires and truces or *long-term and persistent attacks* against civilians, as well as indiscriminate attacks, may be taken as indicia of the intent to spread terror. The Trial Chamber considers that the specific intent may also be inferred from the site of the attack. The fact that, during the siege, civilians were targeted and attacked at sites, well known to be frequented by them during their daily activities, such as market places, water distribution points, on public transport, and so on, may provide strong indicia of the intent to spread terror" (emphasis added).
[105] Memorial, para. 208.
[106] See also Article 50, API defining the term "civilian population".

> individuals) to experience fear and intimidation, the drafters must have intended that what is required is a higher form of intimidation affecting the civilian population.[107]

79. It is also, of course, the case that within armed hostilities, fear and intimidation naturally occur but it is well-established that this must be distinguished from spreading terror. As the Trial Chamber explained in *Milošević*, an authority Ukraine relies on:

> "The Trial Chamber also notes that the crime of terror only covers acts or threats of violence which are specifically intended to spread terror among the civilian population. It must be established that the terror goes beyond the fear that is only the accompanying effect of the activities of armed forces in armed conflict. […] The Trial Chamber notes that a certain degree of fear and intimidation among the civilian population is present in nearly every armed conflict. The closer the theatre of war is to the civilian population, the more it will suffer from fear and intimidation. This is particularly the case in an armed conflict conducted in an urban environment, where even legitimate attacks against combatants may result in *intense fear and intimidation* among the civilian population".[108]

80. The cases of *Galić* and *Milošević*, both authorities Ukraine relies on, concerned the fourteen-month long siege of Sarajevo, during which the civilian population in all areas of the city was subjected to an incessant campaign of sniping and shelling involving direct attacks as well as indiscriminate attacks.[109] The ICTY found that "no Sarajevo civilian was safe anywhere, at any time of day

---

[107] Memorial, para. 208, quoting United Nations General Assembly, 54th Session, Measures to Eliminate International Terrorism: Report of the Working Group, UN Doc. A/C.6/54/L.2, 26 October 1999, Annex III, p. 62, para. 87 (Annex 277 to Memorial).

[108] *Prosecutor v. Milošević*, Trial Chamber Judgment, para. 888 (Annex 466 to Memorial). See also *Prosecutor v. Galić*, Trial Chamber Judgment, para. 103 (Annex 464 to Memorial): "As noted by a representative of France [in the *travaux préparatoires* to API, Vol. XIV, p. 65] the waging of war would almost inevitably lead to the spreading of terror among the civilian population and the intent to spread terror is what had to be prohibited."

[109] *Prosecutor v. Galić*, Trial Chamber Judgment, paras. 284 and 593 (Annex 464 to Memorial); *Prosecutor v. Galić*, Appeals Chamber Judgment, para. 107; *Prosecutor v. Milošević*, Trial Chamber Judgment, paras. 905, 907-908 and 910 (Annex 466 to Memorial).

or night"[110] and held that the requisite specific intent to spread terror could be inferred from, *inter alia*, sniping by "very skilled" snipers, and the use of mortars as an "accurate weapon" operated by "highly trained" crew, continuously for a period of fourteen months.[111]

81. At the provisional measures stage, Ukraine asserted that the prolonged shelling and sniping campaign against the entire civilian population of Sarajevo is "not unlike what Ukraine has experienced".[112] Although that statement is not repeated in terms in its Memorial, Ukraine still seeks to draw parallels between the facts of *Milošević* and the present case.[113] That does not assist Ukraine's case; the facts involved are so radically different to any event that Ukraine relies on that any comparison merely highlights the absence of plausible allegations of terrorist acts within the meaning of Article 2(1) of the ICSFT.[114]

82. *Galić* and *Milošević* are the only ICTY cases resulting in findings of liability for spreading terror. In other cases, the Prosecutor has not even pursued such charges.[115] A good example is *Gotovina*, which concerned "a massive

---

[110] *Prosecutor v. Galić*, Trial Chamber Judgment, para. 593 (Annex 464 to Memorial).

[111] *Prosecutor v. Milošević*, Trial Chamber Judgment, paras. 909 and 912-913 (Annex 466 to Memorial); *Prosecutor v. Milošević*, Appeals Chamber Judgment, paras. 37-38 (Annex 467 to Memorial). Cf. Memorial, para. 209, seeking to use this specific finding as support for a general proposition that "the ICTY infers a purpose to spread terror from 'both the actual infliction of terror and the indiscriminate nature of the attack'" without drawing the Court's attention to the context in which that statement was made.

[112] CR 2017/3, p. 39, para. 15 (Cheek).

[113] Memorial, paras. 213 (asserting actual terrorisation of civilians generally), 231 (claiming that the shelling near Volnovakha targeted sited well known to be frequented by civilians during their daily activities, 242 (referring to damage to civilian sites in Mariupol), 543 (asserting actual terrorisation of civilians in Mariupol), 259 (characterising the episodes of indiscriminate shelling in Avdeevka as repeated, random attacks against civilian areas).

[114] See further below, paras. 103 and 109.

[115] The test for an indictment is whether there is "sufficient evidence for believing that a suspect has committed a crime within the jurisdiction of the Tribunal": see ICTY Rules of Procedure and Evidence, IT/32/Rev.50, 8 July 2015, Rule 47 (B). As to the legal significance of decisions on indictment see *Application of the Convention on the Prevention and Punishment of*

artillery assault on Knin" and artillery fire "directed on civilian targets" in various other towns and villages by the Croatian armed forces in August 1995.[116]

83. Ukraine contends that "the practice of States Parties makes clear [that] attacks on civilian areas will, by their nature or context, generally be regarded as having the requisite purpose" and refers to three decisions of the municipal courts of three States.[117] These decisions are also of no assistance:

a. In *Italy v. Abdelaziz*, as noted above at para. 74 the Italian Supreme Court of Cassation held that the requisite specific purpose may be inferred from "certainty (and not mere possibility or probability) of serious harm inflicted on civilians".[118]

b. Ukraine's assertion that the "The Russian Supreme Court treats an 'armed attack on populated localities' as indicating a purpose to intimidate" is misconceived. The passage Ukraine relies on concerns the objective elements of a terrorist act under Russian law,[119] not the specific purpose requirement, which is addressed in paragraph 1 of the said resolution.[120]

---

the Crime of Genocide (Croatia v. *Serbia)*, *Judgment*, *I.C.J. Reports 2015*, pp. 75-76, para. 187.

[116] ICTY, *Prosecutor v. Ante Gotovina*, Case No. IT-01-45-I, Indictment, 21 May 2001, paras. 43-44.

[117] Memorial, para. 209.

[118] *Italy v. Abdelaziz*, para. 4.1 (Annex 473 to Memorial). Cf. Memorial, para. 209 suggesting that this judgment is authority for the proposition that "attacks on civilian areas will generally 'creat[e] fear and panic among the local people,' thereby 'achiev[ing] the particular results that constitute terrorist purposes." It is also noted that the Court's reasoning is anyway inconsistent with the widely accepted proposition that the fear among civilians which naturally occurs during armed hostilities must be distinguished from spreading terror.

[119] These objective elements are defined as "a commission of an explosion, arson or other act that intimidates the population and creates danger to life of a person, risk of substantial harm to property or occurrence of other especially grave consequences" (Article 205 of the Criminal Code of the Russian Federation, Annex 60).

[120] Resolution on the Plenum of the Supreme Court of the Russian Federation No. 1 "On Some Aspects of Judicial Practice Relating to Criminal Cases on Crimes of Terrorist Nature", 9 February 2012, paras. 1-2 (Annex 438 to Memorial).

In fact, the definition of a terrorist act under Russian law is in certain respects different than in Article 2(1)(b) ICSFT. For example, the specific purpose must concern "destabilizing the operation of public authorities or international organisations, or influencing their decisions".[121] In any case, as a matter of principle, there is nothing to stop a State from establishing a wider criminal offence under its national law.

c. As already noted, the *Fighters and Lovers Case* concerned financing of FARC and PFLP, and it was a relevant factor that both organisations were designated at the international level as terrorist organisations by a number of States and international organisations.[122]

[121] As confirmed in the same resolution by the Supreme Court, this purpose is a "necessary characteristic of an act of terrorism" (*ibid*., para.1).

[122] Supreme Court of Denmark, *Fighters and Lovers Case*, Case 399/2008, Press release, 25 March 2009, pp. 1-2 (Annex 476 to Memorial).

CHAPTER IV
NO PLAUSIBLE ALLEGATION OF *TERRORISM* WITHIN THE MEANING OF ARTICLE 2(1) OF THE ICSFT

84. In the present case, Ukraine contended at the provisional measures phase (with respect to Article 18 of the ICSFT) that it was possible to infer the existence of the necessary specific intent, knowledge and purpose under Article 2(1) of the ICSFT from: (a) the shooting down of Flight MH17, (b) a pattern of indiscriminate shelling of populated areas and specifically shelling events in Volnovakha, Mariupol, Kramatorsk (January to February 2015) and Avdeevka (January to March 2017); (c) bombings carried out in Ukrainian cities in 2014, 2015 and 2017; (d) killings and ill-treatment of civilians located in territory controlled by the DPR/LPR.

85. In its Order of 19 April 2017, the Court rejected Ukraine's argument and held that:

> "75. In the present case, the acts to which Ukraine refers […] have given rise to death and injury of a large number of civilians. However, in order to determine whether the rights for which Ukraine seeks protection are at least plausible, it is necessary to ascertain whether there are sufficient reasons for considering that the other elements set out in Article 2, paragraph 1, such as the elements of intention and knowledge noted above […], and the element of purpose specified in Article 2, paragraph 1 (b), are present. At this stage of the proceedings, Ukraine has not put before the Court evidence which affords a sufficient basis to find it plausible that these elements are present."[123]

[123] Order of 19 April 2017, p. 104.

86. The test as to jurisdiction *ratione materiae* that falls to be applied by the Court at this phase of the proceeding raises closely analogous issues to those already considered by the Court in this aspect of its Order of 19 April 2017. While the above finding is only *prima facie*, there is a key question as to whether materially *new* arguments or evidence going to Article 2 of the ICSFT have been put forward in the Memorial to supersede the *prima facie* decision of the Court that Ukraine *does not have* plausible claims under the ICSFT. The answer is "no". The case now being put forward by Ukraine is essentially the same as at the provisional measures stage; the specific incidents relied on are the same; and such additional evidence as has been put forward in fact confirms the absence of the requisite specific knowledge, intention and purpose.

87. As further developed below, in circumstances where Ukraine has failed to put before the Court any substantially different or better supported case on the key elements of intention, knowledge and purpose, the correct position is that this Court lacks jurisdiction *ratione materiae* with respect to the claims brought by Ukraine for breach of the ICSFT. Ukraine has not put forward claims that are genuinely (or even plausibly) claims of intentional or knowing financing of terrorism.

Section I
Flight MH17

88. As to the appalling loss of life caused by the shooting down of Flight MH17 on 17 July 2014, there is still no material evidence before the Court, credible or otherwise, that:

a. The Russian Federation (or Russian nationals) provided weaponry to any party with the requisite specific intent or knowledge that such weaponry was to be used to shoot down a civil aircraft, as would be required under

Article 2(1)(a) of the ICSFT read in conjunction with Article 1(1)(b) of the Montreal Convention or under Article 2(1)(b) of the ICSFT.

b. Whoever commanded or operated the weapon used to shoot down Flight MH17 intended to shoot down a civil aircraft for the requisite specific purpose, as would be required under those provisions.

89. As at the provisional measures phase, the evidence put forward by Ukraine concerns the alleged delivery of a weapon by the Russian Federation, and Ukraine relies on reports of the Dutch Safety Board ("DSB") and the Joint Investigation Team ("JIT"). However, Ukraine has elected not to draw to the Court's attention the contents of the alleged telephone intercepts to which the JIT refers or to the passage of the JIT's presentation which is of central relevance to the current claim.

90. Taken at their highest, the materials now before the Court show that:

a. Whoever allegedly supplied the weapon allegedly used to shoot down Flight MH17 was acting in response to a series of armed strikes by Ukraine's military aircraft, and was responding to a request for assistance to be used to defend against such military strikes.

b. The person who allegedly requested the weapon made that request for the purpose of defending against military air strikes and expressed shock at the shoot down of a civilian aircraft.

91. As to the background to the shooting down, the DSB Report states:

> "[I]t is clear that between April and July, the armed conflict in the eastern part of Ukraine was continuing to extend into the air. Ukrainian armed forces aeroplanes and helicopters conducted assault flights and transported military personnel and equipment to and from

> the conflict area. The armed groups that were fighting against the Ukrainian government attempted to down these aeroplanes. In May 2014, mainly helicopters were downed, while in June and July also military aeroplanes were downed, including fighter aeroplanes."[124]

92. In the days leading up to the shoot down of Flight MH17, two of Ukraine's military aircraft were shot down on 14 July (an Antonov An-26 military transport aeroplane, which Ukraine stated at the time was flying at an altitude of 6,500m)[125] and on 16 July (a Sukhoi Su-25 fighter aeroplane). With respect to the provision of the weapon allegedly used to shoot down Flight MH17, the JIT report found that:

> "In July 2014, heavy fighting was going on in the area southwest 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 flights, 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."[126]

93. The relevant alleged intercept of a call on 16 July 2014 contains the following key passage, which Ukraine has not drawn to the Court's attention:

> "**Khmuryi:** […] Screw it, Sanych, I don't even know if my men will be able to hold there today or not. They start coming down on them with Grads, I'll be left without my reconnaissance battalion and the spetsnaz company. This sh*t is f**ked up. Oh crap… […] And there's nothing we can do about it… Now, Grads are something we

[124] Dutch Safety Board, Preliminary report, "Crash of Malaysia Airlines Flight MH17 (17 July 2014), October 2015, p. 185 (Annex 38 to Memorial).

[125] Flight MH17 was flying at an altitude of around 10,000 metres when it was destroyed. Ukraine later changed its position with respect to the Antonov An-26, stating that it was shot down at an altitude of 3000m.

[126] Joint Investigative Team, Presentation Preliminary Results Criminal Investigation MH17, Openbaar Ministerie, 28 September 2016 (Annex 39 to Memorial).

> can f**king bear with, but if Sushkas [slang term for Sukhoi fighter aeroplanes] strike in the morning… If I can receive a Buk in the morning and send it over there that'd be good. If not, things will go totally f**ked up. […]
>
> **Sanych:** Well, look here, Nikolayevich, if you need…, we'll send it…over to your area…"[127]

94. Ukraine has put forward the transcript of an alleged intercept said to refer to the downing of Flight MH17. But is has not drawn the Court's attention to the passage of the intercept which shows that the same individual ("Khmuryi") lacked the specific intent to use the weapon to shoot down a civil aircraft for the requisite specific purpose:

> "**Khmuryi:** […] What happened yesterday was messed up [swearing]. I am speechless."[128]

Section II
Indiscriminate shelling by all parties to the armed conflict

A. GENERAL OBSERVATIONS

95. The case now put before the Court with respect to indiscriminate shelling is also substantially the same as at the provisional measures stage. Ukraine continues to rely on four specific episodes of indiscriminate shelling, namely at Volnovakha, Mariupol and Kramatorsk in the period January-February 2015, and at Avdeevka in the period January-March 2017.

96. During the hearing on provisional measures, the Russian Federation showed that three conclusions could safely be drawn from the OHCHR, OSCE

[127] Intercepted conversation between "Khmuryi" and "Sanych" (19:09:20), 16 July 2014 (Annex 394 to Memorial).
[128] Intercepted conversation between "Krot" and "Khmuryi" (07:41:06), 18 July 2014 (Annex 399 to Memorial).

and ICRC reports (sources of evidence upon which Ukraine relied and still relies). Nothing in Ukraine's Memorial displaces these conclusions.

97. *First*, there is an ongoing armed conflict in which there has been an appalling loss of civilian life, caused predominantly by indiscriminate shelling of populated areas by all parties to the conflict.

98. *Secondly*, it is Ukraine alone that is characterising such acts as "terrorism" (see further **Table 1** in **Appendix A**):

a. The OHCHR, the OSCE and the ICRC have repeatedly documented acts of indiscriminate shelling – by all parties to the conflict in East Ukraine. Such acts have been and are consistently characterised by the OHCHR and the ICRC as violations of the IHL principles of distinction, precaution and proportionality, and *never* as acts of "terrorism" notwithstanding the terminology that has been publicly and repeatedly adopted by Ukraine including in the present proceeding.[129]

[129] OHCHR, "Report on the human rights situation in Ukraine 16 May to 15 August 2015", para. 193 (b) (Annex 769 to Memorial); OHCHR, "Report on the human rights situation in Ukraine 16 August to 15 November 2015", para. 185 (b) (Annex 312 to Memorial); OHCHR, "Report on the human rights situation in Ukraine 16 November 2015 to 15 February 2016", para. 214 (b) (Annex 314 to Memorial); OHCHR, "Accountability for killings in Ukraine from January 2014 to May 2016", p. 3 (Annex 49 to Memorial); OHCHR, "Report on the human rights situation in Ukraine 16 May to 15 August 2016", para. 209 (b) (Annex 772 to Memorial); OHCHR, "Report on the human rights situation in Ukraine 16 August to 15 November 2016", para. 224 (d)-(f) (Annex 773 to Memorial); ICRC, "Ukraine crisis: ICRC calls on all parties to spare civilians", 20 January 2015, available at https://www.icrc.org/en/document/ukraine-crisis-icrc-calls-all-parties-spare-civilians; ICRC, "Ukraine crisis: Intensifying hostilities endanger civilian lives and infrastructure", 10 June 2016, available at https://www.icrc.org/en/document/ukraine-crisis-intensifying-hostilities-endanger-civilian-lives-and-infrastructure; ICRC, "ICRC warns of deteriorating humanitarian situation amid intensifying hostilities in eastern Ukraine", 2 February 2017, available at https://www.icrc.org/en/document/icrc-warns-deteriorating-humanitarian-situation-intensification-hostilities-eastern-ukraine.

b. The OHCHR and OSCE have repeatedly recorded that the indiscriminate shelling of populated areas by all parties to the conflict has occurred in a context in which all parties have placed military objectives in (and engaged in hostilities from) residential areas, in violation of the IHL principle of precaution.[130]

c. This is significant since those organisations are looking at the armed conflict through the prism of IHL and, as explained above, that body of law contains separate prohibitions on direct attacks,[131] indiscriminate attacks[132] and the spread of terror among the civilian population.[133] These organisations are making characterisations of acts within the armed conflict in full knowledge of the applicable legal framework, and are describing acts and making recommendations accordingly.[134] Ukraine has (again) elected not to engage with this point and instead continues to

---

[130] See, e.g., OHCHR, "Report on the human rights situation in Ukraine 1 December 2014 to 15 February 2015", para. 21 (Annex 309 to Memorial); OHCHR, "Report on the human rights situation in Ukraine 16 May to 15 August 2015", para. 193 (b) (Annex 769 to Memorial); OHCHR, "Report on the human rights situation in Ukraine 16 November 2015 to 15 February 2016", para. 25 (Annex 314 to Memorial).

[131] Article 51(2) API, Article 13(2) APII; ICRC, *Study on Customary International Humanitarian Law: Rule 1. The Principle of Distinction between Civilians and Combatants,* IHL database, available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule1.

[132] Article 51(4)-(5) API.

[133] Article 51(2) API, Article 13(2) APII; ICRC, *Study on Customary International Humanitarian Law: Rule 2. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited*, IHL database, available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule2.

[134] Cf. OSCE, "Kosovo/Kosova, as seen, as told, An analysis of the human rights findings of the OSCE Kosovo Verification Mission, October 1998 to June 1999", 1999, executive summary, referring to "intent to apply mass killings as an instrument of terror" (available at https://www.osce.org/odihr/17772?download=true). Cf. also 26th International Conference of the Red Cross and Red Crescent, Geneva, 3-7 December 1995, Resolution II, "Protection of the civilian population in period of armed conflict", 7 December 1995, preamble, expressing deep alarm at "the serious violations of international humanitarian law in internal as well as international armed conflicts by acts or threats of violence the primary purpose of which is to spread terror among the civilian population" (available at https://www.icrc.org/eng/resources/documents/resolution/26-international-conference-resolution-2-1995.htm).

assert that "[b]y the spring and summer of 2014, the whole world was aware of the terrorist nature of the aims and activities of the DPR and LPR".[135]

99. *Thirdly*, if there were a plausible case of terrorism based on acts of indiscriminate shelling of populated areas (there is not), it would be one in which Ukraine was centrally implicated (see further **Table 2** in **Appendix A**):

a. It is a striking feature of the present case that the evidence relied on by Ukraine shows that civilian casualties caused by the indiscriminate shelling of populated areas are at least as much attributable to Ukraine, and such casualties have consistently been *greater* in territory controlled by the DPR and LPR, including at the times of the incidents relied on by Ukraine. The OHCHR reports and OSCE crater analysis document that persistent pattern.

b. By way of example only, the OSCE reported that, on 22 January 2015 (two days before the shelling of Mariupol), 8 civilians were killed and 13 were injured when a trolley bus was hit by mortar or artillery rounds in Kuprina Street in Donetsk City.[136] The OSCE assessed that the shells had been "fired from a north-western direction", i.e. from Ukrainian government-controlled territory.

c. If the facts put forward by Ukraine truly pointed to plausible acts of terrorism, the necessary corollary would be that Ukraine was itself

[135] Memorial, para. 285.

[136] OSCE, "Spot report by the OSCE Special Monitoring Mission to Ukraine (SMM): Shelling incident on Kuprina Street in Donetsk City", 22 January 2015, available at https://www.osce.org/ukraine-smm/135786. Image of the trolley bus hit in Donetsk, Annex 1. See also **Table 8** in **Appendix A** for examples of other military attacks attributable to Ukraine, against populated areas on the DPR/LPR-controlled territories.

engaged in precisely the same acts and to an even greater extent. This makes no sense and shows how this case is artificially being brought before the Court as a case under the ICSFT for want of a more appropriate forum.

d. In its Memorial, Ukraine has (again) elected not to engage with this central issue and, remarkably, *makes no reference* to the civilian casualties caused by indiscriminate shelling from Ukrainian government-controlled territory.

100. Moreover, during the hearing on provisional measures, Russia showed that Ukraine's characterisation of the indiscriminate shelling as "terrorism" is also inconsistent with the Minsk "Package of measures", which has been endorsed by the UN Security Council as well as by other entities such as OHCHR. Ukraine has (again) failed to engage with this point.

a. Pursuant to the Package of measures, Ukraine agreed to "Ensure 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."[137]

b. The specific events at Volnovakha, Mariupol and Kramatorsk that Ukraine focuses on all took place before the Package of measures was agreed. Indeed, as Ukraine notes, the Minsk II agreement was concluded "just days after the shelling at Kramatorsk".[138]

[137] Package of Measures for the Implementation of the Minsk Agreements, Minsk, 12 February 2015, para. 5 (Annex I to United Nations Security Council, Resolution 2202 (2015), 17 February 2015), available at http://undocs.org/S/RES/2202%20(2015).
[138] Memorial, para. 108.

c. It is inconceivable that the Ukraine would have agreed to such a pardon and amnesty if, as it now contends, the acts of indiscriminate shelling on which Ukraine now focuses were correctly to be considered as acts of "terrorism".[139]

101. In sub-sections B to E below, Russia explains that Ukraine has failed to put forward any credible evidence that the perpetrators of the four distinct episodes of indiscriminate shelling – Volnovakha, Mariupol, Kramatorsk and Avdeevka – had the requisite specific intent to kill or seriously harm civilians, and that the locations were shelled for the requisite specific purpose of intimidating the population or to compel a government to do or to abstain from doing any act.

102. In its Memorial, Ukraine asks the Court to infer the specific intent to kill or seriously harm civilians and the specific purpose of intimidating the population / compulsion of a government from a number of factors. However, none of the points that Ukraine seeks to make withstands even a cursory scrutiny and, therefore, Ukraine does not meet the plausibility standard.

103. The *first factor* that comes out of Ukraine's submissions is that the four different episodes of indiscriminate shelling caused civilian casualties and damage to civilian objects, and there is an attempt to draw a comparison to the terrible events at Sarajevo.

[139] It is noted that, through Resolution 2202(2015), 17 February 2015, para. 3, the Security Council called on "all parties to fully implement the 'Package of measures', including a comprehensive ceasefire as provided for therein" (available at http://undocs.org/S/RES/2202%20(2015)). See also Statement by the President of the Security Council, UN Doc. S/PRST/2018/12, 6 June 2018, available at http://undocs.org/S/PRST/2018/12.

a. Ukraine states that, like the siege of Sarajevo, the shelling of the checkpoint near Volnovakha "targeted 'sites well-known to be frequented by [civilians] during their daily activities'", the shelling on a single day in Mariupol "hit all types of civilian sites essential to daily life", and that the shelling in Avdeevka involved "random attacks against civilian areas".[140]

b. However, as explained above, the comparison to Sarajevo is manifestly inappropriate, whether in terms of the nature, scale and duration of the indiscriminate shelling, the number of civilian casualties or the damage to civilian objects. Indeed, the events relied on likewise do not compare to the "massive artillery assault on Knin", which was not plausibly considered by the ICTY Prosecutor to amount to spreading terror in its indictment of Gotovina.

104. The *second factor* that comes out of Ukraine's submissions is an alleged absence of any military objective.

a. However, as at the provisional measures phase, the evidence before the Court shows that in each episode there plainly was a military objective or an objective of a nature which has been treated by all parties to the armed conflict (including Ukraine) as a military objective. As noted above, all parties to the conflict have persistently located military objectives in populated areas in violation of IHL.[141]

b. Further, the alleged intercept evidence now put forward by Ukraine in relation to the indiscriminate shelling near Volnovakha and in Mariupol shows that, in each case, the target was a checkpoint manned by armed

[140] Memorial, paras. 231, 242 and 259.
[141] See further above, para. 98 and **Table 1** of **Appendix A**.

personnel. Ukraine has, however, not drawn the Court's attention to the key passages.[142]

105. Ukraine also appears to conflate the separate IHL prohibitions on direct attacks (i.e. targeting the civilian population or individual civilians) and indiscriminate attacks (i.e. the absence of any targeting).[143] As at the provisional measures stage, Ukraine relies on that statement of the Trial Chamber in *Galić* that "indiscriminate attacks, that is to say, attacks which strike civilians or civilian objects and military objectives without distinction, may qualify as direct attacks on civilians".[144] However, that passage is of no assistance to Ukraine's case:

a. The passage Ukraine relies on does not concern indiscriminate acts and the spread of terror, but rather separate offences with respect to direct attacks on civilians.[145]

b. Ukraine's attempt to conflate the separate prohibitions on direct attacks and indiscriminate attacks would deprive the fundamental principle of proportionality of practical significance.

---

[142] See further below, paras. 106 and 111-112 and **Tables 3** and **4** of **Appendix A**.

[143] See further above, para. 73.

[144] Memorial, para. 207, fn. 482, citing *Galić*, Trial Chamber Judgment, para. 57 (Annex 464 to Memorial). Ukraine also relies on a passage in ICTY, Trial Chamber, *Prosecutor v. Martić*, Case No. IT-95-11-T, Judgment, 12 June 2007 (Annex 465 to Memorial) concerning the offence of direct attacks against civilians, and it is noted that Martić was not separately indicted for the offence of spreading terror.

[145] ICTY, Appeals Chamber, *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Judgment, 30 November 2006, para. 132: "In principle, the Trial Chamber was entitled to determine on a case by case basis that the indiscriminate character of an attack can assist it in determining whether the attack was directed against the civilian population." The Trial Chamber's reasoning is also premised on its understanding, relying on the ICRC's Commentary to Article 85(3) of API, that direct attacks against civilians may be committed recklessly: Trial Chamber, *Prosecutor* v. *Galić*, Case No. IT-98-29-T, Judgment, 30 November 2006, para. 54 (Annex 464 to Memorial).

106. Ukraine also contends that there was no or insufficient "military justification" for each of the attacks. However, that approach wrongly conflates the existence of a military objective with the proportionality of an attack (an assessment of which would require consideration of the anticipated military advantage in relation to the expected harm to civilians and civilian objects), and thereby reinforces the indiscriminate rather than direct nature of the shelling. Further, whereas the ICTY in *Galić* (as relied on by Ukraine) placed weight on the fact that the SRK snipers and mortar crews were "highly skilled" persons operating "highly accurate" weapons, the evidence put forward by Ukraine suggests that the opposite is true of the perpetrators of indiscriminate shelling by MLRS. Alleged intercepts put forward by Ukraine as relating to the shelling of Mariupol include:

a. Before the attack, the following statement by a person alleged to be "a Russian colonel who was advising the DPR":

> "'Gorets': You know what pisses me off? How the Ukrainian artillerymen hit their target and leave a bunch of corpses. The way the DPR artillerymen shoot, damn it, they don't get within 300 metres. That really bothers me and gets on my nerves."[146]

b. After the attack, a statement that the shells "overflew by approximately a kilometre".

107. The *third factor* that comes out of Ukraine's submissions is an expansive reading of the "context" of each of the four individual episodes.

[146] Intercepted conversations of Maxim Vlasov, 23-24 January 2015, p. 2 (Annex 408 to Memorial).

a. Ukraine contends that the "context" includes both the previous episodes of indiscriminate shelling of other locations weeks earlier,[147] as well as the "DPR's prior, well-documented pattern and practice of targeting civilians for intimidatory purposes throughout the spring and summer of 2014".[148]

b. The "context" of a specific alleged act of terrorism within the meaning of Article 2(1)(b) does not include events of a different character which are alleged to have occurred up to a year ago in a different location and by different perpetrators.[149] Ukraine's resort to an artificially broad concept of the "context" of a specific act highlights that this is a case seeking artificially to establish acts of "terrorism".

108. At the same time, Ukraine has failed to draw to the Court's attention key aspects of the context of specific attacks, including the escalation of hostilities in the immediate vicinity prior to the attack.

109. The *fourth factor* that comes out of Ukraine's submissions is a general allegation that civilians were terrorised and it is claimed that a number of civilians left those towns.[150]

---

[147] Memorial, paras. 240 ("the DPR's […] attack against civilians in Volnovakha less than two weeks earlier, only strengthens that conclusion), 250 ("The DPR's past practice of targeting civilians to intimidate them – including the two egregious shelling attacks in the weeks prior – bolsters this conclusion") and 258 ("the DPR's prior record of using such weapons to intimidate civilians and the DPR's decision to hit civilian targets reinforce this conclusion").

[148] Memorial, para. 240.

[149] See further para. 77 above.

[150] Memorial, paras. 113 ("created widespread fear among civilians living in Avdiivka") and 259 ("the fact that civilians in Avdiivka were in fact terrorized by the attack heightens the inference that the DPR sought to intimidate civilians. Many were so scared that they fled the city"); para. 243: "residents were in fact terrorized and some fled Mariupol altogether"; para. 253: "civilians heeded this warning; after the attack on Kramatorsk, the city's population decreased

a. Ukraine fails to distinguish between the fear (even intense fear) which naturally occurs during armed hostilities, particularly in areas close to the front line such as Avdeevka (it being noted that Ukraine has placed military objectives in residential areas: see paragraphs 98 and 104 above), and the distinct, higher, phenomenon of terror emphasised by the ICTY in *Milošević*.[151]

b. Moreover, in *Galić* and *Milošević*, the ICTY relied on the *inability* of the civilian population to leave Sarajevo for a period of fourteen months due to the siege as contributing to an inference of the existence of terror and the requisite specific intent to spread terror.

110. The *fifth factor* that comes out of Ukraine's submissions is the speculation that each of the episodes of indiscriminate shelling could be part of a campaign to obtain political concessions.[152] However, Ukraine has not put forward any evidence in support of that speculation, and there is nothing whatsoever in the alleged intercept evidence to suggest such a purpose.

B. VOLNOVAKHA

111. As confirmed in **Table 3** in **Appendix A**, the loss of life at the checkpoint near Volnovakha on 13 January 2015 was not plausibly caused by an act of terrorism within the meaning of Article 2(1)(b) of the ICSFT:

a. It is Ukraine alone that has characterised the shelling as a "terrorist" act. Notwithstanding Ukraine's very public position, the OHCHR, the ICRC or the UNSC have not adopted that characterisation.

---

by approximately 1,500 by the end of 2015". It is noted that in 2016 the population of Kramatorsk was around 160,000.

[151] See further above, para. 79.

[152] Memorial, para. 234.

b. The checkpoint was part of Ukraine's so-called "Anti-terrorist operation" and was manned by armed personnel.

c. All parties to the armed conflict have treated checkpoints manned by armed forces as military targets. For example, on 27 April 2016, Ukraine's armed forces shelled the a DPR/LPR checkpoint located nearby on the same road in Olenivka village, killing four civilians and injuring eight more. The OHCHR report for that period records that: "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".[153] Even Ukraine's own expert emphasises the similarities between the checkpoints near Volnovakha and Olenivka.[154]

d. Ukraine's reliance on the very different facts of *Milošević* is misplaced. The single attack on the armed checkpoint is manifestly not analogous to the fourteen-month campaign of sniping and shelling against the civilian population of Sarajevo.[155]

e. The alleged telephone intercepts now put forward by Ukraine, as with the equivalent documents for Flight MH17, merely emphasise the absence of evidence of the requisite specific intent and purpose. In particular, they show that:

[153] OHCHR "Report on the human rights situation in Ukraine 16 February to 15 May 2016", para. 20 (Annex 771 to Memorial). See also OSCE, "Spot Report by the OSCE Special Monitoring Mission to Ukraine (SMM): Shelling in Olenivka", 28 April 2016, available at https://www.osce.org/ukraine-smm/236936.

[154] Expert Report of Lieutenant General Christopher Brown, para. 32 (Annex 11 to Memorial) ("Brown Report").

[155] Cf. Memorial, para. 231.

i. The target of the attack was the armed checkpoint.

ii. The DPR/LPR closed the road to civilian traffic before the attack (at 12:13) and reopened the road after the attack (at 14:51).

iii. DPR/LPR forces alleged to be in command of a GRAD used ranging shots and adjusted fire away from a populated area.

iv. A DPR superior allegedly reacted to the result of the attack negatively, asking "Who is that f**king Batyushka who shelled Volnovakha from Dokuchayevsk today, that sh*t?"

C. MARIUPOL

112. As confirmed in **Table 4** in **Appendix A**, the shelling of Mariupol on 24 January 2015 was not plausibly an act of terrorism within the meaning of Article 2(1)(b) of the ICSFT:

a. Once again, it is Ukraine alone that has characterised the shelling as a "terrorist" act. Notwithstanding Ukraine's very public position, the OHCHR, the ICRC or the UNSC have not adopted that characterisation.

b. It is plain from the OSCE's reporting and the alleged telephone intercepts on which Ukraine relies that the shelling was aimed at a Ukrainian checkpoint (at Vostochniy), which the OSCE repeatedly stated was located 300 metres from one of the sites of impact.[156] Ukraine has not

[156] OSCE, "Spot report by the OSCE Special Monitoring Mission to Ukraine (SMM), 24 January 2015: Shelling Incident on Olimpiiska Street in Mariupol", 24 January 2015 (Annex 328 to Memorial); OSCE, "Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based

drawn to the Court's attention the fact that the OSCE observed that very soon after shells hit the Vostochniy district, the checkpoint was hit, i.e. the target was always a military objective and the initial shelling overshot that target.[157]

c. The Vostochniy checkpoint was manned by armed National Guard officers with small arms and armoured personnel carriers. According to Ukraine's own expert, the checkpoint "was effectively in the front line".[158]

d. The alleged telephone intercepts now put forward by Ukraine confirm that the Vostochniy checkpoint was the target, and that it was treated as a military objective. These intercepts also confirm the absence of the requisite specific intent and purpose: the alleged DPR/LPR fighters responsible for the attack (a) refer to the purpose of the attack as being to facilitate a ground assault; and (b) express shock and horror at the civilian casualties that resulted from the shells over-shooting the Vostochniy checkpoint:

> "**Valeriy Kirsanov:** Look what Aleksander has done.
> **Ponomarenko S.L. ("Terrorist"):** Yes.
> **Valeriy Kirsanov:** *It's a totally f**king disaster here*.
> **Ponomarenko S.L. ("Terrorist"):** What?
> **Valeriy Kirsanov:** The damn market, nine story high-rise buildings, private houses. All the sh*t was f**ked up.
> **Ponomarenko S.L. ("Terrorist"):** Are you serious?

---

on information received as of 18:00 (Kyiv time), 25 January 2015", 26 January 2015, available at https://www.osce.org/ukraine-smm/136421 (Annex 32).

[157] See OSCE, "Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 18:00 (Kyiv time), 25 January 2015" 26 January 2015, available at https://www.osce.org/ukraine-smm/136421 (Annex 32).

[158] Brown Report, para. 49 (Annex 11 to Memorial).

Valeriy Kirsanov: *It f**king overflew. Overflew by approximately a kilometre.*
Ponomarenko S.L. ("Terrorist"): To Vostochnyi?
Valeriy Kirsanov: Yes, yes. The Kievskiy market, school No. 5, nine-story high-rise buildings, right into the courtyards, f**k, the utility building. It f**king went and fell as far as Olimpiyskaya. F**king f**k. Basically, *they overflew the entire Vostochnyi*.
Ponomarenko S.L. ("Terrorist"): Oh, f**king shit.
[…]
Ponomarenko S.L. ("Terrorist"): *Oh, the ukrops will do good PR now*.
[…]
Valeriy Kirsanov: I f**king called him. *He is totally f**king shocked*. […]
Ponomarenko S.L. ("Terrorist"): No injured people, right?
Valeriy Kirsanov: There are, why not? Dead bodies are laying f**king everywhere.
[…]
Ponomarenko S.L. ("Terrorist"): *This is f**king awful f**k*. […]".[159]

D. KRAMATORSK

113. As confirmed in **Table 5** in **Appendix A**, the shelling of Kramatorsk on 10 February 2015 was not plausibly an act of terrorism within the meaning of Article 2(1)(b) of the ICSFT:

a. Once again, it is Ukraine alone that has characterised the shelling as a "terrorist" act. Notwithstanding Ukraine's public position, the OHCHR, the ICRC or the UN Security Council have not adopted that characterisation.

b. It appears from the OSCE's reporting that the shelling of the Kramatorsk residential district was within 200-300 metres of a Ukrainian military

[159] Intercepted conversation between Kirsanov and Ponomarenko ("Terrorist") (10:38:14), 24 January 2015 (Annex 414 to Memorial) (emphasis added).

compound, located in Lenin Street (now Druzhby Street), which had also been shelled. The inspection reports that Ukraine has put before the Court contain no mention of that compound.[160]

114. Notably, Ukraine has not even put forward any evidence of alleged intercepts.

E. AVDEEVKA

115. As confirmed in **Table 6** in **Appendix A**, the shelling of Avdeevka between late January and February 2017 was not plausibly an act of terrorism within the meaning of Article 2(1)(b) of the ICSFT:

a. It is, once again, Ukraine alone that has characterised the shelling as a "terrorist" act. Notwithstanding Ukraine's very public position, the OHCHR, the ICRC or the UNSC have not adopted that characterisation.

b. As the contemporaneous photographs below show, the Ukrainian Armed Forces had located military equipment and personnel in, and then fired from, populated areas of Avdeevka. Ukrainian Armed Forces firing from populated areas were then targeted:[161]

[160] It is also noted that, almost immediately after the attack, the Ukrainian President stated in Parliament that the "strike hit the [ATO] headquarters, but the second salvo landed in residential areas of Kramatorsk", see "P. Poroshenko's speech in Rada and the report on the shelling of Kramatorsk, 10 February 2015" at https://112.ua/video/vystuplenie-poroshenko-v-rade-i-soobschenie-pro-obstrel-kramatorska-10-fevralya-2015-goda-125788.html (Annex 34).

[161] Ukrainian tanks in Avdeevka, February 2017; Bellingcat Investigation Team, "Ukrainian Tanks in Avdiivka Residential Area", 3 February 2017 (Annex 1).


AP

c. As regards Ukraine's contention that the DPR/LPR intended to intimidate the civilian population of Avdeevka, and that the population was in fact terrorised, in a video report dated 31 January 2017, a BBC correspondent described the situation very differently:

> "[E]ven when the soundtrack of fighting swells, surreal normality persists as well as resilience. […] You can see people just milling about going about their everyday business here while gunfire, mortars and artillery just a short distance from here […] in the industrial area on the edge of this small city. There has been a violent stalemate in Eastern Ukraine for two years. In that time, I have rarely witnessed such a presence from the Ukrainian military."[162]

d. Unlike in relation to Volnovakha and Mariupol, Ukraine has not even put forward any evidence of alleged intercepts.

[162] BBC News, "Ukraine: Avdiivka, the front line of Europe's 'forgotten war'", 31 January 2017, available at http://www.bbc.com/news/world-europe-38818543 (Annex 37).

Section III
Bombings

116. Ukraine's Application focuses on the bombing in Kharkov of 22 February 2015, killing three people and wounding fifteen others.[163] Ukraine claims there, without reference to any evidentiary materials, that this bombing "was supported by the Russian Federation". That is an allegation of extreme gravity. All that was relied upon at the provisional measures stage was a single press report, containing the comments of someone who claims to be the spokesman of the so-called Kharkov Partisans. Notably, in that press report, the alleged spokesperson says that this bombing was not carried out by the Kharkov Partisans.[164]

117. In its Memorial, Ukraine contends that "numerous Russian officials and private actors have provided funds to groups engaged in terrorism in Ukraine".[165] The focus of this section of Ukraine's Memorial is very much on the alleged supply of funds to the DPR/LPR which is said to be relevant to the shoot down of Flight MH17 and the episodes of indiscriminate shelling at Volnovakha, Kramatorsk, Mariupol and Avdeevka. In relation to the bombings in Ukrainian cities, the case Ukraine has put before this Court appears to be that Russian State officials have knowingly financed those acts:

> "Various military intelligence operatives supplied explosives and weapons to the perpetrators of bombings in Kharkiv, Kyiv, and Odesa. Russian intelligence officers provided, for example, the anti-personnel mine used against the Kharkiv unity march, and the SPM limpet mine used against the Stena Rock Club. Eduard Dobrodeev,

---

[163] Application, para. 72.

[164] CR 2017/1, pp. 46-47, para. 45 (Cheek), citing Simon Shuster, "Meet the Pro-Russian 'Partisans' Waging a Bombing Campaign in Ukraine", Time, 10 April 2015, available at http://time.com/3768762/pro-russian-partisans-ukraine/ (Annex 571 to Memorial).

[165] Memorial, Chapter 5(A).

> a GRU officer, financed the attempted assassination of Anton Geraschenko."[166]

118. Ukraine relies principally on transcripts of interrogations of suspects conducted by the State Security Service. There are multiple reasons why such materials do not amount to evidence of plausible terrorism financing, not least because multiple international bodies (including OHCHR and other UN bodies) have expressed deep concern about the pattern of torture and ill-treatment of alleged separatists and collaborators (see further **Section IV** below and **Table 7** in **Appendix A**). Indeed, some of the individuals whose testimony Ukraine now relies on have already sought to withdraw their statements on the basis that they were obtained by torture or ill-treatment.[167]

---

[166] Memorial, para. 276.

[167] See, e.g., Rhythm of Eurasia News Agency, "SBU routine: 'They beat with a metal pipe, passed an electric current...'", 12 October 2017, available in Russian at: https://www.ritmeurasia.org/news--2017-10-12--budni-sbu-bili-metallicheskoj-truboj-propuskali-elektricheskij-tok-32855 (Annex 39); AF News Agency, "'Activists' dictate sentences to the courts and the prosecutor's office. Lawyer Dmitry Tikhonenkov on the peculiarities of Ukrainian hybrid justice", 1 November 2017, available in Russian at: http://antifashist.com/item/aktivisty-diktuyut-prigovory-sudam-i-prokurature-advokat-dmitrij-tihonenkov-ob-osobennostyah-ukrainskogo-gibridnogo-pravosudiya.html#ixzz5PSS5UxOO (Annex 40); AF News Agency, "The accused of the explosion of the Stena Rock Pub, Marina Kovtun, has been tortured for three years by the SBU", 22 November 2017, available in Russian at http://antifashist.com/item/obvinyaemuyu-vo-vzryve-rok-paba-stena-marinu-kovtun-uzhe-tretij-god-pytayut-sotrudniki-sbu.html#ixzz5Ouv30YKc (Annex 41); AF News Agency, "Terrorist attack at the Sports Palace in Kharkov in 2015 - guilty without guilt", 16 August 2017, available in Russian at: http://antifashist.com/item/terakt-u-dvorca-sporta-v-harkove-v-2015-godu-bez-viny-vinovatye.html#ixzz4pvEUAnXd (Annex 38); Frunzensky District Court of Kharkov, Case No. 645/3612/15-k, Decision, 30 September 2015, available in Ukrainian at https://verdictum.ligazakon.net/document/51807534 (Annex 35); News Front Info, "Kharkov resident accused of 'undermining the integrity' of Ukraine announced her hunger strike", 13 January 2018, available in Russian at https://news-front.info/2018/01/13/harkovchanka-obvinyaemaya-v-pokushenii-na-tselostnost-ukrainy-obyavila-golodovku/?utm_campaign=transit&utm_source=mirtesen&utm_medium=news&from=mirtesen (Annex 32). Notably, Ukraine elected to bring the present case before the Court before it had concluded criminal proceedings against the alleged perpetrators.

Section IV
Killings and ill-treatment

119. The evidence before the Court shows that all parties to the armed conflict have committed extra-judicial killings, torture and ill-treatment of civilians. Such acts should be and are characterised as serious violations of obligations under IHL and human rights law. However, there is no credible evidence before the Court that they also amount to plausible "terrorist" acts within the meaning of Article 2(1)(b) of the ICSFT.

120. First, the OHCHR reports on Ukraine have repeatedly documented allegations of extra-judicial killings, torture and ill-treatment by all parties to the conflict, including Ukraine (see further **Table 7** in **Appendix A**). Ukraine's use of torture has also been condemned by the UN Subcommittee on Prevention of Torture, as well as by a source that Ukraine relies on in its Memorial.

121. By way of example, in a report published in May 2017, after Ukraine filed the present claims with the Court, the Subcommittee on Prevention of Torture concluded that:

> "34. The Subcommittee has received numerous and serious allegations of acts that, if proven, would amount to torture and ill-treatment. Persons interviewed by the Subcommittee in various parts of the country have recounted beatings, electrocutions, mock executions, asphyxiations, acts of intimidation and threats of sexual violence against themselves and their family members. In the light of all the work done and experience gained during the visit, the Subcommittee has no difficulty in concluding that these allegations are likely to be true.
>
> 35. Many of the above-mentioned acts are alleged to have occurred while the persons concerned were under the control of the State Security Service or during periods of unofficial detention. In such cases, *detainees accused of crimes relevant to the armed conflict in eastern Ukraine [...] are alleged to have been tortured in order to extract information regarding their involvement or that of their*

> *associates in "separatist" activities and to identify armed groups' military positions.* The Subcommittee also understands that, in some cases, acts were committed by private individuals or volunteer battalions with the consent or acquiescence of public officials.
>
> […]
>
> 37. In addition, it appears that *prosecutors and judges are not particularly sensitive or sympathetic to complaints of torture and ill-treatment*."[168]

122. As with indiscriminate shelling, if Ukraine were correct that the acts of killing and ill-treatment amount to "terrorist" acts under Article 2(1)(b), Ukraine would likewise be centrally implicated in such "terrorist" acts and that is a legal characterisation that Ukraine presumably would not accept.

123. Ukraine has also not put before the Court a 2017 report on "Unlawful detentions and torture committed by the Ukrainian side in the armed conflict in Eastern Ukraine", prepared by a source which Ukraine relies on.[169]

a. The report observes that "as of today, the instances of the similar violations, committed by the Ukrainian side have not been analysed by the national human rights NGOs, and are mainly brought to light by international institutions […] at the level of the Ukrainian government and civil society, the topic of war crimes committed by the Ukrainian side is swept under the carpet."[170]

---

[168] Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, "Visit to Ukraine undertaken from 19 to 25 May and from 5 to 9 September 2016: observations and recommendations addressed to the State party", UN Doc. CAT/OP/UKR/3, 18 May 2017, paras. 34-35 and 37 (emphasis added), available at http://undocs.org/en/CAT/OP/UKR/3 (Annex 6).

[169] Ukrainian Helsinki Human Rights Union, Kharkiv Human Rights Protection Group, Truth Hounds, "Unlawful detentions and torture committed by the Ukrainian side in the armed conflict in Eastern Ukraine", 2017, available at http://truth-hounds.org/wp-content/uploads/2017/11/ZVIT-engl.pdf (Annex 36).

[170] *Ibid.,* p. 3.

b. Based on the cases of 23 detainees, the report concludes that "Detainees were subjected to torture, particularly during interrogation with the purpose of obtaining information about alleged possession of weapons and support of the separatists. Under the pressure of torture, detainees were forced to accept the responsibility for crimes they did not commit. […] In some cases, detainees were used as human shields or were forced to work in conditions that threatened their lives."[171] The report characterises these acts as violations of international human rights law and IHL.

124. Secondly, such acts have generally been characterised by the OHCHR, OSCE and others as violations of IHL and human rights law, rather than "terrorist" acts (see further **Table 7** in **Appendix A**).

a. While Ukraine states that "The OHCHR and OSCE also repeatedly concluded that civilians were terrorized by DPR and LPR attacks", it is able to put forward only two references (both by the OHCHR) to "terror" or "terrorize" across the multiple OHCHR reports spanning more than three years. Where the OHCHR has used those terms it has done so to describe the effect on the population, rather than as part of its legal characterisation of the relevant acts.

b. Ukraine also relies on "OSCE interviews with internally-displaced persons from areas under DPR and LPR control reveal[ing] that many fled these regions because of '[d]irect experience or the witnessing of acts of violence […] as well as the perception by people that these acts of

[171] *Ibid.*, p. 2.

violence could affect them also personally".[172] However, that passage concerns not only the psychological effect of killings and ill-treatment but all acts during the armed conflict, including episodes of indiscriminate shelling (which Ukraine treats as separate "terrorist" acts) and acts not entailing serious bodily harm such as detention.

c. The July 2014 statement of the UN High Commissioner for Human Rights which Ukraine relies on reports a written threat made by a DPR leader to "immerse [civilians] in horror".[173] However, unlike the IHL prohibition on spreading terror, the definition of a terrorist act under Article 2(1)(b) of the ICSFT does not encompass threats. Further, the High Commission characterised that threat as "a clear violation of international human rights law", and not as a "terrorist" act.

125. Thirdly, Ukraine has failed to demonstrate that the only inference that could reasonably be drawn from the killing and ill-treatment of particular individuals is that the perpetrators acted with the specific purpose to intimidate "a population" at large.[174] In particular, Ukraine has not explained how those killings and acts of ill-treatment (and the accompanying psychological effect) rises beyond so-called "ordinary crimes" so as to fall within the definition of "terrorist" acts.

[172] Memorial, para. 213, quoting OSCE, "Thematic Report: Internal Displacement in Ukraine" (12 August 2014), pp. 5-6 (Annex 316 to Memorial).
[173] Memorial, para. 213, quoting OHCHR, "Intensified Fighting Putting at Risk Lives of People in Donetsk and Luhansk – Pillay", 4 July 2014 (Annex 295 to Memorial).
[174] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)*, *Judgment*, *I.C.J. Reports 2015*, p. 67, para. 148.

CHAPTER V
THE COURT'S JURISDICTION UNDER ARTICLE 24 OF THE ICSFT DOES NOT ENCOMPASS STATE RESPONSIBILITY FOR ALLEGED ACTS OF FINANCING TERRORISM, AND NOR ARE STATE OFFICIALS "PERSONS" WITHIN THE MEANING OF ARTICLES 2 AND 18 OF THE ICSFT

126. The ICSFT constitutes a standard criminal law instrument that does not "affect other rights, obligations and responsibilities of States […] under international law, in particular the purposes of the Charter of the United Nations, international humanitarian law and other relevant conventions" (Article 21).

127. The ICSFT requires that State parties criminalise Article 2 offences for individuals and must provide liability for legal entities (Articles 4 and 5). They must also establish their jurisdiction over such acts (Article 7), are required to freeze private funds that are to be used for Article 2 offences (Article 8), shall detect such funds (Article 8), and shall investigate Article 2 offences (Article 9). The ICSFT further contains obligations of *aut dedere aut judicare* (Articles 10 and 11) and mutual legal assistance obligations (Article 12). Lastly, Article 18 obliges States to cooperate in the prevention of Article 2 offences by indicating various law enforcement measures, financial regulations, or exchange of information procedures. The ICSFT is thus a law enforcement instrument which is not concerned with State responsibility for (allegedly) financing acts of terrorism.

128. Accordingly, the Court's jurisdiction under Article 24 of the ICSFT does not encompass matters of State responsibility for allegedly financing acts of

terrorism, contrary to what Ukraine argues.[175] This in no way means that Russia "insist[s] on its own prerogative to finance terrorism".[176] Rather, as the Secretary-General has emphasised, such acts are "already thoroughly regulated under international law,"[177] namely by the United Nations Charter principles of non-intervention and non-use of force.

129. Russia firmly rejects Ukraine's allegations and deplores such acts. The only issue before the Court, however, is whether the ICSFT *implicitly* prohibits States from financing Article 2 offences that would consequently fall within the Court's jurisdiction under Article 24 of the ICSFT, *quod non*. Ukraine's so-called "good faith interpretation"[178] of the ICSFT constitutes an invitation to circumvent Russia's obvious lack of consent.

Section I
The text, title, structure and the drafting history of the ICSFT confirm that State responsibility for financing terrorism is excluded from its scope

130. Nowhere in the text of the ICSFT is a reference to "State responsibility" for acts of financing terrorism to be found. The ordinary meaning of the terms of the Convention is clear; "State terrorism financing" is not covered (see further Section II below).

131. Rather, it is already the very title of the "International Convention *for the Suppression of the Financing of* Terrorism" ("Convention internationale *pour la*

[175] Memorial, paras. 299 *et seq*.
[176] *Ibid.*, para. 305.
[177] United Nations General Assembly, 59th Session, Report of the Secretary-General, "In larger freedom: towards development, security and human rights for all", UN Doc. A/59/2005, 21 March 2005, para. 91, available at https://undocs.org/A/59/2005.
[178] Memorial, para. 305.

répression du financement du terrorisme")[179] which circumscribes the scope and purpose of the ICSFT in that its purpose is *not* to cover the financing of terrorism as such by a State. The Court has underscored the importance of the title of a treaty to its interpretation.[180]

132. The treaty obliges States to *suppress the financing of* terrorism. That very wording – "suppression of the financing" ("*la répression du financement*") – presupposes that the ambit of the ICSFT relates to situations where *individuals or private entities,* distinct from the State itself, engage in the financing of terrorism, which acts of financing the Contracting Parties are then under an obligation to suppress.

133. Were it otherwise, i.e. had the Contracting Parties wished to also encompass the financing of alleged terrorist acts by a State party *itself*, it is safe to assume that a broader title would have been chosen.

134. Ukraine, instead of engaging in a standard exercise of treaty interpretation, as required by the VCLT, places a premium on the ICSFT's preamble to the detriment of the ICSFT's ordinary meaning, context, subsequent practice and drafting history.[181] It is of course a truism that the preamble of a treaty constitutes context (Article 32(2) VCLT), and that the Court has deduced a treaty's purpose from its preamble.[182]

---

[179] Emphasis added.

[180] *Certain Norwegian Loans (France v. Norway), Preliminary Objections, Judgment of July 6th, 1957, I.C.J. Reports 1957*, p. 24; *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, pp. 803, 819, para. 47. See also R. K. Gardiner, *Treaty Interpretation,* Oxford University Press, 2008, pp. 200-201.

[181] Memorial, para. 301.

[182] *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 652, para. 51.

135. At the same time, however, the Court has equally stressed that the "general terms" of a preamble do not outweigh the specific, and often limited, wording of a treaty text.[183] Even the broad references in the ICSFT's preamble to general international law do not indicate a purpose to establish State responsibility for acts of terrorism financing as a matter of treaty law and, in any event, could not override the limited character of the ICSFT as a law enforcement instrument, as is evident in its specific provisions, and confirmed by its drafting history.

136. By contrast, the 1996 Indian proposal for an "International Convention on the Suppression of Terrorism", which marked the starting point for the draft treaty, had stated in its draft preamble,

> "that the suppression of acts of international terrorism, *including those in which States are directly or indirectly involved*, is an essential element for the maintenance of international peace and security, and the sovereignty and territorial integrity of States".[184]

137. Moreover, the Indian draft expressly prohibited States from engaging in terrorism financing. It provided:

> "The Contracting States shall refrain from organizing, instigating, facilitating, financing, assisting or participating in the commission of terrorist offences, in particular those referred to in article 2, in the territories of other States, or acquiescing in or encouraging or tolerating activities within their territories directed towards the commission of such offences."[185]

---

[183] *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal), Judgment, I.C.J. Reports 1991*, p. 72, para. 56 and p. 74, para. 66.

[184] Letter dated 1 November 1996 from the Permanent Representative of India to the United Nations addressed to the Secretary-General, UN Doc. A/C.6/51/6, 11 November 1996, p. 2 (emphasis added), available at http://repository.un.org/bitstream/handle/11176/212860/A_C.6_51_6-EN.pdf.

[185] *Ibid.*, p. 4, Article 3(1).

138. Yet, obviously, the current version of the preamble of the ICSFT does not contain any such reference to acts of international terrorism in which States are involved, one way or the other, nor does the text proper of the ICSFT.

139. This notwithstanding, Ukraine argues in support of its State responsibility claim that the ICSFT's preamble refers to General Assembly Resolution 51/210 and the UN Declaration on Measures to Eliminate International Terrorism which contain language of direct State involvement in terrorist acts.[186] This argument must fail for two reasons.

a. First, referencing these two documents is far from including a direct reference to State involvement in the preamble.

b. Second, international treaties are replete with general references to prior resolutions, but that does not convert such resolutions into binding treaties in their *entirety*. The most famous example is the lack of a right to property in both the ICCPR and the ICESCR, which right is however mentioned in the Declaration of Human Rights, and to which the preamble of both Covenants make reference. Accordingly, the reference to General Assembly Resolution 51/210 and the UN Declaration on Measures to Eliminate International Terrorism can neither have a bearing on the question whether the ICSFT encompasses State responsibility for terrorism financing, *quod non*.

140. This non-inclusion of matters of State responsibility for financing Article 2 offences is further confirmed by various statements of States during the negotiation process leading to the adoption of the ICSFT, which *inter alia*

[186] Memorial, para. 301.

a. "supported the adoption at the current session of the draft Convention for the suppression of the financing of terrorism, although [they] believed that the goal of the Convention could not be fully met unless its provisions applied to […] State terrorism."[187]

b. regretted that the ICSFT "expressly exclude[d] from the supposed definition of financing some of the actors which constituted the various links in the financing chain, namely […] the State itself"[188] and "made no mention of States, while State terrorism was a much more serious problem".[189]

141. Importantly, no other State objected to these statements.

[187] United Nations General Assembly, 54th Session, *Official Records*, Sixth Committee, Summary record of the 34th meeting, UN Doc. A/C.6/54/SR.34, 17 April 2000, pp. 3-4, para. 16 (Sudan), available at http://repository.un.org/bitstream/handle/11176/230570/A_C.6_54_SR.34-EN.pdf.

[188] United Nations General Assembly, 54th Session, *Official Records*, Sixth Committee, Summary record of the 32nd meeting, UN Doc. A/C.6/54/SR.32, 18 May 2000, p. 9, para. 57 (Cuba), available at http://repository.un.org/bitstream/handle/11176/230724/A_C.6_54_SR.32-EN.pdf.

[189] United Nations General Assembly, 54th Session, *Official Records*, Sixth Committee, Summary record of the 33rd meeting, UN Doc. A/C.6/54/SR.33, 2 December 1999, para. 40 (Syria), available at http://repository.un.org/bitstream/handle/11176/230760/A_C.6_54_SR.33-EN.pdf.

Section II
Specific provisions of the ICSFT and their respective drafting history further establish that the ICSFT does not regulate state terrorism financing

142. That the ICSFT does not regulate State terrorism financing is established not only by the general structure of the ICSFT but also by the specific provisions of the Convention (in particular Articles 4, 5, 6, 18, and 20) and their respective drafting history.

A. ARTICLE 3 OF THE ICSFT

143. Article 3 of the ICSFT excludes certain domestic scenarios from the scope of the ICSFT. In that context, Papua New Guinea had proposed during the negotiation process that another paragraph be added to draft Article 3 (now Article 3 of the ICSFT) which would have read:

> "This Convention shall not apply:
>
> (a) Where the financing is part of an agreement between States Members of the United Nations in the performance of a bilateral, regional or international obligation recognized by international law."[190]

144. By excluding the financing between various United Nations Member States pursuant to international obligations, this clause could have – possibly – been interpreted as *a contrario* implying that any financing between States *not* conducted pursuant to international obligations would fall into the ambit of terrorism financing as defined by the ICSFT. Even such a reference which could

[190] Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, 3rd Session, Proposal by Papua New Guinea, UN Doc. A/AC.252/1999/WP.36, 18 March 1999, available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/AC.252/1999/WP.36.

have been interpreted as implying State responsibility was however *not* included in the final text of the ICSFT.

B. ARTICLE 4 OF THE ICSFT

145. Article 4 of the ICSFT provides as follows:

> "Each State Party shall adopt such measures as may be necessary:
>
> (a) To establish as criminal offences under its domestic law the offences set forth in article 2;
>
> (b) To make those offences punishable by appropriate penalties which take into account the grave nature of the offences."

146. Article 4 of the ICSFT constitutes, according to its ordinary meaning, a basic obligation that is typical for suppression conventions dealing with transnational organised crimes committed by private individuals in that it obliges States *to punish* the acts defined in Article 2 of the ICSFT.

147. Article 4 of the ICSFT thus confirms that the ICSFT deals with the relationship of a State party with private individuals under their respective domestic criminal law, rather than establishing, as a matter of international treaty law, the responsibility of a State for (allegedly) committing such crimes itself.

C. ARTICLE 5 OF THE ICSFT

148. This limited character of the scope of the ICSFT is then further confirmed by its Article 5 which reads:

> "1. Each State Party, in accordance with its domestic legal principles, shall take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity, committed an offence set forth in article 2. Such liability may be criminal, civil or administrative.

> 2. Such liability is incurred without prejudice to the criminal liability of individuals having committed the offences.
>
> 3. Each State Party shall ensure, in particular, that legal entities liable in accordance with paragraph 1 above are subject to effective, proportionate and dissuasive criminal, civil or administrative sanctions. Such sanctions may include monetary sanctions."

149. Article 5(1) of the ICSFT provides for sanctions to be taken by Contracting Parties against legal entities ("*personnes morales*") responsible for acts prohibited under the Convention. As the phrase "organized under its laws" ("*constituée sous l'empire de sa législation*") suggests, this provision is concerned with the issue of sanctions for private corporations and similar entities involved in financing terrorist acts. It regulates the responsibility of private entities and, by the same token, *a contrario*, suggests that matters of State responsibility for financing Article 2 offences are excluded.

150. This conclusion is also confirmed by the fact that Article 5 of the ICSFT specifically regulates the *criminal, civil or administrative* sanctions of such entities – without suggesting the regulation of matters of *State* responsibility.

151. Article 5(2) of the ICSFT contains a specific savings clause as to the responsibility of individuals and specifically confirms that the liability, criminal or otherwise, of a legal entity is "without prejudice to the criminal liability of individuals having committed the offences."

152. By contrast, Article 5 of the ICSFT contains no parallel provision with respect to matters of State responsibility for financing terrorism. If, as Ukraine claims, the drafters of the ICSFT had intended to address State responsibility as well, it would have been most natural, if not even mandatory, to include a *mutatis mutandis* identical savings clause such as:

> "Such liability [of legal entities] is incurred *without prejudice to the responsibility of a State under international law* being responsible for having committed the offences."

153. No such provision is, however, contained either in Article 5 of the ICSFT or indeed elsewhere in the Convention. This absence of such a savings clause mandates an *argumentum a contrario* that the ICSFT does not encompass State responsibility for the financing of terrorism.

154. The *travaux préparatoires* of Article 5 of the ICSFT reinforce this conclusion. The text of the ICSFT is largely based on a working document originally submitted by France,[191] which contained a specific provision on State responsibility in Article 5(5), stating that:

> "The provisions of this article cannot have the effect of calling into question *the responsibility of the State as a legal entity*."[192]

155. This was followed up by additional proposals to the same effect. Thus, Italy proposed to include in draft Article 5 a provision which would have stated as follows:

> "The provisions of this article [*i.e.* draft Article 5] cannot be interpreted as affecting the question of the *international responsibility of the State*."[193]

---

[191] Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, 3rd Session, Draft international convention for the suppression of the financing of terrorism, UN Doc. A/AC.252/L.7, 11 March 1999, available at https://documents-dds-ny.un.org/doc/UNDOC/LTD/N99/067/15/PDF/N9906715.pdf, and UN Doc. A/AC.252/L.7/Corr.1, 11 March 1999, available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/AC.252/L.7/Corr.1, and UN Doc. A/AC.252/L.7/Add.1, 11 March 1999 (Annex 275 to Memorial).

[192] United Nations General Assembly, 54th Session, *Official Records*, *Supplement No. 37,* Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, UN Doc. A/54/37, 5 May 1999, Annex II, p. 16 (emphasis added), available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N99/127/34/PDF/N9912734.pdf (Annex 5).

156. This, in turn, led to a revised proposal for such a savings clause, once again submitted by France. It provided:

> "5. No provision of this article can have the effect of calling into question the international responsibility of the State."[194]

157. If any of those proposals would have been adopted, it would have been possible to argue that the ICSFT covers issues of State responsibility. Yet, those proposals met with significant reluctance by many delegations. As aptly summarised in the report of the Ad Hoc Committee responsible for drafting the future ICSFT, States involved in the negotiation process took the position that

> "the concept of State responsibility, as understood in general international law, was beyond the scope of the draft Convention."[195]

158. It was for this very reason, and in light of this consideration, that State responsibility for financing terrorism was not meant to be covered by the future ICSFT. Accordingly, the Ad Hoc Committee

> "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."[196]

159. Accordingly, Ukraine's interpretation is inconsistent with the clear consensus of negotiating States to exclude State responsibility for financing

---

[193] Cf. Proposal by Italy, UN Doc. A/AC.252/1999/WP.22, 17 March 1999, *ibid.,* p. 36, (emphasis added).

[194] Proposal by France, UN Doc. A/AC.252/1999/WP.45, 22 March 1999, *ibid.,* p. 47.

[195] United Nations General Assembly, 54th Session, *Official Records*, *Supplement No. 37,* Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, UN Doc. A/54/37, 5 May 1999, p. 60, para. 46, available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N99/127/34/PDF/N9912734.pdf (Annex 5).

[196] United Nations General Assembly, 54th Session, Measures to Eliminate International Terrorism: Report of the Working Group, UN Doc. A/C.6/54/L.2, 26 October 1999, p. 65, para. 127 (Annex 277 to Memorial).

terrorist acts from the ICSFT as is evident from the text of Article 5 of the ICSFT and its unequivocal drafting history.

D. ARTICLE 6 OF THE ICSFT

160. This interpretation is corroborated by the ordinary meaning of Article 6 of the ICSFT and its drafting history. Article 6 of the ICSFT contains no reference to State responsibility; it reads as follows:

> "Each State Party shall adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature."

161. The Group of South Pacific Countries proposed to add a second paragraph to Article 6 of the draft (now Article 6 of the ICSFT). This proposal provided as follows:

> "Each State Party shall not assist either actively or passively any person or organization in the negotiation, conclusion, implementation, execution or enforcement of any contract or agreement to commit an offence created by this Convention or any other offences created by the Conventions listed in the Annex hereto to which the State is a Party."[197]

162. The reason for this proposal was obvious. The Group of South Pacific Countries "argued that such a provision would be in line with the need for a

[197] Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, 3rd Session, Proposal by the Group of South Pacific Countries (SOPAC), UN Doc. A/AC.252/1999/WP.17, 17 March 1999, in UN Doc. A/54/37, 5 May 1999, available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N99/127/34/PDF/N9912734.pdf (Annex 5).

comprehensive legal framework to combat terrorism."[198] At a later meeting of the Ad Hoc Committee, the Group

> "explained that the proposed additional clause would cover the complicity of States in contracts or agreements to commit an offence under the draft convention, and would create an obligation on States not to enforce such agreements."[199]

163. If it had been adopted, such a clause might have provided at least a limited basis for Ukraine's argument. The proposal was, however, rejected because,

> "[w]hile some support was expressed for the [Group of South Pacific Countries] proposal, the observation was made that a reference to the responsibility of States was not appropriate in the draft convention."[200]

164. This confirms, once again, that States were adamant in insisting that the ICSFT was not meant to encompass issue of State responsibility for a State itself allegedly financing acts of terrorism. This result is further confirmed by Article 18 of the ICSFT.

E. ARTICLE 18 OF THE ICSFT

165. Article 18 of the ICSFT, on which Ukraine heavily relies for its claim that the ICSFT covers the financing by a State of terrorist activities,[201] contains a general obligation to cooperate in the prevention of the financing of terrorist activities. Pursuant to its ordinary meaning, this provision does not contain or suggest any reference to State responsibility.

---

[198] United Nations General Assembly, 54th Session, Measures to Eliminate International Terrorism: Report of the Working Group, UN Doc. A/C.6/54/L.2, 26 October 1999, p. 68, para. 176 (Annex 277 to Memorial).
[199] *Ibid.*, p. 68, para. 176.
[200] *Ibid.*, p. 68, para. 177.
[201] Memorial, paras. 37, 270-271, 297 and 299 *et seq* (arguing that "person" encompasses both private persons and persons acting in an official capacity).

166. During the negotiations, France had proposed to add a third paragraph to draft Article 17 (now Article 18 of the ICSFT). The French proposal was very similar to the Group of South Pacific Countries proposal, and it would have provided for the exact consequence that Ukraine now advances in its Memorial. It provided:

> "Each State Party shall not assist either actively or passively any person or organization in the negotiation, conclusion, implementation, execution or enforcement of any contract or agreement to commit an offence as set forth in article 2."[202]

167. Once again, this proposal failed to garner support among the negotiating States. And it was specifically rejected since it would have enlarged the future ICSFT so as to also cover issues of State financing of alleged acts of terrorism. As the Report of the Working Group put it unequivocally:

> "[t]he Bureau had decided not to include paragraph 3, contained in document A/AC.252/1999/WP.47, since it referred to State responsibility, which was a matter for general international law."[203]

168. In the same vein, it was India that had proposed the addition of a new article for incorporation in the future ICSFT that would have read as follows:

> "States parties shall cooperate in carrying out their obligations under this Convention and shall refrain from committing, either directly or indirectly, any of the acts prohibited under this Convention and the

[202] Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, 3rd Session, Proposal by France, UN Doc. A/AC.252/1999/WP.47, 22 March 1999, in UN Doc. A/54/37, 5 May 1999, p. 50, available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N99/127/34/PDF/N9912734.pdf (Annex 5).

[203] United Nations General Assembly, 54th Session, Measures to Eliminate International Terrorism: Report of the Working Group, UN Doc. A/C.6/54/L.2, 26 October 1999, p. 79, para. 324 (Annex 277 to Memorial).

> Conventions in Annex I, or in any manner assisting, encouraging or permitting their commission".[204]

169. The Indian amendment was not adopted, providing once again evidence of intention of the negotiating States to adopt a standard criminal law instrument that followed the existing *acquis* of terrorism suppression treaties, rather than (also) addressing State responsibility for financing of terrorism.

F. ARTICLE 20 OF THE ICSFT

170. Ukraine also contends that Article 20 of the ICSFT, through its reference to sovereign equality, incorporates a customary international law obligation on States Parties to refrain from financing terrorism.[205]

171. Article 20 of the ICSFT provides as follows:

> "The States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States."

172. Ukraine's approach, which has no basis in the very wording of the provision, misconstrues Article 20 of the ICSFT and is inconsistent with the Court's Judgment in *Equatorial Guinea v. France*.

---

[204] Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, 3rd Session, Proposal by India, UN Doc. A/AC.252/1999/WP.48, 23 March 1999, in UN Doc. A/54/37, 5 May 1999, p. 51, available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N99/127/34/PDF/N9912734.pdf (Annex 5).
It is also worth noting that an earlier Indian draft had similarly distinguished between direct obligations for States not to themselves finance terrorism (which obligation is however *not* reflected in the ICSFT as adopted), and an obligation to cooperate in the prevention of terrorist acts (which obligation is now reflected in Article 18 of the ICSFT); cf. Letter dated 1 November 1996 from the Permanent Representative of India to the United Nations addressed to the Secretary-General, UN Doc. A/C.6/51/6, 11 November 1996, p. 4, Article 3(4), available at http://repository.un.org/bitstream/handle/11176/212860/A_C.6_51_6-EN.pdf.

[205] Memorial, para. 303.

173. The ICSFT is very similar in nature to the Convention against Transnational Organized Crime ("the Palermo Convention") which was at issue in *Equatorial Guinea v. France*. In that case the Court interpreted Article 4 Palermo Convention (which is *mutatis mutandis* identical to Article 20 of the ICSFT) as not creating new obligations beyond those specifically covered by the Convention. As the Court put it:

> "Its [Article 4 Palermo Convention] purpose is to ensure that the States parties to the Convention perform their obligations in accordance with the principles of sovereign equality, territorial integrity and non-intervention in the domestic affairs of other States. […] In its ordinary meaning, Article 4(1) does not impose, through its reference to sovereign equality, an obligation on States parties to act in a manner consistent with the many rules of international law which protect sovereignty in general, as well as all the qualifications to those rules."[206]

174. Article 20 of the ICSFT accordingly does not enlarge the scope of obligations arising under the ICSFT beyond those unambiguously mentioned. Nor does Article 20 of the ICSFT, through its reference to sovereign equality, incorporate a customary international law obligation to refrain from financing terrorism.

Section III
Explicit provisions in regional terrorism conventions, and in Security Council resolution 1373, on State financing for terrorism refute Ukraine's argument that State responsibility for financing terrorism is implicit in the ICSFT

175. The issue of State financing is subject to *express* provisions in the Arab Convention for the Suppression of Terrorism of 22 April 1999 ("Arab

[206] *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections, Judgment of 6 June 2018*, paras. 92-93.

Convention"),[207] the OAU Convention on the Prevention and Combating of Terrorism of 14 July 1999 ("OAU Convention"),[208] and the Organization of Islamic Cooperation Convention on Combating International Terrorism of 1 July 1999 ("OIC Convention").[209] The absence of comparable provisions in the ICSFT suggests that the ICSFT was not intended to cover State financing of terrorism. This interpretative approach follows from this Court's jurisprudence.[210]

176. As conventions contemporary to the ICSFT, all three treaties concluded by the Arab League, the OAU and the OIC remedy certain perceived shortcomings of the ICSFT, namely the treatment of national liberation movements and the issue of State involvement in acts of terrorism.

---

[207] UN (2008), *International Instruments related to the Prevention and Suppression of International Terrorism*, United Nations, pp. 178 *et seq*. As of 16 February 2011, 18 Arab States have ratified or acceded to the Arab Convention, see STL, Appeals Chamber, *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, Case No. STL-11-01/I/AC/R176bis, 16 February 2011, para. 63, fn. 90 (Annex 469 to Memorial).

[208] Organization of African Unity Convention on the Prevention and Combating of Terrorism, 14 July 1999, *UNTS*, Vol. 2219, p. 179. As of 15 June 2017, 43 African States have ratified the OAU Convention, see https://au.int/sites/default/files/treaties/7779-sl-oau_convention_on_the_prevention_and_combating_of_terrorism_1.pdf (accessed 5 September 2018). No reservation is recorded with regard to Article 4(1), see Report on the status of OAU/AU treaties, as at 11 July 2012, EX.CL/728(XXI) Rev.1 (9 – 13 July 2012), para. 96, available at http://www.peaceau.org/uploads/ex-cl-728-xxi-e.pdf.

[209] Convention of the Organisation of the Islamic Conference on Combating International Terrorism, Organization of the Islamic Conference, 1 July 1999, reprinted in UN Doc. A/54/637- S/1999/1204, 11 October 2000, Annex, available at https://undocs.org/en/A/54/637. As of 6 June 2006, 12 OIC member States have ratified the OIC Convention, see Measures to eliminate international terrorism: Report of the Secretary-General, UN Doc. A/64/161, 22 July 2009, Table 1, available at https://undocs.org/en/A/64/161 .

[210] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015*, pp. 50-51, para. 96 (citing a regional convention to interpret the temporal scope of the Genocide Convention).

177. All three treaties contain provisions that are *mutatis mutandis* identical to Article 18 of the ICSFT on which Ukraine bases its claim that the ICSFT implies an obligation upon States not to finance terrorism.[211]

a. Article 4 of the Arab Convention: "Contracting States shall cooperate for the *prevention* and suppression of terrorist offences, in accordance with the domestic laws and regulations of each State."[212]

b. Article 5 of the OAU Convention: "States Parties shall co-operate among themselves in *preventing* and combating terrorist acts in conformity with national legislation and procedures of each State."[213]

c. Article 4 of the OIC Convention: "Contracting States shall cooperate among themselves to *prevent* and combat terrorist crimes in accordance with the respective laws and regulations of each State."[214]

178. On the basis of Ukraine's argument, the said provisions – just like Article 18 of the ICSFT in Ukraine's reading of the ICSFT - alone would suffice to bring matter of State responsibility within the framework of the Arab, OAU and OIC conventions.

179. Yet, in sharp contrast to the ICSFT, all three treaties *explicitly* address matters of State responsibility for financing terrorism in *additional, separate* articles, and thereby confirm, *a contrario,* that the ICSFT, unlike the Arab, OAU and OIC conventions, does not regulate questions of State responsibility.

[211] CR 2017/1, p. 39 (Cheek).
[212] Emphasis added.
[213] Emphasis added.
[214] Emphasis added.

a. Article 3 of the Arab Convention: "Contracting States *undertake not to* organize, *finance* or commit terrorist acts or to be accessories thereto in any manner whatsoever."[215]

b. Article 4(1) of the OAU Convention: "States Parties *undertake to refrain from any acts aimed* at organizing, supporting, *financing*, committing or inciting to commit terrorist acts, or providing havens for terrorists, directly or indirectly, including the provision of weapons and their stockpiling in their countries and the issuing of visas and travel documents."[216]

c. Article 3(I) of the OIC Convention: "The Contracting States *are committed not to* execute, initiate or participate in any form in organizing or *financing* or committing or instigating or supporting terrorist acts whether directly or indirectly."[217]

180. All three treaties thereby directly place a duty on States not to finance terrorism. This demonstrates nothing less than that the Arab League, the OAU and the OIC were acutely aware that an obligation to cooperate in the prevention of terrorist offences by private parties may not be equated with an obligation not to finance terrorist offences through State organs and agents, and that the latter obligation is not implicit in the former.

181. Any reading to the contrary, i.e. implying that Article 4 of the Arab Convention, Article 5 of the OAU Convention and Article 4 of the OIC Convention (as constituting the equivalent of Article 18 of the ICSFT) were also

[215] Emphasis added.
[216] Emphasis added.
[217] Emphasis added.

already governing issues of State responsibility, would effectively render Article 3 of the Arab Convention, Article 4(1) of the OAU Convention and Article 3(I) of the OIC Convention largely redundant. Accordingly, Article 18 of the ICSFT can neither be understood as encompassing issues of State responsibility.

182. A 2007 statement of the Legal Department of the Arab League lamented the absence of an international consensus on terrorism, emphasising:

> "the need to expedite the preparation of the comprehensive United Nations Convention on Terrorism that includes a specific definition of international terrorism [and] *State terrorism* […] *similar to the Arab, Islamic and African conventions on the fight against terrorism*".[218]

183. In its Memorial, Ukraine invokes Article 31(3)(c) of the VCLT and relies on Security Council resolution 1373 (2001) in support of its State responsibility claim.[219] Yet in fact, like the three regional conventions, Security Council resolution 1373 (2001) expressly distinguishes between an obligation to "[p]revent and suppress the financing of terrorist act" (para. 1(a)) and the obligation to "[r]efrain from providing any form of support, active or passive, to entities or persons involved in terrorist act" (para. 2(a)). This once again refutes Ukraine's novel interpretation that Article 18 of the ICSFT implicitly addresses matters of State responsibility for the financing of terrorism.

184. The only reasonable inference to be drawn is that if States had wanted to prohibit State terrorism financing in the ICSFT, they would have done so with clear and unambiguous undertakings in the text of the ICSFT. Because Ukraine

[218] Legal Department of the League of Arab States, Work Paper: The League of Arab States Actions in supporting United Nations in combatting international terrorism, 11 October 2007, pp. 5-6 (Annex 9) (emphasis added).
[219] Memorial, para. 304 (citing Security Council resolutions 1373 (2001) and 1636 (2005)).

can point to no such clear textual commitment, any conclusion to this effect would in effect constitute an amendment, rather than an interpretation, of the ICSFT.

Section IV
Subsequent State practice considers the ICSFT a standard criminal law convention that does not address State responsibility for financing terrorism

185. This understanding of the ICSFT is also duly reflected in the explanatory reports of Contracting Parties submitting the ICSFT for approval by their respective national parliaments. *Inter alia* it was the

a. Australian government that noted in that regard that:

> "[t]he purpose of the Convention is to suppress acts of terrorism by depriving terrorists and terrorist organisations of the financial means to commit such acts. It does so by obliging State Parties to criminalise and take other measures to prevent the […] collection of funds for the purpose of committing terrorist acts and to cooperate with other State Parties in the prevention, detection, investigation and prosecution of terrorist financing."[220]

b. The United States government similarly understood the ICSFT to merely:

> "require […] States Parties to criminalize under their domestic laws certain types of criminal offenses, and also requires parties to extradite or submit for prosecution persons accused of committing or aiding in the commission of such offenses."[221]

---

[220] ICSFT, National Interest Analysis, 18 June 2002, para. 5, reprinted in *Australian Year Book of International Law,* Vol. 23, 2004, pp. 189 *et seq*., available at http://www5.austlii.edu.au/au/journals/AUYrBkIntLaw/2004/12.html.

[221] Message from the President of the United States Transmitting the International Convention for the Suppression of the Financing of Terrorism, Adopted by the United Nations General Assembly on December 9, 1999, and Signed on Behalf of the United States of America on January 10, 2000, 106th Congress, 2nd Session, Treaty Doc. 106–49, 12 October 2000, p. VI, available at https://www.gpo.gov/fdsys/pkg/CDOC-106tdoc49/html/CDOC-106tdoc49.htm.

c. In a memorandum submitted to the German Parliament, the German government described the ICSFT in the same vein as follows:

> "The agreement [i.e. ICSFT] obliges State parties to criminalise the collection and provision of funds of every kind that are intended to facilitate offences as defined in its annex. It obliges States to have the tools in place to seise and confiscate funds that are used for terrorist acts. It contains provisions regarding international judicial dispute settlement as well as provisions for mutual legal assistance and extradition that follow the established model of other agreements in this area."[222]

d. The British government, when requesting parliamentary approval, merely proposed a set of changes to its domestic criminal law thereby:

> "enabl[ing] the UK to meet its obligations under the […] provisions of these [Suppression of Terrorism] Conventions [including the ICSFT], which are common to earlier international counter-terrorism Conventions."[223]

e. Finally, Switzerland similarly understood the ICSFT to exclusively being an instrument to counter private criminal acts when stating that:

> "*les Etats doivent ériger* [...] *les infractions couvertes par cette convention* [...]. *En outre, la Convention institue un système cohérent et complet de coopération internationale régissant les domaines de*

---

[222] Federal Government Bill of the United Nations International Convention for the Suppression of the Financing of Terrorism of 9 December 1999, Bundestag printed version 15/1507, 2 September 2003, p. 24, available at http://dip21.bundestag.de/dip21/btd/15/015/1501507.pdf (Annex 8):
"Das Übereinkommen begründet die Pflicht der Vertragsstaaten, das Sammeln und Bereitstellen finanzieller Mittel aller Art zu dem Zweck, bestimmte, in einem Anhang zu dem Übereinkommen abschließend aufgeführte Tathandlungen zu ermöglichen, unter Strafe zu stellen. Es verpflichtet die Vertragsstaaten, Möglichkeiten der Beschlagnahme und Einziehung finanzieller Mittel, die der Finanzierung terroristischer Akte dienen, zu schaffen. Es enthält Regelungen zur Begründung der internationalen Gerichtsbarkeit sowie zur Rechtshilfe und Auslieferung, die dem bereits bewährten Muster anderer Übereinkommen in diesem Bereich folgen."

[223] Explanatory notes to Terrorism Act 2000, 20 July 2000, para. 57, available at http://www.legislation.gov.uk/ukpga/2000/11/notes.

l'extradition, de l'entraide judiciaire et du transfèrement de personnes condamnées".[224]

186. Most interestingly, the French Minister of Foreign Affairs presented the ICSFT during the domestic ratification procedure as "*une Convention d'incrimination classique*" that follows the principles of the pre-existing anti-terrorism conventions.[225] The Foreign Affairs Commission of the French *Assemblée Nationale* in its report then stressed that ordinary crimes, such as drug trafficking or hostage taking, were now the main problem, as opposed to the 1970s and 1980s when the main sources were acts committed by certain States.[226] Lastly, the report of the French Sénat classified the ICSFT as a "*Convention d'incrimination*" that "*s'inscrit dans le cadre de l'ensemble du droit international anti-terroriste*".[227]

---

[224] *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 Juin 2002, Feuille fédérale n° 32 du 13 août 2002, pp. 5014, 5025, available at https://www.admin.ch/opc/fr/federal-gazette/2002/5014.pdf .

[225] *Projet de loi autorisant la ratification de la Convention internationale pour la répression du financement du terrorisme,* Document Sénat No. 259, Session ordinaire de 2000-2001, Annexe au procès-verbal de la séance du 4 avril 2001 ("*La Convention reprend cependant également les principaux acquis des conventions anti-terroristes existantes*"), available at https://www.senat.fr/leg/pjl00-259.html.

[226] *Rapport No. 3367 de M. René Mangin, fait au nom de la commission des affaires étrangères sur le projet de loi, adopté par le Sénat, autorisant la ratification de la convention internationale pour la répression du financement du terrorisme*, Document Assemblée Nationale No. 3367, 7 November 2001, p. 7:
"Désormais, les sources sont beaucoup plus diversifiées. Celles représentées par le grand banditisme occupent une place de plus en plus importante. Au sein de la criminalité de droit commun, trois types d'activités semblent particulièrement utilisées pour le financement du terrorisme : le trafic de drogue et de matières premières, les prises d'otages ainsi que le racket ou le hold-up", available at http://www.assemblee-nationale.fr/11/rapports/r3367.asp.

[227] *Rapport de M. André Rouvière, fait au nom de la commission des Affaires étrangères, de la défense et des forces armées sur le projet de loi autorisant la ratification de la Convention internationale pour la répression du financement du terrorisme*, Document Sénat No. 355, Session ordinaire de 2000-2001, Annexe au procès-verbal de la séance du 6 juin 2001, p. 8, available at https://www.senat.fr/rap/l00-355/l00-355_mono.html.

187. These statements are all the more compelling since the original French draft, as well as subsequent amendments proposed by France had advocated for the inclusion of some form of direct State responsibility for financing terrorism.

188. Even Ukraine, in its note prepared by the Minister for Foreign Affairs, which was provided to the Ukrainian Parliament for the purpose of explaining the nature of the ICSFT, made no reference to, or suggestion of, State responsibility for terrorism financing.[228] Hence, national documents submitting the ISCFT for approval by the respective national parliament, including the one by Ukraine, did not take the position that the ICSFT encompasses issues of State responsibility for a State itself financing alleged acts of terrorism.

Section V
State responsibility for terrorism financing continues to be the most divisive issue in the ongoing negotiations on the draft Comprehensive Convention on International Terrorism, rendering an implied obligation not to finance terrorism under ICSFT implausible

189. The issue of State responsibility for terrorism constitutes the most important of the so far unresolved issues during the still ongoing negotiations on

[228] Explanatory Note on the draft law of Ukraine on ratification of the International Convention on the Suppression of the Financing of Terrorism, No. 149-IV, 12 September 2002 (Annex 7):
"This Convention criminalizes financing of terrorism regardless of who committed it – a natural or a legal person. The State Parties thereto are obliged to prevent and counteract financing of terrorists and terrorist organizations through appropriate domestic measures whether such financing is provided directly or indirectly through organizations with other goals. […]
State Parties to the Convention shall adopt appropriate measures at national level to identify, detect, freeze or seize any funds that are used or allocated for the purpose of committing terrorist acts without impeding the freedom of lawful capital movement. The States shall also afford one another the greatest measure of assistance to coordinate their actions while investigating such cases, in particular, State Parties cannot refuse a mutual legal aid request on the ground of bank secrecy."

a future *Comprehensive* Convention on International Terrorism.[229] This negotiation process sheds significant light on the understanding of States Parties as to the scope of the ICSFT, i.e. reconfirms their understanding that such issues are not already covered by the ICSFT.

190. This has been explicitly confirmed by Ukraine itself, contradicting its own position in its Memorial for purposes of this very case. In the Sixth Committee of the General Assembly Ukraine is recorded as having made the following statement:

---

[229] See also, e.g., United Nations General Assembly, 59th Session, Report of the Secretary-General, "In larger freedom: towards development, security and human rights for all", UN Doc. A/59/2005, 21 March 2005, para. 91, available at https://undocs.org/A/59/2005; United Nations General Assembly, 60th Session, *Official Records*, *Supplement No. 37*, Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, UN Doc. A/60/37, 28 March – 1 April 2005, p. 20, para. 22 and p. 25, para. 13, available at http://legal.un.org/docs/?symbol=A/60/37(Supp); Letter from the Chairman of the Sixth Committee addressed to the President of the General Assembly, UN Doc. A/59/894, 3 August 2005, Appendix I, p. 3, available at https://undocs.org/A/59/894; United Nations General Assembly, 62nd Session, *Official Records*, *Supplement No. 37*, Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, 11th session, UN Doc. A/62/37, 5, 6 and 15 February 2007, p. 6, para. 5, available at http://legal.un.org/docs/?symbol=A/62/37(Supp); United Nations General Assembly, 62nd Session, *Official Records*, *Supplement No. 37*, Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, 13th session, UN Doc. A/64/37, 29 June to 2 July 2009, p. 5, para. 1, available at http://legal.un.org/docs/?symbol=A/64/37(Supp); United Nations General Assembly, 61st Session, *Official Records*, *Supplement No. 37*, Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, 14th session, UN Doc. A/65/37, 12 to 16 April 2010, p. 7, para. 11, available at http://legal.un.org/docs/?symbol=A/65/37(Supp); United Nations General Assembly, 66th Session, *Official Records*, *Supplement No. 37*, Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, 15th session, UN Doc. A/66/37, 11 to 15 April 2011, p. 7, para. 10, available at http://legal.un.org/docs/?symbol=A/66/37.

The notion of "State terrorism", as used by States, refers to varying degrees of State involvement, that is both State encouragement participation, and support of terrorism, as well as acts of terrorism by the State itself, see G. Guillaume, "Terrorisme et droit international", *Recueil des Cours,* Vol. 215, 1989-III, pp. 297-300; M. Di Filippo, "Terrorist Crimes and International Co-operation: Critical Remarks on the Definition and Inclusion of Terrorism in the Category of International Crimes", *EJIL*, Vol. 19(3), 2008, pp. 533, at 548, fn. 66, available at http://www.ejil.org/pdfs/19/3/1626.pdf.

> "The increase in State-sponsored terrorism throughout the world was detrimental to global counter-terrorism efforts. His delegation was particularly concerned about the difficulty of holding States accountable for the financing of terrorism and believed that no effort should be spared to that end. Ukraine had already led the way in its suit against the Russian Federation before the International Court of Justice, resulting in the finding by the Court, in its order of 19 April 2017, that the case was plausible and that a State could be held accountable for violating the Convention for the Suppression of the Financing of Terrorism. The need to hold to account not only individuals and organizations but also *States responsible* for organizing, encouraging, providing training or otherwise *directly or indirectly supporting terrorist activities* should be duly reflected in the draft comprehensive convention on international terrorism, which would be an *important addition* to the existing international legal counter-terrorism framework."[230]

191. The entire premise of Ukraine's argument is that so far no global instrument exists yet that prohibits State supporting and financing terrorism. Consequently, Ukraine's statement in the Sixth Committee in October 2017, i.e. well after it had brought its case against the Russian Federation under the ICSFT, diametrically contradicts Ukraine's own claim – made for purposes of this case – that the ICSFT already encompasses a prohibition of State financing of terrorism.

192. Statements by other States further confirm that the current regime, including the ICSFT, does not address State responsibility for terrorism in general, and for financing terrorism in particular.

a. Thus, in a Security Council debate the United Kingdom representative stated that:

[230] United Nations General Assembly, 72nd Session, *Official Records*, Summary record of the 2nd meeting, UN Doc. A/C.6/72/SR.2, 23 October 2017, p. 9, para. 51 (emphasis added), available at https://undocs.org/A/C.6/72/SR.2.

> "we [the members of the Security Council] also have to be conscious of the content of the 12 conventions on various aspects of terrorism. *None of these seminal texts* [the 12 sector conventions against terrorism] *refer to State terrorism, which is not an international legal concept*. We must be careful not to get caught up in the rhetoric of political conflict. If States abuse their power, they should be judged against the international conventions and other instruments dealing with war crimes, crimes against humanity and international human rights and humanitarian law."[231]

b. Similarly, it was frequently stressed in reports on the ongoing negotiations that the future Comprehensive Convention, just like the various previous conventions including the ICSFT, is not meant to encompass matters of State responsibility:

> "It was reiterated that the draft convention was a law enforcement instrument dealing with individual criminal responsibility and that the notion of State terrorism was incompatible with the approach taken in the elaboration of the various counter-terrorism instruments […] Those aspects were already covered by different legal regimes, including the law on State responsibility. It was also noted that the Coordinator had proposed language to manage expectations in the draft accompanying resolution which, inter alia, reaffirmed the duty of every State to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when those acts involved the threat of the use of force or the use of force."[232]

---

[231] United Nations Security Council, 4453th meeting, UN Doc. S/PV.4453, 18 January 2002, pp. 24-25, available at http://www.un.org/Docs/pv4453e1.pdf.

[232] United Nations General Assembly, 68th Session, *Official Records*, *Supplement No. 37*, Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, UN Doc. A/68/37, 8 – 12 April 2013, pp. 24-25, para. 24, available at http://legal.un.org/docs/?symbol=A/68/37.

193. The issue of State involvement in terrorism has moreover been addressed by the Coordinator of the Ad Hoc Committee when stating that

a. "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."[233]

b. "an […] inclusion of elements of 'State terrorism' […] would imply revisiting the entire premise on which the Ad Hoc Committee had proceeded in developing those instruments";[234] and that

c. "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.*"[235]

194. Even those States that favour the inclusion of issues of State involvement into the future Comprehensive Convention take it for granted that, so far, those issues have not yet been regulated by the various anti-terrorism instruments, including the ICSFT. They therefore argue in favour of an *explicit* reference to State terrorism in the future Comprehensive Convention against terrorism, be it only in the preamble:

> "Convinced that the suppression of acts of international terrorism, *including those in which States are directly or indirectly involved*, is

[233] United Nations General Assembly, 63rd Session, *Official Records*, Summary record of the 14th meeting, UN Doc. A/C.6/63/SR.14, 18 November 2008, para. 41, available at http://legal.un.org/docs/?symbol=A/C.6/63/SR.14 (emphasis added).
[234] *Ibid.*, para. 49.
[235] *Ibid*.

> an essential element in the maintenance of international peace and security and the sovereignty and territorial integrity of States."[236]

195. In contrast thereto, those States that are aiming at drafting an ordinary criminal law instrument in line with earlier anti-terrorism conventions such as the ICSFT, proposed to delete this reference, be it through deleting the entire preambular paragraph or by deleting the phrase "including those which are committed or supported by States, directly or indirectly".[237]

196. Accordingly, there is a consensus among the States involved in the ongoing negotiating process that *without such an explicit reference to State responsibility*, the future draft convention, just like the ICSFT beforehand, would *not* encompass matters of State involvement in terrorism.

197. Even the accompanying resolution to the ICSFT, General Assembly resolution 54/109 (2000), contains no reference to State financing of terrorists. This stands in sharp contrast to the proposal by the coordinator working on a Comprehensive Convention on terrorism to address the issue of State terrorism in the accompanying resolution.[238] Yet, even such minimal consensus to relegate the

---

[236] Letter dated 3 August 2005 from the Chairman of the Sixth Committee addressed to the President of the General Assembly, UN Doc. A/59/894, 12 August 2005, Appendix II, p. 8, available at https://undocs.org/A/59/894; United Nations General Assembly, 68th Session, *Official Records*, *Supplement No. 37*, Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, UN Doc. A/68/37, 8 – 12 April 2013, p. 5, available at http://legal.un.org/docs/?symbol=A/68/37 (emphasis added).

[237] United Nations General Assembly, 57th Session, *Official Records*, *Supplement No. 37*, Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, 6th Session, UN Doc. A/57/37, 28 January – 1 February 2002, p. 23, available at http://legal.un.org/docs/?symbol=A/57/37(Supp). The wording of the preambular paragraph in question was slightly different in the 2002 version compared to the 2013 version.

[238] United Nations General Assembly, 68th Session, *Official Records*, *Supplement No. 37*, Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, UN Doc. A/68/37, 8 – 12 April 2013, pp. 24-25, para. 24, available at http://legal.un.org/docs/?symbol=A/68/37.

issue of State financing of terrorists was lacking when General Assembly resolution 54/109 was drafted, adopting the text of the ICSFT.

198. The ongoing efforts to conclude a Comprehensive Convention on international terrorism therefore clearly demonstrate that States – including both, those which support addressing State terrorism in a general agreement, and those which support a criminal law instrument – are fully aware, and share the position that any such inclusion would require a specific reference in that regard, and that the previous terrorism treaties (including the ICSFT) had not yet addressed the matter.

Section VI
Ukraine's reliance on this Court's *Bosnian Genocide* Judgment is inapposite since the Genocide Convention and the ICSFT are materially different

199. Ukraine relies heavily on the Court's jurisprudence in the *Bosnian Genocide* case in order to claim that Article 24 of the ICSFT encompasses issues of State responsibility for financing terrorism.[239] Such reliance, however, is misplaced since the ICSFT and the Genocide Convention are materially different.

200. First, it is essential to note that the wording of Article IX Genocide Convention and Article 24 of the ICSFT are *fundamentally* different. It is obviously true that compromissory clauses do not

> "determine whether parties have substantive rights, but only whether, if they have them, they can vindicate them by recourse to a tribunal."[240]

[239] CR 2017/1, p. 39, para. 19 (Cheek); CR 2017/3, p. 19, para. 18 (Koh) and p. 47, paras. 37-39 (Cheek); Memorial, paras. 306-307.

[240] *South West Africa (Ethiopia v. South Africa), Second Phase, Judgment, I.C.J. Reports 1966*, p. 39, para. 65.

201. One may nevertheless draw at least an inference as to the scope of the Court's jurisdiction from the wording of Article 24 of the ICSFT by comparing Article 24 of the ICSFT with Article IX of the Genocide Convention.

202. Article IX of the Genocide Convention covers disputes arising under the Genocide Convention, including those relating "to the responsibility of a State for genocide". This clause *at the very least* "confirm[s]"[241] that State responsibility for genocide are indeed covered by the Genocide Convention. Article 24 of the ICSFT in turn does *not* include any such reference to disputes relating to the "responsibility of a State for financing acts of terrorism".

203. Second, Article IV of the Genocide Convention *expressis verbis* contemplates the commission of genocide by "constitutionally responsible rulers and public officials". Such acts are undoubtedly acts of State organs under customary international law. Article IV of the Genocide Convention therefore clearly implies, as confirmed by the Court in the *Bosnian Genocide* case,[242] that the Genocide Convention encompasses issues of State responsibility. It is this result that is then confirmed by the very wording of Article IX of the Genocide Convention.[243] The ICSFT by contrast does not, however, contain a provision akin to Article IV of the Genocide Convention, nor indeed, as has already been shown, any other reference to State responsibility for financing terrorism. Rather,

---

[241] *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*, p. 114, paras. 168-169.

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

[243] *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*, p. 114, para. 169.

to the contrary, Article 21 of the ICSFT confirms that such matters continue to be governed by general international law.

204. Third, the Court placed great emphasis on the fact that Article I of the Genocide Convention "categorizes genocide as 'a crime under international law'" for concluding that the Genocide Convention contains an implied prohibition to commit genocide.[244] Ukraine relies on the alleged status of terrorism financing as an international crime to support its contention that the ICSFT envisages direct State responsibility.[245] However, the ICSFT does not characterise terrorism financing as a crime under international law.[246] The difference between the Genocide Convention and the ICSFT is supported by two salient features:

a. The core crime of genocide is unlawful under all circumstances. Terrorism financing under Article 2 of the ICSFT, however, must be done "unlawfully". This excludes from the ambit of the ICSFT certain legitimate activities, such as those by humanitarian organizations or ransom payments.[247]

---

[244] *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*, p. 113, para. 166.

[245] Memorial, para. 300 (quoting the ILC's Commentary on the Articles of State responsibility).

[246] On the terminology, see K. Ambos, A. Timmermann, "Terrorism and customary international law", in *Research Handbook on International Law and Terrorism,* B. Saul (ed.), 2014, p. 23 (distinguishing international core crimes and treaty-based crimes) and fn. 19 (with further references).

[247] United Nations General Assembly, 54th Session, Measures to Eliminate International Terrorism: Report of the Working Group, UN Doc. A/C.6/54/L.2, 26 October 1999, p. 60, para. 67 (Annex 277 to Memorial). See also United Nations General Assembly, Sixth Committee, Working Group established by General Assembly resolution 51/210 of 17 December 1996, Comments by the United Nations High Commissioner for Refugees on the draft international convention for the suppression of the financing of terrorism, UN Doc. A/C.6/54/WG.1/INF/1, 9 November 1999, para. 7 (available at http://undocs.org/A/C.6/54/WG.1/INF/1).

b. Genocide is universally criminal, regardless of whether it is a purely internal affair or crosses international boundaries. Financing terrorism is not universally criminal as Article 3 of the ICSFT excludes purely internal instances of terrorism financing without any international link from the scope of the Convention.

205. Fourth, in relying on the Court's finding in the *Bosnian Genocide* case, that the obligation to prevent genocide implies an obligation not to commit genocide,[248] Ukraine overlooks an important difference between the two treaties.

206. Under Article I of the Genocide Convention, States "undertake to prevent" genocide. In contrast, Article 18 of the ICSFT imposes an obligation of a different character. It requires that

> "States Parties shall *cooperate in* the prevention of the offences set forth in article 2 by taking all practicable measures".[249]

207. Ukraine's reliance on the Court's *Bosnian Genocide* Judgment is therefore inapposite.

208. Lastly, having reviewed the drafting history of the Genocide Convention, in the *Bosnian Genocide* case the Court stated:

> "In the view of the Court, two points may be drawn from the drafting history just reviewed. The first is that much of it was concerned with proposals supporting the criminal responsibility of States; but those proposals were not adopted. The second is that the amendment which was adopted — to Article IX — is about jurisdiction in respect of the responsibility of States *simpliciter*. Consequently, the drafting history

[248] *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*, p. 113, para. 166.
[249] Emphasis added.

> may be seen as supporting the conclusion reached by the Court in paragraph 167 above."[250]

209. As shown above, the final text of the ICSFT reflects the consensus among States that the Convention should not, and does not, provide for the responsibility of States for terrorism financing. Time and again, States rejected proposals to provide for direct State responsibility for terrorism financing, however limited. This conclusion is confirmed by the absence of a State responsibility clause in Article 24 of the ICSFT. Given the unequivocal rejection of State responsibility under the ICSFT in the *travaux préparatoires* of the ICSFT, Ukraine asks this Court not to interpret but to rewrite the ICSFT. Accordingly, any reliance by Ukraine on this Court's *Bosnian Genocide* Judgment is misguided and should be rejected.

Section VII
An implicit finding of State responsibility for terrorism financing is otherwise excluded since State officials are not "persons" within the meaning of Articles 2 and 18 of the ICSFT

210. Having become aware of these arguments, Ukraine now argues for the first time in its Memorial that the term "persons" under Articles 2 and 18 of the ICSFT includes both, private persons and State officials.[251] The purpose of this argument is easy to discern: Ukraine invites the Court to find that Russia did not take all practicable measures to prevent *its own officials* from supposedly financing terrorists, while not explicitly finding that Russia as such financed terrorist acts.

---

[250] *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,* p. 118, para. 178.

[251] Memorial, paras. 300 et *seq*. vs. CR 2017/3, p. 47, para. 37 (Cheek).

211. Any such finding would, however, necessarily entail a finding that Russia is directly responsible for terrorism financing as per Article 4 of the ILC Articles on State Responsibility. Such a determination, even if only implicit, is however, as has already been shown, excluded by the ICSFT, and would consequently go far beyond Russia's consent as to the Court's jurisdiction under Article 24 of the ICSFT.

212. Ukraine's construction is without merit. When the ICSFT speaks of "persons" it means private persons only.[252] This is especially the case with Article 18 of the ICSFT.

213. When international law addresses persons whose conduct is attributable to a State, including State officials, the language used is different. In such cases, States are directly addressed through language such as "shall refrain from" or "undertake not to commit" as is *inter alia* evident in Article 3 of the OIC Convention, Article 4 of the OAU Convention, Article 3 of the Arab Convention and Security Council resolution 1373 (2001) that clearly distinguish between an obligation to prevent terrorism and the obligation not to commit terrorism themselves.[253]

214. Besides, this implication – that an obligation to prevent terrorist offences only applies to private persons – is confirmed by this Court's Judgment in the

[252] Y. Banifatemi, "La lutte contre le financement du terrorisme international", *Annuaire Français de Droit International*, Vol. 48, 2002, pp. 103-128, p. 107 ("De manière générale cependant, le 'terrorisme d'État' n'est pas un concept dont on tire aisément des conséquences juridiques: les instruments internationaux récents, et en premier lieu la Convention de 1999, *visent plutôt les actes commis par des 'personnes', en mettant à la charge des États parties des mesures relevant de la prévention et de la sanction d'actes commis par celles-ci.*") (emphasis added).

[253] Similarly, Articles 22 and 29 of the Vienna Convention on Diplomatic Relations clearly distinguish between direct obligations for States on the one hand, and obligations to prevent harm by private actors on the other (Vienna Convention on Diplomatic Relations, 18 April 1961, *UNTS*, Vol. 500, p. 95).

Bosnian Genocide case. There, the Court unequivocally distinguished between an obligation not to *commit genocide through State organs* and an *obligation to prevent genocidal acts committed by other, private persons*.[254]

215. As a matter of fact, the Court addressed the obligation of prevention only after it had considered whether the acts concerned had been committed by organs of the respondent State, or by other persons, the acts of whom could be attributed to that State. The Court accordingly considered a State being responsible for having committed certain acts on the one hand, and for not having prevented such acts on the other to be mutually exclusive.

216. In particular, when addressing the obligation to prevent genocide, the Court refrained from pronouncing whether "there is a general obligation on States to prevent the commission by *other* persons or entities of acts contrary to certain norms of general international law."[255] Yet, to state the obvious, "*other* persons" are, by definition, persons whose conduct cannot be attributed to the State concerned.

217. At the same time, and with regard to the obligation of States not to commit genocide themselves, the Court held that

> "Contracting Parties are bound by the obligation under the Convention not to commit, *through their organs or persons or groups whose conduct is attributable to them*, genocide".[256]

[254] *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*, pp. 214-215, paras. 413-415 and pp. 220-226, paras. 428-438.
[255] *Ibid.*, p. 220, para. 429 (emphasis added).
[256] *Ibid.*, p. 119, para. 179 (emphasis added).

218. It is therefore inherent in the Court's Judgment in the Bosnian Genocide case,[257] that while the commission of acts prohibited by the relevant treaty presupposes that those acts can be attributed to the State concerned, the violation of an obligation of prevention of such acts in turn presupposes that those acts are *not* attributable to the said State. This reasoning equally applies to the ICSFT. Consequently, the obligation to cooperate in the prevention of terrorism financing applies to private persons only, and not to State officials, whose acts are attributed to the State in question.

219. States have recognised this distinction when arguing in favour of a provision, for inclusion in a future Comprehensive Convention that would explicitly prohibit the involvement of States in terrorist activities through their officials. In particular two States, Cuba and Nicaragua, have consistently argued for a provision that would make it explicit that a Comprehensive Convention should apply to State officials. Originally proposed in the context of the Nuclear Terrorism Convention,[258] since 2005 Cuba has advocated for the following amendment to the core provision of the Comprehensive Convention (draft article 2) that contains the definition of a terrorist offence:[259]

> "[Any person also commits an offence if that person is] *in a position to control or direct effectively the actions of troops belonging to the armed forces of the State*, orders, permits or actively participates in the planning, preparation, initiation or execution of any of the offences set forth in paragraphs 1, 2 or 3 of the present article in a

[257] Cf. *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*, p. 119, para. 179 and p. 221, para. 430.

[258] International Convention for the Suppression of Acts of Nuclear Terrorism, 13 April 2005, *UNTS*, Vol. 2445, p. 89.

[259] For the text of draft Article 2, see United Nations General Assembly, 68th Session, *Official Records*, *Supplement No. 37*, Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, UN Doc. A/68/37, 8 – 12 April 2013, p. 6, available at http://legal.un.org/docs/?symbol=A/68/37.

manner incompatible with the purposes and principles of the Charter of the United Nations."[260]

220. *Mutatis mutandis* in identical terms Nicaragua proposed:

> "[Any person also commits an offence if that person is] *in a position to control or direct effectively the actions of armed groups not belonging to the armed forces of the State but responding to it*, orders, permits, or participates directly or indirectly in the planning, preparation, initiation or execution of any of the offences set forth in paragraphs 1, 2 or 3 of the present article in a manner incompatible with the purposes and principles of the Charter of the United Nations."[261]

221. The purpose of these amendments is very clear, as explained by Nicaragua:

> "Discussions should continue on pending issues, including a clear definition of terrorism, *to include State terrorism*, and coverage of actions by the armed forces of a State which were not concordant with international humanitarian law. She recalled the proposal made in that regard by the delegation of Cuba in document A/AC.252/2005/WP.2."[262]

222. Yet, this is exactly what Ukraine now claims in its Memorial when it argues that State officials are "persons" in terms of Article 2 of the ICSFT. States may very well adopt such an amendment in the future Comprehensive Convention, or they may choose not do so. What is clear, however, is that those

---

[260] UN Doc. A/AC.252/2005/WP.2, 9 March 2005, reprinted in Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, UN Doc. A/68/37, 8 - 12 April 2013, p. 18 (emphasis added), available at http://legal.un.org/docs/?symbol=A/68/37.

[261] Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, UN Doc. A/68/37, 8 – 12 April 2013, p. 16 (emphasis added), available at http://legal.un.org/docs/?symbol=A/68/37.

[262] United Nations General Assembly, 66th Session, *Official Records*, Summary record of the 3rd meeting, UN Doc. A/C.6/66/SR.3, 10 January 2012, para. 41 (emphasis added), available at http://undocs.org/A/C.6/66/SR.3.

proposals confirm that the current conventions in general, and the ICSFT in particular, do not cover such actions, and that consequently they may not be read into it either.

223. This is corroborated *a contrario* by Article 15 of the Convention against Terrorism of the Gulf Cooperation Council of 4 May 2004 ("GCC Convention") that expressly includes "*public* […] institutions or individuals" for the purpose of its obligation of prevention:

> "Contracting States shall do their utmost to prevent the entry, movement, transfer or exit of funds that are suspected of being used to finance or support terrorism, and to prevent their nationals and *public* and private *institutions or individuals* or such institutions located on their territory from engaging in such activities."[263]

224. The GCC Convention constitutes an exception to the general treaty practice of applying prevention duties to private persons only. However, Ukraine cannot point to any similar language in Article 18 of the ICSFT. State officials are not "persons" for purposes of Articles 2 and 18 of the ICSFT, and no implicit determination of direct State responsibility for funding terrorists may follow under the ICSFT based on that novel and misconceived construction.

225. By arguing that the ICSFT implicitly encompasses State responsibility for the financing of terrorism, or alternatively, that State officials are "persons" for the purposes of Articles 2 and 18, Ukraine advances an unprecedented and untenable interpretation of the ICSFT. Ukraine's reading is far-reaching since, if

[263] UN, *International Instruments related to the Prevention and Suppression of International Terrorism,* United Nations, 2008, pp. 259 *et seq.* (emphasis added).

adopted by this Court, it would necessarily apply to a whole series of suppression conventions with compromissory clauses that address private actors.[264]

226. Ukraine's interpretation finds no basis in the text, structure, drafting history or subsequent State practice of the ICSFT. It is also not in line with this Court's reasoning in the *Bosnian Genocide* case or with the generally accepted language used by the Security Council in resolution 1373 (2001) and in the Arab, OAU and OIC Conventions. The Court's task is not to legislate. Rather, the issue should be properly left to the States currently negotiating a Comprehensive Convention on International Terrorism.

227. The Russian Federation emphasises again that States are prohibited under general international law from financing terrorism. In international law, however, the actor does matter and, if the ICSFT is applied to the State, entire sets of legal provisions become relevant**.**[265] Therefore, the appropriate framework for Ukraine's claims is the Charter of the United Nations and customary international law – claims which the Court cannot however address under Article 24 of the ICSFT.

[264] See only, e.g., Article 12 of the Convention for the Suppression of Unlawful Seizure of Aircraft, 16 December 1970, *UNTS*, Vol. 860, p. 105; Article 20 of the International Convention for the Suppression of Terrorist Bombings, 15 December 1997, *UNTS*, Vol. 2149, p. 256; Article 23 of the International Convention for the Suppression of Acts of Nuclear Terrorism, 13 April 2005, *UNTS*, Vol. 2445, p. 89.

[265] M. Di Filippo, "The Definition(s) of Terrorism in International Law", in *Research Handbook on International Law and Terrorism,* B. Saul (ed.), 2014, p. 4.

CHAPTER VI
UKRAINE HAS NOT FULFILLED THE PROCEDURAL PRECONDITIONS CONTAINED IN ARTICLE 24(1) OF THE ICSFT

228. Article 24 (1) of the ICSFT provides:

> "Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation within a reasonable time shall, at the request of one of them, be submitted to arbitration. If, within six months from the date of the request for arbitration, the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice, by application, in conformity with the Statute of the Court.

229. Article 24 (1) of the ICSFT thereby requires States Parties to enter into negotiations, and if they fail, to try to agree on a settlement by way of arbitration. It is only where both alternatives have failed that the Court may then be seised. Ukraine did not, however, genuinely attempt to engage in good faith negotiations to settle the dispute (Section I). Moreover, Ukraine did not attempt to settle this dispute through arbitration in accordance with Article 24 of the ICSFT (Section II).

Section I
Ukraine did not genuinely attempt to engage in good faith negotiations

A. THE PRECONDITION OF NEGOTIATION UNDER ARTICLE 24 OF THE ICSFT

230. As early as 1929, the PCIJ affirmed that the judicial settlement of international disputes "is simply an alternative to the direct and friendly

settlement of such disputes between the parties".[266] Since then, the "fundamental character"[267] of the obligation to negotiate and its role in the peaceful settlement of disputes have been underlined time and again.

231. In the *Georgia v. Russian Federation* case, the Court further pointed out that

> "it is not unusual in compromissory clauses conferring jurisdiction on the Court and other international jurisdictions to refer to resort to negotiations. Such resort fulfils three distinct functions.
>
> In the first place, it gives notice to the respondent State that a dispute exists and delimits the scope of the dispute and its subject matter. The Permanent Court of International Justice was aware of this when it stated in the *Mavrommatis* case that 'before a dispute can be made the subject of an action in law, its subject‑matter should have been clearly defined by means of diplomatic negotiations' (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 15).
>
> In the second place, it encourages the parties to attempt to settle their dispute by mutual agreement, thus avoiding recourse to binding third party adjudication.
>
> In the third place, prior resort to negotiations or other methods of peaceful dispute settlement performs an important function in indicating the limit of consent given by States."[268]

232. The completion of the obligation to negotiate is one of the *sine qua non* conditions to which the States Parties to the ICSFT subordinate their acceptance of the compromissory clause. The Court has defined precisely the criteria that must be met for this procedural condition to be deemed satisfied:

---

[266] *Free Zones of Upper Savoy and the District of Gex*, *Order of 19 August 1929, P.C.I.J., Series A, No. 22*, p. 13; *North Sea Continental Shelf (Federal Republic of Germany/Denmark), Judgment, I.C.J. Reports 1969*, pp. 47-48, para. 87.

[267] *Ibid.*, p. 47, para. 86.

[268] *Application of the International Convention for the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011* ("*Georgia v. Russian Federation*, *Preliminary objections"*), pp. 124-125, para. 131.

> "157. In determining what constitutes negotiations, the Court observes that *negotiations are distinct from mere protests or disputations*. Negotiations entail more than the plain opposition of legal views or interests between two parties, or the existence of a series of accusations and rebuttals, or even the exchange of claims and directly opposed counter claims. As such, *the concept of 'negotiations'* differs from the concept of 'dispute', and *requires — at the very least — a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute*."[269]

233. In other words, the obligation is "not merely to go through a formal process of negotiation"[270] and that obligation must be complied with in good faith: it requires the Parties "not only to enter into negotiations but also to *pursue them as far as possible* with a view to concluding agreements".[271] The Parties "are under an *obligation so to conduct themselves that the negotiations are meaningful*, which will not be the case when either of them insists upon its own position without contemplating any modification of it".[272]

234. Mention should also be made in this context of the Judgment of the Court in the *Fisheries Jurisdiction* case, in which the Court directed the Parties "to conduct their negotiations on the basis that each must, in good faith, pay reasonable regard to the legal rights of the other."[273] Similarly, in the Award of

---

[269] *Ibid.,* p. 132, para. 157 (emphasis added).

[270] *North Sea Continental Shelf (Federal Republic of Germany/Denmark), Judgment, I.C.J. Reports 1969*, p. 47, para. 85.

[271] *Georgia v. Russian Federation*, *Preliminary objections,* pp. 132-133, para. 158, referring to *Railway Traffic between Lithuania and Poland, Advisory Opinion of 15 October 1931, P.C.I.J., Series A/B, No. 42*, p. 116; *North Sea Continental Shelf (Federal Republic of Germany/Denmark), Judgment, I.C.J. Reports 1969*, pp. 47-48, para. 87; *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 68, para. 150 (emphasis added).

[272] *North Sea Continental Shelf (Federal Republic of Germany/Denmark), Judgment, I.C.J. Reports 1969*, p. 47, para. 85 (emphasis added).

[273] *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974,* p. 33, para. 78. See also *Government of Kuwait v. American Independent Oil Co.,* Award,

16 November 1957 in the *Lake Lanoux* case, the Arbitral Tribunal mentions as examples of "infringement of the rules of good faith" in the conduct of negotiations, "unjustified breaking off of conversations, unusual delays, disregard of established procedures, systematic refusal to give consideration to proposals or adverse interests".[274]

235. Manifestly, as the Court noted in *Georgia v. Russia*,

> "*in the absence of evidence of a genuine attempt to negotiate, the precondition of negotiation is not met*. However, where negotiations are attempted or have commenced, the jurisprudence of this Court and of the Permanent Court of International Justice clearly reveals that *the precondition of negotiation is met only when there has been a failure of negotiations, or when negotiations have become futile or deadlocked* (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 13; *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 345‑346; *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Judgment, I.C.J. Reports 1980*, p. 27, para. 51; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988*, p. 33, para. 55; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 122, para. 20)."[275]

---

24 March 1982, *ILR,* 1982, p. 578; *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984,* p. 292, para. 87.

[274] Award, 16 November 1957, *RIAA*, Vol. XII, p. 307, para. 11 – in French, the English translation of the relevant passage is provided in the *Yearbook of the International Law Commission*, 1974, Vol. II (Part Two), UN Doc. A/5409, p. 197, para. 1065. The Arbitral Tribunal referred in this connection to the *Tacna-Arica Question*, *RIAA*, Vol. II, pp. 921 ff., and *Railway Traffic between Lithuania and Poland, P.C.I.J., Series A/B, No. 42*, pp. 108 ff.

[275] *Georgia v. Russian Federation*, *Preliminary objections,* p. 133, para. 159 (emphasis added).

236. The Court also specified in *Belgium v. Senegal* that

> "[t]he requirement that the dispute 'cannot be settled through negotiation' could not be understood as referring to a theoretical impossibility of reaching a settlement. It rather implies that, as the Court noted with regard to a similarly worded provision, 'no reasonable probability exists that further negotiations would lead to a settlement' (*South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 345)."[276]

237. The Court reaffirmed and summarised these criteria at paragraph 43 of its Order of 19 April 2017 in the present case.[277]

238. The focus is thus not only on the existence of a negotiation process but on whether the efforts to come to a negotiated solution of the dispute before seising the Court were real, genuine and in good faith.

B. UKRAINE DID NOT ATTEMPT TO NEGOTIATE IN GOOD FAITH

239. Ukraine's Memorial lacks any evidence that it engaged in good faith negotiations in relation to the dispute, as required by the Court's jurisprudence. In particular, the relevant references themselves lack any reference to "genuine", "good faith" or "*bona fide*" efforts to negotiate.[278]

240. Instead, Ukraine's Memorial focuses exclusively on the time and effort it invested through diplomatic exchanges and consultations.[279] While this may satisfy the reasonable time requirement of Article 24(1) of the ICSFT, it does

[276] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, pp. 445-446, para. 57.
[277] The paragraph refers to *Georgia v. Russian Federation*, *Preliminary objections,* pp. 132-133, paras. 157-161.
[278] Memorial, paras. 335-337.
[279] *Ibid*.

nothing to substantiate Ukraine's good faith in attempting to settle the outstanding issues between the Parties by way of negotiations. Instead, the relevant paragraphs reinforce the impression that Ukraine solely engaged in negotiations *with a view to bring this dispute before this Court*, rather than with a view to *resolving the dispute,* by creating the impression that two years of negotiations as such could prove a good faith attempt to settle the dispute.

C. UKRAINE'S DIPLOMATIC NOTES WERE CONSTANTLY CONNECTED WITH ALLEGATIONS OF AGGRESSION AND EXHIBITED MERE PROTESTS AND DISPUTATIONS

241. Ukraine's diplomatic notes were constantly interwoven with accusations against Russia regarding the prohibition of the use of force and the principle of non-intervention,[280] that are clearly outside the scope of the ICSFT and beyond the purview of the Court in the case at hand. To provide but a few examples of Ukraine's allegations, during the negotiations Ukraine stated, *inter alia*:

a. "At the same time, the Russian Federation continues a policy of military, logistic, economic and financial support to terrorist organizations 'DPR' and 'LPR' […] *This policy is contrary to the principle proclaimed by the UN General Assembly in its Declaration of October 24, 1970 (2625 (XXV), and of December 9, 1994 (49/60) and confirmed by the UN Security Council in its resolution 1189 (1998)*."[281]

b. "The Ministry of Foreign Affairs of Ukraine expresses strong protest to the Ministry of Foreign Affairs of the Russian Federation with regard to

[280] See, e.g., Notes Verbales of the Ministry of Foreign Affairs of Ukraine No. 610/22-110/1591, 21 June 2014 (Annex 1); No. 610/22-110-1804, 17 July 2014 (Annex 1); No. 610/22-110/1827, 22 July 2014 (Annex 1); No. 610/22-110/1833, 23 July 2014 (Annex 1); No. 72/22-620-3008, 8 December 2014 (Annex 1); No. 72/22-620-3114, 19 December 2014, (Annex 1); No. 610/22-110-43, 12 January 2015 (Annex 1) and No. 72/22-620-48, 13 January 2015 (Annex 1) (constantly referring to alleged "acts of aggression" committed by the Russian Federation).

[281] Note Verbale of the Ministry of Foreign Affairs of Ukraine No. 610/22-110/1591, 21 June 2014 (Annex 1)(emphasis added).

the *continuing acts of aggression committed by the Russian Federation against Ukraine*."[282]

c. Ukraine "strongly urges the Russian Federation to immediately stop *interference in the internal affairs of Ukraine*, financing of terrorism and to provide proper assurances and guarantees that the aforementioned illegal activities will not be repeated."[283]

d. "The Ukrainian Side further stresses that the *aggression of the Russian Federation against Ukraine*, including support of terrorist groups of the Donetsk and Luhansk regions, constitutes a serious crime against international peace and security giving rise to responsibility under international law."[284]

242. Moreover, Ukraine's failure to engage in good faith negotiations must be inferred from its policy of, to quote the Court's Judgment in *Georgia v. Russia*, "mere protests and disputations". To, once again, provide but some examples Ukraine *inter alia* stated:

a. Russia "[b]y assisting terrorists of the 'DPR' and 'LPR' violates the obligations undertaken in accordance with the whole set of international legal instruments in the field of preventing and combating international terrorism, in particular, the provisions of the [ICSFT]."[285]

b. Ukraine was simply expecting Russia to fulfil Ukraine's demands by "require[ing]", "call[ing] upon", "strongly demand[ing]", "reiterate[ing]s its calls" or "strongly urg[ing]" the Russian Federation to change its behaviour.[286]

[282] Note Verbale No. 610/22-110/1827, 22 July 2014 (Annex 1) (emphasis added).
[283] Note Verbale No. 72/22-620-2717, 3 November 2014 (Annex 17) (emphasis added).
[284] Note Verbale No. 610/22-110-43, 12 January 2015 (Annex 1) (emphasis added).
[285] Note Verbale No. 610/22-110/1591, 21 June 2014 (Annex 1).
[286] See, e.g., Notes Verbales of the Ministry of Foreign Affairs of Ukraine No. 610/22-110/1591, 21 June 2014 (Annex 1); No. 610/22-110-1695, 4 July 2014 (Annex 10); No. 610/22-110-

c. Ukraine "once again *call[ed] upon* the Russian Party to take all practically possible measures for termination of the acts containing the elements of the crime within the meaning of the Convention and to present proper assurances and guarantees that they will not be repeated in the future."[287]

d. Ukraine "*demand[ed]* that the Russian Federation immediately ceases internationally wrongful acts, in particular, invasion of the armed forces of the Russian Federation, including heavy military equipment, in the territory of Ukraine, withdraws all armed forces of the Russian Federation from the territory of Ukraine, stops violating Ukrainian aerial and land borders with Russia, and supplying mercenaries of the terrorist organization with weapons and military equipment."[288]

e. Ukraine "*demand[ed]* that the Russian Federation withdraws its armed forces from the Ukrainian-Russian state border, ensures proper border control on the territory of the Russian Federation along the Ukrainian-

---

1798, 16 July 2014 (Annex 1) ("calls on the Russian Side"); No. 610/22-110-1804, 17 July 2014 (Annex 1) ("lays the blame on the Russian Side", "strongly demands that the Russian Side should put an end to its manifold outrageous provocations against Ukraine"); No. 610/22-110-1805, 17 July 2014 (Annex 1) ("we demand", "The Ukrainian Party reiterates its call on the Russian Party"); No. 610/22-110-1827, 22 July 2014 (Annex 1) ("considers these actions as yet another act of aggression committed by the Russian Federation", "expresses its strong protest", "strongly demands that the Russian Party should end immediately the supply of heavy equipment and weapons"); No. 610/22-110-1833, 23 July 2014 (Annex 1); No. 72/22-620-2406, 24 September 2014 (Annex 14); No. 72/22-620-351, 13 February 2015 (Annex 21); No. 72/22-620-352, 13 February 2015 (Annex 22); No. 610/22-110-504, 2 April 2015 (Annex 23); No. 72/22-620-1069, 7 May 2015 (Annex 24); No. 72/22-484-1103, 13 May 2015 (Annex 26); No. 72/22-620-2604, 23 October 2015 (Annex 28); No. 72/22-620-2894, 23 November 2015 (Annex 29).

[287] Note Verbale No. 72/22-620-2495 of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation, 7 October 2014 (Annex 15) (emphasis added). Similar or identical language appears in Ukraine's Note Verbales No. 72/22-620-2529, 10 October 2014 (Annex 16); No. 72/22-620-2717, 3 November 2014 (Annex 17) and No.72/22-620-2732, 4 November 2014 (Annex 18).

[288] Note Verbale of the Ministry of Foreign Affairs of Ukraine No. 610/22-110-43, 12 January 2015 (Annex 1) (emphasis added).

> Russian state border, investigates all crimes committed from the Russian territory referred to in this note and previous notes of the Ukrainian Side, and punishes perpetrators."[289]

243. Those expressions were not meant to further an atmosphere for *bona fide* negotiations. Instead, they rather aimed at escalating tensions between the Parties by bringing forward allegations unconnected with the ICSFT, and were thus never meant to resolve the matter.[290] Despite almost two months of far-reaching allegations of aggression and intervention in Ukraine's internal affairs, Russia informed Ukraine of its "readiness to conduct negotiations on the issue of the interpretation and application of the [ICSFT]"[291] and agreed to consultations regarding the ICSFT.[292]

244. Lastly, Ukraine displayed numerous times that it negotiated with a view to bringing the dispute before this Court, rather than with a view towards resolving the matter. This was perhaps most obvious when Ukraine proclaimed during the negotiations that the Parties are mutually dissatisfied and that Ukraine perceived this as being a positive development. But it also apparent when considering Ukraine's habit of summarising the positions of both Parties in contravention of diplomatic practices and artificially inflating the differences between the Parties, claiming, *inter alia,* that there were fundamental differences in the interpretation

---

[289] *Ibid*.

[290] As pointed out by Russia in the Notes Verbales of the Ministry Foreign Affairs of the Russian Federation Nos. 16599/dnv, 17 December 2014 (Annex 1) and 17131/dnv, 29 December 2014 (Annex 20).

[291] Note Verbale of the Ministry of Foreign Affairs of the Russian Federation to the Embassy of Ukraine in Moscow No. 10471/dnv, 15 August 2014 (Annex 13).

[292] Note Verbale No. 13355/dnv of the Ministry of Foreign Affairs of the Russian Federation to the Embassy of Ukraine in Moscow, 14 October 2014 (Annex 1).

of the Convention, as well as allegedly completely different understandings of certain of its provisions.

D. UKRAINE WAS DISMISSIVE OF RUSSIA'S LEGITIMATE INTERESTS

245. That Ukraine's sole aim was to bring this dispute before this Court finds further support in its cavalier approach to Russia's interests. When Russia cited credible security concerns about the Ukrainian proposal to conduct the negotiations in Kiev (owing to the previous attack on its Embassy there),[293] Ukraine simply declared that the "Russian Party's concerns with regard to the situation in the sphere of security in Kiev are unsubstantiated,"[294] and further declared that:

> "[t]he Ministry of Foreign Affairs of Ukraine will regard the absence of the Russian Party's reply within a reasonable period and unjustified protraction of the issue on determining the venue and date of negotiations *as the Russian Party's unwillingness to resolve the dispute* in compliance with the 1999 International Convention for the Suppression of the Financing of Terrorism, by way of negotiations."[295]

246. Leaving aside the fact that Ukraine itself had only replied on 30 September 2014 to Russia's Diplomatic Note of 15 August 2014,[296] Ukraine's blanket dismissal of legitimate security concerns after an attack on Russia's Embassy in Kiev in itself shows the absence of any meaningful attempt to negotiate in good faith.

---

[293] *Ibid*.
[294] Note Verbale No. 72/23-620-2674 of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation, 29 October 2014 (Annex 1).
[295] *Ibid*. (emphasis added).
[296] Note Verbale No.14587/dnv of the Ministry of Foreign Affairs of the Russian Federation to the Embassy of Ukraine in Moscow, 24 November 2014 (Annex 19).

247. The absence of a genuine attempt to negotiate by Ukraine notwithstanding, Russia proposed to conduct the consultations in Minsk as a compromise solution, thereby showing its willingness to contemplate modifications of its own position.[297] Nevertheless, even after the Parties had met in Minsk for a first round of consultations, Ukraine constantly put forward other venues for the subsequent consultations which were knowingly unacceptable to Russia either because of the lack of diplomatic relations with the State concerned (Georgia),[298] because substantial resources would have been required (United States),[299] or finally because it would have been impossible to receive the necessary visas for members of the Russian delegation in time.[300]

248. When Russia proposed to put the issue of the safety of diplomatic institutions from terrorist attacks on the agenda of the envisaged bilateral meetings, owing to the previous attack on its Kiev Embassy,[301] Ukraine simply accused Russia of shifting the focus of discussion and moving the negotiations to the sphere of solving the issues of safe functioning of diplomatic institutions, and took the position that the attack on the Russian Embassy is not a crime in the context of the ICSFT.

249. This, once again, confirms the lack of good faith negotiations by Ukraine as the Convention on the Prevention and Punishment of Crimes against

---

[297] *Ibid*.
[298] Note Verbale No. 6392/dnv of the Ministry of Foreign Affairs of the Russian Federation to the Embassy of Ukraine in Moscow, 8 May 2015 (Annex 25).
[299] Note Verbale No. 8395/dnv of the Ministry of Foreign Affairs of the Russian Federation to the Embassy of Ukraine in Moscow, 17 June 2015 (Annex 27).
[300] *Ibid*.
[301] Notes Verbales of the Ministry of Foreign Affairs of the Russian Federation Nos. 14587/dnv, 24 November 2014 (Annex 19); 16599/dnv, 17 December 2014 (Annex 1) and 17131/dnv, 29 December 2014 (Annex 20).

Internationally Protected Persons, including Diplomatic Agents,[302] is directly relevant to the ICSFT as per Article 2(1)(a) ICSFT and its Annex.[303]

E. UKRAINE'S REFUSAL TO MEET RUSSIA'S REASONABLE REQUESTS

250. That Ukraine did not engage in genuine negotiations with a view to resolving the matter is also evident in its approach to reasonable requests made by Russia, in particular with respect to substantiating that the episodes complained of amounted to alleged acts of terrorism financing within the meaning of Article 2 (1) of the ICSFT.

a. This is most obvious in Ukraine's claim that mere allegations constitute reliable evidence as such:

> "The Ukrainian Party repeatedly applied to the Russian Party with demarches, protests and diplomatic notes as regards the facts of commission of acts of terrorism and other crimes falling within the scope of the [ICSFT]. In recent times alone, the Russian Party was notified of commission of internationally wrongful acts in notes No. 610/22-110-1833 dated 23.07.2014, No. 610/22-110-1827 dated 22.07.2014, No. 610/22-110-1805 dated 17.07.2014, No. 610/22-110-1804 dated 17.07.2014, No. 610/22-110-1798 dated 16.07.2014, No. 610/22-110-1695 dated 04.07.2014, No. 610/22-110-1592 dated 21.06.2014.
>
> […]
>
> The Ukrainian Party declares that the circumstances established within the framework of the mentioned criminal proceedings, as well as other existing facts, evidence that the actions of the Russian Party, including the actions of nationals of the Russian Federation, were directly or indirectly, unlawfully and wilfully, aimed at providing or

[302] Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 14 December 1973, *UNTS,* Vol. 1035, p.167.

[303] Note Verbale No. 16599/dnv of the Ministry of Foreign Affairs of the Russian Federation to the Embassy of Ukraine in Moscow, 17 December 2014 (Annex 1).

> collecting funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out acts of terrorism, which is prohibited by the said Convention."[304]

b. Subsequently, in a diplomatic note, Ukraine claimed that it "has evidence proving participation of Russian nationals and legal entities in the commission of the crimes provided for in Article 2 of the Convention".[305] This note, for the overwhelming part, merely repeated provisions of the ICSFT *verbatim*. Where this note went into specific instances by bringing to the attention photo and video materials published on social networks such as Vkontakte, the crucial Article 2 elements of intention or knowledge, as well as purpose, were, once again, only sustained by general allegations, if at all.[306]

251. On 14 October 2014, Russia "inform[ed] the Ukrainian Party of the necessity to provide the Russian Party with evidential materials on the essence of the issues" raised in various Ukrainian diplomatic notes."[307] In its response, Ukraine however simply claimed "that the information and factual data provided in the Ukrainian Party's notes constitute proper and admissible evidence", and that, accordingly, Russia was under an obligation to investigate under Article 9 of the ICSFT, and that therefore

> "Ukraine does not see the need to submit to the Russian Party the evidential materials as to the essence of the issues raised in the Ukrainian Party's notes and believes the aforementioned information

[304] Note Verbale No. 72/22-484-1964 of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation, 28 July 2014 (Annex 11).
[305] Note Verbale No. 72/22-620-2087 of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation, 12 August 2014 (Annex 12).
[306] *Ibid.*, para. 6.
[307] Note Verbale No. 13355/dnv of the Ministry of Foreign Affairs of the Russian Federation to the Embassy of Ukraine in Moscow, 14 October 2014 (Annex 1).

> and evidential data sufficient, within the meaning of the Convention".[308]

252. This notwithstanding, acting in good faith, Russia continued to request evidentiary materials to assess the merits of Ukraine's claims.[309]

253. Ukraine's evidentiary approach is inconsistent with the law enforcement character of the ICSFT. As the Explanatory Report to Article 15 of the Council of Europe Convention on Terrorism (which is identical to Article 9 of the ICSFT) makes clear, information needs to satisfy a certain level of "reliability" in order to trigger investigation obligations.[310] Ukraine, however, did not consider it necessary to submit any kind of evidentiary materials. By refusing to do so, Ukraine effectively argued that its allegations must be blindly accepted as credible and reliable, thus demonstrating a lack of any genuine and good faith attempt to settle the matter by negotiation.

254. On the other hand, when Russia raised the attack on its Embassy in Kiev as a possible violation of international law that may be connected to the financing of terrorism, Ukraine deemed that matter as "unsupported and not justified by the factual circumstances of the cases" and as "evidenc[ing] the absence of any concrete facts and proof of commission of the crimes under the Convention". Ukraine thus concluded:

> "Therefore, the Ukrainian Party may not regard the declared position of the Russian Party as information on the persons who have

[308] Note Verbale No. 72/23-620-2674 of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation, 29 October 2014 (Annex 1).

[309] Notes Verbales of the Ministry of Foreign Affairs of the Russian Federation to the Embassy of Ukraine in Moscow Nos. 384/dnv, 25 January 2016 (Annex 1) and 3219/dnv, 4 March 2016 (Annex 1).

[310] Explanatory Report to the Council of Europe Convention on the Prevention of Terrorism, CETS No. 196, 16 May 2005, paras. 176-177, available at https://rm.coe.int/16800d3811.

committed a crime or are suspected of commission of a crime under the Convention."[311]

255. Ukraine's position is convenient to create an impression of formal negotiations. But it is inherently inconsistent: while Russia, Ukraine argued, had to accept any Ukrainian allegation as credible information triggering an obligation to investigate, Ukraine was not willing to apply an equally low standard of reliability to a publicly known attack on Russia's Embassy in Kiev. Such an inconsistent approach to the required standard of reliable information, once again, provides proof of Ukraine's lack of genuinely conducted negotiations.

256. In sum, Ukraine insisted on its position without contemplating any modification of its stance and its claims were beyond the scope of the ICSFT. Moreover, Ukraine refused to engage seriously with Russia's claims and information, while at the same time arguing that Russia should accept any accusation as reliable information, thus demonstrating an inconsistent and arbitrary approach to evidence.

257. Ukraine deemed Russia's legitimate security concerns as amounting to a shift of the debate and as an alleged protraction of the negotiations. Suddenly proclaiming "that further attempts to resolve the dispute through negotiations will be fruitless"[312] is far from being a *genuine* attempt as required by the Court's jurisprudence. All these instances confirm that Ukraine was only interested in formal negotiations with the sole aim to bring this matter before the Court.

---

[311] Note Verbale No. 72/22-620-3114 of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation, 19 December 2014 (Annex 1).

[312] Notes Verbales of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation No. 72/22-620-954, 19 April 2016 (Annex 1) and No. 72/22-620-1806, 28 July 2016 (Annex 1).

Section II
Ukraine did not attempt to settle this dispute through arbitration

258. Ukraine has also failed to attempt to settle the dispute by arbitration, as required under Article 24(1) of the ICSFT. It insisted on an *ad hoc* Chamber of this Court as the forum, which does not constitute an arbitration within the meaning of Article 24 (A). Moreover, by insisting on its position and failing to submit a concrete draft arbitration agreement, Ukraine made no good faith attempt to organise an arbitration (B). In any event, the Parties were not unable to reach an arbitration agreement (C).

A. UKRAINE DID NOT NEGOTIATE WITH A VIEW TO ORGANIZING AN ARBITRATION SINCE AN *AD HOC* CHAMBER OF THIS COURT DOES NOT CONSTITUTE AN ARBITRATION

259. Ukraine consistently held the position that an *ad hoc* Chamber of this Court ought to be created, and maintained that this would constitute an arbitral tribunal within the meaning of Article 24(1) of the ICSFT.[313] An *ad hoc* Chamber does not, however, constitute an arbitration pursuant to Article 24(1) of the ICSFT. Accordingly, Ukraine's *ad hoc* Chamber proposal did not constitute a valid proposal under Article 24 of the ICSFT, and the lack of an arbitration agreement is not imputable to Russia.

260. Ukraine's position is incompatible with the very structure of Article 24(1) of the ICSFT. Article 24(1) clearly distinguishes between negotiations, arbitration and judicial settlement. By proposing an *ad hoc* Chamber as satisfying the precondition with respect to arbitration, Ukraine's interpretation effectively deletes that precondition from the text. This conflicts with the "well-established

[313] Note Verbale No. 72/22-620-2049 of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation, 31 August 2016 (Annex 1).

principle in treaty interpretation that words ought to be given appropriate effect."[314] Ukraine's argument is untenable: it would convert the *trias* of negotiation, arbitration, and mandatory judicial settlement to an entirely different three-tier model of negotiation, judicial settlement by mutual consent, and mandatory judicial settlement by the same Court.

261. Furthermore, Article 24(1) of the ICSFT adopts the meaning of "arbitration" as it is generally understood in inter-State dispute settlement. That generally accepted meaning leaves no doubt that "both arbitration and judicial settlement […] are […] structurally different from each other."[315] Absent a clear indication to the contrary, Article 24(1) of the ICSFT incorporates this generally accepted meaning of "arbitration" as per Article 31(3)(c) of the VCLT.

262. The Court's Statute itself confirms that an *ad hoc* Chamber process is similar to proceedings before the full Court. Article 27 of the Statute makes this abundantly clear when providing that "[a] judgment given by any of the chambers provided for in Articles 26 and 29 shall be considered *as rendered by the Court*".[316]

263. This interpretation is reinforced by the specific wording of Article 24(1) of the ICSFT, requiring States Parties to agree on the "organization" of the arbitration. An arbitration typically necessitates agreement on issues such as the composition of the arbitral tribunal, the applicable rules of procedure, and the applicable law, its seat and related administrative aspects, as well as the possible implementation of the award to be rendered.

---

[314] *Georgia v. Russian Federation*, *Preliminary objections,* p. 125, para. 133.

[315] United Nations Office of Legal Affairs (ed.), *Handbook on the Peaceful Settlement of Disputes between States* (1992), p. 55, para. 170, available at http://legal.un.org/cod/books/HandbookOnPSD.pdf.

[316] Emphasis added. Cf*., inter alia,* P. Palchetti, "Article 27", MN 3, in: A. Zimmermann *et al.* (eds.), *The Statute of the International Court of Justice: A Commentary* (2nd ed.), 2012.

264. In contrast, as a general rule, the parties have no control over the composition of an *ad hoc* Chamber of this Court and the procedure to be followed since those matters are not subject to agreement.[317]

265. While Russia repeatedly raised this point, and expressly pointed Ukraine to the fact that an *ad hoc* Chamber of the ICJ would not constitute arbitration *ab initio*, Ukraine insisted on this aspect and included it in its Diplomatic Note outlining "core principles" that must form the very basis of any future arbitration agreement.[318]

266. In essence, Ukraine did not negotiate with a view to organising an arbitration since an *ad hoc* Chamber of this Court does not constitute an arbitration. It follows that any rejection by Russia of such proposals may not be relied upon by Ukraine to satisfy the arbitration requirement of Article 24(1) of the ICSFT. Accordingly, the Court's lacks jurisdiction pursuant to Article 24(1) of the ICSFT for this reason also.

B. UKRAINE'S OTHER FAILURES TO MAKE A GENUINE ATTEMPT TO NEGOTIATE WITH REGARD TO AN ARBITRATION

1. Ukraine's interpretation that the parties must only be unable to organise an arbitration as a matter of fact contradicts this Court's jurisprudence

267. Article 24 of the ICSFT requires that before a party is able to bring a case before the Court, a request for arbitration has been made and the Parties have been unable to agree on the organization of the arbitration within six months from

[317] The only exceptions are as set out in Articles 26(2) and 28.; cf. P. Palchetti, "Article 26", MN 34, in: A. Zimmermann *et al.* (eds.), *The Statute of the International Court of Justice: A Commentary* (2nd ed.), 2012.

[318] Note Verbale No. 72/22-194/510-2518 of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation, 2 November 2016, preface to para. 1 (Annex 1).

that request.[319] As the Court confirmed in its Order of 19 April 2017, Article 24(1) of the ICSFT requires that "Ukraine attempted to settle this dispute through arbitration."[320]

268. Ukraine espouses an interpretation of the arbitration precondition that the Court has unequivocally rejected with regard to the negotiations precondition in *Georgia v. Russia*. As Ukraine put its case during the provisional measures phase of the present proceedings:

> "all the Convention requires before the jurisdiction of this Court may be invoked pursuant to Article 24(1) [is]: one, a request, and two, a lack of agreement within the time provided."[321]

269. That position was reiterated in Ukraine's Memorial submitted by Ukraine when stating that

> "Ukraine submitted a direct request to the Russian Federation to proceed to arbitration in its Note Verbale of 19 April 2016. By the plain terms of Article 24(1), Ukraine could have submitted this dispute to the Court on 21 October 2016, six months after the date of its request."[322]

270. In other words, Ukraine maintains that all that is required is that, *as a matter of fact*, the Parties did not reach an arbitration agreement within six months. However, this contradicts the Court's Judgment in *Belgium v. Senegal* where it stated with regard to a similar treaty provision that "the lack of

[319] Cf. *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, pp. 422, 445, para. 56.
[320] Order of 19 April 2017, para. 45.
[321] CR 2017/3, pp. 31-32, para. 20 (Zionts).
[322] Memorial, para. 338.

agreement between the parties as to the organization of an arbitration cannot be presumed."[323]

271. Moreover, Ukraine's approach to the arbitration precondition is fundamentally at odds with the Court's Judgment in the *Georgia v. Russia* case. In the words of this Court, "prior resort to […] other methods of peaceful dispute settlement performs an important function in indicating the limit of consent given by States."[324] Prior resort to arbitration, in contrast to judicial settlement, emphasises party autonomy. Moreover, it reflects the desire of States that, if binding third-party adjudication has become unavoidable, such binding adjudication should be tailored to the parties' needs. Ukraine's interpretation of Article 24 of the ICSFT fundamentally contradicts this purpose of Article 24(1) of the ICSFT.

272. If indeed Article 24(1) of the ICSFT merely required that the parties were unable to agree on the organisation of an arbitration *as a matter of fact*, this would empty Article 24(1) of the ICSFT of any effect, contrary to the maxim, as confirmed by this Court in *Georgia v. Russia*, that those words must be presumed to have effect.[325]

273. Accordingly, since the controlling reasons of *Georgia v. Russia* are equally applicable to the arbitration precondition contained in Article 24 of the

---

[323] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, pp. 447-448, para. 61 (citing *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 41, para. 92).

[324] *Georgia v. Russian Federation*, *Preliminary objections,* p. 125, para. 131.

[325] Cf. *Georgia v. Russian Federation*, *Preliminary objections,* p. 125, para. 133 and p. 132, para. 157.

ICSFT, what is required is a genuine attempt to reach an arbitration agreement under Article 24(1) of the ICSFT undertaken in good faith.

2. Ukraine's insisted on its "core principles" and did not submit a concrete text proposal

274. Ukraine did not engage in genuine negotiations, even when Ukraine discussed Russia's arbitration proposal.

275. First and foremost, this is evident in Ukraine's fundamental negotiation position that, in Ukraine's own words, there are "core principles on which Ukraine believes the parties *must* agree",[326] thus insisting on non-negotiable *sine qua non* conditions that it would not contemplate modification of in light of Russia's interests.

276. Secondly, a number of Ukraine's "core principles" presumed non-compliance on Russia's part:

c. The "core principle" of "Guarantees of Participation and Commitment to the Arbitration Process, Including Compliance with the Arbitration Agreement" assumed, among other things, that Russia would fail to appoint an arbitrator or withdraw from the arbitration proceeding.[327] On its face, such a proposal is based on the very presumption that Russia would not participate in the arbitral proceedings.

d. The "core principle" of "Guarantees of Participation and Commitment to the Arbitration Process, Including Compliance with the Arbitration

[326] See Ukraine's "core principles" contained in Note Verbale No. 72/22-194/510-2518 of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation, 2 November 2016, preface to para. 1 (Annex 1).
[327] *Ibid.*, para. 5.

Agreement" also aimed at circumventing Article 24(1) of the ICSFT by allowing recourse to the Court if a party to the arbitration did not fully confirm to the arbitration agreement. In doing so, it contradicts Article 24(1) of the ICSFT, where arbitration and ICJ adjudication are set out as alternative, rather than as cumulative or successive methods of dispute resolution. Ukraine, however, demanded that the other party "will be free to submit the dispute to the ICJ pursuant to Article 24 of the Convention" "in the event of a failure to participate or other material breach of the arbitration agreement or rules".[328]

e. Similarly, the "core principle" of "Guarantees of Enforcement and Implementation of Arbitral Decisions and Award" demanded that Russia should confirm in writing that it will abstain from any vote on a Chapter VI Security Council resolution relating to the enforcement of the award.[329] Proposals that are based on the presumption that Russia would obstruct the enforcement of the award cannot be considered as a genuine attempt to organise an arbitration since good faith between States must be presumed.

277. This conclusion that Ukraine did not negotiate *bona fide* is further confirmed by the fact that Ukraine had never brought forward concrete proposals for the text of an arbitration agreement. If Ukraine, as the applicant, had negotiated in good faith, one would have expected *Ukraine* to submit such concrete proposals. This notwithstanding, it was Russia that submitted a complete draft arbitration agreement and rules of procedure based on the models Permanent Court of Arbitration, in which Russia sought to address the concerns

[328] Note Verbale No. 72/22-194/510-2518 of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation, 2 November 2016, para. 5 (Annex 1).
[329] *Ibid*., para. 6.

of Ukraine.[330] Following further consultations, Russia submitted a largely amended proposal[331] for the text on which Ukraine never made any specific comments.

278. In its submissions,[332] Ukraine has referred to the Court's Judgment in *Belgium v. Senegal* to support its own position. In that case, the applicant State had submitted a request for arbitration, but the respondent did not react at all. It was in these specific circumstances that the Court decided that "[a] State may defer proposals [concerning arbitration] to the time when a positive response is given in principle to its request to settle the dispute by arbitration."[333]

279. This case has no similarity with *Belgium v. Senegal*. Russia, in its Diplomatic Note of 23 June 2016, gave such a positive response in principle when it stated that "[it] is ready to discuss the organization of arbitration requested by the Ukrainian Side, taking into consideration the provisions of Article 24 of the Convention."[334] Ukraine recognised, albeit belatedly, Russia's genuine intention to arbitrate, when it "welcome[d] the statement by the Russian Federation, in its Note […] of 10 October 2016, indicating for the first time a clear intent of the Russian Side to participate in the arbitration".[335]

---

[330] This was recognised by Ukraine in its Note Verbale No. 72/22-194/510-2518, 2 November 2016, preface to para. 1 ("The Ukrainian Side recalls that on 18 October 2016, the parties met in The Hague to discuss their respective proposals for the organization of the arbitration. The Russian Side presented its proposal based on the arbitration rules of the Permanent Court of Arbitration, with significant modifications.") (Annex 1).

[331] Note Verbale No. 16866/2dsng of the Ministry of Foreign Affairs of the Russian Federation to the Embassy of Ukraine in Moscow, 30 December 2016 (Annex 1).

[332] CR 2017/3, p. 33, para. 24 (Zionts) and Memorial, para. 340.

[333] *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, pp. 447-48, para. 61.

[334] Note Verbale No. 8808/dnv of the Ministry of Foreign Affairs of the Russian Federation to the Embassy of Ukraine in Moscow, 23 June 2016 (Annex 1).

[335] Note Verbale No. 72/22-194/510-2518, 2 November 2016, para. 5 (Annex 1).

280. As a matter of fact, the Parties had long passed the stage of getting in contact with each other. In fact, the Parties were engaged in frequent exchanges, both in writing and orally, making the case at hand incomparable to a situation of complete non-reaction by the respondent.

281. Specifically, with regard to recourse to arbitration the Court has made it clear that the

> "existence of such disagreement [to set up an arbitral tribunal] can follow only from a proposal for arbitration by the applicant, to which the respondent has made no answer or which it has expressed its intention not to accept".[336]

282. Given that Ukraine had not been faced with mere non-reaction by Russia, the relevant question is whether Ukraine had tabled a proposal and whether Russia had shown a clear intention of not accepting such a proposal. Yet, as stated above, since the *ad hoc* Chamber proposal did not constitute a valid arbitration proposal under Article 24(1) of the ICSFT, any rejection of such proposal cannot have enabled Ukraine to circumvent the procedural obligations under Article 24(1) of the ICSFT.

C. IN ANY EVENT, THE PARTIES WERE *NOT* UNABLE TO AGREE ON THE ORGANISATION OF THE ARBITRATION WITHIN THE MEANING OF ARTICLE 24(1) OF THE ICSFT

283. Even if an *ad hoc* Chamber were to constitute an arbitration in terms of Article 24(1) of the ICSFT, *quod non*, and even if the Court were to consider

[336] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, *Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 17, para. 2; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 122, para. 20.

Ukraine's actions as a genuine attempt to organise an arbitration, there was substantial agreement between the Parties on most issues regarding the arbitration during the consultations on 18 October 2016. Accordingly, the precondition that the Parties were "unable to agree on the organization of the arbitration" is not satisfied.

284. The consultations of 18 October 2016 demonstrated substantial agreement between the Parties. The Parties had already agreed, *inter alia*, on public proceedings subject to the redaction of certain confidential information from public documents and a practical arrangement for ensuring confidentiality of such information. The Parties had also agreed on the need to discuss the details of that arrangement further.

285. Moreover, the Parties' representatives had also agreed on the number of five arbitrators, as well as on the applicable law, i.e. international law principles. The Parties also had the common understanding that the arbitrators should have the requisite expertise in public international law. While the Parties had not yet discussed the appointment mechanism in detail, the negotiations on that issue did not fail and had not reached a deadlock as Ukraine did not reject an appointment authority and suggested the ICJ President as such an authority, whereas Russia simply proposed several options (prior agreement on the composition vs. appointment authority) which it was open to discuss. Lastly, while Ukraine proposed that the process for appointing arbitrators ought to follow the model of UNCLOS Annex VII, Russia was ready to consider the UNCLOS Annex VII model, pointing out that the appointment process should be reasonable.

286. Russia was also open to consider Ukraine's proposal to include a power to recommend provisional measures in the arbitration agreement and on 18 October

2016 asked Ukraine to table a specific proposal. Similarly, during the same consultations of 18 October 2016, counsel for Ukraine proposed, for the first time, that a mechanism for the intervention of third States along the lines of Articles 62 and 63 of the Court Statute be included in the arbitration agreement. Russia did not have an immediate answer because Ukraine raised this issue for the first time, but was open to consider such a possibility.

287. Regarding the possible bifurcation of proceedings, Ukraine expressed concerns that the bifurcation of arbitral proceedings between a jurisdictional and a merits phase contained in Russia's arbitration proposal might unduly prolong the proceedings. Instead, Ukraine would have left the issue of bifurcation to the discretion of the arbitral tribunal, and Russia said it would consider such proposal in an open manner.

288. With regard to the issue of an obligation to participate in the arbitration, the Parties, during the first bilateral meeting on 18 October 2016, did not find as much common ground in comparison to other issues because Ukraine insisted on a rule in the arbitration agreement which would void the agreement if one Party refused to participate. Russia's proposal, which was based on the model rules of the Permanent Court of Arbitration, considered standard international practice as the starting point for the discussions. Nevertheless, Russia agreed to consider the Ukrainian position if Ukraine were to follow up with a specific proposal.

289. Of course, there were three issues on which the Parties would not reach an understanding. The first issue was Ukraine's *ad hoc* Chamber proposal. Yet, since the *ad hoc* Chamber proposal did not constitute a valid arbitration proposal under Article 24(1) of the ICSFT at the first place, Ukraine cannot rely on

Russia's opposition to the *ad hoc* Chamber proposal to show that the Parties were unable to organise an arbitration.

290. The other two issues, on which the Parties were divided, were cost-efficiency and the proposal requiring Russia to abstain should the issue of the enforcement of the award come up before the Security Council. Both issues, however, essentially refer back to Ukraine's *ad hoc* Chamber proposal. Accordingly, Russia's objection to this may not be relied upon by Ukraine to demonstrate the lack of an agreement to arbitrate under Article 24(1) of the ICSFT.

291. Leaving aside those three issues, which, again, may not be relied upon to substantiate a lack of an agreement to arbitrate, there was substantial agreement between the Parties on almost all issues. Even if the Parties did not agree on an issue, the negotiations had not reached a deadlock since Russia continued to be open to consider a specific proposal in a second round of bilateral negotiations.

292. For these reasons, Ukraine's claim that the Parties were unable to reach an agreement on the organisation of an arbitration does not hold up. It follows that Ukraine's sudden and unexpected termination of the negotiations does not fulfil Article 24(1) of the ICSFT, and accordingly, cannot circumvent this important limit of State consent.

293. In light of the above, Ukraine perceived both the negotiation and the arbitration preconditions as mere empty shells without any real meaning. It has neither negotiated in good faith to settle the dispute nor negotiated in good faith to settle the dispute by arbitration. Having failed to satisfy the procedural

preconditions of Article 24(1) of the ICSFT, the Court lacks jurisdiction to entertain Ukraine's claims under the ICSFT.

PART III
ABSENCE OF JURISDICTION AND INADMISSIBILITY OF THE CLAIMS UNDER CERD

CHAPTER VII
INTRODUCTION

294. In its Application and Memorial, Ukraine alleges that Russia committed serious and systematic violations of the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD"). As will be shown in the present Part, Ukraine's claims are however not related to the Convention.

295. The real issue in dispute between the Parties does not concern racial discrimination but the status of Crimea. This is manifest from Ukraine's Application[337] and from contemporaneous statements. For instance, shortly before the filing of the Application, the President of Ukraine stated that Crimea

> "is Ukrainian territory. Crimeans are Ukrainians. *I will do everything to return Crimea* through international legal mechanisms, judicial decisions and political mechanisms and diplomatic means".[338]

296. In accordance with this asserted strategy, Ukraine has been attempting to affirm its claimed sovereignty over Crimea in as many fora as it could conceive of. On 8 September 2015, Ukraine lodged a declaration under Article 12(3) of the Rome Statute recognising the jurisdiction of the International Criminal Court ("ICC") with respect to acts allegedly "committed in the territory of Ukraine

[337] See further Chapter VIII, Section I below.

[338] President of Ukraine official website, "President: We will do everything to return Crimea via international legal mechanisms", 6 December 2015, available: http://www.president.gov.ua/en/news/zrobimo-vse-dlya-togo-shob-shlyahom-mizhnarodnih-pravovih-me-36441 (emphasis added).

since 20 February 2014";[339] on 16 September 2016, Ukraine instituted proceedings under Annex VII of UNCLOS concerning its alleged coastal State rights in the Black Sea, Sea of Azov, and Kerch Strait;[340] and five inter-State cases initiated by Ukraine concerning Russia's actions in Crimea and Eastern Ukraine are currently pending before the European Court of Human Rights ("ECtHR").[341] These latter cases are of particular significance since, despite the fact that the legal basis of ECtHR's jurisdiction is substantively broader, the claims brought before the ICJ and the ECtHR have the same essential basis: they rely on the same facts, they allege violations of the same basic rights and they seek equivalent remedies.

297. In relation to the present case, Ukraine's strategy has been unveiled by its Agent, Ms. Zerkal:

> "the Ukrainian Side offered the Russians to consider the lawfulness of annexation of Crimea by the Russian Federation in the ICJ. [...] However, the Russians refused to 'legitimize' their actions through the ICJ. Having analysed the existing international agreements, we have outlined several treaties, on the basis of which we could *assert our [sovereign] rights*. These include the International Convention on

[339] Letter from the Minister of Foreign Affairs of Ukraine to the Registrar of the ICC, 8 September 2015, attaching the Resolution of the Parliament of Ukraine "On the recognition of the jurisdiction of the International Criminal Court by Ukraine over crimes against humanity and war crimes committed by senior officials of the Russian Federation and leaders of terrorist organizations 'DNR' and 'LNR', which led to extremely grave consequences and mass murder of Ukrainian nationals" adopted on 4 February 2015, as well as the Declaration of the Parliament referring both to the Autonomous Republic of Crimea and the city of Sevastopol on the one hand and parts of Donetsk and Luhansk regions on the other hand, available at https://www.icc-cpi.int/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf.

[340] *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation),* PCA Case No. 2017-06, see http://www.pcacases.com/web/view/149.

[341] *Ukraine v. Russia*, Applications Nos. 20958/14, 43800/14, 42410/15, 8019/16, 70856/16. Jurisdiction over Applications Nos. 20958/14, 42410/15, 8019/16 and 70856/16 has been relinquished in favour of the Grand Chamber on 9 May 2018 to avoid inconsistent judgments in accordance with Article 30 of the ECHR.

> the Elimination of All Forms of Racial Discrimination, International Convention for the Suppression of the Financing of Terrorism and the UN Convention on the Law of the Sea, as well as the Ukrainian-Russian Intergovernmental Agreement on the encouragement and mutual protection of investments."[342]

298. The subject-matter of CERD is not to protect "sovereign rights". From that perspective, Ukraine's invocation of CERD is plainly artificial. Under these circumstances, it comes as no surprise that in its Order on provisional measures, the Court found Ukraine's claims to be largely implausible.[343]

299. The artificiality of the present case is confirmed by Ukraine's past and current conduct towards the Crimean Tatar community, in striking contradiction with the rights it is purporting to protect before the Court. Contrary to the harmonious picture that Ukraine is depicting of "a genuinely multi-ethnic society of Ukrainians, Russians, and Crimean Tatars, as well as other groups [...] in Crimea"[344] before its change of status, Ukraine has a long-standing record of failing to protect the rights of Crimean Tatars, including protection against discrimination. In particular, the CERD Committee and other international human rights bodies regularly pointed out discrimination related to, e.g., political rights[345] and security.[346] In its last observations on Ukraine's periodic reports

---

[342] Interview with Olena Zerkal, "Which claims will Ukraine submit against Russia?", 27 January 2016 (translation), available in Russian at http://zn.ua/columnists/kakie-iski-protiv-rossii-podast-ukraina-202564_.html (Annex 3).

[343] See below, para. 336.

[344] Memorial, para. 363.

[345] See, e.g., CERD Committee, Concluding observations on the 17th and 18th periodic reports of Ukraine, CERD/C/UKR/CO/18, 8 February 2007, para. 14: "Crimean Tatars reportedly remain underrepresented in the public service of the Autonomous Republic of Crimea (arts. 5(c) and 2 (2))" (available at https://undocs.org/CERD/C/UKR/CO/18). See also CERD Committee, Concluding observations on the 19th to 21st periodic reports of Ukraine, CERD/C/UKR/CO/19-21, 14 September 2011, para. 17, available at http://undocs.org/en/CERD/C/UKR/CO/19-21. See further European Commission against Racism and Intolerance, Report on Ukraine, CRI (2002) 23, 14 December 2001, para. 48, available at https://rm.coe.int/fourth-report-on-ukraine/16808b5ca5.

before the events of 2014, the CERD Committee declared that "it continues to be strongly concerned by information alleging difficulties experienced by Crimean Tatars who have returned to Ukraine, including lack of access to land, employment opportunities, insufficient possibilities for studying their mother tongue, hate speech against them, lack of political representation, and access to justice."[347] In 2016, the Committee continued to express concern as regards "access to employment, social services and education", as well as the preservation of the Crimean Tatar language, culture and identity for Crimean

[346] See, e.g., Committee on Economic, Social and Cultural Rights, Concluding observations on the 5th periodic report of Ukraine, E/C.12/UKR/CO/5, 4 January 2008, para. 10: "The Committee notes with concern reports about police abuse and denial of effective protection against acts of discrimination and violence committed against ethnic and religious minorities, especially [...] Crimean Tatars [...], the reluctance of the police to investigate properly such incidents, and the tendency to prosecute and sentence perpetrators of such acts under lenient criminal law provisions on 'hooliganism'" (available at: https://undocs.org/E/C.12/UKR/CO/5). See also Human Rights Committee, Concluding observations on the 7th periodic report of Ukraine, CCPR/C/UKR/CO/7, 22 August 2013, para. 11: "The Committee is concerned at reports of hate speech, threats and violence against members of ethnic groups, religious and national minorities, in particular Roma, Jehovah's Witnesses and Crimean Tatars, resulting in physical assaults, acts of vandalism and arson, most of which are committed by groups driven by extreme nationalist and racist ideology. It is also concerned that article 161 of the Criminal Code (inciting ethnic, racial or religious animosity and hatred), which requires proving deliberate action on the part of the perpetrator, is rarely used and that such crimes are usually prosecuted under hooliganism charges" (available at http://undocs.org/en/CCPR/C/UKR/CO/7).

[347] CERD Committee, Concluding observations on the 19th to 21st periodic reports of Ukraine, CERD/C/UKR/CO/19-21, 14 September 2011, para. 17, available at http://undocs.org/en/CERD/C/UKR/CO/19-21. See further Council of Europe Committee of Ministers, Resolution CM/ResCMN(2013)8 on the implementation of the Framework Convention for the Protection of National Minorities by Ukraine, 18 December 2013, available at http://rm.coe.int/09000016805c69b4; Committee of Experts for the implementation of the European Charter for Regional or Minority Languages, Application of the Charter in Ukraine, ECRML (2014) 3, 15 January 2014, available at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806dc600.

Tatars who decided to live in regions subject to the authority of Ukraine after 2014.[348]

300. Overall, according to the concluding observations of the CERD Committee Ukraine shows a trend of worsening its compliance with CERD obligations. In particular, the Committee noted "a rise in racist and hate speech and discriminatory statements in public discourse", "reports of racially motivated incidents and hate crimes", reports regarding organisations (Right Sector, the Azov Civilian Corps, the Social National Assembly) which "promote activities that amount to racial hatred and racial propaganda", and "are responsible for racially motivated violence against persons belonging to minority groups".[349]

301. Against this background, Russia will show that the present case does not fall within the scope of CERD *ratione materiae* (Chapter VIII), while in any event Ukraine has failed to satisfy any of the procedural preconditions set out under Article 22 (Chapter IX), as well as the rule of exhaustion of local remedies (Chapter X).

[348] CERD Committee, Concluding observations on the 22nd and 23rd periodic reports of Ukraine, CERD/C/UKR/CO/22-23, 4 October 2016, paras. 23-24, available at https://undocs.org/CERD/C/UKR/CO/22-23.
[349] *Ibid*., paras. 11, 13, 15.

CHAPTER VIII
ABSENCE OF JURISDICTION *RATIONE MATERIAE* UNDER ARTICLE 22 OF CERD

302. According to the well-settled jurisprudence of the Court, "[w]hen a compromissory clause in a treaty provides for the Court's jurisdiction, that jurisdiction exists only […] within the limits set out therein."[350] This means, as already identified in Part II, Chapter II, above, that the Court "must ascertain whether the violations of the Treaty [pleaded by the Applicant] do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain."[351]

303. In the present case, only claims "with respect to the interpretation or application of" CERD can fall within the jurisdiction *ratione materiae* of the Court under Article 22 of that Convention. As the Court stated in its Order of 19 April 2017,

> "[w]ith regard to the events in Crimea, Ukraine's claim is based solely upon CERD and the Court is not called upon, as Ukraine expressly recognized, to rule upon any issue other than allegations of racial discrimination".[352]

304. For the Court to have jurisdiction *ratione materiae* under CERD, three conditions have to be met: first, the real issue in the case must concern racial

---

[350] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006,* p. 32, para. 65. See also *Georgia v. Russian Federation*, *Preliminary objections,* p. 125, para. 131; *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, *Preliminary Objections, Judgment of 6 June 2018*, para. 42.

[351] *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996,* p. 810, para. 16; *Immunities and Criminal Proceedings (Equatorial Guinea v. France*), *Preliminary Objections, Judgment of 6 June 2018*, para. 46.

[352] Order of 19 April, p. 113, para. 16 *in fine*.

discrimination (Section I); second, Ukraine must invoke rights that are treaty rights under CERD (Section II); third, Ukraine must articulate claims which are at least plausible under CERD (Section III). These conditions are not fulfilled in the present case. Therefore, for the reasons set out in the present Chapter, the Court does not have jurisdiction *ratione materiae* to entertain Ukraine's Application.

Section I
The real issue in dispute is not racial discrimination, but the status of Crimea

305. As the Court recently recalled, the assessment of its jurisdiction *ratione materiae* depends on the determination of the subject-matter of the dispute. According to the well-established jurisprudence of the Court, "it is for the Court itself to determine on an objective basis the subject-matter of the dispute between the parties, *by isolating the real issue in the case* […]. The matter is one of substance, not of form."[353] To "isolate the real issue in the case […], the Court must ascertain the true object and purpose of the claim".[354]

306. In Ukraine's Application and Memorial, the present case is presented by reference to allegations of breaches of CERD. A closer inspection however shows that in reality, Ukraine is seeking to use the provisions of CERD as a vehicle for submitting the dispute on the status of Crimea to the Court. Both the Application

[353] *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, *Preliminary Objections, Judgment of 6 June 2018*, para. 48 (emphasis added); *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015*, p. 602, para. 26; *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 848, para. 38.

[354] *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, pp. 262-263 paras. 29-30; *Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974*, pp. 466-467, paras. 30-31. See also *Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, pp. 448-449, paras. 29-31.

and Memorial repeatedly affirm Ukraine's sovereignty and territorial integrity[355] and point to Russia's "unlawful intervention" and "illegal referendum" – allegations which constitute entire sections of the Application in the part concerning CERD[356] – and even bluntly refer to "aggression" or "unlawful invasion" and "annexation" – allegations which constitute another entire section of the Memorial.[357] Although in its Submissions, Ukraine claims that specific provisions of CERD have been breached, the very relief sought by Ukraine under CERD revolves around "the illegal Russian occupation of Crimea."[358] Such relief and the corresponding claims do not fall within the jurisdiction of the Court under Article 22 of CERD.

307. Ukraine expressly frames its specific claims in the Memorial in a manner that confirms that the real issue in dispute between the Parties does not concern racial discrimination but the status of Crimea. Ukraine's case consists in asserting that the measures that were allegedly taken by Russia against members of some "ethnic communities" were motivated, not by racial factors, but by the fact that these "ethnic communities […] dared to oppose its purported annexation of the peninsula".[359] In a similar vein, Ukraine alleges that Russia applied its laws "selectively", not for racial purposes, but "to crush political dissent from the Crimean Tatar and Ukrainian communities",[360] or that, following the "unlawful

[355] See, e.g., Application, paras. 1, 5, 24, 35; Memorial, paras. 8, 364, 608.
[356] See respectively Application, Section III.A and III.C.1.
[357] See Memorial, Chapter 8.B.1. See also, e.g., Application, paras. 1, 5, 6; Memorial, paras. 11-14, 355, 364, 390, 620. See further references to "occupation" in Application, paras. 13, 14, 15, 23, 36, 47, 63, 81, 86-92, 95, 96, 100, 101, 103, 105, 110, 111, 114, 115, 121, 122, 124, 133, 137; Memorial, paras. 346, 348, 349, 359, 382, among many others.
[358] Application, para. 137, chapeau. See also *ibid*., para. 138 repeatedly referring to "Russian-occupied Crimea".
[359] Memorial, para. 3. See also, among others, para. 349 or para. 596.
[360] *Ibid.*, para. 346.

invasion of the peninsula in February 2014", the Crimean Tatar community was "singled out for its perceived disloyalty to Moscow."[361]

308. In even more explicit terms, in its Memorial Ukraine considers that its claims concern alleged measures taken by Russia "to shut down opposition to the annexation."[362] Ukraine also asserts that

> "The very act of annexation placed the Russian authorities on a collision course with the Crimean Tatar and Ukrainian communities. A defining characteristic of both communities at this time was their loyalty to the principle of Crimea as part of independent Ukraine. By treating Crimea as part of its own sovereign territory, rather than as occupied territory as international law dictates, the Russian Federation set itself on a collision course with these two ethnic groups."[363]

309. In an attempt to get around the absence of jurisdiction *ratione materiae* of the Court under CERD over such allegations related to the status of Crimea, allegations that Russia firmly rejects, Ukraine artificially alleges in the Memorial – as is clear in the quote above – that the definition of "ethnic groups" under CERD can be based on political self-identification and political opinions. On that basis, Ukraine seeks to frame purely politically-oriented claims as claims related to racial discrimination. Ukraine's definition of ethnic groups for the purpose of the present case is, however, clearly misconceived.

310. Ukraine presents in the Memorial a seriously distorted picture of Crimean history. Russia does not intend to address the history of Crimea within these proceedings. For the purpose of jurisdiction it is sufficient to note that Ukraine characterises contemporary Crimean Tatars as an amalgamation of many other

[361] Memorial, para. 364; see also para. 367 and paras. 368 ff.
[362] See *ibid.*, para. 595.
[363] *Ibid.*, para. 382. See also, among others, paras. 392, 393, 475, 514, or 518.

groups, including ethnic groups, in particular Greeks, Romans, subjects of the Byzantine empire, Germanic and Turkic tribes, citizens of medieval Italian city states such as Venice and Genoa, Armenian and Jewish merchants and subjects of the Ottoman Empire.[364] All these groups that Ukraine seeks to depict as belonging to Crimean Tatars have their separate identities characterised by their culture, traditions and language. Many of them also have their own regional national cultural autonomies duly registered with the Crimean authorities under Russian legislation[365] that create an enabling environment for the promotion and protection of their rights.[366]

311. Most importantly, Ukraine's definition of ethnicity is without basis. Ukraine claims – without producing any evidence to the effect that Crimean Ukrainians (or Crimean Tatars) consider themselves as "ethnic" groups on that *political* ground – that the Ukrainian community can be defined as an ethnic group in Crimea encompassing Ukrainian speakers "and others who self-identify as Ukrainian on civic grounds"[367] or who have "a shared outlook with regards to Crimea remaining part of Ukraine's sovereign territory and the importance of defending individual freedoms",[368] or as a group "a key part of whose identity rests on the conception of Crimea as part of Ukraine".[369] Ukraine also contends that "[f]or the community identifying as of Ukrainian ethnicity, such social identity and political beliefs may include, since March 2014, the conviction that

[364] Memorial, para. 350.
[365] The legal basis for the formation and activity of national cultural autonomies in the Russian Federation is Federal Law No. 74-FZ "On national cultural autonomy", 17 June 1996 (Annex 60).
[366] This is the case for instance of the Armenians, Greeks or Jews. Each of these ethnic groups, along with others, have their own registered autonomy, distinct from that of the Crimean Tatars. See https://gkmn.rk.gov.ru/ru/structure/31 (Annex 61).
[367] Memorial, para. 583. See also paras. 576 and 579.
[368] *Ibid.*, para. 584.
[369] *Ibid.*, para. 365.

Crimea is part of Ukraine, and that the Russian occupation of the peninsula is unlawful."[370] Similarly, Ukraine asserts that "[t]he Crimean Tatar and Ukrainian communities are, in part, defined by their loyalty to the principle that Crimea is part of Ukraine's sovereign territory and that Russia's purported annexation of the peninsula is therefore illegitimate."[371] Ukraine even alleges that celebrating Human Rights Day is an event "of cultural importance to Crimean Tatars".[372]

312. In its Memorial, Ukraine does not establish however that ethnicity can be based on political opinions, let alone that "a key part" of ethnicity can rest on them. The expert statement that it attaches to its Memorial, which is drafted in abstract and hypothetical terms, does not point to any State practice or case law to the effect that ethnicity under CERD can result from the sharing of the same political opinions.[373]

313. Such a self-serving definition of ethnicity, the sole purpose of which is to conflate claims related to the status of Crimea with claims under CERD, confirms that the real issue in the present case is not racial discrimination but the status of Crimea, which is beyond the jurisdiction of the Court under Article 22 of CERD, as the Court itself confirmed *prima facie* in its Order of 19 April 2017.

314. Moreover, Ukraine's definition is incompatible with the meaning of the term "ethnicity" under CERD. It would stretch the scope of application of CERD well beyond the ordinary meaning of the text of the Convention, the intent of its drafters and the object and purpose of the Convention since it would result in converting any claim related to political disputes into racial discrimination.

---

[370] *Ibid.*, para. 585.
[371] *Ibid.*, para. 596.
[372] Memorial, para. 487.
[373] Expert Report of Professor Sandra Fredman (Annex 22 to Memorial), paras 48-51.

315. The ordinary meaning of the word "ethnic" refers to a large group of people classed according to common racial, national, tribal, religious, linguistic, or cultural origin or background. It does not refer to political opinions.[374]

316. Similarly, the main criteria that the CERD Committee identified for gathering information about ethnic groups protected by the Convention is self-identification (if no justification exists to the contrary) and nothing in the practice of the CERD Committee suggests that such self-identification can be based on political views. In addition, the Committee's Guidelines for the Periodic Reports to be submitted by States Parties under Article 9(1) of the Convention do not refer to political views to define ethnic groups, but to criteria such as "mother tongue, languages commonly spoken or other indicators of ethnic diversity, together with any information about race, colour, descent, or national or ethnic origins derived from social surveys".[375] Ukraine has not put forward any State practice supporting its interpretation.

---

[374] Webster dictionary, entry for "ethnic", see https://www.merriam-webster.com/dictionary/ethnic. This is confirmed in French, see, e.g., the Larousse dictionary, entry for "ethnie": https://www.larousse.fr/dictionnaires/francais/ethnie/31396, and in Russian, see, e.g., E E. Zakharenko, L. Komarova, I. Nechaeva, *Novyi slovar' inostrannykh slov [New Dictionary of Foreign Words]*, Azbukovnik, 2003, entry for "этнос" ("ethnos"): http://slovari.ru/search.aspx?s=0&p=3068&di=vsis&wi=19841 (Annex 43).

[375] CERD Committee, Guidelines for the CERD-Specific Document to be Submitted by States Parties under Article 9, Paragraph 1, of the Convention, UN Doc. CERD/C/2007/1, 13 June 2008, 13 June 2008, para. 11 (available at http://www.undocs.org/CERD/C/2007/1). Similarly, general definitions of minorities do not include political views as an element. In 1979, the Special rapporteur of the Sub-Commission for the Prevention of Discrimination and the Protection of Minorities defined a minority as "a group, numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – citizens of the State – possess, from the ethnic, religious or linguistic point of view, characteristics different from those of the rest of the population, and express even implicitly a feeling of solidarity, with a view to preserving their culture, traditions, religion or language." Another definition was proposed to the Sub-Commission by a second Rapporteur, in 1985, as follows: "A group of citizens of a State, constituting a numerical minority and in a non-dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only

317. Before the CERD Committee, Ukraine itself considers ethnicity and political beliefs as two distinct concepts. In its nineteenth to twenty-first reports to the Committee due in 2010, Ukraine cited Article 24 of its Constitution on equality of constitutional rights and equality before the law, that provides: "Privileges or restrictions based on race, colour, *political*, religious or other *beliefs*, sex, *ethnic* or social *origin*, property status, place of residence, language or other characteristics are prohibited".[376] This quote was placed prominently in the report and relied on as the legal basis for Ukraine's policy on racial discrimination. It should also be recalled that as part of the consideration by the Committee of Ukraine's 11th and 12th reports submitted under Article 9 of the Convention, Ukraine attempted to exclude the situation in Crimea from the Committee's scrutiny alleging that "the problem of Crimea was based not on

---

implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law" (see I. Diaconu, *Racial Discrimination*, Eleven International Publishing, 2011, p. 87). In a draft Convention on the issues of minorities, presented in 1993 by the Commission for Democracy through Law of the Council of Europe, the following definition was proposed: "For the purpose of the present Convention, the expression "minority" shall mean a group numerically inferior to the rest of the population of a State, whose members, having the citizenship of this State, possess ethnic, religious or linguistic characteristics different from those of the rest of the population and are willing to preserve their culture, traditions, religion or language" (Council of Europe, Proposal for a European Convention for the Protection of Minorities, prepared by the European Commission for Democracy through Law, CDL (91) 7 (1991), 8 February 1991, available at https://books.google.ru/books?id=_oV3pKJfnvcC , p. 67). This definition does not include the element of political opinions. It should also be noted that the 1995 Framework Convention for the Protection of National Minorities (Council of Europe) does not include a definition of "national minority". However, many States that acceded to the Convention made declarations defining this term, and none of them refer to political opinions in such declarations (see https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/157/declarations?p_auth=8CaEGkZo).

[376] CERD Committee, Nineteenth to twenty-first periodic reports due in 2010 – Ukraine, CERD/C/UKR/19-21, 8 January 2010 (report due under Article 9 of CERD), para. 8 (emphasis added), available at https://digitallibrary.un.org/record/696225/files/CERD_C_UKR_19-21-EN.pdf.

issues of nationality or race, but rather on political conflicts and that therefore it did not come within the scope of the Convention."[377]

318. Ukraine's definition of ethnicity is not even compatible with its own characterisation in its Memorial of the "objective factors" that – in its view – usually define ethnic groups, i.e., "sharing a common culture, religious affiliation and physical appearance".[378]

319. Moreover, reliance on political beliefs, and even using it as a key part of the definition of ethnicity under CERD would lead to an absurd result in the present case, since it would split Crimean Tatars and Ukrainians, which are undoubtedly ethnic groups under CERD, into different "ethnic" groups depending on whether or not their members support Crimea as being part of Ukraine or as being part of Russia, bearing in mind that some members of these communities may not have a firm position on that issue. Even according to Ukraine's Memorial itself, it is undisputed that at least some ethnic Ukrainians and Crimean Tatars support the integration of Crimea into the Russian Federation.[379] Another example, that is not quoted in Ukraine's Memorial, is that of Mr. Lenur Islyamov who, as Russia pointed out in its letter to the Registry dated 21 June 2018, "was originally 'delegated' by the Mejlis to serve in the new Government of the

[377] Report of the CERD Committee, UN Doc. A/48/18, 15 September 1993, para. 57, available at http://undocs.org/a/48/18.

[378] Memorial, para. 578. See also Sub-Commission on Prevention of Discrimination and Protection of Minorities, 3rd session, 1950, Summary Record of the 48th Meeting, E/CN.4/Sub.2/SR.48, 16 January 1950, statement of the Chairman, para. 16: "in the Convention on Genocide the term "ethnic" was used to cover cultural, physical and historical characteristics". See also Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, by F. Capotorti (Special Rapporteur), E/CN.4/Sub.2/384/Rev.1, 1979, p. 34, paras. 196-197.

[379] See for instance regarding Crimean Tatars: Witness Statement of Mustafa Dzhemiliev, para. 8 (Annex 16 to Memorial); and regarding Ukrainians: Witness Statement of Andrii Mykolaiovych Tkachenko, para. 15 (Annex 10 to Memorial); Expert report of Professor Paul Magocsi, para. 84 (Annex 21 to Memorial); Memorial, para. 474.

Republic of Crimea (as Vice Chairman of the Council of Ministers)."[380] Following Ukraine's logic, he changed his ethnicity when he later became one of the main organisers of the blockade of Crimea. On the contrary, a former aide to Mustafa Dzhemilev, Mr. Ruslan Balbek, served as Deputy Prime Minister of the Republic of Crimea until September 2016 when he was elected a member of the State Duma.[381] One should also recall the examples of the recent election of the "Council of the Crimean Tatar People" ("Shura") by the Qurultai and of the recently constituted "Council of Crimean Tatars under the auspices of the Head of the Republic of Crimea" (the so-called "Consultative Council"), both including prominent Crimean Tatar figures and former members of the Mejlis.[382] A significant part of state organs of the Republic of Crimea currently consists of Crimean Tatars and Ukrainians.[383] If Ukraine were right that "a key part" of the identity of Crimean Tatars and Ukrainians "rests on the conception of Crimea as part of Ukraine,"[384] then a significant part of the membership of these communities would be disqualified under CERD from being ethnic Crimean Tatars or Ukrainians, and accordingly would be denied of their rights under the Convention. That clearly cannot be right.

[380] Letter of the Russian Federation to the Registry of the ICJ, 21 June 2018, p. 2.

[381] Letter of the Russian Federation to the Registry of the ICJ, 7 June 2018, p. 3, para. 12. Other examples cited in the letter include Mr. Remzi Iliasov (as one of the Vice-Chairs of the State Council of the Republic of Crimea), Mr. Lenur Abduramanov (as Chair of the State Committee on Interethnic Relations and on Formerly Deported Peoples of the Republic of Crimea), Mr. Aider Ablyatipov (as a Deputy Minister of Education, Science and Youth).

[382] Letter of the Russian Federation to the Registry of the ICJ, 7 June 2018, pp. 3-4, paras. 14-15.

[383] CR 2017/2, p. 57, para. 15 (Lukiyantsev), "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".

[384] Memorial, para. 365.

320. Against this background, Ukraine's position that "the conviction that Crimea is part of Ukraine, and that the Russian occupation of the peninsula is unlawful"[385] is a key part of ethnic identity evidences that the real issue in the present case is the status of Crimea, which Ukraine is artificially trying to frame as a case of racial discrimination. Such an issue does not fall within the Court's jurisdiction *ratione materiae* under CERD.

Section II
Ukraine invokes rights or obligations that are not rights or obligations under CERD

321. A significant part of the alleged violations put forward by Ukraine is based on the assumption that the mere application of Russian laws in Crimea constitutes a violation of the rules of IHL, which, following Ukraine's logic, entails a violation of CERD.[386] For instance, Ukraine is seeking to suggest that Russia, in violation of CERD, restricted the right to freedom of peaceful assembly of Crimean Tatars basing itself solely on the fact that Russian laws were applicable to the process of organisation of public events by Crimean Tatars and that a number of them were not permitted in a particular location or date in accordance with applicable procedures.[387] By so doing, Ukraine does not invoke rights and obligations under CERD.

322. By way of further examples,

a. Ukraine invokes Article 31(3)(c) of the VCLT to import Article 49 of the Fourth Geneva Convention into the scope of Article 5 (d)(ii) of

[385] *Ibid.*, para. 585.
[386] See in particular throughout Chapter 10 of the Memorial alleging that Russia's introduction and application of its laws in Crimea is unlawful: paras. 481, 483, 506, 509. See also paras. 602, 613, 621, 624.
[387] Memorial, para. 608.

CERD.[388] However, Article 49 has nothing to do with Article 5(d)(ii). Article 31(3)(c) of the VCLT does not refer to rules of general international law in the abstract. It concerns those rules of general international law that are applicable between the Parties and relevant to the provisions of the specific treaty that is being interpreted. In the present case, whereas Article 49 of the Fourth Geneva Convention concerns the prohibition of forcible transfer by States in a specific context, Article 5(d)(ii) of CERD relates to the right to freedom of movement, including the right to leave one's country and to return to it. The difference between these rules is obvious, and they cannot be merged under the umbrella of Article 31(3)(c) of the VCLT, as Ukraine would wish.

b. Another example of Ukraine's flawed reasoning is its claim that Russia may not invoke its laws on citizenship because "any distinction in this regard between citizens and non-citizens is predicated on an underlying violation of IHL."[389] In other words, Ukraine alleges that IHL applies in Crimea and challenges the legality under IHL of the implementation, as such, of Russian laws in Crimea, which, again, is not a CERD-related claim.

323. In addition, Ukraine misconstrues on a number of occasions the proper scope of CERD.

324. *First*, Ukraine alleges on a number of occasions that Russia breached CERD by discriminating between its citizens and non-citizens.[390] It alleges for

[388] Memorial, para. 614.
[389] Memorial, para. 625.
[390] *Ibid.*, paras. 455-476, 612, 616-618, 624, or 626.

instance that "foreign holders of residency permits suffer many other disadvantages compared to Russian citizens",[391] that Article 5(c) of CERD has been breached by Russia on the ground that it limits "the rights to run for government and municipal office and to be employed in government and municipal service to Russian citizens who do not hold citizenship in another State",[392] or that "[t]he Russian Federation has violated [Article 5(e)(i) on the right to work and free choice of employment] by unlawfully extending to Crimea its restrictions on the employment of non-Russian citizens in government and municipal jobs".[393] These claims are not compatible with Articles 1(2) and (3) of CERD which *expressly exclude* from the scope of the Convention – and thus from the jurisdiction of the Court under Article 22 – "distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens" and which specify that CERD does not affect "in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization."

325. The exclusion of issues of nationality (meaning citizenship) from CERD was a matter of great importance for States in the process of negotiations of the Convention. During the discussion of the draft Convention in the Third Committee of the UN General Assembly, none of the delegations suggested that the rights guaranteed and the duties imposed under national constitutions should be extended to aliens.[394]

[391] *Ibid.*, para. 471.
[392] *Ibid.*, para. 612.
[393] *Ibid.*, para. 624; or, for another example, para. 626 in relation to the right to public health.
[394] United Nations General Assembly, 20th session, *Official Records*, Third Committee, 1304th meeting UN Doc. A/C.3/SR.1304, 14 October 1965, in particular p. 85, para. 19 (available at http://undocs.org/a/c.3/sr.1304).

326. Ukraine claims that Russia is not in a position to invoke Article 1(2) and (3) of CERD because "any distinction in this regard between citizens and non-citizens is the result of Russia's annexation of Crimea and imposition of its citizenship" or because such a distinction "is predicated on an underlying violation of IHL".[395] Once again, such a defence reveals the real object of Ukraine's claims, which is not to protect individuals from racial discrimination, but to challenge the current status of Crimea. Be that as it may, Ukraine's argument is based on a confusion between the existence of the jurisdiction of the Court and the possibility to formulate a defence on the merits. Since the Convention "shall not apply", according to Article 1, any claim regarding distinctions between citizens and non-citizens falls in any case outside the scope of the Convention and thus outside the jurisdiction of the Court.[396]

327. *Second*, a number of rights invoked by Ukraine in the Application and Memorial are not protected under CERD.

328. CERD does not offer a special protection to the representative rights of national minorities corresponding to Ukraine's interpretation. According to Ukraine, the Russian Federation would be in breach of CERD because of "the ban on the Mejlis of the Crimean Tatar People."[397] In its Memorial, Ukraine similarly states that "the Russian Federation has selectively deprived the Crimean

[395] Memorial, para. 626, as well as paras. 613 and 625.

[396] In *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures, Order of 23 July 2018*, the Court did not take a final position on this topic. However, see Joint Declaration of Judges Tomka, Gaja and Gevorgian (in particular para. 4: "Should CERD be considered as covering also discrimination based on nationality, the Convention would be a far-reaching instrument, that contains a clause providing that, with regard to the wide array of civil rights that are protected under CERD, all foreigners must be treated by the host State in the same way as nationals of the State who enjoy the most favourable treatment"); Dissenting Opinion of Judge Crawford, para. 1; and Dissenting Opinion of Judge Salam.

[397] Application, para. 137(c).

Tatar and Ukrainian communities of their civil and political rights", adding that this includes, among other things, "stripping the Crimean Tatar people of representative structures on which they have relied to defend their interests since their return to Crimea".[398] Such an alleged right does not fall within the scope of CERD. There is indeed no "political right" that Ukraine could invoke under Article 5(c) of CERD for the purpose of claiming that the Crimean Tatar people have a right to have "*representative* bodies".[399] The Mejlis is not, and cannot be considered as, a "political entity" and, even if it were, CERD does not include any right for communities or minorities to have, and *a fortiori* to conserve, representative institutions in the political meaning of the term. So far as cultural rights under Article 5(e) of CERD are concerned, they only refer to the "right to equal participation in cultural activities".[400] In the present case, contrary to Ukraine's assertions,[401] there is no plausible case to make that the ban on the Mejlis impedes the right to equal participation in cultural activities.

329. Article 5(e)(v) of CERD does not include, as Ukraine alleges, an absolute right to education "in native language".[402] It provides for the obligation of States Parties to CERD "to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national, or ethnic origin, to equality before the law, notably in the enjoyment of […] civil rights, in particular […] the right to education and training." The main

[398] Memorial, para. 29. See also paras. 3, 359, 412, and 421.

[399] According to Article 5(c) of CERD, political rights include "in particular the right to participate in elections – to vote and to stand for election – on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service."

[400] See also Article 15(1) of the Covenant on Economic, Social and Cultural Rights.

[401] Memorial, paras. 629-630.

[402] Memorial, para. 627: "[t]he Russian Federation has violated this provision [Article 5 (e) (v)] by favoring education in the Russian language at the expense of instruction in the Crimean Tatar and, especially, the Ukrainian languages."

goal of this provision is to ensure the right of everyone regardless of ethnic origin to have access to a national educational system without discrimination.

330. To argue otherwise would have the result that CERD would be interpreted as having created for each State Party to the Convention an unconditional obligation to ensure a right for each minority or community to have its own language as being the educational language at the expense of studying the State language. That was obviously not intended. It is worth noting in that respect that even Article 13 of the International Covenant on Economic, Social and Cultural Rights, which is "the most wide-ranging and comprehensive article on the right to education in international human rights law",[403] does not include a right to education in each community's or minority's native language.

331. Even the 1960 Convention against Discrimination in Education confirms the importance to "recognize the *right of members of national minorities to carry on their own educational activities*, including the maintenance of schools and, *depending on the educational policy of each State, the use or the teaching of their own language, provided* however […] *that this right is not exercised in a manner which prevents the members of these minorities from understanding the culture and language of the community* as a whole and from participating in its activities […] that *attendance at such schools is optional*".[404]

332. *Third*, Ukraine seeks to include religion within the scope of CERD and claims that Crimean Tatars are being targeted based on allegations of religious

[403] United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 13 (21st session), The Right to Education (article 13 of the Covenant), UN Doc. E/C.12/1999/10, 8 December 1999, para. 2, available at http://undocs.org/e/c.12/1999/10.

[404] Convention against Discrimination in Education, 14 December 1960, *UNTS*, vol. 429, p. 100 (Article 5.1(c)).

Muslim extremism.[405] In so doing, it misconstrues CERD. It is well known that the process of elaboration of CERD was launched by the Economic and Social Council's recommendation to the General Assembly to adopt a draft resolution on "Manifestations of Racial Prejudice and National and Religious Intolerance". After the adoption of this resolution, a draft resolution on the preparation of an international convention on the elimination of all forms of racial discrimination was suggested. In the discussion of the draft, it was proposed that the instrument deals with both racial and religious discrimination. The Third Committee of the UN General Assembly eventually adopted two separate resolutions, similarly worded, one asking for the preparation of a draft declaration and a draft convention on the elimination of all forms of racial discrimination and one on the preparation of a draft declaration and a draft convention on the elimination of all forms of religious intolerance.[406] Therefore, it is evident that the United Nations intended to deal with racial discrimination and religious discrimination in separate instruments and that CERD does not encompass discrimination on religious grounds.

333. It is true that in General Recommendation No. 32, the CERD Committee admitted that religious considerations could be relevant in cases of discrimination on multiple grounds.[407] But the Committee made clear that the primary ground of discrimination should always be within the scope of Article 1 of CERD. In other circumstances, the Committee clearly excluded religion as a ground of discrimination covered as such by CERD:

[405] Memorial, paras. 391, 447, 595, 602, 608, 640.
[406] See N. Lerner, *The UN Convention on the Elimination of All Forms of Racial Discrimination,* Brill/Nijhoff, 2015, pp. 3-4, quoting UNGA Resolutions 1780 (XVII) and 1781 (XVII).
[407] Memorial, para. 565 and fn. 1177, referring to Annex 790 to Memorial: CERD Committee, General Recommendation No. 32, para. 7.

> "The Committee recognises the importance of the interface between race and religion and considers that it would be competent to consider a claim of 'double' discrimination on the basis of religion and another ground specifically provided for in article 1 of the Convention, including national or ethnic origin. However, this is not the case in the current petition, which exclusively relates to discrimination on religious grounds. The Committee recalls that the Convention does not cover discrimination based on religion alone, and that Islam is not a religion practised solely by a particular group, which could otherwise be identified by its 'race, colour, descent, or national or ethnic origin.'"[408]

Section III
No plausible allegations of violations of protected rights under CERD

334. As explained in Part II of the present Preliminary Objections,[409] jurisdiction *ratione materiae* requires the Court not only to interpret the relevant provisions of that treaty to determine if the Applicant's allegations fall within them.[410] It also requires the Court, if the real issue in dispute concerns the treaty invoked as a basis for jurisdiction and the rights invoked are treaty rights under that treaty,[411] to assess the plausibility of the Applicant's claims. For the Court to have jurisdiction under CERD, it is not enough for the Applicant merely to *assert* that racial discrimination occurred. The Court must verify that the evidence produced by the Applicant (whether or not it is well-grounded on the merits) is sufficient to *characterise* the claims *as claims under CERD*.[412] As the Court repeatedly indicated, when assessing its jurisdiction, it "will not confine itself to

---

[408] Committee on the Elimination of Racial Discrimination, *A.W.R.A.P. v. Denmark*, Communication No. 37/2006, Opinion, UN Doc. CERD/C/71/D/37/2006, 8 August 2007, para. 6.3 (Annex 799 to Memorial). The Committee further observed: "The Travaux Préparatoires of the Convention reveal that the Third Committee of the General Assembly rejected the proposal to include racial discrimination and religious intolerance in a single instrument, and decided in the ICERD to focus exclusively on racial discrimination".

[409] See above, para. 34.

[410] See above, Section II.

[411] See above, Sections I and II.

[412] See above, Part II, Chapter II, paras. 31-32.

the formulation by the Applicant when determining the subject of the dispute";[413] the Court "takes account of the facts that the applicant identifies as the basis for its claim".[414] It is noted that the CERD Committee takes a similar approach.[415]

335. The necessity for the Court to assess whether it is plausible to consider that Ukraine has proper claims under CERD is particularly critical given the gravity of what is alleged. According to Ukraine, Russia "is responsible for a brazen and comprehensive assault on human rights" and "has committed systematic violations" of CERD. The same charges of exceptional gravity are reasserted in extreme terms throughout the Memorial. Ukraine contends that Russia has committed "overt violations of the CERD, in an open campaign of discrimination and cultural erasure directed against the Crimean Tatar and Ukrainian communities";[416] and that Russia has committed "systematic breaches of its obligations under" CERD and "adopted a systematic policy of racial discrimination in a territory it illegally occupies."[417]

---

[413] *Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 449, para. 30.

[414] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015*, pp. 602-603, para. 26 *in fine*.

[415] The CERD Committee stressed the necessity for a claimant, to have his claim declared admissible, to present "sufficient indications to demonstrate that he was a victim of racial discrimination" and to "sufficiently substantiate his claims": CERD Committee, *M.M. v. Russian Federation*, Communication No. 55/2014, Decision of 7 August 2015, UN Doc. CERD/C/87/D/55/2014, 11 September 2015, para. 6.4, available at http://undocs.org/en/CERD/C/87/D/55/2014.

[416] Memorial, para. 15.

[417] *Ibid*., para. 22. See also, among others: para. 27 ("systematic campaign of discrimination"; "pervasive policy and practice of racial discrimination aimed ultimately at the cultural erasure of the Crimean Tatar and Ukrainian communities in Crimea"); para. 341 ("systematic campaign of racial discrimination"); para. 346 ("The desired end result is as transparent as it is abhorrent to the multi-ethnic heritage of Crimea: the cultural erasure of the Crimean Tatar and Ukrainian communities on the peninsula"); para. 347 ("campaign of racial discrimination"); p. 206 ("Campaign of cultural erasure in Crimea"); para. 388 ("The Russian Federation has used these and other powers at its disposal to systematically discriminate against Crimean Tatars and Ukrainians in Crimea"); para. 389 ("systematic assault on their political and civil rights");

336. In the Order of 19 April 2017, the Court considered that Ukraine's claims under CERD are largely implausible.

a. As the Court observed, Ukraine, in the Application and the Request for the indication of provisional measures, formulated an impressive list of grave allegations, such as an alleged "policy of Russian ethnic dominance", "cultural erasure of non-Russian communities through a systematic and ongoing campaign of discrimination", the prevention of "important cultural gatherings", the perpetration of "a regime of disappearances and murders", "a campaign of arbitrary searches and detentions", the silencing of "media voices", forceful detentions, or "discriminatory limitations on ethnic Ukrainian media in the peninsula."[418]

b. On the basis of the evidence submitted by the Parties, the Court concluded that only "*some* of the acts complained of by Ukraine fulfil th[e] condition of plausibility." The Court referred in that regard to two allegations only: "the banning of the *Mejlis* and the alleged restrictions on the educational rights of ethnic Ukrainians."[419] The Court decided that the rights to be protected by provisional measures were thus limited to "the ability of the Crimean Tatar community to conserve its representative institutions, including the *Mejlis*" and "the

---

para. 392 ("systematic violations of the CERD"); para. 413 ("campaign of discrimination against the Crimean Tatar community"); para. 426 ("Russia's ban on the Mejlis was a political measure directed at the Crimean Tatar community as a whole"); para. 453 ("the foregoing searches are merely illustrative of a broader policy and practice carried out by the Russian occupation authorities in Crimea"); para. 477 ("raises the specter of the total erasure of these distinct cultures from the Crimean peninsula"); para. 587 ("systematic campaign of racial discrimination").

[418] Order of 19 April 2017, pp. 118-119, paras. 33-34.

[419] *Ibid.*, p. 135, para. 83.

availability of education in the Ukrainian language."[420] The contrast between Ukraine's wide and dramatic allegations on the one hand and the decision of the Court on the other speaks for itself.

c. In its Memorial, Ukraine did not adduce materially new evidence with regard to those claims that the Court found to be implausible. That is also the case with respect to Ukraine's other allegations, which fall outside the scope of CERD, as demonstrated in Section II above.

337. The implausible nature of Ukraine's claims is confirmed by the reading of the reports of the OHCHR that Ukraine annexed to its Memorial.[421] It is striking that these reports – even the reports submitted after the present case was brought before the Court – do not refer to alleged acts of "racial discrimination" nor to alleged breaches of the CERD.[422] *A fortiori*, they do not evidence, or even

[420] *Ibid.*, p. 139, para. 102.

[421] Although it should be noted that information in the reports of the OHCHR is not always reliable since this institution has no presence on the ground in Crimea, because Ukraine insists that its representatives can visit the peninsula only as a part of Ukraine.

[422] OHCHR, "Report on Human Rights Situation in Ukraine, 15 April 2014" (Annex 44 to Memorial), paras. 80-92; OHCHR, "Report on Human Rights Situation in Ukraine, 15 May 2014" (Annex 45 to Memorial), paras. 117-154; OHCHR, "Report on Human Rights Situation in Ukraine, 15 June 2014" (Annex 46 to Memorial), paras. 283-326; OHCHR, "Report on the Human Rights Situation in Ukraine, 15 July 2014" (Annex 296 to Memorial), paras. 184-195; OHCHR, "Report on Human Rights Situation in Ukraine, 17 August 2014" (compiled in Annex 299 to Memorial); OHCHR, "Report on the Human Rights Situation in Ukraine, 16 September 2014" (Annex 765 to Memorial), paras. 150-172; OHCHR, "Report on Human Rights Situation in Ukraine, 19 September 2014" (Annex 47 to Memorial), paras. 28-30; OHCHR, "Report on Human Rights Situation in Ukraine, 15 November 2014" (Annex 48 to Memorial), paras. 207-240; OHCHR, "Accountability for Killings in Ukraine from January 2014 to May 2016" (Annex 49 to Memorial), para. 58; OHCHR, "Report on the Human Rights Situation in Ukraine, 15 December 2014" (Annex 303 to Memorial), paras. 79-85; OHCHR, "Report on the Human Rights Situation in Ukraine, 1 December 2014 to 15 February 2015" (Annex 309 to Memorial), paras. 92-103; OHCHR, "Report on the Human Rights Situation in Ukraine, 16 February–15 May 2015" (Annex 310 to Memorial), paras. 156-171; OHCHR, "Report on the Human Rights Situation in Ukraine, 16 May–15 August 2015" (Annex 769 to Memorial), paras. 168-187; OHCHR, "Report on the Human Rights Situation in Ukraine,

suggest, the existence of a "brazen and comprehensive assault", of a "campaign" of "erasure" of Crimean Tatar or Ukrainian communities, or of "systematic" grave breaches of CERD.

338. The implausibility of Ukraine's grave allegations that Russia is responsible since 2014 for "an open campaign of discrimination and cultural erasure directed against the Crimean Tatars and Ukrainian communities"[423] is also confirmed by the fact that the CERD Committee did not trigger the early warning and urgent action mechanism in relation to the situation in Crimea.[424] The CERD Committee has not hesitated to trigger this procedure in the past and

---

16 August to 15 November 2015" (Annex 312 to Memorial), paras. 143-160; OHCHR, "Report on the Human Rights Situation in Ukraine, 16 November 2015 to 15 February 2016" (Annex 314 to Memorial), paras. 183-200; OHCHR, "Report on the Human Rights Situation in Ukraine, 16 February to 15 May 2016" (Annex 771 to Memorial), paras. 178-202; OHCHR, "Report on the Human Rights Situation in Ukraine, 16 May–15 August 2016" (Annex 772 to Memorial), paras. 153-183; OHCHR, "Report on the Human Rights Situation in Ukraine, 16 August –15 November 2016" (Annex 773 to Memorial), paras. 155-181; OHCHR, "Report on the Human Rights Situation in Ukraine, 16 February to 15 May 2017" (Annex 774), paras. 140-162; OHCHR, "Report on the Human Rights Situation in Ukraine, 16 May–15 August 2017" (Annex 775 to Memorial), paras. 133-159; OHCHR, "Report on the Human Rights Situation in Ukraine, 16 August–15 November 2017" (Annex 776 to Memorial), paras. 132-147; OHCHR, "Report on the Human Rights Situation in Ukraine, 16 November 2017 – 15 February 2018" (Annex 779 to Memorial), paras. 122-130 and 152; OHCHR, "Situation of Human Rights in the Temporarily Occupied Autonomous Republic of Crimea and the City of Sevastopol (Ukraine), 22 February 2014 to 12 September 2017" (Annex 759 to Memorial). This is confirmed in the last OHCHR report that was published after Ukraine's Memorial, OHCHR, "Report on the Human Rights Situation in Ukraine, 16 February to 15 May 2018", paras. 90-101 (available at https://www.ohchr.org/Documents/Countries/UA/ReportUkraineFev-May2018_EN.pdf).

[423] Memorial, para. 15.

[424] On this mechanism, see UN General Assembly, 48th session, *Official Records, Supplement No. 18*, Report of the Committee on the Elimination of Racial Discrimination, A/48/18, 15 September 1993, Annex III, Prevention of racial discrimination, including early warning and urgent procedures: working paper adopted by the Committee on the Elimination of Racial Discrimination, para. 8 (ii) (available at http://undocs.org/A/48/18), revised by UN General Assembly, 62nd session, *Official Records, Supplement No. 18*, Report of the Committee on the Elimination of Racial Discrimination, A/62/18, 2007, Annex III, Guidelines for the early warning and urgent action procedures (available at http://undocs.org/A/62/18); see also http://www.ohchr.org/EN/HRBodies/CERD/Pages/EarlyWarningProcedure.aspx#about.

up to this day when it was of the opinion that the situation warranted it,[425] including in the case of Russia in other contexts.[426] The fact that, by contrast, the Committee did not resort to that procedure over the last four years in relation to Crimea even though Ukraine publicly alleged that a "systematic campaign of racial discrimination" and of "cultural erasure" of Crimean Tatars and Ukrainians is ongoing shows how implausible Ukraine's case is.

---

[425] See, e.g., in the United Kingdom, Letter from the Chairperson of the Committee on the Elimination of Racial Discrimination to the Permanent Representative of the United Kingdom to UNOG, Ref. GH/st, 12 March 2010, on the situation of the Romani and Irish Traveller community of Dale Farm, County of Essex (available at https://www.ohchr.org/Documents/HRBodies/CERD/EarlyWarning/UK_12.03.2010.pdf); in South Africa, Letter of the Chairperson of the Committee on the Elimination of Racial Discrimination to Permanent Representative of South Africa to UNOG, Ref. GH/cbr, 11 March 2011, on the situation of refugees and asylum seekers (available at https://www.ohchr.org/Documents/HRBodies/CERD/EarlyWarning/SouthAfrica_11March2011.pdf); or in Peru, Letter of the Chairperson of the Committee on the Elimination of Racial Discrimination to Permanent Representative of Peru to UNOG, Ref. CERD/GH/mja/vdt, 30 August 2013, on the situation of the indigenous peoples from the Reserva del Kugapakori-Nahua-Nanti in south-eastern Peru (available at https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/PER/INT_CERD_ALE_PER_7101_S.pdf).

[426] See, e.g., Letter of the Chairperson of the Committee on the Elimination of Racial Discrimination to Permanent Representative of the Russian Federation to UNOG, Ref. GH/ebr, 11 March 2011 (available at https://www.ohchr.org/Documents/HRBodies/CERD/EarlyWarning/RussianFederation_11March2011.pdf), and Letter of the Chairperson of the Committee on the Elimination of Racial Discrimination to Permanent Representative of the Permanent Mission of the Russian Federation to UNOG, Ref. GH/ST, 2 September 2011 (available at https://www.ohchr.org/Documents/HRBodies/CERD/EarlyWarning/RussianFederation02092011.pdf), on the small-numbered indigenous peoples from Nanai district of the Khabarovsk Krai; Letter of the Chair of the Committee on the Elimination of Racial Discrimination to Permanent Representative of the Russian Federation to the United Nations Office and other international organizations in Geneva, Ref. CERD/GH/cg/ks, 15 May 2015 (available at https://www.ohchr.org/Documents/HRBodies/CERD/EarlyWarning/Letters/RussianFederation15May2015.pdf), and Letter of the Chair of the Committee on the Elimination of Racial Discrimination to the Permanent Representative of Russian Federation to the United Nations Office, Ref. CERD/88th/EWUAP/GH/MJA/ks, 26 January 2016 (available at https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/RUS/INT_CERD_ALE_RUS_7906_E.pdf), on the indigenous Shor people in Myski municipal district, Kemerevo Oblast. See in this vein CR 2017/2, p. 76, para. 37 (Forteau).

339. The mere reading of Ukraine's Memorial confirms the implausible nature of Ukraine's claims. The way Ukraine itself articulates and evidences its claims (B) shows that they do not fall within the scope of CERD (A).

A. THE SCOPE OF CERD

340. The object and purpose of CERD, which is relevant to delimit the legal scope of its provisions for the purpose of jurisdiction *ratione materiae*,[427] shows that it is focused on racial discrimination, as confirmed by the very title of the Convention. CERD does not protect human rights in general as such, in and by themselves. Its object and purpose is specifically to prevent and prohibit racial discrimination in the enjoyment of human rights, above all apartheid, segregation and similar regimes.[428]

341. For a claim to fall within the ambit of CERD, it is required, according to Article 1(1) of the Convention, to establish the existence of a: (i) "distinction, exclusion, restriction or preference", (ii) "based on race, colour, descent, or national or ethnic origin", (iii) "which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms."

342. According to well-settled case law, "discrimination means treating differently, without an objective and reasonable justification, persons in similar

[427] See *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, *Preliminary Objections, Judgment of 6 June 2018*, para. 95.

[428] See for instance M. Banton, *International Action against Racial Discrimination*, Clarendon Press, 1996, p. 28: "Revulsion from apartheid was possibly the main motive force behind the adoption in 1965 of ICERD". See also *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures, Order of 23 July 2018*, Dissenting Opinion of Judge Salam, para. 3(b).

situations."[429] To that extent, it rests on comparisons between persons in similar situations in order to determine to what extent one person or group of persons suffers an unjustifiable difference of treatment.[430] This, in particular, is the reason why reliable statistical data is important in the work and practice of the CERD Committee.[431] The CERD Committee considers in particular in General Recommendation XIV on Article 1(1) that "[i]n seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic ground".[432]

343. Racial discrimination under CERD relates to discrimination based on certain prohibited grounds only, as listed in the Convention. According to Article 1 of CERD, "racial discrimination" means "any distinction, exclusion, restriction or preference *based on race, colour, descent, or national or ethnic origin*." Since CERD only applies to *racial* discrimination, as specifically defined, it thus excludes other forms of discrimination, for instance discrimination based on nationality (citizenship),[433] religion,[434] or political

[429] See for instance, *mutatis mutandis,* ECtHR, Grand Chamber, *Case of Andrejeva v. Latvia*, Application No. 55707/00, Judgment, 18 February 2009, para. 81. CERD Committee practice is convergent with this approach: *Stephen Hagan v. Australia*, Communication No. 26/2002, Opinion of 20 March 2003, UN Doc. CERD/C/62/D/26/2002, 14 April 2003, para. 4.11: "While accepting that the petitioner subjectively felt offended, the Committee should apply an objective test similar to that of the Federal Court in finding that there was no suggestion that the trustees were attempting to justify, promote or incite racial discrimination, contrary to article 4 of the Convention" (available at http://undocs.org/CERD/C/62/D/26/2002); *Emir Sefic v. Denmark*, Communication No. 32/2003, Opinion of 7 March 2005, UN Doc. CERD/C/66/D/32/2003, 10 March 2005, para. 7.2 (referring to "reasonable and objective grounds" for a given requirement), available at http://undocs.org/CERD/C/66/D/32/2003.

[430] See L. Hennebel, H. Tigroudja, *Traité de droit international des droits de l'homme,* Pedone, 2016, pp. 760-761.

[431] See L.-A. Sicilianos, "L'actualité et les potentialités de la Convention sur l'élimination de la discrimination raciale", *Revue trimestrielle des droits de l'homme,* Vol. 2005(61), 2005, p. 873.

[432] CERD Committee, General Recommendation XIV on Article 1(1), para. 2 (Annex 788 to Memorial).

[433] See above, paras. 324-326.

views.[435] The fact that discrimination must be based on racial grounds as defined in Article 1(1) to fall within the scope of the Convention constitutes an important difference with provisions such as Article 26 of the International Covenant on Civil and Political Rights or Article 14 of the European Convention of Human Rights, which are all-encompassing provisions prohibiting any kind of discrimination, not only racial discrimination. To assess whether or not a given claim falls within the specific scope of CERD, the nature of the alleged discrimination (the fact that it is based on racial grounds) is thus decisive.

344. As the CERD Committee put it, for a claim to be "admissible *ratione materiae*",[436] it must "target a national or ethnic group as such".[437] In General Recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system (2005), the CERD Committee stressed for instance that racial discrimination results from differences of treatment which are solely based on racial motives.[438]

---

[434] See in particular E. Schwelb, "The International Convention on the Elimination of All Forms of Racial Discrimination", *International and Comparative Law Quarterly*, Vol. 15, 1966, p. 1002: contrary to other human rights conventions "The 1965 Convention, on the other hand, deals only with 'racial discrimination'. Discrimination on the ground of religion has […] been reserved for a separate set of instruments" (see, making the same point, N. Lerner, *The UN Convention on the Elimination of All Forms of Racial Discrimination,* Brill/Nijhoff, 2015, p. 4). See also above, paras. 332-333.

[435] See above, paras. 314-316.

[436] See CERD Committee, *A.W.R.A.P. v. Denmark,* Communication No. 37/2006, CERD/C/71/D/37/2006, 8 August 2007, para. 7 (Annex 799 to Memorial).

[437] *Ibid.,* para. 6.2 ("it remains that no specific national or ethnic groups were directly targeted as such").

[438] CERD Committee, General recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system (Annex 789 to Memorial). See para. 20 ("States parties should take the necessary steps to prevent questioning, arrests and searches which are in reality based *solely* on the physical appearance of a person, that person's colour or features or membership of a racial or ethnic group, or any profiling which exposes him or her to greater suspicion"); para. 26 a) ("the *mere* fact of belonging to a racial or ethnic group or one of the aforementioned groups is not a sufficient reason, de jure or de facto, to place a person in pretrial detention"); para. 34 ("States should ensure that the courts do not

B. UKRAINE'S CLAIMS DO NOT PLAUSIBLY FALL WITHIN PROTECTED RIGHTS UNDER CERD

345. In its Application and Memorial, Ukraine does not frame its claims and does not produce evidence sufficient to characterise them as plausible claims relating to protected rights under CERD.

346. First, whereas "*one must identify an appropriate comparator*",[439] Ukraine does not provide in its Application and Memorial comparisons between on the one hand Crimean Tatars or Ukrainians and, on the other hand, other persons in similar situations, as required to establish a difference of treatment for the purpose of demonstrating racial discrimination. In particular, Ukraine does not provide statistical data comparing the measures allegedly taken against Crimean Tatars or Ukrainians as compared to persons of other ethnic origin or other communities living on the peninsula and being in a similar situation. On a number of occasions in its Memorial, Ukraine makes statements regarding certain measures disproportionately affecting the said communities, without bringing any evidence to that effect.[440]

347. The only exception is the data on languages of education where a direct numeric comparison between languages is, however, not appropriate since the Russian language is the State language of the Russian Federation (the Ukrainian and Crimean Tatar being State languages of the Republic of Crimea), and the majority of the population of Crimea are and have always been Russian-speaking,

---

apply harsher punishments *solely* because of an accused person's membership of a specific racial or ethnic group"). See also, for instance, Committee on the Elimination of Racial Discrimination, *E.I.F. v. Netherlands*, Communication No. 15/1999, Opinion of 21 March 2001, UN Doc. CERD/C/58/D/15/1999, 17 April 2001, para. 6.2 (available at http://undocs.org/CERD/C/58/D/15/1999).

[439] I. Diaconu, *Racial Discrimination,* Eleven International Publishing, 2011, p. 33 (emphasis added).

[440] See for instance Memorial, paras. 391, 461, 466, 469, 596, 604, or 614.

including a significant number of Ukrainians, as recognised even by Ukraine.[441] Ukraine claims, however, that the Russian Federation ostensibly took measures to minimise instruction in Crimean Tatar and Ukrainian languages and "any reduction in formal requests for instruction in the Crimean Tatar and Ukrainian languages is the result of pressure on parents not to request such instruction in the first place."[442] At the same time Ukraine notes that the "*number* of students receiving education in Crimean Tatar schools has remained relatively steady".[443] What Ukraine fails to mention is that, even according to sources it relies on, the number of students who receive education in Crimean Tatar has increased by 3,5%, and the number of students who study Crimean Tatar has increased by 12%.[444] This data shows that any decrease in the number of students receiving education in Ukrainian is not due to alleged measures taken by Russia against Crimean Tatars and Ukrainians (otherwise both communities would have been affected), but, as recognised by Ukraine, is due to the fact that Crimean Ukrainians are Russian-speaking in their majority and therefore many of them choose this language in order to use newly opened opportunities to continue their education in Russia. Thus, it is not possible in this particular case to establish on the basis of these statistics that certain measures allegedly taken by the authorities have disproportionately affected a particular community.

348. In the course of the proceedings on provisional measures, Russia had presented evidence, including statistical, that establish the absence of any differential treatment in Crimea between Crimean Tatars or Ukrainians and other persons in similar situations. For instance, the evidence submitted by Russia

[441] Memorial, para. 360.
[442] Memorial, para. 628.
[443] Memorial, para. 544 (emphasis in the original).
[444] OHCHR, "Report on the Human Rights Situation in Ukraine 16 November 2017–15 February 2018", para. 127 and ref. 217 at p. 22 (Annex 779 to Memorial).

established that "in criminal matters, people of Tatar or Ukrainian origin were not subject to discriminatory treatment compared to other inhabitants of Crimea."[445] The statistical data regarding the ethnic origin of missing persons and such persons whose whereabouts were established also does not suggest any discrimination.[446] Similarly, regarding the study of and education in Ukrainian and Crimean Tatar languages, Russia pointed to an OHCHR report and statistical data to establish that the evolution of the number of pupils had no relation with any differential treatment, contrary to what Ukraine alleged.[447] In its Memorial, Ukraine maintains that Crimean Tatars and Ukrainians are "disproportionately affected" by alleged measures taken by Russia[448] or that "no other ethnic group in Crimea has faced similar repression,"[449] but beyond these abstract assertions, it does not bring out any concrete element to rebut the data submitted by Russia that establish the absence of any differential treatment on these issues.

349. Second, the evidence produced by Ukraine even taken at face value shows that the measures allegedly taken by Russia cannot be characterised as being measures "based on race, colour, descent, or national or ethnic origin." Rather, these alleged measures are characterised *by Ukraine's own written pleadings* as being related to the change of status of Crimea, not to racial issues.

350. To support its claims of racial discrimination under CERD, Ukraine limits itself to vague and sweeping conjectures to "suggest that [the motives of the measures are in fact] a pretext for discrimination",[450] or that "the apparent goal"

[445] CR 2017/2, p. 68, para. 18 (Forteau) (translation).
[446] CR 2017/ 2, pp. 59-60, para. 30 (Lukiyantsev).
[447] CR 2017/4, pp. 61-62, para. 49(viii) (Forteau) (translation).
[448] See Memorial, para. 627.
[449] See *ibid.*, para. 606.
[450] See *ibid.*, para. 449.

"has been erasing non-Russian cultures from Ukraine's history".[451] These speculative allegations are *not* reflected in the documents that Ukraine annexed to its Memorial, as demonstrated below.

351. Russia wishes to make clear in this regard that it plainly rejects the allegations made in Ukraine's Application and Memorial. But even if these allegations were true (*quod non*), the relevant point for the purpose of jurisdiction *ratione materiae* is that *on their own terms,* Ukraine's claims and allegations do not qualify as instances of racial discrimination under CERD. They relate instead to alleged political opposition, by a number of persons of different origins, to the change of status of Crimea.

352. In the Memorial, Ukraine presents its claims as related to measures motivated by political opposition to the change of status of Crimea, not by racial discrimination.[452] For instance, Ukraine asserts that:

a. "Mykhailo Vdovchenko, for example, was abducted just days before the referendum, *after posting pro-Ukrainian messages on Facebook and participating in peaceful pro-Ukrainian demonstrations in Crimea*";[453]

b. "Mr Umerov remained a strong voice for Crimean Tatars after Russia's military intervention, giving numerous interviews in which he forthrightly described the occupation and purported annexation of the peninsula by Russia as a violation of international law. *Given his outspokenness on this issue of evident sensibility to the Russian*

[451] See *ibid.*, para. 534. See also paras. 523-526.
[452] See *ibid.*, paras. 596-597.
[453] See *ibid.*, para. 406 (emphasis added).

occupation, it is perhaps unsurprising that he became a target of their repressive acts";[454]

c. "the police detained three participants *for waving a Ukrainian flag inscribed with the (accurate) statement that Crimea remains part of Ukraine*";[455]

d. "On 13 March 2015, the Russian occupation authorities charged Center Journalist Anna Andriyevska with 'anti-state activities' *based on an article she had authored stating that Crimea was part of Ukraine*";[456]

e. "the *apparent purpose and certain effect* of these heinous offenses against Crimean Tatars and Ukrainians was *to intimidate and silence inconvenient critics and to warn others in those communities not to resist the Russian takeover*";[457]

f. The purpose of the alleged measures was "to silence media outlets and media representatives *that adopt a pro-Ukrainian stance*";[458]

g. The measures taken by Russia are "designed to shut down opposition to the annexation."[459]

353. This is also clear from the "evidence" put forward by Ukraine. To take a few examples, Ukraine's case consists of claiming that:

[454] See *ibid.*, para. 437 (emphasis added).
[455] See *ibid.*, para. 499 (emphasis added).
[456] See *ibid.*, para. 519 (emphasis added).
[457] See *ibid.*, para. 392, (emphasis added).
[458] See *ibid.*, para. 518 (emphasis added).
[459] See *ibid.*, para. 595.

a. "*Most affected* by these restrictions were *individuals opposed to the March 2014 referendum or criticizing Russian Federation control of Crimea*, *such as* journalists, bloggers, supporters of the Mejlis, pro-Ukrainian and Maidan activists, as well as persons with no declared political affiliation but advocating strict compliance with the tenets of Islam, who are often accused of belonging to extremist groups banned in the Russian Federation, such as Hizb ut-Tahri";[460]

b. "Instances of intimidation of defence lawyers representing clients *opposed to the presence of the Russian Federation in Crimea* have also been reported";[461]

c. "FSB and the Crimean police have also been accused of violating the right to physical and mental integrity of *persons holding dissenting views*, in particular Crimean Tatars and ethnic Ukrainians";[462]

d. "Unlawful limitations to freedom of movement were also imposed against *political opponents and individuals criticizing the human rights situation on the peninsula* who were prohibited entry into the Russian Federation, consequently banning their access to Crimea";[463]

e. "On 7 July 2017, a court in Crimea convicted a Crimean Tatar man from Sevastopol to one year and three months of prison for "publicly inciting hatred or enmity". During an eight months period in 2016, he

[460] OHCHR, "Situation of Human Rights in the Temporarily Occupied Autonomous Republic of Crimea and the City of Sevastopol (Ukraine)", 25 September 2017 (Annex 759 to Memorial), para. 9; see also Witness Statement of Andriy Shchekun (Annex 13 to Memorial), paras. 13-17 (emphasis added).
[461] OHCHR Report, September 2017, para. 79 (Annex 759 to Memorial) (emphasis added).
[462] *Ibid.*, para. 90 (emphasis added).
[463] *Ibid.*, para. 128 (emphasis added).

had posted statements on Facebook *mentioning the "oppression" of the Crimean Tatars, referring to Crimea being "occupied" and "annexed", and quoting a Crimean Tatar leader who had organized the food and trade blockade of Crimea in September 2015*";[464]

f. "From the first days following the entry of Russian troops into Crimea and Russia's declaration of the Crimean Peninsula being part of its territory, *the Mejlis of the Crimean Tatar people has stated that it does not recognize the occupation, and appealed to various international organizations, including the UN, with a request to take measures and prevent the illegal annexation of their homeland*. […] *Since that time, Russia and the occupation authorities have begun to view the Mejlis as its main enemy in Crimea*";[465]

g. "The situation in the Autonomous Republic of Crimea continued to be characterized by human rights violations *targeting mostly those who opposed the unlawful 'referendum' in March 2014 and the arrival of 'authorities' applying the laws of the Russian Federation*";[466]

h. "Pressure and intimidation against all *those who oppose the de facto authorities or officially sanctioned views about events in Crimea*

[464] *Ibid.*, para. 160 (emphasis added). See also Interview of Refat Chubarov with Channel 5 of Ukrainian Television on 1 April 2015, quoted in Annex 913 to Memorial, Case No. 2A-3/2016, Decision of 26 April 2016 of the Supreme Court of the Republic of Crimea concerning the appeal of the ban of the Mejlis, p. 2; on the blockade, see also OHCHR, "Report on the Human Rights Situation in Ukraine 16 August to 15 November 2015" (Annex 312 to Memorial), paras. 143 ff.

[465] Witness Statement of Mustafa Dzhemiliev (Annex 16 to Memorial), para. 28 (emphasis added). See also OHCHR, "Accountability for Killings in Ukraine from January 2014 to May 2016", pp. 26-27, para. 2 (Annex 49 to Memorial).

[466] OHCHR, "Report on the human rights situation in Ukraine 16 February to 15 May 2015", para. 156 (Annex 310 to Memorial) (emphasis added).

continued. They usually take the form of arbitrary arrests, house searches, abusive questioning as suspects or witnesses, the imposition of fines and job dismissals. They also frequently involve the vague and unsubstantiated accusation of promoting extremism and intolerance";[467]

i. "Crimean residents continued to be pressured, intimidated and sanctioned *for expressing views challenging Crimea's status as a part of the Russian Federation or expressing attachment to Ukraine publicly or via social media networks*";[468]

j. "In Russia-occupied Crimea, Russia continues to violate the rights *of those who oppose the occupation*, *including* members of religious and ethnic minorities";[469]

k. "The Russian authorities have outlawed the Mejlis after deeming it extremist, part of what rights groups and Western governments say is a persistent campaign of oppression targeting Crimean Tatars *and other* citizens *who opposed Moscow's takeover*"; "The US State Department on September 25 expressed concern over the conviction of Semena, who was handed a 2 1/2-year suspended sentence, saying

[467] *Ibid*., para. 161 (emphasis added).
[468] OHCHR, "Report on the human rights situation in Ukraine 16 August to 15 November 2015" (Annex 312 to Memorial), para. 152 (emphasis added).
[469] United States Mission to the OSCE, "Ongoing Violations of International Law and Defiance of OSCE Principles and Commitments by the Russian Federation in Ukraine", PC.DEL/696/16, 26 May 2016 (Annex 813 to Memorial), last page, last paragraph (emphasis added). See also Kyiv Post, "Tanya Cooper and Yulia Gorbunova: Russia is Violating Crimeans' Rights", 3 May 2017 (Annex 1065 to Memorial).

it was *'based on the fact that Mr Semena had criticized Russia's occupation and attempted annexation of Crimea* in his writing'";[470]

l. "As for me personally, I also decided to speak the truth publicly about the situation. Over the course of the following months I voluntarily made myself available to journalists, gave many interviews, and also made numerous statements, including on Facebook. In my statements I always pointed out that *Russia's occupation of the Crimea was illegal and that from a legal perspective Crimea continued to remain a sovereign territory of Ukraine.* […] I think that my willingness to speak openly on these issues together with my profile as the Administrative Head of Bakhchisaray district administration and member of the Mejlis and Crimean parliament brought attention to me from the Russian occupation authorities";[471]

m. "One sign of the pressure, which was caused by the Russian authorities on the television stations and other mass media outlets, was the demand sent to ATR television station to replace the Ukrainian flag on its logo with the Russian one. […] ATR television station did not yield to pressure of the Russian authorities and continued broadcasting with the Ukrainian flag on its logo instead. […] As the result of the denial of ATR television station to support the coming occupancy of Crimea, Russian authorities restricted its

[470] RFE/RL, "Russian Court Convicts Crimean Tatar Leader Umerov of 'Separatism'", 27 September 2017 (Annex 1069 to Memorial), p. 4 (emphasis added). See also RFE/RL, "Crimean Tatar Leaders 'Freed,' Fly To Turkey", 26 October 2017 (Annex 1070 to Memorial), p. 3.

[471] Witness Statement of Ilmi Umerov (Annex 20 to Memorial), paras. 7, 15 and 23 (emphasis added).

access to these mass media outlets to the Crimean events highlighted by the media. As of March 2014, participation in such events was provided exclusively to those mass media outlets, which highlighted news in the way approved by Russian occupying authorities. […] I was later informed that I was under guard with due reference to the denial of ATR television station to cooperate with the Russian occupying authorities. […] From my conversation with Marina Yefremova, I understood that the occupational authorities had refused to reregister the ATR television channel and other mass media of the Holding Company *for political reasons when I refused to meet the demands of the Russian authorities to bring out editorial content in line with the wishes of the Russian authorities*".[472]

[472] Witness Statement of Lenur Islyamov (Annex 18 to Memorial), paras. 10-12, 16 and 23 (emphasis added). See also Andrii Ianitski, "Crimean Tatar TV Back on Air", Open Democracy, 30 June 2015 (Annex 1058 to Memorial). See also, for other similar examples: OHCHR, "Situation of Human Rights in the Temporarily Occupied Autonomous Republic of Crimea and the City of Sevastopol (Ukraine)", 22 February 2014 to 12 September 2017 (Annex 759 to Memorial), paras. 97, 105, 149, 182, 183, or 221; Witness Statement of Eskender Bariiev (Annex 15 to Memorial), paras. 27 and 38; Witness Statement of Mustafa Dzhemiliev (Annex 16 to Memorial), paras. 34 and 36; Witness Statement of Akhtem Chiygoz, 4 June 2018 (Annex 19 to Memorial), para. 4; OHCHR, "Report on the Human Rights Situation in Ukraine", 15 December 2014 (Annex 304 to Memorial), para. 80; Human Rights Watch, "Crimea: Persecution of Crimean Tatars Intensifies", 14 November 2017 (Annex 964 to Memorial). A number of other documents submitted by Ukraine have no relation with racial discrimination. See, e.g., ABC News, "Crimean parliament votes to become part of Russian Federation, referendum to be held in 10 Days", 6 March 2014 (Annex 1038 to Memorial); Paul Roderick Gregory, 'Putin's Destabilization of Ukraine Overshadows Today's Crimean Vote", Forbes, 16 March 2014 (Annex 1043 to Memorial); Interfax, "Head of Crimea Acknowledges Disappearance of Crimean Tatars on Peninsula", 16 October 2014 (Annex 1048 to Memorial); DW, "Putin reveals details of decision to annex Crimea", 9 March 2015 (Annex 1051 to Memorial); Thomas J. Reese & Daniel I. Mark, "Losing Their Religion in Crimea", Foreign Affairs, 15 April 2015 (Annex 1054 to Memorial); "Mejlis of Crimean Tatars were not allowed to take action in Simferopol to Human Rights Day", 11 December 2015 (Annex 1061 to Memorial); RFE/RL, "Punitive Medicine? Crimean Tatars Shaken by Leader's Confinement to Mental Asylum", 24 August 2016 (Annex 1063 to Memorial); RFE/RL, "Crimean Tatar Leader Umerov Goes On Trial On Separatism Charge", 7 June 2017 (Annex 1066 to Memorial).

354. In an attempt to circumvent the absence of any plausible claims regarding the existence of a "systematic campaign" of "erasure" of Crimean Tatar and Ukrainian communities "based on race", Ukraine contends in the Memorial that the definition of racial discrimination "does not require that discrimination be intentional but instead *reaches all conduct with a discriminatory 'purpose or effect'*."[473] According to Ukraine, both "direct discrimination, or *de jure* discrimination" and "indirect discrimination, or *de facto* discrimination" are covered by CERD.[474] Ukraine's assertion however misses the point.

355. First, even if CERD were to be interpreted as encompassing indirect discrimination as widely construed by Ukraine, in any event, Ukraine must establish that there exists a difference of treatment between persons of different ethnic origins in a similar situation and that the said difference of treatment is "based on race". To fall under CERD, the effect of the alleged distinction, exclusion, restriction or preference must be a disparate impact on an ethnic group as an ethnic group and no other justifiable ground should be available. It is certainly not sufficient, for a claim to be based on CERD, to just merely claim that members of an ethnic group are affected by alleged measures.[475]

356. Second and in any case, Ukraine's case is *not* articulated in the Application and the Memorial as a case of indirect discrimination. As mentioned above, Ukraine formulates its case on the asserted basis that Russia is responsible for a "*policy* of racial discrimination and cultural erasure *directed against* those

[473] Memorial, para. 566 (emphasis added). See also Expert Report of Professor Sandra Fredman (Annex 22 to Memorial), para. 4 (*inter alia*).
[474] Memorial, para. 566.
[475] Committee on the Elimination of Racial Discrimination, *A.W.R.A.P. v. Denmark*, Communication No. 37/2006, Opinion, UN Doc. CERD/C/71/D/37/2006, 8 August 2007, para. 7 (Annex 799 to Memorial). See also General Recommendation XIV on Article 1(1), para. 2 (Annex 788 to Memorial).

ethnic communities", of "an *open campaign* of discrimination and cultural erasure *directed against* the Crimean Tatars and Ukrainian communities", of "*systematic* breaches of its obligations under" CERD, and of "a systematic *policy of racial discrimination* in a territory it illegally occupies."[476] In Ukraine's own words, "*[t]he desired end result is as transparent* as it is abhorrent to the multi-ethnic heritage of Crimea: *the cultural erasure* of the Crimean Tatar and Ukrainian communities on the peninsula."[477] At its core, Ukraine's case is thus a case of direct discrimination, that is to say, to quote Ukraine's Memorial, a case of "intentional or purposeful discrimination."[478]

357. Intentional or purposeful action or omission is a key component of the alleged violations of specific Articles of CERD that Ukraine articulates in its Memorial, such as the alleged incitement to racial discrimination as a violation of Article 4,[479] the alleged judicial persecution of Crimean Tatar leadership, organisations and individuals as a violation of the principle of equal treatment before tribunals contained in Article 5(a),[480] alleged enforced disappearances of Crimean Tatar and Ukrainian activists as a violation of the right to security of person and protection against violence or bodily harm contained in Article 5(b),[481] alleged violation of the right to peaceful assembly and association contained in Article 5(d)(ix),[482] or alleged violation of the right to participate in cultural activities contained in Article 5(e)(vi).[483]

[476] See above, para. 335 and fns. 416-417; Memorial, para. 3.
[477] Memorial, para. 346 (emphasis added).
[478] *Ibid.*, para. 566.
[479] *Ibid.*, paras. 600-603.
[480] *Ibid.*, paras. 605-608. Similarly, see also para. 634 relating to effective protection and remedies under Article 6.
[481] *Ibid.*, paras. 609-610.
[482] *Ibid.*, paras. 621-622.
[483] *Ibid.*, paras. 629-630.

358. Such accusations presuppose the existence of a specific intent or purpose, that Ukraine has the burden of proof to establish. There is no plausible evidence of the requisite intent or purpose in the present case. As shown above, the evidence produced by Ukraine in the Memorial does not even characterise the alleged measures as being based on race and, *a fortiori,* as measures which "desired end result is […] the cultural erasure of the Crimean Tatar and Ukrainian communities on the peninsula."

359. In light of the above and to conclude, the Court does not have jurisdiction *ratione materiae* in the present case. The real issue in the present case is the status of Crimea, which is not a CERD-related claim. In addition, the Court does not have jurisdiction *ratione materiae,* since Ukraine's case does not concern rights or obligations under CERD, such as claims related to alleged violations of IHL, differences of treatment on the basis of citizenship, education in native language, representative rights of national minorities, and religious discrimination. In any event, Ukraine's case that Russia is committing a systematic campaign of racial discrimination against, and a campaign of cultural erasure of, Crimean Tatars and Ukrainians is not plausible. Ukraine itself does not frame and substantiate its case in its Application and Memorial as a case of racial discrimination.

CHAPTER IX
FAILURE TO SATISFY THE PRECONDITIONS FOR THE SEISIN OF THE COURT UNDER ARTICLE 22 OF CERD

360. Ukraine invokes Article 22 of CERD as the only basis for the jurisdiction of the Court regarding its CERD related claims.[484] According to that provision:

> "Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement."

361. It is firmly established that Article 22 sets out "preconditions to be fulfilled before the seisin of the Court":[485] "along with the precondition of negotiation, Article 22 includes another precondition, namely the use of 'the procedures expressly provided for in the Convention'".[486] These two essential procedural prerequisites to the Court's jurisdiction are cumulative (in the sense that they must both have proved unsuccessful to settle the dispute before recourse may be had to the Court) and are fundamental to ascertain the existence or not of a dispute falling within the Court's jurisdiction (Section I).

362. Without in any way accepting Ukraine's allegations about the existence of a dispute under CERD, it is important to note that in bypassing this carefully balanced mechanism and directly seising the Court, Ukraine has misinterpreted both the letter and the spirit of the Convention and has hindered dispute

[484] Application, para. 22; Memorial, para. 642.
[485] *Georgia v. Russian Federation*, *Preliminary objections,* p. 128, para. 141; Order of 19 April 2017, p. 125, para. 59; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures, Order of 23 July 2018*, para. 29.
[486] Order of 19 April 2017, p. 121, para. 46.

resolution via diplomacy as well as the possibility of finding a solution through the specific mechanism created by CERD (Section II).

Section I
The preconditions for the seisin of the Court under Article 22

363. The two preconditions provided for in Article 22 of CERD have two central features:

a. they are prerequisites to the seisin of the Court, in that the Court has no jurisdiction if their failure to settle the dispute is not established; and

b. they are cumulative.

A. THE CONDITIONS PROVIDED FOR IN ARTICLE 22 OF CERD ARE PRECONDITIONS TO THE SEISIN OF THE COURT

364. The precondition of negotiation has been addressed in Chapter VI above.[487]

365. While the demand for prior negotiation is usual in the international practice of peaceful settlement of disputes, CERD is the first and only universal human rights treaty to also provide for a mandatory inter-State complaint procedure[488] which revolves around conciliation and constitutes a prerequisite to judicial settlement.[489]

[487] See above, paras. 230-238 which are equally applicable to the precondition of negotiation under Article 22 of CERD.
[488] For a comparison with other universal human rights treaties, see below, Section I.B.3
[489] Conciliation is only also envisaged by Article 42 of ICCPR and Article 21 of CAT and the procedure remains optional.

366. Articles 11, 12 and 13 spell out an elaborate procedure which details prove that it was carefully considered and meant to be effectively followed by the Parties in the event of a dispute. They also guarantee its efficiency by imposing strict time-limits.

367. The procedure which must be followed before the Court can be seised may be summarised as follows: a State party alleging that another State party does not comply with its obligations under the Convention must address a communication to the latter through the CERD Committee;[490] then, the receiving State is given three months to submit written statements;[491] if, within six months, the matter is not adjusted to the satisfaction of both parties, it is to be referred once more to the Committee[492] which will ascertain that all domestic remedies have been exhausted[493] and all relevant information is available;[494] if this is the case, an *ad hoc* Conciliation Commission is appointed[495] to make

[490] Article 11(1), two first sentences: "If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may bring the matter to the attention of the Committee. The Committee shall then transmit the communication to the State Party concerned".

[491] Article 11(1), third sentence: "Within three months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State".

[492] Article 11(2): "If the matter is not adjusted to the satisfaction of both parties, either by bilateral negotiations or by any other procedure open to them, within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter again to the Committee by notifying the Committee and also the other State".

[493] Article 11(3): "The Committee shall deal with a matter referred to it in accordance with paragraph 2 of this article after it has ascertained that all available domestic remedies have been invoked and exhausted in the case, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged."

[494] Article 11(4): "In any matter referred to it, the Committee may call upon the States Parties concerned to supply any other relevant information."

[495] Article 12(1)(a): "After the Committee has obtained and collated all the information it deems necessary, the Chairman shall appoint an *ad hoc* Conciliation Commission (hereinafter referred to as the Commission) comprising five persons who may or may not be members of the Committee".

recommendations for the amicable solution of the dispute;[496] the parties then have three months to accept them or not.[497] It is only if and when these previous stages have proved fruitless that the dispute can be referred to the Court.[498]

368. The general philosophy of the mechanism provided for by the Convention is patently of a conciliatory nature. Conciliation has three basic functions:

a. "to elucidate the questions in dispute",

b. to investigate the facts and "collect […] all necessary information", and

c. "to endeavour to bring the parties to an agreement" by suggesting mutually acceptable terms of settlement.[499]

369. As pointed out by the Conciliation Commission between Timor-Leste and Australia on the Timor Sea, "[i]n such proceedings, a neutral commission is established to hear the parties, examine their claims and objections, make proposals to the parties, and otherwise assist the parties in reaching an amicable settlement. […] Procedurally, conciliation seeks to combine the function of a

[496] Article 13(1): "When the Commission has fully considered the matter, it shall prepare and submit to the Chairman of the Committee a report embodying its findings on all questions of fact relevant to the issue between the parties and containing such recommendations as it may think proper for the amicable solution of the dispute".

[497] Article 13(2): "The Chairman of the Committee shall communicate the report of the Commission to each of the States parties to the dispute. These States shall, within three months, inform the Chairman of the Committee whether or not they accept the recommendations contained in the report of the Commission".

[498] Article 22, quoted above, para. 360.

[499] See Article 15 of both the Revised General Act for the Pacific Settlement of International Disputes, 28 April 1949, *UNTS*, Vol. 71, p. 101, and the European Convention for the Peaceful Settlement of Disputes, 24 April 1957, *UNTS*, Vol. 320, p. 243.

mediator with the more active and objective role of a commission of inquiry."[500] It cannot be reduced to mere negotiations.[501]

370. The emphasis upon "bilateral negotiations" in Article 11(2) of CERD, as well as "good offices" and "amicable solution" in Article 12(1)(a), indicates that the inter-State procedure was indeed designed in such a way as to facilitate a mutually acceptable settlement, with the assistance of a third party. As confirmed by the *travaux préparatoires*, States broadly supported the creation of a monitoring and conciliation body in order to ensure the effectiveness of the Convention,[502] while preserving some flexibility and alleviating the reluctance to commit to compulsory settlement of disputes by the Court.[503] The primary concern of the measures of implementation is that "disputes should be settled in a spirit of mutual understanding".[504]

371. Conciliation under CERD has an additional – and crucial – substantive component: by referring to "an amicable solution of the matter on the basis of

---

[500] PCA, *The Compulsory Conciliation Commission between Timor-Leste and Australia on the Timor Sea*, PCA Case No. 2016-10, Commission report and Recommendations, 9 May 2018, paras. 51-52.

[501] See further below, paras. 384-385.

[502] See, e.g., UN Economic and Social Council, Commission on Human Rights, Report of the 20th session, E/CN.4/874, 13 March 1964, para. 285 (available at http://undocs.org/e/cn.4/874); UN General Assembly, 20th session, *Official Records*, Third Committee, 1344th meeting, UN Doc. A/C.3/SR.1344, 16 November 1965, Mr. Garcia (Philippines), p. 315, para. 27 (available at http://undocs.org/A/C.3/SR.1344); *ibid*., Mr. Lamptey (Ghana), p. 316, para. 38; 1345th meeting, UN Doc. A/C.3/SR.1345, 17 November 1965, Mrs. Ramaholimihaso (Madagascar), p. 326, para. 34 (http://undocs.org/A/C.3/SR.1345); 1363rd meeting, UN Doc. A/C.3/SR.1363, 3 December 1965, Lady Gaitskell (United Kingdom), p. 431, para. 3 (available at http://undocs.org/A/C.3/SR.1363).

[503] See further below, para. 374 and Sub-section I.B.2.

[504] UN General Assembly, 20th session, *Official Records*, Third Committee, 1349th meeting, UN Doc. A/C.3/SR.1349, 19 November 1965, Mr Lamptey (Ghana), p. 348, para. 29, available at http://undocs.org/A/C.3/SR.1349. Most of the *travaux préparatoires* are available on http://www.un.org/en/documents/index.html; those not readily available are reproduced as annexes in Volume 2.

respect for this Convention", Article 12(1)(a) makes it clear that the purpose of the procedure is not simply to achieve an amicable settlement, but to ensure that such settlement is in line with the Convention – a result which is not guaranteed by a negotiated solution.

372. Another aspect of the procedure – which would be of practical assistance to the Court if it is later seised – is that the Committee, and then a Conciliation Commission, establish the facts by, *inter alia*, asking the Parties to supply any relevant information that might be required.[505] This complements the Committee's knowledge of the measures adopted by States Parties in application of the Convention as a result of the examination process of the periodic reports submitted by them under Article 9 of CERD, and its monitoring, which extends to ensuring that information missing is delivered, verifying that questions initially incompletely answered are responded to fully and assessing whether new developments in the State concerned give rise to a need for additional information.

B. THE PRECONDITIONS UNDER ARTICLE 22 OF CERD ARE CUMULATIVE

373. The Court has not until now taken an explicit position on whether the two preconditions are cumulative (i.e. whether the applicant must show that both means of settlement have failed) or alternative (i.e. whether the failure of good faith negotiations is sufficient).[506] In the *Georgia v. Russian Federation* case, the Court did, however, note that at the time CERD was being elaborated, "the idea of submitting to the compulsory settlement of disputes by the Court was not

[505] Articles 11(4) and 12(8) of CERD.

[506] *Georgia v. Russian Federation*, *Preliminary objections,* p. 140, para. 183; Order of 19 April 2017, p. 125-126, para. 60; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures, Order of 23 July 2018*, para. 39.

readily acceptable to a number of States", which explains why "*additional limitations* to resort to judicial settlement in the form of prior negotiations *and* other settlement procedures without fixed time-limits were provided for with a view to facilitating wider acceptance of CERD by States".[507] Applying the rules of interpretation reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, Russia thus reiterates its position[508] that the two preconditions in Article 22 are cumulative.

374. Ukraine's reading of Article 22 of CERD is out of keeping with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose, and such reading deprives the provision of any *effet utile* (1). The cumulative character of the preconditions is confirmed by the *travaux préparatoires* (2) and by a comparison with other universal human rights treaties providing for monitoring mechanisms (3).

1. Textual interpretation

375. Article 22 establishes under which circumstances a dispute under CERD can be referred to the Court: it must be a dispute that could not previously be settled by the Parties. At the same time, Article 22 also establishes two specific means available to the Parties to attempt to settle the dispute: "negotiation" and "the procedures expressly provided for in [the] Convention". Negotiation naturally comes first in order since it is the ordinary way of settling disputes in international law.[509] Should this procedure fail, the Convention opens another

[507] *Georgia v. Russian Federation*, *Preliminary objections,* p. 129, para. 147 (emphasis added).
[508] *Georgia v. Russian Federation*, Preliminary Objections of the Russian Federation, paras. 4.57-4.80; CR 2010/8, pp. 53-60 (Pellet); CR 2010/10, pp. 23-38 (Pellet).
[509] See notably *Free Zones of Upper Savoy and the District of Gex, Order of 19 August 1929, P.C.I.J., Series A, No. 22*, p. 13; *North Sea Continental Shelf (Federal Republic of Germany/Denmark), Judgment, I.C.J. Reports 1969*, p. 47, para. 87, quoted above, para. 230.

possibility: the recourse to the CERD-specific procedures, particularly those provided for in Articles 11 to 13.

376. Here, the conjunction "or" does not express alternatives, as Ukraine contends,[510] but cumulative conditions. "Or" cannot simply be opposed to "and"[511] since *both* can actually, *in ordinary as well as in legal language*, have an alternative or a cumulative meaning.[512] In this regard, it is to be noted that the Court has consistently rejected a supposed literal interpretation when it proves meaningless and when the contextual interpretation suggests otherwise.

377. In this respect, it is to be noted that the Grand Chamber of the Court of Justice of the European Communities pointed out in a Judgment of 10 July 2005 that the conjunction "or" "may, linguistically, have an alternative or a cumulative sense and must therefore be read in the context in which it is used".[513] Similarly, the Tribunal in *The South China Sea Arbitration* ruled that the word "or" in Article 121(3) of UNCLOS concerning the definition of "[r]ocks which cannot sustain human habitation *or* economic life of their own" which "shall have no

[510] Memorial, para. 649.

[511] For instance, the PCIJ underlined that "the word *et* [...] in both ordinary and legal language, may, according to circumstances, equally have an alternative or a cumulative meaning" (*Certain German Interests in Polish Upper Silesia, Preliminary Objections, Judgment of 25 August 1925, PCIJ, Series A, No. 6*, p. 14. See also, *Case concerning the interpretation of the air transport services agreement between the United States of America and Italy, signed at Rome on 6 February 1948*, Advisory Opinion, *RIAA*, Vol. XVI, 17 July 1965, pp. 94-95; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, pp. 179-180, paras. 108-111).

[512] See, e.g., *United States v. Fisk*, 70 U.S. (3 Wall.) 445, 447 (1865): "In the construction of statutes, it is the duty of the court to ascertain the clear intention of the legislature. In order to do this, courts are often compelled to construe 'or' as meaning 'and', and again 'and' as meaning 'or'".

[513] CJEC, *Commission of the European Communities v. French Republic*, Case No. C-304/02, Judgment, 12 July 2005, para. 83.

exclusive economic zone *or* continental shelf" "creates a [double] cumulative requirement".[514]

378. In the present case, the drafters had to use "or" to express the conjunctive since formally introducing an "and" in Article 22 would have rendered the phrase – which is expressed in the negative – grammatically absurd: settling the dispute "by negotiation [*and*] by the procedures expressly provided for in this Convention" simply makes no sense. If the dispute is already settled by negotiation, there is no more room for settlement by other procedures. What is meaningful, however, is to refer successively to both: if the negotiation fails, *then* recourse must be had to the CERD-specific procedures to settle the dispute.

379. The phrase in Article 22 must be read as implying successive steps: the Parties must have held negotiations in good faith (step 1). If negotiations fail, the Parties must have activated the inter-State complaint procedure with reference to the Committee and to its *ad hoc* Commission of conciliation (step 2). Only the failure of both these steps allows the Parties to then seise the Court (step 3).

380. This is confirmed by the *United Nations Handbook on the Peaceful Settlement of Disputes between States* which underlines that

> "the dispute settlement clauses of many multilateral treaties provide that disputes which cannot be settled by negotiation shall be submitted to another peaceful settlement procedure. Various patterns of *successive steps* can be found in practice […].
>
> (e) Negotiation; procedures provided by the treaty; resort to ICJ (art. 22 of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination)".[515]

---

[514] PCA, *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, PCA Case No. 2013-19, Award, 12 July 2016, para. 494.

381. Most recently, the ILC also interpreted the CERD Convention as requiring that the Committee be seised before the ICJ:

> "Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination requires the dispute to be submitted *first* to the Committee on the Elimination of Racial Discrimination, which in turn may place the matter before an *ad hoc* conciliation commission."[516]

382. Article 22 forms part of the implementation measures of CERD,[517] the purpose of which is to ensure the effectiveness of the rights and obligations imposed on States Parties with regard to the elimination of racial discrimination *primarily* by settling disputes in a spirit of mutual understanding and through amicable solutions.[518]

383. By interpreting Article 22 to mean that all that is needed is that the dispute has not been settled through negotiation, and by deducing from the failure of

---

[515] United Nations, *Handbook on the Peaceful Settlement of Disputes between States*, 1992, p. 22, para. 70, available at http://legal.un.org/cod/books/HandbookOnPSD.pdf (emphasis added). See also R. Mackenzie, C. Romano, Y. Shany, *Manual on International Courts and Tribunals*, 2nd ed., Oxford University Press, 2010, p. 435, which, after explaining the inter-State communications procedure before the CERD Committee, concludes: "[o]ngoing inter-State disputes may *then* be referred to the ICJ for judicial settlement" (emphasis added); M. Nowak, E. McArthur, *The United Nations Convention against Torture: A Commentary*, Oxford University Press, 2008, pp. 861-862 similarly underlines that "[a]ccording to [Article 22], any dispute between two or more States parties with respect to the interpretation or application of CERD, which is not settled by negotiation 'or by the procedures expressly provided for in this Convention', shall be referred to the ICJ. This explicit reference relates, above all, to the *mandatory inter-State communication procedure* regulated in Articles 11 to 13. [...] If any of the States parties concerned does not accept the amicable solution proposed by the Conciliation Commission, the dispute is not settled and this *State may refer the dispute to the ICJ* in accordance with Article 22 CERD" (emphasis in the original), see further *ibid*., p. 864.

[516] UN General Assembly, *Official Records, Supplement No. 10*, 72nd Session, *Report of the International Law Commission*: Sixty-ninth session (1 May-2 June and 3 July-4 August 2017), A/72/10, Draft articles on crimes against humanity adopted by the Commission on first reading, Commentary to Article 15 on the settlement of disputes, p. 117, fn. 585 (emphasis added).

[517] See further the next Sub-section 2 on the drafting history of CERD.

[518] See above, para. 371.

negotiation the futility of conciliation, a key component of this provision becomes devoid of any legal consequence, contrary to the "well-established principle in treaty interpretation" that "words must be given effect".[519] By referring to "[a]ny dispute [...] which is not settled [...] by the procedures expressly provided for in this Convention", Article 22 shows that sole reliance cannot be placed on the "more classic" dispute resolution mechanisms specified therein. Besides, the express reference to a failure to settle through these procedures suggests an affirmative duty to resort to them prior to the seisin of the Court. Their introduction into the text of Article 22 would otherwise be meaningless and no legal consequences would be drawn from them, contrary to the principle that words should be given appropriate effect.

384. Contrary to what Ukraine implies,[520] conciliation cannot be equated with mere bilateral negotiations; conciliation is a distinct form of dispute settlement as confirmed by the very wording of Article 33(1) of the UN Charter. This is also confirmed by several conventions other than CERD which also explicitly prescribe recourse to conciliation in the event of a failure of negotiation in relation with a dispute bearing upon their application or interpretation and before recourse to judicial settlement or arbitration can be envisaged.[521] The success of

---

[519] *Georgia v. Russian Federation*, *Preliminary objections,* p. 125, para. 133. See also *Free Zones of Upper Savoy and the District of Gex, Order of 19 August 1929, P.C.I.J., Series A, No. 22*, p. 13; *Corfu Channel (United Kingdom v. Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 24; *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 25, para. 51; WTO Appellate Body, Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, 14 December 1999, para. 81.

[520] Memorial, paras. 651-652.

[521] See, e.g., International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 29 November 1969, Article VIII(1):

"Any controversy between the Parties [...] shall, if settlement by negotiation between the Parties [...] has not been possible, and if the Parties do not otherwise agree, be submitted upon request of any of the Parties concerned to conciliation or, if conciliation does not succeed, to arbitration, as set out in the Annex to the present Convention."

Vienna Convention on Succession of States in Respect of Treaties, 23 August 1978:

the Conciliation between *The Democratic Republic of Timor-Leste and The Commonwealth of Australia*, after more than ten years of unsuccessful attempts by the Parties to reach an agreement by way of bilateral negotiations,[522] recently proved how fruitful conciliation can be.

385. Conciliation under CERD cannot be regarded as a simple forum for negotiation. Its function is not only to encourage and structure the Parties' dialogue but also to provide factual and legal findings and to recommend a settlement. Third-party intervention is thus institutionalised here in a way comparable to inquiry or arbitration. The written and oral phases as well as the general organisation of the proceedings envisaged in Article 12 of the Convention are also reminiscent of arbitration.

"Article 41 Consultation and negotiation

If a dispute regarding the interpretation or application of the present Convention arises between two or more Parties to the Convention, they shall, upon the request of any of them, seek to resolve it by a process of consultation and negotiation.

Article 42 Conciliation

If the dispute is not resolved within six months of the date on which the request referred to in article 41 has been made, any party to the dispute may submit it to the conciliation procedure specified in the Annex to the present Convention by submitting a request to that effect to the Secretary-General of the United Nations and informing the other party or parties to the dispute of the request.

Article 43 Judicial settlement and arbitration

Any State at the time of signature or ratification of the present Convention or accession thereto or at any time thereafter, may, by notification to the depositary, declare that, where a dispute has not been resolved by the application of the procedures referred to in articles 41 and 42, that dispute may be submitted for a decision to the International Court of Justice by a written application of any party to the dispute, or in the alternative to arbitration, provided that the other party to the dispute has made a like declaration."

See similarly Articles 42, 43 and 44 of the 1983 Vienna Convention on Succession of States in respect of State property, archives and debts of 8 April 1983 providing for the same steps: consultation and negotiation; conciliation; arbitration or resort to the ICJ. See also Articles 84 and 85 of the 1975 Convention on the Representation of States in Their Relations with International Organizations of a Universal Character providing for successively consultation and conciliation.

[522] PCA, *The Compulsory Conciliation Commission between Timor-Leste and Australia on the Timor Sea*, PCA Case No. 2016-10, Commission report and Recommendations, 9 May 2018, paras. 2 and 304.

386. Therefore, there can be no doubt that Article 22 means that a dispute can be referred to the Court only if genuine attempts have been made with regard to the use of *both* means indicated in this provision. The cumulative character of the preconditions under Article 22 is confirmed by the *travaux préparatoires* of CERD.

2. The travaux préparatoires

387. The drafting history of the implementation clauses in CERD involved three different bodies: (i) the Sub-Commission on Prevention of Discrimination and Protection of Minorities, (ii) the Commission on Human Rights, and (iii) the Third Committee of the General Assembly. It is summarised in the tables reproduced as an Appendix at the end of the present Chapter.[523]

388. The measures of implementation and the compromissory clause were initially considered together as part of a single text by the Sub-Commission and the Commission on Human Rights. It was only during the final review of the text by the Third Committee that they were split into two different sections of the Convention, without this purely formal reorganisation having any consequence as to the meaning of the provisions in question.

i. Sub-Commission on Prevention of Discrimination and Protection of Minorities

389. The present text of Article 22 originates from a proposal made by Mr. Inglés, the Philippine representative in the Sub-Commission. Initially, the provision concerning the ICJ came just after the articles concerning the Committee machinery and provided that:

[523] See below, pp. 220-222.

> "Article 16: The States Parties to this Convention agree that any State Party complained of or lodging a complaint may, *if no solution has been reached* within the terms of article 13, paragraph 1, bring the case before the International Court of Justice, after the report provided for in article 13, paragraph 3, has been drawn up".[524]

390. Mr. Inglés explained that a conciliation procedure between the States would be better suited than litigation to address human rights questions; it is only in case this failed that the States could have recourse to the ICJ:

> "Under the proposed procedure, States Parties to the convention should first refer complaints of failure to comply with that instrument to the State Party concerned; it is only when they are not satisfied with the explanation of the State Party concerned that they may refer the complaint to the Committee. Direct appeal to the International Court of Justice, provided for in both the Covenants on Human Rights and the UNESCO Protocol, was also envisaged in his draft. But he proposed the establishment of a Conciliation Committee because the settlement of disputes involving human rights did not always lend themselves to strictly judicial procedure. The Committee, as its name implied, would ascertain the facts before attempting an amicable solution to the dispute. Application could be made to the Committee, through the Economic and Social Council, for an advisory opinion from the Court on legal issues. *If the Committee failed to effect conciliation* within the time allotted, either of the Parties may take the dispute to the International Court of Justice".[525]

391. Due to lack of time, the Sub-Commission could not discuss at length the articles on measures for implementation; however, Mr. Inglés's draft was transmitted to the Commission on Human Rights for consideration.

---

[524] UN Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Report of the 16th session, UN Doc. E/CN.4/873, E/CN.4/Sub.2/241, 11 February 1964, p. 57, available at http://undocs.org/E/CN.4/873 (emphasis added).

[525] UN Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Summary record of the 427th meeting, E/CN.4/Sub.2/SR.427, 12 February 1964, p. 12 (emphasis added) (Annex 44).

ii. Commission on Human Rights

392. The Philippine representative in the Commission, Mr Quiambao, insisted again upon the conciliatory mechanism proposed and explained that it was only following a failure of that mechanism that the Parties to the dispute could have recourse to the Court:

> "Th[e] preliminary draft provided in particular for the establishment of a good offices and conciliation committee consisting of eleven members, which would be responsible for seeking the amicable settlement of disputes between States parties concerning the interpretation, application or fulfilment of the convention. A State party which considered that another State party was not giving effect to the provisions of the convention would be able to bring the matter to the attention of that State by written communication. If after six months the matter was not adjusted to the satisfaction of both States, either State would have the right to refer the matter to the Committee. *In the event of no solution being reached*, the States would be free to appeal to the International Court of Justice".[526]

393. Again, due to lack of time, no vote could be taken on the text and the Commission transmitted it as it stood to the Third Committee of the General Assembly.

iii. Third Committee of the General Assembly

394. In the Third Committee, Mr Inglés's proposal[527] was put back on the table by the Philippines.[528] The Philippine representative confirmed that the Court's

[526] UN Economic and Social Council, Commission on Human Rights, Summary record of the 810th meeting, UN Doc. E/CN.4/SR.810, 15 May 1964, p. 7 (emphasis added), available at http://undocs.org/E/CN.4/SR.810, (emphasis added).
[527] See above, para. 389.
[528] UN General Assembly, 20th session, *Official Records*, Annexes, Third Committee, Philippines: proposed articles relating to measures of implementation, UN Doc. A/C.3/L.1221, 11 October 1965, Articles 18 and 19, available at http://undocs.org/A/C.3/L.1221.

seisin was meant to be a last resort, and that the Committee was the most natural forum for the settling of inter-State disputes:

> "Articles 2 to 18 would provide for the establishment of a good offices and conciliation committee to which States Parties might complain on grounds of non-implementation of the Convention, but only after all domestic remedies had been exhausted. If a solution could not be reached, the Committee would draw up a report on the facts and indicate recommendations. *Eventually* the States Parties could bring the case before the International Court of Justice".[529]

395. Ghana proposed an amendment envisaging that the Court's jurisdiction should be subject to the conclusion of a *compromis*:

> "With their common consent the parties to a dispute arising out of the interpretation or the application of the Convention, whether it has been dealt with by the Commission of Conciliation or not, may submit the dispute to the International Court of Justice.
>
> 2. The International Court of Justice may affirm, vary or reverse any of the findings and recommendations of the Commission, if any."[530]

396. As explained by the Dutch representative in the Committee:

> "The system of complaints proposed by the Philippines (A/C.3/L.1221) and Ghana (A/C.3/L.1274/Rev. 1) provided that, if a matter was not adjusted to the satisfaction of both the complaining State and the State complained against, either by bilateral negotiations or by any other procedure open to them, either State should have the right to refer the matter to a committee, which in the Philippine text was a good offices and conciliation committee and in the Ghanaian text a fact-finding committee, conciliatory powers being vested in an *ad hoc* commission appointed by the chairman of the committee.

[529] UN General Assembly, 20th session, *Official Records*, Third Committee, 1344th meeting, UN Doc. A/C.3/SR.1344, 16 November 1965, Mr Garcia (Philippines), p. 314, para. 16 (emphasis added) available at http://undocs.org/A/C.3/SR.1344.

[530] UN General Assembly, 20th session, *Official Records*, Annexes, Third Committee, Ghana: revised amendments to document A/C.3/L.1221, UN Doc. A/C.3./L.1274/REV.1, 12 November 1965 (Annex 46).

> Under that system, the case might be referred to the International Court of Justice *as a last resort*; his delegation could not but approve such provision but it would be effective only if the State complained of or the State lodging a complaint could submit the dispute to the Court without first having to obtain the consent of the other State".[531]

397. In the meantime, the Officers had been asked to prepare a handbook on final clauses.[532] To harmonise the Convention with other relevant instruments where reference to the Court was only made in their final clauses, the implementation measures (i.e., the CERD mechanism and the ICJ) were divided into two different sets of provisions. In all likelihood, this was a strategic move on the part of the negotiators to split two difficult questions: that of the establishment of the Committee on the one hand and that of the acceptance of the Court's jurisdiction on the other. The first because of its innovative character,[533] the second mainly due to the reluctance of some States to accept the Court's jurisdiction.[534] The compromissory clause proposed by the Officers read:

> "Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation, shall at the request of any party to the dispute, be

[531] UN General Assembly, 20th session, *Official Records*, Third Committee, 1344th meeting, UN Doc. A/C.3/SR.1344, 16 November 1965, Mr Mommersteeg (Netherlands), p. 319, para. 63, available at http://undocs.org/A/C.3/SR.1344 (emphasis added).

[532] UN Economic and Social Council, Commission on Human Rights, Draft International Convention on the Elimination of All Forms of Racial Discrimination Final Clauses, Working Paper prepared by the Secretary-General, E/CN.4/L.679, 17 February 1964 (Annex 45).

[533] UN General Assembly, 20th session, *Official Records*, Third Committee, 1346th meeting, UN Doc. A/C.3/SR.1346, 17 November 1965, Mrs. Cabrera (Mexico), p. 330, para. 12, available at http://undocs.org/A/C.3/SR.1346.

[534] See in particular *ibid*., 1354th meeting, UN Doc. A/C.3/SR.1354, 25 November 1965, Mr. Lamptey (Ghana), p. 379, para. 54 (available at http://undocs.org/A/C.3/SR.1354); *ibid.*, 1358th meeting, UN Doc. A/C.3/SR.1358, 29 November 1965, p. 399, paras. 20-21 (Poland), available at http://undocs.org/A/C.3/SR.1358.

> referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement."[535]

398. Poland proposed an amendment seeking to reintroduce the *compromis* as the mode of seisin[536] while Ghana, Mauritania and the Philippines, having obtained the establishment of CERD-specific procedures, proposed to combine at one and the same time their compulsory character with that of the ICJ:

> "The amendment of Ghana, Mauritania and Philippines (A/C.3/L.1313) called for the deletion of the comma after 'negotiation'[537] and the insertion of the following between the words 'negotiation' and 'shall': 'or by the procedures expressly provided for in this Convention'".[538]

399. The Ghanaian representative commented that

> "the Three-Power amendment was self-explanatory. Provision has been made in the draft Convention for machinery which should be used in the settlement of disputes *before recourse was had to the International Court of Justice*."[539]

400. As the Court underlined in its 2011 Judgement in the *Georgia v. Russian Federation* case, "some significance must be attached" to this statement and "[i]t should be borne in mind that this machinery encompassed negotiation which was

---

[535] UN General Assembly, 20th session, *Official Records*, Annexes, Report of the Third Committee, UN Doc. A/6181, 18 December 1965, p. 38, available at http://undocs.org/A/6181.

[536] *Ibid.*, p. 38: "The amendment of Poland (A/C.3/L.1272) sought to replace the word 'any' after the words 'at the request of' by the word 'all'".

[537] The deletion of the comma suggests that the phrases describe successive phases and not alternatives.

[538] UN General Assembly, 20th session, *Official Records*, Annexes, Report of the Third Committee, UN Doc. A/6181, 18 December 1965, p. 38.

[539] UN General Assembly, 20th session, *Official Records*, Third Committee, 1367th meeting, UN Doc. A/C.3/SR.1367, 7 December 1965, Mr Lamptey (Ghana), p. 453, para. 29, available at http://undocs.org/A/C.3/SR.1367 (emphasis added).

already mentioned expressly in the text proposed by the Officers of the Third Committee".[540]

401. These unambiguous statements by the main sponsor of the amendment are of particular importance and several other delegations expressed agreement, for example those of France[541] and Italy,[542] without this interpretation ever being contradicted. In particular, the Belgian representative underlined that the clause "provided for various modes of settlement offering *ample opportunity* for agreement *before* the Court was resorted to".[543]

402. This certainly facilitated the acceptance of the compromissory clause. It must be underlined that the amendment of Ghana, Mauritania and the Philippines was adopted unanimously.[544] All the States therefore considered that the CERD-specific procedures had to be exhausted before recourse was made to the Court. Finally, Clause VIII as a whole (which was to become Article 22 of the Convention) was adopted by 70 votes to 9, with 8 abstentions.[545]

403. The cumulative character of the preconditions under Article 22 is further confirmed by an analysis of the conventional precedents that inspired the drafters. Most notably, they relied on the mechanism set up by the Protocol to the Convention against Discrimination in Education adopted by the UNESCO.[546]

---

[540] *Georgia v. Russian Federation*, *Preliminary objections,* p. 130, para. 147.
[541] UN General Assembly, 20th session, *Official Records*, Third Committee, 1367th meeting, UN Doc. A/C.3/SR.1367, 7 December 1965, Mr Boullet (France), p. 454, para. 38, available at http://undocs.org/A/C.3/SR.1367.
[542] *Ibid*., Mr Capotorti (Italy), p. 454, para. 39.
[543] *Ibid.,* Mr Cochaux (Belgium), p. 454, para. 40 (emphasis added).
[544] *Ibid.*, p. 455.
[545] *Ibid*.
[546] Mr. Capotorti: "The Sub-Commission could also rely on a precedent, one, moreover, on which Mr. Inglés had based his proposal: the Protocol to the Convention against Discrimination in Education adopted by UNESCO" (E/CN.4/Sub.2/SR.428, p. 6).

This Protocol establishes that it is only following the failure of the conciliation commission to resolve the dispute that the door is opened to the ICJ:

> "Any State may, at the time of ratification, acceptance or accession or at any subsequent date, declare, by notification to the Director-General, that it agrees, with respect to any other State assuming the same obligation, to refer to the International Court of Justice, after the drafting of the report provided for in Article 16, paragraph 3, any dispute covered by this Protocol *on which no amicable solution has been reached in accordance with Article 17, paragraph 1*".[547]

3. Other universal human rights treaties providing for monitoring mechanisms

404. The CERD inter-State complaint mechanism stands out among the monitoring bodies established by universal human rights treaties. The first of its kind, it was considered a forerunner, an example for all subsequent treaty mechanisms with which it thus has undeniable similarities. But it is also one of a kind since it is the *only* universal human rights treaty establishing a *mandatory* inter-State complaint procedure.

405. Six subsequent treaties simply allow for an *optional* system of inter-State complaints. The facultative nature of those mechanisms results from the necessity of a special declaration through which the State accepts this procedure: this is the case for the International Covenant on Civil and Political Rights ("ICCPR") of 16 December 1966,[548] the Convention against Torture and Other Cruel, Inhuman or

---

[547] Protocol Instituting a Conciliation and Good offices Commission to be Responsible for Seeking the Settlement of any Disputes which may Arise between States Parties to the Convention against Discrimination in Education, 10 December 1962, Article 25 (emphasis added).

[548] See Article 41: "1. A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in

Degrading Treatment or Punishment ("CAT") of 10 December 1984,[549] the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families ("CMW")[550] of 18 December 1990, the International Convention for the Protection of All Persons from Enforced Disappearance ("CED") of 20 December 2006,[551] the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights of 10 December 2008,[552] and the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure of 19 December 2011.[553] On the contrary, no special acceptance of the procedure is required from the States Parties under CERD: the ratification of the Convention automatically implies the acceptance of the inter-State procedure. This means that all 179 States Parties to CERD are equally parties to the inter-State complaint mechanism.[554] In terms of implementation measures, the Convention is certainly the most elaborate project, never subsequently equalled. Accepting that such a constraining mechanism could be ignored and that a State can seise the ICJ without having first complied with its requirements would overlook and effectively eliminate this unique aspect of CERD.

---

regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration".

The provisions cited in fns. 549 to 551 below are drafted similarly.

[549] See Article 21.

[550] See Article 76.

[551] See Article 32.

[552] See Article 10.

[553] See Article 12.

[554] By way of comparison (last checked on 26 August 2018):

- for ICCPR, there are 48 States that made the declaration under Article 41 (out of 172 States parties);
- for CAT, 63 States made the declaration under Article 21 (out of 163 States parties);
- for CMW, 4 States made the declaration under Article 76 (out of 52 States parties);
- for CED, 23 States made the declaration under Article 32 (out of 58 States parties).

406. Four conventions (other than CERD) equally provide for the unilateral seisin of the International Court of Justice:[555] CAT,[556] CMW,[557] CED[558] and the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW").[559] A reading of their compromissory clauses makes apparent that they always provide for at least a *three-step procedure*. First, they all contain the "negotiation" prerequisite. Second, they all provide for an arbitration should the negotiations fail, with the exception of CERD which introduces instead "the procedures expressly provided for in the Convention". Third, in all these treaties, the seisin of the Court appears at the end of the line, after the other means have failed.

407. The difference among these treaties is only found, therefore, in the second stage: CERD provides for a conciliation procedure, while the others provide for mandatory arbitration. The fact that CERD does not provide for arbitration prior to the seisin of the Court cannot be interpreted as a form of complacency with regard to the Court's jurisdiction. The analysis of the *travaux préparatoires* demonstrates that no such intent can be attributed to the drafters.[560] It is because the CERD drafters included a mandatory conciliation procedure under the auspices of the Committee that a reference to arbitration in the compromissory

[555] ICCPR does not have an ICJ compromissory clause.

[556] See Article 30(1): "Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court."

[557] See Article 92(1) which formulation only slightly differs from the above ("Any dispute [...] that is not settled by negotiation").

[558] See Article 42(1) which encompasses an additional step similar to CERD ("Any dispute [...] which cannot be settled through negotiation or by the procedures expressly provided for in this Convention shall [...] be submitted to arbitration").

[559] See Article 29(1) which is virtually identical to Article 92 of CMW ("Any dispute [...] which is not settled by negotiation shall [...] be submitted to arbitration").

[560] See above, Sub-section 2.

clause became superfluous. Conversely, in all likelihood it is because the drafters of the subsequent human rights treaties did not include a mandatory conciliation procedure that they introduced instead the reference to arbitration in the compromissory clause.

408. The Court has already had the occasion to confirm the mandatory character of these previous stages. For instance, in the *Armed Activities (2002)* case, the Court stressed that Article 29 of CEDAW

> "gives the Court jurisdiction in respect of any dispute between States parties concerning its interpretation or application, on condition that: it has not been possible to settle the dispute by negotiation; that, following the failure of negotiations, the dispute has, at the request of one such State, been submitted to arbitration; and that, if the parties have been unable to agree on the organization of the arbitration, a period of six months has elapsed from the date of the request for arbitration.
>
> […T]hese conditions are cumulative […].
>
> The Court [...] notes that the DRC has [...] failed to prove any attempts on its part to initiate arbitration proceedings with Rwanda under Article 29 of the Convention. The Court cannot in this regard accept the DRC's argument that the impossibility of opening or advancing in negotiations with Rwanda prevented it from contemplating having recourse to arbitration; since this is a condition formally set out in Article 29 of the Convention on Discrimination against Women, the lack of agreement between the parties as to the organization of an arbitration cannot be presumed. The existence of such disagreement can follow only from a proposal for arbitration by the applicant, to which the respondent has made no answer or which it has expressed its intention not to accept".[561]

[561] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, pp. 38-39, para. 87 and p. 41, para. 92. See also *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Provisional Measures, Order of 28 May 2009,*

409. As with the arbitration condition in other universal human rights treaties, the Applicant faced with a CERD-related dispute must, as the first step, provide proof of having made a *bona fide* attempt to initiate the conciliation procedure. Absent any such attempt, any inquiry into the effectiveness of the conciliation procedure is without object.

410. Furthermore, by-passing the conciliation mechanism provided in CERD could have an impact that the violation of the arbitration requirement does not otherwise have: it may undermine the authority of the permanent organ established as the primary guardian of the Convention's efficiency. It would also disrupt the complementarity between the monitoring role of the Committee and its mission under the inter-State complaint mechanism.

Section II
Lack of good faith negotiations and failure to seise the CERD Committee

411. Ukraine's Memorial dedicates barely three pages[562] out of 366 to these core issues of jurisdiction. This neglect cannot hide the fact that Ukraine has failed to satisfy the preconditions for the seisin of the Court: Ukraine has not attempted to settle the dispute through negotiations in good faith (A); and it has not used at all the procedures expressly provided for in CERD (B).

A. UKRAINE DID NOT GENUINELY ATTEMPT TO ENGAGE IN GOOD FAITH NEGOTIATIONS

412. In its 2017 Order, the Court noted that

> "Ukraine and the Russian Federation engaged in negotiations regarding the question of the latter's compliance with its substantive obligations under CERD. It appears from the record that these issues

---

I.C.J. Reports 2009, p. 150, paras. 51-52 and *Judgment, I.C.J. Reports 2012*, pp. 446-448, paras. 60-62 regarding Article 30 of CAT.

[562] Memorial, paras. 646-652.

> had not been resolved by negotiations at the time of the filing of the Application."[563]

413. Ukraine relies on this passage[564] but omits that the Court's conclusion was only made "*prima facie*".[565] The Order underlines that

> "The decision given in the present proceedings in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the admissibility of the Application or to the merits themselves. It leaves unaffected the right of the Governments of Ukraine and the Russian Federation to submit arguments in respect of those questions."[566]

414. It is true that, for two and half years, a series of accusations and replies were advanced in diplomatic notes and talks between the Parties but they do not constitute negotiations in good faith. In reality, Ukraine has never even made a *genuine attempt* to engage in discussions with Russia with a view to resolving an alleged dispute with respect to the interpretation or application of CERD.

415. Ukraine's intention has in fact never been to attempt to reach a mutual agreement. On the contrary, it purely and simply expected Russia to fulfil its demands by

> "strongly urg[ing] the Russian Federation to immediately put an end to internationally wrongful acts, investigate all the crimes listed in this note and hold the perpetrators strictly accountable.
>
> The Ministry of Foreign Affairs of Ukraine demands that the Ukrainian Side is provided with adequate assurances and guarantees of non-repetition of the aforementioned internationally wrongful acts.

[563] Order of 19 April 2017, p. 125, para. 59.
[564] Memorial, para. 646.
[565] Order of 19 April 2017, p. 126, para. 61.
[566] *Ibid*., para. 105.

> The Ministry of Foreign Affairs of Ukraine also demands the Russian Side to fully compensate the damage resulting from the internationally wrongful conduct of the Russian Side. The Ukrainian Side is ready to discuss the nature and amounts of such compensation.
>
> In this regard, the Ukrainian Side proposes the Russian Side to hold negotiations on the application of the International Convention on the Elimination of All Forms of Racial Discrimination (1966), in particular the implementation of international legal responsibility of the Russian Federation pursuant to norms of international law."[567]

416. From the outset, Ukraine had thus already unilaterally decided not only that the acts complained of were internationally wrongful acts but also that they were attributable to Russia and sought to impose on it the consequences entailed by its alleged responsibility, i.e. cessation, non-repetition and reparation, in particular in the form of full compensation.

417. Furthermore, Ukraine's diplomatic notes were constantly connected with accusations of occupation – and even aggression –[568] destined not to foster an

[567] Note Verbale No. 72/22-620-2403 of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation, 23 September 2014 (Annex 47). See also, under almost identical terms, Note Verbale No. 72/22-620-297 of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation, 6 February 2015 (Annex 53). The very first paragraph of this latter note also bluntly affirms: "The Ministry of Foreign Affairs of Ukraine presents its compliments to the Ministry of Foreign Affairs of the Russian Federation and, in addition to notes No. 72/22-620-2403 dated 23 September 2014 and No. 72/22-620-3070 dated 15 December 2014, states that the Russian Federation has violated its international legal obligations envisaged in the 1966 [sic] International Convention on the Elimination of All Forms of Racial Discrimination."

[568] See, e.g., Notes Verbales No. 72/22-620-2403 of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation, 23 September 2014 (Annex 47), No. 72/22-620-297 of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation, 6 February 2015 (Annex 53) and No. 72/22-194/510-2006 of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation, 17 August 2015 (Annex 56).

atmosphere of *bona fide* negotiations but to escalate tensions between the Parties regarding the status of Crimea.[569]

418. Far from a negotiated solution, Ukraine's only aim from the outset was that Russia be held responsible and to bring the matter before the Court. Ukrainian officials have been quite clear that Ukraine only intended to 'go through the motions'. As Ms. Zerkal declared in different interviews, "[w]e'd rather go immediately to the Court"[570] but

> "Georgia's experience in lodging a claim against Russia with the ICJ within the framework of the Convention on the Elimination of All Forms of Racial Discrimination shows that it is better to make haste slowly. The Court dismissed the Georgian application only because they failed to take all necessary preliminary, pre-judicial steps and did not make sufficient effort to settle the dispute amicably. Georgia had to hold consultations with Russia in relation to every Article of the Convention, which, in its view, the Russians have breached. [...] We are following the entire settlement procedure by the book."[571]

419. Ukraine's aim is confirmed by the very first exchanges of diplomatic notes which further show that it tried to sabotage the holding of negotiations.

420. The first Note alleging that Russia had violated CERD and proposing to hold negotiations is dated 23 September 2014.[572] On 16 October 2014, Russia

[569] See Note No. 16599/dnv from the Ministry of Foreign Affairs of the Russian Federation to the Embassy of Ukraine in Moscow, 17 December 2014 (Annex 1).
[570] Interview with Olena Zerkal, Fifth Channel (Ukraine), 17 January 2017 (Annex 1).
[571] Interview with Olena Zerkal, "Which claims will Ukraine submit against Russia?", 27 January 2016 (translation), available in Russian at http://zn.ua/columnists/kakie-iski-protiv-rossii-podast-ukraina-202564_.html (Annex 3).
[572] Note Verbale No. 72/22-620-2403 of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation, 23 September 2014 (Annex 47).

accepted to discuss "the issue of the interpretation and implementation" of CERD.[573]

421. In its second Note of 29 October 2014,[574] Ukraine proposed to conduct negotiations on 21 November 2014 in Kiev, Geneva, Vienna or Strasbourg, though this proposal sounded more like a command since Ukraine had already "addressed the arrangements for conducting negotiations in the aforementioned locations". This command was coupled with a threat since Ukraine warned that it would "regard a lack of response from the Russian Side within a reasonable period of time or an unjustified delay [...] as unwillingness of the Russian Side to settle the dispute". The very short timeframe imposed by Ukraine – 16 working days in Russia – was however unrealistic.[575]

422. While the Russian side still replied positively to the holding of negotiations and proposed alternative negotiating venues,[576] Ukraine wrongly accused it of not doing so and sought to bring the process to an immediate and premature end, asserting that the alleged absence of response constituted

> "an express refusal from resolving the existing dispute through negotiations. […S]uch actions of the Russian Side constitute an evidence of impossibility to resolve the dispute through negotiations. […T]he Ukrainian Side conscientiously attempted to resolve the existing dispute through negotiations and exhausted all available possibilities of organization and conduct of the said consultations. […It] reserves the right to use other means of peaceful resolution of the

[573] Note Verbale No. 14279/2dsng of the Ministry of Foreign Affairs of the Russian Federation to the Embassy of Ukraine in the Russian Federation, 16 October 2014 (Annex 48).
[574] Note Verbale No. 72/23-620-2673 of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation, 29 October 2014 (Annex 49).
[575] See below, para. 424.
[576] Note Verbale No. 15642/2dsng of the Ministry of Foreign Affairs of the Russian Federation to the Ministry of Foreign Affairs of Ukraine, 27 November 2014 (Annex 1).

disputes under the International Convention on the Elimination of All Forms of Racial Discrimination of 1965."[577]

423. Hence, without any substantive exchange between the Parties having taken place and showing "a disagreement on a point of law or fact, a conflict of legal views or of interests",[578] Ukraine pre-determined not only that there was a dispute but that it could not be settled by negotiation. This overhasty conclusion after barely two exchanges of notes demonstrates how Ukraine's attempt was purely formal and its only aim was to bring the matter to the Court without going through *bona fide* negotiations, let alone resorting to the Committee's inter-State procedure.

424. Russia reminded Ukraine that it had indeed answered its proposal[579] but Ukraine kept maintaining that the "response of the Russian Side constitutes direct evidence of express unwillingness of the Russian Federation to settle the existing dispute".[580] Ukraine again attempted to impose on Russia an unrealistic date and complicated venue for conducting negotiations, i.e. Strasbourg on 23 January 2015.[581] As underlined by Russia, such a rigid timeframe would prevent the conduct of a substantive and meaningful debate requiring the constitution of an eminent delegation including high-ranking representatives of various governmental bodies, as well as the collection of relevant evidence to support the allegations put forward by both Parties. Besides, a venue in Western European cities would entail significant expenses and the need to obtain visas for both the Russian and Ukrainian sides, conditions which could be avoided if Ukraine

[577] Note Verbale No. 72/22-620-2946 of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation, 1 December 2014 (Annex 1).
[578] *Mavrommatis Palestine Concessions, P.C.I.J., Series A, No. 2*, p. 11.
[579] Note Verbale No. 17004/2dsng of the Ministry of Foreign Affairs of the Russian Federation to the Ministry of Foreign Affairs of Ukraine, 8 December 2014 (Annex 50).
[580] Note Verbale No. 72/22-620-3069 of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation, 15 December 2014 (Annex 52).
[581] *Ibid*.

would agree to hold the consultations in Minsk as proposed by Russia.[582] These examples are evidences of Ukraine's attempt to undermine any process of *bona fide* negotiations.

425. Since Russia refused to react to Ukraine's provocations, rounds of consultations were eventually held but Ukraine failed to engage in *bona fide* negotiations. These meetings fall squarely within the examples of "infringement of the rules of good faith" given by the Arbitral Tribunal in the *Lake Lanoux* case.[583] For example, Ukraine attempted to impose on Russia its unilateral description of the results of the bilateral consultations, in disregard of the generally accepted diplomatic practice.[584]

426. Further, and most importantly, Ukraine insisted upon its own position and refused to devote the necessary time to the examination by both Parties of their respective allegations.[585] The three rounds of consultations were exceedingly short, especially considering the number and gravity of Ukraine's claims. On every occasion, Ukraine proposed one-day consultations, despite Russia's suggestion to allocate more time,[586] and in reality the Ukrainian delegation organised its schedule in such a way that the consultations had to be abruptly interrupted after a couple of hours. The first round – on 8 April 2015 – barely lasted 3 hours and, since a significant part of that time was dedicated to agreeing on the agenda, the Parties did not manage to discuss all its items, in particular the

[582] See, e.g., Notes Verbales of the Ministry of Foreign Affairs of the Russian Federation No. 16599/dnv, 17 December 2014 (Annex 1) and No. 2697-n/dgpch, 11 March 2015 (Annex 54).
[583] See above, para. 234.
[584] See, e.g. the Notes Verbales of the Ministry of Foreign Affairs of Ukraine No. 72/22-194/510-2006 of 17 August 2015 (Annex 56) and No. 72/22-194/510-1973 of 18 August 2016 (Annex 58), and the Russian protests by Notes Verbales No. 11812-n/dgpch of 28 September 2015 (Annex 1) and No. 11042-n/dgpch of 10 October 2016 (Annex 59).
[585] See further, para. 426.
[586] See, e.g., Note Verbale No. 2697-n/dgpch of the Ministry of Foreign Affairs of the Russian Federation to the Embassy of Ukraine in Moscow, 11 March 2015 (Annex 54).

general framework of interpretation and application of CERD or concrete events.[587] Subsequent rounds were thus essential but were again cut short: the second round – on 31 May 2016 – lasted five hours and the third round – on 1 December 2016 – was not even held for three hours. To make matters worse, a key member of the Ukrainian delegation, who was the main speaker articulating the principal allegations against the Russian Federation, Ms Valeriya Vladimirovna Lutkovskaya, Ukraine's Parliamentary Human Rights Ombudsperson, left the second and third rounds even earlier than expected due to her alleged busy schedule, depriving the Russian delegation of the opportunity to pose questions and to establish a dialogue. Again, this shows that *bona fide* negotiation was really not Ukraine's objective.

427. Furthermore, considering the brevity of each round, Ukraine only described a limited number of events and in the most general terms. Russia requested necessary clarifications and documentary evidence but Ukraine was not prepared to substantiate its accusations. While Ukraine alleges that this proves that Russia declined to engage substantively,[588] it clearly shows the contrary. Russia repeatedly attempted to better define the scope of the dispute and render the consultations meaningful.

428. Such clarifications were even more indispensable since Ukraine has merely placed on record a certain number of claims which have constantly shifted from the first diplomatic Note to the Application, rendering it impossible to

[587] See notably Notes Verbales No. 11812-n/dgpch of the Ministry of Foreign Affairs of the Russian Federation to the Embassy of Ukraine in Moscow, 28 September 2015 (Annex 1) and Note Verbale No. 5774-n/dgpch of the Ministry of Foreign Affairs of the Russian Federation to the Embassy of Ukraine in Moscow, 27 May 2016 (Annex 57).

[588] Memorial, para. 647.

establish the respective positions of the Parties on the questions at issue.[589] For example, while two Notes in 2014 mentioned Article 5(d)(iii) of CERD regarding the right to nationality,[590] the issue was never subsequently discussed, nor was it referred to as "violations of CERD" in the Application;[591] but it resurfaced under that heading in the Memorial.[592] Other accusations which Ukraine was previously adamant about then disappeared altogether from the Application and Memorial, such as violations of the right to own property,[593] proving that such claims were not serious. Conversely, several allegations appeared for the first time in the Application, such as violations of Articles 4, 5(a), 5(e)(vi) and 6, and even more surprisingly in the Memorial, which suddenly invokes Articles 5(e)(iv) and 7. These alleged violations have therefore never been the subject of prior negotiations.

429. Ukraine's inconsistencies are heightened by the extreme nature of its current allegations. Prior to the seising of the Court, Ukraine had never accused Russia of engaging in a systematic "campaign of cultural erasure" of certain communities. This grave accusation is now the cornerstone of its claims: it constitutes the very title of Section III.C of the Application describing the facts and that of Chapter 8 of its Memorial; it is the source of all the alleged violations of CERD;[594] it is at the heart of the first relief sought by Ukraine;[595] and it forms,

[589] See in this respect (*a contrario*) *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, p. 446, para. 59.
[590] Notes Verbales of the Ministry of Foreign Affairs of Ukraine No. 72/22-620-2403, 23 September 2014 (Annex 47); No. 72/22-620-3070, 15 December 2014 (Annex 51).
[591] See Application, Section IV.B.
[592] Memorial, Chapter 12.C.5.
[593] See, e.g., Notes Verbales of the Ministry of Foreign Affairs of Ukraine No. 72/22-620-2403, 23 September 2014 (Annex 47); No.72/22-620-3070, 15 December 2014 (Annex 51); No. 72/22-620-297, 6 February 2015 (Annex 53).
[594] See in particular Application, paras. 133 and 137(a).
[595] Application, para. 138(a): "Immediately cease and desist from the policy of cultural erasure and take all necessary and appropriate measures to guarantee the full and equal protection of

in reality, the only basis on which Ukraine requests reparation.[596] Ukraine never gave notice to Russia of this claim which is the subject of the Application – nor *a fortiori* commenced negotiations on it. Claims related to the present case were thus not in dispute when the Application was submitted to the Court.

430. As a result of Ukraine's conduct, the scope of the alleged dispute and its subject-matter have never been clearly delimited and the exchanges between the Parties were neither genuine nor meaningful negotiations. In these circumstances, the requirement of prior negotiation as defined in the Court's jurisprudence has not been met.

B. UKRAINE REFUSED TO INITIATE THE PROCEDURES EXPRESSLY PROVIDED FOR BY THE CONVENTION

431. As the Court noted in its Order of 19 April 2017:

> "Article 22 of CERD also refers to 'the procedures expressly provided for' in the Convention. According to Article 11 of the Convention, '[i]f a State Party considers that another State Party is not giving effect to the provisions of this Convention', the matter may be brought to the attention of the CERD Committee. Neither Party claims that the issues in dispute have been brought to the attention of the CERD Committee. [...] Ukraine did not bring the matter before the CERD Committee".[597]

432. In its diplomatic Note of 27 November 2014, Russia expressly recalled to Ukraine the procedure available under Article 11 of CERD;[598] but Ukraine's only answer was to threaten to abort the negotiation process and "use other means of

---

the law to all groups in Russian-occupied Crimea, including Crimean Tatars and ethnic Ukrainians".

[596] Application, para. 138(k): "Make full reparation for all victims of the Russian Federation's policy and pattern of cultural erasure through discrimination in Russian-occupied Crimea."

[597] Order of 19 April 2017, pp. 125-126, para. 60.

[598] Note No. 15642/2dsng of the Ministry of Foreign Affairs of the Russian Federation to the Ministry of Foreign Affairs of Ukraine, 27 November 2014 (Annex 1).

peaceful resolution of the disputes under [CERD]".[599] Still, it skipped the next logical step expressly provided for therein and did not bring the matter to the attention of the Committee. It also decided to overlook entirely this precondition in its Application which does not contain a single reference to the Committee; and, although its Memorial does finally raise the issue, it immediately discards it[600] by wrongly assimilating the procedures expressly provided for by the Convention with mere bilateral negotiations.[601] Ukraine's attitude has three major consequences.

433. First, Ukraine has deprived the Convention and the procedures expressly provided by it of any effect by denying their role as a means for settling racial discrimination allegations since, according to its interpretation, it could be bypassed by a unilateral decision of a party. The Court simply cannot allow Ukraine to blatantly "inhibit the operation of any of the bodies established by [the] Convention", as confirmed by Article 20(2).

434. Second, recourse to the Committee would have achieved delimitation of the precise scope of the dispute, something that Ukraine failed to do in the course of the aborted consultations between the Parties.[602]

435. Third, Ukraine has deprived the Court of the benefit of having a comprehensive factual and legal picture of the dispute. The importance of the role and findings made by judicial or quasi-judicial bodies established specifically to interpret and apply certain rules of international law as well as examine in detail the conduct of State Parties to the relevant treaty has been highlighted by the

[599] See above, para. 422.
[600] Memorial, para. 652.
[601] See above, para. 385.
[602] See above, para. 430.

Court in previous cases. In the first *Genocide* case, for instance, the Court recognised that it

> "attaches the utmost importance to the factual and legal findings made by the ICTY in ruling on the criminal liability of the accused before it and, in the present case, the Court takes fullest account of the ICTY's trial and appellate judgments dealing with the events underlying the dispute".[603]

436. In the same line, in the *Diallo* case, the Court further underlined that:

> "Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the [Human Rights] Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty."[604]

437. Since Ukraine has overlooked both the Committee procedures and the exhaustion of local remedies – as will be shown in the next Chapter – the facts presented to the Court are incomplete and have not been ascertained. In fact, Ukraine wishes to make the International Court of Justice act as a court of first instance and not of last resort as envisaged by the drafters of the Convention.

438. Finally, Ukraine deprived Russia of the benefit of the Conciliation Commission's recommendations for the amicable solution of the matter.

439. In light of the above, the Court does not have jurisdiction in the present case since Ukraine failed to fulfil the preconditions under Article 22 of CERD.

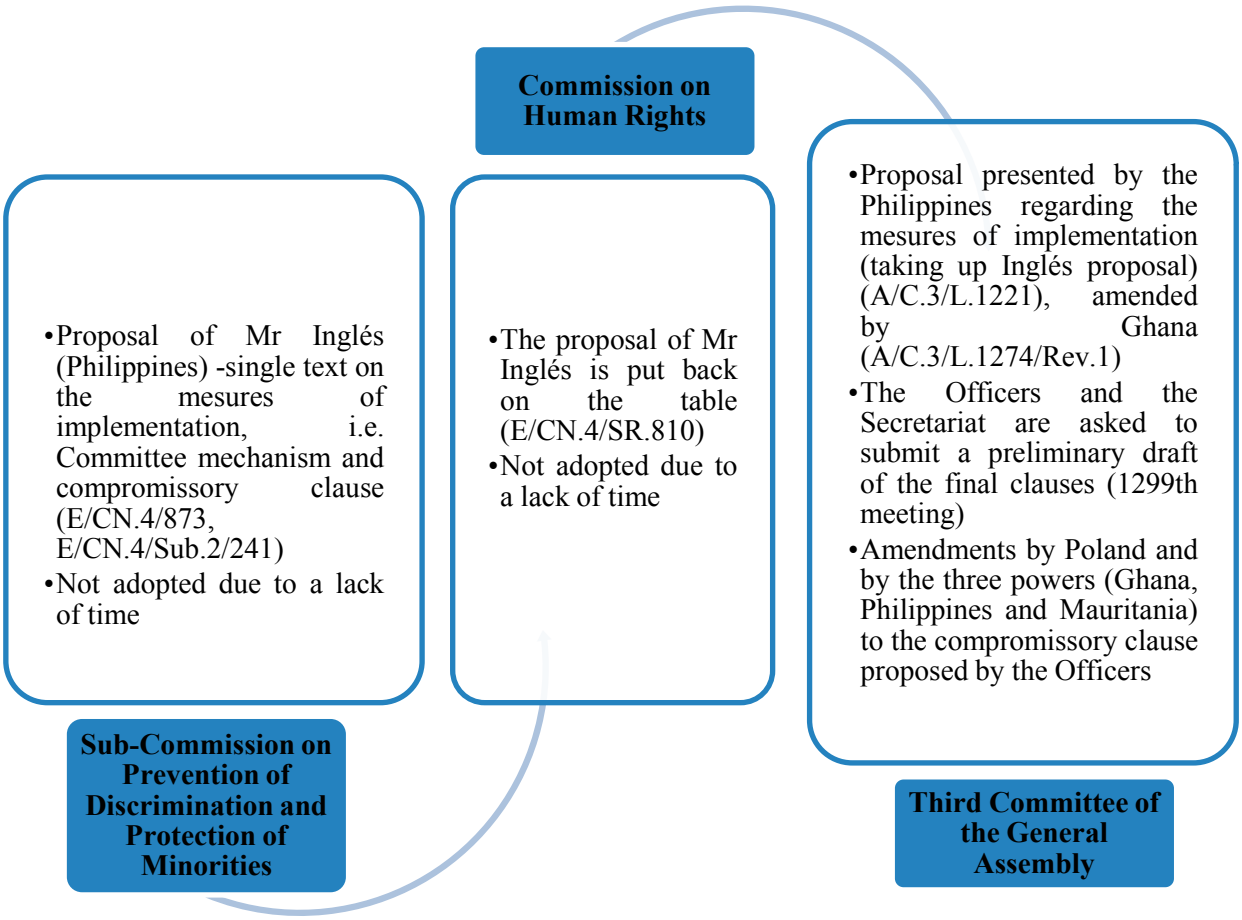
---

[603] *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*, p. 209, para. 403.

[604] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 664, para. 66. See also in this sense *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, pp. 179-180, paras. 109-110, and *ibid*., Separate opinion of Judge Higgins, p. 213, para. 26.

APPENDIX TO CHAPTER IX
TABLES: DRAFTING HISTORY OF THE COMPROMISSORY CLAUSE

I. The institutional path of the compromissory clause



II. Preliminary drafts

Sub-Commission Commentary by Mr Inglés (Philippines) (E/CN.4/Sub.2/SR.427)	Commission on Human Rights Commentary by Mr Quiambao (Philippines) (E/CN.4/SR.810)	Third Committee Commentary by Mr Mommersteeg (Netherlands) (A/C.3/SR.1344)
"Under the proposed procedure, States Parties to the convention should first refer complaints of failure to comply with that instrument to the State Party concerned; it is only when they are not satisfied with the explanation of the State Party concerned that they may refer the complaint to the Committee. Direct appeal to the International Court of Justice, provided for in both the Covenants on Human Rights and the UNESCO Protocol, was also envisaged in his draft. But he proposed the establishment of a Conciliation Committee because the settlement of disputes involving human rights did not always lend themselves to strictly judicial procedure. The Committee, as its name implied, would ascertain the facts before attempting an amicable solution to the dispute. Application could be made to the Committee, through the Economic and Social Council, for an advisory opinion from the Court on legal issues. If the Committee failed to effect conciliation within the time allotted, either of the Parties may take the dispute to the International Court of Justice"	"Th[e] preliminary draft provided in particular for the establishment of a good offices and conciliation committee consisting of eleven members, which would be responsible for seeking the amicable settlement of disputes between States parties concerning the interpretation, application or fulfilment of the convention. A State party which considered that another State party was not giving effect to the provisions of the convention would be able to bring the matter to the attention of that State by written communication. If after six months the matter was not adjusted to the satisfaction of both States, either State would have the right to refer the matter to the Committee. In the event of no solution being reached, the States would be free to appeal to the International Court of Justice"	"The system of complaints proposed by the Philippines (A/C.3/L.1221) and Ghana (A/C.3/L.1274/Rev.l) provided that, if a matter was not adjusted to the satisfaction of both the complaining State and the State complained against, either by bilateral negotiations or by any other procedure open to them, either State should have the right to refer the matter to a committee, which in the Philippine text was .a good offices and conciliation committee and in the Ghanaian text a fact-finding committee. Conciliatory powers being vested in an *ad hoc* commission appointed by the chairman of the committee. Under that system, the case might be referred to the International Court of Justice as a last resort"

III. Final discussion

CHAPTER X
INADMISSIBLITY OF UKRAINE'S APPLICATION DUE TO THE NON-EXHAUSTION OF LOCAL REMEDIES

441. The principle according to which local remedies must be exhausted before individual treaty rights, such as the ones protected by CERD, can be adjudicated before an international body (be it judicial or other) is well established in international law.[605]

442. In its Application and Memorial, Ukraine does not establish – and does not even claim – that local remedies have been exhausted before it instituted proceedings before the Court under Article 22 of CERD. As a result, even if Ukraine's claims under CERD were to be considered (*quod non*) as falling within the jurisdiction of the Court under that Convention,[606] they would be inadmissible.[607]

443. It is a well-established principle of international law that, when the local remedies rule applies,

> "it is incumbent on the applicant to prove that local remedies were indeed exhausted or to establish that exceptional circumstances relieved the allegedly injured person whom the applicant seeks to protect of the obligation to exhaust available local remedies (see *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy),*

[605] See in particular Article 44(b) of the Draft articles on the Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission*, 2001, Vol. II (Part Two), p. 120.

[606] See above, Part III, Chapters VIII and IX.

[607] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008,* p. 456, para. 120: an objection of admissibility "consists in the contention that there exists a legal reason, even when there is jurisdiction, why the Court should decline to hear the case, or more usually, a specific claim therein. Such a reason is often of such a nature that the matter should be resolved *in limine litis*, for example where without examination of the merits it may be seen that there has been a […] failure to exhaust local remedies".

> *I.C.J. Reports 1989*, pp. 43-44, para. 53). […] Thus, in the present case, [the Applicant] must establish that [the alleged victims] exhausted any available local remedies or, if not, must show that exceptional circumstances justified the fact that [they] did not do so."[608]

444. This rule certainly applies to claims under CERD, as is evidenced by the fact that the proposal made by Israel during the negotiations of CERD that the burden of proof should be reversed in relation to exhaustion of local remedies was not adopted.[609]

445. In the course of the discussions that took place between the Parties from 2014 to 2016 on Ukraine's allegations in relation to CERD, Russia made explicit that the local remedies rule was to be considered in relation to these claims:

a. In a Note Verbale dated 11 March 2015,[610] Russia informed Ukraine that "[d]iscussion of any issues during future consultations should prejudice neither […] nor the question of whether domestic remedies or international mechanisms, including the ones envisaged in the Convention, are applicable to them;"

b. Russia reiterated the same observation in its Notes Verbales dated 1st April 2015,[611] 27 May 2016,[612] and 10 October 2016;[613]

---

[608] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, Judgment*, *I.C.J. Reports 2007,* p. 600, para. 44.

[609] UN General Assembly, 20th session, *Official Records*, Third Committee, 1353rd meeting, A/C.3/SR.1353, 24 November 1965, p. 371, para. 32, available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/C.3/SR.1353.

[610] See Note Verbale No. 2697-n/dgpch of the Ministry of Foreign Affairs of the Russian Federation to the Embassy of Ukraine in Moscow, 11 March 2015 (Annex 54).

[611] See Note Verbale No. 3962-n/dgpch of the Ministry of Foreign Affairs of the Russian Federation to the Embassy of Ukraine in Moscow, 1 April 2015 (Annex 55).

[612] See Note Verbale No. 5774-n/dgpch of the Ministry of Foreign Affairs of the Russian Federation to the Embassy of Ukraine in Moscow, 27 May 2016 (Annex 57).

c. In the Note Verbale dated 11 March 2015,[614] Russia also indicated that the agenda for the consultations should include a point on "exchange of information regarding legal remedies, before the competent national tribunals and other State institutions of the Russian Federation and Ukraine, against any acts of racial discrimination which violate human rights and fundamental freedoms contrary to the ICERD."

446. The local remedies rule applies in the present case, since CERD, according to the Court, is "intended to protect individuals from racial discrimination"[615] (Section I). As Ukraine has failed to prove that the said rule has been complied with (Section II), the Court should declare that Ukraine's Application under CERD is inadmissible.

Section I
Exhaustion of local remedies under CERD: Applicable law

A. APPLICABILITY OF THE LOCAL REMEDIES RULE

447. As the Court made clear in *ELSI,* the local remedies rule applies as a matter of principle before the Court when individual treaty rights are invoked by the Applicant. According to the Court, there is

> "no doubt that the parties to a treaty can therein either agree that the local remedies rule shall not apply to claims based on alleged breaches of that treaty; or confirm that it shall apply. Yet the Chamber finds itself unable to accept that an important principle of customary international law should be held to have been tacitly

[613] See Note Verbale No. 11042-n/dgpch of the Ministry of Foreign Affairs of the Russian Federation to the Embassy of Ukraine in Moscow, 10 October 2016 (Annex 59).
[614] See Note Verbale No 2697-n/dgpch of the Ministry of Foreign Affairs of the Russian Federation to the Embassy of Ukraine in Moscow, 11 March 2015 (Annex 54).
[615] *Ukraine v. Russian Federation, Provisional Measures*, p. 135, para. 82, in relation to Articles 2 and 5 of CERD invoked by the Applicant.

> dispensed with, in the absence of any words making clear an intention to do so."[616]

448. The text of CERD makes clear that the local remedies rule applies to any claim under CERD. Article 11(3) of CERD, as well as Article 14(7)(a), include specific reference to the exhaustion of local remedies in relation to international claims under CERD, including in relation to inter-State claims. According to Article 11(3),

> "[t]he Committee shall deal with a matter referred to it in accordance with paragraph 2 of this article [i.e. an inter-State complaint] after it has ascertained that all available domestic remedies have been invoked and exhausted in the case, in conformity with the generally recognized principles of international law."

449. Since Article 11 requires the exhaustion of local remedies in case of inter-State disputes "in conformity with the generally recognized principles of international law", the same principles necessarily apply before the Court.

450. The *travaux préparatoires* of CERD confirm that the requirement of exhaustion of local remedies applies in case of alleged violations of CERD. The representative of Italy stated in particular that

> "With reference to the Ghanaian representative's last remark, he agreed that it would be advisable to insert the word "domestic" before the word "remedies" in paragraph 3. States should be left as free as possible to deal with a case through domestic procedures, for it was a recognized international principle that all domestic remedies should be exhausted before a matter was referred to an international body."[617]

---

[616] *Elettronica Sicula S.P.A. (ELSI), Judgment*, *I.C.J. Reports 1989,* p. 42, para. 50.

[617] UN General Assembly, 20th session, *Official Records*, Third Committee, 1353rd meeting, A/C.3/SR.1353, 24 November 1965, p. 371, para. 28, available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/C.3/SR.1353.

451. The word "domestic" was accordingly inserted in the relevant provision of CERD.[618] In addition, Tanzania's proposal to set aside the condition of exhaustion of local remedies was expressly rejected during the negotiation of CERD.[619] The intent of the drafters of CERD was thus clearly that the local remedies rule is fully applicable to claims under CERD.

452. The application of the local remedies rule under CERD is consistent with Article 6 of CERD which states that

> "States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination."

453. The obligation incumbent on States Parties to provide for local remedies in case of violations of CERD confirms that, following a subsidiarity approach, the first step in case of a violation of CERD is to submit the case to domestic courts or other national institutions.[620]

---

[618] *Ibid.,* pp. 373-374, para. 58.

[619] *Ibid.,* p. 371, para. 25 (Tanzania) and p. 373, para. 57 ("[t]he Tanzanian proposal to delete paragraph 3 was rejected by 70 votes to 2, with 12 abstentions").

[620] See P. Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary*, Oxford University Press, 2016, p. 425: "Article 6 and the other international instruments cited above refer to the obligations of national authorities to provide remedies at the level of domestic law to 'everyone within their jurisdiction'. The engagement of the Committee is essentially subsidiary to the protection of rights nationally. In theory, the greater the effectiveness of the national recourse mechanisms, the less pressing is the need to engage international bodies." See also N. Lerner, *The UN Convention on the Elimination of All Forms of Racial Discrimination,* Brill/Nijhoff, 2015, p. 65: "Article 6 should be taken into consideration when dealing with Article 14, paragraph 2, which establishes the procedure for petitions by victims of a violation 'who have exhausted other available local remedies'."

454. The application of the local remedies rule under CERD including for inter-State disputes is consistent with other human rights treaties. Dispute settlement provisions of core human rights conventions include a reference to the exhaustion of local remedies for both individual and inter-State complaints under these treaties, and they expressly specify that this rule applies "in accordance" or "in conformity with" general international law:

a. This is the case of current Article 35(1) of the European Convention on Human Rights, according to which, with regard to both individual and inter-State complaints, "The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken."

b. In the original version of the European Convention of Human Rights, adopted in 1950, the local remedies rule was only specified in the provision related to the jurisdiction of the then European Commission of Human Rights, which was to be seised before seising the Court.[621] Yet, the European Court had the opportunity to observe that the local remedies rule equally applied before it under the original version of the Convention, even though at that time the provision on the jurisdiction of the Court did not mention it explicitly.[622]

[621] See https://www.echr.coe.int/Documents/Collection_Convention_1950_ENG.pdf, Articles 24, 26 and 47. The Commission was suppressed with the adoption of Protocol 11 of 1994 (which entered into force in 1998), see https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/155.

[622] In ECtHR, *Case of De Wilde, Ooms, and Versyp v. Belgium (Merits)*, Application No. 2832/66, 2835/66, 2899/66, Judgment, 18 June 1971, the Court held in particular that "the rule on the exhaustion of domestic remedies delimits the area within which the Contracting States have agreed to answer for wrongs alleged against them before the organs of the Convention"

c. The local remedies rule equally applies, under the American Convention on Human Rights, to communications in which a State Party alleges that another State Party has committed a violation of a human right set forth in this Convention. According to Article 46(1)(a) of the American Convention on Human Rights, admission of communications, including communications "in which a State Party alleges that another State Party has committed a violation of a human right set forth in this Convention", shall be subject to the following requirement: "that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law." Article 46 concerns the procedure before the Inter-American Commission of Human Rights. But the local remedies rule equally applies before the Inter-American Court, even though the said rule is not expressly referred to in the provision granting the Court jurisdiction. In *Velásquez Rodríguez v. Honduras*, the Inter-American Court considered that "[t]he rule of prior exhaustion of domestic remedies under the international law of human rights has certain implications that are present in the Convention"[623] and that "[t]he rule of prior exhaustion of domestic remedies allows the State to resolve the problem under its internal law before being confronted with an international proceeding. This is

(para. 50). For cases where the Court found, before the entry into force of Protocol 11, that the local remedies rule was not respected, resulting into the case being inadmissible, see, e.g., ECtHR, *Case of Van Oosterwijck v. Belgium*, Application No. 7654/76, Judgment, 6 November 1980, para. 41; ECtHR, *Case of Cardot v. France,* Application No. 11069/84, Judgment, 19 March 1991, para. 36; ECtHR, *Case of Ahmet Sadik v. Greece*, Application No. 18877/91, Judgment, 15 November 1996, para. 34; ECtHR, *Case of Beis v. Greece*, Application No. 22045/93, Judgment, 20 March 1997, para. 36.

[623] Inter-American Court of Human Rights, *Velásquez Rodríguez v. Honduras*, (Ser. C) No. 1, Preliminary Objections, Judgment, 26 June 1987, para. 91.

particularly true in the international jurisdiction of human rights, because the latter reinforces or complements the domestic jurisdiction".[624] The Court has applied the local remedies rule in other cases brought before it.[625]

d. Under Article 50 of the African Charter on Human and Peoples' Rights, the rule of exhaustion of local remedies also applies to communications submitted by States parties to the African Commission on Human and Peoples' Rights. Article 56(6) extends this rule to other communications. Articles 39 and 40 of the Rules of the Court make the rule applicable to the admissibility of cases brought before the African Court on Human and Peoples' Rights itself. The Court has regularly made application of the rule in cases submitted to it, on the basis that it "is one that is recognized and accepted internationally. Referral to international courts is a subsidiary remedy compared to remedies available locally within States."[626]

[624] Inter-American Court of Human Rights, *Velásquez Rodríguez v. Honduras*, (Ser. C) No. 4 (1988), Merits, Judgment, 29 July 1988, para. 61.

[625] See, e.g., Inter-American Court of Human Rights, *Cantoral-Benavides v. Peru,* (Ser. C) No. 40, Preliminary Objections, Judgment, 3 September 1998, para. 30; Inter-American Court of Human Rights, *Furlan and Family v. Argentina*, (Ser. C) No. 246, Preliminary Objections, Merits, Reparations and Costs, Judgment, 31 August 2012, paras. 23-24; Inter-American Court of Human Rights, *Brewer Carías v. Venezuela*, (Ser. C) No. 278, Preliminary Objections, Judgment, 26 May 2014, para. 144.

[626] See, e.g., African Court on Human and Peoples' Rights, *Lohé Issa Konaté v. Burkina Faso*, Application No. 004/2013, Judgment, 5 December 2014, para. 78. See also African Court on Human and Peoples' Rights, *Christopher Jonas v. United Republic of Tanzania*, Application No. 011/2015, Judgment, 28 September 2017, paras 44-45; African Court on Human and Peoples' Rights, *APDF and IHRDA v. Republic of Mali*, Application No. 046/2016, Judgment, 11 May 2018, paras. 33 and 35-45.

e. Similarly, according to Article 41(1) of the International Covenant on Civil and Political Rights ("ICCPR"), communications "to the effect that a State Party claims that another State Party is not fulfilling its obligation under the present Covenant" shall be dealt with by the Committee "only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law."[627]

f. In addition, the relevant case law of international human rights courts or treaty-bodies leaves no doubt whatsoever as regards the full application to inter-State disputes of the local remedies rule.[628]

455. The application of the local remedies rule to international claims that individual rights have been breached is confirmed by the ILC's Draft Articles on State Responsibility. According to Article 44, the responsibility of a State cannot be invoked if local remedies have not been exhausted when "the claim is one to which the rule of exhaustion of local remedies applies". In the commentary on Article 44, the Commission notes that Article 44 "is formulated in general terms in order to cover any case to which the exhaustion of local remedies rule applies, whether under treaty or general international law, and in spheres not necessarily

[627] See also, providing for the same regime: Article 21(1)(c) of the 1984 Convention against Torture; Article 4(1) of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women; Article 7(5) of the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure; Article 2(d) of the Optional Protocol to the Convention on the Rights of Persons with Disabilities; Article 31(2)(d) of the International Convention for the Protection of All Persons from Enforced Disappearance; Article 77(b) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; or Article 50 of the African Charter on Human and People's Rights.

[628] See L. Hennebel, H. Tigroudja, *Traité de droit international des droits de l'homme,* Pedone, 2016, pp. 499-500, with the relevant references.

limited to diplomatic protection".[629] Article 48(3) of the Draft Articles specifies that "the requirements for the invocation of responsibility by an injured State under articles 43, 44 [Article 44 refers to the local remedies rule] and 45" equally applies to the invocation of responsibility by a State other than the injured State.

456. In light of the above, the local remedies rule applies in the present case and the Applicant must demonstrate that local remedies were exhausted before instituting proceedings before the Court under Article 22 CERD.

B. REGIME OF EXHAUSTION OF LOCAL REMEDIES

457. So far as the regime of exhaustion of local remedies under CERD is concerned, the CERD Committee has had the occasion to clarify that the obligation to exhaust local remedies cannot be set aside based on mere doubts about their effectiveness.[630] The Committee has also clarified the modalities for communications lodged by groups of individuals, as admitted in Article 14.[631] According to the Committee, local remedies have to be exhausted by the affected individuals or groups of individuals, not by other entities or individuals.[632] The Committee has also had the occasion to declare that the exhaustion of local remedies covered all available options, even when different parallel procedures existed and when one had proved unsuccessful.[633]

---

[629] *Yearbook of the ILC,* 2001, Vol. II (Part Two), p. 121, para. 77, Article 44, commentary, para. 3.
[630] CERD Committee, *D.S. v. Sweden*, CERD/C/59/D/21/2001, 10 August 2001, para. 4.3.
[631] CERD Committee, *Documentation and Advisory Centre on Racial Discrimination v. Denmark*, CERD/C/63/D/28/2003, 19 August 2003, para. 6.4; *Jewish Community of Oslo et al. v. Norway*, CERD/C/67/D/30/2003, 15 August 2005, para. 7.4; *Zentralrat Deutscher Sinti und Roma et al. v. Germany*, CERD/C/72/D/38/2006, 22 February 2008, para.7.2; *TBB Turkish Union v. Germany*, CERD/C/82/D/48/2010, 26 February 2013, para. 11.4.
[632] *POEM and FASM v. Denmark*, CERD/C/62/D/22/2002, 19 March 2003, para. 6.3.
[633] CERD Committee, *Sadic v. Denmark*, Communication No. 25/2002, View of 19 March 2003, CERD/C/62/D/25/2002, paras. 6.2-6.7.

458. In addition, the local remedies rule imposes that claims submitted to international bodies in relation to alleged violations of international rights suffered by individuals are, in essence, the same as the ones previously submitted to domestic courts. If CERD, or at least, racial discrimination, has not been invoked as such as the legal basis of claims before domestic courts of the Respondent State, it is not possible to invoke CERD at the international level, under Article 22 of CERD. According to the ILC, "[i]n order to satisfactorily lay the foundation for an international claim on the ground that local remedies have been exhausted, the foreign litigant must raise the basic arguments he intends to raise in international proceedings in the municipal proceedings"[634] and "the claimant state must […] produce the evidence available to it to support the essence of its claims in the process of exhausting local remedies."[635] This general rule is fully applicable in human rights case law, in particular in relation to allegations of discrimination.[636]

---

[634] See Draft Articles on Diplomatic Protection, para. 6 of commentary to draft article 14, *Yearbook of the ILC*, 2006, Vol. II (Part Two), p. 45.

[635] *Ibid*., para. 7 of the commentary on Article 14; see also S. Touzé, *La protection des droits des nationaux à l'étranger. Recherches sur la protection diplomatique,* Pedone, 2007, pp. 428-429, paras. 1182-1183; *LaGrand (Germany v. United States of America)*, *Judgment*, *I.C.J. Reports 2001,* p. 488, para. 60.

[636] See for instance Committee on the Elimination of Discrimination against Women, *Rahime Kayhan v. Turkey,* Communication No. 8/2005, 20 August 2004, CEDAW/C/34/D/8/2005, para. 7.5: "The domestic remedies rule should guarantee that States parties have an opportunity to remedy a violation of any of the rights set forth under the Convention through their legal systems before the Committee considers the violation. This would be an empty rule if authors were to bring the substance of a complaint to the Committee that had not been brought before an appropriate local authority", and para. 7.7, concluding that local remedies were not exhausted because the Applicant did not "put forward arguments that raised the matter of discrimination based on sex in substance" before domestic administrative bodies; ECtHR, Grand Chamber, *Vučković and others v. Serbia,* Nos. 17153/11 and others, Preliminary Objection, Judgment, 25 March 2014, para. 75: "It is not sufficient that the applicant may have unsuccessfully exercised another remedy which could have overturned the impugned measure on other grounds not connected with the complaint of a violation of a Convention right. It is the Convention complaint which must have been aired at national level for there to have been exhaustion of "effective remedies". It would be contrary to the subsidiary character of the

459. The requirement to invoke before domestic courts the *same claims* as the ones put forward at the international level is similar to the requirement which applies to the other preconditions for the seisin of the Court to hear that dispute. As the Court put it in 2011 in *Georgia v. Russia,* the negotiations "must relate to the subject-matter of the treaty containing the compromissory clause", i.e. "the subject-matter of the negotiations must relate to the subject-matter of the dispute which, in turn, must concern the substantive obligations contained in the treaty in question."[637] The relevant allegations submitted to the Court under Article 22 must equally have been made first through direct claims of racial discrimination before domestic courts.

Section II
Ukraine has not proven that local remedies were exhausted in the present case

460. In its Memorial, Ukraine has not established that its CERD-related claims have been invoked before competent domestic jurisdictions, and that available procedures have been exhausted in relation to these claims. Ukraine only alleges, in vague and sweeping terms, that "neither the courts nor other public institutions have helped to redress the effects of Russia's discriminatory conduct" without

---

Convention machinery if an applicant, ignoring a possible Convention argument, could rely on some other ground before the national authorities for challenging an impugned measure, but then lodge an application before the Court on the basis of the Convention argument." See also, among other examples, Human Rights Committee, Communication No. 1285/2004, *Michal Klečkovski v. Lithuania*, CCPR/C/90/D/1285/2004, 24 July 2007, para. 8.4; or *Walter Obodzinsky v. Canada*, Communication No. 1124/2002, CCPR/C/89/D/1124/2002, 19 March 2007, para. 8.3.

[637] *Georgia v. Russian Federation*, *Preliminary objections, op. cit.* fn. 268, p. 133, para. 161. See also, in relation to the condition of the pre-existence of the dispute at the time the Application is submitted to the Court, *ibid.*, p. 85, para. 30.

mentioning examples of claims submitted to domestic courts in relation to the present case.[638]

461. Ukraine only refers to applications before the Supreme Court of Crimea that have sought a "review of the ban on the Mejlis in the wake of this Court's Provisional Measures order".[639] However, these applications before domestic courts have been submitted *after*, not *before*, the institution of proceedings before the Court under Article 22 of CERD. In addition, the said applications, that Ukraine annexed to its Letter to the Court dated 7 June 2018 (Annexes 7 and 10), indicate that in previous stages of domestic proceedings, "neither the Mejlis defense, nor the Supreme Court of the Republic of Crimea, nor the Supreme Court of the Russian Federation, analysed the provisions of the 1965 [CERD] during these proceedings."[640] The applications also indicate that the "circumstances regarding the applicability of the provisions of the [CERD] to the activities of the Mejlis of the Crimean Tatar People […] had been unknown to me as the petitioner and I could not have been reasonably aware of them because it was only on January-April 2017 that the UN International Court of Justice evaluated the applicability of provisions of the [CERD] to the activity of the Mejlis of the Crimean Tatar People". This statement shows that persons acting on behalf of the Mejlis did not submit to domestic courts claims in relation to CERD before Ukraine instituted proceedings in the present case.

462. On a more general level, the Russian Federation is not aware of, and Ukraine has not identified, CERD-related claims that have been submitted to competent domestic jurisdictions in the Russian Federation in relation to

[638] Memorial, para. 635.
[639] Memorial, para. 635, as well as para. 428.
[640] Annex 7 to the Letter of Ukraine to the Court dated 7 June 2018 (Appeal by E. Bariev to the Supreme Court of the Russian Federation, 12 July 2017), reproduced in Annex 921 to Memorial.

Ukraine's claims in the present proceedings, and for which local remedies have been exhausted.

463. This is not to say that there have been no claims at all before domestic courts in relation to some facts on which Ukraine relies in its Application and Memorial, but these did not relate to allegations of racial discrimination. The local remedies rule, however, requires more than a factual coincidence; it requires that domestic claims are based on the same legal obligations, at least in substance, as the ones invoked before the International Court of Justice.

464. This is the reason why in particular the decisions of the Supreme Court of Crimea of 26 April 2016 and the appeal decision of the Supreme Court of the Russian Federation of 29 September 2016 do not qualify as exhaustion of local remedies for the purpose of the present case, because they did not address in substance the issue of alleged violations of CERD by the Russian authorities against the Crimean Tatar community or Crimean Tatar individuals.[641] To the contrary, these decisions referred to discriminatory conduct or incitement to discrimination *by* the Mejlis against other sections of the population, as an aspect related to extremism.[642]

---

[641] The same is true as regards domestic claims referred to at paras. 416 and 516 of Ukraine's Memorial (ban or restriction of movement of some Crimean Tatar leaders) (see Supreme Court of the Russian Federation, No. 5-APG15-110s, Ruling, 18 November 2015 (Annex 912 to Memorial); and OSCE, Office for Democratic Institutions and Human Rights (ODIHR) and the High Commissioner on National Minorities (HCNM), Report of the Human Rights Assessment Mission on Crimea (6–18 July 2015), 17 September 2015 (Annex 812 to Memorial), para. 229). These claims do not concern racial discrimination.

[642] See Case No. 2A-3/2016, Decision of 26 April 2016 of the Supreme Court of the Republic of Crimea concerning the appeal of the ban of the Mejlis (Annex 913 to Memorial): "Examining the evidence in its entirety, the Court finds that the hearing confirmed the arguments of the Prosecutor that the Mejlis of the Crimean Tatar People carried out extremist acts aimed at violent change of the foundations of the constitutional order and violating the integrity of the Russian Federation; public justification of terrorism and other terrorist activity; violations of rights, freedoms and lawful interests of a person and citizen, depending on its social, racial,

465. In the Memorial, Ukraine refers to several other cases brought before domestic jurisdictions. However, none of them relates to racial discrimination, and even less to CERD. Rather, such cases relate to charges of extremism, threat to public order, participation in unauthorised public gatherings or violations of norms regulating the preservation of cultural heritage sites.[643]

466. Ukraine's failure to refer to a single relevant case attesting to the exhaustion of local remedies in relation to the claims of racial discrimination under CERD it submitted to the Court cannot be explained in terms of a lack of reasonable or effective remedies in the domestic law of the Russian Federation, including in the law of the Republic of Crimea. On the contrary, such domestic law provides for a comprehensive and effective system of local remedies. Individuals can make use of such remedies either by appealing directly to the superior official or state body (administrative remedies) or to a competent court.

---

national, religious or linguistic affiliation or attitude to religion; obstruction of the lawful activity of state bodies, local self-government bodies, coupled with violence and threat thereof."; Case No. 127-APG16-4 Decision of 29 September 2016 of the Supreme Court of the Russian Federation concerning the appeal of the ban of the Mejlis (Annex 915 to Memorial): "International legal standards in the field of human rights, while proclaiming the right of everyone to freedom of expression, however, stipulate that any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, any dissemination of ideas based on racial superiority or hatred, as well as acts of violence or incitement to such acts against any race or group of persons of another color or ethnic origin, any discrimination based on religion or belief should be prohibited by law" (referring to UDHR, ICCPR, Declaration on the elimination of all forms of intolerance and discrimination based on religion or belief, ECHR, but not to CERD).

[643] See e.g., Ruling in Case No. 5-1591/2016, 4 October 2016 (Annex 916 to Memorial); Ruling in Case No. 5-1588/2016, 23 November 2016 (Annex 917 to Memorial); Judgment of the Bakhchysarai District Court in Case No. 5-238/2017, 8 June 2017, concerning Abdurefiyev, I.L. (Annex 918 to Memorial); Judgment of the Bakhchysarai District Court in Case No. 5-239/2017, 8 June 2017concerning Umerov, S.D. (Annex 919 to Memorial); Judgment of the Bakhchysarai District Court in Case Nos. 5-237/2017 5-236/2017, 8 June 2017, concerning Mamutov, U.R. (Annex 920 to Memorial); Interim measures for Civil Suit No. 2-1688/2014 (prohibiting Crimea Foundation from exercising ownership of its properties and sequestering its bank accounts) (Annex 929 to Memorial); Ruling of Zheleznodorozhny District Court of Simferopol (Annex 930 to Memorial); RFE/RL, "The Editors of the Crimean Tatar Newspaper Are Summoned for Interrogations on Suspicion of Extremism", 3 June 2014 (Annex 1047).

When it comes to administrative remedies, applications may take various forms and may be individual or collective depending on the subject-matter. Decisions of administrative bodies and courts can be appealed at every stage. More specifically the available remedies may include the following (without limitation and depending on the situation of the complainant):

a. A number of administrative and judicial procedures can be used to challenge alleged discriminatory decisions, actions and omissions of state bodies, local self-government (municipal) bodies or state officials.[644] Administrative and judicial challenges described below are very wide reaching. They may be used by individuals and legal entities to challenge, *inter alia*, bans on entry into the territory of the Russian Federation, bans or decisions on mass gatherings issued by local administrations, appeal the ban on activities of an extremist organisation, challenge alleged violations in relation to education in minority language, or denial of registration of media outlets.

    i. Administrative challenges are usually brought to the attention of the superior official or agency of the state body or official, whose decision or action is complained of. Administrative challenges generally are not subject to strict requirements and shall be addressed by relevant competent authority within 30 days from the

[644] These measures do not apply to courts exercising their judicial function and legislative activities of parliaments of any level. Judicial decisions taken in the implementation of the courts' powers to rule on administrative matters are subject to the appeal procedures within the respective court system as described further below in this subparagraph. Legislative enactments can also be repealed, but Ukraine does not seem to allege that any legislation is per se discriminatory. In any event, a short description of the Constitutional Court challenge, as the most relevant to the subject-matter of CERD, is provided in para. 466(e) below.

date of application, unless a shorter deadline is provided for particular type of applications.[645]

Depending on the level of decision-making in administrative hierarchy there may be more than one level of administrative appeal available in each particular case. Administrative appeals do not exclude further recourse to judicial remedies, but are rather envisaged as faster and simpler steps that the applicants may resort to (or should resort to, if specifically provided by the Federal Law) before going to court, if ultimately necessary.

ii. In addition to the administrative challenges an applicant may file a complaint with the Prosecutors' Office,[646] which has a general power to supervise compliance with the law, including human rights, by state organs. If, following enquiry into the application, the prosecutor determines that a state organ violated the law the prosecutor shall issue special mandatory directions aimed at restoring law and order. The prosecutor will also take other steps to initiate criminal or administrative misdemeanor proceedings, where appropriate.

iii. Judicial challenges (depending on the subject-matter of the complaint) are entertained by the courts of general jurisdiction or arbitrazh (commercial) courts. Judicial challenges are subject to

[645] Federal Law No. 59-FZ "On the procedure for consideration of appeals by citizens of the Russian Federation", 2 May 2006 (Annex 60); Federal Law No. 210-FZ "On organisation of provision of state and municipal services", 27 July 2010 (applicable, for example, to media outlets registration services) (Annex 60).

[646] Federal Law No. 2202-1 "On Public Prosecutor Service of the Russian Federation", 17 January 1992 (Annex 60).

special procedural rules prescribed in the Code of Administrative Judicial Procedure and the Arbitrazh Procedural Code (the latter applies for commercial courts when the challenge falls within their purview).[647] Once the case is decided by a court of first instance, several levels of appeal are available within the judicial system up to the Supreme Court of the Russian Federation. Generally, there are three levels of appeal available after the first instance. First level appeals (in appellate instance) can be filed before the first instance judgments enter into force and may challenge deficiencies of law and fact-finding in the first instance. Second level (cassation) appeals may challenge wrong application of law (both substantive and procedural) in a judgment that has entered into force. Third level (supervision) appeals should raise a very significant issue of misapplication of the law, including human rights (such as Article 19 of the Constitution prohibiting discrimination); they are subject to prior admissibility review by a single judge of the relevant court.[648] It follows that in a case of alleged discrimination all levels of appeal should be available.

iv. Finally, if a judge allows discrimination in the proceedings, his or her actions may be appealed to the qualification board for judges that will consider whether the judge should be disciplined.[649] The

[647] The Code of Administrative Judicial Procedure was adopted in 2015. Before that the same remedies could be enforced under the Code of Civil Procedure.

[648] Code of Administrative Judicial Procedure of the Russian Federation (Federal Law No. 21-FZ, 8 March 2015) (Annex 60). Arbitrazh Procedural Code of the Russian Federation (Federal Law No. 95-FZ, 24 July 2002) (Annex 60).

[649] Federal Law No. 30-FZ "On bodies of the judiciary in the Russian Federation", 14 March 2002 (Annex 60); Law No. 3132-1 "On the status of judges", 26 June 1992 (Annex 60).

judge may also be recused in case there are doubts about his or her independence or impartiality in a particular case.[650]

b. The prosecution of administrative offences relies on a special body of rules applicable to offences that do not amount to crimes.

i. Article 5.62 of the Code on Administrative Offenses is the most relevant to Ukraine's case as it makes discrimination an administrative offence and can be used by persons aggrieved against any perpetrators. Complaints should be filed with the courts of general jurisdiction (justices of the peace) under Article 23.1 of the same Code.

ii. Where a person brought to administrative liability believes to have been discriminated by such decision, or in the course of relevant proceedings, he or she can raise this issue before the court or state authority (official) that decides on imposition of administrative liability and challenge the decision issued by a court or other competent authority (official)[651] under the general procedure envisaged in this Code, providing for both administrative and judicial appeals.[652]

The Code provides for a system of appeals broadly similar in structure to the one described above in relation to the actions of

[650] Code of Administrative Judicial Procedure, *op. cit.,* Article 31(2) (Annex 60); Arbitrazh Procedural Code, *op. cit.*, Article 21(1) (Annex 60).

[651] For some administrative offences the Code vests the power to decide whether a person is liable on a state organ (or official), with any decision of such organ or official subject to, *inter alia*, appeal before a court.

[652] Code of the Russian Federation on Administrative Offences (Federal Law No. 195-FZ, 30 December 2001) (Annex 60).

state bodies and officials. According to Article 30.1 of the Code administrative appeals are not mandatory and can be submitted by various interested parties to a higher ranking state body or official.[653] Judicial appeals are available either to the local district court (or the lower level commercial court) or a higher level court, depending on where the challenged ruling originates.[654] Further appeals and procedural challenges are available within the judicial system as outlined in the paragraph (a)(iii) above.

This procedure is applicable for example in connection with administrative penalties imposed for organisation of unauthorised rallies and other public events, disturbance of public order, distribution of certain types of extremist material, etc. It can also be used to challenge administrative arrests, fines imposed on persons as punishment for administrative offences, arrest of individuals for violation of public order, fines for participation in gatherings organised by an extremist organisation, violations of temporary residence rules that may lead to administrative expulsion of foreign nationals, or violations of rules on preservation of cultural heritage sites.

c. Various remedies are provided by Russian criminal law and criminal procedure.

   i. Discrimination in certain circumstances constitutes a standalone criminal offence and it is an aggravating circumstance in the

[653] Except where the original decision is issued by a panel of officials, in which case the appeal goes directly to the court.
[654] Code on Administrative Offences (Annex 60).

context of other criminal offences. Grave discrimination by public officials constitutes a criminal offence. The Criminal Code of the Russian Federation (Article 136)[655] criminalises discrimination committed with the use of official position. A person considering that such an offence has been committed may file a complaint. Therefore, discrimination can be a self-standing basis for a criminal complaint or apply in conjunction with other charges. The complaint would lead to inquiry and, if the allegations are confirmed, investigation in accordance with the standard criminal procedure.[656] In addition, if a crime was committed on racial hatred grounds this serves as an aggravating circumstance and results in higher penalty.[657]

ii. Special administrative and judicial remedies are provided by Russian criminal procedure law to challenge actions (or omissions) and decisions taken in the course of investigation of crimes allegedly committed against individuals (such as those referenced in the Memorial of Ukraine). Administrative complaints are filed either with the prosecutor or the head of the investigation authority, and any complaint based on discrimination can also be filed before the local district court.[658] These complaints may challenge any actions (or omissions) and decisions infringing upon the rights and legitimate interests of a suspect or accused in the

[655] Criminal Code of the Russian Federation (Federal Law No. 63-FZ, 13 June 1996) (Annex 60).
[656] Criminal Procedural Code of the Russian Federation (Federal Law No. 174-FZ, 18 December 2001) (Annex 60).
[657] Criminal Code of the Russian Federation, *op. cit.,* Article 63(1e) (Annex 60).
[658] Criminal Procedural Code, *op.cit.,* Article 123 *et seq*. (Annex 60).

criminal proceedings. A decision of the court on such challenge is subject to further appeals.

iii. Where a person is held criminally liable and believes the judgment of the court or proceedings to have been discriminatory various appeals against the judgment are available. Appeals against criminal sentences follow broadly the same levels of appeal as described in paragraph (a)(iii) above. Disciplinary liability of judges and a right to recuse a judge equally apply in the criminal proceedings.

iv. These remedies available within criminal proceedings provide means to address various allegations raised by Ukraine. That would concern, among other things, allegedly discriminatory actions of law enforcement authorities, where the alleged victims believe that their rights were infringed upon (through searches, detentions, questioning, etc.) without sufficient basis. These remedies would also apply to the allegedly discriminatory failures to investigate complaints of enforced disappearances, torture, murders and other grave crimes, as well as any allegedly discriminatory decisions taken in the course of such investigations.

v. Execution of criminal sentences is performed by a separate authority (the Federal Penitentiary Service) in charge of various penitentiary institutions. Should the alleged victims believe that a particular criminal sentence is executed in a discriminatory way, they may use various administrative and judicial remedies against

the relevant officials, as described in paragraph (a)[659] and paragraphs (b) and (c), if such violations amount to offences under the relevant Codes.

d. Commercial and general jurisdiction court procedures[660] are also available for any pecuniary damage, such as infringements into property rights, unlawful frustration and violation of contracts, torts, etc. Any such violations committed with discriminatory intent or purpose can be redressed through standard panoply of civil causes of action provided for by the Civil Code of the Russian Federation.

   The Civil Procedural Code[661] and the Arbitrazh Procedural Code provide for essentially the same levels of appeal as described above. Disciplinary liability for judges also applies along with recusals procedure.

   Enforcement is handled by the state bailiffs, and any deficiencies at this stage can be addressed as described in paragraph (a) above (or even paragraphs (b) and (c), if the relevant violations are committed).

e. While Ukraine does not seem to argue that Russian legislation is discriminatory *per se*, any such allegation could also be addressed at the national level. In particular, since Article 19 of the Russian Constitution prohibits discrimination,[662] any law that allows discrimination would be

[659] Penitentiary system is a separate area of control for the Public Prosecutor Service (Article 32 *et seq*. of the Federal Law "On Public Prosecutor Service of the Russian Federation", *op. cit.*) (Annex 60).
[660] Depending on the claimant and the subject-matter of the claim.
[661] Civil Procedural Code of the Russian Federation (Federal Law No. 138-FZ, 14 November 2002).
[662] Constitution of the Russian Federation, 12 December 1993 (Annex 60).

subject to challenge in the Constitutional Court of the Russian Federation by those who suffered discrimination through application of such law.[663]

467. These remedies are available under Russian domestic law, including in Crimea. There were a fully functioning court system and criminal prosecution bodies in the Republic of Crimea and the City of Sevastopol at all material times throughout the transition process. Since the accession of the Republic of Crimea and the City of Sevastopol to the Russian Federation on 18 March 2014, transitional arrangements were adopted for the courts and the law enforcement agencies to ensure that there remained a fully functioning and effective system of legal remedies. On 21 March 2014, the Russian Federation adopted the Federal Constitutional Law on Admission to the Russian Federation of the Republic of Crimea and on Formation of the New Subjects of Federation – Republic of Crimea and Federal City of Sevastopol ("Admission Law"). Under the Admission Law:

a. The existing courts of Crimea and Sevastopol retained jurisdiction to be exercised in the name of the Russian Federation during the transition period.

b. Litigants were given the right to file appeals from the decisions of the Crimean and Sevastopol courts to the Supreme Court (or Supreme Commercial Court) in accordance with Russian procedural law.[664]

c. The Crimean and Sevastopol courts applied Russian procedural laws to the conduct of proceedings pending as of the date of admission

[663] Federal Constitutional Law No. 1-FKZ "On Constitutional Court of the Russian Federation", 21 July 1994 (Annex 60).
[664] Article 9(6) of the Admission Law (Annex 60).

(and by implication any proceedings commenced after the admission).[665]

d. Judges of the Crimean and Sevastopol courts continued in their offices for the transition period provided they had acquired Russian nationality.[666]

468. From 26 December 2014, the Crimean courts transferred cases pending before them to the newly established Federal Courts of the Russian Federation.[667]

469. Therefore, the domestic legal order of the Russian Federation did offer at the time of the accession and does offer today an effective system of legal remedies covering all aspects of Ukraine's claim under CERD before this Court. There is consequently no reason why local remedies, which were available, had not been exhausted in the present case before the institution of proceedings under Article 22 of CERD.

470. In light of the above, available local remedies in respect of Ukraine's claims in relation to CERD have not been exhausted and therefore these claims should be dismissed.

---

[665] *Ibid*., Article 9(7) (Annex 60).

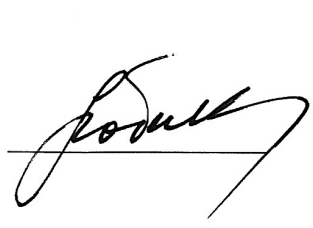
[666] *Ibid*., Article 9(5) (Annex 60).

[667] Federal Law No. 154-FZ "On establishing courts of the Russian Federation in the Republic of Crimea and the Federal City of Sevastopol and amending certain legislative acts of the Russian Federation", 23 June 2014 (Annex 60). The date of the beginning of functioning of newly established courts was determined by Plenum of the Supreme Court of the Russian Federation as 26 December 2014 (Resolution No. 21, 23 December 2014) (Annex 60). Crimea also later formed regional system of the justices of the peace that act as the lowest level of the courts of general jurisdiction for certain categories of cases (Federal Law No. 149-FZ, 8 June 2015, provided for up to 100 justices of the peace in the Republic of Crimea; for Sevastopol, Federal Law No. 516-FZ, 31 December 2014 provided for up to 21 justices of the peace; Federal Law No. 218-FZ "On the number of justices of the peace and number of court districts in the constituent entities of the Russian Federation", 29 December 1999, Article 1 (Annex 60)).

PART IV

SUBMISSION

471. In view of the foregoing, the Russian Federation requests the Court to adjudge and declare that it lacks jurisdiction over the claims brought against the Russian Federation by Ukraine by its Application of 16 January 2017 and/or that Ukraine's claims are inadmissible.



Dmitry A. LOBACH

Ilya I. ROGACHEV

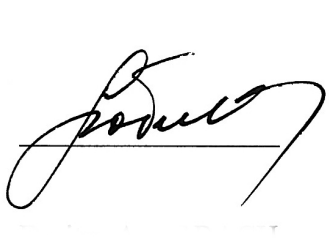
Grigory E. LUKIYANTSEV

Agents of the Russian Federation

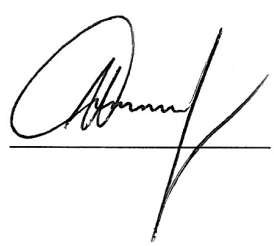
Moscow, 12 September 2018

CERTIFICATION

We hereby certify that the annexes are true copies of the documents referred to and that the translations provided are accurate.



Dmitry A. LOBACH



Ilya I. ROGACHEV

Grigory E. LUKIYANTSEV

Agents of the Russian Federation

Moscow, 12 September 2018

APPENDIX A

TABLE OF CONTENTS

Table 1: Characterisation of indiscriminate shelling and presence of military objectives

Date	Organisation	Characterisation of indiscriminate shelling by all parties to the armed conflict as "terrorism"?	All parties to the armed conflict locating military objectives in populated areas?
December 2014 to February 2015	OHCHR	No.	Yes: "In January 2015, usage of tanks, heavy artillery and multiple launch rocket systems (MLRS) resumed and spread to populated areas along or near the line of contact."[1]
January 2014 to May 2016	OHCHR	No: "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."[2]	-
January 2015	ICRC	No: With specific respect to Volnovakha: "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."[3]	-
May to August 2015	OHCHR	No: Calls on "*all parties* involved in the hostilities in Donetsk and Luhansk regions: […] Respect international humanitarian law, particularly by complying with the principles of distinction,	Yes: Calls on "all parties involved in the hostilities […] Respect international humanitarian law, particularly by complying with the principles of distinction, proportionality and precaution and, in any situation,

[1] OHCHR, "Report on the human rights situation in Ukraine 1 December 2014 to 15 February 2015", para. 21 (Annex 309 to Memorial).
[2] OHCHR, "Accountability for killings in Ukraine from January 2014 to May 2016", p. 3 (Annex 49 to Memorial).
[3] ICRC, "Ukraine Crisis: ICRC calls on all parties to spare civilians", 20 January 2015, available at https://www.icrc.org/en/document/ukraine-crisis-icrc-calls-all-parties-spare-civilians.

		proportionality and precaution, and in any situation, refraining from indiscriminate shelling of populated areas".[4]	refraining from indiscriminate shelling of populated areas, and *refraining from locating military objectives within or near densely populated areas* and damaging objects indispensable to the survival of the civilian population (i.e. water facilities), as well as protect medical personnel, ambulances and facilities."[5]
August to November 2015	OHCHR	No: "To all parties involved in the hostilities […] Ensure the protection of civilians in conflict affected areas in fully conformity with international human rights and humanitarian law, including complete avoidance of indiscriminate shelling by populated areas."[6]	"Recommendations made in OHCHR previous reports […] that have not yet been acted upon or implemented, remain valid."[7]
November 2015 to February 2016	OHCHR	No: "To all parties involved in the hostilities […] Respect international humanitarian law, particularly the principles of distinction, proportionality and precaution; in any situation, refraining from indiscriminate shelling of populated areas, and from locating military objectives within or near densely populated areas".[8]	Yes: "Ukrainian armed forces and armed groups maintained their positions and further embedded their weapons and forces in populated areas, in violation of their obligations under international humanitarian law."[9]

4 OHCHR, "Report on the human rights situation in Ukraine 16 May to 15 August 2015", para. 193 (b) (Annex 769 to Memorial) (emphasis added).
5 *Ibid.* (emphasis added).
6 OHCHR, "Report on the human rights situation in Ukraine 16 August to 15 November 2015", para. 185 (b) (Annex 312 to Memorial).
7 *Ibid.,* para. 185.
8 OHCHR, "Report on the human rights situation in Ukraine 16 November 2015 to 15 February 2016", para. 214(b) (Annex 314 to Memorial).
9 *Ibid.*, para. 25.

June 2016	ICRC	No: "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".[10]	-

[10] ICRC, "Ukraine crisis: Intensifying hostilities endanger civilian lives and infrastructure", 10 June 2016, available at https://www.icrc.org/en/document/ukraine-crisis-intensifying-hostilities-endanger-civilian-lives-and-infrastructure. See also ICRC, "ICRC warns of deteriorating humanitarian situation amid intensifying hostilities in eastern Ukraine", 2 February 2017, available at https://www.icrc.org/en/document/icrc-warns-deteriorating-humanitarian-situation-intensification-hostilities-eastern-ukraine.

Table 2: Greater civilian casualties caused by shelling attributed to Ukraine

Date	Organisation	Greater civilian casualties caused by indiscriminate shelling in territory controlled by the DPR/LPR?	Attribution to UAF?
December 2014 to February 2015	OHCHR/OSCE	No specific data	Yes: On 22 January 2015 (two days before the shelling of Mariupol), 8 civilians were killed and 13 were injured when a trolley bus was hit by mortar or artillery rounds in Kuprina Street in Donetsk City. The OSCE assessed that the shells had been "fired from a north-western direction", i.e., from government-controlled territory. [11]
May to August 2015	OHCHR/OSCE	Yes: Government-controlled territory, 165 civilian casualties, including 41 killed; DPR/LPR-controlled territory, 244 civilian casualties, including 69 killed.[12]	Yes: OSCE crater analysis, which is of obvious use in identifying the source of a given attack, shows 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. [13]

[11] OSCE, "Spot report by the OSCE Special Monitoring Mission to Ukraine (SMM): Shelling incident on Kuprina Street in Donetsk City", 22 January 2015, available at https://www.osce.org/ukraine-smm/135786.

[12] OHCHR, "Report on the human rights situation in Ukraine 16 May to 15 August 2015", paras. 29 and 32 (Annex 769 to Memorial).

[13] 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", 28 May 2015", available at https://www.osce.org/ukraine-smm/160611; OSCE, "Latest from OSCE Special Monitoring Mission (SMM) to Ukraine, based on information received as of 19:30hrs (Kyiv time), 12 June 2015", 13 June 2015, available at https://www.osce.org/ukraine-smm/164141; OSCE, "Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 19:30 hrs (Kyiv time), 19 July 2015", 20 July 2015, available at https://www.osce.org/ukraine-smm/173666; OSCE, "Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 19:30 hrs (Kyiv time), 30 July 2015", 31 July 2015, available at https://www.osce.org/ukraine-smm/175591; OSCE, "Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 19:30 (Kyiv time), 2 August 2015", 3 August 2015, available at https://www.osce.org/ukraine-smm/175736; OSCE, "Latest from OSCE Special Monitoring Mission (SMM) to Ukraine, based on information received as of 19:30 hrs (Kyiv time), 11 August 2015", 12 August 2015, available at https://www.osce.org/ukraine-smm/176961.

November 2015 to February 2016	OHCHR	Yes: see **Map 1** below[14]	Yes.[15]
February to May 2016	OHCHR	Yes: see **Map 2** below[16]	Yes:[17] Supported by OSCE crater analysis of specific shelling attacks on populated areas on the DPR/LPR side of the contact line. 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.[18]
May to August 2016	OHCHR	Yes: see **Map 3** below[19]	Yes: Origin of the shelling is again supported by OSCE analysis of specific shelling incidents.[20]
August to November	OHCHR	Yes: "In October, OHCHR recorded eight times more	Yes: Origin of the shelling is again supported by OSCE

14 OHCHR, "Report on the human rights situation in Ukraine 16 November 2015 to 15 February 2016", map at p. 5 (Annex 314 to Memorial).

15 For specific incidents 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 February 2016", 8 February 2016, available at https://www.osce.org/ukraine-smm/221171. See also OSCE, "Latest from OSCE Special Monitoring Mission (SMM) to Ukraine, based on information received as of 19:30 hrs (Kyiv time), 8 February 2016", 9 February 2016, available at https://www.osce.org/ukraine-smm/221436.

16 OHCHR, "Report on the human rights situation in Ukraine 16 February to 15 May 2016", map at p. 5 (Annex 771 to Memorial).

17 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 February 2016, available at https://www.osce.org/ukraine-smm/224136; 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, available at https://www.osce.org/ukraine-smm/231261.

18 OSCE, "Spot Report by the OSCE Special Monitoring Mission to Ukraine (SMM): Shelling in Olenivka", 28 April 2016, available at https://www.osce.org/ukraine-smm/236936.

19 OHCHR, "Report on the human rights situation in Ukraine 16 May to 15 August 2016", map at p. 4 (Annex 772 to Memorial).

20 See 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, available at https://www.osce.org/ukraine-smm/243031; 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, available at https://www.osce.org/ukraine-smm/248801; 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 August 2016, available at https://www.osce.org/ukraine-smm/257516.

2016		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."[21] See also **Map 4** below.[22]	analysis of specific shelling incidents.[23]
November 2016 to May 2017	OHCHR	Yes: see **Map 5** and **Map 6** below[24] Note that this period includes the shelling of Avdiivka and the period immediately after the Order of 19 April 2017. Note also that the same pattern has continued to date.[25]	-

[21] OHCHR, "Report on the human rights situation in Ukraine 16 August to 15 November 2016", para. 4 (Annex 773 to Memorial) (emphasis added). See also para. 23.

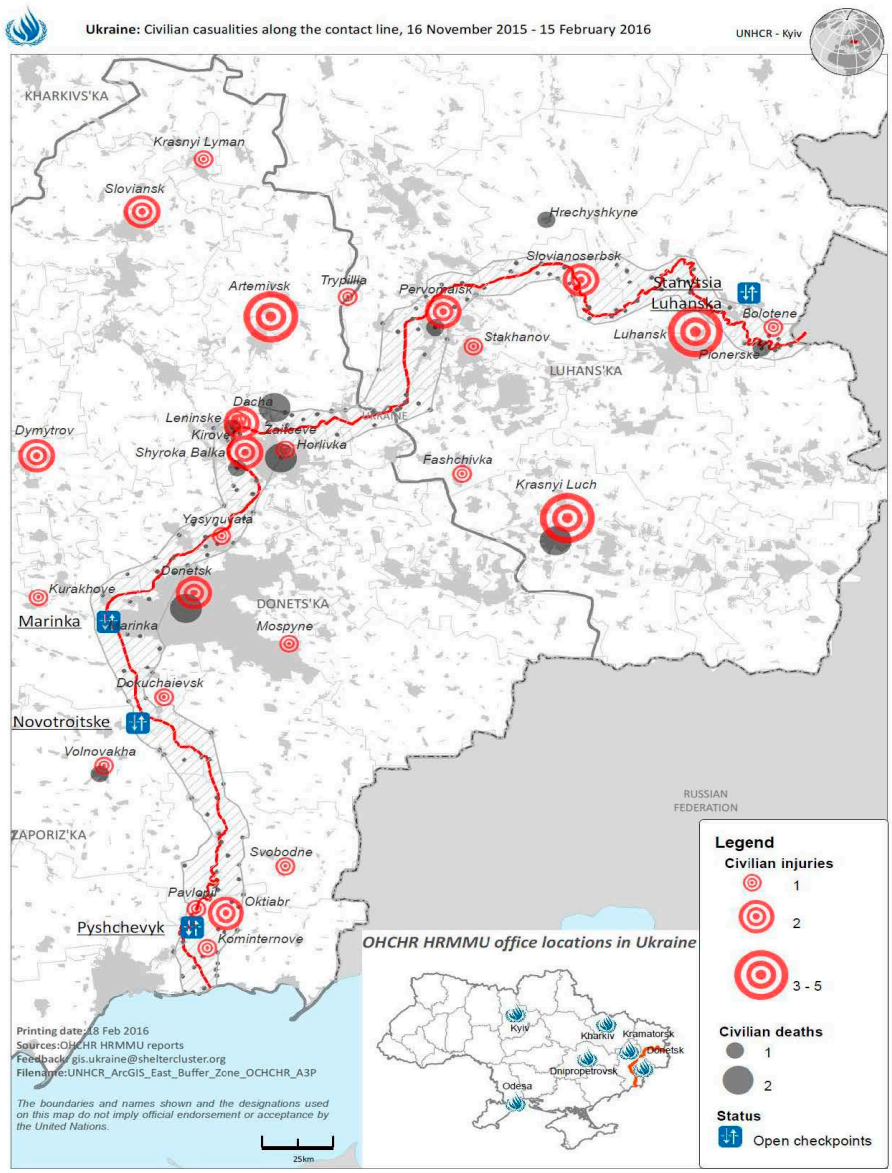
[22] *Ibid.*, map at p. 4.

[23] See 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 October 2016, available at https://www.osce.org/ukraine-smm/273756; 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 October 2016, available at https://www.osce.org/ukraine-smm/274286; 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 October 2016, available at https://www.osce.org/ukraine-smm/278046.

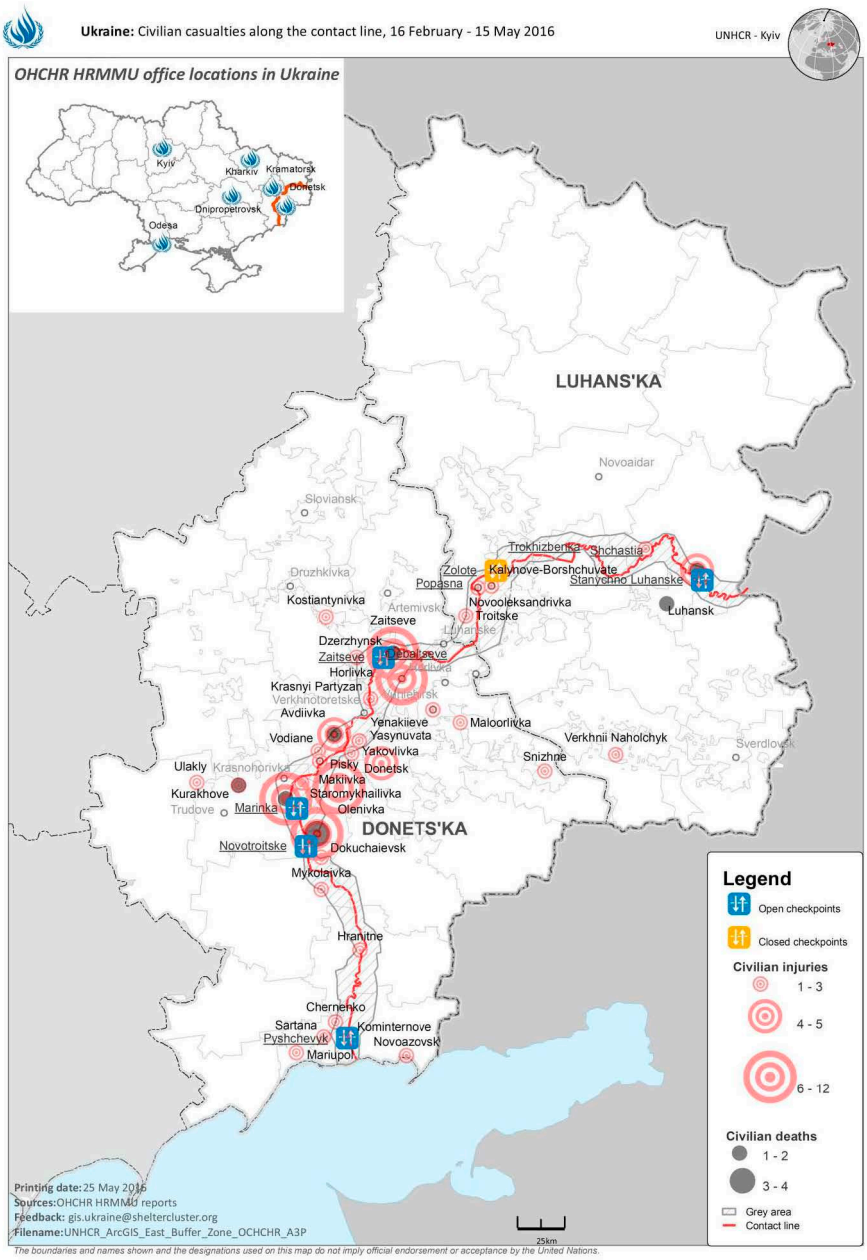
[24] OHCHR, "Report on the human rights situation in Ukraine 16 November 2016 to 15 February 2017", map at p. 4 and para. 28 (recording three times as many civilian casualties in territory controlled by the DPR/LPR), available at https://www.ohchr.org/Documents/Countries/UA/UAReport17th_EN.pdf; OHCHR, "Report on the human rights situation in Ukraine 16 February to 15 May 2017", map at p. 6 (Annex 774 to Memorial).

[25] OHCHR, "Report on the human rights situation in Ukraine 16 May to 15 August 2017", map at p. 6 and table at para. 33 (Annex 775 to Memorial); OHCHR, "Report on the human rights situation in Ukraine 16 August to 15 November 2017", map at p. 6 and table at para. 27 (Annex 776 to Memorial); OHCHR, "Report on the human rights situation in Ukraine 16 November 2017 to 15 February 2018", map at p. 5 and para. 19 (Annex 779 to Memorial); OHCHR, "Report on the human rights situation in Ukraine 16 February to 15 May 2018", map at p. 5 and para. 18, available at https://www.ohchr.org/Documents/Countries/UA/ReportUkraineFev-May2018_EN.pdf.

Map 1: OHCHR Map showing civilian casualties caused by shelling along the contact line, 16 November 2015 to 15 February 2016

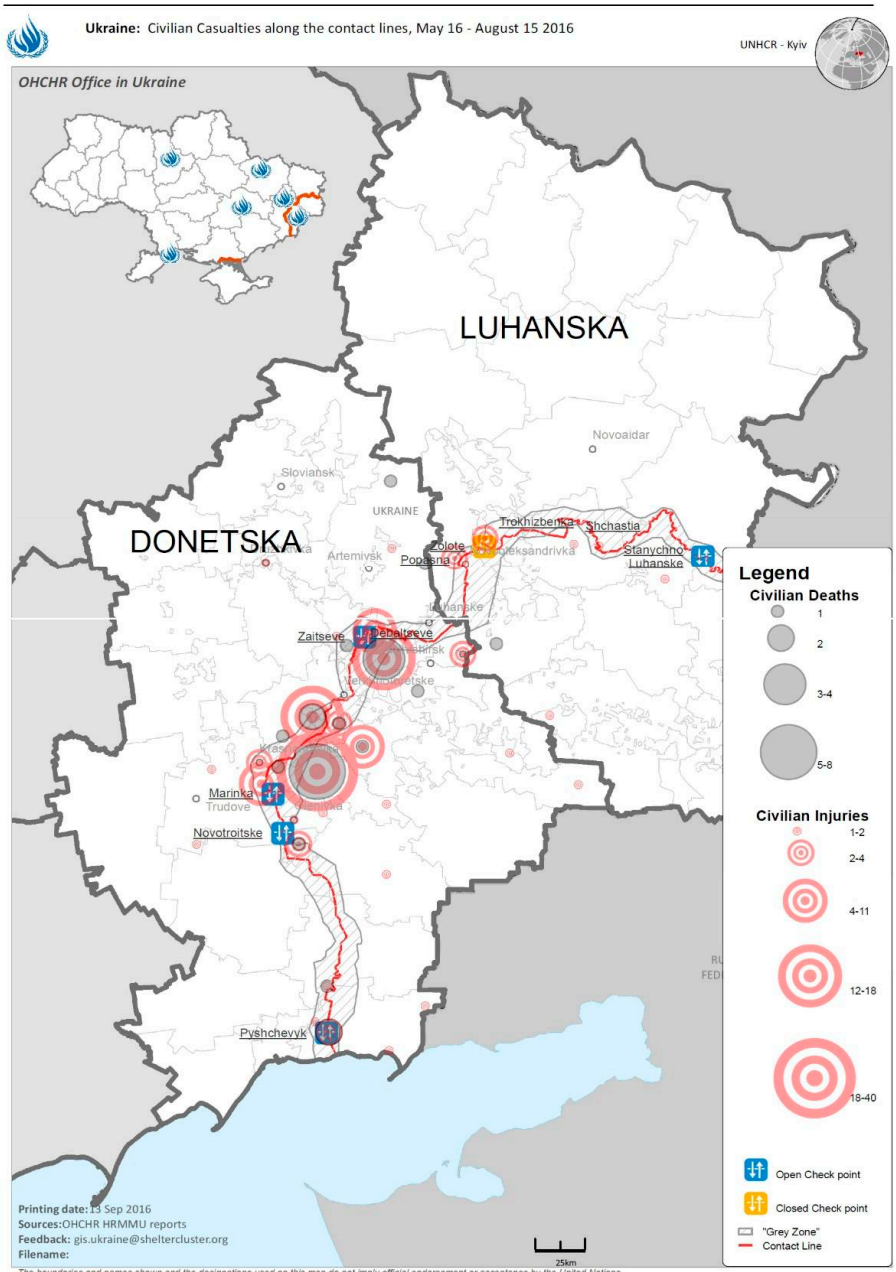


Map 2: OHCHR Map showing civilian casualties caused by shelling along the contact line, 16 February to 15 May 2016

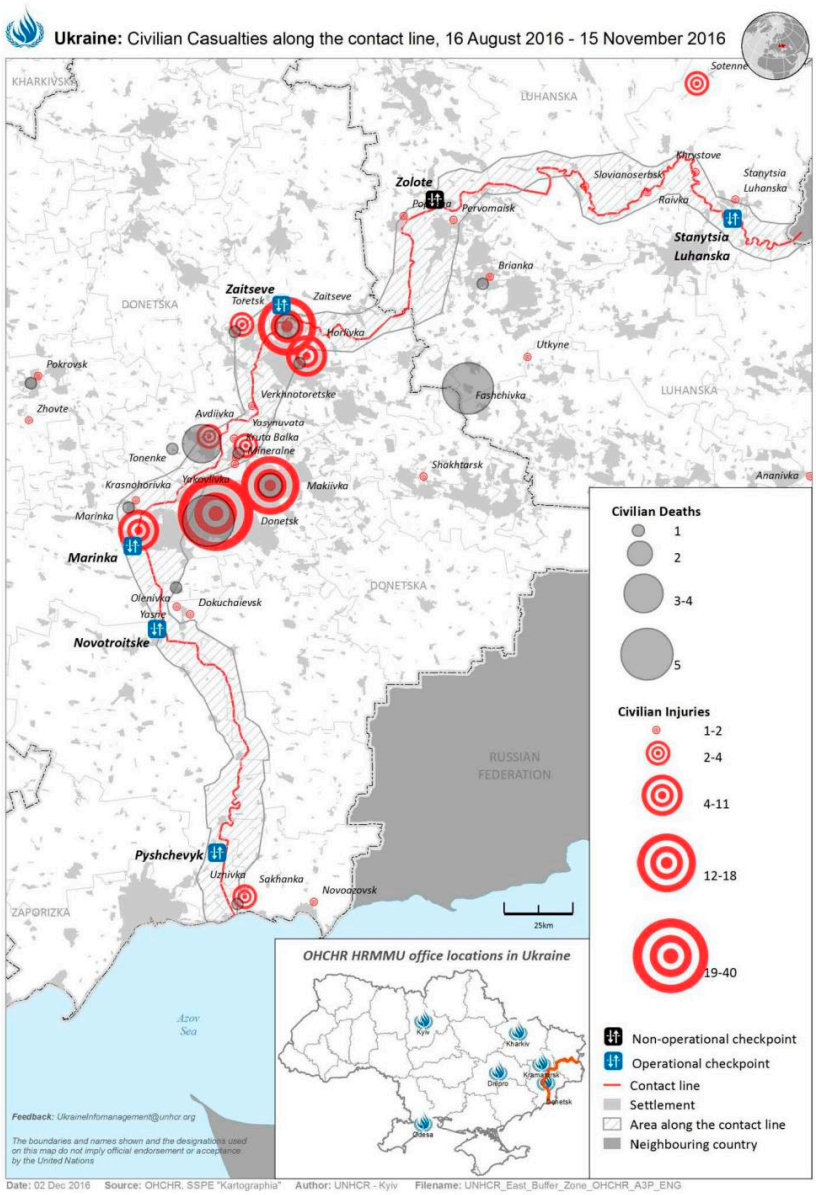


5

Map 3: OHCHR Map showing civilian casualties caused by shelling along the contact line, 16 May to 15 August 2016

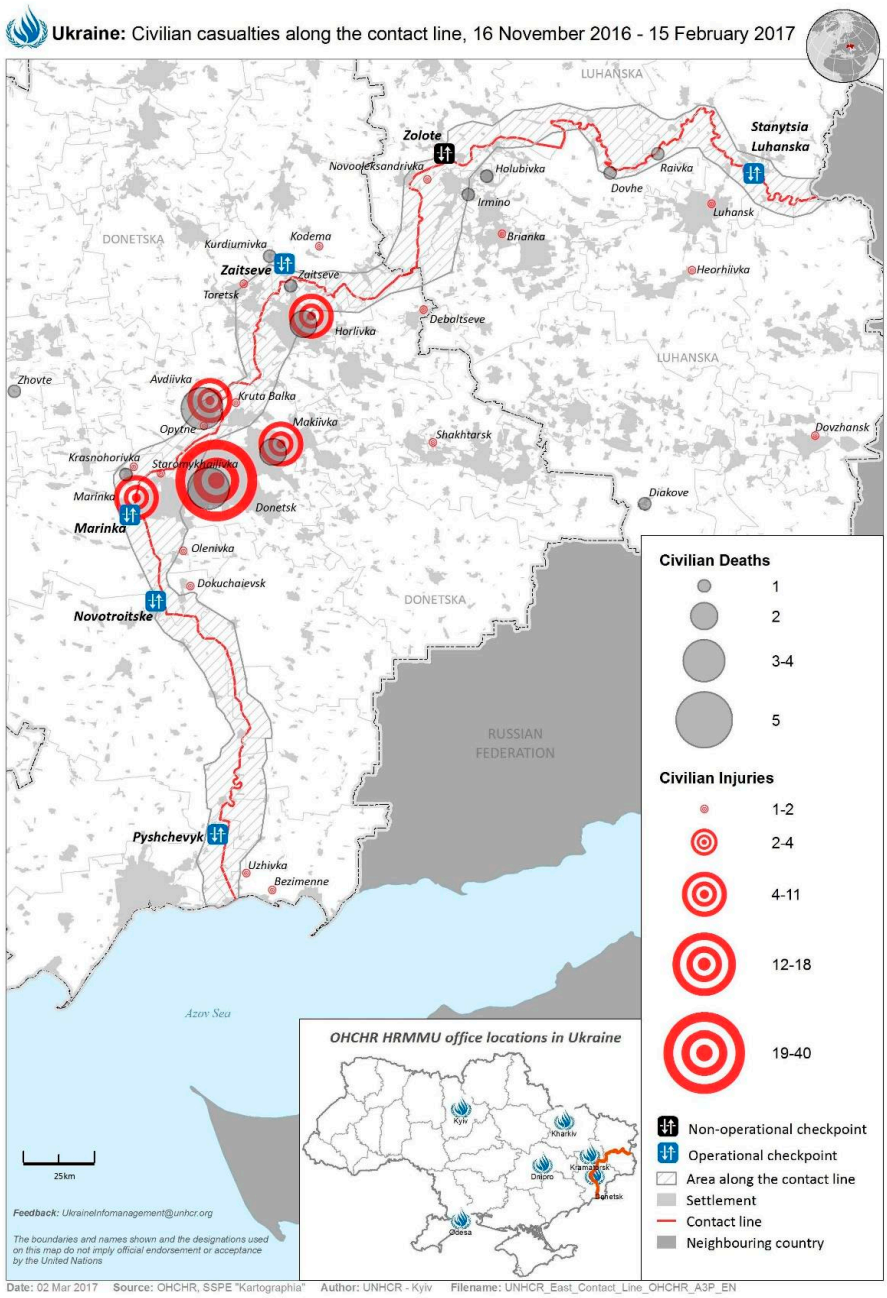


Map 4: OHCHR Map showing civilian casualties caused by shelling along the contact line, 16 August to 15 November 2016



4

Map 5: OHCHR Map showing civilian casualties caused by shelling along the contact line, 16 November 2016 to 15 February 2017



Map 6: OHCHR Map showing civilian casualties caused by shelling along the contact line, 16 February to 15 May 2017

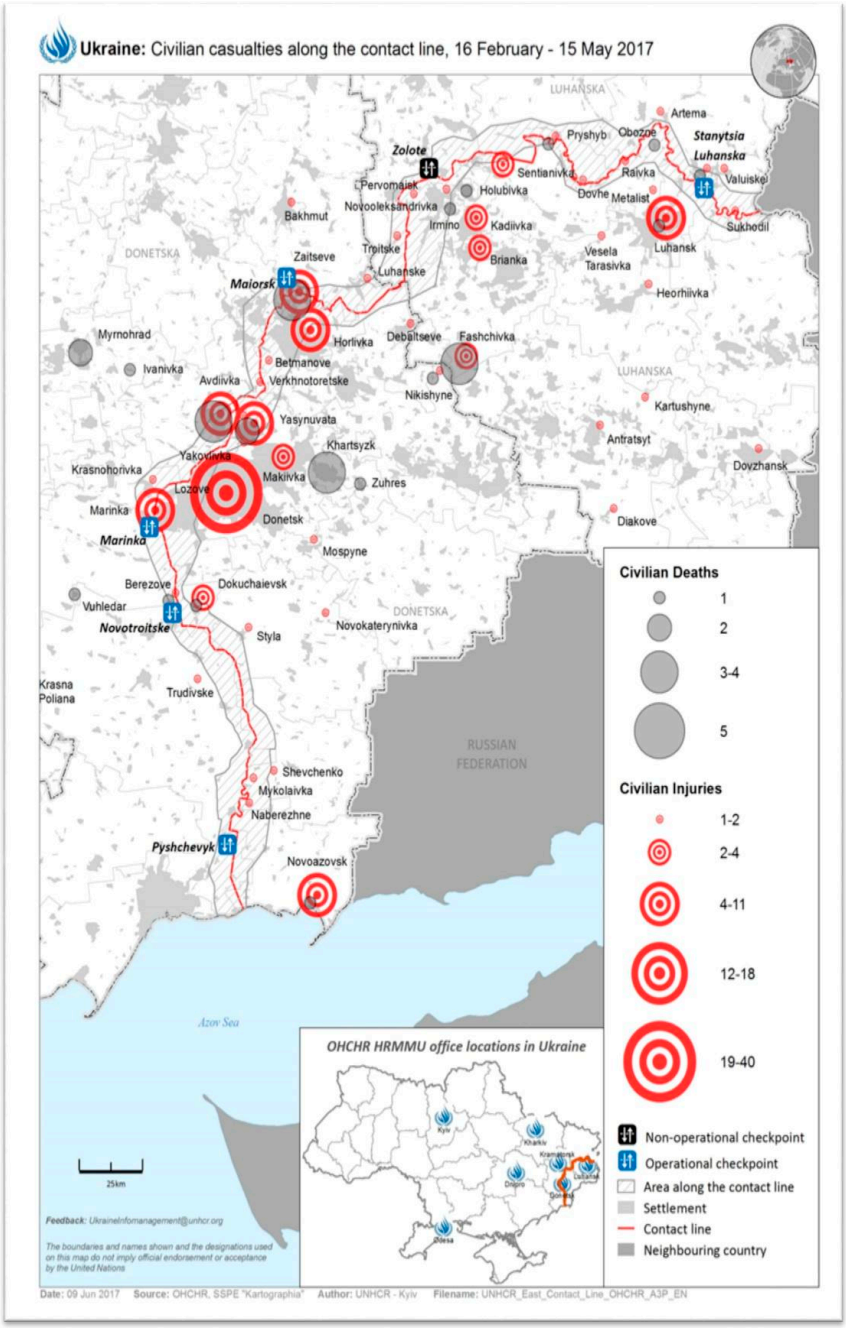


Table 3: Shelling of the checkpoint near Volnovakha on 13 January 2015

	Characterised as an act of "terrorism"?	**Military objective targeted?**	**Specific intent to kill or seriously harm civilians (including DPR/LPR reactions to civilian casualties)?**	**Requisite specific purpose to intimidate or compel?**
Ukraine's case in its Memorial	"Yes" (according to Ukraine only)	Ukraine says "No": Ukraine repeatedly refers to a "civilian checkpoint".[26] But even its own witness evidence is that the checkpoint was established as part of the so-called "Anti-Terrorist Operation" and that it was manned by, among others, "State Border Guard servicemen, internal troops of 'Kyiv-2' unit", both "equipped with small arms, in particular Kalashnikov assault rifles, pistols, and hand grenades."[27] Ukraine states that there was no military advantage to the attack.[28] But even its own	Inferred by Ukraine as follows: Ukraine contends that *dolus directus* should be inferred on the basis that the "checkpoint did not play a role in the ongoing conflict, and there was no military reason to attack it."[30] Ukraine contends that *dolus indirectus* should be inferred on the basis that BM-21 Grad is an inherently indiscriminate weapon.[31] But note that Ukraine: • Does not address certain passages of the alleged intercepts referred to below.[32] • Conflates the existence and targeting of a military objective	Inferred by Ukraine as follows: Ukraine claims that the purpose to intimidate the civilian population should be inferred from the nature of the so-called "civilian checkpoint" as a site well-known to be frequented by civilians, the timing of the attack and the use of BM-21 Grad.[34] Ukraine also states that "Attacking such a target conveys the unmistakable message that no aspect of civilians' lives are safe from the ever-present threat of attack."[35] Note, however, that Ukraine does not provide any evidence of an "ever-present threat of attack".[36] For example, it is not suggested that the checkpoint was

[26] Memorial, paras. 2, 77, 226, 229, 230 and 291.
[27] Witness Statement of Maksym Anatoliyovych Shevkoplias, 4 June 2018, paras. 5, 8 and 10 (Annex 4 to Memorial).
[28] Memorial, para. 227.
[30] *Ibid.*

		expert evidence states that "the checkpoint could undoubtedly warn Ukrainian Armed Forces of any impending attack along the road to Volnovakha".[29]	with the separate questions of the proportionality of an attack on a military objective.[33]	shelled a second time, let alone repeatedly over a period of time, and Ukraine also does not refer to any shelling of populated areas in nearby. Ukraine also speculates, but has not put forward any documentary evidence, that: • DPR/LPR may have intended to target civilian residents of territory controlled by the DPR/LPR who were travelling to Government-controlled territory "to collect pension and social benefit payments".[37] • The attack could be part of a campaign to obtain political concessions.[38]

31 Memorial., para. 229.
32 See the final row of the present table below at pp. 270-271.
34 Memorial, paras. 230-231.
35 *Ibid.*, para. 231.
36 *Ibid.*
29 *Ibid.*, quoting Brown Report, para. 27 (Annex 11 to Memorial). Note that the expert questions the possible "advantage of a conventional military attack on the checkpoint".
33 Memorial, para. 89.
37 *Ibid.*, para. 232.
38 *Ibid.*, para. 234.

United Nations and other bodies	No: OHCHR characterised as "indiscriminate shelling".[39] ICRC characterised as "indiscrimi-nate".[40] The Security Council "condemned in the strongest terms" the attack.[41] Note that in the same year, the Security Council issued numerous press statements expressly condemning "terrorist" acts.[42]	No: The OSCE repeatedly referred to a "Ukrainian Armed Forces checkpoint" where the bus had stopped.[43] OHCHR stated that "a bus was hit […] at a Ukrainian checkpoint".[44]	-	-

39 OHCHR, "Report on the human rights situation in Ukraine 1 December 2014 to 15 February 2015", paras. 23-24 (Annex 309 to Memorial).

40 ICRC, "Ukraine Crisis: ICRC calls on all parties to spare civilians", 20 January 2015, available at https://www.icrc.org/en/document/ukraine-crisis-icrc-calls-all-parties-spare-civilians.

41 United Nations Security Council, "Security Council Press Statement on Killing of Bus Passengers in Donetsk Region, Ukraine", UN Doc. SC/11733, 13 January 2015, available at https://www.un.org/press/en/2015/sc11733.doc.htm.

Alleged intercepts relied on by Ukraine[45]	-	The alleged intercepts show that the target was the checkpoint: • "**Male voice:** […] what [you] transmitted […] the first target we have [coordinates 9492] is not *the checkpoint* at all, but rather 2 kilometres away […] I suspect you mixed them up […] the first target [is] 9294. […] **Yust:** 92-94".[46] • "**Yust:** [We] blew a Ukropian checkpoint to hell […] [f]or the guys".[47]	The alleged intercepts show that the DPR/LPR took measures designed to protect civilians: • DPR/LPR closed the road to traffic before the attack (at 12:13) and reopened the road after the attack (at 14:51).[48] • DPR/LPR forces alleged to be in command of a GRAD used ranging shots, while also adjusting fire away from a populated area.[49] DPR/LPR forces in control of a mortar unit reported receiving fire from tanks and automatic grenade launchers.[50]	See column immediately to the left.

42 See United Nations Security Council, Statements made to the press by the President of the Security Council in 2015, available at https://www.un.org/en/sc/documents/press/2015.shtml.

43 OSCE, "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", 14 January 2015 (Annex 323 to Memorial); OSCE, "Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 18:00 (Kyiv time), 13 January 2015", 14 January 2015) (Annex 320 to Memorial).

44 OHCHR, "Report on the human rights situation in Ukraine 1 December 2014 to 15 February 2015", para. 6 (Annex 309 to Memorial).

45 Intercepted conversations of Yuriy Shpakov, 16 September 2016 (Annex 430 to Memorial).

46 *Ibid.*, pp. 2-3 (emphasis added).

47 *Ibid.*, p. 15.

48 *Ibid.*, pp. 6 and 14.

49 *Ibid.*, pp. 8 and 10-11.

50 *Ibid.*, p. 12.

		Note that neither Ukraine, in its Memorial, nor its expert (Annex 11 to Memorial) appear to have considered these passages of the alleged intercepts.	The DPR/LPR officer in charge of the GRAD unit was ordered to "cease fire!"[51] A DPR superior reacted to the result of the attack negatively, asking that commander "Who is that f*cking Batyushka who shelled Volnovakha from Dokuchayevsk today, that sh*t?"[52] Note that neither Ukraine, in its Memorial, nor its expert (Annex 11 to Memorial) appear to have considered these passages of the alleged intercepts.	

[51] Intercepted conversations of Yuriy Shpakov, 16 September 2016, p. 16 (Annex 430 to Memorial).
[52] *Ibid*.

Table 4: Shelling of Mariupol on 24 January 2015

	Characterised as an act of "terrorism"?	**Military objective targeted?**	**Specific intent to kill or seriously harm civilians (including DPR/LPR reactions to civilian casualties)?**	**Requisite specific purpose to intimidate or compel?**
Ukraine's case in its Memorial	"Yes" (according to Ukraine only)	Ukraine says"No": Ukraine claims that the DPR/LPR targeted a "residential neighborhood"[53] and states that the area shelled was "far from" a "National Guard checkpoint at the northern edge of the city".[54] Ukraine states that the National Guard checkpoint was manned by up to 100 armed National Guard officers with automatic small arms and armoured personnel carriers.[55] Further, Ukraine's expert accepts that "the checkpoint was effectively in the front line and the National Guard posted there would have warned the Ukrainian Armed Forces of, and resisted to the best of their	Inferred by Ukraine as follows: Ukraine contends that *dolus directus* should be inferred on the basis of the alleged intercepts.[65] But note that Ukraine has not drawn the Court's attention to: • The passages of the alleged intercepts which referring to the checkpoint and which show the reaction of DPR/LPR to the civilian casualties.[66] • The interrogation transcript stating that the target was a military checkpoint and that the suspect deliberately provided incorrect coordinates to the DPR/LPR.[67]	Inferred by Ukraine as follows: Ukraine contends that the specific purpose to intimidate the civilian population[69] should be inferred from: • Damage to civilian objects, timing of the attack and the use of BM-21 Grad.[70] • A single line from an alleged intercept after the shelling which states "Let the f*cking bitches be more afraid."[71] • The fact that some civilians "fled Mariupol".[72] • The previous indiscriminate shelling of Volnovakha.

53 Memorial, paras. 235-236.
54 *Ibid.*, para. 238.
55 Ministry of Interior of Ukraine, Main Department of the National Guard of Ukraine Letter No. 27/6/2-3553 to the Ministry of Foreign Affairs of Ukraine, 31 May 2018 (Annex 183 to Memorial).

		ability, any attack from DPR forces".[56] Ukraine also states that there was "no apparent military advantage" in attacking the checkpoint.[57] But see what Ukraine's own expert says (immediately above).[58] Note that Ukraine has not drawn the Court's attention (or, it appears, its own expert's attention[59]) to the following facts: • The OSCE reported that the checkpoint itself was shelled at 13:00.[60] • The Ukrainian authorities' interrogation of the individual alleged to have acted as a	Ukraine contends that *dolus indirectus* should be inferred on the basis of the inherently indiscriminate nature of the BM-21 Grad.[68]	But note that Ukraine has not drawn to the Court's attention to: • The context of that statement or the earlier alleged intercept. • The passages of the alleged intercepts which referring to the checkpoint and showing the reaction of DPR/LPR to the civilian casualties.[73] Ukraine also speculates, but has not put forward any documentary evidence, that the attack could be part of a campaign to obtain political

65 Memorial, para. 237.
66 See the final row of the present table below at pp. 277-278.
67 Signed Declaration of Valerii Kirsanov, Witness Interrogation Protocol, 25 January 2015 (Annex 213 to Memorial).
69 Memorial, paras. 240-242.
70 *Ibid.*
71 *Ibid.*, paras. 99 and 241.
72 *Ibid.*, para. 243.
56 Brown Report, para. 49 (Annex 11 to Memorial).
57 Memorial, para. 238.
58 Brown Report, para. 49 (Annex 11 to Memorial).
59 *Ibid.*, para. 48(d), stating that it is more plausible that the residential district was targeted because the shelling cannot be explained by "gross incompetence alone".
60 See Memorial, paras. 94 ("The OSCE reported additional shelling attacks in the area at 13:02 and 13:21") and 242 ("as Ukrainian authorities were responding to the attack, Vostochniy was struck again"). See also Brown Report, para. 48(d), n. 61 (Annex 11 to Memorial): "It [the checkpoint] suffered no damage from the shelling".

		"spotter" for the DPR/LPR proceeded on the basis that the target of the attack was "Ukrainian roadblocks".[61] • That suspect stated that he was asked to provide DPR with "*the locations of the Ukrainian Armed Forces*", and confirmation that he did so but "always intentionally gave […] wrong coordinates".[62] • That suspect also stated that on 21 and 22 January 2015[63] he "provided coordinates for the sites in Taganrogskaya Street and Marshala Zhukova Street", which is a reference to the location of the Vostochniy checkpoint, and that "those coordinates were wrong".[64]		concessions.[74] Note that Ukraine has also not drawn the Court's attention to: • The general escalation of hostilities near the contact line, including near Mariupol, in January 2015.[75] • The fact that two other military objectives near Mariupol were shelled on the same morning.[76]
United Nations and other bodies	No: OHCHR characterised as	Yes: OSCE observed that the 09:15 attack hit an area "approximately 400		

68 Memorial, para. 239.
73 See the final row of the present table at pp. 277-278 below.
61 Signed Declaration of Valerii Kirsanov, Witness Interrogation Protocol, 25 January 2015 (Annex 213 to Memorial).
62 *Ibid.* (emphasis added).
63 Note that the document refers to "2014", and this is assumed to be a mistake.
64 Signed Declaration of Valerii Kirsanov, Witness Interrogation Protocol, 25 January 2015 (Annex 213 to Memorial) (emphasis added).
74 Memorial, para. 244.
75 OHCHR, "Report on the human rights situation in Ukraine 1 December 2014 to 15 February 2015", para. 21 (Annex 309 to Memorial).
76 IPHR, "Investigation of the Shelling of Mariupol on 24 January 2015", 2015, p. 4, available at http://iphronline.org/wp-content/uploads/2015/09/mariupol_mission_report_febr_2015.pdf.

	"indiscriminate shelling"[77] United Nations Secretary-General stated that "rockets appear to have been launched indiscriminately into civilian areas, which would constitute a violation of international humanitarian law."[78] United Nations Under-Secretary-General for Political Affairs stated that "Mariupol lies outside the immediate conflict zone. The conclusion can thus be drawn that the entity that fired these rockets knowingly targeted a civilian population. This would	metres from a Ukrainian Armed Forces checkpoint"[82] and that "At 13:02hrs and 13:21hrs the SMM heard again incoming MLRS salvos lasting for eight seconds, from an easterly direction. At a distance of 300 metres the SMM saw smoke above the Ukrainian Armed Forces' checkpoint number 14 (8.9 km north-east of Mariupol city centre), just several hundred metres away from where the shelling had hit in Olimpiiska Street."[83] Note that the OSCE had previously raised specific concerns that the Vostochniy checkpoint was located near residential buildings and had observed that Ukrainian Armed Forces had located military vehicles at the checkpoint and had used the area to the north as a firing position.[84] Note that the statement of the United Nations Under-Secretary-General for Political Affairs that "Mariupol lies outside		

[77] OHCHR, "Report on the human rights situation in Ukraine 1 December 2014 to 15 February 2015", para. 6 (Annex 309 to Memorial).

[78] United Nations Secretary-General, "Statement Attributable to the United Nations Secretary-General on Ukraine", 24 January 2015 (Annex 306 to Memorial).

	constitute a violation of international humanitarian law."[79] United Nations Security Council Members characterised as "indiscriminate".[80] Note that Ukraine sought to persuade the United Nations Security Council that the DPR/LPR "terrorists" had committed "crimes against humanity".[81]	the immediate conflict zone"[85] is inconsistent with the OHCHR's reference to the area around Mariupol as a "major flashpoint"[86] and with Ukraine's own expert's view that "the checkpoint was effectively in the front line".[87]		

82 OSCE, "Spot report by the OSCE Special Monitoring Mission to Ukraine (SMM), 24 January 2015: Shelling Incident on Olimpiiska Street in Mariupol", 24 January 2015 (Annex 328 to Memorial); OSCE, "Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 18:00 (Kyiv time), 25 January 2015", 26 January 2015, available at https://www.osce.org/ukraine-smm/136421 (Annex 32).

83 OSCE, "Spot report by the OSCE Special Monitoring Mission to Ukraine (SMM), 24 January 2015: Shelling Incident on Olimpiiska Street in Mariupol, 24 January 2015" (Annex 328 to Memorial).

84 OSCE, "Spot report by the OSCE Special Monitoring Mission to Ukraine (SMM), 5 September 2014: The Situation in Mariupol", available at https://www.osce.org/ukraine-smm/123254.

79 United Nations Security Council, 7368th meeting, UN Doc. S/PV.7368, 26 January 2015, p. 2 (Annex 307 to Memorial).

80 *Ibid.*, pp. 5, 7, 10, 13, 14 and 15.

81 *United Nations Security Council, 7368th meeting, UN Doc. S/PV.7368, 26 January 2015*, pp. 16-17 (Annex 307 to Memorial).

85 United Nations Security Council, 7368th meeting, UN Doc. S/PV.7368, 26 January 2015, p. 2 (Annex 307 to Memorial).

86 OHCHR, "Report on the human rights situation in Ukraine 1 December 2014 to 15 February 2015", para. 21 (Annex 309 to Memorial).

87 Brown Report, para. 49 (Annex 11 to Memorial).

Alleged intercepts		Yes: "**Ponomarenko S.L. ("Terrorist") -** F**king crush it, I f**king asked you, that one, f**king Vostochniy. **Evdotiy O.M. ("Pepel") -** Well… **Ponomarenko S.L. ("Terrorist") -** *There is f**king a big f**king distance to the houses*, little brother! **Evdotiy O.M. ("Pepel") -** I will, I'll do Vostochniy tonight as well, don't worry."[88] "**Valeriy Kirsanov** - Alexander, well... *Too far, too far, too far - overdid it*. **Evdotiy O.M. ("Pepel")** - Tell me, what's going on there? **Valeriy Kirsanov** - What's going on? Long story short, *everything flew over*, and it went on houses... on houses, on nine-story buildings, on private residences, the Kievskiy market, in short. […] **Evdotiy O.M. ("Pepel")** – I don't f**king understand".[89] "**Ponomarenko S.L. ("Terrorist"):** *How about the check point?*	No: "**Valeriy Kirsanov:** Look what Aleksander has done. **Ponomarenko S.L. ("Terrorist"):** Yes. **Valeriy Kirsanov:** *It's a totally f**king disaster here.* **Ponomarenko S.L. ("Terrorist"):** What? **Valeriy Kirsanov:** The damn market, nine story high-rise buildings, private houses. All the sh*t was f**ked up. **Ponomarenko S.L. ("Terrorist"):** Are you serious? **Valeriy Kirsanov:** *It f**king overflew. Overflew by approximately a kilometre.* **Ponomarenko S.L. ("Terrorist"):** To Vostochnyi? **Valeriy Kirsanov:** Yes, yes. The Kievskiy market, school No. 5, nine-story high-rise buildings, right into the courtyards, f**k, the utility building. It f**king went and fell as far as Olimpiyskaya. F**king f**k. Basically, *they overflew the*	No: *Before the attack*: "**Ponomarenko S.L. ("Terrorist") -** F**king crush it, I f**king asked you, that one, f**king Vostochniy. […] **Ponomarenko S.L. ("Terrorist") –** *So that I can f**king come in there and f**king clean it up*."[93] *After the attack*: "**Ponomarenko S.L. ("Terrorist") -** So the Ukrop column is heading toward Gnutovo. **Valeriy Kirsanov -** Yes, to meet them. […] **Ponomarenko S.L. ("Terrorist") -** Well, they're shooting. You can hear it. […] **Valeriy Kirsanov -** Yeah. Talakovka unleashed a bombardment first thing in the morning.

[88] Intercepted conversation between Evdotiy ("Pepel") and Ponomarenko ("Terrorist") (18:00:22), 23 January 2015 (Annex 418 to Memorial) (emphasis added).
[89] Intercepted conversation between Evdotiy ("Pepel") and Kirsanov (10:36:40), 24 January 2015 (Annex 413 to Memorial) (emphasis added).
[93] Intercepted conversation between Kirsanov and Ponomarenko ("Terrorist") (10:38:14), 24 January 2015 (Annex 414 to Memorial).

		Valeriy Kirsanov: *Untouched motherf**ker!* **Ponomarenko S.L. ("Terrorist"):** *It sucks!*"[90] Note that Ukraine has not put before the Court – and does not appear to have provided to its own expert - another, earlier, alleged intercept of a call between the same two individuals, which Ukraine has published online:[91] "**Ponomarenko S.L. ("Terrorist")** – F**k, pour it on "Vostochny", for f**k's sake. Do it right just one time. **Evdotiy O.M. ("Pepel")** – F**k, there are nine-storeyed buildings out there, little brother… **Ponomarenko S.L. ("Terrorist")** – They are f**k knows where, brother. They are at a f**k knows what distance from them. *Pour it on the highway, on the checkpoint itself... The 9-storeyed apartment buildings are f**king long way off, they're in some 1,5 km from there, for f**k's sake."*	*entire Vostochnyi*. **Ponomarenko S.L. ("Terrorist"):** Oh, f**king sh*t. […] **Ponomarenko S.L. ("Terrorist"):** *Oh, the ukrops will do good PR now*. […] **Valeriy Kirsanov:** I f**king called him. *He is totally f**king shocked*. […] **Ponomarenko S.L. ("Terrorist"):** No injured people, right? **Valeriy Kirsanov:** There are, why not? Dead bodies are laying f**king everywhere. […] **Ponomarenko S.L. ("Terrorist"):** *This is f**king awful f**k.*"[92]	**Ponomarenko S.L. ("Terrorist") -** I know. **Valeriy Kirsanov -** And then Vostochniy. **Ponomarenko S.L. ("Terrorist") -** Let the f**king b*tches be more afraid. **Valeriy Kirsanov -** Well, yes."[94] Note that Ukraine has not drawn the Court's attention to earlier passage of the alleged intercept quoted above, and has also not referred to the context of the later passage.

[90] Intercepted conversation between Kirsanov and Ponomarenko ("Terrorist") (10:38:14), 24 January 2015 (Annex 414 to Memorial).

[91] Transcript of a video containing alleged intercepted conversation between "Terrorist" and "Pepel", 24 January 2015 (Annex 31) (emphasis added). Cf. Memorial, para. 237.

[92] Intercepted conversation between Kirsanov and Ponomarenko ("Terrorist") (10:38:14), 24 January 2015 (Annex 414 to Memorial) (emphasis added).

[94] *Ibid.*

Table 5: Shelling of Kramatorsk on 10 February 2015

	Characterised as an act of "terrorism"?	**Military objective targeted?**	**Specific intent to kill or seriously harm civilians (including DPR/LPR reactions to civilian casualties)?**	**Requisite specific purpose to intimidate or compel?**
Ukraine's case in its Memorial	"Yes" (according to Ukraine only)	Ukraine says "No": Ukraine states that the only legitimate military target was the airport approximately 2km away,[95] and refers to an attack against a "residential neighborhood".[96] Note that Ukraine, in the inspection reports relied on, makes no reference to the military compound. Note also that Ukraine has not put before the Court an on-line press release issued by the Ukrainian Border Guards Service on 11 February 2015, which stated that the compound had been shelled at around 12:30, injuring 1 border guard.[97]	Inferred by Ukraine as follows: Ukraine contends that the requisite specific intent should be inferred from: • The alleged absence of any military targets.[98] • The use of BM-30 Smerch weapon.[99] • Alleged knowledge that rockets targeting the military airport "would be expected to sail beyond the airfield and hit the residential neighborhood, harming civilians."[100]	Inferred by Ukraine as follows: Ukraine claims that the specific purpose to intimidate the civilian population[101] should be inferred from: • The timing of the attack, damage to civilian objects and the use of BM-30 Smerch.[102] • The existence of alternative launch sites.[103] • The previous indiscriminate shelling of Mariupol and Volnovakha.[104] • The fact that some civilians left Kramatorsk after the attack.[105] Ukraine also speculates, but has not put forward any documentary evidence, that the attack could be

95 Memorial, para. 246.
96 *Ibid.*, para. 245.
97 State Border Guard Service of Ukraine, "In Kramatorsk terrorists shelled the unit of the State Border Guard Service", 10 February 2015 (Annex 33).
98 Memorial, paras. 246 and 248.
99 *Ibid.*, para. 247.

				part of a campaign to obtain political concessions.[106]
United Nations and other bodies	No: OHCHR characterised as "indiscriminate" shelling.[107]	Yes: OSCE reported that "At 12:45hrs, at the entrance of a Ukrainian military compound on Lenin Street, the SMM saw a member of uniformed Ukrainian Armed Forces personnel lying on the ground, not moving."[108]	-	-

100 Memorial, para. 249.
101 *Ibid.*, paras. 240-242.
102 *Ibid.*, paras. 250-251.
103 *Ibid.*, para. 252.
104 *Ibid.*, paras. 240-242.
105 *Ibid.*, para. 253.
106 Memorial, para. 254.
107 OHCHR, "Report on the human rights situation in Ukraine 1 December 2014 to 15 February 2015", para. 6 (Annex 309 to Memorial).
108 OSCE, "Spot report by the OSCE Special Monitoring Mission to Ukraine (SMM): Shelling in Kramatorsk, 10 February 2015", 10 February 2015 (Annex 331 to Memorial). See also IPHR, "Fighting Impunity in Eastern Ukraine", October 2015, p. 45: "Another potential objective was a building used by border guard forces on Lenin Street.", available at http://iphronline.org/wp-content/uploads/2016/05/Fighting-impunity-in-Eastern-Ukraine-October-2015.pdf.

Table 6: Shelling in Avdeevka from late January to early March 2017[109]

	Characterised as an act of "terrorism"?	**Military objective targeted?**	**Specific intent to kill or seriously harm civilians (including DPR/LPR reactions to civilian casualties)?**	**Requisite specific purpose to intimidate or compel?**
Ukraine's case in its Memorial	"Yes" (according to Ukraine only)	Ukraine says "No": Ukraine states that "military positions were operating along the south of the city" only.[110] But note that Ukraine appears to characterise the shelling as "indiscriminate".[111]	Inferred by Ukraine as follows: Ukraine contends that the requisite specific intent should be inferred from: • Damage to civilian objects "over 2km from [the] nearest UAF position".[112] • Use of indiscriminate Grad rockets, artillery and mortars.[113]	Inferred by Ukraine as follows: Ukraine claims that the specific purpose to intimidate the civilian population[114] should be inferred from: • The "indiscriminate use of Grad rockets and artillery" and damage to civilian objects.[115] • The previous indiscriminate shelling of Volnovakha, Mariupol and Avdeevka.[116] • Absence of a "military reason" for shelling the Avdeevka Coke factory and the resulting humanitarian emergency.[117]

109 Note that Ukraine refers to the period from January to February 2017 but that elsewhere it also refers to early March 2017: see Memorial, paras. 108 and 111.
110 Memorial, para. 256.
111 *Ibid.*, para. 108. Cf. para. 111: "DPR fired at civilian targets indiscriminately."
112 *Ibid.*, para. 256.
113 *Ibid.*, paras. 256-257. See also para. 258: "indiscriminate use of Grad rockets and artillery".
114 *Ibid.*, paras. 240-242.
115 *Ibid.*, para. 258.
116 *Ibid.*
117 *Ibid.*

				• The duration and timing of the shelling over more than a month was random.[118] • The fact that many civilians left Avdeevka.[119] Ukraine also speculates, but has not put forward any documentary evidence, that the attack could be part of a campaign to obtain political concessions.[120]
United Nations and other bodies	No: OHCHR characterised as "indiscriminate shelling".[121] OSCE stated that "The sides' indiscriminate use of proscribed weapons has	Yes: OSCE reported that: • Between 29 and 31 January 2017, the Ukrainian Armed Forces moved four tanks to Avdeevka.[126] • On 1 February 2017, "In violation of the respective withdrawal lines, in government-controlled areas the SMM observed […] four	-	-

118 Memorial, para. 259.
119 *Ibid.*
120 *Ibid.*, para. 260.
121 OHCHR, "Report on the Human Rights Situation in Ukraine 16 November 2016 to 15 February 2017", para. 25, available at https://www.ohchr.org/Documents/Countries/UA/UAReport17th_EN.pdf.
126 OSCE, "Latest from the OSCE Special Monitoring Mission to Ukraine (SMM), based on information received as of 19:30, 29 January 2017", 30 January 2017, available at https://www.osce.org/ukraine-smm/296416; OSCE, "Latest from the OSCE Special Monitoring Mission to Ukraine (SMM), based on information received as of 19:30, 30 January 2017", 31 January 2017, available at https://www.osce.org/ukraine-smm/296721; OSCE, "Latest from the OSCE Special Monitoring Mission to Ukraine (SMM), based on information received as of 19:30, 31 January 2017", 1 February 2017 (Annex 343 to Memorial).

	resulted in civilian casualties and considerable damage to civilian homes and essential infrastructure" and referred to "blatant disregard for the obligations undertaken by the signatories of the Minsk agreements".[122] United Nations Under-Secretary-General for Political Affairs stated that "The human rights Monitoring Mission in Ukraine also	tanks (T-64) parked behind a building in Avdiivka."[127] This is confirmed by contemporaneous photographs.[128] • On 3 February, "In violation of the respective withdrawal lines the SMM observed the following in government-controlled areas […] four tanks (T-64) in Avdiivka."[129] "OHCHR observed the continued use of civilian property by Ukrainian Armed Forces with military positions in many residential areas along the contact line, endangering civilians in these populated areas […] [including] Avdiivka".[130] IPHR, a source of evidence		

122 United Nations Security Council, 7876th meeting, UN Doc. S/PV.7876, 2 February 2017, p. 4 (Annex 315 to Memorial).

127 OSCE, "Latest from the OSCE Special Monitoring Mission to Ukraine (SMM), based on information received as of 19:30, 1 February 2017", 2 February 2017 (Annex 344 to Memorial).

128 See Ukrainian tanks in Avdeevka, February 2017; Bellingcat Investigation Team, "Ukrainian Tanks in Avdiivka Residential Area", 3 February 2017 (Annex 1).

129 OSCE, "Latest from the OSCE Special Monitoring Mission to Ukraine (SMM), based on information received as of 19:30, 3 February 2017", 4 February 2017, available at https://www.osce.org/ukraine-smm/297646.

130 OHCHR, "Report on the Human Rights Situation in Ukraine, 16 November 2016 to 15 February 2017", para. 19 and fn. 9, available at https://www.ohchr.org/Documents/Countries/UA/UAReport17th_EN.pdf.

	recorded damage to civilian houses and a school in populated areas of Avdiivka, which raises serious concerns about possible violations of international humanitarian law by all sides."[123] United Nations Security Council "condemned the use of weapons prohibited by the Minsk Agreements along the contact line in the Donetsk region that led to deaths and injuries, including among civilians" and "underlined the need for strict compliance with resolution 2202 (2015), which	Ukraine relies on reported that "From January to March 2017, the UAF military presence in Avdiivka included: • "UAF quarters located to the north of the city next to the train station (Ln 201) • UAF military checkpoint on Vorobyov street separating the old and new parts of the town with personnel stationed in residential building nearby (Ln 202 and 203) • UAF quarters based in an old orphanage building in the 'Khimik' area – sleeping quarters and medical units (Ln 204) • UAF firing position on the south-southeast edge of the city: in the industrial zone (Ln 17); at the end of Lermontov and Kolosov streets (Ln 205 and 206); the wooded area to the south-southeast (Ln 208) and adjacent to the railway line on the southwest edge (Ln 209).		

[123] United Nations Security Council, 7876th meeting, UN Doc. S/PV.7876, 2 February 2017, p. 2 (Annex 315 to Memorial).

	endorsed the 'Package of measures for the implementation of the Minsk Agreements'".[124] Note that the representative of Ukraine sought to persuade the UNSC that the DPR/LPR were using a "terrorist tactic aimed primarily at civilians".[125]	• UAF ammunition stockpile, combat vehicles and personnel positioned in the south-southeastern end of Kosolov Street (Ln 207) • UAF artillery firing position outside the city near the lake (Ln 327)."[131] "Ukrainian government forces in Avdiivka were located in a building situated between the city and the 'Koksokhim' factory. […] Ammunition warehouses by armored combat vehicles and army personnel are situated in the midst of residential buildings, and Ukrainian government forces use cannon fire from this position, which puts the residents living in the area at increased risk of injury in retaliation fire."[132] Bellingcat, a source Ukraine		

[124] United Nations Security Council, "Security Council Press Statement on Deterioration of Situation in Donetsk Region, Ukraine", UN Doc. SC/12700, 31 January 2017, available at https://www.un.org/press/en/2017/sc12700.doc.htm.

[125] United Nations Security Council, 7876th meeting, UN Doc. S/PV.7876, 2 February 2017, p. 7 (Annex 315 to Memorial).

[131] International Partnership for Human Rights, "Attacks on Civilians and Civilian Infrastructure in Eastern Ukraine, Period Covered: March 2014 – November 2017", 2017, para. 88 (Annex 454 to Memorial).

[132] International Partnership for Human Rights, "Scorching Winter 2016-2017: an analysis of the shelling of settlements in eastern Ukraine", p. 7, available at http://www.coalitionfortheicc.org/sites/default/files/cicc_documents/truth_hounds-report-scorching_winter.pdf.

		relies on, reported that on 2 February artillery fire hit the apartment building next to where Ukrainian Armed Forces tanks were located.[133]		

[133] Bellingcat Investigation Team, "Ukrainian Tanks in Avdiivka Residential Area", 3 February 2017 (Annex 1).

Table 7: Killing and ill-treatment by all parties to the armed conflict

Date	Organisation	Killing and ill-treatment by all parties to the armed conflict, including Ukraine?
March to April 2014	OHCHR	Yes:[134] "2. […] Serious human rights violations were committed including during the Maidan protests, which resulted in the death of 121 individuals […] There have been also numerous reports of torture and ill-treatment of protestors […]" "45. […] dozens of people who participated in the Maidan demonstrations were […] subjected to torture and ill-treatment […]" "52. There has been a culture of effective impunity in Ukraine for the high level of criminal misconduct, including torture […] often committed by the police in the course of their work […]" "58. Most acts of severe beatings, torture, and other cruel, inhuman or degrading treatment were attributed to the 'Berkut' riot police […]"
April to May 2014	OHCHR	Yes:[135] "39. […] The use of torture and ill-treatment in pre-trial detention facilities is often attributed to the fact that police officers are still evaluated on quantitative indicators." "113. […] the HRMMU verified allegations […] that Pavel Gubarev, the self-proclaimed governor of Donetsk, who was detained in Donetsk by police on 6 March and transferred to Kyiv, had been tortured and was in a critical condition […]"

[134] OHCHR, "Report on the human rights situation in Ukraine 15 April 2014", paras. 2, 45, 52, 58 (Annex 44 to Memorial).
[135] OHCHR, "Report on the human rights situation in Ukraine 15 May 2014", paras. 39, 113 (Annex 45 to Memorial).

May to June 2014	OHCHR	Yes:[136] "4. The escalation in criminal activity resulting in human rights abuses […] torture, and killings by armed groups are now affecting the broader population of the two eastern regions, which are now marked by an atmosphere of intimidation and consequent fear […]"
June to July 2014	OHCHR	Yes: [137] "59. Reports suggested that members of the Ukraine forces have been responsible for the ill-treatment and torture of detainees […]"
July to August 2014	OHCHR	Yes:[138] "10. The HRMMU also received reports of human rights violations committed by territorial battalions under the Ministry of Defence or special battalions under the Ministry of Internal Affairs. This includes cases of […] torture […]" "12. […] The Security Service of Ukraine and police have detained more than 1,000 people in the Donbas region, as of 16 August, because of 'irrefutable evidence of their participation in terrorist activities.' […] and there are reports of ill-treatment during arrest or while in custody."
August to September 2014	OHCHR	Yes:[139] "23. The Human Rights Monitoring Mission in Ukraine also received reports of allegations of human rights violations committed by volunteer battalions under the Ministry of Defence or special battalions under the Ministry of Internal Affairs […]"

[136] OHCHR, "Report on the human rights situation in Ukraine 15 June 2014", para. 4 (Annex 46 to Memorial).
[137] OHCHR, "Report on the human rights situation in Ukraine 15 July 2014", para. 59 (Annex 296 to Memorial).
[138] OHCHR, "Report on the human rights situation in Ukraine 17 August 2014", paras. 10, 12, available at https://www.ohchr.org/Documents/Countries/UA/UkraineReport28August2014.pdf.
[139] OHCHR, "Report on the human rights situation in Ukraine 19 September 2014", para. 23 (Annex 47 to Memorial).

September to November 2014	OHCHR	Yes:[140] "10. […] The HRMMU continued to receive credible reports of persons deprived of their liberty being subjected to torture and ill-treatment while being illegally held or detained by either the armed groups or by Ukrainian law enforcement agencies and some volunteer battalions."
November to December 2014	OHCHR	Yes:[141] "9. The efforts of the Government to safeguard the territorial integrity of Ukraine and restore law and order in the conflict zone have been accompanied by arbitrary detentions, torture, and enforced disappearances of people suspected of 'separatism and terrorism'. Most of such human rights violations appear to have been perpetrated by certain voluntary battalions or by the Security Service of Ukraine (SBU). The procedural rights of people have not always been observed, with reports of ill-treatment and reports of reprisals upon release." "44. […] Some other detainees interviewed by the HRMMU reported being beaten and intimidated to confess to participation in the armed groups. On 14 November, a Donetsk resident died on the premises of Izium district police department (Kharkiv region), shortly after being taken out and then returned by masked men and an identified SBU official. Forensic examination found multiple and extensive hematomas on his body and a closed blunt injury of the chest […]"
December 2014 to February 2015	OHCHR	Yes:[142] "14. Allegations of violations of international human rights law and international humanitarian law have persisted over the reporting period. Credible reports of arbitrary detentions of civilians, torture and enforced disappearance have been alleged against the armed groups and the Government […]" "37. […] a pattern of enforced disappearances, secret detention and ill-treatment by Ukrainian law enforcement agencies in the security operation area and adjacent territories."

[140] OHCHR, "Report on the human rights situation in Ukraine 15 November 2014", para. 10 (Annex 48 to Memorial).
[141] OHCHR, "Report on the human rights situation in Ukraine 15 December 2014", paras. 9 and 44 (Annex 303 to Memorial).
[142] OHCHR, "Report on the human rights situation in Ukraine 1 December 2014 to 15 February 2015", paras. 14 and 37 (Annex 309 to Memorial).

February to May 2015	OHCHR	Yes:[143] "13. […] The HRMMU continued to receive allegations of ill-treatment and torture of people detained by the Ukrainian armed forces and law enforcement agencies. It is also concerned that investigations into allegations of gross human rights violations by the Ukrainian military and law enforcement personnel have yet to be carried out." "45. […] the HRMMU received allegations that during interrogation, some detainees were subjected to ill-treatment and torture (beatings, suffocation with bag on the head, electric shocks and deprivation of sleep, food and water for more than 24 hours). The people arrested were not provided with a defense lawyer and were mocked at when requesting one […]"
January 2014 to May 2016	OHCHR	Yes:[144] "51. HRMMU has also received allegations concerning the death of people in custody of the Government or its constituent armed forces. The majority of these allegations pertain to the initial stages of the conflict, i.e. June 2014 – February 2015. They mostly concern individuals who had been members of the armed groups or were suspected of affiliation with them. Most often, the death of victims was allegedly caused by torture and ill-treatment, or by inadequate or absent medical aid." "62. At the same time, OHCHR has observed an apparent lack of motivation to investigate some cases and a formalistic approach in the work of investigative bodies, especially when it concerns acts allegedly committed by Ukrainian forces. Cover-up and political bias are not uncommon, especially when alleged perpetrators belong to the ranks of the military and law enforcement. As a result, some perpetrators continue to enjoy impunity. Changes of measures of restraint often provide alleged perpetrators with opportunities to escape from justice. While, forensic experts do not always pay sufficient attention to documenting signs of torture on bodies recovered from the conflict zone, investigators also do not always task forensic experts to answer questions whether a body bears signs of torture. Material evidence related to a summary deprivation of life is often collected poorly and is not properly preserved."

[143] OHCHR, "Report on the human rights situation in Ukraine 16 February to 15 May 2015", paras. 13 and 45 (Annex 310 to Memorial).
[144] OHCHR, "Accountability for killings in Ukraine from January 2014 to May 2016", paras. 51, 62 and 68 (Annex 49 to Memorial).

		"68. **To the Government of Ukraine:** […] (c) Improve the collection of forensic and preservation of other material evidence related to acts of arbitrary deprivation of life in the conflict zone, including documenting signs of torture or ill-treatment in accordance with international standards […]"
May to August 2015	OHCHR	Yes:[145] "6. HRMMU continued to receive and verify allegations of killings, abductions, torture and ill-treatment, sexual violence, forced labour, ransom demands and extortion of money on the territories controlled by the 'Donetsk people's republic' and 'Luhansk people's republic'. It also received reports of isolated incidents where armed groups disrupted religious services and intimidated several religious communities […] 7. […] HRMMU has received testimonies of plea bargains being made by individuals under torture or duress. 8. HRMMU continued to observe a persistent pattern of arbitrary and incommunicado detention by Ukrainian law enforcement officials (mainly by the Security Service of Ukraine) and military and paramilitary units (primarily by former volunteer battalions now formally incorporated into the Ukrainian armed forces, National Guard and police), which is often accompanied by torture and ill-treatment of detainees, and violations of their procedural rights. HRMMU continues to advocate for proper and prompt investigation of every single reported case, and for prosecution of perpetrators."
August to November 2015	OHCHR	Yes:[146] "7. Efforts of the Government of Ukraine to safeguard the territorial integrity of Ukraine and restore law and order in the conflict zone continued to be accompanied by allegations of enforced disappearances, arbitrary and *incommunicado* detention as well as torture and ill-treatment of people suspected of trespassing against territorial integrity or terrorism or believed to be supporters of the 'Donetsk people's republic' and 'Luhansk people's republic'. Elements of the Security Service of Ukraine appear to enjoy a high degree of impunity, with rare investigations into allegations involving them."

[145] OHCHR, "Report on the human rights situation in Ukraine 16 May to 15 August 2015", paras. 6-8 (Annex 769 to Memorial).

[146] OHCHR, "Report on the human rights situation in Ukraine 16 August to 15 November 2015", para. 7 (Annex 312 to Memorial). See also paras. 43-48 for details.

November 2015 to February 2016	OHCHR	Yes:[147] "45. Throughout the country, OHCHR continued to receive allegations of enforced disappearances, arbitrary and incommunicado detention, and torture and ill-treatment of people accused by the Ukrainian authorities of 'trespassing territorial integrity', 'terrorism' or related offenses, or of individuals suspected of being members of, or affiliated with, the armed groups." "50. During the reporting period, OHCHR documented a pattern of cases of SBU detaining and allegedly torturing the female relatives of men suspected of membership or affiliation with the armed groups […]" "53. […] OHCHR is also deeply concerned that despite its repeated interventions, it continues to receive allegations of SBU violating basic procedural guarantees, denying detainees the right to counsel, and subjecting them to torture and ill-treatment. 54. The failure to investigate allegations of torture is of particular concern. OHCHR has observed that the authorities are unwilling to investigate allegations of torture particularly when the victims are persons detained on grounds related to national security or are viewed as being 'pro-federalist'. […] While monitoring trials, OHCHR observed that prosecutors and judges rarely record or act upon defendant's allegations of torture […] 55. OHCHR is also very concerned about the use of statements extracted through torture as evidence in court proceedings […]" "70. As mentioned above, OHCHR continued to document consistent and credible allegations of torture, ill-treatment, incommunicado detention and enforced disappearances by SBU elements in Kharkiv, Mariupol, and Zaporizhzhia. 71. OHCHR is concerned about SBU officials' systematic denial of these allegations, which suggests their

[147] OHCHR, "Report on the human rights situation in Ukraine 16 November 2015 to 15 February 2016", paras. 45, 50, 53-55, 70-71, 73 and 103 (Annex 314 to Memorial).

		resistance to any investigations […]" "73. OHCHR has followed cases of residents of Government-controlled Donetsk and Luhansk regions who have been charged and tried for their alleged membership in and support of the armed groups, simply for being in contact with people (usually their relatives) living in territories controlled by these groups or working for a civilian water supply company operating in the 'Luhansk people's republic'." "103. […] Of grave concern is the allegation that the accused suffered reprisals in the form of threats, intimidation and ill-treatment by the SBU after they challenged the admissibility of evidence in court."
February to May 2016	OHCHR	Yes:[148] "30. OHCHR received allegations of enforced disappearances, arbitrary and *incommunicado* detention, torture and ill-treatment committed by Ukrainian law enforcement. […] 31. The majority of cases documented during the reporting period concerned incidents in the conflict zone. While the cases from 2014 and early 2015 suggest that volunteer battalions (often in conjunction with the Security Service of Ukraine (SBU)) were frequent perpetrators, information from the late 2015 and early 2016 mostly implicate SBU. Many of these cases concern *incommunicado* detention in unofficial detention facilities where torture and ill-treatment are persistently used as means to extract confessions or information, or to intimidate or punish the victim. […] 32. On 20 February 2016, a Mariupol resident was transferred to Donetsk as part of a simultaneous release of detainees. Since March 2015, he had been held *incommunicado* at the Kharkiv SBU. He was apprehended in Mariupol on 28 January 2015 and kept in an illegal detention facility. There, he was reportedly severely tortured and electrocuted by three men who wanted him to identify supporters of the 'Donetsk people's republic' in Mariupol. On 8 February 2015, he was charged under article 258 (terrorism) of the Criminal Code. The following day, the court placed him in Mariupol SIZO. On 12 March 2015, he was released from custody under house arrest and, while leaving the courthouse, was apprehended by SBU and transferred to Kharkiv SBU. At the time of his arrival, 72 individuals were held

[148] OHCHR, "Report on the human rights situation in Ukraine 16 February to 15 May 2016", paras. 30-32, 48-49, 59, 212(e)-(f), 213(d) (Annex 771 to Memorial).

		there; 17 when he was released on 20 February 2016." "48. In the majority of cases documented by OHCHR, law enforcement employed threats of sexual violence against individuals detained under charges of terrorism, along with other forms of torture and ill-treatment during interrogation. Two of the documented cases took place in or around Avdiivka in April and May 2015. A male detainee who was subjected to torture and forced to confess to his involvement in the armed groups on camera, was subsequently threatened with sexual violence, told that he would be handcuffed and raped by a homosexual man. Two women from the same family, aged 18 and 41, were tortured and repeatedly threatened with sexual violence. 49. Other documented cases appear to be linked to the military presence in densely populated civilian areas, such as towns near the contact line, and general impunity. A man with a mental disability was subject to cruel treatment, rape and other forms of sexual violence by eight to 10 members of the 'Azov' and 'Donbas' battalions in August-September 2014. The victim's health subsequently deteriorated and he was hospitalized in a psychiatric hospital." **"**59. A resident of Mariupol was detained by three servicemen of the 'Azov' battalion on 28 January 2015 for supporting the 'Donetsk people's republic'. He was taken to the basement of Athletic School No. 61 in Mariupol, where he was held until 6 February 2015. He was continuously interrogated and tortured. He complained about being handcuffed to a metal rod and left hanging on it, he was reportedly tortured with electricity, gas mask and subjected to waterboarding and he was also beaten in his genitals. As a result he confessed about sharing information with the armed groups about the locations of the Government checkpoints. Only on 7 February, he was taken to the Mariupol SBU, where he was officially detained." "212. […] (e) The Security Service of Ukraine (SBU) to treat all persons detained in the context of the 'anti-terrorism operation' humanely and without adverse distinction in compliance with binding international human rights law and standards; (f) The SBU to cease the practice of extracting confessions or self-incriminating statements under duress […]" "213. […] (d) To all parties involved in the hostilities […] Treat all persons deprived of their liberty, civilian or military, humanely and according to international human rights and humanitarian law standards […]"

May to August 2016	OHCHR	Yes:[149] "5. […] OHCHR has continued to document cases of torture and ill-treatment by the Government and armed groups […]" "45. […] approximately 70 per cent of cases documented by OHCHR contained allegations of torture, ill-treatment, and incommunicado detention prior to transfer into the criminal justice system. The majority of allegations implicate SBU officials, police, and members of the paramilitary DUK 'Right Sector' […]" "47. In an emblematic case, armed men in camouflage bearing no insignia apprehended a man in his house in Government-controlled areas of Donetsk region in October 2015. He was handcuffed, blindfolded and taken to an indoor shooting range in the basement of the SBU building in Mariupol. There, he was beaten, suffocated with a plastic bag, submerged in cold water, and had his ribs broken by a man who jumped on his torso. He was forced to sign a confession, read it in front of a camera, and was subsequently charged under article 258-3 of the Criminal Code of Ukraine. Still in detention, he is afraid of reprisals and unwilling to corroborate the use of the Mariupol SBU basement indoor shooting range for complain about his ill-treatment to the authorities. Four additional verified cases from 2015 incommunicado detention and torture."
May 2017	United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	Yes:[150] "34. The Subcommittee has received numerous and serious allegations of acts that, if proven, would amount to torture and ill-treatment. Persons interviewed by the Subcommittee in various parts of the country have recounted beatings, electrocutions, mock executions, asphyxiations, acts of intimidation and threats of sexual violence against themselves and their family members. In the light of all the work done and experience gained during the visit, the Subcommittee has no difficulty in concluding that these allegations are likely to be true.

[149] OHCHR, "Report on the human rights situation in Ukraine 16 May to 15 August 2016", paras. 5, 45 and 47 (Annex 772 to Memorial). See also paras. 43-44, 46 and 48 for details.

[150] Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, "Visit to Ukraine undertaken from 19 to 25 May and from 5 to 9 September 2016: observations and recommendations addressed to the State party", UN Doc. CAT/OP/UKR/3, 18 May 2017, paras. 34-38, available at http://undocs.org/en/CAT/OP/UKR/3 (Annex 6) (emphasis added).

		35. Many of the above-mentioned acts are alleged to have occurred while the persons concerned were under the control of the State Security Service or during periods of unofficial detention. In such cases, *detainees accused of crimes relevant to the armed conflict in eastern Ukraine […] are alleged to have been tortured in order to extract information regarding their involvement or that of their associates in "separatist" activities and to identify armed groups' military positions*. The Subcommittee also understands that, in some cases, acts were committed by private individuals or volunteer battalions with the consent or acquiescence of public officials. 36. As it did during its 2011 visit (see CAT/OP/UKR/1, paras. 64 and 93-94), the Subcommittee also received allegations about the ill-treatment of detained persons, including juveniles, by the police during their apprehension and interrogation. Reports of juveniles being punched, kicked, burned and shocked with tasers were borne out by consistent interviews, observation of injuries and registers (even if such records were not always complete). Many detainees stated that, following ill-treatment by the police, they were prevented from entering pretrial detention facilities (SIZOs) because they had visible injuries and had therefore been kept in pretrial centres under the authority of the national police (ITTs) for their "faces to heal" before being registered and undergoing a medical examination at a SIZO. 37. In addition, it appears that *prosecutors and judges are not particularly sensitive or sympathetic to complaints of torture and ill-treatment*. A number of factors may contribute to this, including […] the deference shown to police investigators given prosecutors' reliance on them for other cases and a tolerance for torture committed by 'defenders' (volunteers fighting in eastern Ukraine), stemming from expressions of sympathy for their cause. […] In addition, the Subcommittee met many officials, including administrators, law enforcement officers and medical professionals, who did not feel it was their responsibility to report suspected cases of torture and ill-treatment. 38. When allegations of torture were looked into, some investigative steps, such as medical examinations, witness interviews and the provision of timely access to the scene of the events, were either severely delayed or completely thwarted. Moreover, the Subcommittee observed that accounts of suspicious injuries were treated in a variety of ways. In some cases, a report was forwarded to the prosecutor's office; in others, it was sent to the police. In any event, it was not clear that investigations systematically followed from such reports, perhaps because some were sent to the police officers accused of committing the act. In addition, a number of reports received no reply and others received only an initial acknowledgment."

September 2017	United Nations Human Rights Council	Yes: "21. Dozens of civilians and persons hors de combat had been subjected to summary executions and killings or had died of torture and ill-treatment in custody. About 3,000 conflict-related detainees had been deprived of their liberty in the territories controlled by the armed groups. They had been subjected to torture, ill-treatment and/or inhuman conditions of detention, often aggravated by the lack of access to external observers. In Government-controlled territory, conflict-related detainees had often been kept incommunicado, including in unofficial places of detention, and subjected to torture and ill-treatment. Hundreds of persons remained missing on both sides of the contact line."[151] "39. The Subcommittee recommends [inter alia] that [Ukraine] take urgent measures to prevent and punish all acts of torture and ill-treatment occurring at the hands of, or with the consent or acquiescence of, State officials".[152]

[151] United Nations General Assembly, Human Rights Council, Working Group on the Universal Periodic Review, 28th Session, Compilation on Ukraine, Report of the Office of the United Nations High Commissioner for Human Rights, UN Doc. A/HRC/WG.6/28/UKR/2, 4 September 2017, para. 21, available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/257/58/PDF/G1725758.pdf?OpenElement.

[152] Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, "Visit to Ukraine undertaken from 19 to 25 May and from 5 to 9 September 2016: observations and recommendations addressed to the State party", UN Doc. CAT/OP/UKR/3, 18 May 2017, para. 39, available at http://undocs.org/en/CAT/OP/UKR/3 (Annex 6).

Table 8: Civilian casualties caused by shelling of populated areas of territory controlled by the DPR/ LPR and attributable to Ukraine

In its Preliminary Objections, Russia has explained that the number of civilian casualties (including deaths) caused by shelling of populated areas has been far greater on the DPR/LPR side of the contact line: see Preliminary Objections, para. 99 and **Table 1** of **Appendix**.

According to the SMM OSCE and OHCHR alone, there were numerous attacks on the DPR/ LPR-controlled territories as of the end of December 2017 that led to civilian casualties or damage to key civilian infrastructure.[153]

The following table presents representative examples of civilian casualties caused by shelling of the DPR-/LPR-controlled territories attributable to Ukraine, as reported by the OSCE and OHCHR.[154]

Date	Episode	Organisation reporting the attack	Origin of fire: Ukraine-controlled territory
22 January 2015	"At 08:40hrs on 22 January, the "Emergency Services Department" of the "Donetsk People's Republic" ("DPR") informed the SMM of an alleged shelling incident – involving multiple fatalities – at 42 Kuprina Street, 4.4km south-south-west of city-centre Donetsk. […] At 11:30hrs the SMM visited Donetsk Regional Trauma Hospital, where the chief surgeon said that 13 people with injuries sustained in the incident on Kuprina Street had been admitted."	OSCE[155]	"At 11:00hrs the SMM conducted a crater analysis on both craters, and determined that the rounds that caused the two craters had been fired from *a north-western direction*."

153 For an indicative list of examples of OSCE and OHCHR reports covering respective attacks, including shelling attacks, see List of reports containing the examples of attacks on the DPR-/LPR-controlled territories as of the end of December 2017 (Annex 30).

154 Note that civilian casualties in the territory controlled by the DPR/LPR have also resulted from other forms of indiscriminate and targeted attacks including air strikes and small arms fire. For a recent example of a targeted attack, from the direction of government-controlled territory, on civilians see OHCHR, "Report on the human rights situation in Ukraine 16 February to 15 May 2018", para. 22 ("Of deep concern, on 17 April, a bus carrying approximately 30 civilian workers from the DFS in armed-groups-controlled territory came under what appears to be deliberate small arms fire originating from the direction of government-controlled territory."), available at https://www.ohchr.org/Documents/Countries/UA/ReportUkraineFev-May2018_EN.pdf.

155 OSCE, "Spot report by the OSCE Special Monitoring Mission to Ukraine (SMM), 22 January 2015: Shelling Incident on Kuprina Street in Donetsk City", available at https://www.osce.org/ukraine-smm/135786 (emphasis added).

1-2 February 2015	"The SMM visited Donetsk city's Petrovskyi and Voroshilovskyi districts (respectively 1.7km north-west and 15km south-west of Donetsk city centre, "DPR"-controlled) to monitor the effects of shelling reported by various sources. The SMM visited six sites in the two districts where it observed damage to infrastructure and residential properties. Local residents reported that Petrovskyi district was shelled on 1 February at approximately 17:00hrs and that a young girl was killed and two men wounded as a result. […] In Voroshilovskyi district local residents told the SMM that shelling occurred on 2 February at approximately 07:45hrs and that two adults, one woman and one man were killed."	OSCE[156]	"SMM crater analysis shows that one building sustained a direct artillery hit *originating from the north-west*."
4 February 2015	According to the OSCE SMM Spot Report, the shelling took place in the Kirov quarters of Donetsk on 4 February, between 11:40 a.m. and 11:45 a.m. strikes hit the immediate vicinity of a kindergarten No 381, a neighbouring street and the Donetsk Hospital No 27. As a result, 6 persons were killed, 25 or 26 injured.	OSCE[157]	"Based on the analysis of the impact site, the size of the crater and observed destructions, the SMM concluded that the shelling came *from south-south-westerly direction* and was carried out with the use of MSLR BM-27 Uragan."

[156] OSCE, "Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 18:00 (Kyiv time), 2 February 2015", 3 February 2015, available at http://www.osce.org/ukraine-smm/138896 (emphasis added).

[157] OSCE, "Spot report by the OSCE Special Monitoring Mission to Ukraine (SMM): Shelling in the Kirovskyi district of Donetsk city on 4 February 2015", 7 February 2015, available at https://www.osce.org/ukraine-smm/139406 (emphasis added).

11 February 2015	"In Donetsk, on 11 February from 10:00 to 11:30hrs, the SMM observed the aftermath of a shelling incident in the morning of 11 February at the central bus station and a metal works factory located in Leninskyi district ("Donetsk People's Republic" ("DPR")-controlled). At the bus station the SMM saw two burnt-out buses, one of them struck by an artillery shell. The SMM could not determine the precise type of artillery shell or the direction of fire. Staff at the Donetsk Central Hospital later confirmed to the SMM that the shelling at the two sites had caused four civilian casualties and injured three."	OSCE[158]	"Based on its observations and crater analysis, the SMM assessed that the impacts were caused by mortar shells *fired from the north-west*."
26 May 2015	"The SMM saw the aftermath of shelling in "DPR"-controlled Horlivka (39km north-north-east of Donetsk). Residents, including one injured by the shelling, told the SMM that shells struck at 18:00hrs on 26 May. The SMM saw nine crater impacts (all within a radius of 200 metres) at three locations in residential areas and conducted crater analysis at one location. At this location, the SMM saw the body of a deceased woman close to two crater impacts. […] According to the "DPR" "emergency services" and local residents, a 38 year old man and his 11 year old daughter were killed instantly in this strike and his wife and two young children had been hospitalized with injuries. At City Central	OSCE[159]	"The SMM estimated that the craters were caused by incoming artillery *from the north-north-west*. In both craters the SMM found shrapnel consistent with 122mm artillery."

[158] OSCE, "Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 18:00 (Kyiv time), 11 February 2015", 12 February 2015, available at http://www.osce.org/ukraine-smm/140271 (emphasis added).

[159] OSCE, "Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 19:30 (Kyiv time), 27 May 2015", 28 May 2015, available at http://www.osce.org/ukraine-smm/160611 (emphasis added).

	Hospital No.2 the SMM spoke with the wounded mother. She and her children had suffered shrapnel wounds. Later, the SMM saw three bodies at the mortuary (one a middle aged man, one woman and a child). The SMM assessed that all three were victims of the shelling."		
7 July 2015	"In "DPR"-controlled Svobodne (49km north-east of Mariupol), the SMM noted 15 shell impacts, assessed to have been caused by 120mm artillery rounds fired from the west. The SMM observed three destroyed houses, which it assessed to have sustained direct hits. A number of other houses had sustained damage. According to "DPR" armed personnel and residents of the village, an elderly woman and her adult son were killed in the shelling. The SMM observed a destroyed house where residents said the victims had lived. Human remains and blood were at the scene. The shelling occurred between 04:10 and 04:50hrs on 7 July, according to residents in neighbouring "DPR"-controlled Telmanove (50km north-east of Mariupol). In "DPR"-controlled Starobesheve (81km north-north-east of Mariupol), the head doctor of the hospital later told the SMM that two civilians killed in Svobodne had been taken to the morgue, which is attached to the hospital."	OSCE[160]	"In "DPR"-controlled Svobodne (49km north-east of Mariupol), the SMM noted 15 shell impacts, assessed to have been caused by 120mm *artillery rounds fired from the west*."

[160] OSCE, "Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 19:30 (Kyiv time), 7 July 2015", 8 July 2015, available at https://www.osce.org/ukraine-smm/171186 (emphasis added).

19 July 2015	"On 19 July the SMM observed the aftermath of shelling overnight and conducted crater analyses in "DPR"-controlled Donetsk city, visiting a total of 12 impact sites. Around 80 Universytetska Street and 69 Shchorsa Street (2.5km north-west of Donetsk city centre), the SMM observed three fresh craters that it concluded had been caused by MBT fragmentation shells (125mm) fired from the north-west. At Hospital No. 23 at 46 Tselinogradska Street (4km west of Donetsk city centre), the SMM observed three fresh craters that it also concluded had been caused by MBT fragmentation shells (125mm) fired from the north-west."	OSCE[161]	"In both cases, the SMM was able to conclude *the direction of fire to have been from the area of government-controlled Pisky (11km north-west of Donetsk) and Pervomaiske (17km north-west of Donetsk)*."
29-30 July 2015	"In "DPR"-controlled Horlivka (37km north-east of Donetsk), in the area of Pereslavskaya Street, the SMM was told by residents that shelling had taken place around 22:00hrs on 29 July. […] A resident told the SMM that as a result of the shelling, one woman had been killed and her son and husband had been injured and hospitalized. […] In another area of Horlivka (Rtutna Street), the SMM observed impacts to the western sides of apartment buildings, and some shrapnel marks on eastern façades. […] The walls of buildings were damaged and windows were shattered.	OSCE[162]	"The SMM found remnants of shells in the craters, assessed to be from 120mm calibre mortar. The SMM assessed the direction of fire as incoming *from the west-north-west*. […] The SMM assessed the direction of fire as incoming *from the west-north-west*."

[161] OSCE, "Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 19:30 (Kyiv time), 19 July 2015", 20 July 2015, available at https://www.osce.org/ukraine-smm/173666 (emphasis added).

[162] OSCE, "Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 19:30 (Kyiv time), 30 July 2015", 31 July 2015, available at http://www.osce.org/ukraine-smm/175591 (emphasis added).

	Three residents told the SMM that shelling had begun at around 04:00hrs on 30 July. According to them, one man had been killed and two elderly women and a 14-year-old child were injured. The head and deputy head of Horlivka trauma hospital no. 2 together told the SMM that six people (two elderly women, two men and two children) had been injured as a result of the shelling and brought to the hospital, among them two children (one aged seven and the other 14 years).”		
27 April 2016	“Four civilians were killed close to a “DPR” checkpoint near Olenivka when shelling occurred in the early hours of 27 April.”[163]	OSCE / OHCHR	“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*.”[164]
11 October 2016	“The SMM followed up on reports of civilian casualties and observed the result of shelling. In a hamlet between “DPR”-controlled Sakhanka and Uzhivka (formerly Leninske) (both 24km north-east of Mariupol) the SMM observed two impact sites. At the first site the SMM saw the totally destroyed roof of an inhabited house. Based on the damage and shrapnel, the SMM assessed it as caused by a 122mm artillery round	OSCE[165]	“Based on the damage and shrapnel, the SMM assessed it as caused by a 122mm artillery round possibly fired *from a north-westerly direction*. At the second site the SMM saw a fresh crater next to a road and assessed it as possibly caused by a 122mm artillery round fired *from a north-westerly direction*.”

[163] OSCE, “Spot Report by the OSCE Special Monitoring Mission to Ukraine (SMM): Shelling in Olenivka”, 28 April 2016, available at https://www.osce.org/ukraine-smm/236936 (emphasis added).

[164] OHCHR, “Report on the human rights situation in Ukraine, 16 February to 15 May 2016”, para. 20, available at https://www.ohchr.org/Documents/Countries/UA/Ukraine_14th_HRMMU_Report.pdf (emphasis added).

[165] OSCE, “Latest from OSCE Special Monitoring Mission (SMM) to Ukraine, based on information received as of 19:30, 11 October 2016”, 12 October 2016, available at https://www.osce.org/ukraine-smm/274286 (emphasis added).

	possibly fired from a north-westerly direction. At the second site the SMM saw a fresh crater next to a road and assessed it as possibly caused by a 122mm artillery round fired from a north-westerly direction. The "head" of Sakhanka "village council" told the SMM that a woman (in her late seventies) had been killed during shelling which occurred on the previous night, and as a result her husband (in his late seventies) had suffered a heart attack, adding that two women (aged 53 and 47) and a man had been injured and taken to a hospital".		
20 October 2016	"Conversely, neighbouring villages and towns, such as "DPR"-controlled Makiivka which is adjacent to Avdiivka-Yasynuvata-Donetsk airport area saw a considerable number of casualties, amounting to 23 cases, almost 90 per cent of which resulted from shelling. An example is the incident which occurred on neighbouring streets of a residential area in Makiivka on 27 October, leading to nine casualties (two killed, seven injured). Many of those interviewed by the SMM described being thrown against the wall or the floor during the impacts and being injured by flying shrapnel and shards of glass from shattering windows. The SMM confirmed the deaths of two men as a result of injuries sustained during the shelling."	OSCE[166]	"The SMM assessed two of the impact sites as caused by 122mm artillery rounds *fired from a north-westerly direction*."

[166] OSCE, "Thematic Report: Civilian casualties in eastern Ukraine 2016", September 2017, p. 21, available at https://www.osce.org/special-monitoring-mission-to-ukraine/342121?download=true (emphasis added).

2 February 2017	"In Kalininskyi district of Donetsk city, the SMM observed a fresh impact next to a roundabout assessed as caused by a single multiple-launch rocket system (MLRS; likely Smerch or Uragan) rocket fired from a direction ranging from west to north. […] An SMM mini unmanned aerial vehicle (UAV) spotted a five-storey dormitory building, about 30m south of the impact, whose roof had been completely ripped off and all windows shattered. About 170m north-west of the impact, the gates of a car wash had been blown in, while a gas station behind the car wash had sustained slight damages. The UAV spotted a "DPR" compound some 260m south-east of the impact site with two multi-purpose armoured tracked vehicles (MTLB) inside. The head of the dormitory where internally displaced persons reside said that two of them had been injured. At a morgue, staff said that the body of a dead man had been brought in together with partial remains of another person. On Artema Street in Donetsk city the SMM observed two fresh impacts: one in the entry steps of a residential apartment building and another on the road 15-20m north of the building. The SMM assessed the impacts as	OSCE[167]	"In Kalininskyi district of Donetsk city, the SMM observed a fresh impact next to a roundabout assessed as caused by a single multiple-launch rocket system (MLRS; likely Smerch or Uragan) rocket *fired from a direction ranging from west to north*. […] The SMM assessed the impacts as caused by MLRS (BM-21Grad, 122mm) rockets *fired from a westerly direction*."

[167] OSCE, "Spot Report by the OSCE Special Monitoring Mission to Ukraine: Casualties, damage to civilian infrastructure registered in Donetsk region following fighting", 3 February 2017, available at https://www.osce.org/ukraine-smm/297606 (emphasis added).

	caused by MLRS (BM-21Grad, 122mm) rockets fired from a westerly direction. Half of the windows on the south-west-facing side of the building were destroyed. On Sobinova Street the SMM observed a fresh impact in the garden of a house assessed as caused by a single MLRS (BM-21) rocket. […] On Kievskyi Avenue the SMM observed two impacts, one on the first and another on the fourth floor of two residential buildings, as well as shrapnel damage to nearby buildings. The SMM saw holes in the exterior west-facing walls of several apartments and broken windows. The SMM assessed one impact as caused by an MLRS (BM-21) rocket and the other by an artillery round at least 122mm, both fired from a north-westerly direction. According to local residents the above explosions in Donetsk city had occurred between 22:20 and 23:30 on 2 February."		
28 April 2018	"At a hospital in Dokuchaievsk the injured woman's daughter (in her thirties) told the SMM that on the morning of 28 April her mother, while on the way to a store, had heard sounds of shelling. Then, about 100m away from her house at 4 Polzunova Street, she had felt a strong pain in her right shoulder. The SMM spoke to a doctor (man, in his sixties) who said that a	OSCE[168]	"The SMM assessed the craters as caused by *fire from a north-westerly direction*."

[168] OSCE, "Latest from the OSCE Special Monitoring Mission to Ukraine (SMM), based on information received as of 19:30, 29 April 2018", 30 April 2018, available at https://www.osce.org/special-monitoring-mission-to-ukraine/379156 (emphasis added).

	woman (in her sixties) with injuries caused by shrapnel had been admitted to the hospital that morning. [...] On 28 April, at a morgue in Dokuchaievsk the SMM saw two covered bodies. At the morgue medical staff told the SMM that the bodies were victims of shelling."		

INDEX OF ANNEXES

ICSFT

Annex 32 OSCE, "Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 18:00 (Kyiv time), 25 January 2015", 26 January 2015

Annex 33 State Border Guard Service of Ukraine, "In Kramatorsk terrorists shelled the unit of the State Border Guard Service", 10 February 2015

Annex 34 112.UA News Agency, "P. Poroshenko's speech in Rada and the report on the shelling of Kramatorsk, 10 February 2015", (partial transcript of the video)

Annex 35 Frunzensky District Court of Kharkov, Case No. 645/3612/15-k, Decision, 30 September 2015

Annex 36 Ukrainian Helsinki Human Rights Union, Kharkiv Human Rights Protection Group and NGO "Truth Hounds", "Unlawful detentions and torture committed by Ukrainian side in the armed conflict in Eastern Ukraine", 2017

Annex 37 "Ukraine: Avdiivka, the front line of Europe's 'forgotten war" of 31 January 2017, BBC News (partial transcript of the video)

Annex 38 AF News Agency, "Terrorist attack at the Sports Palace in Kharkov in 2015 - guilty without guilt", 16 August 2017

Annex 39 Rhythm of Eurasia News Agency, "SBU routine: 'They beat with a metal pipe, passed an electric current...'", 12 October 2017

Annex 40 AF News Agency, "'Activists' dictate sentences to the courts and the prosecutor's office. Lawyer Dmitry Tikhonenkov on the peculiarities of Ukrainian hybrid justice", 1 November 2017

Annex 41 AF News Agency, "The accused of the explosion of the Stena Rock Pub, Marina Kovtun, has been tortured for three years by the SBU", 22 November 2017

Annex 42 News Front Info, "Kharkov resident accused of 'undermining the integrity' of Ukraine announced her hunger strike", 13 January 2018