

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)

REPLY

SUBMITTED BY UKRAINE

29 APRIL 2022

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PART I: INTRODUCTION

Chapter 1. INTRODUCTION TO THE REPLY

1. Pursuant to the Court's Orders of 8 October 2021 and 8 April 2022, Ukraine files this Reply.

2. As Ukraine stated in its Memorial, this case concerns a brazen and comprehensive assault on human rights and international law in the territory of Ukraine. In the Autonomous Republic of Crimea and the city of Sevastopol, the Russian Federation invaded and occupied sovereign Ukrainian territory in 2014, launching and maintaining a regime of racial discrimination and cultural erasure targeting the Crimean Tatar and Ukrainian communities under its control. In eastern Ukraine, illegal armed groups launched what U.N. human rights monitors called "a campaign of intimidation and terror" against the civilian population, which Russian officials and other persons under Russian jurisdiction supported with weapons and money, as Russia's government refused to take cooperative measures to prevent and punish such financing of terrorist acts.

3. Tragically, as Ukraine submits this Reply, the world is witnessing that Russia's behavior at issue in this case, revealing Russia's contempt for both international law and the Ukrainian people, was only a prelude. On 21 February 2022, Russia purported to recognize as independent the so-called "Donetsk People's Republic" and "Luhansk People's Republic" — the very illegal armed groups responsible for committing the terrorist acts documented in Ukraine's Memorial. Then, on 24 February 2022, Russia launched a full-scale invasion of Ukraine. The Russian military has used illegal means to carry out its illegal mission, making entire populations in Ukraine's cities and towns the object of attack, and raining rockets and shells down on peaceful civilian areas — similar to the shellings of civilians documented in Ukraine's Memorial in this case, but multiplied exponentially, massively expanded geographically, and carried out by the Russian Armed Forces. In newly occupied territory, Russia is employing repressive techniques familiar from its campaign of racial discrimination in Crimea.

4. Russia's latest aggression against Ukraine is the subject of a different case pending before the Court, in which the Court has indicated provisional measures.¹ At the same time, as this Court considers Russia's past violations of the ICSFT and the CERD, it is impossible to simply ignore Russia's current actions.

5. In the first instance, the Court should assess prior Russian support for attacks on Ukrainian civilians in eastern Ukraine, and Russia's active program of cultural erasure in Crimea, in light of the tragic attacks on civilians by the Russian Federation and the denial of Ukrainian identity and statehood that have been ongoing since 24 February 2022. Russia's recent conduct underscores the bad faith that permeates Russia's Counter-Memorial, in effect asserting that white is black, and night is day. Russia's Counter-Memorial presents a fictional world in which all ethnic groups in occupied Crimea are treated fairly and equally. Similarly, Russia's Counter-Memorial mounts a defense of the DPR's and LPR's attacks against civilians, and then seeks to draw a false equivalence between the illegal armed groups inflicting a reign of terror on the population and the Ukrainian armed forces seeking to stop them and restore constitutional order. Now Russia is directly deploying cluster munitions and other powerful weapons against Ukraine's cities — even targeting a theater in Mariupol that was serving as a shelter, with the word “CHILDREN” spelled out and visible from satellite imagery.² Viewed in light of these recent actions, Russia's Counter-Memorial can only be understood as a series of deflections and distractions crafted by lawyers, not the position of a State genuinely committed to fulfilling its obligations under the ICSFT and the CERD.

6. Second, while Russia's past violations of international law and human rights can appear dwarfed by the magnitude of Russia's current assault on Ukraine, the violations of the ICSFT and the CERD at issue in this case remain extraordinary and important. The world

¹ See *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Provisional Measures, Order of 16 March 2022.

² OSCE, Report on Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes Against Humanity Committed in Ukraine Since 24 February 2022 (13 April 2022), pp. 47–48; Human Rights Watch, *Ukraine: Mariupol Theater Hit by Russian Attack Sheltered Hundreds* (16 March 2022).

has now seen that if Russia is not held accountable for its violations of international law, Russia will escalate its violations. After years of imposing a campaign of racial discrimination and cultural erasure in Crimea, Russia now threatens to deploy the same tactics across the entirety of Ukraine, as Russia's president chillingly denies the existence of a separate Ukrainian people and its historical right to a State of its own. After years of Russian officials providing deadly military weaponry for use against civil aviation, residential neighborhoods, and peaceful unity rallies, the Russian military is now directly turning those same weapons systems and more against the Ukrainian people.

7. As Ukraine completes this Reply, Russia is seeking to expand its occupation of Ukrainian territory. The Ukrainian population is now at risk of the same regime of discrimination faced by the Ukrainian population in occupied Crimea. And to achieve this expanded territorial occupation, Russia is deploying the same tactics of intimidation and coercion that the DPR and LPR used in eastern Ukraine beginning in 2014. The symmetry between past and present is both tragic and unmistakable. In 2015, a bus full of pensioners at a civilian checkpoint near Volnovakha was shelled; today, a hospital in Volnovakha has been bombed and the town "has been almost completely destroyed" by shelling.³ In 2015, a residential neighborhood of Mariupol was intentionally targeted; today, the entire city of Mariupol is being targeted, including direct attacks on civilians that have killed thousands, including many children.⁴ In 2015, a sophisticated multiple launch rocket system was fired

³ OSCE, Report on Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes Against Humanity Committed in Ukraine Since 24 February 2022 (13 April 2022), p. 82; euronews, *Heavy Fighting Leaves Much of Volnovakha in Ruins* (13 March 2022); Reuters, *Inside the Almost Completely Destroyed Town of Volnovakha* (12 March 2022).

⁴ See OSCE, Report on Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes Against Humanity Committed in Ukraine Since 24 February 2022 (13 April 2022), pp. 32, 46–48; U.N. News, *UN Alarm Over Mounting Ukraine Casualties, Amid Desperate Scenes in*

into the center of Kramatorsk; today, a missile strike targeted a train station in Kramatorsk where civilians were gathering to evacuate, killing more than fifty civilians.⁵

8. Third, in violation of the Court’s Order of 19 April 2017, Russia has taken “action which might aggravate or extend the dispute before the Court or make it more difficult to resolve.”⁶ Part IV below addresses in more detail Russia’s violations of the Court’s Order, but it is worth noting here that Russia’s invasion of Ukraine also makes this dispute more difficult to resolve in the most literal way possible. By forcing Ukraine to defend itself from a war of aggression, by forcing it to turn government resources to the most basic needs of its people, by forcing witnesses in this case to dedicate their attention to the national defense, and by forcing others in Ukraine who have been assisting with this case to prioritize their own personal safety, Russia has made it more difficult for the Government of Ukraine to complete this Reply and assist this Court with resolution of the dispute on the merits. Russia also has gone so far as to suggest in negotiations with Ukraine to end Russia’s unlawful aggression that Ukraine drop its legal actions as part of a price for peace.⁷

9. Despite the aggression it is facing, Ukraine’s belief in international law compels it to move forward in this case and demand accountability and responsibility for Russia’s breaches of the ICSFT and the CERD. At the same time, this Reply will on limited occasions

Mariupol (25 March 2022); Human Rights Watch, *Ukraine Theater Hit by Russian Attack Sheltered Hundreds* (16 March 2022).

⁵ See U.N. News, *Ukraine: UN Condemns Deadly Attack on Train Station, Dozens of Civilians Killed* (8 April 2022); Jonathan Beale, *Ukraine War: Disbelief and Horror after Kramatorsk Train Station Attack*, BBC (10 April 2022).

⁶ *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. 140, para. 106.

⁷ StoryUkraine, *Arahamiya in an Interview with RBC-Ukraine on Negotiations between Ukraine and Russia and Security Guarantees* (30 March 2022), <https://news.storyua.com/news/3360.html>.

refer to information available to Ukraine but for which production of documents or a formal witness statement has been rendered temporarily impossible by Russia’s invasion. The Court has long recognized that “a State that is not in a position to provide direct proof of certain facts ‘should be allowed a more liberal recourse to inferences of fact and circumstantial evidence.’”⁸ This principle must apply with particular force when the reason certain evidence is unavailable is that a respondent State has launched an unprovoked invasion of an applicant State while the two States have an important dispute pending before the Court. While the present record more than supports Ukraine’s claims, Ukraine reserves the right to seek the Court’s authorization, pursuant to Article 56(2) of the Rules of the Court, to submit additional documentary evidence when it is able to do so, which under the present circumstances would be manifestly justified.

10. In significant respects, Russia’s Counter-Memorial does not and cannot dispute the most critical facts. Russia does not dispute, for example, the massive supply of arms and money to illegal armed groups in Ukraine who notoriously committed attacks against civilians, and Russia’s complete refusal to police its border or take other cooperative, practicable measures to prevent the financing of terrorist acts in Ukraine. Nor does Russia dispute that it has repeatedly restricted the right of the Crimean Tatar and Ukrainian communities to commemorate events of cultural significance to them, or that it has prioritized the educational needs of Crimea’s ethnic Russian community over those of the Crimean Tatars and Ukrainians. Unable to dispute these and other facts, Russia attempts to bend the law in its favor — denying the most natural interpretations of its obligations in favor of convoluted readings and artificial evidentiary burdens, all for the sake of avoiding responsibility for indefensible conduct. The Counter-Memorial reveals a strategy focused on creating an escape

⁸ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Reparations*, Judgment of 9 February 2022, p. 40, para. 125 (quoting *Corfu Channel (United Kingdom v. Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 18).

route for a non-compliant state, rather than one based on good faith interpretation and performance of international obligations.

11. The first component of Russia's escape route is to nullify its obligations by treating words as if they lack meaning. Thus, when the ICSFT defines the term "funds" to include "assets of every kind," Russia defines funds to mean only "financial assets" but not "non-financial assets"⁹ — that is, not assets of *every* kind. When the ICSFT requires States to take "all practicable measures" to prevent and counter preparations for terrorism financing offenses, Russia insists that its sole obligation is to take only regulatory measures — only "certain" practicable measures, not all practicable measures as the treaty says. To accept these tortured interpretations would free Russia of any obligation to take measures to prevent the supply of deadly weapons from its territory to known perpetrators of terrorist violence. Similarly, Russia ignores the CERD's absolute prohibition on racial discrimination, claiming that it is subject to exceptions based on Russia's subjective assessment of its national security needs, including those purportedly embodied in its discredited anti-extremism laws.

12. The second component of Russia's escape route is to layer unfounded evidentiary requirements on top of one another, such that if Russia's obfuscations can create the smallest uncertainty, Ukraine's case would fail. For example, under the ICSFT Russia maintains that Ukraine should not be permitted to draw reasonable inferences as to the purpose of attacks on civilians — even though the ICSFT states that the purpose of a third party's act to intimidate or compel is to be determined by its "nature or context." Under the CERD, which defines "racial discrimination" to include actions which have "the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life," Russia insists that "effect" is not enough and that Ukraine must prove "purpose." And across the entirety of the case, Russia ignores the fact that the financiers of

⁹ See Russia's Counter-Memorial Part I, paras. 37, 73, 101.

terrorism and the perpetrators of racial discrimination are located in territory controlled by Russia, and that as a consequence, Ukraine must under this Court's jurisprudence be "allowed a more liberal recourse to inferences of fact and circumstantial evidence."¹⁰

13. The third component of Russia's escape route is to ignore inconvenient facts and invent its own facts with the thinnest veneer of support. Under the ICSFT, for example, Russia baldly asserts that well-documented assassinations of civilians based on nothing more than their pro-Ukrainian views are merely "ordinary crimes."¹¹ It seeks to bury the phenomenon of a bombing campaign across Ukraine's peaceful cities, not even engaging with the evidence that the sophisticated military-grade explosives used in those bombings came from Russia. And where the Under-Secretary General of the United Nations determined that the bombardment of a residential neighborhood in Mariupol "knowingly targeted a civilian population," Russia puts forward the opinion of a Russian Major General who is willing to do no more than speculate that the carnage might theoretically have other explanations. Under the CERD, Russia responds to Ukraine's well-documented allegations that the Crimean Tatar and Ukrainian communities have been targeted for arbitrary police action that negates or impairs their human rights with conclusory statements by members of the Russian law enforcement apparatus asserting that everything was done in accordance with Russian law.

14. This Reply will answer Russia's strategy to evade accountability: Ukraine demonstrates why Russia's legal interpretations are wrong, its proposed evidentiary burdens unfounded, and its approach to the facts is not credible. Under good faith interpretations of the ICSFT and the CERD and the facts before this Court, there is but one conclusion to reach: Russia has engaged in brazen violations of these treaties and, in the process, shown fundamental disregard for the human rights of the people of Ukraine.

¹⁰ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, *Reparations*, Judgment of 9 February 2022, p. 40, para. 125 (quoting *Corfu Channel (United Kingdom v. Albania)*, *Merits, Judgment*, *I.C.J. Reports 1949*, p. 18).

¹¹ Russia's Counter-Memorial Part I, para. 515.

Chapter 2. STRUCTURE AND SUMMARY OF UKRAINE’S REPLY

15. Ukraine’s Memorial presented its claims that Russia has violated numerous obligations under the ICSFT and the CERD. On 8 November 2019, the Court issued a judgment finding that “it has jurisdiction on the basis of Article 24, paragraph 1, of the International Convention for the Suppression of the Financing of Terrorism, to entertain the claims made by Ukraine under this Convention,” and that “it has jurisdiction, on the basis of Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination, to entertain the claims made by Ukraine under this Convention, and that the Application in relation to those claims is admissible.” On 9 August 2021, the Russian Federation filed a Counter-Memorial in two parts.¹²

16. **Part II** of the Reply addresses Ukraine’s claims under the ICSFT, **Section A** of which discusses the interpretation of the Convention. **Chapter 3** responds to Russia’s flawed framework for assessing its obligations. It summarizes the framework under which Russia was obligated to cooperate with Ukraine in the prevention and suppression of terrorism financing, outlines Russia’s systematic rejection of its obligations, explains the common flaws that run throughout Russia’s interpretation of the ICSFT, and addresses Russia’s attempt to artificially heighten the evidentiary standard for establishing a breach of its obligations.

17. **Chapter 4** addresses the proper interpretation of Article 2(1) of the ICSFT. It responds to Russia’s arbitrary attempt to narrow Article 1’s definition of “funds,” arguing that weapons and other non-financial assets are excluded from the Convention’s broad definition

¹² Prefaces to both Parts of the Counter-Memorial state that “Russia submits two Counter-Memorials.” In a letter to the Parties, the Registrar noted that the Court “regrets that the Russian Federation used wording in the prefaces to the two volumes of its Counter-Memorial which referred to the submission of ‘two Counter-Memorials,’” as “Article 45, paragraph 1, of the Rules of Court only envisages the presentation of one Memorial by the applicant and one Counter-Memorial by the respondent in a given case.” Letter from Philippe Gautier, Registrar, International Court of Justice, to Yevhenii Yenin, Agent of Ukraine before the International Court of Justice, dated 24 September 2021. The Court instructed that in future pleadings, “reference should be made to the Counter-Memorial Part I and the Counter-Memorial Part II.” *Ibid.* Russia has not designated which parts of its Counter-Memorial it considers Part I and Part II, so for purposes of consistency with the presentation in Ukraine’s Memorial, Ukraine will refer to the volume of the Counter-Memorial addressing the ICSFT as “Counter-Memorial Part I,” and the volume of the Counter-Memorial addressing the CERD as “Counter-Memorial Part II.”

of “funds” to include “assets of every kind.” Chapter 4 then addresses the mental state requirement of Article 2(1), explaining the parties’ common ground that where a funder provides assets to a person or group that has notoriously committed terrorist acts, the funder acts with the required knowledge. The chapter then refutes Russia’s argument, unmoored from the text of the treaty, that such notoriety requires a formal international designation or similar characterization, and cannot be established by notoriety of the group’s acts themselves.

18. **Chapter 5** responds to Russia’s interpretation of the terrorist acts which may not be funded. It first addresses the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, explaining that intention to destroy a civil aircraft is not an element of an offense, and that even if it were, such intention is present where a person fires a weapon incapable of distinguishing military and civilian targets into skies open to civil aviation. Chapter 5 further responds to Russia’s misreading of Article 2(1)(b) ICSFT, which refers not to the mental state of a third party but to the objective nature of an act, and directs that an act’s purpose to intimidate or compel must be evaluated based on its nature or context.

19. **Section B** of Part II responds to Russia’s arguments that Ukraine has not established acts of terrorism financing under Article 2 of the ICSFT. **Chapter 6** addresses the evidence that illegal armed groups in Ukraine committed numerous acts covered by Article 2(1)(a) and 2(1)(b) of the ICSFT through the targeted killings of Ukrainian civilians, the shoot-down of Flight MH17, shelling attacks on civilian areas, and bombing attacks in Ukrainian cities. It shows that for many of these acts, the critical evidence showing they are covered by Article 2(1)(b) is undisputed, and with respect to the DPR’s shelling of civilian areas, Russia’s attempts to excuse and justify these attacks fail. **Chapter 7** demonstrates that it is also undisputed that persons in Russian territory provided money, weapons, and other equipment to the illegal armed groups that carried out the covered terrorist acts, and responds to Russia’s attempt to minimize or ignore the evidence that Russian officials supplied the bombs used in a wave of terrorist bombings across Ukraine. Applying the proper interpretation of Article 2(1), Chapter 7 then illustrates how the many persons in Russian territory who provided funds

did so with the requisite knowledge of how they were to be used.

20. **Section C, Chapter 8** concludes Part II by responding to Russia's attempt to deprive its obligations under the ICSFT of practical effect, and demonstrating Russia's breaches of its obligations under Articles 18, 8, 9, 10, and 12.

21. **Part III** of this Reply addresses Ukraine's claims under the CERD. **Section A** discusses Russia's attempt to mischaracterize Ukraine's case and misconstrue the applicable law in order to avoid responsibility for its racially discriminatory conduct. **Chapter 9** sets out the proper legal framework governing Ukraine's claims, and explains why Russia's efforts to excuse its behavior, including on the basis of purported national security concerns, cannot provide a legal basis for Russia to avoid its CERD obligations. The chapter also responds to Russia's misguided attempt to distort both the nature of Ukraine's claims of discrimination, and the showing that Ukraine must make in order to establish a violation of the CERD.

22. **Section B** examines Ukraine's claims that Russia has violated numerous provisions of the CERD. **Chapters 10 – 13** respond to Russia's arguments that it has not engaged in a policy of discrimination in political and civil affairs against the ethnic Ukrainian and Crimean Tatar communities. **Chapter 10** explains that Russia has violated Articles 2(1), 5(b), and 6 of the CERD, by directly engaging in, or encouraging and tolerating, acts of physical violence targeting Crimean Tatars and Ukrainians, and by systematically failing to investigate such acts. The chapter shows that data from diverse, credible sources consistently confirm that the Crimean Tatars and Ukrainians are disproportionately affected by such enforced acts of violence. It explains that, contrary to Russia's claim that it has made all available investigative efforts, Russia's own evidence confirms that any alleged investigative efforts were a mere formality. The chapter concludes by explaining that Russia is responsible for all illustrative cases set forth in Ukraine's Memorial.

23. **Chapter 11** demonstrates that Russia's campaign of harassment against the Mejlis, and its ongoing ban on that institution, burdens numerous human rights of the Crimean Tatar community, including those protected under Articles 2(1), 4, and 5(a) of the

CERD. The chapter responds to Russia's attempts to mischaracterize the Mejlis as but one of numerous organizations representative of the Crimean Tatar people, and explains that Russia's national security justification for its ban on the Mejlis has no legal or factual basis. The chapter concludes by addressing Russia's criticism of Ukraine's claims of political suppression as entirely unfounded. In fact, as the chapter shows, Russia's own account plainly confirms each and every occasion of individual harassment against members of the Mejlis.

24. **Chapter 12** establishes that Russia has targeted the Crimean Tatar community, in breach of Articles 2(1), 4, 5(a), and 6 of the CERD, by subjecting it to a pattern of arbitrary searches and detentions. The chapter shows that the specific examples in Ukraine's Memorial demonstrate an ongoing pattern of arbitrary law enforcement measures which disproportionately affect the Crimean Tatar population. The chapter establishes that Russia's claim of compliance with its domestic laws, including the anti-extremism laws, does not excuse its CERD violations, and concludes by addressing Russia's factual criticisms of Ukraine's case, which are belied by Russia's own evidence.

25. **Chapter 13** describes how the imposition of Russian citizenship and its residency and immigration framework laid a legal foundation for Russia's systematic campaign of racial discrimination against the Crimean Tatar and Ukrainian communities, violating Articles 5(c), 5(d)(i), 5(d)(ii), 5(d)(iii), 5(e)(i), and 5(e)(iv) of the CERD. The chapter addresses Russia's attempt to characterize the discriminatory effects of these actions as citizenship-based restrictions excluded from the scope of the CERD by virtue of Articles 1(1), 1(2), and 1(3). The chapter demonstrates that Russia's automatic citizenship regime essentially coerced a choice, where either option would unlawfully restrict the human rights of Crimean Tatars and Ukrainians, albeit in different ways.

26. **Chapters 14 – 17** rebut Russia's denials that it engaged in cultural discrimination and suppression by showing the devastating effect Russia's policies have had on the ethnic Ukrainian and Crimean Tatar communities. **Chapter 14** shows that regardless of Russia's legal defense of its legislative and regulatory framework on gatherings, it has been

applied in a discriminatory manner to the Crimean Tatar and ethnic Ukrainian communities in contravention of Articles 2(1), 5(d)(ix), and 5(e)(vi) of the CERD. It also provides sorely needed context to Russia’s narrative regarding its rejection of applications for Ukrainian and Crimean Tatar gatherings, demonstrating that pro-Russian events were accepted while Ukrainian and Crimean Tatar gatherings were denied for pretextual reasons.

27. **Chapter 15** again responds to Russia’s defense that if its legislative and regulatory framework, in this instance governing the media, is lawful, it cannot be accused of discrimination. This Chapter refutes this fallacy, establishing that Russia’s application in Crimea of its restrictive media regime had the purpose or effect of disproportionately burdening the right to free speech of the Crimean Tatar and ethnic Ukrainian communities, in violation of CERD Articles 2(1), 5(d)(viii), and 5(e)(vi).

28. **Chapter 16** responds to Russia’s attempts to reduce Ukraine’s complaints about the degradation of cultural heritage to one claim: the destruction of the Khan’s Palace. Ukraine sets forth numerous other instances of attempted erasure of cultural heritage in violation of CERD Articles 2(1), 5(e)(vi), and 6, while also rebutting Russia’s depiction of the work being done to the Khan’s Palace as innocent “restoration.”

29. **Chapter 17** describes how, regardless of whether Russia’s educational system treats all students alike, its introduction into Crimea has had the purpose or effect of significantly decreasing access to education for the Crimean Tatar and Ukrainian communities by severely restricting the pre-existing provision of education in their native languages and significantly reducing the quality of what remains, in contravention of CERD Articles 2(1), 5(e)(v), 5(e)(vi), and 7.

30. **Part IV, Chapter 18**, addresses Russia’s ongoing and blatant violation of the Court’s Provisional Measures Order of 19 April 2017 — namely, its failure to lift its ban on the Mejlis and to ensure that education in the Ukrainian language is available in Crimea, as well as its aggravation of all aspects of the dispute — constitutes an independent violation of its international obligations. The Reply concludes with Ukraine’s submissions in **Part V**.

PART II: UKRAINE'S CLAIMS UNDER THE ICSFT

31. The ICSFT requires States Parties to take concrete measures in order to cooperate in the prevention and suppression of terrorism financing. The purpose of the Convention is reflected in its preamble, which stresses “the urgent need to enhance international cooperation among States in devising and adopting effective measures for the prevention of the financing of terrorism, as well as for its suppression through the prosecution and punishment of its perpetrators.”¹³ The ICSFT is thus based on a recognition that terrorism financing is a cross-border phenomenon, which can only be effectively prevented and suppressed by good faith cooperation between States. In this Part, Ukraine responds to Russia’s interpretations of the ICSFT that defy both the text and the object and purpose of the Convention, explains how the factual record before the Court establishes numerous instances of terrorism financing, and demonstrates Russia’s complete failure to fulfil its obligations under the Convention to take cooperative measures to prevent and punish terrorism financing.

Section A: Interpretation of the ICSFT

Chapter 3. THE OVERALL FRAMEWORK FOR ASSESSING THE RUSSIAN FEDERATION’S FAILURES TO COOPERATE IN THE PREVENTION AND SUPPRESSION OF TERRORISM FINANCING

32. As with other forms of trans-boundary harm where actions in one State cause harm in another, the State where terrorism financing offenses are committed is best positioned to take measures to prevent and suppress such acts, acting both proactively and in cooperation with the State where the underlying acts of terrorism cause harm. The ICSFT promotes such cooperation by requiring States Parties to take specific cooperative measures set forth explicitly in the treaty’s provisions. For example, Article 8 requires States to take appropriate measures to identify, detect, and freeze or seize funds used or allocated for committing covered offenses. Article 9 requires States Parties to take investigative measures upon receiving information — from any source — about alleged terrorism financing. Article

¹³ ICSFT, preamble.

10 imposes obligations to prosecute or extradite. Article 12 requires States Parties to “afford one another the greatest measure of assistance” in connection with criminal investigations and proceedings. Finally, Article 18 obligates States Parties to “cooperate in the prevention of the offences set forth in article 2 by taking all practicable measures . . . to prevent and counter preparations . . . for the commission of those offences within or outside their territories.”¹⁴

33. These provisions work together to create a structure for genuine, not begrudging, cooperation. A State that is serious about its obligation to cooperate in the prevention of terrorism financing will take comprehensive action to ensure that terrorism financing is not committed within its territory. Such a State will establish a legislative and regulatory framework addressing terrorism financing — but it will not *only* do that, while refusing to take any other cooperative measures. When a State receives information by another State or any other source, the State will investigate promptly and thoroughly, and then based on that investigation will prosecute or extradite those who committed acts of terrorism financing. When there is reasonable suspicion that funds are being used for terrorism financing, the State will freeze those funds immediately. When a State is informed or has reason to know that weapons flowing across its border are being used in terrorist acts, it will immediately police its border. And if there is any indication that a State’s own officials are involved in providing funds to groups that are known to commit acts targeting civilians, it will take measures to forbid and stop its officials from engaging in such conduct.

34. In this case, the Russian Federation has at most made gestures toward compliance; it has shown no genuine interest in cooperating to prevent and suppress the financing of terrorism in Ukraine. As a consequence, Russia has hollowed out the ICSFT’s cooperation obligations. Instead of cooperating in the suppression of terrorism financing, Russia has violated its obligations and obstructed the very object and purpose of the ICSFT.

¹⁴ ICSFT, art. 18.

A. Russia Has Failed to Cooperate in Accordance with the ICSFT

35. Russia has systematically failed to cooperate by taking the measures required by the ICSFT to prevent and suppress the financing of terrorism by any person, including state officials. As established in Ukraine's Memorial, Russia's refusal to cooperate has taken many forms, including ignoring Ukraine's express requests for cooperation by investigating and freezing assets, failing to provide meaningful assistance to Ukraine, and failing to take practicable measures to prevent terrorism financing, such as policing its own border and providing instructions to its own officials.¹⁵

36. There is no meaningful dispute that Ukraine has requested Russia's cooperation, but received none. For example, Ukraine provided Russia with dozens of individuals' and organizations' names, bank account numbers, and other identifying information for funds suspected to be used in terrorism financing. In response, despite Ukraine's repeated requests, Russia did not freeze any of the identified assets.¹⁶ Ukraine asked Russia to investigate more than 50 named individuals for offenses related to terrorism financing, all of which requests Russia ignored or failed to adequately investigate.¹⁷ To cite one glaring example of Russia's bad faith: Ukraine provided information that Konstantin Malofeev, one of the most prominent businessmen in Russia and a close associate of Russia's President, was involved in terrorism financing. Russia did not respond for almost a year, and then simply made the non-credible assertion that "[i]t was not possible to identify the location of" Mr. Malofeev.¹⁸ As with many of the examples of Russia's non-cooperation established in

¹⁵ See Ukraine's Memorial, Chapter 3.

¹⁶ See Ukraine's Memorial, Chapter 3, Section B.

¹⁷ See Ukraine's Memorial, Chapter 3, Section B.

¹⁸ Russian Federation Note Verbale No. 10448 to the Ukrainian Ministry of Foreign Affairs (31 July 2015) (Ukraine's Memorial, Annex 376).

the Memorial, Russia's Counter-Memorial ignores these uncomfortable facts.

37. Russia's Counter-Memorial ignores several practicable measures — identified in Ukraine's Memorial — that Russia should have taken, but did not take, to prevent acts of terrorism financing from being committed in Russia. These practicable measures included instructing its own officials not to finance terrorism, policing its border to ensure weapons do not enter Ukrainian territory, and monitoring and disrupting DPR and LPR fundraising networks within its territory.¹⁹ For example, Ukraine repeatedly informed Russia about impending transfers of funds from Russian to Ukrainian territory, but Russia ignored these warnings and took no steps to stop the flow of funds.²⁰ Russia's disregard of Ukraine's requests for cooperation at the border is particularly egregious: after months of Ukraine requesting a joint meeting between the two States' border services to address the flow of weapons across the border, Russia finally offered the incredible response that it had not identified a Russian government agency with relevant authority.²¹

38. From this general pattern of non-cooperation grows Russia's specific and numerous violations of Articles 8, 9, 10, 12, and 18 of the ICSFT, which are addressed in more detail in Chapter 8, below. Together, they reveal a State that shows no interest whatsoever in cooperating in the prevention and suppression of the financing of terrorism — at least when the State experiencing the consequences is Ukraine.

B. Russia's Counter-Memorial Attempts to Diminish the Scope of the ICSFT and Minimize Its Own Obligations

39. Russia is now faced with defending its record of non-cooperation before this Court, but it makes no attempt to show that it took measures to cooperate. Rather than attempt to defend an indefensible record, Russia proffers an implausibly thin theory of ICSFT compliance that would entirely strip the Convention of meaning and effectiveness.

¹⁹ See Ukraine's Memorial, Chapter 6, Section A.

²⁰ See Ukraine's Memorial, Chapter 3, Section A.

²¹ See Ukraine's Memorial, para. 185.

40. Russia does not dispute most of the critical facts before the Court. It does not, for example, dispute that illegal armed groups in Ukraine have inflicted death, destruction, and intimidation on Ukraine's civilian population. Russia does not dispute that as early as 2014, there was widespread reporting by U.N. human rights monitors and other credible sources that these groups were targeting civilians, murdering political opponents, and "inflict[ing] on the populations a reign of intimidation and terror to maintain their position of control."²² Russia does not dispute that individuals and organizations in Russia mounted large-scale efforts to fund the groups in Ukraine that had a well-known record of attacking civilians. Russia does not dispute that its own officials have provided assets to these groups, including the Buk missile system that was used to shoot down Malaysian Airlines Flight 17, and the multiple launch rocket systems used to shell civilian areas in Ukrainian cities. Russia does not dispute that it ignored numerous requests to investigate allegations of terrorism financing occurring within its territory; that it disregarded requests to guard its border to prevent the financing of terrorism; and that it never took any measures to prevent its own officials from funding groups that commit terrorist acts in Ukraine.

41. Instead, Russia seeks to nullify the ICSFT's cooperation obligations, in two main ways. First, Russia repeatedly offers interpretations that defy the text and defeat the object and purpose of the Convention. Second, Russia attempts to erect heightened evidentiary hurdles with regard to what constitutes a terrorism financing offense under Article 2 of the treaty. The self-evident goal of these legal tactics is to ensure that Russia's obligation to cooperate to prevent and suppress terrorism financing can never be triggered.

²² OHCHR, *Report on the Human Rights Situation in Ukraine* (15 July 2014), para. 26 (Ukraine's Memorial, Annex 296).

42. Russia's first strategy has been evident from the beginning of this case. At the preliminary objections stage, Russia argued that the phrase "any person" in Article 2 excluded some persons, *i.e.*, State officials, such that Russia would have no obligation to take cooperative measures to prevent its own officials from financing terrorism. The Court disagreed with Russia, but Russia continues to advance restrictive interpretations at odds with the words of the treaty.²³ It now argues, for example, that the phrase "assets of *every* kind" in Article 1 means only assets of *some* kind, such that providing terrorists with non-financial assets (such as weapons) is not an offense under the Convention, perversely freeing Russia from any obligation to take measures to prevent and suppress the supply of weapons to groups that carry out terrorist attacks on civilians.²⁴

43. Russia further argues that the obligation in Article 18 to cooperate by taking "all practicable measures" means only *some* practical measures, limited to legislative or regulatory measures — going so far as to state that if individuals in Russia are known to be engaged in terrorism financing activities, the ICSFT does not require Russia to take any measures to actually "prevent these persons from operating."²⁵ Russia's interpretive errors are discussed in more detail in the chapters that follow, but they should be considered together as a thoroughgoing effort by Russia to deprive the words of the ICSFT of their ordinary meaning and to prevent the treaty from achieving its core aims.

44. Russia's second strategy is to compound the effect of these restrictive interpretations with requests for the Court to apply unusually high evidentiary standards, borrowed from cases adjudicating State responsibility for the crime of genocide.²⁶ But this case is about different Russian treaty violations, not about state responsibility for the crime of

²³ *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019*, p. 585, para. 61 [Judgment on Preliminary Objections].

²⁴ See Russia's Counter-Memorial, Part I, Chapter II.

²⁵ See Russia's Counter-Memorial, Part I, Chapter VIII, Section VI.

²⁶ See Russia's Counter-Memorial, Part I, Chapter I, Section IV.

genocide. It is about Russia's failure to cooperate in the prevention and suppression of the financing of terrorist acts by any person in Russian territory. The manifest incorrectness of Russia's evidentiary approach is discussed in the next Section.

C. Ukraine's Burden Is to Establish that Russia Breached Its Obligations to Cooperate Under the ICSFT Without Resorting to Heightened Evidentiary Standards

45. Ukraine's burden before the Court is to establish, according to ordinary evidentiary standards, that Russia failed to take the measures required by the ICSFT to cooperate in the prevention and suppression of terrorism financing. Russia's Counter-Memorial errs in its approach to what Ukraine needs to prove, and how Ukraine may prove it. Ultimately, Russia's attempt to create heightened evidentiary burdens are irrelevant to the only critical fact here: that it *did nothing* to cooperate. Russia's arguments cannot distract from this bald fact of comprehensive non-compliance with its obligations under the ICSFT.

1. Russia's Responsibility for Failing to Take Cooperative Measures Can Be Established Without Conclusive Proof that Specific Acts of Terrorism Financing Were Committed

46. Ukraine claims that Russia has failed to take specific measures that it was required to take under Articles 8, 9, 10, 12, and 18 of the Convention. Russia, however, largely focuses not on its own cooperation or lack thereof, but on the actions of others: the funders of the covered acts who committed offenses under Article 2(1) of the Convention, and (even further removed) the third parties who carried out the covered acts. According to Russia, "to uphold Ukraine's claim the Court will, first, need to make a determination that there was an act of terrorism financing, before considering whether Russia complied with an obligation to prevent such act."²⁷ The main support Russia provides for this argument is the Court's

²⁷ Russia's Counter-Memorial, Part I, para. 596.

conclusion in the *Bosnian Genocide* case that “a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed.”²⁸

47. To be clear, Ukraine has indeed proven many acts of terrorism financing. These specific offenses and the evidence showing they were committed are discussed in Chapter 7 of this Reply. Russia is also wrong, however, to claim that it can avoid responsibility for failing to take the cooperative measures required by the Convention, simply by claiming insufficient proof of the underlying terrorism financing offense. Russia’s total failure to cooperate to suppress and prevent the financing of terrorism establishes violations of the ICSFT’s operative provisions separate from proof of specific terrorist acts or their financing.

48. As an initial matter, Ukraine’s claims relate to several different requirements of cooperative action, and the duty to take such action under the ICSFT is triggered by different thresholds. For example, Article 9 imposes a duty to investigate whenever information is provided “that a person . . . is *alleged* to have committed an offence set forth in Article 2.” If a State receives information about alleged terrorism financing, it must investigate. Article 8 requires appropriate measures to identify, detect, freeze, or seize assets used or allocated for use in terrorism financing; the degree of proof will necessarily depend on the severity of the measure in question. If there is reasonable suspicion of terrorism financing, for example, a State must take the urgent and temporary measure of freezing assets.

49. The obligation under Article 18 is to “*cooperate* in the prevention of the offences set forth in article 2,” and to do so “by taking all practicable *measures* . . . to prevent and counter preparations” for such offenses. While prevention of terrorism financing is the *objective* of these measures, the obligation is to take the measures.

50. Russia argues that absent conclusive proof that terrorism financing offenses have been committed, no violation of Article 18 is possible. This argument is based on a flawed

²⁸ Russia’s Counter-Memorial, Part I, para. 595 (quoting *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, I.C.J. Reports 2007, p. 221, para. 431 [hereinafter *Bosnian Genocide*]).

analogy between Article I of the Genocide Convention, under which States “undertake to prevent” genocide, and Article 18 of the ICSFT, under which States “shall cooperate in the prevention” of terrorism financing “by taking all practicable measures.” Russia’s analogy simply does not work for several reasons.

51. First, an obligation to “cooperate” in the prevention of an act by taking certain “measures” is different from an obligation “to prevent” an act from occurring at all. The International Law Commission, in Article 14(3) of the Articles on State Responsibility, states that “[t]he breach of an international obligation requiring a State to prevent a given event occurs *when the event occurs*.”²⁹ If there is an obligation to prevent harm, and the harm does not occur, the obligation to prevent that harm has been fulfilled. By contrast, the obligation under Article 18 of the ICSFT is to “cooperate” by taking “practicable measures.” If a State has an obligation to take measures, and it does not take those measures in a situation in which they are called for, the obligation is violated regardless of what happens next. For example, if the supply of a limpet mine to a terrorist poised to strike civilians is averted by the swift action of domestic law enforcement who is able to intercede before the mine is transferred, that fortuitous event would not absolve Russia for a manifest failure to take the preventive measures required of it under the Convention. Indeed, the very point of an obligation to take concrete preventative measures is to ensure that States Parties act *before* harmful terrorist consequences may occur.

52. Though Russia seeks to draw an analogy to the *Bosnian Genocide* judgment, it disregards the Court’s observation that alongside the duty to prevent in that case, there was a

²⁹ U.N. General Assembly Resolution 56/83, U.N. Doc. A/RES/56/83, *Responsibility of States for internationally wrongful acts*, Annex (28 January 2002) (emphasis added). The Court relied on this article in *Bosnian Genocide* to conclude that the duty to prevent genocide is established only upon occurrence of genocide. See *Bosnian Genocide*, para. 431.

“corresponding duty to act.”³⁰ This “duty to act” did not depend on proof of the occurrence of genocide, but “arise[s] at the instant that the State learns of, or should normally have learned of, the existence of a *serious risk* that genocide will be committed.”³¹ Thus, the State has a duty to act to prevent genocide if it “has available to it means likely to have a deterrent effect on those *suspected* of preparing genocide, or *reasonably suspected of harbouring specific intent* (dolus specialis).”³² A failure of this duty to act is not, on its own, a basis for responsibility under the Genocide Convention, because a duty to prevent genocide cannot be breached unless and until genocide is committed. The obligations under the ICSFT are different. The duty is not merely to prevent terrorism financing, but to cooperate by taking practicable measures. That is an affirmative duty to act. Failure to cooperate by taking the measures appropriate in the circumstances violates that duty, whatever the final outcome.

53. The ICSFT is premised on cooperation between States Parties. Accordingly, if one State asks another State to take measures to address the possibility of terrorism financing, the State should approach that request with a view toward cooperation. A law-abiding, cooperative State would presume that the request is made of it in good faith, and take preventive measures that have been requested of it, at least absent some explanation for why the measure is not practicable or appropriate (an explanation which Russia never provided when ignoring or dismissing out of hand Ukraine’s requests for cooperation). At a minimum, if terrorism financing is reasonably suspected, a State is obligated by Article 18 to take whatever practicable measures are available to it to address and mitigate the risk. A State cannot categorically refuse to take any measures to prevent terrorism financing and then as an excuse simply assert a lack of conclusive proof of the mental elements of a terrorist act under Article 2 of the Convention, which would typically only be developed after an offense is committed and a full criminal investigation occurs.

³⁰ *Bosnian Genocide*, para. 431.

³¹ *Ibid.* (emphasis added).

³² *Ibid.* (emphasis added).

54. Second, treaty text and context further compel the conclusion that the duty to cooperate by taking practicable measures is breached at the time measures should be, but are not, taken. Article 2(3) of the ICSFT states that “it shall not be necessary that the funds were actually used to carry out” a terrorist act, which, as the Finnish diplomat and ICSFT negotiator Marja Lehto observes, demonstrates that terrorism financing is “a prospective crime” that “may – or may not – lead to terrorist violence.”³³ As further context, Article 2(4) provides that “[a]ny person also commits an offence if that person attempts to commit an offence” under Article 2. And Article 18 provides that practicable measures must be taken not only to “prevent” the commission of terrorism financing offenses, but also to “counter preparations . . . for the commission of those offences.” There are many examples of this in other contexts. For example, the international environmental law rule of harm prevention is an obligation of conduct, and thus “a breach occurs when the relevant state’s conduct falls short of what due diligence required.”³⁴ A domestic law example arises where a person is legally obligated to take prophylactic measures to safely store explosive materials, but instead leaves explosives dangerously exposed to fire; the obligation is violated whether or not the explosives ignite.³⁵ Like these other violations of due diligence obligations, a violation of an obligation to take measures to prevent and counter preparation for a terrorism financing offense cannot depend on proof of what happens following the failure to take the required measures. The breach occurs when there was a failure to take those measures.

³³ Marja Lehto, *Indirect Responsibility for Terrorist Acts* 258 (2009), p. 296 (Ukraine’s Memorial, Annex 490).

³⁴ Jutta Brunnée, *Harm Prevention*, in *THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW* (Lavanya Rajamani & Jacqueline Peel, eds., 2d ed. 2021) (Ukraine’s Reply, Annex 73); *see also* Report of the International Law Commission on the Work of Its Fifty-Third Session, Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, 53rd. Sess., U.N. Doc. No. A/56/10 (23 April–1 June, 2 July–10 August 2001), art. 16 & commentary, p. 154, para. 7, reproduced in *Yearbook of the International Law Commission* 2001, vol. II(2) (“It is the conduct of the State of origin that will determine whether the State has complied with its obligation under the present articles.”).

³⁵ *See e.g.*, The Explosive Regulations 2014, SI 2014/1638 (United Kingdom), *accessed at* <https://www.legislation.gov.uk/uksi/2014/1638/data.pdf>.

55. Third, conclusive proof that an act of terrorism financing has been committed on the territory of a State will often only be available with the cooperation of the State in which the offense is committed. A failure to cooperate by the State where the offense is allegedly carried out may be the very reason why there is a lack of proof of the terrorism financing offense. In this case, Russia refused *even to investigate* allegations of terrorism financing, yet then claims that Ukraine lacks sufficient proof of various mental elements of the offense of financing terrorism and the underlying terrorist acts. But if, as Russia proposes, there can be no violation of the Convention without final proof of both an act of terror and the knowing financing of it, the Convention's entire logic would be reversed: a State could achieve near complete immunity from responsibility under the ICSFT by stubbornly refusing to cooperate in any respect. A totally noncompliant State Party would be perversely rewarded for flouting its obligations to cooperate, making Russia's interpretation completely opposed to the object and purpose of the Convention.

2. The Heightened Evidentiary Standard Proposed by Russia Is Not Appropriate for Proving the Terrorism Financing Offenses that Underlie Russia's Breaches of the ICSFT

56. In addition to demanding proof of the commission of terrorism financing offenses, Russia argues that Ukraine must prove these offenses with evidence that is "fully conclusive," without the benefit of any inference unless it is "the only reasonable inference that can be drawn."³⁶ Since the objective facts of these offenses are largely undisputed, Russia asks the Court to apply this heightened evidentiary standard "in particular [to] the requisite mental elements of the offence."³⁷ Though Russia presents this evidentiary standard in legalistic terms, the Court should take note of what it would mean in practice. On Russia's view, even if a strong inference can be drawn that a group is intentionally targeting civilians for purposes of intimidation, and someone within Russian territory is knowingly funding that group and its

³⁶ Russia's Counter-Memorial, Part I, para. 13 (quoting *Bosnian Genocide*, para. 290).

³⁷ Russia's Counter-Memorial, Part I, para. 12. As discussed in Chapter 5, Russia erroneously refers to the objective nature of the acts which may not be funded as "mental elements."

acts, Russia would have no obligation to take actions to stop the funder, as long as it is *possible* that a different inference could be drawn regarding the purpose and intent of those third parties who ultimately murder civilian activists, shell civilian areas, or bomb peaceful rallies. Yet Russia cannot explain why, as a good faith interpretation of the ICSFT, a State should be relieved of the obligation to take practicable measures that could prevent likely or even potential instances of terrorism financing — such as effective border control — just because there is some possibility that a different inference could be drawn about the intent and purpose of a third party’s conduct. Nor can Russia explain why a State should be permitted to demand from another State the level of proof normally reserved for criminal prosecution, before it is willing to take basic cooperative measures to address a risk of terrorism financing.

57. The heightened evidentiary standard sought by Russia has only been applied by this Court in genocide cases, in which the Court was asked to conclude that a State bore responsibility for committing the crime of genocide. That unusual context called for particular evidentiary standards unique to those cases. In this case, however, Ukraine is alleging that Russia failed to comply with its duty to cooperate in the prevention of terrorism financing by taking practicable measures — a serious treaty breach, but not a criminal charge against the State itself. Nor is Ukraine attempting to establish State responsibility for the underlying act of terrorism, or for violation of any duty to prevent terrorist acts. The evidentiary standard in this case should not be similar to that of a prosecutor’s burden to establish criminal responsibility for committing genocide.

58. Russia’s proposed evidentiary standard is particularly ill-suited to this case, where Russia focuses heavily on the underlying acts of terrorism committed by third parties. According to Russia, Ukraine must prove with “fully conclusive” evidence, drawing inferences only where no other inference is possible, that a third party’s act was an “act intended to cause death or serious bodily injury to a civilian,” and that its purpose was “to intimidate a

population, or to compel a government.”³⁸ It is inherently more difficult to prove a third party’s mental state, and the ICSFT was drafted accordingly: Article 2(3) establishes that a resulting terrorist act does not need to be proven, and Article 2(1)(b) instructs that “nature or context” should be consulted to evaluate purpose. Under the Convention, a State Party is not entitled to presume that an illegal armed group that is in fact harming civilians may still be funded until conclusive proof of that group’s mental state is presented. Applying Russia’s heightened evidentiary standard in this context would defy the ICSFT’s text and undermine and weaken the Convention’s objective of enhancing cooperation in the prevention and suppression of terrorism financing.

59. Apart from the genocide context, this Court has addressed breaches of important international norms, such as the unlawful use of force by one State against another, without resorting to the heightened evidentiary standards Russia invites the Court to apply in this case. The Court has instead considered whether there is “sufficient evidence” or “convincing evidence” to establish such breaches. For example, in *Armed Activities on the Territory of the Congo*, the Court found “*sufficient evidence* to prove that there were attacks against the Embassy and acts of maltreatment against Ugandan diplomats at Ndjili International Airport,”³⁹ and “*convincing evidence* of the training in UPDF [Uganda People’s Defence Force] training camps of child soldiers and the UPDF’s failure to prevent the recruitment of child soldiers in area under its control.”⁴⁰ The Court analyzed various United

³⁸ Russia’s Counter-Memorial, Part I, para. 13.

³⁹ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, *I.C.J. Reports 2005*, p. 277, para. 334 (emphasis added); see also “sufficient evidence” in *ibid.*, paras. 173, 208, 246, 298, 342.

⁴⁰ *Ibid.*, para. 210 (emphasis added); see also “convincing evidence” in *ibid.*, paras. 83, 91, 237.

Nations reports to find “sufficient evidence.”⁴¹ The Court also used a “sufficiency” standard in *Oil Platforms*, which also involved an allegation of unlawful use of force.⁴²

60. Moreover, as the Court recently reiterated, “a State that is not in a position to provide direct proof of certain facts ‘should be allowed a more liberal recourse to inferences of fact and circumstantial evidence.’”⁴³ One circumstance where the Court has permitted this more liberal recourse to inferences is where relevant evidence is outside the applicant State’s “exclusive territorial control.”⁴⁴ That is the case here: Russia’s Counter-Memorial focuses on the mental state of funders who are in Russia, and on the intent and purposes of perpetrators, some of whom are in areas not controlled by Ukraine.

61. In this case, Russia’s comprehensive failure to cooperate in the prevention and punishment of the financing of terrorism constitutes a serious breach of international law, but it does not call for importation of standards from the *sui generis* context of state responsibility for the crime of genocide. The Court should apply the typical standards it uses in resolving disputes between States regarding other serious breaches of international law. In doing so, it should have liberal recourse to inferences and circumstantial evidence, on account of (i) the structure of the ICSFT and the relevance of the acts of third parties, and (ii) the fact that the third parties at issue have not been located in territory controlled by Ukraine. If there is sufficient evidence that Russia has breached its many obligations to cooperate under the Convention by taking preventive measures, such an evidentiary record establishes its breach.

⁴¹ *Ibid.*, paras. 208, 210.

⁴² *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, *I.C.J. Reports 2003*, p. 190, para. 61 (“In short, the Court has examined with great care the evidence and arguments presented on each side, and finds that the evidence indicative of Iranian responsibility for the attack on the Sea Isle City is *not sufficient* to support the contentions of the United States.”).

⁴³ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Reparations, Judgment of 9 February 2022, p. 39, para. 120 (quoting *Corfu Channel (United Kingdom v. Albania)*, Merits, Judgment, *I.C.J. Reports 1949*, p. 18).

⁴⁴ *Corfu Channel (United Kingdom v. Albania)*, Merits, Judgment, *I.C.J. Reports 1949*, p. 18.

Chapter 4. INTERPRETATION OF ARTICLE 2(1) OF THE ICSFT

62. The States Parties' cooperation obligations under the ICSFT are designed to prevent and suppress the commission of terrorism financing offenses, as defined in Article 2 of the Treaty. Throughout its Counter-Memorial, Russia repeatedly attempts to strip Article 2's definition of the offense of terrorism financing of practical effect. The effect of Russia's proposed interpretation is to nullify Russia's substantive obligations to cooperate.

63. First, Russia seeks to re-define the word "funds," which Article 1 of the Convention defines to include "assets of every kind." In an attempt to shrink the scope of the ICSFT, however, Russia asks the Court to read "assets of every kind" to mean only assets of some kind — only "financial assets,"⁴⁵ but not "non-financial assets" such as weapons and equipment.⁴⁶ In doing so, Russia envisions a porous treaty regime under which any person is forbidden from providing terrorists money with which to buy weapons, but any person is free to provide terrorists with the very same weapons directly. As a result, in Russia's view, when persons in Russia's territory are directly supplying weapons to perpetrators of terrorist acts in the territory of another State, Russia is under no obligation to cooperate in the prevention and suppression of this provision of weapons to those engaged in terrorist acts.

64. Second, Russia seeks to make it unreasonably difficult to prove knowledge on the part of the funder, again in an effort to limit its own obligations to cooperate in the prevention and suppression of terrorism financing. Russia initially appears to argue that a funder must know to a certainty that particular funds will be specifically directed toward terrorist acts. Such a rule would, as a practical matter, nullify the ICSFT. As the drafters of the treaty were well aware, groups that engage in terrorist acts also engage in other activities,

⁴⁵ Russia's Counter-Memorial Part I, paras. 73, 99

⁴⁶ Russia's Counter-Memorial Part I, para. 37.

and it is impossible for a funder to know exactly how a third party will use fungible assets. Understandably, Russia is unwilling to embrace the implications of its own argument, and ultimately concedes Ukraine’s fundamental point by acknowledging that knowledge under Article 2(1) may be established where a person provides funds to a group or individual known to commit terrorist acts.⁴⁷ Yet even then, Russia attempts to deprive its concession of practical effect, proposing an arbitrary rule, unmoored from the text of the Convention, that a group cannot be treated as a known perpetrator of terrorist acts unless it has been “characterised by the international community” as a terrorist group.⁴⁸ This argument defies the ICSFT drafters’ deliberate decision to focus on *acts* rather than labels, designations, and characterizations, and is refuted by how States apply the ICSFT in practice.

A. The ICSFT Defines “Funds” to Encompass “Assets of Every Kind,” Including Weapons

65. The ICSFT defines “funds” in Article 1(1) to mean:

*assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including, but not limited to, bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts, letters of credit.*⁴⁹

66. Thus, the term “funds” has a special meaning for purposes of the ICSFT.

Whenever it appears in the Convention, it refers to “assets of every kind.”⁵⁰

⁴⁷ Russia’s Counter-Memorial Part I, para. 125.

⁴⁸ Russia’s Counter-Memorial Part I, para. 125.

⁴⁹ ICSFT, art. 1(1) (emphasis added).

⁵⁰ See Vienna Convention on the Law of Treaties, art. 31(4) 23 May 1969, 1155 U.N.T.S. 331 (“A special meaning shall be given to a term if it is established that the parties so intended.”); Richard Gardiner, TREATY INTERPRETATION (2d ed., 2015), p. 339 (“The most common way in which a special meaning is indicated is by including a definition article in a treaty.”) (Ukraine’s Reply, Annex 72).

67. A weapon easily fits within the Article 1(1) definition, as it is an “asset,” which is “tangible” and “movable.” Consistent with this point, the Court’s Judgment rejecting Russia’s Preliminary Objections observed that “[t]his definition covers many kinds of financial instruments and includes also *other assets*.”⁵¹ Prior to its Counter-Memorial, including during the preliminary objections phase, Russia never denied that weapons fall within the category of “assets of every kind.” Now, however, Russia argues that “non-financial assets” are not within the scope of the Convention.⁵² Russia’s new position is that “assets of every kind” does not mean *every* kind of asset, but only some kinds: “financial assets”⁵³ are an “asset of every kind,” but “non-financial assets,”⁵⁴ including weapons, are somehow not.

68. Russia’s proposed interpretation of “funds” must be rejected. It contradicts the Court’s explanation that the Convention covers “financial instruments” and “also *other assets*.”⁵⁵ It defies the ordinary meaning of “assets of every kind” — in French, “biens de toute nature,” using a word that refers broadly to goods or property. Russia’s interpretation would also thwart the Convention’s object and purpose of enhancing cooperation in the prevention of the financing of terrorism, so that terrorists cannot procure the weapons and other materials needed to commit acts of terrorism. It would make no sense to create an international regime to deprive terrorists of the money they need to purchase weapons and equipment in order to carry out terrorist acts, only to leave untouched what Russia refers to as “direct, in-kind support,” such as the transfer of arms, which may be more immediately and

⁵¹ Judgment on Preliminary Objections, p. 586, para. 62 (emphasis added).

⁵² Russia’s Counter-Memorial Part I, para. 37.

⁵³ Russia’s Counter-Memorial Part I, paras. 73, 99.

⁵⁴ Russia’s Counter-Memorial Part I, para. 37.

⁵⁵ Judgment on Preliminary Objections, p. 586, para. 62 (emphasis added).

directly useful in carrying out terrorist acts.⁵⁶ The *travaux préparatoires* confirm that the States Parties did not intend this surprising result. As the United States summarized in its domestic ratification process, the treaty’s definition of “funds” “was understood by all delegations to include property.”⁵⁷

69. Notwithstanding all of this, Russia bases its argument on an assumption that the undefined phrase “financing of terrorism” in the title and preamble limits the ICSFT’s scope. In so doing, Russia ignores the reasoning of its own Supreme Court, which has stated that the “financing of terrorism . . . should also be understood as the provision or collection *not only of money (in cash or non-cash form), but also of material assets.*”⁵⁸ This understanding of terrorism financing by Russia’s own Supreme Court is consistent with the proper interpretation of the phrase “assets of every kind” in Article 1 of the ICSFT.

1. A Good Faith Interpretation of “Assets of Every Kind,” According to its Ordinary Meaning and Read in Context, Covers All Forms of Property, Including Weapons

70. As a matter of ordinary meaning, a weapon is an “asset of every kind.” Dictionaries define “assets” to include “the property of a person.”⁵⁹ The same breadth is conveyed by the Convention’s authentic texts in other languages. Had Article 1(1) been meant to refer only to financial assets, the French term “avoirs” might have been used. Instead, the Convention uses the phrase “biens de toute nature,” using the word “biens” which refers to

⁵⁶ See Russia’s Counter-Memorial Part I, para. 101.

⁵⁷ Submittal Letter from the Secretary of State, International Convention for the Suppression of Financing Terrorism (Oct. 3, 2000), accessed at <https://www.congress.gov/106/cdoc/toc49/CDOC-106tdoc49.pdf>.

⁵⁸ Resolution of the Plenum of the Supreme Court of the Russian Federation, No. 1 of 9 February 2012, “On Some Aspects of Judicial Practice Relating to Criminal Cases on Crimes of Terrorist Nature,” para. 16 (Ukraine’s Memorial, Annex 438) (emphasis added).

⁵⁹ *Asset*, Oxford English Dictionary (2d ed., 1989); *Asset*, Oxford English Dictionary (3d ed., 2008).

goods generally. Likewise, the Spanish text uses the phrase “los bienes de cualquier tipo,” again using a word (“bienes”) that speaks generally of goods or property, and not only financial assets. Even Russia in its Counter-Memorial finds it natural to distinguish between “financial assets” and “non-financial assets.”⁶⁰ Russia’s use of the phrase “financial assets” confirms that the word “assets” alone does not mean solely financial assets.

71. The complete definition of funds in Article 1(1) further supports the conclusion that “assets of every kind” includes weapons and other non-financial assets. After specifying that “funds” means “assets of every kind,” Article 1 provides that such assets are within the definition whether they are “tangible or intangible, movable or immovable, however acquired.” These words are indicative of an all-encompassing definition, reinforcing that no type of asset is excluded. To state the obvious, weapons are assets that are both tangible and movable and therefore fall under the Convention’s definition.

72. Moreover, the clarification that assets can be “tangible or intangible” as well as “movable or immovable” would not make sense if “assets of every kind” were interpreted to refer only to financial assets. The phrase “intangible asset,” according to the accepted international accounting standards that guide common practice, means “an identifiable *non-monetary* asset without physical substance,” such as “scientific or technical knowledge” and “computer software, patents, [and] copyrights.”⁶¹ These intangible, non-monetary assets would be excluded from Russia’s narrow category of “financial assets,” even though Article 1(1)

⁶⁰ Russia’s Counter-Memorial Part I, paras. 37, 73, 99.

⁶¹ International Accounting Standard 38 – Intangible Assets, International Financial Reporting Standards (2021), para. 9, accessed at <https://www.ifrs.org/content/dam/ifrs/publications/pdf-standards/english/2021/issued/part-a/ias-38-intangible-assets.pdf> (emphasis added); see also *Asset*, Black’s Law Dictionary (11th ed. 2019) (defining “intangible asset” as “[a]ny nonphysical asset or resource that can be amortized or converted to cash, such as patents, goodwill, and computer programs, or a right to something, such as services paid for in advance”).

states plainly that intangible assets are within the scope of the definition. Similarly, an “immovable” asset refers to real estate, such as land and buildings.⁶² As non-financial assets, immovable assets also would be excluded under Russia’s interpretation, despite Article 1(1)’s express statement that such assets are included.

73. Article 1(2) defines funds as:

assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including, but not limited to, bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts, letters of credit.

74. The definition includes a list of illustrative examples of “legal documents or instruments.” Russia mistakenly describes this list as reflecting “specific categories of assets,” from which it attempts to infer that “assets” is “only meant to encompass” items “that are similar in nature to those explicitly listed.”⁶³ This is *not*, however, a list of “categories of assets.” Article 1(1) defines “funds” to include “assets of every kind . . . and legal documents or instruments” that are evidence of an interest in “such assets.” The specific examples provided (bank credits, shares, etc.) are types of “legal documents or instruments” evidencing an interest in an asset, not “assets” themselves.

75. Leading commentaries on the ICSFT are consistent with Ukraine’s interpretation of “assets of every kind.” Marja Lehto explains that the Convention’s definition

⁶² See, e.g., UK HM Revenue & Customs, INTM153070 - Description of double taxation agreements: Income from immovable property, accessed at <https://www.gov.uk/hmrc-internal-manuals/international-manual/intm153070> (“In the United Kingdom ‘immovable property’ means, generally, land, the buildings erected on land, minerals in the soil and rights over land.”); Swiss Civil Code, art. 655, accessed at https://www.fedlex.admin.ch/eli/cc/24/233_245_233/en (defining “immovable property” to refer to, for example, “parcels of land and the buildings thereon”).

⁶³ Russia’s Counter-Memorial Part I, para. 30.

of “funds” is “broad” and “comes close to ‘material assistance.’”⁶⁴ Anthony Aust, former Deputy Legal Adviser of the United Kingdom Foreign and Commonwealth Office, explains that the definition of “funds” was “drawn deliberately wide.”⁶⁵ Roberto Lavalle, Minister-Counsellor of the Permanent Mission of Guatemala to the United Nations and a member of the Sixth Committee when it considered the draft text of the ICSFT in 1999, observed that the definition covers all “material assistance” to those who commit terrorism, and includes “animals, buildings or vehicles,” and “virtually anything under the sun.”⁶⁶ Russia’s Counter-Memorial does not address these commentaries or identify any that supports its strained reading of “assets of every kind” to mean only “financial assets.”

76. Russia’s effort to constrict the ICSFT’s broad language referring to “assets of every kind” relies heavily on unpersuasive inferences it attempts to draw from other provisions of the Convention. Russia dwells on the use of the word “financing” in the title and preamble of the treaty,⁶⁷ but the use of this term adds nothing to the interpretation of “assets of every kind.” The term “financing” is not used in the operative provisions of the treaty, and it is not defined by the treaty. Rather, the treaty uses the word “funds” to describe what may not be provided, and it defines “funds” to encompass “assets of every kind.” For purposes of the ICSFT, therefore, “financing” is simply the provision of “funds,” meaning “assets of every kind.” The treaty’s express definition of “funds” informs what is meant by the more general

⁶⁴ Marja Lehto, *Indirect Responsibility for Terrorist Acts* (2009), p. 261 (Ukraine’s Memorial, Annex 490).

⁶⁵ Anthony Aust, *Counter-Terrorism—A New Approach: The International Convention for the Suppression of the Financing of Terrorism*, 5 Max Planck Y.B. U.N. L. 285, 287 (2001) (Ukraine’s Memorial, Annex 485).

⁶⁶ Roberto Lavalle, *The International Convention for the Suppression of the Financing of Terrorism*, 60 Zaö RV 491, 496–97 (2000) [hereinafter Lavalle] (Ukraine’s Memorial, Annex 484).

⁶⁷ Russia’s Counter-Memorial, Part I, Chapter II, Section III(A)–(B).

reference to “financing” in the treaty’s title and preamble, rather than *vice versa*.

77. The circularity of Russia’s argument is apparent from the drafting history. As explained further below, an earlier draft of the treaty did define the term “financing,” and specified that it included “financial resources,” “assets,” and “other property.”⁶⁸ Thus, the provision of any kind of property was understood to be “financing,” contrary to what Russia now argues. The drafters ultimately reached the same result in a different way — by adopting a definition of “funds” that itself includes all forms of property. With that change, there was no need to define the term “financing” or use it in the treaty’s operative provisions, because the definition of “funds” had been enlarged to address all forms of financing — including the provision of property — that the Convention was intended to cover.

78. Russia also notes that particular provisions of the Convention — Articles 12(2), 13, 18(1)(b), and 18(2) — are specific to money and banking-related crimes. The inclusion of these provisions, however, does not mean the treaty was *only* concerned with financial assets. Monetary and banking issues were indisputably an important part of the Convention (and an area already subject to extensive regulation domestically and internationally), so it is not surprising that there are provisions addressing these points. Their inclusion does not imply that the scope of the Convention is limited to financial assets, in direct contradiction of the broad definition of “funds” as “assets of every kind.”⁶⁹

⁶⁸ Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, Third session, Draft international convention for the suppression of the financing of terrorism, Working document submitted by France, U.N. Doc. A/AC.252/L.7, p. 2 (11 March 1999) (Russia’s Objections, Annex 5).

⁶⁹ Russia further argues that the “necessary implication” of Article 8(4), which requires consideration for using funds derived from forfeitures to compensate victims, is that funds can only be financial, because weapons cannot “be sold on the open market.” Russia’s Counter-Memorial Part I, para. 58. Yet “[a]ssets of every kind” is not limited to weapons; it includes equipment, vehicles, and other goods. If, for example, the relevant asset is a vehicle, the government could seize the vehicle, auction it, and use the monetary proceeds to compensate victims. Even if some kinds of assets are not

2. The Object and Purpose of the ICSFT Compels an Interpretation of “Assets of Every Kind” to Include All Property, Including Weapons

79. The purpose of the ICSFT was to counter the rising tide of global terrorism by addressing terrorism financing, which, as explained in the preamble, had not previously been “expressly address[ed]” in a binding international instrument.⁷⁰ The preamble further notes a deep “concern[] about the worldwide escalation of acts of terrorism,” calling on all States to “prevent and counteract . . . the financing of terrorists and terrorist organizations.”⁷¹

80. In light of the ICSFT’s purpose, it makes no sense to define a terrorism financing offense for any person that provides money for use in terrorist acts, but *not* for any person that provides arms, explosives, equipment, and other goods for use in terrorist acts. Money cannot be used directly to commit a terrorist act — it only furthers acts of terrorism by being exchanged for weapons and other materials necessary to commit terrorist acts. Russia’s attempt to limit the scope of the ICSFT would leave a large loophole that would thwart the Convention’s objective of denying terrorists the resources needed to commit acts of terrorism.

81. Russia argues that “a matter as sensitive as regulating the provision of weapons to non-state groups” would not have been covered by the Convention without being more “explicit[.]”⁷² But Ukraine has never argued that the ICSFT governs “the provision of weapons to non-state groups” as such. The Convention sets forth concrete obligations on States Parties to cooperate in the suppression and prevention of the financing of terrorist acts. Within the Convention’s scope is the provision of assets of every kind, including weapons, with the knowledge that they are to be used, or intention that they should be used, for specific types of unlawful acts. Russia does not explain what it considers sensitive about denying weapons to groups that commit acts intended to cause death or serious bodily injury to civilians, which by

amenable to such a process, that presents no issue for Article 8(4), which merely requires States to “consider establishing mechanisms” to compensate victims from funds derived from forfeitures.

⁷⁰ ICSFT, preamble.

⁷¹ *Ibid.*

⁷² Russia’s Counter-Memorial Part I, para. 38.

their nature or context have a purpose of intimidation or compulsion. Russia cannot seriously claim a sovereign right to allow its territory to be used as a safe haven for the unlawful delivery of weapons to illegal armed groups in other States that attack civilians for terrorist purposes.

82. Russia is also incorrect that respecting the Convention's use of the phrase "assets of every kind" would "through the backdoor, turn the ICSFT into an all-embracing comprehensive convention on which the international community has so far unfortunately failed to reach a consensus."⁷³ Russia refers to efforts to create a comprehensive convention that would regulate all *acts* of terrorism. Giving effect to the ordinary meaning of "assets of every kind" in the context of the ICSFT would leave numerous issues still to be resolved in any such convention. The ICSFT comprehensively addresses terrorism *financing*, which it defines to mean providing the perpetrators of terrorist acts with "assets of every kind."

3. The Relevant Rules of International Law Applicable Between Ukraine and Russia Do Not Support Russia's Narrowing of "Assets of Every Kind" to Only "Financial Assets"

83. U.N. Security Council resolutions prohibit all forms of support for terrorism, including the provision of weapons and other property, confirming that the international community's concern with terrorism financing is not limited to monetary flows alone.⁷⁴ Russia emphasizes the distinction in these resolutions between "financial" support and "other" forms of support and argues that the ICSFT was only meant to cover a subset of what is covered by the Security Council resolutions.⁷⁵ The more natural conclusion is that both the Security Council and the States Parties to the ICSFT addressed the same important issue in an equally

⁷³ Russia's Counter-Memorial Part I, para. 103.

⁷⁴ See U.N. Security Council Resolution 1373, U.N. Doc. S/RES/1373 (28 September 2001) (Ukraine's Memorial, Annex 280); U.N. Security Council Resolution 1377, U.N. Doc. S/RES/1377 (12 November 2001).

⁷⁵ Russia's Counter-Memorial Part I, paras. 93–100.

comprehensive manner, but simply used different language. The Security Council resolutions lack the ICSFT’s definition of “funds” to mean “assets of every kind,” and so address monetary financing and other forms of material support separately. The ICSFT, by defining “funds” to include assets of every kind, reaches the same result.

84. Russia also points to the Arms Trade Treaty as directly regulating the transfer of weapons,⁷⁶ but the possibility of some overlap is unremarkable. Russia and Ukraine are not parties to the Arms Trade Treaty, which serves a different function. The Arms Trade Treaty regulates trade that can be done lawfully but for which diligence is required. The ICSFT creates a framework for preventing and suppressing exclusively unlawful acts, *i.e.*, providing assets of every kind for use in terrorist acts. Whereas the ICSFT addresses the unlawful provision of assets (including weapons) intending or knowing they are to be used for terrorist acts, the Arms Trade Treaty focuses more broadly on potential diversion for “unauthorized end use and end users,” even if a transfer is not itself unlawful terrorism financing.⁷⁷

4. Supplementary Means of Interpretation Confirm that “Assets of Every Kind” Includes Weapons

i. The *Travaux Préparatoires*

85. The *travaux préparatoires* of the ICSFT confirm that the term “assets of every kind” includes all forms of property, including weapons. Russia notes that earlier draft texts referred to both “funds” and “property,” and that separate references to “property” were

⁷⁶ Russia’s Counter-Memorial Part I, paras. 83–91.

⁷⁷ Russia also attempts to distinguish regional conventions that refer to the suppression of “terrorism” versus the “suppression of financing of terrorism.” Russia’s Counter-Memorial Part I, paras. 39–44. These have limited if any relevance, as neither Russia nor Ukraine is a party to them. In any event, these are treaties with different goals — suppressing terrorism regulates *acts* of terrorism themselves. As the language quoted by Russia shows, those treaties were concerned with the *use* of weapons in the commission of terrorist acts. *Ibid.*

deleted.⁷⁸ Russia fails to mention, however, the reason for this deletion, which is stated in the negotiating records: because the eventual definition of “‘funds’ was intended to refer to all property,” making separate references to property was “redundant.”⁷⁹

86. As Russia notes in its Counter-Memorial, an early draft produced by France included in Article 1 a definition of “financing,” to mean the “transfer or reception of funds, assets or other property.”⁸⁰ Since “funds” in this draft was just one of three types of covered “financing,” the term “funds” was at that point defined narrowly, as “any type of financial resource, including the cash or currency of any State”⁸¹ Inclusion of these three distinct concepts led to debate, with some delegations proposing “to delete the phrase ‘or other property’ as superfluous” in light of the term assets, while others proposed deleting “the word ‘assets’” for the same reason.⁸² Others “preferred interpreting ‘property’ as covering only arms, explosives and similar goods.”⁸³ All of these positions, however, recognized that the concept of “property” should be included, whether using that word or the word “assets.”⁸⁴

87. Ultimately, this debate was resolved by deleting the separate definition of “financing”; sweeping all kinds of assets into a broadened definition of “funds”; and revising

⁷⁸ Russia’s Counter-Memorial Part I, paras. 79–81.

⁷⁹ Annex III, Report of the Working Group on Measures to Eliminate International Terrorism, 54th Session, U.N. Doc. No. A/C.6/54/L.2, p. 58, para. 42 (26 October 1999) (Ukraine’s Memorial, Annex 277); *ibid.* p. 71, para. 212.

⁸⁰ Russia’s Counter-Memorial Part I, para. 77.

⁸¹ *Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996*, U.N. Doc. A/54/37 (5 May 1999), p. 57 (Ukraine’s Written Statement, Annex 13).

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ *Ibid.* pp. 15, 57. This is further supported by a working document explaining that France’s draft would address “donations in cash *or in kind*.” France, Working Document: Why an International Convention Against the Financing of Terrorism?, later reproduced as U.N. doc. A/AC.252/L.7/Add.1 (March 11, 1999), p. 2, para. 5 (Ukraine’s Memorial, Annex 275) (emphasis added).

the Article 2 offense to refer to provision of “funds” (as newly defined). This was accomplished by borrowing “the definition of ‘property’ contained in article 1, paragraph (q), of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.”⁸⁵ Thus, the ICSFT defined “funds” to mean “assets of every kind,” equivalent to the Narcotics Convention’s definition of “property” to mean “assets of every kind.”⁸⁶ As a result, references to “property” in other provisions were deemed “redundant, since it was already envisaged in the concept of ‘funds’, as defined in article 1.”⁸⁷ Thus, “support was expressed for a subsequent proposal that the term ‘property’ be deleted whenever it appeared in conjunction with the term ‘funds’ *since ‘funds’ was intended to refer to all property.*”⁸⁸

88. Russia’s Counter-Memorial draws selectively from this history but obscures the ultimate point. Russia notes the drafters’ decision “to drop the reference to this concept of ‘other property’ from Article 1,” and leaps to the conclusion that this deletion narrowed the “scope” of the Convention, removing “arms, explosives and similar goods.”⁸⁹ Russia does not offer any support for the assumption that this was the reason for, or effect of, the deletion, and the *travaux préparatoires* show the opposite: references to “property” were removed because property, including weapons, was *already within the scope* of the Convention under the

⁸⁵ Annex III, Report of the Working Group on Measures to Eliminate International Terrorism, 54th Session, U.N. Doc. No. A/C.6/54/L.2, p. 59, para. 47 (26 October 1999) (Ukraine’s Memorial, Annex 277).

⁸⁶ See Submittal Letter from the Secretary of State, International Convention for the Suppression of Financing Terrorism, p. VI (Oct. 3, 2000), *accessed at* <https://www.congress.gov/106/cdoc/tdoc49/CDOC-106tdoc49.pdf>.

⁸⁷ Annex III, Report of the Working Group on Measures to Eliminate International Terrorism, 54th Session, U.N. Doc. No. A/C.6/54/L.2, pp. 71, 72 (26 October 1999) (Ukraine’s Memorial, Annex 277). This same point was made repeatedly in the *travaux préparatoires* in instances where the term “property” appeared in conjunction with “funds,” both in Article 8 and Article 17 (which became Article 18). See *ibid.* pp. 74, 75, 81, 82.

⁸⁸ *Ibid.* p. 58, para. 42 (emphasis added).

⁸⁹ Russia’s Counter-Memorial Part I, para. 81.

broadened definition of “funds” as meaning “assets of every kind.”

ii. ICSFT Ratification and Domestic Implementation

89. Ratification materials and other domestic practices by States Parties, including the Russian Federation, confirm that the Convention’s broad definition of “funds” includes all types of assets, including weapons.

90. An explanatory memorandum drafted by Australia’s House of Representatives in connection with legislation implementing the ICSFT explains:

[F]unds is defined as property and assets of every kind and legal documents or instruments in any form. The definition is broad in scope and is derived from Article 1 of the International Convention for the Suppression of the Financing of Terrorism. The breadth of the definition will ensure that the financing of terrorism offence applies regardless of whether a person facilitates a terrorist act through the provision of money, *equipment or weapons*.⁹⁰

91. Materials from the United States’ ratification process further confirm that the Convention’s definition of funds “was understood by all delegations to include property.”⁹¹ In the U.S. Secretary of State’s letter transmitting the ICSFT to the Senate for advice and consent to ratification, it notes that the Convention’s definition of “funds” is drawn from the definition of “property” in the Narcotics Convention and specifies that it “encompasses within its very broad scope ‘assets of every kind’”⁹²

⁹⁰ Australia House of Representatives, Explanatory Memorandum: Suppression of the Financing of Terrorism Bill 2002, Schedule 1, Item 2, *accessed at* http://classic.austlii.edu.au/au/legis/cth/bill_em/sotfotb2002453/memo1.html (emphasis added).

⁹¹ Submittal Letter from the Secretary of State, International Convention for the Suppression of Financing Terrorism, p. VI (Oct. 3, 2000), *accessed at* <https://www.congress.gov/106/cdoc/tdoc49/CDOC-106tdoc49.pdf>.

⁹² *Ibid.* (emphasis added). This interpretation was repeated by the State Department in response to then-Senator Biden’s question of whether the term “funds” included “non-financial assets such as personal or real property.” *United States Senate Executive Report No. 107-2, 107th Congress, First Session*, U.S. Government Publishing Office (27 November 2001) p. 49 (Ukraine’s Written Statement,

92. The same understanding is reflected in the Commonwealth Secretariat’s model legislative provisions intended to assist states in combatting terrorism.⁹³ The model legislation uses the term “property,” explaining that the ICSFT’s definition of “funds” “carries the same definition” as the Narcotics Convention’s definition of “property.”⁹⁴ It further explains that “countries may choose to use either term,” property or funds, because “in either event the actual definition is the same.”⁹⁵

93. The decision of the Supreme Court of Denmark in the *Fighters and Lovers Case* supports the same understanding of the term “funds.”⁹⁶ Denmark’s terrorism financing statute, like the ICSFT, uses the term “funds.”⁹⁷ In the *Fighters and Lovers Case*, a group of defendants was convicted for selling t-shirts “with the profits to be used to purchase radio equipment for FARC [Fuerzas Armadas Revolucionarias de Colombia] and a printing press for PFLP [Popular Front for the Liberation of Palestine].”⁹⁸ A different defendant “cooperated in raising *financial* funds.”⁹⁹ The court found that the actions by both sets of defendants violated the terrorism financing law, providing further evidence of a State Party considering the provision of non-financial, in-kind assistance to constitute “funds.”

Annex 59). The State Department agreed that non-financial assets are included, again highlighting that “all delegations understood the definition to include ‘property.’” *Ibid.*

⁹³ The Commonwealth Office of Civil and Criminal Justice Reform, *Model Legislative Provisions on Measures to Combat Terrorism* (September 2002).

⁹⁴ *Ibid.* p. 49.

⁹⁵ *Ibid.* pp. 3, 43.

⁹⁶ “Fighters and Lovers Case,” Case 399/2008, Supreme Court of Denmark (25 March 2009) (Ukraine’s Memorial, Annex 476). This case applied Section 114 of the Danish Criminal Code, which was passed to implement the ICSFT and related anti-terrorism obligations. See Council of Europe Committee of Experts on Terrorism, *Profiles on Counter-Terrorist Capacity: Denmark* (April 2007), p. 2 (Ukraine’s Written Statement, Annex 4).

⁹⁷ *Ibid.* p. 1.

⁹⁸ *Ibid.* p. 2 (emphasis added).

⁹⁹ *Ibid.* (emphasis added).

94. Ukraine's terrorism financing legislation reflects the same understanding.

Article 258.5 of Ukraine's Criminal Code is entitled "Terrorism Financing." It addresses

Terrorism financing, i.e. actions committed for the purpose of financial *or material* support of an individual terrorist or terrorist group (organisation), organisation, preparation or commission of a terrorist act, involvement in the commission of a terrorist act, public calls to commit a terrorist act, contributing to commission of a terrorist act, creation of a terrorist group (organisation)¹⁰⁰

95. Russia notes that Ukraine's Criminal Code has a separate provision criminalizing "[r]ecruitment, arming and training of a person for the purpose of committing a terrorist act," which according to Russia means that Ukraine treats "[f]inancing and arming" as "two different acts."¹⁰¹ But Russia ignores that Ukraine's definition of "terrorism financing" in Article 285.5 includes "material support," a phrase which Russia does not dispute covers weapons.¹⁰² Moreover, Articles 258.4 and 258.5 were enacted to implement two different instruments (the European Convention on the Prevention of Terrorism, and the Financial Action Task Force ("FATF") recommendations on money laundering and terrorism financing, respectively), so it should not be surprising that they have some overlap.¹⁰³

¹⁰⁰ Criminal Code of Ukraine, 5 April 2001, Articles 258-4 and 258-5 (Russia's Counter-Memorial Part I, Annex 51) (emphasis added).

¹⁰¹ See Russia's Counter-Memorial Part I, para. 28.

¹⁰² See Russia's Counter-Memorial Part I, para. 28.

¹⁰³ Russia also misconstrues a reference in Ukraine's explanatory note on ratification of the ICSFT to "terrorism financing," which Russia reads as excluding "other forms of material support to terrorist organizations" such as "the transfer of weapons or arms." Russia's Counter-Memorial Part I, para. 27. The explanatory note reflects the fact that the name of the Convention under consideration referred to terrorism financing. As explained above, "financing" under the Convention is simply the provision of "funds," or as the Convention defines that term: assets of every kind. This is also consistent with Ukraine's domestic legislation, which as previously noted recognizes the concept of "terrorism financing" as covering both "financial and material support." Criminal Code of Ukraine, 5 April 2001, Articles 258-4 and 258-5 (Russia's Counter-Memorial Part I, Annex 51).

96. Russia also fails in its effort to allege some inconsistency by Ukraine in its diplomatic correspondence and Application. Ukraine's *notes verbale* specifically invoked the ICSFT and outlined the transfer of weapons that were used to commit terrorist acts against the civilian population.¹⁰⁴ That is consistent with the Convention's definition of "funds" to mean "assets of every kind." Similarly, Russia quotes a heading in Ukraine's Application that refers to "Arms,"¹⁰⁵ but the Application expressly notes that the treaty's broad definition of "funds" covers "in-kind contributions including heavy weaponry."¹⁰⁶

97. Any inconsistency regarding the definition of "funds" is on the part of Russia. As noted above, until now, Russia has not previously advanced its restrictive interpretation of "assets of every kind," perhaps because it would create an inconsistency with the meaning of terrorism financing in its domestic law.¹⁰⁷

* * *

98. Article 1(1) of the ICSFT explicitly defines the term "funds" to mean "assets of every kind, whether tangible or intangible, movable or immovable." "Assets of every kind" cannot mean, as Russia proposes, only assets of some kind, *i.e.*, "financial assets" but not "non-financial assets."¹⁰⁸ Weapons are a kind of asset that is tangible and movable. Russia's contrary interpretation not only defies the treaty's text, but would create a blueprint for

¹⁰⁴ *Note Verbale* No. 72/22-620-1069 of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation, 7 May 2015 (Russia's Objections, Annex 24); *Note Verbale* No. 72/22-484-1103 of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation, 13 May 2015 (Russia's Objections, Annex 26).

¹⁰⁵ Russia's Counter-Memorial Part I, para. 23.

¹⁰⁶ *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 of 16 January, para. 127(a).

¹⁰⁷ *See supra*, para. 69.

¹⁰⁸ Russia's Counter-Memorial Part I, paras. 37, 73, 99.

supporters of terrorism to evade the Convention by directly delivering the means to carry out terrorist acts.

B. Knowledge that One Is Providing Funds to a Group that Commits Terrorist Acts Satisfies the Knowledge Requirement of Article 2(1)

99. A person commits an offense under Article 2(1) of the ICSFT 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 [acts specified in subparagraphs (a) and (b)].¹⁰⁹

100. As Ukraine explained in its Memorial, when a person provides funds to a recipient known to commit the specified acts, that person has “knowledge” that the funds “are to be used,” at least in part, in order to carry out such acts.¹¹⁰ This common-sense principle is summarized by Lehto: “the financing of *a group which has notoriously committed terrorist acts* would meet the requirements of paragraph 1” of Article 2.¹¹¹ This interpretation is not only consistent with the ordinary meaning of Article 2(1), read in its context, but it is also the only way to give the Convention practical effect. Since terrorist perpetrators generally engage in terrorist acts alongside other activities, uncertainty about the precise use to which specific funds may be put cannot be a defense. Any other interpretation would gut States Parties’ legal obligations by nullifying the offense of terrorism financing that sits at the heart of the Convention.

¹⁰⁹ ICSFT, art. 2(1).

¹¹⁰ Since Ukraine has established numerous acts of terrorism financing based on the “knowledge” prong of Article 2(1), it has not needed to address the alternative “intention that they should be used” standard. Russia nonetheless accuses Ukraine of putting forward “an unduly broad interpretation of ‘intention’” under Article 2(1). See Russia’s Counter-Memorial Part I, para. 116. Russia appears to have confused the phrase “intention that they should be used” in the chapeau of Article 2(1), which Ukraine has not had occasion to interpret, with the different phrase “act intended to cause” in Article 2(1)(b). See *infra*, para. 157.

¹¹¹ Lehto, p. 289 (Ukraine’s Memorial, Annex 490) (emphasis added); Ukraine’s Memorial, para. 281.

101. Though Russia spends several pages of its Counter-Memorial purporting to disagree with Ukraine’s interpretation, it eventually concedes this fundamental point. Russia admits that, if funds are provided to “notorious terrorist groups,” “it would be no defence for the financier to say that he/she intended the funds to contribute to the non-terrorist activities of the relevant group or that he/she could not know whether the funds are to be used to commit a terrorist act or for some other purpose.”¹¹² Yet after agreeing with Ukraine’s basic premise, Russia argues that a group cannot be deemed “notorious” for this purpose unless it has “been characterised by the international community as engaging in terrorist acts,” such as through “design[ation] by the UN Security Council pursuant to Security Council resolution 1373.”¹¹³ Russia merely asserts this limitation without support or explanation. It cannot be reconciled with Article 2’s focus on objectively defined *acts*, rather than labels or designations of groups, which may be politically controversial.

1. The Knowledge Requirement of Article 2(1) Is Satisfied by Providing Funds to a Group Known to Commit Covered Terrorist Acts

102. As explained in Ukraine’s Memorial, Article 2(1)’s use of the phrase “in full or in part” reflects a recognition that groups that engage in terrorist acts may direct the funds they receive toward terrorist and non-terrorist purposes alike, and that funds provided may be used “in part” for terrorist acts and “in part” for other acts. By the very nature of terrorism financing, it will generally be impossible to know with certainty what a third party will do with funds after they are provided. Money is perfectly fungible, and weapons can be used both for acts intended to cause civilian harm as well as other acts.

103. This interpretation is further reinforced by the phrase “used . . . in order to carry out.” The ordinary meaning of the term “used” is “employed in accomplishing something.”¹¹⁴ Money may be “used” to purchase weapons that can be deployed for various purposes,

¹¹² Russia’s Counter-Memorial Part I, para. 125.

¹¹³ Russia’s Counter-Memorial Part I, para. 125.

¹¹⁴ See *Used*, Merriam-Webster Dictionary (accessed 17 February 2022), accessed at <https://www.merriam-webster.com/dictionary/used>.

including terrorist acts. Weapons may be “used” in various ways as well, whether to strengthen a group’s overall arsenal or to direct certain of its weapons to carrying out terrorist acts.

104. This point is further underscored by Article 2(3) of the Convention. Article 2(3) specifies that “it shall not be necessary that the funds were actually used to carry out” an act of terrorism, reinforcing that a funder need not know the terrorist act for which the funds will be used.¹¹⁵ Lehto explains that Article 2(3) confirms that terrorism financing is “a prospective crime” that by its nature “may — or may not — lead to terrorist violence.”¹¹⁶ Aust likewise emphasizes that “para. 3 avoids the need to prove that the accused knew the precise destination of the funds or that they would be used to finance a particular terrorist act . . . or even a specific category of terrorist act.”

105. Requiring the funder to possess particularized knowledge that the specific funds being provided would be directed toward a specific terrorist act would undermine the treaty’s effectiveness. It would rarely be possible to prove that a funder of a group that engages in terrorist acts knew with certainty how the funds being provided would be deployed. Groups committing terrorist acts could easily shield their funders from liability by simply declining to tell funders how specific assets might be directed. Further, if it becomes unduly difficult to prove an Article 2 offense, the object and purpose of the Convention — to promote cooperation in the suppression of terrorism financing — would be thwarted. States who had committed to cooperate in the prevention and suppression of terrorism financing offenses would rarely have to cooperate in practice, since only allegations that a specific asset was to be used to commit a specific act of terror could trigger the treaty’s obligations.

¹¹⁵ ICSFT, art. 2(3).

¹¹⁶ Lehto, p. 296 (Ukraine’s Memorial, Annex 490).

106. The preamble to the Convention underscores this point. The preamble recalls that many terrorist groups and financiers “also have or claim to have charitable, social or cultural goals,” and also may be “engaged in unlawful activities such as illicit arms trafficking, drug dealing and racketeering.”¹¹⁷ In light of this recognition, it cannot be a defense under Article 2(1) for the funder to claim some uncertainty as to whether the specific money or weapons provided would be directly earmarked for terrorist acts.

107. Ukraine’s interpretation thus best advances the object and purpose of the ICSFT, which is to prevent and suppress all financing of terrorist acts against civilians.¹¹⁸ Roberto Lavalle emphasized shortly after the treaty’s completion the “impossib[ility]” of linking “the particular provision of ‘funds’ with a particular terrorist act,” and how these “difficulties will be compounded whenever a terrorist group or organization carries out activities, lawful or unlawful, other than terrorist acts.”¹¹⁹ Thus, “regard being had to the importance attributed by article 31(1) of the Vienna Convention on the Law of Treaties to the ‘object and purpose’ of a treaty,” Article 2(1) must be read so that “it is sufficient to prove that the recipient or recipients . . . of the ‘funds’ are terrorists,” and “that that person was aware of this”¹²⁰

108. The U.N. Office on Drugs and Crime (“UNODC”) similarly explains that, in addition to acts of financing “intending” to support terrorist acts, “the Convention *must* also punish provision or collection of funds with the knowledge and willing acceptance of the

¹¹⁷ ICSFT, preamble.

¹¹⁸ *Ibid.*

¹¹⁹ Lavalle, p. 503 (Ukraine’s Memorial, Annex 484).

¹²⁰ *Ibid.*

possibility that they may be used for terrorist acts.”¹²¹ Russia asserts that this statement only concerns “what the scope of implementing legislation *should* be, as opposed to what is actually required by the ICSFT,”¹²² but this disregards the UNODC’s use of the word “must.”

109. Moreover, Russia does not engage with the full import of the UNODC guide, in particular the scenario described by the UNODC that speaks directly to this issue.¹²³ The UNODC describes a funder who collects and sends funds to an organization that “carries on both legitimate social programmes and bomb attacks on non-combatant civilians of an opposing group.”¹²⁴ The funder “personally hopes that [the funds] will be used for medical care for the community,” but knows that the organization will make the ultimate decision on how to direct the funds and may decide to direct them toward bomb attacks on civilians.¹²⁵ Since this person “knows and is willing that such attacks may be facilitated by his fundraising,” an offense under the Convention “must” cover such a scenario.¹²⁶ The UNODC explains that this requirement is necessary “to accomplish the goal of reducing terrorist attacks by discouraging the knowing provision or collection of funds for their accomplishment.”¹²⁷ This specific point is much more relevant than the UNODC’s suggestion, cited by Russia, that a

¹²¹ UNODC, *Legislative Guide to the Universal Legal Regime Against Terrorism* (2008), p. 31 (emphasis added) (Ukraine’s Memorial, Annex 285). The mandate of the UNODC includes “provid[ing] assistance in implementing such instruments [including ICSFT] to States, upon request.” U.N. General Assembly Resolution 56/261, U.N. Doc. A/RES/56/261, *Plan of Action for the Implementation of the Vienna Declaration on Crimes and Justice: Meeting the Challenges of the Twenty-First Century* (15 April 2002), para. 24(a).

¹²² Russia’s Counter-Memorial Part I, para. 142.

¹²³ Ukraine’s Memorial, para. 282.

¹²⁴ UNODC, *Legislative Guide to the Universal Legal Regime Against Terrorism* (2008), pp. 30–31 (Ukraine’s Memorial, Annex 285).

¹²⁵ *Ibid.*

¹²⁶ *Ibid.* p. 31 (emphasis added).

¹²⁷ UNODC, *Legislative Guide to the Universal Legal Regime Against Terrorism* (2008), p. 31 (Ukraine’s Memorial, Annex 285).

“recklessness” standard may not be required.¹²⁸ The Convention requires knowledge, not recklessness, and knowledge is established when a person provides funds to a group *knowing* it commit terrorist acts.¹²⁹

110. The *travaux préparatoires* confirm Ukraine’s interpretation. Lehto reports that it was “recurrently mentioned in the negotiations” that the required knowledge under Article 2(1) would be met by “the funding of an organisation that carries out multiple activities of a political and social as well as military nature, and where it may not be possible for the financier to make a distinction between the different possible end uses[.]”¹³⁰ Consistent with this understanding, the delegates rejected a proposal to exempt the provision of materials “also used for humanitarian purposes by the beneficiary person or organization,” which “would unnecessarily limit the scope of the convention and diminish its effectiveness.”¹³¹

111. Nothing about the negotiators’ consensus is undermined by the decision not to include words such as “recklessness” or “likely to be used.”¹³² Ukraine does not advocate a recklessness standard, which would be much broader than the principle reflected in Article 2:

¹²⁸ See Russia’s Counter-Memorial Part I, para. 142.

¹²⁹ Russia’s reliance on the IMF Legislative Drafting Handbook fails for similar reasons. See Russia’s Counter-Memorial Part I, paras. 138–139. The IMF handbook distinguishes “actual knowledge on the part of the perpetrator that the funds will be used for a terrorist act” from situations where “the perpetrator foresaw, or could have foreseen, or should have foreseen, that the terrorist act would occur[.]” International Monetary Fund, Legal Department, *Suppressing the Financing of Terrorism: A Handbook for Legislative Drafting* (2003), p. 52. As with “recklessness,” Ukraine is not arguing for a “foreseeability” standard, but that providing funds with *actual knowledge* that the recipient engages in acts of terrorism satisfies the Article 2(1) requirement. Russia repeats the same error with respect to the FATF Special Recommendations, which it quotes selectively and out of context. See Russia’s Counter-Memorial Part I, para. 141. The FATF explains that Article 2 does not encompass “reckless,” “negligent,” or “unwitting” acts of terrorism financing. FATF, *Guidance on Criminalising Terrorism Financing* (Recommendation 5), 2016, p. 2, para. 8. Ukraine does not contend that “reckless” or “negligent” or “unwitting” acts of terrorism financing are covered by the Convention.

¹³⁰ Lehto, p. 293 (Ukraine’s Memorial, Annex 490).

¹³¹ Ad Hoc Committee Report, U.N. Doc. A/54/37, para. 9 (Ukraine’s Written Statement, Annex 13).

¹³² Russia’s Counter-Memorial Part I, paras. 133–134.

actual knowledge that the funder is providing assets to a group that is known to commit terrorist acts establishes the mental element of the offense. It is a well-established principle of international law that *mens rea* can be inferred from objective factual circumstances, and there is no indication that the drafters of the ICSFT intended to deviate from this principle in Article 2(1).¹³³ As Lehto observes, “the law should permit the intentional element of the terrorist financing offence to be inferred from objective factual circumstances.”¹³⁴

2. Russia Admits that Ukraine’s Interpretation Is Correct, But Improperly Suggests that Notoriety Must Be Based on Terrorist Designations or Similar Labels.

112. As noted above, despite its purported objections to Ukraine’s interpretation, Russia ultimately does not dispute the critical point: funding a group that notoriously commits terrorist acts satisfies Article 2(1)’s knowledge requirement. Russia concedes that for groups whose terrorist acts are notorious, “it would be no defence for the financier to say that he/she intended the funds to contribute to the non-terrorist activities of the relevant group or that he/she could not know whether the funds are to be used to commit a terrorist act or for some other purpose.”¹³⁵ It is thus common ground between the parties that where a person provides funds to an individual or organization that notoriously carries out terrorist acts, the “knowledge” requirement of the terrorism financing offense under Article 2(1) is satisfied.

113. The only real disagreement is how such notoriety may be established. In light of the ICSFT’s focus on objectively defined *acts* which may not be funded, the proper inquiry

¹³³ See, e.g., International Criminal Court, Elements of Crimes (2011), p. 1, para. 3, *accessed at* <https://bit.ly/2QXstde> (“Existence of intent and knowledge can be inferred from relevant facts and circumstances.”).

¹³⁴ Lehto, p. 288 (Ukraine’s Memorial, Annex 490); see FATF, Guidance on Criminalising Terrorism Financing (Recommendation 5), 2016, p. 21, Interpretive Note 7 (“Countries should ensure that the intent and knowledge required to prove the offence of terrorist financing may be inferred from objective factual circumstances.”).

¹³⁵ Russia’s Counter-Memorial Part I, para. 125.

is whether there is public knowledge that the individual or group carries out acts that meet the requirements of subparagraphs (a) and (b) of Article 2(1). This is the approach taken by domestic courts implementing the ICSFT.¹³⁶

114. Russia, however, argues that such knowledge can only be satisfied in relation to “terrorist groups which have been characterised by the international community as engaging in terrorist acts such as Al-Qaida, Usama bin Laden or the Taliban, including where the person or entity has been designated by the U.N. Security Council pursuant to Security Council resolution 1373.”¹³⁷ No support for this position is offered. Russia does not explain, for example, why notoriety would not be established by reports of the Office of the United Nations High Commissioner for Human Rights that an illegal armed group engages in a pattern of targeting civilians, and characterizes those acts as “inflict[ing] on the populations a reign of intimidation and terror to maintain their position of control.”¹³⁸

115. In any event, Russia’s emphasis on “characterizations” and “designations” is misplaced for several reasons. First, the Convention was designed to address acts, not legal or political labels. The relevant “knowledge” in Article 2(1) is that funds are to be used to carry out *acts* that meet the requirements of Article 2(1)(a) and 2(1)(b), not knowledge of international characterizations or designations. Such designations may be one way to prove knowledge, but nothing in the Convention indicates that a Security Council terrorism designation is a prerequisite to establishing that a group is known to engage in terrorist acts. Indeed, Russia states in a footnote that its position is not that “designation of a group is *legally*

¹³⁶ See Ukraine’s Memorial, para. 283.

¹³⁷ Russia’s Counter-Memorial Part I, para. 125.

¹³⁸ OHCHR, Report on the Human Rights Situation in Ukraine (15 July 2014), para. 26 (Ukraine’s Memorial, Annex 296); see *infra*, Chapter 6, Section A.

necessary to establish knowledge.”¹³⁹ Therefore, even if designation might be one way to identify a group that is known to commit terrorist acts, it is common ground that it is not the only way (though Russia is not willing to identify other ways it would deem sufficient).

116. Second, the ICSFT’s focus on acts rather than labels was deliberate. As noted by Judge Robinson, “it is no mere happenstance that the ICSFT does not describe the offence in Article 2 as terrorism,” which is a politically controversial label.¹⁴⁰ Given the decision to focus on objective criteria rather than labels that can be politicized, it would be improper to require political action by the Security Council (of which Russia is a permanent member), or other expressions by “the international community,” before knowledge of a group’s terrorist acts could be established. The point of the careful drafting of Article 2(1) was to exclude political judgments and characterizations, and to instead focus on acts.

117. Third, Russia’s argument does not make sense given the timing of the Convention, which was completed in 1999. It was not until the attacks of 11 September 2001 that international designations of terrorist groups (or any similar “characterization by the international community”) became common practice.¹⁴¹ States Parties could not have intended knowledge to be established based exclusively on designations or characterizations by the international community that were not yet commonplace.

¹³⁹ Russia’s Counter-Memorial Part I, para. 126, n.120 (emphasis in original).

¹⁴⁰ *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019*, Declaration of Judge Robinson, para. 16.

¹⁴¹ See U.N. Security Council Resolution 1373, U.N. Doc. S/RES/1373 (28 September 2001); Lee Jarvis & Tim Legrand, *The Proscription or Listing of Terrorist Organisations: Understanding, Assessment, and International Comparisons*, *Terrorism and Political Violence*, Vol. 30 (2018), pp. 200, 204 (explaining that “the attacks of 9/11 marked an immediate and pronounced transformation in the status of proscription worldwide”) (Ukraine’s Written Statement, Annex 86).

118. Fourth, States Parties have implemented and applied Article 2(1) based on knowledge of a group's *acts*, rather than designations. Russia responds by mischaracterizing the cases cited by Ukraine, asserting that national courts inferred knowledge principally "on the basis of international and/or national designations."¹⁴²

119. In fact, these courts did *not* rely on designations, but properly relied on knowledge of the groups' *acts*. In the *Fighters and Lovers Case*, the Supreme Court of Denmark concluded that in order to satisfy the *mens rea* requirement, "it is enough that evidence exists that the person, group or association for which the funds were collected is engaged in or intends to engage in acts of the type and with the particular terrorist intentions specified in" the terrorism financing offense.¹⁴³ Thus, based on evidence of attacks on a civilian population, the court concluded that the defendants "possessed the factual *knowledge of the actions* of FARC and PFLP required for intent."¹⁴⁴ Contrary to Russia's suggestion, the Supreme Court of Denmark never mentioned any national or international designation of the FARC or PFLP as a terrorist organization. Similarly, in *Boim v. Holy Land Foundation*, the U.S. Court of Appeals did not rely on designations to prove knowledge. To the contrary, the case concerned donations made to Hamas in 1996, which was one year *before* the United States designated Hamas as a foreign terrorist organization.¹⁴⁵

¹⁴² Russia's Counter-Memorial Part I, para. 144(a).

¹⁴³ "Fighters and Lovers Case," Case 399/2008, Supreme Court of Denmark (25 March 2009), pp. 1–2 (Ukraine's Memorial, Annex 476).

¹⁴⁴ *Ibid.* (emphasis added). Russia also challenges Ukraine's reliance on French court decisions concerning the PKK and ETA. These decisions relied on classifications of groups as terrorists, but did not suggest this was legally necessary. *See* French Cour de cassation, Case No. 13-83.758, Judgment, 21 May 2014 (Ukraine's Memorial, Annex 477); French Cour de cassation, Case No. Z 04-84.264, Judgment, 12 April 2005 (Ukraine's Memorial, Annex 472). States may have political or other reasons for choosing not to designate a group that in fact commits acts covered by Article 2(1)(b).

¹⁴⁵ *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685 (Court of Appeals for the 7th Circuit of the United States, 2008), p. 712 (Ukraine's Memorial, Annex 474) ("Donations to Hamas itself have been a crime since 1997 . . . when Hamas was formally designated a foreign terrorist

120. Another U.S. court recently followed the same approach in a case involving 18 U.S.C. § 2339C, the statute that implements the ICSFT.¹⁴⁶ This case was brought by victims of the shoot-down of Flight MH17, and addressed the provision of financial services to the DPR.¹⁴⁷ The court concluded that the defendants “were on notice of the DPR’s activities,” citing the DPR’s “attacks on civilians” and the fact that “these attacks were widely reported and discussed by nearly every government across the world, media, and human rights organizations.”¹⁴⁸ The court reached this conclusion even though “the DPR has not been designated as a Foreign Terrorist Organization.”¹⁴⁹ Similarly here, in determining whether the funder knew that the group being financed commits terrorist acts, the Court should consider objective factual circumstances, including the information that was widely reported and available from international organizations and reputable media reports.

121. In sum, all parties agree that providing funds to a group known to commit terrorist acts satisfies the mental element of Article 2(1), but there is no support for Russia’s position that notoriety of terrorist acts can only be established through a formal label at the international level. Thus, the relevant inquiry under the Convention is whether a funder had knowledge, based on objective factual circumstances, that the group to which the person was providing funds in fact commits terrorist acts covered by Article 2(1)(a) and (b).

organization . . .”). The court instead considered whether the funder “knows that the organization engages in [terrorist] acts.” *Ibid.* at 693. Russia also points out that *Boim* involved U.S. legislation on “material support for terrorism,” but the knowledge requirement that the court interpreted is the same: “knowing . . . that they are to be used” to commit specified acts. United States Code: Crimes, 18 U.S.C. § 2339A, Providing Material Support to Terrorist (2009) (Ukraine’s Memorial, Annex 475).

¹⁴⁶ *Schansman v. Sberbank of Russia PJSC*, Civ. No. 19-CV-2985 (ALC), 2021 WL 4482172 (S.D.N.Y. 30 September 2021) (Ukraine’s Reply, Annex 67); see International Monetary Fund, Legal Department, *Suppressing the Financing of Terrorism: A Handbook for Legislative Drafting* (2003), p. 36, n.94 (identifying 18 U.S.C. § 2339C as the U.S. statute implementing the ICSFT).

¹⁴⁷ *Schansman v. Sberbank of Russia PJSC*, Civ. No. 19-CV-2985 (ALC), 2021 WL 4482172, p. 1 (S.D.N.Y. 30 September 2021), p. 1 (Ukraine’s Reply, Annex 67).

¹⁴⁸ *Ibid.*, p. 8.

¹⁴⁹ *Ibid.* As noted below in Chapter 7, the U.S. court decided that the allegations fell within the terrorism financing statute based on the allegations as pled by the Plaintiffs. These allegations, concerning the public knowledge of the DPR’s track record of violent attacks on civilians, are consistent with the evidence presented in this case, which Russia has not attempted to refute.

Chapter 5. INTERPRETATION OF ARTICLE 2(1)(A) AND (B): ACTS WHOSE FUNDING IS PROHIBITED

122. As established in Ukraine’s Memorial, the ICSFT establishes a broad and comprehensive class of terrorist acts whose financing is illegal. Ukraine’s Memorial documented numerous acts committed by Russia’s proxies since the spring of 2014 that constitute terrorist acts covered by the ICSFT. These include the shoot-down of Flight MH17, violating Article 1(1)(b) of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (“the Montreal Convention”), and a series of bombings in Ukrainian cities, violating Article 2(1) of the International Convention for the Suppression of Terrorist Bombings (“the ICSTB”). In addition, Ukraine’s Memorial documented numerous attacks against civilians which meet the requirements of Article 2(1)(b) of the ICSFT.

123. In its Counter-Memorial, Russia does not dispute Ukraine’s interpretation of the ICSTB or that attacks in Kharkiv, Kyiv, and Odesa constitute offenses under the ICSTB. Russia does take issue with Ukraine’s interpretations of Article 1(1)(b) of the Montreal Convention and Article 2(1)(b) of the ICSFT. But, once again, Russia’s arguments on interpretation create hurdles to cooperation in the area of terrorism financing that are not supported by the text’s plain meaning. Russia instead puts forward interpretations that make it more difficult to prove terrorism financing offenses and, consequently, easier for Russia to escape its obligations in connection with such offenses. Russia in particular tries to impose non-existent mental requirements but disregards the critical fact that the underlying offenses are committed by a *third party*. It would be entirely unreasonable to interpret the Convention to require a funder to know the mental state of such a third party.

124. With respect to the Montreal Convention, Russia proposes an implausible rule under which no offense is committed when a person acts unlawfully, fires an indiscriminate weapon incapable of distinguishing military from civilian aircraft, and consequently destroys a civilian aircraft and murders hundreds of people on board. With respect to Article 2(1)(b) of the ICSFT, Russia proposes an interpretation involving numerous deviations from the plain treaty text — for example, urging the Court *not* to consider the “nature or context” of acts that

the treaty specifically directs should be evaluated according to their “nature or context.” Ukraine, by contrast, interprets these provisions in accordance with their ordinary meaning, in a common-sense manner that allows them to play their intended role.

A. Article 1(1)(b) of the Montreal Convention Applies to the Undisputed Facts of the Shoot-Down of Flight MH17

125. Pursuant to Article 2(1)(a) of the ICSFT, acts that constitute an offense under the Montreal Convention are among the acts whose funding is prohibited under ICSFT Article 2.¹⁵⁰

126. Ukraine established in its Memorial that the shoot-down of Malaysian Airlines Flight 17 (“MH17”) was an unlawful and intentional destruction of an aircraft in service, in violation of Article 1(1)(b) of the Montreal Convention.¹⁵¹ Russia has not disputed that the shoot-down was unlawful, or that the attackers intended to destroy an aircraft. Instead, Russia argues that the shoot-down was not an offense under the Montreal Convention because the attackers allegedly intended to destroy a military aircraft rather than a civilian aircraft.¹⁵² This strained argument is based on an incorrect interpretation of the Montreal Convention, for two independent reasons. First, the status of the destroyed aircraft dictates whether the Convention applies, but it is not an element of a violation that is subject to an intent requirement. If a person acts unlawfully and intends to destroy an aircraft, and a civilian aircraft is destroyed, an offense is committed under the Montreal Convention; any claims of intent to unlawfully destroy a different kind of aircraft are irrelevant. Second, even if intent to

¹⁵⁰ ICSFT, art. 2(1)(a) (prohibiting the supply of funds to “[a]n act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex”).

¹⁵¹ Montreal Convention, art. 1(1)(b) (“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 . . .”).

¹⁵² Russia’s Counter-Memorial Part I, Chapters IV.I, VI.

destroy a civilian aircraft were required, a person who uses a weapon that is incapable of distinguishing between civilian and military aircraft acts with the intention of destroying a civilian aircraft. This conclusion is consistent with the ordinary legal meaning of the word “intentionally.” It is also compelled by this Court’s recognition in the *Nuclear Weapons* Advisory Opinion that the “use [of] weapons that are incapable of distinguishing between civilian and military targets” constitutes “mak[ing] civilians the object of attack.”¹⁵³ Russia’s Counter-Memorial does not acknowledge this principle, and instead simply declines to engage on this point.

1. A Person Who Acts Unlawfully and Intends to Destroy an Aircraft in Service, and in Fact Destroys a Civilian Aircraft, Commits a Montreal Convention Offense

127. Under the plain terms of Article 1(1)(b), read in context and in light of the Convention’s object and purpose, a person who “unlawfully and intentionally” shoots down “an aircraft in service,” and in fact shoots down a civilian aircraft in service, “commits an offense,” without any additional requirement to specifically prove that person’s intention to destroy a civilian aircraft. Specifically, Article 1(1)(b) of the Montreal Convention establishes that a “person commits an offense if he unlawfully and intentionally . . . 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”¹⁵⁴ The type of “aircraft” is not qualified except that it must be “in service” when it is destroyed.

128. The status of the aircraft is not addressed in Article 1(1), but instead is addressed separately in Article 4 of the Convention, which enumerates the circumstances in which the Convention shall or shall not apply in particular cases. Under Article 4(1), “[t]his Convention shall not apply to aircraft used in military, customs or police services.”¹⁵⁵

¹⁵³ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, I.C.J. Reports 1996*, p. 257, para. 78.

¹⁵⁴ Montreal Convention, art. 1(1)(b).

¹⁵⁵ Montreal Convention, art. 4(1).

Conversely, the Convention does apply to aircraft used in civilian service. So, for example, if an incident occurs involving a military aircraft, the Convention “shall not apply” to that incident; whereas, if an incident occurs involving a civilian aircraft, the Convention does apply. Reading Article 1 of the Convention in the context of Article 4, the civilian status of an aircraft is a “jurisdictional element” set out in Article 4 that must be present in order for the Convention to apply. Where the Convention applies, an offense is committed when the terms of Article 1(1)(b) are satisfied and a perpetrator unlawfully and intentionally destroys “an aircraft in service.” In the words of the ICTY, the “jurisdictional element” of the offense (in this case found in Article 4) is “not a legal ingredient of the subjective element of the crime.”¹⁵⁶ In short, the Montreal Convention becomes applicable once the objective fact has been established that a civilian aircraft in service was shot down. A violation of the Convention is then established through proof that the perpetrator acted unlawfully and intended to destroy an aircraft in service.

129. Had States wished to require proof of intent to destroy a *civilian* aircraft, it would have been straightforward to say so. Article 1 could have defined the offense as “unlawfully and intentionally destroying a *civilian* aircraft in service.” This point is confirmed by contrasting Article 1(1)(b) with Article 1(bis),¹⁵⁷ which Russia incorrectly invokes as supporting its position.¹⁵⁸ An offense under Article 1(bis)(b) consists of “unlawfully and intentionally, using any device, substance or weapon” to, *inter alia*, “destroy[] or seriously

¹⁵⁶ *Prosecutor v. Tadic*, Case No. IT-94-1-A, Appeals Chamber Judgment, para. 249 (15 July 1999) (Ukraine’s Memorial, Annex 463).

¹⁵⁷ Article 1(bis) was added by Article 2(1) of the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation.

¹⁵⁸ Russia’s Counter-Memorial Part I, para. 156.

damage[] the facilities of an airport serving international *civil aviation or aircraft . . .*”¹⁵⁹ By its plain terms, an offense under Article 1(bis)(b) can only be established if the perpetrator acts “intentionally” to destroy or damage an airport serving “*civil aviation or aircraft.*” That requirement is conspicuously missing in Article 1(1)(b).

130. Russia’s observation that the term “aircraft” is not defined in the Convention does not support its argument that the term “cannot be understood other than by reference to Article 4.”¹⁶⁰ An undefined term should be interpreted according to its ordinary meaning, and the ordinary meaning of “aircraft” encompasses any flying machine, whether used for civilian, military, or other purposes. Further, the phrase used in Article 1(1)(b) is “aircraft in service,” and the Convention provides in Article 2(b) that “an aircraft is considered to be in service from the beginning of the preflight preparation of the aircraft by ground personnel or by the crew for a specific flight until twenty-four hours after any landing; the period of service shall, in any event, extend for the entire period during which the aircraft is in flight as defined in paragraph (a) of this Article.”¹⁶¹ As a matter of ordinary meaning, military aircraft can be naturally referred to as being “in service.”¹⁶² Thus, the phrase “aircraft in service” as used in Article 1(1)(b) refers to the aircraft’s flight status, not whether it is used for civilian or military purposes.

131. Ukraine has previously pointed to the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic

¹⁵⁹ *Ibid.*; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, 24 February 1988, UNTS, vol. 1589, p. 474.

¹⁶⁰ Russia’s Counter-Memorial Part I, para. 154.

¹⁶¹ Montreal Convention, art. 2(b).

¹⁶² *See, e.g.*, UK Aviation Security Act 1982, Section 38 (adopting the same definition for an aircraft “in service” as the Montreal Convention in respect of civil and military aircraft).

Agents (“IPP Convention”)¹⁶³ to note that other treaties, like the Montreal Convention, create crimes that include jurisdictional elements, *i.e.*, an element whose existence must be proved for the offense to occur, but which element is not subject to the *mens rea* of the offense. Russia does not dispute the basic point that an offender need not intend or be aware of the jurisdictional element of a crime; what matters to establish the crime is that the act occurred and the act was committed with the requisite intent. Russia also does not address the example Ukraine gave of Article 5 of the ICTY Statute, and the ICTY’s interpretation of the “committed in armed conflict” element of crimes against humanity as a jurisdictional element.¹⁶⁴ Instead, Russia disagrees that under the IPP Convention, the internationally protected status of a victim is an example of a jurisdictional element.¹⁶⁵ But the IPP Convention differs from the Montreal Convention in a critical respect: the victim’s status is specifically mentioned in the article that defines the offense, such that what must be intentional is the “commission of . . . murder, kidnapping or other attack upon the person or liberty of an internationally protected person.”¹⁶⁶ Article 1(1)(b) of the Montreal Convention, by contrast, does not define the act that must be done intentionally as destroying a “civilian” aircraft in service. If there is a debate over whether the intent requirement applies to the protected status of the victim under the

¹⁶³ Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, 14 December 1973, 1035 U.N.T.S. 167 [hereinafter IPP Convention]. The IPP Convention, like the Montreal Convention, is incorporated in Article 2(1)(a) of the ICSFT.

¹⁶⁴ Ukraine’s Memorial, para. 222, n.507; *see Prosecutor v. Tadic*, Case No. IT-94-1-A, Appeals Chamber Judgment, para. 249 (15 July 1999) (“The Appeals Chamber would also agree with the Prosecution that the words ‘committed in armed conflict’ in Article 5 of the Statute require nothing more than the existence of an armed conflict at the relevant time and place. The Prosecution is, moreover, correct in asserting that the armed conflict requirement is a jurisdictional element, not ‘a substantive element of the *mens rea* of crimes against humanity’ (*i.e.*, not a legal ingredient of the subjective element of the crime).”) (Ukraine’s Memorial, Annex 463).

¹⁶⁵ Russia’s Counter-Memorial Part I, para. 157.

¹⁶⁶ IPP Convention, art. 2(1)(a).

IPP Convention, it only confirms that under the Montreal Convention, where the civilian status of an aircraft is outside the Article that defines the offense and imposes the intent requirement, the aircraft's civilian status is a jurisdictional element that establishes the applicability of the Convention, but is not part of the intent requirement.

132. Russia also does not attempt to reconcile its interpretation of Article 1(1)(b) with the object and purpose of the Montreal Convention. The preamble to the Montreal Convention states that the “occurrence” of “unlawful acts against the safety of civil aviation” is “a matter of grave concern,” and articulates the Convention’s “purpose of deterring such acts.”¹⁶⁷ Consistent with the purpose of the Convention, attacks that harm civil aircraft are within the intended scope of the treaty, so long as the perpetrator acted “unlawfully” and in fact destroyed a civilian aircraft. To carve out a defense for those who destroy civilian aircraft because they allegedly intended to commit a different unlawful act against a different kind of aircraft would create an unjustifiable loophole in the treaty’s prohibitions.

133. Rather than address object and purpose, Russia broadly misstates Ukraine’s position as being that “a key objective of the Montreal Convention is to criminalize all acts which *in fact* endanger civil aviation.”¹⁶⁸ Russia does not mention the critical point that the Convention only addresses attacks on civil aviation that are *unlawful*. As a practical matter, there will be no Article 1(1)(b) offense in many or most situations where there was an intent to destroy a military aircraft — for example, where members of a State’s military mistakenly, but in good faith, destroy a civilian aircraft while lawfully attempting to engage a military target — because such a mistake, while tragic, would not involve an unlawful act. The present case is distinctive in that Flight MH17 was destroyed in an unquestionably unlawful act — Russia advances no argument that the individuals who deployed the weapon had any valid legal justification under Ukrainian or international law for firing weapons at any aircraft.¹⁶⁹ In cases

¹⁶⁷ Montreal Convention, preamble.

¹⁶⁸ Russia’s Counter-Memorial Part I, para. 156(c) (emphasis in original).

¹⁶⁹ See *infra*, Chapter 6, Section B.

like this, where it is plain that the person who shot down a civilian aircraft acted unlawfully and intended to destroy an aircraft, the offense has been proven. There would be no reason to require additional proof of intention as to the status of the aircraft that was unlawfully destroyed.

2. Any Requirement of Intent to Destroy a Civilian Aircraft Is Satisfied by Firing a Weapon Incapable of Distinguishing Military From Civilian Aircraft Into Civilian-Trafficked Skies

134. Even if intention as to civilian status were required, firing into heavily-trafficked civilian airspace with a weapon that is incapable of distinguishing military and civilian targets constitutes intentionally destroying a civilian aircraft. Ukraine has made this specific point previously,¹⁷⁰ but Russia elected not to address it in its Counter-Memorial, instead arguing only that the Montreal Convention does not “encompass indirect intent or recklessness.”¹⁷¹

135. Russia offers little justification for this interpretation, merely asserting that “[w]here the Contracting States to the Montreal Convention agreed to a different mental element to achieve a certain end, they did so expressly.”¹⁷² Russia’s support for this point is the use of the phrase “likely to destroy” in Article 1(1)(c),¹⁷³ but contrary to Russia’s suggestion, “likely to destroy” does not describe a mental element. Article 1(1)(c) creates an offense for placing on an aircraft “a device or substance which is likely to destroy that aircraft.” “Likely to destroy” refers to an objective characteristic of a device or substance. The mental element

¹⁷⁰ See Ukraine’s Written Statement, para. 251, n.463.

¹⁷¹ Russia’s Counter-Memorial Part I, para. 155.

¹⁷² Russia’s Counter-Memorial Part I, para. 155.

¹⁷³ Russia’s Counter-Memorial Part I, para. 155.

remains “intentionally” – the perpetrator must intentionally place a device or substance which in turn is, objectively, likely to destroy the aircraft.

136. While Russia’s interpretation of the Montreal Convention as excluding certain degrees of intent is incorrect, it is also irrelevant. The specific facts that Ukraine has established without dispute – the firing of an anti-aircraft weapon that is incapable of discriminating between civilian and military aircraft toward a plane flying in an area open to civil aviation – establishes direct intent to destroy a civilian aircraft.¹⁷⁴

137. On this point of interpretation related to intent, principles of international humanitarian law (“IHL”) supply a relevant analogy.¹⁷⁵ As this Court explained in the *Nuclear Weapons* Advisory Opinion, the “use [of] weapons that are incapable of distinguishing between civilian and military targets” constitutes “mak[ing] civilians the object of attack.”¹⁷⁶ The International Committee of the Red Cross (“ICRC”) explains that the prohibition on “employ[ing] a method or means of combat which cannot be directed at a specific military objective” is “an application of the prohibition on directing attacks against civilians or against civilian objects.”¹⁷⁷ The ICTY applied this rule in *Prosecutor v. Martić*, where the defendant used a weapon in a civilian area that was “incapable of hitting specific targets.”¹⁷⁸ Since he

¹⁷⁴ *Infra*, Chapter 6, Section B.

¹⁷⁵ Russia contends that “the interpretation of the mental elements of a terrorist act . . . must take place in light, and against the background, of simultaneously applicable and closely related relevant standards of international law.” Russia’s Counter-Memorial Part I, para. 197. Russia overstates the relationship between terrorism suppression treaties and international humanitarian law, as explained below. *See infra*, para. 163. Nonetheless, since IHL addresses issues of intent with respect to attacks on civilians, the parties do agree that this body of law presents a relevant analogy useful in interpreting the words “intentionally” and “intended.”

¹⁷⁶ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, I.C.J. Reports 1996*, p. 257, para. 78.

¹⁷⁷ ICRC, Customary IHL Database, *Rule 12. Definition of Indiscriminate Attacks*, accessed at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule12.

¹⁷⁸ *Prosecutor v. Martić*, Case No. IT-95-11-T, Trial Chamber Judgment (12 June 2007), para. 472.

“knew of the effects of this weapon,” the tribunal found “that Milan Martić willfully made the civilian population of Zagreb the object of this attack.”¹⁷⁹ The ICTY also applied this rule to a situation where “soldiers shot [at a runway] without knowing whether the movements they saw on the runway were caused by civilians or soldiers dressed as civilians,” concluding that such “indiscriminate firing” supported a conclusion of directing attacks on civilians and an “intent to spread terror among the civilian population.”¹⁸⁰

138. Applying this principle, if a person launches a weapon at civilian skies knowing that his weapon is incapable of differentiating between military and civilian targets, the perpetrator is properly described as “willfully” attacking civilians, “directing” an attack against civilians, or making civilians the “object” of an attack. For purposes of the Montreal Convention, that perpetrator has acted “intentionally” in destroying a civilian aircraft.

139. Ukraine’s interpretation is further supported by the object and purpose of the Montreal Convention. As noted above, the Montreal Convention’s preamble states that “unlawful acts against the safety of civil aviation jeopardize the safety of persons and property, seriously affect the operation of air services, and undermine the confidence of the peoples of the world in the safety of civil aviation,” that such acts are a “matter of grave concern,” and that the Montreal Convention has the “purpose of deterring such acts.”¹⁸¹ The act of firing a weapon into civilian airspace, even though that weapon is incapable of differentiating military from civilian targets, is precisely the sort of “unlawful act against the safety of civil aviation” that the Montreal Convention was meant to deter.

¹⁷⁹ *Ibid.* Under the ICTY Statute, the *mens rea* of directing attacks against a civilian population is “willfully,” which is used synonymously with “intentionally.” See generally William A. Schabas, *Mens Rea and the International Criminal Tribunal for the Former Yugoslavia*, *New England Law Review*, Vol. 37 (2002), pp. 1020–1021 (Ukraine’s Written Statement, Annex 72); International Committee of the Red Cross, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (1987), p. 994, para. 3474 [hereinafter ICRC COMMENTARY] (defining “willfully” as meaning to act “consciously and with intent”) (Ukraine’s Written Statement, Annex 79).

¹⁸⁰ *Prosecutor v. Galić*, Case No. IT-98-29-T, Trial Chamber Judgment (5 December 2003), paras. 415–416 (Ukraine’s Memorial, Annex 464); *Prosecutor v. Galić*, Case No. IT-98-29-A, Appeals Chamber Judgment (30 November 2006), paras. 108 & note 349, 131–32.

¹⁸¹ Montreal Convention, preamble.

140. Since the specific act at issue with respect to Flight MH17 constitutes intentionally destroying a civilian aircraft, including on an interpretation that is limited to direct intent, it is not necessary for the Court to opine more generally on the meaning of “intentionally” as used in the Montreal Convention. Nevertheless, it is worth noting that Russia is incorrect in rejecting, with only cursory explanation, degrees of intent other than direct intent.

141. Since the Montreal Convention uses the word “intentionally” in the context of defining an “offence” that is to be criminalized by States parties to the Convention, it is properly interpreted by reference to the usage of the terms “intent” and “intentionally” in criminal law.¹⁸² Practice under both international and domestic criminal law shows that the ordinary meaning of “intent” encompasses various degrees: *dolus directus*, *dolus indirectus*, and *dolus eventualis*.¹⁸³ These degrees of intent encompass situations where the perpetrator desires the prohibited outcome, is aware that the outcome will occur in the ordinary course of events, or sees that his actions will likely produce that outcome and nonetheless willingly takes the risk.¹⁸⁴ The varying degrees of intent are recognized in international criminal law, and are incorporated in both civil and common law legal regimes.¹⁸⁵ Russia itself embraces this

¹⁸² See Michael Milde, *ESSENTIAL AIR AND SPACE LAW: INTERNATIONAL AIR LAW AND ICAO* (2d ed., 2012), pp. 242–43 (“The act must be ‘intentional’ – this specific offence under the Montreal Convention cannot be committed by negligence; the Conference did not discuss whether the intention must be ‘direct’ (*i.e.*, true intent to cause the harmful result) or whether an ‘indirect’ or ‘eventual’ interest would suffice (the offender did not intend to cause the harmful result but was aware that such result may occur and that did not stop him from acting) – that would be left to interpretation by the Courts of law.”) (Ukraine’s Written Statement, Annex 76).

¹⁸³ See Ukraine’s Memorial, para. 206, nn.479-80.

¹⁸⁴ See Ukraine’s Memorial, para. 206, nn.479-80.

¹⁸⁵ See Ukraine’s Memorial, paras. 206–207; *Prosecutor v. Stakić*, Case No. IT-97-24-T, Trial Chamber Judgment (31 July 2003), paras. 585–587; *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR-95-1-T, Trial Chamber Judgment (21 May 1999), para. 139; Lavalley, p. 499 (Ukraine’s Memorial, Annex 484); Kai Ambos, *TREATISE ON INTERNATIONAL CRIMINAL LAW, VOL. I: FOUNDATIONS AND GENERAL PART* (2013), p. 267 (Ukraine’s Written Statement, Annex 83); Rome Statute of the

common practice, as is illustrated by Article 25 of its Criminal Code, which provides that “[a]n act committed with direct or indirect intent shall be recognized as a crime committed intentionally, including where “the person realized the social danger of his actions” but “consciously allowed these consequences or treated them with indifference.”¹⁸⁶

142. Applying the ordinary meaning of the term “intentionally,” a person who fires a missile toward civilian-trafficked skies, knowing that his weapon system is unable to distinguish between a civilian and military target and accepting the extraordinary danger of such an action, intends to destroy a civilian aircraft.

143. Russia concludes its discussion of the Montreal Convention by stating it is “instructive to consider whether other episodes involving the destruction of civil aircraft in error have been alleged to constitute (or have been prosecuted as) a breach of Article 1(1)(b).”¹⁸⁷ Russia does not mention, however, one of the most famous examples, which was alleged to constitute a breach of Article 1(1)(b): the shoot-down of Iran Air Flight 655 by the USS Vincennes. Iran brought a case in this Court alleging that the shoot-down violated the Montreal Convention, maintaining that “there is no doubt that the shooting-down of the plane was intentional,” “even if the plane was believed to be an F-14.”¹⁸⁸ The United States filed Preliminary Objections in that case, but notably did not advance Russia’s current restrictive

International Criminal Court, 17 July 1998, U.N. Doc. A/CONF.183/9, art. 30(2)(b) [hereinafter, Rome Statute]. Russia criticizes Ukraine’s reliance on the Rome Statute on the basis that “terrorism has been deliberately excluded from its scope.” Russia’s Counter-Memorial Part I, para. 214. Ukraine is not, however, invoking the Rome Statute to make any point about terrorism, but as one illustration among many of the ordinary meaning and legal usage of the word “intent.”

¹⁸⁶ Criminal Code of the Russian Federation, art. 25 (Ukraine’s Written Statement, Annex 51).

¹⁸⁷ Russia’s Counter-Memorial Part I, para. 163.

¹⁸⁸ *Case Concerning the Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America)*, Memorial of the Islamic Republic of Iran, para. 4.57.

interpretation of the Montreal Convention's intent requirement.¹⁸⁹

144. Moreover, the examples that Russia does mention do not support its position. Russia highlights the shoot-down of Flight 1812 over the Black Sea in 2001.¹⁹⁰ According to an investigation, that accident occurred during joint Ukrainian-Russian military exercises when reflection from the water caused a missile to veer off course.¹⁹¹ No suggestion was ever made that these military exercises were “unlawful,” or that the missile was fired with an intent to destroy any kind of aircraft. Accordingly, it is not surprising that the Montreal Convention was never invoked.¹⁹² The shoot-down of MH17 presents the unusual circumstance of a civilian aircraft shoot-down where it is undisputed that the attackers acted unlawfully and fired a weapon incapable of distinguishing between military and civilian aircraft. In such circumstances, it should be accepted for the reasons explained above that an offense under Article 1(1)(b) of the Montreal Convention has been committed.

145. As established in Ukraine's Memorial, the ICSFT establishes a broad and comprehensive class of terrorist acts whose financing is illegal. Ukraine's Memorial documented numerous acts committed by Russia's proxies since the spring of 2014 that constitute terrorist acts covered by the ICSFT. These include the shoot-down of Flight MH17, violating Article 1(1)(b) of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (“the Montreal Convention”), and a series of bombings in Ukrainian cities, violating Article 2(1) of the International Convention for the Suppression of

¹⁸⁹ See *Case Concerning the Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America)*, Preliminary Objections of the United States of America.

¹⁹⁰ Russia's Counter-Memorial Part I, para. 164.

¹⁹¹ See BBC News, *Ukraine Blames Water for Downing Airline* (2 November 2001).

¹⁹² Russia also mentions Iran's recent shoot-down of Ukrainian International Airlines Flight 752. Russia characterizes this event as “human error” where an Iranian missile operator allegedly “mistook Flight 752 . . . for an incoming cruise missile.” Russia's Counter-Memorial Part I, para. 164. Ukraine (alongside Canada, Sweden, and the United Kingdom) is a member of the International Coordination and Response Group that has engaged in negotiations with Iran regarding the shoot-down. The Group announced recently that it has determined that further attempts to negotiate with Iran are futile and “will now focus on subsequent actions to take to resolve this matter in accordance with international law.” MFA, Statement from International Coordination and Response Group for the victims of Flight PS752 marking two years since the tragic downing of Flight PS752 (6 January 2022). Further discussion of the matter in this forum would not be appropriate at this time.

Terrorist Bombings (“the ICSTB”). In addition, Ukraine’s Memorial documented numerous attacks against civilians which meet the requirements of Article 2(1)(b) of the ICSFT.

146. In its Counter-Memorial, Russia does not dispute Ukraine’s interpretation of the ICSTB or that attacks in Kharkiv, Kyiv, and Odesa constitute offenses under the ICSTB. Russia does take issue with Ukraine’s interpretations of Article 1(1)(b) of the Montreal Convention and Article 2(1)(b) of the ICSFT. But, once again, Russia’s arguments on interpretation create hurdles to cooperation in the area of terrorism financing that are not supported by the text’s plain meaning. Russia instead puts forward interpretations that make it more difficult to prove terrorism financing offenses and, consequently, easier for Russia to escape its obligations in connection with such offenses. Russia in particular tries to impose non-existent mental requirements but disregards the critical fact that the underlying offenses are committed by a *third party*. It would be entirely unreasonable to interpret the Convention to require a funder to know the mental state of such a third party.

147. With respect to the Montreal Convention, Russia proposes an implausible rule under which no offense is committed when a person acts unlawfully, fires an indiscriminate weapon incapable of distinguishing military from civilian aircraft, and consequently destroys a civilian aircraft and murders hundreds of people on board. With respect to Article 2(1)(b) of the ICSFT, Russia proposes an interpretation involving numerous deviations from the plain treaty text – for example, urging the Court not to consider the “nature or context” of acts that the treaty specifically directs should be evaluated according to their “nature or context.” Ukraine, by contrast, interprets these provisions in accordance with their ordinary meaning, in a common-sense manner that allows them to play their intended role.

B. The Parties Agree on the Interpretation of Article 2(1) of the ICSTB

148. Ukraine in its Memorial established that a series of bombing attacks in Kharkiv, Kyiv, and Odesa constitute offenses under the ICSTB, and are therefore covered acts under ICSFT Article 2(1)(a) (as well as constituting acts covered by Article 2(1)(b) in most

instances).¹⁹³ The Russian Federation does not dispute that these attacks constitute offenses under the ICSTB, or that they are covered acts under ICSFT Article 2(1)(a).¹⁹⁴

C. Article 2(1)(b) of the ICSFT Sets Forth a General Definition of Terrorist Acts, Which Russia Misinterprets

149. Article 2(1)(b) identifies a broad category of acts which may not be financed.

An act is covered by Article 2(1)(b) if it is an:

“[A]ct intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.”

150. As is the case throughout its Counter-Memorial, Russia’s approach to Article 2(1)(b) is to depart from the plain text in order to make an Article 2(1) offense exceedingly difficult to prove, and thereby to minimize its own obligations to cooperate in the prevention and suppression of terrorism financing under the ICSFT. A common thread running through all of Russia’s interpretive arguments is to ignore the context of Article 2(1)(b), which defines the acts of *third parties* that may not be funded. According to Russia, the phrase “act intended to cause death or serious bodily injury” in Article 2(1)(b), for example, requires proof of the mental state of a third-party perpetrator, while some degrees of intent that are well-recognized under criminal law will not meet that requirement. Similarly, Russia resists drawing inferences about the purpose of the third party’s act based on its nature or context — effectively reading the words “nature or context” out of the provision — and proposes other atextual and unrealistic barriers to establishing purpose.

151. The facts established by Ukraine, which include deliberate attacks on civilians, would satisfy even Russia’s exacting proposed standards. The Court therefore need not resolve

¹⁹³ Ukraine’s Memorial, Chapter 1, Section D; *ibid.*, Chapter 4, Section E.

¹⁹⁴ The Russian Federation disputes Ukraine’s evidence of Russian officials’ support of the bombing attacks in Ukrainian cities. Russia’s Counter-Memorial Part I, paras. 506, 508. Ukraine responds to Russia’s claim in Chapter 7 below.

some of the misleading interpretive issues raised by Russia concerning Article 2(1)(b). As this Section shows, however, Russia’s interpretation of Article 2(1)(b) is incorrect.

1. “Act Intended to Cause Death or Serious Bodily Injury to a Civilian”

152. Although the parties disagree on certain points regarding the interpretation of the “act intended to cause” phrase in Article 2(1)(b), Russia’s Counter-Memorial confirms two important points of common ground.

153. First, the parties agree that if an act deliberately targets civilians, including during an armed conflict, that satisfies the “act intended to cause” requirement.¹⁹⁵ As described in Ukraine’s Memorial, and further set forth in Chapter 6 below, Ukraine’s evidence establishes attacks by the DPR and LPR that deliberately targeted civilians.¹⁹⁶ Given this evidence, it is not necessary for the Court to determine the full breadth of acts that may be considered an “act intended to cause death or serious bodily injury to a civilian.”

154. Second, Russia acknowledges that, if an attack would qualify under IHL as “making civilians or a civilian population the object of an attack,” that would “inherent[ly]” mean that it is an “act intended to cause” civilian harm under Article 2(1)(b).¹⁹⁷ To be clear, contrary to Russia’s suggestion, IHL and the ICSFT are distinct bodies of law, and the fact that an act is not prohibited under IHL does not necessarily mean that it is an act that may be funded without committing an offense under the ICSFT. However, as a matter of interpretation, any act that makes civilians the object of an attack necessarily falls within the

¹⁹⁵ See, e.g., Russia’s Counter-Memorial Part I, para. 213 (“Article 2(1)(b) of the ICSFT must be understood as encompassing, in a situation of an armed conflict, intentional attacks on civilians only.”); see also *ibid.*, para. 207 (“It follows that Article 2(1)(b) of the ICSFT, just like the rule of international humanitarian law to which it is related, requires a considered decision and the determination of the perpetrator deliberately to attack civilians”).

¹⁹⁶ See Ukraine’s Memorial, paras. 211–212, 222–223, 228, 238, 248, 256, 262; *infra*, Chapter 6.

¹⁹⁷ Russia’s Counter-Memorial Part I, para. 205.

ordinary meaning of an “act intended to cause” civilian harm, a point on which the parties agree. As Ukraine has demonstrated, moreover, there are different ways to establish that civilians have been made the “object of an attack.”¹⁹⁸ As stated by this Court in its *Nuclear Weapons* Advisory Opinion and noted above in the discussion of the Montreal Convention, “us[ing] weapons that are incapable of distinguishing between civilian and military targets” constitutes “mak[ing] civilians the object of attack.”¹⁹⁹ At the Preliminary Objections stage, Ukraine made this point explicitly, but Russia has chosen not to address it in its Counter-Memorial.²⁰⁰

i. “Act Intended to Cause” Refers to the Objective Consequences of an Act, Not a Requirement to Prove a Third Party’s Mental State

155. According to Russia, the phrase “act intended to cause” refers to the perpetrator’s “intention,” and only in the sense of what the perpetrator desires.²⁰¹ However, the ordinary meaning of the phrase “act intended to cause,” read in its context, indicates that it does not impose a “mental state” requirement at all. Rather, it describes the nature of a third party’s *act* which may not be funded, which can only be determined objectively. “Acts” do not

¹⁹⁸ See *supra*, paras. 134–140.

¹⁹⁹ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 257, para. 78.

²⁰⁰ Ukraine’s Written Statement, paras. 233, 251 n.463; see also *supra*, paras. 134–140. Ukraine has also established that indiscriminately attacking civilian areas may constitute an attack directed against civilians — even if military objects are also alleged to be present. See *ibid.*, para. 233. In *Prosecutor v. Galić*, the ICTY explained that “indiscriminate attacks, that is to say, attacks which strike civilians or civilian objects and military objectives without distinction, may qualify as direct attacks against civilians.” *Prosecutor v. Galić*, Case No. IT-98-29-T, Trial Chamber Judgment (5 December 2003), para. 57 (Ukraine’s Memorial, Annex 464); see also *Prosecutor v. Martić*, Case No. IT-95-11-T, Trial Chamber Judgment (12 June 2007), para. 472 (Martić fired indiscriminately at an area with both civilians and military targets; because he “knew of the effects of [his] weapon,” he “willfully made the civilian population of Zagreb the object of [his] attack”) (Ukraine’s Memorial, Annex 465). Russia’s Counter-Memorial does not address this point, either.

²⁰¹ See, e.g., Russia’s Counter-Memorial Part I, paras. 179–189.

have mental states or subjective desires; they have natural consequences and destinations which can be objectively assessed.

156. Equally authoritative versions of the treaty in the French and Russian languages further demonstrate this point. The French version uses the phrase “acte destiné à,” which concerns the ordinary destination of *the act*. Tellingly, in its Counter-Memorial, Russia attempts to interpret “the term ‘destiné à’” in isolation, rather than the full phrase “acte destiné à.”²⁰² Russia’s interpretation that this language refers to a mental state ignores the word “acte” in the text.

157. The phrase “act intended to cause” must also be read in context. The chapeau of Article 2(1) stipulates that a person commits a terrorism financing offense if he or she “provides funds with the intention that they should be used or in the knowledge that they are to be used” to carry out covered acts. This is a mental state requirement for the funder of terrorist acts, focused on whether the individual offender acts “with” the requisite intention or “in” the requisite knowledge. The French and Russian versions reflect the same. In French, the Article 2(1) funder of terrorist acts must act “dans l’intention,” whereas the Article 2(1)(b) act must be an “acte destiné à.” Similarly, in Russian, the mental state of the Article 2(1) funder of terrorist acts is described as “умышленно” (*umyshlenno*) which translates as “intentionally” or “wilfully.”²⁰³ By contrast, Article 2(1)(b) uses the different word “направленного” (*napravlennogo*), which translates as “aimed at” or “directed at.”²⁰⁴ The

²⁰² Russia’s Counter-Memorial Part I, paras. 182–185.

²⁰³ ICSFT, art. 2(1) (authentic Russian text). *See also* Lingvo Universal Russian-to-English Dictionary, *умышленно* (software ed., 2018) (translating “умышленно” as, *inter alia*, “willfully”) (Ukraine’s Written Statement, Annex 89).

²⁰⁴ ICSFT, art. 2(1) (authentic Russian text). *See also* Lingvo Universal Russian-to-English Dictionary, *направлять* (software ed., 2018) (translating “направлять,” the relevant grammatical variant of “направленного” into English as, *inter alia*, “direct (at, to)” and “aim (at)”) (Ukraine’s Written Statement, Annex 88).

question of what an act is aimed or directed at is an objective question, not a question of the particular desires of the actor.²⁰⁵ This distinction between the mental state of the funder of terrorist acts and the objective aim of the act makes sense in the broader context of Article 2. The funder is the person directly responsible for committing the offense, whereas it is a third party that commits the underlying act that may not be funded. It would be unusual and unrealistic to define a criminal offense that requires proof of the actual mental state of a third party.

158. In addition, contrary to Russia’s suggestion, the *mens rea* of genocide under the Genocide Convention does not support Russia’s claim that Article 2(1)(b) requires “direct intent.”²⁰⁶ Article II of the Genocide Convention requires that the offender act “with intent to destroy.” However, Russia again conflates the mental state of the person who commits the criminal offense (in this case the financing of terrorist acts), with the description in Article 2(1)(b) of a third party’s act which may not be funded. As noted above, the chapeau of Article 2(1) uses the phrase “with the intention” to define one potential mental state of the terrorism financing offender (along with “in the knowledge”). Article 2(1)(b), by contrast, uses *different* language to describe the act which may not be funded, referring objectively to the natural consequences of an act.²⁰⁷

²⁰⁵ See, e.g., *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Trial Chamber Judgment (24 March 2016), para. 454 (identifying various objective criteria for considering whether an attack is directed at a civilian population).

²⁰⁶ See Russia’s Counter-Memorial Part I, paras. 227–228.

²⁰⁷ The *travaux préparatoires* of the Genocide Convention confirm the error of Russia’s interpretation. During the negotiation of the Genocide Convention, the Soviet delegate objected that “intent to destroy” was too stringent a requirement, and proposed to replace it with the phrase “aimed at the physical destruction.” See Sixth Committee of the General Assembly, 73rd Meeting, *Continuation of the Consideration of the Draft Convention on Genocide: Report of the Economic and Social Council*, U.N. Doc. A/C.6/SR.73 (1948), p. 95 (emphasis added) (Ukraine’s Written Statement, Annex 1). However, the Soviet proposal was seen by other delegations as transforming a mental state requirement into an “objective” criterion, and it was ultimately rejected. *Ibid.*, pp. 96–97.

159. The decision of the Italian Supreme Court of Cassation in *Italy v. Abdelaziz and ors* further indicates that the phrase “act intended to cause” calls for an objective assessment of the circumstances of the act. Interpreting Article 2(1)(b), the Italian court held that the provision covers “an attack using explosives against a military vehicle in a crowded market” because the “specific factual circumstances of the event show that serious harm to life and the physical integrity of civilians is *certain and unavoidable*.”²⁰⁸ The Italian court’s discussion of what the “specific factual circumstances of the event show” reflects a proper focus on the objective characteristics of the act and its natural consequences. Russia does not demonstrate otherwise, instead asserting that the Italian court’s decision indicates that it contemplated only the highest degree of *dolus*.²⁰⁹ However, consistent with its focus on the objective characteristics of the act, the Italian court took the position that intent could be inferred from the perpetrator’s actions where a particular outcome was certain.²¹⁰ Similarly, the decision of the Supreme Court of Denmark, interpreting Denmark’s legislation implementing the ICSFT in the *Fighters and Lovers Case* supports an objective approach. In the view of the Danish court, the FARC’s use of “imprecise mortar shells in civilian areas, in which civilians became victims,” constituted terrorist acts which could not be funded.²¹¹

160. Instead of engaging with Ukraine on these issues, Russia’s Counter-Memorial mischaracterizes Ukraine’s position regarding the “act intended to cause” requirement.

²⁰⁸ *Italy v. Abdelaziz and ors*, Final Appeal Judgment, No. 1072, 2007, 17 Guida al Diritto 90, ILDC 559, Supreme Court of Cassation, Italy, 17 January 2007, paras. 4.1, 6.4 (Ukraine’s Memorial, Annex 473) (emphasis added).

²⁰⁹ Russia’s Counter-Memorial Part I, paras. 221–223.

²¹⁰ *Italy v. Abdelaziz and ors*, Final Appeal Judgment, No. 1072, 2007, 17 Guida al Diritto 90, ILDC 559, Supreme Court of Cassation, Italy, 17 January 2007, paras. 4.1, 6.4 (Ukraine’s Memorial, Annex 473) (emphasis added).

²¹¹ *Fighters and Lovers Case*,” Case 399/2008, Supreme Court of Denmark (25 March 2009), pp. 1–2 (Ukraine’s Memorial, Annex 476).

According to Russia, “Ukraine contends that the Court may simply draw inferences from the occurrence of a particular act,” an approach Russia says “was explicitly rejected” in the *Croatian Genocide* case.²¹² However, Ukraine has never suggested that the fact of civilian casualties, by itself, proves that an act was intended to cause those casualties. Rather than assisting Russia, the *Croatian Genocide* case supports Ukraine’s position. In *Croatian Genocide*, the Court concluded that Serbia had not established that the killing of civilians was intentional for purposes of the Genocide Convention because the evidence did not establish “indiscriminate shelling.”²¹³ The Court’s reasoning suggested that if indiscriminate shelling *had* been established, that finding would have supported a conclusion that the killing of civilians was intentional.

161. Russia takes an extreme position, suggesting that the mere presence of a possible military target anywhere in the vicinity negates a conclusion that an act is intended to cause harm to civilians.²¹⁴ Under Russia’s reading, an act attacking a heavily populated civilian area where a single soldier might be traveling could never be intended to cause harm to civilians. However, the authorities discussed by Ukraine, for which Russia has no response, demonstrate that Russia is incorrect. As these authorities show, an attack may still qualify as being directed at civilians (and thus an act intended to cause civilian death or serious bodily injury), including on the basis of being indiscriminate, even if there is a military object in the vicinity that could, in theory, be lawfully be targeted.²¹⁵ Moreover, even assuming direct intent

²¹² See Russia’s Counter-Memorial Part I, para. 224.

²¹³ See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015*, p. 137, para. 472.

²¹⁴ See, e.g., Russia’s Counter-Memorial Part I, para. 367 (suggesting that if a target is not “a purely civilian objective,” it cannot have been an intentional attack on civilians but the only question is whether it was “proportionate”).

²¹⁵ See *supra*, para. 137, para. 154, n.200.

to harm civilians must be proved, the mere presence of a military object in the vicinity does not mean that the military object was the *actual* target or reason for the attack, especially when there is no apparent military reason for such a targeting decision.²¹⁶

ii. Even if Article 2(1)(b) Were Considered a Mental State Requirement, the Word “Intended” Encompasses Different Degrees of Intent

162. If “act intended to cause” were nonetheless considered a requirement to establish a mental state of the third-party perpetrator, the word “intended” would still need to be given its proper meaning according to ordinary principles of treaty interpretation. As discussed in Chapter 5, Section A(2), the ordinary meaning of “intended,” particularly as it is used in the criminal law context, encompasses several degrees of intent, including *dolus directus*, *dolus indirectus*, and *dolus eventualis*. The points made above concerning the ordinary meaning of “intentionally” as used in the Montreal Convention apply equally under the ICSFT, if Article 2(1)(b) were interpreted as a mental state requirement.²¹⁷

163. In relation to the ICSFT specifically, Russia asserts that interpreting the phrase “intended to cause death or serious bodily injury” to encompass the normal degrees of intent under criminal law would not be “in line” with IHL, because intent might be established by an attack causing “expected collateral damage” which “could be lawful under international humanitarian law.”²¹⁸ As an initial matter, this argument has no relevance to the present dispute, because Russia does not and could not defend any of the attacks at issue as consistent with IHL. More fundamentally, the ICSFT and IHL are distinct bodies of law with different

²¹⁶ See, e.g., *infra*, para. 235; Second Expert Report of Lieutenant General Christopher Brown (21 April 2022), para. 11(c) [hereinafter Brown Second Report] (Ukraine’s Reply, Annex 1).

²¹⁷ See *supra*, para. 141.

²¹⁸ Russia’s Counter-Memorial Part I, paras. 198, 201; see also *ibid.* Section V.I.C (“The Object and Purpose of the ICSFT as Well as an Interpretation in Line with International Humanitarian Law Warrants Encompassing Direct Intent Only.”).

objectives. The question under Article 2 of the ICSFT is whether certain acts described by that article may be *unlawfully funded*. Whether or not the perpetrator of the underlying act might separately be responsible for violating IHL is irrelevant.²¹⁹

164. Russia also contends that the chapeau of Article 2(1) of the ICSFT, which refers to the funder as having either knowledge or intention, “implicitly excludes knowledge-based standards” from Article 2(1)(b), because Article 2(1)(b) only refers to an “act intended to cause.”²²⁰ Russia’s argument ignores the fact that the Article 2(1) chapeau and Article 2(1)(b) use different words (“with the intent” / “dans l’intention” versus “act intended to cause” / “acte destiné à”) reflecting their fundamentally different purposes. The Article 2(1) chapeau identifies the mental state of the funder. By contrast, Article 2(1)(b) concerns the nature of the covered act that a third party might commit.²²¹

2. The “Purpose of Such Act,” According to its “Nature or Context”

165. An act intended to cause death or serious injury to a civilian is covered by Article 2(1)(b) “when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain

²¹⁹ Indeed, an act that does not violate IHL may still be unlawful under other sources of law. *See infra*, para. 183. In a similar vein, Russia attempts to draw upon IHL when pointing out the fact that various rules of IHL have “different standards of *mens rea*.” *See* Russia’s Counter-Memorial Part I, para. 204. Russia cannot explain what relevance this point has to the interpretation of the phrase “act intended to cause” in Article 2(1)(b) of the ICSFT. Moreover, to the extent Russia means to argue that indiscriminate attacks cannot qualify as making civilians the object of attack (and thus meeting even Russia’s heightened “direct intent” standard), that is inconsistent with the jurisprudence of this Court and the ICTY, as explained above. *See supra*, para. 137, para. 154 n.200.

²²⁰ Russia’s Counter-Memorial Part I, para. 191.

²²¹ *See supra*, para. 157. For similar reasons, the reference to “intent” in Article 2(1) of the ICSTB does not support Russia’s interpretation of Article 2(1)(b) of the ICSFT. *See* Russia’s Counter-Memorial Part I, para. 167. Article 2(1) of the ICSTB, like the chapeau of Article 2(1) of the ICSFT, refers to the mental state of the perpetrator, who must act “with the intent to cause” one of the specified harms. *See* ICSTB, art. 2(1)(a) & 2(1)(b). By contrast, Article 2(1)(b) of the ICSFT refers to the objective nature of a third-party’s act. Russia’s assumption that “with the intent” and “act intended to cause” must have the same meaning is therefore misguided.

from doing any act.” Russia’s interpretation of the “purpose” requirement cannot be reconciled with the ordinary meaning of the relevant language viewed in context within the structure of the treaty. Russia’s interpretation also is inconsistent with both international and domestic practice. Once again, Russia departs from ordinary meaning and treaty interpretation principles in order to make an Article 2 offense harder to prove, and its own obligations under the ICSFT easier to escape.

i. “Purpose” Is Based on an Objective Assessment Inferred from the Act’s “Nature or Context”

166. The plain text of Article 2(1)(b) is unambiguous and does not reference the third-party perpetrator’s subjective intent or mental state; rather, it focuses on an objective determination: “when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government.”²²² The “purpose” thus refers to the *act* itself (“purpose of *such act*”), not the subjective mental state of the perpetrator, and such purpose must be inferred as an objective matter based on the “nature or context” of that act.

167. The focus of the Article 2(1)(b) “purpose” prong on the objective nature of the act makes particular sense when considering it within the context of Article 2(1) as a whole. In its Counter-Memorial, Russia ignores this point and instead frames its argument around “terrorism” being a special-intent crime.²²³ However, as explained earlier, the relevant mental state for the offense of terrorism financing is that of the funder, not the third-party perpetrator

²²² ICSFT, art. 2(1)(b) (emphasis added).

²²³ See Russia’s Counter-Memorial Part I, Chapter V, Part II (“The Required Purpose of Terrorism Qualifies Terrorism as a Special Intent Crime”); *ibid.*, Chapter V, Part II, Section A (“Terrorism Requires a Specific Intent”). Presumably Russia focuses on the “special intent” needed for the crime of terrorism in order to suggest that the evidentiary burden is higher than it otherwise would be. However, the ICSFT does not establish an offense of “terrorism.” Moreover, as explained below, the “crime of terrorism” under IHL — as Russia refers to it in Article 51(2) of the Additional Protocol I — differs from the act defined in Article 2(1)(b). See *infra*, para. 185.

of the acts covered by Article 2(1)(b).²²⁴ The fact that covered acts are committed by a third party means that objective indicia of purpose will be vital, which explains the Convention’s use of the phrase “nature or context.”

168. Remarkably, Russia faults Ukraine for simply following the text of the Convention. According to Russia, the fundamental flaw in Ukraine’s interpretation is that Ukraine “simply attempts to rely on *the nature and context*, suggesting that the Court may infer the existence of the required mental element of *dolus specialis* from the fulfilment of certain objective elements.”²²⁵ Ukraine does “rely on the nature and context,” because that is precisely what the plain text of Article 2(1)(b) requires. This approach is supported by a commentary written shortly after the drafting of the ICSFT by Anthony Aust, former Deputy Legal Adviser of the United Kingdom Foreign and Commonwealth Office. Aust explained that “[t]he criteria for judging the purpose of the act is objective,” which is “made clear by the references to the ‘nature’ of the act and its ‘context.’”²²⁶ Under Russia’s approach, however, the words “by its nature or context” would be read out of the treaty altogether, defying the principle that all parts of a treaty should be given effectiveness.²²⁷

²²⁴ See *supra*, para. 123; see also *supra*, Chapter 4, Section B.

²²⁵ Russia’s Counter-Memorial Part I, para. 264 (emphasis added); see also *ibid.*, paras. 264–282.

²²⁶ Anthony Aust, *Counter-Terrorism—A New Approach: The International Convention for the Suppression of the Financing of Terrorism*, 5 Max Planck Y.B. U.N. L. 285, 298 (2001) (Ukraine’s Memorial Annex 485). See also U.K. Legal and Constitutional Affairs Division of the Commonwealth Secretariat, *Implementation Kits for the International Counter-Terrorism Conventions*, p. 270, para. 22 (“Yet the references to the ‘nature or context’ of the act shows that the purpose must be judged objectively.”).

²²⁷ See *Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, *Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 120, para. 41. (“[T]he interpretation of a treaty should seek to give effect to every term in that treaty,” such “that no provision should be interpreted in a way that renders it devoid of purport or effect.”).

169. In its Counter-Memorial, Russia advances a novel interpretation of the “purpose” prong of Article 2(1)(b) according to which there must be direct proof of intent, or only one plausible inference based on the circumstances.²²⁸ Thus, even *if the most likely* inference is that an act’s purpose is intimidating a civilian population or compelling a government to act or abstain from acting, Russia’s position is that this act may be funded without consequences and Russia need not cooperate in its prevention, as long as some other inference is plausible (though less likely).

170. Russia argues for this heightened evidentiary standard by portraying the “purpose” prong of Article 2(1)(b) as a “specific intent” element akin to that found in the crime of genocide.²²⁹ This analogy is misconceived. The text of the ICSFT is unambiguous in that the “nature or context” — *i.e.*, objective indicia — are used to assess purpose, whereas the Genocide Convention includes no such language. Article 2(1)(b) of the ICSFT is focused on identifying the purpose of a third-party’s action, whereas the Genocide Convention is focused on the specific intent of the perpetrator of genocide. These differences make it impossible to transpose onto the ICSFT the rule this Court has applied under the Genocide Convention, under which “in order to infer the existence of *dolus specialis* from a pattern of conduct, it is necessary and sufficient that this is the only inference that could reasonably be drawn from the acts in question.”²³⁰

171. The *travaux préparatoires* confirm that a purpose to intimidate a population or compel a government to act or abstain from acting is to be inferred from the “nature or

²²⁸ Russia’s Counter-Memorial Part I, para. 272; *see also ibid.*, para. 264.

²²⁹ Russia’s Counter-Memorial Part I, paras. 237–238, 271–272.

²³⁰ *See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015*, p. 147, para. 148.

context” of the act, and that Russia is incorrect in suggesting that there must be direct evidence of purpose or only one possible inference. An October 1999 “Informal summary of the discussions in the Working Group” shows that the phrase “by its nature or context” was meant to recognize that direct evidence of the attacker’s specific agenda will often be unavailable, and thus an objective evidentiary standard is appropriate.²³¹ The Working Paper, prepared by the Chairman of the Working Group on Measures to Eliminate Terrorism, Mr. Philippe Kirsch, commented on what became the final text of Article 2(1)(b), noting that “[a] proposal was made to delete the phrase ‘by its nature or context’. Some opposed this deletion because it would suggest that the offense required proof of the perpetrator’s subjective state of mind.”²³² The phrase “by its nature or context” was ultimately retained. The natural inference from its inclusion, in light of this negotiating history, is that the Parties decided *not* to require proof of the third-party perpetrator’s subjective state of mind.

172. Russia asserts that the statement noted above was part of “a mere summary reflecting the intense debate that had taken place with regard to this particular element.”²³³ Russia, however, disregards the fact that the Chairman of the Working Group was commenting on text *after* that “intense debate,” which was resolved in favor of language requiring an objective, not subjective, assessment of purpose.²³⁴

²³¹ Annex III, *Informal Summary of the Discussions in the Working Group, prepared by the Chairman, in Measures to Eliminate International Terrorism: Report of the Working Group*, U.N. Doc. A/C.6/54.L2, p. 62, para. 88 (26 October 1999) (Ukraine’s Memorial, Annex 277).

²³² *Ibid.*

²³³ Russia’s Counter-Memorial Part I, para. 265.

²³⁴ The resolution of this debate is further explained by the source Russia cites, a dissertation by Carlos Fernando Díaz-Paniagua, who served as Vice-Chairman of the Negotiating Committee during the drafting of the ICSFT. As Mr. Díaz-Paniagua explains, delegations were concerned that “[i]n real-life criminal cases, it is much easier to prove in court that an act is capable to causing fear, in view of the concrete, objective situation; than to prove that the person who did it actually wanted to cause terror.” See Carlos Fernando Díaz-Paniagua, *Negotiating Terrorism: The Negotiation Dynamics of Four UN Counter-Terrorism Treaties, 1997-2005*, Vol. II, p. 465 (2011). Mexico proposed to “solve

ii. Nature or Context Establishing that the Purpose of an Act Is to “Intimidate a Population”

173. Article 2(1)(b) is satisfied if one of two alternative purposes is present. The first purpose is to “intimidate a population,” and the second is “to compel a government or an international organization to do or to abstain from doing any act.” Deliberate attacks on civilian areas, and indiscriminate attacks on areas where civilians and military objects are present (including attacks using weapons incapable of discriminating), will satisfy this first purpose.

174. As Ukraine explained in its Memorial, similar inferences have been drawn even in the context of the war crime of spreading terror where the mental state of the perpetrator is at issue. Russia does not respond to Ukraine’s observation that under the ICTY’s jurisprudence, intent to spread terror may be inferred from the circumstances of an attack on civilians. Instead, Russia simply asserts that the war crime of spreading terror is a “specific intent” crime, and therefore “the same must also hold true for the offense defined in Article 2(1)(b) of the ICSFT.”²³⁵ Not only does Russia not engage with the ICTY’s reliance on objective indicia, but it also ignores the critical difference between the war crime of spreading terror and the Article 2(1) offense under the ICSFT. In a case prosecuting the war crime of spreading terror, its characterization as a “specific intent” crime makes sense because the defendant’s own mental state is at issue, and must be proved beyond a reasonable doubt. Article 2(1)(b), by contrast, does not define whether a particular defendant has a particular criminal intent, but rather defines which acts may not be funded, calling for an objective assessment based on “nature or context.” As the ICTY was able to infer *specific intent* to spread terror from the

this problem” by allowing the “purpose of the actor” to “be inferred from well-founded evidence or objective and actual circumstances.” *Ibid.* Ultimately, as Mr. Díaz-Paniagua summarizes, “after a round of private, bilateral consultations,” the coordinator prepared a definition that “required that the purpose of the murder be to intimidate a population or compel a government, while it allowed states to infer it from the context in which the murder was carried out.” *Ibid.*, pp. 465–466. Contrary to Russia’s characterization, therefore, both the final treaty text and the negotiating history reflect that the purpose of the act should be inferred from the nature or context of the act. *See* Russia’s Counter-Memorial Part I, para. 266.

²³⁵ Russia’s Counter-Memorial Part I, para. 258.

objective circumstances of an attack on civilians, it is all the more appropriate under the ICSFT to infer that an act, based on its nature or context, has the requisite purpose.

175. Beyond the ICTY's jurisprudence, numerous other courts and legal authorities have recognized that attacking civilians during an armed conflict will generally be sufficient to establish a terroristic "purpose." Russia disregards, for instance, the explanation by the Special Tribunal for Lebanon that "ratif[ying] the Convention for the Suppression of the Financing of Terrorism without making any reservation, thereby accept[s] the notion that the financing of persons or groups attacking innocent civilians in time of armed conflict, as well as, in consequence, the perpetration of such attacks, may be categorised as 'terrorism.'"²³⁶ Likewise, in its 2015 Report, the U.N. Commission of Inquiry on Gaza observed that "indiscriminate" rocket attacks, using imprecise weapons that "rais[e] the question as to what military advantage [the armed groups] could expect to obtain," support finding a purpose of spreading terror.²³⁷

176. In domestic cases under statutes implementing the ICSFT, the same standards have been applied. This practice is illustrated by the judgments of the Italian Supreme Court of Cassation and Supreme Court of Denmark discussed earlier. In *Italy v. Abdelaziz and ors*, the Italian Supreme Court of Cassation held that a situation where there are attacks on military and civilian targets in the same location will "creat[e] fear and panic among the local people,"

²³⁶ See *Prosecutor v. Ayyash et al.*, Case No. STL-11-01, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, pp. 70–71, para. 108 (Special Trib. for Lebanon 16 February 2011) (Ukraine's Memorial, Annex 469); see also Ukraine's Memorial, para. 205, n.476.

²³⁷ United Nations Human Rights Council, *Report of the Detailed Findings of the Independent Commission of Inquiry Established Pursuant to Human Rights Council Resolution S-21/1*, U.N. Doc. No. A/HRC/29/CRP.4 (23 June 2015), para. 99.

thereby “achiev[ing] the particular results that constitute terrorist purposes.”²³⁸ The Italian court rejected the position — similar to that advanced by Russia here — that “the joint presence of military and civilian victims” could be “an element sufficient in itself to deny the terrorist nature of the act,” noting that such a position “undoubtedly lacks coherence and rationality.”²³⁹

177. Russia engages in a strained effort to minimize the analysis of the Italian Supreme Court of Cassation. According to Russia, the Italian court’s holding was limited to a “peculiar and concrete factual situation” that the Italian court believed “might allow for a finding as to the terrorist purpose of a particular act.”²⁴⁰ But nothing in the decision suggests that the Italian court meant to confine its reasoning in that way. To the contrary, the Italian court articulated the following point in general terms: where the “circumstances” are such that “serious harm to the life and integrity of the civilian population are inevitable, creating fear and panic among the local people,” this situation “shows unequivocally that the committing of an intentional and specific act” is “marked by an intent to engage in the action and achieve the particular results that constitute terrorist purposes.”²⁴¹

178. In the *Fighters and Lovers Case*, the Supreme Court of Denmark applied a similar standard. The Danish court determined that acts had a purpose “of terrorizing th[e] population to a serious extent or to destabilize the fundamental political, constitutional, economic and social structures” based on the nature of the attacks, including the use of

²³⁸ *Italy v. Abdelaziz and ors*, Final Appeal Judgment, No. 1072, 17 Guida al Diritto 90, Supreme Court of Cassation, Italy, 17 January 2007, para. 4.1 (Ukraine’s Memorial, Annex 473).

²³⁹ *Ibid.*

²⁴⁰ Russia’s Counter-Memorial Part I, para. 294.

²⁴¹ *Italy v. Abdelaziz and ors*, Final Appeal Judgment, No. 1072, 17 Guida al Diritto 90, Supreme Court of Cassation, Italy, 17 January 2007, paras. 4.1, 6.4 (Ukraine’s Memorial, Annex 473) (interpreting Article 2(1)(b) of the ICSFT).

imprecise weapons in civilian areas.²⁴² Russia attempts to distinguish this case as being based on the Court’s decision “to qualify the FARC as a *terrorist organisation*,” a characterization Russia contends does not apply to the groups at issue in this case.²⁴³ But the Danish court never referred to any designation of the FARC as a “terrorist organization.” Rather, the Danish court relied upon the objective nature of the FARC’s *acts* to conclude that it “perpetrated serious attacks on a civilian population with the intent of terrorizing that population.”²⁴⁴

179. Moreover, while Russia attempts to draw support from this Court’s decision in *DRC v. Uganda*, Russia misstates that decision. According to Russia, the Court had “emphasized that even if there was ‘credible evidence sufficient to conclude that the UPDF troops committed [certain offenses] . . . and [that they] did not take measures to ensure respect for human rights and international humanitarian law,’” the Court “still did not agree that these acts constituted acts of terror, as claimed by the DRC.”²⁴⁵ However, the DRC never asked the Court to determine that any particular attack on civilians constituted a terrorist act as defined in the ICSFT, or even the war crime of spreading terror. Rather, the DRC made a passing remark in its Memorial that the Ugandan authorities had “visibly endorsed” a “deliberate

²⁴² “Fighters and Lovers Case,” Case 399/2008, Supreme Court of Denmark (25 March 2009), pp. 1–2 (Ukraine’s Memorial, Annex 476).

²⁴³ Russia’s Counter-Memorial Part I, para. 292.

²⁴⁴ “Fighters and Lovers Case,” Case 399/2008, Supreme Court of Denmark (25 March 2009), pp. 1–2 (Ukraine’s Memorial, Annex 476). In fact, the only reference to terrorist organizations in the document goes against Russia’s stance, noting: “The Supreme Court finds that the fact that the accused do not view FARC or PFLP as terrorist organizations cannot be ascribed significance with respect to the issue of guilt, insofar as it must be accepted that, based on the High Court’s evidentiary assessment, they possessed the factual knowledge of the actions of FARC and PFLP required for intent.” “Fighters and Lovers Case,” Case 399/2008, Supreme Court of Denmark (25 March 2009), p. 2 (Ukraine’s Memorial, Annex 476).

²⁴⁵ Russia’s Counter-Memorial Part I, para. 273 (quoting *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, *I.C.J. Reports 2005*, paras. 211–212).

policy of terror.”²⁴⁶ In such circumstances, the Court in its judgment simply found no “specific evidence supporting” a claim “that Uganda carried out a deliberate policy of terror.”²⁴⁷

180. Russia’s claim that Ukraine has “fail[ed] properly to contextualise the situation,”²⁴⁸ and that in an armed conflict there must be “extreme fear,”²⁴⁹ is also misguided. Article 2(1)(b) expressly refers to “a situation of armed conflict,” so it makes little sense to read into that provision a higher threshold for what “terror” means in armed conflict. Article 2(1)(b) does not use the words “terror” or “extreme fear.” The purpose of the act, by its nature or context, must be to intimidate a civilian population. In any event, Ukraine’s evidence shows much more than the “overall frightening situation”²⁵⁰ of armed conflict.²⁵¹

iii. Nature or Context Establishing that the Purpose of an Act Is “to Compel a Government . . . to Do or Abstain from Doing Any Act”

181. Russia also attempts to make it virtually impossible to prove Article 2(1)(b)’s alternative purpose “to compel a government or an international organization to do or to abstain from doing any act.” According to Russia, acts in an armed conflict “will always, and indeed inevitably, be to compel a government to do or to abstain from doing any act, i.e. to achieve military objectives and ultimately to bring about surrender by the other party to the

²⁴⁶ See *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Memorial of the Democratic Republic of the Congo, 6 July 2000, para. 4.71 (“Tout au contraire, la politique délibérée de terreur dont se rendent coupables ces forces est visiblement entérinée par les autorités ougandaises.”).

²⁴⁷ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, pp. 241–242, paras. 211–212.

²⁴⁸ Russia’s Counter-Memorial Part I, para. 275.

²⁴⁹ Russia’s Counter-Memorial Part I, paras. 275, 279.

²⁵⁰ Russia’s Counter-Memorial Part I, para. 276.

²⁵¹ See *infra*, Chapter 6.

conflict and translate a military victory into political gains.”²⁵² This can hardly be a reason not to give effect to the ordinary meaning of Article 2(1)(b) of the ICSFT. Russia’s demand for proof of “a purpose over and above the overall context” of the armed conflict is found nowhere in the text of Article 2(1)(b). As applied to this particular case, under Russia’s interpretation, the fact that the DPR and LPR’s attacks on civilians “occurred as the DPR and LPR demanded greater autonomy from Ukraine’s central authorities” would mean that any act by the DPR and LPR could not be viewed under Article 2(1)(b) as an act to compel a government to do or abstain from doing any act.²⁵³ Russia’s interpretation would read the plain language of Article 2(1)(b) — “when the purpose of such act, by its nature or context, is . . . to compel a government . . . to do or abstain from doing any act” — out of the treaty.

182. Russia’s argument is also inconsistent with its own laws. Article 205(1) of the Russian Criminal Code provides that the purpose requirement of an act of terrorism may be met by a purpose of “influencing” the “decision-making” of governmental bodies, which is analogous to the purpose of compelling a government prong of Article 2(1)(b).²⁵⁴ The commentary to the Russian Criminal Code, cited by Russia, explains that this purpose may be met where the “terrorists may demand, for instance, . . . cessation of an ongoing anti-terrorist operation in any territory launched by the government, withdrawal of military formations involved in such an operation, release of terrorists’ accomplices captured during the operation,

²⁵² Russia’s Counter-Memorial Part I, para. 285.

²⁵³ *See ibid.*, paras. 284–285.

²⁵⁴ *See* Criminal Code of the Russian Federation, art. 205(1) (Ukraine’s Reply, Annex 59).

and so on.”²⁵⁵ If these tactical purposes in an armed conflict qualify as compelling a government, then broader political aims of an armed group necessarily would qualify.

183. Russia’s concern that “any lawful act in any armed conflict” would be considered as “serv[ing] the purpose of spreading terror” is based on a fundamental legal error. Russia incorrectly assumes that acts which do not violate IHL are thereby “lawful” conduct.²⁵⁶ In general, IHL *prohibits* certain acts — it does not *permit* other acts. An act that is not prohibited by IHL may still violate other aspects of international law — for instance, human rights obligations, which apply concurrently with IHL in times of armed conflict.²⁵⁷ Russia’s current invasion of Ukraine further illustrates this point: Russia’s aggression against Ukraine is unlawful, so any act by Russia in the course of that conflict is unlawful, irrespective of whether any particular act is also prohibited by IHL. As a further example, an act that is not prohibited by IHL may violate domestic law. In a non-international armed conflict, members of a non-state armed group lack a combatant privilege and may be prosecuted for their participation in hostilities under domestic law.²⁵⁸ This legal point aside, as noted above, Russia’s concern is at best hypothetical in this case, where there is no credible argument that the acts at issue were consistent with IHL.

²⁵⁵ Commentary on Article 205, in *Article-by-Article Commentary on the Criminal Code of the Russian Federation: in Four Volumes*, Special Part, Section IX, Volume 3, Editor-in-Chief V.M. Lebedev, Urait, 2017 (Russia’s Counter-Memorial Part I, Annex 95).

²⁵⁶ Russia’s Counter-Memorial Part I, para. 285. Among Russia’s other errors, Russia’s focus on a “purpose of spreading terror” is not based on the text of the ICSFT. Under Article 2(1)(b), an act may be covered if its purpose, by its nature or context, is to “compel a government,” whether or not it also has a purpose of intimidating a population (or “spreading terror”).

²⁵⁷ See, e.g., *Case Concerning the Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Merits, Judgment, *I.C.J. Reports 2005*, p. 243, para. 216.

²⁵⁸ See, e.g., Nils Melzer, *The Principle of Distinction Between Civilians and Combatants*, in *THE OXFORD HANDBOOK OF INTERNATIONAL LAW IN ARMED CONFLICT*, p. 318 (Andrew Clapham & Paola Gaeta, eds., Oxford University Press 2014) (explaining that in a non-international armed conflict, “members of organized armed groups remain subject to prosecution for violations of domestic law even if they comply with IHL”) (Ukraine’s Reply, Annex 71).

184. Nor does it make any sense for Russia to warn that if the plain terms of Article 2(1)(b) are followed, there will be a “disincentive for non-state actors engaged in an armed conflict to abide by their obligations under international humanitarian law.”²⁵⁹ Such non-state actors may face both domestic and international criminal liability for their actions in violation of IHL, irrespective of the ICSFT. Article 2 of the ICSFT, by contrast, defines an offense targeting the *funders* of certain acts. Thus, the only relevant incentive is for would-be funders to ensure that they do not supply funds to non-state armed groups that commit acts intended to harm civilians in the course of seeking to compel a government to change its policies or take other action. No law-abiding State, particularly a State party to the ICSFT, should be threatened by an interpretation that creates such an incentive.

iv. Intimidating a Population or Compelling a Government Does Not Need to Be the Sole or Primary Purpose of the Act

185. In a final attempt to make it more difficult to prove that an act falls under Article 2(1)(b), Russia suggests that the “purpose of intimidating the population or compelling a government” must be the sole, or at least the primary, purpose of the act.²⁶⁰ Russia relies on the language of Article 51(2) of Additional Protocol I to the Geneva Conventions and Article 13(2) of Additional Protocol II to assert that the offense of terrorism requires establishing that the “primary purpose” of the relevant act is to spread terror among the civilian population.²⁶¹ However, Article 2(1)(b) speaks only of “the purpose,” not “the primary purpose.” Nor does Article 2(1)(b) refer to the “sole”²⁶² or “specific”²⁶³ purpose, as do other articles in Additional Protocol I. Had the drafters of the ICSFT meant to impose a “specific” or “primary” purpose requirement, they could have indicated it expressly. The absence of such language makes sense in light of the broader point articulated above: Article 2(1)(b) serves a different function

²⁵⁹ Russia’s Counter-Memorial Part I, para. 288.

²⁶⁰ Russia’s Counter-Memorial Part I, paras. 259–263.

²⁶¹ Russia’s Counter-Memorial Part I, paras. 261–262.

²⁶² Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, arts. 56(5), 59(3), 60(4).

²⁶³ *Ibid.*, art. 54(2).

of defining which acts may not be funded, not whether a particular defendant has a particular criminal intent. Requiring proof of the primary or sole purpose of a third party's act does not make sense in the context of a treaty whose focus is obligations of States Parties to cooperate to prevent and suppress the financing of terrorist acts, not to convict the third party actors themselves of a crime.

186. Longstanding principles of international law confirm that it would be unreasonable to demand that the required purpose be established as the only or primary purpose. In the well-known Zyklon B case, for example, the Nuremberg tribunal convicted German businessmen who sold Zyklon B to the Nazi regime, where the German businessman knew that Zyklon B would be used in gas chambers. The prosecution did not argue, and the tribunal did not hold, that the primary purpose of the businessmen was anything other than to make a profit.²⁶⁴ Nevertheless, the tribunal inferred a secondary purpose to encourage continued gassing of Jews, based on the fact that the businessmen continued to supply Zyklon B after learning of its use. This was sufficient for conviction.²⁶⁵

187. More recently, the ICTY explained that the purpose required as an element of an offense need not be the sole or main purpose. The crime of torture requires an act undertaken for a prohibited purpose, but “[t]he prohibited purpose needs not be the sole or

²⁶⁴ International Military Tribunal, *Trial of Bruno Tesch and Two Others (The Zyklon B Case)*, in U.N. War Crimes Commission, *Law Reports of Trials of War Criminals* (Vol. 1), p. 94 (1947), accessed at https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-1.pdf.

²⁶⁵ *Ibid.*, p. 102. See also Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, *Northwestern Journal of International Human Rights*, Vol. 6 (2008), p. 312 (“The court accepted that the purpose of the defendant businessmen in selling Zyklon B, while knowing that it would be used in the gas chambers, was to make a profit. . . . Yet by supplying gas in the knowledge that it would be used to kill human beings, [the court] infer[red] that one of their purposes — admittedly secondary — was to encourage continued mass killings of Jews.”) (Ukraine’s Written Statement, Annex 81).

the main purpose of the act or omission in question.”²⁶⁶ Similarly, confronted with an argument that the purpose of sexual gratification was not listed within the definition of torture, the ICTY stated that “[i]f one prohibited purpose is fulfilled by the conduct, the fact that such conduct was also intended to achieve a non-listed purpose . . . is immaterial.”²⁶⁷

188. Reading “sole,” “specific,” or “primary” into Article 2(1)(b)’s use of the phrase “the purpose” would also lead to unreasonable results, as it would ignore the fact that terrorist acts often have multiple purposes.²⁶⁸ For example, ISIS has committed numerous kidnappings with the dual purpose of intimidating the population and funding their general operations through ransom.²⁶⁹ Under Russia’s interpretation, a terrorist act that is committed with a purpose to intimidate or to compel a government, but also with what might be a primary purpose of raising money, would not qualify as a terrorist act under Article 2(1)(b). That is not a good faith interpretation of the provision.

189. In sum, Russia attempts to raise the bar with regard to what constitutes a terrorist act under Article 2(1)(b) by layering multiple additional proofs of specific intent, particular purpose, and states of mind onto the plain language of the Convention. Because these additional hurdles are not required by the text of the Convention and violate its object and purpose, these manufactured requirements must be rejected.

²⁶⁶ *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Trial Chamber Judgment (30 November 2005), para. 239.

²⁶⁷ *Prosecutor v. Kunarac et al.*, Case Nos. IT-96-23 & 23/1, Appeals Chamber Judgment (June 12, 2002), para. 155.

²⁶⁸ See *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I.C.J Reports 1995*, p. 19, para. 35 (adopting an interpretation of the treaty text based on the fact that “[a]ny other interpretation would encounter serious difficulties: it would deprive the phrase of its effect and could well, moreover, lead to an unreasonable result”).

²⁶⁹ CBS News, “Multiple Kidnappings for Ransom” Funding ISIS, Source Says (21 August 2014) (Ukraine’s Written Statement, Annex 87).

Section B: Acts of Terrorism Financing Under Article 2

Chapter 6. ILLEGAL ARMED GROUPS HAVE COMMITTED A PATTERN OF ACTS COVERED BY ARTICLE 2(1)(A) AND (B)

190. Ukraine’s Memorial demonstrated that, beginning in early 2014, illegal armed groups in Ukraine committed numerous acts covered by Article 2(1)(a) and (b) of the ICSFT.²⁷⁰ Ukraine in particular established that Russia’s proxies committed a pattern of targeted killings and torture of Ukrainian civilians, the shoot-down of Flight MH17, shelling attacks on civilian areas, and bombing attacks in Ukrainian cities.²⁷¹

191. In its Counter-Memorial, Russia does not contest the occurrence of these acts, the death to civilians they caused, or the intimidation experienced by the population of Ukraine as a result. Instead, Russia deploys two improper tactics.

192. First, Russia inappropriately focuses on labels, asking whether various U.N. reporting bodies or other international organizations have labeled the DPR and LPR “terrorists” or referred to their attacks on civilians as “terrorism.”²⁷² Whether the perpetrator of an act has been formally designated or labeled a “terrorist,” and whether a particular act has been called a “terrorist act” by international organizations, has no bearing on whether that act falls within subparagraphs (a) or (b) of Article 2(1). The Convention provides an objective definition of acts which may not be funded that does not turn on such administrative

²⁷⁰ See generally Ukraine’s Memorial, Chapters 1, 4.

²⁷¹ *Ibid.*

²⁷² See, e.g., Russia’s Counter-Memorial Part I, para. 1 (“Ukraine stands alone in its characterisation of the Donetsk People’s Republic (‘DPR’) and the Lugansk People’s Republic (‘LPR’) as ‘groups which have notoriously committed terrorist acts’, and likewise in its characterisations of the tragic shooting down of Flight MH17 and acts of shelling within the armed conflict as acts of ‘terrorism.’”); *ibid.*, para. 126 (“There has, however, been no such characterisation (whether by designation or otherwise) of the DPR/LPR, and the alleged perpetrators of terrorist acts in the present case can in no way be suggested to be notorious terrorist groups equivalent to groups such as Al-Qaida.”); *ibid.*, paras. 509–514 (“[S]uch acts have generally been characterised by the OHCHR, OSCE and others as violations of IHL and human rights law, rather than ‘terrorist’ acts.”).

designations. As Judge Robinson observed in his separate opinion at the Preliminary Objections phase of this case, the ICSFT only contains “a reference to terrorism in the preamble but no such reference in the article creating the offence or in any other article.”²⁷³ He continued that “it is no mere happenstance that the ICSFT does not describe the offence in Article 2 as terrorism,” as the word’s inclusion would have caused controversy and objections regarding its meaning.²⁷⁴ Ukraine relies on reports of international organizations not for the terminology they use, but for facts they have found consistent with their mandates.²⁷⁵

193. Second, Russia argues that Ukraine must prove the mental states of the individuals who perpetrated these various acts, and must do so according to an exceedingly demanding evidentiary standard based on a bundle of imagined requirements that have no basis in the treaty text. Russia largely does not dispute that its proxies caused significant death to civilians, but seeks to muddy the waters regarding the mental state of the perpetrators. This second tactic is based on erecting an improperly high evidentiary burden, as explained in Chapter 3, and putting forward incorrect legal interpretations of the text, as explained in Chapter 5. Applying these incorrect standards, Russia avoids offering coherent explanations of the actual reasons for most of the acts at issue, merely proposing what “could” have been intended or what might be a “plausible” explanation.²⁷⁶ As Ukraine will explain below, these

²⁷³ *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019*, Declaration of Judge Robinson, para. 14.

²⁷⁴ *Ibid.*, para. 16.

²⁷⁵ OHCHR, *Report on the Human Rights Situation in Ukraine* (15 April 2014), para. 33 (“The objectives of the HRMMU are to: . . . establish facts and circumstances and conduct a mapping of alleged human rights violations committed in the course of the demonstrations and ensuing violence between November 2013 and February 2014 and to establish facts and circumstances related to potential violations of human rights committed during the course of the deployment.”) (Ukraine’s Memorial, Annex 762); OSCE, *OSCE Special Monitoring Mission To Ukraine, Mandate*, <https://www.osce.org/special-monitoring-mission-to-ukraine/mandate> (“The Mission will gather information and report on the security situation, establish and report facts in response to specific incidents, including those concerning alleged violations of fundamental OSCE principles and commitments.”).

²⁷⁶ *See, e.g.*, Russia’s Counter-Memorial Part I, para. 400 (citing Expert Report of Major General Valery Alexeevich Samolenkov (8 August 2021), paras. 188–189 [hereinafter Samolenkov Report] (Russia’s Counter-Memorial Part I, Annex 2)).

arguments fail on their own terms, and, regardless of the evidentiary standard applied, Ukraine has proved the commission of acts meeting all of the requirements of Article 2(1)(a) and (b). But the Court should reject Russia’s overall approach. Whether or not Russia is able to create a modicum of doubt about any individual perpetrator’s mental state, several years after the fact, does not change the ultimate point: based on the circumstances at the time, there was sufficient evidence of potential terrorist acts occurring in Ukraine that Russia had an obligation to cooperate in the prevention and suppression of the financing of those acts.

A. Ukraine Has Established that the DPR and LPR Engaged in an Open and Notorious Pattern of Killings and Other Attacks Against Civilians Constituting Acts Covered by Article 2(1)(b)

194. Ukraine’s Memorial documented that in the spring of 2014, the DPR and LPR launched a campaign of killings that targeted civilians. The OHCHR determined that these killings constituted “[g]rave human rights abuses” through which “these groups have taken control of Ukrainian territory and inflicted on the populations a reign of intimidation and terror to maintain their position of control.”²⁷⁷ In its Counter-Memorial, Russia does not dispute that the DPR and LPR engaged in this pattern of killings and other attacks on civilians beginning in the spring of 2014.²⁷⁸

195. Instead of disputing this well-documented pattern of attacks, Russia argues that “there is no credible evidence” that they constitute terrorist acts within the meaning of the ICSFT.²⁷⁹ Russia does not, however, dispute that these acts were “intended to cause death or serious bodily injury to a civilian.”²⁸⁰ In a single paragraph, Russia argues that “Ukraine

²⁷⁷ Ukraine’s Memorial, para. 53 (quoting OHCHR, *Report on Human Rights Situation in Ukraine* (15 July 2014), para. 26 (Ukraine’s Memorial, Annex 296)).

²⁷⁸ *See generally* Russia’s Counter-Memorial Part I, paras. 509–515.

²⁷⁹ *Ibid.*, para. 509.

²⁸⁰ ICSFT, art. 2(1)(b).

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.”²⁸¹ According to Russia, Ukraine has not “explained how those killings and acts of ill-treatment (and the accompanying psychological effect) rises beyond so-called ‘ordinary crimes.’”²⁸²

196. As explained above, Russia’s “only reasonable inference” standard is not the proper evidentiary standard.²⁸³ In any event, even under Russia’s artificially high standard, Ukraine has demonstrated that the pattern of DPR and LPR attacks on civilians were acts with the purpose of intimidating a population or compelling a government to act. Russia, notably, does not identify any other purpose that could be inferred from the nature or context of these acts. Its conclusory argument is unsupported by any explanation or evidence, and the record before the Court manifestly shows that this widespread pattern of political murders and intimidation was not “ordinary crimes.”

197. The purpose of intimidating a civilian population is confirmed by the conclusions of multiple independent international monitors. These were presented in Ukraine’s Memorial, and Russia provides no meaningful response to any of them.²⁸⁴ The following points, for example, remain unrebutted:

²⁸¹ Russia’s Counter-Memorial Part I, para. 515 (emphasis added).

²⁸² *Ibid.*

²⁸³ *Supra*, Chapter 3, Section C.

²⁸⁴ *See* Ukraine’s Memorial, paras. 42–56, 210–214.

- The OHCHR determined that the DPR and LPR’s killings “inflicted on the populations a reign of intimidation and terror to maintain their position of control.”²⁸⁵ It is not credible for Russia to assert in cursory fashion that the OHCHR used the term “terror” merely to “describe the effect on the population” and not the purpose of the acts.²⁸⁶ The OHCHR stated plainly that the armed groups “inflicted” terror on the population “to maintain their position of control,” making it apparent that terror and intimidation were *the objective*.²⁸⁷ Similarly, counting the number of times the OHCHR used the word “terror” or “terrorize” is not a serious response.²⁸⁸ As noted above, Article 2(1)(b) does not depend on labels. Moreover, the term used in the text of Article 2(1)(b) is not “terror” but “intimidate,” and the OHCHR referred often to acts of “intimidation.”²⁸⁹
- The U.N. High Commissioner for Human Rights reported that a DPR leader posted a message in 2014 stating that “underage children and women are legitimate targets and that the goal is to ‘immerse them in horror.’”²⁹⁰ Russia does not dispute this fact, but instead calls this message a mere “threat” and argues that “Article 2(1)(b) of the ICSFT does not encompass threats.”²⁹¹ As emphasized by High Commissioner Pillay, the DPR leader stated that immersing civilians in horror was “the goal” — that is a statement of purpose, not just a threat.²⁹² But even a threat to immerse civilians in horror would be powerful evidence of the purpose of the DPR’s documented pattern of murdering civilians.
- The OHCHR reported in June 2014 “an increasing number of acts of intimidation and violence by armed groups, targeting ‘ordinary’ people who support Ukrainian unity or who openly oppose the either of the two ‘people’s republics.’”²⁹³ Russia

²⁸⁵ OHCHR, *Report on Human Rights Situation in Ukraine* (15 July 2014), para. 26 (Ukraine’s Memorial, Annex 296).

²⁸⁶ Russia’s Counter-Memorial Part I, para. 514(a).

²⁸⁷ OHCHR, *Report on Human Rights Situation in Ukraine* (15 July 2014), para. 26 (Ukraine’s Memorial, Annex 296).

²⁸⁸ See Russia’s Counter-Memorial, para. 514(a).

²⁸⁹ See, e.g., OHCHR, *Report on Human Rights Situation in Ukraine* (15 June 2014), paras. 4, 144, 175, 207 (Ukraine’s Memorial, Annex 46); OHCHR, *Report on Human Rights Situation in Ukraine* (15 July 2014), paras. 26, 38 (Ukraine’s Memorial, Annex 296); OHCHR, *Report on Human Rights Situation in Ukraine* (19 September 2014), para. 16 (Ukraine’s Memorial, Annex 47).

²⁹⁰ OHCHR, *Intensified Fighting Putting at Risk Lives of People in Donetsk and Luhansk — Pillay* (4 July 2014) (Ukraine’s Memorial, Annex 295).

²⁹¹ Russia’s Counter-Memorial Part I, para. 514(c).

²⁹² OHCHR, *Intensified Fighting Putting at Risk Lives of People in Donetsk and Luhansk — Pillay* (4 July 2014) (Ukraine’s Memorial, Annex 295).

²⁹³ OHCHR, *Report on Human Rights Situation in Ukraine* (15 June 2014), para. 207 (Ukraine’s Memorial, Annex 46).

ignores this finding, and it does not explain how murdering civilians because of their political views can be considered an “ordinary crime.”

- U.N. Assistant Secretary-General for Human Rights Ivan Simonović stated in an August 2014 address to the members of the U.N. Security Council that the situation in the Donbas “amounts to a reign of fear and terror in areas under control of the armed groups.”²⁹⁴
- In September 2014, the OHCHR found that “[t]he reign of fear and intimidation by the armed groups has been well-documented in the reports of the Human Rights Monitoring Mission in Ukraine.”²⁹⁵
- In a report from December 2014, the OHCHR continued to find that in the separatist-held regions of the Donbas, “[p]ersecution and intimidation of people suspected of supporting Ukrainian forces or merely holding pro-Ukrainian sympathies (or perceived as such) remains widespread.”²⁹⁶

198. Russia also ignores — and thus does not dispute — the detailed evidence put forward by Ukraine of specific killings and acts intended to cause severe bodily injury to civilians. The nature and context of these acts establish that they were committed with the purpose of intimidating a civilian population or compelling the Ukrainian government to act or abstain from action. For example, Russia has not responded to Ukraine’s evidence of the following atrocities:

- The high-profile abduction, torture, and murder of Horlivka town councilor Volodymyr Rybak in response to his raising of the Ukrainian flag.²⁹⁷

²⁹⁴ Statement to the Security Council by Ivan Šimonović, *Assistant Secretary-General for Human Rights on the Human Rights Situation in Ukraine* (8 August 2014), p. 2 (Ukraine’s Memorial, Annex 298). The Assistant Secretary-General provided other similar warnings to the Security Council at multiple other points in 2014. See Ukraine’s Memorial, para. 56, n.69.

²⁹⁵ OHCHR, *Report on Human Rights Situation in Ukraine* (19 September 2014), para. 16 (Ukraine’s Memorial, Annex 47).

²⁹⁶ OHCHR, *Report on Human Rights Situation in Ukraine* (15 December 2014), para. 41 (Ukraine’s Memorial, Annex 303).

²⁹⁷ Luke Harding & Oksana Grytsenko, *Kidnapping of Ukrainian Patriots Has Russia’s Full Support, Says Kiev*, *Guardian* (23 April 2014) (Ukraine’s Memorial, Annex 507); OHCHR, *Accountability for Killings in Ukraine from January 2014 to May 2016* (2016), Annex I, paras. 33–34 (Ukraine’s Memorial, Annex 49).

- The murders of multiple pro-unity activists whose bodies were dumped in conspicuous areas for the public to see.²⁹⁸
- The extrajudicial public execution of an elderly farmer who allegedly provided food to Ukrainian forces.²⁹⁹
- The burning of Valeriy Salo, a farmer and head of a cultural organization known as a pro-unity group, after being abducted from his village by armed persons.³⁰⁰
- The admission from Igor Girkin (who a few months later would request from Russia the Buk missile used to destroy Flight MH17) that the DPR carried out an “execution” of an “ideological” supporter of Ukrainian unity.³⁰¹

199. In addition to not contesting these facts, Russia identifies no legal authority indicating that acts of this nature fall outside the scope of Article 2(1)(b) of the ICSFT. In fact, in a recent decision, the United States District Court for the Southern District of New York considered *these very same acts by the DPR* to be a valid basis for a terrorism claim, in part based on 18 U.S.C. § 2339C, the U.S. law implementing the ICSFT. The plaintiffs, victims of the Flight MH17 shoot-down, sued financial institutions for allegedly financing DPR terrorism.³⁰² To support their claim of the defendants’ knowledge, the plaintiffs relied on the

²⁹⁸ OHCHR, *Report on Human Rights Situation in Ukraine* (15 May 2014), paras. 95–96 (Ukraine’s Memorial, Annex 45); OHCHR, *Report on Human Rights Situation in Ukraine* (15 June 2014), para. 209 (Ukraine’s Memorial, Annex 46).

²⁹⁹ OHCHR, *Report on Human Rights Situation in Ukraine* (15 June 2014), para. 210 (Ukraine’s Memorial, Annex 46).

³⁰⁰ *Ibid.*, para. 209.

³⁰¹ Anna Shamanska, *Former Commander of Pro-Russian Separatists Says He Executed People Based on Stalin-Era Laws*, Radio Free Europe / Radio Liberty (19 January 2016) (Ukraine’s Memorial, Annex 587). The events described in this paragraph are only a subset of the acts of intimidation against civilians throughout the relevant time period. *See, e.g.*, Human Rights Watch, *Ukraine: Anti-Kiev Forces Running Amok, Eastern Insurgents Commit Abductions, Beatings* (23 May 2014) (documenting, *inter alia*, home invasions and beatings conducted by the DPR against Ukrainian sympathizers); OHCHR, *Report on Human Rights Situation in Ukraine* (15 May 2014), para. 50 (describing the violent attack and beating by DPR supporters of participants of a peaceful rally in support of Ukrainian unity) (Ukraine’s Memorial, Annex 45).

³⁰² *See* Second Amended Complaint, *Schansman v. Sberbank of Russia PJSC*, Civ. No. 19-CV-2985 (ALC) (S.D.N.Y. 5 October 2020) (Ukraine’s Reply, Annex 66).

DPR's record of attacking civilians.³⁰³ The court noted that “these attacks were widely reported and discussed by nearly every government across the world, media, and human rights organizations,” and that the plaintiffs’ allegations, if true, would establish that “the DPR has openly, publicly, and repeatedly carried out terrorist attacks on civilians.”³⁰⁴ The U.S. court’s legal analysis is consistent with the decision of the Supreme Court of Denmark in the *Fighters and Lovers Case*, which found that a group “having murdered civilians, subjected civilians to gross acts of violence, carried out kidnappings, including kidnappings of politicians and a presidential candidate, and used imprecise mortar shells in civilian areas” had acted “with the intent of terrorizing that population to a serious extent.”³⁰⁵

200. Unable to dispute the evidence of the DPR’s pattern of killing civilians, or the legal conclusion that such acts, by their nature or context, had the purpose of intimidating a population or compelling the government to act or abstain from action, Russia’s Counter-Memorial attempts to shift attention to acts allegedly committed by Ukraine. According to Russia, “all parties to the armed conflict” are equally responsible for committing “extra-judicial killings, torture and ill-treatment of civilians.”³⁰⁶ These allegations against Ukraine

³⁰³ *Ibid.*, paras. 102–103, 117–128.

³⁰⁴ *Schansman v. Sberbank of Russia PJSC*, Civ. No. 19-CV-2985 (ALC), 2021 WL 4482172, p. 8 (S.D.N.Y. 30 September 2021) (Ukraine’s Reply, Annex 67). The U.S. court decision denied a motion to dismiss, on which the question for the court was whether the Complaint’s allegations, if proved, would support a legal entitlement to relief. The relevant allegations in that case concerning the DPR’s acts, which were the basis of the court’s legal analysis, have in this case been established without dispute.

³⁰⁵ See “Fighters and Lovers Case,” Case 399/2008, Supreme Court of Denmark (25 March 2009), p. 1 (Ukraine’s Memorial, Annex 476). Ukraine notes that in addition to the pattern of killings discussed in this section, the DPR and LPR also executed imprecise mortar attacks on civilian areas and engaged in attempted political assassinations. See Ukraine’s Memorial, para. 111; *infra*, para. 255.

³⁰⁶ Russia’s Counter-Memorial Part I, paras. 509–512.

have no relevance to Ukraine’s claims and are not properly before the Court.³⁰⁷ In any event, Russia’s attempt to draw a false equivalence utterly fails. Though Russia includes in its Counter-Memorial a chart purporting to show “killing and ill-treatment by all parties,” this chart is deeply misleading.³⁰⁸ The chart, and the sources on which it relies, do not in fact allege any extrajudicial killings by Ukrainian officials. Moreover, the allegations of mistreatment in custody by individual Ukrainian officers, while worthy of investigation, is not comparable to the goal of the DPR to immerse civilians in horror, or the participation of DPR leaders such as Igor Bezler and Igor Girkin in political murders. Only one side of the conflict — the illegal armed groups — has been determined by human rights monitors to have “inflicted on the populations a reign of intimidation and terror to maintain their position of control.”³⁰⁹

201. Russia’s arguments do not undermine the overwhelming evidence, supported by the findings of respected international bodies, that the DPR and LPR engaged in a pattern of killings and violent attacks on civilians that, by their nature or context, had the purpose of intimidating a population or compelling the Ukrainian government to take or abstain from action. These are covered terrorist acts under ICSFT Article 2(1)(b).

B. Ukraine Has Established that the Shoot-down of Flight MH17 Constitutes a Terrorist Act Under Article 2(1)(a)

202. Ukraine also established in its Memorial that on 14 July 2014, Flight MH17 was shot down by a 9M38 series missile launched from a Buk TELAR that was delivered by

³⁰⁷ For the avoidance of doubt, Ukraine denies Russia’s allegations that it engaged in any act that violates IHL or falls within Article 2(1)(b) of the ICSFT.

³⁰⁸ Russia’s Counter-Memorial Part I, para. 510 (referencing Table 5 in Appendix A to its Counter-Memorial, Part I).

³⁰⁹ OHCHR, *Report on the Human Rights Situation in Ukraine* (15 July 2014), para. 26 (Ukraine’s Memorial, Annex 296).

members of a Russian military brigade to DPR-controlled territory.³¹⁰ This weapon was fired into civilian airspace despite the fact that it was not capable of distinguishing between military and civilian targets.³¹¹ The shoot-down of Flight MH17, killing 298 civilians, constitutes a terrorist act under Article 2(1)(a) of the ICSFT because it was an offense under Article 1(1)(b) of the Montreal Convention, which applies when “any person . . . unlawfully and intentionally . . . 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.”³¹²

203. Russia does not dispute that the DPR requested a Buk TELAR for the purpose of destroying an aircraft.³¹³ Russia does not dispute that the individuals who deployed the weapon intended to destroy an aircraft.³¹⁴ Russia also does not dispute that these actions were unlawful: Russia advances no argument that the attackers had a valid legal justification under either Ukrainian or international law for firing weapons at any kind of aircraft from Ukrainian territory.³¹⁵

204. Rather than contest these critical facts, Russia focuses its Counter-Memorial on an argument that the attackers had hoped to shoot down a military aircraft, not a civilian one.³¹⁶ Ukraine has established two independent reasons why even if this factual claim is true, the destruction of Flight MH17 was an offense under Article 1(1)(b).

³¹⁰ Ukraine’s Memorial, paras. 58–75.

³¹¹ *Ibid.* para. 74. See also Expert Report of Anatolii Skorik (6 June 2018), paras. 28, 31, 39 [hereinafter Skorik Report] (Ukraine’s Memorial, Annex 12)

³¹² Montreal Convention, art. 1(1)(b).

³¹³ See Russia’s Counter-Memorial Part I, paras. 312–317.

³¹⁴ See *ibid.*, paras. 301–302, 312–317, 325–332.

³¹⁵ See Ukraine’s Memorial, para. 221.

³¹⁶ Russia’s Counter-Memorial Part I, paras. 325–333.

205. First, as explained in Chapter 5, a person who unlawfully and intentionally shoots down an aircraft, and in fact shoots down a civilian aircraft, commits an offense under Article 1(1)(b) of the Montreal Convention, without a need to specifically prove intention to destroy a civilian aircraft.³¹⁷ Thus, any claim that the DPR intended to destroy a military aircraft instead of a civilian aircraft is not a defense. The Montreal Convention violation is established by the undisputed facts: that the DPR intended to destroy an aircraft; its actions were unlawful; and those actions did in fact destroy a civilian aircraft.

206. Second, even if intention as to the civilian status of an aircraft were required, that intention is established. It is undisputed that the Buk was deployed in airspace open to civilian traffic, even though the weapon is incapable of distinguishing between civilian and military aircraft, particularly without support from a combat control center (which was not provided). As discussed in Chapter 5, firing into civilian airspace a weapon that is incapable of distinguishing military and civilian targets constitutes “intentionally destroying a civilian aircraft.”³¹⁸ Russia does not refute this legal point.

207. Associate Professor Anatolii Skorik of the Ivan Kozhedub Kharkiv University of the Air Force, an expert in the Buk system, has testified, without rebuttal, that the “technical capabilities of the Buk-M1 TELAR in autonomous mode *do not make it possible* to accurately distinguish a civilian aircraft from a military one.”³¹⁹ Accordingly, “[t]he Buk-M1 SAM system is very seldom used in situations where the airspace is open to civilian aircraft.”³²⁰ In this unusual scenario, the only way to at least reduce the severe danger to civilian aviation is to use

³¹⁷ *Supra*, Chapter 5, Section (A)(1).

³¹⁸ *Supra*, Chapter 5, Section (A)(2).

³¹⁹ Skorik Report, para. 39.

³²⁰ *Ibid.*, para. 31.

the Buk “in coordination with the combat control center,” such that “information from radio-radar forces about civilian air traffic will be brought to the attention of the commander of the Buk-M1 battery in a timely manner.”³²¹ Without the combat control center feeding information to the commander, the commander using the Buk-M1 TELAR radar alone is not able to distinguish civilian aircraft from military aircraft.³²² As explained by Dr. Skorik, viewed solely on the operator’s screen, military and civilian aircraft are “practically indistinguishable,” and these challenges are compounded by the intense time pressure facing the TELAR operator, who must act “with lightning speed” because use of the TELAR’s radar exposes his position.³²³

208. Russia has not produced its own Buk expert or challenged Dr. Skorik’s expertise. Russia does not dispute Dr. Skorik’s testimony that operating the Buk without a combat control center creates an especially grave risk to civil aviation.³²⁴ Nor does Russia dispute, or even address, Dr. Skorik’s testimony that the Buk was deployed in circumstances in which it was not possible to discriminate between military and civilian targets.³²⁵

209. Instead, Russia makes a brief attempt to mischaracterize Dr. Skorik’s testimony. Russia suggests that instead of using a command control center consistent with modern practice, a Buk commander operating independently could use human judgment to distinguish between civilian and military aircraft.³²⁶ This argument is not based on any evidence, but on Dr. Skorik’s statement that “[a]n experienced Buk-M1 TELAR commander

³²¹ *Ibid.*, para. 34.

³²² *Ibid.*, paras. 28, 39.

³²³ *Ibid.*, para. 36.

³²⁴ Russia’s Counter-Memorial Part I, para. 345(b).

³²⁵ See Ukraine’s Memorial, paras. 73–74.

³²⁶ Russia’s Counter-Memorial Part I, para. 345(c) (“[A] person providing such a weapon would also know that the operator could use other methods to distinguish between civilian and military aircraft. . .”).

and operator can fairly accurately identify the target based on its parameters (dimensions, jet engines, if any).”³²⁷ Viewing Dr. Skorik’s statement in context, he was addressing the technical possibility of differentiating *types* of targets that have different dimensions, such as distinguishing a helicopter from a jet plane or drone.³²⁸ Russia’s mischaracterization simply ignores Dr. Skorik’s unequivocal testimony that the TELAR’s “technical capabilities . . . do not make it possible to distinguish a civilian aircraft from a military one.”³²⁹

210. Russia also states that Ukraine’s Memorial implies that “anyone with access to the internet could have been following the flightpath of Flight MH17,” and suggests that this could have been a “method[] to distinguish between civilian and military aircraft.”³³⁰ Ukraine’s Memorial made the point that it was public knowledge that substantial civilian air traffic was passing through the airspace above eastern Ukraine until the attack, including 160 flights on 17 July.³³¹ That does not mean, and Russia cannot credibly assert, that open-source flight-tracking on the internet was so precise, real-time, and reliable that a Buk TELAR operator could have used that data to distinguish a civilian from military aircraft.

211. In short, Russia has put forward no evidence to refute Dr. Skorik’s testimony that the Buk TELAR that shot down Flight MH17 was incapable of distinguishing between military and civilian targets. Thus, even if one credits Russia’s interpretation of Article 1(1)(b) of the Montreal Convention as requiring intent to destroy a civilian aircraft, the undisputed evidence establishes that any such intention requirement is met.

³²⁷ Russia’s Counter-Memorial Part I, para. 345(c) (quoting Skorik Report, para. 28).

³²⁸ See Skorik Report, para. 24 (noting the theoretical ability of an operator to distinguish the signal returned by a propeller unmanned aerial vehicle, a jet-engine unmanned aerial vehicle, and a Mi-8 helicopter, though “combat crews rarely considered these factors in a highly stressful combat situation when they consider initial firing data”).

³²⁹ Skorik Report, para. 31; see also *ibid.*, para. 28 (“[T]he technical capabilities of the Buk-M1 TELAR do not make it possible to accurately tell civilian aircraft from military targets. This is due to the following key factors: 1) The Buk-M1 TELAR does not have transponders currently used on civilian aircraft, as described below; 2) Information on Buk-M1 TELAR indicator screens makes military aircraft practically indistinguishable from civilian aircraft in terms of their signal attributes.”).

³³⁰ Russia’s Counter-Memorial Part I, para. 345(c).

³³¹ Ukraine’s Memorial, para. 70.

C. Ukraine Has Established that the DPR’s Shelling of Civilian Areas Constitute Terrorist Acts Covered by Article 2(1)(b)

212. While Russia’s Counter-Memorial largely ignores other attacks on civilians by the DPR and LPR, Russia devotes a considerable portion of its Counter-Memorial to the shelling attacks against civilians in eastern Ukraine. Russia’s efforts to defend and excuse the shelling atrocities committed by the DPR do not succeed for a host of reasons outlined below. Before addressing the specific shelling episodes before the Court, however, Ukraine makes five preliminary observations regarding Russia’s flawed approach to these shellings.

213. First, Russia continues its focus on labels, arguing that “Ukraine alone” refers to these shelling attacks as acts of “terrorism.”³³² But, as explained above, whether international observers use the word “terrorism” has no relevance. Article 2 of the ICSFT itself does not use the word “terrorist” or “terrorism.”³³³ As to the relevant *facts* of the shelling incidents, Ukraine’s evidence is supported by statements from the international community. For example, the U.N. Security Council condemned “the shelling of a passenger bus” at Volnovakha as a “reprehensible act”;³³⁴ an Under-Secretary General of the United Nations concluded that the attackers had “knowingly targeted a civilian population” in Mariupol;³³⁵ and the Office of the Prosecutor of the International Criminal Court has determined that there was evidence of “intentionally directing attacks against civilians” in eastern Ukraine.³³⁶

214. Second, while Russia seeks to isolate each shelling incident and inject uncertainty as to each one, the proper approach is to view them holistically and in context. Many of Russia’s hypotheses depend on a series of unlikely malfunctions and errors, which,

³³² See, e.g., Russia’s Counter-Memorial Part I, para. 356.

³³³ See *supra*, para. 192.

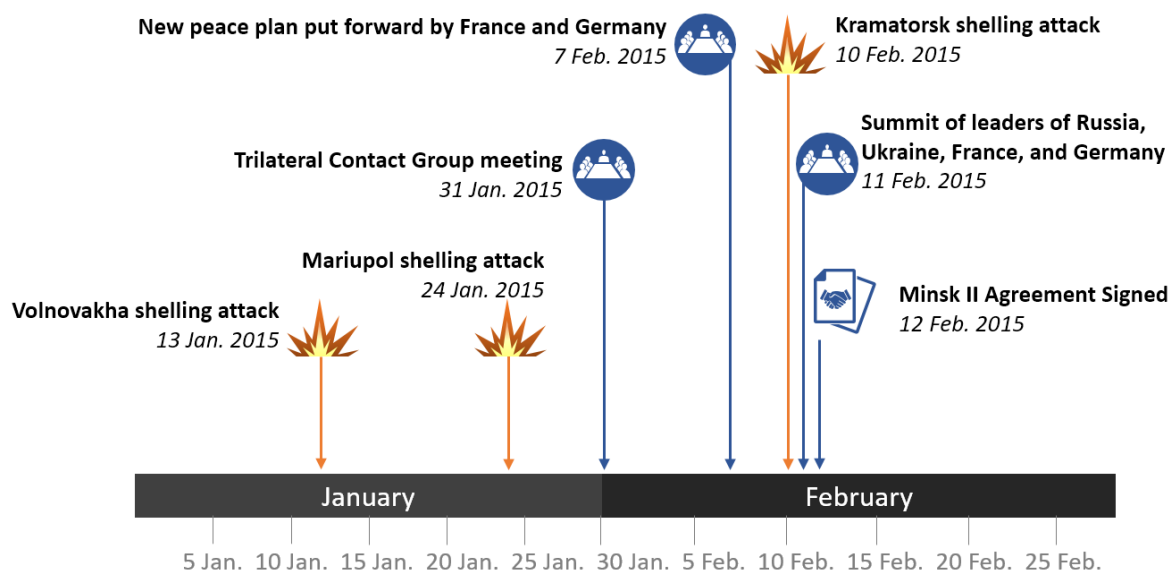
³³⁴ U.N. Security Council, *Security Council Press Statement on Killing of Bus Passengers In Donetsk Region, Ukraine* (13 January 2015) (Ukraine’s Memorial, Annex 305).

³³⁵ U.N. Security Council, Official Record, 7368th mtg., U.N. Doc. S/PV.7368 (26 January 2015), p. 2 (statement of Jeffrey Feltman, U.N. Under-Secretary-General for Political Affairs) (Ukraine’s Memorial, Annex 307).

³³⁶ International Criminal Court, *Report On Preliminary Examination Activities 2020* (14 December 2020), para. 280.

according to Russia, by mere happenstance resulted in rockets detonating in crowded civilian areas. These explanations are dubious on their own, but they are even more so when considered together. In particular with respect to Volnovakha, Mariupol, and Kramatorsk, Article 2(1)(b) requires that the purpose of such acts be considered in light of their “context”: the DPR committed these large-scale, high-profile atrocities one after the other in a span of a few weeks, coinciding with a flurry of intense diplomatic activity leading up to a summit in Minsk on 11 February 2015, during which representatives of Russia, Ukraine, France, and Germany agreed to a package of measures to stop the conflict in eastern Ukraine (“Minsk II”).³³⁷

Figure 1



Timeline of DPR shelling attacks on Ukrainian civilians during intense diplomatic talks

215. Even if it were plausible that one isolated incident could have been a tragic mistake, Russia cannot credibly call it a coincidence that the DPR kept shelling civilian areas, in different cities, with significant casualties, in the lead-up to the Minsk summit. It is even less credible to suggest that it is a coincidence that this series of high-profile attacks on

³³⁷ See Ukraine’s Memorial, para. 254.

civilians happened to occur at a critical time period in which civilian casualties would be most valuable in extracting political concessions from Ukraine.

216. Third, Russia views its burden at the merits phase of this case as merely offering a “reasonable” or “plausible” alternative explanation for each attack, viewed in hindsight, long after the fact.³³⁸ As discussed in Chapter 3, Russia advocates for an artificially high evidentiary burden that is inappropriate in the context of the ICSFT. This case is ultimately not about whether any particular individual committed an act of terrorism in relation to any of these particular acts, but about *Russia’s* failure to cooperate in the prevention and punishment of the funding of acts covered by Article 2(1)(a) and (b). The critical questions are therefore what the funders of these acts would have known *at the time*, and what Russia should have done *at the time* in order to cooperate with Ukraine in good faith as required by the Convention. At the time, despite widespread knowledge of these attacks on civilians, Russian officials continued to provide funds to the groups attacking civilians, and Russia failed to take any measures to prevent or suppress that financing.

217. Fourth, Russia attempts to deflect focus away from the attacks on civilians by illegal armed groups in Ukraine by alleging that Ukraine’s armed forces are also responsible for civilian casualties. Ukraine will not address these allegations at length, since they are irrelevant to an objective determination of the nature of the acts committed by the DPR and LPR.³³⁹ However, it must be stressed that the equivalence Russia seeks to draw is false. Russia simply adds up reported civilian casualties during particular time periods.³⁴⁰ It is improper

³³⁸ See, e.g., Russia’s Counter-Memorial Part I, paras. 400, 423.

³³⁹ Russia has filed no counter-claims against Ukraine, nor can it at this stage in the proceedings. See Rules of the Court, art. 80(2).

³⁴⁰ Russia misleadingly characterizes these civilian casualties as caused by the “reported indiscriminate shelling of populated areas.” See Russia’s Counter-Memorial Part I, para. 352(a) (citing OHCHR reporting from May 2015 to August 2016). The OHCHR reporting Russia cites does

to infer on the basis of such statistics that the Ukrainian Armed Forces (“UAF”) was targeting civilians. As the OHCHR reported in July 2014, “the armed groups are locating their military assets in and conducting attacks from densely populated areas thereby putting the whole civilian population at risk.”³⁴¹ Despite attempting to shift focus to the acts of Ukraine, Russia has not identified any situation where the UAF launched a volley of Grad rockets in the middle of the day at a checkpoint performing civilian functions. It has not identified any UAF attack deemed by a top U.N. official to have “knowingly targeted a civilian population.”³⁴² And it has not alleged that the UAF deployed the sophisticated BM-30 rocket system against the residential area of a city more than 50 kilometers behind the contact line.

218. Fifth, as Ukraine files this Reply in April 2022, the purpose of the DPR’s string of attacks on civilians in 2015 is being tragically confirmed by Russia itself. Russian Armed Forces are currently targeting civilians and creating humanitarian catastrophes in the same cities that were attacked by the DPR in 2015. Volnovakha has been “completely destroyed;”³⁴³ in Mariupol civilians bodies are “carpeted through the streets;”³⁴⁴ and in shocking resemblance to events in 2015, more than 50 people in Kramatorsk were killed when Russia

not characterize the nature of the attacks, but rather groups civilian casualties by type of weapon. *See, e.g.,* OHCHR, *Report On the Human Rights Situation In Ukraine* (16 May–15 August 2015), paras. 29, 32 (identifying civilian casualties as a result of “small arms,” “ERW IEDS,” “road incidents with military vehicles,” “unknown,” and “mortars, canons, howitzers, tanks and MLRS”) (Ukraine’s Memorial, Annex 769).

³⁴¹ OHCHR, *Report on Human Rights Situation in Ukraine* (15 July 2014), para. 31 (Ukraine’s Memorial, Annex 296). Indeed, in June 2015, Donetsk residents staged a protest demanding an end to DPR artillery attacks launched from the Donetsk suburbs for this reason. *See* Paul Gregory, *Residents of Donbass Tell Separatists to Leave: A Glimmer of Hope?*, *Forbes* (17 June 2015).

³⁴² U.N. Security Council, Official Record, 7368th mtg., U.N. Doc. S/PV.7368 (26 January 2015), p. 2 (statement of Jeffrey Feltman, U.N. Under-Secretary-General for Political Affairs) (Ukraine’s Memorial, Annex 307).

³⁴³ euronews, *Eastern Ukrainian Town of Volnovakha Destroyed After Russia Invasion, Local Governor Says* (13 March 2022).

³⁴⁴ Yuras Karmanau, Adam Schreck, and Cara Anna, *Mariupol Mayor Says Siege Has Killed More than 10K Civilians*, *Associated Press* (12 April 2022).

targeted the civilian population with a sophisticated cluster munitions rocket.³⁴⁵ All of these atrocities are being conducted in an apparent effort to exert pressure on Ukraine to make political concessions.³⁴⁶ The similarity in tactics employed by the DPR in 2015 and Russian Armed Forces today is no coincidence: Russia previously provided training to separatist fighters, including instruction on the use of heavy weaponry and Multiple Launch Rocket Systems (“MLRS”).³⁴⁷ Russia’s current playbook is familiar, and is the result of a State being emboldened by having not been held accountable before.

1. The DPR’s Shelling Attack on a Civilian Checkpoint in Volnovakha Is a Covered Act Under ICSFT Article 2(1)(b)

219. Ukraine’s Memorial established that the 13 January 2015 shelling attack by the DPR on a civilian checkpoint near Volnovakha was a terrorist act under ICSFT Article 2(1)(b).³⁴⁸ At 14:25 on a Tuesday afternoon, at least 88 rockets rained down on a long line of civilian vehicles waiting to transit the Buhas checkpoint, hitting a bus full of pensioners, killing 12 passengers, and injuring 19 others. As noted above, the U.N. Security Council condemned

³⁴⁵ See Manisha Ganguly and Joe Inwood, *Ukraine War: What Weapon Killed 50 People in Station Attack?*, BBC (12 April 2022).

³⁴⁶ See, e.g., OHCHR, *Ukraine: Grave Concerns - Statement by Spokesperson for the UN High Commissioner for Human Rights* (12 March 2022) (“Civilians are being killed and maimed in what appear to be indiscriminate attacks, with Russian forces using explosive weapons with wide area effects in or near populated areas. These include missiles, heavy artillery shells and rockets, as well as airstrikes.”); Michael Gorden and Alex Leary, *Russia, Failing to Achieve Early Victory in Ukraine, Is Seen Shifting to Plan B*, *The Wall Street Journal* (20 March 2022) (reporting that Russia plans to continue the “pummeling of Ukrainian cities” in order to “pressure Mr. Zelensky’s government into giving up territory and ceding security arrangements”).

³⁴⁷ See Signed Declaration of Tornike Dzhincharadze, Suspect Interrogation Protocol (21 May 2017), p. 4 (Ukraine’s Memorial, Annex 263); Signed Declaration of Igor Koval, Suspect Interrogation Testimony (9 June 2015), pp. 5–6 (Ukraine’s Memorial, Annex 207); Mumin Shakirov, *I Was an Opposition Fighter in Ukraine*, *The Atlantic* (14 July 2014) (Ukraine’s Memorial, Annex 528).

³⁴⁸ See Ukraine’s Memorial, Chapter 4, Section D(1).

the shelling as a “reprehensible act.”³⁴⁹ The attack had no apparent military purpose and took place less than three weeks before a major diplomatic summit.

i. The Attack on Civilians at the Buhas Checkpoint Was an Act Intended to Cause Death to Civilians Under Article 2(1)(b)

220. Russia does not dispute that the Buhas checkpoint was deliberately targeted with BM-21 Grad MLRS. Ukraine’s Memorial established that any attack using the imprecise BM-21 Grad system against a small target like the Buhas checkpoint, known to be surrounded by civilians, would be certain to harm the civilians lined up at the checkpoint.³⁵⁰ Neither Russia in its Counter-Memorial, nor its expert General Samolenkov, disputes this conclusion. These undisputed facts are sufficient to conclude that the Volnovakha shelling was an act intended to cause civilian deaths within the meaning of Article 2(1)(b).³⁵¹

221. Even assuming that Article 2(1)(b) requires proof of direct intent to harm civilians, such intent is established. Ukraine’s and Russia’s experts agree that from a military perspective, it would have been inefficient to fire BM-21 Grad rockets to destroy a small checkpoint.³⁵² The record shows that the checkpoint played no active role in hostilities, and

³⁴⁹ U.N. Security Council, Security Council Press Statement On Killing of Bus Passengers In Donetsk Region, Ukraine (13 January 2015) (Ukraine’s Memorial, Annex 305). Even the so-called Office of the Prosecutor General of the DPR referred to the shelling as a “terrorist act,” while falsely attempting to attribute the attack to Ukraine. *See* Interfax, *The DPR Opened a Criminal Case On the Fact of the Shelling of a Bus Near Volnovakha* (14 January 2015) (Ukraine’s Reply, Annex 81). Russia’s halfhearted suggestion in its Counter-Memorial that it is not possible to reach a clear conclusion as to which party was responsible for the attack strains credulity. *See* Russia’s Counter-Memorial Part I, paras. 379–383. As Ukraine demonstrated in its Memorial, OSCE monitors, Human Rights Watch, and Ukrainian investigators all conducted forensic analysis of the attack site and concluded that the attack was launched from the direction of DPR-controlled territory. *See* Ukraine’s Memorial, para. 87. General Brown explains in his second report that “the only plausible explanation” is that the attack was launched from DPR territory. *See* Brown Second Report, para. 15 (Ukraine’s Reply, Annex 1).

³⁵⁰ *See* Ukraine’s Memorial, para. 229 (citing Expert Report of Lieutenant General Christopher Brown (5 June 2018), paras. 14, 39 [hereinafter Brown First Report] (Ukraine’s Memorial, Annex 11)).

³⁵¹ *See supra*, Chapter 5, Section C(1).

³⁵² *See* Brown First Report, para. 33 (“Assuming that there were some military value to damaging the checkpoint, other weapons systems could have done so more accurately, and without the same certainty of civilian harm.”) (Ukraine’s Memorial, Annex 11); Samolenkov Report, para. 58 (8 August

Russia's expert has not offered any credible explanation of what military advantage could have been gained by destroying the checkpoint. The most natural conclusion is that in firing rockets from several BM-21 Grad systems toward a long queue of civilian vehicles at a *de facto* border crossing, 10 kilometers behind the UAF front-line and playing no active role in hostilities, the DPR's target and objective was to hit the large concentration of civilians present.

222. Russia takes issue with Ukraine's description of the Buhas checkpoint as a "civilian checkpoint,"³⁵³ but that is the only reasonable conclusion from the evidence:

- Russia does not refute the first-hand witness testimony of Maksym Shevkoplias, the Border Guard Service commander at the Buhas checkpoint on the day of the shelling, that the checkpoint served a *de facto* border control function for civilian traffic.³⁵⁴ This point is confirmed by the January 2015 Anti-Terrorism Operation regulation governing checkpoints.³⁵⁵
- Ukraine's imagery experts, Ms. Gwilliam and Air Vice-Marshal Corbett of Geollect, reviewed the same imagery of the Buhas checkpoint as Colonel Bobkov. They assessed that "the construction and layout was consistent with that of a law

2021) ("[P]rovided the DPR had a choice of artillery and was targeting the checkpoint, BM-21 Grad MLRS would not have been the most efficient weapon to use against such target.") (Russia's Counter-Memorial Part I, Annex 2). Although General Samolenkov states that BM-21 Grad was an inefficient choice of weapon for engaging the checkpoint only if more appropriate weapons were unavailable, the record shows that such weapons were available to the DPR at that time. *See* Brown Second Report, para. 16 (explaining that artillery guns were available to DPR fighters in the region) (Ukraine's Reply, Annex 1).

³⁵³ Russia's Counter-Memorial Part I, para. 364.

³⁵⁴ *See* Witness Statement of Maksym Anatoliyovych Shevkoplias (31 May 2018), para. 9 [hereinafter Shevkoplias Statement] (Ukraine's Memorial, Annex 4).

³⁵⁵ Security Service of Ukraine, ATO Regulation Governing Checkpoints (22 January 2015), Section 1.2 (stating that checkpoints are "designed to control the movement of people, vehicles, verification of identity documents, . . . inspect vehicles and items transported in order to prevent unauthorized entry of persons into uncontrolled territory, intrusion of terrorists and their accomplices from uncontrolled territory") (Ukraine's Reply, Annex 15). This regulation refutes Russia's suggestion that the Buhas checkpoint must have had a military purpose simply because it "was established as part of the so-called 'Anti-Terrorist Operation.'" Russia's Counter-Memorial Part I, para. 365. Nor is it relevant that certain documents inaccurately "describe the location as a checkpoint of the Ukrainian Armed Forces." *Id.* para. 368(a). Such a description is not correct. *See* Shevkoplias Statement, paras. 8, 11 (Ukraine's Memorial, Annex 4).

enforcement configuration designed for screening vehicles.”³⁵⁶ They further concluded that it was “not a fortified military installation,” noting that “the trench systems identified are rudimentary in nature and do not offer adequate protection for arcs of fire and defensive posturing,” and that some of them “faced northwest, away from known DPR positions.”³⁵⁷

- Lieutenant General Brown, Ukraine’s military expert, agrees in his Second Report that, based on the layout of the checkpoint, “it is not capable of combat operations,” noting that “[t]he trenches appear to be for individual protection” and that the “dug-out positions” are “not sited tactically.”³⁵⁸ General Brown further contrasts the Buhas checkpoint, far from the front-line, with the Ukrainian Armed Forces’ Berezove checkpoint, which was “was clearly a front-line combat position” where there were “at least four armoured vehicles.”³⁵⁹
- Mr. Shevkoplias testified that “there were no military formations or military units of Ukraine within a radius of several kilometers around the checkpoint ‘Buhas,’ nor was there any military equipment placed within this radius.”³⁶⁰ This first-hand testimony is far more reliable than Russia’s assertion that “it appears that the Ukrainian Armed Forces used the Buhas checkpoint as an artillery firing position on 12 January 2015,” based on unverified social media posts.³⁶¹
- As Mr. Shevkoplias also testified, members of the Kyiv-2 battalion participated in the running of the checkpoint.³⁶² Kyiv-2 is a “special police patrol unit.”³⁶³ Though Russia asserts that it “appears” that members of Kyiv-2 engaged in “combat tasks” in the broader “region,” there is no evidence of such tasks being

³⁵⁶ Expert Report of Catherine Gwilliam and Air Vice-Marshal Anthony Sean Corbett (21 April 2022), para. 19 [hereinafter Gwilliam and Corbett Report] (Ukraine’s Reply, Annex 2).

³⁵⁷ Gwilliam and Corbett Report, paras. 19–20; *see also* Gwilliam and Corbett Report, para. 23, Figure 2 (demonstrating “features at the checkpoint that are consistent with 2015 UN peacekeeping guidance on the setup of police checkpoints”).

³⁵⁸ Brown Second Report, para. 9 (Ukraine’s Reply, Annex 1).

³⁵⁹ Brown Second Report, para. 7 (Ukraine’s Reply, Annex 1).

³⁶⁰ Shevkoplias Statement, para. 11 (Ukraine’s Memorial, Annex 4).

³⁶¹ *See* Russia’s Counter-Memorial Part I, para. 377(a). Although Mr. Shevkoplias was unable to execute a further witness statement as a result of Russia’s invasion of Ukraine, at a hearing on the merits he will be prepared to confirm that no attacks were launched from the Buhas checkpoint, on 12 January or otherwise.

³⁶² *See* Shevkoplias Statement, para. 8 (Ukraine’s Memorial, Annex 4).

³⁶³ *See* Ministry of Interior of Ukraine Order No. 317 (14 April 2014) (Ukraine’s Reply, Annex 8).

performed at the Buhas checkpoint.³⁶⁴

223. Unable to refute the Buhas checkpoint's purpose of screening civilian vehicles, Russia points to the presence of "pistols" and other "small arms,"³⁶⁵ arguing that it was therefore not a "purely civilian object."³⁶⁶ But whether or not the IHL concept of "civilian object" applies is not the relevant question under the ICSFT. Russia does not claim, and could not plausibly claim, that the *reason* for attacking a civilian vehicle checkpoint with at least 88 Grad rockets was to neutralize a handful of law enforcement officers lacking heavy weaponry.

224. Russia also fails to refute General Brown's conclusion that "it is difficult to argue that the checkpoint was taking an active part in the hostilities, or that its destruction gave the DPR any military advantage."³⁶⁷ Instead, Russia suggests that it does not matter whether the attack "served military logic," which in its view only raises issues of proportionality under IHL.³⁶⁸ Russia is mistaken. But even assuming direct intent must be proved, the question is what the actual motivation was for the attack. If an act makes no military sense, the compelling inference is that the civilian harm was the reason for the act.

225. The most Russia offers as a military explanation for the attack is that "the Buhas checkpoint could be used as a defensive position in the event of a ground assault by the DPR,

³⁶⁴ Brown Second Report, para. 8 (explaining that the Kyiv-2 personnel at the checkpoint "had no combat role: they were well behind both the first and second UAF lines of defence") (Ukraine's Reply, Annex 1). Ukraine's imagery experts confirmed that the Kyiv-2 vehicles seen at the checkpoint "are more commonly associated with law enforcement and do not appear to be military-grade equipment." Gwilliam and Corbett Report, para. 24 (Ukraine's Reply, Annex 2).

³⁶⁵ Russia's Counter-Memorial Part I, para. 365.

³⁶⁶ Russia's Counter-Memorial Part I, para. 369.

³⁶⁷ Brown First Report, para. 27 (Ukraine's Memorial, Annex 11).

³⁶⁸ Russia's Counter-Memorial Part I, para. 367.

in particular, to repel any advance towards Volnovakha or any attempt to gain control of the road.”³⁶⁹ That argument fails for several reasons:

- First, it is undisputed that the attack on the checkpoint was *not* part of any ground assault. General Brown explains that “if the DPR objective was to advance towards Volnovakha via the checkpoint, DPR fighters would have had to fight their way through numerous UAF combat positions, between 10 and 20 km to the northeast,” meaning that “the attacking forces would have put together an artillery fire plan to neutralise the Ukrainian combat forces in order to facilitate such a breakthrough.”³⁷⁰ Yet instead, “the attack on the Buhas checkpoint was an isolated operation.”³⁷¹ Ms. Gwilliam and Air-Vice Marshal Corbett confirm that there was no concentration of DPR fighters in a position to follow the checkpoint shelling with a large offensive.³⁷²
- Second, even if the Buhas checkpoint were attacked as “a precursor to a larger attack” as suggested by Russia, it still would not have made military sense, because, as explained by General Brown, “any advantage” would “be outweighed in its waste of resources and a loss of surprise.”³⁷³
- Third, Russia’s expert concedes that if there had been a military reason to target the checkpoint, a BM-21 Grad would not have been the right weapon to use.³⁷⁴

226. Russia next attempts to distract from the Volnovakha shelling by drawing a simplistic comparison with an attack on a DPR combat position near Olenivka on 27 April 2016. On that basis, Russia asserts that “all parties to the armed conflict have treated checkpoints located on public roads which are manned by armed forces as military targets.”³⁷⁵ Yet the two attacks bear no similarity at all, as illustrated below:

³⁶⁹ Russia’s Counter-Memorial Part I, para. 368(g).

³⁷⁰ Brown Second Report, para. 11(b) (Ukraine’s Reply, Annex 1).

³⁷¹ Brown Second Report, para. 11(b) (Ukraine’s Reply, Annex 1).










³⁷² See Gwilliam and Corbett Report, para. 45 (Ukraine’s Reply, Annex 2).

³⁷³ Brown First Report, para. 27 (Ukraine’s Memorial, Annex 11).

³⁷⁴ See Samolenkov Report, para. 58 (Russia’s Counter-Memorial Part I, Annex 2).

³⁷⁵ Russia’s Counter-Memorial Part I, para. 375.

Figure 2³⁷⁶

	Buhas Checkpoint (13 January 2015)	Olenivka Checkpoint (27 April 2016)
Time of the Attack	Early Afternoon (02:25 PM) 	Middle of the Night (02:45 AM) 
Weapon System Used	BM-21 Grad MLRS 	122mm Artillery 
Observed Impact Craters	88 	7 
Trench Network	100 meters 	2,955 meters 
Vehicle Revetments for Armored Vehicles	0	15 
Checkpoint Personnel	Ministry of Interior Border Guard and Kyiv-2	DPR Fighters
Checkpoint Location	10 km from UAF Front-line	DPR Front-line

Comparison of the DPR’s attack on the Buhas checkpoint and the UAF’s alleged attack on the DPR combat position at Olenivka

227. Russia has provided no reason to conclude that the attack on Olenivka — in the middle of the night, using relatively precise artillery, against a front-line position with military presence, elaborate trenchworks, and evidence of armored infantry vehicles — deliberately targeted civilians.

228. At Volnovakha, by contrast, the DPR attacked a civilian vehicle screening checkpoint, controlled by the Ministry of Internal Affairs and staffed by law enforcement personnel, lacking UAF presence, well behind the last line of Ukrainian military positions, and uninvolved in the conflict, at a time of day when civilian vehicles were known to be concentrated. The only logical inference is that launching a hailstorm of rocket fire from multiple BM-21 Grad systems against such a target in the middle of a weekday afternoon was a deliberate attack on civilians.³⁷⁷

³⁷⁶ See OSCE, *Spot Report by the OSCE Special Monitoring Mission to Ukraine (SMM): Shelling in Olenivka* (28 April 2016); Brown Second Report, para. 17 (Ukraine’s Reply, Annex 1); Gwilliam and Corbett Report, paras. 27–30 (Ukraine’s Reply, Annex 2).

³⁷⁷ See Brown Second Report, para. 32 (Ukraine’s Reply, Annex 11).

ii. The Nature and Context of the Attack Was to Intimidate the Ukrainian Civilian Population and Compel the Ukrainian Government to Act or Abstain from Doing any Act

229. Evidence of a deliberate attack on a civilian area, particularly absent any military explanation, is sufficient to conclude that the attack, by its nature or context, had the purpose of intimidating a civilian population.³⁷⁸ Moreover, as General Brown explains, and as Russia and its expert do not refute, “the unannounced saturation of an area [with MLRS fire] combined with the noise of multiple explosions is highly frightening and creates a sense of helplessness. It has a similar, potentially greater psychological effect on civilians.”³⁷⁹ Such chaotic and shocking attacks directed at sites frequented by civilians strongly indicates the purpose of intimidation.³⁸⁰ Russia’s only response is to repeat its claim that the Buhas checkpoint was not a “civilian checkpoint” and did have military significance,³⁸¹ but as shown above, the evidence is overwhelmingly to the contrary.

230. Separate from the purpose of intimidation, Ukraine’s Memorial established the shelling of civilians near Volnovakha had the purpose of compelling a government to act or abstain from acting, and Russia’s Counter-Memorial has no meaningful response. As noted above, it is undisputed that at the time of the attack, the DPR and LPR were actively pressuring the Ukrainian government to make political concessions regarding the constitutional structure of Ukraine.³⁸² It is also undisputed that the attack occurred less than three weeks before the Trilateral Contact Group, comprised of representatives of Ukraine, the Russian Federation,

³⁷⁸ See *supra*, Chapter 5, Section C(2)(ii).

³⁷⁹ Brown First Report, para. 17 (Ukraine’s Memorial, Annex 11).

³⁸⁰ See *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Trial Chamber Judgment (12 December 2007), pp. 290–91, para. 881 (Ukraine’s Memorial, Annex 466).

³⁸¹ See Russia’s Counter-Memorial Part I, paras. 394–396.

³⁸² See Ukraine’s Memorial, para. 234.

and the OSCE, were scheduled to hold a meeting in Minsk to discuss a possible peace settlement.³⁸³ Nor does Russia dispute that carrying out high-profile attacks in close proximity to peace talks is a classic terrorist strategy to maximize bargaining leverage.³⁸⁴ The logical inference from these undisputed facts is that the shelling of civilians had the purpose of compelling Ukraine to make greater political concessions at the upcoming Minsk meeting.

231. Russia's only response is to assert that the connection between a major attack on civilians and contemporaneous efforts by the attackers to compel the government is only speculation.³⁸⁵ It is not "speculation," but rather proper consideration of "context," to draw the natural inference here: an attack on a long line-up of civilians, which lacked any plausible military purpose, had the purpose of supporting ongoing DPR efforts to compel political concessions, particularly where civilians were attacked in close proximity to major diplomatic negotiations. The most recent atrocities of 2022, in which the Russian military is itself attacking civilians in order to exert political pressure, only confirms the point.

2. The DPR's Shelling Attack on a Residential Neighborhood in Mariupol Is a Covered Act Under ICSFT Article 2(1)(b)

232. Less than two weeks after the deadly attack on civilians in Volnovakha, and just one week before the planned 31 January 2015 meeting of the Trilateral Contact Group, the DPR committed another atrocity, this time against the Vostochniy residential neighborhood in the city of Mariupol. Again using BM-21 Grads, the DPR killed thirty civilians, including children, and injured 118 more.³⁸⁶ Imagery of the Vostochniy residential neighborhood

³⁸³ See OSCE, Statement by the Chairmanship on the Trilateral Contact Group Consultations in Minsk on 31 January 2015 (1 February 2015) (Ukraine's Memorial, Annex 330).

³⁸⁴ See Ukraine's Memorial, para. 234.

³⁸⁵ See Russia's Counter-Memorial Part I, para. 398.

³⁸⁶ See Ukraine's Memorial, Chapter 1, Section C(2).

demonstrates that it is densely populated, designed as a web of high-rise apartment buildings interwoven with vendor stalls and small shops.³⁸⁷ Video in the aftermath of the attack shows scenes of carnage and chaos, as panicked residents run through smoke-filled streets amongst burning vehicles, destroyed buildings, and dead bodies.³⁸⁸ Two days after the attack, the U.N. Under-Secretary-General for Political Affairs informed an emergency meeting of the U.N. Security Council 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.”³⁸⁹ The record before this Court is consistent with the Under-Secretary General’s conclusion.

i. The Attack on the Vostochniy Residential Neighborhood Was an Act Intended to Cause Death to Civilians

233. Russia concedes that the attack on the Vostochniy neighborhood was carried out by BM-21 Grads launched from DPR positions.³⁹⁰ Russia also does not dispute the death, destruction, and fear wrought by the attack. Unlike Volnovakha, however, where Russia agreed that the checkpoint was the target of the attack, Russia claims here that the DPR did not target the Vostochniy neighborhood in Mariupol, instead hypothesizing about a variety of possible firing errors and alternative targets. Russia’s arguments notably fail to commit to any alternative explanation for the attack on the Vostochniy neighborhood, merely speculating

³⁸⁷ See Gwilliam and Corbett Report, Figure 17 (Ukraine’s Reply, Annex 2).

³⁸⁸ See euronews, At Least 20 Killed in Rocket Attack on Ukraine's Mariupol (video) (24 January 2015); RT, RAW: Footage from Shelled Mariupol in Southeastern Ukraine (video) (Ukraine’s Reply, Annex 83); RT, Ukraine: Mariupol Hit by Heavy Shelling, Streets Devastated (video) (Ukraine’s Reply, Annex 84).

³⁸⁹ U.N. Security Council Official Record, 7368th mtg. U.N. Doc. S/PV.7368 (26 January 2015), p. 2 (statement of Jeffrey Feltman, U.N. Under-Secretary-General for Political Affairs) (Ukraine’s Memorial, Annex 307).

³⁹⁰ See Samolenkov Report, paras. 186–187 (Russia’s Counter-Memorial Part I, Annex 2).

about what “the DPR *may* have been targeting.”³⁹¹ Even more fundamentally, Russia’s arguments are based on two independently flawed premises: that an error of as much as 2.5 kilometers by a battery of BM-21 systems is plausible, and that there is a plausible military explanation for engaging what Russia speculates might have been the actual targets.

234. *First*, Russia’s defense of the Vostochniy attack assumes that the DPR was attempting to destroy military targets located as much as 2.5 kilometers from the area near Kievskiy Market in the heart of Vostochniy, the center-point of the rocket impacts.³⁹² As General Brown explains in detail, Russia’s theory assumes a “miss distance” that is “too great to be put down to unfortunate technical error.”³⁹³

- Russia and its expert haphazardly point to a number of potential technical errors, from “incorrect system calibrations,”³⁹⁴ to “mistake on the part of the operator,”³⁹⁵ “equipment malfunction,”³⁹⁶ or “incorrect coordinates.”³⁹⁷ Russia’s expert, General Samolenkov, does not commit to any of these explanations, failing to offer an assessment as to the likelihood of any particular error.³⁹⁸
- General Samolenkov’s speculation about equipment malfunctions is readily dismissed. It is undisputed that four BM-21 Grad launchers were deployed in the attack on the Vostochniy district. General Brown explains that “[a]ll the launchers appear to have fired coherently,” and that “if launchers were ‘out of order,’ the likelihood of the nature of their damage resulting in a single consistent

³⁹¹ Russia’s Counter-Memorial Part I, p. 118.

³⁹² Given the various locations Russia speculates the DPR may have been targeting, and its unwillingness to commit to an alternative explanation for the attack, this measurement (from the center point of impact near the Kyivski Market) varies depending upon which theory Russia is arguing at the time.

³⁹³ Brown Second Report, para. 30 (Ukraine’s Reply, Annex 1).

³⁹⁴ Russia’s Counter-Memorial Part I, para. 443 (citing Samolenkov Report, para. 171 (Russia’s Counter-Memorial Part I, Annex 2)).

³⁹⁵ Russia’s Counter-Memorial Part I, para. 443.

³⁹⁶ Russia’s Counter-Memorial Part I, para. 443.

³⁹⁷ Russia’s Counter-Memorial Part I, para. 446.

³⁹⁸ *See* Samolenkov Report, paras. 188–189 (Russia’s Counter-Memorial Part I, Annex 2).

error across at least four launchers is implausible.”³⁹⁹

- General Samolenkov’s suggestion regarding erroneous coordinates or similar human error defy basic operational realities. As General Brown explains, any competent operator would have detected a 2.5 kilometer error in coordinates before firing.⁴⁰⁰ Intercept evidence from the day of the attack on Volnovakha, less than two weeks prior, demonstrates the DPR’s competence in plotting and confirming target coordinates, in precisely the manner General Brown explains would have detected such an error before the shelling of Mariupol.⁴⁰¹

235. *Second*, Russia’s suggestion that the DPR aimed at military targets and that multiple BM-21 systems significantly missed their targets is unpersuasive for the independent reason that these hypothesized targets would not have made military sense. The lack of a reasonable military explanation for attacking these hypothesized targets with a hailstorm of MLRS fire points to the real reason for the attack; namely, to harm civilians in the residential area.⁴⁰² In the case of the Vostochniy neighborhood attack, the nature of the locations and the military context make it implausible that Russia’s proposed alternative targets were the real aims of the attack.

³⁹⁹ Brown Second Report, para. 30(c) (Ukraine’s Reply, Annex 1).

⁴⁰⁰ *See* Brown Second Report, para. 30(a)(i) (Ukraine’s Reply, Annex 1).

⁴⁰¹ *See* Intercepted Conversations of Yuriy Shpakov, pp. 2–3 (16 September 2016) (intercepted conversation between “Yust” and another individual during which the two confirm target grid locations on map) (Ukraine’s Memorial, Annex 430).

⁴⁰² *See supra*, para. 224.

- Russia fails to provide any military justification for targeting Checkpoint 4014, which was manned by National Guard personnel conducting tasks such as screening people and vehicles entering and exiting the city and apprehending criminals.⁴⁰³ As General Brown concludes, while this unit would have “resisted to the best of their ability . . . any military advantage from neutralizing the checkpoint would therefore only accrue if followed up immediately by a ground assault.”⁴⁰⁴ Both sides agree there was no ground assault after the attack.⁴⁰⁵
- Russia does not explain how targeting apparently unoccupied locations in front of the Vostochniy neighborhood could have advanced any reasonable military objective. Russia’s Counter-Memorial claims it is a “natural inference” that the National Guard servicemen at Checkpoint 4014 were deployed to man the positions Colonel Bobkov identifies in front of the Vostochniy neighborhood.⁴⁰⁶ However, Ukraine’s Memorial established that these trenches, fortified pieces of land, and dug-out vehicle positions were not occupied on the day of the attack.⁴⁰⁷ Ms. Gwilliam and Air-Vice Marshal Corbett concluded based on available satellite imagery that “there is nothing that suggests there was a line of forces running between these positions.”⁴⁰⁸

236. Thus, Russia’s suggestion that the residential neighborhood was mistakenly shelled are both technically and militarily implausible. Moreover, additional evidence supports the conclusion that the civilians of the Vostochniy neighborhood were the targets:

⁴⁰³ See 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) (Ukraine’s Memorial, Annex 183).

⁴⁰⁴ Brown First Report, para. 49 (5 June 2018) (Ukraine’s Memorial, Annex 11).

⁴⁰⁵ See Russia’s Counter-Memorial Part I, para. 405; Ukraine’s Memorial, para. 238.

⁴⁰⁶ See Russia’s Counter-Memorial Part I, para. 421.

⁴⁰⁷ See 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, p. 2 (31 May 2018) (identifying that National Guard units were located at Company Position 4015, Company Position 4013, and at Platoon Position 4014A) (Ukraine’s Memorial, Annex 183).

⁴⁰⁸ Gwilliam and Corbett Report, para. 61 (Ukraine’s Reply, Annex 2).

- While Russia argues that the reference to “Vostochniy” in the intercepts is not a reference to the residential area,⁴⁰⁹ two conversations in particular strongly suggest that the “Vostochniy” neighborhood was the target of the attack and that the DPR celebrated that it had been struck. At 10:38 AM on the morning of the attack, Kirsanov called Sergey Ponomarenko, a DPR member, to provide a damage report, stating: “*Vostochniy seriously f*cking suffered.*”⁴¹⁰ A little more than twenty minutes later, Kirsanov and Ponomarenko had another conversation in which Ponomarenko celebrates the attack, saying about “Vostochniy”: “*Let the f*cking bitches be more afraid.*”⁴¹¹
- Ukraine’s Memorial also presented evidence that at approximately 11:00 AM, a little more than an hour after the end of the first shelling attack, the DPR launched a second attack on the Vostochniy neighborhood.⁴¹² The Counter-Memorial attempts to question the existence of an 11:00 AM shelling, but it merely draws inferences from omissions in certain accounts which are just as readily explained by the chaotic and traumatic course of events. Russia’s response fails to rebut testimony regarding a second round of shelling hitting the neighborhood, and the existence of dashboard camera footage,⁴¹³ both of which support the existence of an 11:00 AM shelling.

237. Even assuming, however, that Russia is correct and the DPR committed extraordinary human error or suffered a catastrophic equipment malfunction while intending to target other locations in the area, the nature of the attack shows that it was an act intended to harm civilians. Russia’s expert concedes that “the most accurate weapon should, where

⁴⁰⁹ Russia’s Counter-Memorial Part I, para. 432.

⁴¹⁰ Intercepted Conversation between Valeriy Kirsanov and Sergey Ponomarenko (24 January 2015) (emphasis added) (Ukraine’s Memorial, Annex 415); Statement of Authentication, Volodymyr Piven, Senior Investigator, Main Investigation Office, Security Service of Ukraine (5 June 2018) (Ukraine’s Memorial, Annex 185).

⁴¹¹ Intercepted Conversation between Valeriy Kirsanov and Sergey Ponomarenko (24 January 2015) (emphasis added) (Ukraine’s Memorial, Annex 415); Statement of Authentication, Volodymyr Piven, Senior Investigator, Main Investigation Office, Security Service of Ukraine (5 June 2018) (Ukraine’s Memorial, Annex 185).

⁴¹² See Ukraine’s Memorial, para. 94.

⁴¹³ See Video of the shelling of Mariupol (24 January 2015) (Ukraine’s Memorial, Annex 697). Russia speculates that the time recorded on the dashboard camera video may have been incorrect, although Russia offers no analysis of the video that would support this assertion. See Russia’s Counter-Memorial Part I, para. 449(b).

possible, be used to attack any given target close to civilian houses or infrastructure.”⁴¹⁴ While General Samolenkov attempts to discount this point by questioning whether the DPR had more accurate weapons available, General Brown notes that it did — based on Colonel Bobkov’s own analysis and the findings of Ms. Gwilliam and Air Vice-Marshal Corbett.⁴¹⁵ As Ukraine explained in its Memorial, the use of multiple BM-21 weapon systems to attack the other purported targets on the outskirts of the city ensured that areas of the Vostochniy neighborhood would be harmed.⁴¹⁶ General Brown explains that the weapon system used was incapable of damaging the northern checkpoint and other nearby positions without hitting the eastern section of the residential area.⁴¹⁷ Thus, even if Russia’s speculation about the actual targets of the attack are credited, the choice of the BM-21 weapon system against targets on the outskirts of a densely populated residential area would have ensured that civilian harm was a certain outcome of the attack.⁴¹⁸

ii. The Nature and Context of the Attack Establish that Its Purpose Was to Intimidate the Ukrainian Civilian Population and Compel the Ukrainian Government to Act or Abstain from Doing any Act

238. The evidence discussed above, in Ukraine’s Memorial, and in more detail by General Brown in his Second Report establish that the DPR launched a deliberate attack on a civilian area with a battery of BM-21 Grad systems. The nature of such an attack is sufficient in itself to establish the purpose of intimidation.⁴¹⁹

⁴¹⁴ Samolenkov Report, para. 185 (Russia’s Counter-Memorial Part I, Annex 2).

⁴¹⁵ See Brown Second Report, para. 34 (Ukraine’s Reply, Annex 1).

⁴¹⁶ Ukraine’s Memorial, para. 239.

⁴¹⁷ See Brown First Report, para. 50 (Ukraine’s Reply, Annex 1).

⁴¹⁸ See Brown First Report, para. 59 (Ukraine’s Memorial, Annex 11).

⁴¹⁹ See *supra*, para. 229.

239. The inference of such a purpose is further strengthened by the specifics of the attack. The DPR launched the attack on a Saturday morning, when civilians in the Vostochniy district were likely either at home with their families or conducting errands in the neighborhood.⁴²⁰ A Saturday morning attack on a densely populated residential neighborhood is guaranteed to heighten its terrorizing effects, a point Russia does not dispute. Nor does it dispute that the attack caused many civilians to flee — confirming General Brown’s assessment that, viewed from a military perspective, the attack appears to have been an attempt to catalyze the evacuation of the civilian population.⁴²¹ While direct evidence of a purpose to intimidate is rare and unnecessary under Article 2(1)(b), in the case of Mariupol it exists: a DPR member on the ground, *after* the civilian death and destruction was apparent, proclaimed: “*Let the f*cking bitches be more afraid.*”⁴²² Russia has no innocent explanation for this statement.

240. Russia’s Counter-Memorial does not even engage with the independent ground for concluding that the Mariupol shelling is covered by Article 2(1)(b): its purpose of compelling the Ukrainian government to act. It is undisputed that Mariupol’s civilian population was shelled less than two weeks after a bus full of civilian pensioners were killed near Volnovakha, just a week before a major diplomatic conference at which the DPR was seeking to extract political concessions, and as a prelude to the attack on the civilians of Kramatorsk discussed below. Considered in light of this political context, it is proper to infer

⁴²⁰ See Ukraine’s Memorial, para. 242.

⁴²¹ See Brown Second Report, para. 35(e)(i) (Ukraine’s Reply, Annex 1).

⁴²² Intercepted Conversation Between Valeriy Kirsanov and Sergey Ponomarenko (24 January 2015) (emphasis added) (Ukraine’s Memorial, Annex 415); Statement of Authentication, Volodymyr Piven, Senior Investigator, Main Investigation Office, Security Service of Ukraine (5 June 2018) (Ukraine’s Memorial, Annex 185).

that the shelling of the Vostochniy neighborhood had the purpose of compelling the Ukrainian government to act or abstain from acting.

3. The DPR's Shelling Attack on a Residential Neighborhood in Kramatorsk Is a Covered Act Under ICSFT Article 2(1)(b)

241. On 31 January 2015, in the shadow of the attacks on civilians at Volnovakha and Mariupol, the Trilateral Contact Group held its planned meeting in Minsk to discuss a proposed peace settlement. The participants made little progress toward a resolution.⁴²³ One week later, on 7 February 2015, France and Germany put forward a new peace plan,⁴²⁴ and a summit involving Russia, Ukraine, France, and Germany was scheduled for 11 February 2015 in Minsk to negotiate measures to stop the conflict.⁴²⁵ On 10 February 2015, one day before this Minsk summit was scheduled to convene, the DPR launched a series of sophisticated rockets deep into government-controlled territory, bombarding a residential sector of the city of Kramatorsk with cluster munitions and debris. The attack, conducted at lunch time on a Tuesday, damaged fifteen residential buildings, as well as a kindergarten, art school, and a local hospital.⁴²⁶ Seven civilians were killed, and twenty-six were seriously injured, including five children. Amateur video captured one resident's terror and fear as cluster munitions exploded on homes and other residential buildings nearby.⁴²⁷

⁴²³ See OSCE, Statement by the Chairmanship On the Trilateral Contact Group Consultations in Minsk on 31 January 2015 (1 February 2015) (Ukraine's Memorial, Annex 330).

⁴²⁴ Stephen Brown & Noah Barkin, *Merkel Rules Out Arming Ukraine Government but Unsure Peace Push Will Work*, Reuters (7 February 2015) (Ukraine's Memorial, Annex 557).

⁴²⁵ See Vladimir Soldatkin & Pavel Polityuk, *"Glimmer of Hope" for Ukraine After New Ceasefire Deal*, Reuters (12 February 2015) (Ukraine's Memorial, Annex 560).

⁴²⁶ See Executive Committee of the Kramatorsk City Council Letter No. F1-28/4812 to the Investigations Department at the Donetsk Regional Directorate of the SBU (26 November 2015), p. 1 (Ukraine's Memorial, Annex 142).

⁴²⁷ See The Guardian, *Rockets Hit Residential Area in Kramatorsk, Ukraine* (video) (10 February 2015).

242. To shell the civilians of Kramatorsk, the DPR employed a significantly more sophisticated weapons system — the BM-30 “Smerch,”⁴²⁸ whose range and munitions made it uniquely suited to intimidating the civilian population deep in government-controlled territory. The sophistication of this system also renders implausible Russia’s speculation that the attack could have been the result of catastrophic mechanical error in an attack on an airfield a full five kilometers away.

i. The Attack on the Kramatorsk Residential Neighborhood Was an Act Intended to Cause Death to Civilians

243. Ukraine in its Memorial established that the Kramatorsk residential neighborhood was deliberately targeted with a BM-30 Smerch.⁴²⁹ In its Counter-Memorial, Russia concedes that the BM-30 was the weapon used in the attack,⁴³⁰ and it does not dispute that the BM-30 is a high value and sophisticated MLRS. Russia and its military expert also do not dispute that the attack was launched by the DPR.⁴³¹ Russia’s expert also agrees with General Brown that “there is no evidence of any military targets in the residential area of Kramatorsk that would justify targeting it with a BM-30 salvo.”⁴³² As with the shelling attacks on Volnovakha and Mariupol, Russia also does not dispute that civilians were killed and injured, and that the population experienced terror and fear as a result of the attack.

⁴²⁸ See Brown First Report, para. 63 (“[The] BM-30 is still considered to be one of the most, if not the most, powerful MLRS in the world. Most countries possessing BM-30 consider it a high value national asset to be controlled at the military strategic level.”) (Ukraine’s Memorial, Annex 11).

⁴²⁹ See Ukraine’s Memorial, paras. 245–248.

⁴³⁰ See Russia’s Counter-Memorial Part I, para. 464; Samolenkov Report, para. 204 (Russia’s Counter-Memorial Part I, Annex 2).

⁴³¹ See Samolenkov Report, para. 219 (stating that “on the assumption that the attack could only be organised by the DPR, I agree that the range must have been more than 50 km”) (Russia’s Counter-Memorial Part I, Annex 2).

⁴³² Samolenkov Report, para. 201 (quoting Brown First Report, para. 67 (Ukraine’s Memorial, Annex 11)) (Russia’s Counter-Memorial Part I, Annex 2).

244. Instead, Russia speculates that the munitions that killed and injured civilians in the residential area of Kramatorsk must have overflowed a different target — the Kramatorsk airfield located five kilometers away from the areas of the Kramatorsk neighborhood that were struck.⁴³³ Russia’s theory is that the DPR launched a single BM-30 attack against the airfield, in which some rockets successfully landed at the airfield, but others overflowed their target by five kilometers to land in the middle of a residential district. Yet again, Russia and its expert suggest a range of hypothetical malfunctions that “may” have caused such an overflight, failing to commit to any of these unlikely explanations.⁴³⁴ In fact, in this instance General Samolenkov even concedes that some of his hypotheses are “very unlikely.”⁴³⁵ Russia’s defense of the Kramatorsk attack must be rejected:

- Although Russia suggests “human error” as an explanation, its own expert concedes that “the totality of various errors . . . is very unlikely to lead to a cumulative increase in the distribution for range to so large an extent.”⁴³⁶ Thus, both parties’ military experts agree that operator error is unlikely to explain an attack targeting the airfield where some rockets overflowed by five kilometers.
- Russia’s speculations of mechanical error are “ballistically implausible,” as explained by General Brown.⁴³⁷ Any ammunition defects would most likely have been detected by the sophisticated BM-30 system itself prior to firing. But in the

⁴³³ See Russia’s Counter-Memorial Part I, para. 464.

⁴³⁴ See Samolenkov Report, paras. 224–227 (Russia’s Counter-Memorial Part I, Annex 2).

⁴³⁵ Samolenkov Report, para. 223 (Russia’s Counter-Memorial Part I, Annex 2).

⁴³⁶ Samolenkov Report, para. 223 (Russia’s Counter-Memorial Part I, Annex 2). General Samolenkov separately suggests the possibility that “grave” human error could have occurred when firing data was transmitted or entered into the BM-30, but quickly admits that this is “less likely.” See Samolenkov Report, para. 224 (Russia’s Counter-Memorial Part I, Annex 2). General Samolenkov reaches this conclusion based on yet another speculation: it is unlikely a BM-30 would fire less than a full load of 12 rockets at once, although he fails to offer any support for his speculation on this point. See Samolenkov Report, para. 224 (Russia’s Counter-Memorial Part I, Annex 2).

⁴³⁷ See Brown Second Report, paras. 43–44 (Ukraine’s Reply, Annex 1).

unlikely event that faulty munitions were launched, that would “typically cause the rocket to drop short of its intended target” — not overfly by 5 kilometers.⁴³⁸

- It is even more unlikely that “[s]everal rockets at once could have exhibited the same malfunctioning pattern.”⁴³⁹ Both parties’ experts agree that multiple rockets landed in both the residential area and the airfield. Russia’s expert proposes no serious theory for how a single attack on the airfield could have resulted in such a large spread of impacts. As General Brown notes, General Samolenkov “accepts that ‘the sub-munitions from one salvo of BM-30 cannot fall 5 km from each other.’”⁴⁴⁰

245. The record thus permits only one possible conclusion: the airfield and the residential area were targeted separately.⁴⁴¹ Russia’s speculation that there was only one attack on the airfield, and that multiple rockets simultaneously malfunctioned, significantly overflowed their intended target, and yet somehow managed to deploy their bomblets in a consistent pattern across the residential area — is completely unsupported. The deliberate attack on the residential area was an act intended to cause civilian death.

ii. The Nature and Context of the Attack Establish that Its Purpose Was to Intimidate the Ukrainian Civilian Population and Compel the Ukrainian Government to Act or Abstain from Doing any Act

246. The fact that the DPR intentionally shelled a densely populated residential neighborhood suffices to establish a purpose to intimidate a civilian population.⁴⁴²

247. Evidence of a deliberate attack on a civilian residential sector of a city, particularly with a powerful and sophisticated weapon system that rains down cluster

⁴³⁸ Brown Second Report, para. 43(a) (Ukraine’s Reply, Annex 1).

⁴³⁹ Brown Second Report, para. 44 (Ukraine’s Reply, Annex 1).

⁴⁴⁰ Brown Second Report, para. 42(b) (citing Samolenkov Report, paras. 210–211, 221 (Russia’s Counter-Memorial Part I, Annex 2)) (Ukraine’s Reply, Annex 1).

⁴⁴¹ This is further supported by the evidence Ukraine presented in its Memorial that there were two separate attacks. *See* Ukraine’s Memorial, para. 102.

⁴⁴² *See supra*, paras. 229, 238.

munitions, is sufficient to conclude that the attack, by its nature or context, had the purpose of intimidating a civilian population.⁴⁴³ The fact that the attack was launched in the middle of a weekday, striking a kindergarten, art school, local hospital, and other civilian buildings, is further evidence of the purpose to intimidate the civilian population.

248. Separate from the DPR's purpose to intimidate, the attack on Kramatorsk had the purpose of compelling the Ukrainian government to act or abstain from acting.⁴⁴⁴ Russia ignores this point altogether. The attack on Kramatorsk occurred one day before Ukraine, Russia, France, and Germany were scheduled to negotiate a peace plan,⁴⁴⁵ bookending a series of high profile shelling attacks on civilians in early 2015. Given the nature of these attacks — the capstone of which involved cluster munitions launched deep into government-controlled territory — the summit participants would have undoubtedly had these events in mind as they negotiated a settlement. This context further demonstrates that the purpose of the attack on Kramatorsk was to compel the Ukrainian government to give in to political demands.

4. The DPR's Protracted Campaign of Shelling Attacks on Civilians in Avdiivka Included Covered Acts Under ICSFT Article 2(1)(b)

249. Even after the Minsk II agreement was signed, Ukrainian civilians remained vulnerable to shelling attacks and intimidation by the DPR and LPR. One palpable example was the relentless, weeks-long, indiscriminate campaign of shelling against the civilian population of Avdiivka in January and February of 2017.⁴⁴⁶ While this campaign included attacks on military personnel and equipment, the evidence establishes that it also included

⁴⁴³ See *supra*, Chapter 5, Section C(2)(ii).

⁴⁴⁴ See Ukraine's Memorial, para. 254.

⁴⁴⁵ See Vladimir Soldatkin and Pavel Polityuk, "Glimmer of Hope" for Ukraine After New Ceasefire Deal, Reuters (12 February 2015) (Ukraine's Memorial, Annex 560).

⁴⁴⁶ See Ukraine's Memorial, paras. 108–114.

many attacks that targeted civilians or were fired indiscriminately at civilians. These acts were intended to cause death or serious bodily injury to civilians, and by their nature and context their purpose was to intimidate the civilian population or compel government action.⁴⁴⁷

i. The Indiscriminate Shelling of Avdiivka Included Acts Intended to Cause Death to Civilians

250. The weeks-long campaign against Avdiivka included numerous terrorist acts under Article 2(1)(b).⁴⁴⁸ Russia does not deny that the DPR launched repeated shelling attacks on Avdiivka. Nor does Russia dispute that launching a volley of indiscriminate MLRS fire into urban areas is certain to harm civilians. Russia's expert even concedes that at least some attacks were aimed at civilians, before concluding without evidentiary support that "[i]t seems reasonable to assume . . . that the *overwhelming majority* of the shellings were aimed at military targets."⁴⁴⁹ While General Samolenkov overstates the extent to which attacks were aimed at military targets, his carefully-worded conclusion accepts that some attacks were *not* aimed at military targets. This alone establishes acts intended to cause death to civilians.

251. Nonetheless, Russia's Counter-Memorial offers various attempts to excuse what "may" be mere "collateral damage."⁴⁵⁰ Russia's arguments fail:

- Many of the documented incidents of harm to civilians in Avdiivka were far from Ukrainian military positions. Though Russia's Counter-Memorial attempts to focus on specific areas of Avdiivka, particularly those at the edge of the city,⁴⁵¹ it identifies no credible military explanation for the attacks on civilian homes in the northern residential area, away from UAF positions and possible resupply routes.

⁴⁴⁷ ICSFT, art. 2(1).

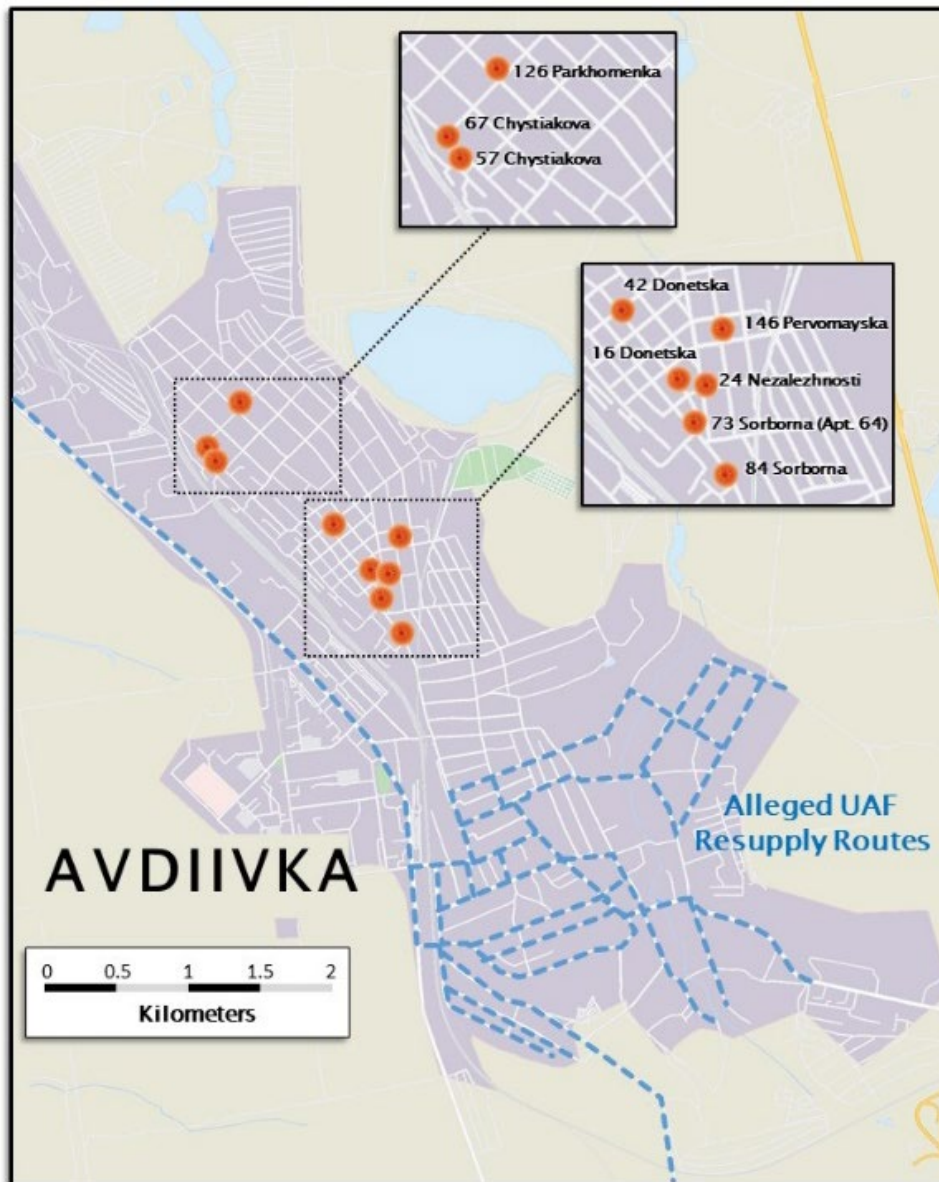
⁴⁴⁸ See Ukraine's Memorial, Chapter 4, Section D(4).

⁴⁴⁹ Samolenkov Report, para. 253 (emphasis added) (Russia's Counter-Memorial Part I, Annex 2).

⁴⁵⁰ See Russia's Counter-Memorial Part I, para. 498.

⁴⁵¹ See Russia's Counter-Memorial Part I, paras. 480–492

Map 1: Shelling Impacts in the Northern Residential Area⁴⁵²



⁴⁵² At the time Ukraine filed its Memorial in June 2018, investigations into the 2017 attacks in Avdiivka were ongoing. Some of the attacks on this map were identified based on witness statements and property inspection reports contained in investigation files obtained after Ukraine filed its Memorial. See Ukraine’s Reply, Annexes 44–49, 51–55.

- With respect to attacks in the southern half of Avdiivka, Russia speculates that some of these attacks were directed at “possible” UAF resupply convoys.⁴⁵³ But there is no evidence the DPR had the capacity to target such convoys. As General Brown explains, “engagement of moving targets on resupply routes by artillery or rockets is particularly contentious and difficult at the best of times, all the more so when observation is restricted as it would have been in the urban environment of Avdiivka.”⁴⁵⁴

252. In any event, even if some military targets were in the vicinity, Russia’s use of MLRS in densely populated civilian areas of Avdiivka was inherently indiscriminate, and qualifies as acts intended to cause civilian deaths on that basis alone.⁴⁵⁵

ii. The Nature and Context of the Attacks Establish that the Purpose Was to Intimidate the Ukrainian Civilian Population and Compel the Ukrainian Government to Act or Abstain from Doing any Act

253. Evidence of deliberate attacks on civilians, particularly civilian homes away from military locations,⁴⁵⁶ is sufficient to conclude that those attacks, by their nature or context, had the purpose of intimidating a civilian population.⁴⁵⁷ General Samolenkov concedes that some attacks on Avdiivka civilians were not aimed at military targets,⁴⁵⁸ and General Brown concludes that there were attacks on “residential areas of Avdiivka where there were neither UAF forces nor resupply routes.”⁴⁵⁹ Russia’s Counter-Memorial does not even

⁴⁵³ See Russia’s Counter-Memorial Part I, para. 498.

⁴⁵⁴ Brown Second Report, para. 55 (Ukraine’s Reply, Annex 1).

⁴⁵⁵ See *supra*, para. 161. Russia attempts to call into question certain evidence that the DPR fired BM-21 Grad into Avdiivka. See Russia’s Counter-Memorial Part I, para. 504. However, as General Brown concludes, expert reports that describe BM-21 shell fragments that damaged civilian property provide “clear evidence that BM-21 was used in attacks on the residential area of Avdiivka.” Brown Second Report, para. 60(a) (Ukraine’s Reply, Annex 1).

⁴⁵⁶ See Ukraine’s Reply, Annexes 44–49, 51–55.

⁴⁵⁷ See *supra*, Chapter 5, Section C(2)(ii).

⁴⁵⁸ See *supra*, para. 250.

⁴⁵⁹ Brown Second Report, para. 58 (Ukraine’s Reply, Annex 1).

attempt to justify these attacks. Russia also does not deny that evidence of repeated, long-term, and persistent attacks against civilians is evidence of the purpose to intimidate a civilian population.⁴⁶⁰ For more than a month, the DPR conducted an unrelenting shelling campaign against Avdiivka that brought civilians to their breaking point.⁴⁶¹

254. The attacks on civilians in Avdiivka also had the purpose of compelling the Ukrainian government to act.⁴⁶² The surge in attacks occurred at a time of significant geopolitical uncertainty as a new U.S. administration took office.⁴⁶³ Ukraine's Memorial demonstrated that the attacks were an attempt by the DPR and LPR to exploit this uncertainty and pressure the Ukrainian government to cede to their political demands.⁴⁶⁴ In dismissing this assessment without explanation, Russia ignores that this was precisely the conclusion of Ukrainian civilians, Ukrainian officials, international news outlets, and leaders in other capitals.⁴⁶⁵ This indisputable context demonstrates that the purpose of the shelling campaign against the citizens of Avdiivka was to exert pressure during a period of geopolitical

⁴⁶⁰ See *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Trial Chamber Judgment (12 December 2007), para. 881 (identifying “long term and persistent attacks on civilians . . . as indicia of the intent to spread terror”) (Ukraine's Memorial, Annex 466).

⁴⁶¹ See Ukraine's Memorial, para. 111; see also John Wendle, *Avdiivka, Evacuating Again As Fighting Escalates*, Al Jazeera (8 February 2017) (“I would give my pension. I would give anything for this to stop.”) (Ukraine's Memorial, Annex 594).

⁴⁶² See Ukraine's Memorial, para. 259.

⁴⁶³ See Ukraine's Memorial, para. 260.

⁴⁶⁴ See Ukraine's Memorial, para. 260.

⁴⁶⁵ See John Wendle, *In Avdiivka, Ukrainians See Surge in Fighting as Putin Testing Trump*, Time (3 February 2017) (As one Ukrainian volunteer soldier stated at the time, “[t]here is a direct link between the fighting in Avdiivka and the election of Trump. The separatists wanted to test the reaction of the new administration.”); Shaun Walker, *Violence Flares in War-Weary Ukraine as US Dithers and Russia Pounces*, The Guardian (14 February 2017) (According to the Deputy Head of the Ukrainian Presidential Administration, the attacks were “a test from the Russian side of the reaction of the new American administration and unity inside the European Union.”); John Wendle, *In Avdiivka, Ukrainians See Surge in Fighting as Putin Testing Trump*, Time (3 February 2017) (Senator John McCain wrote a letter to the newly-elected U.S. President regarding the surge in attacks on Avdiivka, stating: “Vladimir Putin is moving quickly to test you as a commander in chief.”).

uncertainty in an attempt to compel the Ukrainian government to give in to political demands. As this Reply is filed, Russia is itself doing exactly the same against major cities across Ukraine.

D. Ukraine Has Established that Bombings in Ukrainian Cities Constitute Terrorist Acts for Purposes of Article 2(1)(a) and 2(1)(b)

255. Finally, in its Memorial, Ukraine established that various groups orchestrated a campaign of civilian intimidation through bombing attacks in Ukraine's major cities.⁴⁶⁶ In Kharkiv in 2014 and 2015, the Kharkiv Partisans and related terror cells instilled fear in civilians through a string of bombings. One attack targeted the Stena Rock Club, a crowded nightclub popular with supporters of Ukrainian unity, with an SPM limpet mine, a military-grade weapon typically used in naval warfare.⁴⁶⁷ Another attack targeted a patriotic unity march with a MON-100 anti-personnel mine, killing three civilians, including a 15-year-old boy and a police officer, and injuring 15 more.⁴⁶⁸ In Kyiv in 2017, Russian intelligence operatives working with LPR militants offered money to Ukrainian nationals to plant a car bomb in an attempt to assassinate Anton Gerashchenko, a Ukrainian member of Parliament.⁴⁶⁹ In Odesa, pro-separatist operatives targeted the head of an NGO.⁴⁷⁰

256. Russia does not dispute that these bombing attacks occurred. Nor does Russia dispute that all of the bombing incidents cataloged in Ukraine's Memorial constitute acts of terrorism covered by Article 2(1)(a) of the ICSFT (as a violation of the International Convention for the Suppression of Terrorist Bombings), and that many are also covered by Article 2(1)(b) of the ICSFT. Accordingly, it is undisputed that any person who knowingly funded any of these acts committed an offense under Article 2 of the ICSFT.

⁴⁶⁶ Ukraine's Memorial, Chapter 1, Section D.

⁴⁶⁷ Ukraine's Memorial, paras. 118–119.

⁴⁶⁸ Ukraine's Memorial, para. 121.

⁴⁶⁹ Ukraine's Memorial, paras. 123–125.

⁴⁷⁰ Ukraine's Memorial, paras. 128–130.

Chapter 7. UKRAINE HAS ESTABLISHED TERRORISM FINANCING OFFENSES COMMITTED BY OFFICIALS AND OTHER PERSONS IN RUSSIAN TERRITORY

257. Ukraine’s Memorial established that various persons in Russian territory – including state officials, private individuals, and organizations – provided weapons, money, and other assets to groups in Ukraine who carried out a pattern of acts covered by Article 2(1)(a) and (b) of the ICSFT.⁴⁷¹ A terrorism financing offense under Article 2 occurs when “any person” provides “funds” with either the “intention that they should be used” or “knowledge that they are to be used, in full or in part, in order to carry out” acts covered by Article 2(1)(a) and (b). As the Court confirmed in its Judgment on Preliminary Objections, “any person” under Article 2 “applies both to persons who are acting in a private capacity and to those who are State agents.”⁴⁷² Chapter 4, Section A of this Reply explained that “funds” under the ICSFT is defined to include “assets of every kind,” and money, weapons, and other forms of property are kinds of assets.⁴⁷³ As explained in Chapter 4, Section B, the parties agree that if a group notoriously engages in acts covered by Article 2(1)(a) and (b), the knowledge requirement of Article 2(1) is satisfied.⁴⁷⁴ Applying these legal principles to the facts established by Ukraine, numerous acts of terrorism financing by persons under Russia’s jurisdiction have been committed.

258. In its Counter-Memorial, Russia is largely silent with regard to this financing. Remarkably, no section of Russia’s Counter-Memorial even focuses on the specific acts of funding that Ukraine maintains constitute terrorism financing offenses under Article 2 of the Convention. With the sole exception of the bombing attacks in Ukrainian cities, Russia does not dispute that Russian officials and other persons under Russia’s jurisdiction provided funds to the perpetrators of the terrorist activities described in Chapter 6 of this Reply.

⁴⁷¹ See Ukraine’s Memorial, Chapter 5.

⁴⁷² Judgment on Preliminary Objections, p. 585, para. 61.

⁴⁷³ See *supra*, Chapter 4, Section A.

⁴⁷⁴ See *supra*, paras. 101, 112. Ukraine explained that because the knowledge standard is satisfied, Ukraine need not address the separate prong of Article 2(1) regarding “intention” that the funds “should be used” for covered acts. See *supra*, para. 100, n.110.

259. The specific obligations under the ICSFT are triggered in different ways — some when allegations are made, some when there is reasonable suspicion, and so on. Measured against any threshold, however, Ukraine has demonstrated that terrorism financing offenses were in fact committed in this case. As elaborated below, the evidence set forth in Ukraine’s Memorial demonstrates that the provision of funds by persons under Russia’s jurisdiction to the DPR, LPR, and other armed groups constituted knowing financing of terrorism within the meaning of Article 2(1) of the ICSFT.

A. Persons in Russia Supplied Funds to Illegal Armed Groups in Ukraine Who, in Turn, Carried Out Attacks on Civilians

260. Ukraine’s Memorial put forward significant evidence that persons in Russia provided the DPR, LPR, and other illegal armed groups in Ukraine with money, equipment, and extensive weaponry, including the Buk anti-aircraft system that was used to destroy Flight MH17, the BM-21 Grad and BM-30 MLRS that were used to shell Ukrainian civilians, and the military-grade explosives that were used to terrorize Kharkiv and other Ukrainian cities. Chapter 2 of Ukraine’s Memorial detailed this evidence, and Chapter 5 identified numerous specific persons in Russian territory who committed particular acts of terrorism financing.

261. In its Counter-Memorial, Russia simply ignores most of this evidence. With the exception of the military-grade explosives used in Kharkiv and other cities, there is no dispute that the persons in Russia previously identified by Ukraine did in fact supply these funds to groups in Ukraine. This Section will briefly recall the types of financing that are common ground between the parties, and will then respond to Russia’s challenge to the evidence concerning the supply of explosives.

1. Fundraising and Supply of Money

262. Ukraine’s Memorial presented substantial evidence of fundraising in Russia for illegal armed groups operating in Ukraine, and the transfer of vast sums of money to these

groups.⁴⁷⁵ As Ukraine noted, the so-called Supreme Council of the DPR stated that “we would not have survived without support” from Russia.⁴⁷⁶ As examples, prominent Russian billionaire Konstantin Malofeev and multiple members of the Duma have raised private funds to send to the DPR and LPR.⁴⁷⁷ Various Russian non-governmental organizations have also together publicly raised and supplied millions of rubles to the DPR and LPR, including by using a Russian State-owned bank or accounts of a Russian-headquartered technology company for fundraising.⁴⁷⁸ In its Counter-Memorial, Russia disputes none of this evidence.

2. Supply of the Buk TELAR system

263. Russia also does not contest that the Buk TELAR system was supplied to the DPR by Russian persons in July 2014. The day before it was used to destroy Flight MH17, members of the 53rd Anti-Aircraft Missile Brigade of the Armed Forces of the Russian Federation delivered the Buk TELAR surface-to-air missile system to the DPR.⁴⁷⁹ Russia has made no attempt to counter the overwhelming evidence that the Buk was supplied by members of the Russian military.

3. Supply of Multiple Launch Rocket Systems

264. With respect to the numerous deadly Multiple Launch Rocket Systems (“MLRS”) used to bombard the civilian population of Ukraine, Russia also does not contest that Russian military officials began supplying the DPR and LPR with MLRS as early as June

⁴⁷⁵ Ukraine’s Memorial, paras. 174–179.

⁴⁷⁶ Ukraine’s Memorial, para. 174. *See also* The Russian Secret Behind Ukraine’s Self-Declared ‘Donetsk Republic’, France 24 (15 October 2015) (video), mm 00:03:00–00:04:00; 00:12:00 (Ukraine’s Memorial, Annex 583).

⁴⁷⁷ Ukraine’s Memorial, paras. 175–176, 178.

⁴⁷⁸ Ukraine’s Memorial, paras. 176, 176 n.399, 277.

⁴⁷⁹ Ukraine’s Memorial, paras. 137–154. *See also* Official Report of the Dutch National Police (24 May 2018) (original in Dutch) (Ukraine’s Memorial, Annex 42); Witness Statement of Eliot Higgins (5 June 2018) (Ukraine’s Memorial, Annex 9).

2014, and continued to do so into the summer of 2015.⁴⁸⁰ Ukraine has put forward evidence of specific MLRS transfers from Russia, as well as statements by DPR and LPR members that they had received or witnessed the receipt of these weapons from Russia.⁴⁸¹

265. There is, moreover, evidence showing a connection between particular MLRS transfers and particular attacks against civilians. In the days preceding the attack on the civilian checkpoint near Volnovakha, for instance, there was a documented increase in BM-21 Grad MLRS transfers from Russia.⁴⁸² Following that deadly attack, more BM-21 Grads were supplied to the DPR, after which MLRS were used to shell Mariupol.⁴⁸³ After the shelling of civilian areas in Mariupol, the powerful BM-30 Smerch was provided and used against Kramatorsk.⁴⁸⁴ Russia does not dispute any aspect of this disturbing pattern.

4. Supply of Explosive Devices and Other Support of Bombing Attacks in Ukraine

266. Ukraine also has provided evidence that Russian officials funded groups and individuals engaged in bombing attacks in Ukraine.⁴⁸⁵ This supply of funds could not have occurred without the planning, participation, organization, and direction of Russian officials. Russia responds that “Ukraine has failed to prove such involvement of any Russian officials[,]”⁴⁸⁶ falsely asserting that “[t]he evidence relied on by Ukraine consists of records of interrogations” which are “generally unreliable.”⁴⁸⁷ Ukraine’s evidence does not consist solely

⁴⁸⁰ Ukraine’s Memorial, para. 156.

⁴⁸¹ Ukraine’s Memorial, paras. 156–161.

⁴⁸² Ukraine’s Memorial, para. 159.

⁴⁸³ Ukraine’s Memorial, paras. 160, 291.

⁴⁸⁴ Ukraine’s Memorial, paras. 161, 291.

⁴⁸⁵ Ukraine’s Memorial, Chapter 5.

⁴⁸⁶ Russia’s Counter-Memorial Part I, para. 603.

⁴⁸⁷ Russia’s Counter-Memorial Part I, para. 604.

of interrogation records.⁴⁸⁸ Moreover, Russia offers no evidence of coercion or other circumstances that would cast doubt on the statements at issue.⁴⁸⁹ Russia's suggestion that there is no evidence of Russian funding of these bombing attacks is particularly cynical in light of the fact that Russia specifically requested that the bombers in these attacks be included as part of prisoner exchanges between Ukraine and the Russian Federation.⁴⁹⁰ If these perpetrators acted on their own without funding from Russian officials, it is hard to understand why Russia would want to secure their release.

267. The string of bombings in Kharkiv, Ukraine's second-largest city just 40 kilometers from the border with Russia, is particularly significant. Evidence that is not addressed or disputed by Russia establishes that explosives and other lethal devices used in bombing attacks in Kharkiv originated from Russia, and could have only been supplied by Russian officials. These bombing attacks were not committed using improvised explosive devices or weapons that could have been made with instructions from the Internet. Rather, the string of bombings in Kharkiv was committed using military-grade weapons including SPM limpet mines, an MRP-A rocket-propelled grenade launcher, and a MON-100 anti-personnel mine. Russia never engages with this evidence or explains how these military

⁴⁸⁸ Ukraine's Memorial, paras. 118, 119, 121, 125, 126, 128, 129 (citing to expert conclusions, video recordings, security surveillance footage, forensic reports, OSCE and U.N. reports, intercepted conversations, and crime scene reports).

⁴⁸⁹ Russia's Counter-Memorial Part I, paras. 508, 604.

⁴⁹⁰ Novynarnia, "*Separam - Freedom*": *Whom Ukraine Released to ORDLO at the Big Exchange in 2019. List*, (30 December 2019) (Ukraine's Reply, Annex 78). Among those released to Russia were perpetrators who fed intelligence to Russian armed forces about the Ukrainian troops, Russian soldiers involved in hostilities in eastern Ukraine, and Volodymyr Tsemakh, a commander of air defenses for Russian-backed rebels in eastern Ukraine, who allegedly was involved in shooting down of MH-17. Oksana Polishuk, *Feel the Difference: Who Ukraine Gives to Free From Captivity*, Ukrinform (27 December 2019) (Ukraine's Reply, Annex 75); BBC, *Ukraine and Russia Exchange Prisoners in Landmark Deal* (7 September 2019), accessed at <https://www.bbc.com/news/world-europe-49610107>.

weapons, with clear indications of Russian origin, came into the hands of the bombers who Russia now harbors.

i. SPM Limpet Mines Used in the Stena Pub Bombing

268. Russia does not dispute the forensic evidence that an SPM limpet mine was used in the bombing of Stena Pub, perpetrated by Marina Kovtun and her accomplices.⁴⁹¹ Likewise, Russia does not dispute that the SPM limpet mine is a Russian military weapon.⁴⁹² Nor does Russia dispute that, shortly after the Stena Pub bombing, another SPM limpet mine was found in the Kharkiv region with markings establishing that it was produced in 1990.⁴⁹³ Russia further does not challenge the evidence that Ukraine possesses no SPM limpet mines produced in 1990, meaning that this weapon could only have come from Russian military officials or others in Russia with access to these military mines.⁴⁹⁴

269. While the success of the Stena Pub bombing meant that no markings were left to trace the specific mine used to Russia, the discovery of the same weapon nearby, with markings tying it to the Russian military, is powerful evidence that the mine used against Stena Pub came from the same source.⁴⁹⁵ Russia also does not dispute the evidence that three assault

⁴⁹¹ Ukraine's Memorial, paras. 118, 119; Expert Conclusion No. 532/2014, drafted by the Forensic Research Center, Ministry of Internal Affairs of Ukraine, Main Directorate of the Ministry of Internal Affairs of Ukraine in Kharkiv Region (3 April 2015), p. 34 (Ukraine's Memorial, Annex 116).

⁴⁹² Witness Statement of Ivan Gavryliuk (2 June 2018), paras. 38–40 (Ukraine's Memorial, Annex 1).

⁴⁹³ See Ukraine's Memorial, para 165; Extract from Criminal Proceedings No. 22017220000000060 (22 November 2014) (Ukraine's Memorial, Annex 79); Witness Statement of Ivan Gavryliuk (2 June 2018), paras. 38–40 (Ukraine's Memorial, Annex 1).

⁴⁹⁴ Witness Statement of Ivan Gavryliuk (2 June 2018), para. 39 (stating that “[a]fter the collapse of the USSR, limpet mines SPM remained in service at armed forces of former Soviet republics”) (Ukraine's Memorial, Annex 1).

⁴⁹⁵ Further evidence confirms that the SPM limpet mine found in the Kharkiv region with markings and the mines used by Kovtun came from the same source, the Kharkiv Partisans leaders Vadym Monastyrev and Oleg Sobchenko. See Signed Declaration of Igor Boiko, Suspect Interrogation Protocol (22 November 2014), p. 2 (Ukraine's Reply, Annex 38); Report of Presentation of a Person for Identification by Photos, drafted by Lieutenant Colonel I.V.Mezionov, Special Investigator, Investigations Department of the Directorate of the Security Service of Ukraine in the Kharkiv Region

rifles were retrieved from Kovtun's hideout, and that these rifles had specific markings tracing them to Crimea, meaning they were taken by Russia after its invasion in 2014.⁴⁹⁶ Additional evidence confirms that the SPM limpet mines came into Kovtun's possession in one batch together with the three assault rifles traced to Crimea.⁴⁹⁷

270. Unable to provide an explanation for how the bombers in Kharkiv could have obtained sophisticated military-grade weapons that were not possessed by Ukraine, Russia focuses its Counter-Memorial on speculation that Ms. Kovtun's testimony was coerced. But Ms. Kovtun's testimony is corroborated in important respects:

- Kovtun filmed her accomplice planting one of the SPM limpet mines on her cell phone.⁴⁹⁸
- A USB flash drive seized from Kovtun contained detailed instructions on how to use various explosives, including SPM limpet mines.⁴⁹⁹

(22 November 2014) (Ukraine's Reply, Annex 13); Expert Opinion No. 1975, drafted by the Forensic Research Center in Kharkiv Named After M.S. Bokarius, Ministry of Justice of Ukraine (1 April 2015), pp. 2 and 3 (Ukraine's Reply, Annex 29); Signed Declaration of A. M. Tyshchenko, Suspect Interrogation Protocol (26 December 2015), p. 3 (Ukraine's Memorial, Annex 245).

⁴⁹⁶ Ukraine's Memorial, para. 165; Central Missile and Artillery Directorate of the Armed Forces of Ukraine Letter No. 342/2/3618 (11 March 2015) (Ukraine's Memorial, Annex 110). *See also* Signed Declaration of Artem Mineev, Witness Interrogation Protocol (16 November 2014), p. 2 (Ukraine's Reply, Annex 37); Search and Seizure Report, drafted by Senior Lieutenant of Justice O.B. Butyrin, Senior Investigator, Investigations Department of the Directorate of the Security Service of Ukraine in the Kharkiv Region (16 November 2014), p. 3 (Ukraine's Reply, Annex 9).

⁴⁹⁷ Ukraine's Memorial, para 165; Signed Declaration of V. Chekhovsky, Suspect Interrogation Protocol (9 May 2015), pp. 4–7 (Ukraine's Memorial, Annex 229).

⁴⁹⁸ Ukraine's Memorial, para. 118, n.230, n.231. Additionally, Kovtun filmed the aftermath of the bombing attack on the Stena Pub immediately after the explosion. *See* Report on Examination of Things Seized from Marina Kovtun, drafted by Senior Lieutenant of Justice D.S. Gnatushko, Senior Investigator, Investigations Department of the Directorate of the Security Service of Ukraine in the Kharkiv Region (16 November 2014), pp. 2 and 3 (Ukraine's Reply, Annex 10); Signed Declaration of M. Kovtun, Suspect Interrogation Protocol (16 November 2014), pp. 8, 10 (Ukraine's Memorial, Annex 196).

⁴⁹⁹ Report on Examination of Things Seized from Marina Kovtun, drafted by Senior Lieutenant of Justice D.S. Gnatushko, Senior Investigator, Investigations Department of the Directorate of the Security Service of Ukraine in the Kharkiv Region (16 November 2014), pp. 2, 3 (Ukraine's Reply, Annex 10).

- A forensic investigation confirmed that fragments collected from the attack site came from an SPM limpet mine.⁵⁰⁰
- The Ukrainian Border Guard Service has records of Kovtun’s crossing of the Ukraine-Russian border around the same period she indicated in her testimony.⁵⁰¹
- Intercepted conversations confirm that Kovtun and Sobchenko discussed using one of the SPM limpet mines in another bombing attack in Kharkiv.⁵⁰²

271. Finally, Russia specifically included Kovtun in a prisoner exchange list.⁵⁰³ It would be surprising for Russia to have sought the release of a Ukrainian who had merely acted on her own to bomb a pub and similar targets, if those bombings had not been supported by Russian officials or others in the Russian Federation.

ii. Rocket-Propelled Flame Thrower Used in PrivatBank Attack

272. Terrorist bombings were also committed in Kharkiv using the portable Rocket-Propelled Flame Thrower MRO-A, including an attack on the regional office of PrivatBank, a private bank.⁵⁰⁴ Russia does not address the evidence showing that this weapon was provided

⁵⁰⁰ Ukraine’s Memorial, para 119, n.235.

⁵⁰¹ Ukrainian Border Guard Service Letter No. 51/680 to Lieutenant Colonel I.V. Selenkov, Deputy Head of the Investigations Department, Directorate of the Security Service of Ukraine in the Kharkiv Region, dated 16 April 2015, pp. 2–3 (Ukraine’s Reply, Annex 30). Several witnesses identified M. Kovtun and testified that she visited Russia for training in a military camp in Tambov. *See* Ukraine’s Memorial, para. 173, n.393; *see also* Ukraine’s Reply, Annexes 11, 12, 21–23.

⁵⁰² Expert Opinion No. 1975, drafted by the Forensic Research Center in Kharkiv Named After M.S. Bokarius, Ministry of Justice of Ukraine (1 April 2015), pp. 2–3 (Ukraine’s Reply, Annex 29); Signed Declaration of A. M. Tyshchenko, Suspect Interrogation Protocol (26 December 2015), p. 3 (Ukraine’s Memorial, Annex 245); *see also* Signed Declaration of M. Kovtun, Suspect Interrogation Protocol (16 November 2014), pp. 9, 10 (testifying that Kovtun gave the third SPM limpet mine to the same associate who bombed the Stena Rock Club, who said he intended to bomb the Britannia Hotel.) (Ukraine’s Memorial, Annex 196).

⁵⁰³ Novynarnia, “*Separam - Freedom*”: *Whom Ukraine Released to ORDLO at the Big Exchange in 2019. List*, (30 December 2019), p. 3 (Ukraine’s Reply, Annex 78).

⁵⁰⁴ Ukraine’s Memorial, para. 120.

by Russian officials. Like the SPM limpet mine, the flamethrower is a Russian military weapon, approved for use by the Armed Forces of the Russian Federation in 2004.⁵⁰⁵ Russia does not dispute the evidence that perpetrators left their flamethrower at the scene of the crime where it was recovered by Ukrainian authorities. Likewise, Russia does not dispute that the Ukrainian Armed Forces does not possess the MRO-A flamethrower weapon, or any weapon with the serial numbers found at the scene of the PrivatBank attack.⁵⁰⁶ As with the SPM limpet mines, the only explanation for the use of these Russian military weapons in Ukraine is that they were provided by Russian officials or others within the Russian Federation.

iii. Mon-100 Anti-Personnel Mine Used in Deadly Kharkiv Rally Attack

273. The bombing of the 22 February 2015 unity rally in Kharkiv, which murdered three Ukrainians and injured many others, was carried out using a MON-100 antipersonnel mine supplied by Russian officials.

274. Russia again focuses only on Dvornikov's and Tetutskiy's confessions and claims without basis that they were coerced. But a claim of coercion was considered and rejected by the Ukrainian court that convicted Dvornikov and Tetutskiy.⁵⁰⁷ Further, in

⁵⁰⁵ Witness Statement of Ivan Gavryliuk (2 June 2018), paras. 33–35 (Ukraine's Memorial, Annex 1).

⁵⁰⁶ Witness Statement of Ivan Gavryliuk (2 June 2018), paras. 33–35 (Ukraine's Memorial, Annex 1). The independent consultancy Armament Research Services notes that the MRO-A "system is not known to have been exported outside of Russia," and that "its presence in the hands of pro-Russian separatists is striking." ARESA, *Raising Red Flags: An Examination of Arms & Munitions in the Ongoing Conflict in Ukraine 2014*, Research Report No. 3 (November 2014), p. 48, <https://armamentresearch.com/Uploads/Research%20Report%20No.%203%20-%20Raising%20Red%20Flags.pdf>.

⁵⁰⁷ The Ukrainian court engaged an expert to assess whether the perpetrators were in any way coerced or forced to give their testimonies. The examination confirmed that the perpetrators provided their testimonies willingly and without any pressure or coercion. See Case No. 645/3612/15-k, Judgment of Conviction and Sentencing of 28 December 2019 of the Frunze Municipal Court of the City of Kharkiv, pp. 33–36 (Ukraine's Reply, Annex 35); Expert Opinion of Forensic Psychological Examination Commission No. 1632/222, drafted by the Forensic Research Center in Kharkiv Named After M.S.

convicting Dvornikov for committing the rally bombing, the court relied on the fact that “officers of the Russian special services” directed Dvornikov on where to gather the MON-100 mine in a wooded area on the outskirts of Kharkiv.⁵⁰⁸ In reaching this conclusion, the court considered a recorded conversation among inmates⁵⁰⁹ as well as Dvornikov’s e-mails, indicating that he had “corresponded with officers of the Russian special services” regarding the bombing.⁵¹⁰

275. The Ukrainian court that convicted Dvornikov and Tetutskiy also relied on additional evidence that corroborated their testimony:

- Recordings of video surveillance cameras captured the defendants and their

Bokarius, Ministry of Justice of Ukraine (20 February 2017), pp. 2–3 (Ukraine’s Reply, Annex 31); Expert Opinion of Forensic Psychological Examination Commission No. 1794/224, drafted by the Forensic Research Center in Kharkiv Named After M.S. Bokarius, Ministry of Justice of Ukraine (22 February 2017), p. 3 (Ukraine’s Reply, Annex 34); Expert Opinion of Forensic Psychological Examination Commission No. 1793/223, drafted by the Forensic Research Center in Kharkiv Named After M.S. Bokarius, Ministry of Justice of Ukraine (21 February 2017), p. 3 (Ukraine’s Reply, Annex 33); *see also* Ukrainian Criminal Procedure Code, art. 240 (13 April 2012) (stating that an investigator may reconstruct a crime or event to check and clarify details of importance for establishing circumstances of criminal offense), accessed at <https://zakon.rada.gov.ua/laws/show/4651-17?lang=en#Text>.

⁵⁰⁸ Case No. 645/3612/15-k, Judgment of Conviction and Sentencing of 28 December 2019 of the Frunze Municipal Court of the City of Kharkiv, pp. 1–2 (Ukraine’s Reply, Annex 35).

⁵⁰⁹ Ruling Granting Recording of V. Dvornikov’s Conversations, drafted by Investigating Judge R.M. Piddubnyi, the Court of Appeal in Kharkiv District (27 February 2015), p. 3 (Ukraine’s Reply, Annex 19); Ruling Granting Recording of V. Tetutskiy’s Conversations, drafted by Investigating Judge R.M. Piddubnyi, the Court of Appeal in Kharkiv District (27 February 2015), p. 3 (Ukraine’s Reply, Annex 20); Transcript of Covert Investigative Action Concerning V. Dvornikov, drafted by Lieutenant Colonel O.V. Diaghilev, Directorate of the Security Service of Ukraine in the Kharkiv Region (25 March 2015), p. 6 (Ukraine’s Reply, Annex 42); Transcript of Covert Investigative Action Concerning V. Tetutskiy, drafted by Lieutenant Colonel O.V. Diaghilev, Directorate of the Security Service of Ukraine in the Kharkiv Region (25 March 2015), p. 2 (Ukraine’s Reply, Annex 43); Expert Opinion No. 8-ZVZ drafted by the Kharkiv Centre for Forensic Science and Investigations, Ministry of Internal Affairs of Ukraine (21 February 2017), p. 3 (Ukraine’s Reply, Annex 32).

⁵¹⁰ Case No. 645/3612/15-k, Judgment of Conviction and Sentencing of 28 December 2019 of the Frunze Municipal Court of the City of Kharkiv, p. 22 (reviewing e-mails recovered from Dvornikov’s electronic mailbox in which he “correspond[ed] with officers of the Russian special services regarding the preparations for and commission of the terrorist act on 02/22/2015”) (Ukraine’s Reply, Annex 35)

vehicles immediately before and after the bombing attack.⁵¹¹

- A witness confirmed seeing the defendants' vehicle at the crime scene immediately before the explosion.⁵¹² Two witnesses confirmed that the perpetrators bought cell phones they used to detonate the explosive.⁵¹³
- The location of cell phones the defendants used to communicate with each other was traced to the crime scene.⁵¹⁴
- Forensic examination found traces of the dirt similar to the crime scene on the shovel seized from Dvornikov and in his vehicle.⁵¹⁵
- The Ukrainian Border Guard Service recorded Dvornikov's crossing of the

⁵¹¹ Case No. 645/3612/15-k, Judgment of Conviction and Sentencing of 28 December 2019 of the Frunze Municipal Court of the City of Kharkiv, pp. 20, 29 (Ukraine's Reply, Annex 35); Signed Declaration of Volodymyr Dvornikov, Suspect Interrogation Protocol (20 March 2015), pp. 3, 4, 8–9 (Ukraine's Reply, Annex 41); Signed Declaration of Sergey Bashlykov, Suspect Interrogation Protocol (16 March 2015), pp. 2, 4, 7–9. (Ukraine's Reply, Annex 39); Signed Declaration of Victor Tetutskiy, Suspect Interrogation Protocol (16 March 2015), pp. 2–5 (Ukraine's Reply, Annex 40).

⁵¹² Case No. 645/3612/15-k, Judgment of Conviction and Sentencing of 28 December 2019 of the Frunze Municipal Court of the City of Kharkiv, pp. 16, 17, 20, 29 (Ukraine's Reply, Annex 35); Report of Identification of Dvornikov's Car, drafted by Senior Lieutenant of Justice K.O. Pidgirnyi, Senior Investigator, Investigations Department of the Directorate of the Security Service of Ukraine in the Kharkiv Region (19 March 2015) (Ukraine's Reply, Annex 26).

⁵¹³ Case No. 645/3612/15-k, Judgment of Conviction and Sentencing of 28 December 2019 of the Frunze Municipal Court of the City of Kharkiv, pp. 15, 16, 28 (Ukraine's Reply, Annex 35); Report No. 1 of Presentation of a Person for Identification by Photos, drafted by Senior Lieutenant K.O. Pidgirnyi, Senior Investigator, Investigations Department of the Directorate of the Security Service of Ukraine in the Kharkiv Region (26 February 2015) (Ukraine's Reply, Annex 16); Report No. 2 of Presentation of a Person for Identification by Photos, drafted by Senior Lieutenant K.O. Pidgirnyi, Senior Investigator, Investigations Department of the Directorate of the Security Service of Ukraine in the Kharkiv Region (26 February 2015) (Ukraine's Reply, Annex 17); Report No. 3 of Presentation of a Person for Identification by Photos, drafted by Senior Lieutenant K.O. Pidgirnyi, Senior Investigator, Investigations Department of the Directorate of the Security Service of Ukraine in the Kharkiv Region (26 February 2015) (Ukraine's Reply, Annex 18).

⁵¹⁴ Case No. 645/3612/15-k, Judgment of Conviction and Sentencing of 28 December 2019 of the Frunze Municipal Court of the City of Kharkiv, pp. 2, 22 (Ukraine's Reply, Annex 35).

⁵¹⁵ Case No. 645/3612/15-k, Judgment of Conviction and Sentencing of 28 December 2019 of the Frunze Municipal Court of the City of Kharkiv, pp. 8, 19, 25, 29 (Ukraine's Reply, Annex 35); Expert Conclusion No. 5, drafted by the Forensic Research Center, Ministry of Internal Affairs of Ukraine, Main Directorate of the Ministry of Internal Affairs of Ukraine in Kharkiv Region (16 March 2015), p. 2 (Ukraine's Reply, Annex 24). *See also* Expert Conclusion No. 17 drafted by the Forensic Research Center, Ministry of Internal Affairs of Ukraine, Main Directorate of the Ministry of Internal Affairs of Ukraine in Kharkiv Region (20 March 2015), p. 2 (Ukraine's Reply, Annex 27); Expert Conclusion No. 16, drafted by the Forensic Research Center, Ministry of Internal Affairs of Ukraine, Main Directorate of the Ministry of Internal Affairs of Ukraine in Kharkiv Region (20 March 2015), p. 2 (Ukraine's Reply, Annex 28).

Ukrainian-Russian border at the crossing point in Belgorod.⁵¹⁶

276. There is no other possible explanation how the perpetrators of the deadly rally bombing came into possession of a MON-100 antipersonnel mine, if not through funding by Russian persons. Further, as noted above, the rally bombing occurred against the backdrop of a string of bombings in Kharkiv, and the undisputed evidence links the military-grade weapons used in these earlier attacks to Russian officials as well. For these reasons, it is not credible for Russia to suggest that another military-grade weapon could have come from any other source.

277. Finally, Russia specifically included Dvornikov and Tetutskiy in a prisoner exchange list.⁵¹⁷ It would be surprising for Russia to have sought the release of Ukrainians who had merely acted on their own to bomb a peaceful unity rally in Kharkiv, if this bombing had not been supported by Russian officials or others in the Russian Federation.

iv. Money Provided By Russian Intelligence Officials for Assassination Attempt on a Ukrainian Member of Parliament in Kyiv

278. Russia does not dispute that there was an assassination attempt on Anton Gerashchenko, a member of Ukraine's parliament.⁵¹⁸ Nor does it dispute the authenticity of recordings made by Ukrainian intelligence of conversations between Andriy Tyhonov, a

⁵¹⁶ Signed Declaration of V. Dvornikov, Suspect Interrogation Protocol (26 February 2015), pp. 2, 4 (testifying that Dvornikov traveled to Belgorod, Russian, from Kharkiv in November 2014 and February 2015 by mini bus and returned from Russia to Kharkiv in February 2015) (Ukraine's Memorial, Annex 223); Ukrainian Border Guard Service Letter No. 51/442 to Major of Justice A.V. Ryzhylo, Senior Investigator, Investigations Department of the Directorate of the Security Service of Ukraine in the Kharkiv Region, dated 16 March 2015, p. 2 (Ukraine's Reply, Annex 25).

⁵¹⁷ Ukrinform, *The Prosecution Explained Why People Sentenced for a Terrorist Act in Kharkiv Were Released* (28 December 2019) (Ukraine's Reply, Annex 76); Hanna Sokolova, *Terrorist Attack During the "March of Dignity" in Kharkiv. How Three Defendants Were Sentenced to Life Sentence and Immediately Released* (29 December 2019), p. 2 (Ukraine's Reply, Annex 77).

⁵¹⁸ Ukraine's Memorial, paras. 123–126.

member of the LPR, and Oleksiy Andriyenko, a confidential informant of Ukrainian intelligence, in Tyhonov's apartment in Belgorod, Russia, during which Tyhonov referred to the interest of the "Main Intelligence Directorate" in "chasing" Gerashchenko.⁵¹⁹

279. Russia's only response relates to Ukraine's evidence that a Russian by the name of Eduard Dobrodeev (which, ironically, translates as "doer of good things") was involved in supplying a bomb for use in the Gerashchenko assassination attempt. Russia claims that there could not have been involvement by any officer of the Russian military intelligence service ("GRU") named Eduard Dobrodeev, because there are (according to Russia) only three people in the Russian Federation with that name and they are either deceased or had no affiliation with the government.⁵²⁰ This self-serving denial should be given no weight. Nor does it contradict that officials from the "Main Intelligence Directorate" were involved, even if one presumes that Eduard Dobrodeev was an alias.

280. More generally, Russia does not dispute that an LPR leader took actions in Russia to provide funds for use in the bombing attack against a Ukrainian member of parliament. This was an act of terrorism financing by a person under Russia's jurisdiction, which Russia would have been in a position to prevent.⁵²¹

v. Anti-Tank Mine Used in Odesa Bombing

281. Russia does not dispute that the bombing attack in Odesa occurred and was coordinated by a member of the DPR known as Aleksandr (who also went by "Morpekh").⁵²² Ukraine put forward evidence that the perpetrators met a Russian intelligence operative in the Smolensk region of Russia, and retrieved the anti-tank mine from a location he provided. Russia says nothing about the supply of the mine used in this bombing.

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⁵¹⁹ Ukraine's Memorial, para. 124.

⁵²⁰ Russia's Counter-Memorial Part I, para. 605.

⁵²¹ Ukraine' Memorial, paras. 123–126.

⁵²² Ukraine's Memorial, paras. 127–130.

282. Russia’s strategy concerning most of this compelling evidence of terrorism financing is to simply ignore it, apparently in the hope that the Court will do the same. This is not a serious defense on the merits, and the importance of these bombings should not be minimized. These events took the lives of Ukrainian civilians and spread terror to parts of the country far from any armed conflict. The evidence, largely undisputed and by no means limited to interrogation statements, shows that military-grade weapons were supplied by Russian officials to the perpetrators of these acts. Russia does not and could not identify any other plausible explanation for how else, apart from Russian officials supplying this financing, these destructive explosive devices came to the streets, pubs, and offices of Ukrainian cities.

B. Funds Were Provided with the Knowledge Required by Article 2(1)

283. As explained in Chapter 4, Section B, the parties agree that knowledge under Article 2(1) is satisfied if the recipients of funds are notorious for committing terrorist acts defined in subparagraphs (a) and (b).⁵²³ Although Russia argues that there has been no international “characterization” of the DPR and LPR as notorious terrorist organizations, what matters is that their acts were well-known.⁵²⁴ Russia has not contested the widespread reporting on the DPR’s and LPR’s attacks on civilians.

284. Chapter 6, Section A of this Reply addressed the pattern of attacks on civilians beginning in the spring of 2014. These were acts covered by Article 2(1)(b) of the ICSFT, and Russia has not made a serious attempt to argue otherwise. Nor has Russia attempted to dispute that by the spring and summer of 2014, the attacks by the DPR and similar groups were notorious around the world, and certainly in Russia. As detailed in Ukraine’s Memorial, the attacks by these groups were the subject of numerous reports by major international

⁵²³ See *supra*, paras. 101, 112.

⁵²⁴ See *supra*, Chapter 4, Section B(1).

organizations as well as public statements by high U.N. officials. For instance, over the course of 2014, the OHCHR reported on “an increasing number of acts of intimidation and violence by armed groups, targeting ‘ordinary’ people who support Ukrainian unity.”⁵²⁵ An Assistant Secretary-General discussed the DPR’s and LPR’s “reign of fear and terror” before the Security Council,⁵²⁶ and the U.N. High Commissioner for Human Rights spoke about a DPR leader’s “goal” to “immerse” civilians in “horror.”⁵²⁷ U.N. human rights monitors and international newspapers alike reported on the shocking political murder of Volodymyr Rybak, and the role of a leading DPR commander in that crime.⁵²⁸ Russia does not dispute any of this.

285. In addition to this public reporting, there were other ways for Russians to know of the activities and goals of the DPR and LPR. As noted in Ukraine’s Memorial and not disputed by Russia, Russian government officials had connections to the leadership of those groups in 2014 and 2015.⁵²⁹ Similarly, individuals who had served in the Russian military had taken positions in or advised the DPR and LPR, creating further ties to Russian officials.⁵³⁰ Konstantin Malofeev, a prominent fundraiser for the DPR, was the former employer of Igor Girkin — the DPR leader notorious for targeting civilians and requesting the Buk that destroyed Flight MH17.⁵³¹ The then so-called “Prime Minister” of the DPR, Alexander

⁵²⁵ OHCHR, *Report on Human Rights Situation in Ukraine* (15 June 2014), para. 207 (emphasis added) (Ukraine’s Memorial, Annex 46).

⁵²⁶ Statement to the Security Council by Ivan Šimonović, Assistant Secretary-General for Human Rights on the Human Rights Situation in Ukraine (8 August 2014), p. 2 (Ukraine’s Memorial, Annex 298).

⁵²⁷ OHCHR, *Intensified Fighting Putting at Risk Lives of People in Donetsk and Luhansk — Pillay* (4 July 2014) (Annex 295).

⁵²⁸ See Ukraine’s Memorial, paras. 43–45.

⁵²⁹ See Ukraine’s Memorial, paras. 17, 286, 292.

⁵³⁰ See Ukraine’s Memorial, para. 286.

⁵³¹ See *ibid.*, paras. 46 n.40, 175, 277. According to the U.S. Department of the Treasury, Malofeev “funds separatist activities in eastern Ukraine and is closely linked with Aleksandr Borodai, Igor Girkin (a.k.a. Igor Strelkov).” See Press Release, U.S. Department of the Treasury, Treasury Targets

Borodai, was another former Malofeev employee.⁵³² Russia does not dispute the existence of any of these relationships.

286. This unchallenged evidence demonstrates that the terrorist acts of the DPR, LPR, and similar groups were, by the spring and summer of 2014, known to the persons in Russian territory who provided funds to these groups.⁵³³ Any person who provided funds, including deadly weapons, to such groups knew that the recipient targeted civilians for their political beliefs,⁵³⁴ tortured and killed civilians,⁵³⁵ and were “inflict[ing] on the populations a reign of intimidation and terror to maintain their position of control.”⁵³⁶ Thus, all of the funds noted above were provided in “the knowledge that they are to be used, in full or in part, in order to carry out” acts covered by Article 2(1)(a) and (b).

287. Russia’s Counter-Memorial almost entirely ignores the terrorist acts committed by the DPR and LPR in the spring and summer of 2014, and instead focuses on disputing whether the acts carried out by Russia’s proxies later, after receiving various assets from Russia, qualify as terrorist acts under Article 2.⁵³⁷ Although Russia’s arguments regarding those acts are wrong, as discussed in Chapter 6, they would in any event not constitute a defense. Article 2(3) provides that “[f]or an act to constitute an offence set forth in paragraph 1, it shall not be necessary that the funds were actually used to carry out an

Additional Ukrainian Separatists and Russian Individuals and Entities (19 December 2014) (19 December 2014) (Ukraine’s Memorial, Annex 478).

⁵³² See Ukraine’s Memorial, para. 46 n.40, para. 47, n.42. See also Courtney Weaver, *Malofeev: The Russian Billionaire Linking Moscow to the Rebels*, *Financial Times* (24 July 2014) (Ukraine’s Memorial, Annex 533) (describing Malofeev’s connection to Girkin and Borodai).

⁵³³ See Ukraine’s Memorial, paras. 48–57 (detailing violent acts of the DPR and LPR beginning in the spring of 2014); see also *supra*, Chapter 4, Section B.

⁵³⁴ See, e.g. Ukraine’s Memorial, paras. 47, 51–52; *supra*, paras. 197–198.

⁵³⁵ See, e.g., Ukraine’s Memorial, paras. 47–52; *supra*, paras. 197–198.

⁵³⁶ OHCHR, *Report on the Human Rights Situation in Ukraine* (15 July 2014), para. 26 (Ukraine’s Memorial, Annex 296). See also *ibid.*, para. 38; OHCHR, *Report on Human Rights Situation in Ukraine* (15 June 2014), para. 4 (Ukraine’s Memorial, Annex 46); OHCHR, *Report on Human Rights Situation in Ukraine* (19 September 2014), p. 6, para. 16 (Ukraine’s Memorial, Annex 47); OHCHR, *Intensified Fighting Putting at Risk Lives of People in Donetsk and Luhansk – Pillay* (4 July 2014) (Ukraine’s Memorial, Annex 295); *supra*, para. 197.

⁵³⁷ See generally Russia’s Counter-Memorial Part I, Chapter VI & VII.

offence referred to in paragraph 1, subparagraphs (a) or (b).” At the point that Russian persons provided funds to these illegal armed groups, knowing of their pattern of committing terrorist acts in the past, the Article 2(1) offense of terrorism financing was complete.

288. In fact, however, the DPR and similar armed groups did commit further terrorist acts using the funds provided by persons in Russian territory. Russian officials and other persons in Russia nonetheless continued to provide more funds to the same groups, which then committed more terrorist acts. This vicious cycle, as well as additional facts specific to the various attacks, further demonstrates that funds continued to be provided with ongoing knowledge of how they were to be used.

1. The Buk TELAR System Was Provided with the Requisite Knowledge

289. Ukraine has established that the Buk TELAR control system was provided with knowledge that it would be used to commit a covered terrorist act, in this case a violation of the Montreal Convention covered by Article 2(1)(a) of the ICSFT. As explained above, it is undisputed that members of the 53rd Anti-Aircraft Missile Brigade of the Armed Forces of the Russian Federation supplied the Buk TELAR to the DPR without a combat control center. In addition, Russia has not rebutted Dr. Skorik’s testimony that the Buk TELAR could not be used in civilian airspace in a manner capable of distinguishing civilian from military targets.⁵³⁸ Members of a Russian military air brigade would have known that a Buk TELAR could not differentiate military from civilian aircraft, and it was public knowledge that the airspace above eastern Ukraine was open and heavily trafficked by civilian aircraft.⁵³⁹ Russia does not argue otherwise. Nor does Russia argue that there was any reason to believe that the DPR had a lawful basis to operate a Buk TELAR in Ukraine.

290. Thus, the undisputed facts are that Russian officials supplied a weapon that they knew would be used unlawfully, and that they knew would be used in civilian-trafficked

⁵³⁸ Ukraine’s Memorial, paras. 287–288; Expert Report of Anatolii Skorik (6 June 2018), para. 39 (Ukraine’s Memorial, Annex 12).

⁵³⁹ Ukraine’s Memorial, paras. 70–71, 287–288.

skies without the ability to discriminate between civilian and military targets. This establishes that the Russian military officials who provided the Buk acted with knowledge that it was to be used to act in violation of the Montreal Convention.

291. Additional facts reinforce this conclusion. First, as explained above, by the time the DPR requested a Buk, there was a lengthy U.N. record of the DPR's intentional attacks against civilians.⁵⁴⁰ In its recent decision on the Flight MH17 shoot-down, the U.S. District Court for the Southern District of New York underscored that the DPR's record of terrorist acts had been "widely reported and discussed by nearly every government across the world, media, and human rights organizations."⁵⁴¹

292. Second, Russian officials had knowledge not just about the activities of the DPR in general, but also the specific leader who requested the Buk. As indicated in the intercepts on which Russia relies, Russian military officials received the request for the Buk from Igor Girkin.⁵⁴² By the time of this request, Girkin was notorious for targeting civilians in eastern Ukraine.⁵⁴³ Russia does not dispute Girkin's notoriety, and makes no response regarding the particular danger of providing an individual with a known record of terrorist acts with a weapon that could not be used without subjecting civilian aviation to attack. Yet Russian officials supplied him anyway, with predictable and tragic results.

293. Third, the knowledge of Russian officials regarding the danger that the Buk posed to civil aviation is further confirmed by a notice to airmen (NOTAM) issued on 16 July

⁵⁴⁰ See generally Ukraine's Memorial, paras. 42–53, 211–215, 285 (describing reporting by the U.N. and other international bodies in the months leading up to July 2014); see also *supra*, Chapter 4, Section B.

⁵⁴¹ *Schansman v. Sberbank of Russia PJSC*, Civ. No. 19-CV-2985 (ALC), 2021 WL 4482172, p. 8 (S.D.N.Y. 30 September 2021) (Ukraine's Reply, Annex 67); see also *supra*, para. 199, n.304.

⁵⁴² Russia's Counter-Memorial Part I, paras. 309–317.

⁵⁴³ See Ukraine's Memorial, paras. 46, 142–144.

2014 — the same day the Buk was provided to the DPR. Unlike Ukraine’s other arguments, Russia responds at length and accuses Ukraine of misunderstanding the NOTAM.⁵⁴⁴ But Ukraine’s understanding of the NOTAM is consistent with that of the Dutch Safety Board, which noted “internal contradictions” in the notice.⁵⁴⁵ While part of Russia’s NOTAM indicated that it imposed restrictions up to FL320 (32,000 feet), “at the end . . . it states that it applies to the airspace from ground level to FL530 [53,000 feet],” effectively closing civilian airspace.⁵⁴⁶ Thus, the same day members of the 53rd Anti-Aircraft Brigade sent a Buk to Ukraine, Russia rushed out a confusing and contradictory NOTAM appearing to indicate a complete closure of civilian airspace on the Russian side of the border. The timing alone is suspicious. But even if the NOTAM is treated as inconclusive on this point, it would not detract from all of the other, undisputed evidence already establishing the officials’ knowledge that the Buk was to be used to carry out an act covered by Article 2(1)(a) of the ICSFT.

2. Multiple Launch Rocket Systems Were Provided with the Requisite Knowledge

294. Ukraine has also established that Russian officials provided BM-21 Grad and BM-30 Smerch systems to the DPR and LPR with knowledge that they were to be used for acts covered by Article 2(1)(b). This is evident from the extraordinary pattern of events in January and February 2015: Russian officials supplied deadly rocket systems, then the DPR attacked a civilian checkpoint; then Russian officials supplied more deadly rocket systems, then the DPR

⁵⁴⁴ Russia’s Counter-Memorial, para. 337.

⁵⁴⁵ Dutch Safety Board, Crash of Malaysia Airlines Flight MH17 (17 July 2014) (13 October 2015), p. 180 (Ukraine’s Memorial, Annex 38).

⁵⁴⁶ Dutch Safety Board, Crash of Malaysia Airlines Flight MH17 (17 July 2014) (13 October 2015), p. 180 (Ukraine’s Memorial, Annex 38); *see also* Flight Safety Foundation, Factual Inquiry Into the Airspace Closure Above and Around Eastern Ukraine in Relation to the Downing of Flight MH17 (January 2021), p. 53 (“Items F and G as well as the information in the sixth and seventh fields in item Q identify lower and upper limits as surface and FL 530. *This, in fact, means total closure of the airspace.*” (emphasis added)).

attacked a residential neighborhood; then Russian officials supplied a more sophisticated rocket system, and then the DPR attacked another residential neighborhood — all against the backdrop of intensive diplomatic activity leading up to the Minsk II agreement, during which the DPR was seeking to compel the Ukrainian government to make political concessions.⁵⁴⁷

295. Specifically, the Volnovakha attack used BM-21 Grads supplied by Russian officials against a civilian checkpoint that played no role in the military conflict.⁵⁴⁸ At least 88 rocket volleys were launched against the checkpoint. One of the rockets exploded near a bus full of pensioners, killing 12 civilians.⁵⁴⁹ Remarkably, less than two weeks later, Russian officials supplied more of the same weapons to the DPR.⁵⁵⁰ The provision of such weapons after they were just used against civilians constituted an additional offense under Article 2, and under Article 2(3), it would not have mattered whether those Grads were ultimately used to carry out a terrorist act. In fact, however, Grad weapons were then used to attack a densely populated residential neighborhood in Mariupol on 24 January 2015.⁵⁵¹

296. Less than a month later, Russian officials supplied an even deadlier, more sophisticated MLRS to the DPR: the BM-30 Smerch system.⁵⁵² Particularly in light of the DPR's record, including its very recent attacks on civilians using MLRS, the supply of the BM-30 was a completed Article 2 offense regardless of subsequent events. Yet on 10 February 2015, the DPR fired a deadly rocket barrage against the civilian population of Kramatorsk, far

⁵⁴⁷ See Ukraine's Memorial, paras. 21, 234, 244, 254; *supra* para. 214; Figure 1.

⁵⁴⁸ See Ukraine's Memorial, para. 159.

⁵⁴⁹ Ukraine's Memorial, paras. 77–85, 231–232.

⁵⁵⁰ Ukraine's Memorial, paras. 156, 160–161.

⁵⁵¹ Ukraine's Memorial, paras. 90–96, 160.

⁵⁵² Ukraine's Memorial, para. 161; Witness Statement of Vadym Skibitskyi (5 June 2018), paras. 29–37 (Ukraine's Memorial, Annex 8).

away from the contact line.⁵⁵³ As documented in Ukraine’s Memorial, the nature and context of the Kramatorsk attack demonstrate a purpose of intimidation.⁵⁵⁴ The barrage struck multiple quintessential civilians sites, including a hospital and a kindergarten, and it occurred during the middle of the day, when civilians are more likely to be out.⁵⁵⁵ The flow of weapons from Russia to the DPR nonetheless continued, including prior to the indiscriminate shelling of the civilian population of Avdiivka in 2017.⁵⁵⁶

297. Ukraine is not alone in recognizing the danger of supplying such powerful weapons to a group with a history of attacking civilians. In 2016, the OHCHR warned that the “transfers of arms and ammunition” from Russia into eastern Ukraine presented a “substantial risk that they will be used in serious violations or abuses of international human rights or humanitarian law,” including “indiscriminate shelling.”⁵⁵⁷ Indeed, the evidence shows that the Russian officials who supplied these deadly systems knew that the DPR used precisely these types of weapons to commit acts “intended to cause death or serious bodily injury to a civilian, . . . when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.” Taken as a whole, this chain of events compels a conclusion that Russian officials had knowledge of how the MLRS they supplied were to be used within the meaning of Article 2(1).

298. As a final point, the relevant question is the knowledge the funders had at the time they supplied these weapons. Russia’s strategy is to manufacture uncertainty after the

⁵⁵³ Ukraine’s Memorial, paras. 100–107, 245–254.

⁵⁵⁴ Ukraine’s Memorial, para. 251.

⁵⁵⁵ Ukraine’s Memorial, para. 251.

⁵⁵⁶ *See* Ukraine’s Memorial, paras. 156–157, para. 157 n.344.

⁵⁵⁷ OHCHR, *Report on the Human Rights Situation in Ukraine: 16 November 2015 to 15 February 2016*, p. 10, para. 24 (Ukraine’s Memorial, Annex 314).

fact. But in January and February of 2015, the Russian officials who were supplying BM-21 Grad and BM-30 Smerch systems did not have access to the lengthy, *post hoc* views of Colonel Bobkov and General Samolenkov seeking to exonerate the DPR.⁵⁵⁸ What Russian officials did know was the extensive U.N. reporting of the pattern of deadly attacks on civilians by the DPR and LPR.⁵⁵⁹ It included a press statement of the U.N. Security Council, made after the Volnovakha shelling and before the shelling of Mariupol, condemning the killing of civilians at Volnovakha as a “reprehensible act” for which the perpetrators must be brought to justice.⁵⁶⁰ It included the statement of a U.N. Under-Secretary General, made after the shelling of Mariupol and before the shelling of Kramatorsk, that the DPR “knowingly targeted a civilian population” in a city “outside of the immediate conflict zone.”⁵⁶¹ This information, not Russia’s *ex post* analyses, is what is relevant under Article 2(1) of the ICSFT.

3. Explosive Devices Were Provided with the Requisite Knowledge

299. Russian officials also had knowledge that the explosive devices they provided to individuals and groups in Ukraine would be used to commit offenses under Articles 2(1)(a) and 2(1)(b). There is no innocent, non-terroristic explanation for delivering military-grade explosives for use in peaceful cities like Kharkiv, far away from the contact line. Russia does not contest that the Russians who supplied these explosives had knowledge that they would be used for terrorist acts.

300. In sum, the provision of assets of various kinds — including money, the Buk TELAR system, MLRS, explosives, and other weapons — to the DPR, LPR, and other groups, establish offenses of the knowing financing of terrorism under Article 2(1) of the ICSFT.

⁵⁵⁸ See generally Expert Report of Alexander Alekseevich Bobkov (Russia’s Counter-Memorial Part I, Annex 1) (8 August 2021); Expert Report of Major General Valery Alexeevich Samolenkov (Russia’s Counter-Memorial Part I, Annex 2) (8 August 2021).

⁵⁵⁹ See Ukraine’s Memorial, paras. 48–57, 285.

⁵⁶⁰ U.N. Security Council, *Security Council Press Statement on Killing of Bus Passengers in Donetsk Region, Ukraine* (13 January 2015) (Ukraine’s Memorial, Annex 305).

⁵⁶¹ U.N. Security Council, Official Record, 7368th mtg., U.N. Doc. S/PV.7368 (26 January 2015), p. 2 (statement of Jeffrey Feltman, U.N. Under-Secretary-General for Political Affairs) (Ukraine’s Memorial, Annex 307).

Section C: Russia's Breaches of the ICSFT

Chapter 8. UKRAINE HAS ESTABLISHED THAT RUSSIA BREACHED ITS OBLIGATIONS UNDER THE ICSFT

301. The ICSFT imposes on States Parties a series of obligations to cooperate in connection with the prevention and suppression of terrorism financing. These obligations include identifying, detecting, freezing, and seizing funds allocated for terrorism financing (Article 8); investigating information provided about alleged terrorism financing (Article 9); prosecuting or extraditing perpetrators of terrorism financing (Article 10); and affording one another the greatest measure of assistance in investigations of terrorism financing offenses (Article 12). These specific obligations culminate in Article 18, which imposes a comprehensive obligation to “cooperate in the prevention” of terrorism financing, “by taking all practicable measures . . . to prevent and counter preparations” for such offenses.

302. Ukraine established in its Memorial that Russia violated each of these obligations. In all situations where the Convention demands cooperation, Russia has brazenly done the opposite. Russia's Counter-Memorial almost entirely ignores Russia's actual record of non-cooperation with Ukraine, instead seeking to avoid responsibility by offering misguided interpretations of the Convention. If accepted, those misinterpretations would gut the Convention and deprive it of practical effect.

A. Ukraine Has Established that Russia Violated Article 18

303. Article 18(1) imposes an obligation on States Parties to “cooperate in the prevention of offences set forth in Article 2 by taking all practicable measures . . . to prevent and counter preparations in their respective territories for the commission of those offences within or outside their territories.” The Russian Federation seeks to dramatically narrow this obligation, such that it would operate solely as “an obligation to adopt a regulatory

framework.”⁵⁶² Thus, although Russia recognizes that Article 18 is “carefully drafted,” it attempts to redraft it, turning an obligation to take “all practicable measures” into an obligation to take “certain specific preventive measures.”⁵⁶³ Russia’s attempts to avoid liability disregard the very notion of cooperation that is at the heart of Article 18.⁵⁶⁴

304. Ukraine’s Memorial identified measures that were practicable for Russia to take in order to cooperate in the prevention of terrorism financing.⁵⁶⁵ Russia does not claim to have taken these measures, and it does not contend that taking such measures would have been impracticable. Nor does Russia deny that taking those measures would have prevented, or at least reduced the risk of, terrorism financing offenses. Article 18 imposed on Russia a duty to act in a cooperative manner under the circumstances presented here, but Russia simply chose to violate that duty and to refuse to cooperate in the prevention of terrorism financing.

1. The Obligation to Take “All Practicable Measures” Is Not Limited to Merely Creating a Regulatory Framework

305. It is common ground that Article 18(1) of the ICSFT imposes “an obligation of conduct rather than one of result.”⁵⁶⁶ Article 18(1) requires that States cooperate in the prevention of terrorism financing offenses, and it specifies that States must do so by taking “all practicable measures” to prevent and counter preparations for such offenses. That is why, as explained in Chapter 3, Russia’s responsibility for breaching Article 18 is established as soon as it fails to take “practicable measures” capable of preventing terrorism financing from occurring.⁵⁶⁷ Unlike a duty to prevent a harm, which cannot be violated unless and until the harm occurs, a duty to take practicable measures is violated as soon a State party should have taken such measures but did not.⁵⁶⁸

⁵⁶² Russia’s Counter-Memorial Part I, para. 587.

⁵⁶³ Compare ICSFT, art. 18 with Russia’s Counter-Memorial Part I, para. 590(a).

⁵⁶⁴ See Russia’s Counter-Memorial Part I, para. 578.

⁵⁶⁵ See Ukraine’s Memorial, para. 653(a).

⁵⁶⁶ Russia’s Counter-Memorial Part I, para. 584.

⁵⁶⁷ See *supra*, Chapter 3.

⁵⁶⁸ See *supra*, Chapter 3.

306. The agreed-upon premise that Article 18(1) creates a “duty of conduct” rather than “result” does not exonerate Russia. This is not a case where a State in fact took measures to prevent any person in its territory from financing terrorism, but nevertheless some acts of terrorism financing occurred. Instead, Ukraine has established that Russia *did nothing* to cooperate, as it took *no* practicable measures to prevent acts of terrorism financing.

307. Russia seeks to excuse its non-cooperation by diluting the Convention’s obligation to cooperate. According to Russia, Article 18 requires a State to do nothing more than “cooperate in the prevention of the financing of terrorism by taking *certain legislative and administrative measures*.”⁵⁶⁹ In other words, Russia claims that Article 18(1) imposes “an obligation to adopt a regulatory framework *only*.”⁵⁷⁰ And it admits that, on its view, if persons on a State’s territory are engaged in terrorism financing, the State need not take any measure, however practicable, “to prevent these persons from operating,” so long as the State has laws on the books that “prohibit their operations” in name only, as a formal legal matter.⁵⁷¹

308. Russia’s absurd interpretation has no support in the ordinary meaning of Article 18(1), it is not a good faith interpretation of the obligation Article 18(1) imposes, and it is inconsistent with the object and purpose of the ICSFT.

309. It should not be controversial that the obligation imposed by Article 18(1) is one of “cooperation,” or that Article 18(1) dictates how a State must cooperate in the prevention of terrorism financing. According to its plain meaning, “taking all practicable measures” means taking every feasible measure that is capable of preventing acts of terrorism financing, regardless of whether it is a regulatory measure, a law enforcement measure, a border control

⁵⁶⁹ Russia’s Counter-Memorial Part I, para. 592 (emphasis added).

⁵⁷⁰ Russia’s Counter-Memorial Part I, para. 587 (emphasis added).

⁵⁷¹ Russia’s Counter-Memorial Part I, para. 587.

measure, an intra-governmental policy measure, or otherwise. The International Law Commission addressed the term “practicable measures” in a different context where States are required to take practicable measures to address harms caused from their territory, and explained that “practicable measures” are “those that are feasible, workable, and reasonable.”⁵⁷² Nothing about the phrase “practicable measures” connotes regulatory measures only.

310. Article 18(1) further provides that “all” such measures must be taken. “All” means all, and not, as Russia expressly argues, only “certain” measures.⁵⁷³ Thus, if a measure is feasible, workable, and reasonable, and if it has the capacity to prevent the commission of Article 2 offenses, the State is obligated to take the measure. Transforming an obligation to take “all” practicable measures to an obligation to take only “certain” practicable measures is not a good faith interpretation of Article 18. Russia’s interpretation is conspicuously inconsistent with the Court’s judgment on Preliminary Objections, which noted that States Parties are obligated under Article 18 to take “appropriate measures.”⁵⁷⁴ The Court did not suggest that some appropriate measures need not be taken if they are not regulatory in nature.

311. Russia nonetheless refers to Article 18’s provision’s “precision” in referring to “domestic legislation,” *i.e.*, that States must take practicable measures “by adapting their

⁵⁷² See The International Law Commission, *The Law of the Non-Navigational Uses of International Watercourses*, 1990 U.N.Y.B. Int’l L. Comm’n 46, 67 (1990) (stating “paragraph 3 requires only that all ‘practicable’ measures be taken, meaning those that are feasible, workable and reasonable”; paragraph 3 of the relevant draft treaty stated: “A watercourse State within whose territory an emergency originates shall, in cooperation with potentially affected States and, where appropriate, competent international organizations, immediately take all practicable measures necessitated by the circumstances to prevent, mitigate and eliminate harmful effects of the emergency.”).

⁵⁷³ Russia’s Counter-Memorial Part I, para. 592.

⁵⁷⁴ Judgment on Preliminary Objections, p. 585, para. 61 (“[A]ll States parties to the ICSFT are under an obligation to take appropriate measures and to co-operate in the prevention and suppression of offences of financing acts of terrorism committed by whichever person. Should a State breach such an obligation, its responsibility under the Convention would arise.”).

domestic legislation, if necessary, to prevent”⁵⁷⁵ Yet Russia conveniently omits the words “*inter alia*”: Article 18(1) provides that States must take “all practicable measures, *inter alia*, by adapting their domestic legislation, if necessary, to prevent” The Latin phrase “*inter alia*” means “among other things,” indicating that adapting domestic legislation is only one practicable measure among others, not the only practicable measure required by Article 18(1).⁵⁷⁶

312. Russia asks the Court to narrow the obligation of Article 18(1) so severely as to offend the object and purpose of the ICSFT. According to the treaty’s preamble, the purpose of the ICSFT is to address “the urgent need to enhance international cooperation among States in devising effective measures *for the prevention* of the financing of terrorism, as well as for its suppression through the prosecution and punishment of its perpetrators.” Most of the ICSFT’s provisions address the “suppression” component of the treaty relating to prosecution and punishment; only Article 18 refers explicitly to “prevention.” In light of the treaty’s twin purposes of suppression *and* prevention, it would not be faithful to the ICSFT’s object and purpose to interpret Article 18 as simply requiring States to update their regulatory frameworks and nothing more.

313. Russia also misstates the contents of certain implementation guides as supporting its attempt to narrow the scope of its obligations under Article 18. According to

⁵⁷⁵ Russia’s Counter-Memorial Part I, para. 582.

⁵⁷⁶ Russia also states that “the specific examples of the obligation to ‘cooperate in the prevention’ provided for in Article 18 of the ICSFT are consistent with an obligation to adopt a regulatory framework only.” Russia’s Counter-Memorial Part I, para. 587. Russia again leaves out the word that prefaces these examples: “including.” It is not surprising that these examples would be general in nature, as they would be applicable to all States in all circumstances. Whether more specific measures would be practicable and appropriate would depend on the particular circumstances. The treaty’s use of the word “including” establishes that in identifying certain generally appropriate measures, it is not releasing States from the responsibility of taking such other practicable measures that may be appropriate in order to cooperate in the prevention of terrorism financing in a particular circumstance.

Russia, “the IMF has considered Article 18 as containing a limited number of mandatory ‘preventive measures’ ‘borrowed from the FATF 40 recommendations.’”⁵⁷⁷ In fact, however, the IMF states that there are certain “general provisions of the Convention dealing with preventive measures, which are set out in Article 18,” and “are mandatory,” while the more “detailed provisions” “are expressed as obligations of the states parties to consider requiring certain things.”⁵⁷⁸ It is the latter recommended measures that are “borrowed from the FATF 40 Recommendations.”⁵⁷⁹ The IMF’s recognition that there are mandatory “general provisions of the Convention dealing with preventive measures” is consistent with the ordinary meaning of the terms “all practicable measures.”⁵⁸⁰

2. Russia Failed to Take All Practicable Measures to Prevent Terrorism Financing in Circumstances Where Such Measures Were Called For

314. As set out in Chapter 7, there is significant evidence of acts of terrorism financing committed in Russia and ultimately supporting terrorist acts in Ukraine. At a

⁵⁷⁷ Russia’s Counter-Memorial Part I, para. 590(a).

⁵⁷⁸ International Monetary Fund Legal Department, *Suppressing the Financing of Terrorism: A Handbook of Legislative Drafting* (2003), p. 12, *accessed at* <https://www.imf.org/external/pubs/nft/2003/SFTH/pdf/SFTH.pdf>.

⁵⁷⁹ *Ibid.*; *see also ibid.* (“[T]he states parties are required to *consider* adopting rules that are part of the FATF 40 Recommendations.” (emphasis added)).

⁵⁸⁰ Additionally, the UNODC Incorporation and Implementation Guide cited by Russia merely states that “a number of measures of cooperation are required under [A]rticle 18,” and then quotes Article 18, including its obligation to cooperate in the prevention of terrorism financing by taking “all practicable measures.” UNODC, *Guide for the Legislative Incorporation and Implementation of the Universal Anti-Terrorism Instruments* (2006), p. 92, para. 484. Nowhere does it suggest that no practicable measures beyond adopting a regulatory framework are necessary to comply with the duty to cooperate. Similarly, the section of the Commonwealth Implementation Kit referring to “financial offenses” appears to be focused on the FATF 40 Recommendations, which as noted above are not the sole focus of Article 18. The paragraph cited by Russia does not mention or discuss the obligation in Article 18(1) to fulfil the duty to cooperate by “taking all practicable measures,” and cannot be read as proposing a narrow interpretation of the obligation to take all practicable measures as limited to legislative or regulatory measures. *See* Russia’s Counter-Memorial Part I, para. 590(c) (citing U.K. Legal and Constitutional Affairs Division of the Commonwealth Secretariat, *Implementation Kits for the International Counter-Terrorism Conventions*, p. 273, para. 35).

minimum, Ukraine has established facts demonstrating reason to suspect acts of terrorism financing were being committed in Russia. Had Russia intended in good faith to cooperate, it would not have been difficult to meet the basic requirement of taking practicable preventive measures. As noted above, Ukraine’s Memorial identified a number of practicable measures that could have prevented acts of terrorism financing. Russia was required to take these measures in order to fulfil its duty to cooperate in the prevention of terrorism financing. Russia does not dispute that these measures were practicable, yet it did not take any of these available measures.

- Russia failed to take the practicable measure of instructing its own officials not to finance terrorism, *i.e.*, not to provide assets to groups in Ukraine that were known to commit attacks against civilians covered by Article 2(1)(a) and (b) of the ICSFT. The Court has previously concluded that offenses under Article 2 may be committed by “any person,” including state officials.⁵⁸¹ Yet Russia does not allege that it gave the basic instruction to its own officials not to fund terrorist acts in Ukraine even though Ukraine sought Russia’s assistance in preventing Russian weapons systems from being provided to the DPR and similar groups.⁵⁸²
- Russia took no steps to investigate or to prevent private citizens and organizations who were openly financing terrorism in eastern Ukraine. Ukraine’s Memorial established that Russia’s efforts to investigate and prevent terrorism financing as identified by Ukraine, if any, were not in good faith.⁵⁸³ Russia does not dispute the deficiency of these investigations. Nor does Russia contest the conclusion that a State that permits terrorism financing by public officials cannot credibly deter private persons in its territory from financing terrorism, because the State sends the message that such activities are acceptable.⁵⁸⁴
- Russia failed to take the simple practicable measure of policing its border to ensure weapons and other funds provided by any person, public or private, do not enter Ukrainian territory and reach illegal armed groups. Ukraine’s Memorial established that Ukraine repeatedly asked for the cooperation of the Russian

⁵⁸¹ Judgment on Preliminary Objections, p. 585, para. 61.

⁵⁸² See Ukraine’s Memorial, Chapter 3, Section A.

⁵⁸³ See, *e.g.*, Ukraine’s Memorial, paras. 325–326 and accompanying sources.

⁵⁸⁴ See Ukraine’s Memorial, paras. 299–318.

government in controlling the border. Russia first ignored these requests, then delayed in responding. Eventually, Russia offered baseless excuses as to why it could not act, such as stating that the responding agency lacked the authority to act, without identifying which agency could act or referring the requests to such an authority.⁵⁸⁵ Russia does not deny that Ukraine made these requests, or that this was Russia's response. It also does not deny that it would have been practicable for Russia to exercise control over its border. A State that is unwilling even to meet to discuss border control measures capable of preventing acts of terrorism financing is not complying in good faith with its obligations under Article 18.

- Russia failed to monitor and disrupt fundraising networks within its territory, including but not limited to financial networks associated with the DPR, LPR, and other illegal armed groups engaged in terrorism in Ukraine.⁵⁸⁶

315. Rather than engage with these practicable measures, Russia makes three cursory, unpersuasive arguments for why it did not violate Article 18. First, Russia repeats its argument that “Ukraine failed to establish that the provision of funds to the DPR or the LPR constitutes an offence under Article 2.”⁵⁸⁷ As demonstrated above, the parties are in agreement that providing funds to a group that notoriously commits terrorist acts is an offense under Article 2, and Ukraine has established numerous, well-known acts by the DPR and LPR that are covered terrorist acts under Article 2(1)(a) and (b). Moreover, Ukraine has shown that specific types of assets were provided with knowledge that they were to be used to commit acts covered by Articles 2(1)(a) and 2(1)(b), including the shoot-down of Flight MH17, the shelling of civilian areas, and the campaign of bombings in peaceful Ukrainian cities.⁵⁸⁸

316. Second, Russia argues that “Article 18 of the ICSFT does not apply to any

⁵⁸⁵ See Ukraine's Memorial, paras. 183–186 and accompanying sources.

⁵⁸⁶ See Ukraine's Memorial, Chapter 3, Sections B–C; *ibid.*, Chapter 5.

⁵⁸⁷ Russia's Counter-Memorial Part I, para. 598.

⁵⁸⁸ See *supra*, Chapter 5.

alleged provision of weapons” because “weapons do not constitute funds under the ICSFT.”⁵⁸⁹ Ukraine demonstrated in Chapter 4, Section A that this is incorrect.

317. Third, Russia argues that Article 18 only “requires States to adopt a regulatory framework,” and “Ukraine has failed to identify any failure by Russia to adopt such appropriate regulatory framework.”⁵⁹⁰ Ukraine demonstrated above why the Court should reject Russia’s attempt to narrow its Article 18 obligations in this manner.

318. Article 18(1) requires States Parties to cooperate with one another to prevent and counter preparations for terrorism financing covered by Article 2 by taking “all practicable measures” to do so. Yet Russia’s strategy was to withhold cooperation and manufacture uncertainty. Having stonewalled Ukraine’s requests for assistance and information, Russia now claims that Ukraine cannot prove that the acts in question violated Article 2 according to the highest possible evidentiary standards. That is not good faith performance of Article 18. Ukraine sought cooperation to address what at minimum was a serious risk that terrorism financing was occurring, and Russia had an obligation to cooperate in response. Since Russia took no measures to cooperate in the prevention of terrorism financing offenses, it breached Article 18.

B. Ukraine Has Established that Russia Violated Article 8

319. Russia has also breached Article 8(1) of the ICSFT because it has failed to take appropriate measures to identify, detect, and freeze or seize funds used for terrorism financing. As demonstrated in Ukraine’s Memorial, fundraising for groups that engaged in terrorist acts was open and prevalent in Russia, and Ukraine alerted Russia to specific circumstances of terrorism financing. Russia therefore had sufficient information to establish a reasonable suspicion that funds were being used or allocated for terrorism financing, and it was obligated to take appropriate measures to at least freeze those funds as required by Article 8(1). Yet Russia, once again, chose to do nothing.

⁵⁸⁹ Russia’s Counter-Memorial Part I, para. 598.

⁵⁹⁰ Russia’s Counter-Memorial Part I, para. 598.

1. The Obligation to Take the Preventive Measure of Freezing Funds Is Triggered by Reasonable Suspicion

320. Article 8 of the ICSFT provides that:

1. Each State Party shall take appropriate measures, in accordance with its domestic legal principles, for the identification, detection and freezing or seizure of any funds used or allocated for the purpose of committing the offences set forth in article 2 as well as the proceeds derived from such offences, for purposes of possible forfeiture.

2. Each State Party shall take appropriate measures, in accordance with its domestic legal principles, for the forfeiture of funds used or allocated for the purpose of committing the offences set forth in article 2 and the proceeds derived from such offences.

321. In its Counter-Memorial, Russia argues that “[f]or this provision to apply,” “the nature of the use or allocation of the funds for terroristic purposes within the meaning of Article 2 of the ICSFT *must be proven*.”⁵⁹¹ As an initial matter, Russia’s position appears to be that Article 8(1) does not apply at all absent proof of a fully completed offense — including with respect to the obligation to take measures for the “identification” and “detection” of funds used or allocated for use in terrorism financing. Such a rule would be nonsensical, as identification and detection of funds, particularly those “allocated” for the commission of an Article 2 offense, are proactive measures to prevent such terrorism financing offenses from being completed in the first place. Such actions necessarily precede the proof that Russia demands.

322. Russia’s demand that an offense be proven before there is an obligation to freeze assets is likewise inconsistent with the text of Article 8(1) and the object and purpose of the Convention. The appropriate standard for finding a breach of Article 8(1)’s obligation to freeze assets is reasonable suspicion. Russia’s objection to this standard rings hollow since under Russia’s own domestic law, the same standard — “sufficient grounds” or “reasonable suspicion” — is used for freezing assets suspected of use in terrorism financing. Russian law

⁵⁹¹ Russia’s Counter-Memorial Part I, para. 522.

provides that freezing assets means preventing access to assets for individuals or organizations “for which there are sufficient grounds to suspect their involvement in terrorist activity (including the financing of terrorism).”⁵⁹² As further explained by Rosfinmonitoring, the Federal Financial Monitoring Service of the Russian Federation, “freezing” funds means “individuals and legal entities are prohibited from carrying out transactions with such funds or securities owned . . . by an entity or individual who are *reasonably suspected* of being linked to terrorist activities (including financing of terrorism) . . .”⁵⁹³ Russia thus has no principled opposition to freezing assets of persons reasonably suspected of financing terrorism — it has simply been unwilling to freeze assets when the reasonable suspicion concerns financing by Russian persons of terrorist acts in Ukraine.

323. Article 8(1) is also an obligation to “take appropriate measures” with regard to the identification, detection, freezing, or seizure of assets. Requiring proof that a terrorism financing offense was committed before being obligated to take the preventive steps of identifying, detecting, and “freezing” property to be used or allocated for the commission of an offense would not be effective in stopping terrorism financing. To the contrary, taking “appropriate” measures will often require active action to identify, detect, and freeze assets *before* an offense occurs.

324. The context of the article further compels this conclusion. Article 8(2) discusses the forfeiture of funds, which is a more permanent deprivation than freezing of

⁵⁹² Federal Law No. 115-FZ On Countering the Legalisation (Laundering) of Criminally Obtained Incomes and the Financing of Terrorism, *accessed at* https://www.legislationline.org/download/id/7945/file/Russia_law_countering_money_laundering_financing_terrorism_2001_am2017_en.pdf.

⁵⁹³ Irina A. Pankratova and Mikhail V. Kolinchenko, CFT Department of Rosfinmonitoring, *Certain Aspects of Application of New Anti-Terrorism Legislation as it Pertains to Freezing (Restraining) Terrorist and Extremist Assets*, Financial Security (2015), p. 33 (emphasis added) (Ukraine’s Reply, Annex 62).

funds. Final proof is appropriately required before a State effects a permanent forfeiture of the funds used for terrorism financing. If such proof were required merely to freeze funds under Article 8(1), but the same proof of a terrorism financing offense would trigger an obligation to forfeit the funds under Article 8(2), the two provisions would be redundant.⁵⁹⁴

325. Russia's position that there must be conclusive proof of terrorism financing before assets may be frozen also contravenes the object and purpose of the Convention. The U.N. Counter-Terrorism Committee explained that a State must freeze a person's assets when it has "evidence supporting a reasonable suspicion that a person or group . . . is actually engaged in activities in support of terrorism," as "there is no time to be lost."⁵⁹⁵ The Committee observed that even "the time taken . . . to obtain a warrant . . . may put the necessary freezing action at risk."⁵⁹⁶ Russia argues that this conclusion by the U.N. Counter-Terrorism Committee was only a suggestion.⁵⁹⁷ However, the U.N. Counter-Terrorism Committee

⁵⁹⁴ See Sir Robert Jennings & Arthur Watts, *Interpretation of Treaties*, in OPPENHEIM'S INTERNATIONAL LAW: VOLUME 1 PEACE (Robert Jennings & Arthur Watts, eds., Oxford University Press 9th ed. 2008), p. 1280 ("The parties are assumed to intend the provisions of a treaty to have a certain effect, and not to be meaningless: the maxim is *ut res magis valeat quam pereat*. Therefore, an interpretation is not admissible which would make a provision meaningless, or ineffective.") (Ukraine's Reply, Annex 69); *Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, *Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 120, para. 41. ("[T]he interpretation of a treaty should seek to give effect to every term in that treaty," such "that no provision should be interpreted in a way that renders it devoid of purport or effect.").

⁵⁹⁵ Letter from J.W. Wainwright, Expert Adviser, to the Chairman of the Counter-Terrorism Committee, paras. 5, 7 (12 November 2002), endorsed by the Counter-Terrorism Committee on 24 November 2002 (Ukraine's Memorial, Annex 281). The panel of experts viewed language in Security Council Resolution 1373 expressly alluding to the ICSFT as especially relevant to the interpretation of paragraph 1 of Article 8 of the ICSFT regarding the freezing of assets. *Ibid.* para. 4. Security Council Resolution 1373 requires States to "[f]reeze without delay funds and other financial assets" of terrorists. U.N. Security Council Resolution 1373, U.N. Doc. S/RES/1373, p. 2 (28 September 2001) (emphasis added) (Ukraine's Memorial, Annex 280).

⁵⁹⁶ Letter from J.W. Wainwright, Expert Adviser, to the Chairman of the Counter-Terrorism Committee, para. 7 (12 November 2002), endorsed by the Counter-Terrorism Committee on 24 November 2002 (Ukraine's Memorial, Annex 281).

⁵⁹⁷ Russia's Counter-Memorial Part I, para. 524(a).

concluded that a reasonable suspicion standard is the “most effective means possible” for a State to satisfy its obligation to freeze funds, as other methods of freezing proved to be “of little use.”⁵⁹⁸ Russia does not explain how the Convention could succeed in its preventive aims if conclusive proof of the offense were required before States are obligated to take the temporary measure of freezing funds.

326. Russia’s concern about “a significant interference with the property rights of a person” effected “on the basis of a mere allegation” is misplaced.⁵⁹⁹ Reasonable suspicion is not a “mere allegation,” but is an appropriate evidentiary standard proportionate to the temporary nature of a freezing measure. States can and do adopt procedures for the release of funds frozen in accordance with Article 8(1) when reasonable suspicion no longer exists, or if the evidence does not support the level of proof necessary for a permanent confiscation.⁶⁰⁰ Russia’s objection is particularly difficult to understand given that Article 8(1) requires appropriate measures to be taken “in accordance with its domestic legal principles,” and as noted above, reasonable suspicion is the standard for freezing assets under Russia’s domestic legal principles.

327. Many international organizations have recommended a reasonable suspicion standard, and other States have also formally adopted this standard when implementing domestic legislation regarding the freezing of funds, whether in the context of Article 8 of the ICSFT or of the similar obligation under Security Council Resolution 1373. For example, the

⁵⁹⁸ Letter from J.W. Wainwright, Expert Adviser, to the Chairman of the Counter-Terrorism Committee, paras. 7, 8 (12 November 2002), endorsed by the Counter-Terrorism Committee on 24 November 2002 (Ukraine’s Memorial, Annex 281).

⁵⁹⁹ Russia’s Counter-Memorial Part I, para. 523(b).

⁶⁰⁰ See Financial Action Task Force, *Special Recommendation III: Freezing and Confiscating Terrorist Assets (Text of the Special Recommendation and Interpretative Note)* (October 2001, as updated, adopted, and published February 2012) (Ukraine’s Memorial, Annex 360); Government of Canada, Proceeds of Crime (Money Laundering) and Terrorist Financing Act, S.C. 2000, Ch. 17.

International Monetary Fund’s legislative model for implementing Article 8 provides that funds should be frozen when “a request has been made by the appropriate authority of another state in respect of a person . . . whom there is *reasonable suspicion* that the person has committed an offence” under Article 2.⁶⁰¹ This standard is widely followed by other countries.⁶⁰²

328. As noted in Ukraine’s Memorial, guidance from the FATF states that there should be “measures to freeze *without delay* funds or other assets of terrorists, those who finance terrorism or terrorist organisations in accordance with . . . the prevention and suppression of the financing of terrorist acts” “based on *reasonable grounds, or a reasonable basis, to suspect or believe* that such funds or other assets could be used to finance terrorist activity.”⁶⁰³

⁶⁰¹ International Monetary Fund, Legal Department, *Suppressing the Financing of Terrorism: A handbook for Legislative Drafting* (2002), p. 147 (emphasis added), accessed at <https://www.imf.org/external/pubs/nft/2003/SFTH/pdf/SFTH.pdf>.

⁶⁰² In the Commonwealth’s materials for implementing anti-terrorism conventions, the model provision states that the standard for issuing “orders for seizure and restraint of property” is where authorities have “*reasonable grounds*” to believe or suspect the property has been, is being, or may be used to commit a terrorist offense. See U.K. Legal and Constitutional Affairs Division of the Commonwealth Secretariat, *Implementation Kits for the International Counter-Terrorism Conventions*, p. 293; The Commonwealth Office of Civil and Criminal Justice Reform, *Model Legislative Provisions on Measures to Combat Terrorism* (September 2002), p. 28. Similarly, in Canada and Singapore, the terrorism financing laws authorize seizures or warrants when there are “*reasonable grounds*” the property is related to terrorism financing. See Government of Canada, *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, Ch. 17; The Statutes of the Republic of Singapore, *Terrorism (Suppression of Financing) Act 2003*, § 11.

⁶⁰³ Financial Action Task Force, *Special Recommendation III: Freezing and Confiscating Terrorist Assets (Text of the Special Recommendation and Interpretative Note)* (October 2001, as updated, adopted, and published February 2012) (emphasis added) (Ukraine’s Memorial, Annex 360); Ukraine’s Memorial, para. 320. While Russia attempts to downplay the significance of FATF recommendations, its own federal financial monitoring service noted that it updated its terrorism financing laws to bring them “in line” with FATF’s 2012 recommendations and “international standards.” Russia’s Counter-Memorial Part I, para. 524(b); Irina A. Pankratova and Mikhail V. Kolinchenko, CFT Department of Rosfinmonitoring, *Certain Aspects of Application of New Anti-Terrorism Legislation as it Pertains to Freezing (Restraining) Terrorist and Extremist Assets*, *Financial Security* (2015), pp. 30, 32 (Ukraine’s Reply, Annex 62).

329. If, notwithstanding this international practice, the Convention were interpreted not to require measures to freeze assets unless there is conclusive proof of a terrorism financing offense, the Convention's purpose would be undermined. Particularly in light of Russia's recognition in its own municipal law that a reasonable suspicion standard is appropriate, Russia's unwillingness to apply such a standard when interpreting and implementing the ICSFT confirms Russia's non-cooperative approach, in defiance of the Convention.

2. Russia Failed in Its Obligations to Detect, Identify, Freeze, and Seize Funds Associated with Terrorism Financing

330. Ukraine's Memorial established, and Russia does not dispute, that fundraising for the DPR and LPR was open and prevalent in Russia, including on the Internet, and instances of fundraising for the DPR and LPR were reported widely by news organizations.⁶⁰⁴ For example, a wealthy Russian oligarch with close ties to President Putin, Konstantin Malofeev, is known as "one of the main sources of financing for Russians promoting separatism" — including the DPR.⁶⁰⁵ Additionally, individuals and legal organizations like Alexander Zhuchkovsky and the EU-sanctioned "New Russia Movement" have publicly raised significant funds for the DPR and LPR,⁶⁰⁶ as have members of the Duma who have publicly solicited funds for the DPR and LPR.⁶⁰⁷

331. A State serious about its obligation to cooperate to combat terrorism financing would have taken steps to identify and detect the funds used for these purposes, but the Russian Federation made no effort to do so. Even when Ukraine brought specific instances of

⁶⁰⁴ See Ukraine's Memorial, Chapter 2, Section F and accompanying sources.

⁶⁰⁵ See Ukraine's Memorial, para. 175 and accompanying sources.

⁶⁰⁶ See Ukraine's Memorial, para. 176 and accompanying sources.

⁶⁰⁷ See Ukraine's Memorial, para. 178 and accompanying sources.

terrorism financing to Russia's attention, Russia did nothing to "freeze" or "seize" those funds.⁶⁰⁸ Russia argues that Ukraine did not provide information or evidence regarding terrorist activities or terrorism financing in its requests to Russia to freeze or seize funds.⁶⁰⁹ However, in each request, Ukraine outlined the terrorist actions of the DPR and LPR, and provided information to Russia regarding public websites with evidence of individuals fundraising for the DPR and LPR, as well as specific bank account numbers and bank card numbers associated with terrorism financing.⁶¹⁰ This information, together with the widely reported facts of the DPR and LPR's acts against civilians in Ukraine, was at least enough to give rise to reasonable suspicion that the funds in question would be used for terrorism financing, requiring Russia to freeze the funds.

332. Though Russia notes that in some instances Ukraine referred to an individual with bank accounts in both Ukraine and Russia, it does not dispute that Ukraine identified several Russian accounts containing assets that should have been frozen. For example, Russia does not dispute that the account used by the "Liberation Movement Russian Sector – Ukraine," with Sergey Igorevich Khyzhnyak as the beneficiary, was located in Russia.⁶¹¹ It also does not dispute that several other accounts identified by Ukraine, including those of Tatiana Mykhailovna Azarov, Andrei Gennadiyevich Lazarchuk, and various other accounts related to

⁶⁰⁸ See Ukraine's Memorial, Chapter 3, Section B.

⁶⁰⁹ See Russia's Counter-Memorial Part I, para. 527.

⁶¹⁰ Ukrainian Note Verbale No. 72/22-620-2087 to Russian Federation Ministry of Foreign Affairs (12 August 2014) (Ukraine's Memorial, Annex 369); Ukrainian Note Verbale No. 72/22-620-2221 to Russian Federation Ministry of Foreign Affairs (29 August 2014) (Ukraine's Memorial, Annex 371).

⁶¹¹ See Ukraine's Memorial, para. 188; Russia's Counter-Memorial Part I, para. 530; Ukrainian Note Verbale No. 72/22-620-2087 to Russian Federation Ministry of Foreign Affairs (12 August 2014) (Ukraine's Memorial, Annex 369).

the DPR's and LPR's activities, were funded by electronic wallets or bank cards from Yandex and Sberbank — banks located in Russia.⁶¹²

333. Even if Russia had some basis to doubt whether the DPR's and LPR's targeting of civilians, and their "reign of intimidation and terror,"⁶¹³ constituted terrorist acts under the ICSFT, it had more than enough information to reasonably suspect that these groups engaged in terrorist acts. In this situation, a State implementing Article 8 in good faith may not refuse to take any action, and later complain that it was never presented with sufficient proof. Russia was obliged to immediately freeze the assets in question, and then act in good faith to determine whether there was sufficient proof of the offenses to effect a permanent forfeiture.

C. Ukraine Has Established that Russia Violated Article 9

334. Russia also has breached Article 9 of the ICSFT by failing to investigate alleged terrorism financing offenses based upon information it received from Ukraine. The relevant facts are undisputed: Ukraine made numerous requests asking Russia to investigate such alleged offenses; yet Russia made no serious effort to investigate, in many cases ignoring Ukraine entirely. Rather than defend the adequacy of its investigations, Russia's Counter-Memorial twists the law to justify doing nothing in response to Ukraine's requests for cooperation, entirely avoiding its obligations under the ICSFT.

1. Russia Improperly Attempts to Limit Its Obligation to Investigate Under Article 9 of the ICSFT

335. The plain text of Article 9(1) provides that "upon receiving information" about a terrorism financing offense, or even an "alleged" terrorism financing offense, the State is

⁶¹² See Ukraine's Memorial, para. 188; Russia's Counter-Memorial Part I, para. 530; Ukrainian Note Verbale No. 72/22-620-2087 to Russian Federation Ministry of Foreign Affairs (12 August 2014) (Ukraine's Memorial, Annex 369).

⁶¹³ OHCHR, *Report on the Human Rights Situation in Ukraine* (15 July 2014), para. 26 (Ukraine's Memorial, Annex 296).

obligated “to investigate the facts contained in the information.”⁶¹⁴ Then, if “the circumstances so warrant,” the State “shall take the appropriate measures to ensure that person’s presence for the purpose of prosecution or extradition.”⁶¹⁵ Yet in its Counter-Memorial, Russia seeks to add two imaginary preconditions, which if not met, would permit the State *not* to investigate despite receiving information about an alleged terrorism financing offense. These additional requirements on the State requesting cooperation are not grounded in the text of Article 9, and would undermine the treaty’s object and purpose.

336. First, Russia argues that “a specific person must be identified and this person must be specifically alleged to have committed an offence under Article 2.”⁶¹⁶ In numerous instances, Ukraine did identify specific persons it suspected of committing specific terrorism financing offenses.⁶¹⁷ In other instances, however, Ukraine had information about specific acts of terrorism financing by unknown persons residing in Russian territory, and asked Russia for cooperation in investigating.⁶¹⁸ It is hardly unusual in a law enforcement context for there to be information that an offense was committed but the suspect is not yet identified. Indeed, these are the precise circumstances in which cooperation is *most* needed to “investigate the facts,” as Article 9 requires.

337. In light of these circumstances, the effectiveness of Article 9 would be significantly reduced if it imposed no duty to investigate unless a specific criminal suspect can be identified even before any investigation is commenced. In *Belgium v. Senegal*, the Court explained that the duty to make a preliminary inquiry under Article 6(2) of the Convention

⁶¹⁴ ICSFT, art. 9(1).

⁶¹⁵ ICSFT, art. 9(2)

⁶¹⁶ Russia’s Counter-Memorial Part I, para. 540(a).

⁶¹⁷ Ukraine’s Memorial, Chapter 3.

⁶¹⁸ Ukraine’s Memorial, Chapter 3.

Against Torture “must be interpreted in the light of the object and purpose of the Convention, which is to make more effective the struggle against torture.”⁶¹⁹ Similarly, the duty to investigate in Article 9 of the ICSFT should be interpreted in light of the ICSFT’s object and purpose of enhancing cooperation to suppress terrorism financing crimes.

338. Russia’s argument that such cooperation can be refused has no support in the ordinary meaning of the provision’s terms. Article 9(1) refers only to “information that *a person* who has committed or who is alleged to have committed an offence” – not information about “*a specific person*.” Article 9(1) must also be read in context with Article 9(2), which refers not to “a person” but “*the* offender or alleged offender.”⁶²⁰ This more specific reference to “the” person suspected of the offense makes sense, as Article 9(2) requires measures to ensure that potential offender’s presence, and such measures can only be taken in relation to an identified person. By contrast, an investigation can and often must be commenced before a suspect is identified, and a State can “investigate the facts contained in the information” without necessarily taking action against any specific individual.

339. Russia’s interpretation is also inconsistent with the Convention’s object and purpose of enhancing cooperation in the suppression of terrorism financing offenses. In ordinary criminal investigations, there will often be information that some person has committed a crime, but investigation is necessary to identify the suspect. This point is noted in a leading commentary on the Criminal Procedure Code of the Russian Federation:

Typically, there is not enough information regarding all elements of a crime at the initiation stage in a criminal case. For example, a person who committed a crime is quite often unknown, state of mind is unknown, etc. . . .

⁶¹⁹ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, p. 454, para. 86.

⁶²⁰ ICSFT, art. 9(2).

The challenge of establishing a subject [who committed a crime] and mental element is for the stage that follows the initiation of a criminal case, the preliminary investigation stage. . . .⁶²¹

340. Second, Russia argues that a State is under no duty to investigate unless it is provided with “sufficiently detailed” information establishing “at least a reasonable suspicion that an offence under Article 2 of the ICSFT has been committed.” Moreover, as Russia seeks to apply this standard, it is considerably more demanding than what is normally thought of as “reasonable suspicion,” including a demand for evidence of even the subjective elements of a crime. There is no basis in the Convention — or common sense — for a rule that such evidence must be provided before an investigation can even begin.

341. The Article 9(1) obligation is triggered by “receiving information” of *any kind* — not “receiving *sufficiently detailed* information.” Nor does Article 9(1) mention a “reasonable suspicion” standard; it says that “upon receiving information,” the State “shall take such measures as may be necessary under its domestic law to investigate the facts contained in the information.”

342. Russia’s interpretation also disregards the broader context. As explained previously, the widespread practice under Article 8 of the Convention (including under Russian domestic law) is to freeze assets based on reasonable suspicion of use in terrorism financing. Since reasonable suspicion is the appropriate standard for measures that affect a person’s property rights (albeit temporarily), the standard cannot be the same for the less invasive step of initiating an investigation.

343. Moreover, it should be presumed that a State will not seek cooperation in investigating an offense if it does not consider that there is a reasonable, good-faith basis for doing so. If the State receiving the request believes that not enough details have been provided to support an investigation, good faith performance of Article 9(1) would require it to seek

⁶²¹ A.P. Ryjakov, *Commentary to Art. 140*, in COMMENTARY TO THE CRIMINAL PROCEDURE CODE OF THE RUSSIAN FEDERATION (9th rev. ed. 2014), paras. 48-49 (Ukraine’s Reply, Annex 70).

further information and clarification so that it can then investigate as requested. Simply ignoring a request to investigate, and not mentioning the supposed lack of sufficient detail until years later, is not good faith compliance with Article 9(1).

344. Rather than grounding its proposed standard in the text of Article 9(1) or the object and purpose of the Convention, Russia argues that requiring a State “to investigate each and every allegation of terrorism financing” would “drain important law enforcement resources” and “would constitute inappropriate interferences with the human rights of those whose activities would be reviewed.”⁶²² These professed concerns are grounded in an improper assumption that a requesting State would seek cooperation without a good faith basis. Moreover, the ICSFT itself reflects a judgment that the gravity of terrorism financing offenses warrants the use of law enforcement resources. Russia also does not explain how merely initiating an investigation could interfere with someone’s human rights, especially since Russia is under obligations to ensure that human rights are observed in the course of criminal investigations.⁶²³

345. Even assuming, however, that a State could withhold cooperation if information creating “reasonable suspicion” of an offense is not provided, any such standard must be understood in light of the limited information generally available prior to an investigation. While Russia uses the words “reasonable suspicion,” in reality it argues for a much more demanding standard, akin to requiring evidence and proof of every element of the crime — even before any investigation can begin. In particular, Russia insists that the

⁶²² Russia’s Counter-Memorial Part I, para. 543(b).

⁶²³ Russia’s concern that human rights may be violated by the mere act of opening an investigation into terrorism financing is particularly ironic in light of Russia’s discriminatory violations of human rights of Crimean Tatars and ethnic Ukrainians in Crimea, which it seeks to defend on the pretext of addressing “extremism” and terrorism. *See infra*, Chapter 9, Section F.

“information provided” must “contain[] facts” supporting “the requisite actual intention or knowledge that the funds were to be used to commit a terrorist act as defined, including the requisite actual intention and terrorist purpose.”⁶²⁴

346. Russia’s demand for evidence of knowledge and intention before even beginning the process of investigation is inconsistent with international practice. The Rome Statute provides that the ICC prosecutor shall initiate an investigation based on, *inter alia*, whether “the information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed.”⁶²⁵ In interpreting this “reasonable basis” standard, the ICC Appeals Chamber has described the information required as “of a limited and very general nature,” and explained that “the Prosecutor is required only to provide a factual description of the crimes allegedly committed.”⁶²⁶ The Appeals Chamber further noted that “[t]his is consistent with the preliminary stage of proceedings when the Prosecutor has not had the opportunity to gather evidence and ascertain the facts in the course of an investigation.”⁶²⁷ In fact, at the much more advanced stage of issuing an arrest warrant, where there must be “reasonable grounds to believe that the person has committed a crime,” the Appeals Chamber has determined that this standard is met in the case of genocide even where “genocidal intent is only one of several

⁶²⁴ Russia’s Counter-Memorial Part I, para. 542.

⁶²⁵ Rome Statute, art. 53(1).

⁶²⁶ *Appeal Against the Decision on the Authorisation of an Investigation Into the Situation in the Islamic Republic of Afghanistan*, ICC-02/17 OA4, Appeals Chamber Judgment, para. 39 (5 March 2020); *see also* Regulations of the International Criminal Court, ICC-BD/01-05-16, Regulation 49(1).

⁶²⁷ *Appeal Against the Decision on the Authorisation of an Investigation Into the Situation in the Islamic Republic of Afghanistan*, ICC-02/17 OA4, Appeals Chamber Judgment, para. 39 (5 March 2020).

reasonable conclusions available on the materials provided.”⁶²⁸

347. Russian practice also reflects the principle that evidence of subjective elements is not a prerequisite to commencing an investigation. As noted by the commentary to the Russian Criminal Procedure Code, “at the initiation stage in a criminal case,” “the state of mind is unknown.” Thus, establishing the “mental element [*mens rea*] is for the stage that follows the initiation of a criminal case,” because “[o]nly after the production of investigative actions is it permissible to speak of any degree of proof of a person’s guilt in committing a crime.”⁶²⁹ Particularly against this background, Russia’s insistence on specific information establishing knowledge and intention even before initiating an investigation is not a good faith interpretation of Article 9(1).

2. Russia Made No Effort to Investigate Alleged Acts of Terrorism Financing

348. As Ukraine established in its Memorial, the Russian Federation received extensive information about persons who had committed or who were alleged to have committed an offense set forth in article 2 and might have been present in Russia’s territory.⁶³⁰ Ukraine asked Russia to investigate approximately 50 named individuals,⁶³¹ two legal entities,⁶³² and dozens of financial transactions alleged to be involved in terrorism financing

⁶²⁸ *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Prosecution’s Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-OA, Appeals Chamber Judgment, para. 1 (3 February 2010).

⁶²⁹ A.P. Ryjakov, *Commentary to Art. 140*, in COMMENTARY TO THE CRIMINAL PROCEDURE CODE OF THE RUSSIAN FEDERATION (9th rev. ed. 2014), Commentary to Art. 140, para. 49 (Ukraine’s Reply, Annex 70).

⁶³⁰ Ukraine’s Memorial, Chapter 3.

⁶³¹ Ukraine’s Memorial, Chapter 3.

⁶³² Ukrainian Note Verbale No. 72/22-620-2087 to Russian Federation Ministry of Foreign Affairs (12 August 2014) (Ukraine’s Memorial, Annex 369).

related activities.⁶³³ Ukraine also provided Russia with information identifying dozens of Russian bank accounts and Russian bankcard numbers suspected to be used by persons in Russia engaged in money transfers to finance terrorist activities in Ukraine. For example, Ukraine notified Russia that electronic wallets or bank cards from Yandex and Sberbank (account and card numbers identified) were involved in funding the DPR and LPR activities.⁶³⁴ In addition to requesting action to freeze such funds under Article 8, Ukraine asked Russia to “investigate the facts provided” under “Article 9 of the Convention.”⁶³⁵

349. Russia does not dispute that it received this information and requests for investigative cooperation. Russia cannot dispute that the information contains facts about specific persons who Ukraine alleged were involved in financing of terrorism in Ukraine and who may be present in Russia’s territory. For example, Ukraine in its diplomatic note of 12 August 2014 named 13 Russian nationals who procured and smuggled weapons⁶³⁶ or otherwise collected funds, including ammunition or other military equipment⁶³⁷ and money to fund terrorist activities in Ukraine.⁶³⁸

350. Yet Russia also does not deny that it failed to carry out *any* inquiry or investigation into the facts contained in the information concerning at least 27 of the

⁶³³ Ukraine’s Memorial, Chapter 3.

⁶³⁴ Ukrainian Note Verbale No. 72/22-620-2087 to Russian Federation Ministry of Foreign Affairs (12 August 2014) (Ukraine’s Memorial, Annex 369); Ukrainian Note Verbale No. 72/22-620-2221 to Russian Federation Ministry of Foreign Affairs (29 August 2014) (Ukraine’s Memorial, Annex 371).

⁶³⁵ Ukrainian Note Verbale No. 72/22-620-2087 to Russian Federation Ministry of Foreign Affairs (12 August 2014) (Ukraine’s Memorial, Annex 369); Ukrainian Note Verbale No. 72/22-620-2221 to Russian Federation Ministry of Foreign Affairs (29 August 2014) (Ukraine’s Memorial, Annex 371).

⁶³⁶ Ukrainian Note Verbale No. 72/22-620-2087 to Russian Federation Ministry of Foreign Affairs (12 August 2014) (Ukraine’s Memorial, Annex 369).

⁶³⁷ Ukrainian Note Verbale No. 72/22-620-2087 to Russian Federation Ministry of Foreign Affairs (12 August 2014) (Ukraine’s Memorial, Annex 369).

⁶³⁸ Ukrainian Note Verbale No. 72/22-620-2087 to Russian Federation Ministry of Foreign Affairs (12 August 2014) (Ukraine’s Memorial, Annex 369).

individuals identified by Ukraine. By this total absence of action, Russia has breached its obligations under Article 9(1) of the ICSFT.

351. As for those instances where Russia purported to investigate, it also failed to perform in good faith its obligations under Article 9(1) of the ICSFT. As explained in Ukraine’s Memorial, Russia waited for 12 months or longer to provide any response to Ukraine’s requests.⁶³⁹ For example, Ukraine requested that Russia investigate alleged terrorism financing activity in Russia by Andrei Gennadiyevich Lazarchuk, Nina Igorevna Lotysh, Vadim Yuriyevich Kunayev, and Tatiana Mykhailovna Azarovnaz.⁶⁴⁰ Almost one year later, all Russia would say was that it still was investigating.⁶⁴¹

352. Even Russia’s eventual responses (when any responses were made) confirmed the lack of any meaningful investigation.⁶⁴² In purportedly “investigating” terrorism financing by the Coordination Center for Assistance to Novorossia, Russia claimed to have discovered that the Center “does not have electronic accounts,” and that “[m]ilitary items are not acquired” by the group.⁶⁴³ Yet the Center’s own website provides links to electronic bank accounts, and boasts of sending weapons to the DPR and LPR.⁶⁴⁴ Ukraine pointed this out in

⁶³⁹ Ukraine’s Memorial, Chapter 3, Sections B–C.

⁶⁴⁰ Ukrainian Note Verbale No. 72/22-620-2221 to Russian Federation Ministry of Foreign Affairs (29 August 2014) (Ukraine’s Memorial, Annex 371).

⁶⁴¹ Russian Federation Note Verbale No. 10448 to the Ukrainian Ministry of Foreign Affairs (31 July 2015) (Ukraine’s Memorial, Annex 376).

⁶⁴² Ukraine’s Memorial, Chapter 3, Sections B–C.

⁶⁴³ Russian Federation Note Verbale No. 10448 to the Ukrainian Ministry of Foreign Affairs (31 July 2015) (Ukraine’s Memorial, Annex 376).

⁶⁴⁴ *See* Ukrainian Note Verbale No. 72/22-620-2087 to Russian Federation Ministry of Foreign Affairs (12 August 2014) (Ukraine’s Memorial, Annex 369); *see also* Communist Party for the DKO (Volunteer Communist Detachment), Coordination Center for Assistance to New Russia (30 December 2014) (Ukraine’s Memorial, Annex 631); Regular Dispatch Is Not Humanitarian Aid, Coordination Center for Assistance to New Russia (19 November 2014) (Ukraine’s Memorial, Annex 629); Report on Past Deliveries, Coordination Center for Assistance to New Russia (19 August 2014) (Ukraine’s Memorial, Annex 626).

its Memorial, and Russia did not respond or defend its investigation. Similarly, when Ukraine presented evidence that Oleksander Zhukovsky was financing terrorism — including a video he posted to the Internet showing himself in Russia fundraising for the DPR — Russia simply claimed that Mr. Zhukovsky “does not exist in the Russian Federation.”⁶⁴⁵ And when Ukraine informed Russia of Konstantin Malofeev’s involvement in terrorism financing, Russia provided the remarkable response that “it was not possible to identify the location of” this individual, despite the fact that he is one of the most prominent businessmen in Russia with close ties to President Putin.⁶⁴⁶ In these instances as well, Ukraine pointed out in its Memorial the inadequacy of Russia’s purported investigation, and Russia has not responded.

353. Rather than defend its investigations, or address the inadequacies in those investigations, Russia contends that it had no obligation to investigate at all, because Ukraine failed to establish “reasonable suspicion” of terrorism financing offenses, particularly with respect to the intention and knowledge elements of such offenses.

354. As explained above, Russia’s proposed “reasonable suspicion” standard is not grounded in Article 9(1). Yet even if Russia had genuinely believed that Ukraine had not provided sufficient information capable of supporting an investigation, a good faith response would have been to promptly inform Ukraine of that view and request further information. What Russia did instead — flatly ignoring Ukraine’s requests, or conducting plainly inadequate investigations — is not a permissible response under the ICSFT, but is instead the action of a State uninterested in good faith cooperation.

⁶⁴⁵ Russian Federation Note Verbale No. 10448 to the Ukrainian Ministry of Foreign Affairs (31 July 2015) (Ukraine Memorial, Annex 376).

⁶⁴⁶ Russian Federation Note Verbale No. 10448 to the Ukrainian Ministry of Foreign Affairs (31 July 2015) (Ukraine’s Memorial, Annex 376).

355. Moreover, even assuming that a “reasonable suspicion” threshold must be met to require cooperation, Russia’s arguments for why such a standard is not met here are spurious.

356. First, Russia claims that Ukraine’s requests “do not contain any facts concerning the collection or provision of funds or evidencing the requisite intent or knowledge.”⁶⁴⁷ In fact, Ukraine’s diplomatic correspondence contains numerous facts of the collection and provision of funds, including both weapons and money. For example, Ukraine’s diplomatic note No. 72/22-620-2087 of 12 August 2014, specified that O.I. Kuligina “took part in the loading of weapons and ammunition, smuggled from the territory of the Russian Federation to the territory of Ukraine, to GAZel truck.”⁶⁴⁸ The diplomatic note similarly provides information that Mr. Zhuchkovsky procured weapons, ammunition and other military equipment for the DPR.⁶⁴⁹ Ukraine also identified accounts related to the DPR’s and LPR’s activities that were funded by electronic wallets or bank cards.⁶⁵⁰ These requests also alleged that funds were provided with the requisite intention or knowledge.⁶⁵¹ Moreover, as

⁶⁴⁷ Russia’s Counter-Memorial Part I, para. 545(a).

⁶⁴⁸ Ukrainian Note Verbale No. 72/22-620-2087 to Russian Federation Ministry of Foreign Affairs (12 August 2014) (Ukraine’s Memorial, Annex 369)

⁶⁴⁹ Ukrainian Note Verbale No. 72/22-620-2087 to Russian Federation Ministry of Foreign Affairs (12 August 2014) (Ukraine’s Memorial, Annex 369) (stating that “he said individuals maintain their own pages in V Kontakte social network (<http://vk.com/juchkovsky>, http://vk.com/people/Антон_Раевский), which contain personal data, photo and video materials that evidence that these individuals directly and/or indirectly, illegally and intentionally conduct in the territory of the Russian Federation acts aimed at collection of funds with the intention or in the knowledge that they should be used (provided), fully or partially, to procure weapons, ammunition or other military equipment and means for their use by terrorist organizations in the territory of Ukraine for the purpose of carrying out the abovementioned terrorist acts that represent offences under the Convention and treaties listed in the Annex thereto.”)

⁶⁵⁰ Ukrainian Note Verbale No. 72/22-620-2087 to Russian Federation Ministry of Foreign Affairs (12 August 2014) (Ukraine’s Memorial, Annex 369); Ukrainian Note Verbale No. 72/22-620-2221 to Russian Federation Ministry of Foreign Affairs (29 August 2014) (Ukraine’s Memorial, Annex 371).

⁶⁵¹ See e.g., Ukrainian Note Verbale No. 72/22-620-2087 to Russian Federation Ministry of Foreign Affairs (12 August 2014) (Ukraine’s Memorial, Annex 369); Ukrainian Note Verbale No. 72/22-620-

explained above, the subjective element of an offense is usually established by investigating; any perceived lack of such evidence is not a proper basis for refusing to investigate at all.

357. Second, Russia claims that the diplomatic correspondence failed to identify “the specific recipients of the funds that allegedly engage in terrorism.”⁶⁵² Yet it expressly referred to the DPR and LPR as the recipients of the funds concerned.⁶⁵³ If Russia means to suggest that it was necessary to identify specific *members* of these organizations to whom the funds were provided, it provides no support for such a narrow approach to its obligations. This would not make sense in light of the fact that Article 2 focuses on funds being provided for use in specific *acts*, without ever mentioning the person who carries out those acts. Terrorist acts are often perpetrated by groups, and allegations that funds are being provided to such groups must be a sufficient basis to trigger a duty to investigate terrorism financing offenses.

358. Third, Russia argues that Ukraine did not provide “facts giving rise to a reasonable suspicion that the DPR or LPR — the allegedly funded entities — engage in acts of terrorism.”⁶⁵⁴ Ukraine sent the requests in question between August and November 2014. By that time, it was well known, including from U.N. reporting, that the DPR and LPR were engaged in a “reign of intimidation and terror” in eastern Ukraine, which included numerous

2221 to Russian Federation Ministry of Foreign Affairs (29 August 2014) (Ukraine’s Memorial, Annex 371).

⁶⁵² Russia’s Counter-Memorial Part I, para. 545(b).

⁶⁵³ Ukrainian Note Verbale No. 72/22-620-2087 to Russian Federation Ministry of Foreign Affairs (12 August 2014) (Ukraine’s Memorial, Annex 369); Ukrainian Note Verbale No. 72/22-620-2221 to Russian Federation Ministry of Foreign Affairs (29 August 2014) (Ukraine’s Memorial, Annex 371); Ukrainian Note Verbale No. 72/22-620-2529 to Russian Federation Ministry of Foreign Affairs (10 October 2014) (Ukraine’s Memorial, Annex 372); Ukrainian Note Verbale No. 72/22-620-2717 to the Russian Ministry of Foreign Affairs (3 November 2014) (Ukraine’s Memorial, Annex 374) (about Zhuckovsky).

⁶⁵⁴ Russia’s Counter-Memorial Part I, para. 545(c).

instances of murdering civilians on the basis of their support for Ukrainian unity.⁶⁵⁵ Ukraine also noted specific the DPR's and LPR's acts. For example, Ukraine's request for legal assistance concerning V.V. Zhirinovsky explained that the LPR had "cause[d] explosions and commit[ted] arson, kidnap[ped] and murder[ed] citizens," and carried out other acts to "terrorize the population."⁶⁵⁶ Russia did not raise any specific concerns with the information provided at the time.⁶⁵⁷ It only asked for more information after it was alleged to violate the ICSFT, and even after more information was provided, Russia did nothing to investigate.⁶⁵⁸

359. Even if Russia had a good faith belief that Ukraine had not provided information showing that the DPR and LPR engaged in terrorist acts, that would not have relieved it of its obligations under Article 9. Russia has never denied that the DPR and LPR committed numerous acts that killed civilians; it claims only that these were not acts intended to cause death to civilians, and were not acts that, by their nature or context, have the purpose of intimidating a population or compelling a government. As with the knowledge or intention of the funder, these aspects of the offense could have been assessed during an investigation. Particularly in light of Russia's erroneous view that these are subjective elements requiring unusually high levels of proof, Russia should have at least agreed to investigate whether the DPR and LPR's acts are covered by Article 2(1)(a) and (b) of the Convention, rather than refuse to investigate at all.

⁶⁵⁵ Ukraine's Memorial, Chapter 6, Section A.

⁶⁵⁶ Ukrainian Request for Legal Assistance Concerning Case No. 12014000000000292 (4 September 2014) (concerning Zhironovsky) (Ukraine's Memorial, Annex 400).

⁶⁵⁷ Ukrainian Note Verbale No. 72/22-620-967 to the Russian Federation Ministry of Foreign Affairs (24 April 2015) (Ukraine's Written Statement, Annex 30).

⁶⁵⁸ Ukrainian Note Verbale No. 72/22-620-2605 to the Russian Federation Ministry of Foreign Affairs (23 October 2015) (Ukraine's Written Statement, Annex 38).

360. The error of Russia’s approach to Article 9, and to its obligations under the ICSFT more broadly, is illustrated by its observation that “the relevant communications were sent, and the alleged financing took place, even before the acts of shelling that Ukraine relies on” beginning in January 2015.⁶⁵⁹ One of the reasons cooperation in the suppression of terrorism financing is so important is to prevent *further* acts of terrorism from being committed. By the time Ukraine sent requests to Russia seeking cooperation and investigative action, the DPR and LPR had already committed a well-documented pattern of acts covered by Article 2(1)(b).⁶⁶⁰ The fact that more, and deadlier, acts occurred after Russia failed to engage with Ukraine’s requests for cooperation is not a defense for Russia — it underscores the serious consequences of Russia’s refusal to cooperate for achieving the Convention’s goal of preventing and suppressing the financing of terrorism.

D. Ukraine Has Established that Russia Violated Article 10

361. While the Russian Federation received sufficient information from Ukraine to prosecute or extradite persons who committed terrorism financing offenses, Russia again did nothing. In refraining once again from action, Russia violated Article 10’s obligation to extradite or prosecute. The text of Article 10(1) reads:

The State Party in the territory of which the alleged offender is present shall, in cases to which article 7 applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in

⁶⁵⁹ Russia’s Counter-Memorial Part I, para. 547.

⁶⁶⁰ *Supra*, Chapter 6, Section A.

the case of any other offence of a grave nature under the law of that State.⁶⁶¹

362. Russia argues that the obligation to prosecute is only triggered where “the information provided describes an offence of terrorism financing falling within Article 2 of the ICSFT.”⁶⁶² Russia’s reference to “the information provided” appears to suggest that Russia would be under no obligation to prosecute terrorism financing offenses unless another State not only requests this measure, but presents sufficient information warranting prosecution. There is nothing in the text of Article 10 to suggest such interpretation.

363. Instead, if “the alleged offender is present” on the State’s territory, it must “submit the case without undue delay to its competent authorities for the purpose of prosecution.” This obligation applies whether another State provided information about the offense, another State requested an investigation which should have led to discovery of information about the offense, or the State should have been aware of terrorism financing happening in its territory.

364. Article 10 must be read together with Article 9, because the ability to fulfil the obligation under Article 10 to prosecute also requires a good faith performance of Article 9’s duty to investigate. As this Court explained in the context of the Convention Against Torture, “[t]he obligation to prosecute . . . is normally implemented . . . after the State has performed the other obligations provided for in the preceding articles, which require it to . . . make an inquiry into the facts.”⁶⁶³ As with the CAT, the ICSFT’s “obligations, taken as a whole, may be regarded as elements of a single conventional mechanism aimed at preventing suspects from

⁶⁶¹ ICSFT, art. 10.

⁶⁶² Russia’s Counter-Memorial Part I, paras. 553, 555.

⁶⁶³ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, *I.C.J. Reports 2012*, p. 455, para. 91.

escaping the consequences of their criminal responsibility, if proven.”⁶⁶⁴

365. As explained above, Russia made no effort to investigate the allegations of terrorism financing raised by Ukraine. Russia cannot use its own breach of Article 9 as an excuse to say it had insufficient information to prosecute or extradite under Article 10. Russia never even responded to Ukraine’s requests to investigate 27 people, and has not explained why there was no basis to prosecute them.⁶⁶⁵

366. Notwithstanding Russia’s own failure to investigate, Ukraine has laid out in detail in its written pleadings the evidence of terrorism financing offenses that have been committed by numerous, specific Russian officials and private actors alike.⁶⁶⁶ Russia had ample knowledge of these illegal actions, but took no steps to prosecute or extradite the people who committed these offenses; its failure to act manifestly violated Article 10.

E. Ukraine Has Established that Russia Violated Article 12

367. Finally, Article 12(1) imposes an obligation on States Parties to “afford one another the greatest measure of assistance in connection with criminal investigations or criminal or extradition proceedings in respect of the offences set forth in article 2, including assistance in obtaining evidence in their possession necessary for the proceedings.”⁶⁶⁷ Ukraine requested such assistance through mutual legal assistance treaties (“MLAT”).⁶⁶⁸ Russia does not dispute that it received at least twelve MLAT requests, and that it failed to provide “the greatest measure of assistance” to Ukraine. Instead, Russia’s Counter-Memorial offers a series of excuses that only confirm Russia’s unwillingness to cooperate in good faith.

⁶⁶⁴ *Ibid.*

⁶⁶⁵ *Supra*, para. 350; Ukraine’s Memorial, Chapter 3.

⁶⁶⁶ Ukraine’s Memorial, Chapter 5; Ukraine’s Reply, Chapter 7.

⁶⁶⁷ ICSFT, art. 12(1).

⁶⁶⁸ *See* Ukraine’s Memorial, para. 193 and accompanying sources.

368. Russia’s principal response is to assert that Ukraine’s MLAT requests did not “relate to an offence under Article 2 of the ICSFT.”⁶⁶⁹ It makes three arguments in support of this position, all of which fail.

369. First, Russia argues that financing the DPR or LPR does not constitute an offense under Article 2 of the ICSFT.⁶⁷⁰ That argument has been refuted above.⁶⁷¹ At a minimum, Ukraine had a sufficient basis to request investigative assistance in order to establish whether financing the DPR or LPR constitutes Article 2 offenses.

370. Second, Russia complains that Ukraine’s MLAT requests failed to reference the ICSFT.⁶⁷² From the content of Ukraine’s MLAT requests, however, Russia was well aware that Ukraine was seeking assistance relating to terrorism financing. One request, for example, involved a person who “loaded weapons and ammunition” and transported it “to be handed over to representatives of the terrorist organization ‘Donetsk People’s Republic.’”⁶⁷³ Given that terrorism financing was the subject of the requests, there was no requirement under Article 12(1) to expressly reference the ICSFT.

371. Third, Russia complains that eleven MLAT requests referenced Ukrainian criminal laws other than the Article 258 of the Criminal Code concerning terrorism financing.⁶⁷⁴ But the domestic legal basis for these investigations was an internal matter for

⁶⁶⁹ Russia’s Counter-Memorial Part I, para. 564.

⁶⁷⁰ Russia’s Counter-Memorial Part I, paras. 565, 568.

⁶⁷¹ Russia claims that it established in Chapters VI–VII of its Counter-Memorial Part I that the provision of financing to the DPR or LPR does not constitute an offense falling within Article 2 of the ICSFT. Ukraine’s response is provided in the Reply above to the extent Russia relies on its arguments elsewhere in its Counter-Memorial Part. *Supra*, Chapter 6 Sections B–C.

⁶⁷² Russia’s Counter-Memorial Part I, paras. 566 and 568.

⁶⁷³ Ukrainian Request for Legal Assistance Concerning Case No. 22014050000000015 (30 September 2014) (Ukraine’s Memorial, Annex 401).

⁶⁷⁴ Russia’s Counter-Memorial Part I, para. 567.

Ukraine, and not a concern of Russia's. Ukraine's criminal code includes a number of provisions that can encompass acts of terrorism financing as defined in Article 2 of the ICSFT, including Article 258-3 or 260(3) of the Criminal Code of Ukraine.⁶⁷⁵ What matters for purposes of the application of Article 12 is that the substance of the investigations concerned terrorism financing within the meaning of Article 2 of the ICSFT. That is the case here: Ukraine's requests described allegations of individuals providing assets to the DPR and LPR, groups that were by that time known for committing terrorist acts.⁶⁷⁶

372. Even if, as Russia notes, some of these investigations *also* concerned acts of terrorism allegedly committed by the suspects,⁶⁷⁷ that does not change the fact that Ukraine's requests encompassed the provision of funds to the DPR and LPR, and thus involved alleged acts of terrorism financing under the Convention. Moreover, it is ironic that Russia would object to providing assistance concerning the occurrence of acts of terrorism, since elsewhere

⁶⁷⁵ Eleven Ukraine's MLAT requests rely on Article 258-3 or 260(3) of the Criminal Code of Ukraine or both. See Ukraine's Memorial, Annexes 400, 401, 404, 405, 419-423, 427, and 431. Article 258-3 concerns an offense of creation of a terrorist organization *and its support*. See Ukraine's Memorial, Annexes 401 and 423 (quoting Article 258-3 of the Criminal Code of Ukraine). Article 260(3) concerns financing of military of paramilitary organizations, which can include groups that commit terrorist acts. See Ukraine's Memorial, Annex 403 (quoting Article 260(3) of the Criminal Code of Ukraine).

⁶⁷⁶ See *e.g.*, Ukraine's Memorial, Annex 401 (stating that O.I. Kulygina loaded weapons and ammunition into GAZEL vans near the state border between Ukraine and the Russian Federation for the DPR); Ukraine's Memorial, Annex 404 (stating that S.M. Mironov funded the LPR); Ukraine's Memorial, Annex 405 (stating that G.A. Zyuganov raised funds for and funded the LPR); Ukraine's Memorial, Annex 419 (stating that A.I. Mochaev supplied the resources and weapons to the DPR); Ukraine's Memorial, Annex 420 (stating that A.Yu. Boroday provided support to the DPR.); Ukraine's Memorial, Annex 421 (stating that I.N. Bezler provided weapons to local residents to be used in instigating violence in Ukraine); Ukraine's Memorial, Annex 422 (stating that I.V. Girkin obtained firearms, ammunition, means of communication, motor vehicles, and cash for the DPR); Ukraine's Memorial, Annex 433 (stating that G.L. Kornilov provided financial support to the DPR and LPR and supplied "military uniforms, ammunition, military personal protective equipment, means of radio communication and medications to members of said terrorist organizations operating in Donetsk and Luhansk Oblasts.").

⁶⁷⁷ Russia's Counter-Memorial Part I, para. 567(c-e) (noting Ukraine's MLAT requests concerning I.Bezler, A.Boroday and Russian military serviceman).

in its Counter-Memorial, Russia argues (incorrectly) that it could withhold cooperation because Ukraine did not provide sufficient evidence of the underlying acts of terrorism.⁶⁷⁸ There is no consistent principle behind Russia's conduct, just a complete unwillingness to cooperate with Ukraine in order to fulfill the objectives of the ICSFT.

373. Russia refused one request on the basis that documents showing that the LPR was a terrorist organization were not translated from Ukrainian to Russian.⁶⁷⁹ According to Russia, it had the right to insist on such a translation because Article 17 of the 1993 Minsk Convention “expressly requires foreign language documents to be accompanied with a translation into Russian.”⁶⁸⁰ Yet Russia does not quote Article 17 of the Minsk Convention, which states instead that “the Contracting Parties use the state languages of the Contracting Parties *or* Russian.”⁶⁸¹ Ukrainian is a “[l]anguage of the Contracting Parties.” As Russia notes, in many instances Ukraine provided Russian translations as a courtesy. Russia's decision to seize on the lack of a Russian translation in this instance in order to avoid cooperation is more evidence of Russia's pattern of delay and obfuscation.

374. Russia also relies on Article 19 of the Minsk Convention to claim that it was entitled to refuse legal assistance on the basis “that such would represent a threat to the sovereignty and security of the Russian Federation.”⁶⁸² However, Article 19 provides that “[i]f the request for legal assistance is denied, the requesting Contracting Party shall be promptly

⁶⁷⁸ Russia's Counter-Memorial Part I, para. 554.

⁶⁷⁹ Russia's Counter-Memorial Part I, para. 570(a).

⁶⁸⁰ Russia's Counter-Memorial Part I, para. 570(a).

⁶⁸¹ Minsk Convention on Legal Aid and Legal Relations on Civil, Family and Criminal Matters of 1993, art. 17 (22 January 1993) (Ukraine's Memorial, Annex 461).

⁶⁸² Russia's Counter-Memorial Part I, paras. 571–574.

notified of the reasons for the denial.”⁶⁸³ The Court in *Djibouti v. France* found that France violated a materially identical provision by providing “no reasons” for its refusal to render assistance.⁶⁸⁴ Russia’s only response is that the Minsk Convention should be given a different interpretation based on subsequent practice of the parties, providing examples in other contexts where refusals of assistance with minimal explanation were accepted.⁶⁸⁵ But the fact that in different situations the parties decided not to pursue the matter further is not sufficient evidence of practice to conclude that Russia had no obligation to perform its legal assistance obligations in good faith by offering a reasoned explanation for its refusal to cooperate.

* * *

375. The purpose of the ICSFT is to address “the urgent need to enhance international cooperation among States in devising and adopting effective measures for the prevention of the financing of terrorism, as well as for its suppression through the prosecution and punishment of its perpetrators.”⁶⁸⁶ Russia has loudly proclaimed its commitment to stopping the financing of terrorism, but in its relations with Ukraine, Russia’s policy has been the opposite. Russia has no factual defense. Instead, it offers novel legal interpretations to excuse its behavior — interpretations that would strip the ICSFT’s cooperation obligations of practical effect. Under a proper interpretation of the Convention, Ukraine has established numerous, serious violations of the ICSFT for which the Russian Federation is responsible.

⁶⁸³ Protocol to the Minsk Convention on Legal Aid and Legal Relations on Civil, Family and Criminal Matters of 1993, para. 7 (28 March 1997) (Ukraine’s Reply, Annex 63).

⁶⁸⁴ *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment of 4 June 2008, I.C.J. Reports 2008, p. 229, para. 111. Article 17 of the France-Djibouti mutual legal assistance treaty provides that “[r]easons shall be given for any refusal of mutual assistance. See *ibid.*, p. 229, para. 149. Article 19 of the 1993 Legal Assistance Convention provides that “[i]f a request for legal assistance is denied, the requesting Contracting Party shall be promptly notified of the reasons for the denial.” Protocol to the Minsk Convention on Legal Aid and Legal Relations on Civil, Family and Criminal Matters of 1993, art. 7 (28 March 1997) (Ukraine’s Reply, Annex 63).

⁶⁸⁵ Russia’s Counter-Memorial Part I, para. 574.

⁶⁸⁶ ICSFT, Preamble, para. 13.

PART III: UKRAINE'S CLAIMS UNDER THE CERD

376. Ukraine's Memorial described Russia's two-part strategy to entrench Russian dominance in Crimea and to culturally erase the Crimean Tatar and Ukrainian communities:

First, Russia has brought the full weight of its authoritarian security machinery into force in Crimea and has applied it selectively to crush political dissent from the Crimean Tatar and Ukrainian communities. Second, it has abused its position as an occupying power to promote its own culture, while choking off the means available to the Crimean Tatar and Ukrainian communities to preserve their own separate identities, whether through cultural gatherings, mass media, education or otherwise.⁶⁸⁷

377. In its Counter-Memorial, Russia responds that “[i]t is obvious that the existence of a systematic campaign or policy of racial discrimination attributable to Russia and directed at the Crimean Tatar and ethnic Ukrainian communities in Crimea as a means of political and cultural suppression is an invention by Ukraine”⁶⁸⁸

378. Since the filing of the Counter-Memorial, however, Russia has confirmed the accuracy of Ukraine's account by applying the same methodology on a much larger scale. There is ample evidence that in Russia's ongoing invasion of Ukraine, it is once again seeking to erase separate ethnic and/or national identities and to replace them with Russian norms.

379. Before the invasion was unleashed on 24 February 2022, President Putin announced that there was no difference between Russians and Ukrainians⁶⁸⁹ and that Ukraine had no historical right to exist as an independent State.⁶⁹⁰ Since the launch of Russia's so-called “special military operation” to “demilitarize and denazify” Ukraine, the appalling

⁶⁸⁷ Ukraine's Memorial, para. 346.

⁶⁸⁸ Russia's Counter-Memorial Part II, para. 20.

⁶⁸⁹ Reuters, *Putin Says Russians and Ukrainians “Practically One People”* (29 August 2014); AP News, *Putin: Russians, Ukrainians Are “One People”* (20 July 2019); Vladimir Putin, *On the Historical Unity of Russians and Ukrainians*, Presidential Executive Office (12 July 2021) (Ukraine's Reply, Annex 169).

⁶⁹⁰ Reuters, *Extracts from Putin's Speech on Ukraine* (21 February 2022); see also Billy Perrigo, *How Putin's Denial of Ukraine's Statehood Rewrites History*, Time (22 February 2022).

implications of the racist mindset that equates Ukrainians with Nazis have become clearer still. As one commentator in Russian state media has observed:

[I]n addition to the top, a significant part of the people, which are passive Nazis, accomplices of Nazism, are also guilty. They supported and indulged Nazi power. The just punishment of this part of the population is possible only through suffering the inevitable hardships of a just war against the Nazi system, carried out with the utmost care and discretion in relation to civilians. Further denazification of this mass of the population consists in re-education, which is achieved by ideological repression (suppression) of Nazi attitudes and strict censorship: not only in the political sphere, but also obligatory in the sphere of culture and education.⁶⁹¹

380. This prescription of comprehensive political, cultural, and educational repression to force an occupied population to adopt Russian ways of thinking is a logical extension of the systematic campaign of discrimination against Crimean Tatars and Ukrainians described in the Memorial. Sadly, today, Russian armed forces are employing the same two-part strategy described by Ukraine in its Memorial to erase the separate identity of the Ukrainian people at large.

381. First, Russia seeks to intimidate the population to break its will to resist. Techniques of intimidation seen in Crimea have again become depressingly familiar.⁶⁹² The sickening scenes from Bucha of civilians shot in the head and chest, many with their hands

⁶⁹¹ *Ibid.*

⁶⁹² See, e.g., Matilda Bogner, Head of Human Rights Monitoring Mission in Ukraine, *Statement on the Situation in Ukraine*, OHCHR (25 March 2022) (“We have documented 22 cases of arbitrary detention and enforced disappearance of local officials in regions under the control of Russian forces, 13 of whom have been subsequently released. We have also documented the arbitrary detention and enforced disappearance of 15 journalists and civil society activists who vocally opposed the invasion in Kyiv, Kherson, Luhansk, and Zaporizhzhia regions. We are currently trying to verify reports that five of the journalists and three of the activists were subsequently released. The whereabouts of the other individuals remain unknown.”); see also Matt Murphy and Robert Greenall, *Ukraine War: Civilians Abducted as Russia Tries to Assert Control*, BBC (25 March 2022); Oleksandr Yankovskiy, et al., *In a Ukrainian Region Occupied by Russian Forces, People Are Disappearing. Locals Fear It’s About to Get Worse*, RFE/RL (16 March 2022); Lara Bullens, *Russia Uses Abductions to Intimidate Ukrainians in Occupied Territories*, France24 (29 March 2022).

tied behind their backs, before being dumped in the street or shallow graves,⁶⁹³ repeat the pattern of abductions, murders, and torture described in the Memorial.⁶⁹⁴

382. Second, Russia is promoting its own culture and suppressing the cultural expression of other, protected groups. In Kherson, Ukrainian TV channels have been switched off and replaced with Russian State television,⁶⁹⁵ so-called extremist literature (including school textbooks on Ukrainian history) has been removed from libraries,⁶⁹⁶ and journalists have been abducted and interrogated.⁶⁹⁷ Similarly in Crimea, the attack on Crimean Tatar and Ukrainian culture began with repression of their free media⁶⁹⁸ and efforts to impose Russia's educational model in place of the pre-existing status quo.⁶⁹⁹

383. Against this background, the mischaracterizations, technical defenses, and obfuscations Russia uses in its Counter-Memorial to deny that it is liable for a single CERD violation appear clearly exposed as the shams they are. Chapter 9 refutes each of these attempts to escape responsibility for Russia's systematic violations of the Convention. The following chapters address in turn Russia's responses to Ukraine's specific claims. Chapters 10–13 will address the four components of Russia's campaign of political and civil repression (disappearances, political suppression, arbitrary searches and detentions, and forced citizenship). Chapters 14–17 will address the cultural aspect of Russia's erasure strategy (limiting mass gatherings, repressing the media, degrading cultural heritage, and denying the children of protected groups equal access to education).

⁶⁹³ BBC News, *Bucha Killings: Satellite Image of Bodies Site Contradicts Russian Claims* (4 April 2022); Oleksandr Stashevskyi and Nebi Qena, *Ukrainian Troops Find 410 Massacred Civilians, Some Bound and Shot, After Liberating City of Bucha*, Time (3 April 2022).

⁶⁹⁴ Ukraine's Memorial, Chapter 9, Section A.

⁶⁹⁵ Igor Kossov, *Facing Resistance in Occupied Kherson, Russian Forces Crack Down on Disobedient Residents*, Kyiv Independent (28 March 2022).

⁶⁹⁶ Denys Karlovsky, *The Occupiers in the Occupied Territories Are Fighting with History Books*, Pravda (24 March 2022) (Ukraine's Reply, Annex 173).

⁶⁹⁷ Igor Kossov, *Facing Resistance in Occupied Kherson, Russian Forces Crack Down on Disobedient Residents*, Kyiv Independent (28 March 2022).

⁶⁹⁸ Ukraine's Memorial, Chapter 10(B).

⁶⁹⁹ Ukraine's Memorial, Chapter 10(D).

Section A: Russia's Incorrect Legal Framing of the Issues

Chapter 9. GENERAL PRINCIPLES RELATED TO RUSSIA'S BREACHES OF THE CERD

384. Ukraine's Memorial explained the background to and the means by which Russia has racially discriminated against the Crimean Tatar and Ukrainian communities in Crimea since its occupation of the peninsula in the spring of 2014. The Memorial describes an array of measures introduced in Crimea by the Russian Federation since that date with the purpose or effect of severely curtailing the human rights of these two ethnic groups in every area of life, including political, civil, and cultural affairs. The comprehensive nature of the CERD violations shown in the Memorial leads inexorably to the conclusion that Russia is engaged in a systematic campaign of racial discrimination — the exact opposite of its pledge when it ratified the Convention to eliminate racial discrimination in all its forms.

385. The Russian Federation's response, set out in Part II of its Counter-Memorial, exudes the discomfort that Russia obviously feels with having to address the substance of Ukraine's claims. Rather than giving a straightforward account of how its conduct in Crimea since 2014 can be reconciled with its obligations under the Convention, Russia engages in one diversion after another designed to evade accountability for its actions. It tries to recast Ukraine's case as a repeat of Qatar's later-filed case under the CERD, which the Court dismissed at the preliminary objections stage. It mischaracterizes Ukraine's allegations to make them fit better with Russia's preconceived arguments that Ukraine's claims are subject to a higher burden of proof, really about sovereignty over Crimea, or otherwise outside the scope of the Convention. It claims the benefit of a wide and self-judging national security exception that is patently incompatible with the Convention's absolute prohibition on racial discrimination. And, when it does address the substance of Ukraine's claims, Russia relies repeatedly on conclusory statements by its own officials that no Russian laws were broken.

386. But this case is not *Qatar v. UAE*. Ukraine's claims do not hinge on whether distinctions based on the current nationality of individuals fall within the definition of racial discrimination in Article 1(1) of the Convention or are excluded under Articles 1(2) and 1(3).

Instead, it alleges that two disfavored groups have been subjected to a wide range of conduct with the purpose or effect of nullifying or impairing their human rights. Notably, the Parties agree that the Crimean Tatar and Ukrainian communities are protected ethnic groups within the meaning of the Convention, notwithstanding a difference over where the boundaries of the latter group lie. The more important disagreement between the Parties concerns whether racially discriminatory conduct falls outside the scope of the Convention merely because that conduct was ultimately motivated by political reasons. As Ukraine explains below, the answer to that question is categorically “no”: by its terms, and subject only to the narrow exemptions contained in Articles 1(2), 1(3), and 1(4), the Convention prohibits all distinctions based on race or ethnicity that have the purpose or effect of nullifying or impairing the human rights of a protected group, regardless of the motivation behind the distinction.

387. The Russian Federation’s other attempts to escape liability based on technicalities are no more successful, as the remainder of this Chapter explains. Section A exposes the flaws in Russia’s characterization of this case. Section B explains that Ukraine need not satisfy any higher standard of proof simply because Russia has engaged in systematic discrimination. Section C addresses definitional issues concerning the protected groups at issue in this case and Section D discusses the irrelevance of underlying political motivations when examining claims of racial discrimination. Section E disposes of Russia’s attempt to exclude CERD claims that do not meet absurdly high levels of statistical certainty. In Section F, Ukraine demonstrates that Russia’s invocation of national security concerns and threats to public order as a justification for its racially discriminatory conduct lacks any basis in law. Finally, Section G explains that Russia bears State responsibility for all of the acts described in Ukraine’s Memorial.

388. Ukraine relies on three esteemed experts in order to properly contextualize Russia’s misconceived defenses to Ukraine’s claims: Professor Paul R. Magocsi explains the historical foundations of Ukrainian self-identity; Professor Sandra Fredman discusses the human rights jurisprudence underpinning Ukraine’s claims, including with respect to the

meaning of ethnicity; and Professor Martin Scheinin explains why Russia’s acts of racial discrimination cannot be justified based on purported national security requirements.

389. All of these diversions are placed in their proper context by the current situation in Ukraine, where Russian armed forces are engaging in appalling atrocities against Ukrainian citizens in pursuit of a mission to “denazify” and, in a sense, “denationalize” a nation that President Putin claims has no historical or present right to exist, populated by people whose separate ethnic identity he denies. The myth that Ukraine is filled with fascists who must be expunged — rather than made up of Ukrainians who, unsurprisingly, believe in and support the continued existence of an independent Ukrainian State and people — reared its head previously in the run-up to the purported referendum on Crimea’s future in March 2014.

390. This rhetoric continues in the context of the current invasion, which Putin has justified on the supposed need to suppress Ukrainian nationalism,⁷⁰⁰ and which has led Russian commentators to decry Ukrainians’ sentiments toward their own country as an “artificial anti-Russian construction.”⁷⁰¹ The lesson of events currently unfolding in Ukraine is that this sort of hate speech and the racially discriminatory conduct to which it gives rise needs to be called out, condemned, and punished at the earliest opportunity if it is not to metastasize into something with far deadlier consequences over time.

A. The Dispute Before the Court Concerns Russia’s Violations of the CERD as Set Forth in Ukraine’s Memorial

391. In its Memorial, Ukraine demonstrated that Russia has violated Articles 2, 4, 5, 6, and 7 of the Convention through its acts or omissions related to eight substantive areas:

⁷⁰⁰ Bloomberg, *Transcript: Vladimir Putin’s Televised Address on Ukraine* (24 February 2022).

⁷⁰¹ Timofey Sergeytsev, *What Should Russia Do with Ukraine?*, Ria Novosti (3 April 2022) (also stating that “Ukraine . . . is impossible as a nation state” and that “[d]enazification will inevitably also be a de-Ukrainization”) (Ukraine’s Reply, Annex 171).

disappearances, murders, abductions, and torture; political suppression of the Crimean Tatar people, including the banning of the Mejlis; arbitrary searches and detentions; forced Russian citizenship and subsequent discrimination against non-Russians; suppression of culturally significant gatherings; media restrictions and harassment; degradation of cultural heritage; and suppression of minority education rights.⁷⁰²

392. In Part II of its Counter-Memorial, Russia ignores both Ukraine’s pleading and the Court’s prior rulings in this case. It misrepresents the status of the claims before the Court; repeatedly refers to false, extraneous information with no relevance to Ukraine’s claims or Russia’s defenses; and it grossly distorts the nature of Ukraine’s claims.

393. *First*, despite the Court’s unambiguous rejection of Russia’s preliminary objections,⁷⁰³ Russia proceeds as if only a portion of Ukraine’s claims are currently before the Court. In particular, the Counter-Memorial seeks to maintain a false distinction between Ukraine’s claims concerning education and the banning of the Mejlis, which are addressed in the body of the pleadings, and Ukraine’s other claims, which are primarily relegated to appendices.⁷⁰⁴ The reason for this peculiar arrangement appears to be Russia’s claim that the Court “found [the remaining claims] to be implausible at the provisional measures stage.”⁷⁰⁵

394. The Court should ignore Russia’s posturing. Ukraine did not even *request* specific provisional measures with respect to the majority of its CERD claims.⁷⁰⁶ Clearly, no

⁷⁰² See Ukraine’s Memorial, Chapters 9–10, 12.

⁷⁰³ Judgment on Preliminary Objections, p. 595, para. 96.

⁷⁰⁴ See Russia’s Counter-Memorial Part II, Chapter VI; *ibid.*, Appendices A–F.

⁷⁰⁵ *Ibid.*, para. 27; see also *ibid.*, paras. 83–85.

⁷⁰⁶ See generally *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Request for the Indication of Provisional Measures of Protection Submitted by Ukraine on 16 January 2017.

conclusion can be drawn from the Court’s failure to indicate provisional measures related to those issues. With respect to the provisional measures that Ukraine did seek, a decision not to indicate such measures does not establish that the claim is implausible. As the Court noted in its Order on Provisional Measures, “[t]he decision given in the present proceedings in no way prejudices 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.”⁷⁰⁷

395. *Second*, Russia falsely alleges that Ukraine “subvert[s] the interests of minorities” and that Russia, in contrast, supports minorities in Crimea.⁷⁰⁸ Ukraine’s claims involve *Russia’s* violations of the CERD with respect to the Crimean Tatar and Ukrainian communities; they do not concern *Ukraine’s* treatment of those communities, or of any other ethnic minorities. Russia has not pled counterclaims in this case. Accordingly, Russia’s allegations are irrelevant to these proceedings and Ukraine will not address them further here.

396. *Third*, Russia claims that Ukraine’s allegations disguise a sovereignty dispute over Crimea.⁷⁰⁹ Yet, as the Court recognized in its preliminary objections judgment, when it rejected the same argument, Ukraine “is not requesting that [the Court] rule on issues concerning the Russian Federation’s . . . alleged ‘unlawful occupation’ of Ukrainian territory,” and is not “seeking a pronouncement from the Court on the status of Crimea.”⁷¹⁰ The Court should ignore Russia’s attempt to recycle the same failed argument in its Counter-Memorial.

397. Relatedly, Ukraine’s claims in no way require a finding that Russia is an

⁷⁰⁷ *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. 140, para. 105.

⁷⁰⁸ See Russia’s Counter-Memorial Part II, Chapter I.

⁷⁰⁹ *Ibid.*, para. 5.

⁷¹⁰ Judgment on Preliminary Objections, p. 577, para. 29; see also *ibid.*, p. 576, para. 27.

occupying power that is violating international humanitarian law (“IHL”). Ukraine was entitled to observe that certain laws have been introduced by Russia in violation of IHL when describing the context for its claims in its Memorial.⁷¹¹ But those claims are based solely on the discriminatory purpose or effect of those laws with respect to the Crimean Tatar and Ukrainian communities, not the circumstances of their imposition.⁷¹² The Court can accordingly rule on them without regard to whether IHL applies in Crimea or not.

398. Moreover, if Russia is unwilling to have the Court address the issue of sovereignty over Crimea, then its own pleadings should similarly avoid reliance on assumptions concerning its own sovereign rights in that territory. With respect to citizenship issues, the Court should not credit Russia’s position that it enjoyed a sovereign right to impose Russian nationality on Crimeans.⁷¹³ Nor should Russia be permitted to rely on defenses that assume the existence of such rights, as with its argument that Ukraine’s citizenship claims are barred under Articles 1(2) and 1(3) of CERD based on a distinction between citizens and non-citizens that Russia has itself created under the pretense of exercising sovereignty in Crimea.⁷¹⁴

B. Ukraine Is Not Required to Satisfy a Higher Standard of Proof Simply Because Russia’s Violations of the CERD Are Systematic

399. In its Memorial, Ukraine characterized Russia’s overall pattern of conduct as a “systematic campaign of racial discrimination against the Crimean Tatar and Ukrainian

⁷¹¹ See, e.g., Ukraine’s Memorial, para. 387 (describing Russia’s “anti-extremism laws” as one of “a multitude of Russian laws introduced in Crimea in violation of international humanitarian law”).

⁷¹² For example, with respect to cultural gatherings, Ukraine noted that “[i]n violation of IHL, Russia has introduced its own repressive laws governing public gatherings.” *Ibid.*, para. 481. Ukraine next explained that Russia “has then applied those laws discriminatorily to deny Crimean Tatars and Ukrainians an opportunity to commemorate culturally important events equal to that afforded to the ethnic Russian community.” *Ibid.* (emphasis added).

⁷¹³ See generally Russia’s Counter-Memorial Part II, App. C (describing Russian laws on citizenship imposed in Crimea).

⁷¹⁴ See *ibid.*, paras. 380–382.

communities in Crimea.”⁷¹⁵ As described throughout the Memorial, that campaign consisted of numerous individual acts, attributable to Russia, each of which violated the CERD.⁷¹⁶ Russia argues that this framework somehow places a heavier burden of proof on Ukraine, such that Ukraine must show that each of Russia’s breaches was not only intentional, but also “identical or analogous” and closely “inter-connected” to every other breach.⁷¹⁷

400. As an initial matter, Russia’s position turns Ukraine’s claims on their head. Ukraine has made out a multitude of Russian CERD violations. The cumulative conclusion to be drawn from those violations is that Russia engaged in a systematic campaign of racial discrimination. Russia’s response — that Ukraine cannot prove any individual violation unless it proves the violation was part of a systematic campaign — is entirely backwards.⁷¹⁸

401. Russia’s attempt to require proof of discriminatory purpose for every alleged violation of the CERD directly contradicts the plain language of the Convention. Article 1(1) of the CERD defines racial discrimination as “any distinction, exclusion, restriction or preference based on . . . ethnic origin which has the *purpose or effect* of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms.”⁷¹⁹ The plain meaning of this definition is that claims based both on *intentional* discrimination and on acts that have a discriminatory *effect* are encompassed by the CERD.

402. The Court recognized the import of this expansive definition in its preliminary objections judgment in *Qatar v. UAE*, where it stated that “the Convention prohibits all forms

⁷¹⁵ Ukraine’s Memorial, para. 587; *see also ibid.*, Chapter 12.

⁷¹⁶ *See generally ibid.*, Chapters 8–10.

⁷¹⁷ Russia’s Counter-Memorial Part II, paras. 87–102.

⁷¹⁸ *See* Second Expert Report of Professor Sandra Fredman (21 April 2022), para. 14 [hereinafter Fredman Second Report] (Ukraine’s Reply, Annex 5).

⁷¹⁹ CERD, art. 1(1) (emphasis added).

and manifestations of racial discrimination, whether arising from the purpose of a given restriction *or from its effect*.”⁷²⁰ Judge Crawford similarly emphasized this point in the present case, noting that “whatever the stated purpose of [a] restriction, it may constitute racial discrimination if it has the ‘effect’ of impairing the enjoyment or exercise, on an equal footing, of the rights articulated in CERD.”⁷²¹ As Professor Sandra Fredman explains in her second expert report, the CERD Committee has similarly affirmed that the Convention prohibits both “purposive or intentional discrimination *and discrimination in effect*.”⁷²² In the context of contested matters, for example, the Committee has consistently affirmed that a requirement “to prove discriminatory intent runs counter to the Convention’s prohibition against any and all behavior that has a discriminatory effect.”⁷²³

403. By allowing claimants to show that a policy has a discriminatory effect, the CERD’s framework acknowledges the well-recognized difficulty of proving intent, particularly in the discrimination context.⁷²⁴ But the fact that a policy can be shown to have a

⁷²⁰ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021*, pp. 35–36, para. 112 (emphasis added) (further referring to “measures [that], . . . either by their purpose or by their effect, give rise to racial discrimination”).

⁷²¹ *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, Declaration of Judge Crawford, I.C.J. Reports 2017*, p. 215, para. 7.

⁷²² CERD Committee, General Recommendation No. 32 on the Meaning and Scope of Special Measures in the CERD, CERD Doc. No. CERD/C/GC/32 (24 September 2009), para. 7 (emphasis added) (Ukraine’s Memorial, Annex 790); *see also* Fredman Second Report, paras. 7–10 (Ukraine’s Reply, Annex 5).

⁷²³ *Gabaroum v. France*, Communication No. 52/2012, CERD/C/89/D/52/2012 (8 June 2016), para. 7.2; *see also V.S. v. Slovakia*, Communication No. 56/2014, CERD/C/88/D/56/2014 (6 January 2016), para. 7.4.

⁷²⁴ *See* Audrey Daniel, *The Intent Doctrine and CERD: How the United States Fails to Meet Its International Obligations in Racial Discrimination Jurisprudence*, DePaul Journal for Social Justice, Vol. 4.2 (Spring 2011), p. 264 (noting that “prov[ing] that the alleged discriminatory action was done with the specific intention to discriminate” “is almost impossible to prove” and that the CERD instead allows claimants to show discrimination by showing that “an action actually resulted in discrimination”) (emphasis added), *accessed at*

discriminatory effect does not preclude the possibility that discrimination was the intent all along. Moreover, when a multitude of policies and measures are shown to have a discriminatory effect — as in this case — an inference of intent becomes more plausible.

404. Ukraine has satisfied the standard of proof under the CERD by demonstrating that Russia’s conduct had either (or both) the purpose or effect of racially discriminating against the Crimean Tatar and Ukrainian communities in Crimea.⁷²⁵ The Court should not entertain Russia’s attempt to artificially increase the burden of proof by requiring Ukraine to prove that Russia acted intentionally and as part of a methodical plan, with respect to *every action* or inaction described in the Memorial.⁷²⁶ The many individual CERD violations that Ukraine has demonstrated, when viewed as a whole, easily support the conclusion that Russia has engaged in a systematic campaign of discrimination.

405. Russia is unable to point to any persuasive support for its position. It cites the CERD Committee’s decision in *A.W.R.A.P. v. Denmark*, positing that the Committee required a showing of “intent to specifically and ‘directly target’” ethnic groups “as such.”⁷²⁷ But, as

<https://via.library.depaul.edu/cgi/viewcontent.cgi?article=1040&context=jsj>; Theodor Meron, *The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination*, American Journal of International Law, Vol. 79 (1985), p. 288 (discussing how CERD “allow[s] the inference of purpose from effect,” which “is of particular importance where subtle discriminatory purpose is not apparent on the face of statutes, policies or programs”) (Ukraine’s Memorial, Annex 1011); see also CERD Committee, Concluding Observations: United States of America, CERD/C/USA/CO/6 (8 May 2008), para. 35 (recommending, in the context of concerns that a State Party requires “proof of intentional discrimination” in contravention of CERD Article 1(1), that the State Party review its legislation “with a view to allowing . . . a more balanced sharing of the burden of proof between the plaintiff . . . and the defendant”).

⁷²⁵ See, e.g., Ukraine’s Memorial, paras. 383 (forced citizenship and subsequent discrimination); 392–93 (disappearances, murders, abductions, and torture); 413 (political suppression of Crimean Tatars); 506 (media restrictions and harassment); 534 (suppression of minority education rights).

⁷²⁶ See Russia’s Counter-Memorial Part II, paras. 93–96 (contending that Ukraine must prove that “the measures allegedly taken by Russia . . . constitute intentional acts of racial discrimination” and are each part of a preconceived and methodical plan).

⁷²⁷ Russia’s Counter-Memorial Part II, para. 93 (citing *A.W.R.A.P. v. Denmark*, Communication No. 37/2006, CERD/C/71/D/37/2006 (8 August 2007), para. 6.2 (Ukraine’s Memorial, Annex 799)).

Professor Fredman explains, Russia’s reading of that decision is flatly incorrect.⁷²⁸ Russia’s reliance on *Bosnian Genocide* to suggest that Ukraine must meet some higher threshold due to the alleged “gravity” of the allegations is similarly flawed.⁷²⁹ The Court’s judgment in that case noted that, in the context of allegations of failure to prevent and punish the crime of genocide, “the Court requires proof at a high level of certainty,” such that the relevant acts “have been clearly established.”⁷³⁰ Although Ukraine’s allegations are undoubtedly serious in nature, they do not involve the same kinds of violations at issue in *Bosnian Genocide*.⁷³¹

406. In sum, Russia has pointed to no reason why Ukraine should face a higher standard of proof than that normally required for claims under the CERD, and Ukraine has clearly satisfied that standard with respect to its claims that Russia violated the Convention.

⁷²⁸ See Fredman Second Report, paras. 16–17 (Ukraine’s Reply, Annex 5). Russia also cites *Prosecutor v. Krstić* for the proposition that “victims must be ‘targeted by reason of their membership’ in a national or ethnic group.” Russia’s Counter-Memorial Part II, para. 93 (emphasis omitted) (citing *Prosecutor v. Krstić*, International Criminal Tribunal for the former Yugoslavia, Case No. IT-98-33-T, Judgment (2 August 2001), para. 561 (Ukraine’s Memorial, Annex 993)). Yet, in *Krstić*, the International Criminal Tribunal for the former Yugoslavia (“ICTY”) was specifically addressing “the intent which characterises the crime of genocide,” *i.e.*, “[t]he intent to destroy a group as such,” which “presupposes that the victims were chosen by reason of their membership.” *Prosecutor v. Krstić*, International Criminal Tribunal for the former Yugoslavia, Case No. IT-98-33-T, Judgment (2 August 2001), para. 561 (Ukraine’s Memorial, Annex 993). The case says nothing about the applicable standard of proof for claims brought under the CERD.

⁷²⁹ See Russia’s Counter-Memorial Part II, para. 4 (citing *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *Merits, Judgment, I.C.J. Reports 2007*, pp. 129–130, paras. 209–210).

⁷³⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *Merits, Judgment, I.C.J. Reports 2007*, pp. 129–130, paras. 209–210.

⁷³¹ Russia also points to cases analyzing whether a prosecutor has proven the elements of crimes against humanity in a criminal case, specifically the requirement that there be a “systematic attack.” See Russia’s Counter-Memorial Part II, paras. 94–96 & n.185, 191–92. However, these cases, along with the International Law Commission’s draft articles on international crimes, both of which analyze the substantive elements of an international crime, are not instructive for establishing the elements that Ukraine must prove here, *i.e.*, a State’s breaches of the CERD with respect to allegations of racial discrimination. See *ibid.*, paras. 95–96 & n.188–192.

C. There Is No Dispute That the Crimean Tatar and Ukrainian Communities in Crimea Are Ethnic Groups Within the Meaning of the CERD

407. Ukraine alleges that Russia’s acts and omissions have resulted in discrimination against Crimean Tatars and Ukrainians in Crimea. In its Counter-Memorial, Russia “agree[s] that Crimean Tatars and ethnic Ukrainians in Crimea constitute ethnic groups protected under CERD.”⁷³² While Russia takes issue with aspects of Ukraine’s definition of the Ukrainian community,⁷³³ it does not suggest that any difference of view between the Parties over the precise boundaries of that ethnic group affects the validity of any of Ukraine’s claims. Accordingly, Russia’s criticism of Ukraine’s definition is legally irrelevant. Ukraine will briefly address that criticism, however, to correct Russia’s mischaracterization.

408. In a gross distortion of Ukraine’s Memorial, Russia asserts that “political opinion” alone cannot be the basis of an ethnic group, and that Ukraine’s definition of ethnicity – supposedly that “ethnic groups . . . are to be identified by their position on the status of Crimea” – places Ukraine’s claims outside the ambit of the CERD.⁷³⁴ Russia is so uncomfortable with its position on ethnicity that it tries to twist Ukraine’s claim into something that it is not – that a person’s status as a member of an ethnic group somehow rises and falls with that person’s “political opinion.” Ukraine has said nothing of the sort.

409. Instead, as Ukraine explained in its Memorial, citing to Professor Fredman’s first expert report, “determining whether a group shares an ethnic identity” requires “look[ing]

⁷³² *Ibid.*, para. 113 (citing Judgment on Preliminary Objections, p. 595, para. 95).

⁷³³ Russia claims that this definitional issue affects both the Ukrainian and Crimean Tatar communities, but this assertion distorts Ukraine’s position. In its Memorial, Ukraine referred to the issue of statehood only in relation to its definition of the Ukrainian community. Compare Ukraine’s Memorial, paras. 583–586 (describing the Ukrainian community in Crimea), with *ibid.*, paras. 580–582 (describing the Crimean Tatar community).

⁷³⁴ Russia’s Counter-Memorial Part II, paras. 109–118.

to both subjective and objective criteria.”⁷³⁵ Objective factors include features such as religious affiliation, language, and culture; subjective factors encompass both self-identification by individuals and a dominant group’s perception that a group is ethnically different.⁷³⁶ Applying this framework, Ukraine explained that one aspect — of many — of ethnic Ukrainian self-identity could be “a shared outlook with regards to Crimea remaining part of Ukraine’s sovereign territory.”⁷³⁷

410. It should not be controversial that a frequently observed characteristic of ethnic groups is a desire to live together within a common political state. In his second expert report, Professor Paul Magocsi details how this goal has been part of the agenda of the Ukrainian nationalist movement since the nineteenth century.⁷³⁸ As he discusses, over the thirty years that an independent Ukrainian State has existed since 1991, identification with that State has become an increasingly important marker of Ukrainian self-identity, particularly among younger Ukrainians who have grown up exclusively within that State.⁷³⁹ In the specific conditions affecting Crimea after the Russian invasion in February 2014, just as now in the face of a renewed invasion of the entire territory of Ukraine, it is hardly surprising that this marker of self-identity would assume greater significance for many Ukrainians in Crimea.⁷⁴⁰

⁷³⁵ Ukraine’s Memorial, para. 578 (citing First Expert Report of Professor Sandra Fredman, paras. 19–37 [hereinafter Fredman First Report] (Ukraine’s Memorial, Annex 22)).

⁷³⁶ See Ukraine’s Memorial, para. 578 (citing Fredman First Report, paras. 19–37 (Ukraine’s Memorial, Annex 22)); see also Fredman Second Report, para. 30 (Ukraine’s Reply, Annex 5).

⁷³⁷ Ukraine’s Memorial, paras. 584–585; see also Fredman Second Report, Section IV.B (Ukraine’s Reply, Annex 5).

⁷³⁸ See Second Expert Report of Professor Paul Magocsi (14 April 2022), Section II [hereinafter Magocsi Second Report] (Ukraine’s Reply, Annex 6).

⁷³⁹ See *ibid.*, Section III.

⁷⁴⁰ See *ibid.*, paras. 68–70 (also discussing how Russia’s recent invasion of Ukraine has demonstrated the strength of the shared Ukrainian identity, which is defined in part “in contradistinction to Russia and in alignment with European values”).

411. Russia’s argument that a person’s identity as ethnic Ukrainian or Crimean Tatar could change depending on his or her belief about the status of Crimea, or that a member of one of these groups who became more aligned with Russia could no longer be protected under the Convention, is therefore nonsensical.⁷⁴¹ Ukraine’s claim is not that a person’s ethnicity depends solely on his or her “political opinion,” but, as Professor Fredman explains in her second expert report, that the political community (and therefore the collectivity of other citizens) with which he or she most identifies is a relevant factor in assigning ethnicity.⁷⁴² As Ukraine has previously explained, for Crimean Tatars, other factors, such as shared history, religion, and language, as well as their historical treatment as a separate group, including the shared trauma of the *Sürgün*, predominate.⁷⁴³

412. Russia adopts an outdated, static view of ethnic identity, citing the Court’s preliminary objections judgment in *Qatar v. UAE* in support of its contention that “the Court confirmed that the ‘elements of the definition of racial discrimination . . .’ — in particular ‘national or ethnic origin’ — are ‘characteristics that are inherent at birth.’”⁷⁴⁴ However, the

⁷⁴¹ See Russia’s Counter-Memorial Part II, paras. 123–126.

⁷⁴² See Fredman Second Report, Section IV.B (Ukraine’s Reply, Annex 5).

⁷⁴³ See Ukraine’s Memorial, paras. 580–582. A similarly myopic view of ethnic groups animates Russia’s mistaken critique of Ukraine’s claims as being based on religious discrimination and, thus, outside the scope of the CERD. See Russia’s Counter-Memorial Part II, paras. 127–129. Contrary to Russia’s argument, Ukraine has not “base[d] its accusations of ‘racial discrimination’ exclusively on religious grounds,” just as it has not based those claims exclusively “on political opposition.” *Ibid.*, para. 129. Russia appears to believe that discrimination against an ethnic group that happens to share a religion must necessarily constitute religious discrimination. Yet it cites no support for that proposition, and it is belied by Ukraine’s account of a campaign of discrimination targeted not only at religious institutions or practices, but more generally at Crimean Tatars and their cultural institutions as a whole. Further, Ukraine’s claim is that Russia is using alleged religious extremism as a *pretext* for certain actions that in reality are part of a broader strategy of collective punishment directed at the Crimean Tatar and Ukrainian communities. See, e.g., Ukraine’s Memorial, para. 426.

⁷⁴⁴ Russia’s Counter-Memorial Part II, para. 111 (citing *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 26, para. 81).

issue before the Court in that case was the meaning of *national* origin, rather than *ethnic* origin.⁷⁴⁵ Qatar had claimed that “national origin” encompassed current nationality, such that restrictions placed by the UAE on Qatari nationals qualified as racial discrimination.⁷⁴⁶ In finding that the term “national origin” did not cover current nationality, the Court relied on the CERD’s exclusion of measures based on citizenship in Article 1(2)–(3), as well as evidence in the *travaux préparatoires* that the drafters viewed national origin and current nationality as different concepts.⁷⁴⁷ These considerations are not present with respect to ethnic origin.

413. Instead, the term “ethnic origin” must be construed in its own right, applying the rules of interpretation set out in the Vienna Convention on the Law of Treaties (“Vienna Convention”).⁷⁴⁸ The ordinary meaning of “ethnic origin,” read in context and in light of the object and purpose of the CERD, cannot be artificially circumscribed — as Russia suggests — to a characteristic inherent at birth. In defining the bases of racial discrimination covered by the Convention, the CERD lists “ethnic origin” separately from “descent,” *i.e.*, “the fact or process of originating from an ancestral stock.”⁷⁴⁹ Were “ethnic origin” to be given a static meaning, such that it is inherited at birth and cannot change, the term would be entirely redundant with “descent.” Moreover, the Convention uses the phrases “ethnic origin” and “ethnic group” interchangeably, further confirming that “ethnic origin” is not so limited.⁷⁵⁰

⁷⁴⁵ See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Preliminary Objections, Judgment of 4 February 2021*, para. 112.

⁷⁴⁶ *Ibid.*

⁷⁴⁷ *Ibid.*, paras. 83, 93–97.

⁷⁴⁸ Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, arts. 31–32.

⁷⁴⁹ *Descent*, Merriam-Webster Online Dictionary (2021); CERD, art. 1(1).

⁷⁵⁰ See CERD, art. 7.

414. The term “ethnic origin” thus embraces the notion of ethnicity as a dynamic and evolutive concept, and Russia is incorrect to read *Qatar v. UAE*, which interpreted a different term, in a different context, as dictating its meaning. Further, as Professor Fredman explains in her second expert report, this interpretation accords not only with the CERD Committee’s interpretation of ethnicity, but also with the meaning ascribed to that term in the context of international criminal law.⁷⁵¹

415. In sum, Russia’s arguments on ethnicity entirely miss the mark. But, even if they did not, Russia agrees that the Crimean Tatar and Ukrainian communities are ethnic groups for purposes of the CERD, which is sufficient for the purpose of finding liability.

D. Russia’s Political Motivations Are No Excuse for Racial Discrimination

416. Russia further mischaracterizes Ukraine’s claims by asserting that they amount to allegations of political discrimination.⁷⁵² Russia’s previous mischaracterization of Ukraine’s definition of self-identity as turning on “political opinion” is a necessary predicate for this distortion. Russia uses it to suggest that Ukraine’s complaint is that Russia has cracked down on individuals on the basis of their political opinions, namely opposition to the annexation of Crimea, and that such political discrimination falls outside the scope of the CERD.

417. Russia’s argument rests on a misunderstanding of the requirements of Article 1(1), which defines racial discrimination. That provision requires only the adoption of a distinction based on ethnicity that has the purpose or effect of nullifying or impairing a

⁷⁵¹ See Fredman Second Report, Section IV.A (Ukraine’s Reply, Annex 5). Professor Fredman points to examples from the International Criminal Tribunals for the former Yugoslavia and Rwanda, along with the Darfur Commission, in which self-identification as part of an ethnic group was recognized as changing over time, in reaction to changes in social and political environments. See *ibid.*, paras. 34–40.

⁷⁵² See Russia’s Counter-Memorial Part II, paras. 115–117.

particular group's enjoyment of specific human rights.⁷⁵³ Article 1(1) says nothing about the motive behind the adoption of discriminatory distinctions. Thus, a State that discriminates against a protected group for political reasons, economic reasons, or no reason at all, has engaged in racial discrimination regardless of that motive, or lack thereof.⁷⁵⁴

418. It follows that any political motivation that Russia may have had to engage in racial discrimination against the Crimean Tatar and Ukrainian communities in Crimea does not change the character of that discrimination, or absolve Russia from responsibility under the CERD. An apt example of this phenomenon, which Professor Fredman discusses in her report, is the 1944 expulsion of the Crimean Tatar people from Crimea.⁷⁵⁵ The Soviet Union engaged in this deportation because it alleged that the Crimean Tatars had collaborated with Germany during World War II.⁷⁵⁶ This expulsion would undoubtedly have qualified as racial discrimination had the CERD been in place at the time, as the Crimean Tatar people as a whole was deprived of its human rights, unlike the majority of the Crimean population, who were not deported. The mere fact that the initial trigger for the expulsion was a political motivation — *i.e.*, to punish alleged collaborators — does not in any way change this conclusion.⁷⁵⁷

419. The same is sadly true today. Russia has racially discriminated against the Crimean Tatar and Ukrainian communities by engaging in activities that disproportionately affect those communities, in comparison with the ethnic Russian community in Crimea. That

⁷⁵³ See *supra*, notes 720–725 and accompanying text.

⁷⁵⁴ See Fredman Second Report, Section III (Ukraine's Reply, Annex 5).

⁷⁵⁵ See *ibid.*, para. 27; see also First Expert Report of Professor Paul Magocsi (4 June 2018), para. 33 [hereinafter Magocsi First Report] (Ukraine's Memorial, Annex 21).

⁷⁵⁶ See Magocsi First Report, para. 33; State Defense Committee of the Soviet Union Decree No. 589ss "On the Crimean Tatars" (11 May 1944) (Ukraine's Memorial, Annex 871).

⁷⁵⁷ See Fredman Second Report, paras. 27–28 (describing this historical example, along with politically motivated racial discrimination in apartheid-era South Africa) (Ukraine's Reply, Annex 5).

Russia may have been initially motivated to act in this way out of political animus, or for any other reason, makes no difference to Ukraine's claims that Russia has violated the CERD, which the Court can decide without reaching the issue of motivation. Russia's attempt to mischaracterize those claims as political discrimination should therefore be rejected.

E. Ukraine Is Entitled to Rely on Non-Statistical Evidence to Support Its Claims

420. Russia's false contention that Ukraine must put forward "statistical data" regarding Russia's treatment of the ethnic Ukrainian and Crimean Tatar communities in order to prove its claims finds no support in the text of the Convention, the practice of the CERD Committee, or relevant case law.⁷⁵⁸ Russia mistakenly treats *one* way of showing discriminatory effect and intent as the *only* permitted way. And not only is it unnecessary for Ukraine to provide additional statistical evidence; it would be impractical and self-defeating to impose this requirement in the context of this case, where Russia has occupied Crimea by force, greatly impeding Ukraine's ability to collect statistical data there.

421. Contrary to Russia's assertion that a requirement for detailed statistical evidence is well established in the law, the CERD Committee has acknowledged that "indirect discrimination can only be demonstrated circumstantially," and it "has not provided States parties with elaborate guidance on the evidence" required for effects-based discrimination.⁷⁵⁹ Russia has not pointed to a single CERD Committee decision establishing a requirement for statistical data. In *A.W.R.A.P. v. Denmark*, the only Committee opinion to which Russia cites,⁷⁶⁰ the Committee did not address the need to show statistical evidence at all; instead, the

⁷⁵⁸ See Russia's Counter-Memorial Part II, para. 97.

⁷⁵⁹ See Patrick Thornberry, *Article 1: Definition of Racial Discrimination*, in *THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACISM: A COMMENTARY* (Oxford University Press 2016), p. 116 (Ukraine's Reply, Annex 124).

⁷⁶⁰ See Russia's Counter-Memorial Part II, para. 97.

Committee found that the claims of religious discrimination at issue in the case did not implicate any protected grounds and, therefore, were outside the scope of the CERD.⁷⁶¹

422. Further, Russia’s statement that “statistical data have been important in the work and practice of the CERD Committee,”⁷⁶² while true in the abstract, is misleading in the specific context of Ukraine’s evidentiary burden in this case. Russia is correct that the CERD Committee at times requests statistical data from States Parties. However, as Russia’s source for this point makes clear, it does so in the context of monitoring States Parties’ overall compliance with their CERD obligations and recommending internal measures to prevent or address discrimination.⁷⁶³ Such requests for data to be provided by States Parties in periodic compliance reporting cannot be transformed — as Russia attempts to do — into an evidentiary requirement on the part of a claimant alleging discrimination before an adjudicatory body such as the CERD Committee or this Court.⁷⁶⁴

423. Russia also cites precedents of this Court, but those cases are inapposite.⁷⁶⁵ In fact, the Court has never set forth a requirement for statistical data in order to prove discrimination under the CERD. As with *A.W.R.A.P., Qatar v. UAE* does not address the

⁷⁶¹ See generally *A.W.R.A.P. v. Denmark*, Communication No. 37/2006, CERD/C/71/D/37/2006 (8 August 2007) (Ukraine’s Memorial, Annex 799).

⁷⁶² Russia’s Counter-Memorial Part II, para. 97; see also *ibid.*, App. A, para. 9.

⁷⁶³ See *ibid.*, para. 97, n.195 (citing Lino-Alexandre Siciliano, *L’actualité et les Potentialités de la Convention sur L’élimination de la Discrimination Raciale*, *Revue Trimestrielle des Droits de L’homme*, Vol. 64 (2005), p. 873 (Ukraine’s Reply, Annex 115)); see also Patrick Thornberry, *Article 1: Definition of Racial Discrimination*, in *THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACISM: A COMMENTARY* (Oxford University Press 14 July 2016), p. 116 (noting the “general group-based data” that the CERD Committee requests from States) (Ukraine’s Reply, Annex 124).

⁷⁶⁴ See Russia’s Counter-Memorial Part II, App. A, para. 9, n.11 (citing CERD Committee, *Concluding Observations: Ukraine*, CERD/C/UKR/CO/19-21 (29 August 2011), para. 7) (arguing that Ukraine has not provided required statistical data in this case by citing to request from CERD Committee to provide data in periodic report regarding CERD compliance).

⁷⁶⁵ See Russia’s Counter-Memorial Part II, para. 97 & n.196, 199.

evidentiary burden carried by a claimant raising a discrimination claim.⁷⁶⁶ In its preliminary objections judgment in the case, the Court did not specify what kind of evidence would be sufficient for Qatar’s discrimination claims, and it made no reference to statistical data.⁷⁶⁷

424. Russia is thus doubly incorrect. Neither this Court, nor the CERD Committee, requires a discrimination claimant to provide detailed statistical evidence. However, while not necessary, for claims that lend themselves to statistical analysis and where the necessary data is available, Ukraine has provided that data in support of its claims. By providing evidence of specific events complemented where possible by statistics, and by contrasting the treatment of the Crimean Tatar and Ukrainian communities with that received by ethnic Russians, Ukraine amply satisfies the requirements for a racial discrimination claim.

F. Russia Cannot Justify Its CERD Violations Based on Purported National Security or Anti-Extremism Concerns

425. In a further attempt to evade responsibility for its violations of the CERD, Russia invokes purported national security, anti-extremism, and public order justifications for its discriminatory acts. Yet, Russia’s laws regarding “anti-extremism” and public gatherings, which are entirely out of line with international standards, merely serve as a convenient excuse for Russia to avoid its legal commitments. And even if Russia’s national security concerns were legitimate, the CERD does not permit Russia to racially discriminate on that basis.

426. Ukraine’s Memorial demonstrated how Russia’s anti-extremism laws have granted the authorities arbitrary powers that, in the case of Crimea, are being misused to

⁷⁶⁶ See generally *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021*.

⁷⁶⁷ See generally *ibid.*

suppress the Crimean Tatar and Ukrainian communities.⁷⁶⁸ As Professor Martin Scheinin discusses in his expert report, those laws, including the Law on Counteraction of Terrorism, the Law on Combating Extremist Activity, and related offenses within Russia’s Criminal and Administrative Codes, have been widely criticized, including because they contain “vague and overbroad” language that can easily be “misuse[d]” “to prevent criticism of authorities.”⁷⁶⁹ In several recent cases, the European Court of Human Rights found that the laws did not comply with international legal standards on permissible restrictions on human rights.⁷⁷⁰ In particular, the court criticized the failure of Russian courts to provide “relevant and sufficient” reasons to justify interferences with freedom of expression on national security grounds, and routinely found that the prison sentences and other sanctions imposed by the Russian courts were “disproportionate” to the “legitimate aim” of national security invoked by Russia.⁷⁷¹

427. Similar to Russia’s anti-extremism laws, Russia’s laws imposing restrictions on public gatherings have provided authorities with wide discretion to arbitrarily interfere with

⁷⁶⁸ See, e.g., Ukraine’s Memorial, para. 443 (discussing anti-extremism laws in the context of arbitrary searches and detentions); *ibid.*, paras. 514–21 (same with respect to media restrictions and harassment).

⁷⁶⁹ Article 19 and SOVA Center for Information and Analysis, RIGHTS IN EXTREMIS: RUSSIA’S ANTI-EXTREMISM PRACTICES FROM AN INTERNATIONAL PERSPECTIVE (2019), pp. 17–19, accessed at <https://u.pcloud.link/publink/show?code=XZqg3HkZU9jKLddohGH23cIdIrhCO7BnNLhX>; see also Expert Report of Professor Martin Scheinin (14 April 2022), paras. 35–40 [hereinafter Scheinin Report] (Ukraine’s Reply, Annex 7).

⁷⁷⁰ See generally, e.g., *Dmitriyevskiy v. Russia*, ECtHR App. No. 42168/06, Judgment (3 October 2017); *Stomakhin v. Russia*, ECtHR App. No. 52273/07, Judgment (9 May 2018); *Alekhina v. Russia*, ECtHR App. No. 38004/12, Judgment (17 July 2018); *Savva Terentyev v. Russia*, ECtHR App. No. 10692/09, Judgment (28 August 2018); see also Scheinin Report, para. 41 (discussing other European Court of Human Rights case law) (Ukraine’s Reply, Annex 7).

⁷⁷¹ See *Dmitriyevskiy v. Russia*, ECtHR App. No. 42168/06, Judgment, paras. 115, 118 (3 October 2017); *Alekhina v. Russia*, ECtHR App. No. 38004/12, Judgment, paras. 228, 264, 268 (17 July 2018); *Savva Terentyev v. Russia*, ECtHR App. No. 10692/09, Judgment, para. 82, 86 (28 August 2018).

the Crimean Tatar and Ukrainian communities' freedom of assembly, as demonstrated in Ukraine's Memorial⁷⁷² and discussed further in Chapter 15 of this Reply.

428. Even if Russia's use of these instruments was genuinely directed at a national security or extremist threat, or a risk to public order, such threats in no way license States to ignore their obligations under the CERD. As Professor Scheinin explains, the CERD contains no limitations or derogations clause that would permit noncompliance on the basis of national security, public order, or any other justification.⁷⁷³ Instead, the CERD's "prohibition against racial discrimination is absolute."⁷⁷⁴ This conclusion accords with the principle of non-discrimination, enshrined in various human rights instruments, pursuant to which a State must refrain from restricting human rights in a discriminatory manner.⁷⁷⁵

429. Further, to the extent that Russia claims that national security, anti-extremism, or public order justifies its restrictions on underlying substantive human rights (for example, freedom of speech or freedom of assembly), Russia has come nowhere close to meeting the strict requirements for such restrictions. As Professor Scheinin again explains, international law permits some narrow limitations of these substantive human rights, but only subject to extremely stringent conditions.⁷⁷⁶ Additionally, certain treaties contain express limitations

⁷⁷² See, e.g., Ukraine's Memorial, paras. 481, 482–502.

⁷⁷³ See Scheinin Report, Section III (Ukraine's Reply, Annex 7).

⁷⁷⁴ *Ibid.*, para. 14.

⁷⁷⁵ See, e.g., European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 14, 4 November 1950 [hereinafter ECHR]; International Covenant on Civil and Political Rights, arts. 4(1), 26, 16 December 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; Human Rights Committee ("HRC"), General Comment No. 34, Article 19: Freedoms of Opinion and Expression (102nd Session, 11–29 July 2011), U.N. Doc. CCPR/C/GC/34 (12 September 2011), para. 26 [hereinafter HRC General Comment 34]; HRC, General Comment No. 37, Right of Peaceful Assembly (Article 21), U.N. Doc. CCPR/C/GC/37 (17 September 2020), paras. 8, 25, 36, 100 [hereinafter HRC General Comment 37].

⁷⁷⁶ See Scheinin Report, paras. 21–23 (Ukraine's Reply, Annex 7); see also, e.g., U.N. General Assembly, Universal Declaration of Human Rights, arts. 29(2), 29(3), 30 G.A. Res. 217 (III) A, U.N.

clauses for specific rights. Most relevant here, provisions related to the freedoms of expression, assembly, and association found in the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”) and the International Covenant on Civil and Political Rights (“ICCPR”) set out specific requirements for limitations measures,⁷⁷⁷ which have been interpreted to create a high standard for restrictions on these rights.⁷⁷⁸ Further, the Human Rights Committee, interpreting the ICCPR, and the European Court of Human Rights, interpreting the ECHR, have found that a limitations measure is not permissible if less intrusive means exist through which the stated purpose could be achieved.⁷⁷⁹ Yet Russia has made absolutely no attempt to meet those conditions, including by formally invoking derogations to human rights; describing how its actions were limited and tailored; or explaining why it could not have acted in less restrictive ways.⁷⁸⁰ Instead, Russia appears to believe that national security, anti-extremism, and public order are self-judging exceptions to its human rights obligations, which it may invoke retroactively and at will.

430. With respect to national security in particular, while international human

Doc. A/RES/217(III) (10 December 1948); ICCPR, art. 5(1); International Covenant on Economic, Social, and Cultural Rights, arts. 4, 5(1), 16 December 1966, 999 U.N.T.S. 3; ECHR, art. 17.

⁷⁷⁷ ICCPR, arts. 19(3), 21, 22(2); ECHR, arts. 10(2), 11(2). Article 5(d)(viii)–(ix) of the CERD similarly protects the freedoms of opinion, expression, assembly and association, and though the CERD does not elaborate on these rights, the “common restrictions” on those rights found in other human rights treaties and international standards “are implicitly accepted by the [CERD] Committee, provided they do not involve racial discrimination.” Patrick Thornberry, *Article 5: Civil and Political Rights, in THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION: A COMMENTARY* (Oxford University Press 2016), p. 362 (Ukraine’s Reply, Annex 125).

⁷⁷⁸ See, e.g., *Stankov v. Bulgaria*, ECtHR App. Nos. 29221/95 & 29225/95, Judgment, para. 87 (2 October 2001) (discussing requirement of a “pressing social need”); *Lashmankin v. Russia*, ECtHR App. No. 57818/09, Judgment, paras. 411, 445 (7 February 2017); HRC, General Comment No. 10, Article 19: Freedom of Opinion (Nineteenth Session) (1983), para. 4; HRC General Comment 34, para. 21.

⁷⁷⁹ HRC General Comment 34, paras. 22, 33–35; HRC General Comment 37, paras. 36–37, 40; *Lashmankin v. Russia*, ECtHR App. No. 57818/09, Judgment, para. 434 (7 February 2017).

⁷⁸⁰ See Scheinin Report, paras. 26–27 (Ukraine’s Reply, Annex 7).

rights bodies have sometimes accepted it as a legitimate purpose for States to justify restrictions on human rights, this justification is also recognized as giving rise to significant risks, especially in the context of the freedoms of expression, assembly, and association.⁷⁸¹ The European Court of Human Rights, for instance, has been “especially strict in admitting ‘national security’ as a legitimate purpose for interference” with either the freedom of association or assembly.⁷⁸² The Human Rights Committee has similarly found that States must use “[e]xtreme care” to make certain that laws “relating to national security . . . are crafted and applied in a manner that conforms to the strict requirements” of the limitations clauses for the freedoms of expression, assembly, and association.⁷⁸³

431. Additionally, as Professor Scheinin concludes, there is scant support in international law for classifying the objective of countering “extremism” as a legitimate objective that could justify restrictions on human rights.⁷⁸⁴ Therefore, even were Russia able to show that it met the other requirements for justifying restrictions on underlying rights, its invocation of “anti-extremism” fails for the separate reason that this is not a legitimate aim.⁷⁸⁵

432. In summary, Russia fails to meet the widely accepted standards under international law to justify its interferences with the freedoms of expression, assembly, and

⁷⁸¹ See e.g., Theodore Christakis & Katia Bouslimani, *National Security, Surveillance, and Human Rights*, in OXFORD HANDBOOK OF THE INTERNATIONAL LAW OF GLOBAL SECURITY (Robin Geiss & Nils Melzer, eds., Oxford University Press 2021), p. 700 (Ukraine’s Reply, Annex 127); see also *Başkaya v. Turkey*, ECtHR App. Nos. 23536/94 & 24408/94, Judgment, paras. 61–67 (8 July 1999).

⁷⁸² William A. Schabas, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS; A COMMENTARY* (2015), pp. 512–13 (citing *Stankov v. Bulgaria*, ECtHR App. Nos. 29221/95 & 29225/95, Judgment (2 October 2001); *Zhechev v. Bulgaria*, ECtHR App. No. 57045/00, Judgment (21 June 2007)) (Ukraine’s Reply, Annex 122).

⁷⁸³ HRC General Comment 34, para. 30.

⁷⁸⁴ See Scheinin Report, para. 33 (Ukraine’s Reply, Annex 7).

⁷⁸⁵ See also *ibid.*, paras. 45–46 (further concluding that Russia’s anti-extremism laws cannot justify restrictions on underlying human rights for the separate reason that those laws were likely enacted for a discriminatory purpose).

association of Crimean Tatars and Ukrainians in Crimea. As a result, Russia's invocation of national security and public order fails, as both a factual and legal matter, to justify its actions.

G. Russia Bears State Responsibility for the Acts of Its Agents and Proxies in Crimea Between 20 February and 18 March 2014

433. Russia also appears to claim that its CERD obligations with regards to Crimea are temporally limited, such that it is only responsible for CERD violations that occurred there following the official date of the unlawful annexation, 18 March 2014.⁷⁸⁶ Like its other efforts to shrug off its obligations under the CERD, this argument is of no avail.

434. It is well-established that a State bears international responsibility for acts committed by its organs and their employees acting in an official capacity, even when that conduct occurs outside its territory.⁷⁸⁷ A State is similarly responsible for the conduct of a person or a group of persons acting on its instructions, or under its direction or control.⁷⁸⁸ There is ample evidence that Russia's agents were active in Crimea from 20 February 2014 onwards, and that Russia worked hand in hand with purportedly independent organizations such as the Self Defense Forces of Crimea ("SDF") to achieve its objectives in the peninsula.⁷⁸⁹

435. Russia's own admissions, and substantial supporting documentation, establish the presence of Russian forces, including GRU officers, in Crimea no later than 20 February

⁷⁸⁶ See, e.g., Russia's Counter-Memorial Part II, App. A, para. 47.

⁷⁸⁷ See Draft Articles on Responsibility of States, art. 4 (Ukraine's Memorial, Annex 279); see also *ibid.*, art. 4, commentary para. 6 (noting that responsibility extends to organs "exercising whatever functions").

⁷⁸⁸ See *ibid.*, art. 8.

⁷⁸⁹ Even if Russia's account, *i.e.*, that the events in Crimea prior to 18 March 2014 were a spontaneous rebellion without Russian intervention, could be believed — a proposition that is entirely belied by the weight of world opinion and the numerous sources described below — Russia would still be responsible for CERD violations occurring in Crimea starting on 20 February 2014. See *ibid.*, art. 10 (providing for State responsibility in the context of insurrectional movements); *ibid.*, art. 11 (same, in circumstances where a State "acknowledges and adopts" conduct).

2014.⁷⁹⁰ Russia has acknowledged that the events in Crimea leading up to and following the unlawful annexation were the result of a coordinated Russian military operation to “return[] Crimea to Russia.”⁷⁹¹ President Putin admitted to giving direct “instructions about what needed to be done and how” to bring Crimea under Russian control.⁷⁹² The Russian soldiers involved in the operation, who admitted that they removed symbols and insignia from their uniforms upon arriving in Crimea, later received medals “for returning Crimea,”⁷⁹³ and President Putin has stated that these “little green men” were Russian soldiers.⁷⁹⁴

436. Russia has further acknowledged that Russian agents were providing assistance to the SDF throughout Russia’s military operations in Crimea starting in late February 2014, including with respect to the overthrow of the pro-Ukrainian Crimean government and the installation of a pro-Russian administration on 26 to 27 February 2014.⁷⁹⁵

⁷⁹⁰ See, e.g., RFE/RL, *The Online Debate Over a Mysterious Russian 'Medal'* (24 April 2014); Law of Ukraine No. 1207-VII “On Securing Rights and Freedoms of Citizens and the Legal Regime in the Temporarily Occupied Territory of Ukraine,” art. 1.2 (15 April 2014) (Ukraine’s Reply, Annex 185); BBC News, *Putin Reveals Secrets of Russia’s Crimea Takeover Plot* (9 March 2015) (Ukraine’s Memorial, Annex 52); Meduza, *‘I Serve the Russian Federation!’ Soldiers Deployed During the Annexation of Crimea Speak* (16 March 2015) (Ukraine’s Memorial, Annex 567); The Guardian, *Putin Admits Russian Military Presence in Ukraine for the First Time* (17 December 2015) (Ukraine’s Memorial, Annex 585); OHCHR, *Situation of Human Rights in the Temporarily Occupied Autonomous Republic of Crimea and the City of Sevastopol (Ukraine)* (25 September 2017), para. 3 (Ukraine’s Memorial, Annex 759); Ellen Nakashima, *Inside a Russian Disinformation Campaign in Ukraine in 2014*, Washington Post (25 December 2017) (Ukraine’s Memorial, Annex 1072).

⁷⁹¹ Vladimir Putin, Interview Given to the TV Channel “Rossiya” as Part of a Documentary “Crimea: Path to the Homeland” (video) (Ukraine’s Memorial, Annex 53); see also Meduza, *‘I Serve the Russian Federation!’ Soldiers Deployed During the Annexation of Crimea Speak* (16 March 2015) (Ukraine’s Memorial, Annex 567).

⁷⁹² Vladimir Putin, Interview Given to the TV Channel “Rossiya” as Part of a Documentary “Crimea: Path to the Homeland” (video) (Ukraine’s Memorial, Annex 53).

⁷⁹³ Meduza, *‘I Serve the Russian Federation!’ Soldiers Deployed During the Annexation of Crimea Speak* (16 March 2015) (Ukraine’s Memorial, Annex 567).

⁷⁹⁴ See The Guardian, *Putin Admits Russian Military Presence in Ukraine for the First Time* (17 December 2015) (Ukraine’s Memorial, Annex 585).

⁷⁹⁵ See Direct Line with Vladimir Putin, President of Russia (17 April 2014), p. 78 (Ukraine’s Memorial, Annex 51); Vladimir Putin, Interview Given to the TV Channel “Rossiya” as Part of a Documentary “Crimea: Path to the Homeland” (video) (Ukraine’s Memorial, Annex 53); *Ukraine v.*

This new Crimean administration later officially assumed responsibility over the SDF, swearing its members into a newly-formed Crimean military.⁷⁹⁶

437. As detailed in subsequent chapters, both Russian forces and Crimean forces under Russia's control were involved in conduct that formed part of Russia's campaign of racial discrimination against the Ukrainian and Crimean Tatar communities. Russia is responsible for this conduct under the generally accepted rules governing State responsibility, regardless of whether it occurred between 20 February and 18 March 2014.

* * *

438. To conclude, Russia's attempts to evade its obligations under the CERD by mischaracterizing the nature of Ukraine's claims and misstating the proper legal framework should be rejected. Russia must be held to account for its blatant racial discrimination against the Crimean Tatar and Ukrainian communities in Crimea.

Russia (re Crimea), ECtHR App. Nos. 20958/14 & 38334/18, Decision (Admissibility), paras. 176, 280, 331 (16 December 2020). Accordingly, the European Court of Human Rights determined that "Russia had . . . assumed effective control over [Crimea]" by at least 27 February 2014. *Ukraine v. Russia (re Crimea)*, ECtHR App. Nos. 20958/14 & 38334/18, Decision (Admissibility), paras. 50–51 (16 December 2020).

⁷⁹⁶ See RT, *Crimea Creates Own Military by Swearing in Self-Defense Units* (10 March 2014); Olga Skrypnyk, *Legalization of "Crimean Self-Defense,"* The Crimean Human Rights Group (27 November 2015).

Section B: Russia Has Breached Its Obligations Under the CERD

Chapter 10. DISAPPEARANCES, MURDERS, ABDUCTIONS, AND TORTURE

439. Ukraine’s Memorial demonstrated that Russia had directly engaged in, or encouraged and tolerated, acts of physical violence targeting Crimean Tatars and Ukrainians, in violation of CERD articles 2(1), 5(b), and 6.⁷⁹⁷ In support, Ukraine provided extensive evidence of a pattern of enforced disappearances, murders, abductions, and torture directed against members of these communities, along with Russia’s failure to investigate these crimes.

440. Russia attempts to minimize these events as “isolated” and “unsubstantiated” incidents that are not attributable to it. But Russia’s own evidence confirms a pattern of violence disproportionately burdening the human rights of the Ukrainian and Crimean Tatar communities, for which no one has been held accountable.

A. The Physical Violence Against the Crimean Tatar and Ukrainian Communities Violates the CERD

441. Russia claims that Ukraine’s allegations do not provide a basis for a racial discrimination claim at all. To the extent that Russia relies for that point on its assertion that the existence of “a systematic campaign or policy” of racial discrimination requires “evidence of an unambiguous intent,”⁷⁹⁸ Ukraine has already addressed this point in Chapter 9. As explained there, Ukraine is entitled to support this aspect of its claims — as it has done in the Memorial — by demonstrating that the acts in question had either the purpose or effect of burdening the human rights of the Crimean Tatar or Ukrainian communities in Crimea.⁷⁹⁹

⁷⁹⁷ Ukraine’s Memorial, paras. 588–599, 609–610, 631–635.

⁷⁹⁸ Russia’s Counter-Memorial Part II, App. A, para. 5.

⁷⁹⁹ *See supra*, Chapter 9(B).

442. Russia also alleges that Ukraine relies on a limited and selective set of “isolated individual cases,”⁸⁰⁰ without engaging in what it considers “an essential element of discrimination”: a comparative analysis supported by “available statistical data on criminal acts that Ukraine complains of and that cover the whole population of Crimea, namely all ethnic groups.”⁸⁰¹ As discussed in Chapter 9, however, there is no support for Russia’s assertion that detailed statistical evidence is required in order to prove a CERD violation.⁸⁰² In the conditions now prevailing in Crimea, where access is severely restricted,⁸⁰³ it would in any case be unrealistic to expect Ukraine to be able to produce authoritative statistics.⁸⁰⁴

443. In any event, the statistical evidence Ukraine referred to in its Memorial shows that Crimean Tatars and Ukrainians are disproportionately affected by enforced disappearances,⁸⁰⁵ which in turn leave the victims vulnerable to torture and other ill-

⁸⁰⁰ Russia’s Counter-Memorial Part II, App. A, para. 7.

⁸⁰¹ *Ibid.*, paras. 7–10; *see also ibid.*, paras. 40–42.

⁸⁰² *See supra*, Chapter 9(E).

⁸⁰³ *See, e.g.*, U.N. General Assembly Resolution 74/168, U.N. Doc. A/RES/74/168, *Situation of Human Rights in the Autonomous Republic of Crimea and the City of Sevastopol, Ukraine*, p. 3 (21 January 2020) (“Reaffirming its grave concern that the human rights monitoring mission in Ukraine continues to be denied access to Crimea, despite its existing mandate, which covers the entire territory of Ukraine within its internationally recognized borders.”); *cf.* Russia’s Counter-Memorial Part II, App. A, para. 7 (arguing only that Ukraine needs to “look at *available* statistical data”) (emphasis added).

⁸⁰⁴ *Case of Velasquez-Rodriguez v. Honduras*, Inter-Am.Ct.H.R. (Ser. C) No. 4, Judgment (29 July 1988), para. 131 (“Circumstantial or presumptive evidence is especially important in allegations of disappearances, because this type of repression is characterized by an attempt to suppress all information about the kidnapping or the whereabouts and fate of the victim.”); *Aslakhanova and Others v. Russia*, ECtHR App No. 2944/06, Judgment, paras. 98–99, 103–112 (18 December 2012) (noting “the difficulties associated with obtaining the evidence” in forced disappearances and finding it “sufficient for the applicants to make a *prima facie* case” of enforced disappearance and that “it would then be for the Government to discharge their burden of proof either by disclosing the documents in their exclusive possession or by providing a satisfactory and convincing explanation of how the events in question occurred”).

⁸⁰⁵ *See* Ukraine’s Memorial, para. 392, n.814 (collecting sources); *see also ibid.*, para. 398, n.825; 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), para. 102 (“OHCHR

treatment.⁸⁰⁶ Data from U.N. bodies, human rights monitors, and NGOs confirm that the vast majority of the enforced disappearance cases involve Crimean Tatars and Ukrainians.⁸⁰⁷ Reporting on enforced disappearances⁸⁰⁸ from 3 March 2014 to 30 June 2018, for instance, the United Nations monitoring mission in Ukraine noted that: “at least 42 persons were victims of enforced disappearances, including four during the reporting period. The victims (38 men and 4 women) include 27 ethnic Ukrainians; 9 Crimean Tatars; 4 Tajiks; 1 person of mixed Tatar-Russian origins; and 1 Uzbek.”⁸⁰⁹ The monitoring mission further observed that:

The disappearances were often attributed to more than one perpetrator. Thus, in relation to the 42 documented cases, 76 perpetrators were identified, including representatives of pro-Russian formations and Russian Federation military and security structures. Specifically, disappearances were attributed to members of the “Crimean self-defense” (23 attributions), the FSB (23), the Armed Forces of the Russian Federation (10), Cossack groups (8), the Russian Federation police (6), the “Russian Unity” political party (4) and the “Crimea Liberation Army” (2). In cases documented during the reporting period, the FSB was cited as the most common

documented 10 cases of persons who disappeared and are still missing: six Crimean Tatars, three ethnic Ukrainians and one Russian-Tatar – all men.”) (Ukraine’s Memorial, Annex 759).

⁸⁰⁶ OHCHR, U.N. Human Rights Monitoring Mission in Ukraine Briefing Paper: Enforced Disappearances in the Autonomous Republic of Crimea and the City of Sevastopol, Ukraine, Temporarily Occupied by Russian Federation (31 March 2021), p. 6.

⁸⁰⁷ OHCHR, Report on the Situation of Human Rights in the Temporarily Occupied Autonomous Republic of Crimea and the City of Sevastopol, Ukraine 13 September 2017 to 30 June 2018 (10 September 2018), para. 32; U.N. Human Rights Monitoring Mission in Ukraine, Briefing Paper: Enforced Disappearances in the Autonomous Republic of Crimea and the City of Sevastopol, Ukraine, Temporarily Occupied by Russian Federation (31 March 2021).

⁸⁰⁸ “Enforced disappearance is generally defined as the arrest, detention, abduction, or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support, or acquiescence of the State, followed by refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.” U.N. Secretary-General, *Situation of Human Rights In the Temporarily Occupied Autonomous Republic of Crimea and the City of Sevastopol, Ukraine*, U.N. Doc. A/74/276 (2 August 2019), para. 16 [hereinafter 2019 UNSG Report] (citing to the International Convention for the Protection of All Persons from Enforced Disappearance, Art. 2).

⁸⁰⁹ OHCHR, Report on the Situation of Human Rights in the Temporarily Occupied Autonomous Republic of Crimea and the City of Sevastopol, Ukraine 13 September 2017 to 30 June 2018 (10 September 2018), para. 32.

perpetrator, unlike at the beginning of the occupation when the “Crimean self-defense” was most frequently identified as the perpetrator. Victims often described physical violence and psychological pressure inflicted during *incommunicado* detentions.⁸¹⁰

444. Despite having unfettered access to relevant data, Russia has failed to offer any credible or robust data refuting Ukraine’s claim. Russia’s sole statistical evidence offered in rebuttal is a conclusory “note” from the Office of Russia’s Prosecutor General, which tersely states that in 2014–2020, the majority of “missing person cases” “opened” by the internal affairs bodies in Crimea were “Russians.”⁸¹¹ Not only does the note lack evidentiary value, it also omits critical details, including whether the cases it cites fall within the definition of *enforced* disappearances, and to what extent “opened” cases were successfully closed.⁸¹²

445. Lastly, Russia argues that all of the cases included in Ukraine’s Memorial concern “political activists” who were opposed to Russia’s unlawful aggression, and “thus have nothing to do with racial discrimination.”⁸¹³ For the reasons explained in Chapter 9, this is irrelevant. Whatever the motivation for the violence or the occupation of the victims, the

⁸¹⁰ OHCHR, Report on the Situation of Human Rights in the Temporarily Occupied Autonomous Republic of Crimea and the City of Sevastopol, Ukraine 13 September 2017 to 30 June 2018 (10 September 2018), para. 34. As established in Chapter 9 and discussed below, all of the incidents Ukraine has highlighted in this case, including those conducted by the Crimean Self-Defense Forces (“SDF”), are attributable to Russia. *See supra*, Chapter 9(G).

⁸¹¹ Russia’s Counter-Memorial Part II, App. A, para. 8; Main Directorate of International and Legal Cooperation of the Prosecutor General’s Office of the Russian Federation, Note on Missing Person Cases Opened by the Internal Affairs Bodies in 2014–First Half of 2020 (9 September 2020), (Russia’s Counter-Memorial Part II, Annex 636).

⁸¹² It is also unclear on what basis the distinction between Russian, Ukrainian, and Crimean Tatar was made — namely, whether the “Russians” category includes any ethnic Ukrainians or Crimean Tatars who had automatically acquired the Russian citizenship.

⁸¹³ Russia’s Counter-Memorial Part II, App. A, paras. 11–12.

Ukrainian and Crimean Tatar communities were targeted and their human rights — including the right to life — were disproportionately affected.⁸¹⁴

B. Evidence Confirms the Accuracy of Ukraine’s Account of Targeted Violence Against the Crimean Tatar and Ukrainian Communities

446. While Russia criticizes Ukraine’s case as “unsubstantiated allegations,” its own evidence suggests otherwise.⁸¹⁵ For instance, Russia’s investigative records show that, contrary to the occupying authorities’ denial of involvement by the Self Defense Forces (“SDF”),⁸¹⁶ Mr. Reshat Ametov was kidnapped by SDF members and two others in civilian clothes in broad daylight, and that two weeks after being forcefully taken into a car — all of which was captured in video footage — he was found dead with signs of torture on his body.⁸¹⁷ Russia’s evidence further confirms that Mr. Ametov was held in custody and interrogated in the basement of the headquarters of the SDF, before he was found murdered.⁸¹⁸

447. Mr. Ervin Ibragimov’s abduction is another case where the scene of the crime

⁸¹⁴ See *supra*, Chapter 9(D); *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, Declaration of Judge Crawford, I.C.J. Reports 2017*, p. 217, para. 7.

⁸¹⁵ Russia’s Counter-Memorial Part II, para. 340.

⁸¹⁶ RFE/RL, *Snatched in Plain Sight: No Justice in Crimean Tatar’s Slaying Five Years After Russian Annexation* (14 March 2019).

⁸¹⁷ OHCHR, *Accountability for Killings in Ukraine from January 2014 to May 2016* (25 May 2016), paras. 119–121. In fact, Russia’s own evidence concludes that the cause of Mr. Ametov’s death was: “an open craniocerebral injury in the form of two penetrating stab wounds in the left eye socket with fractures of the facial bones, base of the skull and concussion-cracking injury of the brain, complicated by cerebral edema.” First Investigative Department of the High-Priority Cases Directorate of the Main Investigative Directorate of the Investigate Committee of the Russian Federation for the Republic of Crimea, Note Regarding Criminal Case No. 2014417004 on Murder of R.M. Ametov (December 2020), p. 2 (Russia’s Counter-Memorial Part II, Annex 417); Videos of Crimean Tatar Reshat Ametov Kidnapping, H[e] Was Found Dead on March 15, 2014 Crimean Crisis (video) (Ukraine’s Memorial, Annex 1100).

⁸¹⁸ First Investigative Department of the High-Priority Cases Directorate of the Main Investigative Directorate of the Investigate Committee of the Russian Federation for the Republic of Crimea, Note Regarding Criminal Case No. 2014417004 on Murder of R.M. Ametov (December 2020), p. 2 (Russia’s Counter-Memorial Part II, Annex 417).

was captured in video footage.⁸¹⁹ Russia's evidence confirms that Mr. Ibragimov, a prominent member of the Coordination Council of the World Congress of Crimean Tatars and the Bakhchysarai regional Mejlis, was abducted near his home on May 2016, and remains missing to this date.⁸²⁰ Russia's investigative records expressly show that at least two individuals in police uniform were directly involved in Mr. Ibragimov's abduction.⁸²¹

448. Similarly, with respect to Mr. Andrii Shchekun's and Mr. Anatoly Kovalsky's abduction, Russia's evidence — including contemporaneous testimony by witnesses at the scene of the abduction — consistently supports Ukraine's account that Messrs. Shchekun and Kovalsky were taken by men in camouflage uniforms with Saint George's ribbons (a widely recognized military symbol in Russia) at the Simferopol train station.⁸²² Further, Russia's

⁸¹⁹ See, e.g., Third Investigative Department of the Department (for the Investigation of Past Years Crimes) of the High-Priority Cases of the Main Investigative Directorate of the Investigative Committee of the Russian Federation for the Republic of Crimea, Note Regarding Criminal Case No. 2016627042 on Disappearance of E.U. Ibragimov, p. 1 (20 December 2020) (describing CCTV footage) (Russia's Counter-Memorial Part II, Annex 419).

⁸²⁰ *Ibid.*, pp. 1–2; Ukraine's Memorial, para. 397.

⁸²¹ See, e.g., Deputy Head of the Main Investigative Directorate of the Investigative Committee of the Russian Federation for the Republic of Crimea, Letter No. 224-4-18 (23 November 2018), p. 1 (“During the preliminary investigation it was found that on 24 May 2016 in the time period from 10:10 p.m. to 10:45 p.m. E.U. Ibragimov drove his personal car “Ford Focus”, . . . near the house . . . [in] Crimea, where he was stopped by unidentified persons dressed in uniform of traffic police officers, who with the use of violence put E.U. Ibragimov in an unidentified car and took him away in unknown direction. To date, the whereabouts of E.U. Ibragimov have not been found.”) (Russia's Counter-Memorial Part II, Annex 406).

⁸²² Ukraine's Memorial, para. 407; see, e.g., Investigator of the Investigative Department of Zheleznodorozhny District of Simferopol of the Main Investigative Directorate of the Investigative Committee of the Russian Federation, Resolution on Transferring a Crime Report in Accordance with the Investigative Jurisdiction (27 July 2014) (“[Witness] O.S. Golik . . . spotted a large crowd of people in camouflage uniforms with bands and Saint George's ribbons. There were about 10 people, and two men previously unknown to her were walking with them; one of them was aged, medium build, grey hair, was wearing a red jacket, and the second one was younger . . . [Witness] V.V. Serdyukov . . . spotted a group of people in camouflage uniforms with Saint George's ribbons, and two men previously unknown to him were walking with them; one of them looked 50 years old, medium build, grey hair, was wearing a red jacket; the second man looked 35-40 years old, medium build, blond hair . . . [Witness] I.M. Kot . . . saw people in camouflage uniforms with Saint George's ribbons, and two men were walking next to them; one man was wearing a red jacket.”) (Russia's Counter-Memorial Part II, Annex 164); see also Russia's Counter-Memorial Part II, App. A, para. 34.

evidence suggests that Mr. Mykhailo Vdovchenko, as well as Mr. Shchekun and Mr. Kovalsky, were all detained against their will in a military enlistment office of the Republic of Crimea.⁸²³ Russia fails to engage with Mr. Shchekun’s detailed account that, after being abducted, he and Mr. Kovalsky were illegally detained and brutally tortured, including by GRU officers.⁸²⁴

449. Father Klyment, in his witness testimony submitted with this Reply, describes meeting with Igor Girkin (aka “Strelkov”), named by Mr. Shchekun as one of his torturers, on 20 March 2014.⁸²⁵ According to Father Klyment, he asked Girkin about Mr. Shchekun’s and Mr. Kovalsky’s fate, to which Girkin responded, “Don’t worry, they’ll live,” suggesting that he was fully informed of their whereabouts and the conditions in which they were being held.⁸²⁶

450. Ukraine has further demonstrated that the victims of enforced disappearances often were subject to torture and ill-treatment while detained. Victims who were released — such as Mr. Aleksandr Kostenko and Mr. Renat Paralamov — raised detailed and credible allegations of ill-treatment and torture while in undeclared detention by Russian law

⁸²³ Military Investigative Department of the Investigative Committee for Abakan Garrison, Resolution on Transferring of the Crime Report (16 August 2014) (“[O]n 9 March 2014, at approximately 9:30 a.m., a group of men (around 10) dressed in military camouflage clothes with Saint George’s ribbons . . . illegally deprived the citizens of Ukraine, A.V. Shchek[u]n and A.I. Kovalsky, of freedom and then held them in a building of one of the military enlistment offices of the Autonomous Republic of Crimea.”) (Russia’s Counter-Memorial Part II, Annex 168); Military Investigative Department of the Investigative Committee for Abakan Garrison, Resolution on Transferring of the Crime Report (16 August 2014) (same) (Russia’s Counter-Memorial Part II, Annex 169). Russia’s only comment — that it “could not” verify the fact because the Military Commissariat of the Republic of Crimea, which now occupies that office, legally came into existence in September 2014 — is entirely beside the point. Russia’s evidence confirms that the building has always hosted a military enlistment office regardless of the legal status, with same military enlistment officers working in that office since March 2014. Russia’s Counter-Memorial Part II, App. A, para. 37; Investigative Department of Zheleznodorozhny District of Simferopol of the Main Investigative Directorate of the Investigative Committee of the Russian Federation for the Republic of Crimea, Resolution on the Refusal to Initiate a Criminal Case (17 September 2020), p. 3 (Russia’s Counter-Memorial Part II, Annex 428).

⁸²⁴ Witness Statement of Andriy Shchekun (4 June 2018), para. 23 [hereinafter Shchekun Statement] (Ukraine’s Memorial, Annex 13).

⁸²⁵ Shchekun Statement, para. 22; Witness Statement of Father Klyment (29 March 2022), para. 10 [hereinafter Father Klyment Statement].

⁸²⁶ Father Klyment Statement, para. 10.

enforcement.⁸²⁷ As discussed in the following section, while Russia denies these allegations, its purported investigations into such allegations were carried out in a summary fashion, relying on patently unreliable sources — including the perpetrators’ conclusory denial of torture and the victims’ signature disclaiming complaints — while turning a blind eye to the highly suspicious circumstances surrounding the victims’ self-incriminating statements.⁸²⁸

C. Russia Failed to Comply with Its Duty to Investigate These Acts, and Instead Instigated, Encouraged, and Tolerated Them

451. Russia has systematically failed to investigate the enforced disappearances and other acts of violence discussed above. The United Nations monitoring mission in Ukraine has repeatedly expressed “serious doubts about the effectiveness” of Russia’s investigations into the reported cases of enforced disappearances, noting that “[i]n none of the [enforced disappearances] cases documented have perpetrators been brought to justice.”⁸²⁹

⁸²⁷ Mr. Aleksandr Kostenko’s abduction and further undeclared detention is illustrative of an enforced disappearance which was followed by criminal prosecution and formal detention. He was victim to brutal torture and ill-treatment during his enforced disappearance by FSB officers. Mr. Renat Paralamov’s case highlights the practice of using undeclared incommunicado detention to compel the victim to make self-incriminating statements through torture. *See* Ukraine’s Memorial, paras. 408–410; *see also infra*, paras. 459–460.

⁸²⁸ *See infra*, paras. 459–460. Russia does not deny that the whereabouts of the other disappeared individuals mentioned in Ukraine’s Memorial, including Timur Shaimardanov, Seiran Zinedinov, Vladislav Vaschuk, Ivan Bondarets and Vasyl Chernysh, remain unknown. *See* Russia’s Counter-Memorial Part II, App. A, paras. 26–28, 33. Considering the pattern of forced disappearances targeting members of the Ukrainian and Crimean Tatar communities, and Russia’s utter failure to properly investigate such disappearances discussed further below, Russia’s attempt to deny responsibility for those cases is highly unconvincing. *See, e.g.*, OHCHR, U.N. Human Rights Monitoring Mission in Ukraine Briefing Paper: Enforced Disappearances in the Autonomous Republic of Crimea and the City of Sevastopol, Ukraine, Temporarily Occupied by Russian Federation (31 March 2021), p. 8 (noting, for instance, that before the disappearance, Mr. Shaimardanov had received threats from the SDF and had reported being under surveillance, whereas Mr. Zinedinov, before he himself disappeared four days later, had told Mr. Shaimardanov’s ex-wife that he had been negotiating the release of Mr. Shaimardanov).

⁸²⁹ 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) (25 September 2017), para. 81 (expressing “serious doubts about the effectiveness” of the investigation into Mr. Ametov’s disappearance and murder) (Ukraine’s Memorial, Annex 759); OHCHR, Report on the Situation of Human Rights in the Temporarily Occupied Autonomous Republic of Crimea and the City of Sevastopol, Ukraine 13 September 2017 to 30 June 2018 (10 September 2018), para. 35 (“In none of

452. Russia does not dispute that it is under an obligation to investigate these acts, but contends that it has satisfied the “minimum standard for the investigation of disappearances” for each relevant case.⁸³⁰ Russia’s focus on whether it has complied with a duty to investigate disappearances with respect to a particular investigation is misplaced. The relevant question is whether Russia’s alleged investigative efforts — or the lack thereof — corroborate the discriminatory pattern of disappearances and other acts, such as murders, abductions, and torture, that Russia has sponsored and or tolerated.⁸³¹

453. In any event, Russia’s own evidence shows that Russia *has* failed to properly investigate the pattern of violence established in Ukraine’s Memorial, and that its alleged investigative efforts were a mere formality. As to Mr. Ametov, for instance, Russia claims that its investigative authorities have “checked 143 persons with regard to their potential

the cases documented have perpetrators been brought to justice. Seven persons identified by OHCHR as victims of enforced disappearances are listed by Russian Federation authorities as ‘missing.’ In relation to at least ten victims, the authorities have either refused to register a case or suspended previously initiated investigations. The lack of progress in the investigations raises questions about their effectiveness.”); OHCHR, U.N. Human Rights Monitoring Mission in Ukraine Briefing Paper: Enforced Disappearances in the Autonomous Republic of Crimea and the City of Sevastopol, Ukraine, Temporarily Occupied by Russian Federation (31 March 2021), pp. 12–13.

⁸³⁰ Russia’s Counter-Memorial Part II, App. A, para. 14 (stating that “a proper criminal investigation is a matter of legal due process rather than achieving a particular result”); *see also* Russia’s Counter-Memorial Part II, para. 344; *see also ibid.*, App. A, paras. 13–39.

⁸³¹ Further, the ECtHR jurisprudence Russia cites relates to the investigation of deaths, applying the European Convention on Human Right’s requirement, in Article 2, that the right to life be protected by law. *See* Russia’s Counter-Memorial Part II, App. A, para. 14, n.17. In any event, Russia’s investigations have plainly not met the standard set forth by these cases. *See Case of Mustafa Tunç and Fecire Tunç v. Turkey*, ECtHR App. No. 24014/05, Judgment (14 April 2015), para. 172 (an “effective” investigation must be “adequate,” *i.e.*, “capable of leading to the establishment of the facts and, where appropriate, the identification and punishment of those responsible”); *Giuliani and Gaggio v. Italy*, ECtHR App. No. 23458/02, Judgment (24 March 2011), para. 302 (investigations must be “based on thorough, objective and impartial analysis of all relevant elements”). Other human rights treaties impose a duty to investigate disappearances; the jurisprudence interpreting these obligations provides further support for the conclusion that Russia’s investigations were inadequate. *See, e.g., Case of Velasquez-Rodriguez v. Honduras*, Inter-Am.Ct.H.R. (Ser. C) No. 4, Judgment, para. 177 (29 July 1988) (the investigation “must be undertaken in a serious manner and not as a mere formality preordained to be ineffective”).

involvement in committing the crime in question” and “adopt[ed] other comprehensive measures in order to solve the case.”⁸³² But Russia’s investigative records reveal that key individuals — including the “commander” who ordered SDF members to take Mr. Ametov into custody, men in civilian clothes who collaborated with the SDF members and drove Mr. Ametov to the SDF headquarters, and the last known person who was with Mr. Ametov at the headquarters before he was murdered (who, according to Russia’s evidence, instructed the SDF members to keep Mr. Ametov in custody for investigation into his “involvement in illegal actions”) — were never identified or questioned, for no apparent reason.⁸³³

454. Russia’s claim that it has “done a lot in order to solve Mr. Ametov’s case”⁸³⁴ is simply unconvincing, and directly refuted by its evidence.⁸³⁵ The SDF members who were identified as having been directly involved in Mr. Ametov’s abduction, on the other hand, were all found innocent because they allegedly “were acting in accordance with their powers for maintaining public order” as SDF members.⁸³⁶ Notwithstanding the glaring gaps in the

⁸³² Russia’s Counter-Memorial Part II, App. A, para. 22.

⁸³³ First Investigative Department of the High-Priority Cases Directorate of the Main Investigative Directorate of the Investigative Committee of the Russian Federation for the Republic of Crimea, Note Regarding Criminal Case No. 2014417004 on Murder of R.M. Ametov (December 2020), pp. 1-2 (Russia’s Counter-Memorial Part II, Annex 417).

⁸³⁴ Russia’s Counter-Memorial Part II, App. A, para. 22.

⁸³⁵ See First Investigative Department of the High-Priority Cases Directorate of the Main Investigative Directorate of the Investigative Committee of the Russian Federation for the Republic of Crimea, Note Regarding Criminal Case No. 2014417004 on Murder of R.M. Ametov (December 2020), pp. 1-2 (Russia’s Counter-Memorial Part II, Annex 417); OHCHR, U.N. Human Rights Monitoring Mission in Ukraine Briefing Paper: Enforced Disappearances in the Autonomous Republic of Crimea and the City of Sevastopol, Ukraine, Temporarily Occupied by Russian Federation (31 March 2021), p. 8 (“The level of impunity in this case is particularly troubling since there appeared to be strong evidence, including video footage that showed the perpetrators during the abduction, and torture signs on the body of the deceased. The disappearance, torture and extra-judicial execution of Mr. Ametov is a grave human rights violation and his family is entitled to redress and to know the circumstances leading to his death.”).

⁸³⁶ First Investigative Department of the High-Priority Cases Directorate of the Main Investigative Directorate of the Investigative Committee of the Russian Federation for the Republic of Crimea, Note

testimony of those SDF members, “[n]o polygraph examination was performed,” because the investigative authorities “deemed [it] unnecessary due to the absence of doubts in their testimony and its objective confirmation during the investigation.”⁸³⁷

455. Concerning Mr. Ibragimov’s abduction, Russia similarly points to a lengthy list of “procedural actions” that it has allegedly taken, including “questioning over 500 potential witnesses,” checking “156 vehicles,” conducting “at least 7 searches and seizures,” and “performing at least 5 expert examinations.”⁸³⁸ But, notably, there is no evidence that Russia’s police force was ever investigated notwithstanding the apparent involvement of the police in the crime—a fact expressly recognized by the Russian investigative authorities.⁸³⁹

456. As the following paragraphs will show, Russia repeatedly disclaims responsibility relying solely on conclusory and self-serving statements from its own officials. Those statements have little or no evidentiary value and are contradicted by the consistent accounts of U.N. bodies and NGOs. Nor can they negate the sworn testimony of witnesses presented by Ukraine in this case.

457. Concerning the abduction of Mr. Shchekun and Mr. Kovalsky, for instance, Russia denies any involvement of the Russian military, claiming that it was “established that

Regarding Criminal Case No. 2014417004 on Murder of R.M. Ametov (December 2020), p. 3 (Russia’s Counter-Memorial Part II, Annex 417).

⁸³⁷ *Ibid.*, p. 4.

⁸³⁸ Russia’s Counter-Memorial Part II, App. A, para. 32.

⁸³⁹ *See supra*, para. 447. In fact, the investigative records Russia submitted tersely note that a request was made to “law enforcement bodies” on available information, and “[n]o information of relevance for the investigation was received.” Prosecutor’s Office of the Republic of Crimea, Letter No. 15/3-2140-16 (27 April 2017), p. 3 (Russia’s Counter-Memorial Part II, Annex 333). There is no information about what the request was about and what information was received, if any. *Ibid.*

no Russian forces were present in Simferopol city as of 9 March 2014.”⁸⁴⁰ But the only support for Russia’s conclusion is a note from the 534th Military Investigative Directorate stating that, on 9 March 2014, military personnel of the Armed Forces of Russia were not stationed in Simferopol; SDF members had never been Russia’s military personnel; and the fact “that there were Saint George’s ribbons on the clothes of certain persons does not indicate that these persons were military personnel of the Armed Forces of the Russian Federation.”⁸⁴¹ Not only does the conclusory note lack evidentiary value, it does nothing to disprove the crimes (abduction and torture) themselves, which Russia was required to investigate. But, based primarily on this explanation, Russia decided not to open a criminal case.⁸⁴²

458. As to Mr. Vdovchenko’s abduction, Russia similarly argues that it has “spared no efforts in attempting to find individuals involved” in the crime.⁸⁴³ But all of the key “efforts” cited by Russia apparently came in 2017, over 3 years after the abduction, and after Ukraine’s application in this case.⁸⁴⁴ Further, all of the “responses” received from other Russian authorities are conclusory, without any specific support or explanation.⁸⁴⁵

⁸⁴⁰ Russia’s Counter-Memorial Part II, App. A, para. 35; Military Investigative Department of the Investigative Committee for Abakan Garrison, Resolution on Transferring of the Crime Report (16 August 2014) (Russia’s Counter-Memorial Part II, Annex 168).

⁸⁴¹ Military Investigative Department of the Investigative Committee for Abakan Garrison, Resolution on Transferring of the Crime Report (16 August 2014) (Russia’s Counter-Memorial Part II, Annex 168).

⁸⁴² Russia’s Counter-Memorial Part II, App. A, para. 35; *see* Investigative Department of Zheleznodorozhny District of Simferopol of the Main Investigative Directorate of the Investigative Committee of the Russian Federation for the Republic of Crimea, Resolution on the Refusal to Initiate A Criminal Case (17 September 2020), p. 4 (Russia’s Counter-Memorial Part II, Annex 428).

⁸⁴³ Russia’s Counter-Memorial Part II, App. A, para. 36.

⁸⁴⁴ For instance, a request to identify the officers of the internal affairs bodies who patrolled Karla Marksa Street on 11 March 2014 was not made until 17 August 2017. Investigative Department of the Zheleznodorozhny District of Simferopol of the Main Investigative Directorate of the Investigative Committee of Russia for the Republic of Crimea, Order No. 1002-17 on Carrying Out Certain Investigative Activities (17 August 2017) (Russia’s Counter-Memorial Part II, Annex 337).

⁸⁴⁵ For instance, Russia cites a one-sentence “report” from the police investigator saying that “it was not possible to identify the witnesses of the alleged abduction of M.V. Vdovchenko.” No other

459. Russia has also failed entirely to properly investigate a pattern of torture while in official custody. For example, Mr. Renat Paralamov's claim of torture was dismissed by a military investigator based on unnamed FSB officers' self-serving testimony that they did not abuse or torture Mr. Paralamov, and Mr. Paralamov's signed disclaimer of complaints that he later explained was coerced.⁸⁴⁶ Apparently, the military investigator found nothing notable about the FSB officers' highly implausible explanation that Mr. Paralamov voluntarily confessed to a crime on the first day of "questioning," and after being released that day, voluntarily returned to the FSB the next morning, and spontaneously confessed to other grave crimes in relation to which he had not been interrogated.⁸⁴⁷ The investigator dismissed Mr. Paralamov's complaint as an attempt to avoid responsibility for the crimes that he had

information is given. Police Station No. 1 "Zheleznodorozhny" of the Directorate of the Ministry of Internal Affairs of Russia for Simferopol, Report on the Results of Operative Search Activities (2017) (Russia's Counter-Memorial Part II, Annex 304). The document translation does not even have a date but the Annex's cover page dates it to 2017, which is 3 years after the fact, and with no real information regarding the "search."

⁸⁴⁶ Russia's Counter-Memorial Part II, App. A, para. 56; 534th Military Investigative Department of the Investigative Committee of the Russian Federation, Resolution on the Refusal to Initiate a Criminal Case (27 October 2017) (Russia's Counter-Memorial Part II, Annex 371); Prosecutor's Office of the Republic of Crimea, Letter No. 27-239-2017/Np10860-2017 to the Military Prosecutor's Office of the Black Sea Fleet (20 December 2017) (Russia's Counter-Memorial Part II, Annex 584); Prosecutor's Office of the Republic of Crimea, Letter No. 27-239-2017/On6074-2017 to E.M. Kurbedinov (20 December 2017) (Russia's Counter-Memorial Part II, Annex 585). While the investigative records summarily quote two "witnesses" who purportedly participated in the searches at Mr. Paralamov's home and the purported "arms cache," those witnesses were admittedly not present during the interrogations or the undeclared incommunicado detention, during which the torture occurred, and therefore are irrelevant. 534th Military Investigative Department of the Investigative Committee of the Russian Federation, Resolution on the Refusal to Initiate a Criminal Case (27 October 2017), pp. 2-4 (Russia's Counter-Memorial Part II, Annex 371).

⁸⁴⁷ According to the FSB officers, Mr. Paralamov voluntarily came to them at the FSB after his house search, voluntarily confessed to his affiliation with Hizb ut-Tahrir and "his future activity in the interests of the terrorist organisation," was released from the FSB at 5 pm, but voluntarily returned the next day and confessed to creating "an arms cache" in a remote area just a month before to hide "a TNT demolition slab, two electronic detonators, and some 15 bullets," which was promptly confirmed by the FSB. 534th Military Investigative Department of the Investigative Committee of the Russian Federation, Resolution on the Refusal to Initiate a Criminal Case (27 October 2017), pp. 2-3 (Russia's Counter-Memorial Part II, Annex 371).

allegedly committed.⁸⁴⁸ No serious investigator would consider this narrative even remotely plausible. It remains clear that this is a case either of torture or failure to investigate.

460. Similarly, Russia's denial of Mr. Aleksandr Kostenko's claim of torture by FSB officers relies primarily on statements of the accused perpetrators, the FSB officers, and the fact that Mr. Kostenko did not raise any complaints during his interrogations.⁸⁴⁹ Based on these facts, the military investigative authorities concluded (similar to Mr. Paramalov's case) that Mr. Kostenko in fact "voluntarily came to [the FSB] and said that he had been involved in" criminal acts, and dismissed his complaint as "an attempt to escape criminal liability."⁸⁵⁰

461. In certain cases, Russia tries to blame Ukraine for its own lack of progress on the investigation.⁸⁵¹ But it is evident that Russia's requests for cooperation were nothing but an eleventh-hour attempt to shift the blame to Ukraine. For instance, Russia argues that Ukraine's alleged failure to cooperate "directly contribut[ed]" to the suspension of Russia's investigation of Mr. Ametov's case.⁸⁵² Russia's evidence shows, however, that its request for Ukraine's cooperation did not come until 15 December 2017,⁸⁵³ more than 3.5 years after the

⁸⁴⁸ *Ibid.*, pp. 4–5. The decision was summarily affirmed by the 309th Military Prosecutor's office of garrison in a nearly mirror-image decision. Military Prosecutor of the 309th Military Prosecutor's Office of the Garrison, Report on the Examination of the Legality of the Decision to Refuse to Initiate Criminal Proceedings (20 February 2018), p. 6 (Russia's Counter-Memorial Part II, Annex 395).

⁸⁴⁹ Military Investigative Directorate of the Investigative Committee of the Russian Federation for the Black Sea Fleet, Resolution on the Refusal to Initiate a Criminal Case (18 April 2015) (Russia's Counter-Memorial Part II Annex 228).

⁸⁵⁰ *Ibid.* Part of Mr. Kostenko's claims are also that his inmates at the detention facility abused and tortured him on the instruction of the Russian authorities. Russia's basis to deny that claim is the very inmates' testimony, as well as Mr. Kostenko's denial of the torture while still in detention with the accused perpetrators. Main Investigative Directorate of the Investigative Committee of the Russian Federation for the Republic of Crimea, Resolution on the Refusal to Initiate a Criminal Case (25 May 2015) (Russia's Counter-Memorial Part II, Annex 235).

⁸⁵¹ Russia's Counter-Memorial Part II, App. A, para. 23.

⁸⁵² *Ibid.*

⁸⁵³ Main Investigative Directorate of the Investigative Committee of the Russian Federation for the Republic of Crimea, Request for Legal Assistance No. 201-04- 2017/23765 Addressed to the

investigation by Russia purportedly began on 4 April 2014 and almost a full year after Ukraine filed its initial application in this case. The request also came in the very final moments of Russia's investigation; in fact, Russia suspended the investigation on 12 January 2018, less than a month after the request was sent to Ukraine, and while Ukraine's response was pending.⁸⁵⁴ Russia fails to explain why the requested information became "critical" only 3.5 years into the investigation.⁸⁵⁵

462. Russia's allegation that Mr. Shaimardanov's and Mr. Zinedinov's case was "stalled not least because of the intractability of Ukraine" is similarly unfounded.⁸⁵⁶ The request was made only in February 2018, nearly four years after the investigation purportedly began in May 2014.⁸⁵⁷

D. All of the Enforced Disappearances, Murders, Abductions, or Torture Set Forth in Ukraine's Memorial, Including Incidents Occurring Before 18 March 2014, Are Attributable to Russia

463. Russia tries to evade responsibility for its CERD violations by claiming that none of the alleged enforced disappearances, murders, abductions, or torture is attributable to it.⁸⁵⁸ Russia asserts, in particular, that it cannot be held responsible for acts occurring earlier than 18 March 2014, the effective date of the Law on Accession incorporating Crimea

Competent Authorities of Ukraine (15 December 2017) (Russia's Counter-Memorial Part II, Annex 519).

⁸⁵⁴ First Investigative Department of the High-Priority Cases Directorate of the Main Investigative Directorate of the Investigate Committee of the Russian Federation for the Republic of Crimea, Note Regarding Criminal Case No. 2014417004 on Murder of R.M. Ametov (December 2020), p. 4 (Russia's Counter-Memorial Part II, Annex 417).

⁸⁵⁵ Russia's Counter-Memorial Part II, App. A, para. 23.

⁸⁵⁶ *Ibid.*, para. 28.

⁸⁵⁷ Letter No. 14/1/1-24294-18 of the Department of International Legal Cooperation of the Prosecutor General's Office of Ukraine to the Directorate for International Cooperation of the Investigative Committee of the Russian Federation (3 March 2018) (responding to Russia's letter of 1 February 2018) (Russia's Counter-Memorial Part II, Annex 520).

⁸⁵⁸ Russia's Counter-Memorial Part II, paras. 345–347; *see also ibid.*, App. A, paras. 43–57.

into the Russian Federation, thereby seeking to absolve itself of liability for any of the string of disappearances of Crimean Tatar and Ukrainian individuals in the run-up to the purported referendum on Crimea's future.⁸⁵⁹

464. As established in Chapter 9, incidents occurring before 18 March 2014 are properly before the Court.⁸⁶⁰ To the extent that Russian military, police, or other personnel were involved in the conduct, that conduct is directly attributable to the Russian Federation as the act of an organ of state pursuant to Article 4 of the Articles on State Responsibility.⁸⁶¹ The GRU's involvement in the abduction and torture of Mr. Shchekun and Mr. Kovalski, for instance, is attributable to Russia on this basis.⁸⁶²

465. The involvement of the SDF in this conduct is attributable to Russia pursuant to Article 8 of the Articles on State Responsibility because it was carried out on the instructions of, or under the direction or control of, the Russian Federation.⁸⁶³ The fact that SDF members were working under the direction of the Russian forces is apparent in some of the particular cases recorded in Ukraine's Memorial. For example, while SDF members were immediately responsible for the detention of Mr. Shchekun and Mr. Kovalsky, they were accompanied by Russian GRU officers to whom the prisoners were subsequently handed over for detention and torture.⁸⁶⁴ The SDF members' abduction and detention of Mr. Ametov is similarly attributable

⁸⁵⁹ See Russia's Counter-Memorial Part II, para. 347; Ukraine's Memorial, paras. 395, 398, 405–408.

⁸⁶⁰ Cf. Russia's Counter-Memorial Part II, para. 347; see *supra*, Chapter 9(G).

⁸⁶¹ Draft Articles on Responsibility of States, art. 4 (Ukraine's Memorial, Annex 279).

⁸⁶² The apparent involvement of Russian police in Mr. Ibragimov's abduction and the FSB's involvement in Mr. Paralamov's and Mr. Kostenko's torture is demonstrated in this Chapter, above. Such conduct is similarly attributable to Russia pursuant to Article 4 of the Articles on State Responsibility. Russia's subsequent failure to investigate those events provide an additional basis for Russia's responsibility under the CERD.

⁸⁶³ Draft Articles on Responsibility of States, art. 8 (Ukraine's Memorial, Annex 279).

⁸⁶⁴ Shchekun Statement, paras. 21–23 (Ukraine's Memorial, Annex 13).

to Russia, because, as Russia asserts as the reason for their non-prosecution,⁸⁶⁵ they were acting “in accordance with their powers for maintaining public order,” under the direction of individuals who were carrying out law enforcement activities (*e.g.*, interrogating individuals for criminal activities), whose identity Russia does not disclose.⁸⁶⁶

466. To the extent that the Court were to find specific alleged conduct to *not* be attributable to Russia on the bases described above, Russia should still be found to be in violation of the CERD on one or both of two alternative grounds. First, Russia ignores that the scope of state responsibility under the CERD is broad, encompassing violations of the Convention on account of both actions and inaction by the State or its officials, as well as actions by third parties that are tolerated by the State.⁸⁶⁷ Under CERD Article 2(1)(b), for instance, Russia is barred from “sponsor[ing], defend[ing] or support[ing] racial discrimination by any persons or organizations.” CERD Article 5(b) further guarantees freedom from discrimination in “the right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution.” If it is found that Russia is not directly responsible for the acts described in the Memorial, it should at the very least be held liable under Articles 2(1)(b) and 5(b) for

⁸⁶⁵ *See supra*, para. 454.

⁸⁶⁶ First Investigative Department of the High-Priority Cases Directorate of the Main Investigative Directorate of the Investigative Committee of the Russian Federation for the Republic of Crimea, Note Regarding Criminal Case No. 2014417004 on Murder of R.M. Ametov (December 2020), pp. 3–4 (Russia’s Counter-Memorial Part II, Annex 417).

Separately, Russia is wrong to say that the acts described in the Memorial cannot be attributed to it because the SDF was officially established only in July 2014. *See* Russia’s Counter-Memorial Part II, App. A, para. 37, n.93. Even under Russia’s theory, the conduct of the SDF would nonetheless be attributable to Russia because of the general evidence of Russian effective control over Crimea, as established in Chapter 8 of the Memorial, including the subsequent admissions of President Putin. *See generally* Ukraine’s Memorial, Part I(A) & Part III, Chapter 8(B).

⁸⁶⁷ Ukraine’s Memorial, paras. 590–593.

facilitating and tolerating the violence inflicted on Crimean Tatar and Ukrainian community members by the SDF and others.

467. Second, and relatedly, Article 6 of the CERD imposes an obligation on Russia to investigate complaints in a satisfactory manner.⁸⁶⁸ Ukraine submits that, to the extent Russia is not held directly responsible for the conduct described in this Chapter, it should be held responsible for its failure to effectively investigate *any* of the enforced disappearances, murders, abductions, or torture of Crimean Tatars and Ukrainians, in violation of the CERD. As just one glaring example of Russia's failure in this regard, Russia's purported investigation of the murder of Mr. Ametov omitted to identify the presumably Russian personnel under whose directions the SDF was acting.

* * *

468. Despite Russia's weak arguments to the contrary, it is evident that Russia should be held responsible for *all* of the instances of enforced disappearances, murders, abductions, or torture set out in Ukraine's Memorial, both prior to and following 18 March 2014, either because those acts are directly attributable to Russia, or because Russia failed to prevent third parties from inflicting harm or to effectively investigate. The targeting of Crimean Tatars and Ukrainians in this manner constitutes a clear violation of Russia's obligations under CERD.

⁸⁶⁸ See CERD, art. 6; Ukraine's Memorial, paras. 631–633.

Chapter 11. POLITICAL SUPPRESSION OF THE CRIMEAN TATAR PEOPLE

469. Ukraine’s Memorial showed that, beginning in the weeks after its illegal occupation of Crimea, Russia took a series of actions that deprived the Crimean Tatar people of its political leadership. At the heart of these measures was a sustained campaign aimed at dismantling the Crimean Tatar community’s central political and cultural institution, the Mejlis, beginning in 2014 with the exclusion from Crimea of its top leadership, followed by the serial harassment of Mejlis members and interference with the institution’s assets, and culminating in 2016 in an outright ban on the Mejlis as a supposedly extremist organization. Ukraine claims, in particular, that these arbitrary measures were carried out with the purpose or effect of restricting core civil rights in violation of CERD articles 2(1), 4, and 5(a).⁸⁶⁹

470. Russia does not dispute that it has taken all of the actions described in Ukraine’s Memorial. Remarkably, it confirms that, in continued violation of the Court’s Provisional Measures Order of 19 April 2017,⁸⁷⁰ the Russian authorities have taken no action whatsoever to lift the ban on the Mejlis, and have instead doubled down on their efforts to replace it with pro-Russian bodies that do not, and have never, represented the Crimean Tatar people at large. In fact, Russia’s systemic oppression of the Mejlis and its members is ongoing and intensifying.⁸⁷¹ As the FSB boasted in September 2021:

⁸⁶⁹ Ukraine’s Memorial, paras. 588–608.

⁸⁷⁰ *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. 140, para. 106(1)(a) (“With regard to the situation in Crimea, the Russian Federation must, in accordance with its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination, . . . [r]efrain from maintaining or imposing limitations on the ability of the Crimean Tatar community to conserve its representative institutions, including the Mejlis.”).

⁸⁷¹ See, e.g., RFE/RL, *Russian Intelligence Accuses Crimean Tatars of Pipeline Sabotage After Kyiv Riposte* (7 September 2021); Anastasiia Lapatina, *Russian Authorities Raid Crimean Tatar Homes In Crimea, Arrest Deputy Head of Mejlis (UPDATED)*, Kyiv Post (4 September 2021), accessed at

Since April 2016, 32 supporters of the Mejlis have been convicted under different articles of Russia's Criminal Code, 50 indicted on criminal charges, 306 brought to justice for administrative offences, and 33 prohibited from entry, 53 anti-Russian demonstrations were prevented, and 301 prosecutor warnings and 297 police warnings issued.⁸⁷²

471. In an attempt to avoid accountability for its actions, Russia seeks both to minimize the human rights of the Crimean Tatar people in the political sphere and to claim for itself the right to abrogate at will such rights as it does recognize. The Court should, however, recognize Russia's actions for what they are: punitive measures directed explicitly at the Crimean Tatar community which have the indisputable effect of sharply curtailing that community's civil rights and entrenching racial discrimination — in short, an open and brazen violation of a Convention dedicated to the elimination of racial discrimination.

A. The Ban on the Mejlis and Other Acts of Political Suppression Against the Crimean Tatar Community Violate the CERD

472. Russia claims that the ban on the Mejlis falls outside the scope of the CERD because the Convention does not provide for a right of minorities to have and maintain a representative body.⁸⁷³ As an initial matter, Russia's assertion that its assault on the central political institution of the Crimean Tatar people implicates no human rights is inconsistent with the view taken by the Court in the preceding phases of this case. In its Order on Provisional Measures of 19 April 2017, the Court found with regard to the banning of the Mejlis by the Russian authorities that "it is plausible that the acts complained of constitute acts of racial discrimination under the Convention," ordering unambiguously that Russia

<https://www.kyivpost.com/ukraine-politics/russian-authorities-raid-crimean-tatar-homes-in-crimea-arrest-deputy-head-of-mejlis.html>.

⁸⁷² TASS, *FSB Prevents 53 Anti-Russian Demonstrations by Mejlis in Crimea Over Five Years* (15 September 2021).

⁸⁷³ Russia's Counter-Memorial Part II, paras. 138–149; Russia's Objections, para. 328.

immediately lift the ban.⁸⁷⁴ The Court rejected an essentially identical claim Russia made in its Preliminary Objections,⁸⁷⁵ concluding that the measures of which Ukraine complains, including the ban on the Mejlis, “fall within the provisions of the Convention.”⁸⁷⁶

473. Russia’s position is also incompatible with the view of the CERD Committee, which stated in 2017 that it was “particularly concerned about the ban and strict limitations on the operation of Crimean Tatar representative institutions, such as the outlawing of the Mejlis.”⁸⁷⁷ Consistent with Ukraine’s position in this matter, the Committee “urge[d] [Russia] to repeal any administrative or legislative measures adopted since [it] started to exercise effective control over Crimea that have the purpose or effect of discriminating against any ethnic group or indigenous peoples on grounds prohibited under the Convention, including in relation to . . . the operation of Crimean Tatar representative institutions.”⁸⁷⁸

474. Russia’s attempt to hide behind the alleged non-existence of a right of its own formulation mischaracterizes Ukraine’s arguments and is beside the point. As set forth in Ukraine’s Memorial, the political suppression of the Crimean Tatar community burdens numerous human rights, the existence of which is not disputed, including, without limitation,

⁸⁷⁴ *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, pp. 135 & 140, paras. 82–83 & 106(1).

⁸⁷⁵ See Russia’s Objections, para. 328 (“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.”).

⁸⁷⁶ *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Preliminary Objections, Judgment of 8 November 2019, I.C.J. Reports 2019*, pp. 593 & 595, paras. 88 & 96.

⁸⁷⁷ CERD Committee, Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, Concluding Observations of the Committee on the Elimination of Racial Discrimination, Russian Federation, CERD/C/RUS/CO/23-24 (20 September 2017), para. 19 (Ukraine’s Memorial, Annex 804).

⁸⁷⁸ *Ibid.*, para. 20.

the rights to equal treatment before tribunals, freedom of opinion and expression, and freedom of association and of peaceful assembly.⁸⁷⁹ Moreover, the ban on the Mejlis and other measures targeting leaders of the Crimean Tatar community is an unmistakable indicator that the community itself is being singled out for discriminatory treatment. Together, those two things — a distinction targeting a particular group and a consequent burden on the human rights of that group — constitute the essence of a CERD violation.⁸⁸⁰

B. Russia’s Ban on the Mejlis Has Deprived the Crimean Tatar Community of Its Legitimate Representative Institution

475. Russia maintains that its ban on the Mejlis was not directed at the Crimean Tatar community as such, since, “among all existing institutions, organizations, and associations that purport to defend the interests of the Crimean Tatar community, including the Qurultay, the *Mejlis* was *the only one* to be banned.”⁸⁸¹ Russia contends that “there is today, and there has been . . . no impediment to the representation of the Crimean Tatar Community, which is represented by many organisations and associations in Crimea, while the *Mejlis* has discredited itself due to its violent and subversive activities.”⁸⁸²

476. Russia’s assumption that it, rather than the Crimean Tatar people, has the right to decide which organization should speak for that community betrays its misunderstanding of what constitutes genuinely representative politics. But its argument that the Mejlis is just

⁸⁷⁹ Ukraine’s Memorial, paras. 605–606, 619–622.

⁸⁸⁰ Russia alleges, without support, that Ukraine’s characterization of Russia’s assault on the Mejlis and its members as “political suppression of Crimean Tatars . . . does not relate to racial discrimination.” Russia’s Counter-Memorial Part II, para. 163. As demonstrated in Chapter 9(D), Russia’s argument rests on a misunderstanding of the requirements of CERD Article 1(1). *See supra*, para. 417; *see also 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, Declaration of Judge Crawford, I.C.J. Reports 2017*, p. 215, para. 7.

⁸⁸¹ Russia’s Counter-Memorial Part II, para. 223 (emphasis in original).

⁸⁸² *Ibid.*, para. 137.

one of many equally plausible representative institutions is also wrong. As this section will explain, the Mejlis, a body indirectly elected by the entire Crimean Tatar population, has long been recognized as the community's authentic voice. None of the alternative bodies touted by Russia share its legitimacy. Russia's attempt to replace the Mejlis by sponsoring one or more of those alternatives only confirms its disdain for the Crimean Tatar people's political rights.

1. The Mejlis Has Been Widely Recognized as the Legitimate Representative Body of the Crimean Tatar Community

477. Of central significance to the legitimacy of the Mejlis is that it is elected by the Qurultay of the Crimean Tatar People, the delegates of which are themselves elected directly every five years by the Crimean Tatar people at large.⁸⁸³ According to a 2013 needs assessment for the OSCE's High Commissioner for National Minorities, the Qurultay of the Crimean Tatar People "is regarded by most Crimean Tatars as their representative body," with turnout in the early phases of the 2013 Qurultay elections ranging between 57 and 68 per cent of the Crimean Tatar electorate.⁸⁸⁴ To put that in perspective, the upper end of that range exceeds the turnout on which both the current President of the United States and Prime Minister of the United Kingdom were elected (66.8 per cent and 67.3 per cent respectively).⁸⁸⁵

478. The representative legitimacy provided by this electoral base has long made the Mejlis the partner of choice for international organizations wishing to engage with the Crimean Tatar people. The Mejlis has been a permanent member of the Unrepresented

⁸⁸³ Witness Statement of Mustafa Dzhemilev (31 May 2018), para. 5 [hereinafter Dzhemilev Statement] (Ukraine's Memorial, Annex 16); *see also* The Provision On Mejlis of the Crimean Tatar People, Art. 4 (12 September 2004), accessed at http://qtm.org/public/images/ckeditor/file/quick-folder/the_provision_on_mejlis_of_the_crimean_tatar_people.doc.

⁸⁸⁴ OSCE HCNM, *The Integration of Formerly Deported People in Crimea, Ukraine: Needs Assessment* (August 2013), p. 16 & n.38 (Ukraine's Memorial, Annex 805).

⁸⁸⁵ U.S. Census Bureau, *2020 Presidential Election Voting and Registration Tables Now Available* (29 April 2021); BBC News, *Results of the 2019 General Election* (14 December 2019).

Nations and Peoples Organization since 1991 and the Federal Union of European Nationalities since 1993.⁸⁸⁶ In 1995, the Mejlis was accredited by the United Nations inter-sessional Working Group on the draft United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).⁸⁸⁷ United Nations Economic and Social Council resolution 1995/317 gave the Mejlis U.N. recognition as an organization of indigenous people and allowed it to work with the U.N. in that capacity.⁸⁸⁸

479. The Mejlis' role as the representative body of the Crimean Tatar people has also been recognized by the Verkhovna Rada of Ukraine, the Cabinet of Ministers of Ukraine, and the President of Ukraine, who have long turned to the Mejlis and its leaders for input on socio-economic, cultural, and other major issues concerning the Crimean Tatar community.⁸⁸⁹ Tellingly, at the beginning of Russia's occupation, the Qurultay and the Mejlis were also recognized as "bodies of national self-governance for the Crimean Tatar people" by the legislature of the so-called Republic of Crimea.⁸⁹⁰

480. The Mejlis' significance has also been accepted by various U.N. bodies and regional organizations, which have consistently criticized Russia's ban. For example, the

⁸⁸⁶ Witness Statement of Eskender Bariiev (6 June 2018), paras. 22, 25 [hereinafter Bariiev Statement] (Ukraine's Memorial, Annex 15).

⁸⁸⁷ *Ibid.*, para. 24.

⁸⁸⁸ U.N. Economic and Social Council Resolution 1995/317, Applications from Organizations of Indigenous People Not in Consultative Status with the Economic and Social Council for Participation in the Open-Ended Intersessional Working Group of the Commission on Human Rights to Elaborate a Draft Declaration on the Rights of Indigenous Peoples (2 November 1995), part B.

⁸⁸⁹ *See, e.g.*, Bariiev Statement, para. 24 (Ukraine's Memorial, Annex 15); Verkhovna Rada of Ukraine, Resolution No. 1140-VII "On the Statement of the Verkhovna Rada of Ukraine on Guaranteeing the Rights of the Crimean Tatar People within the State of Ukraine" (20 March 2014) (recognizing the Mejlis and the Qurultay as the "supreme representative body of the Crimean Tatar people") (Russia's Counter-Memorial Part II, Annex 793).

⁸⁹⁰ Bariiev Statement, para. 26 (Ukraine's Memorial, Annex 15); Verkhovna Rada of the Autonomous Republic of Crimea, Resolution on Guarantees of the Restoration of the Rights of the Crimean Tatar People and Their Integration into the Crimean Community No. 1728-6/14 (11 March 2014) (excerpts) (Russia's Counter-Memorial Part II, Annex 789).

OHCHR has concluded that “the ban on the Mejlis, which is a self-government body with quasi-executive functions, appears to deny the Crimean Tatars — an indigenous people of Crimea — the right to choose their representative institutions,”⁸⁹¹ warning that the ban “could be perceived as a collective punishment against the Crimean Tatar community.”⁸⁹² The U.N. General Assembly,⁸⁹³ the CERD Committee,⁸⁹⁴ and the European Parliament⁸⁹⁵ have also called for the ban to be lifted.

2. None of the Alternatives Touted by Russia Come Close to Rivaling the Mejlis’ Legitimacy and Representativeness

481. Russia tries to minimize the significance of the Mejlis by referring to 30 or so Crimean Tatar “organizations” that existed in Crimea at the time the ban.⁸⁹⁶ But as the Court recognized in its Provisional Measures Order, none of these “organizations” can claim the same role as the legitimate representative institution of the Crimean Tatar people.⁸⁹⁷ None is

⁸⁹¹ OHCHR, Report on the Human Rights Situation in Ukraine (16 May–15 August 2016), para. 177 (Ukraine’s Memorial, Annex 772).

⁸⁹² OHCHR, Report on the Human Rights Situation in Ukraine (16 February–15 May 2016), para. 188 (Ukraine’s Memorial, Annex 771).

⁸⁹³ U.N. General Assembly Resolution 71/205, U.N. Doc. A/RES/71/205, *Situation of Human Rights in the Autonomous Republic of Crimea and the City of Sevastapol (Ukraine)* (19 December 2016), para. 2(g); U.N. General Assembly Resolution 72/190, U.N. Doc. A/RES/72/190, *Situation of Human Rights in the Autonomous Republic of Crimea and the City of Sevastapol, Ukraine* (19 December 2017), para. 3(j).

⁸⁹⁴ CERD Committee, Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, Concluding Observations of the Committee on the Elimination of Racial Discrimination, Russian Federation, CERD/C/RUS/CO/23-24 (20 September 2017), paras. 19–20 (Ukraine’s Memorial, Annex 804).

⁸⁹⁵ Sharply criticizing the ban, the European Parliament recognized the Mejlis as “the legitimate and recognised representative body of the indigenous people of Crimea,” demanding Russia’s “respect for the Mejlis as the legitimate representation of the Crimean Tatar community.” European Parliament, Resolution of 12 May 2016 on the Crimean Tatars, 2016 O.J. C76/27, para. J.1–2 (Ukraine’s Memorial, Annex 830); European Parliament, Resolution of 4 February 2016 on the Human Rights Situation in Crimea, in Particular of the Crimean Tatars, 2016 O.J. C35/38, para. H.3.

⁸⁹⁶ Russia’s Counter-Memorial Part II, para. 226.

⁸⁹⁷ *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,

an elected body with the legitimacy or capability to represent the Crimean Tatar community at large, and Russia does not indicate otherwise.⁸⁹⁸ In fact, a number of these organizations have been working with the Crimean authorities to undermine the Mejlis.⁸⁹⁹

482. Nor do the new pro-Russia organizations that Russia deems to have replaced the Mejlis represent the Crimean Tatar community at large. For instance, Russia refers to an “extraordinary session of the extended Qurultay of the Muslims of Crimea” that took place on 17 February 2018, and which elected the so-called “Council” of the Crimean Tatar People, or *Shura*.⁹⁰⁰ This “Qurultay,” whose delegates are appointed by local religious organizations, is a distinct organization with a religious focus and not a representative institution elected by the Crimean Tatar people.⁹⁰¹ Mr. Ablayev, a leading member of this supposed “Qurultay” and now the head of the Shura, is well-known within the Crimean Tatar community as a renegade outlier who has chosen to work with the Russian authorities in Crimea.⁹⁰²

p. 138, para. 97 (taking note of the finding of the OHCHR that “the ban on the *Mejlis*, which is a self-government body with quasi-executive functions, appears to deny the Crimean Tatars — an indigenous people of Crimea — the right to choose their representative institutions” and citing the OHCHR’s finding that “none of the Crimean Tatar NGOs currently registered in Crimea can be considered to have the same degree of representativeness and legitimacy as the Mejlis, elected by the Crimean Tatars’ assembly, namely the *Kurultai*” (or Qurultay)).

⁸⁹⁸ Russia’s Counter-Memorial Part II, paras. 225–231.

⁸⁹⁹ 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), para. 239 [hereinafter 2015 OSCE Report] (Ukraine’s Memorial, Annex 812). For the same reasons, Russia’s selective quotes from marginal pro-Russia Crimean Tatar groups and officials that are critical toward the Mejlis do not disprove the widely-recognized legitimacy of the Mejlis or support Russia’s position that the ban on the Mejlis resulted in “no impediment to the representation of the Crimean Tatar Community.” See Russia’s Counter-Memorial Part II, paras. 137, 238–248.

⁹⁰⁰ Russia’s Counter-Memorial Part II, para. 232.

⁹⁰¹ See Taurica.net, *Qurultai of Muslims of Crimea Will Take Place On October 27* (2 August 2018) (Ukraine’s Reply, Annex 153).

⁹⁰² See, e.g., Credo Press, *The Loyal to Moscow Mufti of Crimea Ablayev Is Accused by the World Congress of Crimean Tatars In Reporting on Muslims* (19 October 2016) (Ukraine’s Reply, Annex 143).

483. The so-called “Council of Crimean Tatars under the Head of the Republic of Crimea,”⁹⁰³ established in March 2018 by the occupation authorities on the basis of a proposal from the Shura, is a transparent attempt by Russia to replace the Mejlis with a body that is under its control.⁹⁰⁴ As Russia explains, “[a]ll of the *Shura*’s members elected by the Qurultay [of the Muslims of Crimea] were integrated into the newly-established Council headed by Mr Aksyonov,” the so-called Head of the Republic of Crimea, whose Deputy is Mr. Ablayev.⁹⁰⁵

484. In sum, Russia’s reference to some “other public organizations that continue to represent the Crimean Tatars in Crimea” that purportedly “enjoy[] very high degrees of representativeness and legitimacy” is without basis.⁹⁰⁶ As Judge Crawford stated in his separate declaration to the Court’s Order on Provisional Measures, no other institution can replicate the Mejlis’ role as the Crimean Tatar’s legitimate representative institution:

It is the Mejlis, as the executive body, that operationalizes the policies and and “represent[s] the interests of the Crimean Tatar people [at] all levels.” In the absence of the Mejlis, the ability of the Crimean Tatars to secure effective representation as a group is impaired. As the Provisional Measures Order explains, the other groups in Crimea representing the Crimean Tatars do not appear to have the same status or level of

⁹⁰³ Russia’s Counter-Memorial Part II, para. 233.

⁹⁰⁴ The Russian authorities in Crimea have subsequently been clear that they view the Shura as having replaced the Mejlis. The so-called Deputy Prime Minister of Crimea, Georgy Muradov, stated in December 2018: “I would like to remind you that there is no such organization as the Mejlis for a long time. The Crimean Tatars held a [Q]urulta[y] (congress), at which they elected a new governing body - the [S]hura (council) headed by the spiritual leader Mufti Emirali Ablaev.” RIA Novosti, *Crimea Warns Turkey Against Supporting Mejlis* (16 December 2018) (Ukraine’s Reply, Annex 156); *see also*, RIA Novosti, *Kurultai of Crimea Asked to Transfer the Property of the “Mejlis” to the SAMK* (27 October 2018) (describing how the Qurultay of Crimean Muslims “appeal[ed] to the authorities” to transfer property belonging to the Mejlis to the Spiritual Administration of Muslims of Crimea (“SAMK”), including “apartments, premises equipped for a medical clinic, [and] a building in the center of Simferopol, where the leadership of the Mejlis [had been] located until 2014.”) (Ukraine’s Reply, Annex 154).

⁹⁰⁵ Russia’s Counter-Memorial Part II, para. 233; Decree No. 93-U “On Establishing the Council of Crimean Tatars Under the Head of the Republic of Crimea” (29 March 2018) (Russia’s Counter-Memorial Part II, Annex 112).

⁹⁰⁶ Russia’s Counter-Memorial Part II, para. 224.

acceptance as the Mejlis.⁹⁰⁷

C. Russia’s Invocation of National Security Concerns as a Justification for Its Ban on the Mejlis Has No Basis in Fact or Law

485. Russia next claims that the ban on the Mejlis was a justifiable restriction on human rights for legitimate security reasons, which were upheld by domestic courts, based on its anti-extremism laws.⁹⁰⁸ Russia argues that the ban was proportionate to the allegedly “extremist” conduct of the Mejlis, its members, and associates.⁹⁰⁹ But Russia fails to show that the ban was no more restrictive than strictly necessary to achieve its claimed goal.

1. Russia’s Defense of the Ban on the Mejlis Is Legally Flawed

486. The fact that the ban on the Mejlis was upheld under Russia’s anti-extremism laws — widely criticized for falling far short of meeting international standards for ensuring the protection of human rights — does not shield Russia from its blatant violation of the CERD.⁹¹⁰ As Professor Scheinin explains in his expert report, the CERD’s “prohibition against racial discrimination is absolute.”⁹¹¹ Even assuming that Russia’s use of its anti-extremism laws was genuinely directed at a national security or extremist threat, or a risk to public order, such alleged threats do not authorize Russia to discriminate against the Crimean Tatar community in breach of its CERD obligations.

487. To the extent that Russia claims that concerns relating to national security, anti-extremism, or public order could justify its restrictions on underlying substantive human

⁹⁰⁷ *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, Declaration of Judge Crawford, I.C.J. Reports 2017*, p. 214, para. 4.

⁹⁰⁸ Russia’s Counter-Memorial Part II, paras. 154–163.

⁹⁰⁹ *Ibid.*, paras. 155–175.

⁹¹⁰ *See supra*, Chapter 9(F).

⁹¹¹ Scheinin Report, para. 14 (Ukraine’s Reply, Annex 7); *see also supra*, para. 428.

right, such as the rights to freedom of opinion and expression, and freedom of association and of peaceful assembly, Russia has entirely failed to meet the strict requirements for such restrictions. As Professor Scheinin explains in his expert report, the extent to which human rights may be curtailed for national security reasons is strictly limited, and specific, rigorous procedures must be followed by States that believe that such curtailments are necessary.⁹¹²

488. But not only has Russia made no attempt to notify the relevant international bodies in advance of its need to place such limitations on the human rights of people living under its jurisdiction or to formally invoke derogations under the applicable instruments, it fails entirely to show that its actions were limited, tailored, and not more restrictive than strictly necessary. Instead, Russia has opted for the most extreme option of an outright ban on the Mejlis, without regard to the grave consequences for the freedoms of assembly, speech, and expression of the Crimean Tatar community.

2. Russia's Account of the Mejlis' Alleged Extremist Activities Is Without Factual Basis and Does Not Justify the Ban

489. Russia points to what it calls “an abundant series of extremist actions attributable to *Mejlis* members, stretching over an extensive period of time, usually in connection to contesting Crimea's change of status.”⁹¹³ But Russia's account grossly mischaracterizes the underlying events and the Mejlis' supposed involvement in them.⁹¹⁴

⁹¹² Scheinin Report, paras. 20–22 (Ukraine's Reply, Annex 7); *see also supra*, paras. 429–431.

⁹¹³ Russia's Counter-Memorial Part II, para. 166.

⁹¹⁴ In a single sentence, Russia contends that the Mejlis did not raise racial discrimination claims in any of the Russian court proceedings. *Ibid.*, para. 163. Whatever Russia means by that claim, the fact that the Mejlis did not raise racial discrimination claims in any of the Russian court proceedings is irrelevant to whether Russia violated its CERD obligations. The Court has already found that Ukraine's CERD claims, including as they relate to the Mejlis, are properly before the Court and rejected Russia's objection based on an alleged requirement to exhaust local remedies. Judgment on Preliminary Objections, p. 606, para. 130.

490. Russia asserts that the Mejlis has historically been an extremist group, pointing to snippets from selective sources that have blamed the Mejlis for conflicts involving the Crimean Tatar community.⁹¹⁵ In reality, the pre-2014 events that Russia cites highlight the lingering effect of the mass deportation of the Crimean Tatar people by Stalin in 1944 and the severe hardship that the community has faced since its return to Crimea.⁹¹⁶ Ultimately, it is telling that the Mejlis was never banned by the Ukrainian government, which has instead recognized it as the legitimate representative body of the Crimean Tatar people.⁹¹⁷

491. The real reason for the ban is the opposition of the Crimean Tatar people, voiced by the Mejlis, to Russia's illegal act of aggression. This is evident from Russia's extended but misleading account of a series of events in the lead-up to and following its annexation of Crimea.⁹¹⁸ But notwithstanding their principled protests against Russia's

⁹¹⁵ Russia's Counter-Memorial Part II, para. 167.

⁹¹⁶ For instance, Russia claims that "[t]he Mejlis' violent activities started as early as 1992, in Krasny Rai." *Ibid.*; see also *ibid.*, para. 144. It was in fact the Crimean Tatar community that was subject to hostility, and sometimes violence, from unwelcoming local authorities and trade unions. See Dzhemilev Statement, para. 7 (Ukraine's Memorial, Annex 16); Gulnara Bekirova, *Red Paradise: Bloody Way Home*, Krym.Realii (23 October 2016) (Ukraine's Reply, Annex 144); Gulnara Bekirova, *Red Paradise: Bloody Way Home (Ending)*, Krym.Realii (24 October 2016) (Ukraine's Reply, Annex 145). While vigilantly advocating for Crimean Tatar re-settlers' rights, the Mejlis has been consistently focused on finding a peaceful solution. See Dzhemilev Statement, para. 7 (Ukraine's Memorial, Annex 16); Appeal of the Mejlis of the Crimean Tatar People to All Residents of Crimea (Simferopol) (7 October 1992) ("We are and will continue to strive for recovery [of] the rights of the Crimean Tatar people only in such forms that do not carry [any] danger or threat to citizens, no matter what nationality.") (Ukraine's Reply, Annex 176).

⁹¹⁷ See, e.g., Verkhovna Rada of Ukraine, Resolution No. 1140-VII "On the Statement of the Verkhovna Rada of Ukraine on Guaranteeing the Rights of the Crimean Tatar People Within the State of Ukraine" (20 March 2014) (Russia's Counter-Memorial Part II, Annex 793); see also Bariev Statement, para. 24 (Ukraine's Memorial, Annex 15). Select local parliament members' opinions from decades ago, some of which are before the dissolution of the Soviet Union, are irrelevant and, in any event, do not support Russia's false claim that Ukraine "reacted in the very same manner that it now holds against the Russian Federation." Russia's Counter-Memorial Part II, para. 143.

⁹¹⁸ Russia's Counter-Memorial Part II, para. 167.

unlawful aggression, and Russia’s subsequent acts of harassment targeting the Crimean Tatar community, the leaders of the Mejlis have remained committed to avoiding violence.⁹¹⁹

492. Russia’s account of the 2015 civil “blockade” is also misleading.⁹²⁰ As Mr. Chubarov testifies in his follow-up witness statement, the civil blockade was intended to be, and was implemented as, a peaceful, open-to-the public, and principled protest, within the territory of Ukraine.⁹²¹ Its primary goal was to protest against Ukrainian legislation viewed as offering continued trade and business opportunities to Ukrainian companies doing business with occupied Crimea.⁹²² Even assuming that the blockade, an initiative consisting of a wide range of individuals and organizations, could be deemed to violate Russia’s arbitrary anti-extremism laws, that cannot justify Russia’s ban on the Mejlis, which did not take any collective decision on the initiation or organization of, or participation in, the blockade.⁹²³ The Mejlis members who did participate, namely Mr. Chubarov and Mr. Dzhemilev, did so in their individual capacities and remained committed to keeping the blockade peaceful and tailored to the stated goal of bringing changes at a legislative level.⁹²⁴

493. Not only are Russia’s allegations of extremist activities by members of the

⁹¹⁹ See, e.g., Bariiev Statement, paras. 17–19 (Ukraine’s Memorial, Annex 15); Video of Bariiev Instructing the Crimean Tatars to Show Their Peaceful Intentions in the Face of Provocation (Ukraine’s Memorial, Annex 1101); Witness Statement of Akhtem Chygoz (4 June 2018), para. 5 [hereinafter Chygoz Statement] (Ukraine’s Memorial, Annex 19); Dzhemilev Statement, paras. 30–33 (Ukraine’s Memorial, Annex 16).

⁹²⁰ Russia’s Counter-Memorial Part II, para. 167.

⁹²¹ Second Witness Statement of Refat Chubarov (21 April 2022), para. 2 [hereinafter Chubarov Second Statement].

⁹²² *Ibid.*, para. 5.

⁹²³ *Ibid.*, paras. 10, 13.

⁹²⁴ Russia’s heavy reliance on distorted and selective statements by another organizer of the blockade, Mr. Lenur Islyamov, is misplaced; Mr. Islyamov was not and has never been a member of the Mejlis. In any event, Russia grossly mischaracterizes Mr. Islyamov’s conduct during the blockade. See *infra*, paras. 640–642; see also Chubarov Second Statement, paras. 7–8, 11.

Mejlis factually inaccurate, they are pretextual,⁹²⁵ which is underscored by the fact that Russia's arbitrary harassment targeting the Mejlis and its members began shortly after the annexation. As discussed below, each of those actions confirms that the ban on the Mejlis was a collective punishment of the Crimean Tatar people for opposing Russia's aggression.

D. The Counter-Memorial Confirms the Other Forms of Harassment of Political Leaders Alleged in the Memorial

494. While Russia criticizes Ukraine's other claims of political suppression as "manifestly unfounded,"⁹²⁶ Russia's own account confirms the veracity of each and every occasion of individual harassment against members of the Mejlis alleged in the Memorial.

1. Exile of Crimean Tatar Leaders

495. Russia concedes that its restrictions on the movement of the Tatar leaders began just weeks after the referendum, starting with a five-year entry ban to Crimea on Mr. Dzhemilev, served on 22 April 2014,⁹²⁷ with similar five-year entry bans imposed on Mr. Yuksel on 30 June 2014, and Mr. Chubarov on 5 July 2014.⁹²⁸

496. Russia's evidence further confirms that the bans were without legitimate basis

⁹²⁵ While Russia vaguely refers to "new signs of extremism" in the period following Mr. Dzhemilev's entry ban, the evidence Russia cites shows that the supposed "extremism" lies in the stated foundational aim of the Mejlis, namely the restoration of the Crimean Tatar people's right to free self-identification in their ancestral territory. See Russia's Counter-Memorial Part II, para. 167; Prosecutor of the Republic of Crimea, Warning (Repeated) Issued to Mr. Refat Chubarov, Chairman of the *Mejlis*, On the Impermissibility of Carrying Out Extremist Activities (5 July 2014), p. 1 (claiming that the Mejlis' founding documents such as "the Declaration of National Sovereignty of the Crimean Tatar People adopted on 26–30 June 1991 at the 1st Session of the Qurultay of the Crimean Tatar People of the 2nd Convocation" show that "attempts are still made to create a sovereign national entity, which contradicts both the Constitution of the Russian Federation and the Federal Law 'On the national and cultural autonomy'" and that "[t]he pursuance of this objective not only entails grave problems in the territory of the Republic of Crimea") (Russia's Counter-Memorial Part II, Annex 527).

⁹²⁶ Russia's Counter-Memorial Part II, para. 185.

⁹²⁷ *Ibid.*, para. 188.

⁹²⁸ *Ibid.*, paras. 187–194.

and, in any event, disproportionate to the purported goal of ensuring public order.⁹²⁹ For instance, the first “warning” from the Prosecutor of Crimea to Mr. Chubarov on 23 April 2014 threatens an action under Federal Law No. 114-FZ “On countering extremist activities” for flying the Ukrainian flag at its headquarters in Simferopol.⁹³⁰ In Mr. Dzhemilev’s case, the court decisions that Russia cites offer no basis for the conclusion that the ban was “necessary for the purpose of ensuring the defense capability or security of the state or public order.”⁹³¹ Russia cites four press articles to justify the ban, none of which evidence any “tangible threat to public order and the State’s security,” or “explicit public threats” that Russia claims.⁹³² Nor

⁹²⁹ See CERD Committee, General Recommendation XXXI On the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System (Sixty-Fifth Session, 2005), para. 37 (“Punishments targeted exclusively at non-nationals that are additional to punishments under ordinary law, such as deportation, expulsion or banning from the country concerned, should be imposed only in exceptional circumstances and in a proportionate manner”). Russia further confirms that those bans were all based on the same provisions of Russian law, which allow authorities to deny foreign citizens and stateless persons entry into the Russian territory where “necessary for the purpose of ensuring the defense capability or security of the state or public order.” Federal Law No. 114-FZ “On the Procedure for Exit from the Russian Federation and Entry into the Russian Federation” (15 August 1996), Art. 27(1) (Russia’s Counter-Memorial Part II, Annex 33); Russia’s Counter-Memorial Part II, paras. 188, 190, 193.

⁹³⁰ Acting Prosecutor of the Republic of Crimea, Warning Issued to Mr Refat Chubarov, Chairman of the *Mejlis*, On the Impermissibility of Violating the Law (23 April 2014) (Russia’s Counter-Memorial Part II, Annex 522).

⁹³¹ Federal Law No. 114-FZ “On the Procedure for Exit from the Russian Federation and Entry Into the Russian Federation,” 15 August 1996, Article 27(1) (Russia’s Counter-Memorial Part II, Annex 33); Moscow City Court, Case No. 3a-0836/2016, Decision (20 May 2016) (Russia’s Counter-Memorial Part II, Annex 275); Supreme Court of the Russian Federation, Case No. 5-APG16-81S, Appellate Decision (14 December 2016), p. 3 (dismissing appeal, reasoning that “[t]he appeal’s argument that the case files present no evidence of the fact that Mustafa Dzhemilev was conducting an activity threatening to the national security of the Russian Federation is refuted by a proposal to deny Mustafa Dzhemilev entry into the territory of the Russian Federation that the court reviewed.”) (Russia’s Counter-Memorial Part II, Annex 303).

⁹³² Russia’s Counter-Memorial Part II, para. 188 & n.403, 404. One post-dates the ban, one reveals that his entry restriction had already begun before the ban, and the other two simply reflect Mr. Dzhemilev’s concerns about and opposition to Russia’s unlawful aggression. See UNIAN, *Dzhemilev Promises to ‘Surprise’ the Occupants if They Don’t Let Him Enter Crimea* (22 March 2014) (Russia’s Counter-Memorial Part II, Annex 898); Censor.NET, *War with Ukraine Will Mark the Beginning of the End for Russia and Lead to the Country’s Collapse - Dzhemilev* (14 March 2014) (Russia’s Counter-Memorial Part II, Annex 895); Website of the Mejlis, *Mustafa Dzhemilev: Crimean Tatars Will Hold Their Own Referendum to Determine the Future of Crimea* (27 March 2014) (Russia’s

does Russia explain why no prior warning could have been given to Mr. Dzhemilev.⁹³³

497. In 2019, the FSB reportedly decided to extend Mr. Dzhemilev's entry ban for 15 years, which became public on 5 March 2021 during an ongoing criminal trial against Mr. Dzhemilev — held in absentia — in Crimea.⁹³⁴ Mr. Chubarov faces a similar fate — on 1 June 2021, the Supreme Court of Crimea issued a verdict in absentia against Mr. Chubarov, sentencing him to six years in a general regime colony and a fine.⁹³⁵

498. Russia further admits that these entry bans were followed by other acts of harassment. Russia does not dispute, for example, the check and detention of Mr. Eskender Bariiev, Mr. Sinaver Kadyrov and Mr. Abmedzhit Suleimanov at the border on 22–23 January 2015.⁹³⁶ Russia's one-sentence explanation of the episode — that it was part of “an investigation for inciting to hatred or enmity” — cites no evidence, including any reasonable grounds for such an investigation.⁹³⁷ In his written testimony, Mr. Bariiev explained that he had been stopped and searched no fewer than 39 times as he travelled in and out of Crimea

Counter-Memorial Part II, Annex 1247); Press.ua, *Yatsenyuk Re-Assured that He Works on a Plan to Return Crimea* (8 August 2014) (Russia's Counter-Memorial Part II, Annex 910).

⁹³³ In fact, Russia's evidence confirms that Mr. Dzhemilev was not provided with any specific reasons for his entry ban. See Moscow City Court, Case No. 3a-0836/2016, Decision (20 May 2016), p. 4 (Russia's Counter-Memorial Part II, Annex 275). Nor does Russia's evidence tell us anything about the basis for Mr. Yuksel's entry ban or its appropriateness. The Moscow City Court upheld the ban on the basis that the court reviewed the notice of the entry ban and “ha[d] no reason not to trust this information as it was not refuted by anyone.” Moscow City Court, Case No. 3-247/2015, Decision (14 May 2015), p. 3 (Russia's Counter-Memorial Part II, Annex 231). Citing this decision, Russia speculates that “[i]t is evident that the authorities' concern was similar to that later underlying the ban on the *Mejlis*.” Russia's Counter-Memorial Part II, para. 194.

⁹³⁴ Halya Coynash, *Russia Bans Crimean Tatar Leader Mustafa Dzhemilev for Longer Than He Spent in Soviet Labour Camps*, Kharkiv Human Rights Protection Group (9 March 2021); RFE/RL, *Crimean Tatar Leader Barred From Entering Crimea Until 2034* (5 March 2021).

⁹³⁵ RFE/RL, *Exiled Crimean Tatar Leader Gets Six Years* (1 June 2021).

⁹³⁶ Russia's Counter-Memorial Part II, para. 195.

⁹³⁷ *Ibid.* (“The law enforcement authorities conducted an investigation for inciting to hatred or enmity and for establishing a non-commercial organization for such purposes.”).

between Russia's invasion of Crimea and January 2015—a fact that Russia does not even to attempt to rebut.⁹³⁸

499. Russia's attempt to downplay the removal of the Chairman of the Qurultay's Audit Committee from a train while attempting to cross into mainland Ukraine for medical treatment as a mere "inconvenience[]" stemming from standard border control procedures is similarly unconvincing.⁹³⁹ Notably, Russia offers no evidence for its explanation of the event other than a conclusory response letter from the FSB Border Guard Service, which simply states that the reason for the removal was "the coincidence of [Mr. Ozenbash's] background information with the records of a person on the wanted list."⁹⁴⁰

500. Nor does Russia dispute that Russian investigators summoned senior members of the Mejlis and the Qurultay, Mr. Nariman Dzheljalov and Mr. Zair Smedlyaev, for questioning on 1 August 2015,⁹⁴¹ preventing them from attending the World Congress of the Crimean Tatars, held on 1–2 August 2015 in Ankara.⁹⁴² Russia's claim that Mr. Dzhelyalov and Mr. Smedlyaev could have rescheduled the testimony is disingenuous; the summons

⁹³⁸ Ukraine's Memorial, para. 417; Bariiev Statement, para. 31 (Ukraine's Memorial, Annex 15). Russia denies, at length, that the criminal charges described in Mr. Bariiev's witness testimony were ever brought against him, and asserts that Mr. Bariiev misread a press release published on the website of the prosecutor's office for the Republic of Crimea, which referred to six criminal investigations without disclosing any names. But it is not disputed that Mr. Bariiev had good reason to be intimidated. As Russia admits, "Mr Bariiev was already within the inner circle of suspected persons who were apprehended and home searched by the authorities in September 2014" in connection with a criminal investigation relating to Crimean Tatar individuals who came out to greet Mr. Dzhemilev in May 2014 as he attempted to enter Crimea. Russia's Counter-Memorial Part II, para. 197. Nor does Russia dispute that on the same day that Mr. Bariiev relocated to Kyiv, another prominent Mejlis leader, Mr. Akhtem Chygoz, was arrested. Russia's Counter-Memorial Part II, para. 196; Ukraine's Memorial, para. 418.

⁹³⁹ Russia's Counter-Memorial Part II, para. 199.

⁹⁴⁰ Border Control Department of the Federal Security Service of Russia, Letter No. 21/7/3/O-577 to A.A. Ozenbash (17 March 2015) (Russia's Counter-Memorial Part II, Annex 223).

⁹⁴¹ Ukraine's Memorial, para. 419; Russia's Counter-Memorial Part II, paras. 200–202.

⁹⁴² Russia's Counter-Memorial Part II, para. 201; 2015 OSCE Report, para. 155 (Ukraine's Memorial, Annex 812).

arrived just three days before the interrogation and failing to appear would no doubt have led to further punitive action.⁹⁴³

2. Russia's Oppression of the Mejlis Prior to Its Ban

501. The Memorial shows how the Russian occupation authorities sought to undermine the Mejlis as a whole by carrying out searches of its building and freezing the assets of associated entities, prior to banning it as an organization.⁹⁴⁴ Russia denies a coordinated campaign against the Mejlis, but its Counter-Memorial tells a different story.

502. Russia's evidence shows that the sole legal basis for the extended raid on the building of the Crimea Foundation on 16 September 2014 was the entry ban imposed on Mr. Dzhemilev in April that year.⁹⁴⁵ The court authorization of the raid was based on Article 15(1.2) of Federal Law No. 7-FZ "On Non-Profit Organizations," which "provides that a director (or founder) of . . . organizations cannot be a foreign citizen or stateless person whose presence or residence on the territory of the Russian Federation has been banned pursuant to applicable law."⁹⁴⁶ Given the flimsiness of the grounds on which the entry ban was imposed, it is clear that part of the role of the ban was to provide a pretext for subsequent acts of harassment targeting entities with which he was associated.

503. Leaving aside their pretextual nature, however, the measures that ensued were

⁹⁴³ See Russia's Counter-Memorial Part II, para. 201; 2015 OSCE Report, para. 155 (Ukraine's Memorial, Annex 812); RFE/RL, *Crimean Tatar Leaders Cite Pressure on Eve of World Congress* (28 July 2015). Failure to appear may invite in forcible procedural actions under Articles 188(3) and 111 of the Russian Criminal Procedural Code. Criminal Procedural Code of the Russian Federation No. 174-FZ (18 December 2001), arts. 111 & 188(3), accessed at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=T:/IP/N/1RUSE6-02.pdf&Open=True>.

⁹⁴⁴ Ukraine's Memorial, paras. 421–424.

⁹⁴⁵ Russia's Counter-Memorial Part II, para. 204.

⁹⁴⁶ *Ibid.*, para. 204, n.439; Federal Law No. 7-FZ "On Non-Profit Organizations" (12 January 1996), Art. 15(1.2) (Russia's Counter-Memorial Part II, Annex 31).

plainly disproportionate to the purported concerns. As Russia confirms, the entire building, and not just the offices of the Crimea Foundation, was searched and forcefully vacated the next day.⁹⁴⁷ In addition to banning the Crimea Foundation from owning real property, the court issued an order to “freeze settlement accounts,” *and* “prohibit [the Crimea Foundation] from opening new current accounts” in Russian banks.⁹⁴⁸ As the OSCE observed, this action essentially “confiscated” the property of the Crimea Fund and the Mejlis.⁹⁴⁹

504. Russia confirms that the homes of Mejlis members’ Eskender Bariiev and Mustafa Asaba were searched and their personal belongings seized on the same day as the raid on the Mejlis building.⁹⁵⁰ It does not deny that, pursuant to a court order of 25 September 2014, the Bakhchisaray Regional Mejlis was forced to vacate the premises they had rented.⁹⁵¹ In the face of this clear pattern of conduct designed to put pressure on the Mejlis and its members, Russia’s claim rings hollow that this episode “bears no relation to the previous episode” involving the Mejlis building.⁹⁵² Russia attributes the termination of the lease to non-payment of the rent by the Council of Teachers — the nominal lease tenant who in turn let the Bakhchisaray regional Mejlis occupy the property — but Russia’s evidence shows that the rent

⁹⁴⁷ Russia’s Counter-Memorial Part II, para. 204.

⁹⁴⁸ Central District Court of Simferopol of the Republic of Crimea, Case No. 2-1688/14, Ruling On Interim Measures (15 September 2014), p. 2 (Russia’s Counter-Memorial Part II, Annex 185).

⁹⁴⁹ See 2015 OSCE Report, para. 232 (Ukraine’s Memorial, Annex 812); Interim Measures for Civil Suit No. 2-1688/2014 (prohibiting Crimea Foundation from exercising ownership of its properties and sequestering its bank accounts) (Ukraine’s Memorial, Annex 929). Russia’s evidence further confirms that on 1 December 2016, more than two years after the raid, the petition to lift the interim measures was dismissed for lack of evidence that Mr. Dzhemilev had been removed from the Crimean Foundation’s list of founders, despite a clear showing that Mr. Dzhemilev’s had indeed been removed from the list of the Foundation’s founders. Supreme Court of the Republic of Crimea, Case No. 33-1258/2017, Appellate Decision (15 February 2017) (Russia’s Counter-Memorial Part II, Annex 309).

⁹⁵⁰ Ukraine’s Memorial, para. 423; Russia’s Counter-Memorial Part II, App. B, paras. 31–32. See also *infra*, para. 538.

⁹⁵¹ Ukraine’s Memorial, para. 424; See Russia’s Counter-Memorial Part II, para. 206.

⁹⁵² Russia’s Counter-Memorial Part II, para. 206.

allegedly due was RUB 358.40, less than USD 10 using an annual average exchange rate.⁹⁵³

3. Russia’s Retroactive Prosecution and Convictions Related to the Demonstration of 26 February 2014

505. Russia fails to rebut Ukraine’s showing that, in addition to attacking the Mejlis as an institution and exiling much of its leadership, Russia has resorted to pretextual prosecutions of those Mejlis leaders who remained in Crimea. Russia fails entirely to engage with Mr. Chiygoz’s testimony on the procedural defects of the criminal proceedings against him, which highlight the arbitrary nature of the case, as well as the ban on the Mejlis that relied in part on these charges.⁹⁵⁴ Russia’s denial of Mr. Chiygoz’s ill-treatment during his pre-trial detention is based on unreliable sources that carry no evidentiary value.⁹⁵⁵

⁹⁵³ *Ibid.*; Economic Court of the Republic of Crimea, Case No. A83-944/2014, Decision (25 September 2014), p. 3 (Russia’s Counter-Memorial Part II, Annex 193).

⁹⁵⁴ Russia’s Counter-Memorial Part II, para. 211; *see also* Crimean Process: Observance of Fair Trial Standards in Politically Motivated Cases (Daria Svyrydova ed., 2018), pp. 7, 29–38 (concluding that the judicial system in occupied Crimea was unable to provide effective protection from unlawful politically motivated persecution, including in cases of Mr. Chiygoz, Mr. Umerov, and the cases of 26 February 2014 in general). Further, Russia twists Mr. Chiygoz’s 2020 press interview in an attempt to retroactively establish his “extremist activities.” Russia’s Counter-Memorial Part II, para. 214. Beside the fact that his remarks concerned events in Crimea “in February 2014,” *before* Russia’s annexation, he was referring to a list of civilians ready to support the Ukrainian military, in a *counterfactual* scenario where the military had decided to resist the Russian occupation. *Ukrinform*, “Akhtem Chiygoz, Former Political Prisoner, Deputy Chairman of Mejlis of Crimean Tatar People: I Handed Dzhemilev the Lists of 3,000 People Who Were Ready to Fight In Crimea,” (26 February 2020) (Russia’s Counter-Memorial Part II, Annex 1019).

⁹⁵⁵ In particular, it claims that Mr. Chiygoz was treated with respect, based on a conclusory response from the alleged perpetrator of the conduct, drafted in response to Ukraine’s Memorial. Russia’s Counter-Memorial Part II, para. 212; Head of the Department of the Federal Penitentiary Service of Russia in the Republic of Crimea and the City of Sevastopol, Information Note on the Arguments of Ukraine About Alleged Violations of the International Convention on the Elimination of All Forms of Racial Discrimination (1965) in the Territory of the Russian Federation Concerning Conditions of Mr. Chiygoz’s Pre-Trial Detention (8 December 2020) (Russia’s Counter-Memorial Part II, Annex 429). This document purports to prove that Mr. Chiygoz was not ill, nor ill-treated based on what it claims to be Mr. Chiygoz’s signed waiver of complaints, notwithstanding Mr. Chiygoz’s testimony that he was repeatedly pressured to sign falsified documents, and became the victim of false allegations. Explanatory Statements of Mr Chiygoz on the Absence of Claims on the Conditions of His Detention (6 February 2015) (Russia’s Counter-Memorial Part II, Annex 210); Chiygoz Statement, paras. 11–12 (Ukraine’s Memorial, Annex 19). Russia similarly asserts that Mr. Chiygoz spent only one day in a solitary cell, as a disciplinary penalty for possession of hidden prohibited items (*e.g.*, a USB flash, a cell phone), even though the document it cites to for this claim includes a resolution to place Mr.

506. Russia further confirms the arrest, compulsory psychiatric evaluation and trial of Mr. Ilmi Umerov. Russia cannot show why the vastly disproportionate “security measures” attending Mr. Umerov’s arrest were necessary to preserve public order, in view of Mr. Umerov’s full cooperation.⁹⁵⁶ Russia’s explanation that psychiatric examination was in accordance with Russian law and necessary for the protection of Mr. Umerov’s rights lacks any credibility.⁹⁵⁷ In fact, Mr. Umerov’s forced psychiatric examination is part of a pattern of Russia using psychiatric detention as a means of harassing detainees.⁹⁵⁸

507. These examples of harassment of the top leadership of the Crimean Tatar people confirm what is obvious from Russia’s treatment of the Mejlis: the Crimean Tatar people has been targeted since 2014 for treatment designed to suppress its ability to exercise its human rights in the political sphere.

Chiygoz “into an isolation cell for *five* days.” Information on Mr Chiygoz’s Disciplinary Penalty During the Period of the Pretrial Detention, p. 5 (Russia’s Counter-Memorial Part II, Annex 230). As Mr. Chiygoz has testified, however, this fabricated accusation was one of Russia’s tactics to exert pressure on him, and a pretext to move him to solitary confinement. Chiygoz Statement, para. 12 (Ukraine’s Memorial, Annex 19).

⁹⁵⁶ Witness Statement of Ilmi Umerov (6 June 2018), paras. 12–15 (Ukraine’s Memorial, Annex 20).

⁹⁵⁷ Russia’s Counter-Memorial Part II, para. 221 & n.474 (quoting Article 196(3) of the Criminal Procedural Code of the Russian Federation, No. 174-FZ (18 December 2001) (Russia’s Counter-Memorial Part II, Annex 40)).

⁹⁵⁸ See Committee Against Torture, Concluding Observations On the Sixth Periodic Report of the Russian Federation, U.N. Doc. CAT/C/RUS/CO/6 (28 August 2018), para. 40; U.N. General Assembly Resolution 72/190, U.N. Doc. A/RES/72/190, *Situation of Human Rights in the Autonomous Republic of Crimea and the City of Sevastapol, Ukraine* (19 December 2017), p. 2; U.N. Secretary-General, Situation of Human Rights In the Autonomous Republic of Crimea and the City of Sevastopol, Ukraine, U.N. Doc. A/HRC/47/58 (27 May 2021), para. 20 & n.43.

Chapter 12. ARBITRARY SEARCHES AND DETENTIONS

508. Ukraine has established that, in addition to being subjected to enforced abductions and other acts of violence, the Crimean Tatar community has suffered harassment in the form of pretextual enforcement measures, often carried out under Russia’s widely-criticized anti-extremism laws.⁹⁵⁹ Ukraine claims, in particular, that this community has been singled out for a pattern of arbitrary searches and detentions carried out with the purpose or effect of restricting core civil rights in violation of CERD articles 2(1), 4, 5(a), and 6.⁹⁶⁰

509. Russia essentially accepts that the specific law enforcement actions highlighted in the Memorial has in fact occurred, but claims that they do not implicate the CERD because they were legal under Russian laws and upheld by domestic courts. But, as this Chapter will demonstrate, the sheer frequency and the manifestly disproportionate nature of the Russian authorities’ enforcement measures against the Crimean Tatar community strongly suggests discriminatory intent, and at minimum offers solid proof of disparate impact.

A. Ukraine Has Met Its Burden of Proof, as Supported by Objective Materials from International Organizations and Respected NGOs

510. Russia baselessly claims that Ukraine’s claims are “incapable of triggering CERD” because Ukraine has purportedly failed to show “*differentiation* in treatment in the first place.”⁹⁶¹ According to Russia, Ukraine’s claim singles out a small number of unrelated law enforcement measures, “carefully selects only cases in which the individuals searched and detained happen to be Crimean Tatars,” and “unilaterally labels these measures as ‘racial discrimination.’”⁹⁶²

⁹⁵⁹ Ukraine’s Memorial, Chapter 9(C).

⁹⁶⁰ Ukraine’s Memorial, paras. 588-608, 631-635.

⁹⁶¹ Russia’s Counter-Memorial Part II, paras. 352–353 (emphasis in original).

⁹⁶² *Ibid.*, paras. 350, 373-375.

511. Contrary to Russia’s criticism that Ukraine’s claim relies on selective cases, Ukraine’s Memorial has identified a pattern of arbitrary law enforcement measures implicating at least several dozen members of the Crimean Tatar community.⁹⁶³ As the United Nations monitoring mission in Ukraine observed, these intrusive raids have “disproportionately affected the Crimean Tatars.”⁹⁶⁴

512. In fact, international observers, including U.N. bodies, have consistently pointed to the disproportionate impact that Russia’s law enforcement measures have on the Crimean Tatar population.⁹⁶⁵ As observed by the OHCHR in 2018, for instance:

Crimean Tatars were disproportionately subjected to police and FSB raids of their homes, private businesses or meeting places, often followed by arrests. OHCHR documented 57 searches in 2017, of which 53 concerned Crimean Tatar properties, and 38 searches in the first half of 2018, of which 30 concerned properties of Crimean Tatars. The number of searches carried out in the first six months of 2018 has nearly tripled compared to the similar period in 2017, when 14 searches were documented, 11 of which concerned Crimean Tatars.⁹⁶⁶

513. This pattern of discriminatory searches and detentions has continued since the

⁹⁶³ See generally Ukraine’s Memorial, paras. 444–454. Russia’s position also disregards the fact that, as noted in the Memorial, the specific acts highlighted therein are “merely illustrative of a broader policy and practice carried out by the Russian occupation authorities in Crimea” that disproportionately affects members of the Crimean Tatar community. See *ibid.*, para. 453.

⁹⁶⁴ See *ibid.*, para. 445 & n.944 (quoting 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), para. 12 (Ukraine’s Memorial, Annex 759)).

⁹⁶⁵ See U.N. General Assembly Resolution No. 75/192, U.N. Doc. A/RES/75/192, *Situation of Human Rights in the Autonomous Republic of Crimea and the City of Sevastopol, Ukraine* (28 December 2020), Preamble, p. 4 (“Deeply concerned about continued reports that the law enforcement system of the Russian Federation conducts searches and raids of private homes, businesses and meeting places in Crimea, which disproportionally affect Crimean Tatars . . .”).

⁹⁶⁶ OHCHR, Situation of Human Rights in the Temporarily Occupied Autonomous Republic of Crimea and the City of Sevastopol, Ukraine, 13 September 2017 to 30 June 2018, U.N. Doc. A/HRC/39/CRP.4 (21 September 2018), para. 31.

filing of Ukraine’s Memorial in June 2018.⁹⁶⁷ Reporting on the period between 1 January 2017 and 30 June 2019, for instance, the OHCHR “recorded 186 searches, 140 of which concerned homes, private businesses or meeting places of Crimean Tatars.”⁹⁶⁸ During the reporting period from 1 July 2020 to 30 June 2021, OHCHR documented 61 house searches and raids in Crimea, most of which “concerned homes, meeting places or business premises belonging to Crimean Tatars or Jehovah’s Witnesses.”⁹⁶⁹ The Crimean Tatar Resource Center similarly documented 53 searches and 366 detentions in Crimea in 2021, 33 and 330 of which, respectively, involved Crimean Tatar individuals.⁹⁷⁰ In September 2021 alone, Russia conducted searches that resulted in the detention of five Crimean Tatar leaders, accusing them of sabotaging a gas pipeline, along with dozens of members of the Crimean Tatar community

⁹⁶⁷ Press Statement, Nicola Murray, Deputy Head, UK Delegation to the OSCE, Russia’s Ongoing Violations of Human Rights in Illegally Annexed Crimea, Ukraine (20 May 2021) (noting that “Crimean Tatars are systematically persecuted by the Russian de-facto authorities; subject to frequent intimidation, house raids, and arbitrary arrests,” and in the preceding two years, the majority of politically motivated searches in Crimea took place in Crimean Tatar homes, resulting in “97 Crimean Tatars . . . currently facing politically motivated criminal prosecution and 80 . . . imprisoned”); Press Statement, Dunja Mijatović, Commissioner for Human Rights, Council of Europe, The Persecution of Crimean Tatars Must Stop (25 November 2021) (“In addition to arbitrary arrests and detentions, this clearly discernible pattern is exemplified by abusive raids on their homes and mosques; criminal proceedings devoid of fair trial guarantees; and extremely severe sentences, including long prison terms, imposed in recent years on Crimean Tatar activists like Osman Arifmetetov, Edem Bekirov, Aider Dzhapparov, Timur Ibragimov, Rustem Ismailov, Suleyman Kadyrov, Emir-Usein Kuku, Server Mustafaev, Enver Omerov, Riza Omerov, Erfan Osmanov, Seyran Saliev, Ruslan Suleymanov, and dozens of others. Many of those detained or imprisoned on the basis of abusive counterterrorism or extremism charges continue to be held in maximum security prisons or distant penal colonies, often located outside Crimea.”); Halya Coynash, *Mass Armed Searches for “Prohibited Books” and Arrests in Russian-Occupied Crimea*, Kharkiv Human Rights Protection Group (18 February 2021).

⁹⁶⁸ U.N. Secretary-General, *Situation of Human Rights in the Autonomous Republic of Crimea and the City of Sevastopol, Ukraine*, U.N. Doc. A/74/276 (2 August 2019), para. 18 [hereinafter 2019 UNSG Report]; see also U.N. Secretary-General, *Situation of Human Rights in the Autonomous Republic of Crimea and the City of Sevastopol, Ukraine*, U.N. Doc. A/HRC/44/21 (19 June 2020), paras. 29–30 [hereinafter June 2020 UNSG Report].

⁹⁶⁹ U.N. Secretary-General, *Situation of Human Rights in the Autonomous Republic of Crimea and the City of Sevastopol, Ukraine*, U.N. Doc. A/76/260 (2 August 2021), paras. 2 & 19.

⁹⁷⁰ Crimean Tatar Resource Center, *Analysis of Human Rights Violations in the Occupied Crimea in 2021* (presentation) (25 January 2022) (Ukraine’s Reply, Annex 107).

who gathered in front of the FSB's branch in Simferopol to protest against the detentions.⁹⁷¹

514. Not only is the Crimean Tatar community most frequently subjected to Russia's law enforcement measures, in carrying out those measures the Russian authorities have employed deeply troubling enforcement tactics. According to the OHCHR, these include: "excessive use of force;" overbroad searches "not warranted by circumstances;"⁹⁷² "torture, ill-treatment and the extraction of false confessions;"⁹⁷³ and planting of evidence and unlawful denial of defense counsel's entry to the searched premises.⁹⁷⁴

515. In its Concluding Observations on Russia in 2017, the CERD Committee was "particularly concerned . . . about violations of Crimean Tatars' human rights, including allegations of . . . criminal and administrative prosecutions, mass raids, and interrogations."⁹⁷⁵ The Committee recommended that Russia "investigate effectively the allegations of violations of human rights of the Crimean Tatars, in particular . . . arbitrary detention and ill-treatment,

⁹⁷¹ See Press Statement, EU - EEAS Press Team, Statement by the Spokesperson on the Detention of Five Crimean Tatar Leaders (7 September 2021); Press Statement, Ned Price, Spokesperson, U.S. Department of State, United States Condemns the Unjust Detention of Crimean Tatar Leaders (5 September 2021); RFE/RL, *Russia Jails Crimean Tatar Leader On Charges Dismissed By Ukraine As Fabricated* (6 September 2021); RFE/RL, *More Than 50 Crimean Tatars Detained In Russia-Annexed Crimea* (5 September 2021); Yulia Gorbunova, *The Revolving Door of Persecution in Crimea: Crimean Tatar Leader Arrested on Bogus Criminal Charges*, Human Rights Watch (7 September 2021).

⁹⁷² OHCHR, *Situation of Human Rights in the Temporarily Occupied Autonomous Republic of Crimea and the City of Sevastopol, Ukraine*, 13 September 2017 to 30 June 2018, U.N. Doc. A/HRC/39/CRP.4 (21 September 2018), para. 31.

⁹⁷³ 2019 UNSG Report, para. 18; see also June 2020 UNSG Report, paras. 29–30.

⁹⁷⁴ U.N. Secretary-General, *Situation of Human Rights in the Autonomous Republic of Crimea and the City of Sevastopol, Ukraine*, U.N. Doc. A/76/260 (2 August 2021), paras. 19–20. The OHCHR further pointed out the lack of "adequate and sufficient guarantees against arbitrariness in the manner in which the searches were carried out," pointing out that "attesting witnesses frequently behaved in a way that raised doubts about their ability to serve as impartial and independent observers." *Ibid.*, para. 20.

⁹⁷⁵ CERD Committee, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, Concluding Observations of the Committee on the Elimination of Racial Discrimination, Russian Federation*, CERD/C/RUS/CO/23-24 (20 September 2017), para. 19 (Ukraine's Memorial, Annex 804).

and bring perpetrators to justice and provide victims or their families with effective remedies.”⁹⁷⁶ Russia’s position that Ukraine’s claims are “incapable of triggering CERD” for failure to show differentiation in treatment based on race therefore lacks any basis.⁹⁷⁷

516. Unable to rebut the data demonstrating a pattern of arbitrary searches and detentions disproportionately targeting the Crimean Tatar community, Russia attacks Ukraine’s sources as “lack[ing] probative value.”⁹⁷⁸ Ukraine has produced an extensive list of reports and data from U.N. bodies, including the OHCHR, prominent NGOs, and other international observers that not only constitute reliable sources, but that also consistently support and corroborate each other’s observations.⁹⁷⁹ In any event, Russia’s criticisms are beside the point: as discussed *infra* in this Chapter, Russia’s own account and evidence squarely confirm the accuracy of Ukraine’s allegations, including the abusive enforcement measures against Ms. Vedzhie Kashka, a prominent 82-year-old Crimean Tatar activist, which Russia highlights as being unsubstantiated.⁹⁸⁰

B. Ukraine Need Not Demonstrate that Recourse to Local Remedies Is Futile or that Russian Courts Were Acting Unreasonably and in Bad Faith

517. Russia’s next line of defense is that, to the extent Ukraine’s law enforcement claims arise out of court-approved law enforcement measures and other court decisions,

⁹⁷⁶ *Ibid.*, para. 20.

⁹⁷⁷ Russia’s Counter-Memorial Part II, para. 353.

⁹⁷⁸ *Ibid.*, paras. 357–362. Despite having unfettered and exclusive access to its own enforcement data, Russia has failed to offer any credible or robust data refuting Ukraine’s claim.

⁹⁷⁹ See, e.g., *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, *Merits, Judgment*, *I.C.J. Reports 2005*, pp. 239–241, paras. 205–211 (finding sufficient evidence where reports from U.N. bodies and agencies were “consistent in the presentation of facts, support[ed] each other and [we]re corroborated by other credible sources,” such as a report from an NGO (i.e., the Human Rights Watch), and finding “the coincidence of reports from credible sources sufficient to convince it that massive human rights violations and grave breaches of international humanitarian law were committed”).

⁹⁸⁰ Russia’s Counter-Memorial Part II, paras. 360–362; see *infra*, para. 528.

Ukraine must demonstrate that recourse to local remedies proved futile or that rulings rendered by courts of last resort were not reasonably or legally tenable or not adopted in good faith.⁹⁸¹ Russia's assertion is without basis. The Court has already found that Ukraine's CERD claims, including as they relate to the law enforcement measures, are properly before it and has rejected Russia's objection based on an alleged requirement to exhaust local remedies.⁹⁸²

C. Russia's Claim of Compliance with Its Domestic Laws, Including the Anti-Extremism Laws, Does Not Excuse Its CERD Violations

518. Russia next argues that its law enforcement actions were "in accordance with applicable domestic law," which "exclud[es] any possibility of racial discrimination under CERD."⁹⁸³ But it is elementary that the possibility of CERD or other human rights violations is not precluded merely by the compliance of a measure with domestic law requirements. The law itself may not be consistent with international human rights standards (as for example the Venice Commission has found with regard to Russia's anti-extremism laws)⁹⁸⁴ or it may have been enforced in a discriminatory manner.⁹⁸⁵

⁹⁸¹ Russia's Counter-Memorial Part II, para. 356.

⁹⁸² Judgment on Preliminary Objections, p. 606, para. 130.

⁹⁸³ Russia's Counter-Memorial Part II, para. 363.

⁹⁸⁴ See Council of Europe, European Commission for Democracy Through Law (Venice Commission), Opinion No. 660/2011 on the Federal Law on Combating Extremist Activity of the Russian Federation, CDL-AD(2012)016 (20 June 2012), paras. 74, 77 (Ukraine's Memorial, Annex 817); see generally Ukraine's Memorial, paras. 385–386; see also *supra*, para. 426.

⁹⁸⁵ As the CERD Committee cautioned, Russia is responsible to ensure that "any measures taken in the fight against terrorism do not discriminate, *in purpose or effect*, on the grounds of race, colour, descent, or national or ethnic origin." CERD Committee, General Recommendation No. 30 on Discrimination Against Non-Citizens, CERD Doc. No. CERD/C/64/Misc.11/rev.3 (2004), para. 10 (emphasis added). The Committee has specifically warned of the "potential indirect discriminatory effects of certain domestic legislation, particularly legislation on terrorism," recommending States Parties to "eliminate the discriminatory effects of such legislation and in any case to respect the principle of proportionality in its application to persons belonging to the groups referred to in the last paragraph of the preamble." CERD Committee, General Recommendation No. XXXI on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System, contained in U.N. Doc. No. A/60/18 (2005), para. 4(b).

519. Nor does Russia’s invocation of national security concerns have any merit. Russia argues that its purported “fight against extremism, including but not limited to religious extremism,” constitutes a legitimate basis to limit human rights.⁹⁸⁶ First, as Professor Scheinin explains in his expert report, the CERD’s “prohibition against racial discrimination is absolute.”⁹⁸⁷ Second, to the extent Russia claims that the fight against extremism could justify restrictions on underlying substantive human rights, such as the right to equal treatment before the tribunals and other organs administering justice, Russia has entirely failed to meet the strict requirements for such restrictions. The extent to which human rights may be curtailed on national security grounds is strictly limited and specific procedures must be followed by States which believe that such curtailments are necessary.⁹⁸⁸ As Professor Scheinin explains, such restrictions on substantive human rights may be imposed only in extremely stringent conditions, where strictly necessary, and based on the relevant, rigorous procedures of applicable human rights instruments.⁹⁸⁹

520. None of those conditions are even remotely met by Russia’s arbitrary law enforcement measures targeting the Crimean Tatar community, and Russia does not even attempt to suggest otherwise. Instead, as illustrated below, Russia essentially equates its alleged “fight against extremism” with virtually all law enforcement measures involving members of the Crimean Tatar community. As discussed in the following Section, Russia’s evidence reveals that officers of the so-called “Counter-Extremism Center of the Crimean Ministry of Internal Affairs,” whose main task is to counter extremist activities and

⁹⁸⁶ Russia’s Counter-Memorial Part II, paras. 364, 367–374.

⁹⁸⁷ Scheinin Report, para. 14 (Ukraine’s Reply, Annex 7); *see supra*, para. 428.

⁹⁸⁸ *See supra*, paras. 429–431.

⁹⁸⁹ Scheinin Report, paras. 20–22 (Ukraine’s Reply, Annex 7).

terrorism,⁹⁹⁰ are involved in virtually *all* of the cases highlighted in Ukraine’s Memorial even where the stated goal of such actions have nothing to do with extremism.⁹⁹¹

521. Russia’s supposed fight against religious extremism — a phenomenon that had never been part of the history of the Crimean peninsula⁹⁹² — further illustrates the arbitrary and discriminatory nature of its law enforcement against the Crimean Tatar community. As Russia recognizes, these measures have necessarily had a disproportionate impact on the Crimean Tatar community in Crimea.⁹⁹³ Since Russia’s occupation of Crimea, more than 70 Crimean Tatar individuals have been imprisoned based solely on their alleged association with *Hizb ut-Tahrir*.⁹⁹⁴ The Russian authorities have used even the slightest indicia of any alleged association with these organizations as a basis for manifestly disproportionate law enforcement actions and shockingly lengthy sentences, ranging between 7 and 19 years in prison.⁹⁹⁵ Many fell victim to abusive tactics such as coerced self-incrimination.⁹⁹⁶ Others have been searched and detained for social media posts pre-dating Russia’s occupation of Crimea that allegedly feature a symbol of the organization, or simply for being a family

⁹⁹⁰ *The Center for Counter-Extremism*, the Ministry of Interior for the Republic of Crimea (8 February 2022), accessed at 82.мвд.рф/мвд/структура-министерства/подразделения-полиции/цпэ (blocked as of 25 March 2022) (Ukraine’s Reply, Annex 102).

⁹⁹¹ See *infra*, paras. 526–527.

⁹⁹² Ukraine’s Memorial, para. 449; Magocsi First Report, para. 82 (Ukraine’s Memorial, Annex 21).

⁹⁹³ Russia accepts that members of *Hizb ut-Tahrir* and *Tablighi Jamaat* are Muslims by definition, and therefore likely to include a high ratio of Crimean Tatars in Crimea. Russia’s Counter-Memorial Part II, paras. 367–373; *ibid.*, App. B, paras. 8–25.

⁹⁹⁴ Press Statement, Ukrainian Helsinki Human Rights Union et al., Statement by Human Rights Organizations Regarding Yet Another Sentence Against Crimean Tatars (17 August 2021) (“An absolute majority of Crimean political prisoners (80) are Crimean Tatars. Seventy-three of them are imprisoned within the ‘Hizb ut-Tahrir case’”); Crimean Tatar Human Rights Group, Crimean Human Rights Situation Review (December 2021), p. 5, accessed at https://crimeahrg.org/wp-content/uploads/2022/01/crimean-human-rights-group_dec_en.pdf.

⁹⁹⁵ See *infra*, paras. 535–536.

⁹⁹⁶ See *supra*, para. 459.

member who came to protest the absurdly harsh sentences.⁹⁹⁷

522. On 13 January 2022, the U.N. Working Group on Arbitrary Detention found that Server Mustafayev — a Crimean Tatar man serving a 14-year prison sentence for his alleged involvement in *Hizb ut-Tahrir* — was arbitrarily detained in violation of international law.⁹⁹⁸ The Working Group observed that the proceedings against Mr. Mustafayev had aspects that were “highly irregular,” noting that the case was not an isolated incident but was just one example that shared “a striking similarity” with other reported cases.⁹⁹⁹ The Working Group also found that Mr. Mustafayev’s detention amounted to “discrimination based on national, ethnic or social origin and religion,” in breach of article 26 of the ICCPR.¹⁰⁰⁰

523. In this connection, Russia’s lengthy justification of its ban on *Hizb ut-Tahrir*, including based on European Court of Human Rights decisions upholding the bans in Russia and Germany, is completely beside the point.¹⁰⁰¹ In both the ECtHR cases, the membership of the applicants was not in dispute; nor did the challenges concern the discriminatory or arbitrary nature of the law enforcement measures carried out on the basis of the ban or the evidence used against them.¹⁰⁰² The cases are not a basis for Russia’s abusive searches and

⁹⁹⁷ See *infra*, paras. 531–532, 534.

⁹⁹⁸ U.N. Human Rights Council, Working Group on Arbitrary Detention, Opinion No. 56/2021 concerning Server Mustafayev (Russian Federation), U.N. Doc. No. A/HRC/WGAD/2021/56 (13 January 2022), paras. 9, 14, 100, accessed at https://www.ohchr.org/sites/default/files/2022-01/A_HRC_WGAD_56_2021_Russia_AEV.pdf. See *infra*, paras. 531–532.

⁹⁹⁹ U.N. Human Rights Council, Working Group on Arbitrary Detention, Opinion No. 56/2021 concerning Server Mustafayev (Russian Federation), U.N. Doc. No. A/HRC/WGAD/2021/56 (13 January 2022), paras. 75, 98.

¹⁰⁰⁰ *Ibid.*, para. 98.

¹⁰⁰¹ Russia’s Counter-Memorial Part II, para. 373; *ibid.*, App. B, paras. 8–25.

¹⁰⁰² In fact, *Hizb ut-Tahrir and others v. Germany* was a case brought by *Hizb ut-Tahrir* itself and its representative, as well as members and supporters, challenging Germany’s prohibition. *Hizb ut-Tahrir and others v. Germany*, ECtHR App. No. 31098/08, Decision, para. 1 (12 June 2012). *Kasymakhunov and Saybatalov v. Russia* similarly involved members of *Hizb ut-Tahrir*, who were challenging the Russian ban itself and claimed that its enforcement was unforeseeable, given that the Supreme Court decision upholding the ban had not been officially published prior to the applicants’

arrests, baseless convictions, and absurdly long sentences aimed at the Crimean Tatar community, and certainly do not excuse Russia's violations of the CERD.¹⁰⁰³

524. The pretextual nature of Russia's so-called fight against religious extremism is corroborated by the fact that it is but one of a number of loosely-defined "extremisms" on the basis of which Russia persecutes the Crimean Tatar community. As more fully discussed in Chapter 11, Russia has taken a series of abusive law enforcement measures against the Mejlis, culminating with its ban as an extremist body, as well as against the political leaders of the Crimean Tatar community in their individual capacities. And as discussed in subsequent chapters, law enforcement measures have been wielded as well as against NGOs, media outlets, and other organizations, placing maximum pressure on the political, social, and cultural rights of the Crimean Tatar community. It could not be clearer that the invocation of a non-existent threat from religious extremism in Crimea is just an excuse to deploy the repressive apparatus of the State against a disfavored ethnic group.

D. Russia's Evidence Plainly Confirms the Accuracy of Ukraine's Account of the Individual Enforcement Measures

525. Russia's factual criticisms of Ukraine's case for being "unsubstantiated," "false," and "manifestly fraught with deficiencies" is disproved by Russia's own evidence, which plainly supports and corroborates Ukraine's account of each and every illustrative case

conviction. *Kasymakhunov and Saybatalov v. Russia*, ECtHR App. Nos. 26261/05 & 26377/06, Judgment, paras. 3, 6 (14 March 2013).

¹⁰⁰³ See CERD Committee, Guidelines for the CERD-Specific Document to Be Submitted by States Parties Under Article 9, Paragraph 1, of the Convention, CERD Doc. No. CERD/C/2007/1 (13 June 2008), p. 10, art. 5.I.D (recognizing "the possible intersectionality of racial and religious discrimination, including the effects of anti-terrorism measures, which may lead to discrimination on ethnic grounds against members of specific religious communities"); *ibid.*, p. 13, art. 5.II.B (stating that particular attention should be paid to "complex forms of disadvantage in which racial discrimination is mixed with other causes of discrimination (such as those based on . . . religion . . .)").

in the Memorial.¹⁰⁰⁴

526. Russia does not dispute that Ibraim Ibragimov's home was searched on 28 August 2014.¹⁰⁰⁵ Russia's evidence shows that the search, carried out by officers of the so-called Center for Countering Extremism, was on a purported basis that has nothing to do with extremism—to locate allegedly stolen gold and silver items.¹⁰⁰⁶ While Russia argues that the search was court-approved, the court ruling cited by Russia contains hardly any detail to show that the court's decision was reasonable.¹⁰⁰⁷ The stolen goods were not found; the officers instead seized "extremist literature" relating to *Hizb ut-Tahrir*,¹⁰⁰⁸ and a handgun, which Mr. Ibragimov had inherited from his father, and began a criminal investigation.¹⁰⁰⁹

527. A strikingly similar pattern was followed in the case of Eren Ametov and Nariman Ametov. Russia confirms that the homes of these two Crimean Tatar individuals were searched on 10 September 2014, purportedly in connection with an "illegal arms trafficking" investigation.¹⁰¹⁰ Again, officers of the Center for Countering Extremism

¹⁰⁰⁴ Russia's Counter-Memorial Part II, para. 357–360. Russia further argues that "Ukraine systematically distorts or omits relevant factual and legal circumstances of its alleged cases that do not fit, and in fact disprove, its narrative of systematic campaign of racial discrimination against the Crimean Tatars." *Ibid.*, para. 357.

¹⁰⁰⁵ *Ibid.*, App. B, para. 29.

¹⁰⁰⁶ *Ibid.*; Centre for Countering Extremism of the Ministry of Internal Affairs for the Republic of Crimea, Record of Search in Mr Ibragimov's House, 28 August 2014 (Russia's Counter-Memorial Part II, Annex 172).

¹⁰⁰⁷ Bakhchisaray District Court of the Republic of Crimea, Ruling Authorizing the Search in Mr Ibragimov's House, 25 August 2014 (concluding that "[a]ccording to the available operational information, the stolen items may be located" at Mr. Ibragimov's home) (Russia's Counter-Memorial Part II, Annex 171).

¹⁰⁰⁸ Centre for Countering Extremism of the Ministry of Internal Affairs for the Republic of Crimea, Record of Search in Mr Ibragimov's House, 28 August 2014 (Russia's Counter-Memorial Part II, Annex 172); Russia's Counter-Memorial Part II, App. B, para. 29.

¹⁰⁰⁹ Inquiry Department of the Department of the Ministry of Internal Affairs for the Bakhchisaray District, Resolution on the Initiation of a Criminal Case, 8 December 2014 (Russia's Counter-Memorial Part II, Annex 200).

¹⁰¹⁰ Russia's Counter-Memorial Part II, App. B, para. 33; Ukraine's Memorial, para. 444.

conducted the search, and confiscated a number of books of a religious nature.¹⁰¹¹ Russia does not even attempt to explain how such books — which Russia admits were not even on its list of extremist materials — could possibly be relevant to the stated goal of verifying information “regarding illegal arms trafficking.”¹⁰¹²

528. Nor does Russia dispute that the Russian occupation authorities conducted a search of a café favored by Crimean Tatars on 23 November 2017.¹⁰¹³ While Russia points to this episode as proof that Ukraine’s account is unsubstantiated,¹⁰¹⁴ Russia’s evidence plainly confirms that fully-armed officers of the FSB and the “Berkut” Special Police Force, along with officers of the Counter-Extremism Center, raided a restaurant to arrest Ms. Vedzhie Kashka, a prominent 82-year-old Crimean Tatar activist, and four other Crimean Tatar activists in their fifties and sixties, based on an absurd charge that they were “extorting” USD 7,000 from another individual.¹⁰¹⁵ Russia also admits that the 82-year-old activist died shortly after her arrest, while in police custody, although it implausibly denies responsibility for the tragic death.¹⁰¹⁶ The FSB video footage of the troubling and violent arrests by officers in full combat

¹⁰¹¹ Main Investigative Directorate of the Investigative Committee of the Russian Federation for the Republic of Crimea and the City of Sevastopol, Letter No. AE 0097952, 15 March 2021 (noting that books titled “Fortress of the Muslim,” “Invocations to Allah with prayers,” “Treatment with Incantations Met in Quran and Sunnah” were seized) (Russia’s Counter-Memorial Part II, Annex 643).

¹⁰¹² Russia’s remaining comments — that one of the residents voluntarily handed an unregistered firearm to the authorities; the individuals were not detained or prosecuted; and neither residents had any complaints regarding the authorities’ actions — are based solely on a letter from the Main Investigative Directorate dated 15 March 2021, relaying information received from the FSB and, in any event, do not disprove the targeted and arbitrary nature of the searches. *Ibid.*; Russia’s Counter-Memorial Part II, App. B, paras. 31–33;

¹⁰¹³ Ukraine’s Memorial, para. 454.

¹⁰¹⁴ Russia’s Counter-Memorial Part II, paras. 360–362.

¹⁰¹⁵ *Ibid.*, App. B, paras. 64–66; *see* Ukraine’s Memorial, para. 454.

¹⁰¹⁶ In fact, Russia’s evidence shows that Ms. Kashka died shortly after being detained by a Counter-Extremism Center officer who told her to get into a Berkut vehicle. Investigative Department for the Kievskiy District of Simferopol of the Main Investigative Directorate of the Investigative Committee of

gear was widely aired on Russian television.¹⁰¹⁷ There is no evidence of criminal acts by the victims of this aggressive raid; they were trying to help Ms. Kashka get back USD 7,000 that she had loaned to an individual.¹⁰¹⁸ In any event, the aggressive raid and detention, which resulted in a tragic death, was manifestly disproportionate, given the age of the individuals and the nature of the alleged offense under investigation.¹⁰¹⁹

529. Russia further contends that Ukraine’s account of Russia’s measures at the Café “Bagdad” on 1 April 2016 lacks basis,¹⁰²⁰ claiming that the raid was part of “an ordinary prevention operation, . . . aimed in particular at combatting illegal drugs circulation and countering illegal migration.”¹⁰²¹ Yet, Russia’s own evidence plainly confirms the accuracy of Ukraine’s account of the event:¹⁰²² a group of armed and masked officers raided Café “Bagdad”; subjected visitors to urine tests on the spot; did not stop when negative test results were obtained, but instead took the individuals to the Ministry of Internal Affairs building,

the Russian Federation for the Republic of Crimea, Resolution on the Refusal to Initiate a Criminal Case, 20 April 2018 (Russia’s Counter-Memorial Part II, Annex 398).

¹⁰¹⁷ FSB Video Footage of the Detention of Crimean Tatars in Simferopol (23 November 2017) (Ukraine’s Reply, Annex 178), accessed at <https://crimea.ria.ru/20171123/1112854659.html>.

¹⁰¹⁸ As Russia’s evidence acknowledges, the loan was reflected in a note signed by the borrower, Mr. Yu Aitan. Yu, Aitan, Case No. 2-1123/2019, Counter-Claim, 18 June 2019 (Russia’s Counter-Memorial Part II, Annex 413). While Russian courts sought to explain that Mr. Aitan was “forced” to sign a sham note to make the transaction appear legal, the explanation is highly unconvincing given the ages and the health condition of the individuals involved. *See ibid.*

¹⁰¹⁹ In light of the violent nature of the raid, Russia’s claim that Ms. Kashka’s death was “unrelated to the law-enforcement operation” is unconvincing. Russia’s Counter-Memorial Part II, App. B, para. 66. *See* RFE/RL, *Veteran Crimean Tatar Activist Dies As Associates Detained By Russia* (23 November 2017) (Ukraine’s Memorial, Annex 1071); Halya Coynash, *Russian FSB Remove Incriminating Videos of the Arrest and Death of Crimean Tatar Veteran Vedzhi Kashka*, Kharkiv Human Rights Protection Group (6 November 2018).

¹⁰²⁰ Russia’s Counter-Memorial Part II, App. B, paras. 54–57.

¹⁰²¹ *Ibid.*, para. 56 & n.115 (citing Regnum, *Poklonskaya Refutes Reports of Ukrainian Media Regarding Detentions of Crimean Tatars* (2 April 2016) (Russia’s Counter-Memorial Part II, Annex 952).

¹⁰²² Ukraine’s Memorial, para. 450; OHCHR, Report on the Human Rights Situation in Ukraine (16 February–15 May 2016), para. 183 (Ukraine’s Memorial, Annex 771).

where they were interrogated for participation in “illegal armed formations” or “extremist organizations;” and released those individuals only after photographing, fingerprinting, and taking buccal epitheli samples from them.¹⁰²³ Russia does not rebut the observation in the OHCHR report that the detainees in this particular event were all “Muslim men, mostly Crimean Tatars.”¹⁰²⁴ Russia’s evidence shows that the following day, a number of complaints were filed with the law enforcement authorities concerning the raid and its aftermath, and that these complaints were withdrawn only after the relevant individuals had been subjected to further questioning by Ministry of Internal Affairs officers.¹⁰²⁵

530. Russia’s law enforcement measures against Crimean Tatar individuals based on their alleged affiliation with *Hizb ut-Tahrir* and *Tablighi Jamaat* further confirm the pretextual and vastly disproportionate nature of such measures.¹⁰²⁶ Numerous individuals have been searched and detained for historic social media posts,¹⁰²⁷ or simply for being a bystander or witness at the scene of a search,¹⁰²⁸ or for being a family member who came to

¹⁰²³ Explanation of D.Ya. Selyametov, 13 July 2016, pp. 1–2 (Russia’s Counter-Memorial Part II, Annex 284); Explanation of I.S. Mukhterem, 14 July 2016, pp. 1–2 (Russia’s Counter-Memorial Part II, Annex 285); Explanation of O.N. Seitmemetov, 14 July 2016, pp. 1–2 (Russia’s Counter-Memorial Part II, Annex 286).

¹⁰²⁴ See OHCHR, Report on the Human Rights Situation in Ukraine (16 February–15 May 2016), para. 183 (Ukraine’s Memorial, Annex 771). Russia’s conclusory remark that “[g]enerally speaking, individuals affected by such drug prevention operations include Russians, Ukrainians, Crimean Tatars and other ethnic groups” is conspicuously not specific to the event at issue, grossly lacks any detail, and simply quotes a Russian news agency that cites nothing in support. Russia’s Counter-Memorial Part II, App. B, para. 57.

¹⁰²⁵ Explanation of D.Ya. Selyametov, 13 July 2016, p. 2 (Russia’s Counter-Memorial Part II, Annex 284); Explanation of I.S. Mukhterem, 14 July 2016, p. 2 (Russia’s Counter-Memorial Part II, Annex 285); Explanation of O.N. Seitmemetov, 14 July 2016, p. 2 (Russia’s Counter-Memorial Part II, Annex 286).

¹⁰²⁶ Russia’s Counter-Memorial Part II, paras. 363–373; *ibid.*, App. B(II).

¹⁰²⁷ See *infra*, paras. 531–534.

¹⁰²⁸ See *infra*, paras. 531, 536.

protest the absurdly harsh and baseless sentences.¹⁰²⁹

531. Russia confirms that Crimean Tatar activist Mr. Marlen Mustafayev's home was searched on 21 February 2017, and that Mr. Mustafayev was detained, charged, and convicted of an administrative offense.¹⁰³⁰ The sole basis for the enforcement measure, including the home search by armed and masked riot officers, was Mr. Mustafayev's social media posts from 2014 that allegedly included a symbol of *Hizb ut-Tahrir*.¹⁰³¹ Russia further admits that ten other bystanders who were near Mr. Mustafayev's home at the time of the search were arrested and found guilty of disrupting public order and impeding the movement of civilians.¹⁰³²

¹⁰²⁹ Prisyazhnyuk Vladislava, *In the Occupied Crimea, 30 People Were Detained Near a Court Awaiting Sentencing*, Suspilne Crimea (29 October 2021), accessed at <https://crimea.suspilne.media/en/news/6013>.

¹⁰³⁰ Russia's Counter-Memorial Part II, App. B, paras. 43–44; see Ukraine's Memorial, para. 446; Kievskiy District Court of Simferopol, Case No. 5-479/2017, Decision, 21 February 2017, p. 1 ("During the court hearing, M.E. Mustafaev did not admit guilt . . . and stated that he had actually posted various symbols on his page in 'Vkontakte' social network being indifferent to the content and affiliation thereof, and had no intent to make exactly the symbols of the organization of an extremist nature publicly available.") (Russia's Counter-Memorial Part II, Annex 321); *ibid.*, p. 3.

¹⁰³¹ Centre for Countering Extremism of the Ministry of Internal Affairs for the Republic of Crimea, Certificate of Inspection of the Internet Resource, 9 January 2017, pp. 3–4 (Russia's Counter-Memorial Part II, Annex 306); Kievskiy District Court of Simferopol, Case No. 5-479/2017, Decision, 21 February 2017 (discussing no other evidence other than the social media post and expert opinion interpreting the symbols) (Russia's Counter-Memorial Part II, Annex 321). Russia's evidence also shows the investigative report of the Center for Countering Extremism that "there is a photo of 21 March 2014 with Nazi symbols." Centre for Countering Extremism of the Ministry of Internal Affairs for the Republic of Crimea, Certificate of Inspection of the Internet Resource, 9 January 2017, pp. 4, 10 (Russia's Counter-Memorial Part II, Annex 306). But in reality, the post was denouncing hate speech against Crimean Tatars; it is a photo of writing on a wall, which Russia conveniently fails to translate, which reads "TATARS GET OUT OF CRIMEA! (ТАТАРЫ ВОИ ИЗ КРЫМА)," with the Swastika next to it. *Ibid.*, p. 4; Social Media Page (Vkontakte) with 21 March 2014 Photo, excerpted for translation from Russia's Counter-Memorial Part II, Annex 306 (Ukraine's Reply, Annex 183).

¹⁰³² Russia's Counter-Memorial Part II, App. B, para. 45 & n.87. In one decision, for instance, two out of three "witnesses" were officers of the Ministry of Internal Affairs, whereas the other witness — the only civilian who was approached by an officer at the scene — simply testified that he "did not see any mass riots or crowds of people." Kievskiy District Court of Simferopol, Case No. 5-483/2017, Decision, 21 February 2017, p. 1 (Russia's Counter-Memorial Part II, Annex 310); see also Kievskiy District Court of Simferopol, Case No. 5-484/2017, Decision, 21 February 2017 (Russia's Counter-Memorial Part II, Annex 311); Kievskiy District Court of Simferopol, Case No. 5-485/2017, Decision, 21 February 2017 (Russia's Counter-Memorial Part II, Annex 316). In another decision, witnesses

532. While noting that Mr. Mustafayev “pleaded guilty,”¹⁰³³ Russia omits to mention the fact that Mr. Mustafayev’s home was searched *again* in September 2018, for a different social media post he allegedly uploaded on 25 February 2016.¹⁰³⁴ After these two rounds of targeted actions, and in fear of a substantial fine, Mr. Mustafayev pleaded guilty, asking the court to “take into account his financial situation, the lack of regular employment, [and] the presence of a minor child when determining the fine.”¹⁰³⁵ Mr. Mustafayev is reported to have been detained again on 9 February 2022, along with three other Crimean Tatars, on charges relating to his alleged affiliation with *Hizb ut-Tahrir*.¹⁰³⁶

533. Russia does not contest that “all nine house searches conducted in Crimea in the month of January 2018 were of houses of Crimean Tatars.”¹⁰³⁷ Russia’s defense is that the searches concerned “investigations into *Hizb ut-Tahrir*’s activities,” carried out based on a reasonable suspicion, and four individuals were eventually found guilty.¹⁰³⁸ But the one-page rulings that Russia cites as authorizing these searches only summarily authorize the searches based on “the documents provided,” with no further information provided.¹⁰³⁹

testified unanimously that the suspect was not breaching public order, one witness testifying that “[t]hrough a loudspeaker, it was announced that it was necessary to disperse, however, no opportunity was given to do that.” Kievskiy District Court of Simferopol, Case No. 5-480/2017, Decision, 21 February 2017, pp. 1–2 (Russia’s Counter-Memorial Part II, Annex 317).

¹⁰³³ Russia’s Counter-Memorial Part II, App. B, para. 44.

¹⁰³⁴ Kievskiy District Court of Simferopol, Decision, 4 October 2018 (Russia’s Counter-Memorial Part II, Annex 405).

¹⁰³⁵ *Ibid.*, p. 4.

¹⁰³⁶ Halya Coynash, *New Attack on Crimean Tatar Civic Activists in Russian-Occupied Crimea*, Kharkiv Human Rights Protection Group (10 February 2022).

¹⁰³⁷ Ukraine’s Memorial, para. 446.

¹⁰³⁸ Russia’s Counter-Memorial Part II, App. B, para. 48.

¹⁰³⁹ Kievskiy District Court of Simferopol, Resolution No. 735, 16 January 2018 (Russia’s Counter-Memorial Part II, Annex 385); Kievskiy District Court of Simferopol, Resolution No. 736, 16 January 2018 (Russia’s Counter-Memorial Part II, Annex 387); Kievskiy District Court of Simferopol, Resolution No. 738, 16 January 2018 (Russia’s Counter-Memorial Part II, Annex 386); Kievskiy

534. In fact, Russia’s evidence shows that Mr. Girai Kulametov was sentenced to ten days’ imprisonment on 18 January 2018 based on his social media posts allegedly displaying symbols of *Hizb ut-Tahrir* from 2011, years before Russia’s invasion of Crimea and its subsequent extension of the ban on that organization to Crimea.¹⁰⁴⁰ Mr. Enver Krosh and Mr. Ebazer Islyamov, whose homes were similarly raided in January 2018,¹⁰⁴¹ were charged and summarily convicted of “public display of the signs and symbols of extremist organizations” in connection with social media posts they made in or before 2013 and 2012, respectively.¹⁰⁴² These outrageous retroactive convictions for conduct that both preceded the establishment of Russian jurisdiction in Crimea and was lawful at the time committed clearly indicate an ulterior motive on the part of the Russian authorities—namely to intimidate and harass the Crimean Tatar community.¹⁰⁴³

District Court of Simferopol, Resolution No. 739, 16 January 2018 (Russia’s Counter-Memorial Part II, Annex 388).

¹⁰⁴⁰ Kirovskoe District Court of the Republic of Crimea, Case No. 5-11/18, Decision, 18 January 2018, pp. 3–4 (rejecting Mr. Kulametov’s argument that “the applicant posted said materials in 2011 without violating the legislation then in force in the Crimea” as a matter of Russian law) (Russia’s Counter-Memorial Part II, Annex 389).

¹⁰⁴¹ Russia’s Counter-Memorial Part II, App. B, para. 48.

¹⁰⁴² Nizhnegorskiy District Court of the Republic of Crimea, Case No. 5-12/2018, Decision, 25 January 2018, p. 1 (“The representatives of the individual subjected to administrative liability explained during the court hearing that even if E.R. Islyamov posted the symbols of a terrorist organization on his page, then he had done it before 2012, i.e. when the legislation of Ukraine was applicable on the territory of the Republic of Crimea, which did not provide for a sanction for this, and he could not believe that this action could be regarded as an offense in the future under the legislation of the Russian Federation. Furthermore, E.R. Islyamov had no intention to propagandize it or demonstrate it publicly.”) (Russia’s Counter-Memorial Part II, Annex 392); *see also* Dzhankoy District Court of the Republic of Crimea, Case No. 5-49/2018, Decision, 25 January 2018 (Russia’s Counter-Memorial Part II, Annex 393).

¹⁰⁴³ Mr. Kemal Seityaev was fined for posting on his social media a publicly available song deemed to be extremist material under Russian laws. Belogorsk District Court of the Republic of Crimea, Case No. 5-32/2018, Decision, 18 January 2018 (Russia’s Counter-Memorial Part II, Annex 390). *See also* Halya Coynash, *Crimean Tatar Activist Jailed After New Armed Searches for a Video Posted in 2012*, Kharkiv Human Rights Protection Group (19 January 2018). Notably, these social media postings were “detected” by the investigative authorities on 26 October 2017, less than two weeks after the peaceful “single-picket” protests of 14 October, in which Mr. Kulametov participated along with other Crimean Tatar individuals, calling for the release of Crimean Tatar prisoners and protesting the

535. In numerous cases, Crimean Tatar individuals were sentenced to shockingly long prison sentences, solely based on their alleged affiliation with *Hizb ut-Tahrir*. Russia does not contest that on 12 October 2016, the FSB forcefully broke into a number of homes of Crimean Tatar families and conducted searches in the presence of children.¹⁰⁴⁴ Relying heavily on *Hizb ut-Tahrir* materials allegedly seized during the searches, testimony from an FSB officer and anonymous witness, all five Crimean Tatar men were sentenced to terms of imprisonment from 12 to 17 years and subsequently sent to prisons in Russia, thousands of miles from their families and homes.¹⁰⁴⁵

536. While criticizing Ukraine's account of the home searches and detentions of 11 October 2017 as "misleading," Russia does not dispute that the FSB and Special Forces units searched Crimean Tatar homes in Bakhchysarai and arrested six Crimean Tatar men, all Crimean Solidarity activists,¹⁰⁴⁶ based solely on their alleged membership of *Hizb ut-*

occupation authorities' treatment of Crimean Muslims as extremists or terrorists. *Ibid.* In December 2017, more than 70 court sessions were held to hear administrative cases of individuals who had been on single-man pickets on 14 October; almost 50 Crimean Tatars were reportedly detained. See Halya Coynash, *49 Crimean Tatars Detained for Legal Pickets Demanding an End to Persecution*, Kharkiv Human Rights Protection Group (14 October 2017); Crimean Human Rights Group, Crimean Human Rights Situation Review (December 2017), pp. 13, 21 (reporting a note from the so-called Head of Administrative Law Enforcement Unit of the Simferopol Department of Russia's Ministry of Internal Affairs stating that the protest "*discontented the Slavic population of Crimea*") (emphasis added), accessed at <https://crimeahrg.org/wp-content/uploads/2018/01/Crimean-Human-Rights-Group-Dec-2017-ENG.pdf>.

¹⁰⁴⁴ Ukraine's Memorial, para. 445; Russia's Counter-Memorial Part II, App. B, paras. 34–36.

¹⁰⁴⁵ North Caucasus District Military Court, Decision, 18 June 2019 (Russia's Counter-Memorial Part II, Annex 412); Halya Coynash, *Crimean Tatars Sentenced to 12 and 17 Years on 'Terrorist Charges' Without Being Accused of a Crime*, Kharkiv Human Rights Protection Group (9 August 2019). Just months before the 12 October 2016 searches, on 12 May 2016, four other Crimean Tatar men — Enver Mamutov, Rustem Abiltarov, Zevri Abseitov, and Remzi Memetov — were arrested based on similar *Hizb ut-Tahrir* charges, and in December 2018, sentenced to terms of imprisonment from 9 to 17 years. Halya Coynash, *Four Crimean Tatar Political Prisoners Get Horrifically Long Sentences for Not 'Confessing' to Fake Terrorism Charges*, Kharkiv Human Rights Protection Group (24 December 2018).

¹⁰⁴⁶ Halya Coynash, *Crimean Tatar Civic Journalist Marlen Asanov Gets 19-Year Sentence Because he Refused to Leave Occupied Crimea*, Kharkiv Human Rights Protection Group (12 October 2020) (noting that two other Crimean Solidarity members were also arrested months later, on 21 May 2018).

Tahrir.¹⁰⁴⁷ On 16 September 2020, all defendants except one who was acquitted received 13- to 19-year sentences.¹⁰⁴⁸ Numerous other Crimean Tatar men who were at the scene — including family members, relatives, and friends — were detained and charged with participation in a mass gathering causing a public nuisance.¹⁰⁴⁹

537. Crimean Tatar individuals suspected of being members of *Tablighi Jamaat* faced a similar fate, albeit with shorter periods in prison. Russia confirms that raids were conducted at the premises of four individuals on 2 October 2017, who were later arrested for allegedly being members of *Tablighi Jamaat*.¹⁰⁵⁰ A video clip of dozens of armed and masked officers bursting into homes and arresting the non-resisting Crimean Tatars, the oldest aged 64 and in poor health, was broadcast on Russian state-controlled media.¹⁰⁵¹ All four

¹⁰⁴⁷ Russia's Counter-Memorial Part II, App. B, para. 50. See also Kievskiy District Court of Simferopol, Case No. 3/1-274/2017, Ruling, 12 October 2017 (Russia's Counter-Memorial Part II, Annex 365); Kievskiy District Court of Simferopol, Case No. 3/1-271/2017, Ruling, 12 October 2017 (Russia's Counter-Memorial Part II, Annex 366); Kievskiy District Court of Simferopol, Case No. 3/1-273/2017, Ruling, 12 October 2017 (Russia's Counter-Memorial Part II, Annex 367); Kievskiy District Court of Simferopol, Case No. 3/1-275/2017, Ruling, 12 October 2017 (Russia's Counter-Memorial Part II, Annex 368); Kievskiy District Court of Simferopol, Case No. 3/1-272/2017, Ruling, 12 October 2017 (Russia's Counter-Memorial Part II, Annex 369).

¹⁰⁴⁸ InterfaxUkraine, *Acquittal of Crimean Resident Ernes Ametov Becomes First in History of 'Hizb ut-Tahrir' Case in Russia* (17 September 2020).

¹⁰⁴⁹ Ukraine's Memorial, para. 448; Russia's Counter-Memorial Part II, App. B, paras. 50–51.

¹⁰⁵⁰ Ukraine's Memorial, para. 447; Russia's Counter-Memorial Part II, App. B, para. 49. Relying solely on a heavily redacted court decision summarily finding the four individuals guilty, Russia claims that “a substantial amount of extremist literature was found” and “[t]he suspects were subsequently found to have held meetings of their cell, disseminated extremist materials and encouraged people to join *Tablighi Jamaat*.” Russia's Counter-Memorial Part II, App. B, para. 49. Russia further argues that “three out of four accused pleaded guilty and confessed that they were aware of the restrictions and prohibitions, proceeding with their activities regardless, whereas one of the accused made a partial admission.” *Ibid.* The cited decision, however, does not mention anything to support that any of the men was a member of *Tablighi Jamaat*, or was organizing a so-called “cell,” or confessed to knowingly violating Russia's extremism law, as Russia claims. *Ibid.*, n.97; Supreme Court of the Republic of Crimea, Case No. 1-1/2019, Decision, 22 January 2019 (excerpts) (Russia's Counter-Memorial Part II, Annex 407).

¹⁰⁵¹ Video Footage of the Detention of Crimean Tatars (2 October 2017) (Ukraine's Reply, Annex 177); RIA Novosti, *Cells of Tablighi Jamaat Were Liquidated in Three Regions of Crimea** (2 October 2017), accessed at <https://ria.ru/20171002/1505981902.html> (showing video footage).

individuals were sentenced to between 2.5 and 4 years in prison despite the absence of any indication of planned or actual act of extremism, or any other criminal conduct.¹⁰⁵²

538. The pattern of arbitrary searches and detentions directed against the Crimean Tatar community is completed by the law enforcement measures directed against the political leadership of the community, which Russia also does not deny. Concerning the searches of Mr. Bariiev's and Mr. Mustafa Asaba's homes on 16 September 2014, Russia's explanation is that the search, approved by a court, concerned an ongoing criminal investigation relating to Mr. Dzhemilev's rejected attempt to re-enter Crimea on 3 May 2014.¹⁰⁵³ Leaving aside the arbitrary nature of Russia's entry ban on Mr. Dzhemilev,¹⁰⁵⁴ the court rulings granting the searches — finding a reasonable basis to find “weapons,” “ammunition,” or “objects excluded from civil use” in those premises — further expose the arbitrary nature of such rulings.¹⁰⁵⁵ Unsurprisingly, the officers did not find any such items, but instead seized the processor from Mr. Bariiev's personal computer and laptop.¹⁰⁵⁶ In any event, even assuming the court rulings

¹⁰⁵² Halya Coynash, *Four Crimean Tatars Sentenced for their Faith in Russian Occupied Crimea*, Kharkiv Human Rights Protection Group (23 January 2019).

¹⁰⁵³ Russia's Counter-Memorial Part II, App. B, para. 32.

¹⁰⁵⁴ *See supra*, paras. 495–497.

¹⁰⁵⁵ While the court found that those premises may have “store[d] weapons and ammunition, objects excluded from civil use” or any other potentially relevant objects, the “instruments of crime” that those rulings refer to as allegedly used during the 3 May 2014 event are “vehicles” of the individuals who came to meet and show support for Mr. Dzhemilev and “wooden sticks.” Kievskiy District Court of Simferopol, Case No. 3/6-336/2014, Ruling Authorizing the Search in Mr Bariiev's House, 3 September 2014, p. 1 (Russia's Counter-Memorial Part II, Annex 176); Kievskiy District Court of Simferopol, Case No. 3/6-342/2014, Ruling Authorizing the Search in Mr Asaba's House, 3 September 2014, p. 1 (Russia's Counter-Memorial Part II, Annex 177). There is simply no basis to conclude that “weapons and ammunition” that were not used on 3 May 2014 would be found in homes of Mr. Bariiev or Mr. Asaba, neither of whom even participated in the event. Russia's evidence further confirms that many more — at least six other — Crimean Tatar and Ukrainian individuals had their homes searched on the same basis. *See* Ukraine's Memorial, para. 444, n.940; Russia's Counter-Memorial Part II, Appendix B, para. 32, n.61.

¹⁰⁵⁶ Search Record, drafted by Senior Lieutenant I.S. Emelyanov, Operative, Russian Federal Security Service Directorate in the Republic of Crimea and the City of Sevastopol (16 September 2014) (Ukraine's Memorial, Annex 896).

were reasonable, there is no justification for the FSB’s abusive and violent searches discussed in detail in Mr. Bariiev’s testimony, which Russia does not seriously engage with.¹⁰⁵⁷

539. Russia confirms that in April 2015, the Russian Ministry of Internal Affairs conducted a large-scale exercise, the purpose of which included suppressing “antisocial manifestations” and fighting “terrorism.”¹⁰⁵⁸ Russia does not deny that blockades and searches occurred.¹⁰⁵⁹ Instead, Russia claims that Crimea was not the only area where “Barrier 2015” took place, Ukraine fails to corroborate discriminatory conduct on the part of Russia, and no claims or complaints relating to the operation have been filed.¹⁰⁶⁰ But whether similar operations were carried out elsewhere is beside the point. Ukraine has shown that Russian forces were, in the context of Crimea, engaging in discriminatory conduct based on ethnicity, such targeting those who appeared to be Crimean Tatars during random inspections and, in many cases, searching their homes.¹⁰⁶¹ Further, as both Ukraine’s and Russia’s evidence shows, complaints *were* filed, including by Russia’s own Presidential Council for the Development of Civil Society and Human Rights, which plainly coincide with Ukraine’s

¹⁰⁵⁷ Ukraine’s Memorial, para. 423. Russia’s only other comment — that there apparently is a technical discrepancy between Mr. Bariiev’s witness statement and his 2014 interview with Human Rights Watch concerning the specific number of men who searched his home and the precise length of the search — is immaterial, and Russia does not attempt to suggest otherwise. Russia’s Counter-Memorial Part II, App. B, para. 31, n.58.

¹⁰⁵⁸ Ministry of Internal Affairs of the Russian Federation Official Website, “The Internal Troops of the Russian Ministry of Internal Affairs Began the Operational-Strategic Exercise ‘Zaslou-2015’ the Day Before”, 3 April 2015 (Russia’s Counter-Memorial Part II, Annex 457); Prosecutor’s Office of the Republic of Crimea, Letter No. Isorg 15/3-7209-2015 to Mr Fedotov, Adviser to the President of the Russian Federation, Chairman of the Presidential Council for Civil Society and Human Rights, 28 August 2015 (Russia’s Counter-Memorial Part II, Annex 556).

¹⁰⁵⁹ Ukraine’s Memorial, paras. 451-452; Russia’s Counter-Memorial Part II, App. B, paras. 59–60.

¹⁰⁶⁰ Russia’s Counter-Memorial Part II, App. B, paras. 59–63.

¹⁰⁶¹ Ukraine’s Memorial, para. 452; *see also* Crimea Human Rights Field Mission - Brief Review of the Situation in Crimea (April 2015), pp. 10–11 (Ukraine’s Memorial, Annex 945); Human Rights Group Report of October 2015, pp. 7–8 (Ukraine’s Memorial, Annex 949).

account of the event.¹⁰⁶² The Crimean Prosecutor’s conclusory letter stating “human rights were respected regardless of the age and nationality of citizens, the conditions of their places of residence” has no support or probative value.¹⁰⁶³

540. Nor, beyond labeling Ukraine’s account of this event as “clearly misleading,” does Russia dispute that, on 26 April 2018, the Russian occupation authorities carried out a series of armed searches and detained prominent members of the Crimean Tatar community, on the basis that they allegedly possessed food products in their warehouses that were beyond their sell-by dates, with the intention of selling those products, in violation of Article 238(2) of Russia’s Criminal Code.¹⁰⁶⁴ Russia’s justification of this action as based on “lawful considerations and a legitimate concern for public health,”¹⁰⁶⁵ is belied by the fact that Mr. Velilyaev and Mr. Bariev were each detained for over a year, plainly an entirely disproportionate penalty for an alleged food safety offense.¹⁰⁶⁶

¹⁰⁶² Human Rights Group Report of October 2015, pp. 7–8, 21–24 (noting that a complaint was submitted to the Presidential Council for Civil Society Institutions and Human Rights on the mass searches in Crimea during “Barrier 2015” and appending a copy of the complaint, and the responses from the Chief Military Prosecutor’s Office of the Russian Federation and the so-called Prosecutor of Crimea Natalia Poklonskaya) (Ukraine’s Memorial, Annex 949); Prosecutor’s Office of the Republic of Crimea, Letter No. Isorg 15/3-7209-2015 to Mr Fedotov, Adviser to the President of the Russian Federation, Chairman of the Presidential Council for Civil Society and Human Rights, 28 August 2015 (referring to “the application on violation of the rights of citizens received”) (Russia’s Counter-Memorial Part II, Annex 556); Letter from S.V. Krivenko, Member of the Council Under the President of Russia for the Development of Civil Society and Human Rights to the Chairman of the Council under the President of the Russian Federation for the Development of Civil Society and Human Rights M.A. Fedotov, excerpted for translation from Ukraine’s Memorial, Annex 949 (Ukraine’s Reply, Annex 179).

¹⁰⁶³ Prosecutor’s Office of the Republic of Crimea, Letter No. Isorg 15/3-7209-2015 to Mr Fedotov, Adviser to the President of the Russian Federation, Chairman of the Presidential Council for Civil Society and Human Rights, 28 August 2015 (Russia’s Counter-Memorial Part II, Annex 556).

¹⁰⁶⁴ Ukraine’s Memorial, para. 454; Russia’s Counter-Memorial Part II, App. B, paras. 67–69.

¹⁰⁶⁵ Russia’s Counter-Memorial Part II, App. B, para. 67.

¹⁰⁶⁶ *Ibid.*, para. 69. Russia’s evidence shows the irregularities in the proceedings against Mr. Velilyaev and Mr. Bariev. They were, for instance, transferred to an isolation facility in Moscow shortly after the criminal case was initiated, notwithstanding defense counsel’s complaints that they were not even properly informed of the crime they were suspected of. Directorate for Investigation of Crimes Related to the Use of Prohibited Means and Methods of Warfare, the Main Investigative Directorate of

* * *

541. In sum, Russia's own account and evidence confirm that, in addition to subjecting the Crimean Tatar community to enforced abductions and other acts of violence and harassing its leaders, Russia has singled out the Crimean Tatar community for a pattern of pretextual, abusive, intrusive, and disproportionate enforcement actions in violation of its CERD obligations.

the Investigative Committee of the Russian Federation, Record of Detention of Mr. Velilyaev, 26 April 2018, pp. 4–5 (Russia's Counter-Memorial Part II, Annex 400); Directorate for Investigation of Crimes Related to the Use of Prohibited Means and Methods of Warfare, the Main Investigative Directorate of the Investigative Committee of the Russian Federation, Record of Detention of Mr. Bariev, 26 April 2018, pp. 3–4 (Russia's Counter-Memorial Part II, Annex 401). Russia further omits to mention that Mr. Velilyaev and Mr. Bariev both signed a written admission only on 21 March 2019, almost a full year since their transfer and subsequent detention, which served as the primary, if not the only, basis for their guilty verdict. Directorate for Investigation of Crimes Related to the Use of Prohibited Means and Methods of Warfare, the Main Investigative Directorate of the Investigative Committee of the Russian Federation, Record of Interrogation of Mr. Bariev, 21 March 2019 (Russia's Counter-Memorial Part II, Annex 408); Directorate for Investigation of Crimes Related to the Use of Prohibited Means and Methods of Warfare, the Main Investigative Directorate of the Investigative Committee of the Russian Federation, Record of Interrogation of Mr. Velilyaev, 21 March 2019 (Russia's Counter-Memorial Part II, Annex 409).

Chapter 13. FORCED CITIZENSHIP

542. Ukraine demonstrated in its Memorial that the introduction by Russia of its own nationality and immigration framework into Crimea, as part of the Law on Admission, was one of several measures that laid the foundation for systematic racial discrimination against the Crimean Tatar and Ukrainian communities.¹⁰⁶⁷ As Ukraine has shown, the law has had a discriminatory impact on both those Crimean Tatars and Ukrainians who automatically assumed Russian nationality pursuant to the Law on Admission's provisions *and* the smaller number who did not. The former have been forced into Russia's discriminatory regime, with their right to nationality significantly burdened by Russia's effective disregard for their Ukrainian citizenship; the latter have become foreigners in their homeland.¹⁰⁶⁸ And by forcing this choice on members of the two communities, the law had the purpose or effect of suppressing rather than expanding the core civil rights of the two communities in violation of Articles 5(c), 5(d)(i), 5(d)(ii), 5(d)(iii), 5(e)(i), and 5(e)(iv) of the CERD.¹⁰⁶⁹

543. Russia argues that the harms Ukraine complains of are consequences of citizenship-based measures that fall outside the scope of the CERD, and are based on laws that do not discriminate against the Crimean Tatar and Ukrainian communities.¹⁰⁷⁰ But the fact that discrimination was facilitated by operation of a facially neutral citizenship law does not shield Russia from its CERD violations, where the purpose or effect of that law was to significantly and disproportionately burden the numerous treaty-protected rights to be free of racial discrimination held by members of the Crimean Tatar and Ukrainian communities.

¹⁰⁶⁷ Ukraine's Memorial, para. 382 *et seq.*

¹⁰⁶⁸ *Ibid.*, paras. 455, 617–618.

¹⁰⁶⁹ *Ibid.*, paras. 611–618, 623–626.

¹⁰⁷⁰ Russia's Counter-Memorial Part II, para. 389.

A. Russia's Imposition of Its Citizenship Regime Violates the CERD

544. Russia contends that restrictions based on citizenship and discrimination between citizens and non-citizens are expressly excluded from the scope of the CERD by virtue of Articles 1.1, 1.2, and 1.3, and thus fall outside the jurisdiction of the Court.¹⁰⁷¹

545. As an initial matter, an essentially identical argument made by Russia in its Preliminary Objections has been rejected by the Court. In the Preliminary Objections Judgment, the Court concluded that the measures of which Ukraine complains, including the forced citizenship, “fall within the provisions of the Convention.”¹⁰⁷² Nor can Russia’s assertion be squared with the view of the CERD Committee, which:

urge[d] [Russia] to repeal any administrative or legislative measures adopted since the State party started to exercise effective control over Crimea that have the purpose or effect of discriminating against any ethnic group or indigenous peoples on grounds prohibited under the Convention, *including in relation to nationality and citizenship rights*.¹⁰⁷³

546. In fact, Russia’s defense mischaracterizes Ukraine’s position. Russia accepts that it established a “special regime,” or an “*ad hoc* mechanism,” the primary goal of which was for “residents of Crimea to acquire Russian citizenship quickly and *en masse*.”¹⁰⁷⁴ Ukraine’s claim concerns how this mechanism and its enforcement has particularly burdened the human rights of the Crimean Tatar and Ukrainian communities, *regardless of* whether

¹⁰⁷¹ *Ibid.*, paras. 380–381.

¹⁰⁷² Judgment on Preliminary Objections, p. 595, para. 96. Russia has made essentially the same argument in its Preliminary Objections. *See* Russia’s Objections, para. 324 (“Ukraine alleges on a number of occasions that Russia breached CERD by discriminating between its citizens and non-citizens.”).

¹⁰⁷³ CERD Committee, Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, Concluding Observations of the Committee on the Elimination of Racial Discrimination, Russian Federation, CERD/C/RUS/CO/23-24 (20 September 2017), para. 20 (emphasis added) (Ukraine’s Memorial, Annex 804).

¹⁰⁷⁴ Russia’s Counter-Memorial Part II, App. C, paras. 3–4.

they automatically assumed Russian nationality or were able to opt out.¹⁰⁷⁵

547. In particular, Russia’s “special regime” essentially forced its citizenship onto the Ukrainian and Crimean Tatar population of Crimea, including those who continue to consider themselves citizens of Ukraine and did not want to become Russian citizens, impairing the right to nationality of those Crimean Tatars and Ukrainians and subjecting them to consequential discriminatory effects.¹⁰⁷⁶ The impact fell disproportionately on those two communities, as ethnic Russians who welcomed the purported annexation of Crimea by the Russian Federation have not suffered the same impairment of their right to nationality.¹⁰⁷⁷

548. On the other hand, the restrictions faced by those Crimean residents who opted out of Russian nationality or otherwise were not deemed Russian citizens, and thus became foreigners, resulted in the infringement of a broad range of their CERD-protected rights, including, the “right to freedom of movement and residence with the border of the State,” the “right to leave any country, including one’s own, and to return to one’s country,” and the “rights to work, to free choice of employment.”¹⁰⁷⁸ Again, such restrictions have disproportionately affected the Crimean Tatar and Ukrainian communities, the members of which are far more likely than other inhabitants of Crimea to lack Russian citizenship or not be recognized as permanent residents of Crimea.¹⁰⁷⁹

¹⁰⁷⁵ Ukraine’s Memorial, para. 455.

¹⁰⁷⁶ See *infra*, Sections C–D.

¹⁰⁷⁷ Ukraine’s Memorial, paras. 616–618.

¹⁰⁷⁸ *Ibid.*, paras. 614–615, 623–625.

¹⁰⁷⁹ CERD, art. 1(3) (expressly permitting the Convention to be “interpreted as affecting . . . the legal provisions of States Parties concerning nationality, citizenship or naturalization” when “such provisions . . . discriminate against any particular nationality.”). According to the results of the October 2014 census conducted by the Russian Federation, Ukrainian citizens constituted 90 per cent of all individuals considered “foreigners” who lived in Crimea under the law of the Russian Federation. U.N. Secretary-General, *Situation of Human Rights in the Autonomous Republic of Crimea and the City of Sevastopol, Ukraine*, U.N. Doc. A/HRC/47/58 (27 May 2021), para. 41, n.84.

549. The fact that a prime tool through which the specific harms were imposed was Russia's citizenship framework does not shield Russia from its CERD violations. Russia's reliance on *Qatar v. UAE* is misplaced.¹⁰⁸⁰ The case concerned a distinct legal question, namely, whether discrimination based on a person's current nationality falls within the prohibition of racial discrimination within the meaning of the Convention.¹⁰⁸¹ It did *not* address the discriminatory downstream effect of a forced citizenship regime on a CERD-protected group, the issue appropriately before the Court in this case.¹⁰⁸²

550. Russia's argument that any Ukrainian allegations regarding IHL "are not within the Court's jurisdiction" similarly misses the point.¹⁰⁸³ As discussed in Chapter 9, Ukraine's claims are based solely on the CERD, namely, the discriminatory purpose or effect of the relevant Russian laws with respect to the Crimean Tatar and Ukrainian communities in Crimea, regardless of whatever other violations of international law those measures might entail.¹⁰⁸⁴

B. The Citizenship Status of Residents of Crimea Resulting from the Law on Admission Does Not Reflect Free and Informed Choice

551. The crux of Russia's defense is that residents of Crimea "enjoyed the ability" to opt to retain exactly the citizenship or citizenships of their choice, namely only Russian citizenship, only Ukrainian citizenship, or both (or multiple) citizenships.¹⁰⁸⁵ In Russia's view,

¹⁰⁸⁰ Russia Counter-Memorial Part II, para. 380.

¹⁰⁸¹ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Preliminary Objections*, Judgment of 4 February 2021, para. 105.

¹⁰⁸² See Fredman Second Report, paras. 23–24, 28, n.27 & 31, n.29 (Ukraine's Reply, Annex 5).

¹⁰⁸³ Russia's Counter-Memorial Part II, para. 387.

¹⁰⁸⁴ See *supra*, Chapter 9(A).

¹⁰⁸⁵ Russia Counter-Memorial Part II, para. 382. See also *ibid.*, App. C, paras. 3–34.

therefore, the grievances Ukraine alleges are simply a consequence of individual choices.¹⁰⁸⁶

552. But as demonstrated in the Memorial, the citizenship status of residents of Crimea resulting from the implementation of the Law on Admission does not accurately reflect individual free choice. To the contrary, Russia achieved its stated goal — rapid extension of its citizenship in Crimea¹⁰⁸⁷ — through a mechanism that coerced a choice, and foreseeably did not reflect a voluntary or informed decision.

553. The nominal availability of an opt-out procedure did not provide residents of Crimea a meaningful opportunity to make use of that procedure, as observed by numerous U.N. bodies, the OSCE, and prominent NGOs.¹⁰⁸⁸ As the U.N. Human Rights Monitoring Mission summarized:

(1) the period granted for initiating the procedure of refusing Russian citizenship (18 April) was too short; (2) instructions from the Russian Federal Migration Service (FMS) on the refusal procedure were only available as of 1 April; (3) information about FMS points was not available until 4 April; (4) from 4–9 April only two FMS points were functioning - in Sevastopol and in Simferopol; (5) as of 10 April, 9 FMS points were working: Sevastopol, Simferopol, Yalta, Bakhchisaray, Bilogorsk, Evpatoriya, Saki, Kerch and Djankoy; (6) some requirements in the procedure of refusing Russian citizenship evolved over time, such as the necessity to []make the

¹⁰⁸⁶ See, e.g., *ibid.*, para. 42 (“[I]t is disingenuous for Ukraine to complain on the status of foreigner that indeed logically results for anyone who freely made the choice to opt out from the default regime.”); *ibid.*, para. 51 (arguing that “obtaining and retaining Russian citizenship — to which military obligations are attached — ultimately reflect a person’s own choice”); *ibid.*, para. 52 (arguing that those Crimeans in prison during the application of the 2014 regime were provided “meaningful opportunity to opt out of Russian citizenship, if they so desired,” and 23 detainees and convicts in fact opted out); *ibid.*, para. 55 (arguing that Mr. Oleg Sentsov has failed to opt out while having an opportunity to do so until 18 April 2014).

¹⁰⁸⁷ *Ibid.*, paras. 3–4.

¹⁰⁸⁸ See, e.g., OHCHR, Report on the Human Rights Situation in Ukraine (15 May 2014), para. 127 [hereinafter 2014 OHCHR Report] (Ukraine’s Memorial, Annex 763); 2015 OSCE Report, paras. 37–42 (Ukraine’s Memorial, Annex 812); Open Society Justice Initiative, Human Rights in the Context of Automatic Naturalization in Crimea (June 2018), paras. 75–83 (Ukraine’s Memorial, Annex 975); Regional Center for Human Rights, Crimean Precedent: Forced Displacement from Crimea and Its Human Rights Aspects (December 2019), pp. 24–27, accessed at https://krymbezpravil.org.ua/wp-content/uploads/2019/12/Precedent_Forced_Displacement.pdf.

application in person, and that both parents were required for the application of a child.¹⁰⁸⁹

554. Russia does not deny that the Law on Admission created an extremely tight deadline to reject Russian citizenship — 18 days at most.¹⁰⁹⁰ The U.N. Human Rights Committee has observed that this “very short period” resulted in the “[I]mitation of the possibility for Crimean residents to make an informed decision on the free choice of their citizenship.”¹⁰⁹¹ Nor does Russia dispute the fact that, until 10 April 2014, just about a week before the deadline for opting out, the Russian FMS accepted applications only in four offices in the entirety of Crimea.¹⁰⁹² Russia’s comment that there were five more available locations conveniently omits to mention that it was not until 10 April 2014 that the FMS in Crimea announced its plan to immediately open five more offices.¹⁰⁹³ Russia’s explanation that submission by registered post was an option is belied by the fact that FMS officials themselves

¹⁰⁸⁹ 2014 OHCHR Report, para. 127 (Ukraine’s Memorial, Annex 763).

¹⁰⁹⁰ While the formal deadline was one month from 18 March 2014, in reality, the Russian Federal Migration Service (FMS) provided instructions on the refusal procedure for the first time weeks later, after the relevant citizenship provision of the Law on Admission came into force on 1 April 2014, essentially leaving those who wish to opt out of Russian citizenship and retain Ukrainian citizenship 18 days or to do so. Ukraine’s Memorial, para. 458. The OHCHR, for instance, notes that information about FMS locations was not available until 4 April 2014, just two weeks before the deadline. 2014 OHCHR Report, para. 127 (Ukraine’s Memorial, Annex 763).

¹⁰⁹¹ HRC, Concluding Observations on the Seventh Periodic Report of the Russian Federation, CCPR/C/RUS/CO/7 (28 April 2015), para 23(c); *see also* Ukraine’s Memorial, para. 458 & n.971. Russia’s comment that those who missed the deadline could still apply to renounce their Russian citizenship under the general citizenship framework is a transparent attempt to shift the responsibility for the consequences of its CERD violations. *See* Russia’s Counter-Memorial Part II, App. C, para. 23. In any event, the claim ignores the practical reality that to renounce one’s Russian citizenship, which can take months, one would first need to have obtained a document proving Russian citizenship such as a Russian passport. *See* Information and Reference Material on Procedure of Acquiring Citizenship of the Russian Federation by Crimean Residents as Attached to the Letter of the Main Migration Directorate of the Ministry of Internal Affairs of the Russian Federation No. 20/25495, 27 July 2021, p. 4 (explaining that renunciation of Russian citizenship requires “a passport of a citizen of the Russian Federation”) (Russia’s Counter-Memorial Part II, Annex 1330).

¹⁰⁹² Ukraine’s Memorial, para. 458.

¹⁰⁹³ Russia’s Counter-Memorial Part II, App. C, para. 45; 2015 OSCE Report, para. 38 (Ukraine’s Memorial, Annex 812); 2014 OHCHR Report, para. 127 (Ukraine’s Memorial, Annex 763).

openly discouraged that option as risky.¹⁰⁹⁴

555. More fundamentally, many Ukrainians in Crimea would certainly have been deterred by the political and social atmosphere in which Ukrainians were being labeled as fascists and neo-Nazis,¹⁰⁹⁵ as well as the implications of becoming a foreigner in one's own land discussed *infra* in this Chapter, among other things.¹⁰⁹⁶ While Russia attempts to shrug off such concerns as “not credible” and “overly subjective to carry any real explanatory weight,”¹⁰⁹⁷ it offers nothing in support of its attempt to disregard: (1) Russia's well-documented campaign of disinformation and use of hate speech aimed at stirring up fear among the ethnic Russian majority in Crimea¹⁰⁹⁸; (2) reports from international observers on actual instances of harassment and intimidation against individuals waiting in line to opt out of Russian citizenship¹⁰⁹⁹; and (3) the fact that the opt-out period began within weeks of the enforced disappearances of pro-Ukraine activists.¹¹⁰⁰ As such, the limited number of permanent residents of Crimea who have opted out of Russian citizenship proves nothing about the desirability of Russian citizenship for the remainder, especially where choosing to

¹⁰⁹⁴ Kryminform, *Residents of Crimea Who Are Abroad Can Apply for the Retention of Ukrainian Citizenship to the Consular Services of the Russian Federation - FMS of the Russian Federation* (8 April 2014) (Ukraine's Reply, Annex 129).

¹⁰⁹⁵ Ukraine's Memorial, para. 459.

¹⁰⁹⁶ See *infra*, paras. 567–569.

¹⁰⁹⁷ Russia's Counter-Memorial Part II, App. C, para. 43.

¹⁰⁹⁸ Ukraine's Memorial, paras. 375–383, 459.

¹⁰⁹⁹ See, e.g., 2015 OSCE Report, para. 39 (Ukraine's Memorial, Annex 812).

¹¹⁰⁰ See *supra*, Chapter 10. The shortcomings in the opt-out procedure highlighted here are not exhaustive. For instance, certain categories of individuals were denied meaningful access to the opt-out procedure altogether. See Regional Center for Human Rights, *Crimean Precedent: Forced Displacement from Crimea and Its Human Rights Aspects* (December 2019), pp. 25–26; HRC, *Concluding Observations on the Seventh Periodic Report of the Russian Federation*, CCPR/C/RUS/CO/7 (28 April 2015), para. 23(c) (indicating that Russia's automatic citizenship regime “disproportionately affected those individuals who could not apply in person at the designated locations to refuse citizenship, in particular persons in places of detention and other closed institutions, such as hospitals and orphanages.”).

opt out in favor of remaining Ukrainian would result in being labeled a fascist or neo-Nazi.¹¹⁰¹

556. Conversely, Crimean residents without the evidence of permanent resident status in Crimea needed to qualify for Russian citizenship have, by default, become foreigners in their own land. While Russia maintains that Ukraine is responsible for the lack of evidence of permanent resident status in Crimea, and that Russian law and courts have offered a pragmatic and accommodating approach for them,¹¹⁰² it does not deny that Russia's regime has particularly affected Crimean Tatars who had recently returned from exile in Central Asia, as well as Ukrainians who had moved to Crimea from other parts of Ukraine.¹¹⁰³

C. The Imposition of Russia's Citizenship Law Has Fostered Various Downstream Discriminatory Effects on the Crimean Tatar and Ukrainian Communities in Crimea

557. Even if each individual had been given a meaningful opportunity to make an informed choice under Russia's citizenship regime, that would not address the fundamental dilemma that Russia's citizenship and migration legal framework presents: each choice would have a grave impact on the enjoyment of human rights of Crimean Tatars and Ukrainians, albeit in different ways.¹¹⁰⁴

¹¹⁰¹ Ukraine's Memorial, para. 459.

¹¹⁰² Russia's Counter-Memorial Part II, App. C, paras. 24–29.

¹¹⁰³ Ukraine's Memorial, paras. 461–462. Russia contends that those who did not accept Russian citizenship automatically or were not eligible in the first place could still apply for and obtain Russian citizenship or residence permits under Russia's general rules. *See* Russia's Counter-Memorial Part II, App. C, para. 21. This claim not only understates a host of different practical challenges and uncertainties associated with obtaining Russian citizenship or residence permits, it also disregards the fundamental issue that the downstream discriminatory effects of becoming a Russian national were not necessarily less troubling. *See* Open Society Justice Initiative, Human rights in the Context of Automatic Naturalization in Crimea (June 2018), para. 107 (discussing Russia's annual caps on residence permits) (Ukraine's Memorial, Annex 975); *see also infra*, para. 559–561.

¹¹⁰⁴ *See, e.g.*, OHCHR, Situation of Human Rights in the Temporarily Occupied Autonomous Republic of Crimea and the City of Sevastopol, U.N. Doc. A/HRC/36/CRP.3 (25 September 2017), para. 6 [hereinafter 2017 OHCHR Report] (“[T]he imposition of Russian Federation citizenship on residents of Crimea . . . ha[d] resulted in regressive effects on the enjoyment of human rights, particularly for those who refused to automatically adopt Russian Federation citizenship, were ineligible to obtain it,

1. Harms Specifically Suffered by Ethnic Ukrainians and Crimean Tatars Who Became Russian Nationals

558. One example of the severe consequences of coerced Russian citizenship is potential criminal liability under Russian law, including for actions that are not illegal under Ukrainian law. For instance, those Crimean Tatar and Ukrainian individuals who became Russian citizens would be exposed to severe criminal liabilities under Russian anti-extremism laws, high treason law, and other laws that have broad application in practice if, for instance, they were found to be assisting Ukraine or protesting Russia's unlawful aggression.¹¹⁰⁵

559. Russia argues that Mr. Sentsov represents a “mediatized, though irrelevant, individual case,”¹¹⁰⁶ and involved “the application of the law without any discrimination and without any targeting.”¹¹⁰⁷ But Russia's evidence confirms that Mr. Sentsov was a victim of Russia's forced extension of its citizenship: he was arrested less than a month after the opt-out deadline,¹¹⁰⁸ accused of organizing a terrorist group, tried as a Russian citizen on the basis of the Law on Admission although he considered himself a Ukrainian citizen,¹¹⁰⁹ sentenced to 20 years in prison, and transferred to Russia's northernmost prisons — first to Facility-1 in the

or were required to forfeit their Ukrainian citizenship in order to remain employed.”) (Ukraine's Memorial, Annex 778).

¹¹⁰⁵ See *supra*, Chapter 12(C).

¹¹⁰⁶ Russia's Counter-Memorial Part II, App. C, para. 54.

¹¹⁰⁷ *Ibid.*, para. 55.

¹¹⁰⁸ *Ibid.*, para. 55, n.93.

¹¹⁰⁹ A transcript of Mr. Sentsov's statement to the court in July 2014 is available at Euromaidan Press, *Oleh Sentsov: I am Not a Serf; I Cannot be Transferred with the Land* (8 July 2014) (“I want to register my protest against the attempts to deprive me of my Ukrainian citizenship, since I was and continue to be a citizen of Ukraine. . . . I am not a serf; I cannot be transferred with the land. I did not submit any request for Russian citizenship nor have I renounced my Ukrainian citizenship.”). A transcript of Mr. Sentsov's final statement to the court after the delivery of his 20-year sentence is available at The Guardian, *'A Court of Occupiers Cannot be Just': Ukrainian Director's Courtroom Speech* (25 August 2015).

Republic of Sakha (Yakutiya), then to Facility-8 of the Yamalo-Nenetsk Autonomous Area.¹¹¹⁰

560. While Russia seeks to downplay the importance of Mr. Sentsov's Russian citizenship, it acknowledges that the reason he was denied a consular meeting was due to his automatically-acquired Russian citizenship.¹¹¹¹ Russia's attempt to blame Mr. Sentsov for not opting out before the 18 April 2014 deadline fails for the reasons discussed above.¹¹¹²

561. Mr. Sentsov's case also illustrates that the forcing of Russian citizenship on Ukrainian nationals in Crimea has opened the door to other abuses: such individuals were also vulnerable to forced transfer to prisons anywhere in the Russian Federation. As of December 2020, the OHCHR verified more than 200 cases of such transfers.¹¹¹³ The OHCHR further notes that Russia has not disclosed the total number of detainees transferred from

¹¹¹⁰ Directorate of the Federal Penitentiary Service of Russia for the Republic of Crimea and Sevastopol, Information Note on Places Where the Convicts O.G. Sentsov and A.Z. Chiygoz Served Their Sentences, 15 July 2021 (Russia's Counter-Memorial Part II, Annex 1329).

¹¹¹¹ Russia's Counter-Memorial Part II, App. C, para. 55, n.92 (explaining that under Russian law, "there is no basis for the State to arrange consular meetings of a Russian citizen with officials of a foreign consulate"); *ibid.*, para. 56 ("[T]he status of a person as a Russian citizen or a foreigner does not bear any significance for purposes of applying the Criminal Code or Penal Enforcement Code, particularly when this person is also a Russian citizen.") (emphasis added). The fact that those who did not formally renounce their Ukrainian citizenship could not avail themselves of the protection offered by Ukraine highlights that Russia's citizenship regime in Crimea essentially amounted to a deprivation of Ukrainian citizenship.

¹¹¹² For the same reasons, Russia's claim that "Mr. Sentsov's right of option could not have been impeded by his detention as part of the case opened against him as he was arrested on 11 May 2014, almost a month after the expiry of the transitional opt-out period on 18 April 2014" is without merits. *Ibid.*, para. 55, n.93. To the extent Russia argues that Mr. Sentsov could have renounced his Russian citizenship after 18 April 2014, Mr. Sentsov would not have had a meaningful opportunity to have done so given that, as Russia acknowledges, he was arrested less than a month after the opt-out deadline. *Ibid.*

¹¹¹³ U.N. Secretary-General, *Situation of Human Rights in the Autonomous Republic of Crimea and the City of Sevastopol, Ukraine*, U.N. Doc. A/75/334 (1 September 2020), para. 22, n.34 [hereinafter September 2020 UNSG Report]; U.N. Secretary-General, *Situation of Human Rights in the Autonomous Republic of Crimea and the City of Sevastopol, Ukraine*, U.N. Doc. A/HRC/47/58 (27 May 2021), para. 16 & n.33.

Crimea to Russia, which is likely significantly higher than the number of verified cases.¹¹¹⁴

562. Another example of the dramatic consequences of forced citizenship is compulsory conscription.¹¹¹⁵ Russia does not dispute that those residents of Crimea who have become Russian nationals are subject to compulsory conscription into the armed forces of the Russian Federation.¹¹¹⁶ According to the OHCHR, at least 21,000 male Crimean residents were conscripted between 2015 and January 2020.¹¹¹⁷ Many of these would inevitably have been members of the Crimean Tatar and Ukrainian communities on whom Russian citizenship had been imposed. Draft evasion is punishable under Russian law by fines, correctional labor, and imprisonment for up to two years.¹¹¹⁸ Some Crimean residents, including Crimean Tatars in particular, have reportedly left the peninsula, citing conscription into the Russian army and the criminal liability entailed by any attempts to evade it as the reason for doing so.¹¹¹⁹

563. Here again, Russia's defense that military conscription is a citizenship-based measure that applies equally to all Russian citizens¹¹²⁰ is beside the point. As Ukraine explained in its Memorial, the point is that one of the adverse consequences of forced citizenship for the Ukrainian and Crimean Tatar communities is the prospect of being conscripted into a hostile army — a possibility that would have been particularly troubling for

¹¹¹⁴ 2017 OHCHR Report, para. 116 (Ukraine's Memorial, Annex 778); September 2020 UNSG Report, para. 22 & n.34.

¹¹¹⁵ Ukraine's Memorial, paras. 463, 617.

¹¹¹⁶ Russia's Counter-Memorial Part II, App. C, paras. 50–51.

¹¹¹⁷ September 2020 UNSG Report, para. 40.

¹¹¹⁸ *Ibid.*, para. 41 (documenting prosecutions for draft evasion and convictions resulting in criminal fines).

¹¹¹⁹ ICC, Office of the Prosecutor, Report on Preliminary Examination Activities (4 December 2017), para. 99; 2017 OHCHR Report, para. 121 (“OHCHR spoke to several Crimean Tatars who left the peninsula to avoid serving in the Russian Federation army. They stated they could not return to Crimea as they would be prosecuted for avoiding the draft.”) (Ukraine's Memorial, Annex 778).

¹¹²⁰ Russia's Counter-Memorial Part II, App. C, paras. 50–51.

the two communities given the risk of being deployed to fight against the very country with which they most identify. What might have been considered a hypothetical risk when Ukraine filed its Memorial has acquired immediate and tragic relevance by the full-scale invasion of Ukraine by Russia's armed forces launched by President Putin on 24 February 2022, including by forces attacking north into mainland Ukraine from the Crimean peninsula. Those forces are known to include a large proportion of raw conscripts¹¹²¹ and may reasonably be assumed to include individuals from the Crimean Tatar and Ukrainian communities in Crimea who became subject to conscription as a result of Russia's forced citizenship policy.

564. This consequence of acquiring Russian nationality also exposes the rank hypocrisy behind Russia's assertion that its nationality is a benefit that Crimean residents can enjoy in addition to retaining their Ukrainian nationality.¹¹²² Dual nationality is not a benefit when one of the countries of nationality weaponizes its nationality provisions against the other country of nationality. That is exactly what Russia has done by making it a criminal offense to say that Crimea is part of Ukraine and, still worse, by conscripting its new Russian citizens in Crimea into its armed forces and sending them on a full-scale invasion of mainland Ukraine.

2. Harms Specifically Suffered by Ethnic Ukrainians and Crimean Tatars Who Did Not Become Russian Nationals

565. Russia claims that whether Crimeans who opted out did or did not enjoy equal treatment with Russian citizens concerns a citizenship-based restriction, and falls outside the scope of the CERD.¹¹²³ But the harms suffered by inhabitants of Crimea who did not receive Russian nationality constitute a CERD violation for a number of reasons.

566. First, the harms illustrate that, contrary to Russia's claim that Crimean residents had a "free" choice to opt in or opt out, the costs associated with being a non-Russian

¹¹²¹ Reuters, *Russia Acknowledges Conscripts Were Part of Ukraine Operation, Some Are POWs* (9 March 2022); Halya Coynash, *Russia Is Forcing Ukrainians from Occupied Crimea and Donbas to Fight in Its Invasion of Ukraine*, Kharkiv Human Rights Protection Group (7 March 2022).

¹¹²² Russia's Counter-Memorial Part II, App. C, paras. 12–15.

¹¹²³ *Ibid.*, para. 61.

citizen would have persuaded Crimean Tatars and Ukrainians against rejecting Russian citizenship. Second, Russia's enforcement of laws that discriminate against non-Russians residing in Crimea are themselves a basis for Russia's CERD violation. While facially based on the newly-assumed status of such individuals as foreigners, such measures have, in effect, disproportionately and adversely affected the Crimean Tatar and Ukrainian communities, who are more likely to have rejected Russian citizenship or, for reasons discussed *supra*, were not recognized as permanent residents of Crimea.¹¹²⁴

567. One of the implications of being declared a foreigner is the prospect of being banned from re-entering Crimea for an extended period of time. As discussed in Chapter 11, Russia confirms that the entry bans on Mr. Dzhemilev, Mr. Yuksel, and Mr. Chubarov were all based on the same provisions of Russian law, which allow the authorities to deny “a foreign citizen or a stateless person” entry into the Russian territory where deemed “necessary for the purpose of ensuring the defense capability or security of the state or public order.”¹¹²⁵ As Professor Scheinin discusses in his expert report submitted with this Reply, such national security-based justifications for limiting substantive human rights do not constitute a legitimate defense to a violation of the CERD, whose prohibition on racial discrimination is absolute and allows no exceptions.¹¹²⁶

¹¹²⁴ See U.N. General Assembly Resolution 74/168, U.N. Doc. A/RES/74/168 (18 December 2019), Preamble p. 3 & para. 6(s); U.N. General Assembly Resolution 72/190, U.N. Doc. A/RES/72/190 (19 December 2017), Preamble p. 2 (condemning “the imposition of automatic Russian Federation citizenship on protected persons in Crimea,” noting particularly “regressive effects on the enjoyment of human rights of those who have rejected that citizenship”) (Ukraine’s Memorial, Annex 50); see *also supra*, para. 556.

¹¹²⁵ Federal Law No. 114-FZ “On the Procedure for Exit from the Russian Federation and Entry into the Russian Federation,” 15 August 1996 (excerpt), Art. 27(1) (Russia’s Counter Memorial Part II, Annex 33); Russia’s Counter-Memorial Part II, paras. 188, 190, 193.

¹¹²⁶ Scheinin Report, paras. 8–15 (Ukraine’s Reply, Annex 7).

568. This group was further subject to deportation from their home at the discretion of the Russian authorities. As Russia’s evidence confirms, this group was not permitted to stay in Crimea for more than 90 days within a period of 180 days from the moment they entered the peninsula without obtaining a residency permit.¹¹²⁷ Since the purported annexation, Crimean courts have continued to deport hundreds of Ukrainian citizens, who are in the majority of foreigners being deported; many were detained before being forcibly removed.¹¹²⁸

569. The discrimination against non-citizens continues to this date and is intensifying, effectively leaving no choice but to either apply for Russian citizenship or leave the peninsula. On 20 March 2020, for instance, President Vladimir Putin issued a decree granting 19 territories in Crimea and 8 in Sevastopol the status of “border areas” of the Russian Federation. In effect, this decree prohibited foreigners from owning land in those designated areas, giving them a year to sell or register their property with a Russian citizen.¹¹²⁹ As the

¹¹²⁷ See, e.g., Armyansk City Court of the Republic of Crimea, Case No. 5-49/2015, Decision, 23 January 2015 (Russia’s Counter-Memorial Part II, Annex 207); Federal Law No. 115-FZ “On the Legal Status of Foreign Citizens in the Russian Federation,” 25 July 2002 (excerpts), art. 5 (Russia’s Counter-Memorial Part II, Annex 47).

¹¹²⁸ September 2020 UNSG Report, para. 43 (noting that from 1 July 2019 to 30 June 2020, “[c]ourts in Crimea issued 189 transfer orders concerning individuals considered as foreigners under Russian Federation immigration law. According to available judgments, at least 73 Ukrainian citizens (63 men and 10 women) were transferred to other parts of Ukraine because they were considered as not having residency rights in Crimea.”); 2019 UNSG Report, para. 61 (“[A]ccording to the court registry of the Russian Federation, during 2017–2018 courts in Crimea ordered the transfer of at least 947 individuals considered foreigners under the laws of the Russian Federation, including the transfer of 518 Ukrainian citizens (468 men and 50 women). Of the total number transferred in 2017–2018, at least 109 Crimean residents were reportedly ‘forcibly removed’ by the law enforcement authorities of the Russian Federation. In the majority of cases, the victims were thought to be Ukrainian citizens whom the Russian Federation did not consider as having residence rights in Crimea.”).

¹¹²⁹ Decree of the President of the Russian Federation No. 201 “On Amendments to the List of Border Territories Where Foreign Citizens, Stateless Persons and Foreign Legal Entities Cannot Own Land Plots, Approved by the Decree of the President of the Russian Federation of 9 January 2011, No. 26” (20 March 2020) (Ukraine’s Reply, Annex 97); see also Pjotr Sauer, *New Crimean Land Law Banning Foreign Ownership Comes into Force*, The Moscow Times (1 April 2021); Halya Coynash, *Ukrainians Forced to Take Russian Citizenship, or Lose their Homes in Occupied Crimea*, Kharkiv Human Rights Protection Group (6 January 2021).

OHCHR observes, the decree “effectively restricts land ownership to Russian citizens and Russian companies.”¹¹³⁰ The Crimean authorities have advertised, for instance, that foreigners can keep their houses in Crimea if they sell the land to the authorities and then rent it back.¹¹³¹ The decree is anticipated to predominantly affect landowners who hold Ukrainian citizenship. According to the occupying authorities, “11,572 land plots within the ‘border areas’ of Crimea belong to ‘foreigners,’ including 9,747 (more than 82 per cent) that belong to Ukrainian citizens.”¹¹³² Under the terms of the decree, unless those individuals obtained Russian citizenship or disposed of their land by March 2021, they would lose their land in an enforced sale or nationalization.¹¹³³

* * *

570. In sum, by introducing its own nationality and immigration framework into Crimea aimed at extending Russian citizenship “quickly and *en masse*,”¹¹³⁴ Russia coerced a decision, where all available options gravely and disproportionately burdened numerous CERD-protected rights of members of the Crimean Tatar and Ukrainian communities. Neither the fact that specific discriminatory effects materialized by operation of a facially neutral citizenship law, nor the fact that the law purported to offer “benefits” to Crimean residents, shield Russia from its CERD violations, when Russia has actively weaponized its nationality provisions against Crimean Tatars and ethnic Ukrainians as part of its systemic and ongoing policy of discrimination against these communities.

¹¹³⁰September 2020 UNSG Report, para. 38. *See also* Press Statement, EU - EEAS Press Team, Statement by the Spokesperson on the Russian Land Ownership Decree Affecting Crimea (23 March 2021) (criticizing the decree as having “led to the arbitrary deprivation of property”).

¹¹³¹TASS, *Crimean Authorities Said that Foreigners Will Be Able to Keep Property in the Region* (24 March 2021) (Ukraine’s Reply, Annex 167).

¹¹³²September 2020 UNSG Report, para. 38.

¹¹³³*Ibid.*

¹¹³⁴Russia’s Counter-Memorial Part II, App. C, paras. 3–4.

Chapter 14. SUPPRESSION OF CULTURALLY SIGNIFICANT GATHERINGS

571. Ukraine’s Memorial demonstrated that the Russian occupation authorities in Crimea have routinely infringed upon the rights of the Crimean Tatar and Ukrainian communities to freedom of expression and assembly by denying or limiting culturally significant gatherings. Ukraine claims that this conduct violates Articles 2(1)(a), 5(d)(ix), and 5(e)(vi) of the CERD.¹¹³⁵ Russia makes a number of incorrect assertions in response.

572. First, Russia claims that its legislative and regulatory framework for gatherings is in line with international and human rights law¹¹³⁶ and permits “legitimate limitations on the exercise of the right to freedom of peaceful assembly.”¹¹³⁷ Second, Russia claims that Ukraine fails to prove that the law was applied discriminatorily.¹¹³⁸ Third, Russia denies the allegations regarding specific Crimean Tatar and Ukrainian events.¹¹³⁹

573. In reality, Russia’s draconian approach to gatherings has repeatedly been held to violate the right to freedom of assembly. Russia’s legislation gives the authorities huge power to crack down arbitrarily on disfavored groups. The facts of this case show that Russia has used that power repeatedly to disfavor the Crimean Tatar and Ukrainian minorities in Crimea, thereby curtailing their enjoyment of fundamental human rights.

A. Russia’s Legislative Framework for Public Events Has Previously Been Found Inadequate to Prevent Arbitrary Decisions by Its Officials

574. Russia questions the relevance of Ukraine’s analysis of Russia’s repressive legislative framework for public gatherings,¹¹⁴⁰ but then argues that “Russian law governing public gatherings is not ‘discriminatory’ and is not incompatible thus with CERD.”¹¹⁴¹ The initial criticism is misplaced: the fact that Russia’s laws in this field give its officials wide

¹¹³⁵ Ukraine’s Memorial, paras. 599, 621–22, 629–30.

¹¹³⁶ Russia’s Counter-Memorial Part II, App. D, paras. 5–19.

¹¹³⁷ Russia’s Counter-Memorial Part II, para 393.

¹¹³⁸ *Ibid.*, paras. 394–397.

¹¹³⁹ *Ibid.*, App. D, paras. 30–43, 46–54.

¹¹⁴⁰ *Ibid.*, para. 2.

¹¹⁴¹ *Ibid.*, para. 6.

discretion to arbitrarily restrict the rights of freedom of expression and assembly is a precondition for the multitude of infringements noted in the Memorial. Russia's subsequent defense of its legislation as compatible with European norms ignores a series of rulings by the European Court of Human Rights ("ECtHR") establishing both the shortcomings in Russian laws and their frequent application by public officials to deny freedom of expression and assembly. Specifically, Russia's Public Events Act gives public officials unfettered discretion to impose time, place, and manner restrictions on public assemblies and allows them to abuse the requirement for prior notification to effectively prevent gatherings from taking place. As demonstrated below, Russian occupation authorities used precisely these tools to sharply curtail public gatherings by the Crimean Tatar and Ukrainian communities in Crimea.

1. Russian Law Permits Arbitrary Restrictions on the Time, Place, and Manner of Public Gatherings

575. Russia's Counter-Memorial describes how its legislation gives the government the right to "establish[] the forms and objectives of public gatherings, the procedure for organizing a public event, the list of places prohibited to hold public gatherings, the composition of persons participating in the organization and holding of a public event [and] their rights and obligations."¹¹⁴² According to Russia, "[s]uch detailed regulation of public gatherings is aimed at providing the organizers and participants of public events with clear and precise rules for holding public gatherings. It also ensures the legality of actions of the authorities at all stages of the organization and conduct of public events in a peaceful manner."¹¹⁴³ This benign picture of Russia's public gatherings legislation is, however, totally

¹¹⁴² *Ibid.*, para. 9.

¹¹⁴³ *Ibid.*

at odds with a long reality, as established by the authoritative findings of the ECtHR.¹¹⁴⁴

576. In *Lashmankin v. Russia*, the ECtHR considered applications from 23 applicants from all over Russia whose applications to hold public events had been refused or otherwise frustrated.¹¹⁴⁵ In its judgment on the merits, the Court found that Russia's Public Events Act gave the competent regional or municipal authorities wide-ranging power to propose changes in the location, time, or manner of conduct of a public event, without any requirement for an assessment of the proportionality of the measure.¹¹⁴⁶ In the Court's view:

[T]here is a clear risk of arbitrariness in the grant of such broad and uncircumscribed discretion to the executive authorities. There is a risk that such a widely framed power could be misused against organisers of, and participants in, public assemblies in breach of Article 10 and/or 11 of the Convention. Indeed, the present case shows that the above powers are often used in an arbitrary and discriminatory way.¹¹⁴⁷

577. The ECtHR's *Lashmankin* judgment identified numerous ways in which the Russian authorities had abused the discretion left to them by the Public Events Act in violation of the rights of freedom of expression and assembly embodied respectively in Articles 10 and 11 of the European Convention on Human Rights. These included, "refusal to approve the venue of a public assembly solely on the basis that it [was] due to take place at the same time and at the same location as another public event,"¹¹⁴⁸ "reference to safety or national security

¹¹⁴⁴ As the freedom of assembly encompassed by CERD art. 5(d)(ix) is related to and based on the right of assembly as established by other human rights treaties, the standards governing the permissible limitations under those treaty standards apply to CERD, so long as those limitations "do not involve racial discrimination." Patrick Thornberry, ARTICLE 5: ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A COMMENTARY 361–362 (14 July 2016) (Ukraine's Reply, Annex 125).

¹¹⁴⁵ *Lashmankin v. Russia*, ECtHR App. No. 5718/09, Judgment (Merits), Appendix (7 February 2017).

¹¹⁴⁶ *Ibid.*, para. 419.

¹¹⁴⁷ *Ibid.*, para. 429 (citation omitted).

¹¹⁴⁸ *Ibid.*, para. 422.

considerations, such as a risk of terrorist attacks . . . used selectively to restrict anti-government public assemblies,”¹¹⁴⁹ and changes to the location or time of a proposed event that made it impossible for the organizers to convey the message they intended to communicate.¹¹⁵⁰ Specifically, the Court held that, “the lack of adequate and effective legal safeguards against arbitrary and discriminatory exercise of the wide discretion left to the executive” demonstrates that “the domestic legal provisions governing the power to propose a change of location, time or manner of conduct of public events do not meet the Convention ‘quality of law’ requirements.”¹¹⁵¹ These findings are of direct relevance because the very same techniques have been used by the authorities in Crimea to prevent the Crimean Tatar and Ukrainian communities from commemorating culturally significant events.

578. Russia’s discriminatory application of its gatherings framework also runs afoul of Human Rights Committee guidance. In line with ECtHR jurisprudence, the Human Rights Committee notes that, “while the time, place and manner of assemblies may under some circumstances be the subject of legitimate restrictions under article 21 [of the ICCPR], given the typically expressive nature of assemblies, participants must as far as possible be enabled to conduct assemblies within sight and sound of their target audience.”¹¹⁵² The Committee further explains that a State cannot use technical requirements for assemblies to limit gatherings to quash political activity or the free exchange of ideas. The Committee states that, “[r]estrictions on peaceful assemblies must thus not be used, explicitly or implicitly, to stifle expression of political opposition to a government, challenges to authority, including calls for

¹¹⁴⁹ *Ibid.*, para. 424.

¹¹⁵⁰ *Ibid.*, para. 426.

¹¹⁵¹ *Ibid.*, para. 430.

¹¹⁵² HRC General Comment 37, para 22.

democratic changes of government, the constitution or the political system, or the pursuit of self-determination.”¹¹⁵³ This casts doubt on Russia’s assertion that its legislation requires organizers to submit only the necessary information about the public event, including, “the purpose of the event,” without which “a risk exists that state authorities may not be able to take appropriate steps to ensure safe conditions for both the participants of the public event and other persons.”¹¹⁵⁴ Indeed, Russia used this “purpose” requirement to punish Crimean Tatar and ethnic Ukrainian participants of cultural gatherings, discouraging attendance and thus threatening the continued traditions of these cultures.

2. Russia’s Overly-Broad Notification Requirement Is Open to Abuse by Public Officials

579. Russia accuses Ukraine of “erroneously suggest[ing] that the duty to notify Russian authorities in advance of public events unduly restricts the freedom of assembly.”¹¹⁵⁵ In this context, Russia makes much of the ECtHR’s decision in *Berladir & Others v. Russia*, which it characterizes as confirming that “notification and authorization procedures are *per se* consistent with human rights law.”¹¹⁵⁶ Russia conveniently ignores the subsequent case law of the ECtHR finding the notification requirements in the Public Events Act to be overly broad and accordingly susceptible to abuse. *Navalnyy v. Russia* addressed claims by the well-known anti-corruption campaigner and political activist, Alexei Navalnyy, that the Russian government had repeatedly violated his human rights by arresting him for purported violations of Russian legislation on public gatherings. As the ECtHR noted in its judgment:

Stressing the importance of adequate safeguards against
arbitrary interferences by public authorities with the right to

¹¹⁵³ *Ibid.*, para. 49.

¹¹⁵⁴ Russia’s Counter-Memorial Part II, App. D, para. 13.

¹¹⁵⁵ *Ibid.*, para. 11.

¹¹⁵⁶ *Ibid.*

freedom of assembly, the Court cannot but note the broad terms used in the relevant provisions of section 2 of the Public Events Act defining the notion of “public event”, the broad scope of the attendant duty of notification of such an event under sections 5 and 7 of the Act and the broad definition of the offence in Articles 19 § 3 and 20 § 2 of the Code of Administrative Offences, applicable to any failure to observe that duty.¹¹⁵⁷

580. The case law of the ECtHR indicates that Russian public officials have repeatedly abused the discretion left to them by the legislation’s notification procedures to arbitrarily prevent public gatherings and to punish individuals deemed to have participated in unauthorized gatherings. The Court’s *Lashmankin* judgment, for example, noted that while the Public Events Act requires notification of a public gathering no less than 10 days prior to it taking place, the Act provides for no deadline by which the authorities must give a final decision, thereby allowing officials to effectively prevent gatherings by failing to render a decision in advance.¹¹⁵⁸ Similarly, in *Navalnyy v. Russia*, the Court found, “it cannot be said that the relevant national law provided effective safeguards against abuse, as is further exemplified by the above findings that a legitimate aim was absent.”¹¹⁵⁹

581. As the ECtHR has repeatedly emphasized, Russia has employed the technical requirement of prior notification of an assembly in a discriminatory and impermissible manner to reject or disperse gatherings based on their content or political message.

B. Russia Applied Its Framework on Gatherings Discriminatorily

582. Russia also denies Ukraine’s claim that the Russian Federation blocked numerous specific gatherings of cultural significance to the Crimean Tatar and Ukrainian communities. But its explanations only highlight the pretextual reasons used by Russia to deny applications for these cultural events. Without repeating the full explanation provided in its Memorial, Ukraine addresses below some examples of Russia’s fabricated narratives.

¹¹⁵⁷ *Navalnyy v. Russia*, ECtHR Apps. Nos. 29580/12, Judgment (15 November 2018), para. 118.

¹¹⁵⁸ *Lashmankin v. Russia*, paras. 346, 443.

¹¹⁵⁹ *Navalnyy v. Russia*, para. 151.

1. The Russian Federation Has Violated the CERD's Protection of Gatherings by Discriminating Against the Crimean Tatar and Ukrainian Communities

583. Russia claims that, “Ukraine has not established that in relation to these public events, the law has been applied discriminatorily or arbitrarily against any ethnic group in Crimea, including the Crimean Tatars and ethnic Ukrainians in comparison to ethnic Russians, let alone as part of a systematic campaign or policy of racial discrimination against these groups.”¹¹⁶⁰

584. As explained in Chapter 9, the CERD defines racial discrimination as “any distinction, exclusion, restriction or preference based on . . . ethnic origin which has the purpose *or effect* of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms.”¹¹⁶¹ Article 1(1) of the CERD clearly incorporates claims based both on *intentional* discrimination and on acts that have a discriminatory *effect*.¹¹⁶² The sheer number of ethnic Ukrainian and Crimean Tatar cultural gatherings that the Russian Federation has blocked indicates a discriminatory effect. In 2020 alone, the Crimean Human Rights Group documented no fewer than 42 warnings to Crimean Tatars regarding the holding of peaceful rallies, no fewer than 25 police visits to Crimean Tatars, no fewer than 17 administrative fine resolutions for participation in peaceful rallies, eight court decisions regarding fines on Crimean Tatars, and six resolutions ordering five-day administrative arrests of said activists.¹¹⁶³ As the U.N. Office of the High Commissioner noted

¹¹⁶⁰ Russia's Counter-Memorial Part II, para. 394.

¹¹⁶¹ CERD, art. 1(1) (emphasis added).

¹¹⁶² See *supra*, Chapter 9, paras. 401–404.

¹¹⁶³ Crimean Human Rights Group, Overview of the Situation with Respect for Human Rights and Norms of the International Humanitarian Law in Crimea for 2020 (January 2021) (Ukraine's Reply, Annex 103); see also Crimean Human Rights Group, Statement of Implementation Report Russian

in a 2021 report, “[l]aw enforcement agencies routinely issued written warnings to potential participants of assemblies, which has had a chilling effect on the exercise of the right to freedom of assembly. . . . Crimean Tatars were particularly affected, receiving such warnings in advance of commemorative dates for Crimean Tatars.”¹¹⁶⁴

585. However, it is not just the quantity of gatherings that the Russian Federation has denied, but the quality. The Russian Federation targeted the most critical gatherings, to silence the expression and continuance of the Ukrainians’ and Crimean Tatars’ culture.¹¹⁶⁵ As is noted below, the Russian Federation has specifically blocked the Mejlis from commemorating the *Sürgün*, knowing that the annual remembrance of the Soviet Union’s deportation of the Crimean Tatars from their homeland is a central part of their cultural identity.¹¹⁶⁶ In measuring discriminatory effect, what matters is not the “sample size” of events blocked by the Russian Federation, but the actual harm inflicted on the ethnic communities in the prevention of their cultural gatherings.

586. Ukraine does not need to prove that Russia prioritizes pro-Russian events as Russia alleges,¹¹⁶⁷ although it does submit evidence of this bias, as the clear pattern established by the numerous blocked gatherings constitutes a discriminatory impact on these two ethnic communities, whether intentional or not. Russia’s “proof” that some pro-Russian events are not treated more favorably only serves to reinforce Ukraine’s argument. The Russian

Federation International Legal Commitments in the Field Protection of Human Rights in the Occupied Territory of Crimea and Sevastopol (November 2021), Ch. 3 (Ukraine’s Reply, Annex 105).

¹¹⁶⁴ OHCHR, Civic Space and Fundamental Freedoms in Ukraine, 1 November 2019 – 31 October 2021, (7 December 2021), para. 77.

¹¹⁶⁵ Professor Magocsi explained in his first report that the commemoration of historical figures and events is central to the Crimean Tatar culture and sense of identity. Magocsi First Report, para. 75 (Ukraine’s Memorial, Annex 21).

¹¹⁶⁶ Ukraine’s Memorial, para. 480.

¹¹⁶⁷ Russia’s Counter-Memorial Part II, App. D, para. 22.

Federation claims in its Counter-Memorial Part II that applications for gatherings to celebrate six different Russian holidays “were *not* authorized when their organizers failed to comply with the relevant procedure applicable in Crimea.”¹¹⁶⁸ Russia fails to mention that at least two of the applicants were ultimately able to hold their gatherings.¹¹⁶⁹ Whereas these two holidays were successfully commemorated, ethnic Ukrainian and Crimean Tatar gatherings were not.

587. Nor can the Russian Federation defend against these allegations by pointing to its collaboration with pro-Russian organizations of Crimean Tatars or ethnic Ukrainians. The legitimacy of such organizations as representatives of their ethnic communities is undermined by their close ties to, and even dependence on, Russia.¹¹⁷⁰ The communities cannot fully express themselves through these cultural gatherings if the gatherings’ message and manner must be organized and thoroughly approved by the Russian Federation or its proxies, nor does favoritism shown to Russia’s preferred interlocutors in the Tatar community or among ethnic Ukrainians absolve Russia of allegations of discrimination against these communities.

2. The Russian Federation Cannot Escape the Pattern of Discrimination Against the Crimean Tatar Community in Blocking Its Gatherings

588. Ukraine explained in its Memorial how damaging Russia’s targeted restrictions on gatherings were to the Crimean Tatar community as “the commemoration of historical figures and events is central to the Crimean Tatar culture and sense of identity and was a key

¹¹⁶⁸ Russia’s Counter-Memorial Part II, para. 62.

¹¹⁶⁹ See, e.g., Movement News Simferopol, *Collecting the Column on May 9, 2018* (19 April 2018) (announcing the gathering to celebrate Victory Day) (Ukraine’s Reply, Annex 151); Bezformata, *Metropolitan Lazar of Simferopol and Crimea Performed a Litia in Memory of Those Who Died in the Battles for the Motherland* (23 February 2015) (announcing the event commemorating Defender of the Fatherland Day) (Ukraine’s Reply, Annex 132).

¹¹⁷⁰ See, e.g., Vadim Nikiforov, *Crimean Tatars Will Mourn Without Mejlis*, Kommersant.ru (12 May 2015) (Ukraine’s Reply, Annex 135); Vadim Nikiforov, *Crimean Tatar Mourning Is Not Allowed on the Streets*, Kommersant.ru (18 May 2015) (Ukraine’s Reply, Annex 136); Vladislav Maltsev, “*Crimea is Ours*” for Mufti Ablav, *Nezavisimaya Gazeta* (4 January 2015) (Ukraine’s Reply, Annex 131).

factor in preserving them during the years in exile in Central Asia.”¹¹⁷¹ In its Counter-Memorial, the Russian Federation claims that it “has not applied its laws discriminatorily in respect of the specific situations referred to by Ukraine.”¹¹⁷² The Russian Federation’s purported justifications for the rejection of Crimean Tatar gatherings’ applications are unconvincing and leave undisturbed the conclusion that those rejections have had the purpose or effect of nullifying or impairing that community’s rights to freedom of speech and assembly.

i. Commemoration of the *Sürgün* May 2014

589. The Russian Federation asserts that “it is important to put the record straight concerning facts that Ukraine simply ignores. Ukraine claims that Crimean Tatars were obstructed in commemorating the *Sürgün*. In fact, in May 2014, thousands commemorated the *Sürgün* in Simferopol at a meeting organized at that time by the *Mejlis*.”¹¹⁷³ However, Russia unsurprisingly misrepresents Ukraine’s position. As explained by Mr. Bariiev:

Crimean Tatars’ attempts to gather on 17 May 2014 as they had always done before were disrupted by the joint efforts of Russian occupying forces and paramilitary groups under their control. When the Crimean Tatars began arriving at Lenin Square, they discovered that Russian Federation-controlled local authorities had blocked off the square with a fence. Armored personnel carriers appeared on the streets. They drove around the perimeter of the square to prevent people from entering. Groups of so-called ‘green men’ and local self-defense groups patrolled the area.¹¹⁷⁴

590. As explained in Section A above, without justification as to the necessity for the protection of the collective need, “time, place and manner . . . restrictions should still, as far as possible, allow participants to assemble within sight and sound of their target audience, or at

¹¹⁷¹ Ukraine’s Memorial, para. 480.

¹¹⁷² Russia’s Counter-Memorial Part II, App. D, para. 20.

¹¹⁷³ *Ibid.*, para. 25.

¹¹⁷⁴ Bariiev Statement, para. 6 (Ukraine’s Memorial, Annex 15).

whatever site is otherwise important to their purpose.”¹¹⁷⁵ The Russian Federation provides no explanation as to why Lenin Square was unsuitable for security purposes. As Mr. Bariiev further testifies, in response to Russia’s impermissible blockade, the Mejlis and Mr. Bariiev were forced to scramble to find an alternative way to celebrate the most important date in the Crimean Tatar cultural calendar, “call[ing] on Crimean Tatars to gather at a different location and hold the memorial demonstration [] in the Ak-Mechet residential neighborhood.”¹¹⁷⁶

ii. General Gatherings in 2015

591. Russia points to various events held in Crimea in 2015 as evidence that it did not discriminate against Crimean Tatar gatherings.¹¹⁷⁷ However, the listed events were initiated and supported by the occupation authorities in Crimea, which is why participation in these events was mostly limited to government officials and pro-Russian Crimean Tatars.¹¹⁷⁸

592. For example, whereas the Mejlis’ application to hold a gathering on Flag Day was denied repeatedly, the Russian authorities permitted pro-Russian, Crimean Tatar

¹¹⁷⁵ HRC General Comment 37, para. 53. *See supra*, para. 578.

¹¹⁷⁶ Bariiev Statement, para. 7 (Ukraine’s Memorial, Annex 15); *see also* Vadim Nikiforov, *Crimean Tatar Mourning Is Not Allowed on the Streets*, Kommersant.ru (18 May 2015) (“Recall that last year the Crimean Tatars were also not allowed to hold a rally in the center of Simferopol on May 18. The head of Crimea banned mass events until early June ‘in order to eliminate possible provocations by extremists’ and ‘to avoid disruption of the holiday season.’ Crimean Tatars were allowed to hold small actions near the monuments to the victims of deportation and an all-Crimean rally-prayer on the outskirts of Simferopol.”) (Ukraine’s Reply, Annex 136).

¹¹⁷⁷ Russia’s Counter-Memorial Part II, App. D, para. 26.

¹¹⁷⁸ *See, e.g.*, Vadim Nikiforov, *Crimean Tatars Will Mourn Without Mejlis*, Kommersant.ru (12 May 2015) (Ukraine’s Reply, Annex 135); Vadim Nikiforov, *Crimean Tatar Mourning Is Not Allowed on the Streets*, Kommersant.ru (18 May 2015) (Ukraine’s Reply, Annex 136); Vladislav Maltsev, “*Crimea is Ours*” for Mufti Abliev, *Nezavisimaya Gazeta* (4 January 2015) (Ukraine’s Reply, Annex 131); Vadim Nikiforov, *The Anniversary of the Deportation of the Crimean Tatars was Celebrated Without a Mourning Rally*, Kommersant.ru (18 May 2016) (Ukraine’s Reply, Annex 142); Vadim Nikiforov, *Victims of the Deportation of the Crimean Tatars Are Remembered in Crimea*, Kommersant.ru (18 May 2017) (Ukraine’s Reply, Annex 148).

organizations to host an event on the same day.¹¹⁷⁹ The Russian Federation tries to blame the rejection of the Mejlis' applications on the fact that both organizations wanted to hold the event at the same time and place,¹¹⁸⁰ yet conveniently ignores that the Mejlis submitted two additional applications with alternatives times and places.¹¹⁸¹ Additionally, as emphasized by the ECtHR in *Lashmankin*, it is an abuse of the broad discretion given to the Russian authorities by the Public Events Act to reject an application for an assembly, "solely on the basis that it is due to take place at the same time and at the same location as another public event,"¹¹⁸² especially as the organizers proposed alternative times and places for the event.

iii. Commemoration of the *Sürgün* May 2015

593. The Russian Federation claims that:

Ukraine takes issue with the fact that an application by the *Mejlis* for a public event to commemorate the *Sürgün* was rejected in 2015, but fails to mention that it was rejected because another organization, the Interregional Public Movement of the Crimean Tatar People ["Qirim"], had previously notified the authorities of its intent to organize another event at the same time and at the same location, and due to a lack of alternative available specially designed venues.¹¹⁸³

594. The Russian Federation fails to mention that it favored Qirim, a pro-Russian organization,¹¹⁸⁴ over the Mejlis due to its confidence that Qirim – unlike the Mejlis – could

¹¹⁷⁹ See Halya Coynash, 'Warnings' and Pro-Regime Copycat Events on Crimean Tatar Flag Day, Kharkiv Human Rights Protection Group (26 June 2015); Viktor Vorobyov, *Monopoly on the Holidays: The "Authorities" of the Crimea Coveted the Flag of the Crimean Tatars*, Krym.Realii (25 June 2015) (Ukraine's Reply, Annex 138).

¹¹⁸⁰ Russia's Counter-Memorial Part II, App. D, para. 40.

¹¹⁸¹ Ukraine's Memorial, para 493.

¹¹⁸² *Lashmankin v. Russia*, para. 422.

¹¹⁸³ Russia's Counter-Memorial Part II, App. D, para. 27.

¹¹⁸⁴ See, e.g., President of Russia, Meeting with Representatives of Crimean Ethnic Groups' Public Associations (17 August 2015), accessed at en.kremlin.ru/events/president/news/50140 (quoting Remzi Ilyasov, the Head of Qirim, telling President Putin: "From the outset, we established a

be counted upon to do the occupation authorities' bidding. The Russian Federation received applications for both events on the same day, mere hours apart.¹¹⁸⁵

595. Qirim requested not one, but several significant places to hold its event from 9 AM until 7 PM, whereas the Mejlis asked for only one location for a mere two hours, just a fraction of the other event's time and space.¹¹⁸⁶ The application for the Mejlis also requested a change of venue if the first location was not available.¹¹⁸⁷ Somehow, Qirim's multi-venue, all-day event was approved, whereas the Russian Federation simply had no "other places approved for public events."¹¹⁸⁸ An objective observer would have the distinct impression that the pro-Russian Qirim organization was being used here as a blocking device, to give the Russian authorities an excuse to prevent the Mejlis, the truly representative institution of the Crimean Tatar People, from commemorating the *Sürgün*. But, in any event, as reiterated in *Lashmankin*, rejecting an application for a gathering merely because another event would take

constructive dialogue with the authorities and are systematically holding meetings with the public; among other things, we have assumed a certain level of responsibility for the overall situation in Crimea, sharing it with the authorities.").

¹¹⁸⁵ Interregional Public Movement of the Crimean Tatar People "Qirim", Notification No. 03 to the Administration of the City of Simferopol on Holding a Rally on 18 May 2015 in Simferopol (5 May 2015) (Russia's Counter-Memorial Part II, Annex 546); N.E. Dzhelyalov, Notification to the Administration of the City of Simferopol on Holding a Rally on 18 May 2015 in Simferopol (5 May 2015) (Russia's Counter-Memorial Part II, Annex 547).

¹¹⁸⁶ Interregional Public Movement of the Crimean Tatar People "Qirim", Notification No. 03 to the Administration of the City of Simferopol on Holding a Rally on 18 May 2015 in Simferopol (5 May 2015) (Russia's Counter-Memorial Part II, Annex 546); N.E. Dzhelyalov, Notification to the Administration of the City of Simferopol on Holding a Rally on 18 May 2015 in Simferopol (5 May 2015) (Russia's Counter-Memorial Part II, Annex 547).

¹¹⁸⁷ N.E. Dzhelyalov, Notification to the Administration of the City of Simferopol on Holding a Rally on 18 May 2015 in Simferopol (5 May 2015) (Russia's Counter-Memorial Part II, Annex 547).

¹¹⁸⁸ Administration of the City of Simferopol, Response No. 5646/24/01-66 to the Notification of Interregional Public Movement of the Crimean Tatar People "Qirim" on Approval of the Rally (7 May 2015) (Russia's Counter-Memorial Part II, Annex 548); Administration of the City of Simferopol, Response No. D-217/6597 to the Notification of Mr Dzhelyalov (7 May 2015) (Russia's Counter-Memorial Part II, Annex 549).

place on the same day “is a disproportionate interference with the freedom of assembly.”¹¹⁸⁹

596. Russia’s justification for denying the application by the Mejlis is particularly suspicious as demonstrated later in the Counter-Memorial Part II where the Russian Federation defends the holding of an “Antimaidan” event in Crimea in a location that is not a permitted location to hold gatherings under Russian law. The Russian Federation claims:

As a matter of Russian law, the fact that so-called ‘Specially Assigned Places’ are designated for holding public events does not preclude the organizer of a public event from selecting *other* places to hold it. The list of ‘Specially Assigned Places’ is a list of *recommended* venues, not exclusive ones However, as a general rule, a public event may be carried out at any place suitable for the purposes of the given event.¹¹⁹⁰

597. This may be the law the occupation authorities apply to pro-Russian events, but it is certainly not how the law is applied to Crimean Tatar and Ukrainian gatherings.

iv. International Human Rights Day 2015

598. The Russian Federation attributes its rejection of the Mejlis’ 2015 application to celebrate International Human Rights Day (10 December) “to an energy system malfunction caused by destruction of four power line pylons in Kherson region of Ukraine.”¹¹⁹¹ Again, Russia’s version of events does not withstand scrutiny.

599. The Russian Federation claims the state of emergency began on 22 November 2015, and lasted into 2016.¹¹⁹² Yet, despite this alleged emergency, pro-Russia groups were permitted to gather for an anti-Turkey rally on 27 November 2015 in the central square of

¹¹⁸⁹ *Lashmankin v. Russia*, para. 422.

¹¹⁹⁰ Russia’s Counter-Memorial Part II, App. D, para. 57.

¹¹⁹¹ *Ibid.*, para. 37.

¹¹⁹² *Ibid.*; see also Resolution of the City Administration of Simferopol No. 1, 5 January 2016 (Russia’s Counter-Memorial Part II, Annex 99).

Simferopol.¹¹⁹³ The Russian Federation tries to explain this away by claiming that, starting *the day of* the pro-Russia groups' rally, "the overall situation further deteriorated."¹¹⁹⁴

600. This alleged justification makes no sense, not only because a deterioration in conditions would suggest that the rally should have been cancelled due to an emergency, but also because as of "December 8, the Ministry of Energy of Russia announced the restoration of power supply to all consumers."¹¹⁹⁵ If power had been restored, it is unclear why the International Human Rights Day gathering could not have been held on 10 December, especially if the pro-Russia groups' rally could take place in "deteriorating" conditions.

v. Commemoration of the *Sürgün* May 2016

601. Russia claims, "[t]he Voinka village administration did *not* reject a request to hold a meeting for a commemoration of *Sürgün*" in 2016.¹¹⁹⁶ According to Russia, the Crimean Tatar organizers' request was denied due to public development works underway in the area where the event would take place, and the organizers rejecting an alternative whereby the proposed rally would be merged with a laying of flowers event that was already scheduled.¹¹⁹⁷

602. However, the attendees of the proposed flower-laying event was capped at 27 persons,¹¹⁹⁸ far too small for a rally, and certainly incompatible with a commemoration open to the entire Crimean Tatar community to commemorate. Notably, the Crimean Tatar Cultural

¹¹⁹³ Ukraine's Memorial, para 492; Russia's Counter-Memorial Part II, App. D, para. 38.

¹¹⁹⁴ Russia's Counter-Memorial Part II, App. D, para. 38.

¹¹⁹⁵ TASS, *A Year After the Blackout: How the Energy Blockade Helped to Modernize the Crimean Energy Sector* (22 November 2016) (Ukraine's Reply, Annex 146).

¹¹⁹⁶ Russia's Counter-Memorial Part II, App. D, para. 30.

¹¹⁹⁷ *Ibid.*

¹¹⁹⁸ Division for Culture and Inter-Ethnic Relations of the Administration of the Krasnoperekopsky District of the Republic of Crimea, Information on the Activities Performed in the Village of Voinka for the Purpose of Implementing Resolution of 29 April 2016 No. 111, 9 June 2020 (Russia's Counter-Memorial Part II, Annex 624).

Center of the Voinka village, the organizer of the flower-laying event the Russian Federation selectively allowed to take place, is completely aligned with the Russian Federation. The Center is a municipal entity financed by a municipal budget, under the auspices of the Ministry of Culture of Crimea, and as such is required to implement State policy.¹¹⁹⁹ The Russian Federation does not explain how the proposed public works could be temporarily halted for one commemoration but not for the other, despite the Crimean Tatar organizers being flexible on the time of the public rally.¹²⁰⁰ In reality, the Russian Federation prioritized the flower-laying event of the government-financed group over the rally of the independent Crimean Tatar organizers. It then violated human rights standards on the freedom of assembly by rejecting an application for a gathering solely because it took place on the same day as another gathering, and because there was also a risk of potential “disruption[] of ordinary life” caused by “maintenance works” during the proposed gathering.¹²⁰¹

vi. Commemoration of the *Sürgün* May 2017

603. Russia deliberately ignores the discrimination involved in allowing a Russian-language gathering to take place in the summer of 2017, right after Crimean Tatars were found guilty of administrative offenses and faced fines for driving cars displaying the Crimean Tatar flag to mark the *Sürgün*.¹²⁰² While refusing to address the discrimination in allowing a Russian cultural event to take place but penalizing Crimean Tatars for commemorating a

¹¹⁹⁹ See Ministry of Culture of the Republic of Crimea, *The Ministry of Culture Conducts Certification of Amateur Groups of Crimea* (9 December 2015) (Ukraine’s Reply, Annex 175); Kultura.RF, *Houses of Culture and Clubs of Krasnoperekopsky District*, Ministry of Culture of Russia (2022) (Ukraine’s Reply, Annex 172).

¹²⁰⁰ See Letter of Ms. Ametova to the Voinka Village Administration Consenting to Hold a Rally on 18 May 2016 (12 May 2016) (Russia’s Counter-Memorial Part II, Annex 566).

¹²⁰¹ *Lashmankin v. Russia*, paras. 422, 423.

¹²⁰² Russia’s Counter-Memorial Part II, App. D, para. 59.

culturally significant day, Russia defends the “Great Russian Word” festival by noting that it was “a cultural event with longstanding history in the region dating back to 2007.”¹²⁰³

604. And yet the Crimean Tatar commemorators of the *Sürgün* — the day honoring the victims of the 1944 deportation of Crimean Tatars from their homeland — were punished for observing an event that dates back over 75 years.¹²⁰⁴

3. Russia’s Denial of a Pattern of Discrimination Against Gatherings of Cultural Significance to the Ukrainian Community Is Equally Unconvincing

605. Ukraine’s Memorial described a pattern of discriminatory conduct limiting gatherings of cultural significance to the Ukrainian community in Crimea, mirroring that suffered by the Crimean Tatar people. Russia’s attempts to explain away its discriminatory conduct on a gathering-by-gathering basis is no more persuasive with regard to this community as it is in relation to the Crimean Tatars.

606. For example, Russia criticizes Ukraine’s account of the persecution Sergei Oak [Dub] faced for celebrating Ukrainian Flag Day in 2014 as being made “without evidence.”¹²⁰⁵

607. Yet, a letter from the convicting court explains that all material related to “holding Sergey Stefanovich Dub administratively liable under Part 1 of Article 20.1 of the Code on Administrative Offences of the Russian Federation was destroyed since it had no research and historical value and lost its practical significance.”¹²⁰⁶ The Russian Federation cannot criticize Ukraine for failing to produce evidence that Russia’s own court destroyed.

¹²⁰³ *Ibid.*

¹²⁰⁴ Ukraine’s Memorial, para. 485.

¹²⁰⁵ Russia’s Counter-Memorial Part II, App. D, para. 53.

¹²⁰⁶ Simferopol Central District Court of the Republic of Crimea, Letter No. K-2 on the Entry into Legal Force of the Court Decision of 24 September 2014 in Case No. 5-930/2014 on Holding Sergey Dub Administratively Liable, 19 May 2020 (Russia’s Counter-Memorial Part II, Annex 618).

608. Russia’s justification for the interference with the commemoration of Shevchenko’s birthday in 2015 fails to satisfy the necessity and proportionality requirements for restrictions on freedom of assembly and expression, especially in light of ECtHR cases interpreting and applying these requirements in similar contexts. Russia claims that:

[C]ertain individuals attending this event converted a peaceful gathering to celebrate the poet’s birthday into a forum for political agitation. The approved purpose of the event was to celebrate the birthday of Mr Shevchenko. Contrary to that purpose, some participants began to conduct political agitation in favor of the fact that Crimea is part of Ukraine.¹²⁰⁷

609. International human rights law, as explained above, provides no support for a justified interference with these fundamental freedoms simply because the regulating authority deems that the participants of an event acted outside of the original scope of the event’s purpose. As the Human Rights Committee has explained, “[g]iven that peaceful assemblies often have expressive functions, and that political speech enjoys particular protection as a form of expression, it follows that assemblies with a political message should enjoy a heightened level of accommodation and protection.”¹²⁰⁸

610. The label of “political agitation” also seems dubious, as the only support Russia offers for its claim that these individuals were “agitators” is that they carried flags stating, “Crimea is Ukraine.” Regardless, using the prevention of cultural gatherings to suppress political speech and the exchange of ideas still violates the right to assembly. In this case, explicitly attempting to quash political activity through a prohibition of culturally significant gatherings serves to discriminate against the affected communities.¹²⁰⁹

4. None of the Justifications Cited by Russia Can Excuse Violations of the CERD

611. The preceding sections demonstrated how Russia’s restrictions on individual proposed mass gatherings cannot be justified on the grounds of legitimate restrictions on the

¹²⁰⁷ Russia’s Counter-Memorial Part II, App. D, para. 48.

¹²⁰⁸ HRC General Comment 37, para. 32.

¹²⁰⁹ *Ibid.*, para. 49.

underlying rights of freedom of assembly and speech, for example as being based on legitimate national security or public order concerns. What emerges instead is a pattern of Russian administrative action applying Russia's public gatherings legislation in a manner disproportionately unfavorable to the Crimean Tatar and Ukrainian communities. Ukraine alleges that this pattern of conduct has had the purpose or effect of nullifying or impairing the rights of these two communities to freedom of speech and assembly in violation of the CERD.

612. It is important to observe that the justifications Russia advances for limiting these core human rights at the level of individual events cannot constitute a defense to a violation of the CERD, once the Court has satisfied itself that the entire pattern of conduct constitutes racial discrimination. As Professor Scheinin explains in his expert report, the CERD's prohibition on racial discrimination is absolute and permits no exceptions on national security or other grounds.¹²¹⁰ Specifically, while the ICCPR and the ECHR may contain language allowing particular human rights to be limited or derogated from in narrow circumstances, those treaties make equally clear that such limitations and derogations may not be applied in a racially discriminatory manner, as confirmed both by the terms of the limiting language in the underlying instruments¹²¹¹ and by the absence of any provisions in the CERD for limiting or derogating from the obligations contained in that Convention.

¹²¹⁰ Scheinin Report, paras. 8–15 (Ukraine's Reply, Annex 7).

¹²¹¹ See, e.g., ICCPR, art. 4(1) ("In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, *provided that such measures* are not inconsistent with their other obligations under international law and *do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.*") (emphasis added). See also, ECHR, arts. 14 (Prohibition of Discrimination), 15 (Derogation in Time of Emergency), and 18 (Limitations on Use of Restriction on Rights).

Chapter 15. MEDIA RESTRICTIONS AND HARASSMENT

613. Ukraine’s Memorial demonstrated that Russia has placed severe restrictions on the media in Crimea since February 2014 with the purpose or effect of disproportionately burdening the rights to free speech and cultural participation of the Crimean Tatar and Ukrainian communities, in violation of CERD Articles 2(1), 5(d)(viii), and 5(e)(vi).¹²¹²

614. Russia defends its media legislation, claiming that “[i]n light of the applicable Russian legal framework, which is very similar to Ukraine’s [] and of the diverse and vibrant media landscape in Crimea[], it is manifest that Ukraine’s individual claims are baseless.”¹²¹³ But Russia’s conclusion does not follow from its premises. However facially impartial the regulatory framework for media in Russia may appear, that does not preclude the possibility of discrimination arising from the way that Russia applies its laws and regulations.

615. That is precisely what has happened in Crimea since 2014. Russia has applied its own legislative framework discriminatorily against the Crimean Tatars and Ukrainian communities in Crimea, using a re-registration requirement as a pretext for eliminating media voices articulating the concerns of those communities, and singling out journalists from those communities for harassment. Russia spins alternative narratives to explain away Ukraine’s claims. But the fact that Ukrainian and Crimean Tatar media sources have been disproportionately disadvantaged under Russian jurisdiction speaks for itself and satisfies Ukraine’s burden to show discrimination by purpose or effect.

A. Russia’s Defenses of Its Discriminatory Conduct Do Not Withstand Scrutiny

616. The Russian Federation asserts three defenses to avoid liability under the

¹²¹² See, e.g., Ukraine’s Memorial, paras. 597, 619–620, 629–630.

¹²¹³ Russia’s Counter-Memorial Part II, App. E, para. 1.

CERD. First, it argues that the Court’s decision in *Qatar v. UAE* precludes claims involving “legal entities such as media corporations,” which “fall outside [the Convention’s] scope.”¹²¹⁴ Second, it claims that the measures it took against journalists and media organizations for alleged extremist activities or ties “were legitimate and wholly grounded in law.”¹²¹⁵ Finally, it insists that the media landscape in Crimea today is diverse and vibrant.¹²¹⁶ As will be explained in detail below, none of these defenses can or should be credited.

1. Whether the CERD Encompasses Discrimination Against Corporations Is Irrelevant to Ukraine’s Claims

617. The Russian Federation misrepresents Ukraine’s claims of discrimination in an attempt to misapply the Court’s ruling on preliminary objections in *Qatar v. UAE*. Russia characterizes the ruling as holding that “the Convention concerns only individuals or groups of individuals’ and that legal entities such as media corporations fall outside its scope.”¹²¹⁷ According to Russia, “Ukraine does not establish that measures taken against media corporations were in fact specifically directed at the Crimean Tatar and Ukrainian communities as such. These claims thus fall outside of the Convention.”¹²¹⁸

618. In *Qatar v. UAE*, the Court distinguished between claims of discrimination against media corporations as rights-holders under the Convention and claims that the measures complained of indirectly discriminated against Qataris on the basis of their national origin. As to the former claim, Qatar wrote in its Memorial, “the CERD protects both the rights of individuals and ‘institutions’, which should be read broadly to include corporations such as

¹²¹⁴ Russia’s Counter-Memorial Part II, para. 399.

¹²¹⁵ *Ibid.*, App. E, para. 68.

¹²¹⁶ *Ibid.*, App. E(II)(A).

¹²¹⁷ Russia’s Counter-Memorial Part II, para. 399.

¹²¹⁸ *Ibid.*

Qatari media outlets. Article 2(1)(a) . . . supports their inclusion as rights-holders under the Convention.”¹²¹⁹ Thus, in the portion of the *Qatar v. UAE* judgment cited by Russia, the Court specified that, “the Court will examine only whether the measures concerning certain Qatari media corporations, which according to Qatar have been imposed in a racially discriminatory manner, fall within the scope of the Convention.”¹²²⁰ The Court ultimately answered this question in the negative, finding that although Article 2 of the CERD prohibits racial discrimination against “institutions,” that term is to be understood as referring to “collective bodies or associations, which represent individuals or groups of individuals” – a definition that did not extend to Qatari media corporations as rights-holders.¹²²¹

619. Nothing in this reasoning, however, prevents the Court from addressing a claim arising from restrictions on media activities where the discriminatory impact of the measures at issue is alleged to fall on protected groups, rather than just the media corporations themselves. Consistent with this, in *Qatar v. UAE*, the Court proceeded to analyze Qatar’s claims concerning the effect of the media blockade on persons of Qatari national origin as claims of indirect discrimination.¹²²²

620. The Memorial makes crystal clear that Ukraine’s media claims concern the nullification or impairment of rights belonging to the Crimean Tatar and Ukrainian communities in Crimea, and do not require the Court to treat affected media corporations as rights-holders. As stated there:

¹²¹⁹ *Interpretation and Application of the International Convention on the Elimination of All Forms of Racial Discrimination (The State of Qatar v. The United Arab Emirates), Merits*, Memorial of the State of Qatar Volume I of 25 April 2019, para. 5.150.

¹²²⁰ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Merits*, Judgment of 4 February 2021, para. 108.

¹²²¹ *Ibid.*

¹²²² *Ibid.*

Since March 2014 . . . , Russia has unlawfully introduced measures that significantly restrict freedom of opinion and expression in Crimea. The apparent purpose and unquestionable effect of these measures has been to burden the free speech rights of the Crimean Tatar and Ukrainian communities in particular.¹²²³

621. Ukraine thus claims racial discrimination based on discriminatory impact on protected groups, not media corporations. Russia’s defense based on *Qatar v. UAE* is simply not relevant to this case.

2. The Russian Federation Uses Invented Accusations of Extremism to Justify Its Harassment of Crimean Tatar and Ukrainian Journalists

622. The Russian Federation offers no reasonable justification for its denial of re-registration applications or intimidation of five individual media figures and two media organizations, instead relying on its anti-extremism legislation as a legitimate reason to target these victims with warning letters and home searches.¹²²⁴ As shown in Chapter 9 above, however, it is well-established that Russia’s anti-extremism laws are an open invitation to arbitrary exercises of state power by the Russian authorities.¹²²⁵ Accordingly, any justification of discriminatory conduct based on those laws is inherently suspect.

623. Ukraine’s human rights and national security expert, Professor Scheinin, for example, analyzes two of the laws the Russian Federation invokes to label journalists and journalistic activity extremist: Russia’s Federal Law No. 114-FZ “On Combating Extremist Activity” and Article 280.1 of the Criminal Code. He observes that these laws:

. . . should not enjoy the benefit of being treated as a neutral legal framework which is being applied in good faith to the benefit of good order. Instead, the statutes should be regarded as suspect, due to their inherent features that make them into a

¹²²³ Ukraine’s Memorial, para. 506.

¹²²⁴ Russia’s Counter-Memorial Part II, App. E(I)(A) & (III)(C).

¹²²⁵ *See supra*, Chapter 9, paras. 425–432.

mechanism for targeting not only violent or dangerous actions but also any mobilization or activity of ethnic communities that could be perceived to indicate disloyalty to the central government.¹²²⁶

624. Professor Scheinin is far from being an isolated critic of Russia's anti-extremism legislation. Indeed, his report quotes the excoriating criticisms of that legislation by the Venice Commission, as well as numerous decisions of the ECtHR condemning applications of the legislation in violation of individual human rights.¹²²⁷

625. As if to confirm the overreach of its legislation, Russia claims that a connection to the Mejlis is a valid indicator of potential terrorist activity. According to Russia, "[g]iven the gravity of the extremist activities associated with the Mejlis, media outlets associated with its leaders were legitimately closely monitored and reminded of the law when necessary."¹²²⁸ But the flaws in this argument are manifest. First, as shown in Chapter 11 above, Russia's allegations of extremism against the Mejlis lack any basis in law or fact and were simply a pretext to deprive the Crimean Tatar people of its legitimate representative voice.¹²²⁹ There is similarly no basis to claim that individuals or groups associated with the Mejlis are therefore inherently suspect. Second, even assuming that Russia's claims against the Mejlis were justified, Russia's logic smacks of guilt by association, a method of proof that may have been favored in the Soviet Union during the Stalinist era but which has no place before this Court.

3. The Media Landscape in Crimea Resulting from Russia's Application of Its Laws and Regulations Is Anything but Diverse

626. The Russian Federation claims that its regulation of the press and broadcast

¹²²⁶ Scheinin Report, para. 43 (Ukraine's Reply, Annex 7).

¹²²⁷ *Ibid.*, paras. 36, 41.

¹²²⁸ Russia's Counter-Memorial Part II, App. E, para. 69 (italics omitted).

¹²²⁹ *See supra*, Chapter 11, paras. 489–493.

media in Crimea cannot be labeled discriminatory because it has resulted in a diverse media landscape. Specifically, the Russian Federation claims that, “since 18 March 2014, more than one hundred mass media outlets have been registered in Crimea, whose products are primarily aimed at the Crimean Tatar and Ukrainian communities.”¹²³⁰

627. However, this claim is unfounded. Of the 105 media organizations listed as “[m]ass media outlets registered during the period from 18 March 2014 to 3 June 2021” in the Russian Federation’s Annex 1312, by Russia’s own account, 38 no longer exist. Most of these organizations were closed by their owners, while one was closed by court decision.¹²³¹ The Russian Federation cannot claim that media organizations are serving the Crimean Tatar and Ukrainian communities when those organizations are no longer in operation.

628. Moreover, a majority of the media outlets cited by Russia are print magazines, mostly of a scientific nature and/or published by universities.¹²³² Far fewer of these outlets are TV stations, radio channels, or actual newspapers, which reach a broader population.

629. Most of the surviving media organizations listed by the Russian Federation in its Annex as “primarily aimed at the Crimean Tatar and Ukrainian communities” actually use the Russian language as their predominant language, with, *e.g.*, the Crimean Tatar language used far less prominently.¹²³³ Crimean Tatar and Ukrainian language representation is thus

¹²³⁰ Russia’s Counter-Memorial Part II, App. E, para. 21.

¹²³¹ Ministry of Digital Development, Communications and Mass Communications of the Russian Federation, *List of Registered Media Outlets*, Federal Service for Supervision in the Sphere of Communications, Information Technology and Mass Communications (8 April 2022) (Ukraine’s Reply, Annex 98).

¹²³² *See, e.g.*, Mass Media Outlets Registered During the Period from 18 March 2014 to 3 June 2021, pp. 3, 6, 8, 11 (number 19, *Engineering and Teacher Training Bulletin*; number 42, *The Path to Pedagogical Science*; number 52, *Scholarly Notes of the Crimean Engineering and Teacher Training University*; number 55, *Human-Nature-Society*; number 71, *Bulletin of Physiotherapy and Balneology*; and number 77, *Dynamic Systems*) (Russia’s Counter-Memorial Part II, Annex 1312).

¹²³³ *See, e.g., ibid.* The websites of number 46, *Severnaya Tavrida [Northern Tavrida]* and number 83, *Crimea Today* are entirely in Russian, without any Ukrainian or Crimean Tatar. *Ibid.*, pp. 7, 12.

severely lacking even amongst the few media organizations still operational that Russia characterizes as exemplars of linguistic diversity.

630. Lastly, not all of these organizations are independent. Two of the largest Crimean Tatar TV and radio stations listed in Russia's Annex (Millet and Vatan Sedasy) were created under the patronage of the local government.¹²³⁴ Russia calls attention in particular to "the Public Crimean Tatar TV and Radio Broadcaster as an autonomous non-profit organization, the aim of which is to assist in developing the capacities of Crimean Tatar TV and radio channels, and supporting their activities in Crimea."¹²³⁵ However, this same organization was criticized by the Chair of the Mejlis of the Crimean Tatar people, Refat Chubarov, as, "nothing more than a company completely controlled by the illegal authorities of the annexed Crimea They promise to create a new, as they say, 'public' television and radio corporation. But it will be fully overseen by their Committee on Nationalities."¹²³⁶ The coverage on Russian state television of the ongoing invasion of Ukraine by Russia is a fair indicator of what to expect from Russian state-controlled media companies. The extension of that sort of Russian state propaganda to the Crimean Tatar and Ukrainian communities in Crimea is hardly a defense to Ukraine's claims of racial discrimination.

631. Russia seeks to justify the forced, mass exodus of Crimean Tatar and Ukrainian media organizations from Crimea, by claiming that several of these organizations are still accessible by satellite cable TV or by Internet portal.¹²³⁷ Even if this claim were true,

¹²³⁴ See, e.g., Krym.Realii, *Pro-Government TV Channel "Millet" Was Transferred to the Subordination of the New Department* (21 August 2020) (Ukraine's Reply, Annex 163).

¹²³⁵ Russia's Counter-Memorial Part II, App. E, para. 25.

¹²³⁶ Radio Svoboda, *Chubarov: The New Crimean Tatar Channel in Crimea Will Be a Tool of the Occupiers* (9 June 2015) (Ukraine's Reply, Annex 137).

¹²³⁷ Russia's Counter-Memorial Part II, App. E, para. 28.

potentially cumbersome access to these organizations does not explain or excuse why they were forced to flee Crimea for mainland Ukraine in the first place. Moreover, a recent report by the Crimean Human Rights Group providing an overview of the respect of human rights in Crimea documents continuous blocking of Ukrainian websites by the Russian occupation authorities in Crimea.¹²³⁸ According to the report, in December 2020, “at least 25 Ukrainian popular sites were blocked completely [in Crimea], and another 5 were partially blocked.”¹²³⁹

B. Russia Has Failed to Rebut the Individual Instances of Harassment and Prevention of Registration Cited by Ukraine

632. In its Memorial, Ukraine showed how Russia deployed its re-registration and anti-extremism legislation to target, harass, and silence Ukrainian and Crimean Tatar media organizations.¹²⁴⁰ Russia’s attempts to justify its imposition of the registration requirement to suppress independent media expression ring hollow.¹²⁴¹ Its alternative narratives aiming to justify how almost all independent Ukrainian and Crimean Tatar media organizations were closed since 2014 cannot disguise the very fact that Russia closed them *en masse*.

633. International organizations, including the United Nations, and many NGOs agreed with Ukraine’s assessment that the Russian Federation’s media registration regime was applied in a discriminatory manner against the Crimean Tatar and ethnic Ukrainian media.¹²⁴² The discriminatory nature of registration denials is confirmed by the fact that, of all the main Crimean Tatar media publications and channels, the Russian Federation initially only

¹²³⁸ Crimean Human Rights Group, Overview of the Situation with Respect for Human Rights and Norms of the International Humanitarian Law in Crimea for 2020 (2021), p. 10 (Ukraine’s Reply, Annex 103).

¹²³⁹ *Ibid.*

¹²⁴⁰ See Ukraine’s Memorial, Chapter 10, Section B(2)(ii).

¹²⁴¹ See Russia’s Counter-Memorial Part II, App. E(III)(B).

¹²⁴² See Ukraine’s Memorial, para. 513; see also *Freedom in the World 2017: Crimea*, Freedom House (last visited 9 March 2022).

approved one Crimean Tatar newspaper for re-registration.¹²⁴³ As one NGO observed, “[b]efore the annexation, there were approximately 3,000 outlets in Crimea. After the 2015 deadline, Roskomnadzor [the Russian media and telecommunications regulator] reported that 232 outlets were registered and authorized to operate Independent and pro-Ukraine media no longer function in Crimea, nor do outlets serving the Tatar community.”¹²⁴⁴

634. The Russian Federation’s attempts to explain away individual examples of restrictions imposed on Crimean Tatar and Ukrainian media outlets are unconvincing. For example, the Russian Federation disingenuously states, “[f]rom 1 April 2015 [the newspaper Avdet] adjusted its circulation in order to avoid re-registering with the new system,”¹²⁴⁵ making no mention of the Russian law that limits non-registered media entities to circulating less than 1,000 newspapers.¹²⁴⁶ Russia muddles cause and effect: the reason that Avdet restricted its circulation was that Russia failed to respond to its third application for re-registration, leaving it no choice but to comply with the legislative limit on unregistered circulation, not that Avdet was trying to avoid reregistration in the first place.¹²⁴⁷

635. The Russian Federation effectively confirms Ukraine’s allegations in its Memorial, acknowledging that Avdet’s first “two applications were returned to it without further consideration, based on procedural defects.”¹²⁴⁸ According to Russia, however, “*Avdet*

¹²⁴³ Gleb Shemovnev, *Only One Crimean Tatar Media Has Passed Registration in Russia*, KP.ua (3 April 2015) (Ukraine’s Reply, Annex 134). See also Crimean Tatar Resource Center, *The Russian Federation Systematically Destroys Freedom of Speech in Crimea - Ministry of Foreign Affairs of Ukraine* (4 May 2020) (Ukraine’s Reply, Annex 184).

¹²⁴⁴ *Freedom in the World 2017: Crimea*, Freedom House (last visited 9 March 2022).

¹²⁴⁵ Russia’s Counter-Memorial Part II, App. E, para. 27.

¹²⁴⁶ *About the Newspaper ‘Avdet’* (7 January 2020) (Russia’s Counter-Memorial Part II, Annex 1013).

¹²⁴⁷ QHA, *Crimean Tatar Newspaper “Avdet” Did Not Receive Registration* (27 March 2015) (Ukraine’s Reply, Annex 133).

¹²⁴⁸ Russia’s Counter-Memorial Part II, App. E, para. 27.

did not pursue the matter further, nor did it challenge the returns before the courts. Such decision reflects the founder’s and editor’s own choice and business strategy.”¹²⁴⁹ The Russian Federation creatively frames the situation — shifting the onus from the Russian Federation to Avdet, when in fact Avdet did submit its re-registration application a third time, in an attempt to meet the 1 April 2015 deadline set by the Russian Federation’s legislation.¹²⁵⁰ The Russian Federation did not reply to this application, in keeping with its denials of other Crimean Tatar media organizations’ applications.

636. Russia does not dispute the claim in Ukraine’s Memorial that, “[o]n 3 March 2014, Russian-backed forces shut down Chernomorskaya TV and, a few days later, the station’s signal was cut and replaced with that of a Russian station.”¹²⁵¹ Instead, the Russian Federation only contests Ukraine’s ensuing account that “[o]n 28 June 2014, Chernomorskaya TV and other Ukrainian channels were wholly removed from major cable networks in Crimea The Russian occupation authorities also raided Chernomorskaya TV’s premises on 1 August 2014, and seized cameras and computers belonging to the station.”¹²⁵² The Russian Federation claims these latter two events were related to “a civil dispute between Chernomorskaya TV and Radio and Television Broadcasting Centre of the Autonomous Republic of Crimea [“RTPC”] . . . [a]s part of long-standing financial problems.”¹²⁵³

637. Chernomorskaya itself objects to this characterization of the dispute. It asked RTPC for an invoice of this alleged significant debt, which RTPC suspiciously refused to

¹²⁴⁹ *Ibid.*

¹²⁵⁰ QHA, *Crimean Tatar Newspaper “Avdet” Did Not Receive Registration* (27 March 2015) (Ukraine’s Reply, Annex 133).

¹²⁵¹ Ukraine’s Memorial, para. 507.

¹²⁵² *Ibid.*

¹²⁵³ Russia’s Counter-Memorial Part II, App. E, para. 34.

produce.¹²⁵⁴ The President of Chernomorskaya TV summarized, “[w]e still consider the amount of the debt stated in the RTPC claim to be unfounded, but we were forced to pay it under pressure, in fact, of blackmail All studio and hardware equipment, filming and editing equipment were barbarically removed, which led to the suspension of the broadcasting . . . the declared debt is just an excuse to close the broadcasting of ‘Chernomorskaya.’”¹²⁵⁵

638. Additionally, the Russian Federation’s attempted explanation fails to account for why other Ukrainian channels would also be removed from networks in Crimea on the same day in June, if the removal of Chernomorskaya TV was solely related to a private civil dispute. It also does not explain why the OSCE Representative on Freedom of the Media, Dunja Mijatović, would warn, while condemning the seizure of the property of Chernomorskaya, the largest independent broadcaster in Crimea:

Continuing attempts to put pressure on the independent media in Crimea which provide space for critical voices is a clear sign of censorship and cannot be tolerated under any circumstances This creates an atmosphere of fear in which independent journalism cannot exist.¹²⁵⁶

639. Further, if the removal of the channel and the seizure of Chernomorskaya TV’s property were “legally-based measure[s],” as the Russian Federation claims,¹²⁵⁷ it seems unlikely the property would have been returned lacking memory cards, hard drives, batteries,

¹²⁵⁴ Center for Investigative Journalism, *TRK Chernomorskaya Paid the Debt to the RTPC Before the Court. “The Arrest and Removal of Equipment Was Blackmail” - Zhuravleva* (6 August 2014) (Ukraine’s Reply, Annex 130).

¹²⁵⁵ *Ibid.*

¹²⁵⁶ OSCE, OSCE Representative Condemns Steps Aimed at Full Silencing of Chernomorskaya TV in Crimea (4 August 2014) (Ukraine’s Memorial, Annex 808).

¹²⁵⁷ Russia’s Counter-Memorial Part II, App. E, para. 35.

and sound cards.¹²⁵⁸ The Russian Federation’s alleged explanation does not fit the facts of the harassment faced by Chernomorskaya TV.

640. The Russian Federation next tries to blame “ATR’s decision to move its operations to Kiev” on “the anticipated temporary lack of revenue,” deeming it “a profit-related decision.”¹²⁵⁹ The Russian Federation chooses to ignore the direct testimony of Lenur Islyamov, the owner of ATR Holdings, in which he explained that “[p]rior to the termination of work in Crimea (up to April 1, 2015), ATR television station was for the Crimean Tatars the story of huge success due to its high popularity, credibility with the viewers and economic efficiency as broadcasting was conducted without state support and was profitable.”¹²⁶⁰ Russia fails to explain why a hitherto successful business would expect a temporary lack of revenue unless the Russian occupation authorities had given it reason to believe that it would no longer be able to operate in the manner that had brought its past success.

641. In a familiar refrain, the Russian Federation also cites Mr. Islyamov’s alleged extremist activities as a reason for denying ATR’s registration requirements.¹²⁶¹ As noted elsewhere in this Reply and set out in greater detail in the expert report of Professor Martin Scheinin, Russia’s reliance on its anti-extremism laws to justify its conduct provides greater reason to suspect racial discrimination than to rule it out.¹²⁶² It is telling, for example, that Russia invokes evidence presented to the Supreme Court of the Russian Federation by the Prosecutor’s Office of the Republic of Crimea and the Prosecutor General’s Office of the Russian Federation stating (in identical terms) that the ATR TV channel was broadcasting

¹²⁵⁸ Ukraine’s Memorial, para. 507.

¹²⁵⁹ Russia’s Counter-Memorial Part II, App. E, para. 28.

¹²⁶⁰ Witness Statement of Lenur Islyamov (6 June 2018), para. 8 (Ukraine’s Memorial, Annex 18).

¹²⁶¹ Russia’s Counter-Memorial Part II, App. E, paras. 48, 50–51, 55, 57, 71–75, 84–85.

¹²⁶² *See, e.g.*, Scheinin Report, para. 43 (Ukraine’s Reply, Annex 7).

programs in which “it is possible to trace anti-Russian public opinion and that some Crimean peoples are set against each other and the state, which can destabilise the situation in the Republic of Crimea on the basis of inter-ethnic and inter-denominational relations.”¹²⁶³ In other words, Mr. Islyamov was condemned for daring to give voice to the Crimean Tatar people’s conviction that Crimea remained part of Ukraine.¹²⁶⁴

642. If there could be any remaining doubt about the solidity of Russia’s defense, that should be dispelled by the truly outlandish evidence adduced by Russia against Mr. Islyamov. For example, the court refers to the statements of random individuals who watched video clips of Mr. Islyamov speaking about the blockade who felt “negatively” about Mr. Islyamov’s statements as they could “feel the aggression.”¹²⁶⁵ One “witness” relayed that “he was invited by the operatives of the FSB of Russia in the Republic of Crimea and the city of Sevastopol to participate as a public representative in conducting a study of Youtube Internet resources.”¹²⁶⁶ He watched video clips in the FSB building, and then, in lieu of testifying, the court read out his testimony that, “it became clear to him that Lenur Islyamov was hostile to Russia, for which he began the blockade of the Crimea and cut off the electricity supply to the Crimea.”¹²⁶⁷ This “evidence” meets no identifiable standard of proof in any court of law.

643. The one thing that is clear from the discussion above is that the Court should give no weight to Russia’s repeated efforts to escape liability under the CERD based on anti-extremism laws that are a throw-back to the Soviet era.

¹²⁶³ Prosecutor’s Office of the Republic of Crimea, Letter No. Isorg-27-396-2015 to Roskomnadzor, 28 January 2015 (Russia’s Counter-Memorial Part II, Annex 535); Prosecutor General’s Office of the Russian Federation, Letter No. Isorg-27/3-1804-15/33170 to Roskomnadzor, 18 February 2015, p. 1 (Russia’s Counter-Memorial Part II, Annex 538).

¹²⁶⁴ Supreme Court of the Republic of Crimea, Case No. 1-11/2020, Decision, 10 December 2020 (Ukraine’s translation of Russia’s Counter-Memorial Part II, Annex 430) (Ukraine’s Reply, Annex 96). *See also* U.N. General Assembly Resolution 68/262, U.N. Doc. A/RES/68/262 (27 March 2014) (Ukraine’s Memorial, Annex 43).

¹²⁶⁵ Supreme Court of the Republic of Crimea, Case No. 1-11/2020, pp. 5–7 (Ukraine’s Reply, Annex 96).

¹²⁶⁶ *Ibid.*, p. 6.

¹²⁶⁷ *Ibid.*

* * *

644. In sum, the Russian Federation attempts to distract the Court from its own anti-media actions which have had the purpose or effect of excluding Crimean Tatar and Ukrainian voices from the public discourse in Crimea. But, collectively, the evidence is undeniable: the ethnic Ukrainian and Crimean Tatar media have been disproportionately disadvantaged by Russia's application of its re-registration requirements, depriving both communities of their authentic voice in the Crimean media landscape. This discriminatory application of law constitutes a clear violation of the CERD.

Chapter 16. DEGRADATION OF CULTURAL HERITAGE

645. Ukraine showed in its Memorial that Russia has subjected the Crimean Tatar and Ukrainian communities to a general assault on their respective cultural heritage in the form of destruction of cultural artifacts and the closure of cultural sites and programming. These measures, which have grotesquely magnified during the invasion of 2022, have had the discriminatory purpose or effect of impairing the cultural rights of the Crimean Tatar and Ukrainian communities in violation of CERD Articles 2(1), 5(e)(vi), and 6. But Russia's attack on these communities' cultural heritage has a broader significance: while the preservation and celebration of cultural heritage elevates a people's sense of identity and community, its degradation aims to destroy them and their cultural roots. When systematic degradation forms part of an occupying power's wider campaign of racial discrimination, it rises to the level of full-scale cultural erasure.

646. Russia seeks to dismiss Ukraine's claims as "clearly unfounded."¹²⁶⁸ It asserts that the allegations of degradation of Ukrainian cultural heritage in Crimea "do not stand any scrutiny" [sic]¹²⁶⁹ and that those relating to Crimean Tatar cultural heritage rest solely on the Khan's Palace.¹²⁷⁰ In Russia's narrative, "the Khan's Palace still stands today as a vibrant cultural symbol and historical treasure of the Crimean Tatar community and the Crimean population at large."¹²⁷¹ As explained below, however, Russia has significantly degraded the cultural integrity of that site since 2014, and this is just a leading example in a pattern of wider hostility exhibited towards the cultural heritage of both these communities.

¹²⁶⁸ Russia's Counter-Memorial Part II, App. F, para. 1.

¹²⁶⁹ *Ibid.*, para. 28.

¹²⁷⁰ Russia's Counter-Memorial Part II, para. 414.

¹²⁷¹ *Ibid.*, para. 415.

A. Russia’s Attempt to Reposition Its Scandalous Redevelopment of the Khan’s Palace as a Neutral Act of Renovation Are Unavailing

647. Contrary to Russia’s assertion,¹²⁷² a State’s vandalization of cultural heritage sites can constitute a violation of the CERD. Just months ago, for example, in its ruling on provisional measures in *Armenia v. Azerbaijan*, this Court found plausible the cultural rights asserted by Armenia under the CERD and “allegedly violated . . . through vandalism and desecration affecting Armenian cultural heritage.”¹²⁷³ Russia’s assault on the Khan’s Palace under the pretext of restoration is a particularly serious example. As the National Coordinator in Ukraine for the International Center for Research, Preservation and Restoration of Cultural Property (“ICCROM”) has explained, “[t]he Bakhchisaray ensemble is the only witness in the world to the statehood of the Crimean Tatars as a nation, as a people. The loss of this monument is equivalent to the loss of the nation’s genetic code, and such a thing cannot be allowed under any circumstances.”¹²⁷⁴

648. To avoid addressing the merits, the Russian Federation criticizes Ukraine for relying primarily on “open sources,” asserting “that it has no recent first-hand or confirmed information to accurately and thoroughly appreciate the restoration works.”¹²⁷⁵ The Russian Federation complains of a problem of its own making – because it refuses to allow independent monitors access to Crimea,¹²⁷⁶ Ukraine cannot itself conduct a thorough investigation of the harm being done to the Khan’s Palace in the guise of “restoration.” Even

¹²⁷² Russia’s Counter-Memorial Part II, App. F, para. 8, n.19.

¹²⁷³ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures*, Order of 7 December 2021, para. 61.

¹²⁷⁴ Tatiana Ivanovich, *Khan’s Barbaric “Restoration,” From the Palace to the Barn*, QHA (7 December 2018) (Ukraine’s Reply, Annex 155).

¹²⁷⁵ Russia’s Counter-Memorial Part II, App. F, para. 15.

¹²⁷⁶ 2019 UNSG Report, paras. 70, 72.

UNESCO has been unable to gain access to the site or to Crimea, despite the concerns expressed in the reports of the UNESCO Executive Board related to the construction works.¹²⁷⁷

649. Russia’s “restoration” work on the Khan’s Palace, unusually conducted in winter, has led to interior damage due to flooding and snow;¹²⁷⁸ the destruction of historical handcrafted tiles (“Tatarka”) from the roof of the mosque replaced by modern, mass-produced Spanish tiles;¹²⁷⁹ ruined 18th-century paintings and original roof beams;¹²⁸⁰ and cracks on the façade of the building due to the application of inappropriate cleaning technology that used high pressure water jets.¹²⁸¹ While this cultural dismantling cannot be deemed restoration, such damage is foreseeable when the work is supervised by construction personnel with no experience or special qualification in the restoration of historic buildings.¹²⁸² Similarly, the current General Director of the State Budgetary Institution of the Republic of Crimea “Bakhchisaray Historical, Cultural and Archaeological Museum-Reserve” (which includes the Khan’s Palace), despite drafting a witness statement for Russia in this case about the repair

¹²⁷⁷ UNESCO Executive Board, Follow-Up to Decisions and Resolutions Adopted by the Executive Board and the General Conference at Their Previous Sessions, Doc. No. 207EX/5.I.C (13 September 2019), pp. 10, 21 [hereinafter 2019 UNESCO Report].

¹²⁷⁸ Tatiana Ivanovich, *Khan’s Barbaric “Restoration,” From the Palace to the Barn*, QHA (7 December 2018) (Ukraine’s Reply, Annex 155).

¹²⁷⁹ *Ibid.* See also Krym.Realii, *Khan’s Palace: Restoration or Destruction?* (28 December 2017) (Ukraine’s Reply, Annex 150); Center of Monument Studies, “Restoration” of the Great Khan Mosque (Biyuk Khan-Djami) in Bakhchisaray: on the Tile Roofing (14 March 2018) pp. 1–7 (Ukraine’s Memorial, Annex 1031); Ministry of Information Policy of Ukraine, *Save the Khan’s Palace* (2018) pp. 10–11 (Ukraine’s Memorial, Annex 734).

¹²⁸⁰ See 2019 UNESCO Report, p. 10; Tatiana Ivanovich, *Khan’s Barbaric “Restoration,” From the Palace to the Barn*, QHA (7 December 2018) (Ukraine’s Reply, Annex 155); Krym.Realii, *Khan’s Palace: Restoration or Destruction?* (28 December 2017) (Ukraine’s Reply, Annex 150).

¹²⁸¹ 2019 UNESCO Report, p. 10.

¹²⁸² *Ibid.*, p. 11.

and restoration works on the Khan's Palace,¹²⁸³ is a lawyer and prosecutor who has no visible background in preservation, restoration, or even archaeology.¹²⁸⁴

650. The respected Royal Institute of International Affairs ("Chatham House") has also expressed alarm at this state of affairs, explaining that:

The destructive reconstruction of the 16th-century Bakhchysarai Palace – the only remaining complete architectural ensemble of the indigenous people, included in the UNESCO World Heritage Tentative List – is another example of how the very identity of the Crimean Tatars is being threatened. This reconstruction is being conducted by a team with no experience of cultural sites, in a manner that erodes its authenticity and historical value – which is precisely as Russia intends.¹²⁸⁵

651. Even the Russian Federation has found these contractors lacking—but only when the contractors are damaging sites of cultural significance to Russians. The Russian Federation has engaged firms Kiramet, ATTA Group, and Meander to work on the Khan's Palace.¹²⁸⁶ Kiramet and ATTA Group did not have experience in restoration, nor were restoration specialists included on the team.¹²⁸⁷ As explained in Ukraine's Memorial, when these two contractors were "renovating" the I.K. Aivazovsky House, a site the Russian Federation deems culturally significant, the Lenin District Court in the Rostov Oblast found

¹²⁸³ Witness Statement of Vadim Leonidovich Martynyuk, General Director of the State Budgetary Institution of the Republic of Crimea "Bakhchisaray Historical, Cultural and Archaeological Museum-Reserve," 9 June 2021 (Russia's Counter-Memorial Part II, Annex 20).

¹²⁸⁴ CV of V.L. Martynyuk, Director General of the State Budgetary Institution of the Republic of Crimea "Bakhchisaray Historical, Cultural and Archaeological Museum-Reserve" (Russia's Counter-Memorial Part II, Annex 1285).

¹²⁸⁵ Kateryna Busol, *Crimea's Occupation Exemplifies the Threat of Attacks on Cultural Heritage*, Chatham House (4 February 2020).

¹²⁸⁶ Elena Removskaya, "Vandalism Masquerades as Restoration." *New Contractors From Russia in the Khan's Palace*, Krym.Realii (17 February 2021) (Ukraine's Reply, Annex 165).

¹²⁸⁷ Krym.Realii, *Khan's Palace: Restoration or Destruction?* (28 December 2017) (Ukraine's Reply, Annex 150).

these two contractors to have committed “a gross violation of the law on the protection of [Russian Federation] cultural heritage sites.”¹²⁸⁸

652. Russia attempts to downplay the relevance of this case, claiming that this decision “does not concern, however, a request against any of the two companies, but against Mr Sergey Efimov, the Chairman of the State Committee for Cultural Heritage Preservation, which is the administrative body responsible, inter alia, for granting and supervising renovation works of cultural heritage sites.”¹²⁸⁹ However, the court decision makes explicit that these contractors contributed to the “gross violation of the law” in that: “the performance of the works to preserve the I.K. Aivazovsky House OKN had changed the original historical appearance of the building”; the contractors failed to obtain the required restoration “special license from the Ministry of Culture of the Russian Federation”; and they again failed to submit the appropriate “project documentation . . . for approval to the Committee along with a state historical-cultural expert report on the research and project documentation for preservation of the OKN.”¹²⁹⁰ While Sergey Efimov may have been the defendant, he was being held accountable for the failures of the contractors. And yet, when the Crimean Tatar former director of the Khan’s Palace brought a court case against these same contractors, the Crimean court found a pretextual, procedural reason to reject the claim.¹²⁹¹ Tellingly, the contractors performed almost the same works on both cultural heritage sites: the replacement of tiles,

¹²⁸⁸ Judgment in an Administrative Offence Case, 11 October 2017, Rostov-on-Don, Case No. 5-438/17 (Ukraine’s Memorial, Annex 925); *see also* Ukraine’s Memorial, para. 526.

¹²⁸⁹ Russia’s Counter-Memorial Part II, App. F, para. 24.

¹²⁹⁰ Judgment in an Administrative Offence Case, 11 October 2017, Rostov-on-Don, Case No. 5-438/17, pp. 3-4 (Ukraine’s Memorial, Annex 925).

¹²⁹¹ Ukraine’s Memorial, para. 526; Zheleznodorozhny District Court of Simferopol of the Republic of Crimea (dismissing the claim for lack of standing as the former director’s individual rights had not been infringed without addressing the harms of the construction work to the Khan’s Palace) (Ukraine’s Memorial, Annex 930).

replacement of rafters, and repair of the façade, to name a few, making the I.K. Aivazovsky House an excellent comparator for the Khan’s Palace.¹²⁹²

653. Finally, Russia tries to distract the Court with baseless allegations that Ukraine “decided to ignore the warnings and undertook no adequate restoration works” despite the “alarming state [of the Khan’s Palace] warranting repair.”¹²⁹³ Even if this claim were true, it would not excuse Russia’s active destruction of the cultural heritage of the Crimean Tatars. However, as a letter from the National Coordinator in Ukraine of ICCROM that is already in the record makes clear, the Ukrainian Restoration Research and Design Institute (UkrNDIprojektrestavratsia Institute or “URRDI”) has continued Soviet-era work taking the form of regular scientific studies of the Khan’s Palace complex.¹²⁹⁴ As the letter states:

[I]t is important to note the high professional level of the studies and decisions made regarding conservation, restoration and renewal of many historical elements of the buildings and the rehabilitation of their authenticity. Guided by the principles of the long-standing school of Ukrainian restoration and by the requirements of international charters on the protection of historical and cultural treasures, the design decisions adopted methods that preserve to the utmost both individual building elements and the historical and artistic appearance of the entire ensemble.¹²⁹⁵

654. Moreover, URRDI was actively working on restoring the Khan’s Palace prior to

¹²⁹² See, e.g., Judgment in an Administrative Offence Case, 11 October 2017, Rostov-on-Don, Case No. 5-438/17 (Ukraine’s Memorial, Annex 925); 2019 UNESCO Report, p. 10; Tatiana Ivanovich, *Khan’s Barbaric “Restoration,” From the Palace to the Barn*, QHA (7 December 2018) (Ukraine’s Reply, Annex 155); Krym.Realii, *Khan’s Palace: Restoration or Destruction?* (28 December 2017) (Ukraine’s Reply, Annex 150).

¹²⁹³ Russia’s Counter-Memorial Part II, App. F, para. 7.

¹²⁹⁴ A.E. Antoniuk, National Coordinator of International Center for the Study of the Preservation and Restoration of Cultural Property in Ukraine, Letter No. 12 (April 2018), p. 1 (noting that the Ukrainian Restoration Research and Design Institute “performs scientific studies of the Khan Palace complex dating from 1960, 1962, 1965, 1987, 1988 and 1994 and subsequent years . . .”) (Ukraine’s Memorial, Annex 1030).

¹²⁹⁵ *Ibid.*

the Russian occupation in 2014.¹²⁹⁶ Notably, part of the preparatory studies it conducted revealed that out of 22 roof beams, only three needed replacement and one required restoration, with only one cross beam needing to be replaced.¹²⁹⁷ URRDI's diligent research renders the contractors' complete removal and destruction of the roof all the more perplexing, as it shows that the work was not required.

655. Russia's attempts to defend its disgraceful treatment of this prime example of Crimean Tatar cultural heritage accordingly do not hold water. Were the same level of restorative care devoted to a cultural artifact of similar significance to the Russian population – the Kremlin, say – there would be a national outcry across Russia. By contrast, the casual way in which Russia defends its shoddy treatment of the Khan's Palace highlights the contempt it feels for the Crimean Tatar people and their culture.

B. Contrary to Russia's Characterization, Ukraine Alleges Discriminatory Conduct Affecting the Crimean Tatar Community Beyond the Damage to the Khan's Palace

656. The destruction of the Khan's Palace is certainly not the only instance of abuse leveled at Crimean Tatar cultural heritage. Chatham House confirms that both ethnic communities' cultural heritage is being targeted by the Russian Federation:

First the Soviet Union and now Russia have targeted the Crimean Tatars' cultural heritage to undermine their significance in the general historical narrative, making attempts to preserve or celebrate this culture seem futile. Russia is thus imposing its own historical and political hegemony at the expense of the Crimean Tatar *and* Ukrainian layers of Crimean history.¹²⁹⁸

¹²⁹⁶ Virtual Museum of Russian Aggression, *Aggressor Destroys Cultural Heritage in Crimea, Start of the "Restoration" of the Khan's Palace* (27 July 2017), accessed at <https://rusaggression.gov.ua/en/event-article.html?object=6a3cb8669d24f638f158116a6416dab9>.

¹²⁹⁷ *Ibid.*

¹²⁹⁸ Kateryna Busol, *Crimea's Occupation Exemplifies the Threat of Attacks on Cultural Heritage*, Chatham House (4 February 2020) (emphasis added).

657. Among the additional examples of degradation of Crimean Tatar culture listed by Chatham House is the demolition of Muslim burial grounds to build the Tavrida Highway, “which leads to the newly built Kerch Bridge connecting the peninsula to Russia.”¹²⁹⁹

658. A further example of the attempted cultural erasure of the Crimean Tatar community is the archeological monument Palace of Kalga-Sultan Akmejitsaray and the cultural layer of the ancient city of Akmejtit (modern city of Simferopol). At the end of the 15th century, the Crimean Khanate established the position of Kalga-Sultan – “commander of the army of the Crimean Khanate, the first heir to the khan's throne.”¹³⁰⁰ The Kalga-Sultan’s residence was the city around the Akmejitsaray palace complex. After the annexation of Crimea by the Russian Empire in 1783, Akmejtit lost the palace of the Kalga-Sultan, its main architectural and cultural-political feature.¹³⁰¹ Built in the early 16th century, the palace fell into disrepair at the end of the 18th century, when Russian troops were stationed in Crimea.

659. In 2017, an archaeological study of Akmejtit and the Kalga-Sultan's palace was conducted so the Russian occupation authorities could begin the construction of a Russian Orthodox Church on the territory of a former brewery. In the course of construction, “the remains of the masonry of the palace walls and the cultural layer of the final stage of the palace's existence were discovered.”¹³⁰² But instead of then increasing efforts to protect and preserve archeological sites in the old part of Akmejtit-Simferopol, the occupation authorities permitted archeological “demolition” excavations and “explorations,” beginning in 2019.¹³⁰³ In 2021, video footage captured the shine of the golden dome of the Russian Orthodox Church, built on the remains of the Crimean Tatar palace.¹³⁰⁴

¹²⁹⁹ *Ibid.*

¹³⁰⁰ International Renaissance Foundation, Information on Illegal Archeological Excavations: List of Objects of Destruction of Monuments of Crimea (2021) (Ukraine’s Reply, Annex 106).

¹³⁰¹ *Ibid.*

¹³⁰² *Ibid.*

¹³⁰³ *Ibid.*

¹³⁰⁴ Crimean Tatars in English, *A Flash Mob in Defense of Kalga Sultan Was Announced in Crimea*, YOUTUBE (8 November 2021), accessed at <https://www.youtube.com/watch?v=gxqIV-frtK8>.

C. Russia Fails to Rebut Ukraine’s Account of Its Assault on Ukrainian Cultural Heritage in Crimea

660. The Russian Federation attempts to minimize the aggressive actions taken by its agencies to eliminate cultural expression by the Ukrainian community, but its false narrative does not negate the facts.

661. For example, while Russia asserts that Ukraine cannot support its claims that the Lesya Ukrainka Museum has been significantly reduced, a Museum tourist website admits:

Over the past few years, the Lesya Ukrainka Museum itself has been closed, as it is written at the entrance “for technical reasons.” A small exposition of the poetess has been moved to the Yalta Historical and Literary Museum, which is located on the first floor of the same building.¹³⁰⁵

662. Several other websites confirm this extended closure, despite the fact that the authorities in Yalta assured the public the repairs would be completed by the end of 2017.¹³⁰⁶ As a Ukrainian literary critic and researcher of Lesya Ukrainka’s work explained, “Lesya Ukrainka is consistent in defending the Ukrainian position, so in modern Russia such a museum cannot exist.”¹³⁰⁷

663. Next, Russia claims Ukraine made a “fallacious presentation of the facts” in its Memorial, writing about the forced closure of a Ukrainian-language children’s drama school (Svitanok) and the forced resignation of the head of the drama school, Alla Petrova, due to the

¹³⁰⁵ Portal Big Yalta, *Museum of Lesya Ukrainka in Yalta* (24 July 2019) (Ukraine’s Reply, Annex 157).

¹³⁰⁶ Victoria Veselova & Maxim Stepantsov, *Anniversary with a Leaky Ceiling. What Is Left of the Legacy of Lesya Ukrainka in Crimea*, Krym.Realii (25 February 2021) (Ukraine’s Reply, Annex 166).

¹³⁰⁷ Radio Svoboda, *Lesya Ukrainka Museum in Yalta Closed, Russian Authorities Say – For Repairs, Writers – Forever* (15 March 2016) (Ukraine’s Reply, Annex 141).

theatre's Ukrainian ties.¹³⁰⁸ Russia emphasizes that Ms. Petrova “voluntarily resigned,” and there were no “pressures or conflicts between Ms Petrova and co-workers or the Institution prior to her resignation.”¹³⁰⁹ To support its claim, Russia cites Ms. Petrova's resignation letter which states, in its entirety, “Please accept my voluntary resignation from 11 January 2016.”¹³¹⁰

664. This one-sentence letter fails to contradict the account of the school's co-founder and Ms. Petrova's husband. He claims, “[t]hey tried to force Alla Petrova to leave in summer, and again in fall. . . . They conducted various inspections, they used every opportunity to find faults with her work, they insulted her, threatened her, and tried to lower her salary.”¹³¹¹ The final straw was the school's performance in mid-December, which had the audacity to use Ukrainian-language and include Ukrainian-embroidered clothing. The forced closure of Svitanok, he says, is “another round of repression and persecution of anything that even remotely evokes the past and is connected with Ukraine.”¹³¹²

665. Russia finally attempts to evade any responsibility for the harassment of the Ukrainian cultural center by claiming that the repeated investigations and searches of four of the center's members was justified as “regular investigative activities of law enforcement authorities that lie within their mandate and are based on legitimate suspicions of extremist activities toward persons who, for most of them, appear to be known recidivists.”¹³¹³ Again,

¹³⁰⁸ Russia's Counter-Memorial Part II, App. F, para. 40; see also Ukraine's Memorial, para. 530; The Guardian, *Crimea's Children's Theatre Forced to Shut for 'Promoting Western Propaganda'* (6 January 2016) (Ukraine's Memorial, Annex 1075).

¹³⁰⁹ Russia's Counter-Memorial Part II, App. F, para. 40.

¹³¹⁰ Letter to the Ministry of Education, Science and Youth of the Republic of Crimea No. 01-01-20/170, 5 April 2021 (excerpts), p. 5 (Russia's Counter-Memorial Part II, Annex 644).

¹³¹¹ The Guardian, *Crimea's Children's Theatre Forced to Shut for 'Promoting Western Propaganda'* (6 January 2016) (Ukraine's Memorial, Annex 1075).

¹³¹² *Ibid.*

¹³¹³ Russia's Counter-Memorial Part II, App. F, para. 33.

Russia does not deny Ukraine's facts about the repeated investigations and intimidation, but claims that the Center – founded in May 2015 to provide a place to explore and celebrate Ukrainian language, literature, and culture – and its members are a hub of extremist activity.

666. As Professor Scheinin explains, this attempted deflection does not work:

Notably often, the Russian Federation has not disputed the factual claims by Ukraine but has, instead, relied on its anti-extremism statute as if it would preclude the existence of racial discrimination. In light of the materials examined for this report, however, the application of the anti-extremism statute in Crimea in the context of the purported annexation of a part of Ukraine's internationally recognized territory, and in respect of members of the two ethnic communities of Crimean Tatars and ethnic Ukrainians in Crimea, should be taken as proof of, and admission of, the presence of a discriminatory purpose or effect in the meaning of ICERD¹³¹⁴

667. The Russian Federation has worked systematically toward stigmatization and harassment of Ukrainian culture and language, spoken and written, and degradation of institutions that try to preserve them. That effort is part of a broader and discriminatory pattern of cultural abuse suffered by the Crimean Tatar and Ukrainian communities in Crimea since 2014. The broader message to these communities is clear: those who oppose the russification of Crimea will pay the price, not only through denial of political and civil rights, but through the erasure of their own identities as constituent parts of the peninsula's formerly multi-cultural essence. By so doing, Russia extends its consistent pattern of racial discrimination into a blatantly illegal project of cultural extermination.

¹³¹⁴ Scheinin Report, para. 49 (Ukraine's Reply, Annex 7).

Chapter 17. SUPPRESSION OF EDUCATIONAL RIGHTS

669. Ukraine's Memorial showed that Russia has implemented its program of cultural erasure with measures that have the purpose or effect of limiting opportunities for Crimean children to be taught in the Ukrainian or Crimean Tatar languages. These measures are part of a new emphasis on Russian as the dominant language of tuition and a reorientation of the curriculum, educational qualifications, and teacher development towards the Russian Federation. Ukraine claimed that Russia's use of the educational system to promote the Russian language and culture at the expense of Ukrainian and Crimean Tatar language and culture violated Article 2(1)(a)'s prohibition on acts and practices of racial discrimination, as well as Article 5(e)(v)'s requirement that States Parties guarantee equality before the law in the enjoyment of the right to education and training.

670. Russia responds by misstating Ukraine's arguments and by relying formalistically on declarations of equality written into Russian law. Russia argues, for example, that it is in compliance with the CERD because Article 5(e)(v) "does not encompass a right to education in minority languages."¹³¹⁵ However, as explained below, Ukraine's claim does not require the existence of such a specific right, but rather only that the Ukrainian and Crimean Tatar communities receive less favourable treatment than the ethnic Russian community in Crimea and that this adversely affects their access to education and training. And Russia's claim that "Crimean Tatars and ethnic Ukrainians have been enjoying a particularly favorable treatment since 2014 because their languages have been recognized as State languages of Crimea"¹³¹⁶ repeats the mistake made elsewhere in the Counter-Memorial of confusing statutory labels with the reality on the ground that real people experience.

671. Russia's attempt to present its educational policies in Crimea as more progressive than those of most other States fails. Russia's alleged "extensive protections" of native language education are hollow, as pointed out by both the European Court of Human

¹³¹⁵ Russia's Counter-Memorial Part II, para. 263.

¹³¹⁶ *Ibid.*, para. 260.

Rights and average citizens in Crimea. The reality is that, since 2014, the Russian Federation has selectively *removed* educational opportunities previously available to the Ukrainian and Crimean Tatar communities in Crimea. This policy has had the discriminatory purpose or effect of reducing those communities' access to education and training as compared to that enjoyed by those Crimeans identifying as ethnic Russians, and therefore violates the CERD.

A. Russia's Restrictions on Education in the Ukrainian and Crimean Tatar Languages Impairs Those Communities' General Right to Education

672. The Russian Federation states that the CERD right to education and training free from discrimination does not include a right to education in minority languages.¹³¹⁷ But the question of whether an independent right to be educated in a minority language exists is irrelevant. That is because the changes that the Russian Federation has introduced to the status quo in Crimean education — favoring Russian-language education at the expense of education in minority languages — have had a disparate impact on access to education and training in general across ethnic lines.¹³¹⁸

673. The Russian Federation seeks to defend its conduct with the formalistic argument that all students in Crimea are treated equally, in that they all have access to the public education system on the same terms.¹³¹⁹ But formal equality does not necessarily equate to true equality. As Professor Fredman explains:

[The CERD] protects individuals from both purpose discrimination and effect discrimination in the enjoyment of their right to education. . . . Equal access of all children to Russian-speaking education has an unjustified disparate impact on Ukrainian and Crimean Tatar children as compared to children whose first language is Russian in circumstances where it replaces pre-existing provision for each to be taught in their native languages. This in itself constitutes a breach of the right to enjoy the right to education without distinction as to ethnic origin protected by Article 5 CERD.¹³²⁰

¹³¹⁷ *Ibid.*, para. 263.

¹³¹⁸ *See* Fredman Second Report, para. 49 (Ukraine's Reply, Annex 5).

¹³¹⁹ Russia's Counter-Memorial Part II, para. 278.

¹³²⁰ Fredman Second Report, para. 50 (Ukraine's Reply, Annex 5).

674. An argument based on equality of treatment, similar to that now advanced by Russia, was rejected more than 80 years ago when advanced by Albania to justify measures of purportedly general application, but which in fact burdened the rights of a particular minority. In the Permanent Court of International Justice (“PCIJ”) case, *Minority Schools in Albania*, the Albanian government argued that all children were treated equally when private schools were closed down for majority and minority students alike.¹³²¹ The PCIJ recognized, however, that such formal equality in law could disguise actual discrimination where the majority and minority were not similarly situated. As the Court observed, “[i]t is easy to imagine cases in which equality of treatment of the majority and of the minority, whose situation and requirements are different, would result in inequality in fact.”¹³²²

675. The Court explained that the decision to close private schools adversely affected minority communities to a much greater degree.¹³²³ As Professor Fredman notes, the Court acknowledged that “the majority [of students] would continue to have their needs supplied by public institutions created by the State, whereas in effect the minority groups were deprived of [private] institutions which were indispensable to their special requirements.”¹³²⁴

676. Likewise, in the present case, the Russian Federation’s claim of alleged formal legal equality between Russian, Ukrainian, and Crimean Tatar students, because they all have access to the Crimean education system on the same terms, disguises the fact that ethnic Russian students now benefit from greater educational opportunities in a system skewed

¹³²¹ *Minority Schools in Albania*, Advisory Opinion, 6 April 1935, P.C.I.J. Rep. Series A/B – No. 64, p. 15.

¹³²² *Ibid.*, p. 19.

¹³²³ *Ibid.*, p. 20.

¹³²⁴ Fredman Secpnd Report, para. 52 (Ukraine’s Reply, Annex 5).

towards their linguistic preference, while Ukrainian and Crimean Tatar students suffer from the reduced availability of instruction in their mother tongues.

677. As in *Minority Schools in Albania*, where the PCIJ rejected Greece's contention that Albania was bound to respect historical community rights and applied instead general principles of minority protection, no specific right to education in one's own language is needed to reach the conclusion above. That conclusion rests instead on an understanding of Article 5 of the CERD as guaranteeing practical and not just formal equality before the law,¹³²⁵ together with an appreciation of the particular situation and requirements of the Ukrainian and Crimean Tatar communities in Crimea.

678. Specifically, since occupying Crimea in 2014, Russia has altered the pre-existing status quo, taking away resources previously devoted to education in the Ukrainian and Crimean Tatar languages, and generally "russifying" the Crimean educational system. Those measures have a disparate adverse impact on the right to access education enjoyed by the Ukrainian and Crimean Tatar communities in Crimea, as compared to the ethnic Russian community and therefore constitute a violation of CERD Articles 2(1)(a) and 5(e)(v).

B. Practice Under the CERD and Analogous Human Rights Instruments Supports the Conclusion that Restrictions on Education in Minority Languages May Violate the General Right to Education

679. The Russian Federation supports its assertion that the CERD does not protect a right to education in minority languages by invoking what it claims is consistent international practice under the UNESCO Convention Against Discrimination in Education ("CADE"), the International Convention on Economic, Social and Cultural Rights ("ICESCR"), the European Framework Convention on the Protection of National Minorities ("FCPNM"), as well as the jurisprudence of the European Court of Human Rights.¹³²⁶

680. As explained above, Russia's argument attacks a straw man of its own construction. The issue is not whether there is a specific internationally-recognized right to

¹³²⁵ See, e.g., *ibid.*, para. 53 (Ukraine's Reply, Annex 5).

¹³²⁶ Russia's Counter-Memorial Part II, paras. 263–282.

education in minority languages, but rather whether *measures to remove* pre-existing provision for minority languages can, in the circumstances presented in this case, amount to a violation of the general right to equal access to education and training. Ukraine's position is that the latter question must be answered in the affirmative and it has shown in the preceding section how that outcome finds support in the authoritative case law of the PCIJ.¹³²⁷ In this section, Ukraine will show that its position is also entirely consistent with the concern for minority educational opportunities shown by international judicial and oversight bodies charged with implementing the general right to education under both the CERD and analogous human rights instruments.¹³²⁸

681. When examining the record of individual States Parties in guaranteeing equality in the right to education, the CERD Committee has on numerous occasions found access to teaching in minority languages to be a relevant factor. In its recommendations and concluding observations to States Parties, the CERD Committee has frequently expressed concern over the lack of access to education in minority languages, and urged States to ensure such education is adequately provided.¹³²⁹

¹³²⁷ Professor Fredman explains in her expert report why it is relevant and beneficial for the Court to be guided by the Advisory Opinion of the Permanent Court of Justice. *See* Fredman Second Report, para. 52, n.62.

¹³²⁸ *See, e.g.*, Patrick Thornberry, *UNIVERSAL MINORITY RIGHTS: A COMMENTARY ON THE JURISPRUDENCE OF INTERNATIONAL COURTS AND TREATY BODIES* 340–341 (Oxford University Press 2007) (“A similar spirit informs Article 7 of CERD . . . The lack of provision in educational curricula for indigenous or minority languages has been a matter of regular concern. Other U.N. treaty bodies have made similar recommendations—the CRC/C for example has insisted on the importance of adapting school curricula to suit the particularities of local communities; CESCR/C recommended Greece to ensure adequate staffing with teachers specialized in multicultural education.”) (Ukraine’s Reply, Annex 116).

¹³²⁹ *See, e.g.*, CERD Committee, Concluding Observations of the CERD Committee on the Former Yugoslav Republic of Macedonia (Fifty-First Session), U.N. Doc. CERD/C/304/Add.38 (15 October 1997), para. 13 (“The Committee recommends that the State party continue its efforts to facilitate the participation of different ethnic minorities in the educational system, in particular at the secondary and higher educational level, and to provide for the training of teachers in minority languages in public establishments.”); CERD Committee, Concluding Observations of the CERD Committee on Japan (Fifty-Eighth Session), U.N. Doc. CERD/C/304/Add.114 (27 April 2001), para. 16; CERD

682. For example, in the Committee’s Concluding Observations to China in 2009, the CERD Committee noted it had a “concern about remaining disparities for ethnic minority children in accessing education” under Article 5(e).¹³³⁰ While assessing China’s compliance with the right to education under the CERD, the Committee noted that China had a policy by which ethnic minorities could theoretically access a bilingual education. The CERD Committee explained that it was, however,

concerned at reports that in practice Mandarin is the sole language of instruction in many schools in the autonomous minority provinces, especially at secondary and higher levels of education. . . . The Committee recommends the State party to intensify its efforts to ensure the implementation of legislation and policies on bilingual education at all levels of education.¹³³¹

683. In making these recommendations, the CERD Committee has also repeatedly explained that merely having protections for minority education rights codified in national law will not suffice if the laws or policies are not enforced or implemented.¹³³² Therefore, the Russian Federation’s reliance on “domestic rules” which “provide[] for education in native language, naming expressly within them Russian, Crimean Tatar and Ukrainian languages,”¹³³³ is of no avail unless Russia can demonstrate that these native language

Committee, Concluding Observations of the CERD Committee on Zimbabwe (Forty-Eighth Session), U.N. Doc. CERD/C/304/Add.3 (28 March 1996), paras. 12, 18 (“It is a matter of concern that not all the minority languages are used in the existing education programmes. . . . With regard to the protection and promotion of the rights of ethnic minorities, the Committee encourages the State Party to take all necessary measures to provide mother-tongue teaching in the areas where minorities live in substantial numbers”).

¹³³⁰ CERD Committee, Concluding Observations of the CERD Committee on China (Seventy-Fifth Session), U.N. Doc. CERD/C/CHN/CO/10-13 (15 September 2009), para. 22 (internal parentheses removed).

¹³³¹ *Ibid.*

¹³³² *See, e.g., ibid.*

¹³³³ Russia’s Counter-Memorial Part II, para. 286.

protections are implemented in practice. As Ukraine explained in its Memorial and reiterates below, Russia is unable to make this showing.

684. The Russian Federation should be familiar with the CERD Committee’s interest in protections for minority language education as an aspect of the general right to access to education, as it has itself been told by the Committee that its policies in this regard were lacking and it should take action to provide minorities with education in their own languages.¹³³⁴ Specifically, the CERD Committee admonished the Russian Federation, recommending that “[f]urther measures be taken in order to provide minorities and indigenous groups with elementary education in their own languages.”¹³³⁵

685. The Committee on Economic, Social and Cultural Rights (“CESCR”), charged with monitoring the implementation of the general right to access to education in ICESR, has, similarly to the CERD Committee, identified the lack of education in minority languages as impairing this general right. The CESCR has, like the CERD Committee, repeatedly expressed concern over the lack of education in minority languages.¹³³⁶

¹³³⁴ CERD Committee, Concluding Observations of the CERD Committee on the Russian Federation (Forty-Eighth Session), U.N. Doc. CERD/C/304/Add.5 (28 March 1996), paras. 7, 16 (“Several minority and indigenous groups have no access to education in their own language. . . . The State Party should take all appropriate measures to ensure the promotion of minority and indigenous people’s languages. The Committee recommends that education programmes be provided in the appropriate languages.”); CERD Committee, Concluding Observations of the CERD Committee on the Russian Federation (Fifty-Second Session), U.N. Doc. CERD/C/304/Add.43 (30 March 1998), para. 24.

¹³³⁵ CERD Committee, Concluding Observations of the CERD Committee on the Russian Federation (Fifty-Second Session), U.N. Doc. CERD/C/304/Add.43 (30 March 1998), para. 24.

¹³³⁶ *See, e.g.*, CESCR, Concluding Observations of the CESCR on Estonia (Twenty-Ninth Session), U.N. Doc. E/C.12/1/Add.85 (19 December 2002), paras. 32, 57 (“[t]he Committee is concerned about the persisting lack of attention to the issue of minority languages and cultural rights, including the realization of the right to education in minority languages. . . . The Committee recommends that the Law on Cultural Autonomy of National Minorities be revised to provide for the expedient and full recognition of the rights of minority groups. The Committee also calls upon the State party to ensure that ethnic groups continue to have ample opportunities to be educated in their own languages, as well as to use these languages in public life.”); CESCR, Concluding Observations of the CESCR on Kosovo (UN Interim Mission in Kosovo) (Forty-First Session), U.N. Doc. E/C.12/UNK/CO/1 (19

686. For example, in the 2001 Concluding Observations for Japan, the CESCR went beyond encouraging recognition and funding of private minority schools, expressing concern that:

[T]here are very limited possibilities for children of minorities to enjoy education in their own language and about their own culture in public schools. . . . The Committee strongly recommends that mother-tongue instruction be introduced in the official curricula of public schools enrolling a significant number of pupils belonging to linguistic minorities.¹³³⁷

687. Finally, Russia's reliance on the jurisprudence of the European Court on Human Rights is misplaced. First, Russia's invocation of the 1968 case *Belgian Linguistics* proves nothing: Russia uses it to attack a position that Ukraine has not advanced, *i.e.*, that there is a specific right to education in one's own language. Moreover, it is hardly surprising, given the facts of that case, that the ECtHR did not regard the restrictions placed on minority language education in the unilingual areas of the country to violate the general right to education, given that the parents of affected children could access such education elsewhere within Belgium. Significantly, as explained by Professor Fredman:

[T]he Court held that . . . there was nevertheless discrimination in that Dutch-speaking children resident in the French unilingual region enjoyed access to Dutch-language schools in the six communes. By contrast, French-speaking children living in the Dutch unilingual region were refused access to French-language schools in those communes. The Court held

November 2008), para. 31 (“The Committee recommends that UNMIK identify funds and advise the relevant Kosovo authorities on the urgent need to . . . ensure that children from [minority communities] have adequate opportunities at all levels of education to receive instruction in or of their mother tongue and on their history and culture, that sufficient teaching staff and textbooks are available for that purpose, and that the cultures and traditions of minority communities are adequately reflected in the revised curriculum.”); CESCR, Concluding Observations of the CESCR on Greece (Thirty-Second Session), U.N. Doc. E/C.12/1/Add.97 (7 June 2004), para. 50; CESCR, Concluding Observations of the CESCR on Honduras, U.N. Doc. E/C.12/1/Add.57 (21 May 2001), paras. 29, 52; CESCR, Concluding Observations of the CESCR on Bulgaria, U.N. Doc. E/C.12/1/Add.37 (9 December 1999), paras. 19, 27.

¹³³⁷ CESCR, Concluding Observations of the CESCR on Japan (Twenty-Sixth (Extraordinary) Session), U.N. Doc. E/C.12/1/Add.67 (24 September 2001), paras. 32, 60.

that the enjoyment of the right to education was not secured to everyone without discrimination.¹³³⁸

688. Second, Russia ignores the 2001 decision in *Cyprus v. Turkey*,¹³³⁹ where the ECtHR found that restrictions on minority language education violated the right of access to education on facts that are closely analogous to the present case. In *Cyprus v. Turkey*, the Court found that the substance of the right to education¹³⁴⁰ was violated where the occupation authorities in Northern Cyprus, having assumed responsibility for the pre-existing infrastructure for Greek-language education, failed to make continuing provision for it. The only option that this had left Greek-speaking parents was to send their children to the unoccupied part of the island, where they could receive Greek-language education under the jurisdiction of the Republic of Cyprus. Similarly here, the right to education of the Ukrainian and Crimean Tatar communities has been burdened by measures to remove pre-existing provision for Ukrainian- and Crimean Tatar-language teaching, leaving many with no alternative but to relocate to mainland Ukraine to complete their children's education.¹³⁴¹

689. Consistent with the ECtHR's decision in *Cyprus v. Turkey* and with the practice of the CERD Committee and CESCR, the Court should find that, in the circumstances presented in Crimea, Russia's suppression of education in the Ukrainian and Crimean Tatar languages violates the right of the Ukrainian and Crimean Tatar communities to equality before the law in relation to the right to education and training.

C. The Russian Federation's Denials of Discrimination Within Crimea's Educational System Are Incorrect as a Factual Matter

690. Russia's denial that it has restricted education in the Ukrainian and Crimean Tatar languages is based on three misleading factual assertions. First, it falsely claims that its

¹³³⁸ Fredman Second Report, para. 56 (Ukraine's Reply, Annex 5).

¹³³⁹ *Cyprus v. Turkey*, ECtHR App. No. 25781/94, Judgment (Merits) (10 May 2001).

¹³⁴⁰ The ECtHR was here applying Article 2 of Protocol 1 to the European Convention on Human Rights, which provides that "[n]o person shall be denied the right to education." *Cyprus v. Turkey*, paras. 278–280.

¹³⁴¹ Father Klyment Statement, paras. 11, 14, 22.

legislative framework for minority language education is more liberal than that of many other states, including Ukraine. Second, it falsely asserts that any decrease in the number of students receiving education in the Ukrainian language is the result of lack of interest in studying in that language since Russia's annexation of Crimea. And, third, it falsely claims that the total number of students receiving tuition in the Crimean Tatar language has increased since 2014.

1. Russia's Legislative Framework Does Not Provide Meaningful Protection for Minority Language Education

691. The Russian Federation points to the Constitution of the Republic of Crimea naming Ukrainian and Crimean Tatar as state languages, in addition to Russian, as proof of a non-discriminatory education system. Russia admits, however, that these languages can only be the language of instruction until the ninth grade, from which point all students must study in Russian.¹³⁴² Moreover, while the Constitution supposedly guarantees equality in development and use of these languages, in practice it is an empty declaration which state employees in Crimea, including judges, do not follow.¹³⁴³ As one Crimean Tatar public figure observes, "the Crimean Tatar language as the state language is just a facade[sic] and imitation. In reality, it remains only the language of everyday communication within families, and in the social and political life of Crimea you will not see its use."¹³⁴⁴

692. Russia further claims that, "Crimean Tatars and ethnic Ukrainians benefit in particular from an extensive protection of their language of education by the Russian system, which is more protective of local identities than many other educational systems in the world, including the Ukrainian system."¹³⁴⁵ That statement both overstates the effect on the ground

¹³⁴² Russia's Counter-Memorial Part II, paras. 286-287.

¹³⁴³ Igor Tokar, "*This Is Linguocide*": *How Crimean Tatar and Ukrainian Languages Disappear in Crimea* (22 June 2021) (Ukraine's Reply, Annex 168).

¹³⁴⁴ Andriy Gevko, "*State Crimean Tatar Language in Crimea - Imitation*": *Problems of the Language of the Indigenous People on the Peninsula and the Mainland*, Krym.Realii (19 January 2020) (Ukraine's Reply, Annex 158).

¹³⁴⁵ Russia's Counter-Memorial Part II, para. 260.

of Russian legislative provisions and misrepresents the approach to minority language education under Ukrainian law.

693. Specifically, on the first point, researchers with the Center for Education Law of the Institute of Education in Moscow note that there is an ongoing

centralization of the education system and a corresponding reduction of multilingualism in Russia’s schools. This can, in turn, be seen as part of an underlying drive to promote national unity through uniformity, in the sense of dilution of the country’s linguistic and cultural diversity and concurrent emphasis on the primacy of the Russian language as a ‘unifying factor’ for the citizenry as a whole.¹³⁴⁶

694. President Putin, the Prosecutor General’s Office, and even the judiciary are emphasizing and enforcing the “unity” of Russian language education, while stifling education in regional languages by proclaiming these languages cannot be studied “to the detriment of the study of Russian.”¹³⁴⁷ Contrary, therefore, to Russia’s claim that the extension of its educational norms to Crimea must necessarily be beneficial to minorities, the “Russian-first” policy actually followed in the Russian Federation is entirely consistent with the account given in Ukraine’s Memorial of educational trends since 2014.

695. As to the second point, Article 7 of the Law of Ukraine “On Education” and Article 5 of the Law of Ukraine “On Complete General Secondary Education,” ensure that indigenous peoples in Ukraine have the right to receive a complete general secondary education in a state educational institution in the language of the respective indigenous people, along with the state language.¹³⁴⁸ These laws protect students’ right to a complete school education in a minority language, protection that Crimean Tatar and ethnic Ukrainian children are currently being denied in Crimea.

¹³⁴⁶ Szymon Jankiewicz, et al., *Linguistic Rights and Education in the Republics of the Russian Federation: Towards Unity through Uniformity*, 45 *Review of Central and East European Law* 59, 61 (2020), accessed at <https://eprints.gla.ac.uk/208165/1/208165.pdf>.

¹³⁴⁷ *Ibid.*, pp. 90–91. See also ICELS, *Minority Language Education in Russia: Enforcing the Voluntary Teaching of Non-Russian Languages* (3 July 2018).

¹³⁴⁸ Law of Ukraine No. 2145-VIII “On Education,” art. 7.1 (5 September 2017) (Ukraine’s Reply, Annex 91) and Law of Ukraine No. 463-IX “On Complete General Secondary Education,” art. 5.4-5 (16 January 2020) (Ukraine’s Reply, Annex 92).

2. The Dramatic Collapse in Ukrainian-Language Education Since 2014 Is Attributable to Reductions in Provision Combined with Russian Efforts to Artificially Suppress Demand

696. Russia does not deny that the number of students being taught in the Ukrainian language has declined dramatically since 2014. In *Ukraine v. Russia*, the European Court of Human Rights, citing reporting by the Office of the High Commissioner for Human Rights, found that:

[T]he number of students educated in Ukrainian “dropped dramatically” during the period under consideration, namely from 12,694 students in the 2013/14 academic year to 2,154 in the 2014/15 academic year. There was a similar decrease in the number of Ukrainian schools (from seven to one) and the number of classes (from 875 to 28) from 2013 onwards. Furthermore, by the end of 2014, “Ukrainian as a language of instruction had been removed from university-level education in Crimea.” Those alleged figures cannot be regarded as “small,” contrary to the argument by the respondent Government. Furthermore, the applicant Government’s allegations of threats and harassment relating to the use of the Ukrainian language in the context of education were also noted in that Report. The evidence suggests as a result of all the above, “education in the Ukrainian language had almost disappeared from Crimea” (see paragraph 17 of the OHCHR 2017 Report). The available material further suggests that the situation complained of resulted from the introduction of the Russian Federation’s education standards in Crimea, as the respondent State’s policy.¹³⁴⁹

697. Next, Russia tries to distract from the consequences of its own policies by misrepresenting fluctuations in Ukrainian-language students prior to the occupation. In the 2012/2013 academic year, seven institutions of secondary education offered instruction in the Ukrainian language, totaling 2,215 students and 15 schools with instruction in the Crimean

¹³⁴⁹ *Ukraine v. Russia (Re Crimea)*, ECtHR App. No. 20958/14, Decision (16 December 2020), paras. 493–494.

Tatar language, totaling 2,982 students.¹³⁵⁰ Once students in mixed language schools are added to the mix, overall 12,867 students were taught in the Ukrainian language and 5,406 students in the Crimean Tatar language.¹³⁵¹

698. Russia attempts to undermine this diverse language instruction by focusing on the fact that the number of students educated in the Ukrainian language went from 13,758 in the 2009/2010 school year, to 13,609 the next year, 13,672 the following year, 12,867 the next year, and 12,694 in the 2013/2014 school year.¹³⁵² These mild fluctuations still follow an upward trend of Ukrainian language instruction, which started with only 82 students in the 1992/1993 school year.¹³⁵³

699. Indeed, if the Russian Federation were in fact concerned by a fluctuation of 1,000 students over five years, it should also be deeply worried by the sharp decline of students receiving an education in the Ukrainian language — from 12,694 in the 2013/2014 school year to a mere 2,154 in the year following the occupation.¹³⁵⁴ The number of students in Crimea receiving an education in Ukrainian plummeted even further to only a little over 200 students in the 2020/2021 school year.¹³⁵⁵ Even the pitifully diminished 200 figure is questionable, as the Russian Federation’s statistics on education in a minority language are inflated.¹³⁵⁶

¹³⁵⁰ UNESCO, *Follow-Up to Decisions and Resolutions Adopted by the Executive Board and the General Conference at Their Previous Sessions*, U.N. Doc. 196 EX/5, p. 68 (18 March 2015).

¹³⁵¹ Education Statistics from Ministry of Education of Ukraine (Ukraine’s Memorial, Annex 735).

¹³⁵² *Ibid.*

¹³⁵³ *Ibid.*

¹³⁵⁴ Ukraine’s Memorial, para. 540.

¹³⁵⁵ Kateryna Petrova, *Assessment of the Implementation of the State Policy on the Realization of the Right to Education for Children from Temporarily Occupied Crimea*, Center of Civil Education “Almenda” (2021).

¹³⁵⁶ See, e.g., Crimean Human Rights Group, *The Only ‘Ukrainian School’ Left in Occupied Crimea Teaches in Russian* (21 May 2018).

700. Ukrainians have also suffered a decrease in their opportunities to access Ukrainian language education outside the state system, as demonstrated by Father Klyment's testimony. Russia's efforts to shut down the Ukrainian Orthodox Church in Crimea has deprived members of the Ukrainian community in Crimea not only of places of worship but also of access to non-state providers of Ukrainian-language education.¹³⁵⁷ Of the 45 parishes of the Kyiv Patriarchate, which functioned as community centers and welcome places to engage and explore one's Ukrainian identity, 34 no longer exist.¹³⁵⁸

701. Russia further misrepresents the causes of the collapse in Ukrainian language education by claiming that it was caused exclusively by a reduction in the demand for such education, rather than the effects of its own policies.¹³⁵⁹ This hypothesis is disproved even by pro-Russian sources. A communist, pro-Russian newspaper in Crimea ran a letter from parents of Ukrainian children, which clearly attributes the decline in Ukrainian-language teaching to the Russian authorities' efforts to shut off the resources previously devoted to it:

[T]he Crimean authorities closed all Ukrainian schools, Ukrainian kindergartens, Ukrainian theater, Ukrainian gymnasium, Ukrainian newspaper - this all in the time when more than 500,000 Ukrainian are living on the peninsula. . . . So why cannot our children study, speak, read and write in their native language? Why are the authorities doing everything to destroy everything Ukrainian in Crimea? How will the children speak, write, read in their native Ukrainian language if there are no school, no text books, no teachers, etc. This is in violation of the currently valid Art. 10 of the Crimean Constitution! We have everything written on paper, but nothing in reality. This is [a] violation of [the] rights and dignity of the citizens The children should not be deprived

¹³⁵⁷ Father Klyment Statement, paras. 4, 14–15.

¹³⁵⁸ *Ibid.*, para. 15.

¹³⁵⁹ Russia's Counter-Memorial Part II, para. 310.

from learning in the native language.¹³⁶⁰

702. Russia is also less than forthcoming about the efforts of the Crimean authorities to manipulate demand downwards by pressuring parents not to choose a Ukrainian education for their children. According to Russia, “[e]ach year, parents are required to complete and submit to the authorities, through education institutions, a request specifying the language in which they wish their child to receive general education as well as the desired language to be studied as a subject.”¹³⁶¹ Yet this process is wide open to abuse. For example, in some schools, teachers reportedly distribute a completed application form in which the Russian language has already been entered, such that parents have no place to write a preference for Ukrainian.¹³⁶² In other schools, school officials or even regulatory bodies harass parents who have selected Ukrainian instruction for their children until parents change their language preference to Russian.¹³⁶³ Other children who chose to be instructed in the Ukrainian language were bullied and physically abused by classmates, while teachers failed to intervene.¹³⁶⁴

703. Additionally, School No. 20 in Feodosia, the one school claimed by the Ministry of Education of the Republic of Crimea as providing a full education in the Ukrainian language, only taught the Ukrainian language as a subject in certain grades, but it was not the language

¹³⁶⁰ Sanko V.G., et al., *Return the Ukrainian Gymnasium Back to Us!*, Iskra Pravdy (2 February 2020) (Ukraine’s Reply, Annex 160).

¹³⁶¹ Russia’s Counter-Memorial Part II, para. 308.

¹³⁶² See Crimean Tatar Resource Center, *In Crimea, Parents of Students Are Forced to Refuse to Study in the Crimean Tatar Language at School* (5 April 2021) (Ukraine’s Reply, Annex 104); Halya Coynash, *Only 0.09% of Schoolkids Study in Ukrainian in Russian-Occupied Crimea Despite Hague Court Order*, Kharkiv Human Rights Protection Group (16 July 2021).

¹³⁶³ Halya Coynash, *Russia Uses Threats & Intimidation to Drive Crimean Tatar Language Out of Schools in Occupied Crimea*, Kharkiv Human Rights Protection Group (21 May 2019).

¹³⁶⁴ Father Klyment Statement, para. 14.

of instruction for the students' general education.¹³⁶⁵ Even Natalia Nikolaevna Shustova, a primary school teacher at School No. 20 in Feodosia who submitted a witness statement in support of Russia's Counter-Memorial, confirms that Ukrainian is only taught as a subject to a limited amount of classes in certain grades.¹³⁶⁶ To summarize, only one school that teaches in the Ukrainian language remains in Crimea, and no school is left in which all subjects are taught in the Ukrainian language.¹³⁶⁷

704. Remarkably, Russia also tries to shift the blame for its assault on Ukrainian-language teaching onto Ukraine, incorrectly claiming that Ukraine "is blocking Crimean students from pursuing higher education in Ukraine, as Ukrainian higher education institutions generally have not been accepting education certificates issued by Crimean schools."¹³⁶⁸ As an initial matter, Russia cannot ask the Court to assume the legitimacy of its extension of its educational system to occupied Crimea (which requires that international humanitarian law does not apply there) to shift the onus to Ukraine to accept into its universities students who, as a result of that extension, lack the necessary prerequisites. Further, Russia's argument ignores the lengths to which Ukraine has gone to help Crimean students wishing to pursue university in Ukraine to overcome that Russian-imposed handicap.

705. Specifically, since 2016, the Ministry of Education and Science of Ukraine has

¹³⁶⁵ Halya Coynash, *Russia Uses Threats & Intimidation to Drive Crimean Tatar Language Out of Schools in Occupied Crimea*, Kharkiv Human Rights Protection Group (21 May 2019); see also Halya Coynash, *Only 0.09% of Schoolkids Study in Ukrainian in Russian-Occupied Crimea Despite Hague Court Order*, Kharkiv Human Rights Protection Group (16 July 2021).

¹³⁶⁶ Witness Statement of Natalia Nikolaevna Shustova of School No. 20 of Feodosia, 21 April 2021, paras. 13, 15–16 (Russia's Counter-Memorial Part II, Annex 5).

¹³⁶⁷ The Crimean Human Rights Group, *No Ukrainian Language Media School Has Remained in Crimea* (14 March 2019); see also Halya Coynash, *Only 0.09% of Schoolkids Study in Ukrainian in Russian-Occupied Crimea Despite Hague Court Order*, Kharkiv Human Rights Protection Group (16 July 2021).

¹³⁶⁸ Russia's Counter-Memorial Part II, para. 331.

created effective mechanisms for providing such students with a path into the Ukrainian higher educational sector through the operation of the “Crimea-Ukraine” centers. These centers, located in mainland Ukraine, exist to assist Crimean students with problems that may arise with their applications, such as the lack of appropriate personal identification documents (*i.e.*, a passport recognized by the government of Ukraine) or lack of an educational transcript recognized by the government of Ukraine.¹³⁶⁹ Contrary to the Russian Federation’s claims, students do not need an external evaluation certificate to enroll at these centers.¹³⁷⁰ Instead, they can take two state final certification exams for entry, which are offered to students in Crimea. For the past six years, the number of students who have entered Ukrainian educational institutions through these educational centers has only continued to grow, reaching 397 students in the 2020 school year.¹³⁷¹

3. Russia’s Claim that Education in the Crimean Tatar Language Has Increased Is Flawed and Ignores the Impact of the Russification of Crimean Tatar Education

706. The Russian Federation claims that the number of students enrolled in Crimean Tatar language instruction has increased, not decreased, since 2014.¹³⁷² However, the Russian Federation’s overly-rosy statistics are misleading.

707. First, Russia’s claim, tied as it is solely to the *number* of students receiving teaching in Crimean Tatar, ignores a significant reduction in the *quality* of such teaching, as

¹³⁶⁹ Ministry of Education and Science of Ukraine, *Educational Centers "Crimea-Ukraine" and "Donbas-Ukraine" Have Started Working, in 2020 They Will Work Until October 23* (9 June 2020).

¹³⁷⁰ *See, e.g.*, Julia Stets et al., *Every Fifth Budget Place for Crimea and Donbass*, RFE/RL (16 August 2020) (Ukraine’s Reply, Annex 162).

¹³⁷¹ *Ibid.*; Muslim Umerov, “Crimean Theme Appears on Ukrainian TV Channels When There Are Searches”, *Nariman Dzhelyal’s Interview Before His Detention*, Suspilne Crimea (11 September 2021).

¹³⁷² Russia’s Counter-Memorial Part II, paras. 288–289.

reported by NGOs active in the field. For example, the Crimean Human Rights Group (“CHRG”) conducted an independent analysis of the education situation in Crimea in 2019, speaking with and visiting school management, teachers, and parents. That group concludes that the Ministry of Education of the Republic of Crimea was hiding the truth and that, in fact, education in a minority language is received far less than the Crimean authorities report.¹³⁷³ In particular, CHRG reported that three schools claimed by the Ministry to be providing education in the Crimean Tatar language only taught only partially in Crimean Tatar, with the rest of the students’ education being provided in Russian.

708. Russia’s boast that it opened an “additional Crimean Tatar school” in 2014 is equally misleading.¹³⁷⁴ Crimean Tatar instruction in this school is quite limited. Education is provided in the Crimean Tatar language to two first-grade classes only. After that, only one class of students in the second, third, and fourth grades are instructed in the Crimean Tatar language.¹³⁷⁵ The rest of the student body (four first-grade classes, two second-grade classes, two third-grade classes, two fourth-grade classes, four fifth-grade classes, three sixth-grade classes, three seventh-grade classes, two eighth-grade classes, two ninth-grade classes, and one tenth-grade class) receives education solely in the Russian language.¹³⁷⁶ In fact, only seven schools in Crimea provide education entirely in the Crimean Tatar language, less than half the number of schools open in 2013.¹³⁷⁷

709. Additionally, the Kharkiv Human Rights Protection Group observes:

¹³⁷³ The Crimean Human Rights Group, *No Ukrainian Language Media School Has Remained in Crimea* (14 March 2019).

¹³⁷⁴ Russia’s Counter-Memorial Part II, para. 310.

¹³⁷⁵ Editorial Avdet, *School No. 44 Named After Alime Abdennanova Met Its First Students*, Avdet (1 September 2017) (Ukraine’s Reply, Annex 149).

¹³⁷⁶ *Ibid.*

¹³⁷⁷ U.S. Department of State, *2020 Country Reports on Human Rights Practices: Ukraine – Crimea*.

[B]oth enforcement bodies and school heads are being used in Russian-occupied Crimea to “dissuade” children and their parents from asserting their full right to insist on education in the Crimean Tatar language. The methods, which range from pressure to downright threats, have already been used to effectively close all Ukrainian language classes in Crimea.¹³⁷⁸

710. When a Crimean Tatar advocate tried to organize a campaign to inform parents of their right to choose their children’s language of instruction, it had to be cancelled. The owner of the venue for the opening night of the information tour received a call from the authorities “recommending” that he refuse to provide his venue and threatening him with problems if the event proceeded.¹³⁷⁹

711. In another school, where parents completed the form expressing a preference for Crimean Tatar language instruction for their kids, the school ignored these parents and the forms and refused to provide a Crimean Tatar class.¹³⁸⁰ A PhD candidate researching the efficacy of the implementation of native language instruction in Crimea interviewed a school administrator who admitted:

As for Crimean Tatar, there are no teachers who could teach basic subjects in Crimean Tatar and there are no necessary schoolbooks. I believe that this is not necessary, a child should be ready for university and for further work, and why does he need knowledge of these subjects in his native language?¹³⁸¹

712. The PhD researcher of native language instruction similarly found a lack of true native language education, concluding:

[I]n high school, teachers try to introduce the Crimean Tatar

¹³⁷⁸ Halya Coynash, *Russia Uses Threats & Intimidation to Drive Crimean Tatar Language Out of Schools in Occupied Crimea*, Kharkiv Human Rights Protection Group (21 May 2019).

¹³⁷⁹ *Ibid.*

¹³⁸⁰ Ivan Zhilin, *Trample Other People's Bonds*, New Newspaper (5 July 2018) (Ukraine’s Reply, Annex 152).

¹³⁸¹ Gabrielyan A. M., *THE IMPLEMENTATION OF THE LANGUAGE POLICY IN THE SPHERE OF SECONDARY EDUCATION IN THE CRIMEA*, Archon, Vol. 5, p. 42 (2018) (Ukraine’s Reply, Annex 126).

language only as a component, mostly, the learning is held in Russian. In fact, after primary school, classes taught in Russian and those taught in Crimean Tatar do not differ in the language of instruction. Thus, classes in a language other than Russian are factually absent, real teaching in all classes is carried out in Russian.¹³⁸²

713. Furthermore, as first raised in Ukraine's Memorial, the quality of Crimean Tatar education has declined in other ways.¹³⁸³ Crimean Tatar schools are understaffed and lack sufficient resources. A staff member of another Crimean Tatar school bemoaned this lack of resources, claiming:

[T]here are not enough specialists in the school who could teach disciplines in the Crimean Tatar language. That is, there are no specialists in geography, history, and other subjects who could teach these subjects in Crimean Tatar, although we really need them. There are also no schoolbooks on subjects in Crimean Tatar.¹³⁸⁴

714. What textbooks remain in Crimean Tatar classrooms are suspect. In addition to replacing lessons on Ukrainian and world history with Russian history, textbooks perpetuate Russian propaganda and hateful narratives, instead of historical fact. For instance, one tenth-grade history textbook depicted Crimean Tatars as Nazi collaborators in World War II,¹³⁸⁵ rehabilitating the stereotype propounded by Stalin as an excuse to deport Crimean Tatars from the Crimean peninsula in 1944.¹³⁸⁶ A fourth-grade teacher even told a Crimean Tatar student in front of the entire class that her family deserved to be deported in 1944 because Crimean Tatars were traitors.¹³⁸⁷ This is the racist reality faced today by Crimean

¹³⁸² *Ibid.*

¹³⁸³ Ukraine's Memorial, para. 544.

¹³⁸⁴ Gabrielyan A. M., THE IMPLEMENTATION OF THE LANGUAGE POLICY IN THE SPHERE OF SECONDARY EDUCATION IN THE CRIMEA, Archon, Vol. 5 (2018), p. 42 (Ukraine's Reply, Annex 126).

¹³⁸⁵ Halya Coynash, *Russia Repeats Lies About Crimean Tatars Used by Stalin to Justify the Deportation in School History Textbook*, Kharkiv Human Rights Protection Group (18 February 2019)

¹³⁸⁶ *Ibid.*

¹³⁸⁷ Halya Coynash, *Crimean Tatar Children Told that Their Grandparents Deserved Stalin's Deportation*, Kharkiv Human Rights Protection Group (12 April 2021).

Tatar children in Crimea under Russian occupation, not the rose-tinted, multi-cultural idyll that Russia posits in its Counter-Memorial.

* * *

715. The priority that Russia has given to education in the Russian language in Crimea since 2014 has carried a heavy cost for the Crimean Tatar and Ukrainian communities. The resources previously devoted to education in their native languages have been slashed and the quality of such native-language teaching that remains has plummeted. Deprived of the ability to sustain viable populations of native language speakers within Crimea, these communities face cultural erasure in the medium term. The recent brutality and violence brought on by Russia's aggression makes the threat of total cultural erasure in Crimea even more dire and urgent. The Court should therefore reject Russia's attempt to avoid the consequences for its actions under the CERD by mischaracterizing Ukraine's claim. There is no need for the Court to rely on a general right to education in native languages because Russia's conduct clearly violates the general right to education and training protected by the Convention.

PART IV: RUSSIA'S VIOLATIONS OF THE COURT'S PROVISIONAL MEASURES ORDER

Chapter 18. RUSSIA HAS BRAZENLY VIOLATED THE COURT'S PROVISIONAL MEASURES ORDER

716. In addition to violating its obligations under both the ICSFT and the CERD, the Russian Federation has also violated the Court's order of 19 April 2017 indicating provisional measures in this case (the "Order"), by failing to lift its ban on the Mejlis, failing to ensure that education in the Ukrainian language is available in Crimea, and by aggravating the dispute and making it more difficult to resolve.¹³⁸⁸ Russia's brazen non-compliance with the Order — which continues to this day, fully five years since the Order was issued — constitutes an independent violation of its international obligations and is ripe for the Court's adjudication.

717. It is beyond dispute that the Court's provisional measures orders, issued pursuant to Article 41 of the Court's Statute, "have binding effect."¹³⁸⁹ Indeed, the Court has specifically confirmed the binding character of its Order in this case.¹³⁹⁰ As the Court stated in *LaGrand*, because provisional measures orders are "binding in character," they "create[] a legal obligation" for the States involved.¹³⁹¹ This obligation is independent of any rights or duties a State may have with respect to the broader dispute within which the measures were indicated, or the existence of any rights protected by the measures.¹³⁹² Further, as the Court

¹³⁸⁸ *See supra*, Chapters 11 and 17.

¹³⁸⁹ *LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001*, p. 506, para. 109.

¹³⁹⁰ Letter from Philippe Couvreur, Registrar, International Court of Justice, to Olena Zerkal, Agent of Ukraine, dated 18 July 2018 (reminding "the Parties of the binding nature of the provisional measures indicated in [the Court's] Order of 19 April 2017").

¹³⁹¹ *LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001*, p. 506, para. 110.

¹³⁹² *See Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, I.C.J. Reports 2015*, p. 714, para. 129 (concluding that Nicaragua's violation of the Court's provisional measures order was "independent of the conclusion . . . that the same conduct also

has repeatedly recognized, including in this case, the Court may appropriately consider such violations “in the principal proceedings” of a case.¹³⁹³ Russia does not get to unilaterally decide when the international legal order applies to it.

A. Russia Has Maintained Its Ban on the Mejlis

718. The Order required that Russia “[r]efrain from maintaining or imposing limitations on the ability of the Crimean Tatar community to conserve its representative institutions, including the Mejlis.”¹³⁹⁴ Among other things, the order clearly required Russia to revoke its ban on the Mejlis, which is necessarily a “limitation[] on the . . . Mejlis.”¹³⁹⁵

719. On 19 April 2018, on the one-year anniversary of the Order, Ukraine notified the Court that Russia had not complied with the Order, as it related to the Mejlis.¹³⁹⁶ In particular, Russia had not “suspend[ed] the ban on the Mejlis,” which as Ukraine explained at the time, Russia was required to do under the “only . . . plausible interpretation” of the Court’s Order.¹³⁹⁷ In subsequent correspondence in the following months, Ukraine informed the Court that Russia still had not lifted the ban on the Mejlis, and that it also “ha[d] not provided

constitute[d] a violation of the territorial sovereignty of Costa Rica”); *see also 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. 238, para. 471 (dismissing several substantive genocide-related claims but finding that Serbia had violated its separate obligation to comply with provisional measures orders).

¹³⁹³ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Provisional Measures, Order of 22 November 2013, *I.C.J. Reports 2013*, p. 368, para. 57 (“[T]he question of compliance with provisional measures indicated in a case may be considered by the Court in the principal proceedings.”); Letter from Jean-Pelé Fomété, Deputy-Registrar, International Court of Justice, to Olena Zerkal, Agent of Ukraine, dated 29 March 2019.

¹³⁹⁴ Provisional Measures Order, p. 140, para. 106.

¹³⁹⁵ *Ibid.*

¹³⁹⁶ *See* Letter from Olena Zerkal, Agent of Ukraine, to Abdulqawi Ahmed Yusuf, President, International Court of Justice, dated 19 April 2018.

¹³⁹⁷ *Ibid.*, pp. 2–3.

meaningful responses to Ukraine’s inquiries concerning its implementation of the Court’s Order, and ha[d] obstructed efforts by members of the Mejlis to encourage Russia’s compliance.”¹³⁹⁸

720. In multiple letters sent to the Court in response, Russia in essence admitted that it had done nothing to revoke its ban on the Mejlis.¹³⁹⁹

721. On 29 March 2019, the Court, reiterating “the binding nature of the provisional measures,” stated that issues raised by the Parties regarding the Order — including Russia’s continuing violation — could be “addressed by [the Court] at a later juncture, in the event that the case proceeds to the merits.”¹⁴⁰⁰

722. This case is now in the merits phase. Russia’s violation of the Court’s provisional measures order is thus ripe for adjudication. In its Counter-Memorial, Russia does not dispute that it still, to this day, has not lifted its ban on the Mejlis, and thus remains in violation of its international obligation to comply with the Order. For its part, Ukraine is unaware of any action that Russia has taken to reverse the ban.

¹³⁹⁸ See Letter from Olena Zerkal, Agent of Ukraine, to Abdulqawi Ahmed Yusuf, President, International Court of Justice, dated 7 June 2018, p. 2; *see also* Letter from Olena Zerkal, Agent of Ukraine, to Abdulqawi Ahmed Yusuf, President, International Court of Justice, dated 12 June 2018, pp. 1–2; Letter from Vsevolod Chentsov, Co-Agent of Ukraine, to Abdulqawi Ahmed Yusuf, President, International Court of Justice, dated 18 January 2019; Letter from Olena Zerkal, Agent of Ukraine, to Abdulqawi Ahmed Yusuf, President, International Court of Justice, dated 19 March 2019.

¹³⁹⁹ See Letter from Dmitry Lobach, Agent of the Russian Federation, et al., to Philippe Couvreur, Registrar, International Court of Justice, dated 7 June 2018; Letter from Dmitry Lobach, Agent of the Russian Federation, et al., to Philippe Couvreur, Registrar, International Court of Justice, dated 21 June 2018; Letter from Dmitry Lobach, Agent of the Russian Federation, et al., to Philippe Couvreur, Registrar, International Court of Justice, dated 18 January 2019.

¹⁴⁰⁰ Letter from Jean-Pelé Fomété, Deputy-Registrar, International Court of Justice, to Olena Zerkal, Agent of Ukraine, dated 29 March 2019.

B. Russia Has Failed to Ensure the Availability in Crimea of Education in the Ukrainian Language

723. The Order also required that Russia “[e]nsure the availability of education in the Ukrainian language.”¹⁴⁰¹ The Russian Federation has done exactly the opposite, with Ukrainian-language education in Crimea plummeting from 12,694 students in the 2013/2014 school year to just over 200 students in the 2020/2021 school year.¹⁴⁰² Of the seven Ukrainian-language education institutions that existed in 2014, only one remains today. Even in this sole surviving school, Ukrainian is only taught as a subject to a few classes in specific grades: it is not the general language of instruction of the institution.¹⁴⁰³

724. Unable to avoid these incriminating numbers, the Russian Federation attempts to paint these alarming statistics as the result of a lack of demand for Ukrainian-language education in Crimea after the unlawful annexation.¹⁴⁰⁴ Thus, Russia claims it had “adequate capacities” to ensure the availability of education in the Ukrainian language if parents or students so desired.¹⁴⁰⁵ However, the Russian Federation refuses to acknowledge its own role in preventing students from receiving a Ukrainian-language education. While explaining that parents submit forms requesting the language of instruction for their children’s education, Russia conveniently omits to mention that school officials influence parents’ selections by circulating forms in which Russian has already been selected as the language of instruction.¹⁴⁰⁶ Similarly, school administrators or even government bodies threaten parents who choose for their children to be educated in the Ukrainian language until those parents change their language selection to Russian.

¹⁴⁰¹ Provisional Measures Order, p. 140, para. 106.

¹⁴⁰² *See supra*, para. 699.

¹⁴⁰³ *See supra*, para. 703.

¹⁴⁰⁴ Russia’s Counter-Memorial Part II, para. 310.

¹⁴⁰⁵ *Ibid.*

¹⁴⁰⁶ *See supra*, para. 702.

725. In this environment, where parents are harassed and discouraged from selecting a Ukrainian-language education for their children and resources for Ukrainian-language education in Crimea are sharply dwindling, the Russian Federation has transparently violated the Order and must be held accountable for the eight years in which the educational rights of ethnic Ukrainians in Crimea have been unjustifiably restricted.

C. Russia’s Recent Actions Have Aggravated the Dispute and Made It More Difficult to Resolve

726. The Order also required the Parties to “refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve.”¹⁴⁰⁷ Through its recent actions recognizing the independence of the so-called “Donetsk People’s Republic” and “Luhansk People’s Republic,” committing to provide military assistance to these entities, using insidious rhetoric to deny the very existence of a Ukrainian people, and using an illegal act of aggression as leverage to pressure Ukraine to abandon its claims in this case, Russia has violated this aspect of the Order by aggravating the dispute under the ICSFT and CERD and rendering it more difficult to resolve.

727. Specifically, on 21 February 2022, President Putin announced that Russia “recognize[d] the independence and sovereignty of the Donetsk People’s Republic and the Luhansk People’s Republic.”¹⁴⁰⁸ Immediately after, President Putin signed purported treaties of friendship, cooperation, and mutual assistance with the DPR and LPR, which provided for broad Russian support of those entities, including in political, economic, and military areas.¹⁴⁰⁹ In the early morning hours of 24 February 2022, as is well-known to the Court,

¹⁴⁰⁷ Provisional Measures Order, p. 141, para. 106(2).

¹⁴⁰⁸ Reuters, *Extracts from Putin’s Speech on Ukraine* (21 February 2022).

¹⁴⁰⁹ These purported treaties were ratified on 22 February 2022. See Presidential Executive Office, *President Signed Federal Law On Ratifying the Treaty of Friendship, Cooperation and Mutual Assistance Between the Russian Federation and the Donetsk People’s Republic* (22 February 2022),

Russia commenced a full-scale invasion of Ukraine.¹⁴¹⁰ Russia's illegal actions have caused massive destruction and loss of life, and there is mounting evidence of deliberate targeting of civilians in multiple locations.¹⁴¹¹

728. In connection with Russia's current aggression against Ukraine, President Putin has also denied the historical right of Ukrainians to a state of their own,¹⁴¹² and denied the separate identity of Ukrainians, as distinct from their Russian neighbors.¹⁴¹³ Moreover, as Russia has occupied more Ukrainian territory as part of its invasion, Russia has extended the tactics it used in Crimea of imposing its own culture and suppressing that of other ethnic groups. In occupied Kherson, for example, Ukrainian television channels have been replaced with Russian State television and Ukrainian history textbooks have been removed from libraries.¹⁴¹⁴

729. Russia's actions described above have necessarily prejudiced the parties' rights in this case, and aggravated the dispute under both the ICSFT and the CERD. With respect to the ICSFT, there has been a dispute pending before the Court that focuses, in part, on the series of terrorist acts committed by the DPR and LPR, and Russia's failure to investigate, prevent,

accessed at <http://en.kremlin.ru/events/president/news/67835>; Presidential Executive Office, *President Signed Federal Law On Ratifying the Treaty of Friendship, Cooperation and Mutual Assistance Between the Russian Federation and the Lugansk People's Republic* (22 February 2022), accessed at <http://en.kremlin.ru/events/president/news/67834>.

¹⁴¹⁰ Bloomberg, *Transcript: Vladimir Putin's Televised Address on Ukraine* (24 February 2022).

¹⁴¹¹ See OHCHR, *Ukraine: Civilian Casualty Update* (20 April 2022); OSCE, *Report on Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes Against Humanity Committed in Ukraine since 24 February 2022* (13 April 2022).

¹⁴¹² Reuters, *Extracts from Putin's Speech on Ukraine* (21 February 2022); see also Billy Perrigo, *How Putin's Denial of Ukraine's Statehood Rewrites History*, *Time* (22 February 2022).

¹⁴¹³ Reuters, *Putin Says Russians and Ukrainians "Practically One People"* (29 August 2014); AP News, *Putin: Russians, Ukrainians Are "One People"* (20 July 2019); Vladimir Putin, *On the Historical Unity of Russians and Ukrainians*, Presidential Executive Office (12 July 2021), accessed at <http://en.kremlin.ru/events/president/news/66181>.

¹⁴¹⁴ See *supra*, paras. 380–382.

and punish the financing of these acts.¹⁴¹⁵ Ukraine has requested remedies from this Court that include ordering Russia to take practicable measures to ensure that the DPR and LPR, who are responsible for terrorist acts in Ukraine, are not funded. In ordering Russia not to aggravate or extend this dispute, the Court specifically expressed its judicial support for a diplomatic solution to the situation in eastern Ukraine, stating that it expected the parties, “through individual and joint efforts, to work for the full implementation of this [Minsk] ‘Package of Measures’ in order to achieve a peaceful settlement of the conflict in the eastern regions of Ukraine.”¹⁴¹⁶

730. Even though the question of funding the DPR and LPR is central to this dispute, Russia chose to extend recognition to the DPR and LPR, and formally committed to providing these entities with financial and military assistance. Russia’s actions cannot be reconciled with a commitment to resolving a dispute concerning breaches of the ICSFT in connection with the funding of the DPR and LPR, or with seeking a diplomatic solution or peaceful settlement to the conflict in the eastern regions of Ukraine as called for by the Court.

731. By its recent actions, Russia has also aggravated and extended the dispute between the Parties under the CERD. Ukraine alleges that Russia has pursued a systematic campaign of racial discrimination against the Crimean Tatar and Ukrainian communities in Crimea since it occupied the peninsula in 2014. As described above, Russia’s invasion of Ukraine has been accompanied by ramped-up efforts on the part of the Russian government, including by President Putin, to deny the existence of a separate Ukrainian people and the right of Ukrainians to their own State.¹⁴¹⁷ President Putin’s characterization of Ukrainians as Nazis also repeats the hate speech promoted by Russia’s agents in Crimea in the lead up to the purported referendum in March 2014.¹⁴¹⁸ These acts aggravate, and make more difficult to

¹⁴¹⁵ See Ukraine’s Memorial, Chapter 1.

¹⁴¹⁶ Provisional Measures Order, p. 140, para. 104.

¹⁴¹⁷ See *supra*, paras. 379, 728.

¹⁴¹⁸ Ukraine’s Memorial, Chapter 8(A).

resolve, the current CERD dispute between the parties, which is based on eerily similar acts of cultural erasure taken by Russia in Crimea. Ukraine also reserves the right to assert additional claims under the CERD arising from these recent events later in these proceedings.

732. Finally, in the course of negotiations seeking an end to Russia’s illegal aggression, Russia has even demanded that Ukraine abandon its legal action before this Court as part of its price for peace.¹⁴¹⁹ Demanding at the barrel of a gun that Ukraine give up its right to pursue peaceful resolution of disputes under the ICSFT and the CERD before this Court is another shocking example of how Russia has made the present dispute more difficult to resolve. It is also a testament to the depths of Russia’s disdain for international law.

* * *

733. Russia has brazenly violated the Court’s Order requiring it to “[r]efrain from maintaining or imposing limitations on the ability of the Crimean Tatar community to conserve its representative institutions, including the Mejlis,” to “ensure the availability of education in the Ukrainian language” in Crimea, and to “refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve.” As a consequence, Russia is in breach of its obligation to comply with this Court’s Order of 19 April 2017.

¹⁴¹⁹ StoryUkraine, *Arahamiya in an Interview with RBC-Ukraine on Negotiations between Ukraine and Russia and Security Guarantees* (30 March 2022), accessed at <https://news.storyua.com/news/3360.html>.

PART V: SUBMISSIONS

734. For the reasons set out in the Memorial and in this Reply, Ukraine respectfully requests the Court to adjudge and declare that:

ICSFT

- a. The Russian Federation is responsible for violations of Article 18 of the ICSFT by failing to cooperate in the prevention of the terrorism financing offenses set forth in Article 2 by taking all practicable measures to prevent and counter preparations in its territory for the commission of those offenses within or outside its territory. Specifically, the Russian Federation has violated Article 18 by failing to take the practicable measures of: (i) preventing Russian state officials and agents from financing terrorism in Ukraine; (ii) discouraging public and private actors and other non-governmental third parties from financing terrorism in Ukraine; (iii) policing its border with Ukraine to stop the financing of terrorism; and (iv) monitoring and suspending banking activity and other fundraising activities undertaken by private and public actors on its territory to finance of terrorism in Ukraine.
- b. The Russian Federation is responsible for violations of Article 8 of the ICSFT by failing to identify and detect funds used or allocated for the purposes of financing terrorism in Ukraine, and by failing to freeze or seize funds used or allocated for the purpose of financing terrorism in Ukraine.
- c. The Russian Federation has violated Articles 9 and 10 of the ICSFT by failing to investigate the facts concerning persons who have committed or are alleged to have committed terrorism financing in Ukraine, and to extradite or prosecute alleged offenders.
- d. The Russian Federation has violated Article 12 of the ICSFT by failing to provide Ukraine the greatest measure of assistance in connection with criminal investigations in respect of terrorism financing offenses.

- e. As a consequence of the Russian Federation's violations of the ICSFT, its proxies in Ukraine have been provided with funds that enabled them to commit numerous acts of terrorism, including the downing of Flight MH17, the shelling of Volnovakha, Mariupol, Kramatorsk, and Avdiivka, the bombings of the Kharkiv unity march and Stena Rock Club, the attempted assassination of a Ukrainian member of Parliament, and others.

CERD

- f. The Russian Federation has violated CERD Article 2 by engaging in numerous and pervasive acts of racial discrimination against the Crimean Tatar and Ukrainian communities in Crimea and by engaging in a policy and practice of racial discrimination against those communities.
- g. The Russian Federation has further violated CERD Article 2 by sponsoring, defending or supporting racial discrimination by other persons or organizations against the Crimean Tatar and Ukrainian communities in Crimea.
- h. The Russian Federation has violated CERD Articles 4 by promoting and inciting racial discrimination against the Crimean Tatar and Ukrainian communities in Crimea.
- i. The Russian Federation has violated CERD Article 5 by failing to guarantee the right of members of the Crimean Tatar and Ukrainian communities to equality before the law, notably in their enjoyment of (i) the right to equal treatment before the tribunals and all other organs administering justice; (ii) the right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution; (iii) political rights; (iv) other civil rights; and (v) economic, social and cultural rights.
- j. The Russian Federation has violated CERD Article 6 by failing to assure the Crimean Tatar and Ukrainian communities in Crimea effective protection and remedies against acts of racial discrimination.

- k. The Russian Federation has violated CERD Article 7 by failing to adopt immediate and effective measures in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination against the Crimean Tatar and Ukrainian communities in Crimea.

Provisional Measures Order

- l. The Russian Federation has breached the obligations incumbent upon it under the Order indicating provisional measures issued by the Court on 19 April 2017 by maintaining limitations on the ability of the Crimean Tatar community to conserve its representative institutions, including the *Mejlis*.
- m. The Russian Federation has breached the obligations incumbent upon it under the Order indicating provisional measures issued by the Court on 19 April 2017 by failing to ensure the availability of education in the Ukrainian language.
- n. The Russian Federation has breached the obligations incumbent upon it under the Order indicating provisional measures issued by the Court on 19 April 2017 by aggravating and extending the dispute and making it more difficult to resolve by recognizing the independence and sovereignty of the DPR and LPR and engaging in acts of racial discrimination in the course of its renewed aggression against Ukraine.

735. The aforementioned acts constitute violations of the ICSFT, the CERD, and the Court's order on provisional measures, and are therefore internationally wrongful acts for which the Russian Federation bears international responsibility. The Russian Federation is therefore required to:

ICSFT

- a. Cease immediately each of the above violations of ICSFT Articles 8, 9, 10, 12, and 18 and provide Ukraine with appropriate guarantees and public assurances that it will refrain from such actions in the future.
- b. Take all practicable measures to prevent the commission of terrorism financing offenses, including (i) ensuring that Russian state officials or any other person under

its jurisdiction do not provide weapons or other funds to groups engaged in terrorism in Ukraine, including without limitation the DPR, LPR, Kharkiv Partisans, and other illegal armed groups; (ii) cease encouraging public and private actors and other nongovernmental third parties to finance terrorism in Ukraine; (iii) police Russia's border with Ukraine to stop any supply of weapons into Ukraine; and (iv) monitor and prohibit private and public transactions originating in Russian territory, or initiated by Russian nationals, that finance terrorism in Ukraine, including by enforcing banking restrictions to block transactions for the benefit of groups engaged in terrorism in Ukraine, including without limitation the DPR, LPR, the Kharkiv Partisans, and other illegal armed groups.

- c. Freeze or seize assets of persons suspected of supplying funds to groups engaged in terrorism in Ukraine, including without limitation illegal armed groups associated with the DPR, LPR, and Kharkiv Partisans, and cause the forfeiture of assets of persons found to have supplied funds to such groups.
- d. Provide the greatest measure of assistance to Ukraine in connection with criminal investigations of suspected financiers of terrorism.
- e. Pay Ukraine financial compensation, in its own right and as *parens patriae* for its citizens, for the harm Ukraine has suffered as a result of Russia's violations of the ICSFT, including the harm suffered by its nationals injured by acts of terrorism that occurred as a consequence of the Russian Federation's ICSFT violations, with such compensation to be quantified in a separate phase of these proceedings.
- f. Pay moral damages to Ukraine in an amount deemed appropriate by the Court, reflecting the seriousness of the Russian Federation's violations of the ICSFT, the quantum of which is to be determined in a separate phase of these proceedings.

CERD

- g. Cease immediately each of the above violations of CERD Articles 2, 4, 5, 6, and 7, and provide Ukraine with appropriate guarantees and public assurances that it will refrain from such actions in the future.
- h. Guarantee the right of members of the Crimean Tatar and Ukrainian communities to equality before the law, notably in the enjoyment of the human rights and fundamental freedoms protected by the Convention.
- i. Assure to all residents of Crimea within its jurisdiction effective protection and remedies against acts of racial discrimination.
- j. Adopt immediate and effective measures in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination against the Crimean Tatar and Ukrainian communities in Crimea.
- k. Pay Ukraine financial compensation and moral damages, in its own right and as *parens patriae* for its citizens, for the harm Ukraine has suffered as a result of Russia's violations of the CERD, including the harm suffered by victims as a result of the Russian Federation's violations of CERD Articles 2, 4, 5, 6 and 7, with such compensation to be quantified in a separate phase of these proceedings.

Provisional Measures Order

- l. Immediately comply with the provisional measures ordered by the Court on 19 April 2017, in particular by lifting its ban on the activities of the Mejlis of the Crimean Tatar People and by ensuring the availability of education in the Ukrainian language.
- m. Immediately comply with the provisional measures ordered by the Court on 19 April 2017, in particular by ceasing its actions that aggravate the dispute and by not taking any further action to aggravate the dispute.
- n. Pay Ukraine financial compensation and moral damages, in its own right and as *parens patriae* for its citizens, for the harm Ukraine has suffered as a result of Russia's violations of the Court's order of 19 April 2017, with such compensation to be quantified in a separate phase of these proceedings.

29 April 2022

H.E. Mr. Vsevolod Chentsov

Co-Agent of Ukraine

CERTIFICATION

I hereby certify that the annexes are true copies of the documents referred to and that the translations provided are accurate.

29 April 2022

H.E. Mr. Vsevolod Chentsov

Co-Agent of Ukraine

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