

INTERNATIONAL COURT OF JUSTICE

**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)

**REJOINDER
SUBMITTED BY THE RUSSIAN FEDERATION**

10 MARCH 2023

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GENERAL INTRODUCTION

1. The present Rejoinder is submitted in accordance with Article 45(2) of the Rules of Court and the Court's Orders of 8 October 2021, 8 April 2022, 15 December 2022, and 3 February 2023.
2. As explained in the Russian Federation's Counter-Memorial, Ukraine's claims under the International Convention for the Suppression of the Financing of Terrorism (the "ICSFT") and the International Convention on the Elimination of All Forms of Racial Discrimination (the "CERD") are without merit and should be dismissed in their entirety. Pursuant to Article 49(3) of the Rules of Court, this Rejoinder does not repeat the arguments set out in the Counter-Memorial (which are maintained in full), but is instead limited to responding to Ukraine's Reply, focusing on "the issues that still divide" the Parties.
3. Before going into the substance of Ukraine's claims as they have been recast in the Reply, some introductory observations are in order:
 - (a) The Russian Federation's approach in the present case is straightforward. It consists of: (i) interpreting the scope and content of the obligations arising under the ICSFT and the CERD in accordance with the rules enshrined in the Vienna Convention on the Law of Treaties (the "VCLT"); (ii) pointing to the evidentiary standards applicable in order to establish a breach of those obligations; and (iii) demonstrating that Ukraine's allegations do not fall within the scope of the relevant treaties and do not meet the necessary evidentiary threshold. Interestingly, Ukraine refers to the Russian Federation's approach as "legalistic" and suggests that it seeks to avoid responsibility.¹ If by "legalistic" Ukraine means that the Russian Federation's position is in accordance with the existing law, then it would appear that no real disagreement exists between the Parties, and that Ukraine attempts to put forward a case that cannot be sustained in law. Furthermore, the question is not one of the Russian Federation trying to "avoid" international responsibility, as Ukraine improperly tries to characterise the Russian Federation's position. Like in any other

¹ See Reply, ¶¶11-13.

case before the Court, what must be determined is simply whether a State is responsible for a violation of international law or not.

- (b) Instead of properly engaging with the Russian Federation’s legal arguments, Ukraine seeks to rely on the political context and portrays this case as concerning “a brazen and comprehensive assault on human rights and international law in the territory of Ukraine” and a “fundamental disregard for the human rights of the people of Ukraine”.² Thus, Ukraine’s Reply is replete with irrelevant accusations of “unlawful aggression against Ukraine”, “unlawful occupation of Ukrainian territory” and violations of international humanitarian law, which, as the Court already established, do not form part of the subject-matter of the present Case.³
- (c) The Reply reveals Ukraine’s true purpose in pursuing these proceedings. Indeed, Ukraine is not genuinely concerned with the question whether the Russian Federation complied with its obligations under the ICSFT and the CERD (which it always did), or with the question what the Court may decide on important issues relating to terrorist financing and racial discrimination. Ukraine’s claims have instead been artificially constructed as part of Ukraine’s broader “lawfare” campaign against the Russian Federation, which concerns issues that are manifestly not governed by these treaties. It is as self-evident that Ukraine’s real goal is challenging the legal status of Crimea, branding the people in the Donbass region who oppose the oppression of the Kiev regime as “terrorists”, and even having the Court characterise the Russian Federation as a “terrorist State”.
- (d) The absurdity of Ukraine’s claims is further highlighted by the fact that Ukraine itself has been, and continues to be, engaged in the same kind of actions that it alleges to be in violation of the ICSFT and the CERD. Since 2014, the Ukrainian Armed Forces (the “UAF”) have carried out constant shelling and bombing against residential areas and civilian infrastructure – including schools and hospitals – thereby killing and wounding thousands of civilians, including children, women

² Reply, ¶14.

³ See *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 (“Order of 19 April 2017”), pp. 113, 172, ¶¶16, 76; Preliminary Objections, Judgment of 8 November 2019, I.C.J. Reports 2019 (“Judgment of 8 November 2019”), pp. 577, 585, ¶¶29, 59.

and the elderly. Ukraine has blocked vital supplies of food, water, and medicine to the people of Donbass and Crimea, causing an immeasurable humanitarian crisis. It has persecuted Russians in Donbass and now in the entirety of Ukraine. Alarming, the Ukrainian Government supports and promotes Neo-Nazi ideology inherited from World War II collaborators and criminals, which is contrary to the very spirit of the CERD.

- (e) At each stage of the proceedings Ukraine has attempted to recast its claims. Whether the Russian Federation financed “terrorist activities” in Donbass or whether there was an alleged “campaign of racial discrimination” in Crimea appears no longer to be the focus of Ukraine’s case. Instead, in its Reply Ukraine concentrated on alleged incidents of non-cooperation under the ICSFT and on individual allegations of discrimination under the CERD, which Ukraine apparently considers to be easier to prove.
 - (f) No matter what the strategy of Ukraine is, its case under each of the treaties in question is manifestly without merit. At the provisional measures stage, the Court found most of Ukraine’s claims to be implausible. Since then, Ukraine has failed to provide any legal argument or evidence that would lead to a different conclusion.
 - (g) As the Russian Federation noted in its Counter-Memorial, Ukraine’s Application to the International Court of Justice of 16 January 2017 formally concerns alleged violations of both the ICSFT and the CERD. However, it actually concerns two entirely separate cases which have in common only the use of the Court’s forum in an attempt to stigmatise the Russian Federation.
4. This Rejoinder is divided into two parts: **Part One** shows that Ukraine has not established any violation of the ICSFT by the Russian Federation; and **Part Two** demonstrates that Ukraine has not established any violation of the CERD by the Russian Federation.
 5. The Russian Federation reserves the right to ask the Court for authorisation to make further arguments and to submit further evidence, including in response to any material that Ukraine reserved the right to submit under Article 56(2) of the Rules of the Court.⁴

⁴ Reply, ¶9.

PART 1
APPLICATION OF THE INTERNATIONAL CONVENTION FOR THE
SUPPRESSION OF THE FINANCING OF TERRORISM

I. INTRODUCTION

6. Ukraine's arguments on the ICSFT have significantly changed since the Memorial. Initially, Ukraine's primary argument was that the Russian Federation financed terrorist activities in Ukraine. The Court, however, then found in its Judgment of 8 November 2019 that the "financing by a State of acts of terrorism is not addressed by the ICSFT" and "lies outside the scope of the Convention".⁵ In light of the limited scope of the ICSFT as set out by the Court, Ukraine was forced to recast its legal arguments and now concentrates on allegations of non-cooperation by the Russian Federation in combating of alleged terrorist-funding activities.
7. Before addressing Ukraine's Reply, some preliminary observations regarding the context of the present case are warranted.

A. THE COUP D'ÉTAT IN KIEV

8. In its Reply, Ukraine continues to mispresent the events of 2014 that led to serious developments in the years that followed. It does this in order to place responsibility on the Russian Federation for its own illegal and unreasonable decisions and actions. At the same time, Ukraine seeks artificially to tie the ICSFT with these events, which the Convention has in reality nothing to do with.
9. As the Russian Federation explained in the Counter-Memorial, the armed conflict in Donbass arose out of an unconstitutional upheaval in Kiev, where radical armed groups deeply rooted in Nazi ideology with the aid and political support of the US and several EU States overthrew the legitimate government and imposed a new nationalist, openly anti-Russian regime.
10. What Ukraine now calls a peaceful "Revolution of Dignity" was known in 2014 as the "Maidan". It was a series of protests that took place in Kiev at the end of 2013 and gathered broad support from a number of Western countries. One of the pretexts for this long face-off between the Ukrainian Government and its opposition was the decision by the former President Yanukovich to suspend preparations to sign an association agreement with the European Union. The real problem was, however, created by the

⁵ Judgment of 8 November 2019, p. 585, ¶59.

opposition in Ukraine, which sought to confront the Ukrainian people with a stark but fictitious choice: Ukraine moves ahead either with Europe or with the Russian Federation. As the Russian Federation previously explained to the Court, this false choice largely split the country.⁶

11. The initial wave of violence started in early 2014 in the West of Ukraine and was instigated by radical extremist movements with Neo-Nazi backgrounds. Many of these groups were actively nurtured with open funding from Western countries, primarily the United States. Thus, according to Victoria Nuland, US' Assistant Secretary of State, the United States spent \$5 billion in Ukraine on "promotion of democracy" and "related projects" between 1991 and 2013.⁷ Substantial sums were funnelled through the USAID,⁸ Freedom House and the NED, all of which are funded by the US Government.⁹
12. Thus, in January 2014, radicals blocked regional State administrations in the West of Ukraine, regional Departments of the Ministry of Interior and the Security Service of Ukraine (the "SBU"), police stations and other public buildings. On 23 January 2014, they stormed into the Lvov State Regional Administration and forced its head to write a letter of resignation.¹⁰ By 24 January 2014, the State Administrations had been taken in at least 6 more regional centres.¹¹ On 19 February 2014, further administrative buildings were forcefully seized, including military postings.¹² In particular, the activists in Lvov

⁶ See *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Verbatim Record, 7 March 2017, ¶7 (Kolodkin).

⁷ YouTube, *Victoria Nuland's Admits Washington Has Spent \$5 Billion to "Subvert Ukraine"* (9 February 2014), available at: <https://www.youtube.com/watch?v=U2fYcHLouXY> (Annex 297).

⁸ U.S. Agency for International Development, *Ukraine*, available at: <https://www.usaid.gov/ukraine> (Annex 178).

⁹ See National Endowment for Democracy, *Ukraine*, available at: <https://web.archive.org/web/20140831044648/http://www.ned.org/where-we-work/eurasia/ukraine> (Annex 179).

¹⁰ Unian.ua, *In Lvov activists continue to block the RSA building, "Berkut" bases and internal troops* (24 January 2014), available at: <https://www.unian.ua/politics/875962-u-lvovi-aktivisti-prodovjuyut-blokuvati-budivlyu-oda-bazi-berkutu-i-vnutrishnih-viysk.html> (Annex 298); DailyLviv.com, *Lvov Regional State Administration and "Berkut" and Internal Troops bases are being blocked* (24 January 2014), available at: <https://dailylviv.com/news/polityka/u-lvovi-blokuyut-prymishchennya-oda-i-bazy-berkutu-ta-vv-video-3969> (Annex 299).

¹¹ Ternopol, Khmelnytskyi, Rovno, Chernovtsy, Zhitomir, and Ivano-Frankovsk. Two more were blocked in Lutsk and Uzhhorod. See TSN, *Map of seizures of regional state administrations in Ukraine: eight regions are under the control of demonstrators* (24 January 2014), available at: <https://tsn.ua/politika/karta-zahopen-oda-v-ukrayini-visim-regioniv-opinilysya-pid-kontrolem-demonstrantiv-331198.html> (Annex 300).

¹² BBC.com, *Regions of Ukraine: West rises up, East calls to "stop extremists"* (19 February 2014), available at: https://www.bbc.com/ukrainian/politics/2014/02/140219_regions_conflict_reaction_or.

took control of the city prosecutor's office, the building of the Ministry of Internal Affairs, the headquarters of the SBU and the military unit No. 4114 of the Internal Troops of Ukraine. As a result of negotiations between the radicals and the leadership of the military unit, an agreement was reached that the security forces would leave the military unit unarmed.¹³ The Defence Ministry's military arsenal was looted.¹⁴ Armed groups of extremists, many of whom had criminal records and/or combat experience continued arriving in Kiev.

13. The Maidan leaders (A. Yatsenyuk, A. Turchinov, V. Klichko, O. Tyagnibok, D. Yarosh etc.) organised the siege of the Cabinet of Ministers of Ukraine and an attempted storm of the Office of the President of Ukraine. The leading forces of these actions were the Right Sector (whose leader was D. Yarosh) and the "All-Ukraine Union" (VO) Svoboda (whose leader was O. Tyagnibok), which find their origins in Ukraine's Nazi collaborators, notorious as accomplices in the heinous crimes of the Second World War.
14. The Right Sector and the VO Svoboda formed the core of the so-called "*Samooborona Maidanu*" ("Maidan Self-Defence"). Organised violence against the police became widespread: thousands of radicals used Molotov cocktails and policemen were burned and injured. The tragic culmination came on 18-22 February 2014, when more than 100 people were killed, including at least 13 police officers due to sniper fire. These tragic events were demonstrated in *Ukraine on Fire*, a documentary film released in 2016 by the US Academy Award winning film director and Vietnam War veteran Oliver Stone.¹⁵

¹³ TSN, *In Lvov protesters seize main law enforcement buildings and weapons arsenal* (19 February 2014), available at: <https://tsn.ua/ukrayina/u-lvovi-protestuvalniki-zahopili-golovni-budivli-silovikiv-ta-arsenal-zbroyi-335205.html> (Annex 398).

¹⁴ Unian.ua, *Military warehouses with weapons burn in Lvov* (19 February 2014), available at: <https://www.unian.ua/politics/886677-u-lvovi-goryat-viyskovi-skladi-zi-zbroeyu.html> (Annex 188).

¹⁵ I. Lopatonok, O. Stone, *Ukraine on Fire, Documentary* (2016), available at: <https://watchdocumentaries.com/ukraine-on-fire/>; See also The World, *Who Were the Maidan Snipers?* (14 March 2014), available at: <https://theworld.org/stories/2014-03-14/who-were-maidan-snipers> (Annex 180); BBC News Ukraine, *The Maidan Shooting: a Participant's Account* (13 February 2015), available at: https://www.bbc.com/ukrainian/ukraine_in_russian/2015/02/150213_ru_s_maidan_shooting (Annex 181).

15. The Ukrainian authorities never properly investigated or prosecuted the Maidan shootings.¹⁶ Moreover, the protesters involved in violent acts were later amnestied.¹⁷
16. The Court had an opportunity to review the technologies of the power change with an outside interference.¹⁸ In particular the Court studied a copy of a CIA “Psychological Operations” manual explaining, *inter alia*, how to foment civil unrest to bring down a target government. In the section on “Control of mass concentrations and meetings”, the following guidance is given (*inter alia*):

“If possible, professional criminals will be hired to carry out specific selective ‘jobs’. Specific tasks will be assigned to others, in order to create a ‘martyr’ for the cause, taking the demonstrators to a confrontation with the authorities, in order to bring about uprisings or shootings, which will cause the death of one or more persons, who would become the martyrs, a situation that should be made use of immediately against the régime, in order to create greater conflicts”.¹⁹

¹⁶ The UN Human Rights Monitoring Mission in Ukraine concluded in its Briefing note dated 19 February 2019 that “Five years after the end of the Maidan protests accountability for the killings and violent deaths of 84 protestors, a man who did not participate in the protests, and 13 law enforcement officers is yet to be achieved. The investigation into the killing of 17 protestors and 13 law enforcement officers has still to identify individual perpetrators. Only one person has been found guilty of unintentional killing of a protestor. Two others were found guilty of hooliganism in relation to an incident that resulted in the killing of another protestor... HRMMU notes that investigations into the killing of the law enforcement officers during Maidan protests have been particularly ineffective... The trials in the Maidan-related proceedings are protracted... Government of Ukraine is doing too little to ensure the prompt, independent and impartial investigation and prosecution of the killings perpetrated during Maidan protests”. See UN Human Rights Monitoring Mission in Ukraine, Briefing note Accountability for Killings and Violent Deaths during the Maidan Protests, 20 February 2019, ¶¶4, 13-14, 16, available at: <https://ukraine.un.org/en/108759-briefing-note-accountability-killings-and-violent-deaths-during-maidan-protests>.

The International Advisory Panel established by the Secretary General of the Council of Europe to oversee investigations of the crimes committed during Maidan also concluded that new Ukrainian government failed to promptly conduct the Maidan investigations: “The Panel considers that substantial progress has not been made in the investigations into the violent incidents during the Maidan demonstrations... As has been widely acknowledged, there has been a clear lack of public confidence in Ukraine in any such investigation. On the contrary, there has been a widespread perception of impunity on the part of the law enforcement agencies and of an unwillingness or inability on the part of the investigatory authorities to bring to justice those responsible for the deaths and injuries”. See Report of the International Advisory Panel on its review of the Maidan Investigations, 31 March 2015, ¶¶535, 536, available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016802f038b>.

¹⁷ Law of Ukraine No. 743-VII “On Preventing the Prosecution and Punishment of Persons in Connection with the Events that Occurred during Peaceful Assemblies and on Invalidating Certain Laws of Ukraine”, 21 February 2014, available at: <https://zakon.rada.gov.ua/go/743-18> (Annex 468).

¹⁸ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment. I.C.J. Reports 1986, p. 66, ¶118: “The Court will ... concentrate its attention on the other manual, that on ‘Psychological Operations’. That this latter manual was prepared by the CIA appears to be clearly established: a report published in January 1985 by the Intelligence Committee contains a specific statement to that effect...”.

¹⁹ *Ibid.*

17. On 21 February 2014, former President Yanukovich and the opposition leaders signed an agreement to settle the crisis. This agreement provided, *inter alia*, for the vacation of illegally seized governmental buildings, a political transition and new elections. Representatives of Poland, Germany and France co-signed the agreement as guarantors of its implementation. However, the protesters escalated the hostilities further. On the night of 22 February 2014, they stormed the government premises, and former President Yanukovich was forced to abandon Kiev in fear for his life.²⁰
18. The Right Sector's extremists also intimidated members of parliament to install a new government. This intimidation of members of parliament was referred to by the Estonian Foreign Minister, Mr Paet, in a telephone conversation with Baroness Ashton:

“Paet: So that, well, basically, it is that the trust level is absolutely low. On the other hand, all the security problems, this integrity problems, Crimea, all this stuff. Regions Party was absolutely upset. They say that, well, they accept, they accept this that now there will be new government. And there will be external elections. But there is enormous pressure against members of parliament – that there are uninvited visitors during the night ... to party members.

Well, journalists ... some journalists who were with me, they saw during the day that one member of parliament was just beaten in front of the parliament building by these guys with the guns on the streets”.²¹
19. As a result, on 22 February 2014, one of the Maidan leaders Alexander Turchinov was “elected” as speaker of the Verkhovnyaya Rada. The following day he was designated as acting President of Ukraine, who later unleashed the use of military force against Donbass. On 25 February 2014, he assumed command of the UAF. Another leader of the Maidan Arseniy Yatsenyuk was appointed as Prime Minister on 27 February 2014.
20. As the further events showed, the United States decided who will be in the new Ukraine's government. It appears from a leaked telephone conversation between Victoria Nuland, US' Assistant Secretary of State, and Geoffrey Pyatt, the United States' ambassador in Kiev, on about 7 February 2014. In the call, Ms Nuland and Mr Pyatt discussed the

²⁰ YouTube, *Gian Micalessin, Finally the Truth about the Beginning of the Civil War in Ukraine?* (16 November 2017), available at: <https://www.youtube.com/watch?v=gwoV03ijSoI>.

²¹ See the transcript of a recorded conversation between Mr Paet, Foreign Minister of Estonia, and Catherine Ashton (19 June 2014), available at: [https://nuclearrisk.wordpress.com/2014/06/19/transcript-of-estonian-fm-bombshell-revelation-\(Annex-402\)](https://nuclearrisk.wordpress.com/2014/06/19/transcript-of-estonian-fm-bombshell-revelation-(Annex-402)); YouTube, *Breaking: Estonian Foreign Minister Urmars Paet and Catherine Ashton discuss Ukraine over the phone* (5 March 2014), available at: <https://www.youtube.com/watch?v=ZEgJ0oo3OA8>.

installation of Arseniy Yatsenyuk as prime minister and were keen that US Vice President Joe Biden should be on hand to endorse the new government. She also planned to arrange Yatsenyuk's visit to the UN headquarters in order to give the future Maidan government a sense of legitimacy:²²

“... that would be great, I think, to help glue this thing and to have the UN help glue it...”.

21. On the day of Arseniy Yatseniuk's appointment, Vice President Biden informed him that his interim government had the full support of the United States. US Secretary of State John Kerry then visited Kiev on 4 March 2014 and met with Arseniy Yatsenyuk and his far-right supporters, including Oleg Tyagnibok of VO Svoboda. On 13 March 2014, Arseniy Yatsenyuk visited the United Nations and met the UN Secretary General in New York. The new order was, as Ms Nuland had put it, “glued”. The coup was complete.
22. As noted above, the new government never properly investigated the shootings in Kiev. Details of their failure to investigate appear from a report, dated 31 March 2015, of the International Advisory Panel established by the Secretary General of the Council of Europe.²³ The report concluded, *inter alia*, that “the investigations into the Maidan cases lacked practical independence in circumstances where the investigating body belonged to the same authority as those under investigation”, and that they overall lacked

²² In early February 2014, a telephone conversation between the US' Assistant Secretary of State Victoria Nuland and the US' Ambassador to Ukraine Geoffrey Pyatt appeared on YouTube. Mr Pyatt said: “I think we're in play. The Klitschko piece is obviously the complicated electron here. Especially the announcement of him as deputy prime minister and you've seen some of my notes on the troubles in the marriage right now so we're trying to get a read really fast on where he is on this stuff. But I think your argument to him, which you'll need to make, I think that's the next phone call you want to set up, is exactly the one you made to Yats. And I'm glad you sort of put him on the spot on where he fits in this scenario. And I'm very glad that he said what he said in response.” Ms Nuland responded, “I don't think Klitsch should go into the government. I don't think it's necessary, I don't think it's a good idea.” Mr Pyatt reacted: “Yeah. I guess... in terms of him not going into the government, just let him stay out and do his political homework and stuff...”. See BBC News, *Ukraine crisis: Transcript of Leaked Nuland-Pyatt Call* (7 February 2014), available at: <https://www.bbc.com/news/world-europe-26079957> (Annex 185).

U.S. Secretary of State John Kerry visited Kiev on 4 March 2014 to discuss the future organization of power in Ukraine with the Maidan opposition leaders. See Gettyimages, *UKRAINE-UNREST-POLITICS-US-KERRY* (04 March 2014), available at: <https://www.gettyimages.ae/detail/news-photo/secretary-of-state-john-kerry-oleksandr-turchynov-news-photo/476633249>.

²³ International Advisory Panel, Report of the International Advisory Panel on its review of the Maidan Investigations (31 March 2015), available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016802f038b>.

effectiveness.²⁴ At the same time, the leaders of the Maidan coup ignored extensive internal and international criticism.²⁵

23. Moreover, the new government and its successors also suppressed independent investigation by obstructing and intimidating journalists. There have been abductions and detentions of journalists (who were sometimes reportedly tortured) by UAF or the SBU, with numerous examples of SBU involvement.²⁶ Criminal cases have been opened against journalists whose views were considered to be “pro-Russian”.²⁷ Restrictions on the work of journalists were also put in place, including sanctions,²⁸ travel bans²⁹ and cancellation of media accreditation (licenses).³⁰
24. Thus, instead of trying to establish a coalition government to de-escalate tensions, the Maidan leaders fostered division within the country and installed a government which

²⁴ *Ibid.*, ¶524. See also *Ibid.*, ¶¶525-528: In relation to the effectiveness of the investigations after 22 February 2014, the Panel concluded that:

- Staffing levels were “wholly inadequate”;
- There were “strong grounds” for considering the Ministry of the Interior’s attitude to the investigation to be “uncooperative and, in certain respects, obstructive”;
- There had been a “reticence” on the part of Ukrainian investigators to investigate thoroughly the “possible responsibility of the SSU [State Security Service] at an operational level”.
- There were “grounds to believe that Ukraine’s security service, the SBU (or SSU) “failed adequately to cooperate” with investigators.

²⁵ See, for example: Reuters, *Special Report: Flaws found in Ukraine's probe of Maidan massacre* (10 October 2014), available at: <https://www.reuters.com/article/us-ukraine-killings-probe-special-report/special-report-flaws-found-in-ukraines-probe-of-maidan-massacre-idUSKCN0HZ0UH20141010> (Annex 186); 2000.ua, *Mysterious Maidan snipers* (14 October 2015), available at: https://web.archive.org/web/20220125010212/https://www.2000.ua/specproekty_ru/rassledovanie/tainstvennye-snajpery-majdana.htm (Annex 301); Gazeta.ru, *Unheroic justice* (11 January 2016), available at: https://www.gazeta.ru/politics/2016/01/11_a_8014691.shtml (Annex 302); RIA Novosti Ukraine, *Never-ending investigation. Four years later, killers of the “Heavenly Hundred” still at large* (22 February 2018); available at: <https://rian.com.ua/analytics/20180222/1032575774/beskonechnoe-sledstvie-nebesnoi-sotni.html> (Annex 303); RIA Novosti Ukraine, *Investigation in all Maidan cases stalled* (21 February 2018), available at: <https://rian.com.ua/analytics/20180221/1032544002/Ukraine-Maydan-dela-rasslelovanie.html> (Annex 304); RusNext.ru, *No one came to commemorate. The Heavenly Hundred and their “exploits” on Maidan devalued* (20 February 2018), available at: http://rusnext.ru/recent_opinions/1519134530 (Annex 305).

²⁶ Sputnik International, *Incidents With Russian Reporters in Ukraine in 2014-2017* (31 August 2017), available at: <https://sputniknews.com/europe/201708311056947334-russian-reporters-ukraine/> (Annex 187).

²⁷ KPHG, *Ukraine follows Russia in dubious “State treason” arrests* (16 February 2015) available at: <http://kphg.org/en/index.php?id=1423918032> (Annex 189).

²⁸ TASS, *How Ukraine imposed sanctions on Russian individuals and entities* (20 March 2019), available at: <https://tass.ru/info/6240919> (Annex 306).

²⁹ Human Rights Watch, *Ukraine Foreign Journalists Barred or Expelled* (1 September 2017), available at: <https://www.hrw.org/news/2017/09/01/ukraine-foreign-journalists-barred-or-expelled> (Annex 190).

³⁰ RIA Novosti, *Cases of harassment of journalists in Ukraine in 2014-2017* (19 June 2017), available at: <https://ria.ru/20170619/1496819255.html> (Annex 307).

was unconstitutional, undemocratic and hostile to the Russian-speaking people. This government was neither legitimate nor representative and consisted almost exclusively from the VO Svoboda and the Right Sector with Neo-Nazi convictions. Unsurprisingly, it had minimal democratic support and none amongst the Russian-speaking people in Donbass, who soon found themselves under military assault.

B. THE ARMED CONFLICT IN DONBASS

25. The actions of the “Maidan” leaders plunged the entire country into a state of anarchy and chaos, in the face of which the people of the Donetsk and Lugansk regions decided to take responsibility for maintaining law and order and ensuring normal life.³¹
26. Instead of negotiating with the leaders of the Donbass region, the new government headed by Maidan leader Alexander Turchinov sought to quash them using armed force. On 7 April 2014, it announced the so-called Anti-Terrorist Operation (“ATO”) in Donbass, throwing Ukraine’s army and security forces against the region. In response to this, the people of Donetsk established the People’s Council of Donetsk, which adopted a Declaration on Sovereignty of the Donetsk Peoples’ Republic (the “DPR”) together with an Act of State Independence. Similarly, on 27 April 2014, at a meeting in Lugansk, the sovereignty of the Lugansk People’s Republic (the “LPR”) was also declared.³²
27. In addition to Ukraine’s regular armed forces, the ATO involved the use of irregular volunteer battalions, including Azov and the Right Sector,³³ whose atrocities feature in the reports of the international organisations, including the Office of the UN High Commissioner for Human Rights (the OHCHR”).³⁴ Information about the multiple crimes committed by the Ukrainian armed forces and other irregular armed forces against civilians in Donbass, including indiscriminate shelling, bombing, and the use of human shields is further addressed in Chapter II below.

³¹ [REDACTED]

³² [REDACTED]

³³ Pictures reuters.com, *Members of a “Maidan” self-defence battalion take part in a training at a base of Ukraine’s National Guard near Kiev* (31 March 2014), available at: <https://pictures.reuters.com/archive/UKRAINE-CRISIS--GM1EA3V1ME601.html> (Annex 473).

³⁴ OHCHR Report on the human rights situation in Ukraine (16 May to 15 August 2015), 8 September 2015, ¶123, available at: <https://www.ohchr.org/sites/default/files/Documents/Countries/UA/11thOHCHRreportUkraine.pdf>.

28. Ukrainian State officials started verbally referring to the DPR and LPR as “terrorist entities”, it should be noted that no official decision on such recognition was issued either in Ukraine or at the international level.

C. THE MINSK AGREEMENTS AND THE HYPOCRISY OF UKRAINE’S CASE

29. In October 2014 and April 2015, Ukraine signed two sets of agreements with the DPR and LPR (the “Minsk Agreements”). They provided for a comprehensive process of reintegration of the DPR and LPR into Ukraine. As part of this reintegration process, Ukraine undertook to pardon all “persons connected to the events that took place in certain areas of the Donetsk and Lugansk regions of Ukraine”³⁵ and “prohibit their prosecution and punishment”.³⁶

30. The Minsk Agreements were endorsed by the Organization for Security and Co-operation in Europe (“OSCE”) and the countries of the so-called “Normandy format”, which included Germany, France, Ukraine and the Russian Federation. Furthermore, The Russian Federation also initiated the adoption of the Resolution of the UN Security Council resolution 2202 (2015), which endorsed the Minsk Agreements.³⁷ The settlement process under the Agreements was expected to be finalised by the end of 2015.³⁸

31. However, Ukrainian authorities soon admitted that they had no intention to fulfil the Minsk Agreements.³⁹ In particular, former President Poroshenko declared that the Minsk

³⁵ Package of Measures for the Implementation of the Minsk Agreements (“Minsk-2”), 12 February 2015, ¶5, available at: https://peacemaker.un.org/sites/peacemaker.un.org/files/UA_150212_MinskAgreement_en.pdf.

³⁶ Protocol on the outcome of consultations of the Trilateral Contact Group on joint steps aimed at the implementation of the Peace Plan of the President of Ukraine, P. Poroshenko, and the initiatives of the President of the Russian Federation, V. Putin (“Minsk-1”), 5 September 2014, ¶6, available at: https://peacemaker.un.org/sites/peacemaker.un.org/files/UA_140905_MinskCeasfire_en.pdf.

³⁷ Euronews, *UN Adopts Russian-drafted Resolution on Ukraine Crisis* (17 February 2015), available at: <https://www.euronews.com/2015/02/17/un-adopts-russian-drafted-resolution-on-ukraine-crisis> (Annex 167).

³⁸ Minsk-2, ¶9: “Reinstatement of full control of the state border by the government of Ukraine throughout the conflict area, starting on day 1 after the local elections and ending after the comprehensive political settlement (local elections in certain areas of the Donetsk and Lugansk regions on the basis of the Law of Ukraine and constitutional reform) to be finalized by the end of 2015, provided that paragraph 11 has been implemented in consultation with and upon agreement by representatives of certain areas of the Donetsk and Lugansk regions in the framework of the Trilateral Contact Group.”

³⁹ On 20 October 2016, Ukraine’s Defense Minister Stepan Poltorak stated that “any agreements with the aggressor are not even worth the paper on which they are signed.” See *Telegraf, Poltorak on Disengagement: Agreements with Aggressor are Worth Nothing* (20 October 2016), available at: <https://telegraf.com.ua>

Agreements gave Ukraine time for military build-up and also described them as an instrument which the anti-Russian sanctions depended on.⁴⁰ Former German Chancellor Angela Merkel and former French President François Hollande (who were among the mediators and guarantors of the Minsk Agreements), admitted that the purpose of the Minsk Agreements was to give Ukraine opportunity for military build-up, or “an attempt to give time to Ukraine, [which] it also used ... to become stronger as can be seen today”.⁴¹

32. As will be further explained in Chapter II below⁴², the Minsk Agreements by themselves disprove Ukraine’s allegation that the DPR and LPR ought to be considered “notorious” terrorist organisations, as opposed to self-proclaimed governments. The conclusion of the Minsk Agreements and their endorsement by the UN Security Council confirm that the DPR and LPR were universally perceived as actual self-governing entities representing their people, rather than “terrorists”. In fact, the Minsk Agreements, by providing for pardoning what were essentially combatants, as well as Ukraine as a party thereto, clearly treated the DPR and LPR as entities participating in an armed conflict and not as terrorist organisations. Such a treatment debunks any alleged “notoriety” of the DPR and LPR as “terrorist organizations”.

D. THERE IS UNSURPRISINGLY STILL NO EVIDENCE OF FUNDING OF TERRORISM

33. In its Order of 19 April 2017, the Court rejected Ukraine’s request for the indication of provisional measures with respect to Ukraine’s claims under the ICSFT noting that:

“... the acts to which Ukraine refers ... have given rise to the death and injury of a large number of civilians. However, in order to determine whether the rights for which Ukraine seeks protection are at least plausible, it is necessary to ascertain whether there are sufficient reasons for considering that the other

/ukraina/politika/2917869-poltorak-o-razvedenii-dogovorennosti-s-agressorom-nichego-ne-stoyat.html (Annex 168). On 10 July 2020, Ukraine’s Deputy Prime Minister Alexei Reznikov said that the Minsk agreements are not “carved in stone” and contain “a lot of things that no longer work”. See Ukrinform, *Reznikov: Only Normandy Four Leaders Can Change Minsk Agreements* (11 July 2020), available at: <https://www.ukrinform.net/rubric-polytics/3061245-reznikov-only-normandy-four-leaders-can-change-minsk-agreements.html> (Annex 169).

⁴⁰ Ukrinform, *Poroshenko Says Minsk Agreements Partially Fulfilled Their Goal* (13 December 2019), available at: <https://www.ukrinform.net/rubric-polytics/2837640-poroshenko-says-minsk-agreements-partially-fulfilled-their-goal.html> (Annex 170); Russia Today, *Minsk Deal Was Used to Buy Time – Ukraine’s Poroshenko* (17 June 2022), available at: <https://www.rt.com/russia/557307-poroshenko-comments-minsk-agreement/> (Annex 171).

⁴¹ TASS, *Attempt to “give Ukraine time”: Merkel on Minsk agreements* (7 December 2022), available at: <https://tass.com/world/1547141> (Annex 341).

⁴² See Chapter II below.

elements set out in Article 2, paragraph 1, such as the elements of intention or knowledge noted above ... and the element of purpose specified in Article 2, paragraph 1 (b), are present. At this stage of the proceedings, Ukraine has not put before the Court evidence which affords a sufficient basis to find it plausible that these elements are present”.⁴³

34. Although more than five years have passed since the Court made this finding, the latter continues to be true at the present stage of the proceedings.
35. There is simply, and unsurprisingly, no evidence of any terrorism financing. In light of this, Ukraine asks the Court to apply an extremely low standard of proof which has no basis in international law. Ukraine characterises the Russian Federation’s position in this regard as “legalistic”.⁴⁴ This is tantamount to admitting that the Russian Federation’s position is correct under the existing law and that, to accommodate Ukraine’s claims, such law should somehow be disregarded. This is obviously untenable.
36. Ukraine acknowledges that a stricter standard of proof was applied in *Bosnia Genocide*, but attempts to distinguish it from the present case by claiming that in *Bosnia Genocide* “the Court was asked to conclude that a State bore responsibility for committing the crime of genocide”, and argues that, “[t]he evidentiary standard in this case should not be similar to that of a prosecutor’s burden to establish criminal responsibility for committing genocide”.⁴⁵ But the Court in that case specifically held that it was not dealing with the criminal responsibility of States under international law:

“The Court observes that the obligations in question in this case, arising from the terms of the Convention, and the responsibilities of States that would arise from breach of such obligations, are obligations and responsibilities under international law. They are not of a criminal nature”.⁴⁶

37. Ukraine also argues that the heightened standard is ill-suited to this case because third parties’ mental state is involved, which is “inherently more difficult to prove”.⁴⁷ However, third parties’ mental state was also involved in *Bosnia Genocide*, where the Court still applied the same standard of proof.

⁴³ Order of 19 April 2017, p.131, ¶75.

⁴⁴ Reply, ¶56.

⁴⁵ *Ibid.*, ¶57.

⁴⁶ *Case concerning 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. 115, ¶170.

⁴⁷ Reply, ¶58.

38. Ukraine also argues that, outside the genocide context, the Court has applied a lower standard such as a “sufficient evidence”, or “convincing evidence” in *Armed Activities on the Territory of the Congo*, or a “sufficiency” standard in *Oil Platforms*, and asks the Court to apply that standard in this case.⁴⁸ But those cases cannot be compared to cases of allegations of genocide, or terrorism or terrorism financing, and the standard of proof applied in those cases, even if described accurately by Ukraine, would not do justice to the matters in this case where grave allegations of terrorism and terrorism financing have been made.

39. The standard of proof must be appropriate or correspond to the gravity of the charges against a respondent. As the Court indicated in *Bosnia Genocide*:

“The Court has long recognized that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive ... The Court requires that it be fully convinced that allegations made in the proceedings, that the crime of genocide or the other acts enumerated in Article III have been committed, have been clearly established. The same standard applies to the proof of attribution for such acts.

In respect of the Applicant’s claim that the Respondent has breached its undertakings to prevent genocide and to punish and extradite persons charged with genocide, the Court requires proof at a high level of certainty appropriate to the seriousness of the allegation”.⁴⁹

40. In this case, the gravity of Ukraine’s allegations requires the same “standard of proof” as referred to above. If inferences are resorted to, any inference must be “the only reasonable inference that can be drawn”.⁵⁰

41. The grave nature of terrorism financing is beyond any doubt. Several times it is so described in the ICSFT. In the preamble, it is stated that “the financing of terrorism is a matter of grave concern to the international community as a whole”. Under Article 4(b), each State party undertakes to “make those offences punishable by appropriate penalties which take into account the grave nature of the offences”. Under Article 10, in a case where Article 7 applies, if a suspect is not extradited, a State party undertakes to submit the case for prosecution and the competent authorities “shall take their decision in the

⁴⁸ *Ibid.*, ¶59.

⁴⁹ *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, pp. 129-130, ¶¶209, 210.

⁵⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015, p.128, ¶440. See also *Ibid.*, p. 67, ¶, 148.

same manner as in the case of any other offence of a grave nature under the law of that State”. Therefore, there is no doubt that the standard of proof set out by the Court in *Bosnia Genocide* is applicable to the present case.

E. STRUCTURE OF THIS PART

42. This Part of the Rejoinder is structured as follows:

- (a) **Chapter II** shows that doctrine of clean hands precludes Ukraine’s claims under the ICSFT.
- (b) **Chapter III** reaffirms the Russian Federation’s position regarding the requirements for the establishment of the offence of terrorism financing under the ICSFT and other related treaties.
- (c) **Chapters IV** replies to Ukraine’s arguments regarding the definition of “funds” under the ICSFT.
- (d) **Chapter V** demonstrates that Ukraine has failed to establish the offence of terrorism financing with respect to Flight MH17.
- (e) **Chapter VI** responds to Ukraine’s allegations regarding the shelling at Volnovakha, Mariupol, Kramatorsk and Avdeyevka.
- (f) **Chapter VII** deals with the alleged killings and bombings.
- (g) Finally, in **Chapter VIII**, the Russian Federation explains that Ukraine has failed to establish that the Russian Federation breached its obligations under Articles 8-10, 12 and 18 of the ICSFT.

II. UKRAINE'S CLAIMS UNDER THE ICSFT ARE PRECLUDED BY VIRTUE OF THE CLEAN HANDS DOCTRINE

43. The doctrine of clean hands provides the Court with the power to deny a party's request for relief where the same party has itself engaged in serious misconduct or wrongdoing that has a close connection to the relief sought. Equity and good faith constitute the foundation of the doctrine of clean hands. "He who comes into equity must come with clean hands", stated an arbitral tribunal.⁵¹ In the same vein, Judge Fitzmaurice noted:

"He who comes to equity for relief must come with clean hands. Thus a State which is guilty of illegal conduct may be deprived of the necessary locus standi in judicio for complaining of corresponding illegalities on the part of other States (...)".⁵²

44. A trace of the application of this principle in the case law of the Court can be found in the case of *Diversion of Water from the Meuse*, where the Permanent Court concluded that:

"The Court cannot refrain from comparing the case of the Belgian lock with that of the Netherlands lock at Bosscheveld. Neither of these locks constitutes a feeder, yet both of them discharge their lock-water into the canal, and thus take part in feeding it with water otherwise than through the treaty feeder, though without producing an excessive current in the Zuid-Willemsvaart. In these circumstances, the Court finds it difficult to admit that the Netherlands are now warranted in complaining of the construction and operation of a lock of which they themselves set an example in the past. Accordingly, as has been explained above, in the absence of evidence as to the effects which the use of the Neerhaeren Lock produces on the current in the Zuid-Willemsvaart, or on the Meuse itself, the Court does not consider that the normal use of this lock is inconsistent with the Treaty. The Court is also of opinion that there is no ground for treating this lock less favourably than the Netherlands lock at Bosscheveld. It is thus unable to accord to the Netherlands Government the benefit of its submission".⁵³

45. Judge Hudson appended to the Court's decision a separate opinion in which he stated that:

"It would seem to be an important principle of equity that where two parties have assumed an identical or a reciprocal obligation, one party which is engaged in a continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party. The principle finds expression in the so-called maxims of

⁵¹ *Friedrich & Co. Case*, French-Venezuelan Mixed Claims Commission, Opinion of the Umpire of 31 July 1905, 10 R.I.A.A., pp. 50, 54.

⁵² G. Fitzmaurice, *THE GENERAL PRINCIPLES OF INTERNATIONAL LAW CONSIDERED FROM THE STANDPOINT OF THE RULE OF LAW*, *RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL DE LA HAYE* (1957-II, t. 92, Leyden, Sijthoff, 1958), p. 119.

⁵³ *Diversion of Water from the Meuse (Netherlands v. Belgium)*, Judgment of 28 June 1937, p. 25.

equity which exercised great influence in the creative period of the development of the Anglo-American law. Some of these maxims are, "Equality is equity"; "He who seeks equity must do equity". It is in line with such maxims that "a court of equity refuses relief to a plaintiff whose conduct in regard to the subject-matter of the litigation has been improper".⁵⁴

46. Judge Schwebel, relying on the opinion of Judge Hudson, noted in his dissenting opinion in the case of *Military and Paramilitary Activities in and against Nicaragua*, that the doctrine of clean hands applied to the case of Nicaragua:

“Nicaragua has not come to Court with clean hands. On the contrary, as the aggressor, indirectly responsible - but ultimately responsible - for large numbers of deaths and widespread destruction in El Salvador apparently much exceeding that which Nicaragua has sustained, Nicaragua's hands are odiously unclean. Nicaragua has compounded its sins by misrepresenting them to the Court. Thus both on the grounds of its unlawful armed intervention in El Salvador, and its deliberately seeking to mislead the Court about the facts of that intervention through false testimony of its Ministers, Nicaragua's claims against the United States should fail”.⁵⁵

47. States appearing before the Court have repeatedly relied on the clean hands doctrine in a range of different contexts. While the Court has not upheld a defence on this basis, it also has never rejected the doctrine as a matter of principle. In *Certain Iranian Assets*, the Court noted that “the United States has not argued that Iran, through its alleged conduct, has violated the Treaty of Amity, upon which its Application is based”, and then declared that:

“[w]ithout having to take a position on the ‘clean hands’ doctrine, the Court considers that, even if it were shown that the Applicant’s conduct was not beyond reproach, this would not be sufficient per se to uphold the objection to admissibility raised by the Respondent on the basis of the ‘clean hands’ doctrine”.⁵⁶

48. The Court then added:

“Such a conclusion is however without prejudice to the question whether the allegations made by the United States, concerning notably Iran’s alleged sponsoring and support of international terrorism and its presumed actions in

⁵⁴ *Ibid.*, Individual Opinion of Judge Hudson, p. 77.

⁵⁵ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, Dissenting opinion of Judge Schwebel, p. 392, ¶268.

⁵⁶ *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, I.C.J. Reports 2019, p. 44, ¶122; See also *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, I.C.J. Reports 2004, p. 38, ¶47; *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Preliminary Objections, Judgment, I.C.J. Reports 2017, p. 52, ¶142.

respect of nuclear non-proliferation and arms trafficking, could, eventually, provide a defence on the merits”.⁵⁷

49. In the *Jadhav* case, Judge Iwasawa supported the Court’s finding that rejected Pakistan's objection based on the clean hands doctrine, and explained that “[Pakistan's] allegations do not relate to the Vienna Convention on Consular Relations (the “VCCR”) upon which India’s Application is based”.⁵⁸
50. The same clean hands approach is applicable regarding the unfounded Ukraine’s allegations of “violations” by the Russian Federation of the ICSFT, that, in fact, have never taken place.
51. As has been shown above, what Ukraine conveniently omits is that it concluded the Minsk Agreements with the DPR and LPR. Furthermore, Ukraine also omits to say that companies under its jurisdiction have conducted trade in Donbass. This shows that Ukraine itself has never genuinely recognised the DPR and LPR as terrorist organisations, nevertheless it seeks to deliberately mislead the Court about the nature of the DPR and LPR and to build its allegations of terrorism financing around this misrepresentation.
52. Moreover, Ukraine seeks to represent certain episodes of the armed conflict in Donbass as terrorist acts, such as certain allegations of indiscriminate shelling of residential areas. However, Ukraine itself was using aviation and heavy weapons against civilians and residential areas and does not consider that such situations constitute acts of terrorism.

A. UKRAINE NEVER SOUGHT A PEACEFUL SETTLEMENT IN DONBASS, HAVING INSTEAD USED MILITARY AVIATION AND HEAVY WEAPONS AGAINST CIVILIANS

i. Complete Disregard for the Minsk Agreements by Ukraine

53. One of the most significant attempts to end the conflict in Donbass, for which there were high hopes, was the Minsk Agreements that the representatives of Kiev and the DPR and LPR signed, as explained above.

⁵⁷ *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, I.C.J. Reports 2019, p.44, ¶123.

⁵⁸ *Jadhav Case (India v. Pakistan)*, Judgment, I.C.J. Reports 2019, , Declaration of Judge Iwasawa, p.521,¶3.

54. In its preliminary objections in another case before the Court, the Russian Federation has already elaborated on Kiev's absolute unwillingness to comply with the Minsk Agreements.⁵⁹ According to the Minsk Agreements, Kiev should have sought a consensus with the DPR and LPR on the modalities for local elections and on the specifics of the status of certain areas of the Donetsk and Lugansk regions.⁶⁰ Kiev, however, never started that dialogue. The Head of the DPR, Alexander Zakharchenko, who was one of the signatories to the Minsk Agreements, was assassinated through a targeted killing on 31 August 2018.⁶¹ On 7 February 2022, Ukraine's Foreign Minister stated that there will be "no negotiations with the militants".⁶² During all this time, the Russian Federation, as a mediator, constantly called for a peaceful dialogue between Ukraine and the DPR and LPR.⁶³
55. Importantly, Kiev's use of force against Donbass and lack of willingness to engage in dialogue went against the will of Ukrainian people. In July 2018, the Ukrainian newspaper "Government Courier" (*Uryadovy kuryer*) published the results of a nationwide survey on the future of Donbass. Only 17% of Ukrainian people spoke in favour of using military force for gaining control over the south-eastern region. In contrast, 70% respondents considered it possible to reach a political compromise with the DPR and LPR.⁶⁴

⁵⁹ [REDACTED]

⁶⁰ Minsk-2, ¶4.

⁶¹ The Guardian, *Rebel Leader Alexander Zakharchenko Killed in Explosion in Ukraine* (31 August 2018), available at: <https://www.theguardian.com/world/2018/aug/31/rebel-leader-alexander-zakharchenko-killed-in-explosion-in-ukraine> (Annex 191); Deutsche Welle, *Alexander Zakharchenko: The Latest Ukrainian Rebel Leader to Face an Abrupt Death* (2 September 2018), available at: <https://www.dw.com/en/alexander-zakharchenko-the-latest-ukrainian-rebel-leader-to-face-an-abrupt-death/a-45323653> (Annex 192).

⁶² European Pravda, *No Pressure over Concessions: Kuleba on Negotiations with Germany's Foreign Minister* (7 February 2022), available at: <https://www.euointegration.com.ua/rus/news/2022/02/7/7133666/> (Annex 193).

⁶³ For example, on 18 February 2022, President of the Russian Federation Vladimir Putin emphasized during his joint press-conference with President of Belarus Alexander Lukashenko that "Kiev is not complying with the Minsk Agreements and, in particular, is strongly opposed to a direct dialogue with Donetsk and Lugansk. Kiev is essentially sabotaging the agreements on amending the Constitution, on the special status of Donbass... All Kiev needs to do is sit down at the negotiating table with representatives of Donbass and agree on political, military, economic and humanitarian measures to end the conflict." See The Kremlin, *News conference following Russian-Belarusian talks* (18 February 2022), available at: <http://en.kremlin.ru/events/president/news/67809> (Annex 404).

⁶⁴ Uryadovy Kuryer, *On the Future of Donbass in Terms of Numbers* (21 July 2018), available at: <https://ukurier.gov.ua/uk/articles/pro-majbutnye-donbasu-movoyu-cifr/> (Annex 194).

56. Paragraph 4 of the Minsk Agreements prescribed that Kiev must promptly, and no later than 30 days after their signature, adopt a resolution through its Parliament specifying the areas in Donbass enjoying a special regime and adopt a law on special status of these areas.⁶⁵ On 16 September 2014, the Ukrainian Parliament formally passed a law “On the Special Procedure for Local Self-Government in Certain Areas of Donetsk and Lugansk Regions”. Its validity was, however, limited to one year with a possible prolongation, and its effect was circumscribed by Article 10, which contained a number of conditions that were not consistent with the Minsk Agreements.⁶⁶
57. Article 10 provided, among other things, that the special regime of self-government would be available only for the local authorities elected at extraordinary local elections. This was inconsistent with the first part of paragraph 4 of the Minsk Agreements, which prescribed that the modalities of local elections in Donbass should be negotiated in dialogue between Kiev, Donetsk and Lugansk. However, representatives of Kiev systematically refrained from such dialogue in the Minsk Contact Group formed under the Agreements. Moreover, in 2020 Kiev decided to exclude Donbass from the political framework of Ukraine by prohibiting local elections in the DPR and LPR, as well as in 18 districts controlled by Kiev.⁶⁷ Thus, this law never became operational as envisaged by the Agreements.
58. Moreover, on 18 January 2018, a law “On the Peculiarities of the State Policy on Ensuring Ukraine’s State Sovereignty over Temporarily Occupied Territories in Donetsk and Lugansk Regions”, also known as “the law on Reintegration of Donbass”, was adopted, which formally confirmed that the ATO was a military operation, and in effect excluded any possibility of political settlement within the framework of the Minsk Agreements.⁶⁸

⁶⁵ Minsk-2, ¶4.

⁶⁶ Law of Ukraine No. 1680-VII “On the Special Procedure for Local Self-Government in Certain Areas of Donetsk and Lugansk Regions”, 16 September 2014, Article 10, available at: <https://zakon.rada.gov.ua/laws/show/1680-18#n5> (Annex 469).

⁶⁷ Interfax-Ukraine, *Rada Appoints Next Elections to Local Self-Govt Bodies for Oct 25* (15 July 2020), available at: <https://en.interfax.com.ua/news/general/674837.html> (Annex 195); Freedomhouse.org, *Nations in Transit: Ukraine (2021)*, available at: <https://freedomhouse.org/country/ukraine/nations-transit/2021>. See also Resolution of the Verkhovna Rada of Ukraine No. 795-IX “On Calling Regular Local Elections in 2020”, 15 July 2020, available at: <https://zakon.rada.gov.ua/laws/show/795-IX#Text> (Annex 471).

⁶⁸ Law of Ukraine No. 2268-VIII “On the Peculiarities of the State Policy on Ensuring Ukraine’s State Sovereignty Over Temporarily Occupied Territories in Donetsk and Lugansk Regions”, 18 January 2018, available at: <https://zakon.rada.gov.ua/laws/show/2268-19#Text> (Annex 470).

As will be shown below,⁶⁹ a number of laws further constraining the use of the Russian language were adopted and became effective, which contradicted paragraph 11 of the Minsk Agreements.⁷⁰

59. The most blatant part of the non-implementation of the Minsk Agreements was the constant violation of its first paragraph – the immediate and comprehensive ceasefire. As of 21 July 2020, the SMM recorded more than 1.5 million ceasefire violations.⁷¹

60. Thus, despite repeated statements by high-ranking Ukrainian officials that the Minsk Agreements have no alternative, Kiev in fact used the document as a respite to strengthen its military capabilities and prepare for the final suppression of the Donbass people by military means.

i. Using heavy weapons in residential areas

61. The UAF have constantly shelled residential areas of Donbass, leaving dozens of dead and wounded each time. Below are just some of the most egregious facts of Kiev’s use of indiscriminate weapons against civilians:

- (a) On 2 June 2014, eight people were killed and 28 were seriously wounded as two Su-27s belonging to the UAF 831st Tactical Aviation Brigade bombed Lugansk.⁷² On 14 July 2014, the UAF shelled Mirny and Gaevoy districts of Lugansk, leaving at least 8 killed and 52 wounded.⁷³

⁶⁹ See below, Part 2, Chapter II (B).

⁷⁰ Counter-Memorial (CERD), ¶¶41, 43-51.

⁷¹ OSCE Thematic Report “Impact of the Conflict on Educational Facilities and Children’s Access to Education in Eastern Ukraine”, July 2020, p. 8, available at: <https://www.osce.org/files/f/documents/4/1/457690.pdf>.

⁷² See Vz.ru, *Ukraine's top seven war crimes against Donbas residents* (8 May 2022), available at: <https://vz.ru/society/2022/5/8/1157166.html> (Annex 42).

⁷³ See Lostarmour, *Shelling of the Mirny and Gaevogo Quarters by Grad MLRS Units on 14 July 2014* (29 November 2021), available at: <https://lostarmour.info/articles/obstrel-kvartalov-mirnyy-i-gaevogo-goroda-luganska-s-primeneniem-rszo-grad-14-iyulya-2014-goda#> (Annex 43); See also LiveJournal, *Lest We Forget – How Lugansk Was Shelled in July 2014* (15 July 2018), available at: <https://kot-sapog.livejournal.com/9104932.html> (Annex 44), MigNews, *Mirny and Gaevogo Quarters Attacked by Grad MLRS in Lugansk. PHOTOS. VIDEOS* (15 July 2014), available at: <https://mignews.com.ua/sobitiya/inukraine/3242109.html> (Annex 45); Photo of remains of the rocket part of 122 Grad MLRS projectile in the pavement at Andrey Linev Street, opposite the western end of the house at 79A, available at: <https://lostarmour.info/articles/obstrel-kvartalov-mirnyy-i-gaevogo-goroda-luganska-s-primeneniem-rszo-grad-14-iyulya-2014-goda#> (Annex 478).

- (b) On 15 July 2014, the UAF bombed Snezhnoye, DPR, with, at least, 11 civilians killed.⁷⁴
- (c) On July 27 2014, during a massive shelling of a civilian residential area in Gorlovka, DPR, the UAF killed 22 people, including 27-year-old Kristina Zhuk (known in the Russian Federation as “Gorlovka Madonna”) and her ten-month-old daughter Kira.⁷⁵
- (d) On 13 August 2014, UAF shelled the city beach of Zugres, DPR with 300mm Smerch MLRS cluster projectiles, leaving 13 killed, including 3 children, and more than 30 wounded.⁷⁶
- (e) On 28 August 2014, the UAF shelled Donetsk with 16 civilians killed.⁷⁷ On 22 January 2015, the UAF shelled the *Donetskgormash* bus stop in Donetsk. The OSCE SMM reported on 13 wounded and 8 dead.⁷⁸

⁷⁴ According to preliminary information, a Su-25 of the UAF fired at least six non-guided rocket projectiles. See VESTI.ru, *Airstrike at Snezhnoye: Militiamen Report Dead Civilians* (15 July 2014), available at: <https://www.vesti.ru/article/1842254> (Annex 46).

⁷⁵ See Vz.ru, *Ukraine's top seven war crimes against Donbas residents* (8 May 2022), available at: <https://vz.ru/society/2022/5/8/1157166.html> (Annex 42).

⁷⁶ See RT, “*Still No Answer*”: *Eighth Anniversary of Tragic Shelling of Children Beach in Zugres* (13 August 2022), available at: <https://russian.rt.com/ussr/article/1036237-zugres-plyaj-ukraina-obstrel-vsuvosem-let> (Annex 47).

⁷⁷ See TASS, *Ukrainian Shelling Killed at Least 11 in Donetsk* (28 August 2014), available at: <https://tass.ru/mezhdunarodnaya-panorama/1404809> (Annex 48).

See also OSCE SMM, Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 18:00 (Kyiv time), 27 August 2014, available at: <https://www.osce.org/ukraine-smm/123030>.

The OSCE SMM noted that: “The SMM observed continued shelling in Donetsk city and the increasing impact on the civilian population and infrastructure. In the residential area of Kalininski district, around five kilometres east of the city centre, the SMM observed that the House of Culture was in flames. Several fire brigade vehicles were working to bring the fire under control. Nearby, the SMM saw several five-floor apartment blocks with shattered window panes. The damage appeared to be consistent with shelling. In the same area the SMM observed a burning vehicle. Inside the car, the SMM saw the remains of three persons. In Kievskii district, around five kilometres north of the city centre, the SMM observed significant damage concentrated on residential buildings and shops located along the Kievski Boulevard”.

⁷⁸ Spot report by the OSCE Special Monitoring Mission to Ukraine (SMM), 22 January 2015, “Shelling Incident on Kuprina Street in Donetsk City, available at: <https://www.osce.org/ukraine-smm/135786> : “The SMM observed a trolleybus which had been hit by shrapnel and a burnt-out car 20m away, also hit by shrapnel. All windows in the trolleybus were shattered and tyres punctured. The SMM observed seven dead bodies, three females, three males and one of indeterminate gender. Three of the bodies were in the bus, three in close proximity to the bus – the furthest approximately 25m away – and one in the burnt-out car. At 16:00 hrs the SMM contacted a representative of Donetsk City Morgue, who said that eight bodies – related to the incident on Kuprina Street – had been received by the morgue.”

(f) On 1 October 2014, the UAF shelled Donetsk with 11 killed and more than 40 wounded. The targets were a public transport stop and school No. 57.⁷⁹

(g) On 14 November 2014, 20 civilians including 2 children were killed as a result of artillery shelling of residential areas of Donetsk and Gorlovka by the UAF.⁸⁰

62. Ukraine had not abandoned this tactic in later years but continued it to this day as has been shown in the Preliminary Objections in another case before this Court.⁸¹

ii. Using civilians as human shields

63. Since 2014, the UAF have never been shy of setting up their positions in close vicinity, literally in the backyards, of such socially important facilities as schools, kindergartens, hospitals, libraries, cultural centres, even when those objects remained operational with plenty of students or patients inside, so that in case of return fire they would be able to accuse the Russian Federation of “attacking civilians” and “destruction of civilian infrastructure”. In its Preliminary Objections in the other case before the Court, the Russian Federation drew attention to this fact.⁸²

64. The UAF troops and heavy equipment, deployed in residential areas close to the contact line in violation of the Minsk Package of Measures, were spotted multiple times by the OSCE Special Monitoring Mission in Ukraine (hereinafter – “OSCE SMM”) monitors.

⁷⁹ OSCE SMM, Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 18:00 (Kyiv time), 1 October 2014, available at: <https://www.osce.org/ukraine-smm/124979>. The OSCE SMM noted that: “SMM was alerted by representatives of the “DPR” “Ministry of Emergency Situations” about an incident close to a school in Kiev’skyi district (5 km north of the city centre), where shelling had allegedly caused civilian casualties. When at the scene, the SMM saw a large crater, one metre in diameter, some 50 metres from the school, which it assessed to have been the impact of a shell of an unspecified nature. The SMM was guided inside the building by “DPR” representatives, who showed the SMM two bodies on the floor”.

⁸⁰ OSCE SMM, Latest from OSCE Special Monitoring Mission (SMM) to Ukraine, based on information received as of 18:00 (Kyiv time), 16 November 2014, available at: <https://www.osce.org/ukraine-smm/126802>. The OSCE SMM noted that: “On 15 and 16 November the SMM visited the headquarters of the JCCC in Debaltseve (55 km north-east of Donetsk), where Ukrainian and the Russian Federation (RF) officers worked together with members of the so-called “Donetsk People’s Republic” (“DPR”) and “Lugansk People’s Republic” (“LPR”). The shelling of Horlivka (43km north-east of Donetsk) on 15 November, which allegedly resulted in several civilian casualties including children, was acknowledged by all participants of the JCCC”.

⁸¹

⁸²

For example, in the Daily Report of 31 March 2018 of OSCE SMM reported on digging trenches outside of civilian house occupied by UAF military personnel:

“An SMM mini-UAV spotted on 29 March recently dug trenches about 40m from a residential house on the south-eastern edge of Travneve (government-controlled, 51km north-east of Donetsk)”.⁸³

65. The picture of the above-mentioned house was later demonstrated by the OSCE SMM deputy head, Mr Alexander Hug, while delivering the briefing for the Diplomatic Corps at the SMM headquarters in Kiev on 30 March 2018.⁸⁴

66. On 4 December 2018, an SMM mini-UAV spotted a surface-to-air missile system (9K33 Osa) near Klinovoe (68 km north-east of Donetsk) along with a group of UAF soldiers outside of an occupied civilian house.⁸⁵

67. In Disengagement Areas, UAF used civilian houses as a cover for trenches and armoured vehicles, in order to be able to maintain their position, illegally taken in so called “grey zone”. Thus, in OSCE SMM Daily Report of 23 April 2018 it was emphasised that:

“The SMM observed armoured combat vehicles and an anti-aircraft gun in the security zone. In government-controlled areas, the SMM saw on 20 April four infantry fighting vehicles (IFV) (BMP-2) and an armoured reconnaissance vehicle (BRDM-2) near Zolote-1/Soniachnyi, two IFVs (BMP-2) near Zolote, five IFVs (BMP-2) near Zolote-3/Stahanovets, an armoured reconnaissance vehicle (BRM-1K) near Zolote 2 (60km west of Luhansk)... On 21 April, the SMM saw... three armoured reconnaissance vehicles (BRDM-2) and two IFVs (BMP-1) on flatbed trucks near Zolote... On 22 April, the SMM saw two IFVs (BMP-2) near Zolote...”⁸⁶

68. The picture of one of the above mentioned IFV’s captured by OSCE SMM mini-UAV was demonstrated during the OSCE SMM Deputy Head Mr Alexander Hug’s briefing for the Diplomatic Corps in Kiev, on 14 May 2018.⁸⁷

⁸³ Latest from the OSCE Special Monitoring Mission to Ukraine (SMM), based on information received as of 19:30, 30 March 2018, available at: <https://www.osce.org/special-monitoring-mission-to-ukraine/376672>.

⁸⁴ The OSCE SMM Deputy Chief Monitor Alexander Hug’s briefing for the Diplomatic corps, Photo, 30 March 2018 (Annex 353).

⁸⁵ Latest from the OSCE Special Monitoring Mission to Ukraine (SMM), based on information received as of 19:30, 5 December 2018, available at: <https://www.osce.org/special-monitoring-mission-to-ukraine/405533>.

⁸⁶ Latest from the OSCE Special Monitoring Mission to Ukraine (SMM), based on information received as of 19:30, 22 April 2018, available at: <https://www.osce.org/special-monitoring-mission-to-ukraine/378643>.

⁸⁷ The OSCE SMM Deputy Chief Monitor Alexander Hug’s briefing for the Diplomatic corps, Photo, 14 May 2018 (Annex 353).

69. In SMM Daily Report of 24 May 2018 it was noticed that:

“Beyond withdrawal lines but outside designated storage sites, in government-controlled areas, on 22 May an SMM mini-UAV spotted three surface-to-air missile systems (9K35) about 50m south-east of a school building in Tarasivka (43km north-west of Donetsk) ... In violation of withdrawal lines in government-controlled areas, on 21 May an SMM mini-UAV spotted two surface-to-air missile systems (9K35 *Strela-10*) in a residential area of Teple (31km north of Luhansk) within 200m of a civilian house, on 22 May an SMM mini-UAV spotted a surface-to-air missile system (9K35) about 2km north-east of Teple, an SMM long-range UAV spotted two surface-to-air missile systems (9K33 *Osa*)”.⁸⁸

70. The pictures of the above mentioned UAF equipment along with students staying outside of the school buildings were later demonstrated by the SMM deputy head Mr Alexander Hug while delivering the briefing for the Diplomatic Corps at the SMM headquarters in Kiev on 1 June 2018.⁸⁹

71. Thus, Ukraine used the barbaric practice of using civilians as a human shield as has been shown in Preliminary Objections in another case before this Court.⁹⁰

72. In the Memorial, Ukraine’s position on terrorism was built on the (false) premise that the DPR and LPR intentionally targeted civil and other protected objects with heavy weapons in order to force Ukraine to peace talks and elicit significant concessions from it. In the Reply, and in view of the overwhelming evidence to the contrary that the Russian Federation submitted with the Counter-Memorial, Ukraine has essentially abandoned such allegations of terrorist intent and instead alleges that the DPR and LPR targeted Ukrainian military objects indiscriminately, while intentionally disregarding collateral loss of civilians or damage to the objects protected by the International humanitarian law (“IHL”).⁹¹

73. Although this argument was apparently devised so as to overcome the unachievable evidentiary hurdle of proving terrorist intent, it is nothing more than cynical for Ukraine

⁸⁸ Latest from the OSCE Special Monitoring Mission to Ukraine (SMM), based on information received as of 19:30, 23 May 2018, available at: <https://www.osce.org/special-monitoring-mission-to-ukraine/382423/>.

⁸⁹ Photo of the UAF Surface to Air missiles 52 meters from public school in Tarasovka, Donetsk region, 22 May 2018 (Annex 358).

⁹⁰

⁹¹ See, for example, Reply, ¶249.

to embrace this new theory because whatever collateral damage the armed conflict in Ukraine caused, it was predominantly due to Ukraine's own persistent policy to use the civil objects, its own civilians, and even civil aviation, as a human shield.

74. IHL makes it a war crime to force non-combatants to serve as human shields. From the very beginning of the military conflict in Donbass, the UAF did exactly what the IHL prohibits:

- (a) **First**, Ukraine conducted military air raids in the airspace over the conflict zone but at the same time did not halt intensive civilian air traffic over this territory. Ukraine did not re-consider closing airspace for civil aircraft even after the DPR and LPR claimed that they had “heavy-anti-aircraft systems” to shoot down Ukrainian military aircraft,⁹² and even after their militia indeed shot down an Ilyushin Il-76 transport aircraft of the 25th Transport Aviation Brigade of the Ukrainian Air Force.⁹³ In this way, Ukraine used the presence of civil aviation in the area to shield its fighter jets and complicate any efforts by the militia groups to intercept and shoot them down.
- (b) **Second**, Ukraine marshalled and used civilian-marked vehicles to transport its military personnel within the conflict zone.⁹⁴ While there is no evidence that the civil bus affected by the shelling in Volnovakha was ever a target, even if it were, an attack on it would have been the product of the provocative transportation practices by Ukraine rather than indiscriminate fire by the militia groups.
- (c) Ukraine located its heavy artillery and other military equipment in densely populated areas. For example, the UAF stationed T-64BV tanks, two armoured personnel carriers “Saxon” and Gaz-66 military truck in the civil residential district of Avdeyevka.⁹⁵

⁹² Informnapalm, *Anti-Terrorist Operation: Summary for June 29, 2014* (30 June 2014), available at: <https://informnapalm.org/en/anti-terrorist-operation-summary-for-june-29-2014/>.

⁹³ Statement by the Delegation of Ukraine at the 758-th FSC Plenary Meeting (18 June 2014 at 10.00, Hofburg), FSC.DEL/116/14, 19 June 2014, available at: <https://www.osce.org/files/f/documents/0/0/120104.pdf>.

⁹⁴ VPK News, *Even school buses have been mobilised in Ukraine* (14 April 2021), available at: https://vpk.name/news/500051_na_ukraine_mobilizovali_dazhe_shkolnye_avtobusy.html (Annex 479), The Times of Israel, *Ukraine: Pro-Russian militants seize bus carrying int'l observers* (25 April 2021), available at: <https://www.timesofisrael.com/ukraine-pro-russian-militants-seize-bus-carrying-intl-observers/>.

⁹⁵ Counter-Memorial (ICSFT), Annex 2, Expert Report of Major General Valery Alexeevich Samolenkov (“First Samolenkov Report”), p. 90.



Ukrainian soldiers and tanks in Avdiivka, Ukraine, in Feb. 2, 2017. (Brendan Hoffman / Getty Images)

75. T-64BV tanks, two armoured personnel carriers “Saxon”, Gaz-66 military truck from the Bellingcat⁹⁶ article
76. Ukraine’s unlawful practices of using civilians as human shields have undoubtedly made it difficult for the militia groups to target military objects without at the same time affecting civil objects.

B. UKRAINE CONTINUED TO TRADE OPENLY WITH DONETSK AND LUGANSK

77. Ukraine's hypocritical approach to interpreting the ICSFT in the context of this case can be illustrated by its own practice of applying the relevant article of its own Criminal Code and continuing trade with the DPR and LPR.
78. It should be noted that Article 258-5 on “financing of terrorism” was incorporated into the Criminal Code of Ukraine by Law No. 2258-VI of 18 May 2010. However, as the practice of its application shows, it has not been used for the real fight against the financing of terrorism, but solely as a repressive tool against the people of Donbass, as well as the opponents of the current Kiev authorities.

⁹⁶ Bellingcat, *Ukrainian Tanks in Avdiivka Residential Area* (3 February 2017), available at: <https://www.bellingcat.com/news/uk-and-europe/2017/02/03/ukrainian-tanks-avdiivkaresidential-area/> (Counter-Memorial (ICSFT), Annex 258).

79. The Unified Register of Court Decisions of Ukraine contains only 14 verdicts in criminal cases of “financing of terrorism”.
80. In a number of cases, charges of “financing of terrorism” were brought against residents of Donbass whose only “crime” was to make life easier for civilians in the region, such as entrepreneurs who provided money transfer services to Kiev-controlled territory. These services were in especial demand among ordinary people, who were deprived of the opportunity to transfer money to their relatives due to the shutdown of Ukrainian banks in the DPR and LPR. The clients’ money was physically transported by a “broker” across the Contact Line, deposited into the “broker’s” personal account in a Ukrainian bank, and then transferred to the recipient’s account on behalf of the “broker”.
81. On 28 December 2015, the Darnitsky District Court in Kiev convicted two residents of the Lugansk region for such a “crime”. The text of the judgment explicitly stated, in a cursory manner, that the accused committed the acts they were charged with, “realizing that there was a shortage of cash in the financial market of Lugansk region”.⁹⁷
82. The dire situation with the banking services was created by Kiev’s decision to discontinue any such services for the people of the DPR and LPR. The Government of Ukraine should have restored such services in accordance with the Minsk Agreements, but never did so.
83. People have also been prosecuted for ordinary business activities that had nothing to do with the conflict in Donbass. On 29 March 2018, for example, the Zarechny District Court of Sumy convicted the CEO of Snack Export LLC for the supply of snacks and beer to the LPR.⁹⁸
84. Against this background, as pointed out in the Counter-Memorial,⁹⁹ Ukraine and its enterprises have been trading coal, steel and other goods with the DPR and LPR. This trade has been going on for years and was advocated for by Ukrainian top-level

⁹⁷ The sentence of the Darnitsky District Court in Kiev of 28 December 2015, available at: <http://web.archive.org/web/20161124011138/https://reyestr.court.gov.ua/Review/54799070> (Annex 426).

⁹⁸ Unn.com.ua, *Financing of terrorism by Rybalka's companies: pre-trial investigation continues, examinations appointed* (17 October 2018), available at: <https://www.unn.com.ua/uk/news/1758010-finansuvannya-terorizmu-kompaniyami-ribalki-dosudove-rozsliduvannya-trivaye-priznachenie-ekspertizi> (Annex 296).

⁹⁹ Counter-Memorial (ICSFT), ¶18.

politicians.¹⁰⁰ With the tacit approval of the Ukrainian government, Ukrainian coal mining companies continued to operate freely in Donbass.

85. According to the Ministry of Energy and Coal Industry of Ukraine, the country's coal industry produced about 65 million tons of coal in 2014 and about 40 million tons in 2015 as well as in 2016. At the same time, according to Ernst & Young, a significant part of this coal came from the so called "temporarily occupied territories": at least 15.7 million tons in 2014, 5.4 million tons in 2015 and 11.4 million tons in 2016. At the beginning of 2016, 85 out of 150 Ukrainian coal mines were located in the DPR/LPR, including all those producing "A" grade coal (anthracite).¹⁰¹
86. Ukrainian authorities were hesitant to publish in the public domain statistics on coal production in Donbass. At the same time, amid the annual decline in coal production in Ukraine, the Donbass coal deposits became increasingly important to the country's economy.
87. In 2016 Ukrainian TV channel "1+1" covered a visit of Igor Nasalik, Minister of energy and coal of Ukraine industry, to the DPR. Mr Nasalik was shown having a meeting in Donetsk with the minister of taxes and fees of the DPR and discussing the conditions of coal supply from the DPR to Ukraine. In particular, Mr Nasalik asked his counterpart whether there were any problems with supplying coal from the DPR-controlled territory to Ukraine, and was told that "today there are no obstacles to supplying coal to Ukrainian territory".¹⁰² Statements by Ukraine's Deputy Prime Minister Kistion and Minister for "Temporarily Occupied Territories and Internally Displaced Persons" Chernysh said that in March 2017, Ukraine's yearly demand for Donbass coal amounted to up to 9 million tons.¹⁰³

¹⁰⁰ See Unian, *Ukraine cannot do without coal from the occupied territories - head of the SBU* (26 January 2017), available at: <https://www.unian.ua/politics/1744361-ukrajina-ne-moje-obytyisya-bez-vugillya-z-okupovanih-teritoriy-glava-sbu.html> (Annex 70).

¹⁰¹ See Open Data portal, *National Report of Ukraine in the Framework of the Extractive Industries Transparency Initiative* (2016), available at: <https://web.archive.org/web/20180831064958/https://data.gov.ua/dataset/da1849bf-140f-4161-a71f-2f6a904fffb5>.

¹⁰² YouTube, *Nasalik in the DPR* (19 July 2016), available at: <https://www.youtube.com/watch?v=3gMHY0sxB0>.

¹⁰³ See Zaxid.net, *Deputy Prime Minister says how much coal Ukraine buys from the occupied territories* (16 December 2016), available at:

88. It is also possible to estimate the scale of coal supplies from Donbass from the commentary by the press service of Ukrainian Railways of 15 February 2017, according to which Ukrainian thermal power plants did not receive more than 240 thousand tons of anthracite after 20 days of railroad blocking by “ATO veterans”.¹⁰⁴
89. The energy sector of the DPR and LPR up to 2017 was mainly controlled by the Donbass Fuel and Energy Company (“DTEK”) Holding and Krasnodonugol PJSC, belonging to Ukrainian oligarch Rinat Akhmetov, the Zasyadko Mine, as well as by numerous state enterprises subordinate to the Ministry of Energy and Coal Industry of Ukraine. DTEK operated 12 coal mines in the DPR and LPR (out of its total of 30). It is clearly seen from the DTEK auditor's reports for 2014-2017 published on the Holding’s website.¹⁰⁵
90. As it is shown in **Appendix 1** to this Rejoinder, the coal trade with the DPR and LPR was conducted actively without any interference from law enforcement authorities. The only investigation concerning the supply of coal from the DPR and LPR to the territories controlled by Kiev was initiated in September 2016 in order to put pressure on political opposition. After Petr Poroshenko ceased to be President of Ukraine, he also became a suspect in this case. On 20 December 2021, *i.e.*, two and a half years after he had left office as the President, the Pechersky District Court in Kiev decided on a measure of restraint in the form of personal obligation for the former president.¹⁰⁶ According to this investigation, president Poroshenko exerted administrative pressure on the Ministry of Energy and Coal Industry, the NBU and Centrenergo PJSC to pay money directly to the leaders of the LPR and DPR and to conclude direct contracts for the sale of coal with them. In total, during 2015, Ukraine transferred at least UAH 205.391 million for the

https://zaxid.net/vitsepremyer_povidomiv_skilki_vugillya_kupuye_ukrayina_z_okupovanih_teritoriy_n1412782 (Annex 71); See also Cenzor.net, *Chernysh Is Against Ban On Goods Transportation Through Contact Line* (26 December 2019), available at: https://cenzor.net.ua/news/421058/chernysh_protiv_zapreta_na_provoz_tovarov_cherez_liniyu_soprikosnoveniy_a_na_donbasse_neobhodimo_imet (Annex 72).

¹⁰⁴ Ukrainian railway, *Due to the blocking of train traffic in the Donbass, Ukraine did not receive almost 240 thousand tons of thermal coal, and the industry suffered UAH 53.5 million in losses* (15 February 2017), available at: https://web.archive.org/web/20220328103230/https://www.uz.gov.ua/press_center/up_to_date_topic/445344/ (Annex 73).

¹⁰⁵ See DTEK Energy B.V. Abbreviated IFRS Consolidated Financial Statements, 31 December 2015, pp. 5-6, 17, available at: <http://web.archive.org/web/20201030073416/https://dtek.com/content/files/fy2015/dtek-energy-2015-ifrs-fs.pdf> (Annex 485); FY 2016 Results Corporate Presentation DTEK Energy B.V., April 2017, pp. 17-18, available at: <http://web.archive.org/web/20170712221415/http://www.dtek.com/content/files/ir-presentation-fy-2016.pdf> (Annex 477).

¹⁰⁶ Hromadske, *“Coal case”: Poroshenko was appointed a personal obligation* (19 January 2022), available at: <https://hromadske.ua/posts/vugilna-sprava-poroshenka-vidpustili-pid-osobiste-zobov'yazannya> (Annex 75).

supply of coal from the LPR and DPR, in addition to the funds paid in cash. According to the signed agreements, more than 3 billion. 168 million UAH were to be transferred.¹⁰⁷

91. It is important to note that so far there has seemed to be no progress in the investigation of this criminal case. Until now Petr Poroshenko is free and not restricted in his movements in Ukraine and abroad, he can freely contact any persons and dispose of his assets. Thus, it is obvious that this “coal” investigation was initiated and is being conducted solely to put pressure on political opponents of Vladimir Zelensky, not to investigate the mythical “financing of terrorism”.
92. The above confirms that Ukraine's authorities, while verbally labelling the DPR and LPR as “terrorists” and branding any trade operations with the republics as “terrorist financing”, at the same time conducted trade activities with Donetsk and Lugansk themselves. Ukraine's top leadership, including President Poroshenko and members of the government, actively facilitated these trade activities.

¹⁰⁷ Slovo i dilo, *Coal case of Poroshenko-Medvedchuk: details of procurement announced by SBI* (17 January 2022), available at: <https://www.slovoidilo.ua/2022/01/17/novyna/polityka/vuhilna-sprava-poroshenka-medvedchuka-dbr-ozvuchyly-vytraty-derzhbyudzhetu> (Annex 74).

III. THE REQUIREMENTS FOR THE ESTABLISHMENT OF TERRORISM FINANCING UNDER ARTICLE 2 OF THE ICSFT

93. Article 2 of the ICSFT, in its relevant part, provides:

“1. Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

(a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or

(b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature 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 ...”.

94. As explained in the Counter-Memorial, this provision is central to the present case.¹⁰⁸ In its Judgment of 8 November 2019, the Court determined that:

“The ICSFT imposes obligations on States parties with respect to offences committed by a person when ‘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 of terrorism as described in Article 2, paragraph 1 (a) and (b)’.”¹⁰⁹

95. In other words, and as Ukraine agrees,¹¹⁰ the substantive provisions of the ICSFT apply only in respect of the offence of terrorism financing as defined in Article 2. For Ukraine to establish that the Russian Federation has violated any of its obligations under the Convention (*quod non*),¹¹¹ it must accordingly demonstrate that the relevant requirements found in the *chapeau* of Article 2(1), as well as in sub-paragraphs (a) or (b) thereof, are met. The ICSFT, in short, is not a general treaty of cooperation on criminal matters, not least a comprehensive convention on combating terrorism, but a convention criminalizing

¹⁰⁸ Counter-Memorial (ICSFT), ¶¶104-106.

¹⁰⁹ Judgment of 8 November 2019, p. 585, ¶59. Order of 19 April 2017, p. 131, ¶74 (“... the obligations under Article 18 and the corresponding rights are premised on the acts identified in Article 2, namely the provision or collection of funds with the intention that they should be used or in the knowledge that they are to be used in order to carry out acts set out in paragraphs 1 (a) and 1 (b) of this Article”).

¹¹⁰ Written Statement of Observations and Submissions, ¶200 (“... the entire architecture of the treaty hinges on the Article 2 offence”).

¹¹¹ See below, Part 1, Chapter VIII.

one specific offence – terrorism financing – and establishing a cooperation mechanism to prevent and punish it.

96. This chapter responds to Ukraine’s Reply insofar as it concerns the interpretation of Article 2 of the ICSFT. **Section A** addresses the mental elements of “intention” or “knowledge” necessary for the establishment of terrorism financing under the chapeau of Article 2(1) of the ICSFT. **Section B** deals with the requirements for acts of terrorism under Article 2(1)(a) of the ICSFT, read together with Article 1(1)(b) of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (the “Montreal Convention”) and Article 2(1) of the International Convention for the Suppression of Terrorist Bombing (the “ICSTB”). **Section C** addresses the requirements for acts of terrorism within the meaning of Article 2(1)(b) of the ICSFT. Finally, **Section D** addresses the rules of IHL that are relevant to the interpretation and application of the ICSFT.
97. As a preliminary remark, the manner in which Ukraine’s case under the ICSFT has evolved needs to be highlighted. When Ukraine initiated these proceedings, its main objective was to accuse the Russian Federation not of a failure to cooperate to prevent and punish terrorism financing, but of engaging in terrorism financing itself. In the Memorial, for example, it was claimed that the Russian Federation “transferred vast quantities of dangerous weapons and other funds to groups on Ukrainian soil known to engage in terrorist acts”,¹¹² and Ukraine even went as far as to suggest that the Russian Federation “insist[ed] on its own prerogative to finance terrorism”.¹¹³ These accusations are baseless and firmly rejected by the Russian Federation. Furthermore, it must be recalled that, in its Judgment of 8 November 2019, the Court decided in no unclear terms that “[t]he financing by a State of acts of terrorism is not addressed by the ICSFT. It lies outside the scope of the Convention”.¹¹⁴ The scope of Ukraine’s initial case was thereby significantly reduced.
98. Ukraine has had no choice but to focus in its Reply on some of the actual obligations arising under the ICSFT (Articles 8-16). At this stage of the proceedings, some of the

¹¹² Memorial, ¶22.

¹¹³ *Ibid.*, ¶305.

¹¹⁴ Judgment of 8 November 2019, p. 585, ¶59.

main issues that divide the Parties are the definition and scope of the mental elements of “intention” and “knowledge”, and the threshold of evidence that must be met for establishing the commission of the relevant offences under Article 2 and triggering the obligations of cooperation and legal assistance under the Convention. The various elements of Article 2, properly interpreted in accordance with Articles 31 to 33 of the VCLT, provide an answer to this, as the Russian Federation showed in its Counter-Memorial and will do so again in the sections below. Yet in the end, regardless of whether the Russian Federation’s or Ukraine’s interpretation of the ICSFT, the Montreal Convention and the ICSTB is upheld, the main difficulty faced by Ukraine is that it cannot conclusively prove, on the facts, that terrorism financing or any other terrorist offence related to such alleged financing took place. Chapters V-VII below address these facts in greater detail.

A. THE “INTENTION” OR “KNOWLEDGE” NECESSARY FOR THE OFFENCE OF TERRORISM FINANCING UNDER THE CHAPEAU TO ARTICLE 2(1) OF THE ICSFT

99. Article 2(1) of the ICSFT stipulates that a person commits the offence of financing of terrorism 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*” to carry out the acts of terrorism that Articles 2(1)(a) and 2(1)(b) refer to.¹¹⁵ As explained in the Counter-Memorial, the mental elements of “intention” and “knowledge” in the *chapeau* play a particularly important role in the structure and application of the Convention.¹¹⁶ They are, as it is clear from the plain text of the provision, distinct and alternative.¹¹⁷ “Intention” refers to specific intent or *dolus specialis*, that is, the intention to “obtain[] a certain result prohibited by the texts, namely the pursued goal”, to the exclusion of indirect intent and recklessness: the intent is that the funds “should be used” to carry out the acts of terrorism referred to.¹¹⁸ By contrast, “knowledge” refers to *actual awareness* of the fact that funds “are to be used” to carry out a terrorism offence. Contrary to what Ukraine sought to argue in its Memorial, this requirement under Article 2(1) must not be confused with awareness of a “possibility”,

¹¹⁵ *Emphasis added.*

¹¹⁶ Counter-Memorial (ICSFT), ¶¶107-110.

¹¹⁷ *Ibid.*, ¶¶111-112.

¹¹⁸ *Ibid.*, ¶¶115-116. *See also* Reply, ¶111 (“Ukraine does not advocate a recklessness standard, which would be much broader than the principle reflected in Article 2 [of the ICSFT] ...”).

“probability” or “risk” that funds may be used to commit acts of terrorism – terms which are nowhere to be seen in the text.¹¹⁹ The Russian Federation’s interpretation of the *chapeau* of Article 2(1) is consistent not only with the ordinary meaning of its terms, but also its context within the Convention,¹²⁰ object and purpose,¹²¹ the *travaux préparatoires*,¹²² and States’ practice in the domestic implementation of the Convention.¹²³

100. Ukraine did not engage with most of these arguments in the Reply. Conscious of the impossibility to prove the “intent” requirement under Article 2(1) in light of the facts of the case, Ukraine focuses on the interpretation of the mental element of “knowledge” alone,¹²⁴ and continues to advance, contrary to the ordinary sense of the provision, that “knowledge” that funds “are to be used” to commit a terrorism offence is not necessary for terrorism financing to be established. Citing a single commentator, Ukraine rather proposes as a “common-sense principle” that “the financing of a group which has notoriously committed terrorist acts would meet the requirements” of Article 2(1).¹²⁵ It suggests that this is “the only way to give the Convention practical effect” because “terrorist perpetrators generally engage in terrorist acts alongside other activities”.¹²⁶
101. Contrary to what Ukraine asserts, the Russian Federation has not agreed with this interpretation of Article 2(1) of the ICSFT,¹²⁷ which essentially seeks to read out of the provision the mental elements of “intent” and “knowledge”. The correct interpretation of the “knowledge” requirement, as noted above, is that actual knowledge that funds are to be used to commit an act of terrorism must be established: the funder must know, with certainty, that those funds will be used to commit the relevant terrorism offences as defined in the ICSFT and other anti-terrorism treaties. There is thus no “notoriety test”

¹¹⁹ Counter-Memorial (ICSFT), ¶¶117-118.

¹²⁰ *Ibid.*, ¶¶119-123.

¹²¹ *Ibid.*, ¶¶124-126.

¹²² *Ibid.*, ¶¶127-136.

¹²³ *Ibid.*, ¶¶137-144.

¹²⁴ Reply, ¶99 *ff.*

¹²⁵ *Ibid.*, ¶100.

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*, ¶¶101, 112.

in the Convention which might set the threshold lower than the actual requirements stipulated in Article 2(1).

102. Naturally, there may be some cases, such as the designation of *Al-Qaeda* as a terrorist organisation by the UN Security Council under Chapter VII of the UN Charter,¹²⁸ where there exists a clear international consensus regarding the terrorist activities of a given group, as determined by a competent international organ. There is no question here about a certain terrorist group being “notorious” by virtue of some unspecified and vague criteria – rather, the highest international body charged with dealing with terrorism-related issues – the UN Security Council – after a proper assessment, listed the group as such. In the case of the UN Security Council, States are obliged to accept and carry out its decisions, including determinations of the terrorist nature of an organisation, by virtue of the UN Charter.
103. The DPR and LPR, which were at the relevant time territorial administration units, clearly do not fall within the category of groups like *Al-Qaeda*, as they have never been listed as a “terrorist organization” by any competent international body, not least the UN Security Council. In this regard, it should also be noted that Ukraine itself has never even tried to put this issue before any such body, which confirms that it does not entertain any serious hope to show, with any degree of conclusiveness, that the DPR or LPR may be viewed as terrorist organisations. Ukraine’s behaviour in this regard must be seen in its proper context, that is, the existence of an armed conflict between itself and the DPR and LPR, during which the parties involved can be reasonably presumed to have acted on the basis of military necessity, as opposed to an intention to commit terrorism offences in the absence of conclusive evidence to that effect.¹²⁹
104. The threshold that Ukraine puts forward to meet its “notoriety test” (nowhere to be found in the text of the Convention) is remarkably low and vague, suggesting that States would be obligated to act upon inconsistent assertions of one single State, even if the latter only occasionally refers to a certain group as a “terrorist organization” for mere political purposes. In particular, Ukraine maintains that it suffices for it to rely on a few statements by itself (and itself alone) labelling the DPR and LPR as “terrorist organizations”, even

¹²⁸ Counter-Memorial (ICSFT), ¶125.

¹²⁹ See below, Part 1, Chapters V-VI.

if at the same time Ukraine concluded the Minsk Agreements with these entities, which were later endorsed by resolution 2202 (2015) of the UN Security Council¹³⁰ and conducted trade activities that took place between Ukraine and the DPR and LPR over the years.¹³¹ If this were to be what is required by Article 2(1) of the ICSFT, it would mean that any State's labelling of any entity, however improbable or politically charged, to be a "terrorist organisation" would somehow trigger all States' obligations under the Convention, as well as the possible criminal responsibility of individuals for terrorism financing. Such a vague and subjective approach cannot stand any scrutiny.

105. Ultimately, Ukraine appears not to insist on its suggested "notoriety test",¹³² as it is well aware that the DPR and LPR are not and have never been considered (not even by Ukraine in a consistent manner) terrorist organisations at the international level. Instead, it falls back to the basic position under the ICSFT: what is crucial is not "labels or designations of groups" as terrorists by international organizations, a group of States, or even a single State, but rather the *acts* that an alleged offender objectively carries out: "the Convention was designed to address acts, not legal or political labels".¹³³

106. In this regard, Ukraine's statement that "the point of the careful drafting of Article 2(1) was to exclude political judgments and characterisations, and to instead focus on acts"¹³⁴ deserves special consideration. Ukraine labelled the DPR and LPR as "terrorist entities" long before the occurrence of any of the events it brings up as alleged "terrorist acts" in the present case. Importantly, in April 2014, Ukraine's war against the people of Donbass had already been labelled by Kiev as an "anti-terrorist operation" against anyone who took up arms. Ukraine's characterisation of the DPR and LPR as terrorist organisations was therefore pure and simply political. According to Ukraine's own logic, these "political labels" could not have been considered sufficient grounds for triggering the

¹³⁰ Reply, ¶¶214, 230, 241, 294. The Minsk Agreements included a roadmap for the resolution of the conflict which is irreconcilable with Ukraine's labeling of the DPR and LPR as "terrorist organizations". The Agreements included provisions relating to, *inter alia*, ceasefire obligations, the launch of a dialogue between the Ukrainian government and the DPR and LPR with a view to agreeing on modalities for local elections, ensuring the pardon and amnesty of persons involved in the armed conflict, release and exchange of hostages, and facilitating humanitarian assistance. See UN Security Council resolution No. 2202, 2015, ¶¶1-7.

¹³¹ See below, Appendix 1.

¹³² Memorial, ¶281.

¹³³ Reply, ¶115. See also ¶101.

¹³⁴ *Ibid.*, ¶116.

application of the ICSFT – yet at the same time Ukraine demands that the Russian Federation should have taken them at face value and treated the DPR and LPR as terrorist organisations.

107. The Reply further recognises that recklessness is not covered by the ICSFT:

“Ukraine does not advocate a recklessness standard, which would be much broader than the principle reflected in Article 2: *actual knowledge* that the funder is providing assets to a group that is known to commits terrorist acts establishes the mental element of the offense”.¹³⁵

108. Ukraine also repeats that “[i]t 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)”.¹³⁶ However, Ukraine’s assertion that the inferral of *mens rea* from objective factual circumstances constitutes a “well-established principle of international law” (without specifying its source) is wholly unsubstantiated. As already noted in the Counter-Memorial, when inference from context is allowed in treaties criminalizing certain offences, they do so expressly.¹³⁷ In support of its far-reaching claim, Ukraine refers only to the International Criminal Court’s “Elements of Crimes”; however, ICC documents are neither universal nor legally binding for those not Parties to the Rome Statute – and neither Ukraine nor the Russian Federation are such Parties. Furthermore, these “elements” concern war crimes, and not terrorism financing.

109. There is, on the contrary, much stronger evidence against Ukraine’s claim. In its Counter-Memorial, the Russian Federation has already referred to the International Monetary Fund’s Legal Department’s *Handbook for Legislative Drafting on suppressing terrorism financing* when showing how forms of *mens rea* other than direct intent are not covered by the ICSFT. The Handbook stipulates that the ICSFT does not state that the requisite

¹³⁵ *Ibid.*, ¶111. Ukraine also repeats that “[i]t 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)” (*ibid.*). As noted in the Counter-Memorial, however, when inference from context is allowed in treaties criminalizing certain offences, they do so expressly. See Counter-Memorial (ICSFT), ¶¶121-122. The Russian Federation notes that Ukraine’s assertion that the inferral of *mens rea* from objective factual circumstances constitutes a “well-established principle” (without specifying its source) is wholly unsubstantiated, with the exception of references to a few conventions, while ignoring many others.

¹³⁶ *Ibid.*

¹³⁷ Counter-Memorial (ICSFT), ¶¶121-122.

“intention” or “knowledge” as to the use of the funds may be inferred from objective circumstances:

“One of the criteria for compliance with these standards is stated as follows in the Methodology: “The offences of ML and FT should apply at least to those individuals and legal entities that knowingly engage in ML or FT activity. Laws should provide that the intentional element of the offences of ML and FT **may be inferred from objective factual circumstances.**”

The first sentence of the quoted section of the Methodology is consistent with the Convention, as knowledge is required (as an alternative to intent) in the definition of the offense itself in the Convention. **With respect to the second sentence of the criterion**, the idea that knowledge or intent should be inferred from objective factual circumstances was already present in the FATF 40 Recommendations on Money Laundering. Its origin can be found in the 1988 Vienna Convention, which states that: “Knowledge, intent or purpose required as an element of an offence set forth in paragraph 1 of this article may be inferred from objective factual circumstances.” **There is no similar provision in the [Terrorism Financing] Convention.** It is a matter for each jurisdiction to determine whether its general criminal law provides an equivalent standard applicable to terrorism financing offenses.”¹³⁸ [Emphasis added]

110. Later, however, Ukraine states:

“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.*”¹³⁹ [Emphasis added]

111. And Ukraine then makes yet another turn to say that:

¹³⁸ International Monetary Fund, Legal Department, SUPPRESSING THE FINANCING OF TERRORISM: A HANDBOOK FOR LEGISLATIVE DRAFTING (2003), p. 53, available at: <https://www.imf.org/external/pubs/nft/2003/SFTH/pdf/SFTH.pdf>.

¹³⁹ Reply, ¶105.

“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 . . .’”¹⁴⁰. [*Emphasis added*]

112. Ukraine thereby creates a confusion regarding the requirement of “knowledge” under Article 2(1) of the ICSFT: it says, on the one hand, that one must assess the “acts that [alleged terrorists] objectively carry out” for purposes of establishing this mental element. At the same time, Ukraine suggests that it suffices to somehow show that the recipients of funds are “terrorists” or a “group that is known to commit terrorist acts”, to then reiterate that it is not necessary to prove the existence of knowledge that funds are to be used for a specific terrorist act (as expressly required by the Convention), but rather for unspecified acts which may or may not constitute terrorism offences under Article 2(1)(b) of the ICSFT and other conventions pursuant to Article 2(1)(a).
113. Thus, while on the one hand Ukraine recognises that it is terrorist acts and their financing that “the Convention was designed to address”, it then tries to read into Article 2 of the Convention the notion of financing of “a group that is known to commit terrorist acts” which is nowhere to be found in the text. Furthermore, although Ukraine admits that the Convention was not designed to address “political labels”, it also argues that the obligations under the Convention can be triggered not only through actual (certain) knowledge that funds will be used for the commission of a terrorist act that falls under the Convention (such knowledge possibly being public through an official designation by the Security Council and its Sanctions Committees), but also by a label (of an entity allegedly being a “terrorist organization” or a person allegedly being a “terrorist”) by a single State for political reasons and even if that State is not consistent in such a labelling.
114. Ukraine attempts to prove this point by repeating what it previously stated in its Memorial and selectively quoting Article 2 of the ICSFT. In particular, it relies on the terms “in full or in part” used in Article 2(1), as well as Article 2(3), which states that “it shall not be necessary that the funds were actually used to carry out an offence referred to in paragraph 1, subparagraphs (a) or (b)”.¹⁴¹ Based on these provisions, Ukraine suggests that “[r]equiring the funder to possess particularised knowledge that the specific funds would be directed toward a specific terrorist act would undermine the treaty’s

¹⁴⁰ *Ibid.*, ¶107.

¹⁴¹ *Ibid.*, ¶¶102-104.

effectiveness”.¹⁴² Neither of these elements of Article 2, however, nullifies the mental element set out in the *chapeau* of Article 2(1): the funder must still have the knowledge that the funds being provided “are to be used . . . in order to carry out” the relevant offence; Article 2(1) does not stipulate that such funds “could” or “might” be used to commit such offences, or for some other purpose.¹⁴³ Whether “in full or in part”, the mental element remains, *i.e.* the funder must know that at least “part” of the funds will effectively be used for the commission of one of those offences. As for Article 2(3), Ukraine does not deny that it is not related to the mental element Article 2(1).¹⁴⁴

115. Ukraine’s reference to the preamble of the ICSFT, which notes in part that the financing of terrorism may be indirect “through organizations which also have or claim to have charitable, social or cultural goals or which are also engaged in unlawful activities such as illicit arms trafficking, drug dealing and racketeering, including the exploitation of persons for purposes of funding terrorist activities” is also of no assistance.¹⁴⁵ Ukraine suggests, based on this wording, that “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”.¹⁴⁶ Yet Ukraine again misses the point: the question is not whether an alleged funder may invoke a “defense” based on “uncertainty”, but the degree of knowledge the latter must have for the terrorism financing offence under the Convention to be established and the Convention’s cooperation obligations to be triggered. The object and purpose of the Convention is not the criminalisation of, and establishment of a cooperation regime with respect to, just *any* type of financing (which in itself is not unlawful), but the financing of *terrorist activities*. The text of Article 2(1) of the Convention, which requires actual knowledge that funds “are to be used” to commit a specific terrorist act as set out in various anti-terrorism conventions and in Article 2(1)(b) of the ICSFT, is perfectly compatible with this object and purpose.

¹⁴² *Ibid.*, ¶105.

¹⁴³ *See* Counter-Memorial (ICSFT), ¶118.

¹⁴⁴ *Ibid.*, ¶123; Written Statement of Observations and Submissions, ¶202.

¹⁴⁵ Reply, ¶¶106-107.

¹⁴⁶ *Ibid.*, ¶106.

116. It must be added that if actual knowledge that funds are to be used to commit terrorist acts was not required, the result would be that the ICSFT would criminalise the transfer of funds in an overly broad manner, making individuals criminally responsible for engaging in financial transactions with different types of entities and organisations that do not actually carry out, or plan to carry out, terrorist offences. Ukraine's view is that those individuals should have somehow known or assumed that the recipient of funds planned to carry out such offences simply because someone, somewhere in the world (*e.g.* in Ukraine's parliament), labelled that recipient as a terrorist or terrorist group, even if that labelling was made for political purposes. This position is clearly untenable, and all the more so in cases like the present one since it could lead to the disruption of humanitarian activities necessary in the context of an armed conflict.
117. Ukraine's appeal to the UNODC Legislative Guide to the Universal Legal Regime Against Terrorism is likewise misplaced.¹⁴⁷ First of all, it should be noted that the Legislative Guide was produced by the UNODC, not by the States Parties to the Convention or the UN Security Council or its specialised bodies, such as the Counter-Terrorism Committee (the "CTC") or Counter-Terrorism Executive Directorate (the "CTED"), bodies that are specifically tasked with addressing counter-terrorism activities. Thus, its value for the interpretation of the ICSFT is limited. Moreover, the section of the Guide which Ukraine quotes ("Elements of knowledge and intent") describes a hypothetical situation of a national criminal law provision that goes *beyond* the requirements of the ICSFT:

"The Financing Convention applies only to unlawful and willful provision or collection of funds 'with the intention that they should be used or in the knowledge that they are to be used, in full or in part, to carry out' specified violent acts. Some national laws have extended criminal liability to a person who 'has reasonable cause to suspect' that his or her participation, support or funds may be used for the purpose of supporting terrorist groups or actions. The question may arise whether proof of reasonable cause or suspicion is a standard of negligence or at most recklessness and not of intentional or knowing wrongdoing. Accordingly, a request for international assistance involving reasonable grounds to suspect terrorist activity may be attacked as not satisfying dual criminality under the Financing Convention. The opposing argument is that proof that an offender had reasonable cause to suspect the intended illegal use of funds allows an inference that the accused made a conscious decision to remain willfully blind to the illegality and therefore

¹⁴⁷ *Ibid.*, ¶108.

acted intentionally, or at least knowingly. Which view will prevail depends upon local jurisdiction and statutory language”.¹⁴⁸ [Emphasis added]

118. Thus, according to the plain text of the Guide, the ICSFT itself does not actually “extend” criminal liability to include “reasonable cause to suspect”. Indeed, the Guide unswervingly maintains the wording of Article 2(1), whether directly quoting or restating it. Furthermore, another UNODC document on the same topic – the more detailed Guide for the Legislative Incorporation and Implementation of the Universal Anti-Terrorism Instruments – does not engage in hypothetical situations and states clearly:

“According to the Convention’s definition, the *mens rea* or element of intention behind the financing of terrorism has two aspects: the act must be committed willfully and the offender must intend to use the funds to finance acts of terrorism or know that they will be used for that purpose. Intention and knowledge are thus two sides of the coin. In the absence of other information concerning these two aspects of the subjective element, it is advisable for each State to refer to its general criminal law”.¹⁴⁹ [Emphasis added]

119. As regards the *travaux* of the ICSFT, Ukraine relies on the personal recollections of one participant of the negotiations of the Convention, which it disingenuously presents as a “consensus” reached in 1999 without any reference to primary sources, in an attempt to bolster its interpretation of the mental element of “knowledge”¹⁵⁰ under Article 2(1). This does not however respond to what the Russian Federation clearly established in the Counter-Memorial: the drafting history of the ICSFT reveals that several proposals aimed at creating a standard of likelihood, recklessness or *dolus eventualis*, the threshold of which would be much lower than actual knowledge for purposes of establishing criminal responsibility, were consistently rejected by States.¹⁵¹ The *travaux* thus confirm that “knowledge” means actual knowledge that funds “are to be used, in full or in part, in order to carry out” terrorist acts, following the ordinary meaning of the terms of Article 2(1).

¹⁴⁸ UNODC, Legislative Guide to the Universal Legal Regime Against Terrorism 2008, p. 30, available at: https://www.unodc.org/documents/terrorism/Publications/Legislative_Guide_Universal_Legal_Regime/English.pdf.

¹⁴⁹ UNODC, Guide for the Legislative Incorporation and Implementation of the Universal Anti-Terrorism Instruments, 2006, p. 19, ¶52 (emphasis added), available at: https://www.unodc.org/documents/terrorism/Publications/Guide_Legislative_Incorporation_Implementation/English.pdf.

¹⁵⁰ Reply, ¶¶110-111.

¹⁵¹ Counter-Memorial (ICSFT), ¶¶127-136.

120. Even if Ukraine’s “notoriety test” were correct (*quod non*), the question that remains, as Ukraine itself notes, is determining how such “notoriety” would need to be established.¹⁵² Ukraine suggests that “the proper inquiry 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)”.¹⁵³ No authority is provided in support of this purported “inquiry”, other than a few domestic court cases which the Russian Federation has already addressed in its Counter-Memorial.¹⁵⁴ As it was explained, those cases are either irrelevant because the court in question was not applying the ICSFT itself, but national legislation going beyond the latter, or concerned examples of terrorist organisations that have been recognised as such by competent international bodies or multiple States, and which had committed innumerable terrorist acts before the terrorism financing offence was found to be established.
121. With regard to the new case introduced by Ukraine in its Reply – *Schansman v. Sberbank of Russia PJSC* – the US District Court simply “assumed as true” the plaintiff’s claims that the DPR was a “terrorist organization” and did not possess “armed forces”.¹⁵⁵ The District Court followed a procedure under US law that allows such an assumption without further inquiry.¹⁵⁶ This decision, which runs contrary to the 2022 judgment of The Hague District Court in the MH17 case,¹⁵⁷ was apparently made solely for the purpose of avoiding the lawful exemption established by the US Congress for “injury or loss by reason of an act of war” (including “armed conflict between military forces of any character”).¹⁵⁸

¹⁵² Reply, ¶112.

¹⁵³ *Ibid.*, ¶¶113, 121.

¹⁵⁴ *Ibid.*, ¶113; Counter-Memorial (ICSFT), ¶144.

¹⁵⁵ Reply, Annex 67, p. 12, ¶25.

¹⁵⁶ *Ibid.*, pp. 6-7, ¶¶1-2, 5. This decision was indeed an order against Sberbank under Rule 12(b)(6) (motion to dismiss the complaint for failure to state a claim that is plausible on its face). This Rule requires the claimant to state sufficient facts in the complaint which could allow the federal court to make a reasonable inference that the defendant is liable. When federal courts consider these motions, they must, solely for the purpose of this motion, accept all factual allegations by the claimant as true and make every reasonable inference in favour of the claimant. Accordingly, the court did not, nor was it necessary for it to, establish the nature of the DPR and LPR’s activities.

¹⁵⁷ *See below*, Chapter V.

¹⁵⁸ *See* United States Code, Title 18, § 2336(a), available at : <https://www.govinfo.gov/content/pkg/USCODE-2021-title18/pdf/USCODE-2021-title18-partI-chap113B-sec2336.pdf>

122. Ukraine also does not explain how its proposed threshold of “public knowledge” should be precisely understood or applied. According to its ordinary meaning, “public knowledge” means “something that people know because it has been reported in the news”¹⁵⁹ or “knowledge that is available to everyone”.¹⁶⁰ Yet Ukraine cannot seriously maintain that such a subjective and vague concept (in how much detail must something be reported in the news, with what frequency, and which news outlets are to be relied upon? When exactly does a piece of information become available to the “public”; which “public”? What is one to do when one reads conflicting media reports? How is one to treat media reports that make accusations of a criminal nature without a fully conclusive criminal procedure?) can suffice to establish the criminal responsibility of an individual, or to trigger a State’s cooperation obligations under the ICSFT.
123. As will be shown in more detail in Chapters V-VII below, the facts before the Court do not show that even the low and vague threshold put forward by Ukraine is met. None of the incidents relied on by Ukraine in the present case, or any other acts allegedly attributable to the DPR or LPR, have been qualified as acts of terrorism by competent international bodies or States; nor do any of those acts, on their own merit, constitute terrorist acts according to the applicable treaties. The downing of flight MH17, notably, has not been characterised as an act of terrorism, neither by the UN Security Council, the ICAO Council or even by the States of nationality of the victims (Malaysia, the Netherlands, Australia); furthermore, no terrorist intent was discovered by The Hague District Court in its 2022 judgment. Neither have similar acts committed in the past by various States, including Ukraine itself, been considered terrorism.¹⁶¹ It is thus implausible to maintain, even applying Ukraine’s “notoriety test”, that the persons that allegedly funded the DPR or LPR could have had the knowledge that the funds they provided were to be used, or even likely to be used, to commit terrorist acts; similarly, it cannot be credibly argued, on the basis of the thin evidence relied upon by Ukraine when it requested legal assistance, that the Russian Federation was somehow obliged to attribute or suspect the existence of such knowledge to the persons involved.

¹⁵⁹ Merriam-Webster, Dictionary, available at : <https://www.merriam-webster.com/dictionary/public%20knowledge>.

¹⁶⁰ Vocabulary.com, available at : <https://www.vocabulary.com/dictionary/public%20knowledge>.

¹⁶¹ See, for example, Gazeta.ru, “Do Not Make Tragedy of This”. *How Ukraine Shot Down Russian Aircraft* (4 October 2021), available at: https://www.gazeta.ru/science/2021/10/03_a_14047363.shtml (Annex 343).

124. Ultimately, the main evidence that Ukraine appears to adduce in order to argue that the DPR and LPR are terrorist organisations (besides its own inconsistent assertions) is the 2014 OHCHR report on the human rights situation in Ukraine, which states that they have “inflicted on the populations a reign of intimidation and terror to maintain their position of control”.¹⁶² As explained in the Counter-Memorial, however, the report is far from constituting conclusive evidence that these entities were terrorist organisations.¹⁶³ Furthermore, the expression “reign of intimidation and terror” was used only once, in passing, in the report, and its authors were not dealing with questions of terrorism, but with allegations of specific human rights violations.¹⁶⁴ It should also be noted that that such expressions are commonly used by the OHCHR,¹⁶⁵ without there being an intention (not least a mandate) to create legal consequences in respect of States’ obligations under anti-terrorism treaties.

B. THE REQUIREMENTS FOR ACTS OF TERRORISM WITHIN THE MEANING OF ARTICLE 2(1)(A) OF THE ICSFT

125. In Chapter IV of the Counter-Memorial, the Russian Federation set out the correct interpretation of the two treaties relied upon by Ukraine for purposes of the application of Article 2(1)(a) of the ICSFT, that is, the Montreal Convention and the ICSTB. It was shown, in particular, that:

¹⁶² OHCHR, Report on the human rights situation in Ukraine, 15 July 2014, ¶26, available at: https://www.ohchr.org/sites/default/files/Documents/Countries/UA/Ukraine_Report_15July2014.pdf.

¹⁶³ Counter-Memorial (ICSFT), ¶¶14-15.

¹⁶⁴ As explained in the Counter-Memorial, later reports of the OHCHR on the situation in Ukraine do not employ this expression. *See* Counter-Memorial (ICSFT), ¶15.

¹⁶⁵ *See*, for example, OHCHR, Press briefing note on Burundi, Thailand, Guinea and Ethiopia, 10 July 2015, available at: <https://www.ohchr.org/en/press-briefing-notes/2015/07/press-briefing-note-burundi-thailand-guinea-and-ethiopia>; OHCHR, Press Releases No. HR/SC/99/4, Subcommittee on Promotion and Protection of Human Rights Hears Allegations of Violations Across the Globe, 4 August 1999, available at: <https://www.ohchr.org/en/press-releases/2009/10/subcommission-promotion-and-protection-human-rights-hears-allegations-0>; OHCHR, Press Releases No. HR/99/120, 14 December 1999, available at: <https://www.ohchr.org/en/press-releases/2009/10/default-title-1752>.

- (a) The offence under Article 1(1)(b) of the Montreal Convention¹⁶⁶ requires a specific intent to destroy a civilian aircraft; it does not encompass the destruction of such an aircraft in error, or when there is an indirect intent or recklessness¹⁶⁷;
- (b) The offence under Article 2(1) of the ICSTB¹⁶⁸ contains a dual intention requirement: (1) the intentional delivery, placing, discharging or detonating an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility; and (2) the intent to cause death, serious bodily harm or extensive destruction.¹⁶⁹

126. In its Reply, Ukraine complains that the Russian Federation “puts forward interpretations that make it more difficult to prove terrorism financing offenses”.¹⁷⁰ This assertion is misplaced: the Russian Federation does not put forward interpretations that make it “difficult” or “easy” to prove terrorism financing offences, but simply the correct interpretation of the ICSFT, the Montreal Convention and the ICSTB, in accordance with what the States parties to those treaties agreed to. Ukraine also does not explain why, in any event, terrorism offences should in its view be able to be proved “easily” or “casually” – such approach is not consistent with the gravity of the crimes in question, as well as with general principles of criminal law, such as the principle of legality. In fact, it is not difficult to see that Ukraine’s approach could lead to the violation of the human rights of the accused.¹⁷¹

¹⁶⁶ The provision reads: “1. Any person commits an offence if he unlawfully and intentionally: (b) destroy 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 ...”.

¹⁶⁷ Counter-Memorial (ICSFT), ¶¶149-164.

¹⁶⁸ The provision reads: “Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility: (a) With the intent to cause death or serious bodily injury; or (b) With the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss”.

¹⁶⁹ Counter-Memorial (ICSFT), ¶¶165-168.

¹⁷⁰ Reply, ¶123.

¹⁷¹ See, for example, UNSC Counter-Terrorism Committee, Global survey of the implementation of Security Council resolution 1373 (2001) and other relevant resolutions by Member States, November 2021, ¶¶777, 779, available at: https://www.un.org/securitycouncil/ctc/sites/www.un.org.securitycouncil.ctc/files/ctc_1373_gis.pdf (“The Security Council continues to affirm that Member States must ensure that any measures taken to combat terrorism comply with all their obligations under international law, in particular international human rights law, international refugee law, and international humanitarian law ... One core issue that remains a major matter of concern, almost 20 years after the adoption of Security Council resolution 1373 (2001), is the question of the legal

i. Article 1(1)(b) of the Montreal Convention

127. With respect to Article 1(1)(b) of the Montreal Convention, Ukraine argues that “the status of the destroyed aircraft dictates whether the Convention applies, but is not an element of a violation that is subject to an intent requirement”.¹⁷² Further, according to Ukraine, “[i]f 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”, in Ukraine’s view, “are irrelevant”.¹⁷³ Thus, Ukraine agrees that, under Article 1(1)(b) of the Montreal Convention, a specific intent is required, but maintains that such intent relates to the destruction of *any* aircraft, as opposed to only civilian aircraft. No convincing explanation is given to sustain such an interpretation.
128. While Article 1(1)(b) of the Montreal Convention does not expressly define what type of aircraft is covered by the offence,¹⁷⁴ Article 4(1) clarifies which type of aircraft the Convention is intended to cover: “This Convention shall not apply to aircraft used in military, customs or police services”.
129. Ukraine admits in the Reply that, pursuant to this provision, “the Convention does apply to aircraft used in civilian service”.¹⁷⁵ Yet it fails to make the relevant link between Articles 1(1)(b) and 4(1) and draw the logical conclusion that there must be a specific intent to destroy a civilian aircraft, as opposed to a military aircraft, for the offence to be established. Instead, Ukraine limits itself to rehearsing the Memorial and stating that the civilian status of an aircraft is a “jurisdictional element” set out in Article 4, and not a

definition of terrorist acts. The national laws of a number of States continue to criminalize terrorist acts in vague or overbroad terms that could lead to abuse. Paragraph 2 (e) of resolution 1373 (2001) requires States to criminalize participation in the financing, planning, preparation or perpetration of terrorist acts or in supporting such acts but does not provide a definition of such offences. The Executive Directorate remains concerned about national definitions of terrorism that exceed the scope of Council resolution 1566 (2004), the international counter-terrorism instruments, and the model definition put forward by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, thereby creating the potential for non-violent conduct that is not terrorist in nature to be qualified as ‘terrorist’ ...”).

¹⁷² Reply, ¶126.

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*, ¶127.

¹⁷⁵ *Ibid.*, ¶128, noting also that “[t]he 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”; and that “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”.

“legal ingredient” to determine the intent of an alleged perpetrator.¹⁷⁶ Ukraine provides no support for this proposition, other than the 1999 *Tadić* judgment, which did not concern the Montreal Convention and the questions put before the Court in the present case, but the interpretation of Article 5 of the ICTY Statute and the “armed conflict requirement” thereunder, exclusively in the context of crimes against humanity.¹⁷⁷

130. The ICTY’s reference to a “jurisdictional element” when discussing the term “committed in armed conflict” in Article 5 of the ICTY Statute must be understood taking into account the special nature of the Statute – *i.e.* an instrument that did not concern the criminalisation of a certain conduct, but rather the establishment of an international criminal tribunal in charge of prosecuting crimes committed specifically during the armed conflict in the former Yugoslavia since 1991. Thus, the fact that the ICTY considered the term “committed in armed conflict” to constitute an element concerning its own limited jurisdiction, as opposed to the *mens rea* required for crimes against humanity, is irrelevant for purposes of interpreting Article 1(1)(b) of the Montreal Convention.¹⁷⁸
131. Furthermore, even if Ukraine’s reading of the *Tadić* judgment was correct (*quod non*), this would still not help its position. Contrary to what Ukraine suggests, the Tribunal did not consider the “armed conflict” requirement to be entirely divorced from the mental state of the perpetrator. In fact, the Appeals Chamber was of the view that “it may be inferred from the words ‘directed against any civilian population’ in Article 5 of the Statute that the acts of the accused must comprise part of a pattern of widespread or systematic crimes directed against a civilian population and that the accused must have known that his acts fit into such a pattern”, and that what is required is proof of “the intent to commit the crime and the knowledge of the context into which the crime fits.”¹⁷⁹ Knowledge of the existence of an armed conflict, therefore, was not deemed irrelevant.

¹⁷⁶ *Ibid.*, ¶128; Memorial, ¶222.

¹⁷⁷ *Prosecutor v. Tadic*, Case No. IT-94-1-A, Appeals Chamber Judgment of 15 July 1999, ¶249 (“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”).

¹⁷⁸ The same “jurisdictional element” relating to the existence of an armed conflict does not appear, for example, in the Rome Statute (Article 7), which is not limited to crimes against humanity committed during an armed conflict, as the ICTY Statute was.

¹⁷⁹ *Prosecutor v. Tadic*, Case No. IT-94-1-A, Appeals Chamber Judgment of 15 July 1999, ¶¶248, 249, 250.

132. Ukraine’s reliance on the fact that the term “civilian aircraft” is not expressly used in Article 1(1)(b)¹⁸⁰ is equally unconvincing – it constitutes a vain attempt to distort that provision by interpreting it in an isolated manner and out of its context. Indeed, if Ukraine’s interpretation were to be followed to its logical conclusion, then the entirety of Article 1(1)(b) – not only the element of intent – ought to be viewed as encompassing also military aircraft, which would go against the very object and purpose of the Convention (the suppression of unlawful acts against *civil* aviation).
133. As regards the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons (the “IPP Convention”), Ukraine ultimately agrees with the Russian Federation’s position,¹⁸¹ but maintains that the key distinction is that Article 2(1)(a) of the IPP Convention specifically refers to the victim’s status (“an internationally protected person”) as part of the mental element of the offence (*i.e.* the offender must be aware of the status of the person), while, in contrast, Article 1(1)(b) of the Montreal Convention does not expressly refer to “civilian aircraft”.¹⁸² This argument, again, fails to give a proper interpretation and effect to Articles 1 and 4 of the Montreal Convention read in their proper context, as explained above – even if Article 1(1)(b) of the Montreal Convention does not contain the words “civilian aircraft”, the term “aircraft in service” must be interpreted in accordance with Article 4, which applies to the *whole* of the Montreal Convention, as well as the title of the Convention which speaks of “suppression of unlawful acts against the safety of civil aviation” (Emphasis added), and therefore necessarily qualifies the mental element for the commission of the relevant offence.
134. As Ukraine rightly notes, the preamble of the Montreal Convention specifically refers to the “occurrence” of “unlawful acts against the safety of civil aviation” as a “matter of grave concern”, and that the Convention’s purpose is to “deter[] such acts”.¹⁸³ This object and purpose evidently support the Russian Federation’s interpretation of Article 1(1)(b) of the Convention, but Ukraine suggests that the latter would somehow “create a loophole in the treaty’s prohibitions”.¹⁸⁴ In reality, there is no question that the Montreal

¹⁸⁰ Reply, ¶130.

¹⁸¹ *Ibid.*, ¶131; Counter-Memorial (ICSFT), ¶157.

¹⁸² Reply, ¶131.

¹⁸³ *Ibid.*, ¶132.

¹⁸⁴ *Ibid.*

Convention's scope is limited (covering civil aircraft, to the exclusion of aircraft used for military, police or customs services), and therefore does not address the situations that Ukraine would like it to for purposes of the present case. This does not constitute a "loophole in the treaty's prohibitions", but simply a reflection of what States actually agreed upon when the Convention was concluded.

135. Ukraine further claims that "[w]ith respect to the Montreal Convention, the Russian Federation 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".¹⁸⁵ Ukraine's logic is however wrong on all counts.¹⁸⁶ Firstly, it is not "implausible" that treaties governing civil aviation do not cover acts performed in the context of an armed conflict.
136. That the Montreal Convention should not cover an erroneous downing of a civilian aircraft believed to be in military service in the context of an armed conflict is also confirmed by a working paper of the ICAO Legal Commission, which reflects the predominant position in the ICAO that the Convention is not applicable to military activities by virtue of an implied "military exclusion clause":

"The Group recognized the value of the Conventions in the international cooperation for the prevention and suppression of unlawful acts against the safety of civil aviation. At the same time, it acknowledged that the Conventions were adopted decades ago and they do not reflect the provisions commonly found in the relevant conventions concluded recently in the UN system. Several such provisions are mentioned below. Comparable UN counter-terrorism conventions concluded after 1997 contain a military exclusion clause, which expressly specifies that the conventions do not govern the activities of armed forces during an armed conflict, and the activities undertaken by military forces of a State in the exercise of their official duties. In ICAO, it has been widely understood that the aviation security instruments which criminalize certain acts are not applicable to the military activities mentioned above. The same clause of military exclusion can be included in any instrument amending the Conventions, in order to

¹⁸⁵ *Ibid.*, ¶147.

¹⁸⁶ Ukraine's indignation is misplaced, considering that it was Ukraine's competent authorities, which, after Ukraine's military shot down a Russian civilian airliner in 2001, killing 77 civilians, did not qualify the incident as an offense and never prosecuted any of the persons responsible for the shoot-down. See Gazeta ru, "Do Not Make Tragedy of This". *How Ukraine Shot Down Russian Aircraft* (4 October 2021), available at: https://www.gazeta.ru/science/2021/10/03_a_14047363.shtml (Annex 343).

achieve uniformity and clarity and to prevent any interpretative confusion. Such a clause would be considered as declaratory in nature”.¹⁸⁷

137. As a result of this outlook, a military exclusion clause was included in the 2010 Beijing Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation (Article 5(1)), as well as in the 2010 Beijing Protocol to the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (Article 3*bis*(2)).¹⁸⁸ As between its States Parties, the Beijing Convention replaces the Montreal Convention and the 1988 Protocol thereto. Both new instruments, which amend or replace the older conventions, exclude from their scope all activities of armed forces during an armed conflict which are governed by international humanitarian law (*i.e.*, irrespectively of whether these activities conform to or violate it).
138. Ukraine is also wrong to suggest that “[e]ven 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 civilian aircraft”,¹⁸⁹ and that a guided missile surface-to-air system like Buk may be considered an “inherently indiscriminate weapon”. As explained in the Counter-Memorial and in the preceding paragraphs, this position is untenable because the plain text of Article 1(1)(b) of the Montreal Convention requires a specific intent to shoot down a civilian aircraft, which is excluded when such an event unfolds in error. Chapter V below explains in more detail how the Hague District Court’s judgment of 17 November 2022, relating to the shoot-down of the MH17, confirms that Ukraine’s interpretation of the Montreal Convention is inaccurate and in any event not supported by the facts. Ukraine’s claims regarding “indiscriminate weapons” are thus baseless.
139. Finally, although Ukraine states that “it is unnecessary for the Court to opine more generally on the meaning of ‘intentionally’ as used in the Montreal Convention”, it suggests that “[p]ractice under both international and domestic criminal law shows that

¹⁸⁷ ICAO Legal Commission, Working Paper No. A36-WP/12 LE/4 on Acts or offences of concern to the international aviation community and not covered by existing air law instruments, 14 August 2007, available at: https://www.icao.int/Meetings/AMC/MA/Assembly%2036th%20Session/wp012_en.pdf.

¹⁸⁸ They read, respectively: “This Convention shall not apply to aircraft used in military, customs or police services”; and “The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law are not governed by this Convention, and the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention”

¹⁸⁹ Reply, ¶134. See also ¶¶135-147.

the ordinary meaning of ‘intent’ encompasses various degrees: *dolus directus*, *dolus indirectus*, and *dolus eventualis*”.¹⁹⁰ As explained in the Counter-Memorial, this attempt to read into the Montreal Convention additional forms of criminal liability must be dismissed – when a form of intent other than direct intent is envisaged, this has been expressly set out in the text of the Convention.¹⁹¹

ii. Article 2(1) of the ICSTB

140. As regards Article 2(1) of the ICSTB, Ukraine limits itself to briefly claiming that the Parties agree on its interpretation, and that the Russian Federation does not dispute that the bombing attacks in Kharkov, Kiev and Odessa “constitute offenses under the ICSTB, or that they are covered acts under ICSFT Article 2(1)(a)”.¹⁹² This is not the case. Ukraine in fact agrees that Article 2(1) of the ICSTB contains a dual intent requirement, as noted above (excluding lesser forms of intent or recklessness), but the Parties do not agree on the applicability of this provision in the light of the specific facts of the case. Furthermore, for an act to fall under ICSTB the intent must be “to cause death or serious bodily injury; or... extensive destruction of [a place of public use, a State or government facility, a public transportation system or an infrastructure facility], where such destruction results in or is likely to result in major economic loss”; this also does not fit specific facts of the case. These facts are further addressed in Chapter VII below.

141. Finally, the ICSTB is also subject to the military exception clause as will be shown below.¹⁹³

C. THE REQUIREMENTS FOR ACTS OF TERRORISM WITHIN THE MEANING OF ARTICLE 2(1)(B) OF THE ICSFT

142. According to Article 2(1)(b) of the ICSFT, the offence of terrorism financing is also established when funds are provided or collected with knowledge that those funds are to be used in order to carry out:

¹⁹⁰ *Ibid.*, ¶¶140-141.

¹⁹¹ Counter-Memorial (ICSFT), ¶155. National laws may of course go beyond the offences set out in a particular treaty. In those cases, however, the definitions in the treaty and the national law no longer coincide and a State may not rely on its more expansive domestic law to, for example, request legal assistance.

¹⁹² Reply, ¶148.

¹⁹³ *See below*, ¶16.

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

143. As explained in the Counter-Memorial, this provision contains two distinct mental elements: (1) the “intention” to cause death or serious bodily injury to a civilian, or to any other person not taking part in the hostilities in a situation or conflict; and (2) the “purpose”, by the nature or the context of the act, to intimidate a population, or to compel a government or an international organisation to do or to abstain from doing something.¹⁹⁴ In its Order of 19 April 2017, the Court found that Ukraine had not “put before the Court evidence which affords a sufficient basis to find it plausible that these two elements are present”.¹⁹⁵ As regards Ukraine’s misguided interpretation of Article 2(1)(b), the Russian Federation also showed that:

- (a) The terrorism offence under Article 2(1)(b) can only be committed if death or serious bodily injury is caused to a “civilian” or “any other person not taking active part in the hostilities”. If a person targets armed forces, or groups or other persons taking active part in hostilities, the offence under Article 2(1)(b) may not be established and States’ obligations under the ICSFT would accordingly not be triggered.¹⁹⁶
- (b) The mental element of “intention” covers only direct intent to cause death or serious bodily injury, to the exclusion of lesser forms of intent such as *dolus indirectus* or *dolus eventualis*;¹⁹⁷
- (c) The required “purpose” under Article 2(1)(b) qualifies terrorism as a special intent crime: in addition to the direct intent to cause death or serious bodily injury to civilians and others not taking part in hostilities, the perpetrator must have also acted with the primary purpose (*dolus specialis*) of spreading terror (and more particularly, intimidating a population or compelling a government or international organisation to do or to abstain from doing a certain act). In the context of an armed

¹⁹⁴ Counter-Memorial (ICSFT), ¶170.

¹⁹⁵ Order of 19 April 2017, p. 131, ¶75.

¹⁹⁶ Counter-Memorial (ICSFT), ¶174.

¹⁹⁷ *Ibid.*, ¶¶174-231.

conflict, in which certain acts may fulfil the objective element of Article 2(1)(b) (*i.e.* causing death or bodily harm to a civilian), special care is required when determining whether the purpose of those was the spreading of terror.¹⁹⁸

144. In its Reply, Ukraine once more accuses the Russian Federation of making it “exceedingly difficult to prove” that an offence under Article 2(1)(b) of the ICSFT has been committed,¹⁹⁹ without explaining why a treaty criminalizing a certain serious conduct should adopt an approach that allows the establishment of offences in an unverified and superficial manner. In the end, the crucial question is not whether establishing an offence should be “difficult” or “easy”, but what the correct interpretation of Article 2(1)(b) of the ICSFT is.
145. As regards the term “act intended to cause death or serious bodily injury to a civilian”, Ukraine misrepresents the Russian Federation’s position²⁰⁰ when it claims that “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)”²⁰¹. First of all, the Counter-Memorial clearly stated that “*apart from the general requirement of intent, the perpetrator must have also acted with the primary purpose of spreading terror*”.²⁰² Secondly, while the Counter-Memorial noted that the element of making civilians or a civilian population the object of an attack is common to Articles 2(1)(b) of the ICSFT and Article 85(3)(a) of Additional Protocol I, it also explained that these provisions “necessarily require[] a deliberate decision and the will of the perpetrator to select, determine and orient the attack against such civilians or against a civilian population”.²⁰³ Indeed, the Counter-Memorial explained that:

“If Article 2(1)(b) of the ICSFT were to be interpreted so as to also cover indirect intent or recklessness, thereby outlawing expected civilian casualties *per se* regardless of their proportionality, the military advantage to be gained in the situation of an armed conflict would not be taken into account for purposes of the ICSFT. This would create a situation in which an attack could

¹⁹⁸ *Ibid.*, ¶¶232-297.

¹⁹⁹ Reply, ¶150.

²⁰⁰ Counter-Memorial (ICSFT), ¶198 ff.

²⁰¹ Reply, ¶154.

²⁰² *See, inter alia*, Counter-Memorial (ICSFT), ¶233.

²⁰³ *Ibid.*, ¶205.

be lawful under international humanitarian law provided the expected civilian casualties are not excessive when compared with the military advantage anticipated. At the same time, the very same act would be considered an act of terrorism in Ukraine's reading of the ICSFT even if the civilian casualties were not excessive, but where at least some civilian casualties were expected".²⁰⁴

146. Ukraine does not appear to deny that its interpretation of Article 2(1)(b) of the ICSFT would lead to this unreasonable result, thereby creating collision with international humanitarian law as will be shown below.²⁰⁵
147. In an attempt to bolster its position, Ukraine goes so far as making an appeal to the Court's *Nuclear Weapons* Advisory Opinion.²⁰⁶ Nonetheless, there is no basis to draw a parallel between that Advisory Opinion and the present case. At the very outset, it must be noted that, in its Opinion, the Court stressed the unique character of nuclear weapons as capable of damage "vastly more powerful than the damage caused by other weapons", rendering these weapons "potentially catastrophic", with the capacity to "cause untold human suffering", "damage to generations to come", and even "to destroy all civilization and the entire ecosystem of the world".²⁰⁷ This immense threat cannot, as a matter of course, be compared to isolated uses of conventional weapons.
148. Apart from the Advisory Opinion's overall inapplicability to the present case,²⁰⁸ it also contains findings contrary to Ukraine's position. For example, precisely in the context of "methods and means of warfare which would preclude any distinction between civilian and military targets", the Court held that "it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstances".²⁰⁹ Considering that the Court did not come to the conclusion that even weapons of such destructive magnitude may necessarily be considered *per se* prohibited

²⁰⁴ *Ibid.*, ¶201. See also ¶¶202-213.

²⁰⁵ See below, Chapter III, Section D.

²⁰⁶ Reply, ¶154.

²⁰⁷ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, pp. 243-244, ¶¶35-36.

²⁰⁸ The Opinion may not be perceived as reflective of an *opinio juris* with regard to emergence of a special rule of customary international law concerning such weapons. In fact, the Opinion was famously controversial, boasting no less than 14 statements from the Judges, including six Dissenting Opinions, as well as written and oral statements from a great number of States expressing widely divergent views on the subject.

²⁰⁹ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, pp. 262-263, ¶95.

due to indiscriminate effect against a civilian population, it is difficult to imagine how incomparably lesser weapons, such as multiple launch rocket systems (“MLRS”) or surface-to-air missile systems, may be so prohibited. Indeed, none of the special treaties prohibiting certain types of conventional weapons cover these.²¹⁰ As pointed out in the Counter-Memorial, this is confirmed by international judicial practice.²¹¹ Chapters V-VI below further demonstrate that the nature of the weapons used in the incidents that Ukraine relies on has no bearing in the question of determining “intent” for purposes of establishing terrorism offences.

149. Ukraine seeks to further depart from Article 2(1)(b) of the ICSFT by suggesting that “acts intended to cause” would not “impose a ‘mental state’ requirement at all”, but simply “describe the nature of a third party’s *act* which may not be funded, which can only be determined objectively”.²¹² Ukraine further adds that “[a]cts’ do not have mental or subjective desires; they have natural consequences and destinations which can be objectively assessed”.²¹³ In so doing, Ukraine seeks to erase the words “intended to” (which clearly denotes a mental element – an act does not occur in a vacuum; it is obviously intended to have a certain result *by someone*) from Article 2(1)(b) of the ICSFT, or to change its ordinary meaning to “aimed at” or “directed at”²¹⁴ without taking into account the mental element of the alleged perpetrator – an approach to treaty interpretation that is erroneous and must be dismissed.²¹⁵
150. Ukraine’s reference to the context of Article 2(1)(b), and in particular the *chapeau* of Article 2(1), is of no assistance in this regard.²¹⁶ Indeed, Ukraine’s sole argument, without citing any authority, is that it “would be unusual and unrealistic to define a

²¹⁰ Nor are these weapons considered “indiscriminate” by the ICRC. See ICRC, Customary IHL, Rule 71, available at: https://ihl-databases.icrc.org/en/customary-ihl/v1/rule71#refFn_8ACA2B68_00031.

²¹¹ Counter-Memorial (ICSFT), ¶¶225-226.

²¹² Reply, ¶155.

²¹³ *Ibid.*

²¹⁴ *Ibid.*, ¶157.

²¹⁵ As further discussed at ¶153 below, Ukraine also argues that the “purpose” requirement under Article 2(1)(b) of the ICSFT can be established by making inferences from the “nature” or “context” of the act. To the extent that this position is correct, however, it is clear that such inference is only possible for establishing purpose, but not intent, given the manner in which the provision is drafted (the terms “nature or context” clearly relate only to “purpose”).

²¹⁶ Reply, ¶157.

criminal offense that requires proof of the actual mental state of a third party”.²¹⁷ There is however nothing “unusual” or “unrealistic” about offences that require establishing the mental state of a third person, such as crimes committed by aiding and abetting.²¹⁸ Article 2(1)(a) of the ICSFT itself, by requiring intention that funds be used or knowledge that funds are to be used to commit terrorism offences laid down in other treaties, which in turn further require determining the intent of the perpetrator, further attests to this.²¹⁹

151. As shown in the Counter-Memorial, that direct intent is necessary for the offence under Article 2(1)(b) of the ICSFT to be established is further demonstrated by the jurisprudence of the Court and the ICTY regarding genocide.²²⁰ Ukraine suggests that this jurisprudence is irrelevant since the wording of Article II of the Genocide Convention (“with the intent to”) is different from the that of Article 2(1)(b) of the ICSFT (“any other act intended to cause”).²²¹ The differences between these provisions, however, are immaterial and do not warrant divergent interpretations.²²² Furthermore, while Ukraine states that it “has never suggested that the fact of civilian casualties, by itself, proves that an act was intended to cause those casualties”,²²³ it also suggests that the Court’s judgment in the *Croatia Genocide* case supports its interpretation of Article 2(1)(b) because “if indiscriminate shelling had been established, that finding would have supported the conclusion that the killing of civilians was intentional”.²²⁴ This reading of the 2015 judgment is however incorrect, as the Court made it perfectly clear that an offence under Article II of the Genocide Convention could have been established only if

²¹⁷ *Ibid.*

²¹⁸ See, for example, *Prosecutor v. Grégoire Ndahimana*, Case No. ICTR-01-68-A, Appeals Chamber Judgment of 16 December 2013, ¶157 (“The Appeals Chamber recalls that the requisite *mens rea* for aiding and abetting is knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal perpetrator. The aider and abettor need not share the *mens rea* of the principal perpetrator but must be aware of the essential elements of the crime ultimately committed by the principal, *including his state of mind. Specific intent crimes such as genocide require that the aider and abettor must know of the principal perpetrator’s specific intent*”) (*emphasis added*).

²¹⁹ See Section II above.

²²⁰ Counter-Memorial (ICSFT), ¶¶224-228.

²²¹ Reply, ¶158.

²²² Furthermore, to the extent that Ukraine wishes to adhere to the precise text of Article 2(1)(b) of the ICSFT, it should apply the same approach to other provisions of the latter, as opposed to seeking to read into them mental elements that do not appear in the text, as noted in Sections I and II above.

²²³ Reply, ¶160.

²²⁴ *Ibid.*

there had been “indiscriminate shelling ... deliberately intended to cause civilian casualties”.²²⁵ The relevant part of the judgment in full reads:

“The Court concludes from the foregoing that it is unable to find that there was any indiscriminate shelling of the Krajina towns deliberately intended to cause civilian casualties. It would only be in exceptional circumstances that it would depart from the findings reached by the ICTY on an issue of this kind. Serbia has indeed drawn the Court’s attention to the controversy aroused by the Appeals Chamber’s Judgment. However, no evidence, whether prior or subsequent to that Judgment, has been put before the Court which would incontrovertibly show that the Croatian authorities deliberately intended to shell the civilian areas of towns inhabited by Serbs. In particular, no such intent is apparent from the Brioni Transcript, which will be subjected to a more detailed analysis below in relation to the existence of the *dolus specialis*. Nor can such intent be regarded as incontrovertibly established on the basis of the statements by persons having testified before the ICTY Trial Chamber in the *Gotovina* case, and cited as witnesses by Serbia in the present case ...

‘Killing’ within the meaning of Article II (a) of the Convention always presupposes the existence of an intentional element (which is altogether distinct from the ‘specific intent’ necessary to establish genocide), namely the intent to cause death ... It follows that, if one takes the view that the attacks were exclusively directed at military targets, and that the civilian casualties were not caused deliberately, one cannot consider those attacks, inasmuch as they caused civilian deaths, as falling within the scope of Article II (a) of the Genocide Convention”.²²⁶ [Emphasis added]

152. As regards the *Abdelaziz* judgment by the Italian Supreme Court of Cassation, the Counter-Memorial showed that it does not support Ukraine’s attempt to include the concept of *dolus eventualis* into Article 2(1)(b) of the ICSFT. The judgment rather indicates that, according to the Italian court, what is required for a terrorism offence to be established is “certainty” of serious harm inflicted to civilians, and “intent to engage in the action and achieve the particular results that constitute terrorist purposes”.²²⁷ Ukraine insists in this regard that the judgment can be read as indicating that “intent could be

²²⁵ *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, ¶472.

²²⁶ *Ibid.*, pp. 137-138, ¶¶472, 474. Ukraine further argues, in the alternative, that even if the term “act intended to cause” were to be considered a mental element requirement (as it is), the word “intended” would in any event need to be interpreted as including “several degrees of intent, including *dolus directus*, *dolus indirectus*, and *dolus eventualis*”. See Reply, ¶162. Ukraine adds that the Russian Federation’s interpretation of the ICSFT in accordance with IHL is “irrelevant” because “Russia does not and could not defend any of the attacks at issue as consistent with IHL” and “the ICSFT and IHL are distinct bodies of law with different objectives”. *Ibid.*, ¶163. These issues have already been addressed in the previous section; the relationship between IHL and the ICSFT is further addressed in Chapter III(D) below.

²²⁷ Counter-Memorial (ICSFT), ¶¶221-223.

inferred from the perpetrator's actions where a particular outcome was certain".²²⁸ Since the judgment contains statements that appear to go in different directions, it is of limited value; and in any case the position of one national court cannot be determinative on the correct interpretation of the ICSFT.

153. With respect to the "purpose" requirement under Article 2(1)(b) of the ICSFT, Ukraine does not seem to contest that this provision makes the offence thereunder a special intent crime;²²⁹ it could indeed not be otherwise lest the Convention criminalise the funding of common crimes, which it does not. Ukraine however disagrees on how that special intent must be proved and maintains that the provision "refers to the *act* itself ..., not to 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".²³⁰ As shown in the Counter-Memorial, however, Ukraine's interpretation is misguided because: (1) specific intent crimes require an additional mental element of *dolus specialis*, as confirmed by this Court and international criminal tribunals; (2) the specific intent to create terror must be *the* purpose of the act (not merely one possible among many others); and (3) the *travaux* of the ICSFT confirm this reading of Article 2(1)(b).²³¹
154. Ultimately, if Ukraine's interpretation was correct (*quod non*), what would remain crucial in the present case is whether the purpose to intimidate a civil population or to compel a government may be conclusively inferred from the "nature" or "context" of an act when an armed conflict is taking place and the parties can be reasonably believed to have been driven by military considerations in their actions, as opposed to having a purpose to intimidate a population or compelling a government. As explained in the Counter-Memorial²³² and again in later chapters of this Rejoinder, the armed conflict that existed between Ukraine and the DPR and LPR at the time the incidents relied upon by Ukraine occurred makes an inference of the relevant purpose under Article 2(1)(b) of the ICSFT implausible, thereby depriving Ukraine's requests for cooperation and legal assistance of any basis under the Convention.

²²⁸ Reply, ¶159.

²²⁹ Counter-Memorial (ICSFT), ¶¶236-263; Reply, ¶167.

²³⁰ Reply, ¶166.

²³¹ Counter-Memorial (ICSFT), ¶¶236-268.

²³² *Ibid.*, ¶¶269-289.

155. In conclusion, contrary to what Ukraine suggests, the Russian Federation does not attempt “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”.²³³ The mental elements of “intention” and “purpose” are clearly set out in Article 2(1)(b) of the ICSFT, and the Russian Federation’s position results from their proper interpretation in accordance with Articles 31 and 32 of the VCLT. Ukraine’s attempt to trim down the requirements for establishing the terrorism offence under Article 2(1)(b) must accordingly be dismissed.

D. THE RULES OF IHL ARE RELEVANT TO THE INTERPRETATION AND APPLICATION OF THE ICSFT

156. That the existence of an armed conflict in the Donbass triggers the application of IHL is indisputable. This, in turn, has significant implications for the interpretation and application of the ICSFT in the present case, contrary to what Ukraine appears to argue in its Reply.²³⁴ Indeed, Ukraine entirely misses the point in asserting that:

“the ICSFT and IHL are distinct bodies of law with different 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”.²³⁵

157. The ICSFT itself recognises in no uncertain terms that IHL is not irrelevant. Article 21 of the Convention expressly lays down that:

“Nothing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes of the Charter of the United Nations, *international humanitarian law* and other relevant conventions” [*emphasis added*].

158. The *travaux préparatoires* of the Convention show that the first draft of what later became Article 21 suggested, as proposed by France, that “[n]othing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under

²³³ Reply, ¶189.

²³⁴ *Ibid.*, p. 64, fn 175, and p.77, ¶163.

²³⁵ *Ibid.*, ¶163.

international law, in particular the purposes and principles of the Charter of the United Nations and international humanitarian law”.²³⁶

159. In a working document prepared by France, which served as the basis for discussion at the Ad Hoc Committee of the General Assembly in 1999, the point first appeared as paragraph 8 in the preamble, which read: “*Considering* that any act governed by international humanitarian law is not governed by this Convention”.²³⁷ Lebanon proposed that this paragraph be turned into a new operative article of the Convention, so as to “expressly exclude the application of humanitarian law from the operation of the convention”.²³⁸ During the discussion of the Working Group in the autumn of 1999, several similar proposals were made.²³⁹ It was proposed that “the draft convention make reference to the hierarchy of norms of international law, whereby in the context of armed conflict the application of humanitarian law would take precedence over that of the draft convention”.²⁴⁰ It was after taking into account all these proposals and considerations that the final text of Article 21 emerged.²⁴¹
160. Thus, the fact that IHL affects the application of the ICSFT law is beyond any doubt. In the same vein, the UN Security Council has repeatedly reaffirmed that “Member States must ensure that any measures taken to counter terrorism comply with all their obligations under international law, in particular ... international humanitarian law”.²⁴²

²³⁶ Permanent Representative of France to the United Nations, Letter addressed to the Secretary-General, 3 November 1998, Annex, Article 21(1), A/C.6/53/9, p.11, available at: <https://digitallibrary.un.org/record/263342?ln=en>

²³⁷ Ad Hoc Committee established by General Assembly resolution 51/210, Report of 17 December 1996, A/54/37, Annex II, p.14, available at: <https://digitallibrary.un.org/record/1492194?ln=en>.

²³⁸ *Ibid.*, p. 59, ¶31; *See also* Ad Hoc Committee established by General Assembly resolution 51/210, Proposal submitted by Lebanon, A/AC.252/1999/WP.33, 15-26 March 1999, available at: <https://digitallibrary.un.org/record/1493683?ln=en>.

²³⁹ Working Group to Elaborate an International Convention for the Suppression of Acts of Nuclear Terrorism, Report No. A/C.6/54/L.2 on measures to eliminate international terrorism, 26 October 1999, , p. 21, ¶4, available at: <https://digitallibrary.un.org/record/317435?ln=en>. *See also* p. 54, 56, ¶20.

²⁴⁰ *Ibid.*, p. 61, ¶85.

²⁴¹ *Ibid.*, Annex I, p. 14, Article 21; *See also* p. 62, ¶¶110-112.

²⁴² *See for example* UN Security Council resolution No. 2178, 2014, preamble, available at: [https://www.undocs.org/Home/Mobile?FinalSymbol=S%20FRES%202178%202520\(2014\)&Language=E&DeviceType=Desktop&LangRequested=False](https://www.undocs.org/Home/Mobile?FinalSymbol=S%20FRES%202178%202520(2014)&Language=E&DeviceType=Desktop&LangRequested=False).

161. It follows from the foregoing that in a situation of an armed conflict, the ICSFT clearly does not affect rights, obligations and responsibilities under IHL. The ICSFT does not – and indeed cannot – criminalise conduct that is lawful under IHL.

162. In addition to Article 21 of the ICSFT, other provisions of the Convention and of the other treaties relied upon by Ukraine also confirm that relevance of IHL for purposes of interpreting and applying these counter-terrorism instruments.

163. The ICSTB expressly excludes the activities of armed forces during an armed conflict from the scope of the Convention. The exclusion clause in Article 19(2) reads as follows:

“The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention, and the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention.”

164. In this regard, it has been noted in the literature that:

“Early definitions of ‘armed forces’ were restricted to the forces of a state, therefore excluding freedom fighters fighting against the state. In its recent study of customary IHL, however, the International Committee of the Red Cross (‘ICRC’) has treated the expanded definition of ‘armed forces’ in Article 43 API, which includes ‘organized armed forces, groups and units which are under a command responsible to [a party to the conflict] for the conduct of its subordinates’, as having reached customary status. The definition is not dependent on state organ or agent status and applies to non-state armed groups (including peoples exercising their right of self-determination) as long as they are organized and operate on the basis of command responsibility.”²⁴³

165. Professor Trapp adds that “the Terrorist Bombing Convention attempts to respect the balance achieved by IHL in determining that some bombings will be unlawful, *while others will be lawful (if regrettable) acts of war*”.²⁴⁴

166. The reading according to which IHL is relevant in this context is further confirmed by Article 2(1)(b) of the ICSFT, discussed above,²⁴⁵ which refers to:

“Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation

²⁴³ K. Trapp, STATE RESPONSIBILITY FOR INTERNATIONAL TERRORISM (OUP, 2011), pp. 116-117.

²⁴⁴ *Ibid.*, p. 119.

²⁴⁵ See above, Part 1, Chapter III(C).

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”. [emphasis added]

167. During the treaty negotiations, concern was expressed that a broad definition of the protected persons “would involve difficulties with the application of humanitarian law and could lead to the situation where certain acts would be classified as terrorism when they would be acceptable under humanitarian law”.²⁴⁶ This fully supports the conclusion made in the Counter-Memorial that “...in line with the position taken by the Court in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the interpretation of the ICSFT, including the interpretation of the mental elements of a terrorist act under Article 2(1)(b) of the ICSFT, must take place in light, and against the background, of simultaneously applicable and closely related relevant standards of international law”.²⁴⁷

168. Article 51(2) of Additional Protocol I of 1977, dealing with international armed conflict, must also be taken into account. It provides that:

“The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.” [emphasis added]

169. The same language is found in Article 13(2) of Additional Protocol II of 1977, dealing with non-international armed conflict. The importance is this special form of intent was emphasised during the diplomatic conference leading to the adoption of the Additional Protocols of 1977. The ICRC Commentary of 1987 on the Additional Protocols states:

“Any attack is likely to intimidate the civilian population. The attacks or threats concerned here are therefore those, the primary purpose of which is to spread terror, as one delegate stated during the debates at the Conference.”²⁴⁸

170. This rule is considered to reflect customary international law according to the ICRC Study.²⁴⁹

²⁴⁶ K. Trapp, *STATE RESPONSIBILITY FOR INTERNATIONAL TERRORISM* (OUP, 2011), pp. 62-63, 102.

²⁴⁷ Counter-Memorial (ICSFT), ¶197.

²⁴⁸ ICRC, *Commentary of 1987 on Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, ¶4786, available at: <https://ihl-databases.icrc.org/en/ihl-treaties/apii-1977/article-13/commentary/1987?activeTab=1949GCs-APs-and-commentaries>.

²⁴⁹ ICRC, *Customary IHL, Rule 2*, available at: <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule2>.

171. Thus, the definition in Article 2(1)(b) of the ICSFT should be read in conformity with the criteria for the war crime of terror under IHL. This is confirmed by authoritative legal doctrine. Professor Kretzmer, for example, has noted that:

“As long as the violence is directed against civilians and its purpose is to intimidate a population, the offence defined in this provision would also constitute the crime of terror under LOAC.”²⁵⁰

172. In the same vein, Daniel O’Donnell, the former Deputy Head of the UN Secretary-General’s Investigative Team to the Democratic Republic of the Congo and former Chief Investigator of the Historical Clarification Commission of Guatemala, considers that this element of the Convention “represents a milestone in the development of international law on terrorism, because it is the first treaty provision to refer to the purpose of terrorism as recognized by international humanitarian law, namely, to terrorize the population”.²⁵¹ [Emphasis added]

173. Ukraine’s appeals to the practice of the ICTY in this regard are of no avail: as the Russian Federation has already pointed out in its Counter-Memorial, the ICTY has held that “[the prohibition of spreading terror] is to be understood as excluding *dolus eventualis* or recklessness from the intentional state specific to terror”.²⁵²

174. It is particularly relevant that Ukraine does not object to its own position expressed in the negotiations leading to the adoption of the Additional Protocol I and its Article 51(2), recalled in the Counter-Memorial, according to which: “... spreading terror is limited to those attacks that are specifically directed against the civilian population as such. At the same time, Ukraine did not see this prohibition of spreading terror as also encompassing attacks directed against military targets when these are expected to cause excessive collateral damage among a given civilian population”.²⁵³

175. The Russian Federation has conclusively shown that in the context of an armed conflict, only acts which have “spreading terror” as their “primary purpose” may fall under Article

²⁵⁰ D. Kretzmer, *Terrorism and the international law of occupation* in B. Saul (ed.), RESEARCH HANDBOOK ON INTERNATIONAL LAW AND TERRORISM (2nd ed., Edward Elgar Publishing, 2020), p. 217.

²⁵¹ D. O’Donnell, International Treaties against terrorism and the use of terrorism during armed conflict and by armed forces in *International Review of the Red Cross* (Vol 88, No. 864, 2006), p. 862, available at: <https://www.corteidh.or.cr/tablas/a21937.pdf>.

²⁵² Counter-Memorial (ICSFT), ¶65.

²⁵³ *Ibid.*, ¶203.

2(1)(b) of the ICSFT. That this firmly excludes incidental or collateral damage to civilians is further confirmed by legal doctrine:

“by prohibiting only those acts “the primary purpose of which is to spread terror among the civilian population”, Additional Protocol I does not forbid the incidental causation of terror among civilians... Therefore, an act of violence committed against a legitimate military target which incidentally causes terror among the civilian population is not prohibited under the law of armed conflict. The legislative history of the provision clearly bears this out. At the Diplomatic conference, during the first session, several delegations proposed amendments to what would become article 51(2) that would effectively prohibit any acts capable of spreading terror among the civilian population. However, by the second session, a consensus had emerged that the provision should only be directed towards the intentional spreading of terror. This is confirmed most clearly in the comments issued by the French delegation (“In traditional wars attacks could not fail to spread terror among the civilian population. What should be prohibited in paragraph 1 is the intention to do so.”) as well as those made by Iran (“Although objections had been raised to the phrase methods ‘intended to spread terror’ in paragraph 1, methods of war undoubtedly did spread terror among the civilian population, and those used exclusively or mainly for that purpose should be prohibited.”) As such, the only change which occurred was that “intended to” was changed to “the primary purpose of which”... Additional Protocol II further extends the scope of the prohibition so that it applies to internal armed conflicts.” [emphasis added]²⁵⁴

176. The ICRC Commentary also supports this view:

“In the second sentence the Conference wished to indicate that the prohibition covers acts intended to spread terror; there is no doubt that acts of violence related to a state of war almost always give rise to some degree of terror among the population and sometimes also among the armed forces. It also happens that attacks on armed forces are purposely conducted brutally in order to intimidate the enemy soldiers and persuade them to surrender. This is not the sort of terror envisaged here. This provision is intended to prohibit acts of violence the primary purpose of which is to spread terror among the civilian population without offering substantial military advantage.”²⁵⁵ [Emphasis added]

²⁵⁴ S. Jodoin, *Terrorism as a war crime* in *International Criminal Law Review* (Vol. 7, 2007), pp. 91-92, available at: <https://deliverypdf.ssrn.com/delivery.php?ID=001013124122079070095096027119092110019062053034039007074009023078000117096081096094057048019063014027047121028068103113107018012044022000064028127020104124029070107089043079084091105031097082024118018076007075019124070007000088000030025076073093094102&EXT=pdf&INDEX=TRUE>.

²⁵⁵ ICRC, Commentary of 1987 on Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, ¶1940, available at: <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/article-51/commentary/1987?activeTab=1949GCS-APs-and-commentaries>.

177. The broad interpretation of the “purpose” requirement contained in Article 2(1)(b) of the ICSFT, as suggested by Ukraine, could create a disincentive for non-State actors engaged in armed conflict to abide by their obligations under international humanitarian law.²⁵⁶

This position is confirmed by the UNODC:

“While there is no combatant immunity for violence committed in non-international conflict, even if it complies with IHL, article 6(5) of Additional Protocol II encourages (but does not require) States to grant amnesties for hostile acts (that were consistent with IHL):

‘At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.’

At a policy level, little difficulty arises where national terrorism offences simply duplicate or reinforce existing war crimes under IHL or are otherwise limited to protecting civilians (such as by criminalizing the financing of attacks on civilians). However, it is more problematic where offences also criminalize acts that are not prohibited by IHL, such as attacks on military objectives by non-State armed forces. Such laws may effectively criminalize war-fighting by non-State armed groups as terrorism, particularly since many national laws apply to any persons or groups meeting the national definitions of terrorism (and are not limited to organizations listed by the Security Council)”.²⁵⁷ [emphasis added]

178. The UNODC has also recalled how the ICRC’s note of caution against conflating IHL and counter-terrorism law, arguing that:

“ • IHL does not prohibit attacks on military objectives by non-State armed groups. Designating such acts as “terrorist” under national criminal law thus undermines IHL, which reflects a carefully negotiated balance between military necessity and humanitarian protection;

• Designating acts that are not unlawful under IHL as “terrorist” may discourage compliance with IHL by non-State armed groups in a non-international conflict;

• Classifying acts that are lawful under IHL as “terrorist” is likely to impede the implementation of article 6(5) of Additional Protocol II to the Geneva Conventions (concerning amnesties) and, in addition, may impede humanitarian or peace negotiations and complicate the eligibility of persons associated with armed groups for DDR processes”.²⁵⁸

²⁵⁶ Counter-Memorial (ICSFT), ¶288.

²⁵⁷ UNODC, Counter-Terrorism in the International Law Context., 2021, p. 107, available at: https://www.unodc.org/pdf/terrorism/CTLTC_CT_in_the_Intl_Law_Context_1_Advance_copy.pdf.

²⁵⁸ *Ibid.*

179. The ICRC's 2019 Report on international humanitarian law and the challenges of contemporary armed conflicts has further explained that:

: “[T]here is a tendency among some States to consider any act of violence by a non-State armed group in an armed conflict as an act of terrorism, and therefore necessarily unlawful, even when the act in question is not in fact prohibited under IHL. This approach is likely to diminish any incentive to comply with IHL. [...]

Thus, if a non-State armed group that has been designated as “terrorist” is sufficiently organized for the purposes of IHL, and is involved in sufficiently intense armed confrontations with the State or other armed groups, the situation will amount to a non-international armed conflict, and will be governed by IHL. In contrast, situations of violence involving individuals or groups designated as “terrorist” but remaining below the threshold of armed conflict are not governed by IHL. In such situations, human rights law will govern counterterrorism operations. [...]

In addition to IHL and human rights law, international and regional instruments addressing terrorism may apply, such as the International Convention for the Suppression of Terrorist Bombings (1997), the International Convention for the Suppression of the Financing of Terrorism (1999), the Council of Europe Convention on the Prevention of Terrorism (2005), or the Shanghai Convention on Combating Terrorism (2001). In the ICRC's view, instruments aimed at combating terrorism should never define those acts as “terrorist” that are governed by IHL and not prohibited by it when committed during armed conflict, such as attacks against military objectives or military personnel.²⁵⁹ [emphasis added]

180. Ukraine attempts to downplay this important factor:

“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.” 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”.²⁶⁰

²⁵⁹ ICRC, Report on International humanitarian law and the challenges of contemporary armed conflicts, Recommitting to protection in armed conflict on the 70th anniversary of the Geneva Conventions, 2019, p. 58-89, available at: <https://shop.icrc.org/international-humanitarian-law-and-the-challenges-of-contemporary-armed-conflicts-recommitting-to-protection-in-armed-conflict-on-the-70th-anniversary-of-the-geneva-conventions-pdf-en.html>.

²⁶⁰ Reply, ¶184.

181. However, Ukraine's objection doesn't make sense: if certain acts that are legal under IHL would be criminalised by ICSFT it would not only violate article 21 of the ICSFT, but also disincentivise non-State actors from complying with IHL. As a result, since the acts being financed should not be considered "terrorism" in the first place, it will undermine the object and purpose of the Convention - effectively rewriting it to become a "Convention on Suppression of General Financing of Non-State Groups".

IV. UKRAINE'S INTERPRETATION OF "FUNDS" UNDER THE ICSFT IS MISCONCEIVED

182. Article 1, paragraph 1, of the ICSFT 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".

183. As explained in the Counter-Memorial, the term "assets" in this provision is not meant to be all-encompassing (such as to include by implication, as Ukraine suggests, arms or military weapons), but is rather limited to specific categories of financial assets that have an inherent monetary value, constitute forms of payments, and can be freely and legally purchased, exchanged and sold²⁶¹. This is consistent with the terms Convention interpreted in good faith, in accordance with their ordinary meaning and in their context, and taking into account the object and purpose of the Convention²⁶². This interpretation further results from reading the ICSFT together with other relevant rules of international law²⁶³, and is confirmed by the drafting history of the treaty²⁶⁴.

184. The present chapter responds to Ukraine's misconceived position on the term "funds" under the ICSFT, taking into account the provisions of Article 1(1) in their context (**Section A**), the object and purpose of the treaty (**Section B**), other rules of international law (**Section C**), the *travaux préparatoires* (**Section D**), and the domestic implementation of the ICSFT (**Section E**).

A. THE TERMS OF THE CONVENTION

185. In its Reply, Ukraine continues to advance that the term "funds" under the ICSFT covers "assets of every kind", which would in its view encompass "all forms of property", including "weapons"²⁶⁵. Ukraine thus seeks to reinvent the meaning of Article 1(1),

²⁶¹ Counter-Memorial (ICSFT), ¶30.

²⁶² Counter-Memorial (ICSFT), ¶¶29-76.

²⁶³ Counter-Memorial (ICSFT), ¶¶82-100.

²⁶⁴ Counter-Memorial (ICSFT), ¶¶77-81.

²⁶⁵ Reply, p. 31. Ukraine did not address the meaning of the term "funds" in any detail in its Memorial, limiting itself to simply asserting that the term is "defined broadly by Article 1 to constitute 'assets of every kind'" (Memorial, ¶35; *see also* ¶273).

making it all-embracing (going as far as to suggest that it includes “virtually anything under the sun”²⁶⁶), which would in turn considerably expand States’ obligations under the substantive provisions of the Convention²⁶⁷. For the reasons briefly recalled above, and as explained in detail in the Counter-Memorial, Ukraine’s position is unfounded and must be rejected. Some additional observations are nonetheless warranted in light of the few new propositions advanced by Ukraine in its Reply.

186. It is clear that Ukraine’s entire case on the interpretation of Article 1(1) of the ICSFT consists, in essence, of taking the words “assets of every kind” in that provision²⁶⁸ out of context, while ignoring other relevant elements in the treaty. The term “assets”, when interpreted in a different context, may convey the meaning of “the property of a person” in a broad sense, as indicated by Ukraine²⁶⁹. But Ukraine fails to take into account, for instance, the very term “funds” used in Article 1(1), the ordinary meaning of which is an “amount of money that has been saved or has been made available for a particular purpose”²⁷⁰, and together with which the term “assets” must be read. Furthermore, while Ukraine refers to the French and Spanish versions of the ICSFT in support of its interpretation of “assets”, it does not take into account the equally authoritative versions in Arabic and Russian (“أموال” and “активы”, respectively), which convey a more limited meaning of assets of a financial or monetary nature.

187. The term “assets of every kind” must also be interpreted in accordance with the other provisions of Article 1(1) which, as explained in the Counter-Memorial, refer to the specific categories of assets that are covered by the ICSFT²⁷¹. This is not merely a “list

²⁶⁶ Reply, ¶75; Memorial, ¶237. As an author has noted, “[u]nder such a definition, the title of the Convention would be more precisely titled “material assistance” than “the financing of terrorism”. See H. Tofangaz, “Criminalization of terrorist financing: from theory to practice”, in *New Criminal Law Review*, Vol. 21(1), pp. 85-86.

²⁶⁷ As noted by the International Law Commission, “while there exists some support in international case law that, absent indications in the treaty to the contrary, the agreed subsequent practice of the parties theoretically may lead to modifications of a treaty, the actual occurrence of that effect is not to be presumed, and the possibility of amending or modifying a treaty by subsequent practice has not been recognized”. See Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries, in *Yearbook of the International Law Commission 2018*, Vol. II, Part Two, p. 63, ¶(38).

²⁶⁸ Reply, ¶¶70-75.

²⁶⁹ Reply, ¶70.

²⁷⁰ See Oxford Dictionary. Available at https://www.oxfordlearnersdictionaries.com/definition/english/fund_1.

²⁷¹ Counter-Memorial (ICSFT), ¶30.

of illustrative examples”, as Ukraine suggests²⁷²; rather, the provisions reflect the types of assets that the drafters of the ICSFT had in mind when they concluded the treaty, as will be further shown below²⁷³.

188. The title of the Convention (“International Convention for the Suppression of the *Financing of Terrorism*”) is also an important indicator of the types of assets or funds that the ICSFT is meant to cover²⁷⁴. This title makes it crystal clear that the Convention is aimed at preventing the provision of *financial support* to terrorists only, and not all types of support in an unlimited manner (such as providing arms or weapons). Indeed, the ordinary meaning of the term “financing” used in the title of the Convention, as well as in its preamble²⁷⁵, is to provide “money needed to do a particular thing”²⁷⁶. As the Russian Federation previously noted, the Preamble recalls the need to adopt “regulatory measures to prevent and counteract *movements of funds* suspected to be intended for terrorist purposes *without impeding in any way the freedom of legitimate capital movements*”;²⁷⁷ the Preamble also mentions “illicit arms trafficking” as something organisations that finance terrorism can *also* engage in, but never qualifies weapons supply as a form of financing.²⁷⁸
189. Ukraine says nothing in the Reply to rebut this, other than merely asserting that the title and preamble of the Convention are irrelevant and add “nothing to the interpretation of ‘assets of every kind’”²⁷⁹. But this is not the case. In accordance with Article 31(1) of the VCLT, the term “assets of every kind” term must be interpreted in its context so as to arrive at its correct meaning²⁸⁰. In the present case, it is self-evident that the terms “financing”, “funds” and “assets”, all employed in the Convention, inform each other and must be read together.

²⁷² Reply, ¶74.

²⁷³ See below, Part 1, Chapter IV, Section D.

²⁷⁴ Counter-Memorial (ICSFT), ¶¶32-46.

²⁷⁵ Counter-Memorial (ICSFT), ¶¶47-56.

²⁷⁶ Cambridge Dictionary. Available at : <https://dictionary.cambridge.org/dictionary/english/financing>

²⁷⁷ Counter-Memorial (ICSFT), ¶¶50-51.

²⁷⁸ Counter-Memorial (ICSFT), ¶48.

²⁷⁹ Reply, ¶76.

²⁸⁰ See also *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, I.C.J. Reports 1996, p. 803, ¶47.

190. This interpretation is confirmed by other anti-terrorism conventions, which expressly regulate the transfer of weapons when States' intention is to do so²⁸¹, and of which the drafters of the ICSFT were well aware when they negotiated and concluded the latter. Ukraine did not address these treaties in its Reply, and their relevance for purposes of interpreting the ICSFT is thus uncontested.
191. The Counter-Memorial also explained that the term “funds” must be equally interpreted together with other, more specific provisions of the ICSFT²⁸². The Reply admits that “[m]onetary and banking issues were indisputably an important part of the Convention”, but then asserts, without any explanation, that this “does not imply that the scope of the Convention is limited to financial assets”²⁸³. Ukraine has however not been able to rebut that:
- (a) Article 8, by obliging States to adopt appropriate measures for purposes of the identification, detection and freezing or seizure of funds, as well as the forfeiture thereof in order to compensate the victims of the crimes set out in the Convention, necessarily presupposes that the term “funds” only covers forms of financial support²⁸⁴;
 - (b) Article 12(2), by stipulating that a State may not refuse a request for legal assistance on the ground of bank secrecy, also presupposes the financial nature of the “funds” covered by the Convention. Furthermore, if the Convention had been intended to address the transfer of arms or military weapons, it would have necessarily provided for an exception to the obligation to cooperate on grounds of military secrecy or national security – but it does not²⁸⁵;
 - (c) Article 13, which provides that the offences set out in Article 2 of the ICSFT may not be regarded as “fiscal offences” for purposes of extradition or mutual legal assistance, further attests to the fact that the offences under Article 2, and

²⁸¹ Counter-Memorial (ICSFT), ¶¶38-46.

²⁸² Counter-Memorial (ICSFT), ¶¶57-72.

²⁸³ Reply, ¶78.

²⁸⁴ Counter-Memorial (ICSFT), ¶¶57-59.

²⁸⁵ Counter-Memorial (ICSFT), ¶¶60-63.

correspondingly the term “funds” or “assets” under Article 1, are exclusively related to financial or monetary transfers²⁸⁶;

(d) Article 18 contains several provisions regarding financial transactions and institutions (“money-transferring agencies”), including “physical cross-border transportation of cash and bearer negotiable instruments”. This is clear additional evidence of the fact that the Convention only concerns funds or assets of a financial or monetary nature, as opposed to weapons²⁸⁷.

192. Ukraine also relies on the Court’s 2019 judgment on preliminary objections²⁸⁸, where the Court noted that the definition of “funds” under Article 1(1) “covers many kinds of financial instruments and includes also other assets”²⁸⁹. As the Court indicated, however, the question of the meaning of “funds” was not raised as a preliminary objection at the time, and consequently “this issue relating to the scope of the ICSFT need[ed] not be addressed at [that] stage of the proceedings”²⁹⁰. On the contrary, the Court clearly stated that “the interpretation of the definition of ‘funds’ could be relevant, as appropriate, at the stage of the examination of the merits”²⁹¹. Thus, the Court did not decide on this matter in its judgment, and it remains to be examined *in limine*.

193. In short, when the Convention is read in its entirety, there is no doubt that it was intended to cover funds or assets of a financial nature only – it was not designed (and indeed it is *not equipped*) to encompass the transfer of items such as arms or weapons. Ukraine’s attempt to isolate one term of the Convention (“assets of every kind”) for purposes of the present case, taking it out of context while ignoring the internal logic of the treaty and the specific obligations that it imposes on States, must accordingly be rejected.

²⁸⁶ Counter-Memorial (ICSFT), ¶¶64-65.

²⁸⁷ Counter-Memorial (ICSFT), ¶¶66-72.

²⁸⁸ Reply, ¶¶67-68.

²⁸⁹ *Application of the International Convention for the Suppression of 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. 586, ¶62.

²⁹⁰ *Ibid.*

²⁹¹ *Ibid.*

B. THE OBJECT AND PURPOSE OF THE CONVENTION

194. In the Counter-Memorial, the Russian Federation showed that the object and purpose of the ICSFT is to suppress a specific form of support of terrorist activities, that is, their *financing*. The rationale behind this object and purpose lies in the fact that assets of a financial or monetary value, such as cash, shares, money orders, cheques, titles, or even certain immovable property (such as buildings) are neutral in character: they can be readily liquidated and transformed into specific means for purposes of committing terrorist acts. These funds can normally be easily and legally exchanged and traded, not subject to domestic or international supervision, thereby creating a risk of encouraging and supporting terrorist acts across the world²⁹². This is the important, but limited, scope of the ICSFT.
195. Ukraine replies to this by suggesting that “it would make 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”²⁹³, adding that Russia’s interpretation “would leave a large loophole that would thwart the Convention’s objective of denying terrorists the resources needed to commit acts of terrorism”²⁹⁴. Ukraine, however, mischaracterises the relevant issue: the question is not whether the ICSFT contains “loopholes” – the various existing treaties on anti-terrorism address different matters on which States have agreed progressively over time, and none of them aims at being comprehensive or exhaustive. The ICSFT, equally, does not address all terrorism-related matters, but only those relating to the *financing* of terrorism. The task of the Court is to determine the scope of the Convention in accordance with Articles 31 and 32 of the VCLT, not to expand that scope in light of what one party sees as a gap in the Convention for purposes of a particular case.
196. Ukraine concedes that it “has never argued that the ICSFT governs ‘the provision of weapons to non-state groups’ as such”, but it then makes a complete turn and rehearses its only argument on the matter: “[w]ithin the Convention’s scope is the provision of assets of every kind, including weapons ...”²⁹⁵. In the end, the distinction that Ukraine

²⁹² Counter-Memorial (ICSFT), ¶¶73-76.

²⁹³ Reply, ¶80.

²⁹⁴ *Ibid.*

²⁹⁵ Reply, ¶81.

seemingly seeks to draw between the provision of weapons to “non-state groups as such” and to alleged perpetrators of terrorist acts under Articles 2(1)(a) and 2(1)(b) of the ICSFT is artificial: such perpetrators virtually always operate as part of a broader organisation, and providing them weapons would in essence amount to providing weapons to the non-state group to which they belong. Thus, on Ukraine’s own reading, the ICSFT is not aimed at dealing with the support of terrorists through arms or weapons.

197. The Reply also states that “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”²⁹⁶. As explained in the Counter-Memorial, the point is that the cross-border transfer of weapons, as well as the cooperation that would be required among States to prevent such transfers, is quite different in nature from the financing of terrorism in the ordinary meaning of the term, that is, through funds and assets of a financial or monetary character. Specific provisions to deal with cross-boundary transfers of weapons, and especially those of exclusive military use, would undoubtedly need a more tailored regulation in the ICSFT had the latter been intended to have such a scope. But the ICSFT is silent on this matter, nor was it discussed at all when the Convention was negotiated²⁹⁷. As regards Ukraine’s assertion that “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”²⁹⁸, it is wide off the mark: the Russian Federation has obviously never claimed to have such a right. The question in the present case is simply whether the term “funds” under Article 1(1) includes weapons – in light of the limited object and purpose of the Convention, weapons cannot be read into the treaty by implication.

198. In the end, Ukraine’s position regarding the object and purpose of the ICSFT is a mere repetition of its arguments concerning the interpretation of the term “assets of every kind” under Article 1(1) in an isolated manner. The object and purpose of the Convention, however, is reflected more clearly in the preamble of the Convention which, as explained

²⁹⁶ Reply, ¶81.

²⁹⁷ Counter-Memorial (ICSFT), ¶38.

²⁹⁸ Reply, ¶81.

in the Counter-Memorial, confirms that the Convention is concerned with the suppression of terrorism financing through financial or monetary assets only²⁹⁹.

199. This is precisely the understanding of the term “funds” that is shared by international bodies engaged in the practical application of the ICSFT. For example, the UNODC Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols points it out quite clearly:

“The 1999 Financing of Terrorism Convention is only one aspect of a larger international effort to prevent, detect and suppress the financing and support of terrorism. Under Security Council resolution 1373 (2001), Member States are required to take measures not only against the financing of terrorism, but also against other forms of support, such as recruitment and the supply of weapons. The 1999 Financing of Terrorism Convention only prohibits the provision or collection of “funds”, meaning assets or evidence of title to assets. However, when legislation to implement the Convention is enacted, the resolution’s requirement to suppress recruitment and the supply of weapons should also be considered”³⁰⁰.

200. The UNODC thus elucidates the issue: while the Convention itself does not cover the supply of weapons, the UN Security Council resolution 1373 (20021) does, and when States adopt legislation implementing the Convention, they should also consider implementing the resolution. This explains why national laws aimed at combating terrorism financing might go beyond the requirements of the Convention and cover weapon supply. This duality between providing weapons and financing terrorism is examined in more detail below.

C. OTHER RELEVANT RULES OF INTERNATIONAL LAW

201. As shown in the Counter-Memorial, other rules of international law applicable between the parties to the ICSFT are, in accordance with Article 31(3)(c) of the VCLT, equally relevant in the interpretation of the treaty in a systematic manner³⁰¹. In this regard, too, the Reply puts forward untenable arguments.

202. First, with respect to the Arms Trade Treaty (‘ATT’), Ukraine limits itself to advancing that the possibility of some “overlap” between the latter and the ICSFT is

²⁹⁹ Counter-Memorial (ICSFT), ¶¶47-56.

³⁰⁰ UNODC, Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols (United Nations, 2003), p. 21, ¶49 (available at: https://www.unodc.org/pdf/crime/terrorism/explanatory_english2.pdf).

³⁰¹ Counter-Memorial (ICSFT), ¶¶82-100.

“unremarkable”, and that the ATT “serves a different function”: “[w]hereas the ICSFT addresses the unlawful provision of assets (including weapons) intending or knowing they are to be used for terrorist acts, the [ATT] focuses more broadly on potential diversion for ‘unauthorized end use and end users’, even if a transfer is not in itself unlawful terrorism financing”³⁰². Ukraine’s distinction between unlawful provision of weapons for purposes of the ICSFT and “broader transfers” that are not in themselves unlawful terrorism financing for purposes of the ATT is however not accurate.

203. As noted in the Counter-Memorial, the ATT was aimed, in part, at addressing a lack of “international standards on the ... transfer of conventional arms”, which lacuna can constitute a “contributory factor ... to terrorism”³⁰³. The preamble of the ATT itself notes that the States parties had in mind “the need to prevent and eradicate the illicit trade in conventional arms and to prevent their diversion to the illicit market, or for unauthorized end use and end users, including *in the commission of terrorist acts*”³⁰⁴. Article 1 of the ATT further states, as one of the objects of the treaty, to “[p]revent and eradicate the illicit trade in conventional arms and prevent their diversion”. Article 7, paragraph 1b)(iii), similarly obliges States to assess the potential that the conventional arms or items to be exported could be used to “commit or facilitate an act constituting an offence under international conventions or protocols relating to terrorism to which the exporting State is a Party”.
204. All these elements, also set out in more detail in the Counter-Memorial yet unrebutted by Ukraine, are clear evidence that States do not consider that the term “funds” under Article 1(1) of the ICSFT covers the transfer of arms or weapons, or that this issue is otherwise governed by the ICSFT. The lack of any reference to the ICSFT in the text or negotiating history of the ATT, a treaty that expressly regulates the unlawful transfer and diversion of arms or weapons that may be used for purposes of committing terrorist acts as defined by international treaties, cannot but confirm that the ICSFT does not govern this matter, and that Ukraine’s implausible interpretation of Article 1(1) distorts the true scope and object and purpose of the ICSFT.

³⁰² Reply, ¶84.

³⁰³ United Nations General Assembly, 61st Session, “Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms”, Resolution 61/89, 6 December 2006 (referred to at Counter-Memorial (ICSFT), ¶84).

³⁰⁴ Emphasis added.

205. As regards UN Security Council resolutions, the Russian Federation showed in the Counter-Memorial that the practice of the Council makes a clear distinction between the financing of terrorism activities (covered by the ICSFT), on the one hand, and other forms of support in kind (such as the provision of weapons), on the other.³⁰⁵ The Council only has used the terms “funds” and “funding” to refer to financial assets and activities, and referred to the ICSFT in this context, but not in the context of material support, such as the supply of weapons. In particular, the “core” Security Council resolution 1373 clearly distinguishes between “financing of terrorist acts”, which includes provision of “funds and other financial assets or economic resources” to terrorists (OP1 of the Resolution), from “supply of weapons to terrorists” (OP2 of the Resolution). Security Council resolution 2370, adopted in 2017 and aimed specifically at eliminating the supply of weapons to terrorists, does not mention the ICSFT, and distinguishes “financing” from “obtaining” weapons;³⁰⁶ as for resolution 2482, adopted in 2019, it only mentions ICSFT in the context of “illicit finance including terrorist financing”, but not with regard to trafficking of military materials and equipment.
206. Ukraine’s only reaction to this fact is an attempt to blur the clear language used by the Security Council in its various resolutions, suggesting that “both the Security Council and the States Parties to the ICSFT addressed the same important issue in an equally comprehensive manner, but simply using different language”³⁰⁷. This argument is disingenuous, as the matter is not of result – the Russian Federation does not claim that Security Council resolutions have *lacunae* and fail to cover certain aspects of support for terrorists. The matter lies precisely in the distinction clearly made by the Security Council between different forms of support, regulated by different international instruments, as noted also by the UNODC³⁰⁸. Since Ukraine has failed to fully engage with the practice of the Council and the precise language employed in such resolutions, there is no need to further address this matter – Russia’s position remains uncontested³⁰⁹. However, to make

³⁰⁵ Counter-Memorial (ICSFT), ¶¶93-100.

³⁰⁶ SC Resolution 2370, PP11.

³⁰⁷ Reply, ¶83.

³⁰⁸ See above, ¶117-118.

³⁰⁹ The same holds true for ¶92 of Counter-Memorial (ICSFT), concerning the relevance of the Protocol against the Illicit Manufacturing and Trafficking in Firearms, Their Parts and Components and Ammunitions Supplementing the United Nations Convention against Transnational Organized Crime, which Ukraine has not rebutted.

the matter even clearer, reference can be made to UN documents prepared to facilitate the implementation of these resolutions.

207. For example, the “Technical guide to the implementation of Security Council resolution 1373 (2001) and other relevant resolutions”, adopted by the UN Security Council Committee on Counter-Terrorism in 2019, contains the following guidance regarding the term “funds”:

“A definition of funds should be included in the law or in the criminal code and should comply with the definition contained in the International Convention for the Suppression of the Financing of Terrorism. The definition of ‘funds’ must be broad and must include assets that may potentially be used to obtain goods and services, as well as trade resources. In October 2016, the Financial Action Task Force revised the interpretive note to recommendation 5. The revisions included replacing the term ‘funds’ with the expression ‘funds or other assets’ in order to explicitly cover the provision of ‘economic resources’ (namely, oil, oil products, modular refineries and related material, and other natural resources) in accordance with resolutions 2161 (2014), 2199 (2015) and 2253 (2015). This requirement is reaffirmed in resolutions 2368 (2017) and 2462 (2019)”³¹⁰.

208. This definition does not include weapons, nor does it mention Security Council resolution 2370 (specifically devoted to preventing terrorists from acquiring weapons). There is also some ambiguity with regard to the scope of “funds” as including even “economic resources” (as the FATF had to adopt the term “funds and other assets” to encompass them). Evidently, the default understanding of “funds” by UN Member States and the Counter-Terrorism Committee was to include financial assets only, and was specifically extended to “economic resources”, but never to weapons or heavy armaments.

209. To facilitate the implementation of Security Council resolution 2370, a set of technical guidelines, entitled “Preventing Terrorists from Acquiring Weapons”, was developed as part of a joint project implemented by the United Nations Counter-Terrorism Committee Executive Directorate (CTED), together with the United Nations Institute for Disarmament Research (UNIDIR) and the United Nations Counter-Terrorism Centre (UNCCT) of the United Nations Office of Counter-Terrorism (UNOCT).³¹¹ In response

³¹⁰ “Technical guide to the implementation of Security Council resolution 1373 (2001) and other relevant resolutions”, ¶40.

³¹¹ https://www.un.org/securitycouncil/ctc/sites/www.un.org.securitycouncil.ctc/files/files/documents/2022/Mar/technical_guidelines_to_facilitate_the_implementation_of_security_council_resolution_2370_2017_and_related_international_standards_and_good_practices_on_preventing_terrorists_from_acquiring_weapons.pdf.

to the resolution's call to Member States to "consider becoming a party to the related international and regional instruments, with a view to eliminating the supply of weapons to terrorists", the guide lists a number of international instruments covering control over small arms and light weapons, including the ATT and other instruments.³¹² The ICSFT, however, is not mentioned among them.

210. If Ukraine were right in its interpretation of the Security Council resolutions as considering weapons supply to be an element of terrorism financing, then the ICSFT should have played a prominent role in the guide. Yet not only is the ICSFT absent from the guide: there is also no mention of terrorism financing in general, nor of weapons as "funds" or their supply as "funding". Thus, it is clear that the competent anti-terrorism bodies of the United Nations do not view arms supply as a form of "terrorism financing". While certainly prohibited by Security Council resolutions and various international instruments, this activity is nevertheless not governed by the ICSFT.

211. Finally, it should be noted that Security Council resolutions, the guidance on their implementation and relevant FATF recommendations may extend *beyond* obligations enshrined in the ICSFT. For example, as noted in the "Technical guide to the implementation of Security Council resolution 1373 (2001) and other relevant resolutions":

"Recommendation 5 of the Financial Action Task Force and its interpretive note go beyond the obligations contained in the International Convention for the Suppression of the Financing of Terrorism in requiring States to also criminalize the financing of terrorist organizations and individual terrorists on a broader basis without requiring a link to a specific terrorist act or acts"³¹³.

212. Specifically with regard to "funds", the FATF Guidance on criminalizing terrorism financing makes the following clarification:

"Following the revision of R.5 and the FATF Glossary in October 2016, the TF offence applies to providing or collecting funds or other assets, which explicitly includes economic resources, including oil and other natural

³¹² *Ibid.*, pp. 38, 55, 73 etc. Besides the Arms Trade Treaty, the guide also refers to the 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection (MEX Convention), Convention on the Simplification and Harmonization of Customs Procedures (Kyoto Convention), Convention on the International Civil Aviation (Chicago Convention), 2010 Convention on Suppression of Unlawful Acts against Civil Aviation (Beijing Convention), 2020 amendments to the 1983 International Convention on the Harmonized Commodity Description and Coding System, Convention against Transnational Organised Crime, as well as various human rights treaties.

³¹³ "Technical guide to the implementation of Security Council resolution 1373 (2001) and other relevant resolutions", ¶39.

resources, dividends and income accruing from assets, as well as any other assets which are not funds but which potentially may be used to obtain funds, goods or services.” (emphasis ours).³¹⁴

213. Once again, neither the FATF Guidance on criminalizing terrorism financing, nor the more general FATF Recommendations (“International standards on combating money laundering and the financing of terrorism & proliferation”) ever mention the supply of weapons to terrorists (with the specific exception of combating proliferation of weapons of mass destruction). This evidences a general understanding among all relevant international authorities and UN Member States that (conventional) weapon supply is distinct from terrorism financing.

D. THE DRAFTING HISTORY OF ARTICLE 1(1) OF THE CONVENTION

214. As shown in the Counter-Memorial³¹⁵, the drafting history of the ICSFT shows that, although an early draft of the Convention produced by France originally defined “financing” as including not only “funds” and “assets”, but also “other property”, the latter term being understood at the time to cover “arms, explosives and similar goods”, the negotiating States decided *not* include such a provision in the final version of the Convention. This decision not to make reference in the Convention to property such as weapons confirms that the term “funds” in Article 1(1) is limited to assets of a financial or monetary nature, as explained above.

215. Ukraine replies to this by saying, as it did in its Memorial, that the words “other property” from the earlier version of Article 1(1) of the ICSFT were deleted because the term “funds” was intended to cover such other property, including weapons; thus, adding the words “other property” would have been “redundant”³¹⁶. Yet Ukraine’s selective account of the drafting history is to no avail. In particular, Ukraine fails to note, for example, that according to the *travaux*, “transfer of funds” was understood as “covering all forms of *financial* assistance”.³¹⁷ Coupled with the understanding of the “definition” of funds only covering “types of *financial* resources”³¹⁸, and the final definition only including

³¹⁴ FATF Guidance on criminalizing terrorism financing, ¶10.

³¹⁵ Counter-Memorial (ICSFT), ¶¶77-81.

³¹⁶ Reply, ¶85.

³¹⁷ Measures to eliminate international terrorism: Report of the Working Group (UN doc. A/C.6/54/L.2, 26 October 1999), ¶35 (emphasis added).

³¹⁸ *Ibid.*, ¶43 (emphasis added).

examples of these same “types of *financial* resources” while conspicuously not mentioning weapons, explosives or military equipment, this gives a clear indication that the drafters did not intend to go beyond literal *financing*.

216. The drafting history similarly shows that that:

“Support was expressed by some for providing only a generic definition, without the inclusion of examples, so as not to *include types of financial resources* that might become outmoded in the future, as well as to ensure the necessary flexibility *to encompass new types of funding* that might arise in the future. In the same vein, it was suggested that the paragraph be ended after the words ‘property’ (see A/C.6/54/1999/CRP.5), ‘intangible’ or ‘acquired’, respectively”³¹⁹.

217. Two conclusions can be drawn from the above paragraph. First, when agreeing on the definition of “funds”, the discussion revolved exclusively around various financial resources. Its final version was motivated by the desire of States to cover all types of financial resources. Second, the general debate indicates that the reference to “assets”, encompassing tangible, intangible and other types of assets, was also dictated by the desire to cover by definition all possible types of financial resources, even those that may not have existed at the time. An example is cyber-currency, which had not yet come into circulation when the ICSFT was drafted.

E. DOMESTIC IMPLEMENTATION OF THE ICSFT

218. Finally, Ukraine’s reference to a small selection of national legislations is of no assistance to it³²⁰. First of all, as was explained previously with reference to the UNODC³²¹, in terms of combating terrorism States face broader obligations under international law than those enshrined in the ICSFT, such as those stemming from UN Security Council resolution 1373, and may choose to implement them in their national legislation together with the ICSFT, thus creating legal norms that are not necessarily reflected in the latter.

219. However, even those national legal orders to which Ukraine refers do not truly support its claims. For instance, Ukraine asserts that a “restrictive interpretation of ‘assets of every kind’ ... would create an inconsistency with the meaning of terrorism financing in

³¹⁹ A/C.6/54/L.2, ¶43 (emphasis added).

³²⁰ Reply, ¶¶89-97.

³²¹ See above, ¶199-200.

[Russia's] domestic law".³²² However, this claim is only supported by a reference to a resolution of the Russian Supreme Court Plenary³²³, which does not create legal norms but implements them. The existing law, *i.e.* the Criminal Code of the Russian Federation ("RCC"), clearly distinguishes between providing weapons to terrorists ("arming") and other types of support ("financing of terrorism").³²⁴ This distinction is upheld in the very resolution of the Plenary relied on by Ukraine: in a passage which Ukraine conveniently omits in the Reply, the Plenary explains that the supply of weapons to terrorists should be considered as "arming" (thus constituting a special type of support that is not covered by the term "property" by implication), while the provision of money and material assets, such as clothing, medicine, living quarters, and transportation –*not including weapons* – is to be considered "financing of terrorism".

220. Even US law, upon which Ukraine relies, is not uncontroversial. As noted by an author:

"From a U.S. perspective, which applies a very broad definition of support, this means support beyond pure funding. That is, U.S. law prohibits providing 'material support or resources' to terrorists and foreign terrorist organizations. The term 'material support or resources' includes not only funds and tangible goods, but also 'training,' 'personnel,' 'transportation,' 'service,' and 'expert advice or assistance,' 'except medicine or religious materials.' However, the precise scope of the 'material support and resources' provisions has proved controversial and come under constitutional attack for their vagueness"³²⁵.

221. Furthermore, apart from Ukraine's carefully curated selection of national laws, other States have implemented this element of the ICSFT differently, applying a notion of "funds" that does not include weapons:

"Unlike the United States and other member States that broadly define the term 'funds,' some States limit the definition to pecuniary resources or to funds of a certain value. Following its proposal in the negotiations on the Convention, Japan, in Article 2 of the Act on the Punishment of Financing of Offences of Public Intimidation, uses the term *shikin*, which is the translation of the word 'funds' and which is used and understood as 'cash and monetary

³²² Reply, ¶97.

³²³ 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," ¶16 (Ukraine's Memorial, Annex 438).

³²⁴ See Article 205.1 of the Criminal Code of the Russian Federation, Annex 874 to the Memorial ("arming or training a person to commit at least one of these crimes, as well as financing of terrorism") [Emphasis added].

³²⁵ H. Tofangfaz, "Criminalization of terrorist financing: from theory to practice", in *New Criminal Law Review*, Vol. 21(1), p. 86.

instruments easily convertible into cash.³²⁶ In the case of the law at issue, the scope of the term *shikin* has been also defined by the Ministry of Justice of Japan, under whose jurisdiction a law is enacted and applied, to include not only ‘cash and other means of payment,’ but also ‘other kinds of assets that are provided or collected with the intention of gaining such cash or other means of payment as a fruit or to be converted into such cash or other means of payment.’³²⁷

The scope of the term ‘assets’ is also limited under German law by Section 89a(2), no. 4, of German Penal Code to comprise only assets that are not ‘insubstantial’ in value.^{328,329}

222. As a result, Ukraine’s attempt to rely on State practice in support of its position falls flat. In reality, the implementation of the ICSFT in national legislation varies because some States have elected to attach a wider meaning to the term “funds” or “funding” in the context of terrorism financing, while others have applied a narrower definition (in particular when it concerns weapons). Neither definition would be at odds with the ICSFT – one would simply go beyond the scope of Article 1(1).

* * *

223. To sum up, the term “funds” under Article 1(1) of the ICSFT cannot be interpreted as encompassing “anything under the sun”. The terms of the Convention, interpreted in accordance with Articles 31-33 of the VCLT, confirm that the Convention concerns only assets of a financial or monetary nature, to the exclusion of other items such as weapons. The other provisions of the Convention, and the specific obligations that the latter imposes, must be understood within these parameters.

³²⁶ FATF, Third mutual evaluation report: Anti-money laundering and combating the financing of terrorism: Japan (Oct. 17, 2008), ¶219.

³²⁷ *Ibid.*, ¶221.

³²⁸ International Monetary Fund, Germany: Detailed assessment report on anti-money laundering and combating the financing of terrorism (Mar. 2010), ¶207.

³²⁹ H. Tofangsaz, “Criminalization of terrorist financing: from theory to practice”, in *New Criminal Law Review*, Vol. 21(1), p. 92.

V. UKRAINE HAS FAILED TO ESTABLISH THE OFFENCE OF TERRORISM FINANCING WITH RESPECT TO FLIGHT MH17

A. INTRODUCTION

224. As noted in the Counter-Memorial, the appalling shooting down of Flight MH17 is central to Ukraine's case under the ICSFT. In its Reply, Ukraine continues to rely on this incident to argue that the Russian Federation has allegedly violated its obligations under the Convention by failing to cooperate with the Ukrainian authorities.
225. Chapter VI of the Counter-Memorial showed that Ukraine's claims are entirely unfounded. The present chapter addresses Ukraine's remaining arguments on this issue in the Reply, to the extent that they add anything new. Before doing so, however, a number of general observations are warranted.
226. *First*, the Russian Federation has established in Chapter IV above and in Chapter II of the Counter-Memorial that the provision of weapons cannot be considered as "funding" within the meaning of Articles 1(1) and 2(1) of the ICSFT. This alone suffices to dismiss all of Ukraine's claims concerning Flight MH17 under the Convention.
227. *Second*, Ukraine stands alone in its allegation that the shooting down of the MH17 is a terrorist act. Cases of shooting down of civilian aircraft in error are unfortunately not rare recently, but none of those incidents have been considered to be a terrorist act, including the shooting down by Ukraine's own Armed Forces of a Russian Tu-154 over the Black Sea in 2001, killing all 78 civilians on board.³³⁰
228. *Third*, Ukraine was unable in previous stages of these proceedings, and still is in its Reply, to produce any credible evidence that whoever provided the weapon used to shoot down Flight MH17 did so with the specific intent or knowledge that such weapon should/was to be used to shoot down a civil aircraft, as would be required under Article 2(1)(a) of the ICSFT read in conjunction with Article 1(1)(b) of the Montreal Convention. The specific intent (*dolus specialis*) and knowledge required under the Montreal

³³⁰ Expert Report of Yuri Vladimirovich Bezbododko, 10 March 2023, ¶¶60-63 (Annex 6).

Convention and the ICSFT respectively must be established by fully convincing and conclusive evidence, as explained above.³³¹

229. **Fourth**, alongside the ATO against the people of Donbass organised as the DPR and LPR, the Government of Ukraine and its sponsors launched a massive propaganda campaign against the DPR and LPR and against the Russian Federation, designed to promote sanctions against the Russian Federation without UN approval. Prominent in this campaign were allegations against the Russian Federation³³² in connection with the MH17 incident on 17 July 2014. Since the downing of the flight MH17 in Donbass on 17 July 2014, the Russian Federation has called for a full, thorough, non-biased and depoliticised investigation into the causes of the crash, based on facts and irrefutable evidence. The Russian Federation initiated the adoption of the UN Security Council Resolution 2166 and remains fully committed to its implementation. The Russian side has repeatedly pointed out that the Joint Investigation Team (“JIT”) pursued a selective and politicised approach while collecting evidence on the MH17 case, which later served as the basis for criminal proceedings initiated by The Hague District Court against three Russian citizens – I.V. Girkin, O.Y. Pulatov and S.N. Dubinskiy, as well as one Ukrainian citizen, L.V. Kharchenko.
230. The sentence was mainly built on the findings of the Public Prosecution Service of the Netherlands which were drawn from statements of classified anonymous witnesses and data supplied by the SBU, which has repeatedly been caught providing false, contradictory information and is an interested party in the case. The prosecutors and the judges failed to take into consideration the statements of the witnesses called for by O.Y. Pulatov's defence and the entire set of materials provided by the Russian Federation, including radar raw data and reports on the live-fire test carried out by the Almaz-Antey company, manufacturer of the Buk anti-aircraft missile system.
231. They also disregarded the fact that Ukraine had refused to provide radar data as well as records of communications of ground flight-tracking services. Furthermore, the Ukrainian air traffic control officers who were on duty that day and therefore could have shed light on the facts of the tragedy, disappeared. Since the downing of the flight the

³³¹ See above, Chapter I(D).

³³² The Russian Federation reiterates its position that it vigorously denies all such allegations.

responsibility of Ukraine for not closing the airspace above the zone of hostilities where the UAF deployed air defence systems, including Buks, has not been duly investigated. Satellite images made by the US on the day of the crash could have helped clarify its circumstances, but Washington flatly refused to comply with the judges' request to disclose the data, or at least allow it to be examined under special conditions.

232. The Russian Federation has presented its evaluation of the work of the JIT and The Hague District Court decision in an official communication to the UN Security Council.³³³ A detailed demonstration of an extreme bias against the Russian Federation and the DPR and LPR in these investigations and judgments is reflected in the **Appendix 2** to this Rejoinder. However, despite this obvious bias, the JIT and The Hague District Court could not ignore certain immutable evidence, such as the lack of terrorist intent. In particular, The Hague District Court concluded its case by rendering four final judgments in which:

- (a) It was determined to be “completely implausible that a civil aircraft was deliberately downed ... those involved initially thought that they had succeeded in shooting down a Ukrainian military aircraft”;³³⁴ it was also considered that “the accused may not have wanted to shoot down a civil airliner, nor that 298 innocent civilians be killed as a result”;³³⁵
- (b) It was not established that Russian troops were involved in the incident,³³⁶

³³³ Permanent Representative of the Russian Federation to the United Nations, Letter addressed to the Secretary-General and the President of the Security Council, S/2023/96, 7 February 2023, available at: <https://digitalibrary.un.org/record/4002640?ln=en>.

³³⁴ District Court of The Hague, Case No. 09/748005-19, Judgment against S.N. Dubinsky, 17 November 2022, ¶6.2.5.3, available at: <https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:RBDHA:2022:14036&showbutton=true&keyword=09%252f748005-19&idx=1%2F>.

³³⁵ District Court of The Hague, Case No. 09/748004-19, Judgment against I.V. Girkin, 17 November 2022, ¶6.2.6, available at: <https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:RBDHA:2022:14037&showbutton=true&keyword=09%252f748004-19&idx=1%2F>.

³³⁶ District Court of The Hague, Case No. 09/748004-19, Judgment against I.V. Girkin, 17 November 2022, ¶4.4.3.1.4: “...the court notes that the DPR was not part of the official Armed Forces of the Russian Federation...”, “...the DPR cannot be viewed as part of the Armed Forces of the Russian Federation, the members of the DPR also cannot be considered part of those Armed Forces”, available at: <https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:RBDHA:2022:14037&showbutton=true&keyword=09%252f748004-19&idx=1%2F>.

- (c) It was not established that the DPR troops were under the command of the Russian Federation; “effective control” of the Russian Federation over DPR troops was not established;³³⁷
- (d) It was not established that the alleged actions of the Buk TELAR crew were motivated by terrorist goals, or that they were given any such instructions;³³⁸
- (e) It was clearly established that both the alleged supply and the alleged use of the Buk TELAR pursued a military purpose;
- (f) the only charges brought to the court were for “murder” under Dutch criminal law, not terrorism or war crimes;
- (g) The District Court cast heavy doubt on evidence supplied by Ukraine, pronouncing that any such evidence must be independently verified to be admissible;³³⁹ and
- (h) the only accused who defended himself (Mr Pulatov) was acquitted, while the three persons convicted were tried “*in absentia*” without any defence.

233. These decisions clearly disprove Ukraine’s claim that the shooting down of Flight MH17 constituted a terrorist offence within the meaning of Article 1(1)(b) of the Montreal Convention. By extension, no provision of funds within the meaning of the ICSFT in connection with this incident could constitute terrorism financing.

³³⁷ JIT, Transcript of press conference JIT MH17, 8 February 2023, available at: <https://www.politie.nl/en/information/transcript-of-press-conference-jit-mh17-on-8-february-2023.html> (Annex 390).

³³⁸ District Court of The Hague, Case No. 09/748004-19, Judgment against I.V. Girkin, 17 November 2022, ¶6.2.5.3: “...the actions of the crew of the Buk TELAR when launching the Buk missile at MH17 cannot be established on the basis of the case file. The case file also fails to identify who gave the instruction to launch a missile, and why that order was given...”, available at: <https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:RBDHA:2022:14037&showbutton=true&keyword=09%252f748004-19&idx=1%2F>.

³³⁹ District Court of The Hague, Case No. 09/748004-19, Judgment against I.V. Girkin, 17 November 2022, ¶4.4.4.3: “To the extent that in so doing use was made of research material brought in by or through the SBU with potential probative value, the Public Prosecution Service accounted for this. In doing so, the Prosecution expressly involved the questionable reputation that sources said the SBU had in 2014, which led to caution, verification and validation research... [I]nformation from questionable sources... requires extra caution and investigation... if the court will make use of investigative material introduced along the path of the SBU, it will do so with due caution in accordance with the applicable rules”, available at: <https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:RBDHA:2022:14037&showbutton=true&keyword=09%252f748004-19&idx=1%2F>.

234. *Fifth*, in spite of the judgments rendered by The Hague District Court, uncertainty hangs over the question of which weapon caused the destruction of Flight MH17 or who used it. Thus, an US Agency, the position of which was presented in the proceedings in The Hague District Court, considers it more plausible that a Ukrainian Buk TELAR could have fired a Buk missile from an area to the east of Zaroshchenskoye.³⁴⁰ This is not implausible as Ukraine did have several Buk TELAR deployed and operating in the conflict zone, including in the vicinity of the MH17 crash,³⁴¹ and the UAF have already shot down a civilian airliner, in the course of military exercises, in 2001. There is also a possibility that the Buk TELAR in question originated from Ukraine.³⁴²
235. The Court cannot rely on the proceedings of the Dutch criminal court, or the Dutch Safety Board (“DSB”) or the JIT regarding the issue of who delivered the Buk TELAR or who used it, in particular since to a large degree these findings relied on purported evidence supplied by Ukraine, and more precisely the SBU, which has been confirmed to be an unreliable source.³⁴³ The same applies to the findings of the European Court of Human Rights (“ECtHR”), especially after the withdrawal of the Russian Federation from the Council of Europe. Solid evidence was presented by the Russian Federation to the ECtHR. However, it was not answered by Ukraine and the Netherlands, and the ECtHR decided to make evidence in the process closed to the public.
236. As will be showed in the **Appendix 2** to this Rejoinder the evidence used in the proceedings had clear signs of manipulation and fabrication. For example, the original photos allegedly showing the Buk have not been made available to the public. The JIT based its conclusions regarding the alleged route of the Buk on photos that were shown to be fabricated. Other purported evidence, such as intercepted conversations, videos and

³⁴⁰ District Court of The Hague, Case No. 09/748004-19, Judgment against I.V. Girkin, 17 November 2022, ¶6.2.3, available at: <https://uitspraken.rechtspraak.nl/#/details?id=ECLI:NL:RBDHA:2022:14037&showbutton=true&keyword=09%252f748004-19&idx=1%2F>.

³⁴¹ Fishki.net, *Ukraine draws in BUK missile defence systems to Donetsk Oblast* (8 March 2014), available at: <https://fishki.net/1249959-ukraina-podtjagivaet-v-doneckuju-oblast-zrk--buk.html> (Annex 386); UNIAN, *The Ukrainian air forces receive reconditioned Buk-M1 anti-aircraft missile system (photo)* (6 June 2014), available at: <https://www.unian.net/army/926317-vozdushnyie-silyi-ukrainyi-poluchili-otremontirovannyiy-zenitnyiy-raketnyiy-kompleks-buk-m1-foto.html> (Annex 387); UNIAN, *Ukraine's first reconditioned Buk-M1 SAMS tested in Khmelnychchyna* (27 June 2014), available at: <https://www.unian.net/army/933846-na-hmelnitchine-istryityivayut-perviy-otremontirovannyiy-v-ukraine-zrk-buk-m1.html> (Annex 388); *See also below*, ¶318.

³⁴² *See* Annex 370.

³⁴³ *See also* ¶¶235, 416.

photos of the alleged missile launch site, was likewise manipulated, while handling of wreckage and missile fragments by the DSB was so careless as to cast significant doubt on any findings. The Dutch technical investigation carried a significant number of errors and inconsistencies that show signs of bias towards a preconceived conclusion, while alternative versions of events were dismissed without substantive justification. A particular matter of concern is that these manipulations involved people known to have previously engaged in fabricating false evidence.³⁴⁴

237. *Sixth*, the Russian Federation retains the position that to reject Ukraine’s contentions of breach of the ICSFT it is not necessary for the Court to resolve the issues as to who downed Flight MH17 and where the weapon comes from, in order to dismiss this Case, since, even if Ukraine’s evidence were to be accepted (*quad non*), one thing remains certain: Flight MH17 was downed in a tragic error. As will be shown below, an error obviously cannot be qualified as terrorism.

B. UKRAINE FAILED TO ESTABLISH THAT THE MONTREAL CONVENTION APPLIES TO THE SHOOT-DOWN OF FLIGHT MH17

238. In its Reply, Ukraine alleges that “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 offence 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.”³⁴⁵ It maintains that Russian nationals allegedly provided a Buk TELAR to armed groups in Donbass³⁴⁶ with the intention that it be used to shoot down the civil aircraft or in the knowledge that it was to be used in this way.

239. The Russian Federation already responded to these unfounded allegations in its Counter-Memorial. In particular, it explained that even if the evidence that Ukraine relies on were to be accepted (*quad non*), that evidence merely shows, at the most, that whoever provided weapon did so with the intention that it should be used, or in the knowledge that it was to be used, to target Ukraine’s military aircraft in the context of the ongoing armed

³⁴⁴ See also below, Appendix 2, ¶42.

³⁴⁵ Reply, ¶202.

³⁴⁶ The Russian Federation reiterates its position that it vigorously denies all such allegations.

conflict, and that Flight MH17 was downed in a tragic error. Thus, the requisite intention or knowledge under the chapeau to Article 2(1) of the ICSFT would be absent.³⁴⁷

240. The Counter-Memorial, as well as Chapter III above, also showed that the scope of the offence of unlawfully and intentionally destroying an “aircraft in service” under Article 1(1)(b) of the Montreal Convention, properly interpreted in accordance with Articles 31 and 32 of the VCLT, is limited to civil aircraft only. For the terrorism offence to be established, therefore, a specific intent to destroy a civil aircraft, as opposed to a military aircraft, is required.³⁴⁸ In the present case, where the intent of the persons involved in the shooting down of Flight MH17 was beyond doubt that of destroying a military aircraft, the mental element required under Article 1(1)(b) of the Montreal Convention is not met.
241. Ukraine disagrees. In its Reply, Ukraine advances “two independent reasons” to demonstrate that the Flight MH17 incident was an offence under Article 1(1)(b) of the Montreal Convention: “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 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”.³⁴⁹
242. These arguments are both unconvincing and should be rejected, because: first, even if the evidence that Ukraine relies on were to be accepted (*quad non*), the downing of Flight MH17 was an error and the intent to destroy a military aircraft is not covered by Article 1(1)(b) of the Montreal Convention (i); second, the contention that the Buk TELAR is an “inherently indiscriminate” weapon is unfounded (ii).

³⁴⁷ Counter-Memorial (ICSFT), ¶302.

³⁴⁸ *Ibid.*, ¶162.

³⁴⁹ Reply, ¶126.

i. The Intent Requirement of Article 1(1)(b) of the Montreal Convention Is Not Met

243. Even assuming *arguendo* that one proceeds on the basis of Ukraine’s factual allegations (which the Russian Federation vigorously rejects), the downing of Flight MH17 would still not fall within the scope of the Montreal Convention.

a. Even assuming that Ukraine’s factual allegations were correct (quod non), the intended target was not a civil aircraft

244. It is important to put the shooting down of Flight MH17 in its true context, that is the existence at the time of the incident of an ongoing armed conflict between Ukrainian and the DPR’s armed forces.

245. The existence of an armed conflict between Ukraine and the DPR and LPR at the relevant time is not in doubt, even if Ukraine prefers to turn a blind eye to it. Even The Hague District Court in its Judgment of 17 November 2022 agreed that “the fighting between the Ukrainian army and the Donetsk People’s Republic can ... be characterised as an armed conflict”.³⁵⁰

246. It is in light of this fact that the alleged request for obtaining the Buk TELAR should be considered. According to the materials presented by the Dutch Prosecution to The Hague District Court, the DPR’s sole purpose was to defend itself against a series of armed strikes by Ukrainian military aircraft, not to shoot down a civil aircraft. In this regard, the JIT’s report found that:

“In July 2014, heavy fighting was going on in the area southeast of Donetsk. (...) During these fights, the Ukrainian army carried out many air strikes to stop this offensive. The pro-Russian fighters suffered greatly: there were many losses, both human and material. Intercepted telephone conversations show that during the days prior to 17 July, the pro-Russian fighters mentioned that they needed better air defense systems to defend themselves against these air strikes.”³⁵¹

247. The JIT reiterates this conclusion in a report published on 8 February 2023:

³⁵⁰ District Court of The Hague, Case No. 09/748004-19, Judgment against I.V. Girkin, 17 November 2022, ¶4.4.3.1.2, available at: <https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:RBDHA:2022:14037&showbutton=true&keyword=09%252f748004-19&idx=1%2F>.

³⁵¹ Joint Investigation Team, Presentation of first results of the MH17 criminal investigation, 28 September 2016, available at: <https://www.prosecutionservice.nl/topics/mh17-plane-crash/criminal-investigation-jit-mh17/jit-presentation-first-results-mh17-criminal-investigation-28-9-2016> (Annex 391).

“In June 2014 there was heavy fighting between the Ukrainian army and troops of the DPR and LPR. During this fighting both the DPR and LPR requested heavier weaponry, including better anti-aircraft systems. The investigation carried out shows that from the second half of July 2014 several Buk-TELARs have been delivered to the separatists, including the Buk-TELAR that shot down flight MH17”.³⁵²

248. The view of Ukraine’s own Security Service is that the Buk TELAR was supplied for the purpose of “air defense”. The SBU stated shortly after the tragic downing of Flight MH17 that the weapon had been supplied to take part in a military operation in response to the combat operations of the UAF. In four Notices of Suspicion issued by the SBU on 18 June 2019, which Ukraine did not put into evidence, it is stated:

“On 16 July 2014, the armed units of the DPR [...] attempted to breach the defenses of the Ukrainian government forces in the area of Savur Mohyla (Snizhne District, Donetsk Region); however, due to defense combat action of the Ukrainian Armed Forces (including air warfare), they suffered significant losses in personnel and military equipment. For this reason, it was decided to take the further offensive under the cover of military air defense systems.

For these purposes, the BUK TELAR [...] was transported” (Emphasis added).³⁵³

249. According to The Hague District Court’s judgment of 17 November 2022:

“the evidence shows that this particular Buk TELAR was deployed in the fight that the DPR was waging against the Ukrainian military authorities, and indeed, this Buk TELAR was used to fire a missile from an area held by the separatists in combat to establish a corridor that was of great importance to those separatists (and their battle)”.³⁵⁴

250. The absence of intent to shoot down a civil aircraft also follows even from the new 2023 JIT report:

“However, without concrete information about the circumstances in which the decision was made to fire the Buk missile at MH17, it is not easy to determine whether the downing of MH17 was a war crime. The district court held that it is completely implausible that a civilian aircraft was deliberately

³⁵² Joint Investigation Team, Report, Findings of the JIT MH17 investigation into the crew members of the Buk TELAR and those responsible in the chain of command, 8 February 2023, p. 37, ¶5.2, available at: https://www.politie.nl/binaries/content/assets/politie/onderwerpen/mh17/report_jit-mh17_8-februari-2023_eng.pdf (Annex 392).

³⁵³ Counter-Memorial (ICSFT), Annex 76.

³⁵⁴ District Court of The Hague, Case No. 09/748004-19, Judgment against I.V. Girkin, 17 November 2022, ¶6.2.5.3, available at: <https://uitspraken.rechtspraak.nl/#/details?id=ECLI:NL:RBDHA:2022:14037&showbutton=true&keyword=09%252f748004-19&idx=1%2F>.

shot down and that it is plausible that MH17 was shot down by mistake. As a consequence there appears to be limited scope for instituting criminal proceedings in respect of a war crime” (Emphasis added).³⁵⁵

251. Since war crimes require intentionally attacking civilian targets, this clearly shows that the JIT, along with The Hague District Court, did not believe such intent to be present in the MH17 case.

252. It follows that even if evidence that Ukraine relies on were to be accepted (*quod non*), whoever provided the weapon did so with the intention that it be used, or in the knowledge that it was to be used, to target *Ukraine’s military aircraft*, not a civil passenger plane. Indeed, “there is no military advantage in attacking civilians; it is a waste of military resources and generally stiffens resistance.”³⁵⁶

253. Another author has noted, with respect to the MH17 incident, that

“... everything we know to date about the attack indicates that the separatists honestly believed MH17 was a Ukrainian military transport, not a civilian airplane. If so, that changes the legal assessment of the attack considerably. The attack... would not qualify as a war crime, under either the Rome Statute or the jurisprudence of the ICTY.... The *actus rei* of the war crime of murder and the war crime of intentionally directing attacks at civilians or civilian objects each include a circumstance element: the individuals attacked must qualify as civilians (or as otherwise protected persons). The relevant *mens rea* for circumstance elements is knowledge, pursuant to Art. 30(3) of the Rome Statute: “For the purposes of this article, ‘knowledge’ means awareness that a circumstance exists.” Black-letter criminal law provides that an honest mistake of fact negatives any *mens rea* that requires subjective awareness. So if the separatists honestly believed they were attacking a Ukrainian military transport, they were not aware that they were attacking civilians. In which case they could not be convicted of either the war crime of murder or the war crime of intentionally directing attacks at civilians or civilian objects.”³⁵⁷

254. In view of The Hague District Court:

“...the telephone reactions following the downing of MH17 show that those involved initially thought that they had succeeded in shooting down a

³⁵⁵ Joint Investigation Team, Report, Findings of the JIT MH17 investigation into the crew members of the Buk TELAR and those responsible in the chain of command, 8 February 2023, p. 64, ¶7.2.1, available at: https://www.politie.nl/binaries/content/assets/politie/onderwerpen/mh17/report_jit-mh17_8-februari-2023_eng.pdf (Annex 392).

³⁵⁶ M. Bothe, K. Partsch et al., *NEW RULES FOR VICTIMS OF ARMED CONFLICTS*, (Martinus Nijhoff Publishers, 2013), pp.319-320.

³⁵⁷ K. Heller, *MH17 Should Be Framed as Murder, Not as a War Crime* (11 August 2014), available at: <https://opiniojuris.org/2014/08/11/mh-17-framed-murder-war-crime/>.

Ukrainian military aircraft ... in summary, the court considers that ... they did not intend to kill these people”.³⁵⁸

255. It would be incorrect to regard a mistaken downing of a civilian aircraft during an armed conflict as proof of terrorist intent under the Montreal Convention. The context and specifics of aerial targeting as “emerging targets” must be taken into account:

“The main difficulty in this respect is indisputably due to “emerging targets” for which no advance planning has been possible, and which, by their sudden appearance, make it necessary to strike within a very short time, leaving no opportunity to follow complicated procedures. In such circumstances, determining the military nature of a target and potential collateral casualties and damage will require an accelerated analysis on the basis of predetermined criteria”.³⁵⁹

256. The ICAO Risk Assessment Manual for Civil Aircraft Operations Over or Near Conflict Zones confirms this:

“Past events, although rare, would suggest there is a higher risk to civil aviation as an unintended target when flying over or near conflict zones, in particular the deliberate firing of a missile whose target is perceived to be a military aircraft, but which either misses its intended target or is based on the misidentification of a civil aircraft. In conflict zones the capability may be high and widespread, but there is arguably little to no intent to target passenger aircraft. The same applies when also taking into account the use of missile defence systems by State actors to shoot down ballistic missiles. This illustrates the complexity of such a threat environment for civil aircraft operations”.³⁶⁰ [emphasis added]

257. In this document, the ICAO set out its position on the interpretation of the term “unintentional attack of civil aircraft”, which is defined as an attack where “the intent was not to destroy a civilian aircraft”.³⁶¹ Thus, in the ICAO’s view, if a civilian aircraft is

³⁵⁸ District Court of The Hague, Case No. 09/748004-19, Judgment against I.V. Girkin, 17 November 2022, ¶¶6.2.5.3, 12.5.2 available at: <https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:RBDHA:2022:14037&showbutton=true&keyword=09%252f748004-19&idx=1%2F>.

³⁵⁹ J-F Queguiner, Precaution Under the Law Governing the Conduct of Hostilities. *International Review of the Red Cross*, December 2006, Volume 88, No. 864, pp. 798-799.

³⁶⁰ ICAO, Risk Assessment Manual for Civil Aircraft Operations Over or Near Conflict Zones, ICAO Doc 10084, 2018, ¶2.4.1, available at: <https://zoek.officielebekendmakingen.nl/blg-846381.pdf>.

³⁶¹ *Ibid.*, ¶2.2. In this document ICAO does not explicitly state that the shooting down of MH 17 is unintentional attack. However, firstly, it qualifies the attacks on Iran Air Flight 655 in 1988 and Siberia Airlines flight 1812 in 2001 as unintentional attacks; secondly, it notes, that “no documented cases of an intentional SAM attack in a civilian aircraft have been identified to date”; thirdly, the Hague District Court and available to date sources confirm that the attack on MH17 was unintentional.

downed in error (*e.g.* when believed to be a military target), the intent to destroy a civil aircraft is not present.

258. Unable to engage with these plain facts, Ukraine points to a notice to airmen (NOTAM) issued on 16 July by the Russian Federation, one day before the shoot-down of Flight MH17, to suggest 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”.³⁶² Ukraine claims that “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.”³⁶³ This argument fails not only because it contradicts even the findings of the JIT, the Dutch Prosecution, The Hague District Court and Ukraine’s own SBU that the Buk was allegedly supplied with an explicit military goal, and was allegedly returned immediately after the incident unexpectedly occurred; but also due to the following specific reasons:

- (a) It must be noted that in the Memorial, Ukraine pointed to the said NOTAM to demonstrate that the Russian Federation had “guilty knowledge of the dangers of operating a Buk in civilian-trafficked skies”.³⁶⁴ In the Reply, however, Ukraine advances the same argument in support of its allegation against Russian military officials. This is nothing but a flawed attempt by Ukraine to raise once again the Russian Federation’s alleged responsibility for terrorism financing, which the Court dismissed in the Judgment of 8 November 2019
- (b) Ukraine relies on the DSB Report to substantiate its contention on the “internal contradictions” in the notice. It alleges that “[w]hile 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”.³⁶⁵ Ukraine misrepresents the Russian Federation’s notice, as there is in fact no contradiction: the relevant area of Russian

³⁶² Reply, ¶290.

³⁶³ *Ibid.*, ¶293.

³⁶⁴ Memorial, ¶289.

³⁶⁵ Reply, ¶293.

airspace was not closed between FL320 and FL530,³⁶⁶ and the NOTAM published on 16 July 2014 (V6158/14) did not introduce any restriction or closure of the airspace for civil aviation up to FL530. Rather, it restricted specific segments of certain air routes up to FL320 and additionally contained directions for aircraft arriving and departing at the Rostov-on-Don airfield to use specified entry and exit air routes at FL330 or FL340 and above.³⁶⁷

- (c) The Flight Safety Foundation’s Factual inquiry into the airspace closure above and around eastern Ukraine in relation to the downing of Flight MH17 “did not find sufficient facts that Russian Federation authorities responsible for analysing security risk levels in civil aviation airspace and those establishing restriction of airspace in a conflict zone were aware of a threat to civil aviation before the downing of Flight MH17” or “could have had a proper awareness of the high-altitude threat”.³⁶⁸
- (d) Ukraine’s contention that “[t]he timing alone is suspicious” is baseless. In the Counter-Memorial, the Russian Federation explained at length the process leading to the issuance of the relevant NOTAM, which was triggered by the escalation of hostilities in Donbass, including the downing of several Ukrainian military aircraft. The regional civil aviation authority (SITD) sent a warning to this effect on 12 July 2014 “due to a tense situation near the border with Ukraine and to the fact that the UAF use various weapons”.³⁶⁹ Subsequently, on 14 July and 16 July, new incidents of Ukrainian military aircraft being shot down occurred.³⁷⁰ As the Russian Federation noted in the Counter-Memorial, on 16 July the State ATM Corporation communicated a submission to the Center of Aeronautical Information (“CAI”), requesting the issuance of a NOTAM with effect from midnight on 17 July “due to combat actions on the territory of the Ukraine near the State border with the Russian

³⁶⁶ Counter-Memorial (ICSFT), ¶338.

³⁶⁷ *Ibid.*, ¶337.

³⁶⁸ Flight Safety Foundation, Factual inquiry into the airspace closure above and around eastern Ukraine in relation to the downing of Flight MH17, January 2021, pp. 12, 13, available at: <https://open.overheid.nl/documenten/ronl-cd4cd5ba-881e-4b01-b2ee-99caa2ee9cdf/pdf> (Annex 393).

³⁶⁹ Counter-Memorial (ICSFT), ¶342

³⁷⁰ *Ibid.*, ¶343.

Federation... and the facts of firing from the territory of the Ukraine towards the territory of Russian Federation”.³⁷¹

- (e) Ukraine seeks to prove that the Russian Federation did establish a full prohibition of air traffic in the region bordering Donbass on 16 July in an attempt to show the Russian Federation’s “foreknowledge” of the alleged supply of Buk. However, Ukraine ignores the fact of a Ukrainian military transport aircraft An-26 shoot-down on 14 July over Donbass, only 3 days before the MH17 downing. This incident prompted Ukrainian authorities to publicly allege the presence of “heavy anti-aircraft weaponry” in Donbass – even before the so-called “Russian Buk” allegedly arrived on 16 July. According to the Head of counterintelligence for the SBU, “first information hinting at a Buk launcher in the possession of the non-state forces was received on 14 July and came from counterintelligence units.”³⁷² However, Kiev, having failed to effect closure, did not act diligently and continued to use civilian air traffic to “shield” its military air operations from the separatists’ anti-aircraft defence. Ukraine’s failure to take all necessary measures is confirmed by the DSB report. The DSB considered Ukraine’s “risk assessment to be incomplete because it does not take threats to military aircraft into account, but does not account for the consequences to civil aviation of potential errors or slips”.³⁷³ The DSB further stressed that “airspace users should be able to count on unsafe airspace being closed to civil aviation and that, in any case, airspace users should be adequately informed about the nature of the conflict and the underlying reasons for measures such as a (temporary) altitude restriction”.³⁷⁴

259. The DSB reached the following conclusions with respect to Ukraine’s responsibility in relation to the crash of Flight MH17:

“The decision-making processes related to the use of Ukraine’s airspace was dominated by the interests of military aviation. [...]

³⁷¹ *Ibid.*, ¶342(b).

³⁷² YouTube, (English) Vitaly Nayda. UCMC, 19th of July 2014 (19 July 2014), available at: <https://www.youtube.com/watch?v=PWtH8AA42Fc&feature=share> (Annex 397).

³⁷³ Dutch Safety Board, Crash of Malaysia Airlines Flight MH17 (17 July 2014) (13 October 2015), p. 207 (Memorial, Annex 38).

³⁷⁴ *Ibid.*, pp. 208-209.

The [Ukrainian] NOTAMs did not contain any substantive reason for the altitude restrictions. Therefore, Ukraine did not act in accordance with the guidelines in ICAO Doc 9554-AN/932. [...]

When implementing the above measures, the Ukrainian authorities took insufficient notice of the possibility of a civil aeroplane at cruising altitude being fired upon. This was also the case, when, according to the Ukrainian authorities, the shooting-down of an Antonov An-26 on 14 July 2014 and that of a Sukhoi Su-25 on 16 July 2014 occurred while these aeroplanes were flying at altitudes beyond the effective range of MANPADS. The weapon systems mentioned by the Ukrainian authorities in relation to the shooting down of these aircraft can pose a risk to civil aeroplanes, because they are capable of reaching their cruising altitude. However, no measures were taken to protect civil aeroplanes against these weapon systems. [...]

In the international system of responsibilities, the sovereign state bears sole responsibility for the safety of the airspace.”³⁷⁵

260. Thus, the DSB viewed Ukraine as potentially responsible for not taking sufficient measures to preserve the safety of civil aviation from “potential errors or slips” in the conflict zone and considered that the reason for Kiev’s disregard for aviation safety lied with “the interests of military aviation”.

261. As noted earlier, even The Hague District Court in its judgments of 17 November 2022 confirmed the erroneous nature of the MH17 incident, in particular:

“the statement of [X], who was present in the field, and the telephone reactions following the downing of MH17 rather show that those involved initially thought that they succeeded in shooting down a Ukrainian military aircraft”.³⁷⁶

262. A detailed transcript of the intercepts of “the telephone reactions” to which The Hague District Court refers is produced in the Counter-Memorial.³⁷⁷

263. Even according to The Hague District Court, the individuals who used the Buk TELAR not only were unaware that a civilian target had been hit as opposed to a military one, but instead of publicly taking responsibility for the act and retaining the capacity to conduct more such acts in the future (should they indeed had terrorist goals), they denied any responsibility. This conduct is not at all characteristic of actual terrorist *modus operandi*,

³⁷⁵ *Ibid.*, p. 209.

³⁷⁶ District Court of The Hague, Case No. 09/748004-19, Judgment against I.V. Girkin, 17 November 2022, ¶¶6.2.5.3, available at: <https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:RBDHA:2022:14037&showbutton=true&keyword=09%252f748004-19&idx=1%2F>.

³⁷⁷ Counter-Memorial (ICSFT), ¶¶319-333.

but on the contrary signifies complete lack of terrorist intent and even direct opposition to it. This also signifies a lack of such intent or knowledge on the part of an alleged “financer”.

b. The plain text of the Montreal Convention and of the 1988 Protocol thereto confirms that attacks intended against military aircraft do not fall within its scope, and consequently under the ICSFT

264. As explained in Chapter III above, the “intent” requirement under Article 1(1)(b) of the Montreal Convention requires a specific intent to destroy a civilian aircraft. Furthermore, as shown in the previous section, Flight MH17 was targeted in error, as the real intent of persons allegedly involved was to shoot down a military aircraft in the context of the armed conflict in Donbass. Thus, the Montreal Convention is inapplicable in the present case.

265. The Russian Federation explained in its Counter-Memorial that the word “intentionally” is not to be given a broader meaning, which would encompass indirect intent and/or recklessness.³⁷⁸ This is confirmed by the *travaux* of the Convention, which show that for the Legal Committee that prepared the draft convention, only acts that “would be inherently destructive or harmful and, if intentionally done (and not through inadvertence or mere negligence), would constitute an offense”.³⁷⁹ [Emphasis added] It is justified to maintain that the offense done through mistake or error is not intentionally done either.

266. The destruction of an aircraft in the belief that the latter *was military, not civil*, is not an intentional destruction in the sense of Montreal Convention. In fact, it is well established in criminal law that in such a case the intention does not preside over the action: what was targeted was not intended and what was intended did not happen. Since the adjective “intentionally” qualifies the mental state of the person who destroys the aircraft, when a mistake in target occurs (*error in objecto/persona*), the mental element required for the commission of the wrongful act is negated, thereby changing the qualification of the act.

³⁷⁸ *Ibid.*, ¶155.

³⁷⁹ ICAO, International civil aviation organization: Proposal concerning interference against international civil aviation, *International Legal Materials*, Volume 9, Issue 6, November 1970, p. 1184, ¶5.1.

Anybody mistaken about or not aware of a material element cannot exhibit ‘the mental element required’.³⁸⁰

267. Even The Hague District Court came to the conclusion:

“Although the question of why flight MH17 was downed cannot be answered based on the trial, the court has previously indicated that it assumes that it was the intention of the accused to bring down a military aircraft.

(...)

Although the intention does not lessen the gravity of the event, it does go to the degree of culpability.”³⁸¹

268. There is no reason for it to be any different when it comes to the Montreal Convention. Since it is established that the shooting down of Flight MH17 was an error, the mental element required for committing an offence within the meaning of Article 1(1)(b) is absent. This is the approach of The Hague District Court, which only pronounced its verdict on the charge of murder; no charges of terrorism or even war crimes were brought to the court, and the possibility of terrorism was never considered.

269. The Russian Federation established that Article 1(1)(b) of the Montreal Convention is concerned with the intent to destroy *a civil aircraft*. It follows from the general definition of “aircraft” in Article 1 read in conjunction with Article 4, as excluding military aircraft. Therefore, pursuant to its ordinary meaning, Article 4 of the Montreal Convention limits the scope of the offense of unlawfully and intentionally destroying an “aircraft” in service in Article 1(1)(b) of the Montreal Convention, as well as the meaning of an “aircraft in service” under Article 2(b) of the Montreal Convention. The words “aircraft in service” are to be read as referring specifically to civil aircraft and the status of the aircraft is therefore made part of the definition of the offense, including concerning the intention requirement³⁸² as has been explained above.³⁸³

³⁸⁰ O. Triffterer, K. Ambos et al.(eds), *ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY*, (Bloomsbury T&T Clark, 2016), p.1171.

³⁸¹ District Court of The Hague, Case No. 09/748004-19, Judgment against I.V. Girkin, 17 November 2022, ¶10.2.4, available at: <https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:RBDHA:2022:14037&showbutton=true&keyword=09%252f748004-19&idx=1%2F>.

³⁸² Counter-Memorial (ICSFT), ¶162.

³⁸³ *See above*, Chapter III(A).

270. The ILC Commentary to the 1972 Draft Articles on the Prevention and Punishment of Crimes Against Diplomatic Agents and Other Internationally Protected Persons contains a provision similar to Article 1(1)(b) of the Montreal Convention, which confirms this conclusion. The ILC states that: “The word ‘intentional’, which is similar to the requirement found in article 1 of the Montreal Convention, has been used both to make clear that the offender must be aware of the status as an internationally protected person enjoyed by the victim” [Emphasis added].³⁸⁴ Ukraine does not dispute the relevance of the IPP Convention to the present case, but attempts to refute the analogy by referring to the presence of the victim’s status in the IPP Convention’s definition of the offence, which, according to Ukraine, makes it different from the Montreal Convention.
271. However, the fact is that the definition of the offence in Article 1(1)(b) only encompasses intentional attacks against civil aircraft. This fact notwithstanding, Ukraine misses other critical points, as explained below.
272. Initially, Ukraine’s position was that notwithstanding the unqualified terms of Article 4 of the Montreal Convention, the offense in Article 1(1)(b) of the Montreal Convention encompasses the unintentional shutdown of a civil aircraft (*i.e.* where the intent was to shoot down a military aircraft) because the word “civil” does not appear in Article 1(1)(b) of the Montreal Convention. In its Reply, however, Ukraine now states that “the status of the destroyed aircraft dictates whether the Convention applies”. At the same time, it maintains that “it is not an element of a violation that is subject to an intent requirement”.³⁸⁵ Ukraine does not explain how “a violation” occurs when the Convention does not apply.
273. This brings up another critical point missed by Ukraine: that Article 2(1)(a) of the ICSFT does not refer solely to Article 1(1)(b) of the Montreal Convention, but to the Montreal Convention as a whole (“An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex”). The scope of the Montreal Convention, in turn, excludes aircraft in military service by virtue of Article 4(1).

³⁸⁴ International Law Commission, Draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons with commentaries, 1972, p. 316, ¶8, available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/9_4_1972.pdf.

³⁸⁵ Reply, ¶126.

274. Thus, even if Ukraine’s view that Article 1(1)(b) refers to all aircraft, was correct (*quod non*), not only civil aircraft, it is still indisputable that the scope of the Montreal Convention as a whole does not cover attacks intended against military aircraft, as it is a purely anti-terrorism instrument, and terrorism is characterised by a specific form of intent.
275. This is further confirmed by the text of the 1988 Protocol to the Montreal Convention for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation. As between Parties to the Protocol, the Convention and the Protocol are to be read and interpreted as one single instrument (Article 1 of the Protocol). Article 2 of the Protocol adds a new paragraph 1 bis to Article 1 of the Convention:
- “1 *bis*. Any person commits an offence if he unlawfully and intentionally, using any device, substance or weapon:
- (a) performs an act of violence against a person at an airport serving international civil aviation which causes or is likely to cause serious injury or death; or
- (b) destroys or seriously damages the facilities of an airport serving international civil aviation or aircraft not in service located thereon or disrupts the services of the airport,
- if such an act endangers or is likely to endanger safety at that airport.”
(Emphasis added).
276. This shows that, contrary to Ukraine’s position, “civil status” was not perceived as a separate, “jurisdictional” element, but plainly a part of the definition of the offence. Thus, when the need to add a new type of offence to Article 1 of the Montreal Convention arose, instead of providing for an exception like the one found in Article 4 of the Convention, the reference to civil aviation was included in the definition itself.
277. From the above it can be concluded that Ukraine’s first argument for the establishment of an intent element under the Montreal Convention should fail.
278. Finally, it is also worth recalling that the unlawfulness element of the offence within the meaning of Article 1(1)(b) of the Montreal Convention is absent. This provision stipulates that “[a]ny person commits an offense if he unlawfully and intentionally: [...] (b) destroys an aircraft in service.” The Russian Federation has previously noted that the Flight MH17 incident happened in the context of an ongoing armed conflict between Ukraine and the DPR. The relevant rules of IHL apply in accordance with Article 21 of the ICSFT, as explained in Chapter III above. Ukraine agrees with this position:

“... 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”.³⁸⁶

279. However, Ukraine maintains that “[t]he 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.”³⁸⁷ This is not true. In the Counter-Memorial, and again in this Rejoinder, the Russian Federation referred to an armed conflict that was in effect between the Ukraine and the DPR at time of the crash of Flight MH17. The Russian Federation also stated in the Counter-Memoria that even if Ukraine’s evidence were to be accepted (*quad non*), it would merely show that the persons alleged to have operated the weapon intended to shoot down a Ukrainian military aircraft, and initially believed that they had done so, which is not unlawful under IHL.

c. Authoritative legal doctrine confirms that Article 1(1)(b) of the Montreal Convention refers only to civil aircraft

280. This interpretation is supported in doctrine. For example, Prof Dinstein has noted with respect to Article 1(1)(b) of the Montreal Convention that

“Article 1... creates a parallel offence in respect of any person who unlawfully and intentionally ... (b) destroys a civil aircraft in service or causes damage which renders it incapable of flight or is likely to endanger its safety in flight...”³⁸⁸ [Emphasis added].

281. Prof Trapp is similarly of the view that

“The Montreal Convention requires States to prevent the unlawful and intentional destruction of a civil aircraft in service”³⁸⁹ (Emphasis added);

“Article 1 of the Montreal Convention defines the offence as the unlawful and intentional performance of an act which endangers the safety of a civil aircraft in flight”³⁹⁰ (Emphasis added).

³⁸⁶ Reply, ¶133.

³⁸⁷ *Ibid.*

³⁸⁸ Y. Dinstein. *International Criminal law, Israel Yearbook on Human Rights*, 1975, Vol. 5, pp.65-66.

³⁸⁹ K. Trapp, *Use of Force against Civil Aircraft* (28 June 2011), available at: <https://www.ejiltalk.org/uses-of-force-against-civil-aircraft/>.

³⁹⁰ K. Trapp, *STATE RESPONSIBILITY FOR INTERNATIONAL TERRORISM*, (OUP, 2011), p. 169.

282. Of the same view is Prof Saul who, referring specifically to Article 1(1)(b) of the Montreal Convention as an international counter-terrorism convention (ICTC), pointed out that

“... it is an ICTC offence to intentionally destroy a civilian aircraft or damage it and thereby render it incapable of flight.”³⁹¹ (Emphasis added)

283. Legal opinions issued by governmental jurists go in the same direction. For instance, the Deputy Attorney General of the United States, under the authority of the Office of the Legal Counsel of the Department of Justice, expressed the following position:

“Article 1 of the [Montreal] Convention specifies certain substantive offenses against civil aircraft: in particular, Article 1.1(b) states that “[a]ny person commits an offence if he unlawfully and intentionally ... destroys an aircraft in service of causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight” (Emphasis added).³⁹²

284. The Secretariat of the Commonwealth of Nations made a similar assessment in its “Implementation Kits for the International Counter-Terrorism Conventions”:

“The Montreal Convention is intended to apply only to civil aircraft”³⁹³ (Emphasis added);

“The Convention applies to civil aircraft only”³⁹⁴ (Emphasis added).

285. With regard to Article 1 of the Montreal Convention this document states the following:

"The requirement that the act should be intentional applies only to the acts performed, not to their consequences; it is immaterial whether the consequences were those intended".³⁹⁵

286. This clearly contravenes the interpretation suggested by Ukraine, which makes intent conditional upon the (unintended) consequences.

³⁹¹ B. Saul, From conflict to complementarity: Reconciling international counterterrorism law and international humanitarian law, *International Review of the Red Cross*, 2021, Vol. 103, Issue 916-917, p.173. See also R.S. Rajput, International Conventions on Aerial Hijacking: an Approach to Combat Terrorism, *The Indian Journal of Political Science*, 1990, Vol. 51, No. 1, p. 110 (“The Montreal Convention (the “Sabotage Convention”) covers offences against civil aircraft”).

³⁹² Opinions of the Office of Legal Counsel of the United States Department of Justice, United States Assistance to Countries that Shoot Down Civil Aircraft Involved in Drug Trafficking, 1994. p. 151, available at: <https://www.justice.gov/file/20316/download> (Annex 394).

³⁹³ Commonwealth Secretariat, Implementation Kits for the International Counter-Terrorism Conventions, p. 101, available at: https://www.unodc.org/pdf/crime/terrorism/Commonwealth_Chapter_4.pdf.

³⁹⁴ *Ibid.*, ¶4.

³⁹⁵ *Ibid.*, ¶9.

d. The official legal position of ICAO confirms that the Montreal Convention does not encompass attacks intended against military aircraft

287. That the Montreal Convention does not cover an erroneous downing of a civilian aircraft believed to be in military service in the context of an armed conflict is also confirmed by the ICAO. Seeking to clarify the applicability of aviation security treaties (including the Montreal Convention) to military activities, the ICAO Legal Commission expressed the predominant position in the ICAO that the Convention is not applicable to military activities by virtue of an implied “military exclusion clause”:

“The Group recognized the value of the Conventions in the international cooperation for the prevention and suppression of unlawful acts against the safety of civil aviation. At the same time, it acknowledged that the Conventions were adopted decades ago and they do not reflect the provisions commonly found in the relevant conventions concluded recently in the UN system. Several such provisions are mentioned below. Comparable UN counter-terrorism conventions concluded after 1997 contain a military exclusion clause, which expressly specifies that the conventions do not govern the activities of armed forces during an armed conflict, and the activities undertaken by military forces of a State in the exercise of their official duties. In ICAO, it has been widely understood that the aviation security instruments which criminalize certain acts are not applicable to the military activities mentioned above. The same clause of military exclusion can be included in any instrument amending the Conventions, in order to achieve uniformity and clarity and to prevent any interpretative confusion. Such a clause would be considered as declaratory in nature.”³⁹⁶ (Emphasis added).

288. In keeping with this position, the States added a military exclusion clause to the 2010 Beijing Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation (Article 5(1)), as well as in the 2010 Beijing Protocol to the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (Article 3*bis*(2)). As between its States Parties, the Beijing Convention replaces the Montreal Convention and the 1988 Protocol thereto. Both instruments exclude from their scope all activities of armed forces during an armed conflict which are governed by international humanitarian law (*i.e.*, irrespectively of whether these activities conform to or violate it). As already shown in Chapter III, Section D, armed forces also encompass non-State armed groups as long as they are organized and operate on the basis of command responsibility.

³⁹⁶ ICAO Legal Commission, Working paper A36-WP/12 LE/4, 14 August 2007, ¶¶2.1.3.1 – 2.1.3.2, available at: https://www.icao.int/Meetings/AMC/MA/Assembly%2036th%20Session/wp012_en.pdf.

e. *State practice confirms that the downing of a civilian aircraft in error cannot be considered a terrorist act*

289. State practice also shows that the downing of a civilian aircraft in error is not considered a terrorist act falling under the Montreal Convention. Prof Kimberley Trapp provides a summary of such practice:

“When states condemn a use of military force against a civil aircraft or airport, they generally do so within the parameters of the Chicago Convention and customary international law rather than through an invocation of the Montreal Convention. For example, in presentations to the ICAO Assembly regarding Israel’s downing of a Libyan airliner on 21 February 1973 over occupied Egyptian territory, states invoked the Chicago Convention to condemn Israel’s use of force, but not the Montreal Convention (to which Israel was a party). Similarly, the ICAO resolution adopted in response to the USSR’s downing of Korean Airlines flight 007 (‘KAL 007’) on 1 September 1983 characterized the military action as incompatible with the Chicago Convention, but not the Montreal Convention (to which the USSR was a party). A proposed draft Security Council resolution condemning the Soviet downing of KAL 007 also invoked the Chicago Convention and made no mention of the Montreal Convention, but was not adopted owing to the USSR’s exercise of its veto. During the Security Council debate on the Soviet downing of KAL 007, many states had occasion to address the applicable law and each invoked the Chicago Convention and general international law prohibiting recourse to armed force, rather than the Montreal Convention.

Similarly, in Iran’s letters to the Security Council, complaining of the Iraqi air force’s shooting down of an Iranian passenger plane on 20 February 1986, Iran characterized the Iraqi conduct as a ‘blatant violation of the Chicago Convention regarding the guarantee for the safety of passenger airliners’, and as a ‘gross violation of the Chicago Convention’, but nowhere as a violation of the Montreal Convention... Libya’s letter dated 17 April 1986 to the Security Council, in which it protested that the US had interfered with a Bulgarian civilian aircraft on its way from Sophia to Tripoli, invoked the Chicago Convention, but not the Hague Convention (to which the US, Libya and Bulgaria were a party). Finally, in reference to the shooting down by the Cuban air force of two private US civil aircraft on 24 February 1996, both the ICAO and the Security Council ‘deplored’ the downing of the aircraft on the basis of general international law on the use of force and the Chicago Convention (in particular Article 3bis discussed below), without any reference to the ICAO TCS”³⁹⁷ (Emphasis added).

290. It is thus no wonder that Security Council Resolution 2166 concerning the downing of Flight MH17 and adopted *unanimously* on 21 July 2014, makes no mention of the Montreal Convention, or of terrorism in general.

³⁹⁷ K. Trapp, STATE RESPONSIBILITY FOR INTERNATIONAL TERRORISM, (OUP, 2011), pp. 166-167.

291. Historically there have been numerous incidents concerning civilian aircraft, yet none of them were considered as breaches of the Montreal Convention:

- (a) The Sibir Tu-154 aircraft performing flight 1812 from Tel Aviv to Novosibirsk was hit by an anti-aircraft missile C-200B during the exercises of the Ukraine Air Defence. No restrictions were in place on route, including time restrictions (NOTAM), at the time of the training manoeuvres conducted by Ukraine Air Defence. The Ukrainian authorities should have fully assessed all the risks associated with the exercises and, based on these assessments, take a decision on the parameters for closing the airspace. Unfortunately, this was not done which in turn led to the tragedy. 78 people were killed. The then president of Ukraine commented, “We are not the first or the last, let us not make a tragedy out of it.”³⁹⁸ The investigative commission of Interstate Aviation Committee created to investigate the causes of this air crash came to a conclusion that there were no evidentiary alternative versions of the tragedy, except for the version that this aircraft was shot down by the 5B28 anti-aircraft missile C-200B which had been launched by the Ukraine Air Defence during the exercises on the Crimean Peninsula.³⁹⁹ Ukraine was not held accountable for a breach of the Montreal Convention.
- (b) On 27 July 1955, following the incursion of a Bulgarian MIG-15 fighter jet the Israeli El Al Lockheed L-049 performing flight 402 from London to Tel Aviv was shot down. 58 people were killed. The Bulgarian authorities apologised saying that the pilots were in a hurry, but did not admit guilt.
- (c) On 21 February 1973, an Israeli F-4 fighter jet shot down over the Sinai Peninsula the Libyan Arab Airlines Boeing 727 performing flight 114 from Tripoli to Cairo. 108 people were killed. Israel acknowledged that the civilian aircraft was destroyed in a miscalculation.
- (d) On 12 February 1979, during the war in Southern Rhodesia, Zimbabwe People's Revolutionary Army (ZIPRA) shot down the Air Rhodesia Vickers Viscount passenger aircraft operating a domestic flight from Kariba to Salisbury using the

³⁹⁸ Expert Report of Yuri Vladimirovich Bezborodko, 10 March 2023, Exhibit A (Annex 6).

³⁹⁹ *Ibid.*, Exhibit B (Annex 6).

Strela-2 MANPADS. 59 people were killed. Representatives of ZIPRA stated that, according to their information, there had been a high-ranking military official of the government army aboard the aircraft.

- (e) On 27 June 1980 the Aerolinee Itavia aircraft performing Flight 870 from Bologna to Palermo was presumably shot down by a French fighter jet during NATO exercises or military operations against Libya. According to another version, the aircraft crashed after explosion of a bomb placed in the tail of the aircraft. 81 people died;
- (f) On 24 February 1985, the Dornier Do 228 aircraft operated by the Alfred Wegener Institute (Germany) was shot down over Western Sahara by representatives of the West Saharan Popular Front for the Liberation of Saguia el-Hamra and Río de Oro (the Polisario Front). 3 people were killed. The fighters of the Polisario Front mistook the plane for a Moroccan reconnaissance airplane;
- (g) On 1 September 1983 the Korean Air Lines Boeing 747 aircraft performing flight 007 from New York to Seoul crashed near island Sakhalin. The Korean aircraft violated the Soviet airspace, did not communicate and was shot down by the interceptor Su-15. 269 people were killed;
- (h) On 14 October 1987, in Angola, the Lockheed L-100 HB-ILF aircraft operated by the ICRC on a domestic flight was shot down by unidentified persons involved in the Angolan Civil War. 8 people were killed;
- (i) On 6 November 1987, the Air Malawi SC.7 Skyvan aircraft performing a domestic flight in the Republic of Malawi crashed. The aircraft was partially flying over the territory of Mozambique where it was shot down by the Mozambican troops. 10 people were killed. According to one version, the aircraft flew too close to Mozambique's military base;
- (j) On 3 July 1988, an Iran Air flight 655 from Tehran to Dubai was attacked by a missile from the U.S. Cruiser Vincennes over the Persian Gulf. 290 people were killed. The reason was that the US military mistook the airliner for an Iranian F-14;

- (k) On 8 December 1988, a DC-7 aircraft chartered by the U.S. Agency for International Development was shot down in the sky over Western Sahara. The Polisario Front mistook it for a Moroccan C-130 aircraft.
- (l) On 21 December 2012, in South Sudan a UN chartered Mi-8 of the Nizhnevartovskavia airline was shot down by the government army. Five people were killed (among them four Russians). The South Sudanese military mistook the UN Mi-8 for a Sudanese reconnaissance helicopter;
- (m) On 26 August 2014, Utair airlines civil helicopter Mi-8, being on its mission under the contract signed with UNMISS, was shot down by a surface-to-air missile fired from the territory occupied by guerrillas in South Sudan. Three crew members (citizens of the Russian Federation) were killed, one person was wounded.
- (n) On 8 January 2020, the Iranian Armed Forces mistakenly shot down a Boeing 737 belonging to Ukraine International Airlines flying from Tehran to Kiev. The reason for the shootdown was the incorrect identification of the aircraft in a tense military-political situation.

292. What all of these cases have in common is that: (i) civilian aircraft were shot down in error (either by States or non-State actors); (ii) the incidents were never legally qualified as a terrorism offence in the sense of Article 1(1)(b) of the Montreal Convention.

293. Interestingly, Ukraine attempts to argue against this position:

“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. 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. 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. 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”.⁴⁰⁰

294. It is noteworthy that Ukraine argues that the shooting-down of a Russian passenger airliner, killing all 77 civilians on board, *in time of peace*, was not “unlawful”. Both the

⁴⁰⁰ Reply, ¶144.

Russian Federation and Ukraine have opened criminal investigation into the incident; the Russian Federation transferred its case file to Ukraine, but Kiev decided to close the case once its own fault in the downing became apparent, leaving the incident without an effective investigation. It is also noteworthy that Ukraine in that case insists that there was no “intent to destroy any kind of aircraft”, when the exact goal of the military exercises was to destroy an aircraft (although a training model).⁴⁰¹

295. It is also interesting that while presenting an argument of “a weapon incapable of distinguishing between military and civilian aircraft” Ukraine forgets that its own anti-aircraft weapon in 2001 proved incapable of distinguishing between the designated aerial target and a civilian airliner flying 280 kilometres away – *in time of peace*, in the perfect conditions of a military exercise, without the stress added by conditions of an ongoing armed conflict and real threat of “emergent target” being an enemy aircraft aiming to destroy the anti-aircraft system itself or to bomb civilians which this system was protecting.

296. Ukraine also attempts to forget its own argumentation about how the mere fact of launching a missile into airspace with civilian air traffic by itself, allegedly, constitutes some kind of intent to down a civil aircraft if insufficient precaution was taken:

“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”.⁴⁰²

297. To paraphrase Ukraine’s own position, Ukraine “did know that it was deploying a powerful anti-aircraft system in heavily trafficked civilian airspace”.⁴⁰³ In fact, the C-200B (S-200V) system used by Ukraine to shoot down the Russian airliner was significantly more powerful than a Buk TELAR, capable of destroying aerial targets at a range of up to 300 km and altitude of up to 35 km.

298. If Ukraine believes its own Armed Forces personnel did not “know” about the evident inability of their weapon system to distinguish between a civilian and military target (even

⁴⁰¹ Expert Report of Yuri Vladimirovich Bezbordko, 10 March 2023, Exhibit A (Annex 6).

⁴⁰² Reply, ¶142.

⁴⁰³ Memorial, ¶223.

in the perfect conditions of a peaceful exercise), then it cannot claim that the operators of the weapon system which allegedly shot down Flight MH17 (in the extreme conditions of an ongoing armed conflict) “knew” about such a limitation of their system.

299. If Ukraine really considers that there was no intent in the downing of the Russian airliner by the UAF, that the attack was not “unlawful”, and that Ukraine itself was not to blame even though it failed to take proper precautions by sufficiently closing the airspace to civilian air traffic in 2001, then it cannot raise similar accusations against the Russian Federation with regard to the downing of Flight MH17.

ii. The alleged indiscriminate character of the Buk TELAR is unfounded

300. Ukraine’s alternative argument for the establishment of an intent element under the Montreal Convention is that “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”. Ukraine suggests that “[a]pplying 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 the purposes of the Montreal Convention, that perpetrator has acted “intentionally” in destroying a civilian aircraft”.⁴⁰⁴

301. This argument is both factually and legally unfounded. It is factually unfounded because the attempt to portray the Buk TELAR as an “indiscriminate weapon” is incorrect.

302. In support of its contention, Ukraine mainly relies on Dr Skorik’s report, who believes that “[w]ithout 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”, and that “viewed solely on the operator's screen, military and civilian aircraft are “practically indistinguishable”.⁴⁰⁵ This conclusion does not stand up to scrutiny. As explained by Lieutenant Colonel Bezborodko, “[t]he TELAR is capable of operating in the independent target search mode without control or operational instructions from the command post and in the absence of data from a surveillance and

⁴⁰⁴ Reply, ¶138.

⁴⁰⁵ *Ibid.*, ¶207.

acquisition radar”. Bezborodko concludes in this connection that “the wording of paragraphs 10-12, 18, 27-30 of the [Dr Skorik’s] Report is misleading”.⁴⁰⁶

303. Furthermore, the autonomous Buk is equipped with an Automatic Target Class Recognition System and a television optical sighting device, which consists of a TV optical head (narrow-field-of-view transmitting camera) and a video receiving device (TV screen). It is noteworthy that Dr Skorik ignored the presence of this equipment in an autonomous Buk air defence system. This device makes it possible to obtain an image of the intended target. As noted in Bezborodko’s report:

“Thus, the combination of instrument readings and information displayed on indicator devices makes it possible to determine with sufficient reliability the type of target being tracked, both by its trajectory and signal characteristics including distinguishing between a passenger aircraft and another type of aircraft”.⁴⁰⁷

304. This refutes the view expressed in the Skorik Report that the type of target being tracked cannot be determined by a TELAR that operates independently.”⁴⁰⁸.

305. As The Hague District Court pointed out, [o]perating a Buk TELAR requires a well-trained crew. Furthermore, the weapon cannot be casually deployed. Deployment demands the necessary preparation (...).⁴⁰⁹ The JIT endorsed this conclusion in its recent Report.⁴¹⁰ Bezborodko explained that “[p]reparation of fire without identifying the airborne target type and the airborne target flight parameters is impossible, as these are source data for solving other tasks, such as choosing the tracking method and determining the number of missiles to be expended and the type of fire and the firing sequence”.⁴¹¹ This shows that Buk TELAR is far from being a weapon that a person

⁴⁰⁶ Expert Report of Yuri Vladimirovich Bezborodko, 10 March 2023, ¶11 (Annex 6).

⁴⁰⁷ *Ibid.*, ¶45.

⁴⁰⁸ Memorial, Annex 12, ¶39.

⁴⁰⁹ District Court of The Hague, Case No. 09/748005-19, Judgment against S.N. Dubinsky, 17 November 2022, ¶6.2.5.3, available at: <https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:RBDHA:2022:14036&showbutton=true&keyword=09%252f748005-19&idx=1%2F>.

⁴¹⁰ Joint Investigation Team, Report, Findings of the JIT MH17 investigation into the crew members of the Buk TELAR and those responsible in the chain of command, 8 February 2023, p. 64, ¶2.4, available at: https://www.politie.nl/binaries/content/assets/politie/onderwerpen/mh17/report_jit-mh17_8-februari-2023_eng.pdf (Annex 392).

⁴¹¹ Expert Report of Yuri Vladimirovich Bezborodko, 10 March 2023, ¶¶26-28 (Annex 6).

launches at civilian skies knowing that it is incapable of differentiating between military and civilian targets.

306. Ukraine further claims 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”, because in the absence of the combat control centre Buk-M1 doesn’t receive information from Radio-Technical Troops of the Air Force and their radars about civilian air traffic. As shown above, however, the capabilities of autonomous Buk-M1 TELAR weapons allow it to distinguish between military and civil targets. This is confirmed by the JIT, which stated that “crew can use the TELAR’s own radar to identify or further identify a target”.⁴¹²
307. Thus, even if one adheres to Ukraine’s version of the events, the factual information indicates that the persons who allegedly provided the Buk TELAR to the DPR’s armed forces must have assumed that the crew of this Buk would have all the necessary facilities and data to distinguish between civilian and military aircrafts. This flatly contradicts the Ukraine’s position that using a Buk TELAR in autonomous mode constitutes intention to destroy a civil aircraft.⁴¹³
308. In addition, many anti-aircraft armaments do not have sophisticated identification systems, such as nearly all MANPADs and numerous older SAMs, including those in service in the UAF. The use of these armaments against perceived military targets in a situation of armed conflict, even in the potential presence of civilian air traffic, has never been considered an “intentional attack against civilians” or an “indiscriminate attack”. It is worth mentioning that even sophisticated AA systems, such as the Aegis system installed on the USS “Vincennes”, do not preclude accidental shoot-downs of civilian aircraft. Ukraine itself is proof of this since the UAF shot down a Russian airliner in 2001 despite having all components of the S-200 AA system in place, as explained above.⁴¹⁴

⁴¹² Joint Investigation Team, Report, Findings of the JIT MH17 investigation into the crew members of the Buk TELAR and those responsible in the chain of command, 8 February 2023, p. 64, ¶4.5, available at: https://www.politie.nl/binaries/content/assets/politie/onderwerpen/mh17/report_jit-mh17_8-februari-2023_eng.pdf (Annex 392).

⁴¹³ Reply, ¶206.

⁴¹⁴ Expert Report of Yuri Vladimirovich Bezborodko, 10 March 2023, ¶¶60-63 (Annex 6).

309. Finally, the expert opinion on the Buk TELAR, submitted by Australia and the Netherlands in the framework of ICAO proceedings, indicates that the target identification capabilities of a single Buk would still permit identification of civilian targets, even if those capabilities are smaller in comparison with a full contingent of Buk system elements (including the radar vehicle and the command vehicle). For instance, the target identification instruments mentioned earlier would also display information about the target, though in a smaller range. The expert states, that this “limits its options in terms of identifying target,”⁴¹⁵ but not removes them altogether. Importantly, the expert did not conclude that an autonomously operating Buk TELAR is an indiscriminate weapon.
310. Ukraine’s arguments on the indiscriminate character of the Buk are also legally unfounded. First, the Court’s finding in the *Nuclear Weapons* Advisory Opinion that “use [of] weapons that are incapable of distinguishing between civilian and military targets [constitutes] mak[ing] civilians the object of attack” is of no relevance for Ukraine’s case since it concerned the weapons - like nuclear, chemical, etc., - that by their very nature are incapable of distinguishing between civilian and military targets. It has nothing to do with the Buk TELAR which is a guided projectile.
311. Second, Ukraine invokes the ICRC’s explanation 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”.⁴¹⁶ This argument is also of no relevance for Ukraine’s case because Buk TELAR, being a guided projectile, can in no way be considered as a “means of combat which cannot be directed at a specific military objective”. Quite to the contrary, it is designed to be directed at a specific military objective.
312. Third, Ukraine’s reliance on the ICTY’s case law in *Prosecutor v. Martić* is misleading. The Tribunal held that:

“In examining the responsibility of Milan Martić for the crime of attacks on civilians under Article 3, the Trial Chamber recalls that a direct attack on civilians may be inferred from the indiscriminate character of the weapon

⁴¹⁵ Dutch National Police Crime Squad, Official Report Concerning the Buk Surface-to-Air Missile System, 7 October 2019, p. 90 (Annex 389).

⁴¹⁶ Reply, ¶137.

used. The Trial Chamber has previously found that the M-87 Orkan was incapable of hitting specific targets⁴¹⁷ (Emphasis added).

313. The judgment further explains the indiscriminate character of the M-87 Orkan as follows:

“The M-87 Orkan is a non-guided projectile, the primary military use of which is to target soldiers and armoured vehicles. Each rocket may contain either a cluster warhead with 288 so-called bomblets or 24 anti-tank shells. The evidence shows that rockets with cluster warheads containing bomblets were launched in the attacks on Zagreb on 2 and 3 May 1995. Each bomblet contains 420 pellets of 3mm in diameter. The bomblets are ejected from the rocket at a height of 800-1,000m above the targeted area and explode upon impact, releasing the pellets. The maximum firing range of the M-87 Orkan is 50 kilometers. The dispersion error of the rocket at 800-1,000m in the air increases with the firing range. Fired from the maximum range, this error is about 1,000 m in any direction. The area of dispersion of the bomblets on the ground is about two hectares. Each pellet has a lethal range of ten meters.”⁴¹⁸

314. Thus, the M-87 Orkan, as described by ICTY, bears no similarity to the Buk TELAR, which as explained above is in principle capable of making a distinction between civilian and military targets, but may hit an unintended target through human error or technical problems, as it happened in the case of the MH17.

315. Ukraine’s reference to “firing into civilian airspace”⁴¹⁹ is worth highlighting. It appears that, according to Ukraine, there are two types of airspace over land territory: civilian and military. This is incorrect since aircraft of all types fly in a single airspace. As shown above, active hostilities had been often conducted in Ukrainian airspace, yet Ukraine did not close it – while also conducting offensive military operations there. Bezborodko notes that factors such as the lack of time in active hostilities⁴²⁰ and the deliberate non-closure of airspace with the aim to cover military aviation behind the “human shield” of civil aviation⁴²¹ can lead to error in targeting.

316. The Buk TELAR is thus not a non-discriminatory weapon. However, even with the most advanced technology, there is always a risk of mistake. As Bezborodko points out, “even

⁴¹⁷ International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, Case No. IT-95-11-T, *Prosecutor v. Martić*, Trial Chamber Judgment, 12 June 2007, ¶472.

⁴¹⁸ *Ibid.*, ¶462. Footnotes omitted.

⁴¹⁹ Reply, ¶206.

⁴²⁰ Expert Report of Yuri Vladimirovich Bezborodko, 10 March 2023, ¶¶50-51 (c) (Annex 6).

⁴²¹ *Ibid.*, ¶51(c)

when the provisions of the firing regulations are followed by a qualified combat crew, situations may arise where an airborne object may be misclassified and fired upon by mistake”.⁴²²

317. It has already been argued above that when assessing the use of force against aerial targets in the context of an armed conflict, the entire context of the events must be taken into account.⁴²³ History is replete with examples of mistakenly hitting civilian aircraft, but these acts have never been considered acts of terrorism.

318. The unreasonableness of Ukraine's position also follows from the fact that Ukraine has used Buk TELARs in autonomous mode. Firstly, it follows from the leaked document from the Netherlands security service,⁴²⁴ which revealed the Netherlands’ understanding of the distribution of Buk units in Ukraine at the relevant time. It gave coordinates for the Bucs in the region:

9K37M1 Buk-M1 Luchtverdediging systemen aanwezig in de regio				
Systeem	Land	Locatie	Operationeel	Afstand
9K37M1 Buk-M1	Oekraïne	48° 36'36" N 039° 14'00" E	Nee	67 km (bereik 42 km)
9K37M1 Buk-M1	Oekraïne	48° 05'58" N 037° 45'13" E	Nee	65 km (bereik 42 km)
9K37M1 Buk-M1	Oekraïne	47° 06'25" N 037° 28'28" E	Nee	135 Km (bereik 42 km)
9K37M1	Oekraïne	45° 13'11" N	Juni en juli	515 km

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319.

⁴²² *Ibid.*, ¶74

⁴²³ *See above*, Chapter V(B)(1).

⁴²⁴ M. Van Der Werff, *MH17 properly investigated?* available at: <https://maxfromthewharf.com/5510-2/#DOC> (Annex 396).

Buk-M1		033°22'42" E	2014	(bereik 42 km)	Militaire Inlichtingen- en Veiligheidsdienst Afdeling Juridische Zaken Onze referentie DIS2016012313
9K37M1	Oekraïne	49°00'34" N	Juni en juli	137 km	
Buk-M1		037°18'52" E	2014	(bereik 42 km)	
9K37M1	Oekraïne	48°42'23" N	Juni en juli	98 km	
Buk-M1		037°38'01" E	2014	(bereik 42 km)	
9K37M1	Oekraïne	48°13'14" N	Juni en juli	191 km	
Buk-M1		036°01'20" E	2014	(bereik 42 km)	
9K37M1	Oekraïne	47°58'12" N	Juni en juli	154 km	
Buk-M1		036°34'26" E	2014	(bereik 42 km)	
9K37M1	Rusland	48°44'14" N	11 juli t/m 19 juli 2014	122 km	
Buk-M1		040°01'36" E		(bereik 42 km)	
9K37M1	Rusland	48°38'54" N	Vanaf 18 juli 2014	106 km	
Buk-M1		039°50'18" E		(bereik 42 km)	
9K37M1	Rusland	48°17'51" N	Vanaf 20 juli 2014	108 km	
Buk-M1		040°04'42" E		(bereik 42 km)	

320.

321. This report also states that “from the table it becomes apparent that flight MH17 was flying beyond the range of all identified and operational Ukrainian and Russian locations where 9K37M1 Buk M1 systems were deployed.”⁴²⁵

322. This conclusion can also be drawn from the JIT report:

“It is important to note in this regard that the Ukrainian armed forces were also using such a system, meaning that it could appear as if the DPR had captured it from them”.⁴²⁶

323. If the DPR had the opportunity to capture them, then it logically follows that they were used by Ukraine in the ATO zone. Thus, if Ukraine's erroneous position were applied to its own conduct, then by engaging Buk systems in the conflict zone Ukraine had “intended” to shoot down civilian aircraft.

324. From all of the above it follows that, the transfer and the use of the Buk TELAR cannot *per se* indicate an intention to shoot down a civilian aircraft.

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⁴²⁵ M. Van Der Werff, *MH17 properly investigated?* available at: https://maxfromthewharf.com/5510-2/#DOC_4 (Annex 396).

⁴²⁶ Joint Investigation Team, Report, Findings of the JIT MH17 investigation into the crew members of the Buk TELAR and those responsible in the chain of command, 8 February 2023, p. 64, ¶5.3, available at: https://www.politie.nl/binaries/content/assets/politie/onderwerpen/mh17/report_jit-mh17_8-februari-2023_eng.pdf (Annex 392).

325. Ukraine's allegation that the shoot-down of Flight MH17 is a terrorist act within the meaning of Article 2(1) of the ICSFT is unfounded and should be rejected, because the Russian Federation demonstrated that:

- (a) Even assuming that Ukraine's factual allegations are correct (*quod non*), the shoot-down of Flight MH17 was an error.
- (b) Neither Article 2(1)(a) of the ICSFT and the Montreal Convention, nor Article 2(1)(b) of the ICSFT cover the offence done by error or mistake. Both intentional and unlawful elements of the offence within the meaning of Article 11b are absent.
- (c) The Buk TELAR is not an "inherently indiscriminate weapon".
- (d) In any event the investigations into the circumstances of the crash and connected Court decisions are highly unreliable and in particular cannot be used to prove that the alleged Buk was delivered from the territory of the Russian Federation.⁴²⁷

⁴²⁷ The proposition that the Russian Federation vigorously denies.

VI. UKRAINE HAS FAILED TO ESTABLISH THE OFFENCE OF TERRORISM FINANCING WITH REGARD TO THE SHELLING INCIDENTS

A. INTRODUCTION

326. In its Counter-Memorial, the Russian Federation put Ukraine's allegations⁴²⁸ on the shelling incidents in their proper context, that is, an armed conflict between Ukraine and the DPR and LPR to which IHL applies, as confirmed by international bodies like the OHCHR, ICRC, and OSCE. Even The Hague District Court came to the same conclusion.⁴²⁹ The existence of a situation of an armed conflict is also confirmed in the expert report of Colonel Bondarenko, annexed to the present Rejoinder.⁴³⁰

327. The Russian Federation also explained in detail the interplay between international humanitarian law and anti-terrorism conventions,⁴³¹ stating that the ICSFT is to be applied alongside and with respect for international humanitarian law, as Article 21 requires explicitly.⁴³² The Russian Federation has shown conclusively that in the context of an armed conflict, only acts which have "spreading terror" as their "primary purpose" may fall under Article 2(1)(b) of the ICSFT.⁴³³

328. According to Article 2(1)(b) of the ICSFT, the offence of terrorism financing is established when funds are provided or collected, directly or indirectly, unlawfully and

⁴²⁸ It must be reiterated that Ukraine's claims with respect to the Russian Federation's alleged state responsibility under the ICSFT were dismissed at the preliminary objections stage. Ukraine has also failed to establish that any specific Russian State official exercised control over the DPR/LPR, had insight into the relevant military planning and operations, or knew of the alleged "importance of terrorism to the agenda of the DPR/LPR": Cf. Memorial, ¶ 286. This is nothing more than a reformulation of the State responsibility argument which the Court has found falls outside its jurisdiction. For completeness, and without prejudice to its primary position, the Russian Federation denies that it has ever exercised control over the DPR/LPR and that it had insight into their military plans and actions.

⁴²⁹ District Court of The Hague, Case No. 09/748004-19, Judgment against I.V. Girkin, 17 November 2022, ¶4.4.3.1.2, available at: <https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:RBDHA:2022:14037&showbutton=true&keyword=09%252f748004-19&idx=1%2F>. ("The fighting between the Ukrainian army and the Donetsk People's Republic can therefore be characterized as an armed conflict").

⁴³⁰ Expert Report of Oleg Serzhevich Bondarenko ("Bondarenko Report"), 10 March 2023, Chapter III (Annex 7).

⁴³¹ Counter-Memorial (ICSFT), ¶196.

⁴³² According to this provision, "[n]othing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes of the Charter of the United Nations, *international humanitarian law* and other relevant conventions." (*Emphasis added*).

⁴³³ See Chapter III, Section C above.

wilfully, with 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:

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

329. The terrorism offence under Article 2(1)(b) can only be committed if death or serious bodily injury is intentionally caused to a “civilian” or “any other person not taking active part in the hostilities”. Therefore, if a person targets armed forces, or groups or other persons taking active part in hostilities, but death or serious bodily injury is caused to a civilian or other person not taking active part in the hostilities as collateral damages of the attack, the offence under Article 2(1)(b) may not be established and States’ obligations under the ICSFT would accordingly not be triggered.⁴³⁴

330. As very aptly put by J.D. Ohlin in his work *Targeting and the Concept of Intent*:

“It is important to understand what precisely is at stake in this debate: nothing less than the distinction between the terrorist and the soldier. Although it is frequently said that one nation's freedom fighter is another's terrorist, neither ordinary morality nor international law takes this position. There are morally and legally relevant distinctions to be made between these actions, and failure to understand these distinctions risks undermining the very foundations of *jus in bello*... [I]t is imperative that we continue to insist upon distinguishing between terrorists who deliberately target civilians and soldiers who foresee that civilians will be killed as collateral damage while striking a military target. The former is a war crime, while the latter represents lawful conduct.”⁴³⁵

331. Ukraine argues that “the DPR committed these large-scale, high-profile atrocities [*i.e.* the shelling incidents] 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 the Russian Federation, Ukraine, France, and Germany agreed to a package of measures to stop the conflict in Eastern Ukraine (“Minsk II”)”.⁴³⁶ Ukraine frequently returns to this argument throughout its Reply, sometimes as the context, sometimes as the purpose of the acts of which it complains, in an attempt to link

⁴³⁴ *Ibid.*

⁴³⁵ J. D. Ohlin, *Targeting and the Concept of Intent*, 35 *Michigan Journal of International Law* 79 (2013), p. 130.

⁴³⁶ Reply, ¶214.

these incidents to Article 2(1)(b) of the ICSFT. But unable to provide any documentary evidence in support of this mere speculation, Ukraine relies on the “natural inference” of the related context.⁴³⁷ It goes without saying that the Court cannot rely on the unilateral “natural inference” of Ukraine to consider the attacks in question as terrorist acts for the purpose of Article 2(1)(b) of the ICSFT. As explained in Chapter I above, Ukraine must provide evidence that is fully conclusive.

332. The Russian Federation established, based on the records of international competent bodies, that civilian casualties caused by the reported shelling of populated areas have consistently been greater in territory controlled by the DPR and the LPR than in the Government-controlled area of the conflict zone⁴³⁸ - *i.e.*, many more civilian casualties have been caused by the UAF than by those of the DPR and LPR. If the multiple reported incidents of indiscriminate shelling in Donbass were in fact acts of terrorism (*quod non*), as would follow from Ukraine’s misconceived reading of Article 2(1) of the ICSFT, Ukraine itself would be engaged in such “terrorism” on a massive scale. The Russian Federation provided evidenced examples of such incidents caused by Ukrainian governmental forces,⁴³⁹ and there is no need to reproduce them here.

333. Another critical point is that Ukraine alone refers to these shelling attacks as acts of “terrorism”, while the OHCHR, OSCE, and ICRC have never characterised such acts (including the specific episodes relied on by Ukraine) either as breaches of the IHL prohibition on spreading terror or of Article 2(1)(b) of the ICSFT.⁴⁴⁰

334. In support of its allegations on the shelling incidents, Ukraine refers to some statements made in multilateral fora. It cites as examples the UN Security Council’s condemnation of “the shelling of a passenger bus” at Volnovakha as a “reprehensible act”; and the UN Under-Secretary-General Jeffrey Feltman’s statement that the attackers had “knowingly targeted a civilian population” in Mariupol; and the statement of the ICC Office of the Prosecutor indicating that there was evidence of “intentionally directing attacks against civilians” in Donbass. However, these statements contradict rather than confirm its

⁴³⁷ Reply, ¶231.

⁴³⁸ Counter-Memorial (ICSFT), ¶10.

⁴³⁹ Counter-Memorial (ICSFT), ¶351-352.

⁴⁴⁰ Counter-Memorial (ICSFT), ¶10.

allegations, since nowhere do they characterise such acts as terrorist offences within the meaning of Article 2(1)(b) of the ICSFT.

B. THE SHELLING OF THE ROADBLOCK NEAR VOLNOVAKHA

335. Ukraine's attempt to present the shelling incidents as falling within the scope of Article 2(1)(b) of the ICSFT relies mostly on the loss of life resulting from the shelling impacts close to the military installation near Volnovakha (the Buhas/Bugas roadblock/checkpoint) on 13 January 2015.

336. With regard to this incident, General Samolenkov in his Second Expert Report established the following key findings:⁴⁴¹

- (a) The Bugas roadblock was undeniably a military objective. It was manned by units of armed personnel and armoured vehicles, equipped with fortifications, firing positions and trenches for personnel and equipment, making it capable of all-round defence and control of adjacent territory. The roadblock performed military tasks on an important transportation route, which played a critical role in supplying Ukrainian positions in the vicinity of Dokuchayevsk. The Kiev-2 battalion manning the installation was a military unit actively engaged in the hostilities. Moreover, the Bugas roadblock was regarded by Ukraine itself as a military installation, which is confirmed by the SBU documents submitted by Ukraine in these proceedings and by Ukrainian regulatory acts.
- (b) The main cause of the collateral damage resulting from the shelling was that Ukraine organised searches of civilians and civilian vehicles on the territory of this military installation, which per force put civilians in immediate proximity to a military target.
- (c) The choice of weaponry (BM-21 Grad) does not in itself imply the indiscriminate nature of the attack. Had any other type of artillery been used, the risk of collateral damage would have remained due to Ukraine's failure to separate the functions of a military facility from the functions of a civilian checkpoint. The bus that was on

⁴⁴¹ Second Expert Report of Valery Alexeyevich Samolenkov, 10 March 2023 ("Second Samolenkov Report"), ¶9, (Annex 8).

the territory of the Bugas roadblock at the time of the shelling could have been hit by a shell fired at the roadblock from any type of artillery.

- (d) Ukraine failed to prove that the attack came from DPR-controlled territory. Ukraine itself submitted evidence to the Court which shows that the missiles that hit the Bugas roadblock had spoiler rings, indicating a much shorter range of attack, which the Ukrainian expert General Brown fails to take into account. General Brown also misjudged the firing range and the location of the firing position due to using incorrect data provided by the SBU which was never verified by General Brown himself. The correct calculation of the firing distance based on both the analysis of the craters and the angle of descent of shell fragments proves that the shelling was carried out from positions controlled by the UAF. This data indicates that the Bugas roadblock was hit by UAF artillery fire.
- (e) Ukraine also failed to prove specific terrorist intent on behalf of the DPR. Ukraine's own evidence, such as the alleged intercepts of DPR communications, confirm that the DPR aimed to take measures to avoid damage to civilians. This refutes allegations that civilians were deliberately made the object of attack, for the primary purpose of spreading terror or otherwise. General Brown raises no objections against General Samolenkov's analysis of the intercepts, but merely suggests that the intercepts do not, in his view, directly relate to the shelling of the Bugas roadblock – which is, however, hardly relevant as Ukraine failed to provide any intercepts specifically related to Bugas and there is no reason to conclude that the DPR's approach was any different there.

337. Colonel Bondarenko in his Expert Report related to issues of international humanitarian law made the following relevant findings:⁴⁴²

- (a) The Bugas roadblock was a military facility performing combat functions, and this accords with international military practice (such as that of the US-led “coalition forces” in Iraq). The Kiev-2 battalion manning the facility was a combat unit under the operational command of the UAF. The facility provided military advantage to

⁴⁴² Bondarenko Report, ¶6, Chapter IV (Annex 7).

the Ukrainian war effort. It was thus a military objective within the meaning of IHL.

- (b) Attacks on military facilities located deep within the lines of deployment of the UAF in the area of Ukraine's so-called ATO zone may have been carried out by the DPR forces in order to gain an operational advantage.
- (c) The circumstances of the attack on the facility do not conform to Ukraine's claims that the attack was carried out by the DPR with the deliberate aim of terrorizing the civilian population. This is refuted, in particular, by the alleged intercepts provided by Ukraine itself, as well as the time and place of the attack, which does not coincide with the time and place of maximum civilian concentration at the roadblock.
- (d) Even if the Bugas roadblock was a purely civilian facility, Ukraine consciously placed it within reach of enemy weapons, thus endangering the safety of civilians passing through the roadblock. It follows, in particular, that Ukraine has failed to take all possible precautions to protect civilians and civilian objects under its control from the consequences of attacks.

338. As a result, and as will be examined in more detail below, compelling evidence shows that Ukraine has failed to establish that the attack on the Bugas roadblock was carried out by DPR forces, and even if that were the case (*quod non*), Ukraine has still failed to prove the requisite terrorist intent and purpose.

i. Ukraine failed to establish that the attack on the Bugas roadblock was carried out by the DPR forces

339. As it is established in General Samolenkov's Second Expert Report, the shelling of the Bugas roadblock could have been the result of an attack from the UAF, rather than DPR forces as claimed by Ukraine.

340. *First*, the presence of spoiler rings on MLRS missiles used to shell the Bugas roadblock indicates that the shelling could not have been carried out by DPR artillery. While

General Brown claims that “there is no evidence that spoilers were used”,⁴⁴³ Ukraine’s own expert evidence confirms presence of spoiler ring remains in the wreckage:

“Object No. 3, in terms of the composition of its chemical elements, is consistent with steel grades St3 and BSt3 (Table 7). The technical documentation provides for the use of BSt3-grade steel to manufacture the “large ring” and “small ring” components of a 9M22 shell [6, 7] (exhibit).”⁴⁴⁴

“Object No. 3, in terms of the composition of its chemical elements, is consistent with steel grades St3 and BSt3. It may be a fragment from the “large ring” or “small ring” of an M-21OF (9M22U) shell”⁴⁴⁵

"object (No. 3) may be a fragment of a 'big ring' or 'small ring' of M-21OF (9M22U) shell.”⁴⁴⁶

341. Considering the presence of spoiler rings, General Samolenkov concludes that:

“Ukraine's own evidence thus refutes General Brown's conclusions. It was impossible for DPR's MLRS units to carry out the mission (i.e., to move into a position in close proximity to UAF positions) under such conditions, as DPR's MLRS would have been hit by close combat weapons or by UAF artillery. The fact that BM-21s are not fired from positions close to the enemy is confirmed by General Brown himself.⁴⁴⁷ In this regard, I believe that the Bugas roadblock was attacked not by DPR's MLRS but by UAF's MLRS.”⁴⁴⁸

342. **Second**, the nature of damage to the bus confirms shelling by UAF artillery. General Brown relied entirely on the purported angles of descent provided by the SBU; however, such data is not objective and, in any case, not accurate. By analysing the dispersion pattern of the fragments that hit the bus, General Samolenkov determines the projectile’s angle of descent and thus the firing range, which again leads to the conclusion that shelling was performed from territory under Ukrainian control.⁴⁴⁹

343. **Third**, General Brown's analysis of the location of the craters does not support his own conclusions about the range of fire. The “actual dispersion ellipse” as drawn by General Brown does not conform – by a large margin – to the expected dispersions that he himself

⁴⁴³ Second Expert Report of Lieutenant General Christopher Brown, 21 April 2022 (“Second Brown Report”), ¶47 (Reply, Annex 1).

⁴⁴⁴ Ukrainian Scientific Research Institute of Special Equipment and Forensic Expert Examination, Expert Report No. 16/8, 7 May 2015, p. 12 (Memorial, Annex 123).

⁴⁴⁵ *Ibid.*, p. 15.

⁴⁴⁶ *Ibid.*, p. 16.

⁴⁴⁷ See Second Brown Report, ¶15 (a) (ii), footnote 70 (Reply, Annex 1).

⁴⁴⁸ See Second Samolenkov Report, ¶22 (Annex 8).

⁴⁴⁹ *Ibid.*, ¶¶23-28.

provides in his report for ranges of 15,6 and 19,6 km. In fact, it does not conform to any expected dispersions according to General Brown's own sources. Even using General Brown's "actual" dispersion ellipse parameters, the calculation of the range firing distance shows that this range is in any case significantly less than General Brown claims, and excludes the possibility of firing from DPR-controlled territory.⁴⁵⁰

344. In his dispersion pattern calculations General Brown neglected to account for the fact that firing from three MLRS units would create different dispersion results than firing from one unit. By using a method of converting the results of firing from three units to the results of firing from one unit, as well as a proper analysis of the craters near the Bugas roadblock, with the help of satellite data from Colonel Bobkov, General Samolenkov calculates a different range of fire, which cannot be more than 11.6 km (thus deep within Ukraine-controlled territory).⁴⁵¹
345. **Fourth**, it is implausible how Ukraine's experts (General Brown and Gwilliam and Corbett), using two different methods with significantly different accuracy to establish the firing location, remarkably obtained the same result (19.4-19.8 km), leading to a conclusion that the purpose of General Brown's analysis was not to establish the true distance to the launch site, but merely to confirm an otherwise pre-determined location.⁴⁵²
346. **Fifth**, the range determined by General Brown is the maximum range, which is not used when firing from MLRS, as it does not ensure accuracy in hitting the target.⁴⁵³
347. **Sixth**, reports by purported witnesses submitted by Ukraine are implausible, as witnesses make assertions that are physically impossible (such as seeing the precise angle of ground entry of a missile that was moving at 690 meters per second before it exploded; or identifying the precise location, direction, and number of vehicles conducting the shelling by sound from a distance of 6-8 kilometers). Furthermore, these reports were produced by the SBU, a notoriously unreliable source, and never independently verified.⁴⁵⁴

⁴⁵⁰ See Second Samolenkov Report, ¶¶62-77 (Annex 8).

⁴⁵¹ *Ibid.*, ¶¶78-87.

⁴⁵² *Ibid.*, ¶¶88-93.

⁴⁵³ *Ibid.*, ¶¶96-97.

⁴⁵⁴ *Ibid.*, ¶¶43-55.

348. *Seventh*, the presence of Ukrainian “Grad” MLRS in possible launch area is confirmed by open sources. General Samolenkov draws attention to several reports in social media of shelling by Ukrainian “Grad” from the vicinity of the Novotroitskoye village, on 8, 9, and 10 January 2015. Numerous civilians were killed as a result of these Ukrainian attacks. This further substantiates the possibility of the strike on Bugas being performed by the UAF.⁴⁵⁵
349. Jointly and severally, these factors confirm that the attack on Bugas was not carried out by the DPR, but, on the contrary, by the Ukrainian side. The goal, as General Samolenkov suggests, might have been a provocation.⁴⁵⁶ This would fit the general pattern, also demonstrated by other incidents, of Ukraine using civilians as human shields and staging attacks on civilian targets to smear their opponents.
350. However, as further explained below, even assuming the Ukrainian version that the roadblock was attacked by the DPR forces (*quod non*), the roadblock should be considered as a legitimate military target and there was, consequently, no plausible intent on the part of the attackers to cause death or serious bodily injury to civilians, nor a purpose of intimidating a population or compelling a government or an international organisation.

ii. Ukraine failed to establish that the attack on the Bugas roadblock was intended to cause death to civilians

351. The Russian Federation has established, based on compelling documentary evidence, including Ukraine’s own documents presented to the Court, the OSCE report, open-source information, Bobkov’s expert reports, General Samolenkov’s expert reports and Bondarenko Expert Report, that the Bugas roadblock was a legitimate military target.⁴⁵⁷ General Samolenkov explains in its Second Report that even

“[i]f one was to assume that the roadblock was shelled by the DPR after all (which I believe to be wrong), such shelling could have been carried out in order to neutralize an enemy military facility located within the lines of the UAF troops deployment in Volnovakha — Dokuchayevsk direction. I base this conclusion on the fact that at the Bugas checkpoint there were formations

⁴⁵⁵ See Second Samolenkov Report, ¶¶98-100 (Annex 8).

⁴⁵⁶ *Ibid.*, ¶¶32-33, 35.

⁴⁵⁷ See Second Expert Report of Alexander Alekseevich Bobkov, 10 March 2023 (“Second Bobkov Report”), ¶57 (Annex 4); Second Samolenkov Report, ¶¶102-163 (Annex 8); Bondarenko Report, ¶¶20-25 (Annex 7).

of armed personnel with light armoured vehicles, with equipped positions, including for heavy UAF weapons, and also on the fact that the checkpoint performed tasks on an important road direction, which played a critical role in supplying Ukrainian positions in the Dokuchayevsk area. However, the shelling in the middle of the day is not indicative of an intention to harm civilians, as “queues of civilian vehicles formed at the Bugas roadblock at the night”⁴⁵⁸.

352. Ukraine fails to engage with the merits of these facts in its Reply and limits itself to repeating that its description of the Bugas roadblock as a “civilian checkpoint” is a “reasonable conclusion” resulting from the witness testimony of Maksim Shevko, Ukraine’s imagery experts report, and General Brown’s Expert Report.⁴⁵⁹

353. It is not only the purpose of the roadblock that has not been properly assessed by Ukraine. A number of key conclusions contained in the Gwilliam and Corbett Report, and in General Brown’s Second Report are erroneous. According to Bobkov’s Second Report:

“the results of the analysis provided by Gwilliam and Corbett are incorrect. It was this data, however, that formed the basis of General Brown's conclusions about the shape and size of the fall of shot ellipse pertaining to the shelling of the Bugas roadblock and about the location of the alleged missile launch site. Consequently, General Brown's related conclusions are also incorrect”⁴⁶⁰.

354. General Samolenkov also indicates that:

“General Brown misjudged the firing range and the location of the firing position by using incorrect and unverified data. He uncritically relies on the SBU's analysis of the craters. His own analysis is contradictory and does not support his conclusion that the shelling was carried out from a distance of “19.4-19.8 km”⁴⁶¹.

355. Ukraine further maintains that “[u]nable to refute the Buhas checkpoint’s purpose of screening civilian vehicles, Russia points to the presence of “pistols” and other “small arms,” arguing that it was therefore not a “purely civilian object.”⁴⁶² However, Ukraine misrepresents the Russian Federation’s position. A correct description of the roadblock was provided in the Counter-Memorial as follows:

“Ukraine’s position is contradicted by its own witness evidence, which states that the checkpoint was established as part of the so-called “Anti-Terrorist

⁴⁵⁸ See Second Samolenkov Report, ¶232 (Annex 8).

⁴⁵⁹ Counter-Memorial (ICSFT), ¶222.

⁴⁶⁰ Second Bobkov Report, ¶37 (Annex 4).

⁴⁶¹ Second Samolenkov Report, ¶9 (I) (Annex 8).

⁴⁶² Reply, ¶223.

Operation” and that it was manned by, among others, “State Border Guard servicemen, Internal Troops of ‘Kyiv-2’ Unit”, both “equipped with small arms, in particular Kalashnikov assault rifles, pistols, and hand grenades”⁴⁶³.

356. Thus, Ukraine refers to a part of the Russian Federation’s argument that deals only with what Ukraine itself had confessed. However, the Russian Federation’s argument did not stop at that but continued with the description of the real status of the Bugas roadblock as described by a Ukrainian Court.

357. The Russian Federation explained in its Counter-Memorial the nature of the Kiev-2 battalion based on compelling evidence such as the Svyatoshinsky District Court of Kiev’s decision, which is still uncontested by Ukraine:

“According to open-source information, the Kyiv-2 battalion engaged in combat operations in Eastern Ukraine in 2014 and, after receiving additional heavy weaponry, was redeployed to the area of Volnovakha (including the Buhas checkpoint) in October 2014. Notably, it appears from a ruling of a Ukrainian court that Kyiv-2 servicemen were involved in combat tasks while stationed in the Volnovakha region. The open-source information also indicates that the Kyiv-2 battalion engaged in combat reconnaissance operations in the area of Volnovakha, Olenivka, and Dokuchayevsk. There are also suggestions that the Kyiv-2 battalion became a part of, or at least cooperated with, the 72nd brigade of the Ukrainian Armed Forces. Ukraine has not put before the Court contemporaneous documentation recording the activities of the Kyiv-2 battalion at and around the Buhas checkpoint”⁴⁶⁴.

358. General Samolenkov with regard to Kiev-2 battalion concludes that:

“the so-called ATO was led by the UAF. It is widely known that not only the UAF, but also the so-called "volunteer battalions" or "territorial defence battalions" fought on the Ukrainian side against the DPR and LPR armed forces, one of which was the Kiev-2, which was redeployed to the Bugas roadblock in October 2014 during a rotation (according to reports by Kiev-2 representatives). In June 2014, a few months before the Bugas roadblock was shelled, the Ukrainian Ministry of Defence had announced that all battalions participating in the ATO in south-eastern Ukraine would be operationally subordinated to the ATO leadership. Thus, not only was the Kiev-2 Battalion in practice a combat unit equipped with heavy weapons and military equipment, but it was also formally subordinate to the ATO command.”⁴⁶⁵.

⁴⁶³ Counter-Memorial (ICSFT), ¶365, citing in fn the Witness Statement of Maksym Anatoliyevich Shevkoplias, 4 June 2018 (Memorial, Annex 4), ¶¶5, 8 and 10.

⁴⁶⁴ Counter-Memorial (ICSFT), ¶368 (b)

⁴⁶⁵ See Second Samolenkov Report, ¶¶152-153 (Annex 8).

359. Ukraine's next flawed attempt to demonstrate that the attack on the Bugas roadblock was an "act intended to cause civilian deaths" is to point out the use of the BM-21 Grad system. It argues that the Bugas roadblock was deliberately targeted with BM-21 Grad MLRS and that the use of the latter by itself is sufficient to conclude that the "Volnovakha shelling was an act intended to cause civilian deaths" and that the "proof of intent to harm civilians" is established within the meaning of Article 2(1)(b) of the ICSFT⁴⁶⁶. This argument is clearly untenable, for several reasons:
360. **First**, as noted above, the Bugas roadblock was not a civilian object, and it is in light of this fact that civilian death caused by that attack should be assessed.
361. **Second**, Ukraine's argument on the use of MLRS is reflective of its position with respect to the intention to harm civilians. Ukraine's position is limited to indirect intent, which is insufficient under article 2(1)(b) ICSFT⁴⁶⁷.
362. **Third**, the contention that MLRS, and in particular BM-21 Grad, is an inherently indiscriminate weapon is not supported by the findings of international competent bodies, including the ICRC and international criminal tribunals.
363. In particular, the use of "Grad" MLRS is not prohibited under international humanitarian law, even if used against targets located in a population centre. The jurisprudence of the ICTY makes this clear:

"... In general, the rocket systems used in 1995 [BM-21] were less accurate than the artillery systems, such as Howitzers or mortar systems....⁴⁶⁸ the Trial Chamber considers that the evidence allows for the reasonable interpretation that the forces who fired artillery projectiles which impacted on or nearby these towns were deliberately targeting military targets"⁴⁶⁹.

364. As the Appeals Chamber put it,

"The Trial Chamber's Impact Analysis was premised on its conclusion that "a reasonable interpretation of the evidence" was that an artillery projectile fired by the Croatian Army which impacted within 200 metres of a legitimate target was deliberately fired at that target ("200 Metre Standard").⁷⁶ Using the 200 Metre Standard as a yardstick, the Trial Chamber found that all impact

⁴⁶⁶ Reply, ¶¶220-221.

⁴⁶⁷ Counter-Memorial (ICSFT), Chapter V.

⁴⁶⁸ *Gotovina et al.*, ICTY, IT-06-90, Trial Chamber Judgment, 15 April 2011, ¶1165.

⁴⁶⁹ *Ibid.*, ¶1162.

sites located more than 200 metres from a target it deemed legitimate served as evidence of an unlawful artillery attack”.⁴⁷⁰

365. Thus, according to the Trial Chamber, “Grad” attacks hitting as far as 200 meters away from a military target were still lawful. However, even this generous conclusion was overturned by the Appeals Chamber, which ruled that:

“The possibility of shelling such mobile targets, combined with the lack of any dependable range of error estimation, raises reasonable doubt about whether even artillery impact sites particularly distant from fixed artillery targets considered legitimate by the Trial Chamber demonstrate that unlawful shelling took place...⁴⁷¹ Accordingly, the Appeals Chamber, Judge Agius and Judge Pocar dissenting, holds that after reviewing relevant evidence, the Trial Chamber’s errors with respect to the 200 Metre Standard and targets of opportunity are sufficiently serious that the conclusions of the Impact Analysis cannot be sustained”.⁴⁷²

366. In the end, the Tribunal concluded that even “Grad” attacks hitting further than the 200-meter radius from a military target were still not unlawful.⁴⁷³

“The Appeals Chamber dismissed the 200 meter ‘margin of error’ among other reasons on the ground that firing a weapon from a greater distance could well have resulted in shells and rockets impacting more than 200 meters away from a target. The wide spread of impact sites could then be plausibly explained by a higher margin of error, and it could not be excluded that the shells were all aimed at legitimate military targets.”⁴⁷⁴

367. This conclusion was based upon expert reports, such as that of Lieutenant General (ret.) Shoffner, who rejected the 200-meter standard on the basis that under the given firing conditions, more than 50% of the rockets could be expected to fall more than 300 meters from the aim point.⁴⁷⁵ Contrary to what Ukraine and its experts aim to prove in the present case, the rate of “Grad” rockets dispersal was not considered as evidence of an “inherently indiscriminate weapon”, nor of an “indiscriminate attack”.

⁴⁷⁰ *Gotovina et al.*, ICTY, IT-06-90, Appeals Chamber Judgment, 16 November 2012, ¶25.

⁴⁷¹ *Ibid.*, ¶66.

⁴⁷² *Ibid.*, ¶67.

⁴⁷³ *Ibid.*, ¶84.

⁴⁷⁴ M. Brehm, *Use of Grad Rockets in Populated Areas: What Lessons from Gotovina?* (30 July 2014), available at: <https://ejiltalk.org/use-of-grad-rockets-in-populated-areas-what-lessons-from-gotovina/>.

⁴⁷⁵ *Gotovina et al.*, Appellant Ante Gotovina’s motion to admit new evidence pursuant to Rule 115 (Public redacted version), 4 November 2011, Exhibit 21, 3540.

368. Extensive State practice confirms that MLRS systems, including “Grad”, are regularly used in warfare, including against population centres. Ukraine itself is notorious for such attacks, leading to many civilian casualties.⁴⁷⁶

369. Cluster submunitions were also a principal characteristic of the “Orkan-87” MLRS used by Milan Martić in the eponymous case relied on by Ukraine. As usual, Ukraine fails to take into account a critical element of qualification when attempting to fit a case into its own narrative. As noted by ICTY:

“The M-87 Orkan is a non-guided projectile, the primary military use of which is to target soldiers and armoured vehicles.¹²⁴² Each rocket may contain either a cluster warhead with 288 so-called bomblets or 24 anti-tank shells. The evidence shows that rockets with cluster warheads containing bomblets were launched in the attacks on Zagreb on 2 and 3 May 1995. Each bomblet contains 420 pellets of 3mm in diameter.¹²⁴⁵ The bomblets are ejected from the rocket at a height of 800-1,000m above the targeted area and explode upon impact, releasing the pellets. The maximum firing range of the M-87 Orkan is 50 kilometres. The dispersion error of the rocket at 800-1,000m in the air increases with the firing range. Fired from the maximum range, this error is about 1,000m in any direction. The area of dispersion of the bomblets on the ground is about two hectares. Each pellet has a lethal range of ten metres....⁴⁷⁷ the Trial Chamber notes in this respect that the weapon was fired from the extreme of its range. Moreover, the Trial Chamber notes the characteristics of the weapon, it being a non-guided high dispersion weapon. The Trial Chamber therefore concludes that the M-87 Orkan, by virtue of its characteristics and the firing range in this specific instance, was incapable of hitting specific targets. For these reasons, the Trial Chamber also finds that the M-87 Orkan is an indiscriminate weapon, the use of which in densely populated civilian areas, such as Zagreb, will result in the infliction of severe casualties.”⁴⁷⁸

370. The high dispersal rate of cluster submunitions and their lethality against unprotected civilian targets played a critical role in the Tribunal’s qualification of the weapon’s use as “indiscriminate”. As further noted by the ICTY:

“The Appeals Chamber upheld the Trial Chamber’s finding in *Gali* which relied, *inter alia*, on the *Martić* Rule 61 Decision, 8 Mar 1996, paras 23-31, according to which the Trial Chamber regarded the use of a cluster bomb

⁴⁷⁶ Second Samolenkov Report, ¶¶100, 335, 399, 426-428 (Annex 8); Ministry of Foreign Affairs of the Russian Federation, Statement by the Russian Federation on the false allegations against the Russian Federation made by Ukraine to cover-up its own violations of international law and military crimes against civilian population of Donbass as well as Kharkov, Kherson and Zaporozhye regions, 27 September 2022, available at: https://mid.ru/en/foreign_policy/news/themes/id/1831500/.

⁴⁷⁷ *Martić case*, ICTY Trial Chamber Judgment, 12 June 2007, ¶462.

⁴⁷⁸ *Ibid.*, ¶463.

warhead as evidence of Milan Martić's intent to deliberately attack the civilian population."⁴⁷⁹ [Emphasis added].

371. The same reasoning is evident in other decisions taken by ICTY regarding *Martic*, making it clear that specifically the use of cluster munitions was what guided expert witnesses, the Prosecution and the Tribunal to conclude that the use of Orkan rockets was contrary to international humanitarian law.⁴⁸⁰ Unlike the American MLRS in Iraq and the Yugoslavian "Orkan-87", the BM-21 "Grad" employs unitary projectiles, not cluster submunitions, and is thus inherently more precise and less dangerous to civilians.
372. Ukraine's expert General Brown says that "guns, by virtue of their tighter fall of shot pattern, might have given some credence to the claim that the attackers were at least trying to target the checkpoint, rather than aiming to obliterate 100 hectares and whatever happened to be in it". However, artillery guns, despite the tighter fall of shot pattern in comparison to BM-21, are also not accurate and it would still be impossible to completely exclude collateral damage to civilians due to Ukraine's military tactic of using civilian objects as a shelter and an opportunity to hide its military equipment and personnel from attacks as well as to create a pretext for further allegations in case of collateral damage to civilians that would be made during an attack on Ukrainian military units. This tactic is confirmed, for example in the IPHR report which shows military objects placed by Ukraine within residential areas of Avdeyevka: "It should be noted that numerous incidents of shelling of civilian objects were possible amongst other things because of the military objects located near to civilian populations and residential areas"⁴⁸¹.
373. General Brown believes that the choice of BM-21 Grad to hit the roadblock itself characterises the shelling as indiscriminate: "For BM-21 Grad, the doctrinal "minimum target dimensions (width x depth) are 400 x 400 m. The size of the Bugas roadblock is approximately 100 m x 100 m. Thus, the BM-21 Grad is inherently indiscriminate for a target of this size, as even if the weapon were accurately aimed at the Bugas roadblock,

⁴⁷⁹ *Ibid.*, footnote 135, p. 30.

⁴⁸⁰ *Ibid.*, ¶¶18, 30.

⁴⁸¹ International Partnership for Human Rights, Civic Solidarity Platform, Truth Hounds, "Scorching Winter 2016-2017. Analysis of the shellings of residential areas in Eastern Ukraine", 2017, p. 27, available at: <https://truth-hounds.org/wpcontent/uploads/2017/09/last-UA-eng-20.09-web.compressed.pdf> (Counter-Memorial (ICSFT), Annex 88); See also Kharkov Human Rights Publisher, Armed conflict in the East of Ukraine: the damage caused to the housing of the civilian population, 2019, pp. 21-22, available at: https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/report_on_damage_to_housing_of_the_civilian_population_in_the_eastern_ukraine_eng.pdf (Annex 90).

the pattern of projectile impact would inevitably result in more than 50% of the missiles missing the target.”⁴⁸² However, as General Samolenkov explains, this statement is knowingly incorrect for a number of reasons, such as:

“Firstly, if the documents provided by the SBU are to be trusted, the shell fragments hit the passenger bus, when the bus was actually in the Bugas roadblock territory. Thus, based on the protocols of interviews drawn up by the SBU, at that moment the bus was stopped at the roadblock and inspected by Ukrainian servicemen. Even if the shelling had been carried out from cannon artillery, the shells that were fired at the roadblock and landed on its territory could have hit the passenger bus in the same way. For this reason, regardless of the DPR's choice of weaponry, the risk of collateral damage existed precisely because of Ukraine's organisation of civilian transport inspections at the Bugas roadblock.

Secondly, there is no such criterion for selecting artillery weaponry that would prescribe that 50% of the projectiles must hit the target. General Brown cites no source to support his stated criterion, so I assume that this criterion is merely General Brown's opinion. I disagree with this opinion for the reasons described below.

Thirdly, General Brown claims that the DPR should have used cannon artillery and provides a fall of shot pattern created by a 122 mm artillery gun firing from a distance of 15 km. However, the schematic he provides has dimensions of 208 by 80 m, which also means that a significant portion of shells would have fallen outside the roadblock area (100 by 100 m) given by General Brown.

Fourthly, 15.4 km is the maximum range for firing the appropriate type of cannon artillery that General Brown refers to (D-30 howitzer). If one was to agree with General Brown that the shelling was carried out from a distance of between 19.4 and 19.8 km, this already meant that it was impossible for the DPR to use cannon artillery (which cannot fire beyond 15.4 km).

At the same time, cannon artillery has much lower mobility and a lower density of fire. A strike of the same intensity would require several guns to be moved into positions close to UAF positions, and continuous firing from such a position for a long period of time. This would make the defeat of a DPR artillery position by retaliatory fire by the UAF almost inevitable. Whereas a strike from BM-21 Grad MLRS requires only a few minutes, and the units themselves can move quickly to a position and just as quickly leave it after completing the mission.”⁴⁸³

374. Based on these and other factors, General Samolenkov concludes that BM-21 is not an indiscriminate weapon, and its use does not imply an indiscriminate strike against the Bugas roadblock.

⁴⁸² Second Brown Report, ¶16 (Reply, Annex 1).

⁴⁸³ See Second Samolenkov Report, ¶¶200-206 (Annex 8).

375. Furthermore, General Samolenkov examines examples when high-precision weaponry has been used, and concludes that even the use of the most high-precision weaponry does not eliminate the risk of collateral damage, including cases when a major civilian target (passenger train) has been hit not once, but twice in a row with precision-guided munitions, while being in sight of the attacker (military aircraft pilot), causing dozens of civilian casualties, and yet the International Criminal Tribunal for the Former Yugoslavia ("ICTY") committee found the incident to contain no elements of a war crime.⁴⁸⁴

iii. Ukraine Failed to Establish the Requisite Intent and Purpose

376. In its Order of 19 April 2017, the Court observed that even if the acts to which Ukraine refers have given rise to the death and injury of a large number of civilians, in order to determine whether they constitute the violation of the Article 2(1)(b) of the ICSFT, “it is necessary to ascertain whether there are sufficient reasons for considering that the other elements set out in Article 2, paragraph 1, such as the elements of intention or knowledge [...], and the element of purpose specified in Article 2, paragraph 1 (b), are present”.⁴⁸⁵ The Court found that “At this stage of the proceedings, Ukraine has not put before the Court evidence which affords a sufficient basis to find it plausible that these elements are present”.⁴⁸⁶ The Russian Federation established in its Counter-Memorial, and again in this Rejoinder,⁴⁸⁷ that no credible evidence that could alter this conclusion has been put forward by Ukraine. Therefore, Ukraine contention in this regard should be rejected.

377. In order to establish the *dolus specialis* required by Article 2(1)(b), Ukraine maintains that “[e]vidence 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”.⁴⁸⁸ This argument is unfounded. The Russian Federation has established that “the characterization of the Bugas roadblock as a ‘civilian checkpoint’⁴⁸⁹ is incorrect, and that the relevant rules of IHL apply to the situation; therefore, “the likely presence of civilians at or near the checkpoint is only

⁴⁸⁴ *Ibid.* ¶¶214-218.

⁴⁸⁵ Order of 19 April 2017, ¶75.

⁴⁸⁶ *Ibid.*

⁴⁸⁷ See Chapter III above; Counter-Memorial (ICSFT), Chapter IV.

⁴⁸⁸ Reply, ¶229.

⁴⁸⁹ Counter-Memorial (ICSFT), ¶396 (a).

relevant to an assessment of proportionality”⁴⁹⁰. The Russian Federation also explained in its Counter-Memorial that even if the attack was disproportionate, and even if it were to be characterised as indiscriminate (*quod non*), this would not suffice to establish the requisite specific intent under Article 2(1)(b) of the ICSFT.⁴⁹¹ This “specific purpose” as *dolus specialis* cannot be established by “inference” and “conclusion”. A higher standard of conclusive evidence is required that Ukraine was unable to produce in support of its claim.

378. General Brown’s attempt to prove that “the attack was a deliberate targeting of civilians” with reference to the shelling of the roadblock during the day and not at night⁴⁹² is thoroughly rebutted by General Samolenkov in his Second Report. In particular, “Ukraine’s own sources refute the claim that firing at the Bugas roadblock at night would have resulted in fewer civilian casualties. For instance, recommendations on passing through the Bugas roadblock in 2015 pointed to an important feature of the roadblock: unlike other roadblocks, queues of civilian vehicles formed at the Bugas roadblock at night:

“Features of the Bugas roadblock (Volnovakha, Mariupol direction) <...>.

It is in the Mariupol direction that [people willing to pass] most frequently spend the nights under the open sky.”⁴⁹³

379. This is confirmed by the satellite image analysed in the First Bobkov Report: it shows that in the morning there were queues of civilian vehicles in both directions from the roadblock.⁴⁹⁴ However, according to the video of the shelling, there were far fewer, if not non-existent, vehicles during the shelling itself.⁴⁹⁵

⁴⁹⁰ *Ibid.*, ¶396 (b).

⁴⁹¹ *Ibid.*, ¶396.

⁴⁹² Second Brown Report, ¶¶14,18 (d) (Reply, Annex 1).

⁴⁹³ Kharkov Human Rights Group, *How to Drive Across the Line of Contact. Step-by-step instructions* (9 September 2015), available at: <https://khpg.org/1441791221>; (Second Samolenkov Report, Exhibit P (Annex 8)); See also, Rinat Akhmetov Foundation, *How to drive across the contact line. Step-by-step instructions* (25 September 2015), available at: <https://akhmetovfoundation.org/ru/news/kak-proehat-cherez-lynyyu-soprykosnovenyia-poshagovaya-ynstruktsyya> (Second Samolenkov Report, Exhibit Q (Annex 8)); See also, Second Samolenkov Report, ¶233 (Annex 8).

⁴⁹⁴ Expert Report of Alexander Alekseevich Bobkov, 8 August 2021 (“First Bobkov Report”), ¶36 (2), Figure 8 (Counter-Memorial (ICSFT), Annex 1).

⁴⁹⁵ Memorial, Annex 696, Dashboard camera footage of the 13 January 2015 shelling.

380. Therefore, if, as General Brown suggests, the shelling would have taken place at night, the risk of hitting a concentration of civilian vehicles would have been greater, especially considering that the DPR forces probably lacked night vision equipment for guidance and adjustment of fire.
381. General Samolenkov also provides a list of examples when NATO forces attacked, in broad daylight, targets with concentration of civilian vehicles, such as bridges, tunnels and industrial hubs; in every instance, despite civilians being hit, it has been explained by NATO as collateral damage stemming from lawful strikes on legitimate military targets.⁴⁹⁶ No charges of terrorism have been brought with regard to these strikes.
382. Ukraine’s next flawed argument for establishing the terrorist nature of the shelling of the Bugas roadblock is the proposition that the attack was part of a campaign to obtain political concessions. In this regard, it maintains that “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”.⁴⁹⁷ This calls for some observations:
- (a) Ukraine does not specify which political concessions the DPR was seeking to obtain, and does not substantiate its contention.
 - (b) The Russian Federation stresses that proving a purpose of “compelling a government to act or abstain from acting”, being part of the *dolus specialis* of the terrorism offence under Article 2(1)(b) of the ICSFT, requires “fully conclusive” evidence that Ukraine in this case of shelling was unable to present to the Court. When terrorists seek to compel a government to act in a certain way, they usually do it openly and do not hide their intentions. However, Ukraine fails to show that this is what happened in the present case.
 - (c) The existence of the “campaign” to obtain political concessions requires additional evidence that Ukraine was unable to present to the Court. The only argument that

⁴⁹⁶ See Second Samolenkov Report, ¶¶243-245 (Annex 8).

⁴⁹⁷ Reply, ¶231.

Ukraine brings in support of this point is that the shelling took place “in close proximity to major diplomatic negotiations”.⁴⁹⁸ But this is highly speculative. Indeed, military clashes in this area were ongoing at the time, and a direct link between them and the diplomatic negotiations leading to the Minsk Agreements is not supported by any evidence.

- (d) As regards the alleged “recent atrocities of 2022”,⁴⁹⁹ Ukraine’s accusation is purely political, speculative and erroneous, and in any event irrelevant in the present case, which is limited *ratione temporis* to events that occurred between 2014 and 2017. Moreover, relying on the incidents of 2022 for purposes of the attack that occurred in 2015 in itself shows that there was no particular purpose on the part of the DPR to compel the Ukrainian Government to do or abstain from doing any act in connection to the Minsk Agreements.

383. Therefore, the “purpose” requirement under Article 2(1)(b) of the ICSFT is not met.

C. MARIUPOL

384. The Russian Federation established that the shelling at Mariupol on 24 January 2015 took place in the context of a significant escalation of hostilities near the contact line. Ukraine maintains the opposite but fails to substantiate its claim. Here again, Ukraine turns a blind eye to the real context of the incident, that is an armed conflict to which IHL is applicable in the assessment of the attack that caused the death and injury of civilians in the Vostochniy residence.

i. Ukraine Fails to Establish that the Attack on the Vostochniy Residential Neighbourhood Was Intended to Cause Death to Civilians

385. Failing to provide any conclusive evidence in support of its allegation that “the civilians of the Vostochniy neighbourhood were the targets”⁵⁰⁰, Ukraine points to “the use of BM-21 weapon system” and an alleged “lack of military explanation” for the attack to establish what it calls “the “real reason” behind it. Ukraine maintains that this “real

⁴⁹⁸ Memorial, ¶234.

⁴⁹⁹ Reply, ¶231.

⁵⁰⁰ Reply, ¶236.

reason” was “to harm civilians in the residential area”⁵⁰¹. This argument fails for the simple reason that it is based on Ukraine’s flawed position that the intent required under Article 2(1)(b) of the ICSFT includes indirect intent⁵⁰². Some additional observations are however required.

386. As shown by General Samolenkov in his Second Report, Ukraine’s own evidence (testimonies obtained by SBU and intercepts) and other Ukrainian sources (Ukrainian court judgments, statements by the Ukrainian prosecutor's office, reports of Ukrainian media) confirm that the DPR intended to engage the UAF's defensive positions on the outskirts of the city, and the hitting of residential areas was the result of the informant Kirsanov (apparently secretly pro-Kiev) providing knowingly incorrect target coordinates to the DPR forces.⁵⁰³

387. Some of the materials are particularly illustrative of this. For example, in Kirsanov's testimony, which he gave to the SBU, he asserted:

“I always intentionally gave him wrong coordinates.”

“On 21 and 22 January, 2014, I provided coordinates for the sites in Taganrogskaya Street and Marshala Zhukova Street. However, those coordinates were wrong”.⁵⁰⁴

388. The verdict of the Ukrainian Court on Kirsanov’s case confirms this:

“He added that at PERSON_5's request, he gave him false information about the coordinates of the UAF's positions. Further, he did not ask PERSON_5 why he needed such coordinates. He transmitted this information about UAF roadblocks using a Google map from the Internet. At the same time, he noted that the location of such roadblocks was common knowledge. While communicating with PERSON_5, he also met PERSON_7, whose last name he did not know. He confirmed that the information he gave to PERSON_7 was similar to the information provided by him to PERSON_5, which was false.”⁵⁰⁵ [Emphasis added].

⁵⁰¹ *Ibid.*, ¶235.

⁵⁰² *See above*, Chapter III(C).

⁵⁰³ *See* Second Samolenkov Report, ¶¶246-256.

⁵⁰⁴ Witness Interrogation Protocol of Valeriy Kirsanov, 25 January 2015 (Memorial, Annex 213).

⁵⁰⁵ Ordzhonikidze District Court of Mariupol, Case No. 265/4773/15-k, Sentence, 22 June 2016, available at: <http://web.archive.org/web/20211128095111/https://reyestr.court.gov.ua/Review/58450086> (Second Samolenkov Report, Exhibit AQ (Annex 8)).

389. The same is confirmed by Ukrainian media reports citing data obtained by the SBU during its investigation:

“The SBU officers established that former Mariupol police officer Valeriy Kirsanov was involved in adjusting the fire. According to the special services, the militants' main targets were military roadblocks near Mariupol, but due to inaccurate coordinates, the shells hit a residential area.”⁵⁰⁶

“According to the Ukrainian special services, the militants wanted to shell a roadblock of the ATO forces, which was about a kilometre away from residential buildings, but missed.”⁵⁰⁷

390. And it is again confirmed by the Ukrainian Prosecution service in 2016:

“Thus, on 24 January 2015, the former policeman [Kirsanov] also adjusted the terrorists' fire. Their main target, according to investigators, was roadblocks and other places where UAF forces were deployed near the city of Mariupol. However, due to inaccurate coordinates, the militants shelled the Vostochny residential area in Levoberezhny district of Mariupol from Grad launchers.”⁵⁰⁸

391. Considering that, as noted by General Samolenkov in his First Report, the intercepted conversations in the case file also confirm that the residential area was not the target of the strikes,⁵⁰⁹ “all available sources clearly indicate that the shelling of residential areas in Mariupol was due to targeting errors and that the actual target of the DPR shelling was Ukrainian defensive positions outside the city”.⁵¹⁰

392. Even without taking into account Kirsanov's transmission of incorrect coordinates, the hits on residential areas could have been the result of errors and malfunctions.⁵¹¹ This is confirmed, in particular, by Ukraine's own purported intercept of a DPR communication, informing the DPR commander that “one unit was overshooting... could not account for

⁵⁰⁶ Mariupol City, *Mariupol court adjourns trial of Vostochny shelling spotter* (16 January 2018), available at: https://mrpl.city/news/view/v-mariupole-perenesli-zasedanie-suda-po-delu-navodchika-obstrele-vostochnogo?utm_source=ukr.net&utm_medium=referral&utm_campaign=rss (Second Samolenkov Report, Exhibit AR (Annex 8)).

⁵⁰⁷ Mediaport, *Mariupol shelling: court finds ex-policeman guilty of adjusting fire* (23 June 2016), available at: <https://www.mediaport.ua/obstrel-mariupolya-sud-priznal-vinovnym-eks-milicionera-v-korrektirovke-ognya> (Second Samolenkov Report, Exhibit AS (Annex 8)).

⁵⁰⁸ Donetsk Regional Prosecutor's Office, Press release, 22 June 2016, available at: https://don.gp.gov.ua/ua/news.html?_m=publications&_c=view&_t=rec&id=187414 (Second Samolenkov Report, Exhibit AT (Annex 8)).

⁵⁰⁹ Expert Report of Major General V.A. Samolenkov, 8 August 2021 (“First Samolenkov Report”), ¶¶171-172 (Counter-Memorial (ICSFT), Annex 2).

⁵¹⁰ See Second Samolenkov Report, ¶256 (Annex 8).

⁵¹¹ *Ibid.*, ¶¶314-327.

the number of rockets that impacted the residential area.”⁵¹² Of course, it is not implausible that the report played down the mistake, and in fact more than one unit had erroneously overshoot their targets.

393. Ukraine further maintains that “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”.⁵¹³ It relies on General Brown’s opinion 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”, to conclude that “even if Russia’s speculation about the actual targets of the attack is 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.”⁵¹⁴ This argument is far from being convincing because the use of the BM-21 weapon system proves nothing by itself. In fact, it is not the type of weapon used that is decisive for the characterisation of an attack as a terrorist offence. Moreover, as explained above, the contention that MLRS is an inherently indiscriminate weapon remains unfounded.⁵¹⁵ In this regard, Samolenkov explains that “[t]he mere choice of MLRS as a means of attack does not in itself imply the indiscriminate nature of the shelling”.⁵¹⁶ “As NATO’s military experience shows, even the use of the highest-precision weapons in an urban environment inevitably results in civilian casualties”,⁵¹⁷ and that “the choice in favor of MLRS may have been made based on military necessity and expediency, as MLRS have advantages over cannon artillery and/or could have been the only available means of destruction at the relevant time.”⁵¹⁸
394. Concerning Checkpoint No. 4014, General Brown focuses on the question of whether more precise and accurate weapons (i.e., tanks, infantry, or artillery guns) could feasibly

⁵¹² *Ibid.*, ¶322; Second Brown Report, ¶30 (c) (Reply, Annex 1).

⁵¹³ Reply, ¶237.

⁵¹⁴ *Ibid.*

⁵¹⁵ *See above*, ¶¶301, 310.

⁵¹⁶ *See* Second Samolenkov Report, ¶10 (g) (Annex 8).

⁵¹⁷ *Ibid.*, ¶308.

⁵¹⁸ *Ibid.*, ¶10 (f).

have been used by the DPR.⁵¹⁹ However, as General Samolenkov observes, this is to assume that such options were reasonably available to the DPR when this is far from being clear⁵²⁰. As explained above, there is also considerable evidence that the UAF themselves used, *inter alia*, BM-21 against civilian areas in territory controlled by the DPR.

395. Regarding military explanation, the Russian Federation has established, based on conclusive evidence (including the Decision of Ukraine's Tribunal in the *Kirsanov* case, Ukraine's own expert opinion, and the OSCE Report),⁵²¹ that, *first*, the attack of Mariupol took place in the context of an ongoing armed conflict, in particular during preparation for an assault on the city by DPR forces, and, *second*, the attack was aimed at military objectives. It is in the light of these undisputed facts that civilian harm resulted from the shelling of the Vostochniy Residential Neighbourhood should be considered.

396. In fact, the shelling was intended to target the military positions in front of the city, namely Checkpoint No. 4014 (company strongpoint No. 4014 of the Operational Regiment of the National Guard of Ukraine) and Company Position 4013, very close to the Vostochniy residential area. Ukraine concedes that Checkpoint No. 4014 and Company Position 4013 could legitimately have been treated as military objects which could be attacked by reason of this status. Its focus is on the question of whether attacking these objects served an apparent military advantage.⁵²² According to General Brown's opinion, there would have been a military advantage in attacking this object only "if followed up immediately by a ground assault"⁵²³. However, Ukraine omits to note that its own purported recordings of intercepted DPR communications suggest that ground assaults were carried out in the area, and that "based on the location of these objectives, if shelling from a north-eastern or eastern direction was directed at these targets, it would follow that overshooting could have impacted the residential area beyond".⁵²⁴ As General Samolenkov explains:

⁵¹⁹ Expert Report of Lieutenant General Christopher Brown, 5 June 2018 ("First Brown Report"), ¶¶53-54 (Memorial, Annex 11).

⁵²⁰ First Samolenkov Report, ¶189 (Counter-Memorial (ICSFT), Annex 2).

⁵²¹ Counter-Memorial (ICSFT), ¶421.

⁵²² Reply, ¶235.

⁵²³ *Ibid.*

⁵²⁴ See First Samolenkov Report, ¶168 (Counter-Memorial (ICSFT), Annex 2).

“In this regard, I would like to point out that from the analysis of the material submitted to me for examination, I can also assume the existence of the following several factors or a combination thereof:

- (a) errors in the information received about the coordinates of firing positions and selected military targets,
- (b) errors in aiming the launchers,
- (c) improper technical preparation of the launchers,
- (d) malfunction of the launchers.

It may also be a "human error", such as misinterpretation of received orders (commands) during fire control, reduced capabilities of personnel due to tensions in operations, enemy pressure, etc.”⁵²⁵

“The very location of UAF military positions in close proximity to residential areas, combined with the fact that the population had not been evacuated from nearby areas, was the principal condition for the occurrence of collateral damage. When combat activity takes place in close proximity to residential areas from which civilians have not been evacuated, collateral damage is almost inevitable. The warfare practice of NATO member states in modern history confirms this.”⁵²⁶

397. General Samolenkov also clearly showed in his Second Report that “Ukraine's and General Brown's arguments about the deliberate nature of the attack on residential areas in order to allegedly intimidate the civilian population are contradicted by the fact that the DPR was planning an offensive on Mariupol”, a fact that has been acknowledged by Ukraine and by General Brown.⁵²⁷ Both Russian and Ukrainian military doctrine, which had presumably been followed by the DPR, envisages the destruction of enemy defensive positions on the outskirts of a city as one of the first steps in capturing it.⁵²⁸ Possible plans by the DPR forces to encircle Mariupol also do not refute that the shelling of Ukrainian positions on eastern outskirts of city was expedient.⁵²⁹ Even in the absence of any subsequent ground offensive, the defeat of the Ukrainian positions defending the city was justified from a militarily point of view.⁵³⁰

398. Therefore, Ukraine failed to demonstrate that the “real reason” for that attack was “to harm civilians in the residential area”. On the other hand, the Russian Federation

⁵²⁵ Second Samolenkov Report, ¶¶316-317, (Annex 8).

⁵²⁶ *Ibid.*, ¶10 (a).

⁵²⁷ *Ibid.*, ¶270.

⁵²⁸ *Ibid.*, ¶¶281-282.

⁵²⁹ *Ibid.*, ¶¶283-296.

⁵³⁰ *Ibid.*, ¶¶297 - 306.

established that the attack was aimed at military objects and that it served significant military advantage.

ii. **Ukraine Fails to Establish that the Purpose of the Attack on the Vostochniy Residential Neighbourhood Was to Intimidate the Ukrainian Civilian Population and Compel the Ukrainian Government to Act or Abstain from doing any Act**

399. Insisting on its position that the shelling of the Vostochniy Residential Neighbourhood “was a deliberate attack on a civilian area with a battery of BM-21 Grad systems”, Ukraine concludes that “The nature of such an attack is sufficient in itself to establish the purpose of intimidation”.⁵³¹ Failing to find any conclusive evidence in support of this “inference of such a purpose”, it refers to the timing 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”⁵³².

400. The Russian Federation established above that:

- (a) **First**, the attack on the Vostochniy Residential Neighbourhood was not a deliberate attack targeting a civilian area, but an attack that took place in the context of an ongoing armed conflict between the DPR and Government-controlled Forces, targeting certain military objectives (Checkpoint 4041) that presented military advantages for the DPR.
- (b) **Second**, the use of BM-21 Grad systems proves nothing by itself as it is not an “inherently indiscriminate weapon”.
- (c) **Third**, the timing of the attack is irrelevant to the establishment of the alleged purpose, as other similar shelling incidents took place before and after the attack of 24 January 2015;
- (d) **Fourth**, while conceding that “direct evidence of a purpose to intimidate is rare” under Article 2(1)(b), Ukraine maintains that “in the case of Mariupol it exists: a DPR member on the ground, *after* the civilian death and destruction were apparent,

⁵³¹ Reply, ¶238.

⁵³² *Ibid.*, ¶239.

proclaimed: “*Let the f*cking bitches be more afraid.*”, alleging that “Russia has no innocent explanation for this statement”.⁵³³

401. The Russian Federation has actually addressed this intercepted conversation but addressed it completely, unlike Ukraine:

“... Ponomarenko S.L.: - Let the f***** b***** be more afraid.

Valeriy Kirsanov - Well, yes.

Ponomarenko S.L. – It just f***** sucks, you know that they’re forcing people to leave now, and they’re going to sit there.

Valeriy Kirsanov – Yeah. That’s right. And the people there, I tell you, they’re leaving in droves. In droves!”⁵³⁴

402. The Russian “innocent explanation” of these intercepts, which should be read together, is the following:

“The context of the comment that Ukraine portrays as celebrating the spreading terror is also important. The two individuals are discussing Ukrainian forces (“they” and “they’re”) that are being deployed from Mariupol to engage with the attacking DPR troops. The comment about causing fear is most naturally read as relating to the Ukrainian forces. Immediately after this comment, the speakers regret that the Ukrainian forces are “forcing people [i.e., civilians] to leave now” and that “the people” (i.e., civilians) are leaving in droves”⁵³⁵.

403. Ukraine’s last ground for concluding that the Mariupol shelling is covered by Article 2(1)(b) of the ICSFT is its focus on its alleged “purpose of compelling the Ukrainian government to act”. It argues that “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 that the shelling of the Vostochniy neighborhood had the purpose of compelling the Ukrainian government to act or abstain from acting”.⁵³⁶

⁵³³ Reply, ¶239.

⁵³⁴ Counter-Memorial (ICSFT), ¶437. It is important to emphasize here that the “Let the f***** b***** be more afraid.” refers to Ukrainian forces, *not* to the civilian population (“the people there”), which the Ukrainian forces (“they”) are forcing to “leave in droves”.

⁵³⁵ Counter-Memorial (ICSFT), ¶438 (b).

⁵³⁶ Reply, ¶240.

404. The Russian Federation reiterates its position that:

- (a) **First**, in its Order of 19 April 2017, the Court noted that Ukraine was not able to put before the Court evidence which affords a sufficient basis to submit a plausible case as far as the required purpose to intimidate a population, or to compel a government or an international organisation to do or to abstain from doing any act is concerned.⁵³⁷ No such evidence that could alter this conclusion has been put forward by Ukraine in this Reply regarding the shelling of Mariupol.
- (b) **Second**, the Russian Federation stresses that “compelling a government to act or abstain from acting”, being part of *dolus specialis* of terrorism, its establishment requires “fully conclusive” evidence, that Ukraine in this case of shelling was unable to present to the Court. Therefore, this allegation remains a mere speculation and should be rejected.

D. KRAMATORSK

i. Ukraine Fails to Establish that the Attack on Kramatorsk Was Intended to Cause Death to Civilians

405. Ukraine similarly fails to establish that the shelling impacts at the residential areas of Kramatorsk on 10 February 2015 constituted an act of terrorism within the meaning of Article 2(1)(b) of the ICSFT.

406. The Russian Federation established in its Counter-Memorial that the rockets which hit the residential areas of Kramatorsk were targeted at the Kramatorsk airfield, with the possibility that the rockets may have malfunctioned and overflowed or deviated.⁵³⁸ Ukraine disagrees. It suggests that the shelling of the airfield must have been separate from the shelling that landed on the residential areas, such that the residential areas was directly attacked.⁵³⁹

⁵³⁷ Order of 19 April 2017, ¶75.

⁵³⁸ First Samolenkov Report, ¶¶224-227 (Counter-Memorial (ICSFT), Annex 2).

⁵³⁹ Reply, ¶245.

407. Ukraine has never contested, nor could it, that the Kramatorsk airfield (which is located around two km south-east of the edge of the city) was a legitimate military target of great significance, and that this military objective was in fact attacked on 10 February 2015.⁵⁴⁰

408. General Samolenkov explains that

“The Kramatorsk airfield housed important military facilities, including the ATO command headquarters, UAF combat aircraft, air defence systems, long-range tactical missile systems (Tochka-U Missiles and BM-30 Smerch MLRS), ammunition and fuel depots, at least 26 military units and others.⁵⁴¹

409. The presence of long-range missile systems is particularly notable, including the same BM-30 “Smerch” heavy MLRS that is said to have been used to attack the airfield. It highlights that a suitably powerful weapon was needed to eliminate this military hub.

410. Ukraine’s expert General Brown also confirms the high value of the Kramatorsk airfield as a military objective:

“Neutralization of such a target would significantly impact the operational capability of the Armed Forces of Ukraine, particularly in terms of command and control, but also in damage to material; personnel casualties were particularly heavy in senior officers, a reflection of the level of the headquarters. It would be a high priority target for any enemy”.⁵⁴²

411. Indeed, General Brown himself attests that the BM-30 “Smerch” was an “ideal” weapon to use against the airfield:

“BM-30 is not just the only weapon available, it is also the ideal weapon for neutralization of an airfield and its associated infrastructure, accompanying units, tented accommodation and soft-skinned vehicles. BM-30 firing 9M55K sub-munition missiles is optimized to defeat personnel, armoured and soft targets in concentration areas, artillery batteries, command posts and ammunition depots.”⁵⁴³

412. Nor did Ukraine challenge the evidence showing that “an aide to Ukraine’s President was reported as saying that the shelling “must have been targeting the headquarters of the operation against them”, *i.e.* the headquarters of the so-called ATO at the airfield.⁵⁴⁴

⁵⁴⁰ Counter-Memorial (ICSFT), ¶¶455-456.

⁵⁴¹ Second Samolenkov Report, ¶383 (Annex 8).

⁵⁴² First Brown Report, ¶66 (Memorial, Annex 11).

⁵⁴³ *Ibid.*

⁵⁴⁴ Counter-Memorial (ICSFT), ¶457.

413. Notwithstanding these undisputed facts, Ukraine contends that “The record thus permits only one possible conclusion: the airfield and the residential area were targeted separately”.⁵⁴⁵ This position, however, is thoroughly rebuffed by the available evidence, including from Ukraine’s own side.
414. **First**, as regards the “record” that would permit such “conclusion”, Ukraine refers only to the witness statement of Kyrylo Dvorskyi, who believes that the attack that impacted the residential area would have happened five minutes later than the shelling of the airfield.⁵⁴⁶ However, this allegation fails to stand against the undisputed evidence put forward by the Russian Federation, including the OSCE reports, a report of the press centre of Ukraine’s ATO and Ukraine’s witness evidence which prove that both targets were impacted at the same time, *i.e.*, at around 12.30 pm.⁵⁴⁷ General Samolenkov explains this in greater detail in his Second Report.⁵⁴⁸
415. **Second**, when attempting to prove two distinct attacks General Brown contradicted his own reasoning and based his analysis and conclusions on an extremely sparse and incomplete body of evidence, as he himself admits:
- "The Ukrainian Security Service investigation was primarily focused on evidence of impacts that killed or injured civilians and damaged civilian property. Moreover, the investigation of the casualties and damage on the aerodrome appears to have been carried out separately by the military authorities. The Security Service report is therefore an incomplete picture".⁵⁴⁹
[Emphasis added]
416. Thus, the SBU once again proved to be an unreliable source of information, according to Ukraine’s own expert. Notably, the same excuse has been used by General Brown when attempting to explain why the SBU has provided him with misleading information for his First Expert Report, leading to incorrect conclusions about the strike at Bugas.⁵⁵⁰
417. Regardless, even according to the data provided by the SBU and used by General Brown, only three rockets fell outside the airfield, whereas the airfield was struck, again according

⁵⁴⁵ Reply, ¶245.

⁵⁴⁶ Memorial, ¶102.

⁵⁴⁷ Counter-Memorial (ICSFT), ¶461.

⁵⁴⁸ Second Samolenkov Report, ¶¶429-432 (Annex 8).

⁵⁴⁹ Second Brown Report, ¶39 (a) (Reply, Annex 1).

⁵⁵⁰ Second Brown Report, ¶15 (a) (iii), footnote 72 (Reply, Annex 1).

to a Ukrainian source, by at least “6 to 12 rockets”. This clearly indicates that in any event the primary purpose of the attack was to destroy the numerous high-value military targets at the Kramatorsk airfields. Notably, Ukraine did not provide a tally of military losses incurred by the strike – evidently, to conceal the advantage gained by the DPR.⁵⁵¹

418. *Third*, contrary to General Brown’s assertion,⁵⁵² the attack on the north-west sector of the airfield did not mean that civilian facilities were to be inevitably hit. In particular, General Samolenkov has shown that General Brown incorrectly calculated the range and dispersion ellipse of the strike,⁵⁵³ and Colonel Bobkov has disproved the “possible firing positions” indicated in the Gwilliam and Corbett Report.⁵⁵⁴

419. General Samolenkov further shows that the DPR had taken steps to mitigate collateral damage, but it was almost inevitable that it would occur, as the Ukrainian side had positioned a large, high-value military facility in close proximity to the city and neglected to evacuate the neighbouring residential areas. General Brown’s claim that the DPR could have avoided civilian casualties by locating the missile launchers south of the airfield is untenable because the area south of Kramatorsk was controlled by Ukrainian forces; and his claim that missile wreckage poses the same threat to civilians as live warheads is likewise implausible.⁵⁵⁵

420. The real reason for the collateral damage, as General Samolenkov suggests, was that these few rockets may have malfunctioned and overflowed the target,⁵⁵⁶ and that they hit the residential areas of Kramatorsk by error. In its Second Report, General Samolenkov explains again that:

“The shelling of Kramatorsk residential areas was unintentional and most likely related to failures of flight range adjustment systems of a small number of rockets. Unintentional nature of the shelling of residential areas and the desire to avoid hitting those areas is confirmed by the DPR's use of a UAV for target reconnaissance in the airfield prior to the attack.”⁵⁵⁷

⁵⁵¹ See Second Samolenkov Report, ¶¶392-396 (Annex 8).

⁵⁵² *Ibid.*, ¶42 (a).

⁵⁵³ Second Samolenkov Report, ¶¶405-411 (Annex 8).

⁵⁵⁴ Second Bobkov Report, ¶¶59-82 (Annex 4); Second Samolenkov Report, ¶¶433-436 (Annex 8).

⁵⁵⁵ Second Samolenkov Report, ¶¶412-416 (Annex 8).

⁵⁵⁶ Counter-Memorial (ICSFT), ¶464.

⁵⁵⁷ Second Samolenkov Report, ¶12 (e) (Annex 8).

421. Unfortunately, deviations of even guided munitions can occur for various reasons and do occur in practice, even with the best-trained armed formations; General Samolenkov provides examples of such misfiring from NATO military practice, which led to civilian casualties that were considered by NATO to be legitimate collateral damage.⁵⁵⁸

422. It must be added that Ukraine has repeatedly used MLRS systems with cluster munitions, including BM-30 “Smerch”, hitting population centres in Donetsk and Lugansk with little to no military justification, leading to numerous civilian deaths (including an employee of the ICRC) and sparking an outcry from human rights bodies.⁵⁵⁹ Ukraine, however, has never considered these attacks to be acts of terrorism.

ii. Ukraine Failed to Establish that the Purpose of Attack Was to Intimidate the Ukrainian Civilian Population and Compel the Ukrainian Government to Act or Abstain from Doing any Act

423. Ukraine alleges that “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 munitions, is sufficient to conclude that the attack, by its nature or context, had the purpose of intimidating a civilian population”.⁵⁶⁰ This contention is unfounded and should be rejected, since:

424. **First**, the Russian Federation has established that the residential areas of Kramatorsk were impacted at the same time that the airfield and as a result of mechanical error. Consequently, it cannot be considered as an attack that could have the purpose of intimidating a civilian population.

425. **Second**, the use of BM-30 proves nothing by itself, and this argument is reflective of Ukraine’s position with respect to the intention to harm civilians. Ukraine’s position is limited to indirect intent, which is insufficient under article 2(1)(b) ICSFT.⁵⁶¹

⁵⁵⁸ *Ibid.*, ¶¶423-424.

⁵⁵⁹ *Ibid.*, ¶¶426-428.

⁵⁶⁰ Reply, ¶247.

⁵⁶¹ Counter-Memorial (ICSFT), Chapter V.

426. Ukraine also alleges that “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”. Here again⁵⁶² the Russian Federation reiterates its position that:

- (a) **First**, in its Order of 19 April 2017, the Court noted that Ukraine was not able to put before the Court evidence which affords a sufficient basis to submit a plausible case as far as the required purpose to intimidate a population, or to compel a government or an international organisation to do or to abstain from doing any act is concerned.⁵⁶³ No such evidence that could alter this conclusion has been put forward by Ukraine in this Reply regarding the shelling of Kramatorsk.
- (b) **Second**, the Russian Federation stresses that “compelling a government to act or abstain from acting”, being part of *dolus specialis* of terrorism, its establishment requires “fully concluding” evidence, that Ukraine in this case of shelling was unable to present to the Court. Therefore, this allegation remains a mere speculation and should be rejected.

E. AVDEYEVKA

427. Ukraine has also failed to demonstrate that the shelling of Avdeyevka between late January and February 2017 was an act of terrorism within the meaning of Article 2(1)(b) of the ICSFT, and once again, stands alone in characterizing the said shelling as a “terrorist” act. In fact, Ukraine’s own public position, and the statements or reports of the OHCHR, the ICRC or the UNSC contradict Ukraine’s characterisation of the shelling that is at issue in this case.⁵⁶⁴

i. Ukraine Failed to Establish that the Shelling of Avdeyevka Was Intended to Cause Death to Civilians

428. In its Counter-Memorial, the Russian Federation established that the residential area around Avdeyevka was subject to the intense military operations involving a full scale battle⁵⁶⁵ in that period, and that the key cause of the escalation of hostilities in January

⁵⁶² Reply, ¶248.

⁵⁶³ Order of 19 April 2017, ¶75.

⁵⁶⁴ Counter-Memorial (ICSFT), ¶468.

⁵⁶⁵ Memorial, Annex 454, ¶31.

2017 was Ukraine’s so-called “creeping offensives” and the heavy presence of the UAF both positioned in and moving through residential areas.⁵⁶⁶

429. These key elements of context of attacks that impacted the residential area of Avdeyevka remain undisputed in Ukraine’s Reply. Nor does Ukraine deny the significant presence of its military equipment (including at least three tanks) in the impact sites in Avdeyevka. General Brown himself admits that:

“in Avdiivka the delineation between UAF and civilian activity is more blurred”.⁵⁶⁷ Moreover, contemporaneous media reported that Ukrainian heavy artillery, including MLRS, located in the residential areas of Avdiivka, repeatedly conducted heavy shelling of residential areas in DPR-controlled Donetsk and Makeyevka, making it an urgent need for DPR to deal with this threat.⁵⁶⁸ NGOs and even Ukraine’s own State ministries confirmed that in Avdiivka Ukrainian Armed Forces used civilian infrastructure such as schools for military purposes.⁵⁶⁹

430. Unable to counter these facts, Ukraine attempts to reframe its argument by claiming that alleged strikes occurred away from Ukrainian military targets admittedly located in the town:

“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, [quote] 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”.⁵⁷⁰

431. This calls for some observations. First of all, as far as it concerns “specific areas of Avdeyevka, particularly those at the edge of the city”, Ukraine appears to accept the military explanation put forward by the Russian Federation in its Counter-Memorial. Secondly, Ukraine’s assertion that “Many of the documented incidents of harm to civilians in Avdeyevka were far from Ukrainian military positions”, shows once again

⁵⁶⁶ Counter-Memorial (ICSFT), ¶¶475-479.

⁵⁶⁷ Second Brown Report, ¶52 (Reply, Annex 1).

⁵⁶⁸ RBC, *Who started the war in Avdeyevka* (31 January 2017), available at: <https://www.rbc.ru/newspaper/2017/02/01/589063099a79474b524c6b1d> (Second Samolenkov Report, Exhibit R (Annex 8)).

⁵⁶⁹ Global Development Commons, *Attacks on Schools. Military Use of Schools during the Armed Conflict in Eastern Ukraine*, 2016, available at: <https://gdc.unicef.org/resource/attacks-schools-military-use-schools-during-armed-conflict-eastern-ukraine>.

⁵⁷⁰ Reply, ¶251.

the ambiguity that surrounds Ukraine's allegation regarding the shelling of Avdeyevka, already highlighted in the Counter-Memorial.⁵⁷¹

432. Ukraine's allegation that the Russian Federation "identifies no credible military explanation for the attacks on civilian homes in the northern residential area, away from UAF positions and possible resupply routes",⁵⁷² is quite striking. In fact, Ukraine itself acknowledges that these alleged attacks "were identified based on witness statements and property inspection reports contained in investigation files obtained after Ukraine filed its Memorial".⁵⁷³ It does not explain how and where the Russian Federation was supposed to provide such an explanation. The Russian Federation reiterates its position that due to Ukraine's failure to put into evidence much of the relevant information, which is in its exclusive possession, the Russian Federation is precluded from responding to the specific allegations concerning each shelling impact at Avdeyevka.
433. Moreover, as noted by General Samolenkov, open-source evidence suggests that the information on Ukraine's military positions that it presented in Annex 28 to its Memorial is misleading at the very least. There were many more such positions, and residential areas were used to set up firing positions for MLRS, from which Donetsk, which was 6 km from Avdeyevka, was shelled.⁵⁷⁴
434. Furthermore, Ukraine's manifest practice of locating its military assets in civilian infrastructure or closely proximate thereto already makes it plausible – even expected – that Ukrainian forces would be peppered throughout the town, not only on the outskirts.
435. Nevertheless, General Samolenkov in his Second Report identifies certain specific fortified positions, artillery emplacements and supply routes of the UAF located in deeper parts of Avdeyevka, which would explain shelling of those areas.⁵⁷⁵ Also, the necessity and possibility of hitting Ukrainian reserves advancing to combat positions and preventing the supply of ammunition was a militarily important task for the DPR, and artillery engagement of such mobile targets along the routes would similarly explain the

⁵⁷¹ Counter-Memorial (ICSFT), ¶499.

⁵⁷² Reply, ¶251.

⁵⁷³ Reply, ¶132, fn 452.

⁵⁷⁴ Second Samolenkov Report, ¶335 (Annex 8).

⁵⁷⁵ *Ibid.*, ¶¶341-346.

occurrence of shelling's in these areas.⁵⁷⁶ That such targets represented valid military objectives despite possible collateral damage is shown by General Samolenkov through the practice of NATO forces.⁵⁷⁷

436. As explained by General Samolenkov:

437. "The operational situation in the Avdeyevka area during the reporting period was far from "stable", there was active fighting and an exchange of artillery strikes and other types of fire. In a situation where the UAF were using residential areas to deploy firing positions for strikes on Donetsk and other settlements, the DPR forces were faced with a choice: either expose their own positions and their own civilians in Donetsk and other settlements to the threat of regular shelling, or respond to strikes in order to hit UAF firing positions despite their deployment in residential areas. Even if full firing preparations are made and all prescribed procedures are followed, some projectiles will miss the target, which is a virtually unavoidable part of artillery firing."⁵⁷⁸

438. The possibility of civilian targets being hit by error or as a result of deviations of projectiles is examined in detail by General Samolenkov. In fact, Ukraine's expert General Brown himself claims that civilian damage in Avdeyevka was a result of irregularities (rather than deliberate targeting), and in effect admits the likelihood of misses resulting in civilian damage through the sheer nature of artillery, even if firing occurred in ideal conditions, with no errors or mechanical faults.⁵⁷⁹

439. General Samolenkov thus demonstrates that shelling was carried out exclusively against military targets and was justified by combat tactics. Damage to civilian objects resulted from their proximity to military objects and targets, stemming primarily from Ukrainian practice of using civilians as "human shields" to protect their forces against attacks.⁵⁸⁰

440. Invoking the argument of "inherently indiscriminate weapon" is the last flawed attempt of Ukraine to demonstrate that the shelling of Avdeyevka was an act intended to cause civilian deaths. It argues that "even if some military targets were in the vicinity, Russia's

⁵⁷⁶ *Ibid.*, ¶¶347-358.

⁵⁷⁷ *Ibid.*, ¶¶359-360.

⁵⁷⁸ *Ibid.*, ¶366.

⁵⁷⁹ *Ibid.*, ¶¶361-367.

⁵⁸⁰ *Ibid.*, ¶373-374.

use of MLRS in densely populated civilian areas of Avdeyevka was inherently indiscriminate and qualifies as acts intended to cause civilian deaths on that basis alone”⁵⁸¹. This argument fails too:

- (a) **First**, the Russian Federation has already established that Ukraine’s contention on the use of MLRS in the Avdeyevka shelling episode is unfounded⁵⁸². As General Samolenkov explains, it is “unlikely that the damage was caused by a BM-21 missile (*i.e.*, an area weapon) since this would be expected to cause damage to other buildings in the immediate vicinity of this populated area. If, however, there were to be an isolated BM-21 impact site, this would mean that it was unlikely that the building was the actual target”⁵⁸³. This conclusion has not been disputed in Ukraine’s Reply. Regardless, it must be noted that the use of wide-area weapon systems (such as BM-21) in the shelling of UAF positions and other military targets in Avdeyevka does not in itself indicate that the shooters intended to harm civilians. There are numerous examples of the use of such weapons in urban environments, both by NATO forces and by the UAF themselves.
- (b) **Second**, Ukraine’s argument on the use of MLRS is reflective of its position with respect to the intention to harm civilians. Ukraine’s position is limited to indirect intent, which is insufficient under Article 2(1)(b) of the ICSFT.⁵⁸⁴
- (c) **Third**, even if it was proven that MLRS was used in those attacks, Ukraine’s argument on the use of MLRS would not be of great assistance to its case, since the contention that MLRS is an inherently indiscriminate weapon is not supported by the finding of international competent bodies, including the ICRC, and international tribunals jurisprudence.⁵⁸⁵ In any event, even if the DPR forces used cannon artillery, as opposed to MLRS, it would still be inaccurate enough to make hitting civilian targets highly probable due to the close proximity of Ukrainian military positions to residential buildings.

⁵⁸¹ Reply, ¶252.

⁵⁸² Counter-Memorial (ICSFT), ¶504.

⁵⁸³ *Ibid.*, ¶504 (b), reference omitted.

⁵⁸⁴ Counter-Memorial (ICSFT), Chapter V.

⁵⁸⁵ *Ibid.*

- (d) *Fourth*, military doctrine does not require choosing the highest-precision weapon, even if lower precision would increase the probability of collateral damage. General Samolenkov provides appropriate examples from the doctrines of various States such as the US, the UK, Germany, Australia, Denmark and New Zealand.⁵⁸⁶
- (e) *Fifth*, as the Court observed in its Order of 19 April 2017, even if the acts to which Ukraine refers have given rise to the death and injury of a large number of civilians, in order to determine whether they constitute the violation of the Article 2(1)(b) of the ICSFT, “it is necessary to ascertain whether there are sufficient reasons for considering that the other elements set out in Article 2, paragraph 1, such as the elements of intention or knowledge [...], and the element of purpose specified in Article 2, paragraph 1 (b), are present”.⁵⁸⁷ The Court found that “At this stage of the proceedings, Ukraine has not put before the Court evidence which affords a sufficient basis to find it plausible that these elements are present”.⁵⁸⁸ The Russian Federation established in its Counter-Memorial, and again in this Rejoinder⁵⁸⁹ that no credible evidence has been put forward by Ukraine supporting the presence of these two elements. Therefore, Ukraine’s contention on this regard should be rejected.

ii. **Ukraine Failed to Establish that the Purpose of Attacks Was to Intimidate the Ukrainian Civilian Population or to Compel the Ukrainian Government to Act or Abstain from Doing any Act**

441. The Russian Federation established that Ukraine’s assertion that the escalation of hostilities in late January 2017 was part of a campaign by the militants to obtain political concessions, is wholly inaccurate.⁵⁹⁰ In fact, as noted above, Avdeyevka remained a major flashpoint of the armed conflict for over a month and as the Russian Federation demonstrated, based on compelling evidence, including the statements of Ukraine’s own

⁵⁸⁶ Second Samolenkov Report, ¶¶376-381 (Annex 8).

⁵⁸⁷ Order of 19 April 2017, ¶75.

⁵⁸⁸ *Ibid.*

⁵⁸⁹ *See above*, Chapter III.

⁵⁹⁰ Counter-Memorial (ICSFT), ¶475.

authorities and those of OSCE SMM, the escalation was a reaction to Ukraine's so-called "creeping offensives"⁵⁹¹.

442. Ukraine pretends that "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".⁵⁹² Ukraine deliberately misrepresents the Russian Federation's position. Not only does the Russian Federation deny that the civilians were targeted by "repeated, long-term, and persistent attacks", but it also demonstrated in its Counter-Memorial and in this Rejoinder, that many of the shelling impacts at the residential areas were located along possible convoy routes, and that the targeting of military equipment moving along these roads explains collateral damage to the civilian objects located nearby.⁵⁹³

443. Ukraine's contention that "General Samolenkov concedes that some attacks on Avdeyevka civilians were not aimed at military targets"⁵⁹⁴ is also misleading. The complete reproduction of General Samolenkov's opinion shows the exact opposite of Ukraine's understanding:

"I do not know which part of the registered explosions resulted from the shellings by the DPR. In any event, the number of explosions clearly demonstrates that massive exchanges of fire took place in this area in the relevant period, and only a relatively small number of explosions affected civilian areas. It seems reasonable to assume, therefore, that the overwhelming majority of the shellings were aimed at military targets. If instead the DPR armed forces really had pursued the purpose of attacking civilians, they would have presumably directed much more shellings to the civilian areas and I would have expected a much greater proportion of the shelling to have affected civilian areas. In general terms, it is not surprising to me that collateral damage to civilian objects took place given the total number of explosions registered by the OSCE SMM"⁵⁹⁵. [Emphasis added]

444. Therefore, Ukraine's allegations that the attacks on Avdeyevka were aimed at intimidating the civilians are wholly inaccurate and should be dismissed.

445. Finally, Ukraine contends that "The attacks on civilians in Avdiivka also had the purpose of compelling the Ukrainian government to act". Recalling that "attacks occurred at a

⁵⁹¹ Counter-Memorial (ICSFT), Annex 209.

⁵⁹² Reply, ¶253

⁵⁹³ Counter-Memorial (ICSFT), ¶498.

⁵⁹⁴ Reply, ¶253.

⁵⁹⁵ First Samolenkov Report, ¶253 (Counter-Memorial (ICSFT), Annex 2).

time of significant geopolitical uncertainty as a new US administration took office”, Ukraine concludes that “the purpose of the shelling campaign against the citizens of Avdiivka was to exert pressure during a period of geopolitical uncertainty in an attempt to compel the Ukrainian government to give in to political demands”.⁵⁹⁶

446. The Russian Federation reiterates that “compelling a government to act or abstain from acting”, being part of *dolus specialis* of terrorism, its establishment requires “fully conclusive” evidence, that Ukraine in this case of shelling, like in other cases, was unable to present to the Court. Therefore, this allegation also remains a mere speculation and should be rejected.

⁵⁹⁶ Reply, ¶254.

VII. UKRAINE HAS FAILED TO ESTABLISH THE OFFENCE OF TERRORISM IN RESPECT OF THE ALLEGED KILLINGS AND BOMBINGS WITHIN ITS TERRITORY

447. As the Russian Federation already explained,⁵⁹⁷ Ukraine must provide “fully conclusive evidence” of a terrorism-financing offence to trigger the Russian Federation’s responsibility under the ICSFT. Ukraine has not fulfilled this evidentiary standard as regards its claims of alleged killings and bombings within the Ukrainian territory.
448. As with indiscriminate shelling, if Ukraine were correct that the acts of killing and ill-treatment amount to “terrorist” acts under Article 2(1)(b), Ukraine would likewise be centrally implicated in such “terrorist” acts and that is a legal characterisation that Ukraine presumably would not accept. In particular Ukraine has nothing to say with respect to the 2017 report on “Unlawful detentions and torture committed by the Ukrainian side in the armed conflict in Eastern Ukraine”, prepared by a source which Ukraine relies on and that the Russian Federation referred to in its Counter-Memorial.⁵⁹⁸
449. Moreover, Ukraine failed to demonstrate in the Memorial that these extremely grave allegations are based on any credible evidentiary material at all.⁵⁹⁹ Those additional observations and materials that Ukraine submitted with the Reply do not remedy that flaw in any way.
450. As the Russian Federation will show below, Ukraine’s evidence on the alleged killings and bombings is a combination of coerced confessions, planted or fabricated evidence and biased reports by law enforcement authorities, which contain multiple inconsistencies and errors. Moreover, the “killings” that Ukraine put forward in this case are for the most part obviously staged performances where nobody has actually been killed and the entire incident was fabricated. Such staged incidents or “fake” evidence was the *modus operandi* of Ukrainian authorities in order to create artificial grounds for extension of the anti-terrorism operation, to promote the publicity of certain individuals or simply to detain more individuals under false pretences for exchanging with the DPR and LPR.

⁵⁹⁷ See Chapter I above and Counter-Memorial (ICSFT), ¶13.

⁵⁹⁸ Counter-Memorial (ICSFT), ¶513.

⁵⁹⁹ Counter-Memorial (ICSFT), ¶¶509–515.

A. THE ROLE OF THE SBU AND OTHER LAW ENFORCEMENT AGENCIES

451. When talking about explosions and murders mentioned by Ukraine in its Memorial as well as in its Reply, the first thing to keep in mind is that any claims referring to data from Ukrainian law enforcement and investigative agencies should be treated with scepticism.
452. Domestic political clashes in Ukraine often involve law enforcement agencies that compete for influence and power, one of the consequences of this situation is a poor level of coordination that is demonstrated by the following facts.
453. On 4 December 2016, in the village of Knyazhichi near Kiev, two Ukrainian police units engaged in a shootout, mistaking each other for bandits. Five officers were killed.⁶⁰⁰ On 19 September 2018, detectives of the National Anti-Corruption Bureau of Ukraine tried to wiretap the office of the head of the Specialized Anti-Corruption Prosecutor's Office Kholodnitskiy. They were caught red-handed by officers of the State Guard Department, who were guarding the prosecutor's office. The guards then called the police. In their turn, the Bureau's Director Mr Sytnik sent a special force group to rescue his messed-up colleagues. As a result, officers of four Ukrainian law enforcement agencies fought in the center of Kiev.⁶⁰¹ On 5 March 2022, banker Denis Kireev, who in February 2022 took part in Russian-Ukrainian peace negotiations in Minsk, was summarily executed by the SBU in Kiev. Later, the head of the Main Directorate of Intelligence of Ukraine's Defence Ministry (the "GUR"), Budanov, stated that Denis Kireyev was an agent of the Directorate, and that "no one expected such a reaction from the SBU officers towards the GUR agent".⁶⁰²
454. In its Reply, Ukraine relies predominantly on the statements that the SBU was able to elicit during interrogations of suspects.⁶⁰³ The Russian Federation has already noted that

⁶⁰⁰ Hromadske, *Deadly "friendly fire": why 5 policemen were killed in Knyazhychi* (4 December 2016), available at: <https://hromadske.ua/posts/specoperaciya-knyazhichi-vbivstvo-policeiskih> (Annex 378).

⁶⁰¹ UNIAN, *Kholodnytskyi accuses Sytnyk of using NABU for revenge and "satisfying his ego"* (19 September 2018), available at: <https://www.unian.ua/politics/10267230-holodnickiy-zvinuvativ-sitnika-u-vikoristanni-nabu-zadlya-pomsti-ta-zadovolennya-vlasnih-kompleksiv.html> (Annex 379).

⁶⁰² Hromadske, *Budanov about the death of Denis Kireev: "He was killed in an SBU car"* (22 January 2023), available at: <https://hromadske.ua/ru/posts/budanov-o-gibeli-denisa-kireeva-byl-ubit-v-mashine-sbu> (Annex 380).

⁶⁰³ For example, Signed Declaration of Andrii Baranenko, Suspect Interrogation Protocol (23 October 2014), (Memorial, Annex 191); Signed Declaration of Marina Kovtun, Suspect Interrogation Protocol (16 November 2014), (Memorial, Annex 196); Signed Declaration of Vasily Pushkarev, Suspect Interrogation Protocol (31 August 2015), (Memorial, Annex 242), etc.

such materials do not amount to evidence establishing terrorism financing, and the individuals on whose testimony Ukraine now relies have already sought to withdraw their statements because they were obtained by torture or ill-treatment.⁶⁰⁴

455. It is, however, important to underscore the context in which the SBU was conducting these activities. The period from 2014 to 2017 saw a pattern of brutal violence by Maidan coup supporters against their political opponents. Waves of attacks occurred throughout Ukraine, including Kiev,⁶⁰⁵ Odessa,⁶⁰⁶ and Kharkov.⁶⁰⁷ Pro-Maidan thugs conducted mass beatings, murders, and even house burnings in order to impose power of the Maidan leaders on the Russian-speaking population.⁶⁰⁸ It is therefore unsurprising that in big cities with a large proportion of the Russian population, such as Kiev, Odessa, and Kharkov, resentment against the Maidan regime was fomenting, and possibly taking violent forms. However, this can qualify as a civil strife and not in any way as evidence of terrorism or terrorism-financing.

456. Ukraine, and more specifically the SBU, was notorious for using “staged” or “faked” “plots” in order to incite hatred towards the Russian Federation and raise tensions in Ukrainian society. One such “staged assassination” was the fake “murder” of anti-Russian journalist Arkadiy Babchenko in Kiev in May 2018,⁶⁰⁹ who was discovered alive after being declared dead by the SBU as a result of a “Russian plot”.⁶¹⁰ Arkadiy Babchenko himself admitted the SBU had approached him with a proposal to organise an imitation of his death.⁶¹¹ This is very similar to the present case, where victims of alleged

⁶⁰⁴ Counter-Memorial (ICSFT), ¶508.

⁶⁰⁵ BBC News, *Ukraine Crisis: Russia Condemns Attack on Kiev Embassy* (14 June 2014), available at: <https://www.bbc.com/news/world-europe-27853698> (Annex 95).

⁶⁰⁶ The Guardian, *Ukraine Clashes: Dozens Dead after Odessa Building Fire* (2 May 2014), available at: <https://www.theguardian.com/world/2014/may/02/ukraine-dead-odessa-building-fire> (Annex 94).

⁶⁰⁷ AIF.RU, *Ukrainian barbarians, Ukrainian nationalists demolish Lenin monument in Kharkov* (29 September 2014), available at: <https://aif.ru/euromaidan/prediction/1348374> (Annex 77).

⁶⁰⁸ See for example, The Guardian, *Ukraine Clashes: Dozens Dead after Odessa Building Fire* (2 May 2014), available at: <https://www.theguardian.com/world/2014/may/02/ukraine-dead-odessa-building-fire> (Annex 94).

⁶⁰⁹ Ukrainian Pravda, *Journalist Babchenko is alive, the murder is staged* (30 May 2018), available at: <https://www.pravda.com.ua/rus/news/2018/05/30/7181836/> (Annex 78).

⁶¹⁰ The Guardian, *Arkady Babchenko Reveals He Faked His Death to Thwart Moscow Plot* (30 May 2018), available at: <https://www.theguardian.com/world/2018/may/30/arkady-babchenko-reveals-he-faked-his-death-to-thwart-moscow-plot> (Annex 93).

⁶¹¹ *Ibid.*

killings “miraculously survived” and the body of evidence on the alleged “Russian assassination plots” consists of information supplied by the SBU.

B. “KHARKOV PARTISANS”

457. Ukraine’s evidence on the alleged activities of the group “Kharkov Partisans” is based on unreliable and contradictory evidence obtained by the SBU.

458. *First*, when Ukraine alleges that Mr Sobchenko and Mr Monastyrev founded the “Kharkov Partisans”,⁶¹² “began to receive funding and support from the Russian Federation intelligence services”⁶¹³ and “loosely recruited, arranged training, and supported numerous members to carry out acts of violence in Kharkov”,⁶¹⁴ it relies on the testimony of so-called terrorist suspects and witnesses.⁶¹⁵ However, most of these testimonies were given without the presence of an attorney-at-law,⁶¹⁶ which is a grave procedural violation that renders such testimonies inadmissible evidence at trial.

459. *Second*, the testimony of some of the accused is unconvincing. For example, according to Mr Bondarenko’s testimony:

- (a) Mr Sobchenko arranged for Mr Bondarenko to work at a “construction site” in Belgorod for “about a month and a half”.⁶¹⁷

⁶¹² Memorial, ¶117.

⁶¹³ *Ibid.*

⁶¹⁴ *Ibid.*

⁶¹⁵ Signed Declaration of Aleksandr Bondarenko, Suspect Interrogation Protocol of 23 October 2014 (Memorial, Annex 190); Signed Declaration of Yevhen Kaliberda, Suspect Interrogation Protocol of 21 October 2014 (Memorial, Annex 189); Signed Declaration of Andrii Baranenko, Suspect Interrogation Protocol of 23 October 2014 (Memorial, Annex 191); Signed Declaration of A.M. Tyshchenko, Suspect Interrogation Protocol of 26 December 2015 (Memorial, Annex 245); Signed Declaration of Yaroslav Zamko, Suspect Interrogation Protocol of 26 August 2015 (Memorial, Annex 241); Signed Declaration of Vadim Chekhovsky, Suspect Interrogation Protocol of 9 May 2015 (Memorial, Annex 229); Signed Declaration of Kostiantyn Nuzhnenkoenko, Suspect Interrogation Protocol of 16 July 2015 (Memorial, Annex 233); Signed Declaration of Dmytro Kononenko, Suspect Interrogation Protocol of 22 February 2016 (Memorial, Annex 246).

⁶¹⁶ *See*, for example, Signed Declaration of Yevhen Kaliberda, Suspect Interrogation Protocol of 21 October 2014, (Memorial, Annex 189, p. 2); Signed Declaration of Yaroslav Zamko, Suspect Interrogation Protocol of 26 August 2015, (Memorial, Annex 241, p. 2); Signed Declaration of Vadim Chekhovsky, Suspect Interrogation Protocol of 9 May 2015, (Memorial, Annex 229, p. 2); Signed Declaration of Dmytro Kononenko, Suspect Interrogation Protocol of 22 February 2016, (Memorial, Annex 246, p. 2).

⁶¹⁷ Signed Declaration of Aleksandr Bondarenko, Suspect Interrogation Protocol of 23 October 2014 (Memorial, Annex 190, pp. 4-5).

- (b) Then Mr Sobchenko sent Mr Bondarenko to a military “camp”, having taken away his documents.⁶¹⁸ There he allegedly had a five-day shooting training and theory of using explosives.⁶¹⁹
- (c) At the same time, Mr Bondarenko allegedly did not ask any questions about why he was in that camp and subsequently simply followed Mr Sobchenko’s instructions to participate in the bombings unconditionally, without any reservations.
- (d) This is a very unrealistic narrative that no unbiased investigator would seriously consider to be even remotely plausible. In addition, Mr Bondarenko’s testimony is not corroborated by any photographs of Mr Sobchenko, whom he allegedly identified.⁶²⁰

460. Mr Kaliberda’s testimony⁶²¹ is similarly flawed:

- (a) The “testimony report” states that Mr Kaliberda recognised Mr Sobchenko by pictures, but the pictures themselves are not attached to this document.⁶²² Thus, this testimony cannot be properly verified and is unreliable.
- (b) Just as Mr Bondarenko’s testimony, Mr Kaliberda’s evidence is unconvincing because it describes him following unconditionally the instructions of people whom he barely knew, such as to conceal “grenades” where he chose or travel to Belgorod on several occasions for no plausible reason.
- (c) Further, Ukraine conceals Mr Kaliberda’s real name,⁶²³ thus preventing the Russian Federation to even check if that person had ever crossed the Russian border.

461. Mr Baranenko’s testimony⁶²⁴ is likewise contradictory. The date of Mr Baranenko’s interrogation report as a suspect is 23 October 2014. Mr Baranenko was accused under

⁶¹⁸ *Ibid.*, p. 6.

⁶¹⁹ *Ibid.*, p. 7.

⁶²⁰ *Ibid.*

⁶²¹ Signed Declaration of Yevhen Kaliberda, Suspect Interrogation Protocol of 21 October 2014 (Memorial, Annex 189).

⁶²² *Ibid.*

⁶²³ *Ibid.*, p. 1.

⁶²⁴ Signed Declaration of Andrii Baranenko, Suspect Interrogation Protocol of 23 October 2014 (Memorial, Annex 191).

Articles 258-3 of the Criminal Code of Ukraine (committing a terrorist act) and, according to his interrogation report, fully pleaded guilty to the charges. However, according to publicly available information,⁶²⁵ Mr Baranenko was put on the wanted list only on 22 September 2016. Clearly, if he made his confession in 2014, there would be no reason for him to be at large in 2016. Baranenko's testimony should therefore be treated critically as well.

462. *Third* and finally, “Kharkov Partisans” representatives in media vehemently denied their involvement in any terrorist attacks and indicated that Ukraine purposefully painted them as terrorists to smear their image. Mr Ekoziants, who was a representative of the “Kharkov Partisans”, explained that the explosions that Ukraine attributed to the “Kharkov Partisans” were in fact staged on the orders of Ukrainian Interior Minister Arsen Avakov, so that Kiev could introduce the regime of anti-terrorist operation in the Kharkov region.⁶²⁶

C. STENA PUB BOMBING

463. The allegations of the Russian Federation's involvement in providing weapons for the bombing of Stena Pub in Kharkov by SPM limpet mine⁶²⁷ are likewise unsubstantiated. However, before turning to that it must be recalled that weapons in any case do not constitute funds under the ICSFT.⁶²⁸ Ukraine relies primarily on Marina Kovtun's testimony, which she, like many of the other criminal defendants referred to in the present case, provided without the presence of an attorney-at-law.⁶²⁹

464. When Ukraine alleges that the “Russian officials armed Kovtun with an array of weapons, including three SPM limpet mines, a military weapon developed for use in naval warfare”,⁶³⁰ it refers to the “Expert Conclusion” No. 532/2014, drafted by a governmental

⁶²⁵ 5140.org, *Baranenko Andrii Volodymyrovych* (25 January 2023), available at: <https://5140.org/wanted-people/639374673-baranenko-andrej-vladimirovich?ysclid=lb9xdz81py470992811> (Annex 84).

⁶²⁶ Polit.ru, *The “Kharkov Partisans” Disclaim Responsibility for Terrorist attack in Kharkov* (23 February 2015), available at: https://polit.ru/news/2015/02/23/no_responsibility/ (Annex 79).

⁶²⁷ See Reply, ¶¶268-277, Memorial, ¶¶118-120.

⁶²⁸ See Chapter IV above.

⁶²⁹ Signed Declaration of Marina Kovtun, Suspect Interrogation Protocol of 16 November 2014, (Memorial, Annex 196).

⁶³⁰ Memorial, ¶118.

agency of Ukraine.⁶³¹ At the same time, the expert report contains no references to any marking of the SPM limpet mines, nor does it explain why the only source of the SPM limpet mines could have been the Russian Federation. In fact, SPM limpet mines have been used in various countries, including in Ukraine.⁶³² SMP limpet mine, allegedly produced in 1990, was a Soviet-made weapon in the arsenal of the UAF after the dissolution of the USSR in 1991; furthermore, armaments were still officially supplied from the Russian Federation to Ukraine up until 1994. In the present case there is no evidence that the mine was of later Russian origin. In fact, even Ukrainian police officers have been reported to be the potential suppliers of SMP mines.⁶³³

465. Further, when Ukraine claims that “on the night of 8 November 2014, Kovtun and an accomplice planted the first of these limpet mines in an attempt to destroy the Malyshev Plant”,⁶³⁴ it relies on the Expert Conclusion No. 557/2014,⁶³⁵ the Signed Declaration of Kovtun⁶³⁶ and the video recording that was allegedly found in Kovtun's phone.⁶³⁷ None of these pieces of evidence support this claim:

- (a) As Ukraine itself admits, “no markings were left to trace the specific mine used to Russia”.⁶³⁸
- (b) The Expert Conclusion No. 557/2014, which is also drafted by a governmental agency of Ukraine, contains no analysis of markings on the mine and no confirmation that its only possible source is the Russian Federation. Moreover, the

⁶³¹ 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 Kharkov Region of 3 April 2015 (Memorial, Annex 116).

⁶³² According to S.B. Kozlov, after the collapse of the USSR, the Ukrainian navy was provided with a large number of weapons, including Soviet SPMs. *See* S.B. Kozlov, *GRU SPETSNAZ: FIFTY YEARS OF HISTORY, TWENTY YEARS OF WAR* (Russkaya Panorama Publishers, Essays on Contemporary History Series, 2003), (Annex 41).

⁶³³ BAGNET, *Kharkov terrorists may have been helped by police officers* (22 November 2014), available at: <https://www.bagnet.org/news/accidents/249149/harkovskim-terroristam-mogli-pomogat-rabotniki-militsii> (Annex 81); Ukranews.com, *Kharkov police officer kept mine at home* (22 November 2014), available at: <https://ukranews.com/news/289036-kharkovskyy-mylycyoner-khranyl-doma-mynu> (Annex 82).

⁶³⁴ Memorial, ¶118.

⁶³⁵ Expert Conclusion No. 557/2014, drafted by the Forensic Research Center, Ministry of Internal Affairs of Ukraine, Main Directorate of the Ministry of Internal Affairs of Ukraine in Kharkov Region of 23 March 2015, (Memorial, Annex 112).

⁶³⁶ Signed Declaration of Marina Kovtun, Suspect Interrogation Protocol of 16 November 2014 (Memorial, Annex 196).

⁶³⁷ Kovtun video of Malysheev Plant bombing (video) (Memorial, Annex 693).

⁶³⁸ Reply, ¶269.

very conclusion that the explosion resulted from the SPM limpet mine was only “probable”.⁶³⁹

- (c) The video recording shows an unknown man with a bag walking towards a collection well, then stopping and holding the bag. It is impossible to ascertain from the video neither the location, nor the identity of the man, nor the manipulation that the man was performing with the object in the bag. Furthermore, even the file metadata may have been tweaked because the file modification time (11:48 AM) plainly does not correspond to the late night-time depicted in the video.⁶⁴⁰
- (d) Finally, and most importantly, the Ukrainian court found that Ms Kovtun’s guilt was not proven in other explosions: at “the collector of the Malyshev plant and near Britannia restaurant”.⁶⁴¹ In this way, Ukraine’s claim is directly refuted by its own evidence.

466. Ukraine then asserts that three assault rifles were retrieved from Marina Kovtun’s “hideout”, which had specific markings tracing them to Crimea, implying that they were taken by the Russian Federation after the reunification of Crimea with the Russian Federation in 2014.⁶⁴² This assertion is also unfounded:

- (a) Pursuant to the letter on which Ukraine bases its allegation, the weapons were manufactured in 1985 and 1986 and were located in Crimea.⁶⁴³ This letter does not suggest that the weapons were moved exactly between March and November 2014, and not in the preceding 30 years.

⁶³⁹ Expert Conclusion No. 557/2014, drafted by the Forensic Research Center, Ministry of Internal Affairs of Ukraine, Main Directorate of the Ministry of Internal Affairs of Ukraine in Kharkov Region of 23 March 2015 (Memorial, Annex 112, p. 17).

⁶⁴⁰ Kovtun video of Malyshev Plant bombing (video) (Memorial, Annex 693).

⁶⁴¹ Novynarnia, “Separam – Freedom”: Whom Ukraine Released to ORDLO at the Big Exchange in 2019 List (30 December 2019) (Reply, Annex 78, p. 3).

⁶⁴² Reply, ¶269.

⁶⁴³ Central Missile and Artillery Directorate of the Armed Forces of Ukraine Letter No. 342/2/3618 of 11 March 2015 (Memorial, Annex 110).

- (b) In addition, there is no indication in the “Search and Seizure Report” that the examination of evidence was conducted in the presence of witnesses and an attorney-at-law, which indicates a procedural violation.⁶⁴⁴
- (c) The records of Marina Kovtun’s crossing of the Ukraine-Russian border⁶⁴⁵ are also unreliable and do not constitute proper evidence - according to the entry and exit data in the submitted report, Marina Kovtun left Ukraine twice in a row – on 30 September 2014 and 9 October 2014, with no entry mark between these dates.⁶⁴⁶ This would have been impossible. Also, the dates of crossing the border in Marina Kovtun’s testimony clearly do not match those in Ukraine’s records, sometimes differing by several weeks.⁶⁴⁷

467. In fact, Marina Kovtun’s sister stated that Marina Kovtun happened to be a random passer-by whose confession was received under torture.⁶⁴⁸ According to her, when she saw the video where Marina Kovtun confessed to working for the “Russian special services”, she realised that these words were beaten out of her under torture:

“She had absolutely nothing to do with [the explosion in the rock-pub ‘Stena’]. She didn’t do anything like that. I saw her confession on the Internet; I could hear it in her voice that it hurt to talk. How she was beaten up, if I saw her four weeks later in the jail through two glass panes and two bars, and one side of her face was just blue. I can imagine what happened to her then”.⁶⁴⁹

468. According to the Commissioner for Human Rights in the Lugansk People’s Republic, the explosives found in Marina Kovtun’s possession had been planted on her by the SBU.⁶⁵⁰

⁶⁴⁴ 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 Kharkov Region of 16 November 2014 (Reply, Annex 9, p. 3).

⁶⁴⁵ 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 Kharkov Region, dated 16 April 2015 (Reply, Annex 30, pp. 2–3).

⁶⁴⁶ *Ibid.*

⁶⁴⁷ For instance, Ukraine’s official records refer to her entry to Ukraine on 23 July 2014 (Ukrainian Border Guard Service Letter No. 51/680, p. 4 (Reply, Annex 30)). Kovtun’s testimony, however, refers to arrival to Kharkov “on or around August 3, 2014”, some two weeks later (Declaration of Marina Kovtun, Suspect Interrogation Protocol of 16 November 2014, (Memorial, Annex 196, p. 4).

⁶⁴⁸ See Korrespondent net, *SSU Has Tortured Marina Kovtun Accused of Blowing up Stena Rock Pub for Three Years* (22 November 2017), available at: <https://blogs.korrespondent.net/blog/events/3909377/> (Annex 80); Witness Statement of ██████████, 10 March 2023, ¶¶13-15 (Annex 9).

⁶⁴⁹ Korrespondent net, *SSU Has Tortured Marina Kovtun Accused of Blowing up Stena Rock Pub for Three Years* (22 November 2017), available at: <https://blogs.korrespondent.net/blog/events/3909377/> (Annex 80).

⁶⁵⁰ Witness Statement of ██████████, 10 March 2023, ¶14 (Annex 9).

Her teeth were knocked out during her detention.⁶⁵¹ Physical injuries on her face were visible at the trial.⁶⁵² Marina Kovtun herself also reported ill-treatment, stating that she had been tortured, threatened and blackmailed.⁶⁵³ She retracted her earlier confession given under torture and went on numerous hunger strikes.⁶⁵⁴ She was tortured, tormented, and subjected to psychological pressure during her imprisonment.⁶⁵⁵ Under threats to her family and relatives, and torture, Marina Kovtun confessed and incriminated herself.⁶⁵⁶

469. The fact that Marina Kovtun was later exchanged to the Russian Federation does not in any way prove the Russian Federation's involvement with the bombings. The real reasons of Marina Kovtun's exchange were purely humanitarian - as complaints were made by her relatives as to her unlawful detention, prosecution, and torture by Ukraine's officials.⁶⁵⁷ Marina Kovtun was put on the exchange list on suggestion of the OSCE SMM. When its representative Tony Frisch visited Ukraine, Marina Kovtun confirmed her consent and was put on the exchange list.⁶⁵⁸ In fact, along with Marina Kovtun, dozens of other people, whose involvement in any bombings, killings or other attacks is not alleged by Ukraine, were put on the exchange list.⁶⁵⁹

470. Finally, even if the veracity of Ukraine's improbable account was assumed (*quod non*), the bombing of the Stena Pub still would not qualify as an act of terrorism. The owner of this pub was a sympathiser of the "Azov" battalion and on the day of the attack he

⁶⁵¹ Ukraine ru, *11 years for a note. Political prisoner Kovtun convicted in Kharkov on falsified evidence* (10 October 2019), available at: <https://ukraina.ru/20191010/1025278110.html> (Annex 83).

⁶⁵² Korrespondent net, *SSU Has Tortured Marina Kovtun Accused of Blowing up Stena Rock Pub for Three Years* (22 November 2017), available at: <https://blogs.korrespondent.net/blog/events/3909377/> (Annex 80).

⁶⁵³ 5.ua, *The terrorist attack in the Stena pub in Kharkov: Prosecutors ask for 12 years in prison for the accused - details* (27 September 2019), available at: <https://www.5.ua/ru/rehyoni/terakt-v-pabe-stena-v-kharkove-prokuratura-prosyt-12-let-tiurmi-dlia-obvyniaemoi-podrobnosti-199997.html> (Annex 216).

⁶⁵⁴ Anti-fascist, *Kharkov political prisoner Marina Kovtun is to be sentenced on 7 October. The prosecutor's office requested 12 years in prison* (2 October 2019), available at: <https://antifashist.com/item/harkovskoj-politzaklyuchennoj-marine-kovtun-7-oktyabrya-oglyasyat-prigovor-prokuratura-zaprosila-12-let-lisheniya-svobody.html> (Annex 85).

⁶⁵⁵ *Ibid.*

⁶⁵⁶ Letter of the Commissioner for Human Rights in Lugansk People's Republic N 851 dated 8 December 2022 (Annex 459).

⁶⁵⁷ Witness Statement of [REDACTED], 10 March 2023, ¶16 (Annex 9).

⁶⁵⁸ *Ibid.*

⁶⁵⁹ Novynarnia, *"Separam - Freedom": Whom Ukraine Released to ORDLO at the Big Exchange in 2019. List of 30 December 2019* (Reply, Annex 78, p. 3).

provided Stena Pub's premises for a meeting of the members of this nationalist group that just returned from the ATO.⁶⁶⁰

471. It should also be noted that the Stena Pub is located in Kharkov at Rymarskaya st., 13. Back in 2014, on the opposite site of the street – at Rymarskaya st., 18, the office of the Neo-Nazi organisation “Patriot of Ukraine” was located, whose members formed the so-called “Azov” volunteer battalion and later, in 2016, the Neo-Nazi organisation “National Corps”. Further information on these Neo-Nazi organizations and their role in the genesis of the Ukrainian conflict will be given below in the corresponding section on the CERD.
472. On 14 March 2014, “Patriot of Ukraine” activists opened fire from the windows of their office at the supporters of the federalization of Ukraine, leaving 2 killed and 5 wounded.⁶⁶¹ At the same time, the Stena Pub was used by Neo-Nazis as an observation point from which they monitored the situation on Rymarskaya Street.⁶⁶²
473. Nikolay Kruk, an associate of “Patriot of Ukraine's” leader Andrei Biletsky (later – also commander of the “Azov” battalion and leader of National Corps), also confirmed that there was a “hornet's nest” of Ukrainian Neo-Nazis on Rymarskaya Street in Kharkov:

“On Rymarska Street in Kharkov, the main center of the nationalist movement was located. The building was obtained from the State by the Prosvita Society for the promotion of the Ukrainian Language in the mid-2000s. Since 2006, the office of the Patriot of Ukraine organization, headed by Andriy Biletsky, has been located here. We had about two hundred activists in Kharkov...

We returned there on March 6-7 [2014]. There were old ladies from Prosvita sitting there. And we started building a fortress from Rymarskaya Street. We covered the windows with sandbags and boarded up the back door. There were water barrels and a fire extinguisher in the rooms. We placed "cocktail bars" [Molotov cocktails stored together for further use in fighting] on the roof of our building on both sides. Imagine: the city center, the flag of the Russian Federation on the Kharkov regional state administration, and sandbags and the flag of Ukraine in our windows.

⁶⁶⁰ Korrespondent net, *SSU Has Tortured Marina Kovtun Accused of Blowing up Stena Rock Pub for Three Years* (22 November 2017) available at: <https://blogs.korrespondent.net/blog/events/3909377/> (Annex 80).

⁶⁶¹ See Magnolia-TV, *Nightmare in Kharkov. A chronicle of bloody events* (15 March 2014), available at: <http://magnolia-tv.com/text-news/2014-03-15/37376-n-chnii-koshmar-u-kharkov-khron-ka-krivavikh-pod-i> (Annex 311).

⁶⁶² Wikipedia, Schematic diagram of the battle on Rymarskaya Street in Kharkov, 14/15 March 2014 (23 September 2019), available at: https://commons.wikimedia.org/wiki/File:%D0%91%D1%96%D0%B9_%D0%BD%D0%B0_%D0%A0%D0%B8%D0%BC%D0%B0%D1%80%D1%81%D1%8C%D0%BA%D1%96%D0%B9.jpg (Annex 463).

We were collecting weapons: traumatic, hunting, shovels, pickaxe handles, Molotov cocktails. Twenty people were on duty all the time. We organised a mobilization center, a mini-headquarters.”⁶⁶³

474. There is also quite a remarkable coincidence - on 17 January 2017, the Verkhovna Rada of Ukraine adopted a resolution on the establishment of the Day of Ukrainian Volunteer, setting it on 14 March – the day of the above-mentioned shootout at Rymarskaya street, in front of the Stena Pub.⁶⁶⁴ Neo-Nazi from the National Corps have never denied the fact that the Day of Ukrainian Volunteer was established in honor of the Neo-Nazi, which took part in this shootout:

“The battle on Rymarska Street on 14 March was, in fact, the first armed confrontation in the Russian-Ukrainian war. It was one of the few cases when Ukrainians did not act as “tepees” but gave a worthy rebuff to separatism. Therefore, this date is doubly important for our Movement, because that day 4 years ago became a baptism of fire and gave impetus to the formation of the Azov volunteer unit”.⁶⁶⁵

475. In the context of armed conflict in Donbass, it is important to note that members of the “Azov” battalion are combatants. The fact that they were not in an active combat zone does not change their status. As M.N. Schmitt noted:

“The nexus need not be a battle itself. For instance, combatants may be attacked anywhere they are found outside neutral territory as an example. If a civilian attacks a combatant who is on leave at a resort because of his or her membership in the armed forces of a Party to the conflict, the civilian has directly participated in hostilities.”⁶⁶⁶

476. Thus, the gathering of the “Patriot of Ukraine” and the “Azov” fighters in this pub, who in addition previously have already killed people in front of it, would qualify as a military target for the alleged attack under the IHL, and fall, in particular, under the military exclusion clause in Article 19 of ICSBT.

⁶⁶³ Cenzor.net, *14 March 2014 – Ukraine stands up for Kharkov* (14 March 2018), available at: https://cenzor.net/ua/resonance/3055537/14_berezhnya_2014_ukrayina_vidstoyala_harkiv (Annex 312).

⁶⁶⁴ Resolution of the Verkhovna Rada of Ukraine “On Establishing Ukrainian Volunteer Day Kyiv” No. 1822-VIII, 17 January 2017, available at: <https://zakon.rada.gov.ua/laws/show/1822-19#Text> (Annex 480), See also: Euro.kharkiv.ua, *Day of the Volunteer. Anniversary of the defense of Rymarskaya* (24 February 2023), available at: <https://euro.kharkiv.ua/den-dobrovolczya-richnyczya-oborony-rym/> (Annex 313).

⁶⁶⁵ *Ibid.*

⁶⁶⁶ Schmitt, M. Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees., *Chicago Journal of International Law* (Vol. 5: No. 2, 2005, pp. 536-537).

D. ALLEGED BOMBING OF PRIVATBANK

477. The allegations that the Russian Federation officials “supplied” the weapons used in an attack on the regional office of PrivatBank in Kharkov,⁶⁶⁷ is equally unfounded. Furthermore, the circumstances of the case and the very “evidence” supplied by Ukraine point towards this being yet another staged incident, with no real attack having occurred. In any case, even if Ukraine’s claims were taken for granted, this event would not fall under the ICSFT as it lacks the most basic elements of a terrorist act.
478. *First*, there is no credible evidence that an MRO-A “Borodach” incendiary grenade launcher was used in the attack.⁶⁶⁸ The SBU claims to have found an empty launcher tube at the site of the attack.⁶⁶⁹ However, empty (used and discarded) launcher tubes are not considered weapons and are available for purchase in Ukraine as replicas; actual replicas can also be purchased freely.⁶⁷⁰
479. There is likewise no evidence that the explosion itself was a result of specifically an MRO-A attack: another incendiary grenade launcher might have been used for similar results, such as RPO-“Shmel” in service with the UAF,⁶⁷¹ or the attack could have been performed with a different weapon entirely, such as an improvised explosive device.⁶⁷²
480. In fact, even Ukraine’s own evidence contravenes Ukraine’s claim on the matter. The alleged perpetrator Mr Pushkarev, in his “interview” submitted by Ukraine, first mentions “either grenade launchers or flamethrowers” (indicating he cannot clearly identify even the type of weapon, much less its exact model). Then he says that his apparently more knowledgeable companion M. Reznikov called the weapon a “Shmel flamethrower”. Mr Pushkarev continues to refer to the weapon as “Shmel flamethrower” throughout his “interview”. The MRO-A launcher is never mentioned in the document.⁶⁷³ As noted,

⁶⁶⁷ Memorial, ¶120; Reply, ¶272.

⁶⁶⁸ Expert Report of Vladislav Alexeyevich Filin (“Filin Report”), 10 March 2023, ¶43 (Annex 5).

⁶⁶⁹ Indictment in the Criminal Case Against Vasyly Vitaliyovych Pushkariov, Registered in the Uniform Register of Pretrial Investigations Under No. 22015220000000431 on 22 December 2015 (Memorial, Annex 145).

⁶⁷⁰ Filin Report, ¶58 (Annex 5).

⁶⁷¹ Witness Statement of Ivan Gavryliuk (2 June 2018), ¶35 (Memorial, Annex 1).

⁶⁷² Filin Report, ¶¶53-54 (Annex 5).

⁶⁷³ Signed Declaration of Vasily Pushkarev, Suspect Interrogation Protocol of 31 August 2015, (Memorial, Annex 242, p. 4).

“Shmel” flamethrowers (RPO-A) are in service with the UAF and have no specific ties to the Russian Federation. They are also difficult to confuse with MRO-A since the latter is noticeably smaller and more compact.

481. **Second**, and more importantly, an MRO-A flamethrower could not be used in the attack on the PrivatBank office. According to media reports, the rocket fired did not detonate, as it, having broken the window, accidentally got stuck in the wall or ceiling inside the office, but was allegedly later removed by the SBU’s forensic team.⁶⁷⁴ However, due to their constructive and physical characteristics, rockets fired from MRO-A flamethrowers are incapable of being removed after firing, as they can only be destroyed.⁶⁷⁵ Accordingly, had an MRO-A indeed been used, its rocket would have detonated either immediately or when removal was attempted. Tellingly, Ukraine did not adduce any photo or video evidence of the rocket being launched or removed, nor of the empty launcher allegedly found at the crime scene.
482. This again directly contravenes Ukraine’s own “evidence”. Mr Pushkarev in his “interview” claims that when he allegedly shot the weapon, there was a “very loud bang”, which deafened him. However, as the rocket did not detonate and there was no explosion at the site, no deafening “very loud bang” could have occurred. The sound of the rocket’s launch is relatively quiet, particularly for MRO-A “Borodach” which was designed to be used in close quarters and has a weaker engine than RPO-A “Shmel”, so could not have been “deafening” (this is easily ascertained by openly available videos of use of MRO-A, where the shooters do not wear any ear protection and the sound is low). Furthermore, Mr Pushkarev says he knew that he “might fall within the view of the video surveillance cameras”; however, no video surveillance footage was supplied by Ukraine – not of Mr Pushkarev, not of the rocket being launched, not of the hit, nor of any “deafening” explosion.
483. **Third**, there are material inconsistencies in Ukraine’s evidence that could not be overlooked by any serious investigator. Due to its technical characteristics, a rocket fired from MRO-A could only fail if the firing was handled unprofessionally.⁶⁷⁶ This is in

⁶⁷⁴ Interfax.ru, *PrivatBank branch shelled in Kharkov* (28 July 2018), available at: <https://www.interfax.ru/world/388201>(Annex 86).

⁶⁷⁵ Filin Report, ¶63 (Annex 5).

⁶⁷⁶ Filin Report, ¶10 (Annex 5).

conflict with Ukraine's evidence that Mr Pushkarev served in the UAF for two years and then allegedly had been trained in a military camp.⁶⁷⁷ Further, while Mr Pushkarev testified to not have used ear plugs when firing and to have been "deafened" by it,⁶⁷⁸ his indictment refers to discovery at the crime scene of "two white ear plugs for noise suppression, which were impregnated with a light-yellow substance".⁶⁷⁹ Also, no explanation is provided as to why Mr Pushkarev would simply leave the flame thrower and other evidence on the crime scene rather than take them with him. If anything, it suggests that this evidence was specifically planted to be discovered on the site by the SBU. This fits with the SBU's overall pattern of conduct which includes staged "assassinations",⁶⁸⁰ falsified evidence and extracting false confessions under torture.

484. It is conceivable that the owner of the "PrivatBank" Igor Kolomoisky was interested in smearing the DPR and LPR sympathisers as "terrorists" and agreed to use his bank's office as a stage for imitating a "terrorist attack". Mr Kolomoisky is a powerful Ukrainian oligarch and supporter of the Maidan Coup. After the coup Kolomoisky was appointed as Governor of Dnepropetrovsk Oblast (neighbouring Donbass) by Chairman of the National Security and Defense Committee and a Maidan leader Alexander Turchinov, with the express goal of curbing the "insurgency" in the East. In this role Mr Kolomoisky funded and organised "volunteer battalions" "Dnepr" and "Donbass", which took active part in the hostilities with the DRP and LPR. In effect, the "PrivatBank" was part of the mechanism through which the armed conflict in Donbass was financed.

485. In any event, even if Ukraine's claims as to factual circumstances of the incident were taken for granted, the alleged attack on the "PrivatBank" office would still not qualify as an act of terrorism falling under ICSFT. Most importantly, it manifestly lacked any terrorist intent. Indeed, the alleged attack took place late at night ("shortly after 2:00 AM"),⁶⁸¹ when the office was closed and neither personnel nor customers were present inside, and there were even no incidental passers-by in the vicinity. As a result, not a

⁶⁷⁷ Signed Declaration of Vasily Pushkarev, Suspect Interrogation Protocol of 31 August 2015 (Memorial, Annex 242 pp. 1, 3).

⁶⁷⁸ *Ibid.*, p. 5.

⁶⁷⁹ Indictment in the criminal case against Vasyl Vitaliyovych Pushkariov Registered in the Uniform Register of Pretrial Investigations Under No. 2201522000000431 on 22 December 2015 (Memorial, Annex 145, p. 2).

⁶⁸⁰ *See above*, Chapter VII(A)(F).

⁶⁸¹ Signed Declaration of Vasily Pushkarev, Suspect Interrogation Protocol (31 August 2015), (Memorial, Annex 242, p. 4).

single person was injured from the attack, or even witnessed it occurring. There was not even any significant property damage (a broken window and a damaged ceiling). This excludes not only the application of Article 2(1)(b), but also 2(1)(a), as it does not fit the criterial of an offence under the ICSTB.⁶⁸²

486. Here, once again Ukraine's own evidence contradicts its claims. According to Mr Pushkarev's "interview", he specifically avoided the presence of any persons in the vicinity when making his purported "attack". Furthermore, when purportedly planning attacks, Mr Pushkarev and his companions specifically did not intend to cause any deaths or injuries to any persons, whether or not taking an active part in hostilities. The purported aim, according to Mr Pushkarev interview, was only to "scare the volunteers" (i.e. the volunteer soldiers seeking to take part in the armed conflict). Particularly, when, according to Mr Pushkarev, he purportedly engaged in another alleged act (which Ukraine does not raise up in the present case) against a military recruitment center, he moved the explosive device in order to avoid any potential harm to passers-by, and as a result got injured himself.⁶⁸³ So the only damage this so-called "terrorist" has ever caused was only to himself, and even that in protection of innocent bystanders.

487. Of course, such manifest lack of intent coupled with absence of actual harm precludes any qualification as a terrorist attack and cannot trigger application of the ICSFT.

488. In light of the above-mentioned inconsistencies of the account of the event suggested by Ukraine it can have well be fabricated by the SBU.

E. THE RALLY BOMBING

489. Ukraine also erroneously claims that the bombing of the 22 February 2015 unity rally in Kharkov was carried out using a MON-100 antipersonnel mine supplied by Russian officials.⁶⁸⁴ Before turning to the substance of the allegation it should be noted that weapons are not part of the term funds and thus do not fall under the ICSFT.⁶⁸⁵

⁶⁸² See above, Chapter III, Section B.

⁶⁸³ Signed Declaration of Vasily Pushkarev, Suspect Interrogation Protocol (31 August 2015), (Memorial, Annex 242, p. 12).

⁶⁸⁴ Reply, ¶273.

⁶⁸⁵ See above, Chapter IV.

490. MON-100 mine is a Soviet-made weapon⁶⁸⁶ that is in service with the UAF.⁶⁸⁷ No evidence of its supply by the Russian Federation was provided, except “confessions”, that the SBU elicited under torture.⁶⁸⁸ In fact, according to the documents provided by Ukraine one of the suspects (Mr Dvornikov) in the bombing crossed the border from the Russian Federation legally in a designated border crossing and no contraband was found upon him.⁶⁸⁹
491. According to the Commissioner for Human Rights of the DPR, on 26 February 2015, the SBU detained three men and charged them with planting an improvised explosive device during the unity rally in Kharkov. The SBU officers hit one man in the back and head with a buttstock and then subjected him to a mock execution (“They told him he would not stay alive unless he agreed to cooperate and testify against himself”).⁶⁹⁰
492. The fact that Mr Dvornikov and Mr Tetutskiy were later exchanged to the DPR and LPR does not in any way prove their involvement with the bombings: Ukraine is notorious for arresting Russian sympathizers in order to boost its exchange pool for the return of Ukrainian detainees.⁶⁹¹ The exchange itself was arranged in 2019 (i.e. 4 years after the bombing) within the “Normandy Format” by leaders of France, Germany, the Russian Federation and Ukraine, under the formula “everyone for everyone”, i.e. all Ukrainian detainees held by the DPR/LPR were to be exchanged for all persons held by Ukraine under allegations of pro-Russian (or pro-DPR/LPR) activities.⁶⁹² As with Ms Kovtun, Mr Dvornikov and Mr Tetutskiy were put on the exchange list for purely humanitarian reasons, as their relatives or other people who personally knew them had complained

⁶⁸⁶ Explosive Ordnance Guide for Ukraine, GICHD, 2022, pp. 10-12 (Annex 472).

⁶⁸⁷ Sm.news, *UAF uses MON-50, MON-100 and Claymore on drones* (24 December 2022), available at: <https://sm.news/vs-ukrainy-nachali-ispolzovat-na-bespilotnikax-mon-50-mon-100-i-claymore-59590-u3t5/?ysclid=ldmzva075k431514547> (Annex 87).

⁶⁸⁸ Witness Statement of ██████████, 10 March 2023, ¶¶ 19, 22, 23, 26 (Annex 9).

⁶⁸⁹ Signed Declaration of Volodymyr Dvornikov, Suspect Interrogation Protocol of 26 February 2015 (Memorial, Annex 223).

⁶⁹⁰ See Letter of the Commissioner for Human Rights in Donetsk People’s Republic N 4/04-8408 dated 5 December 2022 (Annex 458); Witness Statement of ██████████, 10 March 2023, ¶¶ 26-27 (Annex 9).

⁶⁹¹ See Letter of the Commissioner for Human Rights in Donetsk People’s Republic N 4/04-8408 dated 5 December 2022 (Annex 458); Witness Statement of ██████████, 10 March 2023, ¶36 (Annex 9).

⁶⁹² See Letter of the Commissioner for Human Rights in Lugansk People’s Republic N 851 dated 8 December 2022 (Annex 459).

about their unjustified prosecution, torture and inhumane treatment by Ukraine.⁶⁹³ After the high publicity of the Kharkov case, and public statements by Mr Dvornikov and Mr Tetutskiy about being subjected to torture, it would have been strange if they were not included in the exchange.

F. “ATTEMPTED ASSASSINATION” OF ANTON GERASHCHENKO IN KIEV

493. Ukraine claims that “Ukrainian nationals working with the LPR militants and Russian intelligence operatives planted a car bomb in an attempt to assassinate Anton Gerashchenko, a Ukrainian member of Parliament and outspoken critic of Russian aggression”.⁶⁹⁴
494. The only piece of evidence that according to Ukraine somehow supports the conclusion that “an LPR leader took actions in the Russian Federation to provide funds for use in the bombing attack against a Ukrainian member of parliament”⁶⁹⁵ is “recordings made by Ukrainian intelligence of conversations between Andriy Tyhonov, a member of the LPR, and Oleksiy Andriyenko, a confidential informant of Ukrainian intelligence, in Andriy Tyhonov’s apartment in Belgorod, the Russian Federation, during which Tyhonov referred to the interest of the “Main Intelligence Directorate” in “chasing” Gerashchenko”.
495. It is difficult to understand how this recording between unknown persons in an unknown place and reference by one of them to a “Main Intelligence Directorate” may be considered as a proof of anything let alone “funds for use in the bombing attack” (which did not end with anyone being “assassinated”, or detonation of any explosive device, or anything at all).
496. Ukraine also refers to Oleksiy Andrienko’s suspect interrogation protocol, in which he allegedly said quite the same, that was caught on the above mentioned “recording”. At the same time, it would be worthy to note that Andrienko was held in custody and interrogated in the premises of the USBU of Kharkov oblast, notorious for its brutal practice of torturing detainees in order to “beat” confessions out of them. Such practice

⁶⁹³ Witness Statement of ██████████, 10 March 2023, ¶37 (Annex 9).

⁶⁹⁴ Memorial, ¶123.

⁶⁹⁵ Reply, ¶¶278, 280.

was fully reflected in 2021 OHCHR Thematic report “Arbitrary detention, torture and ill-treatment in the context of armed conflict in Eastern Ukraine, 2014-2021”:

“Among Government actors, the most common perpetrator of arbitrary detention, torture and ill-treatment was the Security Service of Ukraine (SBU), which had a large coordinating role in the Anti-Terrorist operation, and was responsible for investigating crimes of terrorism. At the initial stages of the conflict, volunteer battalions were also among the regular perpetrators”.⁶⁹⁶

497. The Kharkov SBU case, examined in Annex I, is particularly emblematic of the impunity enjoyed by perpetrators. The SBU has consistently denied that its Kharkov premises were used as an unofficial detention facility from 2014 to 2016, and the few criminal investigations initiated following complaints of former detainees have not progressed since 2017. Journalists of Hromadske TV who, in March 2018, produced a documentary on the Kharkov SBU in which they alleged it was an unofficial detention facility, were named on the Mirotvorets website as “enemies of Ukraine” and as a result, harassed by unidentified individuals.⁶⁹⁷

498. In any event, since Ukraine never provided the Russian Federation with any other information about the case except the alleged name of the “GRU officer” (which Ukraine itself admits might be an alias), it is difficult to see what co-operation the Russian Federation could afford Ukraine in this “case” except checking for all persons with that name in the Russian Federation, which the Russian Federation did, finding that none of the three such persons in existence with the name provided had any connection to the Russian Government or to events in Ukraine.

499. As far as an attempt to assassinate Mr Gerashchenko is concerned, according to media reports, citing sources in the SBU, the attempt on Mr Gerashchenko's life was likewise staged:

“This story has been prepared for a long time. Geraschenko's people prepared a statement to the SBU about a threat to his life. On the basis of this statement, Anton Gerashchenko was allocated a guard consisting of two fighters of the special unit ‘Alpha’. However, according to them, Gerashchenko behaved quite strangely and did not seem to be a man who feared for his life,” said the source. However, it immediately became clear to them that Gerashchenko did

⁶⁹⁶ UN OHCHR Report, Arbitrary Detention, Torture and Ill-treatment in the Context of Armed Conflict in Eastern Ukraine, 2014-2021 (2 July 2021), ¶¶2, 4, 13, available at: https://www.ohchr.org/sites/default/files/Documents/Countries/UA/UkraineArbDetTorture_RU.pdf.

⁶⁹⁷*Ibid.*, ¶82.

not really fear for his life, because at the first meeting Gerashchenko said that he would personally call the fighters when he considered it necessary. You should agree that this is strange behavior for a man who fears an assassination attempt. And at the moment when the SBU was allegedly monitoring the criminals, there was no action on Geraschenko's part. That is, he also knew that it was staged".⁶⁹⁸

500. Other media reported that "the attempt on Mr Gerashchenko's life is being staged to raise the rating of the "Popular Front", to blur the eyes against the background of the purchase of overpriced Japanese cars for the police, to distract attention from the closing of the Lipetsk factory. Cheap PR campaigns, instead of professionalism and a real fight, are all that the incumbent authorities are capable of".⁶⁹⁹

501. Taken together with the overall lack of evidence of the Russian involvement in the alleged "attempted assassination", those public sources portray the more probable picture of another staged incident that has no relation to the Russian Federation.

G. "ATTEMPTED ASSASSINATION" OF GORDIYENKO IN ODESSA

502. Ukraine alleges that the bombing attack in Odessa occurred and was coordinated by "a member of the DPR known as Aleksandr (who also went by "Morpekh)".⁷⁰⁰

503. Once again, here a "Russian plot" is purportedly uncovered by the SBU, with "evidence" consisting of "confessions" which refer to a mysterious "representative of Russian secret services" called "Aleksandr" (not even with a last name this time). The "plot" consisted of attempting to "assassinate" a target who "miraculously survived" without any injuries.

504. The "weapon" allegedly used in the "assassination" had no links to the Russian Federation: it was said to be a makeshift, improvised explosive device using a casing of a TM-62M anti-tank mine.⁷⁰¹ This type of anti-tank mines are a Soviet-produced

⁶⁹⁸ Ukraina.ru, *Gerashchenko Could Stage Attempt on Him* (22 January 2017) available at: <https://ukraina.ru/20170122/1018184795.html> (Annex 88), Sila v Pravde, *Attempt on Gerashchenko Was Feign Staged by SSU and Interior Ministry* (22 January 2017) available at: <https://x-true.info/50402-pokushenie-nageraschenko-inscenirovka-kotoruyu-gotovili-sbu-i-mvd.html> (Annex 89).

⁶⁹⁹ Slovo i Delo, *Assassination Attempt on Anton Gerashchenko. Was It Real?* (23 January 2017) available at: <https://ru.slovoidilo.ua/2017/01/23/kolonka/igor-smaglyuk/pravo/pokushenie-na-antona-gerashhenko.-a-byl-li-malchik> (Annex 92).

⁷⁰⁰ See Reply, ¶¶281-282, Memorial, ¶¶127-130.

⁷⁰¹ Armedconflicts, *SOV - TM-62 (protitanková mina)*, available at: <https://www.armedconflicts.com/TM-62-antitank-mine-t236984> (Annex 472).

armament that is in extensive service with the UAF⁷⁰² and is also produced outside the USSR, for example in Bulgaria, Georgia, Poland.⁷⁰³

505. Because Ukraine did not provide any actionable information related to the alleged assassination, and specifically information as to the persons allegedly involved in that “plot”, the Russian Federation would be unable to assist Ukraine with “investigating” this “crime”.

H. DEATH OF VLADIMIR RYBAK

506. With regard to Gorlovka mayor Vladimir Rybak, Ukraine did not provide any compelling evidence that confirmed the connection between his death and his political views, or the involvement of the DPR’s militia in this crime.

507. At the outset, it should be noted that during Ukraine’s rule, the Donetsk region had a fairly high level of crime, and in 2013 it was the highest in Ukraine. In particular, in January – June 2013, 170 intentional murders were committed in the region (the highest rate in the country).⁷⁰⁴ At the same time, the rate of resolving these murder cases remained extremely low. In July 2013, first deputy chairman of the Verkhovnaya Rada Committee on Combating Organized Crime and Corruption Gennadiy Moskal said that 80% of crimes registered in 2013 remained unsolved by the police.⁷⁰⁵

508. Thus, cases of kidnapping, disappearances and/or murders were also not rare in Donetsk region. For example, on 5 November 2014, Slavyansk City District Court sentenced three local residents who committed an intentional murder for the purpose of robbing the victim’s house. After the murder, they dropped the victim's corpse into the Kazenny Torets River – the same, where Mr Rybak ended his life.⁷⁰⁶ Another egregious example – on 18 March 2014, in the center of Ukrainsk, the Donetsk region, a previously convicted

⁷⁰² Explosive Ordnance Guide for Ukraine, GICHD, 2022, p. 24 (Annex 472).

⁷⁰³ Armedconflicts, *SOV - TM-62 (protitanková mina)*, available at: <https://www.armedconflicts.com/TM-62-antitank-mine-t236984> (Annex 472).

⁷⁰⁴ Tyzhden.ua, *Donetsk region has the highest crime rate in Ukraine* (11 July 2013), available at: <https://tyzhden.ua/na-donechchyni-najvyshchij-v-ukraini-riven-zlochynnosti/> (Annex 315).

⁷⁰⁵ Tyzhden.ua, *Moskal: In the first half of the year, police managed to solve only one in five registered crimes* (10 July 2013), available at: <https://tyzhden.ua/moskal-za-pershe-pivrichchia-militsiia-spromohlas-rozkryty-lyshe-kozhen-p-iatyj-zarieiestrovanyj-zlochyn/> (Annex 316).

⁷⁰⁶ Slavyansk City District Court, Sentence of 5 November 2014, Case No. 243/3885/14, available at: <https://reyestr.court.gov.ua/Review/41273158> (Annex 438).

man kidnapped a young woman in the street in a large crowd of people – just in the same way, Mr Rybak was allegedly kidnapped. The investigation found that the kidnapping had been ordered by a criminal who was serving time in prison and who had a conflict with the husband of the kidnapped girl.⁷⁰⁷

509. In light of the high criminality rate in the region, doubtless exacerbated by ongoing civil strife and armed conflict, the death of Mr Rybak cannot be seen as a unique occurrence only explicable by his political opposition to the DPR.
510. Ukraine misleadingly claims that OHCHR “reported on the shocking political murder of Volodymyr Rybak, and the role of a leading DPR commander in that crime”.⁷⁰⁸ However, the report in question only mentioned that “*Volodymyr Rybak was last seen alive on 17 April, at approximately 6 p.m., on Peremohy Avenue, in the city of Horlivka (Donetsk region), controlled by the armed groups. According to a witness, unidentified people forcefully took him to a car and drove away*”.⁷⁰⁹ In other words, the OHCHR reported on what its monitors had heard from a certain unidentified person, which is mere hearsay. The report also doesn’t contain any evaluation of the story’s plausibility. In fact, the OHCHR was not capable of examining the ‘testimony’, because such examination would lie beyond its mandate.
511. Neither had the OHCHR made any judgments on “the role of a leading DPR commander” in Mr Rybak’s death. It was just stated in the Report, that “the Main Investigative Department of the Ministry of Internal Affairs established that all three men were kept at the premises of the SBU department of the town of Slavyansk. Two commanders of the armed groups allegedly involved in the death of the victims were charged and put on a wanted list”.
512. What remains is Ukraine’s alleged “intercepted telephone conversation”, purportedly between “DPR commander” Bezler and his subordinate. Ukraine did not provide the audio recording itself, instead referring the Court to an article in a pulp Russian (sic!)

⁷⁰⁷ Selidovo City Court of Donetsk region, Sentence of 24 December 2014, Case No. 242/2571/14-к, available at: <https://reyestr.court.gov.ua/Review/42086406> (Annex 476).

⁷⁰⁸ Reply, ¶284.

⁷⁰⁹ OHCHR, Accountability for Killing in Ukraine from January 2014 to May 2016 (2016), p. 33, ¶34, available at: https://www.ohchr.org/sites/default/files/Documents/Countries/UA/OHCHRThematicReportUkraineJan2014-May2016_EN.pdf.

newspaper. According to the article, the only source of the “intercept” was the SBU. Interestingly, the article quoted by Ukraine notes that “Bezler is indeed a retired lieutenant colonel, but of the Ukrainian special forces, not the Russian special forces”.⁷¹⁰

513. Moreover, the above-mentioned article in the Russian newspaper MK, to which Ukraine refers in its Memorial, reads as follows:

“To confirm its "suspicions," the SBU released an audio recording of talks in which Ponomariov, Bezler, and Strelkov discuss Rybak's murder. In particular, it shows the "people's mayor" of Slovyansk deciding with the head of Russian saboteurs where to dispose of the corpse. Strelkov asks Ponomarev to "resolve the issue with the corpse" ("Slava, please resolve the issue with the corpse. So that they can take him away from us quickly. It stinks here"), to which he replies: "With the corpse? I'm going to solve the problem of burying this [cursing].”⁷¹¹ [Emphasis added].

514. Thus, Bezler, Ponomariov and Strelkov were allegedly discussing how to get rid of Mr Rybak’s corpse as soon as possible. However, according to Ukrainian investigators’ version of events, Mr Rybak was thrown into water still alive: “According to the press service of the Ministry of Internal Affairs, “The cause of death of both victims was a combined body trauma as a result of torture, followed by drowning of the still alive unconscious victims”.⁷¹² The same can be read from the OHCHR relevant 2016 Report.⁷¹³ One should also keep in mind that Mr Rybak’s corpse was found in the river on 21 April 2014 and buried by his family three days later, on 24 April 2014. This begs for the conclusion that the so-called “interception of Bezler’s conversation” – was another fake among others that Ukraine uses in the present case.⁷¹⁴

⁷¹⁰ Memorial, Annex 509, p. 2.

⁷¹¹ MK.ru. *SBU: SBU: Slavyansk 'people's mayor' discussed with Russian GRU officer how to get rid of MP Rybak's corpse* (24 April 2014), available at: <https://www.mk.ru/incident/article/2014/04/24/1019785-sbu-narodnyiy-mer-slavyanska-obsuzhdal-s-ofitserom-gru-rf-kak-izbavitsya-ot-trupa-deputata-ryibaka.html> (Annex 381).

⁷¹² Ukrinform, “*Batkivshchyna*” deputy was brutally tortured by foreign saboteurs before his death (24 April 2014), available at: https://web.archive.org/web/20140611192438/http://www.ukrinform.ua/ukr/news/deputata_batkivshchini_pered_smertyu_po_zviryachomu_katuvali_inozemni_diversanti_1931671 (Annex 460).

⁷¹³ OHCHR, *Accountability for Killing in Ukraine from January 2014 to May 2016* (2016), p. 33, ¶34, available at: https://www.ohchr.org/sites/default/files/Documents/Countries/UA/OHCHRThematicReportUkraineJan2014-May2016_EN.pdf.

⁷¹⁴ See above, ¶862.

515. In any event, the “intercept” as quoted by Ukraine⁷¹⁵ only contains a request to “slightly press” Mr Rybak and take him “further out” from the administration building where he was “misbehaving”. No mention of killing or torturing Mr Rybak is made; all such claims (according to Ukraine’s source) are just speculations of the SBU.

516. The sum of Ukraine’s evidence is thus as follows:

- (a) unverified hearsay from an unknown person about how Mr Rybak was “taken” by “unidentified people”;
- (b) unverified claim from the Ministry of Internal Affairs of Ukraine that Mr Rybak was kept in the SBU Department in Slavyansk;
- (c) an alleged seemed-to-be-fake “intercept” produced by the SBU, of a person who, according to Ukraine’s own source, was a lieutenant colonel of the SBU, asking to escort Mr Rybak out of the Gorlovka administration building, take him “further out” and “lightly press him”.

517. It should be added that, in April 2014, Gorlovka was not under the absolute control of the DPR militia. The very fact that a manifestly pro-Ukrainian mayor – Mr Rybak – remained in the city administration building asserts to that; but there is also direct evidence of Ukraine’s law enforcement agencies still being present in the city. For instance, according to the Joint State Registry of Judicial Decisions of Ukraine, on the very day of Mr Rybak’s disappearance, Ukraine’s courts in Gorlovka made more than 200 judicial decisions including 32 on criminal cases.⁷¹⁶ Such judicial decisions from Gorlovka can be traced in the Ukrainian Judicial Registry, at least, until July 2014. The latter also implies that Ukraine’s prosecution authorities, whose participation in hearings of criminal cases is mandatory, were also present and still performed their duties in Gorlovka. Ukrainian police, which investigated the Mr Rybak’s death, also was in charge in Gorlovka. The capacity of Ukraine’s security services to operate in the city thus is more than possible.

⁷¹⁵ Memorial, ¶45.

⁷¹⁶ Central City Court of Gorlovka, Sentence of 18 April 2014, Case No. 253/12580/13-к, available at: <https://reyestr.court.gov.ua/Review/38320990> (Annex 439).

518. In light of the above it is not really clear what happened to Mr Rybak, it is very probable that he fell victim to a crime that was used by the SBU to stage a provocation against the DPR.

I. DEATH OF VALERIY SALO AND ALLEGED KILLINGS OF PRO-UKRAINE FARMERS

519. Ukraine's attempt to speculate on the deaths of several farmers in Donetsk region in order to present those tragic cases as a part of an alleged "intimidation campaign" by the Donetsk people's militia is completely groundless.

520. *First*, it should be noted, that the OHCHR had never established the facts of those killings in its reports, since criminal investigation is not within its purview. The OHCHR had mentioned that "on 8 May, the burned body of Valeriy Salo, a farmer and head of a local cultural organization known as a "Pro-Maidan" activist, was found a day after he had been abducted by armed persons from his village. There have also been several reports of killings at checkpoints held by armed groups ...⁷¹⁷ as well as reports of "summary executions".⁷¹⁸ To be more precise, the OHCHR had just admitted it was aware of the fact that Valeriy Salo's body was found after his alleged abduction by some unnamed armed persons, and had also received several reports of killings and executions from unnamed witnesses. Thus, the OHCHR had not established the fact that such "summary executions" had taken place indeed and Valeriy Salo's death was one of those alleged "executions".

521. *Second*, It follows from the OHCHR Report of 15 June 2014 that several unknown armed men in camouflage entered Salo's house and took him away to an unknown destination, after which his body was found. Thus, it is not clear what the motive behind the crime was: it may well have been a common crime committed for personal reasons, for the purposes of extortion or as a result of a business conflict. That time of political instability with many radicals on the loose was characterized by the highest crime rate in Ukraine and incidents like the one that happened to Mr Salo were not uncommon among farmers and private entrepreneurs.

⁷¹⁷ OHCHR, Report on Human Rights Situation in Ukraine (15 June 2014), ¶209, available at: <https://www.ohchr.org/sites/default/files/Documents/Countries/UA/HRMMUReport15June2014.pdf>.

⁷¹⁸ *Ibid.*, ¶210.

522. For instance, in August 2016, in the Dnepropetrovsk region, unknown persons kidnapped a 64-year-old farmer by stopping his car on the highway. The farmer's wife explained that "the farm was subject to constant raider attacks. A week ago, 40 people came with weapons, attacked the mechanized site, and took the sprayer for the fields. The police did not react in any way".⁷¹⁹ In August 2017, in the village of Matveevka, Volnyansky district, Zaporozhye region, unknown persons in balaclavas broke into the house of a local farmer, tied up the owners and stole a safe with \$500 thousand.⁷²⁰ In 2018 in the Kharkov region, a farmer after another argument over debts and financial obligations, decided to kidnap his business partner and kill him after the victim would sign over his assets to him.⁷²¹ Ukrainian investigators have never qualified these cases as *political* and/or DPR-related.
523. Such crimes still happen in Ukraine. Thus, on 23 March 2022, a group of young men stole a tractor and a trailer with grain from a farm in the Velikiy Burluk district of Kharkov region. The owner and his two employees began to chase the thieves. The young men left the tractor and fled. However, they soon returned to take revenge. They ambushed the farmers in the village. As soon as the car drove into the village, they shot at it with automatic weapons they had taken from a broken military convoy. Later, they took the car to another place and set it on fire along with the three victims, simulating death as a result of shelling.⁷²²
524. ***Third and finally***, on 2 May 2014, just a few days before Valeriy Salo's death, Ukrainian radicals and Neo-Nazi committed one of their gravest crimes – burning 48 people in Odessa Trade Union House. Ukraine never admitted that the 42 burned bodies and six bodies with gunshot wounds found in the Odessa Trade Union House were part of a campaign by Ukrainian neo-Nazis of "immersing civilians in horror". Moreover, Ukrainian authorities, at first, prosecuted the victims of this atrocity instead of the real

⁷¹⁹ Gazeta.ua, *Farmer Was Kidnapped from His Car in the Middle of the Road* (19 August 2016), available at: https://gazeta.ua/articles/np/_fermera-vikrali-z-mashini-posered-trasi/718318 (Annex 382).

⁷²⁰ Interfax-Ukraine, *Farmer was robbed at night in Zaporozhskaya Oblast* (8 August 2017), available at: <https://interfax.com.ua/news/general/440950.html> (Annex 383).

⁷²¹ Kharkov Region Prosecutor's office's website, *Prosecutor's Office prevents contract killing of farmer (photos, video)* (10 December 2018), available at: https://khar.gp.gov.ua/ua/news.html?_m=publications&_c=view&_t=rec&id=241335 (Annex 461).

⁷²² Ukraine National Police Facebook account, *The National Police of Ukraine's Press-service* (6 April 2022), available at: <https://www.facebook.com/watch/?v=1113881682488692> (Annex 462).

perpetrators, which are still unpunished.⁷²³ Ukraine also never considered as a “campaign of immersing civilians in horror” the burned bodies of a Russian photo-correspondent Andrey Stenin and his two fellow colleagues and two locals, found in a burned car in August 2014 in the Donetsk region.⁷²⁴

* * *

525. Consequently, Ukraine’s own evidence on each of these alleged “bombings” and “killings” consists of confessions obtained under duress, unreliable or contradictory evidence and, on closer scrutiny, reveals nothing more than ordinary crimes and/or staged incidents arranged by the SBU to try to implicate the DPR and LPR.
526. In any event, as the Russian Federation has established in the Counter-Memorial and this Rejoinder, Ukraine has failed to demonstrate that the only inference that could reasonably be drawn from the killing and ill-treatment of particular individuals is that the perpetrators acted with the specific purpose to intimidate “a population” at large. In particular, Ukraine has not explained how those killings and acts of ill-treatment (and the accompanying psychological effect) rise beyond so-called “ordinary crimes” so as to fall within the definition of “terrorist” acts.

⁷²³ Hromadske, *Odessa Tragedy: Why the Court Acquitted the “Anti-Maidan Activists”* (22 September 2017), available at: <https://hromadske.ua/posts/odeska-trahediia-sud-vypravdav-antymaidanivtsiv> (Annex 384).

⁷²⁴ RIA Novosti, *Investigative Committee reveals new details of investigation into Andrei Stenin's death* (2 August 2017), available at: <https://ria.ru/20170802/1499592355.html> (Annex 385).

VIII. THE RUSSIAN FEDERATION DID NOT BREACH ITS SPECIFIC OBLIGATIONS UNDER THE ICSFT

527. This chapter responds to Chapter 8 of Ukraine’s Reply and shows that, contrary to what Ukraine argues, the Russian Federation did not breach its specific obligations under Articles 8, 9, 10, 12 and 18 of the ICSFT. Before analysing each of these specific obligations, three introductory comments are in order.
528. *First*, the Court will need to proceed to decide whether the Russian Federation breached its specific obligations under the ICSFT only if it finds that a terrorism-financing offence within the meaning of the ICSFT has occurred. In particular, the Court first needs to reject the Russian Federation’s interpretation of “intent”, “knowledge”⁷²⁵ and “funds”⁷²⁶ and accept Ukraine’s assessment of the facts.⁷²⁷ If, on the contrary, the Court agrees with the Russian Federation on these issues, then no terrorism-financing offence has occurred and thus no specific obligations under the ICSFT have been triggered in this Case.
529. *Second*, Ukraine confuses two evidentiary standards. As the Russian Federation already explained on the basis of the *Bosnia Genocide* case,⁷²⁸ Ukraine must provide “fully conclusive evidence” of a terrorism-financing offence to trigger the Russian Federation’s responsibility under the ICSFT. This is the standard of proof that any applicant State must fulfil when it pursues a claim under the ICSFT.
530. Ukraine rejects this standard and suggests that the Court should instead apply, at least as regards specific obligations under the ICSFT, the lower standards of “sufficient evidence”, “reasonable basis to believe” or even “reasonable suspicion” that a terrorism-financing offence has occurred or is occurring.⁷²⁹ However, these standards operate on a different level: they do not apply to establishing whether a State Party to the ICSFT breached its obligations. Instead, they are addressed to competent bodies of State Parties, which must, for example, furnish such “sufficient evidence” in their MLAT requests. Thus, even if Ukrainian authorities had provided the Russian authorities with “sufficient

⁷²⁵ See Chapter III above.

⁷²⁶ See Chapter IV above.

⁷²⁷ See Chapters V-VII above.

⁷²⁸ See above, ¶¶36-41; see also Counter-Memorial (ICSFT), ¶13.

⁷²⁹ Reply, ¶¶48, 61, 328.

evidence” of a terrorism-financing offence as part of a proper MLAT request, which they had not, Ukraine must still provide this Court with “conclusive evidence” of terrorism-financing to establish that the Russian Federation breached its specific obligations under the ICSFT by failing to process that MLAT request.

531. In any case, Ukrainian authorities failed to comply even with lower evidentiary standards or provide the Russian authorities with “sufficient information” on terrorism-financing offences and conspicuously avoided any references to the ICSFT or terrorism-financing in their requests. The Russian Federation will demonstrate this in respect of each note verbale and MLAT request below.

532. *Third*, as noted earlier, the Russian Federation’s specific obligations under the ICSFT became the focus of Ukraine’s case only very recently. In the Memorial, Ukraine’s principal case was the Russian Federation’s responsibility for financing terrorism. However, the Court found that “[t]he financing by a State of acts of terrorism... lies outside the scope of the Convention.”⁷³⁰ Due to this adverse finding, Ukraine had to change its strategy and concentrate in the Reply on the Russian Federation’s alleged failure to cooperate and assist. Such a shift causes the Russian Federation to provide a more detailed response on these issues in this Chapter.

A. ARTICLE 8: THE RUSSIAN FEDERATION DID NOT VIOLATE ITS OBLIGATION TO TAKE APPROPRIATE MEASURES TO IDENTIFY, DETECT AND FREEZE OR SEIZE FUNDS USED FOR TERRORISM FINANCING

533. Article 8 of the ICSFT contains an obligation to “take appropriate measures ... for the identification, detection and freezing or seizure” of funds used for terrorism-financing. Ukraine’s arguments on this Article have not changed in the Reply as compared to the Memorial and remain wrong in two respects: Ukraine improperly reads the “reasonable suspicion” standard into the text of Article 8 (i); and none of Ukraine’s Notes Verbales pass even this artificially lowered standard (ii).

⁷³⁰ Judgment of 8 November 2019, ¶59.

i. Article 8 does not incorporate the “reasonable suspicion” evidentiary standard

534. Ukraine does not dispute anywhere in the Reply that there is no textual support to incorporate the “reasonable suspicion” standard of proof into Article 8. Ukraine also ignores the Russian Federation’s arguments that the context of Article 8 does not support such incorporation either:

- (a) Unlike Articles 9 and 10, Article 8 does not use the qualifier “alleged [use of funds for the purpose of terrorism-financing]”. This means that Article 8 requires concrete evidence of terrorism-financing to freeze or seize funds.⁷³¹ Ukraine tacitly admits this distinction in its own submissions on Articles 9 and 10, where it states that the qualifier “*alleged* [offender]” sets a lower evidentiary standard than what Article 8 requires.⁷³²
- (b) Unlike Article 8, Article 18 expressly refers to the “reasonable suspicion” standard regarding inquiries about the identity of a person involved in the terrorism-financing offence. The drafters of the ICSFT were thus aware of and used this standard where they intended it to apply, but deliberately chose not to use it in the context of Article 8.

535. Ukraine also ignores the Russian Federation’s arguments that the freezing or seizure of assets is a serious invasion of the property rights of a person, which can have a significant negative impact on normal economic life and freedom of capital movement, and which the authorities thus cannot apply on a mere “suspicion”.⁷³³ The ICSFT drafters must have thought it necessary to provide for such a drastic measure because they repeatedly recognised terrorism-financing as a grave matter.⁷³⁴ However, as the Court stated in the *Bosnia Genocide* case, the evidential standards in grave matters are always heightened to the level corresponding to the gravity involved.⁷³⁵ Thus, the seriousness of the measures provided for in Article 8 leave no room for their application on a mere “reasonable suspicion”.

⁷³¹ Counter-Memorial (ICSFT), ¶523(a).

⁷³² Reply, ¶338.

⁷³³ Counter-Memorial (ICSFT), ¶523(b).

⁷³⁴ See the Preamble (“Considering...”), Articles 4(b) and 10(1) of the ICSFT.

⁷³⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, I.C.J. Reports 2007 (I), p. 90, ¶210.

536. Instead of engaging with these arguments, Ukraine continues to rely on its previous sources: (a) Mr Wainwright’s letter to the Chair of the Counter-Terrorism Committee, (b) the FATF Recommendations and (c) the Russian law on combating terrorism-financing.

537. Ukraine does not dispute that Mr Wainwright’s letter does not purport to give a comprehensive interpretation of Article 8(1) of the ICSFT and only aims to provide guidance on the implementation of UN Security Council Resolution 1373.

538. Indeed, the letter provides that:

“One means of providing legal authority for the freezing (or, indeed, forfeiture) of assets is for the identification of the persons and entities whose assets are to be frozen by including their names in a list, whether sanctioned by the Security Council or compiled by the State concerned, that is given legal force by legislation. It should be noted that neither sub-paragraph 1(c) of the Resolution nor Article 8 of the Convention mandates the use of lists. Their value in the implementation of the Resolution lies in the fact that they can be adopted quickly by countries having no first-hand knowledge of the identity of terrorist groups identified elsewhere and they eliminate the need for proof of actual involvement.”⁷³⁶ [Emphasis added]

539. Thus, Mr Wainwright expressly recognised “the need for proof of actual involvement” in terrorist activities for the freezing or seizure of assets, but then offers one exception – “that neither... Article 8 of the Convention mandates” – in the form of a list made either by the UN Security Council or the State concerned, “that is given legal force by legislation”. As the Russian Federation has shown, the DPR and LPR have never been on any such list of terrorist groups.⁷³⁷ Furthermore, the “State concerned” is clearly the State performing the freezing, so according to Mr Wainwright’s letter, for the Russian Federation such a list could only come from the UN Security Council or from the Russian Federation’s own legislation – not from any foreign, including Ukrainian, sources.

540. Mr Wainwright’s letter also provides that:

“However, lists of that kind are of little use where the authorities of a country have evidence supporting a reasonable suspicion that a person or group hitherto unknown or operating under a new name is actually engaged in activities in support of terrorism.”

⁷³⁶ J.W. Wainwright, Letter to the Chairman of the Counter-Terrorism Committee, 12 November 2002, ¶6 (Memorial, Annex 281).

⁷³⁷ See above, ¶103.

541. It follows that when Mr Wainwright writes of “evidence supporting a reasonable suspicion that a person or group ... is actually engaged in activities in support of terrorism”, he does not introduce a different evidentiary standard but merely refers to the above-mentioned “proof of actual involvement”.
542. Thus, read properly, Mr Wainwright’s letter demands proof of actual involvement in terrorist activities for the freezing or seizure of assets as well, contrary to what Ukraine suggests.
543. In addition, while Ukraine focuses solely on the “efficiency” of asset freezing, it disregards concerns expressed by the Counter-Terrorism Committee about the boundaries of these actions. Mr Wainwright himself acknowledges that freezing and forfeiture of assets are “subject to the constitutional and other legal constraints applicable in a State”, and even “the most effective means possible” are “subject to safeguards”.⁷³⁸ Similarly, Article 8(5) of the ICSFT provides that such measures “shall be implemented without prejudice to the rights of third parties acting in good faith”.
544. Another obvious exception to asset-freezing measures is humanitarian aid, which is well documented in the resolutions of the UN Security Council. For example:
- (a) In Resolution 1844 (2008), the UN Security Council decided that a freeze on assets of designated entities threatening the peace, security or stability of Somalia will not apply to the payment of funds, other financial assets or economic resources necessary to ensure the timely delivery of urgently needed humanitarian assistance in Somalia.⁷³⁹
 - (b) In Resolution 2462 on terrorism financing, the UN Security Council urged States, “when designing and applying measures to counter the financing of terrorism, to take into account the potential effect of those measures on exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law”.⁷⁴⁰

⁷³⁸ J.W. Wainwright, Letter to the Chairman of the Counter-Terrorism Committee, 12 November 2002, ¶¶6, 8 (Memorial, Annex 281).

⁷³⁹ UN Security Council, Resolution 1844 (2008), 20 November 2008, ¶48.

⁷⁴⁰ UN Security Council, Resolution 2462 (2019), 28 March 2019, ¶24.

545. As shown below, Ukraine’s allegations of terrorism-financing concerned primarily humanitarian aid by private individuals to the DPR and LPR.⁷⁴¹
546. Ukraine also wrongly asserts that the Russian Federation “attempts to downplay the significance of FATF recommendations”.⁷⁴² In fact, the Russian Federation has never disputed their significance in general, but it has drawn the Court’s attention to the FATF’s statement that its Recommendations aim to “complement the obligations in the context of the United Nations Security Council [...] resolutions”⁷⁴³ and not States’ obligations under the ICSFT. Ukraine does not provide any substantive response to this. Thus, the FATF Recommendations are inapposite to interpretation of Article 8 of the ICSFT.
547. With respect to the Russian law on combating terrorism-financing, it must be noted that Russian laws are irrelevant for purposes of interpreting the Russian Federation’s obligations under the ICSFT in the same way as the FATF Recommendations are. A State Party’s domestic regime may set a different (stricter or more relaxed) evidentiary standard as to the freezing of funds that complements the one existing under the ICSFT.
548. Ukraine attempts to bootstrap its reliance on Russian law by observing that Article 8 expressly mentions “domestic legal principles”. But such reference is misplaced for several reasons:
- (a) “Domestic legal principles” are not incorporated into the ICSFT but form part of the State Party’s national law and are thus not subject to the Court’s jurisdiction.
 - (b) “Domestic legal principles” do not refer to any specific laws such as the Russian law on combating terrorism financing. The term “legal principles”, as opposed to “legislation” or “law”, refers to fundamental tenets or general rules of law that exist in the State and that its authorities will have to consider when “taking appropriate measures” under Article 8. For example, the FATF commentary to its Recommendation 5 interprets the same term “domestic legal principles” in Article 5 of the ICSFT as “fundamental principles of domestic law ... this is a very narrow

⁷⁴¹ See below, ¶¶554-555.

⁷⁴² Reply, ¶328, fn 603.

⁷⁴³ Counter-Memorial (ICSFT), ¶524(b), citing FATF, Special Recommendation III: Freezing and Confiscating Terrorist Assets, Text of the Special Recommendation and Interpretative Note, October 2001, ¶3 (Memorial, Annex 360).

concept which is limited to principles expressed within a national Constitution (or equivalent document) or binding decisions of the country’s highest court.”⁷⁴⁴ In contrast, where the ICSFT drafters intended to refer to specific laws of the State Party, they used different language such as “domestic law” or “domestic legislation” rather than “domestic legal principles”.⁷⁴⁵

- (c) The drafting history of Article 8 confirms the difference between “domestic law” and “domestic legal principles”. During treaty negotiations, some States were concerned that the ICSFT would require them to adopt measures that would be contrary to their established legal order. To avoid this risk, the drafts first debated inserting a separate “savings clause” that would allow States Parties to subject the application of measures under ICSFT to “fundamental legal principles” existing in their respective legal order. Subsequently, however, they found that they would achieve the same effect by inserting a qualifier “in line with its domestic legal principles” into the wording of paragraphs (1) and (2) of Article 8. The purpose of this wording is, accordingly, completely opposite to what Ukraine suggests: rather than incorporating provisions of domestic law into the ICSFT, it serves to prevent alien legal concepts from upsetting the States’ respective established legal order.⁷⁴⁶
- (d) Ukraine itself takes an opposite approach and inconsistently alleges that its own domestic laws are irrelevant to this Case. For example, when Ukraine complains that the Russian Federation failed to fulfil the MLAT requests under Article 12 of the ICSFT, Ukraine argues that whatever criminal taxonomy Ukrainian authorities employed in their MLAT requests under its domestic criminal code are “*an internal matter for Ukraine, and not a concern of Russia’s*”.⁷⁴⁷

549. Finally, Ukraine tellingly does not cite the relevant provisions of the Russian law on combating terrorism-financing.⁷⁴⁸ In reality, this law does not use the language of

⁷⁴⁴ FATF Guidance: Criminalising Terrorist Financing, Recommendation 5, October 2016, ¶168.

⁷⁴⁵ See, for example, Articles 6, 18(1), 19, 22 of the ICSFT.

⁷⁴⁶ UN General Assembly, Sixth Committee (54th session), Report of the Working Group, 12 November 1999, UN Doc A/C.6/54/L.2, p. 73.

⁷⁴⁷ Reply, ¶317.

⁷⁴⁸ Instead, Ukraine relies on a questionable secondary source (Reply, Annex 62) – a short journal article that was written by two junior employees of Rosfinmonitoring in their personal capacity, who did not even quote the text of the relevant law and loosely paraphrased its contents.

“reasonable suspicion”, but rather authorises asset-freezing only where there are “sufficient grounds to suspect that a person or entity participates in terrorist activity”.

550. The standard of “sufficient grounds to suspect” is a different and much stricter standard of Russian law because it requires law-enforcement authorities to provide “concrete” and “documented” proof of a person’s implication in the crime; a “formal reference to investigative bodies possessing sufficient data” is not allowed. For example:

(a) The Constitutional Court of the Russian Federation noted that the freezing of assets is allowed:

“... only on the condition that there are sufficient, documented by evidence grounds to suspect that it is obtained by way of criminal actions of the suspect, the accused or was used or intended to be used as an instrument of crime or to fund criminal activities.”⁷⁴⁹ [Emphasis added]

(b) The Supreme Court of the Russian Federation likewise noted, in the context of pre-trial detention measures that:

“... sufficient grounds for suspicion in involvement in a crime requires presence of data that this person is involved in the commission of the crime (caught “red-handed” at the crime scene or immediately after; the victim or witnesses indicated this person as the culprit; this person, their clothing or dwelling carry manifest signs of the crime, etc.) ... The verification of sufficient grounds for suspicion cannot be limited to a formal reference ... to investigative organs possessing sufficient data on the person’s involvement in the crime that was committed ... the court must ascertain whether the application [for detention] and materials appended to it contain **concrete information** pointing towards involvement of this **concrete person** in the crime that was committed.”⁷⁵⁰ [Emphasis added]

(c) Other courts followed identical approaches in respect of allegations of terrorism-financing operations.⁷⁵¹

551. Consequently, there is no basis to incorporate the “reasonable suspicion” standard into Article 8.

⁷⁴⁹ Constitutional Court of the Russian Federation, Resolution No. 25-P, 21 October 2014, ¶3.1.

⁷⁵⁰ Plenum of the Supreme Court of the Russian Federation, Resolution No. 41 on Practice of Application by the Courts of the Laws on Pretrial Restrictions in the Form of Detention, House Arrest, Bail and Ban on Certain Activities, 19 December 2013, ¶2.

⁷⁵¹ See, for example, Moscow Circuit Commercial Court, Resolution, 18 October 2021, Case No. A40-207643/2020 (Annex 425).

ii. **Ukraine’s Notes Verbales did not contain evidence that would give even reasonable suspicion of terrorism-financing**

552. Irrespective of which evidentiary standard applies, Ukraine failed to provide any material in its Notes Verbales, based on which the Russian Federation would be able to conclude that a terrorism-financing activity was ongoing.

553. **First**, although all of Ukraine’s Notes Verbales referred to the financing of the DPR and LPR, Ukraine consistently failed to provide the Russian Federation with any evidence that the DPR and LPR are terrorist organisations. As explained above, the DPR and LPR have never been listed as terrorist groups either by the UN Security Council or by the Russian Federation.⁷⁵² In fact, even Ukraine itself failed to officially designate the DPR and LPR as terrorist organisations and did not provide the Russian authorities with evidence of such designation even when the Russian authorities specifically requested it.⁷⁵³

554. **Second**, Ukraine has not proven that the individuals that allegedly provided financing to the DPR and LPR were linked to any “terrorist activity”. To the contrary, Ukraine’s allegations of “terrorism” and “terrorism financing” concerned peaceful private campaigns or efforts of humanitarian assistance to the civil population of Donbass. Remarkably, Ukraine never suggested that the official humanitarian convoys that the Russian Federation regularly sent to Donbass also qualified as “terrorism-financing”.

555. **Third**, Ukraine never attempted to explain in its Notes Verbales or provide any evidence how any alleged instances of providing financing to individuals specified by Ukraine constituted financing of the DPR or LPR or qualified as financing of terrorism within the meaning Article 2 of the ICSFT. Instead, Ukrainian authorities simply demanded that the Russian authorities freeze the assets of multiple persons who had never been implicated in anything related to terrorism. Some of these persons were prominent public persons who engaged in purely humanitarian activities and provided relief to the people of Donbass.⁷⁵⁴ Other individuals could not be identified at all because Ukraine failed to

⁷⁵² See above, ¶103.

⁷⁵³ Russian Federation Note Verbale No. 13355/ДНВ to the Ukrainian Ministry of Foreign Affairs, 14 October 2014 (Memorial, Annex 373).

⁷⁵⁴ *Ibid.*

provide any details necessary to this end.⁷⁵⁵ Blind compliance with Ukraine’s demands to freeze assets would have infringed upon the rights of these persons or interfered with humanitarian aid. Thus, it was reasonable for the Russian authorities to require sufficient evidence from Ukraine before taking any measures provided for in Article 8.

556. In response, Ukraine suggests that the Russian authorities were to deduce themselves that a potential terrorism-financing offence was occurring, for example by analysing “widely reported facts of the DPR and LPR’s acts against civilians in Ukraine”,⁷⁵⁶ and investigate these allegations themselves. This suggestion – that the Russian authorities were to freeze or seize the funds of multiple individuals based on mere mass media reports rather than official evidence received from Ukraine – is clearly absurd and at odds with the provisions and spirit of the ICSFT.

557. **Fourth**, the Russian Federation had reasonable grounds to believe that Ukrainian authorities were acting in bad faith by targeting the DPR and LPR’s supporters as their political enemy rather than as potential terrorism financiers. Ukraine never requested to take anti-terrorism measures against persons that supported the Maidan movement in Ukraine, although that movement involved violence, such as an actual armed coup in the country’s capital, and left many civilians and law enforcement officers dead or wounded.⁷⁵⁷ Even the most horrible atrocities, such as the burning of anti-Maidan protesters in Odessa, which left 48 people dead and 174 wounded, did not receive any effective investigation, let alone terrorism-financing investigation from the Ukrainian authorities.⁷⁵⁸

558. Such omission only means that the Ukrainian authorities – either before or after Maidan – did not view uprising as “terrorism” or providing support to such a cause as “terrorism financing”. In this context, Ukraine’s allegations that calls by various Russian prominent public persons to gather humanitarian aid to the people of Donbass somehow constituted

⁷⁵⁵ Russian Federation Note Verbale No. 10448 to the Ukrainian Ministry of Foreign Affairs, 31 July 2015 (Memorial, Annex 376).

⁷⁵⁶ Reply, ¶331.

⁷⁵⁷ See above, ¶14.

⁷⁵⁸ See Report of the International Advisory Panel on its Review of the Investigations into the Events in Odesa on 2 May 2014, 4 November 2015, available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168048610f>

“financing of terrorism” are outrageous and manifestly implausible. In this respect, the UN Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator and the Secretary General of the Norwegian Refugee Council noted that:

“Counter-terrorism measures have often hindered humanitarian work in areas where armed groups are present, and at times have even criminalized legitimate aid activities, depriving civilians of life-saving aid precisely when international law entitles them to it...⁷⁵⁹ [and] are violations of the right to life, in the name of countering ‘terrorism’.”⁷⁶⁰

559. **Fifth** and finally, Ukraine’s Notes Verbales had multiple other defects that would not allow the Russian authorities to act on them.

- (a) Ukraine did not provide any explanation of why the Russian authorities should have frozen the funds in 2013 or early 2014, which is even before the DPR and LPR came into existence.⁷⁶¹
- (b) Ukraine did not provide any explanation of how the accounts of Ms Tatiana Mikhailovna Azarova and Mr Andrey Gennadievich Lazarchuk were involved in the terrorism-financing activities and why it was necessary to freeze them.⁷⁶²
- (c) Ukraine did not explain why the Russian Federation was requested, or how it was indeed able, to freeze accounts with the banks registered and located in Ukraine.⁷⁶³

560. Ukraine has not provided any answer to any of these issues.

561. In light of the above, Ukraine has failed to establish that the Russian Federation breached its obligations under Article 8 of the ICSFT.

⁷⁵⁹ Norwegian Refugee Council, *Aid workers are staying in Afghanistan - as they do in crises globally. We must protect them*, 30 August 2022, available at: <https://www.nrc.no/opinions-all/aid-workers-are-staying-in-afghanistan-as-they-do-in-crises-globally/>

⁷⁶⁰ Agnes Callamard, *United Nations Security Council Draft Resolution on the Financing of Terrorism: Protecting and Safeguarding Humanitarian Actions*, 22 March 2019, available at: <https://www.ohchr.org/sites/default/files/Documents/Issues/Executions/StatementDraftResolutionFinancingTerrorism.pdf>

⁷⁶¹ Ukrainian Note Verbale No. 72/22-620-2087 to Russian Federation Ministry of Foreign Affairs, 12 August 2014 (Memorial, Annex 369).

⁷⁶² Ukrainian Note Verbale No. 72/22-620-2221 to Russian Federation Ministry of Foreign Affairs, 29 August 2014 (Memorial, Annex 371).

⁷⁶³ Ukrainian Note Verbale No. 72/22-620-2221 to Russian Federation Ministry of Foreign Affairs, 29 August 2014 (Memorial, Annex 371).

B. ARTICLE 9: THE RUSSIAN FEDERATION DID NOT VIOLATE ITS OBLIGATION TO INVESTIGATE THE FACTS RELATED TO TERRORISM-FINANCING

562. To recall, Article 9 of the ICSFT contains an obligation of the State Party

“1. Upon receiving information that a person who has committed or who is alleged to have committed an offence set forth in article 2 may be present in its territory, the State Party concerned shall take such measures as may be necessary under its domestic law to investigate the facts contained in the information.

2. Upon being satisfied that the circumstances so warrant, the State Party in whose territory the offender or alleged offender is present shall take the appropriate measures under its domestic law so as to ensure that person’s presence for the purpose of prosecution or extradition.”

563. Ukraine’s claim that the Russian Federation breached this obligation must fail because Ukraine gives an implausibly broad interpretation of Article 9 of the ICSFT (i) and its Notes Verbales did not contain any sufficient or even credible allegations of terrorism-financing against any specific offenders (ii).

i. Ukraine’s interpretation of Article 9(1) is implausibly broad

564. In the Reply, Ukraine deliberately omits the full text of Article 9(1) and instead craftily quotes selective words from it, scissoring out any language that may limit its application.⁷⁶⁴ As a result, Ukraine makes this Article look like an obligation by the State Party to investigate any allegation of terrorism, however vague or imprecise. However, this is not what the plain text of Article 9 states.

565. **First**, there must be sufficient factual evidence that gives rise to a reasonable suspicion of a terrorism-financing offence. Article 9 does not require a State Party to look into every allegation of terrorism-financing – rather, a State Party must investigate “the facts contained in the information” [Emphasis added]. Although Ukraine appears to equate every allegation to a fact, these terms obviously have the opposite meaning: a *fact* is a piece of information used as *evidence*, whereas an *allegation* is a claim made without any *proof*. Further, as Article 9 makes clear, the “facts” or factual evidence should be sufficient to warrant an investigation under the domestic law of the requested State Party, that is, pass the domestic evidentiary standard as well.

⁷⁶⁴ Reply, ¶335.

566. Thus, contrary to what Ukraine argues, it cannot be enough for the requesting State Party merely to refer to the ICSFT or to assert that an offence of terrorism financing has been committed. The requesting State must provide sufficient information that would give rise to a reasonable suspicion and justify commencing an investigation of a terrorism financing offence in the requested State, which is in itself an allegation of a grave nature.
567. *Second*, Ukraine implausibly alleges that “Article 9(1) refers only to ‘information that a person who has committed or who is alleged to have committed an offence’ and not information about ‘a specific person’.”⁷⁶⁵ In fact, the ordinary meaning of the phrase “a person” Article 9(1), read in its context, must mean a person with sufficiently specific characteristics so as to afford the requested State a sufficient basis or leads to conduct a proper investigation – that is, not just any unidentified individual.
568. In this respect, Ukraine leaves out that the person in question must be shown to actually have committed, or at least be alleged to have committed, a *terrorist* offence (which is not the case with Ukraine’s requests in any case). The text of Article 9(1) refers to an Article 2 offence that has been committed, and thus the occurrence of such an offence must be conclusively proven, with the requisite specific intent, although that person’s participation can be “alleged”. Further, in the subsequent paragraph 2 of this Article that person is referred to as “the offender”, which assumes that it is a known individual. A situation when no information is given about either the commission of a terrorist offence, or any clue as to “the offender”, or both is untenable and cannot be considered reasonable ground for cooperation under Article 9 of the ICSFT.

ii. **Ukraine’s Notes Verbales did not contain sufficient or even credible allegations of terrorism-financing by specific persons**

569. What Ukraine provided to the Russian Federation in its Notes Verbales cannot be considered as sufficient or credible allegations of terrorism financing by specific persons.
570. *First*, the Notes Verbales, neither by their form, content or channel of communication represented proper requests for assistance under the relevant MLA treaties applicable in accordance with Article 12(5) ICSFT. The mere use of diplomatic channels for requests to investigate alone signified Ukraine’s lack of interest in prompt or speedy performance

⁷⁶⁵ Reply, ¶338.

of these requests because such channels are much more complex and slower than direct communication protocols established under MLA treaties between the Russian and Ukrainian competent authorities. If Ukraine were genuinely interested in combating terrorism-financing rather than pursued a political agenda, the appropriate way for cooperation with the Russian Federation would be through the established channels between their respective law-enforcement bodies and via the comprehensive mechanisms set out in the applicable MLA treaties.

571. **Second**, Ukraine's "allegations" put forward in these Notes Verbales were vague in the extreme. The Notes Verbales did not contain a single reference to a concrete offence of terrorism financing and merely claimed that the DPR and LPR were "terrorist organisations" and were engaged in various criminal acts. The Note Verbale dated 12 August 2014 is an illustrative example:

"from March 2014, terrorist organizations "Donetsk People's Republic", hereinafter referred to as the DPR, and "Lugansk People's Republic", hereinafter referred to as the LPR, have been operating illegally in the territory of Ukraine; they intentionally and consciously carry out in the territory of Ukraine terrorist acts aimed at intimidation of population, killing of civilian population, causing grave bodily injury to civilian population, seizure of hostages and administrative buildings of state and local authorities in order to compel the Ukrainian Government to do acts aimed at toppling constitutional order in Ukraine, recognition of the terrorist organizations, and other acts that threaten Ukraine's territorial integrity and security."⁷⁶⁶

572. This Note Verbale does not contain any information as to specific acts, persons or their intent, as required under Article 9, which could indicate to the Russian Federation that it may concern terrorism-financing.

573. **Third**, the context of these Notes Verbales indicated that they had a political rather than terrorism-combating purpose. Only a few months before these Notes Verbales were sent the pro-Maidan activists were openly engaged in intimidating of population, killing of civilian population, causing grave bodily injury to civilian population, seizing hostages and administrative buildings of State and local authorities in order to compel the Ukrainian Government to do acts aimed at toppling constitutional order in Ukraine, which in February 2014, culminated in an armed revolt toppling Ukraine's legitimate

⁷⁶⁶ Ukrainian Note Verbale No. 72/22-620-2087 to Russian Federation Ministry of Foreign Affairs, 12 August 2014 (Memorial, Annex 369).

government.⁷⁶⁷ However, this upheaval was not qualified as “terrorism” by the Ukrainian authorities.

574. In this situation, when Ukraine was clearly reeling from civil strife, instances of unrest could not be automatically interpreted as “terrorism” in the absence of concrete evidence which Ukraine refused to supply – and in all likelihood did not possess.

575. In its Reply, Ukraine states that “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.”⁷⁶⁸ Yet this is exactly what the Russian Federation did – and repeatedly, both in diplomatic correspondence and through MLA channels, while also raising this issue during its bilateral consultations with Ukraine. Ukraine, however, did not provide concrete evidence in response to Russia’s requests.

576. For example, in response to the above-mentioned Ukrainian Note Verbale of 12 August 2014,⁷⁶⁹ the Russian Federation replied with a Note Verbale dated 14 October 2014, where it requested factual information to substantiate claims raised by Ukraine.⁷⁷⁰ No response from Ukraine was forthcoming.

577. Lack of evidence on Ukraine’s claims about the “terrorist activities” of the DPR and LPR came into full view later, when Ukraine finally started sending its MLA requests. For example, coming back to claims made in Ukrainian Note Verbale of 12 August 2014 to which Ukraine refers in its Reply,⁷⁷¹ Ukraine sent an MLA request concerning O.I.

⁷⁶⁷ See Chapter I(A) above.

⁷⁶⁸ Reply, ¶354.

⁷⁶⁹ Ukrainian Note Verbale No. 72/22-620-2087 to Russian Federation Ministry of Foreign Affairs, 12 August 2014 (Memorial, Annex 369).

⁷⁷⁰ Russian Federation Note Verbale No. 13355/ДНВ to the Ukrainian Ministry of Foreign Affairs, 14 October 2014 (Memorial, Annex 373) (“The Ministry of Foreign Affairs of the Russian Federation informs the Ukrainian side about the need to provide the Russian side with factual data on the issues brought up in the notes of the Ministry of Foreign Affairs of Ukraine No. 72/22-484-1964 dated July 28, 2014, No. 72/22-620-2087 dated August 12, 2014, No. 72/22-620-2185 dated August 22, 2014, No. 72/22-620-2221 dated August 29, 2014, No. 72/22-620-2406 dated September 24, 2014, No. 72/22-620-2443 dated September 30, 2014, No. 72/22-620-2495 dated October 7, 2014 and No. 72/22-620-2529 dated October 10, 2014, as well as to hand over to the Russian Federation the criminal cases brought by Ukrainian law enforcement authorities against Russian citizens and individuals permanently residing in the Russian Federation, such as mentioned and identified in the notes of the Ukrainian side, in the order set forth in the Commonwealth of Independent States’ Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters dated January 22, 1993.”).

⁷⁷¹ Reply, ¶356.

Kulygina and others. In its response dated 23 October 2015, the Prosecutor General's Office of the Russian Federation noted the following:

“It follows from the text of the request that in May-June 2014 Russian citizen O.I. Kulygina, acting jointly with Ukrainian citizens V.F. Chernyak, S.V. Suvorov, A.N. Levkin, and Yu.A. Kukashov, assisted the terrorist organization Donetsk People's Republic. While committing the crime, she coordinated her actions with leaders of the terrorist organization according to the established criminal plan with the intention of putting up armed resistance against representatives of the incumbent authorities in Luhansk and Donetsk Oblasts, intimidating the population, committing serious and grave crimes against the fundamentals of national security of Ukraine, human lives and health, by enabling the transfer and smuggling of firearms, ammunition, and explosives from Russia to Ukraine.

After reviewing the request we found that this request (to the extent of the request for information about the instances in which “citizen O.I. Kulygina” crossed the state border during the period since January 1, 2011) contains a request for a procedural formality that is irrelevant to the subject matter of the pretrial investigation being conducted by the Central Investigative Directorate of the Security Service of Ukraine. The request initiator has also requested certified copies of documents proving or disproving the involvement of O.I. Kulygina in illegal paramilitary groups. However, the request fails to state which procedural or other formalities should be carried out in order to provide legal assistance.

We also find it impossible at this time to honor the request in terms of identifying and questioning the next of kin of O.I. Kulygina as witnesses. According to the requirements of Clause (d), Part 1, Article 7 of the Convention on Legal Assistance and Legal Relations in Civil, Family, and Criminal Cases of January 23, 1993, the request must state: the first names and last names of witnesses, their address of residence, and in the case of criminal cases – also the date and place of birth. The request in question lacks the above-mentioned information. In light of this, the Prosecutor General's Office of the Russian Federation would like to suggest that you additionally send to us the information that we need to further review your request for legal assistance. Also present copies of official documents based on which the self-proclaimed Donetsk People's Republic has been declared a terrorist organization in Ukrainian territory.”⁷⁷²

578. Ukraine never followed up on this and numerous other similar requests from the Russian side. By way of further example,

⁷⁷² Office of the Prosecutor-General of the Russian Federation, Letter from the No. 82/1-5444-14, 23 October 2015 (Memorial, Annex 428).

- (a) In its Note Verbale of 22 August 2014 Ukraine communicated that unidentified individuals were directly or indirectly providing the DPR and LPR with various kinds of assistance which could be considered terrorism-financing.⁷⁷³
- (b) In its Note Verbale of 29 August 2014, Ukraine informed the Russian Federation of an alleged scheme used to engage in terrorism-financing.⁷⁷⁴
- (c) In its Note Verbale of 10 October 2014, Ukraine stated that it suspected that several Russian citizens could be involved in terrorism-financing and demanded that:

“[Russia] take all feasible measures in order to terminate acts that constitute offences within the meaning of the ICSFT, as well as provide appropriate assurances and guarantees of non-repetition of such acts in the future”⁷⁷⁵

579. In response, the Russian Federation requested that Ukraine provide additional information in connection with its allegations: provide evidence of the offences purportedly committed by those citizens and provide their case files, as required by the 1999 Legal Assistance Convention.⁷⁷⁶ Ukraine did not reply.

580. Furthermore, in its Note Verbale of 3 November 2014 Ukraine accused the Russian Federation of

“acting by means of its governmental bodies, agents, physical and legal persons entrusted with performing functions of a state, as well as by means of the terrorist organizations, which act under management and control of the Russian Side, commit offences within the meaning of the Convention.”⁷⁷⁷

581. In its responses, the Russian Federation assured Ukraine that all information that the latter relayed was investigated properly and enclosed a report that detailed actions that the Russian Federation undertook on that basis.⁷⁷⁸ It also provided additional confirmation

⁷⁷³ Ukrainian Note Verbale No. 72/22-620-2185 to Russian Federation Ministry of Foreign Affairs, 22 August 2014 (Memorial, Annex 370).

⁷⁷⁴ Ukrainian Note Verbale No. 72/22-620-2221 to Russian Federation Ministry of Foreign Affairs, 29 August 2014 (Memorial, Annex 371).

⁷⁷⁵ Ukrainian Note Verbale No. 72/22-620-2529 to Russian Federation Ministry of Foreign Affairs, 10 October 2014 (Memorial, Annex 372).

⁷⁷⁶ Russian Federation Note Verbale No. 13355/ДНВ to the Ukrainian Ministry of Foreign Affairs, 14 October 2014 (Memorial, Annex 373).

⁷⁷⁷ Ukrainian Note Verbale No. 72/22-620-2717 to the Russian Federation Ministry of Foreign Affairs, 3 November 2014 (Memorial, Annex 374).

⁷⁷⁸ Russian Federation Note Verbale No. 10448 to the Ukrainian Ministry of Foreign Affairs, 31 July 2015 (Memorial, Annex 376).

that the investigations were still ongoing and provided a schedule of actions that it already undertook in response to the information contained in Ukraine's Notes Verbales. Ukraine does not allege that it showed any similar kind of cooperation.

582. Ukraine's approach to the MLA requests proved no better. It repeatedly sent the Russian Federation defective requests and did not follow up on requests to provide the information required to properly act on them.⁷⁷⁹

583. As it is clear from these exchanges between the Russian Federation and Ukraine, the Russian Federation processed information communicated in Ukraine's Notes Verbales and MLA requests in due course and was ready to act on that information; its requests for additional information from Ukraine were entirely reasonable and grounded in law. At the same time, Ukraine repeatedly failed to respond to those queries and now attempts to shift the blame onto the Russian Federation for not being able to follow up on its Notes Verbales in full.

584. Finally, the political character of Ukraine's Notes Verbales that sought to push the Russian Federation to investigate terrorism-financing was further illustrated by the fact that Ukraine widely used the "terrorism" label in order to justify the launch of the ATO which allowed Ukraine to bypass its own domestic rules on the use of its armed forces against its own citizens.

585. In this context, Ukraine's assertions about the alleged "terrorist" nature of the DPR and LPR do not fit its own legislation. Article 24 of Ukrainian Law No. 638-IV of 20 March 2003 "On the fight against terrorism" states that

"An organization that is accountable for commission of a terrorist act and is declared as a terrorist organization by a decision of the court, shall be dissolved... A petition to declare the organisation accountable for terrorism activities shall be submitted to the court by the General Prosecutor..."⁷⁸⁰

586. At the same time, Ukraine failed to provide evidence of a decision by its courts to recognise the DPR and LPR as "terrorist organisations". Moreover, there simply could not have been such a decision by a Ukrainian court, because Ukrainian law has never

⁷⁷⁹ See below, ¶615.

⁷⁸⁰ Law of Ukraine No. 638-IV "On the fight against terrorism", 20 March 2003, Article 24, available at: <https://zakon.rada.gov.ua/laws/show/638-iv> (Annex 456).

specified either the grounds and procedure for prosecutors to file such applications or the courts which would have jurisdiction to consider them.

587. It is remarkable that on 8 December 2014, MP Viktor Baloga submitted to the Verkhovna Rada of Ukraine draft law No. 1286 “On Recognition of the Luhansk and Donetsk People's Republics as Terrorist Organizations”. On 10 December 2014, a similar bill No. 1278 was introduced by MPs S. Pashinsky, A. Teteruk, and Y. Bereza. Both draft laws have failed. The first was rejected by Verkhovnaya Rada’s Committee on Legislative Support of Law Enforcement on the basis that “it was not within the competence of the Parliament to decide on the recognition of organizations as terrorist”.⁷⁸¹ The Main Scientific-Expert Department of the Verkhovnaya Rada rejected the second bill because it “did not eliminate the existing gap in Ukrainian legislation, which had not provided a mechanism and procedure for recognizing organizations as terrorist”. Further, it concluded that “the idea of recognizing organizations as terrorist through the adoption by Parliament of certain legislative acts raised doubts about its legal correctness and compliance with the Constitution of Ukraine”.⁷⁸²
588. Consequently, at first the Ukrainian judges that considered criminal cases against the DPR and LPR militants often did not understand on what legal basis they should consider them to be terrorists. Therefore, judges often re-qualified the “terrorist” charges against them as “participation in an illegal armed formation” (Article 260 of the Criminal Code of Ukraine)⁷⁸³ or as “assistance to criminal organizations” (Article 256 of the Criminal Code of Ukraine). Later Ukrainian courts began to qualify the militants’ actions as related to “terrorism”. However, this shift in their practice was purely political and was due to pressure from the “Maidan” leadership of Ukraine, but not grounded on any legal norms.
589. Of course, painting the DPR and LPR militants as “terrorists” required Ukraine to take some formal measures to investigate their activities under terrorism offences. In this respect, it is remarkable that the alleged financing of terrorism would take place before

⁷⁸¹ Verkhovnaya Rada Committee on Legal Support of Law-Enforcement Activities, Letter of the Chairman No. 1286, 8 December 2014, available at: <http://w1.c1.rada.gov.ua/pls/zweb2/webproc34?id=&pf3511=52751&pf35401=324535>.

⁷⁸² Verkhovnaya Rada Chief Directorate, Opinion on the draft Law of Ukraine No. 1278, 10 December 2014, available at: <http://w1.c1.rada.gov.ua/pls/zweb2/webproc34?id=&pf3511=52808&pf35401=325138>.

⁷⁸³ See, for example, Slavyansky District Court, Case No. 243/5919/14, Sentence, 7 November 2014, available at: <https://reyestr.court.gov.ua/Review/41273251>.

downing the MH17 or any of the acts of shelling in January 2015 – February 2017. that Ukraine relies on in this Case as acts of terrorism.

590. Accordingly, Ukraine failed to establish that the Russian Federation breached Article 9 of the ICSFT.

C. ARTICLE 10: THE RUSSIAN FEDERATION DID NOT VIOLATE ITS OBLIGATION TO PROSECUTE OR EXTRADITE TERRORISM-FINANCING OFFENDERS

591. Similar to the obligation to investigate under Article 9 of the ICSFT, the obligation to prosecute or extradite alleged offenders under Article 10 of the ICSFT is triggered only if the following conditions are met:

- (a) the requested State Party has been provided with information that specifies a person within its territory and sufficient facts that give rise to a reasonable suspicion that this person is involved in terrorism-financing;
- (b) jurisdiction has been properly established in accordance with Article 7;
- (c) in case of extradition, the request is submitted in accordance with the requirements in Article 12(5) and Article 15;
- (d) in case of prosecution, there is a case that may be submitted to competent authorities of the requested State for purposes of prosecution in accordance with its domestic laws.

592. As the Russian Federation has already explained,⁷⁸⁴ Ukraine failed to provide any such information apart from blanket, generic accusations of terrorism-financing. This does not form a sufficient basis for the Russian authorities to launch any prosecution or extradition process.

593. Furthermore, as extradition of Russian citizens is formally excluded due to express prohibition by the Russian Constitution, in response to Ukraine's Notes Verbales the Russian Federation almost immediately, and very explicitly, requested to be provided with

⁷⁸⁴ See above, ¶618.

“... the criminal cases brought by Ukrainian law enforcement authorities against Russian citizens and individuals permanently residing in Russia, such as mentioned and identified in the Note Verbales of the Ukrainian side, in accordance with the procedure set forth in the Commonwealth of Independent States' Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters dated January 22, 1993.”⁷⁸⁵

594. Ukraine refused to do so, thereby excluding the possibility for the Russian Federation to undertake prosecution of these persons due to absence of any incriminating evidence.

595. In any case, as the Russian Federation explained in the Counter-Memorial, Article 10 of the ICSFT is an *aut dedere, aut judicare* obligation, that is, not an absolute obligation to prosecute any persons specified by Ukraine.⁷⁸⁶ The Russian authorities have an unfettered discretion to decide whether there is sufficient evidence for them to prosecute particular individuals for terrorism-financing. Ukraine has not offered any response and thus appears to agree that this principle applies in this Case.

596. Accordingly, Ukraine failed to establish that the Russian Federation breached Article 10 of the ICSFT.

D. THE RUSSIAN FEDERATION DID NOT VIOLATE ITS OBLIGATION UNDER ARTICLE 12 OF THE ICSFT TO ASSIST WITH THE CRIMINAL PROSECUTION OF THE TERRORISM FINANCING

597. Article 12 of the ICSFT requires the Russian Federation to “afford ... assistance in connection with criminal investigations or criminal or extradition proceedings in respect of [Article 2 offences], including assistance in obtaining evidence in their possession necessary for the proceedings”.

598. In an attempt to prove that the Russian Federation did not fulfil its obligations to assist Ukraine in prosecuting terrorist-financing, the latter confines itself to overgeneralisation that the Russian Federation did not execute any of Ukraine’s MLAT requests that Ukraine selected for this Case, had no grounds to refuse assistance under the ICSFT or only provided excuses of non-compliance.

⁷⁸⁵ Russian Federation Note Verbale No. 13355/ДНВ to the Ukrainian Ministry of Foreign Affairs, 14 October 2014 (Memorial, Annex 373).

⁷⁸⁶ Counter-Memorial (ICSFT), ¶554.

599. In the Counter-Memorial the Russian Federation has proved that all of Ukraine’s MLA requests fell outside the scope of the ICSFT.⁷⁸⁷ Ukraine’s vain attempts to prove otherwise in its Reply are unavailing.

600. **First**, Ukraine argues that its MLA requests fall under the ICSFT insofar that they touch upon the issues of financing of the DPR and LPR as “terrorist organisations”. The Russian Federation has expounded upon this issue both in its Counter-Memorial and this Rejoinder multiple times and will merely briefly restate that it is plainly false.

601. **Second**, and relatedly, Ukraine alleges that:

“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.”⁷⁸⁸

602. The Russian Federation takes no position as to whether such requests are admissible in general. It notes, however, that none of Ukraine’s MLA requests described below contained a general request for investigative assistance of that nature. Accordingly, this argument is also false.

603. **Third**, Ukraine suggests that for its MLA requests to fall under the ICSFT, it did not have to do anything to identify them as such. In particular, Ukraine claims that since “from the content of Ukraine’s MLA requests [...] Russia was well aware that Ukraine was seeking assistance relating to terrorism financing” and “there was no requirement under Article 12(1) to expressly reference the ICSFT”.⁷⁸⁹ Ukraine also explains its failure to identify terrorism-financing as the subject of investigation even under its own laws in eleven out of twelve MLA requests as “an internal matter for Ukraine, and not a concern of Russia’s”. It even tries to shift the blame onto the Russian Federation, stating that “it is ironic that Russia would object to providing assistance concerning the occurrence of acts of terrorism.”⁷⁹⁰ In the Reply, Ukraine extrapolates that:

“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.”⁷⁹¹

⁷⁸⁷ See Counter-Memorial (ICSFT), Chapter VIII, Section V.

⁷⁸⁸ Reply, ¶369.

⁷⁸⁹ *Ibid.*, ¶370.

⁷⁹⁰ *Ibid.*, ¶372.

⁷⁹¹ *Ibid.*, ¶371.

604. These suggestions are blatantly incorrect and show how Ukraine is trying to retroactively build up evidence for its case.
605. Although Article 12(1) expressly refers to “offences set forth in article 2”, Ukraine did nothing to identify its MLA requests as related to ICSFT or even to terrorism-financing. Essentially, it suggests that the Russian Federation should have itself somehow identified the alleged offences as relating to the ICSFT, when Ukraine itself ostensibly left out any reference to it. It is also striking that only a single request out of twelve, on which Ukraine relies, actually concerns terrorism-financing under Ukraine’s domestic law (Article 258-5 of the Penal Code of Ukraine, entitled “Terrorism-financing”). Even though the 1999 Legal Assistance Convention attaches considerable significance to proper qualification of the alleged offence in a MLA request,⁷⁹² all Ukraine’s requests save for one refer to completely different charges. Ukraine now attempts to retroactively rectify these glaring deficiencies by trying to place the duty of second-guessing the legal basis of a mutual legal assistance request upon the Russian Federation. These attempts should fail.
606. **Fourth**, Ukraine’s attempt to accuse the Russian Federation of failing to provide assistance in respect of “occurrence of acts of terrorism” is also misplaced. Not only has the Russian Federation regularly addressed Ukraine’s requests for legal assistance in those matters, but in any event, they are irrelevant for the purposes of assessing whether Ukraine’s MLA requests fall under the ICSFT. As the ICSFT is not designed to prevent the “occurrence of acts of terrorism” in general, such MLA requests plainly do not fall within its scope.
607. **Fifth**, Ukraine’s claims that the Russian Federation rejected several MLA requests unjustifiably should also be dismissed.
608. Article 12(5) ICSFT provides that:
- “... the parties must carry out their obligation to afford assistance in conformity with the mutual legal assistance treaties in force between them.”
609. Accordingly, the exchanges between Ukraine and the Russian Federation in respect of mutual legal assistance must be subject to the requirements contained in those treaties.

⁷⁹² Article 7(1)(g) of the 1999 Convention on Legal Assistance.

610. Ukrainian authorities sent its MLA requests under the 1993 Convention on Legal Assistance and Legal Relations in Civil, Family, and Criminal Matters, and the 1959 European Convention on Mutual Legal Assistance in Criminal Matters. Ukraine thus cannot be unaware that its MLA requests must comply with the requirements set forth in these instruments. The same instruments will also govern the requests' processing and grounds for dismissal.
611. The extent to which Ukraine goes to misrepresent the content of the applicable MLA treaties is remarkable. For example, Ukraine asserts that Article 17 of the Minsk Convention does not require a translation of MLA requests into Russian language.⁷⁹³ However, Ukraine exhibits an outdated version of the Minsk Convention and conceals that in 1997, the State Parties (including the Russian Federation and Ukraine) amended Article 17 specifically to include a requirement that such documents must be accompanied by a translation into Russian.⁷⁹⁴
612. Likewise, Ukraine misrepresents the requirements of Article 19 of the 1993 Convention, which provides that in case a legal assistance request is denied, the requesting party should immediately be notified of reasons therefor. As confirmed by the Parties' subsequent practice (including Ukraine's competent bodies as well), the Parties have considered reference to Article 19 of 1993 Convention a sufficient justification for dismissal of a legal assistance request, and where Ukrainian competent bodies required a further justification, the Russian competent bodies provided it.⁷⁹⁵
613. Furthermore, even if Ukraine had qualms about the Russian Federation's mode of compliance with the relevant MLA treaties, it did not follow through the appropriate mechanisms with its complaints. In particular, Article 81 the 1999 Legal Assistance Convention provides that:

“Any differences arising out of this Convention's application shall be resolved by competent bodies of the State Parties as per mutual agreement.”

⁷⁹³ Reply, ¶373.

⁷⁹⁴ See Protocol of 28 March 1997 to the Minsk Convention of 22 January 1993 on legal aid and legal relations in civil, family and criminal cases (Annex 457).

⁷⁹⁵ See, e.g. Letter from the Office of the Prosecutor-General of the Russian Federation No. 82/1-5095-15 dated 18 November 2016 (Annex 51); Letter from the Office of the Prosecutor-General of the Russian Federation No. 82/1-5100-15 dated 20 October 2016 (Annex 50); Letter from the Office of the Prosecutor of the Russian Federation No. 82/1-5094-15 dated 7 February 2017 (Annex 49); Letter from the Office of the Prosecutor-General of the Russian Federation No. 82/1-5099-15 dated 16 November 2016 (Annex 52).

614. Ukraine does not allege that it has ever raised concerns with the Russian Federation's mode of compliance with 1999 Convention. Therefore, it cannot now bring its accusations of the Russian Federation's alleged improper fulfilment of its application under the Convention.
615. In addition, if one looks at each of the twelve MLAT requests separately, one can easily identify multiple grounds why each request was doomed to be refused.
- (a) *The Request dated 4 September 2014 in respect of the Russian State Duma Deputy Speaker Vladimir Zhirinovskiy.* This request did not mention the ICSFT or any terrorism-financing offence; instead, it relied on Article 258-3 of the Criminal Code of Ukraine, entitled "Creation of a terrorist group or organization" which would fall outside the scope of the ICSFT. The Prosecutor General had to refuse assistance because it could harm the sovereignty, security and other vital interests of the Russian Federation.⁷⁹⁶
 - (b) *The Request dated 30 September 2014 in respect of the Russian citizen O.I. Kulygina.* This request did not mention the ICSFT or any terrorism-financing offence; instead, it relied on Article 258-3 of the Penal Code of Ukraine, entitled "Creation of a terrorist group or organization", which would fall outside the scope of the ICSFT. The Prosecutor General had to refuse assistance because the request contained irrelevant requests (border crossing records) and sought to interrogate a witness without specifying any of the details as required by the Minsk Convention. At the same time, the Prosecutor General invited Ukraine to send additional information to process the request.⁷⁹⁷
 - (c) *The Request dated 11 November 2014 in respect of the Russian State Duma Deputy Speaker Sergey Mironov.* This request did not mention the ICSFT or any terrorism-financing offence; instead, it relied on Article 258-3 of the Criminal Code of Ukraine, entitled "Creation of a terrorist group or organization", which would fall outside the scope of the ICSFT. The Prosecutor General had to refuse assistance

⁷⁹⁶ Letter from the Office of the Prosecutor-General of the Russian Federation No. 87-158-2015, 17 August 2015 (Memorial, Annex 425).

⁷⁹⁷ Letter from the Office of the Prosecutor-General of the Russian Federation No. No. 82/1-5444-14 23, October 2015 (Memorial, Annex 428).

because it could harm the sovereignty, security and other vital interests of the Russian Federation.⁷⁹⁸

- (d) *The Request dated 3 December 2014 in respect of the Russian State Duma Deputy Speaker Gennady Zyuganov.* This request did not mention the ICSFT or any terrorism-financing offence; instead, it relied on Article 260(3) of the Criminal Code of Ukraine, entitled “Creation of an illegal armed groups”, which would fall outside the scope of the ICSFT. The Prosecutor General had to refuse assistance because it could harm the sovereignty, security and other vital interests of the Russian Federation.⁷⁹⁹
- (e) *The Request dated 2 July 2015 in respect of the Russian citizen A.I. Mozhaev and R.Z. Khalikov.* This request did not mention the ICSFT or any terrorism-financing offence; instead, it relied on Article 258-3 of the Criminal Code of Ukraine, entitled “Creation of a terrorist group or organization”, which would fall outside the scope of the ICSFT. The Prosecutor General invited Ukraine to send additional information to process the request and, after receiving it, provided documents in respect of R.Z. Khalikov. The Prosecutor General had to refuse assistance in respect of witnesses because Ukraine failed to specify any of their details as required by the Minsk Convention.⁸⁰⁰
- (f) *The Request dated 3 July 2015 in respect of the Russian citizen A.Yu. Boroday.* This request did not mention the ICSFT or any terrorism-financing offence; instead, it relied on Article 258-3 of the Criminal Code of Ukraine, entitled “Creation of a terrorist group or organization”, which would fall outside the scope of the ICSFT. The Prosecutor General forwarded Ukraine the information that the Russian authorities had in its disposal.⁸⁰¹

⁷⁹⁸ Letter from the Office of the Prosecutor-General of the Russian Federation No. 87-159-2015, 17 August 2015 (Memorial, Annex 426).

⁷⁹⁹ Letter from the Office of the Prosecutor-General of the Russian Federation No. 87-157-2015, 17 August 2015 (Memorial, Annex 424).

⁸⁰⁰ Letter from the Office of the Prosecutor of the Russian Federation No. 82/1-5094-15, 4 March 2016, p. 5 (Memorial, Annex 419); Letter from the Office of the Prosecutor of the Russian Federation No. 82/1-5094-15, 7 February 2017 (Annex 49).

⁸⁰¹ Letter from the Office of the Prosecutor-General of the Russian Federation No. 82/1-5095-15, 18 November 2016 (Annex 51).

- (g) *The Request dated 3 July 2015 in respect of the Russian citizen I.N. Bezler.* This request did not mention the ICSFT or any terrorism-financing offence; instead, it relied on Article 258-3 of the Criminal Code of Ukraine, entitled “Creation of a terrorist group or organisation”, which would fall outside the scope of the ICSFT. The Prosecutor General forwarded Ukraine the information that the Russian authorities had in its disposal.⁸⁰²
- (h) *The Request dated 3 July 2015 in respect of the Russian citizen I.V. Girkin.* This request did not mention the ICSFT or any terrorism-financing offence; instead, it relied on Article 258-3 of the Criminal Code of Ukraine, entitled “Creation of a terrorist group or organisation”, which would fall outside the scope of the ICSFT. The Prosecutor General forwarded Ukraine the information that the Russian authorities had in its disposal.⁸⁰³
- (i) *The Request dated 28 July 2015 in respect of a group of Russian senior army officers.* This request did not mention the ICSFT or any terrorism-financing offence; instead, it relied on Article 258-3 of the Criminal Code of Ukraine, entitled “Creation of a terrorist group or organisation”, which would fall outside the scope of the ICSFT. The Prosecutor General had to refuse assistance because it could harm the sovereignty, security and other vital interests of the Russian Federation.⁸⁰⁴
- (j) *The Request dated 15 September 2015 in respect of a Russian citizen V.A. Starkov.* This request did not mention the ICSFT or any terrorism-financing offence; instead, it contained various charges, including Article 263 (“Illegal handling of weapons, ammunition and explosives”), Article 332-1 (“Illegal crossing of the State border of Ukraine”), Article 258-3 (“Creation of a terrorist group or organization”), Article 437 (“Planning, preparation for, instigating and waging aggressive war”) and Article 28 (“Committing a crime by a group of persons, a group by prior conspiracy, an organised group or a criminal organization”), which do not fall within the ICSFT. The Prosecutor General had to refuse assistance because by the

⁸⁰² Letter from the Office of the Prosecutor-General of the Russian Federation No. 82/1-5100-15, 20 October 2016 (Annex 50).

⁸⁰³ Letter from the Office of the Prosecutor-General of the Russian Federation No. 82/1-5099-15, 16 November 2016 (Annex 52).

⁸⁰⁴ Letter from the Office of the Prosecutor-General of the Russian Federation No. 87-200-2015, 29 February 2016 (Annex 53).

time the Prosecutor General received the request, V.A. Starkov had already been convicted, which was an automatic reason for refusing legal assistance.⁸⁰⁵

- (k) *The Request dated 23 March 2017 in respect of a member of the Russian armed forces A.A. Sinelnikov.* This request did not mention the ICSFT or any terrorism-financing offence; instead, it contained various charges, including Article 438 (“Violation of laws and customs of war”), Article 437 (“Planning, preparation for, instigating and waging aggressive war”), Article 258-3 (“Creation of a terrorist group or organisation”), and Article 258 (“Terrorist act”) of the Criminal Code of Ukraine which do not fall within the ICSFT. The Prosecutor General had to refuse assistance because it could harm the sovereignty, security and other vital interests of the Russian Federation and there were clear signs of political motivation behind criminal prosecution.⁸⁰⁶
- (l) *The Request dated 14 November 2017 in respect of the Russian citizen G.L. Kornilov.* This was the *only* request that alleged the offence of terrorism financing (funding of an alleged “terrorist organisation” under Article 258-3 of the Criminal Code of Ukraine). However, even that request did not invoke or otherwise refer to the ICSFT. The Prosecutor General had to refuse assistance because it could harm the sovereignty, security and other vital interests of the Russian Federation and there were clear signs of political motivation behind criminal prosecution.⁸⁰⁷

616. As the above summary makes clear, in each case the Russian Federation either had legal grounds to refuse assistance to the Ukrainian authorities per the applicable international treaties or did in fact provide assistance to Ukraine. In any case, the MLAT requests did not concern the ICSFT and even terrorist-financing in general was mentioned only in one request.

617. In the Reply, Ukraine also fails to observe that, pursuant to Article 12(5) of the ICSFT, Ukraine had an obligation to comply with the order (procedure) of mutual legal assistance

⁸⁰⁵ Letter from the Office of the Prosecutor-General of the Russian Federation No. 82/1-6425-15, 13 September 2016 (Counter-Memorial (ICSFT), Annex 41).

⁸⁰⁶ Letter from the Office of the Prosecutor-General of the Russian Federation No. 82/1-1897-17, 28 February 2019 (Annex 55).

⁸⁰⁷ Letter from the Office of the Prosecutor-General of the Russian Federation No. 82/1-5598-17, 19 December 2018 (Annex 56).

set by MLA treaties in force between the Russian Federation and Ukraine. The Russian authorities rejected or postponed the performance of Ukraine's requests based on the failure of the Ukrainian authorities to comply with the applicable treaty requirements.

618. Below are just a few examples of Ukraine sending incomplete or otherwise unworkable MLA requests:

- (a) Ukraine's MLA request for interrogation of witnesses, which lacked the description of the crime that those witnesses had allegedly seen happen;⁸⁰⁸
- (b) Ukraine's MLA request that does not provide the causal link between the factual circumstances described and the qualification of the offence, or information about the criminal proceedings in question;⁸⁰⁹
- (c) Ukraine's MLA request for interrogation of witnesses that does not specify their addresses and dates of birth, in contravention of the 1999 Legal Assistance Convention and the 1959 Legal Assistance Convention;⁸¹⁰
- (d) Ukraine's MLA request that alleges that several officers of the Federal Security Service of the Russian Federation may have committed treason (whereas as per the Criminal Code of Ukraine only Ukrainian citizens could be convicted for this crime).⁸¹¹

619. Taking into consideration these multiple deficiencies, in multiple instances it was impossible to provide the requested assistance in full. Insofar as it was possible, the Russian Federation relayed to Ukraine the information and documents sought.

620. Remarkably, Ukraine also omits that when it was the Russian authorities who requested legal assistance on terrorism-related charges from the Ukrainian authorities based on the

⁸⁰⁸ Letter from the Office of the Prosecutor-General of the Russian Federation No. 82/1-2791-15, 25 September 2015 (Annex 54).

⁸⁰⁹ Letter from the Office of the Prosecutor-General of the Russian Federation No. 82/1-580-17, 22 June 2017 (Annex 57).

⁸¹⁰ Letter from the Office of the Prosecutor-General of the Russian Federation No. 82/1-3545-15, 11 February 2016 (Annex 58).

⁸¹¹ Letter from the Office of the Prosecutor-General of the Russian Federation No. 82-1-2445-15, 17 February 2016 (Annex 59).

same MLA treaties, the latter consistently denied the MLAT requests on the substantially the same grounds. For example:

- (a) In November 2018, one of the leaders of the Ukrainian nationalist battalion National Corps Konstantin Nemichev arranged a violent attack on the Russian Consulate at Kharkov. The Russian authorities sent a MLAT request to Ukraine for Mr Nemichev's interrogation.⁸¹² However, the Ukrainian authorities denied assistance on the ground that it may prejudice Ukraine's sovereignty or security.⁸¹³
- (b) In March 2016, there was a similar attack on the Russian Embassy in Kiev. The Russian Federation sent five MLAT requests to Ukrainian authorities, seeking to interrogate witnesses of the attack. However, Ukraine denied all five MLAT requests on the ground that a different investigation proceeding was ongoing in Ukraine, without disclosing any details of that investigation.

621. Accordingly, Ukraine failed to establish that the Russian Federation breached its obligations under Article 12 of the ICSFT.

E. ARTICLE 18: THE RUSSIAN FEDERATION HAS NOT VIOLATED ITS OBLIGATIONS TO COOPERATE IN THE PREVENTION OF TERRORISM FINANCING

622. Article 18 requires States to prevent terrorism financing by certain specific means, that is, by cooperating in the prevention of these offences by establishing a regulatory framework and by taking certain specific steps aimed at hindering terrorism financing operations in their territories. Ukraine's claim that the Russian Federation failed to comply with this obligation is wrong because that obligation requires establishment of a regulatory framework for the prevention of terrorism-financing (i), which the Russian Federation successfully did and (ii) Ukraine failed to disprove.

i. Article 18(1) imposes only an obligation to establish a regulatory framework for the prevention of the financing of terrorism

623. Article 18(1) provides that "States Parties shall cooperate in the prevention of the offences set forth in article 2 by taking all practicable measures, *inter alia*, by adapting their

⁸¹² Russian Federation General Attorney's Request for assistance, 23 September 2021 (Annex 455).

⁸¹³ Ukraine's General Attorney Office Letter, 9 February 2022, (Annex 454).

domestic legislation, if necessary, to prevent and counter preparations in their respective territories for the commission of those offences within or outside their territories, including [...]”. Article 18(2) provides that “States Parties shall further cooperate in the prevention of offences set forth in article 2 by *considering*” (emphasis added) certain measures. Article 18(3) provides for sharing of information and coordinating of administrative and other measures” and Article 18(4) provides for exchanging of information through the INTERPOL.

624. In its Memorial, Ukraine quoted language from Article 18(1),

Article 18 of the ICSFT requires States to “cooperate in the prevention of the [terrorism financing] offenses set forth in article 2.” That obligation includes “taking all practicable measures . . . to prevent and counter preparations in their respective territories for the commission of those offenses within or outside their territories.”⁸¹⁴

625. Ukraine then proceeded to make very broad charges of violations of Article 18, without identifying which paragraphs of Article 18 have been violated, showing that it based its Article 18 allegations on Article 18(1) only. In its Reply, it seized upon the wording “all practicable measures, *inter alia* [...]” in Article 18(1) and repeated its charges against the Russian Federation, and again without identifying which paragraphs of Article 18 have been violated. This affirmed that Ukraine based all its Article 18 allegations on Article 18(1) only, and the Russian Federation will also address Article 18(1) only.

626. Ukraine’s broad allegations of violations of Article 18 by the Russian Federation show that Ukraine reads Article 18(1) as providing for a general duty to prevent the financing of terrorism. Ukraine grounds this general duty on the wording “all practicable measures, *inter alia* [...]” in Article 18(1), taken at face value, and considered capable of holding any and all instances of alleged failure to prevent the financing of terrorism. For Ukraine, “all” means any and all, while “*inter alia*” means “among other things”, and what follows “*inter alia*” is just one practical measure among many.⁸¹⁵

⁸¹⁴ Memorial, ¶296.

⁸¹⁵ *Ibid.*, ¶311.

627. Ukraine’s argument fails. As the Russian Federation made clear in its Counter-Memorial, Article 18(1) imposes upon States parties only a duty to establish a regulatory framework for the prevention of the financing of terrorism.⁸¹⁶

628. In this respect, Ukraine alleges that:

“Article 18(1) further provides that “all” such measures must be taken. “All” means all, and not, as Russia expressly argues, only “certain” measures. 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.”⁸¹⁷

629. Article 18(1), however, does not exist in isolation. Ukraine’s interpretation of this article contradicts both Articles Article 18(2), which states that:

“2. States Parties shall further cooperate in the prevention of offences set forth in article 2 by considering:

(a) Measures for the supervision, including, for example, the licensing, of all money-transmission agencies...”

630. If Ukraine’s logic were correct, and Article 18(1) indeed covered all possible measures under the sun, Article 18(2), which merely requires the States Parties to *consider* implementing certain *further* measures would be superfluous.

631. Whether or not Article 18(1), especially the use of the phrase “all practicable measures, *inter alia*”, is a model of advisable drafting, interpreters of the language are not entitled to just take that language at face value so as to read it as including any practicable measures. Generic or general terms must be given concrete content by reading them in context, with due regard to the object and purpose of the treaty and the particular provision at issue, and with the assistance of supplementary means. This finds support in the Court’s judgment in *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, where the phrase “principles of sovereign equality” in Article 4(1) of the Palermo Convention was not interpreted as incorporating all rules and principles that can be put in the basket called “sovereign equality”, but was given meaning by reading it together with other provisions of that convention.⁸¹⁸

⁸¹⁶ Counter-Memorial (ICSFT), ¶¶579-592.

⁸¹⁷ Reply, ¶310.

⁸¹⁸ *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, I.C.J. Reports 2018, pp. 321, 324, ¶¶92-93, 102.

632. In this case, we must keep in mind that often when “*inter alia*” is used, the general term preceding the phrase “*inter alia*” and the concrete illustrations following that phrase both refer to things of the same genre, rather than creating a completely opening ended obligation. Regarding Article 18(1) of the ICSFT, this view is strengthened by the French version—the original version of the ICSFT—where the word “*notamment*” was used instead of “*inter alia*”. “*Notamment*”, or “notably” in English — which means “especially, particularly” — is usually used to refer to a more prominent item among the same category of things, rather than to any item among a hodgepodge of disparate items. Thus, the *Merriam-Webster Dictionary* illustrates this sense of the word “notably” by giving this sentence, “other powers, notably Britain and the United States”, which clearly shows the general term “other powers” preceding the phrase “notably” and the concrete illustrations following that phrase both refer to things of the same genre — powers. Illustrations of this usage can be found in the jurisprudence of the Court. For example, this is the sense in which the Court used the word “notably” in a 2015 judgment in the joint cases between Costa Rica and Nicaragua: “[Costa Rica] further reproaches Nicaragua with conducting works (notably dredging of the San Juan River) in violation of its international obligations”.⁸¹⁹ [Emphasis added] Here the word “works” must be interpreted as referring to the same category as what follows “notably”, that is, “dredging of the San Juan River”, rather than to just any kind of “works”.

633. The same obtains with the judgment in *Djibouti v. France*, where the Court said:

“Djibouti claims that these witness summonses have violated international obligations, both conventional and deriving from general international law, notably the principles and rules governing the diplomatic privileges, prerogatives and immunities laid down in the Vienna Convention on Diplomatic Relations of 18 April 1961 and the principles established in the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents of 14 December 1973.”⁸²⁰ [Emphasis added]

634. Here “general international law” must be interpreted as referring to “rules of general international law” in the same category as what follows “notably”, i.e., principles and rules on privileges and protection of special categories of persons, rather than any general

⁸¹⁹ *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. 665, ¶1.

⁸²⁰ *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, I.C.J. Reports 2008, p. 240, ¶181.

international law rules. The general term refers to the same genre of “things”, rather than things from different genres. In the same vein, “all practicable measures” in Article 18(1) of the ICSFT refers to legislative or regulatory measures in place (or regime) before the conduct at issue takes place.

635. Furthermore, this view finds support in the drafting history. The original proponent and drafter of the ICSFT, France explained the rationale behind the preventive measures in its draft Article 17 (now Article 18) thus:

“10. *Preventive measures based on generally accepted principles followed in combating money-laundering (art. 17).* All magistrates and police investigators who were consulted prior to and during the drafting of this convention emphasized one point in particular: it is very difficult to find evidence in financial cases. Consequently, this convention includes a number of provisions which are directly based on generally accepted principles followed in combating money-laundering, and which are designed to encourage States to adopt domestic measures to require financial institutions to improve the identification of their usual or occasional customers, notably by prohibiting the opening of anonymous accounts, formally identifying account holders, and preserving for at least five years the necessary documents in connection with the transactions carried out.”⁸²¹

636. This explanation confirms that the drafters used the term “*inter alia*” to highlight that, if necessary, the States Parties were also required to modify their existent legislation to implement the measures listed in points (a) – (b) of the same Article.

637. Ukraine also attaches significance to the term “prevention” used in Article 18. Ukraine highlights that the only other instance that it appears is the ICSFT’s preamble and alleges in this respect that:

“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”.⁸²²

638. Ukraine’s interpretation is incorrect. The term “prevention” indeed appears in the preamble of the ICSFT twice, both times in relation to domestic legislation:

“*Recalling* General Assembly resolution 51/210 of 17 December 1996, paragraph 3, subparagraph (f), in which the Assembly called upon all States

⁸²¹ UN General Assembly, Ad Hoc Committee, Third Session, Draft international convention for the suppression of the financing of terrorism, Working document submitted by France, 11 March 1999, A/AC.252/L.7/Add.1, ¶2-3. Available at: https://digitallibrary.un.org/record/1490608/files/A_AC.252_L.7_Add.1-EN.pdf

⁸²² Reply, ¶312.

to take steps to prevent and counteract, through appropriate domestic measures, the financing of terrorists and terrorist organization ...

...and in particular to consider, where appropriate, adopting regulatory measures to prevent and counteract movements of funds suspected to be intended for terrorist purposes...” [Emphasis added.]

639. This is further indicative of the drafters’ intent to induce the States Parties to link the aim of prevention of terrorism-financing offences.

640. Finally, Ukraine suggests that:

“‘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”.⁸²³

641. Here, Ukraine misreads the term “cooperation” used in Article 18, alleging that:

“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.”⁸²⁴

642. This is not a correct interpretation of this term, particularly in the overall context of Article 18. This Article provides that the States Parties must adopt new, or adapt the existing legislation, to conform to the internationally recognised standards, which enables cooperation between the States Parties.

643. The above interpretation is also consistent with the undisputed “obligation of conduct” nature of Article 18. Whereas a State may strive to adopt all reasonable measures to prevent terrorism-financing, it is inevitable that some offences will slip through the cracks. Contrary to Ukraine, the Russian Federation does not allege that such offences should be left unpunished; this punishment, however, would remain outside the scope of Article 18. Ukraine’s attempts to read into this Article a State Party’s international responsibility for every instance where, notwithstanding the existing legislation, an offence has occurred. Following this logic, Ukraine accuses the Russian Federation of not having taken very specific “measures”, which, it invented in hindsight. This interpretation of Article 18 is plainly unreasonable and should be rejected.

⁸²³ Reply, ¶309.

⁸²⁴ Reply, ¶304.

644. Accordingly, the drafters of Article 18(1) of the ICSFT clearly have in mind regulatory regime matters and not any other measures.

ii. Ukraine has failed to demonstrate that the Russian Federation did not take regulatory measures to combat terrorism-financing

645. Ukraine has made broad allegations that the Russian Federation breached its Article 18 obligation to prevent terrorism financing. With regard to specific alleged instances of terrorism, the duty to prevent the financing of terrorism cannot be breached until terrorism has been committed. This is the lesson from the Court's holding in *Bosnia Genocide* that:

“... a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed. It is at the time when commission of the prohibited act (genocide or any of the other acts listed in Article III of the Convention) begins that the breach of an obligation of prevention occurs.”⁸²⁵

646. In this case, Ukraine failed to establish even a single act of terrorism and accordingly there is no question of any failure to prevent the financing of terrorism.

647. In its submissions, Ukraine requests that the Court hold the Russian Federation in violation of its obligations under Article 18 of the ICSFT by failing to designate the DPR and LPR as terrorist organisations; by failing to stop fundraising for the DPR and LPR in the Russian Federation, by failing to police its borders to prevent the transfer of weapons and resources to the DPR and LPR, and because Russian officials engaged in financing the DPR and LPR.⁸²⁶ However, these allegations do not plead a breach of Article 18 of the ICSFT.

648. As highlighted above, Ukraine grounds its Article 18 allegations on Article 18(1), and without identifying other paragraphs in Article 18 as the basis for its allegation. Yet, as elaborated above, Article 18(1) only provides for adopting a regulatory framework rather than requiring the prevention of specific incidents of terrorism financing. None of the above allegations fall within the ambit of Article 18(1).

⁸²⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, I.C.J. Reports 2007 (I), p. 90, ¶431.

⁸²⁶ Reply, ¶734(a).

649. Properly speaking, to make out a claim of violation of Article 18(1) would entail proving a failure to establish regulatory regimes for the prevention of terrorism financing. Yet Ukraine failed to show any examples of non-adoption of such an appropriate regulatory framework.
650. In any event, the Russian criminal code includes articles that provide for severe punishment for involvement in terrorist activities, in particular Articles 205, 205.1, 205.2. Those are regularly implemented articles, imposing liability for terrorism and terrorism financing shall be considered as a proper practicable measure to combat terrorism. As noted above, Article 18 of the ICSFT is a provision specifically designed to establish an obligation to cooperate in the prevention of the financing of terrorism by taking certain legislative and administrative measures rather than containing a general obligation to prevent specific acts of terrorism financing.
651. For the above reasons, Ukraine has failed to make out its claims under Article 18.

SUBMISSIONS ON PART 1

652. In view of the foregoing, the Russian Federation respectfully requests the Court to dismiss all of the claims made by Ukraine under the ICSFT.

Agent of the Russian Federation



Alexander V. SHULGIN

The Hague, 10 March 2023

PART 2
APPLICATION OF THE INTERNATIONAL CONVENTION ON THE
ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

I. INTRODUCTION

653. This part of the Rejoinder addresses Ukraine's claims under the CERD Consistent with the Counter-Memorial (CERD), which is maintained in full, the Russian Federation will respond to the Reply and again show that those claims are without any merit. The Russian Federation has always been a strong supporter of the CERD and takes its obligations arising thereunder seriously. The "systematic racial discrimination campaign" alleged by Ukraine is nothing but a work of fiction that could not be further away from reality.

654. Before turning to Ukraine's specific arguments, four general observations are warranted:

- (a) First, Ukraine's entire case is based on a false narrative. Ukraine portrays the situation in Crimea before 2014 as one where different ethnic groups' rights under the CERD were fully respected. In fact, however, for many years Ukraine consistently neglected and mistreated them. The well-being of the ethnic groups living in Crimea, including Crimean Tatars, has significantly improved since 2014.
- (b) Second, Ukraine's case is based on flawed, misleading and unreliable evidence, most often emanating from sources that are detached from the reality on the ground in Crimea, do not represent the Crimean population or the ethnic groups living there, and are associated with the Ukrainian Government itself. Regarding the latter, the impartiality of these sources could not be taken for granted.
- (c) Third, it is self-evident that the true purpose of Ukraine's case under the CERD is to challenge the status of Crimea. It is telling in this regard that Ukraine does not plead a case for all Crimean Tatars and Ukrainians living in the whole of the Russian Federation, but only those present in Crimea. Indeed, Ukraine simply cannot show that the Crimean Tatars and Ukrainian communities living in Crimea are treated differently from those living elsewhere in the Russian Federation.
- (d) Fourth, Ukraine seeks to found its grave allegations of a "systematic racial discrimination campaign" targeted against Tatar and Ukrainian communities in Crimea on the basis of the conflation of unconnected allegations, which are unrelated to issues of racial discrimination. These allegations are not only unsubstantiated, but also do not prove the existence of a "systematic campaign"

alleged by Ukraine or any intention on the part of the Russian Federation to engage in any such campaign.

A. RUSSIA’S ONGOING SUPPORT OF CRIMEAN TATARS AND ETHNIC UKRAINIANS IN CRIMEA

655. The Counter-Memorial (CERD), described the various measures that the Russian Federation undertakes to support Crimean Tatars and Ukrainians in Crimea. It is telling that Ukraine simply ignores these facts. It is necessary to briefly recall them in this Rejoinder. The measures taken for the benefit of these communities would have never been adopted if Ukraine’s allegation of a “systematic racial discrimination campaign” had some truth to it. Clearly, it does not.

656. It is worth recalling that the first step taken by the Russian Federation in Crimea was the rehabilitation of several groups of ethnic minorities that had suffered from deportation during the Soviet times. In April 2014, President Putin declared the following:

“... We certainly need to do everything we can to rehabilitate and restore the legitimate rights and interests of the Crimean Tatar people at a time when Crimea is joining the Russian Federation.

... That is why my colleagues in the Government and the Presidential Executive Office and I are now preparing an executive order on the rehabilitation of the Crimean Tatars.”⁸²⁷[Emphasis added]

657. The representatives of different ethnic groups in Crimea have praised the positive measures taken by the Russian authorities. In particular, during a meeting of President Putin with the representatives of the Crimean Tatar, Jewish, Ukrainian and Greek communities, the Head of the Qirim Interregional Crimean Tatar Public Movement, Mr Remzi Ilyasov, stated:

“I represent and head the Qirim public movement of the Crimean Tatar people. From the outset, we established a 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. We are participating in all Crimea-wide events held in the Republic of Crimea and are organising and holding Crimean Tatar celebrations.

Thanks to the initiative and active work by members of the Qirim public movement of Crimean Tatar people, during the elections to the State Council

⁸²⁷ Direct Line with Vladimir Putin, President of Russia (17 April 2014), available at: <http://en.kremlin.ru/events/president/news/20796> (Memorial, Annex 51).

and local offices, we were able to reduce a certain amount of political conflict and ethnic tensions.”⁸²⁸

658. Likewise, the Head of the Ukrainian Ethnic and Cultural Community in City of Simferopol District, Mr Oleg Kravchenko, stressed the peaceful coexistence of different ethnic groups in Crimea:

“Despite the many attempts to distort the facts about the Ukrainian population’s life in the Republic of Crimea, I want to tell you that Crimea is a land of calm, of constructive creativity and communication between all ethnic groups. We maintain relations with everyone.

We are a relatively young organisation within the framework of Russian legislation, but now we are building momentum and creating a regional organisation; we are forming chapters in all the cities and representation in all municipalities. We maintain relations with the Ukrainian population through our community in Ukraine and we are trying to convey to them that ethnic Ukrainians’ choice for Crimea, which we declared at the referendum on Crimea’s accession to the Russian Federation, was a conscious decision by ethnic Ukrainians and there is no need for speculation, there is no need to make some sort of interpretation, which has been happening very often lately.”⁸²⁹

659. As the Russian Federation described in the Counter-Memorial, the Rehabilitation Decree on 21 April 2014 sets general framework for the support of ethnic minorities that had suffered from deportation during the Soviet times, particularly Crimean Tatars.⁸³⁰ Thus Decree is implemented in Crimea through local legislation. For example, the Law No. 38-ZRK of 31 July 2014 provides for a simplified procedure for the registration and legalization of land and real property in order to address the core problems encountered before 2014 by Crimean Tatars, who did not always possess official documents proving their ownership title.⁸³¹ These measures are aimed at resolving a decades-long problem by Crimeans previously ignored by Ukraine.

660. The Russian Federation also showed that “substantial financial resources have been budgeted yearly for the socio-economic development of the ethnic minorities as part of their rehabilitation under the Federal Target Program for the period till 2025 (from 10.36

⁸²⁸ President of the Russian Federation official website, “Meeting with representatives from Crimean ethnic groups’ public associations”, Yalta, 17 August 2015, pp.3,14 available at: <http://en.kremlin.ru/events/president/news/50140> ((Counter-Memorial (CERD), Annex 460)).

⁸²⁹ *Ibid.*

⁸³⁰ Counter-Memorial (CERD), Annex 63.

⁸³¹ Counter-Memorial (CERD), ¶63.

million roubles⁸³² in 2015 to 2.497 billion roubles⁸³³ in 2018 and 3.473 billion roubles⁸³⁴ in 2022)".⁸³⁵ To date, these resources have been used to foster development of the residential real estate and public facilities, construction of water and energy supply communications and improvement of infrastructure in the clusters predominantly inhabited by Crimean Tatars, as well as to grant financing to the families in order to upgrade their housing conditions.

661. Crimean Tatar and ethnic Ukrainian children study in newly built schools and kindergartens if they so choose in their own languages.⁸³⁶
662. The Russian Federation has also ensured the provision of finance⁸³⁷ and housing,⁸³⁸ implementing targeted social security programs⁸³⁹ as well as support for ethnic group's practice of different religions.⁸⁴⁰
663. In addition, the Russian authorities have worked in the development of schools,⁸⁴¹ monuments,⁸⁴² museums,⁸⁴³ theatres⁸⁴⁴ and religious facilities⁸⁴⁵, all of which preserve and promote history, traditions and culture of the Crimean Tatar and Ukrainian communities. People whose mother tongue is Crimean Tatar or Ukrainian, have access to several media outlets in those languages that are subsidized by State funds. This includes

⁸³² Circa 185 000 USD.

⁸³³ Circa 43 000 000 USD.

⁸³⁴ Circa 53 000 000 USD.

⁸³⁵ Counter-Memorial (CERD), ¶68.

⁸³⁶ Second Witness Statement of Aider Serverovich Ablyatipov, Annex 13, ¶¶7, 15.

⁸³⁷ Counter-Memorial (CERD), ¶68.

⁸³⁸ *Ibid.*, ¶69.

⁸³⁹ *Ibid.*, ¶71.

⁸⁴⁰ Witness Statement of ██████████, 9 June 2021, ¶¶29-43 ((Counter-Memorial (CERD), Annex 19)).

⁸⁴¹ Counter-Memorial (CERD), ¶72.

⁸⁴² Witness Statement of ██████████ ██████████, 22 April 2021, ¶34 ((Counter-Memorial (CERD), Annex 8)); Witness Statement of ██████████ ██████████, Annex 29, ¶5.

⁸⁴³ Counter-Memorial (CERD), Annex 498, pp. 7-12.

⁸⁴⁴ Counter-Memorial (CERD), Annex 498, pp. 21-24; Witness Statement of ██████████ ██████████, Annex 14, ¶¶5-9.

⁸⁴⁵ Counter-Memorial (CERD), ¶77; Witness Statement of ██████████ ██████████, 9 June 2021, ¶¶29-38 ((Counter-Memorial (CERD), Annex 19)).

the first actual Crimean Tatar TV channel which makes more than 80% of its content in Crimean Tatar language.⁸⁴⁶

664. Furthermore, over 200 newly published books on history and culture of various peoples of Crimea, including Crimean Tatars and Ukrainians, have been made available by the efforts of the Gasprinsky Media Centre. (the Centre funded by the Crimean State Committee on inter-ethnic relations, whose main objectives are support for ethnic media and publication of the books related to various ethnic communities of Crimea). Only in 2022, the Centre hosted or promoted more than 25 public events with a focus on Tatar and Ukrainian culture.⁸⁴⁷ The overall number of public events related to Ukrainian or Crimean Tatar culture is much higher, as Crimean Ministry of Culture invests unparalleled efforts in arranging and facilitating them throughout the peninsula.⁸⁴⁸
665. The Russian Federation also provides essential support for regions in Crimea predominantly inhabited by Crimean Tatar communities by investing significant resources in their infrastructure. This has improved the living conditions for many families, boosted their social and economic development as they were neglected by the Ukrainian authorities for decades. By 2023 the Russian Federation managed to provide in Crimea 76,9 kilometers of gas supply networks; 73,7 kilometers of electrical grid; 49 kilometers of water supply networks; and 21,7 kilometers of roads.⁸⁴⁹
666. The funds allocated by State to these projects amount to 17,3 billion roubles (over 200 million US Dollars). These public investments are naturally in addition to other infrastructure projects that are undertaken throughout Crimea for the benefit of all its inhabitants.
667. Other projects undertaken by Russian authorities include:

⁸⁴⁶ ANO OKTRK, Letter, 8 February 2023 (Annex 173); Witness Statement of [REDACTED], Annex 33, ¶¶19-25.

⁸⁴⁷ Letter of State Autonomous Institution of the Republic of Crimea «Ismail Gasprinskiy Media Center», Information about the work of Ismail Gasprinskiy Media Center, 2 March 2023, Annex 37, ¶25.

⁸⁴⁸ Witness Statement of Tatyana Anatolyevna Manezhina, Annex 16; Counter-Memorial (CERD), Annex 498, pp. 2-7; Witness Statement of [REDACTED], 31 May 2021, ¶¶19-23 ((Counter-Memorial (CERD), Annex 16)); Second Witness Statement of [REDACTED], Annex 10, ¶14.

⁸⁴⁹ State Committee for Inter-ethnic Relations of the Republic of Crimea, Information for MFA (from 2014 to 2022 and plans for 2023), ¶2, Annex 481.

- (a) The construction of the Suren Complex, a landmark site for all the formerly deported peoples including Crimean Tatars has been completed.⁸⁵⁰ The allocation of over 451,68 million roubles (over 6 million US Dollars) for this project has led to the creation of a modern memorial complex, that would allow future generations of Crimean Tatars to better understand their history;
- (b) A land plot has been assigned for the construction of new premises for Feodosia School No. 20, which offers its students a complete primary and basic general education in Ukrainian.⁸⁵¹ Around 500 million roubles (over 6,5 million US Dollars); will be allocated for this project.
- (c) In 2022 more than 300 apartments were granted to Crimean Tatar families by the State in an effort to improve their living conditions. It is planned that 1,262 additional apartments will be provided in the near future. Furthermore, more than 167 million roubles of State funds (over 2,2 million US Dollars) have been provided as grants to more than 850 families of formerly deported peoples, mainly Crimean Tatars, for private housing projects.⁸⁵²
- (d) The State budget of the Russian Federation has allocated to the reconstruction of the Khan Palace amount to a total investment of nearly USD 50 million (RUB 3.6 billion).⁸⁵³
- (e) Construction process of a large Cathedral Mosque in Simferopol is in its final stages. The work is planned to be completed by July 2023. The Mosque grounds are currently being refurbished. Construction of the Mosque was planned in Ukraine in early 2000-s, but only started in 2015, after Crimea's reunification with the Russian Federation.⁸⁵⁴

⁸⁵⁰ Witness Statement of ██████████, Annex 29, ¶5.

⁸⁵¹ Witness Statement of Valentina Vasilyevna Lavrik, Annex 25, ¶14.

⁸⁵² Council of Ministers of the Republic of Crimea, Letter No. 1/01-46/8775/3/3/214, 14 February 2023 (Annex 38).

⁸⁵³ See below, Chapter XI, Section A.

⁸⁵⁴ Witness Statement of ██████████, ¶¶35-38 (Counter-Memorial (CERD), Annex 19).

- (f) The Crimean Center for Multiethnic Youth Culture of the Crimean Engineering and Pedagogical University is currently under construction now. More than 532 million roubles (circa 8 million USD) have been invested in this project.⁸⁵⁵
- (g) In 2020 and 2022, 6 million roubles were allocated to non-governmental organization “the Ukrainian Community of Crimea” per year in order to finance the functioning of the Ukrainian website “Pereyaslavs’ka Rada 2.0”, which provides coverage of the events related to Ukrainian language and culture.⁸⁵⁶
- (h) All along, the Russian Federation continues to provide support to various educational and cultural undertakings arranged by Tatar and Ukrainian civil society institutions, such as the “Armanchik”, “Ukrainian Community of Crimea”, “Crimean regional public organization for support and promotion of Crimean Tatar culture and art”⁸⁵⁷ and others.

668. While Ukraine, which did not effectively allow Crimean Tatars to take full part in the political life of peninsula,⁸⁵⁸ the Russian Federation efficiently implements inclusion practices. It encourages Tatar representatives to engage with local policy and to enter representative bodies. This has allowed more than 450 ethnic Tatars to be elected as deputies of various municipal and regional bodies.

669. The Russian Federation’s consistent efforts to support all of the Crimean population without any distinction have not gone unnoticed by the Crimean Tatar community itself. In August 2019 the Forum of the Crimean Tatar Social-Political Powers and the Crimean Tatar Council issued a declaration, in which they praised the Russian Federation’s measures to rehabilitate the Crimean Tatar people as well as enumerated multiple achievements that they obtained after the Crimean Republic reunited with the Russian Federation.⁸⁵⁹

⁸⁵⁵ Council of Ministers of the Republic of Crimea, Letter No. 1/01-46/8775/3/3/214, 14 February 2023 (Annex 38).

⁸⁵⁶ *Ibid.*

⁸⁵⁷ Letter of State Autonomous Institution of the Republic of Crimea «Ismail Gasprinskiy Media Center», Information about the work of Ismail Gasprinskiy Media Center, 2 March 2023, Annex 37, p. 4.

⁸⁵⁸ Witness Statement of Ervin Kyazimovich Musaev, Annex 33.

⁸⁵⁹ Facebook, *Ruslan Balbek, Forum of the Crimean Tatar Social-Political Powers, Declaration* (17 August 2019) available at

670. Indeed, Russia’s efforts are in stark contrast with Ukraine’s previous behaviour. As noted by a report produced by the OSCE in 2013 “The Integration of Formerly Deported People in Crimea, Ukraine”:

“Nearly a quarter of a century has passed since the members of the communities that were deported on ethnic grounds began returning to Crimea in large numbers. The passing of time has not resolved all problems in Crimea; if anything, it has made them worse.”⁸⁶⁰

B. UKRAINE’S CASE IS ARTIFICIAL AND BASED ON FLAWED EVIDENCE

671. Ukraine’s case continues to be based on flawed evidence that do not come near proving the serious accusations that it has made against the Russian Federation

672. “Evidence” put forward by Ukraine stems from individuals who do not have first hands knowledge of the situation in Crimea. This includes former members of the Mejlis who, as shown in the Counter-Memorial and again in this Rejoinder, have done nothing but acting to the detriment of the Crimean Tatars, not least orchestrating blockade of the peninsula that severely affected its inhabitants.

673. In its groundless accusations Ukraine also extensively relies on the Reports produced by the OHCHR, the concrete findings of which are dealt with in more detail below. However, as a preliminary remark, it is worth underlining that the OHCHR has never suggested that there was a “systematic racial discrimination” planned and deployed by the Russian Federation against Crimean Tatar and Ukrainian communities in Crimea, as Ukraine falsely claims in the present case.

674. Moreover, the OHCHR reports on the situation in Crimea can hardly be treated as compelling and full evidence. This is because the OHCHR has not visited Crimea to collect evidence first-hand, in spite of the Russian Federation’s invitations to do so.⁸⁶¹

https://www.facebook.com/story.php?story_fbid=pfbid031LDapErFLdRtZmnJVUqtfcUsSzefqQZNcEPCvdVagh8MM9CaYvf57UDFEJJ84gntl&id=100009094776367&mibextid=Nif5oz (Annex 484).

⁸⁶⁰ OSCE, The Integration of Formerly Deported People in Crimea, Ukraine: Needs assessment, 16 August 2013, pp. 30-31, available at: <https://www.osce.org/files/f/documents/e/a/104309.pdf>.

⁸⁶¹ See below, ¶1064.

675. Being aware of shortcomings of its case, Ukraine seeks to bolster its position by referring to the special military operation,⁸⁶² which has no relation to the allegations of Ukraine in the present case.

C. STRUCTURE OF THIS PART

676. This part of the Rejoinder is structured as follows:

- (a) **Chapter II** shows that Ukraine's claims under the CERD are precluded by virtue of the clean hands doctrine.
- (b) **Chapter III** shows that Ukraine's claims are manifestly outside the scope and subject-matter of the dispute as defined by the CERD and the Court.
- (c) **Chapter IV** responds to Ukraine's allegations regarding the ban of the Mejlis.
- (d) **Chapter V** shows that there is no racial discrimination with respect to education targeted against Crimean Tatars and ethnic Ukrainians in Crimea.
- (e) **Chapter VI** addresses Ukraine's allegations regarding alleged disappearances, murders, abductions and torture of Crimean Tatars and Ukrainians.
- (f) **Chapter VII** shows the absence of racial discrimination in the context of law enforcement measures.
- (g) **Chapter VIII** addresses the alleged violations of the CERD with respect to matters of citizenship.
- (h) **Chapter IX** responds to Ukraine's accusations regarding public events.
- (i) **Chapter X** shows that there is no racial discrimination of the Crimean Tatar and Ukrainian Media in Crimea.
- (j) **Chapter XI** responds to Ukraine's accusations with respect to the preservation of cultural heritage.

⁸⁶² Reply, ¶379.

- (k) **Chapter XII** will show that the Russian Federation has not violated the Court's Order on provisional measures.

II. UKRAINE'S CLAIMS UNDER THE CERD ARE PRECLUDED BY VIRTUE OF THE CLEAN HANDS DOCTRINE

677. As explained in Chapter II of Part One above, a State that seeks the assistance of the Court must do so with clean hands.⁸⁶³

678. The Russian Federation has set out in its Counter-Memorial Ukraine's misconduct related to the CERD. The Russian Federation showed Ukraine's wrongful policies that are inconsistent with the aim of ensuring peaceful coexistence among ethnic groups, including Russians. It was also explained that over the years Ukraine in fact threatened and discriminated against the Crimean Tatar community it now purports to protect.⁸⁶⁴ Ukraine did not deny these facts, and the Russian Federation considers that the conditions for applying the principle of clean hands are met.

679. As will be shown below, since 1991, Ukraine failed to protect ethnic groups in Crimea. In fact, prior to 2014 in Crimea representatives of different ethnic groups, including Crimean Tatars, regularly protested their situation, some even referring to it as "apartheid" and "racial discrimination."⁸⁶⁵

680. Notably, the CERD Committee itself was concerned about the situation with the Crimean Tatars, the Romas, the Karaites, the Rusyns (Ruthenians) in Ukraine and in 2006 noted that:

"8. Although it is not widespread, the Committee is nevertheless concerned about reports of vandalism of religious sites of minorities, such as defacing of synagogues in different areas of Ukraine, as well as of anti-Muslim and anti-Tatar statements by Orthodox priests in Crimea.

...

15. While noting that an important number of formerly deported persons have been repatriated to Crimea since 1990, the Committee is concerned about reports that only 20 per cent of Crimean Tatars have obtained plots of land, mainly in areas considered undesirable by them.

...

⁸⁶³ See above, Chapter II.

⁸⁶⁴ Counter-Memorial (CERD), ¶31.

⁸⁶⁵ Krymsky Analitik, *Photos. Crimean Tatars Demand that Yushchenko and Tymoshenko Stop Racial Discrimination in Ukraine* (18 May 2009), available at: <http://www.agatov.com/content/view/1451/19/> (Annex 98).

16. The Committee is concerned about the shortage of publications, in particular textbooks for schoolchildren, in minority languages other than Russian, and about reports that some textbooks contain historically inaccurate information about minorities.

...

18. The Committee notes with concern that cultural and religious sites, including cemeteries, of minorities such as the Crimean Tatars, the Karaites and the Roma, are reportedly often not registered or protected and that only very limited funds are allocated to the preservation of the cultural heritage of minorities by the State party;

...

20. The Committee is concerned about the absence of official recognition of the Ruthenian minority despite its distinct ethnic characteristics.”⁸⁶⁶

681. As the following sections will demonstrate, Ukraine fails to protect ethnic groups from violence and hate speech, objects of their cultural heritage are being vandalized, ethnic groups suffer from unemployment and lack of adequate housing. Moreover, progressive restrictions are being imposed on the use of the Russian language and culture. This Chapter will also show that following 2014 *coup d’etat* current regime in Kiev has been heavily influenced by extreme-right radicals deeply rooted in Nazi and fascist ideology. Modern Ukrainian neo-Nazis are heirs of the World War II Nazi collaborators and spread their ideology throughout the country.

682. As will be shown below, the rise of the extreme-right ideology rooted in Nazism in the modern Ukrainian has dramatic repercussions for ethnic communities in Ukraine, especially Russians.

683. These circumstances demonstrate how cynical allegations that Ukraine makes against the Russian Federation in this case are. As a result, the “clean hands” doctrine precludes Ukraine from making any valid claims under the CERD.

⁸⁶⁶ CERD, Consideration of Reports Submitted by States Parties under Article 9 of the Convention, Concluding Observations of the Committee on the Elimination of Racial Discrimination, Ukraine, CERD/C/UKR/CO/18, 8 February 2007, ¶¶8, 15-16, 18, 20, available at: <https://digitallibrary.un.org/record/585087>.

A. UKRAINE FAILED TO PROTECT ETHNIC MINORITIES LIVING ON ITS TERRITORY

i. Failure to protect minorities from racist violence

684. Ukrainian authorities have consistently allowed violence towards ethnic minorities. Reports of international organisations documented Ukraine's reluctance to prevent and properly investigate attacks of radicals against members of various ethnic groups.

685. In 2007, the Third Report of the European Commission against Racism and Intolerance ("ECRI") indicated "a worrying increase in racist violence by youth belonging to skinhead and neo-fascist groups" against foreigners, including immigrants, foreign students and even diplomats and family members of United Nations personnel.⁸⁶⁷ Various fascist actions were organised and information on their barbarities was published. Although the Ukrainian police could monitor and prevent the violence, for some reason they failed to do so:

"[S]kinhead activities appear to be organised and [] racist attacks occur regularly (at least once a week) in the largest cities such as Kiev, Odessa, Lviv, Kharkiv and in the Crimea. Skinhead and neo-fascist groups regularly hold public rallies and concerts where they make Nazi salutes and chant racist, xenophobic and antisemitic slogans. One such rally was reportedly held in Kiev on 3 March 2007 by 50 extremists near the city's Shulyavsky Market where most traders are from African and other developing countries. ECRI has also received reports of a torchlight procession held on campus on 18 March 2007 in Kharkiv by university students who chanted racist slogans. It appears that the university authorities authorised this event and that this is the third such demonstration in recent months... ECRI has also been informed that on April 20th, Adolf Hitler's birthday, there is a marked increase in skinhead violence and activities and that foreigners feel that they have to remain indoors on that day for their own safety. The authorities do not appear to have taken specific steps to either ban or curb such activities nor have special security measures been taken to protect those who may become the target of violence when these types of activities are held. As skinhead and neo-Nazi groups have officially registered websites and some publications, monitoring their activities appears to be possible."⁸⁶⁸ [Emphasis added]

686. The ECRI found reaction of Ukraine's authorities to such outrageous and provocative violence inadequate and stated with regret that "in general there is reluctance on the part

⁸⁶⁷ European Commission against Racism and Intolerance, Third report on Ukraine, 29 June 2007, p. 29, ¶117, available at: <https://rm.coe.int/third-report-on-ukraine/16808b5ca2>. See also *ibid.*, p. 10, ¶22 p. 25, ¶¶96, 118, 121.

⁸⁶⁸ *Ibid.*, p. 30, ¶119.

of the Ukrainian authorities to recognize the existence of violence by skinhead groups which they consider to be by and large sporadic acts of hooliganism.”⁸⁶⁹

687. The situation did not turn for the better at the time the Fourth Report of the ECRI was published in 2012.⁸⁷⁰ The report refers to numerous attacks against ethnic minority members which took place in Kiev and other major cities, when a higher degree of the public order is usually expected.⁸⁷¹ In constant threat of another attack from skinheads foreign students said they “tr[ie]d to be invisible” while moving around the city as no help from the police was expected.⁸⁷²

688. Because Ukrainian authorities failed to bring racially motivated violence to an end, this led to all increasing numbers of attacks against minorities. In 2017 Ukraine showed a twofold increase in number of Anti-Semitic manifestations.⁸⁷³ Among the registered acts of violence were (i) the beating of Alexander Dukovsky, Ukraine’s chief paediatric neurosurgeon on 17 March 2015 in Kiev; (ii) the killing of Israeli Rabbi Mendel Deitsch on 7 October 2016 in Zhitomir; (iii) the *pogrom* in Uman city synagogue on the eve of Jewish Hanukkah on 21 December 2016; and (iv) the attempted arson of the Lvov’s main synagogue on 30 June 2017 during “Shukhevich-fest” festival.⁸⁷⁴

689. The Fifth Report of the ECRI, published in 2017, also signifies multiple episodes of hostilities:

“Roma appear to be the most frequent victims of racist violence. For example, in February 2014, a group of about 15 people attacked four Roma households

⁸⁶⁹ *Ibid.*, p. 31, ¶122.

⁸⁷⁰ European Commission against Racism and Intolerance, ECRI Report on Ukraine (Fourth monitoring cycle), 8 December 2011, p. 19, ¶45, available at: <https://rm.coe.int/fourth-report-on-ukraine/16808b5ca5> (“ECRI remains concerned by the phenomenon of racist violence in Ukraine”).

⁸⁷¹ *Ibid.*, p. 19, ¶43 (“While incidents of desecration of cemeteries have continued to be reported in Ukraine, most racist incidents reported to the authorities or – more often – to civil society consist of physical attacks committed against foreign students, migrants, refugees, asylum seekers, Roma and other persons of non-Slavic appearance, including Africans, Central and South-East Asians and persons from the Middle East or the Caucasus. Such attacks clearly target people based on their appearance and most commonly occur in Kyiv and other major urban centres where there is a significant number of foreign students or migrants. Violent racist attacks are often committed by groups of skinhead youths, who are not necessarily members of structured right-wing organisations but may belong to a skinhead subculture. Such attacks are frequently severe, resulting in serious wounding by beating, knifing or shooting”).

⁸⁷² The Guardian, *Euro 2012: Ukraine’s festering football racism* (1 June 2012), available at <https://www.theguardian.com/world/2012/jun/01/euro-2012-ukraine-football-racism-sol-campbell> (Annex 217).

⁸⁷³ Irina Berezhnaya Institute for Legal Policy and Social Protection, REPORT: INFRINGEMENT OF RIGHTS AND FREEDOMS IN UKRAINE (2018), p. 9 (Annex 350).

⁸⁷⁴ *Ibid.*

in Korosten, and in April 2014 a Roma family's house in Cherkasy was set on fire. In August 2016, as reported above, unrest broke out in Loshchynivka and several Roma households were ransacked and burned down by locals. More than 300 people took part in the violence, resulting in property damage but no injuries. Seven Roma families, including 17 children, fled the village following a local council decision on their eviction.”⁸⁷⁵

“Regarding foreign students, in June 2015, a group of approximately 30 young men wearing balaclavas and armed with knives and sticks attacked foreign students in Kharkiv. The attackers wounded nine students, hospitalising six. According to witnesses the assailants targeted the victims because they “looked like foreigners”. Law enforcement officers were present but did not attempt to stop the attackers. Later they detained five persons, charging them with hooliganism, attempted murder and armed assault.”⁸⁷⁶

690. Radicals' violent attacks on Roma have repeatedly fallen under the attention of the OSCE Special Monitoring Mission to Ukraine (SMM). In its Daily report of 25 May 2018 SMM reported that:

“The SMM followed up on reports of an attack against members of the Roma community on 22 May at a camp on the western edge of Velyki Hai (94km north-east of Ivano-Frankivsk) where the SMM saw an abandoned area that had been recently burned and was covered in ash. At another nearby Roma camp, two women (thirties) and five children (five-ten years old) told the SMM that they had been at the first camp on the evening of 21 May when a group of about 20 masked people arrived and physically assaulted a woman and a man from the Roma community. They said that one of them then fired several rounds into the ground next to another woman from the Roma community as well as several small children and another poured gasoline over the tents and set them on fire, destroying all belongings.”⁸⁷⁷ [Emphasis added]

691. In its Daily report of 9 June 2018 SMM reported on another violent attack on the Roma in Kiev:

“In Kyiv, the SMM followed up on reports of an incident at a Roma community camp on the evening of 7 June in a park in the Sviatoshynskyi district. According to a statement of the local police, after members of the Roma community had been requested to leave the park, park workers began dismantling the camp structures and clearing the area. The police said that a group of people wearing T-shirts with the Natsionalni Druzhyny insignia had gone to the site and had been tearing down the structures with axes and

⁸⁷⁵ European Commission against Racism and Intolerance, ECRI Report on Ukraine (Fifth monitoring cycle), 20 June 2017, p. 19, ¶47, available at: <https://rm.coe.int/fifth-report-on-ukraine/16808b5ca8>.

⁸⁷⁶ *Ibid.*, p. 19, ¶49.

⁸⁷⁷ Latest from the OSCE Special Monitoring Mission to Ukraine (SMM), based on information received as of 19:30, 24 May 2018, available at: <https://www.osce.org/special-monitoring-mission-to-ukraine/382531>.

hammers while recording their own actions and preventing the park workers from clearing up the area”.⁸⁷⁸

692. In May 2018, SMM several times witnessed the consequences of another Roma pogrom in Lvov, Western Ukraine:

“In Lviv city, the SMM continued to follow up on media reports of arson at a Roma camp on 9 May. On 14 May, the head of the Department of Culture and Religions of the Lviv Regional State Administration told the SMM that prior to the alleged attack approximately 30 people had been living in the settlement in Rudne (11km west of Lviv City).”⁸⁷⁹

“In Lviv city, the SMM followed up on media reports of an attack on members of the Roma community. In the western outskirts of Lviv in a bush area opposite 24 Koniushynna Street on 12 May the SMM found the location where the attack was alleged to have occurred to be abandoned; cooking utensils and children’s toys were seen strewn about”.⁸⁸⁰

693. On 23 August 2018, during a briefing for the diplomatic corps at the SMM headquarters in Kiev, the Deputy Head of the Mission, Mr Alexander Hug, showed photos taken by the monitors depicting the consequences of attacks on Roma camps near Kiev: in the Lysaya Gora neighbourhood (21 April 2018), Rusanovka Gardens (23 April 2018) and Goloseevsky National Park (7 June 2018).⁸⁸¹

694. The reports of independent observers for the recent periods also contain numerous episodes of racially motivated violence in Ukraine. For example, only in May 2018 at least three episodes of attacks of neo-Nazis against the members of ethnic communities were placed on record:⁸⁸²

(a) On 9 May 2018, a Roma camp in Rudnoye village near the city of Lvov was burned.

⁸⁷⁸ Latest from the OSCE Special Monitoring Mission to Ukraine (SMM), based on information received as of 19:30, 8 June 2018, available at: <https://www.osce.org/special-monitoring-mission-to-ukraine/384027>.

⁸⁷⁹ Latest from the OSCE Special Monitoring Mission to Ukraine (SMM), based on information received as of 19:30, 15 May 2018, available at: <https://www.osce.org/special-monitoring-mission-to-ukraine/381634>.

⁸⁸⁰ Latest from the OSCE Special Monitoring Mission to Ukraine (SMM), based on information received as of 19:30, 13 May 2018, available at: <https://www.osce.org/special-monitoring-mission-to-ukraine/381160>.

⁸⁸¹ See photo from the SMM briefing (Annex 327). See other photos from OSCE SMM briefings (Annexes 324, 326-329).

⁸⁸² Other episodes include destruction of Roma homes in the Goloseevsky Park in Kiev by the members of “National Militia” on 7 June 2018; attack against a Roma village with resulting in death of one citizen and severe injuries to several others on 23-24 June 2018 (the perpetrators were subsequently found guilty but received no punishment from the local court); dispersion of the Roma camp near Kiev railway station on October 2018; See Iryna Berezhnaya Institute of Legal Policy and Social Protection, REPORT: INFRINGEMENT OF RIGHT AND FREEDOMS IN UKRAINE (2019), p. 7 (Annex 351).

- (b) On 22 May 2018, right-wing radicals with firearms attacked a tent Roma camp near the city of Ternopol.
- (c) On 27 May 2018, extreme-right activists in Kiev attacked Caucasian and Turkish delis at one of the city markets.
- (d) On 22 April 2020, mayor of Ivano-Frankovsk R. Martcinkiv officially gave instruction to take all Roma off to the Zakarpatskaya (trans-Carpathian) region⁸⁸³.
- (e) On 17 October 2021, activists of ultra-right organizations “C14” and “municipal guard” attacked a Roma camp in Irpen town in Kiev region⁸⁸⁴.
- (f) On 17 November 2021 neo-Nazi radicals attacked Roma women and girls in center of Kiev. Radicals damaged their clothes and painted them with antiseptic of brilliant green. Neo-Nazis translated their action on the Internet.⁸⁸⁵ Countless episodes of extreme-right violence, pogroms and killings, which occur to this day,⁸⁸⁶ are the most vivid example of the cynical approach taken by Ukraine in this case.

ii. Failure to prevent hate speech against members of ethnic minorities⁸⁸⁷

695. Ukraine did nothing to prevent the growth of neo-Nazi sentiment in Ukraine. Ukraine effectively failed to ban dissemination of fascist, antisemitic, and white supremacy ideas, which led to a wide-spread development of intolerance agenda in media, politics and, as shown above, ultimately resulted in violence on the streets.

696. In 2007 the Third Report of the ECRI demonstrated pathologically high numbers of people sharing antisemitic ideas and intolerance towards ethnic minorities, especially among young men:

“Surveys carried out in 2006 indicate a relatively high level of antisemitism among the general public with 29 % of the respondents indicating their

⁸⁸³ Irina Berezhnaya Institute for Legal Policy and Social Protection, ONLINE ENVIRONMENT AS A TOOL FOR VIOLATION OF RIGHTS AND FREEDOMS IN UKRAINE (2022), p. 95 (Annex 352).

⁸⁸⁴ *Ibid.* p. 97.

⁸⁸⁵ *Ibid.* p. 98.

⁸⁸⁶ For the violence against Roma population *see* A. Dyukov, M. Vilkov, FROM MURDERS TO POGROMS: UNPUNISHED VIOLENCE FROM THE SIDE OF RIGHT-WING ACTIVISTS AGAINST ROMA IN UKRAINE (Warsaw, 2018) (Annex 39).

⁸⁸⁷ On this issue *see* also Irina Berezhnaya Institute for Legal Policy and Social Protection, ONLINE ENVIRONMENT AS A TOOL FOR VIOLATION OF RIGHTS AND FREEDOMS IN UKRAINE (2022), pp. 47-70 (Annex 352).

aversion to Jewish people living in Ukraine and only 31% stating that they would welcome a Jewish person in their family. These surveys have also noted an increase in antisemitism among young people, especially among 18 to 20 year olds. A poll carried out in 2006 noted that 45% of respondents from this age group would like to see no Jewish people living in Ukraine.”⁸⁸⁸

“[R]acist and antisemitic attacks against persons and property flourish because of the current environment and that although skinhead groups operate underground, they are enjoying increasing public support.”⁸⁸⁹

697. Despite glaring evidence of a further ideological catastrophe, Ukrainian authorities made no effort to prevent development of radical ideas in the country. Xenophobic rhetoric flourished in the general public debate, with political parties using slogans such as “Ukraine for Ukrainians” and politicians accusing each other of being Jewish.⁸⁹⁰

698. Specifically, in 2012 the Fourth Report of the ECRI described hatred against Crimean Tatars as follows:

“As noted elsewhere in this report, anti-Tatar sentiment remains an issue in Ukraine and appears to have increased in recent years as politicians’ rhetoric has given it a semblance of respectability. Local politicians’ tendency to ignore or deny the specific problems faced by Crimean Tatars also pushes the latter to seek their own solutions and voice their identity more strongly. The end result is a risk of radicalisation rather than resolution of the issues, to the detriment of Crimean society as a whole and Tatars in particular as targets of prejudice.”⁸⁹¹

699. Noteworthy, the discriminatory attitude towards members of different cultures was transmitted even in school textbooks. The ECRI found that “[s]chool textbooks are reported to portray Muslims in a negative light, which perpetuates misconceptions and prejudice.”⁸⁹²

⁸⁸⁸ European Commission against Racism and Intolerance, Third report on Ukraine, 29 June 2007, p. 25, ¶96, available at: <https://rm.coe.int/third-report-on-ukraine/16808b5ca2>.

⁸⁸⁹ *Ibid.*, p. 27 ¶107. See also *ibid.*, pp. 24-25, ¶¶94-95, discussing an unprecedented increase in antisemitic publications (“[ECRI] has been informed that there is little response to antisemitic publications and manifestations from the authorities and society in general.”)

⁸⁹⁰ European Commission against Racism and Intolerance, ECRI Report on Ukraine (Fourth monitoring cycle), 8 December 2011, pp. 20, 35, ¶¶49, 133, available at: <https://rm.coe.int/fourth-report-on-ukraine/16808b5ca5>.

⁸⁹¹ *Ibid.*, p. 28, ¶94. The ECRI also found a wide hatred against other ethnic minorities, for example, Roma. See *ibid.*, p. 21 ¶56 and pp. 24-25, ¶73 (“Roma in particular are still often stereotyped by the media as criminals”; “hate speech, negative stereotypes and prejudice against Roma are still widespread”; “Overtly negative stereotypes and prejudices are, however, frequent. Some bars and restaurants refuse to serve Roma, anti-Roma graffiti is sprayed in public places (and occasionally left there by the authorities until Roma paint over it themselves) and hostile messages inviting Ukrainians to kick Roma out of Ukraine or into the Chernobyl exclusion zone are posted on Internet forums”).

⁸⁹² *Ibid.*, p. 29, ¶97.

700. After Crimea reunited with the Russian Federation, and the armed conflict broke out in Donbass, ECRI collected further evidence of intolerance in Ukrainian society. In 2014, the population of the DPR and LPR became another group vulnerable to hate speech. The Fifth ECRI Report states that:

“[I]t seems that while there was initially sympathy for IDPs in 2014, this appears to be waning. ECRI has been informed that it is not uncommon to see discriminatory advertisements for housing or employment, such as “no one from Donetsk should apply”⁸⁹³

701. In addition, ECRI highlighted that right-wing radicals that were engaged in armed conflict in Donbass gained popularity:

“In its fourth report, ECRI recommended that the authorities intensify their efforts to monitor, combat, prevent and punish illegal neo-Nazi activities and events.

...

According to the head of the State Security Service, there are no radical right organisations registered in Ukraine. ECRI notes, however, that there continue to be extremist organisations which manifest intolerance towards vulnerable groups and incite racial hatred. ECRI has also been informed that some of these groups, or individuals within them, have become involved in military action in the East of the country, thus gaining popularity for their openly ultra-nationalist agenda.”⁸⁹⁴

702. On 30 June 2019 in Lvov on the 78-th anniversary of Pogrom and massacre of Jews, the radical movements “National Corps”, “Svoboda” and “The Right Sector” held the “Millennium March of Ukrainian State”.⁸⁹⁵

703. As will be shown below, extreme-right organizations converted that popularity and tolerance of Ukrainian public in political influence.

iii. Ethnic minorities suffered from unemployment and lack of adequate housing

704. For decades, Ukraine has failed to guarantee the most vulnerable ethnic minorities – Crimean Tatars and Roma – even with the basic standard of living, such as providing them with housing and employment.

⁸⁹³ European Commission against Racism and Intolerance, ECRI Report on Ukraine (Fifth monitoring cycle), 20 June 2017, p. 15, ¶26, available at: <https://rm.coe.int/fifth-report-on-ukraine/16808b5ca8>.

⁸⁹⁴ *Ibid.*, p. 16, ¶29.

⁸⁹⁵ Iryna Berezhnaya Institute of Legal Policy and Social Protection, REPORT: INFRINGEMENT OF RIGHT AND FREEDOMS IN UKRAINE (2019), p. 25 (Annex 351).

705. In 2001, the Second Report of the ECRI indicated that the process of reintegration of Crimean Tatars was hindered due to scarce financing of resettlement programs by Ukraine.⁸⁹⁶ Ukraine's authorities failed to provide Crimean Tatars with good title to property over land in peninsula; to find a place for a living, Crimean Tatars had to squat abandoned or empty lands in the peninsula.⁸⁹⁷ The ECRI reports note inhuman living conditions of many of the Crimean Tatars, that lacks "basic infrastructure, such as water, electricity, gas, roads, and sewage systems"⁸⁹⁸ and conclude that "much remains to be done to ensure that the formerly deported population enjoys in practice the same rights as the rest of the population of Crimea and Ukraine as a whole."⁸⁹⁹
706. Although Ukraine was aware that various ethnic communities, such as Crimean Tatars and Roma, require urgent governmental aid, it failed to take appropriate measures for years. In 2007 and 2012, the Third and the Fourth Reports of the ECRI documented grave problems of ethnic minorities and lack of appropriate response from Ukraine, stating that "concerns raised and proposals made in recent years by Crimean Tatars do not seem to have been addressed in a transparent way by the authorities"⁹⁰⁰ and that "Roma continue to live in desperately poor conditions with many facing severe safety and health hazards...no access to running water, electricity, roads, transportation and communication facilities... with only half of Roma persons being able to afford to eat every day"⁹⁰¹.

⁸⁹⁶ European Commission against Racism and Intolerance, Second Report on Ukraine, 14 December 2001, p. 18, ¶46, available at: <https://rm.coe.int/second-report-on-ukraine/16808b5c9f>. The situation was the same with Roma community: in 2017, the Fifth Report of the ECRI indicated that the program for Protection and Integration of the Roma Ethnic Minority in Ukraine failed as it was not sufficiently funded. See European Commission against Racism and Intolerance, ECRI Report on Ukraine (Fifth monitoring cycle), 20 June 2017, pp. 21-22, ¶¶61-62; p. 25, ¶82, available at: <https://rm.coe.int/fifth-report-on-ukraine/16808b5ca8>.

⁸⁹⁷ OSCE, the Integration of Formerly Deported People in Crimea, Ukraine, August 2013, pp. 11-14, available at: <https://www.osce.org/files/f/documents/e/a/104309.pdf>.

⁸⁹⁸ European Commission against Racism and Intolerance, Second Report on Ukraine, 14 December 2001, p. 19, ¶49, available at: <https://rm.coe.int/second-report-on-ukraine/16808b5c9f>.

⁸⁹⁹ *Ibid.*, p. 19, ¶47. See similar considerations in relation to Roma communities: *ibid.*, p. 22, ¶59 ("many Roma/Gypsies live in slums and camps, where sanitary conditions are often extremely poor to the point where the health of those living in such slums and camps is adversely affected").

⁹⁰⁰ European Commission against Racism and Intolerance, ECRI Report on Ukraine (Fourth monitoring cycle), 8 December 2011, p. 28, ¶91, available at: <https://rm.coe.int/fourth-report-on-ukraine/16808b5ca5>.

⁹⁰¹ European Commission against Racism and Intolerance, Third report on Ukraine, 29 June 2007, p. 22, ¶83, available at: <https://rm.coe.int/third-report-on-ukraine/16808b5ca2>. See also European Commission against Racism and Intolerance, ECRI Report on Ukraine (Fourth monitoring cycle), 8 December 2011, p. 38 ¶¶153, 155, available at: <https://rm.coe.int/fourth-report-on-ukraine/16808b5ca5>.

707. Every Report of the ECRI referred to enormously high levels of unemployment of Roma and Crimean Tatars.⁹⁰² For example, as of 2017, more than 60% of Roma were unemployed, which the ECRI specifically attributed to discrimination.⁹⁰³

708. As a result of Ukrainian authorities' policy in the area of employment and labour protection, Crimean Tatars and Roma were among the most vulnerable population groups, with massive numbers of community members below the poverty line. As indicated in the OSCE 2013 Report:

“Crimean Tatars belong to one of the most vulnerable groups: 43 per cent of Crimean Tatar households qualify as poor, compared to 33 per cent for ethnic Russians and 38 per cent for ethnic Ukrainians...

While rural residents can grow their own food, many Crimean Tatars respond to poverty by accumulating debt, delaying payments for rent or communal services or not purchasing food, clothing or medicine, which has an adverse impact on human development in Crimea.”⁹⁰⁴

709. Remarkably, even the Mejlis, which Ukraine now portrays as the most authoritative indicator of Crimean Tatars' views, criticised Kiev for scarce financing of services and utilities for Crimean Tatars.⁹⁰⁵

iv. Political activity and representation

710. In fact, Ukraine has failed to create any conditions for diversified political representation of ethnic minorities.

⁹⁰² European Commission against Racism and Intolerance, Second Report on Ukraine, 14 December 2001, pp. 19-20, ¶50; p. 22, ¶59, available at: <https://rm.coe.int/second-report-on-ukraine/16808b5c9f>; European Commission against Racism and Intolerance, Third report on Ukraine, 29 June 2007, p. 12, ¶30, available at: <https://rm.coe.int/third-report-on-ukraine/16808b5ca2>; European Commission against Racism and Intolerance, ECRI Report on Ukraine (Fourth monitoring cycle), 8 December 2011, p. 28, ¶92; p. 37, ¶146, available at: <https://rm.coe.int/fourth-report-on-ukraine/16808b5ca5>.

⁹⁰³ European Commission against Racism and Intolerance, ECRI Report on Ukraine (Fifth monitoring cycle, p. 22, ¶64. p. 24, ¶77, available at: <https://rm.coe.int/fifth-report-on-ukraine/16808b5ca8>. The ECRI recognized Ukrainian authorities' poor management of employment issues and scarce protection of employees belonging to ethnic minorities: “ECRI observes that despite numerous accounts of discrimination against national/ethnic minorities in the field of employment, there appear to be few or no cases in which anti-discrimination provisions have been applied in this field” (European Commission against Racism and Intolerance, ECRI Report on Ukraine (Fourth monitoring cycle), 8 December 2011, p. 38, ¶150, available at: <https://rm.coe.int/fourth-report-on-ukraine/16808b5ca5>)

⁹⁰⁴ OSCE, the Integration of Formerly Deported People in Crimea, Ukraine, August 2013, p. 20, available at: <https://www.osce.org/files/f/documents/e/a/104309.pdf>.

⁹⁰⁵ Lenta.ru, *Kyrym Khanlygy: Crimea Remembers Its Local Statehood* (12 January 2012), available at: <https://lenta.ru/articles/2012/01/12/crimea/> (Annex 218).

711. In 2001, the ECRI admonished Ukraine for failure to ensure sufficient representation of Crimean Tatars in public life:

“Although, at the national level Crimean Tatars currently have two representatives in the Ukrainian Parliament - one elected under the majority system and the other under the proportional system – there are on the other hand practically no Crimean Tatars among the members of the Crimean Parliament. This situation is linked with the electoral majority system in force since 1998 for elections in Crimea. As a result of this system, Crimean Tatars experience difficulties electing their representatives to the Crimean Parliament, as they constitute a minority, albeit significant, throughout the different regions of the Crimean peninsula.”⁹⁰⁶

712. Ukraine simply ignored these recommendations. In 2009, the Crimean Tatars held a rally, on which they claimed “to ensure the political representation of Crimean Tatars in all authorities of Crimea and Ukraine.”⁹⁰⁷

713. In 2013, OSCE reiterated its criticism on Ukraine for lack of political representation of the Crimean Tatars in governmental and local bodies. In particular, the OSCE pointed at the instances of political re-districting (“gerrymandering”), which were aimed at reducing the chances of the Crimean Tatar candidates to be elected:

“Due to the mixed electoral system with single-mandate constituencies, the demographic distribution of Crimean Tatars across districts and the absence of cross-ethnic voting, not a single Crimean Tatar was elected in single-mandate districts in the 2010 elections for the Supreme Council of the ARC. On the other hand, the threshold for ARC elections (three per cent) is lower than the nationwide elections in Ukraine (five per cent). In total, six Crimean Tatars were elected on party lists. There have been some allegations of gerrymandering: in its report on the 2012 parliamentary elections, the OSCE Office for Democratic Institutions and Human Rights (ODIHR) also noted that electoral boundaries “should not be altered for the purpose of diluting or excluding minority representation.”

Overall, in the Supreme Council of the ARC, Crimean Tatar representation is gradually decreasing, from 14.5 per cent in 1994 (when a short-lived quota system gave 14 guaranteed seats to Crimean Tatars and one each to the other four groups of FDPs) to only six per cent in the 2010 elections.”⁹⁰⁸ [Emphasis added]

⁹⁰⁶ European Commission against Racism and Intolerance, Second Report on Ukraine, 14 December 2001, p. 19, ¶48, available at: <https://rm.coe.int/second-report-on-ukraine/16808b5c9f>.

⁹⁰⁷ Krymsky Analitik, *Photos. Crimean Tatars Demand that Yushchenko and Tymoshenko Stop Racial Discrimination in Ukraine* (18 May 2009), available at: <http://www.agatov.com/content/view/1451/19/> (Annex 98).

⁹⁰⁸ OSCE, *the Integration of Formerly Deported People in Crimea, Ukraine*, August 2013, pp. 17-18, available at: <https://www.osce.org/files/f/documents/e/a/104309.pdf>.

v. **Studying of and in mother language**

714. Ukraine insists that the sheer decrease in number of students in a particular language is somehow indicative of discrimination. However, it did not find any problem with that when it concerned Russians in Ukraine. According to the ECRI, in 1991 50% of the whole student population of Ukraine studied in Russian-language schools; by 2001 Ukraine has reduced this number to 15%.⁹⁰⁹
715. In the 2004-05 academic year, the number of schools with Russian as the primary language of education in Ukraine was 1,555 units⁹¹⁰. Until 2014, it steadily decreased – down to the target figure of 2020 in 1,275 schools⁹¹¹, *i.e.* an average of 4-5% per year. In 2014, the number of Russian schools fell sharply by more than two times – to 621 schools – primarily due to the withdrawal from the statistics of the Crimea and parts of the Luhansk and Donetsk regions, where the majority of the Russian-speaking population lives. However, until 2017, the number of Russian schools declined by no more than 5.3% per year. However, already in 2017-18, the number of Russian-language schools was reduced by 15.5%, and in 2018-19, it was reduced further by 58.8%. In the 2019-20 academic year, their number in Ukraine was 125 units. Thus, from 2004 to 2020, the number of Russian schools in Ukraine has decreased 12 times.⁹¹²
716. In 2013, the OSCE explained there are numerous impediments for studying Crimean Tatar language in Ukraine, including lack of legal guarantees for minority-language education, lack of financing of Crimean-Tatar language schools from Ukraine,⁹¹³ lack of

⁹⁰⁹ European Commission against Racism and Intolerance, Second Report on Ukraine, 14 December 2001, p. 14, ¶29, available at: <https://rm.coe.int/second-report-on-ukraine/16808b5c9f>.

⁹¹⁰ Center for Analysis of the Radical Right, *Can new educational reforms in Ukraine be seen as a tool for forced assimilation of national minorities?* (8 September 2020), available at: <https://www.radicalrightanalysis.com/2020/09/08/can-new-educational-reforms-in-ukraine-be-seen-as-a-tool-for-forced-assimilation-of-national-minorities/> (Annex 399).

⁹¹¹ *Ibid.*

⁹¹² *Ibid.*

⁹¹³ OSCE, the Integration of Formerly Deported People in Crimea, Ukraine, August 2013, p. 28, available at: <https://www.osce.org/files/f/documents/e/a/104309.pdf>. (“[I]n recent years, some district authorities, such as Belogorsk, have reduced the number of classes in Crimean Tatar due to financial constraints”).

qualified teachers, and Ukraine's reluctance to train new personnel,⁹¹⁴ non-availability of textbooks in the Crimean Tatar language.⁹¹⁵

vi. Failure to protect cultural heritage of ethnic minorities

717. Ukraine's allegations that the Russian Federation destroyed cultural heritage of Ukrainians and Crimean Tatars are to no avail. As will be shown below, the episodes referred to by Ukraine show the Russian Federation's intention to preserve, rather than destroy, cultural property, which were underfunded and mismanaged by Ukraine (with restoration of Khan's Palace being the most vivid example).⁹¹⁶

718. Here, the Russian Federation draws attention to the fact that Ukraine failed to address the numerous occasions on which Crimean Tatars appealed to Ukrainian authorities for restoration or construction of the mosques and other cultural and spiritual memorials. To name only a few examples:

- (a) The reconstruction of the Seit-Settar religious complex in Simferopol was closed in 2006 as Ukrainian authorities decided to demolish the building due to its critical conditions and erect a new mosque and facilities from scratch. However, the restoration was not initiated until 2014.⁹¹⁷
- (b) Although the decision to construct the Cathedral Mosque in Simferopol, which was important for holding major religious events of Crimean Tatars, was made in 2000s, Ukrainian authorities did not assist, but rather impeded Crimean Tatars' attempts to proceed with the construction for more than ten years, despite public calls and

⁹¹⁴ *Ibid.*, p. 29 (“Teaching in and of FDP languages in Crimea is hampered by a lack of qualified teachers, which in turn is a consequence of inadequate teacher training and the relatively low value that Ukraine’s teacher-evaluation system attaches to the ability to teach in a minority language. The professional and career development of teachers is not linked to their competencies in any language other than Ukrainian, and the ability to teach bilingually is not recognized as a competency that opens up additional career opportunities or remuneration. Several Crimean Tatar teacher-training programmes exist at a few higher-education institutions in Crimea, but these programmes only train teachers of the language, not those who can teach other subjects in the language”).

⁹¹⁵ *Ibid.*, p. 29 (“[T]here are problems regarding the availability of textbooks, especially in the Crimean Tatar language... Teachers claim that the textbooks are insufficiently related to the curriculum and are too difficult to use, requiring them to spend significantly more time to prepare their classes. The translated textbooks also do not appear to have the aim of gradually raising the linguistic competence of the pupils”).

⁹¹⁶ *See below*, Chapter XI(A).

⁹¹⁷ Witness Statement of ██████████, ¶¶29-30 (Counter-Memorial (CERD), Annex 19).

campaigns for the expedient realization of the project.⁹¹⁸ The construction of the Mosque started only after 2014 with substantive financial support of the Russian Federation.

719. Further, Ukraine's accusations against fully legitimate archaeological works during construction of the "Tavrida" highway⁹¹⁹ are as ridiculous as its indifference and continuous failure to prevent numerous attacks against cultural heritage of various ethnic minorities. From 2014 to 2019, at least 518 acts of vandalism, desecration of synagogues, Jewish cemeteries, memorials to the victims of Holocaust, other victims of the World War II and soldiers who liberated Ukraine from Nazi occupation occurred in Ukraine, which means, that a neo-Nazi action took place every 4 days.⁹²⁰

B. MEASURES TAKEN BY UKRAINE WITH RESPECT TO RUSSIAN LANGUAGE AND CULTURE

720. Ukraine insists that the Russian education system is inconsistent with the CERD, while at the same time Ukraine finds no wrong in adopting legal acts that directly restrict education in and use of Russian language.

⁹¹⁸ *Ibid.*, ¶¶35-36. See also OSCE, the Integration of Formerly Deported People in Crimea, Ukraine, August 2013, p. 25, available at: <https://www.osce.org/files/f/documents/e/a/104309.pdf> ("Efforts to build a new, larger central mosque in Simferopol have been stalled for many years: a building permit was obtained in 2004 and land was allocated by the Simferopol City Council in 2011, but construction has still not begun").

⁹¹⁹ Reply, ¶657.

⁹²⁰ Iryna Berezhnaya Institute of Legal Policy and Social Protection, REPORT: INFRINGEMENT OF RIGHT AND FREEDOMS IN UKRAINE (2019) pp. 7-8, 24 (Annex 351) ("On August 29, 2018 vandals desecrated Hungarian flag in the village of Solotvino (Transcarpathian region) in a progress of a church robbery... On the night of October 14, 2018, in the city of Kamenetz-Podolsky (Khmelnitsky region), neo-Nazis desecrated a memorial dedicated to Holocaust victims... In 2014-2019, the church named in honor of the icon of the Mother of God "Joy of All Who Sorrow" near Holocaust victims monument in Babi Yar in Kiev survived 11 arson attempts"). For further examples, see, e.g., European Commission against Racism and Intolerance, ECRI Report on Ukraine (Fifth monitoring cycle), 20 June 2017, p. 19, ¶48, available at: <https://rm.coe.int/fifth-report-on-ukraine/16808b5ca8> ("Graffiti swastikas continued to appear in Kyiv and other cities. Repeated vandalism of the Holocaust memorial at Kyiv's Babi Yar ravine took place with six incidents in 2015. In March 2016, "Kill the Jews" was scrawled on a synagogue in Cherkasy. A wreath laid by an Israeli Cabinet minister for Holocaust victims at Babi Yar was torched"); European Commission against Racism and Intolerance, Third report on Ukraine, 29 June 2007, p. 25, ¶96. p. 10, ¶23, p. 12, ¶31, available at: <https://rm.coe.int/third-report-on-ukraine/16808b5ca2> ("ECRI also notes with concern that antisemitic attacks are on the rise, with a record number registered in 2006. These attacks range from serious physical violence against, amongst others, Yeshiva students and rabbis to Holocaust memorial sites, synagogues, cemeteries and cultural centres being vandalised. The police often classify these acts as hooliganism and only a few individuals have been prosecuted and convicted for these crimes").

721. Further, and especially following the illegitimate Maidan coup, Ukraine adopted various legislative to suppress education in Russian language and its enjoyment in various spheres of life:⁹²¹

- (a) Since 2014 Ukraine tried to abolish the Law “On the Fundamentals of the State Language Policy”, which provided Russian language and other minority languages with the status of regional within the territories when such languages are native for at least 10% of the population. Despite protests against cancellation of the Law in Donbass, the Constitutional Court of Ukraine rendered the Law unconstitutional in 2018, *i.e.*, more than 5 years after the Law was enacted.⁹²²
- (b) On 5 February 2015 the Verkhovna Rada legislatively banned the broadcasting of films produced in the Russian Federation after 1 January 2014.⁹²³ By October 2018, Ukraine banned more than 780 Russian films and TV-shows.⁹²⁴
- (c) On 16 May 2017 President Poroshenko signed a decree on new sanctions against the Russian Federation, which included ban of Russian-originated social networks “Odnoklassniki” and “VKontakte”, the total monthly audience of which was 25.3 million people.⁹²⁵
- (d) On 5 October 2017 the Law “On Tour Events in Ukraine” was amended to introduce a pre-tour inspection of Russian performing artists by the Security Service of Ukraine. As of January 2018, more than 100 Russian artists were prohibited entry in Ukraine.⁹²⁶

⁹²¹ Counter-Memorial (CERD), ¶¶41-51.

⁹²² TASS, *How the Use of the Russian Language Was Restricted in Ukraine* (15 July 2021), available at: <https://tass.ru/info/11907705> (Annex 219).

⁹²³ Vedomosti, *Ukraine Legislatively Bans Screening of Russian Movies Filmed after January 2014* (21 April 2016), available at: <https://www.vedomosti.ru/politics/news/2016/04/21/638562-ukraine-zaprete-rossiiskih-filmov> (Annex 220).

⁹²⁴ TASS, *Ukraine Banned 780 Russian Movies and Series Since 2014* (5 October 2018), available at: <https://tass.ru/kultura/5643645> (Annex 221).

⁹²⁵ Uspishna Varta, *THE RIGHT TO FREEDOM OF SPEECH AND OPINION IN UKRAINE: THREATS AND OPPORTUNITIES* (2018), p. 16 (Annex 36).

⁹²⁶ Uspishna Varta, *THE RIGHT TO FREEDOM OF SPEECH AND OPINION IN UKRAINE: THREATS AND OPPORTUNITIES* (2018), p. 8 (Annex 36).

722. In 2019, Ukraine adopted the Law “On Ensuring the Functioning of the Ukrainian Language as the State Language”, which imposed numerous restrictions on the use of the languages of ethnic minorities, including Russian.⁹²⁷ In particular:

- (a) The Law drastically decreased the guarantees for education in Russian language. *First*, Article 21 of the Law established guarantees for education in the minority’s language for only 4 years. *Second*, in accordance with Articles 9(1)(13) and 9(1)(14) of this Law directors of educational facilities of all forms as well as pedagogical, scientific-pedagogical and scientific personnel are legally obliged to “apply [Ukrainian language] in the performance of official duties.”⁹²⁸
- (b) Article 22 of the Law restricted publication of scientific materials in Russian language, while permitting to publish them in English or EU language.⁹²⁹
- (c) Article 25 of the Law prohibited publication of printed media in Russian language if the Ukrainian version of the newspaper in the same amount is not printed together with the Russian one.⁹³⁰ As it appears, the Russian media are now obliged to allow for translation of their media items into Ukrainian and spend twice more funds to print their papers in both Ukrainian and Russian, if they want to continue activity in Ukraine. As in the case of scientific works,⁹³¹ the said compulsory requirements do not concern media published in languages of indigenous peoples of Ukraine (Crimean Tatars, Crimean Karaites, and Krymchaks – minorities, the vast majority of which live in Crimea after Crimea become part of Russia), English language and official languages of the EU. This is a clear indicator as to what is more valuable to the current Ukrainian regime in power, when it is choosing between the interests of its own population and its short-term political alliances.

⁹²⁷ Notably, OSCE High Commissioner for National Minorities on 29 July 2019 stated that the language law adopted in Ukraine does not contain guarantees for protection of national minorities languages. *See* Iryna Berezhnaya Institute of Legal Policy and Social Protection, REPORT: INFRINGEMENT OF RIGHT AND FREEDOMS IN UKRAINE (2019), p. 6 (Annex 351).

⁹²⁸ Law of Ukraine No 2704-VIII “On Ensuring the Functioning of the Ukrainian Language as the State Language”, 25 April 2019, Articles 9, 21, available at: <https://zakon.rada.gov.ua/laws/show/2704-19#Text> (Annex 444).

⁹²⁹ *Ibid.*, Article 22.

⁹³⁰ *Ibid.*, Article 25.

⁹³¹ *See above*, ¶722(b).

- (d) Under Article 24 of the Law together with Article 9 of the Law “On Television and Radio Broadcasting” tele and radiobroadcasting companies became obliged to broadcast not less than 75% of the running time in Ukrainian, with a number of censorship restrictions.⁹³²

723. In 2020, Ukraine adopted the Law “On Complete General Secondary Education”, which in line with the goal of “On ensuring the functioning of the Ukrainian language as the state language” further narrowed down opportunity to receive education in Russian. Under Article 5(4) of the Law the “indigenous peoples” are granted the right to receive complete general secondary education in their language. However, the notion of “indigenous peoples” in Ukraine includes only Crimean Tatars, Crimean Karaites, and Krymchaks (which, as stated above, mostly live in Crimea and the law has been adopted after Crimea became part of Russia).⁹³³ For other minorities (such as Russians) Article 5(5) of the Law applies, which provides only for the possibility to receive “primary education” (that is, four years). Therefore, the Russian community members are now able to study in Russian for only four years. As will be shown below, Ukrainian authorities do not abide even by this legally guaranteed term.

724. Ukraine’s attitude for languages other than Ukrainian was emphasized in the speech of Mr Taras Kremin – the Commissioner for the Protection of State Language – who advised

⁹³² Law of Ukraine No. 3759-XII “On Television and Radio Broadcasting”, 21 December 1993, Article 9(6), available at: <https://zakon.rada.gov.ua/laws/show/3759-12#Text> (Annex 445) (“The broadcaster shall have no right to distribute audio-visual works that: deny or justify the criminal nature of the communist totalitarian regime of 1917-1991 in Ukraine or the criminal nature of the National Socialist (Nazi) totalitarian regime; create a positive image of persons who held senior positions in the Communist Party (the position of the secretary of a district committee or a higher position), the highest authorities and governments of the USSR, the Ukrainian SSR (USSR), or other union and autonomous Soviet republics (except in cases related to the development of the Ukrainian science and culture) or employees of Soviet state security agencies; or justify the activities of Soviet state security agencies, the establishment of Soviet power in the territory of Ukraine or in certain administrative and territorial units or the persecution of participants in the struggle for independence of Ukraine in the XX century”).

It is worth mentioning that PACE Resolution No. 2196 of 23 January 2018 found that establishing language quotas by Ukraine reduces the rights of ethnic minorities and urged Ukraine from exacerbating the situation. *See* PACE Resolution 2196, The Protection and Promotion of Regional or Minority Languages in Europe (2018), available at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24410&lang=en>.

⁹³³ Law of Ukraine No 1616-IX “On Indigenous Peoples of Ukraine”, 1 July 2021, available at: https://ips.ligazakon.net/document/view/T211616?utm_source=jurliga.ligazakon.net&utm_medium=news&utm_content=jl03&_ga=2.132976974.1354839119.1668871241-51954790.1668871241 (Annex 446).

people unhappy with Ukraine’s language policy to “go to another country, where [such people] think [they] will feel comfortable”.⁹³⁴

725. Subsequently, in 2022, the restrictions against the Russian language and ethnic Russians snowballed with a vengeance:

- (a) The Ukrainian authorities have restructured the educational programs in Ukrainian schools, excluding from their curriculum “Russian language” as a subject, as well as removing books of Soviet and Russian authors.⁹³⁵
- (b) Several regions of Ukraine have even gone as far as to prohibit teaching and studying Russian in schools.⁹³⁶
- (c) It has been made illegal to listen to Russian music and songs in Russian or of Russian origin, and to perform musical acts created by Russians. Same restrictions were also extended to books written by Russian authors.⁹³⁷ For instance, one of the radio stations was forced to move to Hungary due to the ban to play music in Russian.⁹³⁸

⁹³⁴ NV, “Where it will be comfortable.” *Kremlin called on opponents of the language law to leave Ukraine* (6 August 2021), available at <https://nv.ua/ukr/ukraine/events/movniy-zakon-taras-kremin-zaklikav-protivnikiv-zakonu-zalishiti-ukrajinu-50176123.html> (Annex 96).

⁹³⁵ TASS, *How Russian Was Restricted in Ukraine* (1 August 2022), available at: <https://tass.ru/info/15358089> (Annex 222); RT, *Ukraine Issues New Ban on Russian Language*, available at: <https://www.rt.com/russia/560957-ukraine-schools-russian-courses/> (Annex 466).

⁹³⁶ TASS, *How Russian Was Restricted in Ukraine* (1 August 2022), available at: <https://tass.ru/info/15358089> (Annex 222); MK, *Kiev Schools to Abandon Study of Russian* (12 August 2022), available at: <https://www.mk.ru/politics/2022/08/12/v-shkolakh-kieva-reshili-otkazatsya-ot-izucheniya-russkogo-yazyka.html> (Annex 223); RT, “*The Spirit of Intimidation and Terror*”: *How Ukraine Is Fighting Russian* (12 November 2022), available at: <https://russian.rt.com/ussr/article/1072836-ukraina-russkii-yazyk-zapret> (Annex 224); Kyiv Post, *Russian Language Excluded from Kyiv State Schooling* (11 November 2022), available at: <https://www.kyivpost.com/ukraine-politics/russian-language-excluded-from-kyiv-state-schooling.html> (Annex 467).

⁹³⁷ TASS, *How Russian Was Restricted in Ukraine* (1 August 2022), available at: <https://tass.ru/info/15358089> (Annex 222); DW, *Ukraine bans music, books from Russia, Belarus* (29 June 2022), available at: <https://www.dw.com/en/ukraine-bans-russian-music-and-books/a-62305280> (Annex 226); The Guardian, *Ukraine Restricts Russian Books and Music in Latest Step of ‘Derussification’* (20 June 2022), available at: <https://www.theguardian.com/world/2022/jun/20/ukraine-restricts-russian-books-and-music-in-latest-step-of-derussification> (Annex 227).

⁹³⁸ CNE, *Ukrainian Ban on Russian Language Forces Christian Radio to Move to Hungary* (8 September 2022), available at: <https://cne.news/artikel/1670-ukrainian-ban-on-russian-language-forces-christian-radio-to-move-to-hungary> (Annex 228).

- (d) For violating the provisions of the State language law and other legislative language quotas, one can face serious fines.⁹³⁹ For example, in March 2018 the radio station “Pyatnitsa” was imposed a fine of circa 10 000 EUR as the proportion of songs performed in Ukrainian from 07 am to 14 pm was 29% instead of 30%.⁹⁴⁰ The episode of charging fines extend even to instances of being served in the Russian language in a restaurant.⁹⁴¹

726. Furthermore, since 2014 Ukraine has expanded its attacks against the objects of Russian cultural heritage and memorials commemorating heroes of fight against Nazism. The episodes of forced cancellation of Russian culture are in the hundreds and include:

- (a) Destruction of monuments of prominent Russian writers, such as Alexander Pushkin⁹⁴² and Maxim Gorky.⁹⁴³
- (b) Demolition and defacing of monuments of heroes of the Second World War, including monuments to Marshal Georgy Zhukov,⁹⁴⁴ the hero of Stalingrad battle

⁹³⁹ Uspishna Varta, *THE RIGHT TO FREEDOM OF SPEECH AND OPINION IN UKRAINE: THREATS AND OPPORTUNITIES* (2018), p. 7 (Annex 36).

⁹⁴⁰ Uspishna Varta, *THE RIGHT TO FREEDOM OF SPEECH AND OPINION IN UKRAINE: THREATS AND OPPORTUNITIES* (2018), p. 9 (Annex 36).

⁹⁴¹ TASS, *Ukraine Imposes Fines for Breach of State Language Law* (16 July 2022), available at: <https://tass.ru/mezhdunarodnaya-panorama/15232059> (Annex 225).

⁹⁴² Wikipedia, *Demolition of monuments to Alexander Pushkin in Ukraine* available at: https://en.wikipedia.org/wiki/Demolition_of_monuments_to_Alexander_Pushkin_in_Ukraine (Annex 229); Mosregtoday, *Ukraine Continues to Dismantle Monuments Linked to Russian History and Culture* (22 April 2022), available at: <https://mosregtoday.ru/culture/na-ukraine-prodolzhaetsya-demontazh-pamyatnikov-svyazannyh-s-rossiyskoy-istoriey-i-kul-turoy/> (Annex 230); MK, *From Pushkin to Suvorov: How Many Monuments Have Already Been Demolished in Ukraine* (2 December 2022), available at: <https://www.mk.ru/social/2022/12/02/ot-pushkina-do-suvorova-skolko-pamyatnikov-uzhe-snesli-na-ukraine.html> (Annex 231); Lenta.ru, *Pushkin Monument Dismantled in Zaporozhye* (27 July 2022), available at: <https://lenta.ru/news/2022/07/27/pushkinagain/> (Annex 232).

⁹⁴³ Urdupoint, *Ukraine Dismantles Monument to Soviet Writer Maksim Gorky – Reports* (14 November 2022), available at: <https://www.urdupoint.com/en/world/ukraine-dismantles-monument-to-soviet-writer-1594412.html> (Annex 233).

⁹⁴⁴ Babel, *A Monument to Marshal Zhukov, Which Has Been the Subject of Controversy for Years, Was Dismantled in Kharkiv* (17 April 2022), available at: <https://babel.ua/en/news/77818-a-monument-to-marshal-zhukov-which-has-been-the-subject-of-controversy-for-years-was-dismantled-in-kharkiv> (Annex 234); Irina Berezhnaya Institute for Legal Policy and Social Protection, *ONLINE ENVIRONMENT AS A TOOL FOR VIOLATION OF RIGHTS AND FREEDOMS IN UKRAINE* (2022), p. 124-125 (Annex 352).

and liberator of Ukraine general Nikolay Vatutin,⁹⁴⁵ and many others.⁹⁴⁶ On 16 June 2017 peaceful protesters, mostly elderly people, who came to voice against renaming General Vatutin Avenue into Shukhevich Avenue in honour of the OUN-UPA leader (the role of this organization in support of Nazi Germany in World War II will be explained below),⁹⁴⁷ were severely beaten by activists of the “National Corps” headed by its leader Nazar Kravchenko.⁹⁴⁸

- (c) Destruction and desecration of monuments of commanders of the Russian Empire, in particular, generalissimos Alexander Suvorov⁹⁴⁹ and hero of the Patriotic War against Napoleon Mikhail Kutuzov.⁹⁵⁰
- (d) Renaming of streets named after eminent Russian artists and historic figures, such as Anton Chekhov, Leo Tolstoy, Fyodor Dostoevsky and many others.⁹⁵¹ Newly renamed streets are often assigned names of Ukrainian Nazi collaborators of the WWII. As will be shown below, such renaming is in line with Ukrainian policy of commemorating Nazi collaborators and supporting extreme-right radicals.⁹⁵² For example, on 25 November 2022, the City Council of Vinnitsa voted to rename the Leo Tolstoy street in honour of the World War II Nazi collaborator Stepan

⁹⁴⁵ Gazeta.Ru, “*The Bloody Russian*”: a Monument to Vatutin Demolished in Ukraine (16 July 2022), available at: https://www.gazeta.ru/science/2019/04/16_a_12304231.shtml (Annex 235). See also Irina Berezhnaya Institute for Legal Policy and Social Protection, ONLINE ENVIRONMENT AS A TOOL FOR VIOLATION OF RIGHTS AND FREEDOMS IN UKRAINE (2022), p. 125. (Annex 352).

⁹⁴⁶ TASS, *Soviet Soldier-Liberator Monument Demolished in Western Ukraine* (23 June 2022), available at: <https://tass.ru/mezhdunarodnaya-panorama/15014807> (Annex 236); Iz.ru, *Soviet Army’s Glory Monument Demolished in Ukraine* (24 July 2021), available at: <https://iz.ru/1197647/2021-07-24/na-ukraine-snesli-monument-slavy-sovetskoi-armii> (Annex 237); Irina Berezhnaya Institute for Legal Policy and Social Protection, ONLINE ENVIRONMENT AS A TOOL FOR VIOLATION OF RIGHTS AND FREEDOMS IN UKRAINE (2022), pp. 124-129 (Annex 352).

⁹⁴⁷ See below, Chapter II(C)(ii).

⁹⁴⁸ Irina Berezhnaya Institute for Legal Policy and Social Protection, REPORT: INFRINGEMENT OF RIGHTS AND FREEDOMS IN UKRAINE (2018), p. 7 (Annex 350).

⁹⁴⁹ Lenta.ru, *Ukrainians Dismantled Suvorov Monument* (4 February 2022), available at: <https://lenta.ru/news/2022/02/04/otvetite/> (Annex 238); RIA, *Suvorov’s Monument in Nikolaev is Covered in Paint* (3 December 2022), available at: <https://ria.ru/20221203/pamyatnik-1836124436.html> (Annex 239).

⁹⁵⁰ TASS, *Kutuzov Monument Dismantled in Western Ukrainian Town of Brody* (25 February 2014), available at: <https://tass.ru/mezhdunarodnaya-panorama/1001597> (Annex 240); Vzglyad-Info, *Journalists Found Demolished Kutuzov Monument in Ukrainian Landfill* (15 March 2014), available at: <https://www.vzsar.ru/news/2014/03/15/jyurnalisty-nashli-snesennyi-pamyatnik-kytyzovy-na-ykrainskoi-svalke.html> (Annex 241).

⁹⁵¹ Gazeta.ru, *Chekhov, Pushkin and Gagarin Streets Change Names in Ternopol* (11 July 2014), available at: <https://www.gazeta.ru/politics/news/2022/07/11/18106088.shtml> (Annex 242).

⁹⁵² *Ibid.*

Bandera;⁹⁵³ the city council of Ternopol renamed Anton Chekhov street after a member of Organization of Ukrainian Nationalists⁹⁵⁴ Elena Teliga.⁹⁵⁵

727. Further, on 13 December 2022 Ukraine adopted Law No. 2827-IX “On National Minorities (Communities) of Ukraine”. The law stipulates that “popularization or propaganda of terrorist state (aggressor state) is prohibited”.⁹⁵⁶ Ukraine uses this provision in order to prohibit or “cancel” Russian culture, use of and education in Russian language. The law also sets a specific definition of a national minority as “an established group of Ukraine’s citizens”, thus precluding minorities representatives that are citizens of other countries from necessary protection framework.⁹⁵⁷ Hungarian Minority Parties already issued a critical statement regarding the law.⁹⁵⁸

728. The above restrictions on the use of mother languages by ethnic groups, including Russian language, continue to increase.

C. UKRAINE’S CURRENT REGIME WAS INSTALLED BY EXTREME-RIGHT RADICALS DEEPLY ROOTED IN NAZI AND FASCIST IDEOLOGY

729. The current political regime in Kiev, established after the so-called “2014 Revolution of Dignity”, makes no secret of its ideological continuity with the Organization of Ukrainian Nationalists (“OUN”) created in 1929 and its militant wing, the Ukrainian Insurgent Army (“UPA”), formed in 1942.

730. Materials of the Nuremberg trials directly indicate that OUN-UPA’s leader Stepan Bandera and related organizations allied to German Nazi forces in World War II,

⁹⁵³ RIA Novosti, *Leo Tolstoy Street Renamed in Honour of Bandera in Vinnytsia* (25 November 2022), available at: <https://ria.ru/20221125/vinnitsa-1834301918.html> (Annex 243).

⁹⁵⁴ *Ibid.*

⁹⁵⁵ Gazeta ru, *Chekhov, Pushkin and Gagarin Streets Change Names in Ternopol* (11 July 2014), available at: <https://www.gazeta.ru/politics/news/2022/07/11/18106088.shtml> (Annex 242).

⁹⁵⁶ Law No. 2827–IX “On National Minorities (Communities) of Ukraine”, 13 December 2022, Article 5(5), available at: <https://zakon.rada.gov.ua/laws/show/2827-20#Text> (Annex 97).

⁹⁵⁷ *Ibid.*, Article 1(1).

⁹⁵⁸ HHRF, *New Ukrainian Law on National Minorities Misses the Mark* (19 December 2022), available at: <https://hhf.org/2022/12/19/new-ukrainian-law-on-national-minorities-misses-the-mark/> (Annex 244).

receiving the German Army's instructions to "kindl[e] national antagonism among the people of the Soviet Union" to facilitate German's attack against the USSR.⁹⁵⁹

731. Thus, OUN-UPA was responsible for multiple military crimes and crimes against humanity during World War II, including Jewish pogroms, mass-murders of civilians and probably their most famous atrocity – the Volhynian Massacre resulted in death of at least 60 thousand poles.⁹⁶⁰ OUN-UPA troops were widely used by the Nazi Germany to hold power over the occupied soviet territories. With the same purpose, the German occupation administration authorized creation of a number of paramilitary units subordinated to the Third Reich: the punitive battalions *Nachtigal*, *Roland*, *the 201st Schutzmannschaft Battalion*, *the 14th SS Volunteer Infantry Division* as well as *the Ukrainian auxiliary police*. At the same time, a number of Ukrainians were recruited in German SS divisions "*Leibstandart*", "*Reich*", "*Totenkopf*", and "*Viking*", as well as in the 1st SS Motorized Brigade. All these troops were involved in military crimes as well – this fact was established by the International Military Tribunal at Nuremberg that declared the whole SS as criminal organization.⁹⁶¹

732. In modern Ukraine, the day of UPA's foundation – 14 October 1942 – is now celebrated as a state holiday – the Day of the Defender of Ukraine.⁹⁶² OUN-UPA leaders – Stepan Bandera (hence the second name for all Ukrainian Nazi – *the Banderites*), and Roman Shukhevich are presented by the *Maidan* authorities as national heroes. Both were

⁹⁵⁹ The Avalon Project, Nuremberg Trial Proceedings Vol. 7, Fifty-Sixth Day, Monday, 11 February 1946, pp. 271-272, available at: <https://avalon.law.yale.edu/imt/02-11-46.asp> (Annex 245) ("The testimony of a former colonel of the German Army, Erwin Stolze, who was Lahousen's deputy in Department II, Ausland Abwehr, attached to the Supreme Command of the German Armed Forces... Stolze testified as follows: ... It was pointed out in the order that for the purpose of delivering a lightning blow against the Soviet Union, Abwehr II, in conducting subversive work against Russia, with the help of a net of V men, must use its agents for kindling national antagonism among the people of the Soviet Union... In carrying out the above-mentioned instructions of Keitel and Jodl, I contacted Ukrainian National Socialists who were in the German Intelligence Service and other members of the nationalist fascist groups, whom I roped in to carry out the tasks as set out above... In particular, instructions were given by me personally to the leaders of the Ukrainian Nationalists, Melnik (code name 'Consul I' and Bandara, to organize immediately upon Germany's attack on the Soviet Union, and to provoke demonstrations in the Ukraine in order to disrupt the immediate rear of the Soviet armies, and also to convince international public opinion of alleged disintegration of the Soviet rear").

⁹⁶⁰ Gazeta Wyborcza, *Forget about Giedroyc: Poles, Ukrainians, IPN* (24 May 2008), available at: <https://archive.is/R9ze1> (Annex 318).

⁹⁶¹ International Military Tribunal (Nuremberg). Judgement of 1 October 1946, p. 92, available at: <https://www.legal-tools.org/doc/45f18e/pdf/>.

⁹⁶² Decree of the President of Ukraine No. 806/2014 "On the Day of the Defender of Ukraine", 14 October 2014, available at: <https://www.president.gov.ua/documents/8062014-17816> (Annex 325).

awarded the title of the Hero of Ukraine after the so called “2004 Orange Revolution”.⁹⁶³ The Ukrainian government continues to grant this honorary title to other OUN-UPA criminals.⁹⁶⁴ Since 2015, elderly Banderites are legally equalized to veterans of World War II and are entitled to the same benefits.⁹⁶⁵ Year by year, on 1 January (Bandera’s birthday) and 14 October, they march freely with their young followers through the streets of Ukrainian cities under Nazi banners.⁹⁶⁶

733. Even the ideologists of the current Kiev regime have never denied the evident fact that OUN-UPA, both by its ideological principles and methods of struggle, can be classified as a typical Nazi organization.⁹⁶⁷
734. To date, about 15 neo-Nazi parties and organizations have been formed in Ukraine, which do not hesitate to promote the neo-Nazi ideology of national and racial superiority and hatred of other people, and openly use Nazi symbols - red and black flags of the OUN, Celtic crosses and swastika. Among them – VO Svoboda, National Corps, the Right Sector, Centuria, Freikorps, Karpatska Sich, C14, UNA-UNSO, OUN and others, which function and carry out extremist activities with the tacit approval or direct support of the Ukrainian Government.
735. Modern Ukrainian neo-Nazi movements do not hide their succession from the OUN-UPA and other collaborationists of the World War II. In early 1990-s OUN was legalized in Ukraine under the new title – Congress of Ukrainian Nationalists, however the leaders were the same – Congress’s first chairman was Slava Stetsko – former head of OUN’s women and youth section and wife of Yaroslav Stetsko, the former deputy of OUN’s

⁹⁶³ Administration of the President of Ukraine, Letter No 12-09/2938, 16 July 2019, available at: <https://dostup.pravda.com.ua/request/51414/response/123805/attach/3/2281..pdf> (Annex 330); Decree of the President of Ukraine No. 46/2010 “On Awarding S. Bandera the title of Hero of Ukraine”, 10 January 2010, available at: <https://zakon.rada.gov.ua/laws/show/46/2010#Text> (Annex 331); Decree of the President of Ukraine No. 965/2007 “On Awarding R. Shukhevych the Title of Hero of Ukraine”, 12 October 2007, available at: <https://zakon.rada.gov.ua/laws/show/965/2007#Text> (Annex 332).

⁹⁶⁴ Decree of the President of Ukraine No. 699/2022 “On Awarding M. Simchich the Title of Hero of Ukraine”, 14 October 2022, available at: <https://www.president.gov.ua/documents/6992022-44385> (Annex 342).

⁹⁶⁵ Law of Ukraine No. 3551-XII “On the Status of War Veterans and Guarantees of Their Social Protection”, 22 October 1993, Article 6(16), available at: <https://zakon.rada.gov.ua/laws/main/3551-12#Text> (Annex 344).

⁹⁶⁶ Nv.ua. “*Bandera is our father*”. *Torchlight procession to mark 113th anniversary of Ukrainian nationalist leader held in Kyiv - photos, video* (1 January 2022), available at: <https://nv.ua/ukr/kyiv/den-narodzhennya-banderi-v-kiyevi-vidbulasya-smoloskipna-hoda-video-50206090.html> (Annex 317).

⁹⁶⁷ National Academy of Sciences of Ukraine, I.F. Kuras Institute of Political and Ethnic Studies, Alexander Sych. Thesis “Modern Ukrainian nationalism: political science aspects of paradigm transformation”, p. 135, available at: <https://ipiend.gov.ua/spetsializovana-vchena-rada-svr/dysertatsii/> (Annex 294).

leader Stepan Bandera.⁹⁶⁸ In his turn, Yury Shukhevich, son of Roman Shukhevich,⁹⁶⁹ established and led another Ukrainian major Neo-Nazi party – The Ukrainian National Assembly – Ukrainian People's Self-Defense (UNA-UNSO).⁹⁷⁰ The true genesis of Ukrainian Neo-Nazi movement will be explained in more detail below, but here it would be enough just to quote the current leader of another neo-Nazi party VO Svoboda Oleg Tyagnibok's 2021 speech:

“Local authorities around Ukraine raise Bandera's revolutionary black-and-red flags along with Ukraine's blue-and-yellow state banner. We have already more than 350 such decisions... This is our ideological victory... In our capital city Kiev, there is no Moscow Avenue, but there are Bandera Avenue and Shukhevych Avenue... This ideological sword of fight with Bandera on its point will defeat not only the Muscovites but also internal collaborators...”⁹⁷¹

i. Modern Ukrainian neo-Nazis claim to be heirs of the World War II Nazi-collaborators and spread their ideology throughout the whole country

736. OUN was founded in 1929 by emigrants from the Western Ukraine, who during the World War I were part of the military formations of the Central Rada and Directory - puppet quasi-states created by the German Empire on the German-occupied territories of the Russian Federation. Not surprisingly, from the very the moment of its emergence, OUN came under the scrutiny of the German secret services, which, even before Hitler came to power, established close ties with it. Several hundred OUN fighters were trained in Nazi Germany and Fascist Italy.

737. During World War II, the OUN leaders actively cooperated with the Nazi government of the new German Reich, hoping to obtain Hitler's agreement for establishment of the independent Ukrainian state in exchange for their assistance.

⁹⁶⁸ OUN-UPA, Personalities, *Slava Stetsko (14.05.20 - 12.03.03)* (1 January 2015), available at : https://web.archive.org/web/20150101141420/http://oun-upa.org.ua/personalities/#stetsko_slava (Annex 319).

⁹⁶⁹ See above, ¶732.

⁹⁷⁰ Unian, *Hero of Ukraine Yuriy Shukhevich dies* (22 November 2022), available at : <https://www.unian.net/society/umer-geroy-ukrainy-yuriy-shuhevich-novosti-lvova-12053652.html> (Annex 320).

⁹⁷¹ Youtube, *UPA's March of Glory: Oleg Tyagnibok's speech / October 14 / Protection / Day of Defenders of Ukraine* (17 October 2021), available at : <https://www.youtube.com/watch?app=desktop&v=2kCzI6wa4U0>.

738. Memoirs of one of the OUN leaders Yaroslav Stetsko reveal OUN's close cooperation with Hitler's regime⁹⁷² and its general support for Nazi's abhorrent methods of repression of ethnic minorities, especially Russians and Jews, on the territory of Ukraine:

“[A]t a time of chaos and confusion liquidation of undesirable Polish, Muscovite, and Jewish activists is permitted, especially supporters of Bolshevik-Muscovite imperialism.”⁹⁷³

“Jews are very insolent . . . They have to be treated very harshly ... We must finish them off ... In [eastern] Ukraine, marriages with Jewish women occur mainly in the cities. Jewish women married Ukrainians in order to have a comfortable life. When the Ukrainians went bankrupt, they would divorce them ... I like the German view very much.”⁹⁷⁴

“I am aware that the reconstruction of a sovereign and united Ukrainian state is possible only with Germany's victory. Historical fate and geopolitical reality have determined both Ukraine's and Germany's path. Ukraine's economic structure dictates its cooperation with German.”⁹⁷⁵

739. After Germany invaded the USSR on 22 June 1941, “field groups” of Banderites were sent to the territory of Ukraine as an auxiliary occupation force to spread terror against Jews, Poles and Communists in the Soviet territories controlled by Germany.⁹⁷⁶ OUN's leaflets of the WWII-era urged Ukrainians to “destroy” members of ethnic minorities, including Russians, Poles, Hungarians and Jews.⁹⁷⁷

740. Subsequently, the Nazis formed the punitive battalions “*Nachtigal*”, “*Roland*”, the 201st Schutzmannschaft Battalion (“Ukrainian Legion”), the 14th SS Volunteer Infantry Division (“*Galicia*”, named after a West Ukraine region), and the Ukrainian auxiliary police which, together with the *Einsatzkommandos*, participated in the mass murder of civilians and punitive actions against partisans in Ukraine and Belorussia. From October 1941 to January 1942, up to 2,000 Galician Ukrainians found themselves in the elite

⁹⁷² Specifically, it is shown that the participants at the Second OUN Congress were “primarily representatives of the homeland [Ukraine] and Greater Germany.” K.C. Berkhoff, M. Carynyk, *The Organization of Ukrainian Nationalists and Its Attitude toward Germans and Jews: Iaroslav Stets'ko's 1941 Zhyttiepys*, *Harvard Ukrainian Studies*, Vol. 23, No. 3/4 (December 1999), p. 168.

⁹⁷³ *Ibid.*, p. 153.

⁹⁷⁴ *Ibid.*, p. 154.

⁹⁷⁵ *Ibid.*, p. 171.

⁹⁷⁶ *The Independent*, *To see what Ukraine's future may be, just look at Lviv's shameful past* (9 March 2014), available at: <https://www.independent.co.uk/voices/commentators/to-see-what-ukraine-s-future-may-be-just-look-at-lviv-s-shameful-past-9178968.html> (Annex 246).

⁹⁷⁷ K.C. Berkhoff, M. Carynyk, *The Organization of Ukrainian Nationalists and Its Attitude toward Germans and Jews: Iaroslav Stets'ko's 1941 Zhyttiepys*, *Harvard Ukrainian Studies*, Vol. 23, No. 3/4 (December 1999), p. 154.

German SS divisions “*Leibstandart*”, “*Reich*”, “*Totenkopf*”, and “*Viking*”, as well as in the 1st SS Motorized Brigade.

741. Faithful fellows of Hitler’s regime, Bandera and his allies were responsible for flagrant episodes of ethnic cleansing in Eastern Europe. Bandera’s associate Roman Shukhevich served as a deputy commander of Wehrmacht-controlled “*Nachtigall*” battalion, which participated in mass killings of Jews and Soviet citizens.⁹⁷⁸ After that, Shukhevich joined UPA, which openly received arms from Nazi Germany to suppress anti-Nazi movements in the Germany-controlled territories of Belorussia and Ukraine.⁹⁷⁹ One of the most horrific crimes perpetrated by UPA was the mass murder of inhabitants of some 100 villages in Eastern Galicia and in Volyn. Up to 60 thousand of ethnic Poles in total are reported to have been killed by UPA.⁹⁸⁰ Ukrainian collaborators were also involved in the 1941 Babi Yar massacre in Kiev, where 100 to 150 thousand of soviet war prisoners, Jews and Roma were killed. In all, more than 5.3 million people died in Ukraine at the hands of the Nazis and their henchmen.

ii. The 2014 coup d’état brought the OUN UPA followers, neo Nazi’s and ultra Nazi’s to power

742. As has been explained above,⁹⁸¹ in 2014, after President Yanukovich was unconstitutionally removed from his office and left Ukraine in fear for his life, the Maidan leaders created a government of the victors.⁹⁸² One of them, taking the position of the Deputy Prime Minister, was Alexander Sych, Verkhovna Rada deputy from the neo-Nazi party Svoboda and associate professor of History in the Ivano-Frankovsk Oil and Gas Institute. In his 2020 PhD thesis on “Modern Ukrainian Nationalism” he directly emphasized that OUN willingly adopted experience of fascism and Nazism:

“the OUN belonged to the category of those political movements that were already based on the considerable experience of their predecessors. That is why it used the experience of the early successes of fascism and Nazism, but

⁹⁷⁸ RT, “*Divide and Rule*”: *What Were the Real Relations between the UPA and Nazi Germany?* (14 October 2022), available at: <https://russian.rt.com/science/article/1060517-upa-godovschina-sozdanie> (Annex 247).

⁹⁷⁹ *Ibid.*

⁹⁸⁰ *Gazeta Wyborcza*, *Forget about Giedroyc: Poles, Ukrainians, IPN* (24 May 2008), available at: <https://archive.is/R9ze1> (Annex 318).

⁹⁸¹ *See above*, Chapter I(A).

⁹⁸² [REDACTED]

did not copy them blindly. This is evidenced by the statement of D. Myron-Orlyk: "Undoubtedly, it is necessary to follow the development of nationalist movements in other countries, in particular to learn from the experience of fascism and national socialism, but everything must be adapted to Ukrainian relations and needs, organically assimilated and melted in the crucible of the Ukrainian spirit and thought".⁹⁸³

743. Activity of OUN-UPA were condemned by the Resolution of the European Parliament dated 25 February 2010 "On Situation in Ukraine".⁹⁸⁴

744. In 2016, the Polish Parliament adopted a resolution declaring 11 July a National Day of Remembrance of Victims of massacre committed by UPA. The resolution states:

"The victims of crimes committed in the 40s by Ukrainian nationalists have so far not been commemorated in an appropriate manner and the mass murders have not been named - in keeping with historical truth - as genocide."⁹⁸⁵

745. After the collapse of the USSR and the formation of independent Ukraine, radical Ukrainian nationalism received a second wind. Neo-Nazi organizations quickly emerged and multiplied in the country. The process of their radicalization significantly accelerated after the so-called "Orange Revolution" of 2004, which showed that extremism in Ukraine ceased to be a marginal phenomenon and became politically mainstream. Ukrainian authorities from 1990 to 2010 did not take any visible steps to curb neo-Nazi sentiments in society, but instead used them in their domestic political struggle.

746. As a result, there are currently about 15 radical Neo-Nazi groups in Ukraine. Among them is the National Corps, which was created in 2016 on the basis of the Patriot of Ukraine group and the Azov volunteer battalion fighters who joined it.⁹⁸⁶ The National Corps and its leader Andrey Biletsky had closer ties to the Ukrainian leadership and felt absolute

⁹⁸³ National Academy of Sciences of Ukraine. I.F. Kuras Institute of Political and Ethnic Studies. Alexander Sych. Thesis "Modern Ukrainian nationalism: political science aspects of paradigm transformation". pp. 135, 239, 241-248, 257, available at: <https://ipiend.gov.ua/spetsializovana-vchena-rada-svr/dysertatsii/> (Annex 294).

⁹⁸⁴ European Parliament Resolution on the Situation in Ukraine, 25 February 2010, available at: https://www.europarl.europa.eu/doceo/document/TA-7-2010-0035_EN.html.

⁹⁸⁵ Resolution of the Sejm of the Republic of Poland on paying tribute to the victims of the genocide committed by Ukrainian nationalists on citizens of the Second Republic of Poland in the years 1943–1945, 22 July 2016, available at: http://orka.sejm.gov.pl/proc8.nsf/uchwaly/625_u.htm (Annex 248)

⁹⁸⁶ Gazeta.ua, *Biletskyi: "Azov" will become a party*" (28 May 2016), available at: https://gazeta.ua/articles/politics/_bileckij-azov-stane-partiyeju/701012?mobile=falsehttps://en.interfax.com.ua/news/general/376717.html (Annex 283)

impunity.⁹⁸⁷ In 2020, the Centuria, a far-right organization with a Nazi bias, was formed from members of the National Corps. Among its supporters were many cadets from Ukrainian military schools, including the Lvov National Academy of Land Forces named after P. Sagaidachny, which is closely patronized by the U.S. State Department.

747. A notable role on the right wing is played by the Carpathian Sich movement, founded in 2014, which professes Nazi ideology and uses appropriate symbols - Celtic crosses, swastikas, and the numbers "14/88". They are known for their violent actions against Russians, Hungarians, Jews, and migrants from other countries.⁹⁸⁸ Another scandalous structure is C14, which emerged in 2009 as an informal movement of supporters of Ukrainian nationalism and soccer hooligans who joined them. It is also known for attacks on Russians, Jews, and Roma.⁹⁸⁹
748. On 14 February 2004, the regular congress of the Social-National Party of Ukraine (SNPU) was held where it was renamed into the All-Ukrainian Association "Svoboda" and Oleh Tyagnibok was elected its chairman. In 2012, the party won 37 out of 450 seats in the Verkhovna Rada of Ukraine of the VII convocation. Subsequently, this party would play a significant role in the organization of the 2014 *coup d'etat*.
749. Modern Ukrainian neo-Nazi are followers of OUN-UPA. Their ideologists openly admit it. For instance, Mr Alexander Sych, the former Deputy Prime Minister, in his 2019 article

⁹⁸⁷ BBC News Ukraine, *National Corps in Faces: Who are these people and where are they from?* (11 March 2019), available at: <https://www.bbc.com/ukrainian/features-47527045> (Annex 321) ("Who are the people who lead the "Azov" movement, which is playing an increasingly important role in Ukrainian politics... Biletsky was imprisoned in 2011. At that time, representatives of nationalist organisations, including the "Patriot of Ukraine", were arrested in Ukraine... He was released on 24 February 2014, when the Verkhovna Rada passed a resolution to release political prisoners from the time of Viktor Yanukovich. In the spring of 2014, Andrey Biletskiy became one of the founders of the battalion, and later the "Azov" police Regiment, which participated in the ousting of militants from Mariupol and a number of other operations in Donbass. During the fighting in the East, the Regiment's commander had a good relationship with the Minister of Internal Affairs Arsen Avakov.... Oleg Petrenko, 45, is a member of parliament. He participated in clashes with police in Cherkasy on March 9. Oleg Petrenko was born and raised in Cherkasy, where he was elected to the Verkhovnaya Rada in 2014 in a constituency from the Petr Poroshenko Bloc party...After being elected to parliament, he participated in the work of the "Azov" Civil Corps and later the "National Corps" party... In an interview with "Censor", Mr. Petrenko recalled that he had twice wanted to leave the faction before, but was allegedly personally dissuaded by Petr Poroshenko... Sergey Korotkikh (known in the media as "Boatsman" and "Malyuta") was born in Russia, but later moved with his parents to Belarus... In April 2014, he moved to Ukraine - "from the first day in Azov"... In late 2014, he received a Ukrainian passport from President Poroshenko").

⁹⁸⁸ Iryna Berezhnaya Institute of Legal Policy and Social Protection, REPORT: INFRINGEMENT OF RIGHT AND FREEDOMS IN UKRAINE (2019), pp. 22-23 (Annex 351)

⁹⁸⁹ Iryna Berezhnaya Institute of Legal Policy and Social Protection, REPORT: INFRINGEMENT OF RIGHT AND FREEDOMS IN UKRAINE (2019), pp. 22-23 (Annex 351)

“The Influence of the National Liberation Struggle of the OUN-UPA on the Militarization of the Modern Ukrainian Nationalist Movement” admits that modern Ukrainian neo-Nazi adopted the ideology of “paramilitary nationalist structures”, that is, from Bandera and Shukhevich.⁹⁹⁰

750. Mr, Sych explains the genesis of the Ukrainian neo-Nazi movement stressing that radicalism has always been a distinctive feature of the organizations which consider themselves heirs of OUN-UPA, such as NPU, Right Sector, Trident and Svoboda:

“The first such paramilitary association was the Varta Rukhu. It was created to protect the public actions of the People's Movement of Ukraine for Perestroika (Rukh) during the Soviet regime and was officially registered in late 1990... In 1991, Varta Rukhu became one of the basic organizations for the newly formed Social-National Party of Ukraine (SNPU)... After the formation of the SNPU, it took over the radical methods of the Varta Rukhu.

...

In 1996, the Patriot of Ukraine Society for Assistance to the Armed Forces and the Navy was created under the NPU. Participants in those events claim that at its height, the organization consisted of about three thousand organized and trained young people of military age. At the same time, scholars put the number at a much more modest level, between 300 and 400 people. Since in 1993 Ukrainian legislation introduced criminal liability for the creation and activity of illegal paramilitary groups, the constituent documents of this public organization corresponded to the formal name. However, in reality, Patriot of Ukraine continued the traditions of using radical methods of Varta Rukhu and NZ and participated in street clashes with ideological opponents and law enforcement officials.

...

Another paramilitary association, the S. Bandera Public Sports and Patriotic Organization “Tryzub” (“Trident”), was created at the initiative of the OUN-B. The date of its creation is considered to be October 14, 1993... Law enforcement officers often detained members of the “Tryzub” with weapons, which led to the opening of criminal cases. The story of an attack by several members of the organization on a military unit in the Kharkiv region to seize weapons was a resonant one at the time. Its members were detained and sentenced to various terms of imprisonment. The confrontation between the organization's members and representatives of criminal structures in Dniprodzerzhynsk ended in a shootout and a court case for one of its members”.⁹⁹¹

⁹⁹⁰ A. Sych. The Influence of the National Liberation Struggle of the OUN-UPA on the Militarization of the Modern Ukrainian Nationalist Movement, p. 117, available at: <http://regionalstudies.uzhnu.uz.ua/archive/16/21.pdf> (Annex 295).

⁹⁹¹ *Ibid.*, pp. 117-119.

“In addition to Svoboda, another distinctly nationalist structure in this revolution was the Right Sector movement. The date of its creation is considered to be November 28, 2013, and its name comes from its location in a revolutionary tent camp. It included both well-known nationalist organizations that were in crisis on the eve of the revolution and no longer played a significant role in the political process, and those that had a local impact on social and political processes. For the former, the revolutionary events of 2013-2014 offered a chance to revive their influence. The initiator of the Right Sector is considered to be Tryzub. It included representatives of two other well-known nationalist structures, UNA-UNSO and Patriot of Ukraine, as well as organizations such as White Hammer, Black Committee, Committee for the Liberation of Political Prisoners, Carpathian Sich, close to Svoboda, individual nationalists and football fans.”⁹⁹²

751. Aleksander Sych admits that different Ukrainian Neo-Nazi groups, nurtured on the Nazi and fascist ideas of the *OUN*, took the dominant positions in the 2004 and 2014 *coup d'états*:

“Nationalist structures became a significant factor in the 2004 Orange Revolution. The most effective among them were UNA-UNSO, KUN, Svoboda, and Bandera's Tryzub (Trident). And although V. Yushchenko's election headquarters, actively using the potential of nationalist structures, for ideological reasons did not advertise its connection with them, the revolutionary Maidan itself was largely filled with nationalist content, and for the first time, topics that had previously been the domain of exclusively nationalist discourse...”⁹⁹³

“The parliamentary elections of 2012 clearly placed the accents of influence in the nationalist environment. On the one hand, Svoboda became its undisputed leader. In these elections, the party received 10.44% of the vote in the multi-mandate constituency and 13 of its candidates were elected in single-member districts. Thus, Svoboda managed to form a fairly large parliamentary faction consisting of 38 MPs”.⁹⁹⁴

752. According to Aleksander Sych, the far-right Ukrainian neo-Nazis were particularly deeply involved in organization of Maidan protests, including violent clashes with the law enforcement formations:

“In particular, Svoboda, along with Batkivshchyna and V. Klitschko's UDAR (Strike) party, formed the political core of the revolutionary Maidan.”⁹⁹⁵

⁹⁹² *Ibid.*, p. 121.

⁹⁹³ National Academy of Sciences of Ukraine. I.F. Kuras Institute of Political and Ethnic Studies. Alexander Sych. Thesis "Modern Ukrainian nationalism: political science aspects of paradigm transformation". p. 251, available at: <https://ipiend.gov.ua/spetsializovana-vchena-rada-svr/dysertatsii/> (Annex 294).

⁹⁹⁴ National Academy of Sciences of Ukraine. I.F. Kuras Institute of Political and Ethnic Studies. Alexander Sych. Thesis "Modern Ukrainian nationalism: political science aspects of paradigm transformation". p.239, available at: <https://ipiend.gov.ua/spetsializovana-vchena-rada-svr/dysertatsii/> (Annex 294).

⁹⁹⁵ *Ibid.*

“Once again, members of Svoboda and the Opposition Platform were equally involved in them during the most tragic phase of February 18-20, as they had the most relevant experience, including during their time in paramilitary structure”.⁹⁹⁶

753. Mr Sych was aware of this due to his personal presence on the Maidan. It is well known, that during the Maidan protests he stayed in the hotel “Ukraine” along with his fellow Svoboda members Igor Yankiv and Oleg Pankovski. The all three occupied rooms exactly on the 11 floor, where the BBC reporter Gabriel Gatehouse filmed outgoing gunshots towards the protesters on 20 February 2014.⁹⁹⁷

754. Ukrainian radicals, which took part in violent overthrowing of the legitimate power in Ukraine, were well equipped and armed. On 20 February 2014, the Public Relations Department of the Ministry of Internal Affairs of Ukraine reported a total of 565 law enforcement officers had sought medical assistance since 18 February, 410 of whom had been hospitalized. The number of law enforcement officers killed so far was 13, while 30 law enforcement officers had suffered gunshots in Kyiv.⁹⁹⁸ On 21 February 2014, the Right Sector leader Dmitriy Yarosh openly declared that:

“Brothers and sisters, the situation is difficult. Once again, as it has been the case many times before, the authorities have engaged in deception. The agreements that have been reached do not meet our aspirations. The Right Sector will not lay down its arms. The Right Sector will not lift the blockade of any state institutions until our most important demand is fulfilled - the resignation of Yanukovich.”⁹⁹⁹

755. Since neo-Nazis played a key role in the overthrow of the legitimate authorities of Ukraine in 2014, they got a significant share in the new Cabinet of Ministers. Svoboda party obtained a significant share of high-ranking portfolios:

- (a) Andrey Parubiy was appointed to the post of the Secretary of the National Security and Defense Council of Ukraine;

⁹⁹⁶ *Ibid.*, p.248.

⁹⁹⁷ LB.ua. “Svoboda” members suspected of shooting at protesters on Maidan (13 October 2015), available at: https://lb.ua/news/2015/10/13/318362_svobodovtsev_zapodozrili.html (Annex 322).

⁹⁹⁸ Unian, *Ministry of Internal Affairs: 130 law enforcement officers hospitalised with gunshot wounds* (20 February 2014), available at: <https://www.unian.ua/politics/887357-vje-130-pravoohorontsiv-dostavleni-domedzakladiv-z-vognepalnimi-poranennyami-mvs.html> (Annex 323).

⁹⁹⁹ Ukrainska Pravda, “Right Sector will not lay down arms until Yanukovich resigns” (21 February 2014), available at: <https://www.pravda.com.ua/news/2014/02/21/7015612/> (Annex 333).

- (b) Oleg Makhnitsky became the Prosecutor General of Ukraine;
- (c) Igor Tenyukh became the Minister of Defense of Ukraine;
- (d) Alexander Sych became the Deputy Chairman of the Cabinet of Ministers of Ukraine for Economic Affairs;
- (e) Sergey Kvit became the Minister of Education of Ukraine;
- (f) Igor Shvayka became the Minister of Agriculture of Ukraine.¹⁰⁰⁰

756. At the same time, taking advantage of the victory of Nazi ideology as a result of the Maidan coup, as well as the presence of their representatives in power, Neo-Nazi groups created their own full-fledged military units:

“The experience of nationalist paramilitary organizations was very valuable during the creation of volunteer battalions. The Azov battalion was one of the first to emerge, consisting of representatives of the Patriot of Ukraine, the SNA, and Automaidan. Its commander was the leader of the first two nationalist organizations, A.Biletsky. Then, at the initiative of the Right Sector, the Volunteer Ukrainian Corps (VUC) was created. It was headed by A. Stempitsky, who at the same time remained the commander of Tryzub (Tident). In its turn, VO Svoboda, using its presence in the parliament and the post-revolutionary government, created the Sich Interior Ministry battalion under the command of O.Pysarenko and the Carpathian Sich volunteer battalion led by O.Kutsyn. The latter was later transferred to the 93rd Separate Mechanized Brigade of the Armed Forces of Ukraine (UAF) as a consolidated assault company. In the summer of 2014, a volunteer battalion of the OUN volunteer battalion was formed in the summer of 2014. For some time, it was part of the DUK, and later it was formed as a separate volunteer battalion led by a well-known nationalist activist M. Kokhanivsky... At first it was part of the Azov battalion, then moved to the Shakhtarsk battalion, and eventually a special purpose company of the Ministry of Internal Affairs "Saint Mary" under the command of D.Linko, who was later replaced by O.Seredyuk. There was also information that a separate unit was created by members of the UNSO.”¹⁰⁰¹

757. However, the neo-Nazi have not stopped at overthrowing the legitimately elected government of Ukraine and, establishing a reign of intimidation and terror, began to

¹⁰⁰⁰ Resolution of the Verkhovna Rada of Ukraine No. 802-VII “On Formation of the Cabinet of Ministers of Ukraine”, 27 February 2014, available at: <http://zakon.rada.gov.ua/laws/show/802-VII> (Annex 346)

¹⁰⁰¹ National Academy of Sciences of Ukraine. I.F. Kuras Institute of Political and Ethnic Studies. Alexander Sych. Thesis “Modern Ukrainian nationalism: political science aspects of paradigm transformation”, p. 179, available at: <https://ipiend.gov.ua/spetsializovana-vchena-rada-svr/dysertatsii/> (Annex 294).

actively pursue and literally exterminate all those who disagreed with their methods and views on the future of Ukraine. A wave of violence swept across the country.

758. On 2 May 2014 anti-coup protesters constructed a tent camp in front of the building of the House of Trade Unions in Odessa and were attacked by *Right Sector* militants and groups of radical football fans. The radicals forced people to take refuge inside the building and started shooting at them with semi-auto weapons, Molotov cocktails flew towards the main entrance. The police did not interfere and did not take measures to protect the life and health of the people inside. As a result, 48 people died in fire.¹⁰⁰²
759. On 7 April 2014, Acting President Turchinov announced the so-called Anti-Terrorist Measures in Donbass.¹⁰⁰³ On 14 April 2014, the Anti-Terrorist Operation (“ATO”) against the East was officially started with Acting President Turchinov’s decree.¹⁰⁰⁴ Full military force was used against communities that resisted rule by unconstitutional government. On 2 May 2014, the new government announced a continuation of the ATO which was intensified. Thousands of civilians died in Donbass as a result of aerial bombings and the use of heavy weapons.
760. Numerous so-called “volunteer battalions” formed of members of right-wing radical groups who professed Nazi views were fully involved in the ATO. They were imbued with hatred for Russians, guided by which they murdered and robbed civilians in Donbass and humiliated their human dignity. This can be seen on the videos they published.¹⁰⁰⁵

¹⁰⁰² See, for example, Channel One, *In Odessa, radicals chased protesters into building and set fire to it* (3 May 2014), available at: https://1tv.ru/news/2014-05-03/40826-v_odesse_radicaly_zadnali_protestuyuschih_v_zdanie_i_podozhgli (Annex 334). See also: Youtube, *14.40/02.05.2014.Arrest on Alexandrovsky prospect in Odessa* (15 July 2015), available at: https://www.youtube.com/watch?v=mYiLmtSRox4&list=PL1VsJWkUn2D4c8_U3FffAUJV_XPjPpt4Z&index+67 (Annex 347).

¹⁰⁰³ Interfax.ua, *Anti-Terrorist Measures to be Taken Against Separatists – Turchynov* (7 April 2014), available at: <https://en.interfax.com.ua/news/general/199466.html> (Annex 249). See also YouTube, *Turchinov Announced Anti-Terrorist Measures Against Armed Separatists* (7 April 2014), available at: https://www.youtube.com/watch?v=myjnfelp_V0.

¹⁰⁰⁴ Decree of the Acting President of Ukraine No. 405/2014 “On the Decision of the National Security and Defence Council of Ukraine dated 13 April 2014 “On Urgent Measures to Overcome the Terrorist Threat and Preserve the Territorial Integrity of Ukraine”, 14 April 2014, available at: <https://zakon.rada.gov.ua/laws/show/405/2014#text> (Annex 483). See also BBC News, *Ukraine Crisis: Turchynov Announces Anti-Terror Operation* (13 April 2014), available at: <https://www.bbc.com/news/av/world-europe-27013169> (Annex 250).

¹⁰⁰⁵ Telegram, *Denazification of UA. There is no shame in destroying residents of villages near Artemovsk/Bakhmut because they are all “separatists and katsaps”* (13 December 2022), available at: https://t.me/denazi_UA/30820 (Annex 335).

761. Since the *coup d'état* in 2014, Ukraine has been rapidly acquiring the characteristics of a lawless state condoning and promoting extreme-right and Nazi ideology. This policy included advocacy of violence against Russians and national minorities, glorifying Nazi collaborators involved in horrifying atrocities of the World War II, supporting right-wing radicals as a matter of daily politics and Nazi ideology-based system of the youth education.

762. The quantitative presence of members of the neo-Nazi parties and groups in the higher administrative bodies of Ukraine was not overwhelming, but it was significant. Their ideology has become entrenched in state policies. The pro-presidential majority parties in the Parliament (Poroshenko's European Solidarity, Zelensky's Sluha Naroda [Servant of the People]), do not consider themselves to be Neo-Nazi or radical parties. However, even they exploit the neo-Nazi ideology and willingly implement it. They steadily and drastically progress in pursuing a policy of intensified derusification – by elimination of linguistic, cultural and historical ties between Ukrainians with Russians. In this regard, the nationalistic policies rooted in Nazi ideology of WWII criminals came in handy.

a. Ukraine's officials advocate violence against Russians and ethnic minorities

763. Since Nazi ideology is based on the fiction that this or that nation is supposedly “exceptional”, while other nations are supposedly “inferior”, Ukraine's officials feel completely free and immune to make racist public statements and/or directly advocate Nazi ideology or violence against Russians and ethnic minorities. On 22 June 2022, the Russian Federation distributed to the UN Security Council and the UN General Assembly a letter No. 2802/n containing a compilation of hate speech statements by Ukrainian figures as an official document. The following are only the most egregious examples of such statements.¹⁰⁰⁶

“You call them human [referring to people subject to Ukraine's National Security and Defense Council sanctions]? Not all human representatives are human. There are species as well, I believe” (Vladimir Zelensky's marathon press conference, 29 November 2021);

“I myself am a huge advocate of direct democracy. By the way, so that you know, Adolf Hitler was the highest person practicing direct democracy in the 1930s” (Andrey Parubiy, Chairman of the Verkhovna Rada of Ukraine, 9 April 2018);

¹⁰⁰⁶ Permanent Representative of the Russian Federation to the United Nations, Letter No. 2802 of 22 June 2022, available at: <https://digitallibrary.un.org/record/3975475?ln=ru>.

“We are ready to destroy russkies wherever possible. They must be killed not only in Ukraine, but also beyond its borders in Russia” (Alexander Turchinov, former acting President of Ukraine, 24 February 2022);

“These Russian speakers, they are mentally retarded” (Iryna Farion, member of the 7th Verkhovna Rada of Ukraine from VO Svoboda, the “Opposite View” talk show, April 2018);

“It’s okay to grant Russian the status of a state language... We need to make such promises to this scum, offer any guarantees, make whatever concessions... Have them hanged afterwards” (Boris Filatov, former deputy head of the Dnepropetrovsk regional administration, later – the mayor of Dnepr, 9 March 2014);

“I feel no pity for them [the people of Donbass]. I feel pity for the soldiers who were killed for this scum” (Andrey Reva, Minister for Social Policy, interview to BBC, April 2019).

764. However, since June 2022, the list of Russophobic statements by Ukraine’s officials continues to grow. Thus:

- (a) On 3 April 2022, Ukraine’s President Zelensky admitted that there were neo-Nazi battalions like “Azov” fighting on the side of Ukraine. He said that “Azov was one of these many battalions” and justified the Neo-Nazi leanings of those battalions’ fighters, saying “they are what they are”.¹⁰⁰⁷
- (b) In August 2022, Ukraine’s Ambassador to the Republic of Kazakhstan Petr Vrublevsky said that “the more Russians we kill today, the fewer we would have to kill later”.¹⁰⁰⁸
- (c) On 15 December 2022, Valery Zaluzhny, the head of the UAF, said in an interview to the Economist that “Russians and any other enemies must be killed, just killed, and, most important of all, we should not be afraid to do it.”¹⁰⁰⁹
- (d) In December 2022, Ihor Klymenko, head of the National Police of Ukraine, referred to Russian-speaking residents of Donbass as “people poisoned by Russian propaganda”, and called them “the main problem of this region”. He also called the

¹⁰⁰⁷ Fox News, *Zelenskyy answers questions on assassination attempts* (3 April 2022), available at: <https://www.foxnews.com/video/6302790525001>.

¹⁰⁰⁸ Focus.ua, “*We are trying to kill more*”: *Kazakhstan protests Ukraine's ambassador for words about Russians* (video) (23 August 2022), available at: <https://focus.ua/uk/ukraine/526392-pytaemsysya-ubit-bolshe-kazahstan-vyrazil-protest-poslu-ukrainy-za-slova-o-russkih-video> (Annex 336).

¹⁰⁰⁹ The Economist, *Ukraine’s top soldier runs a different kind of army from Russia’s* (15 December 2022), available at: <https://www.economist.com/zaluzhny-profile> (Annex 251).

residents of Kherson and Kharkov oblasts “fat collaborators” and said that the police is “working” on those of them who “worked as a teacher” on the territories under Russian government.¹⁰¹⁰

- (e) On 25 February 2023, Ukraine’s Defense Minister Reznikov said: “I suddenly felt inside me that I was ready to kill. More than that, I wanted to kill them [Russians]”.¹⁰¹¹

b. Ukraine’s regime unfolded a campaign of commemorating Nazi-related war criminals

765. The both Maidan regimes (the Viktor Yuscshenko’s government established after the so called *2004 Orange Revolution* and the one seized the power in 2014) invested significant efforts to glorify persons notorious for the most shocking ethnic cleansings and genocide in the 20th century.

766. *First*, in 2005 – 2010 and since 2014 Ukrainian regime consistently inculcates admiration for members and leaders of OUN-UPA, including Stepan Bandera, Andrey Melnik, Roman Shukhevich, Yaroslav Stetsko and many others, despite the documented facts of fascist views of the OUN-UPA members:¹⁰¹²

- (a) On 12 October 2007, Ukraine’s President Viktor Yuscshenko signed a Decree on awarding Roman Shukhevych the title of Hero of Ukraine, on 10 January 2010 the same title was handed to Stepan Bandera.¹⁰¹³
- (b) In 2007 Ukraine’s president Viktor Yushenko signed a Decree commemorating OUN’s leader Yaroslav Stetsko and his wife.¹⁰¹⁴

¹⁰¹⁰ RBK-Ukraine. *Igor Klymenko: There is more darkness in Ukraine, but also more police on the streets* (13 December 2022), available at: <https://www.rbc.ua/rus/news/igor-klimenko-zaraz-ukrayini-bilshe-temryavi-1670509562.html> (Annex 337)

¹⁰¹¹ Youtube, *Year – a author’s documentary project of Dmitry Komarov |Part One* (25 February 2023), available at: <https://www.youtube.com/watch?v=rePvm575y5M>.

¹⁰¹² Irina Berezhnaya Institute for Legal Policy and Social Protection, *ONLINE ENVIRONMENT AS A TOOL FOR VIOLATION OF RIGHTS AND FREEDOMS IN UKRAINE* (2022), pp. 107-129 (Annex 351)

¹⁰¹³ Decree of the President of Ukraine No. 46/2010, “On awarding S.Bandera the title of Hero of Ukraine”, 10 January 2010, available at: <https://zakon.rada.gov.ua/laws/show/46/2010#Text> (Annex 331); Decree of the President of Ukraine No. 965/2007 “On awarding R.Shukhevych the title of Hero of Ukraine”, 12 October 2007, available at: <https://zakon.rada.gov.ua/laws/show/965/2007#Text> (Annex 332).

¹⁰¹⁴ Decree of the President of Ukraine No 419/2007 “On the commemoration of Yaroslav Stetsko and Yaroslava Stetsko”, 16 May 2007, available at: <https://zakon.rada.gov.ua/laws/show/419/2007#Text>.

- (c) Since 2007, the so-called “Festival of the Ukrainian Spirit “Bandershtat” (dedicated to Nazi collaborator Stepan Bandera) has been held annually in the outskirts of Lutsk, Volyn region (the region where most heinous crimes of OUN-UPA were committed). The festival is attended en masse by people who profess neo-Nazi views.¹⁰¹⁵ Nazi symbols are used in the decorations. Nazi songs are being played from the stage.¹⁰¹⁶ At 2021 Bandershtat the brass band of the State Border Guard Service of Ukraine performed.¹⁰¹⁷
- (d) Since 2014, Ukrainian neo-Nazi movements hold annual torch rallies in various Ukrainian cities to commemorate Bandera's birthday. Nazi symbols and Nazi slogans are openly displayed. Not only do the police not prevent the Nazi rally, but, on the contrary, protect the participants.¹⁰¹⁸
- (e) In May 2015, Ukraine’s president Petr Poroshenko signed a law praising members of OUN-UPA as freedom fighters and providing a package of social benefits in their support.¹⁰¹⁹ With reference to this law, regional council of Lvov, Volyn, city councils of Kiev and Ternopol and many others decided to use OUN-UPA flag on an equal footing with the state flag.¹⁰²⁰ The law was criticized by the US Senate and Congress as “glorifying Nazism”.¹⁰²¹ Further, in December 2018 another law was

¹⁰¹⁵ Youtube, *Meeting with OUN-UPA veterans, Banderstadt, August 2 (6 August 2014)*, available at: <https://www.youtube.com/watch?v=wdy7sUoXNLk>.

¹⁰¹⁶ Youtube, *Skryabin - Banderstatt Kolomyiki (live @ Banderstat'14) (7 August 2014)*, available at: <https://www.youtube.com/watch?v=vRYtlT5pqTE>.

¹⁰¹⁷ Volynonline.com, *Uncensored and "Bez Obmezhen": the third day of "Bandershtat-2021" in photos (9 August 2021)*, available at: <https://volynonline.com/bez-czenzury-ta-bez-obmezhen-tretij-den-bandershtatu-2021-u-foto/> (Annex 338).

¹⁰¹⁸ Nv.ua. “*Bandera is our father*”. *Torchlight procession to mark 113th anniversary of Ukrainian nationalist leader held in Kyiv - photos, videos (1 January 2022)*, available at: <https://nv.ua/ukr/kyiv/den-narodzhennya-banderi-v-kiyevi-vidbulasya-smoloskipna-hoda-video-50206090.html> (Annex 317).

¹⁰¹⁹ RT, *Poroshenko Signs Laws Praising Ukraine Nationalists as ‘Freedom Fighters’ (16 May 2015)*, available at: <https://www.rt.com/news/259157-ukraine-nazi-freedom-fighters/> (Annex 252)

¹⁰²⁰ Iryna Berezhnaya Institute of Legal Policy and Social Protection, *REPORT: INFRINGEMENT OF RIGHT AND FREEDOMS IN UKRAINE (2019)*, p. 20 (Annex 351).

¹⁰²¹ The website of R. Khanna, *Release: Rep. Khanna Leads Bipartisan Members in Condemning Anti-Semitism in Europe (25 April 2018)*, available at: https://webcache.googleusercontent.com/search?q=cache:nI_Euw_bfyYJ:https://khanna.house.gov/media/press-releases/release-rep-khanna-leads-bipartisan-members-condemning-anti-semitism-europe&cd=1&hl=ru&ct=clnk&gl=ru (Annex 253).

adopted that granted all OUN-UPA members a status of “veterans of combat operations” and provided them with additional social benefits.¹⁰²²

- (f) “Bandera readings” are held annually with direct support of Kiev Mayor Vladimir Klitchko.¹⁰²³ In 2017, Ukrainian neo-Nazis chanted “Jews Out!” in a march celebrating the birthday of Nazi collaborator Stepan Bandera.¹⁰²⁴ In 2018, the Ukrainian Parliament declared 1 January as a national day of commemoration for Stepan Bandera.¹⁰²⁵ In Bandera’s home city Lviv the Regional Council declared the year of 2019 to be the year of Bandera and the OUN.¹⁰²⁶ On 2 January 2019 the German Bundestag and Czech President Milos Zeman criticized the torchlight procession held in Kiev on 1 January 2019 in honour of Bandera, considering the rally as “glorification of Nazism”.¹⁰²⁷ On 1 February 2019 the 6th Forum “Bandera Readings” was held in Kiev in the hall of the Kiev City Council.¹⁰²⁸ On 18 February 2019 the right-wing group C14 held a rally “Bandera, get up!” in Kiev. In January 2022, hundreds of neo-Nazis took part in a march annually organized to celebrate the anniversary of Bandera’s birth.¹⁰²⁹
- (g) On 5 February 2022 the 9th Forum “Bandera readings” was held in Kiev, organised by All-Ukrainian Association Svoboda. The forum was devoted to the 80 anniversary of UPA. Leader of the far-right organization “C14” E.Karas’ participated in it. He declared that nationalists find it “enjoying to make war and

¹⁰²² Law of Ukraine No. 3551-XII “On the Status of War Veterans and Guarantees of Their Social Protection”, 22 October 1993, Article 6(16), available at: <https://zakon.rada.gov.ua/laws/main/3551-12#Text> (Annex 344).

¹⁰²³ Irina Berezhnaya Institute for Legal Policy and Social Protection, ONLINE ENVIRONMENT AS A TOOL FOR VIOLATION OF RIGHTS AND FREEDOMS IN UKRAINE (2022), p. 109 (Annex 352).

¹⁰²⁴ The Times of Israel, *Ukrainian marchers in Kiev chant ‘Jews out’* (3 January 2017), available at: <https://www.timesofisrael.com/ukrainian-marchers-in-kiev-chant-jews-out/> (Annex 254)

¹⁰²⁵ Haaretz, *Ukraine Designates National Holiday to Commemorate Nazi Collaborator* (27 December 2018), available at: <https://www.haaretz.com/world-news/europe/2018-12-27/ty-article/ukraine-designates-national-holiday-to-commemorate-nazi-collaborator/0000017f-f310-d223-a97f-ffdd21e50000> (Annex 255).

¹⁰²⁶ Kyiv Post, *2019 Declared Year of Stepan Bandera in Lviv Region* (13 December 2018), available at: <https://www.kyivpost.com/ukraine-politics/2019-declared-year-of-stepan-bandera-in-lviv-region.html> (Annex 256).

¹⁰²⁷ Gazeta.ru, *“Glorification of Nazism”: Kiev March Criticised by Germany* (2 January 2019) <https://www.gazeta.ru/social/2019/01/02/12116881.shtml> (Annex 257).

¹⁰²⁸ Irina Berezhnaya Institute of Legal Policy and Social Protection, REPORT: INFRINGEMENT OF RIGHT AND FREEDOMS IN UKRAINE (2019), p. 8 (Annex 351).

¹⁰²⁹ Times of Israel, *Hundreds of Ukrainian Nationalists March in Honor of Nazi Collaborator* (1 January 2022), available at: <https://www.timesofisrael.com/hundreds-of-ukrainian-nationalists-march-in-honor-of-nazi-collaborator/> (Annex 258).

kill”.¹⁰³⁰In 2018 Ukraine issued a series of stamps glorifying the personnel of SS Galichina division (formed in 1943 from the members of the OUN). An exhibition of the stamps was organized on the premises of Lvov Central Post office in 2020.¹⁰³¹ In February 2019 a memorial plaque in honour of the Hauptsturmführer of SS Galichina Division of the Third Reich Averky Goncharenko installed in Varva, Chernihiv Region.¹⁰³² On 17 February 2021 a Unterscharführer of Galichina SS Division Ivan Fialka was solemnly buried in Stryi, Lvov region, with the mayor attending the burial.¹⁰³³ On 13 June 2021 the solemn funeral ceremony was held for Orest Vaskul of Galichina SS Division, being the first ceremony in the history of Ukraine when the Guard of Honour of the Presidential regiment of the UAF paid its respects to an SS member.¹⁰³⁴ On 28 April 2021, a rally in honor of the Galichina SS Division was held in Kiev for the first time.¹⁰³⁵

- (h) On December 6, 2022 the Supreme Court of Ukraine put an end to consideration of the case on classification of the insignia of the SS Division Galichina as Nazi symbols. The Supreme Court and the Sixth Administrative Court of Appeal of Kiev before that took a position that such insignia cannot be classified as Nazi symbols.¹⁰³⁶ Unveiling of monuments commemorating leaders and activists of OUN-UPA, as well as other events praising former Nazi collaborators are organized on a weekly basis.¹⁰³⁷

¹⁰³⁰ Focus.ua, “We find it funny to kill”: Karas told about threat of Ukraine to the world after the collapse of Russia, (8 February 2022), available at: <https://focus.ua/politics/505794-nam-prikolno-ubivat-karas-rasskazal-ob-ugroze-ukrainy-dlya-mira-posle-raspada-rf>.

¹⁰³¹ Iryna Berezhnaya Institute of Legal Policy and Social Protection, REPORT: INFRINGEMENT OF RIGHT AND FREEDOMS IN UKRAINE (2019), p. 20 (Annex 351). See also Irina Berezhnaya Institute for Legal Policy and Social Protection, ONLINE ENVIRONMENT AS A TOOL FOR VIOLATION OF RIGHTS AND FREEDOMS IN UKRAINE (2022), p. 112 (Annex 352).

¹⁰³² Iryna Berezhnaya Institute of Legal Policy and Social Protection, REPORT: INFRINGEMENT OF RIGHT AND FREEDOMS IN UKRAINE (2019), p. 8 (Annex 351).

¹⁰³³ Irina Berezhnaya Institute for Legal Policy and Social Protection, ONLINE ENVIRONMENT AS A TOOL FOR VIOLATION OF RIGHTS AND FREEDOMS IN UKRAINE (2022), p. 116 (Annex 352).

¹⁰³⁴ *Ibid.*

¹⁰³⁵ *Ibid.*, p. 121.

¹⁰³⁶ RG, The Supreme Court of Ukraine did not recognize as Nazi the symbols of the SS Division “Galichina” (6 December 2022), available at: <https://rg.ru/2022/12/06/verhovnyj-sud-ukrainy-ne-priznal-nacistskoj-simvoliku-divizii-ss-galichina.html> (Annex 453).

¹⁰³⁷ To name only a few examples: on 24 February 2019 local authorities of the Volyn region solemnly honored the memory of UPA officer Grigory Pereginyak. On 18 March 2019 in Bogorodchany, Ivano-Frankovsk region, a monument to Nahtigall battalion Oleksa Khymency and Ivan Shimansky was unveiled. On 2 April 2019 in the city

- (i) On 28 August 2019 local authorities of the city of Ternopol conducted sports and patriotic contest for the Shukhevich Cup.¹⁰³⁸ On 5 March 2021 the Ternopol City Council of decided to rename the city stadium after Roman Shukhevich.¹⁰³⁹ Polish and Israeli ambassadors to Ukraine strongly condemned the decision while Polish city of Zamość suspended its partnership with Ternopol on the EU-funded project on the cities' common history
- (j) As for Andrey Melnik (one of the OUN-UPA leaders), his monument was installed in Ivano-Frankovsk,¹⁰⁴⁰ he also has streets named after him in Chortkiy, Drohobych, Dubno (Rovno Oblast), Kolomyia, Lvov and Strizhovka.
- (k) Further, dozens of streets in various cities of Ukraine were renamed after OUN-UPA and their leaders.¹⁰⁴¹
- (l) On 14 October 2022, Zelenskiy also awarded the title of the Hero of Ukraine to Miroslav Simchich – the last living *OUN-UPA* commander.¹⁰⁴²

767. Ukraine's actions did not remain unnoticed. Deputy Minister of Culture of Poland Jaroslaw Sellin stated that the mass murder of Poles committed by Bandera-led UPA meets the definition of genocide:

of Truskavets the local authorities erected a monument to OUN activist Roman Riznyak. On 30 April 2019 a competition in honor of the 76th anniversary of formation of Galichina SS division was conducted in Ivano-Frankovsk. On 5 March 2019 a monument to an executor of Jewish pogroms Mykola Arsenych was erected in the village of Nizhny Berezov, Ivano-Frankovsk region. See Iryna Berezhnaya Institute of Legal Policy and Social Protection, REPORT: INFRINGEMENT OF RIGHT AND FREEDOMS IN UKRAINE (2019), pp. 8-9 (Annex 35).

¹⁰³⁸ Iryna Berezhnaya Institute of Legal Policy and Social Protection, REPORT: INFRINGEMENT OF RIGHT AND FREEDOMS IN UKRAINE (2019), pp. 8-10 (Annex 351). For more information on the monuments of OUN-UPA supporters, see Irina Berezhnaya Institute for Legal Policy and Social Protection, ONLINE ENVIRONMENT AS A TOOL FOR VIOLATION OF RIGHTS AND FREEDOMS IN UKRAINE (2022), p. 112-116 (Annex 351).

¹⁰³⁹ Ternopol City Council, *From Now On, the Ternopol City Stadium Will Bear the Name of UPA Commander-in-Chief Roman Shukhevich* (5 March 2021), available at: <https://ternopilcity.gov.ua/news/46912.html> (Annex 259).

¹⁰⁴⁰ Photograph of the monument is available at: <https://www.google.com/maps/uv?pb=!1s0x4730c1424a43d199%3A0x425280cc0bf2e3c413m1!7e115!4shttps%3A%2F%2Flh5.googleusercontent.com%2Fp%2FAF1QipOCY9eKGj1P9v1mHWhBCIfDExtBYuhZbRvjCU9o%3Dw260-h175-n-k!15sCgIgAQ>.

¹⁰⁴¹ Gazeta.ru, *Kiev Residents Vote to Rename Tulskaia Square in Honour of "UPA Heroes"* (21 June 2022), available at: <https://www.gazeta.ru/politics/news/2022/06/21/17974814.shtml> (Annex 260); Lenta.ru, *Turgenev Street Renamed in Honour of UPA Fighters in Lvov* (17 April 2008), available at: <https://lenta.ru/news/2008/04/17/street/> (Annex 261);

¹⁰⁴² Decree of the President of Ukraine No. 699/2022 "On awarding M.Simchich the title of Hero of Ukraine", 14 October 2022, available at: <https://www.president.gov.ua/documents/6992022-44385> (Annex 342).

“They have to acknowledge it because it’s a fact. It’s simply a fact. A political decision was made and implemented for ethnic cleansing, the extermination of the entire national minority that has lived there for centuries

...

“This is genocide, it fits all the parameters of the definition of genocide, so there is no discussion here. This is a historical fact. Sooner or later, the Ukrainians will have to recognize it.”¹⁰⁴³

768. A letter from US Senators and Congressmen to the US Department of State dated 25 April 2018 also condemned Ukraine’s consistent policy of glorifying Nazi accomplices:

“It’s particularly troubling that much of the Nazi glorification in Ukraine is government-supported.”¹⁰⁴⁴

769. Another radical, whose supremacist ideas have elicited admiring response from modern Ukrainian authorities is Yuri Lipa, an author of a number of chauvinist works, such as: “Ukrainian Race”, “Division of Russia”, “Geopolitical orienteers of the new Ukraine”, “Ukrainian Epoch” and others. To provide several excerpts from his works:

“Only Ukrainian uniqueness provides broad opportunities for the expansion of the Ukrainian race. The uniqueness of the Ukrainians affirms the strength of their subconscious racial predecessors: Goths and Hellenes. Moscovites as an admixture of blood is a phenomenon hitherto unknown to the Ukrainian race.”

“First of all, it is necessary to cleanse Ukraine of six million Moscovites, who are its parasites, who form almost 10 percent of the population and, as a rule, live in cities.

...

Free Ukraine will not come after the liberation of Kyiv from the Moscovites, but after the destruction of Moscow. The destruction of Russia - as the center of the supranational division of land between the Volga, Pechora and the White Sea - is the basis of a strong Ukraine.”

¹⁰⁴³ RT, *Poland Wants Ukraine to Admit Genocide* (16 August 2022), available at: <https://www.rt.com/news/560961-poland-ukraine-genocide-bandera/> (Annex 262). See also *People’s World, Ukraine’s Ally Poland Demands It Stop Glorifying Nazi Collaborators* (18 August 2022), available at: <https://www.peoplesworld.org/article/ukraines-ally-poland-demands-it-stop-glorifying-nazi-collaborators/> (Annex 263).

¹⁰⁴⁴ The website of R. Khanna, *Release: Rep. Khanna Leads Bipartisan Members in Condemning Anti-Semitism in Europe* (25 April 2018), available at: https://webcache.googleusercontent.com/search?q=cache:nI_Euw_bf yYJ:https://khanna.house.gov/media/press-releases/release-rep-khanna-leads-bipartisan-members-condemning-anti-semitism-europe&cd=1&hl=ru&ct=clnk&gl=ru (Annex 253).

“Rows march, rows thunder and bathe in blood, tempered in fire. Fire and blood, life, will or death are burning in their chest... You hear the cry – Sieg Heil! Heil! Sieg Heil!”¹⁰⁴⁵

770. Yuri Lipa’s memory is preserved in modern Ukraine:

- (a) On 19 August 2020, a memorial plate commemorating Yuri Lipa was installed at the façade of the district library named after Yuri Lipa in settlement Yavorov, Lvov region.¹⁰⁴⁶
- (b) The name of Yuri Lipa is given to streets in Kiev, Lvov, Krapivnitsky, Vinniki, Konotop, Sumy and other cities and settlements bear.¹⁰⁴⁷

771. Furthermore, Ukrainian government protect the name of Simon Petliura – an early-20th century nationalist whose troops murdered more than 50 000 Jews in Kiev pogroms around 1919.¹⁰⁴⁸ In 2009, a street in Kiev was named after Petliura;¹⁰⁴⁹ streets in other Ukraine’s cities were also assigned Petliura’s name.¹⁰⁵⁰ On 22 May 2019 a solemn inauguration in honor of Simon Petliura was held; on 31 July 2019 the mural dedicated to Petliura was opened in Kamenetz-Podolsky.¹⁰⁵¹ Ukraine’s authorities censor access to information regarding atrocities in which Petliura was involved - Ukraine’s State

¹⁰⁴⁵ EurAsia Daily, *OUN-UPA “Euthanasiologist” Doctor Honoured in Lvov Region* (22 August 2020), available at: <https://eadaily.com/ru/news/2020/08/22/v-lvovskoy-oblasti-chestvuyut-vracha-evtanaziologa-iz-oun-upa> (Annex 265).

¹⁰⁴⁶ See Golos Sokalshchiny, *Memorial Plaque Unveiled on the Facade of Yury Lipa District Central Library in Yavorov* (20 August 2020), available at: [https://golossokal.com.ua/ru/novyny-kultury/y-misti-iavorovi-vidbylos-vidkrittia-memorialnoi-tablici-na-fasadi-raionnoi-biblioteki-imeni-uriia-lipi](https://golossokal.com.ua/ru/novyny-kultury/y-misti-iavorovi-vidbylos-vidkrittia-memorialnoi-tablici-na-fasadi-raionnoi-centralnoi-biblioteki-imeni-uriia-lipi) html (Annex 264); See also EurAsia Daily, *OUN-UPA “Euthanasiologist” Doctor Honoured in Lvov Region* (22 August 2020), available at: <https://eadaily.com/ru/news/2020/08/22/v-lvovskoy-oblasti-chestvuyut-vracha-evtanaziologa-iz-oun-upa> (Annex 265).

¹⁰⁴⁷ Wikipedia, *Yury Lipa Street*, available at: https://uk.wikipedia.org/wiki/%D0%92%D1%83%D0%BB%D0%B8%D1%86%D1%8F_%D0%AE%D1%80%D1%96%D1%8F_%D0%9B%D0%B8%D0%BF%D0%B8 (Annex 266)

¹⁰⁴⁸ Kulturologia ru, *How Nationalist Symon Petlyura Became a Hero of Ukraine, and Why the Man Who Killed Him Was Acquitted* (11 April 2022), available at: <https://kulturologia.ru/blogs/110422/53031/> (Annex 267).

¹⁰⁴⁹ Lenta.ru, *Comintern Street in Kiev Renamed to Petlyura Street* (19 June 2009), available at: <https://lenta.ru/news/2009/06/18/petlura/> (Annex 268).

¹⁰⁵⁰ UKRINFORM, *Nationalists Succeed in Protecting Petlyura Street in Poltava Region* (28 February 2017), available at: <https://www.ukrinform.ru/rubric-regions/2184660-nacionalisty-otstoali-ulicu-petlury-v-poltavskoj-oblasti> html (Annex 269).

¹⁰⁵¹ Iryna Berezhnaya Institute of Legal Policy and Social Protection, *REPORT: INFRINGEMENT OF RIGHT AND FREEDOMS IN UKRAINE* (2019), 2019, p. 9 (Annex 351).

Committee on Television and Radio Broadcasting banned “Book of Thieves” by Swedish historian Anders Rydell, which includes critical analysis of Petliura’s actions.¹⁰⁵²

772. On 14 October 2014, Ukraine’s President Poroshenko with his decree No. 806 introduced the Day of the Defender of Ukraine appointing it to October 14 – the founding day of the UPA.¹⁰⁵³

773. On 14 February 2022, Ukrainian President Zelensky with his Decree No. 80 named the 10th Mountain Assault Brigade of the UAF "Edelweiss" - after the 1st Mountain Division of the Nazi German Wehrmacht, which had stormed Lvov and took part in the Kharkov operation of 1942.¹⁰⁵⁴

c. Ukrainian authorities provide support to formations of extreme-right radicals

774. As stated above, the European Commission against Racism and Intolerance in its Reports has consistently admonished Ukraine for failure to prevent the growth of extreme-right sentiment in Ukraine.¹⁰⁵⁵

775. In particular, failure of Ukraine’s authorities to prevent dissemination of antisemitic and extreme-right ideas resulted in general radicalisation of Ukraine’s society and growing popularity of neo-Nazi parties and movements in Ukraine.

776. *Maidan* riots became the minute of fame for such radical groups with no political experience, but notorious for fierce clashes with the government forces. After *Maidan*, the radical forces came out of the shadow, got institutionalized and claimed their rights to power in Ukraine:

(a) One of such forces movements was “Right Sector” (“Pravy Sector”), whose leader Dmitry Yarosh described his organisation’s goal as follows:

¹⁰⁵² The Ukrainian News, *Expert Council of Ukraine’s State Committee on Television and Radio Broadcasting Bans Swedish Historian’s World-Famous Book That Mentions Jewish Pogroms of Petlyura Times* (26 December 2018), available at: <https://ukranews.com/news/603810-ehkspertnyy-sovet-gosteleradyo-zapretyl-v-ukrayne-vsemyrno-yzvestnyu-knygu-shvedskogo-ystoryka-s> (Annex 270).

¹⁰⁵³ Decree of the President of Ukraine No. №806/2014 “On the Day of the Defendant of Ukraine”, available at: <https://www.president.gov.ua/documents/8062014-17816> (Annex 325).

¹⁰⁵⁴ Decree of the President of Ukraine No. 80\2023 “On awarding the honorary name to the 10th separate mountain assault brigade of the Land Forces of the Armed Forces of Ukraine”, available at: <https://www.president.gov.ua/documents/802023-45805> (Annex 348).

¹⁰⁵⁵ See above, Chapter II(A).

“Pravy Sektor has proved its loyalty to the ideals of freedom... Now we needed to present this movement as a source of leadership.

...

We are not politicians... We are soldiers of the national revolution.”¹⁰⁵⁶

- (b) The leader of another political force named “Svoboda” in 2004 declared that Ukraine was governed by a “Jewish-Russian mafia”,¹⁰⁵⁷ while another “Svoboda” member Igor Miroshnichenko denied Ukrainian roots of actress Mila Kunis, having called her “jidovka”.¹⁰⁵⁸ On 4 September 2018 one of the founders of “Svoboda” Andrey Paruby publicly expressed his admiration for Hitler.¹⁰⁵⁹

777. The popularity of the radicals became apparent. In 2014, 36% of the Verkhovna Rada (Parliament) of Ukraine was presented by far-right parties, including the Narodny Front party, which won the biggest number of votes out of all the parties (22,1%),¹⁰⁶⁰ and radical movements “Right Sector” and “Svoboda”,¹⁰⁶¹ whose candidates won the elections in several single-member districts.¹⁰⁶² Resolution of the European Parliament of 13 December 2012 condemned election of “Svoboda” members to Verkhovna Rada of Ukraine, emphasizing “racist, anti-Semitic and xenophobic views”.¹⁰⁶³ Although President Petr Poroshenko and several other parties united in the political block managed to outweigh the right radicals, he undoubtedly was constrained by their opinions.

¹⁰⁵⁶ Time, *Exclusive: Leader of Far-Right Ukrainian Militant Group Talks Revolution With TIME* (4 February 2014), available at: <https://time.com/4493/ukraine-dmitri-yarosh-kiev/> (Annex 271).

¹⁰⁵⁷ Jewish.ru, *Anti-Semitism Goes Uphill* (9 April 2013), available at: <https://jewish.ru/ru/events/world/8343/> (Annex 272).

¹⁰⁵⁸ Gazeta.ru, *Mila Kunis Called “Zhyd” in Ukraine* (24 December 2012), available at: <https://jewish.ru/ru/events/russia/8945/> (Annex 273).

¹⁰⁵⁹ Iryna Berezhnaya Institute of Legal Policy and Social Protection, *REPORT: INFRINGEMENT OF RIGHT AND FREEDOMS IN UKRAINE* (2019), p. 21 (Annex 351).

¹⁰⁶⁰ Wolfram Nordsieck, *Parties and Elections in Europe*. Supreme Council of Ukraine Elections, available at: <https://web.archive.org/web/20180612211142/http://parties-and-elections.eu/ukraine.html> (Annex 274)

¹⁰⁶¹ In relation to far-right agenda of Svoboda, see The Guardian, *Euro 2012: Ukraine's festering football racism* (1 June 2012), available at <https://www.theguardian.com/world/2012/jun/01/euro-2012-ukraine-football-racism-sol-campbell> (Annex 217).

¹⁰⁶² Central Election Commission, *Extraordinary Parliamentary Election 2014*, Data as of 29 October 2014, available at: <https://web.archive.org/web/20141029091159/http://www.cvk.gov.ua/pls/vnd2014/wp039ept001f01=910.html> (Annex 275).

¹⁰⁶³ European Parliament Resolution on the Situation in Ukraine No. 2012/2889 (RSP), 13 December 2012 https://www.europarl.europa.eu/doceo/document/TA-7-2012-0507_EN.html (Annex 276).

778. While *de jure* the Right Sector and other radical organisations had no right to have personal combat forces, in fact they had a mandate to use force against political rivals and civilians without any risks of prosecution. The leader of the Right Sector Mr Yarosh openly admitted that its forces not being a part of the regular army, had access even to S-300 missiles, “as in any army.”¹⁰⁶⁴ This may be explained by the fact that Kiev officials often called radicals to resolve their problems, for which official state forces (police and army) may not be engaged.¹⁰⁶⁵
779. Needless to say, leaders of the Right Sector felt themselves invincible. One of the chilling episodes reported in media is a speech of Alexander Muzychko (Sashko Byliy) at the meeting of the Council of Rovno oblast’ of Ukraine. Mr Muzychko, effectively threatening the Council members with an assault rifle, delivered a number of political statements, including the promise to ban the Communist Party (which was later banned) and Party of Regions in the oblast’ and to confiscate property of former executives of the oblast’. He also stated that “the Right Sector will not lay down its arms unless legitimate laws are enacted on the State’s territory.”¹⁰⁶⁶ There are no reports as to holding Mr Muzychko liable for an actual armed seizure of a governmental body.
780. During the post-Maidan years, Ukraine’s authorities concluded public agreements with neo-Nazi radicals and even integrated them into the enforcement system (police, National Guard and Armed Forces), legitimizing their activity, while their leaders gained additional political weight, not abandoning their neo-Nazi views:¹⁰⁶⁷
- (a) A special battalion Azov was created under the control of the National Guard of Ukraine (previously – under the control of the Ministry of Internal Affairs).¹⁰⁶⁸ The

¹⁰⁶⁴ Newsweek, *Yarosh: Russians, Rise Up Against Putin!* (19 March 2014), available at: <https://web.archive.org/web/20140328092833/http://mag.newsweek.com/2014/03/28/dmitry-yarosh-ukraine-russia-crimea.html> (Annex 277).

¹⁰⁶⁵ Pravfond, *Why Western Human Rights Activists Paid Attention to Ukrainian Nationalists’ Outages* (18 June 2018), available at: https://pravfond.ru/press-tsentr/stati/pochemu_zapadnye_pravozashchitniki_obratili_vnimanie_na_beschinstva_ukrainskikh_natsionalistov_2423/ (Annex 280).

¹⁰⁶⁶ Youtube, *What did “Sashko Byliy” say at the Presidium of the Rivne Regional Council with a weapon in his hands?* (24 February 2014), available at: <https://www.youtube.com/watch?v=XtxbGjpkF8&t=6s>.

¹⁰⁶⁷ Reuters, *Commentary Ukraine’s neo-Nazi problem* (20 March 2018), available at: <https://www.reuters.com/article/us-cohen-ukraine-commentary-idUSKBN1GV2TY> (Annex 278).

¹⁰⁶⁸ Azov.org, *About Azov*, available at: <https://azov.org.ua/pro-nas/> (Annex 281). For more information on Azov, see Irina Berezhnaya Institute for Legal Policy and Social Protection, *ONLINE ENVIRONMENT AS A TOOL FOR VIOLATION OF RIGHTS AND FREEDOMS IN UKRAINE* (2022), p. 131-135 (Annex 352).

servicemen freely use neo-Nazi symbolic and advertise themselves as a neo-Nazi formation, while one of Azov's leader Andrey Biletsky (nicknamed "White Leader")¹⁰⁶⁹ openly admits his Hitler sympathies:

"A former history student and amateur boxer, Mr Biletsky is also head of an extremist Ukrainian group called the Social National Assembly. "The historic mission of our nation in this critical moment is to lead the White Races of the world in a final crusade for their survival," he wrote in a recent commentary. "A crusade against the Semite-led Untermenschen."

...

Asked about his Nazi sympathies, he said: "After the First World War, Germany was a total mess and Hitler rebuilt it: he built houses and roads, put in telephone lines, and created jobs. I respect that." Homosexuality is a mental illness and the scale of the Holocaust "is a big question", he added."¹⁰⁷⁰

"The reason is a recruitment offensive for a "reconquest of Europe", with which the regiment is also recruiting young German neo-Nazis. In July, for example, flyers in German were distributed to visitors at a right-wing rock festival in Themar, Thuringia, inviting them to "join the ranks of the best" in order to "save Europe from extinction".

Azov was founded by nationalist politicians in spring 2014 and reports to the Ukrainian Interior Ministry. The regiment's commander, far-right politician Andriy Biletsky, was promoted to the rank of lieutenant colonel by Ukraine's Interior Minister in 2014.

The advertising offensive by the Ukrainian fighters is apparently successful: as with Jan K., more and more photos of German neo-Nazis are appearing on social networks, proudly presenting their affiliation with Azov."¹⁰⁷¹

¹⁰⁶⁹ Iryna Berezhnaya Institute of Legal Policy and Social Protection, REPORT: INFRINGEMENT OF RIGHT AND FREEDOMS IN UKRAINE (2019), p. 21 (Annex 351).

¹⁰⁷⁰ The Telegraph, *Ukraine crisis: the neo-Nazi brigade fighting pro-Russian separatists* (11 August 2014), available at: <https://www.telegraph.co.uk/news/worldnews/europe/ukraine/11025137/Ukraine-crisis-the-neo-Nazi-brigade-fighting-pro-Russian-separatists.html> (Annex 279).

¹⁰⁷¹ SPIEGEL, *Ukraine: German mercenaries join far-right volunteer battalion* (11 November 2017), available at: https://www.spiegel.de/panorama/justiz/ukraine-deutsche-soeldner-heuern-bei-rechtsextremem-freiwilligenbataillon-an-a-1177400.html?utm_campaign=buffer&utm_content=bufferfd37d&utm_medium=social&utm_source=twitter.com (Annex 282).

- (b) Notorious for its involvement of torture of Ukraine’s civilians,¹⁰⁷² Azov was considered a neo-Nazi formation in the US and was prohibited from receiving U.S. weapons and training by the Consolidated Appropriations Act of 2018.¹⁰⁷³
- (c) Mr Arsen Avakov, leader of the Narodny Front party, which is reported to have close ties to Azov’s leader Mr Biletsky the former Azov veterans, acquired control over the Police and the National Guard and served as a Minister of Internal Affairs of Ukraine in 2014-2021,¹⁰⁷⁴ despite President Zelensky promises to dismiss all ministers of the previous government.
- (d) In 2016, the decision was made to create a political party “National Corps” on the basis of Azov formation.¹⁰⁷⁵ The party uses the “Wolfsangel” emblem, which is a mirror copy of the emblem of Nazi SS Division “Das Reich”.¹⁰⁷⁶
- (e) In 2014 members of “Maidan Self-Defence” (Samooborona Maidanu) and Right Sector instituted volunteer armed formation called Aidar, which became a part of Ukraine’s regular forces. Aidar members, as many others, used Nazi symbols and were guilty in numerous episodes of abuses, ill-treatment and unlawful detention.¹⁰⁷⁷ Aidar’s founder Mr Sergey Melnichuk is now a member of Ukraine’s Parliament.

¹⁰⁷² For the episodes of torture of civilians by Right Sector and Azov-related militants, see War Crimes of the Armed Forces and Security Forces of Ukraine: Torture and inhumane treatment, pp. 28, 31, 42 available at: <https://democracyfund.ru/userfiles/Second%20report%20-%20War%20Crimes%20of%20the%20Armed%20Forces%20and%20Security%20Forces%20of%20Ukraine.pdf>

¹⁰⁷³ The website of R. Khanna, *Release: Rep. Khanna Leads Bipartisan Members in Condemning Anti-Semitism in Europe* (25 April 2018), available at: https://webcache.googleusercontent.com/search?q=cache:nl_Euw_bfyYJ:https://khanna.house.gov/media/press-releases/release-rep-khanna-leads-bipartisan-members-condemning-anti-semitism-europe&cd=1&hl=ru&ct=clnk&gl=ru (Annex 253).

¹⁰⁷⁴ Reuters, *Commentary: Ukraine’s neo-Nazi problem* (20 March 2018), available at: <https://www.reuters.com/article/us-cohen-ukraine-commentary-idUSKBN1GV2TY> (Annex 278).

¹⁰⁷⁵ Gazeta.ua, *Biletskyi: “Azov” will become a party* (28 May 2016), available at: https://gazeta.ua/articles/politics/_bileckij-azov-stane-partiyeyu/701012?mobile=falsehttps://en.interfax.com.ua/news/general/376717.html (Annex 283)

¹⁰⁷⁶ Iryna Berezhnaya Institute of Legal Policy and Social Protection, *REPORT: INFRINGEMENT OF RIGHT AND FREEDOMS IN UKRAINE* (2019), p. 22 (Annex 351).

¹⁰⁷⁷ Newsweek, *Ukrainian Nationalist Volunteers Committing ‘ISIS-Style’ War Crimes* (10 September 2014), available at: <https://www.newsweek.com/evidence-war-crimes-committed-ukrainian-nationalist-volunteers-grows-269604> (Annex 284); Amnesty International Briefing, *Ukraine: Abuses and war crimes by the Aidar Volunteer Battalion in the north Luhansk region* (8 September 2014), available at: <https://www.amnesty.org/en/wp-content/uploads/2021/06/eur500402014en.pdf> (Annex 285).

- (f) In 2018 a “municipal guard” was formed from members of a right-wing organization “C14”¹⁰⁷⁸ to patrol the streets of Kiev and several other cities. On 8 June 2018 Ministry of Youth and Sports of Ukraine provided “C14” with 17 000 USD to set up a children’s camp to promote “national projects of patriotic education”.¹⁰⁷⁹
- (g) On 14 October 2021 the Press service of 61st Detached Infantry Ranger Brigade stationed on the Ukraine-Belarus border published a Facebook post in which stated that all migrants on the border will be eliminated to prevent their entry into Ukraine.¹⁰⁸⁰

781. Noteworthy, Nazi views are not shared only among “security and defence” officials known for their close ties with radical movements, but by “peaceful” state officials as well.

- (a) In May 2018 Consul of Ukraine in Hamburg Mr Vasyl Marushinets published a photo of himself with the present from colleagues from the Ministry of Foreign Affairs of Ukraine, resembling a folio of “Mein Kampf”. The photo was also included in Marushinets’s book distributed among Ministry employees, including the Minister of Foreign Affairs Mr Pavel Klimkin. As it appears, Mr Marushinets, whose book criticizes “the Magyars” for takeover of Ukraine’s lands and calls Poles “historical enemies” of Ukraine, has never received any reprimand neither for the book, nor for the “Mein Kampf” photo, which received at least 4 “likes” from Ukrainian diplomats. Another post devoted to Prince Svyatoslav’s fight against “Jewish yoke” was liked by the ambassador of Ukraine in Portugal Mrs Inna Ognivets.¹⁰⁸¹

¹⁰⁷⁸ The “C14” or “Sich” uses Nazi symbols – “Celtic cross”, “Tivaz” runes, known as Hitlerjugend emblems. One of C14 activists Andrey Medvedko is accused of murdering the opposition journalist Oles Buzina on 16 April 2015.

¹⁰⁷⁹ Iryna Berezhnaya Institute of Legal Policy and Social Protection, REPORT: INFRINGEMENT OF RIGHT AND FREEDOMS IN UKRAINE (2019), p. 28 (Annex 351).

¹⁰⁸⁰ Irina Berezhnaya Institute for Legal Policy and Social Protection, ONLINE ENVIRONMENT AS A TOOL FOR VIOLATION OF RIGHTS AND FREEDOMS IN UKRAINE (2022), p. 110 (Annex 352).

¹⁰⁸¹ Irina Berezhnaya Institute for Legal Policy and Social Protection, REPORT: INFRINGEMENT OF RIGHTS AND FREEDOMS IN UKRAINE (2018), pp. 10, 108-112 (Annex 350).

- (b) On 3 May 2019 Mr Alexander Nakonechny, the city mayor of Karlovka, Poltava region, shared his photo in German Nazi uniform in Facebook.¹⁰⁸²
- (c) On 13 October 2019 Prime Minister of Ukraine Mr Alexey Goncharuk visited a neo-Nazi concert organized by the “C14” movement.¹⁰⁸³

d. Nazi ideology-based system of patriotic education of youth

782. For years, the Ukrainian authorities have been consistently building a system of "patriotic" education for young people, within the framework of which the younger generation was inculcated the ideology of Nazism, xenophobia and intolerance. This system was based on the glorification of Mrs Stepan S. Bandera, Roman R. Shukhevich, and other Ukrainian Nazi collaborators who fought on the side of Nazi Germany during World War II. This system finally crystallized in May 2019, when President Poroshenko signed the decree "On Approval of the Strategy of National Patriotic Education for 2020-2025" two days before the expiration of his presidential term.

783. A significant part of the above mentioned ‘Strategy’ were the so called ‘children and youth patriotic summer games’ annually held by the governmental institutions as well as by ‘patriotic’ NGOs. Thus, Ukraine’s Ministry of Education annually held a youth "patriotic" game "Sokol" ("Jura"). According to the regulation approved by the Ukrainian Cabinet of Ministers, children"), in which minors aged 6-17 supposed to take part in the game. The participants, by analogy with the structure of the “Ukrainian Insurgent Army”, *UPA*, shall unite into "swarms" and "kurens”. At the same time, each squad of participants must choose a name "based on historical struggle for independence of Ukraine" ("Insurgents," "Azov guys," "Aidar guys," "Roman Shukhevich" etc.).¹⁰⁸⁴

784. At another youth “patriotic” game - “Gurby-Antonivtsi” has been held yearly since 2003 by the same time, the *All-Ukrainian Youth Nationalist Congress*. The game takes place in a 25-square-kilometer forest near the Gurba area, the site of the largest battle between

¹⁰⁸² Irina Berezhnaya Institute for Legal Policy and Social Protection, ONLINE ENVIRONMENT AS A TOOL FOR VIOLATION OF RIGHTS AND FREEDOMS IN UKRAINE (2022), p. 122 (Annex 352).

¹⁰⁸³ Irina Berezhnaya Institute for Legal Policy and Social Protection, ONLINE ENVIRONMENT AS A TOOL FOR VIOLATION OF RIGHTS AND FREEDOMS IN UKRAINE (2022), p. 118 (Annex 352).

¹⁰⁸⁴ Resolution of the Cabinet of Ministers of Ukraine No. 845 “Some issues of children's and youth military-patriotic education” 17 October 2018, available at: <https://zakon.rada.gov.ua/laws/show/845-2018-%D0%BF#Text>.

the UPA and the Soviet Army. The game lasts continuously for 60 hours.¹⁰⁸⁵ “The Youth Nationalist Congress offers residents of the “frontline zone” (Crimea, Kharkov, Lugansk, Donetsk, Dnepr, Zaporozhye, Kherson) to take part in the game for symbolic organizational contribution of 50 UAH (about \$2). It is also important that participants from the Eastern and Southern Ukraine are reimbursed for their travel expenses.¹⁰⁸⁶

785. The distribution of budget allocations for the purposes of such “youth education” was carried out by a competitive commission of the Ministry of Culture, Youth and Sports of Ukraine. According to the results of its meetings on 26 December 2019 and 28 January 2020 a total of 29 million UAH (1.1 million dollars) was allocated for the ‘national-patriotic education projects’, of which 12 million UAH went to the neo-Nazi.¹⁰⁸⁷ In March 2021 the Ministry of Culture, Youth and Sports of Ukraine in its order No 829 (17.03.2021) allocated 8 million UAH for such projects, including 350 hundred UAH to organize in Lvov region all-Ukrainian festival “Zashkiv” devoted to OUN leader E. Konovalts and 185 hundred UAH to organize in Volyn region all-Ukrainian camp “Khorunzhiy”¹⁰⁸⁸.

786. *The "National Scout Organization of Ukraine - Plast"*, which declares its succession to the structure of the same name, the members of which at one time were Mrs Stepan Bandera and Roman Shukhevich, received more than 5 million UAH. The main part of the funds should have been spent on the organization of children's and youth summer camps, as well as on field training for educators, whose organizers actively use Nazi symbols and *OUN-UPA* attributes, which are banned in most European countries.¹⁰⁸⁹

787. Thus, the Ukrainian authorities not only inculcated a reverent respect for Nazi ideology to young people, but also trained them as potential fighters. These brainwashed fighters

¹⁰⁸⁵ Unian, *The 4-day sports and patriotic game “Gurby-Antonivtsi” has started in Ternopil region* (5 May 2016), available at: <https://www.unian.ua/ternopil/1337687-na-ternopilschini-rozpochalasya-4-denna-sportivno-patriotichna-gra-gurbi-antonivtsi.html> (Annex 339).

¹⁰⁸⁶ See: Chas.cv.ua, *Ukraine’s largest sports and patriotic game “Gurby-Antonivtsi” will bring together young people from all regions of Ukraine* (2 March 2016), available at: <https://chas.cv.ua/inform/31224-nayblsha-v-ukrayin-sportivno-patrotichna-gra-gurbi-antonvc-obyednaye-molod-z-ush-regonv-ukrayini.html> (Annex 340).

¹⁰⁸⁷ Decision No. 1 of 26 December 2019 of the competition committee for reviewing national patriotic education projects developed by civil society institutions for which funding is to be provided in 2020, available at: https://www.kmu.gov.ua/storage/app/sites/1/17-civik-2018/rubrik_spriannia/rish-minmolod-2020-2.pdf.

¹⁰⁸⁸ Iryna Berezhnaya Institute of Legal Policy and Social protection, *ONLINE ENVIRONMENT AS A TOOL OF INFRINGEMENTS OF HUMAN RIGHTS AND FREEDOMS IN UKRAINE*, (2022) p. 108 (Annex 352).

¹⁰⁸⁹ *Ibid.*

were meant to be sent to Donbass as part of the UAF and other security units to suppress the Russian population of this region.¹⁰⁹⁰ Those who would not become part of the security services could always join nationalist and neo-Nazi groups throughout Ukraine.

* * *

788. The above shows that Ukraine:

- (a) contrary to the obligation of Article 2(b) of CERD "not to promote, defend or support racial discrimination by any individuals or organizations", not only does not suppress the activities of neo-Nazi organizations, but has actually adopted their ideology itself; promotes it on the governmental level, with further implementation by armed formations created by former street vandals and neo-Nazi fans;
- (b) advocate violence against Russians and ethnic minorities and take restrictive measures against them;
- (c) openly commemorates associates of the most brutal criminals of the twentieth century Nazi collaborators and criminals.

789. In light of this abhorrent conduct that is contrary to both the principles and values of the CERD, Ukraine should not have either legal nor moral right to allege racial discrimination of ethnic minorities in Crimea.

¹⁰⁹⁰ Unian, *The 4-day sports and patriotic game "Gurby-Antonivtsi" has started in Ternopil region* (5 May 2016), available at: <https://www.unian.ua/ternopil/1337687-na-ternopilschini-rozpochalasya-4-denna-sportivno-patriotichna-gra-gurbi-antonivtsi.html> (Annex 339) ("The organizers of the event told UNIAN that the game is dedicated to the commander of the mortar platoon of the 51st Brigade, Volodymyr Harmatiy, a member of the Gurb-Antonovtsy who died in July 2014 in the ATO zone in Luhansk region, and Roman Atamaniuk, a longtime member of the Gurb-Antonovtsy who fought in the 93rd Brigade and died in May 2015 near the Donetsk airport as a result of mortar fire").

III. UKRAINE'S CLAIMS ARE MANIFESTLY OUTSIDE THE SCOPE AND SUBJECT-MATTER OF THE DISPUTE AS DEFINED BY THE CERD AND THE COURT

790. Ukraine continues to claim in its Reply that the Russian Federation “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”; it also maintains that the Russian Federation “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”¹⁰⁹¹. These allegations are not only blatantly false, as was demonstrated in Russia’s Counter-Memorial and will be further developed in this Rejoinder; they nothing to do with racial discrimination. Instead, Ukraine seeks a pronouncement by the Court on meritless allegations of “political dissent” that it ascribes to Tatar and Ukrainian communities in Crimea, and also to impose on the Russian Federation the status of “occupying power”, thus challenging the legal status of Crimea as part of the Russian Federation, issues which have no bearing on the CERD.
791. Because Ukraine’s allegations distort the meaning of ethnicity and racial discrimination under the CERD, as well as the Court’s judgment on preliminary objections of 8 November 2019, it is first necessary to set the record straight in regard to both these foundational matters.
792. The present chapter proceeds as follows. **Section A** recalls that the dispute brought by Ukraine before the Court, as established in the Court’s 2019 judgment, concerns an alleged “systematic racial discrimination campaign”, and not individual claims or discrete unsubstantiated allegations of racial discrimination. **Section B** addresses the test that ought to be applied in demonstrating the existence of a “systematic campaign” of the kind alleged by Ukraine, and points to the fact that Ukraine has not come close to satisfying that test. **Section C** deals with Ukraine’s attempt to recast its case as one on “indirect discrimination”, and shows that “indirect discrimination” as defined by Ukraine is not only incompatible with its initial claim of a “systematic racial discrimination campaign”

¹⁰⁹¹ Reply, ¶376. See also Memorial, ¶346.

and with the 2019 judgment, but also with the Convention itself. **Section D** addresses Ukraine’s failure to produce relevant statistical data in support of its claims. **Section E** responds to Ukraine’s baseless attempt to read political opinions into the definition of “ethnicity” in order to characterize as racial discrimination measures based on security concerns so as to shoehorn them into the provisions of the CERD. **Section F** explains the grounds that may justify certain restrictions on human rights and their relationship to the CERD. Finally, **Sections G** and **H** recall that the present dispute is limited to the CERD, and that Ukraine’s attempt to impose on Russia the status of “occupying power” under international humanitarian law must be dismissed.

A. THE DISPUTE IS LIMITED TO AN ALLEGED “SYSTEMATIC RACIAL DISCRIMINATION CAMPAIGN” AND DOES NOT COVER ISOLATED AND UNCONNECTED INSTANCES OF ALLEGED RACIAL DISCRIMINATION

793. As explained in the Counter-Memorial (CERD), the present case is limited in scope. More specifically, Ukraine did not bring before the Court a case concerning discrete incidents by which the Russian Federation allegedly violated the CERD, but rather alleges that the Russian Federation has engaged in a “systematic campaign of racial discrimination” against Tatar and Ukrainian communities in Crimea beginning in the spring of 2014.¹⁰⁹² It is precisely because of this particular formulation of Ukraine’s claims that, in its 2019 judgment on preliminary objections, the Court rejected Russia’s admissibility challenge to Ukraine’s Application on the ground of non-exhaustion of local remedies:

“... according to Ukraine, the Russian Federation has engaged in a sustained campaign of racial discrimination, carried out through acts repeated over an appreciable period of time starting in 2014, against the Crimean Tatar and Ukrainian communities in Crimea. The Court also notes that the individual instances to which Ukraine refers in its submissions emerge as illustrations of the acts by which the Russian Federation has allegedly engaged in a campaign of racial discrimination. It follows, in the view of the Court, that, in filing its Application under Article 22 of CERD, Ukraine does not adopt the cause of one or more of its nationals, but challenges, on the basis of CERD, the alleged pattern of conduct of the Russian Federation with regard to the treatment of the Crimean Tatar and Ukrainian communities in Crimea. In view of the above, the Court concludes that the rule of exhaustion of local remedies does not apply in the circumstances of the present case.

This conclusion by the Court is without prejudice to the question of whether the Russian Federation has actually engaged in the campaign of racial

¹⁰⁹² Counter-Memorial (CERD), ¶¶89-90.

discrimination alleged by Ukraine, thus breaching its obligations under CERD. This is a question which the Court will address at the merits stage of the proceedings...”¹⁰⁹³[Emphasis added]

794. Being well aware that its accusation of a “systematic racial discrimination campaign” is unfounded and being unable to counter Russia’s arguments in this regard, Ukraine in its Reply tries to shift the focus of its claim to isolated and unconnected instances of alleged racial discrimination, seeking even to transform its case into one concerning “indirect discrimination”¹⁰⁹⁴. While it continues from time to time to refer to a “campaign” against Tatar and Ukrainian communities¹⁰⁹⁵, it is clear that Ukraine simply cannot prove such a state of affairs as there was none¹⁰⁹⁶, and in fact uses that term as window-dressing in order to have the Court pass judgment upon individualized instances of alleged racial discrimination, without proving the existence of the “campaign” itself.
795. Ukraine’s manipulation of the grave charge it has levelled at the Russian Federation must fail. As noted above, the Court’s 2019 judgment makes it plain that the sole claim that Ukraine may advance in this case is one of a “systematic racial discrimination campaign”, and not allegations of individual instances of alleged racial discrimination that are to be considered inadmissible since local remedies have not been exhausted before Ukraine instituted proceedings before the Court¹⁰⁹⁷.
796. In this regard, Ukraine’s Second Expert Report, prepared by Professor Fredman argues that:

“To the extent that Russia is arguing that Ukraine’s reference to a systematic campaign requires application of a different evidentiary standard than usual, I disagree. The CERD does not contain language defining systematic campaigns of racial discrimination as a distinct breach, or defining evidentiary standards particular to allegations of systematic discrimination. I accordingly understand Ukraine’s case to be that Russia has committed

¹⁰⁹³ Judgment of 8 November 2019, p. 606, ¶¶130-131.

¹⁰⁹⁴ See below, Section III(C).

¹⁰⁹⁵ Reply, ¶¶376, 380, 383, 384, 399, 400.

¹⁰⁹⁶ It should be noted that the exhaustion of local remedies rule allows the facts of a case to be established with more certainty and clarity. Since Ukraine rushed into instituting proceedings using an alleged “systematic racial discrimination campaign” as a vehicle to avoid meeting this admissibility requirement, it is now obliged to rely on factual allegations based on whimsy evidence that amount to mere conjecture, as will be shown in further chapters.

¹⁰⁹⁷ Nor have local remedies been exhausted to this day. As is shown in the following chapters, the individuals that, according to Ukraine, have suffered racial discrimination in Crimea did not seek to exhaust the remedies available to them under Russian law before the competent authorities. The only exception to this state of affairs is the ban on the *Mejlis* (see below, Chapter IV).

multiple violations of the CERD which, viewed in the aggregate, constitute a systematic campaign of racial discrimination. It follows that the correct approach is to assess each of Ukraine’s claims under the standards set forth in the Convention and, if necessary, for the Court to take a view on Ukraine’s characterization of the aggregate impact of any violations only once it has ruled on the individual claims”¹⁰⁹⁸.

797. If Ukraine accepts this view, its case under the CERD clearly falls away. Ukraine cannot allege “multiple violations of CERD” based on “individual claims”: that possibility has been discarded by the Court, which has expressly limited Ukraine’s case to “whether the Russian Federation has actually engaged in the campaign of racial discrimination alleged by Ukraine, thus breaching its obligations under CERD”. This was done in accordance with Ukraine’s own position, which was summarized by the Court as follows:

“Ukraine contends that the Russian Federation’s objection is not persuasive because Ukraine did not bring the present case to vindicate individual rights. On the contrary, Ukraine seeks an end to the Russian Federation’s alleged ‘systematic campaign of racial discrimination’ in violation of CERD”¹⁰⁹⁹.

798. It is not optional for Ukraine to prove the existence of a “systematic campaign of racial discrimination”; on the contrary, it is the very subject-matter of its case as found by the Court. Should Ukraine revert to individual claims, it would fail to meet this objective *ipso facto*. Furthermore, if Ukraine takes the position that the CERD does not regulate “systematic campaigns of racial discrimination” as such, its claim against the Russian Federation also does not fall within the scope of the Convention, the Court having declared admissible only the allegation of such a campaign, while individual claims were not admitted due to non-exhaustion of domestic remedies.

799. Ukraine’s blatant attempt to circumvent the Court’s 2019 judgment and revert to the position that has been firmly rejected by the Court only serves to emphasize Ukraine’s lack of evidence in support of its implausible and artificially constructed allegations concerning a “systematic racial discrimination campaign” against Tatar and Ukrainian communities in the Russian Federation.

¹⁰⁹⁸ Second Expert Report of Professor Sandra Fredman, 21 April 2022, ¶14 (Reply, Annex 5).

¹⁰⁹⁹ Judgment of 8 November 2019, p. 50, ¶126.

B. UKRAINE HAS NOT MET THE CRITERIA OR BURDEN OF PROOF FOR ESTABLISHING THE EXISTENCE OF A “SYSTEMATIC RACIAL DISCRIMINATION CAMPAIGN”

800. The Counter-Memorial also explained that in order to establish that the Russian Federation has engaged in a “systematic racial discrimination campaign”, Ukraine has to meet the following cumulative criteria:

- (a) The alleged acts are attributable to the Russian Federation;
- (b) The alleged acts constitute a violation of the CERD, namely that each alleged act constitutes:
 - (i) a distinction, exclusion, restriction or preference,
 - (ii) based on race or ethnic origin within the meaning of the Convention,
 - (iii) that impairs or nullifies the recognition, enjoyment or exercise,
 - (iv) on an equal footing, of human rights and fundamental freedoms, and
 - (v) that has no objective and reasonable justification;
- (c) The alleged acts form part of a systematic campaign or policy, which in turn requires Ukraine to establish that these acts, taken together as a composite whole, constitute:
 - (i) a “policy,” or”, a “campaign” directed against the Crimean Tatar and Ukrainian ethnic groups in Crimea, targeting them as such; and therefore also
 - (ii) a discriminatory intent, as evidenced by the consistent use by Ukraine in its Application and pleadings of terms such as “policy”, “campaign”, “systematic”.¹¹⁰⁰

801. Ukraine must meet a standard of proof that is appropriate to this grave allegation. In particular, Ukraine must demonstrate: (1) that “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin” based on race or

¹¹⁰⁰ Counter-Memorial (CERD), Chapter II, Section II, Sub-Sections A to C.

ethnic origin within the meaning of the Convention¹¹⁰¹ has occurred in a *systematic manner* (**Section A**); and (2) the *disproportionate effect* of any such pattern of conduct on the Crimean Tatar and Ukrainian communities as compared to other communities living in the Russian Federation (**Section B**); and (3) an *intent* or *purpose* specifically and directly to target these communities as such (**Section C**).¹¹⁰² Furthermore, the evidence that Ukraine must produce in support of its claim must be *fully conclusive* (**Section D**).

802. Ukraine disagrees that these are the criteria and standard of proof applicable to the present case. It suggests in the Reply that it has “made out a multitude of Russian CERD violations” and that “[t]he cumulative conclusion to be drawn from those violations is that Russia engaged in a systematic campaign of racial discrimination”¹¹⁰³. Ukraine also states that “Russia’s response – that Ukraine cannot prove any individual violation unless it proves the violation was part of a systematic campaign – is entirely backwards”¹¹⁰⁴.

The Reply adds that:

“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. 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. 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”¹¹⁰⁵.

803. Despite the fact that as shown in the Counter-Memorial and in the following chapters, Ukraine fails to show the existence of a “systematic racial discrimination campaign” even applying its own suggested standards, it must be emphasized that Ukraine’s standards is incorrect. In this regard it is necessary to make additional observations regarding the proper methodology that the Court ought to apply in inquiring into the existence of the “systematic campaign” alleged by Ukraine.

¹¹⁰¹ CERD, Article 1(1).

¹¹⁰² Counter-Memorial (CERD), Chapter II, Section II, Sub-Sections A to C. Evidently, Ukraine must also demonstrate that the acts it complains of are attributable to the Russian Federation (see Counter-Memorial (CERD), ¶3).

¹¹⁰³ Reply, ¶400.

¹¹⁰⁴ *Ibid.*

¹¹⁰⁵ *Ibid.*, ¶404.

i. Ukraine Must Demonstrate that the alleged violations amount to a “Systematic Campaign”

804. It should go without saying that, since Ukraine alleges that the Russian Federation has engaged in a “systematic campaign of racial discrimination” aimed at the “cultural erasure” of Tatar and Ukrainian communities in Crimea¹¹⁰⁶, Ukraine must demonstrate that Russia’s alleged conduct amounts to a *systematic campaign*. The Counter-Memorial explained in this regard that the concept of “systematic campaign” requires, at a minimum, the showing of a pattern of incidents that repeatedly occur in an organized, non-accidental manner to achieve a particular goal – in other words, that there must be identical or analogous breaches of the CERD that are sufficiently interconnected and are carried out in a planned and deliberate way with the aim of singling out a particular group, as opposed to isolated incidents or exceptions¹¹⁰⁷. This interpretation is supported by Alexey Avtonomov – who served for 17 years (2003-2020) as a member of the CERD Committee – in his expert report attached to this Rejoinder.¹¹⁰⁸
805. Ukraine fails to respond to this argument. In fact, it does not even attempt to engage with Russia’s argumentation on substance, but merely states in the Reply that a “multitude” of violations of the CERD (or rather allegations), should by itself be enough to draw a “cumulative conclusion” that a “systematic campaign” took place¹¹⁰⁹. Ukraine’s expert, Prof. Fredman, similarly suggests *en passant* that there is no “need to prove the systematic nature of a distinction”¹¹¹⁰. Nowhere in the Reply does Ukraine address any of the authorities referred to in the Counter-Memorial in support of the self-evident criteria that must be met to show the systematic nature of the alleged “systematic campaign”, including the Court’s 2019 judgment, several decisions of international criminal tribunals, and the work of the International Law Commission¹¹¹¹.
806. Ukraine’s reluctance to try and prove that a “systematic campaign” exists is remarkable: it shows once more that Ukraine’s claim under the CERD does not genuinely concern any

¹¹⁰⁶ Reply, ¶2.

¹¹⁰⁷ Counter-Memorial (CERD), ¶¶94-96.

¹¹⁰⁸ Expert Report of Alexei Stanislavovich Avtonomov, 28 February 2023, ¶¶22-24 (Annex 18).

¹¹⁰⁹ Reply, ¶¶400, 404.

¹¹¹⁰ Second Fredman Report (Reply, Annex 5), ¶15.

¹¹¹¹ Counter-Memorial (CERD), ¶¶94-96.

such “systematic campaign”, and that Ukraine artificially constructed its case so as to overcome the requirement of exhaustion of local remedies concerning alleged individual instances of racial discrimination that would have been declared inadmissible by the Court. This attempt to retreat from the original claim (as also defined by the Court in 2019) cannot be accepted. If Ukraine cannot prove the “systematic campaign” it alleges, then its case cannot stand.

807. Ukraine itself seems to understand the futility of trying to escape the need to prove this systematic character. Thus, Prof. Fredman, while claiming that Ukraine does not “need to prove the systematic nature of a distinction”, still admits that the alleged “multiple violations” must be “viewed in the aggregate” and assessed for an “aggregate impact”¹¹¹². This is, however, merely another attempt to obfuscate the real criteria that must be met in order to show the existence of a “systematic campaign”.

808. The International Law Commission (ILC) has examined in detail the issue of composite acts as breaches of international obligations. According to Article 15 of the Articles on State Responsibility, a breach consisting of a composite act is defined as follows:

“The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act”.

809. Furthermore, according to the ILC’s official commentary to this Article:

“Composite acts covered by article 15 are limited to breaches of obligations which concern some aggregate of conduct and not individual acts as such. In other words, their focus is ‘a series of acts or omissions defined in aggregate as wrongful’. Examples include the obligations concerning genocide, apartheid or crimes against humanity, systematic acts of racial discrimination, systematic acts of discrimination prohibited by a trade agreement, etc. ... Only after a series of actions or omissions takes place will the composite act be revealed, not merely as a succession of isolated acts, but as a composite act, i.e. an act defined in aggregate as wrongful.”¹¹¹³

810. This definition of a composite act must be read together with the manner in which international criminal tribunals have applied and developed the term “systematic” in cases

¹¹¹² Second Fredman Report (Reply, Annex 5), ¶¶14-15.

¹¹¹³ UN International Law Commission, *Yearbook of the International Law Commission 2001*, vol. II, Part Two, A/CN.4/SER.A/2001/Add.1 (Part 2), pp. 62-63, ¶¶2, 7.

concerning crimes against humanity¹¹¹⁴. Established jurisprudence leaves no doubt that “systematic” means: an act that is “massive, frequent, carried out collectively with considerable seriousness and directed against a large number of civilian victims”¹¹¹⁵; “a widespread attack targeting a large number of victims generally relies on some form of planning or organization”¹¹¹⁶; “[t]he existence of an acknowledged policy targeting a particular community, the establishment of parallel institutions meant to implement this policy, the involvement of high-level political or military authorities, the employment of considerable financial, military or other resources and the scale or the repeated, unchanging and continuous nature of the violence committed against a particular civilian population are among the factors which may demonstrate the widespread or systematic nature of an attack”¹¹¹⁷; crimes against humanity “imply crimes of a collective nature and thus exclude single or isolated acts ...”¹¹¹⁸; “‘systematic’ emphasizes the organised character of the acts of violence and the improbability of their random occurrence. Thus, it is in the ‘patterns’ of the crimes, in the sense of the deliberate, regular repetition of similar criminal conduct that one discerns their systematic character”¹¹¹⁹.

811. All these elements must be taken into account when assessing Ukraine’s claim. Since the alleged “systematic racial discrimination campaign” would constitute a breach consisting a composite act in the sense of Article 15 of the ILC Articles on State Responsibility, Ukraine must show that there is an “aggregate conduct” in breach of the CERD, and not merely a “succession of isolated acts”. Furthermore, since the present case is limited to determining whether Russia’s alleged conduct is one of a “systematic campaign”, Ukraine

¹¹¹⁴ See also, Counter-Memorial (CERD) ¶94, fn. 183, 185. Although the present case does not concern crimes against humanity, but an alleged “systematic racial discrimination campaign”, relying on this jurisprudence is appropriate since tribunals have generally interpreted the term “systematic” following its ordinary, common-sense meaning. As noted above, the International Law Commission also put crimes against humanity and “systemic acts of racial discrimination” on the same footing as regards breaches consisting of composite acts.

¹¹¹⁵ ICTY, *Prosecutor v. Ruto, Koshey and Sang*, “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”, PTC II, ICC-01/09-01/11, 23 January 2012, ¶176.

¹¹¹⁶ ICTY, *Prosecutor v. Blaškić*, IT-95-14-T, Judgment, 3 March 2000, ¶207.

¹¹¹⁷ ICTY, *Prosecutor v. Jelisić*, IT-95-10-T, Judgment, 14 December 1999, ¶53.

¹¹¹⁸ ICTY, *Prosecutor v. Tadić*, IT-94-1-T, Judgment, 7 May 1999, ¶644.

¹¹¹⁹ ICTY, *Prosecutor v. Prlić*, IT-04-74-T, Judgment, 29 May 2013, ¶41. See also ICTY, *Prosecutor v. Jovica Stanišić and Franko Simatović*, IT-03-69-T, Judgment, 30 May 2013, ¶963 (“‘Systematic’ refers to the ‘organized nature of the acts of violence’”); ICTR, *Prosecutor v. Augustin Ndingiriyimana, François-Xavier Nzuwonemeye and Innocent Sagahutu*, ICTR-00-56-A, Judgment, 11 February 2014, ¶260 (“...the term ‘systematic’ refers to ‘the organised nature of the acts of violence and the improbability of their random occurrence’”).

must also demonstrate that such conduct has occurred in a “planned” or “organised” manner, or that there is a “pattern” in the sense that the conduct is “deliberate” and “regular”. Since Ukraine does not make the minimum effort to meet these criteria (unsurprisingly, because its allegations are simply false), its claim under the CERD must be rejected.

ii. To Prove the Alleged “Systematic Campaign”, and Also to Conform to its Own Allegations and the 2019 Judgement, Ukraine Must Demonstrate a Purpose or Intent to Target Crimean Tatar and Ukrainian Communities

812. Ukraine also disagrees that demonstrating a purpose or intent to target or single out Crimean Tatar and Ukrainian communities is a relevant criterion to prove the existence of the alleged “systematic racial discrimination campaign”. It refers in this connection to Article 1 of the CERD, which stipulates that racial discrimination encompasses any distinction, exclusion, restriction or preference based on a prohibited ground, which has the “purpose or effect” of impairing or nullifying certain rights¹¹²⁰. Thus, according to Ukraine, the Court does not need to establish a specific purpose or intent to engage in racial discrimination, and can rely instead on an alleged effect, even if Ukraine’s claim concerns a “systematic campaign” in the context of a “regime of racial discrimination”¹¹²¹, and even if the case passed the preliminary objections phase in view of such character of the case.

813. It is clear that Ukraine deliberately misses the point, as it is inconceivable that one may allege the existence of a “systematic racial discrimination campaign”— as opposed to isolated and unconnected instances of racial discrimination – without demonstrating a purpose or intent; precisely this intent is inherent to the notion of a “systematic campaign”¹¹²². By suggesting that purpose or intent are irrelevant, Ukraine concedes that it cannot make out its case. In effect it also deprives its original claim of any meaningful content and seeks considerably to transform it: indeed, to maintain that a “systematic

¹¹²⁰ Reply, ¶¶401-402; Counter-Memorial (CERD), ¶¶99-102.

¹¹²¹ Reply, ¶2.

¹¹²² Counter-Memorial (CERD), ¶¶99-102. The Cambridge Dictionary defines a “campaign” as “a planned group of especially political, business or military activities that are intended to achieve a particular aim” (available at: <https://dictionary.cambridge.org/dictionary/english/campaign>). Similarly, the Oxford Dictionary defines the term as “a series of planned activities that are intended to achieve a particular social, commercial or political aim” (available at: https://www.oxfordlearnersdictionaries.com/definition/english/campaign_1).

campaign” of racial discrimination may occur without there being an intent to discriminate systematically, or that such purpose does not need to be proved, amounts to conflating an actual “systematic racial discrimination campaign” with alleged individual breaches of the CERD.

814. If, as Ukraine claims, there is no real difference between such a “systematic campaign” and a collection of isolated incidents, then there would have been no reason to set aside admissibility requirements, notably the exhaustion of local remedies. As Ukraine has already benefited from this by not being obligated to prove such exhaustion of remedies at the jurisdictional phase, its current position is nothing more than a blatant attempt to “have its cake and eat it too”.
815. In an attempt to reconcile the irreconcilable contradictions of its case, Ukraine suggests that “the fact that a policy can be shown to have a discriminatory effect does not preclude the possibility that discrimination was the intent all along ... 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”¹¹²³. However, what Ukraine forgets to mention is that its case is not about a “multitude of policies” that have an unintended discriminatory effect, but rather about “a systematic policy of racial discrimination”¹¹²⁴ aimed at nullifying or impairing the rights of Tatar and Ukrainian communities as such, which means that racial discrimination must be the goal of such a policy. Ukraine did not even begin to (and obviously cannot) prove this.
816. To be sure, Ukraine does not seem to argue that purpose or intent are completely irrelevant in the present case. Having run out of perfunctory arguments, it makes a final appeal, as noted above, that there *was* intent behind Russia’s alleged “systematic racial discrimination campaign”. Once again, however, Ukraine does not produce any tangible proof – saying instead that it is “*plausible*” to “*infer*” intent from discrete, isolated and unconnected alleged individual violations to which local remedies were not applied. Following the Court’s standard of proof in cases of extreme accusations like the one advanced by Ukraine (“fully conclusive” evidence), such “plausible inference” is wholly improper and must accordingly be rejected.

¹¹²³ Reply, ¶403.

¹¹²⁴ See also Memorial, ¶¶27, 341, 347, 388, 389, 392, and 587.

817. It appears that the main reason why Ukraine seeks to evade the question of purpose or intent is that it finds it, in its own words, “difficult to prove”¹¹²⁵. In this regard it seeks support from an article that takes issue with the United States’ system of protection from discrimination, which requires proof of intent for a case of discrimination to succeed before its own national courts¹¹²⁶. Another article that Ukraine attempts to rely on in support of its thesis, however, clearly disagrees with this point and states, with regard to “purposeful discrimination”, that “[w]hen distinctions are made on the explicit basis of race, a violation of the Convention can often be established without great difficulty”¹¹²⁷. Indeed, when a real “systematic racial discrimination campaign” takes place it is rather easy to distinguish, as can be seen from historical examples of policies of discrimination such as the apartheid regime in South Africa and the antisemitic and racist regime of Nazi Germany. Needless to say, the Russian Federation, a strong supporter of the Convention from its very inception, has never engaged, nor will it ever engage, in such egregious conduct.
818. It was Ukraine itself that initiated the present proceedings by alleging the existence of a “systematic campaign of racial discrimination”, which it considered to be “undoubtedly serious in nature”¹¹²⁸. It must not be allowed then to ask the Court to determine such an alleged violation of the Convention in the absence of sufficient proof. Quite the opposite, Ukraine’s attempt unduly to lower the standard of proof that must be met should be rejected in no uncertain terms.
819. Ukraine’s reliance on the Second Expert Report by Prof. Fredman to avoid proving the purpose or intent required for a “systematic racial discrimination campaign” is also of no

¹¹²⁵ Reply, ¶403.

¹¹²⁶ A. Daniel, *The Intent Doctrine and CERD: How the United States Fails to Meet its International Obligations in Racial Discrimination Jurisprudence*, in *DePaul Journal for Social Justice*, Vol. 4(2) (2011), pp. 263-312.

¹¹²⁷ T. Meron, *The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination*, in *American Journal of International Law*, Vol. 72(2) (1985), p. 287. Meron further noted that: “An authoritative commentator has described purpose as the subjective test, and effect as the objective test of discrimination, implying perhaps that the latter is more easily applied. Yet, depending upon the quantity and the quality of the data required, discriminatory effect may be very difficult to establish, *e.g.*, when it is attributed to the impact of economic policies and practices on ethnic groups that are already economically disadvantaged, or when the discriminatory aspects of social and cultural practices may be explained by other factors (such as religion). Information sufficiently detailed to support findings of violations in such cases will not always be available” (*Ibid*).

¹¹²⁸ Reply, ¶405.

avail¹¹²⁹. The Report refers to the *A.W.R.A.P. v. Denmark* Opinion of the CERD Committee¹¹³⁰, and states that it is irrelevant because it “was a complaint under Article 4(a) of the Convention” and “was therefore not an effects-based claim, but one based on purpose”¹¹³¹. The Russian Federation does not put forward the “proposition that in all cases, the applicant must prove an intent to specifically and directly target a particular community”¹¹³², as the Report suggests – but it does insist that purpose or intent must be shown when the allegation is one of a “systematic racial discrimination campaign”. In fact, *A.W.R.A.P. v. Denmark* well illustrates the point that “purpose” is a factor that must be taken into account when the nature of the claim so demands, such as in the present case¹¹³³. Crucially, however, the *A.W.R.A.P.* case does not concern a “systematic campaign of racial discrimination”, and was only submitted to the CERD Committee after the applicant exhausted domestic remedies, which makes Prof. Fredman’s expostulations on this case of no help to Ukraine.

820. Furthermore, if Ukraine’s position was correct, the CERD Committee would have disregarded the fact that the contested statement in that case was against Muslims and would have found that, despite this fact, the statement produced an unjustifiable disproportionate effect on Arabs as an ethnic group that constitutes the majority of Muslims in Denmark. However, the Committee rather paid attention to the fact that Arabs as an ethnic group were not targeted by the statement as such.

821. The Second Expert Report by Prof. Fredman further states that “[i]n its Opinions in individual complaints, the CERD Committee has regularly affirmed in particular that ‘presumed victims of racial discrimination are not required to show that there was

¹¹²⁹ Reply, ¶405 and Annex 5.

¹¹³⁰ Counter-Memorial (CERD), ¶93; UN Committee on the Elimination of Racial Discrimination, *A.W.R.A.P. v. Denmark*, Communication No. 37/2006, CERD/C/71/D/37/2006, 8 August 2007.

¹¹³¹ Second Fredman Report (Reply, Annex 5), ¶16.

¹¹³² *Ibid.*, ¶17.

¹¹³³ UN Committee on the Elimination of Racial Discrimination, *A.W.R.A.P. v. Denmark*, Communication No. 37/2006, CERD/C/71/D/37/2006, 8 August 2007, ¶6.2 (The Committee observes ... that the impugned statements specifically refer to the Koran, to Islam and to Muslims in general, without any reference whatsoever to any race, colour, descent, or national or ethnic origin. *While the elements of the case file do not allow the Committee to analyse and ascertain the intention of the impugned statements, it remains that no specific national or ethnic groups were directly targeted as such by these oral statements as reported and printed.* In fact, the Committee notes that the Muslims currently living in the State party are of heterogeneous origin. They originate from at least 15 different countries, are of diverse national and ethnic origins, and consist of non-citizens, and Danish citizens, including Danish converts” [*Emphasis added*].

discriminatory intent against them”¹¹³⁴. However, the Report merely refers to two opinions¹¹³⁵ in that are entirely extraneous to the present proceedings as they concerned cases that: (a) were brought before the Committee after the exhaustion of local remedies; (b) dealt with the right to equal access to employment and effective remedies in that context; and (c) did not allege a “campaign of racial discrimination”, but individual violations¹¹³⁶. Thus, these examples are of no aid to Ukraine in demonstrating that purpose or intent are irrelevant when a claim concerns an alleged “systematic racial discrimination campaign”.

iii. Ukraine Must Show a Differentiation in Treatment that Creates an Unjustifiable Disparate Impact

822. The Russian Federation conclusively showed in the Counter-Memorial that a “differentiation of treatment” must be established alongside an “unjustifiable disparate impact”. In this regard, a comparability test must be applied to establish that the measures complained of by Ukraine show a “distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin” that have had a disproportionate effect on Tatar and Ukrainian communities when compared with other groups¹¹³⁷. These criteria must all the more be properly applied in the present case, where Ukraine alleges the existence of a “systematic racial discrimination campaign”.

823. Ukraine does not contest that it falls upon it to demonstrate the existence of a disproportionate or disparate impact on Tatar and Ukrainian communities¹¹³⁸. However, it disagrees with the Russian Federation on two issues: first, the methodology that must be applied to determine that such disproportionate impact exists (notably by suggesting that it is not required to produce reliable statistical data); second, and, whether a differentiation of treatment must be established at all.

¹¹³⁴ Second Fredman Report (Reply, Annex 5), ¶9.

¹¹³⁵ See also Reply, ¶402.

¹¹³⁶ UN Committee on the Elimination of Racial Discrimination, *V.S. v. Slovakia*, Communication No. 56/2014, CERD/C/88/D/56/2014, 4 December 2015, ¶7.4; UN Committee on the Elimination of Racial Discrimination, *Gabaroum v. France*, Communication No. 52/2012, CERD/C/89/D/52/2012, 10 May 2016, ¶7.2.

¹¹³⁷ Counter-Memorial (CERD), ¶¶97-98.

¹¹³⁸ Second Fredman Report (Reply, Annex 5), ¶8 (“To establish a breach of the CERD therefore requires a showing either of purpose or of unjustifiable disparate on a protected group”), and ¶19 (“Ukraine is required to show only the existence of a practice or policy that has a disparate impact on, or disproportionately disadvantages, a racial group”).

824. As regards differentiation of treatment, Ukraine suggests that it is not required to prove it in any manner,¹¹³⁹ at least “regarding effects-based discrimination claims.”¹¹⁴⁰ Thus, according to Ukraine, it would somehow suffice for it to argue that certain measures adopted by Russian authorities have an unjustifiable disparate impact on Tatar and Ukrainian communities, without the need to evidence a differentiation of treatment giving rise to the latter.
825. Ukraine’s continued insistence on an obviously groundless claim challenging this basic criterion is baffling. Indeed, not only multiple scholars agree that differentiation of treatment is a necessary condition of racial discrimination under the CERD¹¹⁴¹, but it is evident even from the plain text of the definition in Article 1(1) of the Convention, according to which “the term ‘racial discrimination’ shall mean *any distinction, exclusion, restriction or preference* based on race, colour, descent, or national or ethnic origin ...” [Emphasis added]. Differentiation in treatment is not only an integral part of the definition of discrimination but lies at the heart of the Convention’s object and purpose, reflected at the very beginning of its preamble by the maxim “that everyone is entitled to all the rights and freedoms set out therein, *without distinction of any kind*”. That Ukraine seeks to erase this fundamental tenet of the Convention speaks volumes about the inability to prove its claims.
826. The understanding that the Convention covers only acts that constitute difference in treatment based on national or ethnic origin, race, colour, or descent, is clearly reflected in doctrine. According to the authoritative commentary of the CERD by Prof. Lerner:

“According to paragraph 1, four kinds of acts are, in given circumstances, considered discriminatory: any distinction, exclusion, restriction or preference. There were some doubts with regard to the use of words indicating discrimination, and there were proposals to include in the definition words as ‘differentiation,’ ‘limitation’ and ‘ban on access.’ It was agreed finally that the four mentioned terms would cover all aspects of discrimination which should be taken into account ...

In order that any of those four acts be considered discriminatory, two conditions are necessary:

1. that they should be based on (a) race, (b) colour, (c) descent, (d) national

¹¹³⁹ Second Fredman Report (Reply, Annex 5), ¶¶18-19.

¹¹⁴⁰ *Ibid.*, ¶19.

¹¹⁴¹ Counter-Memorial (CERD), ¶97.

origin or (e) ethnic origin;

2. that they should 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”¹¹⁴².

827. As has been demonstrated in the Counter-Memorial, Ukraine “must identify an appropriate comparator” and establish that the Russian Federation has adopted measures which discriminate against Crimean Tatar and Ukrainian communities as compared to persons of other ethnic origin that find themselves in a similar situation. Ukraine must conduct a genuine comparative exercise in respect of each allegation in order to establish the existence of an unjustified differential treatment in *comparison with* the rest of the population or other relevant sections thereof in comparable circumstances¹¹⁴³.

828. It is clear, therefore, that a mere effect or negative impact on human rights, without the *act* of distinction based on a prohibited ground, is not sufficient to constitute an act of discrimination under the Convention. This is further supported by the Court’s decision in *Qatar v. UAE*, where the Court emphasized that for discrimination to exist, it must arise from a “restriction”¹¹⁴⁴.

829. In a futile effort to shore up Ukraine’s far-fetched claim, Prof. Fredman offers a truncated quote from General Recommendation 14 of the CERD Committee taken out of context.¹¹⁴⁵ The *entire* relevant part of General Recommendation 14 reads as follows:

“A distinction is contrary to the Convention if it has either the purpose or the effect of impairing particular rights and freedoms ... The Committee observes that a differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate or fall within the scope of article 1, paragraph 4, of the Convention. In considering the criteria that may have been employed, the Committee will acknowledge that particular actions may have varied purposes. In seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an

¹¹⁴² N. Lerner, THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (Brill, 2015), p. 33.

¹¹⁴³ Counter-Memorial (CERD), ¶97.

¹¹⁴⁴ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Preliminary Objections, Judgment, 4 February 2021, I.C.J. Reports 2021, pp. 108-109, ¶112

¹¹⁴⁵ Second Fredman Report (Reply, Annex 5), ¶18.

unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin”¹¹⁴⁶. [Emphasis added]

830. Nothing in this paragraph indicates that differentiation of treatment is not a necessary condition for establishing racial discrimination. On the contrary, the plain text of General Recommendation 14 clearly shows that the Committee viewed distinction/differentiation of treatment as a necessary element of a violation, regardless of whether the discrimination is based on purpose or effect. The term “action” is likewise used by the Committee with respect to discrimination based on both purpose and on effect. This soundly disproves Prof. Fredman’s assertion that the last sentence of the Recommendation somehow indicates a special rule for effect-based discrimination not requiring differentiation in treatment.

831. The Russian Federation recalls that the Court itself in its 2019 judgment on jurisdiction stated that “[i]t is the Applicant’s position that these measures were *principally aimed* against the ethnic groups of Crimean Tatar and Ukrainian communities”¹¹⁴⁷. The existence of differential treatment towards Crimean Tartars and Ukrainians in Crimea was thus considered to lie at the core of Ukraine’s claim that was deemed admissible.

832. Finally, as regards the criterion of “unjustifiable disparate impact”, Ukraine does not disagree with, but questions the methodology that must be applied to show that it has been met as noted above. In this regard Ukraine admits that “statistical data have been important in the work and practice of the CERD Committee”¹¹⁴⁸, but at the same time maintains that it is “entitled to rely on non-statistical evidence to support its claims”¹¹⁴⁹. This cannot be right in the present case, where Ukraine’s manifest inability to produce relevant statistical data speaks volumes¹¹⁵⁰. The simple truth is that such statistical data does not exist because there is no “systematic racial discrimination campaign” against

¹¹⁴⁶ UN Committee on the Elimination of Racial Discrimination, General Recommendation 14, Definition of Racial Discrimination (Forty-second session, 1993), U.N. Doc. A/48/18 at 114 (1994), ¶2 (Memorial, Annex 788).

¹¹⁴⁷ Judgment of 8 November 2019, ¶88.

¹¹⁴⁸ Reply, ¶422.

¹¹⁴⁹ *Ibid.*, ¶¶420-424.

¹¹⁵⁰ See also P. Thornberry, “Article 1: Definition of Racial Discrimination”, in P. Thornberry, *THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION: A COMMENTARY* (OUP, 2016), p. 116 (“While the Committee has not provided States parties with elaborate guidance on the evidence to demonstrate the presence of indirect – or structural – discrimination, general group-based data are regularly called for, as well as scrutiny of the overall circumstances of particularly vulnerable groups, or in relation to specific policies”).

Crimean Tatar and Ukrainian communities in the Russian Federation. In the absence of any credible evidence that the latter have suffered a disparate or disproportionate impact by virtue of the measures complained of, Ukraine's claim must be dismissed.

833. In effect, Ukraine is seeking to prove a case of “a systematic policy of racial discrimination” *in the absence of any solid evidence of such policy whatsoever*:

- (a) without referring to any legislation that is discriminatory in nature,
- (b) without proving any other measurable difference in treatment (and even denying the need to show differential treatment altogether);
- (c) without any evidence of discriminatory intent (and even denying that such intent is necessary);
- (d) without these measures being tested by local remedies (and building its entire case around denying the need to exhaust such remedies);
- (e) without presenting statistical data that show any disproportionate effect of any of the measures complained (and denying the need for such statistics in order to prove the systematic character of discrimination);
- (f) without proving that isolated incidents form a pattern of conduct or a composite act; and
- (g) by denying the possibility of an objective justification for any incident.

834. It seems Ukraine is convinced that its goal may be achieved by claiming that a few isolated alleged events that – in Ukraine's subjective view, not based on any objective data – disproportionately affect Crimean Tatar and Ukrainian communities are tantamount to an actual “systematic racial discrimination campaign” designed the Russian Federation. The Russian Federation, in turn, is convinced that this approach is not sustainable in fact and in law, and must firmly be rejected by the Court.

iv. Ukraine's Claims Must be Proved by Evidence That is Fully Conclusive

835. The Russian Federation further noted in the Counter-Memorial that, due to the gravity of Ukraine's claim – a “systematic racial discrimination campaign” in violation of the

CERD, conduct that would indubitably constitute a serious breach – Ukraine has to provide evidence that is nothing but *fully conclusive*. As the Court noted in the *Bosnia Genocide* case:

“The Court has long recognized that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive ... The Court requires that it be fully convinced that allegations made in the proceedings, that the crime of genocide or the other acts enumerated in Article III have been committed, have been clearly established. The same standard applies to the proof of attribution for such acts.”¹¹⁵¹

836. The same standard of proof applies in the present case, and it is one that Ukraine has to meet.

C. UKRAINE’S RECASTING OF THE CASE AS CONCERNING “INDIRECT DISCRIMINATION” IS INADMISSIBLE AND WITHOUT MERIT

837. The Counter-Memorial thoroughly demonstrated that the measures of which Ukraine complains cannot constitute racial discrimination, nor evidence a “systematic racial discrimination campaign”. Having failed to prove otherwise, the Reply appears to attempt to reformulate Ukraine’s original claim and suggests that the actions of the Russian Federation are unlawful because they amount to “indirect discrimination”¹¹⁵². This attempt by Ukraine to recast the implausible case it brought before the Court ought to be dismissed.

838. At the outset, it must once again be recalled that Ukraine came to the Court with accusations of extreme gravity. In the Application, Ukraine maintained that, as a “collective punishment” against “non-Russian communities in the Crimean peninsula” who refused to “accept the illegal occupation”, the Russian Federation allegedly “mounted a broad-based campaign of cultural erasure through discrimination”¹¹⁵³. It argued that the Russian Federation “targeted” these communities as such¹¹⁵⁴, and that it “determined” that non-Russian communities “should be considered enemies of the

¹¹⁵¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, I.C.J. Reports 2007, p. 129, ¶ 209.

¹¹⁵² Reply, ¶¶401-403, 421, and 619.

¹¹⁵³ Application instituting proceedings, ¶¶13-14.

¹¹⁵⁴ *Ibid.*, ¶¶13, 133.

Russian régime”¹¹⁵⁵. Similarly, in the Memorial, Ukraine stated that the Russian Federation “seeks to entrench Russian dominance [in Crimea] and to erase the competing cultural claims of the Crimean and Tatar and Ukrainian communities”¹¹⁵⁶. This “goal”, in Ukraine’s own words, was pursued in accordance with a “two-part strategy” selectively targeting such communities¹¹⁵⁷. The Memorial added that “[t]he desired end result is as transparent as it is abhorrent to the multi-ethnic heritage of Crimea: the cultural erasure of the Crimean Tatar and Ukrainian communities on the peninsula”¹¹⁵⁸. Thus, both in the Application and the Memorial Ukraine accused the Russian Federation of *direct discrimination, with a specific intent to target Tatar and Ukrainian communities*, as part of a “systematic racial discrimination campaign”.

839. There is no doubt at the present stage of the proceedings that Ukraine has been unable to establish the facts that could sustain such meritless rhetoric. Yet Ukraine’s recasting of its case as one concerning indirect discrimination is manifestly at odds with Ukraine’s original claim of a “systematic racial discrimination campaign”. As explained in Section II above, such a “systematic campaign” cannot be an accidental occurrence – it necessarily has to take place with a specific intent or purpose. In trying to justify the existence of a “systematic campaign” by relying on a small number of alleged instances of “indirect discrimination”, Ukraine effectively concedes that it cannot prove that there is any intent or purpose to discriminate against Tatar and Ukrainian communities on the part of the Russian Federation. This late strategy moreover seeks to circumvent yet again the Court’s 2019 judgment by putting forward individual claims that are unrelated to the alleged “campaign” and are inadmissible because of the non-exhaustion of local remedies¹¹⁵⁹. Thus, Ukraine arguments must be rejected.

840. However, even if against all odds Ukraine’s *démarche* were to be allowed, it would not suffice for Ukraine to insist that a “systematic racial discrimination campaign” occurred

¹¹⁵⁵ *Ibid.*, ¶81.

¹¹⁵⁶ Memorial, ¶346.

¹¹⁵⁷ *Ibid.*

¹¹⁵⁸ *Ibid.*

¹¹⁵⁹ It ought to be noted that neither indirect discrimination nor direct discrimination were argued by the persons concerned in any of the procedures initiated at the domestic level in relation to the measures that Ukraine complains of in the present case.

merely because some measures allegedly may have “collateral or secondary effects” on Crimean Tatars and Ukrainians.

a. “Indirect Discrimination” as Defined by Ukraine is Not Covered by the CERD

841. For the purposes of definition, Ukraine relies on the opinion of Prof. Fredman, who defines “indirect discrimination” as follows:

“Indirect discrimination recognizes that equal treatment which has a disproportionate effect on a group defined by the enumerated grounds is itself discriminatory. Indirect discrimination or disparate impact focuses on inequality of results rather than inequality of treatment”¹¹⁶⁰. [Emphasis added]

842. Equal treatment, however, does not fall within the Convention’s definition of racial discrimination, which, as was shown previously, hinges upon *differential treatment*, i.e., a “distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin”¹¹⁶¹. In other words, “equal treatment” cannot constitute racial discrimination. This also transpires from the preamble of the Convention, which focuses on guaranteeing “equal rights”, “equal protection before the law” and “enjoyment of the same rights without distinction”. The same approach is enshrined in Article 5 of the Convention, where the fundamental obligations of States Parties are set out as follows:

“In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law”. [Emphasis added]

843. In contrast to the plain text of the CERD, Ukraine’s notion of “indirect discrimination” goes as far as to demand *unequal* treatment in order to achieve “equality of result” – which is directly opposed to “equality of treatment” or an ordinary reading of “equality before the law”. As Prof. Fredman has explained elsewhere:

“An alternative conception [sic] of equality, therefore, is based on a more substantive view of justice, which concentrates on correcting maldistribution. Such a principle would lead to a focus on equality of results, requiring unequal treatment if necessary to achieve an equal impact”¹¹⁶²;

¹¹⁶⁰ Memorial, Annex 22, p. 22, ¶53.

¹¹⁶¹ See above, Chapter III(B)(iii).

¹¹⁶² S. Fredman, DISCRIMINATION LAW, 2nd ed. ((OUP, 2011), p. 2.

“... formal equality assumes that the aim is identical treatment. Yet, as we have seen, where there is antecedent inequality, ‘like’ treatment may in practice entrench difference. Thus unequal treatment may be necessary to achieve genuine equality”.¹¹⁶³

844. However, the Convention does not demand “unequal treatment”. While it recognizes in Article 1(4) the possibility of “positive discrimination”, adopting such measures is not an obligation of States Parties (with the narrow exception set out in Article 2(2), which Ukraine does not accuse Russia of violating). The Convention envisages that “special measures” may be undertaken by carving out an exception limited both materially and temporally. Article 1(4) reads:

“Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved”

b. The concept of “indirect discrimination” as advanced by Ukraine, however, implies a permanent regime of separate rights for different racial groups, as “true equality” would never be achieved

845. In support of its claims, Ukraine refers to the Permanent Court’s 1935 advisory opinion on *Minority Schools in Albania*, claiming that there “[a]n argument based on equality of treatment, similar to that now advanced by Russia, was rejected”, and that “[t]he PCIJ recognized... that such formal equality in law could disguise actual discrimination where the majority and minority were not similarly situated”¹¹⁶⁴.

846. This reference is mistaken for a range of reasons, which are also examined below.¹¹⁶⁵ It is nonetheless necessary to highlight a fatal flaw in Ukraine’s position: the PCIJ did *not* recognize that equal treatment constitutes discrimination, as Ukraine suggests. On the contrary, the Court expressly stated that equal treatment (or “equality in law”) “precludes discrimination of every kind”.¹¹⁶⁶ The relevant equal treatment provision that was

¹¹⁶³ *Ibid.*, p. 13.

¹¹⁶⁴ Reply, ¶674.

¹¹⁶⁵ See below, Chapter V(A).

¹¹⁶⁶ PCIJ, *Minority Schools in Albania*, Advisory Opinion, 6 April 1935, P.C.I.J. Rep. Series A/B – No. 64, p. 19.

contained in Article 4 of the 1921 Declaration concerning the protection of minorities in Albania was moreover drafted in terms similar to those of Article 1(1) of the CERD: “All Albanian nationals shall be equal before the law, and shall enjoy the same civil and political rights without distinction as to race, language or religion”.

847. The PCIJ considered Article 4 of the Declaration in question to embody the principle of equality and equal treatment without distinction:

“Article 4 only relates to Albanian nationals and stipulates on their behalf equality before the law and the enjoyment of the same civil and political rights, without distinction as to race, language or religion. It also defines certain of these rights, with the same object of preventing differences of race, language or religion from becoming a ground of inferiority in law or an obstacle in fact to the exercise of the rights in question. In all these cases, the Declaration provides for a régime of legal equality for all persons mentioned in the clause; in fact no standard of comparison was indicated, and none was necessary, for at the same time that it provides for equality of treatment the Declaration specifies the rights which are to be enjoyed equally by all”¹¹⁶⁷.

848. This wording strongly coincides with the text of the CERD, which in its Preamble also proclaims:

“... that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set out therein, without distinction of any kind, in particular as to race, colour or national origin, [and] that all human beings are equal before the law and are entitled to equal protection of the law against any discrimination and against any incitement to discrimination”.

849. The Court interpreted Article 4 as the “anti-discrimination” norm of the Albanian Declaration: “All Albanian nationals enjoy the equality in law stipulated in Article 4 ... Equality in law precludes discrimination of any kind”¹¹⁶⁸. In fact, this is the only instance where the word “discrimination” appears in the advisory opinion.

850. The passage of the advisory opinion to which Ukraine and its expert allude does not pertain to the “anti-discrimination” provisions of Article 4. Rather, it refers to Article 5 of the Declaration, which related to a special regime for the protection of minorities, and which does not have a direct counterpart in the CERD. In the view of the Court:

“All Albanian nationals enjoy the equality in law stipulated in Article 4; on the other hand, the equality between members of the majority and of the

¹¹⁶⁷ *Ibid.*

¹¹⁶⁸ *Ibid.*

minority must, according to the terms of Article 5, be an equality in law and in fact. It is perhaps not easy to define the distinction between the notions of equality in fact and equality in law ... Equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations”.¹¹⁶⁹

851. The last part of this passage lies at the core of Ukraine’s argument. However, Ukraine ignores the fact, as noted above, that the PCIJ did not consider equality in law to be discrimination, but on the contrary to “preclude discrimination of every kind”. The Court considered “equality in fact” to be something different – a result of differential treatment aimed at attaining an “equilibrium between different situations”. This followed from a separate provision related not to the prohibition of discrimination, but to the establishment of a special regime for the protection of minorities.

852. In the Court’s view, therefore, the prohibition of discrimination under the 1921 Declaration only entailed guarantee of equal treatment – not a special preferential regime based on *unequal* treatment. The argument only arose in respect of a different provision – Article 5 aimed at the special protection of the Albanian minority with special rights in education, as opposed to a general non-discrimination clause.

853. This is confirmed by other decisions of PCIJ of the same period and on the same subject. For instance, in *Treatment of Polish nationals and other persons of Polish origin or speech in the Danzig territory*, the Court was called upon to interpret a similar anti-discrimination provision (Article 104(5) of the Treaty of Versailles, which read: “to provide against any discrimination within the Free City of Danzig to the detriment of citizens of Poland and other persons of Polish origin or speech”). The Court held:

“The Polish interpretation would result in granting national and, in certain respects, also minority treatment. In the Court's opinion, however, the object of the prohibition [against any discrimination] is to prevent any unfavourable treatment, and not to grant a special régime of privileged treatment”¹¹⁷⁰ ...[Emphasis added]

854. As a result, the Court concluded that the anti-discrimination rule set out in Article 104(5) was “purely of negative character” and limited to the prohibition of “differential treatment

¹¹⁶⁹ *Ibid.*

¹¹⁷⁰ PCIJ, *Treatment of Polish nationals and other persons of Polish origin or speech in the Danzig territory*, Advisory Opinion, 4 February 1932, PCIJ Series A/B. No 44, p. 29.

to their detriment on the ground of their Polish allegiance, origin or speech” (as opposed to “privileged treatment”)¹¹⁷¹. In particular, the Court did not support Poland’s claim that Polish citizens and persons of Polish origin and speech were entitled, on anti-discrimination grounds, to education in their mother-tongue in Danzig – a special right provided to Danzig citizens of Polish origin by the Convention of Paris.

855. There is nothing in the CERD’s definition of racial discrimination that indicates a perception of discrimination different from the view of the PCIJ – namely, an “equality before the law” “without distinction based on race” which “precludes discrimination of every kind”. The CERD also reflects the concerns of the minority judges in *Albanian Schools* in the sense that it regulates differential treatment – and only differential treatment – as constitutive of discrimination, without any sweeping obligations to maintain an “equilibrium”.
856. This is confirmed by the preparatory work of the CERD, ICCPR and Universal Declaration on Human Rights, where it became apparent that there is a fundamental difference between non-discrimination (ensured through equal treatment) and special measures aimed at providing additional support to minorities.
857. At its first session in 1947, the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities discussed the meaning of the terms “prevention of discrimination” and “protection of minorities” and adopted a decision indicating, for the benefit of the Commission on Human Rights, the considerations which in its view that body should take into account in framing provisions to be included either in the Universal Declaration of Human Rights or in the ICCPR:

- “1. Prevention of discrimination is the prevention of any action which denies to individuals or groups of people equality of treatment which they may wish.
2. Protection of minorities is the protection of non-dominant groups which, while wishing in general for equality of treatment with the majority, wish for a measure of differential treatment in order to preserve basic characteristics which they possess and which distinguish them from the majority of the population. The protection applies equally to individuals belonging to such groups and wishing the same protection. It follows that differential treatment of such groups or individuals belonging to such groups is justified when it is

¹¹⁷¹ *Ibid.*, p. 43

exercised in the interest of their contentment and the welfare of the community as a whole”¹¹⁷².

858. The following remarks were contained in a memorandum submitted in 1949 by the UN Secretary-General, entitled “The Main Types and Causes of Discrimination”:

“The texts adopted by the Sub-Commission indicate the fundamental difference between the prevention of discrimination and the protection of minorities. From these texts, it would appear that discrimination implies any act or conduct which denies to certain individuals equality of treatment with other individuals because they belong to particular groups in society. To prevent discrimination, therefore, some means must be found to suppress or eliminate inequality of treatment which may have harmful results, aiming at the prevention of any act or conduct which implies that an unfavourable distinction is made between individuals solely because they belong to certain categories or groups of society. The aim is to prevent any act which might imply inequality of treatment on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Thus the prevention of discrimination means the suppression or prevention of any conduct which denies or restricts a person’s right to equality.

The protection of minorities, on the other hand, although similarly inspired by the principle of equality of treatment of all peoples, requires positive action: concrete service is rendered to the minority group, such as the establishment of schools in which education is given in the native tongue of the members of the group. Such measures are of course also inspired by the principle of equality: for example, if a child receives its education in a language which is not its mother tongue, this might imply that the child is not treated on an equal basis with those children who do receive their education in their mother tongue. The protection of minorities therefore requires positive action to safeguard the rights of the minority group, provided of course that the people concerned (their parents in case of children) wish to maintain their difference of language and culture”.¹¹⁷³

859. Francesco Capotorti, member of the Sub-Commission who took an active part in elaboration of the CERD, thus summarized this difference:

“The two concepts are distinct in the sense that the concept of equality and non-discrimination implies a formal guarantee of uniform treatment for all individuals — who must be ensured the enjoyment of the same rights and accept the same obligations” – whereas the concept of protection of minorities

¹¹⁷² UN Commission on Human Rights, Report submitted to the Commission on Human Rights, 6 December 1947, E/CN.4/52, sect. V.

¹¹⁷³ UN Secretary-General, The Main Types and Causes of Discrimination, Memorandum, 1949, United Nations publication, Sales No. 49.XIV.3, ¶¶6-7.

implies special measures in favour of members of a minority group¹¹⁷⁴.
[Emphasis added]

860. This distinction between prohibition of discrimination (by guaranteeing equal treatment and protection of minorities (by adopting special measures in their favour which are not considered discrimination), which follows the spirit of the *Albanian Schools* case with regard to Articles 4 and 5 of the Albanian Declaration, is likewise reflected in the CERD. As already noted, apart from the prohibition of discrimination, the Convention also contains provisions devoted to special treatment of minorities – in particular, its Article 1(4) (permitting “special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection”) and Article 2(2) (requiring States to undertake, “when the circumstances so warrant”, “in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them”).
861. However, as noted above, Article 1(4) does not impose an obligation to adopt such measures: it rather envisages the possibility of undertaking them without breaching the CERD. As for Article 2(2), it has a limited and specific scope that is not applicable to the present case. In any event, Ukraine has never alleged any violation by the Russian Federation of these particular provisions, and the Russian Federation has incidentally shown that it takes extensive measures in the economic, social, cultural and other fields to achieve the above-mentioned aims with regard to its national minorities.
862. Still, in an effort to prop up its unsubstantiated and far-reaching claim, Ukraine attempts to cast the prohibition of “discrimination in effect” as tantamount to an obligation to provide “equality in fact” (or “different treatment in order to attain a result which establishes an equilibrium between different situations”). This has no basis in the CERD.
863. The PCIJ already had taken note, in the very case Ukraine relies on, that Article 4 of the Albanian Declaration, which provides for “equal treatment” or “equality before the law”, has the “object of preventing differences of race, language or religion from becoming a ground of inferiority in law or an *obstacle in fact* to the exercise of the rights in

¹¹⁷⁴ F. Capotorti, *STUDY ON THE RIGHTS OF PERSONS BELONGING TO ETHNIC, RELIGIOUS AND LINGUISTIC MINORITIES* (United Nations publication, Sales No. E.91.XIV.2, 1979), ¶241.

question”¹¹⁷⁵ [*Emphasis added*]. In other words, equal treatment should not be merely “platonic”, but have an actual effect. It does not, however, in any way require *unequal treatment* or “equal end result”– only that the obligation to provide equal treatment is implemented in practice.

864. This understanding is also supported by the language of the early treaties on minority protection reviewed by the PCIJ, which used the wording “in legislation or in the conduct of the administration”¹¹⁷⁶ in their anti-discrimination provisions. As noted above, the PCIJ ruled in respect of such a provision that “the object of the prohibition [of discrimination] is to prevent any unfavourable treatment, and not to grant a special régime of privileged treatment”.

865. The words “in effect”, contained in Article 1(1) of the CERD, have the same meaning. As explained by Prof. Lerner:

“The second condition [the first being racial grounds] for making a distinction, exclusion, restriction or preference a discriminatory act is that they must (a) have the purpose of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms or (b) have such an effect. In the first case, a subjective consideration will define the discriminatory nature of the act; in the second, the objective consequences of the act will be the decisive element”¹¹⁷⁷.

866. In other words, a “disparity” of results between ethnic groups does not by itself constitute racial discrimination, unless it is an “objective consequence” of a “distinction, exclusion, restriction or preference based on race, colour, descent, national origin or ethnic origin”. While the concept of “indirect discrimination” as advanced by Ukraine simply presumes that any such “disparity” would in itself constitute racial discrimination, without examining its causal link to an act of differential treatment on racial grounds.

867. This approach has been confirmed in *Qatar v. UAE*, where the Court highlighted the causal link between an act of restriction and an effect of nullifying or impairing human rights:

¹¹⁷⁵ PCIJ, *Minority Schools in Albania*, Advisory Opinion, 6 April 1935, P.C.I.J. Rep. Series A/B No. 64, ¶54.

¹¹⁷⁶ See, e.g., Article 104, paragraph 1 of the Treaty of Versailles, examined in PCIJ, *Treatment of Polish nationals and other persons of Polish origin or speech in the Danzig territory*, Advisory Opinion, 4 February 1932, PCIJ Series A/B. No 44.

¹¹⁷⁷ N. Lerner, *THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION* (Brill, 2015), p. 35.

“The Court first observes that, according to the definition of racial discrimination in Article 1, paragraph 1, of CERD, a restriction may constitute racial discrimination if it “has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life”. Thus, the Convention prohibits all forms and manifestations of racial discrimination, whether arising from the purpose of a given restriction or from its effect”¹¹⁷⁸.

868. The Court then held that, because the restrictions in question were not based on Qatari national origin, but on Qatari nationality, any “collateral or secondary effects” they might have on “persons born in Qatar or of Qatari parents” do not constitute racial discrimination under CERD:

“In the present case, while the measures based on current Qatari nationality may have collateral or secondary effects on persons born in Qatar or of Qatari parents, or on family members of Qatari citizens residing in the UAE, this does not constitute racial discrimination within the meaning of the Convention. In the Court’s view, the various measures of which Qatar complains do not, either by their purpose or by their effect, give rise to racial discrimination against Qataris as a distinct social group on the basis of their national origin”¹¹⁷⁹.

869. This judgment was rightfully perceived as a rebuff of the far-reaching notion of “indirect discrimination”, where any disparity between racial groups is considered racial discrimination by default, without any consideration of whether the disparity was caused by a distinction, exclusion, restriction or preference on racial grounds.¹¹⁸⁰

870. As shown in Section II above, General Recommendation 14 of the CERD Committee further confirms that difference in treatment (or “distinction”) is a necessary element of the definition of racial discrimination. Without actual differential treatment, discrimination in contravention of the CERD cannot exist¹¹⁸¹.

871. In truth, Ukraine seeks to conflate discrimination “in effect”, arising from the effect of laws rather than the purpose behind these laws, with a situation when no actual difference

¹¹⁷⁸ *Application Of The International Convention On The Elimination Of All Forms Of Racial Discrimination (Qatar V. United Arab Emirates)*, Preliminary Objections, Judgment, 4 February 2021, I.C.J. Reports 2021, pp. 108-109, ¶112.

¹¹⁷⁹ *Ibid.*

¹¹⁸⁰ See, e.g., *Application Of The International Convention On The Elimination Of All Forms Of Racial Discrimination (Qatar V. United Arab Emirates)*, Preliminary Objections, Separate Opinion of Judge Iwasawa, 4 February 2021, I.C.J. Reports 2021, p. 157.

¹¹⁸¹ See above, Chapter III(B)(iii).

in treatment exists, *i.e.* everyone is treated equally, but – for some other reason than a difference in treatment – a disparity nevertheless arises. Without going into the depths of various concepts of “social justice”, it suffices to say that the CERD does not cover these eventualities, for the simple reason that it only concerns situations when there is a “distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin”.

872. Even if indirect discrimination was applicable to the present case (*quod non*), Ukraine would still need to demonstrate that the measures it complains constitute a differential treatment directly targeted or singled out Tatar and Ukrainian communities as such, as made clear by the CERD Committee in previous decisions¹¹⁸². In *Qatar v. UAE*, which Ukraine quotes only partially¹¹⁸³, the Court similarly found that:

“The Court first observes that, according to the definition of racial discrimination in Article 1, paragraph 1, of CERD, a restriction may constitute racial discrimination if it ‘has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life’. Thus, the Convention prohibits all forms and manifestations of racial discrimination, whether arising from the purpose of a given restriction or from its effect. In the present case, while the measures based on current Qatari nationality may have collateral or secondary effects on persons born in Qatar or of Qatari parents, or on family members of Qatari citizens residing in the UAE, this does not constitute racial discrimination within the meaning of the Convention. In the Court’s view, the various measures of which Qatar complains do not, either by their purpose or by their effect, give rise to racial discrimination against Qataris as a distinct social group on the basis of their national origin. The Court further observes that declarations criticizing a State or its policies cannot be characterized as

¹¹⁸² See, for example, UN Committee on the Elimination of Racial Discrimination, *A.W.R.A.P. v. Denmark*, Communication No. 37/2006, CERD/C/71/D/37/2006, 8 August 2007, ¶6.2 (“... it remains that no specific national or ethnic groups were directly targeted as such by these oral statements ...”), and ¶6.4 (“... the general references to Muslims, do not single out a particular group of persons, contrary to Article 1 of the Convention”). See also UN Committee on the Elimination of Racial Discrimination *Quereshi v. Denmark*, Communication No. 33/2003, CERD/C/66/D/33/2003, 9 March 2005, ¶7.3 (“... a general reference to foreigners does not at present single out a group of persons, contrary to Article 1 of the Convention ...”). These Committee decisions are particularly relevant, because they deal with allegations of discrimination against a particular group and not individual instances employment discrimination that Ukraine seeks to rely on. See further P. Thornberry, “Article 1: Definition of Racial Discrimination”, in P. Thornberry, *THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION: A COMMENTARY* (OUP, 2016), pp. 111-112; *Application of the International Convention of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018, p. 437, Joint Declaration of Judges Tomka, Gaja and Gevorgian, ¶6 (“Differences of treatment of persons of a specific nationality may target persons who also have a certain ethnic origin and therefore would come under the purview of CERD, but this possibility has not been suggested by Qatar”).

¹¹⁸³ Second Fredman Report (Reply, Annex 5), ¶7.

racial discrimination within the meaning of CERD. Thus, the Court concludes that, even if the measures of which Qatar complains in support of its “indirect discrimination” claim were to be proven on the facts, they are not capable of constituting racial discrimination within the meaning of the Convention”¹¹⁸⁴.

873. The Court thus dismissed Qatar’s arguments on “indirect discrimination” and agreed with the UAE’s position that the statements made by its Attorney-General were in the context of existing legislation on combating cyber-crimes, and that there was no criminalizing of sympathy for Qatar¹¹⁸⁵. Similarly, in the present case, even if Ukraine was able (which it is not) to prove that certain measures taken by Russian authorities had “secondary or collateral effects” on Tatar and Ukrainian communities, its claims must be dismissed: Ukraine fails to demonstrate that those measures, “either by their purpose or by their effect”, give rise to racial discrimination against those communities, and *a fortiori* to a “systematic racial discrimination campaign”. Furthermore, all the measures adopted by the Russian Federation, as explained in further detail in later chapters, had perfectly legitimate objectives which were unrelated to racial considerations of any kind.

874. What is more, Ukraine’s notion of “indirect discrimination” goes even further than the position of Qatar dismissed by the Court. While Qatar did refer to “indirect discrimination”, the core of its complaint constituted an allegation of “differential treatment on the basis of national origin that is not applied pursuant to a legitimate aim, and proportional to the achievement of that aim”¹¹⁸⁶ through acts such as the collective expulsion of “Qatari residents and visitors” from Qatar, the “Absolute and Modified Travel Bans” on “Qatari nationals,” and the UAE’s “Anti-Sympathy Law and Qatari Media Block”¹¹⁸⁷. Conversely, Ukraine, while putting forward its “indirect discrimination” claim, is forced to attack the very notion of “differential treatment” for lack of evidence regarding such restrictions on a ground prohibited by the Convention¹¹⁸⁸.

¹¹⁸⁴ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Preliminary Objections, Judgment, 4 February 2021, I.C.J. Reports 2021, pp. 108-109, ¶112.

¹¹⁸⁵ *Ibid.*, ¶¶ 109-110.

¹¹⁸⁶ Memorial of Qatar, ¶3.20.

¹¹⁸⁷ *Ibid.*, ¶3.5.

¹¹⁸⁸ Qatar’s complaint was dismissed primarily due to the alleged difference in treatment being based on the criteria of nationality, which lies outside the scope of the Convention. As noted above, Ukraine’s complaint not only grounds itself in criteria that are outside the Convention’s subject-matter (political convictions), but also fails to show actual difference in treatment (which would be separate from the alleged “effect” of impacting or nullifying human rights of certain groups).

D. UKRAINE FAILS TO PROVIDE CRUCIAL STATISTICAL DATA

875. Ukraine's refusal to provide statistical evidence of so-called "disparate impact" would preclude any finding of "indirect discrimination" even on Ukraine's own terms.

876. As already mentioned, being unable to supply such statistical evidence (for the simple reason of its absence in reality), Ukraine attempts to argue against the very necessity of this evidence. Here, however, Ukraine manifestly contradicts the position of its own expert, Prof. Fredman, who goes far beyond the CERD in the definition of discrimination but nevertheless considers statistical evidence to be an indispensable tool in establishing the existence of "indirect discrimination".¹¹⁸⁹

877. Entirely contrary to the position taken up by Ukraine in the present case, Prof. Fredman specifically highlights that where "facially neutral" measures are in question, "indirect discrimination" cannot be proven without statistical evidence, and absent such evidence, proof of direct discrimination would have to be submitted instead:

"However, the notion of 'particular disadvantage', while useful in situations of obvious disparate impact, would not be sufficient to flush out measures which appear wholly neutral and are not in any way suspect. If not confronted with actual evidence of a disproportionate impact, courts are tempted to view such measures as non-discriminatory unless they can find an express link with the protected characteristic. This simply reverts to a direct discrimination approach."¹¹⁹⁰

878. Ukraine, of course, fails to provide both statistical evidence of a "disproportionate impact" and evidence of an "express link with the protected characteristic". In short,

¹¹⁸⁹ "Indirect discrimination, like its direct counterpart, is based on a comparison. However, because it is concerned with impact, rather than treatment, the role of the comparator is complex. Both in US and UK law, the comparison is group-based: equal treatment can be unlawful because of its disproportionate exclusionary impact on a group sharing a protected characteristic. But how should the group dimension be established? What proportion of the group should be excluded and relative to whom? The use of statistics is clearly a potent tool to determine such questions. As noted by a recent study, the indirect discrimination concept ... '[is] intrinsically linked to statistics by their logic and objectives. The definition of indirect discrimination is based on quantitative concepts: significant effects and comparisons between groups. The cognitive tools used to capture indirect discrimination, which is the reasoning on which legal and political developments are based, are statistical. The group concept is the focus: treatment is no longer personalised, it is collective and only relates to individuals in terms of their real or assumed affiliation to a protected group. This shift from the individual to a group is strictly analogous to the operations carried out by statistics: impersonal aggregates that highlight a collective situation.'

The importance of statistics is vividly demonstrated in the ECtHR case of *DH*... when the case was re-heard by the Grand Chamber, statistical evidence was accepted, enabling the Court to uphold the claim of indirect discrimination. This follows the pattern set by the early conceptions of indirect discrimination, which reflected the centrality of statistics to a group-based view of discrimination." S. Fredman, *DISCRIMINATION LAW*, 2nd ed. (OUP, 2011), pp. 183-184.

¹¹⁹⁰ *Ibid.*, p. 189.

Ukraine alleges discrimination without any proof whatsoever, even according to its own unsubstantiated made-up terms.

879. Moreover, Ukraine does not even begin to tackle the issue of what exactly constitutes statistical evidence – for example, what would constitute the appropriate comparator groups, what is the threshold or selection rate for disparate impact to occur, etc. All of those are questions which confound practitioners, and where, according to Prof. Fredman, no uniform approach exists. An example rule suggested by Prof. Fredman is the “four-fifths rule” used by US courts:

“in the US... the Equal Employment Opportunity Commission has developed a rule of thumb, known as the ‘four-fifths’ rule. On this approach, a selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact. For example, if the hiring rate for whites is 60 per cent and that for American Indians is 45 per cent, then the ratio for American Indians is 45:60, or 75 per cent, which is less than four-fifths. In the same example, if the hiring rate for Hispanics is 48 per cent, then the ratio for Hispanics is 48:60 or 80 per cent. The result is that there is a prima facie case of disparate impact in relation to American Indians but not Hispanics.”¹¹⁹¹

880. The Russian Federation does not agree with the application of the concept of “indirect discrimination” as proposed by Ukraine, which is inconsistent with the CERD. But the Russian Federation has produced relevant statistical data in its Counter-Memorial showing that no racial discrimination targeted against Tatar and Ukrainian communities has taken place in Crimea. Still further statistical evidence is presented in later chapters of this Rejoinder.¹¹⁹²

E. POLITICAL VIEWS HAVE NO BEARING ON THE DEFINITION OF “ETHNIC ORIGIN” UNDER THE CERD

881. It was further shown in the Counter-Memorial that Ukraine seeks wrongly to broaden the notion of “racial discrimination” under the CERD by defining the Ukrainian community in Crimea¹¹⁹³ as an ethnic group in the light of political views or opposition, and in

¹¹⁹¹ *Ibid.*, p. 187; referring to US Equal Employment Opportunity Commission, Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures, Title VII, 29 CFR Part 1607, available at: http://www.eeoc.gov/policy/docs/qanda_clarify_procedures.html.

¹¹⁹² See in particular Chapters VI (disappearances), IX (public events) and X (media) below.

¹¹⁹³ The Memorial also referred to the Crimean Tatar community, but Ukraine does not appear to insist on their political views in the Reply.

particular an alleged “loyalty to the principle that Crimea is part of Ukraine’s sovereign territory and that Russia’s purported annexation of the peninsula is therefore illegitimate”¹¹⁹⁴. Political opinion, however, is not consonant with “ethnic origin” or “ethnicity”, and allegations of discrimination on the basis of political convictions (which cannot be further from the truth in this case) are not regulated by the CERD. Wedding one to the other constitutes an artificial and unjustified expansion of the scope of the Convention that must accordingly be rejected by the Court¹¹⁹⁵. In the words of Prof. Lerner:

“[t]he Convention on Racial Discrimination... only deals with racial discrimination. Any discrimination on grounds of ... political opinion... is obviously outside its scope”¹¹⁹⁶.

882. In its Reply, Ukraine states that “[w]hile Russia takes issue with aspects of Ukraine’s definition of the Ukrainian community, 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”¹¹⁹⁷; it is moreover argued that “Russia’s criticism of Ukraine’s definition is legally irrelevant”¹¹⁹⁸. These arguments are dealt with in detail in Section H below. Nonetheless, two general observations are warranted at this stage.
883. First, the disagreement between the Parties regarding the proper identification of an “ethnic group” is significant and has a direct impact on the type of measures that may constitute racial discrimination in contravention of the CERD. By arguing that political views can define ethnicity, Ukraine seeks to overturn the universal understanding of ethnic origin and essentially asks the Court to determine that actions taken by Russian authorities against certain individuals on grounds of their extremist criminal behaviour in support of their political views should be seen as “racial discrimination”. Adopting Ukraine’s position would have enormous repercussions; in particular, it would open the door to ascribing certain patterns of behaviour – including *criminal* behaviour– to certain

¹¹⁹⁴ Counter-Memorial (CERD), ¶114.

¹¹⁹⁵ Counter-Memorial (CERD), ¶¶115-126. Similarly, Ukraine’s broadening of the definition of “racial discrimination” to include discrimination on religious grounds is unfounded (Counter-Memorial (CERD), ¶¶127 *ff*). Ukraine, however, does not insist on this matter in the Reply.

¹¹⁹⁶ N. Lerner, *THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION* (Brill, 2015), p. 36.

¹¹⁹⁷ Reply, ¶407.

¹¹⁹⁸ *Ibid.*

ethnicities, something the Convention itself was originally designed to guard against. Such an approach would also lead to denying an ethnic Ukrainian or Crimean Tatar a place in their ethnic communities if their political views are not the one consonant with Ukraine's position. Needless to say, this approach cannot be sustained in law. In fact, it serves to confirm that Ukraine seeks to present as racial discrimination actions that are nothing of the sort.

884. Second, Ukraine's reading of the Court's judgment in *Qatar v. UAE* is misleading¹¹⁹⁹. The relevant part of the judgment, in its entirety, reads:

“As the Court has recalled on many occasions, ‘[i]nterpretation must be based above all upon the text of the treaty’ ... The Court observes that the *definition of racial discrimination in the Convention includes ‘national or ethnic origin’*. These references to ‘origin’ denote, respectively, a person’s bond to a national or ethnic group at birth, whereas nationality is a legal attribute which is within the discretionary power of the State and can change during a person’s lifetime ... The Court notes that the other elements of the definition of racial discrimination, as set out in Article 1, paragraph 1, of the Convention, namely race, colour and descent, are also characteristics that are inherent at birth”¹²⁰⁰. [*Emphasis added*]

885. Thus, even if the issue before the Court in that case concerned the definition of “national origin”, it is clear that in this passage the Court was interpreting Article 1 of the Convention as a whole. It is, in the Court's own view, the reference to “origin” (both with respect to nationality and ethnicity) what denotes a bond to a “*national or ethnic group*” at birth. Ukraine's suggestion that “ethnicity” can be defined in a broad and ever-changing manner, by reference to political opinions that obviously are something that is not inherent at birth, must accordingly be rejected. This is also supported by the Court's clear indication that “declarations criticizing a State or its policies cannot be characterized as racial discrimination within the meaning of CERD”¹²⁰¹, thus putting political differences squarely outside the subject-matter of the Convention.

¹¹⁹⁹ Reply, ¶¶412-414.

¹²⁰⁰ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Preliminary Objections, Judgment, 4 February 2021, I.C.J. Reports 2021, p. 98, ¶81.

¹²⁰¹ *Ibid.*, p. 109, ¶112.

F. MEASURES TAKEN ON JUSTIFIABLE GROUNDS DO NOT CONSTITUTE RACIAL DISCRIMINATION

886. The Counter-Memorial showed that, inasmuch as a given measure can be reasonably justified or deemed legitimate, it does not qualify as racial discrimination under the CERD. Justifications may include, *inter alia*, reasonable limitations on human and/or civil rights as may be necessary in a democratic society, provided for under applicable law and subject to due process, in order to protect public order from acts such as terrorism and extremism¹²⁰². In the present case, several of the measures complained of by Ukraine, notably the ban on the *Mejlis*, the detentions and searches of certain individuals, and the limitations imposed on the organization of certain public rallies and protests, were in fact based on such justifiable grounds, and more specifically on the need to address unlawful extremist behaviour that undermines national security and public order.
887. In the Reply, Ukraine attempts to dismiss these arguments by claiming that “the CERD contains no limitations or derogations clause that would permit noncompliance on the basis of national security, public order, or any other justification”¹²⁰³, and that its “prohibition against racial discrimination is absolute”.¹²⁰⁴ Ukraine’s expert, Prof. Scheinin, adds that the Convention establishes “an absolute and unconditional prohibition against any differentiations that would have the purpose or effect of nullifying or impairing the enjoyment of human rights based on any of the characteristics of an individual or a group as listed in the provision”.¹²⁰⁵
888. Prof. Scheinin’s claim is manifestly false, so much so that it contradicts even Ukraine’s own views, as well as those of Prof. Scheinin. The question is not whether “racial discrimination” is prohibited; it is what constitutes “racial discrimination” in the first place. The Convention, of course, contains substantial exceptions to the general definition of racial discrimination, such as those in paragraphs 2, 3 and 4 of Article 2. Prof. Scheinin in fact admits this shortly after stating that the prohibition is “absolute and unconditional”¹²⁰⁶. The Counter-Memorial presented examples of recommendations and

¹²⁰² Counter-Memorial (CERD), ¶98.

¹²⁰³ Reply, ¶428.

¹²⁰⁴ *Ibid.*

¹²⁰⁵ Expert Report of Martin Scheinin, 14 April 2022, ¶9 (Reply, Annex 7).

¹²⁰⁶ *Ibid.*, ¶12.

decisions of the CERD Committee which show that legitimate restrictions on rights, in accordance with the relevant human rights instruments, do not constitute CERD violations¹²⁰⁷. This interpretation is approved by Prof. Alexey Avtonomov – a former member of the CERD Committee – in his expert report.¹²⁰⁸ Ukraine has not been able to rebut these authorities. Moreover, Ukraine has itself admitted in the Memorial that differential treatment is not considered discrimination if there is an “objective and reasonable justification”¹²⁰⁹.

889. Neither did Ukraine deny in the Memorial the possibility of using national security and public order legislation to justify restrictions – even quoting its own legislation, which allowed such restrictions “in the interests of national security and public order, for the purpose of prevention of disturbances or crimes, protection of the health of the population, or protection of the rights and freedoms of other persons.”¹²¹⁰

890. The possibility of such limitations is generally accepted among practitioners and scholars. As noted by Prof. Lerner with regard to freedom of speech:

“[I]t would not be the first time that States have limited that freedom, which, like any other freedom, is not absolute. State Members will have to deal with this problem in their domestic legislation, and will solve it according to their respective political philosophy and orientation in the question of preeminence of rights. Similar discussions have arisen more than once in connection with legislation on pornography and obscenity, national security, blasphemous utterances which offend basic religious beliefs, libelous and defamatory statements against individuals, and other instances of cases when the legislator considered that absolute freedom of speech and expression could not prevail over conditions of public order.”¹²¹¹

891. Prof. Fredman, an expert Ukraine relies on, in her writings confirms that there could be justifications for measures that could otherwise constitute “direct” and “indirect discrimination”:

“Where equal treatment disproportionately disadvantages a group which already suffers from a history of discrimination, then it too can be unlawful, unless there is a good reason. This concept was imported into UK law and

¹²⁰⁷ Counter-Memorial (CERD), ¶98.

¹²⁰⁸ Expert Report of Alexei Stanislavovich Avtonomov, 28 February 2023, ¶¶7, 29-31 (Annex 18).

¹²⁰⁹ See Memorial ¶574.

¹²¹⁰ Memorial, ¶482

¹²¹¹ N. Lerner, THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (Brill, 2015), p. 15.

gradually made its way into EU law. Known as indirect discrimination, it is formulated in different ways, but broadly speaking has three elements: equal treatment; a disproportionately exclusionary impact on those sharing a protected characteristic; and the absence of an acceptable justification”;¹²¹²

“Indirect discrimination can be justified if it is a proportionate means of achieving a legitimate aim”;¹²¹³

“Indirect discrimination has always been structured in such a way as to permit a *prima facie* case of discrimination to be justified if the exclusionary practice is required for the job or other legitimate aim”;¹²¹⁴

“[I]n practice there are a growing number of ways in which direct discrimination can indeed be justified. . . it has always been possible to justify direct race and sex discrimination where sex or race is a genuine occupational qualification. This has now been extended to most of the protected characteristics, subject to a proportionality requirement.”¹²¹⁵

892. Prof. Fredman particularly stresses that justification should be possible if discrimination was “unintentional”: “if intention and motive are excluded from the original decision, a defence of justification should be permitted”.¹²¹⁶ Therefore, even in the opinion of its own expert, Ukraine cannot allege “discrimination without intent” while at the same time denying the possibility for an objective justification.
893. Having failed to substantiate its untenable claim of impossibility of any justification (for any restrictive measures), Ukraine next attempts to have the Court pass judgment on Russian law in general by alleging that it is “entirely out of line with international standards”. However, Ukraine’s criticism of the Russian Federation’s legislation is based on a non-binding recommendation by the Venice Commission, which, firstly, did not make any pronouncement close to the above-mentioned preposterous allegation of Ukraine, and secondly, as the commission itself admitted, its recommendation was not based on fully conclusive evidence.¹²¹⁷ Ukraine adds that, even if Russian law was

¹²¹² S. Fredman, *DISCRIMINATION LAW*, 2nd ed. ((OUP, 2011), p. 154.

¹²¹³ *Ibid.*, p. 190 (quoting The United Kingdom Supreme Court, *R (on the application of E) (Respondent) v Governing Body of JFS and the Admissions Appeal Panel of JFS (Appellants) and others*, UKSC 2009/0105, Judgment, 16 Dec 2009 & 14 Oct 2009, ¶57, available at: <https://www.supremecourt.uk/cases/uksc-2009-0105.html>).

¹²¹⁴ *Ibid.*, p. 191.

¹²¹⁵ *Ibid.*, pp. 197-198.

¹²¹⁶ *Ibid.*, p. 207.

¹²¹⁷ 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, (Memorial, Annex 817), ¶32; see also Expert Reports addressing the erroneous interpretation and

compatible with those standards and Russia's security concerns were legitimate, "the CERD does not permit Russia to racially discriminate on that basis"¹²¹⁸. Here, a general observation is once again warranted.

894. Prof. Scheinin's suggestion, made without any supporting authority, that "there is no requirement that 'racial discrimination' could only occur where there is a violation of another (so-called substantive) human right"¹²¹⁹ is incorrect. Prof. Scheinin bases this proposition on a truncated reading of Article 1 of the CERD, indicating that "it is sufficient that the 'enjoyment or exercise' of another human right is subject to being impaired."¹²²⁰ But this is not what Article 1 says: the provision refers to any distinction, exclusion, restriction or preference based on a prohibited ground 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 ...". This wording makes it plain that there must be an actual nullification or impairment (*i.e.*, a violation) of an existing right, and not a mere possibility thereof or, as Ukraine obscurely advances at several places in its Reply in an attempt to escape the language of this provision, an alleged "burdening" or "disparate impact"¹²²¹. The CERD Committee itself similarly determined that the Convention "does not itself create civil, political, economic social or cultural rights, but assumes the existence and recognition of these rights. The Convention obliges States to prohibit and eliminate racial discrimination in the enjoyment of such human rights"¹²²². Therefore, Ukraine's suggestion that there may be a violation of the CERD without an underlying violation of a human right protected under international law (taking into account, *inter alia*, the legitimate restrictions that may be imposed upon the latter) is simply untenable, and would in fact expand the scope of application of the CERD to situations going well beyond what States have agreed to.

representation of the Venice Commission's Report: Expert Report of Viktor Merkuryev, 1 March 2023, ¶¶86-104 (Annex 20); Second Expert Report of Valery Viktorovich Engel, 28 February 2023 ¶¶13-48 (Annex 19).

¹²¹⁸ Reply, ¶425.

¹²¹⁹ Scheinin Report (Reply, Annex 7), ¶10.

¹²²⁰ *Ibid.*

¹²²¹ See, for example, Reply, ¶¶27, 440, 441, 613, 672, 673, 678.

¹²²² Counter-Memorial (CERD), ¶107.

G. UKRAINE’S ALLEGATIONS UNDER INTERNATIONAL HUMANITARIAN LAW ARE OUTSIDE THE COURT’S JURISDICTION

895. As noted above, in its 2019 judgment the Court established that “Ukraine’s claims are based solely upon CERD”¹²²³. As the Counter-Memorial explained, the obvious conclusion to be drawn from this is that Ukraine cannot base its claims on rules of international law enshrined in treaties other than the CERD or in customary or other general international law¹²²⁴.

896. In its Reply, Ukraine states that:

“... Ukraine’s claims in no way require a finding that Russia is an 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. 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. The Court can accordingly rule on them without regard to whether IHL applies in Crimea or not.”¹²²⁵

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. 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”¹²²⁶.

897. Ukraine thus agrees that its claims cannot be based on international humanitarian law, but exclusively on the CERD. At the same time, it confusingly suggests that it was “entitled to observe that certain laws have been introduced in violation of IHL”, and that “Russia should avoid reliance on assumptions concerning its own sovereign rights in that territory”. These statements once again show that Ukraine’s real goal in the present proceedings is not to demonstrate the existence of a “systematic racial discrimination campaign” conducted by the Russian Federation against Tatar and Ukrainian

¹²²³ Judgment of 8 November 2019, ¶23.

¹²²⁴ Counter-Memorial (CERD), ¶89.

¹²²⁵ Reply, ¶397

¹²²⁶ Reply, ¶¶397-398.

communities in violation of the CERD, but to challenge the status of Crimea and have the Court make a pronouncement on this matter, notably by imposing on the Russian Federation the status of “occupying power”. This attempt by Ukraine to circumvent the 2019 judgment and expand the Court’s jurisdiction beyond the limits of the CERD must of course be rejected. In the end, as Ukraine itself is forced to admit, the present case must be decided “without regard to whether IHL applies in Crimea or not”.

H. UKRAINE’S MISCONCEIVED INTERPRETATION OF “ETHNIC ORIGIN” (“ETHNICITY”) REVEALS THAT ITS REAL GOAL IS CHALLENGING THE STATUS OF CRIMEA

898. As explained in the previous chapter, Ukraine’s attempt to read political opinions into the definition of “ethnic origin” (“ethnicity”) under the CERD has no basis in international law. The correct position is that ethnicity is obtained at birth, as the Court made clear in its 2021 judgment in *Qatar v. UAE*, and that consequently political views have no role to play in this context.¹²²⁷ In light of Ukraine’s misplaced insistence on this matter, however, some additional observations are required.

899. Although, as noted above, Ukraine brought this case under the CERD against the Russian Federation, ostensibly claiming the existence of a “systematic racial discrimination campaign”, in reality it is clear that its real goal is to challenge the status of Crimea. To do this in a discrete manner, Ukraine seeks to shoehorn political views and the alleged political identification of certain Ukrainians and Crimean Tatars as “defining” criteria into the concept of “ethnic origin”.

900. This is confirmed by the Memorial, where Ukraine states that “[t]he very act of annexation placed the Russian authorities on a collision course with the Crimean Tatar and Ukrainian communities”,¹²²⁸ “and that [t]he Crimean Tatar and Ukrainian communities are, in part, defined by their loyalty to the principle that Crimea is part of Ukraine’s sovereign territory and that Russia’s purported annexation of the peninsula is therefore illegitimate.”¹²²⁹

901. The attempt to put before the Court the question of the status of Crimea was rejected in the Court’s 2019 judgment:

¹²²⁷ See above, Chapter III(E).

¹²²⁸ Memorial, ¶382.

¹²²⁹ *Ibid.*, ¶596.

“In the present case, the Court notes that Ukraine is not requesting that it rule on issues concerning the Russian Federation’s purported “aggression” or its alleged “unlawful occupation” of Ukrainian territory. Nor is the Applicant seeking a pronouncement from the Court on the status of Crimea or on any violations of rules of international law other than those contained in the ICSFT and CERD. These matters therefore do not constitute the subject-matter of the dispute before the Court.”¹²³⁰

902. Thus, the question of the status of Crimea is outside the Court’s jurisdiction and no pronouncement on this matter ought to be made.

903. Initially it may be recalled that, Ukraine asserted that “[a] *defining* characteristic of both communities at this time was their loyalty to the principle of Crimea as part of independent Ukraine.”¹²³¹ The Russian Federation showed in its Preliminary Objections¹²³² and Counter-Memorial¹²³³ that, properly interpreted, there is no room in the CERD for importing political views or identification into the concept of “ethnic origin”. Allowing that would stretch this term to an unrecognizable state, which in turn may diminish the effectiveness of the Convention as a “non-political and universal Convention”,¹²³⁴ as the drafters envisioned.

904. Yet Ukraine does not rest its efforts. In its Reply, although admitting that political views and political identification are not to be treated as “defining” criteria or characteristics for ethnicity, Ukraine does insist that political opinion are to be treated as a “relevant factor in assigning ethnicity”.¹²³⁵ In Ukraine’s view, “ethnicity” under the CERD should be interpreted as “embrac[ing] a notion of ethnicity as a dynamic and evolutive concept”.¹²³⁶ Apart from being inconsistent with the Court’s judgment in *Qatar v. UAE*, Ukraine’s suggestion is wrong for several other reasons.

905. There is no textual basis in CERD itself for including political opinion/affiliation as a factor for identifying “ethnic origin”. According to the survey by experts produced with

¹²³⁰ Judgment of 8 November 2019, ¶29.

¹⁴⁴ Memorial, ¶382.

¹²³² Preliminary Objections, ¶¶305-320.

¹²³³ Counter-Memorial (CERD), ¶¶109-130.

¹²³⁴ UN General Assembly, 20th session, official records, 3rd Committee, 1374th meeting (closing meeting), 15 December 1965, A/C.3/SR.1374, ¶25.

¹²³⁵ Reply, ¶411.

¹²³⁶ *Ibid.*, ¶414.

the Counter-Memorial, “the political factor is not included in most definitions and models of ethnicity in existing scientific literature on the subject of definitions of ethnicity... which indicates that specialists reached a consensus in this matter”.¹²³⁷

906. The drafting history confirms this reading. During the debates on the Declaration on the Elimination of all Forms of Racial Discrimination (“DERD”) proposals were made to include religion and other grounds as prohibited bases for discrimination. For example, a representative suggested that if a proposed amendment concerning religion was accepted, “he himself would be compelled to submit a sub-amendment to replace the words ‘all forms of racial and religious discrimination’ by the words ‘all forms of racial discrimination and of any discrimination based on religion, belief, political opinion or any other status’”.¹²³⁸ This, however, was thoroughly resisted by the delegations. Various statements were made to the effect that matters of a political nature were for other committees,¹²³⁹ and that it was improper to introduce a “bitter political note” into the discussion or to use the DERD as a “political weapon”.¹²⁴⁰ The United States representative summarised the debate as follows:

“the Committee’s task was to construct a document of enduring value which would be a guide to the ages. Consequently, its provisions must be addressed to fundamentals and not to temporary phenomena, and the inclusion of statements intended to promote particular political opinions must be avoided.”¹²⁴¹

907. This was the consensus. There is no hint of any attempt to revisit this issue and to re-introduce political opinions as a relevant factor in the definition of racial discrimination in the subsequent debates in the Human Rights Commission,¹²⁴² or in the Third

¹²³⁷ Expert Report of Dmitry Anatolievich Funk, Roman Alexandrovich Starchenko, Valery Vladimirovich Stepanov and Sergey Valeryevich Sokolovsky (Counter-Memorial (CERD), Annex 21), p.3.

¹²³⁸ UN General Assembly, 17th session, official records, 3rd Committee, 1171st meeting, 2 November 1962, A/C.3/SR.1171, ¶17.

¹²³⁹ E.g., UN General Assembly, 18th session, 3rd Committee, 1213th meeting, 26 September 1963, A/C.3/SR.1213, ¶30; UN General Assembly, 18th session, 3rd Committee, 1220th meeting, 3 October 1963, A/C.3/SR.1220, ¶6; UN General Assembly, 18th session, 3rd Committee, 1232nd meeting, 15 October 1963, A/C.3/SR.1232, ¶26.

¹²⁴⁰ E.g., UN General Assembly, 18th session, 3rd Committee, 1218th meeting, 2 October 1963, A/C.3/SR.1218, ¶¶20, 21.

¹²⁴¹ UN General Assembly, 18th session, 3rd Committee, 1220th meeting, 3 October 1963, A/C.3/SR.1220, ¶22.

¹²⁴² See UN Commission on Human Rights, Report of the 20th session, 17 February-18 March 1964., E/3873, Chapter II, 9-86.

Committee of the General Assembly.¹²⁴³ Unsurprisingly, there is also no indication that political opinion may play a role in the definition of “racial discrimination” in the final text of the CERD.¹²⁴⁴

908. Given the text, object and purpose, and the drafting history of the CERD, Ukraine’s attempt to incorporate political views into the Convention would turn the latter on its head.¹²⁴⁵

909. Thus, it is no wonder that the Court affirmed that political views have no place in the definition of racial discrimination in *Qatar v. UAE*. The Court noted that:

“As further support for its claim of indirect discrimination, Qatar maintains that a number of measures imposed by the UAE encourage anti-Qatari propaganda and suppress speech deemed to be in support of Qatar. It refers to the ban on Qatari media corporations as well as a 6 June 2017 announcement of the Attorney General of the UAE which stated that persons “expressing sympathy, bias or affection for” the State of Qatar or “objecting to the . . . measures . . . taken [by the UAE] against the Qatari [G]overnment” are considered to have committed crimes punishable by imprisonment and a fine. . . .”¹²⁴⁶

and then concluded that:

“The Court further observes that declarations criticizing a State or its policies cannot be characterized as racial discrimination within the meaning of CERD.”¹²⁴⁷

910. This interpretation is further corroborated by two expert reports submitted in support of this Rejoinder, where both experts Avtonomov (a former long-time member of the CERD Committee) and Engel confirm that political beliefs are irrelevant to determining an ethnicity.¹²⁴⁸ Ukraine is thus wrong in finding fault with the Russian Federation’s reading of the Court’s judgment in *Qatar v. UAE* and in arguing for treating “ethnic origin” as

¹²⁴³ See UN General Assembly, 20th session, 3rd Committee, Report of the Third Committee, A/6181, 18 December 1965.

¹²⁴⁴ This is recognized by scholars. See e.g., W. Schabas, *GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES* (2d ed. 2009), p. 133 (“discrimination on the basis of political opinion, or belonging to a political group, was not included”).

¹²⁴⁵ UN General Assembly, 18th session, 3rd Committee: 1220th meeting, 3 October 1963, A/C.3/SR.1220, ¶22.

¹²⁴⁶ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Preliminary Objections, Judgment, 4 February 2021, I.C.J. Reports 2021, p. 89, ¶49.

¹²⁴⁷ *Ibid.*, ¶112.

¹²⁴⁸ Expert Report of Alexei Stanislavovich Avtonomov, 28 February 2023, Section B (Annex 18); Second Expert Report of Valery Viktorovich Engel, 28 February 2023 ¶¶78-81 (Annex 19).

ever-changing concept.¹²⁴⁹ As noted earlier, the judgment stated in no unclear terms that “references to ‘origin’ denote, respectively, a person’s bond to a national or ethnic group *at birth*”.¹²⁵⁰ [*Emphasis added*]

911. An analogy may be drawn with *religious* discrimination. Like nationality and political opinion, religion can be changed during one’s lifetime. As Professor Lerner, explains, it is generally accepted that religious intolerance does not fall within the CERD. As he described, various UN Special Rapporteurs have cautioned

“against... [a] confusion between a racist statement and an act of ‘defamation of religion.’” Any doctrine of superiority based on racial differentiation is condemnable and dangerous, but ‘invoking a direct analogy between concepts of race or ethnicity, on the one hand, and religion or belief, on the other hand, may lead to problematic consequences.’” Religious adherence, membership or identity can be the result of personal choices, the possibility of which constitutes an essential component of the human rights to freedom of religion or belief.”¹²⁵¹

912. This understanding is confirmed by Ukraine’s own expert, Professor Fredman, when commenting on the CERD Committee’s decision on a complaint regarding hate speech against Muslims and Muslim culture, already addressed in the previous sections.¹²⁵²

913. The analogy with political beliefs is indeed quite apparent: like religion, they may be shared by persons of diverse ethnic, national and cultural backgrounds, and change over time.

914. Ukraine further argues that if Russia’s (and the Court’s) interpretation of “ethnic origin” was correct, “the term would be entirely redundant with ‘descent’”.¹²⁵³ This argument is without merit. While the word “origin” may be synonymous with “descent” in the sense of “ancestry”,¹²⁵⁴ the term “ethnic origin” is different from “descent” as used in the Convention because the former denotes *ethnic* ancestry, while the latter refers to other

¹²⁴⁹ Reply, ¶414

¹²⁵⁰ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Preliminary Objections, Judgment, 4 February 2021, I.C.J. Reports 2021, p. 98, ¶81.

¹²⁵¹ N. Lerner, *THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION* (Brill, 2015), p. XV.

¹²⁵² See above, ¶821.

¹²⁵³ Reply, ¶413.

¹²⁵⁴ Merriam-Webster Dictionary, available at: <https://www.merriam-webster.com/thesaurus/origin>.

forms of ancestry, such as the Indian *caste* system or the European blood aristocracy system.

915. It is widely recognized that descent applies across all races, any nationality or ethnicity, and there is no redundancy.¹²⁵⁵ In its General Recommendation XXIX, the CERD Committee affirmed “the consistent view of the Committee that the term ‘descent’ in article 1, paragraph 1, the Convention does not solely refer to ‘race’ and has a meaning and application which complement the other prohibited grounds of discrimination” and that “discrimination based on ‘descent’ includes discrimination against members of communities based on forms of social stratification such as caste and analogous systems of inherited status which nullify or impair their equal enjoyment of human rights”.¹²⁵⁶
916. Ukraine seeks further support for position by reference to international criminal law and to certain views of the CERD Committee. These, however, are of no assistance.
917. An international law scholar has surveyed the use of “ethnic origin” or “ethnic group” in a variety of international law contexts in law-making and adjudication, and reveals no practice of factoring political opinion or belonging to a political group into the definition of ethnic origin or ethnic group.¹²⁵⁷
918. As regards the CERD Committee, the Russian Federation recalls that in *Qatar v UAE* the Court already defined the meaning of “ethnic origin” as referring to a bond obtained at birth, having given due consideration¹²⁵⁸ to the views of the CERD Committee.
919. Furthermore, Ukraine does not present any interpretation by the CERD Committee on “ethnic origin”, contenting itself with resorting to paraphrasing its expert’s conclusory statement that “this interpretation accords not only with the CERD Committee’s

¹²⁵⁵ See generally P. Thornberry, *THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION: A COMMENTARY* (OUP, 2016), pp.119-125.

¹²⁵⁶ UN Committee on the Elimination of Racial Discrimination, General Recommendation 29, Discrimination Based on Descent (Sixty-first session, 2002), U.N. Doc. A/57/18 at 111 (2002), ¶1, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCERD%2fGEC%2f7501.

¹²⁵⁷ W. Schabas, *GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES* (2d ed. 2009), pp. 143-147 (section on “Ethnic groups”).

¹²⁵⁸ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Preliminary Objections, Judgment, 4 February 2021, I.C.J. Reports 2021, p. 104, ¶101.

interpretation of ethnicity”.¹²⁵⁹ The Russian Federation has reviewed that expert’s second report, and found it reveals no instance of the CERD Committee’s interpretation of “ethnic origin” as encompassing political opinion as a relevant factor. In fact, Ukraine’s expert plainly admits that “the meaning of ‘ethnic’ has not been elaborated by the CERD Committee”.¹²⁶⁰ Thus, even if one were to borrow from the interpretation of “ethnic origin” by the Committee, there is none to follow.

920. Professor Avtonomov – a former long-time member of the CERD Committee – notes that he is “not aware of any case in CERD practice of an individual or a group of individuals claiming certain ethnicity on the basis of his/her or their common political goals or common political views. There is no case of CERD’s recommendations recognizing any group as an ethnic one in accordance with this group’s common political goals.”¹²⁶¹ Members of an ethnic group may join political parties, be apolitical or live in different countries showing different political loyalties without their ethnic belonging being affected.¹²⁶² His conclusion based on these data is that “the position of CERD is that a common political purpose is not a characteristic of an ethnic group, and political loyalty as well as a common political purpose does not serve as a ground for an ethnicity. This position is clear and generally accepted.”¹²⁶³
921. As regards Ukraine’s reference to international criminal law, the Russian Federation first observes that neither the ICTY, the ICTR, nor the Darfur Commission were set up for the purpose of interpreting or applying the CERD, a task that the Court is asked to perform in this case. Ukraine does not identify any of the cases or the Darfur Commission Report as in fact applying the CERD, interpreting the term “ethnic origin”, or having interpreted the latter as covering political opinion as a relevant factor. They clearly do none of these things.
922. In fact, the Darfur Commission seemed to show a tendency that would interpret “ethnic groups” as wider than “ethnic origin”, judged by how it defined “national groups” as encompassing both nationality and national origin:

¹²⁵⁹ Memorial, ¶414.

¹²⁶⁰ Second Fredman Report (Reply, Annex 5), ¶33.

¹²⁶¹ Expert Report of Alexei Stanislavovich Avtonomov, 28 February 2023, ¶9 (Annex 18).

¹²⁶² *Ibid.*, ¶¶14-16.

¹²⁶³ *Ibid.*, ¶17.

“...by “national groups”, one should mean those sets of individuals which have a distinctive identity **in terms of nationality or of national origin**. On the other hand, “racial groups” comprise those sets of individuals sharing some hereditary physical traits or characteristics. “Ethnic groups” may be taken to refer to sets of individuals sharing a common language, as well as common traditions or cultural heritage”.¹²⁶⁴ [**Emphasis added**]

923. Ukraine’s expert referred to the judgments in a number of the international criminal cases, which features language that she took as indicating a flexible approach to assessing ethnicity in the light of a particular political, social and cultural context, on a case-by-case basis, in the light of objective and subjective criteria.¹²⁶⁵ She also quoted language from an ECtHR case indicating that “ethnicity has its origin in the idea of societal groups marked by common nationality, tribal affiliation, religious faith, shared language, or cultural and traditional origins and backgrounds”.¹²⁶⁶ But the expert never showed that any of these decisions specifically factored political opinion into their definition or application of ethnicity, not to mention “ethnic origin”.

924. In light of this, the Russian Federation submits that the Court need not go into these cases. But if we were to review these cases, closer scrutiny will reveal that these cases, instead of supporting Ukraine’s argument, go against it in important respects. The decisions in these cases, despite sometimes their flexible language, consider that in the context of genocide law, the ethnic group is to be perceived as “stable”.¹²⁶⁷ Of course, this view enjoys substantial scholarly support.¹²⁶⁸ As to the debate regarding objective-subjective

¹²⁶⁴ International Commission of Inquiry on Darfur, Report to the United Nations Secretary-General, 25 January 2005, ¶494, available at: https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/F87E244D-B27C-4A0A-BE1B-D27CECB5649E/278008/Report_to_UN_on_Darfur.pdf.

¹²⁶⁵ Second Fredman Report (Reply, Annex 5), ¶35.

¹²⁶⁶ *Ibid.*, ¶41.

¹²⁶⁷ ICTY, *Prosecutor v. Jelusic*, IT-95-10-T, Trial Chamber, Judgment, 14 December 1999, ¶69 (When analyzing the notion of a group targeted by genocide, the ICTY Trial Chamber stated that the preparatory work of the Genocide Convention demonstrated that a wish had been expressed to limit the field of application of the Convention to **protecting ‘stable’ groups objectively defined, to which individuals belonged regardless of their own desires**); ICTR, *The Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Trial Chamber, Judgment, 2 September 1998, ¶511 (On reading through the *travaux préparatoires* of the Genocide Convention, it appears that the crime of genocide was allegedly perceived as targeting only “**stable**” groups, constituted in a permanent fashion and membership of which is determined by birth, **with the exclusion of the more “mobile” groups** which one joins through individual voluntary commitment, such as political and economic groups) [**Emphasis added**].

¹²⁶⁸ See, e.g., Agnieszka Szpak, National, Ethnic, Racial, and Religious Groups Protected against Genocide in the Jurisprudence of the ad hoc International Criminal Tribunals, *European Journal of International Law*, Volume 23, 2012, pp. 155–173; N. Lerner, GROUP RIGHTS AND DISCRIMINATION IN INTERNATIONAL LAW (Brill, 2022), pp. 30-31 (“In international law, the notion of group requires the presence of those already mentioned unifying, spontaneous (as opposed to artificial or planned) and permanent factors that are, as a rule, beyond the control of the members of the group”).

criteria, whatever the tribunal chambers had said, the subject-matter of the Court's attention was first and foremost whether a group may be defined in a negative way as "non-Serbs", which is irrelevant to the present case and in any event the ICTY Appeals Chamber insisted in *Stakić* that subjective criteria alone is not acceptable.¹²⁶⁹ And the Court in *Bosnia Genocide* noted this issue, but did not find it profitable to take it further.¹²⁷⁰

925. Even if Ukraine position was correct (*quod non*), Ukraine provides no proof that ethnic Ukrainians and Crimean Tatars self-identify on the basis of political views as a matter of fact. The expert report by Paul Magocsi is completely irrelevant to this issue because it concerns mostly the views of the author on the origins of the Ukrainian State. In any event, the Russian Federation has submitted the Expert Report of Sergey Markedonov, who considers the views of Prof Magocsi's on "historical foundations of Ukrainian self-identity" to be "simplifications and distortions, which in the end give a wrong image of the historical process in Ukraine".¹²⁷¹
926. Furthermore, the Russian Federation's Counter-Memorial pointed this out, with support from a substantial and detailed report of ethnology experts, who concluded that, "[a]s can be seen from results of the 2014 State Crimean population census and the following opinion polls, ... it is evident that Crimean Tatars and local Ukrainians have varying political loyalties and share plural political views".¹²⁷² The report further noted that "[i]n aggregate, people with dual citizenship together with Russian citizenship, as well as foreign nationals and people who did not specify their citizenship, accounted for around 5.3% of the entire Crimean population. This is five times lower than the number of ethnic Ukrainians and Tatars living in Crimea."¹²⁷³ Ukraine has not contested any of this.

¹²⁶⁹ ICTY, *Prosecutor v. Milomir Stakić*, IT-97-24-A, the Appeals Chamber, Judgment, 22 March 2006, ¶25.

¹²⁷⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, I.C.J. Reports 2007, p. 124, ¶191 ("the Parties also discussed the choice between subjective and objective approaches to the definition. The Parties essentially agree that international jurisprudence accepts a combined subjective-objective approach. The issue is not in any event significant on the facts of this case and the Court takes it no further.").

¹²⁷¹ Expert Report of Sergey Miroslavovich Markedonov, 8 March 2023 (Annex 21).

¹²⁷² Expert Report of Dmitry Anatolievich Funk, Roman Alexandrovich Starchenko, Valery Vladimirovich Stepanov and Sergey Valeryevich Sokolovsky (Counter-Memorial (CERD), Annex 21), p.3.

¹²⁷³ *Ibid.*, ¶18.

IV. THE BAN ON THE MEJLIS DOES NOT CONSTITUTE RACIAL DISCRIMINATION

927. In the Counter-Memorial, the Russian Federation demonstrated that: **(1)** the CERD does not include a right of minority groups to establish and maintain their own representative institutions; **(2)** the ban on the *Mejlis* did not violate any rights protected by the CERD; and **(3)** the ban was introduced by the decision of the Supreme Court of the Republic of Crimea and approved by the Supreme Court of the Russian Federation on the basis of a thorough and detailed reasoning that confirmed the lawful nature of the ban, which had nothing to do with racial discrimination. On the contrary, the ban on the *Mejlis* was justified by the need to counter extremist activities posing serious threat to national security, public order, citizen's rights and safety. The ban therefore does not constitute racial discrimination within the meaning of the CERD, and *a fortiori* does form part of an alleged "systematic racial discrimination campaign" targeting the Crimean Tatar community.

928. The Russian Federation notes that while in its Memorial, Ukraine claimed that the ban on the *Mejlis* allegedly "burdens" several provisions of the CERD, in its Reply Ukraine claims a violation of Article (5)(a) (the right to equal treatment before the tribunals and all other organs administering justice). Thus, a vague and unsubstantiated claim with respect to the ban on the *Mejlis* remains at issue before the Court.

929. The present chapter responds to Ukraine's arguments on these remaining issues in the Reply. It shows that, contrary to what Ukraine claims, the *Mejlis* has never been the representative body of the Crimean Tatars in Crimea (Section **A**); that Ukraine fails to identify concrete rights under the CERD that may have been violated by the ban on the *Mejlis* (Section **B**); and that the ban on the *Mejlis* was lawful and legitimate and, consequently, cannot violate Article (5)(a) of the CERD (Section **C**).

A. THE MEJLIS HAS NEVER BEEN A REPRESENTATIVE INSTITUTION OF CRIMEAN TATARS

930. Contrary to what Ukraine asserts, the *Mejlis* has never been, *de jure* or *de facto*, the representative body of the Crimean Tatars in Crimea. Notably, Ukraine refrained from registering it officially in the past and did so due to obvious political reasons after 2014, when Crimea became a part of the Russian Federation. Various prominent members of the Crimean Tatar community, including current members of the Council of Crimean

Tatars and some former members of the *Mejlis*, concur that the *Mejlis* never represented all or even a majority of Crimean Tatars.¹²⁷⁴ In fact, as of 2014, the *Mejlis* was supported by less than a fifth of the Crimean Tatars.¹²⁷⁵

931. Even if one were erroneously to view the *Mejlis* as a sort of public organ, its role according to its own documents was akin to that of an executive body as opposed to a representative one. The *Mejlis*' function was only to implement the decisions adopted by the *Qurultay*. ██████████ ██████████ ██████████ confirms this organizational structure in his witness statement, specifically pointing out that all bodies formed and appointed by the *Qurultay*, which includes the *Mejlis*, are responsible to it and must follow its decisions.¹²⁷⁶ No restrictions or bans have been imposed against the *Qurultay* in the Russian Federation.

932. The *Mejlis* has consistently neglected to support the Crimean Tatar community.¹²⁷⁷ As noted above, it has never been registered in Crimea, and had no official status in Ukraine. Mustafa Djemilev intentionally avoided any formal registration of *Mejlis*. The informal status of the *Mejlis* helped Mr Djemilev to escape responsibility when he and his allies received funds from businessmen in Crimea and abroad supposedly to support Crimean Tatars, but later inappropriately used these funds for their personal benefit.¹²⁷⁸ As ██████████ ██████████ explains in his witness statement, due to this lack of registration and formal procedures, the *Mejlis* operated “informally”, which often resulted in political strife, with Mr Djemilev and Mr Chubarov engaging in attempts to eliminate any opposition within the *Mejlis*.¹²⁷⁹

¹²⁷⁴ Second Witness Statement of ██████████, ¶8 (Annex 15); Witness Statement of ██████████ ██████████, ¶¶6-7 (Annex 33); Witness Statement of ██████████, ¶21 (Annex 11); Statement of the Council of Crimean Tatars under the auspices of the Head of the Republic of Crimea, 6 March 2023 (Annex 403); Witness Statement of ██████████, ¶22 (Annex 27).

¹²⁷⁵ Second Witness Statement of ██████████, ¶8 (Annex 15); Witness Statement of ██████████, ¶7 (Annex 33); Ukraina ru, *Dzhemilev and Western countries try to prevent Crimea from joining Russia* (28 November 2014), available at: <https://ukraina.ru/20141128/1011319376.html> (Annex 99).

¹²⁷⁶ Witness Statement of ██████████, ¶¶7-10 (Annex 17).

¹²⁷⁷ Witness Statement of ██████████, ¶¶5-6 (Annex 11).

¹²⁷⁸ Witness Statement of ██████████, ¶¶17-20 (Annex 17); Witness Statement of ██████████ ██████████, ¶¶10-11 (Annex 11); Witness Statement of ██████████, ¶¶10-12 (Counter-Memorial (CERD), Annex 19).

¹²⁷⁹ Witness Statement of ██████████, ¶¶21-22, 34-36 (Annex 17).

933. Lack of actual interest in improvement of living conditions of Crimean Tatar is evident from the fact that for more than 20 years, the *Mejlis* failed to develop a constructive dialogue with the Crimean authorities. [REDACTED], explains that the *Mejlis*' relationship with the Ukrainian authorities was "very tense and periodically turned into a state of open confrontation and hostility".¹²⁸⁰ The *Mejlis* resorted to ultimatums against the local authorities and threatened to use violence and provoke civil unrest.¹²⁸¹
934. Ukraine only began showing some kind of support to Messrs Djemilev and Chubarov, and to their *Mejlis*, after 2014. The reason for this apparent change of attitude cannot be a concern for the well-being of Crimean Tatars (which, as previously noted, has significantly improved since 2014), but rather a willingness to use radical members of the *Mejlis* to aggravate the situation in Crimea.¹²⁸² It is worth mentioning that at the time when Crimea was part of Ukraine, the Crimean authorities declared the *Qurultay* that appointed members of *Mejlis* to be unconstitutional.¹²⁸³
935. In 2014, the *Qurultay* decided that the *Mejlis* should cooperate with the Russian Federation authorities in Crimea to ensure the development and progress of the Crimean Tatar community.¹²⁸⁴ In blatant disregard of the *Qurultay*'s resolution, Djemilev, Chubarov and their allies opposed any relationships with the Russian Government and excluded those *Mejlis* members that adhered to the *Qurultay*'s decision.¹²⁸⁵ *Mejlis* bosses Mustafa Djemilev, Refat Chubarov and Lenur Islyamov, supported by the Ukrainian Government and neo-Nazi Ukrainian organizations, organized the blockade of Crimea, which caused disruption of electric power and water supply to the peninsula.¹²⁸⁶ That

¹²⁸⁰ Witness Statement of [REDACTED], ¶9 (Counter-Memorial (CERD), Annex 19).

¹²⁸¹ Witness Statement of [REDACTED] ¶¶13-14 (Annex 17); Witness Statement of [REDACTED], ¶9 (Annex 11).

¹²⁸² Witness Statement of [REDACTED], ¶40 (Annex 17).

¹²⁸³ *Verbatim Record of the Public sitting held on Tuesday 7 March 2017, at 10 a.m., at the Peace Palace, President Abraham presiding, in the case concerning Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, CR 2017/2, 7 March 2017, p. 60, ¶¶32-33 (Lukiyantsev).

¹²⁸⁴ Witness Statement of [REDACTED], ¶14 (Counter-Memorial (CERD), Annex 19).

¹²⁸⁵ Witness Statement of [REDACTED], ¶34 (Annex 17).

¹²⁸⁶ Witness Statement of [REDACTED], ¶¶40-48 (Annex 17); Witness Statement of [REDACTED], ¶¶16-20 (Annex 11); Witness Statement of [REDACTED] ¶16 (Counter-Memorial (CERD), Annex 19); Witness Statement of [REDACTED], ¶9-13 (Annex 33).

attack targeted the entire population of Crimea and can hardly be described as ensuring the development of Crimean Tatars. Crimean Tatars continuously attempted to raise the profile of the Crimean blockade's detrimental effect at international level, including at the UN and OSCE.¹²⁸⁷ As the former bosses of the *Mejlis* left Crimea, and chose to work against the interests of Crimean Tatars living in Crimea, they cannot be considered as representing Crimean Tatars living in Crimea.¹²⁸⁸

936. It is telling that the former leaders of the *Mejlis* tried to convene a *Qurultay* in Ukraine in order to re-elect themselves a new *Mejlis* thus extending their mandate and functions.¹²⁸⁹ However, such an attempt failed, due to a manifest lack of support for it. Mr Dzhemilev, Mr Chubarov and other persons associated with them had to try and rectify this situation by declaring themselves as a kind of Committee of *Mejlis*, which somehow performs its duties. This itself shows that this group of people does not represent Crimean Tatars living in Crimea, which has been further confirmed by the statement of the Council of Crimean Tatars consisting of prominent members of Crimean Tatar community. More specifically, the Council declared:

“Former members of the *Mejlis* (the organisation banned in the Russian Federation) R. Chubarov, M. Dzhemilev, L. Islyamov, E. Bariev and other betrayers of the interests of the Crimean Tatar people, who are in Ukraine, Turkey and some other European countries now, act in the interests and under direction of Kiev, actively disseminate false information about the situation of Crimean Tatars in Crimea.

Those individuals do not live in Crimea and do not represent interests of Crimean Tatars, so their unilateral declarations, statements and sayings about the situation in Crimea cannot be considered true and reflecting the real situation of the Crimean Tatar people living in Crimea.

Those functionaries mislead the international community with their untrue words in relation to the rights and interests of Crimean Tatars and the status of the Crimean Tatar historical heritage in Crimea. They are not authorized to make any statements and speak on international platforms and at organizations on behalf of the Crimean Tatar people.

The said persons try to continue their extremist activities in Crimea: they threaten physical reprisals against representatives of the Crimean Tatar community, and perform actions aimed at the creation of an atmosphere of

¹²⁸⁷ Witness Statement of ██████████, ¶13 (Annex 33); Witness Statement of ██████████, ¶29 (Annex 27).

¹²⁸⁸ Second Witness Statement of ██████████, ¶¶6-7 (Annex 15); Witness Statement of ██████████, ¶15 (Annex 33).

¹²⁸⁹ Witness Statement of ██████████, ¶20 (Counter-Memorial (CERD), Annex 19).

enmity and interethnic discord between the Crimean Tatar people and other ethnicities”.¹²⁹⁰

937. The facts also show that the *Mejlis* and its former leaders hardly represented any of the Crimean Tatars even *de facto* even when Crimea was part of Ukraine. According to a statement by Mustafa Dzhemilev himself, the *Mejlis* was only supported by not more than 20% of the Crimean Tatars.¹²⁹¹ Even when the *Mejlis* was still operating in Crimea, half of its members (16 people) did not support Dzhemilev and his actions consistently faced opposition from the Crimean Tatar community.¹²⁹² Although the *Mejlis* went as far as murdering its opponents and leaders of other Crimean Tatar organizations,¹²⁹³ it never acquired monopoly over Crimean Tatar agenda s. It is no surprise that given how the former leaders of the *Mejlis* have treated the Crimean Tatar population, especially since their relocation to Kiev, including by organizing trade and energy blockades of the peninsula, the perception in Crimea of the individuals associated with it has become even more negative.¹²⁹⁴

938. It is worth noting that the *Mejlis* and its bosses themselves seem to not want to represent all Crimean Tatars. Mr Chubarov, for example, has described the Crimean Tatars who supported the Russian Federation as “traitors”.¹²⁹⁵ He has also called for prosecution and punishment of those cooperating with the Russian authorities, which would include most Crimean Tatars who do not support the *Mejlis*.¹²⁹⁶

¹²⁹⁰ Statement of the Council of Crimean Tatars under the auspices of the Head of the Republic of Crimea, 6 March 2023, p. 2 (Annex 403).

¹²⁹¹ Second Witness Statement of [REDACTED], ¶8 (Annex 15).

¹²⁹² *Ibid.*

¹²⁹³ Witness Statement of [REDACTED], ¶¶12-15 (Annex 11).

¹²⁹⁴ *See above*, ¶935.

¹²⁹⁵ Sprotyv.info, *Traitors will flee Crimea even sooner than Russian soldiers Chubarov* (8 May 2017), available at: <https://sprotyv.info/news/predateli-sbegut-iz-kryma-eshhe-bystree-chem-rossijskie-soldaty-chubarov/> (Annex 100).

¹²⁹⁶ Bigmir net, *Chubarov: It is necessary to establish criminal liability for collaborators* (10 April 2016), available at: <https://news.bigmir.net/ukraine/4699499-cubarov-nuzno-vvesti-ugolovnyu-otvetstvennost-dlya-kollaborantov> (Annex 101).

939. As multiple Crimean Tatar witnesses note, it is indeed impossible to talk about the *Mejlis* as a representative of Crimean Tatars.¹²⁹⁷ Currently, the representation of Crimean Tatars is exercised on all levels:

- (a) At the local level Crimean Tatars are successfully elected by the population as deputies;¹²⁹⁸ moreover, in every municipality of the Republic of Crimea, a council on interethnic relations is created.
- (b) At the level of the Republic of Crimea, *first*, the Council of Crimean Tatars and the Council on interethnic and interconfessional relations, under the Head of the Republic, are empowered to inform the republican authorities of issues that concern the Crimean Tatar population. *Second*, Crimean Tatars are vastly represented at the executive bodies of the Republic as 6 out of 20 ministries and 5 out of 8 state committees have a Crimean Tatar as a deputy minister/head of committee while a Crimean Tatar also presides over the state committee on interethnic relations.

940. At the federal level, a council on interethnic relations under the President of the Russian Federation performs this function. A Crimean Tatar, Mr Chingiz Yakubov, is a member of this Council and is able to bring any concerns that Crimean Tatars may have to the attention of the highest authorities in the Russian Federation.¹²⁹⁹

941. Ukraine criticises the Russian Federation’s decision to create a Council of Crimean Tatars under the Head of the Republic of Crimea, branding it as “a transparent attempt by Russia to replace the Mejlis with a body that is under its control”. It is difficult to understand why Ukraine, which is currently sponsoring and controlling the former bosses of the *Mejlis*, takes any issue with the Council of the Crimean Tatars. It may be recalled that a Council of Representatives of the Crimean Tatar People existed under the President of Ukraine since 1999, members of which were appointed by the President, rather than

¹²⁹⁷ Statement of the Council of Crimean Tatars under the auspices of the Head of the Republic of Crimea, 6 March 2023, p. 2 (Annex 403).

¹²⁹⁸ Witness Statement of [REDACTED], ¶16-17 (Annex 33).

¹²⁹⁹ Witness Statement of [REDACTED], ¶16(b) (Annex 33).

delegated by the Crimean Tatars, and included many more representatives than those affiliated with the *Mejlis*.¹³⁰⁰

942. However, for the completeness it must also be recalled that as explained in the Counter-Memorial the extended Qurultay of the Muslims of Crimea elected members of the Shura that subsequently were integrated to the Council of Crimean Tatars. Thus, the Council members represent the Crimean Tatar community.¹³⁰¹

943. In conclusion, the *Mejlis* has never been the body representing the Crimean Tatars, nor has it enjoyed any overwhelming support from or exclusive powers to represent that community. As the Russian Federation explained in the Counter-Memorial, Crimean Tatars are in fact represented by over 30 organisations.¹³⁰²

B. THE BAN OF THE MEJLIS DOES NOT CONSTITUTE A VIOLATION OF THE CERD

944. In its Memorial, Ukraine claimed that the ban on the *Mejlis* and on the activities of its members affected the ability of the Crimean Tatar community to conserve its representative institutions and thus constitutes a breach of the rights protected by CERD, including under Article. 5(c) and 5(d). During the hearings on preliminary objections, however, Ukraine no longer claimed that such a special right exists.¹³⁰³ The Russian Federation established in the Counter-Memorial that neither the CERD nor other human rights instruments include a right of ethnic minority groups to establish and maintain their own representative institutions.¹³⁰⁴

945. As regards Article 5(c) of the CERD, it provides for the prohibition and elimination of racial discrimination in the enjoyment of “political rights, in particular the right to participate in elections — to vote and to stand for election — on the basis of universal

¹³⁰⁰ Avdet, *Appeal to the President of Ukraine on the Council of Representatives* (11 February 2013), available at: <https://avdet.org/2013/02/11/obrashhenie-k-prezidentu-ukrainy-o-sovete-predstavitelej/> (Annex 487). See also Witness Statement of ██████████ ¶8 (Annex 33), Second Witness Statement of ██████████ ¶10 (Annex 15).

¹³⁰¹ Counter-Memorial (CERD), ¶¶232, 233.

¹³⁰² Counter-Memorial (CERD), ¶226.

¹³⁰³ *Verbatim Record of the Public sitting held on Tuesday 4 June 2019, at 10 a.m., at the Peace Palace, President Yusuf presiding in the case concerning Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, CR 2019/10, 4 June 2019, p. 62, ¶24 (Koh).

¹³⁰⁴ Counter-Memorial (CERD), ¶¶35, 138, 40.

and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service”. As Judge *ad hoc* Skotnikov observed in the Separate Opinion he appended to the 2019 judgement, “this provision is not relevant to an organization which claims to represent a certain ethnic group as a self-government body with quasi executive functions.”¹³⁰⁵

946. As already explained, the *Mejlis* is not and has never been the representative body of the Crimean Tatar community. Moreover, currently the functions of the *Qurultay* of the Crimean Tatar people are performed by the *Qurultay* of Muslims of Crimea that has delegated representatives of the Crimean Tatar community to the Council of Crimean Tatars as will be shown below.¹³⁰⁶

947. Therefore, since the *Mejlis* cannot be considered as a representative body, nor have Crimean Tatars more generally been prevented from participating in government or in the public affairs on the basis of their ethnicity, the Russian Federation has not violated Article 5(c) of the CERD.

948. Article 5(d) (xi) of the CERD deals with “the right to peaceful assembly and association”. This right, however, is not intended to cover organizations similar to the *Mejlis*. According to General Comment No. 37 of the Human Rights Committee (“HRC”), concerning the right of peaceful assembly under Article 21 of the Covenant, the latter “protects peaceful assemblies wherever they take place [...] Such assemblies may take many forms, including demonstrations, protests, meetings, processions, rallies, sit-ins, candlelit vigils and flash mobs”.¹³⁰⁷ It is clear that, due to its nature (being an executive body attached to the *Qurultay*), the *Mejlis* cannot fall into the categories of assemblies contemplated by the HRC. The CERD Committee’s opinion that demonstrations ought to be “peaceful” and “respect [...] the human rights of others”,¹³⁰⁸ further confirms this interpretation. It shows that the protection of Article 5(d)(ix) does not extend to

¹³⁰⁵ Judgment of 8 November 2019, Separate Opinion of Judge *Ad Hoc* Skotnikov, ¶2.

¹³⁰⁶ *See above*, Chapter IV(A).

¹³⁰⁷ General comment No. 37 (2020) on the right of peaceful assembly (article 21), CCPR/C/GC/37, 17 September 2020, ¶6.

¹³⁰⁸ CERD Committee, 75th session, Concluding observations of the Committee on the 14th to 17th periodic reports of Peru, UN Doc. CERD/C/PER/CO/14-17, 24 August 2009, ¶15.

assemblies, associations or other groupings like the *Mejlis* which, as shown in the Counter-Memorial, carry out violent and extremist activities.¹³⁰⁹

949. These arguments remain unanswered in the Reply. Instead, Ukraine makes the following allegation:

“The 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)”.¹³¹⁰

950. It thus appears that Ukraine’s claim regarding the ban on the *Mejlis* is now reduced to the alleged violation of CERD Articles 2(1), 4, and 5(a)”. Here again, Ukraine has not substantiated this position, which accordingly must be rejected by Court.

951. Regarding Article 2(1), Ukraine failed to explain how the ban on the *Mejlis* violates this provision that encompasses several obligations enumerated in no less than 5 subparagraphs, satisfying itself by referring to its Memorial,¹³¹¹ to which the Russian Federation has replied in detail in its Counter-Memorial.¹³¹² The Ukraine’s Reply adds nothing to those unfounded allegations.

952. Article 2(1)(a) stipulates that “[e]ach State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation.”

953. As the Court held in *Qatar v. UAE*, “[r]ead in its context and in the light of the object and purpose of the Convention, the term “institutions” refers to collective bodies or

¹³⁰⁹ See, for example, Counter-Memorial (CERD)¶ 246.

¹³¹⁰ Reply, ¶469.

¹³¹¹ Reply, p. 241, fn no 869.

¹³¹² Counter-Memorial (CERD), ¶¶51-99.

associations, which represent individuals or groups of individuals”.¹³¹³ In other words, a body that is not representative cannot be considered as an “institution” under the CERD.¹³¹⁴ Professor Lerner also notes in this regard that “an institution has no race, but an organization which is discriminated against because of colour, descent or national or ethnic origin of its members could therefore invoke the provisions of the Convention”.¹³¹⁵ However, as shown above, the *Mejlis* is not an institution within the meaning of the Convention for it has never represented the Crimean Tatar community.

954. The fact that 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 confirms that the ban did not target the Crimean Tatar community as such, and was not part of any alleged campaign designed, as Ukraine contends, to eradicate the said community because of the ethnicity of its members.
955. To the contrary, there are a number of other organizations that continue to represent the Crimean Tatars, some of them enjoying very high degrees of representativeness and legitimacy, such as, for example, *Qirim*, Crimea in Religion, the *Inkishaf* Crimean Tatar Society, the Committee of Crimean Tatar Mothers, a number of youth organisations, etc.¹³¹⁶ The Russian Federation does not impede the activities of these organizations, which continue to operate freely, and which may at any time voice their concerns about the needs of the Crimean Tatar community with the Russian authorities.
956. The absence of any racial discrimination contrary to the CERD is further confirmed by the fact that the ban of the *Mejlis* had to be implemented for the sole and specific purpose of combating the extremist activities in which its former leaders were involved, which posed a serious risk to national security, public order, and the well-being of the inhabitants of Crimea. Section III below addresses this in more detail.

¹³¹³ *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, ¶1v08.

¹³¹⁴ *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, ¶1v08.

¹³¹⁵ N. Lerner, *THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION* (BRILL, 2014), p. 41. ¶4(a).

¹³¹⁶ Witness Statement of [REDACTED], ¶¶55, fn 41 (Annex 17).

957. Article 4 of the CERD obligates States Parties to “condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination ...” As it is clear from the text of the provision, this obligation has no relation whatsoever with the question of the *Mejlis*, which concerns the ban of an organization due to the extremist activities of its members. Ukraine has not explained how in its view Article 4 could possibly be relevant in this context.
958. Article 5(a) of the CERD, for its part, guarantees “the right of everyone, without distinction as to race, colour or national or ethnic origin, to equality before the law” in the enjoyment of “[t]he right to equal treatment before the tribunals and all other organs administering justice”. Ukraine claims that “[t]he Russian Federation’s judicial assault on the Mejlis and its leadership violates this provision. The Russian courts have banned the Mejlis as an extremist organization, frozen the assets of the NGO that funds it, and convicted top the Mejlis leaders on trumped-up and, in Mr. Chygoz’s case, blatantly discriminatory charges. No other ethnic group in Crimea has faced similar repression.”¹³¹⁷
959. Ukraine’s understanding of Article 5(a) is erroneous and its allegation is unfounded. The right to equal treatment is a well-established and fundamental principle of international law enshrined in almost all human rights instruments, including Article 14 of the Covenant. It is also established that this right cannot be understood to grant a substantive right, including that of authorizing, banning, or not banning, an institution or an activity - something that obviously depends on the circumstances of each case. This is confirmed by General Comment No. 32 of the HRC concerning Article 14 of the Covenant, which explains that “[t]he right to equality before the courts and tribunals and to a fair trial is a key element of human rights protection and serves as a *procedural means* to safeguard the rule of law. Article 14 of the Covenant is aimed at ensuring the proper administration of justice, and to this end guarantees a series of specific rights”.¹³¹⁸

¹³¹⁷ Memorial, ¶606.

¹³¹⁸ UN Human Rights Committee (HRC), General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial, 23 August 2007, CCPR/C/GC/32, 23 August 2007, ¶2. Emphasis added.

960. As explained above and in the Counter-Memorial, the *Mejlis* was banned in 2016 by decision of the Supreme Court of Crimea, reviewed and upheld by the Supreme Court of the Russian Federation, duly respecting due process. That Court upheld decisions of lower instances courts by analysing and revising them.¹³¹⁹ Moreover, the Russian Federation provided representatives of the *Mejlis* with the procedural means to appeal the decision on the ban, heard their positions and allowed their attorneys to present their position in full, as reflected in the text of the judgments.¹³²⁰
961. Furthermore, numerous members of the Crimean Tatar community supported the Prosecution in this case.¹³²¹ For example, a ██████████ states that the Crimean Tatar community were overwhelmingly in favour of the restrictions against the *Mejlis* due to the latter's role in the blockade against the peninsula and its inhabitants.¹³²² Crimean Tatar organizations have expressed support for the ban as well and made their position known to the Court.¹³²³
962. Ukraine has not referred to any facts that may put in question any procedural orders, nor has it demonstrated any deficiencies in them that would be contrary to Russian procedural law. Therefore, Ukraine's invocation of Article 5(a) of the CERD is baseless and should be rejected.
963. Ukraine also invokes the Order on Provisional Measures of 19 April 2017, in which the Court indicated that "it is plausible that the acts complained of constitute acts of racial discrimination under the Convention", as well as the Judgement on Preliminary Objections in which the Court found that the measures which Ukraine complains of, including the ban on the *Mejlis*, "fall within the provisions of the Convention".¹³²⁴ But these findings of the Court do not support Ukraine's case. Regarding the plausibility of

¹³¹⁹ The Russian Federation explained this in detail in its Counter-Memorial (CERD), at ¶226.

¹³²⁰ Memorial, Annexes 913, 915.

¹³²¹ Counter-Memorial (CERD), ¶181.

¹³²² Witness Statement of ██████████ ¶49-51 (Annex 17).

¹³²³ Supreme Court of the Republic of Crimea, Case No. 2A-3/2016, Decision, 26 April 2016 (Memorial, Annex 913); Supreme Court of the Russian Federation, Case No. 127-APG16-4, Decision, 29 September 2016 (Memorial, Annex 915).

¹³²⁴ Reply, ¶472.

rights at the provisional measures stage, it is plain that this test in no way can be taken as prejudging the merits of the claim raised by Ukraine as noted by the Court itself.¹³²⁵

964. As for the Judgement of 8 November 2019, Ukraine conveniently did not quote another relevant part that contradicts its allegation:

“In order to determine whether it has jurisdiction *ratione materiae* under CERD, the Court does not need to satisfy itself that the measures of which Ukraine complains actually constitute “racial discrimination” within the meaning of Article 1, paragraph 1, of CERD. Nor does the Court need to establish whether, and, if so, to what extent, certain acts may be covered by Article 1, paragraphs 2 and 3, of CERD. Both determinations concern issues of fact, largely depending on evidence regarding the purpose or effect of the measures alleged by Ukraine, and are thus properly a matter for the merits, should the case proceed to that stage”.¹³²⁶

965. Unable to establish that its individual claim on the ban violates the CERD, Ukraine seeks in its Reply to put it in a broader context. It alleges that “the political suppression of the Crimean Tatar community burdens numerous human rights, the existence of which is not disputed, including, without limitation, the rights to equal treatment before tribunals, freedom of opinion and expression, and freedom of association and of peaceful assembly. 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”.¹³²⁷

966. A few remarks are called for in reply:

- (a) As explained above, these rights (rights to equal treatment before tribunals, freedom of opinion and expression, and freedom of association and of peaceful assembly) are included in Article 5 of the CERD, and this provision does not support the case of Ukraine concerning the Mejlis.
- (b) The repeated references by Ukraine to “political suppression of the Crimean Tatar community”, are worth highlighting. Such an accusation, on its own terms (which

¹³²⁵ Order of 19 April 2017, ¶105.

¹³²⁶ Judgment of 8 November 2019, ¶94.

¹³²⁷ Reply, ¶474.

is rigorously rejected by the Russian Federation), does not relate to racial discrimination. This demonstrates that the acts which Ukraine complains of, even if taken at face value, do not fall within the scope of the CERD.

- (c) The allegation that “community itself is being singled out for discriminatory treatment” is completely unfounded. The Russian Federation has conclusively demonstrated that the Crimean Tatar community has never been targeted as such, for its ethnic origin or otherwise; the ban of the *Mejlis* was based on the extremist activities of its members, as will be further explained below.

967. The reference to “numerous human rights (...) including, without limitation, the rights to (...)”, shows that Ukraine’s case on the *Mejlis* is marred by a striking ambiguity. Ukraine fails to pin down its claim. In addition, as the Russian Federation demonstrated in its Counter-Memorial, the CERD does not protect human rights in general. As explained above, Article 5, invoked by Ukraine, protects the equality before the law in the exercise of human rights protected under other instruments. No such instruments provide for the right to representative institutions for ethnic groups that Ukraine alleges in these proceedings, including in particular the 1966 International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, the 1992 United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, or the European Convention on Human Rights, despite most of these instruments having been adopted after CERD and having a broader subject-matter in many respects.

C. THE BAN OF THE MEJLIS WAS LAWFUL AND LEGITIMATE

968. The Counter-Memorial showed that even if Ukraine’s claims in relation to the measures taken against the *Mejlis* could qualify as falling under the scope of CERD, *quod non*, those measures do not evidence racial discrimination contrary to the CERD, nor *a fortiori* do they form part of a “systematic racial discrimination campaign”. To the contrary, the measures are based on objective and reasonable grounds.¹³²⁸

969. Ukraine maintains that “[e]ven 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

¹³²⁸ Counter-Memorial (CERD), ¶150.

alleged threats do not authorize Russia to discriminate against the Crimean Tatar community in breach of its CERD obligations”.¹³²⁹ Ukraine relies in this regard on Professor Scheinin’s expert report to suggest that the CERD’s “prohibition against racial discrimination is absolute”.

970. However, the position of Ukraine and report of Professor Scheinin misses the point. As explained in Chapter III above, it is well-established that one crucial element for an act to constitute discrimination contrary to CERD is the absence of the legitimate purpose or reasonable justification¹³³⁰ of a measure complained about, which is not the case regarding Ukraine’s accusations. Indeed, Ukraine has no choice but to concede this when it states that “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*”.¹³³¹

971. This has been confirmed by Judge Crawford, who has explained that “nothing in CERD prevents a State party from regulating an organization that represents an ethnic group or even from banning it in the most serious cases. But such measures must be carefully justified”.¹³³² Similarly, Judge Tomka also recalled that “[w]hatever is the legal basis for the exercise of control and jurisdiction in the territory of Crimea by the Russian Federation and the applicability of the International Convention on the Elimination of All Forms of Racial Discrimination, the Russian Federation must be able to take measures necessary to ensure public order and safety”.¹³³³ In the same vein, the CERD Committee has noted that “a differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate or fall within the scope of article 1, paragraph 4, of the Convention”.¹³³⁴

¹³²⁹ Reply, ¶486.

¹³³⁰ *See above*, Chapter III(F).

¹³³¹ Reply ¶487, *emphasis added*.

¹³³² Order of 19 April 2017, declaration of Judge Crawford, I.C.J. Reports 2017, ¶8.

¹³³³ Order of 19 April 2017, declaration of Judge Peter Tomka, I.C.J. Reports 2017, ¶7.

¹³³⁴ UN Committee on the Elimination of Racial Discrimination, General Recommendation 14, Definition of Racial Discrimination (Forty-second session, 1993), U.N. Doc. A/48/18 at 114 (1994), ¶2 (Memorial, Annex 788).

972. The Russian Federation has demonstrated that the ban on the Mejlis was vitally necessary to safeguard national security and public order against a grave and imminent peril. Several actions undertaken by members of the Mejlis such as wide-spread blockades, illegal rallies, violent protests and riotous statements created a serious threat against national security and public order and put the safety and well-being of the Crimean population in danger. It is explained in particular in the expert report of Valery Viktorovich Engel.¹³³⁵ No State that takes its obligations to protect its population seriously would turn a blind eye to such a situation because the persons involved in such illegal behaviour happen to belong to a particular ethnic group. Yet this is exactly what Ukraine appears to suggest in the present case: if an extremist group is composed of individuals belonging to a particular ethnicity, no measures can be taken to counter their unlawful acts, lest there be a violation of the CERD. This position is untenable as it is unreasonable. This is in particular confirmed by the expert opinion of Mr Engel.¹³³⁶
973. In banning the Mejlis, the Russian Federation did not treat it differently as compared to other extremist organizations. The Government list of extremist organizations currently contains 101 entities. The listed therein are composed of individuals belonging to different ethnicities, including primarily pseudo-Russian nationalists. As explained in the expert report of Prof Merkuryev, “analysing the list, one can see that ethnic or religious orientation of such organizations is different..., out of all organizations included in the above list, an overwhelming majority (77) belong to the organizations of pseudo-religious and pseudo-Russian nationalist nature”.¹³³⁷
974. Inclusion of these entities on the list is not based on grounds of race or ethnicity, but on the nature of their activities, which pose a danger to society and public order. Ukraine has been unable to show any differential treatment with respect to the Mejlis.¹³³⁸ In fact, the Mejlis is the only Crimean Tatar organization on the list, despite there being over 30 Crimean Tatar organizations in general.¹³³⁹ This further proves lack of any

¹³³⁵ Second Expert Report of Valery Viktorovich Engel ¶¶64 – 77 (Annex 19).

¹³³⁶ *Ibid.*

¹³³⁷ Expert Report of Viktor Viktorovich Merkuryev, ¶34 (Annex 20).

¹³³⁸ Official website of the Ministry of Justice of the Russian Federation, List of Public Associations and Religious Organizations Entitled to Liquidation or Prohibition of Activities by the Court on Grounds Provided by Federal Law No. 114-FZ of 25 July 2002 “On Counteracting Extremist Activity”, 25 November 2022, available at: <https://minjust.gov.ru/ru/documents/7822>.

¹³³⁹ Counter-Memorial (CERD), ¶66.

discriminatory campaign against Crimean Tatars and confirms that the ban of the Mejlis was motivated solely by its extremist activities.¹³⁴⁰

975. Moreover, as explained in Section I above, it was only the Mejlis that was subjected to a ban flatly disproves Ukraine’s alleged “systematic racial discrimination campaign” on serious. The precise reasons for which the ban on the Mejlis was deemed necessary have already been explained in the Counter-Memorial: the decision was taken on grounds of national security and public order that bore no relation to the ethnicity of the members of the organization. After leaving for Kiev, the former bosses of the Mejlis set up trade and transport blockades of Crimea. The effect of these blockades was gravely felt internally, including by the Crimean Tatar community.¹³⁴¹ Mr Chubarov, who purports to act for the benefit of Crimean Tatars yet was behind these extreme actions, himself acknowledged that the blockade worsened the life of Crimeans and deteriorated the environmental situation in the peninsula.¹³⁴² The population of Crimea at large suffered from severe shortages in water and electricity.¹³⁴³
976. The OHCHR, on whose reports Ukraine itself extensively relies, did not visit Crimea, but paid in-persons visited to the sites of the blockade, and documented the way that it was conducted. A 2015 OHCHR Report on the human rights situation in Ukraine notes that:¹³⁴⁴

“On 20 September, upon the initiative of the Crimean Tatar leadership, a trade blockade of Crimea from mainland Ukraine started ... From its observations at the three checkpoints on the administrative boundary line in mid-November, HRMMU noted actions to enforce the blockade by Ukrainian activists in uniforms illegally performing law enforcement functions. The activists reportedly have an unofficial list of “traitors”, which serves as a basis to illegally arrest and detain people. The law enforcement officers present at

¹³⁴⁰ Official website of the Ministry of Justice of the Russian Federation, *Ibid.*; see also Expert Report of Viktor Viktorovich Merkuriev, ¶34 (Annex 20).

¹³⁴¹ Witness Statement of ██████████, ¶¶16-19 (Annex 11).

¹³⁴² RIA Novosti Crimea, *The Head of the Mejlis named the condition for the resumption of water supply to Crimea* (30 June 2019), available at: <https://crimea.ria.ru/20190630/1116932081.html> (Annex 102).

¹³⁴³ BBC News, *Crimea hit by power blackout and Ukraine trade boycott* (23 November 2015), available at: <https://www.bbc.com/news/world-europe-34899491> (Annex 129); Financial Times, *Ukraine Imposes Economic Blockade on a Blacked-Out Crimea* (23 November 2015) <https://www.ft.com/content/d5487eaa-9203-11e5-bd82-c1fb87bef7af> (Annex 225).

¹³⁴⁴ OHCHR, Report on the human rights situation in Ukraine 16 August to 15 November 2015.

the checkpoints were often or generally passive, merely observing the situation”.¹³⁴⁵

“A trade blockade of Crimea ... has been in place since 20 September. HRMMU is concerned about the legality of this action and human rights abuses that have accompanied it, including illegal identity checks, vehicle searches, confiscation of goods, and arrests”.¹³⁴⁶

“Since 20 September, hundreds of Ukrainian activists, including Crimean Tatars and members of nationalist battalions, have been blocking the flow of goods between mainland Ukraine and Crimea in both directions. The trade blockade was initiated by the former and current heads of the Crimean Tatar Mejlis, Mustafa Dzhemiliev and Refat Chubarov, and has been conducted simultaneously at all three crossing points on the Ukrainian-controlled side of the administrative boundary line (ABL): in Chaplynka, Chongar and Kalanchak ... The organizers also ... demanded that the next step should be to halt energy supplies to Crimea”.¹³⁴⁷

“HRMMU travelled to the area of the blockade on 12-13 November... The volunteers enforcing the blockade – uniformed men sometimes wearing masks and balaclavas – have been systematically stopping private vehicles. They reportedly have lists of people considered to be ‘traitors’ due to their alleged support to the de facto authorities in Crimea or to the armed groups in the east... In [an] incident, a Crimean resident with a Russian passport issued in Crimea was beaten up... Their behaviour has in some cases been threatening when drivers refuse to show their identification or allow their vehicles to be searched. HRMMU is aware of the case of a driver who had his windows smashed for refusing to unload vegetables”.¹³⁴⁸

“The activists have been enforcing the blockade in the presence of the police and border guards who observed the situation without intervening. HRMMU is concerned about instances of human rights abuses near the ABL”.¹³⁴⁹

977. The people of Crimea felt the severe consequences of the blockades organized by the leadership of the Mejlis. Numerous witnesses attest to this. In particular, As ██████████ notes:¹³⁵⁰

“[t]he most severe of these was the energy blockade, which lasted about six months since November 2015. It occurred as a result of the bombing of power plant towers and high-voltage lines in Ukraine, from which electricity was supplied to Crimea. The Mejlis and Ukrainian neo-Nazi organisations initiated the blockade and prevented repair of the damage.

¹³⁴⁵ *Ibid.*, ¶16.

¹³⁴⁶ *Ibid.*, ¶143.

¹³⁴⁷ *Ibid.* 144.

¹³⁴⁸ *Ibid.* 145.

¹³⁴⁹ *Ibid.* 146.

¹³⁵⁰ Witness Statement of ██████████, ¶¶17-18 (Annex 11).

To say that it was difficult for Crimeans during the energy blockade would be an understatement: for a long time, people were without electricity and heat in winter, there was a shortage of petrol, which was purchased in large quantities to fuel generators, and internet and phone communications worked irregularly”.¹³⁵¹ [Emphasis added]

978. Similarly, Crimeans were deprived of water and electricity for about from two to three hours per day. As a result, the agriculture of Crimea suffered immense losses, as the area of irrigated land was reduced substantively, and the cultivation of some plots had to be abandoned. According to the information of the State Enterprise of the Republic of Crimea “Krymenergo”, as of 15 January 2016, the amount of losses caused to the Republic of Crimea due to the disconnection of vital facilities from the power supply was 1,123,971,317 rubbles.¹³⁵²

979. It must be noted that Ukraine condoned the blockades organized by the Mejlis. As noted by international observers, Ukrainian border guards refused to intervene into the illegal actions of the blockades’ organizers. It is difficult to imagine that persons represent genuinely an ethnic community would resort to depriving that community of access to resources to meet basic needs in order to achieve a political goal. It is equally difficult to accept that a State that backed such actions could credibly bring a claim before the Court invoking the CERD with the purpose of protecting those same communities.

980. As the decision of the Russian Federation Supreme Court¹³⁵³ explained: “The decision of the court of first instance that there are legitimate grounds to recognize the Mejlis as extremist organization and ban its activities is correct and justified, since the court confirmed the arguments of the Prosecutor that his association carried out extremist actions representing a real threat to the foundations of the constitutional order of the Russian Federation, its territorial integrity, security of the state and society, violation of the rights and freedoms of people and citizens, harming the personality and health of citizens”.¹³⁵⁴ At the same time, the court of first instance, on legal grounds, referred as evidence to the information posted on the Internet about the holding of a press conference on 8 September 2015 in Kiev “Civil Blockade of Crimea”, at which the Chairman of the

¹³⁵¹ *Ibid.*

¹³⁵² Supreme Court of the Russian Federation, Case No. 127-APG16-4, Decision, 29 September 2016 (Memorial, Annex 915).

¹³⁵³ *Ibid.*

¹³⁵⁴ Memorial, Annex 915.

Mejlis R. Chubarov announced the start of actions of direct blocking of the administrative border with Crimea by blocking roads for cargo transportation, about a press conference on the same topic in the Ukrainian Crisis Medical Center with the participation of members of the public association R. Chubarov, M. Dzhemilev, L. Islyamov, on a video recording of repeated public speeches by the chairman of the Mejlis R.A. Chubarov, during which he stated that the action organized by them, called the “Civil blockade of Crimea”, is the first stage in the de-occupation of Crimea, the return of Crimea to Ukraine, as well as a video confirming the implementation of the blockade by members of the Mejlis with the fighters of the “Right Sector”.¹³⁵⁵

981. Notably, Judge Tomka mentioned:

“The activities of the *Mejlis*, the 33-member representative and executive body of the Crimean Tatar people elected by the *Kurultai*, the congress of that people, were banned by the Supreme Court of Crimea on 26 April 2016, on the proposal of the Prosecutor of Crimea, having been found to be an “extremist organization” that was supporting “extremist activities”. That decision was appealed to the Supreme Court of the Russian Federation which, by a judgment dated 29 September 2016, confirmed the ban. These judgments were brought to the attention of this Court which, however, remains silent about their content, thus raising a question whether it paid any attention to these judicial decisions. The measure now indicated by this Court under point 1 of the operative clause can be read as requiring the Russian Federation to lift or at least suspend the existing ban on the activities of the *Mejlis*. This raises some concern.”¹³⁵⁶

982. Ukraine submits that the blockade was individual decision of Messrs Chubarov, Dzhemilev and Islyamov, the Mejlis did not take any collective decision on the initiation or organization of, participation in, the blockade.¹³⁵⁷ In accordance with the Mejlis Regulation¹³⁵⁸, President of the Mejlis represents it in domestic and international affairs. Thus, being former and current heads of the Mejlis and initiating numerous blockades in Crimea, Dzhemilev and Chubarov did so in their capacity of the Mejlis heads. Moreover, according to law an organization that disagrees with an extremist statement of its leaders

¹³⁵⁵ RIA Novosti Crimea, “*Right Sector*” reported that “*Azov*” had joined the blockade of Crimea (1 October 2015), available at: <https://crimea.ria.ru/20151001/1101141850.html> (Annex 103).

¹³⁵⁶ Order of 19 April 2017, Declaration of Judge Tomka, I.C.J. Reports 2017, p. 150, ¶2.

¹³⁵⁷ Reply, ¶492.

¹³⁵⁸ Regulations on the Mejlis of the Crimean Tatar People, June 1990, available at: http://old.iea.ras.ru/books/09_KRIM2/120220041253.htm.

can make a statement dissociating itself from such a statement.¹³⁵⁹ However, the Mejlis did not do so, which evidences its support for such statements, according to the law,¹³⁶⁰ that was also comprehensively addressed and upheld by the Russian Federation Supreme Court while adopting decision on the Mejlis ban.

983. In the end, Ukraine itself admits the ban has nothing to do with CERD, when it states in the Reply that “[t]he real reason for the ban is the opposition of the Crimean Tatar people, voiced by the Mejlis, to Russia’s illegal act of aggression.”¹³⁶¹ Although this statement is false on substance, it clearly shows that Ukraine does not really believe that the ban on the Mejlis was based on racial grounds.

984. As the Russian Federation pointed out in the Counter-Memorial (and Ukraine has not disproved it), there are currently around thirty Crimean Tatar organizations representing more than 20,000 members, the banning of the Mejlis cannot be considered to be a discriminatory measure against this ethnic group.¹³⁶² A number of witnesses have likewise confirmed the lack of the Mejlis’ legitimacy as a representative body.¹³⁶³ The statement adopted by the Crimean Tatars Council¹³⁶⁴ also shows that the Mejlis has nothing in common with Crimean Tatars, promotion and advocacy of their rights.

* * *

985. In conclusion, the ban on the Mejlis was exclusively based on the legitimate and justified aim of countering extremist activities. No violation of the CERD can be established in these circumstances, not least the existence of a “systematic racial discrimination campaign”.

¹³⁵⁹ Supreme Court of the Republic of Crimea, Case No. 2A-3/2016, Decision, 26 April 2016 (Memorial, Annex 913).

¹³⁶⁰ Federal Law No. 114 FZ dated 25 July 2002 “On combating extremist activity”, Article 15.

¹³⁶¹ Reply, ¶491.

¹³⁶² See Counter-Memorial (CERD), ¶226.

¹³⁶³ See, for example, Second Witness Statement of ██████████, ¶8 (Annex 15), Witness Statement of ██████████, ¶¶6-7 (Annex 33), Witness Statement of ██████████, ¶21 (Annex 11), etc.

¹³⁶⁴ Statement of the Council of Crimean Tatars under the auspices of the Head of the Republic of Crimea, 6 March 2023 (Annex 403).

V. THERE IS NO RACIAL DISCRIMINATION WITH RESPECT TO EDUCATION

986. Ukraine’s case on educational rights in Crimea is flawed both in fact and in law. **Section A** below shows that Article 5(e)(v) of the CERD does not support Ukraine’s claims in the present case since it does not provide for a right to education in minority languages. **Section B** then demonstrates that, even if such a right existed, it has in any event not been violated by the Russian Federation given that education in both Ukrainian and Crimean Tatar languages is available in Crimea. None of Ukraine’s allegations, therefore, evidence racial discrimination against Crimean Tatar and Ukrainian communities, not least do they evidence the existence of a “systematic racial discrimination campaign” targeted against them.

A. ARTICLE 5(E)(V) OF THE CERD DOES NOT INCLUDE A RIGHT TO EDUCATION IN MINORITY LANGUAGES

987. In the Memorial, Ukraine built up its claim of an alleged “[s]uppression” of minorities education rights” and “program of cultural erasure” on the allegation that the Russian Federation’s educational policy in Crimea since 2014 hinders the right to education in Crimean Tatar and Ukrainian languages in violation of Article 5(e)(v) of CERD.¹³⁶⁵ The Russian Federation showed in response that the right to education and training protected from discrimination under Article 5(e)(v) of CERD does not encompass a right to education in minority languages.

988. According to Article 5(e)(v):

“[...] States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(...)

(e)(v) The right to education and training”.

989. Instruments that specifically address the rights of minorities in relation to education, including the Convention against Discrimination in Education (the “CADE”) and International Covenant on Economic, Social and Cultural Rights (the “ICESCR”), indicate that this right includes both a right of minorities to create their own private

¹³⁶⁵ Memorial, ¶¶533-539.

educational and training establishments, and the right to access, and profit from, mainstream education on the basis of equality.¹³⁶⁶ In other words, the prohibition of discrimination in relation to education refers to “the right of everyone regardless of ethnic origin to have access to a national educational system without discrimination”¹³⁶⁷. There is no multilateral instrument containing an obligation for States to provide minorities with their own educational system.

990. General Comment No. 13 of the Committee on Economic, Social and Cultural Rights (the “CESCR”), concerning Article 13 of the ICESCR, confirms this interpretation. The CESCR observes, with respect to the right to receive education under Article 13(2), that:

“While the precise and appropriate application of the terms will depend upon the conditions prevailing in a particular State party, education in all its forms and at all levels shall exhibit the following interrelated and essential features:

...

(b) Accessibility. Educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State party. Accessibility has three overlapping dimensions:

...

Non-discrimination - education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds...”¹³⁶⁸ [Emphasis added]

991. As further shown in Section B below, the Russian Federation’s educational system is consistent with these criteria.

992. Unable to rebut this, Ukraine now claims in a vague and unclear manner that “Russia uses its educational system “to promote the Russian language and culture at the expense of Ukrainian and Crimean Tatar language and culture”.¹³⁶⁹ Ukraine further asserts that “[its] claim does not require the existence of such a specific right [a right to education in minority language], but rather only that the Ukrainian and Crimean Tatar communities receive less favourable treatment than the ethnic Russian community in Crimea and that

¹³⁶⁶ See Counter-Memorial (CERD), ¶¶263-282.

¹³⁶⁷ *Ibid.*, ¶278.

¹³⁶⁸ CESCR General Comment No. 13: The Right to Education (Art. 13) Adopted at the Twenty-first Session of the Committee on Economic, Social and Cultural Rights, on 8 December 1999, Document E/C.12/1999/10, ¶6, available at: <https://www.refworld.org/pdfid/4538838c22.pdf>.

¹³⁶⁹ Reply, ¶669.

this adversely affects their access to education and training”.¹³⁷⁰ To substantiate its allegation, Ukraine adds, without producing any evidence, that the changes “that the Russian Federation has introduced to the *status quo* in Crimean education — favouring 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”.¹³⁷¹

993. Ukraine does not explain how this position can stand if, as it appears to be the case, Ukraine does not claim a specific right of education in a minority language. In any event, this argument is misleading. First, it raises the issue of the change in the situation of Crimea since its reunification with the Russian Federation in 2014, a matter the Court cannot rule upon as established in the Judgment of 8 November 2019.¹³⁷² Second, it disregards the fact that Crimean Tatars and Ukrainians have enjoyed a particularly favourable treatment since 2014 because, among other things, their languages, along with the Russian language, have been recognized as State languages in Crimea and have been also incorporated into the educational system, as will be further shown below.

994. Ukraine also invokes the theory of formal equality versus true equality (equality of result) in support of its claim. It argues that “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”¹³⁷³ 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)”.¹³⁷⁴

995. In support of this allegation, Ukraine merely relies on the Permanent Court’s Advisory Opinion concerning *Minority Schools in Albania*, where the Court, while interpreting a specific treaty concluded by Albania for the protection of minorities, observed that “[i]t

¹³⁷⁰ Reply, ¶670.

¹³⁷¹ Reply, ¶672.

¹³⁷² Judgment of 8 November 2019, ¶29.

¹³⁷³ The meaning of which is defined neither in the Reply nor earlier in the Memorial, thus it can mean anything.

¹³⁷⁴ Reply, ¶678.

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”.¹³⁷⁵

996. Ukraine maintains that “[a]s 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 (...)”.¹³⁷⁶

997. This is of no assistance for Ukraine’s case. The PCIJ came to the conclusion that the right of the Greek minority was violated by virtue of the abolition of private schools by Albania because the treaty in question contained a specific right for minorities “to maintain, manage and control at their own expense or to establish in the future, charitable, religious and social institutions, schools and other educational establishments, with the right to use their own language and to exercise their religion freely therein”. (Emphasis added).

998. The PCIJ also affirmed that providing the right of minorities to maintain at their own expense private schools offering education in their own language was sufficient to guarantee equality:

“The right provided by the Declaration is in fact the minimum necessary to guarantee effective and genuine equality as between the majority and the minority”.¹³⁷⁷

999. This is different from Article 5(e)(v) of the CERD, which contains a reference to a general “right to education and training” that, as has been shown, does not contain a right to education in minority languages even if it is interpreted in light of other relevant international instruments.

1000. Moreover, Ukraine did not explain the context of the request for the advisory opinion, that is, the abolition by the Albanian Government of private schools that deprived the religious community of its *only* educational system. The Permanent Court was requested

¹³⁷⁵*Minority Schools in Albania*, Advisory Opinion, 6 April 1935, P.C.I.J. Rep. Series A/B – No. 64, p. 19 (Cited by Ukraine in the Reply, ¶674, fn 1322).

¹³⁷⁶ Reply, ¶677.

¹³⁷⁷*Minority Schools in Albania*, Advisory Opinion, 6 April 1935, P.C.I.J. Rep. Series A/B – No. 64, p. 20.

to express its opinion on the conformity of that measure with Article 5(1) of the Albanian Declaration.¹³⁷⁸ Certainly, neither public, nor private schools are prohibited in the Russian Federation, including those tutoring in minority languages.

1001. As for public education, which Ukraine makes the focus of its complaint, the Albanian Declaration only required that provision be made:

“in towns and districts in which are resident a considerable proportion of Albanian nationals whose mother-tongue is not the official language... for adequate facilities for ensuring that in the primary schools instruction shall be given to the children of such nationals through the medium of their own language, it being understood that this provision does not prevent teaching of the official language being made obligatory in the said schools”.¹³⁷⁹

1002. However, Crimean Tatars and Ukrainians in Crimea have full access to free public education, including the possibility to receive it in their native language in accordance with the national legislation.

1003. This reality does not fit into the Ukrainian narrative, forcing its expert, Professor Fredman, to disregard simple facts in order to defend Ukraine’s position:

“Like Russia in the current case [sic], the Albanian government submitted that all children were treated equally under this new measure since it was of general applicability, ending all private schools for students learning in the majority language, as well as the minority. The Court recognized, however, that this impacted minority communities far more heavily, as the majority would continue to have their needs supplied by public institutions created by the State, whereas in effect the minority groups were deprived of institutions which were indispensable to their special requirements”.¹³⁸⁰

1004. This statement is wrong because:

- (a) The Russian Federation, unlike Albania, does not prohibit private schools, regardless of the language they use; and

¹³⁷⁸ *Ibid.*, p. 5.: “Albanian nationals who belong to racial, religious or linguistic minorities will enjoy the same treatment and security in law and in fact as other Albanian nationals. In particular they shall have an equal right to maintain, manage and control at their own expense or to establish in the future, charitable, religious and social institutions, schools and other educational establishments, with the right to use their own language and to exercise their religion freely therein. Within six months from the date of the present Declaration, detailed information will be presented to the Council of the League of Nations with regard to the legal status of the religious communities, Churches, Convents, schools, voluntary establishments, and associations of racial, religious and linguistic minorities. The Albanian Government will take into consideration any advice it might receive from the League of Nations with regard to this question”.

¹³⁷⁹ *Ibid.*, p. 21.

¹³⁸⁰ Second Expert Report of Professor Sandra Fredman, 21 April 2022, ¶52 (Reply, Annex 5).

- (b) The Russian Federation, unlike Albania, provides minorities with access to free public education in their minority languages.

1005. In short, the situation in Crimea is the opposite of the situation in 1935 Albania, and the parallels that Ukraine seeks to draw between the two cases are unfounded. On the contrary, the key right that the PCIJ considered the “minimum necessary to guarantee effective equality” (for minorities to be able to maintain private schools in their own language) has always been preserved in the Russian Federation, which even went beyond by providing free public education in minority languages.

1006. In addition, Crimean Tatars and Ukrainians as minorities do enjoy full, effective and genuine equality in Crimea as was shown in the Counter-Memorial and is supported further in this Rejoinder. Generally, Ukrainian and Crimean Tatar languages, as well as Russian, are State languages of Crimea and may be freely chosen upon request as a language of education. Greek minorities, on the contrary, were factually deprived of possibility to study in their minority language, while Crimean Tatars and Ukrainians were given even more opportunities to study their minority language as Crimean Tatar language was declared as a State language, and Ukrainian schools were given due attention in order to maintain number of students studying Ukrainian. Thus, the *Minority Schools in Albania* case is inapplicable to the case at hand.

1007. Ukraine also relies on some “recommendations” of the CERD Committee¹³⁸¹ and on the *Cyprus v. Turkey* case before the ECtHR,¹³⁸² but they do not support its position. Regarding the “recommendations” of the CERD Committee, Ukraine itself recognizes that they are the expression of a “concern over the lack of education in minority languages”,¹³⁸³ but it overlooks important aspect that the CERD recommendations to each mentioned State aim to provide assistance to resolve their problems resulted from different political, social and economic orders of those States, and thus were related to the particular problems and cannot be generalized.¹³⁸⁴ This does not correspond to the situation in Crimea where education in native languages, including Crimean Tatar and Ukrainian, is available for members of these communities.

¹³⁸¹ Reply, ¶¶681-683.

¹³⁸² *Ibid.*, ¶688.

¹³⁸³ *Ibid.*, ¶681.

¹³⁸⁴ See Expert Report of Alexei Stanislavovich Avtonomov, 28 February 2023, ¶14 (Annex 18).

1008. As regards the *Cyprus v. Turkey* case, Ukraine maintains that “the Court found that the substance of the right to education 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”.¹³⁸⁵ However, that decision is of no relevance for the present case for a number of reasons, in particular (1) this case does not concern the CERD or the right of everyone without distinction as to race, colour or ethnic origin to education and training; (2) the ECtHR was dealing with a special “right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions” under Article 2 of Protocol No. 1 to the ECHR.¹³⁸⁶ Furthermore, the ECtHR did not find a violation of Article 14 of the ECHR (prohibiting discrimination on, inter alia, grounds of race or association with a national minority), so even if the analogy drawn by Ukraine was valid (and it is not), then still no racial discrimination took place. In any case unlike in the “TRNC”, education in the Ukrainian language is available for those who opt for it, as further explained in the next section.

B. CRIMEAN TATARS AND UKRAINIANS HAVE ACCESS TO EDUCATION IN THEIR OWN LANGUAGES IN CRIMEA

1009. The Counter-Memorial showed that, even if Ukraine was right in asserting that States have an obligation to provide full education in minority languages (*quod non*), the Russian Federation ensures that all people living in Crimea have access to education in languages of their own choice, including in Crimean Tatar and Ukrainian.¹³⁸⁷ Therefore, no violation of the CERD can be established.

1010. As Ukraine’s Reply shows, the Parties continue to disagree on three points regarding the educational system in Crimea, each of which is addressed separately below:

¹³⁸⁵ Reply, ¶688.

¹³⁸⁶ *Cyprus v. Turkey*, ECtHR, Application No .25781/94, Grand Chamber, Judgment, 10 May 2001, ¶277. With respect to the right to education as such, the judgment noted that: “Admittedly, it is open to children, on reaching the age of 12, to continue their education at a Turkish or English-language school in the north. In the strict sense, accordingly, there is no denial of the right to education, which is the primary obligation devolving on a Contracting Party under the first sentence of Article 2 of Protocol No. 1 ... Moreover, this provision does not specify the language in which education must be conducted in order that the right to education be respected ...”.

¹³⁸⁷ Counter-Memorial (CERD), ¶¶288-323.

- (a) whether the Russian Federation’s legal framework provides adequate access for ethnic minorities to education in native languages (*i*);
- (b) what are the reasons for fluctuations in the number of students in Ukrainian language in Crimea (*ii*); and
- (c) whether the Russian Federation’s support for ethnic minorities’ educational rights is sufficient (*iii*).

i. Russian Law Affords Appropriate Access to Education in Native Languages

1011. Ukraine portrays the Russian educational system as discriminatory, suggesting that Ukrainians and Crimean Tatars are entitled to have their native languages as a language of education only until the ninth grade of middle school,¹³⁸⁸ whereas Ukraine’s laws allegedly “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.”¹³⁸⁹ The Russian Federation’s system of mandatory education in Russian, in Ukraine’s view, “stifl[es] education in regional language”.¹³⁹⁰

1012. As noted above, Ukraine’s entire case on education is based on the false premise that there is a “systematic racial discrimination campaign” simply because the Russian Federation’s educational system is not identical to the Ukrainian one and because the former applies in Crimea since 2014. All States, however, must naturally ensure compliance with their own laws and regulations on education, and the many differences that may exist in educational systems across countries cannot suffice to establish a violation of the CERD. Crucially, what Ukraine fails to demonstrate is that there is *any* differential treatment in the Russian Federation that nullifies or impairs the right to education of Crimean Tatars and Ukrainians because of their ethnicity as part of a deliberate “systematic campaign” targeting and singling them out. It is evident that Ukraine cannot prove such a state of affairs because the Russian educational system applies throughout Russian territory in an equal manner, regardless of race, colour, descent or national or ethnic origin.

¹³⁸⁸ Reply, ¶691.

¹³⁸⁹ *Ibid.*, ¶695.

¹³⁹⁰ *Ibid.*, ¶¶693-694.

1013. Furthermore, Ukraine seeks to mislead the Court regarding its law “On Complete General Secondary Education”.¹³⁹¹ Article 5(4) of the law declares the right only of “indigenous peoples” to receive complete general secondary education in their own language. The notion of “indigenous peoples” in Ukraine is limited and includes only Crimean Tatars, Crimean Karaites, and Krymchaks.¹³⁹² Moreover, these ethnicities, the majority of which live in Crimea, were recognized by Ukraine as indigenous peoples only after Crimea ceased to be part of Ukraine, and Ukraine initiated the present proceedings.¹³⁹³

1014. In respect of other minorities, including Russians, which constitute a considerable part of the population of Ukraine and for whom the Russian language is not only native but also their language of day to day use, Article 5(5) of the law applies, which provides only for the possibility to receive “primary education” in their own language, which lasts for four years.¹³⁹⁴

1015. Article 14(4) of the Russian Federal Law “On education in the Russian Federation” gives all Russian citizens the right to receive basic general education, which lasts for nine years, in one of the languages of the peoples of the Russian Federation, which includes Ukrainian and Crimean Tatar languages.¹³⁹⁵ Ukraine’s complaint that basic complete general education in the Russian Federation does not last as long as the secondary education Ukraine decided to afford to indigenous peoples (11 years) is simply irrelevant in this context. The length of general education in the Russian Federation does not show any trace of racial discrimination; it simply reflects a policy choice of what the Russian Federation considers most appropriate for students’ development and it is applied uniformly throughout the country.

¹³⁹¹ Law of Ukraine No. 463-IX “On Complete General Secondary Education”, 16 January 2020 (Reply, Annex 92).

¹³⁹² Law of Ukraine No. 1616-IX “On Indigenous Peoples”, 1 July 2021, Article 1(2), available at: <https://ips.ligazakon.net/document/view/T211616?an=2>. (Annex 446).

¹³⁹³ Reply, ¶695; *see also* Chapter II.

¹³⁹⁴ Law of Ukraine No. 463-IX “On Complete General Secondary Education”, 16 January 2020, Article 5(5) (Reply, Annex 92).

¹³⁹⁵ Federal Law “On Education in the Russian Federation”, 29 December 2012, Article 14(4), available at: http://www.consultant.ru/document/cons_doc_LAW_140174/bf7fadb3532c712ccd28cc2599243fb8018ed869/ (Annex 401); *see also* All-Russian Population Information Classifier, available at: http://www.consultant.ru/document/cons_doc_LAW_181559/4bde797bdcec1c751aa426f4facc10f19143eed5/ (Annex 60).

1016. Because it is impossible to challenge the Russian Federation’s statutory guarantees of equality in the use of native languages, Ukraine attempts to portray them as “a mere façade” that does not apply in reality. However, Ukraine’s arguments in this respect are both inapposite and false:

- (a) Ukraine relies on one case where a judge refused to fully conduct the proceedings in Crimean Tatar.¹³⁹⁶ At the outset, this is irrelevant for Ukraine’s claim because it does not concern the right to education at all. Furthermore, it must be noted that the judge’s actions were in accordance with the Russian Code of Administrative Proceedings. Judges “may” direct that proceedings be conducted in a State language other than Russian if the circumstances so require. In all cases, the right of a person to use their own language in court is ensured by providing an interpreter,¹³⁹⁷ which was exactly what happened in Ukraine’s example.¹³⁹⁸
- (b) Ukraine also relies on a pro-Ukrainian “Crimean Tatar public figure” who suggests that “in reality, it [the Crimean Tatar language] remains only the language of everyday communication within families, and in the social and political life of Crimea you will not see its use”.¹³⁹⁹ Again, while of no relevance to the issue of racial discrimination in the context of education as the statement is extremely broad, this allegation is easily dispelled by evidence.¹⁴⁰⁰

¹³⁹⁶ Reply, ¶691, fn 1343.

¹³⁹⁷ Code of Administrative Proceedings of the Russian Federation, 8 March 2015, Article 12(2), available at: http://www.consultant.ru/document/cons_doc_LAW_176147/d53b6fc612510def4b17535a00dd5314b0c50d93/ (Annex 61).

¹³⁹⁸ Krym Realii, *This Is Linguocide”: How Crimean Tatar and Ukrainian Languages Disappear in Crimea* (22 June 2021) (Reply, Annex 168).

¹³⁹⁹ Krym Realii, “*State Crimean Tatar Language in Crimea – Imitation”: Problems of the Language of the Indigenous People on the Peninsula and the Mainland* (19 January 2020) (Reply, Annex 158).

¹⁴⁰⁰ See e.g. Millet, Ayder Ismailov, *Deputy Mufti of Crimea and Sevastopol, speaking on the TV program “Hyzmet ve Berket”* (18 November 2022), available at: <https://trkmillet.ru/program-episode/khizmet-ve-bereket-vipusk-ot-18-11-22-ayder/> (Annex 113); Millet, Eldar Seitbekirov, *editor-in-chief of the newspaper Golos Kryma, speaking on the TV program “Prime Time”* (24 November 2022), available at: <https://trkmillet.ru/program-episode/praym-taym-vipusk-ot-24-11-22-yeldar-seitbek/> (Annex 114); Millet, Remzi Devletov, *Head of Literature and Dramaturgy at the Crimean Tatar Academic Theatre, speaking on the TV program “Ana Yurtun - Altyn Beshik”* (21 November 2022), available at: <https://trkmillet.ru/program-episode/ana-yurtun-altin-beshik-28-vipusk-rem/> (Annex 115); Millet, Eskender Tarakchiyev, *member of the Nizhnegorsk District Council, speaking on the TV program “Tek arzum Vatan!”* (21 November 2022), available at: <https://trkmillet.ru/program-episode/tek-arzum-vatan-vipusk-ot-17-11-2022-yeskende/> (Annex 116); Millet, Ruslan Yakubov, *Deputy Chairman of the State Committee on Inter-Ethnic Relations of the Republic of Crimea* (22 September 2022), available at: <https://trkmillet.ru/program-episode/praym-taym-vipusk-ot-22-09-2022-ruslan-yakubov/> (Annex 117).

1017. To conclude, the Russian Federation’s legislation on education provides all ethnic groups, including Crimean Tatars and Ukrainians, with access to education in their native languages. Ukraine’s arguments suggesting otherwise must be dismissed. Moreover, as has been shown above,¹⁴⁰¹ Ukraine’s own policy regarding Russian language precludes any claims it may have to other States’ systems of education.

ii. Crimean Tatars and Ukrainians Continue to Receive Education in Their Native Languages

1018. The Russian Federation has presented ample data regarding its system of education that shows that no racial discrimination based on any ground prohibited by the CERD exists, and that Crimean Tatars and Ukrainians continue to receive education in their native languages when they so desire.¹⁴⁰² In light of Ukraine’s insistence on arguing otherwise, however, some additional observations are warranted.

a. *Education in the Crimean Tatar language*

1019. While Ukraine refers to the number of Crimean Tatars receiving education in the language of their preference as “overly-rosy”,¹⁴⁰³ the reality is that Ukraine cannot counter the evidence produced in the Counter-Memorial. The plain facts show that this number is growing.

1020. With respect to school education, the Russian Federation has significantly improved the conditions for those wishing to study in Crimean Tatar. As of today, 16 schools continue to offer full education in Crimean Tatar until the ninth grade.¹⁴⁰⁴ As regards high school, (10th and 11th grade), Crimean Tatar is taught as a separate subject.¹⁴⁰⁵ One example is school No. 42, whose principal ██████████ provides information that a large

¹⁴⁰¹ See above in Chapter II(A).

¹⁴⁰² Counter-Memorial (CERD), ¶¶288-323.

¹⁴⁰³ Ukraine’s Reply, ¶706.

¹⁴⁰⁴ Ministry of Education, Science and Youth of the Republic of Crimea, Information on students studying in the state languages of the Republic of Crimea (Russian, Ukrainian, Crimean Tatar) in general education institutions of the Republic of Crimea in the academic year 2022/2023, available at: https://monm.rk.gov.ru/uploads/txteditor/monm/attachments//d4/1d/8c/d98f00b204e9800998ecf8427e/phpzVO5bi_%D0%9D%D0%B0%20%D1%81%D0%B0%D0%B9%D1%82%20%D0%B2%20%D1%80%D0%B0%D0%B7%D0%B4%D0%B5%D0%BB%20%D0%93%D0%BE%D1%81%D1%8F%D0%B7%D1%8B%D0%BA%D0%B8%20%D0%BA%D1%80%D0%B0%D1%82%D0%BA%D0%BE.doc (Annex 63).;

¹⁴⁰⁵ Second Witness Statement of Aider Serverovich Ablyatipov, 22 February 2023, ¶18(c) (Annex 13).

number of students at her school study Crimean Tatar language, as well as participate in extracurricular activities related to the Crimean Tatar language, and the school receives substantial support from local and federal authorities to this end.¹⁴⁰⁶ Additionally, the Russian Federation’s funding helped build numerous kindergartens in areas inhabited by Crimean Tatars.¹⁴⁰⁷

1021. Moreover, before 2014, Ukraine refused to form a class of students in Crimean Tatar, unless there were at least 8-10 people in it.¹⁴⁰⁸ The Russian Federation has no such restrictions. Thus, in Krasnoperekopsky District of Crimea, a “class” educated in Crimean Tatar was organized just for one student.¹⁴⁰⁹

1022. Thus, more and more people choose Crimean Tatar as their language of education. Whereas in 2021/2022 around 7,000 students were instructed fully in Crimean Tatar (with 31,000 students taking the language as a separate subject),¹⁴¹⁰ in 2022/2023 that number grew to 7,300.¹⁴¹¹

1023. With respect to higher education, two Crimean universities teach programs in Crimean Tatar language (philology, history and journalism). Additionally, the Russian Federation sponsors budgetary¹⁴¹² university places for those students who want to specialize in the

¹⁴⁰⁶ ██████████, *Informational Note* (Annex 35).

¹⁴⁰⁷ Second Witness Statement of Aider Serverovich Ablyatipov, 22 February 2023, ¶7. (Annex 13).

¹⁴⁰⁸ *Ibid.*, ¶12 (Annex 13); UNIAN, *In Crimea all Conditions Have Been Created to Teach Children in their Native Languages* (11 October 2006), available at: <https://www.unian.net/society/19145-v-kryimu-sozdanyivseusloviya-dlya-obucheniya-shkolnikov-na-rodnyih-yazyikah.html>.

¹⁴⁰⁹ Second Witness Statement of Aider Serverovich Ablyatipov, 22 February 2023, ¶13 (Annex 13).

¹⁴¹⁰ See Ministry of Education, Science and Youth of the Republic of Crimea, *On the state of education in the state languages of the Republic of Crimea (Russian, Ukrainian, Crimean Tatar) and the study of native languages of the peoples of the Russian Federation living in the Republic of Crimea in general education institutions of the Republic of Crimea in the academic year 2021/2022*, available at: https://monm.rk.gov.ru/uploads/txteditor/monm/attachments//d4/1d/8c/d98f00b204e9800998ecf8427e/php1laB0O_%D0%9D%D0%B0%20%D1%81%D0%B0%D0%B9%D1%82%20%D0%B2%20%D1%80%D0%B0%D0%B7%D0%B4%D0%B5%D0%BB%20%D0%93%D0%BE%D1%81%D1%8F%D0%B7%D1%8B%D0%BA%D0%B8.doc (Annex 62).

¹⁴¹¹ See Ministry of Education, Science and Youth of the Republic of Crimea, *Information on students studying in the state languages of the Republic of Crimea (Russian, Ukrainian, Crimean Tatar) in general education institutions of the Republic of Crimea in the academic year 2022/2023*, available at: https://monm.rk.gov.ru/uploads/txteditor/monm/attachments//d4/1d/8c/d98f00b204e9800998ecf8427e/phpzVO5bi_%D0%9D%D0%B0%20%D1%81%D0%B0%D0%B9%D1%82%20%D0%B2%20%D1%80%D0%B0%D0%B7%D0%B4%D0%B5%D0%BB%20%D0%93%D0%BE%D1%81%D1%8F%D0%B7%D1%8B%D0%BA%D0%B8%20%D0%BA%D1%80%D0%B0%D1%82%D0%BA%D0%BE.doc (Annex 63); see also Witness Statement of Valentina Vasilyevna Lavrik, 7 March 2023, ¶7 (Annex 25).

¹⁴¹² “Budgetary place” means that all costs of education are covered by the government, and the student does not have to incur the costs of the education.

teaching of Crimean Tatar. In particular, during the 2022/23 academic year, the Russian Federation allocated 13 budgetary places for the Crimean Federal University's bachelor's degree program on Crimean Tatar language and literature.¹⁴¹³ Ten additional budgetary places were allocated for extramural program "Philology: the Crimean Tatar language and literature".¹⁴¹⁴ Similarly, the Russian Federation allocated 40 budgetary places for programs aimed at teaching the Crimean Tatar language and literature at the Crimean Engineering and Pedagogical University.¹⁴¹⁵

1024. Mr Ervin Musaev, currently professor at the Chair of Media and Public Relations at the Crimean Federal University, highlights in his witness statement the increase in the level of quality of university education due to the Russian Federation's efforts in this context.¹⁴¹⁶ It goes without saying that none of this would have been done if the Russian Federation had been conducting a "systematic racial discrimination campaign" targeting Crimean Tatars, as Ukraine claims.

1025. It should be noted that, in addition to the above, several events and programs exist to promote Crimean Tatar language and culture, with governmental support. Aider Ablyatipov, former deputy minister of education of Crimea, names just a few in his witness statement:

- (a) For 15 years, an annual festival of student creativity has been held in the Crimean Tatar language, called "Native Language is Priceless, Spiritual Wealth of the People is Inexhaustible". The festival includes the literary creative works competition "*Qirim – Menim Vatany*" ("Crimea is my homeland") named after Yunus Kandym; contest of theatre groups "*Theatre – ayat kuzgyusi*" ("Theater is a mirror of life"), KVN (humour/talent competitions "the Wits and Comedy Club"); and multimedia presentations on the subject "*Aile degerlikleri*" (Family Relics).¹⁴¹⁷

¹⁴¹³See Crimean Federal University, Allocation of budgetary places in the bachelor's and specialist's program in 2023 (full-time programs), available at: <https://priem.cfuv.ru/bachelor/direction/cfu> (Annex 64).

¹⁴¹⁴See Crimean Federal University, Allocation of budgetary places in the bachelor's and specialist's program in 2023 (extramural programs), available at: <https://priem.cfuv.ru/bachelor/direction/cfu> (Annex 65).

¹⁴¹⁵ See Crimean Engineering and Pedagogical University, Number of places for admission for the 2023/2024 academic year, available at: <https://kipu-rc.ru/downloads/2022/priem/11.pdf> (Annex 66).

¹⁴¹⁶Witness Statement of Ervin Kyazimovich Musaev, 7 March 2023, ¶¶29-31 (Annex 33).

¹⁴¹⁷Second Witness Statement of Aider Serverovich Ablyatipov, 22 February 2023, ¶32 (Annex 13).

- (b) The competition of literary creative works “*Qirim – benim Vatanym*” (“Crimea is my Homeland”) named after Yunus Kandym is held in two stages in a remote format on the topics “*Qirimtatar Halk’нын Jenk Q’aramanlary*” (“Heroes of war from among the Crimean Tatars”), “*Menim Q’artbabam (Q’artanam)) - Jenk Ishtirakchisi*” (“My grandfather (grandmother) is a participant of the war”). Students between 5th and 11th grades took part in the first stage of the competition, and in the second stage the winners of stage 1 were divided into two age categories: 5th to 8th grades, 9th to 11th grades. The winners of the republican stage are awarded not only with diplomas, valuable prizes, but also receive the right to be published in the literary and artistic almanac “*Yildiz*” (“Star”).¹⁴¹⁸
- (c) In the competition of school theatre groups uses excerpts from the works of Crimean Tatar writers and poets of various genres, as well as self-authored works. In 20 minutes, a team of young actors (no more than 10 people) must show the level of knowledge of the native language, directorial concept and its stage implementation, relevance and artistic merit of the work, the level of performance skills and repertoire suitability to the age of the performer. During the KVN competition, the stages are followed that have already become traditional for this international game: “Team Presentation Card”, “Warm-Up”, “Musical Contest”, “Homework”.¹⁴¹⁹
- (d) The competition of multimedia presentations “*Aile degerlikleri*” (“Family Relics”) is held in two stages (remote and in person) and involves the presentation of a valuable family heirloom (photos, letters, household items, clothes, etc.). It is held in three categories: Report (an essay plus CD copy); multimedia (presentation, website, etc.); video. The works of the winners of this competition are published in the republican newspaper “*Yanyy Dunya*” (“New World”).¹⁴²⁰
- (e) Students also participate in events dedicated to the memorable dates of the peoples of Crimea: the Crimean-Tatar national holidays “*Khydyrlez*” (1st decade of May), “*Derviza*” (21 September); etc.¹⁴²¹

¹⁴¹⁸*Ibid.*, ¶33.

¹⁴¹⁹*Ibid.*, ¶34.

¹⁴²⁰*Ibid.*, ¶35.

¹⁴²¹*Ibid.*, ¶37.

- (f) Every year between May and August, students of educational institutions participate in organizing and holding events dedicated to the Day of Remembrance of the Victims of Deportation from Crimea. These include the “Light a Fire in Your Heart” campaign, laying flowers at monuments and memorial signs, class hours, thematic exhibitions, meetings with people who survived deportation, and much more.¹⁴²²

1026. In a last attempt to bolster its clearly untenable position, Ukraine goes as far as to suggest that “in Crimea students are forced to refuse to study in the Crimean Tatar language at school”.¹⁴²³ This serious accusation is based on a single photograph produced by the Crimean Tatar Resource Centre, which is incorporated in Kiev and collaborates both with the *Mejlis* and the Ukrainian Foreign Ministry.¹⁴²⁴ Nothing, however, could be further from the truth. As abundantly demonstrated above, Crimean Tatars are free to choose the language of their education, and many of them opt for Crimean Tatar.

b. Education in Ukrainian

1027. Ukraine and the Russian Federation continue to differ in assessing the reasons for the decrease in the number of students receiving education in Ukrainian. In the Reply, Ukraine attributes this to “reductions in provision combined with Russian efforts to artificially suppress demand”.¹⁴²⁵

1028. Ukraine also attempts to portray the statistics presented by the Russian Federation in its previous pleadings as “questionable” and “inflated”.¹⁴²⁶ Nevertheless, while making these allegations Ukraine fails to produce any reliable evidence of its own which would prove a plausible claim under the CERD.¹⁴²⁷

¹⁴²² *Ibid.*, ¶38.

¹⁴²³ Reply, ¶702, fn 1362.

¹⁴²⁴ See Ministry of Information Policy of Ukraine, MIP, MFA and Crimean Tatar Resource Center provide the world with information about human rights in Crimea, available at: <http://mkip.gov.ua/news/2062.html> (Annex 488).

¹⁴²⁵ Reply, ¶¶696-705.

¹⁴²⁶ *Ibid.*, ¶699.

¹⁴²⁷ For instance, Ukraine relies on a manifestly pro-Ukrainian sources, whose line of argumentation is predominantly built upon hearsay: “CHRU has information”, “the information which CHRG has” etc. As regards the OHCHR Reports quoted by Ukraine, as the Russian Federation explained in ¶674 above, the OHCHR missions operated within Ukraine, without visiting Crimea. The OHCHR did not consider the position of Crimeans actually residing in Crimea with respect to the reasons of the decline of people studying Ukrainian.

1029. Contrary to what Ukraine asserts,¹⁴²⁸ the drop in demand for education in Ukrainian was the reason that caused the decline in the number of students. Ukraine does not provide any explanation as to why there would be a need for as many students to continue studying in Ukrainian after 2014, given that the Russian educational system began to be applied in Crimea, thereby providing different opportunities to students. Before 2014, it was natural that parents wanted that their children continue education in Ukrainian universities and potentially start working in State institutions of Ukraine. It should be noted that even at that time the number of students receiving education in Ukrainian was rather low in Crimea – at around seven percent.¹⁴²⁹ It should also be noted that Ukrainian was not used in day-to-day life in Crimea even among students studying Ukrainian. According to a study in the early 2010s, only 3,7% of Crimean internet users used Ukrainians to browse the web.¹⁴³⁰

1030. The practical necessity to study Ukrainian for a lot of the students was no longer there after 2014. As explained in the witness statement of Crimean Minister of Education Valentina Lavrik, students needed Ukrainian in order to pursue careers notably in civil service, military and linguistics.¹⁴³¹ With the exception of linguistics, it was the more logical and pragmatic choice to continue education in the Russian language for the same reasons that those students took up education in Ukrainian before 2014. Some students opted to continue studying in Ukrainian (as Ukraine itself acknowledges),¹⁴³² and there have never been any obstacles for them to do so, as the evidence produced in the Counter-Memorial shows.¹⁴³³

1031. It is worth noting that, as Aider Ablyatipov indicates in his Second Witness Statement, if parents of Crimean students feel that their application to have their child taught in the language of their choice has been ignored or mishandled, they have the right to submit a complaint to competent authorities. However, during his time at the Ministry of

¹⁴²⁸ Reply, ¶701.

¹⁴²⁹ Witness Statement of Valentina Vasilyevna Lavrik, 7 March 2023, ¶8 (Annex 25).

¹⁴³⁰ A. Arefyev, Russian language in the Ukrainian Republic, in *RUSSIAN LANGUAGE IN THE FORMER SOVIET REPUBLICS. RUSSIAN LANGUAGE AT THE TURN OF THE 20TH - 21ST CENTURIES* (Center of Social Forecasting and Marketing, 2012), available at: <http://www.demoscope.ru/weekly/2013/0571/analit03.php> (Annex 489).

¹⁴³¹ Witness Statement of Valentina Vasilyevna Lavrik, 7 March 2023, ¶10 (Annex 25).

¹⁴³² Reply, ¶699.

¹⁴³³ Counter-Memorial (CERD), ¶¶290-323.

Education of Crimea, such complaints were extremely rare – always in single digits – and have been addressed and resolved by the competent authorities.¹⁴³⁴

1032. For the students that choose Ukrainian as their language of education, the Russian Federation continues to provide such opportunities at all levels. At the school level, with respect to School No. 20 in Feodosia, Ukraine claims that:

“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 of instruction for the students’ general education.”¹⁴³⁵

1033. [REDACTED] confirms that Ukrainian is continued to be studied at her school, and the school is getting more and more students with the number of students increasing to 207 during the present year.¹⁴³⁶ The school also hosts events in Ukrainian language to promote it among students.¹⁴³⁷ In the photographs taken in the school one may observe the classes with educational materials on chemistry and physics on the walls in the Ukrainian language.¹⁴³⁸

1034. Furthermore, as Minister Lavrik and [REDACTED] both confirm, a new land plot has already been allocated to the school in order to have a new building constructed, and over 500 million RUB will be allocated from the budget.¹⁴³⁹

1035. With respect to higher education, the Russian Federation allocated 13 budgetary places for the bachelor’s degree program in the Crimean Federal University called “Philology: the Ukrainian language and literature”.¹⁴⁴⁰ [REDACTED] confirms in his witness statement, his university confirms to educate students in Ukrainian literature despite the

¹⁴³⁴Second Witness Statement of Aider Serverovich Ablyatipov, 22 February 2023, ¶11 (Annex 13).

¹⁴³⁵ Reply, ¶703.

¹⁴³⁶ Witness Statement of [REDACTED], 2 March 2023, ¶9 (Annex 26).

¹⁴³⁷ *Ibid.*, ¶10.

¹⁴³⁸ See e.g. Userapi.com, Picture of students of School No. 20, available at: <https://sun9-east.userapi.com/sun9-76/s/v1/ig2/h1PkF4QrhjDPcC6rSc0OV2AbTbrpHM8NedIEZ3iLa4NrPmi0MxND9XFeQlbbLUb3vpPf3sgZmmoSouI-AnE3aH0.jpg?size=1800x1013&quality=96&type=album>.

¹⁴³⁹ Witness Statement of Valentina Vasilyevna Lavrik, 7 March 2023, ¶14 (Annex 25); Witness Statement of [REDACTED], 2 March 2023, ¶8(Annex 26).

¹⁴⁴⁰ Crimean Federal University, Allocation of budgetary places in the bachelor's and specialist's programs in 2023 (full-time programs), available at: <https://priem.cfuv.ru/bachelor/direction/cfu> (Annex 64).

low demand.¹⁴⁴¹ [REDACTED] is also one of the organizers of conferences and public events in commemoration of Ukrainian poets, as well as supports extracurricular activities promoting Ukrainian language.¹⁴⁴²

1036. Another university where students may study Ukrainian with support by the Russian Federation is the Crimean Engineering and Pedagogical University. The Russian Federation allocated 10 budgetary places for a program aimed at teaching the Ukrainian language and literature.¹⁴⁴³

1037. In total, in 2021/2022, 212 students studied fully in Ukrainian, whereas 3,780 students studied Ukrainian as a separate subject and 93 children were engaged in preschool studies in Ukrainian.¹⁴⁴⁴ During the 2022/2023 school year, 190 students studied fully in Ukrainian.¹⁴⁴⁵ It should also be pointed out that the Simferopol Academic Gymnasium has also opened a class with Ukrainian as the language of instruction.¹⁴⁴⁶

1038. Finally, contrary to Ukraine's allegations¹⁴⁴⁷ with respect to extracurricular teaching of Ukrainian, the Russian Federation does not limit such opportunities, but, on the contrary, provides students with numerous chances to use Ukrainian in that context and enhance their knowledge and skills. For example, every year a competition called "Language is the soul of the people" takes place, where students compete in oral and written events in

¹⁴⁴¹ Witness Statement of [REDACTED] 3 March 2023, ¶7 (Annex 31).

¹⁴⁴² *Ibid.*, ¶¶11-19.

¹⁴⁴³ See Crimean Engineering and Pedagogical University, Number of places for admission for the 2023/2024 academic year, available at: <https://kipu-rc.ru/downloads/2022/priem/11.pdf> (Annex 66).

¹⁴⁴⁴ See Ministry of Education, Science and Youth of the Republic of Crimea, On the state of education in the state languages of the Republic of Crimea (Russian, Ukrainian, Crimean Tatar) and the study of native languages of the peoples of the Russian Federation living in the Republic of Crimea in general education institutions of the Republic of Crimea in the academic year 2021/2022, available at: https://monm.rk.gov.ru/uploads/txteditor/monm/attachments//d4/1d/8c/d98f00b204e9800998ecf8427e/php1laB0O_%D0%9D%D0%B0%20%D1%81%D0%B0%D0%B9%D1%82%20%D0%B2%20%D1%80%D0%B0%D0%B7%D0%B4%D0%B5%D0%BB%20%D0%93%D0%BE%D1%81%D1%8F%D0%B7%D1%8B%D0%BA%D0%B8.doc (Annex 62).

¹⁴⁴⁵ See Ministry of Education, Science and Youth of the Republic of Crimea, Information on students studying in the state languages of the Republic of Crimea (Russian, Ukrainian, Crimean Tatar) in general education institutions of the Republic of Crimea in the academic year 2022/2023, available at: https://monm.rk.gov.ru/uploads/txteditor/monm/attachments//d4/1d/8c/d98f00b204e9800998ecf8427e/phpzVO5bi_%D0%9D%D0%B0%20%D1%81%D0%B0%D0%B9%D1%82%20%D0%B2%20%D1%80%D0%B0%D0%B7%D0%B4%D0%B5%D0%BB%20%D0%93%D0%BE%D1%81%D1%8F%D0%B7%D1%8B%D0%BA%D0%B8%20%D0%BA%D1%80%D0%B0%D1%82%D0%BA%D0%BE.doc (Annex 63).

¹⁴⁴⁶ *Ibid.*

¹⁴⁴⁷ Reply, ¶700.

their native languages, including Ukrainian.¹⁴⁴⁸ Moreover, students regularly participate in student competitions (Olympiads) in Ukrainian. In 2016, a republican Olympiad was held in all State languages and literatures of Crimea, with 252 students competing in Crimean Tatar, 375 in Russian, and 112 in Ukrainian.¹⁴⁴⁹

1039. Moreover, children in Crimea regularly participate in further extracurricular activities in Ukrainian (including those organized by the State), and show outstanding results. To exemplify, in 2016, the Ministry of Education, Science and Youth of the Republic of Crimea organized the annual music festival “Crimean Terem” dedicated to the cultures of the peoples of the Russian Federation, including Ukrainian culture.

- (a) In 2018, the winner of the festival was the ensemble “Ulybka” (Smile) of the Center for Children's Creativity in Alushta, which performed the Ukrainian “Hutsul dance”.¹⁴⁵⁰
- (b) In 2019, the winner of the festival was the ensemble “Pearl of Crimea” at the Kerch complex-boarding school-lyceum of arts, which performed the Ukrainian dance “Veselka”.¹⁴⁵¹
- (c) At the international competition “Hopes of Europe” in 2020, the folk dance ensemble “Vesnyanka” (under the aforementioned House of Children's Creativity), which performed the Ukrainian “Transcarpathian dance”, became a 2nd degree diploma winner.¹⁴⁵²

¹⁴⁴⁸ Second Witness Statement of Aider Serverovich Ablyatipov, 22 February 2023, ¶30 (Annex 13).

¹⁴⁴⁹ Ibid., ¶36.

¹⁴⁵⁰ News feed of Crimea, *III Open festival-competition of children's folklore groups "Crimean Terem" took place in Crimea* (3 December 2018), available at: <https://crimea-news.com/society/2018/12/03/465715.html> (Annex 118).

¹⁴⁵¹ The website of the SBEI of the Republic of Crimea “Kerch educational complex-boarding school-lyceum of arts”, *the Dance Ensemble “Pearl of Crimea” is the Winner of the Republican competition “Crimean Terem”* (6 December 2019), available at: http://licey-iskusstv.ru/news/ansambl_tanca_zhemchuzhina_kryma_pobeditel_respublikanskogo_konkursa_krymskij_terem/2019-12-06-1123 (Annex 25, Exhibit F). Ukrainian dances are the visiting card of the “Pearl of Crimea” – See the performance of the “Pleskach” Ukrainian dance by the “Pearl of Crimea” – Youtube, *Ukrainian dance “Pleskach”* (17 June 2018), available at: https://www.youtube.com/watch?v=s58n97jdJ-k&ab_channel=ValeraMouzyka (Annex 25, Exhibit G).

¹⁴⁵² Youtube, *Transcarpathian dance. The folk dance ensemble “Vesnyanka” from Simferopol performs at the competition in Sochi* (20 January 2020) available at: <https://www.youtube.com/watch?v=XVISJf-SafQ> (Annex 25, Exhibit H).

- (d) In 2018, at the dance festival in Sevastopol, several groups performed Ukrainian dances: the Sudarushka Ensemble of the Sevastopolsky Palace of Culture performed the Ukrainian Round Dance,¹⁴⁵³ the Sevastopol Ensemble performed the Hutsul Dance, and the Crimean Pearls Ensemble from Sak performed the dance composition “The Call of Spring” based on Ukrainian folk motives.¹⁴⁵⁴
- (e) In 2017, at the Choreographic Recognition of Crimea festival, the Mozaika Ensemble of the Children's Choreographic School of Simferopol performed the Ukrainian dance Pleskach.¹⁴⁵⁵

1040. The described trend is maintained until today. While Ukrainian is not a very popular choice of language of education, some students continue to opt for it, and education is provided to them in accordance with their choice.

iii. The Russian Federation’s support for ethnic minorities’ educational rights is sufficient

1041. Finally, being unable to demonstrate that Crimean Tatar and Ukrainian communities do not have access to education in their native language, Ukraine attempts to show that there is a “systematic racial discrimination campaign” against them by alleging that the quality of the education they receive in their native languages is subpar.¹⁴⁵⁶ Although Ukraine provides no comparator whatsoever that could hint to an actual violation of the CERD, this accusation can in any event be easily dismissed by looking at the plain facts.

1042. As a preliminary remark, it should be noted that, before 2014, the educational system in Crimea was severely underfunded. This led to schools having no access to relevant literature in Crimean Tatar, and having to conduct lessons in facilities of low quality, sometimes not in compliance even with the most basic sanitary norms.¹⁴⁵⁷

¹⁴⁵³ Youtube, “Ukrainian round dance” was performed at the Sevastopol Dance Festival (28 March 2018), available at: <https://www.youtube.com/watch?v=xIMw-tYXcfU> (Annex 25, Exhibit I).

¹⁴⁵⁴ Krym.Realii, *Ukrainian and European dances were performed in Sevastopol (+ video)* (24 March 2018), available at: <https://ru.krymr.com/a/news/29121649.html> (Annex 25, Exhibit J).

¹⁴⁵⁵ Youtube, *Ensemble "Crimean Mosaic" (Simferopol) Ukrainian dance "Pleskach"* (28 May 2017), available at: <https://www.youtube.com/watch?v=reg0-suYQi8> (Annex 25, Exhibit K).

¹⁴⁵⁶ Reply, ¶¶707-713.

¹⁴⁵⁷ Second Witness Statement of Aider Serverovich Ablyatipov, 22 February 2023, ¶14 (Annex 13).

1043. Textbooks in Crimean Tatar were likewise of unsatisfactory quality, with Ukraine allocating not providing schools with sufficient quantity of textbooks.¹⁴⁵⁸ In 2006, only 44% of students were equipped with textbooks on Crimean Tatar language and literature. In junior school, only 35.5% of students were provided with textbooks in Crimean Tatar, and 70% in the subject of Crimean Tatar as a language. Those numbers dropped with respect to older students. Thus, only 20% of middle-schoolers and 3% of high-schoolers had access to textbooks in Crimean Tatar, with 40% and 3% respectively having access to textbooks in the subject of Crimean Tatar language. Thus, given the unsatisfactory provision of textbooks in Crimean Tatar by Ukraine, most education was conducted in Russian.¹⁴⁵⁹

1044. It was noted in the media that the Crimean Tatar language was not widely used in Crimean schools by 2013, particularly as there were no textbooks, no qualified specialists who could teach in the Crimean Tatar language, and no appropriate salaries for them.¹⁴⁶⁰ The Ukrainian State did little to nothing to solve the issue. As a result of this substandard education, no student in 2013 opted to take their exams in Crimean Tatar.¹⁴⁶¹

1045. Contrary to Ukraine's allegations, since 2014, the Russian Federation has made important efforts to support and improve minorities' rights on all levels of education.

1046. **First**, the Russian Federation has allocated significant investments into improving the conditions in schools, including those teaching in Crimean Tatar. Just to name a few examples¹⁴⁶²:

- (a) In Vilina School No. 2, the necessary conditions were created to ensure high-quality education. The school was equipped with interactive complexes, didactic and visual aids in 9 classrooms: 4 primary school classrooms, biology, chemistry, physics, and mathematics classrooms.

¹⁴⁵⁸ *Ibid.*, ¶17.

¹⁴⁵⁹ *Ibid.*, ¶18(c).

¹⁴⁶⁰ Avdet, *Crimean Tatars protect their language so much that they don't even speak it*, 24 June 2013, available at <https://avdet.org/2013/06/24/krymskie-tatary-nastolko-beregut-svoj-yazyk-hto-dazhe-ne-razgovarivayut-nanem/> {Annex 121}

¹⁴⁶¹ *Ibid.*

¹⁴⁶² Second Witness Statement of Aider Serverovich Ablyatipov, 22 February 2023, ¶15 (Annex 13).

- (b) In Belogorsk school No. 4, with the Crimean Tatar language of instruction, in 2018, all window blocks were replaced with modern plastic ones, so optimal air-thermal conditions would be maintained in all rooms. During 2015-2018, 6 additional classrooms and a library with a total library fund of 8265 copies were equipped.
- (c) In the academic year 2015/2016, the catering unit in Sudak School No. 3, with the Crimean Tatar language of instruction, was modernized. Regular medical examinations are now carried out and vaccinations are given to students. Once a year, medical specialists conduct a medical examination of students. The school is now equipped with a computer room. 9 classrooms were equipped in the school: 4 primary school classrooms, biology, chemistry, physics, and mathematics classrooms.
- (d) Since 2015, Yevpatoriya School No. 18 began to function as a base center. 10 classrooms were equipped with modern projectors, interactive whiteboards, multifunctional devices, and personal computers with Internet access. The informatics room is equipped with a projector, a TV, and 25 laptops for students.
- (e) Simferopol School No. 44, which opened in 2017, has 6 classes instructed in the Crimean Tatar language and 28 classes learning Crimean Tatar language. 430 million roubles were allocated from the federal and regional budgets for the construction of the school, which is considered to be one of the best technically equipped schools. The school consists of 5 three-story blocks. The school has 33 spacious, bright classrooms with high ceilings, an assembly hall and two sports halls, laboratories, and a library. For elementary school students there is a separate annex. In addition to the football field with artificial turf and running tracks bordering it, volleyball and basketball courts, gymnastic courts are at the service of schoolchildren. Primary school classrooms, biology, chemistry, physics, mathematics, history and music classrooms are equipped with the latest technologies. Computer science rooms, a sewing room, language laboratories for learning foreign languages are equipped, as well as cooking and technology classes, metal and wood workshops.. The catering unit was modernly equipped . The school has a canteen that provides hot meals to all students. At the same time, grades 1-4 receive free hot breakfasts, children from low-income families, or otherwise entitled to social security benefits, receive breakfasts and lunches. Regularly and

according to the schedule, medical examinations are carried out and vaccinations are given to students.

1047. *Second*, the Russian Federation has increased the number of textbooks available to students. The Russian Federation has facilitated the publication and supply of tens of thousands of books in Crimean Tatar on subjects such as geography, art, mathematics, history, music, social sciences, life safety fundamentals, physical education, technology, fundamentals of Islamic culture, Crimean Tatar language, biology and more.¹⁴⁶³

1048. By 2018/2019, the students were almost fully provided with textbooks in Crimean Tatar. All junior students and high-schoolers, as well as 70% of middle-schoolers, now have access to books in Crimean Tatar. This demonstrates that Ukraine's allegations of pressure by the Russian authorities on Crimean Tatars to drop studies in their language are entirely unfounded, and a cynical attempt to cover up for Ukraine's own mismanagement of the Crimean Tatars' education in the past.

1049. Ukraine's allegations with respect to educational materials in Crimean Tatar are likewise misplaced. In its Reply, Ukraine falsely contends that "textbooks [for Crimean Tatars provided by Russia] perpetuate Russian propaganda and hateful narratives, instead of historical fact".¹⁴⁶⁴ In support of this allegation Ukraine relies on just one situation:

"[O]ne tenth-grade history textbook depicted Crimean Tatars as Nazi collaborators in World War II, rehabilitating the stereotype propounded by Stalin as an excuse to deport Crimean Tatars from the Crimean peninsula in 1944".¹⁴⁶⁵

1050. However, all Ukraine seeks to do is to diminish the Russian Federation's efforts to rehabilitate Crimean Tatars after the unfortunate events suffered by that community, and does by disingenuously relying on a single book without more. Yet once more Ukraine conveniently omits a number of facts.

1051. The book referred to did not depict "Crimean Tatars as Nazi collaborators in World War II", but mentioned that there were collaborators among Crimean Tatars at the time of the

¹⁴⁶³ Second Witness Statement of Aider Serverovich Ablyatipov, 22 February 2023, ¶18(b) (Annex 13); Bezformata ru, *Crimean Schools Have Received over 80 Thousand Textbooks in Crimean Tatar* (11 January 2019), available at: <https://simferopol.bezformata.com/listnews/uchebnikov-na-krimsko-tatarskom-yazike/64134790/>.

¹⁴⁶⁴ Reply, ¶714.

¹⁴⁶⁵ *Ibid.*

World War II. It also mentioned that there were collaborators among other ethnicities, including Russians. However, since this statement in the book was not welcomed by representatives of Crimean Tatar community, the Council of Crimean Tatars appealed to the Head of the Republic of Crimea to withdraw the relevant part of the said textbook from schools due to it containing such content. The appeal succeeded and the excerpts in question were removed from the book.¹⁴⁶⁶

1052. *Finally*, the Russian Federation has made attempts to make teaching Crimean Tatar language and literature a more attractive career opportunity. Despite Ukraine's suggestions of understaffing among Crimean Tatar teachers,¹⁴⁶⁷ the Russian Federation has in fact opened new opportunities for people wishing to teach Crimean Tatar. Thus, Resolution No. 658 of the Council of Ministers of Crimea, dated 30 December 2014, provided for additional remuneration for teaching Crimean Tatar and Ukrainian language and literature in the amount of ten percent, and for correcting students' written assignments in the amount of 0.5%.¹⁴⁶⁸ As of 2019/2020, over 400 teachers were teaching Crimean Tatar, and 320 were teaching Ukrainian in schools, with the authorities reporting no shortages in staff.¹⁴⁶⁹

* * *

1053. Consequently, contrary to Ukraine's blatant accusations, the Russian Federation has not worsened the lives of ethnic Ukrainians and Crimean Tatars in the peninsula and it has not deprived them of or impeded their enjoyment of any educational rights and opportunities. To the contrary, via its consistent efforts, it has enabled ethnic minorities in Crimea to receive education in their own language. Accordingly, the facts of the case demonstrate that there is no violation of the CERD by the Russian Federation, not least a "systematic racial discrimination campaign" targeted against those communities.

¹⁴⁶⁶ Interfax, *A chapter insulting Crimean Tatars will be removed from a Crimea history textbook* (6 May 2019), available at: <https://www.interfax.ru/russia/660292> (Annex 122); Second Witness Statement of Aider Serverovich Ablyatipov, 22 February 2023, ¶20 (Annex 13).

¹⁴⁶⁷ Reply, ¶713.

¹⁴⁶⁸ Decree of the Council of Ministers of the Republic of Crimea No. 658 "On Approval of the Regulations on the Remuneration System for Employees of State Budgetary and Autonomous Educational Organizations of the Republic of Crimea", 30 December 2014, available at: <https://rk.gov.ru/document/show/736> (Annex 67) Second Witness Statement of Aider Serverovich Ablyatipov, 22 February 2023, ¶24 (Annex 13).

¹⁴⁶⁹ International Affairs, *Republic of Crimea: Education in Native Languages* (12 November 2019), available at <https://interaffairs.ru/jauthor/material/2290> (Annex 68)

VI. NO ENFORCED DISAPPEARANCES, MURDERS, ABDUCTIONS AND TORTURE DIRECTED AT THE CRIMEAN TATARS AND UKRAINIANS ON RACIAL GROUNDS

1054. The Russian Federation has demonstrated in its Counter-Memorial that none of the unconnected allegations of disappearance, murder, abduction and torture alleged by Ukraine constitute racial discrimination in violation of the CERD, let alone form part of any “systematic racial discrimination campaign”.¹⁴⁷⁰ Put simply, even if the alleged acts had actually occurred, none were committed on racial grounds, nor can they validly be said to have disproportionately affected any ethnic group.¹⁴⁷¹

1055. The Russian Federation has also demonstrated that the acts alleged by Ukraine anyway cannot be attributed to the Russian Federation.¹⁴⁷² Ukraine itself failed to show that they could, and therefore presented in its Memorial an alternative argument according to which the Russian Federation rather “encouraged and tolerated” the alleged acts.¹⁴⁷³ No credible evidence was put forward in support of either claim.

1056. In its Reply, Ukraine concedes that it has not produced authoritative statistical data to support its allegation that Crimean Tatars and Ukrainians were in fact violently singled out.¹⁴⁷⁴ More generally, it still has not established the existence of any such pattern or campaign of racial discrimination against Crimean Tatars and Ukrainians (**Section A**). Moreover, Ukraine fails to show that any of those alleged instances can at all be attributed to the Russian Federation (**Section B**). For the sake of good order, the Russian Federation will additionally address in **Appendix 3** to this Rejoinder each individual case that Ukraine attempts to portray in the Reply as discrimination of the Crimean Tatars or Ukrainians on the merits.

¹⁴⁷⁰ Counter-Memorial (CERD), ¶¶339-344; see also Counter-Memorial (CERD), Appendix A.

¹⁴⁷¹ *Ibid.*, Appendix A, ¶11.

¹⁴⁷² *Ibid.*, ¶¶345-347; see also *ibid.*, Appendix A, ¶¶43-57.

¹⁴⁷³ Memorial, ¶393.

¹⁴⁷⁴ Reply, ¶442.

A. THE ALLEGED INSTANCES RELIED ON BY UKRAINE DO NOT AMOUNT TO A PATTERN OR CAMPAIGN OF RACIAL DISCRIMINATION AGAINST CRIMEAN TATARS AND UKRAINIANS

1057. The Russian Federation has shown in its Counter-Memorial that Ukraine seeks in the present case to rely on isolated and unsubstantiated incidents involving Crimean Tatar and Ukrainian political activists.¹⁴⁷⁵ The Reply has done nothing to disprove that. Despite its assertion to the contrary, Ukraine has still not provided any “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”¹⁴⁷⁶.

1058. In essence, Ukraine points to a number of alleged incidents involving Crimean Tatars and Ukrainians, but cannot show that ethnicity had anything to do with those incidents. It is hardly surprising, therefore, that Ukraine is likewise unable to show that these incidents may be said to constitute any “systematic racial discrimination campaign”. Ukraine’s resort in this connection to the broader language of acts “burdening the human rights of the Crimean Tatar or Ukrainian communities in Crimea”,¹⁴⁷⁷ is revealing.

1059. Ukraine cannot disprove, but just criticizes the statistical information provided by the Russian Federation, which shows that Crimean Tatars and Ukrainians were not disproportionately affected by disappearances. It claims that this compelling evidence, which originates in the Office of Russia’s Prosecutor General,¹⁴⁷⁸ “[n]ot only [lacks] 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”¹⁴⁷⁹. This frivolous assertion may easily be countered.

1060. *First*, it is not clear on what basis the evidence put forward by the Russian Federation, coming as it does from its competent authorities may be put in question without any

¹⁴⁷⁵ Counter-Memorial (CERD), Appendix A, ¶11.

¹⁴⁷⁶ Reply, ¶439.

¹⁴⁷⁷ *Ibid.*, ¶441.

¹⁴⁷⁸ 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, Counter-Memorial (CERD), Annex 636.

¹⁴⁷⁹ Reply, ¶444.

evidence rebutting their content. Ukraine itself does not contest the accuracy of the data that is provided, but merely considers it to be incomplete.

1061. **Second**, Ukraine continues to use the term “enforced disappearance” as if it does not have a defined meaning in international law. The Russian Federation has already drawn attention to the fact that this term, as also terms such as “torture”, cannot simply be asserted;¹⁴⁸⁰ it also explained that the distinction between disappearances and *enforced* disappearances is of significance in the present case.¹⁴⁸¹ Ukraine neglects to address any of this, as it also does in regard to the constituent elements of each crime it alleges.

1062. **Third**, information as to whether cases concerning missing persons were “successfully closed” is simply irrelevant. Not only has the Russian Federation already explained that “opening” a case of itself implies the suspicion that a crime has been committed,¹⁴⁸² but Ukraine fails to explain what “successfully closed” would even mean. To the extent that Ukraine refers in this regard to judicial convictions, that information is of course publicly available.

1063. All that is to say that the evidence supplied by the Russian Federation concerning disappearances in Crimea confirms therefore that Crimean Tatars and Ukrainians were not disproportionately affected. It is actually Russians that disappear more often than representatives of other ethnicities. Moreover, most of the disappeared persons for which criminal proceedings have been initiated are ethnic Russians, and they amount to almost 80%.¹⁴⁸³ Thus, any claim of a pattern or campaign against Crimean Tatars and Ukrainians in this regard is untenable.

1064. The data which Ukraine seeks to rely on cannot alter this conclusion. For a start, none of the reports cited by Ukraine have concluded that there had been a pattern or campaign of racial discrimination against Crimean Tatars or Ukrainians. Moreover, reports such as the one by the OHCHR make it clear that they are “primarily based on direct interviews

¹⁴⁸⁰ Counter-Memorial (CERD), ¶342.

¹⁴⁸¹ *Ibid.*, Appendix A, ¶43.

¹⁴⁸² *Ibid.*, Appendix A, ¶15.

¹⁴⁸³ Ministry of Internal Affairs, Information on the number of missing persons in the Republic of Crimea and the City of Sevastopol between 2014 and 2022, No. 3466/dp, 22 February 2023 (Annex 35).

with victims of alleged human rights violations and abuses in Crimea”¹⁴⁸⁴. In other words, such reports have not sought to examine all cases of disappearances in Crimea and information contained in the report cannot be considered complete. It is also noteworthy that the OHCHR did not itself visit Crimea despite numerous invitations extended to it by the Russian Federation.¹⁴⁸⁵ Its reports rely instead on information relayed to it by Ukraine, and some biased NGO’s.

1065. One OHCHR report cited by Ukraine in its Reply,¹⁴⁸⁶ a Briefing Paper dated 31 March 2021, says of disappearances in Crimea as follows:

“Among the 43 cases, 39 victims are men and four are women. All female victims have been released. In terms of ethnicity, the victims include 28 persons *of Ukrainian and/or Russian origin*, 9 Crimean Tatars, 4 Tajiks, 1 person of Tatar origin, and 1 Uzbek.¹⁴⁸⁷” (*Emphasis added*)

1066. Clearly, the report itself did not distinguish between Ukrainian and Russian origin, and therefore cannot evidence that Crimean Ukrainians were disproportionately affected. In any event the OHCHR report itself suggests that the alleged disappearances had to do with the “political affiliation or position” of persons concerned and not with their ethnical origin.¹⁴⁸⁸

1067. Being aware that it cannot show that ethnicity was a reason for any of the afore-mentioned allegations, Ukraine in its Reply makes a bold statement without bringing any support whatsoever that “[w]hatever the motivation for the violence or the occupation of the victims, the Ukrainian and Crimean Tatar communities were targeted and their human

¹⁴⁸⁴ UN General Assembly, Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine, Report of the Secretary-General, A/75/334, 1 September 2020, ¶5; available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N20/226/11/PDF/N2022611.pdf?OpenElement>; 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, 21 September 2018, ¶17, available at: <https://digitallibrary.un.org/record/1643722>.

¹⁴⁸⁵ See above in ¶674.

¹⁴⁸⁶ See, e.g., Reply, fns. 806, 807.

¹⁴⁸⁷ 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. 4, available at <https://ukraine.un.org/sites/default/files/2021-03/BN%20Enforced%20dis%20Crimea%20ENG.pdf>.

¹⁴⁸⁸ *Ibid.*, p.1, ¶6.

rights — including the right to life — were disproportionately affected”.¹⁴⁸⁹ As shown above, however, neither such targeting nor an effect of this kind have been proved.

B. NONE OF THE ALLEGED ACTS CAN BE ATTRIBUTED TO THE RUSSIAN FEDERATION

1068. As the Russian Federation has shown in its Counter-Memorial, none of the alleged disappearances, murders, abductions, or torture are in any case attributable to it.¹⁴⁹⁰ Ukraine continues to argue otherwise by reference to Articles 4 and 8 of the International Law Commission’s Articles on State Responsibility,¹⁴⁹¹ but fails to meet the thresholds for attribution enshrined in these very Articles. It is indeed telling that Ukraine envisages that the Court may well be unable to find that the Russian Federation is directly responsible for the acts described in the Memorial, and therefore claims that the Russian Federation is otherwise “indirectly responsible” for “facilitating and tolerating the violence inflicted on Crimean Tatar and Ukrainian community members by the SDF and others”.¹⁴⁹² This argument, too, cannot be sustained in fact or in law.

1069. Ukraine’s claims can be dealt with briefly. Article 4 of the ILC Articles on State Responsibility, as the Court has had occasion to explain, reflects:

“the well-established rule, one of the cornerstones of the law of State responsibility, that the conduct of any State organ is to be considered an act of the State under international law, and therefore gives rise to the responsibility of the State if it constitutes a breach of an international obligation of the State.”¹⁴⁹³

1070. Ukraine, however, has not shown that the alleged acts which it complains of were in fact the conduct of organs of the Russian Federation. The Russian Federation, for its part, has confirmed following internal investigations that it has no links whatsoever to those alleged acts.¹⁴⁹⁴

¹⁴⁸⁹ Reply, ¶445.

¹⁴⁹⁰ Counter-Memorial (CERD), ¶¶345-347; see also Counter-Memorial (CERD), Appendix A, ¶¶43-57.

¹⁴⁹¹ Reply, ¶¶463-465.

¹⁴⁹² *Ibid.*, ¶¶466-467.

¹⁴⁹³ *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. 202, ¶385.

¹⁴⁹⁴ See e.g., Counter-Memorial (CERD), Appendix A, ¶¶37, 49;

1071. Ukraine’s suggestion that individuals said to be wearing Saint George’s ribbons may pass for organs of the Russian Federation clearly cannot be right. It is unnecessary to multiply authorities because the Court itself has explained that:

“according to the Court’s jurisprudence, persons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in “complete dependence” on the State, of which they are ultimately merely the instrument.

[...]

However, so to equate persons or entities with State organs when they do not have that status under internal law must be exceptional, for it requires proof of a particularly great degree of State control over them, a relationship which the Court’s Judgment quoted above expressly described as “complete dependence”.¹⁴⁹⁵

1072. Needless to add, Ukraine did not present the Court with proof of Russian State control over the persons it points to – most certainly not any “proof of a particularly great degree of State control over them”.¹⁴⁹⁶ The threshold of “complete dependence” is clearly not met.

1073. In the same vein, the suggestion that “individuals in police uniform” implicate the Russian Federation and can without more engage its responsibility, ought to be rejected.¹⁴⁹⁷

1074. Nor can the alleged acts be attributed to the Russian Federation on the basis of direction or control in accordance with the rule laid down in Article 8 of the ILC Articles on State Responsibility. As the Court has consistently held, including by reference to Article 8, for attribution on this basis:

“it has to be proved that [the persons in question] acted in accordance with that State’s instructions or under its “effective control”. It must however be shown that this “effective control” was exercised, or that the State’s instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.”¹⁴⁹⁸

¹⁴⁹⁵ *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. 205, ¶¶392-393.

¹⁴⁹⁶ *Ibid.*, ¶393.

¹⁴⁹⁷ ECtHR, *Case of Khadija Ismayilova v. Azerbaijan* (Applications nos. 65286/13 and 57270/14), Judgment of 10 January 2019, ¶¶86, 110-111.

¹⁴⁹⁸ *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. 208, ¶400.

1075. Significantly, the Court has also explained in this connection that even a “general control by the respondent State over a force with a high degree of dependency on it” would not imply, without further evidence, that the State directed or enforced the perpetration of the acts concerned.¹⁴⁹⁹

1076. Ukraine has not begun to establish that the test of “effective control” has been met in regard to the alleged acts. There is indeed no basis upon which the Russian Federation may validly be said to have incurred responsibility for these acts under the rule of customary international law set out in Article 8 of the ILC Articles on State Responsibility.

1077. As the Russian Federation explained in its Counter-Memorial Ukraine cannot rely on incidents that allegedly occurred prior to the reunification of Crimea with the Russian Federation on 18 March 2014, since they are not within the Court’s jurisdiction *ratione temporis* as defined in the Court’s Judgment of 8 November 2019.¹⁵⁰⁰

* * *

1078. It follows that Ukraine has not shown — indeed it cannot show — any violation of CERD by the Russian Federation on account of alleged acts of disappearance, murder, abduction and torture involving Crimean Tatars and Ukrainians. Ukraine’s claims in this regard are without basis, and ought to be rejected.

¹⁴⁹⁹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 64, ¶115.

¹⁵⁰⁰ Counter-Memorial (CERD) ¶344; *See also* Counter-Memorial (CERD), Appendix A, ¶¶3-4; *See also* Judgment of 8 November 2019, ¶23.

VII. NO RACIAL DISCRIMINATION IN REGARD TO LAW ENFORCEMENT MEASURES

1079. In its Memorial, Ukraine alleged that the Russian Federation resorted to arbitrary searches and detentions as part of a policy of racial discrimination in Crimea¹⁵⁰¹. Ukraine continues to pursue this unfounded claim in its Reply, but refers in this connection only to Crimean Tatars, notably making no allegation of arbitrary searches and detentions relating to members of the Ukrainian community¹⁵⁰². This is telling: if Ukraine insists that the Russian Federation’s alleged “discrimination policy” targets both Crimean Tatars and Ukrainians, it begs the question of why allegations of “pretextual enforcement measures” pertain to Crimean Tatars alone. Ukraine offers no answer, but the reason is a simple one: The Russian Federation has been fighting extremism in Crimea with no unlawful distinctions based on ethnicity and in accordance with the law¹⁵⁰³, as any State has both the right and the obligation to do.

1080. The Russian Federation demonstrated in its Counter-Memorial that Ukraine has indeed failed to show any difference or distinction in law enforcement efforts involving Crimean Tatars as compared to persons of other ethnic origins¹⁵⁰⁴. Nothing in Ukraine’s Reply has shown otherwise.

1081. More specifically, Ukraine has still not shown—indeed it cannot show—that law enforcement measures applied to Crimean Tatars were based on any impermissible distinction, or had the purpose or effect of violating their human rights and freedoms. As with other of Ukraine’s claims, allegations made in reference to discrete incidents anyway do not amount to any “pattern” or “campaign” of discrimination.

1082. The present Chapter recalls briefly the lawful and legitimate basis of enforcement measures undertaken by the Russian Federation in its fight against extremism in Crimea (**Section A**). It then reiterates that Ukraine’s allegation of enforcement measures undertaken as part of a systematic campaign or policy of racial discrimination is not supported by facts or the evidence (**Section B**). For the sake of good order, the Russian

¹⁵⁰¹ Memorial, ¶¶442-454.

¹⁵⁰² Reply, Chapter 12.

¹⁵⁰³ Second Expert Report of Valery Viktorovich Engel, 28 February 2023, Section VI (Annex 19).

¹⁵⁰⁴ Counter-Memorial (CERD), ¶¶352-354; Appendix B.

Federation will additionally address in the **Appendix 4** to this Rejoinder each individual case that Ukraine attempts to portray in the Reply as targeting Crimean Tatars on grounds of their ethnicity.

A. THE LAWFUL AND LEGITIMATE BASIS OF LAW ENFORCEMENT MEASURES UNDERTAKEN BY THE RUSSIAN FEDERATION IN CRIMEA

1083. The Russian Federation demonstrated in its Counter-Memorial that law enforcement measures to which Ukraine refers were taken in accordance with applicable law, and on the basis of objective and reasonable grounds, in order to safeguard national security and protect public order from extremist activity and terrorism¹⁵⁰⁵. Such measures concerned persons associated with extremist organizations that have been banned throughout the Russian Federation (*i.e.*, not only in Crimea), just like various other extremist organizations and regardless of the particular identity of their members. In other words, these law enforcement measures had nothing to do with racial discrimination, which has no room in Russian law and practice.

1084. Ukraine once again attempts in its Reply to paint a different — and distorted — picture by alleging that the applicable Russian law is inconsistent with international human rights standards or has been enforced in a discriminatory manner¹⁵⁰⁶. Once again, this is blatantly untrue.

1085. As further elaborated in the Witness Statement of Mr Alexei Gayarovich Zhafyarov, the Deputy Head of the department for supervising the implementation of the law on federal security, inter-ethnic relations and combating extremism and terrorism of the General Prosecutor's Office of the Russian Federation, and further confirmed by expert reports of Mr Engel and Prof Merkuryev:

- (a) Russian legislation had outlawed extremist activity, which includes separatist acts prior to, and without any connection to, the reunification of Crimea with Russia. Law enforcement activities throughout the Russian Federation have been focused on prevention and suppression of the spread of radical ideas (for instance, by searches and detentions), precisely in order to reduce both criminal activity and to

¹⁵⁰⁵ Counter-Memorial (CERD), Chapters IV, VI (sections I, II).

¹⁵⁰⁶ Reply, ¶518.

ensure criminal prosecution and the imposition of penalties where applicable. Such measures are subject to review by the Russian courts, including the Supreme Court of the Russian Federation. No accusations of discriminatory nature of the legislation of its application has been voiced in intergovernmental fora concerning international cooperation on countering extremism, including in the OSCE. The model of anti-extremist legislation adopted by the Russian Federation is indeed similar to that of other States, including European ones and is based on the Shanghai Convention on Combating Terrorism, Separatism and Extremism.

- (b) The Supreme Court of the Russian Federation has itself had occasion to explain that the exercise of human and civil rights and freedoms in the Russian Federation must not violate the rights and freedoms of other people. In this vein, legislation that provides for the possibility of restricting rights and freedoms may only do so to the extent necessary to protect the foundation of the constitutional order, morality, health, the rights and lawful interests of others, as well as national defence and State security. The obligation of the State to ensure national security and public order forms a part of the Russian constitutional order just as it does elsewhere.
- (c) It follows that if a citizen, whilst exercising his or her constitutional rights and freedoms, violates the rights and freedoms of others, the offender may be held liable under public law (including criminal law), which has as its aim the protection of public interests. To argue that Russian anti-extremist legislation is inherently discriminatory for targeting ethnic and religious minorities and prioritizing national security over the rights of ethnic minorities, simply does not correspond to reality.
- (d) The legal position adopted in the Russian Federation is fully consistent with the standards enshrined in multiple international legal instruments, which, while recognizing and promoting the right of every person to freedom of thought, conscience and religion, the right to hold opinions without interference and the right to freedom of expression (including the freedom to seek, receive, and impart information and ideas of all kinds through any media and regardless of frontiers), also provide that the exercise of these rights and freedoms may be subject to certain legitimate restrictions provided for by law. Needless to say, States would not have agreed otherwise. Ukraine itself appears to accept that.

- (e) Combating extremism and terrorism, including by investigating extremist crimes, is a high priority of the Russian Federation. Such law enforcement action does not seek any exceptions from the absolute prohibition of racial discrimination: indeed, it applies equally to all who are suspected of extremist activities, with racial or ethnic grounds playing no role at all. Russian criminal law itself penalizes any offence motivated by racial, ethnic, political, ideological, or religious hatred, and the commission of any crime motivated by racial, ethnic, or religious hatred or enmity constitutes an aggravating circumstance.¹⁵⁰⁷

1086. Thus, law enforcement measures adopted by the Russian Federation and complained of by Ukraine were based on objective and reasonable grounds and taken in accordance with applicable domestic law, excluding any possibility of racial discrimination under CERD. They were not arbitrary. They served a clearly legitimate aim and were proportionate, so much so that even if they were to be viewed as suggesting a differentiated treatment (which they are not¹⁵⁰⁸), they would not constitute racial discrimination¹⁵⁰⁹. Moreover, as already noted, a possibility always existed for challenging them before the Russian courts. Contrary to what Ukraine argues¹⁵¹⁰, the Russian Federation does not claim that the fight against extremism justifies restrictions on the right to equal treatment before “tribunals and other organs administering justice”.

1087. The Russian Federation continues to maintain, therefore, that the law enforcement measures of which Ukraine complains were lawfully undertaken and had nothing whatsoever to do with racial discrimination. Ukraine has not been able to prove otherwise.

B. UKRAINE’S ALLEGATION OF “PRETEXTUAL ENFORCEMENT MEASURES” UNDERTAKEN AS PART OF A SYSTEMATIC CAMPAIGN OR POLICY OF RACIAL DISCRIMINATION IS NOT SUPPORTED BY ANY EVIDENCE

1088. The Russian Federation has already pointed out that Ukraine’s allegations concerning “pretextual enforcement measures” are unsubstantiated, not least for being “almost

¹⁵⁰⁷ Witness Statement of Alexei Gayarovich Zhafyarov, 28 February 2023, ¶8 (Annex 22); Expert Report of Vladimir Viktorovich Merkuriev, 1 March 2023, ¶¶5-15 (Annex 20).

¹⁵⁰⁸ See also Counter-Memorial (CERD), ¶¶375-377.

¹⁵⁰⁹ See Chapter III; Counter-Memorial (CERD), ¶368.

¹⁵¹⁰ Reply, ¶519.

entirely bereft of primary evidence and built on hearsay”¹⁵¹¹. Ukraine’s Reply did nothing to show otherwise. Indeed, it continues to refer to uninformed, and in some cases partisan, reports whose authors for the most part have not themselves set foot in Crimea¹⁵¹². The OHCHR, as explained above, turned down Russian invitations to visit Crimea and assess the situation first-hand¹⁵¹³. Much like other NGO documents or news reports previously put forward by Ukraine and often based on second-hand accounts, these materials cannot be said to afford weighty and convincing evidence¹⁵¹⁴.

1089. What is more, the reports relied on by Ukraine do not at all support its case. In fact, the OHCHR reports say nothing about racial discrimination. Even if there was any truth — *quod non* — in their claim that Crimean Tatars were “disproportionately” subjected to certain law enforcement measures¹⁵¹⁵, nothing in such statements inevitably or even logically suggests necessarily any racial discrimination.

1090. In reference to one OHCHR report, moreover, concerning the period between 1 July 2020 and 30 June 2021, Ukraine itself suggests that “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’” (emphasis added)¹⁵¹⁶. This remarkable statement itself suggests to any impartial reader that Ukraine’s claim of disproportionate treatment of Crimean Tatars based on racial discrimination simply cannot be taken seriously.

1091. What Ukraine does consistently fail to mention is that even the reports to which it refers indicate repeatedly that the reason and context of law enforcement activities undertaken by the Russian Federation are preventive actions to combat religious extremism. This is the crucial element to consider in connection with Ukraine’s allegation, as members of the Crimean Tatar community who were detained or searched were not subjected to these measures by reason of their ethnicity, but rather because of their involvement in extremist activity. It would be equally ridiculous — and indeed dangerous — to suggest that

¹⁵¹¹ Counter-Memorial (CERD), ¶351.

¹⁵¹² Reply, ¶¶512-515.

¹⁵¹³ Counter-Memorial (CERD), ¶16.

¹⁵¹⁴ See also Counter-Memorial (CERD), ¶¶358-362.

¹⁵¹⁵ Reply, ¶512.

¹⁵¹⁶ Reply, ¶513.

measures undertaken around the world against members of other extremist and violent organizations can so easily be characterized as racial discrimination only because they happen to involve persons of certain ethnic origin.

1092. Ukraine fails to counter this truth. Its false claim that religious extremism is “a phenomenon that had never been part of the history of the Crimean peninsula”¹⁵¹⁷ illustrates just that, for it is undeniable that Ukraine itself faced the threat of the radicalisation of Muslim Crimean Tatars as far back as 2004¹⁵¹⁸. For example, Ukrainian authorities themselves fought actively against *Hizb ut-Tahrir*. In May 2009, the Security Service of Ukraine reported that it prevented the creation of a *Hizb ut-Tahrir* cell in Ukraine, explaining that “documentary materials were obtained showing that the *Hizb ut-Tahrir* group was trying to create a terrorist structure with a clear hierarchy and distribution of functions among its members on a deep conspiratorial basis”¹⁵¹⁹. In September 2009, Ukraine’s Deputy Minister of Interior and Crimean Police Chief called for the ban of *Hizb ut-Tahrir* in Ukraine due to its “destabilizing role” in the Crimean Peninsula¹⁵²⁰. Ukraine even informed the UN Security Council on the “terrorist plans” of *Hizb ut-Tahrir*¹⁵²¹. The organization is banned in Bangladesh, Germany, Indonesia and a number of Arab States¹⁵²².

¹⁵¹⁷ Reply, ¶521.

¹⁵¹⁸ See Counter-Memorial (CERD), Appendix B, ¶¶5-6.

¹⁵¹⁹ On 12 May 2009, the head of the SSU press center, Maryna Ostapenko, said that the SSU had prevented an attempt to set up a *Hizbut-Tahrir* cell in Ukraine. She said that “as a result of operative actions, documentary materials were obtained showing that the *Hizb ut-Tahrir* group was trying to create a terrorist structure with a clear hierarchy and distribution of functions among its members on a deep conspiratorial basis”. She added that “the activities of this unit must have been aimed at creating primary terrorist organizations, propaganda and dissemination of *Hizb ut-Tahrir* ideology, recruitment and training of potential terrorists. At the same time, all members of the organization were clearly aware that they could be held criminally liable for their activities.” See ‘Security Service of Ukraine Uncovered Terrorists Organizers of *Hizb ut-Tahrir* Cell’, available at: <https://www.unian.net/society/220077-sbu-nakryila-terroristov-organizatorov-yacheyki-hizb-ut-tahrir.html>.

¹⁵²⁰ On 23 September 2009, Mr G.Moskal asked Acting Foreign Minister Vladimir Khandogiy “to collect documents showing that *Hizb ut-Tahrir* was banned from the territory of other countries”. In his opinion, *Hizb ut-Tahrir* activity “may cause destabilization of interethnic relations in the south of Ukraine”. Earlier, on 16 September 2009 the Crimean police press-service reported that the Crimean Police Chief, Mr Moskal, directly asked SSU to ban *Hizb ut-Tahrir*. See ‘LB.ua. Moskal is concerned about the activities of the Islamic organization *Hizb ut-Tahrir* in Crimea’, available at: https://lb.ua/news/2009/09/23/9076_moskal_obespokoen_deyatelnostyu.html.

See also ‘Deputy Minister of Internal Affairs of Ukraine - Head of the Crimean Police Gennadiy MOSKAL asks the Security Service to ban the party "Hizbut-Tahrir" on the territory of the state’, available at: <https://www.unian.net/society/266416-moskal-trebuat-ot-sbu-zapretit-partiyu-hizb-ut-tahrir.html>.

¹⁵²¹ See ‘Security Service of Ukraine Uncovered Terrorists Organizers of *Hizbut-Tahrir* Cell’, available at: <https://www.unian.net/society/220077-sbu-nakryila-terroristov-organizatorov-yacheyki-hizb-ut-tahrir.html>.

¹⁵²² Zhafyarov Witness Statement (Annex 22), ¶42.

1093. Ukraine still fails, moreover, to offer any evidence that the individuals involved in the incidents it refers to even identified themselves as Crimean Tatars. As previously explained, it is not without significance that it is Ukraine itself that classifies them in such terms¹⁵²³.

1094. It remains the case that Ukraine has not shown that law enforcement measures adopted in connection with individual members of the Crimean Tatar community differed in any way from those adopted by the Russian Federation more broadly in its combat against threats to national security and public order. Nor has Ukraine shown a purpose or intent on the part of the Russian Federation to target Crimean Tatars as such, or that such has been the effect. It has not been able to refute the fact, to which the Russian Federation has drawn attention in its Counter-Memorial, that “the proportion between the annual numbers of crimes that were considered committed in Crimea by individuals from various ethnic group ... reflects the general proportion between these ethnic groups among the Crimean population”¹⁵²⁴.

1095. Thus, Ukraine may speak of “the sheer frequency and the manifestly disproportionate nature of the Russian authorities’ enforcement measures against the Crimean Tatar community”¹⁵²⁵, but it has not pointed to any credible evidence that might establish such a grave allegation. The fact that some of those individuals who were searched or detained in Crimea for engaging in extremist activities were Crimean Tatars does not in any way imply, let alone establish, any racial discrimination—and certainly not a pattern thereof. To be clear, and despite Ukraine’s false statement to the contrary¹⁵²⁶, the Russian Federation does not accept the disproportionate impact that Ukraine alleges.

1096. It will be recalled that any claims Ukraine might have against specific incidents anyway fall outside the scope of the present case, which it has brought before the Court in regard to a “systematic campaign”¹⁵²⁷. Again, Ukraine has not demonstrated that recourse to local remedies has proven futile – and it admits as much in its Reply¹⁵²⁸.

¹⁵²³ See Counter-Memorial (CERD), ¶355.

¹⁵²⁴ Counter-Memorial (CERD), ¶366.

¹⁵²⁵ Reply, ¶509.

¹⁵²⁶ Reply, ¶521.

¹⁵²⁷ See also Chapter III.

¹⁵²⁸ Reply, ¶517.

VIII. THERE IS NO VIOLATION OF THE CERD WITH RESPECT TO CITIZENSHIP

1097. In Chapter 13 of the Reply, labelled “Forced Citizenship”, Ukraine argues that “Russia’s Imposition of Its Citizenship Regime Violates the CERD”; that “The Citizenship Status of Residents of Crimea Resulting from the Law on Admission Does Not Reflect Free and Informed Choice”; and that “The Imposition of Russia’s Citizenship Law Has Fostered Various Downstream Discriminatory Effects on the Crimean Tatar and Ukrainian Communities in Crimea”. Ukraine’s claims have thus several components, each relating to, first, the Russian Federation’s grant of citizenship; second, certain restrictions based on citizenships or the lack thereof; and, third, the alleged “downstream” effects of the grant of citizenship or restrictions based on citizenship.

1098. This chapter first points out that Ukraine fails to discharge its burden of proving a “systematic campaign” of discrimination in matters of citizenship (**Section A**). Without prejudice to this stance, this chapter reviews the CERD’s framework on the issues of nationality and citizenship (**Section B**). It then reiterates that distinctions, restrictions or preferences based on citizenship are not within the scope of the CERD (**Section C**); demonstrates that Ukraine’s claims about the grant of citizenship and the relevant legal framework are not envisaged by the CERD, and the Russian Federation’s grant of citizenship and the associated regime are not discriminatory against any particular nationality or group (**Section D**); and shows that the so-called “downstream” effect or more accurately “collateral or secondary effects” resulting from the grant of citizenship and the associated regime are not capable of falling within the scope of racial discrimination under the CERD and are outside the Court’s jurisdiction (**Section E**). In the present chapter the Russian Federation moreover demonstrates that its grant of citizenship is anyway consistent with longstanding international practice and does not constitute a violation of international human rights law (**Section F**). Finally, the Russian Federation reiterates that Ukraine’s claims regarding international humanitarian law are beyond the scope of the CERD and the Court’s jurisdiction (**Section G**).

A. UKRAINE HAS FAILED TO DISCHARGE ITS BURDEN OF PROVING A SYSTEMATIC CAMPAIGN OF DISCRIMINATION IN MATTERS OF CITIZENS

1099. In its Reply, Ukraine asserts that the Russian Federation’s grant of citizenship in Crimea and the relevant legal framework laid the foundation for “systematic racial discrimination”,¹⁵²⁹ and that the Russian Federation “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”.¹⁵³⁰ In response to the Russian Federation’s argument that alleged harms complained of are in fact the consequences of citizenship-based measures that fall outside the scope of CERD and that the grant of citizenship does not discriminate against Crimean Tatars and Ukrainians, Ukraine does not attempt to show otherwise; rather, it turns to what it claims as discriminatory impact or disproportionate burden on Crimean Tatars and Ukrainians. In this vein, Ukraine argues that “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.”¹⁵³¹

1100. Ukraine’s words show clearly that Ukraine has either abandoned claims regarding direct discrimination against the Crimean Tatar and Ukrainian communities in the grant of citizenship and its relevant legal framework or completely failed to discharge its burden to prove any such discrimination. Its claims in this regard now are called “disproportionate or disparate impact” claims or “indirect discrimination” claims.

1101. As the Russian Federation explained above, failure to prove direct discrimination necessitates the finding that there was no campaign of racial discrimination within the meaning of the CERD, whatever bald assertions Ukraine may be making. This is because indirect discrimination claims cannot be considered part of any “systematic campaign” or as falling within the ambit of the CERD.¹⁵³² Ukraine’s claims concerning the grant of citizenship and the relevant legal framework must be dismissed in their entirety for this

¹⁵²⁹ Reply, ¶542.

¹⁵³⁰ Reply, ¶570.

¹⁵³¹ Reply, ¶543.

¹⁵³² See Chapter III(B).

reason alone. The Russian Federation will nevertheless show that these claims are without merit in any case.

B. NATIONALITY AND CITIZENSHIP UNDER THE CERD

1102. As shown in the Counter-Memorial,¹⁵³³ the CERD’s position on nationality or citizenship is clear: citizenship is synonymous with nationality, and Article 1(1) of the Convention does not include distinctions based on nationality or citizenship within the scope of prohibited “racial discrimination”. By using phrases such as “the introduction by Russia of its own nationality and immigration framework”, “automatically assumed Russian nationality”, Ukraine is also using “nationality” and “citizenship” in this sense.¹⁵³⁴ It was defined in *Nottebohm* as “a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties”.¹⁵³⁵

1103. This was confirmed by the Court in *Qatar v. UAE*, which held that the term “national origin” under Article 1(1) does not encompass current nationality (or citizenship). There, the Court conducted a thorough interpretation exercise by reading the term “national origin” in accordance with its ordinary meaning, in its context and in the light of the object and purpose of CERD, as well as in the light of the *travaux préparatoires* as a supplementary means of interpretation, and by reviewing the practice of the CERD Committee and the jurisprudence of regional human rights courts.¹⁵³⁶ There is no reason for the Court to depart from that decision in this case.

1104. Article 1(2) further provides that the CERD does not apply to “distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens”, while Article 1(3) stipulates that “[n]othing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality”. Furthermore, under Article 5(d)(iii),

¹⁵³³ Counter-Memorial (CERD), ¶¶380-382.

¹⁵³⁴ Reply, ¶542.

¹⁵³⁵ *Nottebohm (Liechtenstein v. Guatemala)*, Judgment, 6 April 1955, I.C.J. Reports 1955, p. 23.

¹⁵³⁶ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Preliminary Objections, Judgment, 4 February 2021, I.C.J. Reports 2021, ¶¶74-105.

States undertake to prohibit and eliminate racial discrimination and to guarantee, “the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: ... the right to nationality”.

1105. Together, these provisions demonstrate that the CERD excludes distinctions based on nationality/citizenship from the definition of racial discrimination, affirms the prerogative of the sovereign State to regulate matters of nationality/citizenship, and provides for the obligation to guarantee, without discrimination based on prohibited grounds, the right to nationality. Citing to its early case *Nottebohm*, the Court thus pointed out in *Qatar v. UAE* that “nationality is a legal attribute which is within the discretionary power of the State and can change during a person’s lifetime”,¹⁵³⁷ and read the express exclusion under Article 1(2) from the scope of CERD of differentiation between citizens and non-citizens as indication that CERD does not prevent adoption of restrictive measures against non-citizens “on the basis of their current nationality”.¹⁵³⁸ Ukraine does not dispute this.¹⁵³⁹

1106. The understanding that nationality/citizenship is separate from race or ethnic origin is in line with long-standing views regarding nationality prevalent in the field of international law. For example, the 1997 European Convention on Nationality, which was drafted in part to address issues of nationality after dissolution of the USSR and to which Ukraine is a Party, expressly states in Article 1:

“‘nationality’ means the legal bond between a person and a State and does not indicate the person’s ethnic origin.”

C. DISTINCTIONS AND RESTRICTIONS OR PREFERENCES BASED ON CITIZENS AND NON-CITIZENS ARE NOT WITHIN THE SCOPE OF THE CERD

1107. The CERD excludes nationality/citizenship as a prohibited ground for distinction or discrimination and keeps citizenship-based restrictions and consequences of citizenship-based measures, such as naturalisation, outside the scope of the Convention.

1108. Ukraine, however, complains about various alleged distinctions, restrictions, exclusions or preferences made between citizens and non-citizens. These concern the prospect of

¹⁵³⁷ *Ibid.*, ¶81.

¹⁵³⁸ *Ibid.*, ¶83.

¹⁵³⁹ Reply, ¶549.

being banned from re-entering Crimea for an extended period of time,¹⁵⁴⁰ the prohibition of foreigners owning land in “border areas”¹⁵⁴¹, the absence of the possibility to obtain State pensions, free health insurance, and social allowances, the absence of the possibility of taking on employment in being elected to government or municipal jobs, to apply to hold a public gathering, or to own a media entity.¹⁵⁴² Ukraine claims that such distinctions, restrictions, exclusions or preferences violate these various provisions of the CERD, that is, the right to stand for election under Article 5(c), the right to freedom of movement and residence within the border under Article 5(d)(i), the right to leave any country under Article 5(d)(ii), the right to nationality under Article 5(d)(iii), the rights to work under Article 5(e)(i), and the right to public health, medical care, social security and social services under Article 5(e)(iv) of the CERD.¹⁵⁴³

1109. These allegations fall clearly outside the scope of the definition of racial discrimination under Article 1(1), and squarely within the scope of the matters excluded by virtue of Article 1(2) from the application of the Convention. There is no need to go into the details to reach this conclusion, and Ukraine’s claims regarding these allegations must be dismissed.

D. UKRAINE’S CLAIMS ABOUT THE RUSSIAN FEDERATION’S GRANT OF CITIZENSHIP AND THE RELEVANT LEGAL FRAMEWORK ARE NOT ENVISAGED BY THE CERD, AND THAT REGIME IS NOT DISCRIMINATORY AGAINST ANY PARTICULAR NATIONALITY OR GROUP ENUMERATED IN ARTICLE 1(1)

1110. The granting of citizenship has long been considered to fall within the discretionary power of the sovereign State, with international law placing little limits in this regard. In the present case, contrary to the complaints sometimes found about the restrictive grant of citizenship, Ukraine seems to claim that the Russian Federation’s grant of citizenship as part of the process of admission of Crimea was, in a way, too generous, even if Ukraine labels it as “forced”. In any event, this complaint of Ukraine’s does not fall within the ambit of the CERD at all.

¹⁵⁴⁰ Reply, ¶567.

¹⁵⁴¹ Reply, ¶569.

¹⁵⁴² Memorial, ¶471.

¹⁵⁴³ Reply, ¶542.

1111. The position in regard to the CERD is clear: how citizenship is granted is not of concern to the Convention; it is only whether the grant is tainted by racial discrimination that is. Accordingly, if, *arguendo*, Ukraine's complaint was covered by the CERD (*quod non*), it could only concern whether the grant of citizenship and the associated regime were discriminatory against any particular nationality, or any particular group as enumerated in Article 1(1) of the Convention, by some kind of combined reading of Article 1(3) and Article 5(d)(iii). That is to say, a particular nationality or group within the meaning of Article 1(1) must be singled out for discrimination under the citizenship regime for it to be in violation of the CERD.

1112. In this regard, the Russian Federation's grant of citizenship and the relevant legal framework are not discriminatory against any particular nationality or ethnic group, including Crimean Tatars and Ukrainians.

- (a) Firstly, the Law on Admission was applied to all residents of Crimea without exceptions; persons could also freely and without restrictions reject Russian citizenship if they desired to remain Ukrainian citizens.
- (b) Secondly, the prohibition for foreigners to own land in "border areas" applies to everyone throughout the Russian Federation regardless of their nationality. However, the Russian Federation met halfway and allowed foreigners to lease lands in such areas in Crimea.
- (c) Thirdly, Ukraine argues that Ukrainian individuals who became Russian citizens would be exposed to potential criminal liability under Russian anti-extremism laws, high treason laws, and other laws, including for actions that are not illegal under Ukrainian law. As the Russian Federation has demonstrated earlier, the application of all of these laws does not depend on the ethnicity or nationality of perpetrators. Under Article 4 of the Russian Criminal Code, persons who have committed crimes are equal before the law and are subject to criminal liability irrespective of sex, race, nationality, residence, religion, or origin.
- (d) Finally, Ukraine has not proven that compulsory conscription into the Russian armed forces discriminates against Crimean Tatars and Ukrainians since the conscription is universal and does not apply to any particular group of persons or group.

1113. In addition to other practice evidencing that the Russian Citizenship Law and its practice in the Republic of Crimea is not discriminatory, it may be mentioned that the same position was consistently presented by the Russian Federation to the CERD Committee:

“By its article 6, the Constitution stipulates that citizenship of the Russian Federation is acquired and revoked in accordance with federal law; it is the same and equal for all, irrespective of the grounds for acquisition. The same article establishes absolute protection of this right by stipulating that citizens of the Russian Federation may not be stripped of their citizenship or denied the right to change it at will. In accordance with article 4 of Federal Act No. 62 of 31 May 2002, on citizenship of the Russian Federation, the principles and regulations governing the acquisition of citizenship may not contain provisions that restrict the rights of citizens on social, racial, ethnic, linguistic or religious grounds.”¹⁵⁴⁴

1114. In light of the above, the only conclusion one can draw is that even if the grant of citizenship and the relevant legal framework fall within the scope of the CERD (*quod non*), the Russian Federation’s grant of citizenship and the relevant legal framework are not discriminatory against any particular nationality or ethnic group and do not run afoul of the Convention.

E. THE ALLEGED “DOWNSTREAM” EFFECTS OF THE RELEVANT LEGAL FRAMEWORK DO NOT FALL WITHIN THE SCOPE OF THE CERD

1115. Ukraine’s main claims regarding citizenship is that the “imposition of the Russian Federation’s citizenship law has fostered various downstream discriminatory effects on the Crimean Tatar and Ukrainian communities in Crimea”.¹⁵⁴⁵ Ukraine seeks to show these alleged effects by referring to alleged “harms specifically suffered by ethnic Ukrainians and Crimean Tatars who became Russian nationals”,¹⁵⁴⁶ and those who did not become Russian nationals.¹⁵⁴⁷ This is an attempt to rewrite the CERD and its position in regard to issues of nationality/citizenship, as explained above, and must be rejected.

¹⁵⁴⁴ CERD Committee, Consideration of reports submitted by States parties under article 9 of the Convention, Russian Federation, 1 July 2016, CER/C/RUS/23-24. Available at: <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhsnLht97JCs%2FgtYiPXQ%2F%2B4iHVXBeflgkO8JgS%2FMNpgTT7w88ipmy9%2BhetmwDhoz%2B68S7I%2FkNy7pZpA%2B64Z8cqP968YSOP9ZmewZuhxsGnnTl>

¹⁵⁴⁵ Reply, ¶544 et seq.

¹⁵⁴⁶ *Ibid.*, ¶558 et seq.

¹⁵⁴⁷ *Ibid.*, ¶565 et seq.

1116. A similar attempt was made by Qatar in its case against the UAE, where Qatar argued that certain measures taken by the UAE targeting nationals of Qatar had disparate impacts on the enjoyment of rights by Qataris living in the UAE who were relatives or somehow associated with Qatar nationals. The Court characterized such effects as “collateral and secondary effects” and rejected Qatar’s claims:

“The Court first observes that, according to the definition of racial discrimination in Article 1, paragraph 1, of CERD, a restriction may constitute racial discrimination if it “has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life”. Thus, the Convention prohibits all forms and manifestations of racial discrimination, whether arising from the purpose of a given restriction or from its effect. In the present case, while the measures based on current Qatari nationality may have collateral or secondary effects on persons born in Qatar or of Qatari parents, or on family members of Qatari citizens residing in the UAE, this does not constitute racial discrimination within the meaning of the Convention. In the Court’s view, the various measures of which Qatar complains do not, either by their purpose or by their effect, give rise to racial discrimination against Qataris as a distinct social group on the basis of their national origin. The Court further observes that declarations criticizing a State or its policies cannot be characterized as racial discrimination within the meaning of CERD. Thus, the Court concludes that, even if the measures of which Qatar complains in support of its “indirect discrimination” claim were to be proven on the facts, they are not capable of constituting racial discrimination within the meaning of the Convention.”¹⁵⁴⁸

1117. The Court thus considered that the collateral or secondary effects flowing from a distinction made on the basis of nationality/citizenship, do not constitute racial discrimination within the meaning of the CERD. The Court did not even find it necessary to analyse whether the alleged distinction pursued a legitimate aim and whether there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved — most probably because such analysis does not apply to a distinction based on nationality/citizenship, notwithstanding the possible collateral or secondary effects of the particular measure.

1118. There are no reasons for the Court to depart from its approach in the present one. In this case the grant of citizenship and the relevant legal framework of the Russian Federation are similarly measures based on nationality, that is, citizenship. Any collateral or

¹⁵⁴⁸ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Preliminary Objections, Judgment, 4 February 2021, I.C.J. Reports 2021, ¶112.

secondary effects of the latter are not covered by the CERD and, in any event, Ukraine has not shown that Ukrainians or Crimean Tatars were treated differently because of their ethnic origin in comparison to other communities living in the Russian Federation. Therefore, these measures do not give rise to any form of racial discrimination contrary to the CERD.

1119. If Ukraine's position were accepted, this would artificially add nationality/citizenship as a prohibited ground for distinction under Article 1(1), unduly remove the exclusion of nationality/citizenship from the scope of the CERD under Article 1(2) and eliminate the saving clause under Article 1(3) by disregarding the States' sovereign power to regulate nationality, citizenship, or naturalisation. This would clearly be contrary to all tenets of treaty interpretation.

F. THE GRANT OF CITIZENSHIP IS CONSISTENT WITH LONGSTANDING INTERNATIONAL PRACTICE AND DOES NOT CONSTITUTE A VIOLATION OF INTERNATIONAL HUMAN RIGHTS LAW

1120. As demonstrated in previous Sections, there is no discrimination involved in the Russian Federation's grant of citizenship and its associated framework adopted upon Crimea's reunification with the Russian Federation; the acts alleged by Ukraine simply do not fall within the provisions of that CERD. In regard to this issue as with others upon which Ukraine bases its claims, the Russian Federation agrees with Judge Yusuf that

“transforming the Convention into a ‘fourre-tout’; a receptacle in which all sorts of asserted rights may be stuffed” risks “turn[ing] the Convention into an all-encompassing instrument for those trying to establish the jurisdiction of the Court whenever other legal grounds cannot be found for that purpose”,¹⁵⁴⁹

and that

“[i]t is high time that the Court put an end to the attempts by States to use CERD as a jurisdictional basis for all kinds of claims which do not fall within its ambit. Acceding to such requests undermines the credibility of a very important multilateral convention and the reliance on its compromissory clause (Article 22) for genuine claims relating to racial discrimination.”¹⁵⁵⁰

¹⁵⁴⁹ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)*, Provisional Measures, Order of 7 December 2021, Dissenting Opinion of Judge Yusuf, I.C.J. Reports 2021, p. 395, ¶1.

¹⁵⁵⁰ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)*, Order on Provisional Measures, Declaration of Judge Yusuf, 22 February 2023, ¶10.

1121. Nevertheless, as Ukraine has made serious charges in this regard, and although the Court should reject them for falling outside the scope of the CERD, the Russian Federation herein shows that the grant of citizenship is consistent with longstanding international practice and does not constitute a violation of international human rights law. The grant is not a “forced citizenship” regime. Options and choices are made available. Indeed, this regime is similar to what the ILC proposed, and the UNGA recommended to States, in the context of State succession.

1122. The granting of nationality is commonly considered a sovereign right of the State concerned. In 1923, the PCIJ held that questions of nationality in principle fall within exclusive domain of the State.¹⁵⁵¹ The classic 1930 Convention on certain questions relating to the conflict of nationality laws stipulates this very clearly:

“Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State”.

1123. The same view is echoed by the 1997 European Convention on nationality, to which Ukraine is a Party:

“Each State shall determine under its own law who are its nationals ... This law shall be accepted by other States in so far as it is consistent with applicable international conventions, customary international law and the principles of law generally recognized with regard to nationality.”

1124. According to the Explanatory Report to this Convention, “Matters of nationality are generally considered to be within the domestic jurisdiction of each State; this is the guiding principle of public international law”.¹⁵⁵²

1125. Article 4 of the European Convention on Nationality sets out the following principles on which to base rules on nationality: everyone has the right to a nationality; statelessness shall be avoided; no one shall be arbitrarily deprived of his or her nationality; neither marriage nor the dissolution of a marriage between a national of a State Party and an alien, nor the change of nationality by one of the spouses during marriage, shall automatically affect the nationality of the other spouse. It also stipulated that rules of a State Party on nationality shall not contain distinctions or include any practice which

¹⁵⁵¹ PCIJ Advisory Opinion No. 4, *Nationality Decrees Issued in Tunis and Morocco*, 7 February 1923, PCIJ Reports (1923), Series B. No. 4.

¹⁵⁵² Explanatory Report to European Convention on Nationality, ETS No. 166, p. 6, ¶28.

amount to discrimination on the grounds of sex, religion, race, colour or national or ethnic origin.

1126. Since the World War II, there has been a concern with restrictive grant of citizenship and arbitrary deprivation of citizenship. The emergence of this concern as well as the new wave of international law instruments,¹⁵⁵³ which were spearheaded by the Universal Declaration on Human Rights (specifically in Article 15), came as part of the reaction to Nazi policy that stripped Jewish People of their citizenship, which was the most important factor in sealing their fate, and informed by the recognition that

“to be without a nationality or not to be a citizen of any country at all is to stand naked in the world of international affairs. It is to be alone as a person, without protection against the aggression of States [...] As [the] Nazi practices show, the right to a nationality is not the luxury some people think it is.”¹⁵⁵⁴

1127. In the context of State succession, the European Convention addresses this concern in several provisions. Article 18(1) provides that “each State Party concerned shall respect the principles of the rule of law, the rules concerning human rights and the principles contained in Articles 4 and 5 of this Convention and in paragraph 2 of this article, in particular in order to avoid statelessness.” In deciding on the granting or the retention of nationality in cases of State succession, each State Party concerned shall take account in particular of: “the genuine and effective link of the person concerned with the State; the habitual residence of the person concerned at the time of State succession; the will of the person concerned; the territorial origin of the person concerned.”¹⁵⁵⁵ The Council of Europe’s Explanatory Report to this provision of the European Convention:

“This article needs to be seen in the light of the presumption under international law that the population follows the change of sovereignty over the territory in matters of nationality.”¹⁵⁵⁶

¹⁵⁵³ For a summary of these instruments, see Patrick Thornberry, *THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION: A COMMENTARY* (2016), p. 341.

¹⁵⁵⁴ J. Morsink, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING AND INTENT* (University of Pennsylvania Press, 1999), p. 80, also citing R.E. Conot, *JUSTICE AT NUREMBURG* (Harper and Row, 1983), 169.

¹⁵⁵⁵ Article 18(2) of the European Convention on Nationality.

¹⁵⁵⁶ Explanatory Report to European Convention on Nationality, ETS No. 166, p. 17, ¶108.

1128. The Explanatory Report further clarifies that “taking into account the will of the person concerned” “might entail, for example, giving persons a right of option or avoiding the imposition of nationality against the wishes of a person.”

1129. The solution provided for in the above-mentioned 1997 European Convention on Nationality was proposed by the ILC in its 1999 draft articles on nationality of natural persons in relation to the Succession of States and taken of note and recommended to States by the UN General Assembly. Specifically, the ILC suggested that

“Subject to the provisions of the present articles, persons concerned having their habitual residence in the territory affected by the succession of States are presumed to acquire the nationality of the successor State on the date of such succession...”

“Each State concerned should, without undue delay, enact legislation on nationality and other connected issues arising in relation to the succession of States consistent with the provisions of the present articles. It should take all appropriate measures to ensure that persons concerned will be apprised, within a reasonable time period, of the effect of its legislation on their nationality, of any choices they may have thereunder, as well as of the consequences that the exercise of such choices will have on their status.”¹⁵⁵⁷

1130. According to the ILC, the term “option” used in the present draft articles does not only mean a choice *between* nationalities, but is used in a broader sense, covering also the procedures of “opting in”, i.e. the voluntary acquisition of nationality by declaration, and “opting out”, i.e. the renunciation of a nationality acquired *ex lege*. Such right of option may be provided under national legislation even without agreement between States concerned.¹⁵⁵⁸

1131. With regard to the time limit, the ILC provided in its Articles that “States concerned should provide a reasonable time limit for the exercise of the right of option”, noting in its commentaries that “State practice shows that the length of the period during which persons concerned were granted the right of option varied considerably”, giving examples of three-month and six-month option periods.¹⁵⁵⁹ In the view of the ILC, a “reasonable time limit” is a time limit necessary to ensure an effective exercise of the right of option.

¹⁵⁵⁷ UN General Assembly, Resolution 55/153, A/RES/55/153, 12 December 2000, Annex, Articles 5 and 6.

¹⁵⁵⁸ ILC, Draft Articles on Nationality of Natural Persons in relation to the Succession of States with commentaries, Article 11, commentary (7), p. 34.

¹⁵⁵⁹ *Ibid.*, pp. 34-35.

In this sense, the period of one month set by Russian legislation was an entirely reasonable time limit.

1132. An earlier convention between Romania and Yugoslavia provided for a period of six months from the ratification of the agreement for the exercise of this option.¹⁵⁶⁰ That convention also provided for a three-month period for the ratification of the Convention for those who lost their nationality to become nationals of Yugoslavia.¹⁵⁶¹ This approach was affirmed by a subsequent “Additional Agreement” to that convention.¹⁵⁶² Furthermore, the European Commission for Democracy through Law (Venice Commission) adopted in 1996 a Declaration on the Consequences of State Succession for the Nationality of Natural Persons. In that declaration, the Venice Commission endorses the need of the option, and states in paragraph 15 that “The right of option should be exercised by all adults within a reasonable time from the date of succession.”¹⁵⁶³ The comment to this paragraph observes that

“[t]his provision is aimed at avoiding potentially damaging uncertainty as to the nationality of persons affected by State succession (for example in respect of enjoyment of diplomatic protection). The Commission did not consider it appropriate to establish a precise time limit. However, the time limit should be reasonable in the light of the circumstances of each individual case.”¹⁵⁶⁴

1133. Indeed, these conditions have been met with regard to acquisition of Russian nationality by Crimeans upon Crimea’s reunification with the Russian Federation, which implemented the above-mentioned basic principle of population following the change of sovereignty over the territory in matters of nationality, while basing it on the criteria of habitual residence. To be more concrete, the Russian Federation has enacted legislation on nationality and other connected issues by signing the Law of Admission and the other laws regarding property, social insurance, pensions, etc. These guaranteed the rights of Crimeans. Under the Law of Admission, the permanent residents of Crimea

¹⁵⁶⁰ Convention between Romania and Yugoslavia between the Two Countries regulating the Question of Nationality and that of the Citizenship of Persons who, in consequence of the Frontier Delimitation, have lost their Original Nationality, 3 January 1933, Articles 1, 3.

¹⁵⁶¹ *Ibid.*, Article 1, last clause.

¹⁵⁶² Additional Agreement to the Convention between Romania and Yugoslavia between the Two Countries regulating the Question of Nationality and that of the Citizenship of Persons who, in consequence of the Frontier Delimitation, have lost their Original Nationality, 13 March 1935, Article 1.

¹⁵⁶³ Venice Commission, Declaration on the Consequences of State Succession for the Nationality of Natural Persons, 10 February 1997, CDL-STD(1997)023, ¶15.

¹⁵⁶⁴ *Ibid.*, Comments on the Provisions of the Declaration, ¶15.

automatically received Russian nationality on 18 March 2014 when Crimea became the territory of the Russian Federation. But, apart from that, Crimean residents have the freedom of choice to save or reject Ukrainian citizenship and nobody imposed Russian citizenship. It was important that persons were not forcefully deprived of their citizenship, but instead could obtain dual citizenship.¹⁵⁶⁵

1134. Furthermore, Crimeans who rejected Russian citizenship in 2014 or were not eligible in the first place under the 2014 special regime could apply for Russian citizenship at any time afterwards. This was also simplified for other groups of persons, for example, those who left the peninsula before 18 March 2014, but were born and permanently resided in the territory of the Republic of Crimea or Sevastopol. In addition to the above, the Russian authorities provided measures of “positive discrimination” or of “affirmative action” for previously deported Crimean Tatars in Soviet times who as of 18 March 2014 did not have a permanent residence or Ukrainian citizenship.¹⁵⁶⁶ They could also acquire Russian citizenship later under the simplified procedure.

1135. The persons who declined Russian citizenship could continue to reside in Crimea based on Russian permanent residence permits which could be obtained in a simplified manner.¹⁵⁶⁷ Permanent residence also provides the right to pension, free health insurance, social allowances, and the right to exercise professions.¹⁵⁶⁸ Both permanent and temporal residence exclude immigration barriers.¹⁵⁶⁹ Additional potential difficulties for Crimeans were handled as well: for example, Crimeans who completed their military service in Ukraine are exempted from the duty to perform this duty in the Russian Federation.¹⁵⁷⁰

1136. All these abovementioned provisions, which were described in detail in Appendix C to the Counter-Memorial (CERD), have confirmed that the Russian Federation guaranteed the rights of Crimeans, provided a lot of additional opportunities and special facilitated procedures for them, and, therefore, performed the necessary requirements as recommended by the ILC and UN General Assembly.

¹⁵⁶⁵ Counter-Memorial (CERD), Appendix C, ¶¶12-18.

¹⁵⁶⁶ Counter-Memorial (CERD), Appendix C, ¶11.

¹⁵⁶⁷ Counter-Memorial (CERD), Appendix C, ¶9.

¹⁵⁶⁸ Counter-Memorial (CERD), Appendix C, ¶63.

¹⁵⁶⁹ Counter-Memorial (CERD), Appendix C, ¶76.

¹⁵⁷⁰ Counter-Memorial (CERD), Appendix C, ¶¶49-51.

1137. As can be seen from the above summary, this acquisition of nationality was equal and universal, but not “forced”, as every person so entitled to receive Russian nationality had the opportunity to reject it within one month, which corresponded to the classic principle of option.

1138. Notably, the Russian Federation also did not require the loss of Ukrainian nationality for acquisition of Russian nationality, and Russian law provided for the possibility of renouncing Russian nationality later on, if another nationality (in this case Ukrainian) existed for the person concerned.

1139. Finally, before application to Crimea, this precise approach was followed pursuant to the dissolution of the USSR by its continuator State (the Russian Federation) and successor States (including Ukraine). Ukraine’s own national legislation reflects this, as its law on citizenship is founded on the criterion of permanent residence, granting Ukrainian citizenship to:

- (a) all citizens of the former USSR permanently residing in the territory of Ukraine at the moment of declaration of the independence of Ukraine (24 August 1991);
- (b) all persons residing in Ukraine and not being Ukrainian citizens or citizens of other states at the moment of entry into force of the Law of Ukraine On Citizenship of Ukraine (1636-12) (13 November 1991), regardless of their race, skin colour, political, religious and other beliefs, sex, ethnic and social origin, property status, place of residence, linguistic or other features.¹⁵⁷¹

G. UKRAINE’S CLAIMS REGARDING INTERNATIONAL HUMANITARIAN LAW ARE BEYOND THE SCOPE OF THE CERD AND OUTSIDE THE COURT’S JURISDICTION

1140. Before leaving the issue of citizenship, the Russian Federation would like yet again to make it clear that the Court has no jurisdiction over any claims regarding the granting of Russian citizenship by references to international humanitarian law. As the Russian Federation explained in its Counter-Memorial, such claims are beyond the scope of the CERD.¹⁵⁷² Earlier in its Judgment of 8 November 2019, the Court found that “[w]ith

¹⁵⁷¹ Law of Ukraine On Citizenship of Ukraine (1636-12) (13 November 1991), Article 3. Available at: <https://www.refworld.org/pdfid/44a280fa4.pdf>

¹⁵⁷² Counter-Memorial (CERD), ¶387.

regard to the situation in Crimea, Ukraine's claims are based solely upon CERD".¹⁵⁷³ That decision is *res judicata* now. Ukraine confirmed in its Reply that "Ukraine's claims are based solely on the CERD."¹⁵⁷⁴ Any claims relating to IHL are therefore undoubtedly outside the Court's jurisdiction.

¹⁵⁷³ Judgment of 8 November 2019, ¶¶23 and 29.

¹⁵⁷⁴ Reply, ¶550.

IX. THE RUSSIAN FEDERATION DID NOT BREACH CERD WITH RESPECT TO PUBLIC EVENTS

1141. Ukraine's claims of an alleged "racial discrimination campaign" targeting the Crimean Tatar and Ukrainian communities in regard to certain decisions to postpone or relocate what it describes as "culturally significant gatherings" are entirely unfounded.

1142. As the Court found in the 2019 judgment on the Russian Federation's preliminary objections, Ukraine's claim in this case, as far as the CERD is concerned, is that "the Russian Federation has engaged in a sustained campaign of racial discrimination, carried out through acts repeated over an appreciable period of time starting in 2014, against the Crimean Tatar and Ukrainian communities in Crimea."¹⁵⁷⁵ After the Russian Federation showed in its Counter-Memorial that there was no racial discrimination, let alone such a discrimination campaign, Ukraine in its Reply does not use the word "campaign" in the chapter on what it labelled as "culturally significant gatherings". Rather it uses the word "pattern" to describe a few isolated incidents. As elaborated earlier in this Rejoinder, the isolated incidents complained about by Ukraine are not sufficient to prove a "systematic campaign".¹⁵⁷⁶ Nor are these isolated incidents sufficient to prove a pattern of discriminatory acts, if, for purposes of argument, such a pattern is taken to be the same as a campaign.¹⁵⁷⁷ These isolated incidents are thus beyond the scope of the present case and are inadmissible. In any event, none of these incidents constitute racial discrimination within the meaning of CERD because the decision in each of them was made on the basis of a legitimate reason that had nothing to do with ethnic origin.

1143. As the Russian Federation showed in its Counter-Memorial, Ukraine failed to demonstrate that any of the decisions or measures concerning public events were discriminatory against the Crimean Tatars or Ukrainians because of their ethnic origin. Ukraine's own arguments and evidence in the Memorial and the Reply show that all of the measures of which Ukraine complains were taken because the applicants failed to comply with the clear requirements of Russian law for the holding of such events. Whether or not these requirements are too strict in light of international standards (what

¹⁵⁷⁵ Judgment of 8 November 2019, p.606, ¶130.

¹⁵⁷⁶ See above, Chapter III.

¹⁵⁷⁷ See above, Chapter III.

Ukraine's arguments boil down to) is beyond the scope of the Court's jurisdiction under the CERD, and Ukraine's unwarranted general criticism of the Russian legal framework¹⁵⁷⁸ is therefore irrelevant to this case.¹⁵⁷⁹ What is crucial is that this legal framework applies uniformly throughout the entire territory of the Russian Federation and without any discrimination on the basis of race, colour, descent or national or ethnic origin. In light of this, there was no racial discrimination involved in any of the decisions complained about by Ukraine, and there could not have been any pattern or campaign of such discrimination built upon such non-discriminatory decisions.

1144. In this Chapter of the Rejoinder, the Russian Federation will highlight the deficiencies in Ukraine's arguments concerning alleged racial discrimination concerning "culturally significant gatherings" (**Section A**), and then provide additional evidence to refute Ukraine's allegations of different treatment in this area of the Crimean Tatar and Ukrainians in general (**Section B**). For the sake of good order, the Russian Federation will additionally address in the **Appendix 5** to this Rejoinder each individual case that Ukraine attempts to portray in the Reply as discrimination of the Crimean Tatars or Ukrainians on the merits.

A. UKRAINE'S ALLEGATIONS OF DISCRIMINATION CAMPAIGN WITH RESPECT TO PUBLIC GATHERINGS ARE BASED ON THE ERRONEOUS AND MISLEADING REPRESENTATION OF LAW AND FACT

1145. As a preliminary remark, the Russian Federation notes that the CERD provides no specific right to "culturally significant gatherings", as Ukraine appears to suggest in the Reply.¹⁵⁸⁰ The CERD only prohibits ethnicity-based restrictions on the already existing rights and, more particularly, the rights to freedom of expression and peaceful assembly, which are also invoked by Ukraine.

1146. It should also be noted at the outset that the public events¹⁵⁸¹ that Ukraine tries to present as "culturally significant" were in fact of a *political nature*. As opposed to

¹⁵⁷⁸ Reply, ¶¶574-581.

¹⁵⁷⁹ See above, Chapter III.

¹⁵⁸⁰ Reply, ¶571.

¹⁵⁸¹ For instance, the Sürgün Commemorations, celebrations of Crimean Tatar Flag Day, Human Rights Day, Shevchenko's Birthday.

commemorating a cultural aspect unique to Crimean Tatars/Ukrainians, events were used in order to present a certain political position. As the Russian Federation has demonstrated in the Counter-Memorial, and again in this Rejoinder, political opinion is no part of “ethnic origin”.¹⁵⁸² It is particularly telling that Ukraine focuses on events organized by members of the *Mejlis*, which as evidence shows were in fact used to put pressure on authorities and stage provocations.¹⁵⁸³ At the same time, Ukraine conveniently overlooks events organized by Crimean Tatars that were actually aimed at promoting the Tatar culture,¹⁵⁸⁴ and which constitute clear proof that there is no racial discrimination targeting this community, certainly not any “systematic racial discrimination campaign”.

1147. It is but no less true that the right to freedom of assembly and the freedom of expression are not absolute. Ukraine failed to show that regulatory measures taken with respect to a small number of events, based on Russian legislation that is applicable throughout the Russian Federation, had anything to do with discrimination. Those measures were indeed based on lawful and legitimate grounds.

i. Freedom of assembly

1148. As regards freedom of assembly, for example, the Universal Declaration of Human Rights in Article 20(1) provides for freedom of assembly and association, and then in Article 29(2) provides that “In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.” The scope of this freedom has been defined by human rights treaties, in particular by Article 21 of the International Covenant on Civil and Political Rights:

“The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.”

¹⁵⁸² See above, Chapter III; Counter-Memorial (CERD), ¶¶114-122.

¹⁵⁸³ Witness Statement of ██████████, Annex 17, ¶¶10-20; Second Witness Statement of ██████████, Annex 15, ¶¶5-10.

¹⁵⁸⁴ Counter-Memorial (CERD), Annex 498. See also Witness Statement of ██████████, Annex 29, ¶¶5-7; Witness Statement of ██████████, Annex 33, ¶¶19-26.

1149. A State has the right to regulate such assemblies in accordance with the law: it may require notifications, demand modifications, and, when the circumstances so require, ban public events. Where a State's measure pursues the legitimate aim of, for instance, suppressing violence, that measure is not contrary to the right to peaceful assembly; nor is it discriminatory,¹⁵⁸⁵ even if this limits a specific event organised by members of an ethnic group.

1150. With respect to notifications, the State must be aware of planned events, at least in order to protect and guarantee the rights and freedoms of all other persons under its jurisdiction.¹⁵⁸⁶

1151. States routinely set different requirements which event organizers have to comply with in order to hold public events.¹⁵⁸⁷ For example, in Germany, applicants must obtain permits, and state and local officials may deny permits when public safety concerns arise or when the applicant is from a prohibited organization, mainly right-wing extremist groups¹⁵⁸⁸. In the United Kingdom, organizers must inform the police in writing six days before a public march stating its exact route, names and addresses of organizers, and police have the power to limit or change the route of a march, and set any other condition of a march.¹⁵⁸⁹ In France, a notification of an assembly must be made at least 48 hours in advance; the organizers are required to give their names, addresses, the aim of the assembly, the date, the place and the route of any demonstration, and the authorities have the right to ban demonstrations for national security reasons.¹⁵⁹⁰ In Spain, an applicant will be fined if they fail to notify authorities about peaceful demonstrations in public areas, especially near governmental buildings or "key infrastructure".¹⁵⁹¹ In Latvia,

¹⁵⁸⁵ William A. Schabas, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A COMMENTARY*, (OUP, 2015), pp. 511-513, 523-524.

¹⁵⁸⁶ N. Weiß, *Assembly, Freedom of, International Protection* in *MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* (OUP, 2021), ¶13.

¹⁵⁸⁷ US Department of State, *Custom Report Excerpts*, available at: <https://www.state.gov/report/custom/256f0dd74a/> (Annex 286).

¹⁵⁸⁸ *Ibid.*, p.78.

¹⁵⁸⁹ UK Government Official Site, *Protests and marches: letting the police know*, available at: <https://www.gov.uk/protests-and-marches-letting-the-police-know> (Annex 287).

¹⁵⁹⁰ Right to Assembly, *The right of peaceful assemble in France*, available at: <https://www.rightofassembly.info/country/france> (Annex 288).

¹⁵⁹¹ US Department of State, *Custom Report Excerpts*, p.167, available at: <https://www.state.gov/report/custom/256f0dd74a/> (Annex 286).

organizers of demonstrations typically must notify authorities 10 days in advance, and officials may deny or modify permits to prevent public disorder.¹⁵⁹² Corresponding requirements and restrictions also exist and apply in other States, including, according to the US State Department, Morocco, Somalia, People’s Republic of China, India, and others.¹⁵⁹³

1152. In certain circumstances, the authorities may indeed ban such public events. States routinely prohibit certain events and including those organized by certain groups by invoking security reasons. For example, the Czech Republic banned marches organized by Neo-Nazi groups.¹⁵⁹⁴ In another example, Germany banned a pro-Palestine rally on security grounds.¹⁵⁹⁵ France likewise banned such a rally, citing expected unrest and disturbances.¹⁵⁹⁶

ii. Freedom of expression

1153. Freedom of expression is no different in this respect. It can likewise be subject to lawful limitations.¹⁵⁹⁷ Specifically, a request to change venue is in line with what human rights treaty bodies and national courts consider to be a legitimate limitation of the right to freedom of expression. Thus in *Ernst Zundel v. Canada* before the HRC, the applicant claimed that “he was discriminatorily denied his right to freedom of expression” because he was prohibited from holding a press conference in the premises of the Canadian

¹⁵⁹² *Ibid.*, p.111.

¹⁵⁹³ US Department of State, *Custom Report Excerpts*, pp. 46, 88, 127, 164, available at: <https://www.state.gov/report/custom/256f0dd74a/>(Annex 286).

¹⁵⁹⁴ Zpravy, *Law on rallies flawed, Prague officials plan amends* (29 April 2008), available at: <https://zpravy.aktualne.cz/law-on-rallies-flawed-prague-officials-plan-amends/r~i:article:603786/> (Annex 289).

¹⁵⁹⁵ AA, *German court upholds ban on pro-Palestine protest in Berlin* (30 April 2022), available at: <https://www.aa.com.tr/en/europe/german-court-upholds-ban-on-pro-palestine-protest-in-berlin/2576991> (Annex 290).

¹⁵⁹⁶ France 24, *Pro-Palestinian rally in Paris banned amid rising Israel-Gaza tensions* (13 May 2021), available at: <https://www.france24.com/en/france/20210513-pro-palestinian-rally-in-paris-banned-amid-escalating-israel-gaza-tensions> (Annex 291).

¹⁵⁹⁷ See for example Human Rights Committee, General Comment No. 34, 12 September 2011, ¶21, available at: <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>.

Parliament.¹⁵⁹⁸ The HRC found no discrimination in this case, noting inter alia that the applicant remained at liberty to hold a press conference elsewhere.¹⁵⁹⁹

1154. An important conclusion to be drawn from this is that a State can and indeed must regulate public events, as expressly recognized and provided for in relevant human rights instruments. Such regulation clearly does not constitute as such any racial discrimination.

B. NO RACIAL DISCRIMINATION IN CRIMEA AGAINST CRIMEAN TATARS AND UKRAINIANS WITH RESPECT TO PUBLIC GATHERINGS, AS UKRAINE DID NOT SHOW THAT CRIMEAN TATARS OR UKRAINIANS WERE TREATED DIFFERENTLY THAN OTHERS

1155. As the Russian Federation has shown in Chapter 3 of this Rejoinder, racial discrimination can only be established if there is a difference or distinction as compared with others.¹⁶⁰⁰ Thus, even if the freedom of assembly (or freedom of expression) was restricted or even violated with respect to the cases relied on by Ukraine (*quod non*), this does not evidence racial discrimination, since Ukraine does not show that the measures were taken based on ethnicity, and not for other reasons, namely security considerations. Nor does Ukraine respond to the Russian Federation's arguments in the Counter-Memorial and provide comparative statistics that would actually prove that the events of Crimean Tatars and Ukrainians were specifically targeted, or were treated differently when compared to those organized by Russians.

1156. In the Reply, Ukraine makes repeated attempts to present standalone cases of the Russian authorities' legitimate decisions to postpone, relocate or cancel public events in the

¹⁵⁹⁸ Human Rights Committee, Communication No. 953/2000, *Zundel v Canada*, Decision on Admissibility, 29 July 2003, ¶4.1, available at: <http://hrlibrary.umn.edu/undocs/953-2000.html>.

¹⁵⁹⁹ *Ibid.*, ¶8.5: "However, and despite the State party's willingness to address the merits of the communication, the Committee considers that the author's claim is incompatible with article 19 of the Covenant and therefore inadmissible *ratione materiae* under article 3 of the Optional Protocol. Although the right to freedom of expression, as enshrined in article 19, paragraph 2, of the Covenant, extends to the choice of medium, it does not amount to an unfettered right of any individual or group to hold press conferences within the Parliamentary precincts, or to have such press conferences broadcast by others. While it is true that the author had obtained a booking with the Press Gallery for the Charles Lynch Press Conference Room and that this booking was made inapplicable through the motion passed unanimously by Parliament to exclude the author's access to the Parliamentary precincts, the Committee notes that the author remained at liberty to hold a press conference elsewhere. The Committee therefore takes the position, after a careful examination of the material before it, that the author's claim, based on the inability to hold a press conference in the Charles Lynch press Conference Room, falls outside the scope of the right to freedom of expression, as protected under article 19, paragraph 2, of the Covenant". [Emphasis added]

¹⁶⁰⁰ See above, Chapter III.

Crimean Peninsula as if they had to do with ethnic discrimination, arguing, *inter alia*, that there was a disproportionate effect on Crimean Tatars.¹⁶⁰¹ This is a mischaracterisation of the events, and yet another attempt by Ukraine to mislead the Court.

1157. Ukraine's own references show that there have never been any measures targeting the Crimean Tatar or ethnic Ukrainian communities as such. In order to portray the Russian Federation as an unfavourable jurisdiction to hold social gatherings, Ukraine cites ECtHR cases such as *Lashmankin v. Russia* and *Navalny v. Russia*.¹⁶⁰² While the Russian Federation does not agree with the ECtHR's conclusions in these cases and does not consider its findings under a different treaty to be relevant to this case, it is worth noting that Ukraine itself states with respect to the *Lashmankin* case that "the ECtHR considered applications from 23 applicants from all over Russia" [emphasis added]. This indicates that the regulation of public gatherings, of which the ECtHR was critical, applies to every event organiser or participant regardless of where they are located in the Russian Federation (in Crimea or in other Russian regions), or of their ethnic background. The ECtHR's findings show nothing to the contrary. The quoted provision from the *Navalny v. Russia* judgment merely refers to the broad language of the Public Events Act, which cannot itself lead to any conclusion that the Act is discriminatory or will be used to discriminate based on ethnicity. Importantly, the judgments of the ECtHR never concluded that there was racial (or any discrimination), when such decisions were made by competent authorities. Nor have any such determinations been reached by the HRC with regard to the Russian Federation.

1158. Statistical data from Crimea on public events also shows no abnormalities and is in line with the statistics concerning the rest of the Russian Federation and other States. In fact, as the Russian Federation has already shown in the Counter-Memorial, hundreds of events organized by Crimean Tatars and Ukrainians have been organized and successfully conducted since 2014,¹⁶⁰³ and this continues to be the case. Ukraine did not address or disprove this overwhelming evidence. The numbers of events in Crimea that have been in any way modified or cancelled by authorities is lower than in other Russian regions,

¹⁶⁰¹ Reply, ¶584.

¹⁶⁰² Reply, ¶¶576, 579.

¹⁶⁰³ Counter-Memorial (CERD), Annex 498; Witness Statement of ██████████, Annex 29, ¶¶5-7.

and the number of complaints submitted to the High Commissioner on Human Rights of the Russian Federation emanating from the Crimean Federal District is only at around 4%.¹⁶⁰⁴ If one compares to other States then, for example, in South Korea up to 11% of requested public events were banned.¹⁶⁰⁵ It is clear that in the present case Ukraine claims there is a “systematic campaign” of racial discrimination based on only a few unconnected cases, which are in fact a drop in the ocean of all events peacefully and successfully organized by the Crimean Tatar community.

1159. Ukraine cannot accuse Crimean Tatars that cooperate with the Russian authorities¹⁶⁰⁶ of being “proxies” of the Russian State in order to try and diminish the relevance of their events. It is entirely unclear why being “pro-Russian” undermines these peoples’ status as Crimean Tatars, makes them “the wrong kind of Crimean Tatars”, or makes their public events not count as celebrating Crimean Tatar cultural heritage. Even if Crimean Tatars that organized events in Crimea supported the Russian Federation, this does not undermine their legitimacy as ethnic minorities or their events as evidence that there is no racial discrimination.

1160. Ukraine also misleads the Court by implying that ethnic Russian applicants who apply for permission to conduct public rallies in Crimea had preferable conditions as compared to the applicants of the Crimean Tatar or ethnic Ukrainian background.¹⁶⁰⁷ In the Counter-Memorial, the Russian Federation demonstrated to the Court that many events planned by “ethnic Russians” were also denied permission on the same ground that the applications did not conform to Russian law.¹⁶⁰⁸ Ukraine tries to downplay this evidence by stating that “two of the applicants were ultimately able to hold their gatherings”,¹⁶⁰⁹ however, Ukraine does not even comment on many other cases to which the Russian Federation refers in the Counter-Memorial.¹⁶¹⁰ Clearly, the fact that two applicants were

¹⁶⁰⁴ High Commissioner for Human Rights in the Russian Federation, Annual Report, 2014, Annex 293, p.35, Figure 19.

¹⁶⁰⁵ Yonhap News Agency, *11 pct of assemblies banned in Seoul last year due to pandemic: activists* (12 August 2021), available at: <https://en.yna.co.kr/view/AEN20210812012000315> (Annex 292).

¹⁶⁰⁶ Reply, ¶587.

¹⁶⁰⁷ *Ibid.*, ¶587.

¹⁶⁰⁸ Counter-Memorial (CERD), Appendix D, ¶62.

¹⁶⁰⁹ Reply, ¶586.

¹⁶¹⁰ Counter-Memorial (CERD), Appendix D, ¶62 (e.g. the events in support of the Russian President, as well as dedicated to celebrating Unity Day on 4 November, National Flag Day on 22 August and Russia Day on 12 June).

eventually allowed to hold a public rally does not show any pattern of differential treatment between Russian communities and other ethnic groups in this respect.

1161. As regards the two public events, which were organised by ethnic Russians and which Ukraine attempts to use as a comparator, Ukraine fails to disclose to the Court that the events that it refers to have gone ahead, but not in the original form requested by the applicants. As regards the event on 23 February 2018, it was initially planned as a “rally-march”.¹⁶¹¹ What then happened, as Ukraine’s own evidence confirms, was a Litia (worship service).¹⁶¹² A worship service and a rally march are completely different in nature, since they suppose different kinds of activities, require different kinds of venues, and imply different kinds of security risks. As regards the 9 May 2018 march, it should be noted that the organisers had to alter their route, and had to start from the Chekhova street¹⁶¹³ instead of the Lenin Square as they originally requested.¹⁶¹⁴

1162. The fact that the organisers of these events were ultimately able to hold the gatherings in a different form does not prove any discrimination against any other persons. What it does show is that the organizers were able to fix any deficiencies in their applications on time, be flexible in order to find equally acceptable solutions for themselves and for the authorities, and complied with the relevant requirements of the legislation of the Russian Federation. If the applicants failed to do so – regardless of their ethnicity – their applications were dismissed, and the gatherings could not go ahead.

1163. Therefore, Ukraine failed to show that the Russian Federation acted in violation of Article 5 of the CERD, when it lawfully regulated public events in its territory, as there has been no difference in treatment of different ethnic groups either *de jure* or *de facto*. The evidence clearly shows that the Russian Federation treated every ethnic group equally: where the applicants, Russian, Ukrainian or Crimean Tatar complied with the lawful requirements, their public events were approved and successfully carried out, and where

¹⁶¹¹ Counter-Memorial (CERD), Annex 536.

¹⁶¹² Reply, Annex 132.

¹⁶¹³ Komsomolskaya Pravda, “Immortal Regiment 2018” in Crimea: Route and Time (3 May 2018), available at: <https://www.crimea.kp.ru/daily/26825.4/3863926/> (Annex 104).

¹⁶¹⁴ Counter-Memorial (CERD), Annex 595. This also confirms that the Lenina Square was also refused to Russian applicants, and not to Mejlis only.

the opposite was true – the applications were modified or dismissed regardless of the ethnic origin of those putting them in.

* * *

1164. As the above account shows, the Russian authorities never imposed any restrictions on the public events organised by the Crimean Tatars and Ukrainians based on the ethnic origin of their organizers or participants. Accordingly, Ukraine completely failed to substantiate its allegations of racial discrimination in this regard. As a result, there cannot be any pattern of discriminatory conduct, much less any sustained systematic campaign of racial discrimination with respect to these “culturally significant gatherings”.

X. THE RUSSIAN FEDERATION DID NOT BREACH THE CERD WITH REGARD TO CRIMEAN TATAR AND ETHNIC UKRAINIAN MEDIA IN CRIMEA

1165. In the Counter-Memorial, the Russian Federation explained that Ukraine's allegations with respect to the treatment of Crimean Tatar and Ukrainian media are unfounded.¹⁶¹⁵ It showed that the Russian Federation's legislative framework is similar to that of Ukraine,¹⁶¹⁶ and that the re-registration requirement was a regular formality.¹⁶¹⁷ The Russian Federation also demonstrated that its legislation has not been applied in an arbitrary manner, and that Ukrainian and Crimean Tatar media outlets and journalists were not targeted – either directly or indirectly.¹⁶¹⁸ The media outlets that failed to re-register did not receive licence for legitimate reasons that bear no relation to racial discrimination, and certainly cannot show any systematic campaign thereof.

1166. This chapter addresses the surviving parts of Ukraine's allegations concerning media corporations' discrimination. First, the Russian Federation will show that Ukraine's claims involving media corporations are beyond the Court's jurisdiction in the present case, as corporations are not protected under the CERD (**Section A**). Second, the Russian Federation will show that Ukraine's claims are in essence claims of discrimination based not on ethnic origin but on political opinion, which does not constitute an element in racial discrimination under the CERD (**Section B**). Third, the Russian Federation will show that Ukraine's new claims regarding indirect discrimination are inadmissible for going beyond the scope of the case determined by the Court in the Judgment of 8 November 2019 (**Section C**). Finally, it will be explained that Ukraine failed to prove any campaign of racial discrimination against Crimean Tatar and Ukrainian media (**Section D**). For the sake of good order, the Russian Federation will additionally address in **Appendix 6** to this Rejoinder each individual case that Ukraine attempts to portray in the Reply as discrimination of the Crimean Tatar or Ukrainian media on the merits.

¹⁶¹⁵ Counter-Memorial (CERD), ¶¶398-412; see also Counter-Memorial (CERD), Appendix E.

¹⁶¹⁶ *Ibid.*, Appendix E, ¶¶15-17.

¹⁶¹⁷ *Ibid.* Appendix E, ¶¶10-11.

¹⁶¹⁸ *Ibid.*, Appendix E, Sections II and III.

A. UKRAINE’S CLAIMS CONCERNING TREATMENT OF MEDIA CORPORATIONS AND ANY COLLATERAL EFFECTS THEREOF ARE BEYOND THE COURT’S JURISDICTION BECAUSE CORPORATIONS ARE NOT PROTECTED UNDER THE CERD

1167. At the outset, some observations are warranted with respect to the Court’s findings in its judgment on preliminary objections in *Qatar v. UAE*. There, the Court pointed out that because the CERD concerns only individuals or groups of individuals, any claims arising out of measures imposed on or taken in regard to media corporations or companies are, as such, outside the scope of the CERD and therefore of the Court’s jurisdiction.¹⁶¹⁹ Furthermore, the Court found that the term “institutions” in Article 2(1)(a) of the Convention refers to “collective bodies or associations, which represent individuals or groups of individuals”, to the exclusion of media corporations.¹⁶²⁰

1168. In its Memorial, submitted before this 2021 judgment of the Court, Ukraine essentially argued a case of rights of media outlets (media corporations)¹⁶²¹ being subjected to an allegedly unfair application of the re-registration requirement. Thus, Ukraine considered media outlets as individual right-holders that allegedly suffered as a result of the application of Russian legislation.

1169. In the Reply, Ukraine claims that the Court “proceeded to analyse Qatar’s claims concerning the effect of the media blockade on persons of Qatari national origin as claims of indirect discrimination”.¹⁶²² It conveniently forgets to mention another important finding in the *Qatar v. UAE* Judgment:

“The Court first observes that, according to the definition of racial discrimination in Article 1, paragraph 1, of CERD, a restriction may constitute racial discrimination if it “has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life”. Thus, the Convention prohibits all forms and manifestations of racial discrimination, whether arising from the purpose of a given restriction or from its effect. In the present case, while the measures based on current Qatari nationality may have collateral or secondary effects on persons born in Qatar or of Qatari parents, or on family members

¹⁶¹⁹ *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. 106-107, ¶108.

¹⁶²⁰ *Ibid.*

¹⁶²¹ Memorial, ¶¶511-513; see also Counter-Memorial (CERD), ¶399.

¹⁶²² Reply, ¶619.

of Qatari citizens residing in the UAE, this does not constitute racial discrimination within the meaning of the Convention. In the Court’s view, the various measures of which Qatar complains do not, either by their purpose or by their effect, give rise to racial discrimination against Qataris as a distinct social group on the basis of their national origin. The Court further observes that declarations criticizing a State or its policies cannot be characterized as racial discrimination within the meaning of CERD. Thus, the Court concludes that, even if the measures of which Qatar complains in support of its “indirect discrimination” claim were to be proven on the facts, they are not capable of constituting racial discrimination within the meaning of the Convention.”¹⁶²³
[Emphasis added]

1170. Ukraine’s analysis is misleading. In reality, the Court, while treating Qatar’s claims as claims of “indirect discrimination”, held that such indirect or collateral effects claims did not constitute racial discrimination within the meaning of the CERD, and dismissed them at the Preliminary Objections stage.

1171. As the Russian Federation explained above,¹⁶²⁴ the important implication of the *Qatar v. UAE* judgment on this case is that even if Ukraine were able to prove that the measures taken by Russian authorities had any collateral effects on Ukrainian or Crimean Tatar communities, such claims would still have to be dismissed. Since media corporations are not covered under the CERD, any measures taken against them as such do not fall within the CERD, and neither do any collateral effects, which may have occurred as a result of such measures.

B. UKRAINE’S CLAIMS ARE IN ESSENCE CLAIMS OF DISCRIMINATION BASED ON POLITICAL OPINION, WITH NO CONNECTION TO ETHNIC ORIGIN, AND THUS BEYOND THE COURT’S JURISDICTION BECAUSE SUCH DISTINCTION DOES NOT CONSTITUTE RACIAL DISCRIMINATION UNDER THE CERD

1172. As the Russian Federation has demonstrated above,¹⁶²⁵ political views have nothing to do with ethnicity. Thus, any allegations based on political views are not regulated by the CERD. Yet Ukraine’s case concerns precisely unsubstantiated allegations of political oppression. In its Memorial, Ukraine accused the Russian Federation of a politically-

¹⁶²³ *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. 108-109, ¶112.

¹⁶²⁴ See above in ¶1116.

¹⁶²⁵ See above in Chapter III(E); see also Expert Report of Alexei Stanislavovich Avtonomov, 28 February 2023, Section B (Annex 18).

based limitation of freedom of expression. Specifically, Ukraine alleged that “a registration requirement [was] enforced as a means of excluding potentially critical voices in Crimean Tatar and Ukrainian media”¹⁶²⁶ and that “the Russian authorities used this requirement as a pretext to ban disfavored Crimean Tatar media entities”.¹⁶²⁷ Ukraine likewise referred to an alleged “interference with freedom of expression”¹⁶²⁸ and “harassment that Crimean Tatar and Ukrainian journalists and media organizations have faced and continue to face in Crimea”.¹⁶²⁹

1173. Thus, Ukraine did not truly center its case around racial discrimination – it accused the Russian Federation of silencing media outlets that opposed the change of status of Crimea. In the Reply, Ukraine attempts to save its case by quoting a sentence from the Memorial, which states:

“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”.¹⁶³⁰
[Emphasis added]

1174. Despite the rather short length of the paragraph, important conclusions can be drawn from it. Ukraine itself confirms that its case concerned the freedom of opinion and freedom of expression for those opposing the Russian Federation in Crimea *generally*.

1175. By using the qualifier “*in particular*”, which ordinarily means “*specifically*”, or “*one of*”, but not “*exclusively*”, Ukraine argues and indeed concedes that Crimean Tatars and Ukrainians were in fact part of a larger group of inhabitants of Crimea whose rights were allegedly “burdened”. Needless to add, this statement in no way shows that these two groups were affected disproportionately, or any differently than any other ethnic group in Crimea that stood in political opposition to the Russian Federation’s authorities.

¹⁶²⁶ Memorial, ¶505.

¹⁶²⁷ *Ibid.*, ¶511.

¹⁶²⁸ *Ibid.*, ¶510.

¹⁶²⁹ *Ibid.*, ¶521.

¹⁶³⁰ Reply, ¶620.

1176. This is similar to the UAE’s argument in *Qatar v. UAE*, where the latter argued that “there cannot be racial discrimination within the meaning of the CERD, as the effects of the blocking of transmissions are felt by all individuals within the UAE”.¹⁶³¹

1177. Since Ukraine’s position is that some media outlets were closed because of what they were saying, and not because of who they were ethnically, such claims are outside the scope of the CERD.

C. UKRAINE’S NEW CLAIMS REGARDING “INDIRECT DISCRIMINATION” ARE INADMISSIBLE FOR GOING BEYOND THE SCOPE OF THE CASE DETERMINED BY THE COURT

1178. As the Russian Federation explained above in Chapter III, Ukraine’s “new claims” that go beyond the scope of the case determined by the Court in the Judgment of 8 November 2019, are inadmissible.¹⁶³² Perhaps aware of this, Ukraine attempts to modify its case in the Reply. Now, it presents its claims not as based on media corporations or legal entities as right-holders,¹⁶³³ but alleges a discriminatory impact of the restrictions on media activities on the Crimean Tatar and Ukrainian communities in Crimea.¹⁶³⁴

1179. First of all, as explained in Chapter III above, Ukraine’s reformulation of its claims as “indirect discrimination” is wholly incompatible with the notion of a “systematic racial discrimination campaign”, to which the scope of the present dispute is limited. Ukraine’s manipulation of the subject-matter of the case and attempt to circumvent the Court’s Judgment of 8 November 2019 must accordingly be rejected.

1180. In any event, as the Russian Federation has demonstrated in the Counter-Memorial, and will further elaborate on below, Ukraine has not proven that any of the decisions or measures imposed on the media in Crimea is discriminatory against Crimean Tatars or Ukrainians on the basis of their ethnic origin.

¹⁶³¹ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Preliminary Objections of the United Arab Emirates, ¶136.

¹⁶³² See above in Chapter III(C).

¹⁶³³ See Memorial, ¶¶511-513; Application instituting proceedings, ¶¶109-110.

¹⁶³⁴ Reply, ¶621.

D. UKRAINE FAILED TO PROVE ANY SYSTEMATIC CAMPAIGN OF RACIAL DISCRIMINATION AGAINST CRIMEAN TATAR AND UKRAINIAN MEDIA

1181. Importantly, Ukraine's case fails to show any systematic campaign or policy framework authorized or directed by the Russian Federation,¹⁶³⁵ directed against Crimean Tatar and Ukrainian media. There is simply no such policy framework. At no point in Ukraine's submissions does it provide evidence that there has been any differential treatment of Crimean Tatar and Ukrainian media when compared to other, Russian media, or that any measures have been taken based on the ethnic background of such media.

1182. The facts presented below in Appendix 6 show that there has been no mistreatment with respect to the individual media outlets. It should be noted that Ukraine failed to disprove the Russian Federation's account on the existence of a vibrant and diverse media landscape in Crimea.¹⁶³⁶ Ukraine also cannot disagree with the fact that over 200 media organizations that had been created under Ukrainian law, were re-registered in Crimea.¹⁶³⁷

1183. In reality, the vast majority of Crimean Tatar and Ukrainian media continue to freely operate under the same conditions and regulations as the Russian media.¹⁶³⁸ Nothing in Ukraine's case shows any differential treatment, which is essential for a finding of discrimination. As elaborated below in Appendix 6, individual instances that Ukraine refers to are incapable of constituting racial discrimination on their own, let alone evidence "a systematic campaign of racial discrimination".

1184. In an attempt to disprove the Russian Federation's description of the broad and diverse media landscape in Crimea, where 65 Ukrainian and Crimean Tatar media operate,¹⁶³⁹ Ukraine refers to the closure of some (38 out of 105) media outlets previously registered in the Russian Federation and concludes that "the Russian Federation cannot claim that media organizations are serving the Crimean Tatar and Ukrainian communities when

¹⁶³⁵ See above in Chapter III(B).

¹⁶³⁶ Counter-Memorial (CERD), Appendix E, ¶¶21-26.

¹⁶³⁷ Roskomnadzor, *232 Media Outlets Registered in Crimea* (2 April 2015), available at: <https://rk.gov.ru/ru/article/show/1502>. (Annex 128)

¹⁶³⁸ Witness Statement of ██████████, 18 February 2023, ¶6 (Annex 27).

¹⁶³⁹ Roskomnadzor, List of existing media outlets operating in the territory of the Republic of Crimea and/or Sevastopol fully or primarily in Ukrainian and/or Crimean Tatar from 18.03.2014 until present time (Annex 482).

those organizations are no longer in operation.”¹⁶⁴⁰ Even taken at face value, this allegation only confirms that the majority of these outlets continue operating. Nonetheless, Ukraine’s allegation is baseless and is found on the distortion of statistics. As Ukraine’s evidence shows, the vast majority of the media (33 out of 38) were liquidated by the owners’ own decision¹⁶⁴¹ and Ukraine does not argue otherwise. As for the media outlets closed by judicial decisions (of which there were only six in total, which estimates at roughly 5% of all open outlets and 14% of all closures), all such outlets were closed due to the fact that they did not publish any materials for one year – which is a mandatory ground for closure under Article 15 of the Russian media law.¹⁶⁴² Besides, the media outlets were closed in different periods of time from 2015 to 2022, with most closures happening from 2018 onwards. Therefore, it is implausible for Ukraine to state that the closed media *never* served the Crimean Tatar and Ukrainian communities or had not served the communities at the time Ukraine filed its Application with the Court. Given these low numbers of closing media outlets, it is not possible to speak of a systematic campaign .of racial discrimination.

1185. To make further comparisons, in the year 2015, in the entirety of the Russian Federation, territorial departments of *Roskomnadzor* have liquidated 4,825 media outlets, the vast majority of which in this year as well as in following years were Russian media resources that have nothing to do with ethnic minorities, and of which 2,440 (over 50%) were liquidated by judicial decision, and 2,385 by their owners’ decision.¹⁶⁴³ In 2016, that number dropped to 4,028, of which 1,583 (approximately 37%) were closed by judicial

¹⁶⁴⁰ Reply, ¶627.

¹⁶⁴¹ Reply, Annex 98.

¹⁶⁴² Dzerzhinsky District Court of St Petersburg, Case No. 2a-863/22, Decision, 15 March 2022 (Annex 447); Yevpatoria City Court of the Republic of Crimea, Case No. 2a-1433/2021, Decision, 22 September 2021 (Annex 448); Topchikhinsky District Court of the Altai Krai, Case No. 2a-161/2021, Decision, 4 June 2021 (Annex 449); Central District Court of the City of Simferopol of the Republic of Crimea, Case No. 2a-1105/2022, Decision, 21 February 2022 (Annex 450); Central District Court of the City of Simferopol of the Republic of Crimea, Case No. 2a-4159/16, Decision, 30 September 2016 (Annex 451); Yalta City Court of the Republic of Crimea, Case No. 2a-2964/2022, Decision, 29 July 2022 (Annex 452).

¹⁶⁴³ Roskomnadzor, Report on Registration of Media Outlets, 2016, available at <https://rkn.gov.ru/mass-communications/smi-registation/p885/> (Annex 406).

decision, and 2,445 by owners' decision.¹⁶⁴⁴ In 2017, 4,167 media outlets were liquidated, of which 2,135 by judicial decision, and 2,032 by owners' decision.¹⁶⁴⁵

1186. More than anything, the data confirms that far fewer Crimean Tatar media were closed by judicial decisions in Crimea as compared to the rest of the Russian Federation. If compared to other regions of the Russian Federation,¹⁶⁴⁶ the numbers of closed media outlets in Crimea likewise shows no abnormalities. For instance, in the year of 2016, the Crimean territorial department of Roskomnadzor has annulled only 12 media licences, as opposed to over 100 such cases in Chelyabinsk Region, or over 170 cases in the Samara Region. Therefore, Ukraine's arguments of racial discrimination are not supported by the evidence.

1187. Ukraine's complaints about the content and character of the registered media outlets are baseless and misleading. Ukraine attempts to argue that "a majority of [these] outlets ... are print magazines", and that they do not reach the broader population.¹⁶⁴⁷ However, in the list provided by the Russian Federation, from which Ukraine selectively picks print magazines, there are at least 30 newspapers, 9 radio channels, 10 TV Channels and 6 online media. Moreover, the fact that most outlets are printed media is in line with the general trend in the Russian Federation, as more than half of registered media between 2014 and 2016 were print media.¹⁶⁴⁸

1188. As for Ukraine's allegations that these media do not use Crimean Tatar as their language, again those are factually incorrect. Ukraine's arguments can easily be refuted by accessing the TV Programme of the Millet Channel, which contains various broadcasts in Crimean Tatar.¹⁶⁴⁹ Moreover, according to *Roskomnadzor's* statistical information, in 2017, as many as 56 media outlets were operating in Crimea in Crimean-Tatar

¹⁶⁴⁴ *Ibid.*

¹⁶⁴⁵ Roskomnadzor, Report on Registration of Media Outlets, 3rd Quarter of 2017, available at: <https://rkn.gov.ru/mass-communications/smi-registation/p885/> (Annex 125); Roskomnadzor, on Registration of Media Outlets, 4th Quarter of 2017, available at: <https://rkn.gov.ru/mass-communications/smi-registation/p885/> (Annex 127).

¹⁶⁴⁶ Roskomnadzor, Data on media outlets registration between 01 January 2016 and 31 December 2016, available at: <https://rkn.gov.ru/mass-communications/smi-registation/p885/> (Annex 172).

¹⁶⁴⁷ *Ibid.*, ¶628.

¹⁶⁴⁸ Roskomnadzor, Report on Registration of Media Outlets, 2016, available at: <https://rkn.gov.ru/mass-communications/smi-registation/p885/> (Annex 406).

¹⁶⁴⁹ Witness Statement of Ervin Kyazimovich Musaev, ¶21 (Annex 33); ANO OKTRK, Letter, 8 February 2023 (Annex 173).

language.¹⁶⁵⁰ With respect to Ukrainian language, it is worth noting multiple resources continue their work in Ukrainian with no harassment or pressure from the authorities, such as “Krym Sjogodni” magazine, “Krymskiy Visnyk” and Pereyaslavskaya Rada 2.0 Internet-resource¹⁶⁵¹

1189. Again, currently over 60 media continue operating in Crimean Tatar and Ukrainian languages, their content aimed at different audiences and issued in different forms. The corresponding list, which dispels Ukraine’s unfounded accusations, is annexed to this Rejoinder.¹⁶⁵²

1190. Ukraine also tries to blame the Russian Federation for the “mass exodus” of Crimean Tatar and Ukrainian media organizations,¹⁶⁵³ and the alleged difficulty of reaching them online. However, it fails to prove if there was in fact any such “exodus” and that it were the Russian Federation’s actions (as opposed to commercial/business considerations) that inspired the media organizations to move to Ukraine. Ukraine also accuses the Russian Federation of blocking “popular websites”. However, according to Ukraine’s own source,¹⁶⁵⁴ those include the websites of Mejlis, Jehovah’s Witnesses (extremist organizations) and the Ministry of Reintegration of the “Temporarily Occupied Territories of Ukraine”. Thus, such data disproves any notion of racial discrimination yet again. It is also ironic how Ukraine accuses the Russian Federation of blocking access to some Ukrainian websites, considering that Ukraine itself closes access to Russian websites¹⁶⁵⁵ and mass media¹⁶⁵⁶ to people in its territory, and denies access to its own websites from the territory of the Russian Federation.

¹⁶⁵⁰ Roskomnadzor, *483 Media Outlets Operate in Crimea* (18 March 2017), available at: <https://rkn.gov.ru/news/rsoc/news43573.htm> (Annex 130).

¹⁶⁵¹ Second Witness Statement of [REDACTED], 22 February 2023, ¶15 (Annex 10).

¹⁶⁵² Roskomnadzor, List of existing media outlets operating in the territory of the Republic of Crimea and/or Sevastopol fully or primarily in Ukrainian and/or Crimean Tatar from 18 March 2014 until present time (Annex 482).

¹⁶⁵³ Reply, ¶631.

¹⁶⁵⁴ *Ibid.*, Annex 103 (cited by Ukraine at fn 1238).

¹⁶⁵⁵ Ria.ru, *In Ukraine An Almost Complete Blocking of Access to Russian Websites Was Announced* (20 April 2022), available at: <https://ria.ru/20220420/sayty-1784463195.html> (Annex 464).

¹⁶⁵⁶ TASS, *Re-Broadcasting of 15 Russian Channels Was Banned in Ukraine* (9 September 2014), available at: <https://tass.ru/mezhdunarodnaya-panorama/1430068> (Annex 465).

1191. Further, Ukraine’s contentions that “not all of [media organizations catering to the Crimean Tatar and Ukrainian communities] are independent” is to no avail.¹⁶⁵⁷ First of all, this accusation has nothing to do with the Russian Federation’s obligations under the CERD. The characterization of Millet and Vatan Sedasy as “sort of Russian state propaganda” is not supported by any evidence. The activities of these outlets are overseen by a community council on the contrary shows that they are closely linked to the Crimean Tatar community and represents its interests. In fact, any accusations of “propaganda” can be dispelled by looking at the programme of the these channels, which consists of politically neutral broadcasts. Mr Ervin Musaev, formerly head of Millet channel, also denied any kind of involvement by the State during his tenure at Millet.¹⁶⁵⁸ He confirms that the broadcasting programmes were defined by the interest of the viewers, not by any directives from above. The only piece of evidence Ukraine cites in this regard is some speculative comments of the former boss of the Mejlis, Mr Refat Chubarov, which, as shown in multiple parts of the Counter-Memorial and the Rejoinder, has engaged in several extremist activities. Mr Chubarov is obviously biased and represents the opinion of the Ukrainian Government; he also supports and promotes the interests of another media company, ATR, which belongs to his supporter and partner in extremist activities Mr Islyamov, and is obviously unhappy about the popularity of Millet. Thus, Ukraine’s assertions that the media landscape in Crimea is not diverse are entirely unsubstantiated.

1192. Millet broadcasts around 50% and produces over 80% of its own content in Crimean-Tatar;¹⁶⁵⁹ its primary aim is to promote and preserve Crimean Tatar culture and language. This is further evidenced by the fact that out of 22 programs broadcast at Millet, 14 are fully in Crimean Tatar, 6 are bilingual, and only 2 are broadcast fully in Russian.¹⁶⁶⁰ Examples of its programs broadcast in recent times are:

- (a) “Vatan Khatyrasy” is a program that provides the audience with information about the great figures among the Crimean Tatar people and preserves the memory of them. This program airs every week on Saturdays;¹⁶⁶¹

¹⁶⁵⁷ Reply, ¶630.

¹⁶⁵⁸ Witness Statement of Ervin Kyazimovich Musaev, ¶25 (Annex 33).

¹⁶⁵⁹ ANO OKTRK, Letter, 8 February 2023, p. 2 (Annex 173).

¹⁶⁶⁰ *Ibid.*

¹⁶⁶¹ Millet, *Vatan Khatirasi* (17 February 2023), available at: <https://trkmillet.ru/programs/vatan-khatirasi/> (Annex 132).

- (b) “History of the Crimean Tatars” is a program about the life of the Crimean Tatar people during the time of the Crimean Khanate, about the monuments and objects of cultural heritage that have survived from those times until now. This program airs three times a week - on Monday, Wednesday, and Friday;¹⁶⁶²
- (c) “Crimean Family” is a program talking about representatives of various ethnic groups living in Crimea and their traditions.¹⁶⁶³
- (d) “Kyrymda Bayram” is a program in the Crimean Tatar language about the culture and traditions of the Crimean Tatar people;¹⁶⁶⁴
- (e) “Millet Bereketi” is a culinary program about the national dishes of various ethnic groups living in Crimea;¹⁶⁶⁵
- (f) “Peoples of Crimea” is a program about the culture and traditions of the peoples of Crimea telling the audience about the centuries-old history and modern way of life;¹⁶⁶⁶
- (g) “Prime Time” is a daily information and news program airing at 18:45. It is usually in Russian, but once a week (on Thursdays) it is broadcast in the Crimean Tatar language.¹⁶⁶⁷ Also, the Haberler news program is aired several times a day in Russian and Crimean Tatar languages;
- (h) “Seyaatt” is a program about travel in the Crimean Tatar language. Aimed at the promotion of domestic tourism, it concerns interesting places in Crimea, which may be unknown to its residents;¹⁶⁶⁸

¹⁶⁶² Millet, *History of the Crimean Tatars Programme* (17 February 2023), available at: <https://trkmillet.ru/programs/istoriya-krimskikh-tatar/> (Annex 133).

¹⁶⁶³ Millet, *Crimean family* (17 February 2023), available at: <https://trkmillet.ru/programs/krimskaya-semya/> (Annex 134).

¹⁶⁶⁴ Millet, *Kirimda Bayram* (17 February 2023), available at: <https://trkmillet.ru/programs/kirimda-bayram/> (Annex 135).

¹⁶⁶⁵ Millet, *Millet Bereketi* (17 February 2023), available at: <https://trkmillet.ru/programs/millet-bereketi/> (Annex 136).

¹⁶⁶⁶ Millet, *The Peoples of Crimea: Diversity of Unity* (17 February 2023), available at: <https://trkmillet.ru/programs/narodi-krima-raznoobrazie-edinstva/> (Annex 137).

¹⁶⁶⁷ Millet, *Prime Time* (17 February 2023), available at: <https://trkmillet.ru/programs/praym-taym/> (Annex 138).

¹⁶⁶⁸ Millet, *Seyaatt* (17 February 2023), available at: <https://trkmillet.ru/programs/instaseyaat/> (Annex 139).

- (i) “Tarikh Izleri” is a program about the old Crimean Tatar villages and settlements, which tells about the life and traditions of local residents. The show comes out every two weeks;¹⁶⁶⁹
- (j) “Tek Arzum Vatan” is a program in the Crimean Tatar language about the culture, customs and traditions of the Crimean Tatars, aired weekly;¹⁶⁷⁰
- (k) “Yurt Nefesi” is a program in the Crimean Tatar language, which gives its viewers the opportunity to watch interviews with cultural, religious and public figures. The show comes out weekly;¹⁶⁷¹
- (l) “Yayla Boyu”¹⁶⁷² and “Chalgidzhi Live”¹⁶⁷³ are programs dedicated to the popularization of music, folk songs and dances of the Crimean Tatar people;
- (m) “Ana Yurtun - Altyn Beshik” is a program in the format of short instructional videos, in which prominent social and religious figures state their position in the Crimean Tatar language and give instructions on a number of issues;¹⁶⁷⁴
- (n) “Diniy Subet”,¹⁶⁷⁵ “World of Islam”,¹⁶⁷⁶ “Khyzmet Ve Bereket”¹⁶⁷⁷ are religious and educational information programs in the Crimean Tatar and Russian languages, dedicated to Islam and its impact on modern society. Within the framework of these broadcasts, the Crimean Tatar population, predominantly professing Islam, can get to know the traditions of their religion more closely and find the answers to their questions;

¹⁶⁶⁹ Millet, *Tarikh Izleri* (17 February 2023), available at: <https://trkmillet.ru/programs/tarikh-izleri/> (Annex 140).

¹⁶⁷⁰ Millet, *Tek Arzum Vatan* (17 February 2023), available at: <https://trkmillet.ru/programs/tek-arzum-vatan/> (Annex 141).

¹⁶⁷¹ Millet, *Yurt Nefesi* (17 February 2023), available at: <https://trkmillet.ru/programs/yurt-nefesi/> (Annex 142).

¹⁶⁷² Millet, *Yaylya Boyu* (17 February 2023), available at: <https://trkmillet.ru/programs/yaylya-boyu/> (Annex 143).

¹⁶⁷³ Millet, *Chalgidzhi Live* (17 February 2023), available at: <https://trkmillet.ru/programs/chalgidzhi-live/> (Annex 144).

¹⁶⁷⁴ Millet, *Ana Yurtun - Altyn Beshik* (17 February 2023), available at: <https://trkmillet.ru/programs/ana-yurtun-altin-beshik/> (Annex 145).

¹⁶⁷⁵ Millet, *Diniy Subet* (17 February 2023), available at: <https://trkmillet.ru/programs/diniy-subet/> (Annex 146).

¹⁶⁷⁶ Millet, *The World of Islam* (17 February 2023), available at: <https://trkmillet.ru/programs/mir-islama/> (Annex 147).

¹⁶⁷⁷ Millet, *Khizmet ve Bereket* (17 February 2023), available at: <https://trkmillet.ru/programs/khizmet-ve-bereket/> (Annex 148).

- (o) “Millet Khatyrlai” is a program in the format of short clips dedicated to the most tragic event in the history of the Crimean Tatar people – the deportation of Crimean Tatars in 1944. The program tells the stories of people who suffered from it and is aimed at preserving the historical memory of the Crimean Tatar people;¹⁶⁷⁸
- (p) “Miras” is an educational program in the Crimean Tatar language about the history, traditions and culture of the Crimean Tatars. The show comes out daily.¹⁶⁷⁹
- (q) “Erketai” is a children's entertainment program through which children, among other things, can learn the Crimean Tatar language. The show airs weekly;¹⁶⁸⁰
- (r) “Yukyu TIME” is a children's program in which children are told fairy tales in the Crimean Tatar language. Thanks to this program, children from a very early age have the opportunity to listen to their native language and learn it through fairy tales.¹⁶⁸¹

1193. It should also be noted that Ukraine did not disprove the Russian Federation’s evidence on numerous films, cartoons and shows broadcast at Millet in Crimean Tatar.¹⁶⁸² In 2022, this was no different, as 141 films and cartoons with the overall length of 65 hours and 36 minutes were broadcast at Millet.¹⁶⁸³ Moreover, in 2022 Millet filmed and broadcast programs featuring performances of Crimean Tatar pop stars and folk song and dance groups, as well as those of the Crimean Tatar Academic Music and Drama Theater in the Crimean Tatar language.¹⁶⁸⁴

1194. In 2022, numerous documentaries were filmed on significant events and important people in Crimean Tatar culture, i.e. on the deportation of Crimean Tatars (“Long Road

¹⁶⁷⁸ Millet, *Millet Khatirlyay* (17 February 2023), available at: <https://trkmillet.ru/programs/millet-khatirlyay/> (Annex 149).

¹⁶⁷⁹ Millet, *Miras* (17 February 2023), available at: <https://trkmillet.ru/programs/miras/> (Annex 150).

¹⁶⁸⁰ Millet, *Yerketay* (17 February 2023), available at: <https://trkmillet.ru/programs/yerketay/> (Annex 151).

¹⁶⁸¹ Millet, *Yuku Time* (17 February 2023), available at: <https://trkmillet.ru/programs/yukutime/> (Annex 152).

¹⁶⁸² Council of Ministers of the Republic of Crimea, Information note on measures taken to implement the Decree No. 268 of the President of the Russian Federation and other activities aimed at promoting cultures of the Ukrainian and Crimean Tatar peoples, as attached to Letter No. 1/01-46/8775/3/1, 5 June 2020 (excerpts), see Counter-Memorial (CERD), Annex 498.

¹⁶⁸³ ANO OKTRK, Letter, 8 February 2023, p. 3 (Annex 173).

¹⁶⁸⁴ *Ibid.*, p. 5.

Home”)¹⁶⁸⁵ and on persons that contributed to the promotion of the Crimean Tatar language. Namely, films were produced on Fevzi Bilyalov (the author of the only opera in Crimean Tatar),¹⁶⁸⁶ Asan Refatov (composer),¹⁶⁸⁷ Abduraim Reshidov (Hero of the Great Patriotic War).¹⁶⁸⁸ Now, Millet is shooting two further documentaries on Crimean Tatars – one of them is dedicated to the composer Ilyas Bakhshish, while the other is about gunsmith, artist and jeweller Amet Kalafatov.¹⁶⁸⁹

1195. Ervin Musaev, the former head of Millet, also notes in his witness statement that the Millet Channel takes part in the organization and coverage of major events aimed at promoting the Crimean Tatar culture, such as competitions in the traditional Crimean Tatar wrestling kuresh, the festival of the Crimean Tatar culture Hydyrlez, events dedicated to Islamic holidays, such as Eid al-Fitr.¹⁶⁹⁰

1196. Therefore, contrary to Ukraine’s allegations, the media landscape in Crimea does not show any sign of discrimination. On the contrary, it allows each culture, including Crimean Tatars and ethnic Ukrainians, to preserve and promote their history, language and culture.

1197. It follows that the Russian Federation did not breach the CERD in dealing with Crimean Tatar and ethnic Ukrainian media organizations. Once again, Ukraine’s arguments cannot be sustained in fact or in law.

¹⁶⁸⁵ Millet, *Documentary "The Long Way Home"* (18 May 2022), available at: <https://trkmillet.ru/program-episode/dokumentalnyy-film-dolgaya-doroga/> (Annex 153).

¹⁶⁸⁶ Millet, *Documentary "Fevzi Bilyalov: Singer for All Times..."* (5 November 2022), available at: <https://trkmillet.ru/program-episode/dokumentalnyy-film-fevzi-bilyalov/> (Annex 154).

¹⁶⁸⁷ ANO OKTRK, Letter, 8 February 2023, p. 5 (Annex 173).

¹⁶⁸⁸ *Ibid.*

¹⁶⁸⁹ *Ibid.*

¹⁶⁹⁰ Witness Statement of Ervin Kyazimovich Musaev, ¶23 (Annex 33).

XI. THERE IS NO RACIAL DISCRIMINATION WITH RESPECT TO PRESERVATION OF CULTURAL HERITAGE

1198. As explained in the Counter-Memorial,¹⁶⁹¹ Ukraine's claims concerning an alleged degradation of cultural heritage as evidence of a planned "systematic racial discrimination campaign" by the Russian Federation targeted against the Crimean Tatar and Ukrainian communities is a clear illustration of Ukraine's unsubstantiated and bad faith position. More specifically, the Russian Federation showed that the works related to the Khan's Palace have been carried out for much needed restoration purposes because of the dire conditions in which Ukraine itself left the site, and that the Russian Federation's efforts in this regard evidence no racial discrimination of any sort, but on the contrary support for the Crimean Tatar community. Similarly, it was shown that Ukraine's claim regarding an alleged "harassment and closure of Ukrainian cultural institutions" does not withstand scrutiny as the factual allegations made by Ukraine are incorrect, selective, distorted, and taken out of context.

1199. Ukraine's Reply has been unable to disprove any of the evidence produced in the Counter-Memorial, yet Ukraine continues to make unfounded accusations, arguing that the Russian Federation has acted in breach of Articles 2(1), 5(e)(vi) and 6 of the CERD, and even levelling the extremely serious charge that the Russian Federation's plan is to carry out a "full-scale cultural erasure"¹⁶⁹². This chapter responds to the Reply as regards the alleged degradation of the cultural heritage of Crimean Tatar communities (**Section A**) and of Ukrainian communities (**Section B**), reaffirming that none of the measures adopted by Russian authorities that Ukraine complains of amount to racial discrimination, nor do they evidence the existence of any "systematic racial discrimination campaign".

A. THE RUSSIAN FEDERATION PRESERVES THE CULTURAL HERITAGE OF CRIMEAN TATAR COMMUNITIES

1200. The Reply continues to make the restoration of the Khan's Palace the center piece of Ukraine's allegations on degradation of Crimean Tatar cultural heritage.¹⁶⁹³ In addition, Ukraine mentions in passing two new "facts", namely, the alleged demolition of Muslim

¹⁶⁹¹ Counter-Memorial (CERD), Chapter VI, Section VI and Appendix F.

¹⁶⁹² Reply, ¶¶645.

¹⁶⁹³ Reply, ¶¶647-655.

burial grounds to build the “Tavrida” Highway¹⁶⁹⁴ and the alleged destruction of the remains of the Palace of Kalga-Sultan Akmejisaray and the cultural layer of the ancient city of Akmejit.¹⁶⁹⁵ As shown below, all these claims are unfounded and ought to be dismissed.

1201. Three general remarks are warranted. *First*, citing the Court’s order on provisional measures in *Armenia v. Azerbaijan*,¹⁶⁹⁶ Ukraine states that “a State’s vandalization of cultural heritage sites can constitute a violation of the CERD”.¹⁶⁹⁷ The position of the Russian Federation in this issue is misrepresented by Ukraine.¹⁶⁹⁸ The question at issue in the present case is whether the restoration works of the Khan’s Palace undertaken by Russian authorities constitute a violation of the CERD for being part of a “systematic racial discrimination campaign” targeting the Crimean Tatar communities. The plain facts show that this is not the case.

1202. *Second*, Ukraine concedes that it “cannot itself conduct a thorough investigation of the harm being done to the Khan’s Palace” since it does not have access to first-hand or confirmed information allowing a proper appreciation of the restoration works.¹⁶⁹⁹ While this confirms that Ukraine’s factual allegations are indeed insufficient to establish a violation of the CERD, Ukraine also suggests that this is “a problem of [Russia’s] own making” because the latter allegedly refuses independent monitors access to Crimea.¹⁷⁰⁰ This is yet another manipulation of the facts by Ukraine. In reality, the Russian Federation has on multiple occasions invited organizations such as the OSCE, the UNESCO, and the OHCHR to visit Crimea and observe the measures adopted by local

¹⁶⁹⁴ Reply, ¶657.

¹⁶⁹⁵ Reply, ¶¶658-659.

¹⁶⁹⁶ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)*, Provisional Measures, Order, 7 December 2021, I.C.J. Reports 2021, p. 383, ¶61 (“The Court also considers plausible the rights allegedly violated through incitement and promotion of racial hatred and discrimination against persons of Armenian national or ethnic origin by high-ranking officials of Azerbaijan and through vandalism and desecration affecting Armenian cultural heritage”).

¹⁶⁹⁷ Reply, ¶647.

¹⁶⁹⁸ At fn 1272, the Reply refers to Appendix F of the Counter-Memorial (CERD), ¶8, fn. 19, but it nowhere states that the Russian Federation considers that a State vandalism of cultural heritage would not be contrary to the CERD if established.

¹⁶⁹⁹ Reply, ¶648.

¹⁷⁰⁰ *Ibid.*

and federal authorities to preserve cultural heritage in Crimea.¹⁷⁰¹ Regardless of this, Appendix F of the Counter-Memorial and this Chapter provide a full account of all the relevant facts based on first-hand evidence.

1203. *Third*, Ukraine fails to take into account the numerous measures adopted by Russian authorities with a view to maintaining and promoting the cultural heritage of Crimean Tatar communities. For example:

- (a) the Russian authorities funded the construction of the Cathedral Mosque in Simferopol, a site of overwhelming importance for Crimean Tatars and Muslims;¹⁷⁰²
- (b) the Russian authorities have transferred all cultural sites that bear significance to the Crimean Tatars into the ownership of the local Muslim communities (*ummahs*);¹⁷⁰³ and
- (c) the Russian authorities began assisting and sponsoring the Crimean Tatars' pilgrimage trips to Mecca (*hajj*).¹⁷⁰⁴

1204. The correctness of the Russian Federation's approach to Crimean Tatar culture is also confirmed by the testimonies of people from the sphere of culture:

¹⁷⁰¹ See, e.g., Statement by Mr. Dmitry Balakin, Deputy Permanent Representative of the Russian Federation at the 1177th Meeting of the OSCE Permanent Council, 1 March 2018, PC.DEL/209/19, available at: <https://www.osce.org/files/f/documents/b/b/381229.pdf>; Statement by Mr. Alexander Lukashevich, Permanent Representative of the Russian Federation at the 1220th Meeting of the OSCE Permanent Council, 14 March 2019, PC.DEL/209/19, available at: <https://www.osce.org/files/f/documents/5/c/414629.pdf>; Statement by Mr. Alexander Lukashevich, Permanent Representative of the Russian Federation at the 1306th Meeting of the OSCE Permanent Council via Video Teleconference, 18 March 2021, PC.DEL/360/21/Rev.1, available at: <https://www.osce.org/files/f/documents/3/3/483326.pdf>; Commentary of the Russian Federation's Permanent Representatives at the OSCE, 18 March 2020 (Annex 441). See also Second Witness Statement of ██████████, 7 March 2023, ¶¶4-6 (Annex 23). All organisations refused the invitation to visit Crimea.

¹⁷⁰² See Witness Statement of ██████████, 22 February 2023, ¶29 (Annex 11); First Witness Statement of ██████████, 9 June 2021, ¶¶35-38 (Counter-Memorial (CERD), Annex 19). As Mr ██████████ notes, Ukraine in contrast always put obstacles to the construction of the Cathedral Mosque.

¹⁷⁰³ Tatar-inform.ru, *Mufti of Crimea: "We cannot repeat the mistake we made in 1783"* (13 August 2022) (Annex 160), available at: <https://www.tatar-inform.ru/news/muftii-kryma-my-ne-mozem-povtorit-osibku-kotoruyu-soversili-v-1783-godu-5872339>; TASS, *Head of the Council of Muftis of the Russian Federation: Crimean Tatars will be able to regain ownership of their mosques* (1 April 2014), available at: <https://tass.ru/obschestvo/1090066> (Annex 161).

¹⁷⁰⁴ See First Witness Statement of ██████████, 9 June 2021, ¶¶32-34 (Counter-Memorial (CERD), Annex 19), and sources referenced there.

- (a) In 2019-2021 Crimean authorities conducted repairs of the Crimean Tatar Academic Music and Drama Theatre (the one and only Crimean Tatar theatre in the world), which were required well before 2014. According to the theatre’s director [REDACTED] the Crimean Tatar community freely promotes its culture and language, major part of the plays in the theatre being conducted in Crimean Tatar and Russian. State financing covers all necessary expenditures and the revenue from the ticket sell is distributed among the theatre staff.¹⁷⁰⁵
- (b) The Russian Federation’s financing was vital for the continuance of the Crimean Tatar dance ensemble “Haytarma”. The Crimean state philharmonic which hosts the ensemble receives over 200 million roubles each year. Apart from Crimean Tatar dances, the ensemble “Haytarma” also performs traditional Ukrainian dances.¹⁷⁰⁶ There are, naturally, many other local Crimean Tatar ensembles active all over the peninsula.
- (c) The Russian Federation spent almost half a billion roubles on a Memorial complex, the “Suren”, devoted to the victims of deportation. The complex is currently assigned to the Crimean Tatar Museum,¹⁷⁰⁷ which in addition regularly hosts various events devoted to the Crimean Tatar language and culture.¹⁷⁰⁸
- (d) The Crimean Minister of Culture Tatiana Manezhina describes many more cultural events aimed at the promotion of the Crimean Tatar culture in her witness statement.¹⁷⁰⁹

1205. The adoption of these measures flatly disproves Ukraine’s claim that the Russian Federation seeks to “erase” the cultural heritage of Tatar communities as part of a “systematic racial discrimination campaign”. To the contrary, they show that the Russian

¹⁷⁰⁵ Witness Statement of [REDACTED], 2 March 2023, ¶¶5-9 (Annex 14).

¹⁷⁰⁶ Witness Statement of [REDACTED], 7 March 2023, ¶¶6, 11-13 (Annex 28).

¹⁷⁰⁷ Witness Statement of [REDACTED], 7 March 2023, ¶¶4-5 (Annex 29).

¹⁷⁰⁸ Witness Statement of [REDACTED], 7 March 2023, ¶7 (Annex 29).

¹⁷⁰⁹ Witness Statement of [REDACTED], 7 March 2023, ¶7 (Annex 16).

Federation, as a multi-ethnic State, actively supports Crimean Tatars by promoting their important cultural legacy.¹⁷¹⁰

i. The Restoration of the Khan’s Palace

1206. In the Reply, which for the most part reproduces the factual allegations made in the Memorial without presenting any new substantial evidence,¹⁷¹¹ Ukraine claims that the restoration works at the Khan’s Palace amount to a “cultural dismantling”.¹⁷¹² It is remarkable, to say the least, that after neglecting this important cultural site for years and allowing it to crumble, Ukraine now takes issue with the significant efforts undertaken by the Russian Federation to restore it to its original splendour.

1207. Ukraine’s case on the Khan’s Palace rests essentially on certain damages that were allegedly suffered by the complex during the restoration works.¹⁷¹³ The few press reports and the Chatham House blogpost that Ukraine relies on to make this claim, however, were disproven by the documented witness statement (including photographs) of [REDACTED]
[REDACTED]
[REDACTED]¹⁷¹⁴ as well as by the witness statement of [REDACTED] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].¹⁷¹⁵ Ukraine did not engage with this evidence in

¹⁷¹⁰ This is confirmed by the Crimean Tatars themselves, who are generally of the view that the situation regarding cultural heritage in Crimea has improved since 2014. See, for example, Witness Statement of [REDACTED] ¶¶29-30 (Annex 11); Witness Statement of [REDACTED], 6 March 2023, ¶¶54-56 (Annex 17).

¹⁷¹¹ Memorial, ¶523-526.

¹⁷¹² Reply, ¶649.

¹⁷¹³ More particularly, Ukraine alleges that there was (1) interior damage due to flooding and snow; (2) destruction of historical handcrafted tiles (“Tatarka”) from the roof of the mosque, replaced by modern Spanish tiles; (3) damage to 18th-century paintings and original roof beams; (4) cracks on the façade of the building (*see* Reply, ¶649) and (5) complete replacement of the original oak anti-seismic belt (Memorial, ¶524).

¹⁷¹⁴ Witness Statement of [REDACTED], 9 June 2021 (Counter-Memorial (CERD), Annex 20). Ukraine seeks to swiftly dismiss the witness statement as a whole, arguing that the qualifications of [REDACTED] are insufficient (Reply, ¶649). This, however, shows Ukraine’s clear discomfort with the statement, which constitutes first-hand evidence provided by a person closely involved in the restoration of the Khan’s Palace. The account of [REDACTED] is further supported by the Witness Expert Statement of Ms [REDACTED] 6 March 2023 (Annex 24), who also possess factual knowledge and expertise on the matter.

¹⁷¹⁵ Counter-Memorial (CERD), Appendix F, ¶¶2-20; Witness Statement of Yulia Alexandrovna Ivanishkina, 19 March 2021 (Counter-Memorial (CERD), Annex 15), ¶¶26-27.

any detail in the Reply, which cannot but confirm the falsity of its allegations. Notably, Ukraine has not challenged that:

- (a) The historical hand-made roof tiles (“Tatarka”) in the Khan’s Mosque were in fact missing due to several replacements throughout the history of the Khan’s Palace;¹⁷¹⁶
- (b) The wood flooding that took place in December 2017 due to heavy rain was quickly fixed, and the waterproofing layer was restored;¹⁷¹⁷ and
- (c) The replacement of wooden roof beams was carried out due to the critical stage in which they were found, notably due to fungal and entomological damage.¹⁷¹⁸

1208. More generally, Ukraine conveniently ignores basic material facts, including the reasons for the restoration project initiated by the Russian authorities; the funds provided by the Russian Federation for the restoration works; and the results of the restoration to date.

1209. As to the reasons for the restoration works, Ukraine has not denied that such works were urgently required because of the poor conditions in which the Khan’s Palace was found.¹⁷¹⁹ Indeed, Ukraine only appears to dispute the number of roof beams that were in critical need of repair.¹⁷²⁰ Ukraine is noticeably hesitant in contesting that the conditions of the Palace were due to its own failure to take appropriate measures in the past.¹⁷²¹ To deny this, it merely indicates that the Ukrainian Restoration Research and Design Institute conducted “regular scientific studies” (not actual restoration work) of the Khan’s Palace complex.¹⁷²² Ukraine further argues that the Institute “was actively working on restoring the Khan’s Palace prior to Russian occupation in 2014”, but

¹⁷¹⁶ Counter-Memorial (CERD), Appendix F, ¶¶12.

¹⁷¹⁷ Counter-Memorial (CERD), ¶43.

¹⁷¹⁸ Counter-Memorial (CERD), ¶¶32-35, 40. *See also* Second Witness Statement of Vadim Leonidovich Martynuk, 7 March 2023, ¶13 (Annex 23).

¹⁷¹⁹ Counter-Memorial (CERD), Appendix F, ¶6.

¹⁷²⁰ Reply, ¶654.

¹⁷²¹ *Ibid.*, ¶653.

¹⁷²² *Ibid.*

provides no evidence of such restoration work.¹⁷²³ In fact, these claims are false because Ukraine never invested into proper research or archaeological works.¹⁷²⁴

1210. Ukraine further overlooks the fact that, to date, the Russian Federation provided the sum of RUB 3.6 billion (circa USD 50 mln) to restore the Khan's Palace.¹⁷²⁵ These funds have been used to ensure proper repair of the Palace's infrastructure, which confirms the Russian Federation's commitment to maintaining and promoting the cultural heritage of the Crimean Tatar community. Needless to say, if Ukraine's accusation that the Russian plan is to carry out a "full-scale cultural erasure" were true, such a significant amount of resources would have never been allocated to the restoration of the Palace in the first place.

1211. With respect to the results of the restoration works to date, they are still ongoing and it is expected that they will be finalised by 2024, thereby allowing Crimean Tatars to benefit once more from the Palace in its original splendour and promoting their cultural legacy. It is noteworthy that, during the restoration process, archaeologists have discovered new cultural objects and sites within the complex, which will allow the study and understanding of new aspects of the Crimean Tatar culture.¹⁷²⁶

1212. In light of the above, there is no doubt that restoring the Khan's Palace was an utmost necessity and that Russian authorities have taken their obligations in this regard seriously. Given that in its Reply Ukraine continues to misrepresent certain facts, however, some additional details concerning the restoration work are warranted:

- (a) At the preliminary stage of the restoration process, all necessary studies were carried out, including archaeological ones. This was done in compliance with the

¹⁷²³ *Ibid.* Fn. 1296 in the Reply merely provides a link to a Ukrainian governmental website called "Virtual Museum of Russian Aggression", created after Ukraine instituted the present proceedings, which contains no evidence of restoration work carried out before 2014.

¹⁷²⁴ Witness Statement of Tatiana Anatolyevna Manezhina, 7 March 2023, ¶26 (Annex 16).

¹⁷²⁵ Witness Statement of Tatiana Anatolyevna Manezhina, 7 March 2023, ¶28 (Annex 16); RIA, *Mufti Speaks about Restoration of Khan's Palace in Crimea* (17 February 2022) (Annex 162), available at: <https://ria.ru/20220217/dvoretz-1773343741.html>

¹⁷²⁶ Witness Statement of Tatiana Anatolyevna Manezhina, 7 March 2023, ¶27(b) (Annex 16).

applicable legislation of the Russian Federation, which is applied throughout its territory without distinctions of any sort.¹⁷²⁷

- (b) With respect to the wall paintings, their handling was executed in accordance with the approved restoration plan and the established practices for the protection of culturally significant objects.¹⁷²⁸ Notably, the murals were not damaged after 2014 – if any damage has been inflicted on the murals, this was before 2014.¹⁷²⁹
- (c) As to the alleged crack on a side wall of the tombstone, photographs show the absence of any significant alterations to its structure. This is clear from the comparison of photographs of the same tomb made prior and after the restoration works began.¹⁷³⁰ During the restoration works, all the tombs adjacent to the buildings under restoration have been protected from possible damage by wooden planks.¹⁷³¹
- (d) Regarding the cracks in the façade, allegedly caused by washing works, Ukraine’s case is once again wrong and misleading. A “gentle cleaning” technology was used at all times. However, Ukraine has not provided photographs or any visual evidence other than a reference to a UNESCO report, whose authors have not inspected in person the buildings of the museum complex. Any cracks that are present were caused by other reasons, for example due to deformation of part of the foundation and of the walls, which had been identified prior to the start of restoration works.¹⁷³²
- (e) The beams in the Mosque were in a depleted state and needed replacement. Since Crimea is located in a zone of high seismic activity, extra caution must be exercised when managing buildings in light of that natural threat. Accordingly, all beams, and not just some of them, needed to be replaced, lest there be a significant risk of roof collapse. As regards the beams that were replaced, it is highly possible that they were not all entirely authentic, as replacements had already been made in the

¹⁷²⁷ Witness Statement of ██████████, 19 March 2021, ¶10 (Counter-Memorial (CERD), Annex 15).

¹⁷²⁸ Second Witness Statement of ██████████, 7 March 2023, ¶17 (Annex 23)..

¹⁷²⁹ Witness Expert Statement of ██████████, 6 March 2023, ¶¶13, 15 (Annex 24).

¹⁷³⁰ Witness Expert Statement of ██████████, 6 March 2023, ¶¶43, 44 (Annex 24).

¹⁷³¹ *Ibid.*, ¶44.

¹⁷³² *Ibid.*, ¶36.

past. The beams that were considered unsuitable for further use have been preserved and remain accessible to the public on the territory of the “Salachik” archaeological complex.¹⁷³³

- (f) As regards the tiles, the technology employed, which includes to the use of self-tapping screws, is also explained by seismic activity in the Peninsula as well as the angle of inclination which increased during reconstructions. Therefore, since the 18th century a heavy cement-lime mortar was used. Furthermore, it is unclear, which tile can qualify as authentic because tiles have been re-laid many times in the past. It is also noteworthy that after the completion of the first phase of restoration of Khan’s Mosque, the tiles that were removed and were not severely damaged, were later used in restoring other objects of the Khan’s Palace complex, such as the “Sary-Guzel baths”, the “Stable building” and the “Library building”.¹⁷³⁴
- (g) With respect to the anti-seismic belt that was put in place, it should be noted that this is required by the safety regulations of the Russian Federation, as ██████████ explains.¹⁷³⁵ If the belt had not been built, the Mosque may have collapsed during the restoration process.

1213. Ukraine takes particular issue with the contractors that were engaged by the Russian authorities to carry out the restoration of the Khan’s Palace (Kiramet and the ATTA Group), alleging that they lack the expertise required to conduct such work.¹⁷³⁶ These unfounded accusations were already addressed in the Counter-Memorial,¹⁷³⁷ with which Ukraine again fails to engage. The same holds true for the alleged “comparator” presented by Ukraine between the Ablyalimova and Efimov cases to show racial discrimination targeted against the Tatar community: the Reply merely restates the Memorial, with no response to Russia’s detailed counter-arguments. It is thus understood that most of the facts remain uncontested by Ukraine.

¹⁷³³ *Ibid.*, ¶¶29-33.

¹⁷³⁴ *Ibid.*, ¶¶39-41.

¹⁷³⁵ *Ibid.*, ¶¶37-38.

¹⁷³⁶ Reply, ¶¶651-652.

¹⁷³⁷ Counter-Memorial (CERD), Appendix F, ¶¶10-12.

1214. In light of the above, Ukraine’s attempt to portray the restoration of the Khan’s Palace as a masked attempt to “dismantle” the Palace is simply wrong and constitutes a cynical attempt to blame the Russian Federation for the rectification of the manner in which Ukraine itself neglected this cultural site in the past. The Russian Federation’s actions concerning the Palace constitute good faith efforts to maintain and promote the Crimean Tatar cultural heritage in Crimea. No racial discrimination, and certainly no “systematic racial discrimination campaign”, has been established by Ukraine in this regard.

ii. Muslim burial grounds and the Palace of Kalga-Sultan Akmejitsaray

1215. As noted above, being aware of the weakness of its allegations concerning the restoration of the Khan’s Palace, Ukraine succinctly refers in its Reply to two “additional examples of degradation of Crimean Tatar culture”: the alleged destruction of Muslim burial grounds and of archaeological sites at the Palace of Kalga-Sultan Akmejitsaray.¹⁷³⁸ These baseless accusations, too, can be swiftly dismissed.

1216. *First*, as regards the alleged “demolition of Muslim burial grounds to build the Tavrida Highway”,¹⁷³⁹ Ukraine presents no real evidence to substantiate this accusation; in fact, the Reply simply reproduces an excerpt of a Chatham House blogpost, written by a Ukrainian lawyer, which makes the same claim without any supporting sources.¹⁷⁴⁰ Carrying out excavations when working on large infrastructural projects is common practice. It is worth noting that Ukraine itself carried out excavations in Crimea and found remains when building the road in 1992.¹⁷⁴¹

1217. As Mr Bariev explains, the builders of the Tavrida Highway and the parallel waterway found a group of ancient burials, the origin of some of which was not immediately determined. The builders stopped the construction and archaeological and scientific works were carried out to determine their origin. All artefacts were carefully extracted,

¹⁷³⁸ Reply, ¶¶657-659.

¹⁷³⁹ Reply, ¶657.

¹⁷⁴⁰ Reply, fn. 1298.

¹⁷⁴¹ S. Vnukov, O. Sharov, CRIMEA - TAURIDA. ARCHAEOLOGICAL RESEARCH IN CRIMEA IN 2017-2018 (Institute of Archeology RAS, 2019, Vol. 1), p. 63 (Annex 40).

transported and examined by appropriate scientists and later transferred to a museum fund, while the remains were re-buried.¹⁷⁴²

1218. The scientists determined that the burials dated back to the 1st- 4th centuries and cannot belong to the Crimean Tatars, who settled in Crimea much later. The Crimean Mufti office also conducted its own research and determined that even if burials were of Crimean Tatar origin, the archaeological works and subsequent re-burial of the remains did not violate Islamic rules.¹⁷⁴³

1219. *Second*, in relation to the alleged destruction of archaeological sites at the Palace of Kalga-Sultan, Ukraine again only refers to an online article published by an NGO which, in turn, does not contain any actual evidence of the convoluted allegations made therein, and to a “flash mob” video on YouTube.¹⁷⁴⁴

1220. The reality is the opposite. As an archaeologist ██████████ explains, from the beginning of the 19th century and until 1982, the site was occupied by a brewery plant. In 1984 the plant buildings were demolished and the land plot under it remained neglected until 2017. Even though Ukrainian authorities had knowledge that the Palace of Kulga-Sultan might be located in that area, no archaeological research was conducted.¹⁷⁴⁵

1221. Ukrainian authorities demonstrated nothing but disregard for the cultural heritage of the Crimean Tatar people by selling the land plots in the area where the Kalga-Sultan might have been located to private individuals. These private owners, as part of standard development, conducted an archaeological inspection at the construction site to establish whether it has any cultural layers. As a result, the archaeologists located a cultural layer containing the foundation and other remains of an ancient palace, which resulted in recognising the land plot marked in red as the object of cultural heritage.¹⁷⁴⁶

¹⁷⁴² Second Witness Statement of ██████████, 27 February 2023, ¶¶19-20 (Annex 15); NTS, *Scientists Discover Secrets of Ancient Necropolis on Tavrida Highway near Sevastopol – Sevastopol Independent TV* (13 July 2018), available at: <https://nts-tv.com/news/uchyenyie-otkryvayut-tayny-drevnego-nekropolya-raspolozhennogo-na-puti-trassy-tavrida-pod-sevastopole-7915/> (Annex 174); Russian Gazette, *3500+ years old Artifacts Found on Tavrida Highway Construction Site* (20 May 2021), available at: <https://rg.ru/2021/05/20/reg-ufo/na-meste-trassy-tavrida-najdeny-artefakty-vozzrastom-bolee-3500-let.html> (Annex 175).

¹⁷⁴³ Statement of the Centralized religious organization Spiritual direction of muslims of the Republic of Crimea and the city of Sevastopol (Tavrichesky Muftiat) No 31, 22 February 2023, (Annex 15, Exhibit Q).

¹⁷⁴⁴ Reply, fn. 1304.

¹⁷⁴⁵ Witness Statement of ██████████ 22 February 2023, ¶¶4-6 (Annex 30).

¹⁷⁴⁶ *Ibid.*, ¶8.



1222. Later on one of the owners who confronted the Crimean authorities on the issue of construction on land plots, requested specialists from the Institute of Archaeology of the Russian Academy of Sciences (RAS) to determine that the site contains no remnants of the Kalga-Sultan Palace. ██████████, who signed the documentation on behalf of Institute of Archaeology RAS, explains that the results of the excavations proved that land plot had no signs of cultural layer. Thus, the said land plot was excluded from the list of objects of cultural heritage and the authorities allowed construction works.¹⁷⁴⁷

1223. The Scientific Project Documentation for the Boundary Change Project of Institute of Archaeology of Crimea RAS, from 2019, reads as follows:

“In view of the pitting conducted in 2019, it can be argued that no remains of structures dating earlier than the first half of the XX century were found on the land plot [...]. The only remains of the cultural layer of the end of XVIII - first half of XIX century are some fragments strongly mixed with rubbish of the first half of the XX century. [...]

Based on archival data and in view of the 2019 pitting, the area of the land plot [...] can be excluded from the territory of the newly discovered cultural heritage object ‘Urban Area of Ak-Mosque, XVII - XVIII centuries (possible site of the Palace of Kalga Sultan)’.”¹⁷⁴⁸

1224. As it was established that there is no cultural layer, and the land plot where the Palace of Kalga-Sultan supposedly was located was excluded from the list of cultural heritage objects, the construction of any structures cannot be regarded to impair the Crimean Tatar heritage. The new limits of the object of cultural heritage were as follows.

¹⁷⁴⁷ *Ibid.*, ¶¶11-13.

¹⁷⁴⁸ Scientific Project Documentation for the Boundary Change Project dated 2019 (Annex 30, Exhibit C).



Scheme of Boundaries, 25 August 2019 (Annex 30, Exhibit C, p. 6)

1225. As regards construction of a chapel at one of the land plots, the local authorities never endorsed its construction. As ██████ explains, the Simferopol Eparchy denied any connection to that church.¹⁷⁴⁹ In any event, as the dome was constructed by a private individual who has no connection with State authorities, this cannot be attributed to the Russian Federation.

B. THE RUSSIAN FEDERATION PRESERVES THE CULTURAL HERITAGE OF UKRAINIAN COMMUNITIES

1226. Ukraine claims that 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”.¹⁷⁵⁰ Despite the broad language employed in levelling this highly regrettable charge, Ukraine lists no more than two allegations of such alleged “systematic work”: the alleged harassment and closure of the Lesya Ukrainka Museum and the Svitanok drama school.¹⁷⁵¹ These allegations, even if proven on the facts (*quod non*), clearly cannot establish Ukraine’s grave accusation; they

¹⁷⁴⁹ Witness Statement of ██████ 22 February 2023, ¶¶15 (Annex 30).

¹⁷⁵⁰ Reply, ¶667.

¹⁷⁵¹ The Russian Federation notes that Ukraine does not insist on other allegations it made in its Memorial, in particular as regards the alleged crack-down on Crimea-based NGOs, activists and media outlets; the case of the Ukrainian Cultural Centre and Krymsky Teren; and other unspecified allegations (see Counter-Memorial (CERD), Appendix F, ¶¶29-34, 41-42).

are also irrelevant to the present proceedings because they bear no relationship whatsoever with racial discrimination, as explained in detail in the Counter-Memorial.¹⁷⁵²

1227. Ms ██████████, ██████████ – a non-governmental organisation that is officially registered as the Regional National Cultural Autonomy of Ukrainians of Crimea Republic – likewise for the second time rejects allegations of the impairment of the Ukrainian culture. She recounts multiple ways in which the Russian authorities sought to support Ukrainian culture in Crimea, such as:

- (a) sponsoring cultural events on Ukrainian language and Ukrainian literature, *e.g.*, open lectures, presentations, public poem-reading, including the reading of Lesya Ukrainka’s poems;
- (b) printing of books in Ukrainian, including a recent publication of a poem-collection “A Flower on the Palm of Eternity” by Lesya Ukrainka, translation of Russian books into Ukrainian and printing of a bilingual (Russian and Ukrainian) book of fairy-tales for children;
- (c) supporting Ukrainian traditional dance groups, including the internationally acclaimed folk ensemble “Radonitsa”; and
- (d) spreading the culture of the Ukrainian embroidery and other decorative arts, including organising exhibitions devoted to the art of a Ukrainian embroiderer Vera Roik.¹⁷⁵³

1228. Furthermore, the Minister of Culture of Crimea, Ms Manezhina explains that many Ukrainian “ethnic corners” are being created in cultural centres throughout Crimea.¹⁷⁵⁴

1229. Ukraine’s presentation of facts concerning Lesya Ukrainka Museum once again distorts the reality. According to the director of the Museum, she drew the attention of Ukrainian authorities to the need to engage in urgent repair works as early as 2005, but Ukraine did nothing for the ensuing 9 years and even planned to use its premises as a hotel.¹⁷⁵⁵ The

¹⁷⁵² Counter-Memorial (CERD), ¶¶35-40.

¹⁷⁵³ See generally Second Witness Statement of ██████████, 22 February 2023 (Annex 10).

¹⁷⁵⁴ Witness Statement of Tatiana Anatolyevna Manezhina, 7 March 2023, ¶21 (Annex 16).

¹⁷⁵⁵ Suspilne Crimea, *In occupied Yalta, the second floor of Lesya Ukrainka museum is closed for more than 5 years* 25 February (Annex 163). Available at: <https://crimea.suspilne media/ru/news/3194>.

museum became seriously neglected,¹⁷⁵⁶ which led to the need for a long and costly restoration project. The Ukrainian authorities would not allocate funds required for the extensive refurbishment of the museum, despite its director's repeated requests for financing. It is the Russian authorities that finally approved the funding for the repairs and began gradual restoration works.¹⁷⁵⁷

1230. As Ms Manezhina points out, the Lesya Ukrainka Museum was not the only culturally significant object that needed restoration after the long period of abandonment until 2014, and the Crimean authorities had to prioritize certain works. Notably, even though the project for restoration works of the Lesya Ukrainka Museum have been approved, the works themselves have not started yet, as funds have first been allocated to the reparation of rural cultural community centres.¹⁷⁵⁸

1231. Although the museum's collection currently remains closed, local authorities continue to hold public events linked to commemoration of Lesya Ukrainka, including on the museum's grounds.¹⁷⁵⁹ This is further proof that the Ukrainian culture has no relevance to the problems that the museum currently experiences.

1232. In relation to Svitanok, Ukraine's claims regarding the closure of this Ukrainian artistic studio are based on a couple of sensationalist news articles that repeat a second-hand account by the spouse of the studio's director. As ██████████ notes, there is no reason to believe that the closure had anything to do with the overall treatment of the Ukrainian culture, as the real reason was the resignation of Ms Petrova, and no one has ever officially complained about Svitanok's closure.¹⁷⁶⁰ This very isolated incident cannot overshadow the fact that many other Crimean artistic groups that concentrate on Ukrainian culture operate freely in Crimea.¹⁷⁶¹

(a) For example, another artistic folk team, which is also called "Svitanok", was created in 2014 and operates in one of the villages of Simferopol region. ██████████,

¹⁷⁵⁶ Second Witness Statement of ██████████, 22 February 2023, ¶5 (Annex 10); Witness Statement of Tatiana Anatolyevna Manezhina, 7 March 2023, ¶10 (Annex 16).

¹⁷⁵⁷ Second Witness Statement of ██████████, 22 February 2023, ¶5 (Annex 10).

¹⁷⁵⁸ Witness Statement of Tatiana Anatolyevna Manezhina, 7 March 2023, ¶¶12-16 (Annex 16).

¹⁷⁵⁹ *Ibid.*, ¶19-20.

¹⁷⁶⁰ Second Witness Statement of ██████████, 22 February 2023, ¶8 (Annex 10).

¹⁷⁶¹ Witness Statement of Valentina Vasilyevna Lavrik, 7 March 2023, (Annex 25), ¶¶16-19.

1235. In sum, Ukraine's complaints regarding the treatment of cultural heritage in Crimea are not only based on sources that contain false information, but plainly contradict the reality and evidence originating from Crimea.

XII. THE RUSSIAN FEDERATION HAS NOT VIOLATED THE COURT'S ORDER ON PROVISIONAL MEASURES

1236. In its Order of 19 April 2017, the Court indicated the following provisional measures:

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

(a) By thirteen votes to three,

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

...

(b) Unanimously,

Ensure the availability of education in the Ukrainian language;

(2) Unanimously,

Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve.¹⁷⁶⁶

1237. In its Reply, Ukraine accuses the Russian Federation of violating the Order of 19 April 2017 “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”.¹⁷⁶⁷ Perhaps bearing in mind the considerable weakness of its claims in regard to alleged violations of the ICSFT and the CERD, Ukraine seeks to emphasize that non-compliance with an Order of the Court would constitute an independent violation of the international obligations by which the Russian Federation is bound.¹⁷⁶⁸

1238. The Russian Federation has been scrupulous in complying with the Order of 19 April 2017. As detailed in the letter of the Agents of the Russian Federation to the Registrar of the Court dated 7 June 2018, the Order of 19 April 2017 was immediately reported to the President of the Russian Federation and was “expeditiously transmitted to all competent authorities and agencies of the Russian Federation, including in the Republic of Crimea, in order that they ensure – each within their respective competence – implementation of

¹⁷⁶⁶ Order of 19 April 2017, pp. 140-141, ¶106.

¹⁷⁶⁷ Reply, ¶716.

¹⁷⁶⁸ *Ibid.*, ¶¶716-717.

its provisions”.¹⁷⁶⁹ A number of inter-agency meetings were soon convened for purpose of ensuring compliance with the Order of 19 April 2017, and various meetings were held with the Crimean authorities as well as with the leaders of non-governmental organizations representing the interests of national minorities, including Crimean Tatars.¹⁷⁷⁰ In a subsequent letter to the Registrar dated 21 June 2018, the Russian Federation reiterated that it “continues to take all necessary measures ensuring implementation of the Order of this Court”;¹⁷⁷¹ and in a letter dated 18 January 2019 it informed the Registrar that it “continues to implement the Court’s Order on provisional measures, [which] is in the focus of the Ministry of Foreign Affairs and other competent authorities of the Russian Federation”.¹⁷⁷²

1239. As the present chapter will briefly explain, the Russian Federation has indeed acted pursuant to any obligations it may have under the CERD (**Section A**) and refrained from any action that might aggravate or extend the dispute before the Court or make it more difficult to resolve (**Section B**).

A. THE RUSSIAN FEDERATION HAS ACTED IN ACCORDANCE WITH ANY OBLIGATIONS IT MAY HAVE UNDER THE CERD

i. “Refrain from maintaining or imposing limitations on the ability of the Crimean Tatar community to conserve its representative institutions”

1240. The Order of 19 April 2017 did not prescribe without more that the Russian Federation must refrain from maintaining or imposing limitations on the ability of the Crimean Tatar community to conserve its representative institutions, including the *Mejlis*. Rather, it specified expressly that this was to be done “in accordance with [the Russian

¹⁷⁶⁹ Letter of the Agents of the Russian Federation to the Registrar of the International Court of Justice, 7 June 2018, ¶6 (Counter-Memorial (CERD), Annex 483).

¹⁷⁷⁰ *Ibid.*, ¶¶7-8 and 24.

¹⁷⁷¹ Letter of the Agents of the Russian Federation to the Registrar of the International Court of Justice, 21 June 2018, p. 6 (Counter-Memorial (CERD), Annex 483).

¹⁷⁷² Letter of the Agents of the Russian Federation to the Registrar of the International Court of Justice, 18 January 2019, ¶2 (Counter-Memorial (CERD), Annex 483).

Federation’s] obligations under the International Convention on the Elimination of All forms of Racial Discrimination.”¹⁷⁷³

1241. Thus, and bearing in mind that the Court’s decision clearly did not prejudge the merits of the present case,¹⁷⁷⁴ the Order of 19 April 2017 did not require the Russian Federation to refrain from maintaining or imposing any limitations on the ability of the Crimean Tatar community to conserve its representative institutions, including the *Mejlis*; it prescribed instead that the Russian Federation must do so in keeping with its obligations under the CERD.

1242. That this reading of the Order of 19 April 2017 is possible and indeed accurate finds support in the Declaration by Judge Tomka, who was concerned that the measure indicated under point 1 of the operative clause “can be read as requiring the Russian Federation to lift or at least suspend the existing ban on the activities of the *Mejlis*”¹⁷⁷⁵ [Emphasis added]. In other words, the measure in question does not necessarily require the Russian Federation to lift or suspend the existing ban on the activities of the *Mejlis*, and does not necessarily intend to do so. Ukraine had in fact asked the Court expressly to order the Russian Federation to “suspend the decision to ban the *Mejlis*”,¹⁷⁷⁶ but the Court decided not to do so.

1243. The wording of the Order of 19 April 2017 is consistent with the fact that rights protected under the CERD are not unlimited. Acting in accordance with the CERD most certainly means safeguarding those rights—but also that restrictions may be imposed on them when such restrictions are not based on racial considerations and pursue a legitimate aim.¹⁷⁷⁷ It is indeed difficult to imagine that the Court would demand otherwise of States Parties to the CERD—or that they had ever accepted otherwise. In the same vein, provisional

¹⁷⁷³ Order of 19 April 2017, pp. 140-141, ¶106(1). The French version reads: “... conformément aux obligations lui incombant au titre de la convention internationale sur l’élimination de toutes les formes de discrimination raciale ...”.

¹⁷⁷⁴ *Ibid.*, p. 140, ¶105. The Russian Federation would recall that it does not consider the CERD to provide for any right to representative institutions of minorities, nor does it consider the *Mejlis* to be a representative institution of Crimean Tatars: see Chapter IV above.

¹⁷⁷⁵ *Ibid.*, p. 150, ¶2.

¹⁷⁷⁶ *Ibid.*, p. 132, ¶78, and p. 135, ¶85.

¹⁷⁷⁷ See also *ibid.*, Declaration of Judge Crawford, at p. 215, ¶8 (recognising that “Nothing in CERD prevents a State party from regulating an organization that represents an ethnic group or even from banning it in the most serious cases. But such measures must be carefully justified.” (Footnote omitted)).

measures indicated by the Court surely do not seek to deny the right of a State to maintain its national security and public order either.

1244. As the Russian Federation has repeatedly explained,¹⁷⁷⁸ the ban on the *Mejlis* was adopted on national security grounds in the face of serious extremist threat. The designation of the *Mejlis* as an extremist organisation and the subsequent ban on its activities were the outcome of a specific and rigorous process carried out in accordance with law on the basis of indisputable evidence, a number of which Ukraine itself has not denied. The Supreme Court of Crimea upheld the ban, as did the Russian Supreme Court on appeal.¹⁷⁷⁹ As the Russian Federation explained in its letter to the Registrar dated 21 June 2018, the severe threat to national security and public order emanating from the *Mejlis* by virtue of its declared support for a full-scale military conflict with the Russian Federation, has not been removed.¹⁷⁸⁰ Thus the Russian Federation “has been genuinely addressing the situation of the *Mejlis* without at the same time hampering the principle of the rule of law and undermining the protection of national security”.¹⁷⁸¹

1245. All the while, and bearing well in mind its obligations under domestic as well as international law, the Russian Federation has continued to guarantee that Crimean Tatars can enjoy and exercise their rights to freedom of peaceful assembly and association, and to full participation in civic and political life. As the Court is aware, more than 30 Crimean Tatar organizations, representing some 30,000 members, have continued freely to operate in Crimea and advance the interests of the Crimean Tatars. Among these bodies is the *Shura*, the “Council of the Crimean Tatar People”, which was elected in February 2018 by the *Qurultay*.¹⁷⁸² Some of the organisations themselves repudiated the *Mejlis* for reason that it engaged in a radical, violent, and subversive agenda.¹⁷⁸³ It is noteworthy that Ukraine itself limits its claim concerning an alleged violation of the

¹⁷⁷⁸ See Chapter IV, Section C above; Counter-Memorial (CERD), Chapter IV, Section II.

¹⁷⁷⁹ Petitions for reconsideration of these decisions have been abandoned: see Letter of the Agents of the Russian Federation to the Registrar of the International Court of Justice, 21 June 2018, pp. 1-2 (Counter-Memorial (CERD), Annex 483).

¹⁷⁸⁰ *Ibid.*, pp. 5-6.

¹⁷⁸¹ *Ibid.*, p. 2.

¹⁷⁸² Other Crimean Tatar representative bodies are present in Crimea, including “КЪЫРЫМ”, “Inquishaf”, Regional national-cultural autonomy of the Crimean Tatars.

¹⁷⁸³ See *Ibid.*, p. 3; Counter-Memorial (CERD), ¶¶181, 184(b).

measure indicated by the Court under point 1 of the Order of 19 April 2017's operative clause to the ban on the *Mejlis*.¹⁷⁸⁴

1246. Nor is it without significance that since 2014, some former leaders of the *Mejlis* have organised themselves in Kiev and proclaimed themselves to be the *Mejlis*.¹⁷⁸⁵ The fact that these individuals serve the interests of the Government of Ukraine rather than those of the Crimean Tatars has been shown in Chapter IV above. Meanwhile, the Crimean Tatar community is represented in all State bodies of the Republic of Crimea, including the State Council (the Crimean parliament). Moreover, former members of the *Mejlis* have not been prosecuted for the membership in it since the Court handed down its Order.

1247. In sum, the ban on the activity of the *Mejlis* was both legitimate and non-discriminatory, and thus fully in accordance with the Russian Federation's obligations under the CERD. It follows that the Court's Order on Provisional Measures was complied with in this regard.

ii. “Ensure the availability of education in the Ukrainian language in Crimea”

1248. In keeping with the Order of 19 April 2017, and with its character as a multi-ethnic State, the Russian Federation has also continued to ensure the availability of education in the Ukrainian language in Crimea.

1249. As the Russian Federation has explained at length in its Counter-Memorial and once more in the present Rejoinder,¹⁷⁸⁶ the Ukrainian language remains an official language of Crimea (alongside the Russian and Tatar languages) and enjoys the protection of the law. There is moreover no prohibition—Ukraine itself could not point to any—on education in the Ukrainian language. Parents can request that Ukrainian be the language of education for their children,¹⁷⁸⁷ and the Crimean authorities have maintained the capacity of schools and teachers to grant that request.¹⁷⁸⁸

¹⁷⁸⁴ Ukraine's submissions in this regard, which are framed in a more general way, are thus baseless: see Reply, p. 375.

¹⁷⁸⁵ See above, ¶¶937-938.

¹⁷⁸⁶ See above, ¶¶Chapter V; Counter-Memorial (CERD), ¶260.

¹⁷⁸⁷ See above, ¶¶Chapter V(B)(ii); Counter-Memorial (CERD), ¶308.

¹⁷⁸⁸ See above, ¶¶Chapter V(B)(iii) above; Counter-Memorial (CERD), ¶¶306-307.

1250. In other words, access to education in the Ukrainian language is not denied to those who wish to pursue it, and Ukrainian can be the language of instruction for students upon request. It is demand for education in the Ukrainian language that has fallen, for reasons explained above;¹⁷⁸⁹ and it is this drop in demand that accounts for the decrease in the number of students receiving such education.¹⁷⁹⁰ In arguing otherwise Ukraine has once again not established the facts which it bears the burden of proving, and its submissions on this point must accordingly be rejected.

B. THE RUSSIAN FEDERATION HAS NOT AGGRAVATED OR EXTENDED THE DISPUTE BEFORE THE COURT OR MADE IT MORE DIFFICULT TO RESOLVE

1251. Contrary to Ukraine’s allegations, the Russian Federation has not engaged in any activity that might aggravate or extend the dispute or make it more difficult to resolve. Ukraine points in this regard to the events that have unfolded beginning in February 2022, but these bear no relation to the present proceedings. Ukraine itself, in reliance on those same events, has brought before the Court a separate application invoking the Convention on the Prevention and Punishment of the Crime of Genocide.¹⁷⁹¹

1252. Ukraine’s argument that the Russian Federation has aggravated the dispute is not only inconsistent with Ukraine’s own approach, but also with the Court’s observation in the Order of 19 April 2017, according to which “the case before the Court is limited in scope”.¹⁷⁹²

1253. As another unfortunate example of Ukraine’s manipulation or misunderstanding of international law and practice, the Reply goes so far as to suggest that a proposal made by the Russian Federation to discontinue the present proceedings upon reaching a negotiated settlement between the Parties is “a testament to the depths of Russia’s disdain for international law”.¹⁷⁹³ Needless to add, the Court has recognized, in keeping with its predecessor, that the judicial settlement of international disputes “is simply an alternative

¹⁷⁸⁹ See ¶¶ Chapter V(B)(ii)(b) above; Counter-Memorial (CERD), ¶¶293-295.

¹⁷⁹⁰ See *ibid.*; Counter-Memorial (CERD), ¶¶296-297.

¹⁷⁹¹ *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*. The Russian Federation filed preliminary objections to the jurisdiction of the Court in this case and to the admissibility of Ukraine’s claims there.

¹⁷⁹² Order of 19 April 2017, ¶16.

¹⁷⁹³ Reply, ¶732.

to the direct and friendly settlement of such disputes between the parties”.¹⁷⁹⁴ Thus, the Court itself has said that “pending a decision of the Court on the merits, any negotiation between the Parties with a view to achieving a direct and friendly settlement is to be welcomed.”¹⁷⁹⁵ Indeed, Articles 88-89 of the Rules of Court expressly envisage that the parties may agree “to discontinue the proceedings in consequence of having reached a settlement of the dispute”.

1254. It follows that the Russian Federation has not violated the Court’s Order in regard to the measure indicated under point 2 of the operative clause either.

¹⁷⁹⁴ *North Sea Continental Shelf*, Judgment, 20 February 1969, I.C.J. Reports 1969, p. 47, ¶87 (quoting the PCIJ in its Order of 19 August 1929 in the case of the *Free Zones of Upper Savoy and the District of Gex*).

¹⁷⁹⁵ *Passage through the Great Belt (Finland v. Denmark)*, Provisional Measures, Order, 29 July 1991, I.C.J. Reports 1991, p. 20, ¶3. The Court has also had occasion to state that “[w]hile judicial settlement may provide a path to international harmony in circumstances of conflict, it is none the less true that the needless continuance of litigation is an obstacle to such harmony”. See *Nuclear Tests (New Zealand v. France)*, Judgment, 20 December 1974, I.C.J. Reports 1974, p. 477, ¶61.

SUBMISSIONS ON PART 2

1255. In view of the foregoing, the Russian Federation respectfully requests the Court to dismiss all of the claims made by Ukraine under the CERD.

Agent of the Russian Federation



Alexander V. SHULGIN

The Hague, 10 March 2023

APPENDIX 1

UKRAINE'S COAL TRADE WITH THE DPR AND LPR

1. DTEK's coal mining enterprises “Komsomolets Donbassa” (in the DPR), “Sverdlovanthracite” and “Rovenkianthracite” (both in the LPR) produced a total of 12.6 million tons of coal in 2014, 4.7 million tons in 2015 and 8 million tons in 2016. In March 2017, when the Kiev government imposed the “blockade” on Donbass, the total capacity of the mines of these associations reached 1 million tons per month.¹⁷⁹⁶
2. Much of the coal was supplied to thermal power plants in Ukraine: Tripolskaya TPP (Kiev Region), Zmievska TPP (Kharkov Region), Pridneprovskaya TPP, Krivorozhskaya TPP (Dnepropetrovsk Region), as well as to Zuyevskaya TPP in the DPR and Luganskaya TPP in the LPR.
3. Among the consumers of the aforementioned mines' products were also Ukrainian metallurgical enterprises. For example, in June 2016, the Commercial Court of Kiev considered a number of claims to recover damages from Ukrainian Railways for negligent delivery of coal shipped by DTEK Rovenkianthracite LLC to Ilyich Iron and Steel Works of Mariupol operating under the Ukrainian jurisdiction.¹⁷⁹⁷
4. The total volume of coal exported by DTEK from the DPR and LPR reached 2.46 million tons in 2015 and 4.83 million tons in 2016.¹⁷⁹⁸ In total, DTEK earned UAH 9.95 billion (\$389 million) or 7.8% of the holding's annual revenues through economic activity in DPR and LPR in 2016 (\$243 million in 2015; \$730 million in 2014). In Q1 and Q2 2017, the DPR and LPR held 17.8% of the holding's assets totalling \$785 million (2015 - \$1.39 billion; 2014 - \$1.93 billion).¹⁷⁹⁹

¹⁷⁹⁶ See FY 2016 Results Corporate Presentation DTEK Energy B.V., April 2017, pp. 10, 19, available at: <http://web.archive.org/web/20170712221415/http://www.dtek.com/content/files/ir-presentation-fy-2016.pdf> (Annex 477).

¹⁷⁹⁷ See Commercial Court of Kiev, Case No. 910/7790/16, Judgment, 15 June 2016, available at: <http://reyestr.court.gov.ua/Review/58490173> (Annex 407); Commercial Court of Kiev, Case No. 910/10009/16, Judgment, 30 June 2016, available at: <http://reyestr.court.gov.ua/Review/58808523> (Annex 408); Commercial Court of Kiev, Case No. 910/9327/16, Judgment, 30 June 2016, available at: <http://reyestr.court.gov.ua/Review/58808518> (Annex 409).

¹⁷⁹⁸ See FY 2016 Results Corporate Presentation DTEK Energy B.V., April 2017, pp. 10, 19, available at: <http://web.archive.org/web/20170712221415/http://www.dtek.com/content/files/ir-presentation-fy-2016.pdf> (Annex 477).

¹⁷⁹⁹ *Ibid.*

5. In 2014, the Krasnodonugol PJSC, which was a part of the Rinat Akhmetov's Metinvest holding, produced 3.1 million tons of coal in the DPR and LPR (compared to 0.8 million tons in 2015, 1.6 million tons in 2016). The coal was shipped to various regions of Ukraine, in particular, to Zaporozhkoks PJSC (Zaporozhye region) and Azovstal PJSC (Mariupol, Donetsk region).¹⁸⁰⁰
6. After the beginning of the ATO in 2014, the Zasyadko Mine, Donetsk (the DPR), owned by its former director, Verkhovnaya Rada Member Yefim Zvyagilsky, was re-registered under the Ukrainian jurisdiction in Avdeyevka, Donetsk region in order to "legalize" its activities in Ukraine's legal field. At the same time, the extraction of minerals continued in the same place in the DPR.¹⁸⁰¹
7. The work of the mine, both before 2014 and after, was not transparent: its management did not publish its audit reports in the public domain. However, a number of sources indicate that it produced 0.75 million tons of G-grade coal concentrate in 2014. The company's production capacity was estimated at 1.2 million tons of coal yearly.¹⁸⁰²
8. The coal produced by the Zasyadko mine in the DPR was headed for enrichment to the Kiev Central Processing Coal Plant and then shipped to Alchevsk, Gorlovka, Donetsk, Zaporozhye, Krivoy Rog, Makeyevka, Mariupol and Yasinovataya Coke Plants operating under the Ukrainian jurisdiction.¹⁸⁰³
9. The main suppliers of equipment for the Zasyadko mine (the DPR) were PJSC Mining Machines, Kharkov Machine-Building Plant Svet Shakhtyora, JSC Yasinovatsky Machine-Building Plant, and TD Krasnoluchsky Machine-Building Plant operating under the Ukrainian jurisdiction.¹⁸⁰⁴

¹⁸⁰⁰ See Commercial Court of the Lugansk Region, Case No. 913/1184/16, Judgment, 21 November 2016, available at: <https://reyestr.court.gov.ua/Review/62911633> (Annex 410).

¹⁸⁰¹ See Youcontrol, PJSC Shakhta im. A.F Zasyadka, available at: <https://youcontrol.com.ua/contractor/?id=8079593>.

¹⁸⁰² See SMIDA, Information on production and sales volumes of the main types of products, available at: <https://smida.gov.ua/db/emitent/year/xml/showform/53850/169/templ> (Annex 430).

¹⁸⁰³ *Ibid.*

¹⁸⁰⁴ See Commercial Court of the Donetsk Region, Case No. 905/1544/14, Judgment, 12 May 2014, available at: <http://reyestr.court.gov.ua/Review/38632669> (Annex 413), See also: SMIDA, Business profile of the Zasyadko mine, available at: <https://smida.gov.ua/db/emitent/year/xml/showform/53850/156/templ> (Annex 431).

10. In June 2016, the management of the Zasyadko mine (the DPR) placed an order with the Poltava Geophysical Works enterprise to perform blasting operations in the mine. One hundred percent advance payment was made for the explosives used by the geologists.¹⁸⁰⁵ Thus, commercial activities also involved explosives.
11. The largest State-owned coal mining company in the DPR until March 2017 was the Donbass Mine Administration PJSC, which included mines No. 22 Kommunarskaya and Sheglovskaya Glubokaya (coal production in 2016 – 1.55 million tons). The coal was shipped to Tripolskaya TPP, Kiev Region, and Zmeevskaya TPP in the Kharkov Region under the Ukrainian jurisdiction.¹⁸⁰⁶
12. Metallurgical enterprises owned by Ukrainian oligarchs were no less active in the DPR and LPR. The signs of their economic activity on republics' territories are similarly traced from publicly available decisions of Ukrainian commercial courts. The ones with the largest volumes of economic activity were Donetsk Metallurgical Plant (DMZ, PJSC Donetskstal, Donetsk, DPR), Alchevsk Metallurgical Plant (AMK, Alchevsk, LPR), and Enakievo Metallurgical Plant (EMZ, Enakievo, DPR).
13. The decision of the Donetsk Region Commercial Court of 17 November 2016 solved a dispute between LLC Inkotel Group (Kiev) and PJSC Donetskstal (the DPR) concerning the supply of iron ore pellets from Inkotel owned Severny Mining and Processing Plant (Krivoy Rog).¹⁸⁰⁷
14. On 31 October 2014, PJSC “Donetskstal” and freight forwarding company “Energotrans” (Kiev) signed a contract for transportation of DMZ (DPR) export products from Donetsk to Mariupol Seaport, as well as the goods imported by DMZ (DPR) from Mariupol to Donetsk.¹⁸⁰⁸

¹⁸⁰⁵ See Commercial Court of the Poltava Region, Case No. 917/482/17, Judgement, 23 May 2017, available at: <http://reyestr.court.gov.ua/Review/66713571> (Annex 414).

¹⁸⁰⁶ See Commercial Court of the Donetsk Region, Case No. 905/3455/15, Judgment, 18 February 2016, available at: <https://reyestr.court.gov.ua/Review/56514743> (Annex 411). See also Zaporozhye Commercial Court, Case No. 908/286/15-г, Judgment, 5 March 2015, available at: <https://reyestr.court.gov.ua/Review/43033419> (Annex 411).

¹⁸⁰⁷ See Commercial Court of the Donetsk Region, Case No. 905/2849/16, Judgment, 17 November 2016, available at: <http://reyestr.court.gov.ua/Review/62910967> (Annex 415).

¹⁸⁰⁸ See Commercial Court of the Donetsk Region in case No. 905/3531/15, Judgment, 3 March 2016, available at: <http://reyestr.court.gov.ua/Review/56421088> (Annex 416).

15. On 22 July 2014, AMK (LPR) received 6 carriages of grey metallurgical dolomite from a supplier located in Lvov Region under the Ukrainian jurisdiction.¹⁸⁰⁹ During the reconstruction of the plant's facilities, project documentation was prepared by PSK-Kharkov LLC.¹⁸¹⁰ Ventan LLC (Kramatorsk, Donetsk Oblast) was involved in the replacement of concrete slabs in the workshops.¹⁸¹¹
16. On 9 February 2017, a freight car of 62 tones of AMK (the LPR) products was sent to ThyssenKrupp Energostal SA (Torun, Poland), two freight cars of rolled iron with a total weight of 125 tones were sent to Slovakia, and five freight cars of rolled steel were sent to Romania with a total weight of 329 tones.¹⁸¹² Thus EU countries were also involved in trade with companies from the LPR.
17. In October 2018, the Liberian-flagged ship “Comet” was detained in the seaport of Mariupol. It was carrying 3,000 tons of AMK (the LPR) rolled metal products, which, according to investigators, were to be exported to Germany via the Belgian port of Antwerp. This time Ukraine’s Prosecutor General Lutsenko decided to make a strong promise “to prosecute all those involved in terrorist financing”. However, judging from open sources information, no charges have been brought against any specific individuals.
18. Moreover, on 31 July 2020, the Severodonetsk city court released the seized metal and handed it over to AMK PJSC, whose management, while “denying” any operations with the products of the factory ‘seized by LPR militants’, nevertheless did not abandon its attempts to “get their hands on” the disputed property, claiming ownership of it.¹⁸¹³
19. EMZ (the DPR) generally exported its products through the Mariupol Sea port. In the meantime, port operations were carried out by Metinvest-Shipping, a company belonging

¹⁸⁰⁹ See Commercial Court of the Donetsk Region in Case No. 905/2456/15, Judgment, 11 January 2016, available at: <http://reyestr.court.gov.ua/Review/54985154> (Annex 417).

¹⁸¹⁰ See Commercial Court of the Lugansk Region, Case No. 913/638/17, Judgment, 7 September 2017, available at: <http://reyestr.court.gov.ua/Review/68781545> (Annex 418) and Commercial Court of the Lugansk Region, Case No. 913/639/17, Judgment, 14 September 2017, available at: <http://reyestr.court.gov.ua/Review/68963844> (Annex 419).

¹⁸¹¹ See Commercial Court of the Lugansk Region, Case No. 913/511/17, Judgment, 27 July 2017, available at: <http://reyestr.court.gov.ua/Review/68038819> (Annex 420).

¹⁸¹² See Commercial Court of Kiev, Case no. 910/13519/17, Judgment, 6 October 2017. available at: <https://reyestr.court.gov.ua/Review/69544181> (Annex 421).

¹⁸¹³ See Severodonetsk City Court of the Lugansk Region, Case No. 428/5927/20, Judgment, 31 July 2020, available at: reyestr.court.gov.ua/Review/90921696

to the same holding. The decision of the Commercial Court of the Donetsk Region dated 27 April 2016 mentions the shipment from EMZ of 60 tones of rolled steel to Mariupol Port-Export on 22 June 2015.¹⁸¹⁴ Then, on 29 November 2015, two more carriages of the same products with a total weight of 133 tones were dispatched in the same direction.¹⁸¹⁵

¹⁸¹⁴ See Commercial Court of the Donetsk Region, Case No. 905/44/16, Judgment, 27 April 2016, available from: <https://reyestr.court.gov.ua/Review/57613978> (Annex 423).

¹⁸¹⁵ See Commercial Court of Kiev, 6 September 2016 in Case no. 910/7494/16, Judgment, 6 September 2016, available at: <https://reyestr.court.gov.ua/Review/61318480> (Annex 424).

APPENDIX 2

GENERAL ASSESSMENT OF THE WORK OF THE JIT AND THE HAGUE DISTRICT COURT AS COMMUNICATED TO THE UN SECURITY COUNCIL

1. Since the downing of the Malaysia Airlines flight MH17 in Donbass on 17 July 2014, the Russian Federation has called for a full, thorough, non-biased and depoliticized investigation into the causes of the crash, based on facts and irrefutable evidence.¹⁸¹⁶ The Russian Federation initiated the adoption of the UN Security Council Resolution 2166 and remains fully committed to its implementation.
2. The Russian side has repeatedly pointed out that the JIT pursued a selective and politicized approach while collecting evidence on the MH17 case, which later served as the basis for criminal proceedings initiated by the District Court of the Hague against three Russian citizens – I.V. Girkin, O.Y. Pulatov and S.N. Dubinskiy, as well as one Ukrainian citizen, L.V. Kharchenko.
3. As a result, the court found S.N. Dubinskiy, L.V. Kharchenko and I.V. Girkin guilty on all counts of the charge, *i.e.*, of intentionally causing an aircraft to crash and murder, and sentenced them *in absentia* to life imprisonment. O.Y. Pulatov, the only Russian defendant whose interests were represented by lawyers, was acquitted.
4. The sentence was mainly built on the findings of the Public Prosecution Service of the Netherlands which were drawn from statements of classified anonymous witnesses and data supplied by the SBU, which has repeatedly been caught providing false, contradictory information and is an interested party in the case. The prosecutors and the judges failed to take into consideration the statements of the witnesses called for by O.Y. Pulatov's defence and the entire set of materials provided by the Russian Federation, including radar raw data and reports on the live-fire test carried out by the Almaz-Antey company, manufacturer of the Buk anti-aircraft missile system.
5. They also disregarded the fact that Ukraine had refused to provide radar data as well as records of communications of ground flight-tracking services. Furthermore, the Ukrainian air traffic control officers who were on duty that day and therefore could have

¹⁸¹⁶ Permanent Representative of the Russian Federation to the United Nations, Letter addressed to the Secretary-General and the President of the Security Council, S/2023/96, 7 February 2023, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N23/038/95/PDF/N2303895.pdf?OpenElement>.

shed light on the facts of the tragedy, disappeared. Since the downing of the flight the responsibility of Ukraine for not closing the airspace above the zone of hostilities where the UAF deployed air defence systems, including Buks, has not been duly investigated.

6. Satellite images made by the US on the day of the crash could have helped clarify its circumstances, but Washington flatly refused to comply with the judges' request to disclose the data, or at least allow it to be examined under special conditions.
7. It is crystal clear that the District Court of the Hague adopted a highly politicized approach when considering the MH17 case, disregarding the evidence that ran counter to its initial version of the tragedy. Despite this biased position, the verdict says nothing about the Russian Federation's guilt for the crash, as was speculated in the Western media. Besides, the verdict contains the following conclusions.
 - (a) Firstly, the DPR troops were not recognized as being part of the Armed Forces of the Russian Federation – that is, the involvement of the Russian troops in the crash has not been established (¶4.4.3.1.4 of the Judgment “...the court notes that the DPR was not part of the official Armed Forces of the Russian Federation...”, “...the DPR cannot be viewed as part of the Armed Forces of the Russian Federation, the members of the DPR also cannot be considered part of those Armed Forces”).¹⁸¹⁷
 - (b) Secondly, according to the District Court Judgment, a Buk missile was launched at a civil aircraft by mistake. In other words, one cannot speak of an act of terrorism: “...the court considers it completely implausible that a civil aircraft was deliberately downed...A mistake being made is something the court does find plausible...”¹⁸¹⁸
 - (c) Thirdly, the court was unable to identify specific persons responsible for launching the missile. It is also noteworthy that the “guilty” verdict of complicity was handed down only to those defendants who did not participate in the trial:

¹⁸¹⁷ District Court of The Hague, Case No. 09/748004-19, Judgment against I.V. Girkin, 17 November 2022, ¶4.4.3.1.4, available at: <https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:RBDHA:2022:14037&showbutton=true&keyword=09%252f748004-19&idx=1%2F>.

¹⁸¹⁸ District Court of The Hague, Case No. 09/748005-19, Judgment against S.N. Dubinsky, 17 November 2022, ¶6.2.5.3, available at: <https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:RBDHA:2022:14036&showbutton=true&keyword=09%252f748005-19&idx=1%2F>.

“...the actions of the crew of the Buk TELAR when launching the Buk missile at MH17 cannot be established on the basis of the case file. The case file also fails to identify who gave the instruction to launch a missile, and why that order was given...”¹⁸¹⁹

- (d) Fourthly, the court noted the improper work of the Dutch Public Prosecution Service in a number of cases. The judges found it a procedural violation to display the suspects' personal data and photographs at press conferences:

“...Communicating the full names and other personal details of the accused, combined with displaying their photographs, at a press conference broadcast globally goes beyond the type of dissemination of information that is usual for criminal cases...», «...the manner chosen by the prosecution and the JIT to communicate on the fate of flight MH17 and announce the suspects in these criminal proceedings does give pause for thought... In the court's view they did contribute to shaping public opinion on this criminal case... Stating the personal details of the accused at the press conferences and showing their photographs might quite easily be considered to be a potential infringement of the right to privacy protected under Article 8 ECHR...”¹⁸²⁰.

8. Throughout the trial, the court was under unprecedented pressure from Dutch politicians, representatives of the Dutch Prosecution Service and the media seeking to impose a politically motivated decision. It is also obvious that the Netherlands, having initiated parallel hearings of the MH17 case against the Russian Federation in other fora, simply could not allow any verdict other than guilty at the national level because that would lead to its arguments falling apart in international formats. Needless to say, objectivity and impartiality in such circumstances are out of question.

A. UKRAINE'S FAILURE TO PROVIDE ORIGINAL DATA FILES

9. Ukraine and the Netherlands failed to provide the Russian Federation or the ECtHR with original digital files in respect of this material despite an Order of the European Court that covered it.¹⁸²¹

¹⁸¹⁹ *Ibid.*

¹⁸²⁰ District Court of The Hague, Case No. 09/748006-19, Judgment against O.Y. Pulatov, 17 November 2022, ¶4.4.4.2, available at: <https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:RBDHA:2022:14040&showbutton=true&keyword=09%252f748006-19&idx=7%2F>.

¹⁸²¹ European Court of Human Rights, *Case of Ukraine and the Netherlands v. Russia (applications nos. 8019/16, 43800/14 and 28525/20)*, Grand Chamber Decision, 25 January 2023, ¶¶401-402.

10. The indications are that proper original data files do not exist. Evidence has emerged that original digital files were not even shared with the States in the JIT. Investigators in Australia requested the original data and it was not provided. They sought to analyse key photographs said to show the passage of a Buk TELAR from the Russian Federation to Ukraine. They quickly identified that the files provided to them were not original and had been manipulated.¹⁸²² They were central to the efforts of Bellingcat and the JIT to depict the passage of a Buk Telar from the Russian Federation to Snezhnoe and back again.

B. THE RUSSIAN FEDERATION’S UNCONTRADICTED PROOF THAT THE LIMITED DIGITAL MATERIAL THAT DID EMERGE WAS FALSE

11. In addition, the Russian Federation was able to present unequivocal evidence showing that digital material incriminating it was fake. For example, critical reliance was placed by Bellingcat and then the JIT on a video showing a Buk Telar near Snezhnoe (the “Snezhnoe video”).

12. The original version of the Snezhnoe video was published on the internet on 17 July 2014, the day of destruction of MH17, but it was uploaded onto the internet the day before – on 16 July 2014. The same applied to a compendium of alleged intercepts of rebels discussing an accidental shooting down. It was published by the Ukrainian security service, the SBU, on 17 July 2014, but again, it was uploaded onto the internet *the day before* the destruction of MH17.

13. The video and the intercepts were also defective and manipulated, as demonstrated by copious expert evidence.¹⁸²³

14. The intercepts were also clearly false. Aside from the problem that the digital file with the compendium of intercepts was encoded, and therefore uploaded, on 16 July 2014, the day before the destruction of MH17, another fatal problem has emerged.

¹⁸²² Australian Federal Police, Report in the Matter of AFR Case Reference No. 5667342 (Operation AVENELLA), July 2015, available at: <https://www.bonanzamedia.com/bonanza-leaks/> (Annex 360).

¹⁸²³ Expert report of Mr Akash Rosen, 26 May 2019 (Annex 197); Expert report analyzing videos from social media (Annex 361); Report on Expert Examination of a Video File for Any Signs of Falsification, 7 December 2020 (Annex 362); OG IT Forensic Services, International Platform Global Right of Peaceful People, Report, 3 March 2020 (Annex 364).

15. One of the key intercepts featured Mr Bezler, a rebel commander, speaking about the downing of an airplane. When a full recording of his conversation came to light,¹⁸²⁴ it transpired that his real conversation concerned a Sukhoi bomber shot down in a different place on a different day. The SBU had manipulated the recording to remove the reference to the Sukhoi, and then used it in the fake compendium uploaded on 16 July 2014, in order to suggest that the rebels discussed the shooting down of MH17 on 17 July 2014.
16. Mr Bezler sued Bellingcat in the Russian Federation. Fully represented, Bellingcat was unable to offer any defence.¹⁸²⁵ No doubt also, they preferred not to draw attention to this damning indictment of the SBU's fake compendium of intercepts.
17. For any objective tribunal, the clear Bezler fabrication shows at the least that the SBU could not be relied upon as a source of intercepts. They were the only source, as the JIT was driven to admit.¹⁸²⁶ Ukraine and the Netherlands failed to answer these points. The ECtHR ignored them altogether.

C. UKRAINE'S INTERFERENCE WITH PHYSICAL WRECKAGE AND RELIANCE ON PIECES WITHOUT PROVENANCE

18. The Russian Federation was also able to show that physical evidence had unconvincing provenance. More particularly, men in the blue uniforms of Ukraine's emergency service (the "SES") had full access to the crash site.
19. An OSCE observer, Michael Bociurkiw, saw men "hacking away" at the cockpit with a power saw:¹⁸²⁷

¹⁸²⁴ The Dutch National Police, Official Report Concerning Disclosed Intercepted Conversations, 16 December 2019, p. 36 (Annex 200).

¹⁸²⁵ Telegram, St. Petersburg Courts Unified Press Service, *The Oktyabrsky District Court of St. Petersburg ruled in the suit of Igor Bezler against the Foundation Bellingcat* (19 May 2021), available at: <https://t.me/SPbGS/8487> (Annex 308); See also St. Petersburg's Oktyabrsky District Court, Case № 2-323/2021, Judgement, 19 May 2021, available at: https://oktibrsky--spb.sudrf.ru/modules.php?name=sud_delo&name_op=doc&number=520996079&delo_id=1540005&case_type=0&new=0&text_number=1&srv_num=1 (Annex 432).

¹⁸²⁶ When asked at a JIT media presentation about the source of intercepts, Wilbert Paulissen (head of the National Investigative department of the Dutch police) first stated that the intercepts were "mainly" from a Ukrainian service. When pressed about his use of the word "mainly" and asked whether there were any other sources, he stated that they were all intercepts from Ukraine - see Ruptly, Translation of JIT Press Conference, September 2016, available at: <https://m.facebook.com/RTnews/videos/10154726285794411/>.

¹⁸²⁷ YouTube, *OSCE Investigator: Flight MH17 downed by machine-gun fire* (31 July 2014) at 2 minutes 45 seconds, available at: <https://www.youtube.com/watch?v=76PG9RQStFU>; See also CBC News, *Malaysia Airlines*

“... going almost daily to the cockpit scene, that has been the most stark in terms of how it’s changed. When we first arrived there ... the cockpit appears to have just slammed down into earth. It was pretty much intact. Over the days, we have seen that piece of cockpit kind of spread out like this. Day two, I believe it was there were actually men in uniform hacking into it with a power saw.”

20. This eye-witness observation is corroborated by video showing men in blue uniforms using power tools.¹⁸²⁸



21. At the same time, there was press coverage identifying the men in blue uniforms as members of Ukraine’s State Emergency Services (SES).¹⁸²⁹

MH17: Michael Bociurkiw talks about being first at the crash site (29 July 2014), available at: <https://www.cbc.ca/news/world/malaysia-airlines-mh17-michael-bociurkiw-talks-about-being-first-at-the-crash-site-1.2721007> (Annex 365).

¹⁸²⁸ YouTube, Vice News, *Searching Through the Debris of Flight MH17: Russian Roulette (Dispatch 61)* (23 July 2014), available at: https://www.youtube.com/watch?v=INXf_HncM20.

¹⁸²⁹ ABC News, *IMAGE: MH17 crash site, Ukrainian State Emergency Service employees search for bodies amongst the wreckage of Malaysia Airlines Flight MH17*, available at: <https://www.abc.net.au/news/2014-07-21/ukrainian-state-emergency-service-mh17-wreckage/5612412?nw=0> (Annex 366).



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MH17 crash site

Posted 21 Jul 2014, 10:01am

Ukrainian State Emergency Service employees search for bodies amongst the wreckage of Malaysia Airlines Flight MH17.

TOP STORIES

- South Australia ordered into major six-day lockdown amid COVID-19 outbreak
- 'We have police officers on standby': Panic buying sets in ahead of SA coronavirus lockdown
- Live: SA has gone 'hard and fast'

22. There is no scope for dispute on this. Ukraine has acknowledged that its SES agents were all over the crash area.¹⁸³⁰ It was therefore “Statecraft” and disingenuous when President Obama and various media accused local militia of interference with the wreckage of the airplane.¹⁸³¹ The evidence shows that direct physical interference was by Ukraine’s State Agents.
23. Contemporary pictures show that afterwards, the entire port side of the cockpit was missing – for example, this one, published in London’s *Evening Standard*:

¹⁸³⁰ NBC News, *MH17 Investigators Face Huge Challenges in Ukraine ‘Combat Zone’* (18 July 2014), available at: <https://www.nbcnews.com/storyline/ukraine-plane-crash/mh17-investigators-face-huge-challenges-ukraine-combat-zone-n158881> (Annex 196); CNN, *Kerry: ‘Drunken separatists’ interfering at MH17 crash site* (24 July 2014), available at: <https://edition.cnn.com/2014/07/20/world/europe/ukraine-malaysia-airlines-crash/index.html> (Annex 198); DNA, *Ukrainian investigators found 196 bodies at #MH17 crash site* (20 July 2014), available at: <https://www.dnaindia.com/world/report-ukrainian-investigators-found-196-bodies-at-mh17-crash-site-2003686> (Annex 199).

¹⁸³¹ Financial Express, *What are they trying to hide, cries Barack Obama even as Malaysia Airlines MH17 bodies, black boxes handed over* (22 July 2014), available at: <https://www.financialexpress.com/archive/what-are-they-trying-to-hide-cries-barack-obama-even-as-malaysia-airlines-mh17-bodies-black-boxes-handed-over/1272346/> (Annex 201); Stuff, *MH17 wreckage ‘cut into pieces’* (23 July 2014), available at: <http://www.stuff.co.nz/world/10299196/MH17-wreckage-cut-into-pieces> (Annex 202). YouTube, Vice News, *Searching Through the Debris of Flight MH17: Russian Roulette (Dispatch 61)* (23 July 2014), available at: https://www.youtube.com/watch?v=LNxf_HncM20.

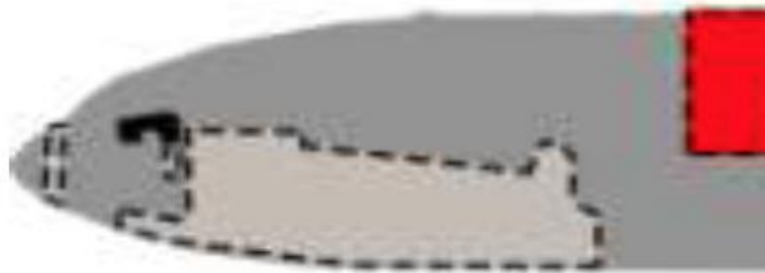


24.

25. This space on the port side of the cockpit was later filled with mysterious black pieces on schematics of the wreckage produced by the DSB in draft and final versions of its report. Black indicates that that origin is not known.

26. The difference between the schematics, showing the late-recorded pieces, is highlighted in the comparison below.

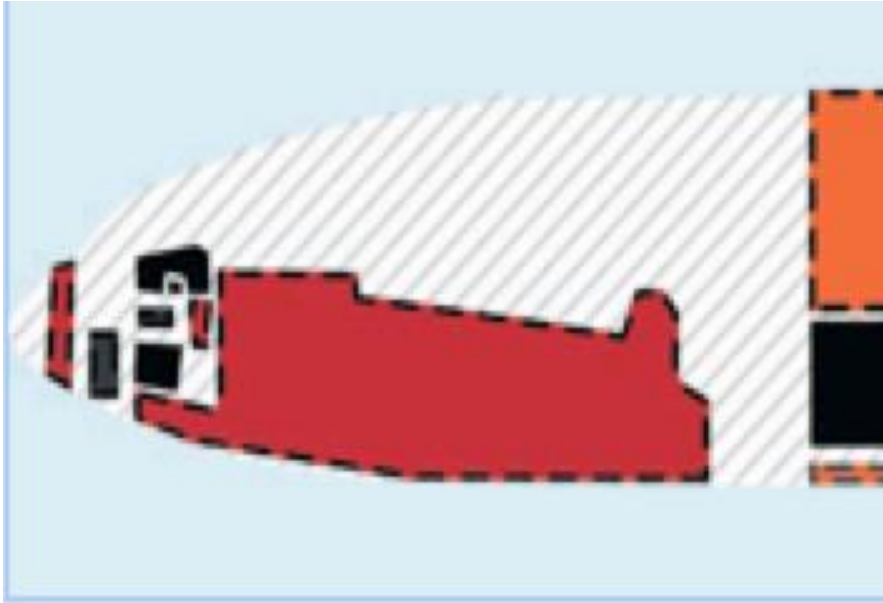
27. The Draft DSB Report¹⁸³²:



28. The Final DSB Report¹⁸³³:

¹⁸³² Dutch Safety Board, Draft Final Report, Crash of Malaysia Airlines Flight MH17, May/June 2015 (Annex 204).

¹⁸³³ Memorial, Annex 38.



29. The last collection of physical evidence by the DSB was in April-May 2015.¹⁸³⁴ The Draft DSB Report was produced in July 2015. It is therefore odd that further black pieces emerged in the final DSB Report. The DSB does not even record who found them, who handed them over, to whom, where and when. Nonetheless, these pieces are at the very center of the DSB's conclusion that MH17 suffered penetrating damage from high-energy objects produced by an explosion outside and above the cockpit on the port side.
30. There has been no explanation of where these further black pieces suddenly materialized from, which is extraordinary, given that they make up the crucial port side of the cockpit, against the background of a DSB/JIT case that a Buk missile exploded just above and to the port side of the cockpit. As part of any thorough and proper investigation, it should have been critical to check their provenance. Neither the DSB nor the JIT appears to have done so.

D. RELIANCE ON FAKE “BOW-TIES”

31. The DSB also relied on distinctive “bow-tie” shrapnel supposedly removed by the DSB from the bodies of the aircrew - long after their funerals.¹⁸³⁵ The funerals of each of the relevant flight crew are documented, and they occurred in 2014, long before the alleged

¹⁸³⁴ *Ibid.*, p. 16, ¶1.4.

¹⁸³⁵ Dutch Safety Board, Draft Final Report, Crash of Malaysia Airlines Flight MH17, May/June 2015, Section 2.16.1 (Annex 204).

further discovery.¹⁸³⁶ If they had addressed the point, which they did not, Ukraine and the Netherlands would have to argue that the metal fragments were extracted early and set aside, *but not examined until June 2015*. That is absurd given the early and consistent focus of the DSB on shrapnel to try to prove its Buk case.

32. Moreover, as between the draft DSB report and the final report, the DSB's story changed as to what alleged distinctive shrapnel was found in which body.¹⁸³⁷
33. The DSB also misrepresented the mass of the key piece of shrapnel in the final DSB report, in order to give it sufficient mass to be identified as a bow-tie. Evidently, someone forgot that the said piece had been weighed earlier in the presence of Russian experts and given by the Netherlands Aerospace Laboratory as an example of a piece that could not qualify as a bow-tie because of its low mass.¹⁸³⁸
34. Mr Akkermans of the Dutch broadcaster RTL was involved in a curious episode where he purported to find a piece of "bow-tie" shrapnel distinctive of a 9N314M warhead in very strange circumstances. More particularly, Mr Akkermans claimed in March 2015 that he had found a bow-tie piece in wreckage still lying at the site, supposedly in November 2014, keeping quiet about it for six months.¹⁸³⁹
35. Mr Akkermans' made a news report¹⁸⁴⁰ on RTL about how he found the piece:

¹⁸³⁶ New Straits Times, *MH17: Captain Eugene Choo Jin Leong at his final resting place* (4 September 2014), available at: <https://www.nst.com.my/news/2015/09/mh17-captain-eugene-choo-jin-leong-his-final-resting-place> (Annex 203); AstroAWANI, *#RememberingMH17: The Funeral Of Wan Amran Wan Hussin* (3 September 2014), available at: <https://www.astroawani.com/foto-malaysia/rememberingmh17-the-funeral-wan-amran-wan-hussin-1519/relatives-and-friends-of-captain-malaysia-airlines-flight-mh17-16797> (Annex 205); New Straits Times, *MH17: Two more remains to arrive on Sunday: Liow* (22 August 2014), available at: <https://www.nst.com.my/news/2015/09/25710/mh17-two-more-remains-arrive-sunday-liow> (Annex 206).

¹⁸³⁷ The location in the DSB Draft Final Report for a 12x12x5mm fragment with mass 5.7g was given as "flight crew member" (Dutch Safety Board, Draft Final Report, Crash of Malaysia Airlines Flight MH17, May/June 2015, section 2.16.1, (Annex 204)). In a DSB presentation at a meeting with experts (including experts from the Russian Federation) in August 2015, it was given as the First Officer. In the DSB Final Report it was given as the Captain's body (DSB Report, p. 89, figure 37 (Memorial, Annex 38)). In the DSB presentation at a meeting with experts in August 2015, the location of the 12x12x1mm fragment with mass 1.2g was given as the Captain's body. In the Final Report, it was said to be the Purser's body (DSB Report, p. 89).

¹⁸³⁸ Netherlands Aerospace Centre (NLR), Presentation "Damage Investigation MH17", p. 21 (Annex 367).

¹⁸³⁹ BBC News, *MH17 crash: My revealing fragments from east Ukraine* (16 April 2015), available at: <https://www.bbc.com/news/world-europe-32283378> (Annex 207).

¹⁸⁴⁰ YouTube, *"BUK missile fragments are found in the debris of Malaysian Boeing MH-17, proof"* (20 March 2015), available at <https://www.youtube.com/watch?v=CIIzb6KHr18>.



36. Note where he says that the bow-tie was found:



37. However, there is a problem with this account. When the crash occurred, this section of wreckage landed the other way up:¹⁸⁴¹

¹⁸⁴¹ As shown in countless contemporary pictures from July 2014. *See*, for example, Getty images, Image “Ukraine Russia crisis Malaysia aviation crash”, 25 July 2014, available at: <https://www.gettyimages.co.uk/detail/news-photo/picture-shows-a-piece-of-debris-of-the-fuselage-at-the-news-photo/452667890> (Annex 368).

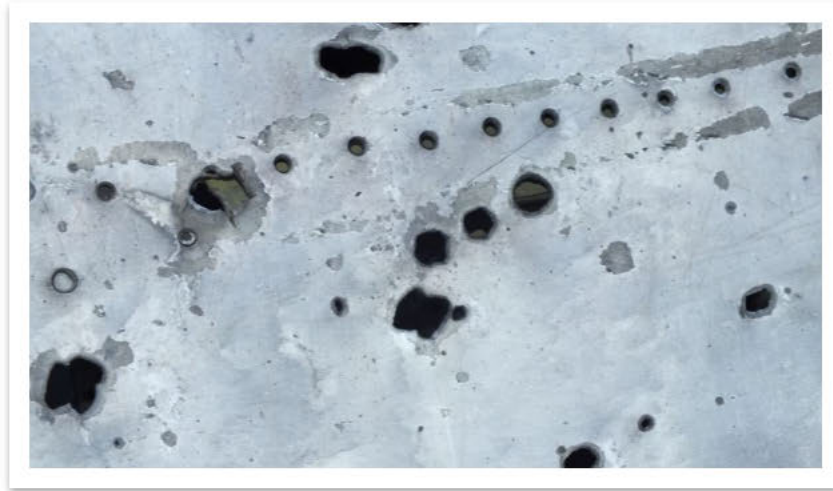


38. It follows that the single bow-tie could not have been lying on top of this section of wreckage.
39. The Dutch investigators and JIT did not ultimately rely on the Akkermans fragment, probably because of the obvious “upside down” problem had become public. However, it was used to persuade Almaz-Antey that MH17 had been hit with a Buk missile with an M1 warhead – the kind containing bow-ties.¹⁸⁴²
40. Almaz-Antey later changed their mind on that point because of two developments.
- (a) First, a test with a real M1 warhead exploding next to a plane showed a rash of distinctively shaped holes caused by bow-tie shrapnel. Almaz-Antey undertook their own experiments with a missile and a similar airframe, and discovered a number of things. One, that the airframe was riddled with bow-tie shaped holes,¹⁸⁴³ not present on the wreckage of MH17; two, that the wreckage contained many bow-ties; and three, that they had a minimum mass after impact, of around 6.5 to 7.9 grams.¹⁸⁴⁴ Almaz-Antey accordingly changed their mind and concluded that a 9N314M warhead could not have been involved.

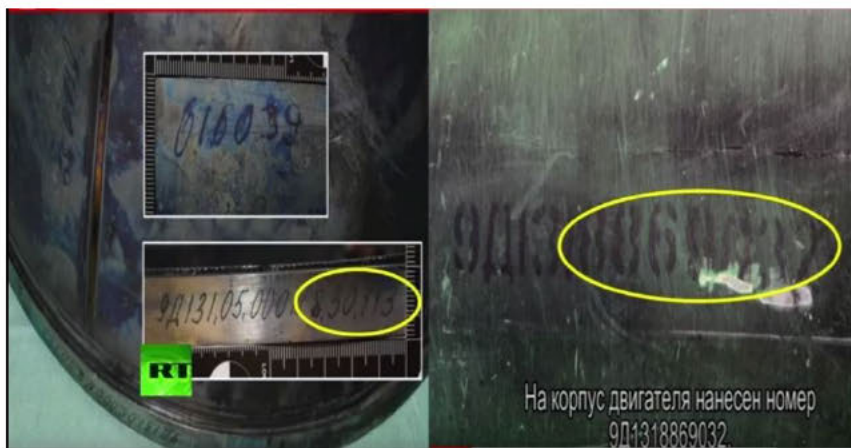
¹⁸⁴² Witness Statement of Mikhail Vadimovich Malyshevskiy (submitted in support of the Russian Federation’s position in the ECtHR), ¶14 (Annex 369).

¹⁸⁴³ *Ibid.*, ¶23.

¹⁸⁴⁴ *Ibid.*, ¶15.



- (b) Secondly, the missile parts produced mysteriously and late by the DSB turned out to come from an old-style Buk missile delivered to Ukraine in the 1980s.¹⁸⁴⁵



41. All of this evidence counted for nothing with the ECtHR and is not even addressed in its judgment. Given that the evidence was secret, aside from the Annex of documents that the Court produced alongside its judgment, it would be difficult for any observer to know that it even existed.
42. Remarkably, Mr Akkermans was involved in another fake episode in the Georgia litigation involving the Russian Federation. His colleague was allegedly killed in the town square in Gori, and attempts were made to blame the Russian Federation for an

¹⁸⁴⁵ Facebook, RT, *Russian MoD reveals new findings in MH17 downing probe* (17 September 2018), available at: <https://www.facebook.com/RTnews/videos/325968421542383/> (Annex 472); Documents Regarding BUK Missile Delivered to Ukraine in the 1980s (Annex 370); RT, *Serial numbers of missile that downed MH17 show it was produced in 1986, owned by Ukraine - Russia* (17 September 2018), available at: <https://www.rt.com/news/438596-mh17-downing-russian-briefing/> (Annex 208).

attack with an Iskander missile. The purported evidence was a fake video showing missile pieces and the alleged discovery of distinctive shrapnel in holes around the square. However, the video was clearly fake with transposed missile pieces. The shrapnel holes only appeared on contemporary videos after a mission coordinated by the State Department of the United States.¹⁸⁴⁶ The shrapnel damage “miraculously” avoided the famous statue of Stalin in the square, which has since been removed. Nonetheless, a Dutch investigative mission including representatives of its police force concluded that the Russian Federation was responsible. Under cross-examination, its representatives were driven to accept that they had seen no missile parts, and they had relied on dubious digital pictures and video.

43. A key picture showed the tail of a missile on a sofa inside a top floor apartment. The Russian Federation showed that an Iskander missile descends at several times the speed of sound and this section had very substantial mass. Had it really hit the building, it would have penetrated to the bottom and buried itself in the basement.



44. It transpired that the picture was created by Lieutenant Hoeft, who went to Gori in Georgia as part of a US State Department Mission, after Russian forces withdrew.

¹⁸⁴⁶ *Georgia v. Russia (II)*, Application No. 38263/08, Open Exhibit for Oral Submissions of the Russian Federation on 23 May 2018, pp. 59-64 (Annex 371).



45. In the event, the ECtHR was saved from making findings on this clear demonstration of fabrication of evidence because of its decision of principle, somewhat against the run of its previous jurisprudence, that the European Convention on Human Rights does not apply in a situation of active conflict.¹⁸⁴⁷

E. THE DSB’S UNRELIABLE TRIANGULATION EXERCISE

46. There are other clear indications that the DSB work was not reliable. The most obvious example is the triangulation exercise by which the DSB purported to establish that a Buk missile exploded above and outside the cockpit on the port side of MH17 based on the different timings of receipt of the sound of the explosion at various cockpit microphones recorded on the “Black Box” Flight Recorder. This was utterly absurd and suggests the work of an Arts graduate recruited for information operations rather than anyone with a basic knowledge of physics.

47. As the Russian Federation proved:

- (a) There is no sound wave so close to an explosion – just a pressure wave, which travels much faster than sound.¹⁸⁴⁸

¹⁸⁴⁷ European Court of Human Rights, *Case of Georgia v Russia II (applications no. 38263/08)*, Judgment on the Merits, 21 January 2021, ¶126ff.

¹⁸⁴⁸ Expert Report on the Applicability of the Triangulation Method of Oleg Rudenko, Boris Goncharenko and Andrei Shurup, 18 May 2021 (Annex 372).

- (b) A Buk missile also expels shrapnel at many times the speed of sound. That would have penetrated the aircraft much faster and ahead of any sound wave if, *quod non*, it existed. The microphones would have been destroyed before they registered anything, or anything that they did register would derive from local impact of the shrapnel striking around them.
- (c) Sound travels much faster through metal than air. Accordingly, there would have been myriad routes to each microphone through the structure of the airplane. A straight-line triangulation exercise, as depicted by the DSB, was unreliable – albeit glossy and convincing for a lay reader already prejudiced by the likes of Bellingcat.

F. INCONSISTENT EXPLOSIVE TRACES

48. The Russian Federation also noted evidence that further called into question whether MH17 was destroyed by a missile on 17 July 2014. As noted above, digital proof against the Russian Federation had evidently been created before that date. The draft and final DSB reports were radically inconsistent as to the number of swab tests done on the MH17 wreckage to detect explosives. The number reduced (unaccountably) from 500 to 126.¹⁸⁴⁹ Moreover, inexplicably different explosive traces were found on alleged missile parts (tainted with the explosive RDX) and on the airplane (RDX, TNT and PETN; the latter two were not found on the missile parts).¹⁸⁵⁰ The DSB attempted to obfuscate this fact in the Report’s conclusions by misleadingly stating that “similar” explosives were found on both missile and airplane parts.¹⁸⁵¹ However, in the Dutch prosecution, the Prosecutor produced a table showing the results of some swab tests of the plane wreckage.¹⁸⁵²

¹⁸⁴⁹ At section 2.16.3, the Draft Final Report states that 500 swab tests were undertaken on “various locations of the wreckage of the aeroplane” (Dutch Safety Board, Draft Final Report, Crash of Malaysia Airlines Flight MH17, May/June 2015 (Annex 204). At section 2.16.3 of the Final Report, it is said that 126 swab samples were taken “on the wreckage and one of the missile parts” (Memorial, Annex 38).

¹⁸⁵⁰ See section 2.16.3 of the DSB Final Report (Memorial, Annex 38).

¹⁸⁵¹ “The missile parts also had traces of a type of explosive (i.e. RDX) on them that is similar to the traces found on the wreckage.” See DSB Final Report, p. 255, ¶10.2(7) (Memorial, Annex 38).

¹⁸⁵² YouTube, *The Dutch Public Prosecution Service, Presentation* (9 June 2020), available at: <https://www.youtube.com/watch?v=Bdz0y14NLbk>.

SIN	Geïdentificeerde explosieven	Nederlands Forensisch Instituut
aanvraag 131		Aangetroffen sporen van explosieven buitenzijde
AAHI8252NL	PETriN	
AAHI8253NL	RDX, PETriN, PEDiN	
AAHI8254NL	RDX	
AAHI8269NL	RDX	
AAHI8274NL	RDX	
AAHI8275NL	RDX	
AAHI8283NL	RDX	
AAHI8304NL	MNG	
AAHI8415NL	RDX	
AAHI8418NL	RDX	
AAHI8433NL	RDX	
AAHI8437NL	RDX	

49. The DSB does not state the nature of explosives in a Buk missile. That is a very serious omission, because there is no PETN in a Buk missile. However, the airplane parts were covered in degradation products of PETN. It should be noted that PETN is an extremely powerful explosive favoured by real terrorists – such as Richard Reid who infamously concealed it in his shoes for an attack on an American Airlines flight in 2001.¹⁸⁵³

G. NO RADAR TRACES

50. To this must be added the evidence, from specialists at Almaz-Antey, that no Buk could have been fired from the launch site contended for by the JIT and Ukraine.¹⁸⁵⁴ Any such Buk would have been caught in profile by three successive sweeps of the Utes-T radar. No missile was detected, which meant (with 99% certainty) that no launch occurred.¹⁸⁵⁵

H. FAKE LAUNCH PICTURES

51. Next, the Russian Federation debunked pictures of the alleged launch plume of the missile which had been given false authentication by none other than Bellingcat. Two pictures, taken seconds apart, were irreconcilable. See below:

(a) The first picture:

¹⁸⁵³ Federal Bureau of Investigation, *Richard Reid's Shoes*, available at: <https://www.fbi.gov/history/artifacts/richard-reids-shoes> (Annex 209); The New York Times, *Packages' Explosive PETN Used in Past Plots* (30 October 2010), available at: <https://www.nytimes.com/2010/10/31/world/middleeast/31petn.html> (Annex 210).

¹⁸⁵⁴ Report of JSC Air and Space Defense Corporation "Almaz-Antey" on the results of studies related to the technical investigation into the crash of the Malaysian airlines Boeing 777-200 9M-MRD (flight MH17), 2023, p. 108, clause 5.2.4.5 (Annex 1).

¹⁸⁵⁵ *Ibid.*



(b) The second picture:



(c) Consider now, a super-position of the zoomed picture over the panned out picture:



52. The first picture was zoomed in more than the second, which pans back to cover the area of the first picture and more background. However, the zoomed picture shows power lines, which are conspicuously absent from the wider version. It would have been physically impossible for the second picture, if real, to omit the power lines. Bellingcat’s attempt to explain this makes no sense.

E. FAKE LAUNCH SITE

53. For good measure, the Russian Federation showed that an exercise to locate the launch site in a partly burned field was fake. The exercise was undertaken by Mr Roland Oliphant of the *Daily Telegraph* newspaper and Christopher Miller of *Buzzfeed*. Their work was adopted by the Netherlands Government via an “Official Report of the Dutch National Police” which incorporated it.¹⁸⁵⁶ However, there is a problem. The photographs and video that the “reporters” supposedly took of the launch site showed partial burning of the wheat field, with golden wheat behind. However, a Google Earth picture given below from the day before showed that the field was already substantially burned – including in the area of golden wheat shown by the Oliphant-Miller team.
54. More particularly, Mr Oliphant and Mr Miller claim to have tracked down the launch site of the alleged Buk missile based on the smoke plume pictures. That was not a promising

¹⁸⁵⁶ Dutch National Police, Official Report Concerning the Transport Route, on the Basis of Open Sources, 16 May 2018, p.13 (Annex 373).

start because, as demonstrated above, those were fake.¹⁸⁵⁷ They say that they took photographs and a video of the alleged site on 22 July 2014.¹⁸⁵⁸ Mashable published the photographs with metadata the same purported day.¹⁸⁵⁹ One photograph,¹⁸⁶⁰ dated 22 July 2014, has location 47.974628 North; 38.760117 East. It shows a burned patch of ground, with unburned wheat in the background:



55. Another picture¹⁸⁶¹ also dated 22 July 2014 again shows what appears to be localized burning, with golden wheat behind, in the space toward the line of trees:

¹⁸⁵⁷ See ¶¶51 of the present Appendix 2.

¹⁸⁵⁸ Dutch National Police, Official Report Concerning the Transport Route, on the Basis of Open Sources, 16 May 2018, p. 14 (Annex 373).

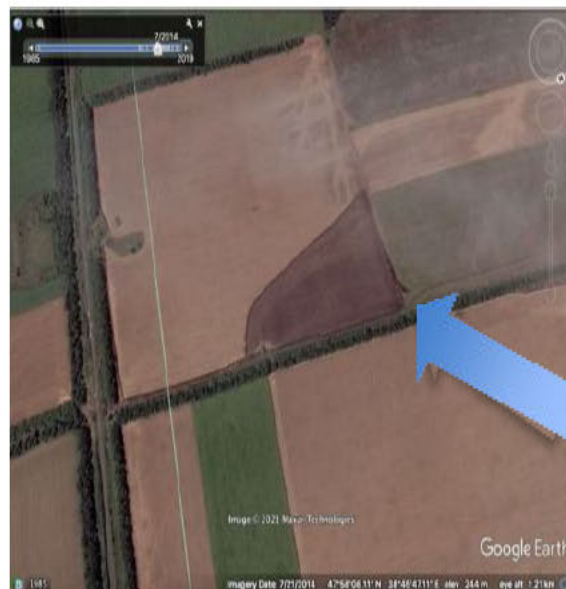
¹⁸⁵⁹ Mashable, Picture of Alleged Launch Site, 22 July 2014, available at: https://mashable-evaporation-wordpress.s3.amazonaws.com/2015/07/image_5.jpeg; Mashable, Picture of alleged launch site, 22 July 2014, available at: <https://mashable-evaporation-wordpress.s3.amazonaws.com/2015/07/image-3.jpeg>; Mashable, Picture of alleged launch site, 22 July 2014, available at: <https://mashable-evaporation-wordpress.s3.amazonaws.com/2015/07/image-4.jpeg>; Mashable, Picture of alleged launch site, 22 July 2014, available at: https://mashable-evaporation-wordpress.s3.amazonaws.com/2015/07/image_7.jpeg.

¹⁸⁶⁰ Mashable, Picture of alleged launch site, 22 July 2014, available at: <https://mashable-evaporation-wordpress.s3.amazonaws.com/2015/07/image-3.jpeg>.

¹⁸⁶¹ Mashable, Picture of alleged launch site, 22 July 2014, available at: https://mashable-evaporation-wordpress.s3.amazonaws.com/2015/07/image_5.jpeg.



56. The location for these pictures is shown below on a Google Earth picture taken on 21 July 2014 – the day before the Oliphant/Miller pictures and video. The photographs were supposedly taken from the corner of the field shown by the arrow.



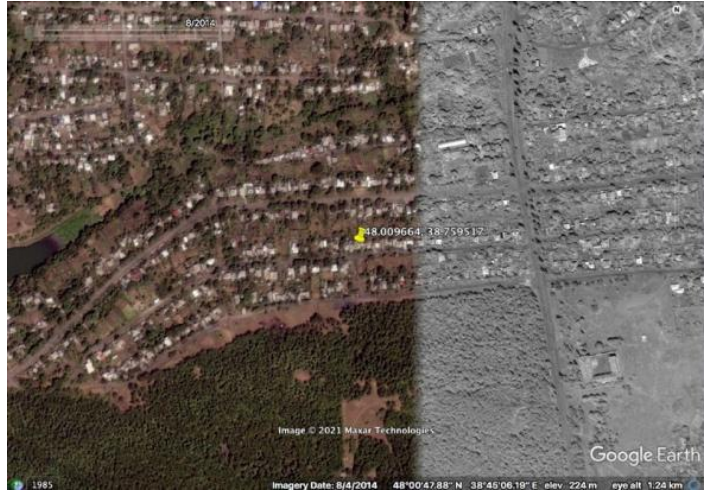
57. Both look towards the only side of the field with a line of poles, and towards the same configuration of trees (the boundary of the field at the top of the picture below). The precise point is apparent from the close-up of the Google Earth picture (below on the right), which shows the path across the field in the picture above:



58. Unfortunately for Ukraine, the Oliphant/Miller pictures and video of 22 July 2014 do not fit with the Google Earth picture from the day before. The picture from 21 July 2014 shows a huge burned area in the field. A picture taken from the position of the photographer in the wheat field photos would show a vast area of burned land – not golden wheat. It is therefore clear that the wheat field photographs are fabricated, which makes a mockery of Ukraine’s supposed geo-location of a purported launch site in this case.
59. It is also interesting to note that one of the Oliphant/Miller pictures¹⁸⁶² has curious geo-location metadata (which would have been recorded automatically by the iPhone 5 on which the metadata indicates that it was taken¹⁸⁶³). The location data is in the middle of a town, and not in a field:

¹⁸⁶² Mashable, Picture of Alleged Launch Site, 22 July 2014, available at: https://mashable-evaporation-wordpress.s3.amazonaws.com/2015/07/image_5.jpeg.

¹⁸⁶³ Metapicz, Metadata for the Picture of Alleged Launch Site Image, available at: metapicz.com/#landing?imgsrc=https%3A%2F%2F (Annex 472).



F. THE RESULTS OF AEROSPACE DEFENSE CONCERN ALMAZ-ANTEY’S TECHNICAL INVESTIGATION WERE UNJUSTIFIABLY REJECTED

60. Almaz-Antey is the manufacturer of the Buk TELAR. It has conducted a highly technical investigation and concluded that the DSB's findings, which were taken at face value by the District Court in The Hague and the ECtHR, were unreliable.

61. In this report, Almaz-Antey analysed in detail the nature of the damage to various parts of the aircraft and technical aspects of the Buk TELAR. In the course of this investigation, Almaz-Antey experts discovered mistakes made by the Dutch specialists. For example, when calculating the likely launch area, they did not consider “a correction of about 4 degrees between the course line projection of the Boeing 777 on the map and the actual orientation of the aircraft's longitudinal axis must be considered when estimating the likely launch area”.¹⁸⁶⁴

62. It was found that the DSB's analysis of the launch area was also not intended to establish an objective truth. As noted in the Almaz-Antey report:

“Thus, during the technical investigation, NLR specialists carried out calculations of the "likely launch area" three times using different models. The main feature of these calculations was that, despite changing the parameters of the warhead model, damage model, detonation point areas, and missile flight models, the calculated area always "included the town of Snizhne. In all cases, the "matching" was done by fitting the parameters of

¹⁸⁶⁴ Report of JSC Air and Space Defense Corporation "Almaz-Antey" on the results of studies related to the technical investigation into the crash of the Malaysian airlines Boeing 777-200 9M-MRD (flight MH17), 2023, p. 79, clause 5.2.3 (Annex 1).

the warhead, damage model, and detonation region, as well as by fitting the parameters in the missile flight model”¹⁸⁶⁵

63. Moreover, the results obtained by Almaz Antey “directly contradict the results obtained in the DSB-led technical investigation”¹⁸⁶⁶. As a result, “the studies using adjusted source data in the models do not support the version of a missile launch from the area of Snezhnoye and Pervomaysky settlements”.¹⁸⁶⁷
64. This applies not only to the launch area, but also to the modification of the missile. Thus, the damage patterns of the outer skin, airframe, floor and interior of the cockpit prove that if flight MH 17 was shot down by a Buk TELAR, it could only have been an older modification of the 9M38 missile, which approached the aircraft on a collision course in the horizontal plane with angles 72^{+2}_{-10} deg.¹⁸⁶⁸ This is inconsistent with the findings of the DSB, according to which the aircraft's encounter with the missile occurred on an oncoming course.
65. All of these materials were groundlessly dismissed by the District Court of The Hague. In its judgment, it pointed out that Almaz-Antey was a State-owned enterprise of the Russian Federation and could not be objective in its investigations. Also, the Court stated that its studies were not presented in a “perfectly clear, insightful, followable and verifiable manner”. Therefore, preference was given to the expert appointed by the Court. The ECtHR in its recent judgment also found only prima facie evidence and did not consider the merits.
66. Thus, until now, the Almaz-Antey material has never been assessed in substance, as it rejects the generally accepted version of the shooting down of flight MH17 and the Russian Federation's (or the DPR's) involvement in it.

¹⁸⁶⁵ Report of JSC Air and Space Defense Corporation "Almaz-Antey" on the results of studies related to the technical investigation into the crash of the Malaysian airlines Boeing 777-200 9M-MRD (flight MH17), 2023, p. 125 (Annex 1).

¹⁸⁶⁶ Report of JSC Air and Space Defense Corporation "Almaz-Antey" on the results of studies related to the technical investigation into the crash of the Malaysian airlines Boeing 777-200 9M-MRD (flight MH17), 2023, p. 124, clause 5.3.2.2 (Annex 1).

¹⁸⁶⁷ *Ibid.*, p.129, clause 6.

¹⁸⁶⁸ *Ibid.*

G. THE BIAS OF THE DUTCH POLICE AGAINST THE RUSSIAN FEDERATION DURING THE INVESTIGATION

67. The prejudiced negative perception towards the Russian Federation during the investigation is clearly demonstrated in the Dutch National Police Report on the Crew of the Buk. This report, for example, provides the following transcript of the intercepted conversation:

Recipient: There's only hope – Russia. (...) I wish they give us surface to air system.

Caller: That's what I'm telling. I wish they give you at least something. If you can't come, don't come. Give something, they will deal with it.

Recipient: '[inaudible] We have air defense guys [sic!]. We have everyone. Everyone was serving in the Soviet [sic!] army. Give us that weapon.'¹⁸⁶⁹

68. In comments on this conversation, the Dutch Police notes the following:

“The separatist claims that they have people in their midst who served in the Russian army and have experienced with air defense systems”.¹⁸⁷⁰

69. Thus, the Dutch Police deliberately equates "Russian army" and "Soviet army", which distorts the meaning. The reference to the Soviet Army relates to the period before 1991 and means that the DPR Armed Forces, which could have people who served in the Soviet army among them, can operate air defense systems independently, without the need to send specialists from outside. This is supported by the plain fact of the DPR actually operating such surface-to-air missile systems they have captured from the UAF before the MH17 incident – like, for instance, the Strela-10 mobile surface-to-air missile system that DPR was known to operate prior to the crash.¹⁸⁷¹

¹⁸⁶⁹ Dutch National Police, Official Report on the Crew and two DPR Separatist Leaders, 7 October 2019, p. 8 (Annex 374).

¹⁸⁷⁰ *Ibid.*

¹⁸⁷¹ Reuters, *Ukraine rebel commander says will not pull out of Donetsk* (10 July 2014), available at: <https://www.reuters.com/article/us-ukraine-crisis-strelkov-idUSKBN0FF2BX20140710> (Annex 177).



70. DPR-operated Strela-10 self-propelled anti-aircraft guided missile system, captured as a trophy from the UAF. Donetsk, 10 July 2014
71. However, the Dutch Police chose to misinterpret the (alleged) intercept in order to give the impression that the DPR Armed Forces are composed of former or current Russian Federation military personnel, which does not directly follow from the dialogue.
72. Furthermore, the Dutch police file explicitly states that there is evidence of at least one soldier in the DPR forces who had previously been trained to operate air defence systems and who took an active part in the DPR's air defence operations in the summer of 2014:

“Evidence confirms that this separatist has been trained in Missile Air Defense and was active in air defense for the separatists in summer 2014”¹⁸⁷²
73. In this report, the Dutch Police also drew attention to an article by an Associated Press reporter in the section "Identifications relating to the potential country of origin of the crew on the BUK-TELAR". According to that article, an AP reporter met the Buk-TELAR crew who spoke English with a “distinctive Russian accent” and wore “sand colored camouflage without identifying insignia”. With regard to this, the following is worth noting.

¹⁸⁷² Dutch National Police, Official Report on the Crew and two DPR Separatist Leaders, 7 October 2019, p. 10 (Annex 374).

74. Sand-colored camouflage corresponds to the uniform of the Ukrainian and not Russian Armed Forces. In contrast, the Russian “Ratnik” combat outfit used by Russian troops in Crimea in the spring of 2014 is bright green in colour (which is where the expression “little green men” comes from). The sandy colour is not characteristic of the Russian Armed Forces uniform (even Russian soldiers in Syria were equipped with the Ratnik in green).



Ratnik combat equipment kit used by the Russian Armed Forces¹⁸⁷³



Ukrainian Armed Forces uniforms¹⁸⁷⁴

75. The Associated Press journalist's statement that the servicemen had a “Russian accent” also cannot indicate that they belonged to the Russian Armed Forces, as over 90% of the population in Eastern Ukraine are Russian speakers,¹⁸⁷⁵ and the DPR Armed forces

¹⁸⁷³ Rostec, *Rostec delivered almost 300,000 sets of Ratnik combat equipment* (10 December 2020), available at: <https://rostec.ru/news/rostekh-postavil-pochti-300-000-komplektov-boevoy-ekipirovki-ratnik/> (Annex 310); RBC, *Three Russian soldiers killed in Syria* (25 March 2019), available at: <https://www.rbc.ru/politics/25/03/2019/5c9924cd9a79477f008a4a3e?ysclid=ldy7ysaa3b784094146> (Annex 309).

¹⁸⁷⁴ The Kiev Independent, *British instructors train Ukrainian military to operate NLAW tank killers (PHOTOS)* (25 January 2022), available at: <https://kyivindependent.com/national/british-instructors-train-ukrainian-military-to-operate-nlaw-tank-killers-photos> (Annex 211); Reuters, *Ukraine holds military drills with U.S. forces, NATO allies* (20 September 2021), available at: <https://www.reuters.com/business/aerospace-defense/ukraine-holds-military-drills-with-us-forces-nato-allies-2021-09-20/> (Annex 212).

¹⁸⁷⁵ Gallup, *Russian Language Enjoying a Boost in Post-Soviet States* (1 August 2008), available at: <https://news.gallup.com/poll/109228/russian-language-enjoying-boost-postsoviet-states.aspx> (Annex 213).

certainly spoke with a “Russian accent”. Moreover, many Ukrainian citizens outside of Donbass are also Russian-speaking; a foreign journalist would be unlikely to be able to tell from the pronunciation of the foreign language in which the conversation was apparently taking place whether the person in front of him was a native Russian or a native Ukrainian, and in any event could not have distinguished a native Russian-speaking DPR resident from a citizen of the Russian Federation. Thus, the pronunciation with a Russian accent not only does not prove that the person in question came from the Russian Federation (and was not a local resident of Donbass), but also does not rule out that the person was a member of the UAF (which would fit with the “sandy” colour of their uniform).

H. SUBSTANTIVE DEFICIENCIES OF DUTCH CRIMINAL PROCEEDINGS AND THE ECtHR PROCEEDINGS

76. Against this background, all of which was known to the Netherlands Government and the ECtHR, the judicial decisions of the Dutch Criminal Court and of the ECtHR in relation to MH17 are lamentable departures from justice.
77. The Dutch State was clearly aware of the points that the Russian Federation made in Strasbourg, and its Prosecutor in the Dutch Criminal Court was plainly aware of them. The case was founded on the investigative work of the DSB and JIT, which adopted much of the analysis of Bellingcat and Mr Oliphant of the *Daily Telegraph*. In particular, the JIT purported to track the arrival of a Buk Telar from the Russian Federation at the request of rebels, the shooting down of MH17 and the surreptitious return of the Buk Telar to the Russian Federation.
78. After the Russian Federation had raised the points above concerning digital evidence in Strasbourg, the Prosecutor changed his tune. Extraordinarily, he announced in his opening statement on 8 June 2020 that he did not have to prove what kind of missile brought down MH17 or that it came from the Russian Federation.¹⁸⁷⁶ He said (in free translation from the Dutch):

“...the charges do not request that we also investigated the type of rocket of that 9M38 series ...”

¹⁸⁷⁶ The Dutch Public Prosecution Service, *Opening statement and context of the investigation* (8 June 2020), available at: <https://www.prosecutionservice.nl/topics/mh17-plane-crash/prosecution-and-trial/court-sessions-june-2020/opening-statement-and-context-investigation> (Annex 363).

79. The Prosecutor’s statement is eloquent testimony to a total collapse of confidence by the Dutch authorities in the core case that Ukraine and the Netherlands had previously made and which Ukraine now puts forward again in this Court.
80. The ECtHR decision is even worse than what happened in the Dutch criminal proceedings, because it is not clear that the Dutch judges, as opposed to the Prosecutor, were made aware of the holes in the Prosecution case. The ECtHR however was fully aware of the Russian Federation’s objections. That Court was also fully acquainted with the pedigree of Bellingcat.
81. However, it responded to the Russian Federation’s evidence by making it secret, and making secret some of the submissions themselves. This was a grotesque contradiction of open justice, which is the only true justice.
82. The Russian Federation protested about the secrecy with utmost force, but to no avail. In its submission of March 2021, it said the following:
- “... the Court has spontaneously imposed confidentiality on evidence, and sometimes on submissions, in such cases. A further unfair direction from the President is that whilst submissions in Ukraine’s application are open, evidence must be treated as confidential, and the Netherlands’ entire application, including its evidence, must be treated as confidential. This is utterly wrong, antithetical to justice and an impossible way of proceeding in the present applications”.
83. Secrecy has produced absurd results. It allowed the ECtHR to suggest that the Russian Federation had provided little evidence and to dismiss it on the unreasoned basis that the Court had confidence in the DSB and JIT.¹⁸⁷⁷ The European Court ignored all of the Russian Federation’s objections to the DSB and JIT reports, which were well-made and properly vouched with compelling evidence. It ignored the fact that Ukraine and the Netherlands failed to produce original digital material and failed to respond, in substance, to the Russian Federation’s objections. The Netherlands merely asserted that digital materials had been checked, and produced short formulaic purported expert reports saying so. However, these did not attach any original digital material and did not engage with any of the Russian Federation’s specific objections. In fact, it was absurd to say that original digital material had been checked:

¹⁸⁷⁷ European Court of Human Rights, *Case of Ukraine and the Netherlands v. Russia (applications nos. 8019/16, 43800/14 and 28525/20)*, Grand Chamber Decision, 25 January 2023, ¶¶464, 467 and 469.

- (a) Real originals did not even exist. The JIT was unable to produce original data files to Australia – one of the JIT members – for assessments performed by the Australian Federal Police between 22 April 2015 and 2 July 2015.¹⁸⁷⁸
- (b) If the data had been checked, why is there no mention by Ukraine, or the Netherlands, or the JIT, of the fact that the crucial Snezhnoe video was uploaded on 16 July 2014 - the day before MH17 was destroyed? Why is there no mention of the fact that the SBU’s compendium of intercepts of rebels discussing MH17 was also uploaded the day before? Why is there no acknowledgment that the Bezler intercept about MH17 in fact related to a Sukhoi airplane shot down on a different date in a different place? Why has there been no proper attempt by Ukraine, the Netherlands or the JIT to deal with Russia’s objections? There is no evidence whatsoever of original data files, and no evidence whatsoever that they were checked for veracity. They are manifestly fake, for reasons that the Russian Federation proved with copious evidence, and which the JIT, Ukraine and the Netherlands have *almost* consistently ignored.
84. The *almost* arises in this way. Written submissions concluded before the ECtHR in May 2021, subject to further directions of the Court. Of course, there should have been further directions: Ukraine and the Netherlands to produce original digital evidence etc., an evidential hearing before an evidential commission, cross-examination, a proper opportunity to challenge evidence on both sides with witnesses and experts available for cross-examination.
85. Even Ukraine was conscious at this stage of its embarrassing failure to engage with the Russian Federation’s evidence. Intriguingly, but belatedly, Ukraine acknowledged the strength of the Russian Federation’s points by requesting permission from the ECtHR to submit a “comprehensive expert report” from Eliot Higgins of Bellingcat, together with the generous proposal that he be offered for cross-examination - albeit for a parsimonious 60 minutes.¹⁸⁷⁹

¹⁸⁷⁸ Australian Federal Police, Report in the Matter of AFR Case Reference No. 5667342 (Operation AVENELLA), July 2015, available at: <https://www.bonanzamedia.com/bonanza-leaks/> (Annex 360).

¹⁸⁷⁹ *Ukraine and the Netherlands v. Russia*, Applications nos. 8019/16, 43800/14 and 28525/20, Submission of May 2021 of Ukraine, ¶20.

86. The President of the ECtHR refused Ukraine permission to file the proposed “expert report” in June 2021, noting that Ukraine had already “...had every opportunity to submit any expert reports they considered necessary or desirable ...”.¹⁸⁸⁰ However, even though the Russian Federation’s expert evidence had not been met, the ECtHR ignored it, failed to refer to it and found against the Russian Federation without reference to it.
87. Moreover, the scant references that the Court does make in its judgment to the Russian Federation’s evidence are wrong and, whilst they appear, in a superficial way, to demonstrate consideration of the evidence, all of which was secret, they in fact show the opposite.
88. For example, the Court complained that there was only one expert report challenging the SBU’s compendium of alleged intercepts of rebel conversations about the shooting down of MH17, as if quantity instead of quality rules the day.¹⁸⁸¹ This was an unsustainable basis for rejection.
89. First, in the Report that presumably the Court refers to, the Malaysian expert, Mr Rosen, noted the following about the intercepts in the compendium:¹⁸⁸²
- (a) Track 1 [“I Bezler (‘Bes’)” and “V. Geranin”]: “This ... Track 1 is tampered”, with “...possible cuts and edits which can be seen as the Background noises in the V. Geranin track are different when V. Geranin speaks”;¹⁸⁸³
 - (b) Track 2 [“Major” and “Grek”]: “...Difference level of noise in the background seen, which clearly indicating of editing/addition of different audio into this part of the audio track”;¹⁸⁸⁴

¹⁸⁸⁰ European Court of Human Rights, *Case of Ukraine and the Netherlands v. Russia* (applications nos. 8019/16, 43800/14 and 28525/20), Letter, 10 June 2021 (Annex 376), which did not give any reasons for refusing the relevant request for permission.

¹⁸⁸¹ European Court of Human Rights, *Case of Ukraine and the Netherlands v. Russia* (applications nos. 8019/16, 43800/14 and 28525/20), Grand Chamber Decision, 25 January 2023, ¶465.

¹⁸⁸² Expert report of Mr Akash Rosen, 26 May 2019 (Annex 197).

¹⁸⁸³ *Ibid.*, p. 77, see also p. 140.

¹⁸⁸⁴ *Ibid.*, p. 83, see also p. 140.

- (c) Track 3 [“Major” and “Grek”]: “Possible merging can be seen, and background noises appear to be different”;¹⁸⁸⁵
- (d) Track 4 [“Major” and “Grek”]: “Audio seems to be cut between time frame 1.24.2 and 1.24.3. Different frequency level appears in many places and different background noises level were seen”;¹⁸⁸⁶
- (e) Track 5 [“Kozitsyn” and “Militant”]: “Possible merging can be seen... also sudden difference in the spectrum frequency from 2:02:98”;¹⁸⁸⁷

90. These points were compelling. Moreover, it was clear beyond any doubt that the first conversation, the Bezler tape, was manipulated. After Mr Rosen’s work, a full record of the Bezler conversation came to light¹⁸⁸⁸ – and it showed, as noted above, that it was recorded on an earlier date and related to the shooting down of a Sukhoi bomber. The Court ignored this too.

91. Further, the Court was wrong to say that only one expert report undermined the intercepts. It ignored other expert evidence that when a digital file is uploaded to YouTube, it is encoded at that time, so that the encoding date in the metadata of a digital file is the date of uploading.¹⁸⁸⁹ The date of publication may be later.

¹⁸⁸⁵ *Ibid.*, p. 88, see also p. 141.

¹⁸⁸⁶ *Ibid.*, p. 93, see also p. 141.

¹⁸⁸⁷ *Ibid.*, p. 99, see also p. 141.

The Dutch Prosecutor has stated Kozitsyn has confirmed that he took part in this conversation (see The Dutch Public Prosecution Service, *Status of the investigation and position on the progress of the trial of the Dutch Public Prosecution Service* (10 March 2020), available at: <https://www.prosecutionservice.nl/topics/mh17-plane-crash/prosecution-and-trial/court-sessions-march-2020/status-of-the-investigation-and-position-on-the-progress-of-the-trial--part-2-10-3-2020> (Annex 377)). However, it is clear from the relevant Vice News interview with Simon Ostrovsky that Kozitsyn does not appear to know specifically which conversation was being referred to. Simon Ostrovsky refers to remarks about the involvement of Cossacks which Kozitsyn did not say in the alleged intercept published on 17 July 2014. The only remark made by Kozitsyn was a natural response of rebels, easy to anticipate. This does not work as corroboration (see YouTube, Vice News, *Return to the MH17 Crash Site: Russian Roulette (Dispatch 87)* (19 November 2014), at 6 minutes 45 seconds onwards, available at: <https://www.youtube.com/watch?v=cYEH6Tfzouo>). The relevant compendium was uploaded on 16 July 2014. This is a curious recording, with at least 3 different voices (with the relevant part of the SBU compendium only referring to Kozitsyn and an unnamed “Militant”).

¹⁸⁸⁸ Sharij net, *BOEING. The Bird Has Come* (10 August 2020), available at: <https://sharij.net/boing-ptichka-priletela> (Annex 405).

¹⁸⁸⁹ Expert report analyzing videos from social media (Annex 361); Report on Expert Examination of a Video File for Any Signs of Falsification, 7 December 2020 (Annex 362).

92. As the Russian Federation explained,¹⁸⁹⁰ this expert evidence showed that the Snezhnoe video and the compendium were fake, because both were encoded, and therefore uploaded, on 16 July 2014. The Court failed even to mention this point or the evidence supporting it.
93. Another example concerns photographs of a soldier called Tarasov who was presented on a military vehicle – a BMP – about to move into Ukraine. The Russian Federation noted that so many hands were involved in disinformation that some did not know what others were doing. Thus the Russian Federation pointed to the fact that different versions were used by Bellingcat and the Atlantic Council. In the Bellingcat version, the number on the vehicle was removed, which fitted Bellingcat’s allegations that military marks were removed from Russian military vehicles before they were sent into Ukraine. The pictures are below.



¹⁸⁹⁰ *Ukraine and the Netherlands v. Russia*, Applications nos. 8019/16, 43800/14 and 28525/20, Further Observations of the Russian Government on Admissibility (Regarding East Ukraine), Submission of May 2021 of Ukraine, 8 November 2019, ¶¶390-402 (Annex 375).



94. In its judgment, the European Court said that Mr Eliot Higgins of Bellingcat had produced a statement, which answered the Russian Federation’s objections to the Tarasov pictures.¹⁸⁹¹ He suggested that Mr Tarasov changed his own picture in two postings to conceal his unit. The European Court said that the Russian Federation had no riposte.¹⁸⁹² This, however, is not right. In written submissions, [in expert evidence] and in oral submissions in front of the full Court, the Russian Federation made the point that the changing of the picture to delete the number on the BMP vehicle was probably done by AI – some artificial intelligence algorithm - rather than a human hand. A close-up shows that the number was obscured by cloning the soldier’s boots into the metal where the number had been. No human would choose boots to cover up a number on metal. A human would use an area of metal. By contrast, AI can be stupid:

¹⁸⁹¹ European Court of Human Rights, *Case of Ukraine and the Netherlands v. Russia* (applications nos. 8019/16, 43800/14 and 28525/20), Grand Chamber Decision, 25 January 2023, ¶473.

¹⁸⁹² *Ibid.*



95. In any event, the Russian Federation has pointed out that the Tarasov manipulation was by no means unique.

APPENDIX 3

THE RUSSIAN FEDERATION IS NOT ACCOUNTABLE FOR THE ACTS OF DISAPPEARANCE, MURDER, ABDUCTION AND TORTURE ALLEGED BY UKRAINE

1. No doubt being well aware that it has not shown that the Russian Federation is responsible for the alleged acts of disappearance, murder, abduction and torture, Ukraine continues to argue that the Russian Federation has alternatively violated the CERD by “facilitating and tolerating” those alleged acts.¹⁸⁹³ In this connection it claims more specifically that the Russian Federation has not investigated the alleged acts in a satisfactory manner.¹⁸⁹⁴ As has been shown in the Counter-Memorial¹⁸⁹⁵ as well as the following account makes plain, that claim, too, does not withstand scrutiny.

A. THE RESHAT AMETOV CASE

2. In regard to the death of Mr Reshat Ametov, it first bears to mention that the Ukrainian authorities investigating the matter themselves elected to qualify the crime as an “intentional murder of a kidnapped person” under clause 3 of Part 2 of Article 115 of the Criminal Code of Ukraine.¹⁸⁹⁶ The Ukrainian authorities did not invoke clause 14 of the same Article, which penalizes “intentional murder for reasons of racial, national or religious intolerance”¹⁸⁹⁷. Thus even Ukraine, it appears, does not consider the death of Mr Ametov as having to do with his ethnicity.

3. Ukraine dismisses the serious investigation undertaken by the Russian Federation into the circumstances of Mr Ametov’s death, as detailed in the Counter-Memorial,¹⁸⁹⁸ on the basis of a single argument that no polygraph examination was performed during its course¹⁸⁹⁹. In so doing Ukraine essentially calls into question the judgment and expertise

¹⁸⁹³ Reply, ¶466.

¹⁸⁹⁴ *Ibid.*, ¶467.

¹⁸⁹⁵ *See, e.g.*, Counter-Memorial (CERD), ¶¶21-24; 30-32; 34-39;

¹⁸⁹⁶ Criminal Code of Ukraine, 5 April 2001, Article 115(2)(2), available at: <https://zakon.rada.gov.ua/laws/show/2341-14#Text> (Annex 91).

¹⁸⁹⁷ *Ibid.*, Article 115(2)(14).

¹⁸⁹⁸ Counter-Memorial (CERD), ¶¶21-24.

¹⁸⁹⁹ Reply, ¶454.

of the Russian authorities simply for not achieving an outcome that Ukraine desires. That clearly cannot be a violation of the CERD.

4. Moreover, in reality the interrogation was conducted. However, the use of polygraph is not provided for by the Code of Criminal Procedure of the Russian Federation. Notably, the Supreme Court of the Russian Federation has pointed out that the results of a study using a polygraph do not meet the requirements of the law for evidence and may not be used in investigative activity.¹⁹⁰⁰ Noteworthy is the fact that Ukraine itself refused a request for legal assistance made by Russian investigative and prosecution body as part of this investigation.

B. THE ERVIN IBRAGIMOV CASE

5. Ukraine is moreover discontent with the investigation into the abduction of Mr Ibragimov by individuals dressed in police uniform, notwithstanding the substantive efforts undertaken by the Russian authorities that examined the matter. Despite the fact that CCTV footage was accessed, over 500 potential witnesses were questioned, over 150 vehicles were checked, at least 7 searches and seizures were performed, and at least 5 expert examinations were conducted,¹⁹⁰¹ Ukraine complains that “there is no evidence that Russia’s police force was ever investigated”¹⁹⁰².
6. In fact, as Ukraine itself recognizes,¹⁹⁰³ the Russian authorities investigating this case did contact law enforcement bodies. This line of investigation simply did not yield any meaningful results. This, again, does not constitute racial discrimination contrary to the CERD.

C. THE SHCHEKUN, KOVALSKY AND VDOVCHENKO CASES

7. Ukraine once more chooses to ignore the significant record of activity undertaken in the course of the investigation into the alleged abductions of Mr Shchekun, Mr Kovalsky,

¹⁹⁰⁰ Supreme Court of the Russian Federation, Cassation Ruling №33-UD22-11-A2, 28 June 2022, p.5: “For a psychophysiological study using a polygraph, the need for which the applicant indicates in the complaint, there are no scientifically based methods, which does not allow using the results obtained as evidence in the case”, available at: https://vsrf.ru/stor_pdf.php?id=2134162 (Annex 69).

¹⁹⁰¹ Counter-Memorial (CERD), Appendix A, ¶32.

¹⁹⁰² Reply, ¶455.

¹⁹⁰³ *Ibid.*, fn. 839.

and Mr Vdovchenko.¹⁹⁰⁴ It also considers the Note from the 534th Military Investigative Directorate, which made it clear that no military personnel of the Armed Forces of the Russian Federation were stationed in the area in question at the relevant time, to “lack evidentiary value”, but without giving any reason why that can possibly be so.¹⁹⁰⁵ The Note is also criticized for not disproving the alleged crimes,¹⁹⁰⁶, when clearly it was not intended to do that.

8. Ukraine does not disprove the finding that no military personnel of the Armed Forces of the Russian Federation, nor local police or the Crimean People’s Militia, were (or could have been) in the area in question at the relevant time. It may not like the decision of the Russian authorities not to open a criminal case following their extensive investigation, but that decision was a natural and lawful consequence of the results yielded by the investigation.
9. Ukraine seeks to rely in the Reply on a witness statement by the Metropolitan of Simferopol and Crimea Klyment,¹⁹⁰⁷ yet that statement itself suggests that Mr Shchekun and Mr Kovalsky were kidnapped not for any reason having to do with their ethnicity, but because they organized a political demonstration against Crimea’s separation from Ukraine.¹⁹⁰⁸
10. The statement by the Metropolitan of Simferopol and Crimea Klyment also refers to a meeting that took place between the Metropolitan Klyment and a man named Igor Strelkov, who, it is claimed, knew of the condition of Mr Shchekun and Mr Kovalsky and facilitated their release.¹⁹⁰⁹ To the extent that any such meeting took place, the statement itself suggests that Mr Strelkov was not an official of the Russian Federation but rather “an adviser on security and defense of the Council of Ministers of the Republic of Crimea”.¹⁹¹⁰

¹⁹⁰⁴ Counter-Memorial (CERD), Appendix A, ¶¶34-39.

¹⁹⁰⁵ Reply, ¶457. ¶

¹⁹⁰⁶ *Ibid.*

¹⁹⁰⁷ Witness Statement of the Metropolitan of Simferopol and Crimea Klyment (Reply, Annex 4).

¹⁹⁰⁸ *Ibid.*, ¶6.

¹⁹⁰⁹ *Ibid.*, ¶10. .

¹⁹¹⁰ *Ibid.*, ¶7.

11. Ukraine likewise complains of the investigation concerning the alleged abduction of Mr Vdovchenko,¹⁹¹¹ despite the fact that the Russian Federation spared no efforts in attempting to find individuals involved.¹⁹¹² Now it suggests that investigation activities “apparently came in 2017, over 3 years after the abduction”¹⁹¹³, pointing to the date of the “Report on the Results of Operative Search Activities” presented by the Russian Federation. As it is clear from the very title of the document, however, it is the Report that dates from 2017; the date clearly does not relate to the investigation activities that preceded it.

D. THE KOSTENKO AND PARALAMOV CASES

12. In regard to the alleged torture of Mr Kostenko and Mr Paralamov, Ukraine itself accepts that the Russian Federation’s military investigative authorities investigated those allegations, including by questioning FSB officers.¹⁹¹⁴ It is simply the result of these investigations that Ukraine once again refuses to accept, apparently considering it implausible that complaints of torture might be raised as part of a criminal defence strategy. In the meantime, both Mr Kostenko and Mr Paralamov refused to pursue complaints of torture;¹⁹¹⁵ Ukraine may argue they were coerced to do so,¹⁹¹⁶ but points to no evidence in this regard.
13. What is more, Ukraine does not put forward any evidence that Mr Kostenko and Mr Paralamov were tortured, nor that any alleged mistreatment was based on their ethnicity. In fact, Ukraine does not deny that Mr Kostenko and Mr Paralamov were both involved

¹⁹¹¹ Reply, ¶458.

¹⁹¹² Counter-Memorial (CERD), Appendix A, ¶36.

¹⁹¹³ Reply, ¶458.

¹⁹¹⁴ Reply, ¶¶459-460.

¹⁹¹⁵ See Counter-Memorial (CERD), ¶¶54-56; See also Senior Forensic Investigator of the 534th Military Investigative Department of the 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 (Counter-Memorial (CERD), Annex 228); Investigator of the First Investigative Department for Investigation of High-Priority cases 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, 25 May 2015 (Counter-Memorial (CERD), Annex 235); 534th Military Investigative Department of the Investigative Committee of the Russian Federation, Resolution on the refusal to initiate a criminal case, 27 October 2017 (Counter-Memorial (CERD), 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 (Counter-Memorial (CERD), Annex 584); Prosecutor’s Office of the Republic of Crimea, Letter No. 27-239-2017/On6074-2017 to E.M. Kurbedinov, 20 December 2017 (Counter-Memorial (CERD), Annex 585).

¹⁹¹⁶ Reply, ¶459.

with extremist organisations (*Samooborona Maidana* and *Hizb ut-Tahrir* respectively), as they themselves have acknowledged.¹⁹¹⁷

14. Thus, either individually or collectively, the cases referred to by Ukraine cannot be said to show any signs of violation of the CERD. Ukraine has not shown — and cannot show — that any of them can reasonably be capable of constituting racial discrimination, let alone a “systematic racial discrimination campaign”, against the Crimean Tatars and Ukrainians.
15. It is further of note that the investigative procedures in question have been reviewed by the competent Russian authorities, namely the General Prosecutor’s Office of the Russian Federation, the Investigative Committee of the Russian Federation, and, where applicable, competent courts.¹⁹¹⁸ Ukraine’s mischaracterization of these investigations is self-serving and misinformed.
16. Ukraine itself offers no justification in its Reply for failing to respond to Russian requests for cooperation made in the context of various investigations, choosing instead to criticize the timing of those requests.¹⁹¹⁹ Needless to explain, proper investigations do take time; it is expected of Ukraine to lend assistance to them rather than hamper them.
17. The Russian Federation has sought to maintain public order and safety in Crimea, and, as shown above, investigates alleged crimes that may cause a threat in this regard. At no point did it promote or sponsor discrimination or violence against any ethnic group in Crimea (or elsewhere). Given that the alleged crimes had nothing to do with racial discrimination, obligations under Articles (2)(1)(b), 5(b) and 6 of the CERD do not arise either.

¹⁹¹⁷*Ibid.*

¹⁹¹⁸ See, for example, Kievskiy District Court of Simferopol, Case No. 3/6-330/2014, Ruling authorizing the search in Mr Paralamov’s house, 3 September 2014 (Counter-Memorial (CERD), Annex 181); Kievskiy District Court of Simferopol, Republic of Crimea, Case No.444/2017, Ruling authorizing the inspection of R.R. Paralamov’s house, September 2017 (Counter-Memorial (CERD), Annex 343); 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 (Counter-Memorial (CERD), Annex 395); see also with respect to other Ukraine’s allegations Head of the Directorate for Supervision of Criminal Procedural and Operative Search Activities of the Prosecutor’s Office of the Republic of Crimea, Letter No. 15/1-382-2016/On4261-2017, 29 August 2017 (Counter-Memorial (CERD), Annex 339); Directorate for written appeals of Citizens and Organisations of the Administration of the President of the Russian Federation, Letter No. A26-16-7216411, 24 January 2018 (Counter-Memorial (CERD), Annex 391).

¹⁹¹⁹ Reply, ¶¶461-462.

APPENDIX 4

NO DISCRIMINATION IN REJECTION TO GRANT PERMISSIONS TO ORGANISE PUBLIC EVENTS IN CRIMEA

1. As the Russian Federation established in its Counter-Memorial, the various individual instances of enforcement measures complained of by Ukraine have nothing at all to do with racial discrimination¹⁹²⁰. Contrary to Ukraine's unsubstantiated claim, they were neither arbitrary nor "pretextual": anti-terrorist and anti-extremist measures against banned extremist organizations are carried out in all relevant parts of the territory of the Russian Federation and against all suspects, regardless of their ethnic background. Ukraine's account of the facts is thus at best inaccurate, and the Russian Federation contests it. These is in particular confirmed by Expert Report of Mr Engel and Expert Report of Prof Merkuryev, who brought relevant statistics that shows that the majority of extremist organizations banned pertain to pseudo-religious organizations and Russian extremist.¹⁹²¹
2. The following examples illustrate just how unfounded Ukraine's claims are in regard to law enforcement measures undertaken by the Russian federation in combatting extremism.

A. THE CASE OF MR IBRAIM IBRAGIMOV

3. The court-approved search in question was conducted in the context of criminal proceedings opened in June 2014 concerning goods stolen from another resident of Bakhchisaray. Clearly, in regard to this and other cases, the fact that these goods were not then found does not render the search unlawful. Ukraine itself accepts that extremist literature related to *Hizb ut-Tahrir* was however found, along with firearm and ammunition¹⁹²². Only naturally, this led to the commencement of further investigation and eventually the opening of a criminal case for illegal possession of a firearm (article 222 (1) of the Criminal Code of the Russian Federation).

¹⁹²⁰ Counter-Memorial (CERD), Appendix B.

¹⁹²¹ Expert Report of Vladimir Viktorovich Merkuryev, Chapter D (Annex 20); Second Expert Report of Valery Viktorovich Engel, ¶¶103-108 (Annex 19); See also Witness Statement of Alexey Gayarovich Zhafyarov, ¶10 (Annex 22).

¹⁹²² Reply, ¶526.

B. THE CASE OF MR MARLEN MUSTAFAYEV

4. Mr Mustafayev was suspected of extremist activity, and following a search at his home in 2017 was charged and convicted by Russian courts for the public dissemination of the symbols of the terrorist organization *Hizb ut-Tahrir*. He notably pleaded guilty in 2018 to committing actions directed at incitement of hatred and enmity against other people on radical religious grounds¹⁹²³. Two new criminal cases were indeed brought against him in 2022 (and later joined) for his continued dissemination of *Hizb ut-Tahrir* propaganda on social media. His detention took place in accordance with the law, and his trial is currently ongoing. Ukraine's own account suggest that the measures taken had a legitimate basis as he was suspected of extremist activity.

C. THE CASE OF MR GIRAI KULAMETOV, MR KEMAL SAITYAEV, MR ENVER KROSH AND MR EBAZER ISLYAMOV

5. Proceedings against these individuals concerned investigations into *Hizb ut-Tahrir*'s activities, and all of them were eventually found guilty and convicted for the dissemination of the symbols of *Hizb ut-Tahrir* or other extremist materials¹⁹²⁴. The searches conducted at their homes were court-approved on the basis of a reasonable suspicion of their involvement in public incitement to terrorist activity, incitement of hatred and enmity against other people, as well as participation in the activity of a terrorist organization. These were not "outrageous retroactive convictions"¹⁹²⁵: arguments that the prohibited information shared on the internet by these individuals had been posted by them prior to the reunification of Crimea with the Russian Federation were the subject of consideration by the courts; the latter came to the conclusion that the prohibited information was subject to deletion from the moment when the legislation of the Russian Federation took effect in the territory of Crimea¹⁹²⁶.

¹⁹²³ See also Counter-Memorial (CERD), Annex B, ¶¶43-44.

¹⁹²⁴ See also Counter-Memorial (CERD), Annex B, ¶48.

¹⁹²⁵ Reply, ¶534.

¹⁹²⁶ Counter-Memorial (CERD), Chapter IV, Section C.

D. HOME SEARCHES AND ARRESTS OF CRIMEAN TATARS AFFILIATED WITH TERRORIST ORGANIZATIONS IN OCTOBER 2016 AND OCTOBER 2017

6. In regard to searches that took place on 12 October 2016, for example, Ukraine does not deny that evidence was indeed gathered against the individuals concerned from multiple sources¹⁹²⁷. Nor does it deny that *Hizb ut-Tahrir* materials were found during those searches¹⁹²⁸. Here and in regard to Crimean Tatars whose homes were searched on 2 October 2017, what Ukraine appears to be concerned with is the prison sentences handed down against individuals who were affiliated with *Hizb ut-Tahrir* and *Tablighi Jamaat*, and not that criminal affiliation itself, which Ukraine does not contest¹⁹²⁹.

E. ALLEGED DISPROPORTIONATE LAW ENFORCEMENT ACTIONS AGAINST PERSONS PARTICIPATING IN PROTESTS

7. In reply to Ukraine's complaint that "numerous" Crimean Tatars who were at the scene of home searches of suspected extremists in Bakhchisaray were detained and charged with participation in a mass gathering causing a public nuisance.¹⁹³⁰

8. It is further of note that according to statistics between the years 2015 and 2018, 1,610 administrative proceedings were initiated in the Russian Federation for violations of the procedure for organising or holding a meeting of extremist/terrorist organizations (Article 20.2 of the Code of Administrative Offences of the Russian Federation); the vast majority of persons against whom such proceedings were initiated were Russians. The total number of people arrested was 741¹⁹³¹.

F. THE MEASURES AT THE CAFÉ "BAGDAD", PIONERSKOE, ON 1 APRIL 2016

9. This operation was part of an ordinary preventive operation conducted by officers of the Crimean offices of the Ministry of Internal Affairs, the Federal Drug Control Service, and the Federal Migration Service, with the purpose of combatting illegal drug circulation and

¹⁹²⁷ Reply, ¶535.

¹⁹²⁸ Ibid.

¹⁹²⁹ Reply, ¶¶535, 537

¹⁹³⁰ Reply, ¶536.

¹⁹³¹ See ODV.info, Article 20.2 of the Code of Administrative Offenses: Application, available at: https://data.ovdinfo.org/20_2/#/regions/RU (Annex 436).

countering illegal migration¹⁹³². The Russian Federation has already presented explanatory statements of several individuals who were among those alleged by Ukraine to have been detained but showing that in fact they were not, and were cooperating with the State officials without being coerced to¹⁹³³. To be more precise, these persons were invited to the premises of the Center for Combating Extremism of the Ministry of Internal Affairs of the Russian Federation in order to verify their identity. Nor was administrative detention carried out, and no persons were forcibly delivered. Not a single one of them claimed that State officers destroyed furniture or behaved wrongfully during the operation, or that they were targeted on an ethnic basis. Ukraine has failed to refute this evidence.

G. OPERATION “BARRIER-2015”

10. As to the operation “Barrier-2015” conducted in April 2015, Ukraine has not provided any evidence of a discriminatory conduct based on ethnicity against Crimean Tatars during random inspections and searching¹⁹³⁴. The real context and nature of the operation is also of importance, which Ukraine fails to mention. As the Russian Federation previously explained, it was a country-wide-scale strategic training exercise carried out by the Russian Ministry of Internal Affairs. The purpose of this was to master the plans of cooperation between internal troops and other enforcement bodies. The “Barrier 2015” operational strategic exercise obviously did not constitute discriminatory treatment, not to mention a systematic campaign of racial discrimination.
11. The law-enforcement episode of 23 November 2017 was carried out to gather evidence as part of a criminal investigation into extortion of money from Mr Aitan. As part of this operation, Messrs Ametov, Degermendji, Trubach, and Chapukh were detained in accordance with Russian law and eventually found guilty. FSB had grounds to suspect their involvement in criminal conduct at the time of their arrest; ethnic identity was immaterial.¹⁹³⁵

¹⁹³² See Counter-Memorial (CERD), Annex B, ¶¶53-57.

¹⁹³³ See Explanation, 13 July 2016 (Counter-Memorial (CERD), Annex 284), Explanation, 14 July 2016 (Counter-Memorial (CERD), Annex 285), Explanation, 14 July 2016 (Counter-Memorial (CERD), Annex 286) (describing circumstances of the MIA’s preventive operation in café “Bagdad” on 1 April 2016 and the consequent questioning).

¹⁹³⁴ Reply, ¶539.

¹⁹³⁵ See Counter-Memorial (CERD), Appendix B, ¶64.

12. Law enforcement measures taken in the case of Mr Velilyaev and Mr Bariev were also based on lawful and legitimate grounds. Both individuals and employees of their business (the company KrymOpt) were charged under Article 238(2) of the Criminal Code of the Russian Federation for storage and sale of food products whose use-by date had expired.¹⁹³⁶ It is obvious that the respective case relied on legitimate concern for public health and sanitary issues, not to mention that sale of spoilt food to the population is a criminal offense. In the course of the investigation, both Mr Velilyaev and Mr Bariev admitted their guilt. On 26 March 2020, the Belogorskiy District Court of the Republic of Crimea found them guilty of the charges raised against them. As their sentence had been fully served during pre-trial detention, Mr Velilyaev and Mr Bariev were both released upon delivery of the judgment.¹⁹³⁷ Once again, Ukraine did not submit any evidence that the measures were discriminatory on grounds of ethnicity.

13. The basic point remains that for racial discrimination within the meaning of the CERD to be established, Ukraine would need to establish a (1) “distinction, exclusion, restriction or preference” that is (2) “based on race, colour, descent, or national or ethnic origin” and which had (3) “the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing” of human rights and fundamental freedoms. As with other allegations put forward by Ukraine in the present case, none of these elements have been established in regard to searches and detentions involving Crimean Tatars. Ukraine’s claims cannot be sustained in this regard either.

¹⁹³⁶ See Counter-Memorial (CERD), Appendix B, ¶68.

¹⁹³⁷ See Counter-Memorial (CERD), Appendix B, ¶69.

APPENDIX 5

NO DISCRIMINATION IN REJECTION TO GRANT PERMISSIONS TO ORGANISE PUBLIC EVENTS IN CRIMEA

1. In the Counter-Memorial, the Russian Federation addressed every individual instance of decisions to postpone, relocate or cancel public events that Ukraine relied on in its Memorial, and showed that all such decisions were legitimate, in accordance with Russian law, and not at all discriminatory against Crimean Tatar or Ukrainian communities.¹⁹³⁸ Ukraine's Reply addresses only some of these cases,¹⁹³⁹ which indicates that Ukraine no longer insists on the rest of its claims. As regards the events that the Reply does address, Ukraine's arguments are unconvincing and misleading, as will be shown below.

A. THE 2014 SÜRGÜN COMMEMORATION

2. The Russian Federation notes how Ukraine has softened its position on the 2014 *Sürgün* commemoration. After claiming in the Memorial that it was “*prohibited*”,¹⁹⁴⁰ the Reply now states that the Crimean Tatars were “obstructed” in holding this event,¹⁹⁴¹ which implies that they were able to do (as they were), but with some alleged limitations. Now Ukraine's complaint appears to be limited to the allegation that some Crimean Tatars attempted to gather on the Lenin Square on 17 May 2014 but found it blocked by the authorities.¹⁹⁴²
3. The *Mejlis*, as the organizer of the event, was fully aware of the restrictions on the use of the Lenin Square based on security issues. The website of the *Mejlis* contains numerous news pieces dedicated to the 2014 *Sürgün* commemoration, posted in advance of the event, which included detailed plans and schedules.¹⁹⁴³ By the *Mejlis*' own account, over

¹⁹³⁸ Counter-Memorial (CERD), Appendix D, ¶¶30-54.

¹⁹³⁹ In the Memorial Ukraine also referred to the following cases, but does not address them in the Reply: Commemoration of the Death of Noman Çelebicihan in 2015; Private events (press-Conferences in 2014 and 2015); Shevchenko's Birthdays outside of 2015.

¹⁹⁴⁰ Memorial, ¶485.

¹⁹⁴¹ Reply, ¶589.

¹⁹⁴² *Ibid.*, ¶589.

¹⁹⁴³ See generally *Mejlis, News* (9 September 2013), available at: <https://web.archive.org/web/20140702114241/http://qtm.org/news/index/page/2> (Annex 164); *Mejlis, Procedure for Holding 18 May 2014 Memorial Events Dedicated to the Memory of Crimean Tatar People Genocide Victims* (17 May 2014), available at:

30,000 people participated in the event,¹⁹⁴⁴ which exceeds the number of participants in the 2013 *Sürgün* commemoration by around 5 000 people.¹⁹⁴⁵ Thus, it is unclear why in Ukraine's view a mere venue change, which did not lead to a decrease of participants, but instead made the event available to more people, would limit the Crimean Tatars' ability to commemorate the *Sürgün* and could be considered as racial discrimination.

4. Ukraine refers to the need for participants "to assemble within sight and sound of their target audience, or at whatever site is otherwise important to their purpose".¹⁹⁴⁶ However, Ukraine never explains why the Lenin Square (named after the Soviet leader) was culturally significant for the Crimean Tatars to hold an event dedicated to commemorating their ill-treatment by the Soviet Government. In fact, the choice of the Lenin Square seems to be explained by mere practical reasons, such as more asphalt at a square as compared to other venues, as well as its central location in the city of Simferopol.¹⁹⁴⁷ Thus, clearly, the Lenin Square bears no specific cultural significance to Crimean Tatars.
5. Neither does Ukraine explain why the Ak-Mechet neighbourhood of Simferopol, where the *Mejlis* did hold the *Sürgün* in accordance with the applicable legal requirements, was not a suitable venue for the event – Ak-Mechet is a historical Crimean Tatar settlement, previously the capital of the Crimean Tatar Khanate, of a very high cultural significance to the Crimean Tatar people and hosting numerous historical buildings preserved from the Khanate epoch. Ak-Mechet is still predominantly inhabited by Crimean Tatars, and thus represents a much more suitable venue for a Crimean Tatar cultural event.
6. The desire to use the Lenin square may have been present because the *Mejlis* actually used the *Sürgün* not as an event of commemoration, but as an opportunity to put political

<https://web.archive.org/web/20140728215349/http://qtmm.org/новости/4486-порядок-проведения-18-мая-2014-года-мемориальных-мероприятий-посвященных-памяти-жертв-геноцида-крымскотатарского-народа> (Annex 165).

¹⁹⁴⁴ *Mejlis*, "No Nation Can Exist without Its Historical Memory", *Refat Chubarov* (18 May 2014), available at: <https://web.archive.org/web/20140728205426/http://qtmm.org/новости/4489-ни-один-народ-не-может-существовать-без-своей-исторической-памяти-рефат-чубаров> (Annex 166).

¹⁹⁴⁵ KP.ua, *Rally in Memory of Deportation Victims Took Place in Crimea* (18 May 2013), available at: <https://kp.ua/crimea/394378-v-krymu-proshel-mytynh-pamiaty-zhertv-deportatsyy> (Annex 105).

¹⁹⁴⁶ Reply, ¶590.

¹⁹⁴⁷ Avdet, *So that the youth remember* (26 February 2000), available at: <https://avdet.org/2000/02/26/strong-CHto-by-pomnila-molodezh-Gulnara-Abdulaeva-Zazhgi-ogonek-v-svoem-serdtse-pod-takim-lozungom-17-maya-Krymskotatarskij-Molodezhnyj-TSentr-KMTS-minuya-prepony-i-nedovolstva-so-storony-vlastej/> (Annex 106).

pressure (demands) on local authorities, in particular the Crimean Council of Ministers, which is located in the Lenin Square.¹⁹⁴⁸

7. To exemplify, in 2013, the Mejlis did hold the *Sürgün* at the Lenin Square. However, it used this allegedly commemorative event to advance political demands against Crimean authorities.¹⁹⁴⁹
8. Thus, the press report on the website of the Mejlis mentions the following: “In the central square of Ak'mesjit,¹⁹⁵⁰ participants of the All-Crimean mourning rally held ... banners with the inscriptions “Mogilev!¹⁹⁵¹ Leave Crimea and take with you the team of “Council of Akshakals 2”... “Give the Crimean Tatars the status of an indigenous people!”...“With a chauvinistic snout – no way to the European Union”, and others. One of the senior members of Mejlis, Mr Mustafa Dzhemilev demanded the immediate resignation of Mogilev, and the investigation of his activities.¹⁹⁵² Thus, the event was not used to commemorate the deportation of Crimean Tatars, but to advance demands against authorities, which is why a central location was required.
9. In 2014, Chubarov and the Mejlis also used the Lenin Square to stage provocations. For instance, in February 2014, Chubarov demanded that the square be renamed, and the Lenin monument be taken down. He also threatened to take action if his demands were not complied with: “I think the leaders of other cities and regions of Crimea have heard

¹⁹⁴⁸ Witness Statement of [REDACTED], Annex 17.

¹⁹⁴⁹ Mejlis, *Over 40,000 people took part in All-Crimean mourning rally dedicated to the 69th anniversary of the deportation of Crimean Tatars* (18 May 2013), available at: <https://web.archive.org/web/20140324063144/http://qtm.org/новости/2873-свыше-40-тысяч-человек-приняли-участие-во-всекрымском-траурном-митинге-посвященном-69-й-годовщине-депортации-крымских-татар> (Annex 107); Milli Firka, *Mejlismen want Mogilev's resignation* (7 May 2013), available at: <http://milli-firka.org/меджлисмены-хотят-отставки-могилева/> (Annex 108); BBC, *Anniversary of deportation: Crimean Tatars want Mogilev's resignation - BBC News Ukraine* (17 May 2013), available at: https://www.bbc.com/ukrainian/ukraine_in_russian/2013/05/130517_ru_s_crimea_tatars_deportation_anniv (Annex 109).

¹⁹⁵⁰ Crimean Tatar for Simferopol.

¹⁹⁵¹ At the time head of Crimean Government.

¹⁹⁵² Mejlis, *Over 40,000 people took part in All-Crimean mourning rally dedicated to the 69th anniversary of the deportation of Crimean Tatars* (18 May 2013), available at: <https://web.archive.org/web/20140324063144/http://qtm.org/новости/2873-свыше-40-тысяч-человек-приняли-участие-во-всекрымском-траурном-митинге-посвященном-69-й-годовщине-депортации-крымских-татар> (Annex 107).

us. If not, we will take action... In 10 days, be ready for a new call. We gave them 10 days. There are 10 thousand of us today, in 10 days there will be 50-60 thousand".¹⁹⁵³

10. Therefore, given extremist methods used by the Mejlis and its bosses as explained above, it was reasonable to expect that further provocations would be staged at the Lenin Square by Chubarov and the Mejlis.

B. THE CRIMEAN TATAR FLAG DAY ON 26 JUNE 2015

11. Ukraine disputes the measures concerning the celebrations of the Flag day on 26 June 2015.¹⁹⁵⁴ In the Reply, Ukraine's only argument appears to boil down to the fact that the application to hold an event was dismissed despite the organisers providing alternative dates or venues for the event.¹⁹⁵⁵ However, neither the originally cited source,¹⁹⁵⁶ nor any further evidence adduced by Ukraine in the Reply,¹⁹⁵⁷ show what such proposed alternative venues or times were, or whether they were actually appropriate or safe for a public event, and whether the resubmitted applications were in compliance with the other requirements of Russian law.
12. In fact, the organisers of the Flag Day celebrations themselves issued a statement that they merely suggested to move their celebration to the next day – 27 June 2015.¹⁹⁵⁸ However, as the Russian Federation has demonstrated in the Counter-Memorial, the location was already occupied for the entire weekend period between 26 June and 28 June 2015.¹⁹⁵⁹ Therefore, it made no sense to request permission to hold a meeting on 27 June instead of 26 June, being aware that the venue would not be available until after 28 June. Therefore, rejection of this application did not show any violation of the law, let alone any racial prejudice.

¹⁹⁵³ Centre for Investigative Journalism, Mejlis gives authorities 10 days to demolish Lenin monuments in Crimea - Centre for Investigative Journalism (23 February 2014), available at: <https://investigator.org.ua/en/news/119259/> (Annex 110).

¹⁹⁵⁴ Reply, ¶592.

¹⁹⁵⁵ *Ibid.*, ¶592.

¹⁹⁵⁶ Memorial, Annex 961, p. 4.

¹⁹⁵⁷ Reply, ¶592, footnote 1179.

¹⁹⁵⁸ Haberler, *The Organising Committee Has Filed Another Application for the Celebration* (3 June 2015), available at: <https://web.archive.org/web/20150710141231/http://bayraq.info/haberler/72-orgkomitet-podal-eshche-odno-zayavlenie-na-provedenie-prazdnika.html> (Annex 111).

¹⁹⁵⁹ Counter-Memorial (CERD), Annex 554.

13. In addition, Article 3.2 of the Resolution of the Administration of the City of Simferopol of the Republic of Crimea “On Approval of the Regulations on the Procedure for Organizing and Holding Mass Events in the Territory of the Municipality of City District of Simferopol of the Republic of Crimea” No. 128, dated 23 March 2015, which governs the organisation of public events and applies to the situation at hand, allows organisations to hold joint mass events, if they are united by a common theme.¹⁹⁶⁰ Because both the approved event that went on, and the event Ukraine complains of were aimed at celebrating the Crimean Tatar Flag, it could have been reasonably possible to hold a joint event.
14. Accordingly, there are no grounds to suggest that the applications were dismissed based on any ethnic prejudice. As the Russian Federation demonstrated in its Counter-Memorial, widespread celebrations were held on 26 June 2015,¹⁹⁶¹ and Ukraine does not dispute this in the Reply.

C. THE SÜRGÜN COMMEMORATION IN 2015

15. As regards the *Sürgün* commemoration of 2015, Ukraine does not dispute the fact that *Qirim*'s application was submitted about six hours earlier,¹⁹⁶² which is the reason for *Qirim*'s application being granted. This is merely a case of one Crimean Tatar organization acting faster than the other in organizing a public event. Ukraine provides no evidence substantiating its allegations that *Qirim* was a “blocking device”, and relies merely on speculations.¹⁹⁶³ Likewise, Ukraine fails to comment on the fact that there have been no judicial challenges to any refusal of applications to commemorate *Sürgün*.¹⁹⁶⁴ Thus, Ukraine failed to show that what happened in this instance was anything more than one organisation filing an application requesting permission for a culturally significant public events hours earlier than the other – or that there was any discrimination based on ethnicity involved.

¹⁹⁶⁰ Administration of the City of Simferopol of the Republic of Crimea, Resolution No. 128 “On Approval of the Regulations on the Procedure for Organizing and Holding Mass Events in the Territory of the Municipality of City District of Simferopol of the Republic of Crimea”, 23 March 2015, Article 3.2 (Annex 443).

¹⁹⁶¹ Counter-Memorial (CERD), Appendix D, ¶39.

¹⁹⁶² Reply, ¶594.

¹⁹⁶³ Reply, ¶¶594-595.

¹⁹⁶⁴ See Counter-Memorial (CERD), Appendix D, ¶28.

16. This would also be the appropriate place to refute Ukraine’s contentions on specially assigned places, as if the regulation was applied discriminatory against Crimean Tatars.¹⁹⁶⁵ According to the Resolution of the Council of Ministers of Crimea No. 452, which provides for a list of specially assigned places, in the City of Simferopol, four places have been “specially assigned”:
- (a) Territory in front of the Private institution “Crimean Republican Palace of Culture of Trade Unions”;
 - (b) The area in front of the center of culture and business “Consol”;
 - (c) Park named after Yu.A. Gagarin (from the sculptural composition “Three Graces” along the pedestrian zone located along the ponds);
 - (d) Area from the territory of the Private Institution “Crimean Republican Palace of Culture of Trade Unions” along the pedestrian zone located along Kievskaya str. to the Salgir River.¹⁹⁶⁶
17. The 2015 Sürgün Commemoration was ultimately approved for the Crimean Tatar *Qirim* in more locations – namely, at Vorovskogo str., at the monument to I. Gaprinsky, in the “Fontany” microdistrict, between the building of the State Council of the Republic of Crimea and the Pobedy public garden, in the Gagarin Park, in the Territory in front of the Crimean Republican Palace of Culture of Trade Unions, in the Public garden near the Railway station, and in front of the culture and business center “Konsol”.¹⁹⁶⁷ This is direct proof that Crimean Tatars were also allowed to hold events in places outside of the “specially assigned” list, which Ukraine conveniently overlooks.

D. HUMAN RIGHTS DAY 2015

18. As regards the celebration of the 2015 Human Rights Day, Ukraine consistently fails to explain why this universal human rights event should be considered a “culturally significant gathering” for the Crimean Tatar people, as if a particular ethnicity had a “special claim” to a universal celebration of human rights. This cynical claim is on par

¹⁹⁶⁵ Reply, ¶¶596-597.

¹⁹⁶⁶ Counter-Memorial (CERD), Annex 74.

¹⁹⁶⁷ Counter-Memorial (CERD), Annex 550.

with Ukraine's other claim – that for some reason only anti-Russian political affiliation is permissible for Crimean Tatars, and those who support Crimea's unification with Russia are not “real” Crimean Tatars but “illegitimate” “proxies”. The 2015 Human Rights Day claim is particularly appalling because this event was cancelled due to the cutting off of power supply to Crimea, which left the entire peninsula in deficit of electricity, severely impacting, *inter alia*, the Crimean Tatar community. This energy blockade was inspired, organised and physically perpetrated by the *Mejlis* and its activists, including Mustafa Dzhemilev and Refat Chubarov.¹⁹⁶⁸ Ukraine continuously tries to downplay the severity of the blockade against Crimea, but in reality after *Mejlis* tried to destabilise the situation in Crimea by economic blockade and by leaving the population of Crimea with no electricity or food in deteriorating conditions,¹⁹⁶⁹ it was not reasonably possible to hold any public events in Crimea. Ukraine's referral to the 27 November 2015 event is irrelevant because the Decision on the application in question was only taken after that date – namely, on 3 December 2015.¹⁹⁷⁰ As the Russian Federation explained in the Counter-Memorial, the situation got significantly worse after 27 November 2015, which ultimately ruled out any possibility for public events due to the state of public emergency caused by the lack of electric power and the necessity to deploy police to protect socially-significant objects once they were without energy.¹⁹⁷¹ Ukraine does not submit any evidence that the emergency regime was applied differently in respect to any other community.

19. In the Reply, Ukraine mentions that on 8 December 2015 the Russian Ministry of Energy was able to restore power supply in Crimea and suggests that “[i]f power had been restored, it is unclear why the International Human Rights Day event could not have been held on 10 December”.¹⁹⁷² The simple answer to this is that the *Mejlis* application was submitted, and rejected, before power supply was restored. After the restoration of power supply on 8 December the *Mejlis* did not submit any requests for a public rally, either for 10 December or for any other day that year.

¹⁹⁶⁸ See also Chapter IV(C).

¹⁹⁶⁹ The Russian Federation explains the blockade's effects on Crimean Tatars in a different part of this Rejoinder.

¹⁹⁷⁰ Counter-Memorial (CERD), Annex 560.

¹⁹⁷¹ Counter-Memorial (CERD), Appendix D, ¶¶37-38.

¹⁹⁷² Reply, ¶600.

E. THE SÜRGÜN COMMEMORATION 2016

20. With respect to the *Sürgün* 2016 Commemoration, Ukraine fails to explain the actions of the organisers, including why they declined alternative options suggested to them by the Crimean authorities due to works taking place in the location applied for, which mandated a different venue. In the Counter-Memorial, the Russian Federation explained that the authorities offered the organizer other options, including to hold the planned meeting in the morning at 9 a.m. before the works commence so as to avoid their interruption, or to hold with other citizens a joint cultural event of laying flowers at the commemorative plaque, which had previously been planned at the indicated place and time. The applicant refused to agree to any suggested solutions.¹⁹⁷³
21. Ukraine completely disregards this, and continues to promote the false narrative according to which the organisers were denied any opportunity to commemorate the *Sürgün*. However, the organisers' own failure to consider alternative venues, in spite of the perfectly reasonable grounds behind the refusal to hold the public event in the Voinka Village, once again cannot be framed as racial discrimination.

F. BAKHCHISARAY FINES

22. Ukraine likewise continues to mislead the Court on the essence of the 2017 Bakhchisaray fines.¹⁹⁷⁴ Ukraine does not dispute that Crimean Tatar flags have been freely displayed at other events in Crimea without restriction and are indeed displayed all over Crimea on a daily basis. As the Russian Federation explained in the Counter-Memorial¹⁹⁷⁵ – and what Ukraine also does not dispute – the persons in questions were (modestly) fined *not* for displaying Crimean Tatar flags (which is itself permissible) but for failing to comply with the procedural requirements of Russian law to notify the authorities of such planned public events in advance.
23. Ukraine's position on this incident appears to suggest that being part of an ethnic group exempts one from the obligation to comply with the requirements of local law concerning

¹⁹⁷³ Counter-Memorial (CERD), Appendix D, ¶30.

¹⁹⁷⁴ Reply, ¶603.

¹⁹⁷⁵ Counter-Memorial (CERD), Appendix D, ¶31.

public events, and that holding one accountable for violating that local law constitutes racial discrimination. This proposition is obviously untenable.

G. ALLEGED DISCRIMINATION AGAINST UKRAINIAN COMMUNITY

24. In the Reply Ukraine expands on two cases, which it considers indicating a “pattern of discrimination” against the ethnic Ukrainian community in Crimea.¹⁹⁷⁶ Such claims are likewise unfounded.
25. In respect of Mr Sergey Dub, Ukraine merely disputes that that the accusations against him were “without evidence”.¹⁹⁷⁷ However, the Russian Federation produced such evidence in the Counter-Memorial, which confirms that Mr Dub was rightfully held by a court to be responsible for using foul language under Article 20.1 of the Code of Administrative Offences of the Russian Federation.¹⁹⁷⁸ This is an ordinary misdemeanour for which thousands of people are fined every year.¹⁹⁷⁹ The Russian Federation also noted that Mr Dub never challenged the decision against him. Ukraine does not engage with the evidence that the Russian Federation presented, nor does Ukraine present any alternative evidence or point of view on the case. Accordingly, this case is entirely irrelevant to the claims advanced by Ukraine under the CERD.
26. With respect to the restrictions placed on the celebration of the Shevchenko birthday in 2015, Ukraine does not deny that certain participants turned a social event into a political rally, provoking the attendants. Such provocations can usually lead to public disorder and violence, which is exactly what happened in 2014, when a similar celebration of Shevchenko’s birthday ended in a scuffle.¹⁹⁸⁰
27. Instead of commemorating the poet’s accomplishments and his work, the individuals concerned started making political statements. Distracting the Court from what happened

¹⁹⁷⁶ Reply, ¶¶605-610.

¹⁹⁷⁷ Reply, ¶606.

¹⁹⁷⁸ See Central District Court of Simferopol of the Republic of Crimea, case No. 5-930/2014, Decision, 24 September 2014 ((Counter-Memorial (CERD), Annex 191)).

¹⁹⁷⁹ For example, in 2021, over 150 000 people were fined under Article 20.1 of the Code of Administrative Offences of the Russian Federation, see Judicial Statistics of the Russian Federation on Administrative Offences, Article 20.1 of the Code of Administrative Offences, 2021, available at: <https://stat.xn----7sbqk8achja.xn--p1ai/stats/adm/t/31/s/1> (Annex 442).

¹⁹⁸⁰ Counter-Memorial (CERD), Appendix D, ¶48.

in reality, Ukraine discusses whether the actions of the Russian authorities meet the standard for restricting the freedom of assembly and expression under international human rights law.¹⁹⁸¹ However, whether the Russian Federation's actions met the relevant standards under the ECHR or the ICCPR is not the appropriate subject of discussion for this particular issue before this Court.

28. In reality, the Russian Federation did not in any way restrict the possibility for the participants of the event in question to commemorate Taras Shevchenko and honor his works. The Crimean authorities interfered only when a few participants started shouting provocative slogans that were completely unrelated to Mr Shevchenko's birthday and did so to prevent what happened a year prior.¹⁹⁸² Thus, Ukraine failed to show that these measures discriminated against ethnic Ukrainians.
29. Ever since, Ukrainian communities have peacefully celebrated Shevchenko's birthday every year, including in 2022.¹⁹⁸³ Thus Ukrainians, have all the opportunities to publicly celebrate Shevchenko's birthday. The events described by Ukraine were aimed at preventing social unrest, and not at hampering the opportunity for ethnic Ukrainians to celebrate their culture.

¹⁹⁸¹ Reply, ¶609.

¹⁹⁸² See Appendix 5, ¶26 above.

¹⁹⁸³ Gorod 24, *Simferopol Celebrates Taras Shevchenko's Birthday* (10 March 2022), available at: https://gorod24.online/simferopol/news/238837-v_simferopole_otmetili_den_rojdeniya_tarasa_shevchenko.html (Annex 112).

APPENDIX 6

INDIVIDUAL INSTANCES OF MEDIA OUTLETS TO PASS REGISTRATION PROCEDURE SHOWS NO DISCRIMINATION BASED ON ETHNIC ORIGIN

1. At the outset it should be noted that Ukraine failed to disprove the fact that the majority of Crimean media outlets in Crimea successfully passed the re-registration procedure.¹⁹⁸⁴ Ukraine portrays a few individual instances of failure to do so as examples of discrimination based on ethnic origin. However, those are simply due to the non-compliance of the applicants with the requirements of the Russian legislation. Ukraine does not show that there was any prejudice against those applicants at all, let alone any prejudice based on their ethnicity. Ukraine also fails to provide evidence to the effect that any other media outlet which would similarly disregard the applicable law would be excused for it and granted registration, or that the decisions of the relevant competent bodies were based on any discriminatory grounds including ethnicity.
2. As has been shown in Chapter III, measures taken legitimately with the aims of preventing public disorder and protecting national security and are not discriminatory.¹⁹⁸⁵ The Russian Federation has demonstrated this in the Counter-Memorial with regard to the media organizations to which Ukraine refers, and will further elaborate on that below.

A. AVDET NEWSPAPER

3. Ukraine's references to the denial of the registration of Avdet newspaper are erroneous.¹⁹⁸⁶ Ukraine does not provide any evidence that Avdet's registration was denied on a discriminatory basis. Notably, Ukraine does not contest that: (1) the first and second applications of Avdet had procedural defects; and (2) Avdet did not challenge the denial before the competent courts. As regards Avdet's third application,¹⁹⁸⁷ contrary to Ukraine's allegations, Avdet did receive a response that it did not comply with Article 13 of the Law "On Media".¹⁹⁸⁸ . Ukraine may not claim the Russian Federation's

¹⁹⁸⁴ Roskomnadzor, *232 Media Outlets Registered in Crimea* (2 April 2015), available at: <https://rk.gov.ru/ru/article/show/1502>. (Annex 128)

¹⁹⁸⁵ See above, Chapter III(F).

¹⁹⁸⁶ Reply, ¶635.

¹⁹⁸⁷ *Ibid.*, ¶634.

¹⁹⁸⁸ Roskomnadzor, Letter dated 26 March 2015 No. 571-05-91 (Annex 124).

responsibility under the CERD for Avdet's own failure to register its status in compliance with the law.

4. Having failed to comply with the legislation, Avdet decided not to file a proper application to be registered and made good of the permission to continue its activity after adjustment of the volume of its printing circulation.¹⁹⁸⁹ In this regard, Avdet also maintains a website, where this newspaper and other materials are available in Crimean Tatar, Russian and English.¹⁹⁹⁰ This website is not subject to any restrictions and is easily accessible in the Russian Federation.
5. Although Ukraine tries to present 1 April 2015 as a preclusive deadline for the registration of media in Crimea, in fact all interested organizations could file their applications for the re-registration after that date as well; the only difference would be that the registration after 1 April 2015 would proceed on a regular basis, applicable to all media, with no simplified procedures introduced by the Federal Law of 1 December 2014 No. 402-FZ.¹⁹⁹¹

B. CHERNOMORSKAYA TV

6. Ukraine misrepresents the course of events concerning Chernomorskaya TV. A review of the operation of Chernomorskaya TV in the years prior to Crimea's reunification with the Russian Federation shows no hint of ethnic discrimination, but rather a picture of severe financial problems dating back to 2010 (with media describing the situation as critical¹⁹⁹²), which does not correspond to what Ukraine argues.

¹⁹⁸⁹ See, for example, Avdet, *Newspaper No 27 of 29 September 2020* (30 September 2020), available at: <https://avdet.org/wp-content/uploads/2020/09/gazeta-avdet-27-ot-29-sentjabrja-2020-g..pdf> (Annex 131); see also Counter-Memorial (CERD), Appendix E, ¶27.

¹⁹⁹⁰ See <https://avdet.org/>

¹⁹⁹¹ Roskomnadzor, *232 Media Outlets Registered in Crimea* (2 April 2015), available at: <https://rk.gov.ru/ru/article/show/1502>. (Annex 128); See also the Federal Law of 1 December 2014 No. 402-FZ "On the peculiarities of legal regulation of relations in the field of mass media in connection with the admission of the Republic of Crimea to the Russian Federation and the formation of new subjects within the Russian Federation - the Republic of Crimea and the federal city of Sevastopol", Article 2, available at: http://www.consultant.ru/document/cons_doc_LAW_171583/1d13e9394279f71a6e2276fd25f6d4d725d7c04a/ (Annex 470); see also Counter-Memorial (CERD), Appendix E, ¶10.

¹⁹⁹² Investigative Journalism Centre, *BSTRC Threatened with Discontinuation of Broadcasting in Crimea* (13 January 2014), available at: <https://investigator.org.ua/news/114144/> (Annex 155).

7. In 2013, workers of Chernomorskaya TV began a strike because they were not paid their wages. The management of the company refused to promptly satisfy the demands of the journalists:¹⁹⁹³

“I personally and in front of witnesses declared this to the president of the television and radio company... She replied that she knew about our demands and about the strike. She made it clear that they are not going to pay journalists yet,” Andronaki wrote on his Facebook page.

8. In January 2014, reports came out showing that Chernomorskaya TV was still over 1.6 million in debt and unable to pay its employees, as well as to cover its electricity bills.¹⁹⁹⁴ All these reports show that well before Crimea reunited with the Russian Federation, Chernomorskaya TV was in a dire financial situation.
9. Accordingly, Ukraine mischaracterized the dispute between Chernomorskaya TV and RTPC in 2014, which is nothing more than an ordinary civil dispute between two entities.
10. The Resolution of the Appeal Court, which introduced the interim measures against Chernomorskaya TV’s property, clearly indicated the reasons for doing so, and for overturning the Ruling of the 1st instance Court, which declined such measure:

“Thus, from the materials of the case it is seen that in the letters Ref. No. 131220/03, ref. No. 140114/02 and ref. No. 140428/01, the defendant acknowledged the fact that it had a debt (pp. 94, 116-119 volume 1), and in support of its obligations sent a schedule for its repayment (p. 120 volume 1). Moreover, by letter ref. No. 140506/01yu dated 6 May 2014, the Chernomorskaya Television and Radio Company Limited Liability Company offered to pay off the resulting debt under contract No. 02/01-2007 dated March 30, 2007 in one payment and asked the state enterprise Radio and Television Transmitting Center of the Autonomous Republic of Crimea to issue an invoice for payment. On 12 May 2014, the plaintiff issued and sent to the defendant an invoice No. SF-0000880 in the amount of 3,014,774.15 rubles. (p. 121 volume 1).

However, as follows from the response to the statement of claim dated 19 June 2014 (entry No. 23810/2014), Chernomorskaya TV and Radio Company LLC did not recognize the claim and asked the court to refuse to satisfy it (pp. 103-104 volume 1). These circumstances, according to the court, indicate a change in the position of the debtor in the dispute, which may cast doubt on his voluntary performance of obligations, and also allows the court to make

¹⁹⁹³ Investigative Journalism Centre, *Employees of BSTRC, Crimea’s Largest TV Company, Walked Out* (7 February 2013), available at: <https://investigator.org.ua/en/news/72786/> (Annex 156).

¹⁹⁹⁴ Taurica.net, *BSTRC Begins Repaying Debts to RTTC* (20 January 2014), available at: <https://taurica.net/90873-Chernomorskaya-teleradiokompaniya-nachala-oplachivat-dolgi-pered-RTPC.html> (Annex 157).

an assumption about the impossibility or difficulty of enforcing a judicial act...”¹⁹⁹⁵ [Emphasis added]

11. Subsequently, after the Court considered the case on the merits and dismissed the claims against Chernomorskaya TV, its property was returned to it. Despite Ukraine’s attempts to portray an ordinary civil law case as an instance of ethnic discrimination, this is clearly not the case.
12. It should also be noted that Chernomorskaya TV did not in fact apply to competent Russian authorities for a broadcasting license. Thus, a claim that it was discriminated against is absurd, as the company did not even pursue the opportunity of broadcasting in the Russian Federation.

C. ATR TV CHANNEL

13. As regards ATR TV Channel, Ukraine likewise misrepresents the facts.
14. Ukraine argues that “Mr. Islyamov was condemned for daring to give voice to the Crimean Tatar people’s conviction that Crimea remained part of Ukraine”.¹⁹⁹⁶ In doing so, Ukraine conveniently tries to hide the real face of the company, as well as its controller – Mr Lenur Islyamov. It is also not clear on what basis Ukraine asserts that Mr Islyamov is a voice of the Crimean Tatar people. Mr Ervin Musaev, who has submitted a witness statement attached to this Rejoinder, specifically disputes ATR’s and Islyamov’s claims to be the voice of Crimean Tatars, pointing out that the channel exploited the Crimean Tatar agenda when it benefitted Islyamov, and was not popular among Crimean Tatars according to Mr Islyamov himself.¹⁹⁹⁷
15. As the Russian Federation highlighted elsewhere,¹⁹⁹⁸ Mr Islyamov was not a mere peaceful protester, who expressed his disagreement with Crimea reuniting with the Russian Federation in a civilized manner. He was one of the ideologists and leaders of

¹⁹⁹⁵ Sevastopol Commercial Appeal Court, Case No. A83-112/2014, Resolution, 31 July 2014, available at: <https://21aas.arbitr.ru/node/13305> (Annex 437).

¹⁹⁹⁶ Reply, ¶641.

¹⁹⁹⁷ Witness Statement of Ervin Kyazimovich Musaev, ¶¶27-28 (Annex 33). *See also* Witness Statement of ██████████ ██████████ 22 February 2023, ¶19 (Annex 11); *See also* Witness Statement of ██████████ ██████████, 18 February 2023, ¶¶7-8 (Annex 27).

¹⁹⁹⁸ *See above*, Chapter IV(C).

the Crimean blockade, which was organized together with neo-Nazi movements,¹⁹⁹⁹ and was aimed at leaving Crimea without food or electricity.

16. Subsequently, Mr Islyamov formed a military battalion in order to destabilize the situation in Crimea and “facilitate its return to Ukraine”:

“The battalion will include 560 people. They will deal with the tasks set by the General Staff. But the main task is to protect the border of Crimea in Crimea itself. We will do our best to bring Crimea closer as soon as possible. The task of this battalion is to strike in a way that we can only know.....”²⁰⁰⁰

17. On a press-conference devoted to energy blockade of Crimea Lenur Islyamov publicly called Crimean Tatars to armed *jihād*:

“We are waiting for your children here. This is a liberation jihad for us. Yes, some of you will shed blood, yes, some of you will die, but we need to fight! We will have to do it, at the cost of blood of certain people as well.”²⁰⁰¹

18. Mr Islyamov also suggested introducing a naval blockade of Crimea, and opined that it would be “patriotic” to attack ships transferring goods to Crimea.

“If there were more patriots from Odessa, then it would be possible to attack ships with small boats when they allegedly go to Skadovsk, while they themselves are transporting goods to the Crimea”²⁰⁰²

19. It is telling that “patriotism” in the understanding of Mr Islyamov is to deprive Crimeans of essential supplies required for day-to-day life. The ATR Channel itself also consistently promoted and celebrated the blockade, calling for “fighting the aggressor”, and advocating for inhumane measures that the blockade organisers decided to undertake,

¹⁹⁹⁹ Witness Statement of ██████████, 22 February 2023, ¶17 (Annex 11). See also above i

²⁰⁰⁰ Odessa Crisis Media Center, “*We’ll Return Crimea in 2016*”, Says Lenur Islyamov (25 December 2015), available at: <https://web.archive.org/web/20160207145939/http://www.odcrisis.org/lenur-islyamov2/> (Annex 158); See also Witness Statement of ██████████, 9 June 2021, ¶¶16-18 (Counter-Memorial (CERD), Annex 19); Second Witness Statement of ██████████, 27 February 2023, ¶16 (Annex 15).

²⁰⁰¹ *Komsomolskaya Pravda*, “Inglorious extremists: How a runaway businessman wanted to ‘advance to Crimea’ but failed” (14 January 2020) (Counter-Memorial (CERD), Annex 1015.)

²⁰⁰² Odessa Crisis Media Center, “*We’ll Return Crimea in 2016*”, Says Lenur Islyamov (25 December 2015), available at: <https://web.archive.org/web/20160207145939/http://www.odcrisis.org/lenur-islyamov2/> (Annex 158).

which can be seen in information available online and in recollections of Crimean Tatars.²⁰⁰³

20. To sum up, Mr Islyamov has been consistently promoting radical ideas of violence, including through his channel ATR, and actively acted to realize them. Those ideas, which include proposals for military actions against the Russian Federation itself, as well as the blockade, which directly targets ordinary Crimeans and their well-being, are very far from the “peaceful protest” that Ukraine is trying to present them as.
21. It should also be noted that ATR tried applying for a license, but its applications were returned without consideration because ATR failed to meet the most basic formal requirements – such as paying the state fee to the correct requisites, or submitting information on the company that complies with the requirements of the Unified State Register of Legal Entities (EGRUL).²⁰⁰⁴ Ukraine must not be allowed to blame ATR’s incompetence on the Russian Federation and accuse it of violating the CERD. In this regard, it should be noted that former employees of the ATR Channel, even those, who did not initially support Crimea’s reunification with the Russian Federation, have successfully opened media outlets and web-resources in Crimea, which operate with no restrictions.²⁰⁰⁵
22. On the other hand ATR that was moved to Kiev by Mr Islyamov discontinued its work in 2021 for financial reasons.²⁰⁰⁶

²⁰⁰³ Facebook, *ATR TV Channel*, “*This Is Our Second Victory. First One Was Trade Blockade of Crimea*”, Liza Bogutskaya Says (17 August 2017), available at: <https://www.facebook.com/atrchannel/posts/1587344634620099/> (Annex 159); See also Witness Statement of Ervin Kyazimovich Musaev, ¶¶9-13, 27 (Annex 33); Witness Statement of ██████████, 22 February 2023, ¶¶17-19 (Annex 11); Youtube, *Civil Blockade of Crimea: How it all started three years ago and what its results were* (20 September 2018), available at: https://www.youtube.com/watch?v=_2J5XG_qgjs&ab_channel=%D0%A2%D0%B5%D0%BB%D0%B5%D0%BA%D0%B0%D0%BD%D0%B0%D0%BBATR (Annex 33 Exhibit H).

²⁰⁰⁴ Counter-Memorial (CERD), Appendix E, ¶¶46-49.

²⁰⁰⁵ Witness Statement of ██████████, 18 February 2023, ¶9 (Annex 27).

²⁰⁰⁶ Witness Statement of ██████████, ¶28 (Annex 33).

CERTIFICATION

I hereby certify that the annexes are true copies of the documents referred to and that the translations provided are accurate.

Agent of the Russian Federation



Alexander V. SHULGIN

The Hague, 10 March 2023

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