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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2023

Public sitting

held on Tuesday 6 June 2023, at 10 a.m., at the Peace Palace,

President Donoghue, presiding,

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

VERBATIM RECORD

ANNÉE 2023

Audience publique

tenue le mardi 6 juin 2023, à 10 heures, au Palais de la Paix,

sous la présidence de M[me] Donoghue, présidente,

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

COMPTE RENDU

Present:	President	Donoghue
	Judges	Tomka
		Abraham
		Bennouna
		Yusuf
		Xue
		Sebutinde
		Bhandari
		Salam
		Iwasawa
		Nolte
		Charlesworth
`		Brant
	Judges *ad hoc*	Pocar
		Tuzmukhamedov
	Registrar	Gautier

Présents : M^me^ Donoghue, présidente
MM. Tomka
Abraham
Bennouna
Yusuf
M^mes^ Xue
Sebutinde
MM. Bhandari
Salam
Iwasawa
Nolte
M^me^ Charlesworth
M. Brant, juges
MM. Pocar
Tuzmukhamedov, juges *ad hoc*

M. Gautier, greffier

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HE Ms Oksana Zolotaryova, Director General for International Law, Ministry of Foreign Affairs of Ukraine,

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Mr Jean-Marc Thouvenin, Professor at the University of Paris Nanterre, Secretary-General of The Hague Academy of International Law, associate member of the Institut de droit international, member of the Paris Bar, Sygna Partners,

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The PRESIDENT: Please be seated. The sitting is open.

The Court meets today and will meet in the coming days to hear the oral arguments of the Parties on the merits of 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)*. This morning and this afternoon, the Court will hear the first round of oral argument of Ukraine.

For reasons duly made known to me, Judge Robinson will not sit with us in these oral proceedings.

*

Before we start our judicial proceedings today, I would first like to pay solemn tribute, on behalf of the Court, to the memory of two eminent former Members of the Court who have recently passed away: Judge Bola Adesumbo Ajibola and Judge Thomas Buergenthal.

Prince Bola Adesumbo Ajibola, who died on 9 April 2023 in his hometown Abeokuta, Nigeria, was a distinguished Member of the Court from 1991 to 1994 and served as a judge *ad hoc* in the case concerning *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening)* from 1994 to 2002.

He obtained his Bachelor's degree in Law at the University of London in 1962 and was then called to the English Bar at Lincoln's Inn. Upon his return to Nigeria, he enjoyed a very successful career as a practising lawyer and arbitrator, and in 1984, he became the President of the Nigerian Bar Association. Judge Ajibola was subsequently appointed Attorney-General and Minister of Justice of the Federal Republic of Nigeria from 1985 to 1991.

Upon his election to the Court, Judge Ajibola brought with him a wealth of experience and knowledge, allowing him to make a marked contribution to the judicial work of this institution. His expertise in the field of international law was as impressive as it was wide-ranging, and stood him in good stead as he directed his mighty intellectual powers towards the multifaceted legal issues raised in the cases on the Court's docket at the time.

In particular, Judge Ajibola's period on the bench coincided with the Court's work on a number of cases dealing with questions of territorial and insular sovereignty. In the case concerning *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judge Ajibola appended to the Court's Judgment of 3 February 1994 a separate opinion in which he reflected on what he called the "unfortunate legacy" of Africa's "colonial past". He noted, for example, and I quote, "[t]he colonial penchant for geometric lines"[1] that had left Africa with a high concentration of States whose frontiers were, in his words, "purely artificial"[2].

After leaving the Court, Judge Ajibola continued to serve the international community, as well as his country. He served as a Commissioner at the United Nations Compensation Commission set up following Iraq's invasion of Kuwait. He also served as a member of the Eritrea-Ethiopia Boundary Commission, alongside other eminent jurists, resulting in a decision regarding the delimitation of the border in 2002. He was appointed High Commissioner of Nigeria to the United Kingdom from 1999 to 2002. Judge Ajibola was also keen to pour his incredible energies into African initiatives — in 1994, he founded the NGO *African Concern*, intended to bring an African response to the Rwandan Genocide and other destabilizing conflicts on the continent; in 1996, he founded the *Islamic Mission for Africa*, a centre dedicated to the promotion of peace and harmony.

As this brief summary reveals, Judge Ajibola seems to have fit many lives into the span of a single life. His death is a major loss to international law and justice, ideals to which he dedicated himself with great passion and idealism.

*

Let me now pay tribute to our revered colleague and friend, Judge Thomas Buergenthal, who sadly passed away in Miami, Florida, on 29 May. Judge Buergenthal was a Member of the Court from 2000 to 2010.

Throughout his illustrious career as a judge and an academic, Judge Buergenthal showed a deep commitment to the role of justice in upholding human rights. As one of the youngest survivors

[1] *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, separate opinion of Judge Ajibola, p. 52, para. 7.

[2] *Ibid.*, para. 9.

of Nazi concentration camps, he saw first-hand the importance of establishing a judicial framework to hold perpetrators to account and to reset the stage for a world based on the rule of law. After he emigrated from his mother's hometown Göttingen in Germany to the United States in the 1950s, Judge Buergenthal studied law at the New York University Law School and obtained his postgraduate degrees in international law from Harvard Law School.

He subsequently held a number of distinguished positions in academia, including being appointed as Lobingier Professor of Comparative Law and Jurisprudence at the George Washington University Law School, as Dean of the Washington College of Law of the American University, and being honoured as endowed professor at the University of Texas and at Emory University, where he was also the Director of the Human Rights Program of the Carter Center. Judge Buergenthal was a renowned scholar, with an impressive list of publications on international law to his name. Much of his scholarship was focused on human rights, but many of us on this Bench were reminded in two recent cases that his first major publication, in 1969, was a book about law-making in the International Civil Aviation Organization, a treatise that remains an important reference today.

In addition, Judge Buergenthal was a widely respected member of the international judiciary. Prior to his election as a Member of the Court, he served between 1979 and 1991 as a judge of the Inter-American Court of Human Rights, including a term as that Court's President. From 1989 to 1994, he was a judge on the Administrative Tribunal of the Inter-American Development Bank. As an indefatigable advocate for human rights, Judge Buergenthal also served as a member of the United Nations Human Rights Committee and the United Nations Truth Commission for El Salvador.

Judge Buergenthal brought his extraordinary range of academic and judicial experience to his role as a Member of the Court. He was known as a charmingly understated but brilliant judge, who shone through his spirit of co-operation, his invaluable common sense and his gently ironic sense of humour.

Judge Buergenthal was sincerely committed to encouraging a new generation of active participants in international and global justice. This forward-looking approach went hand in hand with his conviction that the horrors of his youth should never be forgotten. In that respect, an initiative that was close to his heart was the project to conserve through digitization the archives of the

Nuremberg International Military Tribunal, which were entrusted to the Court in 1946. During his decade on the Court, he also published his memoir, *A Lucky Child*, which describes his experience as a survivor of the Shoah.

During his lifetime, Judge Buergenthal was the recipient of numerous awards in recognition of his work as a human rights champion, including the Stockholm Human Rights Award in 2018. He was an exemplary judge, a leading international jurist and an inspiring teacher who enriched the lives of all whose path crossed his. He will be sorely missed.

*

On behalf of the Members of the Court and myself, on behalf of the Registrar and all the Registry staff, may I offer our sincere condolences to the families and loved ones of Judge Ajibola and Judge Buergenthal.

I invite you now to stand and observe a minute of silence in their memory.

[The Court to observe a minute of silence]

*

Please be seated. Let me now turn back to the judicial proceedings 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)*. Before setting out the procedural steps in the case, it is necessary to complete the composition of the Court. I recall that the Member of the Court of Russian nationality, invoking Article 24, paragraph 1, of the Statute, decided not to take part in the decision of the case. The Russian Federation consequently became entitled, under Article 37, paragraph 1, of the Rules of Court, to choose a judge *ad hoc*. It first chose Mr Leonid Skotnikov, who resigned on 27 February 2023, and then Mr Bakhtiyar Tuzmukhamedov. I further recall that, for its part, Ukraine, exercising the right to choose a judge *ad hoc* conferred upon it by Article 31 of the Statute, in the absence of a judge of Ukrainian nationality on the Court, chose Mr Fausto Pocar.

Article 20 of the Statute provides that "[e]very Member of the Court shall, before taking up his duties, make a solemn declaration in open court that he will exercise his powers impartially and conscientiously". Pursuant to Article 31, paragraph 6, of the Statute, the same provision applies to judges *ad hoc*. While Mr Pocar already made his solemn declaration during an earlier phase of the case, Mr Tuzmukhamedov has yet to be sworn in as judge *ad hoc*.

Before inviting Mr Tuzmukhamedov to make his solemn declaration, I shall first, in accordance with custom, say a few words about his career and qualifications.

Mr Bakhtiyar Tuzmukhamedov, who is of Russian nationality, graduated in international law from the Moscow State Institute of International Relations, at which he also received a post-graduate degree, and subsequently obtained an LLM at Harvard Law School. He holds the title of professor of international law and has taught at a number of universities in Russia and abroad, including the Diplomatic Academy of the Russian Ministry of Foreign Affairs and the University of Virginia Law School. He has also lectured on public international law at The Hague Academy of International Law. In addition to his academic experience, Mr Tuzmukhamedov has served as a Judge at the International Criminal Tribunal for Rwanda from 2009 to 2012 and at the Appeals Chamber of the International Criminal Tribunals for Rwanda and for the former Yugoslavia from 2012 to 2015. Between 2019 and 2021, he served as an *ad hoc* judge in a case heard by the Grand Chamber of the European Court of Human Rights.

Over his wide-ranging career, Mr Tuzmukhamedov has often worked and collaborated with the United Nations. He has served as adviser within his country's delegation in the United Nations Special Committee on Peacekeeping Operations and the Ad Hoc Committee on the Indian Ocean. He has also served as a Civil Affairs Officer with the United Nations Peace Forces in the former Yugoslavia, and as a member of numerous expert groups. He is currently Vice-Chairperson of the Committee Against Torture, of which he has been a member since 2018.

Mr Tuzmukhamedov has held several high-profile positions in professional associations including being Vice-President of the Russian Association of International Law, Deputy Editor-in-Chief of the Moscow Journal of International Law and Member of the Editorial Board of the International Review of the Red Cross. He has written extensively on international legal matters, including international peace and security and arms control.

I shall now invite Mr Tuzmukhamedov to make the solemn declaration prescribed by the Statute, and I request all those present to rise. Mr Tuzmukhamedov, you have the floor.

Mr TUZMUKHAMEDOV: Thank you Madam President.

> "I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously."

Madam President.

The PRESIDENT: Thank you. Please be seated. I take note of the solemn declaration made by Judge Tuzmukhamedov and declare him to be duly installed as judge *ad hoc* in this case.

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I shall now briefly recall the principal procedural steps in the case.

On 16 January 2017, the Government of Ukraine filed in the Registry of the Court an Application instituting proceedings against the Russian Federation in regard to alleged violations by the latter of its obligations under the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999 (to which I shall refer as the "ICSFT") and the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965 (to which I shall refer as "CERD").

In its Application, Ukraine sought to found the jurisdiction of the Court on Article 24, paragraph 1, of the ICSFT and on Article 22 of CERD, in conjunction with Article 36, paragraph 1, of the Statute of the Court.

On 16 January 2017, Ukraine also submitted a Request for the indication of provisional measures, referring to Article 41 of the Statute and to Articles 73, 74 and 75 of the Rules of Court. By an Order of 19 April 2017, the Court, having heard the Parties, 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)* Refrain from maintaining or imposing limitations on the ability of the Crimean Tatar community to conserve its representative institutions, including the *Mejlis*;

(b) Ensure the availability of education in the Ukrainian language;

(2) Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve."

By an Order dated 12 May 2017, the President of the Court fixed 12 June 2018 and 12 July 2019 as the respective time-limits for the filing of a Memorial by Ukraine and a Counter-Memorial by the Russian Federation. The Memorial of Ukraine was filed within the time-limit thus fixed.

On 12 September 2018, within the time-limit prescribed by Article 79, paragraph 1, of the Rules of Court of 14 April 1978 as amended on 1 February 2001, the Russian Federation raised preliminary objections to the jurisdiction of the Court and the admissibility of the Application. In its Judgment of 8 November 2019, the Court found that it had jurisdiction on the basis of Article 24, paragraph 1, of the ICSFT, to entertain the claims made by Ukraine under this Convention. In the same Judgment, the Court found that it had jurisdiction on the basis of Article 22 of CERD to entertain the claims made by Ukraine under this Convention and that the Application of Ukraine in relation to those claims was admissible.

By an Order of 8 November 2019, the Court fixed 8 December 2020 as a new time-limit for the filing of the Counter-Memorial of the Russian Federation. By Orders dated 13 July 2020 and 20 January 2021, respectively, the Court, at the request of the Respondent, extended that time-limit first to 8 April 2021 and then until 8 July 2021. By an Order dated 28 June 2021, the President of the Court, at the request of the Respondent, further extended the time-limit to 9 August 2021. The Counter-Memorial was filed within the time-limit thus extended.

By an Order dated 8 October 2021, the Court authorized the submission of a Reply by Ukraine and a Rejoinder by the Russian Federation, and fixed 8 April 2022 and 8 December 2022 as the respective time-limits for the filing of those pleadings. By an Order dated 8 April 2022, and at the request of the Applicant, the Court extended to 29 April 2022 and 19 January 2023 the respective time-limits for the filing of those pleadings. The Reply was filed within the time-limit thus extended.

By Orders dated 15 December 2022 and 3 February 2023, respectively, the Court, at the request of the Respondent, extended the time-limit for the filing of the Rejoinder by the Russian Federation first until 24 February 2023 and then until 10 March 2023. The Rejoinder was filed within the time-limit thus extended.

By letter dated 30 May 2023 and received in the Registry the following day, the Agent of the Russian Federation submitted a document entitled "Expert report of Alexey Borisovich Artyushenko, Olga Anatolyevna Zolotareva, Viktor Viktorovich Merkuryev", together with certain annexed exhibits, with reference to Article 56 of the Rules of Court and Practice Direction IX.

By letter dated 2 June 2023, the Agent of Ukraine informed the Court that his Government objected to the production of the report and annexed materials that the Russian Federation wished to submit.

The Court, having considered the views of the Parties, decided to authorize the production by the Russian Federation of the above-referenced report and annexed materials pursuant to Article 56, paragraph 2, of the Rules of Court, it being understood that Ukraine would have the opportunity to comment thereon during the present hearings. In addition, should Ukraine wish to comment in writing and submit documents in support of its comments pursuant to Article 56, paragraph 3, of the Rules of Court, it may do so by 26 June 2023, at 6 p.m. at the latest. The decision of the Court with respect to the Russian Federation's request was duly communicated to the Parties by letters from the Registrar dated 5 June 2023.

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After ascertaining the views of the Parties, the Court decided, pursuant to Article 53, paragraph 2, of its Rules, that copies of the written pleadings and the documents annexed would be made accessible to the public on the opening of the oral proceedings, with the exception of the names and personal data of certain witnesses referred to in the Counter-Memorial and Rejoinder of the Russian Federation, as well as in documents annexed thereto. Further, in accordance with the Court's practice, the pleadings and documents annexed, with the above-referenced redactions, will be placed on the Court's website from today.

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I note the presence in the Court of the Agents and counsel of the two Parties.

In accordance with the arrangements for the organization of the proceedings which have been decided by the Court, the hearings will comprise a first and second round of oral argument. The first round will begin today, with the oral pleadings of Ukraine, and will close on Thursday 8 June, following the Russian Federation's first round of pleadings. For the first round, each Party will have two sessions of three hours at its disposal. The second round of oral argument will begin on Monday 12 June and conclude on Wednesday 14 June. Each Party will have one session of three hours to present its reply.

In this first sitting, Ukraine may, if required, avail itself of a short extension beyond 1 p.m., in view of the time taken up by my introductory remarks.

I shall now give the floor to HE Mr Anton Korynevych, Agent of Ukraine. You have the floor, Excellency.

Mr KORYNEVYCH:

INTRODUCTION

1. Madam President, distinguished Members of the Court, it is my honour to stand before you on behalf of my country.

2. On 6 March 2017, during the very first oral hearing in this case, the Agent of Ukraine stated the following:

> "Ukraine has come before this Court to defend the basic human rights of its people, faced with the Russian Federation's violations of human rights and international law . . . Thousands of innocent Ukrainian civilians have already suffered deadly attacks, and millions remain under imminent threat. Their peaceful, simple day-to-day routines have been ruined, and their fundamental rights have been blatantly violated by . . . the Russian Federation."

3. If we turn to the situation of today, what can demonstrate better that Ukraine was right to sound the alarm, warning the world of Russia's mounting violations of international law. Russia's abusive behaviour, and the measured reaction of the world, ultimately led to the largest war in Europe since World War II.

4. The Russian Federation has contempt for international law. Over the last 16 months, the world has woken up to this dark reality. The world watched as Russia launched a full-scale invasion of Ukraine. Russia even had the audacity to cloak its actions in international law, on the absurd

pretext that it was acting to prevent genocide. The world watched as Russia used this pretext to terrorize the Ukrainian people, targeting civilians, including children. The world watched as Russia targeted Ukraine's very identity, aiming to wipe us from the map, including those of us sitting in front of you. Trying to "Russify" the people it occupied. I speak of Russia's war of aggression, and its utter disregard for human life, that is continuing right now.

5. But Russia's contempt for international law did not start in 2022. Beginning in 2014, Russia illegally occupied Crimea and then engaged in a campaign of cultural erasure, taking aim at ethnic Ukrainians and Crimean Tatars. In Donbas, in Kharkiv and elsewhere far from the contact line, we endured a Russian-fuelled campaign of intimidation and terror. The lesson this case teaches is simple: the past is prologue. If the world does not stand up to serious violations of international law, the violators are emboldened. If there is no accountability, the violations become more brazen.

6. Recall what happened when Russia occupied Crimea. Russia purged the Ukrainian language from Crimea's schools and Ukrainian culture from Crimea's streets. Russia punished the Crimean Tatar people, including their historic institutions and the *Mejlis*, banned their gatherings, and subjected them to disappearances, torture, and arbitrary detention. Look at what happens now. Russia is no longer limiting itself to discrimination in Crimea. Now it seeks to erase Ukrainian identity everywhere. It even puts our people through filtration camps, deporting our children, and hiding their own identities from them. Russia simply denies the existence of Ukrainians as a distinct identity.

7. Recall what happened as Russian money and weapons poured in. Flight MH17. Volnovakha. Mariupol. Kramatorsk. Kharkiv. Civilians faced a reign of intimidation and terror. Now Russia brings terror to all the citizens of Ukraine on a national scale. In every city I just mentioned, Russia has committed larger atrocities. Mariupol, recently the most vibrant city in the Azov region, turned into ruins. Volnovakha, a quiet town, smashed to nothing. Large portions of Kharkiv, called the students' capital of Ukraine, levelled. New cities have been added to this list: Horrifying massacres in Bucha, torture chambers in Kherson, mass graves in Izyum and so much more.

8. Bombs and BM-21s are no longer quietly smuggled across the border. Now Russia openly rains down thousands of missiles and bombs on Ukrainians. Under the leadership of President Zelenskyy and with the courage of the armed forces of Ukraine, Russia cannot defeat us on the battlefield. So, it targets civilian infrastructure to try to freeze us into submission. Earlier

today, just today, Russia blew up a major dam located in Nova Kakhovka causing significant civilian evacuations, harsh ecological damages and threatening the safety of the Zaporizhzhia nuclear power plant. Russia's actions are the actions of a terrorist state, an aggressor. But such actions did not appear out of the blue. They are the tragic but logical outcome of the situation we brought to this Court's attention back in 2017.

9. Russia shall face accountability for the crimes of the present. But today, we focus on the recent past. We will not let new atrocities cloud the memories of past victims. As Russia assaults the idea of a Ukrainian people, we will not forget Russia's attack on the Ukrainians and Crimean Tatars in Crimea. As the death toll mounts, and Russian missiles fall on our cities, we will not forget the civilians who perished in the deadly winter of 2015, sacrificed for the political agenda of Russia's proxies.

10. Ukraine brings claims under two treaties, but this is one case. It is about the choice the Ukrainian people made in our Revolution of Dignity of 2014, to chart the path to a European future; the Orange Revolution of 2004, to have free and fair elections; and, ultimately, the Revolution on Granite of 1990, to live independently from the orders of Moscow. This case, and the treaty violations that flow from it, arise from Russia's refusal to accept our free choices.

11. Russia's tactics are flexible. Where it could occupy Ukrainian territory, it imposed discrimination. Where it could not, Russian officials fuelled terror. As a result, Russia violated two different treaties — the Convention on the Elimination of All Forms of Racial Discrimination, or CERD, and the International Convention for the Suppression of the Financing of Terrorism, or the ICSFT. But Russia's violations are variations on the same theme.

12. This morning, Ukraine will present its claims under the ICSFT. Professor Harold Hongju Koh will introduce Ukraine's claims, Russia's treaty obligations and how Russia twists them. He will then address the Convention's special definition of "funds" to mean "assets of every kind" and show how weapons naturally fall within the treaty's scope.

13. Professor Jean-Marc Thouvenin will then address the terrorism financing offence in Article 2 of the Convention and how Russia again distorts the Convention's text. As Professor Thouvenin will show, by the summer of 2014, it was common knowledge, as reflected in United Nations reports, that the so-called DPR and LPR were engaged in a pattern of terrorist acts.

14. Next, Mr David Zionts will address the financing of terrorist acts covered by Article 2 (1) *(a)*. He will cover the Russian supply of weapons that led to the shoot-down of Flight MH17, an offence under the Montreal Convention, and a campaign of bombings targeting peaceful Ukrainian cities, offences under the Bombings Convention.

15. Fourth, Ms Marney Cheek will address the supply of Russian multiple rocket launch systems and the resulting series of attacks on civilian areas in Donbas. After the lunch break, Ms Cheek will conclude by summarizing Russia's blatant violations of its ICSFT obligations.

16. Then Ukraine will turn to its claims under the CERD.

17. Professor Koh will introduce Ukraine's claims, providing historical and legal context to Russia's systematic campaign of racial discrimination against Ukrainians and Crimean Tatars. He will then explain why Russia cannot escape its peremptory obligation not to discriminate by citing its own propaganda, anti-extremism or national security laws.

18. Next, Ms Cheek will address the law applicable to Ukraine's claims, including the definition of racial discrimination under the CERD and the substantive provisions that Russia has violated.

19. Ms Clovis Trevino will then demonstrate that Russia has engaged in a multitude of CERD violations that, when viewed together, amount to a systematic campaign of racial discrimination in Crimea.

20. Finally, Professor Thouvenin will conclude by addressing Russia's ongoing — and flagrant — violations of this Court's provisional measures Order of 19 April 2017.

21. Madam President, Members of the Court, I will end this introduction where I began — with Russia's contempt for international law. Recently, the spokesperson of the Russian Ministry of Foreign Affairs presented a list of conditions for Russia to end its illegal war. I will highlight one of them: that Ukraine abandon all "lawsuits against Russia in international courts"[3]. That is a shocking statement — if Ukraine continues to pursue the peaceful settlement of disputes, Russia promises to keep using force against us. The Court should not tolerate such an attack on its jurisdiction.

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[3] Ministry of Foreign Affairs of the Russian Federation, Foreign Ministry Spokeswoman Maria Zakharova's answer to a media question related to the Ukrainian Foreign Minister's statement (18 March 2023), accessed at https://mid.ru/ru/press_service/spokesman/answers/1858588/?lang=en.

22. Still, in its cynical way, Russia is paying tribute to international law. Russia knows that this Court matters and it fears a decision from this Court on the merits. Russia is right to be worried: international law does matter. As we will show today, international law requires Russia to be held accountable for serious violations of the ICSFT and CERD. We ask you today to begin restoring respect for international law.

23. Let me conclude with another quote of the Agent of Ukraine when this case began, six years ago: "Today, I stand before the World Court to request protection of the basic human rights of Ukrainian people. We seek justice and accountability under international law . . . [P]eople of Ukraine are facing an ongoing campaign of terror and cultural erasure. The situation is truly dire."

24. Back then, the world took half-measures, which led to half-peace, which led to a total war. Today, by looking at the facts and the law fairly and impartially, this honourable institution can deliver a historic decision. It can help guide the international community to justice, sustainable peace and the prevention of future gross violations of international law. The lack of accountability for Russia must finally end.

25. Madam President, on behalf of Ukraine, I thank you for your attention to this important case, and for the hard work of the Court's staff. I now ask you to give the floor to Professor Koh.

The PRESIDENT: I thank the Agent of Ukraine. I now give the floor to Professor Harold Hongju Koh. You have the floor, Professor.

Mr KOH:

INTRODUCTION TO UKRAINE'S CLAIMS UNDER THE ICSFT AND THE DEFINITION OF "FUNDS" TO INCLUDE "ASSETS OF EVERY KIND"

I. Ukraine's claims under the International Convention on the Suppression of the Financing of Terrorism

1. Madam President, Members of the Court: it is my honour to appear before you today on behalf of Ukraine.

2. This case concerns Russia's fundamental contempt for the Ukrainian people, their human rights and the international law for which this Court stands. As Ukraine's Agent has observed, this contempt, which the world witnesses daily, did not begin in 2022. Following its blatant aggression

in Crimea in 2014, Russia has sought to control the population there through a brutal campaign of discrimination and cultural erasure. This afternoon, we will describe that campaign and the many violations of the CERD it has caused.

3. But soon after occupying Crimea, Russia showed the same contempt — for international law, the Ukrainian people and their human rights — by failing to prevent and suppress the financing of terrorism throughout Ukraine, especially the Donbas region of eastern Ukraine. As Ukraine will demonstrate this morning, Russia's failure to co-operate to prevent and suppress the financing of terrorism in Donbas and elsewhere violates the ICSFT, the Terrorism Financing Convention.

4. In adopting that Convention, the States parties — including Russia and Ukraine — expressly recognized that because terrorism financing crosses borders, it can only be effectively prevented and suppressed when States parties, including Russia, are required to take specific, good faith measures to co-operate in the prevention and suppression of the financing of terrorist acts. Yet Russian officials have consistently and illegally refused to co-operate. Instead, Russian officials have themselves repeatedly financed terrorism by providing funds to persons, knowing that those assets would be used to carry out acts intended to cause death or serious bodily injury to Ukrainian civilians.

5. For this hearing, Russia has flooded this Court with volumes of propaganda regarding events in Ukraine and Donbas. But everything the Court needs to know about the spring of 2014 has been established by neutral United Nations monitors. A United Nations monitoring mission documented the origins of the so-called "Donetsk People's Republic", or "DPR", and "Luhansk People's Republic", or "LPR". In May of 2014, those monitors noted "the increasing numbers and presence of well-organized armed persons in eastern Ukraine"[4]. These "armed groups" increasingly conducted "illegal take-overs of administration buildings" for purposes of coercion, to enforce "political demands" that they were making of Ukraine's Government[5].

6. The consequences for Ukraine's civilians were devastating and deliberate. By the summer of 2014, the Office of the United Nations High Commissioner for Human Rights stressed "that these groups have taken control of Ukrainian territory and inflicted on the populations a reign of

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[4] OHCHR, *Report on Human Rights Situation in Ukraine* (15 May 2014), para. 90 (Memorial of Ukraine (MU), Ann. 45, judges' folder, tab 5).

[5] *Ibid*.

intimidation and terror to maintain their position of control"[6]. United Nations monitors identified "an increasing number of acts of intimidation and violence by armed groups, targeting 'ordinary' people who support Ukrainian unity or who openly oppose either of the two [so-called] "people's" republics"[7]. United Nations High Commissioner for Human Rights Navi Pillay recounted the chilling message of one DPR leader who boasted that the DPR's goal was to target women and children and "immerse them in horror"[8].

7. As this campaign of violence against Ukraine's civilian population unfolded, Russia faced a clear choice. The legal path was co-operation, the path to which Russia had committed when it joined the ICSFT. That treaty lays out a comprehensive framework of co-operation that States must follow when terrorism financing occurs or appears likely. Ukraine sought Russia's co-operation, raising grave concerns about the money and weapons flowing from Russia to sustain attacks on civilians in Ukraine. On its face, that flow of assets to the DPR and LPR to target civilians for purposes of intimidation and governmental coercion triggered the treaty. Had Russia chosen this co-operative, lawful path, so much painful civilian suffering could have been avoided.

8. Instead, Russia violated its commitments by choosing an illegal path: it did nothing. As private fundraising networks for the DPR and LPR flourished on Russian territory, Russia did nothing. When asked to control its borders, Russia did nothing. When it could have instructed its officials not to fund groups committing violence against civilians, Russia did nothing.

9. Instead, as more deadly weapons arrived in Ukraine, and more Ukrainian civilians suffered atrocities, Russian officials escalated their illegal supply of moneys and weapons, sending — in July 2014 — a Buk anti-aircraft system into Ukraine, after which Malaysian Airliner Flight MH17 was destroyed; sending — in January 2015, while Ukraine was being pressed for political concessions in negotiations — a stream of rocket launch systems to DPR operatives, who turned them on the innocent civilians of Volnovakha, Mariupol and Kramatorsk. By sending Russian

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[6] OHCHR, *Report on the Human Rights Situation in Ukraine* (15 July 2014), para. 26 (MU, Ann. 296, judges' folder, tab 6).

[7] OHCHR, *Report on Human Rights Situation in Ukraine* (15 June 2014), para. 207 (MU, Ann. 46, judges' folder, tab 7).

[8] OHCHR, "Intensified Fighting Putting at Risk Lives of People in Donetsk and Luhansk — Pillay" (4 July 2014) (MU, Ann. 295, judges' folder, tab 8).

military-grade mines to Kharkiv — far from any line of conflict — to attack and kill innocent civilians at nightclubs and a unity rally.

10. This morning we will tell you about all these events, which demonstrate that Russia's path of non-co-operation flagrantly violated its treaty obligations to co-operate to prevent and punish the financing of terrorism. Ukraine's evidence is detailed, multifaceted, but our case is simple: the ICSFT focuses not on labels, but on acts that States must not fund. The DPR, LPR and others in Ukraine carried out such acts, which are covered by Article 2 (1) *(a)* and *(b)* of the Convention. Under Article 2, these acts may not be funded by "any person", which this Court has already held would include officials of the Russian Government. Yet instead Russian officials repeatedly gave funds to support acts that Russia was forbidden to fund. By doing nothing to stop these assets, Russia utterly defaulted on its obligations to obey this solemn treaty.

II. Russia has violated its co-operation obligations under the ICSFT

11. Article 18 of the ICSFT requires States to "cooperate in the prevention of the offences set forth in article 2", i.e. prohibited acts of terrorism financing. As Article 18 specifies, that co-operation means "taking all practicable measures . . . to prevent and counter preparations in their respective territories for the commission of [terrorism financing] offences within or outside their territories".

12. The treaty's twin objectives are "suppression" and "prevention". Most of the Convention is devoted to suppression of terrorism financing through investigation, prosecution, and other law enforcement measures. But only Article 18 expressly addresses the proactive measures States must take "to prevent and counter preparations in their respective territories" for commission of terrorist offences, wherever they occur. If a "measure" is practicable and could prevent the commission of an Article 2 offence, the State is required by the treaty to take that measure.

13. Article 8 further provides that States "shall take appropriate measures" to identify, detect, and freeze or seize funds used for terrorism financing.

14. Article 9 concerns the investigation of alleged Article 2 offences, and clearly mandates that "[u]pon receiving information" that a person who "may" be in its territory is "alleged to have committed" a terrorism financing act, the State must investigate.

15. Article 10 similarly concerns prosecution or extradition. If "the alleged offender is present" on the State's territory, it must either extradite the alleged offender, or "submit the case without undue delay" for the purpose of prosecution.

16. Finally, Article 12 (1) forbids half-hearted co-operation. Instead, States parties must "afford one another the *greatest measure of assistance* in connection with criminal investigations or criminal or extradition proceedings in respect of the offences set forth in article 2, including assistance in obtaining evidence in their possession necessary for the proceedings".

17. Read together, these provisions require that the State do something. It requires a good-faith structure for genuine co-operation to suppress terrorism financing offences. But with respect to Ukraine, Russia did nothing. It has displayed instead complete non-co-operation and has refused to take even the most minimal measure to prevent terrorism financing. Russia has ignored Ukraine's most basic requests for co-operation and investigation — even as weapons flow uncontrolled across the border. Our evidence shows the reason: Russia's own officials were providing funds to groups committing terrorist acts in Ukraine.

18. Now Russia's brazen non-co-operation continues in this Great Hall of Justice, where it continues to make a mockery of its legal commitments. At every turn, Russia has twisted the treaty's text to invent limitations on its obligations, and to impose burdens on Ukraine that appear nowhere in the treaty's text. Ukraine's written pleadings address Russia's arguments in great detail. Let me just highlight just two examples: Articles 18 and 9.

19. On its face, Article 18 requires Russia to "cooperate in the prevention of" prohibited offences by "*taking all practicable measures* . . . to prevent and counter preparations . . . for the commission of those offences". Yet Russia reads this expansive language as obliging it only to "establish a regulatory framework for the prevention of the financing of terrorism"[9]. Russia would shrink its obligation so that it must take no practicable measure, apart from adopting a law on the books that its officials then ignore. So long as Russia passes a paper law saying that terrorism financing is illegal, it need actually do nothing to stop anyone from financing terrorism. It need not

[9] Rejoinder of the Russian Federation (RR), para. 627.

police its border to prevent the supply of weapons for use in terrorist acts. It need not even stop its own officials from brazenly financing terrorism.

20.Article 9 similarly requires Russia to investigate if it "receiv[es] information that a person who has committed *or who is alleged to have committed* [a covered offence] may be present in its territory". Again, Russia would shrink this treaty obligation to nothing. Russia insists that before it has any obligation to investigate an alleged offence, "the occurrence of such an offence must be conclusively proven, *with the requisite specific intent*"[10]. In short, Russia need not investigate a potential crime unless the perpetrator's mental state has already been proven in advance. Consider how absurd this reading is: a State need not investigate a possible crime until after the crime is fully proven. In the first sentence of Article 9, Russia would rewrite the words to substitute for the word "alleged", the words "conclusively proven". But what kind of legal system requires interstate co-operation to investigate possible crimes only after the crimes have been conclusively proven? No criminal justice system in the world works like that.

21. Madam President, Members of the Court, the rest of Russia's legal analysis just repeats this false claim: that Russia obeyed its treaty obligations to co-operate, they say. How? By doing nothing, because the Convention's obligations, in their eyes, require no meaningful action. In short, this court is asked by Russia to absolve it of responsibility by gutting a Convention developed to protect civilians and human rights. And by so asking, Russia only underscores its contempt for the rule of law, human rights, the Ukrainian people, and this Court.

III. Russia's "unclean hands" defence is baseless

22. Russia's Rejoinder continues its non-co-operation by claiming — for the first time — that *Ukraine* has unclean hands, thus nullifying Russia's responsibility for its own violations of the ICSFT. This frivolous argument need not detain you long.

23. For, as this Court recently noted in *Certain Iranian Assets*, you have never held that the clean hands doctrine "was part of customary international law or constituted a general principle of

[10] RR, para. 568, emphasis added.

law"[11]. "As a defence on the merits, the Court has always treated the invocation of 'unclean hands' with the utmost caution"[12].

24. This case shows why this Court wisely exercises such caution. Russia's factual narrative in support of this defence is a work of propaganda. It offers many citations, but they are to State-sponsored Russian media, and even to their own preliminary objections in another case, of which we will surely hear more on Thursday[13].

25. And based on such dubious sources, Russia continues its historic "big lie": that Ukraine, not Russia, is to blame for harming its own citizens. But given the total absence of evidence submitted by Russia, this Court need only ask: who did United Nations human rights monitors find was responsible for a reign of intimidation and terror? Who destroyed MH17, a civilian aircraft? Who did United Nations officials say knowingly targeted the civilian population of Mariupol? A simple answer: not Ukraine.

26. Russia falsely equates alleged coal purchases by Ukrainian officials in their own territory with Russian officials supplying deadly weapons to terrorist groups they know target innocent civilians in another independent nation[14]. This offensive comparison only underscores that Russia intends its unclean hands argument as a distraction, not as a meaningful defence to any of Ukraine's claims.

VI. The ICSFT defines "funds" to encompass "assets of every kind", including weapons

27. Madam President, Members of the Court, Ukraine has presented overwhelming, undisputed evidence that vast sums of money, weapons, and other equipment have been transferred from Russia to Ukraine[15]. This includes open and active fundraising in Russia for illegal armed groups operating in Ukraine. As my colleague Ms Cheek will detail shortly, Russian billionaires and

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[11] *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America)*, *Judgment of 30 March 2023*, para. 81.

[12] *Ibid*.

[13] See e.g. RR, fns. 72, 75, 76, 81, 82, 90.

[14] RR, para. 92.

[15] Summary of Ukraine's Annexes Evidencing Funding from Russia to Illegal Groups in Ukraine (judges' folders, tab 9).

Russian co-ordination centres[16] have openly provided monetary assistance to the DPR and LPR[17]. And even Russian lawmakers have actively and publicly solicited donations to the DPR and the LPR. In response, Russia has done nothing[18].

28. Ukraine has presented equally ample evidence regarding the transfer of weapons from Russia to these illegal armed groups. Because Russia cannot dispute these facts, it makes instead the implausible claim that a convention to stop terrorism financing was never intended to restrict the supply of weapons to terrorists. To ensure the broadest co-operation to prevent and suppress the commission of terrorism financing, Article 1 (1) of the Convention broadly defines the term "funds" to mean "assets of every kind" — *assets of every kind* — "whether tangible or intangible, movable or immovable, however acquired". Yet here too, Russia asks you to justify its open non-co-operation. How? By stripping these words from the treaty.

A. The ordinary meaning of "assets of every kind", interpreted in light of the treaty's object and purpose, covers all forms of property, including weapons

29. On its face, this text leaves no doubt. The treaty's ban on terrorism financing covers "assets of every kind", including a Buk anti-aircraft system, multiple-launch rocket systems, limpet mines. The ordinary meaning of "assets of every kind . . . tangible or intangible" is weapons, equipment, other forms of property — as much as the rubles or dollars used to buy such weapons, equipment, and property. All of these are tangible "assets" — "assets of every kind" — and therefore "funds" of the kind Russian officials may not supply if they are serious about seeking to suppress the financing of terrorism.

30. In Russia's Rejoinder, it grudgingly concedes that the term "assets" "may convey the meaning of 'the property of a person' in the broad sense indicated by Ukraine"[19]. So the Parties agree on the key point: the ordinary meaning of "assets", and here "funds", covers every form of property, including weapons.

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[16] MU, paras. 174–179.

[17] Press Release, U.S. Treasury, Treasury Targets Additional Ukrainian Separatists and Russian Individuals and Entities (19 Dec. 2014) (MU, Ann. 478); *Report of the CCNR on the Results of 2014*, Coordination Center for New Russia (12 Jan. 2015) (MU, Ann. 633).

[18] See e.g. *Fundraising for the Rendering of Humanitarian Assistance to the Residents of the Southeast of Ukraine*, The Communist Party of the Russian Federation (17 June 2014) (MU, Ann. 605); *Lugansk Terrorists Are Financed by the Communist Party of Russia*, Details (26 June 2014) (MU, Ann. 526).

[19] RR, para. 186.

31. But Russia tries to escape the ordinary meaning of "assets", by narrowing it to conform to their own dictionary's definition of "funds"[20]. This is backwards treaty interpretation, a task for which dictionary definitions are simply beside the point.

32. Recall Article 31 (4) of the Vienna Convention on the Law of Treaties:"[a] special meaning shall be given to a term *if it is established that the parties so intended*"[21]. Article 1 of the ICSFT included a set of definitions "for the purposes of this Convention", including, as we saw, the treaty's own special meaning or definition of "funds" as covering "assets of every kind". The special meaning of funds is "assets of every kind", not some definition found in whatever dictionary Russia's lawyers might find. To impose generic dictionary definitions on interpretations of particular treaties — which chose their terms carefully — would upend treatymaking by denying drafters the option of adopting specialized definitions that are tailored to meet the particular purposes of a particular treaty.

33. Equally backward is Russia's reliance on the word "financing" in the treaty's name: that term that is prominently nowhere found in the treaty's text. Treaty titles are not operative provisions. By using, only, the word "funds," the text gives that term special meaning — "assets of every kind" — which defines the breadth and forms of "financing" the treaty is designed to suppress.

34. Madam President, Members of the Court: many nations use the term "financing of terrorism" as shorthand to cover the many variegated forms of terrorism support. For just one example, look at the Russian Supreme Court. Its own reading:

> "The financing of terrorism, along with rendering of financial services, should also be understood as the provision or collection not only of money (in cash or non-cash form), but also of material assets (for example, items of uniforms, equipment, means of communication, medicines, residential or non-residential premises, vehicles)"[22].

35. So Russia's artificial attempt to narrow the interpretation of "funds" to "monetary assets", would offend its own national law, as construed by its own Supreme Court. Yet, Russia repeats the same flawed tactic that it tried — and this Court rejected — earlier in these proceedings. Russia tried

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[20] *Ibid*.

[21] Vienna Convention on the Law of Treaties (1969), Art. 31 (4), emphasis added; see also Reply of Ukraine (RU), para. 66.

[22] Resolution of the Plenum of the Supreme Court of the Russian Federation, No. 1 of 9 February 2012, "On Some Aspects of Judicial Practice Relating to Criminal Cases on Crimes of Terrorist Nature", para. 16 (MU, Ann. 438, emphasis added), judges' folders, tab 10; see also RU, para. 69.

to convince this Court that the term "any person" in Article 2 must mean "some persons". This Court correctly decided:"any" means "any". Similarly, in Article 1, the term "every" means "every". When the treaty refers to assets of "*every* kind", it cannot mean — as Russia argues — only assets of "some kind: the monetary kind".

36. Russia's interpretation also violates this Court's directive that treaty clauses must be interpreted to avoid rendering them superfluous[23]. The treaty's clarification that an asset may be "movable or immovable" only makes sense when the term is given its ordinary meaning — "assets of every kind" meaning "property". Because the treaty prohibits providing an immovable asset, like a warehouse, to a terrorist to be used as a hideout or weapons depot. But if, as Russia claims, "assets of every kind" were limited to money, to what then would the term "immovable" assets refer? Money moves, there is no such thing as "immovable money". Russia's reading of "funds" as "monetary assets" would make the treaty's mention of "movable or immovable" assets superfluous.

37. Russia also misreads the second part of the treaty definition of "funds". After defining that term to include "assets of every kind", it adds "and legal documents or instruments in any form . . . evidencing *title to, or interest in, such assets*", listing examples of such "documents or instruments". Russia incorrectly calls this list the exclusive and "specific categories of assets that are covered by the ICSFT"[24], claiming that nothing else is covered[25]. Plainly, this is wrong. The definition does not exhaustively describe whatever constitutes "assets"; it only lists documents or instruments that "evidence title" to such assets. But on its face, the Convention bars producing terrorists with "assets of every kind", not just those assets for which someone can prove title by producing a piece of paper. So once again, Russia asks you to ignore the plain terms of the treaty to shrink its scope.

38. Most obviously, Russia's interpretation defies the broad object and purpose of the ICSFT, whose obvious goal was to deny groups any and all resources necessary to commit terrorist acts. Money on its own cannot be used to commit terrorist acts. The international community wanted to prevent terrorists from receiving money, because that money can be exchanged for goods that can be used to commit terrorist acts, such as explosives, arms and equipment. What sense would it make to

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[23] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 126, para. 134.

[24] RR, para. 187; Counter-Memorial of the Russian Federation, Part I (CMR-1), para. 30.

[25] RR, para. 187; CMR-1, para. 30.

forbid providing money to terrorists, but allowing those same terrorists to receive directly goods, weapons and arms that the same money would buy? To accept Russia's attempt to carve this gaping loophole into the treaty would gut that treaty and render it meaningless.

B. The *travaux préparatoires* confirm "assets of every kind" covers all forms of property, including weapons

39. Finally, Madam President: the *travaux préparatoires* confirm that "assets of every kind" means just what it says — all forms of property, including weapons. From the beginning, the treaty's drafters focused not just on financial or monetary assets, but weapons as well.

40. This early draft of the Convention defined the act prohibited by Article 2 as "financing". The substantive offence of financing encompassed financial and non-financial assets. Draft Article 1 defined "financing" broadly, to include, not just "funds," but "assets or other property". At the time, the term "funds" was defined narrowly to cover "any type of financial resource, including the cash or currency of any State"[26]. But non-financial assets were covered by the phrase "assets or other property".

41. The negotiators debated this wording; no one suggested shrinking the scope of the treaty to address only financial resources. No one ever proposed dropping all non-financial assets from the treaty. Instead, the debate concerned whether to cover just financial resources and weapons, or financial resources, weapons and other forms of property. And as this summary of the negotiations explained:

> "Suggestions were also made to delete the phrase 'or other property' as being superfluous. [Some argued] in favour of the deletion of the word 'assets'. Still others preferred retaining both terms . . . Some preferred interpreting 'property' as covering only arms, explosives and similar goods."[27]

42. As this reflects, there was a proposal to narrow the types of non-financial assets covered, but none of the proposals would have eliminated weapons from the coverage of the treaty. Given this history, Russia's Rejoinder is wildly misleading when it claims that the issues of weapons was, in their words, "not discussed at all when the Convention was negotiated"[28]. What this excerpt shows

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[26] *Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996*, UN doc A/54/37 (5 May 1999), p. 15 (Written Statement of Ukraine (WSU), Ann. 13, judges' folder, tab 11); see also RU, para. 86.

[27] *Ibid.*, p. 57; see also RU, para. 86.

[28] RR, para. 197.

is that weapons, arms and explosives were openly discussed when the Convention was negotiated, and everyone agreed that the Convention barred the provision of weapons to terrorists.

43. Ultimately, the States parties resolved the wording debate by taking the concept of "financing" out of the text and replacing it with a broader definition of "funds" defined as "assets of every kind". The drafters gave the term "funds" the broader, special meaning given to the definition of property in the Narcotics Convention: "assets of every kind"[29].

44. This outcome thus made any separate reference to property "redundant, since it was already envisaged in the concept of 'funds', as defined in article 1"[30]. The drafters adopted a "proposal that the term 'property' be deleted whenever it appeared in conjunction with the term 'funds' *since 'funds' was [now] intended to refer to all property*"[31]. In short, the *travaux* clarify that the final version of the treaty omitted the word "property" because the umbrella term was now "funds" as "assets of every kind" which plainly includes non-financial forms of property, including weapons.

45. This consensus was confirmed after the Convention was finalized. During the ratification process, a United States senior senator asked: "In Article 1 (1), does the term 'funds' include non-financial assets such as personal or real property?" That senator was named Joe Biden. The State Department responded "yes", "all delegations understood the definition to include 'property'"[32].

46. Leading commentators who participated in the negotiations confirm this view. Marja Lehto, who led Finland's delegation, explained that the expansive definition of "funds" covers "material assistance"; Roberto Lavalle, a Guatemalan diplomat who served on the Sixth Committee, agreed that that deliberately wide definition swept in such "material assistance" as the direct provision of weapons[33].

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[29] Annex III, Report of the Working Group on Measures to Eliminate International Terrorism, 54th Session, UN doc. A/C.6/54/L.2, p. 59, para. 47 (26 Oct. 1999) (MU, Ann. 277, judges' folder, tab 12); see also RU, para. 87.

[30] *Ibid.*, p. 71, para. 212.

[31] *Ibid.*, p. 58, para. 42 (emphasis added).

[32] *United States Senate Executive Report No. 107-2, 107th Congress, First Session*, US Government Publishing Office (27 Nov. 2001), p. 49 (WSU, Ann. 59, judges' folder, tab 13); see also RU, paras. 89-97.

[33] Marja Lehto, *Indirect Responsibility for Terrorist Acts* (2009), p. 261 (MU, Ann. 490, judges' folder, tab 15); Roberto Lavalle, "The International Convention for the Suppression of the Financing of Terrorism", 60 *Zaö RV* 491, 496-97 (2000) (MU, Ann. 484) (judges' folder, tab 16); Anthony Aust, "Counter-Terrorism—A New Approach: The International Convention for the Suppression of the Financing of Terrorism", 5 *Max Planck Y.B. U.N. L.* 285, 287 (2001) (MU, Ann. 485); see also RU, para. 75.

47. So in the end, every tool of treaty interpretation points to the same result. By its terms, the Convention encompasses "assets of every kind". Weapons are one kind of asset. The treaty drafters well understood and discussed that the Convention covers all forms of property, not just financial assets. After the treaty was finalized, States and commentators universally reaffirmed this breadth of coverage.

48. Yet against this evidence, Russia asks you to read an absurd exclusion. They would have you rewrite the phrase "assets of every kind" to mean "assets of every kind, except dangerous weapons". This outrageous misreading would create a gigantic loophole through which recalcitrant States could entirely flout their legal duties. While State officials looked the other way and did nothing, private parties could send weapons to Al Qaeda. A treaty partner could pretend to be suppressing the financing of terrorism, even while allowing or assisting supporters of terrorism to deliver unlawfully the very lethal weapons used to carry out terrorist acts. And this is exactly what Russia is doing here. Russian officials and private supporters are delivering lethal bombs, shells, and missiles directly to those terrorizing the civilian population of a peaceful neighbouring country and pretending that they are obeying this Convention.

49. Madam President, Members of the Court: this is not a good faith interpretation of the treaty. It cannot be the law. This misreading violates the Convention's ordinary meaning and object and purpose. It is a brazen attempt to escape the solemn commitments Russia made when it ratified the treaty 21 years ago. It would justify Russia's continuing refusal to co-operate with Ukraine in suppressing the financing of terrorism. And adopting their reading would reward and reinforce Russia and its naked contempt for the rule of law and human rights of Ukrainian citizens which we are all witnessing, every day.

50. Madam President, that concludes my presentation. I now ask you to call Professor Thouvenin to the podium.

The PRESIDENT: I thank Professor Koh and I now give the floor to Professor Jean-Marc Thouvenin. You have the floor, Professor.

M. THOUVENIN :

LE SENS, LA PORTÉE ET LA MISE EN ŒUVRE DE L'ARTICLE 2, PARAGRAPHE 1, DE LA CONVENTION SUR LA RÉPRESSION DU FINANCEMENT DU TERRORISME

1. Merci, Madame la présidente. Madame la présidente, Mesdames et Messieurs les juges, c'est toujours un insigne honneur de parler à votre barre aujourd'hui en pensant particulièrement au juge disparu devant qui j'ai eu l'honneur de plaider par le passé. La tâche que l'État demandeur m'a confiée consiste à vous éclairer sur le sens et la portée de l'article 2, paragraphe 1, de la convention sur la répression du financement du terrorisme.

2. Permettez-moi d'en projeter le texte à l'écran. Pour votre confort, il se trouve également à l'onglet n° 2 de votre dossier. Je ne le lirai pas.

3. L'Ukraine affirme et démontre que des personnes ont commis des actes illégaux au sens du chapeau de l'article 2, paragraphe 1, autrement dit des infractions de financement d'actes visés aux alinéas *a)* et *b)* de ce même paragraphe.

4. Pour autant, vous n'êtes pas saisis de la mise en cause pénale de telle ou telle personne physique ou morale. Vous êtes saisis du différend entre l'Ukraine et la Russie, à raison de la passivité, totale — j'allais dire « coupable » — de la Russie face au flux massif de financement d'actes terroristes en provenance non seulement de son territoire, mais aussi de ses agents publics.

5. Telle est la cause que l'Ukraine plaide devant vous. Pour sa défense, la Russie vous propose une interprétation totalement erronée de l'article 2 de la convention, avant de s'échiner à tordre les faits.

6. Me David Zionts procédera après moi à l'interprétation de l'article 2, paragraphe 1, alinéa *a)*. Pour ma part, traitant du reste de l'article 2, paragraphe 1, je m'arrêterai dans un premier temps sur l'alinéa *b)*, puis, dans un deuxième temps, sur le chapeau de l'article 2, paragraphe 1. Je terminerai ma plaidoirie en rappelant les actes terroristes commis par les bandes armées de Donetsk et Louhansk au printemps et à l'été 2014.

I. INTERPRÉTATION DE L'ALINÉA *B)* DE L'ARTICLE 2, PARAGRAPHE 1

7. Commençons donc avec l'article 2, paragraphe 1, alinéa *b)*. Il vise tous les actes qui ne sont pas déjà visés à l'alinéa *a)*, s'ils présentent deux caractères cumulatifs : premièrement, il s'agit de

« [t]out … acte destiné à tuer ou blesser grièvement un civil, ou toute autre personne qui ne participe pas … aux hostilités dans une situation de conflit armé » ; deuxièmement, ces mêmes actes sont visés « lorsque, par [leur] nature ou [leur] contexte, [ils] vise[nt] à intimider une population ou à contraindre un gouvernement ou une organisation internationale à accomplir ou à s'abstenir d'accomplir un acte quelconque ».

8. La Russie prétend qu'un acte répond à cette description si et seulement si une double intention de son auteur est prouvée : l'intention de tuer ou blesser grièvement des civils, et l'intention de le faire dans l'unique ou principal but de terroriser une population ou de contraindre un gouvernement.

9. L'Ukraine, au contraire, affirme qu'il suffit que des actes soient d'une certaine nature, ou qu'ils soient commis dans un certain contexte, pour relever de l'alinéa *b)*, sans qu'il soit nécessaire de prouver autrement l'intention subjective de l'auteur de ces actes.

10. C'est là que gît notre différend.

A. Le premier caractère de l'acte visé : « destiné à tuer ou blesser grièvement » des civils

11. Madame la présidente, la Cour peut d'emblée prendre note que les Parties s'accordent sur le fait que le premier caractère de l'acte décrit à l'alinéa *b)*, qui doit être « destiné à tuer ou blesser grièvement » des civils, est présent lorsqu'une personne ou un groupe de personnes mène une action létale visant délibérément des civils, y compris en situation de conflit armé[34]. L'Ukraine a démontré, et démontrera encore aujourd'hui, que les actions terroristes qu'elle a subies sont précisément des actes meurtriers visant *délibérément* des civils.

12. Mais l'Ukraine soutient aussi que pour déterminer ce qu'est un acte destiné à tuer ou à blesser grièvement un civil au sens de l'alinéa *b)*, l'intention subjective de l'auteur de l'acte n'a pas à être établie. L'alinéa *b)* est purement descriptif d'une catégorie de faits. Le seul auteur que cible l'article 2 au titre de l'infraction qu'il établit est la personne qui fournit des fonds. C'est elle qui commet l'infraction créée par la convention, pas la personne qui commet les actes que les fonds financent. Dès lors, l'acte destiné à tuer ou blesser se décrit objectivement, par le constat que, par sa

[34] Contre-mémoire de la Fédération de Russie (ci-après « CMFR »), partie I, par. 205, 207, 213 ; duplique de la Fédération de Russie (ci-après « DFR »), par. 145.

nature — et non parce que celui qui le commet nourrit certaines pensées —, son résultat est de tuer ou blesser grièvement des civils.

13. L'État défendeur promeut une autre approche qui a déjà longuement été réfutée dans les écritures de l'Ukraine[35]. Je suggère donc respectueusement à la Cour de bien vouloir lire les paragraphes 155 à 161 de la réplique, et serai pour le reste assez bref.

14. La Russie confond, d'une part, les actes commis « dans l'intention de » — « with the intent to », — mentionnés par exemple à l'article 2, paragraphe 1, alinéas *a)* et *b)*, de la convention sur la répression des attentats terroristes à l'explosif, ou encore à l'article II de la convention sur le génocide, ou encore dans le chapeau de l'article 2, paragraphe 1, de la convention CIRFT, textes — on le voit à l'écran — qui renvoient expressément à l'intention de l'auteur d'un acte, et, d'autre part, les « acte[s] destiné[s] à », « act[s] intended to » — visés à l'alinéa *b)* que nous discutons ici.

15. Or aucune confusion n'est permise ; il s'agit de deux formules volontairement distinctes, la première renvoyant à l'intention de l'auteur d'un acte érigé en infraction pénale, la seconde décrivant de manière objective un acte à raison de sa « destination », c'est-à-dire au regard du résultat auquel il aboutit, sans pour autant l'ériger en infraction pénale, c'est-à-dire, sans se préoccuper de l'intention criminelle de son auteur.

16. La Russie raisonne à tort comme si la convention érigeait en infraction pénale les actes destinés à tuer ou blesser des civils qu'elle interdit de financer. Ce n'est pas le cas. Il est donc erroné de se placer sur le terrain du droit pénal pour interpréter l'alinéa *b)*, en exigeant que l'intention de l'auteur des actes qu'il décrit soit établie[36].

17. Au demeurant, Madame la présidente, contrairement à la Russie, au moins devant vous car, chez elle, son interprétation est toute différente, la Cour de cassation italienne ne commet pas l'erreur à laquelle la Russie vous invite. Elle ne tient pas compte de l'intention de l'auteur de l'acte visé à l'alinéa *b)*, mais seulement de la nature de cet acte. Dans l'affaire *Italie c. Abdelaziz et autres*[37] de 2007, elle a jugé de manière limpide que

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[35] Réplique de l'Ukraine (ci-après « REU »), par. 155-161.

[36] CMFR, partie I, par. 174–282.

[37] *Italy* v. *Abdelaziz and ors*, Final Appeal Judgment, No. 1072, 2007, 17 Guida al Diritto 90, ILDC 559, Supreme Court of Cassation, Italy, 17 January 2007 (mémoire de l'Ukraine (ci-après « MU »), annexe 473) (dossier des juges, onglet nº 14).

> « an action against a military objective must also be regarded as terrorism if the particular circumstances show beyond any doubt that serious harm to the life and integrity of the civilian population are inevitable, creating fear and panic among the local people. A simple example is an attack using explosives against a military vehicle in a crowded market. »[38]

18. Votre Cour relèvera aussi l'arrêt de la Cour suprême du Danemark de 2009 dans l'affaire *Fighters* and *Lovers*[39], où il était question de l'interprétation de la loi danoise de transposition de l'article 2, paragraphe 1, alinéa *b)*, de la CIRFT. Cette juridiction suprême a jugé que les FARC (les forces armées révolutionnaires de Colombie), qui avaient reçu des financements pour lesquels leurs auteurs étaient poursuivis, devaient être considérées comme ayant commis des actes visés à l'article 2, paragraphe 1, alinéa *b)*, notamment parce qu'ils avaient utilisé des obus de mortier imprécis dans des zones civiles où des civils avaient succombé à leurs blessures. Elle n'a pas recherché autrement l'intention subjective de ceux qui avaient tiré ces obus.

B. Le second caractère de l'acte qu'il est interdit de financer : il « vise à intimider une population ou à contraindre un gouvernement ou une organisation internationale à accomplir ou à s'abstenir d'accomplir un acte quelconque »

19. Madame la présidente, Mesdames et Messieurs les juges, il y a un second caractère qu'un acte doit remplir pour relever de l'alinéa *b)*. Il doit viser à intimider une population ou à contraindre un gouvernement ou une organisation internationale à accomplir ou à s'abstenir d'accomplir un acte quelconque.

20. Comment sait-on qu'un acte vise un tel objectif ? *Le texte le dit :* c'est en tenant compte de « sa nature ou son contexte ».

21. Cela *ne veut pas dire* que l'objectif de l'acte n'est pas un élément pertinent. Il l'est. La Cour l'a d'ailleurs suggéré dans sa décision sur les mesures conservatoires[40] et, à cet égard, les longs développements de la Russie aux paragraphes 236 et suivants de son contre-mémoire enfoncent des portes ouvertes, si vous me permettez cette expression.

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[38] *Ibid*., par. 4.1. Voir également par. 6.4.

[39] « Fighters and Lovers Case », Case 399/2008, Supreme Court of Denmark (25 March 2009) (MU, annexe 476).

[40] *Application de la convention internationale pour la répression du financement du terrorisme et de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Ukraine c. Fédération de Russie), mesures conservatoires, ordonnance du 19 avril 2017, C.I.J. Recueil 2017*, p. 131-132, par. 75.

22. Mais *cela veut dire* que, pour ce qui touche à l'alinéa *b)*, la détermination de ce qu'un acte vise se réalise au regard de la nature de cet acte, ou du contexte dans lequel il est commis.

23. C'est très exactement ce que le texte de l'article 2, paragraphe 1, alinéa *b),* dit. Les mots sont choisis. Ils ne se réfèrent pas aux intentions des auteurs des actes, dont je rappelle une fois encore qu'ils ne sont pas érigés par la convention en infractions pénales, contrairement à la convention sur le génocide à laquelle la Russie s'accroche en vain, et contrairement à d'autres textes, comme le chapeau de l'article 2, paragraphe 1, de la convention CIRFT.

24. Du reste, s'il fallait le vérifier à la lumière des travaux préparatoires, on verrait que les rédacteurs de la convention ont expressément voulu exclure la prise en compte de l'intention de l'auteur des actes.

25. Durant les discussions au sein du groupe de travail de la Sixième Commission de l'Assemblée générale, le Costa Rica et le Mexique avaient proposé la réécriture suivante de l'alinéa *b)* :

> « Des actes ayant pour objet de causer la mort et des lésions corporelles graves à une personne lorsque de tels actes sont commis dans l'intention de provoquer la terreur parmi la population ou de contraindre une personne morale, une organisation internationale ou un État à commettre ou à s'abstenir de commettre un acte. »[41]

26. Cet amendement, isolé, n'avait pas prospéré. Le président du groupe de travail de la Sixième Commission explique pourquoi dans son rapport :

> « Il a été proposé de supprimer le membre de phrase "par leur nature ou leur contexte". Certains se sont opposés à cette suppression car elle donnerait à penser qu'il est nécessaire de prouver l'état d'esprit subjectif de l'auteur de l'infraction. »[42]

27. Amendement rejeté. L'état d'esprit subjectif de l'auteur n'est pas pertinent. La thèse russe n'a donc aucun fondement.

28. Mais, Madame la présidente, Mesdames et Messieurs les juges, la Russie s'échine aussi à arguer que l'acte décrit à l'alinéa *b)* doit viser uniquement, ou principalement, ou spécifiquement, à intimider la population[43].

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[41] Proposition du Costa Rica et du Mexique (A/C.6/54/WG.1/CRP.14), *in* Annexe II, rapport du groupe de travail sur les mesures visant à éliminer le terrorisme international, 54e session, Nations Unies, doc. A/C.6/54/L.2, p. 23-24 (26 octobre 1999) (version anglaise reproduite dans MU, annexe 277).

[42] Annexe III, *Résumé officieux des débats du Groupe de travail, établi par le Président*, rapport du groupe de travail sur les mesures visant à éliminer le terrorisme international, 54e session, Nations Unies, doc. A/C.6/54/L.2, p. 63, par. 88 (26 octobre 1999) (version anglaise reproduite dans MU, annexe 277).

[43] CMFR, partie I, par. 259-263 ; DFR, par. 143.

29. Trois réponses s'imposent ici, chacune étant déterminante.

30. Premièrement, et de manière tout à fait frappante, justement, la Russie prétend interpréter l'article 2, paragraphe 1, alinéa *b)*, dont je rappelle qu'il concerne non seulement les actes visant à terroriser la population civile, mais aussi ceux qui visent à contraindre le gouvernement, à la lumière d'autres textes, notamment les protocoles additionnels I et II, qui n'évoquent au titre du terrorisme que des actes visant à semer la terreur dans la population civile, à l'exclusion des actes visant à contraindre un gouvernement[44]. L'objet, le champ d'application, la substance des textes étant manifestement différents, interpréter le premier à l'aune des autres serait donc totalement incohérent.

31. Deuxièmement, pour que l'argument russe prospère, il faudrait réécrire le texte puisque ce dernier ne vise pas un acte « lorsque, par sa nature ou son contexte, son but principal est d'intimider une population ou de contraindre un gouvernement », contrairement, par exemple, à l'article 13, paragraphe 2, du protocole additionnel II, ou encore au paragraphe 84 des règles sur l'application du droit international humanitaire par les forces armées de la Fédération de Russie, publiée le 8 août 2001 par le ministère de la défense russe[45], qui interdit les actes de violence dont l'objet *principal* est de semer la terreur dans la population civile. Mais la Russie ne peut pas réécrire le texte. Dans la convention discutée devant vous, la notion de « but principal » ne figure pas, ni explicitement, ni implicitement.

32. Troisièmement, la Russie veut, une fois encore, faire oublier que la convention a pour seul objet de prévenir et réprimer le financement du terrorisme. Or, elle n'aurait aucun effet utile en termes de prévention du financement du terrorisme s'il était exigé, avant qu'un État puisse réclamer d'un autre qu'il coopère pour mettre un terme au financement d'actes qui tuent et blessent des civils et visent à terroriser la population ou à contraindre un gouvernement, de prouver que cet objectif est « principal » ou « exclusif »[46].

33. Quoi qu'en dise la Russie, Madame la présidente, Mesdames et Messieurs les juges, au sens de la convention, une attaque qui vise délibérément une zone que l'on sait peuplée de civils, ou

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[44] CMFR, partie I, par. 259–263.

[45] Manual on International Humanitarian Law for the Armed Forces of the Russian Federation, approved on 8 August 2001 by the Minister of Defense of the Russian Federation (translated by Aleksei Romanovski), *Int'l L. Stud.*, Vol. 99 (2022), p. 813 (translation originally published in Evan J. Wallach, *The Law of War in the 21st Century*, Appendix 1 (2017)), accessible à l'adresse suivante : https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=3029&context=ils.

[46] REU, par. 185.

une attaque indiscriminée, notamment avec des armes imprécises incapables de discernement, lancée sur une zone où sont présents des civils et des militaires, est un acte qui vise « par sa nature ou son contexte », à terroriser la population, indépendamment du fait que d'autres objectifs, par exemple militaires, seraient également visés.

34. J'ajoute que de tels actes visent aussi, de par leur nature ou leur contexte, à contraindre le gouvernement[47].

35. Mais, jamais à court de subterfuges, la Russie prétend dans son contre-mémoire que la convention ne s'appliquerait pas dans une situation de conflit armé lorsque les actes financés visent à contraindre le gouvernement[48]. La raison en serait que le droit des conflits armés ne qualifie pas de terroristes des actes visant à contraindre le gouvernement, et qu'il faudrait interpréter la convention conformément au droit des conflits armés. Il en découlerait selon la Russie que, en situation de conflit armé, la contrainte contre le gouvernement serait visée par l'alinéa *b) si et seulement si* elle est « related to something beyond the overall goal of the armed conflict as such »[49].

36. « [S]omething beyond » ? Beyond imagination! La Cour ne prêtera aucun crédit à cette thèse sortie de nulle part.

C. Le rôle allégué par la Russie du droit des conflits armés dans l'interprétation de l'article 2, paragraphe 1, alinéa *b)*, de la convention

37. Madame la présidente, ces dernières remarques me conduisent à revenir plus avant sur le rôle que la Russie veut faire jouer au droit des conflits armés. Sa thèse est que l'article 2, paragraphe 1, alinéa *b)*, ne saurait ériger en infraction un acte qui, par ailleurs, n'est pas considéré comme terroriste par le droit international humanitaire. Autrement dit, ce qui est, selon la Russie, « légal » en droit international humanitaire, ne saurait être « illégal » en vertu de la convention sur le financement du terrorisme[50].

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[47] REU, par. 181-184 ; MU, par. 215, 234, 244, 254, 260.

[48] CMFR, partie I, par. 283-289.

[49] CMFR, partie I, par. 289.

[50] DFR, par. 161, 171.

38. La Cour notera sans doute que ce débat est purement académique puisque aucun des actes dont le financement a été dénoncé par l'Ukraine n'est compatible avec le droit international humanitaire. Il n'en demeure pas moins que la thèse russe est juridiquement erronée.

39. En premier lieu, le droit international humanitaire n'autorise rien qui soit pertinent ici. Il ne pose que des interdictions. Or, ce qui n'est pas interdit par le droit international humanitaire n'est pas pour autant réputé autorisé par le droit international ; tout au contraire, ce qui n'est ni interdit ni autorisé par le droit international humanitaire peut parfaitement être interdit par d'autres branches du droit international.

40. En second lieu, contrairement au droit international humanitaire, et contrairement à ce que la Russie persiste à croire, la convention n'a aucunement vocation à créer des infractions de terrorisme, ni en temps de conflit armé, ni en temps de paix. J'y ai déjà insisté : ce n'est ni son objet, ni ce qu'elle fait. Elle se borne à ériger comme infraction le financement transnational de certains actes qu'elle décrit. Par contraste, le droit des conflits armés ne se préoccupe pas de financement transnational du terrorisme. Dès lors, il n'y a aucune raison de limiter arbitrairement la portée de la convention en référence au droit international humanitaire, qui ne saurait être la « *lex specialis* » puisque, par définition, aucun conflit normatif ne peut survenir entre les deux corps de normes. Au demeurant, s'il fallait faire appel à la notion de *lex specialis*, *quod non*, c'est clairement la convention qui en ferait office puisqu'elle seule traite du financement de certains actes. Au surplus, la convention est indubitablement la « *lex posterior* ».

II. INTERPRÉTATION DU CHAPEAU DE L'ARTICLE 2, PARAGRAPHE 1

41. Madame la présidente, Mesdames et Messieurs les juges, j'ai rappelé que ce qui est érigé en infraction par la convention est le financement de certains actes. Permettez-moi maintenant d'aborder à cet égard le chapeau de l'article 2, paragraphe 1.

42. L'Ukraine soutient qu'il résulte de ce texte que l'infraction est établie lorsque le financeur fournit des fonds à un groupe notoirement connu pour commettre des actes qu'il est interdit de financer.

43. Bien entendu, un groupe terroriste notoire peut utiliser les fonds qui sont mis à sa disposition de diverses manières, par exemple pour mener des actions de propagande, acquérir des

vivres, des tenues militaires, des véhicules de transport, mais aussi des armes. Mais les fonds de nature monétaire sont fongibles — je parlerai des armes tout à l'heure —, de sorte que celui qui fournit de tels fonds à un groupe connu pour commettre des actes qu'il est interdit de financer aura nécessairement connaissance que, du fait de leur fongibilité, et sauf s'il en conditionne le déboursement à des preuves d'achats ou d'utilisations spécifiques, les fonds de nature monétaire qu'il fournit « seront utilisés, en tout ou partie, en vue de commettre » des actes qu'il est interdit de financer.

44. Au demeurant, la mention, dans le texte, que les fonds seront utilisés « en tout ou partie », confirme qu'il n'est pas requis de démontrer l'affectation précise des fonds à des actes spécifiques visés aux alinéas *a)* et *b)*. Du reste, les terroristes ne diront probablement jamais à l'avance quels sont leurs plans, de sorte que s'il était exigé pour qualifier l'infraction de financement, que le financeur connaisse à l'avance les actions précises que le groupe terroriste entend mener, l'infraction ne serait jamais constituée[51]. Le paragraphe 3 de l'article 2, renforce cette interprétation puisqu'il établit que,

> « pour qu'un acte constitue une infraction au sens du paragraphe 1, il n'est pas nécessaire que les fonds aient été effectivement utilisés pour commettre une infraction visée aux alinéas *a)* ou *b)* du paragraphe 1 du présent article ».

45. Au surplus, exiger une vérification de l'affectation exacte des fonds fournis, ce qui est généralement impossible en pratique, serait incompatible avec l'objet et le but de la convention qui sont de promouvoir la coopération interétatique pour supprimer le financement du terrorisme transnational. Ce serait interpréter l'article 2, paragraphe 1, de manière à le rendre inutile, contrairement au principe d'effet utile formulé par votre Cour[52].

46. Il est tout à fait évident, j'y viens, que lorsque ce qui est fourni à un groupe prend la forme d'armes, la connaissance du financeur quant à leur utilisation pour commettre des actes qu'il est interdit de financer sera établie si le groupe est notoirement connu pour commettre de tels actes.

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[51] Roberto Lavalle, *The International Convention for the Suppression of the Financing of Terrorism*, 60 Zaö RV, p. 503 (MU, annexe 484) (dossier des juges, onglet nº 16).

[52] Voir *Violations alléguées de droits souverains et d'espaces maritimes dans la mer des Caraïbes (Nicaragua c. Colombie), exceptions préliminaires, arrêt, C.I.J. Recueil 2016 (I)*, p. 22-23, par. 43 ; *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), exceptions préliminaires, arrêt, C.I.J. Recueil 2011 (I)*, p. 125-126, par. 133 ; *Détroit de Corfou (Royaume-Uni c. Albanie), fond, arrêt, C.I.J. Recueil 1949*, p. 24.

47. Sur ce point, les commentateurs les mieux informés, certains ayant été directement impliqués dans les négociations de la convention, confirment l'interprétation de l'Ukraine. L'ambassadrice Marja Lehto écrit : « the financing of *a group which has notoriously committed terrorist acts* would meet the requirements of paragraph I »[53].

48. Elle explique que, durant les négociations, il a été « recurrently mentioned » que l'infraction de l'article 2, paragraphe 1, est constituée en cas de « funding of an organisation that carries out multiple activities of a political and social as well as military nature, and where it may not be possible for the financier to make a distinction between the different possible end uses »[54].

49. Dans le même sens, Roberto Lavalle explique, dans son étude sur la convention, que

> « to convict a person of a primary offence under the Convention it is sufficient to prove that the recipient or recipients, actual or intended, of the "funds" are terrorists, that that person was aware of this, and that accordingly he or she had to know that the "funds" would probably be used (or could be used) to commit an offence or offences covered by one of the treaties listed in the Annex to the Financing Convention, or falling within the residual category »[55].

50. Pour être tout à fait complet, Madame la présidente, je relève que la Russie s'accroche à son argument selon lequel il ne suffit pas que les fonds aient été fournis à un groupe terroriste par une personne qui ne connaissait pas le détail de leur utilisation, ou qui savait seulement qu'il y avait un risque que les fonds soient affectés à une certaine utilisation.

51. Mais l'Ukraine ne plaide *pas* que l'ignorance quant à la destination des fonds, ou que la seule conscience d'une probabilité qu'ils seront utilisés d'une certaine façon, soit le critère pertinent. L'Ukraine est d'avis que l'article 2, paragraphe 1, exige une connaissance de la destination des fonds, mais affirme que cette connaissance peut être déduite de circonstances factuelles objectives, et non uniquement d'une évaluation poussée de l'intention subjective du financeur. Autrement dit, si le financeur sait que le bénéficiaire commet des actes terroristes, le critère de « connaissance » est rempli.

52. Au demeurant, la querelle que la Russie fait à l'Ukraine sur ce point est sans objet puisqu'elle reconnaît que le financement d'un groupe dont il est notoire qu'il commet des actes

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[53] M. Lehto, Indirect Responsibility for Terrorist Acts (2009), p. 289 (emphasis added) (MU, annexe 490) (dossier des juges, onglet n° 15).

[54] *Ibid*., p. 293.

[55] Roberto Lavalle, *The International Convention for the Suppression of the Financing of Terrorism*, 60 Zaö RV, p. 504 (MU, annexe 484) (dossier des juges, onglet n° 16).

terroristes tombe sous le coup de l'infraction. En effet, dans son contre-mémoire que vous voyez reproduit à l'écran, la Russie écrit qu'à l'égard de

> « notorious entities, it would be no defence for the financier to say that he/she intended the funds to contribute to the non-terrorist activities of the relevant group or that he/she could not know whether the funds are to be used to commit a terrorist act or for some other purposes »[56].

53. La Russie semble regretter d'avoir eu l'honnêteté d'avoir fait cette concession dans sa duplique[57]. Elle prétend maintenant que seuls les groupes spécifiquement désignés comme terroristes par le Conseil de sécurité des Nations Unies pourraient être considérés comme commettant notoirement des actes décrits aux alinéas *a)* et *b)* de l'article 2, paragraphe 1.

54. De toute évidence, la connaissance qu'une personne peut avoir qu'un groupe commet des actes décrits par les alinéas *a)* et *b)* est indépendante d'une désignation par le Conseil de sécurité, qui n'est certainement pas la seule source d'information dans ce monde.

55. La question n'est donc pas de savoir si le Conseil de sécurité a inscrit les bandes armées de Donetsk et de Louhansk sur la liste des groupes terroristes, mais de savoir si les personnes qui les financent ne pouvaient ignorer, donc avaient connaissance, sur la base de circonstances factuelles objectives, que ces groupes commettaient des actes couverts par l'article 2, paragraphe 1, alinéas *a)* ou *b)*.

56. C'était clairement le cas des groupes qui se proclamaient « République populaire de Donetsk » et « République populaire de Louhansk » — RPL — durant le printemps et l'été 2014.

Madame la présidente, il me reste à peu près dix minutes ; je suis entre vos mains ; si vous souhaitez que la Cour suspende l'audience pour quelques minutes.

La PRÉSIDENTE : Thank you, Prof. Thouvenin. Why don't you go ahead and finish up, and then we'll take a break after that. Please go ahead.

M. THOUVENIN : Merci, Madame la présidente.

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[56] CMFR, partie I, par. 125.

[57] DFR, par. 101-102.

III. LE CARACTÈRE NOTOIRE DES ACTES D'INTIMIDATION ET DE TERREUR COMMIS PAR LES GROUPES SÉPARATISTES DURANT LE PRINTEMPS ET L'ÉTÉ 2014

57. Les actes d'intimidation et de terreur commis par les bandes armées de Donetsk et Louhansk sont documentés. Ils étaient de notoriété publique. Au printemps et à l'été 2014, personne ne pouvait prétendre ne pas en connaître la nature et le contexte.

58. Dans ses rapports successifs de 2014, le Haut-Commissariat des Nations Unies aux droits de l'homme souligne que de nombreux actes destinés à tuer ou à blesser grièvement des civils étaient régulièrement commis dans l'est de l'Ukraine. Son rapport du 15 mai 2014 indique que

> « [l]eaders and members of these armed groups commit an increasing number of human rights abuses, such as abductions, harassment, unlawful detentions, in particular of journalists. This is leading to a breakdown in law and order and a climate of intimidation and harassment. »[58]

Le même rapport insiste : « Armed groups have increasingly committed human rights abuses, including abductions, torture/ill-treatment, unlawful detentions and killings. »[59]

59. Dans un rapport de juin 2014, le HCDH s'indigne du fait que

> « [a]bductions, detentions, acts of ill-treatment and torture, and killings by armed groups are now affecting the broader population of the two eastern regions, which are now marked by an atmosphere of intimidation and consequent fear »[60].

60. Dans le rapport suivant, daté de juillet 2014, le HCDH ne peut que déplorer que les groupes séparatistes du Donbass « have taken control of Ukrainian territory and inflicted on the populations a reign of intimidation and terror to maintain their position of control »[61].

61. Dans son rapport du 19 septembre 2014 au Conseil des droits de l'homme, le haut-commissaire des Nations Unies aux droits de l'homme constate que « [l]e fait que les groupes armés font régner la peur et l'intimidation est attesté par les rapports de la Mission de surveillance des droits de l'homme en Ukraine »[62].

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[58] OHCHR, *Report on Human Rights Situation in Ukraine* (15 May 2014), par. 5(ii) (MU, annexe 45) (dossier des juges, onglet nº 5).

[59] *Ibid*., par. 58.

[60] OHCHR, *Report on Human Rights Situation in Ukraine* (15 June 2014), par. 4 (MU, annexe 46) (dossier des juges, onglet nº 7).

[61] OHCHR, *Report on Human Rights Situation in Ukraine* (15 July 2014), par. 26 (MU, annexe 296) (dossier des juges, onglet nº 6).

[62] HCDH, rapport annuel du Haut-Commissaire des Nations Unies aux droits de l'homme sur la situation des droits de l'homme en Ukraine (19 septembre 2014), par. 16 (version anglaise reproduite dans MU, annexe 47) (dossier des juges, onglet nº 17) ; voir aussi OHCHR, *Report on Human Rights Situation in Ukraine* (15 December 2014), par. 41 (MU, annexe 303).

62. La Russie n'a pas contesté ces faits dans son contre-mémoire.

63. S'il en fallait d'autres preuves, il suffirait de rappeler l'effroi manifesté en juillet 2014 par la haute-commissaire aux droits de l'homme, Navi Pillay, désormais juge *ad hoc* dans une affaire pendante devant votre Cour[63].

64. En août 2014, Ivan Šimonović, secrétaire général adjoint des Nations Unies aux droits de l'homme indiquait au Conseil de sécurité que la situation dans le Donbas : « amounts to a reign of fear and terror in areas under control of the armed groups »[64].

65. Il ne fait aucun doute que l'objectif de l'instauration de cet état de terreur créé par les prétendues RPD et RPL était de forcer les Ukrainiens à accepter leur prise de contrôle total du Donbas. En dehors des bombardements de zones peuplées de civils, les attaques ciblées sur des personnalités spécifiques ont toutes concerné des Ukrainiens considérés par les séparatistes comme « pro-Ukraine », ou « pro-Maidan », qu'il s'agisse de responsables politiques, de journalistes, d'activistes ou de personnes soupçonnées de soutenir les autorités ukrainiennes.

66. La Cour trouvera dans le mémoire, entre autres, le récit de l'horrible assassinat de M. Rybak, conseiller municipal de Horlivka, qui avait osé brandir le drapeau ukrainien sur la mairie de sa ville le 17 avril 2014[65] ; des meurtres ou attaques de responsables politiques[66], le meurtre d'un prêtre[67], de multiples enlèvements et actes de tortures[68], bref, des persécutions systématiques d'opposants ou de personnes considérées comme tels[69].

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[63] OHCHR, *Intensified Fighting Putting at Risk Lives of People in Donetsk and Luhansk — Pillay* (4 July 2014) (MU, annexe 295).

[64] Statement to the Security Council by Ivan Šimonović, Assistant Secretary-General for Human Rights on the Human Rights Situation in Ukraine (8 August 2014), p. 2 (MU, annexe 298) (dossier des juges, onglet n° 18).

[65] MU, par. 43-45 ; OHCHR, *Accountability for Killing in Ukraine from January 2014 to May 2016* (2016), annexe 1, p. 33, par. 33 (MU, annexe 49) ; Conseil de sécurité des Nations Unies, procès-verbal, 7165e séance, Nations Unies, doc. S/PV.7165 (29 avril 2014), p. 9 (déclaration de Mme Sylvie Lucas, représentante permanente du Luxembourg aux Nations Unies) (version anglaise reproduite dans MU, annexe 290).

[66] MU, par. 47. Voir, par exemple, OHCHR, *Report on Human Rights Situation in Ukraine* (15 May 2014), par. 102 (MU, annexe 45) ; OHCHR, *Report on Human Rights Situation in Ukraine* (15 June 2014), pars. 199, 205, 209-210 (MU, annexe 46) ; OHCHR, *Accountability for Killing in Ukraine from January 2014 to May 2016* (2016), annexe 1, p. 36, par. 50 (MU, annexe 49).

[67] MU, par. 49 ; OHCHR, *Report on Human Rights Situation in Ukraine* (15 June 2014), par. 209 (MU, annexe 46) ; Ukrainian Orthodox Church Confirms Priest Murdered in Donetsk Region, Kyiv Post (10 May 2014) (MU, annexe 514).

[68] MU, par. 49-50. Voir, par exemple, OHCHR, *Report on Human Rights Situation in Ukraine* (15 May 2014), para. 58, 102 (MU, annexe 45) ; OHCHR, *Report on Human Rights Situation in Ukraine* (15 June 2014), par. 200, 212-14 (MU, annexe 46) ; OHCHR, *Report on Human Rights Situation in Ukraine* (15 July 2014), par. 2 (MU, annexe 296).

[69] MU, par. 47, 51-52. Voir, par exemple, OHCHR, *Report on Human Rights Situation in Ukraine* (15 June 2014), par. 207 (les italiques sont de moi) (MU, annexe 46) ; Human Rights Watch, *Ukraine: Rebel Forces Detain, Torture Civilians* (28 August 2014), p. 10 (MU, annexe 444).

67. La Russie fait mine de croire, ou plutôt de ne *pas* croire que de telles horreurs aient été commises dans le but de terroriser la population ou de contraindre le Gouvernement ukrainien[70]. On découvre aussi dans le contre-mémoire une thèse étrange selon laquelle, en substance, bien que la population ukrainienne ait été terrorisée par les violences répétées des groupes armés, il n'en découlerait pas que les actes de ces derniers visaient, par leur nature ou leur contexte, à la terroriser[71].

68. Au fond, elle était terrorisée par inadvertance. La Cour appréciera.

69. Ce que le secrétaire général adjoint aux affaires politiques du Secrétariat général des Nations Unies, M. Feltman, dénonçait devant le Conseil de sécurité lors de sa séance du 29 avril 2014[72], à savoir « de plus en plus d'actes de torture, d'enlèvements et d'affrontements violents »[73] et tout le reste, n'étaient-ils que des actes de violence gratuite ? Des crimes crapuleux ? La Russie plaide-t-elle la démence des séparatistes ?

70. Il suffit de la prononcer pour que cette thèse, si c'en est une, s'effondre sous le poids de son inanité.

71. Dans sa duplique, la Russie croit pouvoir convaincre du contraire, en s'appuyant essentiellement sur deux cas.

72. Elle s'attaque d'abord au meurtre du conseiller municipal de Horlivka, Volodymyr Rybak[74], qui avait horrifié jusqu'aux membres du Conseil de sécurité lors de sa réunion du 29 avril 2014[75]. La Russie dit qu'il n'est pas établi que ce soit un assassinat politique et que le groupe RPD y était lié[76].

73. Mais, comme je l'ai dit en introduction de mon propos, nous ne sommes pas devant vous à conduire un procès pénal contre les auteurs de cet acte. Ce qui importe ici est que cet acte ait été

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[70] Voir, par exemple, CMFR, partie I, par. 14-15, 514-515.

[71] CMFR, partie I, par. 514.

[72] Conseil de sécurité des Nations Unies, procès-verbal, 7165e séance, Nations Unies, doc. S/PV.7165 (29 avril 2014), p. 2 (déclaration de M. Jeffrey Feltman, secrétaire général adjoint aux affaires politiques) (version anglaise reproduite dans MU, annexe 290) (dossier des juges, onglet no 19).

[73] *Ibid*.

[74] DFR, par. 506, 517.

[75] Conseil de sécurité des Nations Unies, procès-verbal, 7165e séance, Nations Unies, doc. S/PV.7165 (29 avril 2014), p. 9 (déclaration de Mme Sylvie Lucas, représentante permanente du Luxembourg aux Nations Unies) (version anglaise reproduite dans MU, annexe 290).

[76] DFR, par. 506, 517.

dénoncé par les organes de l'ONU, dans des rapports publics, comme étant un crime politique commis par des rebelles séparatistes. C'était donc notoire.

74. La Russie s'attaque ensuite aux meurtres de Valeriy Salo en mai 2014 et d'autres fermiers pro-ukrainiens. Elle allègue qu'il n'y a pas de preuve des meurtres parce que le HCDH publie dans ses rapports des faits qu'on lui rapporte sans pour autant évaluer leur réalité[77], et que rien ne prouve que le meurtre de M. Salo ne fût pas crapuleux ou purement personnel[78].

75. Je noterai simplement que, dans son rapport du 15 juin 2014, le HCDH — [le] Haut-Commissariat [des Nations Unies] aux droits de l'homme — indique dès le premier paragraphe que « [t]he present report is based on *findings* of the United Nations (UN) Human Rights Monitoring Mission in Ukraine (HRMMU) covering the period of 7 May-7 June 2014 »[79]. Parmi ces « findings » figure le meurtre de M. Salo, militant pro-Maidan[80]. En principe, votre Cour accorde du crédit à ce qu'écrivent les organes des Nations Unies. Vous relèverez que lorsque le HDCH a un doute sur un fait, il indique que ce fait est « allégué ». Ce n'est pas le cas ici.

76. En tout état de cause, là encore, la seule question qui se pose ici est de savoir si ce fait, rapporté, parmi de nombreux autres, par le Haut-Commissariat des Nations Unies aux droits de l'homme, et par de nombreux organes de presse, naturellement, est de nature à rendre notoire que les groupes séparatistes du Donbas commettent des actes qui, par leur nature ou leur contexte, visent à terroriser la population ou à contraindre le gouvernement. La réponse est indubitablement, massivement, positive.

77. Ceci me conduit à conclure.

78. Madame la présidente, Mesdames et Messieurs les juges, au printemps et à l'été 2014 personne ne pouvait ignorer ce que la population ukrainienne endurait. Les groupes armés dits RPD et RPL étaient notoirement connus comme auteurs de nombreux actes de plus en plus violents relevant manifestement de l'article 2, paragraphe 1, alinéas *a)* ou *b)*, de la convention. En particulier des actes destinés à tuer ou à blesser grièvement des civils. Leur objectif, tel que constaté par les

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[77] *Ibid.*, par. 520.

[78] *Ibid.*, par. 521.

[79] OHCHR, *Report on Human Rights Situation in Ukraine* (15 June 2014), par. 1 (MU, annexe 46).

[80] *Ibid.*, par. 209.

organes des Nations Unies, était de prendre le contrôle total d'une partie du territoire ukrainien, en dissuadant, par la terreur, la population de résister — et on sait combien cette population sait résister, d'où la montée crescendo de violence des actes destinés à la terroriser, et à contraindre le Gouvernement ukrainien.

79. C'était de notoriété publique. Personne ne pouvait ignorer leurs actes d'intimidation et de terreur politique. Et aucune des personnes qui ont fourni des fonds à ces groupes ne pouvait ignorer qu'ils allaient être utilisés pour d'autres actes de ce type.

80. Madame la présidente, ceci conclut ma présentation — un petit peu précipitée, pour avoir une pause plus tôt. Je vous prierais d'appeler, après la pause, à cette barre, M[e] David Zionts, qui continuera nos plaidoiries.

The PRESIDENT: I thank Prof. Thouvenin. Before I invite the next speaker to take the floor, the Court will observe a coffee break of 15 minutes. The sitting is suspended.

The Court adjourned from 11.50 a.m. to 12.10 p.m.

The PRESIDENT: Please be seated. The sitting is resumed. I shall now give the floor to Mr David M. Zionts. You have the floor, Sir.

Mr ZIONTS:

THE RUSSIAN FEDERATION'S VIOLATIONS OF THE ICSFT IN CONNECTION WITH ACTS UNDER ARTICLE 2 (1) *(A)*

1. Madam President, Members of the Court, it is an honour to appear before you on behalf of Ukraine.

2. As Professor Thouvenin established, by the summer of 2014, the whole world knew that the DPR and LPR attacked civilians as part of a campaign of intimidation and terror. Russian money and weapons fuelled this campaign. In response, Ukraine alerted Russia to the flow of weapons across the border and urged Russia to take measures to stop it. Yet Russia did nothing. Instead, Russian officials escalated their provision of funds. The consequences were horrific.

3. I will address some of those consequences, in particular, the financing of acts covered by Article 2 (1) *(a)* of the ICSFT. Through Article 2 (1) *(a)*, it is an offence to provide funds knowing

that they are to be used in the commission of offences under certain other treaties. These treaties include the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, and the International Convention for the Suppression of Terrorist Bombings. As I will explain, the reign of terror that began in the spring of 2014 deepened in the summer and fall to include attacks on civil aviation and bombings across Ukraine.

I. THE FINANCING OF THE SHOOT-DOWN OF FLIGHT MH17

4. On 16 July 2014, members of the 53rd Anti-Aircraft Brigade of the Russian Armed Forces delivered to the DPR a partial component of a surface-to-air missile system: a Buk Transporter-Erector-Launcher-Radar, or "Buk-TELAR". Less than 24 hours later, the DPR fired that weapon at civilian-trafficked skies, killing 298 civilians on board Malaysian Airlines Flight MH17.

5. This shoot-down was an offence under the Montreal Convention. The Russian officials who provided the Buk knew the DPR was infamous for targeting civilians. They also knew that this weapon could not reliably distinguish civilian from military targets. Accordingly, providing the Buk was an offence under Article 2 of the ICSFT. Russia violated that treaty by failing to take measures to prevent this offence, and then failing to investigate and prosecute it.

6. I note two preliminary points.

7. First, other judicial bodies have ruled on the MH17 shoot-down, and they have rejected Russia's narrative on both the facts and the law[81]. The Court may wish to consult in particular the decisions of the European Court of Human Rights and the District Court of The Hague, excerpted at tabs 20 and 22 of your folder, which, among other things, document Russia's falsification and manipulation of evidence[82].

8. Second, Russia's approach to Flight MH17 in this case has fundamentally changed. In its Counter-Memorial, Russia did not dispute several key points of fact and law:

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[81] See *Ukraine and the Netherlands* v. *Russia*, ECtHR App. Nos. 8019/16, 43800/14, 28525/20 and 11055/22, Grand Chamber Judgment (30 Nov. 2022) (judges' folder, tab 20); ICAO Council decision on jurisdiction in MH17 legal proceedings, joint media release (18 Mar. 2023), accessed at: https://ministers.ag.gov.au/media-centre/icao-council-decision-jurisdiction-mh17-legal-proceedings-18-03-2023 (judges' folder, tab 21); District Court of The Hague, Case Nos. 09-748004/19, 09-748005/19, 09-748007/19, 17 Nov. 2022 (judges' folder, tab 22); *Schansman* v. *Sberbank of Russia PJSC*, Civ. No. 19-CV-2985 (ALC), 2021 WL 4482172 (S.D.N.Y. 30 Sept. 2021) (RU, Ann. 67, judges' folder, tab 23).

[82] See *Ukraine and the Netherlands* v. *Russia*, ECtHR App. Nos. 8019/16, 43800/14, 28525/20 and 11055/22, Grand Chamber Judgment, para. 904 (30 Nov. 2022) (judges' folder, tab 20); District Court of The Hague, Case Nos. 09-748004/19, 09-748005/19, 09-748007/19, 17 Nov. 2022, 6.2.2.5 (judges' folder, tab 22).

(a) It did not dispute that the DPR shot down Flight MH17[83].

(b) It did not dispute that members of the 53rd Anti-Aircraft Brigade supplied the Buk-TELAR[84].

(c) It did not dispute that the DPR acted "unlawfully"[85].

(d) It did not present evidence disputing Ukraine's expert testimony that the Buk-TELAR was incapable of distinguishing civilian from military aircraft[86].

(e) And it did not deny that firing such a weapon establishes intent under any interpretation of the Montreal Convention[87].

9. Only in its Rejoinder did Russia contest these points, in violation of Article 49 (2) of the Court's Rules[88]. As Judge Greenwood explained in *Whaling in the Antarctic*, "[a] State should never hold part of its case — whether argument or evidence — in reserve for a second round"[89]. More importantly, there is a reason Russia initially did not dispute these points: they are indisputable.

A. Article 2 (1) *(a)*: the shoot-down of Flight MH17 was an offence under the Montreal Convention

10. Madam President, Members of the Court, I will now address the commission of a Montreal Convention offence. A person commits an offence under Article 1 (1) *(b)* if he or she "unlawfully

[83] MU, para. 59.

[84] MU, para. 154.

[85] MU, para. 221.

[86] Expert Report of Anatolii Skorik, 6 June 2018 (hereinafter "Skorik Report"), para. 39 (MU, Ann. 12, judges' folder, tab 25).

[87] MU, para. 223.

[88] Rules of Court (1978), Art. 49 (2).

[89] *Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, separate opinion of Judge Greenwood, p. 418, para. 35; see also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 26, para. 31.

and intentionally . . . destroys an aircraft in service"[90]. Overwhelming evidence proves that the DPR destroyed Flight MH17[91] and acted both unlawfully and intentionally.

1. The DPR "unlawfully" destroyed an aircraft in service

11. Unlawfulness is straightforward. As explained in the Commonwealth Implementation Kits for the Counter-Terrorism Conventions, the Montreal Convention's "unlawful" requirement "excludes from the scope of the offence conduct which is legally justifiable or done with legal authority, such as preventive action by police"[92]. The DPR had no legal justification and no legal authority to fire deadly weapons in Ukraine, whatever type of aircraft they meant to destroy.

12. In its Rejoinder, Russia belatedly seeks to cloak the DPR's actions in international humanitarian law[93]. But it is well-settled in international law that a non-privileged combatant can be prosecuted for violating domestic law[94]. The Hague District Court correctly recognized this point: "in the absence of combatant privilege, killing a soldier warrants punishment as much as killing a civilian, and shooting down a military aircraft warrants punishment as much as shooting down a civil aircraft"[95]. Assessing the facts, the court concluded that DPR members lacked any such privilege[96]. Russia offers no argument to the contrary.

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[90] Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (hereinafter "Montreal Convention"), Art. 1 (1) *(b)*, 23 Sept. 1971, 974 *UNTS* 178 (judges' folder, tab 3).

[91] See MU, paras. 58-75 and 137-154; Joint Investigation Team, Presentation Preliminary Results Criminal Investigation MH17, Openbaar Ministerie (28 Sept. 2016) (MU, Ann. 39); Joint Investigation Team, Narrative conference 24 May 2018, Openbaar Ministerie (24 May 2018) (MU, Ann. 40); 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 Feb. 2023 (RR, Ann. 392) (judges' folder, tab 29); Dutch Safety Board, Crash of Malaysia Airlines Flight MH17 (17 July 2014) (13 Oct. 2015) (MU, Ann. 38); Official Report of the Dutch National Police, and accompanying annexes (16 May 2018) (MU, Ann. 41); Official Report of the Dutch National Police, (24 May 2018) (Ann. 42) (judges' folder, tab 26); see also District Court of The Hague, Case Nos. 09-748004/19, 09-748005/19, 09-748007/19, 17 Nov. 2022, 7 (Judicial Finding of Fact) (judges' folder, tab 22); *Ukraine and the Netherlands* v. *Russia*, ECtHR App. Nos 8019/16, 43800/14, 28525/20 and 11055/22, Grand Chamber Judgment, paras. 460-481, 701-702, 904-905 (30 Nov. 2022) (judges' folder, tab 20).

[92] UK Legal and Constitutional Affairs Division of the Commonwealth Secretariat, *Implementation Kits for the International Counter-Terrorism Conventions*, p. 77, para. 9 (28 Nov. 2002).

[93] RR, para. 279.

[94] See e.g. Nils Melzer, "The Principle of Distinction Between Civilians and Combatants", in *The Oxford Handbook of International Law in Armed Conflict*, p. 318 (Clapham et al., eds., Oxford University Press 2014) (RU, Ann. 71).

[95] District Court of The Hague, Case Nos. 09-748004/19, 09-748005/19, 09-748007/19, 17 Nov. 2022, 6.2.5.3 (judges' folder, tab 22).

[96] District Court of The Hague, Case Nos. 09-748004/19, 09-748005/19, 09-748007/19, 17 Nov. 2022, 4.4.3.1.4, 6.2.5.3 (judges' folder, tab 22).

13. It is worth pausing on the importance of the "unlawful" element. Russia highlights various incidents where the Montreal Convention was not invoked[97], but ignores an obvious reason why: in those cases, no one appeared to act "unlawfully". For instance, Russia highlights the loss of Siberian Airlines Flight 1812 in 2001, in the course of joint Ukrainian-Russian military exercises in Crimea[98]. I note that unlike Russia in the case of MH17, Ukraine compensated the families. Ukraine also does not accept Russia's account of this incident. But the more important point today is that the Ukrainian military plainly had legal authority to conduct a training exercise. The DPR did not have authority to fire an anti-aircraft weapon.

2. The DPR "intentionally" destroyed an aircraft in service

14. The DPR also acted intentionally, for two independent reasons. First, there is no dispute that the DPR intended to destroy an aircraft in service, and Article 1 (1) *(b)* does not require additional proof of intent to destroy a *civilian* aircraft. Second, even if such specific intent were required, it was satisfied here when the DPR fired a weapon knowing it could not distinguish civilian from military aircraft.

(a) *It is undisputed that the DPR intentionally destroyed an aircraft and intent as to civilian status is not required*

15. The proper place to begin is the text of Article 1 (1). The act that must be done intentionally is "destroy[ing] an aircraft in service"[99]. Russia's position, that the DPR hoped to destroy a military aircraft in service, concedes the point: the DPR intended to destroy an aircraft in service. Article 1 (1) *(b)* does not refer to "intentionally destroying a *civilian* aircraft in service". Russia is asking the Court to read into the treaty a word that is not there.

16. The Hague District Court similarly rejected a defence based on an allegedly mistaken target. As a matter of domestic criminal law, a killing is "intentional" even if the wrong victim is killed. The court explained that "this also applies to intentionally and unlawfully causing an aircraft

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[97] RR, para. 291.

[98] RR, para. 291 *(a)*; Expert Report of Yuri Vladimirovich Bezborodko, 10 Mar. 2023 (hereinafter "Bezborodko Report"), para. 62 (RR, Ann. 6).

[99] Montreal Convention, Art. 1 (1) (judges' folder, tab 3); UK Legal and Constitutional Affairs Division of the Commonwealth Secretariat, *Implementation Kits for the International Counter-Terrorism Conventions*, p. 77, para. 9 (28 Nov. 2002).

to crash. If in retrospect it turns out that a different type of aircraft than the intended type was shot down, the definition of the offence is still met."[100] The Hague District Court was not applying the Montreal Convention. But it is striking that it found, on the same facts, that DPR members intentionally and unlawfully destroyed an aircraft. That is precisely how the Montreal Convention defines an offence.

17. This intent element of Article 1 is not modified by Article 4 (1), which reads: "[t]his Convention shall not apply to aircraft used in military, customs or police services"[101]. Article 4 (1) describes the objective circumstances in which the Convention "shall not apply". If a military aircraft had been destroyed, the Convention would not have applied. But a civil aircraft was destroyed, so the Convention is not being applied "to aircraft used in military service".

18. Article 4 (1) must also be read in context. Consider its neighbouring subparagraph. Like in other counter-terrorism treaties, Article 4 (2) provides that the treaty "shall apply" only to transnational incidents. But a perpetrator does not need to *intend* to destroy a transnational flight versus a domestic one. As Professor Kai Ambos explains, "this element is not part of the offence definition, but rather a jurisdictional rule that limits the application of the respective convention to terrorist offences with a cross-border dimension"[102]. Article 4 (1) is written the same way. It likewise establishes only a jurisdictional rule, not a part of the offence definition.

19. Russia also ignores the Montreal Convention's stated object and purpose of deterring "unlawful acts against the safety of civil aviation"[103]. Note the focus on unlawful acts — not intentional acts. As this case painfully illustrates, those who unlawfully target aircraft of any kind cannot be trusted to keep civil aviation safe.

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[100] District Court of The Hague, Case Nos. 09-748004/19, 09-748005/19, 09-748007/19, 17 Nov. 2022, 6.2.5.3 (judges' folder, tab 22).

[101] Montreal Convention, Art. 4 (1) (judges' folder, tab 3).

[102] Kai Ambos, "Judicial Creativity at the Special Tribunal for Lebanon: Is There a Crime of Terrorism under International Law?", *Leiden Journal of International Law* 24 (2011), 672 & fn. 139 (judges' folder, tab 24); see also Special Tribunal for Lebanon, *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, STL-11-01/1 (16 February 2011), para. 89.

[103] Montreal Convention, preamble (judges' folder, tab 3).

(b) ***Firing a weapon incapable of distinguishing civilian from military aircraft establishes intent to destroy a civilian aircraft***

20. But, Madam President, Members of the Court, even if intent to destroy a *civilian* aircraft were required, the destruction of Flight MH17 was still intentional. Firing a weapon that is incapable of distinguishing military from civilian targets, into civilian-trafficked airspace, establishes intent to destroy a civilian target.

21. The capabilities and practical operation of the Buk system are explained in the testimony of Dr Anatolii Skorik, a colonel and professor at Kharkiv Air Force University. I would like to acknowledge that Dr Skorik has taken time from his important responsibilities in Ukraine to be here today.

22. Dr Skorik explains that Buk operations are normally carried out under the direction of a combat control centre. A single TELAR can operate autonomously, but with severe limitations. In autonomous mode, a commander must make firing decisions on the basis of the TELAR's sparse indicator screens and friend-or-foe system. This system, however, only identifies allied military aircraft as "friends"; everyone else, military or civilian, is marked as a "foe". The aiming screen provides information about a target's location and general parameters — but not enough information to tell a civilian plane from a military plane. Dr Skorik therefore concludes: "The technical capabilities of the Buk-M1 TELAR in autonomous mode do not make it possible to distinguish a civilian aircraft from a military one, and this situation is further exacerbated under highly stressful conditions experienced by the combat crew."[104]

23. Dr Skorik's conclusion is shared by the Government of the Netherlands: "The Buk system was not capable of distinguishing between enemy military aircraft and civilian aircraft."[105]

24. Only in its Rejoinder does Russia respond with an opinion by Lieutenant Colonel Yuri Bezborodko. Ukraine objects to the admissibility of this untimely submission. More importantly, Bezborodko concedes every key point.

25. Begin with the TELAR's aiming system. Bezborodko admits that this system classifies a target as "ballistic", "helicopter" or "aerodynamic" — it does not distinguish types of airplanes[106].

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[104] Skorik Report, para. 28 (MU, Ann. 12, judges' folder, tab 25).

[105] *Ukraine and the Netherlands* v. *Russia*, ECtHR App. Nos. 8019/16, 43800/14, 28525/20 and 11055/22, Grand Chamber Judgment, para. 902 (30 November 2022, judges' folder, tab 20).

[106] Bezborodko Report, para. 16 (RR, Ann. 6, judges' folder, tab 27).

He then admits that "in practice, it is rarely possible to unambiguously determine the type of airborne target based solely on the performance of [this system]"[107]. That is consistent with Dr Skorik's testimony[108].

26. A Dutch police report, which Russia embraces and submitted in its Rejoinder, further explains why the available radar signals are insufficient to distinguish military from civilian aircraft. The size of a "blip" on the screen may vary for different kinds of aircraft, but that is only helpful information when multiple "blips" are in view[109]. And in order to avoid detection, "an autonomous TELAR will limit its radar image. This diminishes its capacity to identify a target."[110] The joint investigation team agrees[111].

27. Bezborodko also points to the TELAR's camera, but he makes a critical concession: "adverse weather conditions (cloud cover) and distance to the target can make identification difficult"[112]. "Difficult" is an understatement. As the Dutch police explain, "[i]f a target is flying above the clouds, it is out of reach of the [camera]. This limitation is foreseeable by the TELAR's crew."[113] The joint investigation team notes that this was the case at the relevant time: "on a cloudy day *like the afternoon of 17 July 2014*, the TELAR's camera cannot be used"[114].

28. Finally, Bezborodko admits that "[d]ifficult ground situation, time pressures, and a certain extreme situation have an impact on the process of combat work"[115]. This again is consistent with Dr Skorik's explanation that a Buk-TELAR in autonomous mode must make firing decisions in a manner of seconds[116].

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[107] Bezborodko Report, para. 22 (RR, Ann. 6, judges' folder, tab 27).

[108] Skorik Report, paras. 12, 24 (MU, Ann. 12, judges' folder, tab 25).

[109] Dutch National Police Crime Squad, Official Report Concerning the Buk Surface-to-Air Missile System, 7 October 2019, p. 41 (RR, Ann. 389 — original, judges' folder, tab 28).

[110] Dutch National Police Crime Squad, Official Report Concerning the Buk Surface-to-Air Missile System, 7 October 2019, pp. 90-91 (RR, Ann. 389 — original, judges' folder, tab 28).

[111] Joint investigation team, 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. 30, para. 4.5 (RR, Ann. 392, judges' folder, tab 29).

[112] Bezborodko Report, para. 23 (RR, Ann. 6, judges' folder, tab 27).

[113] Dutch National Police Crime Squad, Official Report Concerning the Buk Surface-to-Air Missile System, 7 October 2019, p. 90 (RR, Ann. 389 — original, judges' folder, tab 28).

[114] Joint investigation team, 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. 30, para. 4.5 (RR, Ann. 392, judges' folder, tab 29).

[115] Bezborodko Report, para. 50 (RR, Ann. 6, judges' folder, tab 27).

[116] Skorik Report, para. 29 (MU, Ann. 12, judges' folder, tab 25).

29. To summarize, every material fact is undisputed. Ukraine's expert, Russia's expert, the Dutch police and the JIT agree that the "friend or foe" system cannot distinguish a civilian aircraft. All agree that in practice, the crew cannot use the available targeting information to determine aircraft status. All agree that in autonomous mode, the TELAR's radar field is narrow, limiting its ability to compare multiple objects. All agree that the camera cannot see a plane flying above clouds. And all agree that the crew must make lightning-quick decisions.

30. Ultimately, Bezborodko only disagrees with Dr Skorik's choice of words. Dr Skorik concludes from all of this that the Buk-TELAR in autonomous mode lacks a practical ability to distinguish civilian from military aircraft. Bezborodko concludes that civilians being hit is "inevitable"[117]. These are two ways of saying the same thing.

31. Once this factual point is settled, the legal analysis is straightforward. On any interpretation of Article 1 (1) *(b)*, intent is established by proof that the perpetrator fired at civilian-trafficked skies with a weapon that could not distinguish civilian from military aircraft.

32. The word "intentionally" has an ordinary legal meaning. There are degrees of "intent" and a purpose of causing a specific consequence is just one of those degrees[118]. For example, Professor Ben Saul explains that an attack targeting a military installation, but with knowledge that civilian aircraft are there and will be destroyed, constitutes "intentionally" destroying an aircraft under the Montreal Convention[119].

33. Russia's own criminal code reflects that "an act committed with direct or indirect intent shall be recognized as a crime committed intentionally". This includes where "the person realized the social danger of his [or her] actions"[120]. This, at a minimum, describes the intent of a person who endangers civilians by firing a weapon he knows cannot distinguish military from civilian aircraft.

34. Russia invites this Court to consider intent in light of IHL, but doing so would only confirm Ukraine's conclusion. As this Court explained in its *Nuclear Weapons* Advisory Opinion: "States must never make civilians the object of attack and must consequently never use weapons that are

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[117] Bezborodko Report, para. 50 (RR, Ann. 6, judges' folder, tab 27).

[118] See MU, paras. 206-207.

[119] Ben Saul, "From conflict to complementarity: Reconciling international counterterrorism law and international humanitarian law", *International Review of the Red Cross*, Vol. 103, Issue 916–917, pp. 173-174 (April 2021).

[120] Criminal Code of the Russian Federation, Art. 25 (WSU, Ann. 51, judges' folder, tab 30).

incapable of distinguishing between civilian and military targets"[121]. The ICTY, applying this principle, confirms that the question is not whether the weapon is indiscriminate in some abstract sense, but in the circumstances in which it is used[122].

35. It therefore does not matter whether there could be some theoretical set of circumstances — no time pressure, no clouds, a wide radar screen with plentiful "blips" to compare — where a Buk-TELAR commander might, *might*, be able to identify a civilian aircraft. Under the real-world circumstances faced by the DPR members who fired the missile, the Buk-TELAR could not distinguish civilian from military targets. Using that weapon in those circumstances constitutes making civilians the object of attack. In other words, using that weapon in those circumstances constitutes intentionally destroying a civilian aircraft.

B. Article 2 (1): provision of the Buk with knowledge of how it was to be used

36. Madam President, Members of the Court, since the DPR's destruction of Flight MH17 violated the Montreal Convention, it was an act which may not be funded under Article 2 (1) *(a)* of the ICSFT.

37. There is no serious dispute that Russian officials, including members of the 53rd Anti-Aircraft Brigade, provided the Buk-TELAR that was used to commit this act. On this point, the Dutch police and the independent investigator Eliot Higgins submitted detailed statements specifically for this case[123]. Russia ignores them.

38. The Buk was provided knowing it was to be used to commit a terrorist act. As Professor Thouvenin established, providing a weapon to a group notorious for committing acts covered by the Convention establishes the required knowledge. A United States court reached the same conclusion in a case specifically about Flight MH17, and specifically brought under legislation

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[121] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 257, para. 78.

[122] *Prosecutor* v. *Martić*, ICTY Case No. IT-95-11-T, Trial Chamber Judgment (12 June 2007), paras. 463, 472; *Prosecutor* v. *Galić*, Case No. IT-98-29-T, Trial Chamber Judgment (5 Dec. 2003), paras. 415-416 (MU, Ann. 464); *Prosecutor* v. *Galić*, Case No. IT-98-29-A, Appeals Chamber Judgment (30 Nov. 2006), paras. 108 and note 349, 131-32.

[123] See Witness Statement of Eliot Higgins (5 June 2018) (MU, Ann. 9); Official Report of the Dutch National Police, and accompanying annexes (16 May 2018) (original in Dutch) (MU, Ann. 41); Official Report of the Dutch National Police, p. 1 (24 May 2018) (original in Dutch) (MU, Ann. 42, judges' folder, tab 26); see also District Court of The Hague, Case Nos. 09-748004/19, 09-748005/19, 09-748007/19, 17 Nov 2022, 6.2.4.4 (judges' folder, tab 22); *Ukraine and the Netherlands* v. *Russia*, ECtHR App. Nos. 8019/16, 43800/14, 28525/20 and 11055/22, Grand Chamber Judgment, paras. 904-905 (30 Nov 2022) (judges' folder, tab 20).

implementing the ICSFT. The court held that if the victims' families can prove that the DPR carried out attacks on civilians, and that these attacks were widely reported, that would establish that the DPR's funders knowingly financed terrorism[124]. That is exactly what Ukraine has proved in this case. By the summer of 2014, United Nations monitors and others extensively documented the DPR's pattern of committing terrorist acts. The brutality of Igor Girkin — the specific DPR leader who requested the Buk from his Russian benefactors — was particularly infamous[125].

39. But here knowledge can be established with even more granularity. Members of a Russian air defence brigade surely knew the limitations of the system they were providing. They knew the implications of providing a Buk-TELAR alone. They knew the skies were open to civilian traffic. And they knew that the DPR would have no practical ability to distinguish military from civilian targets. In short, they knew that striking civilian aircraft was — in the words of Russia's own expert — "inevitable". Russian officials provided the Buk-TELAR "in the knowledge" that it "was to be used" to achieve this inevitable result. So they knew that the Buk was to be used to commit a Montreal Convention offence, making these officials guilty of terrorism financing under Article 2 (1) of the ICSFT.

C. Russia's violations of the ICSFT in connection with the shoot-down of Flight MH17

40. The destruction of Flight MH17 is another tragic example of the consequences of Russia's total non-co-operation. Under Article 18 of the ICSFT, Russia had an obligation to take practicable measures to prevent terrorism financing. It would have been practicable for Russia to instruct its officials not to supply the DPR with weapons, and at the very least not to supply a partial system unable to distinguish civilian from military targets. But Russia did nothing of the sort.

41. Russia also could have policed the border. On 24 May 2014, the State border guard of Ukraine sent one of many requests to the Russian border guard. Ukraine urged, in the interest of safeguarding civilians specifically, that Russia urgently implement measures to stop the smuggling

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[124] *Schansman* v. *Sberbank of Russia PJSC*, Civ. No. 19-CV-2985 (ALC), 2021 WL 4482172 (S.D.N.Y. 30 Sept. 2021), pp. 10-12 (RU, Ann. 67, judges' folder, tab 23).

[125] See MU, Chap. 1.A; RU, Chap. 4.B.

of weapons across the border[126]. Russia ignored that plea. It did not even respond until months after the destruction of Flight MH17. And then the Russian border guard deflected responsibility, making a bizarre claim that it had no authority to address "the passage of vehicles transporting cargo"[127]. That is, Russia's border guard disclaimed authority to guard Russia's border.

42. Had Russia answered Ukraine's call to co-operate in good faith, no Buk-TELAR could have entered Ukraine on 16 July 2014. In legal terms, this practicable measure could have prevented an Article 2 offence. In human terms, 298 people would still be alive. The three infants on board would be 9 years old today. These were preventable deaths. Russia could have prevented them.

43. After those deaths, Ukraine confronted Russia with allegations that the supply of the Buk constituted an Article 2 offence[128]. Article 9 of the ICSFT required Russia to investigate that allegation in good faith. Article 10 required Russia to prosecute or extradite the perpetrators. Instead, Russia obstructed multilateral efforts to investigate and prosecute those responsible.

44. Most brazenly, this past February, President Putin bestowed on the 53rd Anti-Aircraft Brigade the honorary title of "Guards" for their "mass heroism and valor"[129]. That is how Russia responds when its own officials finance terrorism and cause mass civilian destruction — not co-operation, not prevention, not investigation, not punishment. Instead, high honours. That is not the act of a State that takes its obligations under the Convention seriously.

II. THE FINANCING OF THE BOMBING CAMPAIGN AGAINST UKRAINIAN CITIES

45. Madam President, Members of the Court, the ICSFT also makes it an offence to finance acts covered by the Bombings Convention. Ukraine's largest cities, hundreds of kilometres from any fighting, faced a campaign of such terrorist bombings. These bombings targeted a member of parliament in Kyiv and the leader of an NGO in Odesa. Kharkiv, Ukraine's second-largest city, was hit the hardest. One resident described the atmosphere in the city this way: "the anxiety raised by the

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[126] Ukraine State Border Guard Letter No. 0.42-4016/0/16-14 to the Russian Border Directorate of the FSB, (24 May 2014) (MU, Ann. 388, judges' folder, tab 31).

[127] Russian Border Directorate of the FSB Letter No. 26-1209 to the Ukrainian State Border Guard, (7 Nov 2014) (MU, Ann. 403, judges' folder, tab 32).

[128] Ukrainian Note Verbale No. 72/22-620-2604 to the Russian Federation Ministry of Foreign Affairs (23 Oct. 2015) (WSU, Ann. 37).

[129] The Insider, "Putin awards honorary Guards title to anti-aircraft missile brigade that supplied the Buk that shot down Flight MH-17" (21 Feb. 2023) (judges' folder, tab 33).

bombings is painful[.] . . . [T]hat's the whole point of terrorist acts — to bring people to a pitch of fear where they can be easily broken."[130]

46. The bombs and money to conduct this campaign came from Russian persons. Yet once again, Russia did nothing to prevent this financing, and nothing to investigate it or suppress it.

47. Time does not permit me to address every part of this bombing campaign and the way it was financed. Nor is that necessary. Russia disputed almost nothing about this subject in its Counter-Memorial. As with Flight MH17, Russia improperly makes new arguments in its Rejoinder. For example, in its Counter-Memorial, Russia did not dispute the supply of MRO-A rocket launchers, which are possessed only by the Russian military. Nor did it dispute the fact that terrorists used this Russian weapon to attack the regional headquarters of a major bank[131]. Only in its Rejoinder did Russia offer a purported expert to try to explain away these inconvenient facts. This untimely expert opinion — another one — should not be admitted[132]. But even that is an exception. Mostly, Russia just ignores the evidence.

48. I will therefore focus on two serious bombings in Kharkiv, and the nearly undisputed evidence that they were financed by Russian persons. When the Court revisits the written pleadings, it will see similar patterns in other incidents, and a similar failure by Russia to meaningfully engage.

A. The Stena rock pub bombing

49. The Stena rock pub is a nightclub in downtown Kharkiv that was popular among supporters of Ukrainian unity[133]. On the evening of Sunday 9 November 2014, an SPM limpet mine exploded inside[134]. OSCE monitors visited the scene, reporting that "[t]he explosion resulted in a number of injured people"[135].

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[130] Corey Flintoff, "Bomb Attacks Increase In Ukraine's Second-Largest City", Kharkiv, NPR (6 Apr. 2015), p. 2 (MU, Ann. 570).

[131] CMR-1, paras. 506-508.

[132] Expert Report of Vladislav Alexeyevich Filin, 10 Mar. 2023, para. 43 (RR, Ann. 5); see also RR, paras. 477-488.

[133] MU, para. 119.

[134] MU, para. 119; OSCE, Latest from OSCE Special Monitoring Mission (SMM) to Ukraine, Based on Information Received as of 18:00 (Kyiv time) (10 Nov. 2014) (MU, Ann. 318); Expert Opinion No. 532/2014, drafted by the Forensic Research Center, Ministry of Internal Affairs of Ukraine, Main Directorate of the Ministry of Internal Affairs of Ukraine in Kharkiv Region (3 Apr. 2015), p. 43 (MU, Ann. 116).

[135] OSCE, Latest from OSCE Special Monitoring Mission (SMM) to Ukraine, Based on Information Received as of 18:00 (Kyiv time) (10 Nov. 2014) (MU, Ann. 318, judges' folder, tab 34).

1. Article 2 (1) *(a)* and *(b)*: the attack was an offence under the Bombings Convention and an act intended to cause harm to civilians or other persons not taking active part in hostilities

50. In its Counter-Memorial, Russia did not dispute that this was an offence under the Bombings Convention. Only in its Rejoinder did Russia contest that point.

51. But the Stena attack fits squarely within the Bombings Convention. Stena rock pub was a "place of public use". And detonating a military-grade mine inside of a crowded bar undeniably reflects an "intent to cause death or serious bodily injury".

52. At paragraph 476 of its Rejoinder, Russia now calls the Stena pub a "military target" and claims that it falls "under the military exclusion clause in Article 19"[136]. The Court should pause here: Russia is saying that a crowded nightclub is a legitimate target. The callousness of that argument speaks volumes. It also has no basis in fact or law.

53. Russia's explanation is that members of a Ukrainian battalion, who had returned from fighting in Donbas, were at the nightclub[137]. Russia bases this argument on rumours printed in a pro-Russian blog, which itself admits it is "impossible to confirm this fact"[138]. Russia also did not identify what "armed force", as that term is defined in international humanitarian law, it believes carried out this attack. The bombing thus cannot be an "activit[y] of armed forces during an armed conflict" that is excluded under Article 19.

54. While the Court may stop there, the attack is separately covered by Article 2 (1) *(b)* of the ICSFT. Even in its Rejoinder, Russia does not address that point. I will just add two brief observations. First, the ICSFT has no "armed forces" exclusion akin to Article 19 of the Bombings Convention, so Russia's exclusion defence is irrelevant. Second, Article 2 (1) *(b)* covers acts intended to harm civilians, and "any other person not taking an active part in the hostilities in a situation of armed conflict". As the United States State Department explained, this language was specifically adopted "to ensure that the Convention encompassed the financing of attacks on off-duty

[136] RR, para. 476.

[137] RR, para. 470.

[138] Korrespondent.net, SSU Has Tortured Marina Kovtun Accused of Blowing up Stena Rock Pub for Three Years, p. 4 (22 Nov. 2017), available at https://blogs.korrespondent.net/blog/events/3909377/ (RR, Ann. 80).

military personnel"[139]. Even assuming some off-duty servicemen happened to be at the nightclub, this is precisely the type of attack Article 2 (1) *(b)* was meant to cover.

2. Article 2 (1): provision of the SPM limpet mine with knowledge of how the weapon was to be used

55. Madam President, the Russian persons who delivered limpet mines to Kharkiv committed a terrorism financing offence under Article 2 (1). Russia does not dispute that the limpet mine was provided with knowledge it was to be used to commit a terrorist act. There is no innocent explanation for delivering a bomb to a peaceful city. Russia instead denies that Russian persons supplied the mine. The evidence says otherwise.

56. An SPM limpet mine is typically used in naval warfare[140]. We are not talking about an improvised bomb someone could build at home. Only militaries have it. And Russia offers no evidence this was a Ukrainian military mine[141]. Major-General Ivan Gavryliuk of the Ukrainian Armed Forces testified, without dispute, that Ukraine had no limpet mines in Donetsk and Luhansk oblasts[142].

57. Less than two weeks after the Stena attack, Ukrainian law enforcement discovered in the Kharkiv region another SPM limpet mine, marked with the number "90"[143]. Russia ignores this evidence. As General Gavryliuk testified, this marking reflects a 1990 production date, and "[t]he UAF has not had any limpet mines . . . manufactured after 1987 in its service"[144]. Russia ignores that too. This mine could only have come from Russian sources. In other words, undisputed evidence shows that Russian persons delivered limpet mines to Kharkiv.

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[139] International Convention for Suppression of Financing Terrorism: Message from the President of the United States to the Senate, Treaty doc. 106-49, 106th Congress, Second Session, US Government Publishing Office (12 Oct. 2000), p. 7, available at https://www.congress.gov/treaty-document/106th-congress/49/document-text (judges' folder, tab 35).

[140] MU, paras. 118-119; Expert Conclusion No. 532/2014, drafted by the Forensic Research Center, Ministry of Internal Affairs of Ukraine, Main Directorate of the Ministry of Internal Affairs of Ukraine in Kharkiv Region (3 Apr. 2015), p. 34 (MU, Ann. 116); Collective Awareness to Unexploded Ordnance, SPM Limpet Mine, accessed at https://cat-uxo.com/explosive-hazards/landmines/spm-limpet-mine (judges' folder, tab 36).

[141] RR, paras. 463-466.

[142] Witness Statement of Ivan Gavryliuk (2 June 2018), para. 39 (MU, Ann. 1, judges' folder, tab 37).

[143] MU, para. 165; Extract from Criminal Proceedings No. 22017220000000060 (22 Nov. 2014) (MU, Ann. 79, judges' folder, tab 38).

[144] Witness Statement of Ivan Gavryliuk (2 June 2018), para. 40 (MU, Ann. 1, judges' folder, tab 37).

58. That is more than enough to establish a financing offence. But there is even more evidence tying the perpetrator, Marina Kovtun, to Russian persons. That evidence includes Kovtun's own testimony, which Russia focuses on and calls unreliable[145]. Yet there is also hard evidence, which you can find at tabs 39 through 42 of your folder, corroborating what she said: border crossing records[146], intercepted conversations[147], seized assault rifles[148] — which were registered with Ukrainian military units in Crimea until the occupation[149].

59. More fundamentally, the Court should view the record as a whole. Russia has not disputed that Russian persons delivered an overwhelming amount of weapons into Ukraine in 2014 and 2015[150]. During the same period, a Russian-made, military-grade mine exploded at a nightclub popular with supporters of the Revolution of Dignity. It defies credulity to think this attack was financed by anyone other than Russian persons.

B. The Kharkiv peace rally bombing

60. Russia offers even less of a defence of the deadly bombing of a Kharkiv peace rally. On 22 February 2015, Ukraine commemorated one year since the Revolution. The people of Kharkiv gathered to rally for peace and unity. They were greeted by a MON-100 anti-personnel mine. This terrorist attack killed three civilians and injured many more[151].

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[145] Signed Declaration of M. Kovtun, Suspect Interrogation Protocol (16 Nov. 2014), p. 8 (MU, Ann. 196).

[146] Ukrainian Border Guard Service Letter No. 51/680 to Lieutenant Colonel I. V. Selenkov, Deputy Head of the Investigations Department, Directorate of the Security Service of Ukraine in the Kharkiv Region, dated 16 April 2015, pp. 2-3 (RU, Ann. 30, judges' folder, tab 39).

[147] Expert Opinion No. 1975, drafted by the Forensic Research Center in Kharkiv Named After M. S. Bokarius, Ministry of Justice of Ukraine (1 Apr. 2015), pp. 2-3 (RU, Ann. 29) (judges' folder, tab 40); Signed Declaration of A. M. Tyshchenko, Suspect Interrogation Protocol (26 Dec 2015), p. 3 (MU, Ann. 245).

[148] MU, para. 165; Search and Seizure Report, drafted by Senior Lieutenant of Justice O. B. Butyrin, Senior Investigator, Investigations Department of the Directorate of the Security Service of Ukraine in the Kharkiv Region (16 Nov. 2014), p. 3 (RU, Ann. 9, judges' folder, tab 41).

[149] Central Missile and Artillery Directorate Of the Armed Forces of Ukraine Letter No. 342/2/3618 (11 Mar. 2015) (MU, Ann. 110, judges' folder, tab 42).

[150] MU, Chap. 2.

[151] OHCHR, Report on the Human Rights Situation in Ukraine (16 Feb.-15 May 2015), para. 24 (MU, Ann. 768); OSCE, Latest from OSCE Special Monitoring Mission (SMM) to Ukraine Based on Information Received as of 18:00 (Kyiv time) (24 Feb. 2015) (MU, Ann. 335); OSCE, Spot Report by Special Monitoring Mission to Ukraine, 22 February 2015: Explosion in Kharkiv at March Commemorating February 2014 Pro-Maidan Events (22 Feb. 2015) (MU, Ann. 334, judges' folder, tab 44).

61. Like a limpet mine, the MON-100 is a Russian military weapon[152]. The "100" in its name means it has an intended lethal range of 100 m[153].

62. Russia does not dispute that the rally bombing was an offence under the Bombings Convention and also an act covered by Article 2 (1) *(b)*. Russia also cannot deny that anyone who delivered an anti-personnel mine to Kharkiv knew it was to be used to commit a terrorist act.

63. Russia's only, cursory defence is to say there is "no evidence" the mine came from Russia[154]. Russia is again ignoring the record.

64. The relevant evidence was summarized by a Ukrainian court judgment, in your folder at tab 45. It includes a recorded conversation of the perpetrators speaking with other inmates[155]. The evidence also includes a perpetrator's emails "with officers of the Russian special services"[156]. Russia engages with none of this.

65. As with the Stena rock pub bombing, there is a more fundamental point. Anti-personnel mines are not readily available. Undisputed evidence shows an influx of Russian weapons during this time period — into Ukraine in general, and Kharkiv in particular. The only reasonable conclusion is that when terrorists used a Russian-made, military-grade mine against patriotic Ukrainian civilians rallying for national unity, that mine came from Russia.

C. Russia's violations of the ICSFT in connection with the bombing campaign

66. As I noted at the outset, these two bombings are just illustrative examples. Kharkiv faced a rash of bombings. A similar pattern repeated across the country. It would have been practicable for

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[152] Geneva International Centre for Humanitarian Demining, the GICHD Ukraine Ordnance Guide, p. 12 (April 2022), accessed at https://www.gichd.org/fileadmin/GICHD-resources/rec-documents/GICHD_Explosive_Ordnance_Guide_for_Ukraine_2022_v18.pdf (judges' folder, tab 43).

[153] Geneva International Centre for Humanitarian Demining, the GICHD Ukraine Ordnance Guide, p. 12 (April 2022), accessed at https://www.gichd.org/fileadmin/GICHD-resources/rec-documents/GICHD_Explosive_Ordnance_Guide_for_Ukraine_2022_v18.pdf (judges' folder, tab 43).

[154] RR, para. 476.

[155] RU, para. 276; Transcript of Covert Investigative Action Concerning V. Dvornikov, drafted by Lieutenant Colonel O. V. Diaghilev, Directorate of the Security Service of Ukraine in the Kharkiv Region (25 Mar. 2015), p. 6 (RU, Ann. 42); Transcript of Covert Investigative Action Concerning V. Tetutskiy, drafted by Lieutenant Colonel O. V. Diaghilev, Directorate of the Security Service of Ukraine in the Kharkiv Region (25 Mar. 2015), p. 2 (RU, Ann. 43); Expert Opinion No. 8-ZVZ drafted by the Kharkiv Centre for Forensic Science and Investigations, Ministry of Internal Affairs of Ukraine (21 Feb. 2017), p. 3 (RU, Ann. 32).

[156] RU, para. 276; Case No. 645/3612/15-k, Judgment of Conviction and Sentencing of 28 December 2019 of the Frunze Municipal Court of the City of Kharkiv, p. 22 (RU, Ann. 35, judges' folder, tab 45).

Russia to prevent the supply of its own military's mines into Ukraine. But Russia took no "practicable measures" to prevent this terrorism financing. Nor is there any evidence that Russia did anything to investigate or suppress this terrorism financing. Instead, Russia chooses to defend the legitimacy of bombing nightclubs.

67. Madam President, Members of the Court, the evidence is unequivocal. Russia violated the ICSFT in connection with the financing of attacks on civil aviation and terrorist bombings. I now ask, Madam President, that you call upon Ms Marney Cheek.

The PRESIDENT: I thank Mr Zionts. I now invite Ms Marney Cheek to address the Court. You have the floor, Madam.

Ms CHEEK:

THE RUSSIAN FEDERATION'S VIOLATIONS OF THE ICSFT IN CONNECTION WITH SHELLING OF CIVILIAN AREAS, AND RUSSIA'S BREACH OF ITS COOPERATION OBLIGATIONS UNDER THE ICSFT

1. Madam President, Members of the Court, it is a pleasure to appear before you today on behalf of Ukraine.

2. As Professor Thouvenin established earlier today, it was well known in 2014 that the DPR and LPR were attacking civilians as part of a campaign of intimidation and terror. Yet funds continued to flow across the border from Russian persons, into the hands of those committing these terrorist acts. Ukraine repeatedly sought assistance from Russia to prevent this financing, raising grave concerns about the money and weapons flowing from Russia's territory. But instead of cooperation, instead of taking measures to prevent and counter preparations for the commission of terrorism financing offences, Russia did not engage in any meaningful way.

3. As Ukraine's requests for co-operation were met with silence, funds continued to flow to the DPR, LPR and other groups engaged in terrorist acts. Mr Zionts has already spoken of the knowing funding of terrorist acts under Article 2 (1) *(a)*. I will speak of the knowing funding of terrorist acts covered by Article 2 (1) *(b)*, specifically shellings that targeted civilians. After speaking in some detail of these terrorist acts and the supply of weapons used to commit them, I will then return to Russia's utter disregard for its obligations under the ICSFT to prevent and counter

preparations for terrorism financing, as well as Russia's failure to co-operate in the investigation and suppression of terrorism financing.

I. THE FINANCING OF SHELLING ATTACKS ON CIVILIANS IN DONBAS DURING ONGOING MINSK NEGOTIATIONS

4. In a span of 30 days in January and February 2015, shells rained down on civilians in major Ukrainian cities far from the contact line, coinciding with an intense period of diplomacy and negotiations which ultimately led to the Minsk II Agreement.

5. Each of these attacks involved multiple-launch rocket systems from Russia. Each attack was widely publicized. And after each of these attacks, Russian officials continued to supply DPR fighters with more of these weapons. BM-21 Grads were supplied to DPR in early January. Days later, BM-21 Grads were used to shell a civilian checkpoint in Volnovakha. After Volnovakha, more BM-21s were sent to the DPR fighters. Eleven days after Volnovakha, a neighbourhood in Mariupol was shelled. Then yet another MLRS was provided to the DPR, this time a BM-30 Smerch. And 17 days after Mariupol, civilians were shelled in Kramatorsk. By supplying weapons in these circumstances, Russian persons committed terrorism financing offences within the meaning of Article 2 of the Convention.

A. The attack on a civilian checkpoint near Volnovakha

6. The first in these of series of attacks was the shelling of a civilian crossing and vehicle inspection point near Volnovakha, the Buhas checkpoint.

7. At 14:25 on a Tuesday afternoon — 13 January 2015 — at least 88 rockets rained down on a line of civilian vehicles, hitting a bus full of pensioners. Twelve passengers were killed, and 19 were injured.[157]

[157] MU, para. 77; RU, para. 219; Record of Site Inspection, drafted by A. G. Albot, Investigations Department of the Volnovakha District Department of the Donetsk Regional Directorate of the Ministry of Internal Affairs of Ukraine (13 Jan. 2015), pp. 2-23 (MU, Ann. 85).

8. In the months leading up to the attack, vast amounts of monetary support[158] and Russian weapons flowed to the DPR and other illegal armed groups in eastern Ukraine[159]. This large-scale effort, both overt and covert, raised millions of rubles and provided weapons systems and other military equipment to the same groups publicly named by the OHCHR as engaging in a campaign of intimidation and terror against Ukrainian civilians[160].

1. Article 2 (1): provision of BM-21 Grad with knowledge of how the weapons were to be used

9. It is undisputed that in the weeks prior to the Volnovakha attack, Russian officials supplied illegal armed groups with BM-21 Grads[161], the weapon used in the attack in Volnovakha. The supply of these weapons was done with the knowledge that they would be used to carry out a terrorist act under Article 2 (1) of the ICSFT.

10. Russian officials knew to whom they were supplying these destructive weapons. The DPR and other illegal armed groups had a well-documented track record of targeting civilians[162]. Knowingly providing such a group BM-21 Grads is an offence under Article 2 (1). Once the weapons were provided, the Article 2 offence was complete.

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[158] Report of the CCNR on the Results of 2014, Coordination Center for New Russia (12 Jan. 2015) (MU, Ann. 633); Report on Past Deliveries, Coordination Center for New Russia (19 Aug. 2014) (MU, Ann. 626); Communist Party for the DKO (Volunteer Communist Detachment), Coordination Center for New Russia (30 Dec. 2014) (MU, Ann. 631); Regular Dispatch Is Not Humanitarian Aid, Coordination Center for New Russia (19 Nov. 2014) (MU, Ann. 629); James Rupert, How Russians are Sent to Fight in Ukraine, Newsweek (6 Jan. 2015) (MU, Ann. 549); Alexander Zhuchkovsky, On the Advisability of Purchasing Armored Vehicles, StrelkovInfo (4 Sept. 2014) (MU, Ann. 628); Actual Requests for Assistance to the Militia of Novorossia, StrelkovInfo (last visited 21 March 2018) (MU, Annex 688); Report on Expenditures and Purchases for the Militia of Novorossia, StrelkovInfo (22 July 2017) (MU, Ann. 651); Report on Expenditures and Purchases for the Militia of Novorossia, StrelkovInfo (30 May 2017) (MU, Ann. 650); Report on Expenditures and Purchases for the Militia of Novorossia, StrelkovInfo (14 Apr. 2017) (MU, Ann. 649); Report on Expenditures and Purchases for the Militia of Novorossia, StrelkovInfo (24 Feb. 2017) (MU, Ann. 648); Summaries from the Militia of Novorossia, Vkontakte (last accessed 21 March 2018) (MU, Ann. 662); Novorossia Humanitarian Battalion, gumbat.ru (last visited 21 Mar. 2018) (MU, Ann. 661); Save the Donbas (last archived on 12 Sept. 2017) (MU, Ann. 654); Financial Reports, The managing company OD "Novorossiya" - ANO "KNB": Transfer of money for OD "Novorossia" II. Strelkov (last visited 21 Mar. 2018) (MU, Ann. 658)

[159] MU, paras. 174-180.

[160] *Ibid.* Chapter 1, Section A; OHCHR, *Accountability for Killing in Ukraine from January 2014 to May 2016* (2016), p. 33 (MU, Ann. 49). OHCHR, *Report on Human Rights Situation in Ukraine* (15 June 2014), para. 209 (MU, Ann. 46); OHCHR, *Intensified Fighting Putting at Risk Lives of People in Donetsk and Luhansk — Pillay* (4 July 2014) (MU, Ann. 295); OHCHR, *Report on Human Rights Situation in Ukraine* (15 May 2014), para. 58 (MU, Ann. 515); OHCHR, *Report on Human Rights Situation in Ukraine* (15 June 2014), para. 209 (MU, Ann. 45); OHCHR, *Report on Human Rights Situation in Ukraine* (15 June 2014) (MU, Ann. 46); OHCHR, *Report on Human Rights Situation in Ukraine* (15 July 2014), para. 2 (MU, Ann. 296); Summary of Ukraine's Annexes Evidencing Funding from Russia to Illegal Groups in Ukraine (judges' folder, tab 9).

[161] MU, para. 159; Witness Statement of Vadym Skibitskyi (5 June 2018), paras. 23–25 (hereinafter "Skibitskyi Statement") (MU, Ann. 8).

11. I respectfully remind the Court that Article 2 offences are offences regarding funding. Indeed, Article 2 (3) confirms that a terrorism financing offence is complete regardless of whether the funds are actually used in the end to carry out a terrorist act.

12. That said, what happened after Russian officials provided the DPR with BM-21 Grads was, unfortunately, predictable. The weapons were used against a group of civilians lined up at a civilian vehicle inspection point, 10 km away from the contact line.

2. Article 2 (1) *(b)*: the attack was an act intended to cause civilian harm

13. As Professor Thouvenin established, an act whose certain consequence is civilian death is an "act intended to cause death to a civilian" under ICSFT Article 2 (1) *(b)*. It is undisputed that firing BM-21 Grads at the Buhas civilian checkpoint was certain to have this result.

14. It was well known that the checkpoint attracted long lines of civilian cars, especially in the afternoon[163]. Satellite imagery captured on the morning of the attack shows a long line of civilian vehicles waiting to be screened[164]. This image and other satellite imagery Ukraine presents to the Court today is available in the judges' folder at tabs 46 and 48 and is also in the record at Ukraine's reply Annex 2[165].

15. The checkpoint facility itself was small — approximately 100 m by 100 m[166]. General Brown, Ukraine's military expert who is here as part of the Ukrainian delegation today and whose expert reports are excerpted in the judges' folder at tab 47, has explained that at the distance the DPR fighters fired the BM-21, rockets fall throughout a 1,300 m by 700 m area[167]. This spread of fire guaranteed that civilians lined up at the inspection point would be harmed in the attack[168].

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[163] Witness Statement of Maksym Anatoliyovych Shevkoplias (31 May 2018), para. 7 [hereinafter Shevkoplias Statement] (MU, Ann. 4, judges' folder, tab 50).

[164] Expert Report of Catherine Gwilliam and Air Vice-Marshal Anthony Sean Corbett (21 Apr. 2022), Figure 10 [hereinafter Gwilliam and Corbett Report] (RU, Ann. 2, judges' folder, tab 46).

[165] Gwilliam and Corbett Report (RU, Ann. 2, judges' folder, tab 46); Buhas Checkpoint Imagery (judges' folder, tab 48).

[166] Expert Report of Lieutenant General Christopher Brown (5 June 2018), para. 28 (hereinafter "Brown First Report") (MU, Ann. 11).

[167] Brown First Report, Figure 1 (MU, Ann. 11, judges' folder, tab 47).

[168] Second Expert Report of Lieutenant General Christopher Brown (21 Apr. 2022), para. 16 [hereinafter Brown Second Report] (RU, Ann. 1) (judges' folder, tab 47).

16. This is sufficient to satisfy an "act intended to cause death to a civilian" under Article 2 (1) *(b)*. However, even under Russia's interpretation that the attacker must have intended civilian harm, the evidence demonstrates that the DPR intended to harm civilians.

17. Satellite imagery confirms that Buhas was a civilian checkpoint designed to slow down cars and conduct vehicle inspections along a busy roadway[169]. Its layout was consistent with United Nations peacekeeping guidance on a setup of police checkpoints[170]. It was not a fortified military installation. Russia's attempt to compare this civilian inspection point to a DPR front line combat position near Olenivka that was attacked by Ukrainian forces 15 months later, only confirms how different these installations were[171].

18. The undisputed testimony of Maksym Shevkoplias, the Ukrainian border guard official in charge of the Buhas checkpoint at the time, confirms that the facility performed administrative tasks such as inspecting vehicles and cargo[172]. There were no Ukrainian Armed Forces units or equipment present. It did not play a role in the conflict.

19. Russia also has responded with an academic debate about whether a civilian checkpoint qualifies as a "military target" under international humanitarian law because there were some small arms and minimal self-defence capabilities there[173]. But the Court need not engage in this exercise, because whatever the civilian checkpoint's status was, General Brown has explained that there was no plausible military explanation for DPR fighters to attack this civilian checkpoint. The only explanation that makes sense is an objective of harming civilians gathered at the checkpoint.

20. Russia's arguments to the contrary are not supported by the evidence. Russia theorizes that the DPR may have been trying to neutralize the checkpoint for military reasons. But General Brown explains that if that was the case, the BM-21 Grad was the wrong weapon to use. Russian military doctrine, which the DPR presumably followed since they were using Russian weapons[174], prescribes

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[169] Gwilliam and Corbett Report, paras. 19-23, Figure 1 (RU, Ann. 2, judges' folder, tab 46).

[170] *Ibid.* paras. 19 and 23, Figure 2.

[171] *Ibid.* paras. 27-30, Figures 7 and 8.

[172] Shevkoplias Statement, paras. 8-9 (MU, Ann. 4, judges' folders, tab 50).

[173] CMR-1, para. 365; RR, para. 336.

[174] Brown Second Report, para. 16 (RU, Ann. 1).

that the minimum target size for a BM-21 is 400 m by 400 m[175]. The Buhas checkpoint was four times smaller than the minimum target[176]. Russia's military expert argues that it was not "prohibited" to use a BM-21 Grad in these circumstances[177]. But that misses the point. As General Brown explains, artillery doctrine prescribes a minimum target size because if a target is too small the rockets will likely miss and the target will not be destroyed[178]. Indeed, this is precisely what happened at the Buhas checkpoint. None of the BM-21 rockets actually hit the checkpoint facility[179], but they did hit a civilian bus full of pensioners.

21. As explained by General Brown, none of Russia's other arguments work, either. If DPR fighters actually intended to destroy the checkpoint, they had access to more precise and effective weapons for the target[180].

22. Russia calls attention to the presence of Kyiv-2 battalion personnel at the checkpoint[181]. But Kyiv-2 was a police patrol unit[182] that assisted the border guard with running the checkpoint[183]. They did not have a combat role[184].

23. Russia speculates that the attacks were part of a co-ordinated artillery campaign against locations deep behind the front line[185], but there is no evidence to support Russia's theory[186].

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[175] *Ibid.*; Ministry of Defense of the Russian Federation, Manual for the Study of the Rules of Firing and Fire Control of Artillery (PSiUO-2011) (2014), para. 409, Table 55 (RU, Ann. 61).

[176] Brown Second Report, para. 16 (RU, Ann. 1, judges' folders, tab 47); BM-21 Doctrinal Minimum Target Size (judges' folders, tab 48).

[177] Second Expert Report of Valery Alexeyevich Samolenkov, 10 Mar. 2023 (hereinafter "Samolenkov Second Report"), para. 211 (RR, Ann. 8).

[178] Brown Second Report, para. 16 (RU, Ann. 1, judges' folders, tab 47).

[179] *Ibid.*, para. 31.

[180] *Ibid.*, para. 16; Fall of Shot Created by 122mm Artillery Gun at 15 km Range (judges' folders, tab 48).

[181] CMR-1, para. 368 *(b)*; RR, paras. 357-358.

[182] Ministry of Interior of Ukraine Order No. 317 (14 Apr. 2014) (RU, Ann. 8).

[183] Shevkoplias Statement, para. 8 (MU, Ann. 4, judges' folders, tab 50); Brown Second Report, para. 8 (RU, Ann. 1).

[184] Brown Second Report, para. 8 (RU, Ann. 1); Gwilliam and Corbett Report (21 Apr. 2022), paras. 24-25 (RU, Ann. 2).

[185] Expert Report of Major General Valery Alexeevich Samolenkov, 8 Aug. 2021 (hereinafter "Samolenkov First Report"), para. 18 (CMR-1, Ann. 2).

[186] Brown Second Report, para. 11 *(a)* (RU, Ann. 1, judges' folders, tab 47).

24. Russia further suggests that the attack could have been a precursor to a ground offensive toward the checkpoint[187]. Ukraine's satellite imagery experts confirmed there was no concentration of DPR fighters ready to follow the BM-21 Grad attack with a larger ground offensive[188].

25. In sum, Russia's theories do not line up with reality, and they are not supported by the evidence. Attacking this small vehicle inspection post 10 km behind the contact line with BM-21 Grads had no military purpose[189]. Attacking a line of civilian cars, with a weapon designed to blanket a large area with rocket fire, made sense only for someone wishing to cause death and serious injury to civilians.

3. Article 2 (1) *(b)*: the nature and context of the attack was to intimidate the Ukrainian civilian population and compel the Ukrainian Government to act or abstain from doing any act

26. Now, Ukraine does not have to prove both a purpose to intimidate a population and a purpose to compel a government to act under ICSFT Article 2 (1) *(b)*, but based on the nature and context of the act, both are present here.

27. The only plausible explanation for the attack on the Buhas checkpoint was its value in intimidating the civilian population known to line up at that checkpoint. As already mentioned, the BM-21 is designed to be used where there is a large area of troops or vehicles gathered in the open[190]. With no credible military purpose for this attack, the only conclusion is that it was another volley in DPR's reign of terror designed to intimidate civilians. Consistent with its name — "Grad" means "hail" in Russian — one BM-21 launcher fires 40 rockets in as little as 20 seconds[191]. Being on the receiving end of such a hail of rockets, as General Brown has explained, "tends to cause fear, confusion and panic". He goes on to say that it is "highly frightening and creates a sense of helplessness" for those subject to the attack[192].

28. The timing of this incident also is telling. January through February 2015 was an intense period of diplomacy within the Trilateral Contact Group that ultimately led to the Minsk II

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[187] CMR-1, para. 368 *(g)*.

[188] Gwilliam and Corbett Report, para. 45 (RU, Ann. 2, judges' folders, tab 46).

[189] Brown Second Report, paras. 11-12 (RU, Ann. 1, judges' folders, tab 47).

[190] Brown First Report, para. 14 (MU, Ann. 11, judges' folders, tab 47).

[191] *Ibid.*, para. 22.

[192] *Ibid.*, para. 17.

Agreement. During this period, DPR and LPR were making demands for Ukraine to change its constitutional structure and pressuring Ukraine to make concessions[193]. It is not a coincidence that a series of high-profile attacks against civilians happened during this short timeframe, precisely when they would be most useful to compelling the Government of Ukraine to act.

B. The attack on the Vostochniy neighbourhood of Mariupol

29. The second shelling incident was in Mariupol. Just 11 days after the attack on the civilian checkpoint near Volnovakha on the Buhas checkpoint, on the morning of Saturday 24 January 2015, DPR deployed a barrage of no less than 154 BM-21 rockets against the Vostochniy neighbourhood of Mariupol, a densely populated residential area[194]. Thirty civilians died, including one child, and 118 people were injured[195]. This second high-profile shelling of civilians with a Russian weapon damaged at least fifty-three residential buildings, four schools, three day-care centres and eight grocery stores[196].

1. Article 2 (1): provision of BM-21 Grad with knowledge of how the weapons were to be used

30. Those Russian persons supplying the DPR with BM-21 Grads were well aware of the DPR's reign of intimidation and terror, its downing of Flight MH17, the attack on a bus full of pensioners at a civilian checkpoint just days earlier.

31. To be clear, within days of killing civilians in Volnovakha with BM-21 Grads, Russian officials supplied the DPR with more BM-21 Grads[197]. This act was plainly done with the knowledge of how such weapons would be used under Article 2 (1) of the ICSFT. Accordingly, an Article 2 offence was completed once Russian officials delivered more BM-21 Grads in the aftermath of Volnovakha. Per ICSFT Article 2 (3), it does not matter what happened next.

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[193] MU, para. 21; Lb.ua, "Media Publish the Demands of the DPR and LPR for the Resolution of the Conflict (Documents)" (11 Feb. 2015) (MU, Ann. 558); Zn.ua, "The DPR's and LPR's Proposals at the Negotiations in Minsk" (11 Feb. 2015) (MU, Ann. 559).

[194] Witness Statement of Igor Evhenovych Yanovskyi, 31 May 2018 (hereinafter "Yanovskyi Statement"), para. 14 (MU, Ann. 5); Expert Opinion No. 143, drafted by the Ukrainian Scientific Research Institute of Special Equipment and Forensic Expert Examination, Security Service of Ukraine (3 Apr. 2015), p. 12 (MU, Ann. 117).

[195] MU, para. 91.

[196] *Ibid*.

[197] See *ibid.*, paras. 160-161; Intercepted Conversations of Maxim Vlasov (23–24 Jan. 2015), pp. 6-8 (MU, Ann. 408); Yanovskyi Statement, paras. 26-36 (MU, Ann. 5).

32. But regrettably, predictably, what happened next was the DPR used those Russian-supplied weapons against civilians again, this time in the residential neighbourhood of Mariupol.

2. Article 2 (1) *(b)*: the attack was an act intended to cause civilian harm

33. The shelling of the Vostochniy neighbourhood was an "act intended to cause" death to a civilian under ICSFT Article 2 (1) *(b)*.

34. Russia acknowledges there was no military reason to attack the Vostochniy neighbourhood. Instead, Russia claims that the DPR did not intentionally target the residential neighbourhood, hypothesizing a variety of possible alternative targets without committing to a single theory of which target the DPR fighters actually intended to attack[198]. But once again, Russia's theories do not line up with the evidence.

35. At times, Russia has suggested that Ukrainian national guard checkpoint number 4014, a position on the edge of the city, was the real target[199]. If so, it is undisputed that this small checkpoint could not have been targeted with four BM-21 Grad systems without rockets also raining down throughout the residential neighbourhood[200]. General Brown explains that, as with the Buhas checkpoint, BM-21 Grads would not have been the right weapons system if that had been the target[201].

36. Russia also suggests at times that the intended target might have been the Ukrainian National Guard Company position number 4013, which was more than 2.5 km away[202]. But that explanation could not be credited with a series of firing errors so far-fetched that one would have to conclude that BM-21 Grads were an indiscriminate weapon in the DPR fighters' incompetent hands.

37. Once again, Russia has many theories, but none are supported by the facts. Russia speculates about potential technical malfunction[203], but when a BM-21 launcher malfunctions its rockets fire erratically, impacting unpredictably in a scattered pattern[204]. That was not the case

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[198] CMR-1, paras. 412-422; RR, para. 396.

[199] CMR-1, para. 414.

[200] Brown First Report, para. 50 (MU, Ann. 11).

[201] Brown Second Report, para. 34 (RU, Ann. 1).

[202] CMR-1, para. 415.

[203] *Ibid.*, para. 400; RR, para. 392.

[204] Brown Second Report, para. 30(c) (RU, Ann. 1, judges' folder, tab 47).

here[205]. Russia has offered no explanation for how the four separate BM-21 launchers used in the attack simultaneously malfunctioned in a way that produced a coherent impact pattern throughout the Vostochniy neighbourhood.

38. With regard to the possibility of human error, Russia hypothesizes that maybe bad target co-ordinates were given. But the co-ordinates of the proposed alternative targets were also known to DPR[206], and DPR fighters are on record conducting pre-firing checks that would have caught any error in the co-ordinates[207].

39. Russia suggests that the shelling was a precursor to a ground offensive toward the city[208]. But as General Brown observes, there was no ground assault[209]. Russia's military expert himself concedes: "I do not see sufficient evidence of the actual attempt to capture Mariupol."[210]

40. Finally, intercepted DPR communications provide additional evidence that the residential area was intentionally targeted. The night before the attack, a DPR member told DPR fighters to hit "Vostochniy"[211].

41. The next morning, DPR fighters launched a massive strike on the Vostochniy neighbourhood, and the same DPR member who requested the attack the night before celebrated that it would make the people in Mariupol "more afraid"[212]. While Russia points to additional intercepts that it claims show some surprise about this attack on civilians, that does not negate this chilling evidence that some DPR members were rejoicing, and it is not surprising that other DPR members might not have known about the plan.

42. The only plausible explanation is that the Vostochniy neighbourhood of Mariupol was intentionally targeted. As observed by the United Nations Under-Secretary-General two days after

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[205] *Ibid.*

[206] Expert Report of Alexander Alekseevich Bobkov (8 August 2021), paras. 75-84 (CMR-1, Ann. 1); Samolenkov Second Report, para. 247 (RR, Ann. 8).

[207] RU, para. 234; Intercepted Conversations of Yuriy Shpakov, pp. 2-3 (16 September 2016) (MU, Ann. 430).

[208] CMR-1, para. 404; RR, para. 397.

[209] Brown Second Report, para. 25 (RU, Ann. 1, judges' folder, tab 47).

[210] Samolenkov First Report, para. 119 (CMR-1, Ann. 2).

[211] Intercepted Conversation between Sergey Ponomarenko and Oleksandr Evdotiy (23 January 2015) (MU, Ann. 418, judges' folder, tab 51).

[212] Intercepted Conversation between Valeriy Kirsanov and Sergey Ponomarenko (24 January 2015) (emphasis added) (MU, Ann. 415, judges' folder, tab 52).

the attack: "Mariupol lies outside the immediate conflict zone. The conclusion can thus be drawn that the entity that fired these rockets knowingly targeted a civilian population."[213]

3. Article 2 (1) *(b)*: the nature and context of the attack was to intimidate the Ukrainian civilian population and compel the Ukrainian Government to act or abstain from doing any act

43. Once again, while a terrorist act under ICSFT Article 2 (1) *(b)* need only be shown to have the purpose of intimidation or to compel a government to act, both are present here.

44. The United Nations Under-Secretary-General described the Mariupol incident as an attack on a residential neighbourhood[214]. Such an attack is an act whose nature is to intimidate a population. And although direct evidence is not required, in this case it exists. Whatever Russia might speculate about others' reactions, there is simply no explanation for a DPR leader rejoicing that the residents of Vostochniy will "be more afraid".

45. The shelling of Mariupol's civilian population occurred less than two weeks after the DPR killed the bus full of civilian pensioners at the Buhas checkpoint in Volnovakha, and just one week before a major diplomatic conference that would result in the Minsk II Agreement[215]. This was a period when political leverage was crucial, and the nature and context of events shows that the DPR saw these high-profile shelling attacks on civilians as providing leverage. Considering this political context, the shelling of the Vostochniy neighbourhood of Mariupol had the purpose of compelling the Ukrainian Government to act.

C. The attack on a residential neighbourhood in Kramatorsk

46. The final act I will discuss in early 2015 was the attack on the city of Kramatorsk.

47. On 10 February 2015, DPR launched a series of BM-30 rockets, bombarding a residential area of the city. The attack, conducted on a Tuesday afternoon, around lunchtime, damaged

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[213] United Nations Security Council Official Record, 7368th mtg. UN doc. S/PV.7368 (26 January 2015), p. 2 (statement of Jeffrey Feltman, United Nations Under-Secretary-General for Political Affairs) (MU, Ann. 307).

[214] *Ibid.*

[215] RU, para. 240.

15 residential buildings, as well as a kindergarten, an art school, a local hospital[216]. Seven civilians were killed, and twenty-six were seriously injured, including five children[217].

1. Article 2 (1): provision of BM-30 Smerch with knowledge of how the weapons were to be used

48. Russian officials who supplied the DPR with a BM-30 Smerch were well aware of the DPR's reign of intimidation and terror, its downing of Flight MH17, the attacks on Volnovakha and Mariupol. Russian officials knew that a barrage of rockets had killed a bus full of pensioners at a civilian checkpoint in Volnovakha, an act condemned by the United Nations Security Council press statement as "reprehensible"[218]. Russian officials knew that less than two weeks earlier, an even larger barrage of rockets had landed on a residential neighbourhood in Mariupol, an act the United Nations Under-Secretary-General observed "knowingly targeted a civilian population"[219].

49. With this knowledge of how the weapon would be used under ICSFT Article 2 (1), Russian officials provided the DPR fighters with a BM-30 Smerch[220].

50. The BM-30 Smerch is a more sophisticated multiple-launch rocket system than the BM-21[221]. Unlike the BM-21, where the rocket warhead explodes on impact, each BM-30 rocket contains 72 cluster munitions[222]. These cluster munitions are released from the rocket as it flies over its intended target[223]. After the cluster munitions are released, the rocket continues on its path and eventually falls to the ground[224].

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[216] Executive Committee of the Kramatorsk City Council Letter No. F1-28/4812 to the Investigations Department at the Donetsk Regional Directorate of the SBU (26 Nov. 2015), p. 1 (MU, Ann. 142).

[217] RU, para. 241.

[218] United Nations Security Council, Security Council Press Statement on Killing of Bus Passengers in Donetsk Region, Ukraine (13 January 2015) (MU, Ann. 305).

[219] United Nations Security Council Official Record, 7368th mtg. UN doc. S/PV.7368 (26 Jan. 2015), p. 2 (statement of Jeffrey Feltman, United Nations Under-Secretary-General for Political Affairs) (MU, Ann. 307).

[220] Skibitskyi Statement, paras. 29-33 (MU, Ann. 8); Ukraine Main Directorate of Intelligence Letter No. 222/4D/535 (17 May 2018) (attaching Intelligence Briefing from the Main Intelligence Directorate of the Ukrainian Ministry of Defense No. 222/3D/90/09 (2 January 2015 at 9:00)) (MU, Ann. 182); Skibitskyi Statement, paras. 34-37 (MU, Ann. 8).

[221] Brown First Report, para. 62 (MU, Ann. 11, judges' folder, tab 47).

[222] *Ibid.*, para. 68.

[223] *Ibid.*

[224] *Ibid.* para. 70.

51. Supplying DPR fighters with this advanced multiple-launch rocket system after they had used similar systems against civilians in Volnovakha and Mariupol completed an Article 2 offence. As already mentioned, under ICSFT Article 2 (3), it does not matter what happened next. The funds were provided knowing that they were to be used in terrorist acts, whether those acts were ultimately carried out or not.

52. But, once again, predictably, the funds were in fact used against civilians, this time attacking the centre of a residential neighbourhood in Kramatorsk, more than 50 km from the contact line.

2. Article 2 (1) *(b)*: act intended to cause civilian harm

53. Using the BM-30 Smerch against the residential neighbourhood in Kramatorsk was an "act intended to cause death to a civilian" under ICSFT Article 2 (1) *(b)*. As with the attack on the Vostochniy neighbourhood of Mariupol, Russia agrees there was no military reason to attack a residential neighbourhood in Kramatorsk[225].

54. Once again, Russia has various theories for what might have happened on that fateful day in February 2015. For example, Russia hypothesizes about various technical malfunctions and human errors that could have resulted in rockets overflying an airfield 5 km away and hitting the residential area instead. General Brown has looked at those theories and found them unsupported by the evidence.

55. After the attack on Kramatorsk, BM-30 debris and cluster munition impacts were identified across an area spanning more than 5 km[226]. As General Brown explains, he and Russia's expert agree that the cluster munitions from one salvo of BM-30 rockets cannot fall 5 km from each other[227]. In other words, if DPR had only targeted the airfield, cluster munitions would not have impacted in the residential area[228]. This confirms that the airfield and the residential area were targeted separately[229].

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[225] RU, para. 243.

[226] Brown First Report, para. 68 (MU, Ann. 11).

[227] Brown Second Report, para. 42*(b)* (RU, Ann. 1, judges' folder, tab 47); Samolenkov First Report, para. 221 (CMR-1, Ann. 2).

[228] Brown Second Report, para. 42*(b)* (RU, Ann. 1, judges' folder, tab 47).

[229] *Ibid.*, para. 42.

56. Russia's suggestion that human error, faulty rockets or technical malfunction could have led to a 5 km overflight[230] is also highly unlikely. General Brown and Russia's expert agree it is very unlikely the operators of the BM-30 made so many errors while preparing and aiming the launcher that multiple rockets overshot their target by 5 km[231]. Further, as General Brown explains, faulty rockets typically burn out and fall short of their intended target — they do not overshoot[232]. In the very unlikely event some BM-30 rockets malfunctioned and overflew the airfield, the rockets' timing mechanisms would still have been programmed to release their cluster munitions over their intended target — supposedly the airfield[233]. But instead, cluster munitions rained down on the residential area in Kramatorsk. The likelihood that multiple BM-30 rockets experienced a simultaneous overflight and timing mechanism malfunction is near zero[234]. Russia's expert does not dispute that conclusion.

57. Madam President, Members of the Court, at this stage, it is important to step back and consider Russia's explanation for these attacks together. According to Russia, a once-in-a-lifetime confluence of errors occurred in Kramatorsk, which could have led to cluster munitions falling anywhere, but instead they landed in a residential area in a major city. This coincidence just so happened to take place two weeks after another implausible set of errors supposedly occurred in Mariupol, which resulted in more than 150 rockets landing in the centre of a residential neighbourhood. This also happened one month after DPR fighters targeted a civilian checkpoint, killing a bus full of pensioners in an attack that Russia has never been able to explain from a military perspective. Even if any one of these events could be explained in isolation, they cannot be explained in concert. Taken together, these were all acts intended to cause death or serious bodily injury to civilians, far from the conflict zone.

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[230] CMR-1, para. 464; RR, para. 420.

[231] Brown Second Report, para. 46 (RU, Ann. 1, judges' folder, tab 47); Samolenkov First Report, para. 223 (CMR-1, Annex 2).

[232] Brown Second Report, para. 43 *(a)* (RU, Ann. 1).

[233] Brown Second Report, para. 43*(a)* (RU, Ann. 1).

[234] RU, para. 244.

3. Article 2 (1) *(b)*: the nature and context of the attack was to intimidate the Ukrainian civilian population and compel the Ukrainian Government to act or abstain from doing any act

58. Targeting civilian areas of a major city, far from the conflict zone, has the purpose of intimidating a population under ICSFT Article 2 (1) *(b)*. For the attack on Kramatorsk, the political context is particularly clear — as the city was attacked just one day before Ukraine, Russia, France, and Germany were scheduled to meet at Minsk to negotiate a possible peace plan[235]. The participants would have undoubtedly had this shelling and the other recent shelling in mind as they met to negotiate. The nature and context of the attack indicate that this was precisely the point.

D. Attacks on civilians in Avdiivka

59. Following these three high-profile shelling attacks on civilians, the Minsk II agreement was signed in February 2015, and attacks on civilians subsided for a time. But the financing continued. Russian persons continued to supply funds to the DPR. Ukrainian civilians remained vulnerable to the DPR's reign of intimidation and terror.

60. In January and February 2017, that reign of intimidation and terror continued with the shelling of Avdiivka. Unlike Volnovakha, Mariupol and Kramatorsk, Avdiivka was quite close to the contact line, and many attacks in that city did target Ukrainian military personnel and equipment[236]. But the DPR did not stop there. The DPR also carried out attacks against a northern residential area of the city, where there was no evidence of a Ukrainian military presence.

61. Russia has not provided an explanation for this beyond mere speculation. Nor has Russia answered General Brown's conclusions on the inappropriateness of using BM-21 Grads in this populated area in Avdiivka, which were certain to harm civilians[237].

62. In sum, despite the DPR's widely-publicized history of attacking civilians, despite the United Nations' condemnation of these attacks, Russian persons continued to send the DPR a steady supply of weapons and other funds. Once a Grad was used against civilians, more would come. In this Court, Russia defends these acts of terrorism financing on a massive scale by putting forward *post hoc* speculative theories for the DPR fighters' attacks. General Brown has considered and

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[235] *Ibid.* para. 248; Vladimir Soldatkin and Pavel Polityuk, "Glimmer of Hope" for Ukraine After New Ceasefire Deal", Reuters (12 Feb. 2015) (MU, Ann. 560).

[236] RU, para. 249.

[237] Brown First Report, paras. 86 and paras. 89-93 (MU, Ann. 11).

rejected those theories. More to the point, what should be considered regarding the knowing of funding of terrorist acts covered under Article 2 (1) *(b)* is this question: what did those funders know at the time they were sending yet another shipment of weapons across the border to DPR fighters? Here is what those funders knew: they knew about the DPR's reign of terror and intimidation; they knew about the shoot-down of Flight MH17; they knew about the DPR fighters' shelling targeting civilians which were condemned by United Nations officials. And what did Russia do to prevent and suppress this financing of terrorism? Nothing. Russia took no practicable measures to stop this terrorism financing. It is to that topic that I will turn to next, but I would defer to Madam President as to whether this would be an appropriate time to break for lunch.

The PRESIDENT: I thank Ms Cheek. Your statement for the time being brings to an end this morning's session. The Court will meet again this afternoon, at 3 p.m., to hear the remainder of the first round of the oral argument of Ukraine. As you have suggested Ms Cheek, when we resume this afternoon, we shall begin with the end of your statement. Thank you. The sitting is adjourned.

The Court rose at 1.25 p.m.

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