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**International Court  
of Justice**

**Cour internationale  
de Justice**

**THE HAGUE**

**LA HAYE**

**YEAR 2023**

*Public sitting*

*held on Tuesday 6 June 2023, at 3 p.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)*

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**VERBATIM RECORD**

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**ANNÉE 2023**

*Audience publique*

*tenue le mardi 6 juin 2023, à 15 heures, au Palais de la Paix,*

*sous la présidence de M<sup>me</sup> 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)*

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**COMPTE RENDU**

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

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

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***The Government of Ukraine is represented by:***

HE Mr Anton Korynevych, Ambassador-at-Large, Ministry of Foreign Affairs of Ukraine,

*as Agent;*

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

*as Co-Agent;*

Ms Marney L. Cheek, Covington & Burling LLP, member of the Bar of the District of Columbia,

Mr Jonathan Gimblett, Covington & Burling LLP, member of the Bars of the District of Columbia and the State of Virginia, solicitor of the Senior Courts of England and Wales,

Mr Harold Hongju Koh, Sterling Professor of International Law, member of the Bars of the State of New York and the District of Columbia,

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,

Ms Clovis Trevino, Covington & Burling LLP, member of the Bars of the District of Columbia and the State of New York,

Mr David M. Zions, Covington & Burling LLP, member of the Bars of the Supreme Court of the United States and the District of Columbia,

*as Counsel and Advocates;*

Mr Andrii Pasichnyk, Deputy Director, Department of International Law, Ministry of Foreign Affairs of Ukraine,

Ms Anastasiia Mochulska, Department of International Law, Ministry of Foreign Affairs of Ukraine,

Ms Mariia Bezdieniezhna, Counsellor, Embassy of Ukraine in the Kingdom of the Netherlands,

Mr Volodymyr Shkilevych, Covington & Burling LLP, member of the Bar of the State of New York,

Ms Amanda Tuninetti, Covington & Burling LLP, member of the Bars of the State of New York and the District of Columbia,

Ms Ariel Rosenbaum, Covington & Burling LLP, member of the Bars of the State of New York and the District of Columbia,

Mr Paul Strauch, Covington & Burling LLP, member of the Bars of the State of California and the District of Columbia,

Mr Minwoo Kim, Covington & Burling LLP, member of the Bars of the State of New York and the District of Columbia,

***Le Gouvernement de l'Ukraine est représenté par :***

S. Exc. M. Anton Korynevych, ambassadeur itinérant, ministère des affaires étrangères de l'Ukraine,

*comme agent ;*

S. Exc. M<sup>me</sup> Oksana Zolotaryova, directrice générale du département de droit international, ministère des affaires étrangères de l'Ukraine,

*comme coagente ;*

M<sup>me</sup> Marney L. Cheek, cabinet Covington & Burling LLP, membre du barreau du district de Columbia,

M. Jonathan Gimblett, cabinet Covington & Burling LLP, membre des barreaux du district de Columbia et de l'État de Virginie, *solicitor* près les juridictions supérieures d'Angleterre et du pays de Galles,

M. Harold Hongju Koh, titulaire de la chaire Sterling, membre des barreaux de l'État de New York et du district de Columbia,

M. Jean-Marc Thouvenin, professeur à l'Université Paris Nanterre, secrétaire général de l'Académie de droit international de La Haye, membre associé de l'Institut de droit international, membre du barreau de Paris, cabinet Sygna Partners,

M<sup>me</sup> Clovis Trevino, cabinet Covington & Burling LLP, membre des barreaux du district de Columbia et de l'État de New York,

M. David M. Zions, cabinet Covington & Burling LLP, membre des barreaux de la Cour suprême des États-Unis et du district de Columbia,

*comme conseils et avocats ;*

M. Andrii Pasichnyk, directeur adjoint, département de droit international, ministère des affaires étrangères de l'Ukraine,

M<sup>me</sup> Anastasiia Mochulska, département de droit international, ministère des affaires étrangères de l'Ukraine,

M<sup>me</sup> Mariia Bezdniezhna, conseillère, ambassade de l'Ukraine au Royaume des Pays-Bas,

M. Volodymyr Shkilevych, cabinet Covington & Burling LLP, membre du barreau de l'État de New York,

M<sup>me</sup> Amanda Tuninetti, cabinet Covington & Burling LLP, membre des barreaux de l'État de New York et du district de Columbia,

M<sup>me</sup> Ariel Rosenbaum, cabinet Covington & Burling LLP, membre des barreaux de l'État de New York et du district de Columbia,

M. Paul Strauch, cabinet Covington & Burling LLP, membre des barreaux de l'État de Californie et du district de Columbia,

M. Minwoo Kim, cabinet Covington & Burling LLP, membre des barreaux de l'État de New York et du district de Columbia,

Ms Jill Warnock, Covington & Burling LLP, member of the Bar of the District of Columbia,

*as Counsel;*

Mr Refat Chubarov, Chairman of the *Mejlis* of the Crimean Tatar People,

Mr Pavlo Kushch, Metropolitan of Simferopol and Crimea Klyment, Head of the Crimean Eparchy of the Orthodox Church of Ukraine,

Major General Victor Trepak, Defence Intelligence, Ministry of Defence of Ukraine,

Mr Dmytro Zyuzia, Security Service of Ukraine,

Mr Mykola Govorukha, Deputy Head of Unit, Office of the Prosecutor General of Ukraine,

Ms Olha Kuryshko, Mission of the President of Ukraine in the Autonomous Republic of Crimea,

Mr Anatolii Skoryk, Associate Professor, Kharkiv Air Force University,

Ms Iulia Tyshchenko, Head of the Democratic Processes Support Program, Ukrainian Center for Independent Political Research,

Lieutenant General (Retired) Christopher Brown, former Head of the Artillery Branch of the British Army,

*as Members of the Delegation;*

Mr Fedir Venislavskyy, Defence Intelligence, Ministry of Defence of Ukraine,

Ms Ambria Davis-Alexander, Covington & Burling LLP,

Mr Liam Tormey, Covington & Burling LLP,

Ms Églantine Jamet, Sygna Partners,

*as Assistants.*

***The Government of the Russian Federation is represented by:***

HE Mr Gennady Kuzmin, Ambassador-at-Large, Ministry of Foreign Affairs of the Russian Federation,

HE Mr Alexander Shulgin, Ambassador of the Russian Federation to the Kingdom of the Netherlands,

HE Ms Maria Zabolotskaya, Deputy Permanent Representative of the Russian Federation to the United Nations,

*as Agents;*

Mr Hadi Azari, Professor of International Public Law at the Kharazmi University of Tehran, Legal Adviser to the Centre for International Legal Affairs of Iran,

Mr Michael Swainston, KC, member of the Bar of England and Wales, Brick Court Chambers,

M<sup>me</sup> Jill Warnock, cabinet Covington & Burling LLP, membre du barreau du district de Columbia,

*comme conseils ;*

M. Refat Chubarov, président du *Majlis* des Tatars de Crimée,

M. Pavlo Kushch, métropolite Klyment de Simferopol et de Crimée, chef de l'éparchie de Crimée de l'Église orthodoxe ukrainienne,

M. Victor Trepak, général de division, service de renseignement de défense, ministère de la défense de l'Ukraine,

M. Dmytro Zyuzia, service de sécurité de l'Ukraine,

M. Mykola Govorukha, chef adjoint d'unité au bureau du procureur général de l'Ukraine,

M<sup>me</sup> Olha Kuryshko, mission du président de l'Ukraine en République autonome de Crimée,

M. Anatolii Skoryk, professeur associé, Université de l'armée de l'air de Kharkiv,

M<sup>me</sup> Iulia Tyshchenko, responsable du programme d'appui aux processus démocratiques au centre ukrainien de recherche politique indépendante,

M. Christopher Brown, général de corps d'armée (retraité), ancien chef de la division d'artillerie de l'armée britannique,

*comme membres de la délégation ;*

M. Fedir Venislavskyy, service de renseignement de défense, ministère de la défense de l'Ukraine,

M<sup>me</sup> Ambria Davis-Alexander, cabinet Covington & Burling LLP,

M. Liam Tormey, cabinet Covington & Burling LLP,

M<sup>me</sup> Églantine Jamet, cabinet Sygna Partners,

*comme assistants.*

***Le Gouvernement de la Fédération de Russie est représenté par :***

S. Exc. M. Gennady Kuzmin, ambassadeur itinérant du ministère des affaires étrangères de la Fédération de Russie,

S. Exc. M. Alexander Shulgin, ambassadeur de la Fédération de Russie auprès du Royaume des Pays-Bas,

S. Exc. M<sup>me</sup> Maria Zabolotskaya, représentante permanente adjointe de la Fédération de Russie auprès des Nations Unies,

*comme agents ;*

M. Hadi Azari, professeur associé de droit international public à l'Université Kharazmi à Téhéran, conseiller juridique auprès du centre des affaires juridiques internationales d'Iran,

M. Michael Swainston, KC, membre du barreau d'Angleterre et du pays de Galles, Brick Court Chambers,

Mr Jean-Charles Tchikaya, member of the Paris and Bordeaux Bars,

Mr Kirill Udovichenko, Partner, Monastyrsky, Zyuba, Stepanov & Partners,

Mr Sienho Yee, Changjiang Xuezhe Professor of International Law and Director of the Chinese Institute of International Law, China Foreign Affairs University, Beijing; member of the Bars of the United States Supreme Court and the State of New York; member of the Institut de droit international,

*as Counsel and Advocates;*

Mr Dmitry Andreev, Counsel, Monastyrsky, Zyuba, Stepanov & Partners,

Mr Konstantin Kosorukov, Head of Division, Legal Department, Ministry of Foreign Affairs of the Russian Federation,

Mr Andrew Thomas, member of the Bar of England and Wales, Brick Court Chambers,

*as Counsel;*

Mr Aider Abliatipov, Adviser to the President of the State Council of the Republic of Crimea,

Mr Mikhail Abramov, Senior Associate, Monastyrsky, Zyuba, Stepanov & Partners,

Mr Yury Andryushkin, First Secretary, Legal Department, Ministry of Foreign Affairs of the Russian Federation,

Mr Mikhail Averianov, First Secretary, Permanent Mission of the Russian Federation to the Organisation for Security and Co-operation in Europe,

Mr Ruslan Bairov, Deputy Mufti of the Republic of Crimea,

Ms Olga Chekrizova, First Secretary, Department for Multilateral Human Rights Cooperation, Ministry of Foreign Affairs of the Russian Federation,

Mr Vladislav Donakanian, Attaché, Legal Department, Ministry of Foreign Affairs of the Russian Federation,

Ms Kseniia Galkina, Second Secretary, Legal Department, Ministry of Foreign Affairs of the Russian Federation,

Ms Victoria Goncharova, First Secretary, Permanent Representation of the Russian Federation to the Organisation for the Prohibition of Chemical Weapons,

Ms Anastasia Khamenkova, Expert, Office of the Prosecutor General of the Russian Federation,

Mr Stanislav Kovpak, Principal Counsellor, Department for Multilateral Human Rights Cooperation, Ministry of Foreign Affairs of the Russian Federation,

Ms Marina Kulidobrova, Associate, Monastyrsky, Zyuba, Stepanov & Partners,

Mr Artem Lupandin, Associate, Monastyrsky, Zyuba, Stepanov & Partners,

Ms Tatiana Manezhina, Minister of Culture of the Republic of Crimea, ,



M. Jean-Charles Tchikaya, avocat aux barreaux de Paris et de Bordeaux,

M. Kirill Udovichenko, associé, cabinet Monastyrsky, Zyuba, Stepanov & Partners,

M. Sienho Yee, professeur Changjiang Xuezhe de droit international, directeur de l'Institut chinois de droit international, Université des affaires étrangères de Chine, membre des barreaux de la Cour suprême des États-Unis et de l'État de New York, membre de l'Institut de droit international,

*comme conseils et avocats ;*

M. Dmitry Andreev, conseil, cabinet Monastyrsky, Zyuba, Stepanov & Partners,

M. Konstantin Kosorukov, chef de division au département juridique, ministère des affaires étrangères de la Fédération de Russie,

M. Andrew Thomas, membre du barreau d'Angleterre et du pays de Galles, Brick Court Chambers,

*comme conseils ;*

M. Aider Abliatipov, conseiller du président du Conseil d'État de la République de Crimée,

M. Mikhail Abramov, collaborateur senior, cabinet Monastyrsky, Zyuba, Stepanov & Partners,

M. Yury Andryushkin, premier secrétaire au département juridique, ministère des affaires étrangères de la Fédération de Russie,

M. Mikhail Averianov, premier secrétaire, mission permanente de la Fédération de Russie auprès de l'Organisation pour la sécurité et la coopération en Europe,

M. Ruslan Bairov, mufti adjoint de la République de Crimée,

M<sup>me</sup> Olga Chekrizova, première secrétaire au département pour la coopération multilatérale pour les droits de l'homme, ministère des affaires étrangères de la Fédération de Russie,

M. Vladislav Donakanian, attaché au département juridique, ministère des affaires étrangères de la Fédération de Russie,

M<sup>me</sup> Kseniia Galkina, deuxième secrétaire au département juridique, ministère des affaires étrangères de la Fédération de Russie,

M<sup>me</sup> Victoria Goncharova, première secrétaire, mission permanente de la Fédération de Russie auprès de l'Organisation pour l'interdiction des armes chimiques,

M<sup>me</sup> Anastasia Khamenkova, experte, parquet général de la Fédération de Russie,

M. Stanislav Kovpak, conseil au département pour la coopération multilatérale pour les droits de l'homme, ministère des affaires étrangères de la Fédération de Russie,

M<sup>me</sup> Marina Kulidobrova, collaboratrice, cabinet Monastyrsky, Zyuba, Stepanov & Partners,

M. Artem Lupandin, collaborateur, cabinet Monastyrsky, Zyuba, Stepanov & Partners,

M<sup>me</sup> Tatiana Manezhina, ministre de la culture de la République de Crimée,

Ms Daria Mosina, Second Secretary, Permanent Mission of the Russian Federation to the Organisation for Security and Co-operation in Europe

Mr Igor Nazaikin, Expert, Federal Financial Monitoring Service of the Russian Federation,

Ms Emile Shirin, Assistant at the Department of Russian, Slavic and General Linguistics at the V.I. Vernadsky Crimean Federal University,

Mr Ibraim Shirin, member of the Public Chamber of the Republic of Crimea,

Ms Elena Stepanova, Expert, Prosecutor General's Office of the Russian Federation,

Mr Aider Tippa, Chairman of the State Committee on Inter-Ethnic Relations of the Republic of Crimea,

Mr Aleksei Trofimenkov, First Secretary, Legal Department, Ministry of Foreign Affairs of the Russian Federation,

Ms Kata Varga, Associate, Monastyrsky, Zyuba, Stepanov & Partners,

Ms Victoria Zabyvvorota, First Secretary, Second CIS Department, Ministry of Foreign Affairs of the Russian Federation,

Mr Mikhail Zaitsev, Third Secretary, Legal Department, Ministry of Foreign Affairs of the Russian Federation,

Ms Olga Zinchenko, Second Secretary, Department for Multilateral Human Rights Cooperation, Ministry of Foreign Affairs of the Russian Federation,

Mr Nikolay Zinovyev, Senior Associate, Monastyrsky, Zyuba, Stepanov & Partners,

*as Advisers.*

M<sup>me</sup> Daria Mosina, deuxième secrétaire, mission permanente de la Fédération de Russie auprès de l'Organisation pour la sécurité et la coopération en Europe,

M. Igor Nazaikin, expert, service fédéral de surveillance financière de la Fédération de Russie,

M<sup>me</sup> Emile Shirin, assistante au département de philologie russe, slave et générale, Université fédérale de la Crimée V.I.Vernadski,

M. Ibrahim Shirin, membre de la Chambre publique de la République de Crimée,

M<sup>me</sup> Elena Stepanova, experte, parquet général de la Fédération de Russie,

M. Aider Tippa, président du comité d'État pour les relations interethniques de la République de Crimée,

M. Aleksei Trofimenkov, premier secrétaire au département juridique, ministère des affaires étrangères de la Fédération de Russie,

M<sup>me</sup> Kata Varga, collaboratrice, cabinet Monastyrsky, Zyuba, Stepanov & Partners,

M<sup>me</sup> Victoria Zabyvvorota, première secrétaire au deuxième département de la communauté d'États indépendants, ministère des affaires étrangères de la Fédération de Russie,

M. Mikhail Zaitsev, troisième secrétaire au département juridique, ministère des affaires étrangères de la Fédération de Russie,

M<sup>me</sup> Olga Zinchenko, deuxième secrétaire au département pour la coopération multilatérale pour les droits de l'homme, ministère des affaires étrangères de la Fédération de Russie,

M. Nikolay Zinovyev, collaborateur senior, cabinet Monastyrsky, Zyuba, Stepanov & Partners,

*comme conseillers.*

The PRESIDENT: Please be seated. The sitting is open. The Court meets this afternoon to hear the remainder of the first round of the oral argument of Ukraine. I now give the floor to Ms Cheek to complete her statement. You have the floor, Madam.

Ms CHEEK: Thank you.

**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** *(continued)*

**II. RUSSIA HAS VIOLATED ITS CO-OPERATION OBLIGATIONS UNDER THE ICSFT**

63. I will now turn to Russia's violations of the ICSFT. Amid a stream of terrorist acts in Ukraine, amid the flood of Russian funds crossing the border to finance these acts, Ukraine sought co-operation from Russia. Under the ICSFT, Russia could have chosen a lawful path: good-faith co-operation to prevent, investigate, and punish terrorism financing. Russia instead chose an unlawful path: delay, inaction, wilful blindness, and outright falsehoods, defying its co-operation obligations under ICSFT Articles 8, 9, 10, 12 and 18. These are the violations of the ICSFT from which Ukrainians have suffered. The States parties to the ICSFT noted in the Convention's preamble that "the number and seriousness of acts of international terrorism depend on the financing that terrorists may obtain". Shelling civilians in peaceful cities far from conflict, detonating bombs at peace rallies, shooting down civilian aircraft — these are very serious acts, and they depended on financing by Russian persons.

64. Yet Ukraine's repeated requests for co-operation from the Russian Federation to help cut off the financing of these terrorist acts fell on deaf ears. Ukrainians suffered through one terrorist act after another from early 2014 to early 2015. In response, Ukraine sent dozens of requests to the Russian Federation, seeking co-operation to prevent and suppress the financing of these acts. Ukraine provided names, bank accounts, websites, information on weapons supply convoys. Ukraine waited for responses and continually asked for co-operation. Ukraine's Border Guard Service made multiple requests for a joint meeting with Russian officials. Russia chose to stay silent. Eventually the Russian side responded. But those responses only confirmed that Russia had no interest in genuine co-operation to suppress and prevent the financing of terrorism. I should note that Russia's

obligations under the ICSFT are not only triggered by requests for assistance. Russia had a duty to be pro-active. Yet when it was obliged to act, Russia did nothing.

65. Let me now briefly summarize Russia's specific violations of its co-operation obligations under the ICSFT. For every example that I give here today, there are many more reflected in Ukraine's written pleadings.

#### **A. The Russian Federation violated Article 8 of the ICSFT**

66. ICSFT Article 8 requires States parties to take appropriate measures to identify, detect, freeze and seize funds used to finance terrorism. As I just mentioned, this obligation is not triggered by a request. Russia has an obligation to be proactive. In 2014 and 2015, it was common knowledge that the DPR and LPR were committing terrorist acts in Ukraine. In their push to win political concessions, they engaged in a campaign of intimidation, attacking civilians and killing and seriously injuring many. In Russia, people were openly funding these groups. Russia therefore had a duty to "identify" the funds being used for this purpose, and to "detect" them if they could not easily be identified. If there was reasonable suspicion certain funds were being used to finance terrorism, Russia had a duty to freeze them. But Russia did nothing.

67. Russia defends its failure to act by asserting that Ukraine has not conclusively proven various alleged mental elements of terrorism financing offences. That is false, but also irrelevant to Ukraine's claim under Article 8. Co-operation does not mean demanding conclusive proof, while at the same time closing your eyes to existing evidence. At a minimum, where there was a reasonable suspicion of terrorism financing, Russia had an obligation to temporarily freeze the funds and promptly investigate. Instead, Russia did nothing.

68. Russia also ignored Ukraine's specific requests. To take just one example: on 29 August 2014, Ukraine notified Russia of specific individuals, and specific bank card numbers, being used to finance terrorism in Ukraine<sup>1</sup>. Most of the relevant accounts were at Sberbank, a State-owned bank. Had Russia wanted to co-operate, it could have taken swift action. But Russia did not respond for

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<sup>1</sup> Ukrainian Note Verbale No. 72/22-620-2221 to the Russian Federation Ministry of Foreign Affairs (29 Aug. 2014) (MU, Ann. 371, judges' folders, tab 53).

almost a year. When it did, all Russia said was: “work to identify the persons mentioned in the note . . . as well as the details of their bank accounts is being processed at the current time”<sup>2</sup>.

69. This non-response speaks for itself, but let me add two observations. First, when it comes to freezing assets used in terrorism financing, speed is essential. Freezing is a temporary, emergency measure. Seizing comes later, after more due process. If reasonable suspicions are not acted on, funds may be used to finance terrorism, and then it is too late. Waiting a year to even begin “processing” bank account details is not good-faith co-operation or compliance with Article 8 of the Convention.

70. Second, at the time Russia responded to Ukraine, Russia mentioned none of its current arguments that are before this Court. Russia did not claim that the individual funders lacked knowledge under Article 2. They did not say that there was nothing that gave rise to a reasonable suspicion. Russia could not say that, because for a year it showed no interest in investigating, no interest in determining the culpability of these individuals at all. Again, that is not good-faith co-operation that the ICSFT requires.

#### **B. The Russian Federation violated Articles 9 and 10 of the ICSFT**

71. Russia displayed the same indifference under Articles 9 and 10 of the ICSFT. Under Article 9, if Russia received information that a person committed a terrorism financing offence, or was alleged to have committed a terrorism financing offence, Russia was obligated to investigate the facts. Under Article 10, Russia was obligated to extradite offenders, or refer them for prosecution, treating the case in the same manner as any other offence of a grave nature. Again, Russia did none of those things.

72. Just a few examples are more than enough to illustrate Russia’s violations of Articles 9 and 10 of the ICSFT. In August 2014, Ukraine sent Russia a request for assistance. Ukraine described the terrorist acts being committed by the DPR and LPR, including that they were “aimed at intimidation of [the] population”<sup>3</sup>. Ukraine also provided Russia with information about specific

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<sup>2</sup> Russian Federation Note Verbale No. 10448 to the Ukrainian Ministry of Foreign Affairs (31 July 2015) (MU, Ann. 376, judges’ folders, tab 54).

<sup>3</sup> Ukrainian Note Verbale No. 72/22-620-2087 to Russian Federation Ministry of Foreign Affairs (12 August 2014) (MU, Ann. 369, judges’ folder, tab 55).

persons and legal entities suspected of terrorism financing. This included Putin loyalist Konstantin Malofeev, a major shareholder in Rostelecom, one of Russia's largest State-controlled monopolies.

73. Again, Russia did not respond for nearly a year. When it did respond on 31 July 2015, all Russia could say was that "it was not possible to identify the location of Mr Malofeev"<sup>4</sup>. Russian authorities apparently did not check his office in Moscow, where American journalists were able to find Mr Malofeev to interview him in October 2014<sup>5</sup>. It is an understatement to say that Russia did not investigate the information that Ukraine had provided. Russia did nothing.

74. In the same request from August 2014, Ukraine alerted Russia to terrorism financing by Oleksander Zhuckovsky, who publicly admitted fundraising for the DPR<sup>6</sup>. In November 2014, Ukraine informed Russia of additional terrorism financing offences committed by Mr Zhuckovsky<sup>7</sup>. When Russia finally responded on 31 July 2015, it said that Mr Zhuckovsky "does not exist in the Russian Federation"<sup>8</sup>. Russia apparently did not click the link supplied by Ukraine, which would have taken them to Mr Zhuckovsky's social media page, where he boasted of hosting a fundraiser for the DPR. Russia also apparently did not notice that Mr Zhuckovsky gave interviews to the Russian media, where he was described as a "St. Petersburg-based activist"<sup>9</sup>. These are surprising activities for someone who does not exist in the Russian Federation. Once again, Russia did nothing.

75. As a final example, Ukraine asked Russia to investigate the "Coordination Center for Assistance to Novorossia", describing it as "one of the centers of financing and provision of assistance to the operations of terrorist organizations in the territory of Ukraine"<sup>10</sup>. Once again,

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<sup>4</sup> Russian Federation Note Verbale No. 10448 to the Ukrainian Ministry of Foreign Affairs (31 July 2015) (MU, Ann. 376, judges' folder, tab 54).

<sup>5</sup> Joshua Keating, "God's Oligarch: One of Vladimir Putin's Favorite Businessmen Wants to Start an Orthodox Christian Fox News and Return Russia to Its Glorious Czarist Past", *Slate* (20 October 2014), accessed at <https://slate.com/news-and-politics/2014/10/konstantin-malofeev-one-of-vladimir-putins-favorite-businessmen-wants-to-start-an-orthodox-christian-fox-news-and-return-russia-to-its-glorious-czarist-past.html>.

<sup>6</sup> Ukrainian Note Verbale No. 72/22-620-2087 to Russian Federation Ministry of Foreign Affairs (12 August 2014) (MU, Ann. 369, judges' folder, tab 55).

<sup>7</sup> Ukrainian Note Verbale No. 72/22-620-2717 to the Russian Ministry of Foreign Affairs (3 November 2014) (MU, Ann. 374).

<sup>8</sup> Russian Federation Note Verbale No. 10448 to the Ukrainian Ministry of Foreign Affairs (31 July 2015) (MU, Ann. 376, judges' folder, tab 54).

<sup>9</sup> See e.g. "Alexander Zhuchkovsky's "Militia" of the DPR: The Only Support is in the Russian Media", ZAKS (10 June 2014) (MU, Ann. 520, judges' folder, tab 56).

<sup>10</sup> Ukrainian Note Verbale No. 72/22-620-2087 to the Russian Ministry of Foreign Affairs (12 Aug. 2014) (MU, Ann. 369, judges' folder, tab 55).

Russia ignored this request for a year. When Russia finally responded, it informed Ukraine that the centre “does not have electronic accounts” and that “military items are not acquired” by the group<sup>11</sup>. In this case, Russia appears not to have consulted the centre’s own website, which has links to electronic bank accounts accepting donations, and elsewhere boasts of providing “non-humanitarian aid” and sending “all kinds of useful items for the militia”<sup>12</sup>. Again, Russia did nothing.

76. Russia’s responses to Ukraine’s requests for co-operation are indefensible. That explains why Russia has not even tried to defend them before this Court. Instead, Russia argues that in order to even request co-operation, terrorism financing offences “must be conclusively proven, with the requisite specific intent”<sup>13</sup>. But that is backwards. Article 9 requires a State to investigate when a terrorism financing offence is alleged. Investigation is what produces the proof.

77. Since Russia failed to investigate under Article 9, it is perhaps not surprising that it also could not comply with its obligation to prosecute or extradite under Article 10. Ukraine has provided evidence showing the commission of terrorism financing offences by Russian officials and other Russian persons. At a minimum, the established facts warranted serious attention by Russian prosecutors. Article 10 required Russian authorities to “take their decision in the same manner as in the case of any other offence of a grave nature”. Instead, Russia did nothing.

78. In short, Russia had no interest in suppressing the financing of terrorism in Ukraine. Russia never investigated allegations of terrorism financing in a timely matter, if at all. Russia never fulfilled its obligations to extradite or prosecute in the same manner it would have for other serious grave crimes. Through this refusal of genuine co-operation, Russia breached its obligations under Articles 9 and 10 of the ICSFT.

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<sup>11</sup> Russian Federation Note Verbale No. 10488 to the Ukrainian Ministry of Foreign Affairs (31 July 2015) (MU, Ann. 376) (judges’ folder, tab 54).

<sup>12</sup> See e.g. “Report on Past Deliveries”, Coordination Center for Assistance to New Russia (19 Aug. 2014) (MU, Ann. 626, judges’ folder, tab 58); “Communist Party for the DKO (Volunteer Communist Detachment)”, Coordination Center for Assistance to New Russia (30 Dec. 2014) (MU, Ann. 631); “Regular Dispatch Is Not Humanitarian Aid”, Coordination Center for Assistance to New Russia (19 November 2014) (MU, Ann. 629) (judges’ folder, tab 57).

<sup>13</sup> RR, para. 598.



### C. The Russian Federation violated Article 12 of the ICSFT

79. Russia also failed to offer the “greatest measure of assistance” to Ukraine in connection with its criminal investigations of terrorism financing, as required by ICSFT Article 12. Ukraine sent many such requests for assistance. Instead of engaging with those requests, Russia did the opposite.

80. Ukraine made at least twelve mutual legal assistance requests related to terrorism financing investigations<sup>14</sup>. For half of them, Russia offered a bare invocation of national security and sovereignty<sup>15</sup>. Russia did not explain how terrorism financing investigations implicated its national security or sovereignty. Indeed, it is difficult to see how providing assistance with a terrorism financing investigation could undermine national security or sovereignty. In *Djibouti v. France*, this Court found that such an unexplained denial of assistance violated a mutual legal assistance treaty<sup>16</sup>. It also violates Article 12 of the ICSFT.

81. In other instances, Russia refused assistance based on supposed “procedural formalities”. For example, Russia denied assistance because Ukraine had not supplied the place of birth of potential witnesses<sup>17</sup>. That is not affording the greatest measure of assistance under ICSFT Article 12<sup>18</sup>.

82. Even where Russia responded to Ukraine’s requests, it offered no real help. For example, Ukraine sought assistance regarding the supply of weapons to DPR fighters by O. Kulygina, a Russian citizen<sup>19</sup>. Ukraine asked Russia for information on Kulygina’s crossings of the Ukraine-Russia border. Rather than offer the greatest measure of assistance, the Russian Prosecutor’s Office

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<sup>14</sup> MU, para. 193; RU, para. 367; MU, Anns. 400, 401, 404, 405, 419-423, 427, 431, 433.

<sup>15</sup> RR, para. 615; Letter from the Office of the Prosecutor-General of the Russian Federation No. 87-158-2015, 17 Aug. 2015 (MU, Ann. 425); Letter from the Office of the Prosecutor-General of the Russian Federation No. 87-159-2015, 17 Aug. 2015 (MU, Ann. 426); Letter from the Office of the Prosecutor-General of the Russian Federation No. 87-157-2015, 17 Aug. 2015 (MU, Ann. 424); Letter from the Office of the Prosecutor-General of the Russian Federation No. 87-200-2015, 29 Feb. 2016 (MU, Ann. 53); Letter from the Office of the Prosecutor-General of the Russian Federation No. 82/1-1897-17, 28 Feb. 2019 (MU, Ann. 55); Letter from the Office of the Prosecutor-General of the Russian Federation No. 82/1-5598-17, 19 Dec. 2018 (MU, Ann. 56).

<sup>16</sup> *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, *I.C.J. Reports 2008*, p. 229, para. 111.

<sup>17</sup> RR, para. 615; Letter from the Office of the Prosecutor-General of the Russian Federation No. 82/1-5444-14 23, October 2015 (MU, Ann. 428, judges’ folder, tab 60); Letter from the Office of the Prosecutor of the Russian Federation No. 82/1-5094-15, 7 Feb. 2017 (RR, Ann. 49).

<sup>18</sup> MU, para. 198; Prosecutor General’s Office of the Russian Federation Letter No. 87-159-2015 (17 Aug. 2015) (MU, Ann. 426); Prosecutor General’s Office of the Russian Federation Letter No. 87-158-2015 (17 Aug. 2015) (MU, Ann. 425); Prosecutor General’s Office of the Russian Federation Letter No. 87-157-2015 (17 Aug. 2015) (MU, Ann. 424).

<sup>19</sup> See e.g. Ukrainian Note Verbale No. 72/22-620-2087 to Russian Federation Ministry of Foreign Affairs (12 Aug. 2014) (MU, Ann. 369) (judges’ folder, tab 55); Ukrainian Request for Legal Assistance Concerning Case No. 22014050000000015 (30 Sept. 2014) (MU, Ann. 401, judges’ folder, tab 59).

took it upon itself to conclude that Ukraine did not need this assistance, because it was supposedly “irrelevant to the subject matter of the pretrial investigation being conducted by” Ukraine<sup>20</sup>. Yet Ukraine was investigating allegations of crossing the Ukraine-Russia border with weapons<sup>21</sup>. It is difficult to see how information about Ms Kulygina’s border crossings and illegal weapons possession would not be relevant to that crime. Far from offering Ukraine “the greatest measure of assistance” under Article 12, Russia offered Ukraine no assistance at all.

#### **D. The Russian Federation violated Article 18 of the ICSFT**

83. Let me conclude by focusing on ICSFT Article 18. Article 18 is essential to achieving the Convention’s purpose. Article 18 requires States parties to “cooperate in the prevention” of terrorism financing, by taking “all practicable measures . . . to prevent and counter preparations” for the offences set forth in Article 2 of the Convention. As Professor Koh explained, Russia reads this provision as a nullity, under which Russia has no obligation to do anything but have a terrorism law on paper. What Article 18 really requires is what the text says: States must take all practicable measures to prevent and counter preparations for terrorism financing.

84. Today, you have heard extensive evidence of terrorism financing offences. Russian persons delivered weapons, money and other support to groups well known for committing acts covered by Articles 2 (1) (a) and 2 (1) (b) of the ICSFT. In many cases, the specific weapons Russian officials provided were immediately used to commit more terrorist acts. Russian politicians, non-governmental organizations and private persons openly raised money and collected equipment for groups that notoriously committed terrorist acts. These were Article 2 offences, and Russia had an obligation to take all practicable measures to stop the financing of them. Instead, Russia did nothing.

85. Russia could have prevented terrorism financing by policing its border. As Mr Zions mentioned earlier, Ukraine specifically asked Russia to do this. United Nations monitors warned of the devastating consequences to the human rights of civilians resulting from the flow of weapons

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<sup>20</sup> Prosecutor General’s Office of the Russian Federation Letter No. 82/1-5444-14 (dated 23 Oct. 2015, sent 6 Nov. 2015) (MU, Ann. 428, judges’ folder, tab 60).

<sup>21</sup> *Ibid.*

across an uncontrolled border<sup>22</sup>. Yet again, Russia refused to take the most obvious practicable measure of policing it.

86. Russia also could have instructed its own officials not to send weapons and money to groups committing terrorist acts in Ukraine. That would have been simple, practicable and capable of preventing terrorism financing. Russia refused to take that step.

87. Russia also could have shut down the fundraising networks used to support the groups committing terrorist acts in Ukraine. This fundraising was happening in the open, through public social media channels and websites, and it was practicable for Russia to stop it. Again, Russia did nothing.

88. Article 18 does not speak of sitting idly by, feigning an inability to assist, and hiding behind unspecified procedural or other formalities to do nothing. It speaks of taking all practicable measures to prevent and counter the commission of terrorism financing offences. Russia chose to take no measures at all. Russia chose to do nothing, and in doing so, it violated Article 18.

89. The preamble of the ICSFT considers “that the financing of terrorism is a matter of grave concern to the international community as a whole”. Today you have heard that the financing of terrorist acts in Ukraine by Russian persons was of no concern to Russia, and Russia did nothing to fulfil its obligations under the ICSFT to investigate, to afford the greatest measure of assistance and to take all practicable measures to counter terrorism financing. In other words, Ukraine has proven multiple violations of the ICSFT by the Russian Federation.

90. Madam President, Members of the Court, I thank you for your attention, and this concludes Ukraine’s pleadings regarding the ICSFT. I would now ask that you call upon Professor Koh to speak to Ukraine’s claims under the Convention on the Elimination of All Forms of Racial Discrimination.

The PRESIDENT: I thank Ms Cheek, and I now call on Professor Harold Koh to address the Court. You have the floor, Professor.

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<sup>22</sup> See, e.g., OHCHR, *Report on the Human Rights Situation in Ukraine: 16 November 2015 to 15 February 2016*, pp. 49-50, 10, paras. 24, 207 (MU, Ann. 314).

Mr KOH:

**INTRODUCTION TO UKRAINE’S CLAIMS UNDER THE CERD AND THE CERD’S  
ABSOLUTE PROHIBITION ON RACIAL DISCRIMINATION**

**I. THE CERD’S ABSOLUTE PROHIBITION ON RACIAL DISCRIMINATION  
IS A PEREMPTORY NORM OF INTERNATIONAL LAW**

1. Madam President, Members of the Court, it is again my honour to appear before you on behalf of Ukraine. This afternoon, I will introduce Ukraine’s case concerning the Russian Federation’s numerous violations of the Convention on the Elimination of All Forms of Racial Discrimination, the CERD.

2. The origins of that treaty are well known to you. The CERD emerged in response to toxic patterns of colonialism, the Holocaust, apartheid and racist practices that have plagued our collective history. In response, the international community developed universal human rights standards to recognize the equality of all peoples<sup>23</sup>.

3. The CERD was adopted in 1965 as the first of several universal human rights treaties elaborating upon these principles<sup>24</sup>. When the General Assembly adopted the Convention that year, the United Nations Secretary General called it “a most valuable instrument” to empower the United Nations to “carry forward its efforts to eradicate the vestiges of racial discrimination”<sup>25</sup>. The treaty’s text reflects the States parties’ “[r]esolve[] to adopt all necessary measures for speedily eliminating racial discrimination in all its forms and manifestations”<sup>26</sup>.

4. To that end, the CERD establishes an absolute prohibition against “racial discrimination”, defined as:

“any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life”<sup>27</sup>.

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<sup>23</sup> See, e.g., United Nations General Assembly, 20th Session 1406th Plenary Meeting, Official Records, UN doc. A\_PB.1406, para. 137 (21 Dec. 1965) (MU, Ann. 782); see also MU, para. 342.

<sup>24</sup> United Nations General Assembly, res. 2106 (XX) (21 Dec. 1965) (MU, Ann. 738).

<sup>25</sup> United Nations General Assembly, 20th Session 1406th Plenary Meeting, Official Records, UN doc. A\_PB.1406, para. 137 (21 Dec. 1965) (MU, Ann. 782); see also MU, para. 342.

<sup>26</sup> CERD, preamble (judges’ folder, tab 2).

<sup>27</sup> CERD, Art. 1 (judges’ folder, tab 2).

5. As this Court knows too well, this is one of the most fundamental protections in human rights law. For that reason, the total prohibition against racial discrimination contained in the CERD is both an *erga omnes* obligation of States and a peremptory norm of customary international law (*jus cogens*). Because the CERD's prohibition of racial discrimination is absolute, no derogation from it is permitted. The CERD contains no exceptions to the prohibition on racial discrimination; other human rights treaties have affirmed its non-derogable nature; and any effort to limit human rights nevertheless requires adherence to this fundamental norm of non-discrimination<sup>28</sup>.

## **II. RUSSIA HAS TARGETED ETHNIC UKRAINIANS AND CRIMEAN TATARS IN CRIMEA FOR RACIAL DISCRIMINATION**

6. The Convention's absolute guarantees require all contracting States to suppress racial discrimination in all its forms. Yet by its discriminatory treatment of the Crimean Tatar and Ukrainian communities in Crimea, Russia has utterly failed to meet its affirmative obligations under the CERD. Even worse, Russia has sought to replace the multi-ethnic community that had characterized Crimea before Russia's intervention with discriminatory Russian nationalism — described in the report of Russia's expert, Sergey Markedonov, as “[t]he *artificial* separation of Russians and Ukrainians”<sup>29</sup>. So through concerted cultural erasure, Russia has established a policy and practice of racial discrimination that is the exact *opposite* of what the CERD requires.

### **A. Origins of Russia's campaign of racial discrimination against the Ukrainian and Crimean Tatar communities in Crimea**

7. Russia's campaign of racial discrimination grew out of its illegal military occupation and purported “annexation” of the Crimean peninsula starting in February 2014. When Russia unlawfully invaded and occupied Crimea, it identified the Crimean Tatar and ethnic Ukrainian communities as obstacles to its twin aims: annexation and regional domination.

8. From the first days of Russia's military intervention in Crimea, representatives of the Crimean Tatar and Ukrainian communities quickly mobilized to oppose Russia's actions<sup>30</sup>. Even as

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<sup>28</sup> See Expert Report of Martin Scheinin (14 Apr. 2022), paras. 12-14 (RU, Ann. 7).

<sup>29</sup> See e.g. MU, para. 350; Expert Report of Professor Paul Magocsi (4 June 2018), paras. 7-19 (MU, Ann. 21); Expert Report of Sergey Miroslavovich Markedonov (8 Mar. 2023), para. 28 (RR, Ann. 21); emphasis added.

<sup>30</sup> MU, para. 367.

Russia's military intervention in Crimea was under way, the *Mejlis* organized a rally in front of the Crimean Parliament building in Simferopol to oppose Crimea's accession to the Russian Federation<sup>31</sup>; the members of that body invited representatives of the local Ukrainian community to join them in protest<sup>32</sup>.

9. But as demonstrators gathered in the square, gangs of young men carrying Russian flags formed against them<sup>33</sup>. And as the day unfolded, the two sides sought to push each other's supporters out of the parliament building<sup>34</sup>. In the crush, two people died and some 70 others were injured<sup>35</sup>. This image of Ukrainian and Crimean Tatar flags opposing Russian flags explains why the Russian authorities felt the need to punish those ethnic groups *as groups*. From the start of the purported annexation, Russia pitted ethnic community against ethnic community.

10. The next day, heavily armed men in uniforms without insignia seized the Crimean parliament building and raised the Russian flag<sup>36</sup>. An occupied so-called parliament then convened in an extraordinary, closed, session and dismissed the existing government. This sham body then appointed as Prime Minister Sergey Aksyonov, the pro-Russian leader of the radical Russian Unity Party, even though his party held only three out of 100 seats in the Crimean Party<sup>37</sup>. These Russian proxies then moved to convene a sham referendum on Russia's invasion of Crimea<sup>38</sup>.

11. As a sham referendum approached, the Russian Federation tried and failed to induce the Crimean Tatar and Ukrainian communities to support the purported annexation. Our evidence

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<sup>31</sup> MU, para. 367; Office of the United Nations High Commissioner for Human Rights, *Accountability for killings in Ukraine from January 2014 to May 2016*, Ann. I, para. 2 (MU, Ann. 49); *Mejlis* of the Crimean Tatar People, Notification to Simferopol City Council (inserted in Ukrainian Helsinki Human Rights Union, Report of the International Expert Group: 26 Feb. Criminal Case (2017), p. 12 (original), p. 98 (English translated)) (MU, Ann. 959); see also Ukrainian Helsinki Human Rights Union, Report of the International Expert Group: 26 Feb. Criminal Case (2017) (MU, Ann. 958).

<sup>32</sup> MU, para. 367; Witness Statement of Andriy Shechekun (4 June 2018), para. 13 (MU, Ann. 13).

<sup>33</sup> Ukrainian Helsinki Human Rights Union, Report of the International Expert Group: 26 February Criminal Case (2017), p. 17 (MU, Ann. 958).

<sup>34</sup> Ukrainian Helsinki Human Rights Union, Report of the International Expert Group: 26 February Criminal Case (2017), pp. 26-62 (MU, Ann. 958).

<sup>35</sup> Ukrainian Helsinki Human Rights Union, Report of the International Expert Group: 26 February Criminal Case (2017), p. 12 (MU, Ann. 958); OHCHR, Situation of Human Rights in the Temporarily Occupied Autonomous Republic of Crimea and the City of Sevastopol (Ukraine) (22 February 2014 to 12 September 2017), para. 23 (MU, Ann. 759).

<sup>36</sup> MU, para. 369; see also, e.g., Harriet Salem et al., "Crimean Parliament Seized by Unknown Pro-Russian Gunmen", *The Guardian* (27 February 2014) (MU, Ann. 1037).

<sup>37</sup> MU, para. 369.

<sup>38</sup> MU, para. 370.

presents the testimony of Mr Mustafa Dzhemilev, the first chair of the *Mejlis* and a pioneering figure in the Crimean Tatar community. He testifies regarding a telephone call he had directly with President Vladimir Putin on 12 March 2014 — engineered by the Russians. During that conversation, President Putin sought the Crimean Tatar community's support for union with Russia in return for unspecified favourable treatment in the future. But Mr Dzhemilev rebuffed that request and continued to insist Crimea was part of Ukraine<sup>39</sup>.

12. The Russians conveyed a similar message to Metropolitan Klyment, who is in the courtroom today. He is the head of the Orthodox Church of Ukraine, which at that time was the Crimean eparchy of the Ukrainian Orthodox Church of Kyiv Patriarchate. Father Klyment describes meeting with Igor Strelkov (also known as Igor Girkin), who introduced himself as an adviser on security and defence to the Council of Ministers of the “Republic of Crimea”<sup>40</sup>. This morning — from Mr Zionts — we heard about Girkin, the notorious GRU member<sup>41</sup> who later became a leader of the DPR in connection with the shoot-down of MH-17<sup>42</sup>. Girkin informed Father Klyment that “[he] would be safe, and [his] church would be protected if [he] agreed to sign [a] document, to be published in press, confirming that in Crimea everything was calm and quiet, and no illegal actions were taken against Kyiv Patriarchate”<sup>43</sup>. Father Klyment declined to sign the statement, because, he has testified, it falsely suggested his support for the purported annexation in its final form<sup>44</sup>.

13. Even as Russia was vainly seeking political support from the Crimean Tatar and Ukrainian communities, pro-Russian forces were creating a hostile and intimidating environment for these same groups. The doors and gates of Crimean Tatar houses were marked with crosses, a chilling reminder of the infamous historical episode known to Crimean Tatars as the *Sürgün*, when Soviet authorities similarly rounded up Crimean Tatars for deportation and forced their exile based on the false pretext

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<sup>39</sup> Witness Statement of Mustafa Dzhemilev (31 May 2018), paras. 16-27 (MU, Ann. 16).

<sup>40</sup> Witness Statement of Father Klyment (29 March 2022), para. 7 (RU, Ann. 4, judges' folder, tab 3).

<sup>41</sup> Witness Statement of Andriy Shchekun (4 June 2018), para. 22 (MU, Ann. 13, judges' folder, tab 15); EU Sanction, pp. 17, 40 (MU, Ann. 357); MKRU, Colonel of the FSB Igor Strelkov Called the Senseless Assault on the Donetsk Airport (1 December 2014) (MU, Ann. 548).

<sup>42</sup> See RU, para. 285.

<sup>43</sup> Witness Statement of Father Klyment (29 March 2022), para. 7 (RU, Ann. 4, judges' folder, tab 3).

<sup>44</sup> Witness Statement of Father Klyment (29 March 2022), paras. 8-9 (RU, Ann. 4, judges' folder, tab 3); see also Electronic message from S. Kavtan (21 March 2014) (RU, Ann. 189).

that they had collaborated with the Nazis during World War II<sup>45</sup>. At the same time, unidentified, uniformed armed men — little green men — began appearing in Crimean Tatar settlements, claiming to own Crimean Tatar properties<sup>46</sup>.

14. As you will soon hear in more detail, Crimean Tatar and Ukrainian activists became targets of brutal disappearances, murders and torture<sup>47</sup>. An early tragic victim was Reshat Ametov, a well-known activist and Crimean Tatar, who was kidnapped by uniformed men while silently protesting in front of the Cabinet of Ministers building in Simferopol. Mr Ametov's body, bearing signs of brutal torture, was found two weeks later<sup>48</sup>.

15. The Russian Federation and its agents also sought to stir up fear and hatred by the ethnic Russian majority against the Ukrainian community, through a vigorous disinformation campaign which claimed that fascists had seized power in Kyiv and intended to come to Crimea to punish ethnic Russians there<sup>49</sup>. Posts appeared across social media claiming that Crimea was under threat from “Nazis”<sup>50</sup> — a chilling preview of a broader disinformation campaign that Russia continues today, employing it against Ukraine to support its brutal invasion based on false claims of preventing genocide. In the divisive run-up to the sham referendum, as this outrageous campaign poster shows, the forthcoming vote was depicted as “16 MARCH We Choose between [on the left] ‘Ukrainian Nazis’ or [on the right] ‘Russia in Crimea’”.

16. Yet despite all of this intimidation, on 16 March 2014, the vast majority of the Crimean Tatar community, and reportedly nearly half a million ethnic Ukrainians, boycotted the sham

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<sup>45</sup> MU, para. 372; Natalia Antelava, “Who Will Protect the Crimean Tatars”, *The New Yorker* (6 March 2014) (MU, Ann. 1039). See also First Magosci Report, para. 33 (MU, Ann. 21); United Nations Human Rights Council, *Report of the Special Rapporteur on Minority Issues on Her Mission to Ukraine (7-14 April 2014)*, UN doc. A/HRC/28/64/Add.1 (26 August 2014), para. 51 (MU, Ann. 760).

<sup>46</sup> MU, para. 372; OHCHR, Report on the human rights situation in Ukraine (15 April 2014), para. 88 (MU, Ann. 44); United Nations Human Rights Council, *Report of the Special Rapporteur on Minority Issues on Her Mission to Ukraine (7-14 April 2014)*, UN doc. A/HRC/28/64/Add.1 (26 August 2014), para. 51 (MU, Ann. 760).

<sup>47</sup> See MU, Chapter 9 (A).

<sup>48</sup> MU, para. 395; OHCHR, Report on the human rights situation in Ukraine (15 April 2014), para. 85 (MU, Ann. 44); Human Rights Watch, *Crimea: Disappeared Man Found Killed* (18 March 2014) (MU, Ann. 939).

<sup>49</sup> MU Memorial, para. 375; see also Ellen Nakashima, “Inside a Russian Disinformation Campaign in Ukraine in 2014”, *The Washington Post* (25 December 2017) (MU, Ann. 1072).

<sup>50</sup> MU, para. 375; see also Ellen Nakashima, “Inside a Russian Disinformation Campaign in Ukraine in 2014”, *The Washington Post* (25 December 2017) (MU, Ann. 1072).



referendum<sup>51</sup>. Yet in reporting the results, pro-Russian Crimean authorities falsely claimed that more than 90 per cent of the voters, on a turnout of 83.1 per cent, had voted in favour of Crimea's union with Russia<sup>52</sup>.

**B. Russia has engaged in a campaign of racial discrimination  
against Crimean Tatars and ethnic Ukrainians**

17. Madam President, Members of the Court: it is thus no mystery why the courageous Crimean Tatar and Ukrainian opposition to Russia's brutal actions would lead an authoritarian régime — intolerant of any opposition — to deliberately target these ethnic communities for discriminatory treatment<sup>53</sup>. As Ukraine demonstrates in its pleadings, the Russian Federation engaged in a two-part campaign to assert its dominance in Crimea by culturally erasing the Crimean Tatar and Ukrainian communities<sup>54</sup>.

18. *First*, Russia forcefully brought the full weight of its authoritarian security machinery into Crimea and applied it selectively to destroy the political and human rights of the Crimean Tatar and Ukrainian communities. *Second*, Russia abused its position as occupying power to promote its own culture, even while suppressing every means available to the Crimean Tatar and Ukrainian communities to preserve their own identities, through cultural gatherings, mass media, education or otherwise. The aim of both kinds of Russian action was unambiguous: *racial discrimination*. Their illegal purpose and effect violates the CERD's absolute prohibition against racial discrimination.

19. Yet instead of explaining how its conduct in Crimea can be reconciled with its CERD obligations, Russia's response throughout these proceedings has been deflection and evasion<sup>55</sup>. To evade accountability for its blatant violations of the CERD, Russia has erected a "paper castle" of

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<sup>51</sup> MU, para. 373; see also United Nations Security Council, *United Nations Human Rights Monitoring Mission Deployed to Crimea Amid Crisis Between Russian Federation, Ukraine, Security Council Told* (19 March 2014); OHCHR, *Report on the human rights situation in Ukraine* (15 April 2014), para. 4, fn.2 (MU, Ann. 44).

<sup>52</sup> MU, para. 373; State Council of Crimea, *Announcement of the Results of the Crimea-wide Referendum Held in Autonomous Republic of Crimea* (16 March 2014) (MU, Ann. 886); Media Relations Department of Sevastopol City Council, *Results of the Crimea-wide Referendum of 16 March 2014 Ratified at the Session of the City Council* (17 March 2014) (MU, Ann. 1086).

<sup>53</sup> See MU, paras. 364-365.

<sup>54</sup> See RU, para. 376; MU, para. 346.

<sup>55</sup> See generally RU, paras. 385-389.

unsupported legal arguments<sup>56</sup>. But on examination, these empty arguments collapse, and the illegality of its actions cannot be denied.

20. Instead of acting to suppress racial discrimination, as the CERD requires, Russia has shown its contempt for the Convention, and the fundamental rights it safeguards, by its ongoing treatment of these two groups protected by the CERD in Crimea: the Crimean Tatars and ethnic Ukrainians in Crimea. Russia's obvious disdain for equality rights is further confirmed by its refusal meaningfully to engage with the CERD Committee on issues related to Crimea, Sevastopol, and the ongoing armed conflict<sup>57</sup>.

### **III. CRIMEAN TATARS AND UKRAINIANS ARE DISTINCT ETHNIC GROUPS UNDER THE CERD**

21. Madam President, Members of the Court, as you observed in your preliminary objections Judgment in this case, "both Parties agree that Crimean Tatars and ethnic Ukrainians in Crimea constitute ethnic groups protected under CERD"<sup>58</sup>.

#### **A. History and self-identification of Crimean Tatars and Ukrainians**

22. The existence of these two ethnic groups is firmly rooted in objective historical fact, confirmed by how both groups now choose to self-identify. The history of the Crimean Tatar community dates back centuries<sup>59</sup>. It comprises individuals who describe themselves as such, who are Muslims of the Sunni faith, and who may, but do not necessarily, speak or understand a Turkic language called Crimean Tatar<sup>60</sup>.

23. As Professor Magocsi explains in his expert report, central to the Crimean Tatar sense of identity has been the cultivation of historical memory, including through commemoration of historical figures and events<sup>61</sup>. The Crimean Tatar community vividly recalls having spent nearly

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<sup>56</sup> See RU, para. 385.

<sup>57</sup> See, e.g. CERD Committee, Concluding Observations on the Combined Twenty-Fifth and Twenty-Sixth Periodic Reports of the Russian Federation, CERD/C/RUS/CO/25-26 (1 June 2023), para. 2 (judges' folder, tab 35).

<sup>58</sup> *Preliminary Objections, Judgment, I.C.J. Reports 2019 (II)*, p. 595, para. 95.

<sup>59</sup> MU, para. 350; see generally First Magocsi Report, paras. 21-43 (MU, Ann. 21).

<sup>60</sup> First Magocsi Report, para. 21 (MU, Ann. 21).

<sup>61</sup> *Ibid.*, para. 75.

half a century in exile thousands of miles from their ancestral home<sup>62</sup>, after being brutally deported to Soviet Central Asia by then-Soviet dictator, Joseph Stalin, at the end of the World War II<sup>63</sup>. Tragically, Stalin's racially discriminatory decision to impose brutal collective punishment on the Crimean Tatars as a group has now been replicated today by the current Russian régime's decision to brutally target their civil and cultural rights.

24. By comparison, the ethnic Ukrainian community in Crimea has a more recent history<sup>64</sup>. It encompasses those who speak Ukrainian as their primary means of communication, those who follow Ukrainian cultural traditions, as well as Russian-speakers who self-identify as Ukrainian<sup>65</sup>.

### **B. Russia has identified Crimean Tatars and ethnic Ukrainians as separate ethnic groups**

25. The evidence shows that the Russian Federation has singled out both of these communities, Crimean Tatars and ethnic Ukrainians, as distinct ethnic groups, who they subject to differential and discriminatory treatment. So by its discrimination, Russia confirms that these ethnic groups exist.

26. Ukraine's expert Professor Fredman has explained "where identification of an ethnic group is imposed by the dominant population in order to remove rights . . . or where a group is identified by the dominant population in a country as ethnically different, this will . . . be recognized"<sup>66</sup>. The "CERD Committee has also suggested that a group may be identified by the dominant population in a country as ethnically different, even if it does not regard itself as such"<sup>67</sup>. International criminal tribunals, such as the Rwanda Tribunal, have similarly observed that, among other considerations, "identity could be created and entrenched by an external dominant group such as a colonial force"<sup>68</sup>.

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<sup>62</sup> *Ibid.*

<sup>63</sup> See e.g. MU, para. 352; First Magoesi Report, paras. 30-35 (MU, Ann. 21).

<sup>64</sup> MU, paras. 351, 353; see also First Magoesi Report, paras. 43-57 (MU, Ann. 21).

<sup>65</sup> MU, para. 360; First Magoesi Report, paras. 83-85 (MU, Ann. 21).

<sup>66</sup> First Expert Report of Professor Sandra Fredman (6 June 2018), para. 19 (MU, Ann. 22, judges' folder, tab 4).

<sup>67</sup> First Fredman Report, para. 21 (MU, Ann. 22, judges' folder, tab 4).

<sup>68</sup> *Ibid.*, para. 26 (citing ICTR, *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T (2 Sept. 1998), paras. 170-171 (MU, Ann. 988)).

### C. The Russian Federation mischaracterizes Ukraine's position on ethnicity

27. But despite the Parties' agreement that Crimean Tatars and ethnic Ukrainians constitute protected groups under the CERD, Russia's lawyers would reduce Ukraine's definition of ethnicity to a simplistic claim that "political views can define ethnicity"<sup>69</sup>. Russia argues that Ukraine "seeks wrongly to broaden the notion of 'racial discrimination' under the CERD by defining the Ukrainian community in Crimea as an ethnic group *in the light of political views or opposition*"<sup>70</sup>. So Russia claims that Ukraine's definition of ethnicity is just a litigation tactic to further its "real goal . . . to challenge the status of Crimea"<sup>71</sup>. For at least four reasons, this Court should not be side-tracked by Russia's misdirection:

28. *First*, as already noted, Russia itself has admitted to the existence of a Crimean Tatar and ethnic Ukrainian community in Crimea. It had identified no specific claim or issue by Ukraine that turns on any claimed difference between the Parties regarding the definition of ethnicity.

29. *Second*, Russia's argument is based on a gross mischaracterization of Ukraine's position. Ukraine's claim is not that a person's ethnicity depends on "political opinion". Rather, Ukraine has explained that "the political community (and therefore the collectivity of other citizens) with which he or she *most identifies* is a relevant factor in assigning ethnicity"<sup>72</sup>.

30. It is no surprise that common ethnic identity will breed political community. History shows that ethnic groups usually desire to live together within a common political state. As Professor Magocsi has explained, this has been a goal of the Ukrainian nationalist movement since the nineteenth century<sup>73</sup>. And especially since Ukraine's independence in 1991, identification with the Ukrainian State has become an increasingly important marker of Ukrainian self-identity. This is particularly true among younger Ukrainians who have grown up exclusively within a free and democratic Ukraine<sup>74</sup>. These are the people who are fighting for Ukraine now. For many Ukrainians in Crimea, it is obvious why — especially after Russia's invasion in February 2014, and its even

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<sup>69</sup> RR, para. 883.

<sup>70</sup> RR, para. 881 (emphasis added).

<sup>71</sup> RR, para. 899.

<sup>72</sup> RU, para. 411 (citing Second Expert Report of Professor Sandra Fredman (21 Apr. 2022), Sec. IV.B (RU, Ann. 5)); emphasis added.

<sup>73</sup> RU, para. 410; Second Expert Report of Paul Magocsi (14 Apr. 2022), Sec. II (RU, Ann. 6).

<sup>74</sup> RU, para. 410; Second Magocsi Report, Sec. III (RU, Ann. 6).

more brutal invasion of the entire territory of Ukraine nine years later — that their self-identification as Ukrainians, not Russians, would only intensify<sup>75</sup>.

31. *Third*, Russia argues for an outdated, static view of ethnicity, relying on this Court’s quite different Judgment in *Qatar v. United Arab Emirates*<sup>76</sup>. But as the Court recalls, that case was not about ethnic origin; it concerned whether the CERD’s protection based on “national origin” extends to measures based on national citizenship. This Court was thus called upon to interpret the meaning of the term “national origin” as that phrase is used in the CERD<sup>77</sup>. But on its face, the concept of “national origin” is plainly distinct from the term at issue here, “ethnic origin”. This distinction is also reflected in the Convention’s drafting history<sup>78</sup>. So the Court in *Qatar v. United Arab Emirates* considered issues that specifically concern national origin — such as the CERD’s express exclusion of measures based on citizenship reflected in Articles 1 (2) and 1 (3), as well as evidence from the Convention’s drafting history. The Court held “the term ‘national origin’ . . . does not encompass current nationality”<sup>79</sup>. But this case, unlike the *Qatar* case, is about discrimination based *solely* on ethnic origin, directed against affected communities who are undeniably protected ethnic groups under the CERD.

32. *Fourth*, Russia charges that Ukraine’s definition of ethnicity demonstrates that its “real goal is to challenge the status of Crimea”<sup>80</sup>. But this is only further evidence of Russia’s effort to make this case something it is not. As this Court has already acknowledged, Ukraine *does not* ask this Court to make any determination regarding the status of Crimea. Ukraine seeks only to hold Russia accountable for its naked violations of the CERD. Russia’s baseless claim simply ignores this Court’s own clear statement at preliminary objections that:

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<sup>75</sup> RU, para. 410; Second Magocsi Report, paras. 68-70 (RU, Ann. 6).

<sup>76</sup> See e.g. RR, paras. 884-885.

<sup>77</sup> See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021*, pp. 108-109, para. 112.

<sup>78</sup> See UN General Assembly, Twentieth Session, 1304th Meeting of the Third Committee, UN doc. A/C.3/SR.1304 (14 Oct. 1965), paras. 4, 23; UN Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities (Sixteenth Session), Summary Record of the 410th Meeting Held 15 January 1964, E/CN.4/Sub.2/SR.410 (7 Feb. 1964), p. 9; Commission on Human Rights, Subcommission on Prevention of Discrimination and Protection of Minorities, Summary Record of the 411th Meeting Held at Headquarters, New York, E/CN.4/Sub.2/SR.411 (5 Feb. 1964), pp. 5-7 (MU, Ann. 737, judges’ folder, tab 7).

<sup>79</sup> See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 98, para. 83, pp. 101-103, paras. 93-97.

<sup>80</sup> RR, para. 899.

“In the present case, the Court notes that Ukraine is not requesting that it rule on issues concerning the Russian Federation’s purported ‘aggression’ or its alleged ‘unlawful occupation’ of Ukrainian territory. Nor is the Applicant seeking a pronouncement from the Court on the status of Crimea or on any violations of rules of international law other than those contained in the ICSFT and CERD. These matters therefore do not constitute the subject-matter of the dispute before the Court.”<sup>81</sup>

It could not be any clearer.

33. In sum, Russia cannot hide behind its purported annexation of Crimea to evade accountability for its violations of the CERD. The question before you is discrimination, pure and simple. Has Russia discriminated against the Crimean Tatar and ethnic Ukrainian communities in the peninsula, in purpose or effect?

#### **IV. RUSSIA’S SO-CALLED NATIONAL SECURITY, ANTI-EXTREMISM AND PUBLIC ORDER DEFENCES SHOULD BE REJECTED**

34. Instead of answering that straightforward question, Russia tries to “justify” its discrimination, such as its “ban on the *Mejlis*, the detentions and searches of certain individuals, and the limitations imposed on the organization of certain public rallies and protests”<sup>82</sup>. Russia would have you excuse that discrimination based on national security, anti-extremism and public order<sup>83</sup>. But these excuses have no traction here, for the simple reason that the CERD’s absolute prohibition of racial discrimination is not subject to derogation<sup>84</sup>. Russia cannot claim exemption from its non-derogable CERD obligations just because it has adopted measures ostensibly directed at a national security or extremist threat, or a risk to public order<sup>85</sup>.

35. Russia would treat national security, anti-extremism, and public order as self-judging exceptions to its peremptory human rights obligations, that it is free to invoke retroactively and at will<sup>86</sup>. Although “national security” is recognized in international human rights law as a legitimate aim that *may*, under different circumstances, justify necessary and proportionate restrictions on other non-peremptory rights, it “cannot provide proper justification in respect of any intrusions into

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<sup>81</sup> *Preliminary Objections, Judgment, I.C.J. Reports 2019 (II)*, p. 577, para. 29.

<sup>82</sup> RR, para. 886.

<sup>83</sup> See e.g. *ibid.*

<sup>84</sup> See generally Scheinin Report, paras. 8-15 (RU, Ann. 7).

<sup>85</sup> See e.g. RU, para. 428.

<sup>86</sup> See RU, para 429.

so-called underlying substantive rights”<sup>87</sup>. Nor does international law support treating countering “extremism” as a legitimate objective that could justify restrictions on appropriate human rights<sup>88</sup>. Because national anti-extremism laws do not enjoy global acceptance, they require “even closer scrutiny than counter-terrorism laws”<sup>89</sup>.

36. But Russia would “justify” its actions by citing its own domestic statutes or case laws<sup>90</sup>. But it is those very Russian laws, and their racially discriminatory application in Crimea that violate the CERD. Russia’s “anti-extremism” laws, in particular, have granted Russian authorities arbitrary powers that they have widely abused to suppress the Crimean Tatar and ethnic Ukrainian communities<sup>91</sup>.

37. For that reason, those laws have been widely criticized. To take just one example, in 2017, the CERD Committee identified Russia’s anti-extremism law, Federal Law No. 114-FZ, as “vague and broad”, an issue exacerbated by Russia’s amendments to its criminal code. The CERD Committee expressed concern that these laws contained no “clear and precise criteria on how materials may be classified as extremist”<sup>92</sup>. The sweeping definitions in this law, the Committee observed, “can be used arbitrarily to silence individuals, in particular those belonging to groups vulnerable to discrimination, such as ethnic minorities, indigenous peoples or non-citizens”<sup>93</sup>.

38. Other international organizations — including notably the Human Rights Committee of the International Covenant on Civil and Political Rights (ICCPR) and the Venice Commission — have echoed the CERD Committee’s concerns<sup>94</sup>. The European Court of Human Rights has also dealt

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<sup>87</sup> Scheinin Report, para. 27 (RU, Ann. 7).

<sup>88</sup> RU, para. 431 (citing Scheinin Report, para. 33 (RU, Ann. 7)).

<sup>89</sup> Scheinin Report, para. 33 (RU, Ann. 7).

<sup>90</sup> See e.g. Counter-Memorial of the Russian Federation, Part II (CMR-2), paras. 155-159.

<sup>91</sup> See e.g. RU, para. 426; MU, paras. 443 and 514-521.

<sup>92</sup> CERD Committee, Concluding Observations on the Russian Federation, CERD/C/RUS/CO/23-24 (20 Sept. 2017), para. 11 (MU, Ann. 804, judges’ folder, tab 5); see also CERD Committee, Concluding Observations on the Combined Twenty-Fifth and Twenty-Sixth Periodic Reports of the Russian Federation, CERD/C/RUS/CO/25-26 (1 June 2023), para. 20.

<sup>93</sup> CERD Committee, Concluding Observations on the Russian Federation, CERD/C/RUS/CO/23-24 (20 Sept. 2017), para. 11 (MU, Ann. 804, judges’ folder, tab 5); see also CERD Committee, Concluding Observations on the Combined Twenty-Fifth and Twenty-Sixth Periodic Reports of the Russian Federation, CERD/C/RUS/CO/25-26 (1 June 2023), para. 20.

<sup>94</sup> Council of Europe, European Commission for Democracy Through Law (Venice Commission), Opinion No. 660/2011 on the Federal Law on Combating Extremist Activity of the Russian Federation, CDL-AD(2012)016 (20 June 2012) (MU, Ann. 817); see also Scheinin Report, para. 36–37 (RU, Ann. 7).

with many cases in which it has found that Russia's application of this Russian Federal Law in violation of international standards<sup>95</sup>. Yet, Russia's Rejoinder entirely fails to undermine the weight of this international authority<sup>96</sup>.

39. Shortly before Russia purported to annex Crimea, Russia amended its Criminal Code to criminalize “[p]ublic calls to carry out actions aimed at violating the territorial integrity of the Russian Federation”<sup>97</sup>. Upon supposedly annexing the peninsula, Russia extended to Crimea the application of both its anti-extremism statute and its amended criminal code. These amendments only exacerbated the discriminatory impact of Russian federal law. By so doing — Professor Martin Scheinin has observed — “[Russia] effectively made it a crime to publicly state that [the simple fact that] Crimea is a part of the internationally recognized territory of Ukraine”<sup>98</sup>.

40. Consequently, based on his expert review of Russia's anti-extremism laws, Professor Scheinin — the first United Nations Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism — concluded that these laws “should not enjoy the benefit of being treated as a neutral legal framework which is being applied in good faith to the benefit of good order”<sup>99</sup>. Instead, he said, these laws “should be regarded as suspect”, because their “inherent features . . . make them into a mechanism for targeting not only violent or dangerous actions but also *any mobilization or activity of ethnic communities that could be perceived to indicate disloyalty to the central government*”<sup>100</sup>.

41. Thus, far from “justifying” Russia's discriminatory treatment of the Crimean Tatar and ethnic Ukrainian communities, Russia's extremism laws are *evidence* of Russia's discriminatory purpose in harshly applying its laws against those communities. Russia's anti-extremism framework — and its other efforts to address “anti-terrorism” or “national security” concerns or issues of “public order” — are thinly disguised tools to punish those ethnic communities who refuse

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<sup>95</sup> See RU, para. 426; see also e.g. *Dmitriyevskiy v. Russia*, ECtHR App. No. 42168/06, Judgment (3 Oct. 2017); *Stomakhin v. Russia*, ECtHR App. No. 52273/07, Judgment (9 May 2018); *Alekhina v. Russia*, ECtHR App. No. 38004/12, Judgment (17 July 2018); *Savva Terentyev v. Russia*, ECtHR App. No. 10692/09, Judgment (28 Aug. 2018).

<sup>96</sup> See e.g. RR, para. 893.

<sup>97</sup> Russian Federation, Federal Law No. 433-FZ of 28 Dec. 2013, ‘On Amendments to the Criminal Code of the Russian Federation’ (RU, Ann. 94); see also Scheinin Report, para. 38 (RU, Ann. 7).

<sup>98</sup> Scheinin Report, para. 38 (RU, Ann. 7).

<sup>99</sup> Scheinin Report, para. 43 (RU, Ann. 7, judges’ folder, tab 6).

<sup>100</sup> *Ibid.* (emphasis added).



to declare fealty to the Russian Government. So at bottom, these laws are not for the purpose of national security or anti-extremism. Russia's *application* of these laws in Crimea has a deliberate discriminatory purpose and a devastating discriminatory effect.

42. Because the Russian legislation and measures at issue amount to racial discrimination, this Court must conclude that the CERD is violated. Russia cannot invoke allegedly legitimate aims to justify measures that choose to discriminate based on race or ethnic origin. The Convention itself makes clear that even lawful ends can never justify discriminatory means.

43. As this afternoon proceeds, we will demonstrate how the purpose and effect of Russia's measures has been to discriminate against Crimean Tatars and ethnic Ukrainians and further show why Russia cannot escape liability by claiming such "justifications", as national security. Ms Cheek, will return to the podium to explain next, why as a matter of law, a State may only assert such "justifications" in a narrow class of cases, where it must satisfy a high evidentiary burden that Russia does not remotely meet. Then my colleague, Ms Trevino, will document, as a matter of fact, the discriminatory purpose and effect of Russia's myriad discriminatory acts in Crimea restricting civil and political rights and erasing cultural expression. Finally, Professor Thouvenin will close our presentation by showing how Russia's overtly discriminatory campaign in Crimea has violated your provisional measures Order in this case and, against your clear mandate, clearly and gravely aggravated this dispute.

#### **V. RUSSIA'S UNCLEAN HANDS DEFENCE IS MERITLESS AND MUST BE REJECTED**

44. To repeat what I said this morning, the Court's recent decision in the *Certain Iranian Assets* case specified that the unclean hands doctrine is not "part of customary international law or . . . a general principle of law"<sup>101</sup>. The Court further recognized that, "[a]s a defence on the merits, the Court has always treated the invocation of 'unclean hands' with the utmost caution"<sup>102</sup>.

45. Russia's exorbitant unclean hands claims here again shows why this "utmost caution" is warranted. Just as Russia did to advance this same argument to evade its responsibility under the

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<sup>101</sup> *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Judgment of 30 March 2023, para. 81.

<sup>102</sup> *Ibid.*; ILC Articles on State Responsibility: Commentary, Chapter V, p. 72, para. 9 (MU, Ann. 279).

ICSFT, it is making similar outlandish claims against Ukraine, baselessly branding Ukrainians and the Ukrainian Government as “Nazis” who are oppressing Russian speakers<sup>103</sup>. But Russia supports its claim with no evidence, because there is none. Russia simply repeats its own government propaganda, outrageously mischaracterizing both objective facts and applicable Ukrainian laws<sup>104</sup>.

46. Madam President, Members of the Court: Russia’s efforts are particularly egregious in a case like this, where the treaty involved is a landmark, *erga omnes* human rights instrument and where Russia has engaged in a systematic campaign of racial discrimination that violates almost every provision of this historic treaty.

47. Russia would distract you from its own egregious misconduct, by claiming that *Ukraine* is mistreating ethnic minorities in its territory, including Crimean Tatars<sup>105</sup>. Crimean Tatars who had been forcibly deported from Crimea under Stalin returned to an independent Ukraine, encouraged by Ukrainian authorities<sup>106</sup>. Before Russia’s purported annexation, Ukraine worked hard to build a genuinely multi-ethnic society of Ukrainians, Russians, and Crimean Tatars, as well as other groups in Crimea. Ukraine has acknowledged the challenges it has faced in reintegrating hundreds of thousands of returning Crimean Tatars into the economy and society of the peninsula<sup>107</sup>. But Ukraine has also demonstrated that, unlike Russia, it made conscious, substantial efforts to promote multiculturalism in Crimea. So just before the purported annexation, in 2013, the High Commissioner for National Minorities of the OSCE praised the Ukrainian government for its efforts to reintegrate the Crimean Tatar and other formerly deported peoples, while noting that much work remained to be done<sup>108</sup>. And these efforts continue today, as reflected in the law “On the Indigenous Peoples of Ukraine”, adopted in July 2021<sup>109</sup>.

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<sup>103</sup> See RR, Chap. 2 (II) (B)-(C).

<sup>104</sup> See *ibid.*

<sup>105</sup> See *ibid.*, Chap. 2 (II) (A).

<sup>106</sup> MU, para. 356; First Magocsi Report, para. 17 (MU, Ann. 21).

<sup>107</sup> See e.g. MU, para. 356.

<sup>108</sup> Organization for Security and Co-operation in Europe High Commissioner for National Minorities, The Integration of Formerly Deported People in Crimea, Ukraine: Needs Assessment (Aug. 2013), p. 2 (MU, Ann. 805); see also MU, para. 356.

<sup>109</sup> Law of Ukraine No 1616-IX “On the Indigenous Peoples of Ukraine” (1 July 2021) (RR, Ann. 446).

48. But crucially, this case is not about *Ukraine's* treatment of any of these minorities. This case challenges *Russia's* many acts of discrimination in violation of the CERD with respect to the Crimean Tatar and Ukrainian communities. For all of its rhetoric, Russia has conspicuously declined to raise any counter-claims challenging Ukraine's liability under the Convention. Russia's glaring omission makes its renewed "unclean hands" argument not just demonstrably false, but just legally irrelevant to the case before you.

49. Madam President, Members of the Court: every day, we witness Russia's contempt for the human rights of the Ukrainian people. But the point is this: Russia does not just bomb and shell; it does not just tolerate and support those who terrorize the Ukrainian people. It is pursuing a long-term project to erase the rights and culture that make Ukraine a proud multi-ethnic nation, to wipe out what makes Ukrainians, Ukrainians, and what makes Crimean Tatars, Crimean Tatars. And now, Russia would seek to enlist this Court to condone this blatantly discriminatory campaign. But after so many years, the path is finally clear. You can finally rule, on the merits, that Russia's acts violate this historic Convention on the Elimination of All Forms of Racial Discrimination. The law is clear. The evidence is overwhelming. We ask you to give judgement for Ukraine, and thereby to send a message to all nations, by rejecting Russia's transparent attempt to avoid accountability for its discrimination in Crimea.

50. I now ask that you call to the podium, Ms Cheek.

The PRESIDENT: I thank Prof. Koh. I now give the floor again to Ms Marney Cheek. You have the floor, Ms Cheek.

Please go ahead.

Ms CHEEK:

#### **THE LAW APPLICABLE TO UKRAINE'S CLAIMS UNDER THE CERD**

1. Madam President, Members of the Court, it is an honor to appear again before you in these proceedings on behalf of Ukraine.

2. The focus of my presentation will be the legal obligations of the Russian Federation under the Convention on the Elimination of All Forms of Racial Discrimination.

3. First, I will address the definition of racial discrimination reflected in Article 1 (1) of the Convention. In this context, I will clarify that Ukraine's claims are those of race discrimination, not political discrimination. I also will address Russia's mistaken argument that its forced citizenship régime is beyond the CERD's purview.

4. Second, I will focus on Russia's legal violations of the CERD, which will then be addressed in more detail by my colleague, Ms Clovis Trevino.

5. Finally, I will discuss the appropriate standard of proof in this case. I will explain why this Court must reject Russia's attempt to make racial discrimination under the CERD more difficult to prove just because Russia has aggressively engaged not only in individual, isolated instances of discrimination, but in a pattern of discriminatory conduct.

## **I. THE DEFINITION OF RACIAL DISCRIMINATION**

### **A. The text of Article 1 (1)**

6. Let me turn first to the Convention's definition of "racial discrimination". As you are aware, the Convention defines "racial discrimination" broadly.

#### **1. Distinction, exclusion, restriction or preference**

7. The first element of the definition: a "distinction, exclusion, restriction or preference". The plain meaning of this language reflects the CERD's broad prohibition on *all* forms of racial discrimination. The drafting history of the Convention further confirms the intended breadth of this language. As noted by Finland's representative in the early stages of the Convention's drafting, "[t]he words 'distinction, exclusion, preference and limitation' would cover all aspects of discrimination which should be taken into account"<sup>110</sup>. The word "limitation" was ultimately replaced by "restriction", but this amendment does not detract from the point. By the time the Third Committee came to a vote on what would become the final text of Article 1 (1), the drafter's intention was clear. In the words of the United States delegate, "every form of racial discrimination was pernicious" and

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<sup>110</sup> Commission on Human Rights, Subcommission on Prevention of Discrimination and Protection of Minorities, Summary Record of the 411th Meeting Held at Headquarters, New York, E/CN.4/Sub.2/SR.411 (5 Feb. 1964), p. 6 (MU, Ann. 737, judges' folders, tab 7).

the Convention's definition in Article 1 "applied to every manifestation of that evil, even if each one was not specifically mentioned"<sup>111</sup>.

## **2. Based on a protected ground**

8. The second element of the definition of race discrimination requires that the relevant distinction, exclusion, restriction or preference be "based on" a protected ground, namely "race, colour, descent, or national or ethnic origin". It is well understood that Ukraine's claims focus on discrimination as to ethnic origin against the Crimean Tatars and the ethnic Ukrainians in Crimea.

9. Discrimination "based on" a protected ground is a broad concept. As Judge Crawford explained in his declaration at the provisional measures phase of this case, Article 1 (1) "does not require that the restriction in question be based expressly on racial or other grounds enumerated in the definition; it is enough that it directly implicates such a group on one or more of these grounds"<sup>112</sup>.

10. The breadth of the term "based on" is confirmed by the context in which it appears in Article 1 (1). As the CERD Committee has explained in its General Recommendation No. 14, "the words 'based on' do not bear any meaning different from 'on the grounds of'", such that a distinction is "contrary to the Convention if it has either the purpose or the effect of impairing particular rights and freedoms"<sup>113</sup>.

## **3. Purpose or effect of nullifying or impairing the recognition, enjoyment or exercise of human rights and fundamental freedoms**

11. This leads me to the third element of the Article 1 (1) definition of racial discrimination, the phrase "purpose or effect". The disjunctive "or" in the phrase "purpose *or* effect" makes clear that the CERD protects against both discrimination that can be demonstrated to have a discriminatory purpose, as well as effects-based discrimination — where a measure is facially neutral, but gives rise

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<sup>111</sup> See UN General Assembly, Twentieth Session, 1373rd Meeting of the Third Committee, UN doc. A/C.3/SR.1373 (14 Dec. 1965), para. 40 (judges' folders, tab 8); see also RR, para. 826 (citing N. Lerner, *The UN Convention on the Elimination of All Forms of Racial Discrimination* (Brill, 2015), p. 33).

<sup>112</sup> *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, declaration of Judge Crawford, p. 215, para. 7; see also *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021*, dissenting opinion of Judge Robinson, pp. 152-153, para. 20.

<sup>113</sup> CERD Committee, General Recommendation 14, para. 1 (MU, Ann. 788, judges' folders, tab 9).

to a “distinction, exclusion, restriction or preference” in the form of an impermissibly disproportionate impact on a protected class.

12. Whether discriminatory in purpose or effect, the prohibition against racial discrimination is absolute. Put another way, once racial discrimination has been established, there is no circumstance under which a derogation is allowed, as Professor Koh explained earlier.

13. In examining what constitutes racial discrimination under the CERD, the Parties have divergent views of how to meet the definition of racial discrimination in Article 1 (1) and what evidence is required. Of course, in the modern era, there are few laws that simply state a racist purpose or mandate a racist effect. And so it is appropriate, indeed, it is necessary, to look to circumstantial evidence to determine whether racial discrimination has occurred.

14. First, let me speak to purpose. Discriminatory purpose may be apparent on the face of a challenged measure, but discriminatory purpose also can be ascertained from the nature or context of the measure. With regard to the Russian Federation’s actions in Crimea, Russia has singled out ethnic minorities for discriminatory treatment, including through the enforcement of broad and vague laws — engaging in a pattern of conduct that evidences racial animus and discriminatory purpose. As I mentioned, once discriminatory purpose is established, the definition of racial discrimination under Article 1 (1) of the CERD is met.

15. Second, let me speak to effect. The context and circumstances of a challenged measure are also relevant to the assessment of effects-based discrimination. As the CERD Committee observed in *L.R. v. Slovakia*, in assessing measures which are “discriminatory in fact and effect, . . . the Committee must take full account of the particular context and circumstances of the petition, as by definition indirect discrimination can only be demonstrated circumstantially”<sup>114</sup>.

16. While the Convention speaks of “purpose or effect”, at times the two should be read together in assessing racial discrimination. As Judge Theodor Meron has observed, “[t]he word ‘effect’ may thus bring actions for which discriminatory purpose could not be established within the scope of the Convention by allowing the inference of purpose from effect; consequences may be

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<sup>114</sup> CERD Committee Opinion, *L.R. v. Slovakia*, Communication No. 31/2003, CERD/C/66/D/31/2003 (10 March 2005), para. 10.4 (judges’ folder, tab 10).

probative of an actor's intent"<sup>115</sup>. In other words, where a measure is discriminatory in effect, this may also be evidence that discrimination was the purpose of the measure all along.

17. The Russian Federation claims, and I quote from its Rejoinder, that where "a given measure can be reasonably justified or deemed legitimate, it does not qualify as racial discrimination under the CERD"<sup>116</sup>. But "reasonably justified" is not the applicable standard. As the CERD Committee has stated in its General Recommendation No. 14, "[i]n seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether [the challenged measure] has an unjustifiable disparate impact" on a protected group<sup>117</sup>. Further, any disparate impact on the basis of a protected ground must be based on a "legitimate" justification when "judged against the objectives and purposes of the Convention"<sup>118</sup>.

18. In the context of the ICCPR, for example, the Human Rights Committee has set out a rigorous test that looks at whether the human rights intrusive measure is, among other things, "necessary", has a "genuine and identifiable legitimate aim", and conforms to the "(strict) principle of proportionality in that the expected benefit obtained towards serving the legitimate aim invoked outweighs any adverse impact upon human rights"<sup>119</sup>.

19. It follows that conduct resulting in a disparate impact will constitute racial discrimination unless the relevant measure is necessary, it has a legitimate aim and is proportionate, in that the expected benefit in furtherance of the legitimate aim outweighs any adverse impact on human rights. This is an objective assessment that precludes Russia from invoking its self-judging "justifications" or hiding behind its national laws to racially discriminate. Clear and objective proof is required and the standard is high. Russia has come nowhere close to satisfying this high bar for justifying effects-based discrimination.

20. The Court also should bear in mind that the adverse impact on human rights is comprehensive in scope, covering, in the words of Article 1 (1), any acts "nullifying or impairing the

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<sup>115</sup> Theodor Meron, "The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination", *American Journal of International Law*, Vol. 79 (1985), p. 288 (MU, Ann. 1011).

<sup>116</sup> RR, para. 886.

<sup>117</sup> CERD Committee, General Recommendation 14, para. 2 (MU, Ann. 788, judges' folder, tab 9).

<sup>118</sup> *Ibid.*; see also CERD Committee, General Recommendation 32, para. 8 (MU, Ann. 790, judges' folder, tab 11).

<sup>119</sup> See Scheinin Report, para. 22 (RU, Ann. 7); see also Human Rights Committee, General Comment No. 27, paras. 11, 14-15; Human Rights Committee, General Comment No. 37, paras. 37, 40-47.

recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of human life”. This is the comprehensive legal framework that should inform the Court’s analysis of Ukraine’s claims.

**B. Ukraine’s claims focus on racial discrimination,  
not political discrimination**

21. I turn next to the question of whether conduct that constitutes racial discrimination in purpose or effect nonetheless falls outside the scope of the Convention merely because that conduct may have been motivated by political reasons. The answer to this question is “no”.

22. The Russian Federation subjected the Crimean Tatar and Ukrainian communities in Crimea to unfavourable treatment as a collective punishment for opposing Russia’s unlawful occupation of Crimea. The Russian Federation twists this fact to claim that, in reality, Ukraine’s complaint is that Russia has cracked down on individuals based on their political opinions, which falls outside the Convention’s scope<sup>120</sup>.

23. But Ukraine’s claims focus on specific, racially discriminatory measures that have had the purpose or effect of restricting the human rights of ethnic Ukrainians and Crimean Tatars. Those measures fall squarely within the Convention. The fact that Russia’s discriminatory measures may have been motivated, in whole or in part, by politics does not exempt Russia’s race discrimination from the Convention. Put another way, a “distinction, exclusion, restriction or preference” based on a protected class does not fall outside the definition of “racial discrimination” simply because the perpetrator may also have had political reasons for discriminating against these ethnic minorities.

24. This can be illustrated by an example. In 1944, expulsion and forced deportation by the Soviet Union of the Crimean Tatar people from Crimea was allegedly motivated by Stalin’s accusation that the Crimean Tatars had collaborated with Germany during World War II<sup>121</sup>. But, as Professor Fredman explains in her expert testimony, there is no question that, had the CERD been in force in 1944, this forced deportation would have qualified as a distinction based on ethnic origin

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<sup>120</sup> See e.g. CMR-2, paras. 115-117, 122.

<sup>121</sup> See State Defense Committee of the Soviet Union Decree No. 589, “On the Crimean Tatars” (11 May 1944), p. 2 (MU, Ann. 871).



which has the purpose or effect of nullifying and impairing the human rights of the Crimean Tatar people — regardless of motive<sup>122</sup>.

25. If Russia were correct, a State could avoid responsibility under the CERD by asserting political reasons for its actions. A “political motive” exception to the anti-discrimination norm would allow the State to set the terms of its own compliance with the CERD. That cannot be reconciled with the object and purpose of the Convention: namely, to eliminate *all* forms of racial discrimination, whatever the claimed motive might be.

### **C. The exclusions from the CERD’s definition of racial discrimination do not apply to Ukraine’s claims**

26. I will now say a brief word about the explicit and tailored exclusions from the broad definition of “racial discrimination” in CERD Article 1(1) before I turn to the substantive provisions of the CERD.

27. The Russian Federation relies on the exclusions reflected in Article 1 (2) and 1 (3), to argue that Ukraine’s “forced citizenship” claims fall outside the scope of the Convention<sup>123</sup>. But Russia misstates Ukraine’s case. Ukraine’s case does not concern “distinctions between citizens and non-citizens” within the meaning of Article 1 (2), and Ukraine does not challenge “legal provisions . . . concerning nationality, citizenship or naturalization”, within the meaning of Article 1 (3). Rather, Ukraine submits that Russia’s special citizenship régime in Crimea — which Russia explains expanded its citizenship “quickly and *en masse*”<sup>124</sup> — has particularly burdened the human rights of the Crimean Tatars and ethnic Ukrainian communities in Crimea<sup>125</sup>. Simply put, Russia weaponized its citizenship law to advance a policy and practice of racial discrimination against the Crimean Tatar and ethnic Ukrainian communities.

28. In any event, as the CERD Committee has recognized, Russia cannot shield its conduct from the purview of the CERD, where such conduct has the purpose or effect of discriminating against protected groups on grounds prohibited under the Convention, “including in relation to

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<sup>122</sup> Second Fredman Report, para. 27 (RU, Ann. 5, judges’ folder, tab 12).

<sup>123</sup> RR, paras. 1107–1109; CMR-2, paras. 380–381.

<sup>124</sup> CMR-2, App. C, para. 3.

<sup>125</sup> *See, e.g.*, OHCHR, Situation of Human Rights in the Temporarily Occupied Autonomous Republic of Crimea and the City of Sevastopol, U.N. Doc. No. A/HRC/36/CRP.3 (25 September 2017), para. 6 (Ukraine’s Memorial, Ann. 778).

nationality and citizenship rights”<sup>126</sup>. As Judge Iwasawa explained in his separate opinion in *Qatar v. United Arab Emirates*:

“If differentiation of treatment based on nationality has the ‘purpose or effect’ of discrimination based on one of the prohibited grounds listed in Article 1, paragraph 1, it is capable of constituting ‘racial discrimination’ within the meaning of the Convention.”<sup>127</sup>

The same holds true for citizenship. I respectfully refer the Court to paragraphs 456 to 473 of Ukraine’s Memorial and paragraphs 557 to 569 of its Reply for a discussion of the harms flowing from Russia’s weaponization of its citizenship régime.

29. Russia also argues that the Court should dismiss Ukraine’s claims because they are grounded in violations of international humanitarian law<sup>128</sup>. But once again Russia misstates Ukraine’s case under the CERD. Ukraine’s claims, including those on forced citizenship, are based solely on the discriminatory purpose or effect of various measures on the Crimean Tatar and ethnic Ukrainian communities in Crimea, and in no way require a finding that Russia is an occupying Power that is violating international humanitarian law<sup>129</sup>.

## II. THE CERD’S SUBSTANTIVE PROTECTIONS

30. Madam President, Members of the Court, I will now turn to the second topic in my presentation, the substantive provisions of the CERD.

31. Through its systemic campaign of racial discrimination against the Crimean Tatar and ethnic Ukrainian communities in Crimea, the Russian Federation has violated almost every substantive provision of the CERD. I will now very briefly examine the provisions relevant to Ukraine’s claims. I will take these Articles out of order, addressing first Articles 2 and 5, which together set out a vast set of obligations for States parties, prohibiting racial discrimination in connection with a wide range of human rights, before returning to the remaining Articles.

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<sup>126</sup> CERD Committee, Concluding Observations on the Russian Federation, CERD/C/RUS/CO/23-24 (20 Sept. 2017), para. 20 (Ukraine’s Memorial, Ann. 804) (judges’ folder, tab 5); *see also* CERD Committee, General Recommendation No. 30, para. 4.

<sup>127</sup> *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021*, separate opinion of Judge Iwasawa, p. 173, para. 49; *see also ibid.*, *Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018*, joint declaration of Judges Tomka, Gaja and Gevorgian, p. 437, para. 6.

<sup>128</sup> RR, para. 1140.

<sup>129</sup> RU, para. 397.

**A. The obligation to eliminate racial discrimination — Article 2**

32. Article 2 of the CERD sets out the Convention’s fundamental obligations. As Russia does not dispute the content or scope of its obligations under Article 2, I will address it only briefly.

33. Under Article 2, each State has undertaken “to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms”. States have further undertaken, under subparagraph (a), “to engage in no act or practice of racial discrimination”. A State party’s responsibility will thus be engaged where it has committed individual acts of racial discrimination. A State party’s responsibility will also be engaged where it has undertaken a practice of racial discrimination, in other words, a series of acts that constitute a pattern of discriminatory conduct<sup>130</sup>.

34. Under subparagraph (b) of Article 2, States further undertake “not to sponsor, defend or support racial discrimination by any persons or organizations”. This obligation is reinforced by subparagraph (d), which provides that each State party shall “prohibit and bring to an end . . . racial discrimination by any persons, group, or organization”. As indicated by the CERD Committee in a 1994 report to the United Nations General Assembly, the broad language of these provisions captures a range of non-State actors, including private militias, paramilitaries and other organized groups ostensibly outside of the State’s control<sup>131</sup>.

35. The Russian Federation has blatantly, and wilfully, disregarded its obligations under CERD Article 2. Its discriminatory pattern of conduct directed at the Crimean Tatar and Ukrainian communities, as well as each discriminatory act comprising such a practice, violates Article 2 (1) (a). As you will hear in greater detail from Ms Trevino, Russia has engaged in a broad assault on the political and civil rights of Crimean Tatars and ethnic Ukrainians in Crimea, through a pattern of physical violence, arbitrary searches and detentions and widespread fear. It has also forced Russian culture and language onto Crimea, while stripping these protected groups of their ability to preserve and transmit their native language through education, and to gather in commemoration of their history and culture. To the extent that Russia has ignored and denied responsibility for any particular discriminatory act that was undertaken by non-State agents, Russia has additionally violated its

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<sup>130</sup> MU, para. 589.

<sup>131</sup> See Report of the CERD Committee, General Assembly Official Records: 48th Session, Supp. No. 18, UN doc. No. A/48/18 (19 Jan. 1994), para. 543 (MU, Ann. 792).

Article 2 (1) (b) obligation not to sponsor, defend or support acts of discrimination by “any persons or organizations”.

### **B. Equality before the law — Article 5**

36. I turn next to Article 5 of the Convention. This Article requires States, in compliance with Article 2, “to prohibit and to eliminate racial discrimination in all of its forms and to guarantee the right of everyone . . . to equality before the law, notably in the enjoyment of” a series of civil, political, economic, social and cultural rights.

37. I will pause here to address the meaning of equality before the law in this context. The principle of “equality before the law” is closely related to the principle of non-discrimination. As explained by the CERD Committee in its General Recommendation No. 32, the principle of equality underlying the Convention’s prohibition on discrimination “combines formal equality before the law with equal protection of the law”, where the “aim to be achieved” by the CERD is “*de facto* equality in the enjoyment and exercise of human rights”<sup>132</sup>. Equality before the law is therefore not synonymous with equal treatment, as Russia suggested in its Rejoinder. To use the words of Judge Tanaka in his seminal dissenting opinion in *South West Africa*, “the principle of equality before the law . . . means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal”<sup>133</sup>.

38. Article 5, of course, then goes on to enumerate numerous fundamental rights for which equality before the law must be guaranteed. And as you will hear from Ms Trevino, the Russian Federation has violated almost every provision of Article 5 through its treatment of Crimean Tatars and ethnic Ukrainians in Crimea. By way of example:

39. Article 5 (b) requires States parties to guarantee equality before the law with respect to the “right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual, group or institution”. The breadth of this protection is self-evident — it contains no restricting language and instead fully guarantees the rights of protected persons or groups. Russia has violated this provision by directly engaging in and

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<sup>132</sup> CERD Committee, General Recommendation No. 32, para. 6 (MU, Ann. 790, judges’ folder, tab 11).

<sup>133</sup> *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Second Phase, Judgment, I.C.J. Reports 1966*, dissenting opinion of Judge Tanaka, pp. 305-306.

sponsoring or tolerating a pattern of violence targeting Crimean Tatars and ethnic Ukrainian activists, including enforced disappearances, abductions, murder and torture.

40. Article 5 (*d*) provides another example. Article 5 (*d*) guarantees equality before the law with respect to a variety of listed civil rights, including the “right to freedom of movement and residence within the border of the State”, the “right to nationality”, to “freedom of opinion and expression”, to “freedom of peaceful assembly and association”. This provision has been violated by Russia’s repression of the Crimean Tatars’ and ethnic Ukrainians’ expression of their cultural identity by blocking culturally significant gatherings, denying re-registrations of the ethnic groups’ media organizations on pretextual grounds, and harassing and silencing their journalists.

41. Article 5 (*e*) guarantees equality before the law with respect to economic, social and cultural rights, including “the right to public health, medical care, social security and social services”, “the right to education and training” and “the right to equal participation in cultural activities”. Particularly relevant in Ukraine’s case, Article 5 (*e*) (v) guarantees equality before the law in the enjoyment of the right to education. As Ms Trevino will explain, regardless of whether Russia’s educational system treats all students alike, it discriminates in fact against Crimean Tatars and ethnic Ukrainians by depriving them of previously provided public schooling in their native language that is appropriate to their needs.

### **C. Incitement to racial discrimination — Article 4**

42. For the sake of completeness, let me also run through Articles 4, 6 and 7 of the CERD very briefly. Under Article 4 of the Convention, parties condemn all racially discriminatory propaganda and all organizations which are based on, or which attempt to justify, racial superiority. Among other measures, Article 4 requires parties to “prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination”, and not to permit “public authorities or public institutions . . . to promote or incite racial discrimination”.

43. The Russian Federation has done the exact opposite of what that provision requires. Instead of taking measures to eradicate incitement of racial discrimination, Russia has deliberately inflamed racial tensions and has encouraged or tolerated racial discrimination by third parties. This was done,

for example, through Russia's disinformation campaign designed to vilify Crimean Tatars and ethnic Ukrainians in Crimea.

#### **D. Effective protection and remedies — Article 6**

44. Article 6 requires parties to “assure to everyone within their jurisdiction effective protection” from racial discrimination as well as effective “remedies” through national tribunals and other State institutions, against any acts of racial discrimination. In a report to the United Nations General Assembly, the CERD Committee emphasized that, in instances of alleged State harm, States must fully investigate and punish any responsible actors, including State actors who are alleged to have breached this commitment<sup>134</sup>.

45. Russia has violated this provision with impunity. Rather than protecting Crimean Tatars and ethnic Ukrainian communities in Crimea from racial discrimination, the so-called courts of Crimea have actively engaged in discriminatory conduct, themselves convicting Crimean Tatar leaders on trumped-up charges, banning the *Mejlis*, denying relief to protected Crimean Tatar cultural heritage and jailing ethnic Ukrainians.

#### **E. Education to combat racial discrimination — Article 7**

46. Finally, under Article 7, parties “undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination”. By its terms, this Article places an affirmative obligation on States to integrate measures into their educational, cultural and information policies that are aimed at overcoming prejudice, particularly as directed at racial or ethnic minorities.

47. Russia has directly contravened this obligation by implementing measures in the education, cultural and media fields that inflame prejudices and racial discrimination. For example, in the field

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<sup>134</sup> See Report of the CERD Committee, General Assembly Official Records: 48th Session, Supp. No. 18, UN doc. No. A/48/18 (19 Jan. 1994), paras. 537, 539 (MU, Ann. 792); see also MU, para. 633.

of education, Russia has introduced a “Russia First” educational policy<sup>135</sup>, while actively suppressing minority language instruction and erasing the history of Crimean Tatars and ethnic Ukrainians from the educational curriculum<sup>136</sup>.

### **III. THE RUSSIAN FEDERATION WRONGLY ATTEMPTS TO IMPOSE ADDITIONAL REQUIREMENTS FOR ESTABLISHING A VIOLATION OF THE CERD**

48. In the third and final part of my presentation this afternoon, I will now address the series of legal hurdles invented by the Russian Federation that have no basis in the CERD or this Court’s prior judgments. First, Russia mischaracterizes Ukraine’s case in an effort to narrow its scope, and in the process misconstrues the Court’s Judgment on preliminary objections. Second, Russia attempts to raise the standard of proof in such a way that it can evade responsibility for its pervasive discriminatory conduct. And third, Russia misstates the evidentiary requirements applicable to Ukraine’s claims.

#### **A. Russia mischaracterizes Ukraine’s case and improperly seeks to narrow its scope**

49. Turning to my first point, Russia argues in its Rejoinder that Ukraine’s case is “limited in scope” because, according to Russia, “Ukraine did not bring before the Court a case concerning discrete incidents by which the Russian Federation allegedly violated the CERD”<sup>137</sup>. To this, Russia adds that Ukraine has “reformulate[d]” its “original claim” into one of “indirect discrimination”<sup>138</sup>. But Russia’s argument is based on a mischaracterization of Ukraine’s case and a misreading of this Court’s preliminary objections Judgment<sup>139</sup>.

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<sup>135</sup> “Republic of Crimea”, Ministry of Education, Science and Youth, Letter No. 01-14/382 (25 June 2014) (MU, Ann. 836, judges’ folder, tab 31); Interview with Sergey Meniaylo, the Governor of Sevastopol, published on Meduza.ru (18 Mar. 2016) (MU, Ann. 1062); Decree of the Head of the “Republic of Crimea”, Approving the Concept of Patriotic, Spiritual and Moral Upbringing of the Population in the “Republic of Crimea” (18 Dec. 2014) (MU, Ann. 894); OSCE, Report of the Human Rights Assessment Mission on Crimea (6-18 Jul. 2015) (17 Sept. 2015), para. 190 (MU, Ann. 812); Witness Statement of Yulia Tyshchenko (6 June 2018), paras. 25-27 (MU, Ann. 17, judges’ folder, tab 30); Szymon Jankiewicz, et al., “Linguistic Rights and Education in the Republics of the Russian Federation: Towards Unity through Uniformity”, 45 *Review of Central and East European Law* 59, 61, 90-91 (2020), accessed at <https://eprints.gla.ac.uk/208165/1/208165.pdf>.

<sup>136</sup> Ukrainian Center for Independent Political Research, “*Annexed*” Education in Temporarily Occupied Crimea, Monitoring Report (2015), pp. 5, 7, 13-14 (MU, Ann. 944); Tyshchenko Statement, paras. 22-24 (MU, Ann. 17, judges’ folder, tab 30).

<sup>137</sup> RR, para. 793.

<sup>138</sup> *Ibid.*, para. 837.

<sup>139</sup> *Ibid.*, para. 793.

50. First, Ukraine has demonstrated in its written pleadings that Russia has committed numerous individual violations of the CERD which, taken together, constitute a pattern and practice of discriminatory conduct directed against Crimean Tatars and Ukrainian ethnic communities in Crimea that are prohibited under Articles 2, 5, etc. It has always been Ukraine's position, and here I quote Ukraine's Memorial: "Russia has implemented measure after measure the purpose or effect of which is to generate racial discrimination."<sup>140</sup> The comprehensive nature of Russia's CERD violations leads to the inevitable conclusion that Russia has engaged in a campaign of racial discrimination against these communities in Crimea. That pattern or practice of racial discrimination is a violation of the CERD, and the text supports this conclusion. Article 2 (1) (a) speaks to both acts of racial discrimination and to practice. Article 5 speaks of the elimination of racial discrimination "in all its forms".

51. Second, Russia is wrong that the Court's preliminary objections Judgment has precluded any argument by Ukraine that Russia has committed multiple violations of the CERD which, viewed in the aggregate, constitute a campaign of racial discrimination<sup>141</sup>. As this Court observed in its Judgment,

"the individual instances to which Ukraine refers in its submissions emerge as illustrations of the acts by which the Russian Federation has allegedly engaged in a campaign of racial discrimination. It follows . . . that . . . Ukraine does not adopt the cause of one or more of its nationals, but challenges, on the basis of CERD, the alleged pattern of conduct of the Russian Federation with regard to the treatment of the Crimean Tatar and Ukrainian communities in Crimea."<sup>142</sup>

52. Consistent with this Court's Judgment, Ukraine has alleged that a "pattern of conduct" and "campaign of racial discrimination" violates the CERD. Ukraine has done this by referencing illustrative, individual instances of acts that also constitute racial discrimination.

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<sup>140</sup> MU, para. 587.

<sup>141</sup> See RR, paras. 793-798.

<sup>142</sup> *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019 (II)*, p. 606, para. 130.



**B. Ukraine's characterization of Russia's CERD violations as a "systematic campaign" of racial discrimination does not change the evidentiary standards that apply to Ukraine's claims**

53. Moving to my second point, Russia advocates for novel evidentiary standards in this case. Specifically, Russia claims that Ukraine must show that Russia's discrimination occurred in a "systematic manner", that there was an intent or purpose "specifically and directly to target these communities as such", and Ukraine's claims must be supported by "fully conclusive" evidence<sup>143</sup>.

54. But Russia offers no relevant support for its argument that Ukraine must demonstrate an intentional and systematic campaign of discrimination in order to succeed in its claims, relying instead on sources that have no application to the Convention or to Ukraine's case<sup>144</sup>. On review of the Convention itself, one finds no support for Russia's position. Not only is Russia's argument rooted in a mischaracterization of Ukraine's claims, it is also wholly inconsistent with the CERD's plain language. As Professor Fredman has explained:

"The CERD does not contain language defining systematic campaigns of racial discrimination . . . It follows that the correct approach is to assess each of Ukraine's claims under the standards set forth in the Convention and, if necessary, for the Court to take a view on Ukraine's characterization of the aggregate impact of any violations only once it has ruled on the individual claims."<sup>145</sup>

55. Despite the CERD's silence on this issue, Russia creates a new set of evidentiary rules out of whole cloth. Russia argues that Ukraine must *first*, show the existence of "identical or analogous breaches of the CERD"; *second*, that these breaches have to be "sufficiently interconnected"; and *third*, that they "are carried out in a planned and deliberate way with the aim of singling out a particular group, as opposed to isolated incidents or exceptions"<sup>146</sup>. Russia provides no support for its newly created test.

56. The CERD explicitly recognizes that intent is not required to establish breach. As I addressed earlier, the plain text of Article 1 (1)'s definition of racial discrimination makes clear that claims based on discriminatory purpose and discriminatory effect are both encompassed within the Convention<sup>147</sup>. And the CERD Committee has confirmed, that a requirement "to prove

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<sup>143</sup> RR, para. 801.

<sup>144</sup> See *ibid.*, paras. 808-811.

<sup>145</sup> Second Fredman Report, para. 14 (RU, Ann. 5, judges' folders, tab 12).

<sup>146</sup> See RR, para. 804.

<sup>147</sup> See RU, para. 401.

discriminatory intent runs counter to the Convention’s prohibition against any and all behaviour that has a discriminatory effect”<sup>148</sup>.

57. Aside from being wholly unsupported by the text of the Convention, Russia’s position turns Ukraine’s claims on their head. Ukraine need only demonstrate discriminatory purpose or discriminatory effect. And as I have just described, Ukraine’s claims are rooted in Russia’s pattern of individual violations of the Convention. The pattern of Russia’s conduct at issue here yields discriminatory purpose but, also, and at a minimum, discriminatory effect. As Professor Fredman has explained, it is sufficient that there exists “a law, practice or policy which appears neutral on its face but which has a disparate impact”<sup>149</sup>.

58. Russia appears to focus on Ukraine’s language that Russia’s CERD violations amount to a systematic campaign of racial discrimination in an attempt to analogize this campaign to genocide and argue that “fully conclusive” is the standard of proof that is articulated by this Court in *Bosnian Genocide* and should apply here. But as Ukraine noted in its Reply, “[a]lthough Ukraine’s allegations are undoubtedly serious in nature, they do not involve the same kinds of violations at issue in *Bosnian Genocide*”<sup>150</sup>. The standard of proof in *Bosnian Genocide* is simply irrelevant to Ukraine’s claims of racial discrimination under the CERD.

### **C. Comparative statistical data is not required to establish discrimination under the CERD**

59. Finally, the Russian Federation claims that Ukraine must establish a “differentiation of treatment” *in addition to* an “unjustifiable disparate impact”<sup>151</sup>. According to Russia, such

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<sup>148</sup> See CERD Committee Opinion, *Gabaroum v. France*, Communication No. 52/2012, CERD/C/89/D/52/2012 (8 June 2016), para. 7.2 (judges’ folders, tab 13); CERD Committee Opinion, *V.S. v. Slovakia*, Communication No. 56/2014, CERD/C/88/D/56/2014 (6 Jan. 2016), para. 7.4.

<sup>149</sup> Second Fredman Report, para. 15 (RU, Ann. 5) (judges’ folders, tab 12); see also *ibid.*, n. 12 (citing ICESCR, General Comment No. 20, para. 10(b); *D.H. and Others v. the Czech Republic*, ECtHR App. No. 57325/00, Grand Chamber, Judgment (13 Nov. 2007), para. 184 (MU, Ann. 1001); Council of the European Union, Directive 2000/43/EC (“Race Directive”) (29 June 2000), Art. 2(2)(b) (MU, Ann. 827); U.K. Equality Act of 2010, § 19, accessed at <https://www.legislation.gov.uk/ukpga/2010/15/section/19>; U.S. Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000e-2(k); *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-436 (1971) (U.S. Supreme Court), accessed at <https://www.freedomforuminstitute.org/wp-content/uploads/2019/07/Griggs-v.-Duke-Power.pdf>; *Ontario Human Rights Commission v. Simpsons-Sears, Ltd.*, [1985] 2 S.C.R. 53, para. 18 (Supreme Court of Canada), accessed at <https://www.canlii.org/en/ca/scc/doc/1985/1985scanlii18/1985calii18.html>; *Nitisha v. Union of India* [Writ Petition No. 1109/2020], 25 Mar. 2021, paras. 49–71 (Indian Supreme Court), accessed at <https://indiankanoon.org/doc/190567716/>.

<sup>150</sup> RU, para. 405.

<sup>151</sup> RR, para. 822.

“differentiation in treatment” must be demonstrated by comparison using “statistical data”<sup>152</sup>. Ukraine also takes note that while the Russian Federation had 15 months to file its Rejoinder in this case, they chose on the eve of this hearing to supplement the record on the issue of statistics. Ukraine will comment on this new annex in due course. But in any case, statistical data is not required to establish racial discrimination. Simply put, this is another failed attempt by Russia to avoid liability for its plainly discriminatory conduct.

60. As already noted, an act or practice which does not explicitly provide for a difference in treatment can nonetheless violate the CERD, if it results in a discriminatory effect on a protected group. Russia’s continued insistence that an effect-based claim under the CERD requires “an *act* of distinction based on a prohibited ground” in addition to showing a disparate impact is wrong<sup>153</sup>. Russia appears intent on reading effects-based discrimination out of the Convention.

61. With regard to statistical data, while comparative statistical data may be used as a means to demonstrate racial discrimination, it is not the only way for an applicant to make such a showing. The CERD Committee, for example, does not require statistical data as an evidentiary requirement to establish a discrimination claim, nor has the Court ever suggested such evidence would be required.

62. Russia’s attempt to impose this additional evidentiary requirement on Ukraine is based largely on a misrepresentation of the academic writings of Ukraine’s expert, Professor Fredman. Contrary to Russia’s statement in its Rejoinder that Professor Fredman “considers statistical evidence to be . . . indispensable”<sup>154</sup>, Professor Fredman simply noted the potential relevance of statistics in indirect discrimination claims<sup>155</sup>. Russia conveniently omits her further statement in the same treatise that “statistical focus brings with it several complex problems”, including the fact that many States do not collect data; and when statistics are available, they are difficult to apply<sup>156</sup>.

63. Finally, the Court observed in *Corfu Channel* that in situations where, as here, relevant evidence is outside the applicant State’s “exclusive territorial control”, the State that is not in a

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<sup>152</sup> See e.g. *ibid.*, paras. 824-834.

<sup>153</sup> See *ibid.*, para. 828; see also Second Fredman Report, para. 15 (judges’ folders, tab 12).

<sup>154</sup> RR, para. 876.

<sup>155</sup> Sandra Fredman, *Discrimination Law* (2d ed. 2011), p. 183.

<sup>156</sup> *Ibid.*, p. 184.

position to produce direct proof of certain facts “should be allowed a more liberal recourse to inferences of fact and circumstantial evidence”<sup>157</sup>. This conclusion is directly relevant in a case such as this, where the Russian Federation has not only directly impeded Ukraine’s ability to collect statistical data in Crimea but has — in the words of the CERD Committee — “refus[ed] . . . to discuss and respond to questions posed by the [CERD] Committee” on its discriminatory conduct in Crimea<sup>158</sup>.

64. Quite simply, Russia engages in legal gymnastics in an attempt to evade responsibility for its blatant discriminatory conduct against Crimean Tatars and ethnic Ukrainians in Crimea. But Russia’s approach would leave the CERD without teeth.

65. Madam President, I would now ask that you call Ms Clovis Trevino to the podium to speak on Russia’s CERD violations in detail, unless, perhaps, it is time for the coffee break. Thank you.

The PRESIDENT: I thank Ms Cheek. Before I invite the next speaker to take the floor, the Court will observe a coffee break of 10 minutes. The sitting is suspended.

*The Court adjourned from 4.50 p.m. to 5 p.m.*

The PRESIDENT: Please be seated. The sitting is resumed. I now give the floor to Ms Clovis Trevino. You have the floor.

Ms TREVINO:

**UKRAINE’S FACTUAL CASE ESTABLISHES RACIAL DISCRIMINATION  
UNDER THE CERD**

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

2. Driven by a desire to punish, the Russian Federation has subjected Crimean Tatars and ethnic Ukrainians to a systematic campaign of racial discrimination, which, as you heard, violates

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<sup>157</sup> *Corfu Channel (United Kingdom v. Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 18.

<sup>158</sup> CERD Committee, Concluding Observations on the Combined Twenty-Fifth and Twenty-Sixth Periodic Reports of Russian Federation, CERD/C/RUS/CO/25-26 (1 June 2023), para. 2 (judges’ folders, tab 35).

almost every obligation Russia has undertaken under the CERD. Russia has run a two-pronged racial discrimination campaign.

3. First, Russia has suppressed the political and civil rights of Crimean Tatars and ethnic Ukrainians, silencing them through physical violence, oppression of their political leadership, arbitrary searches and detentions, and widespread fear.

4. Second, Russia has assaulted Crimean Tatar and Ukrainian ethnic identity, blocking their celebrations, silencing their media, degrading their cultural heritage and erasing their language and history from the schools of their children.

5. Russia does not dispute the most critical facts underlying Ukraine's case. But Russia would disaggregate those facts into "isolated and unconnected instances"<sup>159</sup>, hiding behind such justifications as "national security", "anti-extremism" and "public order", all to hide flagrant racial discrimination. But Russia's efforts to justify its conduct through false labels only admit to the underlying facts.

6. The only question that remains before your Court is whether Russia's conduct had the purpose or effect of restricting the human rights and fundamental freedoms of these protected groups. The answer is conclusively "yes".

#### **I. RUSSIA'S PATTERN OF DISCRIMINATORY CONDUCT IN POLITICAL AND CIVIL AFFAIRS**

7. Madam President, Russia has subjected Crimean Tatars and ethnic Ukrainians to a widespread pattern of suppression of their political and civil rights. It has done so by subjecting them to physical violence; persecuting the Crimean Tatar leaders and banning the *Mejlis*; and by harassing the broader Crimean Tatar community through arbitrary searches and detentions.

##### **A. Russia directly engaged in, or encouraged and tolerated, acts of physical violence targeting Crimean Tatars and Ukrainians, in violation of CERD Articles 2 (1), 5 (b) and 6**

8. Russia's first tool is suppression. Russia has subjected Crimean Tatars and ethnic Ukrainians to a series of disappearances, abductions, torture and murder, restricting in purpose and effect their right to security of person and effective remedies against racial discrimination.

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<sup>159</sup> RR, paras. 794, 813.

9. Many of those who have been forcibly disappeared or kidnapped remain missing, such as Ervin Ibragimov, a prominent Crimean Tatar who was abducted in 2016 and never seen again<sup>160</sup>. He was 30 at the time of his abduction by men in police uniform<sup>161</sup>.

10. Others have been found dead, such as Reshat Ametov, a well-known Crimean Tatar activist and father of three, who was abducted in broad daylight by the so-called Self-Defence Forces of Crimea, who forced him into a black car and drove him away, as you can see in the video footage on the screen, available at Annex 1-100 of the Memorial. Two weeks later, Mr Ametov was found dead, including — as the Russian medical examiner reports — “an open craniocerebral injury in the form of two penetrating stab wounds in the left eye socket with fractures of the facial bones, base of the skull and concussion-cracking injury of the brain”<sup>162</sup>. He was just 39 at the time of his brutal murder<sup>163</sup>.

11. Those who survived the atrocities all tell the same story: they were forcefully kidnapped, held in undisclosed locations and subjected to violent interrogation and torture. Russia’s evidence confirms that on 9 March 2014, Andrii Shchekun<sup>164</sup> and Anatoly Kovalsky were captured at the Simferopol train station by men “in camouflage uniforms with Saint George’s ribbons”<sup>165</sup>. This is a widely recognized pro-Russian symbol. As Mr Shchekun recounts in his witness statement:

“For the next 11 days . . . Kovalsky and I were detained by these men from the GRU and their associates. During this time, we were blindfolded and badly mistreated — we were repeatedly interrogated, threatened with violence and subjected to electric shocks. I was shot on the hands and knees.”<sup>166</sup>

Mr Shchekun was literally grounded into submission.

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<sup>160</sup> MU, para. 397; RU, para. 447.

<sup>161</sup> RFE/RL, “Crimea: Political Activists Who Were Killed, Kidnapped, or Went Missing” (30 Aug. 2017) (MU, Ann. 1068); Deputy Head of the Main Investigative Directorate of the Investigative Committee of the Russian Federation for the “Republic of Crimea”, Letter No. 224-4-18 (23 Nov. 2018), p. 1 (CMR-2, Ann. 406).

<sup>162</sup> First Investigative Department of the High-Priority Cases Directorate of the Main Investigative Directorate of the Investigate Committee of the Russian Federation for the “Republic of Crimea”, Note Regarding Criminal Case No. 2014417004 on Murder of R. M. Ametov (Dec. 2020), pp. 1-2 (CMR-2, Ann. 417, judges’ folder, tab 14).

<sup>163</sup> RFE/RL, “Crimea: Political Activists Who Were Killed, Kidnapped, or Went Missing” (30 Aug. 2017) (MU, Ann. 1068).

<sup>164</sup> MU, paras. 407, 480, 496; Shchekun Statement, paras. 19-25 (MU, Ann. 13, judges’ folder, tab 15); RU, paras. 448-449; Father Klyment Statement, para. 10 (RU, Ann. 4, judges’ folder, tab 3).

<sup>165</sup> See e.g. Investigator of the Investigative Department of Zheleznodorozhny District of Simferopol of the Main Investigative Directorate of the Investigative Committee of the Russian Federation, Resolution on Transferring a Crime Report in Accordance with the Investigative Jurisdiction (27 July 2014) (CMR-2, Ann. 164); see also CMR-2, App. A, para. 34.

<sup>166</sup> Shchekun Statement, para. 23 (MU, Ann. 13, judges’ folder, tab 15).

12. Russia has failed to effectively investigate these atrocities. By way of example, Russia claims that it took a series of steps to investigate Mr Ametov's brutal murder. However, key individuals involved in his abduction — including, as indicated in Russia's criminal report on the screen, a "commander named Oleg", the "two men" who you saw forced Mr Ametov into a black car and "an unidentified person" who was last to hold custody of Mr Ametov — were neither identified, nor investigated. The SDF members involved were found innocent, as they were "acting in accordance with their powers for maintaining public order"<sup>167</sup>.

13. This is outright impunity and clear evidence of Russia's *choice* to deny justice to the victims.

14. Madam President, these are only illustrations of Russia's systematic pattern of violence and intimidation. But as I said, Russia disaggregates these atrocities into "isolated and unconnected incidents", and disclaims all responsibility<sup>168</sup>.

15. But Russia cannot escape liability for these acts, as they were either carried out by Russian State organs, such as the GRU, or by actors under Russian control, such as the SDF<sup>169</sup>, whose conduct Russia, in any event, adopted as its own when it incorporated them into the military of the occupying authorities<sup>170</sup>. Even if somehow Russia could escape responsibility and attribution, Russia still violated the Convention by tolerating, failing to prevent and failing to effectively investigate these atrocities.

16. As I said, Russia also is wrong that the atrocities committed against Crimean Tatars and ethnic Ukrainians are "isolated and unconnected".

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<sup>167</sup> First Investigative Department of the High-Priority Cases Directorate of the Main Investigative Directorate of the Investigative Committee of the Russian Federation for the "Republic of Crimea", Note Regarding Criminal Case No. 2014417004 on Murder of R. M. Ametov (Dec. 2020), p. 3 (CMR-2, Ann. 417, judges' folder, tab 14).

<sup>168</sup> RR, para. 1068.

<sup>169</sup> RU, Chap. 10 (D).

<sup>170</sup> See *RT*, "Crimea Creates Own Military by Swearing in Self-Defense Units" (10 March 2014); Olga Skrypyuk, "Legalization of 'Crimean Self-Defense'", The Crimean Human Rights Group (27 Nov. 2015).

17. Data from United Nations bodies, human rights monitors, and NGOs confirms that Crimean Tatars and ethnic Ukrainians have been disproportionately impacted by the violence<sup>171</sup>.

18. As the Office of the United Nations High Commissioner for Human Rights reports, between the beginning of Russia's occupation of Crimea and 30 June 2018, "at least 42 persons were victims of enforced disappearances", out of which 36 victims — or more than 85 per cent — were ethnic Ukrainians or Crimean Tatars. The OHCHR also reported that "[i]n *none* of the cases documented have perpetrators been brought to justice"<sup>172</sup>.

19. Madam President, Members of the Court: These are not "isolated and unconnected incidents". The pattern of Russia's behaviour yields not just discriminatory effect, but also discriminatory purpose. The very nature of the atrocities at issue here required a deliberate purpose to harm. When that harm has been inflicted over and over again on people of Crimean Tatar and Ukrainian ethnicity, a strong inference can be drawn that they were deliberately targeted. You can also find Russia's discriminatory purpose from the systematic pattern of violence and impunity to which Crimean Tatars and ethnic Ukrainians have been subjected, as well as in Russia's deliberate choice not to investigate and bring the perpetrators to justice. At a minimum, there is no question that Crimean Tatars and ethnic Ukrainians have been disproportionately impacted by the violence.

### **B. Russia violated CERD Articles 2 (1), 4 and 5 by depriving the Crimean Tatar people of its political leadership**

20. Russia has not only subjected Crimean Tatars to brutal violence and fear; it has applied a second tool of suppression: harassing and oppressing the community's political leadership, with the purpose and effect of restricting their political rights, including the right to equal treatment before tribunals, freedom of opinion and freedom of association and peaceful assembly.

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<sup>171</sup> OHCHR, Situation of Human Rights in the Temporarily Occupied Autonomous Republic of Crimea and the City of Sevastopol (Ukraine) (22 Feb. 2014 to 12 Sept. 2017), para. 102 (MU, Ann. 759, judges' folder, tab 16); U.N. Secretary-General, Situation of Human Rights in the Temporarily Occupied Autonomous Republic of Crimea and the City of Sevastopol, Ukraine, UN doc. A/77/220 (25 July 2022), para. 15 (judges' folder, tab 18); Sergey Zayets (Regional Center for Human Rights) et al., *The Peninsula of Fear: Chronicle of Occupation and Violation of Human Rights in Crimea* (2015), p. 41 (MU, Ann. 976, judges' folder, tab 17); Council of Europe Commissioner for Human Rights, *Crimean Tatars' Struggle for Human Rights* (18 Apr. 2023).

<sup>172</sup> OHCHR, Situation of Human Rights in the Temporarily Occupied Autonomous Republic of Crimea and the City of Sevastopol, Ukraine, 13 Sept. 2017 to 30 June 2018, UN doc. A/HRC/39/CRP.4, para. 35 (emphasis added), judges' folder, tab 19.



21. Russia does not dispute the key facts underlying this claim. It does not dispute that it exiled much of the Crimean Tatar leadership, including Mr. Refat Chubarov, the Chairman of the *Mejlis*<sup>173</sup>, who is in this Great Hall of Justice today as part of Ukraine's delegation.

22. It is also undisputed that members of the *Mejlis* have been charged and prosecuted by the Russian authorities. In January 2015, Russia opened a criminal case against Deputy Chairman of the *Mejlis*, Akhtem Chiygoz, along with other Crimean Tatars, they were charged for their role in the February 2014 demonstrations against Russian aggression<sup>174</sup>. As Mr. Chiygoz describes in his witness statement, he was not allowed to attend his trial in person but rather via a poor video connection. And he was convicted largely based on alleged testimony by "secret witnesses"<sup>175</sup>. To state the obvious, this is the opposite of due process.

23. Russia has also subjected prominent members of the *Mejlis* to terrifying searches in their homes<sup>176</sup>. As Mr. Bariiev describes in his witness statement: at 6:30 in the morning of 16 September 2014,

"[f]our men in camouflage and face masks barged into the apartment with automatic weapons that they pointed at me, my wife and two small children (the oldest was 4 years old, and the youngest was just 6 months old) . . . It seemed to me that they weren't so much looking for prohibited items as they were trying to frighten my family and, with such searches as an example, the entire Crimean Tatar people."<sup>177</sup>

24. As the Court is aware, Russia's campaign of political suppression led to an outright ban on the *Mejlis* in 2016. You will hear from Professor Thouvenin that, in defiance of the Court's provisional measures Order, Russia has taken no action to lift that ban. Instead of complying with international law, Russia's oppression of the *Mejlis* is ongoing and intensifying<sup>178</sup>.

25. Russia's concerted measures targeting the Crimean Tatar leadership, and their context, are an unmistakable indicator that the community itself has been singled out for the purpose of suppressing their political rights and silencing their voices. That context was set out earlier by

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<sup>173</sup> CMR-2, paras. 187–194.

<sup>174</sup> MU, paras. 432–435; RU, para. 505; Witness Statement of Akhtem Chiygoz (4 June 2018), para. 6 (MU, Ann. 19); OSCE, Office for Democratic Institutions and Human Rights (ODIHR) and the High Commissioner on National Minorities (HCNM), Report of the Human Rights Assessment Mission on Crimea (6–18 July 2015) (17 Sept. 2015), paras. 146 and 236 (MU, Ann. 812).

<sup>175</sup> Witness Statement of Akhtem Chiygoz (4 June 2018), paras. 17–19 (MU, Ann. 19).

<sup>176</sup> MU, para. 423; RU, para. 504.

<sup>177</sup> Bariiev Statement, para. 28 (MU, Ann. 15, judges' folder, tab 20).

<sup>178</sup> See e.g. RR, paras. 1244–1247.

Professor Koh, who explained that when Russia's president sought but did not obtain the support of the *Mejlis* for annexation, Russia exacted collective punishment. At a minimum, Russia's measures have disproportionately impacted Crimean Tatars, who have been deprived of their political leadership and their ability to advocate for their rights through their central representative institution.

26. Unable to dispute the facts underlying Ukraine's claims, Russia hides behind familiar sham justifications: "national security"; "public order"<sup>179</sup>. But as a matter of law, where discriminatory purpose is established, the Convention provides no room for justifications. The prohibition against racial discrimination is absolute and non-derogable.

27. Even if the Court were to entertain Russia's sham justifications, Russia has come nowhere close to establishing that its use of "anti-extremism laws" against the political leadership of the Crimean Tatar People was necessary, proportionate, and in furtherance of a legitimate aim. As Professor Scheinin has demonstrated, far from "justifying" Russia's conduct, Russia's extremism laws are *evidence* of their discriminatory purpose. At bottom, these laws are not for the purpose of national security or anti-extremism but tools deployed by Russia to discriminate<sup>180</sup>.

28. Russia replies that the ban on the *Mejlis* falls outside the scope of the CERD because the Convention does not grant minorities a right to a representative body<sup>181</sup>. But again, Russia mischaracterizes Ukraine's claim, which is not premised on such a right, but on the discriminatory purpose and effect of Russia's measures against Crimean Tatars.

29. Second, Russia claims that the *Mejlis* is not a representative "institution" within the meaning of Article 2 (1) of the Convention<sup>182</sup>. But this argument is simply not credible. The *Mejlis* is an executive body elected by the Qurultay of the Crimean Tatar People. In the words of Russia's own witness, the Qurultay is "a congress of Crimean Tatar representatives"<sup>183</sup>, themselves elected directly by the Crimean Tatar people at large<sup>184</sup>.

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<sup>179</sup> RR, para. 886.

<sup>180</sup> See Scheinin Report, para. 43 (RU, Ann. 7, judges' folder, tab 6).

<sup>181</sup> RR, paras. 944-948; CMR-2, paras. 138-149; Preliminary Objections of the Russian Federation, para. 328.

<sup>182</sup> RR, paras. 952-956.

<sup>183</sup> Witness Statement (22 February 2023), para. 5 (RR, Ann. 11); see also Witness Statement of Mustafa Dzhemilev (31 May 2018), para. 3 (MU, Ann. 16).

<sup>184</sup> Witness Statement of Mustafa Dzhemilev (31 May 2018), para. 5 (MU, Ann. 16).

30. This is widely known. As the OHCHR observed in 2016, “[w]hile approximately 30 Crimean Tatar NGOs are currently registered in Crimea, none can be considered to have the same degree of representativeness and legitimacy as the Mejlis and Kurultai”<sup>185</sup>. The *Mejlis*’ significance has been widely recognized by various United Nations bodies and regional organizations, which have also consistently criticized Russia’s ban<sup>186</sup>.

**C. Russia has subjected the Crimean Tatar community to a pattern of arbitrary searches and detentions, in violation of CERD Articles 2 (1), 4, 5 (a) and 6**

31. Russia has employed a third tool of suppression: subjecting the wider Crimean Tatar community to a pattern of arbitrary searches and detentions in their homes and meeting places, with the purpose and effect of restricting their core civil rights, including the right to equal treatment before tribunals and effective remedies against racial discrimination.

32. Again, the facts underlying Ukraine’s case are not in dispute. But Russia — again — denies the existence of a pattern of conduct, and attempts to justify its measures — again — by invoking sham labels: “national security”; “public order”<sup>187</sup>.

33. But as Ukraine has documented, and international observers corroborate, the existence of a pattern of arbitrary searches and detentions targeting and disproportionately affecting Crimean Tatars is self-evident.

34. By way of example, officers of Russia’s Centre for Countering Extremism searched the home of Ibraim Ibragimov in August 2014, purportedly to locate stolen gold and silver items<sup>188</sup>. The

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<sup>185</sup> OHCHR, Report on the Human Rights Situation in Ukraine (16 August-15 November 2016), para. 169 (MU, Ann. 773, judges’ folder, tab 21); *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, p. 138, para. 97 (judges’ folder, tab 34). See also CERD Committee, Concluding Observations on the Russian Federation, CERD/C/RUS/CO/23-24 (20 September 2017), paras. 19-20 (MU, Ann. 804, judges’ folder, tab 5); see also CERD Committee, Concluding Observations on the Combined Twenty-Fifth and Twenty-Sixth Periodic Reports of the Russian Federation, CERD/C/RUS/CO/25-26 (1 June 2023), paras. 23-24 (judges’ folder, tab 35); see also OHCHR, Report on the Human Rights Situation in Ukraine (16 May-15 August 2016), para. 177 (MU, Ann. 772, judges’ folder, tab 22).

<sup>186</sup> OHCHR, Report on the Human Rights Situation in Ukraine (16 May-15 August 2016), para. 177 (MU, Ann. 772, judges’ folder, tab 22); CERD Committee, Concluding Observations on the Russian Federation, CERD/C/RUS/CO/23-24 (20 September 2017), para. 19 (MU, Ann. 804, judges’ folder, tab 5).

<sup>187</sup> RR, para. 1083.

<sup>188</sup> Bakhchisaray District Court of the “Republic of Crimea”, Ruling authorizing the search in Mr Ibragimov’s house, 25 August 2014 (CMR-2, Ann. 171); Centre for Countering Extremism of the Ministry of Internal Affairs for the Republic of Crimea, Record of Search in Mr Ibragimov’s House, 28 August 2014 (CMR-2, Ann. 172); Acting Investigator of the Investigative Directorate of the Ministry of Internal Affairs for the “Republic of Crimea”, Resolution on the initiation of a criminal case, 9 June 2014 (CMR-2, Ann. 151); see also CMR-2, para. 29.

homes of Eren Ametov and Nariman Ametov were also searched in September 2014, in connection with “illegal arms trafficking”<sup>189</sup>. But after finding no evidence of such illegal activities, the officers confiscated religious books and personal belongings — only underscoring that these searches are pretext for harassment.

35. Russia’s counter-extremism forces have also raided Crimean Tatar meeting places. Russia’s own video footage<sup>190</sup> — at Annex 178 of Ukraine’s Reply — confirms that in November 2017, Russian armed officers aggressively raided a café favoured by Crimean Tatars, allegedly to arrest Ms Vedzhie Kashka, a prominent 82 year old Crimean Tatar activist, as well as other Crimean Tatars, on an absurd allegation of extortion<sup>191</sup>. Russia admits that Ms Kashka died shortly after being detained<sup>192</sup>.

36. Russia’s own evidence also shows that a group of armed and masked officers raided a café in Simferopol and detained and interrogated dozens for alleged participation in “extremist organizations”<sup>193</sup>. Russia does not deny that the detainees were mostly Crimean Tatars<sup>194</sup>.

37. Again, these are part of a discriminatory pattern of conduct, not “isolated and unconnected incidents”, as international observers confirm. As early as 2016, for example, the OHCHR expressed concern “about the growing number of large-scale ‘police’ actions conducted with the apparent intention to harass and intimidate Crimean Tatars”<sup>195</sup>.

38. In September 2018, the OHCHR observed that “Crimean Tatars were disproportionately subjected to police and FSB raids of their homes, private businesses or meeting places, often followed

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<sup>189</sup> Main Investigative Directorate of the Investigative Committee of the Russian Federation for the “Republic of Crimea” and the City of Sevastopol, Letter No. AE 0097952, 15 March 2021 (CMR-2, Ann. 643); CMR-2, App. B, para. 33.

<sup>190</sup> FSB Video Footage of the Detention of Crimean Tatars in Simferopol (23 November 2017), accessed at <https://crimea.ria.ru/20171123/1112854659.html> (RU, Ann. 178).

<sup>191</sup> CMR-2, App. B, paras. 64-66.

<sup>192</sup> Investigative Department for the Kievskiy District of Simferopol of the Main Investigative Directorate of the Investigative Committee of the Russian Federation for the “Republic of Crimea”, Resolution on the Refusal to Initiate a Criminal Case, 20 April 2018 (CMR-2, Ann. 398).

<sup>193</sup> Explanation of D.Ya. Selyametov, 13 July 2016, pp. 1-2 (CMR-2, Ann. 284); Explanation of I.S. Mukhterem, 14 July 2016, pp. 1-2 (CMR-2, Ann. 285); Explanation of O.N. Seitmemetov, 14 July 2016, pp. 1-2 (CMR-2, Ann. 286).

<sup>194</sup> See OHCHR, Report on the Human Rights Situation in Ukraine (16 February-15 May 2016), para. 183 (MU, Ann. 771, judges’ folder, tab 23).

<sup>195</sup> *Ibid.*

by arrests”<sup>196</sup>. OHCHR notes not only that virtually all searches in 2017 and 2018 targeted Crimean Tatars, but also, as you saw, “the raids often involved excessive use of force . . . not warranted by circumstances, going beyond the lawful objective of preventing crime and protecting the rights and freedoms of others”<sup>197</sup>.

39. This pattern of discriminatory searches and detentions has continued. In February 2021, the Commissioner for Human Rights raised concerns at the Council of Europe about a “clearly discernible pattern” of arbitrary arrests and detentions of Crimean Tatars, as well as “abusive raids on their homes and mosques; criminal proceedings devoid of fair trial guarantees; and extremely severe sentences, including long prison terms”<sup>198</sup>.

40. “From 1 January 2017 to 30 June 2019, OHCHR recorded 186 searches, 140 [or seventy-five per cent] of which concerned homes, private businesses and meeting places of Crimean Tatars”<sup>199</sup>.

41. Madam President, these are not isolated and unconnected incidents. The discriminatory purpose of Russia’s systematic measures is evident from the sheer number of arbitrary searches and detentions that Crimean Tatars have been subjected to, as well as the excessive and disproportionate force that Russia has deployed. Undeniably, these measures have also disproportionately harmed Crimean Tatars, whose sense of safety and belonging in their homeland has been shattered.

42. Unable to dispute the facts, Russia again relies on its “anti-extremism legislation” as a shield from racial discrimination. But because Ukraine has established the discriminatory purpose of Russia’s measures, the Convention leaves no room for any “justification”.

43. Even if the Court were to entertain Russia’s so-called “justification,” Russia’s generalized and unsubstantiated accusations of “extremism” come nowhere close to meeting the strict test for

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<sup>196</sup> OHCHR, Situation of Human Rights in the Temporarily Occupied Autonomous Republic of Crimea and the City of Sevastopol, Ukraine, 13 September 2017 to 30 June 2018, UN doc. A/HRC/39/CRP.4 (21 September 2018), para. 31 (judges’ folder, tab 19).

<sup>197</sup> *Ibid.*

<sup>198</sup> Press Statement, Dunja Mijatović, Commissioner for Human Rights, The Persecution of Crimean Tatars Must Stop, Council of Europe (25 November 2021) (judges’ folder, tab 24).

<sup>199</sup> United Nations Secretary-General, Situation of Human Rights in the Autonomous Republic of Crimea and the City of Sevastopol, Ukraine, UN doc. A/74/276 (2 August 2019), para. 18 (judges’ folder, tab 25); see also United Nations Secretary-General, Situation of Human Rights in the Autonomous Republic of Crimea and the City of Sevastopol, Ukraine, UN doc. A/HRC/44/21 (19 June 2020), paras. 29-30; Crimean Tatar Resource Center, Analysis of Human Rights Violations in the Occupied Crimea in 2021 (presentation) (25 January 2022), pp. 2, 4 (RU, Ann. 107).

showing that the challenged measures were necessary and proportionate to achieve a legitimate governmental aim.

44. Taken together, the evidence before the Court shows that Russia has discriminated against Crimean Tatars, in both purpose and effect, by restricting their exercise of civil and political human rights protected under the Convention. Such targeting on accusations of “extremism” also incites racial discrimination and undermines the community’s sense of safety, survival and belonging in their homeland.

## **II. RUSSIA’S PATTERN OF CULTURAL DISCRIMINATION AND SUPPRESSION**

45. Madam President: as Russia advanced its campaign to silence Crimean Tatars and ethnic Ukrainians through violence and fear, it has simultaneously engaged in a second, widespread campaign: to assault their ethnic identity. It has done so by blocking their celebrations, silencing their media, degrading their cultural heritage, and erasing their language and history from the schools of their children.

46. Let me address in particular Russia’s suppression of cultural gatherings and access to education rights.

### **A. Russia has denied or limited culturally significant gatherings, in violation of CERD Articles 2 (1) (a), 5 (d) (ix) and 5 (e) (vi)**

47. Russia has suppressed the ability of Crimean Tatars and ethnic Ukrainians to commemorate events of cultural significance, restricting, in purpose and effect, their right to peaceful assembly and association and to equal participation in cultural activities.

48. As you heard from Professor Koh, the cultivation of historical memory is central to the Crimean Tatar sense of identity. In particular, every 18 May, Crimean Tatars commemorate the victims of the *Sürgün*<sup>200</sup>, who were forcibly deported by Stalin in 1944 and loaded onto packed cattle carts to slave labour camps far from their homeland. Similarly important for Crimean Tatars is International Human Rights Day, commemorating Crimean Tatars who were imprisoned and exiled while fighting to restore the political and collective rights of their people<sup>201</sup>.

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<sup>200</sup> Bariiev Statement, para. 5 (MU, Ann. 15).

<sup>201</sup> *Ibid.*, para. 9 (MU, Ann. 15) (judges’ folder, tab 20).

49. For the Ukrainian community, cultural gatherings are an indispensable means of preserving their identity. Chief among them is the annual celebration of the birthday of Taras Shevchenko, a poet and writer who is considered the cultural father of Ukraine and a champion of Ukrainian independence.

50. Madam President, Members of the Court, there is no dispute between the Parties that, in Russia's words, "the decisions or measures concerning public events . . . of which Ukraine complains were taken"<sup>202</sup>.

51. For example, just two days before the 70th anniversary of the *Sürgün*, Russia abruptly issued a decree prohibiting all public assemblies in Crimea until 6 June 2014, thus impeding Crimean Tatars from holding their traditional ceremony in Lenin Square<sup>203</sup>. Russia blocked attempts to commemorate the most important event in the Crimean cultural calendar for four consecutive years.

52. In 2014, Russia repeatedly denied permits for the Crimean Tatar community's commemoration of International Human Rights Day<sup>204</sup>, invoking a number of bureaucratic excuses. First, the applicants allegedly failed to specify the estimated number of participants<sup>205</sup>. Then, Lenin Square was supposedly booked through 7 January 2015<sup>206</sup>. Finally, after running out the clock, Russia rejected the third application for being untimely<sup>207</sup>.

53. In 2014, Russia similarly blocked planned celebrations of the 200th anniversary of the birthday of Taras Shevchenko<sup>208</sup>. As described earlier, two of the event organizers, Andrii Shchekun and Anatoly Kovalsky were unlawfully detained, blindfolded and tortured as they prepared to stage

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<sup>202</sup> RR, para. 1143.

<sup>203</sup> See Bariiev Statement, para. 5 (MU, Ann. 15); see also OSCE, Report of the Human Rights Assessment Mission on Crimea (6–18 July 2015) (17 Sept. 2015), para. 252 (MU, Ann. 812).

<sup>204</sup> Bariiev Statement, paras. 9–18 (MU, Ann. 15) (judges' folder, tab 20); Letter from Executive Committee of "Republic of Crimea" Simferopol City Council to the Committee for Protection of Rights of the Crimean Tatars, No. 9818/24/01-66, dated 2 Dec. 2014 (MU, Ann. 841); Letter from the Committee for Protection of Rights of the Crimean Tatars to Viktor Nikolaevich, No. 001/12, dated 5 Dec. 2014 (MU, Ann. 844); Letter from the Committee for Protection of Rights of the Crimean Tatars to Viktor Nikolaevich, No. 001/12, dated 9 Dec. 2014 (MU, Ann. 847); Letter from Administration of Simferopol to the Committee for Protection of Rights of the Crimean Tatars, No. 12154/24/01-66, dated 9 Dec. 2014 (MU, Ann. 846).

<sup>205</sup> Letter from Executive Committee of "Republic of Crimea" Simferopol City Council to the Committee for Protection of Rights of the Crimean Tatars, No. 9818/24/01-66, dated 2 Dec. 2014 (MU, Ann. 841).

<sup>206</sup> Letter from the Committee for Protection of Rights of the Crimean Tatars to Viktor Nikolaevich, No. 001/12, dated 5 Dec. 2014 (MU, Ann. 844).

<sup>207</sup> Letter from Administration of Simferopol to the Committee for Protection of Rights of the Crimean Tatars, No. 12154/24/01-66, dated 9 Dec. 2014 (MU, Ann. 846).

<sup>208</sup> MU, paras. 480 and 496; Shchekun Statement, para. 19 (MU, Ann. 13) (judges' folder, tab 15).

this celebration in Simferopol<sup>209</sup>. Similarly, a planned celebration in Sevastopol was aggressively disrupted by violent Russian protesters.

54. Since then, Russia's suppression of culturally significant events for these communities has continued. As the United Nations Office of the High Commissioner noted in a 2021 report, "[l]aw enforcement agencies routinely issued written warnings to potential participants of assemblies, which has had a chilling effect on the exercise of the right to freedom of assembly". The report continues: "Crimean Tatars were particularly affected, receiving such warnings in advance of commemorative dates for Crimean Tatars."<sup>210</sup>

55. In 2020 alone, the Crimean Human Rights Group documented no fewer than 42 warnings issued to Crimean Tatars regarding the holding of peaceful rallies, no fewer than 25 police visits to Crimean Tatars, no fewer than 17 administrative fine resolutions for participation in peaceful rallies, eight court decisions regarding fines on Crimean Tatars, and six resolutions ordering five-day administrative arrests of Crimean Tatar activists<sup>211</sup>. These are not "isolated and unconnected incidents". The existence of a discernible pattern of conduct is evidenced not only by the sheer number of gatherings that Russia has frustrated, but also by the fact that Russia targeted the most important gatherings in the Crimean Tatar and ethnic Ukrainian cultural calendars. To recall, Russia restricted commemorations of the *Sürgün* for four consecutive years.

56. Discriminatory purpose, in turn, can be inferred not only from this pattern of conduct but also from Russia's abusive and selective application of its legal framework on public gatherings, which permits Russian gatherings to continue unhindered, while enforcing endless procedural minutiae to block events deeply meaningful to the Crimean Tatars and ethnic Ukrainians<sup>212</sup>.

57. At a minimum, there is no question that Crimean Tatars and ethnic Ukrainians have been disproportionately impacted by these measures.

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<sup>209</sup> Shchekun Statement, paras. 22–25 (MU, Ann. 13) (judges' folder, tab 15).

<sup>210</sup> OHCHR, Civic Space and Fundamental Freedoms in Ukraine, 1 November 2019 – 31 October 2021 (7 Dec. 2021), para. 77 (judges' folder, tab 28).

<sup>211</sup> Crimean Human Rights Group, *Overview of the Situation with Respect for Human Rights and Norms of the International Humanitarian Law in Crimea for 2020* (Jan. 2021) (RU, Ann. 103) (judges' folder, tab 27); see also Crimean Human Rights Group, Statement of Implementation Report Russian Federation International Legal Commitments in the Field Protection of Human Rights in the Occupied Territory of Crimea and Sevastopol (Nov. 2021), Ch. 3 (RU, Ann. 105).

<sup>212</sup> *Mejlis of Crimean Tatars were not allowed to take action in Simferopol to Human Rights Day* (11 Dec. 2015) (MU, Ann. 1061).



58. Again, unable to dispute the facts, Russia relies on its “anti-extremism legislation” as a shield for racial discrimination. But as Ms Cheek explained, whereas here, discriminatory purpose is established, the Convention provides no room for justification.

59. And even if the Court were to entertain Russia’s sham labels, Russia’s generalized and unsubstantiated accusations of “extremism” come nowhere close to meeting the strict test for showing necessity, proportionality, and a legitimate aim. The Russian Federation, for example, provides no explanation as to why Lenin Square — or the alternative places proposed by the organizers — were unsuitable locations to commemorate the *Sürgün*. There are none.

**B. Russia has suppressed educational rights of the Crimean Tatar and Ukrainian communities, in violation of CERD Articles 2 (1), 5 (e) (v) and 7**

60. Finally, Russia has used its educational system as a tool of suppression: to impose Russian as the dominant language of instruction and suppress the language and culture of Crimean Tatars and ethnic Ukrainians.

61. Russia boldly proclaims that “it ensures that all people living in Crimea have access to education in languages of their own choice, including in Crimean Tatar and Ukrainian”<sup>213</sup>. But even if this right exists on paper, it does not exist in practice.

62. Russia has systematically suppressed Ukrainian and Crimean Tatar language education by cutting off resources previously devoted to their instruction, ending teacher-training programmes in these languages<sup>214</sup>, pressuring parents to choose a Russian education<sup>215</sup> and harassing teachers and parents who dare to advocate for their children’s education in their native language<sup>216</sup>.

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<sup>213</sup> RR, para. 1009.

<sup>214</sup> MU, para. 545; OSCE, *Report on the Human Rights Assessment Mission on Crimea (6-18 July 2015)* (17 September 2015), para. 191 (MU, Ann. 812); Ukrainian Center for Independent Political Research, “*Annexed*” *Education in Temporarily Occupied Crimea*, Monitoring Report (2015), p. 7 (MU, Ann. 944); Tyshchenko Statement, paras. 13 and 19 (MU, Ann. 17).

<sup>215</sup> OSCE, *Report on the Human Rights Assessment Mission on Crimea (6-18 July 2015)* (17 September 2015), para. 190 (MU, Ann. 812); Tyshchenko Statement, paras. 25–27 (MU, Ann. 17, judges’ folder, tab 30); Ukrainian Center for Independent Political Research, “*Annexed*” *Education in Temporarily Occupied Crimea*, Monitoring Report 2015, p. 23 (MU, Ann. 944); Halya Coynash, *Russia Uses Threats & Intimidation to Drive Crimean Tatar Language Out of Schools in Occupied Crimea*, Kharkiv Human Rights Protection Group (21 May 2019); Ivan Zhilin, *Trample Other People’s Bonds*, New Newspaper (5 July 2018) (RU, Ann. 152).

<sup>216</sup> Halya Coynash, *Russia Uses Threats & Intimidation to Drive Crimean Tatar Language Out of Schools in Occupied Crimea*, Kharkiv Human Rights Protection Group (21 May 2019); Ivan Zhilin, *Trample Other People’s Bonds*, New Newspaper (5 July 2018) (RU, Ann. 152); Tyshchenko Statement, paras. 25–27 (MU, Ann. 17, judges’ folder, tab 30).

63. The results are stark. The number of students receiving a Ukrainian-language education decreased by more than 80 per cent, from more than 12,000 students before 2014 to just 2,154 students the first school year after the occupation<sup>217</sup>. In the most recent year, the number diminished to under 200 students<sup>218</sup>. Of the seven Ukrainian-language schools that existed in Crimea before 2014, only one remained in operation as of 2023<sup>219</sup>.

64. Russia does not deny that the number of students being taught in the Ukrainian language has declined dramatically since 2014. But Russia attributes this decline to a “drop in demand for education in Ukrainian”<sup>220</sup>. According to Russia, “it was the more logical and pragmatic choice to continue education in the Russian language”<sup>221</sup>. But Russia has it backwards. The collapse in Ukrainian language education results not from a drop in demand, but from Russia’s own policies cutting off supply<sup>222</sup>.

65. Beyond numbers, Russia has robbed Crimean Tatars and ethnic Ukrainians not only of their ability to pass on their language but also their history to their children.

66. General history classes in Crimea now teach a Russian version of history. As Yulia Tyshchenko, who is here today as part of Ukraine’s delegation, explains in her witness statement: “[t]he prejudice that currently exists in these Crimean Tatar schools can . . . be observed in the version of history taught there . . . The purpose of this concept is to distort the history of Russia in support of the establishment of an idealized Russian civil identity and patriotism.”<sup>223</sup>

67. One telling example is a tenth-grade history textbook depicting Crimean Tatars as Nazi collaborators in World War II. To state the obvious, this textbook rehabilitates the false narrative propounded by Stalin as a basis to deport Crimean Tatars from their homeland in 1944<sup>224</sup>.

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<sup>217</sup> OHCHR, Report on the Human Rights Situation in Ukraine (16 August–15 November 2015), para. 157 (MU, Ann. 770) (judges’ folder, tab 29); see Permanent Delegation of the Russian Federation to UNESCO, *Information on the Situation in the Republic of Crimea (the Russian Federation) within the Scope of UNESCO Competence as of April 8, 2015* (14 Apr. 2015), p. 2 (MU, Ann. 785).

<sup>218</sup> RR, para. 1037.

<sup>219</sup> OHCHR, Report on the Human Rights Situation in Ukraine (16 Aug.-5 Nov. 2016), para. 180 (MU, Ann. 773).

<sup>220</sup> RR, para. 1029.

<sup>221</sup> *Ibid.*, para. 1030.

<sup>222</sup> See RU, para. 702; Halya Coynash, *Russia Uses Threats & Intimidation to Drive Crimean Tatar Language Out of Schools in Occupied Crimea*, Kharkiv Human Rights Protection Group (21 May 2019).

<sup>223</sup> Tyshchenko Statement, paras. 23–24 (MU, Ann. 17, judges’ folder, tab 30).

<sup>224</sup> Halya Coynash, *Russia Repeats Lies About Crimean Tatars Used by Stalin to Justify the Deportation in School History Textbook*, Kharkiv Human Rights Protection Group (18 Feb. 2019).

68. Taken together, the evidence before you demonstrates not only the discriminatory effect of Russia's measures, but their clear discriminatory purpose.

69. That discriminatory purpose was made clear in June 2014, when, as quoted on the screen, the so-called Crimean Ministry of Education declared that studying the Crimean Tatar and Ukrainian languages "must not be conducted at the expense of instruction and study of the official language of the Russian Federation"<sup>225</sup>.

70. Russia replies that Ukraine claims entitlement to a right to education in minority languages. But that is not Ukraine's case.

71. Russia takes issue with Ukraine's reliance on *Minority Schools in Albania*, arguing that the Permanent Court of International Justice "expressly stated that equal treatment (or 'equality in law') 'precludes discrimination of every kind'"<sup>226</sup>. It will not be lost on the Court that Russia misreads your predecessors' Advisory Opinion. It is well known that the Permanent Court in that case recognized that "[e]quality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations".

72. Applying this principle, the Permanent Court found that the closure of private schools would destroy equality in fact, for its effect would be to "deprive the [Greek] minority of the institutions appropriate to its needs, whereas the majority would continue to have them supplied in the institutions created by the State"<sup>227</sup>.

73. This is precisely the situation here, where equal access to Russian-language education discriminates in fact against Crimean Tatars and ethnic Ukrainians by depriving them of public schooling appropriate to their needs in their native language.

74. What does this mean for affected parents and children? A letter to the editor of a Russian newspaper by Ukrainian parents captures the agony: "How will the children speak, write, read in their native Ukrainian language if there are no schools, no text books, no teachers, etc. This is in

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<sup>225</sup> "Republic of Crimea," Ministry of Education, Science and Youth, Letter No. 01-14/ 382 (25 June 2014) (MU, Ann. 836, judges' folder, tab 31).

<sup>226</sup> *Ibid.*, para. 846.

<sup>227</sup> *Ibid.*, Advisory Opinion, 6 Apr. 1935, P.C.I.J. Rep. Series A/B – No. 64, p. 20.

violation of the currently valid Art[icle] 10 of the Crimean Constitution! We have everything written on paper, but nothing in the reality.”<sup>228</sup>

### III. CONCLUSION

75. Madam President, Members of the Court, all the evidence before you points to one conclusion: Not only has Russia failed to take any steps towards eliminating racial discrimination in Crimea, Russia has implemented measure after measure, the purpose and effect of which has been to nullify and impair the human rights of Crimean Tatars and ethnic Ukrainians.

76. Russia has undertaken a systematic campaign of racial discrimination in Crimea since 2014 and continues to assault the past, present and future of the Crimean Tatar and ethnic Ukrainian communities. Russia assaults their past by blocking outlets for remembrance, degrading their cultural heritage and erasing their history from schoolbooks. It assaults their present by imposing a régime of racial discrimination and fear. And it assaults their future by robbing them of the ability to pass on their traditions, culture and language to their children.

77. But apparently that is not enough. Russia now threatens to erase Ukrainian identity everywhere, as Russia’s president chillingly denies the existence of a separate Ukrainian people. The symmetry between past and present is tragic and unmistakable. Their future is in your hands.

78. Madam President, Members of the Court, this concludes my presentation. I now ask that you call Professor Thouvenin.

The PRESIDENT: I thank Ms Trevino. I now give the floor to Prof. Jean-Marc Thouvenin to address the Court. You have the floor, Professor.

M. THOUVENIN : Merci, Madame la présidente. Je suis face à un dilemme : si je délivre ma plaidoirie telle que je l’avais prévue, nous dépasserons de dix minutes la journée. Je sais qu’elle a été longue, aussi me remettrai-je entre vos mains... Je peux faire des coupures et essayer de rendre la chose cohérente tout de même ? Ou bien, si vous m’autorisez ce dépassement, j’en serais ravi...

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<sup>228</sup> V.G. Sanko et al., *Return the Ukrainian Gymnasium Back to Us!*, Iskra Pravdy (2 Feb. 2020) (RU, Ann. 160, judges’ folder, tab 32).

The PRESIDENT: Thank you, Professor, for asking. If you think you can finish by 6.10 p.m., that would be fine. Please go ahead.

M. THOUVENIN : Thank you very much, Madam President.

**LA VIOLATION PAR LA RUSSIE DE L'ORDONNANCE EN INDICATION  
DE MESURES CONSERVATOIRES**

1. Madame la présidente — je repasse au français —, Mesdames et Messieurs les juges, je reviens à votre barre vous démontrer que la Russie a violé de multiples manières votre ordonnance en indication de mesures conservatoires du 19 avril 2017.

2. Chacun sait le mépris avec lequel la Russie traite vos ordonnances en indication de mesures conservatoires. Mais chacun sait aussi que ces ordonnances sont la source autonome d'obligations juridiques<sup>229</sup>. Leur violation engage la responsabilité de leur auteur.

3. Votre Cour a été témoin d'échanges épistolaires quant au sort réservé par la Russie à votre ordonnance de 2017.

4. J'en retiens que cette dernière — la Russie — a affirmé ce qui suit :

« any issue relating to compliance with provisional measures of the Court is a matter to be decided at the merits phase if the Court were somehow to find that it has jurisdiction to deal with the merits and that Ukraine's Application is admissible »<sup>230</sup>.

5. Dans votre arrêt du 8 novembre 2019, votre Cour s'est jugée pleinement compétente pour trancher le fond du litige. La Russie considère donc — et nous en sommes d'accord — que le moment est venu pour vous de juger, au fond, si elle a violé votre ordonnance.

6. Vous avez indiqué trois mesures conservatoires à la Russie :

— « [s]'abstenir de maintenir ou d'imposer des limitations à la capacité de la communauté des Tatars de Crimée de conserver ses instances représentatives, y compris le *Majlis* » ;

— « rendre disponible un enseignement en langue ukrainienne » ;

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<sup>229</sup> *LaGrand (Allemagne c. États-Unis d'Amérique)*, arrêt, C.I.J. Recueil 2001, p. 506, par. 109 et 110.

<sup>230</sup> Lettre en date du 7 juin 2018 adressée à M. Ph. Couvreur, greffier de la Cour internationale de Justice, par les agents de la Fédération de Russie, par. 3 (dossier des juges, onglet n° 33) ; lettre en date du 21 juin 2018 adressée à M. Ph. Couvreur, greffier de la Cour internationale de Justice, par les agents de la Fédération de Russie, p. 1.

— « s’abstenir de tout acte qui risquerait d’aggraver ou d’étendre le différend dont la Cour est saisie ou d’en rendre la solution plus difficile »<sup>231</sup>.

7. Trois obligations. Aucune n’a été respectée.

## I. LA VIOLATION DE L’OBLIGATION DE SUSPENDRE L’INTERDICTION DU *MAJLIS*

8. La première a été indiquée après que le *Majlis* a fait l’objet d’une interdiction en 2016, ce qui avait provoqué l’indignation non seulement en Ukraine mais également au sein de l’Organisation des Nations Unies.

9. Votre ordonnance de 2017 prend acte que l’interdiction du *Majlis* est une violation plausible de la convention<sup>232</sup> ; évoque les rapports s’alarmant de l’interdiction du *Majlis*<sup>233</sup> ; puis décide « à titre provisoire » que la Russie doit — je cite la première mesure provisoire adoptée — « [s]’abstenir de maintenir ou d’imposer des limitations à la capacité de la communauté des Tatars de Crimée de conserver ses instances représentatives, y compris le *Majlis* ».

10. Cette mesure est-elle suffisamment clairement énoncée pour que chacun la comprenne ?

11. J’aurais mauvaise grâce à ne pas reconnaître que vos décisions laissent parfois place à des interprétations divergentes, y compris au sein de la Cour. Mais cela ne saurait être le cas ici.

12. Le regretté juge Crawford le constatait dans sa déclaration jointe à l’ordonnance : « [l]a mesure conservatoire indiquée par la Cour relativement au *Majlis* impose à la Fédération de Russie de s’abstenir de maintenir cette interdiction »<sup>234</sup>.

13. Dans une autre déclaration, plutôt « dissidente », un autre juge indique que « [l]a mesure qu[e la Cour] a indiquée ce jour au point 1 du dispositif peut être interprétée comme imposant à la Fédération de Russie de lever ou, à tout le moins, de suspendre l’interdiction en vigueur visant les activités du *Majlis* »<sup>235</sup>. Contre toute attente, la Russie cherche à inférer de ce commentaire d’un des trois juges sur seize qui ont voté contre la mesure, que l’ordonnance ne lui imposait en réalité aucune

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<sup>231</sup> *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. 140, par. 106 (dossier des juges, onglet n° 34).*

<sup>232</sup> *Ibid.*, p. 135, par. 83.

<sup>233</sup> *Ibid.*, p. 138, par. 97.

<sup>234</sup> *Ibid.*, déclaration du juge Crawford, p. 215, par. 9.

<sup>235</sup> *Ibid.*, déclaration du juge Tomka, p. 150, par. 2.

obligation à l'égard du *Majlis*<sup>236</sup>. Tout au contraire, vous dit la Russie, « the Court decided not to do so »<sup>237</sup>.

14. Sa thèse est que, en spécifiant dans le chapeau des mesures conservatoires que la Fédération de Russie doit agir en Crimée « conformément [à ses] obligations en vertu de la convention »<sup>238</sup>, votre Cour aurait décidé que ses mesures conservatoires ne créaient aucune obligation indépendamment de la convention, fût-ce « à titre provisoire ». Pour la Russie,

« the ban on the activity of the Mejlis was both legitimate and non-discriminatory, and thus fully in accordance with the Russian Federation's obligations under the CERD. It follows that the Court's Order on Provisional Measures was complied with in this regard. »<sup>239</sup>

15. Bref, vous auriez indiqué des mesures conservatoires sans aucun objet. Or, votre jurisprudence est constante : vos ordonnances en indication de mesures conservatoires ont « un caractère obligatoire » et « mett[en]t une obligation juridique à la charge [des parties auxquelles elles sont adressées] »<sup>240</sup>. La teneur de ces obligations est sans doute plus ou moins précise selon les formulations que vous retenez. Mais, dans votre ordonnance du 19 avril 2017, la précision est, je dirais, chirurgicale : vous ordonnez à la Russie de lever l'interdiction du *Majlis*, « à titre provisoire », c'est-à-dire sans aucunement trancher la question de fond, qui ne vient devant vous qu'aujourd'hui.

16. La Russie a maintenu jusqu'à ce jour la position qu'elle tenait lors de l'audience sur les mesures conservatoires, que treize juges sur seize de votre Cour ont rejetée à titre provisoire en 2017.

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<sup>236</sup> DFR, par. 1242.

<sup>237</sup> *Ibid.*

<sup>238</sup> *Ibid.*, par. 1240.

<sup>239</sup> *Ibid.*, par. 1247.

<sup>240</sup> *LaGrand (Allemagne c. Etats-Unis d'Amérique)*, arrêt, C.I.J. Recueil 2001, p. 506, par. 110 ; *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie)*, mesures conservatoires, ordonnance du 15 octobre 2008, C.I.J. Recueil 2008, p. 397, par. 147 ; *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua)*, mesures conservatoires, ordonnance du 8 mars 2011, C.I.J. Recueil 2011 (I), p. 26-27, par. 84 ; *Demande en interprétation de l'arrêt du 15 juin 1962 en l'affaire du Temple de Préah Vihéar (Cambodge c. Thaïlande) (Cambodge c. Thaïlande)*, mesures conservatoires, ordonnance du 18 juillet 2011, C.I.J. Recueil 2011 (II), p. 554, par. 67 ; *Affaire Jadhav (Inde c. Pakistan)*, mesures conservatoires, ordonnance du 18 mai 2017, C.I.J. Recueil 2017, p. 245, par. 59 ; *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Qatar c. Émirats arabes unis)*, mesures conservatoires, ordonnance du 23 juillet 2018, C.I.J. Recueil 2018 (II), p. 433, par. 77 ; *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Azerbaïdjan c. Arménie)*, mesures conservatoires, ordonnance du 7 décembre 2021, C.I.J. Recueil 2021, p. 430, par. 74 ; *Allégations de génocide au titre de la convention pour la prévention et la répression du crime de génocide (Ukraine c. Fédération de Russie)*, mesures conservatoires, ordonnance du 16 mars 2022, par. 84.

17. Elle ne le nie d'ailleurs pas<sup>241</sup>. Elle assume sa conduite postérieure à votre ordonnance. M<sup>e</sup> Trevino a rappelé avant moi le traitement réservé aux membres du *Majlis*. Je n'y reviens pas. Je noterai simplement que le Conseil exécutif de l'UNESCO a dénoncé en 2018 le fait que

« [L]es attaques brutales menées par les autorités russes dans le but d'éliminer le *Majlis*, l'organe historique de représentation du peuple tatar de Crimée, ainsi que pour museler ses dirigeants et ses membres, se poursuivent sans répit, en violation manifeste de l'ordonnance de la Cour internationale de justice du 19 avril 2017 »<sup>242</sup>.

Nous étions en 2018.

18. L'Ukraine a alerté la Cour sur ce comportement par des courriers des 19 avril, 7 et 12 juin 2018, et 18 janvier et 19 mars 2019<sup>243</sup>. Rien n'y a fait, la Russie est restée de marbre. À ce jour, l'oppression exercée sur le *Majlis* par la Russie se poursuit, et même s'intensifie. Nombre de ses membres ont été condamnés depuis votre ordonnance, notamment M. Nariman Dzhelyalov, premier chef adjoint du *Majlis*, qui a été condamné à 17 ans de prison l'année dernière et qui est toujours derrière les barreaux<sup>244</sup>.

19. Il y a là une violation grave, assumée, de votre ordonnance, dont je rappelle qu'elle tire sa force obligatoire de l'article 41 de votre Statut<sup>245</sup>.

## II. LA VIOLATION DE L'OBLIGATION DE « [F]AIRE EN SORTE DE RENDRE DISPONIBLE UN ENSEIGNEMENT EN LANGUE UKRAINIENNE »

20. La deuxième mesure conservatoire était de « [f]aire en sorte de rendre disponible un enseignement en langue ukrainienne ».

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<sup>241</sup> Voir les lettres en date des 7 juin 2018, 21 juin 2018 et 18 janvier 2019 adressées à M. Ph. Couvreur, greffier de la Cour internationale de Justice, par les agents de la Fédération de Russie (dossier des juges, onglet n° 33).

<sup>242</sup> UNESCO, Suivi des décisions et résolutions adoptées par le Conseil exécutif et la Conférence générale à leurs sessions antérieures, 205 EX/5, partie I.E., p. 5 (7 septembre 2018), accessible à l'adresse suivante : <https://unesdoc.unesco.org/ark:/48223/pf0000369719>.

<sup>243</sup> Lettre en date du 19 avril 2018 adressée au président de la Cour internationale de Justice par l'agent de l'Ukraine ; lettre en date du 7 juin 2018 adressée au président de la Cour internationale de Justice par l'agent de l'Ukraine, p. 2 ; lettre en date du 12 juin 2018 adressée au président de la Cour internationale de Justice par l'agent de l'Ukraine ; lettre en date du 18 janvier 2019 adressée au président de la Cour internationale de Justice par l'agent de l'Ukraine ; lettre en date du 19 mars 2019 adressée au président de la Cour internationale de Justice par l'agent de l'Ukraine.

<sup>244</sup> RFE/RL, « Russia-Imposed Court in Crimea Sentences Crimean Tatar Leader to 17 Years in Prison » (21 September 2022) ; Halya Coynash, « Russia Sentences Crimean Tatar Mejlis Leader Nariman Dzhelyal to 17 Years in Revenge for Crimea Platform », Kharkiv Human Rights Protection Group (21 September 2022).

<sup>245</sup> *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Qatar c. Émirats arabes unis), mesures conservatoires, ordonnance du 14 juin 2019, C.I.J. Recueil 2019 (I),* opinion individuelle du juge Abraham, p. 379, par. 9.



21. La Russie n'a pas davantage respecté cette obligation. M<sup>e</sup> Trevino a donné les statistiques de l'enseignement en ukrainien. Le constat que l'on peut faire est que ces statistiques sont désastreuses<sup>246</sup>.

22. La Russie impute cet effondrement à un manque d'intérêt pour la langue ukrainienne<sup>247</sup>. Ce n'est pas ce que disent les habitants<sup>248</sup>. Dans son rapport de 2022, le Secrétaire général de l'Organisation des Nations Unies relève que,

« [s]elon les témoignages recueillis par le Haut-Commissariat auprès de jeunes Tatars de Crimée diplômés et de parents d'élèves, les possibilités de suivre un enseignement en tatar de Crimée et en ukrainien et d'apprendre ces deux langues ne sont pas à la hauteur de la demande. Les personnes interrogées à Simferopol, dans la zone du Grand Yalta et à Djankoï se sont plaintes du nombre insuffisant d'heures, de l'absence d'enseignement en tatar de Crimée ou de sa piètre qualité et de l'impossibilité de s'inscrire à des cours pour apprendre cette langue. »<sup>249</sup>

23. Bref, et cela ne surprendra personne vu les développements actuels, la politique de « russification » forcée de la Crimée n'a pas cessé depuis votre ordonnance de 2017. Là encore, votre ordonnance a été purement et simplement ignorée.

### III. LA RUSSIE A AGGRAVÉ LE DIFFÉREND ENTRE LES PARTIES

24. Enfin, la Russie n'a cessé depuis 2017 d'aggraver et d'étendre le différend, sous tous ses aspects, et de rendre la solution plus difficile<sup>250</sup>.

#### A. En ce qui concerne l'application de la convention sur le financement du terrorisme

25. Quant au volet relatif à la convention sur le financement du terrorisme, je rappelle que ce dont la Cour est saisie est de l'absence totale de coopération de la Russie depuis 2014 pour prévenir et réprimer le financement d'actes terroristes commis à l'encontre de civils par des groupes dont la

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<sup>246</sup> Rapport du Secrétaire général, Nations Unies, doc. A/77/220, Situation relative aux droits humains dans la République autonome de Crimée et la Ville de Sébastopol (Ukraine) temporairement occupées (25 juillet 2022), par. 38, note 54 (dossier des juges, onglet n° 18).

<sup>247</sup> DFR, par. 1248-1250.

<sup>248</sup> Rapport du Secrétaire général, Nations Unies, doc. A/77/220, Situation relative aux droits humains dans la République autonome de Crimée et la Ville de Sébastopol (Ukraine) temporairement occupées (25 juillet 2022), par. 40 (dossier des juges, onglet n° 18).

<sup>249</sup> *Ibid.*, par. 40.

<sup>250</sup> *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. 140, par. 106 (dossier des juges, onglet n° 34).*

RPD et la RPL<sup>251</sup>. Ces deux entités sont donc indirectement mises en cause dans la présente affaire, en ce sens que leurs actes sont soumis à examen. Or, la Russie a décidé de reconnaître ces entités comme des États souverains, et de s'engager dans la foulée à leur fournir une assistance financière et militaire, avant, finalement, d'en épouser totalement les contours en prétendant les absorber.

26. Je sais bien, Madame la présidente, que la convention n'interdit pas à la Russie de financer le terrorisme ni de s'adonner à cette activité coupable.

27. Mais là n'est pas le propos. Ce que l'Ukraine soutient est que les décisions prises par la Russie de reconnaître la légitimité de l'action de groupes terroristes du Donbas, et singulièrement celle de la RPD et de la RPL, reviennent à endosser formellement et rétrospectivement leurs actes. L'un des chefs de la RPD, M. Pushilin, totalement impliqué dans les actes de terreur commis dans le Donbas, qui, en mai 2014, aimait à être photographié au milieu des hommes de la RPD — mai 2014, un moment où la RPD était notoirement engagée dans des exactions terroristes —, M. Pushilin donc s'est vu acclamé, en grande pompe, par le pouvoir russe en 2022, comme les médias du monde entier en ont rendu compte. Du même coup, la Russie s'est interdit de réprimer ceux qui ont financé les actes terroristes de ce groupe. Comment la Russie pourrait-elle punir ceux qui ont financé une action qu'elle a formellement non seulement entérinée, mais dont elle a chaudement applaudi, et hautement gratifié, les responsables ?

28. Je rappelle que le différend est défini par la requête de l'Ukraine, qui demande à la Cour de juger que la Russie doit

« coopérer pleinement et immédiatement avec l'Ukraine pour toutes les demandes d'assistance, existantes et à venir, concernant les enquêtes relatives au financement du terrorisme lié aux groupes armés illégaux qui se livrent à des actes de terrorisme en Ukraine, dont la RPD, la RPL, les Partisans de Kharkiv et d'autres groupes et personnes qui y sont associés, ainsi que l'interdiction de ce financement »<sup>252</sup>.

29. Les décisions prises par la Russie que je viens de mentionner sont un exemple parfait d'actes rendant « la solution du différend [tel que défini par la requête] plus difficile ».

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<sup>251</sup> MU, chap. 1 ; REU, par. 729.

<sup>252</sup> Requête introductive d'instance, par. 136, al. f) ; reproduit dans *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. 107 (dossier des juges, onglet n° 34), et dans *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), exceptions préliminaires, arrêt, C.I.J Recueil 2019 (II)*, p. 569.

**B. En ce qui concerne l'application de la convention sur la discrimination raciale**

30. La Russie a également aggravé et étendu le différend sous le volet de la convention sur la discrimination raciale.

31. Elle l'a tout d'abord aggravé en amplifiant les discriminations à l'égard des Tatars de Crimée et des Ukrainiens de souche, comme M<sup>e</sup> Trevino l'a démontré. Le ciblage de ces groupes par la Russie n'a fait que s'intensifier.

32. Vous noterez à cet égard que la Russie a imposé la conscription aux Tatars de Crimée, de manière disproportionnée, pour soutenir son effort d'agression. Le Comité pour l'élimination de la discrimination raciale l'a dénoncé il y a seulement quelques jours (en juin) :

« [T]he Committee is deeply concerned about :

.....

(c) Reports of forced mobilization and conscription, both within the territory of the State party and on other territories under its effective control, which disproportionately affect members of ethnic minorities and Indigenous Peoples »<sup>253</sup>.

33. La Russie a fait valoir dans son contre-mémoire que la conscription militaire est obligatoire pour toutes les personnes de nationalité russe<sup>254</sup>. Mais, la Russie a pratiquement imposé la citoyenneté russe aux habitants de Crimée<sup>255</sup>, forçant par là même les Criméens membres de minorités ethniques, qu'elle a tout particulièrement ciblés, à servir, en masse, une armée qui mène une guerre d'agression contre leur pays.

34. Ce mois-ci, le Comité pour l'élimination de la discrimination raciale a exprimé d'autres graves préoccupations quant à la politique de la Russie en Crimée, concernant :

« numerous and serious human rights violations against members of ethnic minority groups and Indigenous Peoples in Crimea, in particular abductions, enforced disappearances, arbitrary detention, ill-treatment and the forcible transfer or deportation of inhabitants from those territories to the Russian Federation, and the lack of information on measures taken to investigate such allegations and to provide victims with redress and support;

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<sup>253</sup> CERD Committee, Concluding Observations on the Combined Twenty-Fifth and Twenty-Sixth Periodic Reports of the Russian Federation, CERD Doc. No. CERD/C/RUS/CO/25-26, paras. 4 (c) (1 June 2023).

<sup>254</sup> CMFR, partie II, appendice C, par. 50-51.

<sup>255</sup> OHCHR, Situation of human rights in the temporarily occupied Autonomous Republic of Crimea and the city of Sevastopol (Ukraine), 25 September 2017, A/HRC/36/CRP.3, par. 120-145 (MU, annexe 778).

. . . destruction of and damage to Crimean Tatar cultural heritage, including tombstones, monuments and shrines, and the lack of information on investigations carried out into such allegations and on other measures to prevent such vandalism;

. . . barriers to using and studying in the Ukrainian and Crimean Tatar languages;

. . . restrictions on the representative institutions and political rights of Crimean Tatars, such as the dissolution of the Mejlis and the prosecution and persecution of its members »<sup>256</sup>.

C'était ce mois-ci.

35. Il y a encore davantage car, non contente d'aggraver le différend portant sur la discrimination raciale en Crimée, la Russie a entrepris d'en étendre les effets sur le reste du territoire ukrainien qu'elle occupe depuis l'année dernière.

36. L'instigateur en chef de cette expansion est le président de la Fédération de Russie. Ès qualités, il a signé en juillet 2021 un article-programme qui préfigure l'ensemble de l'action russe mise en œuvre en Ukraine à compter de février 2022. Il s'intitule — tout le monde l'a lu je crois —, « On the Historical Unity of Russians and Ukrainians ». En substance, il nie l'identité ethnique ukrainienne en l'absorbant complètement : « Russians and Ukrainians were one people — a single whole », affirme-t-il pour justifier sa politique. En réalité, c'est la supériorité historique des Russes sur leurs voisins qu'il fait valoir, et l'obligation subséquente des Ukrainiens de se plier à la volonté russe, de gré ou de force. Peut-on parler d'une forme post-moderne de racisme colonial ? Avant de lancer sa guerre « coloniale », et je reprends ici un terme utilisé à la tribune de l'Assemblée générale des Nations Unies par le président de la République française — « coloniale » —, le président Poutine s'est adressé au président ukrainien, ou plutôt à la population ukrainienne, car il ne s'est jamais adressé au président ukrainien, de la manière suivante — je m'excuse de faire cette citation : « Like it or don't like it, it's your duty, my beauty. »

37. Ce discours faussement paternaliste, authentiquement dégradant, a été repris et développé dans la presse russe, notamment dans un article remarqué de Timofey Sergeytsev intitulé « Ce que la Russie devrait faire avec l'Ukraine »<sup>257</sup>. Cet article, que j'invite la Cour à lire dans sa totalité tant

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<sup>256</sup> CERD Committee, Concluding Observations on the Combined Twenty-Fifth and Twenty-Sixth Periodic Reports of the Russian Federation, CERD Doc. No. CERD/C/RUS/CO/25-26, par. 23(a)-(d) (1 June 2023) (dossier des juges, onglet n° 35).

<sup>257</sup> Timofey Sergeytsev, « What Should Russia Do with Ukraine », *Ria Novosti* (3 avril 2022) (REU, annexe 171).

il est édifiant, est une incitation contemporaine à la haine et à l'annihilation d'une nation, de son histoire, de sa culture, de sa langue et de ses aspirations.

38. Ces textes ont ouvert les vannes aux discours de haine raciste qui a cours en Russie. Le Comité sur l'élimination de la discrimination raciale s'en est dit particulièrement alarmé très récemment, en dénonçant les

« [i]ncitement to racial hatred and propagation of racist stereotypes against ethnic Ukrainians, in particular on State-owned radio and television networks, ... as well as by public figures and government officials »<sup>258</sup>.

39. Bien sûr, la Russie n'a rien fait pour mettre un terme à ces pratiques. Au contraire, elle suit obstinément le programme terrifiant fixé par le plus haut niveau de l'État. On connaît les kidnappings d'enfants — je passe, le temps m'est compté, pour conclure.

40. Madame la présidente, Mesdames et Messieurs les juges, à la suite de mes collègues, c'est un bien noir tableau — j'en conviens — que je viens de dresser. Tout au long de la journée, nous avons développé une réalité. Il est inutile de résumer ce qui a été dit à ce stade avancé de la journée, si ce n'est pour dire qu'il s'agit d'un tableau cauchemardesque, peint consciencieusement par la Russie au son funeste des orgues de Staline. Il fait — ce tableau — inévitablement penser à celui, si douloureux, dénoncé à notre humanité par Picasso, *Guernica*. Le fait est que la Russie ne respecte plus rien. Ni la convention sur le financement du terrorisme, ni la convention sur la discrimination raciale. Et pas davantage les mesures conservatoires que vous avez, avec la sagesse qui vous caractérise, ordonnées en 2017. Aucune des trois.

43. Merci beaucoup, Madame la présidente, de m'avoir accordé ces quelques minutes supplémentaires. Nous vous remercions pour votre patiente attention.

The PRESIDENT: I thank Prof. Thouvenin, whose statement brings to an end the first round of oral argument of Ukraine. The Court will meet again on Thursday morning at 10 a.m. to hear the first round of oral argument of the Russian Federation. The sitting is adjourned.

*The Court adjourned at 6.10 p.m.*

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<sup>258</sup> CERD Committee, Concluding Observations on the Combined Twenty-Fifth and Twenty-Sixth Periodic Reports of the Russian Federation, CERD Doc. No. CERD/C/RUS/CO/25-26, par. 4(b) et par. 5(c) (1 June 2023).