

CR 2017/1

International Court  
of Justice

THE HAGUE

Cour internationale  
de Justice

LA HAYE

YEAR 2017

*Public sitting*

*held on Monday 6 March 2017, at 10 a.m., at the Peace Palace,*

*President Abraham presiding,*

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

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VERBATIM RECORD

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ANNÉE 2017

*Audience publique*

*tenue le lundi 6 mars 2017, à 10 heures, au Palais de la Paix,*

*sous la présidence de M. Abraham, président,*

*dans 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 Abraham  
                 Vice-President Yusuf  
                 Judges Owada  
                                 Tomka  
                                 Bennouna  
                                 Cañado Trindade  
                                 Greenwood  
                                 Xue  
                                 Donoghue  
                                 Gaja  
                                 Sebutinde  
                                 Bhandari  
                                 Robinson  
                                 Crawford  
                 Judges *ad hoc* Pocar  
                                 Skotnikov  
  
                 Registrar Couvreur

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*Présents :* M. Abraham, président  
M. Yusuf, vice-président  
MM. Owada  
Tomka  
Bennouna  
Caçado Trindade  
Greenwood  
Mmes Xue  
Donoghue  
M. Gaja  
Mme Sebutinde  
MM. Bhandari  
Robinson  
Crawford, juges  
MM. Pocar  
Skotnikov, juges *ad hoc*  
M. Couvreur, greffier

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

H.E. Ms Olena Zerkal, Deputy Foreign Minister of Ukraine,

*as Agent;*

Mr. Vsevolod Chentsov, Ministry of Foreign Affairs of Ukraine, Director-General for the European Union,

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Mr. Jonathan Gimblett, Covington & Burling LLP, member of the Bars of the District of Columbia and Virginia,

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Ms Lali Moroz, Second Secretary, Embassy of Ukraine in the Kingdom of the Netherlands,

Mrs. Alona Dovgan, Second Secretary, Director-General for International Law, Ministry of Foreign Affairs of Ukraine,

Mr. Oleksii Kriukov, National Police of Ukraine,

Mr. Yevhen Rohachov, National Police of Ukraine,

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Mr. Oleksandr Tkachuk, Security Service of Ukraine,

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M. Yevhen Rohachov, police nationale de l'Ukraine,

M. Mykola Hovorukha, bureau du procureur général de l'Ukraine,

M. Oleksandr Tkachuk, service de sécurité de l'Ukraine,

Mr. Bohdan Tyvodar, Security Service of Ukraine,

Mr. Vadym Skibitskyi, Ministry of Defence of Ukraine,

Mr. Ihor Zhovkva, Administration of the President of Ukraine,

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Mr. Vasily Torkanovsky, member of the Saint Petersburg Bar, Ivanyan & Partners,

M. Bohdan Tyvodar, service de sécurité de l'Ukraine,  
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M. Ihor Zhovkva, services du président de l'Ukraine,  
M. Bohdan Kryklyvenko, bureau du commissaire aux droits de l'homme du Parlement ukrainien,  
M. Herman Haluschchenko, agence pour le droit international,  
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M. Alexey Zhafyarov, chef de département adjoint au bureau du procureur général de la Fédération de Russie,

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M. Alexander Velichko, expert au service fédéral de surveillance financière de la Fédération de Russie,

*comme conseillers.*

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

Before we start our judicial proceedings today, I would like first to pay solemn tribute, on behalf of the Court, to the memory of two distinguished figures of international law who have recently passed away, and who held very close ties with our Court: Professor Elihu Lauterpacht and Professor Hubert Thierry.

Professor Elihu Lauterpacht was an outstanding scholar and international lawyer. Sir Elihu was born in London in 1928. He studied history, then law, at Trinity College Cambridge, where he excelled both in his undergraduate and postgraduate studies. Following in the footsteps of his eminent father, Hersch Lauterpacht, he specialized in international law, and became a renowned authority as an academic and as a practitioner.

In the 1950s, he began his brilliant academic career teaching international law at the London School of Economics, and then at Trinity College Cambridge, culminating in an honorary professorship at Cambridge University in 1994. At Cambridge he founded in 1983 what is now known — in his honour and in honour of his father — as the Lauterpacht Centre for International Law, aimed at providing a forum for critical and constructive thought about the function, content and working of law in the international community. With his characteristic verve and energy, Sir Elihu also found time to write, in particular on the administration of international justice, to edit the *International Law Reports* from 1960 to 1979, to edit five volumes of his father's collected papers, and to found his own publishing imprint, Grotius Publications, which is now part of Cambridge University Press.

In tandem with his rich scholarly life, Sir Elihu enjoyed a stellar career as a counsel and advocate. He was called to the Bar at Gray's Inn in 1950 and appointed a Queen's Counsel in 1970.

His focus was always on finding practicable legal solutions. He relished the opportunity to apply international law in a way that would contribute to a fairer and safer world. In that optic, as Legal Adviser of the Australian Department of Foreign Affairs from 1975 to 1978, he was closely involved in the negotiation of the United Nations Convention on the Law of the Sea. He also played a key role in negotiating the 1994 Peace Treaty between Israel and Jordan.

Sir Elihu acted as counsel in many cases before the International Court of Justice, dealing with a wide range of issues, from territorial sovereignty and maritime delimitation, to human rights, environmental, and various trade-related and commercial issues. He truly believed in the role of international courts and tribunals in making international law more effective. He was appointed judge *ad hoc* by Bosnia and Herzegovina in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, which was instituted by that State in 1993 against what was then the Federal Republic of Yugoslavia.

Despite Sir Elihu's remarkable achievements in his life, including being knighted in 1998, he is remembered just as much for his warm and nurturing personality — always ready to share his knowledge and his time freely, always encouraging towards his students. He enriched the lives of all whose paths crossed his. His legacy is exceptional and unique. We extend our deepest sympathy to his family at this sad time.

Je voudrais à présent rendre hommage, au nom de la Cour, à l'éminent juriste Hubert Thierry, qui s'est éteint le 28 janvier dernier à Genève.

Né en 1925, Hubert Thierry suivit des études de droit et de lettres à Paris. Il exerça ensuite quelques années la profession d'avocat avant d'obtenir, en 1954, l'agrégation de droit public. Il devint alors professeur des Universités et débuta une brillante carrière académique à la faculté de droit de Grenoble. Il enseigna aussi à Caen puis à Paris X-Nanterre, Université qu'il rejoignit en 1969 et où il resta jusqu'à son départ à la retraite, en 1990. Il en fut le vice-président de 1973 à 1978.

Parallèlement, Hubert Thierry fit profiter de son immense savoir bien d'autres étudiants : il enseigna à l'Institut d'études politiques de Paris, à l'Institut des hautes études internationales de la même ville ainsi qu'à l'Institut universitaire des hautes études internationales de Genève, où il fut professeur invité en 1986 et 1987. Il assura également, en 1990, le prestigieux cours général de droit international public à l'Académie de droit international, qu'il consacra à «L'évolution du droit international».

Travailleur insatiable et passionné, Hubert Thierry ne se contenta pas d'enseigner. Il fut, de 1959 à 1961, conseiller juridique à l'ambassade de France à Tunis. Il présida, de 1971 à 1979, la

section française d'Amnesty International. Il devint, en 1981, directeur adjoint de l'Institut des Nations Unies pour le désarmement, poste qu'il occupa jusqu'en 1986. Quelques années plus tard, il rejoignit le Tribunal administratif des Nations Unies, dont il devint le président en 1996. Il fut par ailleurs président de la Société française pour le droit international de 1993 à 1999, avant d'en être président d'honneur.

Juriste émérite, Hubert Thierry fut désigné, fin 1989, par la Guinée-Bissau en tant que juge *ad hoc* en l'affaire relative à la *Sentence arbitrale du 31 juillet 1989 (Guinée-Bissau c. Sénégal)*.

Hubert Thierry est de surcroît l'auteur d'un grand nombre de publications. Plusieurs de ses articles témoignent de tout l'intérêt qu'il portait à la Cour internationale de Justice, dont il étudia le fonctionnement et la jurisprudence.

Les enseignements et les écrits d'Hubert Thierry auront marqué des générations d'internationalistes. Mais, au-delà du professeur et de l'éminent juriste, tous ceux qui l'ont connu se souviendront d'un homme profondément attachant, humain et bienveillant.

Je voudrais maintenant vous inviter à vous lever pour observer une minute de silence à la mémoire des professeurs Lauterpacht et Thierry.

*[La Cour observe une minute de silence.]*

Le **PRESIDENT** : Veuillez vous rasseoir. La Cour se réunit aujourd'hui pour entendre, conformément au paragraphe 3 de l'article 74 de son Règlement, les observations des Parties concernant la demande en indication de mesures conservatoires présentée par l'Ukraine 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)*.

Avant de rappeler les principales étapes de la procédure en l'espèce, je signalerai que, se référant au paragraphe 1 de l'article 24 du Statut, le juge Gevorgian, ressortissant de la Fédération de Russie, a fait savoir à la Cour qu'il estimait ne pas devoir participer au jugement de l'affaire. Le paragraphe 1 de l'article 37 du Règlement de la Cour dispose que,

«[s]i un membre de la Cour ayant la nationalité de l'une des parties n'est pas ou n'est plus en mesure de siéger dans une phase d'une affaire, cette partie est autorisée à

désigner un juge *ad hoc* dans un délai fixé par la Cour ou, si elle ne siège pas, par le Président».

En conséquence, la Fédération de Russie a désigné M. Leonid Skotnikov pour siéger en qualité de juge *ad hoc*.

La Cour ne comptant sur le siège aucun juge de nationalité ukrainienne, l'Ukraine s'est prévalu du droit que lui confère l'article 31 du Statut et a désigné M. Fausto Pocar pour siéger en qualité de juge *ad hoc* en l'affaire.

L'article 20 du Statut dispose que «[t]out membre de la Cour doit, avant d'entrer en fonction, en séance publique, prendre l'engagement solennel d'exercer ses attributions en pleine impartialité et en toute conscience». Aux termes du paragraphe 6 de l'article 31 du Statut, cette disposition s'applique également aux juges *ad hoc*.

Bien que M. Skotnikov ait siégé en tant que juge *ad hoc* dans une autre affaire et qu'il ait déjà été appelé à prendre l'engagement solennel que le Statut prévoit, il lui faut, conformément au paragraphe 3 de l'article 8 du Règlement de la Cour, faire une nouvelle déclaration solennelle en la présente affaire.

Avant d'inviter chacun des deux juges *ad hoc* à faire sa déclaration solennelle, dans l'ordre indiqué au paragraphe 3 de l'article 7 du Règlement, je dirai d'abord quelques mots de leur carrière et de leurs qualifications.

De nationalité italienne, M. Fausto Pocar a obtenu le diplôme de la faculté de droit de l'Université de Milan *summa cum laude*. Il est membre du barreau de Milan depuis 1963 et avocat à la Cour de cassation italienne depuis 1971. Depuis le début de sa carrière, brillante et variée, il cumule fonctions universitaires et judiciaires et a acquis une importante expérience en tant que praticien du droit aux plus hauts niveaux.

M. Pocar a occupé plusieurs postes prestigieux à l'Université de Milan, son *alma mater*, notamment celui de professeur de droit international pendant de nombreuses années. M. Pocar a également été vice-recteur, membre du conseil d'administration et doyen de la faculté de sciences politiques. Il a enseigné à l'Académie de droit international de La Haye, où il a entre autres dispensé le cours général de droit international privé en 1993. Par ailleurs, M. Pocar a publié un grand nombre d'ouvrages consacrés à un large éventail de questions juridiques allant de la

procédure pénale internationale au droit international public et privé ; il a également dispensé des cours dans plusieurs universités prestigieuses.

M. Pocar a en outre représenté son pays auprès de l'Organisation des Nations Unies en maintes occasions, en tant que membre de la délégation italienne auprès de l'Assemblée générale et d'autres organes des Nations Unies. Il a exercé différentes fonctions au Comité des droits de l'homme des Nations Unies établi en vertu du Pacte international relatif aux droits civils et politiques, notamment celles de président, de vice-président et de rapporteur.

En 2000, M. Pocar a été élu membre du Tribunal pénal international pour l'ex-Yougoslavie au sein duquel il joue depuis un rôle judiciaire important ; il en a été le vice-président de 2003 à 2005, puis le président de 2005 à 2008. Il a aussi été membre de la chambre d'appel du Tribunal pénal international pour le Rwanda.

Ressortissant de la Fédération russe, M. Skotnikov est diplômé en droit international de l'Institut des relations internationales de Moscou. Il est bien connu de la Cour puisqu'il en a été membre pendant neuf ans, de 2006 à 2015 ; il est également juge *ad hoc* dans une autre affaire pendante devant la Cour. Avant d'être élu à la Cour, M. Skotnikov a effectué une remarquable carrière au ministère des affaires étrangères de l'URSS, puis de la Fédération de Russie, au sein duquel il a occupé plusieurs postes, tant à Moscou qu'à l'étranger. Il a été notamment le directeur du département juridique de ce ministère. En outre, M. Skotnikov a été ambassadeur extraordinaire et plénipotentiaire de la Fédération de Russie auprès du Royaume des Pays-Bas de 1992 à 1998, puis représentant permanent de la Fédération de Russie auprès de l'Office des Nations Unies et des autres organisations internationales ayant leur siège à Genève, ainsi que de la conférence du désarmement, de 2001 à 2005. Au cours de sa brillante carrière, il a participé à d'importantes rencontres et négociations internationales en tant que membre puis chef des délégations représentant son pays.

M. Skotnikov a par ailleurs exercé des activités scientifiques et d'expertise. Ses publications portent sur divers sujets, allant de l'emploi de la force à la primauté du droit en politique. Il a aussi été membre du curatorium de l'Académie de droit international de La Haye. En 2015, il a été invité à faire partie du groupe d'experts chargé par l'ancien Secrétaire général de l'Organisation

des Nations Unies de réaliser une évaluation indépendante intermédiaire du système d'administration de la justice au sein de l'Organisation.

J'invite maintenant MM. Pocar et Skotnikov à faire la déclaration solennelle prescrite par l'article 20 du Statut et je demanderai à toutes les personnes présentes à l'audience de bien vouloir se lever. Monsieur Pocar.

M. POCAR :

«Je déclare solennellement que je remplirai mes devoirs et exercerai mes attributions de juge en tout honneur et dévouement, en pleine et parfaite impartialité et en toute conscience.»

Le PRESIDENT : Je vous remercie, Monsieur Pocar. Monsieur Skotnikov.

M. SKOTNIKOV :

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

Le PRESIDENT : Je vous remercie, Monsieur Skotnikov. Veuillez vous asseoir. La Cour prend acte des déclarations solennelles faites par MM. Pocar et Skotnikov et les déclare dûment installés en qualité de juges *ad hoc* en l'affaire.

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Je rappellerai à présent brièvement les étapes de la procédure en l'affaire.

Le 16 janvier 2017, le Gouvernement de l'Ukraine a déposé au Greffe de la Cour une requête introductive d'instance contre la Fédération de Russie concernant des violations alléguées 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. Dans ce document, l'Ukraine soutient que, dans la partie orientale du pays, la Fédération de Russie «a fomenté et soutenu une insurrection armée contre l'autorité de l'Etat ukrainien, notamment par la fourniture systématique d'armement lourd, de fonds, de personnel, de formation et d'autres formes de soutien à des groupes armés illégaux». Selon elle, cette assistance aurait non seulement été utilisée dans le cadre de la lutte contre les autorités ukrainiennes, mais aurait aussi servi à la commission d'actes

terroristes contre des civils. La Russie, selon la demanderesse aurait manqué à son obligation de coopération pour la prévention du financement du terrorisme. L'Ukraine affirme en outre que, depuis la prétendue annexion de la Crimée, qui fait partie intégrante du territoire ukrainien, la Fédération de Russie «mène dans la péninsule une politique d'annihilation culturelle en se livrant à une série d'actes discriminatoires» contre les communautés ethniques non russes, notamment les Tatars et les Ukrainiens de souche.

Après avoir déposé sa requête, l'Ukraine a également présenté, le 16 janvier 2017, une demande en indication de mesures conservatoires en se fondant sur l'article 41 du Statut de la Cour et l'article 73 de son Règlement. Dans ce document, l'Ukraine fait état de violations de la convention contre le financement du terrorisme qui auraient été commises par la Fédération de Russie, et affirme que des mesures conservatoires sont nécessaires «pour protéger sa population des nouveaux actes de terrorisme qu'elle pourrait avoir à subir en conséquence du soutien que la Fédération de Russie, en violation de la convention, apporte au terrorisme». Elle affirme par ailleurs que la Fédération de Russie a violé la convention internationale sur l'élimination de toutes les formes de discrimination raciale et «demande que des mesures conservatoires soient indiquées pour protéger sa population des préjudices irréparables causés par cette campagne discriminatoire d'annihilation culturelle qui perdure à ce jour».

L'Ukraine fait valoir qu'il y a urgence car «les populations civiles [sur son territoire], tout particulièrement dans [l]a partie orientale [de celui-ci] et en Crimée, sont extrêmement vulnérables et ont besoin de la protection immédiate de la Cour».

Le greffier va à présent donner lecture du passage de la demande dans lequel sont précisées les mesures conservatoires que le Gouvernement de l'Ukraine prie la Cour d'indiquer :

Le GREFFIER :

S'agissant de la convention contre le financement du terrorisme, l'Ukraine prie la Cour d'indiquer les mesures conservatoires suivantes :

- a) La Fédération de Russie doit s'abstenir de tout acte qui risquerait d'aggraver ou d'étendre le différend porté devant la Cour sur le fondement de la convention contre le financement du terrorisme, ou d'en rendre la solution plus difficile.

- b) La Fédération de Russie doit exercer un contrôle approprié sur sa frontière afin de prévenir tout nouvel acte de financement du terrorisme, y compris la fourniture d'armes en provenance de son territoire et à destination du territoire ukrainien.
- c) La Fédération de Russie doit cesser et prévenir tous transferts d'argent, d'armes, de véhicules, de matériels, de formation ou de personnel en provenance de son territoire et à destination de groupes s'étant livrés à des actes de terrorisme contre des civils en Ukraine ou dont elle sait qu'ils pourraient se livrer à pareils actes dans le futur, à savoir, et sans que cette énumération soit limitative, la «République populaire de Donetsk», la «République populaire de Louhansk», les «Partisans de Kharkiv» et tous groupes ou personnes qui y sont associés.
- d) La Fédération de Russie doit prendre toutes les mesures dont elle dispose pour s'assurer que tout groupe opérant en Ukraine et ayant auparavant bénéficié de transferts d'argent, d'armes, de véhicules, de matériels, de formation ou de personnel en provenance de son territoire s'abstienne de se livrer à des actes de terrorisme contre des civils en Ukraine.

S'agissant de la convention internationale sur l'élimination de toutes les formes de discrimination raciale, l'Ukraine prie la Cour d'indiquer les mesures conservatoires suivantes :

- a) La Fédération de Russie doit s'abstenir de tout acte qui risquerait d'aggraver ou d'étendre le différend porté devant la Cour sur le fondement de la convention internationale sur l'élimination de toutes les formes de discrimination raciale ou d'en rendre la solution plus difficile.
- b) La Fédération de Russie doit s'abstenir de tout acte de discrimination raciale visant des personnes, groupes ou institutions sur le territoire placé sous son contrôle effectif, et notamment dans la péninsule de Crimée.
- c) La Fédération de Russie doit mettre fin et renoncer à tout acte de répression politique et culturelle visant le peuple tatar de Crimée, notamment en suspendant le décret ayant interdit le parlement de ce groupe (Majlis) et en s'abstenant d'exécuter ledit décret ainsi que toute autre mesure similaire, tant que la présente affaire demeurera pendante.
- d) La Fédération de Russie doit prendre toutes les mesures nécessaires pour mettre fin aux disparitions de Tatars de Crimée et enquêter sans délai sur celles qui ont déjà eu lieu.

e) La Fédération de Russie doit mettre fin et renoncer à tout acte de répression politique et culturelle visant les Ukrainiens de souche en Crimée, notamment en levant les restrictions relatives à l'enseignement en langue ukrainienne et en respectant les droits de ce groupe en matière de langue et d'éducation, tant que la présente affaire demeurera pendante.

Le PRESIDENT : Immédiatement après le dépôt de la requête et de la demande en indication de mesures conservatoires, le greffier en a communiqué copie au Gouvernement de la Fédération de Russie. Il a également informé le Secrétaire général de l'Organisation des Nations Unies de ce dépôt.

Aux termes de l'article 74 du Règlement, la demande en indication de mesures conservatoires a priorité sur toutes autres affaires ; il est précisé au paragraphe 2 de ce même article que la Cour doit statuer d'urgence sur une telle demande. Cet impératif doit néanmoins être mis en balance avec la nécessité de fixer la date des audiences de manière à donner aux parties la possibilité d'y être représentées. Les Parties à la présente espèce ont par conséquent été informées le 25 janvier 2017 que l'ouverture de la procédure orale durant laquelle elles pourraient présenter leurs observations sur la demande en indication de mesures conservatoires avait été fixée au lundi 6 mars 2017 à 10 heures.

Je prends acte de la présence devant la Cour des agents et conseils des deux Parties. La Cour entendra ce matin l'Ukraine, qui a présenté la demande, et demain matin à 10 heures, la Fédération de Russie. Pour ce premier tour de plaidoiries, les deux Parties disposeront chacune d'une séance de trois heures. Chacune aura ensuite la possibilité de répondre à la Partie adverse dans le cadre d'un second tour de plaidoiries : l'Ukraine prendra la parole le mercredi 8 mars à 10 heures et la Fédération de Russie, le jeudi 9 mars à la même heure, chaque Partie disposant au maximum de trois heures pour présenter sa réponse.

J'appelle l'attention des Parties sur l'Instruction de procédure XI, aux termes de laquelle,

«[d]ans leurs exposés oraux sur les demandes en indication de mesures conservatoires, les parties devraient se limiter aux questions touchant aux conditions à remplir aux fins de l'indication de mesures conservatoires, telles qu'elles ressortent du Statut, du Règlement et de la jurisprudence de la Cour. Les parties ne devraient pas aborder le fond de l'affaire au-delà de ce qui est strictement nécessaire aux fins de la demande.»

Pour cette première séance, l'Ukraine peut, si nécessaire, étendre son temps de parole légèrement au-delà de 13 heures, afin de compenser le temps qui vient d'être consacré à l'introduction de la présente procédure orale.

J'appelle maintenant à la barre S. Exc. Mme Olena Zerkal, agent de l'Ukraine. Excellence, vous avez la parole.

Ms ZERKAL:

#### **INTRODUCTORY STATEMENT**

1. Mr. President, distinguished Members of the honourable Court, it is a great honour and exceptional privilege to appear before the principal judicial body of the United Nations on behalf of Ukraine.

2. Ukraine has come before this Court to defend the basic human rights of its people, faced with Russian Federation's violations of human rights and international law, today, I ask the Court to indicate provisional measures to prevent those rights from being irreparably harmed while this case is pending.

3. Thousands of innocent Ukrainian civilians have already suffered deadly attacks, and millions remain under imminent threat. Their peaceful, simple day-to-day routines have been ruined, and their fundamental rights have been blatantly violated by one of the Permanent Members of the United Nations Security Council — the Russian Federation.

4. The Russian Federation continuously violates international law and abuses human rights. The Russian Federation continues to supply deadly assistance to illegal armed groups in Ukraine that have committed numerous terrorist attacks. In occupied Crimea, the Russian Federation wholly disregards human rights, while implementing policies of cultural erasure and pervasive discrimination. These actions are unacceptable to the international community: they have been denounced by the United Nations.

5. The Russian Federation implements its foreign policy without regard for human life, and uses any available tool to impose its will. The Russian Federation's tactics include support for terrorism and acts of racial discrimination, as well as propaganda, subversion, intimidation,

political corruption, and cyber-attacks. This is the reality that we are facing in Ukraine. The Russian Federation has continued to engage in this conduct for three years, and all this time it continues to deny its multifaceted aggression against Ukraine.

6. Today, I stand before the World Court to request protection of the basic human rights of Ukrainian people. We seek justice and accountability under international law, while the Russian Federation continues to demonstrate disregard for its obligations under international treaties. As a result, people of Ukraine are facing an ongoing campaign of terror and cultural erasure. The situation is truly dire.

7. Even in the last few weeks, the stakes have been raised. Russian-backed armed groups have again escalated their attacks and intimidation of civilians. In the Ukrainian city of Avdiivka, just within the week between 29 January and 5 February 2017, independent Organization for Security and Co-Operation in Europe (OSCE) monitors have confirmed at least eight deaths and 30 injuries among civilians. As a result of indiscriminate shellings, the city has suffered widespread destruction of residential buildings and critical infrastructure, leaving civilians without electricity, water supplies, and even heat, at harsh temperatures far below zero. In just two months, since the beginning of 2017, the amount of ammunition used to shell Avdiivka is estimated at almost 15,000 pieces. This amount is equivalent to 14 cargo railway cars fully stocked with ammunition. Meanwhile, the official spokesperson of the Russian president publicly expressed hope that Russian proxies will not run short of ammunition. Can there be any doubt about where all this ammunition comes from? No. It is all from the Russian Federation.

8. The attacks on Ukrainian civilians are the logical conclusion of the Russian Federation's support for groups that engage in terrorism. The destruction of Flight MH17 with a Russian Buk system did not stop Russian financing of terrorism. With that continued support, we suffered an attack on a bus at Volnovakha. A mere two weeks later, Mariupol was bombarded, and Kramatorsk a few weeks after that. In Kharkiv, a peaceful population was terrified by a string of bombings. These were not isolated incidents, but the result of Russia's sponsorship of terrorism.

9. While in the east of Ukraine civilians continue to suffer indiscriminate attacks, in occupied Crimea the Russian Federation continues to implement a Soviet-style approach to human rights, suppressing groups it sees as its enemies. Just recently, 11 Crimean Tatars, who were

peacefully protesting against arbitrary searches, were forcefully detained. This is yet another example of how the Russian régime silences those it disfavours.

10. In this case, Ukraine seeks relief for Russia's continuous violations of two treaties: the International Convention for the Suppression of the Financing of Terrorism, and the International Convention on the Elimination of All Forms of Racial Discrimination. Ukraine's counsel will explain in detail the nature of our claims, and the reasons why provisional measures are so urgent. Before they do so, I wish to briefly provide historical context to show that current events in Ukraine are not occurring in isolation.

11. Since the re-establishment of modern Ukraine's statehood after the collapse of the Soviet Union, the people of Ukraine have sought to embrace democratic values, placing human life and dignity as the highest priority of both the government and society. Unlike many other post-communist states, Ukraine has never been known for ethnic tensions. The Constitution of Ukraine and relevant legislation provides a fundamental system of protection of ethnic groups' rights, as verified by United Nations and European Union monitors. Horrifying news of terror against civilians seemed to be something that was happening far away from us.

12. Ukraine's transformation and strengthening of ties with the European Union became a particular source of Russian anger. The Russian Federation threatened to destroy Ukraine's economy by imposing punitive unilateral trade restrictions, attempted to freeze Ukraine's people by withholding gas supplies during the harsh winter season, and called Ukraine's territorial integrity into question.

13. Over the last decade Russia's interference in Ukrainian affairs has steadily escalated. It reached dangerous levels in 2014. Russia decided to intervene in Ukraine militarily; sponsor illegal groups that commit acts of terrorism on Ukrainian soil; and violate the human rights of millions of people of Ukraine. Including, for too many, their right to life. This conduct reflects a broader pattern of Russian behaviour that sadly we are all familiar with.

14. As a Deputy Foreign Minister, I have dealt with all these issues. But today I am here as Ukraine's Agent, and in that capacity, my interest is in law, not in politics. For almost three years, I have personally pursued negotiations with the Russian Federation on these legal disputes. I admit it has been difficult. Time after time, Russia brushed aside Ukraine's protests of treaty violations.

Our objections were not taken seriously, and we were repeatedly told that we did not have a real dispute. Then I would return home and see with my own eyes Russia continuing its campaign against Ukraine. After many efforts, it was finally time to say enough is enough.

15. That is what finally brings us here to the World Court. At this trying time, we must place our faith in the institutions of international law for protection. This case will send a message about whether the international legal order can stand up to powerful countries that disregard law and disrespect human rights.

16. At the same time, our request is very modest. All we seek is a measure of stability and calm, in an unpredictable and dangerous situation. Mr. President, Members of the Court, in light of the imminent threat facing the Ukrainian people, I urge you to order provisional measures. Ukraine's distinguished counsel will explain the reasons why the Court should grant us this protection.

17. First, Professor Harold Hongju Koh will provide an overview of Ukraine's claims and our request for provisional measures.

18. Second, Ms Marney Cheek will explain the need for provisional measures relating to the Terrorism Financing Convention, and will demonstrate that all criteria for the indication of provisional measures are satisfied.

19. Third, Mr. Jonathan Gimblett will explain the need for provisional measures relating to the Committee on the Elimination of Racial Discrimination (CERD), and will demonstrate that criteria for the indication of provisional measures under that Convention are also satisfied.

20. Thank you, Mr. President and honourable Members of the Court. I now ask you to give the floor to Professor Koh to continue the oral pleadings of Ukraine.

Le PRESIDENT: Je vous remercie, Excellence. Je vais à présent donner la parole au professeur Koh. Monsieur le professeur.

Mr. KOH:

## **OVERVIEW OF THE CASE AND PROVISIONAL MEASURES REQUEST**

### **A. Introduction**

1. Mr. President, it is my great privilege to come before this Court again, today on behalf of Ukraine. Regrettably, I do so under grave circumstances. Less than two days' drive to our east, Ukraine faces a human rights emergency. Only weeks after Ukraine filed its Application in this Court, Russian-supplied rockets rained down on civilians living in the town of Avdiivka. The civilians of Mariupol, already victims of large-scale terrorism, live in fear. To the south, in occupied Crimea, the Tatar and Ukrainian communities face daily discrimination based solely on their ethnic origin. Russia has forbidden the leading Crimean Tatar institution, the Mejlis, from gathering. Russia is erasing non-Russian cultural identities.

2. Facing this horror, Ukrainians ask: what's next? Will Russian anti-aircraft weapons shoot down another civilian aircraft like Malaysian Flight MH17? Will civilian areas like Mariupol again be barraged by rockets? Will Russian proxies bomb another gathering far from the conflict zone? Will the Crimean Tatar community survive the destruction of its institutions and the persecution of its leaders? And in Crimea, will Ukraine's language and culture survive?

3. This is the bitter reality the people of Ukraine face. Mr. President, Members of the Court, to you Ukraine makes a modest request: not to resolve any difficult questions of treaty interpretation or to reach any final conclusion about Russia's responsibility for treaty violations. All we ask is for this Court's temporary order protecting the innocent people of Ukraine, so that rights international law already protects are not destroyed while this Court deliberates.

4. Before we explain why your standards for indicating provisional measures are met, let me explain how we got here, and what this case is about. We will not debate the merits of the case, nor ask this Court to intrude on those merits. But what Ukraine fears is that the past will become prologue. To see why the people of Ukraine urgently need your protection, you must understand what they have endured over the past three years, and the grave breaches of international law that Russia has already inflicted upon them.

## **B. Overview of Ukraine's case**

5. Ukraine's case is simple: Russia has turned its legal obligations on its head. Russia claims to outlaw the financing of terrorism, then supports it. Russia claims to outlaw racial discrimination, then commits it. Ukraine simply asks this Court to insist that Russia do what it has promised to do. If Russia is in fact keeping its commitments, how can it object to the Court's provisional measures order, which will impose no burdens beyond those that Russia has already accepted?

6. Three years ago, Ukraine's Revolution of Dignity unfolded in Kyiv's Independence Square, after years of Russian attempts to exert control over its neighbour. When the people of Ukraine tried to chart a new course, the Russian Federation responded with a concerted campaign of illegal intervention against Ukraine and its people that caused numerous violations of international law. Not all of those violations are before this Court. Ukraine has not come here seeking either relief for Russia's acts of territorial aggression in violation of the United Nations Charter, or confirmation of Ukraine's sovereignty over Crimea. The international community has already acknowledged Ukraine's sovereignty in successive resolutions of the United Nations General Assembly.

7. But, at the same time, the treaty violations in this case stem from a common source. Throughout its illegal intervention, the Russian Federation has daily shown profound contempt for the human rights of the Ukrainian people. In eastern Ukraine, while claiming to meet its obligations under the Terrorism Financing Convention, Russia has knowingly supplied weapons to groups that attack civilians. In Crimea, while claiming to meet its obligations under the Convention on the Elimination of All Forms of Racial Discrimination (CERD), Russia has engaged in a campaign of cultural erasure against non-Russian ethnic groups. These treaty violations are neither isolated, disconnected, nor temporary. Rather, they reflect a long-standing, ongoing assault on human rights in Ukraine that we ask this Court to halt.

## **C. Support for Terrorism**

8. In its preamble, the Terrorism Financing Convention declares that the financing of terrorism "is a matter of grave concern to the international community as a whole". Because terrorists' capacity to harm civilians turns on how much external support they receive, in 1999 the

world came together to demand that every state co-operate to prevent the financing of terrorism. The Russian Federation not only loudly supported that treaty, but called on all countries swiftly to ratify it, proclaiming its opposition to terrorism in all its forms. But Russia's actions since tell a different, louder story: that those who would carry out terrorist violence against Ukraine's civilians have a great friend in Russia. That the Russian Federation not only fails to prevent private individuals from supporting terrorism in Ukraine, but lets its major Russian banks serve as conduits for money to be sent to groups engaged in terrorism in Ukraine. That Russia not only flagrantly violates its obligation to prevent the financing of terrorism, but itself engages in the financing of terrorism. As I speak, the Federation is conducting its own massive operation to supply money, weapons, and other assistance to these illegal groups.

9. When I say that Russia sponsors terrorism, I am not saying that all members of illegal armed groups are terrorists, or that any State that interferes, or intervenes in support of a non-State belligerent is supporting terrorism. But terrorism under the Terrorism Financing Convention has a specific definition, concerned mainly with attacks on *civilians*. Of course, the daily newspapers show that Russia's proxies in Ukraine are fighting Ukraine's armed forces, but that is not what this case is about. Russian-backed armed groups conduct terrorism against civilians, as defined in the Convention. They intimidate the Ukrainian people to give in to their demands. Russia knows full well that its friends commit indiscriminate acts of terrorism against civilians, but nevertheless continues to supply them with valuable, highly dangerous forms of assistance.

10. With your own eyes, you have witnessed the catastrophic effects Russia's sponsorship of terrorism has had on innocent civilians. Less than three years ago, on 17 July 2014, the civilian airliner Malaysian Flight MH17 took off just kilometres from here, from Schiphol Airport. Russian-supported fighters ruthlessly shot it down over eastern Ukraine, murdering 298 innocent civilians, including citizens from many of your nations, as well as our host nation. The MH17 shoot-down was nothing less than an attack on humanity: nationals of the Netherlands, Australia, Belgium, Canada, Germany, Indonesia, Malaysia, New Zealand, the Philippines, the United Kingdom, and the United States of America were all killed. Among those senselessly murdered were three tiny infants. The world was stunned. The Security Council demanded accountability. Yet the Russian Federation vetoed a Security Council resolution that would have

created an international tribunal to prosecute the individual perpetrators of this vicious attack. Even so, the truth has emerged. As we all watched, the Dutch Safety Board established the cause and origin of the attack. An international Joint Investigation Team (the JIT) methodically concluded that Flight MH17 was destroyed by a Buk missile delivered from Russia to territory controlled by fighters aligned with the so-called “Donetsk People’s Republic” (DPR). And when its work was done, that Buk missile went home to Russia, from which — absent an order by this Court — it could return again to Ukraine tomorrow.

11. But MH17 was just the beginning. Russian-backed armed groups in Ukraine also attacked Ukrainian civilians on the ground during the winter of 2015. In mid-January, when civilian vehicles lined up to cross a well-travelled government checkpoint near Volnovakha, Russian-supplied “Grad” rockets rained down from above and pierced a passenger bus, murdering thirteen. OSCE monitors confirmed that Russian-backed separatists were responsible.

12. Just one week later, Russian-backed fighters attacked the port city of Mariupol. Russian-backed DPR fighters indiscriminately bombarded a neighbourhood just like the one outside this Peace Palace, a peaceful area of private homes, shops, and a school. The United Nations Under-Secretary-General confirmed to the Security Council that the civilian population had been “knowingly targeted”<sup>1</sup>. Thirty civilians were murdered. Secretary-General Ban Ki-moon condemned the launching of rockets “indiscriminately into civilian areas”<sup>2</sup>. Yet ignoring international uproar, Russian-backed groups kept firing Russian-supplied weapons into population centres. Only weeks later, those Russian-backed groups again fired indiscriminately at another residential area in Kramatorsk, killing seven civilians.

13. Russian-backed groups have made it impossible for Ukrainian citizens to feel secure anywhere in their own country. As 2014 turned into 2015, Russian-financed terrorists launched a concerted bombing campaign against Kharkiv, Ukraine’s second-largest city, far from active hostilities. In November 2014, Russian-backed terrorists struck a nightclub popular with

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<sup>1</sup>United Nations Security Council Official Record, 7368th mtg., p. 2, UN doc. S/PV.7368 (26 January 2015) (statement of Jeffrey Feltman, United Nations Under-Secretary-General for Political Affairs).

<sup>2</sup>Spokesman for the United Nations Secretary-General Ban Ki-moon, Statement Attributable to the United Nations Secretary-General Ban Ki-moon on Ukraine (24 January 2015).

supporters of the Revolution of Dignity. Three months later, they carried out a deadly attack on a peaceful parade and rally.

14. Attacking civilians for political ends is terrorism. The Russian Federation has loudly committed itself to prevent the financing of such terrorism. But it freely allows a terror campaign to be funded from its territory, and actively supplies the groups that ruthlessly target the Ukrainian people. Ukraine invokes this Court's jurisdiction under the Terrorism Financing Convention to hold Russia to account for its role in this campaign of terror.

#### **D. Cultural Erasure Through Discrimination**

15. The Russian Federation has acted even more openly in Crimea. In eastern Ukraine, Russia finances terrorists to wreak havoc, but in Crimea, Russia has baldly invaded Ukrainian soil and claimed to annex it. The common thread is Russian contempt for the human rights of Ukrainians. Occupation authorities in Crimea have installed a régime of ethnic Russian dominance that targets for discrimination non-Russian groups, particularly the Crimean Tatar and ethnic Ukrainian populations. Their acts are not isolated, but form a consistent pattern and practice. Together, they amount to a *campaign of cultural erasure*: a concerted effort to deny non-Russian groups their cultural identities.

16. But the Russian Federation is party to the International Convention on the Elimination of All Forms of Racial Discrimination. That legal obligation follows Russia to the Ukrainian territory that it now illegally occupies. As with the Terrorism Financing Convention, Russia has turned its legal obligations on its head. Russia claims to ban terrorism financing, then finances terror. Russia claims to eliminate all forms of racial and ethnic discrimination, then engages in them. In Crimea, Russia neither respects racial equality nor works to eliminate discrimination. Instead it engages in illegal collective punishment against non-ethnic Russians.

17. This pattern started with Russia's invasion, even before the Russian Federation formally purported to annex Crimea. The asserted basis for that annexation was the widely condemned "referendum" that the United Nations has conspicuously refused to recognize<sup>3</sup>. As United Nations monitors reported at the time, this so-called "referendum" was carried out amid a climate of fear

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<sup>3</sup>United Nations General Assembly resolution 68/262, UN Doc. A/RES/68/262, *Territorial Integrity of Ukraine* (27 March 2014).

and intimidation targeted against Crimean Tatars and ethnic Ukrainians, whose situation has since only deteriorated. Crimean Tatars have been disappeared and kidnapped, with Russian authorities refusing to undertake serious investigations. Duly elected leaders of the Crimean Tatar people were exiled or persecuted. Tatar homes and institutions were arbitrarily searched. Tatar media was dismantled. Having previously been exiled en masse from Crimea by Stalin, the Crimean Tatar community is sadly all too familiar with Russian persecution. Fittingly, their new Russian occupiers' first acts included cracking down on commemorations of the 70th anniversary of that exile.

18. In the face of widespread international condemnation, Russia has outlawed the Mejlis, the central self-governing institution of Crimean Tatar life. The Mejlis has represented the Crimean Tatar community since its return from Stalin's exile. But Russia declared the Mejlis a so-called "extremist" organization and barred its members from meeting.

19. Russian authorities now bar culturally significant gatherings for ethnic Ukrainians, and suppress Ukrainian media. Before the occupation, the Ukrainian language — an important part of many people's heritage — was taught, celebrated, and co-existed comfortably with the Russian and Tatar languages. But since the occupation, Russian authorities have targeted institutions dedicated to sustaining the Ukrainian language in Crimea. Unless this Court urgently acts, this important facet of the Ukrainian culture in Crimea may soon disappear.

20. Ukraine's claims under the CERD simply ask that Russia keep its commitment not to discriminate on grounds of race and ethnicity. The Russian Federation has no lawful basis to occupy Crimea. But so long as it does, it is legally bound to respect the multi-ethnic population that lives there, not to impose its own policy of "russification" that inflicts collective punishment and pervasive discrimination against other cultures.

#### **E. Standard for provisional measures**

21. Ukraine has brought this case to stop this interrelated campaign of human rights violations on its own soil. International law cannot tolerate support for indiscriminate targeting of civilians and cultural erasure by a nation that claims to forbid both terrorism financing and racial discrimination. Your task today is not to determine the merits of these claims, only to decide

whether Ukraine should be afforded temporary measures of protection while this case proceeds. Because provisional measures proceedings are expedited, as Judge Greenwood summarized in his declaration in *Costa Rica v. Nicaragua*, the Court's criteria: "cannot be as exacting as those which fall to be applied in the later phases of a case . . . [I]t is not possible for the parties to deploy, or the Court to consider, the detailed evidence or arguments on legal issues which are required at the stage of ruling on jurisdiction or the merits."<sup>4</sup>

22. This Court has articulated three basic prerequisites to order provisional measures. First, that the Court has prima facie jurisdiction over its claims. "[T]here is no need", as the Court observed in *Belgium v. Senegal*, for you "to satisfy [yourselves] in a definitive manner that the Court has jurisdiction as regards the merits of the case"<sup>5</sup>.

23. Second, there must be a link between the rights at issue in the proceedings on the merits, and the provisional measures being sought. As you recently explained in awarding provisional measures to Equatorial Guinea, the Court need not resolve "the *existence* of the rights claimed", so long as they are "at least plausible"<sup>6</sup>, and there is a connection between those rights and the measures requested<sup>7</sup>.

24. Third, this Court may indicate provisional measures "if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice may be caused to the rights in dispute before the Court has given its final decision"<sup>8</sup>. As set forth in *Georgia v. Russia*, this Court has found it particularly appropriate to indicate provisional measures in circumstances that are "unstable and could rapidly change", when there is "ongoing tension" without "overall settlement to [an ongoing] conflict"<sup>9</sup>. Provisional measures also have been granted when conflicts and similar

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<sup>4</sup>*Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures, Order of 8 March 2011, declaration of Judge Greenwood*, p. 46, para. 2.

<sup>5</sup>See *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 147, para. 40.

<sup>6</sup>*Ibid.*, p.152, para. 60 (emphasis added) and p. 151, para. 57.

<sup>7</sup>See *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Provisional Measures, Order of 7 December 2016*, para. 78.

<sup>8</sup>See *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 152, para. 62; see also *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand), Provisional Measures, Order of 18 July 2011, I.C.J. Reports 2011 (II)*, p. 537, para. 47.

<sup>9</sup>See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008*, p. 396, para. 143.

“incidents have occurred on various occasions . . . leading to fatalities, injuries and the displacement of local inhabitants”, such as in *Cambodia v. Thailand*<sup>10</sup>. As you recently explained in *Equatorial Guinea v. France*, provisional measures are also indicated where past violations have occurred and it is “not inconceivable” that they will recur<sup>11</sup>. All of these reasons for indicating provisional measures take on greater urgency when, as you recognized in *Georgia v. Russia*<sup>12</sup>, there is a “vulnerable” population in need of the Court’s protection.

25. Taking all of this into account, Ukraine’s present situation presents a paradigm case for indicating provisional measures. In both eastern Ukraine and Crimea, the situation remains dangerous and unstable. Previous Russian violations of rights under the treaties at issue have resulted in fatalities and other injuries to innocent civilians. Some 1.7 million Ukrainian citizens have been displaced. Violations are ongoing and the situation is getting worse. And if any population could be called “vulnerable” and in need of protection today, it is the people of Ukraine.

26. Terrorism financing continues unabated. Russian weapons and other support flow unchecked across a border over which both Ukraine and international organizations have been denied control. Russian arms fill the hands of groups that regularly engage in terrorist acts of violence against civilians. These unpredictable acts of violence not only lead to innocent deaths, but also to widespread terror. Even since Ukraine filed its Application with this Court on 16 January, just weeks ago, innocent residents of Avdiivka’s neighbourhoods suffered as Russian-supplied Grad rockets rained down on civilian streets. Unless this Court intervenes, such terrorist acts will recur even while this case is pending. Russia refuses to stop weapons and financial flows from its territory to the groups known as the Donetsk and Luhansk “People’s Republics” (DPR and LPR), and to similar armed groups in eastern Ukraine. Without provisional measures from this Court, the Russian Federation will continue to do the opposite of what the Convention requires, and innocent civilians will pay the price.

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<sup>10</sup>*Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand), Provisional Measures, Order of 18 July 2011, I.C.J. Reports 2011 (II), p. 550, para. 53.*

<sup>11</sup>*Immunities and Criminal Proceedings (Equatorial Guinea v. France), Provisional Measures, Order of 7 December 2016, para. 89.*

<sup>12</sup>*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008, p. 396, para. 143.*

27. To be clear: the stakes here are not balanced. Of course, Russia has denied supplying weapons to groups in Ukraine. If so, it will suffer no inconvenience from the provisional measures order we are requesting. From Russia's perspective, where is the prejudice from an order not to do what it claims it is not doing? But Ukraine, on the other hand, does not have the luxury of accepting Russia's denials at face value. For many innocent Ukrainians, this Court's award of provisional measures is simply a matter of life and death.

28. In Crimea, the stakes are just as high. The Mejlis continues to be barred from meeting. Crimean Tatars keep disappearing, and their leaders are exiled or persecuted. Just last fall, Russian authorities revived a barbaric Soviet-era practice, subjecting a Tatar leader to involuntary psychiatric detention. Ethnic Ukrainians face continued harassment as their language is systematically driven out of schools. Just a few months ago, the United Nations condemned the persistent pattern of discrimination in occupied Crimea. Without provisional measures, Russia's campaign of cultural erasure may well reach fruition, causing irreparable harm and making a mockery of Russia's international commitment to eliminate all forms of racial discrimination.

29. Without interim measures of protection, more Ukrainian lives may be ruined without notice. In an instant, Russia's recent violations have changed lives forever. One day after Russia sent a powerful anti-aircraft missile into Ukraine three years ago, a civilian airliner was destroyed and nearly 300 civilians murdered. Crimean Tatar activists receive no advance warning before they are arrested — or disappeared.

30. The Registrar has recounted Ukraine's provisional measures requests, which I will not repeat. Stripped to its essence, all Ukraine asks is for this Court to invoke its legal authority to protect innocent Ukrainian civilians threatened by indiscriminate terrorism and cultural erasure. Russia must stop the flow of weapons and assistance across its borders to groups that launch terrorist attacks against civilians. In Crimea, Russia must cease its campaign of cultural erasure. There is ample legal and factual basis for all such measures. And without them, even while this Court deliberates, so much will be lost.

31. Mr. President, Members of the Court: if Russia is not committing these illegal acts, it would lose nothing by refraining from doing them while this case proceeds. If Russia will not refrain, it must be because its behaviour is neither innocent nor legal.

32. Your Excellencies, we submit that the criteria for indication of provisional measures are amply satisfied here. My colleagues will now show how your own standards compel the award of provisional measures in this case, under both the Terrorism Financing Convention and the Convention for the Elimination of All Forms of Racial Discrimination. With that, Mr. President, I ask you to invite Ms Marney Cheek to the podium, to explain in more detail the basis for provisional measures relating to the Terrorism Financing Convention.

LE PRESIDENT : Merci, Monsieur le professeur. Je donne à présent la parole à Mme Marney Cheek.

Ms CHEEK:

## **PROVISIONAL MEASURES RELATING TO UKRAINE’S CLAIMS UNDER THE TERRORISM FINANCING CONVENTION**

### **I. INTRODUCTION**

1. Mr. President, distinguished Members of the Court, it is an honour to appear before you, and to explain the urgent need for provisional measures to halt the ongoing financing of terrorism in Ukraine.

2. As Professor Koh explained, Ukraine must meet three basic criteria for the indication of provisional measures. First, that the Court has *prima facie* jurisdiction over Ukraine’s claims. Second, there is a link between the provisional measures sought and plausible rights that will be the subject of the proceedings on the merits. And third, the situation is urgent. Ukraine submits that all three of these criteria are readily satisfied with respect to Ukraine’s requests under the Terrorism Financing Convention.

### **II. FIRST CRITERION: PRIMA FACIE JURISDICTION**

3. I will start with *prima facie* jurisdiction. Article 36 (1) of the ICJ’s Statute gives this Court jurisdiction over “all matters specially provided for in . . . treaties and conventions in force”. Ukraine invokes this Court’s jurisdiction with respect to its terrorism claims under Article 24 (1) of the Terrorism Financing Convention. The Terrorism Financing Convention is at tab 1 of your judge’s folder and also Article 24 (1) is on the screen. The Parties have agreed to refer disputes

concerning the interpretation or application of that treaty to this Court, provided that three preconditions for referral are satisfied. First, a dispute must exist. Second, the dispute must not have been settled “through negotiation within a reasonable time”. And third, there is a request for arbitration and there is no agreement on the organization of the arbitration within six months of the request. Given the two-year history of negotiations between the Parties to resolve their dispute over the interpretation and application of the Terrorism Financing Convention, a history involving more than 40 diplomatic notes and four negotiating sessions, and given the lack of agreement on the organization of arbitration, *prima facie* jurisdiction may readily be found. Let me nevertheless speak to each of these points in a bit more detail.

#### **A. Existence of a Dispute**

4. As to the first precondition, there was a dispute when Ukraine filed its Application on 16 January 2017. In fact, the dispute had crystallized long before. In a diplomatic note dated 28 July 2014, Ukraine gave notice that it considered the Russian Federation to be violating the Terrorism Financing Convention. In further correspondence and in-person negotiations, Ukraine continued, repeatedly, to inform the Russian Federation of the nature of its claims.

5. In doing so, Ukraine has heeded this Court’s guidance in ensuring that the Russian Federation is properly on notice. The Court’s recent decision in *Nicaragua v. Colombia* noted that “a formal diplomatic protest may be an important step to bring a claim of one party to the attention of the another”<sup>13</sup>. In the *Georgia v. Russia* case, the Court noted that “an express specification” of the treaty rights being claimed “would remove any doubt about one State’s understanding of the subject-matter in issue”<sup>14</sup>. Notably, in those cases the Court found that a dispute existed even without these formalities. But Ukraine has, in fact, diligently followed these best practices.

6. Both by word and deed, the Russian Federation has made it abundantly clear that it disputes Ukraine’s claims. At times, Russia has clearly stated this disagreement. For example, at tab 2 in the judge’s folder, at page 2 of the diplomatic note, this is Russia’s diplomatic note of

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<sup>13</sup>*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Preliminary Objections, Judgment of 17 March 2016, para. 72.

<sup>14</sup>*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, I.C.J. Reports 2011, p. 85, para. 30.

15 October 2015, you will see that Russia accused Ukraine of “advancing patently false claims”<sup>15</sup>. More often, Russia simply ignored Ukraine’s claims and refused to address them. This Court has repeatedly held that a party may not defeat the existence of a dispute by simply disregarding the other party’s claims. This Court’s Judgment on preliminary objections in *Cameroon v. Nigeria* is an example of that basic principle<sup>16</sup>. There is no question that a dispute exists here.

### **B. Failure of Negotiations**

7. The second precondition is the failure of settlement through negotiation in a reasonable time. Ukraine spent nearly two years attempting to settle this dispute with the Russian Federation. Over that period of time, as I mentioned earlier, the Parties exchanged 40 diplomatic notes and participated in four rounds of bilateral negotiations. Unfortunately, the Russian Federation largely ignored Ukraine’s claims and refused to discuss issues that Ukraine views as central to the dispute. At the same time, the Russian Federation was continuing to engage in the conduct Ukraine was protesting. By April of 2016, Ukraine had been attempting to negotiate this pressing dispute for 21 months; well beyond what could be considered a reasonable time under the circumstances. The Parties were at an impasse. Weapons and money continued to flow across Russia’s uncontrolled border, and civilians remained under threat. Having exhausted all diplomatic avenues, Ukraine could not reasonably be expected to “fiddle while Rome burns”, that is, to continue participating in fruitless negotiation sessions, while its citizens remained vulnerable.

8. The Court has on several occasions addressed a negotiation precondition at both the provisional measures and preliminary objections stages. In *Belgium v. Senegal*, the Court stressed that at the provisional measures stage, it was “sufficient . . . that *an attempt* has been made by [Belgium] to negotiate”<sup>17</sup>. Ukraine has not simply attempted to negotiate. It has done far more<sup>18</sup>.

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<sup>15</sup>Russian Federation Note Verbale No. 13457 to Ukraine, dated 15 October 2015 (Ann. 84).

<sup>16</sup>*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 315-317, paras. 89-94 (“[A] disagreement on a point of law or fact, a conflict of legal views or interests, or the positive opposition of the claim of one party by the other need not necessarily be stated *expressis verbis*. In the determination of the existence of a dispute, as in other matters, the position or the attitude of a party can be established by inference, whatever the professed view of that party.”).

<sup>17</sup>See *Question Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 150, para. 50 (emphasis added); see also *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008*, p. 388, para. 114 (holding that to establish prima facie jurisdiction, “some attempt should have been made by the claimant party to initiate, with the Respondent Party, discussion on issues that would fall under” the treaty at issue).

Ukraine's more extensive efforts to negotiate easily meet the standard for showing prima facie jurisdiction.

### **C. Request for Arbitration**

9. Finally, Ukraine has satisfied the arbitration precondition. As set forth in *Belgium v. Senegal*, which considered a similar provision, an "explicit offer . . . to have recourse to arbitration" satisfies the first part of this requirement<sup>19</sup>. On 21 April 2016, Ukraine transmitted to the Russian Federation a request to submit their dispute to arbitration<sup>20</sup>.

10. The Parties were then unable to agree on the organization of an arbitration in the six-month period provided by the Convention. For the first two months of that period, Ukraine's request for arbitration simply received no response. Russia finally did respond, and eventually the Parties met twice and exchanged correspondence concerning their respective proposals. By the end of the six-month period, however, differences between the parties remained.

11. Under the plain terms of the Convention, Ukraine could have submitted the dispute to this Court on 21 October 2016. Nonetheless, Ukraine continued to try to reach agreement with the Russian Federation. By January of 2017, however, there were still important areas of disagreement. Meanwhile, the flow of weapons to the DPR and the LPR continued unabated. The risk of another terrorist attack against Ukrainian civilians was high. Ukraine concluded that it could no longer delay in seeking judicial recourse, and so exercised its right to submit the dispute to this Court.

12. In short, Ukraine has done more than enough to establish the jurisdiction of this Court on a prima facie basis, which is all that is required at this stage.

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<sup>18</sup>Belgium attempted to negotiate for eight months and never held a single, in-person negotiation session. *See Question Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 150, para. 50; *see also Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Public sitting held on 6 April 2009, at 10 a.m., Presentation of Belgium*, p. 46, para. 32.

<sup>19</sup>*See Question Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 150, para. 52.

<sup>20</sup>Ukraine Note Verbale No. 72/22-610-954 to the Russian Federation, dated 19 April 2016 (Ann. 28).

### **III. SECOND CRITERION: LINK BETWEEN THE PROVISIONAL MEASURES SOUGHT AND THE RIGHTS THAT ARE THE SUBJECT OF THE CASE**

13. Let me now turn to the second requirement for provisional measures: the relationship between the measures requested and the rights that are subject of the proceeding on the merits. As part of that analysis, the Court has also considered whether these rights are plausible<sup>21</sup>. In discussing this criterion, I will first describe Ukraine's relevant claims under the Convention before explaining how they are closely linked to the provisional measures Ukraine seeks. As this is the first time that the Terrorism Financing Convention has been before the Court, I will walk briefly through each relevant provision.

#### **A. The plausible rights claimed under the Terrorism Financing Convention**

14. Ukraine has asserted rights under the Terrorism Financing Convention under Articles 8, 9, 12, and 18 of the Convention. I focus today on Ukraine's rights under Article 18 of the Convention, as it is those rights that relate to Ukraine's Request for the indication of provisional measures.

##### **1. Ukraine's rights under Article 18**

15. Ukraine has a treaty right under Article 18 to Russia's full co-operation in the prevention of the financing of terrorism. The Russian Federation is violating that right, both by allowing its territory to serve as a launching pad for terrorist financing, and by engaging in that activity itself. As I will explain shortly with reference to Articles 1 and 2 of the Convention, this means that Russia is prohibited from sending money, weapons, or other support to groups in Ukraine that launch indiscriminate attacks on innocent civilians. Russia is further obligated to prevent such support from flowing to groups known to launch such attacks.

16. Yet, Ukraine submits that this is exactly what Russia has done. Russia permits weapons and other assistance to cross its border. It does not take other readily available steps to stop the financing of terrorism in Ukraine. And, perhaps most egregiously, the Russian Government directly supports groups known to engage in terrorist acts against civilians. Ukraine has a right to

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<sup>21</sup>See *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Provisional Measures, Order of 7 December 2016, p. 19, para. 78; *Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand)*, Provisional Measures, Order of 18 July 2011, I.C.J. Reports 2011, p. 545, para. 33; *Question Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009, p. 151, para. 57.

Russia's co-operation against the financing of terrorism — instead, it finds itself a victim of Russian sponsorship of terrorism.

17. Under Article 18 of the Convention, which is on the screen, Russia must “co-operate in the prevention of the offenses set forth in Article 2”. It must do so “by taking all practicable measures . . . to prevent and counter preparations in their respective territories for the commission of those offenses”. The article speaks to adopting domestic legislation as one such measure. But the mandate to co-operate in the prevention of financing terrorism is a broad one.

18. It follows that if a State itself engages in the financing of terrorism, it violates Article 18 of the Convention. One might debate on the margins what measures are “practicable” to prevent the financing of terrorism. But some are simply obvious. Adopting laws against terrorism is not enough. If a State is aware that money and weapons are flowing across the border to assist illegal armed groups that have perpetrated terrorist acts targeting civilians, it is surely “practicable” for a State to secure its border to stop that flow. And if a State is aware that its own officials are engaged in the financing of terrorism, it is surely “practicable” to order those officials to cease and desist.

19. This straightforward application of the Convention is consistent with this Court's Judgment in the *Bosnia Genocide* case. As you know, that case concerned the Genocide Convention, which requires States to prevent acts of genocide. The Court explained:

“[i]t would be paradoxical if States were under an obligation to prevent, so far as within their power, commission of genocide by persons over whom they have a certain influence, but were not forbidden to commit such acts through their own organs . . . In short, the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide.”<sup>22</sup>

It would be equally antithetical to the text and purpose of the Terrorism Financing Convention if a State that has an obligation to co-operate to prevent the financing of terrorism, was considered free to finance terrorism directly.

20. In any case, Russia fails on both counts. It has unlawfully financed terrorism directly, and it has failed to prevent others in its territory from financing terrorism.

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<sup>22</sup>*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007 (“*Bosnia Genocide*”), p. 113, para. 166.

## 2. “Terrorism financing” under the Convention

21. Let me now turn to Article 2 of the Convention, for as this Court determines whether the rights asserted by Ukraine under Article 18 are plausible, it is useful to examine how this Convention defines the underlying offense of financing terrorism. The offense recognized in Article 2 of the Convention states that it is an offense where any “person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they will be used” for terrorism.

22. That definition is extremely broad. It must be read in conjunction with Article 1, paragraph 1, which defines the term “funds”. “Funds” covers money, but it is not limited to financial instruments. Rather, funds are defined to include “assets of every kind, whether tangible or intangible, movable or immovable, however acquired”. The definition of “funds” in the Terrorism Financing Convention is drawn from the United Nations Convention against Illicit Traffic in Narcotic Drugs, which uses materially identical language to define the term “property”<sup>23</sup>.

23. Under the Terrorism Financing Convention, then, the offense of financing terrorism can be accomplished by providing monetary support, or by making in-kind contributions of property. And that makes perfect sense considering the object and purpose of the Convention. One reason to keep money out of the hands of those who commit acts of terrorism is so they cannot purchase destructive weapons and other assets to carry out those acts. Sponsoring terrorism by supplying weapons, directly or indirectly, is an offense under the Convention, if it is done with the knowledge that the assistance will be used, in full or even in part, for terrorism.

24. What are terrorist acts under the Convention? Let me focus your attention again on Article 2 of the Convention. First, the Convention incorporates violations of several separate treaties as acts of terrorism, through Article 2 (1) (a). Of particular note here is the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, which forbids the intentional destruction of a civilian aircraft in service. Through the incorporation of Montreal Convention offenses, the destruction of a civilian aircraft, such as Malaysian Airlines Flight MH17, is an act of terrorism under the Terrorism Financing Convention.

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<sup>23</sup>See Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 19 December 1988, Art. 1; see also UN General Assembly, Report of the Working Group of the Sixth Committee, *Measures to eliminate international terrorism*, A/C.6/54/L.2 (26 Oct. 1999), p. 59, para. 47.

25. The Terrorism Financing Convention also provides a broad residual definition of terrorist acts under Article 2 (1) (b). That definition reaches:

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

26. I wish to draw your attention to two key aspects of this definition. First, although there is sometimes debate over the application of the concept of “terrorism” during armed conflict, certain acts committed within a situation of armed conflict — like bombarding residential neighbourhoods, or targeting a peaceful unity rally — can amount to terrorism under the Convention. Put another way, the Convention recognizes that acts of terrorism and a state of armed conflict are not mutually exclusive.

27. The second aspect is the Convention’s focus on civilians. While the definition of terrorism in other contexts may be debated, here the Convention focuses on acts that are widely accepted as terrorism, namely, the use of violence against civilians not engaged in active hostilities. Thus indiscriminate attacks on civilian enclaves would be covered, given that such innocents are not in a posture of active military engagement, and such acts constitute attacks on a civilian population.

28. The same group may be guilty of acts of terrorism against civilians, but also carry out attacks on military targets that would not fall within the Convention. One example outside of Ukraine is the Islamic State of Iraq and the Levant (ISIL), which of course has carried out many attacks on civilians in disparate parts of the world, but has also attacked military targets, such as Iraqi troops in Mosul. Not every act of ISIL may qualify under the Convention’s core definition of terrorism, but it is nonetheless impermissible under the Convention to supply that organization with any type of financial or other support. Doing so would at least “in part” facilitate terrorist acts that are covered by the Convention. The same can be said for the Russian Federation’s support for groups in Ukraine that engage in acts of terrorism against civilians. As I will now describe, it is far more than simply “plausible” that Russia has engaged and continues to engage in this prohibited behaviour.

LE PRESIDENT :

Madame, permettez-moi de vous interrompre. Je crois que le moment est venu de faire une pause selon l'usage, une pause café de 15 minutes. L'audience reprendra donc à 11 h 55. J'attire l'attention de la délégation de l'Ukraine sur le fait que cette audience devra prendre fin au plus tard à 13 h 15. Je vous remercie. L'audience est suspendue pour 15 minutes.

*L'audience est suspendue de 11 h 40 à 11 h 55.*

LE PRESIDENT : L'audience est rouverte. Je donne la parole à Mme Marney Cheek pour la poursuite de sa plaidoirie. Madame, vous avez la parole.

### **B. The Russian Federation's pattern of terrorism financing**

29. Mr. President, Members of the Court, I will next discuss the factual basis underpinning Ukraine's claims.

30. The Russian Federation has financed its proxies in Ukraine for many years. Since the spring of 2014 this support has greatly intensified. This fact is well-supported by highly credible international organizations. Let me provide a few examples. On your screen and at tab 3 of the judge's folder, page 2, are satellite images from a NATO Headquarters briefing, showing a military build-up in western Russia along the border of Ukraine in March 2014<sup>24</sup>. These photos show no weapons at the border in May 2013, and a sizeable build-up of weapons by March 2014. Separately, Dutch intelligence officials involved in the Dutch Safety Board Report of the Crash of Malaysian Airlines Flight MH17 also confirmed that in June 2014, weapons were being assembled in the Russian Federation to be subsequently supplied to the separatists<sup>25</sup>.

31. These weapons were then systematically funnelled into Ukraine. In the summer of 2014, the Organization for Security and Co-operation in Europe (OSCE)'s Special Monitoring Mission (SMM) documented reports of multiple military convoys of tanks, armoured personnel carriers, and heavy artillery, moving from Russian territory across the Ukrainian border into the Donbas

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<sup>24</sup>NATO, Supreme Headquarters Allied Powers Europe, *NATO Defends Accuracy of Satellite Images with Additional Proof* (11 April 2014) (Ann. 43); see Photographs of the Military Build Up in Russia (various dates), publicly available at <https://www.shape.nato.int/nato-defendsaccuracy-of-satellite-images-with-additional-proof->.

<sup>25</sup>*Dutch Safety Board, Crash of Malaysian Airlines Flight MH17: Hrabove, Ukraine, 17 July 2014* (and appendices) (Oct. 2015) (hereinafter "DSB Report"), Appendix T, p. 138 (Ann. 34).

region<sup>26</sup>. At tab 4 of your judge's folder is a July 2014 report where the OSCE notes "a reported movement of a significant amount of military hardware across the Russian-Ukrainian border"<sup>27</sup>. At tab 5, a June 2014 report notes that "according to local witnesses and traffic surveillance camera footage seen by the SMM, a military convoy, of unknown origin, consisting of three tanks and ten BTRs, drove through Luhansk city. An interlocutor told the SMM that the convoy came from the direction of the Russian border"<sup>28</sup>. There are many more such reports.

32. In one case reported by the *New York Times* and other news outlets, a Russian soldier questioned on 14 August 2014 admitted that he participated in the delivery of weapons to Ukraine. The statement of Petr Khokhlov is transcribed at tab 6 of your judge's folder, and if you turn to page 2, you see that Mr. Khokhlov stated to Ukrainian authorities that his unit was ordered to "destroy the machines' numbers, machine guns' numbers, throw away . . . remove casings from the tanks". In the next paragraph, last sentence, he says, "They told us that they had passed the machines to the Chechens. And these machines would be given to the militants. They were being moved to the Russian Donetsk."<sup>29</sup> Similarly, at tab 7, you will see the statement of Mr. Tkachenko, a deputy chief prosecutor of the Ukrainian Military Prosecution Office. In paragraph 6 (d) of his statement he refers to the testimony of three Ukrainian victims, D, E, and F, who were detained by illegal armed groups in Donetsk and Luhansk oblasts. If you turn to Appendix 4, page 8, fourth paragraph, Witness D, testifies that he personally observed "mortar shells, heavy machine guns, lots of boxes with cartridges of 5.45 caliber, there were also boxes with multiple launch rockets 'Grad'". He notes these weapons were in trucks designated as a "humanitarian convoy" from the Russian Federation<sup>30</sup>.

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<sup>26</sup>Organization for Security and Co-operation in Europe, *Latest from OSCE Special Monitoring Mission in Ukraine Based on Information Received as of 18:00 (Kyiv time), 20 June 2014* (21 June 2014) (Ann. 11).

<sup>27</sup>Organization for Security and Co-operation in Europe, *Latest from the Special Monitoring Mission (SMM) in Ukraine Based on Information Received as of 18:00 (Kyiv time), 13 July 2014* (14 July 2014) (Ann. 12).

<sup>28</sup>Organization for Security and Co-operation in Europe, *Latest from OSCE Special Monitoring Mission in Ukraine Based on Information Received as of 18:00 (Kyiv time), 20 June 2014* (21 June 2014), p. 1 (Ann. 11); Organization for Security and Co-operation in Europe, *Latest from the Special Monitoring Mission (SMM) in Ukraine Based on Information Received as of 18:00 (Kyiv time), 13 July 2014* (14 July 2014), p. 1 (Ann. 12).

<sup>29</sup>Transcript of Interrogation of Petr Khokhlov, Security Service of Ukraine (published 27 Aug. 2014) (English translation), p. 2 (Ann. 33); Joshua Yaffa, *A Russian Soldier Vanishes in Ukraine*, *New York Times* (7 Jan. 2015) (Ann. 53).

<sup>30</sup>Affidavit of Testimony of Tkachenko Andriy Mykolaiovych (24 Feb. 2017), Witness Interrogation Record D, Appendix 4, at 8 (Ann. 82).

33. Such movements of weapons are not just evidence of military support for illegal armed groups in Ukraine, although that is happening. Heavy artillery supplied by the Russian Federation has repeatedly been used to carry out deadly attacks aimed at the civilian population in an effort to intimidate the citizens of Ukraine.

34. Perhaps the most methodically investigated example of Russian supply of weapons across the border is the Buk missile system that destroyed Malaysian Airlines Flight MH17. Flight MH17 was one of more than 160 civilian aircraft flying over eastern Ukraine on 17 July 2014, cruising at an altitude — 10,000 meters — that was reserved for civilian air traffic<sup>31</sup>. If you turn to tab 8, this is the Dutch Safety Board Report. At page 9, the Dutch Safety Board states its conclusion that the plane was struck by a 9M38 series missile launched by a Buk system<sup>32</sup>. That investigation also pinpointed the launch site to an area near Snizhne, in a territory controlled by the DPR.

35. The Buk system that destroyed MH17 has been carefully traced back to Russian territory. A formal Joint Investigation Team comprised of law enforcement officials from Australia, Belgium, Malaysia, the Netherlands, and Ukraine — the nations most affected by the tragedy — collaborated to investigate how the attack happened. They found extensive evidence that the Buk system was transported across the border from the Russian Federation, brought to the launch site where it destroyed the civilian aircraft, and then returned to Russia.

36. In the record there is a video presentation assembled by the Joint Investigation Team illustrating its findings with regard to the path of the weapon from Russia to separatists in Ukraine and back to Russia. A summary of the Joint Investigation Team's full report is at tab 9 in your folders. It is a compelling piece of investigative work and Ukraine would urge the Members of the Court to consider it in full. But right now, I would like to play a short excerpt<sup>33</sup>. In three clips. The first clip shows the transport of the Buk system from Russia into Ukraine. The second clip

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<sup>31</sup>DSB Report, pp. 10-11 (Ann. 34).

<sup>32</sup>*Ibid.* at p 9 (Ann. 34); see *ibid.* at p 137 (Ann. 34).

<sup>33</sup>Joint Investigation Team, *Presentation Preliminary Results Criminal Investigation MH17* (hereinafter "JIT Presentation"), Openbaar Ministerie [Public Prosecution Service] (28 Sept. 2016) (video no. 3, "MH17 Animation Regarding the Transport Route and the Launch Site," publicly available at <https://www.youtube.com/watch?v=Sf6gJ8NDhYA>) (Ann. 35).

shows the transport of the Buk within Ukraine. And the third clip shows the transport of the system out of Ukraine and back to Russia.

[Video clips 1, 2 and 3 on screen]

37. The loss of life that followed from that Russian weapons transfer is well known.

38. Mr. President, Members of the Court, the Russian Federation has supplied much more than just this Buk system. Those weapons include various types of multiple rocket launch systems, including the Grad BM-21. One example of such a system can be seen at tab 7 of your folders. Mr. Tkachenko attests at paragraph 6 (*b*) of his statement that Ukrainian forces recovered a Grad system from the DPR on 13 June 2014 and found markings showing its Russian origin<sup>34</sup>. Appendix 2 of Mr. Tkachenko's statement is the protocol of inspection related to this system<sup>35</sup> which is also on your screen.

39. Another powerful indication of Russian support for armed groups in Ukraine is the presence of weapons these groups would have no other way to obtain. The OSCE witnessed, for example, the presence of a lethal TOS-1 Buratino multiple rocket launcher in Luhansk<sup>36</sup>. This weapon has never been made by the Ukrainian army. According to an OSCE spokesman, by its very nature, "[t]his is a very destructive weapon which is fired indiscriminately"<sup>37</sup>. And it is only produced in Russia<sup>38</sup>.

40. Similarly, the model Grad-K rocket launcher has been found in Donetsk<sup>39</sup>. At tab 10, which is in Volume I B of the judges' folder, is a report by the Atlantic Council. At page 21, there is a description of Russian military equipment in Ukraine, which notes that the Grad-K rocket system is a uniquely Russian-produced weapon<sup>40</sup>.

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<sup>34</sup>Affidavit of testimony of Tkachenko Andryi Mykolaiovych, 24 Feb. 2017, para. 6 (*b*) (Ann. 82).

<sup>35</sup>Affidavit of testimony of Tkachenko Andryi Mykolaiovych, 24 Feb. 2017, Protocol of Inspection, 28 Oct. 2015 (Ann. 82).

<sup>36</sup>Organization of Security and Co-operation in Europe, "Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 27 September 2015", 28 Sep. 2015, p. 3 (Ann. 15); BBC News, "Ukraine Rebels Have Powerful New Russian-Made Rockets — OSCE", 2 Oct. 2015 (Ann. 47).

<sup>37</sup>BBC News, "Ukraine Rebels Have Powerful New Russian-Made Rockets — OSCE", 2 Oct. 2015 (Ann. 47).

<sup>38</sup>*Ibid.* (Ann. 47).

<sup>39</sup>The Atlantic Council, "Hiding in Plain Sight", 2015, p. 21 and No. 91 (Ann. 44).

<sup>40</sup>*Ibid.* (Ann. 44).

41. How did fighters in the Donbas manage to procure such sophisticated and powerful Russian weapons? There is just one logical and plausible inference: the Russian Federation supplied them.

42. Armed with these powerful Grad systems, Russian-backed armed groups launched a string of devastating attacks on civilian populations over the winter of 2015, as Professor Koh has already mentioned. The deadliest was the attack on Mariupol, the tenth largest city in Ukraine. This is a satellite map<sup>41</sup> showing the area surrounding Olimpiiska Street, a densely populated neighbourhood that suffered from this bombardment.

43. Thirty civilians lost their lives in Mariupol and many more were injured. In a subsequent investigation, the OSCE's Special Monitoring Mission conducted a crater analysis of the impact, and determined that the rockets came from DPR-controlled territory<sup>42</sup>. At tab 11 of the judges' folder is the OSCE report on the incident. The OSCE determined that the attack was carried out by Grad and Uragan rockets<sup>43</sup>. In other words, the type of weapons that the Russian Federation was transferring to the DPR.

44. The OSCE reached a similar conclusion in its investigation of the attack in Volnovakha. There, civilian passengers on a bus were killed while waiting at a checkpoint, a location on a well-travelled highway that saw long queues of civilian vehicles. The DPR unleashed a volley of more than 50 rockets. The OSCE describes this incident in a 14 January 2015 report, also at tab 11. Here as well, the OSCE conducted an analysis and determined that the attack originated from DPR-controlled territory<sup>44</sup>.

45. I will not discuss every one of these examples of attacks on civilians. But I do want to briefly mention Russia's sponsorship of another type of attack — and that is bombings well outside the zone of conflict — in the city of Kharkiv, Ukraine's second largest city. One of the leaders of

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<sup>41</sup>Satellite photograph of Mariupol, Ukraine, 24 Sept. 2015 (Ann. 77).

<sup>42</sup>Organization for Security and Co-operation in Europe, "Spot Report by the OSCE SMM to Ukraine, 24 January 2015: Shelling Incident on Olimpiiska Street in Mariupol", 24 Jan. 2015, p. 1 (Ann. 21).

<sup>43</sup>*Ibid.* (Ann. 21). The report also notes that there were multiple impacts on an open market, buildings, retail shops, homes, and a school. *Ibid.* (Ann. 21).

<sup>44</sup>Organization for Security and Co-operation in Europe, "Latest from OSCE Special Monitoring Mission (SMM) to Ukraine Based on Information Received as of 18:00 (Kyiv time), 13 January 2015", 14 Jan. 2015 (Ann. 13); Organization for Security and Co-operation in Europe, "Latest from OSCE Special Monitoring Mission (SMM) to Ukraine Based on Information Received as of 18:00 (Kyiv time), 16 January 2015", 17 Jan. 2015 (Ann. 14).

the Kharkiv Partisans who carried out the attack, admitted in a media interview that his group receives Russian support through the fighters in Donetsk and also financing from those within Russia<sup>45</sup>. What has been the result of Russian support for the Kharkiv Partisans? The bombing of a peaceful rally on 22 February 2015 marking the one-year anniversary of Ukraine's Revolution of Dignity.

46. In addition to the direct supply of weapons, the Russian Federation has allowed its territory to serve as the hub of a large-scale fundraising operation. As reported by the *New York Times* at tab 12 of your folder, more than a dozen groups in Russia are openly raising money for organizations that commit act of terrorism in Ukraine<sup>46</sup>. The DPR and similar groups rely on an extensive fundraising network that includes prominent Russian nationals. Groups and individuals like Igor Girkin, a DPR leader implicated in the MH17 shoot-down, have called for donations to be routed through Russian banks like Sberbank, a State-owned bank and Russia's largest.

47. At tab 13 in your folder and also on the screen, you will find a note dated 5 July 2014. The head of the LPR sent a letter to Sergei Mironov, a member of the Russian State Duma, to thank him for his "financial support" for the LPR<sup>47</sup>.

48. Russia has its own "facts" related to this financing. When it comes to the Buk system that destroyed Flight MH17, for example, it has denied the overwhelming evidence that it supplied the weapon that was used. Suffice it to say, however, that given the evidence presented by Ukraine, it is more than "plausible" that illegal armed groups in eastern Ukraine are receiving funds from the territory of the Russian Federation, and that this assistance is being used in attacks on civilians.

49. Russia's knowledge of what these groups were doing with its assistance is apparent. To understand who it was sponsoring, Russia needed only to have read the contemporaneous reports of the United Nations High Commissioner for Human Rights. Indeed, as a member of the

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<sup>45</sup>Simon Shuster, "Meet the Pro-Russian 'Partisans' Waging a Bombing Campaign in Ukraine", *Time* (10 April 2015), publicly available at: <http://time.com/3768762/pro-russian-partisans-ukraine/> (Ann. 56).

<sup>46</sup>Jo Becker & Steven Lee Myers, "Russian Groups Crowdfund the War in Ukraine", *New York Times*, 11 June 2015 (Ann. 51).

<sup>47</sup>Официальный сайт Политической партии СПРАВЕДЛИВАЯ РОССИЯ [Official Website of the Political Party A JUST RUSSIA], Сергей Миронов получил благодарственное письмо от главы ЛНР Валерия Болотова ["Sergei Mironov Received a Thank You Letter From the Head of the LPR Valery Bolotov"], 11 July 2014 (Ann. 58).

United Nations Security Council, Russia receives briefings from the High Commissioner on a regular basis. If you turn to tab 14 in your binder at paragraph 207, one can see that as early as 2014, the United Nations High Commissioner for Human Rights put the Russian Federation — and indeed the world — on notice that the DPR and LPR were committing “an increasing number of acts of intimidation and violence . . . targeting ‘ordinary’ people who support Ukrainian unity or who openly oppose the either of the two ‘people’s republics’”<sup>48</sup>.

50. As the months went on and the atrocities continued, no reasonable person could think that the Russian Government was ignorant of how the supplies of weapons and money from Russia to groups in eastern Ukraine were being used. Yet the financing continued, contributing to and supporting acts of terrorism over the next three years.

### **C. Relationship between the rights asserted and the provisional measures sought**

51. Let me now speak to the strong connection between the rights Ukraine asserts under the Terrorism Financing Convention and the provisional measures Ukraine seeks.

52. The first measure Ukraine seeks would require the Russian Federation not to aggravate the dispute under the Convention. That measure is self-explanatory, and has a clear fit with the claims before the Court.

53. The second measure Ukraine seeks is that Russia be ordered to exercise appropriate control over its border. There is a close nexus between this measure and the rights asserted by Ukraine. Ukraine claims that the Russian Federation is failing in its obligations under Article 18, which require Russia to take “all practicable measures” to prevent the financing of terrorism from its territory. Controlling what crosses one’s border is a practical measure, and indeed is something all States are expected to do.

54. The third measure Ukraine seeks would require Russia to both halt and prevent transfers of money, weapons, and other support to groups that commit terrorist acts in Ukraine. Again, this measure is tightly linked to Ukraine’s claims on the merits.

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<sup>48</sup>Office of the United Nations High Commissioner for Human Rights, “Report on Human Rights Situation in Ukraine”, 15 June 2014, para. 207 (Ann. 7); see Office of the United Nations High Commissioner for Human Rights, “Accountability for Killing in Ukraine from January 2014 to May 2016” (2016), p. 33 (Ann. 6).

55. Finally, Ukraine asks the Court to order the Russian Federation to use whatever influence it possesses over the groups that it supports to refrain from carrying out further acts of terrorism against civilians. Even if Russia begins to comply with Article 18, control its border, and stops the flow of weapons into Ukraine, imminent danger would remain. Three years of violations of the Convention have put groups like the DPR and the LPR in a position to carry out more acts of terrorism, particularly given the cache of weapons these groups are thought to possess. It is appropriate to order the Russian Federation to take all measures at its disposal to ensure that further acts of terrorism are not perpetrated with the Russian support that has already been received<sup>49</sup>.

56. These measures are not onerous. In fact, they are what countries who abide by the rule of law and the terms of the Convention should be doing in any case.

#### IV. THIRD CRITERION: URGENCY

57. Mr. President, Members of the Court, for the last portion of my presentation, I will speak directly to the question of urgency. Under any fair interpretation of that term, the situation for civilians in Ukraine is quite urgent indeed.

58. In past cases, the Court has asked: is it conceivable that past violations may recur? Is there a vulnerable population? Is the situation unstable? In this case, the answer to all of these questions is yes.

59. Let me begin by addressing the possibility of recurrence. Ukraine has put before the Court significant evidence that the Russian Federation perpetrates and condones the financing of terrorism in Ukraine. We have further shown evidence that Russia's proxies in Ukraine have used Russian weapons and other support to carry out attacks on civilians. Russia's violations of the Terrorism Financing Convention have already caused irreparable harm to Ukraine and its people.

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<sup>49</sup>Cf. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *Provisional Measures, Order of 8 April 1993*, *I.C.J. Reports 1993*, p. 24, para. 52:

“The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should immediately, in pursuance of its undertaking in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, take all measures within its power to prevent commission of the crime of genocide . . . The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should in particular ensure that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide.”

To borrow the Court's words from *Equatorial Guinea v. France*, it is not "inconceivable" that these violations will happen again<sup>50</sup>. Unfortunately, absent the Court's protection, it is more than conceivable, or possible, that Russia's violations will continue; it is virtually inevitable.

60. Consider the recent statement by Mr. Alexander Hug, the Deputy Chief Monitor of the OSCE's Special Monitoring Mission: "This is the worst fighting we've seen in Ukraine since 2014 and early 2015."<sup>51</sup> As you will recall, 2014 to 2015 was a period of significant terrorist acts targeting civilians in Ukraine.

61. Weapons and other funds continue to flow. In August 2016, the Office of the United Nations High Commissioner for Human Rights noted the continued "inflow of ammunition, weaponry and fighters *from the Russian Federation*"<sup>52</sup>. The United Nations monitors said that these Russian weapons are helping to facilitate human rights abuses in Ukraine. That report is at tab 17 of your folder. As recently as the end of February 2017, OSCE monitors themselves were targeted by the same groups that target Ukrainian civilians<sup>53</sup>. That report is at tab 18.

62. At tab 19 of the judge's folder, you will find a statement from Colonel Skibitskyi of the Ministry of Defence of Ukraine concerning the continued flow of weapons from the Russian Federation to illegal armed groups in eastern Ukraine. Exhibit 1 to that statement identifies numerous cases of weapons crossing the border. For example, on 18 November 2016, seven Grad multiple launch rocket systems arrived from the Russian Federation to Dovzhanska Nova, near the border<sup>54</sup>.

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<sup>50</sup>*Immunities and Criminal Proceedings (Equatorial Guinea v. France), Provisional Measures, Order of 7 December 2016*, p. 21, para. 89.

<sup>51</sup>Christian Borys, "'Everything is Destroyed': On the Ground As Latest Surge of Deadly Violence Strikes Eastern Ukraine", *The Independent*, 4 February 2017, publicly available at: <http://www.independent.co.uk/news/world/europe/ukraine-violence-war-conflict-russia-rebels-separatists-a7562811.html> (Ann. 48); see also "Transcript of Alexander Hug, Principal Deputy Chief Monitor of the OSCE Special Monitoring Mission to Ukraine, Weekly Updates from the OSCE Special Monitoring Mission", 3 Feb. 2017, publicly available at: <http://uacrisis.org/52200-osce-smm-11> (Ann. 22).

<sup>52</sup>Office of the UN High Commissioner for Human Rights, "Report on the Human Rights Situation in Ukraine", 16 May–15 Aug. 2016, para. 3 (emphasis added) (Ann. 9).

<sup>53</sup>Organization for Security and Co-operation in Europe, "OSCE Chief Monitor in Ukraine Condemns Targeting of Monitors and Seizure of Unmanned Aerial Vehicle", 24 Feb. 2017, publicly available at: <http://www.osce.org/ukraine-smm/301766> (Ann. 18).

<sup>54</sup>Affidavit of testimony of Colonel V.V. Skibitskyi (and supporting documents), 27 Feb. 2017, p. 4 (Ann. 79). In October 2016, at the same time Ukraine was tracking these shipments, the OSCE reported on six Grad multiple-launch rocket systems in DPR-controlled areas on 12 October 2016. Organization for Security and Co-operation in Europe, "Latest from OSCE Special Monitoring Mission (SMM) to Ukraine, based on Information Received as of 19:30, 12 October 2016" (13 Oct. 2016) (Ann. 16).

63. Tab 21 of your folder is an OSCE joint inspection conducted by Canadian, Dutch and Ukrainian officials in accordance with Vienna Document 2011<sup>55</sup>. That report concludes that, as of January 2017, there is a significant quantity of weaponry and equipment in Rostov, a region bordering Ukraine<sup>56</sup>.

64. In short, sophisticated Russian weaponry used in previous acts of terrorism are in the Donetsk and Luhansk oblasts. More equipment and ammunition appear ready to be supplied. The delivery of such weapons into the hands of groups that carry out violent attacks against civilians risks irreparable harm to innocent lives.

65. Let me end by focusing on the current situation in the town of Avdiivka, which illustrates both the vulnerability of the population and the instability of the situation. In Avdiivka and elsewhere in Donetsk, citizens are, quite literally, under fire<sup>57</sup>. The OSCE reported in late January and early February 2017 that residential neighbourhoods in Avdiivka came under assault by Grad missiles from DPR-held territory. In these attacks, there were disturbing reminders of the indiscriminate shelling of civilians in Kramatorsk and Mariupol.

66. Eyewitness testimony is consistent with the OSCE's report and confirms that civilian populations have suffered. In your judge's folder at tab 15 is the testimony of Ms Hanna Fadeeva, a 76-year-old woman from Avdiivka.<sup>58</sup> At around 4 a.m. in the morning of 31 January, Ms Fadeeva heard the sound of glass breaking and walls collapsing. As Ms Fadeeva testified at paragraph 4: "After the explosion subsided I saw that I was trapped in my own house and could

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<sup>55</sup>Ukrainian Delegation to the OSCE, "Report Summarizing Findings of Joint Canadian, Dutch, and Ukrainian Inspection of Russian Military Base (16–19 January 2017)", OSCE Vienna Document Communication No. CBM/UA/17/0004/F35/O (Ann. 24).

<sup>56</sup>Surrounding the recent attacks on Avdiivka, two captured members of the DPR confirmed on 15 to 16 February 2017 their awareness that Russia continues to supply weapons to the DPR. Record of Interrogation of Detained Anonymous Soldier No. 1 of the Self-Proclaimed "Donetsk People's Republic", Security Service of Ukraine, 15 Feb. 2017; Ann. 30; Record of Interrogation of Detained Anonymous Soldier No. 2 of the Self-Proclaimed "Donetsk People's Republic", Security Service of Ukraine, 16 Feb. 2017 (Ann. 31).

<sup>57</sup>See "Avdiivka Civilians Caught in Crossfire as Clashes Rage: Thousands Without Heating or Electricity in Town of Avdiivka as Ukrainian Troops and Rebels Remain Locked in Fighting", *Al Jazeera*, 5 February 2017, publicly available at: <http://www.aljazeera.com/news/2017/02/ukraine-avdiivka-civilians-clashes-170205060625593.html> (Ann. 45); see also John Wendle, "Avdiivka, evacuating again as fighting escalates Civilians in Avdiivka wonder if they will survive the cold nights and random, incessant shelling", *Al Jazeera* (8 Feb. 2017), publicly available at: <http://www.aljazeera.com/indepth/features/2017/02/avdiivka-evacuating-fighting-escalates-170207113627961.html> (Ann. 52).

<sup>58</sup>Affidavit of testimony of Hanna Mykolayva Fadeeva, 15 Feb. 2017 (Ann. 80).

not get out. The shelling continued and I was very scared when I realized that at that time I could not get out of the building and was trapped.”

67. At tab 16 is the testimony of Christopher Nunn, a British photographer who was in Avdiivka during the recent attack, with pictures he took at the scene<sup>59</sup>. As Mr. Nunn explained at paragraph 5, “[o]n the night of Thursday, 2 February 2017, I was staying in a flat of a friend of a friend in the town of Avdiivka when a shell exploded immediately outside”. That seriously damaged Mr. Nunn’s face and eye. Mr. Nunn’s host, Elena, was killed as a result of the attack.

68. Mr. President, Members of the Court, to conclude, the Buk missile that destroyed Flight MH17 was in Russian territory until the day before the attack. If Russia does not monitor its border, there is nothing to prevent another Buk missile from crossing that border tomorrow. Patriotic marchers in Kharkiv were not told to expect a bomb to explode at the end of their peaceful rally, but one did. Avdiivka had no advance warning that it would face bombardments similar to what Mariupol felt months earlier.

69. In January 2017, Ukraine filed this case, concerned about how weapons and other assistance continued to flow across the border, how those weapons might be unleashed. We do not know what will happen next, or who the next victims may be. Provisional measures in this case would help stabilize the situation<sup>60</sup> and the provisional measures Ukraine requests today are not onerous, and could very well could save lives.

70. Mr. President, that concludes my presentation on the need for provisional measures concerning the financing of terrorism. I now ask that you give the floor to my colleague Mr. Gimblett to discuss the need for provisional measures under the CERD.

Le Président: Merci, Madame. Je donne maintenant la parole à Monsieur Gimblett pour sa plaidoirie, en lui demandant d’être attentif à la remarque que j’ai faite tout à l’heure concernant l’heure de fin de la présente audience. Monsieur Gimblett, vous avez la parole.

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<sup>59</sup>Affidavit of Testimony of Christopher Nunn (21 Feb. 2017) (Ann. 78).

<sup>60</sup>See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008*, p. 396, para. 143.

Mr. GIMBLETT: Bien sûr, Monsieur le président.

**PROVISIONAL MEASURES RELATING TO UKRAINE’S CLAIMS UNDER THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION**

**I. INTRODUCTION**

1. Mr. President, distinguished Members of the Court, it is an honour to appear before you on behalf of Ukraine. I will address how Ukraine’s request for provisional measures with regard to its claims under the International Convention on the Elimination of All Forms of Racial Discrimination — which I will call the “CERD” — fully satisfies the Court’s well-established standards for indicating provisional measures. Specifically, I will show: first, that Ukraine has made a prima facie showing of jurisdiction; second, that the provisional measures sought by Ukraine relate to rights asserted by Ukraine in its Application that are at least plausible; and, third, that there is an urgent need that the Court act to prevent those rights from suffering irreparable damage.

**II. FIRST CRITERION: PRIMA FACIE JURISDICTION**

2. Turning first to jurisdiction, Ukraine again invokes Article 36 (1) of the ICJ’s Statute, providing the Court with jurisdiction over “all matters specially provided for in . . . treaties and conventions in force”<sup>61</sup>. Like the Terrorism Financing Convention, the CERD provides for dispute resolution before this Court. The full text of the Convention is at tab 24 in Volume 2 of the judges’ folder, which contains the documents relevant to Ukraine’s CERD claims. As you will see there, pursuant to Article 22, which is now on the screen, Ukraine and the Russian Federation have agreed to submit disputes concerning the interpretation or application of the CERD to this Court, subject to two conditions. First, there must be a dispute. And, second, an attempt to settle the dispute must have failed. Both conditions are satisfied here.

3. Beginning with its diplomatic Note of 23 September 2014, Ukraine has brought a series of violations of the CERD to Russia’s attention<sup>62</sup>. That Note — sent nearly two and a half years ago — is in the judges’ folder at tab 25. As with its notes concerning terrorism financing, Ukraine

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<sup>61</sup>Statute of the Court, Art. 36 (1).

<sup>62</sup>Ukraine Note Verbale No. 72/22-620-2403 to the Russian Federation, dated 23 Sep. 2014, Ann. 25.

fully complied with this Court's previous guidance on giving notice of a dispute, as set out in such cases as *Nicaragua v. Colombia*<sup>63</sup> and *Georgia v. Russia*<sup>64</sup>. As you can see on the next slide, the Note specifically refers to violations by Russia of the CERD<sup>65</sup>. It proceeds to explain in some detail which articles of the CERD have been violated by Russian conduct and how<sup>66</sup>. Those violations include: limiting access to Ukrainian-language education<sup>67</sup>, suppressing ethnic Ukrainian and Crimean Tatar media entities<sup>68</sup>, carrying out illegal searches of the premises of the Mejlis of the Crimean Tatar People<sup>69</sup>, and harassing Mejlis members<sup>70</sup>. Later, the Note demands that the Russian Federation stop its internationally unlawful acts and provide compensation for the damage they had caused<sup>71</sup>. And, finally, it offers to negotiate with Russia over the issues set out in the Note<sup>72</sup>.

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<sup>63</sup>*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections, Judgment of 17 March 2016.*

<sup>64</sup>*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011.*

<sup>65</sup>Ukraine Note Verbale No. 72/22-620-2403 to the Russian Federation, dated 23 September 2014 at 1, Ann. 25: ("The Ministry of Foreign Affairs of Ukraine presents its compliments to the Ministry of Foreign Affairs of the Russian Federation and has the honour to report a violation by the Russian Federation of its obligations under the International Convention on the Elimination of All Form of Racial Discrimination (ICERD) dated 1966.")

<sup>66</sup>*Ibid.* (listing violations of CERD articles 2 & 5).

<sup>67</sup>*Ibid.* at 2 ("In April 2014, Sevastopol's local authorities in the framework of so-called 'saving and optimization' process had decided to stop teaching pupils in Ukrainian boarding school No. 7 from the new school year. Those pupils who do not want to move to Russian schools had been concluded to transfer to a boarding schools for children with mental retardation. Starting from April 2014 Ukrainian schools in Crimea has been prohibited to teach Ukrainian language and literature and those teachers are forced to retire.")

<sup>68</sup>*Ibid.* ("June 24, 2014 the FSB of Russian Federation put pressure on Chief Editor of M[e]jlis's newspaper 'Avdet' Mr. Sh.Kaybullayev in connection with the publication by the newspaper of 'extremist['] materials – the decision of M[e]jlis to boycott of so-called 'elections to the State Council' in the temporarily occupied AR Crimea and City of Sevastopol.")

<sup>69</sup>*Ibid.* ("September 16, 2014 armed individuals were conducted illegal searches in the premises of M[e]jlis on 2 Schmidt Street, City of Simferopol. They had seized the protocols of meetings, removed office equipment and Mr. M.Dzhemilev's personal belongings.")

<sup>70</sup>*Ibid.* ("May 4, 2014 so-called 'Prosecutor of Crimea' Ms N.Poklonska had announced a warning to Mr. R.Chubarov about the inadmissibility of his extremist activity, in particular, in view of the fact that 'in several districts of Crimea the Mejlis led by Mr. R.Chubarov had conducted an illegal public action of extremist nature associated with numerous riots, highways blockage, illegal border crossing, obstruction of public authorities and violence'.")

<sup>71</sup>*Ibid.* at 3 ("The Ministry of Foreign Affairs of Ukraine strongly demands from Russian Federation to stop immediately the internationally wrongful acts, to investigate all crimes outlined in this note, and severely punish those responsible . . . The Ministry of Foreign Affairs of Ukraine also demands from the Russian Side to make full compensation for damages incurred as a result of the internationally wrongful actions conducted by the Russian Side.")

<sup>72</sup>*Ibid.* at 3 ("In this regard, the Ukrainian Side offers to the Russian Side to negotiate the use of the International Convention on the Elimination of All Forms of Racial Discrimination of 1966, in particular, the implementation of international legal liability in accordance with international law.")

4. Ukraine's diplomatic Note was followed by a further 18 notes following up on the violations reported there, raising fresh violations, and offering negotiations. Russia responded with 15 notes of its own. A Ukrainian delegation met with its Russian counterpart on three separate occasions in Minsk to try to settle the dispute.

5. Notwithstanding the volume of this correspondence and the opportunities afforded to it in three rounds of negotiations, the Russian Federation never provided straight and specific responses on the issues raised by the Ukrainian side. Instead, the Russian Federation has confined itself to general and non-committal statements, such as that the facts and incidents alleged in Ukraine's diplomatic notes were being addressed by the relevant law enforcement authorities. Rather than address the specifics of the serious treaty violations raised by Ukraine, the Russian Federation raised semantic questions<sup>73</sup>. Even while declining to engage substantively on its past violations of the CERD, the Russian Federation has continued and escalated its pattern of discrimination against Crimean Tatars and ethnic Ukrainians in Crimea. The violations raised by Ukraine in its September 2014 diplomatic Note remain unresolved and they are among the claims now before the Court. They have been joined by numerous others, as Russia continues and compounds its discriminatory conduct without heed to Ukraine's protests.

6. At the provisional measures stage, it is enough that, as the Court stated in *Georgia v. Russia*, "some attempt should have been made by the claimant party to initiate, with the Respondent Party, discussions on issues that would fall under CERD"<sup>74</sup>. That requirement is more than amply satisfied here. For more than two years, Ukraine sought to resolve the issues under the CERD by engaging directly with the Russian Federation. In response, Russia engaged in similar delays and refusals to co-operate as it did with respect to Ukraine's attempts to negotiate under the Terrorism Financing Convention. It has thus become manifestly clear that a dispute exists between Ukraine and Russia concerning, at a minimum, the application of the CERD. It is also clear that the dispute has not been settled by negotiation.

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<sup>73</sup>See Ukraine Note Verbale No. 72/22-194/510-1973 to the Russian Federation, dated 18 August 2016 (Ann. 29).

<sup>74</sup>*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008*, p. 388, para. 114.

### **III. SECOND CRITERION: RELATIONSHIP OF REQUESTED PROVISIONAL MEASURES TO PLAUSIBLE RIGHTS ASSERTED IN UKRAINE'S APPLICATION**

7. I will turn next to the second criterion considered by the Court before indicating provisional measures. That criterion is whether the provisional measures requested relate to rights asserted in the Application, and whether the existence of those rights is at least plausible. I will start by recapping the rights invoked by Ukraine, as relevant to Ukraine's Application for Provisional Measures.

#### **A. The rights asserted in Ukraine's Application**

8. The CERD protects the right in general not to be subjected to acts or practices of racial discrimination<sup>75</sup>. It also protects a variety of more specific rights from infringement on a racially discriminatory basis. Ukraine claims that, since its unlawful occupation of Crimea, the Russian Federation has embarked on a campaign of cultural erasure directed at non-Russian communities, in particular the Crimean Tatar and ethnic Ukrainian communities. That conduct violates many different articles of the CERD, as set forth in paragraph 132 of Ukraine's Application, but today I want to focus on two articles in particular: Article 2 and Article 5.

9. Article 2 reflects the general right not to be subjected to racial discrimination<sup>76</sup>. That is apparent in the language of Article 2 (1) (a) in which the State Parties undertake "to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation". It is apparent also in Article 2 (1) (b) in which the States Parties undertake "not to sponsor, defend or support racial discrimination by any persons or organizations". The same is true of Article 2 (1) (c) and (d), which set out affirmative commitments by the State Parties to take actions aimed at preventing and ending racial discrimination.

10. Ukraine asserts that the overall pattern of Russian conduct aimed at the cultural erasure of non-Russian communities violates these general Article 2 rights. As Professor Koh said earlier,

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<sup>75</sup>International Convention on the Elimination of All Forms of Racial Discrimination, 660 *UNTS* 212 (entered into force 4 January 1969). See *ibid.*, Art. 1 (defining "racial discrimination" 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>76</sup>*Ibid.*, Art. 2.

the objective of that conduct is to deny to non-Russian communities, in particular the Crimean Tatar and ethnic Ukrainian communities, their specific cultural identities. Russia has pursued that goal through a variety of means, including measures aimed at preventing those communities from mobilizing politically, harassing activists from those communities under the guise of combatting terrorism, suppressing the Crimean Tatar and ethnic Ukrainian broadcast and print media, and restricting educational opportunities and cultural expression. This deliberate attempt to crush the separate identities of non-Russian communities is the antithesis of Article 2.

11. Article 5 elaborates a series of specific rights, with regard to which the States Parties undertake to “prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without discrimination as to race, colour, or national or ethnic origin, to equality before the law”. Ukraine asserts that the specific acts and practices that together comprise the Russian Federation’s policy of cultural erasure violate specific rights protected by Article 5. For example:

- Article 5 (a) protects “[t]he right to equal treatment before the tribunals and all other organs administering justice”<sup>77</sup>. The Application details how the Russian authorities have subjected members of the Crimean Tatar community to a wave of arbitrary searches and detentions. It describes how the Russian courts have been used to put in place a ban on that community’s representative organization, the Mejlis of the Crimean Tatar People. In both cases, Ukraine contends, Russia’s actions violate the Article 5 (a) rights of Ukraine and its people.
- Article 5 (b) protects “[t]he right to security of person and protection by the State against violence or bodily harm”<sup>78</sup>. The Application describes a pattern of disappearances and murders committed against members of the Crimean Tatar community which, Ukraine claims, were either instigated, or at least tolerated and encouraged by, the Russian authorities. Ukraine submits that this conduct violates the Article 5 (b) rights of Ukraine and its people.
- Article 5 (c) protects political rights, including the right to take part in government<sup>79</sup>. The Application describes the measures that the Russian authorities have taken to eliminate the

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<sup>77</sup>International Convention on the Elimination of All Forms of Racial Discrimination, 660 *UNTS* 212 (entered into force 4 January 1969), Art. 2.

<sup>78</sup>*Ibid.*

<sup>79</sup>*Ibid.*

ability of the Crimean Tatar community to express themselves politically and to ensure that their needs are properly taken into account by the government. This includes the banning of the Mejlis. Ukraine asserts that these measures violate the Article 5 (c) rights of Ukraine and its people.

- Article 5 (d) protects a variety of civil rights, including “[t]he right to leave any country, including one’s own, and to return to one’s country”<sup>80</sup>. The Application explains that the Russian Federation has excluded many prominent Crimean Tatar leaders from Crimea, their homeland. Ukraine maintains that this conduct violates the Article 5 (d) rights of Ukraine and its people.
- Article 5 (d) also protects the right to freedom of opinion and expression<sup>81</sup>. The Application details restrictions imposed by the Russian Federation targeting media organizations serving the Crimean Tatar and ethnic Ukrainian communities. It describes how journalists employed by these organizations have been harassed and branded as extremists for expressing their opinions. Ukraine contends that these actions violate the Article 5 (d) rights of Ukraine and its people.
- Article 5 (e) protects a variety of economic, social and cultural rights, including the right to education and training and the right to equal participation in cultural activities<sup>82</sup>. The Application sets out how the Russian authorities have suppressed education in the Tatar and Ukrainian languages on the Crimean peninsula and have prevented the Crimean Tatar and ethnic Ukrainian communities from commemorating events of cultural significance to those communities. Again, Ukraine submits that those actions violate the Article 5 (e) rights of Ukraine and its people.

12. My time is limited, but suffice it to say that it is uncontested that the aforementioned rights exist as a matter of law, as set forth in plain language in the text of the CERD.

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<sup>80</sup>International Convention on the Elimination of All Forms of Racial Discrimination, 660 *UNTS* 212 (entered into force 4 January 1969), Art. 2.

<sup>81</sup>*Ibid.*

<sup>82</sup>*Ibid.*

### **B. The Plausibility of the Rights Asserted in the Application**

13. As Ms Cheek has explained, Ukraine does not seek today to prove the merits of its case. The Court can grant provisional measures if it finds that the rights asserted by Ukraine are “plausible”. As stated in *Belgium v. Senegal*, at the provisional measures stage “the Court does not need to establish definitively the existence of the rights claimed” nor does it need to consider the applicant’s “capacity to assert such rights before the Court”<sup>83</sup>. Instead, it is sufficient if the rights claimed are “grounded in a possible interpretation” of the treaty invoked<sup>84</sup>. Ukraine’s CERD claims easily satisfy that minimal standard.

14. Numerous independent observers have documented the Russian Federation’s infringements upon the rights described in the Application. At tab 26 in your folder, you will find an excerpt from the report of the Office of the United Nations High Commissioner for Human Rights (the UNHCHR) on the Human Rights Situation in Ukraine, 16 May to 15 August 2016<sup>85</sup>. The excerpt describes at page 34 the disappearance of a prominent Crimean Tatar leader, Ervin Ibragimov — one of 10 such disappearances recorded by the United Nations since March 2014<sup>86</sup>. At page 38, it relates how another Crimean Tatar leader, Ilmi Umerov, a Vice Chairman of the Mejlis, was ordered into a psychiatric facility by a Crimean court on the motion of the Russian authorities investigating his case<sup>87</sup>. And, among other pressure exerted on the Crimean Tatar and ethnic Ukrainian communities, the UNHCHR reports, at page 37, threats by Crimean prosecutors against Lilia Budzhurova, deputy director of a Crimean Tatar TV channel, after she criticized the arrests of Crimean Tatars on social media — an opinion deemed “extremist” by the Russian authorities<sup>88</sup>.

15. In this and 15 other reports on the human rights situation in Ukraine since April 2014, the Office of the United Nations High Commissioner for Human Rights corroborates the facts alleged in Ukraine’s Application in support of its claims under the CERD.

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<sup>83</sup>See *Question Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009, p. 152, para. 60.

<sup>84</sup>*Ibid.*

<sup>85</sup>Office of the United Nations High Commissioner for Human Rights, *Report on the Human Rights Situation in Ukraine* (16 May–15 August 2016) (Ann. 9).

<sup>86</sup>*Ibid.*, para. 154.

<sup>87</sup>*Ibid.*, para. 178.

<sup>88</sup>*Ibid.*, para. 169.

16. At tab 27 you will find an excerpt from the Report of the Human Rights Assessment Mission on Crimea (6-18 July 2015), issued by the Office for Democratic Institutions and Human Rights and High Commissioner on National Minorities of the Organization for Security and Co-operation in Europe (OSCE).<sup>89</sup> The detailed events reported in this excerpt again reflect Ukraine's allegations in its Application. But I draw your attention specifically to the summary of findings on page 100 and in particular the following passage in paragraph 292, which is on your screen now:

“Crimean Tatars and Ukrainians who openly support the territorial integrity of Ukraine and do not support the *de facto* authorities continue to be in a particularly vulnerable position. The Mejlis — a self-governing body of Crimean Tatars — became the main target of administrative and criminal reprisals by the *de facto* authorities. Intimidation, expulsion, or incarceration of prominent leaders of the Mejlis of the Crimean Tatar People has a detrimental effect on the exercise of the political and civil rights of persons belonging to the Crimean Tatar community.”<sup>90</sup>

This paragraph and the following paragraph 293 go on to describe a series of specific measures taken against the Crimean Tatar and ethnic Ukrainian communities by the Russian authorities.

17. The aforementioned United Nations and OSCE reporting, and similar reporting from the Commissioner for Human Rights of the Council of Europe, was welcomed by the United Nations General Assembly in its resolution 71/205, adopted in December last year<sup>91</sup>. That resolution, which is in your folder at tab 28, condemned “the abuses, measures and practices of discrimination against the residents of the temporarily occupied Crimea, including Crimean Tatars, as well as Ukrainians and persons belonging to other ethnic and religious groups, by the Russian occupation authorities”<sup>92</sup>. And it goes on to urge the Russian Federation to

“take all measures necessary to bring an immediate end to all abuses against residents of Crimea, in particular reported discriminatory measures and practices, arbitrary detentions, torture and other cruel, inhuman or degrading treatment, and to revoke all discriminatory legislation”<sup>93</sup>.

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<sup>89</sup>Office for Democratic Institutions and Human Rights & High Commissioner on National Minorities, *Report of the Human Rights Assessment Mission on Crimea* (6-18 July 2015) (Ann. 23).

<sup>90</sup>*Ibid.*, para. 292.

<sup>91</sup>United Nations General Assembly resolution 71/205, UN doc. A/RES/71/205, *Situation of Human Rights in the Autonomous Republic of Crimea and the City of Sevastopol (Ukraine)*, 19 Dec. 2016 (Ann. 3).

<sup>92</sup>*Ibid.*, para. 1.

<sup>93</sup>*Ibid.*, para. 2 (b).

18. These are not Ukraine's allegations. These are the authoritative findings of the United Nations General Assembly. And those findings are based on the international organization reporting to which I have alluded. This body of proof is more than sufficient to confirm the plausibility of the rights asserted in Ukraine's Application and the broader pattern of cultural erasure.

### **C. The Relationship Between the Requested Provisional Measures and the Rights Asserted**

19. Finally, under this second criterion for provisional measures, the provisional measures requested by Ukraine self-evidently relate to the rights asserted in the Application.

20. First, as with its claim under the Terrorism Financing Convention, Ukraine asks the Court to order the Russian Federation to refrain from any action which might aggravate or extend the dispute before you, or make this dispute more difficult to resolve. As Ms Cheek explained previously, that requested measure is by definition related to the rights asserted in the Application.

21. Second, Ukraine requests that the Court order the Russian Federation to refrain from any act of racial discrimination against persons, groups of persons, or institutions in the territory under its effective control, including the Crimean peninsula. In essence, Ukraine asks that the Court order that, while this case is pending, Russia desist from any further action to abridge the rights of the Ukrainian people guaranteed by the CERD. Given that Ukraine's Application invokes the general right to be free from acts of racial discrimination contained in Article 2 of the CERD, this provisional measure plainly relates to a right asserted in the Application.

22. Third, Ukraine requests that the Court order the Russian Federation, during the pendency of the present case, to suspend the decree banning the Mejlis of the Crimean Tatar People and refrain from any acts to enforce this decree and any similar measures. Ukraine's Application, at paragraph 133, highlighted the ban on the Mejlis as a violation of the CERD and, at paragraphs 137 and 138, sought relief from it. As I have explained today, the ban and the Russian courts' role in enforcing it, violate, at a minimum, the Article 5 (a) right to equal

treatment before tribunals and Article 5 (c)'s protections for political rights<sup>94</sup>. This provisional measure accordingly relates to rights invoked in the Application.

23. Fourth, Ukraine asks the Court to order the Russian Federation to take all necessary steps to halt the disappearance of Crimean Tatar individuals and to promptly investigate those disappearances that have already occurred. Again, paragraphs 133, 137 and 138 of Ukraine's Application identify the disappearances of Crimean Tatars as a violation of the CERD and seek relief from that violation. As I explained earlier, the disappearances implicate, in particular, the Article 5 (b) right to security of person and protection by the State against violence or bodily harm<sup>95</sup>. This requested provisional measure plainly relates to a right asserted in the Application.

24. Fifth and last, Ukraine requests that the Court order the Russian Federation to suspend restrictions on Ukrainian-language education and respect the right to Ukrainian-language education while this case is pending. The Application describes at paragraphs 114-118 the toll taken on Ukrainian-language education by the restrictions imposed by the Russian occupation authorities. At paragraph 133, it specifically identifies this as a violation of the CERD and at paragraphs 137 and 138, it seeks relief from that violation. As explained earlier, Russia's conduct in this regard violates the Article 5 (e) protections for economic, social and cultural rights<sup>96</sup>. This provisional measure too, therefore, relates to a right invoked in the Application.

25. Each of these measures requested by Ukraine relate to plausible rights asserted in the Application. The Court therefore can be satisfied that the second criterion for provisional measures is fulfilled.

#### **IV. THIRD CRITERION: THE URGENT NEED FOR PROVISIONAL MEASURES**

26. This brings me to the third and final criterion: the urgent need for provisional measures in the presence of a real and imminent risk of irreparable prejudice to the rights in dispute before

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<sup>94</sup>International Convention on the Elimination of All Forms of Racial Discrimination, Art. 5, 660 UNTS 212 (entered into force 4 January 1969).

<sup>95</sup>*Ibid.*

<sup>96</sup>*Ibid.*

the Court gives its final decision. This criterion also is amply satisfied. Violations of the CERD continue to be perpetrated against vulnerable populations in Russian-occupied Crimea, whose rights risk being irreparably harmed absent protection from this Court.

27. Let me address first the continuing nature of Russia's campaign of racial discrimination in Crimea. Ukraine's claims under the CERD are not limited to seeking redress for past violations of its rights. Rather, Ukraine was forced to come before this Court because important non-Russian communities in Crimea today face an ongoing assault on their rights, raising a real risk that, absent immediate action by this Court, their separate cultural identities would ultimately be erased. As I explained earlier, Ukraine tried to find a negotiated resolution of its dispute with Russia. But, when it became clear that further discussion of these issues was futile, and that Russia was meanwhile continuing with its pattern of abuses against the non-Russian communities in Crimea, Ukraine had no alternative but to seek this Court's intervention.

28. The Crimean Tatar community, in particular, remains under intense pressure from the Russian authorities. This is a community that since 1991 had made significant strides in re-establishing its presence in Crimea following the mass deportation of the Tatar population by Stalin in 1944. Central to that revival was the establishment of the Mejlis of the Crimean Tatar People, a representative and executive body with deep roots in Tatar history, which advocated persistently and successfully for the interests of the Crimean Tatar people following Ukraine's independence.

29. Ukraine's Application describes the measures taken by the Russian authorities in the wake of the purported annexation of Crimea to deprive the Tatar community of its political leadership. Key leaders, including the present and past chairmen of the Mejlis — Refat Chubarov and Mustafa Dzhemilev respectively — were simply excluded from Crimea, their homeland<sup>97</sup>. Others, including the Deputy Chairman of the Mejlis, Akhtem Chiygoz, were arrested and prosecuted by the Russian authorities on trumped up charges<sup>98</sup>.

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<sup>97</sup>Office for Democratic Institutions and Human Rights & High Commissioner on National Minorities, *Report of the Human Rights Assessment Mission on Crimea* (6-18 July 2015), para. 229-30 (Ann. 23).

<sup>98</sup>*Ibid.*, para. 236.

30. In 2016, the Russian occupation authorities significantly escalated their repression of the political identity of the Crimean Tatar people. On 18 April, in a sparsely worded statement, the Ministry of Justice of the Russian Federation declared that the Mejlis had been suspended due to its alleged “involvement in extremist activity”<sup>99</sup>. A copy of that statement is at tab 29 in your folder. On 26 April, the so-called Supreme Court of the Republic of Crimea rejected the Mejlis’s appeal against this draconian and unjustified measure<sup>100</sup>. And on 29 September, the Supreme Court of the Russian Federation ratified the Crimean court’s decision<sup>101</sup>.

31. In a sworn statement that can be found at tab 30 of your folder, Refat Chubarov, the current Chairman of the Mejlis, describes the crucial role played by the Mejlis as “the traditional permanent representative and executive body” of the Crimean Tatar population. He explains that, without the Mejlis to represent their collective voice, Crimean Tatars will be exposed to further acts of discrimination at the hands of the Russian authorities.

32. The ban has been widely condemned. The Council of Europe’s Commissioner for Human Rights stated in April that

“[t]he Mejlis is an important traditional and social structure of the Crimean Tatar people. Equating it with extremism paves the way for stigmatisation and discrimination of a significant part of the Crimean Tatar community and sends a negative message to that community as a whole.”<sup>102</sup>

That statement is at tab 31 in your folder.

33. In its Report on the Human Rights Situation in Ukraine for February to May 2016, the UNHCHR observed that the ruling of the Crimean court appeared “to be based on prejudicial evidence and could be perceived as a collective punishment against the Crimean Tatar community”. That report is Annex 8 to Ukraine’s supporting documents and the quoted passage is at paragraph 188.

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<sup>99</sup>Ministry of Justice of the Russian Federation, *Public association Mejlis of the Crimean Tatar people included in list of public associations and religious organizations whose activity has been suspended due to their involvement in extremist activity* (Ann. 59).

<sup>100</sup>See Office of the United Nations High Commissioner for Human Rights, *Report on the Human Rights Situation in Ukraine* (16 August–15 November 2016), para. 167 (Ann 10).

<sup>101</sup>*Ibid.*

<sup>102</sup>Council of Europe Commissioner for Human Rights, *Crimea: Commissioner Urges a Reversal of the Ban on the Mejlis* (26 April 2016) (Ann. 38).

34. In its resolution 71/205 in December (tab 28 in your folder), the United Nations General Assembly expressed serious concern about the court decisions upholding the ban and urged the Russian Federation to revoke the ban immediately and to repeal the decision banning leaders of the Mejlis — such as Mr. Chubarov and Mr. Dzhemilev — from entering Crimea<sup>103</sup>.

35. Rather than listening to and acting on this international condemnation, the Russian authorities have doubled down on their repressive strategy in recent months. As reported in the UNHCHR report for August to November 2016, at tab 32 in your folder, the ban is being rigorously enforced, with eight members of the Mejlis being fined by the Crimean courts for holding a meeting on 28 September in the house of the Deputy Chairman, Ilmi Umerov<sup>104</sup>.

36. These actions against the Mejlis are part of a broader ongoing assault on the political leadership of the Crimean Tatar community. As I have mentioned earlier, Mr. Umerov himself is no stranger to the brutal tactics employed by the Russian authorities to harass members of the leadership. The UNHCHR reports for May to August and August to November 2016, document the Soviet-style treatment Mr. Umerov had to endure after being charged with separatism in May 2016 for making a public statement denying that Crimea was part of the Russian Federation<sup>105</sup>. This included involuntary psychiatric detention for three weeks in August and September<sup>106</sup>.

37. I regret to say that the use of disappearances to silence the Crimean Tatar leadership also continues. As we saw earlier, the UNHCHR report for May to August 2016 (tab 26 in your folder) described the kidnapping on 24 May 2016 of Ervin Ibragimov, a member of the World Congress of Crimean Tatars<sup>107</sup>. The intimidatory effect of his kidnapping hangs over his fellow Crimean

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<sup>103</sup>UN General Assembly resolution 71/205, UN Doc. A/RES/71/205, Situation of Human Rights in the Autonomous Republic of Crimea and the City of Sevastopol (Ukraine) (19 Dec. 2016), para. 2 (g) (Ann. 3).

<sup>104</sup>Office of the United Nations High Commissioner for Human Rights, *Report on the Human Rights Situation in Ukraine* (16 August–15 November 2016), para. 168 (Ann. 10).

<sup>105</sup>Office of the United Nations High Commissioner for Human Rights, *Report on the Human Rights Situation in Ukraine* (16 May–15 August 2016), para. 178 (Ann. 9); Office of the United Nations High Commissioner for Human Rights, *Report on the Human Rights Situation in Ukraine* (16 August–15 November 2016), para. 158 (Ann. 10).

<sup>106</sup>Office of the United Nations High Commissioner for Human Rights, *Report on the Human Rights Situation in Ukraine* (16 August–15 November 2016), para. 158 (Ann. 10).

<sup>107</sup>See Office of the United Nations High Commissioner for Human Rights, *Report on the Human Rights Situation in Ukraine* (16 May–15 August 2016), para. 154 (Ann. 9).

Tartars to this day, compounded by the Russian authorities failure to mount a meaningful investigation.

38. In their determination to silence political expression by the Crimean Tatar community, most recently the Russian authorities have extended their repressive measures to encompass the lawyers representing Crimean Tatar political leaders. As recently as 26 January 2017, Crimean Tatar human rights lawyer Emil Kurbedinov was detained by armed men as his home and office were searched<sup>108</sup>. Thereafter he was sentenced to ten days' imprisonment<sup>109</sup>. Apparently Mr. Kurbedinov had attracted the attention of the Russian authorities by representing both Mr. Umerov and Mr. Chiygoz, the former Deputy Chairman of the Mejlis who has remained imprisoned on trumped up charges since early 2014.

39. Mr. Kurbedinov has spoken publicly about the human rights violations suffered by Crimean Tatars, including in a press conference he gave in Kyiv on 13 January. The same day, a Crimean court authorized the search of his premises<sup>110</sup>. The ordeal suffered by Mr. Kurbedinov is referred to in the statement of the Ukrainian Parliament's Commissioner for Human Rights, Valeriya Lutkovska, at tab 33<sup>111</sup> and is described in more detail in an authoritative account of his illegal arrest and detention by Human Rights Watch, which is at tab 34<sup>112</sup> of your folders.

40. On 21 February 2017 — just two weeks ago — Russian police conducted a search at the Simferopol home of Crimean Tatar activist and lawyer Marlen Mustafayev. That morning, Mr. Mustafayev was detained on his way to work and taken to the so-called Center for Combating Extremism. When other Crimean Tatars began taking photographs and videos of the search, Russian authorities arrested them as well<sup>113</sup>. The same day Mr. Mustafayev and ten other individuals were convicted of holding an illegal public gathering and sentenced to administrative

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<sup>108</sup>Human Rights Watch, *Crimea: Defense Lawyers Harassed* (30 January 2017) (Ann. 41).

<sup>109</sup>*Ibid.*

<sup>110</sup>*Ibid.*

<sup>111</sup>Affidavit of Testimony of Valeriya Lutkovska (27 February 2017), para. 4(h) (Ann. 83).

<sup>112</sup>Human Rights Watch, *Crimea: Defense Lawyers Harassed* (30 January 2017) (Ann. 41).

<sup>113</sup>Radio Free Europe / Radio Liberty's Ukrainian Service, *Russia Detains 11 Crimean Tatars* (22 February 2017) (Ann. 54).

detention. These very recent events are reported in the statement of Ms Lutkovska at tab 33 of your folder<sup>114</sup> as well as a press report at tab 35<sup>115</sup>.

41. The ethnic Ukrainian community is also suffering current and ongoing violations of their rights. The impact of Russian discrimination is being felt particularly keenly in the loss of educational opportunities in the Ukrainian language, a key component of the distinct identity of this community on the Crimean peninsula. Already in July 2015, the OSCE's Human Rights Assessment Mission on Crimea found that "Ukrainian language instruction in Crimea is rapidly declining"<sup>116</sup>. Their report can be found at tab 27 of your folder, at pages 96-98. The situation has only got worse since then. In its report for August to November 2016, at tab 32 in your folder, the UNHCHR found that "[o]f the seven Ukrainian language education institutions that existed until 2014, the Simferopol Gymnasium School is the only one remaining"<sup>117</sup>. Sadly, the campaign to erase Ukrainian-language education is working. This year, that last remaining school "ceased instruction in Ukrainian in the first and second grade"<sup>118</sup>.

42. What all of these events demonstrate is that Russia's campaign of discrimination against non-Russian communities continues to this day. There is absolutely no reason to believe that it will not continue tomorrow and further into the future.

43. The impact of this continuing campaign will be all the more acute because it is leveled against an already vulnerable population. The ethnic Ukrainian community has been vulnerable since the day Crimea was unlawfully occupied by the Russian Federation. Its continuing conviction — shared by the international community at large — that Crimea is part of Ukraine, is perceived as a slap in the face of the Russian occupying forces. Ukraine's application at paragraph 97, describes the case of Mr. Kadyrov, a Crimean Tatar, for whom merely saying that "Crimea is Ukraine" was sufficient to land him in jail for a period of time. If you are a member of

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<sup>114</sup>Affidavit of Testimony of Valeriya Lutkovska (27 February 2017), para. 4(i) (Ann. 83).

<sup>115</sup>Radio Free Europe / Radio Liberty's Ukrainian Service, Russia Detains 11 Crimean Tatars (22 February 2017) (Ann. 54).

<sup>116</sup>Office for Democratic Institutions and Human Rights & High Commissioner on National Minorities, *Report of the Human Rights Assessment Mission on Crimea* (6-18 July 2015), para. 276 (Ann. 23).

<sup>117</sup>Office of the United Nations High Commissioner for Human Rights, *Report on the Human Rights Situation in Ukraine* (16 August–15 November 2016), para. 180 (Ann. 10).

<sup>118</sup>*Ibid.*

the ethnic Ukrainian community, the threat of imprisonment for merely stating a fact looms equally large.

44. The Crimean Tatar community is every bit as vulnerable as the ethnic Ukrainian. In addition to losing the protection of the Ukrainian State, when the occupying Russian forces made their move in 2014, the Crimean Tatars have in the last few months been stripped of their own representative organization, the Mejlis. As recounted in Mr. Chubarov's affidavit, the Mejlis has been a tireless advocate for the rights of Crimean Tatars in the multi-ethnic Ukrainian State. With the Mejlis now banned from meeting publicly, and its members subject to arrest for meeting privately in each other's homes, the Crimean Tatars have no protection from the arbitrary whims of a State determined to eliminate their separate cultural identities.

45. The vulnerability of these non-Russian groups is confirmed by the numbers who have left Crimea since the peninsula was occupied. The early signs of that exodus are apparent in the results of the census conducted by the Russian authorities in 2014, just months after Russia's unlawful occupation began<sup>119</sup>. Excerpts from that census are at tab 36 in your folder. Remarkably, the number of ethnic Ukrainians recorded in that census was only 291,603 — down from the 490,000 recorded in the previous census conducted by the Ukrainian authorities in 2001<sup>120</sup>, excerpts of which are at tab 37. Crimean Tatar numbers were down as well, although the extent of the drop is obscured by the confusing distinction drawn by Russian census takers between Tatars and Crimean Tatars. Ukraine's Application cited the number of Tatars remaining — some 43,000, as recorded in the census. But even the larger number of Crimean Tatars recorded — just under 230,000 — is down 14,000 as compared to the 2001 census, which recorded just under 244,000 Crimean Tatars. That difference is notable, as it indicates that around 14,000 Crimean Tatars left Crimea in the months between the occupation and the Russian census in the last quarter of 2014.

46. This large scale migration of non-Russian communities out of Crimea is confirmed by the findings of international organizations. As recently as 2016, the Prosecutor of the International Criminal Court reported that some 19,000 residents of Crimea had become internally displaced

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<sup>119</sup>Russia Census in the Republic of Crimea, National Composition of the Population (Ann. 55).

<sup>120</sup>State Statistics Committee of Ukraine, About number and composition population of Autonomous Republic of Crimea by data All-Ukrainian population census (2001) (Ann. 32).

within Ukraine, and that a large proportion of this number is believed to be of Crimean Tatar ethnicity<sup>121</sup>. The report by the Prosecutor of the International Criminal Court is at tab 39.

47. But, while this steady flow of ethnic Ukrainians and Crimean Tatars out of Crimea is bad news for the maintenance of those separate cultural identities on the peninsula, it is only a small part of the story. That is because the continuation of the Russian authorities' campaign of discrimination against ethnic Ukrainians and Crimean Tatars who are still in Crimea, risks stripping those communities of their separate cultural identities over time, even if they remain *in situ*. That is why Russia's suppression of political expression by these groups, its tolerance of kidnappings and disappearances, its refusal to allow them to commemorate events central to their identity, its restrictions on the media outlets of these communities, and its strangulation of education in the ethnic Ukrainian language in particular, are all so serious. Without the interim protection that Ukraine seeks today, by the time this case is decided, the ethnic Ukrainian and Crimean Tatar communities will be severely weakened or destroyed as culturally distinct communities.

48. All of the prejudice caused to those communities in the intervening years will be irreparable. In the *Georgia v. Russia* case, this Court previously found that violations of the right to life and physical security — such as those occasioned by disappearance and kidnapping — is apt to cause irreparable prejudice<sup>122</sup>. Similarly, the denial of an entire community's right to political expression through its traditional representative organ, causes irreparable prejudice when that community's needs and aspirations are overlooked or ignored as a result. And the lost opportunity of children and other members of these communities who will never acquire their native language and the broader culture of their forebears in culturally appropriate schools from an early age, causes irreparable prejudice when those individuals end up living culturally impoverished lives.

49. The provisional measures that Ukraine requests from this Court are an appropriate and proportionate response to this threat of irreparable damage to the rights asserted by Ukraine in this

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<sup>121</sup>Office of the Prosecutor of the International Criminal Court, *Report on Preliminary Examination Activities* (14 November 2016), para. 172 (Ann. 36).

<sup>122</sup>*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008, p. 396, para. 142.*

proceeding. If Russia claims it has never strayed from the requirements of that Convention, it should have no difficulty complying with the Order and no reason to oppose it.

50. The first and second measures on the screen before you only order Russia not to further aggravate or extend this dispute and to refrain from any further violations of the CERD in Crimea, which is already its legal duty. The third, fourth and fifth measures would require the Russian authorities to redress those elements in Russia's campaign of racial discrimination that pose the greatest threat to the long term viability of Crimean Tatar and ethnic Ukrainian culture in Crimea. The ban on the Mejlis should be reversed, as the United Nations General Assembly and many other international organizations have urged. Ukraine asks the Court to lend its legal authority to those calls. The pattern of disappearances and murders must end and Russia must investigate those that have already taken place, to safeguard from irreparable prejudice the right that most people hold dearest. And the restrictions on Ukrainian-language education must be lifted to prevent ethnic Ukrainian culture on the peninsula from being dealt a fatal blow even while this Court deliberates over the merits of Ukraine's dispute with Russia.

## V. CONCLUSION

51. Mr. President, Members of the Court, in concluding Ukraine's opening oral submission, let me reiterate what you heard earlier from previous speakers. The present dispute is a serious matter indeed for Ukraine. Its people have suffered, they are suffering today, and, absent this Court's protection, will continue to suffer serious and systematic human rights abuses at the hands of the Russian Federation. We are not asking you today to reach any conclusions about the merits of Ukraine's case, which remain to be briefed and argued. We do ask, however, that the Court exercise its discretion to prevent irreparable damage to Ukraine's rights by ordering the modest provisional measures Ukraine seeks. The situation in eastern Ukraine and Crimea today is unstable. The populations in both places are vulnerable. It is far from inconceivable that further violations of the Terrorism Financing Convention and CERD will occur before the case is decided. These are precisely the circumstances in which provisional measures are both appropriate and necessary.

52. This concludes Ukraine's first round of oral observations. Mr. President, Members of the Court, thank you for your attention.

Le PRESIDENT : Merci, Monsieur Gimblett. Ainsi s'achève la séance d'aujourd'hui. La Cour se réunira de nouveau demain à 10 heures pour entendre la Fédération de Russie en son premier tour de plaidoiries. Je vous remercie.

La séance est levée.

*L'audience est levée à 13 h 20.*

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