8 NOVEMBRE 2019

ARRÊT

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)

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)

8 NOVEMBER 2019

JUDGMENT

TABLE OF CONTENTS

INTERNATIONAL COURT OF JUSTICE

YEAR 2019

2019
8 November
General List
No. 166

8 November 2019

APPLICATION OF THE INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF THE FINANCING OF TERRORISM AND OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

(UKRAINE *v.* RUSSIAN FEDERATION)

PRELIMINARY OBJECTIONS

Subject-matter of the dispute — Proceedings instituted by Ukraine under the ICSFT and CERD — Two aspects of the dispute — Alleged breaches by the Russian Federation of its obligations under the ICSFT and CERD.

Bases of jurisdiction invoked by Ukraine — Article 24, paragraph 1, of the ICSFT and Article 22 of CERD.

* *

Whether the Court has jurisdiction ratione materiae *under the ICSFT.*

Whether acts of which Applicant complains fall within provisions of the ICSFT — Interpretation of the ICSFT according to rules contained in Vienna Convention on Law of Treaties — Scope of obligations under the ICSFT — The ICSFT addresses offences committed by individuals — Financing by a State of acts of terrorism outside scope of the ICSFT — Ordinary meaning of term "any person" in Article 2 of the ICSFT — Term applies both to persons acting in private capacity and to those who are State agents — All States parties to the ICSFT under

obligation to take appropriate measures and to co-operate in prevention and suppression of offences of financing acts of terrorism — Definition of "funds" in Article 1 need not be addressed at present stage of proceedings — Whether specific act falls within meaning of Article 2, paragraph 1 (a) *or* (b)*, of the ICSFT is matter for the merits — Questions concerning existence of requisite mental elements not relevant to the Court's jurisdiction* ratione materiae *— Objection to the Court's jurisdiction* ratione materiae *under the ICSFT cannot be upheld.*

*

Whether the procedural preconditions under Article 24, paragraph 1, of the ICSFT have been met.

First precondition, namely, whether dispute between the Parties could not be settled through negotiation — Precondition requires genuine attempt to settle dispute through negotiation — Little progress made by the Parties during negotiations — Dispute could not be settled through negotiation within reasonable time — First precondition met — Second precondition, namely, whether the Parties were unable to agree on organization of arbitration — Failure to reach agreement during requisite period despite negotiations — Second precondition fulfilled.

*

The Court has jurisdiction to entertain Ukraine's claims under the ICSFT.

* *

Whether the Court has jurisdiction ratione materiae *under CERD.*

Whether measures of which Ukraine complains fall within provisions of CERD — Parties agree that Crimean Tatars and ethnic Ukrainians in Crimea constitute ethnic groups protected under CERD — Rights and obligations contained in CERD broadly formulated — Measures of which Ukraine complains are capable of having adverse effect on enjoyment of certain rights protected under CERD — These measures fall within provisions of CERD — Claims of Ukraine fall within scope of CERD.

*

Whether the procedural preconditions under Article 22 of CERD have been met.

Whether two preconditions alternative or cumulative — Application of rules of customary international law on treaty interpretation — Meaning of conjunction "or" in phrase "not settled by negotiation or by the procedures expressly provided for in [CERD]" — Term "or" may have either disjunctive or conjunctive meaning — Article 22 must be interpreted in its context — Negotiation and CERD Committee procedure two means to achieve same objective — Context of Article 22 does not support a reading that preconditions cumulative in nature — Article 22 must also be interpreted in light of object and purpose of CERD — Aim of States parties to eradicate racial discrimination effectively and promptly — Achievement of such aims more difficult if procedural preconditions under Article 22 cumulative — No need to examine travaux préparatoires *of CERD — Article 22 imposes alternative preconditions to the Court's jurisdiction.*

Whether the Parties attempted to negotiate settlement to their dispute — Notion of "negotiation" — Precondition of negotiation met when there has been a failure of negotiations, or when negotiations have become futile or deadlocked — Genuine attempt at negotiation made by Ukraine — Negotiations between the Parties futile or deadlocked by time Ukraine filed Application — Procedural preconditions satisfied.

*

The Court has jurisdiction to entertain Ukraine's claims under CERD.

* *

Objection by the Russian Federation to admissibility of Ukraine's Application with regard to claims under CERD — Contention that Application inadmissible because local remedies not exhausted before dispute referred to the Court — When a State brings claim on behalf of its nationals customary international law requires previous exhaustion of local remedies — Ukraine challenges alleged pattern of conduct of the Russian Federation with regard to treatment of Crimean Tatar and Ukrainian communities in Crimea — Rule of exhaustion of local remedies not applicable in circumstances of present case — Objection to admissibility of Ukraine's Application with regard to CERD rejected.

* *

The Court has jurisdiction to entertain the claims made by Ukraine under CERD and Ukraine's Application with regard to those claims is admissible.

JUDGMENT

Present: *President* YUSUF; *Vice-President* XUE; *Judges* TOMKA, ABRAHAM, BENNOUNA, CANÇADO TRINDADE, DONOGHUE, GAJA, SEBUTINDE, BHANDARI, ROBINSON, CRAWFORD, SALAM, IWASAWA; *Judges* ad hoc POCAR, SKOTNIKOV; *Registrar* GAUTIER.

In the case concerning the 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,

between

Ukraine,

represented by

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

as Agent;

H.E. Mr. Vsevolod Chentsov, Ambassador Extraordinary and Plenipotentiary of Ukraine to the Kingdom of the Netherlands,

as Co-Agent;

Mr. Harold Hongju Koh, Sterling Professor of International Law at Yale Law School, member of the Bars of New York and the District of Columbia,

Mr. Jean-Marc Thouvenin, Professor at the University Paris Nanterre, Secretary-General of the Hague Academy of International Law,

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

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

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

as Counsel and Advocates;

Ms Oksana Zolotaryova, Acting Director, International Law Department, Ministry of Foreign Affairs of Ukraine,

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

Mr. Volodymyr Shkilevych, Covington & Burling LLP, member of the Bars of Ukraine and New York,

Mr. George M. Mackie, Covington & Burling LLP, member of the Bars of the District of Columbia and Virginia,

Ms Megan O'Neill, Covington & Burling LLP, member of the Bars of the District of Columbia and Texas,

as Counsel;

Mr. Taras Kachka, Adviser to the Minister for Foreign Affairs of Ukraine,

Mr. Roman Andarak, Deputy Head of the Mission of Ukraine to the European Union,

Mr. Refat Chubarov, Head of the *Mejlis* of the Crimean Tatar People, People's Deputy of Ukraine,

Mr. Bohdan Tyvodar, Deputy Head of Division, Security Service of Ukraine,

Mr. Ihor Yanovskyi, Head of Unit, Security Service of Ukraine,

Mr. Mykola Govorukha, Deputy Head of Unit, Prosecutor General's Office of Ukraine,

Ms Myroslava Krasnoborova, Liaison Prosecutor for Eurojust,

as Advisers;

Ms Katerina Gipenko, Ministry of Foreign Affairs of Ukraine,

Ms Valeriya Budakova, Ministry of Foreign Affairs of Ukraine,

Ms Olena Vashchenko, Consulate General of Ukraine in Istanbul,

Ms Sofia Shovikova, Embassy of Ukraine in the Kingdom of the Netherlands,

Ms Olga Bondarenko, Embassy of Ukraine in the Kingdom of the Netherlands,

Mr. Vitalii Stanzhytskyi, Ministry of Interior of Ukraine,

Ms Angela Gasca, Covington & Burling LLP,

Ms Rebecca Mooney, Covington & Burling LLP,

as Assistants,

and

the Russian Federation,

represented by

H.E. Mr. Dmitry Lobach, Ambassador-at-large, Ministry of Foreign Affairs of the Russian Federation,

Mr. Ilya Rogachev, Director, Department of New Challenges and Threats, Ministry of Foreign Affairs of the Russian Federation,

Mr. Grigory Lukiyantsev, PhD, Special Representative of the Ministry of Foreign Affairs of the Russian Federation for Human Rights, Democracy and the Rule of Law, Deputy Director, Department for Humanitarian Co-operation and Human Rights, Ministry of Foreign Affairs of the Russian Federation,

as Agents;

Mr. Mathias Forteau, Professor at the University Paris Nanterre,

Mr. Alain Pellet, Emeritus Professor at the University Paris Nanterre, former chairperson of the International Law Commission, member of the Institut de droit international,

Mr. Samuel Wordsworth, QC, member of the Bar of England and Wales, member of the Paris Bar, Essex Court Chambers,

Mr. Andreas Zimmermann, LLM (Harvard University), Professor of International Law at the University of Potsdam, Director of the Potsdam Centre of Human Rights, member of the Permanent Court of Arbitration and of the Human Rights Committee,

as Counsel and Advocates;

Mr. Sean Aughey, member of the Bar of England and Wales, 11KBW Chambers,

Ms Tessa Barsac, consultant in international law, Master (University Paris Nanterre), LLM (Leiden University),

Mr. Jean-Baptiste Merlin, doctorate in law (University Paris Nanterre), consultant in public international law,

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

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

Mr. Sergey Usoskin, member of the Saint Petersburg Bar,

as Counsel;

Mr. Ayder Ablyatipov, Deputy Minister of Education, Science and Youth of the Republic of Crimea,

Mr. Andrey Anokhin, expert, Investigative Committee of the Russian Federation,

Mr. Mikhail Averyanov, Second Secretary, Permanent Mission of the Russian Federation to the Organization for Security and Co-operation in Europe,

Ms Héloïse Bajer-Pellet, member of the Paris Bar,

Ms Maria Barsukova, Third Secretary, Department for Humanitarian Co-operation and Human Rights, Ministry of Foreign Affairs of the Russian Federation,

Ms Olga Chekrizova, Second Secretary, Department for Humanitarian Co-operation and Human Rights, Ministry of Foreign Affairs of the Russian Federation,

Ms Ksenia Galkina, Third Secretary, Legal Department, Ministry of Foreign Affairs of the Russian Federation,

Mr. Alexander Girin, expert, Ministry of Defence of the Russian Federation,

Ms Daria Golubkova, administrative assistant, Legal Department, Ministry of Foreign Affairs of the Russian Federation,

Ms Victoria Goncharova, Third Secretary, Embassy of the Russian Federation in the Kingdom of the Netherlands,

Ms Anastasia Gorlanova, Attaché, Legal Department, Ministry of Foreign Affairs of the Russian Federation,

Ms Valeria Grishchenko, interpreter, Investigative Committee of the Russian Federation,

Mr. Denis Grunis, expert, Prosecutor General's Office of the Russian Federation,

Mr. Ruslan Kantur, Attaché, Department of New Challenges and Threats, Ministry of Foreign Affairs of the Russian Federation,

Ms Svetlana Khomutova, expert, Federal Financial Monitoring Service of the Russian Federation,

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

Ms Maria Kuzmina, Acting Head of Division, Second CIS Department, Ministry of Foreign Affairs of the Russian Federation,

Mr. Petr Litvishko, expert, Prosecutor General's Office of the Russian Federation,

Mr. Timur Makhmudov, Attaché, Legal Department, Ministry of Foreign Affairs of the Russian Federation,

Mr. Konstantin Pestchanenko, expert, Ministry of Defence of the Russian Federation,

Mr. Grigory Prozukin, expert, Investigative Committee of the Russian Federation,

Ms Sofia Sarenkova, Senior Associate, Ivanyan & Partners,

Ms Elena Semykina, paralegal, Ivanyan & Partners,

Ms Svetlana Shatalova, First Secretary, Legal Department, Ministry of Foreign Affairs of the Russian Federation,

Ms Angelina Shchukina, Junior Associate, Ivanyan & Partners,

Ms Kseniia Soloveva, Associate, Ivanyan & Partners,

Ms Maria Zabolotskaya, Head of Division, Legal Department, Ministry of Foreign Affairs of the Russian Federation,

Ms Olga Zinchenko, Attaché, Department for Humanitarian Co-operation and Human Rights, Ministry of Foreign Affairs of the Russian Federation,

as Advisers,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

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

2. In its Application, Ukraine seeks to found the Court's jurisdiction on Article 24, paragraph 1, of the ICSFT and on Article 22 of CERD, on the basis of Article 36, paragraph 1, of the Statute of the Court.

3. On 16 January 2017, Ukraine also submitted a Request for the indication of provisional measures, referring to Article 41 of the Statute and to Articles 73, 74 and 75 of the Rules of Court.

4. The Registrar immediately communicated the Application and the Request for the indication of provisional measures to the Government of the Russian Federation, in accordance with Article 40, paragraph 2, of the Statute and Article 73, paragraph 2, of the Rules of Court, respectively. He also notified the Secretary-General of the United Nations of the filing of the Application and the Request for the indication of provisional measures by Ukraine.

5. In addition, by a letter dated 17 January 2017, the Registrar informed all Member States of the United Nations of the filing of the above-mentioned Application and Request for the indication of provisional measures.

6. Pursuant to Article 40, paragraph 3, of the Statute, the Registrar notified the Member States of the United Nations, through the Secretary-General, of the filing of the Application, by transmission of the printed bilingual text of that document.

7. By letters dated 20 January 2017, the Registrar informed both Parties that, referring to Article 24, paragraph 1, of the Statute, the Member of the Court of Russian nationality informed the President of the Court that he considered that he should not take part in the decision of the case. Pursuant to Article 31 of the Statute and Article 37, paragraph 1, of the Rules of Court, the Russian Federation chose Mr. Leonid Skotnikov to sit as judge *ad hoc* in the case.

8. Since the Court included upon the Bench no judge of Ukrainian nationality, Ukraine proceeded to exercise the right conferred upon it by Article 31 of the Statute to choose a judge *ad hoc* to sit in the case; it chose Mr. Fausto Pocar.

9. By an Order of 19 April 2017, the Court, having heard the Parties, indicated the following provisional measures:

> "(1) With regard to the situation in Crimea, the Russian Federation must, in accordance with its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination,
>
> *(a)* Refrain from maintaining or imposing limitations on the ability of the Crimean Tatar community to conserve its representative institutions, including the *Mejlis*;
>
> *(b)* Ensure the availability of education in the Ukrainian language;
>
> (2) Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve." (*I.C.J. Reports 2017*, pp. 140-141, para. 106.)

10. In a letter dated 19 April 2018, Ukraine drew the Court's attention to the Russian Federation's alleged non-compliance with point (1) *(a)* of operative paragraph 106 of the Court's Order on the indication of provisional measures. Ukraine stated that this lack of compliance stems from the Russian Federation's interpretation of the provision in question, which is contrary to its proper meaning. Consequently, in light of the "different and conflicting interpretations" ascribed to point (1) *(a)* by the Parties, Ukraine requested that the Court "exercise its authority to interpret its Order of 19 April 2017".

11. Following this communication, on 17 May 2018 the Court requested the Russian Federation to provide, by 7 June 2018 at the latest, information on measures that had been taken by it to implement point (1) *(a)* of operative paragraph 106 of the Court's Order

of 19 April 2017, and Ukraine to furnish, by the same date, any information it might have in that regard. This information was duly provided on 7 June 2018. Each Party having been given until 21 June 2018 to provide comments on the information submitted by the other, the Court received comments from Ukraine on 12 June 2018 and from the Russian Federation on 21 June 2018. On 18 July 2018, having considered the information and comments submitted to it by the Parties, the Court again requested the Russian Federation to provide, by 18 January 2019, information regarding measures taken by it to implement point (1) *(a)* of operative paragraph 106 of the Court's Order of 19 April 2017, and Ukraine to furnish, by the same date, any information it might have in that regard. This information having been transmitted to the Court, each Party was invited to communicate its comments on the information received from the other, by 19 March 2019 at the latest. Both Parties provided their comments on that date. By letters dated 29 March 2019, the Parties were informed that the Court had considered and taken due note of the various communications submitted by them. It was further indicated in this respect that the issues raised in these communications may need to be addressed by the Court at a later juncture, should the case proceed to the merits. Under such circumstances, the Parties would be at liberty to raise any issues of concern to them relating to the provisional measures indicated by the Court.

12. Pursuant to Article 43, paragraph 1, of the Rules of Court, the Registrar addressed to States parties to the ICSFT and to States parties to CERD the notifications provided for in Article 63, paragraph 1, of the Statute. In addition, with regard to both of these instruments, in accordance with Article 69, paragraph 3, of the Rules of Court, the Registrar addressed to the United Nations, through its Secretary-General, the notifications provided for in Article 34, paragraph 3, of the Statute.

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

14. On 12 September 2018, within the time-limit prescribed by Article 79, paragraph 1, of the Rules of Court of 14 April 1978 as amended on 1 February 2001, the Russian Federation raised preliminary objections to the jurisdiction of the Court and the admissibility of the Application. Consequently, by an Order of 17 September 2018, having noted that, by virtue of Article 79, paragraph 5, of the Rules of Court of 14 April 1978 as amended on 1 February 2001, the proceedings on the merits were suspended, the President of the Court fixed 14 January 2019 as the time-limit within which Ukraine could present a written statement of its observations and submissions on the preliminary objections raised by the Russian Federation. Ukraine filed such a statement within the time-limit so prescribed and the case thus became ready for hearing in respect of the preliminary objections.

15. Referring to Article 53, paragraph 1, of the Rules of Court, the Government of the State of Qatar asked to be furnished with copies of the Memorial of Ukraine and the preliminary objections of the Russian Federation filed in the case, as well as any documents annexed thereto. Having ascertained the views of the Parties in accordance with the same provision, the Court decided, taking into account the objection raised by one Party, that it would not be appropriate to grant that request. The Registrar duly communicated that decision to the Government of the State of Qatar and to the Parties.

16. Pursuant to Article 53, paragraph 2, of its Rules, after ascertaining the views of the Parties, the Court decided that copies of the written pleadings and documents annexed thereto, with the exception of the annexes to the Memorial, would be made accessible to the public on the opening of the oral proceedings.

17. Public hearings on the preliminary objections raised by the Russian Federation were held from 3 to 7 June 2019, during which the Court heard the oral arguments and replies of:

For the Russian Federation:	H.E. Mr. Dmitry Lobach, Mr. Samuel Wordsworth, Mr. Andreas Zimmermann, Mr. Grigory Lukiyantsev, Mr. Alain Pellet, Mr. Mathias Forteau.
For Ukraine:	H.E. Ms Olena Zerkal, Mr. Jean-Marc Thouvenin, Ms Marney L. Cheek, Mr. David M. Zionts, Mr. Harold Hongju Koh, Mr. Jonathan Gimblett.

*

18. In the Application, the following claims were made by Ukraine:

With regard to the ICSFT:

"134. Ukraine respectfully requests the Court to adjudge and declare that the Russian Federation, through its State organs, State agents, and other persons and entities exercising governmental authority, and through other agents acting on its instructions or under its direction and control, has violated its obligations under the Terrorism Financing Convention by:

(a) supplying funds, including in-kind contributions of weapons and training, to illegal armed groups that engage in acts of terrorism in Ukraine, including the DPR, the LPR, the Kharkiv Partisans, and associated groups and individuals, in violation of Article 18;

(b) failing to take appropriate measures to detect, freeze, and seize funds used to assist illegal armed groups that engage in acts of terrorism in Ukraine, including the DPR, the LPR, the Kharkiv Partisans, and associated groups and individuals, in violation of Articles 8 and 18;

(c) failing to investigate, prosecute, or extradite perpetrators of the financing of terrorism found within its territory, in violation of Articles 9, 10, 11, and 18;

(d) failing to provide Ukraine with the greatest measure of assistance in connection with criminal investigations of the financing of terrorism, in violation of Articles 12 and 18; and

(e) failing to take all practicable measures to prevent and counter acts of financing of terrorism committed by Russian public and private actors, in violation of Article 18.

135. Ukraine respectfully requests the Court to adjudge and declare that the Russian Federation bears international responsibility, by virtue of its sponsorship of terrorism and failure to prevent the financing of terrorism under the Convention, for the acts of terrorism committed by its proxies in Ukraine, including:

(a) the shoot-down of Malaysia Airlines Flight MH17;

(b) the shelling of civilians, including in Volnovakha, Mariupol, and Kramatorsk; and

(c) the bombing of civilians, including in Kharkiv.

136. Ukraine respectfully requests the Court to order the Russian Federation to comply with its obligations under the Terrorism Financing Convention, including that the Russian Federation:

(a) immediately and unconditionally cease and desist from all support, including the provision of money, weapons, and training, to illegal armed groups that engage in acts of terrorism in Ukraine, including the DPR, the LPR, the Kharkiv Partisans, and associated groups and individuals;

(b) immediately make all efforts to ensure that all weaponry provided to such armed groups is withdrawn from Ukraine;

(c) immediately exercise appropriate control over its border to prevent further acts of financing of terrorism, including the supply of weapons, from the territory of the Russian Federation to the territory of Ukraine;

(d) immediately stop the movement of money, weapons, and all other assets from the territory of the Russian Federation and occupied Crimea to illegal armed groups that engage in acts of terrorism in Ukraine, including the DPR, the LPR, the Kharkiv Partisans, and associated groups and individuals, including by freezing all bank accounts used to support such groups;

(e) immediately prevent all Russian officials from financing terrorism in Ukraine, including Sergei Shoigu, Minister of Defence of the Russian Federation; Vladimir Zhirinovsky, Vice-Chairman of the State Duma; Sergei Mironov, member of the State Duma; and Gennadiy Zyuganov, member of the State Duma, and initiate prosecution against these and other actors responsible for financing terrorism;

(f) immediately provide full co-operation to Ukraine in all pending and future requests for assistance in the investigation and interdiction of the financing of terrorism relating to illegal armed groups that engage in acts of terrorism in Ukraine, including the DPR, the LPR, the Kharkiv Partisans, and associated groups and individuals;

(g) make full reparation for the shoot-down of Malaysia Airlines Flight MH17;

(h) make full reparation for the shelling of civilians in Volnovakha;

(i) make full reparation for the shelling of civilians in Mariupol;

(j) make full reparation for the shelling of civilians in Kramatorsk;

(k) make full reparation for the bombing of civilians in Kharkiv; and

(l) make full reparation for all other acts of terrorism the Russian Federation has caused, facilitated, or supported through its financing of terrorism, and failure to prevent and investigate the financing of terrorism."

With regard to CERD:

"137. Ukraine respectfully requests the Court to adjudge and declare that the Russian Federation, through its State organs, State agents, and other persons and entities exercising governmental authority, including the *de facto* authorities administering the illegal Russian occupation of Crimea, and through other agents acting on its instructions or under its direction and control, has violated its obligations under the CERD by:

(a) systematically discriminating against and mistreating the Crimean Tatar and ethnic Ukrainian communities in Crimea, in furtherance of a State policy of cultural erasure of disfavoured groups perceived to be opponents of the occupation régime;

(b) holding an illegal referendum in an atmosphere of violence and intimidation against non-Russian ethnic groups, without any effort to seek a consensual and inclusive solution protecting those groups, and as an initial step toward depriving these communities of the protection of Ukrainian law and subjecting them to a régime of Russian dominance;

(c) suppressing the political and cultural expression of Crimean Tatar identity, including through the persecution of Crimean Tatar leaders and the ban on the *Mejlis* of the Crimean Tatar People;

(d) preventing Crimean Tatars from gathering to celebrate and commemorate important cultural events;

(e) perpetrating and tolerating a campaign of disappearances and murders of Crimean Tatars;

(f) harassing the Crimean Tatar community with an arbitrary régime of searches and detention;

(g) silencing Crimean Tatar media;

(h) suppressing Crimean Tatar language education and the community's educational institutions;

(i) suppressing Ukrainian language education relied on by ethnic Ukrainians;

(j) preventing ethnic Ukrainians from gathering to celebrate and commemorate important cultural events; and

(k) silencing ethnic Ukrainian media.

138. Ukraine respectfully requests the Court to order the Russian Federation to comply with its obligations under the CERD, including:

(a) immediately cease and desist from the policy of cultural erasure and take all necessary and appropriate measures to guarantee the full and equal protection of the law to all groups in Russian-occupied Crimea, including Crimean Tatars and ethnic Ukrainians;

(b) immediately restore the rights of the *Mejlis* of the Crimean Tatar People and of Crimean Tatar leaders in Russian-occupied Crimea;

(c) immediately restore the rights of the Crimean Tatar People in Russian-occupied Crimea to engage in cultural gatherings, including the annual commemoration of the *Sürgün*;

(d) immediately take all necessary and appropriate measures to end the disappearance and murder of Crimean Tatars in Russian-occupied Crimea, and to fully and adequately investigate the disappearances of Reshat Ametov, Timur Shaimardanov, Ervin Ibragimov, and all other victims;

(e) immediately take all necessary and appropriate measures to end unjustified and disproportionate searches and detentions of Crimean Tatars in Russian-occupied Crimea;

(f) immediately restore licenses and take all other necessary and appropriate measures to permit Crimean Tatar media outlets to resume operations in Russian-occupied Crimea;

(g) immediately cease interference with Crimean Tatar education and take all necessary and appropriate measures to restore education in the Crimean Tatar language in Russian-occupied Crimea;

(h) immediately cease interference with ethnic Ukrainian education and take all necessary and appropriate measures to restore education in the Ukrainian language in Russian-occupied Crimea;

(i) immediately restore the rights of ethnic Ukrainians to engage in cultural gatherings in Russian-occupied Crimea;

(j) immediately take all necessary and appropriate measures to permit the free operation of ethnic Ukrainian media in Russian-occupied Crimea; and

(k) make full reparation for all victims of the Russian Federation's policy and pattern of cultural erasure through discrimination in Russian-occupied Crimea."

19. In the written proceedings on the merits, the following submissions were presented on behalf of the Government of Ukraine in its Memorial:

"653. For the reasons set out in this Memorial, Ukraine respectfully requests the Court to adjudge and declare that:

ICSFT

(a) The Russian Federation is responsible for violations of Article 18 of the ICSFT by failing to cooperate in the prevention of the terrorism financing offenses set forth in Article 2 by taking all practicable measures to prevent and counter preparations in its territory for the commission of those offenses within or outside its territory. Specifically, the Russian Federation has violated Article 18 by failing to take the practicable measures of: (i) preventing Russian state officials and agents from financing terrorism in Ukraine; (ii) discouraging public and private actors and other non-governmental third parties from financing terrorism in Ukraine; (iii) policing its border with Ukraine to stop the financing of terrorism; and (iv) monitoring and suspending banking activity and other fundraising activities undertaken by private and public actors on its territory to finance of terrorism in Ukraine.

(b) The Russian Federation is responsible for violations of Article 8 of the ICSFT by failing to identify and detect funds used or allocated for the purposes of financing terrorism in Ukraine, and by failing to freeze or seize funds used or allocated for the purpose of financing terrorism in Ukraine.

(c) The Russian Federation has violated Articles 9 and 10 of the ICSFT by failing to investigate the facts concerning persons who have committed or are alleged to have committed terrorism financing in Ukraine, and to extradite or prosecute alleged offenders.

(d) The Russian Federation has violated Article 12 of the ICSFT by failing to provide Ukraine the greatest measure of assistance in connection with criminal investigations in respect of terrorism financing offenses.

(e) As a consequence of the Russian Federation's violations of the ICSFT, its proxies in Ukraine have been provided with funds that enabled them to commit numerous acts of terrorism, including the downing of Flight MH17, the shelling of Volnovakha, Mariupol, Kramatorsk, and Avdiivka, the bombings of the Kharkiv unity march and Stena Rock Club, the attempted assassination of a Ukrainian member of Parliament, and others.

CERD

(f) The Russian Federation has violated CERD Article 2 by engaging in numerous and pervasive acts of racial discrimination against the Crimean Tatar and Ukrainian communities in Crimea and by engaging in a policy and practice of racial discrimination against those communities.

(g) The Russian Federation has further violated CERD Article 2 by sponsoring, defending or supporting racial discrimination by other persons or organizations against the Crimean Tatar and Ukrainian communities in Crimea.

(h) The Russian Federation has violated CERD Article 4 by promoting and inciting racial discrimination against the Crimean Tatar and Ukrainian communities in Crimea.

(i) The Russian Federation has violated CERD Article 5 by failing to guarantee the right of members of the Crimean Tatar and Ukrainian communities to equality before the law, notably in their enjoyment of (i) the right to equal treatment before the tribunals and all other organs administering justice; (ii) the right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution; (iii) political rights; (iv) other civil rights; and (v) economic, social and cultural rights.

(j) The Russian Federation has violated CERD Article 6 by failing to assure the Crimean Tatar and Ukrainian communities in Crimea effective protection and remedies against acts of racial discrimination.

(k) The Russian Federation has violated CERD Article 7 by failing to adopt immediate and effective measures in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination against the Crimean Tatar and Ukrainian communities in Crimea.

654. The aforementioned acts constitute violations of the ICSFT and CERD, and are therefore internationally wrongful acts for which the Russian Federation bears international responsibility. The Russian Federation is therefore required to:

ICSFT

(a) Cease immediately each of the above violations of ICSFT Articles 8, 9, 10, 12, and 18 and provide Ukraine with appropriate guarantees and public assurances that it will refrain from such actions in the future.

(b) Take all practicable measures to prevent the commission of terrorism financing offences, including (i) ensuring that Russian state officials or any other person under its jurisdiction do not provide weapons or other funds to groups engaged in terrorism in Ukraine, including without limitation the DPR, LPR, Kharkiv Partisans, and other illegal armed groups; (ii) cease encouraging public and private actors and other non-governmental third parties to finance terrorism in Ukraine; (iii) police Russia's border with Ukraine to stop any supply of weapons into Ukraine; and (iv) monitor and prohibit private and public transactions originating in Russian territory, or initiated by Russian nationals, that finance terrorism in Ukraine, including by enforcing banking restrictions to block transactions for the benefit of groups engaged in terrorism in Ukraine, including without limitation the DPR, LPR, the Kharkiv Partisans, and other illegal armed groups.

(c) Freeze or seize assets of persons suspected of supplying funds to groups engaged in terrorism in Ukraine, including without limitation illegal armed groups associated with the DPR, LPR, and Kharkiv Partisans, and cause the forfeiture of assets of persons found to have supplied funds to such groups.

(d) Provide the greatest measure of assistance to Ukraine in connection with criminal investigations of suspected financers of terrorism.

(e) Pay Ukraine financial compensation, in its own right and as *parens patriae* for its citizens, for the harm Ukraine has suffered as a result of Russia's violations of the ICSFT, including the harm suffered by its nationals injured by acts of terrorism that occurred as a consequence of the Russian Federation's ICSFT violations, with such compensation to be quantified in a separate phase of these proceedings.

(f) Pay moral damages to Ukraine in an amount deemed appropriate by the Court, reflecting the seriousness of the Russian Federation's violations of the ICSFT, the quantum of which is to be determined in a separate phase of these proceedings.

CERD

(g) Immediately comply with the provisional measures ordered by the Court on 19 April 2017, in particular by lifting its ban on the activities of the Mejlis of the Crimean Tatar People and by ensuring the availability of education in the Ukrainian language.

(h) Cease immediately each of the above violations of CERD Articles 2, 4, 5, 6, and 7, and provide Ukraine with appropriate guarantees and public assurances that it will refrain from such actions in the future.

(i) Guarantee the right of members of the Crimean Tatar and Ukrainian communities to equality before the law, notably in the enjoyment of the human rights and fundamental freedoms protected by the Convention.

(j) Assure to all residents of Crimea within its jurisdiction effective protection and remedies against acts of racial discrimination.

(k) Adopt immediate and effective measures in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination against the Crimean Tatar and Ukrainian communities in Crimea.

(l) Pay Ukraine financial compensation, in its own right and as *parens patriae* for its citizens, for the harm Ukraine has suffered as a result of Russia's violations of the CERD, including the harm suffered by victims as a result of the Russian Federation's violations of CERD Articles 2, 4, 5, 6 and 7, with such compensation to be quantified in a separate phase of these proceedings."

20. In the Preliminary Objections, the following submissions were presented on behalf of the Government of the Russian Federation:

"In view of the foregoing, the Russian Federation requests the Court to adjudge and declare that it lacks jurisdiction over the claims brought against the Russian Federation by Ukraine by its Application of 16 January 2017 and/or that Ukraine's claims are inadmissible."

21. In the Written Statement of its Observations and Submissions on the Preliminary Objections, the following submissions were presented on behalf of the Government of Ukraine:

"For the reasons set out in this Written Statement, Ukraine respectfully requests that the Court:

(a) Dismiss the Preliminary Objections submitted by the Russian Federation in its submission dated 12 September 2018;

(b) Adjudge and declare that it has jurisdiction to hear the claims in the Application submitted by Ukraine, dated 16 January 2017 and that such claims are admissible; and

(c) Proceed to hear those claims on the merits."

22. At the oral proceedings on the preliminary objections, the following submissions were presented by the Parties:

On behalf of the Government of the Russian Federation,

at the hearing of 6 June 2019:

"Having regard to the arguments set out in the Preliminary Objections of the Russian Federation and during the oral proceedings, the Russian Federation requests the Court to adjudge and declare that it lacks jurisdiction over the claims brought against the Russian Federation by Ukraine by its Application of 16 January 2017 and/or that Ukraine's claims are inadmissible."

On behalf of the Government of Ukraine,

at the hearing of 7 June 2019:

"Ukraine respectfully requests that the Court:

(a) Dismiss the Preliminary Objections submitted by the Russian Federation in its submission dated 12 September 2018;

(b) Adjudge and declare that it has jurisdiction to hear the claims in the Application submitted by Ukraine, dated 16 January 2017, that such claims are admissible, and proceed to hear those claims on the merits; or

(c) In the alternative, to adjudge and declare, in accordance with the provisions of Article 79, paragraph 9, of the Rules of Court that the objections submitted by the Russian Federation do not have an exclusively preliminary character."

*

* *

I. INTRODUCTION

A. Subject-matter of the dispute

23. The present proceedings were instituted by Ukraine following the events which occurred in eastern Ukraine and in Crimea from the spring of 2014, on which the Parties have different views. However, the case before the Court is limited in scope. With regard to the events in eastern Ukraine, the Applicant has brought proceedings only under the ICSFT. With regard to the situation in Crimea, Ukraine's claims are based solely upon CERD.

24. Article 40, paragraph 1, of the Statute and Article 38, paragraph 1, of the Rules of Court require an applicant to indicate the "subject of the dispute" in its application. Furthermore, the Rules require that the application "specify the precise nature of the claim, together with a succinct statement of the facts and grounds on which the claim is based" (Article 38, paragraph 2, of the Rules) and that the memorial include a statement of the "relevant facts" (Article 49, paragraph 1, of the Rules). However, it is for the Court itself to determine on an objective basis the subject-matter of the dispute between the parties, by isolating the real issue in the case and identifying the object of the claim. In doing so, the Court examines the application as well as the written and oral pleadings of the parties, while giving particular attention to the formulation of the dispute chosen by the applicant. It takes account of the facts that the applicant presents as the basis for its claim. The matter is one of substance, not of form (*Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018 (I),* pp. 308-309, para. 48).

25. The Court observes that the Parties have expressed divergent views as to the subject-matter of the dispute brought by Ukraine before it.

* *

26. According to the Applicant, its claims under the ICSFT concern the alleged violations by the Russian Federation of its obligations to take measures and to co-operate under Articles 8, 9, 10, 12 and 18 of the ICSFT in the prevention and suppression of terrorism financing offences, as defined in Article 2 of the Convention. In this regard, Ukraine contends that the Russian Federation has failed to take all practicable measures to prevent and counter preparations in its territory for the commission of terrorism financing offences in the context of the events which occurred in eastern Ukraine starting from the spring of 2014 and to repress them. In its Application, Ukraine also claimed that the Respondent supplied funds to groups that engage in acts of terrorism, but has not put forward the same claim either in its Memorial or in the proceedings on preliminary objections. The Applicant indeed stated that "[its] claim is not that Russia has violated Article 2 of the ICSFT", but rather "that Russia has violated ICSFT Article 18 and other related cooperation obligations".

The Applicant submits that its claims on the basis of CERD concern alleged violations by the Russian Federation of its obligations under Articles 2, 4, 5, 6 and 7 of CERD. In this regard, Ukraine maintains that the Russian Federation engaged in a campaign directed at depriving the Crimean Tatars and ethnic Ukrainians in Crimea of their political, civil, economic, social and cultural rights and pursued a policy and practice of racial discrimination against those communities.

27. For its part, the Russian Federation considers that the dispute submitted by Ukraine to the Court in fact concerns matters which are unconnected to the two conventions relied on by the Applicant. It asserts that the Parties' rights and obligations under the ICSFT cannot be invoked by Ukraine, since the acts referred to by the Applicant do not constitute offences within the meaning of Article 2 of the Convention. The Russian Federation further asserts that the facts relied on and evidence submitted by the Applicant do not substantiate its claim that funds were provided or collected by various actors in the Russian Federation with the intention or knowledge that they were to be used to carry out acts of terrorism in eastern Ukraine. The Respondent also contends that the dispute does not concern its obligations under CERD and contests allegations that it is subjecting Crimean Tatar and Ukrainian communities in Crimea to a systematic campaign of racial discrimination. The Russian Federation argues that, under cover of allegations relating to violations of the ICSFT and CERD, Ukraine is seeking to bring before the Court disputes concerning alleged violations of "different rules of international law". In particular, the Respondent contends that Ukraine is seeking to seise the Court of disputes over the Russian Federation's alleged "overt aggression" in eastern Ukraine and over the status of Crimea.

* *

28. As the Court has observed, applications that are submitted to it often present a particular dispute that arises in the context of a broader disagreement between the parties (*Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment of 13 February 2019*, para. 36; *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015 (II)*, p. 604, para. 32). The fact that a dispute before the Court forms part of a complex situation that includes various matters, however important, over which the States concerned hold opposite views, cannot lead the Court to decline to resolve that dispute, provided that the parties have recognized its jurisdiction to do so and the conditions for the exercise of its jurisdiction are otherwise met.

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

30. The Court observes that Ukraine requests the Court to adjudge and declare that the Russian Federation has violated a number of provisions of the ICSFT and CERD, that it bears international responsibility for those violations, and that it is required to cease such violations and make reparation for the consequences thereof.

31. The Court considers that it follows from the opposing views expressed by the Parties in the present case that the dispute consists of two aspects. First, the Parties differ as to whether any rights and obligations of the Parties under the ICSFT with regard to the prevention and suppression of the financing of terrorism were engaged in the context of events which occurred in eastern Ukraine starting in the spring of 2014, and whether terrorism financing offences, within the meaning of Article 2, paragraph 1, of the ICSFT, were committed. As a result of these differences of views, the Parties draw opposite conclusions as to the alleged breaches by the Russian Federation of its obligations under Articles 8, 9, 10, 12 and 18 of the ICSFT and as to its ensuing international responsibility. Secondly, the Parties disagree as to whether the decisions or measures allegedly taken by the Russian Federation against the Crimean Tatar and Ukrainian communities in Crimea constitute acts of racial discrimination and whether the Russian Federation bears responsibility in that regard for the violation of its obligations under Articles 2, 4, 5, 6 and 7 of CERD.

32. In view of the foregoing, the Court concludes that the subject-matter of the dispute, in so far as its first aspect is concerned, is whether the Russian Federation had the obligation, under the ICSFT, to take measures and to co-operate in the prevention and suppression of the alleged financing of terrorism in the context of events in eastern Ukraine and, if so, whether the Russian Federation breached such an obligation. The subject-matter of the dispute, in so far as its second aspect is concerned, is whether the Russian Federation breached its obligations under CERD through discriminatory measures allegedly taken against the Crimean Tatar and Ukrainian communities in Crimea.

B. Bases of jurisdiction invoked by Ukraine

33. The Court recalls that its jurisdiction is based on the consent of the parties and is confined to the extent accepted by them (*Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018 (I),* p. 307, para. 42).

34. To establish the Court's jurisdiction in the present case, Ukraine invokes Article 24, paragraph 1, of the ICSFT and Article 22 of CERD (see paragraph 2 above). The first of these provisions reads as follows:

> "Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation within a reasonable time shall, at the request of one of them, be submitted to arbitration. If, within six months from the date of the request for arbitration, the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice, by application, in conformity with the Statute of the Court."

Article 22 of CERD provides that:

> "Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement."

35. Ukraine and the Russian Federation are parties to the ICSFT, which entered into force for them on 5 January 2003 and 27 December 2002 respectively. Neither of them entered any reservations to the ICSFT.

Ukraine and the Russian Federation are also parties to CERD. The Convention entered into force for Ukraine on 6 April 1969. The instrument of ratification, deposited by Ukraine, on 7 March 1969, contained a reservation to Article 22 of the Convention; on 20 April 1989, the depositary received notification that this reservation had been withdrawn. The Russian Federation is a party to the Convention as the State continuing the international legal personality of the Union of Soviet Socialist Republics, for which CERD entered into force on 6 March 1969. The instrument of ratification, deposited by the Union of Soviet Socialist Republics on 4 February 1969, contained a reservation to Article 22 of the Convention; on 8 March 1989, the depositary received notification that this reservation had been withdrawn.

36. The Russian Federation contests the Court's jurisdiction to entertain the dispute on the basis of each of the two instruments invoked by Ukraine. In this regard, it argues that the dispute is not one which the Court has jurisdiction *ratione materiae* to entertain, either under Article 24, paragraph 1, of the ICSFT or under Article 22 of CERD, and that the procedural preconditions set out in these provisions were not met by Ukraine before it seised the Court. The Respondent further contends that Ukraine's claims under CERD are inadmissible, since, in its view, available local remedies had not been exhausted before Ukraine filed its Application with the Court.

37. The Court will address the preliminary objection raised by the Russian Federation to its jurisdiction on the basis of the ICSFT in Part II of the Judgment. It will then address, in Part III, the preliminary objections to its jurisdiction on the basis of CERD and to the admissibility of the Application in so far as it concerns the claims made by Ukraine under CERD.

II. THE INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF THE FINANCING OF TERRORISM

38. The Court will now consider whether it has jurisdiction *ratione materiae* under Article 24, paragraph 1, of the ICSFT and whether the procedural preconditions set forth in that provision have been met.

A. Jurisdiction *ratione materiae* under the ICSFT

39. The Court recalls that its jurisdiction *ratione materiae* over the dispute under Article 24, paragraph 1, of the ICSFT covers "[a]ny dispute between two or more States Parties concerning the interpretation or application of this Convention".

* *

40. The Russian Federation contests the Court's jurisdiction *ratione materiae* with regard to all aspects of the dispute submitted by Ukraine to the Court under the ICSFT. In the Russian Federation's opinion, the fact that the Parties entertain different views on the interpretation of a treaty containing a compromissory clause is not sufficient to establish the Court's jurisdiction *ratione materiae*. According to the Respondent, the Court must interpret the key provisions of the relevant treaty and "[s]atisfy itself that the facts pleaded and the evidence relied on by the applicant State plausibly support the asserted characterisation of its claims" as claims under that treaty. The Russian Federation does not request from the Court a complete analysis of the facts at the stage of a decision on preliminary objections, but contends that some consideration must be given to the facts.

41. The Russian Federation recalls that, in its Order of 19 April 2017 on the Request for the indication of provisional measures in the present case, the Court affirmed that Ukraine's claimed rights under the ICSFT were not plausible (*I.C.J. Reports 2017*, pp. 131-132, para. 75). In considering the plausibility of Ukraine's case at the present stage, the Russian Federation maintains that the Court must rely on its earlier assessment. According to the Respondent, Ukraine has not put forward any new evidence related to elements of intention, knowledge and purpose concerning the funding of acts of terrorism which would allow the Court to depart from the findings made at the stage of its decision on provisional measures.

42. More specifically, the Respondent maintains that no material evidence has been presented by Ukraine demonstrating that the Russian Federation provided weaponry to any entity "with the requisite specific intent or knowledge" under Article 2, paragraph 1, of the ICSFT that such weaponry would be used to shoot down flight MH17. With regard to four specific incidents of alleged indiscriminate shelling, the Russian Federation submits that no new evidence has been presented by Ukraine since the stage of provisional measures. In the Respondent's view, Ukraine fails to present any credible evidence that the perpetrators of the shelling acted with "the requisite specific intent to kill or seriously harm civilians" and that the locations were shelled "for the requisite specific purpose of intimidating the population or to compel a government to do or to abstain from doing any act". Moreover, even if a plausible case of terrorism could be demonstrated with regard to those incidents, the Russian Federation argues that Ukraine would also be implicated in the commission of indiscriminate shelling during the same conflict. Concerning the further allegation of bombing that took place in Kharkiv, the Respondent maintains that no reliable evidence was submitted to show that the incident was perpetrated with the Russian Federation's support. The Russian Federation also maintains that, in diplomatic correspondence, it confirmed its interest in receiving from Ukraine "the concrete materials containing evidential data" relating to that incident, which Ukraine failed to provide. Furthermore, with regard to other alleged acts of extrajudicial killing, torture and ill-treatment of civilians, the Respondent contends that the evidence does not demonstrate that they were "plausible 'terrorist' acts within the meaning of Article 2 (1) *(b)* of the ICSFT". According to the Russian Federation, such acts have in any case been committed by all parties to the armed conflict.

43. The Russian Federation is of the view that the ICSFT is a "law enforcement instrument" which does not cover issues of State responsibility for financing acts of terrorism. It bases its interpretation on a textual analysis of the Convention, as well as on considerations pertaining to the structure of the ICSFT, the preparatory work related to the drafting of specific articles, provisions of other conventions concerned with terrorism and subsequent State practice. The Russian Federation asserts that multiple attempts were made by delegations during the drafting of the ICSFT to bring public officials and State financing within the scope of the Convention, but all attempts failed.

44. The Russian Federation maintains that the Court must at this stage fully interpret the relevant provisions of the ICSFT, especially Article 2, paragraph 1. The Russian Federation submits that the term "any person" in Article 2, paragraph 1, has to be interpreted as meaning "private persons only" and does not cover State officials. It points out that Ukraine is asking the Court to find that the Russian Federation has not prevented its own officials from financing terrorism. In the Respondent's view, while State responsibility is excluded from the scope of the ICSFT, a finding that State officials are also covered would mean declaring that the Russian Federation is directly responsible for financing terrorism in accordance with Article 4 of the Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission.

45. The Russian Federation further argues that, in order to determine the scope of the ICSFT, the mental elements of the offence of terrorism financing must be defined. The terms "intention" and "knowledge" in Article 2, paragraph 1, of the ICSFT must therefore be interpreted. The Russian Federation maintains that these two terms are not synonymous. It is of the view that "intention" must be understood as "a specific intent requirement". Following the interpretation given by the Respondent, "knowledge" refers to actual knowledge that the funds will be used to commit acts of terrorism, and not merely that they may be used to do so. According to the Russian Federation, recklessness is insufficient to establish knowledge. The Russian Federation accepts that the requirement of knowledge can be satisfied by the financing of groups that are notorious terrorist organizations. However, the Respondent argues that it is not sufficient for Ukraine to so characterize any entity unilaterally, particularly in the absence of any indication to that effect by an international organization.

46. The Russian Federation notes that an act constitutes an offence within the meaning of Article 2, paragraph 1 *(a)*, of the ICSFT when it is "an offence within the scope of and as defined in one of the treaties listed in the annex" to the Convention. In this regard, the Respondent submits that in order to constitute an offence defined in Article 1, paragraph 1 *(b)*, of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done in Montreal on 23 September 1971 (hereinafter the "Montreal Convention"), relied on by Ukraine with regard to the downing of flight MH17, there must be an intent to destroy or cause damage to a civilian aircraft in service. The Russian Federation also provides an interpretation of Article 2, paragraph 1 *(b)*, of the ICSFT, under which acts of terrorism need to be performed with a specific intention and with the purpose of intimidating a population or compelling a government. According to the Respondent, intention under the same subparagraph refers to a "subjective aim, desire or plan" and "implicitly exclud[es] knowledge-based standards".

*

47. Ukraine contends that the Russian Federation's preliminary objections "improperly ask the Court to address the merits of the Parties' dispute". In the Applicant's view, the Court should not provide a definitive interpretation of Article 2 of the ICSFT at the present stage of the proceedings, nor should it determine the plausibility of the alleged facts before it, but must only decide whether the dispute is one that concerns the interpretation or application of the ICSFT. Ukraine considers that the Russian Federation's contention that the Court should examine the plausibility of the case is based "on a flawed analogy between preliminary objections and provisional measures". It argues that the Court, in determining whether it has jurisdiction, must provisionally assume that the facts alleged by Ukraine are true; it must therefore accept them *pro tempore*.

48. Despite its view that facts should not be assessed in terms of plausibility at the present stage of the proceedings, Ukraine contends that it has "more than plausibly" demonstrated that acts of terrorism within the meaning of the ICSFT have been committed by the Russian Federation's "proxies" on Ukrainian territory. The Applicant argues that its Memorial contains an "extraordinary level of evidence".

49. Ukraine maintains that a number of events documented by the evidence presented by it establish offences covered by Article 2, paragraph 1, of the ICSFT. It asserts that Russian officials supplied the missile launching system that was used to shoot down flight MH17. Ukraine argues that this launching system was "knowingly provided" to a terrorist organization, and that the requirement of knowledge under Article 2, paragraph 1, was amply met. Ukraine contends that the shooting down of the aircraft constituted a violation of the Montreal Convention and that the supply of the launching system was an offence under Article 2, paragraph 1 *(a)*, of the ICSFT. Moreover, Ukraine argues that its Memorial shows that bombing attacks by the Russian Federation's "proxies" constituted offences under the International Convention for the Suppression of Terrorist Bombings and that the alleged knowledge of financing the attacks, including through the supply of bombs, was covered by Article 2, paragraph 1 *(a)*, of the ICSFT.

50. With regard to other incidents, Ukraine argues that the evidence presented demonstrates that certain events of indiscriminate shelling such as those that occurred in Volnovakha and Mariupol constituted acts of terrorism under Article 2, paragraph 1 *(b)*, of the ICSFT because these acts were performed by the Russian Federation's "proxies" with the intent to kill civilians and for the purpose of intimidating a population or compelling a government. Concerning further allegations of acts of torture and killings, Ukraine submits that those acts were performed with the objective of terrorizing a civilian population.

51. Ukraine contends that the Russian Federation's arguments with regard to the interpretation of the different elements of Article 2 of the ICSFT belong to the merits, and that they do not have an impact on the Court's jurisdiction. The Applicant argues that, if the Court were now to proceed to such interpretation, it would "prematurely determine some elements of this dispute on the merits". Ukraine submits that such issues of interpretation are "inseparable from the factual questions" and in any event do not possess an exclusively preliminary character.

52. If however the Court were to find it necessary to give an interpretation of Article 2 of the ICSFT at the present stage of the proceedings, Ukraine argues that the Russian Federation's restrictive reading should be dismissed. The Applicant submits that Article 2, paragraph 1 *(a)* and *(b)*, of the ICSFT gives a broad and comprehensive definition of acts of terrorism. It also maintains that the notion of "'funds' under Article 1 of the ICSFT is a broad term covering all property, including weapons".

53. In Ukraine's view, the term "any person" in Article 2, paragraph 1, includes both private individuals and public or government officials. Relying on a textual interpretation of the treaty provisions, read in their context, Ukraine contends that Article 18 imposes on States an obligation to prevent terrorism financing offences and that, according to Article 2, such offences may be committed by "'any person', without qualification". It maintains that concluding otherwise would be "paradoxical" as the ICSFT would bind a State to prevent the financing of acts of terrorism, but would not prohibit financing by officials of the same State. Ukraine also argues that the Russian Federation's interpretation undermines the object and purpose of the ICSFT and that its

own interpretation is, on the contrary, supported by the preamble, the context and the preparatory work of the Convention. The Applicant argues that the Russian Federation is conflating the States' duty under Article 18 of the ICSFT to prevent terrorism financing with the notion of State responsibility for committing terrorism financing.

54. Ukraine is of the view that providing funds to groups with the knowledge that such groups carry out acts of terrorism is sufficient to fulfil the requirement of knowledge under Article 2, paragraph 1, of the ICSFT, and that certainty that the funds will be used to commit specific acts is not required. Ukraine contends that the groups in question do not need to be designated as terrorist by, for instance, the Security Council, a competent organization or a considerable number of States, for a financing entity to have knowledge of the terrorist groups' activities.

55. Ukraine also addresses the terrorism offences referred to in Article 2, paragraph 1, of the ICSFT. As to the offence defined in Article 1, paragraph 1 *(b)*, of the Montreal Convention, it holds that "the civilian or military status of the aircraft is a jurisdictional element of the offence, not subject to an intent requirement". The Applicant also maintains that the phrase "act intended to cause death or serious bodily injury" in Article 2, paragraph 1 *(b)*, of the ICSFT, does not refer to a specific mental element; it is "an objective statement, referring to the ordinary consequences of an act". It points out that this provision further refers to the purpose of an act of terrorism to intimidate a population or compel a government. Ukraine states that in many cases the specific agenda of the perpetrators of acts of terrorism will be unknown, but that in such cases the requisite purpose can be inferred, as the provision suggests, from the "nature or context" of the act.

* *

56. The Court will now determine whether the dispute between the Parties is one that concerns the interpretation or the application of the ICSFT and, therefore, whether it has jurisdiction *ratione materiae* under Article 24, paragraph 1, of this Convention.

57. As the Court stated in the case concerning *Oil Platforms (Islamic Republic of Iran* v. *United States of America)* (*Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, pp. 809-810, para. 16) and, more recently, in the case concerning *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America)* (*Preliminary Objections, Judgment of 13 February 2019*, para. 36), in order to determine the Court's jurisdiction *ratione materiae* under a compromissory clause concerning disputes relating to the interpretation or application of a treaty, it is necessary to ascertain whether the acts of which the applicant complains "fall within the provisions" of the treaty containing the clause. This may require the interpretation of the provisions that define the scope of the treaty. In the present case, the ICSFT has to be interpreted according to the rules contained in Articles 31 to 33 of the Vienna Convention on the Law of Treaties of 23 May 1969 (hereinafter the "Vienna Convention"), to which both Ukraine and the Russian Federation are parties as of 1986.

58. At the present stage of the proceedings, an examination by the Court of the alleged wrongful acts or of the plausibility of the claims is not generally warranted. The Court's task, as reflected in Article 79 of the Rules of Court of 14 April 1978 as amended on 1 February 2001, is to consider the questions of law and fact that are relevant to the objection to its jurisdiction.

59. The ICSFT imposes obligations on States parties with respect to offences committed by a person when "that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out" acts of terrorism as described in Article 2, paragraph 1 *(a)* and *(b)*. As stated in the preamble, the purpose of the Convention is to adopt "effective measures for the prevention of the financing of terrorism, as well as for its suppression through the prosecution and punishment of its perpetrators". The ICSFT addresses offences committed by individuals. In particular, Article 4 requires each State party to the Convention to establish the offences set forth in Article 2 as criminal offences under its domestic law and to make those offences punishable by appropriate penalties. The financing by a State of acts of terrorism is not addressed by the ICSFT. It lies outside the scope of the Convention. This is confirmed by the preparatory work of the Convention, which indicates that proposals to include financing by States of acts of terrorism were put forward but were not adopted (United Nations, docs. A/C.6/54/SR.32-35 and 37). As was recalled in the report of the Ad Hoc Committee established by the General Assembly which contributed to the drafting of the ICSFT, some delegations even proposed to exclude all matters of State responsibility from the scope of the Convention (United Nations, doc. A/54/37). However, it has never been contested that if a State commits a breach of its obligations under the ICSFT, its responsibility would be engaged.

60. The conclusion that the financing by a State of acts of terrorism lies outside the scope of the ICSFT does not mean that it is lawful under international law. The Court recalls that, in resolution 1373 (2001), the United Nations Security Council, acting under Chapter VII of the Charter, decided that all States shall "[r]efrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts".

61. When defining the perpetrators of offences of financing acts of terrorism, Article 2 of the ICSFT refers to "any person". According to its ordinary meaning, this term covers individuals comprehensively. The Convention contains no exclusion of any category of persons. It applies both to persons who are acting in a private capacity and to those who are State agents. As the Court noted (see paragraph 59 above), State financing of acts of terrorism is outside the scope of the ICSFT; therefore, the commission by a State official of an offence described in Article 2 does not in itself engage the responsibility of the State concerned under the Convention. However, all States parties to the ICSFT are under an obligation to take appropriate measures and to co-operate in the prevention and suppression of offences of financing acts of terrorism committed by whichever person. Should a State breach such an obligation, its responsibility under the Convention would arise.

62. As the title of the ICSFT indicates, the Convention specifically concerns the support given to acts of terrorism by financing them. Article 2, paragraph 1, refers to the provision or collection of "funds". This term is defined in Article 1, paragraph 1, as meaning:

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

This definition covers many kinds of financial instruments and includes also other assets. Since no specific objection to the Court's jurisdiction was made by the Russian Federation with regard to the scope of the term "funds" and in particular to the reference in Ukraine's submissions to the provision of weapons, this issue relating to the scope of the ICSFT need not be addressed at the present stage of the proceedings. However, the interpretation of the definition of "funds" could be relevant, as appropriate, at the stage of an examination of the merits.

63. An element of an offence under Article 2, paragraph 1, of the ICSFT is that the person concerned has provided funds "with the intention that they should be used or in the knowledge that they are to be used" to commit an act of terrorism. The existence of the requisite intention or knowledge raises complex issues of law and especially of fact that divide the Parties and are properly a matter for the merits. The same may be said of the question whether a specific act falls within the meaning of Article 2, paragraph 1 *(a)* or *(b)*. This question is largely of a factual nature and is properly a matter for the merits of the case. Within the framework of the ICSFT, questions concerning the existence of the requisite mental elements do not affect the scope of the Convention and therefore are not relevant to the Court's jurisdiction *ratione materiae*. Should the case proceed to the examination of the merits, those questions will be decided at that stage.

64. In light of the above, the Court concludes that the objection raised by the Russian Federation to its jurisdiction *ratione materiae* under the ICSFT cannot be upheld.

B. Procedural preconditions under Article 24 of the ICSFT

65. The Court needs now to examine whether the procedural preconditions set forth in Article 24, paragraph 1, of the ICSFT (see paragraph 34 above) have been fulfilled. In this context, the Court will consider whether the dispute between the Parties could not be settled through negotiation within a reasonable time and, if so, whether the Parties were unable to agree on the organization of an arbitration within six months from the date of the request for arbitration.

1. Whether the dispute between the Parties could not be settled through negotiation

66. The Russian Federation notes that, under Article 24, paragraph 1, of the ICSFT, the Parties must pursue negotiations over their dispute and that, in the event of failure, they shall try to agree on a settlement by way of arbitration. It argues that the Court may be seised only if genuine attempts to pursue these procedures have been made and both failed.

67. The Russian Federation is of the view that it is not sufficient for the Parties simply to enter into negotiations; these must be meaningful and pursued "as far as possible". The Respondent argues that "mere protests and disputations" are not sufficient to fulfil the precondition relating to negotiation. It maintains that Ukraine did not attempt to negotiate in good faith. The Russian Federation considers that Ukraine only engaged in negotiations "with a view to bring this dispute before this Court" and not with the objective of settling the matters in contention between the Parties. It states that during the negotiations Ukraine did not take into account the Russian Federation's interests. According to the Respondent, Ukraine also did not contemplate any modification to its position and refused to substantiate some of its allegations, notwithstanding requests to do so made by the Russian Federation. The Respondent points out that negotiations took place in Minsk at its suggestion and that it showed its willingness "to contemplate modifications of its own position". Furthermore, the Russian Federation contends that, in its Notes Verbales, the Applicant mainly did not address the ICSFT, but rather raised allegations of acts of aggression and of intervention in the internal affairs of Ukraine.

*

68. Ukraine points out that the Parties negotiated extensively for two years, even though the dispute ultimately could not be resolved by negotiations. It mentions that it sent more than twenty Notes Verbales to the Russian Federation and that the Parties met in four rounds of in-person negotiations. Ukraine maintains that it has genuinely attempted to negotiate with the Russian Federation and to discuss in good faith all the issues separating them under the ICSFT. Ukraine specifies that the negotiations did not concern acts of aggression and intervention. In the Applicant's opinion, there was no genuine attempt by the Russian Federation to settle the dispute as it did not meaningfully engage with the claims raised by Ukraine and refused to take account of the latter's positions. The Applicant is of the view that, when negotiations have been conducted "as far as possible with a view to settling the dispute" but have failed, become futile or reached a deadlock, the precondition of holding negotiations is fulfilled. Ukraine submits that Article 24, paragraph 1, of the ICSFT only requires negotiations to be conducted for a "reasonable time" and not to the point of futility. Ukraine contends that it would not have been reasonable to require further negotiations between the Parties for an extended period of time.

* *

69. The Court considers that Article 24, paragraph 1, of the ICSFT requires, as a first procedural precondition to the Court's jurisdiction, that a State makes a genuine attempt to settle through negotiation the dispute in question with the other State concerned. According to the same provision, the precondition of negotiation is met when the dispute "cannot be settled through negotiation within a reasonable time". As was observed in the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)*, "the subject-matter of the negotiations must relate to the subject-matter of the dispute which, in turn, must concern the substantive obligations contained in the treaty in question" (*Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 133, para. 161).

70. The Court recalls that, on 28 July 2014, Ukraine wrote a Note Verbale to the Russian Federation, stating that

> "under the provisions of the 1999 International Convention for the Suppression of the Financing of Terrorism, the Russian Party is under an obligation to take such measures, which may be necessary under its domestic law to investigate the facts contained in the information submitted by the Ukrainian Party, as well as to prosecute persons involved in financing of terrorism",

and proposing "to conduct negotiations on the issue of interpretation and application of the [ICSFT]". On 15 August 2014, the Russian Federation informed Ukraine of its "readiness to conduct negotiations on the issue of interpretation and application of the [ICSFT]". While exchanges of Notes and meetings between the Parties did not always focus on the interpretation or application of the ICSFT, negotiations over Ukraine's claims relating to this Convention were a substantial part. In particular, in a Note Verbale of 24 September 2014 Ukraine contended that

> "the Russian Side illegally, directly and indirectly, intentionally transfers military equipment, provides the funds for terrorists training on its territory, gives them material support and send[s] them to the territory of Ukraine for participation in the terrorist activities of the DPR and the LPR etc.".

On 24 November 2014, the Russian Federation contested that the acts alleged by Ukraine could constitute violations of the ICSFT, but accepted that the agenda for bilateral consultations include the "international legal basis for suppression of financing of terrorism as applicable to the Russian-Ukrainian relations". After that Note, several others followed; moreover, four meetings were held in Minsk, the last one on 17 March 2016. Little progress was made by the Parties during their negotiations. The Court therefore concludes that the dispute could not be settled through negotiation in what has to be regarded as a reasonable time and that the first precondition is accordingly met.

2. Whether the Parties were unable to agree on the organization of an arbitration

71. The Russian Federation contends that Ukraine has also not satisfied the precondition to submit the Parties' dispute to arbitration. It argues that Ukraine did not properly engage in negotiations with a view to organize an arbitration. It points out that Ukraine insisted that an *ad hoc* chamber of the Court should be constituted as the forum for arbitration, and in the Russian Federation's view, this suggestion was not apposite because referral of the dispute to a chamber of the Court cannot be regarded as a form of submission to arbitration.

72. The Russian Federation also points out that, according to Article 24, paragraph 1, of the ICSFT, a claim may be brought before the Court only if the Parties have been unable to agree on the organization of an arbitration within six months from the date of the request by one of them for arbitration. It considers that it is not sufficient "as a matter of fact" that the six-month period has elapsed without reaching any agreement on the organization of the arbitration. What is required, the Respondent maintains, is a "genuine attempt" to reach an agreement. In the Russian Federation's

view, Ukraine — by insisting on some core principles that would govern the arbitration and by not submitting any concrete suggestions for the text of an arbitration agreement while refusing the Russian Federation's proposals — did not genuinely attempt to organize the arbitration pursuant to Article 24 of the ICSFT.

73. The Russian Federation maintains that Article 24, paragraph 1, of the ICSFT requires the Parties to negotiate with a view to "agree on the organization of the arbitration" and that accordingly they must decide on the composition of the tribunal, the law applicable, as well as on administrative matters. The Respondent argues that the Parties were in agreement with regard to most issues concerning the organization of the arbitration. It asserts that negotiations with regard to the arbitration had not reached a deadlock. In the Russian Federation's view, the procedural precondition to submit the Parties' dispute to arbitration set forth in Article 24 of the ICSFT has not been fulfilled.

*

74. Ukraine points out that it submitted to the Russian Federation a Note Verbale dated 19 April 2016 which contained a direct request to have recourse to arbitration with a view to settling their dispute. Contrary to the Russian Federation's argument, Ukraine maintains that its later suggestion to constitute an *ad hoc* chamber of the Court was only an alternative option on which it did not insist.

75. Ukraine argues that the Parties were unable to agree on the organization of the arbitration within the six-month period referred to in Article 24, paragraph 1, of the ICSFT. It notes that the Russian Federation responded to its request for arbitration more than two months after receiving it and only offered to meet to discuss the organization of the arbitration a further month later. Ukraine maintains moreover that at the first meeting the Russian Federation did not address Ukraine's views on the organization of the arbitration. The Applicant asserts that, when negotiations with respect to the organization of the arbitration were discontinued, the Parties had only agreed to discuss the details of the arbitration further and to consider each other's positions, and had not reached any agreement on the actual organization of the arbitration. Ukraine submits that it genuinely attempted to reach an agreement on the organization of the arbitration within the requisite period.

* *

76. The Court recalls that, nearly two years after the start of negotiations between the Parties over the dispute, Ukraine sent on 19 April 2016 a Note Verbale in which it stated that those negotiations had "failed" and that, "pursuant to Article 24, paragraph 1 of the Financing Terrorism Convention, [it] request[ed] the Russian Federation to submit the dispute to arbitration under terms

to be agreed by mutual consent". Negotiations concerning the organization of the arbitration were subsequently held until a period of six months expired. During these negotiations, Ukraine also suggested to refer the dispute to a procedure other than arbitration, namely the submission of the dispute to a chamber of the Court. In any event, the Parties were unable to agree on the organization of the arbitration during the requisite period. The second precondition stated in Article 24, paragraph 1, of the ICSFT must thus be regarded as fulfilled.

77. The Court therefore considers that the procedural preconditions set forth in Article 24, paragraph 1, of the ICSFT were met. The Court thus has jurisdiction to entertain the claims made pursuant to that provision.

III. THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

78. The Court will now examine the Russian Federation's preliminary objections to the Court's jurisdiction and the admissibility of Ukraine's claims under CERD. As stated above (see paragraph 36), the Russian Federation argues that the Court lacks jurisdiction *ratione materiae* under CERD, and that the procedural preconditions to the Court's jurisdiction set out in Article 22 of the Convention are not met; it also argues that Ukraine's Application with regard to claims under CERD is inadmissible because local remedies had not been exhausted before the dispute was referred to the Court. The Court will deal with each objection in turn.

A. Jurisdiction *ratione materiae* under CERD

79. It is the Russian Federation's position that the real issue in dispute between the Parties does not concern racial discrimination but the status of Crimea. The Russian Federation contends that the measures which Ukraine characterizes as racial discrimination are not in breach of CERD, since they are not based on any of the grounds set out in Article 1, paragraph 1, of CERD. According to the Respondent, Ukraine's claims of racial discrimination consist in asserting that measures allegedly taken by the Russian Federation in respect of members of certain ethnic communities were motivated by the opposition of these communities to the "purported annexation" of Crimea.

80. According to the Russian Federation, Ukraine's attempt to define "ethnic groups" within the meaning of CERD on the basis of political self-identification and opinions is misconceived. The Russian Federation argues that Ukraine's definition of "ethnicity" is not in consonance either with the ordinary meaning of CERD, or with the intention of its drafters, and is also unsupported both by State practice, and by the decisions of the Committee on the Elimination of Racial Discrimination (hereinafter the "CERD Committee"). The Russian Federation does not contest, in any event, that Crimean Tatars and ethnic Ukrainians in Crimea constitute distinct ethnic groups protected by CERD.

81. The Respondent argues that the claims that it discriminated between citizens and non-citizens are beyond the scope of CERD, in so far as they are incompatible with Article 1, paragraphs 2 and 3, of the Convention, which expressly excludes from its scope "distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens", and does not affect "in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization".

82. The Russian Federation further contends that a number of rights invoked by Ukraine are not protected under CERD. According to the Respondent, Ukraine's argument that Article 5 of CERD includes a right "to return to one's country", allegedly breached by Russian citizenship laws, was only made to circumvent Article 1 of the Convention, since such a right is not protected under CERD unless the person concerned is subject to racial discrimination within the meaning of the Convention. On this basis, the Russian Federation argues that the alleged imposition of Russian citizenship in Crimea could not be a breach of CERD.

83. In relation to the ban on the *Mejlis* of the Crimean Tatar People, the Russian Federation contends that the political right of the Crimean Tatars to retain their representative institutions is not protected under Article 5, paragraphs *(c)* and *(e)*, of CERD, as those provisions protect only individual and not collective, political rights.

84. The Respondent also states that the right to education and training, to which Article 5, paragraph *(e)* (v), of CERD refers, does not guarantee an absolute right to be educated in one's native language, since this provision only aims to ensure the right of everyone to have access to a national educational system, irrespective of ethnic origin.

85. The Russian Federation contends that by claiming that Crimean Tatars have been discriminated against because of their Muslim faith, Ukraine misconstrues the scope of CERD, which does not include discrimination based on religious grounds.

86. According to the Russian Federation, a considerable part of the alleged violations of CERD to which Ukraine refers is based on the assumption that the application of Russian laws in Crimea amounts to a breach of certain rules of international humanitarian law, which, following Ukraine's logic, would in turn entail a breach of CERD. The Russian Federation contends that Ukraine is seeking to challenge the application of Russian laws in Crimea, purportedly on the basis of CERD, but actually by reference to certain rules of international humanitarian law.

*

87. Ukraine argues that, while it is obliged to refer to the Russian Federation's "intervention" in Crimea in describing the alleged campaign of racial discrimination against the Crimean Tatar and Ukrainian communities in Crimea, neither the substance of Ukraine's claims, nor the relief requested, concern the status of Crimea.

88. According to Ukraine, its claims under CERD fall squarely within the definition of "racial discrimination" under Article 1, paragraph 1, of the Convention. Ukraine alleges that the Russian Federation has implemented a "policy of discrimination in political and civil affairs" and a "campaign of cultural erasure" against Crimean Tatars and ethnic Ukrainians in Crimea. The Applicant claims that the Russian Federation has impaired the civil and political rights of the Crimean Tatar and Ukrainian communities in Crimea by a series of targeted murders and acts of torture; forced disappearances and abductions; arbitrary searches and detentions; the imposition of Russian citizenship on the residents of Crimea; and the ban on the *Mejlis*. The Applicant also claims that the Russian Federation has impaired the economic, social and cultural rights of these communities, by imposing restrictions on Crimean Tatar and Ukrainian media outlets; the degradation of their cultural heritage; the suppression of culturally significant gatherings of these communities; and the suppression of minority rights relating to education, and in particular restrictions placed on education in the Crimean Tatar and Ukrainian languages. It is the Applicant's position that these measures were principally aimed against the ethnic groups of Crimean Tatar and Ukrainian communities in Crimea and had the "purpose and/or effect" of disproportionately affecting these communities less favourably than other ethnic groups in Crimea. Accordingly, Ukraine maintains that these measures amount to racial discrimination within the meaning of Article 1, paragraph 1, of CERD.

89. Ukraine argues that its Memorial shows, "on an article-by-article basis", that the Russian Federation's conduct has resulted in nullifying or limiting the rights and freedoms of the Crimean Tatar and Ukrainian communities protected under Articles 2, paragraph (1) *(a)* and *(b)*, 4, 5 *(a)* to *(e)*, 6 and 7, of CERD. Ukraine thus asserts that its claims relate to an aspect of the dispute which concerns the interpretation or application of CERD.

90. Moreover, Ukraine argues that freedom from deportation from one's country by an "occupying State" is a human right or fundamental freedom, the denial of which on a racial or ethnic basis constitutes a breach of CERD. Ukraine further argues that the denial of the right to return to one's country either by the territorial sovereign or by an "occupying State" also constitutes a breach of CERD. Ukraine also emphasizes that, considering Article 1, paragraph 3, of CERD, citizenship laws passed by States parties to the Convention may constitute a breach of CERD if they "discriminate against any particular nationality". In this regard, Ukraine maintains that the law granting Russian citizenship to citizens of Ukraine and to stateless persons resident in Crimea, together with the Russian Federation's enforcement of this law, disproportionately and adversely affects Crimean Tatars and ethnic Ukrainians in Crimea. Ukraine disputes the Russian Federation's assertion that these measures fall outside of CERD by virtue of paragraphs 2 and 3 of Article 1.

91. Ukraine also submits that the protections provided by CERD do not exist solely with respect to those rights listed in the Convention, but extend to human rights and fundamental freedoms in other fields of public life. It is Ukraine's position that the Russian Federation's arguments on the interpretation of certain provisions of CERD confirm that the dispute between the Parties also concerns the interpretation of that Convention. According to Ukraine, the issues in dispute between the Parties concern the respect of the right of indigenous peoples to maintain their representative institutions, the right of minorities to be educated in their native language, the consideration of Article 49 of the Fourth Geneva Convention as a rule relevant to the interpretation of Article 5, paragraph *(d)* (ii), of CERD, and the relevance of Article 1, paragraphs 2 and 3, to claims relating to the imposition of Russian citizenship in Crimea. Ukraine submits that it is appropriate for the Court to decide these disputed issues at the merits stage of the proceedings.

92. In the alternative, Ukraine argues that, should the Court decide to address such issues at the preliminary objections stage, it should decide them in Ukraine's favour. The Applicant maintains that targeting the *Mejlis* constitutes an ethnicity-based distinction having the purpose or effect of impairing the human rights and fundamental freedoms of the Crimean Tatar people. Ukraine further states that Article 5 *(e)* (v) of CERD provides for a broad right to education and training, which also covers the right to be educated in one's own native language. Ukraine also clarifies that it is not requesting the Court to make any finding or grant any relief in respect of breaches of CERD resulting from discrimination on religious grounds. The Applicant further maintains that it is not asking the Court to decide claims of discrimination on the basis of political opinion.

93. According to Ukraine, the Russian Federation's claim that the extension of its laws in Crimea is equated by Ukraine to a violation of CERD is inaccurate; the Applicant argues that, in its Memorial, it referred to the introduction of such laws to describe the means by which the Respondent has pursued a campaign of discrimination in Crimea. Using as an example the breach of freedom of peaceful assembly, Ukraine submits that the alleged violations of CERD do not result from breaches of international humanitarian law, but from the discriminatory application by the Russian Federation of its domestic legislation as a means of repressing the Crimean Tatar and Ukrainian communities in Crimea.

* *

94. In order to determine whether it has jurisdiction *ratione materiae* under CERD, the Court does not need to satisfy itself that the measures of which Ukraine complains actually constitute "racial discrimination" within the meaning of Article 1, paragraph 1, of CERD. Nor does the Court need to establish whether, and, if so, to what extent, certain acts may be covered by Article 1, paragraphs 2 and 3, of CERD. Both determinations concern issues of fact, largely depending on evidence regarding the purpose or effect of the measures alleged by Ukraine, and are thus properly a matter for the merits, should the case proceed to that stage.

95. At the current stage of the proceedings, the Court only needs to ascertain whether the measures of which Ukraine complains fall within the provisions of the Convention (see paragraph 57 above). In this respect, the Court notes that both Parties agree that Crimean Tatars and ethnic Ukrainians in Crimea constitute ethnic groups protected under CERD. Moreover, Articles 2, 4, 5, 6 and 7 of the Convention set out specific obligations in relation to the treatment of individuals on the basis of "race, colour, descent, or national or ethnic origin". Article 2, paragraph 1, of CERD contains a general obligation to pursue by all appropriate means a policy of eliminating racial discrimination, and an obligation to engage in no act or practice of racial discrimination against persons, groups of persons or institutions. Article 5 imposes an obligation to prohibit and eliminate racial discrimination, and to guarantee the right of everyone to equality before the law, notably in the enjoyment of rights mentioned therein, including political, civil, economic, social and cultural rights.

96. The Court, taking into account the broadly formulated rights and obligations contained in the Convention, including the obligations under Article 2, paragraph 1, and the non-exhaustive list of rights in Article 5, considers that the measures of which Ukraine complains (see paragraph 88 above) are capable of having an adverse effect on the enjoyment of certain rights protected under CERD. These measures thus fall within the provisions of the Convention.

97. Consequently, the Court concludes that the claims of Ukraine fall within the provisions of CERD.

B. Procedural preconditions under Article 22 of CERD

98. Having established that the claims of Ukraine fall within the scope of CERD, the Court now turns to the examination of the procedural preconditions under Article 22 of the Convention.

1. The alternative or cumulative character of the procedural preconditions

99. The Russian Federation argues that Article 22 imposes preconditions to the seisin of the Court, and that the Court has jurisdiction only if both preconditions are satisfied. According to the Russian Federation, the conjunction "or" may have an alternative meaning, a cumulative meaning or both; the Respondent further maintains that, in Article 22, the word "or" indicates cumulative, not alternative, preconditions. The Russian Federation also argues that interpreting Article 22 to provide for alternative procedural preconditions would deprive the provision of *effet utile*, as it would be meaningless if no legal consequences were to be drawn from the reference to two distinct preconditions. The Russian Federation adds that conciliation under the auspices of the CERD Committee cannot be regarded as a kind of negotiation, since, unlike negotiation, it entails third-party intervention, and that reading Article 22 in its context and in light of the object and purpose of CERD confirms that the two procedural preconditions are cumulative.

100. The Respondent contends that its interpretation of Article 22 of CERD is supported by the drafting history of the Convention. The Russian Federation argues that the earliest version of what subsequently became Article 22, proposed by the representative of the Philippines to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, envisaged that the

Court could only be seised of a dispute if the CERD Committee had already failed to effect conciliation. According to the Russian Federation, a new proposal for the compromissory clause, prepared by the officers of the Third Committee of the United Nations General Assembly, mentioned only negotiation as a procedural precondition; thereafter, an amendment by Ghana, Mauritania and the Philippines (hereinafter "the Three-Power amendment"), which proposed introducing the words "or by the procedures expressly provided for in this Convention" into Article 22, was adopted unanimously. The Russian Federation infers from this addition that the drafters of CERD intended that resort to those procedures would be compulsory before referral of a dispute to the Court.

101. The Russian Federation also infers the cumulative character of the procedural preconditions under Article 22 of CERD by comparing the compromissory clauses of other human rights treaties, namely the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, the International Convention for the Protection of All Persons from Enforced Disappearance and the Convention on the Elimination of All Forms of Discrimination against Women. According to the Respondent, the compromissory clauses in these treaties set out a three-step procedure to settle disputes on their interpretation or application, envisaging negotiation as the first step, efforts to set up an arbitration over a certain period of time as the second step, and resort to the Court once that period of time has elapsed as the third step. The Russian Federation states that the dispute settlement system under Article 22 of CERD is similar to, and should be interpreted consistently with, the three-step procedure for which these treaties provide.

*

102. Ukraine states that the correct interpretation of Article 22 of CERD is that it contains no preconditions to the Court's jurisdiction. The Applicant argues that should the Court interpret Article 22 as establishing preconditions, the "most natural reading" of Article 22 is that "or" conveys that "negotiation" and the "procedures expressly provided for in this Convention" are two alternative options for resolving a dispute before the seisin of the Court. Ukraine also contends that, in Article 22, the word "or" appears three times, always with disjunctive meaning.

103. Ukraine submits that, if the CERD Committee procedure were to be considered as mandatory, the Convention would have said so explicitly. According to the Applicant, it would not make sense if Article 22 required disputing States first to negotiate within an unspecified period of time only to renegotiate for six more months in accordance with the CERD Committee procedure. Ukraine adds that the CERD Committee only hears complaints by a State party "that another State Party is not giving effect to the provisions of this Convention", which entails that, if Article 22 required exhaustion of the CERD Committee procedure, a dispute limited to the interpretation of

CERD would never satisfy the preconditions for States to seise the Court. Ukraine considers that the placement of Article 22 within Part III of CERD, while the CERD Committee procedures are governed by Part II, indicates that Article 22 was not intended to make the procedures before the CERD Committee a necessary precondition for seising the Court. According to the Applicant, as the preamble indicates that CERD was intended to be an effective instrument to eliminate racial discrimination promptly, it would be inconsistent with the object and purpose of CERD if Article 22 delayed the settlement of disputes by imposing cumulative procedural preconditions.

104. Although Ukraine expresses the view that recourse to supplementary means of interpretation is not necessary, it argues that, should recourse be had to the drafting history of CERD, it would not assist the Russian Federation's case. According to Ukraine, the late addition, by the Three-Power amendment, of a reference to "the procedures expressly provided for in this Convention" to the compromissory clause of CERD merely aimed to clarify that the CERD Committee procedure was one of the options available before States referred their disputes to the Court. Ukraine also supports this view by reference to the statement that Ghana made as a sponsor of the Three-Power amendment, according to which the amendment was "self-explanatory" and contained a "simple refer[ence] to the procedures provided for in the Convention".

105. Ukraine further maintains that the Russian Federation's reliance on the compromissory clauses in other human rights treaties (see paragraph 101 above) is misplaced, as such treaties contain compromissory clauses which are different from Article 22 of CERD.

* *

106. Pursuant to Article 22 of CERD, the Court has jurisdiction to decide a dispute brought under the Convention provided that such a dispute is "not settled by negotiation or by the procedures expressly provided for in this Convention". In the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)*, the Court found that

> "in their ordinary meaning, the terms of Article 22 of CERD, namely '[a]ny dispute . . . which is not settled by negotiation or by the procedures expressly provided for in this Convention', establish preconditions to be fulfilled before the seisin of the Court" (*Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 128, para. 141; see also *ibid.*, pp. 129–130, para. 147).

In that case, the Court did not determine whether the preconditions set out in Article 22 of CERD are alternative or cumulative. In order to make this determination, the Court will apply the rules of customary international law on treaty interpretation as reflected in Articles 31 to 33 of the Vienna Convention (*Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 116, para. 33).

107. Concerning the text of Article 22 of CERD, the Parties expressed divergent views on the meaning of the word "or" in the phrase "not settled by negotiation or by the procedures expressly provided for in this Convention". The Court notes that the conjunction "or" appearing between "negotiation" and the "procedures expressly provided for in this Convention" is part of a clause which is introduced by the word "not", and thus formulated in the negative. While the conjunction "or" should generally be interpreted disjunctively if it appears as part of an affirmative clause, the same view cannot necessarily be taken when the same conjunction is part of a negative clause. Article 22 is an example of the latter. It follows that, in the relevant part of Article 22 of CERD, the conjunction "or" may have either disjunctive or conjunctive meaning. The Court therefore is of the view that while the word "or" may be interpreted disjunctively and envisage alternative procedural preconditions, this is not the only possible interpretation based on the text of Article 22.

108. Article 22 of CERD must be interpreted in its context. Article 22 refers to two preconditions, namely negotiation and the procedure before the CERD Committee governed by Articles 11 to 13 of the Convention. Article 11, paragraph 1, of CERD envisages that, if a State party considers that another State party "is not giving effect to the provisions of [the] Convention, it may bring the matter to the attention of the [CERD] Committee"; the CERD Committee "shall then transmit the communication to the State Party concerned", which, within three months, "shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken". Under Article 11, paragraph 2, a State has the right to refer the matter back to the CERD Committee through a second communication "[i]f the matter is not adjusted to the satisfaction of both parties, either by bilateral negotiations or by any other procedure open to them, within six months after the receipt by the receiving State of the initial communication".

109. Pursuant to Article 12, paragraph 1 *(a)*, of CERD, after the CERD Committee has obtained the necessary information, its chairperson shall appoint an *ad hoc* Conciliation Commission, the good offices of which shall be made available to the States concerned "with a view to an amicable solution of the matter". Article 13, paragraph 1, provides that, when the Commission has fully considered the matter, it shall submit to the chairperson of the CERD Committee a report containing "such recommendations as it may think proper for the amicable solution of the dispute". Pursuant to Article 13, paragraph 2, the States concerned, within three months of receiving such recommendations from the chairperson of the Committee, shall inform the chairperson as to "whether or not they accept the recommendations contained in the report of the Commission". The references to the "amicable solution" of the dispute and to the States' communication of acceptance of the Conciliation Commission's recommendations indicate, in the Court's view, that the objective of the CERD Committee procedure is for the States concerned to reach an agreed settlement of their dispute.

110. The Court therefore considers that "negotiation" and the "procedures expressly provided for in [the] Convention" are two means to achieve the same objective, namely to settle a dispute by agreement. Both negotiation and the CERD Committee procedure rest on the States parties' willingness to seek an agreed settlement of their dispute. It follows that should negotiation and the CERD Committee procedure be considered cumulative, States would have to try to negotiate an agreed solution to their dispute and, after negotiation has not been successful, take the matter before the CERD Committee for further negotiation, again in order to reach an agreed

solution. The Court considers that the context of Article 22 of CERD does not support this interpretation. In the view of the Court, the context of Article 22 rather indicates that it would not be reasonable to require States parties which have already failed to reach an agreed settlement through negotiations to engage in an additional set of negotiations in accordance with the modalities set out in Articles 11 to 13 of CERD.

111. The Court considers that Article 22 of CERD must also be interpreted in light of the object and purpose of the Convention. Article 2, paragraph 1, of CERD provides that States parties to CERD undertake to eliminate racial discrimination "without delay". Articles 4 and 7 provide that States parties undertake to eradicate incitement to racial discrimination and to combat prejudices leading to racial discrimination by adopting "immediate and positive measures" and "immediate and effective measures" respectively. The preamble to CERD further emphasizes the States' resolve to adopt all measures for eliminating racial discrimination "speedily". The Court considers that these provisions show the States parties' aim to eradicate all forms of racial discrimination effectively and promptly. In the Court's view, the achievement of such aims could be rendered more difficult if the procedural preconditions under Article 22 were cumulative.

112. The Court notes that both Parties rely on the *travaux préparatoires* of CERD in support of their respective arguments concerning the alternative or cumulative character of the procedural preconditions under Article 22 of the Convention. Since the alternative character of the procedural preconditions is sufficiently clear from an interpretation of the ordinary meaning of the terms of Article 22 in their context, and in light of the object and purpose of the Convention, the Court is of the view that there is no need for it to examine the *travaux préparatoires* of CERD.

113. The Court concludes that Article 22 of CERD imposes alternative preconditions to the Court's jurisdiction. Since the dispute between the Parties was not referred to the CERD Committee, the Court will only examine whether the Parties attempted to negotiate a settlement to their dispute.

2. Whether the Parties attempted to negotiate a settlement to their dispute under CERD

114. The Russian Federation argues that, although the Parties made reciprocal accusations and replies to each other, Ukraine did not negotiate in good faith within the meaning of Article 22 of CERD. According to the Russian Federation, Ukraine's Notes Verbales were replete with accusations, including of occupation and aggression, which resulted in escalating tensions between the Parties. The Respondent expresses the view that Ukraine had never aimed at solving the dispute between the Parties, but that its only aim was to hold the Russian Federation responsible by bringing the matter before the Court. The Russian Federation also refers to the diplomatic exchanges between the Parties in 2014, emphasizing that Ukraine set very short deadlines for the Parties to organize face-to-face meetings, and that it wrongly accused the Russian Federation of not replying positively to negotiation proposals. The Russian Federation acknowledges that the Parties finally held face-to-face negotiations, but states that Ukraine did not behave in good faith during such negotiations, as it insisted on its positions, refusing to devote the necessary time to examining

the positions and allegations of both Parties. The Russian Federation also submits that face-to-face negotiations were carried out within an unduly short time frame owing to choices made by Ukraine, which resulted in little progress being made.

*

115. Ukraine states that it engaged in good-faith negotiations by sending multiple Notes Verbales to the Russian Federation, making concrete proposals for the organization of the negotiations and detailing the acts of racial discrimination allegedly being committed against the Crimean Tatar and Ukrainian communities of Crimea. Ukraine maintains that its attempts to negotiate directly with the Russian Federation were not met with substantive responses, since there was no reply to any of the Notes Verbales concerning the Russian Federation's alleged conduct in violation of CERD sent by Ukraine before the filing of the Application. Nonetheless, Ukraine contends that it persisted in its efforts to engage with the Russian Federation, which included three face-to-face meetings in Minsk. The Applicant maintains that it has meticulously put the Russian Federation on notice with respect to the facts which allegedly constitute breaches of CERD and has given the Russian Federation ample opportunity to respond over a two-year period. Ukraine submits that it only filed its Application with the Court when it had become clear that further negotiations would have been fruitless, considering that no progress had been made and that there had been no change in the Parties' respective positions. The Applicant also rejects the Respondent's attempts to show that it acted in bad faith while conducting negotiations with respect to CERD.

* *

116. The Court has already had the opportunity to examine the notion of "negotiation" under Article 22 of CERD. In the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)*, the Court stated that

> "negotiations are distinct from mere protests or disputations. Negotiations entail more than the plain opposition of legal views or interests between two parties, or the existence of a series of accusations and rebuttals, or even the exchange of claims and directly opposed counter-claims. As such, the concept of 'negotiations' differs from the concept of 'dispute', and requires — at the very least — a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute." (*Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 132, para. 157; see also *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 68, para. 150; *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, pp. 47–48, para. 87; *Railway Traffic between Lithuania and Poland, Advisory Opinion, 1931, P.C.I.J., Series A/B, No. 42*, p. 116.)

The Court also stated that "evidence of such an attempt to negotiate — or of the conduct of negotiations — does not require the reaching of an actual agreement between the disputing parties" (*I.C.J. Reports 2011 (I)*, p. 132, para. 158), and that "to meet the precondition of negotiation in the compromissory clause of a treaty, these negotiations must relate to the subject-matter of the treaty containing the compromissory clause" (*ibid.*, p. 133, para. 161).

117. The Court further held that "the precondition of negotiation is met only when there has been a failure of negotiations, or when negotiations have become futile or deadlocked" (*ibid.*, p. 133, para. 159). This statement was confirmed in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, in which, despite the fact that Belgium had sent Senegal four Notes Verbales and engaged in negotiations with Senegal, such steps did not lead to a settlement of their dispute (*Judgment, I.C.J. Reports 2012 (II)*, p. 446, paras. 58-59).

118. The Court notes that Ukraine sent its first Note Verbale to the Russian Federation concerning alleged violations of CERD on 23 September 2014. In that Note, Ukraine listed a number of measures which, in its view, the Russian Federation was implementing in violation of the Convention, and the rights which such acts were allegedly violating, and went on to state that "the Ukrainian Side offers to the Russian Side to negotiate the use of [CERD], in particular, the implementation of international legal liability in accordance with international law". On 16 October 2014, the Russian Federation communicated to Ukraine its willingness to hold negotiations on the interpretation and application of CERD. On 29 October 2014, the Applicant sent a second Note Verbale to the Respondent, asking for face-to-face negotiations which it proposed to hold on 21 November 2014. The Russian Federation replied to this Note on 27 November 2014, after Ukraine's proposed date for the meeting had passed. Ukraine sent a third Note Verbale on 15 December 2014, proposing negotiations on 23 January 2015. The Russian Federation replied to this Note on 11 March 2015, after the date proposed by Ukraine for the negotiations had passed. Eventually, the Parties held three rounds of negotiation in Minsk between April 2015 and December 2016.

119. There are specific references to CERD in the Notes Verbales exchanged between the Parties, which also refer to the rights and obligations arising under that Convention. In those Notes, Ukraine set out its views concerning the alleged violations of the Convention, and the Russian Federation accordingly had a full opportunity to reply to such allegations. The Court is satisfied that the subject-matter of such diplomatic exchanges related to the subject-matter of the dispute currently before the Court, as defined in paragraphs 31-32 of this Judgment.

120. The Court observes that the negotiations between the Parties lasted for approximately two years and included both diplomatic correspondence and face-to-face meetings, which, in the Court's view, and despite the lack of success in reaching a negotiated solution, indicates that a genuine attempt at negotiation was made by Ukraine. Furthermore, the Court is of the opinion that, during their diplomatic exchanges, the Parties' respective positions remained substantially the same. The Court thus concludes that the negotiations between the Parties had become futile or deadlocked by the time Ukraine filed its Application under Article 22 of CERD.

121. Accordingly, the Court concludes that the procedural preconditions for it to have jurisdiction under Article 22 of CERD are satisfied in the circumstances of the present case. As a result, the Court has jurisdiction to consider the claims of Ukraine under CERD.

C. Admissibility

122. The Court will now turn to the objection raised by the Russian Federation to the admissibility of Ukraine's Application with regard to claims under CERD on the ground that Ukraine did not establish that local remedies had been exhausted before it seised the Court.

* *

123. The Russian Federation contends that the rule of exhaustion of local remedies is well established in international law, and that it also applies to inter-State claims under CERD. The Russian Federation submits that the rule of exhaustion of local remedies requires claims relating to alleged violations of individual rights to be, in essence, the same as those previously submitted to domestic courts. It follows, the Respondent maintains, that the allegations in Ukraine's Application should have been submitted to domestic courts as claims of racial discrimination. The Russian Federation further submits that, in its Written Statement, Ukraine formulated its claims differently from its Application and Memorial in order to overcome the objection based on the rule of exhaustion of local remedies.

124. According to the Respondent, Articles 11, paragraph 3, and 14, paragraph 7 *(a)*, of CERD make it clear that the rule of exhaustion of local remedies applies to claims under the Convention. The Respondent further submits that the application of the rule of exhaustion of local remedies is consistent with Article 6 of CERD, which imposes an obligation on States parties to provide "effective protection and remedies, through the competent national tribunals and other State institutions", to everyone within their jurisdiction. The Russian Federation also contends that the application of the rule of exhaustion of local remedies is consistent with the approach of other human rights treaties and is confirmed by the Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission.

125. The Russian Federation further relies on the approach of the CERD Committee that local remedies must be exhausted even if there are doubts as to their effectiveness. The Respondent argues that Ukraine has not established that local remedies were exhausted, or that cases were submitted before domestic courts, prior to it instituting proceedings under Article 22 of CERD. Moreover, according to the Russian Federation, the claims before domestic courts on which Ukraine relies did not concern allegations of racial discrimination.

*

126. Ukraine argues that local remedies must be exhausted only when a State brings a claim on behalf of one or more of its nationals. According to the Applicant, the rule of exhaustion of local remedies has no application in the present case since Ukraine's claims relate to an alleged pattern of conduct of the Russian Federation, and Ukraine is invoking the rights it holds as a State under CERD. Ukraine contends that the Russian Federation's objection is not persuasive because Ukraine did not bring the present case to vindicate individual rights. On the contrary, Ukraine seeks an end to the Russian Federation's alleged "systematic campaign of racial discrimination" in violation of CERD.

127. Ukraine states that both the structure of CERD and the plain language of its provisions contradict the Russian Federation's argument. Ukraine emphasizes that references to the rule of exhaustion of local remedies are contained in Part II of CERD concerning the procedure before the CERD Committee, whereas Article 22 is located in Part III of the Convention, which makes no reference to the rule of exhaustion of local remedies. On this basis, Ukraine infers that the rule of exhaustion of local remedies applies only in the context of the CERD Committee procedure. Ukraine further submits that, in any event, Article 11, paragraph 3, and Article 14, paragraph 7 *(a)*, of CERD have no relevance in the present case: first, as a sovereign State, Ukraine cannot be expected to submit itself to the domestic courts of another sovereign State; secondly, bringing a dispute before the courts of the Russian Federation would be futile, as Ukraine could not expect a fair hearing of its claims.

128. Ukraine states that the cases heard by human rights courts on which the Russian Federation relies all concern claims by individuals or non-governmental organizations acting on their behalf. Ukraine relies on the jurisprudence of the European Court of Human Rights and of the African Commission on Human and Peoples' Rights, which, in its view, supports its position that the rule of exhaustion of local remedies does not apply in the present case. In particular, Ukraine refers to a decision in which the European Court of Human Rights held that the rule of exhaustion of local remedies "does not apply where the applicant State complains of a practice as such . . . but does not ask the Court to give a decision on each of the cases put forward as proof or illustrations of that practice" (*Georgia* v. *Russia (II)*, Application No. 38263/08, Decision on Admissibility of 13 December 2011, para. 85). Ukraine concludes that the rule of exhaustion of local remedies does not apply in the present case and that its Application is consequently admissible.

* *

129. The Court recalls that local remedies must be previously exhausted as a matter of customary international law in cases in which a State brings a claim on behalf of one or more of its nationals (*Interhandel (Switzerland* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1959*, p. 27; *Elettronica Sicula S.p.A. (ELSI) (United States of America* v. *Italy), Judgment, I.C.J. Reports 1989*, p. 42, para. 50; *Ahmadou Sadio Diallo (Republic of*

Guinea v. *Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 599, para. 42; see also Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, Report of the International Law Commission on the work of its fifty-third session, *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two, pp. 120-121; Draft Articles on Diplomatic Protection with Commentaries, Report of the International Law Commission on the work of its fifty-eighth session, *Yearbook of the International Law Commission*, 2006, Vol. II, Part Two, p. 44).

130. The Court notes that, according to Ukraine, the Russian Federation has engaged in a sustained campaign of racial discrimination, carried out through acts repeated over an appreciable period of time starting in 2014, against the Crimean Tatar and Ukrainian communities in Crimea. The Court also notes that the individual instances to which Ukraine refers in its submissions emerge as illustrations of the acts by which the Russian Federation has allegedly engaged in a campaign of racial discrimination. It follows, in the view of the Court, that, in filing its Application under Article 22 of CERD, Ukraine does not adopt the cause of one or more of its nationals, but challenges, on the basis of CERD, the alleged pattern of conduct of the Russian Federation with regard to the treatment of the Crimean Tatar and Ukrainian communities in Crimea. In view of the above, the Court concludes that the rule of exhaustion of local remedies does not apply in the circumstances of the present case.

131. This conclusion by the Court is without prejudice to the question of whether the Russian Federation has actually engaged in the campaign of racial discrimination alleged by Ukraine, thus breaching its obligations under CERD. This is a question which the Court will address at the merits stage of the proceedings.

132. The Court finds that the Russian Federation's objection to the admissibility of Ukraine's Application with regard to CERD must be rejected.

*

133. It follows from the findings made above that the Russian Federation's objections to the jurisdiction of the Court under Article 22 of CERD and to the admissibility of Ukraine's Application with regard to CERD must be rejected. Accordingly, the Court concludes that it has jurisdiction to entertain the claims made by Ukraine under CERD and that Ukraine's Application with regard to those claims is admissible.

*

* *

134. For these reasons,

THE COURT,

(1) By thirteen votes to three,

Rejects the preliminary objection raised by the Russian Federation that the Court lacks jurisdiction on the basis of Article 24, paragraph 1, of the International Convention for the Suppression of the Financing of Terrorism;

IN FAVOUR: *President* Yusuf; *Judges* Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Salam, Iwasawa; *Judge* ad hoc Pocar;

AGAINST: *Vice-President* Xue; *Judge* Tomka; *Judge* ad hoc Skotnikov;

(2) By thirteen votes to three,

Finds that it has jurisdiction on the basis of Article 24, paragraph 1, of the International Convention for the Suppression of the Financing of Terrorism, to entertain the claims made by Ukraine under this Convention;

IN FAVOUR: *President* Yusuf; *Judges* Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Salam, Iwasawa; *Judge* ad hoc Pocar;

AGAINST: *Vice-President* Xue; *Judge* Tomka; *Judge* ad hoc Skotnikov;

(3) By fifteen votes to one,

Rejects the preliminary objection raised by the Russian Federation that the Court lacks jurisdiction on the basis of Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination;

IN FAVOUR: *President* Yusuf; *Vice-President* Xue; *Judges* Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Salam, Iwasawa; *Judge* ad hoc Pocar;

AGAINST: *Judge* ad hoc Skotnikov;

(4) Unanimously,

Rejects the preliminary objection raised by the Russian Federation to the admissibility of the Application of Ukraine in relation to the claims under the International Convention on the Elimination of All Forms of Racial Discrimination;

(5) By fifteen votes to one,

Finds that it has jurisdiction, on the basis of Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination, to entertain the claims made by Ukraine under this Convention, and that the Application in relation to those claims is admissible.

IN FAVOUR: *President* Yusuf; *Vice-President* Xue; *Judges* Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Salam, Iwasawa; *Judge* ad hoc Pocar;

AGAINST: *Judge* ad hoc Skotnikov.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this eighth day of November two thousand and nineteen, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of Ukraine and the Government of the Russian Federation, respectively.

(Signed) Abdulqawi Ahmed YUSUF,
President.

(Signed) Philippe GAUTIER,
Registrar.

Vice-President XUE appends a dissenting opinion to the Judgment of the Court; Judges TOMKA and CANÇADO TRINDADE append separate opinions to the Judgment of the Court; Judges DONOGHUE and ROBINSON append declarations to the Judgment of the Court; Judge *ad hoc* POCAR appends a separate opinion to the Judgment of the Court; Judge *ad hoc* SKOTNIKOV appends a dissenting opinion to the Judgment of the Court.

(Initialled) A.A.Y.

(Initialled) Ph.G.