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**International Court of Justice — Jurisdiction — Subject-matter of dispute — Jurisdiction *ratione materiae* under International Convention for the Suppression of the Financing of Terrorism, 1999 (“ICSFT”) — Whether Court having to establish plausibility of claims of Ukraine — Interpretation of Article 2 of ICSFT — Whether ICSFT applying to terrorism financing by State officials — Meaning of “funds”, “knowledge”, “intention” and “purpose” matters for merits — Whether Parties having negotiated a settlement before filing the case — Whether Parties having endeavoured to organize arbitral proceedings for six months before filing the case**

**International Court of Justice — Jurisdiction — Jurisdiction *ratione materiae* under International Convention on the Elimination of All Forms of Racial Discrimination, 1966 (“CERD”) — Whether acts of which Ukraine complains constituting “discrimination” within meaning of Article 1 of CERD matter for merits — Whether rights invoked by Ukraine protected under CERD — Alternative or cumulative character of preconditions under Article 22 of CERD — Whether Ukraine making a genuine attempt to find a negotiated solution before filing the case — Admissibility of claims under CERD — Whether rule on exhaustion of local remedies applicable — Diplomatic protection — Alleged existence of a sustained campaign of racial discrimination**

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INTERNATIONAL COURT OF JUSTICE  
200 ILR 1**preconditions — Whether Ukraine making a genuine attempt to negotiate settlement of dispute — Whether Court having jurisdiction to entertain Ukraine’s claims under CERD — Whether preliminary objection to admissibility of Ukraine’s claims to be upheld**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)<sup>1</sup>*International Court of Justice**Preliminary Objections. 8 November 2019*(Yusuf, *President*; Xue, *Vice-President*; Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Salam, Iwasawa, *Judges*; Pocar, Skotnikov, *Judges ad hoc*)SUMMARY:<sup>2</sup> *The facts*:—On 16 January 2017, Ukraine filed with the International Court of Justice (“the Court”) a unilateral application against the Russian Federation, in a dispute concerning alleged activities in Crimea and eastern Ukraine. Ukraine maintained that the Court’s jurisdiction was

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The Russian Federation, represented by H.E. Mr Dmitry Lobach, Mr Ilya Rogachev, Mr Grigory Lukiyantsev, as Agents; Mr Mathias Forteau, Mr Alain Pellet, Mr Samuel Wordsworth, Mr Andreas Zimmermann, as Counsel and Advocates; Mr Sean Aughey, Ms Tessa Barsac, Mr Jean-Baptiste Merlin, Mr Michael Swainston, Mr Vasily Torkanovskiy, Mr Sergey Usoskin, as Counsel; Mr Ayder Ablyatipov, Mr Andrey Anokhin, Mr Mikhail Averyanov, Ms Héloïse Bajer-Pellet, Ms Maria Barsukova, Ms Olga Chekrizova, Ms Ksenia Galkina, Mr Alexander Girin, Ms Daria Golubkova, Ms Victoria Goncharova, Ms Anastasia Gorlanova, Ms Valeria Grishchenko, Mr Denis Grunis, Mr Ruslan Kantur, Ms Svetlana Khomutova, Mr Konstantin Kosorukov, Ms Maria Kuzmina, Mr Petr Litvishko, Mr Timur Makhmudov, Mr Konstantin Pestchanenko, Mr Grigory Prozukin, Ms Sofia Sarenkova, Ms Elena Semykina, Ms Svetlana Shatalova, Ms Angelina Shchukina, Ms Kseniia Soloveva, Ms Maria Zabolotskaya, Ms Olga Zinchenko, as Advisers.

<sup>2</sup> Prepared by Dr M. Lando.

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founded on Article 24(1) of the International Convention for the Suppression of the Financing of Terrorism, 1999<sup>3</sup> (“ICSFT”), and Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination, 1966<sup>4</sup> (“CERD”). On 16 January 2017, Ukraine also filed a request for provisional measures in accordance with Article 41 of the Court’s Statute. The Court handed down its Order on provisional measures on 19 April 2017.<sup>5</sup>

The Russian Federation raised objections to the Court’s jurisdiction both under the ICSFT and under CERD, and an objection to the admissibility of Ukraine’s claims under CERD.

While Ukraine submitted that the dispute concerned compliance by the Russian Federation with its obligations under the treaties invoked, the Russian Federation argued that the dispute really concerned alleged violations of international humanitarian law in eastern Ukraine and the status of Crimea.

Concerning jurisdiction under the ICSFT, the Russian Federation contended that Ukraine had failed to provide evidence with respect to the elements of intention, knowledge and purpose to show that its claims fell within the provisions of the ICSFT. The Russian Federation added that the ICSFT did not apply to State officials and stated that the Court was called upon fully to interpret the terms of Article 2 of the ICSFT at this stage of the proceedings. Ukraine replied that the Court could not address, at this stage, issues which were properly matters for the merits, as the Court had to take the facts presented by Ukraine as established for jurisdictional purposes. In any case, Ukraine argued that the evidence provided showed that offences had been committed within the meaning of Article 2 of the ICSFT. According to Ukraine, fully interpreting the terms of Article 2 was a matter for the merits, but that those terms should be given a broad meaning. Ukraine stated that the ICSFT also applied to the acts of State officials.

The Russian Federation maintained that there had been no genuine attempt by Ukraine to achieve a negotiated solution before filing the case with the Court, as required under Article 24(1) of the ICSFT. The Russian Federation added that Ukraine had not attempted to set up an arbitration as required under that provision, instead insisting on the case being referred to an ad hoc chamber of the Court. Ukraine argued that the Parties had negotiated for over two years, both by letters and in person. Moreover, Ukraine stated that it had specifically requested the Russian Federation to start arbitral proceedings, giving the Court’s ad hoc chamber only as an alternative.

Concerning CERD, the Russian Federation contended that the measures of which Ukraine complained were not based on any of the grounds under Article 1(1) of that Convention; it argued that, conversely, such measures fell

<sup>3</sup> For the text of Article 24(1) of the ICSFT, see para. 34 of the judgment.

<sup>4</sup> For the text of Article 22 of the ICSFT, see para. 34 of the judgment.

<sup>5</sup> The text of the Order and the individual opinions is reported at 185 ILR 1.

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within Article 1(2) and (3) of CERD and were thus lawful. The Russian Federation also maintained that certain rights invoked by Ukraine were not protected under CERD. Ukraine replied that the measures of which it complained fell within the definition of racial discrimination under CERD, adding that the rights to which its Application referred were protected under CERD.

The Russian Federation submitted that Article 22 of CERD had to be interpreted to entail that the two procedural preconditions thereunder were cumulative; it added that Ukraine had not satisfied such preconditions before filing its Application. Ukraine responded that the correct interpretation was that the two preconditions were alternative and, although it admitted that the CERD Committee had not been seized, Ukraine also stated that the Parties had endeavoured to find a negotiated solution to their dispute.

Finally, the Russian Federation argued that Ukraine had made its claims under CERD on behalf of individuals, which entailed that the rule on exhaustion of local remedies applied. The Russian Federation contended that, in the circumstances, Ukraine had not exhausted local remedies, and its claims under CERD were therefore inadmissible. Ukraine maintained that its claims under CERD concerned injury caused to the rights it held as a State, which entailed that the rule on exhaustion of local remedies did not apply in the circumstances.

*Held:*—(1) (by thirteen votes to three, Vice-President Xue, Judge Tomka and Judge ad hoc Skotnikov dissenting) The objection to the Court's jurisdiction under the ICSFT was rejected; the Court had jurisdiction to entertain Ukraine's claims under that Convention.

(a) The ICSFT had to be interpreted pursuant to Articles 31-3 of the Vienna Convention on the Law of Treaties, 1969. At the preliminary objections stage, the Court considered questions of law and fact relevant to the objection to jurisdiction. The financing of terrorism by States was not addressed in the ICSFT and was outside the scope of the treaty. However, if a State breached its obligations under the ICSFT, it would be responsible for such a breach. The term "any person" in Article 2 of the ICSFT meant that terrorism financing offences could be committed both by private individuals and by State officials. The interpretation of "funds" and the existence of the requisite mental elements could be relevant at the merits stage of the proceedings (paras. 57-63).

(b) Between 2014 and 2016, the Parties had exchanged several Notes Verbales and held four in-person meetings in Minsk relating to the implementation of obligations under the ICSFT without reaching an agreed settlement. It followed that the dispute could not be settled by negotiation within a reasonable time. The Parties also held negotiations for starting arbitral proceedings for at least six months, in which Ukraine proposed an ad hoc

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chamber of the Court as an alternative; it followed that the arbitration precondition was met (paras. 70-6).

(2) (by fifteen votes to one, Judge ad hoc Skotnikov dissenting) The objection to the Court's jurisdiction under the CERD and to the admissibility of Ukraine's claims under the CERD were rejected.

(a) Deciding whether the measures of which Ukraine complained constituted racial discrimination within the meaning of Article 1(1) of CERD or whether those measures fell within Article 1(2) or (3) of CERD were matters for the merits. The broad formulation of rights and obligations under CERD, and the non-exhaustive list of rights under Article 5 thereunder, entailed that the measures of which Ukraine complained fell within the scope of that Convention (paras. 94-6).

(b) Article 22 of CERD had to be interpreted pursuant to customary rules of international law on treaty interpretation. The word "or" in Article 22 was not decisive to establish whether the procedural preconditions were alternative or cumulative. If the preconditions were cumulative, States would need to negotiate twice: first, between themselves; secondly, within the framework of the CERD Committee. The achievement of the aims of CERD would be more difficult if the procedural preconditions were cumulative. The preconditions were alternative (paras. 106-13).

(c) Between 2014 and 2016, the Parties had exchanged a number of Notes Verbales and held face-to-face meetings in Minsk. These indicated that Ukraine had made a genuine attempt to negotiate the settlement of the dispute. The procedural preconditions under Article 22 of CERD were thus met (paras. 118-21).

(d) Ukraine complained of a sustained campaign of racial discrimination allegedly pursued by the Russian Federation, of which individual cases were only examples. It followed that Ukraine did not adopt the cause of any of its nationals, which entailed that the rule on exhaustion of local remedies did not apply in the circumstances (para. 130).

*Dissenting Opinion of Vice-President Xue:* (1) In order to determine whether it had jurisdiction *ratione materiae*, the Court had to ascertain whether the dispute could be severed from the overall context in which it existed and therefore presented before the Court as a self-standing issue. It was nearly impossible to distinguish between alleged violations of international humanitarian law and the alleged commission of terrorist acts (paras. 4-5).

(2) The term "any person" in Article 2 of the ICSFT could encompass State officials. However, Ukraine sought a declaration that the Russian Federation was internationally responsible for violations of the ICSFT, which was a treaty not applicable to terrorism financing by States. Moreover, the Court had no jurisdiction to decide whether the Russian Federation had encouraged or financially supported armed groups in eastern Ukraine (paras. 7-10).

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*Separate Opinion of Judge Tomka:* (1) The Court had failed to ascertain whether the acts of which Ukraine complained in relation to the ICSFT actually fell within the scope of that Convention. The interpretation of the term “funds” was a matter to be decided at the preliminary objections stage. Overall, the Court had applied the test for determining jurisdiction *ratione materiae* in a cursory and incomplete manner (paras. 6-11).

(2) The Court’s analysis of jurisdiction *ratione materiae* under CERD was also unduly limited. The reasoning relating to the alternative or cumulative character of the procedural preconditions was unpersuasive. The text of Article 22 of CERD should have been interpreted to mean that the two procedural preconditions were cumulative, owing to the word “not” before “settled by negotiation”. A cumulative reading would also preserve the effectiveness of the CERD Committee procedures under Articles 11-13 of CERD and was supported by the drafting history of CERD (paras. 13-29).

*Separate Opinion of Judge Cançado Trindade:* (1) The Court had not departed from the outdated approach of giving paramount importance to State consent in order to establish its jurisdiction. Human rights stood well above State consent and access to justice was not conditional on fulfilling any prior preconditions. The Court had been experiencing difficulties understanding the rationale of compromissory clauses in human rights treaties, which were victim-oriented and under which jurisdiction could not be based on State consent. Article 22 of CERD did not provide for preconditions to be met before seizing the Court (paras. 4-17).

(2) The rule on exhaustion of local remedies had been unduly invoked by the Russian Federation in the present case. Ukraine had rightly stated that it was not possible to bring the case against the Russian Federation before domestic courts. The rationale of the rule on exhaustion of local remedies was the overriding need for redress (paras. 30-42).

(3) The Court could treat the vulnerability of those human beings who sought redress in the present case as an abstraction. The need for protection against arbitrariness and human rights violations was superior to the “will” of any State. Ultimately, the law of nations emanated from human conscience, not from the “will” of individual States (paras. 44-62).

*Declaration of Judge Donoghue:* It was difficult neatly to separate questions of treaty interpretation which the Court could decide at the preliminary objections stage. If the Court found that such questions belonged to the merits, it had to leave that question for the merits stage of the proceedings. In order to decide on jurisdiction *ratione materiae*, the Court did not have to decide either that the applicant’s claims were plausible, or that the facts alleged by the applicant had been proved. The Court had correctly decided not to examine the purpose or effect of the measures of which Ukraine complained, which would have potentially prejudiced the merits (paras. 3-10 and 23-7).

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*Declaration of Judge Robinson:* (1) Paragraph 59 of the judgment did not contain convincing arguments in support of the decision that the ICSFT did not apply to terrorism financing by a State. The Court should have first interpreted the words “any person” under Article 2 of the ICSFT, and only then decided whether the ICSFT also applied to terrorism financing by States. In this regard, the drafting history of the ICSFT was far from unequivocal (paras. 2-7).

(2) The failure to adopt a comprehensive anti-terrorism treaty was due to the difficulty in defining “terrorism”. This was also why the ICSFT did not describe the offences under Article 2 as “terrorism” (paras. 13-17).

*Separate Opinion of Judge ad hoc Pocar:* Accepting obligations to criminalize certain offences necessarily entailed that a State also had to undertake not to perpetrate those offences. Even if State conduct were outside the scope of the ICSFT, State responsibility could be engaged on the basis of the customary rules of international law on responsibility. The Court’s conclusion on the meaning of “any person” was strongly supported by the object and purpose of the ICSFT, international practice, the approach of other treaties and domestic legislation. The Court should have stated that, because the interpretation of “funds” did not affect the scope *ratione materiae* of its jurisdiction, it was not irrelevant to dispose of the preliminary objections (paras. 3-17).

*Dissenting Opinion of Judge ad hoc Skotnikov:* (1) It was contradictory of the Court to state that it did not need to establish that the applicant’s claims were plausible and, at the same time, that it had to consider questions of law and fact relevant to the objections raised. The Court did not follow its well-established jurisprudence when it stated that the issue relating to the scope of the term “funds” need not be addressed at the present state of the proceedings. Moreover, to find that the ICSFT did not apply to the financing of terrorism by States but that “any person” included State officials was inconsistent since States could act only through their officials (paras. 2-7).

(2) Certain acts which Ukraine had argued were CERD violations had taken place before the 2014 Crimean referendum, and therefore raised an issue of jurisdiction *ratione temporis*. The Court had to establish that the acts of which Ukraine complained could fall within the provisions of Article 1 of CERD, as well as whether the right to education under Article 5 guaranteed the right to be educated in one’s own native language. The Court’s reasoning on the alternative or cumulative character of the procedural preconditions under Article 22 of CERD was not convincing (paras. 8-13).

The text of the judgment and separate opinions and declarations is set out as shown on the following page.

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[565] 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.

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

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- (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. (*ICJ Reports 2017*, pp. 140-1, 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