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Terrorism — Treaties — International Convention for the Suppression of the Financing of Terrorism, 1999 — Whether Court having prima facie jurisdiction under ICSFT — Article 18 of ICSFT — Obligation to cooperate to prevent terrorism financing — Whether Ukraine proving that alleged acts constituting breach of Article 18 of ICSFT — Whether provisional measures to be ordered

Human rights — Treaties — International Convention on the Elimination of All Forms of Racial Discrimination, 1965 — Whether Court having prima facie jurisdiction under CERD — Articles 2-5 of CERD — Right to education — Whether restrictions on Ukrainian-language education plausibly breaching right to education — Freedom of association — Whether banning of *Mejlis* plausibly breaching freedom of association — Whether provisional measures to be ordered

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 DISCRIMINATION¹

¹ Counsel for the parties are listed in para. 13 of the Order.

(UKRAINE *v.* RUSSIAN FEDERATION)

International Court of Justice

Order on Provisional Measures. 19 April 2017

(Abraham, *President*; Yusuf, *Vice-President*; Owada, Tomka, Bennouna, Cañado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Robinson and Crawford, *Judges*; Pocar and Skotnikov, *Judges ad hoc*)

SUMMARY:² *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 founded the Court’s jurisdiction on Article 24(1) of the International Convention for the Suppression of the Financing of Terrorism, 1999 (“the ICSFT”),³ and on Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination, 1965 (“CERD”).⁴ Ukraine also filed a request for provisional measures in accordance with Article 41 of the Court’s Statute.⁵

Concerning *prima facie* jurisdiction, Ukraine argued that a dispute existed between the Parties. According to Ukraine, since 2014 the Russian Federation had been supplying arms to various armed groups, including the Donetsk People’s Republic and the Luhansk People’s Republic. Ukraine contended that such arms were used to commit terrorist acts within the meaning of Article 2 of the ICSFT,⁶ and that arms could fall within the definition of “funds” under the ICSFT. The Russian Federation argued that there was *prima facie* no dispute between the Parties on the interpretation or application of the ICSFT. The Russian Federation contended that the acts alleged by Ukraine could not fall within the meaning of terrorist acts under the ICSFT, and that the ICSFT did not cover matters of State responsibility.

Ukraine argued that since 2014, the Russian Federation had implemented a campaign of cultural erasure with respect to the Ukrainian and Crimean Tatar communities, which fell within the scope of CERD. The Russian

² Prepared by Dr M. Lando.

³ For the text of Article 24(1) of the ICSFT, see para. 20 of the Order.

⁴ For the text of Article 22 of CERD, see para. 21 of the Order.

⁵ Article 41 of the Court’s Statute provided that: “1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.

2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.”

The provisional measures requested by Ukraine are listed in paras. 6, 7 and 14 of the Order.

⁶ For the text of the relevant parts of Article 2 of the ICSFT, see para. 73 of the Order.

Federation argued that Ukraine had failed to show that the acts which it had alleged constituted violations of CERD, even on a prima facie level. The Russian Federation also disputed the veracity of Ukraine's account of the activities which had taken place in Crimea since 2014.

Ukraine argued that the procedural preconditions to the Court's jurisdiction had been satisfied under both the ICSFT and CERD. The Russian Federation contended that neither the obligation to negotiate under the ICSFT, nor the procedural preconditions under CERD, had been satisfied.

Ukraine sought to protect its rights arising under Article 18 of the ICSFT⁷ on inter-State cooperation in preventing the financing of terrorism. Ukraine argued that it was more than plausible that the Russian Federation had engaged in activities prohibited under the ICSFT, and that a state of armed conflict did not prevent the application of the ICSFT. The Russian Federation contended that Ukraine's right under Article 18 of the ICSFT was subject to the acts alleged by Ukraine being characterized as terrorist acts under Article 2 of the ICSFT. The Russian Federation stated that the acts alleged by Ukraine could not fall within that provision, and, as a result, its rights arising under Article 18 of the ICSFT were not plausible.

Ukraine also sought to protect its rights arising under Articles 2-5 of CERD,⁸ which it alleged had been plausibly breached by the Russian Federation's racially discriminatory activities in Crimea. The Russian Federation replied that Ukraine had not demonstrated that discriminatory measures had been adopted and targeted at the Ukrainian and Crimean Tatar communities. Therefore, Ukraine's rights under CERD were not plausible.

Ukraine contended that without provisional measures, the Ukrainian and Crimean Tatar communities in Crimea would be severely weakened or possibly destroyed. According to Ukraine, this potential prejudice would be irreparable, and there was urgency in the circumstances. The Russian Federation argued that there was no risk of irreparable prejudice to the rights of Ukraine, since the Russian Federation itself had taken a number of measures in support of the Ukrainian and Crimean Tatar communities in Crimea.

Held:—(A) (by thirteen votes to three, Judge Tomka, Judge Xue and Judge ad hoc Skotnikov dissenting) The Russian Federation had to refrain from maintaining or imposing limitations on the ability of the Crimean Tatar community to conserve its representative institutions, including the *Mejlis*.

(B) (unanimously) The Russian Federation had to ensure the availability of education in the Ukrainian language in Crimea.

⁷ For the text of Article 18 of the ICSFT, see para. 72 of the Order.

⁸ For the text of Articles 2 and 5 of CERD, see para. 80 of the Order. Although Ukraine asserted rights under Articles 2, 3, 4, 5 and 6 of CERD, for the purposes of its Request for the indication of provisional measures, in order to identify the rights which it sought to protect pending a decision on the merits, Ukraine relied exclusively on Articles 2 and 5 of the Convention.

(1) (a) At this stage of the proceedings, the Court had to examine whether a dispute existed between the Parties and whether the dispute concerned the interpretation or application of the ICSFT or CERD (para. 23).

(b) In relation to the ICSFT, at least some of the allegations made by Ukraine appeared to be capable of falling within the scope *ratione materiae* of the ICSFT. Issues concerning the definition of “funds” and whether the financing of terrorism by the State itself fell within the scope of the ICSFT did not fall to be answered at this stage of the proceedings (paras. 24-30).

(c) Concerning CERD, the banning of the *Mejlis* and the alleged restrictions on cultural and educational rights in Crimea appeared to be capable of falling within the scope *ratione materiae* of CERD (paras. 31-8).

(d) Where a requirement to negotiate existed as a procedural precondition to the Court’s jurisdiction, such a precondition was met only if negotiations had failed, or had become futile or deadlocked. The subject matter of the negotiations had to relate to the subject matter of the dispute between the Parties. Issues under the ICSFT had been raised in bilateral contacts between the Parties, both by way of diplomatic notes and in person, and the Parties had also discussed the initiation of an arbitration prior to filing an application with the Court. Issues concerning the application of CERD in Crimea were raised in bilateral negotiations between the Parties. It was unnecessary to decide, at this stage of the proceedings, whether Article 22 of CERD also required the Parties to bring the matter to the attention of the CERD Committee prior to filing a case with the Court (paras. 43-60).

(e) The Court had *prima facie* jurisdiction both under the ICSFT and under CERD (para. 62).

(2) (a) Provisional measures could be indicated only if the rights claimed by the applicant State were at least plausible, and there had to be a link between the rights whose protection was sought and the provisional measures requested. Article 18 of the ICSFT had to be read in conjunction with Article 2 of the ICSFT. Since the obligations under Article 18 were premised on the acts identified in Article 2, a State party to the ICSFT could rely on Article 18 only if it was plausible that the acts alleged constituted offences under Article 2. Ukraine did not provide the Court with sufficient evidence to find that the elements under Article 2 of the ICSFT plausibly existed. The conditions for the indication of provisional measures under the ICSFT were not met (paras. 63-76).

(b) There was a correlation between the respect of individual rights under CERD, the obligations arising under CERD and the right of States to seek compliance therewith. The evidence submitted by Ukraine showed that the acts allegedly committed by the Russian Federation plausibly constituted acts of racial discrimination under CERD, especially in respect of the banning of the *Mejlis* and of educational rights in Crimea (paras. 81-3).

(c) The rights which Ukraine sought to protect under Articles 2 and 5 of CERD were linked to the provisional measures requested (para. 86).

(d) The Court was not called upon to make definitive findings on breaches of CERD at this stage of the proceedings. Certain rights invoked by Ukraine

under CERD were of such a nature that prejudice to them could be irreparable. Reports by the Office of the UN High Commissioner for Human Rights (“OHCHR”) indicated that no other Crimean Tatar NGO had the same degree of representativeness and legitimacy as the *Mejlis*. Reports by the OHCHR and by the Organization for Security and Cooperation in Europe showed that, *prima facie*, there had been restrictions on Ukrainian-language education in Crimea. Therefore, there was an imminent risk of irreparable prejudice to the rights invoked by Ukraine (paras. 90-8).

(3) (unanimously) Both Parties had to refrain from any action which could aggravate or extend the dispute between them, or make it more difficult to resolve. On the basis of the circumstances in the present case, it was necessary to indicate provisional measures to prevent the extension and aggravation of the dispute between the Parties. The Parties were reminded that Resolution 2202 (2015) of the UN Security Council endorsed the “Package of Measures for the Implementation of the Minsk Agreements”, which the Parties were expected to fully implement (paras. 103-4).

Separate Opinion of Judge Owada: (1) The rights claimed by Ukraine were plausible, but there was no real and imminent risk of irreparable prejudice to such rights. The requirement of plausibility found resonance in similar concepts in some domestic legal systems. While *prima facie* jurisdiction and plausibility concerned the scope of the legal framework in which the Court could exercise its power to indicate provisional measures, irreparable prejudice and urgency concerned the discretionary power of the Court in determining whether to indicate provisional measures. The former two requirements (*prima facie* jurisdiction and plausibility) carried considerable weight in order to avoid falling into a prejudgment of the merits of a case (paras. 1-9).

(2) The test of plausibility of the existence of the asserted rights did not have to be as high as the test of “*prima facie* case” of the existence of those rights. Plausibility meant that there was some arguable possibility that the asserted rights existed. A higher standard could prejudice the merits. The use of the word “plausible” showed that the Court intended to keep the test distinct from that for *prima facie* jurisdiction. The Court’s jurisprudence indicated that the plausibility standard was fairly low (paras. 10-20).

(3) The Court’s finding that a State party to the ICSFT could rely on Article 18 only if it were plausible that the alleged acts fell within the scope of Article 2 prejudged the merits. While it may have been true that Ukraine did not prove that requirements of intention, knowledge and purpose were satisfied, the Court should not have expected Ukraine to do so (paras. 23-4).

(4) In assessing irreparable prejudice, the Court might have taken into account the elements of intention, purpose and knowledge under Article 2 of the ICSFT. Since there was uncertainty as to the exact flow of financing and arms supply in and out of eastern Ukraine, there could have been no real and imminent risk of irreparable prejudice to the rights of Ukraine. Since Ukraine invoked the right to obtain cooperation from the Russian Federation to

prevent terrorism financing, such a right could not have been said to be irreparable at this stage of the proceedings (paras. 25-6).

Declaration of Judge Tomka: The Court's decision concerning the lifting of the banning of the *Mejlis* caused concerns, since it required the Russian Federation to alter the decision taken by its domestic judicial bodies without a full-scale enquiry by the Court into the underlying issues. Some rights under CERD were not unlimited. Whatever the legal basis for the exercise of jurisdiction in Crimea, the Russian Federation had to be able to take measures to ensure safety and public order in that region. Moreover, the requirement of urgency had not been demonstrated to exist in the circumstances. The provisional measure that the ban on the *Mejlis* had to be lifted was thus inappropriate (paras. 4-10).

Separate Opinion of Judge Cançado Trindade: (1) In the present case, the accounts of indiscriminate shelling and attacks on civilians were numerous. Such evidence showed the existence of irreparable damage and urgency in the circumstances. The Court should have focused its attention on the vulnerability of human beings. The Court used the term "plausibility" in a number of different meanings, which could create obstacles to the adoption of provisional measures (paras. 28-39).

(2) The autonomous legal regime of provisional measures was configured by the rights to be protected, the obligations emanating from an order on provisional measures, and the responsibility of non-complying States. The determination of breaches of provisional measures did not need to wait until the end of the proceedings on the merits, since obligations to respect provisional measures were additional to those ensuing from the judgment on the merits. If provisional measures were breached, the Court would be in the position to decide on appropriate reparation. International tribunals had an inherent power to supervise *motu proprio* compliance with provisional measures (paras. 74-81).

(3) In the circumstances of this case, the central test for the indication of provisional measures was not the test of "plausibility", but the test of "human vulnerability". In order to secure the protection of human beings in situations of great vulnerability, the Court had to go beyond the inter-State dimension. It was regrettable that the issue of human vulnerability was not addressed appropriately in the Court's order (paras. 85-8).

Separate Opinion of Judge Bhandari: (1) The Court should have indicated provisional measures in relation to the ICSFT. The documents submitted by the Parties showed that they had engaged in negotiations with a view to settling their dispute under the ICSFT. At this stage of the proceedings, it was improper for the Court to decide whether Ukraine's attempt to arbitrate was genuine, since Ukraine proposed to bring a case to an ad hoc chamber of the Court instead of arbitration. The Court correctly found that it had prima facie jurisdiction under the ICSFT (paras. 1-14).

(2) In order to satisfy the plausibility test, applicant States had to show that the rights invoked were not manifestly unfounded, the so-called *fumus non mali juris*. To decide whether terrorism financing by States fell within the scope of the ICSFT would have been improper at the provisional measures stage. The Court's finding that Ukraine's rights under the ICSFT were plausible was not justified based on the available evidence. Knowledge that funds were used to spread terror could have been inferred from a pattern of behaviour, which would have put individuals allegedly financing terrorism "on notice" regarding how the funds they had provided could have been used. The evidence before the Court was sufficient to show that funds had been provided with the intent or knowledge that they would be used to carry out terrorist activities within the meaning of Article 2 of the ICSFT. In assessing plausibility under the ICSFT, the Court could have discussed the evidence more closely. Ukraine had shown that the acts alleged by it plausibly fell within the scope of Article 2 of the ICSFT (paras. 16-37).

(3) It was not logical to say that a State had an obligation to cooperate to prevent terrorism financing, but not an obligation to prevent terrorism financing. The instability of the situation in eastern Ukraine justified a conclusion that there was urgency in the circumstances. The Minsk Package of Measures did not remove the risk of irreparable prejudice (paras. 40-4).

Declaration of Judge Crawford: No other body within Crimea was as representative of the Crimean Tatar population as the *Mejlis*. The evidence concerning the carrying out of unauthorized protest condoned by the *Mejlis* was not submitted to the Court. The ban on the *Mejlis* was criticized by several UN bodies. Although CERD did not prevent a State from regulating organizations representing an ethnic group, such decisions had to be carefully justified. The Court did not purport to question the decision of the Russian courts on banning the *Mejlis*, but nothing prevented the Court from making an order on a matter already examined by a domestic judicial body (paras. 4-9).

Separate Opinion of Judge ad hoc Pocar: (1) Provisional measures should have been indicated in relation to the ICSFT. It was plausible that the indiscriminate attacks alleged by Ukraine were intended to spread terror, and that persons who provided funds knew of their use for such attacks. The spread of terror had been regarded by international criminal jurisprudence as the only reasonable inference to be drawn from repeated indiscriminate attacks bearing no military advantage. The threshold for plausibility was met in this case (paras. 1-4).

(2) The Court had never clearly defined the standard of plausibility. The Court's decision in the present case would encourage States excessively to argue the merits, which begged the question as to the level of evidence required to

satisfy the plausibility test. Practice Direction XI directed States not to overburden the Court with material more appropriately examined at the merits phase. If too much evidence were submitted at the provisional measures stage, the Court could delay the indication of provisional measures (paras. 6-9).

(3) The Court should have clarified that it did not need, at this stage of the proceedings, to examine the applicability of the Montreal Convention, 1999 to the shooting-down of flight MH17 (para. 13).

Separate Opinion of Judge ad hoc Skotnikov: No rights mentioned under Article 5(c) of CERD could have been violated with respect to the *Mejlis*, since that provision did not apply to an organization claiming to represent an ethnic group as a self-government body. It was unclear whether freedom of association under Article 5(e) of CERD applied to an organization such as the *Mejlis*, which could also be seen not to be a “peaceful” organization within the meaning of that provision. The provisional measure on lifting the ban on the *Mejlis* prejudged the merits. The right to education and training under Article 5(e)(v) of CERD did not necessarily encompass a right to education in one’s own language. The requirements of irreparable prejudice and urgency were not met in respect of that right (paras. 2-3).

The following is the text of the Order of the Request for the Indication of Provisional Measures:

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[106] 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 of 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. With regard to the ICSFT, Ukraine presented the following claims in its Application:

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 Malaysian Airlines Flight MH17;
- [107] (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 Defense of the Russian Federation; Vladimir Zhirinovskiy, 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 cooperation 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 Malaysian 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;
- [108] (j) make full reparation for the shelling of civilians in Kramatorsk;
- (k) make full reparation for the bombing of civilians in Kharkiv; and