

CASE NOTE

***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 RUSSIA)***

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CONTENTS

I	Introduction.....	1
II	Background and Provisional Measures Sought	3
III	<i>Order on the Indication of Provisional Measures: General Remarks</i>	6
IV	<i>ICSFT</i>	7
	A Prima Facie Jurisdiction	7
	B Plausibility of Claims	10
	1 Duty to Prevent and Prohibition of State Financed Terrorism under <i>ICSFT</i>	11
	2 Plausibility of Terrorism Offences: War Crimes or Terrorism?	13
	3 Terrorism Suppression Regime v IHL	15
	4 More Guidance Needed for the Plausibility Test?	18
V	<i>CERD</i>	18
	A Prima Facie Jurisdiction	18
	B Plausibility of Claims	19
	C Risk of Irreparable Harm and Urgency	21
VI	Concluding Words	23

I INTRODUCTION

With the annexation of Crimea by Russia and escalation of the conflict in eastern Ukraine fuelled by Russia’s alleged support of the separatist groups, Ukraine is embroiled in a bitter standoff with its neighbour. In the absence of an openly declared war between the two countries, the ‘battlefield’ has moved to courtrooms of international courts, in which Ukraine attempts to reinstate its

rights.¹ Ukraine has on many occasions condemned Russia's aggression against it, however, bringing a case against Russia before the International Court of Justice ('ICJ') for waging an aggressive war and the unlawful use of force was not an option in the absence of Russia's acceptance of the compulsory jurisdiction of the Court.² Therefore, Ukraine's only avenue for bringing the case before the ICJ was to invoke a compromissory clause in a treaty ratified by both parties that provides for the possibility of judicial settlement in the ICJ.

On 17 January 2017, Ukraine submitted its lawsuit against Russia, alleging numerous violations of the *International Convention for the Suppression of the Financing of Terrorism* ('ICSFT') and the *International Convention on the Elimination of All Forms of Racial Discrimination* ('CERD').³ At first sight, the choice of the two *Conventions* seems rather peculiar, as the issues of terrorism financing and racial discrimination appear to be largely peripheral to the major issues at stake; that is, Russia's unlawful use of force in annexing Crimea and conducting the war by proxy in eastern Ukraine. However, Ukraine's hands were tied, as none of the treaties ratified by both countries provide for ICJ jurisdiction to examine its claims with respect to the unlawful use of force. Therefore, Ukraine followed in the footsteps of Georgia that had earlier brought action against Russia before the ICJ on the basis of the alleged breaches of *CERD* as a result of the Russia–Georgia military standoff in 2008 in Georgia's breakaway regions of Abkhazia and South Ossetia. This was despite the unlawful use of

¹ Ukraine filed four separate interstate applications against the Russian Federation to the European Court of Human Rights ('ECtHR') which are all pending before the Court: *Ukraine v Russian Federation* (ECtHR, No 20958/14, 13 March 2014); *Ukraine v Russian Federation (II)* (ECtHR, No 43800/14, 13 June 2014); *Ukraine v Russian Federation (III)* (ECtHR, No 49537/14, 09 July 2014) (struck off the list on 1 September 2015); *Ukraine v Russian Federation (IV)* (ECtHR, No 42410/15, 26 August 2015). The situation in Ukraine is currently under consideration of the International Criminal Court at the preliminary examination stage: see Iryna Marchuk, 'Ukraine and the International Criminal Court: Implications of the Ad Hoc Jurisdiction Acceptance and Beyond' (2016) 49 *Vanderbilt Journal of Transnational Law* 323. Ukraine also instituted the arbitration proceedings against the Russia Federation under *United Nations Convention on the Law of the Sea* seeking to enforce its maritime rights: *Dispute concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v Russian Federation)* (Permanent Court of Arbitration, Case No 2017-06, 16 September 2016).

² *Statute of the International Court of Justice* art 36.

³ International Court of Justice, 'Ukraine Institutes Proceedings against the Russian Federation and Requests the Court to Indicate Provisional Measures' (Unofficial Press Release, No 2017/2, 17 January 2017) <<http://www.icjciij.org/docket/files/166/19310.pdf>> ('ICJ Press Release'). See also 'Application Instituting Proceedings', *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 Russia) (Order)*, International Court of Justice, General List No 166, 16 January 2017 ('Application'); *International Convention for the Suppression of the Financing of Terrorism*, opened for signature on 9 December 1999, 2178 UNTS 197 (entered into force 10 April 2002); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969) ('CERD').

force being evidently at the heart of the dispute between the two countries.⁴ Similarly to Georgia's litigation strategy, Ukraine requested the Court to indicate provisional measures, with a view to protecting its rights under the two *Conventions* pending determination of the case on the merits.⁵

This case note examines a recent order on the indication of provisional measures delivered by the ICJ in the highly politicised case of *Ukraine v Russia*. It takes a closer look at the Court's assessment of the fulfilment of the necessary prerequisites for the indication of provisional measures, which Ukraine sought in order to protect its rights under *ICSFT* and *CERD* pending the determination of the case. The first two parts of the case note provide introductory and background information explaining the context, which gives rise to Ukraine's claims under *CERD* and *ICSFT*, as well as providing an overview of the provisional measures sought by Ukraine. Part III provides general remarks on the ICJ order on the indication of provisional measures. Part IV examines the application of a three-pronged test for indication of provisional measures to Ukraine's claims under *ICSFT*. Particular attention is paid to the Court's finding on the lack of plausibility of Ukraine's claims under *ICSFT*, which stems from Ukraine's weak submissions on mens rea of the alleged offences. Further to this, a broader question on the interaction between the terrorism suppression regime and international humanitarian law ('IHL') that arose in the context of the proceedings will be discussed. This part also comments on the highly contested issue related to the scope of the duty to prevent under *ICSFT* and whether it implies the duty of a state to refrain from state sponsored terrorism. Part V will discuss the Court's findings with respect to the indication of provisional measures under *CERD*. The case note concludes by emphasising the significance of the case in light of its potential to clarify a number of important matters of international law with respect to the interpretation of *ICSFT* and *CERD*.

II BACKGROUND AND PROVISIONAL MEASURES SOUGHT

The refusal of the former President Yanukovich to sign the *European Union Association Agreement* in 2013, which was intended to signal Ukraine's pro-European choices in its foreign policy, led to widespread protests in the capital of Ukraine.⁶ The government used violent methods to crack down on protesters that resulted in the killing of around one hundred persons and the injury of

⁴ International Court of Justice, 'Georgia Institutes Proceedings against Russia for Violations of the *Convention on the Elimination of All Forms of Racial Discrimination*' (Unofficial Press Release, No 2008/23, 12 August 2008) <<http://www.icj-cij.org/files/case-related/140/14659.pdf>>, archived at <<https://perma.cc/FTE2-CBL4>>. See also Judge Crawford's comment in the *Marshall Islands* case on the interpretation of the existence of a dispute in *Georgia v Russian Federation*. Although Judge Crawford did not question the existence of a dispute between Georgia and Russia, however, he doubted whether the dispute concerned racial discrimination under *CERD* or whether it was being used as a 'device to bring a wider set of issues before the Court': *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom) (Preliminary Objections)* ICJ Rep, 6 [19] (Judge Crawford).

⁵ ICJ Press Release, above n 3. See also *Statute of the International Court of Justice* art 41; International Court of Justice, *Rules of Court* (adopted 14 April 1978) arts 73–5.

⁶ Iryna Marchuk, 'No Crimes Against Humanity During the Maydan Protests in Ukraine? Or the ICC Prosecutor's Flawed Interpretation of Crimes Against Humanity?' (2017) 35 *Boston University International Law Journal* 39.

hundreds.⁷ As the violence reached its apogee, the former beleaguered President Yanukovich fled Ukraine to neighbouring Russia. This had a catalysing effect on Russia's assertion of power in Crimea where the referendum on secession from Ukraine was held in the presence of Russia's troops. Following the declaration of independence, Crimea requested to be incorporated into the territory of the Russian Federation.⁸ However, its status under international law is disputed as it lacks international recognition, and the international community considers Crimea to be part of Ukraine.⁹ There are numerous reports on the human rights violations of non-Russian ethnic population at the territory of Crimea, in particular Crimean Tatars.¹⁰ The human rights situation has been invoked by Ukraine as a basis for its action before the ICJ, alleging numerous violations of *CERD* manifest in 'the deliberate campaign of cultural erasure' through 'a broad-based pattern of discriminatory acts' directed against non-Russian ethnic population.¹¹ With respect to *CERD*, Ukraine requested the Court to order provisional measures that will oblige the Russian Federation:

a. ... [to] refrain from any action which might aggravate or extend the dispute under *CERD* before the Court ... ; b. ... [to] refrain from any act of racial discrimination against persons, groups of persons, or institutions in the territory under its effective control, including the Crimean peninsula; c. ... [to] cease and desist from acts of political and cultural suppression against the Crimean Tatar people, including suspending the decree banning the Mejlis of the Crimean Tatar People ... ; d. ... [to] take all necessary steps to halt the disappearance of Crimean Tatar individuals and to promptly investigate those disappearances that have already occurred; and e. ... [to] cease and desist from acts of political and cultural suppression against the ethnic Ukrainian people in Crimea, including suspending

⁷ For an official source on the number of casualties see General Prosecutor of Ukraine, *Register of Proceedings on Crimes related to Interference with the Conduct of Peaceful Protest Actions that Took Place in Kyiv and Other Cities during the Period from November 2013 to February 2014* <<http://rrg.gp.gov.ua/>>, archived at <<https://perma.cc/33N7-XFFK>>.

⁸ *Constitutional Law N 6 ФКЗ, 'О принятии в Российскую Федерацию Республики Крым и образовании в составе Российской Федерации новых субъектов Республики Крым и города федерального значения Севастополя'* [Law on Admitting to the Russian Federation the Republic of Crimea and establishing within the Russian Federation New Constituent Entities the Republic of Crimea and the City of Federal Significance Sevastopol] (Russia) 21 March 2014.

⁹ *Territorial Integrity of Ukraine*, GA Res 68/262, UN GAOR, 68th sess, 80th plen mtg, Agenda Item 33(b), UN Doc A/RES/68/262 (1 April 2014); Parliamentary Assembly, 'Resolution 1990 (2014): Reconsideration on Substantive Grounds of the Previously Ratified Credentials of the Russian Delegation' (Report, Council of Europe, 10 April 2014).

¹⁰ Organization for Security and Cooperation in Europe, Office for Democratic Institutions and Human Rights and High Commissioner on National Minorities, *Report of the Human Rights Mission Assessment on Crimea (6–18 July 2015)*, 17 September 2015 ('OSCE, DIHR and HCNM Report'); Office of the United Nations High Commissioner for Human Rights, *Report on the Human Rights Situation in Ukraine 16 August to 15 November 2016* (8 December 2016) <http://www.ohchr.org/Documents/Countries/UA/UAReport16th_EN.pdf>, archived at <<https://perma.cc/X8N7-LWCX>> ('Report on Human Rights Situation in Ukraine').

¹¹ *Application*, above n 3, 2 [5].

restrictions on Ukrainian language education and respecting ethnic Ukrainian language and educational rights.¹²

In parallel to the escalating situation in Crimea, secessionist tendencies have emerged in eastern Ukraine that culminated in the declarations of independence by the Donetsk Peoples Republic ('DPR') and Luhansk Peoples Republic ('LPR'). This was followed by a military standoff between the Ukrainian armed forces and the pro-Russian separatist groups in eastern Ukraine. It is widely reported that Russia has been rendering continuous support to those groups in the form of financing, arms and ammunition, personnel and training.¹³ Despite Russia's denial of its role in steering the conflict, the international community has repeatedly condemned Russia's involvement and called upon its leaders to facilitate ceasefire and peaceful resolution of the conflict.¹⁴ The events in eastern Ukraine give rise to Ukraine's claims under *ICSFT* that alleges Russia's engagement in state sponsored terrorism and its failure to honour its obligations to cooperate in the prevention of the prohibited conduct under the *Convention*. Ukraine requested the Court to order provisional measures that will oblige the Russian Federation to:

a. ... refrain from any action which might aggravate or extend the dispute under *ICSFT* before the Court ... ; b. ... [to] exercise appropriate control over its border to prevent further acts of terrorism financing, including the supply of weapons from the territory of the Russian Federation to the territory of Ukraine; c. ... [to] halt and prevent all transfers from the territory of the Russian Federation of money, weapons, vehicles, equipment, training, or personnel to groups that have engaged in acts of terrorism against civilians in Ukraine or that the Russian Federation knows may in the future engage in acts of terrorism against civilians in Ukraine; ... [and] d. ... [to] take all measures at its disposal to ensure that any groups operating in Ukraine that have previously received transfers from the territory of the Russian Federation of money, weapons, vehicles, equipment,

¹² 'Request for the Indication of Provisional Measures of Protection Submitted by Ukraine', *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 Russia)*, International Court of Justice, General List No 166, 16 January 2017, 7 [24] ('Ukraine Request').

¹³ David M Herszenhorn and Peter Baker, 'Russia Steps Up Help for Rebels in Ukraine War', *New York Times* (online), 26 July 2014, <<https://www.nytimes.com/2014/07/26/world/europe/russian-artillery-fires-into-ukraine-kyiv-says.html>>, archived at <<https://perma.cc/UEK6-P8AQ>>; Thomas Grove and Warren Strobel, 'Special Report: Where Ukraine's Separatists Get Their Weapons', *Reuters* (online), 29 July 2014 <<http://www.reuters.com/article/us-ukraine-crisis-arms-specialreport/special-report-where-ukraines-separatists-get-their-weapons-idUSKBN0FY0UA20140729>>, archived at <<https://perma.cc/F6F4-9Q98>>.

¹⁴ The *Minsk Protocol* ('Minsk I'), aimed at stopping the war in eastern Ukraine, was signed by the representatives of Ukraine, Russia, and the self-proclaimed Donetsk and Luhansk People's Republics on 5 September 2014. The negotiations were facilitated by the Organization for Security and Co-operation in Europe. After the collapse of *Minsk I*, another peace deal known as *Minsk II* was signed on 12 February 2015: see *Minsk I*, Ukraine–Russian Federation–Donetsk People's Republic–Lugansk People's Republic–Organization for the Security and Co-operation in Europe, signed 5 September 2014; *Minsk Protocol (II)*, Ukraine–Russian Federation–Donetsk People's Republic–Lugansk People's Republic–Organization for the Security and Co-operation in Europe, signed 12 February 2015.

training, or personnel will refrain from carrying out acts of terrorism against civilians in Ukraine.¹⁵

III ORDER ON THE INDICATION OF PROVISIONAL MEASURES: GENERAL REMARKS

The parties' polarised positions became evident during their heated exchange of arguments during the oral proceedings on the indication of provisional measures that took place between 6–9 March 2017 before the ICJ in The Hague. Following the oral proceedings, the Court delivered its highly anticipated decision in which it indicated provisional measures with respect to Ukraine's claims under *CERD* by requesting Russia '[to] [r]efrain from maintaining or imposing limitations on the ability of the Crimean Tatar community to conserve its representative institutions, including the Mejlis' (by thirteen to three) and '[e]nsure the availability of education in the Ukrainian language' by a unanimous vote.¹⁶ In addition to those specific measures aimed at preserving specific rights under *CERD*, the Court chose to indicate an additional measure of general nature, with the view of ensuring the non-aggravation of the dispute between the parties.¹⁷

Although the Court did not indicate provisional measures with respect to Ukraine's claims under *ICSFT*, it spoke of its expectation for the parties, 'through individual and joint efforts, to work for the full implementation of [the Minsk Agreements] in order to achieve a peaceful settlement of the conflict in the eastern regions of Ukraine'.¹⁸ As argued elsewhere, this seems to be a compromise solution when the majority — although having dismissed the plausibility of claims under *ICSFT* and therefore having chosen not to indicate provisional measures with respect to Ukraine's claims under the *Convention* — highlighted the seriousness of the ongoing fighting in eastern Ukraine and encouraged the parties to revive the *Minsk Protocols* that have been violated countless times.¹⁹ The judges also emphasised the gravity of the conflict in eastern Ukraine, characterising it by the extensive fighting that has claimed many civilian lives.²⁰ Such losses also include those who were killed when the ill-fated MH17 passenger plane was shot down over the territory of eastern Ukraine.²¹ While acknowledging the complexity of the conflict, the judges however made it

¹⁵ *Ukraine Request*, International Court of Justice, General List No 166, 16 January 2017, 6–7 [23].

¹⁶ *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) (Order)* (International Court of Justice, General List No 166, 19 April 2017) 35 [106] ('*Ukraine v Russia Order*') (emphasis omitted).

¹⁷ *Ibid* 34 [103], 35 [106].

¹⁸ *Ibid* 34 [104].

¹⁹ See Iryna Marchuk, 'Ukraine's Dashed High Hopes: Predictable and Sober Decision of the ICJ on Indication of Provisional Measures in *Ukraine v Russia*' on *EJIL: Talk!* (24 April 2017) <<https://www.ejiltalk.org/ukraines-dashed-high-hopes-predictable-and-sober-decision-of-the-icj-on-indication-of-provisional-measures-in-ukraine-v-russia/>>, archived at <<https://perma.cc/29BX-ZPJT>>.

²⁰ *Ukraine v Russia Order* (International Court of Justice, General List No 166, 19 April 2017) 10 [16].

²¹ *Ibid*.

clear that the scope of their judicial inquiry was solely limited to the claims under the two *Conventions*.²²

In deciding whether to indicate provisional measures, the judges are guided by a well-established three-pronged test: (1) the existence of prima facie jurisdiction;²³ (2) a link between the rights protected and the provisional measures sought (the test of plausibility of the existence of the asserted rights);²⁴ and (3) the risk of irreparable prejudice and urgency.²⁵

While the judges found that all the prerequisites for the indication of provisional measures had been satisfied with respect to *CERD*,²⁶ they dismissed the plausibility of the existence of the asserted rights by Ukraine under *ICSFT*, which resulted in the denial of provisional measures in relation to this claim.²⁷ The majority's finding on the lack of the plausibility of Ukraine's claims under *ICSFT* prompted discussion in four separate opinions about the interpretation of the plausibility test in the present case and in the ICJ jurisprudence more generally.²⁸ However, it is important to bear in mind that the finding on the lack of the plausibility of claims under *ICSFT* does not preclude Ukraine from advancing its arguments on the violations of the *ICSFT* at a later stage of proceedings, since the Court established its prima facie jurisdiction with respect to some allegations made by Ukraine under *ICSFT*.²⁹

IV *ICSFT*

A *Prima Facie Jurisdiction*

In order to indicate provisional measures, the ICJ has to be satisfied on a prima facie basis that its jurisdiction is well founded. As Ukraine invokes art 24 of *ICSFT* as a jurisdictional basis for its claims, the Court had to examine whether that compromissory clause prima facie conferred upon it jurisdiction to rule on the merits of the case.³⁰ Article 24(1) of *ICSFT* 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

²² Ibid.

²³ *Immunities and Criminal Proceedings (Equatorial Guinea v France) (Order on the Request for the Indication of Provisional Measures)* (International Court of Justice, General List No 163, 7 December 2016) 8 [31] ('*Equatorial Guinea v France Order*'); *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal) (Order on the Request for the Indication of Provisional Measures)* [2009] ICJ Rep 2009, 147 [40] ('*Belgium v Senegal Order*').

²⁴ *Equatorial Guinea v France Order* (International Court of Justice, General List No 163, 7 December 2016) 17 [71]; *Belgium v Senegal Order* [2009] ICJ Rep 2009, 13 [57].

²⁵ *Equatorial Guinea v France Order* (International Court of Justice, General List No 163, 7 December 2016) 19 [82]; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation) (Provisional Measures)* [2008] ICJ Rep 2008, 353, 392–3 [128]–[129] ('*Georgia v Russia Order*').

²⁶ *Ukraine v Russia Order* (International Court of Justice, General List No 166, 19 April 2017) 33 [99].

²⁷ Ibid 26–7, [75]–[76].

²⁸ Ibid (Judges Owada, Bhandari and Cançado Trindade; Judge ad hoc Pocar).

²⁹ Ibid 14 [30].

³⁰ Ibid 10 [18].

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*.³¹

The exercise of the jurisdiction of the Court is conditional upon the existence of a dispute arising out of the interpretation or application of the *ICSFT*. Both parties fundamentally disagreed on the nature of events in eastern Ukraine and whether they give rise to the rights and responsibilities under *ICSFT*. Despite Ukraine's numerous alleged breaches of *ICSFT* ranging from Russia's failure to prevent the terrorism financing offences to its alleged active financing of such crimes, the Court found that only 'some of the allegations made by Ukraine ... appear to be capable of falling within the scope of the *ICSFT* *ratione materiae*'.³² However, at this preliminary stage, the Court did not feel obligated to outline what *specific* allegations appear to be capable of falling within the scope of the *ICSFT*.³³ In doing so, the Court avoided addressing a highly contested issue between the parties as to whether Ukraine's allegations relating to the prohibition of state sponsored terrorism could also be potentially covered by *ICSFT* and therefore, form the basis for the Court's jurisdiction. That said, it took note of Ukraine's argument on the prohibition of state sponsored terrorism under *ICSFT*, but did not find it necessary to make any pronouncements at this stage whether a state's obligation to prevent the terrorism financing offences implies an obligation on the part of a State not to engage in terrorism financing itself.³⁴

Apart from demonstrating the existence of a dispute, Ukraine had to demonstrate that the procedural preconditions set out in art 24 of *ICSFT* — which include the attempted pre-judicial settlement of the dispute through negotiations and arbitration — have been met. Ukraine argued that Russia had ignored central issues to the dispute and therefore, it could not have reasonably been expected 'to continue participating in fruitless negotiation sessions'.³⁵ In turn, Russia argued that Ukraine, by only pursuing a strategy to take Russia to the court, had not engaged in negotiations *bona fide*, and that Ukraine's representatives had unilaterally walked away from the negotiations when the parties were in the course of agreeing on yet another round of negotiations.³⁶ Despite different accounts of the attempted arbitration proceedings, the parties had engaged into negotiations but they had been unable to agree either on the arbitration setup or on the enforcement of a possible arbitral award.

³¹ *ICSFT* art 24(1).

³² *Ukraine v Russia Order* (International Court of Justice, General List No 166, 19 April 2017) 14 [30].

³³ *Ibid* 13–14 [29]–[31].

³⁴ *Ibid* 13 [29], 14 [31]. The question of the definition of 'funds' within the meaning of *ICSFT* was also left out by the judges and not addressed at the provisional measures stage.

³⁵ 'Verbatim Record 2017/1', *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v Russian Federation) (Provisional Measures)* International Court of Justice, General List No 166, 6 March 2017, 36.

³⁶ 'Verbatim Record 2017/2', *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v Russian Federation) (Provisional Measures)*, International Court of Justice, General List No 166, 7 March 2017, 47–9.

Of particular interest is that Ukraine suggested setting up an arbitral tribunal within the meaning of art 24 of *ICSFT* by way of creation of an ad hoc chamber of the ICJ.³⁷ In other words, Ukraine equates the possible settlement of the dispute by an ad hoc chamber of the ICJ with arbitration. In support of its position, Ukraine referred to the declaration of Judge Oda in the previous two cases before the ICJ, in which he posits that ‘an ad hoc chamber [formed under art 26 of the Statute] is essentially an arbitral tribunal’.³⁸ Judge Oda considers that the involvement of the parties to agree upon the composition of the Chamber ‘not only as to the number of the judges forming the chamber but also as to their names’ is what essentially transforms the dispute settlement mechanism by an ad hoc chamber to arbitration.³⁹ However, the reference Judge Oda’s statement may have been taken out of the context. In another piece, which he authored, Judge Oda argues that an ad hoc chamber of the ICJ ‘may in some measure be equated to an arbitral tribunal’.⁴⁰ Therefore, it appears that he draws a distinction between the two modes of dispute settlement by submitting ‘the most important difference [between an ad hoc chamber and an arbitration tribunal] is that a case submitted to an ad hoc Chamber is adjudged in the same way as proceedings before the full Court and is concluded with a judgment that has the same effect as one rendered by the full Court’.⁴¹

The former ICJ Judge Stephen Schwebel was even more vocal in drawing the distinction between the two modes of settlement, calling an ad hoc chamber as a ‘halfway house between adjudication and arbitration’.⁴² One of his arguments in support of such distinction is that the parties who agree upon the settlement by an ad hoc chamber ‘are not altogether free to determine the composition and rules of a Chamber’ when compared to arbitration proceedings.⁴³ Moreover, in his opinion, the difference between the two modes of settlement is also supported by the fact that an ad hoc chamber constitutes an ‘arm of the Court’ and its judgments are ‘considered as rendered by the Court’ pursuant to art 27 of the *Statute of the International Court of Justice*.⁴⁴ In the case of non-compliance with the judgment rendered by the ICJ, including that of an ad hoc chamber, a party may have recourse to the UNSC pursuant to art 94(2) of the *Charter of the United Nations* (‘*UN Charter*’). The *UN Charter* clearly does not provide for the

³⁷ Ibid 48; ‘Verbatim Record 2017/3’, *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 Russia) (Provisional Measures)* International Court of Justice, General List No 166, 8 March 2017, 32–3 (‘*Verbatim Record of Ukraine v Russia CR2017/3*’).

³⁸ *Ukraine v Russia CR2017/3*, International Court of Justice, General List No 166, 8 March 2017, 32–3.

³⁹ *Application for Revision of the Judgment of 11 September 1992 in the Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) (El Salvador v Honduras) (Order of 27 November 2002)* [2002] ICJ Rep 622–3 [5] (Judge Oda); see also *Frontier Dispute (Benin/Niger) (Order of 27 November 2002)* [2002] ICJ Rep 616 (Judge Oda).

⁴⁰ Shigeru Oda, ‘Further Thoughts on the Chambers Procedure of the International Court of Justice’ (1988) 82 *American Journal of International Law* 556, 559.

⁴¹ Ibid.

⁴² Stephen M Schwebel, ‘Ad Hoc Chambers of the International Court of Justice’ (1987) 81 *American Journal of International Law* 831, 854.

⁴³ Ibid.

⁴⁴ Ibid.

possibility of the enforcement of arbitral awards. As rightly pinpointed in the academic literature, the fundamental difference between an ad hoc chamber and an arbitration tribunal is that the former derives its authority from the Court as the United Nations' principal judicial organ and not from the parties.⁴⁵ In light of this, for the purposes of the present case, an important question to be answered is whether the required arbitration mechanism within the meaning of art 24 of *ICSFT* had been attempted at all by Ukraine, given its suggestion to institute an ad hoc chamber of the ICJ for the purposes of fulfilling the procedural prerequisites. While in its decision, the Court did not comment on whether Ukraine's insistence of setting up an arbitral tribunal by way of creation an ad hoc chamber of the ICJ could satisfy the procedural preconditions under *ICSFT*, the issue is bound to re-emerge at a later stage of proceedings.

B *Plausibility of Claims*

The second prerequisite for indication of provisional measures is that there should be a link between the provisional measures sought and the rights which are subject of the proceedings before the Court as to the merits of the case. The Court may only indicate provisional measures of the rights asserted by a party that are at least plausible. In the present case, the Court was not satisfied that the requirement of plausibility had been met.⁴⁶ The majority found that that the evidence put before the Court did not afford a sufficient basis to find it plausible that the required mens rea elements with respect to the terrorism financing offences, as well as underlying offences, were present.⁴⁷ As clarified by the Court, a state's obligation under art 18 to cooperate in the prevention of terrorism financing offences arises only if it is plausible that the acts constitute offences under art 2 of *ICSFT*.⁴⁸ To put it differently, in order to establish the breaches of substantive law obligations under *ICSFT*, the ICJ has to ascertain first whether the offences of terrorism financing, as defined in the *ICSFT*, have been committed.

In its application, Ukraine alleges that Russia breached its obligations under *ICSFT* by (1) actively financing terrorist acts;⁴⁹ (2) failing to cooperate in the prevention of terrorism financing offences;⁵⁰ and (3) failing to cooperate with Ukraine to investigate, identify and prevent terrorism financing offences committed by Russian officials, organisations and citizens.⁵¹ In support of its claims, Ukraine provides three specific instances of terrorism that allegedly stemmed from Russia's support and its failure to prevent: (1) shooting down of

⁴⁵ Malgosia Fitzmaurice, 'Environmental Protection and the International Court of Justice' in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Cambridge University Press, 1996) 293 307; see also Andreas Zimmermann, 'Ad Hoc Chambers of the International Court of Justice' (1989) 8 *Dickinson Journal of International Law* 1, 7 (note that Professor Zimmermann acts as Agent for the Russian Federation in the present case).

⁴⁶ *Ukraine v Russia Order* (International Court of Justice, General List No 166, 19 April 2017) 27 [76].

⁴⁷ *Ibid* 26 [75].

⁴⁸ *Ibid* 26 [74].

⁴⁹ *Application* (International Court of Justice, General List No 166, 16 January 2017) 36 [125].

⁵⁰ *Ibid* 37 [128].

⁵¹ *Ibid* 38 [129].

the passenger plane MH17;⁵² (2) shelling of civilians in Volnovakha, Mariupol and Kramatorsk;⁵³ (3) bombing of civilians in Ukrainian cities.⁵⁴

A major issue that arose in the present case concerns the interpretation of the scope of state obligations under *ICSFT*. In particular, whether the duty to prevent the terrorism financing offences implies the prohibition of state sponsored terrorism. Another point of disagreement was the distinction between terrorism as defined in art 2(1)(b) of *ICSFT* and indiscriminate attacks under IHL. A broader question is an interplay between the suppression terrorism regime and IHL, and whether obligations imposed upon states by these two distinct bodies of law are exclusive or coextensive.

1 *Duty to Prevent and Prohibition of State Financed Terrorism under ICSFT*

State sponsored terrorism is hardly a new phenomenon, however, states which render their support to terrorist groups often deny any involvement in funding terrorist activities, as they tend to provide such support in a covert manner.⁵⁵ The prohibition of state sponsored terrorism, although firmly entrenched in customary international law, is glaringly absent from the text of the growing body of the terrorism related conventions. In fact, they treat the state as an instrument through which terrorism committed by non-state terrorist groups can be contained by imposing obligations upon states party to criminalise terrorism offences, to prevent the terrorism offences, to cooperate in combatting terrorism, including the obligation to extradite or prosecute (*aut dedere aut judicare*).⁵⁶ The *ICSFT*, which is invoked as a jurisdictional basis in the present case, does not explicitly impose an obligation upon states party to refrain from rendering their support for terrorism. It only speaks of the obligation in the prevention of the terrorism financing offences, as well as the obligation to cooperate in order to investigate and prosecute those offences.⁵⁷ However, the obligation of states not to engage in the financing of the terrorism offences, albeit not explicitly mentioned, appears to be implied. This viewpoint is supported by the academic literature that discusses the potential application of the ICJ findings in *Bosnia and Herzegovina v Serbia and Montenegro* ('*Bosnian Genocide Case*') to the interpretation of state obligations set out in the *Terrorism Suppression Conventions*, including *ICSFT*.⁵⁸

In *Bosnian Genocide Case*, the Court grappled with the question as to whether, in the absence of an express reference prohibiting states from committing genocide under the *Convention on the Prevention and Punishment of*

⁵² Ibid 13 [49], 16 [57].

⁵³ Ibid 17 [58]–[59], 20 [68].

⁵⁴ Ibid 21 [69], 22 [73].

⁵⁵ For a brief overview on state financed terrorism in international law, see Ilias Bantekas, 'The International Law of Terrorist Financing' (2003) 97 *American Journal of International Law* 315, 316–17.

⁵⁶ Kimberley N Trapp, *State Responsibility for International Terrorism* (Oxford University Press, 2011) 266.

⁵⁷ *ICSFT* art 18.

⁵⁸ Trapp, above n 56, 156; see also Vincent-Joël Proulx, "'Terrorism' at the World Court: *Ukraine v Russia* as an Opportunity for Greater Guidance on Relevant Obligations?" on *EJIL: Talk!* (17 April 2017) <<https://www.ejiltalk.org/terrorism-at-the-world-court-ukraine-v-russia-as-an-opportunity-for-greater-guidance-on-relevant-obligations/>>, archived at <<https://perma.cc/TQV6-KRFD>>.

the *Crime of Genocide* ('*Genocide Convention*'), such obligation could nevertheless be inferred from the expressly provided duty to prevent genocide under *Genocide Convention*.⁵⁹ Consequently, it found that an obligation not to commit genocide could be inferred from the teleological reading of the *Genocide Convention*, as states party in agreeing to categorise genocide as a crime under international law must undertake an obligation not to commit genocide.⁶⁰ Further to this, the ICJ found that such obligation follows from the expressly stated obligation to prevent the commission of genocide, which requires the states party 'to prevent persons or groups not directly under their authority from committing an act of genocide'.⁶¹ One could hardly disagree with the Court's finding that it would be 'paradoxical' to assume that states were only under an obligation to prevent, but 'were not forbidden to commit such acts through their own organs, or persons over whom they have such firm control' and whose conduct is attributable to the state concerned under international law.⁶² When interpreting the duty to prevent under the *Genocide Convention*, the Court emphasised that it did not 'purport to establish a general jurisprudence to all cases where a treaty instrument includes an obligation for states to prevent certain acts'.⁶³ Although one can fully understand the ICJ's cautious approach in that regard, one cannot rule out that general findings with respect to the duty to prevent in *Bosnian Genocide Case* may also apply to the interpretation of an obligation to prevent under *ICSFT*. It is logical to assume that the obligation to prevent the terrorism financing offences should imply the prohibition of state sponsorship of terrorism. In fact, this broad teleological reading of *ICSFT* was advanced by Ukraine where it referred to *Bosnian Genocide Case* in support of its argument on the implicit prohibition of state-sponsored terrorism was implied.⁶⁴ Should the Court construe the duty to prevent under *ICSFT* in the same fashion as it had done in *Bosnian Genocide Case*, this would have far reaching implications for the development of international law and bring much needed clarity to the law of state responsibility for terrorism by upholding that states could be held liable for state sponsorship of terrorism. As argued in the academic circles, any other interpretation of the duty to prevent under *ICSFT* would be 'short sighted' and divorced from a broader text, in which counter terrorism measures have been adopted in the post-9/11 climate.⁶⁵ Any possible findings of the Court with respect to the interpretation of the content of state obligations under *ICSFT*, including the prohibition of state-sponsored terrorism, will be a welcome

⁵⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* [2007] ICJ Rep 43 ('*Bosnian Genocide Case*') 113 [166]; see *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) art I.

⁶⁰ *Bosnian Genocide Case* [2007] ICJ Rep 43, 113 [166].

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ *Ibid* 220 [429].

⁶⁴ 'Verbatim Record 2017/1', *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v Russian Federation) (Provisional Measures)*, International Court of Justice, General List No 166, 6 March 2017; *Bosnian Genocide Case* [2007] ICJ Rep 43, 113 [166].

⁶⁵ Proulx, above n 58, 3.

addition to the advancement of international law dealing with state responsibility for terrorism.

2 *Plausibility of Terrorism Offences: War Crimes or Terrorism?*

As stated above, another point of contention was the legal qualification of specific acts that Ukraine qualified as terrorist, for which Russia allegedly provided support. Given that the vast majority of Ukraine's claims relate to an armed conflict in eastern Ukraine, a question arose as to whether the specific incidents of shelling of civilians in eastern Ukraine constituted the acts of terrorism (primary offence) within the meaning of art 2(1)(b) of *ICSFT* or indiscriminate attacks against the civilian population. Article 2(1) of *ICSFT* defines what constitutes an act of terrorism (primary offence): (1) '[a]n act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex';⁶⁶ and (2) '[a]ny other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act'.⁶⁷ For the purposes of establishing the offence of terrorism financing under *ICSFT*, it is necessary to prove that a person who provides or collects funds entertains the necessary mens rea; that is, the intention or knowledge that the funds will be used, in whole or in part, to carry out an act of terrorism proscribed in one of the terrorism 'sectoral' conventions or falling within the residual category (committed during an armed conflict).

Ukraine argued that the acts of shelling were intentional attacks against the civilian population, which were accompanied by the requisite specific intent to spread terror among the civilian population for political gains, and therefore constituted the acts of terrorism in an armed conflict within the meaning of art 2(1) of *ICSFT*.⁶⁸ Russia maintained that the acts alleged by Ukraine committed in an ongoing armed conflict 'are not correctly — or even to the standard of reasonable possibility — characterized as terrorist acts' within art 2(1) of *ICSFT*.⁶⁹ In Russia's view, Ukraine 'conflated the two legally distinct concepts of indiscriminate attacks and terrorism'.⁷⁰ In support of its position, Russia referred to numerous reports of international organisations that condemned indiscriminate shelling in eastern Ukraine as a flagrant violation of IHL.⁷¹ As none of those reports produced by international organisations spoke of terrorism but of indiscriminate attacks only in connection with the acts of shelling, Russia

⁶⁶ *ICSFT* art 2(1)(a).

⁶⁷ *Ibid* art 2(1)(b).

⁶⁸ 'Verbatim Record 2017/1', *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v Russian Federation) (Provisional Measures)*, International Court of Justice, General List No 166, 6 March 2017, 41.

⁶⁹ 'Verbatim Record 2017/2', *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v Russian Federation) (Provisional Measures)*, International Court of Justice, General List No 166, 7 March 2017, 25.

⁷⁰ *Ibid*.

⁷¹ *Ibid* 28–9.

argued that Ukraine had no case that those acts of shelling could plausibly constitute acts of terrorism. The crux of Russia's argument is that indiscriminate attacks were directed at military objects that entailed *incidental* (rather than intentional) loss of civilian lives in violation of the IHL principles of distinction, proportionality and precaution.⁷² In other words, Russia suggests that in the absence of the required intent to target civilians that could satisfy the stringent requirement of art 2(1)(b), indiscriminate attacks are a matter to be exclusively dealt with by IHL. Kimberley Trapp took issue with Russia's 'logic', pointing to the International Criminal Tribunal for the Former Yugoslavia ('ICTY') jurisprudence that recognised that indiscriminate attacks may be tantamount to direct attacks against civilians.⁷³ As explicated in ICTY case law, 'attacks which employ certain means of combat which cannot discriminate between civilians and civilian objects and military objectives are tantamount to direct targeting of civilians'.⁷⁴ Hence, indiscriminate shelling may potentially fall under the acts of terrorism within the meaning of art 2(1) if the means of warfare employed are tantamount to direct targeting of civilians, as well as the acts were carried out with a specific intent 'to intimidate a population, or to compel a government or an international organisation to do or to abstain from doing any act'.⁷⁵ The possible characterisation of the same conduct under IHL and the suppression of terrorism regime also appears to be supported by the recent reasoning of the European Court of Justice. In this particular case, four claimants argued that the freezing of their assets was unlawful on account of the designation of the Liberation Tigers of Tamil Eelam ('LTTE') as a terrorist organisation. The LTTE was characterised as a non-state party engaged in a non-international armed conflict in Sri Lanka whose activities were solely governed by IHL rather than the terrorism suppression framework.⁷⁶ However, the Court acknowledged the possible parallel application of both regimes, concluding that 'actions by armed forces during periods of armed conflict, within the meaning of

⁷² Ibid 31.

⁷³ Kimberley Trapp, 'Ukraine v Russia (Provisional Measures): State "Terrorism" and IHL' on *EJIL: Talk!* (2 May 2017) <<https://www.ejiltalk.org/ukraine-v-russia-provisional-measures-state-terrorism-and-ihl/>>, archived at <<https://perma.cc/WG4B-GB8F>>.

⁷⁴ *Prosecutor v Galić (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-98-29-A, 30 November 2006) [132] ('*Galić Appeal Judgement*'), quoting *Prosecutor v Galić (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-98-29-T, 5 December 2003) [56] n 101.

⁷⁵ The mens rea standard required for the crime of terrorism committed in the context of an armed conflict under art 2(1)(b) of *ICSFT* differs from the mens rea standard required for a war crime of 'acts or threats of violence the primary purpose of which is to spread terror among the civilian population' under art 51(2) of *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)* and art 13(2) of *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*. The definition of the latter permits the existence of other purposes behind the acts or threats of violence, in addition to spreading fear among the civilian population: see *Galić Appeal Judgement* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-98-29-A, 30 November 2006) [104] (emphasis added).

⁷⁶ *A v Minister van Buitenlandse Zaken* (Court of Justice of the European Communities, C-158/14, 14 March 2017) [45].

international humanitarian law, may constitute “terrorist acts” for the purpose of EU law on combatting terrorism.⁷⁷

Ukraine’s failure to convince the Court of the plausibility of its claims under *ICSFT* is largely due to its weak and poorly articulated submissions on mens rea with respect to the underlying offences and terrorism financing offences. In that regard, Ukraine’s major litigation mistake was to take it for granted that the specific terrorist attacks committed in eastern Ukraine satisfied *dolus specialis*, as they ‘would naturally intimidate Ukrainian civilians, and they arose in the context of a group that was seeking political concessions from their Government’.⁷⁸ Although Ukraine had an opportunity to address the question of mens rea in a much more comprehensive manner on rebuttal, it did little to rectify the situation. Instead, it made general remarks on the absence of a commonly agreed definition of intent in the jurisprudence of international courts and tribunals,⁷⁹ and submitted that *dolus specialis* in art 2(1)(b) may be ‘inferred from the act’s nature or context’.⁸⁰ Little time was spent on rebuttal to demonstrate Russia’s knowledge with respect to financing of the alleged terrorism offences in eastern Ukraine. Ukraine simply reiterated that Russia ‘knew the types of activities the DPR and similar groups would engage in with the support being provided’.⁸¹ The evidence adduced by Ukraine with respect to the mens rea of the alleged underlying offences and terrorism financing offences was also of somewhat poor quality. It is unclear why Ukraine chose to rely solely on the reports of international organisations in support of its claims, while it did not furnish the Court with more robust evidence (that is, decisions of national courts, prosecution acts of indictment and so forth) related to the terrorism and terrorism financing offences.⁸²

3 *Terrorism Suppression Regime v IHL*

However, the disagreement between the parties is not simply about the legal qualification of the underlying offences Ukraine qualifies as ‘terrorist’. It goes far beyond that, as a broader question at stake is an interplay between the terrorism suppression regime and IHL. The distinction between IHL and the terrorism suppression regime has become increasingly ‘blurred’ in the aftermath of 9/11 attacks, which had a catalysing impact on the proliferation of counter

⁷⁷ Ibid [97].

⁷⁸ ‘Verbatim Record 2017/3’, *Ukraine v Russia*, International Court of Justice, General List No 166, 8 March 2017, 40–1 (emphasis in original).

⁷⁹ Ibid 38–9.

⁸⁰ Ibid 40.

⁸¹ Ibid 43–4.

⁸² The General Prosecutor’s Office of Ukraine earlier issued statements on the alleged involvement of Russian citizens in the terrorism and terrorism financing offences, which were confirmed to be subject to investigation by the Ukrainian prosecutorial units at the time of issuance of the press release. See Prosecutor General’s Office of Ukraine, ‘Actions of Senior Russian Officials Rendering Support to the Unlawful Armed Groups in Ukraine Signal Support For International Terrorism’ (Press Statement, 2 June 2014), <http://www.gp.gov.ua/ua/news.html?_m=publications&_c=view&_t=rec&id=139321>, archived at <<https://perma.cc/48RM-FDKG>>.

terrorism measures.⁸³ The 9/11 aftershock waves prompted the Ad Hoc Committee, which was earlier established by the UN General Assembly to draft a comprehensive terrorism convention,⁸⁴ to intensify its efforts in consolidating the legal framework governing terrorism. One of the major obstacles in the drafting process was the applicability of the *Draft Convention* to armed conflicts.⁸⁵ The Coordinator's proposal was to protect the integrity of IHL by including an exclusion clause in the *Draft Convention*. The clause was modelled upon the existing exclusion clauses in the *International Convention for the Suppression of Terrorist Bombings* ('1997 Terrorist Bombings Convention') and the *International Convention for the Suppression of Acts of Nuclear Terrorism* ('2005 Nuclear Terrorism Convention') that exclude 'the activities of armed forces during an armed conflict', as well as 'the activities undertaken by military forces of a State in the exercise of their official duties' from the scope of the two *Conventions*, 'inasmuch as they governed by other rules of international law'.⁸⁶ The Coordinator's proposal was aimed at minimising any possible overlaps between the terrorism suppression regime and IHL.⁸⁷ Another draft put forward by the Organization of Islamic Cooperation was more accommodating with respect to the inclusion of state terrorism, as it only suggested excluding state military conduct from the scope of the *Draft Convention* only when it was in conformity with international law.⁸⁸

The *ICSFT*, which forms the basis for the ICJ jurisdiction, does not contain an exclusion clause, akin to the ones in the *1997 Terrorist Bombings Convention* and the *2005 Nuclear Terrorism Convention*, which suggests a possible parallel application of *ICSFT* during an armed conflict. This also appears to be supported by the wording of art 2(1), which provides a definition of an underlying offence of terrorism and proscribes the acts of terrorism during an armed conflict. Article 21 of *ICSFT* contains a standard 'without prejudice clause' that 'nothing in this

⁸³ Ben Saul, 'Terrorism and International Humanitarian Law' in Ben Saul (ed), *Research Handbook on International Law and Terrorism* (Edward Elgar, 2014) 208, 230–1. As rightly noted by Saul, many states have enacted far reaching terrorism legislation by criminalising acts that are not prohibited by IHL, as well as delegitimising non-state groups, which are parties to an armed conflict, by labelling them as terrorist groups.

⁸⁴ See generally *Measures to Eliminate International Terrorism*, GA Res 51/210, UN GAOR, 51st sess, Agenda Item 151, UN Doc A/RES/51/210 (16 January 1997) establishing the Ad Hoc Committee; see also *Measures to Eliminate International Terrorism*, GA Res 54/110, UN GAOR, 54th sess, Agenda Item 160, UN Doc A/RES/54/110 (2 February 2000) emphasising upon the importance of the mandate of the Ad Hoc Committee in further developing a comprehensive legal framework dealing with terrorism.

⁸⁵ See also Ben Saul, *Defining Terrorism in International Law* (Oxford University Press, 2006) 186–90.

⁸⁶ *International Convention for the Suppression of Terrorist Bombings*, opened for signature 12 January 1998, 2149 UNTS 256 (entered into force 23 May 2001) art 19(2); *International Convention for the Suppression of Acts of Nuclear Terrorism*, opened for signature 14 September 2005, 2445 UNTS 89 (entered into force 7 July 2007) art 4(2).

⁸⁷ United Nations Ad Hoc Committee, *Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996*, UN GAOR, 68th sess, Supp No 37, UN Doc A/68/37, 8–12 April 2013, annex III ('*Informal Summary Prepared by the Chair On the Exchange of Views During the Plenary Debate and the Informal Consultations*') 22 [14].

⁸⁸ United Nations Ad Hoc Committee, *Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996*, UN GAOR, 57th sess, Supp No 37, UN Doc A/57/37, 28 January – 1 February 2002, annex IV ('*Texts Relating to Article 18 of the Draft Comprehensive Convention*') 17.

Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes of the *Charter of the UN*, international humanitarian law and other relevant conventions'. The provision is not an exclusion clause and should be read that the conduct, which is considered lawful under IHL, cannot be prohibited under *ICSFT*.⁸⁹

The discussion on the interplay between the suppression terrorism regime and IHL was picked up in academic circles, in particular as to whether any possible overlaps could be created if the Court were to accept Ukraine's argument on the implicit prohibition of state sponsored terrorism under *ICSFT*. In that case, as pointed out by Trapp, the prohibition of state-sponsored terrorism will possibly overlap with the duty of states to ensure respect for the *Geneva Conventions* laid down in the Common Article 1 of the *Geneva Conventions* ('CA1'), which imposes a negative obligation upon third states 'neither to encourage, nor aid or assist in violations of the *Conventions*'.⁹⁰ The same author suggests that that the Court 'might best serve the interests of international peace and security' if it were to recognise the coextensive application of the prohibition of supporting terrorism under *ICSFT* and the prohibition of supporting the breaches of IHL under CA1 of the *Geneva Conventions*.⁹¹ While Trapp's argument is premised on Russia allegedly being a third party to a non-international armed conflict in eastern Ukraine, what if we were to assume that Russia, by virtue of its exercise of overall control over the pro-Russian separatist groups in eastern Ukraine, is in fact a party to an international armed conflict itself?⁹² If this were the case, such scenario would entail the application of the rules of IHL relevant to an armed conflict of international character as *lex specialis*, with IHL matters falling outside the ambit of the ICJ due to its lack of jurisdiction.

⁸⁹ On the interpretation of art 21 of *ICSFT*, see exchange between Dapo Akande and Trapp in the comments section of *EJIL: Talk!* in response to Trapp, above n 73.

⁹⁰ *Ibid.*

⁹¹ Trapp, above n 73, citing International Committee of the Red Cross, *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field Commentary of 2016 Article 1: Respect for the Convention* (2016) <<https://ihl-databases.icrc.org/ihl/full/GCI-commentaryArt1>>.

⁹² In parallel to the ICJ proceedings, the International Criminal Court ('ICC') Prosecutor examines allegations that the Russian Federation has exercised 'overall control' over armed groups in eastern Ukraine and whether this entails the application of the rules of international humanitarian law relevant to an armed conflict of international character: see Office of the Prosecutor, 'Report on Preliminary Examination Activities' (Report, International Criminal Court, 2016) [170]. The 'overall control' test as defined in *Tadić* implies a situation when a state goes beyond mere financing and equipping of opposition groups and participates in the planning and supervision of military operations, thus qualifying an armed conflict for the status of an international armed conflict. The rationale behind introducing the test was to determine whether the conflict in Bosnia was international or non-international, rather than to deal with matters of state responsibility: see *Tadić v Prosecutor (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-A, 15 July 1999), [131], [137], [145]. The 'overall control' test differs from the 'effective control' test introduced by the ICJ in the *Nicaragua* case which was concerned with clarifying the matters of state responsibility, in particular the attributability of the action of *contras* to the United States: see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 1986, 14, 62–3 [110], 64–5 [115]. See also Antonio Cassese, 'The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18 *European Journal of International Law* 649.

4 *More Guidance Needed for the Plausibility Test?*

The finding of the majority with respect to the plausibility of claims sparked a lively discussion among the judges who appended separate opinions to the decision. Judge Pocar noted uncertainty regarding the interpretation of the plausibility standard at the provisional measures stage more generally, while arguing that the plausibility test required for indication of provisional measures had been positively met in the present case.⁹³ A similar conclusion was reached by Judge Owada who opined that the standard of plausibility should be fairly low at the provisional measures stage.⁹⁴ Judge Bhandari opines that the question of intent has to be addressed at the merits stage, whereas at this stage it must only be shown that individuals allegedly financing terrorism had at least knowledge that the funds might be used for carrying out acts in art 2 of *ICSFT*, which could be inferred from the pattern of behaviour.⁹⁵ Judge Cançado Trindade went as far as to dismiss the ‘plausibility of rights’ test and claimed that, in present circumstances, the decisive test should be that of human vulnerability.⁹⁶ Anne Peters notes that the combined reading of ‘vulnerability’ of the victims of terrorism and ‘plausibility’ in the present case could have led to ‘a more generous indication of a provisional order’ under *ICSFT*.⁹⁷ Whereas it is unlikely the plausibility test will be abandoned by the ICJ, the question on the required standard for application of the plausibility test at the provisional measures certainly merits further attention in the academic literature and the jurisprudence of the ICJ alike.

V *CERD*

A *Prima Facie Jurisdiction*

In relation to the claims under *CERD*, the Court concluded that the acts referred to by Ukraine, which included the banning of the Mejlis,⁹⁸ and the alleged restrictions of cultural and educational rights of Crimean Tatars and ethnic Ukrainians, are capable of falling within the scope of the Convention.⁹⁹ This is notwithstanding the fact that Ukraine alleged a broad spectrum of discriminatory practices targeting the Crimean Tatar and ethnic Ukrainian

⁹³ *Ukraine v Russia Order* (International Court of Justice, General List No 166, 19 April 2017) 2 [4], [6] (Judge ad hoc Pocar).

⁹⁴ *Ibid* 5 [20] (Judge Owada).

⁹⁵ *Ibid* 9–10 [22] (Judge Bhandari).

⁹⁶ *Ibid* 23 [85] (Judge Cançado Trindade).

⁹⁷ Anne Peters, “‘Vulnerability’ versus ‘Plausibility’: Righting or Wronging the Regime of Provisional Measures? Reflections on ICJ, *Ukraine v Russian Federation*, Order of 19 April 2017’ on *EJIL: Talk!* (5 May 2017) <<https://www.ejiltalk.org/vulnerability-versus-plausibility-righting-or-wronging-the-regime-of-provisional-measures-reflections-on-icj-ukraine-v-russian-federation-order-of-19-apr/>>, archived at <<https://perma.cc/9ZMT-WQW7>>.

⁹⁸ Mejlis is a representative body of the Crimean Tatar people, established with the view of restoring national and political rights of the Crimean Tatars who were forcefully deported from their homeland during the period of Stalin’s repressions in the Soviet Union: see generally Mejlis of the Crimean Tatar People, *General Information about Mejlis* <<http://qtm.org/en/general-information-about-mejlis>>, archived at <<https://perma.cc/HV7H-XBZ9>>.

⁹⁹ *Ukraine v Russia (Order)* (International Court of Justice, General List No 166, 19 April 2017) 16 [38].

communities in Crimea, which included far more serious allegations under *CERD* such as disappearance and murder, arbitrary searches and detention, media restrictions and harassment, and requested broader provisional measures under *CERD*.¹⁰⁰

Given the Court's conclusion that the issues pertinent to *CERD* had not appeared to be resolved by negotiations, the Court was satisfied that the procedural preconditions for the seisin of the Court, *prima facie*, have been met.¹⁰¹ Although negotiations were attempted, the parties do not seem to have communicated about the same issues which form basis for Ukraine's action before the ICJ, with Russia advancing seemingly irrelevant arguments on Ukraine's practice of discrimination of Crimean Tatars prior to the annexation of Crimea.¹⁰² At the next stage of proceedings, the ICJ judges — guided by the test introduced in *Georgia v Russian Federation* — will have to evaluate whether 'a genuine attempt' to engage in discussions, with a view to resolving the impasse, has been pursued by at least one of the disputing parties.¹⁰³ Also, as in *Georgia v Russian Federation*, the Court did not make any pronouncements whether the procedural preconditions of 'negotiations' and recourse to the 'procedures expressly provided for in *CERD*' are alternative or cumulative.¹⁰⁴ This matter is so far unresolved and will come up at a later stage of proceedings, although the plain textual reading of art 22 strongly suggests that these two preconditions are used in the alternative.

B *Plausibility of Claims*

The judges confirmed the plausibility of Ukraine's claims in arts 2 and 5 under *CERD* 'with regard to the ability of the Crimean Tatar community to conserve its representative institutions and with regard to the need to ensure the availability of Ukrainian-language education in schools in Crimea.'¹⁰⁵ However, they did not elaborate on Ukraine's more serious allegations that Russia pursues a campaign of 'cultural erasure' through imposing measures aimed at preventing the Crimean ethnic communities 'from mobilizing politically, harassing activists from those communities under the guise of combatting terrorism, suppressing the Crimean Tatar and ethnic Ukrainian broadcast and print media, and restricting

¹⁰⁰ *Ibid* 7 [7]; see also *Application* (International Court of Justice, General List No 166, 16 January 2017) 31–6 [103]–[123].

¹⁰¹ *Ukraine v Russia (Order)* (International Court of Justice, General List No 166, 19 April 2017, 21 [61].

¹⁰² Ministry of Foreign Affairs of the Russian Federation, *Comments by the Department of Information and Press of the Ministry of Foreign Affairs of the Russian Federation in Connection with the Proceedings Instituted Against the Russian Federation with the International Court of Justice by Ukraine*, 17 January 2017, <http://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2599587>, archived at <<https://perma.cc/T5Q6-534D>>; > ('*ICJ Russia's Comments*'); see also 'Verbatim Record 2017/2', *Ukraine v Russia* (International Court of Justice, General List No 166, 7 March 2017) 54–5.

¹⁰³ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russia) (Preliminary Objections)* [2011] ICJ Rep 70, [157].

¹⁰⁴ *Ukraine v Russia Order* (International Court of Justice, General List No 166, 19 April 2017) 21 [60].

¹⁰⁵ *Ibid* 30 [86].

educational opportunities and cultural expression'.¹⁰⁶ The ICJ imposed rather modest provisional measures under *CERD* in comparison to that requested by Ukraine.¹⁰⁷

As for specific violations alleged by Ukraine, the Court did not confirm the plausibility of Ukraine's claims at this preliminary stage with respect to the violation of the right to equal treatment before the tribunals and all other organs administering justice in art 5(a), which Ukraine claimed manifested itself in a wave of arbitrary searches and detentions of Crimean Tatars.¹⁰⁸ Similarly, the judges remained silent as to Ukraine's serious allegations of the violation of art 5(b) (the right to security of person and protection by the state against violence or bodily harm) that concern instigation, toleration and encouragement of disappearances and murder committed against the members of the Crimean Tatar community.¹⁰⁹ Likewise, the Court did not address Ukraine's claims that the ban imposed upon many prominent Crimean Tatar leaders to return to their homeland constituted the violation of 'the right to leave any country, including its own, and to return to one's country'.¹¹⁰ It also remained silent as to whether the restrictions imposed upon media organisations serving the Crimean Tatar and ethnic Ukrainian communities violated 'the right to freedom of opinion and expression' enshrined in art 5(d) of *CERD*.¹¹¹

Despite the fact that international organisations, such as the Office of the United Nations High Commissioner for Human Rights ('OHCHR') and the Organization for Security and Co-operation in Europe ('OSCE'), produced credible reports that document a broad spectrum of discriminatory practices directed against minority communities in Crimea, the judges did not ascertain the plausibility of Ukraine's claims with respect to those allegations and chose to focus exclusively on the banning of the Mejlis and denial of education in Ukrainian language. Among the human rights violations endured by the members of the minority communities in Crimea, the OSCE report specifically emphasises the violation of freedom of movement and residence of the members of the Crimean Tatar community, which manifests itself in the intimidation, expulsion, and incarceration of prominent leaders of the Mejlis or other community organisations.¹¹² It also speaks of the restrictions of media freedom and access to information encountered by the minority groups.¹¹³ Apart from the restrictions of access to education in Ukrainian language, the report also presents similar findings with respect to instruction in the Crimean Tatar language.¹¹⁴ The

¹⁰⁶ 'Verbatim Record 2017/1', *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v Russian Federation) (Provisional Measures)*, International Court of Justice, General List No 166, 6 March 2017, 56–7 [10].

¹⁰⁷ See above Part II.

¹⁰⁸ 'Verbatim Record 2017/1', *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v Russian Federation) (Provisional Measures)*, International Court of Justice, General List No 166, 6 March 2017, 57 [11].

¹⁰⁹ *Ibid.*

¹¹⁰ *CERD* art 5(d).

¹¹¹ *Ibid.*

¹¹² *OSCE, DIHR and HCNM Report*, above n 10, 7 [16].

¹¹³ *Ibid* 7 [17].

¹¹⁴ *Ibid* 8 [19].

OHCHR report explicitly calls upon the de facto authorities of Crimea and the Russian Federation to '[g]uarantee the human rights of all inhabitants of Crimea without discrimination'.¹¹⁵ Apart from calling upon Russia to allow Crimean Tatars to choose their self-governing institutions, the report also emphasised the need to uphold freedom of opinion and the necessity to release persons arrested for expressing their views on the status of Crimea.¹¹⁶

As is clear from the reports on the human rights situation in Crimea, the roots of the political and cultural suppression run much deeper than those violations recognised by the Court as Ukraine's plausible claims. Hence, it is surprising why the Court accepted the plausibility of Ukraine's claims only with respect to the banning of the Mejlis and restricted access to education, for which it indicated provisional measures, whereas it did not address the plausibility of Ukraine's allegations on numerous violations of other provisions of *CERD*.¹¹⁷

The two ICJ judges, namely Judge Tomka and Judge ad hoc Skotnikov, questioned the appropriateness of indicating the provisional measure that required Russia to refrain from limiting the ability of Crimean Tatars to conserve the Mejlis as its representative institution. Judge Tomka reproached the majority for its 'cavalier approach' in requiring Russia to reconsider the decision adopted by its highest judicial authority, the Supreme Court, and for that reason acting like a court of appeal on the decision of national courts.¹¹⁸ He found that it was not appropriate to reach any firm conclusion on the banning of the Mejlis at the provisional measures stage.¹¹⁹ Judge Skotnikov went as far as to argue that the banning of the Mejlis, absent any element of discrimination, does not fall within the scope of *CERD*. More specifically, he submits that art 5(c) of *CERD* is solely limited to the exercise of certain political rights and does not cover the right of Crimean Tatars to have its own representative institutions.¹²⁰ Likewise, he is not convinced that art 5(e) dealing, among others, with the right to peaceful assembly and association, is intended to cover organisations similarly to the Mejlis. He continues that the banning of the Mejlis cannot be considered to be discriminatory in nature within the meaning of *CERD* given the presence of around thirty Crimean Tatar organisations on the Crimean peninsula.¹²¹ He also emphasises that the decision of the Supreme Court of Crimea and, subsequently, the Supreme Court of Russia that banned the activities of the Mejlis bore no relation whatsoever to the ethnicity of its members, but was adopted on security grounds due to its involvement in 'extremist activities'.¹²²

C Risk of Irreparable Harm and Urgency

The third prerequisite for indicating provisional measures is the existence of the risk of irreparable harm to rights, which are sought to be protected, and

¹¹⁵ *Report on Human Rights Situation in Ukraine*, above n 10, 58 [225] (emphasis added).

¹¹⁶ *Ibid.*

¹¹⁷ See Part II.

¹¹⁸ *Ukraine v Russia (Order)* (International Court of Justice, General List No 166, 19 April 2017) 2 [4] (Judge Tomka).

¹¹⁹ *Ibid.*

¹²⁰ *Ibid* 1 [2] (Judge ad hoc Skotnikov).

¹²¹ *Ibid.*

¹²² *Ibid.*

urgency. The power of the Court to indicate provisional measures presupposes that ‘irreparable prejudice shall not be caused to rights which are the subject of a dispute in judicial proceedings’.¹²³ Further to this, the Court can exercise its power ‘only if there is urgency in the sense that there is a real risk that action prejudicial to the rights of either party might be taken before the Court has given its final decision’.¹²⁴ In the *Georgia v Russian Federation* case, the Court assessed the irreparable harm and urgency criteria with respect to the alleged violations of the rights in art 5 of *CERD* invoked by Georgia. As for the irreparable harm requirement, the ICJ found that the rights enshrined in art 5(b), (d) and (i) of *CERD* were ‘of such a nature that prejudice to them could be irreparable’.¹²⁵ The majority arrived at this conclusion by assessing the vulnerability of the ethnic Georgian population in the areas affected by the conflict and ongoing tensions, ultimately finding that this demonstrated the existence of an imminent risk that the rights under *CERD* might suffer irreparable prejudice.¹²⁶ However, the dissenting judges criticised the majority’s approach, as they considered that its interpretation of ‘irreparable harm’ suggested that ‘certain rights may automatically fulfil the irreparable harm criterion, without analysing the real facts on the ground or the actual threat against the said rights’.¹²⁷ The dissent does not do justice to the majority’s finding, since the latter did consider, albeit briefly, the volatility of the situation on the ground and the vulnerability of the ethnic Georgian population.

In the present case, when discussing the question of irreparable harm, the Court noted that certain rights enumerated in art 5(c), (d) and (e) of *CERD*, which were alleged to have been violated by Ukraine, were of ‘such a nature that prejudice to them is capable of causing irreparable harm’.¹²⁸ Similarly to the *Georgia v Russian Federation* case, the Court assessed the fulfilment of such criterion against the backdrop of the vulnerability of the affected population, having concluded that Crimean Tatars and Ukrainians remained vulnerable in Crimea.¹²⁹ In support of its findings the Court referred to the latest OHCHR reports — which found that Crimean Tatars through the ban on the Mejlis were denied to choose their representative institutions — in the absence of any other Crimean Tatar’ institutions with the same degree of representativeness and legitimacy as the Mejlis.¹³⁰ The judges also took note of the OHCHR and OSCE reports that speak of the restrictions imposed upon the Ukrainian language education in Crimean schools.¹³¹

The Court, however, did not shed much light on the interpretation of the urgency requirement in the present case, as it merely concluded that ‘there is an imminent risk that the acts [of Russian authorities in Crimea with respect to

¹²³ *Ukraine v Georgia (Order)* [2008] ICJ Rep 2008, 353, 392 [128] (original citation omitted).

¹²⁴ *Ibid* 392 [129] (original citations omitted).

¹²⁵ *Ibid* 396 [142].

¹²⁶ *Ibid*.

¹²⁷ *Ibid* 405 [21] (Vice President Al Khasawneh, Judges Ranjeva, Shi, Koroma, Tomka, Bennouna and Judge ad hoc Skotnikov).

¹²⁸ *Ukraine v Russia (Order)* (International Court of Justice, General List No 166, 19 April 2017) 33 [96].

¹²⁹ *Ibid*.

¹³⁰ *Ibid* 33 [97].

¹³¹ *Ibid*.

banning the Mejlis and restricting the use of Ukrainian language in Crimean schools] could lead to irreparable prejudice to the rights invoked by Ukraine'.¹³² Judge Tomka opines that the majority applied the urgency requirement in a 'rather 'loose' way', which he believes has not been shown to exist in the present case. More specifically, he submits that the absence of urgency with respect to provisional measures aimed at protecting the Mejlis as a representative institution is demonstrated by the presence of other organisations that appear to be in a position to advance the interests of Crimean Tatars, while the ICJ is adjudicating the case.¹³³ He also pointed to pending proceedings before the European Court of Human Rights where a case has been lodged alleging violations of the *European Convention on Human Rights*, stemming from the decision of the Russian Supreme Court that upheld the ban on the activities of the Mejlis.¹³⁴ With respect to the provisional measure requesting Russia to ensure the availability of education in Ukrainian language in Crimea, Judge Skotnikov casts doubt that the irreparable harm and urgency criteria have been met, however, he supported the measure given its 'general and non-controversial nature'.¹³⁵

VI CONCLUDING WORDS

As soon as the decision came out, Russian media declared the decision to be 'a political defeat' for Ukraine,¹³⁶ whereas Ukrainian media paints a more optimistic picture of its prospects before the ICJ.¹³⁷ Although Ukraine delivered a highly charged emotional appeal to the Court, highlighting its grievances over the loss of Crimea and escalation of fighting in eastern Ukraine, the judges adopted a predictably sober approach to Ukraine's claims, only having indicated provisional measures with respect to certain alleged violations of *CERD*. Ukraine's claims under *CERD* are likely to be heard on the merits, however, it is rather disappointing for Ukraine at this stage that the Court did not find sufficient evidence to recognise the plausibility of its more serious allegations under *CERD* and indicate specific provisional measures with respect to those alleged breaches of *CERD*.

As for *ICSFT*, it has been, yet again, proven that the attribution of conduct to a state when international or transnational crimes are involved is complicated by the question of intent. While it is doubtful that the ICJ will satisfy Ukraine's

¹³² Ibid 33 [98].

¹³³ *Ukraine v Russia (Order)* (International Court of Justice, General List No 166, 19 April 2017) 3 [8]–[9] (Judge Tomka).

¹³⁴ Ibid 3 [9].

¹³⁵ *Ukraine v Russia (Order)* (International Court of Justice, General List No 166, 19 April 2017) 2 [3] (Judge ad hoc Skotnikov).

¹³⁶ 'В Думе назвали политическим поражением Киева решение суда ООН по иску к РФ' [Russia's State Duma Calls the ICJ Decision Regarding the Lawsuit Against Russia a Political Defeat for Ukraine] *Ria Novosti* (online), 19 April 2017 <<https://ria.ru/politics/20170419/1492613088.html>>, archived at <<https://perma.cc/V9YZ-ZLDK>>.

¹³⁷ Сергій Сидоренко, 'Між рядками рішення Суду ООН: де виграла та де програла Україна' [Between the Lines of the ICJ Decision: Where Ukraine Won and Where It Lost] *Європейська правда* (online), 20 April 2017 <<http://www.eurointegration.com.ua/articles/2017/04/20/7064741/>>, archived at <<https://perma.cc/W7NQ-B2P8>>.

claims under *ICSFT*, notwithstanding its finding of prima facie jurisdiction, it is hoped that the Court will seize an opportunity to shed light on some important questions that arose out of the proceedings, in particular the content of state obligations under *ICSFT* as well as regime interaction between IHL and the suppression of terrorism legal framework. As Ukraine pursues parallel proceedings before the ICC and the ECtHR, it remains to be seen whether the findings of other courts could potentially influence the ICJ findings and open a judicial dialogue on the important matters of international law that require immediate attention.