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Press Release

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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)

The Court finds that it has jurisdiction to entertain the claims made by Ukraine and that the Application in relation to those claims is admissible

THE HAGUE, 8 November 2019. The International Court of Justice (ICJ), the principal judicial organ of the United Nations, has today delivered its Judgment on the preliminary objections raised by the Russian Federation in the case concerning Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation).

In its Judgment, which is final, without appeal and binding on the Parties, the Court

(1) rejects, by thirteen votes to three, the preliminary objection raised by the Russian Federation that the Court lacks jurisdiction on the basis of Article 24, paragraph 1, of the International Convention for the Suppression of the Financing of Terrorism;

(2) finds, by thirteen votes to three, that it has jurisdiction on the basis of Article 24, paragraph 1, of the International Convention for the Suppression of the Financing of Terrorism, to entertain the claims made by Ukraine under this Convention;

(3) rejects, by fifteen votes to one, the preliminary objection raised by the Russian Federation that the Court lacks jurisdiction on the basis of Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination;

(4) rejects, unanimously, the preliminary objection raised by the Russian Federation to the admissibility of the Application of Ukraine in relation to the claims under the International Convention on the Elimination of All Forms of Racial Discrimination;

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

History of the proceedings

On 16 January 2017, Ukraine filed in the Registry of the Court an Application instituting proceedings against the Russian Federation with regard to alleged violations by the latter of its obligations under the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999 (the “ICSFT”) and the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965 (“CERD”). In its Application, Ukraine seeks to found the Court’s jurisdiction on Article 24, paragraph 1, of the ICSFT¹ and on Article 22 of CERD². On 12 September 2018, the Russian Federation raised preliminary objections to the jurisdiction of the Court and the admissibility of the Application.

Reasoning of the Court

The Court explains that the present proceedings were instituted by Ukraine following the events which occurred in eastern Ukraine and in Crimea from the spring of 2014. With regard to the events in eastern Ukraine, the Applicant has brought proceedings only under the ICSFT. With regard to the situation in Crimea, Ukraine’s claims are based solely upon CERD.

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

The Court begins by examining whether the dispute relating to the events in eastern Ukraine is one which it has jurisdiction ratione materiae to entertain under Article 24, paragraph 1, of the ICSFT. In accordance with its relevant jurisprudence on the matter, it recalls that, to determine its jurisdiction ratione materiae under a compromissory clause concerning disputes relating to the interpretation or application of a treaty, it is necessary to ascertain whether the acts of which the Applicant complains “fall within the provisions” of the treaty containing the clause. This may require the interpretation of the provisions that define the scope of the treaty. The Court states however that, at the present stage of the proceedings, an examination by it of the alleged wrongful acts or of the plausibility of the claims is not generally warranted. Its task consists in considering the questions of law and fact relevant to the objection to its jurisdiction.

The Court first considers the scope of obligations under the ICSFT. It notes in this regard that the ICSFT applies to offences committed by “any person”, i.e. both individuals acting in a private capacity and those who are State agents. It is of the view that, while the commission by a State official of an offence does not in itself engage the responsibility of the State concerned under the Convention, the States parties to the ICSFT are under an obligation to take appropriate measures and to co-operate in the prevention and suppression of offences of financing acts of terrorism committed by whichever person. Should a State breach such an obligation, its responsibility under the Convention would arise. The Court observes that the ICSFT specifically concerns the support given to acts of terrorism by financing them. The Convention refers to the

¹ Art. 24, para. 1, of the 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 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.”

² Art. 22 of CERD reads as follows:

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

provision or collection of “funds”. The Court notes that since no specific objection to the Court’s jurisdiction was made by the Russian Federation with regard to the scope of the term “funds”, this issue relating to the scope of the ICSFT need not be addressed at the present stage of the proceedings. The Court adds that an element of an offence under the Convention is that the person concerned has provided funds “with the intention that they should be used or in the knowledge that they are to be used” to commit an act of terrorism. In its view, the existence of the requisite intention or knowledge raises complex issues of law and especially of fact that divide the Parties and are properly a matter for the merits. The same may be said of the question whether a specific act is an act of terrorism within the meaning of the Convention. In light of the above, the Court concludes that the objection raised by the Russian Federation to its jurisdiction ratione materiae under the ICSFT cannot be upheld.

The Court then examines whether the procedural preconditions set forth in Article 24, paragraph 1, of the ICSFT have been fulfilled. It observes that, in order to meet the first precondition, namely that the dispute between the Parties could not be settled through negotiation within a reasonable time, a genuine attempt must have been made to settle the dispute through negotiation and that attempt must have failed to produce results within a reasonable time. It notes that diplomatic exchanges relating to the subject-matter of the dispute currently before it took place between the Parties, but that little progress was made by them during their negotiations. It thus concludes that the first precondition is met. As regards the second precondition concerning the organization of an arbitration, the Court notes that negotiations concerning the organization of an arbitration were held, but that the Parties were unable to reach an agreement within six months. It therefore concludes that the second precondition is also met. Accordingly, the Court considers that the procedural preconditions set forth in Article 24, paragraph 1, of the ICSFT have been fulfilled. It thus has jurisdiction to entertain the claims made pursuant to that provision.

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

The Court then turns to the question whether the dispute relating to the events in Crimea is one which it has jurisdiction ratione materiae to entertain under Article 22 of CERD. In particular, it considers whether the measures of which Ukraine complains “fall within the provisions” of that Convention. In this respect, the Court notes that both Parties agree that Crimean Tatars and ethnic Ukrainians in Crimea constitute ethnic groups protected under CERD. Taking into account the broadly formulated rights and obligations contained in the Convention, the Court considers that the measures of which Ukraine complains — restrictions allegedly imposed on Crimean Tatars and ethnic Ukrainians in Crimea — are capable of having an adverse effect on the enjoyment of certain rights protected under CERD. These measures thus fall within the provisions of the Convention. The Court concludes that the claims of Ukraine fall within the provisions of CERD.

Next, the Court examines whether the procedural preconditions set out in Article 22 of CERD, namely that the dispute has “not [been] settled by negotiation or by the procedures expressly provided for in this Convention”, are met. It begins by considering whether those conditions are alternative or cumulative in character. As regards the text of Article 22, the Court is of the view that while the word “or” may be interpreted disjunctively and envisage alternative procedural preconditions, this is not the only possible interpretation. Turning to the context of Article 22, the Court notes that “negotiation” and the “procedures expressly provided for in [the] Convention” are two means to achieve the same objective, namely to settle a dispute by agreement. It follows that should negotiation and the CERD Committee procedure be considered cumulative, States would have to try to negotiate an agreed solution to their dispute and, after negotiation has not been successful, take the matter before the CERD Committee for further negotiation, again in order to reach an agreed solution. The Court considers that the context of Article 22 of CERD does not support this interpretation. Lastly, the Court turns to the object and purpose of the Convention, in light of which Article 22 must be interpreted. It observes that the Convention aims to eradicate

all forms of racial discrimination effectively and promptly. The achievement of such aims could be rendered more difficult if the procedural preconditions under Article 22 were cumulative. The Court concludes that Article 22 imposes alternative preconditions to the Court's jurisdiction. Since the dispute between the Parties was not referred to the CERD Committee, the Court examines only whether the Parties attempted to negotiate a settlement to their dispute.

The Court observes that the negotiations between the Parties, which related to the subject-matter of the dispute before it, lasted for approximately two years and included both diplomatic correspondence and face-to-face meetings, which, in the Court's view, and despite the lack of success in reaching a negotiated solution, indicates that a genuine attempt at negotiation was made by Ukraine. The Court thus concludes that the negotiations between the Parties had become futile or deadlocked by the time Ukraine filed its Application under Article 22 of CERD. Accordingly, the Court concludes that the procedural preconditions set out in Article 22 of CERD are satisfied. As a result, it has jurisdiction to consider the claims made under that provision.

Lastly, the Court turns to the objection raised by the Russian Federation to the admissibility of Ukraine's Application with regard to claims under CERD on the ground that Ukraine did not establish that local remedies had been exhausted before it seised the Court. The Court recalls that local remedies must be previously exhausted as a matter of customary international law in cases in which a State brings a claim on behalf of one or more of its nationals. The Court is of the view that, in filing its Application, Ukraine does not adopt the cause of its nationals, but challenges, on the basis of CERD, the alleged pattern of conduct of the Russian Federation with regard to the treatment of the Crimean Tatar and Ukrainian communities in Crimea. It thus concludes that the rule of exhaustion of local remedies does not apply in the circumstances of the present case. It finds that the Russian Federation's objection to admissibility must be rejected.

Composition of the Court

The Court was composed as follows: President Yusuf; Vice-President Xue; Judges Tomka, Abraham, Bennouna, Cañado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Salam, Iwasawa; Judges ad hoc Pocar, Skotnikov; Registrar Gautier.

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

A summary of the Judgment appears in the document entitled "Summary No. 2019/5". This press release, the summary and the full text of the Judgment are available on the Court's website (www.icj-cij.org), under the heading "Cases".

Note: The Court's press releases are prepared by its Registry for information purposes only and do not constitute official documents.

The International Court of Justice (ICJ) is the principal judicial organ of the United Nations. It was established by the United Nations Charter in June 1945 and began its activities in April 1946. The Court is composed of 15 judges elected for a nine-year term by the General Assembly and the Security Council of the United Nations. The seat of the Court is at the Peace Palace in The Hague (Netherlands). The Court has a twofold role: first, to settle, in accordance with international law, legal disputes submitted to it by States (its judgments have binding force and are without appeal for the parties concerned); and, second, to give advisory opinions on legal questions referred to it by duly authorized United Nations organs and agencies of the system.

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