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Consejo de Seguridad

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Carta de fecha 8 de agosto de 2017 dirigida a la Presidencia del Consejo de Seguridad por el Secretario General

A raíz de las comunicaciones recibidas del Secretario de la Corte Internacional de Justicia y de conformidad con el párrafo 2 del Artículo 41 del Estatuto de la Corte, tengo el honor de adjuntar a la presente (véase el anexo)[1] copias de los textos de las providencias en que se dictan medidas provisionales en las siguientes causas pendientes ante la Corte:

- *Causa Jadhav (India c. Pakistán)*, providencia de 18 de mayo de 2017
- *Aplicación del Convenio Internacional para la Represión de la Financiación del Terrorismo y de la Convención Internacional sobre la Eliminación de Todas las Formas de Discriminación Racial (Ucrania c. Federación de Rusia)*, providencia de 19 de abril de 2017
- *Inmunidades y proceso penal (Guinea Ecuatorial c. Francia)*, providencia de 7 de diciembre de 2016

(*Firmado*) António **Guterres**

[1] El anexo se distribuye únicamente en el idioma en que fue presentado y sin revisión editorial.

Se ruega reciclar

18 MAY 2017

ORDER

JADHAV CASE

(INDIA *v.* PAKISTAN)

AFFAIRE JADHAV

(INDE c. PAKISTAN)

18 MAI 2017

ORDONNANCE

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INTERNATIONAL COURT OF JUSTICE

YEAR 2017

2017
18 May
General List
No. 168

18 May 2017

JADHAV CASE

(INDIA *v.* PAKISTAN)

REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

ORDER

Present *President* ABRAHAM, *Judges* OWADA, CANÇADO TRINDADE, XUE, DONOGHUE, GAJA, SEBUTINDE, BHANDARI, ROBINSON, CRAWFORD, GEVORGIAN, *Registrar* COUVREUR

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Articles 41 and 48 of the Statute of the Court and Articles 73, 74 and 75 of the Rules of Court,

Makes the following Order

Whereas

1 On 8 May 2017, the Government of the Republic of India (hereinafter "India") filed in the Registry of the Court an Application instituting proceedings against the Islamic Republic of Pakistan (hereinafter "Pakistan") alleging violations of the Vienna Convention on Consular Relations of 24 April 1963 "in the matter of the detention and trial of an Indian National, Mr Kulbhushan Sudhir Jadhav", sentenced to death in Pakistan

2 At the end of its Application, India requests

"(1) a relief by way of immediate suspension of the sentence of death awarded to the accused

(2) a relief by way of restitution in integrum by declaring that the sentence of the military court arrived at, in brazen defiance of the Vienna Convention rights under Article 36, particularly Article 36, paragraph 1 *(b)*, and in defiance of elementary human rights of an accused which are also to be given effect as mandated under Article 14 of the 1966 International Covenant on Civil and Political Rights, is violative of international law and the provisions of the Vienna Convention, and

(3) restraining Pakistan from giving effect to the sentence awarded by the military court, and directing it to take steps to annul the decision of the military court as may be available to it under the law in Pakistan

(4) if Pakistan is unable to annul the decision, then this Court to declare the decision illegal being violative of international law and treaty rights and restrain Pakistan from acting in violation of the Vienna Convention and international law by giving effect to the sentence or the conviction in any manner, and directing it to release the convicted Indian National forthwith "

3 In its Application, India seeks to found the jurisdiction of the Court on Article 36, paragraph 1, of the Statute of the Court and Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes, which accompanies the Vienna Convention on Consular Relations

4 On 8 May 2017, accompanying its Application, India also submitted a Request for the indication of provisional measures, referring to Article 41 of the Statute of the Court and to Articles 73, 74 and 75 of the Rules of Court

5 In that Request, India asked that the Court indicate

"*(a)* that the Government of the Islamic Republic of Pakistan take all measures necessary to ensure that Mr Kulbhushan Sudhir Jadhav is not executed,

(b) that the Government of the Islamic Republic of Pakistan report to the Court the action it has taken in pursuance of sub-paragraph *(a)*, and

(c) that the Government of the Islamic Republic of Pakistan ensure that no action is taken that might prejudice the rights of the Republic of India or Mr Kulbhushan Sudhir Jadhav with respect to any decision th[e] Court may render on the merits of the case "

6 The Request also contained the following plea

"In view of the extreme gravity and immediacy of the threat that authorities in Pakistan will execute an Indian citizen in violation of obligations Pakistan owes to India, India respectfully urges the Court to treat this Request as a matter of the greatest urgency and pass an order immediately on provisional measures suo-motu without waiting for an oral hearing The President is requested [to] exercis[e] his power under Article 74, paragraph 4, of the Rules of Court, pending the meeting of the Court, to direct the Parties to act in such a way as will enable any order the Court may make on the Request for provisional measures to have its appropriate effects "

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

8 By a letter dated 9 May 2017 addressed to the Prime Minister of Pakistan, the President of the Court, exercising the powers conferred upon him under Article 74, paragraph 4, of the Rules of Court, called upon the Pakistani Government, pending the Court's decision on the Request for the indication of provisional measures, "to act in such a way as will enable any order the Court may make on this Request to have its appropriate effects" A copy of that letter was transmitted to the Agent of India

9 By letters dated 10 May 2017, the Registrar informed the Parties that, pursuant to Article 74, paragraph 3, of the Rules, the Court had fixed 15 May 2017 as the date for the oral proceedings on the Request for the indication of provisional measures

10 At the public hearings held on 15 May 2017, oral observations on the Request for the indication of provisional measures were presented by

On behalf of India	Dr Deepak Mittal, Dr Vishnu Dutt Sharma, Mr Harish Salve
On behalf of Pakistan	Dr. Mohammad Faisal, Mr Khawar Qureshi, Q C

11 At the end of its oral observations, India asked the Court to indicate the following provisional measures

"*(a)* that the Government of the Islamic Republic of Pakistan take all measures necessary to ensure that Mr Kulbhushan Sudhir Jadhav is not executed,

(b) that the Government of the Islamic Republic of Pakistan report to the Court the action it has taken in pursuance of sub-paragraph *(a)*, and

(c) that the Government of the Islamic Republic of Pakistan ensure that no action is taken that might prejudice the rights of the Republic of India or Mr Kulbhushan Sudhir Jadhav with respect to any decision the Court may render on the merits of the case"

12 For its part, Pakistan asked the Court to reject India's Request for the indication of provisional measures

*

* *

13 The context in which the present case has been brought before the Court can be summarized as follows Mr Jadhav has been in the custody of Pakistani authorities since 3 March 2016, although the circumstances of his arrest remain in dispute between the Parties. India maintains that Mr Jadhav is an Indian national, which Pakistan recognized in its Notes Verbales of 23 January 2017, 21 March 2017 and 10 April 2017 (see Annexes 2, 3 and 5 to the Application) The Applicant claims to have been informed of this arrest on 25 March 2016, when the Foreign Secretary of Pakistan raised the matter with the Indian High Commissioner in Pakistan As of that date, India requested consular access to Mr Jadhav India reiterated its request on numerous occasions, to no avail On 23 January 2017, Pakistan sent a Letter of Request seeking India's assistance in the investigation process concerning Mr Jadhav and his alleged accomplices On 21 March and 10 April 2017 Pakistan informed India that consular access to Mr Jadhav would be considered "in the light of" India's response to the said request for assistance

14 According to a press statement issued on 14 April 2017 by an adviser on foreign affairs to the Prime Minister of Pakistan, Mr Jadhav was sentenced to death on 10 April 2017 by a Court Martial due to activities of "espionage, sabotage and terrorism" India submits that it protested and continued to press for consular access and information concerning the proceedings against Mr Jadhav It appears that, under Pakistani law, Mr Jadhav would have 40 days to lodge an appeal against his conviction and sentence (i e , until 19 May 2017), but it is not known whether he has done so India states however that, on 26 April 2017, Mr Jadhav's mother filed "an appeal" under Section 133 (B) and "a petition" to the Federal Government of Pakistan under Section 131 of the Pakistan Army Act 1952, both of which were handed over by the Indian High Commissioner to Pakistan's Foreign Secretary on the same day

I. Prima facie jurisdiction

15 The Court may indicate provisional measures only if the provisions relied on by the Applicant appear, prima facie, to afford a basis on which its jurisdiction could be founded, but need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case (see, for example, *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*, Order of 19 April 2017, para 17)

16 In the present case, India seeks to found the jurisdiction of the Court on Article 36, paragraph 1, of the Statute of the Court and on Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes, which accompanies the Vienna Convention on Consular Relations (hereinafter the "Optional Protocol" and the "Vienna Convention", respectively) The Court must therefore first seek to determine whether Article I of the Optional Protocol prima facie confers upon it jurisdiction to rule on the merits, enabling it — if the other necessary conditions are fulfilled — to indicate provisional measures

17 India and Pakistan have been parties to the Vienna Convention since 28 December 1977 and 14 May 1969, respectively, and to the Optional Protocol since 28 December 1977 and 29 April 1976, respectively. Neither of them has made reservations to those instruments

18 Article I of the Optional Protocol provides as follows

> "Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol "

19 India claims that a dispute exists between the Parties regarding the interpretation and application of Article 36, paragraph 1, of the Vienna Convention, which provides as follows

> "With a view to facilitating the exercise of consular functions relating to nationals of the sending State
>
> *(a)* consular officers shall be free to communicate with nationals of the sending State and to have access to them Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State,
>
> *(b)* if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph,
>
> *(c)* consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action."

* *

20. India contends that Pakistan has breached its obligations under the above-mentioned provisions in the matter of the arrest, detention and trial of Mr Jadhav The Applicant asserts that Mr Jadhav has been arrested, detained, tried and sentenced to death by Pakistan and that, despite several attempts, it could neither communicate with nor have access to him, in violation of Article 36, sub-paragraphs (1) *(a)* and (1) *(c)* of the Vienna Convention, and that Mr Jadhav has neither been informed of his rights nor been allowed to exercise them, in violation of sub-paragraph (1) *(b)* of the same provision India asserts that Article 36, paragraph 1, of the Vienna Convention "admits of no exceptions" and is applicable irrespective of the charges against the individual concerned

21 India acknowledges that the Parties have signed an Agreement on Consular Access on 21 May 2008 (hereinafter the "2008 Agreement"), but it maintains that this instrument does not

limit the Parties' rights and obligations pursuant to Article 36, paragraph 1, of the Vienna Convention According to India, while Article 73 of the Vienna Convention recognizes that agreements between parties may supplement and amplify its provisions, it does not provide a basis for diluting the obligations contained therein India therefore considers that this Agreement does not have any effect on the Court's jurisdiction in the present case

22 India also emphasizes that it only seeks to found the Court's jurisdiction on Article I of the Optional Protocol, and not on the declarations made by the Parties under Article 36, paragraph 2, of the Statute India is of the view that where treaties or conventions especially provide for the jurisdiction of the Court, such declarations, including any reservations they may contain, are not applicable

*

23 Pakistan claims that the Court has no prima facie jurisdiction to entertain India's Request for the indication of provisional measures It first submits that the jurisdiction of the Court is excluded by a number of reservations in the Parties' declarations under Article 36, paragraph 2, of the Statute Pakistan refers to two of India's reservations to its declaration of 18 September 1974, i e , first, that preventing the Court from entertaining cases involving two members of the Commonwealth and, second, its multilateral treaty reservation Pakistan also refers to a reservation contained in its own amended declaration of 29 March 2017, according to which "all matters relating to the national security of the Islamic Republic of Pakistan" are excluded from the compulsory jurisdiction of the Court For Pakistan, this reservation is applicable in the present case because Mr Jadhav was arrested, detained, tried and sentenced for espionage, sabotage and terrorism

24 Secondly, Pakistan also contends that Article 36, paragraph 1, of the Vienna Convention could not have been intended to apply to persons suspected of espionage or terrorism, and that there can therefore be no dispute relating to the interpretation or application of that instrument in the present case

25 Finally, Pakistan avers that the facts alleged in the Application fall within the scope of the 2008 Agreement, which "limit[s] and qualif[ies] or supplement[s]" the Vienna Convention It refers to Article 73, paragraph 2, of the Vienna Convention, which provides that "[n]othing in the present Convention shall preclude States from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof" Pakistan considers that the 2008 Agreement "amplifies or supplements [the Parties'] understanding and the operation of the Convention" In this regard, Pakistan calls attention to sub-paragraph (vi) of the 2008 Agreement, which provides that "[i]n case of arrest, detention or sentence made on political or security grounds, each side may examine the case on its merits" Pakistan argues that this provision applies to Mr Jadhav and that the Court therefore lacks prima facie jurisdiction under Article I of the Optional Protocol

* *

26 The Court recalls that the Applicant seeks to ground its jurisdiction in Article 36, paragraph 1, of the Statute and Article I of the Optional Protocol, it does not seek to rely on the Parties' declarations under Article 36, paragraph 2, of the Statute When the jurisdiction of the Court is founded on particular "treaties and conventions in force" pursuant to Article 36, paragraph 1, of its Statute, "it becomes irrelevant to consider the objections to other possible bases of jurisdiction" (*Appeal Relating to the Jurisdiction of the ICAO Council (India* v *Pakistan), Judgment, I C J Reports 1972*, p 60, para 25, *see also Territorial and Maritime Dispute (Nicaragua* v *Colombia), Preliminary Objections, Judgment, I C J Reports 2007 (II)*, p 872, para 132) Therefore, any reservations contained in the declarations made by the Parties under Article 36, paragraph 2, of the Statute cannot impede the Court's jurisdiction specially provided for in the Optional Protocol Thus, the Court need not examine these reservations further.

27 Article I of the Optional Protocol provides that the Court has jurisdiction over "[d]isputes arising out of the interpretation or application of the [Vienna] Convention" (see paragraph 18 above)

28 The Court will accordingly ascertain whether, on the date the Application was filed, such a dispute appeared to exist between the Parties

29 In this regard, the Court notes that the Parties do indeed appear to have differed, and still differ today, on the question of India's consular assistance to Mr Jadhav under the Vienna Convention While India has maintained at various times that Mr Jadhav should have been (and should still be) afforded consular assistance under the Vienna Convention (see for instance Notes Verbales dated 19 and 26 April 2017 annexed to the Application), Pakistan has stated that such an assistance would be considered "in the light of India's response to [its] request for assistance" in the investigation process concerning him in Pakistan (see the Notes Verbales of Pakistan dated 21 March and 10 April 2017 annexed to the Application) These elements are sufficient at this stage to establish prima facie that, on the date the Application was filed, a dispute existed between the Parties as to the question of consular assistance under the Vienna Convention with regard to the arrest, detention, trial and sentencing of Mr Jadhav

30 In order to determine whether it has jurisdiction — even prima facie — the Court must also ascertain whether such a dispute is one over which it might have jurisdiction *ratione materiae* on the basis of Article I of the Optional Protocol In this regard, the Court notes that the acts alleged by India are capable of falling within the scope of Article 36, paragraph 1, of the Vienna Convention, which, *inter alia*, guarantees the right of the sending State to communicate with and have access to its nationals in the custody of the receiving State (sub-paragraphs *(a)* and *(c)*), as well as the right of its nationals to be informed of their rights (sub-paragraph *(b)*) The Court considers that the alleged failure by Pakistan to provide the requisite consular notifications with regard to the arrest and detention of Mr Jadhav, as well as the alleged failure to allow communication and provide access to him, appear to be capable of falling within the scope of the Vienna Convention *ratione materiae*

31 In the view of the Court, the aforementioned elements sufficiently establish, at this stage, the existence between the Parties of a dispute that is capable of falling within the provisions of the Vienna Convention and that concerns the interpretation or application of Article 36, paragraph 1, thereof

32 The Court also notes that the Vienna Convention does not contain express provisions excluding from its scope persons suspected of espionage or terrorism At this stage, it cannot be concluded that Article 36 of the Vienna Convention cannot apply in the case of Mr Jadhav so as to exclude on a prima facie basis the Court's jurisdiction under the Optional Protocol

33 In respect of the 2008 Agreement, the Court does not need to decide at this stage of the proceedings whether Article 73 of the Vienna Convention would permit a bilateral agreement to limit the rights contained in Article 36 of the Vienna Convention It is sufficient at this point to note that the provisions of the 2008 Agreement do not impose expressly such a limitation Therefore, the Court considers that there is no sufficient basis to conclude at this stage that the 2008 Agreement prevents it from exercising its jurisdiction under Article I of the Optional Protocol over disputes relating to the interpretation or the application of Article 36 of the Vienna Convention

34 Consequently, the Court considers that it has prima facie jurisdiction under Article I of the Optional Protocol to entertain the dispute between the Parties

II. THE RIGHTS WHOSE PROTECTION IS SOUGHT AND THE MEASURES REQUESTED

35 The power of the Court to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights claimed by the parties in a case, pending its decision on the merits thereof It follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by it to belong to either party Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by the party requesting such measures are at least plausible (see, for example, *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*, Order of 19 April 2017, para 63)

36 Moreover, a link must exist between the rights whose protection is sought and the provisional measures being requested (*ibid* , para 64)

37 In its Application, India asserts that the rights it is seeking to protect are those provided by paragraph 1 of Article 36 of the Vienna Convention (quoted above at paragraph 19)

38 As the Court stated in its Judgment in the *LaGrand* case,

> "Article 36, paragraph 1, establishes an interrelated régime designed to facilitate the implementation of the system of consular protection It begins with the basic principle governing consular protection the right of communication and access (Art 36, para 1 *(a)*) This clause is followed by the provision which spells out the modalities of consular notification (Art 36, para 1 *(b)*) Finally Article 36, paragraph 1 *(c)*, sets out the measures consular officers may take in rendering consular assistance to their nationals in the custody of the receiving State" (*I C J Reports 2001*, p 492, para 74)

39 It follows from Article 36, paragraph 1, that all States Parties to the Vienna Convention have a right to provide consular assistance to their nationals who are in prison, custody or detention in another State Party They are also entitled to respect for their nationals' rights contained therein

* *

40 In the present case, the Applicant claims that Mr Jadhav, who is an Indian national, was arrested, detained, tried and sentenced to death by Pakistan and that, despite several attempts, India was given no access to him and no possibility to communicate with him In this regard, India states that it requested consular access to the individual on numerous occasions between 25 March 2016 and 19 April 2017, without success India points out that on 21 March 2017, at the end of the trial of Mr Jadhav, Pakistan stated that "the case for the consular access to the Indian national Kulbushan Jadhav shall be considered in the light of India['s] response to Pakistan's request for assistance" in the investigation process concerning him, Pakistan reiterated its position on 10 April 2017 — apparently the day when Mr Jadhav was convicted and sentenced to death (see paragraphs 13-14 above) India argues in this connection that the conditioning of consular access on assistance in an investigation is itself a serious violation of the Vienna Convention It adds that Mr Jadhav has not been informed of his rights with regard to consular assistance The Applicant concludes from the foregoing that Pakistan failed to provide the requisite notifications without delay, and that India and its national have been prevented for all practical purposes from exercising their rights under Article 36, paragraph 1, of the Vienna Convention

*

41 Pakistan, for its part, contests that it has conditioned consular assistance as alleged by India Furthermore, it avers that the rights invoked by India are not plausible because Article 36 of the Vienna Convention does not apply to persons suspected of espionage or terrorism, and because the situation of Mr Jadhav is governed by the 2008 Agreement

* *

42 At this stage of the proceedings, the Court is not called upon to determine definitively whether the rights which India wishes to see protected exist, it need only decide whether these rights are plausible (see above paragraph 35 and *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*, Order of 19 April 2017, para 64)

43 The rights to consular notification and access between a State and its nationals, as well as the obligations of the detaining State to inform without delay the person concerned of his rights with regard to consular assistance and to allow their exercise, are recognized in Article 36, paragraph 1, of the Vienna Convention Regarding Pakistan's arguments that, first, Article 36 of the Vienna Convention does not apply to persons suspected of espionage or terrorism, and that, second, the rules applicable to the case at hand are provided in the 2008 Agreement, the Court considers that at this stage of the proceedings, where no legal analysis on these questions has been advanced by the Parties, these arguments do not provide a sufficient basis to exclude the plausibility of the rights claimed by India, for the same reasons provided above (see paragraphs 32-33)

44 India submits that one of its nationals has been arrested, detained, tried and sentenced to death in Pakistan without having been notified by the same State or afforded access to him The Applicant also asserts that Mr Jadhav has not been informed without delay of his rights with regard to consular assistance or allowed to exercise them Pakistan does not challenge these assertions

45 In the view of the Court, taking into account the legal arguments and evidence presented, it appears that the rights invoked by India in the present case on the basis of Article 36, paragraph 1, of the Vienna Convention are plausible

*

46 The Court now turns to the issue of the link between the rights claimed and the provisional measures requested.

47 The Court notes that the provisional measures sought by India consist in ensuring that the Government of Pakistan will take no action that might prejudice its alleged rights, in particular that it will take all measures necessary to prevent Mr Jadhav from being executed before the Court renders its final decision

48 The Court considers that these measures are aimed at preserving the rights of India and of Mr Jadhav under Article 36, paragraph 1, of the Vienna Convention Therefore, a link exists between the rights claimed by India and the provisional measures being sought

III. Risk of irreparable prejudice and urgency

49 The Court, pursuant to Article 41 of its Statute, has the power to indicate provisional measures when irreparable prejudice could be caused to rights which are the subject of judicial proceedings (see, for example, *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*, Order of 19 April 2017, para 88)

50 However, the power of the Court to indicate provisional measures will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to the rights in dispute before the Court gives its final decision (*ibid*, para 89) The Court must therefore consider whether such a risk exists at this stage of the proceedings

* *

51 India contends that the execution of Mr Jadhav would cause irreparable prejudice to the rights it claims and that this execution may occur at any moment before the Court decides on the merits of its case, as any appeal proceedings in Pakistan could be concluded very quickly and it is unlikely that the conviction and sentence would be reversed In this regard, India explains that the only judicial remedy available to Mr Jadhav was the filing of an appeal within 40 days of the sentence rendered on 10 April 2017 It points out that, although Mr Jadhav may seek clemency, first from the Chief of Army Staff of Pakistan and secondly from the President of Pakistan, these are not judicial remedies

*

52 Pakistan claims that there is no urgency because Mr Jadhav can still apply for clemency and that a period of 150 days is provided for in this regard According to Pakistan, even if this period started on 10 April 2017 (the date of conviction at first instance), it would extend beyond August 2017 The Agent for Pakistan stated that there would be no urgent need to indicate provisional measures if the Parties agreed to an expedited hearing and suggested that Pakistan would be content for the Court to list the Application for hearing within six weeks

* *

53 Without prejudging the result of any appeal or petition against the decision to sentence Mr Jadhav to death, the Court considers that, as far as the risk of irreparable prejudice to the rights claimed by India is concerned, the mere fact that Mr Jadhav is under such a sentence and might therefore be executed is sufficient to demonstrate the existence of such a risk

54 There is considerable uncertainty as to when a decision on any appeal or petition could be rendered and, if the sentence is maintained, as to when Mr Jadhav could be executed Pakistan has indicated that any execution of Mr Jadhav would probably not take place before the end of August 2017 This suggests that an execution could take place at any moment thereafter, before the Court has given its final decision in the case The Court also notes that Pakistan has given no assurance that Mr Jadhav will not be executed before the Court has rendered its final decision In those circumstances, the Court is satisfied that there is urgency in the present case

55 The Court adds, with respect to the criteria of irreparable prejudice and urgency, that the fact that Mr Jadhav could eventually petition Pakistani authorities for clemency, or that the date of his execution has not yet been fixed, are not per se circumstances that should preclude the Court from indicating provisional measures (see, e g , *Avena and Other Mexican Nationals (Mexico* v *United States of America), Provisional Measures, Order of 5 February 2003, I C J Reports 2003*, p 91, para 54)

56 The Court notes that the issues brought before it in this case do not concern the question whether a State is entitled to resort to the death penalty As it has observed in the past, "the function of this Court is to resolve international legal disputes between States, *inter alia* when they arise out of the interpretation or application of international conventions, and not to act as a court of criminal appeal" (*LaGrand (Germany* v *United States of America), Provisional Measures, Order of 3 March 1999, I C J Reports 1999 (I)*, p 15, para 25, *Avena and Other Mexican Nationals (Mexico* v *United States of America), Provisional Measures, Order of 5 February 2003, I C J Reports 2003*, p 89, para 48)

IV. Conclusion and measures to be adopted

57 The Court concludes from all the above considerations that the conditions required by its Statute for it to indicate provisional measures are met and that certain measures must be indicated in order to protect the rights claimed by India pending its final decision

58 Under the present circumstances, it is appropriate for the Court to order that Pakistan shall take all measures at its disposal to ensure that Mr Jadhav is not executed pending the final decision in these proceedings and shall inform the Court of all the measures taken in implementation of the present Order

*

* *

59 The Court reaffirms that its "orders on provisional measures under Article 41 [of the Statute] have binding effect" (*LaGrand (Germany* v *United States of America), Judgment, I C J Reports 2001*, p 506, para 109) and thus create international legal obligations for any party to whom the provisional measures are addressed

*

* *

60 The decision given in the present proceedings in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the admissibility of the Application or to the merits themselves It leaves unaffected the right of the Governments of India and Pakistan to submit arguments in respect of those questions

*

* *

61 For these reasons,

THE COURT,

I Unanimously,

Indicates the following provisional measures

Pakistan shall take all measures at its disposal to ensure that Mr Jadhav is not executed pending the final decision in these proceedings and shall inform the Court of all the measures taken in implementation of the present Order

II Unanimously,

Decides that, until the Court has given its final decision, it shall remain seised of the matters which form the subject-matter of this Order

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this eighteenth day of May two thousand and seventeen, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of India and the Government of the Islamic Republic of Pakistan

(Signed) Ronny ABRAHAM,
President

(Signed) Philippe COUVREUR,
Registrar

Judge CANÇADO TRINDADE appends a separate opinion to the Order of the Court, Judge BHANDARI appends a declaration to the Order of the Court

(Initialled) R A

(Initialled) Ph C

19 AVRIL 2017

ORDONNANCE

APPLICATION DE LA CONVENTION INTERNATIONALE POUR LA RÉPRESSION DU FINANCEMENT DU TERRORISME ET DE LA CONVENTION INTERNATIONALE SUR L'ÉLIMINATION DE TOUTES LES FORMES DE DISCRIMINATION RACIALE

(UKRAINE c. FÉDÉRATION DE RUSSIE)

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

(UKRAINE *v.* RUSSIAN FEDERATION)

19 APRIL 2017

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INTERNATIONAL COURT OF JUSTICE

YEAR 2017

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General List
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19 April 2017

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)

REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

ORDER

Present *President* ABRAHAM, *Vice-President* YUSUF, *Judges* OWADA, TOMKA, BENNOUNA, CANÇADO TRINDADE, GREENWOOD, XUE, DONOGHUE, GAJA, SEBUTINDE, BHANDARI, ROBINSON, CRAWFORD, *Judges* ad hoc POCAR, SKOTNIKOV, *Registrar* COUVREUR

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Articles 41 and 48 of the Statute of the Court and Articles 73, 74 and 75 of the Rules of Court,

Makes the following Order

Whereas

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

2 With regard to the ICSFT, Ukraine presented the following claims in its Application

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

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

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

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

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

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

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

(a) the shoot-down of Malaysian Airlines Flight MH17,

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

(c) the bombing of civilians, including in Kharkiv

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

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

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

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

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

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

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

(g) make full reparation for the shoot-down of Malaysian Airlines Flight MH17,

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

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

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

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

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

3 With regard to CERD, Ukraine presented the following claims in its Application

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

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

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

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

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

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

(f) harassing the Crimean Tatar community with an arbitrary regime of searches and detention,

(g) silencing Crimean Tatar media,

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

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

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

(k) silencing ethnic Ukrainian media

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

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

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

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

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

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

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

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

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

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

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

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

4 In its Application, Ukraine seeks to found the Court's jurisdiction on Article 24, paragraph 1, of the ICSFT and on Article 22 of CERD

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

6 With respect to the ICSFT, in paragraph 23 of its Request for the indication of provisional measures, Ukraine asked the Court to indicate the following provisional measures

"*(a)* The Russian Federation shall refrain from any action which might aggravate or extend the dispute under the Terrorism Financing Convention before the Court or make this dispute more difficult to resolve

(b) The Russian Federation shall 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) The Russian Federation shall 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, including but not limited to the 'Donetsk People's Republic', the 'Luhansk People's Republic', the 'Kharkiv Partisans', and associated groups and individuals

(d) The Russian Federation shall 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, training, or personnel will refrain from carrying out acts of terrorism against civilians in Ukraine "

7 With respect to CERD, in paragraph 24 of its Request for the indication of provisional measures, Ukraine asked the Court to indicate the following provisional measures

"*(a)* The Russian Federation shall refrain from any action which might aggravate or extend the dispute under CERD before the Court or make it more difficult to resolve

(b) The Russian Federation shall 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) The Russian Federation shall 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 and refraining from enforcement of this decree and any similar measures, while this case is pending

(d) The Russian Federation shall take all necessary steps to halt the disappearance of Crimean Tatar individuals and to promptly investigate those disappearances that have already occurred

(e) The Russian Federation shall cease and desist from acts of political and cultural suppression against the ethnic Ukrainian people in Crimea, including suspending restrictions on Ukrainian-language education and respecting ethnic Ukrainian language and educational rights, while this case is pending "

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

9 Pending the notification provided for by Article 40, paragraph 3, of the Statute by transmission of the printed bilingual text of the Application to the Members of the United Nations through the Secretary-General, the Registrar informed those States of the filing of the Application

10 By letters dated 20 January 2017, the Registrar informed both Parties that the Member of the Court of the nationality of the Russian Federation, referring to Article 24, paragraph 1, of the Statute, had notified the Court of his intention not to participate in the decision of the case Pursuant to Article 31 of the Statute and Article 37, paragraph 1, of the Rules of Court, the Russian Federation chose Mr Leonid Skotnikov to sit as judge *ad hoc* in the case

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

12 By letters dated 25 January 2017, the Registrar informed the Parties that, pursuant to Article 74, paragraph 3, of the Rules, the Court had fixed 6, 7, 8 and 9 March 2017 as the dates for the oral proceedings on the Request for the indication of provisional measures

13 At the public hearings held from 6 to 9 March 2017, oral observations on the Request for the indication of provisional measures were presented by

On behalf of Ukraine	H E Ms Olena Zerkal, Mr Harold Hongju Koh, Ms Marney Cheek, Mr Jonathan Gimblett
On behalf of the Russian Federation	H E Mr Roman Kolodkin, Mr Ilya Rogachev, Mr Samuel Wordsworth, Mr Andreas Zimmermann, Mr Grigoriy Lukiyantsev, Mr Mathias Forteau

14 At the end of its second round of oral observations, Ukraine asked the Court to indicate the following provisional measures

> "With respect to the Terrorism Financing Convention, Ukraine requests that the Court order the following provisional measures
>
> *(a)* the Russian Federation shall refrain from any action which might aggravate or extend the dispute under the Terrorism Financing Convention before the Court or make this dispute more difficult to resolve
>
> *(b)* the Russian Federation shall 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)* the Russian Federation shall 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, including but not limited to the 'Donetsk People's Republic', the 'Luhansk People's Republic', the 'Kharkiv Partisans', and associated groups and individuals

(d) the Russian Federation shall 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, training, or personnel will refrain from carrying out acts of terrorism against civilians in Ukraine

With respect to the CERD, Ukraine requests that the Court order the following provisional measures

(a) the Russian Federation shall refrain from any action which might aggravate or extend the dispute under CERD before the Court or make it more difficult to resolve

(b) the Russian Federation shall 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) the Russian Federation shall 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 and refraining from enforcement of this decree and any similar measures, while this case is pending

(d) the Russian Federation shall take all necessary steps to halt the disappearance of Crimean Tatar individuals and to promptly investigate those disappearances that have already occurred

(e) the Russian Federation shall cease and desist from acts of political and cultural suppression against the ethnic Ukrainian people in Crimea, including suspending restrictions on Ukrainian-language education and respecting ethnic Ukrainian language and educational rights, while this case is pending "

15 At the end of its second round of oral observations, Russia made the following statement

"In accordance with Article 60 of the Rules of the Court for the reasons explained during these hearings the Russian Federation requests the Court to reject the request for the indication of provisional measures submitted by Ukraine "

*

16 The context in which the present case comes before the Court is well known In large parts of eastern Ukraine, that context is characterized by periods of extensive fighting which, as the record before the Court demonstrates, has claimed a large number of lives The destruction, on 17 July 2014, of Malaysia Airlines Flight MH17 while it was flying over Ukrainian territory en route between Amsterdam and Kuala Lumpur, caused the deaths of 298 people The Court is well aware of the extent of this human tragedy Nevertheless, the case before the Court is limited in scope In respect of the events in the eastern part of its territory, Ukraine has brought proceedings only under the ICSFT With regard to the events in Crimea, Ukraine's claim is based solely upon CERD and the Court is not called upon, as Ukraine expressly recognized, to rule upon any issue other than allegations of racial discrimination

I. PRIMA FACIE JURISDICTION

1. General introduction

17 The Court may indicate provisional measures only if the provisions relied on by the Applicant appear, prima facie, to afford a basis on which its jurisdiction could be founded, but need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case (see, for example, *Immunities and Criminal Proceedings (Equatorial Guinea* v *France), Provisional Measures*, Order of 7 December 2016, para 31)

18 In the present case, Ukraine seeks to found the jurisdiction of the Court on Article 24, paragraph 1, of the ICSFT and on Article 22 of CERD (see paragraph 4 above) The Court must therefore first seek to determine whether the jurisdictional clauses contained in these instruments prima facie confer upon it jurisdiction to rule on the merits of the case, enabling it — if the other necessary conditions are fulfilled — to indicate provisional measures

19 Ukraine and the Russian Federation are parties to the ICSFT, which entered into force on 10 April 2002 They deposited their instruments of ratification on 6 December 2002 and 27 November 2002, respectively Neither of them entered reservations to that instrument.

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

20 Article 24, paragraph 1, of the ICSFT provides that

"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 "

21 As regards CERD, Article 22 of that instrument 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 "

2. Existence of a dispute concerning the interpretation or application of the ICSFT and CERD

22 Both Article 24, paragraph 1, of the ICSFT and Article 22 of CERD make the Court's jurisdiction conditional on the existence of a dispute arising out of the interpretation or application of the respective Convention A dispute between States exists where they "'hold clearly opposite views concerning the question of the performance or non-performance of certain' international obligations" (see *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v *Colombia), Preliminary Objections*, *Judgment, I C J Reports 2016*, p 26, para 50, citing *Interpretation of Peace treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I C J Reports 1950*, p 74) The claim of one party must be "positively opposed" by the other (*South West Africa (Ethiopia* v *South Africa, Liberia* v *South Africa), Preliminary Objections, Judgment, I C J Reports 1962*, p 328) In order to determine, even prima facie, whether a dispute exists, the Court "cannot limit itself to noting that one of the Parties maintains that the Convention applies, while the other denies it" (*Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures*, Order of 7 December 2016, para 47) Since Ukraine has invoked as a basis for the Court's jurisdiction the compromissory clauses in two international conventions, the Court must ascertain whether "the acts complained of by [the Applicant] are prima facie capable of falling within the provisions of [those] instrument[s] and as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain" *(ibid)*

23 At this stage of the proceedings, the Court must examine (1) whether the record shows a disagreement on a point of law or fact between the two States, and (2) whether that disagreement concerns "the interpretation or application" of the respective convention, as required by Article 24, paragraph 1, of the ICSFT and Article 22 of CERD

***(a)* The International Convention for the Suppression of the Financing of Terrorism**

24 Ukraine asserts that "[a] dispute has plainly arisen concerning the interpretation and application of the Terrorism Financing Convention" Ukraine states that in a diplomatic Note dated 28 July 2014, it "gave notice that it considered the Russian Federation to be violating the Terrorism Financing Convention" and that it continued, repeatedly, to inform the Russian Federation of the nature of its claims According to Ukraine, "both by word and deed, the Russian Federation has made it abundantly clear that it disputes Ukraine's claims"

25 Ukraine contends that, in the eastern part of its territory, since the spring of 2014, the Russian Federation has systematically supplied "illegal armed groups", such as the "Donetsk People's Republic" (DPR), the "Luhansk People's Republic" (LPR), the "Partisans of the Kharkiv People's Republic", and associated groups and individuals, with heavy weaponry, money, personnel, training, and by giving other backing That assistance, according to Ukraine, has been used not only to support combat against the Ukrainian authorities, but also to conduct terrorist attacks against civilians, within the meaning of Article 2, paragraph 1 *(a)* and *(b)*, of the ICSFT, such as the shelling of civilians in Volnovakha, Kramatorsk and Mariupol, the bombing of a peaceful rally in support of national unity in Kharkiv and the shooting-down of Malaysia Airlines Flight MH17 Ukraine contends that the definition of funds contained in the ICSFT is "extremely broad" and includes in particular such weapons as those which it maintains have been provided by the Russian Federation Ukraine adds that the Russian Federation knew that the "illegal armed groups" supported by it were perpetrating acts of terrorism It also asserts that the obligation contained in Article 18 (see paragraph 72 below) to co-operate in the prevention of the financing of terrorism "is a broad one" and includes the obligation to take all practicable measures to prevent individuals from providing or collecting funds for terrorism as well as the State obligation not to finance terrorism directly It claims that the Russian Federation has failed to co-operate in the prevention of financing acts of terrorism, and has "unlawfully financed terrorism directly" in violation of Article 18 of the ICSFT

*

26 The Russian Federation denies that there is any dispute between the Parties as to the interpretation and application of the ICSFT Although it agrees that, during the conflict which started in spring 2014, instances of alleged indiscriminate shelling and other humanitarian law violations by both sides have been reported, it considers that these acts are not capable of falling within the definition of acts of terrorism provided for in Article 2, paragraph 1, of the Convention (see paragraph 73 below) The Russian Federation contends that no international body or organization seised of the current situation in eastern Ukraine has qualified the ongoing hostilities in terms of terrorism It further contends that Ukraine has failed to submit any document from any international organization or any State other than Ukraine itself, characterizing the acts of the DPR

and the LPR as acts of terrorism The Russian Federation adds that most of the civilian casualties are in the territories under the control of the DPR and the LPR, and that multiple sources report that Ukrainian armed forces are themselves responsible for numerous acts of indiscriminate shelling, starting with the shelling of residential areas in Slavyansk in May 2014, where many civilians were killed and wounded by the shelling by Ukrainian armed forces, while residential buildings, hospitals and infrastructures were destroyed or damaged In respect of the allegations regarding the shooting-down of Malaysia Airlines Flight MH17, the Russian Federation argues that the evidence does not suggest that any funds were provided with the intent or knowledge that they were to be used for acts of terrorism against civilians

27 The Russian Federation claims that, in any event, the ICSFT obliges States to co-operate in the prevention and punishment of the financing by private actors of terrorist activities, but that it does not cover matters of State responsibility for the financing of such activities by the State itself It contends that the text of the Convention, its drafting history, as well as subsequent practice, confirm that it was only meant to address State obligations with respect to private actors, rather than broadly regulating issues of a State's responsibility for its own acts It follows that, in the opinion of the Russian Federation, purported instances of a State itself allegedly financing acts of terrorism as defined by the Convention do not fall within the jurisdiction provided for in Article 24 of the Convention

28 More specifically, the Russian Federation argues that the duty to prevent, as laid down in Article 18 of the ICSFT, is significantly limited in various respects First, States are only under an obligation to co-operate in the prevention of the specific acts of financing criminalized by the Convention Article 18 of the Convention does not contain an obligation per se to prevent such acts Secondly, the obligation is limited to co-operation in the prevention of "preparations in [the] respective territories" of States parties for the commission of acts prohibited by the Convention Thirdly, a State party to the Convention may only be held responsible for breaching Article 18 if the acts prohibited by the Convention have actually been committed

* *

29 The Court considers that, as it appears from the record of the proceedings, the Parties differ on the question of whether the events which occurred in eastern Ukraine starting from the spring of 2014 have given rise to issues relating to their rights and obligations under the ICSFT The Court notes that Ukraine contends that the Russian Federation has failed to respect its obligations under Articles 8, 9, 10, 11, 12 and 18 In particular, Ukraine maintains that the Russian Federation has failed to take appropriate measures to prevent the financing of terrorism in Ukraine by public and private actors on the territory of the Russian Federation and that it has repeatedly refused to investigate, prosecute, or extradite "offenders within its territory brought to its attention by Ukraine" The Russian Federation positively denies that it has committed any of the violations set out above

30 The Court must ascertain whether the acts of which Ukraine complains are prima facie capable of falling within the provisions of the Convention (see paragraph 22 above) The Court considers that at least some of the allegations made by Ukraine (see paragraph 29 above) appear to be capable of falling within the scope of the ICSFT *ratione materiae*

31 In the view of the Court, the above-mentioned elements are sufficient at this stage to establish prima facie the existence of a dispute between the Parties concerning the interpretation and application of the ICSFT During the hearings, the question of the definition of "funds" in Article 1, paragraph 1, of the Convention (see paragraph 73 below) was raised The question was also raised whether acts of financing of terrorist activities by the State itself fall within the scope of the Convention For the purposes of determining the existence of a dispute relating to the Convention, the Court does not need to make any pronouncement on these issues

***(b)* The International Convention on the Elimination of All Forms of Racial Discrimination**

32 Ukraine claims that a dispute exists between the Parties concerning the interpretation and application of CERD In particular, it asserts that the Russian Federation, by discriminating against Crimean Tatars and ethnic Ukrainians in Crimea, has violated provisions of this Convention

33 Ukraine contends that, following the purported annexation of the Crimean peninsula in March 2014, the Russian Federation has used its control over this territory to impose a policy of Russian ethnic dominance, "pursuing the cultural erasure of non-Russian communities through a systematic and ongoing campaign of discrimination"

34 With regard to the Crimean Tatar community, Ukraine argues that the Russian Federation has suppressed its political leaders and institutions — having, in particular, "outlawed the *Mejlis*, the central self-governing institution of Crimean Tatar life" — and has "prevented important cultural gatherings, perpetrated a regime of disappearances and murders, conducted a campaign of arbitrary searches and detentions, silenced media voices, and suppressed educational rights" Ukraine alleges that, "[j]ust recently, eleven Crimean Tatars who were peacefully protesting against arbitrary searches were forcefully detained" With regard to ethnic Ukrainians living in Crimea, Ukraine states that the Russian Federation has restricted their educational rights and ability to maintain their language and culture, and imposed discriminatory limitations on ethnic Ukrainian media in the peninsula

*

35 The Russian Federation contends that there is no dispute between the Parties concerning the interpretation or application of CERD It claims that Ukraine has failed to demonstrate that, prima facie, the alleged facts constitute violations of the provisions of the Convention It asserts, in particular, that the Applicant has not demonstrated that the searches, preventive measures or criminal proceedings undertaken by the Crimean authorities against certain people of Tatar or Ukrainian origin were applied in a discriminatory manner on the basis of the racial or ethnic origin of those concerned In its view, neither has Ukraine established that the Russian authorities were engaged in a systematic practice of forced disappearances and murders motivated by racial or ethnic considerations

36 The Russian Federation further contests Ukraine's allegations that the educational rights of the Tatar and Ukrainian communities have been restricted It claims, for instance, that the Crimean Federal University recognizes the Ukrainian and Tatar languages as languages of instruction, and that there are a dozen schools that offer Ukrainian-language education The Russian Federation also disagrees with Ukraine's assertion that the Respondent has been seeking to silence the Tatar and Ukrainian media in Crimea It argues that more than 80 radio stations, television channels and newspapers in the Ukrainian and Tatar languages are registered in Crimea today and that only a few media outlets in those two languages were not registered, on the ground that their application file was incomplete The Russian Federation further denies that it has suppressed the political leaders and institutions of the Tatar and Ukrainian communities With respect to the *Mejlis*, the Russian Federation claims that it has been wrongly characterized by Ukraine as "the central self-governing institution of Crimean Tatar life" it is not the only representative body of the Crimean Tatars It adds that, in any event, the decision to ban the *Mejlis* was taken on security grounds and for public order reasons and bore no relation to the ethnicity of its members

* *

37 The Court considers that, as evidenced by the documents placed before the Court, the Parties differ on the question of whether the events which occurred in Crimea starting from late February 2014 have given rise to issues relating to their rights and obligations under CERD The Court notes that Ukraine has claimed that the Russian Federation violated its obligations under this Convention by systematically discriminating against and mistreating the Crimean Tatars and ethnic Ukrainians in Crimea, suppressing the political and cultural expression of Crimean Tatar identity, banning the *Mejlis*, preventing Crimean Tatars and ethnic Ukrainians from gathering to celebrate and commemorate important cultural events, and by suppressing the Crimean Tatar language and Ukrainian-language education The Russian Federation has positively denied that it has committed any of the violations set out above

38 The acts referred to by Ukraine, in particular the banning of the *Mejlis* and the alleged restrictions upon the cultural and educational rights of Crimean Tatars and ethnic Ukrainians, appear to be capable of falling within the scope of CERD *ratione materiae*

39 In the view of the Court, the above-mentioned elements are sufficient at this stage to establish prima facie the existence of a dispute between the Parties concerning the interpretation and application of CERD

3. Procedural preconditions

40 The ICSFT and CERD set out procedural preconditions to be fulfilled before the seisin of the Court

41 Under Article 24, paragraph 1, of the ICSFT (see paragraph 20 above), a dispute that "cannot be settled through negotiation within a reasonable time" shall be submitted to arbitration at the request of one of the parties and it may be referred to the Court only if the parties are unable to agree on the organization of the arbitration within six months from the date of the request

42 Under Article 22 of CERD (see paragraph 21 above), the dispute referred to the Court must be a dispute "not settled by negotiation or by the procedures expressly provided for in this Convention" In addition, Article 22 states that the dispute may be referred to the Court at the request of one of the parties thereto only if the parties have not agreed to another mode of settlement The Court notes that neither Party contests that this latter condition is fulfilled in the case

43 Regarding the negotiations to which both compromissory clauses refer, the Court observes that negotiations are distinct from mere protests or disputations and require a genuine attempt by one of the parties to engage in discussions with the other party, with a view to resolving the dispute Where negotiations are attempted or have commenced, the precondition of negotiation is only met when the attempt to negotiate has been unsuccessful or where negotiations have failed, become futile or deadlocked In order to meet the precondition of negotiation contained in the compromissory clause of a treaty, "the subject-matter of the negotiations must relate to the subject-matter of the dispute which, in turn, must concern the substantive obligations contained in the treaty in question" (see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v *Russian Federation), Preliminary Objections, Judgment, I C J Reports 2011 (I)*, pp 132-133, paras 157-161)

44 At this stage of the proceedings, the Court first has to assess whether it appears that Ukraine genuinely attempted to engage in negotiations with the Russian Federation, with a view to resolving their dispute concerning the latter's compliance with its substantive obligations under the ICSFT and CERD, and whether Ukraine pursued these negotiations as far as possible

45 With regard to the dispute under the ICSFT, if the Court finds that negotiations took place but failed, it will also have to examine whether, prior to the seisin of the Court, Ukraine attempted to settle this dispute through arbitration, under the conditions provided for in Article 24, paragraph 1, of the Convention

46 With regard to CERD, along with the precondition of negotiation, Article 22 includes another precondition, namely the use of "the procedures expressly provided for in the Convention" In this context, the Court will need to determine whether, for the purposes of its decision on the Request for the indication of provisional measures, it is necessary to examine the question of the relationship between both preconditions and Ukraine's compliance with the second one

***(a)* The International Convention for the Suppression of the Financing of Terrorism**

47 Regarding the procedural conditions set out in Article 24, paragraph 1, of the ICSFT, Ukraine contends that during a period of two years it has made "efforts to negotiate a resolution to the dispute" with the Russian Federation, including the exchange of more than 40 diplomatic Notes and participation in four rounds of bilateral negotiations According to Ukraine, the Russian Federation "largely failed to respond to Ukraine's correspondence, declined to engage on the substance of the dispute, and consistently failed to negotiate in a constructive manner", arguing that Ukraine's claims did not raise issues under the ICSFT Ukraine contends that it therefore became apparent that the dispute could not be settled by way of negotiations within a reasonable time, and that further negotiations would be futile Consequently, by a Note Verbale dated 19 April 2016, Ukraine suggested to the Russian Federation that the dispute be submitted to arbitration, pursuant to Article 24, paragraph 1, of the ICSFT

48 Ukraine explains that it was more than two months before the Russian Federation agreed to discuss the arbitration Ukraine asserts that in August 2016 it informed the Russian Federation of its views on how an arbitration should be organized It indicates that it was only in October 2016 that the Russian Federation stated "clearly its intent to participate in an arbitration if the parties reached agreement on its organization" and presented a partial counter-proposal Ukraine contends that it continued to meet with the Russian Federation and engaged in diplomatic exchanges in an attempt to reach agreement on the organization of the arbitration According to Ukraine, however, no agreement could be reached Ukraine contends that the main reasons why the Parties were unable to agree upon arbitration were that there had been months of delay on the part of the Russian Federation and a divergence of views on various important issues Because more than six months had passed since Ukraine's request for arbitration without the parties reaching agreement on the organization of the arbitration, Ukraine claims that the procedural conditions of Article 24, paragraph 1, of the ICSFT had been met when it seised the Court

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49 The Russian Federation, for its part, claims that Ukraine has not fulfilled its obligation to negotiate, as required by Article 24 of the ICSFT It contends, in particular, that Ukraine did not negotiate in good faith as to the substance of its claim that the Russian Federation had allegedly violated its obligations under the Convention, and that it did not make a bona fide effort to try to set up an arbitral tribunal

50 With respect to its first argument, the Russian Federation explains that, throughout the exchange of diplomatic Notes, Ukraine constantly insisted on its own position without showing any willingness to engage in a meaningful discussion with the Russian Federation on relevant issues In particular, it contends, Ukraine consistently put forward allegations that went well beyond the scope of the Convention The Russian Federation asserts that nearly all of Ukraine's diplomatic Notes, which were meant to address issues arising under the Convention, were closely interwoven with accusations against the Russian Federation regarding the prohibition of the use of force The Russian Federation claims to have requested, on several occasions, that Ukraine provide evidentiary material and comprehensive information and data in order to be able to verify Ukraine's claims The Russian Federation states that, should such elements have substantiated Ukraine's claims, it would have then taken the appropriate measures as required by the Convention However, Ukraine did not follow up on such requests, thereby rendering pointless the further round of negotiations that had been envisaged

51 With respect to its second argument, the Russian Federation states, in particular, that Ukraine has never submitted concrete proposals for an arbitration agreement According to the Russian Federation, resorting to an *ad hoc* chamber of this Court as proposed by Ukraine could not qualify as arbitration within the meaning of Article 24 of the ICSFT In the Respondent's view, it was the Russian Federation which submitted full drafts for an arbitration agreement, as well as draft rules of procedure with a view to addressing the concerns of Ukraine The Russian Federation adds that it never received any specific comments from Ukraine on its draft arbitration agreement

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52 The Court notes that it appears from the record of the proceedings that issues relating to the application of the ICSFT with regard to the situation in eastern Ukraine have been raised in bilateral contacts and negotiations between the Parties In particular, Ukraine addressed a diplomatic Note to the Russian Federation on 28 July 2014 in which it alleged that the latter was violating its obligations under the ICSFT By means of a diplomatic Note of 15 October 2015, the Russian Federation denied the claims being made by Ukraine Further diplomatic exchanges followed, in which Ukraine specifically referred to alleged breaches by the Russian Federation of its obligations under the ICSFT Over a period of two years, the Parties also held four in-person negotiating sessions specifically addressed to the ICSFT

These facts demonstrate that, prior to the filing of the Application, Ukraine and the Russian Federation had engaged in negotiations concerning the latter's compliance with its substantive obligations under the ICSFT It appears from the facts on the record that these issues could not then be resolved by negotiations

53 With regard to the precondition relating to the submission of the dispute to arbitration, the Court notes that by a Note Verbale dated 19 April 2016 Ukraine submitted a request for arbitration to the Russian Federation The Russian Federation responded by means of a Note Verbale dated 23 June 2016, in which it offered to discuss "issues concerning setting up" the arbitration at a meeting it suggested should be held a month later By a Note Verbale dated 31 August 2016 Ukraine proposed to the Russian Federation to resort to the mechanism of an *ad hoc* Chamber of this Court In its Note Verbale to Ukraine, dated 3 October 2016, the Russian Federation rejected this proposal and submitted its own draft arbitration agreement and accompanying rules of procedure At a meeting on 18 October 2016, the Parties discussed the organization of the arbitration but no agreement was reached Further exchanges between the Parties did not resolve the impasse It appears that, within six months from the date of the arbitration request, the Parties were unable to reach an agreement on its organization

54 The above-mentioned elements are sufficient at this stage to establish, prima facie, that the procedural preconditions under Article 24, paragraph 1, of the ICSFT for the seisin of the Court have been met

***(b)* The International Convention on the Elimination of All Forms of Racial Discrimination**

55 Regarding the procedural conditions set out in Article 22 of CERD, Ukraine contends that it "has made extensive efforts to negotiate a resolution to the dispute, including the exchange of more than 20 diplomatic Notes and participation in three rounds of bilateral negotiation sessions" Ukraine refers, in particular, to a diplomatic Note dated 23 September 2014, in which it "brought a series of violations of the CERD to Russia's attention" However, Ukraine states that the Russian Federation largely failed to respond to Ukraine's correspondence, declined to engage on the substance of the dispute, and consistently failed to negotiate in a constructive manner It failed to engage in detailed discussions of the claims presented by Ukraine, and avoided substantive discussions of the relevant issues According to Ukraine, during the three bilateral negotiation sessions held in Minsk to try to settle the dispute, the "Russian Federation never provided straight and specific responses on the issues raised" Ukraine alleges that, at the same time as it was refusing to engage in a meaningful discussion of issues of discrimination in Crimea, the Russian Federation was continuing and intensifying its pattern of discrimination against Crimean Tatars and ethnic Ukrainians in Crimea It therefore became apparent that "further negotiations would be futile, and prejudicial to the people living under a discriminatory occupation regime" According to Ukraine, the procedural conditions of Article 22 of CERD have thus been complied with

56 Ukraine further states that the Russian Federation is wrong in claiming that Ukraine was obliged both to exhaust bilateral negotiations, and to attempt proceedings before the Committee on the Elimination of Racial Discrimination established under the Convention (hereinafter the "CERD

Committee") In any event, whether or not the preconditions of Article 22 of CERD are cumulative, is not, according to Ukraine, a matter for the current stage of the proceedings, which only requires a finding of prima facie jurisdiction

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57 The Russian Federation, for its part, claims that none of the procedural conditions set out in Article 22 of CERD has been fulfilled by Ukraine First, it contends that there is no evidence of a "genuine attempt to negotiate" Although the Respondent acknowledges that, for two and a half years, exchanges have taken place between the Parties, in the form of Notes Verbales and three rounds of meetings, it contends that Ukraine has merely placed on record a certain number of accusations that have constantly shifted from one Note Verbale to the next, rendering it impossible to establish the positions of the two Parties on the questions at issue Secondly, the Russian Federation observes that Ukraine did not refer its claims to the CERD Committee, whereas Articles 11 to 13 of the Convention establish a specific procedure for bringing State-to-State complaints before this Committee It adds that, in the exchange of diplomatic Notes, it had expressly recalled to the Applicant, on 27 November 2014, that it should follow this procedure It recalls that the Committee can trigger an urgent action procedure when a situation requires "immediate attention to prevent or limit the scale or number of serious violations of the Convention"

58 The Russian Federation is of the view that the two preconditions in Article 22 of CERD — namely, recourse to negotiations and to the procedures expressly provided for in the Convention — are cumulative It observes that the Court has recognized in its jurisprudence that, at the time CERD was being elaborated, the idea of submitting to the compulsory settlement of disputes by the Court was not readily acceptable to a number of States, which explains why additional limitations to resort to judicial settlement — in the form of prior negotiations and other settlement procedures without time-limits — were provided for with a view to facilitating wider acceptance of CERD by States

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59 The Court recalls that it has earlier concluded that the terms of Article 22 of CERD established preconditions to be fulfilled before the seisin of the Court (see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v *Russian Federation), Preliminary Objections, Judgment, I C J Reports 2011 (I)*, p 128, para 141) It notes that, as evidenced by the record of the proceedings, issues relating to the application of CERD with regard to the situation in Crimea have been raised in bilateral contacts and negotiations between the Parties, which have exchanged numerous diplomatic Notes and held three rounds of bilateral negotiations on this subject These facts demonstrate that, prior to the filing of the

Application, Ukraine and the Russian Federation engaged in negotiations regarding the question of the latter's compliance with its substantive obligations under CERD. It appears from the record that these issues had not been resolved by negotiations at the time of the filing of the Application

60 Article 22 of CERD also refers to "the procedures expressly provided for" in the Convention According to Article 11 of the Convention, "[i]f a State Party considers that another State Party is not giving effect to the provisions of this Convention", the matter may be brought to the attention of the CERD Committee Neither Party claims that the issues in dispute have been brought to the attention of the CERD Committee Although both Parties agree that negotiations and recourse to the procedures referred to in Article 22 of CERD constitute preconditions to be fulfilled before the seisin of the Court, they disagree as to whether these preconditions are alternative or cumulative The Court considers that it need not make a pronouncement on the issue at this stage of the proceedings Consequently the fact that Ukraine did not bring the matter before the CERD Committee does not prevent the Court from concluding that it does have prima facie jurisdiction

61 The Court considers, in view of all the foregoing, that the procedural preconditions under Article 22 of CERD for the seisin of the Court have, prima facie, been complied with

4. Conclusion as to prima facie jurisdiction

62 In light of the foregoing, the Court considers that, prima facie, it has jurisdiction pursuant to Article 24, paragraph 1, of the ICSFT and Article 22 of CERD to deal with the case to the extent that the dispute between the Parties relates to the "interpretation or application" of the respective Convention

II. The rights whose protection is sought and the measures requested

1. General introduction

63 The power of the Court to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights claimed by the parties in a case, pending its decision on the merits thereof It follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by it to belong to either party Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by the party requesting such measures are at least plausible (see, for example, *Immunities and Criminal Proceedings (Equatorial Guinea* v *France), Provisional Measures*, Order of 7 December 2016, para 71)

64 At this stage of the proceedings, the Court, however, is not called upon to determine definitively whether the rights which Ukraine wishes to see protected exist, it need only decide whether the rights claimed by Ukraine on the merits, and for which it is seeking protection, are plausible (see, for example, *ibid* , para 78) Moreover, a link must exist between the rights whose protection is sought and the provisional measures being requested (*ibid* , para 72)

2. The International Convention for the Suppression of the Financing of Terrorism

65 In its Application, Ukraine asserts rights under Articles 8, 9, 10, 11, 12 and 18 of the ICSFT However, for the purposes of its Request for the indication of provisional measures, in order to identify the rights which it seeks to protect pending the decision on the merits, Ukraine relies exclusively upon Article 18 of the ICSFT

66 Ukraine submits that, under Article 18 of the ICSFT, it has a right to the Russian Federation's co-operation in preventing the financing of terrorism, i e , the provision or collection of funds with the intention that they should be used, or in the knowledge that they will be used, in order to carry out acts of terrorism defined in Article 2, paragraphs 1 *(a)* and 1 *(b)* of the Convention As examples of such acts, committed on its territory, Ukraine refers, in particular, to *(a)* the bombing of peaceful marchers in Kharkiv, *(b)* the bombardment of Mariupol, *(c)* the attacks on Volnovakha and Kramatorsk; and *(d)* the shooting-down of Malaysia Airlines Flight MH17, all of which, according to the Applicant, plausibly involved an "intent to cause death or serious injury to civilians" and had a plausible purpose "to intimidate a population"

67 Ukraine contends that a state of armed conflict does not exclude the application of the ICSFT According to Ukraine, international humanitarian law is not the only relevant law applicable in situations of armed conflict The ICSFT also applies in such situations, as long as those attacked are not actively engaged in armed conflict Civilians living far from conflict zones who are not taking an active part in hostilities can be victims of terrorist attacks financed by external suppliers of war materiel Ukraine argues that the obligations under the ICSFT are different from those under international humanitarian law, because that convention addresses the financing of terrorism, "a topic not covered at all by the laws governing armed conflict"

68 Ukraine maintains that, given the evidence before the Court, "it is far more than simply 'plausible'" that the Russian Federation has engaged and continues to engage in prohibited behaviour under the ICSFT Ukraine states that various "highly credible international organizations" have found that the Russian Federation "has financed its proxies in Ukraine for many years" In this regard, Ukraine refers, *inter alia*, to the reports of the Special Monitoring Mission of the Organization for Security and Co-operation in Europe (OSCE) detailing multiple military convoys of tanks, armoured personnel carriers, and heavy artillery, moving from Russian territory across the Ukrainian border

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69 The Russian Federation claims that the specific rights claimed by Ukraine under the ICSFT are not plausible In particular, referring to the right to co-operation under Article 18 of the Convention, which is "the sole right that Ukraine asserts with respect to the Request", it explains that this right is linked to the existence of financing of acts of terrorism as specified in Article 2 However, according to the Russian Federation, there is no plausible allegation of acts of

terrorism under the Convention, committed on the territory of Ukraine The Respondent contends that the civilian casualties referred to by Ukraine in its Request were caused by indiscriminate shelling of areas controlled by both sides, and not by acts of terrorism within the meaning of Article 2 In this regard, it adds that Ukraine's own evidence shows that the Applicant has equally engaged in these acts

70 The Russian Federation asserts that Ukraine has mischaracterized the nature of the case by erroneously seeking to invoke the ICSFT According to the Russian Federation, the facts at hand fall directly within the scope of international humanitarian law The Respondent points out that reports on human rights prepared by organizations such as the Office of the United Nations High Commissioner for Human Rights (OHCHR), the OSCE and the International Committee of the Red Cross (ICRC) refer to the need to "respect international humanitarian law" and to "violations of the [international humanitarian law] principles of distinction, proportionality and precaution", but never characterize such acts as acts of terrorism The Russian Federation states that incidents of attacks in residential areas are not plausibly governed by the ICSFT and that, by contrast, international humanitarian law is self-evidently relevant

71 According to the Russian Federation, first, it cannot have breached its obligations under Article 18 of the ICSFT, since it has not been demonstrated that the armed groups in eastern Ukraine were engaging in acts of terrorism Secondly the Russian Federation recalls its position that the ICSFT obliges States to co-operate in the punishment and prevention of the financing by private actors of terrorist activities In any event, it contends that there is no plausible allegation that it financed terrorism within the meaning of Article 2, paragraph 1, of the ICSFT It recalls that Article 2 is concerned solely with funds supplied with the knowledge or intent that they are to be used for acts of terrorism, and that no evidence has been adduced that the Russian Federation purposefully provided funds for the commission of alleged terrorist acts

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72 The Court notes that the ICSFT imposes a number of obligations on States parties with regard to the prevention and suppression of the financing of terrorism However, for the purposes of its Request for the indication of provisional measures, Ukraine invokes its rights and the respective obligations of the Russian Federation solely under Article 18 of the Convention, which reads as follows

> "1 States Parties shall co-operate in the prevention of the offences set forth in article 2 by taking all practicable measures, *inter alia*, by adapting their domestic legislation, if necessary, to prevent and counter preparations in their respective territories for the commission of those offences within or outside their territories, including

(a) measures to prohibit in their territories illegal activities of persons and organizations that knowingly encourage, instigate, organize or engage in the commission of offences set forth in article 2,

(b) measures requiring financial institutions and other professions involved in financial transactions to utilize the most efficient measures available for the identification of their usual or occasional customers, as well as customers in whose interest accounts are opened, and to pay special attention to unusual or suspicious transactions and report transactions suspected of stemming from a criminal activity For this purpose, States Parties shall consider

(i) adopting regulations prohibiting the opening of accounts the holders or beneficiaries of which are unidentified or unidentifiable, and measures to ensure that such institutions verify the identity of the real owners of such transactions,

(ii) with respect to the identification of legal entities, requiring financial institutions, when necessary, to take measures to verify the legal existence and the structure of the customer by obtaining, either from a public register or from the customer or both, proof of incorporation, including information concerning the customer's name, legal form, address, directors and provisions regulating the power to bind the entity,

(iii) adopting regulations imposing on financial institutions the obligation to report promptly to the competent authorities all complex, unusual large transactions and unusual patterns of transactions, which have no apparent economic or obviously lawful purpose, without fear of assuming criminal or civil liability for breach of any restriction on disclosure of information if they report their suspicions in good faith,

(iv) requiring financial institutions to maintain, for at least five years, all necessary records on transactions, both domestic or international

2 States Parties shall further co-operate in the prevention of offences set forth in article 2 by considering

(a) measures for the supervision, including, for example, the licensing, of all money-transmission agencies,

(b) feasible measures to detect or monitor the physical cross-border transportation of cash and bearer negotiable instruments, subject to strict safeguards to ensure proper use of information and without impeding in any way the freedom of capital movements

3 States Parties shall further co-operate in the prevention of the offences set forth in article 2 by exchanging accurate and verified information in accordance with their domestic law and coordinating administrative and other measures taken, as appropriate, to prevent the commission of offences set forth in article 2, in particular by

(a) establishing and maintaining channels of communication between their competent agencies and services to facilitate the secure and rapid exchange of information concerning all aspects of offences set forth in article 2,

(b) co-operating with one another in conducting inquiries, with respect to the offences set forth in article 2, concerning

(i) the identity, whereabouts and activities of persons in respect of whom reasonable suspicion exists that they are involved in such offences,

(ii) the movement of funds relating to the commission of such offences

4 States Parties may exchange information through the International Criminal Police Organization (Interpol) "

73 Article 18 should be read together with Article 2 of the ICSFT because under Article 18 States parties must co-operate in the prevention of the offences set forth in Article 2, which reads as follows

"1 Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out

(a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex, or

(b) Any 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

3 For an act to constitute an offence set forth in paragraph 1, it shall not be necessary that the funds were actually used to carry out an offence referred to in paragraph 1, subparagraphs *(a)* or *(b)*

4 Any person also commits an offence if that person attempts to commit an offence as set forth in paragraph 1 of this article

5 Any person also commits an offence if that person

(a) Participates as an accomplice in an offence as set forth in paragraph 1 or 4 of this article,

(b) Organizes or directs others to commit an offence as set forth in paragraph 1 or 4 of this article,

(c) Contributes to the commission of one or more offences as set forth in paragraphs 1 or 4 of this article by a group of persons acting with a common purpose Such contribution shall be intentional and shall either

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of an offence as set forth in paragraph 1 of this article, or

(ii) Be made in the knowledge of the intention of the group to commit an offence as set forth in paragraph 1 of this article "

Under Article 1, paragraph 1, of the Convention, the notion of "funds" which Article 2 refers to

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

74 Thus, the obligations under Article 18 and the corresponding rights are premised on the acts identified in Article 2, namely the provision or collection of funds with the intention that they should be used or in the knowledge that they are to be used in order to carry out acts set out in paragraphs 1 *(a)* and 1 *(b)* of this Article Consequently, in the context of a request for the indication of provisional measures, a State party to the Convention may rely on Article 18 to require another State party to co-operate with it in the prevention of certain types of acts only if it is plausible that such acts constitute offences under Article 2 of the ICSFT

75 In the present case, the acts to which Ukraine refers (see paragraph 66 above) have given rise to the death and injury of a large number of civilians However, in order to determine whether the rights for which Ukraine seeks protection are at least plausible, it is necessary to ascertain whether there are sufficient reasons for considering that the other elements set out in Article 2, paragraph 1, such as the elements of intention or knowledge noted above (see paragraph 74), and the element of purpose specified in Article 2, paragraph 1 *(b)*, are present At this stage of the proceedings, Ukraine has not put before the Court evidence which affords a sufficient basis to find it plausible that these elements are present

76 Therefore, the Court concludes that the conditions required for the indication of provisional measures in respect of the rights alleged by Ukraine on the basis of the ICSFT are not met

77 The above conclusion is without prejudice to the Parties' obligation to comply with the requirements of the ICSFT, and, in particular, Article 18 thereof

3. The International Convention on the Elimination of All Forms of Racial Discrimination

78 In its Application, Ukraine asserts rights under Articles 2, 3, 4, 5 and 6 of CERD However, for the purposes of its Request for the indication of provisional measures, in order to identify the rights which it seeks to protect pending a decision on the merits, Ukraine relies exclusively on Articles 2 and 5 of the Convention (see paragraph 80 below) Ukraine states that each of the measures requested relate to these rights In this respect, it recalls that it is requesting the Court to order the Russian Federation to refrain from any act of racial discrimination, to suspend the decision to ban the *Mejlis* of the Crimean Tatar People, to take all necessary steps to halt the disappearance of Crimean Tatar individuals and to suspend restrictions on Ukrainian-language education

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79 The Russian Federation considers that the rights Ukraine asserts are not plausible and are not grounded in a possible interpretation of CERD It explains that it is not enough to allege that a person has suffered a prejudice or that one of his or her rights under the Convention has been infringed It must be shown that the prejudice or the infringement of a right is discriminatory in nature Yet, according to the Russian Federation, Ukraine has not established that the Respondent has adopted measures which had a discriminatory effect on the Tatar and Ukrainian communities, showing a differentiation of treatment between those communities and the other residents in Crimea Focusing on Articles 2 and 5 of CERD, the Russian Federation considers that Ukraine merely gives a list of alleged violations of human rights that have affected people of Tatar or Ukrainian origin, at no point does it explain how these alleged violations constitute racial discrimination under CERD

* *

80 The Court notes that CERD imposes a number of obligations on States parties with regard to the elimination of racial discrimination in all its forms and manifestations For the purposes of CERD, the term "racial discrimination" includes discrimination on the basis of ethnic origin (Article 1, paragraph 1) Articles 2 and 5 of the Convention, invoked by Ukraine for the purposes of its Request for the indication of provisional measures, read as follows

"*Article 2*

1 States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end

(a) each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation,

(b) each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations,

(c) each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists,

(d) each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;

(e) each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division

2 States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved",

"*Article 5*

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights

(a) the right to equal treatment before the tribunals and all other organs administering justice,

(b) the right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution,

(c) political rights, in particular the right to participate in elections — to vote and to stand for election — on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service,

(d) other civil rights, in particular

(i) the right to freedom of movement and residence within the border of the State,

(ii) the right to leave any country, including one's own, and to return to one's country,

(iii) the right to nationality,

(iv) the right to marriage and choice of spouse,

(v) the right to own property alone as well as in association with others,

(vi) the right to inherit,

(vii) the right to freedom of thought, conscience and religion,

(viii) the right to freedom of opinion and expression,

(ix) the right to freedom of peaceful assembly and association,

(e) economic, social and cultural rights, in particular

(i) the rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration,

(ii) the right to form and join trade unions,

(iii) the right to housing,

(iv) the right to public health, medical care, social security and social services,

(v) the right to education and training,

(vi) the right to equal participation in cultural activities,

(f) the right of access to any place or service intended for use by the general public, such as transport hotels, restaurants, cafes, theatres and parks"

81 The Court observes that there is a correlation between respect for individual rights, the obligations of States parties under CERD and the right of States parties to seek compliance therewith (see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation), Provisional Measures, Order of 15 October 2008, I C J Reports 2008*, pp 391-392, para 126)

82 The Court notes that Articles 2 and 5 of CERD are intended to protect individuals from racial discrimination Consequently, in the context of a request for the indication of provisional measures, a State party to CERD may avail itself of the rights under Articles 2 and 5 only if it is plausible that the acts complained of constitute acts of racial discrimination under the Convention

83. In the present case, on the basis of the evidence presented before the Court by the Parties, it appears that some of the acts complained of by Ukraine fulfil this condition of plausibility This is the case with respect to the banning of the *Mejlis* and the alleged restrictions on the educational rights of ethnic Ukrainians

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84 The Court now turns to the issue of the link between the rights claimed and the provisional measures requested

85 The provisional measures sought by Ukraine in paragraph 24, points *(b)* to *(e)* of its Request, which were reiterated at the close of its oral argument, are aimed at preventing the Russian Federation from committing acts of racial discrimination against persons, groups of persons, or institutions in the Crimean peninsula (point *(b)*), preventing acts of political and cultural suppression against the Crimean Tatar people, including suspending the decree banning the *Mejlis* (point *(c)*), preventing the disappearance of Crimean Tatar individuals and ensuring prompt investigation of disappearances that have already occurred (point *(d)*), and preventing acts of political and cultural suppression against the ethnic Ukrainian people in Crimea, including suspending restrictions on Ukrainian-language education (point *(e)*)

86 As the Court has already recalled, there must be a link between the measures which are requested and the rights which are claimed to be at risk of irreparable prejudice In the current proceedings, this is the case with respect to the measures aimed at safeguarding the rights of Ukraine under Articles 2 and 5 of 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

III. Risk of irreparable prejudice and urgency

87 In view of the conclusion reached in paragraph 76, the issue of the risk of irreparable prejudice and urgency only arises in relation to the provisional measures sought with regard to CERD

88 The Court, pursuant to Article 41 of its Statute, has the power to indicate provisional measures when irreparable prejudice could be caused to rights which are the subject of judicial proceedings (see, for example, *Immunities and Criminal Proceedings (Equatorial Guinea v France), Provisional Measures*, Order of 7 December 2016, para 82)

89 However, the power of the Court to indicate provisional measures will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to the rights in dispute before the Court gives its final decision (*ibid*, para 83) The Court must therefore consider whether such a risk exists at this stage of the proceedings

90 The Court is not called upon, for the purposes of its decision on the Request for the indication of provisional measures, to establish the existence of breaches of CERD, but to determine whether the circumstances require the indication of provisional measures for the protection of rights under this instrument It cannot at this stage make definitive findings of fact The right of each Party to submit arguments in respect of the merits remains unaffected by the Court's decision on the Request for the indication of provisional measures

* *

91 Ukraine maintains that in Crimea, the Russian Federation is conducting a "policy of cultural erasure" through its discrimination against the Crimean Tatar and ethnic Ukrainian population Ukraine claims that the risk of irreparable prejudice to the rights it invokes is imminent in view of the persecution of the community's leaders and the banning of the *Mejlis* (described by Ukraine as the community's central political and cultural institution), as well as the suppression of the cultural and educational rights of Crimean Tatars and ethnic Ukrainians Ukraine refers to General Assembly resolution 71/205 of 19 December 2016 which expressed serious concern over the banning of the *Mejlis* Ukraine in addition refers to various reports of the OHCHR which, it states, are highly critical of the intimidatory tactics used by the Russian Federation to silence political expression by the Crimean Tatar community Ukraine also cites reports of the OSCE's Human Rights Assessment Mission on Crimea and another report of the OHCHR which voiced great concern over the rapid decline of Ukrainian-language instruction in Crimea

92 According to Ukraine, without the interim measures of protection that Ukraine urgently seeks, by the time this case is decided, "the ethnic Ukrainian and Crimean Tatar communities will be severely weakened or destroyed as culturally distinct communities" Ukraine stresses that all of

the prejudice caused to those communities in the intervening years will be irreparable It points out that "[t]he vulnerability of these non-Russian groups is confirmed by the numbers who have left Crimea since the peninsula was occupied"

*

93 The Russian Federation, for its part, denies that there exists a risk of irreparable prejudice to the rights of the Applicant under CERD As regards the decision to ban the *Mejlis*, the Russian Federation states that, in his report on the human rights situation in Ukraine (16 August to 15 November 2016), the United Nations High Commissioner for Human Rights, who was aware of the contents of General Assembly resolution 71/205 of 19 December 2016, because this document was drafted before the High Commissioner submitted his last report, made no criticism of the decision of the Supreme Court of Crimea to ban the *Mejlis*, which was subsequently confirmed by the Supreme Court of the Russian Federation The Russian Federation contends that these judicial decisions were taken on security grounds and for public order reasons and bore no relation to the ethnicity of the members of the *Mejlis*

94 The Russian Federation further asserts that the situation is not urgent, as alleged by Ukraine The Russian Federation points out that throughout the two and a half years of consultations between the Parties, Ukraine has never made any reference to any kind of urgency or to an imminent risk of prejudice Quite the contrary, Ukraine has acted as if there were no urgency at all In addition, the Russian Federation argues that the CERD Committee, which is in its view the most competent body in this area and has all the information to hand, has not deemed it necessary to trigger the urgent action procedure at its disposal, despite having the possibility of doing so at any time and being aware of the situation of minorities in Crimea for a long time According to the Respondent, this fact "deprives of all credibility Ukraine's accusation that the Russian authorities are pursuing a systematic campaign of cultural erasure in Crimea with the aim of eliminating the Tatar and Ukrainian communities"

95 Furthermore, the Russian Federation contends that it has taken substantive measures to support the Crimean Tatar and Ukrainian communities and to promote their culture It refers, in particular, to the adoption of a presidential decree on 21 April 2014 on the rehabilitation of the Crimean Tatar people, providing support for their revival and development, and granting them specific social benefits The Russian Federation states that it is aware of the need to provide education in the language of that community, which, according to it, is being met It also mentions the fact that Crimean Tatars are represented in the political, legislative and judicial institutions of the Republic of Crimea It furthermore considers it important to point out that Crimea's new Constitution, which was adopted on 11 April 2014, establishes both the Crimean Tatar and Ukrainian languages as official languages of Crimea The Russian Federation adds that the educational rights of the Tatar and Ukrainian communities are duly protected

* *

96 The Court notes that certain rights in question in these proceedings, in particular, the political, civil, economic, social and cultural rights stipulated in Article 5, paragraphs *(c)*, *(d)* and *(e)* of CERD are of such a nature that prejudice to them is capable of causing irreparable harm Based on the information before it at this juncture, the Court is of the opinion that Crimean Tatars and ethnic Ukrainians in Crimea appear to remain vulnerable

97 In this regard, the Court takes note of the report on the human rights situation in Ukraine (16 May to 15 August 2016), whereby the OHCHR acknowledged that "the ban on the *Mejlis*, which is a self-government body with quasi-executive functions, appears to deny the Crimean Tatars — an indigenous people of Crimea — the right to choose their representative institutions", as well as of his report on the human rights situation in Ukraine (16 August to 15 November 2016), in which the OHCHR explained that none of the Crimean Tatar NGOs currently registered in Crimea can be considered to have the same degree of representativeness and legitimacy as the *Mejlis*, elected by the Crimean Tatars' assembly, namely the *Kurultai* The Court also takes note of the report of the OSCE Human Rights Assessment Mission on Crimea (6 to 18 July 2015), according to which "[e]ducation in and of the Ukrainian language is disappearing in Crimea through pressure on school administrations, teachers, parents and children to discontinue teaching in and of the Ukrainian language" The OHCHR has observed that "[t]he start of the 2016-2017 school year in Crimea and the city of Sevastopol confirmed the continuous decline of Ukrainian as a language of instruction" (report on the human rights situation in Ukraine (16 August to 15 November 2016)) These reports show, prima facie, that there have been restrictions in terms of the availability of Ukrainian-language education in Crimean schools

98 The Court considers that there is an imminent risk that the acts, as set out above, could lead to irreparable prejudice to the rights invoked by Ukraine

IV. Conclusion and measures to be adopted

99 The Court concludes from all of the above considerations that the conditions required by its Statute for it to indicate provisional measures in respect of CERD are met It is therefore appropriate, pending its final decision, for the Court to indicate certain measures in order to protect the rights claimed by Ukraine, as identified above

100 The Court recalls that it has the power, under its Statute, when a request for provisional measures has been made, to indicate measures that are in whole or in part other than those requested Article 75, paragraph 2, of the Rules of Court specifically refers to this power of the Court The Court has already exercised this power on several occasions in the past (see, for example, *Immunities and Criminal Proceedings (Equatorial Guinea* v *France), Provisional Measures*, Order of 7 December 2016, para 94)

101 In the present case, having considered the terms of the provisional measures requested by Ukraine and the circumstances of the case, the Court finds that the measures to be indicated need not be identical to those requested

102 Remindıng the Russıan Federatıon of ıts duty to comply wıth ıts obligatıons under CERD, the Court consıders that, wıth regard to the sıtuatıon ın Crımea, the Russıan Federatıon must refraın, pendıng the fınal decısıon ın the case, from maıntaınıng or ımposıng lımıtatıons on the abılıty of the Crımean Tatar communıty to conserve ıts representatıve ınstıtutıons, ıncludıng the *Mejlıs* In addıtıon, the Russıan Federatıon must ensure the avaılabılıty of educatıon ın the Ukraınıan language

103 The Court recalls that Ukraıne has requested ıt to ındıcate measures aımed at ensurıng the non-aggravatıon of the dıspute wıth the Russıan Federatıon When ıt ıs ındıcatıng provısional measures for the purpose of preservıng specıfic rıghts, the Court also possesses the power to ındıcate provısional measures wıth a vıew to preventıng the aggravatıon or extensıon of a dıspute whenever ıt consıders that the cırcumstances so requıre (see *Request for Interpretatıon of the Judgment of 15 June 1962 ın the Case concernıng the* Temple of Preah Vıhear (Cambodıa v Thaıland) *(Cambodıa* v *Thaıland), Provısional Measures, Order of 18 July 2011, I C J Reports 2011 (II)*, pp 551-552, para 59) In thıs case, havıng consıdered all the cırcumstances, ın addıtıon to the specıfic measures ıt has decıded to take, the Court deems ıt necessary to ındıcate an addıtıonal measure aımed at ensurıng the non-aggravatıon of the dıspute between the Partıes

*

* *

104 Wıth regard to the sıtuatıon ın eastern Ukraıne, the Court remınds the Partıes that the Securıty Councıl, ın ıts resolutıon 2202 (2015), endorsed the "Package of Measures for the Implementatıon of the Mınsk Agreements", adopted and sıgned ın Mınsk on 12 February 2015 by representatıves of the OSCE, Ukraıne and the Russıan Federatıon, as well as by representatıves of "certaın areas of the Donetsk and Luhansk regıons", and endorsed by the Presıdent of the Russıan Federatıon, the Presıdent of Ukraıne, the Presıdent of the French Republıc and the Chancellor of the Federal Republıc of Germany The Court expects the Partıes, through ındıvıdual and joınt efforts, to work for the full ımplementatıon of thıs "Package of Measures" ın order to achıeve a peaceful settlement of the conflıct ın the eastern regıons of Ukraıne

*

* *

105 The decision given in the present proceedings in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the admissibility of the Application or to the merits themselves It leaves unaffected the right of the Governments of Ukraine and the Russian Federation to submit arguments in respect of those questions

*

* *

106 For these reasons

THE COURT,

Indicates the following provisional measures,

(1) With regard to the situation in Crimea, the Russian Federation must, in accordance with its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination,

(a) By thirteen votes to three,

Refrain from maintaining or imposing limitations on the ability of the Crimean Tatar community to conserve its representative institutions, including the *Mejlis*,

IN FAVOUR *President* ABRAHAM, *Vice-President* YUSUF, *Judges* OWADA, BENNOUNA, CANÇADO TRINDADE, GREENWOOD, DONOGHUE, GAJA, SEBUTINDE, BHANDARI, ROBINSON, CRAWFORD, *Judge* ad hoc POCAR,

AGAINST *Judges* TOMKA, XUE, *Judge* ad hoc SKOTNIKOV,

(b) Unanimously,

Ensure the availability of education in the Ukrainian language,

(2) Unanimously,

Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve

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

(Signed) Ronny ABRAHAM,
President

(Signed) Philippe COUVREUR,
Registrar

Judge OWADA appends a separate opinion to the Order of the Court, Judge TOMKA appends a declaration to the Order of the Court, Judges CANÇADO TRINDADE and BHANDARI append separate opinions to the Order of the Court, Judge CRAWFORD appends a declaration to the Order of the Court, Judges *ad hoc* POCAR and SKOTNIKOV append separate opinions to the Order of the Court

(Initialled) R A

(Initialled) Ph C

7 DÉCEMBRE 2016

ORDONNANCE

IMMUNITÉS ET PROCÉDURES PÉNALES

(GUINÉE ÉQUATORIALE c. FRANCE)

DEMANDE EN INDICATION DE MESURES CONSERVATOIRES

IMMUNITIES AND CRIMINAL PROCEEDINGS

(EQUATORIAL GUINEA *v.* FRANCE)

REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

7 DECEMBER 2016

ORDER

INTERNATIONAL COURT OF JUSTICE

YEAR 2016

2016
7 December
General List
No. 163

7 December 2016

IMMUNITIES AND CRIMINAL PROCEEDINGS

(EQUATORIAL GUINEA *v.* FRANCE)

REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

ORDER

Present *Vice-President* YUSUF, *Acting President*, *President* ABRAHAM, *Judges* OWADA, TOMKA, BENNOUNA, CANÇADO TRINDADE, GREENWOOD, XUE, DONOGHUE, GAJA, SEBUTINDE, BHANDARI, ROBINSON, CRAWFORD, GEVORGIAN, *Judge* ad hoc KATEKA, *Registrar* COUVREUR

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Articles 41 and 48 of the Statute of the Court and Articles 73, 74 and 75 of the Rules of Court,

Makes the following Order

Whereas.

1 On 13 June 2016, the Government of the Republic of Equatorial Guinea (hereinafter "Equatorial Guinea") filed in the Registry of the Court an Application instituting proceedings against the French Republic (hereinafter "France") with regard to a dispute concerning

> "the immunity from criminal jurisdiction of the Second Vice-President of the Republic of Equatorial Guinea in charge of Defence and State Security [Mr Teodoro Nguema Obiang Mangue], and the legal status of the building which houses the Embassy of Equatorial Guinea, both as premises of the diplomatic mission and as State property"

2 At the end of its Application, Equatorial Guinea

> "respectfully requests the Court
>
> *(a)* With regard to the French Republic's failure to respect the sovereignty of the Republic of Equatorial Guinea,
>
> (i) to adjudge and declare that the French Republic has breached its obligation to respect the principles of the sovereign equality of States and non-interference in the internal affairs of another State, owed to the Republic of Equatorial Guinea in accordance with international law, by permitting its courts to initiate criminal legal proceedings against the Second Vice-President of Equatorial Guinea for alleged offences which, even if they were established, *quod non*, would fall solely within the jurisdiction of the courts of Equatorial Guinea, and by allowing its courts to order the attachment of a building belonging to the Republic of Equatorial Guinea and used for the purposes of that country's diplomatic mission in France,
>
> *(b)* With regard to the Second Vice-President of the Republic of Equatorial Guinea in charge of Defence and State Security,
>
> (i) to adjudge and declare that, by initiating criminal proceedings against the Second Vice-President of the Republic of Equatorial Guinea in charge of Defence and State Security, His Excellency Mr Teodoro Nguema Obiang Mangue, the French Republic has acted and is continuing to act in violation of its obligations under international law, notably the United Nations Convention against Transnational Organized Crime and general international law,
>
> (ii) to order the French Republic to take all necessary measures to put an end to any ongoing proceedings against the Second Vice-President of the Republic of Equatorial Guinea in charge of Defence and State Security,
>
> (iii) to order the French Republic to take all necessary measures to prevent further violations of the immunity of the Second Vice-President of Equatorial Guinea in charge of Defence and State Security and to ensure, in particular, that its courts do not initiate any criminal proceedings against the Second Vice-President of the Republic of Equatorial Guinea in the future,

(c) With regard to the building located at 42 avenue Foch in Paris,

(i) to adjudge and declare that, by attaching the building located at 42 avenue Foch in Paris, the property of the Republic of Equatorial Guinea and used for the purposes of that country's diplomatic mission in France, the French Republic is in breach of its obligations under international law, notably the Vienna Convention on Diplomatic Relations and the United Nations Convention [against Transnational Organized Crime], as well as general international law,

(ii) to order the French Republic to recognize the status of the building located at 42 avenue Foch in Paris as the property of the Republic of Equatorial Guinea, and as the premises of its diplomatic mission in Paris, and, accordingly, to ensure its protection as required by international law,

(d) In view of all the violations by the French Republic of international obligations owed to the Republic of Equatorial Guinea,

(i) to adjudge and declare that the responsibility of the French Republic is engaged on account of the harm that the violations of its international obligations have caused and are continuing to cause to the Republic of Equatorial Guinea,

(ii) to order the French Republic to make full reparation to the Republic of Equatorial Guinea for the harm suffered, the amount of which shall be determined at a later stage "

3 In its Application, Equatorial Guinea seeks to found the Court's jurisdiction, first, on the Optional Protocol concerning the Compulsory Settlement of Disputes to the Vienna Convention on Diplomatic Relations of 18 April 1961 (hereinafter the "Optional Protocol"), and, second, on Article 35 of the United Nations Convention against Transnational Organized Crime of 15 November 2000 (hereinafter the "Convention against Transnational Organized Crime")

4 In accordance with Article 40, paragraph 2, of the Statute of the Court, the Registrar immediately communicated the Application to the French Government He also notified the Secretary-General of the United Nations of this filing

5 Pending the notification provided for by Article 40, paragraph 3, of the Statute by transmission of the printed bilingual text of the Application to the Members of the United Nations through the Secretary-General, the Registrar informed those States of the filing of the Application and its subject

6 Since the Court included upon the Bench no judge of the nationality of Equatorial Guinea, the latter proceeded to exercise the right conferred upon it by Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case, it chose Mr James Kateka

7 By an Order dated 1 July 2016, the Court fixed 3 January 2017 and 3 July 2017 as the respective time-limits for the filing of a Memorial by Equatorial Guinea and a Counter-Memorial by France.

8 On 29 September 2016, Equatorial Guinea submitted a Request for the indication of provisional measures, referring to Article 41 of the Statute and to Articles 73, 74 and 75 of the Rules of Court

9 At the end of its Request for the indication of provisional measures, Equatorial Guinea asks the Court, "pending its judgment on the merits, to indicate the following provisional measures

(a) that France suspend all the criminal proceedings brought against the Vice-President of the Republic of Equatorial Guinea, and refrain from launching new proceedings against him, which might aggravate or extend the dispute submitted to the Court,

(b) that France ensure that the building located at 42 avenue Foch in Paris is treated as premises of Equatorial Guinea's diplomatic mission in France and, in particular, assure its inviolability, and that those premises, together with their furnishings and other property thereon, or previously thereon, are protected from any intrusion or damage, any search, requisition, attachment or any other measure of constraint,

(c) that France refrain from taking any other measure that might cause prejudice to the rights claimed by Equatorial Guinea and/or aggravate or extend the dispute submitted to the Court, or compromise the implementation of any decision which the Court might render "

10 Equatorial Guinea also requested "the President of the Court, as provided for in Article 74, paragraph 4, of the Rules of Court, to call upon France to act in such a way as will enable any order the Court may make on the request for provisional measures to have its appropriate effect"

11. The Registrar immediately transmitted a copy of the Request for the indication of provisional measures to the French Government, in accordance with Article 73, paragraph 2, of the Rules of Court He also notified the Secretary-General of the United Nations of this filing

12 By a letter dated 3 October 2016, the Vice-President of the Court, acting as President in the case, drew the attention of France, in accordance with Article 74, paragraph 4, of the Rules of Court, "to the need to act in such a way as will enable any order the Court may make on the request for provisional measures to have its appropriate effects"

13 A copy of that letter was transmitted, for information, to the Government of Equatorial Guinea

14 By a letter dated 3 October 2016, the Registrar informed the Parties that, pursuant to Article 74, paragraph 3, of the Rules, the Court had fixed 17, 18 and 19 October 2016 as the dates for the oral proceedings on the request for the indication of provisional measures

15 On 14 October 2016, France submitted to the Court several documents related to the case

16 At the public hearings held on 17, 18 and 19 October 2016, oral observations on the request for the indication of provisional measures were presented by

On behalf of Equatorial Guinea	H E Mr Carmelo Nvono Nca, Mr Jean-Charles Tchikaya, Sir Michael Wood, Mr Maurice Kamto
On behalf of France	Mr François Alabrune, Mr Alain Pellet, Mr Hervé Ascensio

17 At the end of its second round of oral observations, Equatorial Guinea asked the Court to indicate the following provisional measures

> "On the basis of the facts and law set out in our Request of 29 September 2016, and in the course of the present hearing, Equatorial Guinea respectfully asks the Court, pending its judgment on the merits, to indicate the following provisional measures
>
> *(a)* that France suspend all the criminal proceedings brought against the Vice-President of the Republic of Equatorial Guinea, and refrain from launching new proceedings against him, which might aggravate or extend the dispute submitted to the Court,
>
> *(b)* that France ensure that the building located at 42 avenue Foch in Paris is treated as premises of Equatorial Guinea's diplomatic mission in France and, in particular, assure its inviolability, and that those premises, together with their furnishings and other property thereon, or previously thereon, are protected from any intrusion or damage, any search, requisition, attachment, confiscation or any other measure of constraint,
>
> *(c)* that France refrain from taking any other measure that might cause prejudice to the rights claimed by Equatorial Guinea and/or aggravate or extend the dispute submitted to the Court, or compromise the implementation of any decision which the Court might render "

18 At the end of its second round of oral observations, France made the following statement

> "For the reasons explained by its representatives at the hearings on the request for the indication of provisional measures in the case concerning *Immunities and Criminal Proceedings (Equatorial Guinea* v *France)*, the French Republic asks the Court
>
> (1) to remove the case from its List,
>
> (ii) or, failing that, to reject all the requests for provisional measures made by Equatorial Guinea "

19 During the hearings, questions were put by certain Members of the Court to Equatorial Guinea, to which replies were given in writing Availing itself of the possibility given to it by the Court, France submitted written comments on Equatorial Guinea's replies to those questions

*

* *

I. Factual background

20 Beginning in 2007, certain associations and private individuals lodged complaints with the Paris public prosecutor against certain African Heads of State and members of their families in respect of allegations of "misappropriation of public funds in their country of origin, the proceeds of which have allegedly been invested in France"

21 One of these complaints, filed on 2 December 2008 by the association Transparency International France, was declared admissible by the French courts, and a judicial investigation was opened in respect of the handling of misappropriated public funds, complicity in the misappropriation of public funds, misuse of corporate assets and complicity in misuse of corporate assets, and concealment of each of these offences The investigation focused, in particular, on the methods used to finance the acquisition of movable and immovable assets in France by several individuals, including the son of the President of Equatorial Guinea, Mr Teodoro Nguema Obiang Mangue, who was at the time Minister for Agriculture and Forestry of Equatorial Guinea

22 The investigations more specifically concerned the way in which Mr Teodoro Nguema Obiang Mangue acquired various objects of considerable value and a building located at 42 avenue Foch in Paris On 28 September 2011, cars belonging to Mr Teodoro Nguema Obiang Mangue, that were parked at 42 avenue Foch, were attached and removed by the police On 14, 15 and 16 February 2012, searches of the building at 42 avenue Foch were conducted, during which additional items were attached and removed The investigating judge considered that the

investigations had shown, *inter alia*, that the building had been wholly or partly paid for out of the proceeds of the offences under investigation and that its real owner was Mr Teodoro Nguema Obiang Mangue He consequently ordered the attachment *(saisie pénale immobilière)* of the building on 19 July 2012 This decision was subsequently upheld by the *Chambre de l'instruction*, before which Mr Teodoro Nguema Obiang Mangue had lodged an appeal

23 As part of the investigation, the police questioned a number of individuals In particular, they sought to question Mr Teodoro Nguema Obiang Mangue on two occasions in 2012 Mr Teodoro Nguema Obiang Mangue, who became Second Vice-President of Equatorial Guinea in charge of Defence and State Security on 21 May 2012, maintained that he was immune from the jurisdiction of the French Courts and declined to appear

24 An arrest warrant was issued against Mr Teodoro Nguema Obiang Mangue on 13 July 2012 He challenged this measure before the *Chambre de l'instruction*, but that court took the view that he was not entitled to any form of immunity from criminal process in respect of acts allegedly committed by him in France in his private capacity It further noted that he had refused to appear or to respond to the summonses sent to him

25 Since they were unable to question him, the French judicial authorities, by a request dated 14 November 2013, sought international mutual assistance in criminal matters from the Equatorial Guinean judicial authorities, under Article 18 of the Convention against Transnational Organized Crime, asking them to transmit a summons to Mr Teodoro Nguema Obiang Mangue to attend a first appearance

26 The judicial authorities of Equatorial Guinea accepted the request for mutual assistance on 4 March 2014 They then executed that request and, on 18 March 2014, following a hearing held in Malabo, Equatorial Guinea, in which the French investigating judges participated by videolink, Mr Teodoro Nguema Obiang Mangue was indicted by the French judiciary

> "for having in Paris and on national territory during 1997 and until October 2011 assisted in making hidden investments or in converting the direct or indirect proceeds of a felony or misdemeanour by acquiring a number of movable and immovable assets and paying for a number of services"

On 19 March 2014, a notice cancelling the summons *(avis de cessation de recherches)* for Mr Teodoro Nguema Obiang Mangue was issued by the French investigating judge

27 On 31 July 2014, Mr Teodoro Nguema Obiang Mangue applied to the *Chambre de l'instruction de la Cour d'appel* to annul the indictment, on the ground that he enjoyed immunity from jurisdiction in his capacity as Second Vice-President of Equatorial Guinea in charge of Defence and State Security However, the *Cour d'appel* rejected his application by a judgment of 11 August 2015 The *Cour de cassation*, by a judgment of 15 December 2015, rejected the argument that Mr Teodoro Nguema Obiang Mangue enjoyed immunity and upheld the indictment

28 The investigation was declared to be completed and, on 23 May 2016, the Financial Prosecutor filed final submissions "seeking separation of the complaints, their dismissal or their referral to the *Tribunal correctionnel*" On 5 September 2016, the investigating judges of the Paris *Tribunal de grande instance* ordered the referral of Mr Teodoro Nguema Obiang Mangue — who, by a presidential decree of 21 June 2016, had been appointed as the Vice-President of Equatorial Guinea in charge of Defence and State Security — for trial before the *Tribunal Correctionnel* for alleged offences committed between 1997 and October 2011 On 21 September 2016, the Financial Prosecutor issued a summons ordering Mr Teodoro Nguema Obiang Mangue to appear before the 32nd *Chambre correctionnelle* of the Paris *Tribunal correctionnel* on 24 October 2016 for a "hearing on the merits"

29 The Assistant Financial Prosecutor subsequently informed Mr Teodoro Nguema Obiang Mangue's counsel, in an e-mail dated 26 September 2016, that the hearing was merely intended to "raise a procedural issue" He explained that, having noted an irregularity (namely, that the operative part of the referral order did not mention the relevant texts setting out the criminalization and punishment of offences), the Public Prosecutor's Office was of the view that the *Tribunal correctionnel* should settle that issue before addressing the merits of the case

30 On 24 October 2016, the *Tribunal correctionnel* sent the proceedings back to the Public Prosecutor's Office so that it could return the case to the investigating judge for the purpose of regularizing the referral order, it also stated that the trial hearings would be held from 2 to 12 January 2017

II. Prima facie jurisdiction

31 The Court may indicate provisional measures only if the provisions relied on by the Applicant appear, prima facie, to afford a basis on which its jurisdiction could be founded, but need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case (see, for example, *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v *Australia), Provisional Measures, Order of 3 March 2014, I C J Reports 2014*, p 151, para 18)

32 In the present case, Equatorial Guinea seeks to found the jurisdiction of the Court, first, on Article 35 of the Convention against Transnational Organized Crime, and, second, on the Optional Protocol to the Vienna Convention on Diplomatic Relations (see paragraph 3 above) However, at the hearings, Equatorial Guinea relied only upon Article 35 in respect of its claim regarding the immunity of Mr Teodoro Nguema Obiang Mangue The Court will therefore proceed on the basis that the Optional Protocol to the Vienna Convention is invoked by Equatorial Guinea only in relation to the claim regarding the alleged inviolability of the premises at 42 avenue Foch

33 The Court must therefore first seek to determine whether the jurisdictional clauses contained in these instruments do indeed confer upon it prima facie jurisdiction to rule on the merits, enabling it — if the other necessary conditions are fulfilled — to indicate provisional measures

34 Equatorial Guinea and France ratified the Convention against Transnational Organized Crime on 7 February 2003 and 29 October 2002, respectively Neither of them entered reservations to that instrument, which came into force on 29 September 2003 Further, Equatorial Guinea and France have been parties to the Vienna Convention on Diplomatic Relations (hereinafter the "Vienna Convention") since 29 September 1976 and 30 January 1971 respectively, and to the Optional Protocol since 4 December 2014 and 30 January 1971, respectively Neither Equatorial Guinea nor France entered reservations to the Protocol

35 Article 35 of the Convention against Transnational Organized Crime provides that

> "1 States Parties shall endeavour to settle disputes concerning the interpretation or application of this Convention through negotiation
>
> 2 Any dispute between two or more States Parties concerning the interpretation or application of this Convention that cannot be settled through negotiation within a reasonable time shall, at the request of one of those States Parties, be submitted to arbitration If, six months after the date of the request for arbitration, those States Parties are unable to agree on the organization of the arbitration, any one of those States Parties may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court "

36 As regards the Optional Protocol to the Vienna Convention, its first three articles read as follows

> "*Article I*
>
> Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol
>
> *Article II*
>
> The parties may agree, within a period of two months after one party has notified its opinion to the other that a dispute exists, to resort not to the International Court of Justice but to an arbitral tribunal After the expiry of the said period, either party may bring the dispute before the Court by an application
>
> *Article III*
>
> 1 Within the same period of two months, the parties may agree to adopt a conciliation procedure before resorting to the International Court of Justice

2 The conciliation commission shall make its recommendations within five months after its appointment If its recommendations are not accepted by the parties to the dispute within two months after they have been delivered, either party may bring the dispute before the Court by an application "

37 The Court notes that both Article 35, paragraph 2, of the Convention against Transnational Organized Crime and Article I of the Optional Protocol make the Court's jurisdiction conditional on the existence of a dispute arising out of the interpretation or application of the Convention to which they relate At this stage of the proceedings, the Court must first establish whether, prima facie, such a dispute existed on the date the Application was filed, since, as a general rule, it is on that date, according to the jurisprudence of the Court, that its jurisdiction must be determined (see *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v *Senegal), Provisional Measures, Order of 28 May 2009, I C J Reports 2009*, p 148, para 46)

38 The Court also notes that the Convention against Transnational Organized Crime sets out procedural requirements with which the parties must comply after a dispute arises in order for the Court to have jurisdiction Under Article 35, paragraph 2, of that instrument, the dispute referred to the Court must be a dispute that "cannot be settled through negotiation within a reasonable time" That provision also states that the dispute must be submitted to arbitration at the request of one of the parties to the dispute and that it may be referred to the Court only if the parties are unable to agree on the organization of the arbitration within six months of the date of the request

39 Article I of the Optional Protocol does not impose any procedural requirements However, Articles II and III of that instrument provide that parties may resort to alternative methods of dispute settlement, namely arbitration and conciliation, in such circumstances, the seisin of the Court is subject to certain preconditions

40 The Court therefore will have to consider these different procedural aspects of the Convention against Transnational Organized Crime and of the Optional Protocol, if it considers that there exists, prima facie, a dispute arising out of "the interpretation or application" of the conventions concerned

(1) The Convention against Transnational Organized Crime

41 Equatorial Guinea asserts that a dispute exists between the Parties concerning the application of Article 4 of the Convention against Transnational Organized Crime That provision, entitled "Protection of sovereignty", reads as follows

"1 States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States

2 Nothing in this Convention entitles a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law "

42 In its Request for the indication of provisional measures, Equatorial Guinea contends that "[t]he personal immunity of the Vice-President" and "the inviolability of the building" located at 42 avenue Foch in Paris "derive from the principles of sovereign equality of States and non-interference in States' internal affairs", principles to which reference is explicitly made in Article 4, paragraph 1, of the Convention While it accepts that the claim in respect of the building at 42 avenue Foch and the one relating to the immunity of the Vice-President are closely linked in the criminal proceedings instituted in France, Equatorial Guinea maintains that jurisdiction in respect of one claim is not dependent upon jurisdiction in respect of the other

43 According to Equatorial Guinea, Article 4 of the Convention is not merely a "general guideline", in light of which the other provisions of the Convention should be interpreted The principles of sovereign equality and non-intervention to which that Article refers encompass important rules of customary or general international law, in particular those relating to the immunities of States and the immunity of certain holders of high-ranking office in the State In the Applicant's view, the rules in question are binding on States when they apply the Convention as they are embodied in the above-mentioned principles Equatorial Guinea thus claims that, when initiating proceedings against the Vice-President of Equatorial Guinea, France was obliged, in applying the Convention — and in particular Articles 6 (Criminalization of the laundering of proceeds of crime), 12 (Confiscation and seizure), 14 (Disposal of confiscated proceeds of crime or property) and 18 (Mutual legal assistance) thereof — to respect the rules relating to the immunity *ratione personae* of the Vice-President of Equatorial Guinea, deriving from Article 4 of that instrument It adds that the provision on the basis of which France initiated proceedings against the Vice-President of Equatorial Guinea (Art 324-1 of the French Penal Code) represents implementing legislation for the Convention

*

44 For its part, France denies the existence of a dispute concerning the application of the Convention, and, consequently, that the Court has jurisdiction In its view, the reference in Article 4 to the principles of sovereign equality and territorial integrity of States, and to that of non-intervention in the domestic affairs of other States, indicates the manner in which the other provisions of the Convention must be applied France thus maintains that Article 4, paragraph 1, is merely a "general guideline which clarifies the manner in which the other provisions of the treaty should be implemented", it does not give rise to autonomous legal obligations

45 France adds that the provisions of the Convention which Equatorial Guinea claims were not implemented in accordance with the principles set out in Article 4 of that instrument (Arts 6, 12, 14 and 18), for the most part (Arts 6, 12 and 14) do nothing more than oblige States to legislate or regulate As regards Article 18 of the Convention, France notes that it requested mutual legal

assistance from Equatorial Guinea in this case and that the latter raised not the slightest objection on the basis of the rules relating to the immunity *ratione personae* of its Vice-President France further observes that the proceedings against Mr Teodoro Nguema Obiang Mangue were instituted not on the basis of the Convention, but under provisions of the French Penal Code, provisions which "were in no way adopted to give effect to the Convention", since French criminal legislation was already "in complete conformity with the obligations laid down by the Convention"

46 Consequently, France considers that the Court has no jurisdiction, on the basis of Article 35, paragraph 2, of the said Convention, to entertain Equatorial Guinea's requests concerning the alleged violation of its sovereignty and the purported interference by France in its domestic affairs In particular, it asserts that the Court has no jurisdiction to entertain Equatorial Guinea's requests relating to the immunity *ratione personae* claimed by Mr Teodoro Nguema Obiang Mangue

* *

47 It is clear from the case file that the Parties have expressed differing views on Article 4 of the Convention against Transnational Organized Crime Nonetheless, in order to determine, even prima facie, whether a dispute within the meaning of Article 35, paragraph 2, of the Convention exists, the Court cannot limit itself to noting that one of the Parties maintains that the Convention applies, while the other denies it It must ascertain whether the acts complained of by Equatorial Guinea are prima facie capable of falling within the provisions of that instrument and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain pursuant to Article 35, paragraph 2, of the Convention (see *Legality of Use of Force (Yugoslavia* v *Belgium), Provisional Measures, Order of 2 June 1999, I C J Reports 1999 (I)*, p 137, para 38)

48 The Court notes that the obligations under the Convention consist mainly in requiring the States parties to introduce in their domestic legislation provisions criminalizing certain transnational offences — such as participation in an organized criminal group (Art 5), laundering the proceeds of crime (Art 6), the active or passive corruption of public officials (Art 8) and the obstruction of justice (Art 23) — and to take measures aimed at combatting these crimes (notably measures to combat money laundering (Art 7), measures against corruption (Art 9), measures to enable confiscation and seizure (Art 12), as well as the disposal of confiscated proceeds of crime or property (Art 14)) An international co-operation mechanism is also provided for with regard to these crimes (international co-operation for purposes of confiscation (Art 13), extradition (Art 16), transfer of sentenced persons (Art 17), mutual legal assistance (Art 18) and joint investigations (Art 19)) Under the terms of the Convention, the States parties must, if they have not already done so, legislate against the transnational offences set out in the said instrument and participate in the international co-operation mechanism referred to therein

49 The purpose of Article 4 of the Convention is to ensure that the States parties to the Convention perform their obligations in accordance with the principles of sovereign equality, territorial integrity of States and non-intervention in the domestic affairs of other States The provision does not appear to create new rules concerning the immunities of holders of high-ranking office in the State or incorporate rules of customary international law concerning those immunities

Accordingly, any dispute which might arise with regard to "the interpretation or application" of Article 4 of the Convention could relate only to the manner in which the States parties perform their obligations under that Convention It appears to the Court, however, that the alleged dispute does not relate to the manner in which France performed its obligations under Articles 6, 12, 14 and 18 of the Convention, invoked by Equatorial Guinea The alleged dispute, rather, appears to concern a distinct issue, namely whether the Vice-President of Equatorial Guinea enjoys immunity *ratione personae* under customary international law and, if so, whether France has violated that immunity by instituting proceedings against him

50 Consequently, the Court considers that, prima facie, a dispute capable of falling within the provisions of the Convention against Transnational Organized Crime and therefore concerning the interpretation or the application of Article 4 of that Convention does not exist between the Parties Thus, it does not have prima facie jurisdiction under Article 35, paragraph 2, of that instrument to entertain Equatorial Guinea's request relating to the immunity of Mr Teodoro Nguema Obiang Mangue It is therefore not necessary for it to examine whether the procedural conditions set out in that provision are met (see paragraph 38) As the Convention is the only instrument which Equatorial Guinea invoked as a basis for jurisdiction in relation to the claimed immunity of Mr Teodoro Nguema Obiang Mangue, it follows from the above finding that the Court cannot indicate provisional measures of protection in relation to that claimed immunity

(2) The Optional Protocol to the Vienna Convention on Diplomatic Relations

51 Equatorial Guinea also claims that a dispute exists between the Parties regarding the application of Article 22 of the Vienna Convention, which reads as follows

> "1 The premises of the mission shall be inviolable The agents of the receiving State may not enter them, except with the consent of the head of the mission
>
> 2 The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity
>
> 3 The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution "

52 Equatorial Guinea contends that France, in the proceedings against Mr Teodoro Nguema Obiang Mangue, has disregarded the legal status of the building located at 42 avenue Foch in Paris "as premises of its diplomatic mission in France"

53 The Applicant claims that, on 4 October 2011, it informed the French Ministry of Foreign Affairs that for a number of years it had had the building located at 42 avenue Foch at its disposal and that it used the building "for the performance of the functions of its diplomatic mission without having given [the Ministry's] services official notification thereof" It contends that it has since consistently affirmed the diplomatic status of the building through no less than some 30 diplomatic exchanges

54 Equatorial Guinea maintains that, notwithstanding the immunity that the building on avenue Foch should enjoy under the Vienna Convention, it was searched on four occasions between 2011 and 2016, and was attached *(saisie pénale immobilière)* on 19 July 2012

55. The Applicant thus considers that, "by failing to recognize the building as the premises of the diplomatic mission", France has breached its obligations owed to Equatorial Guinea under the Vienna Convention, in particular Article 22 thereof

56 Equatorial Guinea stresses that it has protested consistently and that it has, at the same time, sought to settle the dispute through negotiation, conciliation or arbitration In this regard, it refers to a memorandum dated 26 October 2015, in which it transmitted to France an "offer of conciliation and arbitration", on the basis, in particular, of Articles I and II of the Optional Protocol to the Vienna Convention Equatorial Guinea asserts that it reiterated that offer in a Note Verbale dated 6 January 2016, in which it renewed its commitment to finding a diplomatic solution to the dispute arising from the so-called "ill-gotten gains" case Lastly, Equatorial Guinea recalls that, on 2 February 2016, it transmitted to France a memorandum setting out its position on the questions forming the subject of the dispute and that, on that occasion, it once again reiterated its offer of settlement through conciliation and arbitration The Applicant states that, on 17 March 2016, the French Ministry of Foreign Affairs responded that it was "unable to accept the offer of settlement" on the grounds that "the facts mentioned [had] been the subject of court decisions in France and [remained] the subject of ongoing legal proceedings"

57 Equatorial Guinea considers that, in light of the foregoing, the Court has jurisdiction under the Optional Protocol In its Application, Equatorial Guinea contended that the Court had jurisdiction under Article I of that instrument and that Articles II and III thereof did not restrict its right to bring these proceedings before the Court

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58 France, for its part, contends that the building located at 42 avenue Foch cannot be considered as housing the premises of Equatorial Guinea's mission in France It points out that, prior to the Note Verbale from the Embassy of Equatorial Guinea dated 4 October 2011 (see paragraph 53 above), the Protocol Department of the French Ministry of Foreign Affairs had never been informed of the existence of those premises, that not a single piece of correspondence from the Embassy was ever sent to the Ministry from that address, that the Embassy of Equatorial Guinea had not requested any particular measures — concerning protection, in particular — in relation to those premises, and that no requests for tax exemption for them were ever presented, "as [had been done] for the only Embassy premises known to the French authorities, and which are located at another address 29 boulevard de Courcelles" France explains that the French Ministry of Foreign Affairs had therefore replied to Equatorial Guinea, on 11 October 2011, "that it did not consider the building to form part of the premises of the diplomatic mission"

59 France further states that several items of correspondence show that the manner in which the use of the building was subsequently presented varied According to France, it was not until 27 July 2012 that Equatorial Guinea described the premises of 42 avenue Foch as housing, as from that date, the diplomatic mission itself At the hearings, France acknowledged that the Embassy offices of Equatorial Guinea seemed to have been transferred to that address at that time It nonetheless stated, in its comments on Equatorial Guinea's replies to the questions put by judges at the hearings, that the French Ministry of Foreign Affairs had "consistently" recalled that it did not consider the building to form part of the premises of Equatorial Guinea's diplomatic mission "even when the French authorities consented to occasional protection measures for that building"

60 As regards the searches carried out in the building in question, France states that they were conducted at the request of the French judicial authorities, in the context of a lawful procedure, and that they took place only in 2011 and 2012 It maintains that, since that time, there have been no measures of constraint in connection with the building, nor any intrusion therein Regarding the attachment *(saisie pénale immobilière)* of the building, France asserts that it has "only a provisional effect" and that it was justified by the fact that the investigations had revealed that the building at 42 avenue Foch had, in all likelihood, been wholly or partly acquired with the proceeds from the offences falling within the scope of the judicial investigation into Mr Teodoro Nguema Obiang Mangue

61 The Respondent considers, moreover, that the "finding that the Court lacks prima facie jurisdiction" to rule, on the basis of the Convention against Transnational Organized Crime, on Equatorial Guinea's requests with regard to the alleged immunities of Mr Teodoro Nguema Obiang Mangue "impacts" on the fate of its requests in respect of the building at 42 avenue Foch It explains that there is "no risk of the building being confiscated or sold until Mr [Teodoro Nguema] Obiang [Mangue] has been definitively convicted of money laundering" Since the Court, in France's view, does not have prima facie jurisdiction over the requests relating to the alleged immunities of the Vice-President of Equatorial Guinea, it also lacks jurisdiction over the requests relating to the building located on 42 avenue Foch

62 Lastly, as regards Equatorial Guinea's offer of conciliation and arbitration, France confirms that it could not pursue it because, under the principle of the independence of the judiciary, and owing to the fact that French criminal law does not allow for proceedings to be stopped by way of a compromise, the French Government had no means of putting an end to the criminal proceedings against Mr Teodoro Nguema Obiang Mangue

* *

63 The Court recalls that Article I of the Optional Protocol provides that the Court has jurisdiction over disputes relating to the interpretation or application of the Vienna Convention (see paragraph 36 above)

64 It further recalls that Articles II and III of the Optional Protocol provide that the parties may agree, within a period of two months after one party has notified its opinion to the other that a dispute exists, to resort to arbitration or conciliation After the expiry of that period, either party may bring the dispute before the Court by an application However, as the Court had occasion to note in the case concerning *United States Diplomatic and Consular Staff in Tehran (United States of America* v *Iran)*, the terms of the said Articles II and III,

> "when read in conjunction with those of Article I and with the Preamble to the Protoco[l], make it crystal clear that they are not to be understood as laying down a precondition of the applicability of the precise and categorical provision contained in Article I establishing the compulsory jurisdiction of the Court in respect of disputes arising out of the interpretation or application of the Vienna Convention" (*Judgment, I C J Reports 1980*, pp 25-26, para 48)

The Court then specified as follows

> "Articles II and III provide only that, as a substitute for recourse to the Court, the parties *may agree* upon resort either to arbitration or to conciliation It follows, first, that Articles II and III have no application unless recourse to arbitration or conciliation has been proposed by one of the parties to the dispute and the other has expressed its readiness to consider the proposal Secondly, it follows that only then may the provisions in those articles regarding a two months' period come into play, and function as a time-limit upon the conclusion of the agreement as to the organization of the alternative procedure " (*Ibid* , p 26, para 48 (emphasis in the original))

In the present case, the Court notes that, while Equatorial Guinea did indeed propose to France recourse to conciliation or arbitration, France did not express its readiness to consider that proposal, the Respondent even expressly stated that it could not pursue it Articles II and III of the Protocol thus in no way affect any jurisdiction the Court might have under Article I

65 In light of the foregoing, the Court will examine only Article I of the Protocol in determining whether it has prima facie jurisdiction to entertain the merits of Equatorial Guinea's claim relating to the building located at 42 avenue Foch It will accordingly ascertain whether, on the date the Application was filed, a dispute arising out of the interpretation or application of the Vienna Convention appeared to exist between the Parties

66 In this regard, the Court notes that the Parties do indeed appear to have differed, and still differ today, on the question of the legal status of the building located at 42 avenue Foch in Paris While Equatorial Guinea has maintained at various times that the building houses the premises of its diplomatic mission and must therefore enjoy the immunities afforded under Article 22 of the Vienna Convention, France has consistently refused to recognize that this is the case, and claims that the property has never legally acquired the status of "premises of the mission" In the view of the Court, there is therefore every indication that, on the date the Application was filed, a dispute existed between the Parties as to the legal status of the building concerned

67 In order to determine whether it has jurisdiction — even prima facie — the Court must also ascertain whether such a dispute is one over which it might have jurisdiction *ratione materiae* on the basis of Article I of the Optional Protocol In this regard, the Court notes that the rights apparently at issue may fall within the scope of Article 22 of the Vienna Convention, which guarantees the inviolability of diplomatic premises, and that the acts alleged by the Applicant in respect of the building on avenue Foch appear to be capable of contravening such rights Indeed, the premises which, according to Equatorial Guinea, house its diplomatic mission in France were searched on several occasions and were attached *(saisie pénale immobilière)*, they could also be subject to other measures of a similar nature

68 The aforementioned elements sufficiently establish, at this stage, the existence between the Parties of a dispute capable of falling within the provisions of the Vienna Convention and concerning the interpretation or application of Article 22 thereof

69 Consequently, the Court considers that it has prima facie jurisdiction under Article I of the Optional Protocol to the Vienna Convention to entertain this dispute It is of the view that it may, on this basis, examine Equatorial Guinea's request for the indication of provisional measures, in so far as it concerns the inviolability of the building located at 42 avenue Foch in Paris

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70 The Court has held in the past that where there is a manifest lack of jurisdiction, it can remove the case from the List at the provisional measures stage (*Legality of Use of Force (Yugoslavia* v *Spain), Provisional Measures, Order of 2 June 1999, I C J Reports 1999*, p 773, para. 35, *Legality of Use of Force (Yugoslavia* v *United States of America), Provisional Measures, Order of 2 June 1999, I C J Reports 1999*, p 925, para 29) Conversely, where there is no such manifest lack of jurisdiction, the Court cannot remove the case at that stage (*Armed Activities on the Territory of the Congo (New Application 2002) (Democratic Republic of the Congo* v *Rwanda), Provisional Measures, Order of 10 July 2002, I C J Reports 2002*, p 249, para 91) In the present case, there being no manifest lack of jurisdiction, the Court cannot accede to France's request that the case be removed from the List

III. The rights whose protection is sought and the measures requested

71 The power of the Court to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights claimed by the parties in a case, pending its decision on the merits thereof It follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by it to belong to either party Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by the party requesting such measures are at least plausible (see, for example, *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v *Australia), Provisional Measures, Order of 3 March 2014, I C J Reports 2014*, p 152, para 22)

72 Moreover, a link must exist between the rights which form the subject of the proceedings before the Court on the merits of the case and the provisional measures being sought (*ibid*, para 23)

* *

73 Equatorial Guinea maintains that the rights that it is seeking to protect are (i) the right to respect for the principles of sovereign equality and non-intervention, as provided for by Article 4 of the Convention against Transnational Organized Crime, (ii) the right to respect for the rules of immunity that derive from fundamental principles of the international legal order, in particular the immunity *ratione personae* of certain holders of high-ranking office in a State, and the immunity from enforcement enjoyed by States in regard to their property, and (iii) the right to respect for the inviolability of the premises of its diplomatic mission, as provided for by the Vienna Convention

74 Having found that it does not have prima facie jurisdiction to entertain the alleged violations of the Convention against Transnational Organized Crime, the Court will address only Equatorial Guinea's alleged right to "the inviolability of the premises of its diplomatic mission", in respect of which Article 22 of the Vienna Convention is invoked

75 In this regard, France contends that the building on avenue Foch does not fall within the category of "premises of the [diplomatic] mission" of Equatorial Guinea in Paris and that it was "disguised", in haste and with a certain amount of improvisation, either as the Embassy of Equatorial Guinea in France, or as the residence of the Permanent Delegate to UNESCO In this regard, France refers in particular to a letter dated 14 February 2012 addressed to the President of the French Republic by the President of the Republic of Equatorial Guinea, in which the latter indicated that the Permanent Representative to UNESCO resided at that time in the building in question According to the Respondent, Equatorial Guinea's allegations cannot hide the fact that the building never legally acquired the status of "premises of the mission" Therefore, claiming that this amounts to "legal window-dressing", France argues that to recognize the building as an "office of the mission" would be "to sanction a fait accompli resulting from a[n] abuse of right"

76 Moreover, with regard to Equatorial Guinea's request for provisional measures concerning furnishings and other property which were in the building and which were seized and removed from it (see paragraph 22 above), this has no relation, according to France, with the use of the building for the purposes of the diplomatic mission and "is unrelated to the subject-matter of the dispute"

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77 The Court notes that Equatorial Guinea maintains that it acquired the building located at 42 avenue Foch on 15 September 2011 and has used it for its diplomatic mission in France as from 4 October 2011, which the Applicant claims to have indicated to the Respondent on several occasions The Court further notes that Equatorial Guinea contends that, since that date, the building in question has been searched a number of times and has been attached *(saisie pénale immobilière)* — acts which, in the view of the Applicant, infringe the inviolability of those premises

78 At this stage of the proceedings, the Court is not called upon to determine definitively whether the right which Equatorial Guinea wishes to see protected exists, it need only decide whether the right claimed by Equatorial Guinea on the merits, and for which it is seeking protection, is plausible (See *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v *Australia), Provisional Measures, Order of 3 March 2014, I C J Reports 2014*, p 153, para 26)

79 Given that the right to the inviolability of diplomatic premises is a right contained in Article 22 of the Vienna Convention, that Equatorial Guinea claims that it has used the building in question as premises of its diplomatic mission in France since 4 October 2011, and that France acknowledges that, from the summer of 2012, certain services of the Embassy of Equatorial Guinea appear to have been transferred to 42 avenue Foch (see paragraph 59 above), it appears that Equatorial Guinea has a plausible right to ensure that the premises which it claims are used for the purposes of its mission are accorded the protections required by Article 22 of the Vienna Convention

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80 The Court now turns to the issue of the link between the rights claimed and the provisional measures requested

81 The purpose of the provisional measures sought by Equatorial Guinea in point *(b)* of the submissions which it presented at the end of the oral proceedings is

> "that France ensure that the building located at 42 avenue Foch in Paris is treated as premises of Equatorial Guinea's diplomatic mission in France and, in particular, assure its inviolability, and that those premises, together with their furnishings and other property thereon, or previously thereon, are protected from any intrusion or damage, any search, requisition, attachment, confiscation or any other measure of constraint" (see paragraph 17 above)

The Court considers that, by their very nature, these measures are aimed at protecting the right to the inviolability of the building which Equatorial Guinea presents as housing the premises of its diplomatic mission in France It concludes that a link exists between the right claimed by Equatorial Guinea and the provisional measures being sought

IV. Risk of irreparable prejudice and urgency

82 The Court, pursuant to Article 41 of its Statute, has the power to indicate provisional measures when irreparable prejudice could be caused to rights which are the subject of judicial proceedings (see, for example, *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v *Australia), Provisional Measures, Order of 3 March 2014, I C J Reports 2014*, p 154, para 31)

83 However, the power of the Court to indicate provisional measures will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to the rights in dispute before the Court gives its final decision (*ibid*, para 32) The Court must therefore consider whether such a risk exists at this stage of the proceedings

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84 Equatorial Guinea maintains that there is a "serious risk of irreparable prejudice to [its] rights with regard to the building located at 42 avenue Foch in Paris" It contends, first, that because Mr Teodoro Nguema Obiang Mangue has been referred before the *Tribunal correctionnel*, the building is now exposed, as a result of the order of attachment *(saisie pénale immobilière)*, to a risk of judicial confiscation which could occur at any moment It follows, according to Equatorial Guinea, that the building could be sold at auction and the diplomatic mission could be evicted Equatorial Guinea also submits that there is a permanent risk of intrusion, either by the police and the French judicial authorities, or by private individuals, which affects its Embassy's capacity to conduct its daily activities

85 Equatorial Guinea considers that there is urgency in so far as, notwithstanding the raising of a "procedural issue" at the hearing on 24 October 2016 (see paragraph 29), the referral to the *Tribunal correctionnel* is "irrevocable" Since a trial is, in its view, "inevitab[le]", the confiscation of the property could occur at any moment

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86 France, for its part, contends that there is no risk of imminent confiscation of the building located at 42 avenue Foch It points out that under French law attachment of property *(saisie pénale immobilière)* has only a provisional effect the owner of the building cannot sell it, but he may continue to use it freely until the courts have issued a final ruling on the merits of the case France explains that, under French criminal law, confiscation is an additional penalty which could only potentially be ordered, in the light of the circumstances of the case, if Mr Teodoro Nguema Obiang Mangue was sentenced to at least one year's imprisonment In other words, it could not be ordered by the *Tribunal correctionnel* without the defendant first having been found guilty, and it could not be put into effect until all avenues of appeal have been exhausted Accordingly, any final decision on confiscation would not be rendered for several years

87 In response to the arguments advanced by Equatorial Guinea with regard to the hearing on 24 October 2016, France asserts that the sole purpose of that hearing was to remedy the fact that there was no reference to the texts setting out the criminalization and punishment of offences in the referral order, and that the scheduling of the hearing does not create any urgency or engender any prejudice of any kind

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88 As the Court has previously observed (see paragraph 66 above), the record before the Court shows that France does not accept that the building forms part of the premises of Equatorial Guinea's diplomatic mission in France, and refuses to grant it the immunity — and thus the corresponding protection — afforded to such premises under the Vienna Convention Consequently, there is a continuous risk of intrusion

89 The Court has noted above (see paragraph 77) that the building located at 42 avenue Foch has already been searched a number of times in the context of the proceedings brought against Mr Teodoro Nguema Obiang Mangue While the Parties disagree as to whether any searches have been conducted recently, they recognize that such acts did indeed occur in 2011 and 2012 Given that it is possible — as France has moreover indicated — that, during the hearing on the merits, the *Tribunal correctionnel* may, of its own initiative or at the request of a party, request further investigation or an expert opinion, it is not inconceivable that the building on avenue Foch will be searched again If that were to happen, and if it were established that the building houses the premises of Equatorial Guinea's diplomatic mission, the daily activities of that mission — the representation of a sovereign State — would risk being seriously impeded, as a result, for example, of the presence of police officers or the seizure of documents, some of which might be highly confidential

90 It follows from the foregoing that there is a real risk of irreparable prejudice to the right to inviolability of the premises that Equatorial Guinea presents as being used as the premises of its diplomatic mission in France Indeed, any infringement of the inviolability of the premises may not be capable of remedy, since it might not be possible to restore the situation to the *status quo ante* Furthermore, that risk is imminent, in so far as the acts likely to cause such a prejudice to the rights claimed by Equatorial Guinea could occur at any moment The criterion of urgency is therefore also satisfied in the present case

91 The Court recalls that Equatorial Guinea also asks the Court to indicate provisional measures in respect of items previously located on the premises of 42 avenue Foch (see paragraph 17 above), some of which have been removed by French authorities (see paragraph 22 above) As to these items, the Court observes that Equatorial Guinea failed to demonstrate the risk of irreparable prejudice and the urgency that the Court has identified in respect of the premises at 42 avenue Foch (see paragraph 90 above) Accordingly, it finds no basis to indicate provisional measures in respect of these items

V. Conclusion and measures to be adopted

92 The Court concludes from all the above considerations that the conditions required by its Statute for it to indicate provisional measures in respect of the building located at 42 avenue Foch in Paris have been met It is therefore appropriate for the Court to indicate certain measures in order to protect the rights claimed by Equatorial Guinea in this regard pending its final decision

93 The Court recalls that it has the power, under its Statute, when a request for provisional measures has been made, to indicate measures that are in whole or in part other than those requested Article 75, paragraph 2, of the Rules of Court specifically refers to this power of the Court The Court has already exercised this power on several occasions in the past (see, for example, *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v *Australia), Provisional Measures, Order of 3 March 2014, I C J Reports 2014*, p 159, para 49)

94 In the present case, having considered the terms of the provisional measures requested by Equatorial Guinea, the Court finds that the measures to be indicated need not be identical to those requested The Court is of the view that, pending a final decision in the case, the premises presented as housing the diplomatic mission of Equatorial Guinea at 42 avenue Foch in Paris should enjoy treatment equivalent to that required by Article 22 of the Vienna Convention, in order to ensure their inviolability

95 With regard to the attachment *(saisie pénale immobilière)* of the building at 42 avenue Foch and the risk of confiscation, the Court notes that there is a risk that such confiscation may occur before the date on which the Court reaches its final decision In order to preserve the respective rights of either Party, the execution of any measure of confiscation is to be stayed until the Court takes that decision

96 The Court recalls that Equatorial Guinea has requested it to indicate measures aimed at ensuring the non-aggravation of the dispute When it is indicating provisional measures for the purpose of preserving specific rights, the Court also possesses the power to indicate provisional measures with a view to preventing the aggravation or extension of the dispute whenever it considers that the circumstances so require (*Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the* Temple of Preah Vihear (Cambodia *v* Thailand) *(Cambodia* v *Thailand), Provisional Measures, Order of 18 July 2011, I C J Reports 2011 (II)*, pp 551-552, para 59) In this case, however, given the measures it has decided to take, the Court does not deem it necessary to indicate additional measures aimed at ensuring the non-aggravation of the dispute

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97 The Court reaffirms that its "orders on provisional measures under Article 41 [of the Statute] have binding effect" (*LaGrand (Germany* v *United States of America), Judgment, I C J Reports 2001*, p 506, para 109) and thus create international legal obligations for any party to whom the provisional measures are addressed

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98 The decision given in the present proceedings in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the admissibility of the Application or to the merits themselves It leaves unaffected the right of the Governments of Equatorial Guinea and France to submit arguments in respect of those questions

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99 For these reasons,

THE COURT,

I Unanimously,

Indicates the following provisional measures

France shall, pending a final decision in the case, take all measures at its disposal to ensure that the premises presented as housing the diplomatic mission of Equatorial Guinea at 42 avenue Foch in Paris enjoy treatment equivalent to that required by Article 22 of the Vienna Convention on Diplomatic Relations, in order to ensure their inviolability,

II Unanimously,

Rejects the request of France to remove the case from the General List

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this seventh day of December two thousand and sixteen, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Equatorial Guinea and the Government of the French Republic

(Signed) Abdulqawi A YUSUF,
Vice-President

(Signed) Philippe COUVREUR,
Registrar

Judge XUE appends a separate opinion to the Order of the Court, Judges GAJA and GEVORGIAN append declarations to the Order of the Court, Judge *ad hoc* KATEKA appends a separate opinion to the Order of the Court

(Initialled) A A Y

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