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APPLICATION OF THE INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF THE FINANCING OF TERRORISM AND OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (UKRAINE V. RUSSIAN FEDERATION)

Julia Assmann de Freitas Macedo[1]
Julia Goldman Bergmann[2]
Julio Cesar Veiga Bezerra[3]

ABSTRACT

On 24 August 1991, Ukraine proclaimed its independence from the Soviet Union. At the time, the Russian Federation made solemn commitments to respect Ukraine's sovereignty and independence within its settled borders. However, over the course of the last decade, Russian leaders have sought to reinstate dominance over their neighbors. Following the Orange Revolution of 2004 in Ukraine, Russia has increasingly exerted pressure over Ukraine, failing to abide by its earlier promise to respect sovereign equality and territorial integrity of Ukraine. In the violent aftermath of the Revolution of Dignity of 2014, the Ukrainian President Viktor Yanukovych was overthrown and the Russian government refused to recognize the interim government, claiming the revolution was a *coup d'état*. The Russian Federation then engaged in a series of military incursions into Ukrainian territory, including the annexation of the Crimean Peninsula on 18 March 2014. On 16 January 2017, Ukraine instituted proceedings against the Russian Federation before the International Court of Justice with regard to alleged violations of the International Convention for the Suppression of the Financing of Terrorism (ICSFT) and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). Although the Court may not be able to address the use of force and the legality of Crimea's unilateral cessation, it is propounded to discuss whether it can exercise jurisdiction over this matter with respect to the requirements of Article 22 of the CERD or Article 24(1) of the ICSFT, as procedural precondition. Being this case judicable before the Court, it must then decide whether Russia's actions fall within the scope of the violations of either treaties and, if so, to establish the due forms of reparation.

1 Julia is a final year student of Law at UFRGS and Director at the ICJ.
2 Julia is a fourth-year student of Law at UFRGS and Director at the ICJ.
3 Julio Cesar is a fourth-year student of Law at UFRGS and Director at the ICJ.

1 INTRODUCTION

The International Court of Justice (ICJ) is the principal judicial organ of the United Nations. Established by United Nations' Charter in June 1945, it began its activities in April 1946. The seat of the Court is at the Peace Palace in The Hague, Netherlands, making it the only of the six principal organs of the United Nations which is not located in New York. The official languages of the Court are French and English. Also known as the "World Court", it is the only court of a universal character with general jurisdiction. The Court has a twofold role: (i) to settle, in accordance with international law, legal disputes submitted to it by States – its judgments have binding force and are without appeal for the parties concerned –; and (ii) to give advisory opinions on legal questions referred to it by duly authorized United Nations' organs and agencies. The Court is composed of fifteen judges elected for a nine-year term by the General Assembly and the Security Council of the United Nations. Being independent of the United Nations Secretariat, it is assisted by a Registry, its own international secretariat, whose activities are both judicial and diplomatic, as well as administrative (ICJ 2017f, online).

On 24 August 1991, Ukraine proclaimed its independence from the Soviet Union. At the time, the Russian Federation made solemn commitments to respect Ukraine's sovereignty and independence within its settled borders. However, over the course of the last decade, Russian leaders have sought to reinstate dominance over their neighbors. Following the Orange Revolution of 2004 in Ukraine, in which the people peacefully and successfully demanded their right choose their leaders in free and fair elections, Russia has increasingly exerted pressure over Ukraine, failing to abide by its earlier promise to respect the sovereign equality and the territorial integrity of Ukraine.

In the violent aftermath of the Revolution of Dignity of 2014, when Ukrainian citizens took the streets *en masse* calling for the resignation of President Viktor Yanukovych and were brutally repressed by the government, Yanukovych was overthrown and the Russian government refused to recognize the interim government, claiming the revolution was a *coup d'état*. The Russian Federation then engaged in a series of military incursions into Ukrainian territory, and continue to do so to this date, which would entail the annexation of Crimean Peninsula on 18 March 2014, as well give support to pro-Russian separatist insurgents in eastern Ukraine.

On 16 January 2017, Ukraine instituted proceedings against the Russian Federation before the International Court of Justice with regard to alleged violations of the 1999 International Convention for the Suppression of the Financing of Terrorism (ICSFT) and the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (CERD).

With respect to the ICSFT, Ukraine claimed that the Russian government was interfering in its territory by instigating and sustaining an armed insurrection in eastern Ukraine. As to the CERD, its reasoning was that Russia's unilateral annexation of the Crimean Peninsula by military force, attempting to legitimize its act of aggression through an illegal referendum, as well as the implementation a climate of violence and intimidation against non-Russian ethnic groups.

The Court may not be able to address Russia's allegedly unlawful use of force and the legality of Crimea's unilateral cessation. Insofar, in the present case, the judges of the ICJ are propounded to determine, preliminarily, whether the Court can exercise jurisdiction over this matter given procedural preconditions set forth on Article 22 of the CERD and on Article 24(1) of the ICSFT. Being this case judicable before the Court, the judges must then decide whether Russia's actions fall within the scope of the violations of either treaties and, if so, they ought to establish the due forms of reparation.

2 HISTORICAL BACKGROUND

In the aftermath of an attempted *coup d'état* against the Soviet President and the General Secretary Mikhail Gorbachev by his opposition inside the Communist Party of the Soviet Union on 19 August 1991, the Ukrainian parliament adopted the Act of Declaration of Independence of Ukraine on 24 August 1991. The Act was approved by the overwhelming majority of the population, through a referendum held on 1 December 1991 (Magocsi 2010). At the time of Ukraine's independence from the Soviet Union, the Russian Federation made solemn commitments to respect Ukraine's sovereignty and independence within its settled borders. It was over the course of the past decade that a new generation of Russian leaders have sought to reinstate dominance over the former Soviet provinces. Since then, Ukraine has become the target of an escalating campaign of Russian interference and aggression (ICJ 2017a).

In a series of non-violent protests from November 2004 to January 2005 that became known as the Orange Revolution, millions of Ukrainians peacefully and successfully demanded their right to choose their leaders in free and fair elections. The two months of mass protests were prompted by evidence that the results of the presidential run-off election held on 21 November 2004 had been rigged in favor of the then Prime Minister Viktor Yanukovych, while nonpartisan exit polls, as well as the widespread public perception had given the lead to the candidate Viktor Yushchenko. Accordingly, on 26 December 2004, the Supreme Court of Ukraine annulled the original run-off and ordered a revote. The Orange Revolution culminated in

the clear victory of Yushchenko, who campaigned on a platform advocating a modern future for Ukraine oriented toward the European Union (Subtelny 2009).

In the following years, Ukraine's longstanding foreign policy objective of forging closer ties to the European Union (EU) was met by Russia's escalated attempts to reinstate its hegemony over the Ukrainian territory, failing to abide to its earlier promise to respect sovereign equality and territorial integrity of Ukraine. While the pro-Russian candidate Viktor Yanukovych won the 2010 presidential elections, Ukraine still continued to pursue a closer relationship with the EU, and preparations to conclude the landmark Association Agreement with the EU began in 2012. Indeed, on 25 February 2013, Yanukovych reaffirmed Ukraine's commitment to concluding the agreement (ICJ 2017a).

In November 2013, Ukraine and the EU were close to concluding the historic agreement – with plans to enact important electoral, judicial, and constitutional reforms in Ukraine preceding its signature – when Yanukovych yielded to intense Russian pressure and backed off from the negotiations. The European Union strongly condemned this Russian interference with Ukraine's relations foreign relations. Given this extreme shift of policy, Ukrainian citizens took the streets *en masse* calling for the President's resignation and were brutally repressed by his government. Under Russian directions and aid, Yanukovych's regime called special forces on the protesters, resorting ultimately in lethal force. While Ukraine's so called Revolution of Dignity prevailed and Yanukovych was overthrown, the Russian government refused to recognize the interim government claiming, the revolution was a *coup d'état* (ICJ 2017a).

The Russian Federation have since engaged in a series of military incursions into Ukrainian territory, and continue to do so to this date. The Russian government has, thus, willingly and blatantly acted in breach reach international law by violating Ukrainian sovereignty and attacking the fundamental human rights of Ukraine's people. These operations entail not only annexation of Crimean Peninsula on 18 March 2014, as well providing support to pro-Russian separatist insurgents in eastern Ukraine (ICJ 2017a).

3 STATEMENT OF THE ISSUE

In this section, the core aspects of the dispute in question will be presented through the analysis of arguments brought by each party, both Ukraine and the Russian Federation, to the Court.

3.1 Ukraine's Allegations

The allegations brought forth by Ukraine in its Application[4] will be addressed here in four main axes: (i) jurisdiction of the ICJ; (ii) Russia's alleged violations under the ICSFT; (iii) Russia's alleged violations under the CERD; and (iv) Ukraine's request for provisional measures.

3.1.1 As to the Jurisdiction of the International Court of Justice

In its Application, Ukraine invokes Article 36(1) of the Statute of the ICJ, which grants the Court jurisdiction over "all matters specially provided for [...] in treaties and conventions in force" (Statute of the International Court of Justice, art. 36, para. 1). Accordingly, it claims the present case concerns the application of two conventions, the ICSFT and the CERD. It further contends that both Ukraine and the Russian Federation are party to both treaties and have consented to the jurisdiction of the Court on such matters. Additionally, Ukraine clarifies that neither party maintains a reservation to either Convention's compromissory clause (ICJ 2017a).

Ukraine therefore sustains that the Court exerts jurisdiction over the present case by virtue of Article 24(1) of the ICSFT, which provides:

> 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 (ICSFT, art. 24, para. 1).

The Applicant maintains that a dispute arose from the application and interpretation of the ICSFT based on arguments that since 2014 the Russian Federation has been interfering in its territory and that by instigating and sustaining an armed insurrection in eastern Ukraine, Russia has violated fundamental principles of international law enshrined in the Convention (ICJ 2017a).

Ukraine argues that while it has made extensive efforts to negotiate a resolution, its efforts were met by Russia's refusal to engage in meaningful discussion. It further contends that the Russian Federation denied that Ukraine's claims arose from the ICSFT at all and that throughout this process Russia continued to practice violations to the Convention. The Applicant thus

4 See Ukraine v. Russian Federation. Application instituting proceedings.

asserts that, on 21 April 2016, it delivered a request to submit the dispute to arbitration to Russia, pursuant to Article 24(1) of the ICSFT, since the dispute appeared not to be settled within reasonable time and that further negotiations would be futile (ICJ 2017a).

According to the Applicant, the Russian Federation failed to acknowledge the offer to arbitrate for over two months. It claims that the Russian Federation repeatedly ignored request to affirm it would participate in arbitration. It further asserts that it was only in October 2016 that Russia made clear its intent to participate in an arbitration. Even without Russia's express its intent to participate in an arbitration, in August 2016 Ukraine informed the Russian Federation of its views on how an arbitration should be organized. The Applicant claims that Russia delayed to respond, only presenting its counter-proposal in October 2016 and that it failed to address critical aspects of the arbitration's organization. Consequently, the it reasons that it brought the present matter before the Court because more than six months have passed since its initial request to arbitrate without the parties reaching agreement on the organization of the arbitration, as envisioned in Article 24(1) of the Convention (ICJ 2017a).

Ukraine further contends that the jurisdiction of the Court over the present matter arises from Article 22 of the CERD, which provides:

> 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 (CERD, art. 22).

The Applicant's reasoning for the application of the CERD, in the same manner, is based on claims that after the Russian Federation openly defied the United Nations Charter when it seized the Crimean Peninsula by military force, attempting to legitimize its act of aggression through an illegal referendum, Russia proceeded to implement a climate of violence and intimidation against non-Russian ethnic groups (ICJ 2017a).

In a much similar fashion to its efforts related to the ICSFT, Ukraine claims that its attempts to negotiate under the CERD were met by Russia's failure to engage in meaningful discussion and denial to engage on the substance of the dispute, avoiding to discuss relevant issues. The Applicant further contends that while Russia declined to negotiate issues of discrimination in Crimea, it intensified such practice which violate the Convention. Accordingly, Ukraine asserts that the Russian Federation consistently failed to negotia-

te in a constructive manner and therefore, as envisioned in Article 22 of the CERD, it brought the matter to the Court, arguing that further negotiations would be futile, and prejudicial to the people living under a discriminatory occupation regime (ICJ 2017a).

3.1.2 As to Russia's Violations to its Obligations under the ICSFT

Ukraine claims that the Russian Federation has violated the 1999 International Convention for the Suppression of the Financing of Terrorism, which both parties are signatories, not only by refusing to cooperate in the prevention of the financing of terrorism, but also actively promoting and sponsoring it (ICJ 2017a). The conducts abovementioned constitute the keystones of the Convention and are recognized in Articles 18 and 2, respectively. In order to finance terrorism in Ukraine, the Respondent would have been acting through its organs, agents and entities, benefiting from the Applicant's political turmoil and the impotence to control its borders because of the situation.

According to the Applicant, the Russian Federation would have breached the main purpose of the Convention, enshrined in its Article 2, i.e. to provide or collect funds directly or indirectly, unlawfully or willfully with the intention that they should be used or in the knowledge that they are to be used to commit any act of terrorism (ICJ 2017a). The concept of terrorism used is any act criminalized by the treaties annexed to the ICSFT, such as the International Convention for the Suppression of Terrorist Bombings, the International Convention against the Taking of Hostages and the Convention for the Suppression of Unlawful Seizure of Aircraft. The Convention recognizes terrorism as

> [...] 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 (ICSFT, art. 2, para. 1b).

The Applicant pleads before the International Court of Justice that the Russian Federation has supported illegal armed groups in eastern Ukraine by supplying them with money and weapons. This conduct would have culminated in catastrophic events, namely the shoot-down of Malaysian Airlines Flight MH17 over Ukrainian territory and the shelling of civilians in Ukrainian cities. To support this claim, the Applicant contends that the acts com-

mitted by the Ukrainian armed groups are comprised in Article 2(1) of the Convention, therefore falling under the concept of terrorism (ICJ 2017a).

Likewise, Ukraine contends it has consistently protested against the Russian Federation attitude toward these activities. In this sense, the latter would not have obliged the mandatory Article 18 of the ICSFT, which declares

> States Parties shall cooperate 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 (ICSFT, art. 18.1).

In Ukraine's percipience, the refusal to cooperate would have been pattern-like, and consequently not compatible with the Russian obligations under international law (ICJ 2017a).

3.1.3 As to Russia's Violations to its Obligations under the CERD

In its Application, Ukraine invokes the obligations enshrined in the CERD, which was ratified by the Russian Federation[5], based on the argument that the Russian occupation of the Crimean territory has subjected the Ukrainian citizens under their control to a situation of mass intimidation and human rights offenses. Such abuses were committed against the non-Russia communities of the Crimean Peninsula, especially Crimean Tatar[6] and ethnic Ukrainian communities. These minorities refused to accept the alleged illegal occupation by Russia, which led the Russian authorities installed on Crimean territory to structure a broad-based campaign of cultural erasure through discrimination. According to the Applicant, with the goal of ethnic dominance achieved through cultural erasure, Russia breached its obligation under the CERD to combat racial discrimination (ICJ 2017a).

In this sense, with the occupation process to annex Crimea, the Russian regime started to consider the non-Russian communities of the region enemies of the authorities installed on the territory. Thus, the Russian Federation has opted to collectively punish such communities, aiming at suppressing and erasing their cultural heritage, as well as imposing a regime of ethnic Russian dominance. According to the Applicant, those acts violate articles 2,

5 The CERD entered into force in January 4, 1969. Russian Federation ratified the Convention in February 4, 1969 (United Nations 2017b).

6 Crimean Tatars are a Turkic ethnic group that formed in the Crimea region during the centuries XII-XVII, primarily from the Turkic tribes that moved to the Crimea Peninsula in Eastern Europe from the Asian steppes beginning in the century X. Today, Crimean Tatars constitute between 12% and 13% of the Crimea's population (Fisher 1978).

3, 4, 5 and 6 of the CERD, so that each of them constitute an independent violation of the convention (ICJ 2017a).

The whole Ukrainian claim regarding the CERD is based on articles 2 and 3. Both provisions establish general obligations to the States party to condemn actions of racial discrimination, as well as to adopt measures to eliminate such practices. Thereby, such articles provide:

> 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;
> [...]
> Article 3
> States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction (CERD, art. 2, para. 1, art. 3).

According to the Applicant, the pursuing by Russian authorities of a policy of cultural erasure through a pattern of discriminatory practices violates the general obligation, expressed in Article 2(1)(a), of engaging "in no act or practice of racial discrimination against persons, groups of persons or institutions" (CERD, art. 2). Likewise, the Ukrainian state submits that the treatment of groups that are not ethic Russian as threats to the regime installed on the Crimean Peninsula, as well as the suppression of that communities' culture and identity constitute a clear violation of Article 3, which call the states to prevent, prohibit and eradicate all practices of racial discrimination on its territory (ICJ 2017a, CERD, art. 3).

Regarding the Article 4, Ukraine's allegation that the Respondent violated such provision is based on the fact that Russian authorities, through their organs, perpetrated and tolerated a campaign of disappearances and murder targeting Crimean Tatars, as well as harassment towards such community, by disproportionately subjecting it to a regime of arbitrary searches and detention (ICJ 2017a). Article 4(c) of the CERD thus provides:

> Article 4
> States Parties condemn all propaganda and all organizations which are based

> on ideas or theories of superiority of one race or group of persons of one color or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:
> [...] (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination (CERD, art. 4).

The aforementioned Russian authorities include state organs and agents, and other people and entities which exercise governmental authority, as well as the *de facto* authorities administering the Crimea occupation (ICJ 2017a). Hence, the Applicant submits that Russia did not comply with its obligation under Article 4(c), since it failed in preventing that its own public authorities and institutions promoted or incited racial discrimination.

The Applicant also claims that the Russian Federation committed a number of breaches to Article 5 of the CERD and to several of its subparagraphs. Before addressing the specific factual background which, according to Ukraine, gave rise to the alleged violations, it is worth mentioning the excerpts from Article 5 that are under discussion in the present lawsuit:

> 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, color, 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; [...] (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: […] (v) The right to education and training; (vi) The right to equal participation in cultural activities; […] (CERD, art. 5).

According to Ukraine's Application, the Respondent violated Article 5(a) and (b) at creating an environment of violence and intimidation against Crimean Tatar and Ukrainian communities, since it did not either provide these minorities with equal access to the organs administering justice, if compared with those from Russian ethnicity, or make any effort to seek a consensual and inclusive solution protecting them (ICJ 2017a). Instead of it, as alleged by the Applicant, the Respondent has subjected those groups to a regime of its dominance, thus violating their right to security and protection by the State, which is expressed in Article 5(b).

Ukraine also submits that the Respondent, at fostering an atmosphere of intense political intimidation during the Application of the referendum, breached Article 5(c) of the CERD, since this threatening conduct by its forces did not permit an equal and universal participation of the non-Russian communities on such public vote. The referendum itself was designed with the specific goal of discriminating non-Russian people, since the question under vote was not neutrally framed, as well as it did not provide clear option for voters to maintain the Crimea's political status at the time (ICJ 2017a). The Applicant, for this reason, still argues that the referendum is invalid under international law, as recognized by the United Nations General Assembly in its Resolution 68/262 (United Nations 2014b).

Moreover, the Applicant sustains that Russia breached Article 5(d)(i) and (ii) by persecuting the Crimean Tatar community's leaders and banning its central institution, the Mejlis of the Crimean Tatar People[7]. Such actions of stifling of political and cultural rights of the Crimean Tatar community culminated in the outright ban of the Mejlis. In this sense, the Russian authorities, as alleged by the Applicant, have exiled, imprisoned, and otherwise persecuted Tatar leaders, which has led to a mass outflux of such community from Crimea (ICJ 2017a). Thereby, the Application brings the United Nations High Commissioner for Refugees report on Internally Displaced Persons (IDP), which shows that most displaced persons from Crimea

7 The Mejlis of the Crimean Tatar people is a representative and executive body of the Crimean Tatar people, which is considered by the community to be its legitimate representative organ (ICJ 2017a). Its main goals are the "elimination of the consequences of the genocide, committed by the Soviet state against Crimean Tatars, restoration of the national and political rights of the Crimean Tatar people and implementation of its right to free national self-determination in its national territory" (Mejlis of the Crimean Tatar People 2011, online). The organization is composed by 33 members, including the Chairman of Mejlis.

have been Tatars. The report also has cited the pressure on that community under Russian rule as the reason for the exodus, which is proved by the data that, since the Russian military intervention in the region, on September 16, 2014, the number of Crimean Tatars leaving Crimea has increased by 2-3 families per day (United Nations 2014a, ICJ 2017a).

The brutal suppressing of the political and cultural expression of Crimean Tatar identity by the Russian authorities constitute a clear violation, according to the Applicant, of Tatar community's rights to freedom of thought, conscience, opinion and expression, as provided in Article 5(d)(vii) and (viii) of the CERD. Furthermore, the silencing of Crimean Tatar and ethnic Ukrainian voices in the media, through the establishment of a pattern of discriminatory restrictions to that media entities by the Russian Federation, also violates Article 5(d)(viii). Such restrictions include arbitrary rejection of registrations and raiding, as well as harassment of media outlets (ICJ 2017a).

Ukraine also alleges that Article 5(d)(ix) and (e)(vi) were breached by the Respondent because of its practices of preventing the non-Russian communities from gathering in celebration and commemoration of their culture. This ongoing and widespread action to bar the Crimean Tatars and Ukrainian community "[...] from holding such gatherings reflects a pattern of oppression and punishment against [...]" those minorities and their cultures (ICJ 2017a, 30).

Moreover, the Applicant defends that Russia violated Article 5(e)(v) at suppressing Crimean Tatar language education and educational institutions, as well as the ethnic Ukrainians' rights to education in the Ukrainian language. Before the occupation, both ethnic Russian and non-Russian had the opportunity to study in their respective native language; however, since 2014, the Russian authorities installed on the Crimean Peninsula have deliberately reduced the supply of Ukrainian-language teachers and the number of hours dedicated to Crimean Tatar language in schools (ICJ 2017a).

Finally, the Applicant invokes Article 6 of the CERD, which deals with remedies for racial discrimination. Ukraine, in this regard, claims that the Respondent violated such a provision because of facts arising from the Russian occupation of the Crimean Peninsula. Thus, it follows the whole content of Article 6:

> Article 6
>
> States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a

result of such discrimination (CERD, art. 6).

According to the Application, the Russian Federation did not comply with the obligations expressed in Article 6, since it failed to assure, to the non-Russian communities of the Crimea, any effective protection and remedies, through its judicial bodies and State institutions, against acts of racial discrimination. Instead, the Russian authorities have perpetrated and tolerated a widespread campaign of disappearances and murder of Crimean Tatars, as well as a generalized harassment against such community through arbitrary searches and detention in public spaces and their homes (ICJ 2017a).

In addition, Ukraine argues that the Russian Federation has made no effort to seek an adequate solution to protect the groups which have their human rights and fundamental freedoms violated. Even with several cases of murders and disappearances, the Respondent has made no progress investigating such cases in a reasonable time. In some occasions, Russian occupation authorities failed to even open investigations (ICJ 2017a). This framework, in the view of the Applicant, justifies the violation of Article 6, considering also the unwillingness of the Russian Federation in achieving an adequate reparation or satisfaction to those groups that suffered damage because of racial discrimination (CERD, art. 6), in the terms of the CERD.

3.1.4 Ukraine's Plead for Provisional Measures

Based on Article 41 of the ICJ Statute and Articles 73, 74, and 75 of the Rules of the Court, on the same date it filed its Application, Ukraine submitted a request for the indication of provisional measures of protection[8]. It contends the Russian Federation's alleged unlawful and ongoing aggression against Ukraine has violated the ICSFT and the CERD and it deems the request for provisional measures necessary to safeguard the lives and basic human rights of the people of Ukraine against possible further Russian violations (ICJ 2017b).

Recognizing the need to preserve the respective rights of the parties pending the decision of the Court (ICJ 1993, para. 34); that at his stage the Court does not make "definitive findings" (ICJ 2000, para. 41; 2011b, para. 2); and that the indication of provisional measures depends on the Court finding the rights claimed are "plausible" (ICJ 2016, para. 78), Ukraine ascertains its claims far exceeded these standards (ICJ 2017b).

What Ukraine seeks to protect are its rights, and those of its people under the ICSFT. It claims that, while Article 18 of said treaty requires the Russian Federation to "cooperate in the prevention" of terrorism financing,

8 See Ukraine v. Russian Federation. Request for the indication of provisional measures of protection submitted by Ukraine.

it has instead repeatedly violated its obligations under this Convention by directly financing terrorism in Ukraine, as well as refusing to halt or investigate the financing of terrorism by public and private actors on its territory. Thus Ukraine requests provisional measures to protect its people from additional terrorist acts they may suffer as a consequence of Russia's actions (ICJ 2017b).

Ukraine further seeks to protect its rights and those of its people under the CERD. Arguing that Russia's campaign of cultural erasure through discrimination violates Articles 2, 3, 4, 5, and 6 of the Convention, Ukraine requests provisional measures to protect its people from the irreparable harm caused by this ongoing discriminatory campaign of cultural erasure (ICJ 2017b).

Ukraine ascertains its civilian populations, in particular eastern Ukraine and Crimea, are extremely vulnerable and therefore it requires the Court's immediate protection. Unless measures are put in place there is significant risk that the civilian population will face more terrorist violence, given that Russia continues to arm and otherwise finance its proxies that have engaged in acts of terrorism in Ukraine. Similarly, Crimean Tatar and ethnic Ukrainian communities face continuing harassment, abuse, and restrictions and if further acts of discrimination continue to be perpetrated, there is a significant risk that the Russian policy of erasing their distinct cultural identities will succeed (ICJ 2017b).

Accordingly, it contends that the Court has previously found it appropriate to indicate provisional measures in circumstances that are "[…] unstable and could rapidly change […]" and when there is "[…] ongoing tension […]" without any "[…] overall settlement to [an ongoing] conflict […]" (ICJ 2008, para. 143). It also asserts that provisional measures have been granted in similar circumstances when conflicts and similar "incidents have occurred on various occasions […] leading to fatalities, injuries and the displacement of local inhabitants." (ICJ 2011c, para. 53). Additionally, provisional measures are appropriate when past violations have occurred so long as it is "not inconceivable" that they will recur (ICJ 2016, para. 89). Finally, all these reasons for the indication of provisional measures are aggravated when there is a "vulnerable" population in need of the Court's protection (ICJ 2008, para. 143).

Insofar, with regard to the ICSFT, Ukraine requests that the Court 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 (ICJ 2017b, online).

As to what concerns the CERD, Ukraine requests that the Court 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 (ICJ 2017b, online).

3.2 Russian Federation's Allegations

The Russian Federation is yet to present written arguments to the Court, given the early stage of the current procedure. Actually, besides the oral arguments presented by its agents in the proceedings regarding Ukraine's request for indication of provisional measures, which relate solely to that matter, Russia is yet to make any official claims or objections in order to defend its position before the Court. Nonetheless, the Russian Ministry of Foreign Affairs issued comments[9], through its Department of Information and Press, on Ukraine's Application on 17 January 2017. While the release does not yet constitute an official document in relation to the present case[10] before the International Court of Justice, it serves to illustrate Russia's views on the dispute at hand.

With regard to Ukraine's claims under the ICSFT, the Russian Federation maintained that Ukraine did not provide any evidence that was supportive of its allegations on the breach of the Convention. Specifically in what concerns the efforts to negotiate a peaceful resolution to the dispute, Russia asserts that, when it genuinely attempted to clarify the nature of Ukraine's claims and to investigate them in good faith, it was faced with the persistent unwillingness of Ukrainian authorities to engage in a substantive dialogue, resulting on the the unilateral termination of consultations by the Ukrainian side. Additionally, Russia ascertains that it was Ukraine that dismissed the prospect of settling the dispute through an independent arbitration tribunal, claiming that Ukraine did not seek to settle the dispute, but it rather attempted to find any excuse to bring the case to the ICJ (Ministry of Foreign Affairs of the Russian Federation 2017).

As to what concerns Ukraine's claims under the CERD, Russia argues, specifically regarding the attempts to negotiate, that while it engaged in the dialogue with Ukraine in good faith, Ukraine "showed a lack of interest in the substantive discussion of these issues" (Ministry of Foreign Affairs of the Russian Federation 2017, online). Additionally, the Russian Federation maintains Ukraine ignored the Committee on the Elimination of Racial Discrimination, an expert body established under the Convention to settle any differences if such arise. Russia further contends that in what concerns the CERD, Ukraine not interested in actual protection of the people or compliance with the treaty but instead makes use of the proceedings before the Court

9 See Ministry of Foreign Affairs of the Russian Federation. *Comments by the Department of Information and Press of the Ministry of Foreign Affairs of the Russian Federa¬tion in Connection with the Proceedings Instituted Against the Russian Federation with the International Court of Justice by Ukraine.*

10 While the comments issued by the Russian Ministry of Foreign Affairs may be considered an official diplomatic statement, the Court has yet to recognize it as such so that it can be admissible in the current proceedings.

to short-term political interests (Ministry of Foreign Affairs of the Russian Federation 2017).

Specifically with respect to Ukraine's claims that the Russian Federation openly defined the UN Charter when it seized Crimea by military force and attempted to legitimize its act of aggression through the illegal referendum, Russia fails to properly address the issues of the impact of the annexation of Crimea on the rights of non-Russian ethnic groups in Crimea in its comments, limiting itself to say it "pays great attention to compliance with its obligations under CERD" (Ministry of Foreign Affairs of the Russian Federation 2017, online). Nonetheless, it remains unclear wheatear the Court will be able to specifically address this issue.

3.3 Reasoning of the Court concerning Provisional Measures

Given that Ukraine invoked Article 24(1) of the ICSFT and Article 22 of the CERD as basis for the exercise of the ICJ's jurisdiction, the Court observes that the jurisdictional clauses contained in those instruments make its jurisdiction conditional on the existence of a dispute arising out of the interpretation or application of the Convention to which they relate. Additionally, the Court recognizes that the jurisdictional clauses contained in either treaty also set out procedural preconditions to be fulfilled prior to the seisin of the Court (ICJ 2017e).

The Court found that the evidence before it is sufficient, at this stage, to establish, *prima facie*, first, the existence of a dispute between the Parties concerning the interpretation and application of these treaties; and, second, the procedural preconditions for the seisin of the Court, set out in Article 24(1) of the ICSFT and Article 22 of CERD, have been fulfilled. Accordingly, the ICJ recognizes its jurisdiction to address the Request for the Indication of Provisional Measures and its Amendment (ICJ 2017e).

With regard to the rights Ukraine seeks to protect under the ICSFT, the Court observes that Ukraine has invoked its rights and the Russian Federation respective obligations solely under Article 18 of the Convention, which overall provides that States Parties are obligated to cooperate to prevent the financing of terrorism. The Court further notes that, for the purposes of a request for the indication of provisional measures, a state may only invoke this provision if it is plausible that the acts it is complaining about constitute acts of terrorism (ICJ 2017e).

Accordingly, the Court recognizes that the acts to which Ukraine refers have given rise to the death and injury of a large number of civilians. Nonetheless, before determining that 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 elements set out in Article 2 of the ICSFT, such as intention and knowledge, as well as the element of purpose, are present. To the Court, Ukraine has not yet put evidence which affords a sufficient basis to find it plausible that these elements are present and that, consequently, the conditions required for the indication of provisional measures in respect of the rights alleged by Ukraine on the basis of the ICSFT have not been fulfilled (ICJ 2017e).

In respect to the rights Ukraine seeks to protect under the CERD, the Court asserts that Articles 2 and 5 of CERD are intended to protect individuals from racial discrimination, remarking that, for the purposes of a request for the indication of provisional measures, a party to this treaty may only invoke these provisions if it is plausible that the acts complained about constitute acts of racial discrimination under the Convention. The Court understands that some of the acts of which Ukraine complained about fulfil this condition of plausibility, such as the banning of the Mejlis and the alleged restrictions on the educational rights of ethnic Ukrainians. Insofar, there must be a link between the measures which are requested and the rights which are claimed to be at risk of irreparable prejudice. This connection is present with respect to the measures aimed at safeguarding the rights of Ukraine under Articles 2 and 5 of the CERD in what concerns 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 (ICJ 2017e).

The Court, thus, decided to indicate 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) Refrain from maintaining or imposing limitations on the ability of the Crimean Tatar community to conserve its representative institutions, including the Mejlis;[11]
> b) Ensure the availability of education in the Ukrainian language;[12]
> 2) Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve.[13] (ICJ 2017e, redacted).

11 Measure was approved by thirteen votes to three. In favor were President Abraham; Vice--President Yusuf; Judges Owada, Cançado Trindade, Greenwood, Donoghe, Gaja, Sebutinde, Robison, Crawford, and Judge *ad hoc* Pocar. Against were Judges Tomka, Xue, and Judge *ad hoc* Skotikov.

12 Measure was approved unanimously.

13 Measure was approved unanimously.

4 LEGAL THESES INVOLVED IN THE MERITS

If issues related to jurisdiction and admissibility, which were first addressed by the Court in its decision concerning preliminary objections are overcome, the judges of the ICJ will then be faced with the main legal theses involved in the merits of this case, specifically analyzed in this section.

4.1 Jurisdiction of the Court and Admissibility

Ukraine's choice of the ICSFT and the CERD as a jurisdictional basis for its claims is rather peculiar, though it is explained by the fact that no other treaties ratified by both states provide jurisdictional basis to address the underlying, and yet most pressing issue of this case: the unlawful use of force (Marchuk 2017). Indeed, the exercise of the Court's jurisdiction over contentious proceedings depends on state consent (Crawford 2012). Given that the Russian Federation does not recognize the compulsory jurisdiction of the ICJ[14], Ukraine's only resort for bringing action before the Court was to rely upon a treaty that provides for the possibility of judicial settlement in the ICJ and that has been ratified by both parties (Marchuk 2017).

It remains clear that while Ukraine makes reference to Russia's unilateral annexation of Crimea as brazen defiance to the UN Charter (ICJ 2017a), it does not, at any time, expressly relate the Russian government actions to a violation of Article 2(4) of the Charter[15], or any similar international instrument in order to specially associate Russia's conduct to a breach of international law. Insofar, the present case concerns solely alleged violations of the ICSFT and of the CERD. No matter how paramount to the dispute and evidenced in fact an issue may seem, if it does not fall under the scope of these treaties it remains outside the court's jurisdiction.

On its Order on the existence of a dispute between the Parties concerning the interpretation and application of the ICSFT and of the CERD, the Court observed that the jurisdictional clauses contained in those instruments make its jurisdiction conditional on the existence of a dispute arising out of the interpretation or application of the Convention to which they relate. The

14 Under Article 36 of the ICJ Statute, states party may at any time recognize the jurisdiction of the Court as compulsory in legal disputes concerning the interpretation of a treaty; any question of international law; the existence of any fact which, if established, would constitute a breach of an international obligation; or the nature or extent of the reparation to be made for the breach of an international obligation, in relation to any other State accepting the same obligation. To do so, States may deposit Declarations Recognizing as Compulsory the Jurisdiction of the Court with the Secretary-General of the United Nations. See *Statute of the International Court of Justice*, available at http://www.icj-cij.org/documents/?p1=4&p2=2.

15 Article 2(4) of the UN Charter prohibits the use of force or the threat of use of force against the territorial integrity or political independence of any state or in any manner inconsistent with the Charter. See *Charter of the United Nations*, available at http://www.un.org/en/charter-united-nations/.

ICJ recognized, *prima facie*, its jurisdiction over the case, on grounds that there is sufficient evidence at this stage to establish the existence of a dispute between the parties on the interpretation and application of both treaties (ICJ 2017e).

Nonetheless, the Court observed that the jurisdictional clauses contained in either treaty also set out procedural preconditions to be fulfilled prior to adjudication before the ICJ. With respect to the ICSFT, Article 24(1) provides the dispute in question must be a one that "cannot be settled through negotiation within a reasonable time" (ICSFT, art. 24, para. 1); it must have been submitted to arbitration at the request of one of the parties, and may be referred to the Court only if the parties have been unable to agree on the organization of the arbitration within six months from the date of the request.

Ukraine has already presented clear enough claims and it may yet be able to establish that after it requested the dispute was submitted the dispute to arbitration, the parties were indeed unable to reach an agreement on the organization of the arbitration given Russia's alleged delays to comply with the proceedings. Even so, the Court still needs to establish if the period between the initiation of the negotiations in 2014 and the delivery of Ukraine's request to submit the dispute to arbitration in April 2016, along with Russia's alleged failure to engage in negotiations, indeed amount that the dispute wasnot settled by negotiation.

Yet, it is with regard to the CERD that an issue of admissibility may arise. This treaty provides in its Article 22 that the dispute referred to the Court must be a one "not settled by negotiation or by the procedures expressly provided for in th[e] Convention" (CERD, art. 22). In order to recognize jurisdiction under the CERD, the Court will have to establish, within the meaning of the Convention, if negotiations indeed have taken place. In *Georgia v. Russian Federation*, the ICJ has constructed what constitutes negotiations and to what extent they have to be pursued before it can be found that the preconditions for bringing the case before the Court have been met (Marchuk 2017):

> Negotiations entail more than the plain opposition of legal views or interests between two parties [...]. As such, the concept of "negotiations" [...] requires [...] a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute (ICJ 2011, para. 157).

The Court additionally found that when "negotiations are attempted or have commenced", the preconditions are to be considered fulfilled if "there has been a failure of negotiations, or when negotiations have become futile

or deadlocked" (ICJ 2011, para. 159). The difficulty presented is to prove both parties made a *genuine* attempt to engage in discussions, with a view of resolving the impasse, which may result in an undue delay in the proceedings (Marchuk 2017). While an attempt to negotiate does not have to lead to an actual agreement (ICJ 2011, para 158), failing to show a "genuine attempt to negotiate" demonstrates absence of evidence to meet the required preconditions (Marchuk 2017). Within this context, while Russia argues that Ukraine's attempts to negotiate have not been genuine[16], the latter maintains that negotiations have become futile or deadlocked[17]. The judges of the ICJ are presented with the arduous task to ascertain whether the procedural preconditions have been fulfilled given the highly politicized context which underlines the present case (Marchuk 2017).

4.2 Law of Treaties

Considering that the claims brought by Ukraine to this Court are based on Russia's violations of two international conventions, it is first necessary to address the specificities of each treaty, to comment on the main issues related to Law of Treaties which may be applied in the present case.

The formally recognized sources of international law are reflected in Article 38 of the Statute of the International Court of Justice (Crawford 2012). Although such article is provided within the competence of the ICJ, since it represents a directive to the judges' practice on Court (Dunoff, Ratner e Wippman 2015), its provisions are generally accepted as a correct statement of the sources of international law[18] (Harris 2004).

> Article 38.
> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> b. international custom, as evidence of a general practice accepted as law;
> c. the general principles of law recognized by civilized nations;

16 *See* Section 3.1.1
17 *See* Section 3.2
18 Despite the Article 38 stipulate an order, (a) to (d), to present the sources, there is no formal hierarchy between them. However, in international law, it is recognized that the first three sources listed under article 38 (treaties, international custom and general principles of law) represent what is called "hard-law", that is, those sources that effectively create obligations for the states; while the sources listed in line (d) refer to the so-called "soft law", i.e., sources that do not formally bind states, but act as subsidiary means to determinate legal obligations, and may represent evidence of law, such as judicial decisions, UN resolutions, unilateral acts and writings of publicists (Crawford 2012).

> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law (Statute of the International Court of Justice, art. 38).

This article refers to "international conventions [...] establishing rules expressly recognized by the contesting parties" (Statute of the International Court of Justice, art. 38), which means treaties that come into existence from commitments agreed by two or more States. A treaty is thereby "one of the most evident ways in which rules binding on two or more States may come into existence, and thus an evident formal source of law" (Thirlway 2010, 99). However, treaties are better understood, formally, as a source of obligation rather than a source of law. In fact, the "law" existent, in such context, is derived not from a treaty in itself, but from the principle of pact *sunt servanda*, which is an antecedent general principle of law[19] that represents the basis for the binding nature of treaties (Thirlway 2010, Harris 2004). These are instruments in which the law is stated and thus are not formally source of international law, but only evidence of it. In this sense, if the treaty codifies existing law, the parties, when applying such rules, are merely acting conform to general law obligations already valid under international law (Harris 2004). Beyond codifying existing international law, treaties are also responsible for developing new law (Dunoff, Ratner e Wippman 2015).

Recently, bilateral and multilateral treaties have multiplied in an almost exponential way. Most treaties are bilateral, but many involve several States - the so called "multilateral treaties". In general, treaties create rights and obligations for the parties to them, specifying, in many cases, particular arrangements of interest of the states party or, in other cases, establishing wide norms to govern state conduct in areas such as human rights, trade, or the environment (Dunoff, Ratner e Wippman 2015). Thus, much of the practical content of international relations is embodied and structured by treaties, as in the case of international organizations, which have its legal basis on multilateral treaties (Crawford 2012). The treaty may be considered the "ubiquitous instrument through which all kinds of international transactions are conducted" (Harris 2004, 786).

States must enter into treaties to obtain binding commitments from other states, since treaties are by definition legally binding. This way, such commitments expressed in the treaty may assist the parties in pursuing their interests, considering that, in the international legal system, there are no "enforcement mechanisms comparable to those of effective national legal sys-

19 General principles of law are recognized as sources of international law in the terms of Article 38(1)(c) of the Statue of the ICJ.

tems" (Dunoff, Ratner e Wippman 2015, 38). In participating of a treaty, thereby, States party accept to act in accordance with certain commitment that would not be legally required of it in the absence of the treaty (Thirlway 2010). For this reason, it makes sense to consider that the effect of treaties is to raise the political costs of noncompliance, since there are no international institutions that offer external guarantees for promises made by States. It is also important to note that, in signing and ratifying a treaty, states take into consideration that, in general, treaties and international law exert some influence over state behavior (Dunoff, Ratner e Wippman 2015).

Most of international law rules applicable to treaties have been codified in the Vienna Convention on the Law of Treaties (VCLT), which was adopted by states at the United Nations Conference on the Law of Treaties in 1969 and entered into force on January 27, 1980 (Dunoff, Ratner e Wippman 2015, Crawford 2012). Beyond representing a codification of pre-existing general law on the subject, especially customary international law[20], VCLT provisions also reflected an effort to create new law, in a progressive development of international law[21] (Dunoff, Ratner e Wippman 2015). Moreover, it is important to mention that, according to Article 1 of the VCLT, the rules enshrined in the Convention apply only "to treaties between States" (United Nations 1969, 333). In the VCLT, there is also a clear definition of "treaty":

> Article 2. Use of Terms
> 1. For the purposes of the present Convention:
> (a) "**Treaty**" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation; [...] (VCLT, art. 2, para 1).

The way how treaties are negotiated and brought into force depends on the intention of the States party, which is why there are no specific and necessary requirements as to the form of the treaties (Crawford 2012). In this sense, treaties may be written or oral[22], bilateral or multilateral, for a fixed term or indefinite (Dunoff, Ratner e Wippman 2015). The multilateral treaties, which is the case of the CERD, for example, differ from the bilate-

20 In *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970), the ICJ ruled, for the first time, that VCLT must be considered as a codification of existing customary law on the subject (Crawford 2012).

21 Currently, "some provisions that might have constituted 'progressive development' when the treaty was drafted have acquired the status of custom" (Dunoff, Ratner e Wippman 2015, 41).

22 However, VCLT applies only to written treaties (Dunoff, Ratner e Wippman 2015, Crawford 2012).

ral ones because of its "law-making" character. This is to say such treaties "concern general norms of international law and deal with general interest to States as a whole" (Crawford 2012, 370), creating a set of rules, such as the Convention on the Prevention and Punishment of the Crime of Genocide (1948), or an institution, such as the Marrakesh Agreement (1994) establishing the World Trade Organization (Crawford 2012). As Harris (2004) points out,

> "[...] the multilateral treaty remains best medium available at the moment for imposing binding rules of precision and details in the new areas into which international law is expanding and for codifying, clarifying and supplementing the customary law already in existence in more familiar settings" (Harris 2004, 786).

The successful outcome of the negotiation of a treaty is the adoption and authentication of the agreed text. In this sense, the signature has the function to authenticate the document, which will be, later on, subject to ratification. This institute involves two distinct procedural acts: first, an internal act of approval by the states' domestic institutions and, second, the international proceedings of deposit or formal exchange of the instruments of ratification, which brings a treaty into force. Such written instruments of ratification "[...] and also reservations and other declarations are placed in the custody of a depositary, which may be one or more States or an international organization" (Crawford 2012, 373-374).[23]

In most treaties, the uniform acceptance of all the treaties' provisions is a general norm which must be complied by the parties. Nevertheless, in some cases, there are States that, despite the intention to be part of the treaty, have to refuse the signature because do not agree with some of the treaty's provisions. If authorized by treaty and international law, reservations may be made, in such a way as to limit, for a particular state, the application of the treaty' provisions which have been reserved (Dunoff, Ratner e Wippman 2015). In this sense, it is the definition enshrined in art. 2(d) of VCLT:

> [...] (d) "**Reservation**" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State; [...] (VCLT, art. 2).

Under the VCLT, there is a presumption of validity and continuance

23 The UN Secretariat has an important role as the depositary of many multilateral treaties (Crawford 2012).

in force of a treaty, which is based, as already mentioned, upon *pact sunt servanda*, general principle of law expressed in art. 26 of the Convention: "every treaty in force is binding upon the parties to it and must be performed by them in good faith" (VCLT, art. 26). For such reason, states may not invoke its domestic law to justify a noncompliance of a treaty[24]. In addition, it is worth mentioning that, as general rule, treaties operate on a non-retroactivity basis[25], that is, parties are only bound to acts or facts taking place after the treaty has entered into force for such States (Crawford 2012).

Finally, considering that the judges of this Court will have to examine the provisions of both Conventions to decide whether or not the Russian Federation has violated such provisions, they must necessarily resort to the rules of interpretation of treaties in order to reach a conclusion on Ukraine's claims. Regarding the interpretation of treaties, the VCLT provides in its Article 31 some general rules:

> Article 31. General Rules of Interpretation
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
> (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
> (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
> 3. There shall be taken into account, together with the context:
> (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
> (c) Any relevant rules of international law applicable in the relations between the parties.
> 4. A special meaning shall be given to a term if it is established that the parties so intended (VCLT, art. 31).

24 VCLT, Article 27: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty [...]" (United Nations 1969, 339).
25 VCLT, Article 28: "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party" (United Nations 1969, 339).

This article recognizes the so-called "textual approach", a technique of treaty interpretation which emphasizes the intention of the parties as expressed in the text as the best guide to their common intention. The ICJ's case law[26] has usually supported such textual approach. The *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* itself recognized the general rule, enshrined in Article 31, as reflecting customary international law. This article refers to "ordinary meaning to be given to the terms of the treaty", which means that the treaty's provisions must be interpreted in its ordinary sense, considering its normal functions. Moreover, the meaning must emerge in the context of the treaty as a whole, including the text, its preamble and annexes. In addition, the examination of the language of the treaty must be in accordance with the general international law rules in force at the time of its conclusions, and also with the contemporaneous meaning of such terms. In its Article 32, the VCLT also permits recourse to further means of interpretation, differently from the textual approach, in certain circumstances (Crawford 2012):

> Article 32. Supplementary Means of Interpretation
> Recourse may be had to supplementary means of interpretation, including the **preparatory work** of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
> (a) Leaves the meaning ambiguous or obscure; or
> (b) Leads to a result which is manifestly absurd or unreasonable (VCLT, art. 32).

The preparatory work has been used by the ICJ to confirm a conclusion reached by the judges, on a number of cases[27]. In the case of multilateral agreements, the records of conference proceedings, treaty drafts, among others, may be confused or inconclusive, reason why the preparatory work should be employed very carefully. Also, it is recognized that articles 31 and 32 "should operate in conjunction, and would not have the effect of drawing a rigid line between 'supplementary' and other means of interpretation" (Crawford 2012, 384). In this context, the teleological approach is inserted

26 Some cases of the ICJ in which the judges used the textual approach of interpretation: *Competence of the General Assembly for the Admission of a State to the United Nations* (1950); *Territorial Dispute (Libya/Chad)* (1994); *Qatar v Bahrain, Jurisdiction and Admissibility* (1995); *Pulau Ligitan/Sipadan* (2002); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (2007) (Crawford 2012).

27 The ICJ (here encompassing PCIJ) used the preparatory work of treaties in the following cases: *Convention of 1919 concerning the Work of Women at Night* (1932); *Territorial Dispute (Libya/Chad)* (1994) (Crawford 2012).

as another interpretative method, different from the textual approach, in which any ambiguity in the text of the treaty should be resolved preferably by an interpretation in the light of the object and purpose of the treaty (Crawford 2012).

Since the main issues of treaty law applicable in the present case have been overcome, the following two sections will address specific questions related to the ICSFT and the CERD, especially the content of the allegedly violated rights of both conventions, as well as its implications.

4.2.1 The International Convention for the Suppression of the Financing of Terrorism (ICSFT)

The International Convention for the Suppression of the Financing of Terrorism was adopted by the United Nations General Assembly in 1999 and there currently are 150 states party to it. The Convention is the outcome of a series of multilateral treaties and declarations during the nineties, with the ambition to combat terrorist acts. The Financing Convention is the most recent treaty of this series and it does not aim at fighting terrorist acts, but at undermining the system which maintains and sponsors them (Klein 2009).

It may be important to note that there is a meaningful difference between the definition of "financing" employed by the 1999 Convention and the one typically used in other treaties. Usually, to "finance" means to contribute with pecuniary resources. Notwithstanding, in the case at hand, the definition would approach "material assistance", since it encompasses assets of every kind, stretching the term beyond the dictionary traditional meaning (Lavalle 2000).

In virtue of its sparsely ratification, the Convention would have had very limited effect, if not for the terrorist attacks of 9 September 2001 (Bantekas 2014). Just after the events, the states began to give priority to the subject. Concerned with the matter, the UN Security Council adopted resolution 1373 (2001) on 28 September 2001, implementing almost all the central elements of the Financing Convention (Klein 2009). However, the expansive delineation of "terrorist" and "terrorist acts" used in the resolution is considered problematic, since it would be susceptible to interpretations capable of facilitating the violation of rights. Despite the issues related to the non-definition of the term, the Security Council has deliberately used an open-ended term to reach a consensus during the negotiations. In this sense, the lack of definition of "terrorism" would have been a condition *sine qua non* for the resolution's approval (Saul 2006).

The definition of the term "terrorist act" became essential under the Financing Convention, since "financing" something is not necessarily unlawful *per se*. Although Article 2 indicates the framing of the concept, the defini-

tion still lacks precision and evokes doubts. During the *travaux préparatiores,* for example, the debates were polarized about whether activities of national liberation movements could be classified as terrorist acts. While some states repeatedly raised their concern that national liberation movements or acts of resistance to foreign occupation might be characterized as terrorism under the 1999 Convention, others argued that its purpose was to punish those offences by whomsoever committed, regardless of any justification (Klein 2009).

Most challenges in the interpretation and application of the Financing Convention are resultant of the difficulty in defining "terrorism". Until the present days, dissonance arises especially in the matters related to national liberation movements. According to Mastorodimos (2016, online),

> national liberation movements correspond to a category of armed non-state actors who are defined by their objective (self-determination), the quality of their constituency (peoples) and the conduct and/or quality of the opposing government. In essence, national liberation movements constitute the self-help vehicle of peoples to achieve self-determination. In order, however, to substantiate this definition, it is necessary to explore the interrelated notions of self-determination and peoples.

Arab and African states, in particular, have long sought to include in international documents references to the *causes* of terrorism and to exclude the acts of certain liberation movements from its scope. Characterization of movements by states may be, in this sense, controversial, especially when these movements desiderate the secession of a region from the territory of a state, as a form of exercising the right to self-determination. It is the case, e.g., of the Uighur separatists by China, the Chechen rebels by Russia, and the Kashmiri militants by India (Plant 2003).

It may be pivotal to consider, when analyzing Ukraine's application against the Russian Federation, the incontestable existence of terrorist groups in eastern Ukraine and the characterization of the acts perpetrated by these individuals. If the ICJ interprets the events in the eastern portion of Ukraine as part of a national liberation movement, aiming to exercise its right to self-determination against Ukraine's central regime by forming another state, the ICSFT might not be applied. On the other hand, if the Court construes the events as terrorist activities, either because no political justification is acceptable or because the activities do not meet the notion of national liberation movement, the Convention might be enforced.

4.2.2 The International Convention on the Elimination of All Forms of Racial Discrimination (CERD)

The context of the CERD's creation dates back to the post-World War II period, when racial discrimination continued to be practiced in many countries. In such time, people in colonial territories, for example, until gaining independence, lived in an environment of marked inequality. Likewise, the socialist regimes in central and Eastern Europe had as their basis discriminatory policies. Discrimination and exclusion could no longer be tolerated by the international community, at the time. As soon as the developing countries found access to the United Nations as newly independent States, the fight against racial discriminations and apartheid became one of their main goals. In such process, international treaty regimes were created to establish international instruments which would effectively combat the practice of discrimination (Tomuschat 2008).

Such initiative was responsible for structuring the basis of the current universal human rights regime. Since then, in addition to the UN Charter and the Universal Declaration of Human Rights, a host of multilateral human rights treaties, as well as resolutions or declarations with a more limited or focused subject than the above-mentioned general treaties, have grown out of the UN and have been ratified by a substantial number of States (Alston and Goodman 2013). One of them was the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), adopted and opened for signature and ratification by Resolution 2106 of the UN General Assembly, on December 21, 1965. The Convention entered into force on January 4, 1969, in accordance with its Article 19 (CERD, art. 19). Currently, the treaty has 178 states party and also 5 signatures of States that have not yet ratified in their respective domestic jurisdictions (United Nations 2017b). The CERD sets obligations for governments to take all appropriate measures to prevent, remedy and eliminate all forms of racial discrimination in order to combat contemporary forms of racial discriminations and inequality (US Human Rights Network 2013).

The norms of the CERD represent an exhaustive list of grounds prohibiting any kind of racial discrimination (Moeckli 2010, Tomuschat 2008). The Convention thereby brings the definition of "racial discrimination" in its Article 1:

> Article 1
>
> 1. In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on

> an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life (CERD, art. 1, para. 1).

Article 2 of the CERD, allegedly breached by the Russian Federation, is the principal repository of general obligations to implement the Convention. The text contained in paragraph 1 and its subparagraphs refine the basic message that the state itself shall not discriminate, directly or indirectly. For this reason, Article 2(1) addresses state-generated racial discrimination. Given the CERD's character of text devoted principally to the enunciation of rights, Article 2 can be considered as a general obligations clause, which it will be supplemented by more detailed prescriptions throughout the Convention's text. Moreover, the "racial discrimination" term, expressed in that article, must be assumed to carry its full meaning as discrimination in intention or effect as well as related forms (Thornberry 2016).

Article 3, in turn, is the shortest of the normative articles in the Convention. Such provision calls upon the states to condemn racial segregation and apartheid. Segregation is an expression "in common usage, meaning to 'set apart from the rest or each other', or to 'separate along racial, or religious lines' and may be defined in active or passive senses, 'the action of segregating or the state of being segregated'" (Thornberry 2016, 237). As to apartheid, such practice may be defined involving the ideas of domination of a racial group – or group – by others and of committing inhuman acts, which are linked to a systematic institutionalized process of domination. These elements are directly related to the South Africa situation at the time, which had been on the agenda of the UN since 1946. The obligation to "prevent, prohibit and eradicate" segregation and similar practices, expressed in the text of the Convention, is wide ranging and includes action against those discriminatory practices which come from both private and public sectors (Thornberry 2016).

Article 4 address the important issue of "racist hate speech", through the use of penal provisions. In such article, as well as in other articles of the CERD, the term "hate speech" is not used; however, its use by the Committee on the Elimination of Racial Discrimination has steadily advanced. In the case of Article 4(c), the paragraph (c) emphasizes the law and policy obligation in relation to public authorities and widening obligations beyond the application of criminal law. Thus, such provision does not impose obligations on domestic criminal law, but merely establishes that such domestic rules must be in conformity with the Convention, and that due care must be taken to ensure that public officers, at national level, do not depart from those rules (Thornberry 2016).

Article 5 is the longest of the substantive articles in the Convention. Its content includes a complex obligation to prohibit and eliminate all form of racial discrimination, as well as to guarantee equality before the law on a non-discriminatory basis. Such guarantee is applied by the enjoyment of an extensive list of rights, which covers all the main "categories" of that: civil, political, economic, social and cultural. These are presented, in the text of the CERD, without further elaboration found in other human rights instruments, that is, the rights are described rather than defined, without the detailed apparatus of limitation or restriction clauses found in most other human rights conventions (Thornberry 2016). In foreseeing such a rights roll, important implications for government's responsibility in addressing and eradicating racial disparities are raised "in key social and economic indicators such as poverty, incarceration, educational attainment, and health outcomes" (US Human Rights Network 2013, 11).

The last article alleged to have been violated by Russia, according to Ukraine's claim, is Article 6, which deals with issues of reparation and satisfaction for damage suffered as a result of discrimination. Reparations are owed always that it occurs a breach of an international obligation, when such reparation will be made in an adequate form. The corpus of international human rights law contains an abundance of the so-called "primary rules" - norms that establish direct conducts with which the states must comply -, including those expressed in Article 6. The right to a remedy, imposed to the state party to the CERD through Article 6 provisions, for instance, is a key aspect of international human rights law and is reflected in a broad variety of global and regional instruments (Thornberry 2016). The issues related to the law of state responsibility in light of the states obligation to make reparation to those victims who had their rights violated will be addressed further in this study guide.

It is also important to mention that the CERD establishes, in its Article 8, a Committee for the implementation of the Convention. This body is composed by eighteen experts of high moral standing and acknowledged impartiality elected by states party from among their nationals. Such independent experts are responsible, mainly, to monitor the implementation of the CERD by that states (United Nations 2017a). In this sense, the Committee sessions are "devoted to reviewing State reports and drafting concluding observations, which are recommendations for improved implementation" (US Human Rights Network 2013, 11).

It is also worth noting that the Russian Federation, while still the Union of Soviet Socialist Republics (USSR), made a reservation regarding the provision in Article 17(1) of the CERD. The USSR stated that it is of a discriminatory nature deprive a number of states of the opportunity to be-

come parties to the Convention. Thus, it defended that, in accordance with the principle of the sovereign equality of states, the CERD should be open to signature and further ratification by all interested states without any kind of discrimination or restriction (United Nations 2017c).

4.3 Self-determination and Territorial Integrity

If the International Court of Justice interprets the existence of national liberation movements as a situation permitting or justifying violent activities, it might need to ponder the situations experienced by the eastern Ukrainian population, and the relevance of the demands brought by the armed groups. In this regard, it becomes necessary a brief elucidation about secessionist movements and the right of self-determination.

The principle of self-determination of peoples is one of the most fundamental and controversial principles of international law. Recently it has been brought to light as a key argument to Ukraine's secessionist and national movements by scholars and politicians. Nonetheless, neither secession movements nor the invoking of self-determination are atypical situations. Over the past decade, separatist movements worldwide have tended to grow, aspiring to constitute a new state or to become a part of another one, as in Chechnya and Kosovo, respectively (Chernichenko and Kotliar 2003).

The promotion of the right of a people to self-determination is recognized in Article 1.2 of the UN Charter as a purpose of the United Nations, and it is described in the Friendly Relations Declaration of 1970 as a duty of every state. The latter affirms that all peoples have the right to freely decide its own political condition and to conduct its own economic, social and cultural development. Nonetheless, the 1970 Declaration recalls its provisions must not be interpreted as authorizing or encouraging actions which "would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States" (The Friendly Relations Declaration, principle 5).

Moreover, in *South West Africa*[28], *Construction of a Wall*[29] and *Kosovo*[30], the International Court of Justice has identified this principle as part of the international system's body of laws. In *Western Sahara*[31], the Court emphasized "that the application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned" (ICJ 1975, para. 55). The International Court of Justice has also confirmed the undisputed

28 *See* South West Africa, Second Phase, Judgment, I.C.J. Reports 1961

29 *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I. C. J. Reports 2004

30 *See* Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I. C. J. Reports 2010

31 *See* Western Sahara, Advisory Opinion, I.C.J. Reports 197

value of the right to self-determination in *East Timor*[32] as an erga omnes obligation under international law.

However, controversy arises to establish a common notion of "people", once there are neither legal decisions nor general accepted standards to characterize the concept. In this sense, while some scholars perceive a "people" *lato sensu*, as a group possessing certain common characteristics (Summers 2014), others approach it as all the people within a state, i.e., its population (Dugard 2003). In the case at hand, this becomes essential when examining the situation in Ukraine, since the eastern Ukraine population cannot exercise the right of self-determination, and, therefore, constitute a national liberation movement, if they are not considered a "people" in international law.

In the human rights' system, the Miskito case has been the only situation that the Inter-American Commission has considered the issue of the right of self-determination of peoples. The Miskito, an ethnic group in Nicaragua, claimed human rights' violations by the Sandinista government. In the case, the Commission stated that the right of self-determination of peoples is not recognizable for every ethnic group and that the territorial integrity of sovereign states must not be undermined (IACRH 1983).

Furthermore, there is no consensus if secession is a legal justifiable manner to perform the right to self-determination (Kapustin 2015), namely because of divergences concerning the relation between democracy and self-determination. For some scholars, democracy means popular sovereignty, i.e., government by the people. Therefore, they understand secession as the effort of the peoples to govern themselves. In this logic, forming their own states would be a valid means to self-determine its political status, consistent with the highest democratic values (Buchanan 2003).

Another circle of scholars construes the relationship between democracy and secession with enthusiastic support for the former and careful approach toward the latter. On this perception, democracy is a general right enjoyed by the citizens of every state, while legitimate secession is, as the right to revolution, a remedial right. This means groups have the right to secede as a last resort, in cases of serious injustices perpetrated against them by the state (Buchanan 2003).

There is general acceptance by doctrine and practice regarding the right to secede in the situation of colonial emancipation from the metropolitan control. However, this is an exception and has almost no pertinence since the 1990s, when most of the colonial territories achieved their independence. Currently, the common understanding is that there is no rule in contemporary international law recognizing the right to separate from a mother state

32 *See* East Timor Case (Portugal v. Australia), ICJ, Judgment of 30 June 1995, par. 29

(Ouali 2012). In what concerns the new wave of secessions initiated in the nineties, international law has not given sufficient response to the cases arisen. It has neither provided clear requirements to what would constitute a legitimate secession nor has it been successfully adopted to halt secession movements (Buchanan 2003).

Regarding the subject, Cassese considers it possible to justify secession:

> […] when the central authorities of a sovereign State persistently refuse to grant participatory rights to a religious or racial group, grossly and systematically trample upon their fundamental rights, and deny the possibility of reaching a peaceful settlement within the framework of the State structure. Thus, denial of the basic right of representation does not give rise per se to the right of secession. In addition, there must be gross breaches of fundamental human rights, and what is more, the exclusion of any likelihood for a possible peaceful solution within the existing State structure (Cassese 1996).

The policy justification opposing national secession movements is usually that of stability. However, it is necessary to ponder, on one hand, if retaining the boundaries of some states is truly improving international stability and, on the other hand, if self-determination has not been manipulated in order to disintegrate states, and to create recurrently non-viable ones (Ouali 2012).

4.4 Responsibility of States under International Law

This section will address the main legal basis of the Law of State Responsibility, thus indicating the fundamental concepts guiding this field, as well as important legal documents and judicial cases applicable on this subject. The main goal in addressing such themes is due to Ukraine's claim to recognize the international responsibility of the Russian Federation for violations to the Terrorism Financial Convention and the CERD. For this reason, if this Court decides that the Respondent violated any of the above-mentioned conventions, it will be necessary to know the rules concerning State Responsibility in order to apply them in the specificities of the present case.

State Responsibility is a fundamental institution of international law, which results from the legal personality of the state as a subject of international law, as well as from the fact that states are the main conveyers of international obligations (Crawford 2006). The Law of State Responsibility, as the Law of Treaties, has been largely articulated by the work of the International Law Commission (ILC) (Crawford 2012). In this sense, the ILC has

been codifying and developing the standards assumptions of responsibility in its Draft Articles on State Responsibility for Internationally Wrongful Acts (ARSIWA), which represent the modern framework of State Responsibility, since they are an active and useful portion of the process of international law (Crawford 2006). International Courts and renewed scholars have already considered these Articles "to be in whole or in large part an accurate codification of the customary international law of state responsibility" (Crawford 2013, online), as stated, for instance, by the ICJ in the Application of the Convention on the Prevention and Punishment of the Crime of Genocide: "This is the state of customary international law, as reflected in the ILC Articles on State Responsibility" (ICJ 2007, 170).

The essential premise of the ARSIWA is the concept of State Responsibility itself, which is introduced in Article 1 of the document: "Every internationally wrongful act of a State entails the international responsibility of that State" (ILC 2001, 32). Such provision affirms the basic principle that each state is responsible for its own conduct (Crawford 2013). Moreover, for the characterization of an act of a State as internationally wrongful it is necessary the presence of two elements: attribution and breach. Similarly, such characterization is governed by international law and is not affected by lawful character, in internal law, of that same act. Such principles are provided in articles 2 and 3 of ARSIWA:

> Article 2. Elements of an internationally wrongful act of a State:
> There is an internationally wrongful act of a State when conduct consisting of an action or omission:
> (a) is **attributable** to the State under international law; and
> (b) constitutes a **breach** of an international obligation of the State.
> [...]
> Article 3. Characterization of an act of a State as internationally wrongful:
> The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law (ILC 2001, 34-36).

Regarding the attribution of a wrongful conduct (act or omission), Article 4 establishes that the internationally wrongful act of state organs generates the responsibility of the respective state, which means that, for purposes of international responsibility, that organs, whatever its function, act on behalf of such state under international law. Such provision is quite important due to the fact that, in the present case, Ukraine claims for the

attribution of the international responsibility of the Respondent for acts committed by Russian state organs and agents. In this sense, Article 4 provides:

> Article 4. Conduct of organs of a State:
> 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
> 2. An organ includes any person or entity which has that status in accordance with the internal law of the State (ILC 2001, 40).

Also, the ARSIWA defines the conditions which the breach of an obligation must satisfy in order to create the international responsibility of a State. Such requirements are expressed in articles 12 e 13:

> Article 12. Existence of a breach of an international obligation:
> There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.
> [...]
> Article 13. International obligation in force for a State:
> An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs (ILC 2001, 54-57).

Considering that the present case deals with treaty obligations, it is worth mentioning issues related to the possible conflict between rules of the Law of State Responsibility and the Law of Treaties, both originated from the same breach. For this reason, in such cases involving the breach of a treaty obligation, which is the litigation in question, the general defenses available under the Law of State Responsibility coexist with the rules of treaty law, expressed in VCLT, as held in both *Rainbow Warrior*[33] arbitration and *Gabčíkovo-Nagymaros*[34]. Nonetheless, while the rules of treaty law determine when a treaty obligation is in force for a state and how it should be interpreted, the norms concerning State Responsibility, on the other hand, establish the legal consequences of the violation, such as reparation. Even so, according to the Law of Treaties, the choice of a state to suspend or terminate a treaty due

33 *See* Case concerning Rainbow Warrior Affair (New Zealand/France), Reports of International Arbitral Awards (published on 30 April 1990).
34 *See* Gabčikovo-Nagymaros Project (Hungary/Slovakia), Judgment, 1.C.J. Reports 1997.

to a material breach does not prevent it from making a claim for reparation flowing from the breach (Crawford 2013).

In addition to trying to establish the Russian Federation's international responsibility under both the Terrorism Financing Convention and the CERD, Ukraine brings this case to the Court in order to seek redress for its people who allegedly have suffered the consequences of the Russian Federation's behavior in occupying the Crimean Peninsula (ICJ 2017a).

For this reason, ARSIWA also provides the consequences which flow by operation of law from the commission of an internationally wrongful act, according to its Article 28. Such consequences fall into two categories: the obligation of cessation and non-repetition (Article 30) and the obligation to make reparation (Article 31) (Crawford 2006). The understanding of those consequences and of their implications become essential in light of the Applicant's claims, which include the immediate cessation from all support to terrorism activities, prevention of Russian authorities from financing terrorism in Ukraine, full reparation for all acts of terrorism allegedly practiced, as well as cessation of erasure of non-Russian communities' culture, restoration of their rights and full reparation for all victims who suffered racial discrimination by Russian authorities (ICJ 2017a). In this sense, the cessation of conduct which violates an international obligation is the first condition to eliminate the consequences generated by a wrongful conduct (ILC 2001, 89). Regarding the consequent obligation to make reparation due to the breach, the Permanent Court of International Justice (PCIJ) has already pronounced that:

> [...] it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to **make reparation**. [...] the Court has already said that reparation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself (Permanent Court of International Justice 1928, 29).

There are three forms of reparation under Article 34 of ARSIWA, namely: restitution, compensation and satisfaction. In the present case, Ukraine requests, before this Court, restitution of rights, enshrined in the CERD, to the non-Russian communities, as well as full compensation for all acts of terrorism allegedly practiced and for all victims who suffered racial discrimination (ICJ 2017a). According to Article 35, the obligation of Restitution binds the state:

> [...] to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution (a) is

> not materially impossible; and (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation (ILC 2001, 96).

When the damage caused by the breach cannot be repaired by restitution, the compensation is the proper means of reparation (Article 36). Also, such compensation "shall cover any financially assessable damage including loss of profits insofar as it is established" (ILC 2001, 98).

Finally, it is important to address the legal basis for Ukraine's claim for "full reparation for all victims of the Russian Federation's policy and pattern of cultural erasure through discrimination in Russian-occupied Crimea" (ICJ 2017a, 44). In the case of this Court considers that the Applicant is clamming such reparation on behalf of the victims, it is necessary analyze if Ukraine has standing, under international law, to claim it before the ICJ.

The law of diplomatic protection, which is an important subset of State Responsibility, was architected in order to states might espouse a claim, in respect of an injury arising from a breach of an international obligation by another state (Crawford 2006), on behalf of its nationals, which normally have no standing to invoke the international responsibility of a state (Crawford 2013). The ILC's Draft Articles on Diplomatic Protection (ADP), in its Article 1, thus defines diplomatic protection:

> Article 1. Definition and scope:
> For the purposes of the present draft articles, diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility (ILC 2006, 2).

When a State claims diplomatic protection, it happens by doing so on the basis of its own rights (Crawford 2006, 15). Such right thus allows states "to protect their citizens who have injured by unlawful conduct on the part of a foreign government" (Tomuschat 2008, 266-267). Thereby, the diplomatic protection, as a traditional device under general international law, was instituted especially for that cases in which the victims themselves are unable to assert their rights, before an international organ, since its state of origin does not recognize any of the relevant individual complaint procedures (Tomuschat 2008). In this sense, the institution of diplomatic protection must be considered as part of a progressive development of international law (Crawford 2006).

Also, as a general rule, a state can only protect some person or entity from violations of international law if that person or entity is a national of such state (Crawford 2006). However, in accordance with Article 8 of the ADP, it is possible that a state exercises diplomatic protection of a person that is not its national in cases of stateless people and refugees (ILC 2006). In addition, there are, in human rights law, some rules of paramount importance for the entire international community, in which all states have a legal interest in their protection. Such rules are obligations with *erga omnes* character, whose concept began to be developed in the Barcelona Traction (Tomuschat 2008). In this dispute, the ICJ had to determine whether Belgium was entitled to assume diplomatic protection on behalf of the Belgian shareholders of a company, Barcelona Traction, Light and Power, for the wrongful treatment of an investment made in Spain. Although the Court has ruled, in such case, that Belgium could not make a claim of diplomatic protection because its national shareholders were not the injured party, it has also appointed, in the same occasion, cases in which the international community as a whole has interest in the protection of rights, as the protection from racial discrimination, for instance (Crawford 2012, Tomuschat 2008). In this sense, it is necessary to bring here excerpt from the decision in which the ICJ's judges state the definition of *erga omnes* obligations:

> 33. When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of al1 States. In view of the importance of the rights involved, al1 States can be held to have a legal interest in their protection; they are **obligations erga omnes.**
> 34. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and **racial discrimination** (ICJ 1970, 32).

Thus, it can be said that a set of fundamental norms of human rights protection has higher status under international law, inasmuch as its violation authorizes any third state to take up the matter. The Barcelona Traction judg-

ment thereby transmits the idea of a "right to act on behalf of protected people in instances where the obligation breached serves the collective interest of a group of states or where it is owed to the international community as a whole" (Tomuschat 2008, 268). Such understanding is especially relevant in the present case against the Russian Federation, considering that Ukraine's claim of reparation is based on alleged violations of rules expressed in the CERD, that is, norms of protection from racial discrimination, which are *erga omnes* obligations. For cases possibly similar to the present one, the ICL codified such ideas in Article 48 of ARSIWA:

> Article 48
> Invocation of responsibility by a State other than an injured State:
> 1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:
> (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
> (b) the obligation breached is owed to the international community as a whole.
> 2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:
> (a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and
> (b) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached (ILC 2001, 126).

However, even with the current and progressive development of international law on the matter of state responsibility for violations of human rights, especially in the context of regional systems, it is not correct to affirm that diplomatic protection is obsolete because of such instruments. In fact, international human rights law at its current stage of development cannot justify discarding diplomatic protection, since neither all regional and global human rights systems on the world have achieved their intended success (Crawford 2006).

5 RELEVANT JUDICIAL PRECEDENTS

While the Court is not bound to follow its precedents, it has consistently done so. Nonetheless, the judges cannot disregard them completely, given the duty of consistency and observance of settled principles (Lauterpa-

cht 1970). Therefore, the previous pronouncements of the Court which were deemed most relevant for the discussion of the present case will be addressed in this section. The examination of following decisions is paramount in order to indicate to the judges of the ICJ the previous decisions they ought to take into account in the resolution of the dispute at hand.

5.1 Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)

In 1988, Pan Am Flight 103, a plane flying from New York to London, exploded and clashed in the hills of Lockerbie, Scotland, killing more than 250 passengers. The investigation, conducted after the incident in order to trace the causes of the explosion, concluded that a bomb was installed in the aircraft by two Libyan citizens.

The United Kingdom and the United States governments requested Libya to extradite the accused, so that they could be prosecuted in Scotland or in the United States. However, as Libya refused to extradite the citizens and claimed that it would persecute the suspects itself, the United Nations Security Council (UNSC) approved three resolutions, demanding Libya to comply with the United Kingdom and the United States' requisitions in order to contribute to the clearance of international terrorism.

In response to the resolutions, Libya filed an application to the International Court of Justice, alleging its right to refuse extradition under the Montreal Convention, one of the three multilateral treaties dealing with international terrorist acts against aviation, and that no extradition treaty with the U.K. and the U.S. were signed. Moreover, the applicant requested, before the Court, the United States to

> [...] cease and desist from such breaches and from the use of any and all force or threats against Libya, including the threat of force against Libya, and from all violations of the sovereignty, territorial integrity, and the political independence of Libya (ICJ 1993, p. 6).

In 2003, during the unfolding of the proceedings, the governments of Libya, the United Kingdom and the United States of America notified the Court that they had agreed to discontinue the cases. Both suspects were tried, with Libya's consent, in a neutral Court in the Netherlands. One of the suspects, Abdelbaset Ali Mohmed Al Megrahi, was found guilty and sentenced to life imprisonment. The other, Al Amin Khalifa Fhimah, was considered not guilty and released (ICJ 2003).

5.2 Advisory Opinion on the Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo

The International Court of Justice gave, on 22 July 2010, its Advisory Opinion regarding the question of the "Accordance with international law of the unilateral declaration of independence in respect of Kosovo". In 2008, Kosovo unilaterally declared its independence from Serbia, an outcome of the brutal and bloody armed conflict that followed years of oppression and discrimination of the Albanian majority in Kosovo. It is important to note that, until 1989, Kosovo was an autonomous province within the Republic of Serbia. During the 1990s, Kosovar Albanians tried to restore autonomy for Kosovo – or the independence itself; however, in the late nineties, the Serb government initiated military actions in the province, which resulted in widespread atrocities (ICJ 2010a).

The Court's approach to the matter restricted itself to the question, issued by the General Assembly, whether or not the applicable international law prohibited the declaration of independence. The International Court of Justice refrained, in this sense, from commenting about the extent of the right of self-determination or remedial secession. The Court has observed it was not necessary to resolve the question whether, outside the context of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation, the international law of self-determination confers upon part of the population of an existing State a right to separate from that state, or whether international law provides for a right of "remedial secession" and, if so, in what circumstances (ICJ 2010a).

The International Court of Justice has considered that general international law contains no applicable prohibition of declarations of independence. Accordingly, it concludes that the declaration of independence of 17 February 2008 did not violate general international law (ICJ 2010a).

5.3 Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)

On 12 August 2008, the Republic of Georgia instituted proceedings against the Russian Federation before the International Court of Justice in respect of a dispute concerning "actions on and around the territory of Georgia" (ICJ 2008a, para. 1), in breach of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICJ 2008a).

Georgia sought to have the Court establish that the Russian Federation was afforded international responsibility for its actions on and around the territory of Georgia in a breach of the CERD. Georgia claims that Russia

has practiced, sponsored and supported racial discrimination through attacks against, and mass-expulsion of, ethnic Georgians, as well as other ethnic groups, in the South Ossetia and Abkhazia regions of the Republic of Georgia (ICJ 2008a). The Court recognized there was a dispute between Georgia and the Russian Federation about the latter's compliance with its obligations under the CERD (ICJ 2011a).

The case was dismissed without prejudice when the Court found it did not have jurisdiction to resolve the dispute when, on the 1 April 2011 Judgment on preliminary objections, the judges of the ICJ upheld, by ten votes to six[35], the second preliminary objection raised by the Russian Federation concerning the procedural preconditions set forth in Article 22 of the CERD (ICJ 2011a). The Russian Federation had contended that Georgia failed to meet the two procedural preconditions contained in that provision, namely negotiations and referral to procedures expressly provided for in the Convention (ICJ 2009). As to this claim, Georgia had argued that Article 22 does not establish any explicit obligation to negotiate nor does it establish any obligation to have recourse to the procedures provided for in the CERD before the seisin of the Court (ICJ 2010b). It was the finding of the Court that Article 22 of the CERD cannot serve to found the Court's jurisdiction in the present case (ICJ 2011a).

The ICJ asserts the ordinary meaning of the terms used in Article 22 of the CERD with in order to decide whether this Article contains preconditions to be met before the seisin of the Court. With regard to the expression "dispute [...] which is not settled", the Court understood that the express choice of two modes of dispute settlement, i.e., negotiations or resort to the special procedures under CERD, evinces an affirmative duty to resort to them prior to adjudication. Additionally, the Court observed that the French version of the Convention further reinforces the idea that an attempt to settle the dispute must have taken place before referral to the Court, while the Chinese, the Russian and the Spanish texts do not contradict this interpretation. Thus, it concludes that Article 22 of the CERD establish preconditions to be fulfilled before adjudication when it prescribes that "[a]ny dispute [...] which is not settled by negotiation or by the procedures expressly provided for in this Convention" (ICJ 2011a).

The Court turns to address whether these preconditions were met in the current instance. Given that Georgia did not claim it used or attempted to use the procedures expressly provided for in the CERD prior to adjudication <u>before the Court</u>, the ICJ limited its examination to the question of whether

35 In favor were Vice-President Tomka, Judges Koroma, Al-Khasawneh, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Yusuf, Greenwood, and Xue while against were President Owada, Judges Simma, Abraham, Cançado Trindade, Donoghue, and Judge *ad hoc* Gaja. See *Georgia v. Russia. Judgment of 1 April 2011, Preliminary Objections.*

the precondition of negotiations was fulfilled (ICJ 2011a)

The Court understood that the concept of "negotiations" requires a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute and that in its absence the precondition of negotiation is manifestly not met. The Court further ascertains that, in case there was only an attempt to negotiate, the precondition of negotiation is met only when there has been a failure of negotiations, or when negotiations have become deadlocked (ICJ 2011a).

After reviewing the facts in the record during the period of dispute, the Court is of the view that, although certain claims and counter-claims made by the parties concerning ethnic cleansing may evidence the existence of a dispute as to the interpretation and application of CERD, these exchanges did not constitute attempts at negotiations by either party. The Court thus conclude that Georgia did not attempt to negotiate under the CERD, and, for this reason, the parties did not engage in negotiations with respect to the Russian Federation's compliance with its substantive obligations under the CERD. Insofar, the Court found that the neither requirements contained in Article 22 had been satisfied (ICJ 2011a).

6 SUBMISSIONS

Ukraine requests this 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 ICSF 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.

Ukraine requests this 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, 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.

Ukraine 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 cooperation to Ukraine in all pending and future requests for assistance in the investigation and interdiction of the financing of terrorism relating to illegal armed groups that engage in acts of terrorism in Ukraine, including the DPR, the LPR, the Kharkiv Partisans, and associated groups and individuals;

g) Make full reparation for the shoot-down of Malaysian Airlines Flight

MH17;
h) Make full reparation for the shelling of civilians in Volnovakha;
i) Make full reparation for the shelling of civilians in Mariupol;
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.

Ukraine requests this 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.

Ukraine 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 Sürgün;

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.

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IMMUNITIES AND CRIMINAL PROCEEDINGS (EQUATORIAL GUINEA V. FRANCE)

Patricio Alves de Souza[1]
Pedro Hiroshi Watanabe di Gesu[2]

ABSTRACT

Teodoro Nguema Obiang Mangue, Vice-President to the Republic of Equatorial Guinea, is facing investigations in French territory since 2007, after he was accused of a series of crimes related to the misuse of public funds and money laundering. Despite Equatorial Guinean attempts at a diplomatic solution, no halt has been put at the African leader's case in France. Thus, the situation has been brought before the International Court of Justice, in a case which recalls two of the Court's most controversial and notorious decisions – namely, *the 2002 Arrest Warrant of 11 April 2000* Case, between Congo and Belgium, and 1980 *United States Diplomatic and Consular Staff in Tehran*, between United States and Iran. In a debate that will inevitably address fundamental questions concerning state sovereignty, the International Court of Justice's (ICJ) position may redefine the immunities of senior state officials and the inviolability of diplomatic premises.

1 Patricio is a fourth-year student of Law at UFRGS and Director at the ICJ.
2 Pedro is a third-year student of Law at UFRGS and Director at the ICJ.

1 INTRODUCTION

Due to accusations of committing and complying with a series of crimes related to the misuse of public funds and money laundering, presented by French non-governmental organizations (NGOs) and associations, the sitting Vice-President of Equatorial Guinea, Mr. Teodoro Nguema Obiang Mangue, has been, since 2007, investigated in French territory. That has led, ultimately, to the institution of criminal proceedings against the Equatorial Guinean leader, in spite of his state attempts to reach an agreement to halt them (International Court of Justice 2016a).

Thus, in an application presented before the International Court of Justice on 13 June 2016, the Equatorial Guinean government has instituted proceedings against the French Republic, claiming that France has failed to comply with obligations held towards the Republic of Equatorial Guinea in the international legal order. According to the claimant, Mr. Teodoro holds, as a senior government official, *ratione personae* immunity[3] to foreign prosecution, granted by International Law and upheld by the ICJ in the 2000 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* case. The claim, nonetheless, has been disputed. The French *Cour de Cassation*, for example, asserted that "the functions of the applicant [Mr. Mangue] are not those of a Head of State, Head of Government or Minister for Foreign affairs" (International Court of Justice, 2016a 9). The legal issue, thus, in this point, can be stated as follows: to whom *ratione personae* immunity is granted in International Law?

Additionally, during the investigations held against Mr. Teodoro, the building located at nº 42, Foch Avenue, in Paris, was searched by French law-enforcement officials, in an alleged breach of its inviolability as part of the Equatorial Guinean diplomatic mission to France. The claimant has alleged having attempted diplomatic communication, requesting the halting of the proceedings, but to no avail, thus presenting itself before the ICJ, requesting ceasing of the prosecution in course in France and the recognition of the building located at Foch Avenue. The legal issue may be stated, in this point, as: does the building at 42nd, Foch Avenue, Paris, qualify as a diplomatic premise in International Law?

Dealing with the request of provisional measures made by the claimant, the Court, in a decision issued on 7 December 2016, determined that France shall, pending a final decision on the case, ensure that the building at 42 Foch Avenue, in Paris, enjoy the inviolability granted in article 22 of the Vienna Convention on Diplomatic Relations (VCDR), due to the possibility of *irreparable prejudice and urgency*. Conversely, nonetheless, the Court gran-

3 On immunities, see 3.1.1. and 5. below.

ted no provisional measure concerning Mr. Teodoro's alleged immunity, for it found it *had not prima facie jurisdiction*[4] under Article 35, paragraph 2, of the Convention against Transnational Organized Crime (CTOC), over the dispute concerning the article 4 of the same Convention, invoked by Equatorial Guinea as jurisdictional ground to its claims.

Apart from the debate to be held over the jurisdictional ground to Equatorial Guinea resort to the ICJ, two will be the key issues posed before the Court: (i) is *ratione personae* immunity to foreign prosecution due to Mr. Teodoro under international law? (ii) is the building located at 42nd, Foch Avenue, Paris, part of the Equatorial Guinean diplomatic mission to France and thus protected by International Law?

2 HISTORICAL BACKGROUND

By the end of the fifteenth century, Portugal was the first European nation to approach the region where nowadays the Republic of Equatorial Guinea[5] is situated. The area was destined to the development of cultures brought from the Portuguese colonies in Asia and South America. In 1641, the West India Company made the island of Fernão do Pó a centre for slave trafficking from Western Africa, but a few years later the Portuguese Empire established itself as the manager of this market, which had as its biggest clients England, France and Spain (Liniger-Goumaz 1988). With the signature of the treaties of Santo Ildefonso, in 1777, El Pardo, in 1778, and Badajoz, in 1801, the Guinean coast came under the power of the Spanish Empire. In return, Spain then withdrew from the island of Santa Catarina, in Brazil, ceded the area to the East of the Prata River and confirmed some other agreements settled on account of Alexandre de Gusmão's efforts under the *uti possidetis* doctrine[6] in the 1750 Treaty of Madrid. The territorial arrangements achieved within the Treaty of Badajoz would remain in effect regardless the invasion of Portugal by Napoléon, being that the continental block France established against England after its defeat at the Battle of Tra-

4 That is, the Court, in a preliminary analysis, found it had not the power adjudicate the case. On jurisdiction, see 4, below.

5 Three members of the United Nations are called *Guinea*: *the Republic of Guinea-Bissau, the Republic of Equatorial Guinea and the Republic of Guinea*. Guinea-Bissau is a former Portuguese colony, while Guinea is a former French colony, being both coastal states located in the northeastern sub-Saharan part of Africa. Equatorial Guinea is a former Spanish colony, situated at the Gulf of Guinea.

6 Literally translated to English as "*as you possess*", according to the Oxford Dictionary of Law, the *uti possidetis* is "*a principle usually applied in international law to the delineation of borders. When a colony gains independence, the colonial boundaries are accepted as the boundaries of the newly independent state. This practice, first adopted for the sake of expediency by the Spanish American colonies when they declared independence, has since been employed elsewhere in the world following the withdrawal of empire*" (Law 2015).

falgar was also a feature of the Treaty of Badajoz. Portugal had strong ties to England and did not abide by the rules of the block. Therefore, in order to avoid Napoleon's Army, which had been deployed in Spain, the Portuguese Royals had to escape to Brazil in 1807 (Bethell 1985).

The nineteenth Century witnessed the prohibition of slavery within the British Empire with the enactment of the *Slavery Abolition Act* in 1833[7], the outcome of an abolition movement initiated with Lord Mansfield's judgment[8] in the *Somerset v. Stewart case* in 1772 (Usherwood 1981). In an effort to fight slave trade in the coast of Africa, the United Kingdom established control over the area of the Gulf of Guinea for the first half of the XIX century under a special agreement with Spain, after the end of which the Spanish Empire regained control over the area until the country's independence more than a hundred years later.

With the foundation of the United Nations in 1947, European countries that possessed ultramarine territories faced complications in the international sphere. It took Spain almost ten years to join the organization due to its still existing colonial status. Therefore, in 1959, the Spanish General Francisco Franco decided to raise the status of the Guinean regions to ultramarine *provinces* of Francisco Pó and Rio Muni. This consisted in a maneuver to escape from the United Nations' decolonization committee's attention. This situation persisted until 1963, when the provinces were transformed into the *Autonomous Region of Equatorial Guinea* and parliamentary elections were held in January, the following year. The full independence of the country was only achieved in 1968, when it became the current Republic of Equatorial Guinea (Liniger-Goumaz 1988).

The first president elected democratically was Mr. Macias Nguema Biyogo Negue, who turned the country into a military-dominated police state with ties to Moscow and Havana. His election was followed by a series of atrocities, such as mass killings. The death toll is estimated at 35,000, while around 100,000 fled into neighboring countries or to Europe, mostly to Spain. In 1979, Macias was overthrown by a military coup and tried to resist with the help of Cuban troops, to no avail – he was captured, tried and exe-

7 The Slavery Prohibition Act promulgated by the British Parliament has also a long title: "*An Act for the Abolition of Slavery throughout the British Colonies*; *for promoting the Industry of the manumi*tted Slaves; and for compensating the Persons hitherto entitled to the Services of such Slaves".

8 As a matter of fact, slavery was never allowed in Britain by positive law. Lord Mansfield then understood that neither could common law allow it, as he expressed in his judgment, *in verbis*: "*The state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political, but only by positive law, which preserves its force long after the reasons, occasions, and time itself from whence it was created, is erased from memory. It is so odious, that nothing can be suffered to support it, but positive law. Whatever inconveniences, therefore, may follow from the decision, I cannot say this case is allowed or approved by the law of England*; *and therefore the black must be discharged*" (United Kingdom 1772).

cuted. The coup leader, former Lieutenant Colonel Teodoro Obiang Ngueme Mbasogo, took on as head of state and government, ruling through the Supreme Military Council. Col. Mbasogo promoted a series of constitutional reforms that allowed him to rule over the bicameral system provided for in the first constitution. Such changes made it possible for him to set forth a new constitution through referendum, which established and guaranteed him almost eternal power (Alum Jr. 1987). He has since then been in power. The only threat against his presidency he has faced was a failed coup promoted by a group of English financiers in 2004 – one of the main founders of said group was Sir Mark Thatcher, son of former Prime Minister of the United Kingdom, the Baroness Margaret Thatcher, who was tried and condemned by a South African court (Independent 2004, New York Times 2004).

Before its independence from Spain, in 1968, 75% of the country's Gross Domestic Product (GDP) came from cocoa production, a resource that the soviet oriented government of Macias Nguema (1968-1979) brought to a collapse. Oil and gas extraction had always been in the economic agenda, but it was only in the mid 1990's that a consortium of joint ventures was able to begin the extraction. Since then, the country's GDP has grown by a staggering average of 41.6 percent per year between 1997 and 2001, the highest in the world (Frynas 2004). Curiously, though, this outstanding increase in GDP from the oil and gas exploration has never been felt by the population, neither has the country achieved satisfying development rates. Equatorial Guinea has not proportionately progressed in areas such as education, public health or basic sanitation, being ranked 153 in the Human Development Index (HDI), with just 57.9 years of life expectancy at birth.

3 STATEMENT OF THE ISSUE

The main disputes posed by Equatorial Guinea before the Court are: (i) the alleged immunity of Mr. Teodoro Obiang Mangue, former Second-Vice President, current Vice-President of the Republic of Equatorial Guinea, to international criminal proceedings, due to his position as senior government official; (ii) the alleged inviolability of the premises of the Equatorial Guinean building, located at 42nd Foch Avenue, Paris, due to its alleged use as an asset to Equatorial Guinean Diplomatic Mission to France.

3.1 Equatorial Guinea's Allegations

In the hearing concerning the provisional measures plead by Equatorial Guinea, the claimant's agent Mr. Carmelo Nvono Nca, stating regret over coming before the Court, argued that his State's suit against France was due to threats posed to its sovereign rights. According to Mr. Camelo, in spite

of diplomatic dialog attempts – "we preferred to resolve our differences by negotiation and conciliation, but, unfortunately, this solution has found no echo" (International Court of Justice 2016d, 14) –, criminal proceedings have continued to be pursued against Mr. Teodoro Obiang. It is worth noting that, according to the Equatorial Guinean government, the French government has been presented with a report elaborated by the Equatorial Guinean Attorney General concluding that no criminal activity investigated by France was committed in Equatorial Guinean territory. Thus, France's decision to allow the criminal prosecutions to continue, according to Mr. Carmelo, has resulted in a violation of immunities held by Equatorial Guinea in the international legal regime (International Court of Justice 2016d).

Claiming that Mr. Teodoro is in charge of national defense and state security, the Equatorial Guinean agents have alleged that thus he is entitled to immunity to foreign prosecution, stating, in this point, that French courts have failed to duly address the issue. Reaffirming some of the points made in the application instituting proceedings, Equatorial Guinean agent Mr. Jean-Charles Tchikaya averred that the criminal prosecution of Mr. Teodoro begun with a series of investigation requests concerning African high-ranking state officials, made by NGOs and French associations to the Parisian Republic's Attorney in 2007. Moreover, Mr. Jean-Charles stated that Mr. Teodoro, before taking office as sole Equatorial Guinea Vice-President in 2016, was the Equatorial Guinea minister for Agriculture and Forests and, between 2012 and 2016, second Vice-President (International Court of Justice 2016d).

The agents representing Equatorial Guinea have also claimed that the building located at number 42, Foch Avenue, in Paris, has had its inviolability infringed, despite it being property of the State of Equatorial Guinea and premise of its diplomatic mission in France. It is worth noting that the building has been searched by French law-enforcement agents, as mentioned in the application instituting proceedings presented by Equatorial Guinea (International Court of Justice 2016d).

The main allegations may, thus, be distinguished in two main claims: (i) the immunity to foreign prosecution allegedly held by Mr. Teodoro as sitting Vice-President to the Republic of Equatorial Guinea; (ii) the qualification and consequent inviolability of the building located at nº 42, Foch Avenue, Paris, as an alleged part of the Equatorial Guinean diplomatic mission to France and part of the state's estate.

3.1.1 Mr. Teodoro Obiang's position in the international legal order and the derived obligations to which France is subjected

Mr. Jean-Charles, representing Equatorial Guinea, has argued that

Mr. Teodoro's alleged immunity has been treated by the French courts in a both confusing and inappropriate manner. First, the agent has pointed that no distinction between *ratione materiae* and *ratione personae* immunity has been made. Not only that, France allegedly failed to acknowledge ICJ's precedents dealing with the issue and has based its justification to proceed with the criminal persecution in reasons alien to International Law. Mr. Teodoro, according to Equatorial Guinea, holds *ratione personae* immunity in the international legal regime (International Court of Justice 2016d).

Second, the French courts' treating of the case was allegedly inappropriate for it involved the challenging of the Equatorial Guinean reasons for nominating Mr. Teodoro as high-ranking official and acquiring the 42nd Foch Avenue building. Describing the course of the proceedings, Mr. Jean-Charles, representing Equatorial Guinea, has pointed out that, in the French legal order, there is, first, a preliminary investigation, led by a prosecutor, followed by a pre-trial investigation under the authority of an investigating judge. In Mr. Teodoro's case, both parts have been completed, as the prosecution reached its trial stage with an order issued, on 5 September 2016, referring the Vice-President of the Parisian *Tribunal correctionnel*. The Equatorial Guinean agent has stated that, thus, according to French law, Mr. Teodoro is now a defendant, obliged to appear before French courts at risk of conviction (International Court of Justice 2016d).

Along those lines, the claimant, represented by Sir. Michael Wood, referred to the 2000 *Arrest Warrant of 11 April 2000* case, between Belgium and Congo (International Court of Justice 2002b). Quoting directly the ICJ's decision, Equatorial Guinea averred that those who hold certain high-ranking offices in the State structure, such as Heads of State and Government, and Foreign Ministers, enjoy immunity to foreign jurisdiction. In this point, Equatorial Guinea mentioned that, in previous legal discussions in domestic *fora*, the immunity has also been recognized to reach officials in charge of defense. For example, in the Nezzar case, judged by Swiss Federal Criminal Court (International Court of Justice 2016d). Regarding Mr. Teodoro, Sir Wood, in his declarations, restated that the Vice-President is entitled to *ratione personae* immunity, due to his office and the functions by him performed on behalf of Equatorial Guinea (International Court of Justice 2016d).

At this point, it is worth presenting a general outlook on the distinction between *ratione materiae* and *ratione personae* immunity[9], so that the claimant's allegations can be properly understood in context. This issue shall be addressed further on, to a broader extent. Akande (2011) has stated that *ratione personae* immunity stems from office or *status*, being often grounded in three justifications. First, a functional *raison d'être*: the exercise of interna-

9 On immunities, see 5 below.

tional functions by high-ranking officials would be impaired were there the risk of their criminal prosecution and consequent arresting in other states. Second, an alleged connection to sovereignty: "The person and position of the Head of State reflects the sovereign quality of the state and the immunity accorded to him or her is in part due to the respect for the dignity of the office and of the state which that office represents" (Akande 2011, 10)[10]. Finally, a connection to the non-intervention principle of international law: the arrest of a high-ranking official (especially in the case of a Head of Government) directly influences a state's internal affairs. Hence, immunity *ratione personae* is, as embedded in the non-intervention principle, a corollary of the *par in parem non habet imperium*[11] principle (Akande 2011).

Conversely, the *ratione materiae* immunity, according to Akande (2011), is circumscribed to *the official acts* performed by the state officials in the exercise of their functions. As pointed by Foakes (2014), this kind of immunity, albeit restricted to fewer acts - since private acts are excluded -, bars, when due, the prosecution of *any state official*, for it is attached to the nature of the act, not the office held by the actor.

It would appear, consequently, that, in the case of Mr. Teodoro, pleading *ratione materiae* immunity would amount to no protection against French prosecution, for the crimes of which he is accused. That is because, despite him having been allegedly acted whilst he held office, his actions have not been part of his official duties themselves – take it, for example, the accusation of money laundering[12]. Moreover, as it has been formerly stated, the agents representing Equatorial Guinea claimed that the Vice-President bears *ratione personae* immunity. It is also possible to identify the three-aforementioned basis for this kind of immunity in the claimant's discourse: (i) functional *raison d'être* is present in the constant references to the fact that Mr. Teodoro is in charge of security and defense functions in the Equatorial Guinean State; (ii) sovereignty and non-intervention principles *raisons d'être* are referred to when the claimant avers violations to the Equatorial Guinean "sovereign rights" (International Court of Justice 2016d, 14) and the disrespect of "non-intervention in the internal affairs of States" (International

10 On the connection of dignity, immunity, and sovereign power, see, specially, 5.2, below.

11 The principle may be loosely translated as "Between pairs there is no command", meaning that sovereign states, as equals, may not interfere in each other's internal affairs as if there was a hierarchical relation between them. On this point, see 5, below.

12 Foakes (2014, 18) indicated that this argument is "not without difficulty because it is clear that a head of State can, in the course of his public functions, engage in criminal conduct". Albeit the author refers to "head of State" in this quote, what she states applies, by context, to other high-ranking officials. She also indicates (2014, 18) a US appeals court case, *Jimenez v Aristeguieta* (1962) 33 ILR 353 "where in extradition proceedings [...] rejected the former Venezuelan head of State's argument that the acts in question (various financial crimes) were carried out in his official capacity". The limits of *ratione materiae* immunity are discussed at 5.3, below.

Court of Justice 2016d, 22). Those issues will be furthermore explored in the specific section of this guide concerning the immunities regime in International Law.

3.1.2 The inviolability of the building located at nº 42, Foch Avenue, in Paris

In its application instituting proceedings, Equatorial Guinea has declared:

> The building located at 42 avenue Foch in Paris was, until 15 September 2011, co-owned by five Swiss companies of which Mr. Teodoro Nguema Obiang Mangue had been the sole shareholder since 18 December 2004. On 15 September 2011, he transferred his shareholder's rights in the companies to the State of Equatorial Guinea. Since then, the building has been used by the diplomatic mission of Equatorial Guinea (International Court of Justice 2016a, 4).

The claimant has thus averred that the building is qualified as a diplomatic protected premise, which is inviolable pursuant to the Vienna Convention on Diplomatic Relations (VCDR), the United Nations Charter, and general international law. Quoting from a previous precedent from the Court, the *Diplomatic and Consular staff case* (International Court of Justice, 1979), Equatorial Guinea stated that the inviolability of foreign diplomatic premises is a long-lasting principle in international law. Noncompliance with this rule disrupts the Guinean embassy's capacity to perform its activities (International Court of Justice 2016a).

Furthermore, Equatorial Guinea has indicated that a diplomatic note has been sent to the French Ministry of Foreign Affairs declaring that the building in Foch Avenue was being used in diplomatic functions. The text in the note reads as follows:

> The Embassy of the Republic of Equatorial Guinea presents its compliments to the Ministry of Foreign and European Affairs [...] and has the honor to inform it that the Embassy has for a number of years owned a building located at 42 avenue Foch, Paris (16th arr.), which it uses for the performance of the functions of its diplomatic mission, a fact which it has hitherto not formally notified to your Department (International Court of Justice 2016e, 5).

It is worth stating that the note dates from before the search of the building on 14 February 2012. Also, the Guinean President Obiang addressed a letter to the then French President Nicolas Sarkozy, which reads the

following:

> Your Excellency is not unaware of the fact that my son, Teodoro NGUEMA OBIANG MANGUE lived in France, where he pursued his studies, from childhood until he reached adulthood. France was his preferred country and, as a young man, he purchased a residence in Paris, however, due to the pressures on him as a result of the supposed unlawful purchase of property, he decided to resell the said building to the Government of the Republic of Equatorial Guinea. At this time, the building in question is a property that was lawfully acquired by the Government of Equatorial Guinea and is currently used by the Representative to UNESCO, who is in charge of the Embassy's property. The said property is afforded legal and diplomatic protection under the Vienna Convention and the bilateral agreements signed by the two States (International Court of Justice 2016e, 6).

Moreover, Equatorial Guinea holds that its claims are endorsed by the assignment of the Foch Avenue building as housing to its *Chargée d'affaires* and Permanent Representative of Equatorial Guinea to UNESCO in Paris, Ms. Bindang Obiang, on 17 October 2011. Not only that, but the claimant sustains that Ms. Bindang Obiang still lived at the building when it was searched by French law-enforcement officials in February 2012 (International Court of Justice 2016e). The claimant averred that thus both "declaratory effect" and "effective assignment" *criteria* to the qualification of the premises as those protected by the 1961 Vienna Convention on Diplomatic Relations and customary international law were fulfilled (International Court of Justice 2016e).

With the aforementioned reasons assessed, the allegations backing the claim of inviolability of the building at nº 42, Foch Avenue, in Paris, may be identified to flow along two lines: (i) the French authorities were aware of its use as diplomatic premises, as demonstrated by official messages sent by the representatives of the state of Equatorial Guinea (declaratory effect criterion); (ii) the property of the building has been transferred, in 2011, from Teodoro Obiang to the State of Equatorial Guinea, being used for diplomatic purposes, such as the housing of Ms. Bindang Obiang (effective assignment criterion).

3.2 France's allegations

3.2.1 The evident lack of a basis of jurisdiction for Equatorial Guinea's requests with regard to the immunities of Mr. Obiang

The French Republic defends that it is not possible to qualify Mr. Obiang as a person protected by the 1961 *Vienna Convention on Diplomatic Relations* for a myriad of reasons that are further developed in Chapter 4 of this study guide. That said, France argues that, first, the Court has no jurisdiction over this case and, second, Mr. Obiang is not entitled to the rights enjoyed by diplomats.

3.2.2 Equatorial Guinea's request with regard to 42 avenue Foch is implausible and frivolous

The agents of France presented a chronology to show the implausibility of Equatorial Guinea's request regarding the 42 avenue Foch building. A few years after the opening of the investigations in 2007, Mr. Bindang Obiang was appointed as the permanent delegate of Equatorial Guinea to UNESCO in 2011. He resided at 46 rue des Belles Feuilles, Paris. Later that year, 18 vehicles were seized at 40-42 avenue Foch, including Ferraris, Bentleys, Bugattis, a Maserati, a Porsche and Aston Martins and Mercedes--Benz luxury cars. In October 2011, the Ministry of Foreign Affairs of France was notified about the change of address of Equatorial Guinea's Embassy and, during the same month, the ambassador of Equatorial Guinea to France was called back to Malabo, which led the interim ambassador to move to 29 Boulevard des Courceilles, the usual address of the country in Paris. On 14 February 2012 UNESCO was officially notified about Equatorial Guinea's change of representative, the first of the three-day search the French authorities conducted at 42 avenue Foch. Subsequently, after the end of the searches on 16 February, President Obiang appointed his son as the new ambassador in France; his *curriculum vitae* still appointed his original address as 46 rue des Belles Feuilles, Paris. Mr. Obiang was officially appointed ambassador of Equatorial Guinea to France on 21 March 2012, and only four months later the premises located at 42 avenue Foch were officially listed as the Embassy's premises. It was noted by the French agent that, albeit Equatorial Guinea had the right to ask for tax exemption for the 42 Avenue Foch address, they never did, even though such request was made for 46 Rue des Belles Feuilles (International Court of Justice 2016e).

The Defendant also argues that the objects found in the alleged embassy at 42 avenue Foch - a four thousand square meter house on the most expensive street in Paris, which in turn is one of the most expensive cities in Europe – are not what is expected to be found in a diplomatic mission, such as works of art, designer suits, and extremely expensive cars without diplomatic plates. Moreover, there was evidence that the building was not being used as a diplomatic mission – it harbored a nightclub with a movie screen, a sports room, an oriental room, a bar, a hair salon, but it held no official do-

cuments belonging to Equatorial Guinea and its diplomatic mission in France (International Court of Justice 2016e).

4 JURISDICTION OF THE COURT AND ADMISSIBILITY

The Applicant argues the Court jurisdiction under Article 36(1) of its Statute (compromissory clause jurisdiction) under two separate agreements: first, the *Optional Protocol concerning the Compulsory Settlement of Disputes to the Vienna Convention on Diplomatic Relations* of April 18th, 1961; second, Art. 35 of the *United Nations Convention against Transnational Organized Crime* of November 15th, 2000. France and Equatorial Guinea have signed and ratified both the aforementioned treaties. Equatorial Guinea alleges that the requirement of exhaustion of diplomatic means required by Art. 35 (2) of the *United Nations Convention against Transnational Organized Crime*[13] has been met, since there was an attempt at arbitration between the parties. France however states that Equatorial Guinea failed to sustain that this case is about the application of the said treaties. In the words of the French agent, "*the mere mentioning of a jurisdiction clause does not suffice to establish the Court's jurisdiction*" (International Court of Justice 2016e). From the statement of the Agent of Equatorial Guinea at the Public Sitting held on October 17th, 2016, it is possible to understand that the Applicant suggests the direct application of general principles of public international law and peremptory norms, *in verbis*:

> The case concerns the application, as between Equatorial Guinea and France, of fundamental principles and rules of international law, among them the sovereign equality of States, non-intervention in the internal affairs of States, the immunity of certain holders of high-ranking office in the State and the status of the premises of diplomatic missions and of State property. All of these principles and rules are essential for the conduct of peaceful relations among States (International Court of Justice 2016d, 13).

Nevertheless, the French Republic, quoting vast jurisprudence of the ICJ[14], argues

13 Art. 35 (2) of the *United Nations Convention against Transnational Organized Crime*: "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".

14 *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports* 2006, p. 32, paras.

> [...] jurisdiction cannot depend on the importance of the principles at issue. The mere fact that rights and obligations *erga omnes*, or even peremptory norms of general international law, are "at issue in a dispute would not give the Court jurisdiction to entertain that dispute. [...] Under the Court's Statute that jurisdiction is always based on the consent of the parties. [...] [T]he Court has jurisdiction in respect of States only to the extent that they have consented thereto" (International Court of Justice 2016e, 13).

Furthermore, France asserts that the application of the 1961 Optional Protocol concerning the Compulsory Settlement of Disputes to the Vienna Convention on Diplomatic Relations and the Convention itself would only apply to the members of the *troika*[15] - Head of State, Head of Government, and Minister for Foreign Affairs –, thus excluding Mr. Obiang (International Court of Justice 2016e). As for the application of Art. 4 (1)[16] of the United Nations Convention against Transnational Organized Crime, the French agent argues that

> [T]his is a general guideline, however, which clarifies the manner in which the other provisions of the treaty should be implemented, but which does not impose on States any specific obligation, the violation of which the other parties to the Convention could invoke before this Court (International Court of Justice 2016e, 15).

5 IMMUNITIES IN INTERNATIONAL LAW: *PAR IN PAREM NON HABET IMPERIUM*

Immunities of agents of the state, personal or functional, are regulated by customary international law (Foakes 2014), and are not to be confused with those enjoyed by diplomats and their staff, which are regulated by a treaty - the VCDR. The difference is due to the fact that, unlike diplomats and their personnel who traditionally undertake frequent international travel as part of their duties[17], high-ranking officials such as Heads of State and of

64-65, citing the Order of 10 July 2002, *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. 241, para. 57.

15 The Russian expression troika means literally a vehicle drawn by three horses abreast and is used in international politics to refer to a government of three, like the roman *triumvirate*. A famous example of a *troika* of modern times is the government lead by Georgi Malenkov, Lavrentiy Beria e Vyacheslav Molotov in the Soviet Union after the death of Stalin in 1953.

16 Art. 4 (1) of the *United Nations Convention against Transnational Organized Crime* reads as follows: "*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*".

17 Whose rights as accorded by the VCDR were the result of previous consistent practice

Government did not travel as much as they do today, and "when they did, it was unusual for an incident to occur" (Foakes 2014, 19). No clear practice arises when a situation which never or very rarely happens, hence why Foakes (2014) believes the issue has only recently become subject of greater concern.

Though a few justifications may be put forward to rationalize the immunities of state officials, Foakes (2014) has indicated that *ratione personae* (or personal) and *ratione materiae* (subject matter) immunities originate from the *par in parem non habet imperium* principle. In other words, all immunities held by officials are grounded in the notion that no state may intervene in another's internal affairs as all states are equal and sovereign.

The bar imposed by an immunity is a stop to the exercise of jurisdictional power in the first place - such as that in the prosecution and conviction of a foreign chief of government. This is why Foakes (2014) points that an immunity plea is not a substantial defense - in other words, it is not, for example, an argument against charges of committing a crime - but rather a procedural defense, inasmuch as the exercise of jurisdiction is blocked by the *status* of the agent (in the case of *ratione personae* immunity) or the act itself (in the case of ratione materiae immunity).

A few notes on the distinction between the kinds of immunity shall now be drawn, followed by specific commentary on some of the relevant topics concerning immunities in international law.

5.1 General outlook and notes on the distinction between *ratione personae* and *ratione materiae* immunities

Foakes (2014, 10) has stated that "[b]roadly speaking, both types of immunity have developed to enable officials to carry out their public business effectively free from interference by the exercise of jurisdiction by another State". Thus, since both immunities are primarily justified by sovereign equality of the States, it is impossible to separate the immunities enjoyed by state officials from the immunities of States themselves. This explains why "only the State of the office-holder concerned may waive" the immunities of their officials (Foakes 2014, 7).

There is however a difference between the immunities enjoyed by different officials within the state depending on the office they hold. High-ranking state officials while in office enjoy the broad personal immunity that covers both private and official acts from foreign judicial scrutiny (*ratione personae* immunity). Lower-ranking state officials' immunity is much narrower, as they only enjoy immunity for acts undertaken in a public capacity (Foakes, 2014).

(*ratione materiae* immunity), on behalf of the state. This means that, when we discuss the immunity of a high-ranking state official, the factual claims revolve around the position of the person who is being subjected to proceedings, whereas in cases of lower-ranking state officials' immunities the discussions revolve around whether the acts undertaken by said officials were private acts or public acts. In the words of Foakes (2014, 7) "a plea of immunity *ratione materiae* is essentially a plea by a State that the act of its official or former official was an act of the State itself and, therefore, one for which it is responsible". Said in other words, *ratione materiae* immunity and State immunity are essentially the same, being the former a manifestation of the latter.

Rather differently, albeit still deriving from the *par in parem non habet imperium* principle (and, moreover, State sovereignty), the existence of *ratione personae* is due to the office held by the agent, being thus circumscribed to a much narrower class of individuals, but protecting a considerably larger scope of acts. It is worth stressing, on the other hand, that personal immunities cease to exist once the official leaves office. Conversely, the *ratione materiae* immunity, when present, remains unaffected event after the agent leaves office[18] (Foakes 2014): this means, in the case of agents who hold *ratione personae* immunity, that, even though their immunity for personal acts may end when the office is left, the functional immunity (which covers official acts, due to their nature) still hold good.

These differences between the two kinds of immunities, as it shall be seen, appear to have to be linked to idea of dignity (of the state represented by the official or, sometimes, of the agent himself[19]), and, furthermore, the functional needs of the agent *in representing* the state. This is, famously, the *rationale* lying beneath the notorious ICJ decision in the 2002's *Arrest Warrant case*[20] (International Court of Justice 2002a, Foakes 2014).

These differences may be understood if one considers that, as Foakes (2014) has indicated, there is also a difference in justifying one of them: apart from the functional necessities, personal immunity has its rationale linked to its subjects, specially Heads of State, being "embodiments" of the State. Inasmuch *dignity* plays a relevant role in this respect, as we have mentioned, considering its meaning hopefully will give illuminating insight in understanding both kinds of immunity, as we will now attempt to.

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18 This is so regardless of if the agent was also entitled to personal immunity whilst in office: when this is the case, they overlap as long as the agent holds office - after that, only functional immunity remains (Foakes 2014).

19 See 5.2, below. Foakes (2014, 11) affirms that personal immunity is connected, in its origin, to "*notions as to the inherent dignity and majesty of sovereigns and their close identification with the State itself*".

20 See 7.1, below.

5.2 Immunities and dignity?

As pointed by Foakes (2014), dignity has been put forward either as a reason in favour or connected to the *ratione personae* immunities regime in International Law (sometimes pertaining the State, sometimes pertaining the condition of the official in question). One such example is to be found in ICJ's *Djibouti v. France* case: according to Foakes (2014, 65), the Court then found there was "[...] a positive obligation on a receiving State to protect the honour and dignity of heads of State 'in connection with their inviolability'". A brief exposition of the concept of dignity in law and moral discourse shall be done in this section so to offer a clearer view of the implications of its alleged connection to personal immunities in international law, being followed by a suggested link between this idea and the functional needs of the States and its agents in acting independently in the international sphere.

The idea of dignity is present throughout the modern legal discourse - take the two examples offered by Rosen (2012): the United Nations' Universal Declaration of Human Rights (UDHR)[21] and the German Basic Law (*Grundgesetz*)[22]. Its presence in moral discourse is most famously traced back to Immanuel Kant (Rosen 2012, Sarlet 2015, Waldron 2012). Nonetheless, as it shall be shown, its usage, especially in the case of *ratione personae* immunity, appears to be traceable to *another* conception of dignity, inasmuch as it bars the prosecution of *private acts*, for these do not seem to be a relevant part of the functional exercise of the office.

Beneath the modern usage of the term in law, aligned with the wording of the UDHR - *all human beings are born equal in dignity* -, lies the idea that every person holds dignity, regardless of her conditions or actions. This "universalization" of dignity is very much due to the Kantian approach, in which, according to Elizabeth Anderson (2008), the equal condition of every human being as a moral agent - that is, an agent with rational capacity to act upon her desires - leads to the recognition of equal value of every one's wills and conditions - an idea ultimately expressed by the Kantian maxim that no human may be treated as a mean, always as an end[23] (Sarlet 2015). Every human being, thus, bears dignity, as a value from which are derived duties and restrictions to others - for example, that of the proscription of degrading and inhumane treatment.

21 Article 1: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood".

22 Article 1: "The human dignity is untouchable. Its respect and protection is a duty of all state power" (our translation from the original German version).

23 Put in other words, since, in Kantian ethics, everyone's will is just as much valuable (by parity of form) as that of any one else, no one shall be put aside as less valuable, as an instrument (mean) to other.

5.2.1 Personal immunities and *L'État c'est moi* dignity

This has not always been exactly the meaning attributed to dignity, and to understand its connection with rank and sovereign power (be it of the State or that of the office held by individuals), it is necessary to trace back to times in which the egalitarian principles espoused by Kant and its relation to the natural condition of every human being - not to social status - were not dominant[24]. Don Herzog (2012, 101) interestingly argues that the dignity accorded to British nobles in the XVII century was one such that meant "I don't have to answer to the likes of you". Dignity, then, was a matter of rank and deference - which was unequal between the citizens. Such rank was one according to which judicial privileges were granted to certain men and women, depending upon their status[25][26].

The theory that high-ranking officials shall be accorded immunity before foreign jurisdiction due to their dignity may be properly understood in such context. Inasmuch the theory relates to sovereignty, it is worth noting that Foakes (2014, 12) has mentioned that "early theories as to the scope and nature of sovereign power and the status of the monarch were influenced by mystical and quasi-religious ideas". Furthermore, "in the early stages [...], in certain respects the State was seen almost as property or sacred charge of the monarch and it was the monarch's personal attributes of sovereignty which gave the State the quality of being a sovereign State rather than the other way around" (Foakes 2014, 12). This confusion of the State sovereign status and the immunity of its high-ranking representatives, especially that of

24 Although, for example, in the catholic tradition, an idea of dignity related to the human condition in itself could already be seen in Giovanni Pico Della Mirandola 1486's anthropocentrist manifest *Oratio de Hominis Dignitate*. Pico Della Mirandola's concept of dignity was informed by the notion that human beings were placed in the center of the universe in terms of importance, due to the extent of their free-will, (Pico Della Mirandola 2011, 57): "Neither a determined place nor an aspect that is your own, neither a specific assignment, o, Adam, we have given to you, so that, by your vote, by your decision, you obtain that place, that aspect, that assignment you surely will to. The definite nature of other beings is constrained by our laws. You, otherwise, unconstrained, shall determine yours by the will that you bear in hands [...] Neither celestial nor earthly, neither mortal nor immortal, we've made you, so that you, your own arbitrator and sovereign maker, may plasm and inform yourself, in the form you've surely chosen. You may degenerate until the beings that are beasts; you may regenerate up to the beings that are divine, by decision of your will." (our translation, from the original Latin version, comparing to the Portuguese version).

25 Waldron (2012, 56) points out the 1606 case of Isabel, the Countess of Rutland, who had been imprisoned for debt. The Star Chamber, dealing with the issue, stated that "her person should not be arrested in such cases [of debt]; one in respect of her dignity, and the other in respect that the law doth presume that she hath sufficient lands and tenements in which she may be distrained".

26 Waldron (2012) proposes, surprisingly, that such *status* concept of dignity shall be employed in the modern egalitarian usage of the word, implying that what has changed is that such rank and derived rights have not disappeared, but been universalized. The theory, albeit interesting, has limits, which won't be here discussed. For more, see 2012 Jeremy Waldron "Dignity, Rank, and Rights", specially "Aristocratic Dignity", by Don Herzog.

its head of State, albeit old, is not at all absent in modern international law discourse: see, for example, the case of *Congo v. France*, in which ICJ's Judge de Cara affirmed an ongoing investigation against the Congolese president, as much as it damaged his honor and reputation, attacked the dignity of his State, which he personified (Foakes 2014).

The famous *L'État c'est moi*[27] quote from Louis XIV, indicated by Foakes (2014) as an adequate description of the early theories of sovereign power and high-ranking government officials, is not, thus, absolutely excluded from the *rationale* that lies beneath immunity. There may be in this a concise explanation as to why immunity *ratione personae* protects private-acts: if an official is confounded with the State itself, her acts, both in a public or private capacity, should not be a matter of foreign investigations, for the indignity (to her State and herself) of subjecting her to prosecution.

How much of these reasons hold good in modern international community is a question that is left without an answer: it seems, for example, doubtful that the mystical sovereign-sovereignty relation of Louis XIV's France is still dominant. But if one informs her understanding of dignity with the egalitarian background that now permeates much of the legal discourse[28], it seems possible to still invoke it in order to associate *ratione personae* immunity[29], considering that it tidily fits its main justification - the par in parem non habet imperium principle. Either way, the international practice remains firm to grant Heads of State[30] immunity from criminal prosecution in foreign courts (Foakes 2014)[31], even when such immunity extends itself further than it would in the case of mere functional immunity[32], and regardless of the gravity of the acts[33]. To whom those immunities belong is the question we will discuss now.

27 Translatable as "I am the State".
28 See 5.2, §§ 1-3, above.
29 Nevertheless, it could not, probably, justify *absolute immunity* such as the one granted by current international practice.
30 And possibly other high-ranking officials, depending on whether they hold personal immunities. The group to which *ratione personae* immunity is accorded is discussed at 5.3, below.
31 Foakes (2014, 82) mentions, for example, a 1999 Spanish court decision ruling that Fidel Castro, "as long as he was in office [...] could not be prosecuted in Spain for international crimes".
32 For example, in a case of an act committed in private capacity. Due to the restrictive doctrine of state sovereignty, criminal acts committed by government members who do not hold personal immunity are now much less protected from foreign jurisdiction, if they are at all. See 5.4 below.
33 There is a 2001 resolution of the Institut de droit international, mentioned by Foakes (2014, 82), with this wording: "In criminal matters the head of State shall enjoy immunity from jurisdiction before the courts of a foreign State for any crime he or she may have committed, regardless of its gravity".

5.3 Whose personal immunity?

We shall now make few remarks on to whom personal immunity is due in international law. This is, of course, the central question to be tackled by the Court in judging the immunity part of *Equatorial Guinea v. France*. The issue, nevertheless - being one of customary law - has no clear solution. A few judicial pronouncements on the matter will now be presented, merely as a starting point to reflection.

After *The Arrest Warrant case*, it remained open to question whether high-ranking officials other than Heads of State, Heads of Government, and Foreign Relations Ministers could also hold *ratione personae* immunity (Foakes 2014). In this respect, Foakes (2014, 128) has signaled that the Court's wording left the possibility open, and "emphasized that such immunities are not for the benefit of the individual concerned but designed to enable the effective performance of his or her functions on behalf of the State".

The criteria applied in the decision, according to the author, may be (roughly) put as: (i) capacity of acting on behalf of the State; (ii) frequent travel on diplomatic missions and need to communicate with other States' officials. As pointed by Foakes, following a statement from the ICJ in *Congo v. Rwanda* (2006)[34], a considerable number of officials now exercise these functions, being thus unclear, according to the author, which officers would hold *ratione personae* immunities on this basis. It seems possible, though, to respectfully disagree with Foakes in this point, and indicate that the issue with the criteria presented by the ICJ is not one of determining which officers would match them, but, otherwise, that of their application entailing an exaggerated number of officials protected by personal immunity. In any case, this interpretation seems unsatisfactorily too wide, in contrast to State practice.

As of what concerns the latter - and, also previous decisions on the subject - Foakes (2014) indicates that there is almost no guidance to be found on the issue, but it appears that a restricted version of the scope of personal immunity - one which includes only the "troika" of Heads of State, Government, and Ministers of Foreign Affairs - is winning the debate[35]. In this respect, it is important to note that the International Law Commission, whilst drafting articles on the "*Immunity of State officials from foreign criminal jurisdiction*", has only included the aforementioned three officials within the

34 "[...] with increasing frequency in modern international relations other persons representing a State in specific fields may be authorized by that State to bind it by their statements in respect of matters falling within their purview. This may be true, for example, of holders of technical ministerial portfolios exercising powers in their field of competence in the area of foreign relations, and even of certains officials" (Foakes 2014, 128).

35 Foakes (2014, 132) has affirmed that "some States have indicated that they are disinclined to accord immunity *ratione personae* to foreign officials outside the 'troika' expressly identified by the ICJ in the *Arrest Warrant case*".

group that enjoys *ratione personae* immunity from criminal jurisdiction[36] - although Foakes (2014) indicates that the discussion is not settled. The formula adopted by the ILC, in the draft article, seems "*to represent something of a compromise on the question*"[37] (Foakes 2014, 133).

Furthermore, Foakes (2014, 129) has mentioned that in *Djibouti v. France* "the ICJ did not suggest that the Djiboutian Head of National Security or its Procureur de la Republique would enjoy personal immunity". According to the author, France had alleged that no personal immunity was granted to them, due to "essentially internal nature of their functions". Also in this respect, Foakes (2014, 129) indicated a 2011 U.K. court ruling that the Secretary of the Executive Office of the National Security of Mongolia "fell clearly outside the circle of high-ranking officials entitled to such immunity".

Foakes nevertheless alleges that these are special cases, for the officials in question are of an "administrative level" (2014, 129). The author also mentions that, in different occasions, when ministers were the officials whose alleged immunity was in question, the courts "appear[ed] more willing to accord personal immunity". She also provides the example of a Belgian court that recognized the immunity of a Vice-President of the Congo, and of British courts that have recognized it to an Israeli Defense Minister[38] and a Chinese Minister for Commerce and International Trade[39].

In the drawn context, the issue remains very much unsettled. Albeit it seems to be the case that a more restrictive doctrine of *ratione personae* immunity is now preferred, we have seen cases in which courts have accorded it to officials of a lower rank. The issue posed before the ICJ, in Equatorial *Guinea v. France*, will depend on the decision on whether the position of Vice-President held by Teodoro Nguema Obiang Mangue suits the (very unclear) criteria given by international practice.

5.4 The limits of functional immunities

If the Court decides, contrary to what is alleged by Equatorial Guinea, that the Vice-President does not enjoy absolute immunity in relation to his role (*ratione personae* immunity), the debate of whether his acts are covered by immunities *ratione materiae* arises.

As we have mentioned, the issue concerning whether a functional immunity is to be identified in a given controversy involves, before anything

36 "Draft article 3 Persons enjoying immunity *ratione personae* Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction" (United Nations 2013, 1).

37 Foakes noted that even the status of a Foreign Affairs Minister immunity was not free from, in spite of the *Arrest Warrant* decision.

38 See the case of General Shaul Mofaz, "Re Mofaz (2004) 128 ILR" (Foakes 2014, 130).

39 See "Re Bo Xilai (2005) 129 ILR 713" (Foakes 2014, 130).

else, considering if the act in question was practiced in an official capacity or in a private one. This matters for, as noted above, the plea of functional immunity ultimately implies that the "act of its official or former official was an act of the State itself" (Foakes 2014, 7). If the act was indeed one carried out in an official capacity, the controversy becomes essentially one concerning State immunity itself. If, conversely, the act was one of a "purely private capacity" (Foakes 2014, 8), no functional immunity will be found.

In any case, when concerning the extent and limits of functional immunities (and thus State immunities), it is worth noting that, according to Foakes (2014, 16), State immunity has passed, in international practice, from an absolute doctrine "whereby a foreign State or sovereign could not be impleaded regardless of the nature of the act complained of", to a restrictive doctrine, whereby the exercise of jurisdictional powers could be made when concerning acts that were not of a sovereign nature. This passage from a doctrine to another, which was influenced by dissatisfaction with the implications of the former in commercial activities, was neither linear nor fast, but it has, by now even been employed in the UN Convention on Jurisdictional Immunities of States and Their Property (Foakes 2014).

As for what respects individual *ratione materiae* immunities and the consequences of a restrictive doctrine, a relevant aspect shall be remarked. According to Foakes (2014), the question as to the extent of State immunity, in the restrictive doctrine, is: was the act undertaken in the exercise of sovereign authority (*iure imperii*) or was it of a private character (*iure gestionis*)? This implies that "if the act is imputable to the State [...] and the State is immune, then immunity ratione materiae should apply to the official" (Foakes 2014, 8). Conversely, "if [...] the state is not immune then immunity ratione materiae cannot arise" (Foakes 2014, 8). In such cases, it may happen that the conducts in question are not properly imputable to the official, being "the correct action in the circumstances [...] to strike out the proceedings against the State official [...]" (Foakes 2014, 8). If they are, on the other hand, a limit to functional immunity may be then found.

6 RELEVANT PRECEDENTS

Four ICJ precedents will be now discussed, in order to consider a few issues already tackled by the Court in what concerns the main legal controversies arisen in Equatorial Guinea v. France.

6.1 International Court of Justice - Arrest Warrant of 11 April 2000 (Congo v. Belgium, 2002)

As mentioned, the dispute between Congo and Belgium before the

ICJ known as *The Arrest Warrant Case* is quite significant to the issue of immunities of state officials in International Law. Abdoulaye Yerodia Ndombasi, then Foreign Relations Minister of The Democratic Republic of the Congo, had criminal proceedings on course against him in Belgium in the early days of the millennium (International Court of Justice 2002a). An arrest warrant was issued against him, as well as an Interpol Red Notice[40], causing the Congo to present itself before the ICJ (International Court of Justice 2002a).

The prosecution involved alleged violations of international humanitarian law committed in the Congo – Belgium thus held that universal jurisdiction could be exercised in such cases, even though the alleged crimes had not been committed in Belgian territory nor one of its subjects[41]. The Congo, conversely, held that Belgium had no right to exercise jurisdiction in this case and, moreover, that Yerodia had immunity from prosecution due to his position as a high-ranking official in the Congolese government (International Court of Justice 2002a).

The Court, in a landmark judgment, held that, under international customary law, *ratione personae* immunity extended to Foreign Relations ministers due to the nature of their functions – in which such officials represent the State, for example, in international negotiations and meetings, and thus had to travel extensively to fulfill their functions (Foakes 2014). Moreover, analyzing the decision, the Foreign Relation Ministers could "act on behalf of and to bind his State at the international level" (Foakes 2014, 22). The judges have not ruled out, it is worth mentioning, that other high-ranking officials could also enjoy personal immunity, if exercising "functions analogous to those of a Head of State, head of Government, or Foreign Minister" (Foakes 2014, 22).

6.2 Notes on ICJ's "Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)" and "Certain Criminal Proceedings in France (Congo v. France)"

Two other relevant ICJ disputes, subsequent to the *Arrest Warrant Case*, shall be briefly mentioned now.

6.2.1 Djibouti v. France, 2008

The proceedings between Djibouti and France were initiated after two witness requests were made by France to the Djiboutian Head of State

40 That is, a request to foreign countries to detain the subject of the notice, pending an extradition request.

41 Such as that of territorial waters, in the case of piracy.

(Foakes 2014). It was then argued by the African state that France had failed to comply with its international legal "obligation to prevent attacks on the dignity of an internationally protected person" (Foakes 2014, 65). Djibouti also argued that the witness requests violated – being constraining measures – the immunity of the Head of State. Albeit the Court, as it has been mentioned before, recognized there was such an obligation binding the French State to protect "the honour and dignity of heads of State 'in connection with their inviolability'" (Foakes 2014, 65), no violation was averred from the acts of the French State, even though one of the requests was made without proper attendance to "'the courtesies due to a foreign head of State'" (Foakes 2014, 66).

6.2.2 Congo v. France, 2010

In a situation similar to that of Equatorial Guinea v. France, Congo instituted proceedings before the ICJ against France after, during a State visit made by the president of the former to the latter, a French judge attempted to acquire evidence for an ongoing domestic criminal proceeding concerning members of the African government - amongst them, President Sassou Nguesso himself. The claim was dropped by the Congo before the judgment of the Merits, but it was then argued that Nguesso's immunity had been violated. In this respect, it is worth noting that the Congo alleged that the investigation was impairing its capacity of maintaining its international relations and had damaged Nguesso's honour and reputation. France, conversely, convinced the Court that its domestic law respected Heads of State immunities – it must be noticed that, for example, according to French law, the President could only have been interrogated if the Congo had agreed to it. Finally, it shall be remarked that, as aforementioned, it was in this case that Judge De Cara averred that any attack to the Congolese president's honour or reputation implied an attack at the Congolese State's honour and reputation (Foakes 2014)[42].

6.3 *United States Diplomatic and Consular Staff in Tehran* (United States v. Iran, 1980)

On 29 November 1979, the United States filed before the Court a case arising out of the situation at its embassy in Tehran and consulates at Tabriz and Shiraz, and the seizure and detention as hostages of its diplomatic and consular staff in Tehran and two more citizens of the United States. Iran did not appear before the Court, nor did it file a memorial or preliminary objections; its Ministry for Foreign Affairs only addressed two letters to the Court concerning the country's disagreement in relation to the Court's juris-

42 See 5.2, above.

diction over the case. Even though the conduct of the militants responsible for the attack could be directly attributed to the Iranian government, the Court could not find legal determine this relation with certainty. However, as the Iranian government did nothing to avoid the attack, failing with its obligation to protect the inviolability of the diplomatic premises of the Unites States, the Court found that Iran was in breach of the obligations assumed under the provisions of the 1961 *Vienna Convention on Diplomatic Relations*, Articles 22 (2), 24, 25, 26, 27 and 29 and of Articles 5 and 36 of the 1963 *Vienna Convention on Consular relations, inter alia*. Furthermore, Iran's Ayatollah Khomeini endorsement of the terrorist actions and its refusal to comply with the international obligations to which Iran was entitled to were considered by the Court when deciding that the Defendant not only should promote the cessation of the hostilities and release the hostages, but also pay compensation to the United States of America.

7 SUBMISSIONS

The Republic of Equatorial Guinea requests the Court to adjudge and declare that (International Court of Justice 2016b)[43]:

a) In what concerns the disrespect of the Republic of Equatorial Guinea's Sovereignty by the French Republic:
i) adjudge and declare that the French Republic has failed to comply to its obligation to respect the principles of sovereign equality of the states and of non-intervention in other states' internal affairs in what concerns the Republic of Equatorial Guinea, according to International Law, in permitting the engagement of its jurisdiction in judicial criminal proceedings against its Second Vice-President for the allegations that, as were established, quod non, revealed the sole competence of Equatorial-Guinean jurisdiction, and ordered the seizing of a property of the Republic of Equatorial Guinea used in the diplomatic mission of this country in France.

b) In what concerns the Second Vice-President of the Republic of Equatorial Guinea, in charge of the Defense and Security of the State:
i) adjudge and declare that in engaging in criminal proceedings against the Second Vice-President of the Republic of Equatorial Guinea, in charge of the Defense and Security of the State, his Excellency M. Teodoro Nguema Obiang Mangue, the French Republic has acted in violation of its international legal obligations, notably the United Nations Convention against Transnational Or-

43 As of July 2017, the English version of the application instituting proceedings had become unavailable at the ICJ's website. The text that follows is, thus, a translation from the original French version, in which the wording and structure were, as much as possible, maintained, in name of meaning fidelity (International Court of Justice 2016b).

ganized Crime and general International Law;
ii) order the French Republic to take all the necessary measures in order to end all the proceedings on course against the Second Vice-President of the Republic of Equatorial Guinea, in charge of the Defense and Security of the State.
iii) order the French Republic to take all the measures to prevent new attacks to the immunity of the Second Vice-President of Equatorial Guinea, in charge of the Defense and Security of the State, specially assuring that your jurisdictions won't engage, in the future, in criminal proceedings against the Second Vice-President of Equatorial Guinea.

c) In what concerns the property in the 42 Foch Avenue, in Paris:
i) adjudge and declare that the French Republic, in seizing the property in the 42 Foch Avenue, Paris, owned by the Republic of Equatorial Guinea and employed for purposes of this country's diplomatic mission in France, acted in violation of its international legal obligations, notably the Vienna Convention on Diplomatic Relations, the United Nations Charter, and general international law;
ii) order the French Republic to recognize the property at 42 Foch Avenue, Paris, as owned by the Republic of Equatorial Guinea and location of its diplomatic mission in Paris, consequently ensuring its protection as required by International Law.

d) As a consequence to the series of violations by the French Republic of its international legal obligations to the Republic of Equatorial Guinea:
i) adjudge and declare that the responsibility of the French Republic due to the prejudices that have been caused and continue to be caused to the Republic of the Equatorial Guinea by its violation of its international obligations.
ii) order the French Republic to pay the Republic of Equatorial Guinea full reparation for the sustained prejudice, in an amount to be determined in a posterior stage.

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