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COMMENTS ON THE ICJ JUDGMENT ON APPLICATION OF THE INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF THE FINANCING OF TERRORISM AND THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (UKRAINE V. RUSSIAN FEDERATION) ON 31 JANUARY 2024

Abstract: This commentary explores key aspects of the ICJ's January 2024 judgment in Case No. 166, examining Ukraine's claims against Russia under the ICSFT and CERD. The authors analyze five pivotal issues affecting the interpretation of international law and offering strategic insights for states considering similar legal approaches. The ICJ's ruling on the 'clean hands' doctrine, dismissing it as a defense in interstate disputes, marks an important precedent, as does its interpretation of 'funds' under the ICSFT, limited to financial assets and excluding weapons—a decision that could influence the effectiveness of anti-terrorism financing efforts. The judgment also highlights the challenges in evidence gathering for states without territorial control. Importantly, the judgment distinguishes between compliance with provisional measures and substantive treaty violations, though it underscores the Court's limited capacity to enforce its orders. Overall, this judgment reflects both the utility and limitations of the ICJ in conflict-related

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disputes, signaling a need for a more comprehensive legal framework to address state violations in war and peace.

Keywords: International Convention for the Suppression of the Financing of Terrorism (ICSFT), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), International Court of Justice (ICJ), Ukraine, Russia

1. Introduction

In recent years, the International Court of Justice (ICJ or the Court) has experienced a resurgence in its role as a key international mechanism for resolving legal disputes between states. As of August 2023 to July 2024, the Court had 22 pending contentious proceedings and three advisory proceedings, marking a record number of cases on its docket.[1] However, it is not solely the number of cases that is significant; states increasingly rely on the ICJ's provisional measures, which have gained notable prominence in recent years, as a potentially powerful legal tool. These measures are often seen as an additional lever in armed conflicts, where legal rulings may complement or enhance political and military strategies, thereby influencing the conduct of the parties involved.[2]

Nevertheless, it is important to recognize the limitations of the ICJ, given its position as the judicial organ of the United Nations (UN). The Court's capacity to influence the situation on the ground remains constrained, particularly in active conflict zones. Among the contentious cases currently before the Court, two have been brought by Ukraine against the Russian Federation. This paper focuses on one of these cases: *Application of the International Convention for the Suppression of the Financing of Terrorism* and the *International Convention on the Elimination of All Forms of Racial*

* This paper came about within the framework of Academic Excellence Hub – Digital Justice Center carried out under Initiative of Excellence – Research University at the University of Wrocław.

1 UNGA, *Report of the International Court of Justice, August 1, 2023, July 31, 2024*, A/79/4, August 1, 2024.

2 Rose and Burger, "Tackling the Overflowing Caseload at the International Court of Justice".

Discrimination, Case no. 166 (the case), in which the final judgment was delivered on 31 January 2024 (judgment).[3]

Before delving into the specifics of the judgment, it is crucial to underscore that the judgment addresses events following Russia's 2014 aggression, which resulted in the occupation of parts of Ukraine's territory, including Crimea and sections of the Luhansk and Donetsk Oblasts. However, the judgment was delivered in the context of Russia's full-scale invasion of Ukraine in 2022, which adds a deeper geopolitical dimension to the Court's decision and the broader situation.

This case forms part of Ukraine's comprehensive legal strategy to pursue justice and accountability through peaceful legal channels, while simultaneously defending its sovereignty on the ground through military means. By leveraging international legal forums such as the ICJ, Ukraine aims to hold Russia accountable for violations of international law. At the same time, it continues to confront Russian aggression militarily, employing a dual approach that combines legal recourse with direct defense measures to safeguard its territorial integrity.

The Russian aggressions in 2014 and 2022 constitute clear violations of Article 2(4) of the UN Charter, which prohibits the use of force against the territorial integrity or political independence of any state.[4] Additionally, these acts breach the *jus cogens* norm that prohibits aggression as a fundamental principle of international law. Despite these clear violations, the current global security framework assigns the primary responsibility for maintaining international peace and security to the UN Security Council (UNSC). However, Russia's status as a permanent member with veto power has effectively rendered the UNSC dysfunctional, as its paralysis prevents the body from taking any decisive action or issuing official determinations on Russia's conduct. Thus, given the absence of an immediate response from this supervisory body, it is anticipated that states will increasingly resort to provisional measures as substitutes for UNSC resolutions.

As a corollary to the UNSC's paralysis, the UN General Assembly (UNGA) adopted resolutions calling for the non-recognition of territorial

3 *Application of the International Convention for the Suppression of the Financing of Terrorism and the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation),* Merits, ICJ Judgment of 31 January 2024, I.C.J. Reports 2024.

4 Kwiecień, "The Aggression of the Russian Federation Against Ukraine: International Law and Power Politics or 'What Happens Now'", 10.

changes resulting from Russia's actions in 2014[5] and condemning the 2022 full-scale invasion of Ukraine.[6] While these resolutions carry significant symbolic weight and reflect the international community's broad disapproval of Russia's actions, they remain non-binding under international law. Consequently, they fall short of Ukraine's expectations for achieving concrete justice and holding Russia accountable for its violations. Therefore, Ukraine turned to alternative legal avenues to hold Russia accountable, identifying inter alia the ICJ as a suitable forum to demonstrate that Russia's actions amount to numerous violations of international law.

To implement this legal prosthesis, Ukraine has devised a comprehensive legal strategy, bringing cases before international courts and tribunals with jurisdiction over Russia and the competence to adjudicate its claims.[7] Recognizing the limitations of the current international criminal justice system, Ukraine is also actively advocating for the establishment of a special tribunal dedicated to prosecuting the crime of aggression.[8] This approach reflects Ukraine's determination to ensure comprehensive accountability, both through existing legal mechanisms and by pushing for the creation of new avenues for justice.[9] While commendable, this strategy is not without risks, particularly in cases where clear and unequivocal evidence of alleged violations is lacking.

The challenges inherent in Ukraine's legal strategy are exemplified by Case No. 166 before the ICJ, where Ukraine accused the Russian Federation

5 UNGA, *Territorial integrity of Ukraine*, 68/262, March 27, 2014.

6 UNGA, *Aggression against Ukraine*, ES-11/1, March 2, 2022.

7 Ukraine's broader legal strategy includes several high-profile cases at various international tribunals. Among them is the case *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation*), ICJ Case no. 182 (pending). Milanović, "ICJ Delivers Preliminary Objections Judgment in the Ukraine v. Russian Federation Genocide Case, Ukraine Loses on the Most Important Aspects". Additionally, Ukraine has initiated four interstate cases before the European Court of Human Rights (ECtHR), more than 10 investment arbitrations against Russia, and two interstate arbitrations under UNCLOS. Czepek, "ECtHR Case-law Concerning Russian Aggression on Ukraine and the Events Taking Place after 2014", 573--588; Sazhko, "War in Ukraine: Recourse Against Russia Through Investment Arbitration", 259; Oral, "Ukraine v. The Russian Federation: Navigating Conflict over Sovereignty under UNCLOS", 479. Furthermore, there are numerous individual cases pending before the ECtHR, alongside at least six arrest warrants issued by the International Criminal Court Russia's highest political and military leaders.

8 Nuridzhanian, "International Enough? A Council of Europe Special Tribunal for the Crime of Aggression".

9 Including compensation mechanisms as the Register of Damage for Ukraine. Lingsma, "Register of Damages for Ukraine: 'The biggest claims program in history'".

of violating 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). Proceedings were initiated by Ukraine in 2017, with allegations that Russia had been involved in financing terrorism and committing acts of racial discrimination, particularly in relation to events in eastern Ukraine and Crimea following Russia's 2014 occupation of the Crimean Peninsula.

Notably, this case marked the first instance in which the ICJ had the opportunity to rule on the merits of claims under CERD, establishing an important precedent for the Court's interpretation and application of the convention. Furthermore, it was also the first time where the ICJ, in a merits-based decision, determined that Russia had violated international law.

In this judgment commentary, the authors aim to examine five key issues that contribute to the interpretation of international law and provide strategic guidance for states contemplating an approach akin to Ukraine's. These issues include the application of the 'clean hands' doctrine in interstate disputes, the exclusion of weapons from the definition of 'funds' under the ICSFT, standards of evidence, the role of provisional measures (particularly when addressing alleged treaty violations), and whether an act of aggression may be considered a breach of non-aggravation measures.

2. Case No. 166 Overview

Ukraine's allegations before the ICJ concerned multiple violations of both the ICSFT and CERD alongside breaches of the provisional measures order (PM Order).[10]

Regarding the ICSFT, Ukraine alleged that Russia violated Articles 8, 9, 10, 11, 12, and 18 by supplying funds, weapons, and training to illegal armed groups involved in terrorism in Ukraine, such as the Donetsk People's Republic (DPR), Lugansk People's Republic (LPR), and the Kharkiv Partisans. Ukraine also contended that Russia had failed to take appropriate steps to detect, freeze, and seize financial resources used by these groups and had not fulfilled its obligations to investigate, prosecute, or extradite individuals involved in the financing of terrorism. Furthermore, Ukraine asserted that

10 *Application of the International Convention for the Suppression of the Financing of Terrorism and the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation),* Request for the indication of provisional measures, ICJ order of April 19, 2017, I.C.J. Reports 2017, 104.

Russia had not provided the necessary cooperation in Ukraine's criminal investigations related to terrorism financing and had failed to prevent or counter the financing of terrorism by both public and private actors within Russia.

Under CERD, Ukraine claimed Russia violated Articles 2, 4, 5, 6, and 7 by systematically discriminating against the Crimean Tatar and ethnic Ukrainian communities in Crimea, with the objective of cultural erasure of groups perceived as opponents of the occupation regime. These alleged violations included holding an illegal referendum under conditions of violence and intimidation, suppressing the political and cultural expression of the Crimean Tatars, banning the *Mejlis* of the Crimean Tatar People, and tolerating or perpetrating disappearances and killings. Other claims included harassment of Crimean Tatars through arbitrary searches and detentions, suppressing Crimean Tatar and Ukrainian media, and limiting access to education in their native languages.

Additionally, Ukraine alleged that Russia breached PM Order by continuing restrictions on the *Mejlis*, failing to ensure Ukrainian language education in Crimea, and further aggravating the dispute by recognizing the DPR and LPR as independent states and engaging in its renewed aggression in 2022.

In its judgment, the ICJ found that Russia had violated its obligations under Article 9(1) of the ICSFT[11] and remained obliged under that provision to investigate sufficiently substantiated allegations of terrorist financing in eastern Ukraine.[12] Regarding the allegations of racial discrimination, the Court determined that Russia breached its obligations under Articles 2(1)(a) and 5(e)(v) of CERD by implementing an education system in Crimea after 2014 that failed to provide access to education in languages other than Russian.[13] Specifically, Russia was found to have failed in ensuring that the education system accommodated the needs of the Ukrainian ethnic minority.

The ICJ found that Russia had violated its obligations under paragraph 106(1)(a) of the PM Order, which indicated provisional measures, by continuing to impose restrictions on the *Mejlis*.[14] Furthermore, the Court found that Russia had breached paragraph 106(2) of the PM Order by failing to refrain

11 Judgment, ibidem, para. 111.
12 Ibidem, para. 149.
13 Ibidem, para. 370.
14 Ibidem, para. 392.

from actions that could aggravate or extend the dispute between the parties or make its resolution more difficult.[15] For the remaining claims, the Court concluded that there was insufficient convincing evidence to establish that Russia had violated international law.[16] The judgment turned out to be a big disappointment for Ukraine because out of 19 charges, the Court found a violation of only four.

Finally, the Court addressed the issue of remedies. Ukraine had requested several forms of relief, including the cessation of ongoing violations, guarantees of non-repetition, compensation, and moral damages. The Court, however, limited its ruling to a declaratory judgment, affirming that Russia remains obligated to ensure that its educational system in Crimea adequately accommodates the needs and reasonable expectations of Ukrainian ethnic minorities.[17] The Court found no need to grant further remedies beyond this declaration, declining to order the additional measures sought by Ukraine.

3. Discussion of Selected Issues

3.1. Clean Hands Doctrine

In response to Ukraine's allegations under the ICSFT and CERD, Russia invoked the 'clean hands' doctrine, claiming that Ukraine's own misconduct disqualified its claims.[18] Ukraine countered by accusing Russia of misapplying the doctrine, engaging in evidentiary misconduct, and attempting to divert attention from its own violations.[19]

The 'clean hands' doctrine has been interpreted through various legal maxims, such as *ex turpi causa* (no action arises from a dishonorable cause), *ex injuria jus non oritur* (unlawful acts do not create legal rights), and *ex delicto non oritur actio* (an illegal act cannot be the basis of legal action). Fundamentally, the doctrine posits that a claimant cannot seek redress for an international wrong if their claim is tainted by their own prior misconduct. Key elements include the claimant's wrongdoing and a direct connection between that misconduct and the claims brought. The principle is rooted

15 Ibidem, para. 398.
16 Ibidem, para. 404.
17 Ibidem, para. 372.
18 Ibidem, para. 34 and 153.
19 Ibidem, para. 154.

in the idea that one must come to court with 'clean hands'.[20] Practically, invoking 'unclean hands' can undermine a State's credibility when it accuses others of breaching international law.[21]

The current status of the 'clean hands' doctrine in international law remains ambiguous and inconsistent. The 'clean hands' doctrine can be seen as an equitable principle derived from Anglo-American law. It is closely related to the principle of equity, as it requires a party seeking equitable relief to be free of wrongdoing in the matter at issue. This doctrine suggests that a state engaged in illegal conduct may be denied standing to challenge similar or consequential illegal acts by other states, particularly if the other state's actions were a response to the initial wrongdoing.[22] The principle of equity was affirmed by the ICJ noting that 'equity is a general principle directly applicable as law'. However, despite this conceptual alignment with equity, the 'clean hands' doctrine lacks the consistency and organization typical of established legal principles.[23] The International Law Commission also presented a mixed view. The Special Rapporteur highlighted the relevance of the 'clean hands' principle in cases of bad faith, yet emphasized that it does not apply broadly to interstate disputes.[24] Cases such as *Diversion of Water from the River Meuse25* and *Military and Paramilitary Activities in and against Nicaragua26* have alluded to the doctrine, but the ICJ has never issued a definitive ruling on its application. Additionally, investment arbitration tribunals have adopted the doctrine in a more direct way, treating it as a bar to claims,[27] but even here, the approach has been inconsistent. For example, the *Littop v. Ukraine* tribunal applied the doctrine, whereas

20 Toh, "Did the ICJ Wash its Hands out of the Controversies Behind the 'clean hands' Doctrine in its 2024 Judgment on the Application of the ICSFT and CERD (Ukraine v Russia) (Merits)?".

21 Peters, "The Russian invasion of Ukraine: an anti-constitutional moment in international law?", 6.

22 Kałduński, "Principle of clean hands and protection of human rights in investment arbitration", 70.

23 Ibidem.

24 ILC, "Report of the International Law Commission", para. 236.

25 *Diversion of Water from the Meuse Case (Netherlands v. Belgium),* Individual Opinion by Mr. Hudson, PCIJ Judgment of 28 June 1937, PCIJ ser. A/B, No. 70, para. 321-327.

26 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* Dissenting opinion of Judge Schwebel, ICJ Judgment of 27 June 1986, I.C.J. Report 1986, 382, para. 268-272.

27 *International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation),* Separate opinion of Judge Iwasawa, ICJ Judgment of 31 January 2024, I.C.J. Reports 2024, para. 5.

the *Yukos* Tribunal explicitly rejected its status as a general principle barring claims, demonstrating the lack of uniformity in its interpretation across international law.[28]

In conclusion, while the 'clean hands' doctrine holds significance in various areas of international law, its inconsistent application and the absence of a clear, binding ruling by the ICJ on its scope leave it as a doctrine subject to interpretation rather than settled principle. Its relevance is recognized in equity and bad faith cases, but its broader application remains contested and uncertain.

In this case, the Court approached the application of the 'clean hands' doctrine with significant caution, particularly since Russia only raised the issue after the 8 November 2019 judgment on preliminary objections, which established the ICJ's jurisdiction.[29] While the Court's judgment leaves room for debate, it suggests that a valid title of jurisdiction and admissibility is sufficient to proceed with the case. The Court briefly and without further elaboration dismissed the 'clean hands' doctrine as a defense on the merits.[30] As a result, the minority view presented by Judge *ad hoc* Tuzmukhamedov, who advocated for applying the doctrine in interstate disputes, was rejected.[31] Addressing the broader question of whether one party's misconduct negates another's responsibility requires careful consideration, as oversimplifying this issue risks distorting complex international legal principles and undermining the Court's ability to adjudicate disputes effectively. The Court reaffirmed that the 'clean hands' doctrine is neither part of customary international law nor a general principle.[32] It also implied that the doctrine may be inapplicable to interstate disputes, despite its frequent use in investment arbitration.[33]

28 Pomson, "The "clean hands" Doctrine in the Yukos Awards: A Response to Patrick Dumberry", 714.

29 Judgment, ibidem, para. 36.

30 Ibidem, para. 38.

31 *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),* Separate Opinion, Partly Concurring And Partly Dissenting, of Judge ad hoc Tuzmukhamedov, ICJ Judgment of 31 January 2024, I.C.J. Reports 2024, para.84.

32 Judgment, ibidem, para. 37.

33 Kałduński, ibidem, 70.

3.2. Weapons as 'Funds'

Ukraine asked the Court to declare that Russia had violated its obligations under the ICSFT by providing financial support to terrorist organizations and failing to detect financial resources used to fund terrorism in Ukraine.

The ICSFT was created by the effort of states directed at dealing with the problem of terrorism by denying terrorists sanctuary, ensuring international cooperation in combating their activities and bringing them to justice.[34] This initiative was prompted by an increased awareness of the importance of terrorist financing and the potential role that material flows play in the preparation of terrorist acts.[35] Accordingly, the ICSFT seeks to cripple the phenomenon of terrorism as a whole, not by addressing the acts of terrorism themselves, but by pursuing resources that can be considered drivers of terrorism. These resources are defined in Article 1 of the ICSFT, which seems comprehensive:

> Funds means assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including, but not limited to, bank credits, travelers cheques, bank cheques, money orders, shares, securities, bonds, drafts, letters of credit.[36]

The definition begins broadly, covering 'assets of every kind', but follows with examples focused on financial instruments, while clarifying that the list is not exhaustive. Doctrinal interpretations have extended the definition to include items such as animals, buildings, or vehicles. [37] The central issue in this case, however, is whether weapons also fall under the term 'funds'.

Ukraine argued that the term 'funds' should be interpreted broadly, encompassing all assets, including both financial and non-financial resources, such as weapons. This position was supported by the ordinary meaning of the term, its context, and the object and purpose of ICSFT. Additionally, Ukraine referred to the French and Spanish versions of the phrase 'assets of every kind' and the preparatory work of the ICSFT to bolster its claim.

34 Lavalle, "The International Convention for the Suppression of the Financing of Terrorism".
35 Klein, "International Convention for the Suppression of the Financing of Terrorism", 1-5.
36 Judgement, ibidem, para. 40.
37 Lavalle, ibidem.

In contrast, Russia maintained that 'funds' referred exclusively to financial resources intended for the financing of terrorist acts, not non-monetary assets like weapons used to carry out terrorism. Russia contended that the term 'funds' in Article 1(1) of the ICSFT must be read in the context of the provision as a whole, particularly in relation to the specific categories of assets listed in the convention, all of which, in Russia's view, possess inherently monetary value, function as forms of payment, and can be legally bought, sold, or exchanged.

The Court clarified the meaning of 'funds' using the interpretative rules outlined in Articles 31 to 33 of the 1969 Vienna Convention on the Law of Treaties (VCLT). The Court explained that 'funds' cover a broad range of assets with monetary value but exclude the means of committing terrorism, such as weapons or training camps.[38] To support this interpretation, the Court referred to the object and purpose of the ICSFT, focusing on preventing terrorist groups from acquiring financial resources rather than military equipment.[39] It also pointed to the preparatory works of the ICSFT, which highlighted concerns about terrorists misusing charitable organizations to collect funds, placing emphasis on the abuse of financial systems rather than the acquisition of physical means to carry out terrorist activities.

This interpretation sparked debate among the judges. Judges Charlesworth, Bhandari, and *ad hoc* Pocar supported including weapons in the definition of 'funds', while Judges Tomka, Sebutinde, and *ad hoc* Tuzmukhamedov favored a narrower interpretation, excluding weapons. Adopting such a narrow interpretation of 'funds' under the ICSFT could have significant implications for future cases brought under the convention. As terrorists adapt their methods to evade legal responsibility, acquiring support in ways beyond those recognized by the Court, this restrictive reading may limit the ICSFT's effectiveness in addressing contemporary forms of terrorism financing. Thus, it is crucial to present the arguments in support of a broader interpretation of 'funds' under the ICSFT. These arguments center around three primary considerations:

1. The definition of 'funds' in Article 1 of the ICSFT, interpreted through treaty rules and preparatory works, does not support excluding weapons, as there is no clear intent to limit 'funds' solely to financial resources.

38 Judgement, ibidem, para. 48-49, 53.
39 Ibidem, para. 50.

2. The Court's prior opinions conflict with the ruling on the exclusion of weapons.
3. There is no clear distinction between the monetary value of funds and their use in terrorism.

Article 1 of the ICSFT supports an inclusive interpretation of 'funds' that does not justify excluding weapons from its scope. The phrase 'assets of every kind' broadly encompasses all items with economic value, including aircraft, vehicles, and equipment, indicating that items like weapons, given their economic value, should logically fall within this scope.[40] This understanding aligns with the ordinary meaning of 'assets', commonly defined as 'all the property of a person', supporting a broad interpretation that includes both financial and non-financial resources, such as weapons.[41] Consequently, 'funds' under Article 1 should not be limited to purely financial assets but should reasonably include weapons as well.[42] Under Articles 31 to 33 of the VCLT, there is no compelling justification for excluding weapons from 'funds' as defined in Article 1 of the ICSFT.[43] The phrase 'assets of every kind' is broad, and interpreting it narrowly to exclude weapons would conflict with the text's plain meaning. Thus, the term 'assets' should be understood as encompassing all economically valuable resources, including weapons, challenging a restrictive interpretation.[44] Additionally, Article 32 of the VCLT permits examination of the preparatory work to clarify an interpretation

40 *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),* Separate Opinion of Judge Bhandari, ICJ Judgment of 31 January 2024, I.C.J. Reports 2024, para. 6.

41 *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),* Separate Opinion of Judge ad hoc Pocar, ICJ Judgment of 31 January 2024, I.C.J. Reports 2024, para. 4.

42 *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),* Separate Opinion of Judge Charlesworth, ICJ Judgment of 31 January 2024, I.C.J. Reports 2024, para. 4.

43 *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),* Separate Opinion of Judge ad hoc Pocar, ICJ Judgment of 31 January 2024, I.C.J. Reports 2024, para. 3.

44 *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),* Separate Opinion of Judge Charlesworth, ICJ Judgment of 31 January 2024,, para. 3.

of Article 1. Although it was highlighted that the preparatory work emphasized concerns focused on financial support rather than broader forms of assistance,[45] it should be noted that this drafting history does not suggest a consensus to limit 'funds' exclusively to financial resources.[46] In fact, earlier drafts indicate that some delegations advocated for a broader definition of material support, which included resources beyond financial aid.[47] The record of the negotiations 'expressed a focus on the issue of financial or monetary support'.[48] The history of the convention, therefore, does not provide solid grounds for the Court's narrow interpretation. Furthermore, the Court's exclusion of weapons from the definition of 'funds' appears inconsistent with its own reasoning. The Court acknowledges that the language of Article 1 suggests the term 'funds' encompasses more than traditional financial assets.[49] Since assets like weapons hold economic value and can be exchanged for monetary resources, excluding them contradicts the Court's broader interpretation of assets in relation to economic value and terrorism financing.[50] This separation between an asset's monetary worth and its use in terrorist acts can be questioned, as assets retain their financial value even when employed for such purposes.[51]

The judgment is likely to significantly undermine the utility of the ICSFT in future litigation. By adopting a narrow interpretation of 'funds' and the associated obligations, the judgment could discourage parties from pursuing

45 *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),* Separate Opinion, Partly Concurring And Partly Dissenting, of Judge ad hoc Tuzmukhamedov, ICJ Judgment of 31 January 2024, I.C.J. Reports 2024, para. 10.

46 Judgement, ibidem, para. 48.

47 *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),* Separate Opinion of Judge Bhandari, ICJ Judgment of 31 January 2024, I.C.J. Reports 2024, para. 21.

48 *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),* Separate Opinion of Judge ad hoc Pocar, ICJ Judgment of 31 January 2024, I.C.J. Reports 2024, para. 10.

49 Judgment, ibidem, para. 48.

50 *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),* Separate Opinion of Judge Bhandari, ICJ Judgment of 31 January 2024, I.C.J. Reports 2024, para. 11.

51 Ibidem, para. 18.

claims based on alleged violations of ICSFT.[52] This restrictive approach diminishes the convention's effectiveness in achieving its primary objective of combating terrorism, thereby limiting its potential impact on preventing the financing of terrorism through non-financial assets.

3.3. Questions of Evidence: Standards and Methods

In general, the ICJ, in its desire to maintain freedom and flexibility in assessing evidence, has refrained from establishing a uniform standard of proof.[53] As a result, despite valid criticisms raised by Judge Higgins in *Oil Platforms*,[54] this UN judicial body remains non-transparent on this issue, leaving litigants with minimal guidance regarding which specific standard—whether decisive, conclusive, fully conclusive, fully convincing, sufficient, balance of probabilities, beyond reasonable doubt, or proper degree of certainty—should apply to the claimed facts in a given case. The only emerging consensus is that the standard of proof tends to fluctuate based on the gravity of the allegations, with more serious claims, such as genocide, requiring a higher threshold of evidence, while less severe disputes, such as those involving human rights or environmental law, demand a lower one.[55] This was also acknowledged in this case, where the Court admitted that claims under the ICSFT and CERD, 'while undoubtedly serious, are not of the same gravity as those relating to the crime of genocide and do not require the application of a heightened standard of proof'.[56] Thus the standard of 'convincing evidence' was applied.[57]

Another factor the Court appropriately recognized was the factual reality on the ground, specifically the Russian occupation of Ukrainian territory, which deprived Ukraine of effective control over these regions. This occupation severely limited Ukraine's access to the relevant areas, making

52 Marchuk, "Unfulfilled Promises of the ICJ Litigation for Ukraine: Analysis of the ICJ Judgment in Ukraine v Russia (CERD and ICSFT)".

53 Farnelli, "Consistency in the ICJ's Approach to the Standard of Proof: An Appraisal of the Court's Flexibility", 98-121.

54 *Oil Platforms (Islamic Republic of Iran v. United States of America),* Separate Opinion of Judge Higgins, ICJ Judgment of 6 November 2003, I.C.J. Reports 2003, 234, para. 33.

55 *Pulp Mills on the River Uruguay (Argentina v. Uruguay),* Separate opinion of Judge Greenwood, ICJ Judgment of 20 April 2010, I.C.J. Reports 2010, 230, para. 25.

56 Judgment, ibidem, para. 82 and 170-171.

57 Ibidem, para. 83 and 170.

the collection of essential evidence exceedingly difficult.[58] The Court recognized this practical challenge and, as a result, permitted a more liberal use of inferences of fact and circumstantial evidence to compensate for the difficulties in obtaining direct proof. Although the burden of proof rested with Ukraine, the Court rightly noted that Russia had a duty to cooperate by providing any evidence in its possession that could aid the Court in resolving the dispute.[59]

Beyond the disagreement on the standard of proof, the parties also diverged on the methods of proof, particularly under CERD. Russia contended that statistical data was necessary to establish discrimination.[60] The Court, however, clarified that while statistical data is a valid method, it is not the sole means of proving discrimination, and parties are not limited to it as the only reliable form of evidence.[61] Ukraine, for its part and given limited access to the territory, relied on reports from official and independent bodies, such as the Office of the High Commissioner for Human Rights, along with nongovernmental reports, witness statements, press articles, and publications.[62] The Court rightly indicated that these forms of evidence should be assessed on a case-by-case basis, exercising particular caution with witness statements and treating publications as corroborating evidence of additional value.

Although this cautious approach is both correct and traditional, which can spark significant concern is the Court's suggestion that, while reports from international governmental organizations are valuable sources of evidence, they were deemed insufficient in this case because their authors had no direct presence on the ground.[63] This sends a troubling message to states, implying that simply denying access to areas where violations occur might be enough to undermine any successful claim before the ICJ. Such a scenario would leave the defendant state in full control of crucial evidence, allowing it to misuse its sovereignty to conceal human rights violations, contrary to the fundamental purposes of the UN Charter.

Despite the application of two relatively low standards of proof—the 'convincing evidence' standard due to the gravity of the claims, and

58 Ibidem, para. 80 and 169.
59 Ibidem, para. 169.
60 Ibidem, para. 172-173.
61 Ibidem, para. 174.
62 Ibidem, para. 205-206 and 214.
63 Ibidem, para. 215.

a more liberal recourse to inferences and circumstantial evidence justified by Ukraine's lack of access to the territory—the Court frequently found that Ukraine had not provided sufficient evidence to substantiate its claims. This was a known risk of Ukraine's creative legal strategy to use these conventions in pursuing Russia's accountability, and while it was likely considered in advance, few may have anticipated that the Court would remain unconvinced in so many instances.

3.4. Provisional Measure: Mejlis Ban

The judgment also addresses the measures taken by Russia against the *Mejlis*, the representative body of the Crimean Tatar people. The Court noted that while Russia acknowledged the measures taken against the *Mejlis* and Crimean Tatar leaders, it disputed the characterization of these actions as racial discrimination under Article 1(1) of CERD.[64] The Court clarified that the mere fact that the targeted individuals were part of an ethnic group's leadership does not automatically qualify the actions as racial discrimination. As a result, the ICJ rejected Ukraine's claim that Russia had violated CERD.[65] However, the Court simultaneously found that Russia had breached its obligations under the PM Order by continuing to impose restrictions on the *Mejlis*.[66]

In a series of declarations, separate, and dissenting opinions, the central issues concerning the ban on the *Mejlis* focused on two key questions: whether the ban indeed constituted a violation of CERD, and whether it was appropriate to conclude that Russia had breached the PM Order in the absence of an established treaty violation.

As for the CERD violation, the Court treated the political and ethnic aspects of the *Mejlis* activities as distinct.[67] It concluded that the actions taken against the *Mejlis* were driven by the political activities of its members, rather than their ethnicity. However, separate opinions highlighted that the political and ethnic identities of groups like the Crimean Tatars are

64 Ibidem, para. 247.
65 Ibidem, para. 404.
66 Ibidem.
67 *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),* Separate Opinion of Judge ad hoc Pocar, ICJ Judgment of 31 January 2024, I.C.J. Reports 2024, para. 27.

often deeply intertwined. This was also illustrated in the *Qatar v. United Arab Emirates* case.[68] As an ethnic minority, the Crimean Tatars share a common history, culture, and political interests rooted in their ethnic identity, making it difficult to separate their political views from their ethnicity. State policies often serve multiple objectives,[69] and the actions taken against the *Mejlis* could have been politically motivated, while simultaneously discriminatory toward the Crimean Tatars based on their ethnicity.[70] The assumption that only a complete deprivation of representation would constitute a violation of CERD is flawed. Several judges pointed out that banning the *Mejlis*, a body with significant representational legitimacy, could substantially impact the rights of the Crimean Tatar community, even though other institutions, like the *Qurultay*,[71] continued to operate.[72] Thus, the ban on the *Mejlis* may have been influenced by ethnic discrimination, even if this was not explicitly stated.[73] This analysis illustrates that weakening a group's main representative body can have discriminatory impacts, even when other ethnic institutions persist. It also emphasizes the challenges in defining ethnicity, a term open to varied interpretations across legal contexts. Classifying discrimination as either ethnic or political remains contentious, as the boundaries between these categories are often fluid and context-dependent.

Furthermore, the Court's decision to conclude that the ban on the *Mejlis* did not violate CERD, while simultaneously finding that it breached Russia's obligations under the PM Order, sparked significant debate among the judges. If provisional measures are designed to safeguard the rights of the parties while the final dispute remains unresolved, and the judgment finds no violation of Ukraine's rights under CERD yet identifies a violation under

68 *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),* Separate Opinion of President Donoghue, ICJ Judgment of 31 January 2024, I.C.J. Reports 2024, para. 17.

69 Ibidem, para. 13.

70 Ibidem, para. 25.

71 National congress and one of the representative bodies of the Crimean Tatar people.

72 *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),* Separate Opinion of Judge ad hoc Pocar, ICJ Judgment of 31 January 2024, I.C.J. Reports 2024, para. 25.

73 *Application of the International Convention for the Suppression of the Financing of Terrorism and the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation),* Mertis, Dissenting Opinion of Judge Sebutinde, ICJ Judgment of 31 January 2024, I.C.J. Reports 2024, para. 32.

the PM Order for precisely the same right, then the basis for confusion is clear. This tension between the Court's ruling on CERD and its interpretation of the provisional measures highlights the need for greater clarity on how provisional measures protect rights of the parties to the dispute, creating a focal point for debate on the coherence of the Court's decision.

The separate opinions on the potential contradiction between the lack of a CERD violation and a breach of the PM Order suggest that provisional measures are intended to 'preserve the respective rights of either party' with these rights deriving their plausibility from CERD; therefore, without a CERD violation, there would be no basis for a PM Order breach.[74] However, if the primary function of provisional measures is to protect the integrity of legal proceedings—as in domestic frameworks where pre-trial detention ensures proper conduct without determining guilt—then provisional measures, issued under the convention governing the case, do not establish a violation but instead secure the continuation of proceedings and uphold the court's jurisdiction. In this instance, the judgment affirms this latter approach. Thus, it can be argued that the PM Order creates a distinct obligation on the party, separate from convention-based claims, as it is grounded in Article 41 of the ICJ Statute.

This judgment sends a significant message to states increasingly relying on provisional measures. The ICJ has clarified that while the link to the primary claim is essential, it is not decisive, permitting enforcement even without a substantive treaty violation. This position may be viewed as an invitation from the Court to employ this mechanism more widely in legal disputes to protect rights throughout the lengthy judicial process.

3.5. Provisional Measure: Non-aggravation

Despite being frequently invoked by the ICJ, the content and scope of the non-aggravation measure remain unclear. The Court has not provided a precise definition or threshold for what constitutes an "aggravating" act, leaving

74 *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),* Declaration of Judge Tomka, ICJ Judgment of 31 January 2024, I.C.J. Reports 2024, para. 4; *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),* Declaration of Judge Brant, ICJ Judgment of 31 January 2024, I.C.J. Reports 2024, para. 3 and 4.

significant ambiguity.[75] This lack of clarity often leads to confusion among parties regarding what is expected of them, complicating enforcement and compliance.

In this case, Ukraine argued that Russia aggravated the dispute by recognizing, financing, and providing military support to the self-proclaimed DPR and LPR. Additionally, Ukraine highlighted various racially discriminatory statements made by Russian officials, including President Putin's characterization of Ukrainians as Nazis, the denial of Ukrainian statehood, and the rejection of Ukraine's right to self-determination. Ukraine also emphasized that the 2022 full-scale invasion further perpetuated this aggression, thereby significantly aggravating the dispute.[76] In response, Russia sought to dismiss these allegations, arguing that its actions after February 2022 are irrelevant to the current case. Russia contended that these issues should instead be addressed in the separate ICJ proceedings concerning the *Application of the Genocide Convention*, where matters related to the 2022 invasion could be properly discussed.[77] The Court stated that the recognition of DPR and LPR, as well as the initiation of the 'special military operation' against Ukraine, were actions that aggravated the dispute. Consequently, the Court found that Russia had violated the PM Order in this respect by engaging in these activities, which exacerbated tensions and complicated the resolution of the case.[78]

While it might seem evident that an act of aggression by one state against another—particularly while they are engaged in legal proceedings before the ICJ—would clearly constitute an 'aggravating' act under the non-aggravation measure,[79] this was not universally accepted by the Court.

The prohibition of aggression, as a *jus cogens* norm, is intrinsically linked to the obligation to settle disputes peacefully, in accordance with Article 2(3) of the UN Charter. As rightly pointed out by Judge Sebutinde in her dissenting opinion:

> It is difficult to imagine a more serious form of conduct with the potential to aggravate the tensions between the Parties than what the Respondent

75 Ratner, "The Aggravating Duty of Non-Aggravation The Aggravating Duty of Non-Aggravation", 1307-1342.
76 Judgment, ibidem, para. 381-383.
77 Ibidem, para. 387.
78 Ibidem, para. 398.
79 See "red" in a tripartite scheme. Ratner, ibidem, 1340.

> has done in Ukraine since the Court's Order on provisional measures. The Respondent's conduct not only dramatically worsened the relations between the Parties, almost entirely eliminating the possibility that the dispute could be peacefully settled, but concretely affected Ukraine's ability to prepare its case before the Court, including its ability to collect evidence located in the territory now under Russian control, thereby making the dispute more difficult to resolve. [80]

Despite these considerations, the Court's decision faced notable disagreement, as evidenced by the ten to five split, with five judges dissenting on whether one of the clearest and most indisputable examples of waging an aggressive war—referred to as a 'special military operation'—constitutes an aggravation of the interstate dispute that could hinder its effective resolution. On the other hand, Judge Bennouna emphasized that the Court has historically refrained from explicitly sanctioning non-compliance with this type of provisional measure.[81] Therefore, the confirmation of the violation of the non-aggravation provisional measure can be regarded as the most the ICJ was able to achieve, considering its limitations and the circumstances prevailing at the time the judgment was rendered.[82]

Although Ukraine had hoped its legal strategy would yield a direct and unequivocal recognition of Russia's aggression, the Court ultimately issued a more nuanced condemnation of these actions, stopping short of a definitive ruling on the illegality of Russia's conduct. While the judgment provided some acknowledgment of Ukraine's claims, it fell short of fully addressing the gravity of the situation. Thus, Ukraine received less than what it had

80 *Application of the International Convention for the Suppression of the Financing of Terrorism and the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation),* Mertis, Dissenting Opinion of Judge Sebutinde, ICJ Judgment of 31 January 2024, I.C.J. Reports 2024, para. 36.

81 *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),* Declaration of Judge Bennouna, ICJ Judgment of 31 January 2024, I.C.J. Reports 2024.

82 For critique of this condemnation, see: *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),* Declaration of Judge Abraham, ICJ Judgment of 31 January 2024, I.C.J. Reports 2024, para. 6 and *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation),* Declaration of Judge Yusuf, ICJ Judgment of 31 January 2024, I.C.J. Reports 2024, para. 12.

sought, but more than might have been anticipated given the limitations under which the Court was operating.

As a consequence of the above, the Court could not offer more than a mere declaration that the breach of the provisional measure constituted adequate satisfaction. This approach illustrates the Court's generally restrictive and narrowly focused consideration of cases, reaffirming its established practice of avoiding issues that are not directly central to the subject-matter of the dispute.[83] The judgment offers a crucial lesson for states, as well as UN organs and agencies, aiming to use the ICJ as a platform for advancing interpretations of international law. It highlights the importance of being highly strategic and conducting a comprehensive cost-benefit analysis when submitting allegations or framing claims and advisory opinion requests.[84]

4. Conclusions

In conclusion, the ICJ's judgment addresses the 'clean hands' doctrine, rejecting it as a defense in interstate disputes and affirming that neither customary nor general principles of international law support its application. The Court also clarified that a valid basis of jurisdiction and admissibility suffices for a case to proceed.

This judgment further refines the interpretation of 'funds' under ICSFT, confining it strictly to financial assets and excluding non-monetary resources like weapons. While this narrow scope aligns with a traditional understanding of financial support, it risks limiting ICSFT effectiveness in combating the financing of terrorism by restricting prosecutable forms of innovative material assistance to terrorist groups.

The Court also acknowledged the limited capacity of states to gather evidence when occupied territories restrict access. As cooperation obligations in such cases often prove ineffective, user-generated evidence from bystanders and survivors may gain increased significance, potentially setting a precedent in future cases, such as the *Application of the Convention on*

83 *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),* Declaration of Judge Yusuf, ICJ Judgment of 31 January 2024, I.C.J. Reports 2024, para. 2.

84 Anderson, "Episode 62 – Black and White, Chagos at the ICJ with Philippe Sands".

the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel).[85]

Regarding provisional measures, two important conclusions arise. First, the ICJ has clearly delineated compliance with the convention from compliance with provisional measures. Second, despite the ICJ's ongoing role as a judicial body, its orders remain largely declaratory, highlighting the Court's limited capacity to enforce compliance. While interest in ICJ proceedings is renewing, especially amid armed conflicts, this judgment starkly reveals the limitations of international law, where jurisdictional and procedural constraints may not fully address the demands of the parties.

While Ukraine's legal challenge against Russia demonstrates a remarkable use of international legal avenues, this case underscores a broader need for a stronger legal framework to address state violations in both wartime and peacetime. The challenges Ukraine faces might have been mitigated had a treaty, like the long-proposed Crimes Against Humanity Treaty,[86] been in place, potentially obviating the need to stretch the interpretation of existing conventions beyond their intended purposes.

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85 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, Application instituting proceedings and request for the indication of provisional measures, ICJ, 29 December 2023.

86 "We Need a Crimes Against Humanity Treaty Now", https://cahtreatynow.org/.

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