Ewa Salkiewicz-Munnerlyn
Diplomat and Lecturer of International Law,
Prof at the Krakowska Akademia Andrzej Frycz Modrzewski in Krakow

INTERIM MEASURES OF PROTECTION (UKRAINE V.RUSSIA) - ORDER OF 19 APRIL 2017

I. INTRODUCTION

On 16 January 2017, Ukraine instituted proceedings against the Russian Federation with regard to alleged violations of the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999 (ICSFT) and the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965 (CERD). In respect of the events in the eastern part of its territory, Ukraine has brought proceedings only under the ICSFT. With regard to the events in Crimea, Ukraine's claim is based solely upon CERD.

On the same day, Ukraine submitted a request for the indication of provisional measures, aimed at safeguarding the rights it claims under those two conventions pending the Court's decision on the merits. Ukraine asked the Court to indicate the following provisional measures:

With respect to the Terrorism Financing Convention, Ukraine requests that the Court order the following provisional measures:

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

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

(c) the Russian Federation shall halt and prevent all transfers from the territory of the Russian Federation of money, weapons, vehicles, equipment, training, or personnel to groups that have engaged in acts of terrorism against civilians in Ukraine, or that the Russian Federation knows may in the future engage in acts of terrorism against civilians in Ukraine, including but not limited to the 'Donetsk People's Republic', the 'Luhansk People's Republic', the 'Kharkiv Partisans', and associated groups and individuals.

(d) the Russian Federation shall take all measures at its disposal to ensure that any groups operating in Ukraine that have previously received transfers from the territory of the Russian Federation of money, weapons, vehicles, equipment, training, or personnel will refrain from carrying out acts of terrorism against civilians in Ukraine.

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

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

(b) the Russian Federation shall refrain from any act of racial discrimination against persons, groups of persons, or institutions in the territory under its effective control, including the Crimean peninsula.

(c) the Russian Federation shall cease and desist from acts of political and cultural suppression against the Crimean Tatar people, including suspending the decree banning the Mejlis of the Crimean Tatar People and refraining from enforcement of this decree and any similar measures, while this case is pending.

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

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

Russia made the following statement:

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

On 19 April 2017, the ICJ issued an order indicating some interim measures of protection in favour of Ukraine, only on the basis of the CERD but not on the basis of ICSFT [1]. This order safeguarded the interests of etnic minorities in Crimea, an protected the vistims of armed conflict in the eastern regions of Ukraine. The Court obliged the Russian Federation to refrain from constraining the representative body of the Crimean Tartars and to ensure the availability of education in Ukrainian language in Crimea (para. 102). The Court also "reminds" both parties of the Minsk Agreement on the Donetsk and Luhansk regions, and "expects" them to work towards its full implementation (para. 104).

II. PLAUSIBILITY OF STATE RIGHTS

Judge Cancado Trindade in his separate opinion spoke about "plausibility of state rights" versus „human vulnerability" (esp. in paras 36 et *seq*) [2].

The Decisive Test: Human Vulnerability over "Plausibility" of Rights.

In this case, Judge Trindade pointed out that indiscriminate shelling of civilians could cause further irreparable damage, and the urgency of the situation. In his opinion, which I agree, he mentioned, that the test of human vulnerability entitles even more than the one of "plausibility" of rights, for the indication of provisional measures of protection, in order to protect human beings who are vulnerable. The so-called "plausibility" test is a recent invention of the Court and it was introduced in the case of Questions Relating to the Obligation to Prosecute or Extradite (Belgium versus Senegal, Order of 28.05.2009) [3]. Since then, the ICJ tried to clarify its meanaing. Sometimes it was related to to rights, sometimes to facts, or

else to arguments of the parties, - as can be seen in paragraphs 63-64, 66-71, 74-75, 79 and 82-83 of the present Order. The ICJ used the term "plausible" not only in respect of rights (paras. 63-64, 69, 75, 79 and 82), but also in respect of the application of international instruments (para. 70), thus disclosing two distinct forms of legal "plausibility". Likewise, in the present Order, the ICJ uses the term "plausible" also in relation to facts (paras. 66, 68, 75 and 82-83), thus referring to another distinct form, this time of factual "plausibility". The term is used also by reference to "intent" and "purpose" (para. 66) and in relation to arguments or allegations (para. 71).

The question arises if it ist reasonable to use the "plausibility" test in this way, without precision? Second: in the present Order, the ICJ seeks to apply "plausibility" not only as a test (supra), but also even as a "condition" (para. 83). Such approach can create a difficulty or obstacle for the consideration and adoption of provisional measures of protection in relation to the dispute as a whole before the Court, encompassing both the ICSFT and the CERD Conventions, and extending to both Crimea and eastern Ukraine.

It is not the first time the ICJ used the so-called "plausibility" test without certainity. The same judge Trindade already highlighted this point in his Separate Opinion in the case of Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste versus Australia) [4], where he said that "a right is a right, irrespective of its so-called 'plausibility' (whatever that might concretely mean)" (para. 48). The requirements for the granting of provisional measures of protection are: the gravity of the situation, the urgency of the need of such measures, and the probability of irreparable harm and they are all met in this case. In eastern Ukraine, the fundamental rights to life and to the security and integrity of the person are in daanger. And he went even too far saying that: „ 44. As I have been sustaining along the years, time and time again, provisional measures of protection have an autonomous legal regime of their own. This being so, it is clear to me that human vulnerability is a test even more compelling than "plausibility" of rights for the indication or ordering of provisional measures of protection. In so acknowledging

and sustaining, one is contributing to the ongoing historical process of humanization of contemporary international law."

III. *PRIMA FACIE* JURISDICTION

When a request for the indication of provisional measures is submitted to it, the Court does not need to be sure in a definitive manner that it has jurisdiction as regards the merits of the case [1]. In the present case, Ukraine seeks to found the jurisdiction of the Court on Article 24, paragraph 1, of the ICSFT and on Article 22 of CERD. The Court must determine whether the jurisdictional clauses contained in these instruments prima facie confer upon it jurisdiction to rule on the merits of the case, enabling it — if the other necessary conditions are fulfilled — to indicate provisional measures.

After observing that Ukraine and the Russian Federation are parties to both conventions at issue in the present case, the Court points out that both Article 24, paragraph 1, of the ICSFT and Article 22 of CERD make the Court's jurisdiction conditional on the existence of a dispute arising out of the interpretation or application of the respective convention. At this stage of the proceedings, the Court must therefore examine (1) whether the record shows a disagreement on a point of law or fact between the two States; and (2) whether that disagreement concerns "the interpretation or application" of the respective convention.

(a) The International Convention for the Suppression of the Financing of Terrorism. The Court considers that, as it appears from the record of the proceedings, the Parties differ on the question of whether the events which occurred in eastern Ukraine starting from the spring of 2014 have given rise to issues relating to their rights and obligations under the ICSFT. It notes that Ukraine contends that the Russian Federation has failed to respect its obligations under Articles 8, 9, 10, 11, 12 and 18. In particular, Ukraine maintains that the Russian Federation has failed to take appropriate measures to prevent the financing of terrorism in Ukraine by public and private actors on the territory of the Russian Federation and that it has repeatedly refused to investigate, prosecute, or extradite "offenders within its territory brought

to its attention by Ukraine". The Russian Federation positively denies that it has committed any of the violations set out above.

The Court considers that at least some of the allegations made by Ukraine appear to be capable of falling within the scope of the ICSFT ratione materiae. It is of the view that the above-mentioned elements are sufficient at this stage to establish prima facie the existence of a dispute between the Parties concerning the interpretation and application of the ICSFT. During the hearings, the question of the definition of "funds" in Article 1, paragraph 1, of the Convention was raised. The question was also raised whether acts of financing of terrorist activities by the State itself fall within the scope of the Convention. For the purposes of determining the existence of a dispute relating to the Convention, the Court considers that it does not need to make any pronouncement on these issues.

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

The Court is of the view that the acts referred to by Ukraine, in particular the banning of the Mejlis and the alleged restrictions upon the cultural and educational rights of Crimean Tatars and ethnic Ukrainians, appear to be capable of falling within the scope of CERD ratione materiae. In its opinion, the above-mentioned elements are sufficient at this stage to establish prima facie the existence of a dispute between the Parties concerning the interpretation and application of CERD.

The Court noted, that the ICSFT and CERD set out procedural preconditions to be fulfilled prior to the seisin of the Court. Thus, under Article 24, paragraph 1, of the ICSFT, a dispute that "cannot be settled through negotiation within a reasonable time" shall be submitted to arbitration at the request of one of the parties, and may be referred to the Court only if the parties are unable to agree on the organization of the arbitration within six months from the date of the request. Under Article 22 of CERD, the dispute referred to the Court must be a dispute "not settled by negotiation or by the procedures expressly provided for in this Convention". In addition, Article 22 states that the dispute may be referred to the Court at the request of one of the parties thereto only if the parties have not agreed to another mode of settlement. The Court noted that neither Party contested this condition.

Regarding the negotiations to which both compromissory clauses refer, the Court observes that negotiations are distinct from mere protests or disputations and require a genuine attempt by one of the parties to engage in discussions with the other party, with a view to resolving the dispute. Where negotiations are attempted or have commenced, the precondition of negotiation is only met when the attempt to negotiate has been unsuccessful or where negotiations have failed, become futile or deadlocked. In order to meet the precondition of negotiation contained in the compromissory clause of a treaty, the subject-matter of the negotiations must relate to the subject-matter of the dispute, which, in turn, must concern the substantive obligations contained in the treaty in question.

At this stage of the proceedings, the Court first has to assess whether it appears that Ukraine genuinely attempted to engage in negotiations with the Russian Federation, with a view to resolving their dispute concerning the latter's compliance with its substantive obligations under the ICSFT and CERD, and whether Ukraine pursued these negotiations as far as possible. With regard to the dispute under the ICSFT, if the Court finds that negotiations took place but failed, it will also have to examine whether, prior to the seisin of the Court, Ukraine attempted to settle this dispute through arbitration, under the conditions provided for in Article 24, paragraph 1, of the Convention. With regard to CERD, along with the precondition

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

(a) The International Convention for the Suppression of the Financing of Terrorism (paras. 47-54)

The Court notes that it appears from the record of the proceedings that issues relating to the application of the ICSFT with regard to the situation in eastern Ukraine have been raised in bilateral contacts and negotiations between the Parties. Diplomatic exchanges have taken place, in which Ukraine specifically referred to alleged breaches by the Russian Federation of its obligations under the ICSFT. Over a period of two years, the Parties also held four in-person negotiating sessions specifically addressed to the ICSFT. These facts demonstrate that, prior to the filing of the Application, Ukraine and the Russian Federation had engaged in negotiations concerning the latter's compliance with its substantive obligations under the ICSFT. It appears from the facts on the record that these issues could not then be resolved by negotiations.

With regard to the precondition relating to the submission of the dispute to arbitration, the Court notes that by a Note Verbale dated 19 April 2016, Ukraine submitted a request for arbitration to the Russian Federation. The Russian Federation responded by means of a Note Verbale dated 23 June 2016, in which it offered to discuss "issues concerning setting up" the arbitration at a meeting it suggested should be held a month later. By a Note Verbale dated 31 August 2016, Ukraine proposed to the Russian Federation to resort to the mechanism of an ad hoc chamber of this Court. In its Note Verbale to Ukraine, dated 3 October 2016, the Russian Federation rejected this proposal and submitted its own draft arbitration agreement and accompanying rules of procedure. At a meeting on 18 October 2016, the Parties discussed the organization of the arbitration but no agreement was

reached. Further exchanges between the Parties did not resolve the impasse. It appears that, within six months from the date of the arbitration request, the Parties were unable to reach an agreement on its organization.

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

(b) The International Convention on the Elimination of All Forms of Racial Discrimination (paras. 55-61)

The Court recalls that it has earlier concluded that the terms of Article 22 of CERD established preconditions to be fulfilled before the seisin of the Court. It notes that, as evidenced by the record of the proceedings, issues relating to the application of that Convention with regard to the situation in Crimea have been raised in bilateral contacts and negotiations between the Parties, which have exchanged numerous diplomatic Notes and held three rounds of bilateral negotiations on this subject. These facts demonstrate that, prior to the filing of the Application, Ukraine and the Russian Federation engaged in negotiations regarding the question of the latter's compliance with its substantive obligations under CERD. It appears from the record that these issues had not been resolved by negotiations at the time of the filing of the Application.

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

the fact that Ukraine did not bring the matter before the CERD Committee does not prevent the Court from concluding that it does have prima facie jurisdiction.

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

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

IV. RISK OF IRREPARABLE PREJUDICE AND URGENCY

The Court said that the conditions required for the indication of provisional measures in respect of the rights invoked by Ukraine on the basis of the ICSFT are not met, and for that reason the Court considers that the issue of the risk of irreparable prejudice and urgency arises only in relation to the provisional measures sought with regard to CERD.

The Court recalls that it has the power to indicate provisional measures when irreparable prejudice could be caused to rights which are the subject of judicial proceedings, but that this power will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to the rights in dispute before the Court gives its final decision.

The Court notes that certain rights in question in these proceedings, in particular the political, civil, economic, social and cultural rights stipulated in Article 5, paragraphs (c), (d) and (e) of CERD, are of such a nature that prejudice to them is capable of causing irreparable harm. The Court is of the opinion that Crimean Tatars and ethnic Ukrainians in Crimea are in vulnerable situation.

In this regard, the Court takes note of the report on the human rights situation in Ukraine (16 May to 15 August 2016), when the Office of the United Nations High Commissioner for Human Rights (OHCHR) acknowledged that "the ban on the Mejlis, which is a self-government body with quasi-executive functions, appears to deny the Crimean Tatars, an indigenous people of Crimea, the right to choose their

representative institutions", as well as of the report on the human rights situation in Ukraine (16 August to 15 November 2016), in which the OHCHR explained that none of the Crimean Tatar NGOs currently registered in Crimea can be considered to have the same degree of representativeness and legitimacy as the Mejlis, elected by the Crimean Tatars' assembly, namely the Kurultai. The Court also takes note of the report of the OSCE Human Rights Assessment Mission on Crimea (6 to 18 July 2015), according to which "education in and of the Ukrainian language is disappearing in Crimea through pressure on school administrations, teachers, parents and children to discontinue teaching in and of the Ukrainian language". The OHCHR has observed that "the start of the 2016-2017 school year in Crimea and the city of Sevastopol confirmed the continuous decline of Ukrainian as a language of instruction" (report on the human rights situation in Ukraine (16 August to 15 November 2016)). These reports show, prima facie, that there have been restrictions in terms of the availability of Ukrainian-language education in Crimean schools.

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

I many cases of the ICJ jurisprudence the irreparable prejudice was considered the main reason to indicate the interim measures.[1] The irreparable prejudice is as I said [6, p. 69; 7, p. 1026-1077], and I was quoted by Judge Bula- Bula: „This, I believe, is a type of irreparable prejudice (concerning "damage not capable of any reparation"). Of course the death of human beigns cannot be repaired…..It can be paid, but it is irreparable prejudice.

[1] See the dissenting opinion of Judge Bula -Bula in case -Arrest warrant of 11 April 2000 (DRC v.Belgium, p.222 <http://www.icj-cij.org/docket/files/121/8106.pdf>; the cases concerning Nuclear Tests (Australia v. France) (I.C.J. Reports 1973, p. 103); United States Diplomatic und Consular Staff in Tehran (United Stutes of America v. Iran) (I. C.J. Reports 1979, p. 19); Application of the Convention on the Prerention und Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro) (I. C. J. Reports 1993, p. 19); and Vienna Convention on Consular Relations (Paraguay v. United States of America) (I.C.J. Reports 1998, p. 36); LaGrand (Germany v. United States of America) (I. C.J. Reports 1999, p. 15); and the case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) (I. C. J. Reports 2000, p. 127, para. 39

V. CONCLUSION

The Court concludes that the conditions required by its Statute for it to indicate provisional measures in respect of CERD are met. Reminding the Russian Federation of its duty to comply with its obligations under CERD, the Court considers that, with regard to the situation in Crimea, the Russian Federation must refrain, pending the final decision in the case, from maintaining or imposing limitations on the ability of the Crimean Tatar community to conserve its representative institutions, including the Mejlis. In addition, the Russian Federation must ensure the availability of education in the Ukrainian language. The Court considers it necessary to indicate a measure aimed at ensuring the non-aggravation of the dispute between the Parties.

With regard to the situation in eastern Ukraine, the Court reminds the Parties that the Security Council, in its resolution 2202 (2015), endorsed the "Package of Measures for the Implementation of the Minsk Agreements", adopted and signed in Minsk on 12 February 2015. The Court expects the Parties, through individual and joint efforts, to work for the full implementation of this "Package of Measures" in order to achieve a peaceful settlement of the conflict in the eastern regions of Ukraine. Here is the Operative clause (para.106)- The full text of the final paragraph of the Order reads as follows: "For these reasons, the Court, indicates the following provisional measures,

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

(a) By thirteen votes to three,

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

In Favour: President Abraham; Vice-President Yusuf; Judges Owada, Bennouna, Cançado Trindade, Greenwood, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford; Judge ad hoc Pocar;

Against: Judges Tomka, Xue; Judge ad hoc Skotnikov;

(b) Unanimously,

Ensure the availability of education in the Ukrainian language;

(2) Unanimously,

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

Judge Owada appends a separate opinion to the Order of the Court; Judge Tomka appends a declaration to the Order of the Court; Judges Cançado Trindade and Bhandari append separate opinions to the Order of the Court; Judge Crawford appends a declaration to the Order of the Court; Judges ad hoc Pocar and Skotnikov append separate opinions to the Order of the Court.

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Салкевіч-Маннерлін Е. Проміжні заходи захисту (справа Україна проти Росії) – наказ від 19 квітня 2017 року

Анотація. Справа була представлена Україною 16 січня 2017 року і Міжнародний Суд ООН 19 квітня 2017 року видав наказ, який містить деякі проміжні заходи захисту на користь України, щоправда тільки щодо порушення Конвенції про ліквідацію всіх форм расової дискримінації, а не Міжнародної конвенції про боротьбу з фінансуванням тероризму. Як і в інших подібних випадках Суд розглянув, чи дотримані всі умови, тобто чи наявна юрисдикція prima facie, непоправна шкода і терміновість. Знову обговорювалося поняття «вирогідності наявності прав держави». Наказ МС відображає існуючі напрямки юрисдикції Суду у випадку, коли виконані всі необхідні вимоги.

Ключові слова: юрисдикція prima facie, непоправна шкода, вирогідність, вразливість.

Salkiewicz-Munnerlyn E. Interim measures of protection (Ukraine v.Russia) - order of 19 april 2017

Abstract: The case was introduced by Ukraine on 16 January 2017 and the ICJ on 19 April 2017 issued an order indicating some interim measures of protection in favour of Ukraine, only on the basis of the CERD but not on the basis of ICSFT. As in other similar cases Court examined if all conditions are met, it means competence prima facie, irreparable prejudice and urgency. Again the notion of «plausibility of State rights» was discussed. The order followed the actual tendencies in the ICJ jurisdcition as far as requirements are concerned.

Key words: *prima facie* jurisdiction, irreparable prejudice, plausibility, vulnerability.