UCLouvain

Faculté de droit et de criminologie

The International Convention for the Suppression of Financing of Terrorism

An analysis of the duty to prevent State's agents financing of terrorism

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Année académique 2021-2022

Master de spécialisation en droit international public

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Acknowledgements:

First of all, I would like to thank all the professors of public law I had the chance to learn from. The passion I found in this field of study was unexpected but offered me intellectual opportunities I had no idea of. I would specifically thank Professor D'Argent for his advice during the lectures and the preparation of this thesis. "Passion first!". I would also like to address my sincerest gratitude to Professor Radi, who followed the development of my passion since the very beginning. Finally, I would turn my thoughts to Professor Romainville, whose contagious enthusiasm paved my road to public international law.

Once again, my family and friends have shown an incommensurable support for my projects. I could not demonstrate enough gratitude towards the closest of mines whose help has never faded. My kindest affection goes to my four-legged friends, whose I shall always miss the company. In their absence, I have been reminded that annoyance is temporary, but glory is eternal. A motivational sentence that, even in the darkest of times, turned on the lights. I would also tarry a moment on those whose musical talent shaped my mind: Khatia Buniatishvili, Anna Fedorova, Arthur Rubinstein, etc.

Finally, I would show courtesy to anyone who shall read these lines. In the best hope that my work should please you, allow me to propose you the final chapter of my student life.

Guillaume Bach

Table of content

Introduction

On the 24 February 2022, the Russian Federation military entered the Ukrainian territory, new turning point of the conflict between the two countries. It appears indeed, *a minima* on a judicial point of view, that the different has crystallised before the International Courts on a plethora of issues: maritime boundaries delimitations in the Sea of Azov, capture of Ukrainian vessels, allegations of financing of terrorism and, recently, allegations of genocide. The present study proposes an analysis of the judgement of the International Court of Justice considering the preliminary objections raised by the Russian Federation in the 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. Specifically, the focus is brought on the interpretation of the notion of "person" under the ICSFT, in connection with the financing of terrorism by State's agents and the duty for States to prevent such financing.

In order to comprehensively understand the scope of the duty to prevent lying in the ICSFT, the first chapter of this work presents the Convention in its historical context. Therefore, the context of the adoption of the Convention is presented, notably concerning the terrorist attacks which led to its creation. This is followed by an analysis of the preparatory works of the Convention which contain the intentions of the State's parties to the negotiations. In this light, the content of the ISCFT is summarily presented, and completed with a short comparison with the Convention on the Physical Protection of Nuclear Material and of the International Convention for the Suppression of Terrorist Bombings.

The second chapter proposes an overview of the concrete legal procedure of the case. After a short review of the several legal conflicts between Ukraine and the Russian Federation before the International Court of Justice, a summary of the legal arguments raised by the parties regarding the issue of this thesis is advanced. As the critical point of the research, a detailed commentary of the paragraphs 59 to 61 of the judgement demonstrates the argumentation of the Court concerning the duties of States parties to the ICSFT. The notion of "person", the obligations to be fulfilled by the States and the scope of application of the Convention are therefore determined. The interpretation of the Court is moreover completed by the relevant dissenting and separate opinions of the Judges.

Finally, the third chapter of this paper investigates the implications of the Bosnia Genocide case and the United Nations Security Council resolution 1373 on the duty to prevent the financing of terrorism by States' agents. A final consideration is brought concerning the responsibility of the States parties to the ICSFT, in relation with the duty to refrain, the duty to prevent, and the duty to cooperate provided by the Convention. Concretely, it is argued that the scope of the duty to prevent the financing of terrorist acts does not induce *per se* a duty for State to refrain from financing these acts, even though this prohibition lies in the resolution cited above. However, it is supported that the disrespect of the duty to refrain leads to an automatic breach of the obligation to prevent. Moreover, the conditions under which the duty to prevent would be neglected are enlightened. To conclude, following the methodological limits of the thesis, an overture on the States' agents immunities is raised.

Chapter I: The International Convention for the Suppression of the Financing of Terrorism

I. Context of the adoption

It is first necessary to remind that the ICSFT is no isolate legal instrument regarding international terrorist activities. Created in a context of development of international conventions regarding this matter, the ICSFT tends to complete fields of international law that were not covered yet[1]. Precisely, the Convention avoids any sectorial focus and broadens the international legal order to sources of terrorist activities' financing in general. The Convention, elaborated through a UN *Ad Hoc* Committee established by the UN Resolution 51/210 (17th December 1996)[2], follows, *exempli gratia*, the International Convention for the Suppression of Terrorist Bombings (1997). Others international instruments are connected to the Convention in its Annex and will be briefly analysed at the end of this chapter.

Shall not be forgotten the international context preceding the establishment of the Committee, notably the adoption of the UN Resolution 49/60 (9th December 1994)[3]. In its Annex, the General Assembly remains *"deeply disturbed by the world-wide persistence of acts of international terrorism in all its forms and manifestations, including those in which States are directly or indirectly involved, which endanger or take innocent lives, have a deleterious effect on international relations and may jeopardize the security of States"*[4]. Would be underlined the alleged State sponsoring of terrorism in the 1990s by Syria, Sudan, Iran or Libya[5], *exempli gratia* the bombing of the United States Embassy premises in Nairobi in 1998, whose effects on the drafting of the Convention have already been shown[6].

The preamble of the Convention also demonstrates the interests of the States to develop such a field of law. First the resolutions cited above are recalled, and then are

[1] KLEIN Pierre, New-York: United Nations, 2009, from the website of the United Nations Audio-visual Library of International Law, http://www.un.org/law/avl, accessed on 15 July, 2020.
[2] Resolution 51/210 UNGA on measures to eliminate international terrorism, A/RES/51/210, 16 January 1997.
[3] Resolution 49/60 UNGA on measures to eliminate international terrorism, A/RES/46/60, 9 December 1994.
[4] *Ibidem*, Annex.
[5] *Ibidem*, Annex.
[6] BANTEKAS I., "The International Law of Terrorist Financing", *American Journal of International Law*, 2003, Vol. IIIX, n°2, pp. 315–333.

specified two concerns: *"the number and seriousness of acts of international terrorism depend on the financing that terrorists may obtain"* and *"the urgent need to enhance international cooperation among States in devising and adopting effective measures for the prevention of the financing of terrorism, as well as for its suppression through the prosecution and punishment of its perpetrators"*.[7] Accordingly, a decisive impulse is pursued regarding effectivity of measures concerning the financing of terrorism through cooperation. It shall be noticed that this focus extends to both prior and posterior terrorist activities.

Nowadays, the ICSFT is one of the most ratified international convention, especially due to the urge presented by the UNGA in its 51/210 resolution. One hundred eighty-nine States are parties to the Convention, including the Russian Federation and Ukraine since 2002, both without reservation[8]. In accordance with its Article 26, the Convention has then entered into force and is to be considered as fully binding between its parties.

II. Preparatory works of the Convention

It is first relevant to analyse the report of the *Ad Hoc* Committee presented to States in May 1999 and its focus on State financing. As regards the definition of financing, the concern of the drafters was initially to cover all means of financing of the most serious terrorist acts[9]. In such circumstances, it was intended to include both "unlawful" and "lawful" means; as, for instance, racketeering, thieveries, or as private and public financing, financing provided by associations, etc. While the definition of an offence is specifically built within the scope of pre-existing anti-terrorist conventions at that time[10], the axis of analysis is based on the knowledge and the intention of the fund's provider. The position defended in the report is to exclude from the scope of the Convention those who might finance terrorism in "good faith", regardless of their statute.

The Committee nevertheless addresses the issue of State financing in a subtracting way: *"Different views were expressed regarding the use of the term "person". Some*

[7] International Convention for the Suppression of the Financing of Terrorism adopted 9 December 1999, 2178 UNTS p.197, A/RES/54/109 (entered into force 10 April 2002), Preamble.
[8] Status of the International Convention for the Suppression of the Financing of Terrorism, New-York: United Nations Treaty Collection, 19 July 2022, https://treaties.un.org/, accessed on 19 July 2022.
[9] *Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996*, New York: UN General Assembly, 5 May 1999, Supplement n° 37 (A/54/37), 1999.
[10] *Ibidem.*

suggested that it should cover both natural and legal persons. Others preferred the insertion of the phrase "or State" after the words "or any person". (...)". The final position of the Committee did not include the financing of terrorist activities by a State in the phrasing of the Convention.

Concerning the report of the Working Group, opened to all States and to members of several International Organisations (International Atomic Energy Agency, International Committee of the Red Cross, International Criminal Police Organisation, etc.), the choice has been expressed to rephrase the definition of financing in the Article 2 of the Convention, dedicated to the notion of offence[11]. Therefore, the definition of an offence as framed in the Article 2 of the Convention pursues two objectives. First, as established in the precedent report, the notion of offence is established with due regards to the other anti-terrorism conventions. Hence, mechanisms of updating have been conceived in order to actualise the list of antiterrorism conventions annexed[12]; a particular attention is given to Article 2 and its interpretation through an interconnected framework of conventions completing each other's.

In addition, the second objective of Article 2 is about issues that were not governed by the existing conventions. Except for the International Convention for the Suppression of Terrorist Bombings, offences causing death or serious bodily injury were absent of anti-terrorism conventions. A particular attention was granted to the conviction of a person: under Article 2 of the Convention, the level of proof was lowered, and the scope of complicity with terrorist activities broadened. It must be concluded that no consideration toward State financing is herein raised, the content of the Convention debated within the frame of the precedent report concerning this matter.

Howbeit, State financing of terrorist activities is anew discussed during the 32nd to 37th seances of negotiation of the Sixth Commission of the UNGA. During these sessions, debates arose on State-financed terrorism which was finally put aside: as an example, the Pakistani delegation presented the need of defining the financing of

[11] *Measures to eliminate international terrorism Report of the Working Group*, New York: UN General Assembly, 26 October 1999, A/C.6/54/L.2, 1999.
[12] *Ibidem.*

terrorist activities outside the scope of legitimate struggle of freedom movements but including the concept of State financing of terrorism[13].

Following the same kind of consideration, the Cuban delegation demonstrated its concern about terrorist activities *"instigated, financed or tolerated by States"*[14]. The delegation also deplored the fact that some actors contributing to the financing of terrorism were excluded from the definition of the Convention itself, such as corporations and States. Cuba considered that those actors were of a primordial nature and that the reluctance of States to include them during the negotiations of the Convention would weaken its purpose.

At the end of the day, the scope of the Convention has not been defined as distinguishing acts of terrorism of the contests of peoples under alien domination or foreign occupation under the right of self-determination[15]. Have been enlighten by the Cuban, Iraqi, Yemenite and Pakistani delegations the lack of definition of terrorism in the Convention and the lacunae in the definition of financing; the delegations insisted once again on the risks linked to the exclusion of some legal entities or States themselves but went along with the global consensus[16]. Several States have therefore highlighted the importance of general principles of law (*pacta sunt servanda)*, the efforts that were to be pursued through cooperation and the relevant resolutions present in the preamble of the Convention[17].

III. Content of the Convention

The Convention grants first a consequent attention to definitions in its first two articles. Article 1 provides three definitions: "funds", "State or government facility" and "proceeds". The notion of funds is drafted in an extensive way, in order to cover all sorts of support to terrorist activities: "*whether tangible or intangible, movable or immovable,*

[13] *Sixth Committee Summary record of the 34th meeting,* New York: UN General Assembly, 16 November 1999, A/C.6/54/SR.34 ,1999.
[14] *Sixth Committee Summary record of the 32nd meeting,* New York: UN General Assembly, 15 November 1999, A/C.6/54/SR.32, 1999.
[15] *Sixth Committee Summary record of the 37th meeting,* New York: UN General Assembly, 23 November 1999, A/C.6/54/SR.37, 1999.
[16] *Sixth Committee Summary record of the 35th meeting,* New York: UN General Assembly, 18 November 1999, A/C.6/54/SR.35, 1999.
[17] *Ibidem, 32nd and 37th meetings.*

however acquired, and legal documents or instruments in any form"[18]. The term is exemplified with a non-exhaustive enumeration of means of financing and detailed in its scope in Article 2[19]. "State or government facility" is to be understood as related to permanent or temporary installation occupied by any public authority in general: State's representatives, members of Government, members of the Judicial or Legislative Power, etc. Finally, the term "proceeds" is about direct or indirect obtention of funds through an offence as defined in Article 2.

Article 2 is a key provision of the Convention. Its first paragraph defines the notion of terrorism as any person which "*by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part"* to commit any act of violence within the scope of the other antiterrorist conventions listed in the annex (cfr infra) or causing death or serious physical injuries to civilians or non-parties to an 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*" [20]. The notion of offence is determined widely while defining the scope of origin of the funds and focuses on the knowledge and intention of the person financing.

It shall be notified that the funds concerned do not have to be used (paragraph 3), and the offence does not have to succeed in order to be characterised as such (paragraph 4). A final list of offences is compiled in Article 2 paragraph 5: participating in the perpetration of the offence as an accomplice, organising or directing the perpetrators of the offence, or contributing to the accomplishment of the offence "*with the aim of furthering the criminal activity or criminal purpose of the group"* or "*in the knowledge of the intention of the group"*[21] are equally condemned.

Defined that way, the Convention provides that States parties shall criminalise the offense in their legal order (Article 4). Moreover, both legal entities and individuals are, under Article 5, subjects to criminal, civil or administrative liability. Article 6 prohibits

[18] International Convention for the Suppression of the Financing of Terrorism adopted 9 December 1999, 2178 UNTS p.197 (entered into force 10 April 2002).
[19] MARTIN J-C., *Les règles internationales relatives à la lutte contre le terrorisme*, Bruxelles : Bruylant, 2006, p.618.
[20] International Convention for the Suppression of the Financing of Terrorism adopted 9 December 1999, *op. cit.*
[21] *Ibidem.*

the justification of the perpetration of any offence by "*political, philosophical, ideological, racial, ethnic, religious or other similar nature*" considerations[22]. Focusing on jurisdictional issues, the Convention proposes a large scale *ratione loci* and *ratione personae*. Situations where the financing occurs in the territory of the State and where the offence occurs in the territory of the State are both covered. Moreover, both the personal jurisdiction (active and passive) and the universal jurisdiction over the perpetrator can be claimed under the Convention[23].

In addition, in the situation where the perpetrator is present on the territory of a different State party to the Convention than the one in the territory of which the terrorist activity took place, the authorities of the "host" State can choose between either to prosecute the case or to extradite the perpetrator to the other State party (Article 10). In order to facilitate the extradition and mutual legal assistance between State parties, regulated under Articles 11 and 12, the notion of offence covered by the Convention cannot be limited as "fiscal" (Article 13) nor "political" (Article 14) offences only. Therefore, an extradition may not be refused on that ground alone[24].

Furthermore, a State party could refuse a request for extradition or mutual legal assistance if there are good reasons to believe that the request *"has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion"*[25] (Article 15). On the same ground, with the aim of protecting Human Rights, under Article 17, the right to a fair treatment, rights and guarantees for any person taken into custody or prosecuted shall be guaranteed, with due respect to the law of the "host" State[26].

Under Article 18, States parties are required to cooperate in the prevention of offences set out under Article 2 by taking all practicable measures to prevent within and outside their territories the occurrence of such terrorist events[27]. More precisely, the

[22] International Convention for the Suppression of the Financing of Terrorism adopted 9 December 1999, *op. cit. p.7.*
[23] KLEIN Pierre, New-York: United Nations, 2009, from the website of the United Nations Audio-visual Library of International Law, http://www.un.org/law/avl, accessed on 15 July 2020, *op. cit. p.3.*
[24] *Ibidem.*
[25] International Convention for the Suppression of the Financing of Terrorism adopted 9 December 1999, *ibidem.*
[26] KLEIN Pierre, New-York: United Nations, 2009, from the website of the United Nations Audio-visual Library of International Law, http://www.un.org/law/avl, accessed on 15 July 2020, *ibidem.*
[27] International Convention for the Suppression of the Financing of Terrorism adopted 9 December 1999, *ibidem.*

Convention stipulates the prohibition of illegal activities supporting terrorism, measures regarding financial institutions, regulations upon the opening of accounts and money transactions, etc. Two last considerations are provided: the obligation to cooperate in the prevention of offences by the exchange of information between coordinated relevant administrative institutions on the one hand, and with the International Criminal Police Organisation on the other hand.

Finally, the Article 20 recalls the principle of non-intervention in the domestic affairs while the Article 21 reminds the fact that nothing in the Convention shall prevent the "*other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes of the Charter of the United Nations, international humanitarian law and other relevant conventions*"[28] to be respected. Article 22 protects the exercise of exclusive jurisdiction of States on their own territory, Article 23 permits the amendment of the Convention, and Article 24 provides that any dispute on the interpretation of the Convention which cannot be settled through negotiations may be submitted to arbitration or to the International Court of Justice[29].

IV. Annex of the Convention

The Convention contains in its Annex nine sectorial conventions related to the fight against terrorism: the Convention for the Suppression of Unlawful Seizure of Aircraft (1970), the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971), the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (1973), the International Convention against the Taking of Hostages (1979), the Convention on the Physical Protection of Nuclear Material (1980), the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (1988), the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988), the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf (1988) and the International Convention for the Suppression of Terrorist Bombings (1997).

For the purpose of this work, a short summary of the relevant provisions of the

[28] International Convention for the Suppression of the Financing of Terrorism adopted 9 December 1999, *op. cit. p.7.*
[29] *Ibidem.*

Convention on the Physical Protection of Nuclear Material (CPPNM, 1980) and of the International Convention for the Suppression of Terrorist Bombings (ICSTB, 1997) is proposed. Those conventions seem to have had an impact on the drafting and the debates of the ICSFT[30]. Shall also be kept in mind that the *Ad Hoc* Committee established by the UN Resolution 51/210 prepared the ICSTB and the International Convention for the Suppression of Acts of Nuclear Terrorism (ICSANT, 2005)[31], based *inter alia* on the CPPNM[32]. It may then be useful to situate the ICSFT in the light of these Conventions; the CPPNM is therefore put in parallel with the ICSANT, even though the latter is not part of the Annex of the ICSFT.

Concerning the ICSTB, it shall first be read under the classical structure of the precedent conventions: parties agreed on definitions given to the reprehensible act, agreed to criminalise the act regardless of its motives and to insure mutual legal assistance, notably towards extradition[33]. On the other side, the ICSTB has also expanded the scope of application of the international legal order to new fields of terrorist activities, governed until there by local or bilateral agreements: bombing of public buildings, attacks with toxic chemicals, etc.[34]

Precisely, the ICSTB defines an offence as such: "*any person commits an offence (…) if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility with the intent to cause death or serious bodily injury or with the intent to cause extensive destruction of such a place, (…) where such destruction results in (…) major economic loss*"[35]. The following provisions broaden the scope of ancillary offences under this

[30] "(…) *the text of the revised draft was mostly based on the provisions of already existing conventions, adopting, in particular, the formulations of the relevant provisions of the Terrorist Bombings Convention (…)*"
Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, *op. cit. p.4.*
[31] D'ARGENT P., « Examen du projet de Convention Générale sur le Terrorisme International » in BANNELIER K *et alii* (directors), *Le droit international face au terrorisme*, Paris, Editions Pedone, 2002, pp. 121-140.
[32] International Convention for the Suppression of Acts of Nuclear Terrorism adopted 13 April 2005, 2445 UNTS p.89, A/RES/59/290 (entered into force 7 July 2007).
[33] WITTEN S., "The International Convention for the Suppression of Terrorist Bombings", in SAUL B. (director), *Research Handbook on International Law and Terrorism*, Cheltenham, Edward Elgar, 2020, sec. edition, pp.109-119.
[34] *Ibidem.*
[35] International Convention for the Suppression of Terrorist Bombings adopted 15 December 1997, 2149 UNTS p.256, A/RES/52/164 (entered into force 23 May 2001).

definition, notably concerning the illegal use of chemical, biological, and radioactive devices[36]. Moreover, the ICSTB ensures the existence of law enforcement cooperation through the criminalisation of the offense (Article 6), legal cooperation and extradition rules (Article 7)[37]. Finally, under Article 19, the Convention shall not affect other State's duties, in particular regarding the UN Charter and International Humanitarian Law, but is not applicable to State's army official activities, including during an armed conflict[38].

As for the CPPNM, the treaty criminalises the intentional disposal or use of nuclear material likely to cause death or serious injury to any individual or substantial damage to a property (Article 7)[39]. The CPPNM does not only focuses on the use of nuclear material, but also on the means of obtention of such materials and any act guided against nuclear installation leading to death, physical injury, or substantial damage to the installation[40].

In comparison, the ICSANT criminalises in the same phrasing than the ICSFT or the ICSTB offences contained in the CPPNM. Moreover, the ICSANT broadens the acts concerned by adding the fabrication of devices containing nuclear material, the acts of sabotage, and attacks on nuclear installations in the intention of the spread of radioactive or nuclear materials[41]. The Article 4 of the ICSANT, in the same spirit of the ICSTB, reminds the obligations of State parties to respect their obligations under the UN Charter and Humanitarian Law, without addressing the issue of legality of the use or threat of use of nuclear weapons by States (paragraph 4)[42]. It may then be noticed, all other things being equal, that States are expressly bound, under the annex of the ICSFT, to their obligations under the UN Charter.

[36] WITTEN S., "The International Convention for the Suppression of Terrorist Bombings", *op. cit. p. 10.*
[37] International Convention for the Suppression of Terrorist Bombings adopted 15 December 1997, *op. cit. p.10.*
[38] *Ibidem.*
[39] Convention of the Physical Protection of Nuclear Material adopted 26 October 1979, INFCIRC/274 (entered into force 8 February 1987).
[40] MARTIN J-C., *Les règles internationales relatives à la lutte contre le terrorisme, op. cit. p.7.*
[41] International Convention for the Suppression of Acts of Nuclear Terrorism adopted 13 April 2005, 2445 UNTS p.89, A/RES/59/290 (entered into force 7 July 2007).
[42] *Ibidem.*

Chapter II: Application of the ICSFT – Ukraine v. Russian Federation

I. Ukraine v. Russian Federation

As an introduction to this chapter, it is useful to contextualise the several judicial tensions between Ukraine and the Russian Federation. Between 2016 and 2019, three legal situations are balancing in parallel: a first dispute concerning coastal state rights in the Black Sea, Sea of Azov, and Kerch Strait, a second case on the 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, and a final case concerning the detention of three Ukrainian Naval vessels. Nowadays, a fourth case has been brought to the International Court of Justice concerning allegations of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide. A chronological timeline of this multiple cases can be found in Annex I.

For the purpose of this paper, a particular attention is given to the preliminary objections brought to the Court in 2019[43], aiming the research on the financing of terrorism and the interpretation of Article 2 of the ICSFT (cfr infra). It shall not be forgotten that the case is still pending, even though the conflict between Ukraine and the Russian Federation has drastically evolved since February 2022. The legal questions generated in this case have nonetheless not been deprived of their validity and are therefore not to be esteemed as null and void.

II. Ukraine's Memorial

The Memorial of Ukraine is built on three sections: the evidence showing the financing of terrorism in Ukraine by the Russian Federation, the breach by the Russian Federation of its obligation under the ICSFT and the jurisdiction of the Court. For the purpose of this work, a particular attention is given to the arguments concerning the obligation to prevent the financing of terrorism, the duty to cooperate between States and more generally to the interpretation of the ICSFT by Ukraine (Articles 2 and 18 of

[43] See "I.C.J., 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, order of 19 April 2017, https://www.icj-cij.org/en/case/166 (4 July 2022)" paragraphs 24 to 31, 47 to 54, and the following judgement "I.C.J., 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), preliminary objections, judgement of 8 November 2019, https://www.icj-cij.org/en/case/166 (4 July 2022)" paragraphs 38 to 64.

the Convention). Other arguments, notably the facts concerning the alleged financing of terrorist activities by the Russian Federation, are not relevant for this thesis and are then not addressed.

The Ukrainian Memorial defends the position that three offences have been committed by the Federation: Russian agents would have knowingly pursued terrorist activities prohibited under Article 2 paragraph 1 of the ICSFT, Russian state officials and private individuals would have knowingly financed these terrorist acts and the Russian Federation would have refused to cooperate in the Ukrainian's attempts to regulate the financing of these acts.[44] Precisely, the Federation is found by Ukraine in breach of its obligations under Articles 8 (identification, detection, freezing and seizure of funds), 9 and 10 (investigation, extradition and prosecuting), 12 (assistance in the proceedings) and 18 (all practicable measures to prevent the financing of terrorism).

First, Ukraine defends the position according to which the notion of "any person" under Article 2 encompasses both private individuals and public officials, interpretation seen as consistent with the other existing counter-terrorism conventions (paragraph 270). Moreover, the Russian officials pointed by the Memorial would have acted in knowledge of the future terrorist use of the funds provided, behaviour prohibited under Article 2 (paragraph 279). The "knowledge" of those officials is defined by Ukraine as the "*the possibility, sometimes even the probability, that the funds may be used for the commission of terrorist acts," and "willingly took the risk that they would be so used*" (paragraph 281).

The obligations provided by Article 18 are, according to Ukraine, phrased and linked to the definition set out in Article 2. Therefore, the duty to prevent financing of terrorist activities would automatically apply to State officials too. Ukraine finds a breach of such an obligation by Russia, through Russian nationals and the Russian foreign policy (paragraphs 297-298). Indeed, the teleological interpretation of Article 18, as reflected in the preamble of the Convention, could not exclude State officials from the scope of the Convention, creating by such a bias a lacuna contravening its purpose.

[44] For this section, see I.C.J., Case concerning Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of all forms of Racial Discrimination (Ukraine v. Russian Federation), memorial submitted by Ukraine, 12 June 2018, https://www.icj-cij.org/en/case/166 (4 July 2022).

Relying on the UNSC Resolution 1373, Ukraine argues that the interpretation of the Convention must also be relevant with the other international rules binding between the Parties. Consequently, the involvement of a State in terrorist activities would contravene the Resolution which aims at preventing and refraining the support to terrorism (paragraph 304). Moreover, in order to act in good faith and relying on the *Bosnia Genocide Case*, Ukraine considers that the realisation of the objectives of the Convention can only be effective if the obligation upon individuals phrased in Articles 2 and 18 imply an obligation upon States not to commit such offences themselves (paragraph 306). Therefore, the obligation to prevent terrorism would ineluctably imply in itself the prohibition for States to encourage terrorism.

III. Preliminary Objections submitted by the Russian Federation

The preliminary objections raised by the Russian Federation, concerning the interpretation of the ICSFT, begins with an analysis of the "mental elements" of Article 2: the notion of "knowledge" dissociated from the notion of "interest". Thenceforth, the Federation the Russian analyses the term "person" under the ICSFT, put in relation with its application under Articles 2 and 18[45]. Are finally crossed the *Bosnia Genocide* case and the UNSC Resolution 1373, in order to exclude their application under the ICSFT.

First refuting the allegation according to which the Federation would have committed any acts of terrorism defined under the Convention, the Federation precises that the notions of "knowledge" and "intention" are not synonym and should therefore be analysed separately. The term "knowledge" is then defined as a mindset according to which the individual is aware of a fact or a situation. This notion should then not be extended under the Convention as referring to a situation that should have been known, as confirmed by the preparatory works (paragraph 42). Moreover, the addition of the notion of "intention" is seen as complementary to the "knowledge", insufficient on its own. Any other interpretation, according to the Federation, would lead to the absurd supposition that the drafters of the Convention redundantly associated the two notions, regardless of their ordinary meaning under international law (paragraph 68).

[45] For this section, see I.C.J., Case concerning Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of all forms of Racial Discrimination (Ukraine v. Russian Federation), preliminary objections submitted by the Russian Federation, 12 September 2018, https://www.icj-cij.org/en/case/166 (4 July 2022).

Following this distinction, the Russian Federation comments the *Bosnia Genocide* case: considering the differences between the Conventions, a specific definition of the intention exists in relation of the prohibition of genocide. Indeed, the Court considered an "*extreme form of wilful and deliberate acts designed to destroy a group or part of a group*"[46] (paragraph 71). The Federation therefore ascertains that this level of specificity is not found in the phrasing of the Article 2 of the ICSFT, and then that the Conventions induce obligations of different character upon States (paragraph 206). The Federation adds that, recalling the decision of the Court in its Order of April 2017, no plausible claim under the ICSFT was raised by Ukraine[47]; no additional evidence has been proposed by Ukraine on the intention of the Russian Federation to support acts of terrorism (paragraph 86).

Finally, the Federation interprets the ICSFT as other criminal law instruments: the other obligations, rights and responsibilities are no to be affected by the Convention. Regarding the issues of State responsibility, the Federation argues that State terrorism is not covered by the Convention: Article 2 concerns the conduct of individuals and private parties (paragraphs 132 and 212). The Federation consequently considers that, even if the preamble of the Convention refers to general international law and notably the Resolution 51/210, such reference does not encompass the law enforcement character of the Convention upon private individuals, as supported by its drafting (paragraph 135).

The Federation also interprets the Article 18 of the Convention as not containing, even implicitly, any reference to State responsibility (paragraph 165). Moreover, the distinction made in the UNSC Resolution 1373 between the obligation to refrain from providing support and the obligation to prevent and suppress the financing of terrorism induces, according to the Federation, two different issues addressed exclusively (paragraph 183). The Federation accordingly concludes that Ukraine's arguments are not to be found neither in the interpretation given of the ICSFT, the *Bosnia Genocide*

[46] I.C.J., Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgement, 11 July 1996, https://www.icj-cij.org/en/case/91/judgments (31 July 2022).
[47] See I.C.J., 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, order of 19 April 2017, https://www.icj-cij.org/en/case/166 (4 July 2022).

case, nor the UNSC Resolution 1373.

In reaction to the preliminary objections raised by the Russian Federation, Ukraine emitted some observations. Firstly, Ukraine reiterates the argument according to which the ICSFT cannot address issues of financing of private individuals solely: it is seen as paradoxical to consider that the obligations under Article 18 would exclude "*the most practicable measure available to a State*" as the control of its own officials[48] (paragraph 106). In addition, Article 18 is interpreted by Ukraine as applying to a comprehensive scope of the notion of "person", including therefore State officials. However, the breach of international obligation enlightened by Ukraine is about the duty to prevent State's agents financing of terrorist activities, not the obligation for States not to commit such financing (paragraph 116).

This distinction is primordial in the Ukrainian argumentation: both the duty to prevent and the duty not to commit can engage the State responsibility under similar circumstances (paragraph 118). In the present case, Ukraine underlines that Article 18 provides a duty to prevent offences defined under Article 2, which is different from the duty for States not to commit such offences (paragraph 119). Indeed, the "practicable measures" covered by Article 18 are understood by Ukraine as an obligation upon States to actively search for feasible measures which would prevent the occurrence of offences under Article 2. This interpretation is supported by the wording of Article 18, implying that the Article provides a non-exhaustive list of measures to be taken (paragraph 123).

On Article 2, Ukraine confirms its broad interpretation of the notion of "person" relying on the ICSTB and ICSANT: the annex of the ICSFT excludes certain public officials of the scope of the Conventions under specific circumstances. It would consequently be redundant if the State officials were already excluded (paragraph 135). This interpretation is once again reaffirmed under the purpose of the Resolution 51/210, the preamble of the Convention, and its application under the Financial Action Task Force (paragraph 146).

[48] For this section, see I.C.J., 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), written statement of observations and submissions on the preliminary objections of the Russian Federation, 14 January 2019, https://www.icj-cij.org/en/case/166 (4 July 2022).

In this continuity, Ukraine refutes the Russian argument considering that two different and exclusive duties lie in the UNSC Resolution 1373: a first duty to prevent private individuals to finance terrorist activities, and a second duty upon States to refrain from such financing. According to Ukraine, those different duties both apply to States (paragraph 151). In addition, concerning the *Bosnia Genocide* case, Ukraine finds that the opposition of a genocide as a "crime under international law" toward the financing of terrorism as a "matter of grave concern" is irrelevant (paragraph 177). Indeed, the gravity of the offense is not to be appreciated, while the violation is considered serious enough not to tolerate the implication of a State in such violation. Finally, Ukraine considers that the notion of "intent" compared to the *Bosnia Genocide* case is misunderstood; the ICSFT would have a focus on the nature of the act in itself. In other words, the "intention" is not linked to the subjective element of the perpetrator but to the goal of the offence under Article 2 (paragraph 226).

IV. Court's judgement

In the judgement disposed by the ICJ on the preliminary objections brought by the Russian Federation, the Court distinguishes two aspects under the interpretation of the ICSFT: a first issue on whether the Russian Federation has an obligation under the ICSFT to take measures in the prevention of the presumed financing of terrorism in Donbass, and a second one on the breach of such obligation by the Federation (paragraph 32). In order to respond to the oppositions of view between Ukraine and the Russian Federation, the Court addresses the issue related to the interpretation of Article 2 paragraph 1 of the ICSFT with due respect to the Articles 31 to 33 of the Vienna Convention on the Law of Treaties (1969). However, the Court leaves to the merits the interpretation of the notion of "funds" and the requisite of "intention or knowledge" under the ICSFT, considering that these notions were not of such a nature that they would question the jurisdiction of the Court.

The Court, in its judgement, recalls Article 2 paragraph 1 and the obligation of criminalisation of the offence defined in the Article under domestic law. The Court also reminds the intention of the preamble of the Convention of insuring effectivity in the fight against terrorist activities at all stages (prevention, suppression, prosecution, and punishment). Is then addressed the interpretation of the wording of Article 2, and the notion of "person":

"59. (…) The ICSFT addresses offences committed by individuals. (…) The financing by a State of acts of terrorism is not addressed by the ICSFT. It lies outside the scope of the Convention."

No doubt subsists, as confirmed by the preparatory work of the Convention and the negotiations during the drafting by the Ad Hoc Committee, State's financing of terrorism is not contained in the ICSFT. Nevertheless, the Court precises that (…)

"60. (…) it has never been contested that if a State commits a breach of its obligations under the ICSFT, its responsibility would be engaged."

Indeed, the exclusion of offences committed by State's agents does not induce that such offences are lawful under international law. In this spirit, the Court reminds the resolution 1373 (2001) of the UNSC under Chapter VII of the UN Charter. The content of the obligations of this resolution and the issue of its application with regards to the ICSFT is treated in the next chapter of this study.

The Court finally quotes that the notion of "any person" is to be understood in a comprehensive way, which would tend to refrain any limiting analysis. No strict exclusion lies in the phrasing of the Convention, and therefore applies to both private capacities and States' agents functions. In itself, the responsibility of the State whose officials would commit such an offence is not engaged under the ICSFT. Hence, the other obligations contained in the Convention are to be fulfilled:

"61. (…) However, all States parties to the ICSFT are under an obligation to take appropriate measures and to co-operate in the prevention and suppression of offences of financing acts of terrorism committed by whichever person. Should a State breach such an obligation, its responsibility under the Convention would arise."

It appears, in the reading of this paragraph, that State's responsibility is to be found under the ICSFT if appropriate measures of cooperation, prevention and suppression of financing of terrorism are not respected. Consequently, the determination of these measures, their scope and content, is needed.

V. Separate and dissenting opinions

In the interest of understanding the complete extent of legal arguments raised by the Court, it is desirable to consider the separate and dissenting opinions of the Judges individually. Are put aside the elements concerning other issues of jurisdiction than those related to the interpretation of Article 2, the obligation of cooperation under the

Convention or the determination of the dispute in itself. Therefore, the separate opinion of Judge Cançado Trindade is not mentioned in this paper, while opinions of Judges Donoghue, Pocar, Robinson, Skotnikov, Tomka and Vice-President Xue are.

In major accordance with the judgement of the Court, the Judge Pocar agrees with the fact that the ICSFT does not in itself deal with State financing of terrorist activities. Indeed, the criminalisation, prevention and suppression of the offences described in the Article 2 would presuppose the State not to commit them. Nevertheless, would it be proven that a State acted this way, its responsibility would not be engaged for the financing as such, but for having failed in the establishment of measures preventing and suppressing terrorist activities. The position defended by the Judge Pocar is based on the analysis of the Court of the purpose and the wording of the Convention: the exclusion of State's agents from the notion of "person" under Article 2 would jeopardise the implementation of the Convention and would be contrary to the international practice related to similar treaties.[49]

In the same spirit, Judge Donoghue agrees with the definition given by the Court to the wording "any person" according to its ordinary meaning. The Convention addresses issues concerning individuals, regardless of their functions. Even though the Convention does not rule on State financing *per se*, the effects of Article 2 induce similar obligations. The unambiguity of the phrasing leads the Judge to consider that no exception exists under the given interpretation of the Convention[50].

With moderation, Judge Robinson also approves the judgement of the Court. According to the view he proposes in his Declaration, no ground is to be found in interpreting the ICSFT nor its preparatory work to defend the position by which State financing of terrorist activities lies outside the scope of the Convention. Consequently, the paragraph 61 of the judgement would be questionable: the commitment of an offence under Article 2 of the ICSFT could engage the responsibility of the State concerned.

[49] I.C.J., 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), preliminary objections, judgement of 8 November 2019, Separate Opinion of Judge Ad Hoc Pocar, https://www.icj-cij.org/en/case/166 (4 July 2022).
[50] I.C.J., 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), preliminary objections, judgement of 8 November 2019, Separate Opinion of Judge Donoghue, https://www.icj-cij.org/en/case/166 (4 July 2022).

Judge Robinson considers that the Court analysed the Article 2 correctly while arguing, in its ordinary meaning, that the wording of "any person" covers both private individuals and officials. However, the Court would have been too hasty in considering that the State financing of terrorism is not addressed by the Convention prior the determination of the notion of person under Article 2[51].

Precautious, Judge Tomka, in disfavour of the judgement, emits some critics. Absolutely conscient of the object of the Convention and the obligations of cooperation which result from it, Judge Tomka regrets the fact that the Court did not propose an interpretation of the notion of "funds" under Article 1 of the Convention. Moreover, the Judge finds an inconsistency in the methodology of the Court: keeping in mind that, in its judgement on provisional measures of 2017, the Court did not find that the rights to be protected raised by Ukraine were at least plausible. Nowadays, Judge Tomka, referring to the *Oil Platform* jurisprudence, deplores that the Court did not "*ascertain whether the acts of which the applicant complains 'fall within the provisions' of the treaty containing the clause"*. In doing so, the Court could have clarified which claims of Ukraine falls within its jurisdiction and is then addressed. As things stand, Judge Tomka insists on the fact that State's financing of terrorist activities lies outside the scope of the ICSFT and is therefore of the opinion that the claims of Ukraine, if proven, could not be adjudicated under the Convention[52].

The Vice-President Xue presents his dissenting opinion on the purpose that the Court mis-conceptualises the dispute between Ukraine and the Russian Federation. Accordingly, the non-international armed conflict in Donbass, allegedly supplied the Russian Federation through military and financial support could have led to violations of international humanitarian law and international human rights law. However, considering that those acts fall within the scope of the ICSFT would extend the Court's jurisdiction in a way that would be contrary to the objectives of the Convention and the stability of the law. The notion of "fund" in Article 1 and the notion of "person" in

[51] I.C.J., 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), preliminary objections, judgement of 8 November 2019, Declaration of Judge Robinson, https://www.icj-cij.org/en/case/166 (4 July 2022).

[52] I.C.J., 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), preliminary objections, judgement of 8 November 2019, Separate Opinion of Judge Tomka, https://www.icj-cij.org/en/case/166 (4 July 2022).

Article 2 would have to be interpreted within the limited framework of the Convention; by focussing on the obligations of preventing and suppressing terrorism financing, the Court would jeopardise the law of State responsibility[53].

Finally, the Judge *Ad Hoc* Skotnikov similarly deplores the dismissal of the notion of funds to the merits of the case. The Judge argues that the notion should have been addressed, in accordance with the *Oil Platform* jurisprudence (cfr supra). Moreover, Judge Skotnikov points out that, if correctly considering that State's financing of terrorist activities is not ruled under the ICSFT, the occurrence by an agent of the State of an offence under Article 2 should correspondingly not engage the responsibility of the State concerned. This conclusion is not, in his opinion, defended by the Court: the finding that the Convention applies both to private persons and public officials would be contrary to the Court's first assessment and to the Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission.

[53] I.C.J., 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), preliminary objections, judgement of 8 November 2019, Dissenting Opinion of Vice-President Xue, https://www.icj-cij.org/en/case/166 (4 July 2022).

Chapter III: The duty to prevent State's agents financing of terrorism

I. The *Bosnia Genocide* case applied

The *Bosnia Genocide* case, in its limited application to the Genocide Convention, demonstrated that the obligation to prevent genocide under the Convention necessarily implied an obligation for States not to commit genocide[54]. In other words, the obligation to prevent the occurrence of genocide for individuals lying in the Convention overlaps with the obligation from States to refrain committing genocide themselves. The purpose of this section is to determine whether or not such interpretation could apply to the ICSFT. As a starting point, it shall be kept in mind that the Court specifically stated that the *Bosnia Genocide* case was not intended as creating a precedent applicable to all binding instruments bearing an obligation to prevent[55]. The issue then is to determine whether or not the legal reasoning pursued by the Court could be applicated on the interpretation of a terrorism suppression convention.

As argued by the Court, and relied on in the Memorials cited above, two arguments are raised in order to determine the existence of an implied prohibition: first, the genocide is to be characterised as an international crime, prohibited to both States and individuals; second, the obligation to prevent necessarily implies a prohibition of the act for the State. As far as the first argument is concerned, the notion of international crime has evolved since the drafting of the Genocide Convention: nowadays, the "crime" of genocide behoves in the section of serious breaches of obligations arising under peremptory norms and *erga omnes* obligations[56]. Arguably, the concept of terrorism does not fall within this scope and is consequently considered as "*a matter of grave concern to the international community"* [57]. Considering that such a phrasing is neutral regarding the individual or State responsibility (as opposed to the notion of "international crime"), it may have been possible to duplicate the prohibition of the offence to States. However, in the present case, the Court dismissed this interpretation:

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[54] I.C.J., Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), *op. cit. p. 16.*
[55] *Ibidem*, paragraph 429.
[56] CRAWFORD J.R., *The Law of International Responsibility*, Oxford: Oxford University Press, 2010, p.932.
[57] TRAPP K.N., *State Responsibility for International Terrorism Problems and Prospects*, Oxford: Oxford University Press, 2011, p.289 and CASSESE A., "Terrorism as an International Crime" in BIANCHI A. (director), *Enforcing International Law Norms Against Terrorism*, Portland: Hart Publishing, 2004, pp. 213-226.

the fact that the ICSFT does not address the issue of direct State responsibility for the financing of terrorist activities undermines this argument.

The second argument of the Court is developed on the vision by which the State is engaged through a process of control regarding the prosecution and the punishment of offences[58]. Accordingly, this role of law enforcement implies the State to take all measures to prevent person not directly under its authority from committing such unlawful act; *per se*, the obligation to prevent does not intimate the prohibition of the conduct upon States[59]. However, once demonstrated that the scope of the obligation can also apply to State officials (cfr. supra) and that the obligation upon States to refrain from committing such offences exists, the Court could have had considered that the obligation to prevent these offences would have logically induced the prohibition of the offence for the State under the Convention. As a matter of fact, the Court has dismissed such interpretation:

> *"61. (…) therefore, the commission by a State official of an offence described in Article 2 does not in itself engage the responsibility of the State concerned under the Convention."*

By this reasoning, the Court seems to distinguish the obligation to prevent the financing of terrorist activities applying to both officials and private individuals from the obligation upon States to refrain from financing terrorist activities. Indeed, unlike the *Bosnia Genocide* case, the Court cannot support its reasoning on a compromissory clause explicitly inducing State responsibility for the related offence. The lack of such explicit clause, replaced by an implicit acknowledgement of individual criminal responsibility for State's agents, limits the ICSFT as compared to the Genocide Convention and prevent the Court to propose a broad interpretation of the obligation to prevent under the ICSFT. It is moreover argued that an extensive interpretation of treaties shall not have positive effects on the international legal order unless no other basis of jurisdiction is to be found to ensure international peace and security[60]. *Exempli gratia*, a systematic application of the *Bosnia Genocide* case could push States to refrain from concluding further conventions on this matter.

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[58] TRAPP K.N., *State Responsibility for International Terrorism Problems and Prospects, op. cit. p. 23.*
[59] I.C.J., Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), *op. cit. p. 16.*
[60] TRAPP K.N., *State Responsibility for International Terrorism Problems and Prospects, ibidem.*

II. Security Council Resolution 1373

The resolution 1373 is taken by the UN Security Council in reaction to the terrorist attacks of 11th September 2001. Its unanimous adoption has had a revolutionary impact on the international rules concerning counter-terrorist obligations, the Security Council having for the first time adopted a clear legislative role. The fact that the Security Council may have overcome its duties under the UN Charter by circumventing its executive role is not addressed in this paper[61]. Rather, an analysis of the duty to prevent and its content under the resolution is proposed in order to interpret the Articles 2 and 18 of the ICSFT and to clarify the arguments raised by the parties in their memorials. It shall, regarding this matter, be kept in mind that the resolution urges States to ratify the counter-terrorism conventions, including the ICSFT.

The resolution is divided in three parts: compulsory measures against the financing of terrorist activities, compulsory measures to fight terrorism, and general counter-terrorist measures. Therefore, concerning the prevention and suppression of the financing of terrorist acts, the resolution is precisely about the criminalisation of offences substantially similar to the ICSFT: the wilful provision of funds, direct or indirect, with the knowledge that such funds shall or may be used for terrorist activities; the freeze of funds and economic resources directed to the benefit of perpetrators of terrorists acts; the prohibition for nationals and any entity under the direct or indirect control of the State to make funds available for the perpetrators and accomplices of terrorism (respectively paragraph 1a, 1b, 1c and 1d) [62].

On the same mandatory basis, the resolution also addresses States a set of measures that are to be taken as: the duty to refrain from supporting terrorist activities, actively and passively; the duty to prevent terrorism, notably by the exchange of information; the duty not to provide safe places to perpetrators, financers and accomplices; the duty to prosecute; assistance regarding criminal investigations and proceedings; assistance regarding the pursuit of evidence; the prevention of terrorism in border controls

[61] See CORTEN O., « Vers un renforcement des pouvoirs du Conseil de sécurité dans la lutte contre le terrorisme ? », in BANNELIER K *et alii* (directors), *Le droit international face au terrorisme*, Paris, Editions Pedone, 2002, pp.259-277.

[62] Resolution 1373 UNSC on threats to international peace and security caused by terrorist acts, S/RES/1373, 28 September 2001.

(respectively, paragraph 2a, 2b, 2c, 2d, 2e, 2f, 2g)[63].

Even though the resolution lacks the definition of the notion of "terrorism"[64], which constitutes a default that could impact the effectivity of the measures, the judgement of the Court is to be understood as in accordance with the scope of the means to preventively fight the financing of terrorism. Indeed, the phrasing of the resolution is comprehensively drafted: the first paragraph prohibits and criminalises the conduct of *nationals* of the States. Following such indication, it would be paradoxical to argue that State officials rely outside the classical criminalisation of the financing of terrorist acts. It is important to notify that the resolution nevertheless exceeds in paragraph 1c the scope of the ICSFT, in relation with the freeze of funds, by incorporating entities under the control of the perpetrators[65].

Concerning the duty to prevent the financing of terrorism, the resolution reaffirms a series of measures contained in the Article 18 of the ISCFT and *calls upon* States to cooperate in the prevention of such measures (paragraph 3c)[66]. Therefore, the resolution does not create any legal obligation, but it reinforces the spirit of the norms of the ICSFT: the obligation to prevent is linked to a duty to cooperate between States. Such a duty may be characterised by the duty to exchange accurate and verified information, the obligation to alert the known risk of terrorist attack and finally the duty to coordinate administrative measures[67].

Finally, the resolution 1373 reiterates obligations merely existing in the ICSFT. It nevertheless permitted the actual success of the Convention and presented an international common legal ground on the obligation to prevent the financing of terrorism, the duty to cooperate to fight terrorism and the duty to refrain from supporting or engaging in terrorist activities. The wild scope of the resolution concerning State's sponsored terrorism is not covered by the Convention, limited to individuals (cfr. supra), but the notion of "individual" under the resolution seems to largely embrace both private

[63] Resolution 1373 UNSC on threats to international peace and security caused by terrorist acts, *op. cit. p. 25.*
[64] MARTIN J-C., *Les règles internationales relatives à la lutte contre le terrorisme, op. cit. p.7.*
[65] HINOJOSA-MARTINEZ L. M., "Security Council Resolution 1373: the cumbersome implementation of legislative acts" in SAUL B. (director), *Research Handbook on International Law and Terrorism*, Cheltenham, Edward Elgar, 2020, sec. edition, pp. 564-587.
[66] Resolution 1373 UNSC on threats to international peace and security caused by terrorist acts, *ibidem.*
[67] MARTIN J-C., *Les règles internationales relatives à la lutte contre le terrorisme, ibidem.*

persons and public officials. It shall be kept in mind that the implementation of the resolution has raised several issues regarding for example the actualisation of the data, the determination of illegal immigration or even sometimes the good will of States to comply[68]. In this regard, the resolution provides, as an enforcement tool, the creation of the Counter Terrorism Committee.

III. Responsibility of the State

In this section will not be debated the issues related to the State's responsibility for a breach of its obligation to refrain from financing terrorist activities as such, the scope of this obligation remaining outside the ICSFT. Preferably, will be discussed the potential legal consequences of a breach of the obligation to refrain with due regards to the obligation to prevent the terrorist financing as defined under the Convention. *In casu*, it is important to notice that this thesis does not address the factual opposition between Ukraine and the Russian Federation: the appreciation of the facts, their plausibility and the evidence brought by the parties to the dispute are left to the Court.

If under the Convention, the duty to prevent the financing of terrorist acts does not induce a prohibition of an active States' support of terrorism, the contrary could be argued regarding passive support. A passive support to terrorist acts would be characterised by the State's incapacity, per neglect, lack of will or deliberate choice, to take all measures needed to fight terrorism[69]. *A posteriori*, this principle is completed by the logic *Aut dedere aut iudicare* which behoves States to prosecute the perpetrators of offences if they refuse to extradite them. Therefore, before the occurrence of the terrorist act, States are under an obligation of due diligence regarding the prevention and cooperation, and under an obligation of results regarding the prosecution and extradition[70].

Once again, such a situation is to be distinguished from the active support of States regarding terrorist activities. In this scenario, the State is found in breach of a negative obligation, its duty to refrain, notably by the provision of funds or by giving the order

[68] HINOJOSA-MARTINEZ L. M., "Security Council Resolution 1373: the cumbersome implementation of legislative acts", *op. cit. p. 26.*
[69] SICILIANOS L.-A., « La responsabilité de l'Etat pour absence de prévention et de répression des crimes internationaux » in ASCENSIO H. *et alii* (directors), *Droit international pénal*, Paris : Pedone, 2012, pp. 115-128.
[70] MARTIN J-C., *Les règles internationales relatives à la lutte contre le terrorisme*, *op. cit. p.7.*

to commit a terrorist act. Nevertheless, in such a situation, it would still be possible to investigate the responsibility of the State under the ICSFT. Indeed, the disrespect of the duty to refrain would automatically induce a breach of both the obligation to cooperate and to prevent. There could exist no condition under which a State could knowingly finance terrorism but respect its obligation to prevent and cooperate. *Exempli gratia*, the obligation to alert the risk of a terrorist attack would lead to the absurd case of alerting a State victim of an international wrongful act committed by the State alerting, itself perpetrator of the offence. If proven, the voluntary provision of funds by a State would lead to the breach of both its duty to refrain, but equally to the duty to prevent, contained in the Convention.

Adequately, the reverse logic could only apply under certain circumstances. As previously demonstrated, under the ICSFT, the obligation to prevent financing of terrorist activities does not necessarily prevent States to commit offences under Article 2. Therefore, the responsibility of the State can only be engaged if the obligation to prevent financing of individuals, State's agents included, is disrespected. Two possibilities arise then: the concerned State could be found in breach of its obligation of due diligence, or in breach of its obligation of result. Consequently, would a State fail in taking all the measures in its capacity to prevent terrorist financing under its control, its international responsibility could be engaged[71]. Such a failure is nevertheless to be proven by the injured State; the occurrence of the offence does not suffice to behove State's responsibility[72].

Moreover, after the appearance of the offence, would the State fail in the cooperation with the State victim of the offence, or would the State implicitly support such offence by creating a safe haven to the perpetrators, would the State not prosecute such perpetrators, its international responsibility could also be engaged. Should an agent of the State perpetuate an offence under Article 2 of the Convention not be prosecuted nor pursued by a national law criminalising his conduct[73], shall the State be found in breach of its international obligations under the Convention. It may lastly be noticed that the

[71] CRAWFORD J., "Introduction", in CRAWFORD (director), *The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries*, Cambridge: Cambridge University Press, 2002, pp.1-60.
[72] PISILLO MAZZESCHI R., "The Due Diligence Rule and the Nature of International Responsibility of States", *Georgetown yearbook of International Law*, 1992, vol. XXXV, pp. 5-51.
[73] LEHTO M., *Indirect Responsibility for Terrorist Acts*, Leiden: Martinus Nijhof Publishers, 2009, p.487.

failure to respect its duty to prevent the financing of terrorist activities, in the situation of such an act could not be attributed to the State, could nevertheless engage its indirect responsibility for tolerance towards such offences[74].

It shall finally be kept in mind that the Convention is to be read as compliant with the UN Charter and principles (Article 21). The purpose of the criminalisation of the offences described under Article 2, as confirmed in the lecture of the preamble and annexe of the Convention, is to effectively fight against terrorism in all its forms. As far as, as described under the resolution 1373, State and individuals terrorism are contrary to these principles, an evolutive interpretation of the Convention could be proposed: in the light of the intention of legally enforcing the resolution 1373 and its purpose, it may be desirable to amend the Convention and extend its scope to the State's duty to refrain financing of terrorist activities.

IV. Methodological limits

The analysis proposed pursue a positivist approach of international law. Accordingly, some limits are to be pointed out in the best interest of the comprehension of this study. Focused on the empirical research of the definition of the will of States as written it international treaties and conventions, the social needs of the law are not to be ignored. The political context of the adoption of the Convention, such as the actual geopolitical events occurring in the Donbass are important issues influencing, in one way or another, the Courts and States decisions.

Hence, the scope of this thesis is not broadened outside the voluntaristic approach: this paper relies on formal sources of international as provided under the Article 38 of the ICJ Statute. Therefore, doctrinal tools as sociological of philosophical approaches of the International Law are excluded. These interpretations are not to be considered as invalid but lie outside the scope of the applied methodology[75]. In this conception, the present study intends to determine legal issues remaining in the observation of the existing law, its understanding, description, and determination, regardless of the personal and external influences.

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[74] See PROULX V.-J., *Transnational Terrorism and State Accountability*, Oxford: Hart Publishing, 2012, p.346.

[75] CORTEN O., *Méthodologie du droit international public*, Bruxelles : Editions de l'Université de Bruxelles, 2009, p.291.

Conclusion

As a conclusion, this study presents the broad scope of the international obligation to prevent the financing of terrorist activities under the ICSFT. Understood in its ordinary meaning, the notion of person under its Article 2 also encompasses the States officials: therefore, the duties of the State concerning the criminalisation of the offence also applies to these individuals. It has also been enlightened that the duty to refrain from committing an offence under Article 2 is not addressed by the Convention, notably by a parallel application of the *Bosnia Genocide* case-law.

This duty, provided by the UNSC resolution 1373, has then been used as an interpretative tool in order to determine the general scope of the States obligations to prevent and to cooperate provided by the Article 18 of the Convention. With due regards to the rules of State's responsibility under international law, two sets of obligations have emerged: obligations of conduct (due diligence) prior the occurrence of a terrorist act, obligations of result posterior the occurrence. Finally, if the disrespect of the obligation to refrain from financing terrorist activities would automatically trigger the responsibility of the State toward its obligations to prevent and to cooperate covered by the Convention, the opposite statement seems to be conditioned: the concerned State should have failed in taking all the measures in its capacity to prevent terrorist financing under its control.

Regarding State's agents financing of terrorist activities, would a State, in complete breach of its international obligations, support or tolerate such conduct, the absence of prosecution and extradition of these agents seems probable. Moreover, the international diplomatic and immunity law may cover such offences. If the concerned State is not party to the Rome Statute of 17 July 1998, what are the alternative legal procedures granted by international law? To what extent the enforcement measures regarding international wrongful acts is applicable toward terrorist issues? How could these measures coexist with international immunity law?

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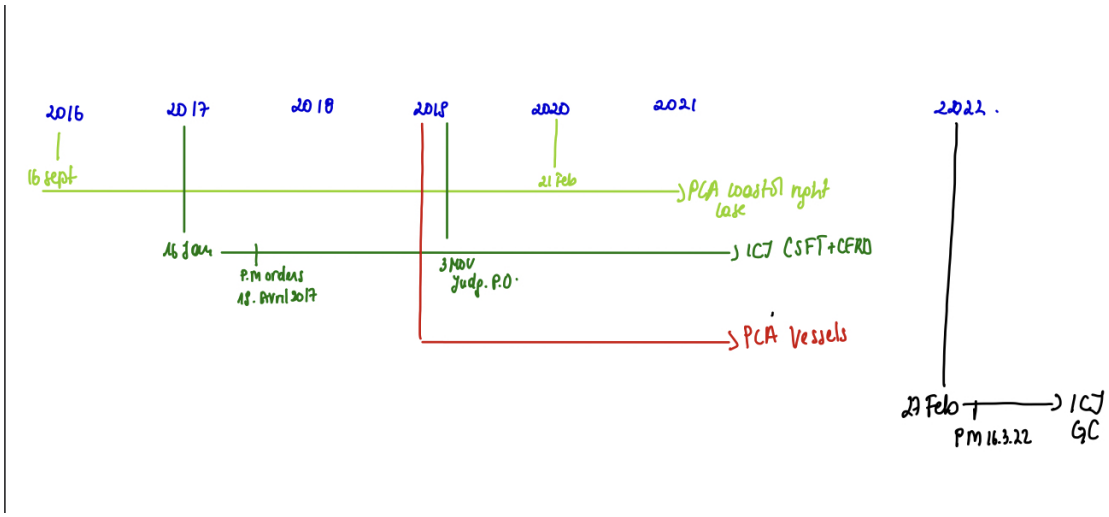
Annex I



Legend:

Light Green: dispute concerning coastal state rights in the Black Sea, Sea of Azov, and Kerch Strait.

Dark Green: case on the 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.

Red: case concerning the detention of three Ukrainian Naval vessels.

Black: case concerning allegations of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide.

This graphic has been elaborated by Melick L, based on the lectures provided by Professor D'Argent.

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