DECLARATION OF JUDGE TOMKA

Order on provisional measures — Scope of the first measure ordered — Insufficient attention paid to reasons underlying decisions of the Supreme Court of Crimea and the Supreme Court of the Russian Federation — Lack of urgency.

1. My vote on point 1 of the operative clause calls for some explanation. While I agree that, in view of its obligations under Articles 2 and 5 of the International Convention on the Elimination of All Forms of Racial Discrimination, the Russian Federation has an obligation to "pursue by all appropriate means . . . a policy of eliminating racial discrimination" (Art. 2) and to prohibit and eliminate racial discrimination in the enjoyment of certain rights, such as for instance, the "right to freedom of peaceful assembly and association" (Art. 5 *(d)* (ix)), by all Crimean Tatars, I consider that the Court is going too far when it requires the Russian Federation to "refrain from maintaining . . . limitations on the ability of the Crimean Tatar community to conserve . . . the *Mejlis*" (para. 106 (1) *(a)*).

2. The activities of the *Mejlis*, the 33-member representative and executive body of the Crimean Tatar people elected by the *Kurultai*[1], the congress of that people, were banned by the Supreme Court of Crimea on 26 April 2016, on the proposal of the Prosecutor of Crimea, having been found to be an "extremist organization" that was supporting "extremist activities". That decision was appealed to the Supreme Court of the Russian Federation which, by a judgment dated 29 September 2016, confirmed the ban. These judgments were brought to the attention of this Court which, however, remains silent about their content, thus raising a question whether it paid any attention to these judicial decisions. The measure now indicated by this Court under point 1 of the operative clause can be read as requiring the Russian Federation to lift or at least suspend the existing ban on the activities of the *Mejlis*. This raises some concerns.

3. First, the Russian Federation pointed out during the hearings that the judgment of the Supreme Court of Crimea provided a number of reasons said to justify the decision to ban the activities of the *Mejlis*. The Supreme Court made reference to statements made by leaders of the

[1] Ukraine uses this transcription of the name of the body, the Russian Federation refers to it as the *Qurultay*, like the official website of the *Mejlis* of the Crimean Tatar People. As the Court refers in this Order to *Kurultai*, I follow it in using that term.

Mejlis encouraging "a full-scale military conflict with Russia", the declaration of "a state of war with Russia", and urging preparation for "open war" with it. These statements were not disowned by the *Mejlis*. The leaders of the *Mejlis* were also involved in organizing a blockade of freight transportation of goods to Crimea. The *Mejlis* leaders urged Ukraine to stop any trade with, and any supply, including electricity, to Crimea. According to the Supreme Court of Crimea, the *Mejlis* also participated in November and December 2015 in the organization of a blockade preventing the speedy repair of electricity transmission lines from Ukraine to Crimea, destroyed by an explosion in November 2015, thus causing the disruption of power supply to vital infrastructure and households in Crimea for several weeks in the winter period. Those reasons were confirmed in the appellate decision of the Supreme Court of the Russian Federation. Moreover, certain reports from international organizations appear to confirm that at least certain of these activities have taken place. The Russian Federation submitted that "[i]n the light of this evidence, it is difficult to argue that Russia was not manifestly entitled to ban the *Mejlis* and to take the necessary steps to protect public order."

4. It is not appropriate at the provisional measures stage to reach any firm conclusion on these issues. However, I am concerned with the cavalier approach of the Court in requiring the Russian Federation to alter the decision adopted by a judicial body, and affirmed on appeal by its highest judicial authority, without any consideration having been given to these issues. This Court does not act as a court of appeal from national courts and should not simply overturn the decisions of such courts, in particular at the provisional measures stage (cf. *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 486, para. 52).

5. It has to be noted that the purpose of the International Convention on the Elimination of All Forms of Racial Discrimination is to guarantee the equality of all human beings in rights by prohibiting and eliminating racial discrimination in the enjoyment of civil, political, economic, social and cultural rights. These rights as such are recognized in other international instruments, such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. These rights are, however, not unlimited. For instance, restrictions can be imposed on the freedom of peaceful assembly and association under Article 21 (second sentence), and Article 22, paragraph 2, of the International Covenant on Civil and Political Rights. Such restrictions can be "imposed in conformity with the law" (Art. 21) or "prescribed by law" (Art. 22, para. 2) when they are "necessary in a democratic society in the interests of national security or public safety, public order *(ordre public)*, the protection of public health or morals or the protection of the rights and freedoms of others." What the International Convention on the Elimination of All Forms of Racial Discrimina-

tion guarantees is that any such restriction shall not be based on racial considerations, resulting in racial discrimination. On the other hand, the International Convention on the Elimination of All Forms of Racial Discrimination does not provide for immunity from such restrictions when their imposition is necessary for the above-mentioned purposes.

6. When considering requests for provisional measures the Court is expected to weigh and balance the respective rights of the parties in light of their arguments. This has been the practice of the Court in a number of cases (see, e.g., *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia), Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014*, pp. 154-155, 157-158, paras. 33, 36, 42, and 46; *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*, pp. 130-131, paras. 66 and 67; *Passage through the Great Belt (Finland* v. *Denmark), Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*, p. 16, para. 16; *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Interim Protection, Order of 17 August 1972, I.C.J. Reports 1972*, pp. 16-17, paras. 22-24). Recent jurisprudence of the International Tribunal for the Law of the Sea provides another example of this exercise (see *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures, Order of 25 April 2015, ITLOS Reports 2015*, pp. 164-165, paras. 96, 99-102). As Judge Abraham has opined

> "[w]hen acting on a request for the indication of provisional measures, the Court is necessarily faced with conflicting rights (or alleged rights), those claimed by the two parties, and it cannot avoid weighing those rights against each other. On one side stands (stand) the right (rights) asserted by the requesting party, which it claims to be under threat and for which it seeks provisional protection, and on the other the right(s) of the opposing party, consisting at a minimum in every case of the fundamental right of each and every sovereign entity to act as it chooses provided that its actions are not in breach of international law. Yet the measure sought by the first party from the Court often — as in the present case — consists of enjoining the other party to take an action which it does not wish to take or to refrain — temporarily — from taking an action which it wishes, and indeed intended, to take. In issuing such injunctions, the Court necessarily encroaches upon the respondent's sovereign rights, circumscribing their exercise." (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*, separate opinion of Judge Abraham, p. 139, para. 6.)

7. There is a dispute between the Parties as far as sovereignty over Crimea is concerned. The Court cannot rule on this matter as it is beyond its jurisdiction and Ukraine, knowing the limits of the Court's jurisdiction

ratione materiae, has not asked the Court to make any pronouncement on this highly contested issue. What is, however, not disputed is the fact that the Russian Federation exercises control and jurisdiction over Crimea. Both Parties are in agreement that the International Convention on the Elimination of All Forms of Racial Discrimination is applicable to Crimea and the Russian Federation has obligations thereunder as far as people in that territory are concerned. Whatever is the legal basis for the exercise of control and jurisdiction in the territory of Crimea by the Russian Federation and the applicability of the International Convention on the Elimination of All Forms of Racial Discrimination, the Russian Federation must be able to take measures necessary to ensure public order and safety. This, in my view, needs to be taken into account when considering what kind of measures should be indicated by the Court in the present case.

8. Moreover, one of the requirements for the Court to order provisional measures is that it be satisfied that there is urgency, in the sense of there being "a real and imminent risk that irreparable prejudice *will* be caused to the rights in dispute before the Court gives its final decision" (*Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia), Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014*, p. 154, para. 32, emphasis added). While the Court has once again articulated this requirement, explaining urgency as there being "a real and imminent risk that irreparable prejudice *will* be caused to the rights in dispute" (Order, para. 89, emphasis added), it applies it in a rather "loose" way. It, first, states that various "rights stipulated in Article 5, paragraphs *(c)*, *(d)* and *(e)* of [the International Convention on the Elimination of All Forms of Racial Discrimination] are of such a nature that prejudice to them is *capable* of causing irreparable harm" (*ibid.*, para. 96, emphasis added), in order then to conclude that it considers that there is an imminent risk that the acts, described earlier in the Order, "*could lead* to irreparable prejudice to the rights invoked by Ukraine" (*ibid.*, para. 98, emphasis added). I am not convinced that such requirement of urgency has been shown to exist in the case at hand.

9. The claims made by Ukraine are likely to be adjudicated within the next four years. It may be noted that the Russian Federation has presented evidence that there are a number of other organizations of Crimean Tatars in Crimea. Whether or not they have "the same degree of representativeness and legitimacy as the *Mejlis*" (see *ibid.*, para. 97), Ukraine does not deny that these organizations exist, and they appear to be in a position to advance the interests of the Crimean Tatars to at least some extent during the intervening period. Moreover, the *Kurultai*, which elected the *Mejlis* and which constitutes the highest assembly of Crimean Tatars, has not been, according to the Russian Federation, prohibited[2].

[2] This statement was not contradicted during the hearing by Ukraine.

According to information in the public domain, it appears that the ban on the activities of the *Mejlis* has now, some six months after the final decision of the Supreme Court of the Russian Federation, been challenged before the European Court of Human Rights as involving the alleged violation of several provisions in the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms.

10. For the above reasons, I am of the view that the first measure indicated by the Court is, in the circumstances, inappropriate, while I agree that the obligations of the Russian Federation under the International Convention on the Elimination of All Forms of Racial Discrimination remain unaffected.

(Signed) Peter TOMKA.