SEPARATE OPINION OF JUDGE CHARLESWORTH

Concept of "funds" in the International Convention for the Suppression of the Financing of Terrorism — Function of non-financial assets — Mental elements of the offence of terrorism financing.

Article 12 of the ICSFT — Unjustified delay as a failure to afford the greatest measure of assistance — Justification of a refusal to provide assistance.

Scope of Ukraine's case under the International Convention on the Elimination of All Forms of Racial Discrimination — No requirement for a pattern of racial discrimination under CERD.

Concept of racial discrimination — Measures producing disparate adverse effect — Justification — Burden of proof.
Law enforcement measures — Ban on the Mejlis *— Justification.*
Provisional measure relating to the availability of education — Obligation to ensure that demand for instruction in Ukrainian is met.

Provisional measure relating to the non-aggravation of the dispute — Obligation against aggravation as a manifestation of the obligation of peaceful settlement of disputes — Incompatibility of the use of force with the obligation against aggravation.

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1. I agree with much of the Court's reasoning and many of the Court's conclusions in this case. This opinion explains the points on which I differ from the majority and the basis of my negative votes on some clauses of the *dispositif*. I address in turn Ukraine's claims concerning the International Convention for the Suppression of the Financing of Terrorism (Section I), the International Convention on the Elimination of All Forms of Racial Discrimination (Section II) and the Court's Order of 19 April 2017 indicating provisional measures (Section III).

I. International Convention for the Suppression of the Financing of Terrorism

1. The Concept of "Funds"

2. Many of the incidents where, according to Ukraine, the Russian Federation breached its obligations under the International Convention for the Suppression of the Financing of Terrorism ("ICSFT") involve the provision or collection of such items as weapons or training camps. Do such items constitute "funds" within the meaning of the ICSFT so that their provision or collection may constitute the offence under Article 2 if all other conditions are fulfilled?

3. The Court concludes that the term "funds" "refers to resources provided or collected for their monetary and financial value and does not include the means used to commit acts of terrorism, including weapons or training camps" (Judgment, para. 53). I do not subscribe to this conclusion. Under the applicable customary rules of treaty interpretation, means used to commit acts of terrorism may come within the scope of the concept of "funds" under the ICSFT.

4. The Court accepts that the term "funds" is not confined to financial assets. This is clear from the wording of the definition, which covers "assets of every kind", including immovable assets. It is also consistent with the drafting history of the Convention, which suggests that the term "funds" was understood as synonymous to "property"[1].

[1] "Measures to eliminate international terrorism: Report of the Working Group", UN doc. A/C.6/54/L.2, 26 October 1999, p. 58, para. 42.

5. The Court thus considers that the term "funds" in principle extends to a broad range of assets, from precious metals to artwork (Judgment, para. 48). However, the Court insists that such assets are only covered by the definition where they "are provided for their monetary value and not as a means of committing acts of terrorism" (*ibid*.).

6. There is a certain appeal in the Court's view, in so far as it captures the main focus of the Convention. The title and preamble of the Convention indicate that the primary concern behind its adoption was the aim to deprive groups committing acts of terrorism of their financial resources (Judgment, para. 50). This is also reflected in the fact that some of the obligations under the Convention apply primarily, if not exclusively, in situations where the "funds" in question are financial or monetary in character (*ibid*., para. 49).

7. It is unsurprising that the focus of the ICSFT is on assets that are traded and transferred with little trace of their origin. But a treaty's focus is not the same thing as its scope. So, the fact that some provisions of the Convention are not applicable unless the assets in question are financial is of limited interpretative value. In *Oil Platforms*, the Court had to grapple with the meaning of "commerce" under Article X, paragraph 1, of the Treaty of Amity, Economic Relations, and Consular Rights[2] between the parties to that case. The Court gave

> "due weight to the fact that, after Article X, paragraph 1, in which the word 'commerce' appears, the rest of the Article clearly deals with maritime commerce. Yet this factor [wa]s not, in the view of the Court, sufficient to restrict the scope of the word to maritime commerce."[3]

This logic applies with even greater force where the term in question is defined under the applicable treaty. For example, Article 37, paragraph 1, of the Vienna Convention on Diplomatic Relations[4] assumes that the diplomatic agent is accompanied by family members and only applies in such situations, but few would rely on Article 37 to argue that persons not accompanied by family members do not qualify as "diplomatic agents" under Article 1 *(e)* of the Vienna Convention. Likewise, the fact that some provisions of the ICSFT apply to some types of "funds" and not to others does

[2] Treaty of Amity, Economic Relations, and Consular Rights (concluded 15 August 1955; entered into force 16 June 1957), United Nations, *Treaty Series*, Vol. 284, p. 93.

[3] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 817, para. 41.

[4] Vienna Convention on Diplomatic Relations (concluded 18 April 1961; entered into force 24 April 1964), United Nations, *Treaty Series*, Vol. 500, p. 95.

not detract from a broader interpretation of "funds". Indeed, some of the provisions the Court relies on — for example, Article 18, paragraph 2 *(b)* — are equally inapplicable to assets that are covered by the Court's interpretation — for example, energy resources provided for their monetary value.

8. It seems artificial to include non-financial assets in the concept of "funds" when they are used "for their monetary and financial value" but to exclude them when they serve as the means used to commit acts of terrorism. An asset does not lose its financial value when it serves as the means for the commission of an act of terrorism. Following the Court's reasoning, provision by a sponsor of a building will be considered provision of "funds" where the sponsored entity (the "terrorist group", for want of a better term) rents out the building and uses the proceeds to rent a hideout for its activities. But provision of the same building will not be considered provision of "funds" where the terrorist group uses that building as its hideout. In both cases, the building has improved the financial situation, or the equity, of the terrorist group; whether it has done so directly or indirectly is not legally relevant.

9. The Court's complicated delineation of the concept of "funds" with reference to the function of the relevant assets is further obscured by the fact that, under the terms of Article 2, the critical function is the one intended or perceived by the sponsor. So, a person who provides a building in the knowledge that it will be used "for [its] financial value" — for example, that it will be rented out by the sponsored terrorist group — commits an offence. This is so even if the sponsored terrorist group eventually decides to use the building as a hideout: under Article 2, paragraph 3, of the ICSFT, the actual fate of the funds provided is not decisive for the purpose of establishing an offence. By contrast, a person who provides a building in the knowledge that it will be used as a hideout does not commit an offence even if the sponsored terrorist group eventually decides to rent out the building instead and to use the proceeds to finance other acts. Thus, the function of the assets provided, and consequently the question whether they constitute "funds" within the meaning of the ICSFT, is relegated to the mental state of the person who provides them — it is part of the requisite mental elements for the establishment of the offence under Article 2.

10. There is a more fundamental point about the scope of the term "funds" and thus about the scope of the offence under Article 2. As the Court observes, the question whether a party to the ICSFT is required to perform its obligations thereunder will depend on the applicable threshold evidence of terrorism financing (Judgment, para. 84). The obligations invoked in the

present case arise regardless of whether the offence of terrorism financing has been proved (see, for example, *ibid.*, paras. 92, 103 and 138). Yet the function of an asset in a specific situation — whether or not it is provided or collected "for [its] monetary and financial value" — is one of the elements that will be ascertained on the basis of the relevant evidence. On occasion, the existing evidence may leave no doubt as to the function of a non-financial asset provided to a terrorist group. Often, however, the function will not emerge so clearly — even less so the function intended or perceived by the sponsor. Preliminary evidence may indicate that a non-financial asset, such as a building or a weapon, was provided for its financial value, namely in order to be traded to support acts of terrorism. But upon further investigation and closer assessment of the evidence, it may emerge that the asset was provided to be used as a means for the commission of acts of terrorism. The opposite may of course also be true: a non-financial asset that initially seemed to have been provided as a means for the commission of acts of terrorism may turn out to have been provided for its financial value.

11. Following the logic of the Judgment, a party's obligations under the ICSFT may arise in the former situation, where there is some evidence that a non-financial asset is used for its financial value, even if this evidence is eventually rebutted, thereby precluding the commission of the offence. By contrast, in the latter situation, where preliminary evidence indicates that a non-financial asset is used as a means for the commission of an act of terrorism, then the obligations under the ICSFT do not arise, even if it eventually turns out that this asset is used for its financial value (and perhaps even if it turns out that the offence of terrorism financing was actually committed).

12. This counter-intuitive conclusion complicates the application of the ICSFT in practice, because it creates confusion as to the situations in which the parties are to take action under the Convention. I think that this fact alone undermines the object and purpose of suppressing terrorism financing.

2. The Obligation to Afford Assistance under Article 12

13. The Court concludes that it has not been established that the Russian Federation violated its obligations under Article 12, paragraph 1, of the ICSFT (Judgment, para. 131). It considers that the evidence accompanying Ukraine's requests was insufficient to require the Russian Federation to attend to them by affording its assistance (*ibid.*, para. 130). I do not share this conclusion. Article 12 requires States parties to "afford one another the greatest measure of assistance in connection with criminal investigations or criminal or extradition proceedings" in respect of offences under Article 2.

In addition to my doubts, expressed above, that obligations under Article 12 only come into play in the context of the provision of financial assistance, I do not agree with the Court's analysis of the type of obligation imposed by Article 12.

14. The obligation to afford assistance in another State party's investigations under Article 12 bears some similarities to the obligation to investigate under Article 9, which the Court finds to have been violated in the present case. Similarly to the obligation to investigate, the obligation to afford assistance is to be performed with a view to ascertaining whether an offence has been committed. Assistance in investigations, like investigations themselves, is most valuable at a point when the details surrounding the alleged offence are not yet known and the facts provided are general in nature (see Judgment, para. 103). With respect to the obligation to investigate under Article 9, the Court notes that unsubstantiated allegations do not give rise to a duty to initiate an investigation (*ibid.*, para. 104). This proposition is based on the terms of Article 9 ("shall take such measures as *may be* necessary under its domestic law"; emphasis added). It is not clear however that the same qualification applies to the obligation to afford assistance to another State party in its investigations: the text of Article 12 does not hint at it, nor is it warranted by the character of the obligation to assist another State in its investigations, which is normally significantly less onerous than the obligation to initiate one's own investigation.

15. Even if a State party to the ICSFT has no obligation to provide assistance to another State's investigations unless there is sufficient evidence of the offence in question, Ukraine's two requests were detailed enough to require action by the Russian Federation. For example, the request of 11 November 2014 recounts in some detail an alleged decision by the suspect (deputy of the State Duma of the Russian Federation and head of a political party faction) to fund the Luhansk People's Republic, and the contemporaneous launch by the political party of a fundraiser for the benefit of an organization otherwise unknown to the Ukrainian authorities[5]. In its request, Ukraine documented the alleged decision and the launch of the fundraiser (including the bank details of the beneficiary organization), and it requested the Russian Federation's assistance in questioning officials of the organization as witnesses and in providing details concerning the suspect[6]. Similar details with reference to a different suspect were provided in Ukraine's request of 3 December 2014[7]. In my view, the obligation under Article 12 to afford the greatest measure of assistance to Ukraine in its criminal investigations entailed a duty of the Russian Federation to react to these requests. Given that one of the Convention's aims is to enhance international co-

[5] Ukrainian request for legal assistance concerning case No. 12014000000000293 (11 November 2014) (Memorial of Ukraine, Ann. 404).

[6] *Ibid.*

[7] Ukrainian request for legal assistance concerning case No. 12014000000000291 (3 December 2014) (Memorial of Ukraine, Ann. 405).

operation among States parties for the effective punishment of terrorism financing, as stated in the preamble of the ICSFT[8], such a reaction should be timely, especially if it consists in the refusal rather than the provision of assistance. Unjustified delay in responding to a request for assistance hampers the requesting State's efforts to suppress terrorism financing and thus thwarts the performance of its own obligations under the ICSFT.

16. The Russian Federation responded to Ukraine's requests more than eight months later in each case[9]. Such a delay contrasts to the promptness with which the Russian Federation has responded to requests for legal assistance generally (see Judgment, para. 110). The Russian Federation did not provide any grounds for its delay in its responses to Ukraine or in its pleadings before the Court. This conduct alone would sustain a breach of the Russian Federation's obligation to afford Ukraine the greatest measure of assistance under Article 12.

17. It is in principle possible under the conventions of mutual legal assistance in force between the Parties, which are to be observed in such situations pursuant to Article 12, paragraph 5, of the ICSFT. Specifically, the European Convention on Mutual Assistance in Criminal Matters and the Convention on Legal Aid and Legal Relations in Civil, Family and Criminal Cases permit the refusal of legal assistance where granting such assistance may prejudice the sovereignty, security or essential interests of the requested State[10]. In its responses, the Russian Federation invoked these provisions to refuse assistance to Ukraine. While reliance on such grounds as sovereignty and security may entail a certain measure of discretion, the refusing State is still expected to state the reasons for its refusal. This is not only mandated under the terms of one of the conventions but, as the Court observed in a similar context, "[i]t also allows the requested State to substantiate its good faith in refusing the request"[11]. Against this background, I think that the Russian Federation's terse reference to the permissible grounds of refusal under the applicable conventions does not discharge its obligations

[8] ICSFT, preamble, twelfth recital.

[9] Prosecutor General's Office of the Russian Federation Letter No. 87-157-2015 (17 August 2015) (Memorial of Ukraine, Ann. 424); Prosecutor General's Office of the Russian Federation Letter No. 87-159-2015 (17 August 2015) (Memorial of Ukraine, Ann. 426).

[10] Article 2 *(b)* of the European Convention on Mutual Assistance in Criminal Matters (concluded 20 April 1959; entered into force 12 June 1962), United Nations, *Treaty Series*, Vol. 472, p. 185; Article 19 of the Convention on Legal Aid and Legal Relations in Civil, Family and Criminal Cases (concluded 22 January 1993; entered into force 19 May 1994), as amended by the Protocol of 1997.

[11] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, p. 231, para. 152.

under those conventions and, by extension, under the ICSFT. Relatedly, I do not think that this explicit obligation of justification has somehow been extinguished because it may have been breached by both Parties in the past[12].

II. International Convention on the Elimination of All Forms of Racial Discrimination

18. This is the first Judgment of the Court dealing with the interpretation and application of the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD") on the merits of a dispute. For this reason, it may be useful to situate the Court's analysis in existing international jurisprudence. In this section, I also explain why, in my view, some acts of the Respondent should have been found to be inconsistent with its obligations under CERD.

1. Scope of the Case

19. As the Judgment recalls, Ukraine's claim under CERD consists in an allegation that the Russian Federation has engaged in a pattern of conduct that is in breach of its obligations under CERD (Judgment, para. 159). To address Ukraine's claim concerning the existence of "a pattern of racial discrimination", the Court framed the appropriate enquiry, stating that a significant number of individual acts together would constitute a pattern of racial discrimination (*ibid*., para. 161).

20. So, in the present case, the Court does not examine whether individual instances have given rise to violations of the Respondent's obligations under CERD for the simple reason that it was not called upon to do so by the Applicant in this case (Judgment, para. 161). It is therefore important to emphasize that the conduct giving rise to racial discrimination does not need to consist of multiple acts[13]. An individual act of racial discrimination against one victim is wrongful under CERD, regardless of whether it forms part of a pattern of racial discrimination. Moreover, a pattern of racial discrimination may emerge from a single measure to the extent that it introduces changes affecting an undefined number of persons — as regulatory measures usually do. The Judgment accepts this when it finds that legislative

[12] See, by analogy, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 68, para. 114.

[13] Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two, p. 63, para. 6 (Commentary to Article 15).

and other practices applying to an undefined number of persons constitute a pattern of racial discrimination (*ibid*., para. 369).

21. I should also clarify that the pattern of racial discrimination need not in all cases be composed of acts having the same character or belonging to the same "category of violations" (Judgment, para. 161). As with the decision to ascertain the existence of a pattern of racial discrimination, the structure of the Court's reasoning on the basis of the different types of alleged acts — physical violence, law enforcement measures, etc. — is simply a result of the manner in which the Applicant presented and argued its case. I do not read the Judgment as suggesting that a pattern of racial discrimination cannot emerge from a series of acts that are of a diverse character.

2. The Concept of Racial Discrimination

22. Article 1, paragraph 1, of CERD defines the term "racial discrimination" as

> "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

23. The text of the Convention thus clarifies that prohibited racial discrimination may arise from the purpose of particular acts as well as from their effect. Effects-based discrimination may occur when laws, policies and practices (which the Judgment refers to collectively as "measures"), while generally applicable (or "neutral"), can be shown to have a disparate adverse effect on the human rights of persons of a particular protected group.

24. A finding that a measure produces a disparate adverse effect on the rights of members of a protected group does not in itself amount to a finding of racial discrimination. It does, however, call for close scrutiny. As the Judgment emphasizes, the disparate adverse effect must be explicable in a way that does not relate to the prohibited grounds (Judgment, para. 196). This requirement for explanation, or justification, has been identified by the Committee on the Elimination of Racial Discrimination ("CERD Committee"), the independent body established specifically to supervise the interpretation and application of CERD[14]. When addressing comparable

[14] CERD Committee, General Recommendation XIV on Article 1, paragraph 1, of the Convention, Report of the Committee on the Elimination of Racial Discrimination, UN doc. A/48/18 (Supp) (1993), para. 2.

provisions prohibiting discrimination, other treaty monitoring bodies and international courts have similarly affirmed the need for an objective and reasonable justification of measures that produce a disparate adverse effect on a given person or group[15].

25. Once it has been established that a measure has produced a disparate adverse effect on members of the protected group, the burden will normally fall on the State imposing (or tolerating) the measure, which is expected to show that this effect is justified, in the sense that it is unrelated to the prohibited grounds (see Judgment, para. 196)[16]. When the group experiencing the disparate adverse effect of a measure is identified with reference to the characteristics protected under CERD, the justification given must be subjected to rigorous scrutiny. As observed by the European Court of Human Rights ("ECtHR"), "[w]here the difference in treatment is based on race, colour or ethnic origin, the notion of objective and reasonable justification must be interpreted as strictly as possible"[17]. In this regard, the measures producing the disparate adverse effect ought to be applied pursuant to a legitimate aim, and they ought to be proportional to the achievement of this aim[18]. Only in such circumstances will the explanation of the disparate adverse effect produced by the measure in question be deemed unrelated to the prohibited grounds under CERD (see Judgment, para. 196).

3. Application in the Present Case

26. Against this background, the Court's assessment of Ukraine's claims in the present case is not fully consistent, especially with regard to the question of proof for the justification of measures that produce a disparate adverse effect. On occasion, the Court, upon affirming that a given measure

[15] Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-discrimination in economic, social and cultural rights (International Covenant on Economic, Social and Cultural Rights, Art. 2, para. 2), UN doc. E/C.12/GC/20 (2 July 2009), para. 13; ECtHR, *Thlimmenos* v. *Greece* (Application No. 34369/97), Judgment of 6 April 2000 (Grand Chamber), para. 44; Inter-American Court of Human Rights, *Yatama* v. *Nicaragua* (Series C, No. 127), Judgment of 23 June 2005, para. 185.

[16] ECtHR, *D. H. and Others* v. *Czech Republic* (Application No. 57325/00), Judgment of 13 November 2007 (Grand Chamber), para. 177; ECtHR, *Biao* v. *Denmark* (Application No. 38590/10), Judgment of 24 May 2016 (Grand Chamber), para. 114.

[17] ECtHR, *Oršuš and Others* v. *Croatia* (Application No. 15766/03), Judgment of 16 March 2010 (Grand Chamber), para. 156.

[18] CERD Committee, General Recommendation No. 32: The meaning and scope of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination, UN doc. CERD/C/GC/32 (24 September 2009), para. 8. See also Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-discrimination in economic, social and cultural rights (International Covenant on Economic, Social and Cultural Rights Art. 2, para. 2), UN doc. E/C.12/GC/20 (2 July 2009), para. 13; ECtHR, *Molla Sali* v. *Greece* (Application No. 204520/14), Judgment of 19 December 2018 (Grand Chamber), para. 135; Inter-American Court of Human Rights, *Norín Catrimán and Others (Leaders, Members and Activist of the Mapuche Indigenous People)* v. *Chile* (Series C, No. 279), Judgment of 29 May 2014, para. 200.

produces such an effect, thoroughly inspects the explanations given by the Respondent. This is the case with the measures relating to education (Judgment, paras. 338-370). At times, however, in my view, the majority is too quick to conclude that the Respondent has discharged its duty for justification of measures producing a disparate adverse effect. This is best illustrated by the Court's approach to the Russian Federation's law enforcement measures and its ban of the *Mejlis* which, I consider, both give rise to discrimination against persons of Crimean Tatar ethnic origin.

27. As the Judgment acknowledges, the Russian Federation's application of measures of law enforcement produced a disparate adverse effect on persons of Crimean Tatar ethnic origin (Judgment, para. 238). This has been extensively documented in reports by the Secretary-General and by the Office of the High Commissioner for Human Rights and noted with deep concern by the General Assembly (see *ibid.*). This being so, the Russian Federation is expected to explain this effect, and its justification ought to be rigorously scrutinized[19]. The Judgment states that the application of law enforcement measures to persons solely on the basis of an assumption that they are prone to specific types of behaviour owing to their ethnic origin is unjustifiable (*ibid.*, para. 237). For its part, the CERD Committee has condemned the practice of racial profiling as a violation of CERD and has warned that the practice is committed through such acts as arbitrary searches, investigations and arrests[20].

28. The Russian Federation justifies its conduct with reference to considerations of security (notably, the "fight against religious 'extremism' and 'terrorism'") and of public health (Judgment, paras. 239-240). However, reports of the Office of the High Commissioner for Human Rights paint a different picture. They express concern "about the growing number of large-scale 'police' actions conducted with the apparent intention to harass and intimidate Crimean Tatars"[21], and they document that some searches against Crimean Tatars "were conducted without presenting any

[19] See, among others, ECtHR, *Timishev* v. *Russia* (Application Nos. 55762/00 and 55974/00), Judgment of 13 December 2005, para. 58:

> "no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures".

[20] CERD Committee, General Recommendation No. 36 (2020) on preventing and combating racial profiling by law enforcement officials, UN doc. CERD/C/GC/36 (17 December 2020), paras. 21 and 14.

[21] OHCHR, Report on the human rights situation in Ukraine (16 February to 15 May 2016), para. 183.

authorization"[22]. The reports observe that "[t]he raids often involved excessive use of force and an extent of searches not warranted by circumstances, going beyond the lawful objective of preventing crime and protecting the rights and freedoms of others"[23].

29. In these circumstances, invocation of grounds of security and public health does not suffice to discharge the burden on the Russian Federation to provide an objective and reasonable explanation for its conduct. In fact, the Court acknowledges that the

> "stated purpose of certain measures appears [in some cases] to have served as a pretext for targeting persons who, because of their religious or political affiliation, the Russian Federation deems to be a threat to its national security" (Judgment, para. 241).

Crucially, the religious or political affiliation in question (and thus the risk to national security) may itself not be manifested but instead conjectured on account of the individual's ethnic origin as a Crimean Tatar.

30. Against this background, I think that the Court should have required more convincing evidence from the Russian Federation that its law enforcement measures were indeed justified. In the absence of such a convincing explanation, I think that a finding of violation was warranted.

31. Similar considerations apply with respect to the Russian ban on the *Mejlis*. The ban, by its very nature, produces a disparate adverse effect on persons of Crimean Tatar origin[24]. Although the Court acknowledges such an effect (Judgment, para. 270), it then proceeds to find that "the *Mejlis* was banned due to the political activities carried out by some of its leaders in opposition to the Russian Federation, rather than on grounds of their ethnic origin" (*ibid*., para. 271).

32. In so doing, the Judgment seems to regard the various justifications for differential treatment as mutually exclusive: if differential treatment is "due to . . . political activities", it cannot also be based on grounds of ethnic origin. Yet a common feature of measures that produce a disparate adverse effect on specific groups is that they rely on a variety of justifications. This accords

[22] OHCHR, Report on the situation of human rights in the temporarily occupied Autonomous Republic of Crimea and the city of Sevastopol, Ukraine 13 September 2017 to 30 June 2018, UN doc. A/HRC/39/CRP.4 (21 September 2018), para. 31.

[23] *Ibid.*

[24] In a previous phase of this case, Judge Crawford highlighted the importance of the historical context in appreciating the impact of the ban on Crimean Tatars: *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*

with human experience that almost all actions have multiple motives. So, a finding that differential treatment is based on political grounds does not preclude it being also based on prohibited grounds, such as ethnic origin. In this sense, the Court did not comprehensively examine whether the explanation provided by the Russian Federation relates to one of the prohibited grounds under CERD.

33. Still less persuasive is the ensuing reversal of the burden of proof back to the Applicant, which is expected to provide convincing evidence that the measure was based on prohibited grounds (Judgment, para. 272). This move may in part be the result of the way in which Ukraine itself described the measure in this case (see *ibid*., para. 271). However, the shift of the burden of proof from the applicant to the respondent and then back to the applicant can be criticized as a matter of principle. In my view, the Russian Federation has not successfully discharged its burden of establishing that the ban on the *Mejlis* is justified. Neither the domestic court decisions nor the pleadings of the Russian Federation convincingly explain why an outright ban of the entire institution was the appropriate measure in the circumstances. One can easily imagine, for example, measures prosecuting the individual members of the *Mejlis* who are accused of extremism, and even banning their participation in the activities of the *Mejlis*, while preserving the operation or activities of the institution and ensuring that the prosecuted members are replaced by new members elected by the *Qurultay*[25].

III. Provisional Measures

34. As my votes indicate, I agree that the Russian Federation has violated the Court's Order of 19 April 2017 in relation to the ban on the *Mejlis* and to the aggravation of the dispute before the Court. In this section, I offer my views, first, on the basis for the latter violation and, second, on the remaining provisional measure indicated by the Court's Order of 19 April 2017.

(Ukraine v. *Russian Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, declaration of Judge Crawford, pp. 213-214, paras. 1-3.

[25] My understanding is that the complaint among Crimean Tatars against the *Mejlis* is levelled primarily against the individual serving members of the *Mejlis*, who allegedly abuse their powers and engage in extremism, rather than the institution as such: see, for example, Witness statement of Ibraim Rishatovich Shirin (22 February 2023), para. 9 (Rejoinder of the Russian Federation, Ann. 11); Witness statement of Elivna Izetovna Seitova (18 February 2023), para. 12 (Rejoinder of the Russian Federation, Ann. 27).

1. Aggravation of the Dispute

35. In its Order of 19 April 2017, the Court indicated that both Parties "shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve"[26]. The Court explains only briefly why the Russian Federation violated this obligation.

36. In my view, this obligation is an aspect of the obligation to use exclusively peaceful means for the settlement of disputes. Elaborating on the principle of the peaceful settlement of international disputes, which the Court considers "essential in the world of today"[27], the Friendly Relations Declaration explains:

> "States parties to an international dispute . . . shall refrain from any action which may aggravate the situation so as to endanger the maintenance of international peace and security, and shall act in accordance with the purposes and principles of the United Nations."[28]

Accordingly, provisional measures of non-aggravation reflect a pre-existing general duty of litigant parties that stems from the very purpose of dispute settlement[29]. Several Members of this Court have described non-aggravation measures as a means to contribute to the purpose of maintaining international peace and security, which is entrusted to the United Nations and to the Court as its principal judicial organ[30].

37. Therefore, conduct that is incompatible with the obligation to use peaceful means for the settlement of disputes is in principle likely to aggravate a dispute pending before the Court. On occasion, the Court has linked

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[26] *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), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, pp. 140-141, para. 106, point 2.

[27] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 145, para. 290.

[28] UN General Assembly, resolution 2625 (XXV) "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations".

[29] *Electricity Company of Sofia and Bulgaria, Order of 5 December 1939, P.C.I.J., Series A/B, No. 79*, p. 199; see also *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 503, para. 103.

[30] *Aegean Sea Continental Shelf (Greece* v. *Turkey), Judgment, I.C.J. Reports 1978*, separate opinion of Judge Lachs, p. 52; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, dissenting opinion of Judge Weeramantry, p. 70; *ibid.*, dissenting opinion of Judge Ajibola, p. 93; *Legality of Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, declaration of Judge Koroma, p. 143; *ibid.*, dissenting opinion of Vice-President Weeramantry, p. 202; *ibid.*, dissenting opinion of Judge Shi, pp. 207-208; *ibid.*, dissenting opinion of Judge Vereshchetin, p. 209.

the risk of aggravation of the dispute with ongoing or probable use of force[31]. The Chamber of the Court in *Frontier Dispute* explicitly treated the use of force as incompatible with the duty not to aggravate the dispute. Specifically, the Chamber observed that some types of conduct "not merely are likely to extend or aggravate the dispute but comprise a resort to force which is irreconcilable with the principle of the peaceful settlement of international disputes"[32].

38. In the same vein, the Court has suggested that the use of force by litigant parties undermines the ongoing judicial proceedings. In *Tehran Hostages*, the Court expressed its concern with respect to the United States' intrusion into Iran after the Court's hearings in the case but before the delivery of the Judgment. Recalling its order of provisional measures, whereby it "had indicated that no action was to be taken by either party which might aggravate the tension between the two countries", the Court felt

> "bound to observe that an operation undertaken in those circumstances [in which the Court was deliberating upon the pending dispute], from whatever motive, is of a kind calculated to undermine respect for the judicial process in international relations"[33].

39. So, conduct amounting to the use of force undermines the dispute settlement proceedings pending before the Court and, in doing so, aggravates the ongoing dispute[34]. As recorded in the Judgment, since the Court's Order of 19 April 2017 the Russian Federation has launched a "special military operation", which entails the use of force. In my view, this conduct is incompatible with the Russian Federation's obligation to use peaceful means for the settlement of its dispute with Ukraine in the present case, and there-

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[31] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996 (I)*, p. 23, para. 42; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Requests for the Modification of the Order Indicating Provisional Measures of 8 March 2011, Order of 16 July 2013, I.C.J. Reports 2013*, p. 240, paras. 37-38.

[32] *Frontier Dispute (Burkina Faso/Republic of Mali), Provisional Measures, Order of 10 January 1986, I.C.J. Reports 1986*, p. 9, para. 19; see also *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Provisional Measures, Order of 14 June 2019, I.C.J. Reports 2019 (I)*, declaration of Vice-President Xue, p. 374, para. 6.

[33] *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, I.C.J. Reports 1980*, p. 43, para. 93.

[34] See also *Frontier Dispute (Burkina Faso/Republic of Mali), Provisional Measures, Order of 10 January 1986, I.C.J. Reports 1986*, p. 9, para. 19, referring to non-aggravation measures as "conduc[iv]e to the due administration of justice"; and *The South China Sea Arbitration between the Republic of the Philippines and the People's Republic of China, Award of 12 July 2016*, United Nations, *Reports of International Arbitral Awards*, Vol. XXXIII, p. 603, para. 1176, referring to conduct aggravating a dispute "by undermining the integrity of the

fore is incompatible with its obligation to refrain from actions that might aggravate the dispute submitted to the Court.

40. This conclusion does not bear on the compatibility of the Russian Federation's "special military operation" with international law in general. Rather, the Court's task here is confined to examining its compatibility with the very specific obligation imposed on it under the terms of the Court's Order of 19 April 2017. In this regard I note that, at least before the Court, the Russian Federation has not invoked any circumstance that might preclude the wrongfulness of the conduct that breaches its obligations under the Order, including self-defence[35].

41. Under the terms of the Court's Order, the obligation to refrain from actions that might aggravate the dispute was addressed to both Parties. However, the Russian Federation has not claimed that Ukraine has breached the obligation through its own conduct. For this reason, the Court's finding concerning the Russian Federation's violation is without prejudice to the question as to whether Ukraine also failed to comply with this provisional measure[36].

2. Availability of Education in the Ukrainian Language

42. Unlike the majority, I consider that the Russian Federation has also breached the provisional measure relating to ensuring the availability of education in the Ukrainian language[37]. In order to ascertain the scope of the provisional measure indicated by the Court, it is important to appreciate the context in which it was indicated, and specifically the risk of irreparable prejudice to which this provisional measure responded. In the Order of 19 April 2017, the Court had regard to two reports that documented a decline in the use of Ukrainian as a language of instruction, coupled with allegations of pressure for its discontinuance[38]. Relying on these reports, the Court concluded, on a prima facie basis, that there might have been restrictions in terms of the availability of Ukrainian-language education in Crimean schools[39]. In directing the Russian Federation to "[e]nsure the availability of

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dispute resolution proceedings themselves, including . . . taking other actions that decrease the likelihood of the proceedings in fact leading to the resolution of the parties' dispute."

[35] See Article 21 of the Articles on the Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two, p. 26.

[36] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 259, para. 265.

[37] *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), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, p. 140, point (1) *(b)*.

[38] *Ibid*., p. 138, para. 97.

[39] *Ibid.*

education in the Ukrainian language", the Court aimed at mitigating the risk posed by such restrictions.

43. Seen against this background, the measure does more than provide for simply making education in Ukrainian available in some areas pending the Court's final decision in the case. Rather, this measure obliges the Russian Federation to ensure that students in Crimea wishing to be educated in the Ukrainian language are able to do so. There is evidence indicating that the demand for instruction in Ukrainian was not always met. Specifically, the Secretary-General has documented in consecutive reports that the availability of instruction in Ukrainian has not always satisfied demand[40]. In addition, he has raised doubts as to the extent to which Ukrainian, while formally available as a language of instruction, is used in practice in the curriculum[41]. To this, one can add the reported indifference, if not discouragement, from school administrations in the face of requests for enrolment in Ukrainian-language curricula[42]. The limited availability in practice of Ukrainian has raised concern as to the impact that it could have on the well-being and development of children belonging to the Ukrainian ethnic minority[43]. In my view, this evidence points towards a violation by the Russian Federation of its relevant obligation under the Court's Order.

(Signed) Hilary CHARLESWORTH.

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[40] Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine: Report of the Secretary-General, UN doc. A/76/260 (2 August 2021), para. 35; Situation of human rights in the temporarily occupied Autonomous Republic of Crimea and the city of Sevastopol, Ukraine: Report of the Secretary-General", UN doc. A/77/220 (25 July 2022), para. 40.

[41] Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine: Report of the Secretary-General, UN doc. A/74/276 (2 August 2019), para. 52; Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine: Report of the Secretary-General, UN doc. A/75/334 (1 September 2020), para. 35; Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine: Report of the Secretary-General, UN doc. A/76/260 (2 August 2021), para. 34; Situation of human rights in the temporarily occupied Autonomous Republic of Crimea and the city of Sevastopol, Ukraine: Report of the Secretary-General, UN doc. A/77/220 (25 July 2022), para. 39.

[42] Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine: Report of the Secretary-General, UN doc. A/76/260 (2 August 2021), para. 35; Situation of human rights in the temporarily occupied Autonomous Republic of Crimea and the city of Sevastopol, Ukraine: Report of the Secretary-General", UN doc. A/77/220 (25 July 2022), para. 40.

[43] Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine: Report of the Secretary-General, UN doc. A/75/334 (1 September 2020), para. 35.