SEPARATE OPINION OF JUDGE *AD HOC* POCAR

Disagreement with the Court's interpretation of the term "funds" — The Court ignores the special meaning of "funds" as "assets of every kind" — The exclusion of weapons and other items used operatively in terrorist attacks contravenes the object and purpose of the ICSFT — Dismissal of predicate acts involving the transfer of weapons is unjustified — The Russian Federation has breached its co-operation obligations under Articles 10 and 12 of the ICSFT — Disagreement with the Court's definition of racial discrimination under Article 1 (1) of the CERD — The Court fails to shift the burden of proof to the Russian Federation after Ukraine has established a prima facie case of discrimination — The ban of the Mejlis *creates a disparate adverse effect on Crimean Tatars that was unjustified and disproportional — Protection of minority language education under the CERD is broader than admitted by the Court — The Russian Federation has breached the Court's provisional measures Order in relation to the availability of Ukrainian-language education.*

1. I regret that I am unable to join the majority in several key aspects of today's Judgment. In particular, I strongly disagree with the Court's methodological approach to the interpretation of the term "funds" in the International Convention for the Suppression of the Financing of Terrorism (hereinafter the "ICSFT"), which I believe is incompatible with the rules of interpretation laid down by the Vienna Convention on the Law of Treaties (hereinafter the "VCLT") and their customary law equivalents. Moreover, I retain some concerns as to the Judgment's analysis of the co-operation obligations under Articles 10 and 12 of the ICSFT. I also dissent on the conclusion that the ban of the *Mejlis*, as an important representative body of the Crimean Tatar population, did not constitute a violation of the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter the "CERD"). Finally, I concurred with the majority's conclusion that the Russian Federation has violated its obligations under the CERD in relation to the availability of Ukrainian-language education. However, I do not agree with the Court's conclusion that the Russian Federation did not violate the provisional measure indicated by the Court in its Order of 19 April 2017, namely, to ensure the availability

of education in the Ukrainian language. The reasons for my dissent are set out below.

I. Ukraine's Claims under the International Convention for the Suppression of the Financing of Terrorism (ICSFT)

1. Application of the Vienna Convention on the Law of Treaties and Interpretation of the Term "Funds"

2. A significant part of Ukraine's claims in this case depends on the question of whether the term "funds" under the ICSFT encompasses items used operatively to carry out terrorist acts, in particular weapons, ammunition and explosives. In its Judgment, the Court concludes that

> "the term 'funds', as defined in Article 1 of the ICSFT and used in Article 2 of the ICSFT, 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"[1].

3. I cannot support this conclusion. The interpretation of the term "funds" must be undertaken in accordance with the rules of interpretation laid down in Articles 31 to 33 of the VCLT, which, in addition, are reflective of customary international law[2]. Under Article 31 (1), a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. However, according to Article 31 (4) of the VCLT, a special meaning shall be given to a term if it is established that the parties so intended. Such a special meaning is clearly expressed in Article 1 (1) of the ICSFT, which defines "funds" as

> "assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including, but not limited to, bank credits, travellers

[1] Judgment, para. 53.

[2] See e.g. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Preliminary Objections, Judgment, I.C.J. Reports 2022 (II)*, p. 510, para. 87; *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, Judgment, I.C.J. Reports 2019 (II)*, p. 598, para. 106; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, pp. 109-110, para. 160.

cheques, bank cheques, money orders, shares, securities, bonds, drafts, letters of credit".

4. The ordinary meaning of "assets" is already quite broad, sometimes defined in dictionaries as "all the property of a person"[3]. As such, it would clearly encompass weapons or other property used operatively by terrorist groups. This broad scope is further emphasized by the addition of the phrase "of every kind". Nevertheless, the Judgment seems to suggest that the meaning of "assets of *every* kind" — in direct contrast to its ordinary meaning — is in fact "assets of *some* kind". In doing so, the Judgment highlights the list of documents or instruments in Article 1 (1) that may evidence title to or interest in assets, such as "bank credits, traveller's cheques, bank cheques, money orders, shares, securities, bonds, drafts and letters of credit"[4]. The Judgment then concludes:

> "Thus, while the phrase 'assets of every kind' is an expansive one, the documents or instruments listed in the definition are ordinarily used for the purpose of evidencing title or interest only with regard to certain types of assets, such as currency, bank accounts, shares or bonds."[5]

5. As I have already pointed out in my separate opinion to the 2019 Judgment on preliminary objections, the focus of the definition of "funds" in Article 1 (1) lies on the term "assets" and refers to legal documents and instruments only in so far as they may evidence title to such "assets"[6]. Therefore, the list of documents and instruments included in Article 1 (1) — which is expressly defined as non-exhaustive by the words "but not limited to" — can by no means be used to circumscribe the type of assets included under that provision.

6. The Court's reductive interpretation of the term "assets" can also not be explained with a reference to the apparent context of the Convention. The Judgment stipulates that the fact that certain provisions of the Convention explicitly deal with "bank secrecy", "cross-border transactions" or "fiscal offences" must mean that the term "funds" (or "assets of every kind" for that

[3] See e.g. Bryan A. Garner, *Black's Law Dictionary*, West: 2009, p. 134.

[4] Judgment, para. 47.

[5] *Ibid.*

[6] *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, Judgment, I.C.J. Reports 2019 (II)*, separate opinion of Judge *ad hoc* Pocar, p. 674, para. 15.

matter) is limited to "resources that possess a financial or monetary character"[7]. At the same time, however, the Judgment acknowledges that the definition of "funds" enshrined in Article 1 (1) explicitly lists immovable and intangible property, for example real estate or patents, which do not possess a monetary character and could equally not be the subject of these specific provisions.

7. The Court also aims to find further support for its narrow interpretation by invoking the object and purpose of the Convention. The Judgment asserts that "the object of the ICSFT is not to suppress and prevent support for terrorism in general, but rather to prevent and suppress a specific form of support, namely its financing"[8]. But this argument is circular. The meaning of "financing" is "to raise or collect funds"[9]. "Funds", however, are explicitly defined in Article 1 (1), namely as "assets of every kind".

8. Ultimately, the Court acknowledges that the term "funds" under the Convention encompasses assets other than "traditional financial assets", for example oil, artworks or precious metals, and therefore implicitly accepts that financing can occur "in-kind"[10]. However, the Judgment also stipulates that such other assets are included only to the extent that they are "provided for their monetary value and not as a means of committing acts of terrorism"[11]. By excluding the transfer of assets used operatively from the scope of the Convention, the Court introduces — in essence — an unwritten additional element of intent. It is well known that weapons and ammunition (just like oil or precious metals) have an inherent monetary value and are subject to a large black market all over the world. This means an individual can commit the offence of terrorism financing by transferring weapons to a terrorist group with the knowledge that the group will sell the weapons; but that person will not commit the offence if he or she knows that the group aims to use these weapons directly. Similarly, the offence of terrorism financing would be completed if an individual transfers real estate to a terrorist group in the knowledge that the group will trade the property for weapons, but not if the group sets up its command centre in said property or uses it to hold hostages.

9. This outcome lacks any basis in the text of the ICSFT. Indeed, Article 2 (1) prescribes that the perpetrator intends or knows that the "funds" are to be used to "*carry out*" the acts defined in subparagraphs *(a)* or *(b)*.

[7] Judgment, para. 49.

[8] *Ibid*., para. 50.

[9] See Article 2 (1) of the ICSFT. See also Bryan A. Garner, *Black's Law Dictionary*, West: 2009, p. 706, defining "financing" as "to raise or provide funds".

[10] Judgment, paras. 41-42 and 48.

[11] *Ibid*., para. 48.

Nowhere does it say that the "funds" must first be used to purchase or acquire equipment or used as a reward for those carrying out such acts. This leads to an absurd incentive for terrorism supporters to directly acquire and transfer weapons and other goods used operatively for terrorist acts rather than to "only" provide "monetary" assistance. Therefore, the Court's conclusion squarely contravenes the object and purpose of the Convention.

10. Finally, the Judgment aims to justify its conclusion by a selective survey of the *travaux préparatoires*. It notes that the record of the negotiations "expressed a focus on the issue of financial or monetary support"[12]. However, the initial draft prepared by the *ad hoc* Committee defined "funds" as "cash, assets or any other property, tangible or intangible, however acquired"[13]. The informal summary of the working group recorded that

> "[s]uggestions were . . . made to delete the phrase 'or other property' as being superfluous. Another view was expressed in favour of the deletion of the word 'assets'. Still others preferred retaining both terms as distinct notions. Some preferred interpreting 'property' as covering *only* arms, explosives and similar goods."[14]

Ultimately, the term "other property" was deleted from the text. However, this was not done in order to remove arms and explosives but because "property" was already encompassed by the phrase "assets of every kind":

> "During the debate in the Working Group on the Bureau's proposed text, it was noted that the word 'property' was redundant, since it was already envisaged in the concept of 'funds', as defined in article 1. Thus, it could be deleted."[15]

Therefore, while it may well be that the focus of the negotiations was on "monetary support", including through "real or spurious charitable institutions"[16], these extracts show that this was certainly not the sole concern of

[12] *Ibid*., para. 51.

[13] Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, General Assembly, Official Records, Fifty-fourth session, Supplement No. 37 (A/54/37), p. 12.

[14] *Ibid*., p. 57, para. 4 (emphasis added).

[15] UNGA, "Measures to eliminate international terrorism: Report of the Working Group", UN doc. A/C.6/54/L.2, 26 October 1999, pp. 71-72.

[16] Judgment, paras. 51-52.

the drafters, and that the provision of weapons and arms was explicitly discussed. Rather than to confirm the narrow interpretation adopted by the Court, the *travaux* thus indicate that the term "property" was associated with "arms, explosives and similar goods", and that "property" was also considered as encompassed by the ultimate definition of "funds" as "assets of every kind".

11. In conclusion, I am convinced that the Court has erred in its interpretation of the term "funds". As a result, the Court put itself in the position not to be able to evaluate predicate acts the commission of which was solely sustained by the supply of weapons or other means to commit such acts[17], among others the shooting down of MH17 that has been widely litigated by the Parties[18]. Consequently, it dismissed a significant number of complaints and requests for assistance submitted by Ukraine to the Russian Federation under Articles 9, 12 and 18 as outside the scope of the Convention[19]. In addition, the Court's interpretation will likely have considerable impact beyond the present case as domestic courts may rely on today's decision in interpreting domestic legislation aimed to implement the ICSFT. Regrettably, this could lead to a significant gap in the legal framework aimed at preventing terrorism.

2. Relationship between Articles 9 and 10 of the ICSFT

12. In its Judgment, the Court found that the Russian Federation has failed to co-operate with Ukraine and to undertake the necessary investigations prescribed by Article 9 of the ICSFT[20]. I agree with this conclusion. However, the decision then proceeds to analyse the obligation to prosecute or extradite found in Article 10, paragraph 1, of the ICSFT. The Court notes that this obligation is

> "ordinarily implemented after the relevant State party has performed other obligations under the ICSFT, such as the obligation under Article 9 to conduct an investigation into the facts of alleged terrorism financing (see *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 455, para. 91). Ordinarily, it is only after an investigation has been conducted that a decision may be taken to submit the case to the competent authorities for the purpose of prosecution."[21]

13. The Judgment then continues to dismiss Ukraine's claim under Article 10 on the basis that the information provided by Ukraine to the

[17] *Ibid.*, para. 75.
[18] *Ibid.*, paras. 70 and 73.
[19] *Ibid.*, paras. 74, 106, 128 and 144.
[20] *Ibid.*, para. 111.
[21] *Ibid.*, para. 118.

Russian Federation did not give rise to "reasonable grounds to suspect that terrorism financing offences within the meaning of Article 2 of the ICSFT had been committed"[22]. However, the Judgment also acknowledges the Court's prior findings in the case of the *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, in which the Court has dealt with an obligation similar to the one contained in Article 10 (1) of the ICSFT (commonly known as the principle of *aut dedere aut iudicare*). In that case, the Court found that the similarly worded Article 6 (1) of the Convention against Torture

> "obliges the State to make a *preliminary inquiry immediately from the time that the suspect* is present in its territory. The obligation to submit the case to the competent authorities, under Article 7, paragraph 1, may or may not result in the institution of proceedings, in the light of the evidence before them, relating to the charges against the suspect."[23]

14. Therefore, irrespective of whether the evidence submitted by Ukraine was sufficient or not to prosecute the accused individuals, Article 10 nevertheless requires that the matter at least be brought to the attention of the relevant prosecutorial authorities, who, after making preliminary inquiries, will then decide whether the evidence warrants the filing of charges against the suspects. In the present case, it appears that the matter was not even submitted to the relevant authorities and that no genuine preliminary inquiry was made. The lack of action appears sufficient to justify a breach of Article 10, irrespective of whether a State has previously complied with its obligation to investigate under Article 9.

3. The Court's Dismissal of Ukraine's Claims under Article 12 of the ICSFT

15. In its assessment of Ukraine's claims under Article 12 of the ICSFT, the Judgment concludes that

> "none of the three requests described in any detail the commission of alleged predicate acts by the recipients of the provided funds. Nor did they indicate that the alleged funders knew that the funds provided would be used for the commission of predicate acts (see paragraph 64 above). Accordingly, the Court considers that the requests for legal assistance cited by Ukraine did not give rise to an obligation by the Russian Federation under Article 12 of the ICSFT to afford Ukraine 'the greatest measure of assistance' in connection with the criminal investigations in question."[24]

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[22] *Ibid*., para. 119.

[23] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 456, para. 94 (emphasis added).

[24] Judgment, para. 130.

16. This conclusion is problematic for several reasons. First, Article 12 (1) does not stipulate that the State requesting assistance must submit any specific information regarding the commission of predicate acts, or the intention of the funders, it simply obliges each State to provide "the greatest measure of assistance" in connection with criminal investigations in relation to the offence of terrorism financing. It is therefore not clear to me where the Court takes the above-mentioned evidentiary requirements from.

17. Second, Article 2 (3) of the ICSFT makes clear that it is not necessary that predicate acts are actually carried out by the recipients of the funds in order to complete the offence of terrorism financing. Accordingly, information relating to the commission of predicate acts cannot be an indispensable requirement to trigger the obligation of another State to assist with investigations. Nor can a State be expected to provide detailed information about the intention of suspected funders. It is in the nature of criminal investigations that certain elements of a potential crime, in particular the mental element, have yet to be established. It is precisely for this reason that Articles 9 and 12 provide for assistance by other States who might be in a position to supply information establishing such elements. This becomes even more pertinent in the case of terrorism financing, which is per definition a cross-border offence (see Article 3 of the ICSFT).

18. Third, and most importantly, Articles 9 and 12 represent two sides of the same coin. Whereas Article 9 deals with investigations to be carried out by the requested State, Article 12 regulates assistance to be given to the requesting State in relation to its own investigations. It makes no sense to conclude that the evidentiary basis was sufficient to trigger one obligation (Article 9) but not the other (Article 12). Indeed, such difference in relation to the applicable threshold finds no support in the text of Articles 9 and 12.

19. Finally, I note that the Court dismissed nine out of twelve relevant requests for legal assistance that have been submitted by Ukraine on the basis that they concerned the alleged transfer of weapons, ammunition or military equipment and therefore fall outside the scope of the Convention[25]. In this regard, I reiterate my strong dissent from the Court's erroneous interpretation of the term "funds" discussed above. Moreover, even under the Court's own definition of funds, the transfer of weapons would be encompassed by the Convention as long as such weapons are not intended to be used operatively but for their monetary value. The precise intention of the suspected individuals mentioned in these nine additional requests for legal assistance, however, can only be established by criminal investigations,

[25] *Ibid.*, para. 128.

including those foreseen by Articles 9 and 12. Therefore, the Court erred in summarily dismissing these requests without further analysis.

II. Ukraine's Claims under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD)

20. In relation to Ukraine's claims under the CERD, I agree with most of the Court's findings. However, there are some points that I would like to address more critically.

1. The Definition of Discrimination under the CERD

21. At the outset, I would like to address the Court's definition of racial discrimination in paragraph 196 of the Judgment. There, the Court states that

> "[a]ny measure whose purpose is a differentiation of treatment based on a prohibited ground under Article 1, paragraph 1, constitutes an act of racial discrimination under the Convention. A measure whose stated purpose is unrelated to the prohibited grounds contained in Article 1, paragraph 1, does not constitute, in and of itself, racial discrimination by virtue of the fact that it is applied to a group or to a person of certain race, colour, descent, or national or ethnic origin. However, racial discrimination may result from a measure which is neutral on its face, but whose effects show that it is 'based on' a prohibited ground. This is the case where convincing evidence demonstrates that a measure, despite being apparently neutral, produces a disparate adverse effect on the rights of a person or a group distinguished by race, colour, descent, or national or ethnic origin, unless such an effect can be explained in a way that does not relate to the prohibited grounds in Article 1, paragraph 1."

22. In my view, the phrase "unless such an effect can be explained in a way that does not relate to the prohibited grounds" remains ambiguous. It seems to suggest that prohibited discrimination must always contain an intentional element, whether concealed or not. However, as confirmed by the CERD Committee, requiring proof of "discriminatory intent is inconsistent with the Convention's prohibition of conduct having a discriminatory effect"[26]. Even a measure that is entirely neutral and implemented in good faith can nevertheless produce a disparate adverse effect on the rights of a group distinguished by race, colour, descent, or national or ethnic origin. In such a

[26] See e.g. CERD Committee, *V. S.* v. *Slovakia*, Communication No. 56/2014 (6 January 2016), UN doc. CERD/C/88/D/56/2014, para. 7.4.

case, the State in question must demonstrate that the measure was taken for a legitimate aim and is proportionate in relation to the achievement of that aim[27]. For example, where measures create a disparate adverse effect on the civil rights protected by Article 5 *(d)* of the CERD, restrictions may be imposed under the same requirements as prescribed by the International Covenant on Civil and Political Rights ("ICCPR")[28].

23. The general principle in proceedings before the Court is *onus probandi actori incumbit*, meaning that it is the party seeking to establish a fact who bears the burden of proving it[29]. However, this principle is not absolute. Once a prima facie case of discrimination is established by demonstrating the disparate adverse impact on a group distinguished by race, colour, descent, or national or ethnic origin, it is up to the respondent to demonstrate that the measure in question was taken for a legitimate aim and in a proportionate manner. This practice is well established in the case law of international courts and quasi-judicial bodies. The European Court of Human Rights, for example, has noted that once an applicant establishes "a rebuttable presumption that the effect of a measure or practice is discriminatory, the burden then shifts to the respondent State, which must show that the difference in treatment is not discriminatory"[30]. A similar practice can be found in the case law of the CERD Committee[31], the UN Human Rights Committee[32] and the Court of Justice of the European Union[33].

24. I believe that the Court should have applied this principle to Ukraine's claims under the CERD, in particular in relation to the law enforcement

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[27] CERD Committee, General Recommendation XXX (2004), UN doc. CERD/C/64/Misc.11/rev.3, para. 4. See also General Recommendation No. 32 (2009), UN doc. CERD/C/GC/32, para. 8.

[28] Patrick Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary*, Oxford University Press, 2016, p. 362.

[29] See e.g. *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 71, para. 161; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 437, para. 101.

[30] *D. H. and Others* v. *Czech Republic*, Judgment of 13 November 2007, Application No. 57325/00, para. 189.

[31] See e.g. CERD Committee, Opinion adopted by the Committee under article 14 of the Convention, concerning Communication No. 60/2016 (31 May 2021), UN doc. CERD/C/103/D/60/2016.

[32] See e.g. Human Rights Committee, *Karnel Singh Bhinder* v. *Canada* (1989), Communication No. 208/1986, UN doc. CCPR/C/37/D/208/1986.

[33] See e.g. *Dr Pamela Mary Enderby* v. *Frenchay Health Authority and Secretary of State for Health*, Judgment of 27 October 1993, C-127/92. The European Union Council Directive 2000/43/EC of 29 June 2000 explicitly stipulates that the principle of equal treatment requires that the rules on the burden of proof must be adapted when there is a prima facie case of

measures taken by the Russian Federation against the Crimean Tatars[34], as well as to the ban of the *Mejlis* discussed below.

2. The Ban of the Mejlis

25. The present Judgment dismisses Ukraine's claims in relation to the ban of the *Mejlis* instituted by the Russian authorities in Crimea. First, the Court distinguishes between the *Mejlis*, which can be described as a self-government body with quasi-executive functions, and the *Qurultay*, the highest representative body of the Crimean Tatar people, which is composed of directly elected representatives[35]. The Judgment then notes that since only the *Mejlis* but not the *Qurultay* has been banned, the Court is "not convinced that Ukraine has substantiated its claim that the ban on the *Mejlis* deprived the wider Crimean Tatar population of its representation"[36]. This statement is problematic as it assumes that only measures that deprive a protected group of *all* representation can constitute a violation of the CERD. This cannot be correct. Article 1 (1) of the Convention explicitly recognizes that prohibited racial discrimination can be brought about by restrictions that have the purpose or effect of "nullifying or *impairing*" the rights protected under the Convention.

26. Ultimately, the Judgment admits that the ban of the *Mejlis* produces "a disparate adverse effect on the rights of persons of Crimean Tatar origin", even though it acknowledges such effect only "in so far as the members of the *Mejlis* are, without exception, of Crimean Tatar origin"[37]. However, the Court then concludes "that Ukraine has not provided convincing evidence that the ban of the *Mejlis* was based on the national or ethnic origin of its members, rather than its political positions and activities" and, therefore, that the ban cannot "constitute an act of discrimination within the meaning of Article 1, paragraph 1, of CERD"[38]. This statement is at odds with the above-mentioned shift of the burden of proof once an applicant has made a prima facie case of racial discrimination. Since Ukraine had convincingly demonstrated that the ban of the *Mejlis* has a disparate adverse effect on Crimean Tatars, it should have been the duty of the Russian Federation to provide evidence that the ban was not based on race or ethnicity but pursued for a legitimate aim and in a proportionate manner.

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discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought.

[34] Judgment, paras. 238-244.
[35] *Ibid.*, para. 269.
[36] *Ibid.*
[37] *Ibid.*, para. 270.
[38] *Ibid.*, para. 272.

27. The Judgment also notes that the evidence shows 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". Even if this was correct and the main reason for measures against Crimean Tatars was their political opposition to Russia's occupation and annexation of Crimea, this does not automatically exclude the deliberate targeting of Crimean Tatars to the extent that their political opinion is presumed on the basis of their ethnicity. In my view, the Russian Federation has not produced sufficient evidence to dispel this presumption.

28. Finally, even assuming that the ban was based exclusively on the political opinion of certain Crimean Tatars rather than their ethnicity, this alone is not sufficient to justify the disparate adverse impact on the Crimean Tatar community as a whole. As mentioned above, any measure creating such adverse impact must pursue a legitimate aim and be implemented in a proportionate manner. The Russian Federation has argued that multiple *Mejlis* leaders were engaged in "extremist acts" such as the setting up of trade and transport blockades of Crimea, and that the *Mejlis* was banned for security reasons under neutral anti-extremism laws[39]. Public security and the combat against terrorism and extremism are, in principle, legitimate aims. However, the Russian Federation never claimed that the *Mejlis* as a collective was responsible for such acts. Rather, it only mentioned that the *Mejlis* "failed to disassociate itself" from these actions[40]. Neither the Russian Federation nor its domestic courts convincingly explained why it was necessary and proportionate to dissolve the *Mejlis* as such, rather than to take measures against the three individual members alleged to have orchestrated the blockade of Crimea (in particular, Mr Chubarov, Mr Dzhemilev and Mr Islyamov). I therefore conclude that the ban constitutes a violation of the Russian Federation's obligations under the CERD.

3. The Right to Minority Language Education under the CERD

29. The present Judgment concludes that the Russian Federation has violated its obligations under Article 2 (1) *(a)* and Article 5 *(e)* (v) of the CERD by the way in which "it has implemented its educational system in Crimea after 2014 with regard to school education in the Ukrainian language"[41]. I concur with this conclusion. However, some of the statements

[39] Rejoinder of the Russian Federation, para. 975.
[40] *Ibid*., para. 982.
[41] Judgment, para. 370.

made by the Court in relation to the protection of language education under the CERD warrant additional remarks.

30. At the beginning of its analysis, the Court notes that

> "even if Article 5 *(e)* (v) of CERD does not include a general right to school education in a minority language, the prohibition of racial discrimination under Article 2 , paragraph (1) *(a)*, of CERD and the right to education under Article 5 *(e)* (v), may, under certain circumstances, set limits to changes in the provision of school education in the language of a national or ethnic minority"[42].

The wording chosen by the Court gives the impression that the protection of language rights under the CERD is rather limited. While the Convention does indeed not explicitly mention a right to education in a minority language, I believe that it does protect minority language education more broadly than acknowledged in the present Judgment.

31. In particular, I think that the relevant provisions of the CERD must be interpreted in the light of the relevant subsequent practice and agreements in relation to States' obligations with regard to education in minority languages. In this regard, it is appropriate to draw attention to the 1992 United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities[43]. The Declaration was adopted by consensus by the United Nations General Assembly and aims to promote, *inter alia*, "the principles contained in the . . . Convention on the Elimination of All Forms of Racial Discrimination". Therefore, it arguably constitutes a subsequent agreement, or at least subsequent practice to the Convention under Article 31 (3) *(a)* and *(b)* of the VCLT[44].

32. Article 1 (1) of the Declaration stipulates that "States *shall* protect the existence and the national or ethnic, cultural, religious and *linguistic* identity of minorities" (emphasis added). The use of the word "shall" points towards more than a mere recommendation. In addition, Article 4 (3) indicates that States should take "appropriate measures so that, wherever possible, persons belonging to minorities may have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue". In the light of this language, I do not believe that a State enjoys the type

[42] *Ibid*., para. 354.

[43] Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, UNGA resolution 47/135 (18 December 1992), UN doc. A/RES/47/135.

[44] See International Law Commission (ILC), Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries, *Yearbook of the International Law Commission*, 2018, Vol. II (2), p. 40, para. 13.

of "broad discretion" indicated by the Court in relation to changes in school curricula and the primary language of instruction[45].

4. Compliance by the Russian Federation with the Court's Provisional Measures in relation to the Availability of Ukrainian-language Education

33. In its Order of 19 April 2017, the Court instructed the Russian Federation to ensure the availability of education in the Ukrainian language[46]. As mentioned above, in the present Judgment, the Court found that

> "the Russian Federation has violated its obligations under Article 2, paragraph (1) *(a)*, and Article 5 *(e)* (v) of CERD by the way in which it has implemented its educational system in Crimea after 2014 with regard to the school education in the Ukrainian language"[47].

Simultaneously, the Court found that the Russian Federation has not violated its obligations under the Order of 19 April 2017, in so far as it was obliged to ensure the availability of education in the Ukrainian language[48]. The Court reaches this conclusion by noting that the Order of 19 April 2017 required the Russian Federation only to ensure that education in the Ukrainian language remains "available"[49] and that Ukraine has not sufficiently established that education in the Ukrainian language was unavailable for those who wish to choose this possibility[50].

34. I cannot concur with this finding. Ukraine has submitted as evidence credible reports by the United Nations Secretary-General and the Office of the United Nations High Commissioner for Human Rights ("OHCHR"), which noted, *inter alia*, the "rapid decline"[51] of institutions offering instruction in the Ukrainian language, the failure to meet the demand for Ukrainian-

[45] Judgment, para. 356.

[46] *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 (1) *(b)*.

[47] Judgment, para. 370.

[48] *Ibid*., para. 395.

[49] *Ibid*., para. 394.

[50] *Ibid.*

[51] OHCHR, 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. 69.

language education[52], as well as intimidation of parents wishing to enrol their children in Ukrainian language classes[53]. In my view, this shows that access to such education has been impeded to an extent that constitutes a violation of the Court's Order of 19 April 2017. Moreover, a State cannot escape its obligation to ensure the availability of language education by artificially reducing demand, including by displacement and intimidation. For these reasons, I believe the Court should have held that the Russian Federation has breached its obligations "to ensure the availability of education in the Ukrainian language".

(Signed) Fausto POCAR.

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[52] UNGA, Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine, Report of the Secretary-General for the period from 1 July 2020 to 30 June 2021, UN doc. A/76/260 (2 August 2021), para. 35.

[53] OHCHR, 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. 69.