

DECLARATION OF JUDGE CRAWFORD

Plausibility of claimed rights under CERD — Banning of Mejlis — Role of Mejlis in light of modern history of the Crimean Tatars — Meaning of racial discrimination.

1. It seems necessary to supplement the reasoning of the Court on the plausibility of the rights Ukraine claims under the Convention on the Elimination of All Forms of Racial Discrimination (CERD), and which the Court seeks to protect in ordering the Russian Federation to refrain from maintaining or imposing limitations on the ability of the Crimean Tatar community to conserve its representative institutions, including the *Mejlis* of the Crimean Tatar People. In particular, it is helpful to recall the role played by the *Mejlis* in light of the modern history of the Crimean Tatars.

2. It is not disputed that in 1944, in an event known as the “*Sürgün*”, the indigenous Crimean Tatar population of approximately 200,000 people was collectively accused of treason and peremptorily deported, mostly to the Uzbek Soviet Socialist Republic¹. Many Crimean Tatars perished during this period². A decree of 1967 absolved them of the original charge of treason, but, with limited exceptions, it was not until 1989 that the USSR allowed the Crimean Tatars to reside or work in Crimea. Since then, approximately 250,000 Crimean Tatars have returned to Crimea. The Organization for Security and Co-operation in Europe (OSCE) has reported that the Crimean Tatars have endured significant social and economic hardship in returning and seeking re-integration in Crimea, including with respect to their legal status and rights³.

3. The *Mejlis* is a representative body of the Crimean Tatar people⁴, formed in 1991⁵. The members of the *Mejlis* are elected by the *Qurultay* (or *Kurultai*)⁶, which is described in its constitutive instrument as a

¹ Application of Ukraine, para. 84, and see Brian G. Williams, “The Deportation and Ethnic Cleansing of the Crimean Tatars” in Vardy *et al.*, eds., *Ethnic Cleansing in Twentieth Century Europe* (Columbia University Press, 2003), pp. 537, 542.

² *Ibid.*, p. 543.

³ OSCE, *The Integration of Formerly Deported People in Crimea, Ukraine*, August 2013. <http://www.osce.org/hcnm/104309?download=true> (last visited 10 April 2017).

⁴ Application of Ukraine, para. 85; The Provision on *Mejlis* of the Crimean Tatar People (Qirim Tatar Milli Mejlisi), Art. 1.1.

⁵ OSCE, *The Integration of Formerly Deported People in Crimea, Ukraine*, *ibid.*, p. 16.

⁶ Regulations of *Qurultay* of the Crimean Tatar People, Art. 2.1; The Provision on *Mejlis* of the Crimean Tatar People, Art. 2.1.

“national congress” and as “the supreme representative plenipotentiary body of the Crimean Tatar people”⁷. The members of the *Qurultay* are elected directly by local communities in Crimea every five years⁸. The goals of the *Mejlis* include eliminating the consequences of the “*Sürgün*” and the “restoration of the national and political rights of the Crimean Tatar people”⁹. This is to be achieved *inter alia* through promoting “measures to revive the language, culture, religion, system of national upbringing and education, customs and traditions of Crimean Tatars”¹⁰.

4. The Russian Federation argues that the ban on the *Mejlis* was not racially discriminatory but was taken on security grounds. It points out that the *Qurultay* was not banned, and that there are other Crimean Tatar organizations¹¹. But, by comparison to the *Mejlis*, the *Qurultay* has a limited mandate. It usually meets every two and a half years to select the members of the *Mejlis* and makes overall policy decisions. It is the *Mejlis*, as the executive body, that operationalizes the policies and “represent[s] the interests of the Crimean Tatar people [at] all levels”¹². In the absence of the *Mejlis*, the ability of the Crimean Tatars to secure effective representation as a group is impaired. As the provisional measures Order explains, the other groups in Crimea representing the Crimean Tatars do not appear to have the same status or level of acceptance as the *Mejlis*. The Office of the United Nations High Commission for Human Rights (OHCHR) observed that “[t]he *Mejlis* is viewed by many Crimean Tatars as a traditional organ of an indigenous people” and that “[w]hile approximately 30 Crimean Tatar NGOs are currently registered in Crimea, none can be considered to have the same degree of representativeness and legitimacy as the *Mejlis* and *Kurultai*”¹³.

5. The Russian Federation argues that it banned the *Mejlis* because of extremism and in response to violent protests against the annexation of Crimea that were incited or condoned by the *Mejlis*, and that the ban “has nothing to do with the ethnicity of its members”¹⁴. The Supreme Court of Crimea upheld the ban¹⁵, and so did the Russian Supreme Court on appeal¹⁶. The decisions of the Supreme Court of Crimea and the Russian Supreme Court refer to acts of unauthorized protest that

⁷ Regulations of *Qurultay* of the Crimean Tatar people, Preamble.

⁸ *Ibid.*

⁹ The provision on *Mejlis* of the Crimean Tatar People, Art. 2.1.

¹⁰ *Ibid.*, Art. 2.2.

¹¹ CR 2017/4, p. 59, para. 45 (Forteau).

¹² The provision on *Mejlis* of the Crimean Tatar People, Art. 4.2.

¹³ OHCHR, *Report on the Human Rights Situation in Ukraine*, 16 August to 15 November 2016, para. 169.

¹⁴ CR 2017/2, pp. 60-61 (Lukiyantsev).

¹⁵ *Decision of the Supreme Court of Crimea concerning the Mejlis of the Crimean Tatar People*, Case No. 2A-3/2016, Judgment of 26 April 2016.

¹⁶ *Decision of the Supreme Court of Russia concerning the Mejlis of the Crimean Tatar People*, Judgment of 29 September 2016.

were allegedly condoned by the *Mejlis*, but the evidence recited to that effect was not put before this Court.

6. Various United Nations bodies have criticized the ban. The OHCHR has expressed the view that the ban “appears to deny the Crimean Tatars . . . the right to choose their representative institutions”¹⁷ and that it “could be perceived as a collective punishment against the Crimean Tatar community”¹⁸. The General Assembly urged the Russian Federation to “revoke immediately the decision declaring the *Mejlis* of the Crimean Tatar people an extremist organization and banning its activities and repeal the decision banning leaders of the *Mejlis* from entering Crimea”¹⁹.

7. The definition of “racial discrimination” in Article 1 of CERD does not require that the restriction in question be based expressly on racial or other grounds enumerated in the definition; it is enough that it directly implicates such a group on one or more of these grounds. Moreover, whatever the stated purpose of the restriction, it may constitute racial discrimination if it has the “effect” of impairing the enjoyment or exercise, on an equal footing, of the rights articulated in CERD.

8. Nothing in CERD prevents a State party from regulating an organization that represents an ethnic group or even from banning it in the most serious cases²⁰. But such measures must be carefully justified. In this case, such justification is particularly necessary given the historical persecution of the Crimean Tatars and the role of the *Mejlis* in advancing and protecting the rights of the people it represents at a time of disruption and change. In an eventual merits hearing (should the case proceed so far), it will be for the Court to assess the evidence provided by the Parties in that regard. At this stage of the proceedings it is sufficient to say that the measure in question, for the reasons given, plausibly affects rights under CERD.

9. The provisional measures ordered by the Court in relation to the *Mejlis* requires that Russia refrain from maintaining that ban. The Order does not purport to question the decisions of the Crimean and Russian Supreme Courts in terms of Russian law. Instead, the Court is concerned

¹⁷ OHCHR, *Report on the Human Rights Situation in Ukraine*, 16 May to 15 August 2016, para. 177.

¹⁸ OHCHR, *ibid.*, 16 February to 15 May 2016, para. 188.

¹⁹ *Situation of Human Rights in the Autonomous Republic of Crimea and the City of Sevastapol (Ukraine)*, GA Res. A/71/205, 19 December 2016.

²⁰ Cf. *Artyomov v. Russia*, Application 17582/05, ECHR Judgment, 7 December 2006; *Refah Partisi (The Welfare Party) and Others v. Turkey*, Application 41340/98 and ECHR Judgment, 13 February 2003; *Freedom and Democracy Party (OZDEP) v. Turkey*, Application 23885/94, ECHR Judgment, 8 December 1999.

that the ban may plausibly implicate rights under international law. Nothing prevents the Court from making an order concerning a matter that has been dealt with by domestic courts²¹.

(Signed) James CRAWFORD.

²¹ See for example: *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Provisional Measures, Order of 7 December 2016, *I.C.J. Reports 2016 (II)*, p. 1148; *LaGrand (Germany v. United States of America)*, Provisional Measures, Order of 3 March 1999, *I.C.J. Reports 1999 (I)*, p. 9; *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, *I.C.J. Reports 2012 (I)*, p. 99.