SEPARATE OPINION OF PRESIDENT DONOGHUE

Ban on Mejlis *violated obligations under CERD — Violation of obligations under Article 12 ICSFT — Agreement with Court's decisions regarding alleged violations of obligations created by Provisional Measures Order of 19 April 2017.*

1. I submit this separate opinion to indicate the reasons why I voted against two subparagraphs in the dispositive paragraph of the Judgment. I also comment on the Court's decision regarding the alleged violations of the obligations created by the Order on the indication of provisional measures of 19 April 2017 (hereinafter the "Order").

I. The ban on the *Mejlis*

2. I consider that the Court should have held that, by banning the *Mejlis*, the Russian Federation violated its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter "CERD").

3. Article 1, paragraph 1, of CERD provides that

> "the term 'racial discrimination' shall mean 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".

Pursuant to Article 2, paragraph 1 *(a)*, of CERD, each State party "undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions".

4. Read together, and focusing on the elements of Articles 1 and 2 that are of particular relevance to the ban on the *Mejlis*, these two provisions obligate State parties, *inter alia*, not to impose on a group of persons or an institution any restriction based on ethnic origin that has the purpose or effect of nullifying or impairing the enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political or any other field of public life.

5. While Ukraine asserts that the ban on the *Mejlis* violated obligations set out in Articles 2, 4, 5 and 6, I consider that the ban has particular implications for the rights of the members of the *Mejlis* to equality before the law, without distinction as to ethnic origin, in the enjoyment of civil and political rights, including the right to freedom of opinion and expression and the right to freedom of peaceful assembly and association (Article 5, paragraph *(d)* (viii) and (ix)).

6. I set out here three comments on the application of CERD to the ban on the *Mejlis*.

7. My first comment is that the question whether the ban on the *Mejlis* violated the obligations of the Russian Federation under CERD must be answered in light of the legal framework on which the ban was based.

8. The Russian Federation banned the *Mejlis* through a series of measures imposed on the basis of Articles 9 and 10 of the Russian Federation's Law on Combatting Extremist Activity (Federal Law 114-FZ of 2002 (as amended)) (hereinafter the "Anti-Extremism Law"). In particular, in February 2016, the Prosecutor of the Republic of Crimea applied to the Supreme Court of the Republic of Crimea for recognition of the *Mejlis* as an extremist organization and for banning its activities. On 12 April 2016, the Prosecutor decided to suspend the activities of the *Mejlis* pending the decision of the Supreme Court of Crimea and, on 18 April 2016, the Ministry of Justice of the Russian Federation ordered the inclusion of the *Mejlis* in the "List of public associations and religious organizations whose operation is suspended in view of their extremist activities". The Supreme Court of Crimea ruled, on 26 April 2016, that the *Mejlis* was an extremist organization and banned its activities pursuant to Article 9 of the Anti-Extremism Law, a decision that was upheld on 29 September 2016 by the Supreme Court of the Russian Federation.

9. In today's Judgment, the Court concludes that the domestic legal framework on the basis of which the Russian Federation took certain measures towards members of the Crimean Tatar community, which includes the Anti-Extremism Law, does not in and of itself constitute a violation of CERD. Even if this conclusion is formally correct, the Court's analysis of the ban on the Mejlis fails to take into account the ways in which an anti-extremism law can facilitate violations of human rights, including the rights protected by CERD. In this regard, I note that the notions of "terrorism" and "extremism" cannot be equated. Although there is no internationally accepted definition of either term, the notion of "terrorism" usually connotes concrete violent acts, such as the predicate acts that are identified in the International Convention for the Suppression of the Financing of Terrorism (hereinafter the "ICSFT"). "Extremism" is a broader term that includes the expression and manifestation of certain views, which means that anti-extremism laws are well suited to the suppression of civil and political rights, including freedom of expression and freedom of assembly.

10. The Respondent argues that the ban on the *Mejlis* on the basis of the Anti-Extremism Law was a "legitimate limitation to the exercise of a right" for security reasons. According to the Russian Federation, such "limitations provided for in Russian law comply with the principle of legality in international law: the applicable domestic law offers a clear and specific understanding of the targeted offences" (Counter-Memorial of the Russian Federation, Part II, paras. 153-163).

11. There is, however, no clarity or specificity in the "offences" targeted by the Anti-Extremism Law. As the CERD Committee has observed, this law is vague and broad, lacks clear and precise criteria and contains far-reaching definitions that can be "used arbitrarily to silence individuals, in particular those belonging to groups vulnerable to discrimination, such as ethnic minorities, indigenous peoples or non-citizens" (Committee on the Elimination of Racial Discrimination, Concluding observations on the twenty-third and twenty-fourth periodic reports of the Russian Federation, 20 September 2017, p. 2, para. 11; see also Human Rights Committee, Concluding observations on the seventh periodic report of the Russian Federation, 28 April 2015, p. 9). Of particular relevance to the measures imposed on ethnic minorities, this law includes in the definition of extremism the "stirring up of social, racial, ethnic or religious discord".

12. I therefore consider that, in light of its vague, open-ended and far-reaching provisions, the use of the Anti-Extremism Law to ban an organization with an unquestionably ethnic character, such as the *Mejlis*, must be subjected to particularly close scrutiny.

13. My second comment relates to the assertion by the Russian Federation, which was embraced by the Court, that the ban on the *Mejlis* was adopted in response to political positions and activities of the leaders of the *Mejlis* and its members, rather than on grounds of their ethnic origin,

and was thus not an act of racial discrimination (Judgment, paras. 271-272). The Court has previously observed, in applying a treaty provision that calls for consideration of the "purposes" of a State's measure, that "a State often seeks to accomplish more than one goal when it pursues a particular policy" (*Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 260, para. 97). This observation, while made in a very different context, rings true in the present case.

14. Even if one accepts the Court's conclusion that the ban on the *Mejlis* was based on the political activities of the leaders and members of the *Mejlis* in opposition to the Russian Federation, this conclusion does not foreclose the possibility that the ban was also based on race and had the purpose or the effect of nullifying or impairing the enjoyment or exercise of certain rights and freedoms by persons of Crimean Tatar ethnic origin.

15. This possibility is illustrated by an observation made by Professor Sandra Fredman in her second expert report (Reply of Ukraine, Annexes, Vol. I, Ann. 5, Second expert report of Professor Sandra Fredman, 21 April 2022, para. 27), in which she noted that the Soviet Union's expulsion of the Crimean Tatars from Crimea in 1944, based on an assertion that they had collaborated with the Nazis, could have been characterized as having a political motivation, but, had CERD been in force at that time, the expulsion would have been contrary to its provisions since it also had the purpose or effect of nullifying the rights of the affected Crimean Tatars.

16. For these reasons, a conclusion that the ban on the *Mejlis* was imposed in response to the political activities of the group or its leaders, in particular the opposition to the change in status of Crimea, even if established by evidence, would be insufficient to exclude a finding that the ban also amounted to racial discrimination.

17. In relation to the Crimean Tatars, it is especially problematic to insist that their ethnic identity can be isolated from their "political" views. I call attention to a point that the Court made in the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Qatar* v. *United Arab Emirates*), where the Court found that the term "national or ethnic origin" in Article 1, paragraph 1, of CERD did not encompass current nationality (*I.C.J. Reports 2021*, p. 106, para. 105). To substantiate this conclusion (with which I agree) the Court distinguished the concept of current nationality from "national or ethnic origin", stating that the latter term (which appears in Article 1, paragraph 1, of CERD) refers to characteristics that are inherent at birth (*ibid.*, p. 98, para. 81).

18. In considering the situation of ethnic Ukrainians and Crimean Tatars in Crimea, I have come to recognize the extent to which this observation by the Court may be an oversimplification. As Professor Fredman observes, human rights instruments have recognized that "ethnic minorities have political concerns which are closely bound up with their ethnic identity" (Second expert report of Professor Sandra Fredman, 21 April 2022, para. 50). The distinct ethnic identity of a particular group goes beyond shared physical characteristics and can be forged or strengthened by a variety of forces, including the way in which that group is characterized and treated by governmental authorities (see e.g. International Criminal Tribunal for Rwanda, Trial Chamber I, *The Prosecutor* v. *Jean-Paul Akayesu*, Judgment of 2 September 1998, para. 702).

19. In order to appreciate the reasons for the strong opposition of many Crimean Tatars to events in 2014 that placed their homeland once again under the control of Russian authorities in Moscow, it is necessary to recall the history of the group. The Russian Empire encouraged emigration

by Crimean Tatars in the nineteenth century. In May 1944, the State Defense Committee of the Soviet Union ordered the expulsion of Crimean Tatars from Crimea, in the exile known as the Sürgün, an event that one former leader of the *Mejlis* described as "the most horrible catastrophe in the history" of the Crimean Tatar people (Memorial of Ukraine, Annexes, Vol. I, Ann. 16, Witness statement of Mr Mustafa Dzhemiliev, 31 May 2018, para. 4). After the deportation and expulsion of Crimean Tatars from Crimea, Soviet authorities also abolished the ethnonym "Crimean Tatar" and thereafter issued internal passports listing the nationality of members of that group as "Tatar", making them indistinguishable from other Tatars living in the Soviet Union (Memorial of Ukraine, Annexes, Vol. I, Ann. 21, Expert report of Professor Paul Magocsi, 4 June 2018, para. 34).

20. As Professor Magocsi explains, during their exile from Crimea, Crimean Tatars depended on cultivating historical memory as the primary means to sustain their ethnic identity. He observes that the purpose of the annual commemoration of the Sürgün was to "embed in the hearts and minds of the living that there was nothing more tragic than May 18 in the modern history of Crimea and its Crimean Tatars" (Expert report of Paul Magocsi, 4 June 2018, para. 76).

21. It is thus unsurprising that many persons of Crimean Tatar ethnic origin have opposed the reassertion of control over their Crimean homeland by Moscow in 2014. The *Mejlis* played a central role in mobilizing the Crimean Tatar community to oppose what Ukraine calls the "purported referendum" on Crimea's future, held on 16 March 2014. For example, it organized a rally in Simferopol on 26 February 2014 for the "preservation of Ukraine's territorial integrity" (Memorial of Ukraine, para. 367) and appealed to all Crimean Tatars to boycott the "so-called 'referendum'" (Memorial of Ukraine, Annexes, Vol. I, Ann. 16, Witness statement of Mr Mustafa Dzhemiliev, 31 May 2018, para. 28). The Office of the United Nations High Commissioner for Human Rights stated that, according to Crimean Tatar representatives, no more than 1,000 Crimean Tatars voted in the referendum, out of a total population of 290,000-300,000 (*Memorial of Ukraine*, para. 373, footnote 785; Memorial of Ukraine, Annexes, Vol. III, Ann. 44, Office of the High Commissioner for Human Rights: Report on Human Rights Situation in Ukraine, 15 April 2014, para. 6, fn. 2). These events and others validate the assertion by Ukraine that a characteristic of many members of the Crimean Tatar community after the events of early 2014 was their "loyalty to the principle of Crimea as part of independent Ukraine" (Memorial of Ukraine, para. 382). The *Mejlis* was the central body espousing this position on behalf of the Crimean Tatar ethnic group until it was suspended and ultimately banned.

22. Against this background, I find particularly problematic that the Judgment insists on a bright-line distinction between the political views espoused by the *Mejlis* and the ethnic origin of its members. In light of the background and history of the Crimean Tatar ethnic group explained above, I cannot agree with this distinction.

23. My third comment arises from the Court's conclusion that the ban on the *Mejlis* did not violate CERD by depriving the wider Crimean Tatar population of its representation because the *Mejlis* is neither the only nor the primary institution representing the Crimean Tatar community, and other such institutions have not been banned. The Court sees no need to consider whether the Crimean Tatar institutions established after 2014 genuinely represent the Crimean Tatar people (Judgment, para. 269).

24. It is to be expected that all members of an ethnic minority do not hold identical views on government decisions that affect the ethnic group and that some organizations representing an ethnic group will stridently oppose the authorities in power, while others will adopt a more accommodationist approach towards those authorities. I do not accept the proposition that a ban on

one particular organization representing an ethnic group would not amount to racial discrimination so long as other organizations comprised of members of that ethnic group have not been banned.

25. I therefore do not agree that the continued existence of other organizations of Crimean Tatars supports the conclusion that the Russian Federation did not engage in racial discrimination when it banned the *Mejlis*.

26. The Anti-Extremism Law, through its vagueness and breadth, authorizes the imposition of highly intrusive measures on persons and groups on the basis, *inter alia*, of "stirring up . . . ethnic . . . discord". It is a tool exceptionally well suited for discrimination against groups that espouse views on behalf of members of an ethnic minority that clash with the policies of the Government of the Russian Federation. The Russian Federation invoked this Law to ban the continued existence of an entity comprised entirely of members of one ethnic group. As the Court acknowledges, the ban had the effect of excluding the *Mejlis* from public life (Judgment, para. 267). Even if the ban had the purpose of silencing the "political" views of the *Mejlis*, its leaders and its members, those views cannot be isolated from the ethnicity of its members. The ban must be seen as having been based, at least in part, on their ethnic origin. The evidence available to the Court establishes that the ban had the purpose or effect of nullifying or impairing the enjoyment on equal footing of the rights of the Crimean Tatar members of the group, in particular their rights to freedom of expression and of association. The Court should have found that the ban on the *Mejlis* was an act of racial discrimination in violation of the obligations of the Russian Federation under CERD.

II. The failure to provide the greatest measure of assistance as required by Article 12 of the ICSFT

27. I consider that the Court should have found a violation by the Russian Federation of its obligations under Article 12, paragraph 1, of the ICSFT. For this reason, I voted against subparagraph (2) of the dispositive paragraph of the Judgment.

28. The Judgment identifies three requests by Ukraine for mutual legal assistance concerning persons identified as nationals of or present in the territory of the Russian Federation who were allegedly involved in fundraising for the benefit of the "Donetsk People's Republic" ("DPR") or the "Lugansk People's Republic" ("LPR"). The Court concludes that these requests did not give rise to an obligation by the Russian Federation under Article 12 because none of the three requests described in any detail the commission of alleged predicate acts by the recipients of the provided funds, nor did the requests indicate that the alleged funders knew that the funds provided would be used for the commission of predicate acts (Judgment, para. 130).

29. I disagree with this conclusion and the reasoning leading to it. I instead consider that the Russian Federation violated its obligations under Article 12 in relation to at least one of the requests for mutual legal assistance. In the overall context of the present case, one violation of a procedural requirement may seem unworthy of a dissenting vote and separate opinion. However, I feel compelled to set out my views here because I consider that the Judgment sets out criteria for the application of Article 12 that are neither stated nor suggested in the ICSFT, fails to apply other relevant treaty provisions and ignores relevant jurisprudence of the Court.

30. Article 12, paragraph 1, requires a State party to afford another State party "the greatest measure of assistance" in connection, *inter alia*, with criminal investigations or criminal proceedings in respect of the offences set forth in Article 2. This obligation is not conditioned on the provision by the requesting State of any of the information that the Court found to be required, such as evidence

of the knowledge of alleged funders or of the commission of predicate acts. The Judgment gives no justification for grafting such requirements onto a mutual legal assistance provision.

31. In common with mutual legal assistance provisions in many multilateral treaties calling for co-operation in certain international criminal matters, Article 12 does not set out either the conditions under which mutual legal assistance must be granted or any exceptions to the obligation to provide the "greatest measure of assistance". Instead, Article 12, paragraph 5, of the ICSFT specifies that States parties shall do so in conformity with other applicable treaties or arrangements on mutual legal assistance. The Parties pointed to two treaties on mutual legal assistance that are in force between the Russian Federation and Ukraine (both of which are cited in the three requests by Ukraine and the responses thereto of the Russian Federation), so it is necessary to consider the provisions of those treaties in order to determine whether the Russian Federation met its obligations under Article 12.

32. The first of these treaties is the 1959 European Convention on Mutual Assistance in Criminal Matters. It requires States parties to provide "the widest measure of mutual assistance" and specifies that assistance may be refused in two circumstances: first, if the request concerns an offence which the requested Party considers a political offence, an offence connected with a political offence or a fiscal offence and, secondly, if the requested Party considers that execution of the request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests of its country. The European Convention provides that a request for mutual assistance shall contain certain information, such as identifying details of the person concerned and person to be served. It also specifies that "[r]easons shall be given for any refusal of mutual assistance".

33. The second mutual legal assistance treaty is the 1993 Minsk Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters, as amended by a 1997 Protocol, which requires the judicial institutions of the Contracting Parties to provide legal assistance in accordance with the provisions of the Convention. The Minsk Convention sets out certain requirements for requests for legal assistance, including identification of the matter for which assistance is being requested and the names and identifying details of persons who are the subject of the request. It also requires, for criminal matters, that the request include "a description and classification of the committed act and information regarding the amount of any damage caused by the act". The Minsk Convention further provides that a request for legal assistance "may be refused in part or in full if granting such assistance may prejudice the sovereignty or security of, or contradict the legislation of, the requested Contracting Party. In the event that a request for legal assistance is denied, the requesting Contracting Party shall immediately be notified of the reasons for refusal."

34. Article 12 of the ICSFT, read together with the two mutual legal assistance treaties, therefore requires a requested party to afford to a requesting party the "greatest measure of assistance". The requested party is not required to provide such assistance if one of the exceptions applies but, if it refuses to provide assistance, it is obligated to inform the requesting party of the reasons for its refusal.

35. The Court had occasion to address very similar mutual legal assistance provisions in *Certain Questions of Mutual Assistance in Criminal Matters* (*Djibouti* v. *France*), in which the applicant alleged that the respondent had violated certain obligations under the Convention on Mutual Assistance in Criminal Matters between France and Djibouti. That convention obligates the parties to afford each other "the widest measure of mutual assistance". Article 2, paragraph *(c)*, of the convention permits a requested State to refuse to provide assistance in certain circumstances. The

convention also specifies that "[r]easons shall be given for any refusal of mutual assistance" (Article 17).

36. Applying these provisions to a failure by France to provide assistance to Djibouti, the Court said that a "bare reference" to Article 2, paragraph *(c)* would not meet the obligation to provide reasons set out in Article 17, stating that "[s]ome brief further explanation was called for. This is not only a matter of courtesy. It also allows the requested State to substantiate its good faith in refusing the request. It may also enable the requesting State to see if its letter rogatory could be modified so as to avoid the obstacles to implementation enumerated in Article 2" (*Certain Questions of Mutual Assistance in Criminal Matters* (*Djibouti* v. *France*)*, Judgment, I.C.J. Reports 2008*, p. 231, para. 152). I note that the Court was prudent in not requiring more than a "brief" explanation of the reasons why a request for assistance was refused. The level of detail sufficient to meet a requirement to give reasons for a refusal may vary, depending on the particular exception invoked by a requested party.

37. I turn now to the three requests that the Court highlights in the Judgment and as to which it considers that no obligation arose for the Russian Federation under Article 12.

38. On 11 November 2014, Ukraine presented a request for mutual legal assistance in a specified pre-trial investigation, referring to both the Minsk Convention and the European Convention. The request indicated that a particular individual had, *inter alia*, raised funds for the LPR. It sought various forms of assistance, including the questioning of witnesses and the provision of information related to bank accounts and identity documents. The Russian Federation responded over nine months later, on 17 August 2015, stating that the request could not be executed based on Article 2, paragraph *(b)*, of the European Convention and Article 19 of the Minsk Convention, "because the requested assistance may harm the sovereignty, security and other vital interests of the Russian Federation".

39. Ukraine filed the second request on 3 December 2014, once again citing the Minsk Convention and the European Convention. It stated that Ukraine was conducting a pre-trial investigation into a particular person suspected of funding the LPR. Ukraine requested, *inter alia*, assistance in the questioning of witnesses and information regarding a bank account and identity documents. The 17 August 2015 response of the Russian Federation was identical to the response to the first request.

40. Ukraine made the third request addressed by the Court on 28 July 2015, citing the European Convention and the Minsk Convention. The request stated that a particular individual had been involved, *inter alia*, in the provision of financing to extralegal armed groups operating in Ukraine. The request asked for assistance, *inter alia*, in determining the place of residence of this individual (and others) and in delivering the written charge sheet to him. The Russian Federation responded seven months later, stating that the request "has been found impossible to satisfy due to the grounds provided" in Article 2, paragraph *(b)*, of the European Convention and Article 19 of the Minsk Convention.

41. Thus, in each case, there was a significant delay in the response of the Russian Federation. The first two responses did not indicate the factual basis for the invocation of exceptions in the European Convention and the Minsk Convention, but did identify the particular exceptions invoked by the Russian Federation. The third response by the Russian Federation did not even mention the particular exceptions, containing only what the Court had previously called "bare references" to

article and paragraph numbers in the mutual legal assistance treaties. Even if the first two responses might be considered sufficient to meet the requirement of setting out reasons, the third response would not have satisfied the test that the Court set out in *Certain Questions of Mutual Assistance in Criminal Matters*.

42. The Financial Action Task Force stated in 2019 that "[the] Russia[n] [Federation] generally provides [mutual legal assistance] in a constructive and timely manner" (*Anti-money laundering and counter-terrorist financing measures — Russian Federation,* Fourth Round Mutual Evaluation Report, para. 607). These general practices stand in sharp contrast to the manner in which the Russian Federation responded to the three requests for assistance addressed in the Judgment, which was neither timely nor constructive. The Russian Federation cannot be said to have met its obligation to provide the greatest measure of assistance to Ukraine. The Court therefore should have concluded that the Russian Federation violated its obligations under Article 12 of the ICSFT.

III. Alleged violations of obligations under the Order of 19 April 2017

43. Ukraine alleges that the Russian Federation violated three obligations set out in the Order.

44. The Order explicitly and specifically required the Russian Federation to refrain from maintaining limitations on the ability of the Crimean Tatar community to conserve its representative institutions, "including the *Mejlis*". The fact that the Russian Federation instead maintained the ban is not in dispute. For me, the conclusion that the Russian Federation violated the obligation set out in the Order is not in doubt.

45. I reach the opposite conclusion with respect to the alleged violation of the measure requiring the Russian Federation to "[e]nsure the availability of education in the Ukrainian language". I share the view of Judge *ad hoc* Skotnikov, who voted in favour of this measure in 2017, observing that it was a measure of a "general and non-controversial nature" (*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*, separate opinion of Judge *ad hoc* Skotnikov, p. 223, para. 3). In the Order (para. 97), the Court referred to reports that showed, prima facie, that there had been restrictions in terms of the availability of Ukrainian-language education in Crimean schools. However, unlike the measure related to the *Mejlis*, the Court did not indicate that the Russian Federation was required to reverse actions that it had taken between 2014 and the adoption of the Order three years later.

46. The third measure imposed in the Order required both Parties to "refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve". Relations between the Parties were strained when the Order was issued in 2017. I am convinced that the two actions of the Russian Federation to which the Judgment refers (para. 397) — the launch in 2022 of the "special military operation" and the recognition as independent States of the DPR and LPR — had such a sharp and negative impact on the Parties' relationship as to undermine severely the prospects for them to resolve the dispute in the present case. It is the impact of these actions that leads me to believe that the Russian Federation violated its obligation not to make the dispute more

difficult to resolve, wholly apart from the question whether these actions complied with the obligations of the Russian Federation under international law (which, in any event, the Court has no basis to address in the present case).

(Signed) Joan E. DONOGHUE.

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