DECLARATION OF JUDGE TOMKA

I.

1. In its Order on provisional measures, adopted on 19 April 2017, the Court indicated, among others, the following provisional measure:

> "(1) With regard to the situation in Crimea, the Russian Federation must, in accordance with its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination,
>
> *(a)* Refrain from maintaining or imposing limitations on the ability of the Crimean Tatar community to conserve its representative institutions, including the *Mejlis*" (*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, para. 106 (1) (a)).

2. I did not support the indication of that provisional measure for the reasons provided in the declaration I appended to the Order (*ibid.*, declaration of Judge Tomka, pp. 150-154). In particular, I considered that the Court was "going too far when it require[d] the Russian Federation to 'refrain from maintaining . . . limitations on the ability of the Crimean Tatar community to conserve . . . the *Mejlis*'" (*ibid.*, p. 150, para. 1). I noted that the ban on the activities of the *Mejlis* had been confirmed — on appeal — by the Supreme Court of the Russian Federation for a number of reasons brought to the attention of the Court by the Respondent (*ibid.*, pp. 150-151, paras. 2 and 3). Furthermore, I expressed my concern at "the cavalier approach of the Court in requiring the Russian Federation to alter the decision adopted by a judicial body, and affirmed on appeal by its highest judicial authority, without any consideration having been given to [the reasons for those judicial decisions]" (*ibid.*, p. 151, para. 4). I further stressed that "[w]hen considering requests for provisional measures the Court is expected to weigh and balance the respective rights of the parties in light of their arguments" (*ibid.*, p. 152, para. 6).

3. In today's Judgment on the merits, the Court takes the view 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" (Judgment, para. 271; see also para. 272). The Court thus "concludes that it has not been established that the Russian Federation has violated its obligations under CERD by imposing a ban on the *Mejlis*" (*ibid.*, para. 275). I agree.

4. The ban on the *Mejlis* thus did not constitute a breach of any obligation of the Russian Federation under CERD. The Court, however — and in my view somewhat surprisingly — finds that "the Russian Federation, by maintaining limitations on the *Mejlis*, has violated its obligation under paragraph 106 (1) *(a)* of the Order of 19 April 2017 indicating provisional measures" (Judgment, para. 404 (5)).

5. Article 41 of the Statute gives the Court "the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party". The same provision was already contained in the Statute of the

Permanent Court of International Justice adopted in 1920. It took some 80 years for the Court to clarify that "orders on provisional measures under Article 41 have binding effect" (*LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 506, para. 109). The purpose of a provisional measure is "to preserve the respective rights of either party". The Court, having considered the evidence submitted by the Parties, concluded that the Russian Federation did not violate its obligations under CERD by imposing a ban on the *Mejlis* (Judgment, para. 275). If no obligation under CERD was violated by the ban, it necessarily follows that the rights claimed by Ukraine were not affected by the ban; in other words, those rights were "preserved". The purpose sought by the measure indicated was thus achieved even without lifting or suspending the ban; in other words, by maintaining the ban on the *Mejlis*, the Russian Federation has not breached any obligation under CERD.

6. States have not granted to the Court the power to create and impose on them independent obligations. The Court, when indicating the provisional measure under consideration, clearly stated that this measure was to be taken "in accordance with its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination" (*I.C.J. Reports 2017*, p. 140, para. 106 (1)). Although, according to the Court, this formulation "refers to the source of the rights which the measure seeks to preserve" (Judgment, para. 391), it also necessarily refers to the source of the obligation, in view of the correlation between the rights of one party and the obligations of the other party.

7. For the reasons stated above, I am unable to support the Court's finding.

II.

8. In today's Judgment, the Court provides an interpretation of the term "funds" as defined in Article 1 and used in Article 2, paragraph 1, and other provisions of the ICSFT. Applying the rules on interpretation codified in the Vienna Convention on the Law of Treaties (Judgment, paras. 46-52), the Court holds 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" (*ibid*., para. 53). And the Court draws the conclusion that "the alleged supply of weapons to various armed groups operating in Ukraine . . . *fall[s] outside the material scope of the ICSFT*" (*ibid*., emphasis added). I agree with this conclusion. I expressed that view already in my separate opinion appended to the Court's 2019 Judgment on preliminary objections (*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 Tomka, p. 618, para. 11). The Court in its 2019 Judgment admitted that determining the scope of the Convention "may require the interpretation of the provisions that define [it]" (*ibid*., p. 584, para. 57), but it refrained in that Judgment from interpreting the term "funds". I did not consider that to be the right approach, arguing that "[t]he ascertainment of the scope of the term 'funds' is a distinctly legal issue which is a matter of interpretation of the Convention" which relates to the scope of the ICSFT and thus has a "direct bearing on the scope of the Court's jurisdiction *ratione materiae*" (*ibid*., p. 617, para. 8). Had the Court followed my approach and the principle of procedural economy (see *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II),* declaration of Judge Tomka, p. 899, para. 8), it could

have spared the Parties unnecessary submissions (including extremely voluminous evidence presented in the course of the proceedings) on claims which it now declares "fall outside the material scope of the ICSFT" (Judgment, para. 53).

(Signed) Peter TOMKA.