DECLARATION OF JUDGE *AD HOC* KRESS

Standard of plausibility — Genocidal intent — Protected group under the Genocide Convention.

1. I have voted in favour of all points contained in operative paragraph 86 of the Order. I also concur with the essence of the Court's reasoning. I only wish to add a few observations regarding the plausibility standard, and, in particular, regarding its connection with the questions of genocidal intent and protected groups under the Genocide Convention.

2. It would seem that the plausibility of the rights claimed as a prerequisite for the indication of provisional measures is by now quite firmly anchored in the Court's jurisprudence. At the same time, it would seem that questions remain open regarding the precise scope of the requirement and that it remains a challenge to describe the Court's standard of plausibility with precision[1].

3. The partial rejection of plausibility of the rights claimed in the *Ukraine* v. *Russian Federation* case (*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. 131-132, para. 75) has given rise to the interpretation that the Court has widened the scope of the plausibility requirement so that it includes, at least partially, the plausibility of breach of rights[2]. Additionally, there is the question whether the Court's Order in that case may have set a comparatively demanding standard of plausibility with respect to the mental elements of crimes in question (see, in particular, the separate opinion of Judge Owada in the aforementioned Order, *ibid.*, pp. 147-148, paras. 21-23). It is against this background, that Myanmar, in the current proceedings, has placed special emphasis on the *Ukraine* v. *Russian Federation* case in order to make the argument that the standard of plausibility extended to the requirement of genocidal intent and that this standard was not met (CR 2019/19, pp. 24-25, paras. 9-11 (Schabas)). As part of this argument, Myanmar further advanced the view that in "a case like this involving allegations of exceptional gravity" the Court

[1] For a useful recent analysis, see Cameron Miles, "Provisional Measures and the 'New' Plausibility in the Jurisprudence of the International Court of Justice", *British Yearbook of International Law* (2018, forthcoming), available at https://doi.org/10.1093/bybil/bry011.

[2] *Ibid.*, pp. 32-39 (provisional pagination).

should apply a "stricter plausibility standard" (CR 2019/19, p. 25, para. 13 (Schabas)).

4. In paragraph 56 of the Order, the Court rejects the idea of such a more stringent standard. I agree and wish to add that, rather than saying, as Myanmar has done, that a strict standard to be applied at the merits stage in case of exceptionally grave allegations, must apply *"a fortiori"* "at the provisional measures phase" *(ibid.)*, one might wonder whether the distinct — that is, the protective — function of provisional measures does not point in the opposite direction, precisely because fundamental values are at stake.

5. Irrespective of this last consideration, it is apparent from paragraph 56 of the Order, read in its immediate context, that the Court has applied a low plausibility standard with respect to the question of genocidal intent. Whatever the correct interpretation of the standard applied in the Court's Order in the *Ukraine* v. *Russian Federation* case might be, the Court, in the present case, has not proceeded to anything close to a detailed examination of the question of genocidal intent. In that respect it seems worth recalling that, in the separate opinion he appended to the *Pulp Mills* case, Judge Abraham distinguished between *fumus boni juris* and *fumus non mali juris* (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*, pp. 140-141, para. 10). In my view, it is the latter formulation that captures far better the approach taken by the Court in this Order with respect to the question of genocidal intent. Drawing a distinction between the words *"boni"* and *"non mali"* may be a "subtlety", as Judge Abraham suggested in his separate opinion. But in the present case at least, it would be an important subtlety. I make this observation also because, even on the basis of the low standard applied by the Court in this case, it is not entirely without hesitation that I have come to the conclusion that the materials provided by The Gambia so far are sufficient to enable the Court to conclude that the plausibility test was met with respect to the question of genocidal intent.

6. While the exceptional gravity of the violations alleged in this case does not justify the application of a stringent standard of plausibility as a prerequisite for the indication of provisional measures, the same exceptional gravity does justify, and perhaps even calls for emphasizing that this Order's finding on plausibility in no way whatsoever prejudges the merits.

7. This is as true for the question of genocidal intent as it is for the question whether the Rohingya in Myanmar constitute a protected group under the Genocide Convention. The Order alludes to this issue in one single sentence in paragraph 52. Here, the Court states that "the Rohingya appear to constitute a protected group within the meaning of Article II of the Genocide Convention". I would have preferred seeing the Court

express more clearly than by the mere use of the word "appear" that, with respect to the question of protected groups under the Genocide Convention, it cannot go beyond the point of plausibility at this stage of the proceedings. This preference is based, not least, on the fact that the question of protected groups under the Genocide Convention did not receive closer attention during the proceedings.

(Signed) Claus KRESS.
