The urgent, the plausible and the irreparable

The significance of lowering ICJ thresholds for provisional measures

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The ICJ's decision on Iran's application for provisional measures in its high-profile proceedings against the United States of America for alleged violations of their 1955 Treaty of Amity was handed down yesterday. This tightly constrained and circumscribed stage of the proceedings, though only a precursor to the far more significant jurisdictional and merits stages—each of which has the potential to ask questions with lasting significance for international law and international relations (for discussion see here)—has already produced fireworks. The US Secretary of State, Mike Pompeo, has already announced that the US intends to withdraw from the Treaty of Amity in response to the Court's order, and John Bolton has declared that all agreements which could form a jurisdictional basis for an ICJ case will be reviewed (see report on BBC News). Nevertheless, the Court's provisional measures decision has a significance drawn not only from the geopolitical situation, but also as a result of timing: it comes hard on the heels of the Court's decision on provisional measures in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v UAE)*, in which the Court appeared significantly to lower the threshold for the indication of provisional measures. Aside from its innate interest, the decision on provisional measures in Iran v USA has given the Court an opportunity, just weeks after this first foray, either to confirm its new approach or to draw back. This short contribution will not attempt to give a comprehensive overview of these two cases—there are many issues worthy of discussion contained within each of the Court's provisional measures orders—but rather will focus on what they reveal about the changing nature of provisional measures.

Qatar v UAE: The Background

The background to the dispute between Qatar and the UAE is convoluted to the point of confusion, and remarkable almost to the point of absurdity. In a sequence of events that would be darkly comic if not for their deeply damaging consequences for the prospects for stability in the region and for the lives of the individuals in the States concerned, there has been a fundamental breakdown of relations between Qatar and several of its neighbours, who have imposed a swinging sanctions regime on the grounds of its alleged support (financial and otherwise) for terrorism (See here, here, and here).

Under the 2013-14 Riyadh Agreements, Qatar committed "to cease supporting, financing or harbouring persons or groups presenting a danger to national security,

in particular terrorist groups". Nevertheless, following that agreement a number of huge payments were made by Qatar to various groups in the region. According to the Financial Times, after the Riyadh Agreements Qatar paid around $1bn to such organisations: $700 million to Shi'a irregular forces in Iraq, $140 million to al-Qaeda in Syria, and $80 million to Ahrar al-Sham. The New York Times reported an additional 500 million euro payment to Kata'ib Hezbollah, listed as a terrorist organisation by the US State Department. Indeed, this may not be all: there were unsuccessful attempts. In a truly bizarre incident, on 15 April 2017, fifteen Qatari men told security at the VIP terminal at Baghdad airport that they didn't wish to have their luggage inspected. The Iraqis insisted, prompting the Qataris to leave their luggage at the airport and drive away. Security opened the 23 identical black duffel bags, and found $360 million in cash, weighing 1,200 kilos. Qatar explains these payments as ransom for a group of 28 hunters, including members of the ruling royal house of Thani, kidnapped in December 2015.

Adding to the tension caused by these revelations, in May 2017, statements of support for Iran, Hamas, Hezbollah and Israel appeared on the Qatar News Agency's website, attributed to the Emir of Qatar. Qatar disavowed the statements and blamed hackers, a conclusion in which the FBI (who assisted with the investigation) apparently concurs. Nevertheless, and citing Qatar's failure to honour the Riyadh Agreements, on 5 June 2017 thirteen states, including the UAE, Bahrain, Saudi Arabia, and Egypt (the quartet), severed or downgraded diplomatic relations, imposed sanctions, and blocked Qatar's airspace and sea routes.

Hampered by the lack of an Article 36(2) declaration and absent any prospect of a joint referral, Qatar has been left without a legal means to challenge the sanctions regime *in toto*. Instead, it has pursued a clever (if high risk) strategy of seeking to subsume various aspects of the sanctions regime under, variously, the WTO, the ICAO, and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).

On 11 June 2018 Qatar initiated ICJ proceedings against the UAE—the only member of the quartet that has accepted the jurisdiction of the ICJ under CERD—under Articles 2 and 4-7 of that convention for encouraging racial hatred against Qatar and Qataris, and violating Qataris' human rights to marriage and choice of spouse, freedom of opinion and expression, public health and medical care, education and training, property, work, participation in cultural activities, and equal treatment before tribunals. Under Article 41 of the Statute of the Court, Qatar asked for provisional measures "to protect against further, irreparable harm to the rights of Qataris and their families under CERD, and to prevent aggravation or extension of the dispute".

***The Court's Provisional Measures Order in* Qatar v UAE**

In its 23 July Order the ICJ ruled that there are plausible human rights violations causing irreparable harm, and imposed provisional measures. Of Qatar's nine requests they granted three: concerning mixed families, students, and access to UAE courts. This was a knife-edge decision. The ICJ granted provisional measures by 8:7, the first vote so narrow in a contentious case since the 1962 decision to claim

jurisdiction in the South West Africa Cases. Moreover, eight of the fifteen judges registered disagreement: the stage produced four Dissenting Opinions (of Judges Bhandari, Crawford, Salam, and Judge ad hoc Cot), a Joint Declaration (though in effect a dissent by another name) of Judges Tomka, Gaja, and Gevorgian, and a somewhat critical Separate Opinion by Judge Cançado Trindade who, though he agreed with the ICJ's decision criticised it lightly, and the UAE legal team heavily, for an "unfortunate diversion" in not addressing human rights head-on.

The most prominent objection concerned CERD's scope. The UAE team (as well as Judges Crawford, Tomka, Gaja, Gevorgian, Salam, and Cot) argued that CERD, as defined by Article 1(1-3), applies only to "race, colour, descent, or national or ethnic origin," none of which cover present nationality. It was also pointed out that while in other CERD cases the ICJ relied on the CERD Committee's report concerning human rights violations, in this case the Committee has not even started its investigation – this despite that Article 22 of CERD appears to permit recourse to the ICJ only after a failure of the Convention's organs to resolve a dispute. The Court decided that it had prima facie jurisdiction to order provisional measures without addressing either issue [27, 39] and without considering whether Qatar has exhausted local remedies [42].

Provisional measures can be granted if the ICJ finds a plausible risk of irreparable and urgent prejudice to State rights. A great deal could be said about each of these criteria and their application in this case, but the focus of this short contribution will be the Court's interpretation of the requirement of plausibility – a matter which has already had implications for the oral arguments in Iran v USA.

Interpretation of "Plausibility" in Provisional Measures

The criterion that the right claimed by a State must, to some small extent consistent with the obligation of the Court not to prejudice the Merits phase, be substantiated was first discussed by the Court in the Great Belt case [21-22]. Its modern case-law on the subject (see, for example, its 2011 Order on provisional Measures in Costa Rica v Nicaragua [53-54]) refers rather to its discussion in Obligation to Prosecute or Extradite. Paragraph 57 of that Order declared that "the power of the Court to indicate provisional measures should be exercised only if the Court is satisfied that the rights asserted by a party are at least plausible". The rationale for such a rule is clear: As Karin Oellers-Frahm notes in her Commentary on Article 41 of the Court's Statute, where there is little to suggest that the right claimed could actually apply to the matter in the merits phase, "there would not be any necessity to indicate provisional measures" (p.938).

Plausibility is already a low threshold for a Party seeking provisional measures to reach, and it is therefore surprising that the Court seemed, in Qatar v UAE to lower it further. Having first repeated, in paragraphs 43 and 44, that the standard of plausibility applies, it gave little or no apparent consideration to what "plausibility" entails. Instead, the Court appeared to accept Qatar's reasoning that "the alleged rights are plausible in so far as they are 'grounded in a possible interpretation' of" CERD [46]. After citing the Convention's terms extensively, the Court made a brief statement that "some of the acts of which Qatar complains may constitute

acts of racial discrimination as defined by the Convention" [54], a level of analysis which seems entirely suited to the "possibility" test advanced by Qatar, but entirely insufficient to demonstrate that the higher standard of plausibility has been met.

Act Two: Iran v USA *at the ICJ*

The background to the *Iran v USA* proceedings is well known, and will not be repeated (it has already been discussed here, here and here). Iran contends that the re-imposition of the sanctions regime following the American disavowal of the JCPOA is in violation of the two countries' 1955 Treaty of Amity, and sought five provisional measures. In a victory for Iran that is likely to be of greater symbolic than practical relevance, the ICJ granted certain of Iran's provisional measures requests. It ruled that it had prima facie jurisdiction to hear the case [24-52], that Iran had a plausible claim to certain rights under the 1955 Treaty [53-76, and that there was an urgent risk of irreparable prejudice to those rights [77-94]. It ordered, in its first operative paragraph, that

The United States of America, in accordance with its obligations under the 1955 Treaty of Amity, Economic Relations, and Consular Rights, shall remove, by means of its choosing, any impediments arising from the measures announced on 8 May 2018 to the free exportation to the territory of the Islamic Republic of Iran of

- medicines and medical devices;
- foodstuffs and agricultural commodities; and
- spare parts, equipment and associated services (including warranty, maintenance, repair services and inspections) necessary for the safety of civil aviation

Its second operative paragraph ordered the USA to 'ensure that licences and necessary authorizations are granted and that payments and other transfers of funds are not subject to any restriction', insofar as they relate to the items listed in the first paragraph; and the third operative paragraph ordered both parties to 'refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve'. All orders were, in marked contrast to the *Qatar v UAE* case, made unanimously.

Though the success of its manouvering has already been called into question by the furious American reaction, the Court attempted to steer a careful course; giving Iran a symbolic victory, while leaving aside the majority of questions concerning national security, the nuclear programme, and the bulk of the US sanctions. It may have hoped, through this balance between upholding the treaty—in particular where it applied to the health, safety and rights of Iran's citizens—and leaving unaffected the largest and most significant parts of the US sanctions regime, that it would maintain the goodwill of both parties for the present. Nevertheless, it has ordered meaningful changes to the sanctions regime, and in areas likely to be of direct relevance to the Iranian people.

At first glance it seems that the American reaction has dashed these hopes: the Trump administration continues its anti-internationalist approach (though it should

be said that in this attack on the ICJ it is not so far removed from some previous administrations – the *Nicaragua* saga in particular springs to mind), and has placed itself on a direct collision course with the Court. Should it follow through with its threat to denounce the Treaty of Amity the Court's jurisdiction to hear the case will likely not be affected: the Court's jurisdiction will be established at the time of the institution of proceedings, as its practice confirms (see the *Use of Force* cases *(Serbia and Montenegro v Belgium and others)*). But the Court, in ruling on a Treaty that may, by the time of the Merits proceedings, no longer be in force between the Parties, will be an ideal symbol for the Trump administration of an overbearing internationalist order that seeks to undermine the sovereignty of a victimised USA. There is no doubt that the future developments of this case will be interesting indeed.

Fascinating though these questions are, our interest here is on the Court's construction of plausibility. Indeed, the Court appears to have confirmed its lowered standard, applied in *Qatar v UAE* entirely. In its oral arguments on 27-30 August, Iran repeatedly and explicitly invoked the ICJ decision on provisional measures in *Qatar v UAE* to frame the claim that the plausibility of harm exists because the rights ostensibly violated by sanctions are "grounded in a possible interpretation" of the pertaining treaty.

Paragraph 67 of the Court's order of 3 October makes explicit the link hinted at in *Qatar v UAE*, declaring that the 'Court notes that the rights whose preservation is sought by Iran appear to be based on a possible interpretation of the 1955 Treaty'. Possibility also appears to be the standard applied in the Court's subsequent references to a second reading of the treaty, put forward by the USA, by which it argued that the 1955 Treaty itself gives an exception for certain sanctions for the purposes of, among other things, the protection of national security [68]. This the Court counterbalanced against Iran's claim of rights, acknowledging that it 'might affect at least some of the rights invoked'. Both arguments were assessed under the possibility standard, and so both prevailed: Iran was acknowledged to have a "plausible" claim to those rights governed by the Treaty which fell out with the USA's exemption argument; namely medical supplies, foodstuffs, and parts and equipment for civil aviation [70]. The Court thus appears to have amply confirmed the shift it indicated in *Qatar v UAE*: assessing plausibility is the art of the possible.

Would a different assessment of plausibility have altered the outcome of this case, or the subsequent reaction? It is doubtful that the Court's assessment of the legal realities would have been significantly altered as a result of the application of the plausibility standard rather than possibility. It would, though, have required a more rigorous assessment both of the Iranian claim, and the scope and applicability of the American counterclaim. Though it may be an unrealistic hope that a more rigorous justification by the Court would have assuaged the US reaction—here the optics are everything; the audience internal—but it is always preferable that reasoning be justified to the fullest extent reasonably possible. By employing the possibility standard, the ICJ closed off that space for justification and thus for rational contestation.

Looking to the Future: Examining the Possibilities

Whatever the Court's reasons for making this apparent shift from plausibility to possibility, it runs the risk of making the criterion established in the line of cases following Great Belt—that the State requesting provisional measures must at least have the prospect of success on the merits—meaningless, or even rendering it counterproductive.

That is not to say that the requirement of plausibility is itself unproblematic. On the contrary, there are a number of arguments to be made against the plausibility standard, not least that advanced by Judge Cançado Trindade's Separate Opinion. There, he argued that the ICJ's doctrine of plausibility is ill-advised, and human vulnerability is a more compelling test than the plausibility of rights as a new precondition to establish ICJ jurisdiction ([57-61 and 100-102], also referring to his separate opinion in Ukraine v Russian Federation (on this see here). There is, moreover, as Dapo Akande has argued, a tension which has been inherent in the plausibility test since it was introduced in 2009 (see also the 6 April 2017 draft of the preparatory work on provisional measures by the Institut de droit international). In a sense this may have been an attempt, although perhaps ill-judged, to resolve those tensions.

Importantly, though, the Court has had an opportunity immediately to revisit the question in the Iran v USA decision, and has seemed not only to confirm but to strengthen the shift which *Qatar v UAE* began. It is unclear what motivated the ICJ to make this apparent shift from plausibility to possibility in its provisional measures criteria, but it is abundantly clear that the shift has already created effects, at the least for the *Iran v USA* case. How future provisional measures proceedings will read these cases remains to be seen, but all those interested in the practice of the Court should certainly be watching with interest.

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