A Pyrrhic Victory? Iran obtains Provisional Measures against the United States

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Last week Iran scored what has widely been reported to be an important legal victory over the United States. The International Court of Justice ordered provisional measures that prohibit key elements of the new administration's efforts to wage economic warfare against Iran. The ruling is noteworthy for the clarity and stringency of its argument, but also because nobody expects it to alter the existing dispute between the parties in the slightest. This calls to mind certain parallels to Iran's Pyrrhic victory in the 1951–54 *Anglo-Iranian Oil Co. Case*. Then, the losing side, Great Britain with help from the United States, proceeded to intervene in Iran to change its regime through a military *coup d'état*, which enduringly alienated Iranians, and many other Southern peoples, from the idea that international law can be an effective protector of their interests.

Jurisdiction

In the current dispute, the Court has accepted Iran's claim that the little-known 1955 Treaty of Amity, concluded between these two states under very different political and social circumstances but never rescinded, gives it jurisdiction to hear the case. This is hardly surprising, as the same treaty had already formed the jurisdictional basis in the 1979-81 *Hostage Case*; in the 1992-2003 *Oil Platforms Case*; and is currently being relied upon in the 2016 *Certain Iranian Assets Case*.

There are only two other cases involving Iran: one of which, the already-mentioned *Anglo-Iranian Oil Co. Case*, directly led to regime change and the conclusion of said 1955 Treaty, while the 1989-96 *Aerial Incident Case* likewise could have been based on the 1955 Treaty, but relied instead on the even stronger basis of the Chicago and Montreal Conventions on civil aviation. In other words, it must have been absolutely apparent to the American litigation team that the jurisdictional question had long since been settled and their arguments to the contrary would be dismissed. More on this below.

Source of Substantive Rights

Having thus correctly asserted its jurisdiction, the Court stringently concludes that the 1955 Treaty incorporates a number of economic and procedural rights entirely separate and not superseded by the 2015 *Joint Comprehensive Plan of Action* (JCPOA, the so-called Nuclear Deal), as had been claimed by the American side. These *prima facie* substantive rights have obviously been affected by recent

American actions aimed at scuttling the JCPOA through the re-imposition of domestic and extraterritorial sanctions, a point not in dispute between the parties.

Provisional Measures

Without prejudice to its decision at the merits stage of the proceedings, the Court finds at this stage that the conditions for the imposition of *provisional measures* exist. This means that there must be a *real* and *imminent risk* of *irreparable* prejudice to Iran's *rights* at issue in the proceedings requiring an *urgent* intervention by the Court.

The Court parts company with Iran in its assessment of the *scope* of these rights and thus the extent of the measures necessary. Contrary to Iran's demand for a wide-ranging 'cease and desist' order, the Court accepts the American notion that economic damage very seldom reaches the threshold of irreparability and thus urgency required for provisional measures. Irrespective of the outcome at the merits stage, which is not expected for several years, the Courts thus finds the stringent conditions required for provisional measures *only* fulfilled for three, rather narrow classes of economic rights established by the 1955 Treaty.

Humanitarian Needs

In order to meet the requirements of urgency and irreparability, the Court, correctly, finds that only those economic transactions which plausibly entail an *imminent* risk to *human life* could be subject to provisional measures and finds this to be the case in three areas: (1) *medicines and medical devices*; (2) *foodstuffs and agricultural commodities*; and (3) goods and services necessary for the *safety of civil aviation*. Importantly, the Court orders (4) that necessary *licences and authorizations* must be issued; (5) that *payments and other transfer of funds* for the above goods and services must not be obstructed; and (6) that both parties must *refrain from aggravating* the situation.

It is highly noteworthy that the order in all these points has been made *unanimously*, that is with the concurrence of the American judge *ad hoc* Charles Brower (the permanent US judge on the Court, Ms. Joan E. Donoghue, had recused herself from the proceedings; presumably due to her personal involvement as a member of the United States government in some of the issues under review.)

United States Treaty Withdrawals

Not unexpectedly, the United States government responded by announcing its intention to ignore the ruling and proceeded immediately to withdraw from the 1955 Treaty, which had provided the jurisdictional basis for Iran's claim. It simultaneously announced its withdrawal from the 1963 Optional Protocol concerning the Compulsory Settlement of Disputes to the 1961 Vienna Convention on Diplomatic Relations, both of which the United States had been a party to since 1972. The latter instrument had provided Palestine with the jurisdictional basis to challenge the recent United States decision to move its embassy in Israel to Jerusalem.

Visibly upset, the United States national security advisor Bolton announced: "We will commence a review of all international agreements that may still expose the US to purported binding jurisdiction dispute resolution [sic] in the International Court of Justice."

In a well-rehearsed propaganda routine, this latest development has been hailed as a "great victory for the Iranian nation," while the other side shed crocodile tears about being "disappointed" at the Court's willingness to lend itself to "baseless, politicized claims," and its inability "to recognise its lack of jurisdiction." While one side hailed this preliminary ruling as a great victory for the rule of law, the other –not entirely without reason– denounced the lack thereof *within* the Islamic Republic. Happily, both sides agreed in describing each other as "outlaw regimes."

Significance of the Ruling

In order to assess the significance of the ruling for the parties, for third parties, and, perhaps most interestingly, for international law, we need to begin by looking at the convention itself. *Pro captu judicis habent sua fata pacta*. The adage of the medieval grammarian Terentianus Maurus about books having their own fate is often adduced to indicate that every time and place will find a new, different or no meaning in old texts. What is generally forgotten is the beginning of the quote, which ties the fate of the book to the *ability* of the reader, or, in our paraphrasing, the judge, to comprehend the text, whether it's a book or a convention. There is very little doubt that the 1955 Treaty of Amity between Iran and the United States had been drafted under very different circumstances from the ones in which the ongoing dispute arose, for which it furnished the jurisdictional basis. The Court chose to disregard these contextual differences by applying a formal, positivist test of its validity and content.

'Originalism' is currently a much-discussed legal school of thought among our American colleagues. It is centred around the claim –described by some as an "impossible ideal"– that judging should be a politically neutral act of interpreting a given legal instrument according to its 'original meaning', presumably the original drafters' intent. Without wading too deep into debates about human rights and European integration, fields which could not exist without a 'dynamic' approach to interpretation, we can simply note here that there is an alternative methodological school, which treats founding documents as 'living instruments' that have to be interpreted 'in the light of present-day conditions.'

Law and Power

While it is probably safe to assume that many, if not most, of the current American decision-makers are adherents of originalism, their hostility towards international legal constraints is not really grounded in differences over legal hermeneutics. When announcing the intention to ignore the ruling and to withdraw from the 1955 Treaty of Amity, American Secretary of State Pompeo stated that "this is a decision that is, frankly, 39 years overdue," referring to the 1979 revolution which fundamentally

altered the basis of the relationship between both countries. One does not have to be an originalist in the American conservative vein to see a certain degree of wisdom in this statement. It is perplexing that in all these years neither country deemed it advantageous to abrogate the treaty. Likewise, neither party ever tried to rely on the principle of *clausula rebus sic stantibus* in Article 62 in the Vienna Convention on the Law of Treaties, which appears singularly applicable to the paradox of a *friendship* treaty linking erstwhile allies now turned mortal enemies.

When it was drafted, the Treaty was a relatively straight-forward, not to say boiler-plate, type of legal arrangement concluded routinely between an ascendant capitalist superpower and its various third-world vassals, here an investment-starved, poor Iran recently brought back into the American orbit. The Treaty was drafted two years after a Western-orchestrated coup got rid of the democratically-elected Iranian government, which had just won a major judicial victory at The Hague due to the Court finding that it lacked jurisdiction.

Compromissory Clause

The subsequent 1955 Treaty of Amity can thus be read as a direct response to that Western failure, as it explicitly provides in its Article XXI (2) that: “Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means.”

As the Court, correctly, notes today, this is a *purely factual test* and does not impose any obligation to engage in good faith negotiations or similar, as other compromissory clauses sometimes require. This low threshold is deliberate, as our brief excursus into its drafting history has shown. If the dispute has not been resolved through diplomatic means, which evidently is not the case here, either party is free to refer the case to the Court.

We didn’t Get the Memo or Dogs Eating Homework

The argument made by the US delegations that it didn’t receive the second note verbal sent by Iran through the usual channels of the US Interest Section at the Swiss Embassy in Tehran is rightly rejected by the Court as embarrassingly implausible. It also curtly rejects the American contention that the Iranian communication did not constitute a genuine attempt to negotiate because it did not mention a place and time to meet, nor does the Court accept that the “twelve angry demands” were evidence of “a genuine initiative to address the issues of acute concern to the United States.” These are the kind of arguments Ferris Bueller would make to get a day off, or for that matter a group of “loud, obnoxious drunks with prolific pukers among us,” but hardly those to be expected in a legal brief by the sole surviving superpower pleading before the world’s highest court.

This brings us to "un pequeño detalle de forma:" during oral proceedings, the Iranian delegation consisted of four highly experienced international lawyers pleading in both official languages, supported by a rooster of eminently qualified national and international lawyers. The United States delegation, in sharp contrast, consisted of only one senior (British) international lawyer supported by a host of relatively low-ranking ministerial functionaries in a monolingual team. This "profound imbalance" is reflected in the quality of the legal arguments presented and constitutes a major, and in all likelihood lasting, structural change in attitude in *both* nations towards the importance of international law.

Iran's Newfound Fondness for International Law

For Iranians and many others in the developing world, the encounter with international law has historically rarely been positive, an experience that has left elites and publics alike with a deep distrust of the international legal system. The Islamic revolution only exacerbated these feelings of alienation, as well as drastically culling the manpower pool from which to draw.

When the Treaty of Amity was signed, 'third world approaches to international law' did not yet exist and the economic realities of the time made it abundantly clear to both sides *whose* investments, access to courts, equal legal treatment, banking services, etc. were to be protected by this international instrument. It went without saying that all the rights enumerated in the Treaty for private and juristic persons were already sublimely provided for in the United States but needed to be credibly signalled by Iran to prospective, and desperately-needed, foreign investors. The revolution considered the inherent imbalance in these relations and the legal form they took as fundamentally unacceptable, exacerbated by massive ideological differences with the international legal and political *status quo*.

Belatedly, Iran has realised that international law can be used to further its national interests and has finally begun to use increasingly sophisticated legal stratagems to argue its position, not least in the court of public opinion. It is remarkable that Iran is now able to argue that it is the American legal, administrative and political system which cannot ensure the substantive rights enumerated in the treaty to its natural and corporate citizens. Iran's realisation that revolutionary, let alone Islamic, rhetoric carries little persuasive weight, and that law can constitute a useful tool of statecraft is long overdue but still welcome. It is an interesting twist of fate that this about-face comes precisely at the same time when the United States is adopting an increasingly hostile attitude towards international law, which it appears to treat as little more than "a forum for propaganda."

Outlook

It is consequently with third parties, especially within the internal legal order of the European Union, where we can expect the provisional measures ordered by the Court to develop their greatest impact, not least with respect to the proposed creation of a 'Special Purpose Vehicle' creating a payment system free from

United States interference. The present ruling is just the latest manifestation of an increasing "rift between Europe and the United States." It is important to note here that the question at issue is *not* European sympathy with Iran, but rather a well-documented divergence of assessment of what is in the *European* security interest.

Most sanctions experts agree that fiery rhetoric notwithstanding, current European efforts at blocking legislation and the creation of alternative financial channels, while welcome, are likely to remain ineffective, certainly for major commercial enterprises. The rabid willingness of all three branches of the United States government to impose crippling punitive damages on recalcitrant European firms has so far not been forcefully resisted by European states or the Union, and this is not likely to occur in the near future.

The present ruling will therefore be most useful in enabling smaller commercial enterprises, those which are isolated from the United States market and thus the threat of punitive damages, to use European courts in the defence of their business transactions with Iran, now formally recognised as lawful if not mandatory.
