INTERNATIONAL COURT OF JUSTICE
QATAR V. UNITED ARAB EMIRATES
HEARING ON QATAR'S REQUEST FOR PROVISIONAL MEASURES

Response on behalf of the State of Qatar to the questions posed by Judge Cançado Trindade on Friday, 29 June 2018

Question 1: Does the local remedies rule have the same rationale in diplomatic protection and in international human rights protection? Does the effectiveness of local remedies have an incidence under the International Convention on the Elimination of All Forms of Racial Discrimination?

1. The rationale of the local remedies rule in diplomatic protection is to give the host State an opportunity to redress the wrong. As the Court famously stated in *Interhandel*:

> Before resort may be had to an international court . . . it has been considered necessary that *the State where the violation occurred should have an opportunity to redress it by its own means*, within the framework of its own domestic legal system.[1]

2. The Court has not suggested that the rationale would be any different in the context of international human rights protection, where the claim is in respect of an injury to a national. In *Diallo*, a diplomatic protection case concerning human rights, the Court approvingly cited the passage above from *Interhandel*, without noting any particularities arising from the fact that the case concerned human rights.[2]

3. International human rights bodies have generally agreed with the Court's rationale in *Interhandel* in cases involving claims brought directly by or on behalf of individual human rights victims.[3] However,

---

1 *Interhandel Case (Switzerland v. United States), Preliminary Objections, Judgment of 21 March 1959, I.C.J. Reports 1959*, p. 27 (emphasis added).

2 *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, Judgment of 24 May 2007, I.C.J. Reports 2007)*, p. 599, para. 42.

3 *Micallef v. Malta*, application No. 17056/06, judgment of 15 October 2009, ECHR, para. 55 ("The purpose of this rule is to afford the Contracting

these bodies have also stressed that the purpose of the local remedies rule includes an "element of actual redress" for the victims of human rights violations.[4] Hence, according to the Human Rights Committee, the purpose of the local remedies rule is not only to "*enable State parties to examine*, on the basis of individual complaints, the implementation, within their territory and by their organs, of the provisions of the Covenant and, if necessary, *remedy the violations occurring, before the Committee is seized of the matter*," but also to "*direct possible victims of violations of the provisions of the Covenant to seek, in the first place, satisfaction from the competent State party authorities.*"[5]

4. This added element of "actual redress" also underscores the obligation of State parties to human rights treaties to provide an effective remedy to individuals whose rights under those treaties have been violated. For example, Article 2(3)(a) of the International Covenant on Civil and Political Rights provides: "Each State Party to the present Covenant undertake . . .To ensure that any person whose rights or freedom as herein recognized are violated *shall* have an *effective*

States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court."); *see also Selmouni v. France*, application No. 25803/94, judgment of 28 July 1999, ECHR, para. 74; William A. Schabas, *The European Convention on Human Rights: A Commentary* (2015), pp. 764–765; *Viviana Gallardo et al. v. Costa Rica*, judgment of 13 November 1981, IACHR, Series A, No. G 101/81, para. 26 ("under the generally recognized principles of international law and international practice, the rule which requires the prior exhaustion of domestic remedies is designed for the benefit of the State, for that rule seeks to excuse the State from having to respond to charges before an international body for acts imputed to it before it has had the opportunity to remedy them by internal means."); *Velásquez Rodríguez v. Honduras*, judgment of 29 July 1988 (merits), IACHR, Series C, No. 4, para. 61; Laurence Burgorgue-Larsen, "Exhaustion of Domestic Remedies," *in* Laurence Burgorgue-Larsen & Amaya Úbeda de Torrespara (eds.), *The Inter-American Court of Human Rights: Case Law and Commentary* (2011), para. 6.02.

4 A.A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law* (1983), p. 56.

5 *TK v. France*, communication No. 220/1987, decision of 8 November 1989 (admissibility), HRC, para 8.3 (emphasis added); *see also* Sarah Joseph & Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3d ed. 2013), para. 6.01.

remedy . . . ."[6] And, most relevant for current purposes, Article 6 of the CERD provides: "States Parties *shall* assure to everyone within their jurisdiction *effective protection and remedies*, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention . . . ."[7]

5. This added element of "actual redress" finally echoes the differences in the function of the local remedies rule in both systems, illustrated by Judge Cançado Trindade's seminal 1983 monograph on the subject.[8] In diplomatic protection, the local remedies rule ensures that disputes are not elevated onto the international plane before the authorities of the offending State have had an adequate opportunity to address them by their own means. It can thus be said that in diplomatic protection, the local remedies rule operates *preemptively*.

6. In international human rights protection, the focus of the rule is different. As explained above, under most major international human rights instruments, States have bound themselves to international obligations to respect and ensure human rights, including by subjecting those obligations to the scrutiny of national tribunals and other State institutions. By asking that such tribunals and other State institutions be

---

[6] International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171, art. 2(3)(a) (emphasis added). Similarly, Article 13 of the European Charter on Human Rights ("ECHR") provides: "Everyone whose rights and freedoms as set forth in this Convention are violated *shall* have an *effective remedy* before a national authority . . ." Convention for the Protection of Human Rights and Fundamental Freedoms, November 1950, 213 U.N.T.S. 222, art. 13 (emphasis added). For its part, Article 25(1) of the American Convention on Human Rights ("ACHR") provides: "Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention . . ." American Convention on Human Rights, 22 November 1969, 1144 U.N.T.S. 123, art. 25(1).

[7] International Convention on the Elimination of All Forms of Racial Discrimination, 4 January 1969, 660 U.N.T.S. 195, art. 6 (emphasis added).

[8] *See* A.A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law* (1983), pp. 39, 51-52, 56.

resorted to before the violations are entrusted to the international machinery for their implementation, the rule thus operates *protectively*.[9]

7. The next part of the question concerns the incidence of the principle of effectiveness of local remedies under the Convention and other human rights instruments. General international law posits that only effective remedies can be taken into account in the application of the local remedies rule. The ILC Draft Articles on Diplomatic Protection, Article 15(a), illustrate the principle: "Local remedies do not need to be exhausted where: (a) there are no reasonably available local remedies to provide *effective redress, or the local remedies provide no reasonable possibility of such redress* . . . ."[10] Similarly, the ILC Articles on State Responsibility, Article 44(b), provide: "The responsibility of a State may not be invoked if: . . . (b) the claim is one to which the rule of exhaustion of local remedies applies and any available *and effective* local remedy has not been exhausted."[11]

8. The Convention envisages three procedures: (1) an inter-State procedure before the CERD Committee and potentially a Conciliation Commission (Articles 11-13); (2) an individual-State procedure before the CERD Committee (Article 14); and (3) an inter-State procedure before the Court (Article 22). Only the first two procedures contain a local remedies requirement. This is consistent with the general proposition that the local remedies rule does not apply in cases involving a direct injury to the claimant State,[12] and the Court's recognition that human rights treaties may give rise to direct obligations

---

[9] This added purpose for the local remedies rule necessarily informs its application under the Convention and other human rights treaties, as Qatar will explain at the appropriate stage of these proceedings.

[10] International Law Commission, *Draft Articles on Diplomatic Protection with commentaries (2006)*, Yearbook of the International Law Commission, 2006, vol. II, Part Two, art. 15(a) (emphasis added).

[11] International Law Commission, *Articles on the Responsibility of States for Internationally Wrongful Acts (2001)*, Yearbook of the International Law Commission, 2001, vol. II, Part Two, art. 44(b) (emphasis added).

[12] *See* International Law Commission, *Draft Articles on Diplomatic Protection with commentaries (2006)*, Yearbook of the International Law Commission, 2006, vol. II, Part Two, p. 45, para. 9 (commentary to Article 14).

between the Contracting Parties, including obligations *erga omnes partes*.[13] Indeed, the issue of exhaustion of local remedies did not arise in either *Georgia v. Russian Federation* or *Ukraine v. Russian Federation*. The principle of effectiveness is fully applicable to both procedures where the local remedies requirement does apply.

9. Article 11(3) provides in pertinent part: "The Committee shall deal with a matter referred to it in accordance with paragraph 2 of this article after it has ascertained that all available domestic remedies have been invoked and exhausted in the case, in conformity with the generally recognized principles of international law." Although this provision does not expressly require the local remedies to be "effective," the reference to "generally recognized principles of international law" incorporates the principle of "effectiveness" of remedies.

10. Article 14(7)(a) provides in pertinent part: "The Committee shall not consider any communication from a petitioner unless it has ascertained that the petitioner has exhausted all available domestic remedies." This provision also does not require the local remedies to be "effective," and in contrast with Article 11(3), it does not contain a reference to "generally recognized principles of international law." Nevertheless, the principle of effectiveness of local remedies is again fully applicable for two reasons. *First*, Rule 92(7) of the CERD Committee's Rules of Procedure provides that if a State challenges the admissibility of a communication on the basis of the local remedies requirement, then "the State party is required to give details of the

---

[13] *See Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment of 20 July 2012, I.C.J. Reports 2012*, p. 449, para. 68; *see also Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008* (hereinafter "*Georgia v. Russian Federation*"), pp. 391-392, para. 126 ("States parties to CERD have the right to demand compliance by a State party with specific obligations incumbent upon it under Articles 2 and 5 of the Convention"); *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* (hereinafter "*Ukraine v. Russian Federation*"), p.30, para 81 ("there is a correlation between respect for individual rights, the obligations of States parties under CERD and the right of States parties to seek compliance therewith").

effective remedies available to the alleged victim."[14] *Second*, in its jurisprudence, the CERD Committee expressly requires that the remedy be "effective."[15]

11. The principle of effectiveness of local remedies is similarly applicable to all other major human rights treaties.[16]

12. In view of the foregoing, Qatar submits that although there is a certain degree of overlap in the rationale of the local remedies rule in the fields of diplomatic protection and international human rights

---

[14] Rules of Procedure of the Committee on the Elimination of Racial Discrimination, U.N. Doc. No. CERD/C/35/Rev.3 (1 Jan. 1986), rule 92(7) (emphasis added).

[15] CERD Committee, *L.R. et al. v Slovak Republic*, CERD/C/66/D/31/2003 (2005), para. 6.1; *see also* Patrick Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary* (2016) (hereinafter "Thornberry"), p. 59, n.233.

[16] Hence, under the ECHR and the ACHR, the principle of effectiveness of local remedies is incorporated as part of the "generally recognized rules of international law" (under ECHR Article 35(1)) or the "generally recognized principles of international law" (under ACHR Article 46(1)(a)). In their jurisprudence, both the European Court of Human Rights ("ECtHR") and the Inter-American Court of Human Rights ("IACtHR") have expressly required that the remedy be "effective." For the ECtHR, *see Scoppola v. Italy (no. 2)*, application No. 10249/03, judgment of 17 September 2009, ECHR, para. 70; *see also* William A. Schabas, *The European Convention on Human Rights: A Commentary* (2015), p. 765 n.75. For the IACtHR, *see Cruz v. Honduras*, judgment of 20 january 1989 (merits), IACHR, Series C, No. 5, para. 69; *see further* Laurence Burgorgue-Larsen, "Exhaustion of Domestic Remedies," *in* Laurence Burgorgue-Larsen & Amaya Úbeda de Torrespara (eds.), *The Inter-American Court of Human Rights: Case Law and Commentary* (2011), paras. 6.24-6.29. Similarly, although Article 5(2)(b) of the First Optional Protocol of the International Covenant on Civil and Political Rights does not expressly require the local remedies to be "effective," in its jurisprudence, the Human Rights Committee has expressly required that the remedy be "effective." *See Ominayak et al v. Canada*, communication No. 167/1984, decision of 26 March 1990, HRC, para. 13.2; *see also* Sarah Joseph & Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3d ed., 2013), ch. 6, para. 6.04.

protection; in the latter, the rule is also underscored by an element of "actual redress." Such redress must, furthermore, be effective.

Question 2: Is it necessary to address the plausibility of rights in face of a continuing situation allegedly affecting rights protected under a human rights treaty like the International Convention on the Elimination of All Forms of Racial Discrimination?

13. The Court's requirement that an applicant for provisional measures demonstrate the "plausibility" of the rights asserted is subject to a low showing—that is, the Court is to engage in some "minimum review" that the rights exist. This test was first articulated in Judge Abraham's separate opinion in *Pulp Mills*, upon which both parties rely.[17] By design, the showing does not impose an "exacting" or "high" standard; indeed, the rights need only be grounded in a "possible interpretation" of the legal instrument at issue.[18] Even as, in more recent cases, the Court has considered implicitly a "legal" *and* "factual" component of the "plausibility" requirement, the showing for both remains low. The low threshold for this showing is especially important when it comes to the protection of rights under a human rights treaty, such as the Convention, in order to preserve the protective function of human rights treaties that seek to secure the fundamental rights of vulnerable populations from infringement by the State.

14. So whatever the relationship between the Court's "plausibility of rights" test or an alternative "test of vulnerability of segments of the population"[19] for purposes of provisional measures sought to protect human rights, the existing, low threshold required to demonstrate whether the rights thus claimed actually exist and whether they are in danger of being violated should, at a minimum, be maintained for human rights such as those asserted under the Convention. In particular, the plausibility requirement should be considered fulfilled as

---

[17] *See* CR 2018/12, p. 35, para. 15 (Amirfar); CR 2018/13, pp. 30-31, para. 9 (Treves).

[18] *Obligation to Prosecute or Extradite (Belgium v. Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009* (hereinafter "*Belgium v. Senegal, Provisional Measures, Order of 28 May 2009*"), p. 152, para. 60.

[19] *Ukraine v. Russian Federation, Separate Opinion of Judge Cançado Trindade*, pp. 6-9, paras. 12-26.

long as an applicant has set forth, *first*, a legal showing that the asserted human right is, to use the Court's language in *Belgium v. Senegal*, "grounded in a possible interpretation of the treaty," and *second*, to use Judge Abraham's language in *Pulp Mills*, based on "some minimum review" of the underlying facts, the "possibility of the other party's conduct infringing that right is not manifestly to be ruled out."[20]

15. Below, we address, *first*, the development of the Court's "plausibility" requirement and the principles underlying it; and *second*, the "plausibility" requirement considered in the framework of human rights treaties, including the Convention.

A. The Impetus for the "Plausibility" Requirement

16. The Court first adopted the "plausibility" requirement in *Belgium v. Senegal*, where it stated 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."[21] The Court has assessed the "plausibility" of the rights asserted in each of its subsequent Orders on provisional measures.[22]

---

[20] *Belgium v. Senegal, Provisional Measures, Order of 28 May 2009*, p. 152, para. 60; *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006* (hereinafter "*Pulp Mills*"), Separate Opinion of Judge Abraham, pp. 139-141, paras 8-10.

[21] *Belgium v. Senegal, Provisional Measures, Order of 28 May 2009*, p. 151, para. 57.

[22] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011* (hereinafter "*Costa Rica v. Nicaragua*"), p. 18, para. 53; *Request for Interpretation of the Judgement of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Provisional Measures, Order of 18 July 2011, I.C.J. Reports 2011*, p. 545, para. 33; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Provisional Measures, Order of 22 November 2013, I.C.J. Reports 2013*, p. 360, para. 27; *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica); Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures, Order of 13 December 2013, I.C.J. Reports 2013* (hereinafter "*Nicaragua v. Costa Rica*"), pp. 403-4,

17. Judge Abraham's separate opinion in *Pulp Mills*, written one year prior to *Belgium v. Senegal*, foreshadowed the plausibility standard later adopted by the Court. Both Qatar and the UAE have agreed that Judge Abraham's approach is reflected in the Court's existing jurisprudence.[23] Judge Abraham wrote separately in that case in order to address "the question of the relationship between the merit, or prima facie merit, of the arguments asserted by the party requesting the measures . . . and the ordering of the urgent measures it seeks from the Court"—a question he believed was particularly important following the Court's 2001 determination in *LaGrand* that provisional measures are binding on the parties.[24] According to Judge Abraham, following *LaGrand*:

> It is now clear that the Court does not suggest: it orders. Yet, and this is the crucial point, it cannot order a State to conduct itself in a certain way simply because another State claims that such conduct is necessary to preserve its own rights, unless the Court has carried out *some minimum review* to determine whether the rights thus claimed actually exist and whether they are in danger of being violated—and irreparably so—in the absence of the provisional measures the Court has been asked to prescribe: thus, unless the Court has given some thought to the merits of the case.[25]

---

paras. 17-19; *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia), Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014*, p. 152, para. 22; *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016* (hereinafter "*Equatorial Guinea v. France*"), pp. 1165-6, para. 71; *Ukraine v. Russian Federation*, p. 21, para. 63; *Jadhav Case (India v. Pakistan), Provisional Measures, Order of 18 May 2017* (hereinafter "*Jadhav*"), para. 35.

[23] CR 2018/12, p. 35, para. 15 (Amirfar); CR 2018/13, pp. 30-31, para. 9 (Treves).

[24] *Pulp Mills*, Separate Opinion of Judge Abraham, pp. 137, 139–40, paras. 1, 7-8 (citing *LaGrande (Germany v. United States of America), Judgment of 27 June 2001, I.C.J. Reports 2001*, p. 466).

[25] *Ibid.* p. 140, para. 8 (emphasis added).

18. Judge Abraham concluded that in order to indicate provisional measures, the Court must "satisfy itself" that, among other things, "there is a plausible case for the existence of the right."[26] While he did not take a position on the exact content of this standard, he stressed that it was a low threshold of "some minimum review" that could be described by a range of terms, and noted that "it might be enough to ascertain that the claimed right is *not patently non-existent* and that . . . the possibility of the other party's conduct infringing that right is not manifestly to be ruled out."[27]

19. Indeed, in light of the purpose of the requirement and the broader context of the Court's jurisprudence on provisional measures, plausibility is *necessarily* subject to a low showing. *First*, the purpose of plausibility is not to enter into an in-depth consideration of the likelihood of success on the merits—it is to ensure only that the Court does not order binding measures on the basis of rights which are patently non-existent or which are obviously not in danger of violation from the other party's conduct. *Second*, anything other than a very low threshold would run afoul of the Court's long-established rules that the Court must not pre-judge the merits of the claims at the provisional measures stage,[28] and that the Court is not in the position to undertake an in-depth factual assessment at the provisional measures stage.[29] This is consistent with Practice Direction XI, which provides that parties "should not enter into the merits of the case beyond what is strictly necessary" at the

---

[26] *Ibid.* p. 141, para. 11.

[27] *Ibid.*, pp. 140-41, para. 10.

[28] *See, e.g., Nicaragua v. Costa Rica*, p. 404, paras. 20-21; *Ukraine v. Russian Federation*, Separate Opinion of Judge Owada, pp. 2-3, para. 10 ("This low requirement of the threshold should only be obvious, if regard is had to the point that the determination on whether the rights are plausible should not prejudge the merits of the dispute . . . Such prejudgment would clearly be inappropriate in light of the fact that, at the stage of provisional measures, the parties have not had sufficient opportunity to furnish all the evidence to establish their arguments in full, nor the Court has had sufficient opportunity to consider the totality of the evidence and arguments that the parties would like to present at the merits stage.").

[29] *See, e.g., Nuclear Tests (New Zealand v. France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973*, Declaration of Judge Jiménez de Aréchaga, p. 144.

provisional measures stage.[30] This approach is reflected in the jurisprudence of other international tribunals, which also adopt a low showing, for the same reasons.[31]

20. Thus, in *Belgium v. Senegal*, the Court primarily concerned itself with whether "the rights asserted by Belgium, being grounded in *a possible interpretation* of the Convention against Torture, therefore appear to be plausible."[32] In recent cases, the Court has also assessed "factual" plausibility—namely, whether it is plausible that the rights invoked are applicable to the factual situation at hand.[33] Several Judges of the Court have noted that the Court's jurisprudence on whether plausibility involves a legal or factual inquiry, or both, has not been entirely clear over the years.[34]

21. However, even the cases in which the Court has assessed both legal *and* factual "plausibility" confirm that the Court should not engage in any extensive evidentiary inquiry at the provisional measures stage. For example, in *Equatorial Guinea v. France*, Equatorial Guinea claimed breach of the Vienna Convention on Diplomatic Relations based on France's attachment of its alleged diplomatic premises.[35] The Court's conclusion that Equatorial Guinea's right to inviolability of these premises was "plausible" rested in part on a factual determination that

---

30 International Court of Justice Practice Direction XI, as amended on 20 January 2009 and 21 March 2013, http://www.icj-cij.org/en/practice-directions.

31 *See, e.g., Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte D'Ivoire), Provisional Measures, Order of 25 April 2015, ITLOS Reports 2015*, pp. 158-159, paras. 58, 62.

32 *Belgium v. Senegal, Provisional Measures, Order of 28 May 2009*, p. 152, para. 60 (emphasis added).

33 *See, e.g., Georgia v. Russian Federation*, p. 387, para. 112; *Ukraine v. Russian Federation*, p. 26, paras. 75, 82-83; *Equatorial Guinea v. France*, p. 1167, para. 79.

34 *See, e.g., Ukraine v. Russian Federation*, Separate Opinion of Judge Cançado Trindade; *Costa Rica v. Nicaragua*, Separate Opinion of Judge Koroma, pp. 29, 32, paras. 1-2, 10-12.

35 *Equatorial Guinea v. France*, p. 1167, para. 79.

Equatorial Guinea "plausibly" used those premises for diplomatic purposes.[36]

22. In *Ukraine v. Russian Federation*—the only case in which the Court has found a lack of plausibility, in relation to Ukraine's rights asserted under the International Convention for the Suppression of the Financing of Terrorism ("***ICSFT***")—the Court appeared to base its determination on the fact that Ukraine had not provided *any* evidence with respect to certain elements of the legal claim. Ukraine relied only on Article 18 of that instrument, which obligated Russia to cooperate in preventing terrorism financing as defined by Article 2. Article 2 in turn defined terrorism financing as including an element of knowledge or intent that the funds will be used to carry out certain acts, and that the acts be carried out with the purpose of intimidating the population or compelling the government to act, or refrain from acting, in a particular way.[37] The Court concluded that Ukraine had "not put before the Court evidence which affords a sufficient basis to find it plausible that these elements are present."[38] By contrast, with respect to Ukraine's claims under the Convention, the Court concluded that, based on the evidence presented—primarily reports from international rights organizations—"it appears that some of the acts complained of by Ukraine fulfill this condition of plausibility."[39] In other words, the Court found it "plausible" that these acts "constitute acts of racial discrimination under the Convention."[40] Likewise, in *Georgia v. Russian Federation*, the Court acknowledged that it need not "establish the existence of breaches of CERD . . . or make definitive findings of fact." Rather, the Court must "determine whether the circumstances require the indication of provisional measures for the protection of rights under CERD."[41]

23. The Court's development of the doctrine since *Belgium v. Senegal* illustrates that the plausibility inquiry remains a limited one, in

---

[36] *Ibid.*

[37] *Ukraine v. Russian Federation*, p. 26, para. 74.

[38] *Ibid.* p. 26, para. 75.

[39] *Ibid.* p. 30, para. 83.

[40] *Ibid.* p. 30, para. 82.

[41] *Georgia v. Russian Federation*, pp. 395-6, para. 141.

which the Court conducts "some minimum review" to assess whether the applicant has sufficiently demonstrated that the rights it asserts might have been breached. It follows that any factual review of the record at the provisional measures stage of proceedings must be very limited.

B. The "Plausibility" Requirement Considered in the Particular Context of Human Rights Treaties

24. Given the character of human rights, the fundamental interest in protecting vulnerable populations from continuing violations of such rights, and the rationale for plausibility, the *most modest showing* should be required for purposes of meeting the "plausibility" requirement in human rights cases. This point applies to both legal and factual plausibility, which will be addressed in turn below.

25. *First*, as a matter of legal plausibility, while the interpretation of human rights treaties, like other treaties, is subject to the interpretative framework of the Vienna Convention on the Law of Treaties, the particular object and purpose of human rights treaties, and the nature of the rights and obligations they afford, have led courts to take a specialized "*pro homine*" or "*pro femina*" approach to their interpretation—in other words, that they should be interpreted in the way that is most protective of human rights.[42] This approach takes into account the specific object and purpose of human rights treaties, which is the protection of the individual human person.

26. Accordingly, courts will generally interpret human rights treaties in the manner that maximizes the effectiveness of their protections.[43] In order to do so, such treaties are approached as a "living instrument," whose interpretation is rooted in present day conditions.[44]

---

[42] *See Case of Ricardo Canese v. Paraguay*, judgment of 31 Aug. 2004 (merits, reparations, and costs), IACHR, Series C, No. 111, para. 181; *see also* Cançado Trindade, *Current State and Perspectives of the Inter-American System of Human Rights, Protection at the Dawn of the New Century*, 8 Tulane Journal of International & Comparative Law 5, 12 (2001).

[43] *Case of Soering v. the United Kingdom*, application No. 14038/88, judgment of 7 July 1989, ECHR, para. 87.

[44] CR 2018/14, p. 27, para. 6 (Amirfar); *see Mayagna (Sumo) Awas Tingni Community* v. *Nicaragua*, judgment of 31 August 2001 (merits, reparations and costs) IACHR, Series C, No. 79, para. 146; *see also Loizidou* v.

This approach is particularly critical in determining a request for provisional measures seeking protection for basic human rights from allegations of, as Question 2 acknowledges, "continuing harm." As Judge Cançado Trindade has noted, "the principle of humanity permeates the whole *corpus juris* of contemporary international law . . . [It] has a clear incidence on the protection of persons in situations of great vulnerability."[45] The Court's jurisprudence with respect to provisional measures appears implicitly to take account of the nature of the rights asserted for purposes of the indication of provisional measures.[46]

27. The Convention by definition seeks to protect those who are particularly vulnerable to infringements upon their fundamental human rights, by virtue of their race, color, descent, national origin, or ethnic origin. Indeed, in both of the cases in which the Court has indicated provisional measures to protect Convention rights, the Court has rejected narrow readings of the Convention in favor of readings that would give the greater protection.[47] The Court accordingly indicated provisional

---

Turkey, application No. 15318/89, judgment of 23 February 1995 (preliminary objections), ECHR, para. 71; Thornberry, p. 158; Committee on the Elimination of Racial Discrimination, *General Recommendation XXXII on the meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination*, U.N. Doc. CERD/C/GC/32 (2009), para. 5.

45 *Ukraine v. Russian Federation*, Separate Opinion of Judge Cançado Trindade, p. 25, para. 91.

46 *See, e.g., Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, pp. 22-23, paras. 45, 49 (noting that "the crime of genocide 'shocks the conscience of mankind, results in great losses to humanity . . . and is contrary to moral law and to the spirit and aims of the United Nations'"); *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Provisional Measures, Order of 1 July 2000, I.C.J. Reports 2000*, pp. 127-128, paras. 40, 43 (noting the rights in issue include, among others, "rights to respect for . . . the instruments relating to the protection of human rights," and stating, with respect to the risk of irreparable prejudice, that "persons, assets, and resources present on the territory of the Congo, particularly in the area of conflict, remain extremely vulnerable").

47 *See, e.g., Georgia v. Russian Federation*, p. 386, paras. 108-109 (rejecting Russia's argument for territorial limitations on the CERD's application and instead finding that the CERD provisions invoked by Georgia "generally

measures related to the Convention in both cases (even while rejecting provisional measures under the ICSFT in the case of *Ukraine v. Russian Federation*). As Judge Cançado Trindade stated in his separate opinion in *Ukraine v. Russian Federation*, "In such situations, the social exclusion of the victimized renders the international jurisdiction their 'last hope', given their situation of extreme vulnerability and defencelessness."[48] So, for example, as a matter of legal plausibility, it is not only *possible* to interpret the Convention to prohibit measures targeting Qataris for discriminatory treatment because their "national origin" is Qatari, but in fact *probable* based on the plain text of the Convention, viewed in context and in light of the Convention's object and purpose, as well as the *travaux préparatoires* and explicit interpretations set forth by the CERD Committee.[49]

28. *Second*, to the extent the Court in *Ukraine v. Russian Federation* addressed plausibility as a matter of *fact*, the Court likewise applied a low threshold. Indeed, while addressed as a matter of the requirement of urgency and irreparable harm, the Court acknowledged the "nature" of the fundamental human rights involved under the Convention and that the affected populations appear to "remain

---

appear to apply, like other provisions of instruments of that nature, to the actions of a State party when it acts beyond its territory"); *ibid.* pp. 391-392, para. 126 (finding that "Articles 2 and 5 of the CERD are intended to protect individuals from racial discrimination by obliging States parties to undertake certain measures specified therein. . . . States parties to CERD have the right to demand compliance by a State party with specific obligations incumbent upon it under Articles 2 and 5 of the Convention;[] there is a correlation between respect for individual rights, the obligations of States parties under CERD and the right of States parties to seek compliance therewith...."); *Ukraine v. Russian Federation*, p. 30, para. 81 (citing *Georgia v. Russian Federation*, pp. 391-392, para. 126).

[48] *Ukraine v. Russian Federation,* Separate Opinion of Judge Cançado Trindade, p. 7, para. 18.

[49] CR 2018/14, pp. 21-25, paras. 3-10 (Amirfar); CR 2018/14, pp. 25-27, paras. 11-15 (Amirfar); *see also* CR 2018/14, pp. 27-29, paras. 16-19 (Amirfar) (addressing plausibility of rights asserted under Article 5). We note that the UAE did not challenge the plausibility of the rights asserted by Qatar under Articles 4, 6, or 7 of the CERD; thus, we submit there is no dispute as to their plausibility and the Court should find them plausible both on the law and the facts.

vulnerable."[50] And while the Court did not find the evidence adduced by Ukraine sufficient to find plausible its assertion of rights under the ICSFT, the Court did find that there was sufficient evidence in the form of reports from independent human rights organizations such as Human Rights Watch, the Ukrainian Helsinki Human Rights Union, and Amnesty International to find plausible Ukraine's assertion of rights under the Convention. So for example, here, where there is undisputed evidence that the 5 June 2017 policy statement of the UAE's discriminatory measures against Qataris as a group of people has not been revoked,[51] that is all that should be required to show the plausibility of the claim that Convention rights might be breached, since the "effect" of infringement of Articles 2 and 5 and the other human rights sought to be protected through the provisional measures requested stem from the 5 June 2017 statement.[52]

29. In short, whether or not the Court puts the requisite showing in terms of "plausibility of rights" or "vulnerability of populations" for purposes of a human rights treaty such as the Convention, at a minimum, the rights asserted under the Convention should be subject, in accord with the Court's jurisprudence, to a low threshold showing of both legal and factual plausibility in order to indicate provisional measures.

Question 3: What are the implications or effects, if any, of the existence of a continuing situation allegedly affecting rights protected under a human rights Convention, for requests of Provisional Measures of Protection?

30. The Court has the authority to indicate provisional measures in order to ensure that, after the full course of proceedings, it will have

---

50 *Ukraine v. Russian Federation*, p. 33, para. 96.

51 The UAE does not dispute that the 5 June 2017 statement has not been revoked, taking the position during its second round of oral submissions that "in a sense there was no need" to revoke the 5 June 2017 statement. CR 2018/15, p. 38, para. 12 (Shaw) ("Lord Goldsmith says that the 5 June statement has not been withdrawn. In a sense there was no need. No legislative or administrative measures were taken, no general policy of expulsion introduced. The political sentence fell away. If fear has indeed been generated, Mr. President, the source is not the measures taken by the UAE against Qatar, but the reasons why such measures were introduced.").

52 CR 2018/14, pp. 29-31, paras. 19-23 (Amirfar).

the capacity to fulfill its judicial function by fully vindicating the rights of the parties before it.[53] The Court indicates provisional measures when it determines that there is a *real and imminent risk* that the rights in dispute will be irreparably prejudiced before the Court is able to issue its decision on the merits.[54]

31. Where there is a continuing situation allegedly affecting the rights in dispute, the requirement of a real and imminent risk is necessarily satisfied. In that circumstance, unlike a situation in which the requesting party has identified a future event that will cause irreparable harm,[55] the harm is being caused on a continuing basis and hence, if irreparable, will necessarily satisfy the requirement that the risk be "real and imminent."

32. Further, when the rights at issue arise under a human rights Convention, irreparable prejudice is the natural consequence of restrictions on those rights. The rights protected by human rights conventions like CERD go to the very heart of human dignity, and a violation of those rights, once underway, cannot be repaired through financial compensation or other customary forms of reparation available to the Court.[56]

33. The irreparability of the harm from continuing violations of rights protected in human rights conventions is also exacerbated by the vulnerability of the affected individuals. As the Court stated in *Georgia v. Russian Federation*, certain rights under the CERD "are of such a

---

[53] Robert Kolb, *The International Court of Justice* (Hart Publishing, 2013), p. 616; *see also* CR 2018/12, p. 19, para. 2 (Donovan); CR 2018/12, p. 51, para. 2 (Goldsmith).

[54] *Equatorial Guinea v. France*, p. 1168, paras. 82-83. On the meaning of "real and imminent risk of irreparable prejudice" of the rights in dispute before the decision on the merits, see CR 2018/12, pp. 52, 54, 59-61, paras. 7, 12-14, 31-38 (Goldsmith); CR 2018/14, pp. 32-34, paras. 5-13 (Goldsmith) (stating, for example that "[t]he Court should ask here, we respectfully suggest, as it has done in granting provisional measures in other cases: is it conceivable that irreparable prejudice could occur to the rights in dispute before the merits decision?").

[55] *Equatorial Guinea v. France*, p. 1168-1169, paras. 84-85, 89-90; *Jadhav*, pp. 12-13, paras. 51, 54, 55.

[56] CR 2018/14, p. 33, paras. 9-10 (Goldsmith).

nature that prejudice to them could be irreparable."[57] Against Russia's assertion that a tentative peace had taken hold, the Court noted that the Georgian population "remain[ed] vulnerable."[58] Even though the "problems of refugees and internally displaced persons" were "currently being addressed," the conditions "ha[d] not yet been resolved in their entirety."[59] As a result, "there exist[ed] imminent risk that the rights at issue in this case . . . may suffer irreparable prejudice."[60]

34. Likewise, in *Ukraine v Russian Federation,* the Court noted that the "rights stipulated in Article 5, paragraphs (c), (d) and (e) of CERD are of such a nature that prejudice to them is capable of causing irreparable harm." The Court continued, "[b]ased on the information before it at this juncture, the Court is of the opinion that the Crimean Tatars and ethnic Ukrainians in Crimea appear to remain vulnerable."[61] The Court "took note" of evidence of restrictions on rights, and "consider[ed] that there [was] an imminent risk that the acts . . . could lead to irreparable prejudice to the rights invoked by Ukraine."[62]

35. These principles also find support in the practice of the Inter-American Court of Human Rights ("***IACtHR***"), in respect of the American Convention on Human Rights ("***ACHR***"). In awarding provisional measures, the IACtHR considers whether there is "extreme gravity and urgency" and whether measures are necessary "to avoid irreparable damage to persons," in line with Article 63(2) of the ACHR.[63] The IACtHR has confirmed that "urgent and provisional measures serve . . . to protect fundamental human rights, thereby avoiding

---

57 *Georgia v. Russian Federation*, p. 396, para. 142.

58 *Ibid.*, para. 143.

59 *Ibid.*

60 *Ibid.*

61 *Ukraine v. Russian Federation*, p. 33, para. 96.

62 *Ibid.*, p. 33, paras. 97-98.

63 American Convention on Human Rights, 22 November 1969, 1144 U.N.T.S. 123.

irreparable harm to persons."[64] Examples from IACtHR practice confirm the principle that, in the case of ongoing violations, any assessment of risk of harm is necessarily met. They also exhibit a concern that harm compounds over time. For example, in *Matter of L.M. (Paraguay)*, the Commission argued that "the urgency does not derive from a threat of harm, whose appearance can be anticipated in the future, but from harm that is already being caused and the prospects of repairing it are inversely proportionate to the passage of time."[65] The Court agreed. The situation "entails a risk that is not only imminent but may already be occurring."[66] In this case, "[t]he passage of time would inevitably constitute a defining element of ties of affection that would be hard to revert without causing damage to the child."[67]

36. In this case, Qatar has submitted independent reporting showing continuing harm throughout the past thirteen months.[68] This is

---

64 *Matter of Pueblo Indigena Sarayaku*, order of 6 July 2004 (provisional measures regarding Ecuador), IACHR, p. 8, para. 6.

65 *Matter of L.M. (Paraguay)*, order of 1 July 2011(provisional measures with regard to Paraguay), p. 8, para. 8.

66 *Ibid.* p. 15, para. 18.

67 *Ibid.* In *Case of Haitian and Haitian Origin Dominican Persons in the Dominican Republic*, which concerned allegedly illegal immigration policies, the IACtHR indicated provisional measures (to protect individuals and communities more broadly) based on evidence showing *prima facie* that the policies resulted in abuse. This evidence included testimony of—amongst other things—the trauma that results from separation of families. *Case of Haitian and Haitian-Origin Dominican Persons in the Dominican Republic*, order of 18 August 2000 (provisional measures requested by the IACHR), p. 10, para. 5, p. 7, para. 13. In a Concurring Opinion, Judge Cançado Trindade noted that "[w]ith the uprootedness, one loses, for example, the familiarity with the day-to-day life, ... the work which gives to each person the meaning of life and sense of usefulness to the others, in the community wherein one lives... as well as the possibility to develop a project of life. It is, thus, a problem which concerns the whole human kind...". *Case of Haitian and Haitian-Origin Dominican Persons in the Dominican Republic*, order of 18 August 2000 (provisional measures requested by the IACHR), Concurring Opinion of Judge A.A. Cançado Trindade, p. 15, para. 6.

68 CR 2018/14, pp. 39-42, paras. 34-51 (referring to Tab 8 of the Judges' Folder) (Goldsmith).

the exact type of evidence that the Court has found more than sufficient to make a finding of urgency in past cases involving continuing situations allegedly affecting rights under the Convention.[69] The rights that Qatar has alleged have been violated, as these reports evidence, harm the fundamental interests of the affected individuals, including marriage and family life, education, work, and the enjoyment of one's property.[70] Thus, as revealed by the very existence of and necessity for the UAE's claimed "mitigation" measures, the question of a "real and imminent risk of irreparable harm" to Qataris is satisfied every day because of the continuing situation caused by the UAE's discriminatory measures announced on 5 June 2017 and subsequently. Even on the UAE's own case, the continuing situation "has not yet been resolved in [its] entirety."[71]

37. In sum, these decisions express a simple principle. Where the alleged violations of human rights are occurring in a continuing situation, the Court need not imagine the risk that such violations will occur again. They are, by definition, imminent. Further, where the alleged violations affect rights under a human rights Convention, such as the CERD, that harm is *by definition* irreparable: deprivation of any core human rights on a discriminatory basis impacts on human dignity.

---

[69] *Ukraine v. Russian Federation*, p. 33, para. 97 (stating that OHCHR and OSCE reports regarding past and ongoing violations were "prima facie" evidence "that there have been restrictions in terms of the availability of Ukrainian-language education in Crimean schools"); *Georgia v. Russian Federation*, pp. 393, 396, paras. 131, 143 (noting that Georgia presented "reports of international and non-governmental organizations and witness statements" to show "ongoing, widespread, and systematic abuses of the rights of ethnic Georgians under the Convention," which formed a central part of the case file on which the Court concluded that the population in question remained vulnerable).

[70] CR 2018/12, pp. 54-59, paras. 12-30 (Goldsmith); CR 2018/14, pp. 42-43, paras. 52-54 (Goldsmith) (referring to Tab 9 of the Judges' Folder).

[71] *Georgia v. Russian Federation*, p. 396, para. 143; *see also* CR 2018/15, p. 38, para. 12 (Shaw) (explaining that "in a sense there was no need" to revoke the 5 June statement).