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Völkerrechtsblog
INTERNATIONAL LAW & INTERNATIONAL LEGAL THOUGHT

IFHV

BOFAXE

Just a Friendly Suggestion?

On the (Il-)Legality of Germany's Inaction Following an Interim Measure by the ESCR Committee

After acceding to the Optional Protocol to the International Covenant on Economic Social and Cultural Rights (ICESCR) in 2023, Germany is now, for the first time, facing an individual complaint before the Committee on Economic, Social and Cultural Rights ("the ESCR Committee"). The case was brought by a man from Syria who had requested asylum in Germany and, after having his request denied by German authorities based on the Dublin Regulation, is no longer provided any social benefits in Germany and is thus *inter alia* deprived of housing and health care. Shortly after the individual complaint was lodged, the Committee handed down an interim measure requesting Germany to ensure that the complainant "is provided with basic housing, healthcare and access to minimum subsistence support." The German state, however, while apparently using a federalist diffusion of responsibility as an excuse, largely ignored the interim measure, deeming it a mere "recommendation" – which is why the complainant is by now homeless and without urgently needed dental care.

The legal bindingness of interim measures by UN treaty bodies has repeatedly been subject to scholarly debate. This post argues that while such an interim measure is eventually not legally binding, by ignoring it Germany is not only weakening its own reputation on the world stage but also the normative force of the international legal order as a whole.

Interim Measures by UN Treaty Bodies: Legally (Non-)Binding?

Are interim measures by the ESCR Committee binding for the parties? If one asks the Committee itself, they *de facto* are – even if only through a legal "workaround" that allows it to neglect the wording of pertinent sections of the ICESCR's Optional Protocol. Article 5(1) of the Optional Protocol permits the Committee to "transmit to the State Party concerned [...] a request that the State Party take such interim measures as may be necessary to avoid possible irreparable damage". It must be noted that the Committee may only "request" and not *order* interim measures. And whereas the ICJ has stated in *LaGrand* that its provisional measures have binding effect despite the comparably soft language in Art. 41(1) of the ICJ Statute ("indicate [...] any provisional measures which ought to be taken"), this finding was mainly based on the object and purpose of the ICJ and its statute, namely enabling effective judicial settlement of the disputes before it as well as the necessity "to avoid prejudice to the rights of the parties as determined by the final judgement" (paras. 100-103). However, these considerations do not equally apply to the ESCR Committee which is after all only a quasi-judicial body. And then again, even among these quasi-judicial bodies, the ESCR Committee has an arguably precarious status keeping in mind the historic debate about whether or not economic, social and cultural rights can truly be justiciable. Contending that it might be too burdensome to comply with them, some states have thus firmly objected to the inclusion of a provision allowing for interim measures by the ESCR Committee in the optional protocol.

Nonetheless, the Committee has found that a failure to adopt interim measures as requested may entail a violation of Article 5(1) of the Optional Protocol read in conjunction with the good faith principle enshrined in Article 26 of the VCLT (cf. *S.S.R. v. Spain*, paras. 7.9 and 9). A comparable approach is also adopted by other UN treaty bodies, for instance the Human Rights Committee (*Piandiong et al. v. Philippines*, para. 5.1) which additionally alludes to the right to an effective remedy to construe the obligatory character of its provisional measures (cf. General Comment No. 31 [80], para. 19) and the Committee against Torture (*Cecilia Rosana Nunez Chipana v. Venezuela*, para. 8). Thus, many scholars argue that while the interim measures of UN treaty bodies are not legally binding in themselves, they are binding in effect as it "would run counter to a purposive interpretation of human rights treaties to deny" their binding power (*Bantekas/Oette*, International Human Rights Law and Practice, 4th ed., p. 349).

Yet, this differentiation between "legal" and "factual" bindingness seems artificial and unconvincing. Firstly, why would the Committee's provisional measures be binding despite the weak language in the Optional Protocol?

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Referring to the good faith principle, and thus *pacta sunt servanda*, only makes sense if the treaty at hand actually imposed an obligation to obey the Committee's provisional measures in the first place – otherwise the whole argumentation is based on circular reasoning. Secondly, one could argue that it would require an explicit textual basis to give provisional measures binding effect when even the final communications of the UN treaty bodies are not legally binding as such. Without said textual basis it would seem that as the final decisions are not binding on the parties, the treaty bodies' interim measures can *a fortiori* not be of an obligatory character. Against this backdrop, applying the "good faith" argument seems to introduce a binding effect through the backdoor that states had not intended. And indeed, Germany is of course not the first state to explicitly reject the idea of such an obligation. Canada (*Ahani v. Canada*, para. 5.3) and Belarus (*Lyubov Kovaleva and Tatyana Kozyar v. Belarus*, para. 6.3) for instance have previously done so. Moreover, the list of countries that simply through their failure to comply with interim measures by UN treaty bodies have arguably protested against their alleged binding effect is of course considerably longer (cf. Bantekas/Oette, p. 349). Therefore, although it is certainly crucial and desirable to effectively safeguard the rights of the complainant, this aim in itself cannot alter the legal status of the Committee's communications.

Not Binding, But Authoritative

In light of this it seems more persuasive to abandon the whole "binding in effect, if not by law" argument as it feigns a legal force that does not exist. This is however not at all to say that, from a normative view, states should be encouraged to simply ignore the Committee's interim measures – otherwise including Article 5(1) in the Optional Protocol would have been rather pointless. In fact, it seems reasonable to apply the same standard to interim measures that is also applied to other communications by UN treaty bodies. General Comments, for instance, while not vested with any formal legal status, are generally treated as authoritative interpretations of the respective treaty, i.e. soft law that may be invoked by actual judicial bodies (see ICJ in *Ahmadou Sadio Diallo*, para. 66). The same applies to final decisions in individual complaint procedures (*Bantekas/Oette*, p. 340). With that authoritative character of the treaty bodies' communications comes a strong expectation that states will act in accordance with them. The interim measures provide a point of reference to states on how to behave in the most human rights friendly manner and shine a light on an urgent human rights issue by drawing the international community's attention to it, thereby exerting pressure on the respective state to not recklessly create new "facts on the ground" without considering the relevant human rights obligations. This effect can be a powerful tool for advocates and potential victims of human rights abuses and is eventually not precluded by the fact that interim measures are not binding. After all, as its preamble states, the Optional Protocol enables the Committee to review states' actions "in order further to achieve the purposes of the Covenant and the implementation of its provisions [...]." It would be politically unwise while also detrimental to the advancement of human rights and thus run counter to the purpose stated in the preamble, for states to subject themselves to an independent oversight body that is tasked with reviewing their actions only to then arbitrarily ignore this body's communications without providing a substantive reason. This line of thinking is also supported by previous jurisprudence by the German Constitutional Court which held that, even though German national courts are not bound by the communications of UN treaty bodies, they "should engage" with their reasoning (for instance here, para. 107).

A Question of Credibility

Eventually, the non-binding nature of UN treaty bodies' decisions has a two-fold consequence.

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On the one hand, also due to a lack of available enforcement mechanisms, the treaty bodies are constrained to rely on their legitimacy and the persuasiveness of their opinions. Accordingly, they should always retain due regard for the legal views of states and ought not to claim competences for themselves that are not sufficiently supported by their founding legal documents. On the other hand, it falls to the states to not permanently undermine through their negligence the human rights institutions that they have themselves created by cavalierly ignoring their guidance. In the case at hand, Germany's unwillingness to implement the Committee's request must be seen in the broader context of the new German government's desperate desire to appear tough on immigration. This desire has not only been demonstrated on the campaign trail but has also found its way into several new government policies. For instance the German government has recently taken the lead in European efforts to legitimize the Taliban by letting representatives of the pariah regime take over all diplomatic missions in Germany in order to facilitate a future deal that would allow for regular deportation flights to Afghanistan. Moreover, heavy pressure was exerted on German foreign minister Wadephul from within his own conservative party, with some party colleagues even demanding his resignation, after he had taken the (apparently outrageous) step of lowering expectations regarding repatriations to the completely destroyed regions of Syria ("Hardly anyone can live here with dignity"). These examples clearly indicate that the current political climate on Germany's political right does not leave much room for concessions towards immigrants.

Nevertheless, the complete suspension of all social benefits for asylum applicants, often happening on short notice, is legally extremely problematic in light of German constitutional law as well as human rights law. It is thus not surprising that several German courts have already determined the illegality of the policy (for an overview see here). In light of this, it is not at all apparent why the relevant German authorities do not comply with the Committee's requested interim measure. While not being legally bound by it, Germany should carefully consider the approach recommended by the Committee. A state that often prides itself on its constitutional order's openness to international law (the term "*Völkerrechtsfreundlichkeit*" has for decades appeared in German jurisprudence, and thus in German legal debates, see for instance the German Constitutional Court's latest *Ramstein* ruling, paras. 81 *et seq.*) and that does not mince words when it comes to criticizing other actors for their human rights violations (see here, here, and here), should, when an authoritative treaty body alerts it to the possibility of a violation of fundamental human rights, in the end have better arguments than "You can't force me, because your measures are not legally binding!" Otherwise, Germany's actions might during the process very well do severe damage to its own credibility as well as to the Committee's authority.

Conclusion

All in all, one can conclude that while interim measures by UN treaty bodies are not legally binding on states, due to the authoritativeness of the committees there is a strong expectation that they will be implemented. If states choose not to do so, they should provide good reasons if they do not intend to seriously damage the international human rights treaty system as a whole. By failing to provide convincing arguments for its lack of compliance with the CESCR Committee's interim measure, Germany risks not only undermining the Committee's authority but equally its own credibility on the world stage.

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