

Interim Measures under the OP-ICESCR: Standards and Practice

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With the coming into force of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR), the availability of remedies for the violation of economic, social, and cultural rights including individual communications and inter-state communications has brought the enforcement of these rights at par with that of civil and political rights under the International Covenant on Civil and Political Rights (ICCPR). Parties to the Optional Protocol to the ICESCR recognize the competence of the Committee on Economic, Social and Cultural Rights (CESCR) to receive complaints from individuals (under their jurisdiction) alleging that such state party has violated any of their economic, social, and cultural rights under the Covenant. Where such a communication has been filed by an individual claiming violation of any of the covenant rights, the CESCR may request the concerned state party, before the determination of the matter on merits, for urgent consideration that it take such interim measures as may be necessary in exceptional circumstances, so as to avoid irreparable damage to the victim or victims.¹ While in the universal human rights system, provisions for seeking interim measures were commonly provided in the rules of procedure of the concerned body, this form of the provision either resulted in a challenge to their mandatory character or a refusal to comply; consequently instruments including the Optional Protocols to the Convention on Elimination of All Forms of Discrimination against Women and Convention on the Rights of Persons with Disabilities include provisions on interim measures within the treaty.² The role of such measures lies in ‘ensuring the integrity of the

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¹ Article 5(1), Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

² Christian Curtis and Julieta Rossi, ‘Individual Complaints Procedure’ in Malcolm Langford, Bruce Porter, Rebecca Brown and Julieta Rossi (eds), *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary* 61, 61–63 (Pretoria University Law Press, 2016).

process’ and the ‘effectiveness of the mechanism for protecting covenant rights where there is risk of irreparable damage’.³ Such measures have a role in preventing irreparable damage even where there is no complete certainty that damage would otherwise occur.⁴ Provisions on interim measures are seen as important for the system of international human rights law as they ‘recognize the unique status of individuals as potential targets of state or state-sponsored retaliation or repression, whereas the same is not true in state-to-state complaints in other legal arenas’, and thereby bring about some sense of ‘equality’ between states and individuals.⁵

Article 5 [OP-ICESCR] on interim measures states that the Committee is empowered to request a state party to take such interim measures as are necessary in exceptional circumstances and so as to avoid irreparable damage to the victim or victims. It also clarifies that such a request for interim measures does not imply a decision on admissibility or as to the merits of the communication.⁶ In other words, the CESCR may request a party to take interim measures and still find that the communication is inadmissible⁷; that is, its decision at this stage is without prejudice to subsequent decisions on admissibility.⁸ The state party may make a request for withdrawal of the interim measures, and on submissions received from the state party, the Committee may decide to withdraw the same if they are found on the basis of submissions to be unjustified or no longer necessary.⁹

While the optional protocol sets out the basic provision as to interim measures, further guidance as to the interpretation of the terms used, and the requirements to avail of protection under the provision can be drawn from both guidelines issued by the CESCR, and its decisions on individual

³ S.S.R. v. Spain, Communication 51/2018, E/C.12/66/D/51/2018, para 7.6; also *Rosario Gómez-Limón Pardo v. Spain*, Communication 52/2018, E.12/C.12/67/D/52/2014, para 10.2.

⁴ S.S.R. v. Spain, Communication 51/2018, E/C.12/66/D/51/2018, para 7.4.

⁵ Alexandra R. Harrington, ‘Don’t Mind the Gap: The Rise of Individual Complaint Mechanisms Within International Human Rights Treaties’, 22 *Duke Journal of International and Comparative Law* 153, 175 (2012).

⁶ Article 5(2), Optional Protocol to the International Covenant on Economic, Social and Cultural Rights

⁷ S.S.R. v. Spain, Communication 51/2018, E/C.12/66/D/51/2018, para 7.9

⁸ Committee on Economic, Social and Cultural Rights, ‘Guidelines on Interim Measures’, para 10.

⁹ Committee on Economic, Social and Cultural Rights, ‘Guidelines on Interim Measures’, para 9.

communications issued thus far, particularly *S.S.R v. Spain*,¹⁰ where the nature and scope of interim measures under the Covenant were considered in detail.

Elucidating the Meaning of the Provision: Terms Used

Under article 5, requests for interim measures may be made by the CESCR to a concerned state party in ‘exceptional circumstances’ and to avoid ‘irreparable damage’ likely to be caused by ‘action taken or likely to be taken by a state party’, if not suspended or withdrawn, pending consideration of the communication.¹¹ Towards interpreting and applying this provision, the guidelines and decisions of the CESR have firstly elaborated on the meaning to be given to these terms.

The CESCR has clarified in its guidelines, that ‘irreparable damage’ refers to the ‘threat or risk of violation of a Covenant right that could not lead to a reparation in kind (full restitution), and for which monetary compensation at a later stage would not be adequate’.¹² A similar clarification was made in *S.S.R v. Spain* wherein ‘irreparable damage’ was seen as referring to the ‘threat or risk of a rights violation that is of such a nature as to be irreparable or not adequately compensable or to forestall the possibility of restoring the rights that have been violated’.¹³ In this decision, it was further pointed out that in making such assessment of possibility of irreparable damage in matters related to eviction, the situation of the concerned family is a pertinent factor and aspects such as the presence of small children or persons with disability who are particularly at risk would be taken into account.¹⁴

As regards the expression ‘exceptional circumstances’, in *SSR v. Spain*, the CESCR noted that it refers to the ‘serious impact that an act or omission by a state party may have on a protected right

¹⁰ Communication 51/2018, E/C.12/66/D/51/2018.

¹¹ *S.S.R. v. Spain*, Communication 51/2018, E/C.12/66/D/51/2018, para 7.2; In this context, the CESCR made a reference to General Comment 33 under the ICCPR.

¹² Committee on Economic, Social and Cultural Rights, ‘Guidelines on Interim Measures’, para 2.

¹³ *S.S.R. v. Spain*, Communication 51/2018, E/C.12/66/D/51/2018, para 7.3.

¹⁴ *S.S.R. v. Spain*, Communication 51/2018, E/C.12/66/D/51/2018, para 7.5.

or on the future effectiveness of any decision by the Committee on a communication submitted for its consideration'.¹⁵

Requirements

In order for the CDESCR to request the concerned state party to take interim measures pending consideration of the communication on merits, certain requirements have been identified relating to various aspects ranging from onus of proof, to the time within which a request to be made, and relevant documentation. First, in order for interim measures to be requested by the CDESCR, the risk must be real.¹⁶ Both the reality of the risk and the damage being irreparable should the risk materialize are to be demonstrated by the author seeking interim measures.¹⁷ However, as per the Guidelines issued by the CDESCR, which also set out the standards of such proof, the likelihood of damage occurring need not be proved beyond reasonable doubt as such a requirement would be incompatible with the objective of interim measures; rather, the information provided by the author must enable the committee to prima facie determine that there is risk of irreparable damage.¹⁸

The second requirement for seeking interim protection is that there must be no available effective domestic remedies that may prevent such irreparable damage.¹⁹ An instance of such a remedy given by the Committee is an appeal that would suspend a domestic judgment which if given effect to would cause irreparable damage to the author's covenant rights.²⁰ Once again, the responsibility to provide information demonstrating that such effective domestic remedy is not available lies with the author.²¹

The third important requirement relates to admissibility, and is that interim measures will not be requested unless the communication appears to be at least prima facie admissible and the violation appears to be at least arguable; that on the face of it, a violation must be established and other

¹⁵ *S.S.R. v. Spain*, Communication 51/2018, E/C.12/66/D/51/2018, para 7.3.

¹⁶ *S.S.R. v. Spain*, Communication 51/2018, E/C.12/66/D/51/2018, para 7.3.

¹⁷ Committee on Economic, Social and Cultural Rights, 'Guidelines on Interim Measures', para 2.

¹⁸ Committee on Economic, Social and Cultural Rights, 'Guidelines on Interim Measures', para 5.

¹⁹ *S.S.R. v. Spain*, Communication 51/2018, E/C.12/66/D/51/2018, para 7.3.

²⁰ Committee on Economic, Social and Cultural Rights, 'Guidelines on Interim Measures', para 4.

²¹ Committee on Economic, Social and Cultural Rights, 'Guidelines on Interim Measures', para 6.

requirements if admissibility met.²² It may be mentioned once again here even though prima facie admissibility may have been shown at this stage, the CESCR may still find on full consideration of the communication at a later stage that the same is not admissible.

Besides requirements as regards the nature of risk and possible damage, the CESCR also requires that the applicant seek interim protection within reasonable time, and has in fact prescribed a specific time within which the request should be made. The CESCR has specified in its guidelines that the author should not wait till the last minute, but should submit a request as soon as it appears that effective domestic remedies to prevent such irreparable damage are not available. The Committee has further clarified that such submission of a request for interim measures must be made without undue delay, and unless the same can be explained, should be made at least four working days before the damage is expected to materialize.²³

A fifth requirement specified by the CESCR relates to relevant documentation. This includes copies of relevant decisions of national authorities and reports on the situation that would help substantiate the claim of risk of irreparable damage.²⁴ The author making a request for interim measures is to provide all relevant information and disclose material facts in good faith, and failure to disclose may result in the withdrawal of the request.²⁵ Where the information provided is insufficient but it appears to the CESCR that there is risk of irreparable damage, it may require the state to take interim measures for a limited time while providing time to the applicant to provide the missing information; but in such cases the measures are automatically withdrawn if the information is not provided.²⁶

²² Committee on Economic, Social and Cultural Rights, 'Guidelines on Interim Measures', para 3.

²³ Committee on Economic, Social and Cultural Rights, 'Guidelines on Interim Measures', para 4.

²⁴ Committee on Economic, Social and Cultural Rights, 'Guidelines on Interim Measures', para 6.

²⁵ Committee on Economic, Social and Cultural Rights, 'Guidelines on Interim Measures', para 6.

²⁶ Committee on Economic, Social and Cultural Rights, 'Guidelines on Interim Measures', para 7; also *S.S.R. v. Spain*, Communication 51/2018, E/C.12/66/D/51/2018, para 7.4.

Failure to Comply with Request: Consequences

Failure to adopt interim measures is seen as a failure by the concerned state to respect in good faith the procedure for individual communications and will be considered to be a violation of article 5 of the optional protocol.²⁷ The CESCR has also clarified that when a state party makes a request for the withdrawal of interim measures, it cannot do so in disregard of the measures before the Committee has had the opportunity to consider the request.²⁸ A violation of article 5 was also found in another decision *Maribel Viviana v. Spain*, where the state party was found to have not complied with the request for interim measures in good faith, both by not providing adequate alternative accommodation to the complainant and by being unable to explain why the requests for interim measures were not complied with.²⁹

Where a violation of article 5 has been found however, both in cases where a violation of a covenant right was found at a later stage and in those where it was not, the CESCR has only made recommendations to the state party to ensure such compliance by its authorities in the future. For instance, in *SSR v. Spain*, where no violation of the complainant's rights was found in its final decision on the communication, it issued a general recommendation to the state that it develop a general protocol to honour requests for interim measures by the CESCR and direct its relevant authorities to also do so.³⁰ This recommendation was also made in *Maribel Viviana López Albán v. Spain*, where a violation of article 11 of the ICESCR was found as the author was evicted with her family without providing adequate alternative accommodation.³¹

²⁷ *Rosario Gómez-Limón Pardo v. Spain*, Communication 52/2018, E.12/C.12/67/D/52/2014, paras 10.2 and 10.3.

²⁸ *S.S.R. v. Spain*, Communication 51/2018, E/C.12/66/D/51/2018, para 7.7.

²⁹ *Maribel Viviana López Albán v. Spain*, E/C.12/66/D/37/2018, para 13.3.

³⁰ *S.S.R. v. Spain*, Communication 51/2018, E/C.12/66/D/51/2018, para 10.

³¹ *Maribel Viviana López Albán v. Spain*, E/C.12/66/D/37/2018, para 14 (f). See also *Rosario Gómez-Limón Pardo v. Spain*, Communication 52/2018, E.12/C.12/67/D/52/2014, para 14 (b).

Conclusion

Interim measures of protection can play an important role in protecting the rights of a party against state action taken or about to be taken where such action may lead to irreparable damage which cannot be adequately compensated or where no action can restore the situation. Such was for instance the case in *Maribel Viviana*, where the author and her family were evicted without provision of adequate alternative accommodation and were moved to different shelters in some of which some of the author's children had to stay separately from their mother. The provision of interim measures in the protocol seeks to prevent precisely such situations, and the CESCR has through its guidelines and decisions clarified all the important aspects and requirements of the provision for its smooth implementation. The CESCR has also stressed on its relevance and role in the effective implementation of the individual communications process. As pointed out by commentators and noted earlier in this paper, one reason for inclusion of provision of interim measures in the text of the protocol was the issue of avoidance of compliance by states when the same was merely part of the procedural rules. While the present paper has looked at only very limited decisions, it appears that despite interim measures being requested by the CESCR, non-compliance is still observed. It remains to be seen whether the situation is a common one and continues in the future or whether improved compliance will be seen ensuring more effective implementation of the individual communications process.