

Using Unilateral Diplomatic Assurances to Evade Provisional Measures' Orders

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Abstract : This paper will highlight the failure of international adjudication to prevent a state from evading an order of provisional measures by simply issuing a diplomatic assurance to the court. This practice changes the positions of the litigants as equals before a court, prevents the court from inquiring into the reliability of the political pledge as it would with assurances from a state to an individual, and diminishes the court's ability to control its own proceedings in the face of concerns over sovereignty. Both the European Court of Human Rights (ECtHR) and International Court of Justice (ICJ) will entertain these kinds of unilateral pledges, but they consider them differently when the declaration is made between states or between a state and an individual, and when made directly to the court. In short, diplomatic assurances issued between states or to individuals are usually considered not to be legally binding and are essentially questions of fact, but unilateral assurances issued directly to an international court are questions of law, and usually legally binding. At the same time, orders for provisional measures are now understood also to be legally binding, yet international courts will sometimes permit a state to substitute an assurance in place of an order for provisional measures. This emerging practice has brought the nature of a state as a sovereign capable of creating legal obligations into the forum of adjudication where the parties should have equality of arms and permitted states to create legal obligations that escape inquiry into the reliability of the outcome. While most recent practice has occurred at the ICJ in state-to-state litigation, there is some practice potentially extending the practice to human rights courts. Especially where the litigants are factually unequal - a state and an individual - this practice is problematic since states could more easily overcome factual failings in their pledges and evade the control of the court. Consider, for example, the potential for evading non-refoulement obligations by extending the current diplomatic assurances practice from the state-to-state context to the state-to-court context. The dual nature of assurances, as both legal and factual instruments, should be considered as addressed to distinct questions, each with its own considerations, and that we need to be more demanding about their precise legal and factual effects.

Keywords : unilateral, diplomacy, assurances, undertakings, provisional measures, interim measures

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