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Human Rights Committees: Their nature and legal relevance in Spain

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Abstract: This article analyses the state of the enforcement mechanisms of human rights treaties, frequently constituted as "committees", evaluating the effectiveness of their resolutions and their incidence in Spain. In particular, a more in-depth examination of the Human Rights Committee, the Committee on Economic, Social and Cultural Rights and the Committee for the Elimination of Discrimination against Women (CEDAW Committee) will be carried out.

Keywords: Human rights Committees Treaties Spain Rule of Law

(A) INTRODUCTION

Recent reports from the human rights committees have referred to Spain in relation to issues such as gender-based violence, access to housing, expulsion of immigrants and historical memory. These issues are highly topical and come into conflict with respect for basic human rights and people's dignity. It is therefore necessary to examine closely the nature and relevance of these bodies, which must be understood not only within the area of international but also of national law, which is where they have effect.

There are surprisingly a small number of studies regarding human rights treaty-based bodies and the effectiveness of its resolutions in domestic law. Nevertheless, Human Rights Committees recent jurisprudence is of special interest in the study of the development of International Human Rights Law.

The monitoring system of human rights treaty-based bodies, frequently constituted as "committees", will be analysed below. Originating as quasi-jurisdictional monitoring tools, these committees nonetheless play a highly relevant role in the protection of fundamental rights in most States that make up the international community. After setting out the system of the current treaty bodies, it will be necessary to pronounce on the effectiveness of the decisions issued by those bodies by highlighting the rule of law, which has its correlate in both national and international legal systems. Understanding of these instruments by States' national courts is necessary and urgent, since dialogue between courts at both levels is essential to guarantee the protection of fundamental rights.

It should be noted that the research will focus on three of these bodies: the Human Rights Committee (monitoring body of the International Covenant on Civil and Political Rights, ICCPR, 1996), the Committee on Economic, Social and Cultural Rights (monitoring body of the International Covenant on Economic, Social and Cultural Rights, ICESCR, 1996) and the Committee on the Elimination of

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Discrimination Against Women (body overseeing the Convention on the Elimination of All Forms of Discrimination Against Women, CEDAW, 1979).

These treaty-based bodies (and not others) have been chosen for a well-founded reason: the important work carried out by these committees in the interpretation of violations of fundamental rights has been widely recognised. The Human Rights Committee plays a central role, given the absence of a universal international human rights court and the limitations of the Human Rights Council. Its interpretative and monitoring functions are ineluctable in the international community. It is, actually, controlling the most widely ratified human rights treaty: International Covenant on Civil and Political Rights (ICCPR).

The Committee on Economic, Social and Cultural Rights is the monitoring body of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and its recommendations and reports are highly topical and important, especially when considering its two rulings against Spain. An analysis of this Committee entails an analysis of the monitoring bodies of the 1966 International Covenants, which leads to a more comprehensive insight into the concept of human rights and their different dimensions. Furthermore, gender-based discrimination is one of the most common violations of human rights around the world, being widespread in all regions although varying in scale. Supreme Court Judgment 1263/2018, which ordered Spain to accept the application of the CEDAW Committee ruling in *González Carreño v Spain*, is highly relevant, and thus cannot be omitted from this analysis.

Furthermore, it will be analysed the differences among the human rights mechanisms in the International Community to figuring out what is the substantive nature of the Human Rights Committees and to what extend that may affect to the effectiveness and legal relevance of its pronouncements.

(B) MONITORING SYSTEM OF HUMAN RIGHTS BASED-BODIES

People's legal capacity and capacity to act in international law have traditionally been undermined by the exorbitant subjectivity of the States in the international community. It emerged with the sole (although not always feasible) aim of regulating interstate relations. This primary and principal subjectivity of the States is still the maximum expression of the essence of international law. However, after the two world wars of the 20th century, a new and progressively communal concept materialized[1]. Following the phenomenon of international organisations (nowadays at its culmination) and, particularly, after the process of humanization of international law[2], the order of things has tended to counteract the State's position,

[1] A. J. Rodríguez Carrión, *Lecciones de Derecho Internacional Público,* (Tecnos, 2006), at 75.

[2] The so-called "process of humanization of international law" was the means which enabled the shift of focus and the transformation of international public law into a regulatory corpus much closer to society. As Cançado Trindade states, "the recognition of the centrality of human rights corresponds to a new ethos of our times. Such process of humanization manifests itself, in my view, as I have been sustaining for years, in all domains of the discipline: the foundations of international law, its subjects, its new conceptual constructions, the basic considerations of humanity permeating on all its chapter, and the quest for the international rule of law for the realization of justice and maintenance of peace. Such process, in turn, discloses the new jus gentium of our times. The International Law for humankind" (A. A. Cançado Trindade, 'International Law for Humankind: Towards a New Jus Gentium', 317 *R. des Cours*, (2005) 336, at 271). These obligations extend to compliance with international human rights law in all its manifestations.

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qualifying its place within the international community and making certain room for other institutions with legal capacity, albeit in a limited fashion. In this regard, and within the process of humanization of international law, international human rights law may be the most decisive instrument for structuring the relationship between two very different subjects of international law: States and people. If to that duo we add the international organisations, particularly the United Nations and its fundamental role in developing these rights, the equation results in an international community that imposes restrictions on States with regard to respect for human rights of their citizens through different kinds of norms.

The *Charter of the United Nations* was the first step towards a heterogeneous system constructed through this process whose importance, as Carrillo Slacedo points out, lies in the imposition of legal obligations in the field of human rights on both States and the United Nations organisation itself[3]. The different nature of the human rights provisions (convention-based, custom-based and institutional)[4] shows the importance acquired by this branch of international law despite its youthfulness, given that it started to emerge in the aftermath of the Second World War, a period crucial to the matter at hand. At the same time, it is indicative of the fragmentation and complexity involved in articulating its effectiveness in the international community, as well as in States' national legal systems.

In any event, the spearhead of human rights in international law has been the development of the conventions. The Universal Declaration of Human Rights (1948) was the first text to include these rights at an international, general and universal level. However, the first general convention on human rights was adopted at a regional level: the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms. The International Covenants of 1966, at a universal level, and the American Convention on Human Rights of 1969 complete a series of international instruments that form the fundamental and fairly homogeneous core of the ever-expanding list of general human rights.

A short while later, human rights treaties started to address certain groups considered to be particularly exposed, giving rise to specific (in contrast to general) human rights. Thus, the broad development experienced by this branch of international law has allowed the provisions of the conventions adopted to be not only of a general nature but also to address groups that suffer from a particular form of discrimination that affects them specifically, through the use of conventional instruments to protect specific rights, depending on the focus of attention at the time.[5] The beneficiaries of these rights are limited to members of the group. This type of treaty includes the Convention on the Elimination of Racial Discrimination (1965), the Convention on the Elimination of all Forms of Discrimination Against Women (1979), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), the Convention on the Rights of the Child (1989), the International Convention on the

3 J. A. Carrillo Salcedo, *Soberanía del Estado y Derechos Humanos en el Derecho Internacional Contemporáneo,* (Tecnos, 2001, Madrid) 186, at 39.

4 C. Fernández Casadevante Romaní, 'La práctica española relativa a los órganos internacionales de control de los derechos humanos: un estudio introductorio', in C. De Casadevante Romaní (ed.), *España y los órganos internacionales de control en materia de Derechos Humanos* (Dilex, 2010) 17-49, at 17.

5 C. Jiménez Sánchez, 'Los Derechos Humanos de las mujeres en Europa y Latinoamérica: perspectiva jurisprudencial internacional', 40 *ARAUCARIA* (2018) 483-510 [doi: 10.12795/araucaria.2018.i40.22].

Protection of the Rights of All Migrant Workers and Members of Their Families (1990) and the Convention on the Rights of Persons with Disabilities (2006).

Due to the importance of the subject matter of these treaties, all international human rights conventions have a monitoring instrument, the purpose of which is to oversee compliance with the treaty provisions by signatory States. These instruments are no more than bodies created under the treaty itself and which are given certain specific competences, whether in the text itself or in an additional protocol. These human rights treaty bodies are established as independent expert committees (although their members are from the States party) and their basic competence involves the obligation of States to present regular reports regarding compliance with the convention provisions. In co-operation with agents in civil society, the body is commissioned with examining and replying to those reports, recommending guidelines for the State. As Casadevante Romaní puts it, "despite the apparent weakness of this monitoring technique in view of the fact that the State is the author of the report, it is worth highlighting that clearly it has its relevance due to the public release and discussion of the report, and the legal effects of the observations and recommendations made."[6]

Furthermore, human rights treaty bodies can deploy two other notable competences: interstate complaints and individual complaints.[7] While interstate complaints have not been well received by States,[8] individual complaints have brought about a change in the level of protection of human rights offered by the committees. Their constitution as international quasi-jurisdictional last instance bodies to which individuals may appeal amplifies the legal personality of the individual in the international community, and broadens the obligations of the State to comply with the international human rights treaties to which it is party, as analysed below.

(C) NATIONAL AND INTERNATIONAL RULE OF LAW

The rule of law is a general principle whereby the State is bound to comply with the obligations that it has contracted. It is considered to be a core value in every state at national and international levels, and is the basis on which rights inherent to people should be protected. In the words of the Secretary-General of the United Nations, it is "a principle of governance by which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards."[9] This "principle of governance" entails the independent application of international human

6 C. Fernández Casadevante Romaní, 'La práctica española...', *supra n.* 4, at 19.

7 Furthermore, some bodies have less common competences, such as the visits system established by the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and the confidential investigation included in several human rights instruments, such as the Optional Protocol to the CEDAW.

8 K. M. Smith, *International Human Rights,* (Oxford University Press, 2017), 472.

9 Report of the Secretary General on the rule of law and transitional justice in societies that suffer or have suffered from conflicts, UN Doc. S/004/616.

rights norms, and guarantees that the state acts through channels consistent with the other principles of justice such as supremacy of the law, separation of powers or, in a more direct way, legality.

The human rights treaty bodies are convention-based mechanisms that play an essential role in the development of international law and human rights by protecting people from serious atrocities perpetrated under the halo of state sovereignty. In this regard, it has been widely considered that observations, recommendations and even decisions of the human rights committees do not have legally binding effects on the state. However, it must be considered that a state's subjection to the rule of law stems precisely from the obligations assumed by that state within the framework of consensus and willingness governing the international community. In the Spanish Constitution, the rule of law is clearly set out in article 1.1, which must be read in conjunction with articles 9.2 and 9.3. In addition, article 10.2 establishes that state bodies must interpret the provisions in accordance with the international treaties,[10] and the task of the human rights committees is to offer a legitimate interpretation of the treaties,[11] as they are the bodies that oversee respect for the treaties in the practices of the state.

The peculiar structure of international law makes it inevitable that the principle of good faith (which is a general principle of law) is at the centre of this issue,[12] although that does not prevent the obligatory nature of good faith from being denied. Good faith is enshrined in the Preamble to the Charter of the United Nations and is one of the guiding principles in Resolution 2625 (XXV), and also in customary international law, and it must apply to all the provisions of international law. Likewise, the *pacta sunt servanda* principle plays a pre-eminent role in treaty-based international law by reinforcing the principle of good faith.

The *Declaration of the High-level Meeting of the General Assembly on the rule of law at the national and international level* reaffirms that commitment to the rule of law must guide the activities of States and give legitimacy to their actions. In addition, the importance of the issue is highlighted by reaffirming that "human rights, the rule of law and democracy are interlinked and mutually reinforcing and they belong to the universal and indivisible core values and principles of the United Nations."[13]

Further, it must be taken into consideration that in a single-tier (moderate) system, as found in Spain and most European countries, the unity of the legal system is undeniable, and state compliance with international rules is an obligation under the national legal system.[14] International provisions that bind Spain become part of the national legal system once published in the Spanish Official State Journal, with no further action being required. Thus, the international legal system is an unequivocal part of the national legal system[15] and, therefore, it must be stated categorically that the decisions, recommend-dations and

[10] A. H. Catalá i Bas, 'Diálogo entre tribunales y creación de un sistema de protección de derechos humanos en red', 28 *Revista Europea de Derechos Fundamentales* (2016) 13-47.

[11] A. García, *La interpretación de la Constitución*, (Centro de Estudios Constitucionales, Madrid, 1984), at 400.

[12] H. Valencia Restrepo, 'La definición de los principios en el Derecho Internacional Contemporáneo', *36 Revista Facultad de Derecho y Ciencias Políticas*, (2007), 69-124.

[13] *Declaración de la reunión de alto nivel de la Asamblea General sobre el estado de derecho en los planos nacional e internacional*, 24 September 2012, A/RES/67/1.

[14] P. Niken, 'El Derecho Internacional de los Derechos Humanos en el derecho interno', *56 Revista IIDH*, (2012), 11-68.

[15] C. Fernández Casadevante Romaní, *La interpretación de las normas internacionales*, (Aranzadi, Pamplona, 1996).

observations of the human rights committees of the treaties ratified by Spain are of a binding nature. Although different degrees of *self-enforcement* of international rules can exist,[16] that fact is not a ground to refuse to respect the rules. As stated in article 29 of the Spanish Act on Treaties and other International Agreements (Ley de Tratados y Otros Acuerdos Internacionales) "All the authorities, bodies and institutions of the state must respect the obligations of the international treaties in force to which Spain is a party and ensure adequate compliance with those treaties"[17]. Further, article 30 of that Act underscores that the treaties prevail over other infra-constitutional provisions, which is reaffirmed in articles 95 and 96 of the Spanish Constitution.

The binding nature of the international rules requires a conjoint approach to the rule of law at national and international levels, and failing to connect the two when analysing them is to stray from the constitutional order itself.

(D) ACCEPTANCE OF THE COMMITTEES' COMPETENCE BY SPAIN

Spain, therefore, is bound by the treaties it has signed and non-compliance with their provisions is in contravention to the rule of law. The development of international human rights law over the last 60 years has been remarkable and the States of the international community have agreed to consider its central role in international law. However, the problem persists when observing the varying degrees to which States agree to comply with the provisions of human rights treaties, despite the high number of ratifications of the majority. At times this is behind the low degree of compliance with their provisions, when also considering the mechanism of flexibility of reservations.[18] It is true that the effectiveness of this branch of international law is its biggest weakness. Nonetheless, the lack of effectiveness is not as high as often claimed and the degree of state compliance with human rights treaties and their monitoring bodies is comparable to that in national law. In fact, more than 80% of judgments of the European Court of Human Rights are respected by the States involved, and the decisions of the human rights committees have led to dozens of legislative amendments in many jurisdictions.

Spain has ratified all but one of the 18 treaties on human rights (adding conventions and protocols), the exception being the 1990 *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*. This convention imposes rights which for European States involved a costly dispute with border controls and the management of migration. Therefore, the majority of them have not signed or ratified it, and it is the main human rights treaty with the fewest States party to it (54).[19] The Convention established the Committee on the Protection of the Rights of Migrant Workers and Members of their Families (CMW), to whose control Spain is not subject.

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[16] X. González de Rivera I Serra, 'Conversaciones entre la norma internacional y la norma interna: la aplicación por los órganos judiciales", *5 Revista jurídica de Derechos Sociales,* (2015) 260-291.

[17] Act 25/2014 on Treaties and other International Agreements, BOE No. 288, 28 November 2014.

[18] JR. Dw Hill, 'Avoiding obligation: Reservations to Human Rights Treaties', *60 Journal of Conflict Resolution,* (2015) 1129-1158 [https://doi.org/10.1177/0022002714567947].

[19] There are other accompanying texts such as the *Optional Protocol to the International Covenant on Economic, Social*

Spain is bound by eight human rights committees at the universal level:

(1) As regards the Human Rights Committee, the monitoring body of the *International Covenant on Civil and Political Rights*, Spain ratified the treaty in 1977, thereby accepting the creation of the Committee. Likewise, in 1985 it ratified the Optional Protocol, by which individual communications were added as a monitoring technique of the Committee. Thus, Spain is subject not only to the articles of the Covenant, which entails changing national law where necessary, but also to the decisions of this treaty-monitoring body. In this regard, article 1 of the Optional Protocol establishes that a state party to the Covenant that becomes a party to the Protocol recognises the competence of the Committee to receive and consider communications from individuals. However, pursuant to the reservation made by Spain, it is a body subsidiary to other international jurisdictions such as the ECHR:

> "The Spanish Government accedes to the Optional Protocol to the International Covenant on Civil and Political Rights, on the understanding that the provisions of article 5, paragraph 2, of that Protocol mean that the Human Rights Committee shall not consider any communication from an individual unless it has ascertained that the same matter has not been or is not being examined under another procedure of international investigation or settlement".

(2) In 1984 Spain ratified the *Convention on the Elimination of all Forms of Discrimination Against Women* (CEDAW, 1979), which, together with the Optional Protocol ratified in 2001, extends the competences of the Committee to individual communications. At article 8, the Protocol also establishes a confidential investigation inquiry which can be initiated when there are grave or systematic violations by a state party. In addition, under the Protocol, at the time of signing or ratification the state may declare that it does not recognise the power of the Committee to undertake the above-mentioned confidential investigation, a declaration not made by Spain.

(3) A different case is that of the second International Covenant on Economic, Social and Cultural Rights, the adoption of which reflected the qualitative and quantitative changes experienced by the United Nations during the 1960s. In this case, the monitoring body was not created within the treaty, but rather afterwards by Resolution 1985/17 of the United Nations Economic and Social Council (ECOSOC), with the objective of monitoring the functions of this body and not the activities of States regarding the articles of the Covenant. However, it was in 2008, through the adoption of the Optional Protocol, that the Committee's competences came to include the classic trio: reports, interstate complaints and individual complaints. It also establishes the technique of confidential investigation. Spain ratified the Protocol in 2013.

(4) The Convention against Torture, ratified by Spain in 1987, establishes the Committee's competences as being the presentation of reports and the mechanisms for interstate and individual complaints. However, the Optional Protocol to this Convention, ratified by Spain in 2006, extends the competences of the Committee to include regular visits to detention centres by way of a subcommittee on prevention, a monitoring technique shared with the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (1987).

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and Cultural Rights (24) and *the Optional Protocol to the Convention on the Rights of the Child on a communications procedure* (40 ratifications) with fewer States parties, but they are not texts establishing catalogues of rights.

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(5) As for the *Convention on the Elimination of Racial Discrimination*, ratified by Spain in 1969, on 13 January 1988 the state made the following declaration establishing procedural limitations on the Committee's actions:

> "The Government of Spain recognizes the competence of the Committee on the Elimination of Racial Discrimination to receive and consider communications from individuals or groups of individuals within the jurisdiction of Spain claiming to be victims of violations by the Spanish State of any of the rights set forth in that Convention.
> "Such competence shall be accepted only after appeals to national jurisdiction bodies have been exhausted, and it must be exercised within three months following the date of the final judicial decision".

(6) In the case of the Committee on the Rights of the Child, it must be emphasised that its competence is imposed in the *Convention on the Rights of the Child* itself, and there can be no voluntary acceptance of that competence[20]. Ratified by Spain in 1990, it is the human rights treaty with the highest number of ratifications (196).

(7) Other committees whose competence Spain has accepted are the Committee on the Rights of People with Disabilities (through ratification of the Optional Protocol to the Convention in 2007); and

(8) the Committee against enforced disappearance, established by the *International Convention for the Protection of All Persons from Enforced Disappearance* and ratified by Spain in 2009. Article 30 of the Convention establishes the competence of this body to examine individual communications submitted by relatives of a disappeared person.

(E) THE HUMAN RIGHTS COMMITTEE AND SPAIN'S IRREGULAR COMMITMENT

The International Covenant on Civil and Political Rights proclaims basic and classic human rights by including, for the first time in a binding text, a universal and general catalogue, and it is one of the most recognised and renowned instruments in the international community. Its impact in Europe is highly relevant, since all the European States are parties to the Covenant and all but two, the United Kingdom and Switzerland,[21] are parties to the Optional Protocol. Many party States have been the subject of adverse decisions of the Human Rights Committee.

It is clear that there is a gradation of the rights included in the Covenant, which affects their direct effect, where it is declared that it is automatically applicable without further implementing measures being necessary for some of its provisions, for example, the prohibition of torture or slavery,[22] but not others[23], which suffer from a certain lack of precision. This lack of clarity must be related to the large number of signatory States, and to the need for generalisation on some issues that in different legal systems must be

[20] C. Fernández Casadevante Romaní, 'La práctica española... *supra n. 4*, at 25.

[21] Th status of ratifications of Human Rights Treaties is available electronically at: http://indicators.ohchr.org.

[22] C. Rodríguez Rubio, 'La eficacia de las resoluciones del Comité de Derechos Humanos', in A. Cuerda Ruezu (ed), *Las tensiones entre la criminalidad internacional y las garantías propias de un Estado de Derecho en un mundo globalizado*, (Universidad Rey Juan Carlos, 2008) 147-173, at 151.

[23] *La apertura constitucional al Derecho Internacional y Europeo de los Derechos Humanos. El artículo 10.2 de la Constitución española*, (Consejo General del Poder Judicial, Madrid, 1999), at 126.

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described in detail in the national systems of protection. Clear proof of this is article 14.5,[24] in relation to which, in its judgment of 21 October 1985, Spain's Constitutional Court considered the connection between the International Covenant and articles 24.1 (on effective judicial protection) and 10.2 of the Spanish Constitution. Indeed, in 2000 the Committee found that Spain had breached this article by not providing for the right to a second criminal hearing, which has led to successive amendments of the Organic Law on Judicial Power extending the appeal procedure.

The activity of the Human Rights Committee has been profuse in relation to all the state parties, including the countries of Europe. Up to 2018, the Committee's individual communications mechanism had admitted 37 communications against Spain and decided on the merits of the cases. In the most recent, in 2014, the Committee found that the state had extradited a suspected terrorist (Mr Ali Aarrash) to his country of nationality (Morocco) without having first ascertained that his life or physical integrity would not be at risk, thereby violating article 7 of the Covenant,[25] which had already been the main subject of General Recommendation 31 (2004) of the Committee. The Committee applied an interpretation that is close to the peremptory norm (*ius cogens*) of international law, which *non-refoulement* is, in a way similar to the ECHR. In the Views of the Committee, Spain had the obligation of:

> "(i) providing adequate compensation for the violation of his rights, taking account of the acts of torture and ill-treatment to which he was subjected as a result of his extradition to Morocco; and (ii) taking all possible steps to cooperate with the Moroccan authorities in order to ensure effective oversight of the author's treatment in Morocco."[26]

Previously, in 2013, the Human Rights Committee had criticised Spain for violation of articles 7 and 2.3. Prior to her acquittal in the National High Court, where she was charged with collaborating with an armed group, Ms *Achabal Puertas* had complained that she was the victim of torture while being held incommunicado at Civil Guard headquarters in Madrid. The Committee considered that Spain was under an obligation to provide Ms *Achabal Puertas* with an effective remedy which had to include an impartial, effective and thorough investigation of the facts, and it is under an obligation to prevent similar violations by putting a definitive end to the practice of incommunicado detention.

Differences of opinion between the Human Rights Committee and the European Court of Human Rights (ECtHR) are highlighted in this case, having the ECtHR determined it was inadmissible, with the succinct explanation of not having found any violation of the Convention articles. That, however, made it possible for the Committee to examine the case, as Spain had made a reservation to the Optional Protocol to the Covenant by which it gave priority to the ECHR.

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[24] "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."

[25] Article 7 of the International Covenant on Civil and Political Rights establishes: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

[26] Decision approved by the Committee in its 111th session period (7 to 25 July 2014), Communication No. 2008/2010, CCPR/c/111/D/2008/2010, 30 September 2014.

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The decision in *Achabal Puertas* was seen as a signal by the Committee directed to the European States who share that provision, by offering its mechanism of individual complaints as a remedy to a possible lack of effectiveness on the part of the ECtHR.[27]

In the final Observations on the sixth regular report of Spain, the Human Rights Committee reproaches Spain for not guaranteeing the direct application of the International Covenant on Civil and Political Rights in national legislation, despite the contents of article 10 of the Spanish Constitution, and for the absence of a specific procedure to implement the decisions adopted. In fact, the information presented by Spain for the implementation of the decisions in *Achabal Puertas* and *Aarrass* was insufficient according to the Committee's assessment in its follow-up report,[28] even though Spain had installed video camera surveillance systems in police stations and approved Instructions 11/2015 and 12/2015, but without including specific provisions on the prevention of torture.

The main concerns about Spain also include the situation of unaccompanied minors, an issue that is a major focus in the Observations on the sixth report.[29] The issues of unaccompanied foreign minors and the use of police force were graded B and C in the follow-up recommendations of the Committee.[30] To that must be added a third issue (given the lowest grade (E)), namely the lack of investigation into human rights violations during the Civil War and the Francoist dictatorship, a matter in the Committee again urged Spain:

> "The Committee regrets that the State party does not intend to repeal the 1977 Amnesty Act and that no measures have been taken to implement its recommendations regarding: (a) the investigation, prosecution and punishment of perpetrators and redress for victims of past human rights violations, in particular for victims of international crimes; and (b) the review of the legislation on the search for, exhumation and identification of disappeared persons and the provision of adequate resources."

Similarly, in the Committee's Observations on Spain's sixth report, the State was urged to review the Citizen Security Act. The Committee was particularly concerned about the practice of summary deportations (*devoluciones en caliente*) in Ceuta and Melilla, rejecting the special regime that the Act grants to these territories, and it sought the creation of an independent mechanism with authority to suspend negative decisions on expulsions.

Even when the nature of the Committee´s decisions and recommendations has to be distinguished from those from an International Court, such as the European Court of Human Rights, it cannot be denied that the States are subject to the rule of law in the terms they have ratified the Optional Protocol and, then

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[27] H. Gerards, 'Inadmissibility decisions of the European Court of Human Rights. A critique of the lack of reasoning', *14 Human Rights Law Review,* (2004) 148-158 [doi: 10.1093/hrlr/ngt044].

[28] Informe sobre el seguimiento de las observaciones finales del Comité de Derechos Humanos, CCPR/C/122/3, de 18 de abril de 2018.

[29] In the concluding observations on the sixth periodic report of Spain, the Committee is concerned about the situation of unaccompanied minors and asks the State to develop a standard protocol for determining their age and urges the State to always take into account the best interests of the child in all decisions concerning unaccompanied minors (para. 23 et seqq.).

[30] In the Committee's evaluation report, the letters B, C and E correspond to the following assessments of replies:
B: Reply/action partially satisfactory
C: Reply/action not satisfactory
E: Information or measures taken are contrary to or reflect rejection of the recommendation.

it would be more than incongruent not to follow the recommendations emanated from this and other bodies. Something that expressly has denied the Constitutional Court and Supreme Court[31], arguing its lack of "legal character" in order to avoid the execution of the recommendations. Nonetheless, still remains some hovels about the execution of European Court of Human Rights sentences, showing up little differences between legal and quasi-legal bodies of protection

In support of that idea, the Human Rights Committee General Comment No. 33 stated that:

> "While the function of the Human Rights Committee in considering individual communications is not, as such, that of a judicial body, the views issued by the Committee under the Optional Protocol exhibit some important characteristics of a judicial decision. They are arrived at in a judicial spirit, including the impartiality and independence of Committee members, the considered interpretation of the languages of the Covenant, and the determinative character of the decisions."[32]

Moreover, the absence of an international human rights court leads us to see the Human Rights Committee as the sole mechanism occupying to universal human rights at individual communications level, accompanied only by the Committee on Economic, Social and Cultural Rights we are going to examine down below.

(G) COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, SPAIN AND ACCESS TO HOUSING

While the International Covenant on Civil and Political Rights was the product of a classic and westernised vision of human rights, the second of the international covenants gave a voice to another part of the international community, one that increased in size and influence during the 1960s. The new nations born of decolonisation clamoured for a more realistic view of the situation faced by millions of people and the prevailing causes in situations of destitution and impoverishment, along with cultural neo-imperialism. The creation of both covenants was based on the idea that civil and political rights should be immediately applicable, otherwise economic, social and cultural rights would be applied progressively. [33] This dichotomy between human rights, now resolved, was certainly the reason why the International Covenant on Economic, Social and Cultural Rights did not automatically incorporate a monitoring body. As remarked above, this emerged as a substitute for the ECOSOC verification system, which was later established as a true human rights committee in the 2008 Optional Protocol, 42 years after the adoption of the Covenant.

In the years following its creation, the Committee on Economic, Social and Cultural Rights (CESCR) has made recommendations and observations on the reports presented by Spain (six until 2018), and has adopted decisions condemning Spain on two occasions.

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[31] STC 70/2002, de 7 de abril y STS 141/2015 de 11 de febrero.

[32] General Comment No. 33. The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights, Human Rights Committee, CCPR/C/GC/33, 3 November 2008.

[33] A. Cançado Trindade, 'La protección internacional de los derechos económicos, sociales y culturales', *Estudios de Derechos Humanos,* (Instituto Interamericano de Derechos Humanos, 1994).

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In the final Observations on the sixth regular report by Spain,[34], the CESCR recommended that Spain take the legislative measures necessary to ensure that economic, social and cultural rights enjoy the same level of protection as civil and political rights, "including by means of the remedy of amparo."[35] In addition, the Committee remained concerned about untenable disparities between the regions in the enjoyment of these rights and recommended that Spain better coordinate social welfare services. Similarly, it was concerned about the effect of austerity measures introduced after the economic crisis, discrimination between men and women, unemployment, and the working and living conditions of migrants in Temporary Migrant Reception Centres (Centros de Estancia Temporal) in Ceuta and Melilla.

However, it has been the right to housing and the issue of evictions that has most concerned the Committee in relation to Spain, so much so that Spain is one of only three countries to be condemned by the Committee, the others being Ecuador and Italy.

In the final observations of its report, the CESCR recommends that the state address the social housing deficit, regulate the private housing market, review its tenancy legislation and provide for effective judicial mechanisms to guarantee protection.[36] As for evictions, the Committee has complained to the state of the need to adopt a protocol that incorporates reasonableness and proportionality, and which ensures, among other things, compensation or alternative suitable accommodation for people in impoverished conditions who suffer eviction.

In addition to these observations, the two condemnations in 2015 and 2017[37] must be taken into account. The first decision ruled against Spain for violation of articles 11.1, which involves the obligation of the States to provide their citizens with an adequate standard of living, including housing, clothing and food (which in no case entails a subjective right of individuals to housing, but rather the obligation of the State to create favourable conditions for individuals to be able to access housing) and 2.1 of the Covenant, by which the parties commit to taking steps to achieve the full realisation of the rights recognised in the treaty.

After she had failed to pay several instalments of her mortgage, there was a possibility that the author would lose her home following auction of her property as ordered by Court No. 31, although there had been no notification of the mortgage enforcement proceedings.

The Committee considered that the State party had an obligation to provide the author with an effective remedy:

> "in particular: (a) to ensure that the auction of the author's property does not proceed unless she has due procedural protection and due process, in accordance with the provisions of the Covenant and taking into account the Committee's general comments Nos. 4 and 7; and (b) to reimburse the author for the legal costs incurred in the

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34 Concluding Observations on the sixth periodic report by Spain, 25 April 2018, Committee on Economic, Social and Cultural Rights, adopted by the Committee at its 63rd session period (12-29 March 2018), E/C.12/ESP/CO/6.

35 *Ibid.*, para. 6.

36 *Ibid.*, para. 36.

37 Decision adopted by the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights concerning Communication No. 5/2015, 21 July 2017 and Communication No. 2/2014, Decision adopted by the Committee in its 55th session period (1-19 June 2015), 13 October 2015.

processing of this communication."

The CESCR also recommended that the State should include guarantees of non-repetition and prevent similar violations in the future. However, this was not the only occasion on which Spain has been condemned. In July 2017, in the decision approved by the Committee concerning Communication No. 5/2015, the State was again condemned for violating articles 11.1 and 2.1 of the Covenant, this time with the addition of article 10, referring to the protection of the family.[38] On this occasion a family with two minor children was evicted from social housing belong to the Madrid Housing Institute because they were unable to pay the rent, and all their appeals had been rejected. In its decision, the Committee obliged the State, in parallel with the earlier decision, to provide the authors with an effective remedy: to grant them public housing if needed, to award them financial compensation for the violations suffered, and to pay the authors' costs of the proceedings before the CESCR.

(H) COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN AND THE JUDGMENT 1263/2018 OF THE SPANISH SUPREME COURT

Article 17 of the CEDAW created what is known as the "Committee", originally with functions limited to the regular presentation of reports by States parties and the issuance of general and particular recommendations. For that reason, the adoption of the additional Optional Protocol in 1999 was welcome news as it greatly extended the competences of the monitoring body and made it possible to receive communications from individuals or groups of individuals under the jurisdiction of States parties for violations of the Convention, after they have first exhausted all national appeals. The CEDAW has a peculiar character which distinguishes it from other human rights catalogues in that it is not a mere declaratory text, but rather, in addition to being a compilation of the fundamental rights of women, it establishes an action plan for the States parties and international organisations.[39]

Spain has assumed most of those commitments and has so far presented eight regular reports to the Committee. The last, prepared in combination with the seventh report and presented in 2015, represents an advance with regard to the recommendations established by the Committee in light of the sixth report presented in 2009, largely due to the adoption of different legislative instruments such as Organic Act 1/2015, which modifies the Criminal Code with regard to violence against women, and Act 12/2009 on asylum and subsidiary protection, which includes the recognition of gender-based persecution in the contexts of refuge and asylum (although with restrictions).

[38] The article 10.1 of the Covenant prescribes: "The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses."

[39] I. Jaising, 'The Convention on the Elimination of all forms of Discrimination against Women (CEDAW) and Realisation of Rights: Reflections on Standard Settings and Culture', in M. Shivdas et. Al. (eds), *Without Prejudice: CEDAW and the Determination of Women's Rights in a Legal and Cultural Context,* (Commonwealth Secretariat, London, 2010) 9-13.

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However, the CEDAW Committee still has reservations about the actions of Spain based on the seventh and eighth reports. It has highlighted its concern over the reduction of resources allocated to the prevention of and fight against discrimination during the recession, reminding that more in this context, it should give "priority to women in vulnerable situations and avoid retrogressive measures."[40]

The ruling against the State in *González Carreño v Spain* (prior to Spanish Supreme Court Judgment 1263/2018, analysed below) must be noted, given that the Committee continued to consider that there was a lack of understanding of the Convention by the State and it urged that judges and lawyers be provided with training in this matter[41]. The Committee called on Spain to:

> "Provide legal education and regular training for government officials, judges, lawyers, senior judges, prosecutors, police officers and other law enforcement officials on the Convention and the Optional Protocol and on their application, so that the Convention and the Optional Protocol can serve as an effective framework for all laws, court decisions and policies on gender equality and the advancement of women."

Regarding gender-based violence, the CEDAW Committee urged the State to revise Act 1/2004 so as to include other forms of gender-based violence, apart from violence in close relationships, such as police and workplace violence, or violence by care providers. It was particularly concerned about the high number of children killed by their fathers and the lack of forethought in this area. Furthermore, there was criticism of the deterioration of protective services and the limited availability of shelters for women and children, particularly in rural areas. In addition, the Committee insisted on the need to provide mandatory training for judges, prosecutors, police officers and other law enforcement officials by including a gender-sensitive perspective in all preventive procedures applying criminal law provisions in cases of violence against women. It also encouraged the State to collect statistics broken down by sex.

Returning to the case of *González Carreño v Spain*, the change of course resulting from Spanish Supreme Court Judgment 1263/2018 should be noted. This judgment brought an end to the series of negative judicial decisions (four in all)[42] on the enforcement of the condemnation by the CEDAW-Committee adoption of views[43] that urged Spain to grant the author appropriate reparation, to conduct an exhaustive and impartial investigation, and to strengthen application of the legal framework to ensure that the competent authorities exercise due diligence when dealing with situations of domestic violence,[44] following findings of violations of articles 2, 5 and 16 of the Convention. Ms González Carreño's youngest daughter was murdered by her father, Ms González Carreño's former partner, who had been convicted of gender-based violence. Ms González Carreño had appealed repeatedly to the authorities to prevent the

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[40] Concluding Observations on the seventh and eighth periodic reports of Spain, Committee on the Elimination of Discrimination Against Women, 29 July 2015, para. 8.

[41] *Ibid.*, para. 10.

[42] The history of Ms González Carreño's case to have the State held liable for the abnormal functioning of the administration of justice includes four judicial decisions in the negative prior to the said judgment of the Supreme Court: in 2005 by the Ministry of Justice, in 2008 by the National High Court, in 2009 by the Supreme Court and in 2011 by the Constitutional Court.

[43] R. Abril Stoffels, 'The 'effectiveness' of CEDAW Committee González Carreño v. Spanish', 19 *SYbIL* (2015), 365-372 [doi: 10.17103/sybil.19.27].

[44] Decision adopted by Committeé at its 58th session period (30 June – 18 July 2014), Communication No. 47/2012, 15 August 2014, Committee on the Elimination of Discrimination Against Women, CEDAW/C/58/D/47/2012.

father from visiting the child unsupervised but that condition was always refused, with fatal consequences for the child.

In its judgment, the Spanish Supreme Court applied a judicial criterion that took into consideration the international and national legal principle of the rule of law, and rejected the contention that the decisions of the committees were mere recommendations, in line with the words in Order 260/2000, dated 13 November, issued by the Constitutional Court in Appeal 5427/1999, where it established that "the international treaties and agreements on Human Rights are unavoidable instruments for the interpretation of the fundamental rights under the Spanish Constitution (article 10.2 Spanish Constitution). Thus, an appellant should have an adequate and effective remedy for asserting before the Spanish courts the nullity of his criminal conviction when his human rights have been violated pursuant to an international treaty signed by Spain." Although the judgment recognises that there is no direct procedure in Spain's system to enforce the Committee's decision, it accepts that it is binding on the State party, and also considers it to be "the authority that enables a claim to be brought against the State for financial liability arising from the abnormal functioning of the administration of justice, as the last means to obtain reparation."[45] Thus, by overturning the contested judgment and obliging the Administration to pay 600,000 euros as compensation for moral damage, it confirms the breach of Ms González Carreño's fundamental rights in the terms set out by the CEDAW Committee.

That judgment puts an end to a legal analysis based on a scant understanding of international law and its single-tier system. Further, it makes it clear that the considerations of the monitoring bodies of the human rights treaties signed by Spain have an evident and unavoidable interpretative value.[46] As expressed in General Comment no. 33 of the Human Rights Committee, "The views of the Committee under the Optional Protocol represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument". A similar statement is included in General Recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, asserting that "the Committee on the Elimination of Discrimination against Women and other actors at the national and international levels have contributed to the clarification and understanding of the substantive content of the Convention's articles, the specific nature of discrimination against women and the various instruments required for combating such discrimination."[47]

Whether the CEDAW Committee is officially representing the interpretation of the Treaty or not, the countries ratifying the Optional Protocol assumed that it is, since they are accepting the Committee competence to receive and consider individual communications, having the opportunity not do to so.

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45 Supreme Court Judgment 1263/2018, 17 July 2018.

46 C. Gutiérrez Espada, 'La aplicación en España de los dictámenes de Comités Internacionales: la STS 1263/2018, un importante punto de inflexión', *10 Cuadernos de Derecho Transnacional,* Octubre (2018), 836-851 [doi: https://doi.org/10.20318/cdt.2018.4406].

47 General Recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/GC/28, 16 December 2010.

(J) DISTINGUISHING COMMITTEES FROM OTHER HUMAN RIGHTS MECHANISMS

(1) International Human Rights Courts: The European Court of Human Rights

The cases before the different UN treaty-based bodies are not to be equated to sentences of International Courts. Nonetheless, some gaps remain regarding the effectiveness of International Courts pronouncements in the same way these are also present in the cases before the Committees. The differences between Courts and Committee has more to do with proceeding than with final decisions. The ability to receive and consider communications from individuals make Committees very close to International Courts, some voices having expressed there is no difference when States have ratified the text including these competences[48].

From an International Law perspective, the nature of the Human Rights Committee and European Court of Human Rights is the same: they are both treaty body control mechanisms. Their function is to control the fulfilment of the treaty and also to offer citizens the opportunity to enforce human rights in their own countries. Besides, the decisions made by either of them have to be considered *res iudicata*. This is best illustrated by the fact that most European States are giving priority to the European Court of Human Rights or another procedure formulating a reservation in the Optional Protocol of the Human Rights Committee. If the States are not having a sense of obligation about the Committee, why should it be necessary?

It is quite clear that the obligations themselves are emanated from the ratified treaties, and not directly from the Committees decisions. But the Committee adoption of views reflect violations of these treaties. While these conventions are part of the rule of law, the States must comply effectively with Committees observations in the same way they have to comply with International Courts sentences, in the sense expressed by the Human Rights Committee in its General Comment No. 33. when observing that "the Optional Protocol sets out a procedure, and imposes obligations on States Parties to the Optional Protocol".[49]

Certainly, the States ratifying the Optional Protocol have accepted the competence of the Committee to receive and consider communications. Also this General Comment express forcefulness with explicit recognition of the obligation of States Parties to refrain any retaliatory measures against authors of the communications.

As another example, we can observe how the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women declares in its preamble "States parties to the Protocol should undertake to respect the rights and procedures provided by the Protocol and cooperate with the Committee on the Elimination of Discrimination against Women at all stages of its proceedings under the Protocol;". Along with the non-permission of any reservation.

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[48] C. Fernández de Casadevante Romaní, 'La ejecución de sentencias y decisiones de tribunales y comités', in C. Escobar Hernández et. Al. (eds), *Los Derechos Humanos en la Sociedad Internacional del siglo XXI* (Colección Escuela Diplomática, 2009), 179-198.

[49] General Comment No. 33. The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights, Human Rights Committee, CCPR/C/GC/33, 3 November 2008.

A further consideration is the difference between the "views" and the "recommendations" adopted by a Committee. Following article 7.4 of the CEDAW´s Optional Protocol the State must consider each of them as distinctive things: "The State Party shall give due consideration to the views of the Committee, together with its recommendations". As illustrated in the Protocol, different ways to accomplish different things are being considered. In the same line, the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights expressed "After examining a communication, the Committee shall transmit its views on the communication, together with its recommendations". If we add to this the formal legal language used by most of Committees, it is clear that we are in front of something of very different nature of a mere recommendation's mechanism. For instance, in the Optional Protocol to the International Covenant on Civil and Political Rights we can observe the words "jurisdiction" or "competence". In the European Covenant of Human Rights, the Court is described as follows "To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights", which can be identified as the same function of the Committees regarding its own rules.

As I have already mentioned, we must look to the procedure in order to find the substantial differences between International Courts of Human Rights and Committees. Even when the Human Rights bodies are alto entitled to adopt interim measures when it is desirable to avoid irreparable damage to the author of the communication,[50] Committees do not hold oral hearings, being the totality of the process written. We can find in the Committees more procedural economy, with the role of the "expert" and a much more confidential process. The lack of transparency have been seen by the Spanish Supreme Court as an element to rest efficacy to the decisions emanated from the Human Rights Committee[51].

In the same way it is essential to distinguish between the enforceability and enforcement whether of the sentences (International Courts) or resolutions (Committees). As ECHR make clear in article 46, the States are responsible for the observance of the Court pronouncements, which is based in good faith, giving the competence to monitor execution to another body designed by the Treaty: The Committee of Ministers. This body is -of course- a political one, being the same reflection proposed for the Human Rights Committees, and the execution of sentences is not to be compared to those in the domestic level.

Regarding the efficacy, apart from the particular execution of judgments of the ECtHR we have to consider there is a *res interpretata* effect, since States have a legal obligation to take the full body of the Court´s case law into account[52]. Every ECtHR judgments would also have also *erga omnes* effects[53], since

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[50] In this regard, Vid., B. Vázquez Rodríguez, 'Interim Measures Requested before International Courts and Quasi-Judicial Bodies in the Protection of Human Rights: Do They Also Protect the Right to Participate in Public Affairs?', 22 *SYbIL* (2018), 77-115.

[51] The Spanish Supreme Court expressed in the sentence STS 141/2015, de 11 de febrero the following: 'El mencionado Comité de Derechos Humanos de la ONU no tiene no tiene carácter jurisdiccional de modo que sus resoluciones o dictámenes carecen de aptitud para crear una doctrina o precedente que pudiera vincular a esta Sala de lo Penal del Tribunal Supremo".

[52] O. M. Arnardóttir, 'Res Interpretata, Erga Omnes Effect and the Role of the Margin of Appreciation in Giving Domestic Effect to the Judgments of the European Court of Human Rights', 28 *The European Journal of International Law*, (2017), 810-843 [doi:10.1093/ejil/chx045].

[53] S. Almeida, 'La ejecución de Sentencias del Tribunal Europeo de Derechos Humanos: la singularidad y eficacia del

it "focuses on law enforcement and establishes that on the basis of general international law"[54]. In the same way, the International Court of Justice in Barcelona Traction Judgment expressed that *erga omnes* are "obligations of State towards the international community as a whole".[55] Besides, it is widely recognised that the compulsory nature of the Court´s case law is not confronted with the declarative and not executive essence of the judgments, since that Court does not constitute a higher instance and the legal proceedings are not automatically re-opened[56].

After an erratically tendency in the Constitutional Court[57], the Law 7/2015 admitted the possibility to appeal for a review of sentence (*recurso de revisión*) in case there is no other possibility.[58]

Even when we can argue that the *res interpretata* and the *erga onmes* effects can be assumed in the Human Rights Committees, it is essential to underline the lack of a specific mechanism for re-open the cases after the views have been adopted, which make up the main difference between the ECtHR and the Human Rights Committees.

Even though, this is not a situation created by the presumption that they are legally different things, but crafted by the different degree of compromise from the States (in this case, Spain), since the obligations are still the same (emanated from a Human Rights Treaty): *erga omnes* and affecting basic human rights. Actually, in the commented Sentence 1263/2018, the Supreme Court clearly expressed that the lack of observance of CEDAW´s adoption of views constitutes a grave breach of articles 14, 15, 18 and 24 of the Spanish Constitution, accepting a Human Rights Committee resolution as a valid element to formulate a claim for the patrimonial responsibility of the State.

In addition, we can argue a much bigger concretion in the ECtHR pronouncements, structured in formal sentences. Besides, judicial bodies are not only to be defined by the decisions adopted but also through their structure and authority, which is certainly different in design and legal intention.

(2) Human Rights Council Mechanisms

(a) *Universal Periodic Review (UPR)*

Created by the General Assembly in the UNGAR 60/251, this mechanism of the UN Human Rights Council tries to be a neutral process to analyse the fulfilment of human rights obligations by States each

Sistema de Protección de Derechos Humanos', IV *RyD República y Derecho,* (2019), 1-39, at 23.

54 O. M. Arnardóttir, 'Res Interpretata...., *supra n.* 32, at 821.

55 *Barcelona Traction, Light and Power Company Limited, Second Phase, Judgement, 5 February 1970, ICJ Reports* (1970), 3, párr. 33.

56 S. Almeida, 'La ejecución de Sentencias...., *supra* n. 33, at 21.

57 The Constitutional Court stand for the automatic execution of ECtHR judgement on *Barberá, Messegué and Jabardo v. Spain* (Bultó Case) in 1998, granting "recurso of amparo" and ordering provisional measures, when in 1994 it had rejected the execution of *Ruiz Mateos v. Spain* judgment, denying its supranational character.

58 Article 328.2 of the Law 7/2015 declares: "se podrá interponer recurso de revisión contra una resolución judicial firme cuando el Tribunal Europeo de Derechos Humanos haya declarado que dicha resolución ha sido dictada en violación de alguno de los derechos reconocidos en el Convenio Europeo para la Protección de Derechos Humanos y Libertades Fundamentales y sus Protocolos, siempre que la violación, por su naturaleza y gravedad, entrañe efectos que persistan y no puedan cesar de ningún otro modo que no sea mediante esta revisión."

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five years. As considered in the resolution it is "based on an interactive dialogue, with the full involvement of the country concerned and with consideration given to its capacity-building needs; such a mechanism shall complement and not duplicate the work of treaty bodies".

The nature of the different UN Human Rights mechanism is well structured and non-overlapping system. In this case, UPR offers recommendations to States after a whole process of examination, including the participation of civil society and the State itself. The recommendations are based in the promotion and protection of human rights in general, not focusing in individual claims or situations.

Even though, the Human Rights Council is the main political human rights body in the United Nations [59], and the considerations of the UPR are also anchored to that idea. Nevertheless, the examination is a huge effort of the international community thought as the trident "international organizations-States-civil society". The participation of all these subjects is granting a certain degree of complete monitoring process, also complementing another procedure.

In the treaty-based bodies the concluding observations to the periodical reports of States play an important role in the process of evaluating a country situation, and maybe that is the closest tool to be compared with the UPR. However, the second is not linked to specific treaty obligations, covering "all States and all norms"[60], providing a forum for the universal promotion of human rights.

Contrary to the responsiveness of the ECtHR with the doctrine of the margin of appreciation, in the UPR universality of human rights constitutes an axiom. This is essentially a barrier to efficacy but also a guarantee for the promotion of Human Rights. Universality reflects also when other States make its own recommendations to another inside the UPR, which have been seen as a tool to emphasise bilateral, state-to-state relations[61]. As stated by Cowan, "in the UPR sovereignty is formally respected and, indeed, small countries felt that its modalities offered an unprecedented opportunity for their voices to be heard"[62], something really far for the poor interactions emanated on treaty-based mechanisms.

(b) *Special Procedure*

The emphasis of the Special Procedure is substantially different from other mechanisms. The idea of "urgent" and "alarming" violations of human rights by a State moves the focus away country-specific perspective with the support of the High Commissioner of Human Rights (OHCHR). Reports based on researches and visits to the territory, and also complains to be addressed by the State included in the procedure, always those whose protection of human rights is more worrying. What we find in this tool is a change of focus on the prevention and promotion of Human Rights to a later stage, when it is urgent to address the protection of fundamental and basic rights. In the words of HOEHNE, "Special Procedures

[59] F. D. Gaer, 'A Voice Not a Echo: Universal Periodic Review and the UN Treaty Body System', 7 *Human Rights Law Review* (2007), 109-139 [doi: 10.1093/hrlr/ngl040].

[60] *Ibid.*, at 125.

[61] E. MacMahon et al, 'A Step Ahead in Promoting Human Rights? The Universal Periodic Review of the UN Human Rights Council', 18 *Global Governance* (2012), 231-248, at 235.

[62] J. K. Cowan and J. Billaud, 'Between learning and schooling: the politics of human rights monitoring at the Universal Periodic Review', *Third World Quarterly* (2015), 1175-1190, at 1181 [doi: https://doi.org/10.1080/01436597.2015.1047202].

mechanisms thus resulted from compromises and ad hoc solutions, rather than from a plan or predefined strategy".[63]

At the moment, the Special Procedure counts 44 thematic mandates and 12 country-specific. It clearly reflects that this mechanism is not examining all human rights violations, but only the more alarming territories[64], frequently those who are undergoing a political crisis or an armed conflict, such us Syria or Sudan. Nevertheless, it has been discussed whether the Special Procedures are also entitled to supervise Humanitarian Law[65], given the particular and worrying situations of those territories and the unavoidable necessary interaction between Human Rights Law and Humanitarian Law. In any case, this is something that moves away from the competences of the treaty-based bodies.

From a legal perspective, this is a non-conventional body, depending on Human Rights Council and observing the general situation of human rights in a specific country, without having an explicit mandate of surveillance from a treaty. Furthermore, its competence has not been singularly accepted by States, but adopted by the former Commission of Human Rights and now developed by the Council.

(c) *Complaint Procedure*

This Human Rights Council mechanism is the closest to the Human Rights based bodies' competence to receive and consider individual communications in the whole UN Human Rights system. Based on the former 1503 procedure, the 2007 renovated mechanism is directed to address violations of all human rights worldwide.

The main difference with the Committees is that this is a universal tool, since a communication can be submitted whether or not the State has ratified any of the Human Rights treaties. It also, of course, undermine the effectiveness of their decisions and transform their legal nature, pushing it away from being a quasi-judicial organ.

Apart from that, the Human Rights Council is to decide on the experts (based on working groups and State delegations). This is a restricted and intergovernmental UN body, in contrast to the Committees. Whether the admissibility criteria are almost the same, there is no need to base the communication on a specific treaty, but in any violation of human rights committed by a State, and not politically motivated. Moreover, this is a subsidiary mechanism in respect to treaty bodies and Special Procedure, as it is stated in the admissibility criteria that requires "not already being dealt with by a Special Procedure or a Treaty Body". Actually, the possible measures to be taken by the Human Rights Council are limited to the following:

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[63] O. Hoehne, 'Special Procedures and the New Human Rights Council. A Need for Strategic Positioning', 4 *Essex Human Rights Review* (2007), 16, at 5.

[64] The 12-country mandate at the Special procedure are currently: Belarus, Cambodia, Central African Republic, Democratic People's Republic of Korea, Eritrea, Islamic Republic of Iran, Mali, Eritrea, Occupied Palestinian territories, Somalia, Sudan and Syria.

[65] Ph. Alston et. al, 'The Competence of the UN Human Rights Council and its Special Procedures in relation to Armed Conflict: Extrajudicial Executions in the War on Terror', 19 *European Journal of International Law* (2008), 183-209. [doi: https://doi.org/10.1093/ejil/chn006].

"- To keep the situation under consideration and wait for further information from the State concerned.
-To keep the situation under consideration and appoint an expert to monitor the situation and report back to the HRC.
-To discontinue considering the situation.
-To refer the matter to the 1235 public procedure.
-To recommend that the country be urgently reviewed through the UPR.
-To give a follow-up to the process, if the State fails to comply with HRC decisions or refuses to cooperate.
-To recommend the OHCHR to provide technical and capacity building assistance to the country concerned"[66].

This lack of quasi-judicial nature has been an obstacle for individuals, since the efficacy of its decisions is still more difficult to maintain than those from the UN treaty-based bodies. This is something that is evidenced in the procedure, practice and shortage of cases.

(I) FINAL THOUGHTS

The human rights treaty-based bodies are quasi-jurisdictional mechanisms whose main objective is to guarantee compliance with the conventions they protect and, in that sense, Spain and other States that have ratified the conventions are obliged to comply with the treaty provisions. The observations and recommendations in response to the reporting method must be included in this point, as must the assent to other methods, such as confidential investigation and regular visits, when the State in question has consented to be bound by them.

Due to the lack of an international human rights court and effective national mechanisms for the interpretation of the norms in conjunction with the international treaties, the decisions of the human rights committees are increasingly relevant as it is necessary to appeal to these bodies of last resort in order to assess the commitments acquired by the State on certain occasions.

The Human Rights Committee has a symbiotic relationship with the European Court of Human Rights, where there are sometimes dissonant and sometimes concordant opinions. This double channel allows citizens to appeal on a dual (universal or regional) track for recognition of possible violations of their fundamental rights. There is a hierarchy between the two bodies, with priority given to the ECtHR, but that does not lessen the effectiveness of the Committee. Moreover, although the ECtHR is a jurisdictional body, which distinguishes it from the Committee, the result is not much different if the citizen is seeking recognition of a violation of rights and the binding effect on the State to comply with the decision of the corresponding body, although there are differences with regard to the enforcement mechanisms that the national legal system provides for each result.

In its short lifetime, the Committee on Economic, Social and Cultural Rights has twice had grounds to condemn Spain, which, apart from Ecuador and Italy, is the only country to have that particular blemish. That fact is representative of the part that Spain may play in the protection of human rights around the world, since these are not only fundamental civil rights and freedoms, but also have a wider and more complex nature to which Spain and its neighbouring countries must respond.

66 Implementation of UN General Assembly Resolution 60/251 of 15 March 2006 entitled 'Human rights Council', A/HRC/3/CRP.3, 1 December 2006.

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Gender-based violence is one of the great challenges of this century, not only in Spain but in most countries, and it is unacceptable that in a case as conclusive as *González Carreño*, the legal system gave a number of simplistic excuses so as to avoid admitting an evident liability, now accepted in Supreme Court Judgment 1263/2018, which considers that international law is not a mere anecdote in Spain's legal system and, likewise, that the protection of minors who are victims of gender-based violence is not a secondary necessity.

Human Rights Council mechanisms have different focus from treaty-based bodies, and clearly seek to be complementary and develop a positive synergy with them. Only treaty-based bodies can be defined as quasi-judicial methods, being those from the UPR, Special Procedure and Complaint's Procedure in a much more political and institutional nature.

In general, Spain complies with its obligation of regular information to the committees analysed above and, to a certain extent, it has accepted some of the recommendations made by these bodies in previous session periods. It cannot be denied that there has been an advance in the understanding of the dimensions of the human rights phenomenon, and in the legislative and social systems created in the last 20 years. However, it is essential that the recommendations and decisions of these bodies are accepted, and that the national legal system is equipped with a specific implementation procedure that permits direct application of the provisions of these treaties, which should take place at the EU level.

Likewise, there are issues of vital importance that remain unresolved, issues in which Spain can be a leading country with respect to human rights in Europe. For that purpose, there should be reconsideration of the current policies on migratory flows, non-accompanied minors, hot returns, access to housing, equality between men and women, and effective judicial protection that truly grants individuals the ability to have breaches of their human rights recognised prior to completion of the procedures in the international bodies of last resort.

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