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The Legal Value of the Views and Interim Measures Adopted by United Nations Treaty Bodies

(A Response to the Opinions of E. Jimenez Pineda, C. Jiménez Sánchez and B. Vázquez Rodríguez)

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(A) INTRODUCTION

There is a clear and growing interest in the international law literature in the legal value of the views and interim measures adopted within the framework of treaty-body-based complaint mechanisms. One reason for this interest is surely the extension to all United Nations (UN) system human rights treaty bodies of the system of individual complaints or communications from individuals.

However, this interest is particularly apparent in the Spanish international law literature, especially since Spanish Supreme Court Judgment 1263/2018, delivered on 17 July 2018.[1] The comments of various Spanish and foreign authors on this judgment were not long in coming.[2] This is not surprising. A supreme court judgment recognizing the binding or obligatory nature of the views of human rights treaty bodies is worthy of comment. Was it a misstep by Spain's highest judicial authority or a step forward in the protection of human rights?

The articles by Eduardo Jiménez Pineda and Carolina Jiménez Sánchez published in this volume of *SYbIL* present two alternatives. For Jiménez Pineda, "the interpretation of the value of the CEDAW's [Committee on the Elimination of Discrimination against Women] decisions may be risky since it forces the State to accept and apply domestically certain obligations in respect of which the State has not been committed internationally".[3] Furthermore, "the ruling of the Supreme Court seemingly misunderstands the nature of the Committee considering that, as a UN treaty body, its essence is political and not judicial". In short, for this author, the judgment is a misstep by the Supreme Court that can be regarded as an excess

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1 Supreme Court Judgment [STS] 1263/2018, 17 July 2018.

2 In addition to the articles contained in this Yearbook, see, among others: C. Escobar Hernández, 'Sobre la problemática determinación de los efectos jurídicos internos de los "dictámenes" adoptados por comités de derechos humanos. Algunas reflexiones a la luz de la STS 1263/2018, de 17 de julio', 71 (1) *Revista Española de Derecho Internacional* (2019) 241-250 [doi:10.17103/redi.71.1.2019.3.01]; C. Gutiérrez Espada, 'La aplicación en España de los dictámenes de comités internacionales: la STS 1263/2018, un importante punto de inflexión', 10 (2) *Cuadernos de Derecho Transnacional* (2018) 836-851 [doi:10.20318/cdt.2018.4406]; and K. Casla, 'Supreme Court of Spain: UN Treaty Body individual decisions are legally binding', *EJIL Talk!*, published on 1 August 2018 (and the comments to it from various authors).

3 See his contribution in this same volume here.

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of zeal, which does not accommodate the state's international obligations.[4]

In contrast, for Jiménez Sánchez, "human rights treaty-based bodies are quasi-jurisdictional mechanisms whose main objective is to guarantee compliance with the conventions they protect".[5] In her opinion, "from an International Law perspective, the nature of the Human Rights Committee and European Court of Human Rights [ECtHR] is the same: they are both treaty body control mechanisms". Furthermore, "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". The logical consequence for this author is that, although "[it] is quite clear that the obligations themselves are emanated from the ratified treaties, and not directly from the Committees' decisions", "the Committees' adoption of views reflects violations of these treaties" and "States must comply effectively with Committee observations in the same way they have to comply with International Court sentences". From this perspective, the Supreme Court judgment would constitute a step forward in the protection of the rights of individuals in Spain.

These positions are representative of those taken in the literature to date, where the judgment is either criticized for opening the doors to recognizing the legal effects in Spain of treaty-body views whose binding nature is rejected[6] or praised for recognizing that the views of treaty bodies have binding legal effects.[7]

This issue is not so different from that addressed in the previous volume of this *Yearbook* by Beatriz Vázquez Rodríguez concerning the legal value of interim measures.[8] As we will see, the legal value of the interim measures adopted by treaty bodies is closely related to the legal value that we give to their views.

In any case, all the positions agree on one point: the Supreme Court judgment marks a radical departure from the previous case law of the Spanish Supreme and Constitutional Courts and, if it is confirmed, will have significant consequences for the Spanish legal system.

But which position should we take in this debate? Law is a science, not a religion. The aim is not to believe that one opinion is more correct than another, but to demonstrate the correct position. To this end, in my view, it is necessary to address three issues before we can position ourselves on the Supreme Court ruling:

(1) the need to distinguish between the various acts adopted by treaty bodies;
(2) the object and purpose of the views and interim measures of treaty bodies; and
(3) the domestic applicability of acts that are legally binding in international law.

(B) THE ACTS ADOPTED BY TREATY BODIES

4 Although the author ultimately justifies the judgment, despite his inconsistent approach, he considers it to constitute a response to the need to implement in the Spanish legal system the human rights treaties to which Spain is a party.

5 See her contribution in this same volumen here.

6 For example, Escobar Hernández, *supra* n. 2.

7 For example, Gutiérrez Espada, *supra* n. 2.

8 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.

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Treaty bodies can adopt several types of acts in accordance with the various functions assigned to them. It is important to distinguish between these acts, as each type has different legal effects. For the purposes of this article, we will look at three types of such acts (the most often cited): *concluding observations*, which are adopted after interactive dialogue with each State party to a treaty and addressed exclusively to that State party; *general comments,* which are adopted by treaty bodies and addressed to all States parties; and *views* and *interim measures*, which are adopted by treaty bodies in the framework of the system of individual complaints or communications from individuals.

(1) Concluding observations

The main function attributed to treaty bodies is regular monitoring of the States parties to the convention that they serve. In this context, following the regular review conducted of each State party, the committees approve concluding observations, in which they set out, in accordance with the provisions of the treaties themselves, the "suggestions and recommendations"[9] that they deem appropriate after analysing all the information received and the interactive dialogue with the state's delegation.

The legal value of these concluding observations is that indicated by the literal meaning of the terms used in the convention, i.e. "suggestions and recommendations". Whatever the corresponding treaty body might indicate therein cannot be considered binding. What is legally binding on the state is the treaty itself. The state appears before the corresponding committee to report on the progress made and the difficulties and obstacles encountered in the performance of its obligations under the treaty. Based on the state's report, the rest of the information in the committee's power and the interactive dialogue with the state's delegation, the committee then drafts concluding observations with the aim of bolstering the progress made and suggesting and recommending actions to help the state fulfil its obligations. However, should the state fulfil those obligations without following those suggestions and recommendations, it will not be in breach of any obligation. It is the obligations arising under the treaty themselves that are binding on the state, nothing else. The suggestions and recommendations are intended exclusively to assist the state in fulfilling them, and it may or may not follow them.

(2) General comments

Another function attributed to treaty bodies is the formulation of *general comments*.[10] These are documents that seek to better explain to the States parties and to society at large the content of the obligations arising under each treaty. They are drafted by the committees, usually when, as part of their monitoring function, they observe that there are non-uniform or even contradictory interpretations of the treaty's provisions or when they observe particular difficulties for the understanding or application of the

9 This is the expression used in almost all the conventions. See, among others: the Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 *UNTS* 3, Art. 45.d; the Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 *UNTS* 3, Art. 36.1; the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 *UNTS* 171, Arts. 36.1 and 40.4; and the Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 *UNTS* 13, Arts. 36.1 and 21.1.

10 Called *general recommendations* in the case of the CEDAW.

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obligations in general.

The legal value of general comments is related to their object and purpose: to improve understanding of the content and consequences of the obligations arising under the corresponding convention. Accordingly, the committees are usually especially careful about the terminology used, distinguishing in particular between the modal verbs *should*, *shall* and *must* when explaining states' obligations. They thus aim to distinguish what, in their view, is only a recommendation from a deduced obligation or an imperative obligation clearly established in the convention.

General comments are especially important when they are drafted jointly by two or more treaty bodies.[11]

In any case, although they are an interpretation of the convention performed by a treaty body that has been given the competence to do so, this interpretation can be challenged by the States parties. Thus, the treaties provide that the general comments will be transmitted to the UN General Assembly with the comments, if any, of the States parties. These comments may object to the committee's stated interpretation of a given treaty provision. However, if the committee's interpretation is not challenged, a *juris tantum* presumption of acceptance of the interpretation by the States parties to the treaty can be considered to exist.

In other words, general comments have legal value for the purpose of interpreting the corresponding convention's provisions, especially if that interpretation has not been challenged by the States parties.

(3) Views and interim measures

Finally, there are the views and interim measures adopted by treaty bodies in the framework of the system of individual complaints or communications from individuals. This procedure, which was originally exceptional in nature, has ultimately been recognized for all treaty bodies through supplementary declarations provided for in the convention itself or through the optional protocols to the main human rights treaties.[12] In this case, we are dealing with the attribution to each committee, through a specific act

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[11] This is, for example, the case of *Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child on harmful practices* (CEDAW/C/GC/31-CRC/C/GC/18, of 14 November 2014); *Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families* [CMW] *and No. 22 (2017) of the Committee on the Rights of the Child* [CRC] *on the general principles regarding the human rights of children in the context of international migration* (CMW/C/GC/3-CRC/C/GC/22, of 16 November 2017); and *Joint general comment No. 4 (2017) of the CMW and No. 23 (2017) of the CRC on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return* (CMW/C/GC/4-CRC/C/GC/23, of 16 November 2017).

[12] Currently, eight of the human rights treaty bodies may, under certain conditions, receive and consider individual complaints or communications from individuals: 1) the Human Rights Committee (CCPR) may consider individual communications alleging violations of the rights set forth in the International Covenant on Civil and Political Rights by States parties to the First Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976), 999 *UNTS* 171; 2) the Committee on Elimination of Discrimination against Women (CEDAW) may consider individual communications alleging violations of the Convention on the Elimination of All Forms of Discrimination against Women by States parties to the Optional Protocol to the Convention on the Elimination of Discrimination against Women (adopted 6 October 1999, entered into force 22 December 2000), 2131 *UNTS* 83; 3) the Committee against Torture (CAT) may consider individual complaints alleging violations of the rights set out in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by States parties who have made the

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of attribution other than the ratification of the treaty creating them, of the competence to determine whether or not the convention has been violated in a specific case and, prior to that, the possibility of adopting interim measures. These are legal acts of a different nature from that of concluding observations and general comments. The origin of the treaty bodies' competence to adopt views and interim measures is different. The mere ratification of the human rights treaty gives them the competence to adopt concluding observations and general comments, in the framework of the monitoring function assigned to treaty bodies. With views and interim measures, however, we are no longer strictly speaking of the monitoring function and, thus, a legal act accepting this new competence of the treaty bodies is required. Whether by preparing a supplementary declaration or ratifying an optional protocol, the States parties assign a new, different, specific competence to the treaty bodies, allowing them to rule on complaints in individual cases of violation of the respective convention.

The key question raised by the two articles on the topic published in this volume of *SYbIL* is: what is the international legal value of these views? The present article will expand that question, in response to the article published in the previous volume of *SYbIL*, to include consideration of the legal value of interim measures as well.[13] However, before responding to this question, it is necessary to take a more thorough look at the object and purpose of both types of acts.

(C) THE OBJECT AND PURPOSE OF THE VIEWS AND INTERIM MEASURES OF TREATY BODIES

(1) The object and purpose of views

As explained, views are a legal act whereby a treaty body determines whether or not there has been a

necessary declaration under Art. 22 of the Convention (adopted 10 December 1984, entered into force 26 June 1987), 1465 *UNTS* 85; 4) the Committee on the Elimination of Racial Discrimination (CERD) may consider individual petitions alleging violations of the International Convention on the Elimination of All Forms of Racial Discrimination by States parties that have made the necessary declaration under Art. 14 of the Convention (adopted 7 March 1966, entered into force 4 January 1969), 660 *UNTS* 195; 5) the Committee on the Rights of Persons with Disabilities (CRPD) may consider individual communications alleging violations of the Convention on the Rights of Persons with Disabilities by States parties to the Optional Protocol to the Convention (adopted 13 December 2006, entered into force 3 May 2008), 2518 *UNTS* 283; 6) the Committee on Enforced Disappearances (CED) may consider individual communications alleging violations of the International Convention for the Protection of All Persons from Enforced Disappearance by States parties that have made the necessary declaration under Art. 31 of the Convention (adopted 20 December 2006, entered into force 23 December 2010), 2716 *UNTS* 3; 7) the Committee on Economic, Social and Cultural Rights (CESCR) may consider individual communications alleging violations of the International Covenant on Economic, Social and Cultural Rights by States parties to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008, entered into force 5 May 2013), A/RES/63/117; and 8) the CRC may consider individual communications alleging violations of the Convention on the Rights of the Child or its first two Optional Protocols on the sale of children, child prostitution and child pornography (OPSC) and on the involvement of children in armed conflict (OPAC) by States parties to the Third Optional Protocol on a communications procedure (OPIC) (adopted 19 December 2011, entered into force 14 April 2014), A/RES/66/138.

Finally, Article 77 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003), 2220 UNTS 3, gives the CMW competence to receive and consider individual communications alleging violations of the Convention by States parties that made the necessary declaration under Art. 77. However, this individual complaint mechanism will only become operative when 10 States parties have made the necessary declaration under Art. 77 and has not yet entered into force.

[13] Vázquez Rodríguez, *supra* n. 11.

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violation of a given human rights treaty in a given case, following the presentation of an individual communication by an alleged victim and provided certain requirements have been met, including the prior exhaustion of all domestic remedies.

The prior exhaustion of domestic remedies is required for the state's act to be final, that is, for it no longer to be possible for it to be remedied within the domestic legal system itself. However, one essential point to take into account is that treaty bodies (like human rights courts) are not appellate courts of last resort for judgments delivered in the national system. The committees are competent to consider possible violations of the rights guaranteed by the treaties concerned, but not to act as an appellate instance with respect to national courts and tribunals. Thus, the committees cannot in principle examine the determination of the administrative, civil or criminal liability of individuals, nor can they review the question of innocence or guilt. Similarly, the committees cannot review the facts and evidence in a case already decided by the national courts.

In other words, the competence of the treaty bodies within the framework of the competence to study individual communications is limited to determining whether or not there has been a violation of any of the rights recognized under the respective treaty in a specific case. And that is precisely the specific content of the treaty body's view: to decide, after analysing the arguments put forward by the author of the communication and by the state in the framework of a dispute, whether or not the facts denounced before it constitute a violation of the convention.

After making this determination, the committee may formulate the recommendations it considers suitable to remedy the violation. However, it is important to distinguish between these two things. The view is one legal act and the recommendations regarding the potential remedy another.

The texts of the optional protocols are clear on this point. For example, Article 9.1 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights provides that "After examining a communication, the Committee shall transmit its views on the communication, together with its recommendations, if any, to the parties concerned".[14] Therefore, the legal value of views and of recommendations can be (and, in fact, is) different.

And what is the international legal value of these views? The texts of the treaties and optional protocols are admittedly vague in this regard. They either say nothing on the issue[15] or use the formula "The

[14] In the same sense, see, for example: Art. 7.3 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women ("After examining a communication, the Committee shall transmit its views on the communication, together with its recommendations, if any, to the parties concerned"); Art. 10.5 of the Optional Protocol to the Convention on the Rights of the Child on a communications procedure ("After examining a communication, the Committee shall, without delay, transmit its views on the communication, together with its recommendations, if any, to the parties concerned"); etc.

[15] International Convention on the Elimination of All Forms of Racial Discrimination; Optional Protocol to the International Covenant on Civil and Political Rights; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Optional Protocol to the Convention on the Rights of Persons with Disabilities; and International Convention for the Protection of All Persons from Enforced Disappearance.

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State Party shall give due consideration to the views of the Committee".[16]

What is the "due consideration" merited by a committee's view in an individual complaint procedure?

The interpretation of "due consideration" must be based on the object and purpose of the procedure in which the view is adopted. To that end, the attribution of specific and special competence to the committee, through a specific and special declaration of willingness by the state, to hear individual complaints is of particular importance. What competence is it attributed? To determine whether or not the convention has been violated in a specific case. It is not a matter of exercising generic control over compliance with the convention (as in the case of the regular monitoring that gives rise to concluding observations), or of offering a generic interpretation of the convention (as in the case of general comments), but rather of determining, in a specific case, whether or not the convention has been violated. And that function is a judicial function, not a monitoring one.

The committees consist of experts of high moral standing and recognized competence in the field covered by the convention. The committee members, although elected by the States parties from among their nationals, serve in their personal capacity and have strict standards to guarantee their independence and impartiality.[17] The individual complaints procedure is an adversarial procedure, in which the respondent state's rights of defence are guaranteed, as it may access all the documentation and submit the allegations it considers appropriate. The rules of procedure are public.

In light of these factors, it can be said that there are no substantive differences between the actions of the committees when they are exercising their attributed competence of examining individual communications and those of human rights courts, such as the European Court of Human Rights, when they exercise their jurisdiction over individual complaints.

There are certainly formal differences, such as the name of the international body ("court" in one case, "committee" in the other) or the term used for the decision ("judgment" in one case, "view" in the other). However, beyond these formal differences, with regard to neither the statute of the members (form of election, nature of the mandate, independence), the body's powers (ensure the interpretation and application of the respective convention), the system for the attribution of competence (a treaty), nor the adversarial procedure followed (with the participation of the respondent state, all of whose rights of defence are guaranteed) can substantive differences be said to exist between the work of the European court and that of the committees when they are fulfilling their judicial functions.

With regard to the formal differences, it must not be forgotten that one of the defining characteristics of international law as a legal system is its markedly non-formalistic nature. Thus, as the International Court of Justice indicated in analysing whether a not a joint communiqué was a treaty, whether a document "does or does not constitute such an agreement essentially depends on the nature of the act or transaction to which [it] gives expression; and it does not settle the question [of whether or not it is binding]

[16] Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (Art. 9.2). In the same sense, see: the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (Art. 7.4); and the Optional Protocol to the Convention on the Rights of the Child on a communications procedure (Art. 11.1).

[17] See the *Guidelines on the independence and impartiality of members of the human rights treaty bodies ("the Addis Ababa guidelines")*, adopted by all UN treaty bodies.

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simply to refer to the form in which that act or transaction is embodied",[18] regardless of its particular designation (treaty, convention, protocol, memorandum, etc.) or how it was concluded (in writing, orally, virtually, etc.). The same can be said of the terms used to designate a body or its decisions.

In such a non-formalistic system, special importance cannot be attached to the fact that the body is called a "committee" and not a "court"; that its decisions are called "views" and not "judgements"; or that it is not expressly stated that "The High Contracting Parties undertake to abide by the views of the Committee in any case to which they are parties", but rather simply that "The State party shall give due consideration to the views of the Committee". What matters is "the nature of the act" and, in this case, in light of all the circumstances, it is clear that the act has a judicial nature that is binding on the state that has granted the committee the competence to determine whether or not the convention has been violated.

As the International Court of Justice noted in its Advisory Opinion of 13 July 1954, "It depends on the intention of the [States] in establishing the [Committee], and on the nature of the functions conferred upon it by its [Optional Protocol]. An examination of the language of the [Optional Protocol] has shown that the [States] intended to establish a judicial body; moreover, [they] had the legal capacity [...] to do so".[19]

(2) The object and purpose of interim measures

Having determined the judicial nature of treaty bodies' views and, therefore, their legally binding nature, we must now also consider that of the interim measures adopted in the framework of the individual communications procedure.

Interim measures, also referred to as precautionary *or* provisional measures,[20] are adopted to protect the rights of the parties pending the final decision in a dispute without jeopardizing any subsequent decisions on the admissibility or merits of the case in question. In fact, interim measures were designed as a tool for preventing further human rights violations and may be defined as a means through which a judicial or quasi-judicial body (hereinafter, international body) is able to prevent irreversible harm to persons who are in a situation of imminent risk, extreme gravity and urgency.

Interim measures have a dual precautionary and protective nature. They are protective because they seek to prevent irreparable harm and preserve the exercise of human rights. They are precautionary insofar as they are intended to preserve a legal situation under consideration by the committee. Their precautionary nature aims to preserve rights at risk of grave violation until the committee can examine the

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[18] *Aegean Sea Continental Shelf (Greece v. Turkey)*, ICJ Reports (1978) par. 96, at 40.

[19] The question then raised was whether the sentences of the United Nations Administrative Tribunal were legally binding for the General Assembly. In that case, the Court noted: "It depends on the intention of the General Assembly in establishing the Tribunal, and on the nature of the functions conferred upon it by its Statute. An examination of the language of the Statute of the Administrative Tribunal has shown that the General Assembly intended to establish a judicial body; moreover, it had the legal capacity under the Charter to do so." *Effect of Awards of Compensation made by the United Nations Administrative Tribunal*, ICJ Reports (1954) 18.

[20] In the African system, the measures adopted by the African Commission and the African Court are called provisional measures, whilst in the Inter-American system, the measures endorsed by the Inter-American Commission are referred to as precautionary measures and the measures adopted by the Inter-American Court are called provisional measures. In the context of the European Court on Human Rights, these measures are called interim measures. Finally, the International Court of Justice also uses the term provisional measures to refer to these measures.

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complaint. Their object and purpose are to ensure the integrity and effectiveness of the committee's decision on the merits and, thus, to prevent infringement of the rights at stake, which could adversely affect the useful purpose (effet utile) of the final decision. Interim measures also enable the state concerned to implement the final views and comply with the ordered reparations.

Interim measures are different from the "*protection measures*" referred to, for example, in Article 4 of the Optional Protocol to the Convention on the Rights of the Child on a communications procedure. However, the difference between them is not simple. Interim measures differ from protection measures mainly in terms of their purpose. Protection measures are the measures that states must adopt to ensure that individuals under their jurisdiction are not subjected to any human rights violation, ill-treatment or intimidation as a consequence of communications or cooperation with the committee. The different purposes of the two types of measures justify their being regulated in separate articles. Protection measures are adopted whenever the perpetrator or representative justifies a risk of reprisal (acts of reprisal often appear after the complaint has been registered or even once the decision has been adopted). Interim measures are adopted when the case is registered (in practice, there have been no cases in which they were adopted later, although in theory it is possible). The treaty bodies distinguish between when each type of measure is adopted, especially based on the purpose thereof. However, the distinction is not always clear. In any case, it has no practical consequences for the purposes of the present paper since the legal regime for both types of measures is the same. We will thus not discuss it any further.

The possibility for an international body competent to hear a dispute to adopt interim measures is considered a general principle of law. In the Electricity Company case of 1939, the Permanent Court of International Justice clearly identified the power to order interim measure as a general principle of international law.[21] The International Court of Justice took the same position in the LaGrand *case* of 1999.[22] As the *Institut de Droit International* has pointed out, "It is a general principle of law that international and national courts and tribunals may grant interim relief to maintain the status quo pending determination of disputes or to preserve the ability to grant final effective relief."[23]

The adoption of interim measures as an inherent power of international human rights judicial bodies was also expressed by the Inter-American Court of Human Rights in the Velásquez Rodríguez *case* of 1988, on the basis of Articles 63(2-39) and 33 of the American Convention on Human Rights, Articles 1 and 2 of the Statute of the Court, and Article 23 of the Rules of Procedure.[24]

Although treaty bodies are not, strictly speaking, judicial bodies, when they are dealing with an individual communication, they are exercising a quasi-judicial function and should therefore have that

[21] *The Electricity Company of Sofia and Bulgaria (Interim Measures of Protection)*, Order of 5 December 1939, PCIJ Series A/B No. 79, at 199.

[22] *LaGrand Case (Germany v. United States of America) - Request for the Indication of Provisional Measures of Protection*, Order of 3 March, ICJ Reports (1999), par. 21 and 22.

[23] See: *Resolution on Provisional measures* adopted by the Institut de Droit International at the session of Hyderabad in 2017, par. 1.

[24] *Case of Velásquez-Rodríguez v. Honduras*, Judgment of 29 July 1988 (Merits), IACHR.

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competence recognized.

In sum, all international human rights bodies that receive complaints or individual communications, whether judicial or not, have the ability to adopt interim measures in the context of individual communication procedures. This is either recognized by the relevant treaties establishing these procedures[25] or by the given treaty body's own rules of procedure.[26]

In the case of judicial bodies, the dispute over the mandatory nature of interim measures was finally settled in the LaGrand *case* by the International Court of Justice. In that case, the Court adopted a teleological approach, declaring:

> "The object and purpose of the Statute is to enable the Court to fulfill the functions provided for therein and in particular, the basic function of judicial settlement of international disputes by binding decisions in accordance with Article 59 of the Statute. It follows from that object and purpose, as well as from the terms of Article 41 when read in their context, that the power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court. The contention that provisional measures indicated under Article 41 might not be binding would be contrary to the object and purpose of that Article."[27]

This doctrine has been affirmed repeatedly by the ECtHR, the Inter-American Court on Human Rights (IACHR) and the African Commission on Human and Peoples' Rights (ACHPR).

In the case of the ECtHR, two Grand Chamber judgments have given the Court an opportunity to clarify this obligation, based particularly on Article 34 (individual applications) of the European Convention on Human Rights: Mamatkulov and Askarov v. Turkey, of 4 February 2005[28]; and Paladi v. the

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[25] Art. 5 OP-CEDAW, Art. 6 OPIC-CRC, Art. 4 OP-CRPD, Art. 31 (4) CED, and Art. 5 OP-CESCR.

[26] For the three oldest procedures, namely ICCPR, CAT and CERD. In the cases of the ECtHR and the IACHR, it is recognized in the Rules of Procedure.

[27] *LaGrand Case (Germany v. United States of America),* Judgment of 27 June 2001, ICJ Reports (2001), par. 102.

[28] *Mamatkulov and Askarov v. Turkey,* (App. 46951/99 and 46827/99), (Grand Chamber Judgment) (2005) ECtHR 64. The applicants were two Uzbek nationals and members of an opposition party in Uzbekistan. They were arrested in Turkey on suspicion of murder and an attempted attack, and extradited to Uzbekistan in spite of an interim measure indicated by the Court under Rule 39 of the Rules of Court. Their representatives maintained in particular that, in extraditing the applicants, Turkey had failed to discharge its obligations under the Convention by not acting in accordance with the indications given by the Court under Rule 39 of its Rules of Court. In this judgment, the Court concluded, for the first time, that, by failing to comply with interim measures indicated under Rule 39 of the Rules of Court, a State party had failed to comply with its obligations under Art. 34 of the Convention. The Court noted in particular that, under the Convention system, interim measures, as they had consistently been applied in practice, played a vital role in avoiding irreversible situations that would prevent the Court from properly examining the application and, where appropriate, securing for the applicant the practical and effective benefit of the asserted Convention rights. Accordingly, in those conditions, a failure by a State which had ratified the Convention to comply with interim measures would undermine the effectiveness of the right of individual application guaranteed by Art. 34 and the State's formal undertaking in Art. 1 to protect the rights and freedoms in the Convention. Lastly, the Court reiterated that, by virtue of Art. 34, States which had ratified the Convention undertook to refrain from any act or omission that might hinder the effective exercise of an individual applicant's right of application. A failure to comply with interim measures had to be regarded as preventing the Court from effectively examining the applicant's complaint and as hindering the effective exercise of his or her right and, accordingly, as a violation of Art. 34.

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Republic of Moldova, of 10 March 2009.[29] This jurisprudence has been repeated in many other cases.[30]

In the case of the IACHR, according to Article 19(c) of the Statute of the Inter-American Commission on Human Rights, the Commission has the power "to request the Inter-American Court of Human Rights to take such provisional measures as it considers appropriate in serious and urgent cases which have not yet been submitted to it for consideration, whenever this becomes necessary to prevent irreparable injury to persons". In its case law, in *the* Constitutional Court v. Peru case of 2001, the Court stated that the provision established in Article 63(2) of the Convention makes it binding for the state to adopt the interim measures ordered by the Court. This reasoning relies on one main argument: states must comply with their conventional international obligations in good faith and in conformity with the fundamental principle of international law pacta sunt servanda, which is supported by international case law and practice.[31] In fact, according to the Court's view, states are supposed to abide by the Commission's requests, based on the principles of good faith and effectiveness.[32]

Likewise, in the International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr and Civil Liberties Organisation v. Nigeria *case* of 1998, the ACHPR declared the binding nature of its interim measures. According to the Commission, states are bound by Article 1 of the African Charter

[29] *Paladi v. the Republic of Moldova* (App. 39806/05), Judgment of 10 March 2009 (Grand Chamber Judgment), (2009) ECtHR 182. The applicant, who suffered from a number of serious illnesses, complained about the unlawfulness of his detention pending trial and that, during that time, he had not been given appropriate medical care. He also alleged that the authorities had failed to comply swiftly with the Court's interim measures ordered under Rule 39 of the Rules of Court stating that the applicant should not be transferred back to the prison hospital until the Court had had an opportunity to examine the case in breach of Art. 34 of the Convention. The Court held that there had been a violation of Art. 34 of the Convention, on account of the Moldovan authorities' failure to comply with the interim measure, issued under Rule 39 of the Rules of Court, in which the Court asked them to keep the applicant in the Republican Neurology Centre of the Ministry of Health. In this judgment, the Court reiterated in particular that interim measures that it might have cause to adopt under Rule 39 of its Rules of Court served to ensure the effectiveness of the right of individual petition established by Art. 34 of the Convention. The Court further explained that there would be a breach of Art. 34 if the authorities of a Contracting State failed to take all steps which could reasonably have been taken in order to comply with the measure indicated by the Court. In addition, the Court noted that it was not open to a Contracting State to substitute its own judgment for that of the Court in verifying whether or not there existed a real risk of immediate and irreparable damage to an applicant at the time when the interim measure was indicated or in deciding on the time limits for complying with such a measure.

[30] See also, among others: *Kondrulin v. Russia*, judgment of 20 September 2016; *Shamayev and Others v. Georgia and Russia*, judgment of 12 April 2005; *Aoulmi v. France*, judgment of 17 January 2006; *Olaechea Cahuas v. Spain*, judgment of 10 August 2006; *Mostafa and Others v. Turkey*, judgment of 13 January 2007; *Aleksanyan v. Russia*, judgment of 22 December 2008; *Ben Khemais v. Italy*, judgment of 24 February 2009; *Grori v. Albania*, judgment of 7 July 2009; *D.B. v. Turkey* (no. 33526/08), judgment of 13 July 2010; *Al-Saadoon and Mufdhi v. the United Kingdom*, judgment of 2 March 2010; *Trabelsi v. Italy*, judgment of 13 April 2010; *Toumi v. Italy*, judgment of 5 April 2011; *Makharadze and Sikharulidze v. Georgia*, judgment of 22 November 2011; *Mannai v. Italy*, judgment of 27 March 2012; *Abdulkhakov v. Russia*, judgment of 2 October 2012; *Labsi v. Slovakia*, judgment of 15 May 2012; *Rrapo v. Albania*, judgment of 25 September 2012; Zokhidov v. Russia, judgment of 5 February 2013; Salakhov and *Islyamova v. Ukraine*, judgment of 14 March 2013; *Savriddin Dzhurayev v. Russia*, judgment of 25 April 2013; *Trabelsi v. Belgium*, judgment of 4 September 2014; *Amirov v. Russia*, judgment of 27 November 2014; *Sergey Antonov v. Ukraine*, judgment of 22 October 2015; *Andrey Lavrov v. Russia*, judgment of 1 March 2016; and *Klimov v. Russia and Maylenskiy v. Russia*, judgments of 4 October 2016.

[31] Provisional Measures, Order of the Inter-American Court of Human Rights of 14 August 2000, in Provisional Measures Compendium: July 2000 June 2001, Series E, No 3, p 143, par. 14.

[32] For example, in *the Colotenango v. Guatemala* case of 2001 and the *James et al. v. Trinidad and Tobago* case of 2009.

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on Human and Peoples' Rights. In fact, one of the African Commission's functions is to support States parties in complying with their obligations under the Charter.[33]

Although not strictly judicial bodies, treaty bodies have maintained the same position in relation to the mandatory nature of interim measures.

In the Mansaraj v. Sierra Leone *case of 2001*, the Human Rights Committee (HRC) declared that non-compliance with its interim measures constituted a clear violation of the general duty of cooperation with the Committee under the Covenant of Civil and Political Rights and its Optional Protocol.[34] In the Glen Ashby v. Trinidad and Tobago *case of 2002*, it declared that non-compliance with the Committee's interim measures would undermine the Committee's work.[35] In Piandiong v. The Philippines, the HRC declared that "Having been notified of the communication, the State party breaches its obligations under the Protocol, if it proceeds to execute the alleged victims before the Committee concludes its considerations and examination, and the formulation and Communication of its views".[36] It further emphasized that this breach was "particularly inexcusable" given the request for interim measures. The HRC's position in this regard has also been reinforced in its General Comment No. 33, which mentions that "failure to implement such interim or provisional measures is incompatible with the obligation to respect in good faith the procedure of individual communication established under the Optional Protocol".[37] The HRC has also mentioned the obligation to respect interim measures in some of its *concluding observations*.[38] In these concluding observations, the Committee recalls that each State party has to fulfil its obligations under the Covenant and the Optional Protocol, including requests for interim measures, in accordance with the principle of *pacta sunt servanda*.

The Committee against Torture (CAT) has taken a similar position to the HRC's. In Brada v. France, the CAT stated:

> "The State party's action in expelling the complainant in the face of the Committee's request for interim measures nullified the effective exercise of the right to complaint conferred by article 22, and has rendered the Committee's final decision on the merits futile and devoid of object. The Committee thus concludes that in expelling the complainant in the circumstances that it did the State party breached its obligations

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[33] 137/94-139/94-154/96-161/97: *International PEN, Constitutional Rights Project, Civil Liberties Organisation and Interights (on behalf of Ken Saro-Wiwa Jnr.) / Nigeria*, par. 113-114.

[34] *Anthony Mansaraj, Gilbert Samuth Kandu-Bo, Khemalai Idrissa Keita, Tamba Gborie, Alfred Abu Sankoh (alias Zagalo), Hassan Karim Conteh, Daniel Kobina Anderson, Alpha Saba Kamara, John Amadu Sonica Conteh, Abu Bakarr Kamara, Abdul Karim Sesay, Kula Samba, Nelson Williams, Beresford R. Harleston, Bashiru Conteh, Victor L. King, Jim Kelly Jalloh and Arnold H. Bangura v. Sierra Leone*, Views, HRC, UN Doc. CCPR/C/72/D/839/1998, Communication Nos. 839, 840, 841/1998, 16 July 2001.

[35] *Ashby v. Trinidad and Tobago*, Views, HRC, UN Doc. CCPR/C/74/D/580/1994, Communication No. 580/199421, March 2002,

[36] *Piandiong v. The Philippines*, HRC, UN Doc. CCPR/C/70/D/869/1999, Comm. No. 869/1999, para. 5.2. See also HRC, Israil v. Kazakhstan, HRC, UN Doc. CCPR/C/103/D/2024/2011, Comm. No. 2024/2011, para. 7.1.

[37] HRC, General comment No. 33, *Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, UN Doc. CCPR/C/GC/33, 5 November 2008, para. 19.

[38] See, e.g., Concluding Observations on Uzbekistan, UN Doc. CCPR/CO/83/UZB, 26 April 2005, para. 6; Concluding Observations on Tajikistan, UN Doc. CCPR/CO/84/TJK, 18 July 2005, para. 8; and Concluding Observations on Canada, UN Doc. CCPR/C/CAN/CO/5, 20 April 2006, para. 7.

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under article 22 of the Convention."[39]

The CAT has generally made these decisions in the face of the State party's denial of any binding effect of requests for interim orders. In Sogi v. Canada, the State party argued the non-binding nature of requests for interim measures and subsequently contended that non-compliance with such a request by returning the complainant to India did not entail a violation of Articles 3 and 22 of the Convention. In this regard, the Committee stated that:

> "[T]he State party's obligations include observance of the rules adopted by the Committee, which are inseparable from the Convention, including rule 108 of the rules of procedure, which is specifically intended to give meaning and scope to article 3 and 22 of the Convention."[40]

Although one could point to like-minded case law of the other treaty bodies, it would be more illuminating to conclude with a special reference to the Committee on the Rights of the Child. Despite being the last committee to have been given the competence to receive individual communications and adopt interim measures, through the Optional Protocol to the Convention on the Rights of the Child on a communications procedure (OPIC), it was the first to adopt Guidelines with a view to interpreting Article 6 of the Optional Protocol on interim measures.[41] The purpose of these Guidelines is to explain to states and the potential authors of communications the concept of interim measures, the criteria that the Committee will use for their potential adoption or denial, and the legal value of those interim measures. Although the document refers exclusively to Article 6 OPIC and to the specific situation of children as potential victims, it can be viewed as a synthesis of the opinion of all treaty bodies on the nature, object and purpose of interim measures. In this regard, the last paragraph, referring to the legal value thereof, provides:

> "The Committee is of the view that interim measures issued under article 6 of the OPIC impose an international legal obligation on State parties to comply. A failure by the State party concerned to implement the interim measures would undermine the effectiveness of the individual communications procedure and render the case moot. Such non-compliance would entail a violation of article 6 of the OPIC, which expressly establishes the Committee's competence to issue interim measures."[42]

In sum, the case law discussed above makes clear that adherence to requests for interim measures should be considered binding by states that have authorized the relevant committee to receive individual complaints, as non-compliance with interim measures undermines the integrity of those individual complaint systems.

Also, the practice of interim measures has been widely accepted by State parties with few

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[39] *Brada v. France*, CAT, UN Doc. CAT/C/34/D/195/2002, 24 May 2005, para. 13.4. See also: CAT Committee, *Agiza v. Sweden*, UN Doc. CAT/C/34/D/233/2003, para. 13.9; *Pelit v. Azerbaijan*, UN Doc. CAT/C/38/D/281/2005, para 11; and *Tebourski v. France*, UN Doc. CAT/C/38/D/300/2006, para. 8.7.

[40] *Sogi v. Canada*, CAT, UN Doc. CAT/C/39/D/297/2006, para. 10.11.

[41] *Guidelines for Interim measures under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure*, adopted by the Committee on the Rights of the Child at its 80th session (14 January to 1 February 2019).

[42] *Ibid.*, par. 9.

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exceptions.[43] This is reflected in the very high level of compliance, suggesting that most States parties accept the binding nature of such requests.

Naturally, this does not mean that the state must comply with the adoption of interim measures and accept them until the end of the process before the committee. Interim measures must be an exception. They must be adopted exclusively "in exceptional circumstances to avoid possible irreparable damage to the victim or victims of the alleged violations". The Committee on the Rights of the Child has sought to clarify these concepts. The aforementioned Guidelines specify:

> "Hence, for the purposes of making a decision on the adoption of interim measures, the Committee considers that:
>
> (a) "exceptional circumstances" refers to a grave impact that an action or omission by a State party can have on a protected right or on the eventual effect of a pending decision in a case or petition before the Committee;
>
> (b) "irreparable damage" refers to a violation of rights which, due to their nature, would not be susceptible to reparation, restoration or adequate compensation. This also implies that, in principle, there is no domestic remedy that would be available and effective; and
>
> In analyzing those requirements, the Committee considers that the risk or threat must be imminent and can materialize; if the risk is not imminent, the author may request the interim measures at a later stage, when the risk becomes imminent."[44]

Accordingly, if a state considers that these circumstances are not met, it can make that allegation to the Committee for it to withdraw the interim measures. The Guidelines themselves state as much, indicating that:

> "Since the information on which the Committee relies is at that time preliminary (notably, in the absence of State party's observations), a decision on interim measures can be reviewed in light of further information provided by the parties."[45]

However, it is one thing to appeal the decision to adopt interim measures and another thing entirely to deny their binding nature.

(D) THE DOMESTIC APPLICABILITY OF ACTS THAT ARE LEGALLY BINDING IN INTERNATIONAL LAW

Having determined that both views and interim measures are legally binding at the international level, we must now turn to the question their domestic legal value. This question poses problems of international and domestic law.

In relation to international law, there are two elements that must be taken into consideration. The first is the general principle expressed in Article 27 (Internal law and observance of treaties) of the Vienna Convention on the Law of Treaties: "A party may not invoke the provisions of its internal law as

[43] It is true that, as Vázquez Rodríguez notes (*supra* n. 11, at 114), there have been several cases of non-compliance with interim measures. However, these cases are far outnumbered by those in which the measures have been accepted by states. Moreover, in most cases in which the interim measures have not been adopted, the state has sought a legal argument to justify the rejection. This legal argument is usually not their lack of a binding nature (see the documents Vázquez Rodríguez cites in footnote n. 161 of her paper).

[44] *Ibid.*, par. 2 and 3 (emphasis in the original).

[45] *Ibid.*, par. 8.

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justification for its failure to perform a treaty." The second is the obligation explicitly provided for in almost all human rights treaties, whereby "States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention."[46]

The Committee on the Rights of the Child interpreted this second provision in its General Comment No. 5, explaining that "For rights to have meaning, effective remedies must be available to redress violations. This requirement is [...] consistently referred to in the [...] major international human rights treaties. [...] So States need to give particular attention to ensuring that there are effective [...] procedures available to [subjects protected by the Convention]. These should include the provision of [...] information, advice, advocacy, including support for self-advocacy, and access to independent complaints procedures and to the courts with necessary legal and other assistance. Where rights are found to have been breached, there should be appropriate reparation, including compensation, and, where needed, measures to promote physical and psychological recovery, rehabilitation and reintegration [...]."[47]

In other words, taking "all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the Convention" includes not only implementing the convention's provisions, but also guaranteeing the existence of effective remedies when they are breached.

In accordance with these two provisions, it is clear that the international framework imposes an obligation to eliminate any obstacle there may be in the domestic legal system to guarantee and enforce the rights recognized in human rights treaties. Failure to do so constitutes a breach of international legal obligations.

However, it is an obligation of result and not an obligation of conduct. Therefore, the procedure and way in which the goal is achieved remain the exclusive responsibility of the state, in accordance with the provisions of its domestic law. Each domestic legal system has its own rules regarding how to guarantee and enforce the rights recognized in human rights treaties. That is precisely why, when a committee determines that there has been a violation of the treaty's provisions in a given case, it limits itself to "recommending" possible solutions to remedy that violation.[48] The state can make the reparations following those recommendations or use another procedure to achieve that goal. The obligation imposed by the treaties is for the state "to inform the Committee, within six months after the views, of the action

[46] This provision can be found in the same or similar terms in: the International Covenant on Economic, Social and Cultural Rights (Art. 2); the International Covenant on Civil and Political Rights (Art. 2); the International Convention on the Elimination of All Forms of Racial Discrimination (Art. 2); the Convention on the Elimination of All Forms of Discrimination against Women (Art. 2); the Convention on the Rights of the Child (Art. 4); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (Art. 2); the International Convention on the Rights of Persons with Disabilities (Art. 4); the African Charter on Human and Peoples' Rights (Art. 1); the African Charter on the Rights and Welfare of the Child (Arts. 11, 18, 21, 28 and 29); the Arab Charter on Human Rights (Art. 3); the American Convention on Human Rights (Art. 2); the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador") (Art. 1); and the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities (Art. 3).

[47] General Comment No. 5 (2003) on *General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)*, UN Doc. CRC/GC/2003/5, par. 24.

[48] See *supra* n. 17, on the difference between "views" and "recommendations".

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taken and envisaged in the light of the views and recommendations of the Committee".[49] It is not obliged to follow the committee's recommendations.

How the rights are implemented and guaranteed with access to effective remedies if a violation is determined to have taken place is, therefore, a question of domestic law. Consequently, whether or not to recognize the direct effect of the committees' views, the establishment of an administrative or judicial procedure to obtain reparation if a violation is found to have occurred, and even how the reparation is made all fall under the discretionary competence of the state. This stands in contrast with the result to be achieved: the state must implement and guarantee all the rights recognized in the human rights treaties it ratifies.

(E) CONCLUSION

In light of the conclusions reached in the preceding sections, it is possible to determine whether or not Judgment 1263/2018, of the Fourth Section of the Judicial Review Chamber of the Spanish Supreme Court, of 17 July 2018, referred to in the introduction to this paper, was correct.

The CEDAW's view determining that Ángela Rodríguez Carreño's rights were violated under the Convention on the Elimination of All Forms of Discrimination against Women[50] is obligatory for Spain. Spanish Supreme Court Judgment 1263/2018 recognizes this.

However, the truth is that this finding is hardly novel in Spanish case law. Previous case law had not denied that legal value. In fact, neither the National High Court judgment appealed before the Supreme Court of Spain in the Ángela Rodríguez case nor the National High Court's previous case law denied Spain's potential international legal obligation to comply with the views of treaty bodies. What they did not accept was that those views had a direct effect on Spanish law and that it fell to the courts to implement that effect.

In the words of the National High Court, human rights treaties "do not impose on the States parties the duty to immediately and directly compensate the injured parties when the Human Rights Committee concludes that a state has violated the rights or freedoms recognized in the Convention, but rather the obligation to establish a procedure that makes it possible to claim the appropriate compensation".[51] And, in its opinion, it is not the purview of the Spanish courts "to asses compliance by the Spanish state with the Committee's view, nor to demand such compliance from the Spanish government, which must be enforced before the competent international authority".[52] In other words, the National High Court does not deny that the views of treaty bodies, within the framework of communications procedures, are legally binding on Spain; however, in its opinion, it does not fall to it to rule on this issue. Anyone wishing to

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[49] See, for example, the Optional Protocol to the Convention on the Rights of the Child on a communications procedure (Art. 11.1); the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (Art. 9); or the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (Art. 7.4).

[50] UN Doc. CEDAW/C/58/D/47/2012, of 15 August 2014.

[51] STS 1263/2018, *supra* n. 1, first legal basis.

[52] *Ibid.*

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demand that Spain comply with the view must do so before the competent international authority.

The recognition of legal effects in the Spanish legal order of a binding act of an international body with judicial functions is not a new issue in Spain. Since Spain's accession to the European Convention on Human Rights, it has been a recurring issue in relation to the domestic application of the judgments of the European Court of Human Rights. However, in this specific case, in the wake of the complex and meandering case law of the Spanish Supreme and Constitutional Courts,[53] a solution was reached, first, provisionally, by the Supreme Court,[54] and then definitively through the reform of Article 5 bis of the Organic Law on Judicial Power [LOPJ].[55] And that reform was undertaken even though (or, perhaps, precisely because), in the specific case of the European Court of Human Rights, there is a competent international authority before which to seek the responsibility of states that do not comply with its judgments: the Committee of Ministers of the Council of Europe.

The legislative reform does not recognize the direct applicability of the judgments of the European Court of Human Rights, but rather simply establishes a review procedure before the Supreme Court "when the European Court of Human Rights has declared that said decision has been issued in violation of one of the rights recognized in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, provided that the violation, due to its nature and gravity, has persistent effects that cannot be ended by any means other than through such review."[56]

In other words, if the effects do not persist, or can be ended by some way other than through review of a Supreme Court judgment, this extraordinary procedure cannot be used. And, in that case, who should implement the European Court judgment declaring the violation of a fundamental right? The answer should be the state, through its liability for the violation of fundamental rights. Failure to do so would mean that the Spanish legal system does not respond to the legally binding recognition of the violation of a citizen's fundamental rights and, therefore, would entail the violation of the principle of the effective protection of the rights of citizens, an essential principle for any democratic society.

Whilst all of these considerations can be asserted in relation to the judgments of the European Court of Human Rights, in light of the conclusions reached in the previous sections, we can also affirm that they

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53 The Supreme Court initially refused to recognize any type of internal effect for the judgments of the European Court of Human Rights (see, for example, the Supreme Court Judgment of 4 April 1990). Likewise, in Judgment 245/1991, of 16 December 1991 (STC 245/1991), the Constitutional Court noted that "the European Convention on Human Rights does not oblige states to give internal effect to the European Court's judgments that would annul the authority of *res judicata*".

54 In 2014, the Spanish Supreme Court, sitting in plenary session, ruled on the feasibility of judicial review as a procedural means of compliance with ECtHR resolutions declaring a violation of fundamental rights. The ruling, dated 21 October 2014, established that "as long as there is no express legal provision in the legal system for enforcing judgments delivered by the ECtHR finding that the fundamental rights of a party convicted by the Spanish courts have been violated, the appeal for review provided for under Article 954 of the Law on Criminal Procedure fulfils this purpose" (see: "Acuerdo del Pleno No Jurisdiccional de la Sala Segunda del Tribunal Supremo de 21-10-2014, sobre la viabilidad del Recurso de Revisión como vía procesal para dar cumplimiento a las resoluciones del TEDH en el que se haya declarado una vulneración de derechos fundamentales que afecten a la inocencia de la persona concernida").

55 Organic Law 7/2015, 21 July 2015, amending Organic Law 6/1985, of 1 July, on Judicial Power (Spanish Official Gazette (BOE) No. 174, 22 July 2015).

56 Art. 5bis LOPJ.

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should be predicable in relation to the views and interim measures of human rights treaty bodies.

However, it is not the same thing to say that the effective protection of fundamental rights requires any citizen who is the victim of a violation of those rights to be redressed as to say that the procedure to be followed in Spain to obtain that redress, when the violation has been determined to exist by an international body, is that of a special review procedure or a liability claim against the state in the courts. Such remedies are costly, slow and not always accessible. Victims of such violations have usually been litigating in the domestic courts and, then, in the international framework for many years. As noted, the obligation accepted by the state to take all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the human rights conventions involves providing for accessible mechanisms to obtain an appropriate reparation, including compensation, and, where needed, measures to promote physical and psychological recovery, rehabilitation and reintegration.

This objective was one of the goals explicitly provided for under the 1st National Human Rights Plan approved by the Spanish government on 12 December 2008.[37] Measure 5 of the Plan provided, "An action protocol will be adopted for complying with the views and recommendations of the UN system's various human rights protection committees. In particular, guidelines will be established to process the recommendations of such committees with the aim of providing suitable reparation to the interested parties." However, the Plan did not ultimately achieve this goal. And, as of late 2019, we have only the solution proposed in Spanish Supreme Court Judgment 1263/2018. A solution that, moreover, unlike the judgments of the European Court of Human Rights,[38] was not adopted generically but rather exclusively for the case tried.

The Spanish state cannot accept this solution. Until an accessible and effective procedure is put into place for obtaining suitable reparation in cases in which a human rights violation is determined to have taken place by an international body that has been given the competence to do so, it will remain in breach of its international obligation "to take all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the Human Rights Conventions".

[37] See the full text at: https://www.ohchr.org/Documents/Issues/NHRA/Spain_NHRAP.pdf.

[38] See *supra* n. 37.

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