

Strategies for Compliance with Non-Binding International Decisions: The Spanish Case

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Résumé de l'article

L'État espagnol fait partie des pays qui respectent scrupuleusement leurs obligations internationales. Quelles que soient les raisons qui expliquent le respect de ces obligations, il est surprenant de constater que le degré de considération des traités et obligations en matière de droits humains diffère selon le mécanisme de garantie internationale que ces traités aient prévu. Le respect des traités, dont la garantie internationale est attribuée à une juridiction comme la Cour européenne des droits de l'homme, est plus strict que celui des traités des Nations unies, dont le contrôle est attribué aux différents Comités créés par chacun des traités ou leurs protocoles annexés. Bien que les Comités répondent également à des plaintes individuelles déposées par des personnes soumises à la juridiction de l'État espagnol, le caractère obligatoire de leurs résolutions est remis en question par certaines institutions de l'État, tant à l'interne du pouvoir exécutif, que par les juges et magistrats qui font partie du pouvoir judiciaire. Dans ces pages, nous examinons les raisons qui justifient cette conformité à deux vitesses, et nous nous interrogeons sur les raisons institutionnelles qui soutiennent une telle réalité. Notre réflexion insiste sur le fait que les obligations découlant de tous les traités relatifs aux droits humains ratifiés par l'Espagne sont identiques et exigent une réponse égale des institutions de l'État, car le droit international des droits humains et la Constitution espagnole elle-même les y obligent.

STRATEGIES FOR COMPLIANCE WITH NON-BINDING INTERNATIONAL DECISIONS: THE SPANISH CASE

*Carmen Montesinos Padilla et Itziar Gómez Fernández**

The Spanish State is among the countries with high standards of compliance with its international obligations on human rights. Regardless of the reasons that explain the respect for such commitments, it is surprising to note that the degree of compliance differs depending on the international guarantee mechanism. Compliance with treaties whose oversight is attributed to a court, such as the European Court of Human Rights, is stricter than compliance with covenants under the United Nations, whose supervision is recognised to the committee established by each treaty or by their annexed protocols. Even though the Committees also respond to individual complaints raised by persons subject to the Spanish State jurisdiction, the binding nature of their resolutions is questioned by some State institutions. Both members of the executive and the judiciary. This paper analyses the grounds that justify this two-speed compliance and questions the institutional arguments that support such reality. Our reflection insists that the obligations derived from all human rights treaties ratified by Spain are identical and demand an equal response from the State institutions. The international human rights law and the Spanish Constitution itself so require it.

L'État espagnol fait partie des pays qui respectent scrupuleusement leurs obligations internationales. Quelles que soient les raisons qui expliquent le respect de ces obligations, il est surprenant de constater que le degré de considération des traités et obligations en matière de droits humains diffère selon le mécanisme de garantie internationale que ces traités aient prévu. Le respect des traités, dont la garantie internationale est attribuée à une juridiction comme la Cour européenne des droits de l'homme, est plus strict que celui des traités des Nations unies, dont le contrôle est attribué aux différents Comités créés par chacun des traités ou leurs protocoles annexés. Bien que les Comités répondent également à des plaintes individuelles déposées par des personnes soumises à la juridiction de l'État espagnol, le caractère obligatoire de leurs résolutions est remis en question par certaines institutions de l'État, tant à l'interne du pouvoir exécutif, que par les juges et magistrats qui font partie du pouvoir judiciaire. Dans ces pages, nous examinons les raisons qui justifient cette conformité à deux vitesses, et nous nous interrogeons sur les raisons institutionnelles qui soutiennent une telle réalité. Notre réflexion insiste sur le fait que les obligations découlant de tous les traités relatifs aux droits humains ratifiés par l'Espagne sont identiques et exigent une réponse égale des institutions de l'État, car le droit international des droits humains et la Constitution espagnole elle-même les y obligent.

El Estado español se sitúa entre los países con altos estándares de cumplimiento de sus obligaciones internacionales. Independientemente de cuales sean las razones que explican el respeto de tales obligaciones, sorprende constatar que el grado de cumplimiento de los tratados y obligaciones de derechos humanos difiere en función del mecanismo de garantía internacional que hayan previsto esos tratados. El cumplimiento de los tratados cuya garantía internacional se atribuye a una corte, como el Tribunal Europeo de Derechos Humanos, es más estricto que el que se da a los tratados de las Naciones Unidas, cuya supervisión se atribuye a los distintos Comités creados por cada uno de los Tratados o sus Protocolos anexos. Pese a que los Comités también responden a demandas individuales planteadas por personas sujetas a la jurisdicción del Estado español, el carácter vinculante de sus resoluciones es puesto en duda por algunas instituciones del Estado, tanto integrantes del ejecutivo, como pertenecientes al poder judicial. El trabajo que recogen estas páginas indaga en las razones que justifican este cumplimiento a dos velocidades, y cuestiona las razones institucionales que sostienen tal realidad. Nuestra reflexión insiste en que las obligaciones derivadas de todos los tratados de derechos humanos ratificados por España son idénticas y exigen una respuesta igual por parte de las instituciones del Estado, porque a ello obliga el derecho internacional de los derechos humanos y la propia Constitución española.

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Academic theories that are emerging at the dawn of the 21st century regarding compliance with international obligations are not yet capable of providing complete and valid responses to the diversity of States behaviour, nor can they explain why the same State develops different practices in this respect based on reasons strictly related to the procedural grounds of domestic law.¹

As Asher Alkoby rightly says, "Studying compliance, in turn, increasingly demands close consideration of social processes, including the necessary economic, political and cultural conditions for the successful implementation of international legal commitments".² But, in our opinion, the study of compliance also requires accurate knowledge of States' constitutional structures, which project onto the international behaviour of the institutional structure of the State itself. It is from this local perspective that this study is approached. We thus opt for a critical method we believe to be particularly useful for identifying gaps in the various theories of compliance with international obligations.

This paper will take into account the complementary perspective of International Law experts and International Relations scholars, but also that of constitutionalist doctrine. To omit the latter point of view would be to formulate an incomplete theoretical construction.

Rational choice theories explain compliance from the idea of coercion, assuming that international regulations influence States' behaviour based on a "logic of consequences" associated, in some way, with the sanction.³ Constructivist theories articulate their explanations around the ideas of persuasion and acculturation, in other words, around the "logic of appropriation".⁴ From the latter perspective, States act under international social pressure linked to the loss of their reputation or position in a "society of equals" (persuasion). Still, States can also comply with international commitments because socialization with other international subjects has built a mutually valid conviction of what is appropriate to do (acculturation).

The problem with these two major theoretical theories is that they do not explain that international regulations are also national rules. The application of International Law in the domestic sphere depends on State subjects who do not necessarily respond to the logic of appropriation. When States act according to the logic of consequences, national operators can introduce dysfunctions into compliance processes. This is mainly the case when State agents understand that non-compliance effects depend on the nature of the duty itself, or even on the kind of the international institutions in charge of ensuring compliance. This logic would go beyond the "logic of consequences" to the philosophy of "watchdog power".

¹ About the literature on theories of compliance, see William C Bradford, "International Legal Compliance: An Annotated Bibliography" (2004) 30:2 NCJ Intl L & Com Reg at 379.

² Asher Alkoby, "Theories of Compliance with International Law and the Challenge of Cultural Difference" (2008) 4:1 J of Intl L & Intl Relations 151 at 152.

³ Andrew T Guzman, "A Compliance-Based Theory of International Law" (2002) 90:6 Cal L Rev at 1823.

⁴ Alkoby, *supra* note 2 at 166.

The Spanish constitutional system represents a paradigmatic example of the above-mentioned theoretical models' insufficiencies. As we will explain in the following pages, Spain has ratified most of the international treaties on human rights, including treaties both of the European regional system and of the universal system. This commitment also includes, with the exceptions that we will see, the acceptance of institutional mechanisms for monitoring compliance. Spain has even adhered to the formulas for monitoring individual compliance, i.e., procedural mechanisms for individual compliance. This could result in a high degree of compliance with international instruments for the protection of human rights. And, in general terms, that's correct. However, the situation varies according to the type of treaty and the nature of the treaty bodies.

Both the rational choice and the constructivist models would serve to explain the reasons behind considerably widespread compliance in Spain with our international commitments. But our objective is not to explain the causes of that compliance. In the following pages, we will focus on demonstrating why none of these models serve to adequately explain the unequal degree of compliance in our country between the international courts' judgments and the United Nations (UN) Committees' resolutions.

I. Compliance, Binding Legal Character and Implementation of Treaty Bodies' Resolutions

A. The New Model for International Protection of Human Rights

Since the end of the 20th century, the international human rights system (IHRS) has evolved towards a progressive widening of individuals' possibilities to access to international treaty bodies. It could be said that the latest procedural changes in the international arena have driven towards a kind of paradigm shift. Nowadays, interlocution within the framework of the IHRS takes place not only between States and international organizations but also between the latter and national authorities, individuals and organized civil society.

In a nutshell, the transformation of the IHRS has gone from a model in which the guarantee of covenants was based on State participation through monitoring mechanisms to another in which national authorities accept that citizens may file an individual petition with treaty bodies. Furthermore, the UN Committees have also gradually assumed their role as quasi-jurisdictional bodies, submitting national agents to compliance control. This is a factor that constructivist and rational choice theories should introduce into their analytical system.

The limited coercive power of the Mechanism of periodic reports (until a few years ago, the only binding mechanism for States) drove the UN system to endow itself,

through optional protocols,⁵ with procedures that legitimate citizens for submission of individual communications/petitions.⁶

Individual petition mechanisms are considered a critical element in order to guarantee compliance with international human rights law (IHRL).⁷ It allows the description of UN Committees as quasi-jurisdictional bodies. This possibility responds to the particular nature of the petition procedure (very similar to that of the processing of individual lawsuits before international courts), as well as to the structure of mandates emerging from Committees' final resolutions. Once an individual petition is admitted, and provided that agreement (between State and petitioner) has not been completed, the treaty body legally analyzes the controversial actions. This is when the Committee determines whether or not there has been a violation of the treaty. In doing so, the Committee acts as an international human rights court. However, the Committee's decisions are not legally binding.⁸ Here we find the axis around which the following pages turn.

Undoubtedly, all of the transformations we have referred to above imply positive consequences. Firstly, individuals whose rights have been violated are provided with a broader range of mechanisms for redress. International mechanisms of guarantees nowadays represent a much more realistic way to promote and protect human rights. Secondly, the allocation of new competences to treaty bodies entails the opening of new channels for constructive dialogue between national and international legal systems. In this way, the idea of multilevel protection of human rights is clearly reinforced.

However, criticism also emerges both from the beneficiaries of the new model and from its detractors. The former regret that States are not able to adapt their legal systems to enforce Committee decisions, while the latter focus on questioning the legitimacy of the Committees themselves. These criticisms are not merely theoretical.

⁵ Thomas Buergenthal, "The UN Human Rights Committee" (2001) 5:1 Max Planck YB of United Nations L 341 at 347.

⁶ It is the case with the *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) [ICCPR]; *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) [*Convention Against Torture*]; *International Convention on the Elimination of All Forms of Racial Discrimination*, 7 March 1966, 660 UNTS 195 s 5(d) (entered into force 4 January 1969); *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981); *Convention of the Rights of Persons with Disabilities*, 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008); *International Convention for the Protection of All Persons against Enforced Disappearances* 61 UNTS 177 (entered into force 23 December 2010); *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, 18 December 1990, 2220 UNTS 3 (entered into force 1 July 2003); *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 (entered into force 16 January 1976) [ICESCR]; *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

⁷ Dinah Shelton, "Enforcement and Remedies" in Scott Sheeran & Sir Nigel Rodley, eds, *Routledge Handbook of International Human Rights Law* (London, New York: Routledge, 2013) 663 at 675.

⁸ Nadia Bernaz, "Continuing evolution of the United Nations treaty bodies system" in Scott Sheeran & Sir Nigel Rodley, *ibid* 707 at 723; This lack of enforceability is generally considered to be one of the main shortcomings of the UN system; Vide Manfred Nowak, "The Need for a World Court of Human Rights" (2007) 7:1 Human Rights L Rev 251 at 252.

They are based on a factual reality that, even today, at least in Spain, we have not managed to overcome. In the pages that follow we will have the opportunity to see how the attitude and, consequently, the behaviour of the Spanish State concerning our international commitments, is substantially different according to the treaty to which we refer. Our national authorities continue to be anchored in a somewhat "selective" view of our international obligations. This bias responds to the nature and scope of the treaties, as well as to the existence or not of a supranational court responsible for compliance with the same. In formal terms, there is no distinction. Spain has ratified most of the international human rights treaties. However, the perception of the degree of binding nature and, therefore, of our obligations to provide reparation, radically differs when we analyze compliance with the judgments of the European Court of Human Rights (ECtHR) and the UN Committees' resolutions jointly.

B. Theoretical and Practical Reluctances of States towards the New Model

Paradoxes are much more common within the legal world than we might imagine. When it comes to looking for an explanation of how States act in the IHRS framework, one could speak of a kind of 'commitment paradox'.⁹ A paradox that, of course, is interesting to approach from the prism of the different compliance theories.

States, adding their sovereign wills, build the IHRS. Through the signing of international covenants, national authorities assume compliance with international obligations and adherence to mechanisms through which such compliance is guaranteed. Once the signing of treaties is ratified, that commitment translates into a willingness to comply with a commitment that is, in essence, voluntary. This change is easy to understand from the perspective of the critical constructivist theory: States, from their interaction, have modified their convictions about what is appropriate to do and what is not.

Commitment with the protection of human rights should be assumed not only from the bottom-up approach (by ratifying international treaties) but also from the top-down perspective (abiding by consequences of commitment). It is relating to the latest approach that paradox emerges. Regarding compliance with their obligations throughout the domestic implementation of treaty bodies' resolutions, States rely on classic concepts of international law to dilute their commitment. States commit themselves to the IHRS and the individual petition procedures. However, they do not feel committed to complying with resolutions emanating from those procedures. This paradoxical behaviour generates a high level of frustration among people who obtain resolutions favourable to their claims. Furthermore, that *modus operandi* is assumed by the IHRS itself when it develops specific mechanisms for monitoring compliance.¹⁰

⁹ According to the dictionary of the Royal Spanish Academy, the term "paradox" refers to a fact or expression apparently contrary to logic. *Real Academia Española, sub verbo "paradojo"*, online: <dle.rae.es/paradojo>.

¹⁰ HRI, *Compilation of Rules of Procedure adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/3/Rev. 1, April 2003, Rule 95.

It certainly does not seem very difficult to argue that treaty bodies' resolutions have real legal significance.¹¹ However, it is doubted that those rulings can be considered legally binding and enforceable as well as they can be endowed with the same legal effects as international court judgments.¹² Indeed, from a strict technical-legal perspective, it is not possible to establish a full analogy between judgments of international human rights courts, such as the ECtHR, and the UN Committees' resolutions. However, a number of nuances may be considered.

UN procedures are evolving from the field of diplomatic monitoring to the area of legal tracking, despite the UN system terminology itself. Remember that the UN Committees admit communications/petitions and not claims. States do not give arguments but explanations. Individual communication/petition procedure is not contentious; final observations are not judgments and recognition of an international covenant violation does not imply a conviction. States are not obliged to execute the UN Committees' resolutions, but to inform about measures adopted to give them effect.¹³ Nevertheless, none of these statements prevent recognition of the fact that there is a clear parallel between proceedings before international courts and UN treaty bodies. As was pointed out earlier on, the quasi-jurisdictional nature of the latter procedures is evident.

That said, it may be necessary to move the discussion away from this area. It may not be so much about equipping international courts' judgments and UN Committees' resolutions but more so assessing different ways to comply with the latter. There is no doubt about the impossibility of establishing a legal analogy between a court judgment and a committee opinion. However, this does not mean that the UN Committees' resolutions do not have any legal effect. These rulings do have mandatory effects for the States. They do generate positive obligations and compliance obligations.

Firstly, international treaties, based on the *pacta sunt servanda* principle, bind State parties. It is clearly inferred from Article 26 of the *Vienna Convention on the Law of Treaties (VCLT)*,¹⁴ under the wording of which, any treaty in force binds the State parties and must be complied with by them in good faith. To this rule, Article 27 *VCLT*¹⁵ must be added. According to the last conventional precept, States may not invoke domestic law as justification for breaching treaty regulations. This mandate includes the principle of preferential application of international law over domestic law.¹⁶

¹¹ Nigel S Rodley, "The role and impact of treaty bodies" in Dinah Shelton, ed, *The Oxford Handbook of International Human Rights Law* (Oxford: Oxford Handbooks, 2013) at 621.

¹² Natalia Ochoa, "La jurisprudencia del Comité de las Naciones Unidas contra la Tortura" (2004) 20 *Anuario Español de Derecho Internacional* 521 at 523.

¹³ Ottavio Quirico, "Droit 'flou', droit 'doux' ou droit 'mou'? Brèves réflexions sur la 'texture' des mesures conservatoires et des constatations dans les procédures individuelles devant le Comité des droits de l'homme" in Denis Alland et al, eds, *Unity and Diversity of International Law: Essays in Honour of Professor Pierre-Marie Dupuy* (Leiden: Martinus Nijhoff, 2014) 875 at 878.

¹⁴ *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

¹⁵ *Ibid*, art 27.

¹⁶ Manuel Díez De Velasco, *Instituciones de Derecho Internacional Público*, 18th ed (Madrid: Tecnos, 2013) 200 at 208.

Secondly, the body of rules formed by international covenants, additional protocols establishing individual petitions' procedures, and regulations stating follow-up measures oblige States to enforce the UN Committees' resolutions. By ratifying that set of regulations, national authorities usually accept the intervention of a UN Rapporteur who monitors activity to ensure compliance with those rulings.¹⁷ Reports on compliance with UN Committee resolutions are public, and this publicity can be understood as satisfaction for the victim.¹⁸ These follow-up mechanisms, which are reproduced almost mitotically for each UN Committee, can be considered as an international execution phase. The State responses are aimed at showing that they enforce the UN Committee resolutions. These resolutions do not require a particular type of action nor reaction from a specific public power. UN Committee decisions can be enforced through legislative action or public policies, through individual responses, or through internal procedural mechanisms of guarantee and non-repetition.

Finally, the Committee resolutions define the content of human rights as recognized by the UN treaties. We can consequently confirm that those rulings constitute an authoritative treaty interpretation. However, it is not unusual that Spanish courts deny this possibility. For example, in its judgment number 70/2002 (Legal Basis 7),¹⁹ the Spanish Constitutional Court (SCC) not only rejected jurisdictional powers to the Human Rights Committee (HRC) but also refused to consider its resolutions as genuine interpretations of the *International Covenant on Civil and Political Rights (ICCPR)*.²⁰ This statement can be only understood under that logic of a "commitment paradox" involving all the State's powers, including the judicial power. However, national courts are obliged to comply with international covenants. Constitutional texts usually require this obligation. Furthermore, that nature of 'genuine interpretation' of the UN Committee resolutions has been confirmed at the international level. Thus, for example, in its General Comments No. 33, the HRC qualified its rulings as an authorized interpretation of the *ICCPR*.²¹ The International Court of Justice (ICJ) endorsed this statement.²² As can be deduced from

¹⁷ CCPR, *General Comment N° 33, The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political*, 94th Sess, UN Doc CCPR/C/GC/33/CRP.3, November 2008 [CCPR, *General Comment N° 33*].

¹⁸ Quirico, *supra* note 13 at 879.

¹⁹ Tribunal Constitucional de España [Spanish Constitutional Court], Madrid, 3 April 2002, *Judgment 70/2002* (25 April 2002), 19 BOE, ECLI:ES:TC:2002:70, s II at para 7 (Spain).

²⁰ This doctrine is reiterated in the SCC *Judgments 296/2005* and *Judgments 116/2006*. However, it seems to have been modified in the recent *Judgment 64/2019*, which expressly refers to the General Comments of the Committee on the Rights of the Child as an authoritative argument both to delimit the content and scope of article 3 of the corresponding convention, and to justify the inclusion of its requirements in the *Spanish Organic Law on the Protection of Minors*. It will be necessary to analyze the continuity of this jurisprudential turn; Tribunal Constitucional de España [Spanish Constitutional Court], Madrid, 21 November 2005, *Judgments 296/2005* (21 December 2005), 304 BOE (Spain); Tribunal Constitucional de España [Spanish Constitutional Court], Madrid, 24 April 2006, *Judgments 116/2006* (26 May 2006), 125 BOE (Spain); Tribunal Constitucional de España [Spanish Constitutional Court], Madrid, 9 May 2019, *Judgment 64/2019* (10 June 2019), 138 BOE (Spain); *ICCPR, supra* note 6.

²¹ CCPR, *General Comment N° 33, supra* 17 at para 13.

²² Rodley, *supra* note 11.

the more specialized doctrine, this consideration is easily extended to resolutions of the different committees that make up the IHRS.²³

So where do we identify the difficulties? Obviously, relating to the area of compliance with individual reparation measures, and particularly in two cases. Firstly, regarding rulings in which these measures are identified with the reopening of judicial proceedings that have *res judicata* effect. Secondly, when reparation aims to provide financial compensation and to set the amount of payment.

Most legal systems do not have procedural mechanisms for reopening judicial proceedings if a UN Committee's decision so requires. The same is true relating to procedural tools for claiming compensation for damages arising from UN treaty violations. This absence of procedures qualifies decisions as unenforceable. Even though the two cases are different, it is not surprising that from the UN Committee resolutions lack of binding nature, one can deduce their lack of enforceability. Here, we find a new manifestation of the compliance theories inadequacies. It is clear that logic based on rational choice, persuasion or acculturation requires an analysis of the relationship of States with those who are subject to their powers, and not only the relationship between equals in the field of international relations.

II. Compliance and Implementation of Treaty Bodies' Resolutions

A. The Spanish System as a Strong Model of Multilevel Protection of Human Rights

The Spanish system can be considered as a robust model of multilevel protection of human rights. Various reasons justify this statement. Firstly, Spain is firmly committed to the universal and regional systems of human rights protection from an upward approach. Our country has ratified most of the UN treaties.²⁴ Furthermore, Spain has accepted the individual petition mechanism regarding these covenants.²⁵ The *European*

²³ Jaap E Doek, "The CRC: Dynamics and Directions of Monitoring its Implementation" in Antonella Invernizzi & Jane Williams, eds, *The Human Rights of Children. From Visions to Implementation* (London: Routledge, 2011) 99 at 101; Ursula Kilkelly, "Using the Convention on the Rights of the Child in Law and Policy: Two ways to improve Compliance", *ibid* 179 at 192.

²⁴ The only universal human rights treaty that has not been ratified is the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, *supra* note 6.

²⁵ Spain accepted the inquiry mechanism regarding to the *Convention Against Torture* on 21 October 1987 (art 20); the *Convention for the Protection of All Persons from Enforced Disappearance* on 24 September 2009 (art 33); the *Convention on the Elimination of All Forms of Discrimination against Women* on 6 July 2001 (arts 8-9 of the *Additional Protocol*); the *Convention on the Rights of the Child* on 3 June 2013 (art 13 of the *Additional Protocol*); and the *Covenant on the Rights of Persons with Disabilities* on 3 December 2007 (arts 6-7 of the *Optional Protocol*). Only the latter was activated: CRPD, *Inquiry concerning Spain carried out by the Committee under article 6 of the Optional Protocol*

*Convention of Human Rights (ECHR)*²⁶ and the *European Social Charter*²⁷ are also an integral part of the Spanish system of sources of Law. Consequently, the ECtHR and the European Committee of Social Rights (ECSR) integrate the institutional framework of the multilevel protection system we have referred to.²⁸ Thus, once domestic remedies have been exhausted, individuals can access a system of external protection conformed by complaints before the ECtHR and individual petition procedures before the UN Committees.

Secondly, international human rights treaties are part of the Spanish system of sources of Law. According to Article 96 of the *Spanish Constitution (SC)*,²⁹ they apply preferentially to national laws that contradict them. The aforementioned Article 27 *VCLT* is already expressly reflected in the Spanish legal system. According to Article 31 of Law 25/2014 on *Treaties and other International Agreements (Spanish Treaty Law)*,³⁰ international treaties validly concluded by Spain prevail over any other domestic law in case of conflict, except for constitutional rank regulations. However, debate on viability in Spain of the so-called "conventionality control" was always very polarized. It is not until four years after the adoption of *Spanish Treaty Law* that the SCC decided to take a step forward. In its recent *Judgment 140/2018*,³¹ the SCC redirected to Article 96 *SC*, the legal foundation that legitimizes the "conventionality control" by Spanish courts.³² This judgment consequently paves a new path for general compliance with Spain's international human rights obligations.³³

Thirdly, Article 10.2 *SC* contains an interpretative mandate that projects onto Title I of the *SC*.³⁴ Under this provision, the constitutional regulations related to

to the *Convention*, UN Doc CRPD/C/20/3, June 2018; CPRD, *Observaciones del España acerca del informe del Comité sobre la investigación realizada en virtud del artículo 6 del Protocolo Facultativo de la Convención*, UN Doc CRPD/C/20/5, June 2018.

²⁶ *European Convention of Human Rights*, 4 November 1950, 213 UNTS (entered into force 3 September 1953).

²⁷ *European Social Charter*, 18 October 1961, 35 Eur TS (entered into force 26 February 1965).

²⁸ Together with these, we cannot forget the role of the Court of Justice of the European Union as the main interpreter and guarantor of the *European Union Charter of Fundamental Rights*. CE, *European Union Charter of Fundamental Rights*, [2000] JO C 364/1.

²⁹ Spain, *Constitución Española*, 311 BOE, 29 December 1978, BOE-A-1978-31229.

³⁰ Spain, *Ley 25/2014 de Tratados y otros acuerdos internacionales*, 288 BOE, 27 November 2014, art 31, BOE-A-2014-12326.

³¹ Tribunal Constitucional de España [Spanish Constitutional Court], Madrid, 20 December 2018, *Judgment 140/2018* (25 January 2019), 22 BOE (Spain).

³² Carmen Montesinos Padilla, "La jurisdicción universal en regresión: Comentario a la Sentencia del Tribunal Constitucional español 140/2018, de 20 de diciembre" (2019) 72 REDE at 97.

³³ This control of diffuse conventionality has already been applied by the ordinary Spanish courts, for example, in the *Judgment of the High Court of Justice of Catalonia 1/2020, of 17 January*. In this ruling, the Court mentioned above released the current *Workers' Statute* provision that regulates objective dismissal for recurrent absence from work. It is considered to be contrary to International Labour Organization Conventions 155 and 158, the *European Social Charter (revised)* and the *Convention on the Elimination of All Forms of Discrimination against Women*.

³⁴ Theoretical reflection on article 10.2 *SC* is extensively worked by the Spanish doctrine in monographs such as the following: Xabier Arzoz Santisteban, *La concretización y actualización de los derechos fundamentales* (Madrid: Centro de Estudios Políticos y Constitucionales, 2014); Argelia Queralt

fundamental rights must be interpreted following the *Universal Declaration of Human Rights*³⁵ and the international treaties on the matter ratified by Spain. It is a criterion of normative interpretation that completes classic criteria contained in the *Spanish Civil Code*³⁶. Thus, Article 10.2 *SC* ensures, on the one hand, the adjustment between national and international human rights protection systems. In this way, it offers adequate hermeneutic cohesion between the different parts that make up the multilevel protection system's puzzle. On the other hand, Article 10.2 *SC* also supports the option for an evolutionary interpretation of the constitutional text according to the *SCC Judgment 198/2012*.³⁷ It is, therefore, a paradigmatic example of a collaboration mechanism between constitutional law and international law. To the extent that it ensures a minimum hermeneutic pattern conformed by international treaties, this "interpretative pattern" becomes a "guarantee clause". In our opinion, this obligation of interpretative adjustment applies to international court judgments as well as non-jurisdictional committee rulings. Consequently, if the UN Committees develop a genuine interpretation of the respective international treaty, Article 10.2 *SC* must also be projected onto their opinions or resolutions. Therefore, drawing on the so-called *res interpretata* doctrine can be the right way to get the full effectiveness of international covenants. In case that hermeneutic adjustment does not take place, the possibility to file a claim before the ECtHR is not ruled out. Recall that in its resolutions, the Strasbourg Court uses the UN Covenants either as *ratio decidendi* or an authority criterion reinforcing its arguments.³⁸

Finally, Article 5 *bis* of the *Organic Law of the Judiciary* (OLJ) was amended in 2015 to open up a channel for the execution of the ECtHR judgments.³⁹ This provision gives the Spanish Supreme Court (SSC), through the appeal for review, the power to review a final Spanish court judgment if an ECtHR ruling

Jiménez, *La interpretación de los derechos: del Tribunal de Estrasburgo al Tribunal Constitucional* (Madrid: Centro de Estudios Políticos y Constitucionales, 2008); Luis Martín-Retortillo Baquer, *La interconexión de los ordenamientos jurídicos y el sistema de fuentes del derecho* (Madrid: Civitas, 2004); Alejandro Saiz Arnaiz, *La apertura constitucional al derecho internacional y europeo de los derechos humanos: el artículo 10.2 de la constitución española* (Madrid: Consejo General del Poder Judicial, 1999).

³⁵ Spain, *Civil code of Spain*, at title I.

³⁶ *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948).

³⁷ In this ruling, the SCC declared the constitutionality of marriage between persons of the same sex, using, among other hermeneutic criteria, the "evolutionary interpretation" of the Constitution.

³⁸ For examples concerning the *Convention on the Rights of the Child*, see the judgements in *Rahimi v Greece*, No 8687/08, [2011] ECHR; *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*, No 13178/03, [2006] XI ECHR, which, based on Articles 3.1 and 37.b of the *Convention*, recognize the exceptional nature of the placement of a child in a detention centre.

³⁹ Spain, *Organic Law 7/2015, of 21 July, amending Organic Law 6/1985, of 1st July, on the Judiciary*, 174 BOE, 21 July 2015, BOE-A-2015-8167 [*Organic Law 7/2015*]. This same provision also modifies the other procedural laws, such as Article 102.2 of the *Contentious-Administrative Jurisdiction Law*; Article 954.3 of the *Criminal Procedure Law* and Article 510.2 of the *Civil Procedure Law*. Several SCC rulings paved the way for this legislative reform by focusing on the possibility of reviewing criminal procedure. Among others, Tribunal Constitucional de España [Constitutional Court of Spain], Madrid, 16 December 1991, *Judgments 245/1991* (15 January 1992), 13 BOE (Spain); Tribunal Constitucional de España [Constitutional Court of Spain], Madrid, 3 July 2006, *Judgments 197/2006* (4 August 2006), 185 BOE (Spain).

declares that such a resolution was issued in violation of the ECHR and generates persistent effects over time. Few legal systems provide for such an extensive system of review since it is not limited to criminal jurisdiction. However, as we will see later on, this possibility does not extend to the "execution" of the UN Committee resolutions.⁴⁰

Notwithstanding the above, what does not exist in Spain is a specific mechanism to request the State's economic responsibility for an international treaty violation. It is true that in cases of ECtHR judgments, financial compensation is determined in its decisions, and the national public administration responds to payment without any difficulties. Nonetheless, this is not the case with the UN Committee decisions, which do not define financial compensation. As will be analyzed in the next pages, the *SSC Judgment 1263/2018*⁴¹ responds to a patrimonial claim to comply with a resolution by the Committee on the Elimination of Discrimination against Women's (CEDAW). This ruling recognizes the non-existence of a specific channel in the Spanish system to comply with economic compensations foreseen in the UN Committee resolutions. However, the SSC approved the procedure initiated by the petitioner: an ordinary process for malfunctioning of the administration of justice. The SSC recognized that the malfunctioning had occurred because the CEDAW had ruled in this way. Accepting this resolution, the SSC granted the compensation.

B. A Strong Model in a Complex Context. Towards Use (and Abuse) of the International System

In the last decade, holders of fundamental rights in Spain experienced a tightening of their possibilities to access the constitutional jurisdiction. Simultaneously, as a result of the economic crisis, the exercise of many civil (freedom of expression) and social (housing, education, health care, access to jurisdiction) rights was widely restricted.

The reform of the *Organic Law of the SCC* operated in 2007⁴² introduced a new admissibility requirement regarding the constitutional complaint for protection of fundamental rights (*recurso de amparo*). The "special constitutional significance" (*especial trascendencia constitucional*) requirement implied an unprecedented

⁴⁰ The SCC clearly established this in its Tribunal Constitucional de España [Constitutional Court of Spain], Madrid, 20 June 2016, *Judgment 116/2016* (28 July 2016), 181 BOE (Spain), whose doctrine has recently been reproduced by the SSC in its *Ruling 401/2020* of 12 February. As we will see, the Supreme Court ruled along the same lines in the well-known case of Angela González Carreño: Sala de lo Contencioso-Administrativo [Contentious-Administrative Chamber], Madrid, 25 September 2017, *STS 3418/2017* (2017), ECLI: ES:TS:2017:3418 (Spain) [*STS 3418/2017*]. Although, subsequently, the payment of economic compensation was accepted by another procedure as individual reparation.

⁴¹ Sala de lo Contencioso-Administrativo [Contentious-Administrative Chamber], Madrid, 22 March 2018, *STS 1263/2018* (2018), ES:TS:2018:1263 (Spain).

⁴² Spain, *Ley Orgánica 6/2007, de 24 de mayo, por la que se modifica la Ley Orgánica 2/1979, de 3 de octubre*, 125 BOE, 24 May 2007, BOE-A-2007-10483.

restriction on accessing the SCC. This restriction, contemporary to the aforementioned crisis, was not accompanied by a simultaneous reinforcement of ordinary court protection of human rights. This context gave rise to a jurisdictional vacuum, which made us think from the beginning of more frequent use of international protection mechanisms.⁴³

The multi-level protection of human rights logic provided for a progressive increase in Spanish complaints before the ECtHR. However, in recent years, access to the Strasbourg Court was also progressively restricted. The Interlaken Process⁴⁴ resulted in a series of reforms that attempted to combat what, since the Protocol 11⁴⁵ adoption, was announced as the chronicle of a death foretold. In the face of an abusive use of the individual complaint mechanism, the Council of Europe progressively reinforced the Strasbourg jurisdiction subsidiary nature. In their conjugate action, the application of the 'significant disadvantage' requirement and Article 47 *ECtHR Regulation*, as well as the exercise of competencies by the single judge, significantly reduced the ECtHR workload. The Interlaken Process' inevitable consequence was then limitation of individuals' access to the ECtHR.

In Spain, this double-restriction effect (regarding access to the SSC and the ECtHR) led organized civil society to develop litigation strategies to bring petitions to the UN Committees regarding violations of the most vulnerable people's rights. It is an action strategy openly related to legal activism of many civil society organizations and lawyers committed to the defence of people at risk of social exclusion, as well as to fight against systemic violations of fundamental rights. However, the problem that these legal actors did not bear in mind is the limited effects of the Committees' resolutions. Together with the limited possibilities of accession to jurisdictional bodies, people suffering violations of their human rights must also face difficulties relating to compliance with UN Committees' resolutions. Therefore, despite limited possibilities of accession to the Strasbourg jurisdiction, the effectiveness of the ECtHR's judgments still justifies its pre-eminence on defining strategic litigation.

Beyond what has been said here, the UN Committee resolutions against Spain bring to light specific violations of international treaties by national authorities and the consequent need to adopt redress and reparation measures. However, Spanish authorities use the non-enforceable nature of these rulings as a conceptual basis to support their failure of our international commitments. Let's analyze some examples.

⁴³ Carmen Montesinos Padilla, *La tutela multinivel de los derechos desde una perspectiva jurídico-procesal. El caso español* (Valencia: Tirant lo Blanch, 2017).

⁴⁴ *Interlaken Process*, online: *Europe's human rights watchdog* <www.europewatchdog.info/en/court/interlaken-process/>.

⁴⁵ *Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, 11 May 1994, 155 STE (entered into force 1 November 1998) [Protocol 11].

III. United Nations Committee's Resolutions Against Spanish Authorities

A. Human Rights Committee

When the HRC⁴⁶ identifies an *ICCPR* violation, it usually includes reparation and non-repetition measures in its decision. Only exceptionally does the HRC consider that mere declaration of the *ICCPR* breach is enough. In any event, HRC resolutions most commonly contain specific obligations for the State party to provide an adequate remedy.⁴⁷ As a result of the low level of compliance with the HRC resolutions, between 21 October 1993 and 21 July 1994, Articles 70 and 95 to 99 of its *Rules of Procedure*⁴⁸ were amended in order to strengthen the follow-up mechanism and to provide for the appointment of a Special Rapporteur to ensure continuity of such follow-up. While the follow-up mechanism is useful in providing information on States, it does not seem to lead to a better degree of compliance. From this information, it can be deduced that one of the problems of compliance with individual reparation measures is the absence of specific regulatory mechanisms to ensure payment of financial compensation to victims. It has led the HRC to call on States to develop such procedures. In Spain, this recommendation has not been followed.

Since the ratification of the corresponding *Optional Protocol on the individual communications procedure*⁴⁹ in January 1985, Spain has been the subject of several rulings by the HRC, the majority still pending compliance with the Special Rapporteur.⁵⁰ Among the most recent, we can refer, for example, to the latest opinion on torture.⁵¹ In May 2019, the HRC ruled that Gorka Lupiáñez, sentenced in April to 50 years in prison for the abduction of a family and other crimes related to his terrorist activity, suffered torture during his incommunicado detention in 2007. Accordingly, the Committee urged our national authorities to guarantee justice and reparation for the petitioner. It recalled that torture cannot be justified under any circumstances, even for reasons of national security. The HRC

⁴⁶ This Committee was the first to introduce the mechanism of individual petitions through the *Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976). In Spain, this mechanism has been applicable since 25 January 1985.

⁴⁷ Wouter Vandenhoele, *The procedures before the UN human rights treaty bodies: divergence or convergence?* (Antwerp: Intersentia, 2004) at 233.

⁴⁸ CCPR, *Rules of procedure of the Human Rights Committee*, UN Doc CCPR/C/3/Rev.9, September 2005.

⁴⁹ *Optional Protocol to the Convention on the Rights of the Child on a communications procedure*, 19 December 2011, A/RES/66/138 (entered into force 14 April 2014).

⁵⁰ A paradigmatic example is the Opinion in the case *Ali Aarrass v Spain* in which the Committee concluded that Spain violated Article 7 *ICCPR* by extraditing the victim to Morocco, where he suffered severe torture. The reparation measures indicated were: compensation to the victim, cooperation with the Moroccan authorities to ensure adequate supervision of the treatment that the victim receives in Morocco, and measures to prevent similar violations in the future. None has been complied with by Spain. *Communication No 2008/2010*, CCPR, 111th Sess, UN Doc CCPR/C/111/D/2008/2010 (2014).

⁵¹ A previous case than those to be considered on the following pages concerns the *Achabal Puertas case*, *Communication No 1945/2010*, CCPR, 117th Sess, UN Doc CCPR/C/107/D/1945/2010 (2013).

urged Spain to investigate allegations of torture immediately, thoroughly and impartially, asking our country to take necessary legislative measures to put an end to incommunicado detention. The HRC established 180 days for compliance with its *Opinion* under the ICCPR.⁵²

However, most of the HRC's rulings against Spain are related to Article 14.5 *ICCPR*, concerning the second criminal instance. Taking into account the specific topic of this paper, we are especially interested in referring to the *Opinion*, of July 2007, in the Jacques Hachuel case. In March 2000, Mr Hachuel was acquitted by the Spanish National Court (*Audiencia Nacional*) of a crime of misappropriation. However, in July 2002 he was sentenced to two years in prison by the SSC. His appeal for the protection of fundamental rights before the SCC (*recurso de amparo*) was rejected, so Hachuel filed a complaint before the HRC pleading a violation of Article 14.5 of the *ICCPR*.⁵³ He claimed that his conviction (imposed for the first time by the SSC on appeal) was not reviewed by a higher court.

The HRC *Opinion* concluded with a declaration of violation of the *ICCPR* by Spain, establishing the obligation to provide the petitioner an adequate remedy allowing the SSC judgment to be reviewed by a higher court.⁵⁴ However, in February 2020, the SSC issued a ruling (1/2020) rejecting the appeal for review and recalling that Spanish law only attributes ECtHR judgments the condition of enabling title for a review appeal against a firm judicial resolution.⁵⁵ Individual execution of the HRC *Opinion* was thus denied. This is the natural consequence of the traditional refusal of the UN Committee resolutions to a legally binding nature. However, the UN Committee resolutions are considered for legislative reforms. This happened, for example, with the reform of *Organic Law 19/2003*,⁵⁶ which generalized the second criminal instance.⁵⁷

B. Committee Against Torture

Individual petition procedure is recognized by Article 22 of the *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture)*. In its resolutions, the Committee Against Torture (CAT) usually proposes some reparation measures, although they are usually

⁵² Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No 2657/2015, CCPR, 2019, UN Doc CCPR/C/125/D/2657/2015.

⁵³ Views, Communication No. 1381/2005, CCPR, 90th Sess, UN Doc CCPR/C/90/D/1381/2005, September 2007.

⁵⁴ *Ibid.*

⁵⁵ Tribunal Supremo [Supreme Court], Madrid, *STS 1/2020* (2020), ES:TS:2020:1 (Spain).

⁵⁶ Spain, *Organic Law 19/2003 of 23 December 2003, amending Organic Law 6/1985 of 1 July 1985 on the Judiciary*, 309 BOE, 26 December 2003, BOE-A-2003-23644.

⁵⁷ According to the Exposition of Reasons of the *Organic Law 19/2003*, generalization of the second criminal instance in Spain "intends to solve the controversy that arose as a consequence of the resolution of July 20, 2000 of the UN Human Rights Committee, in which it was maintained that the current Spanish system of cassation violated the International Covenant on Civil and Political Rights".

attached to the specific case.⁵⁸ Spain joined the mechanism on 21 October 1987 and to date, twelve cases have been reported. Let us look at some of the more recent ones.

On December 27, 2019, the CAT issued its last ruling against Spain in the *E.L.G. case*, condemning our national authorities for cruel treatment perpetrated against a woman detained in January 2013 by four national police officers and transferred to the police station, which she came out of with a broken nose.⁵⁹ E.L.G. reported her case to the ordinary courts, but it was closed by an investigating court and then by the Spanish National Court (*Audiencia Nacional*). The SCC also rejected the appeal for the protection of fundamental rights (*recurso de amparo*). However, the CAT concluded in its *Opinion* that proven facts showed that E.L.G. suffered cruel, inhuman or degrading treatment during her stay at the police station. The UN Committee, therefore, urged Spain to repair E.L.G. in a "full and adequate" manner, which implied possible compensation and adoption of disciplinary measures against responsible agents.

However, the CAT's resolutions have traditionally been breached by our national authorities. An example of this lack of compliance is the *Opinion* in the *Gallastegi case*.⁶⁰ In June 2012, the CAT reproached Spain for not complying with Article 12 of the *Convention against Torture*, as it did not carry out a prompt and impartial investigation of the complaint filed by Orkatz Gallastegi Sodupe after his detention period under the Ertzaintza. In October 2014, the petitioner was still serving his prison sentence, with the Committee having established that the judgment responded to a self-incriminating statement made under torture.⁶¹

C. Committee on Economic, Social and Cultural Rights

Spain ratified the *Covenant on Economic, Social and Cultural Rights Optional Protocol*⁶² in 2010, thereby recognizing its Committee (CESCR) competence to receive and examine individual communications. In its first ruling against our country, in the

⁵⁸ Vandenhole, *supra* note 47 at 268. However, a specific mechanism for monitoring compliance with the resolutions is provided for. Monitoring of compliance with these resolutions is based on voluntary reporting by States. On May 2002, this mechanism was reinforced by the possibility of appointing one or more special rapporteurs since May 2002. This mechanism is currently provided for in rule 120 of the Committee's Rules of Procedure: CAT, *Rules of Procedures*, UN Doc CAT/C/3/Rev.6, September 2014, Rule 120.

⁵⁹ *Decision adopted by the Committee under article 22 of the Convention, concerning communication No 818/2017*, CAT, 2019, UN Doc CAT/C/68/D/818/2017.

⁶⁰ *Communication no 453/2011*, CAT, 8th Sess, UN Doc CAT/C/48/D/453/2011 (2012).

⁶¹ *Ibid.* Orkatz was arrested in Berango (Bizkaia) in October 2002 for sabotage and destruction of publicly owned property. After his arrest, he was taken to the Ertzaintza headquarters in Arkaute, Vitoria, where it was determined that the acts of which he was accused fell within the anti-terrorist jurisdiction. He was therefore held incommunicado for three days. It was during this period without access to family members, a lawyer of his choice or a doctor of his choice that Orkatz suffered the torture and ill-treatment that he ended up denouncing in court.

⁶² *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, 10 December 2008, A/RES/63/117 (entered into force 5 May 2013).

case *I.D.G. v Spain*,⁶³ the CESCR responded to a petition relating to an eviction for non-payment. The owner of the house did not know about the eviction until the moment in which the eviction took place. In its resolution, the CESCR found a violation of the right to adequate housing, considering that the court with jurisdiction to hear the case did not take all reasonable measures to notify the foreclosure properly. Thus, the CESCR urged Spain to modify the procedural legislation regulating foreclosure. However, the Spanish Government did not adopt relevant measures to comply with its international commitments. It did not comply regarding the opinion in the case *Djazia et al.*,⁶⁴ respecting to which national authorities only reported that the Community of Madrid had initiated procedures so that those who were affected could submit to open procedures for adjudication of protected public housing.⁶⁵

The passivity of the Spanish authorities in connection with the right to housing recently tried to be denied by the Government. Facing the Committee *Opinion* in the *Lopez Albán case*,⁶⁶ the Spanish Executive sustained the *Royal*

⁶³ *Communication No. 2/2014*, ESC, 55th Sess, UN Doc E/C.12/55/D/2/2014, October 2015; Helena Torroja Mateu, “El control internacional universal cuasi-contencioso de los derechos económicos, sociales y culturales: comentario a la comunicación núm. 2/2014 ante el Comité de Derechos Económicos, Sociales y Culturales sobre el incumplimiento por el Estado español del respeto del derecho a una vivienda adecuada” in Jordi Bonet Pérez & Rosa. A. Alija Fernández, eds, *La exigibilidad de los derechos económicos, sociales y culturales en la Sociedad internacional del siglo XXI: una aproximación jurídica desde el Derecho internacional* (Madrid, Barcelona, Buenos Aires, Sao Paulo: Marcial Pons, 2016) 431 at 145-61; Koldo Casla, “The rights we live in: protecting the right to housing in Spain through fair trial, private and family life and non-retrogressive measures” (2016) 20:3 *Intl J of Human Rights* 285 at 297.

⁶⁴ *Views adopted by the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights with regard to communication No. 5/2015*, ESC, 2017, UN Doc 12/61/D/5/2015. The Committee resolution examines the case of Mohamed Ben Djazia, Naouel Bellili and their two minor children. The petitioners lived with their children in a rented room in an apartment in Madrid. Despite having submitted social housing applications repeatedly for twelve years, none was attended. Once the unemployment benefit that Ben Djazia received was exhausted, they were unable to pay their rent for several months. The landlord expressed their wish not to extend it before the end of the contract. However, petitioners refused to leave the room, since they did not have alternative housing, claiming that this would amount to a violation of their right to decent and adequate housing. In this case, the Committee took into account that the eviction took place without assessing the possible consequences on the minors, concluding that the fact that the eviction was carried out without confirmation of the availability of alternative housing constituted a violation of the right to housing. The individual measures envisaged by the Committee were: to see an effective repair, which would imply if those affected did not yet have adequate housing, assessment of their situation and granting them public housing, or taking other measures to allow them to live in adequate housing, plus financial compensation.

⁶⁵ On the failure of Spain to comply with this resolution: “ONG lamentan respuesta de España ante condena y recomendaciones de ONU por no garantizar una vivienda alternativa a familia desahuciada” *Amnistía Internacional España* (8 February 2018), online: <www.es.amnesty.org/en-que-estamos/noticias/noticia/articulo/ong-lamentan-respuesta-de-espana-ante-condena-y-recomendaciones-de-onu-por-no-garantizar-una-vivienda/>.

⁶⁶ *Views adopted by the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, concerning communication No. 37/2018*, ESC, 2019, UN Doc 12/66/D/37/2018. Ms López rented a home in 2014. Two years later, she separated from her husband and lost her job as a waitress. She then stopped paying the rent. When she appeared in court, she discovered the house belonged to Bankia. Ms López failed to reach an agreement with the banking entity. She was convicted of illegal occupation and forced to leave the apartment in May 2018. In its resolution, the CESCR Committee asks the Community of Madrid to provide a home to Ms López to raise her children and reprimands the regional Executive for not offering a housing solution after the eviction and

Decree-Law 7/2019 as the main argument to deny that passivity.⁶⁷ This regulation introduced some changes to our national legislation concerning the right to housing, including in its Preamble an express reference to the CESCR's opinions. However, as doctrine points out, the new Spanish legislation does not incorporate many of the guarantees referred to by the UN Committee rulings. All this without forgetting that, on most of the occasions, the competent national judge orders that foreclosure be carried out despite the existence of a request for provisional measures arising from the UN system.⁶⁸

D. Committee on the Elimination of Discrimination Against Women

Since Spain ratified the *Optional Protocol to the Convention on the Elimination of all Forms of Discrimination Against Women*,⁶⁹ our national authorities have only received three opinions from the respective Committee (CEDAW).⁷⁰ However, despite the low quantitative relevance of the CEDAW's rulings, the last *Opinion* was the first of those resolutions issued by a UN Committee against Spain which was fully executed in our country.⁷¹

For eight years, Ms González Carreño suffered physical and psychological violence in her marriage, which ended with the death of her daughter at the hands of her ex-husband in the context of a regime of unsupervised visits. After the exhaustion of domestic remedies, Ms González Carreño complained before the CEDAW which, in an *Opinion* of July 16, 2014, considered that Spain did not maintain due diligence to protect Ms González Carreño and her daughter in a situation of continued domestic violence. Lack of due diligence and stereotyped application of the visitation regime

denying her request for public housing. The Committee's resolution is also addressed to the State, which is required: to amend legislation so that petitioners can appeal judicially; to adopt a housing plan in coordination with the Autonomous Communities, and to implement a protocol to comply with the precautionary measures requested by those who are going to be evicted.

⁶⁷ Spain, *Royal Decree-Law 7/2019 of 1 March on urgent measures concerning housing and rent*, 55 BOE, 5 March 2019, BOE-A-2019-3108.

⁶⁸ Juan Carlos Benito Sánchez, "Los pronunciamientos del Comité DESC sobre el derecho a la vivienda relativos a España. Respuestas jurisprudenciales y legislativas" (2019) 9:2, *Lex Social* 583 at 589.

⁶⁹ *Optional Protocol to the Convention on the Elimination of all Forms of Discrimination Against Women*, 15 October 1999, 54 RTNU 4 (entered into force 22 December 2000).

⁷⁰ The first resolution, regarding the Cristina Muñoz Vargas case, was inadmissible because the alleged violation of rights occurred prior to the entry into force of CEDAW for our country. In the case of *Cristina Muñoz Vargas v Spain*, the Committee established that the act by which Ms. Muñoz' brother was awarded the noble title held by their father preceded the entry into force of the Protocol. On this basis, the Committee was excused from considering the merits of the case. There was, however, a dissenting opinion stating that this discriminatory act had continued throughout the author's appeals and claims process until the matter was resolved by the Constitutional Court (2003), at which time the Convention and the Protocol were already in force. *Decision of the Committee on the Elimination of Discrimination against Women under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women: Communication No. 7/2005*, CEDAW, 39th Sess, UN Doc CEDAW/C/39/D/7/2005 (2007).

⁷¹ *Decision of the Committee on the Elimination of Discrimination against Women under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women: Communication No 47/2012*, CEDAW, 58th Sess, UN Doc CEDAW/C/58/D/47/2012 (2014).

implied a violation of the Convention, with the CEDAW recommending that Spain: 1) grant the applicant adequate reparation and comprehensive compensation; 2) carry out a thorough and impartial investigation to determine the existence of failures in national structures and practices which caused a lack of protection.⁷²

After that *Opinion*, the Spanish Ministry of Justice rejected the claim of state liability once again. The Ministry's decision was based on the State Council *Opinion 218/2015*,⁷³ which stated that UN Committee resolutions are not legally binding, nor a genuine interpretation of the Convention. However, in its *Judgment 1263/2018*, the SSC took a "Copernican turn" regarding its previous jurisprudence.⁷⁴ In its ruling, the SSC qualified the CEDAW's resolutions as binding/mandatory and, therefore (for the specific case), as a valid foundation to formulate a property claim for the Administration of Justice malfunction.⁷⁵

E. Committee on the Rights of the Child

The CRC Committee has seen a proliferation of complaints against Spain in recent years, particularly in the area of care for unaccompanied migrant children. In all cases that have passed the admission procedure, precautionary judgments have been issued that have only been applied on one occasion. Also, in all of the decisions, general and individual measures are contemplated but have not been complied with.⁷⁶

On February 1, 2019, the UN Committee on the Rights of the Child (CRC) adopted its decision in the *D.D. case*. This ruling responded to the communication presented by a citizen from Mali who claimed to be a victim of multiple violations of his rights as a result of his summary deportation to Morocco when, as a minor, he crossed the border fence post that separates Morocco from Melilla.⁷⁷ Only a few days

⁷² *Ibid.*

⁷³ Tribunal Constitucional de España [Spanish Constitutional Court], Madrid, 22 October 2015, *Judgment 218/2015* (27 November 2015), 284 BOE, ECLI:ES:TC:2015:218 (Spain).

⁷⁴ This ruling overturned the decision of the National Court of Justice (Audiencia Nacional- Administrative Chamber) of 2 November 2016, which rejected Ms. González Carreño's claim for recognition of the financial responsibility of the Administration of Justice for the management of her case. *STS 1263/2018*, *supra* note 41.

⁷⁵ According to the SSC, although neither the *Convention* nor the *Optional Protocol* establishes the enforceable nature of the CEDAW's opinions, there can be no doubt that they are binding/mandatory for our country, since Article 24 of the *Convention* provides that States parties undertake to adopt all necessary measures at a national level to achieve full realization of the rights recognized therein. It also refers to the provisions of Article 7.4 of the *Optional Protocol*, under which State parties must give due consideration to the views of the Committee. Consequently, after affirming that the Spanish Administration had violated the appellant's fundamental rights and had failed to put an end to the effects declared by the Committee, the SSC annulled the contested judgment and declared the obligation to remedy the violation.

⁷⁶ Spain signed the *Optional Protocol to the Convention on the Rights of the Child* on 3th June 2013.

⁷⁷ *Dictamen aprobado por el Comité en relación con el Protocolo Facultativo de la Convención sobre los Derechos del Niño relativo a un procedimiento de comunicaciones respecto de la Comunicación Núm. 4/2016*, CRC, 2019, UN Doc CRC/C/80/DR/4/2016. The petitioner alleged that, before his expulsion, he was not subjected to any identification procedure, nor had he the opportunity to explain his

later, on February 18, the CRC Committee delivered its opinion in the *N.B.F. case*. N.B.F.'s statements were not considered in the process of determining his age, which ended with his admission to an adult detention centre.⁷⁸

A very similar case was resolved by the *Opinion* (May 31, 2019) in the case of A.L., a citizen from Algeria who was travelling in a "patera", a small boat, who was intercepted by the National Police and the Red Cross organization when he intended to access Almeria (Spain).⁷⁹ In this case, after the arrest, the petitioner presented his birth certificate confirming he was a minor.

J.A.B. also presented his identification document to the Spanish authorities.⁸⁰ J.A.B. left Cameroon in 2015 and, after passing through Nigeria, Benin, Niger, Algeria and Morocco, he arrived in Ceuta in 2016. As in the previous cases, J.A.B. was subjected to an age determination procedure, which ended with his internment in a temporary immigrant residence centre. Although his expulsion order was judicially revoked, the Prosecutor's Office denied the revision of the decree determining his age, which meant the termination of J.A.B.'s guardianship. J.A.B. had been diagnosed with tuberculosis, schistosomiasis, strongyloidiasis and malaria. The CRC took consideration of his particular vulnerability considering his physical condition. The same thing happened with A.D.,⁸¹ although in his case there were no health problems.

In the case of *H.B. v. Spain*,⁸² it is clear that some of these incorrectly identified minors end up in foreign adult internment centres as a preliminary measure to their expulsion to their countries of origin, regardless of whether or not they have original documentation proving their age. In this case, the documentation was from Guinea and did not match the results of the medical tests.

Together with the previous cases, the CRC reinforces the protection of children arriving in Spain in conditions of applying for asylum. This was so in the case of R.K., who left the Republic of Guinea fleeing clashes between Christians and Muslims.⁸³ Although R.K. maintained that he was a minor since the moment he was

circumstances, nor did he have the assistance of a lawyer, interpreter or doctor, nor did he have effective resources available to exhaust.

⁷⁸ *Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No.11/2017*, CRC, 2019, UN Doc CRC/C/79/D/11/2017.

⁷⁹ *Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No 16/2017*, CRC, 2019, UN Doc CRC/C/81/D/16/2017.

⁸⁰ *Views adopted by the Committee under article 10 of the Optional Protocol, concerning communication No 22/2017*, CRC, 2019, UN Doc CRC/C/81/D/22/2017.

⁸¹ *Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No 21/2017*, CRC, 2020, UN Doc CRC/C/83/D/21/2017.

⁸² *Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No 25/2017*, CRC, 2020, UN Doc CRC/C/83/D/25/2017.

⁸³ *Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No 27/2017*, CRC, 2019, UN Doc CRC/C/82/D/27/2017.

transferred to the cells in a police station in Almeria; he was decreed as being of legal age, thus denying him the guardian required to request international protection. A very similar situation was experienced by M.T., who also arrived from Nador (Morocco), fleeing the Ivory Coast after his father was arrested and murdered by the National Army, having been accused of collaborating with militias in the North of the country.⁸⁴

F. Committee on the Rights of Persons with Disabilities

On May 20, 2009, an officer of the Barcelona City Guard was run over by a car at an intersection as he was riding his motorcycle to attend to a case of male violence. This case paved the way for the subsequent Spanish individual petitions before the Committee on the Rights of Persons with Disabilities (CRPD).

The City Guard was hospitalized for several months. The injury to his right foot was aggravated on the day that, while still on leave, he witnessed a burglary in the street. He chased and managed to reduce the thief but at the cost of a relapse. The aftermath that remained was definitive.

The Spanish National Institute of Social Security determined that he was permanently and totally incapable of exercising his profession. This situation led him in 2010 to apply to the Consistory of Barcelona for a second job. However, the local Executive denied his request, applying the municipal ordinance that excludes from this transfer anyone who has a recognized incapacity to work, unless it is partial. Faced with the City Council's decision, this former officer went to court, which in the first instance agreed with him. However, the City Council appealed against the ruling and the Catalanian Superior Court of Justice accepted its arguments.

After neither the SCC nor the ECtHR admitted his case, the last step was to go before the CRPD. Ten years later, in April 2019, the UN Committee ruled that Barcelona City Council discriminated against this city guard. The CRPD *Opinion* concluded that the City Guard's forced retirement violated several articles of the Convention, in force in Spain since 2008.⁸⁵ Therefore, the CRPD determined that the central Government must compensate the petitioner for the costs incurred in the process and take measures to "ensure that he is subjected to an alternative functional assessment, considering the capabilities he might have in a second or complementary activity". In addition, Spain must adopt the necessary provisions so that the Consistory ordinances are in accordance with the *Convention on the Rights of Person*

⁸⁴ *Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No 17/2017*, CRC, 2019, UN Doc CRC/C/82/D/17/2017.

⁸⁵ It notes, for example, that Spain failed to comply with the provisions of Article 27. This article calls for safeguarding and promoting the exercise of the right to work, "including for persons who become disabled during employment, by adopting appropriate measures, including legislation". This provision also prohibits "discrimination on the basis of disability with regard to all matters concerning any form of employment, including conditions of recruitment, hiring, continuance, promotion and safe and healthy conditions". *Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No 34/2015*, CRDP, 2019, UN Doc CRPD/C/21/D/34/2015.

with *Disabilities* and what is set out in the CRPD *Opinion*. It has six months to present the decisions it takes to the Committee and it is its responsibility "to prevent similar violations in the future".⁸⁶

IV. Between Jurisdiction and Policies. Obligations and Barriers to Compliance

A complete analysis of Spain's compliance with the UN Committee resolutions would require a review of every measure contained in those decisions, as well as an examination of how Spain transfers those opinions to the national system for the protection of human rights. Such an analysis exceeds the possibilities of this paper. For this reason, we chose to analyze a specific case. We are examining the CRC opinions. The aim is not so much to assess the compliance measures adopted by national authorities (as not enough time has passed to make such a criticism) but rather to identify possible actions to be taken.

The common theme to all petitions addressed to the CRC has to do with the Spanish model for determining the age of unaccompanied foreign minors. Article 35 of the *Spanish Law on Foreigners (SLF)*⁸⁷ states that, in the absence of documentation and cases of doubt as to the minority status of a foreigner, the Public Prosecutor's Office shall initiate an age determination procedure to place the minor under the Autonomous Communities' protection system. However, subsequent practices and regulatory developments (Articles 189 et seq. *Immigration Regulation*,⁸⁸ Article 12.4 *Organic Law on the Legal Protection of Minors*,⁸⁹ *Framework Protocol*⁹⁰) have proved not to be very faithful to the *prima facie* protective spirit of the SLF. Often, age determination tests are developed by unreliable medical experts. Legal assistance to minors is not guaranteed. The age determination procedure is systematically initiated when a foreigner claims to be a minor, even if he or she is documented. Age determination decrees issued by the Public Prosecutor are decisions (without recognized legal status) which cannot be submitted to judicial control.

Taking into account all that has been said so far, the CRC is very clear in delimiting the Spanish authorities' international obligations. In its opinions relating to Spain, the CRC points out the duty of presumption of authenticity of identity documentation submitted by children. Moreover, it underlines the obligation to take

⁸⁶ *Ibid* at para 9 (b).

⁸⁷ Spain, *Organic Law 4/2000, of 11 January, on the rights and freedoms of foreigners in Spain and their social integration*, 10 BOE, 12 January 2000.

⁸⁸ Spain, *Royal Decree 557/2011, of 20 April, approving the Regulations of Organic Law 4/2000 on the rights and freedoms of foreigners in Spain and their social integration, following its reform by Organic Law 2/2009*, 103 BOE, 30 April 2011.

⁸⁹ Spain, *Organic Act 1/1996, dated 15th January, on Legal Protection of Minors, of partial amendment of the Civil Code and of the Civil Procedure Act*, 15 BOE, 17 January 1996.

⁹⁰ Spain, *Resolution of 13 October 2014 on the Framework Protocol on actions relating to foreign unaccompanied minors*, 251 BOE, 16 October 2014, BOE-A-2014-10515 [*Framework Protocol on actions relating to foreign unaccompanied minors*].

children's statements into account and to grant them the benefit of the doubt. The UN Committee also refers to the duty to exempt children from submission to procedures for determining age when there is valid documentation and, otherwise, from the obligation to submit them to a holistic evaluation (not limited to astrometric tests). Consequently, the CRC identifies in its resolutions the measures to be adopted by Spanish authorities in order to comply with their international obligations. These measures can be summarized as follows:

- Review the age determination procedure to ensure that documents presented by children are taken into consideration, as well as to guarantee that their authenticity is accepted when the States of origin confirm them.
- Guarantee children the assignment of a qualified legal representative (without delay and free of charge), as well as a competent guardian for unaccompanied young migrants seeking asylum, even when the process of determining their age is pending.
- Develop an adequate and accessible reparation mechanism for unaccompanied young migrants claiming to be minor (so that they can request the revision of the decrees determining their age).
- Train immigration officials, police officers, Public Ministry officials, judges and other competent professionals on the rights of asylum-seeking minors and other migrant children.
- Provide timely compensation and redress to the child who filed the complaint.

The CRC is a meridian both for the diagnosis of our principal diseases and for prescribing the principal remedies. However, as noted from the beginning, the alleged non-binding nature of the UN Committee opinions is generally presented by our national authorities as an insurmountable obstacle to providing those rulings with internal effectiveness. It is necessary to rethink legal categories in light of both general principles of international law, as well as mandates related to the reality of the facts. The refusal of a binding nature of the UN Committee resolutions can no longer be understood as the absence of any legal effect.

A. Compliance with General Measures

Compliance with CRC opinions requires action at different levels of State structures, and it is essential to start from an initial division between general and individual measures. Individual measures focus on reparation in a specific case. However, general measures include all those actions in order to ensure a non-repetition of the injury. Such measures would then require State action in the legislative, executive and judicial spheres.

1. LEGISLATIVE ACTION

Spanish regulations on unaccompanied foreign minors provide general legal support for a model that must be modified. Assignment of powers to the Public Prosecutor's Office in the age determination procedure prevents compliance with the requirements of the *Convention on the Rights of the Child*⁹¹ regarding access to courts. This is due to the nature of the age determination decree which cannot be reviewed by courts. Adequate compliance with CRC's resolutions in this area would require a reform of the *OLJ* and the *SLF*. These reforms should be undertaken either to provide for a judicial remedy for decrees determining the age or to confer directly on court competencies to carry out that procedure.

Besides, compliance with the CRC's opinions requires removal of the power of the Public Prosecutor's Office to conduct a proportionality assessment regarding the documentation presented by children. The *Convention on the Rights of the Child* requires minors to be exempted from all evidence when there is documentation proving their identity that is not contested on the grounds of falsity.

The above-mentioned legislative changes would favour the adaptation of the Spanish model to our international obligations. However, the two national laws we have referred to are organic laws, which require an absolute majority of the Spanish Congress of Deputies for their approval.⁹² However, the Spanish Government, which has constitutional recognition of the competence to represent the State abroad⁹³ and, with it, the obligation to report to the UN Committees, does not currently have that majority.

2. (DECENTRALIZED) EXECUTIVE ACTION

Albeit in a different way, difficulties derived from that political fragmentation also have an impact on those cases where the action of the Executive and the Spanish Public Administration is required. In these last cases, our international responsibilities might seem more intense because it is the Government who is liable before the international treaty bodies. However, in decentralized political systems such as Spain's, that strength of commitment is also diluted.

It is the central Government's responsibility to develop legislation on foreigners.⁹⁴ Therefore, the Spanish Executive could reform the Immigration Regulation in order to modify the age determination procedure. The Spanish Government also approved the mentioned *Protocol 14* of the General State Prosecutor's Office on Unaccompanied Foreign Minors.⁹⁵ Consequently, the central Executive might repeal it and transfer its provisions to the Immigration Regulation to gain legal certainty and to strengthen the procedural guarantees system. However, responsibility

⁹¹ *Convention on the Rights of the Child*, *supra* note 6.

⁹² *Constitución Española*, *supra* note 29, art 81.

⁹³ *Ibid*, art 97.

⁹⁴ *Ibid*, art 149.1.3.

⁹⁵ *Framework Protocol on actions relating to foreign unaccompanied minors*, *supra* note 90.

for providing care for minors does not lie with the central Government but with the Autonomous Communities.

Autonomous Communities are the institutions with material competencies to protect children and provide them with social assistance.⁹⁶ Still, they have no powers whatsoever in the area of international relations. Autonomous Communities are the institutions that guard and protect minors, make up for their lack of capacity to act and, on many occasions, urge the initiation of the age determination procedure. If the State wants the administrative action to respond to the CRC's resolutions, it is obliged to carry out coordination work.

This coordination task was attributed to the *Protocol* mentioned above. However, it does not guide administrative action for the benefit of minors, but to the detriment of their interests. Coordination is not adequate, so more appropriate mechanisms need to be developed, perhaps through a specific sectoral conference or the signing of collaboration agreements between the State and the Autonomous Communities with more minors in their care. In a decentralized State such as ours, a coordination body for the enforcement of committee resolutions becomes an imperative need.

3. JUDICIAL ACTION

Pending the policy changes mentioned above, whether in the legal or regulatory field, Spanish courts must apply the UN Committee decisions. They must accept the revision of age-determination decrees to comply with the guarantee of judicial protection, mainly if children provide documentation proving their identity. They must guarantee the presence of a legal representative of the child and ensure specialized free legal assistance. They must apply the presumption of minority and issue precautionary measures of protection that give full effect to that presumption. Furthermore, even though the natural reaction of the courts will be to deny the binding legal nature and enforceability of the UN Committees' opinions, the children's legal representatives must request the Spanish courts to comply with their international obligations. Indeed, the rulings of these treaty bodies are not executive acts. However, at least in the Spanish system, they must be complied with by our national courts.

On the one hand, from Article 10.2 *SC*, which enshrines the application of the principle of *res interpretata*, national courts are obliged to take the decisions of these committees into account. Otherwise, they will be opposing this constitutional mandate and thus violating Article 24.1 *SC*, on the side of the right to obtain a decision based on law, reasonable, not erroneous and not arbitrary. On the other hand, international commitments assumed when signing treaties and protocols making up IHRS are projected to all State institutions. It can be inferred both from International Law itself and, in our case, from Article 96 *SC*⁹⁷. This constitutional precept identifies treaties'

⁹⁶ *Constitución Española*, *supra* note 29, art 148.20.

⁹⁷ *Ibid*, art 96.

position in the Spanish system of sources of law, as well as their relations with the rest of the national regulations. Thus, Spanish courts are committed to applying the *Convention on the Rights of the Child*. Even where contradictions with domestic rules are observed, failure to comply with this obligation would constitute a violation of Article 24.1 SC.⁹⁸

B. Compliance with Individual Measures

Individual measures for compliance are those directly linked to the victim's reparation and, where appropriate, to the restoration of the state of affairs before the violation of the corresponding international covenant. This type of measure requires both the provision of a system of compensation for damages and the possibility of reviewing decisions issued by national courts which did not repair the violation and may have contributed to the injury confirmed by a UN Committee. These are, of course, the most difficult measures to enforce.

As we have explained above, in Spain, there is no specific procedure that provides for compensation for human rights violations identified by the UN Committees, including the CRC. It is also not possible to extend the use of the mechanism giving reopening of domestic judicial procedures to comply with the ECtHR's judgments. All of the above does not mean, however, that the legal tools already existing cannot be used to comply with the UN Committee resolutions.

The procedure for claiming state liability for abnormal functioning of public services is a viable procedure for requesting economic compensation. This is set out in *Law 39/2015 on the Common Administrative Procedure*.⁹⁹ The request for a claim for damages can be upheld if the damage can be attributed to the public administration. If the judiciary is considered to be liable, the relevant procedure is that of malfunctioning of the administration of justice.¹⁰⁰ The SSC validated this last option in its ruling number 2747/2018.¹⁰¹ The SSC thus opened up this option as a specific mechanism for compliance with individual measures. In this way, the SSC reached a milestone in this respect. It was the first time that the SSC resorted to the combined interpretation of Articles 10.2 and 96 SC in order to justify the need to provide financial satisfaction to those who have filed a complaint with a UN Committee and obtained a favourable opinion.

It is much more complicated to reopen a domestic judicial procedure after obtaining a UN Committee favourable resolution when that procedure was previously exhausted to file the petition. As already mentioned, the extraordinary appeal for review was opened as a mechanism for the internal execution of the ECtHR's judgments, but

⁹⁸ *Judgment 140/2018, supra* note 31.

⁹⁹ Spain, *Law 39/2015, of 1 October, on the Common Administrative Procedure of Public Administrations*, 236 BOE, 2 October 2015.

¹⁰⁰ *Organic Law 7/2015, supra* note 39, arts 292-97.

¹⁰¹ Tribunal Supremo, [Supreme Court], Madrid, 17 July 2018, *STS 2747/2018* (2018), ES:TS:2018:2747 (Spain).

not for compliance with the UN Committee resolutions. It was strongly confirmed by the SSC in its mentioned Judgment in the *Hachuel case*.¹⁰² However, the UN Committee decisions may be obtained pending internal procedures. Experience shows us that those resolutions can require States to act in the processing of precautionary measures before the Committee or even in the processing of the trial on the merits.

Regarding CRC decisions on foreign unaccompanied minors (both in the precautionary phase and in the substantive resolution), it should be kept in mind that most of the Spanish petitions before the CRC respond to the lack of an adequate procedure for determining the age of children. Consequently, many of the Committee's rulings, which reject the charge of inadmissibility relating to non-exhaustion of domestic remedies, are issued when domestic procedures have not been completed. In many of the mentioned cases, the CRC issued interim measures which have not been complied with by national authorities. However, their compliance could have been challenged under the domestic procedure (non-concluded) as part of an interim measure piece that reproduced the Committee's reasoning. National courts are obliged to act in this way under Articles 10(2) and 96 *SC*. Compliance with CRC resolutions requiring action on inconclusive judicial proceedings could also be articulated through the filing of an incident of nullity of proceedings (e.g. Article 241 *OLJ*). In both the first and second cases, national courts might be tempted to argue that the UN Committee resolution is not legally binding. But we insist, the obligation to comply does exist. Moreover, there is nothing to prevent judicial bodies from adjusting their reasoning to the Committee's resolutions, even if those opinions are contrary to the domestic rule applicable to the specific case. Let us recall that the SCC already recognized in Article 96 *SC* the constitutional basis of a diffuse control of conventionality.

If we accept that compliance concerns the relationship of correspondence between legal regulations and State conduct,¹⁰³ in this case the relationship between human rights treaties and the behaviour of the Spanish State, we could also accept that there is a high level of compliance by Spain in relation to international standards. This conclusion is easily reached from the analysis of the Universal Periodic Review results, or the reports on compliance with each of the human rights treaties of universal and regional scope.¹⁰⁴

¹⁰² *Views, Communication No. 1381/2005*, CCPR, 90th Sess, UN Doc CCPR/C/90/D/1381/2005 (2007).

¹⁰³ Kal Raustiala & Anne-Marie Slaughter, "International Law, International Relations and Compliance" in Walter Carlsnaes, Thomas Risse & Beth Simmons, eds, *The Handbook of International Relations* (Sage Publications Ltd., 2002) at 539, online: <ssrn.com/abstract=347260>.

¹⁰⁴ In relation to the enforcement of ECtHR judgements see the information in: *Department for the execution of judgments of the European Court of Human rights*, online: Council of Europe <www.coe.int/en/web/execution>.

However, this paper shows that in our country, there is a problem of compliance regarding the UN human rights treaties; a problem that lies in the difficulty of making the resolutions of the UN Committees responsible for monitoring and following up on their implementation fully effective, particularly when they are declared in response to individual complaints. Compliance depends on a series of national (and not international) actors whose behaviour does not respond to the same logic as a State entity in the game of international relations.

Notwithstanding the above, we can see a line of connection between the behaviour of the executive, legislative and judicial State powers and the action of a State as an international actor. If there is no awareness among actors in international relations that compliance with specific rules is mandatory, it is challenging for such a perception to emerge in the national institutions in charge of articulating the specific measures of compliance with an international treaty. In Spain, that is the case of the Government, according to Article 97 SC. In any case, the difficulty is not insurmountable. As an example of this, we can recall some of the judicial decisions analyzed in this study, especially the Supreme Court's decision to grant financial compensation to Mrs González Carreño. But these are exceptional examples.

In a legal system where the Judiciary suffers from hyper-formalism, the lack of procedural mechanisms forcing executive effectiveness of individual decisions makes it difficult to comply with them and, consequently, with the treaties they interpret. From the perspective of international responsibility, the lack of compliance will be attributed to the State. Still, it cannot be attributed to the Government which personalizes the State behaviour in directing its international policy. This also occurs if the Legislative Power does not adjust domestic regulations to international requirements or if administrative authorities act according to the same hyper-formalistic rules as judges. Therefore, while compliance theories can explain some State behaviour, they cannot explain its complexity if they lose sight of how such a State behaviour is deconstructed inwardly, a response that is neither unique nor always consistent with its external projection. At the same time, these same theories cannot ignore the undeniable fact that States do not respond equally to compliance with all treaty control mechanisms, nor are all treaties recognized as having the same legitimacy nor are their decisions recognized as having the same binding force.¹⁰⁵ In short, there is a crucial institutional dimension to the analysis of State behaviour that cannot be ignored.

¹⁰⁵ Reflect in this sense on the change of status of Humanism Right Council: Surya P Suedí, *The effectiveness of the UN Human Rights System: Reform and the Judicialisation of Human Rights* (New York: Routledge, 2017) at 236.