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LEGAL ISSUES RELATED TO THE REPORTS OF THE UNITED NATIONS COMMITTEES. LEGAL EFFECTS IN SPAIN

SUMMARY: 1. Introduction. – 2. The relevance of General Comments. – 3. The legal effectiveness of the Committees' reports. – 4. The application of the Committees' reports in Spain. – 5. Conclusions.

1. *Introduction*

The United Nations (UN) Committees in charge of supervising compliance with the human rights treaties under the auspices of this organization have different control instruments. Among them, as E.J. Martínez Pérez points out, the reports that conclude the individual communications procedure «represent the greatest interference in the internal sphere of states, as the supervisory bodies can determine the violation of their international obligations»[1].

In recent years, there has been a significant increase in academic interest in the reports with which these bodies respond to individual communications submitted to them. In Spain, this procedure has sparked intense academic debate due to the number of communications filed against it, with reasons including the lack of success of complaints in the domestic sphere, the introduction of the special constitutional significance as a requirement for filing an amparo appeal, civil society's growing awareness of the importance of defending human rights, and the potential of strategic litigation. Against this backdrop, it is not surprising that the Committees are emerging as an alternative mechanism to the jurisdiction of the European Court of Human Rights (hereinafter, ECtHR).

The admissibility and analysis of individual communications submitted by individuals to the Committees is an optional mechanism for monitoring compliance with the treaty. The percentage of States that have accepted this possibility varies from treaty to treaty[2]. The difference

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[1] E.J. MARTÍNEZ PÉREZ, *UN treaty bodies as a limited alternative for safeguarding human rights in Spain*, in *Cuadernos de derecho transnacional*, 2023, pp. 517 y ss. The aforementioned text can be found in page 523.

[2] The one with the most States parties is the Optional Protocol to the International Covenant on Civil and Political Rights (117) and the one with the lowest number of States parties is the Optional Protocol to the

between the number of States parties to the treaty and the protocols (or in the particular acceptance of this possibility in the case of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) is evidence of a lack of commitment to the monitoring of compliance with internationally acquired obligations by an independent body.

The reports of the UN Committees are not sentences[3] as they are not issued by a judicial body, as the Spanish courts have repeatedly reminded us[4]. Nevertheless, due to the relevance of the author body, they can be considered quasi-judicial bodies that apply a procedure similar to that of the courts. The procedural rules applicable to each Committee, while not identical, are approximate and are contained in their respective internal rules of procedure.

In this scenario, some legal problems arise, in the following pages we will focus on: 1) the legal value of the general observations on which the committees usually base their decisions; 2) the legal effectiveness of the reports from the perspective of international law; and, 3) the application of the Committees' reports in Spain. After that, I will end with the usual concluding section. In order to carry out this study, the methodology of applied legal science has been used, with an empirical and interdisciplinary perspective, from international law and domestic law, sometimes descriptive and sometimes exploratory insofar as the evolution of the work required it.

2. *The relevance of General Comments*

The Committees often use their general comments as authoritative interpretations of the treaties whose compliance they are supposed to ensure. The competence of these bodies to interpret the content of the human rights treaties under which they are established is

International Covenant on Economic, Social and Cultural Rights (26). In between are the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (115), the Optional Protocol to the Convention on the Rights of Persons with Disabilities (104), the Optional Protocol to the Convention against Torture and Inhuman or Degrading Treatment or Punishment (91) and the Optional Protocol to the Convention on the Rights of the Child (50). Data verified on 11 March 2024 from: https://indicators.ohchr.org

[3] Against the previous opinion J. CARDONA LLORENS, *The legal value of acts adopted by human rights treaty bodies: the need to distinguish between different acts and between international and domestic legal effects*, in E. J. MARTINEZ PÉREZ (coord.), *Cuestiones actuales en torno a la aplicación de normas y obligaciones en materia de derechos humanos: diálogo con la práctica y otras disciplinas jurídicas*, Valencia, 2022, from page 117. The text can be found in the pages from 129. Despite this similarity, according to C. MONTESINOS PADILLA, *El cumplimiento de los dictámenes de los Comités de Naciones Unidas en España ¿imposibilidad jurídica o falta de voluntad política?*, in *Revista Española de Derecho Constitucional,* nº 127, 2023, from page 49, p. 53, «there is a fairly generalised conviction that the degree of demand for compliance with treaties provided with a jurisdictional system of guarantee is not equally intense as that which is deduced from treaties whose control is entrusted not to an international court, but to a body made up of independent experts».

[4] For example, in Judgment 116/2006 of the First Chamber of the Constitutional Court, of 24 April, in its fourth Legal Basis, recalling previous jurisprudence, it stated «...that the 'observations' which the Committee issues in the form of a report are not judicial decisions, since the Committee does not have jurisdictional powers (as is clearly deduced from the reading of arts. 41 and 42 of the Covenant), and its Reports cannot constitute the authentic interpretation of the Covenant, since at no time does neither the Covenant nor the Optional Protocol grant it such competence». Also the Supreme Court, among others in Judgment 1/2020 of 12 February. In the same sense, the Council of State in its Report 318/2015, of 11 June 2015, regarding the extraordinary appeal for review formulated by Ángela González Carreño.

beyond doubt. The question is whether this authoritative interpretation can be made through general comments or only in the instruments to which States have consented[5].

It should be reminded that these are documents clarifying the content of the treaties that are prepared by the respective Committees, with the competence attributed to them by the rules of procedure or internal rules of procedure of each of these bodies. In the case of the Human Rights Committee, they are defined by their purpose, which is «to assist States parties in fulfilling their obligations under the Covenant and its Optional Protocols». The Committee itself is competent to «decide to prepare and adopt general comments on specific subjects relating to particular aspects of the Covenant and the Protocols thereto»[6].

The participation of the States parties in the procedure established for its drafting is very limited; the text is only sent to them after its adoption at first reading «for their comments», in a kind of information and allegations procedure, which the Committee may consider at second reading[7]. It is clear that the opinions transmitted by the States have no impact on the final result of the text, although practice shows that on some important occasions they have had an effect. This is the case of General Comment No. 33 of the Human Rights Committee (Obligations of States Parties to the Optional Protocol to the Covenant on Civil and Political Rights[8]), which sought to incorporate an express reference to Article 31.3.b of the Vienna Convention on the Law of Treaties, with the aim of expressly considering the general comments as «subsequent practice in the application of the treaty by which the agreement of the parties regarding the interpretation of the treaty is established», the angry reaction of the States Parties to the Protocol led to the removal of the reference in question[9].

Moreover, the regulations incorporating the general comments do not indicate the legal value of these documents whose purpose is to "assist" States. Despite the fact that the procedure

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[5] Article 21 of the Convention on the Elimination of All Forms of Discrimination against Women refers superficially to "general recommendations" in wording that can be interpreted as a reference to general comments.

[6] The transcribed text can be found in Rule 76(1) of the Rules of Procedure of the Human Rights Committee. Rule 65 of the Rules of Procedure of the Covenant on Economic, Social and Cultural Rights, Rule 77.1 of the Rules of Procedure of the Committee on the Rights of the Child and Rule 47 of the Committee on the Rights of Persons with Disabilities contain a substantively identical reference to the above. Rule 52 of the Rules of Procedure of the Committee on the Elimination of All Forms of Discrimination against Women, based on article 21.1 of the Convention, states that «the Committee may... make general recommendations addressed to States parties». Rule 74 of the Rules of Procedure of the Committee against Torture states «The Committee may prepare and adopt general comments on the provisions of the Convention with a view to promoting better implementation of the Convention or assisting States parties in fulfilling their obligations». Rule 56.1 of the Rules of Procedure of the Committee on Enforced Disappearances contains similar, though not formally identical, wording.

[7] This is Rule 76.4 of the Committee's Rules of Procedure, however, not all Rules of Procedure incorporate a provision similar to this. While all will incorporate the General Comments in their annual report to the General Assembly, not all contain a procedure for their adoption involving States. In the case of the Rules of Procedure of the Committee against Torture, it is the same body that decides whether to circulate the draft comment «to United Nations human rights mechanisms, United Nations special procedures, United Nations bodies and specialised agencies, national human rights institutions and non-governmental organisations, as well as individual experts, for comment». Again, however, the submissions received will be for information purposes.

[8] The final version can be found and read at: https://documents.un.org/doc/undoc/gen/g09/432/66/pdf/g0943266.pdf?token=5n6EZuO00pbdzs3f9K&fe=true.

[9] See the commentary to the second paragraph of the thirteenth conclusion in Draft Conclusions on subsequent agreement and practice in the context of treaty interpretation, Report of the International Law Commission on the work of its seventieth session, in *Anuario de la Comisión de Derecho Internacional,* 2018, vol. II (2), parágrafo 10 in fine, page 91.

for their adoption differs considerably from that of the treaties, the Committees have used these instruments as if they were a kind of modification of the conventional text. The Garzón case serves to illustrate this assertion, since one of the foundations of the communication is to be found in Article 14 of the Covenant on Civil and Political Rights, the fifth paragraph of which states that «Everyone convicted of a crime shall have the right to have his conviction and sentence reviewed by a higher tribunal according to law».

In the Spanish legal system there is a double instance except in the case of persons who, like Baltasar Garzón, had been tried by the Supreme Court, so that a second ruling by the highest court is not appropriate. The defendant State's interpretation is that the fifth paragraph of Article 14 of the Covenant refers to the State system ("as prescribed by law"), which incorporates the exception derived from the immunity of a former judge of the Audiencia Nacional. Despite this, the Committee, on the basis of General Comment 32, concludes that this article has been violated, since this document establishes that «When the highest court of a country acts as first and only instance, the absence of any right to review by a higher court is not compensated by the fact of having been tried by the highest court of the State party; on the contrary, such a system is incompatible with the Covenant, unless the State party concerned has made a reservation to that effect».[10]

However, Spanish legislation, in accordance with the jurisprudence of the Constitutional Court and the ECtHR, incorporates the exception of this precise case.[11].This means that the same behaviour, according to the Committee, violates human rights, but not according to the ECtHR in accordance therewith. The absence of institutional dialogue between the Committee and the ECtHR leads to the feared fragmentation on this point, which favours *forum shopping*.

From an international legal perspective, the effectiveness of the Committees' General Comments is not clear from the jurisprudence of the International Court of Justice (ICJ or the Court). In the case of *Ahmadou Sadio Diallo*, Guinea alleges a violation by the Democratic Republic of Congo of Article 13 of the International Covenant on Civil and Political Rights, which refers to the possibility of expelling foreign nationals exclusively as a consequence of a decision taken in accordance with the law. In order to be able to assess whether we are in this situation, the Court states that such an expulsion will only be lawful from an international perspective if the decision has been taken in application of domestic law and only if it is in accordance with the requirements of the Covenant, so that the decision cannot be arbitrary. The ICJ adopts this interpretation on the basis of decisions of the Human Rights Committee, specifically in a decision in response to an individual communication and in its General Comment no. 15, in which it develops the article referred to with regard to the situation of aliens in accordance with the Covenant[12].

Furthermore, in order to remove any doubt as to its independence with regard to the interpretation of the rights contained in the Covenants or in other treaties containing the creation of Committees to monitor compliance with them, it reiterates that there is no obligation whatsoever to endorse the interpretations of the Human Rights Committee. Despite this «it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal

[10] General Comment No. 32 can be found at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FGC%2F32&Lang=es.

[11] This is Article 2(2) of Protocol 7 to the European Convention on Human Rights.

[12] See in this regard para. 66 of the Judgment of 30 November 2010 referring to para. 9.3 of the Decision adopted in respect of Communication No 58/1979 in Maroufidou v. Sweden.

security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled».[13]

In accordance with the above, we might think that when one of the grounds for a claim is the violation of one of the articles of the treaties that have bodies in charge of supervising compliance with them, the ICJ will assume their interpretation, despite its functional autonomy. However, it would not take long to realize that this is not the case, or at least not in all cases, as in the case between Qatar and the United Arab Emirates[14], the plaintiff alleged a violation of article 1.1 of the Convention against all forms of racial discrimination and, specifically, the scope of the concept of "national origin". Despite what was stated in the *Ahmadou Sadio Diallo* case, the Court did not consider General Comment XXX of the Committee against Racial Discrimination which deals with the issue. Thus, the ICJ interprets the aforementioned provision by applying the general criteria established for this purpose in the 1969 Vienna Convention without taking into account the aforementioned Comment, or giving any reasons for this omission.

Moreover, there are several elements to be taken into account in support of the Court's decision in the latter case: first, as noted above, the Committees are quasi-judicial bodies[15]; second, the diffuse effectiveness that the treaties endow their decisions with. Be that as it may, if the principal judicial organ so rules on the effects of UN Committee interpretations, the question must be: how are states to act?

3. *The legal effectiveness of the Committees' reports.*

In this section we will consider two distinct issues: the first is the declaratory nature of the Committees' reports and the second is that they are not directly enforceable. It is clear that the reports declare the non-fulfilment (or not) of some of the obligations voluntarily undertaken by States contained in an international treaty to which it has the status of a party.

With regard to the first question, whether, from an international perspective, the reports are legally binding on the States parties to the treaty instruments from which the competence of these bodies to hear individual communications derives, the ILC has stated that the «relevance of the pronouncement of a treaty body of experts for the interpretation of a treaty depends on the applicable rules of the treaty»[16]. A statement that follows from legal logic and the principle *pacta sunt servanda*. The problem in the case of the reports is that the human rights treaties to which we refer and the optional protocols lack express provisions regarding the legal value of the reports they issue in response to individual communications. Some remain silent[17]; others contain a kind of follow-up mechanism, but

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[13] The transcribed paragraph is found in paragraph 66 of the Judgment indicated in the previous footnote.

[14] On the matter, see the investigation by A. GARRIDO MUÑOZ, A possible Trojan horse in CERD: the notion of 'national origin' and the limits to the ICJ's competence *ratione materiae* in matters of racial discrimination, in S. TORRECUADRADA, C. ESPÓSITO (eds), *Los desafíos de la Corte Internacional de Justicia frente a derecho humanos: II Jornadas sobre los nuevos retos de la Corte Internacional de Justicia,* Madrid, 2022, p. 61 y ss.

[15] On the matter J. CARDONA LLORENS, *The legal value of acts adopted by human rights treaty bodies*, cit., p. 117. The main ideas of the text can be found in the pages 129 and following.

[16] This is the second paragraph of conclusion 13 of *Subsequent agreements and subsequent practice in relation to the interpretation of treaties*, Report of the International Law Commission on the work of its 70th session, p. 27.

[17] Article 14 of the Convention against Racial Discrimination, the Optional Protocol to the International Covenant on Civil and Political Rights or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Article 22(7)) follow this model.

without pronouncing themselves on the issue of concern[18]; and a third group merely indicate that States parties to the treaty and the Optional Protocol shall give «due consideration to the Views of the Committee, as well as to its recommendations, if any, and shall submit to the Committee, within six months, a written response, including information on any action taken in the light of the Views and recommendations of the Committee»[19].

The ILC has also answered in the negative to the question whether these acts could be considered as subsequent agreement or practice for the purposes of Article 31(3)(a) or (b) of the 1969 Vienna Convention. The answer was due to the absence of an agreement of the States Parties to this effect or a practice from which agreement on this point could be inferred. The absence of these presuppositions was confirmed by the reaction of the States parties to the Covenant on Civil and Political Rights to a draft proposal of the Human Rights Committee, according to which their own "general body of jurisprudence", or the acquiescence of States to that jurisprudence, would constitute subsequent practice under Article 31(3b)"[20].

Knowing the characteristics of international law, it cannot be ruled out that State practice in the sense indicated in a Committee's pronouncement could generate such an effect if State practice conforms to the body's report, the latter acting as a «catalyst for subsequent practice by States parties»[21]. The example given by the ILC to illustrate this statement is General Recommendation 35 of the Committee on the Elimination of Discrimination against Women[22]. Since General Recommendation 19 proclaimed that «[V]iolence against women is a form of discrimination»[23], the practice of Member States has conformed to this statement, so that the Recommendation is understood to express opinio iuris, coupled with subsequent state practice has succeeded in creating a principle of customary international law[24].

For its part, the Human Rights Committee pronounced on the nature of these bodies in its General Comment No. 33 on the obligations of States parties to the Optional Protocol to the International Covenant on Civil and Political Rights, stating «While the function of the Human Rights Committee in considering individual communications is not, as such, that of a judicial body, the Views issued by the Committee under the Optional Protocol exhibit some of the principal characteristics of a judicial decision»[25]. Few doubts remain in this respect if the Committee itself expresses it in this way.

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18 Article 9 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women.

19 Article 9(2) of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. Substantively identical wording is contained in Article 11(1) of the Optional Protocol to the Convention on the Rights of the Child on the communications procedure, as well as in Article 7 of the Optional Protocol to the Convention on the Rights of Persons with Disabilities.

20 Draft conclusions on subsequent agreements and practice in the context of the interpretation ... cit. supra at note 9, page 90, para. 9.

21 Id. supra note, p. 104, para. 17.

22 This is the 2017 General Recommendation on gender-based violence against women, which updates the previous Recommendation 19.

23 General Recommendation 19 was adopted at the Committee's eleventh session (1992). The statement is found in the first paragraph.

24 This idea is to be found in the Draft Conclusions on subsequent agreements and practice in the context of interpretation … cit. supra at note 9, note 626, p. 104.

25 Page 2, parr 11. Can be found in: https://documents.un.org/doc/undoc/gen/g09/432/66/pdf/g0943266.pdf?token=5n6EZuO00pbdzs3f9K&fe=true.

From an academic perspective, C. Gutiérrez Espada considers the reports to be a "kind of jurisprudence" or "a guide" of unquestionable «interest for States parties and their organs»[26], as they are issued by bodies «for the supervision and control of the conduct of States parties in relation to the rights recognized» in the treaties that create them[27], C. Escobar Hernandez considers that making the reports legally binding would distort their very nature and cause interpretative problems "with unforeseeable consequences"[28].

In any case, let us agree that the reports must have a legal value to be considered beyond the implicit interpretative value. For with this interpretative value, the victim of the breach declared by the Committee is not compensated, which places us before the perpetuation of the harm to the victim of a breach of human rights. This brings us to the second aspect indicated at the beginning of this section: the execution of the reports. There are those who defend their immediate enforceability and enforceability[29]. J. Cardona believes that the reports contain an obligation of result, and therefore, although he considers them binding, States have a margin of appreciation to adopt the means and forms to make them effective[30]. But this margin will never be so wide as to allow them to disengage from achieving the result contained therein.

Finally, comparative law does not help us to resolve this question, since, according to the Report of the United Nations High Commissioner for Human Rights, K. Fox Principi on the *Implementation of decisions under treaty body complaints procedures - Do states comply? How do they do it* [31], few States have effective legal mechanisms in place to adequately consider the reports of the committees. This is evidenced by the fact that, following the Supreme Court's 2018 ruling, the United Nations headlined the news as follow «Spain sets precedent in international human rights law, say UN women's rights experts»[32].

4. *The application of the Committees' reports in Spain.*

Establishing the effectiveness of the Committees' decisions in the domestic legal systems of States parties is complex, as evidenced by Spanish jurisprudence. J. Cardona

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[26] C. GUTIÉRREZ ESPADA, *The application in Spain of the reports of international committees: the STS 1263/2018, an important milestone*, in *Cuadernos de derecho transnacional*, 2018, pp. 836.

[27] C. ESCOBAR HERNÁNDEZ, *On the problematic determination of the internal legal effects of the "reports" adopted by Human Rights Committees: some reflections in the light of the STS 1263/2018 of 17 July*, in *Revista Española de Derecho Internacional*, 2019, pp. 241, the full text can be found in page 246.

[28] *Ibid.*, p. 250.

[29] C. VILLAN DURAN, *The legal value of the decisions of the United Nations human rights treaty bodies*, in C. FERNÁNDEZ DE CASADEVANTE ROMANÍ (coord.,) *Los efectos jurídicos en España de las decisiones de los órganos internacionales de control en materia de derechos humanos de naturaleza no jurisdiccional*, Madrid, 2019, pp. 99.

[30] This is based on the same reports which systematically request States to report in writing to the relevant Committee on actions taken «in the light of the present Views and the Committee's recommendations». The transcribed text is from the report adopted on 28 August 2020 by the Committee on the Rights of Persons with Disabilities in response to Communication No. 41/2017.

[31] As can be seen in https://hr.un.org/sites/hr.un.org/files/editors/u4492/Implementation%20of%20decisions%20under%20treaty%20body%20complaints%20procedures%20-%20Do%20states%20comply%20-%202015%20Sabbatical%20-%20Kate%20Fox.pdf

[32] See in: España sienta un precedente en el derecho internacional de los derechos humanos, afirman expertos de las Naciones Unidas en los derechos de la mujer | OHCHR.

Llorens argues in favour of considering reports as judgments with two ideas: firstly, that there are no substantive differences between the actions of the Committees and the human rights courts when they exercise their competence to examine individual communications; secondly, that the international system is not very formalistic, so that "no special importance can be attributed" to the name used to identify the body (Committee and not Court) or the act (Report and not Judgment). Despite this, Spanish jurisprudence has been inflexible on the matter.

In order to make this section clearer, I will split it into three sections: the first will be the state of affairs in Spain; the second, the mechanisms available to the Spanish legal system to implement the reports; and the third, the jurisprudential developments that have taken place.

With regard to the first point, the state of affairs, we must begin by indicating that Spain is a party to all the instruments conferring competence on the United Nations [33], human rights Committees, with the exception of the one on the rights of migrant workers and members of their families, as it is not a party to the Convention in the implementation of which this body is created. A second element to consider is that it has received reports - some of them highly publicised - in which different UN human rights Committees (such as the Committee on the Rights of the Child[34], the Committee on Economic, Social and Cultural Rights[35], the Committee against Discrimination against Persons with Disabilities[36], the Human Rights Committee[37], the Committee on the Elimination of All Forms of Discrimination against Women[38] and the Committee against Torture[39]) identified human rights violations attributable to the State.

Most serious is the repetition of rights that are violated. In the case, for example, of the Committee on the Rights of the Child, most of the violations focus on the treatment of unaccompanied migrant minors and, more specifically, on the determination of the age of children entering the national territory through the southern border[40]. This border is particularly permeable in the autonomous cities in North Africa (Ceuta and Melilla), which are accessed by people coming from that continent through places other than the ports set up for this purpose[41]. When in doubt about the age of those who confess to being minors,

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33 They accepted the individual communications procedure provided for in Article 31 of the International Convention for the Protection of All Persons from Enforced Disappearance.

34 For example, the Report adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of communication No. 63/2018, C.O.C, CRC/C/86/D/63/2018.

35 Among others, the Report adopted by the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on Communication No. 5/2015, with Mohamed Ben Djazia and Naouel Bellili, E/C.12/61/D/5/2015.

36 Report adopted by the Committee under article 5 of the Optional Protocol, in respect of communication No. 41/2017, with Rubén Calleja Loma and Alejandro Calleja Lucas as rapporteurs, CRPD/C/23/D/41/2017.

37 For example, the report adopted by the Committee under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 2844/2016, which had Baltasar Garzón as a petitioner, CCPR/C/132/D/2844/2016.

38 The Report adopted by the Committee at its fifty-eighth session (30 June-18 July 2014) Communication No. 47/2012, is the case of Ángela González Carreño, represented by Women's Link Worldwide, CEDAW/C/58/D/47/2012.

39 This is the Report of the Committee against Torture under Article 22(7) of the Convention, in response to Communication No. 59/1996, adopted on 14 May 1998.

40 Except the ones regarding family law. See in: https://juris.ohchr.org/SearchResult.

41 On the access of people to Ceuta and Melilla and hot returns, see the ECtHR Pilot Judgment of 13 February 2020, in the case of N.D. and N.T. v. Spain, cases 8675/15 and 8697/15.

the Spanish authorities carry out more or less invasive tests (osteometric or other) of dubious effectiveness. The Committee has indicated that priority should be given to the right of the child to be heard, which is not adequately considered by the authorities[42].

As far as the Committee on Economic, Social and Cultural Rights is concerned, most of the reports that conclude with Spain's non-compliance deal with the right to housing and, more specifically, with evictions without providing alternative accommodation to families who were evicted from what had been their homes, either due to non-payment or due to the conclusion of an eviction procedure as a result of an occupation[43]. From a constitutional perspective, this situation raises a problem when it has to be balanced with the right to private property, because although both are found in the Spanish Constitution, neither of them is placed among the fundamental rights and public freedoms formulated in the text, since the right to housing is configured as a principle (Article 47), while the right to private property is endowed with the nature of a right (Article 33)[44].

The second point mentioned above concerns the mechanisms available to the Spanish legal system for applying the reports. In application of the exegetical mandate contained in Article 10.2 of the Spanish Constitution, we are faced with an interpretative parameter of the fundamental rights contained therein[45]. Although this precept refers to «the Universal Declaration of Human Rights and the international treaties and agreements on the same matters ratified by Spain», the Constitutional Court, from its early jurisprudence, understood that the logical and evident consequence of a human rights treaty establishing a body in charge of its interpretation and supervision cannot be other than to consider its jurisprudence for the purposes of the treaty[46].

Furthermore, Article 96.2 of the Spanish Constitution must be considered, according to which international treaties become part of the Spanish legal system when they are officially published[47]. Thus, if the treaties in question incorporated the legal effects of the reports issued by the Committees in response to individual communications, the Spanish courts would not have had to rule on the matter.

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42 For example, see the Report adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of communication No. 27/2017, submitted by R.K. represented by the non-governmental organization Fundación Raíces. CRC/C/82/D/27/2017.

43 See for example the report adopted by the Committee under the Optional Protocol to the Covenant on Economic, Social and Cultural Rights on communication No. 134/2019 of 27 February 2023. On the matter see J.C. BENITO SÁNCHEZ, *The Committee on ESC rights' pronouncements on the right to housing concerning Spain. Jurisprudential and legislative responses*, in *Lex Social,* 2019, p. 583 ff.

44 The right to housing is located in the third section "Guiding principles of economic and social policy", while the right to private property is proclaimed in the second section "Rights and duties of citizens", within the second chapter "Rights and freedoms", in the first title "Fundamental rights and duties". The right to property is even endowed with a guarantee that the right to housing lacks, since the second paragraph of Article 33 contains the following wording «No one may be deprived of their property and rights except for justified reasons of public utility or social interest, by means of the corresponding compensation and in accordance with the provisions of the law».

45 Article 10.2 of the Constitution states «2. The norms relating to the fundamental rights and freedoms recognised by the Constitution shall be interpreted in accordance with the Universal Declaration of Human Rights and the international treaties and agreements on the same subjects ratified by Spain».

46 The argumentation contained in the text refers to the ECtHR and can be found in the third legal basis of Judgement 245/1991, of 16 December in Appeal for protection 1005/1990. Bultó case, but it is applicable to the present case.

47 El artículo 23 de la Ley 25/2014, de Tratados y otros acuerdos internacionales, de 27 de noviembre, esa publicación oficial será en el Boletín Oficial del Estado.

In its reports, the Council of State, after affirming the absence of legally binding effects of the reports, has pointed out that the international commitments assumed by Spain in the area of fundamental rights impose the adoption of measures derived from the internationally assumed commitments[48]. This affirmation derives from the good faith respect of the reports, since, although their non-observance does not generate international responsibility, it declares the violation of the precept whose non-observance is based on non-compliance, a non-compliance that does generate such responsibility.

The evolution of case law in Spain regarding the application of the reports has been unequivocal: the courts have clung to their non-binding nature to declare their non-application until Judgment 1263/2018, of 17 July in the case of *Ángela González Carreño*[49], in which a turning point is identified[50]. The factual assumption concerns vicarious violence: ex-husband who decides to perpetuate the harm to his ex-wife by murdering their daughter and then committing suicide. The mother claims patrimonial liability of the State due to the abnormal functioning of the administration of justice, since the interested party had denounced the physical and psychological violence of which she had been a victim, having filed more than thirty complaints in two years and repeatedly requested restraining orders from the father with respect to the plaintiff and her daughter[51]. In 2002, however, unsupervised visits with the minor were authorised. On 24 April 2003, at the conclusion of a court hearing regarding the use of the family home, her ex-husband "told her that he would take away what she loved most[52]". That was the last day Angela saw her daughter alive.

The Committee affirms the violation of articles 2, 5 and 16 of the Convention on the Elimination of All Forms of Discrimination against Women, and the interested party proceeds to claim pecuniary responsibility from the Ministry of Justice, after which she initiates a contentious procedure before the National High Court, the refusal of which she appeals in cassation before the Supreme Court[53]. The latter proclaimed that the consequence

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48 It is the Report 431/2007, from April 26th 2007. It can be found in: https://www.boe.es/buscar/doc.php?id=CE-D-2007-431. This content has been reiterated in subsequent reports, including 526/10 of 29 April, 1955/2010 of 2 December and 425/2017 of 28 September. The fifth legal basis of Judgment STC 116/2006, of 26 May, stresses this idea, according to which the reports have a legal value that «…is not binding for the purposes we are now examining, they do not impose an obligation and are not enforceable, which does not mean that they do not produce any legal consequences».

49 See in: https://www.ohchr.org/es/press-releases/2018/11/spain-sets-milestone-international-human-rights-law-say-un-womens-rights.

50 This cannot be interpreted as absolute disregard for the reports, since legislative amendments have been made along the lines indicated in them. This is the case, among others, of Organic Law 19/2003, of 23 December, amending the Organic Law of the Judiciary, which incorporated the right to a second hearing based on the violations of Article 14.5 of the International Covenant on Civil and Political Rights, declared by the reports of the Human Rights Committee, is just one of the examples of this.

51 Paragraph 2.5 from the Committee's Report.

52 The transcribed text is found in paragraph 2.16 of the report of the Committee on the Elimination of All Forms of Discrimination against Women of 16 July 2014, in response to Communication No. 47/2012.

53 The report of the Council of State (318/2015, of 11 June 2015, https://www.boe.es/buscar/doc.php?id=CE-D-2015-318) stresses the lack of binding legal force, that "sort of common slogan", as A.G. LÓPEZ MARTÍN, *La doctrina del Consejo de Estado sobre los efectos jurídicos de los dictámenes de los comités de derechos humanos de las Naciones Unidas*, in C. FERNÁNDEZ DE CASADEVANTE ROMANÍ (coord..), *Los efectos jurídicos en España de las decisiones de los órganos internacionales de control en materia de derechos humanos de naturaleza no jurisdiccional*, Madrid, 2019, pp. 171 et seq. The transcribed reference can be found on p.186. On the case of Ángela Rodríguez Carreño there is a varied academic bibliography, among which can be found V. BOU FRANCH, *El cumplimiento en España de las sentencias y dictámenes de los órganos de control del cumplimiento de los*

of refusing to apply the Committee's report was to perpetuate the violation of the victim's constitutionally recognised rights[54].

The Supreme Court, in its Judgment, incorporates important content with respect to this Report, as it states that in this case the Report «must be considered, in this case and with its particularities, as a valid basis for formulating a claim for State liability, apart from the previous one that has already been denied[55]». Of course, this is not a generic statement applicable to other cases, since it is specific to the report in question. This is despite the fact that the reasoning used by the High Court is applicable to any other claim for State liability based on a report of a United Nations Committee.

However, after this ruling, we returned to the previous situation, indicating in Circular 1/2020 of the State Attorney General's Office in relation to the 2018 ruling that «The ruling appears to respond to an attempt to satisfy an assumption of material justice by departing not only from the case law on the State's financial liability, as it has to derogate from the consolidated case law to accommodate the claim, but also from the consolidated case law on the nature of the reports of the United Nations committees»[56]. This assertion has been proven by subsequent case law. The rejection was mainly for two reasons: firstly, because of the procedural route used to do so; secondly, because it was understood that the requirements that motivated the 2018 Judgment were not met.

As far as the first reason is concerned, the lack of a specific means of enforcement in the Spanish legal system does not mean that it is impossible to resort to the general ones. Enforcement of the reports has been attempted on several occasions through the review procedure without success due to its exceptional nature, which is only possible in the cases expressly provided for in the Law (which do not include the reports of the Committees[57]). Due to their particular characteristics, extensive application is not plausible, which is why the application was rejected[58]. This possibility has also been ruled out on the grounds that a

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derechos humanos establecidos en tratados internacionales, comentario a la STS núm. 2747/2018, de 17 de julio (ROJ: 2747/2018), in *Revista Boliviana de Derecho*, 2019, pp. 434 et seq.

54 In the fourth Legal Ground 3 of the aforementioned Judgment, the precepts of the Spanish Constitution that have been violated and their correspondence with those of the Convention on the Elimination of All Forms of Discrimination against Women, to which Spain is a party, are indicated.

55 This is the seventh Legal Basis of Ruling 1283/2018, of 17 July. The affirmation of the text is accompanied by the following reasoning «this is because it accredits, together with the facts that emerge from the administrative file (i) the existence of a real and effective injury or damage, individualised in the person of the appellant, which she was not obliged to bear, and which was produced by the lack of protection that she has endured for years in a clear situation of discrimination, before and after the death of her daughter, a fact that in itself cannot be assessed. It is a damage that is not integrated by the value judgement of the international body, even if this serves to establish it on the basis of the facts that occurred, which is still in force as the situation of lack of protection of rights has not been compensated and which, furthermore, is economically assessable as it is represented (not only by the death of her daughter, which is also the case, but also) by the damages of all kinds that she has had to bear as a consequence of being a victim of violence against women, which is undoubtedly the most serious case of inequality of women in today's society, and never obtaining protection from the Administration and effective judicial protection; (ii) an abnormal functioning of the Administration of Justice, as an integral part of the State to which it imputes negligent action in the protection of the appellant's rights, which we consider to be concurrent; (iii) the evident link between the anti-juridical injury and the actions of the State, of which the Administration of Justice forms part».

56 It is the Circular 1/2020, from the State Attorney from October 22nd 2020, that can be found in: https://www.boe.es/buscar/abrir_abogacia.php?id=ANALES_20_0025.pdf, p. 299.

57 This is the case of Ruling 401/2020, of 12 February, in which the Third Chamber of the Supreme Court.

58 Title VI of the Law on Civil Procedure, Title III of the Law on Criminal Procedure, Title V of the Law on Common Administrative Procedure for Public Administrations.

report of the Committee on Civil and Political Rights is not a new fact and, as such, cannot be the basis for the appeal[59].

An exceptional case in this regard is the report issued by the Committee on Economic, Social and Cultural Rights in response to the communication of *Mohamed Ben Djazia*[60]. In this case, the Supreme Court found a violation of due process, since the entry into the home took place "without a prior assessment of the circumstances", nor had it taken into account the presence of underage children whose rights had not been observed. Consequently, he ordered that the proceedings be taken back to the appropriate procedural moment[61].

More recently, the same High Court, in relation to a report by the Committee against Torture, established that, unlike the 2018 Judgment, in the case in question, this body had ruled on facts whose falsity was discovered *a posteriori* (the physical damage alleged by the complainant was not visualised in the security camera footage), so that the requirements for pecuniary liability are not met. Therefore, given that the latter has a given the reparatory nature of the liability in the absence of damage caused by the Administration, there is no room for pecuniary liability, since the nature of the figure cannot be altered as a result of a report from the Committee[62].

The last judgment handed down so far by the Supreme Court was at the end of 2023, in the case of Rubén Calleja, a child with Down's syndrome who the State did not send to an integration school. His parents decided to educate him at home, for which they were subject to criminal proceedings in which they were accused of abandoning the child. The Committee on the Rights of Persons with Disabilities declared that the Spanish State had violated several provisions of the Convention (specifically articles 7, 15, 17, 23 and 24). In this case, the Supreme Court establishes the obligation to comply with the reports of this Committee', thus confirming the doctrine established by the Chamber in the 2018 judgment. The second noteworthy element is that it confirms the State's claim for patrimonial liability as a means of doing so[63].

This is a different ruling from that contained in the 2018 judgment, because while in that case the Supreme Court concluded by indicating identical reparation to that established in the Committee's report, without the need to resort to patrimonial responsibility, on this occasion, the appeal is upheld and the previous judgment is revoked so that the court can proceed to study the merits of the case[64]. As a result of this latest judgment, the panorama seems to be becoming clearer with regard to the application of the reports of the Committees, which is great news for human rights defenders.

5. *Conclusions.*

[59] This is Order 8958/2001, of 14 December, in relation to the report of the Human Rights Committee in response to communication 701/1996, Cesario Gómez Vázquez v. Spain, 11 August 2000. The same argument is used in Order 9021/2002, 25 July 2002, in relation to the report of the Human Rights Committee in response to Communication 526/1993, Michael and Brian Hill v. Spain, 23 June 1997.

[60] The Committee pronounced itself on Communication No. 5/2015 of 20 June. Document E/C.12/61/D/5/2015.

[61] Supreme Court Judgment No. 1797/2017, p. 14.

[62] Es el Fundamento Jurídico quinto de la Sentencia de la Sala de lo Contencioso-Administrativo del Tribunal Supremo 2842/2023, de 16 de junio de 2023.

[63] Es el fundamento jurídico cuarto de la Sentencia 5520/2023, de la Sala de lo contencioso del tribunal Supremo, de 29 de noviembre de 2023.

[64] Fundamento Jurídico noveno Sentencia 5520/2023.

The fitting of the reports of the UN Committees into domestic law is complicated. Moreover, an inter-institutional dialogue has to be established between the bodies in charge of interpreting human rights in order to prevent divergent opinions from causing the feared fragmentation. For example, we have the Garzón case or the Rubén Calleja case, which had been rejected by the single judge of the ECtHR. It is essential to provide human rights with the best and most coherent interpretation, but without these breakdowns.

For years, the courts have been asking the Spanish legislature to establish ways of enforcing the reports of the Committees in order to provide us with greater legal certainty both for the persons who make the communications and for the courts themselves, which are struggling with a welter of diverse jurisprudence. Let us hope that a positive response to this request materialises and that we do not have to wait more than a quarter of a century, as happened with the incorporation of ECtHR rulings as a prerequisite for review.

Although the Committees have procedures similar to those of the courts, it is undeniable for those who study their reports that they are more condescending than the ECtHR when it comes to assessing the admissibility requirements of individual communications, as we have seen in the case of Rubén Calleja, since in the face of the Court's inadmissibility, the then plaintiffs decided to turn to the Committee.

The Committees have the competence to interpret the treaties by virtue of which they are created, a competence that cannot extend to the modification of these treaty texts, and even less so to acts which, like the general observations, are not covered by them. The authoritative interpretation of the Committees derives from their nature as bodies for monitoring compliance with those treaty texts, a competence attributed to them in the treaties themselves: periodic reports and, where appropriate, reports.

The submission of these cases to the United Nations Human Rights Committees involves strategic litigation on the part of those who demand a solution to their specific case, seeking legislative or other changes in the society in which we live. This last aspect has had a certain presence in the Spanish legal system, given that some of the legislative modifications introduced have originated in reports or final reports by these bodies.

Let us hope that the legislature will show us the way forward in order to ensure easier application for those whose fundamental rights have been violated and who, after ten years of seeking redress, obtain a favourable ruling on their claims. We cannot allow these violations to continue.