# POSITIONING PAPER OF THE ESCR PLATFORM CONCERNING CIRCULAR 1/2020 OF THE SPANISH STATE'S LEGAL COUNSEL, NOTE COMMUNICATION ON "THE LEGAL STATUS OF THE RESOLUTIONS ISSUED BY THE HUMAN RIGHTS TREATY BODIES OF THE UNITED NATIONS" of 22nd October 2020.

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## I.- International Human Rights Law vs. Public International Law: a New Paradigm

The starting point for an analysis of the legal value of the resolutions of the Human Rights Treaty Bodies must be seen in the United Nations human rights protection system, its development, and evolution. **A set of rules that can be identified as an autonomous legal subsystem or with characteristics that distinguish it from classic public international law**. Features of its own that have a significant impact on the conception and basis of human rights obligations.

The proclamation of the Universal Declaration of Human Rights and the subsequent development that International Human Rights Law has undergone allows us to affirm that we are faced with a "human rights protection system".[1] An evolution that can be considered unfinished and which is essentially marked by clear advances in two directions: **the determination or establishment of obligations linked to human rights, and the institutional framework for the application and protection of rights,** in particular, the possibility of identifying human rights violations and adopting protective decisions from a legal point of view.

The protection of human rights does not only integrate the rights of individuals and the obligations of States, but also establishes "a system to protect human dignity that constitutes a true international public order, the maintenance of which must be in the interest of all States that participate in the system"[2] and **must be strengthened at the national level, through the different legal systems and their practices.**

The **body of law** of this system is made up of the rights that every State must respect, contained in the nine United Nations human rights treaties and their protocols, as well as an institutional architecture, including the committees of each of the treaties, with competence in human rights matters, which regulates the procedures for monitoring States' compliance with human rights and the presentation of individual complaints of human rights violations.

Therefore, when we talk about human rights, even if we adopt the point of view of the State's legal system, it is not possible to ignore the lines of evolution

[1] **CARDONA, J.** (2016), «Hacia la configuración de un "sistema" de protección de los derechos humanos de Naciones Unidas» (Towards the configuration of a "system" of protection of the human rights of United Nations), *International Law and International Relations Courses in Vitoria-Gasteiz*, 2016/1, p. 135-172.

[2] **MEDINA, C.** (2005), "Las obligaciones de los Estados bajo la Convención americana sobre derechos humanos" *La Corte interamericana de derechos humanos: un cuarto de siglo* (The Obligations of States under the American Convention on Human Rights, *The Inter-American Court of Human Rights: A Quarter of a Century),* p. 209-210. Cecilia Medina was a Judge of that Court from 2002 to 2009.

of human rights as a kind of legal subsystem with certain features that mark its autonomy with respect to public international law[3].

Human rights as a whole aim to protect basic legal rights, to recognise and ensure certain fundamental guarantees of individuals vis-à-vis the State. Therefore, not only do human rights treaties have a regulatory value *per se*, but their protection is the responsibility of the international community as a whole, which has a legal interest in protecting and reacting to serious violations of human rights. In order to respond to these requirements, the international legal regime has adopted a number of characteristic features. **A legal regime of a general nature, endowed with peremptory rules, *erga omnes* obligations, and obligations guaranteed by the international community**.[4] Features or characteristics to which State action in relation to these rights must be receptive.

The **Inter-American Court of Human Rights** expresses this legal regime very clearly[5]:

> 29. The Court must emphasise, however, that modern human rights treaties in general, and the American Convention in particular, **are not multilateral treaties of the traditional type, concluded in terms of a reciprocal exchange of rights**, for the mutual benefit of the contracting States. Their object and purpose are the protection of the fundamental rights of human beings, irrespective of their nationality, both vis-à-vis their own State and vis-à-vis other contracting States. In adopting these human rights treaties, States submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards the individuals under their jurisdiction. The special nature of these treaties has been recognised, *inter alia*, by the European Commission on Human Rights when it stated that "the obligations assumed by the High Contracting Parties to the [European] Convention are essentially of an objective character, being designed rather to protect the fundamental rights of human beings from violations by the High Contracting Parties rather than to create subjective and reciprocal rights between the High Contracting Parties ("Austria vs. Italy", Application No. 788/60,

[3]This process has also occurred in other areas such as international environmental law or international humanitarian law. A process that has also been referred to as the fragmentation of international law. **International Law Commission,** Report «Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law» by M. Koskeniemi, 2006.

[4]**CARDONA, J.** (2016), «Hacia la configuración de un "sistema" de protección de los derechos humanos de Naciones Unidas» (Towards the configuration of a "system" of protection of the human rights of United Nations), cit. p. 136-137.

[5]**INTER-AMERICAN COURT OF HUMAN RIGHTS** (1982) *Advisory Opinion OC-2/82 of 24th September 1982, on the effect of reservations on the entry into force of the American Convention on Human Rights (Art. 74 and 75) requested by the Inter-American Commission on Human Rights*. Paragraphs 29 and 30.

European Yearbook on Human Rights, (1961), vol. 4, p. 140)".
The European Commission, relying on the Preamble of the European Convention, further emphasised that "the purpose of the High Contracting Parties in adopting the Convention was not to grant each other rights and obligations in order to satisfy their national interests but to realise the aims and ideals of the European Council [...] and to establish a common public order of the free democracies of Europe with the aim of safeguarding their common heritage of political traditions, ideas, and rule of law (*ibid*., p. 138)".

## I.2.- Characteristics of human rights obligations:

- **Obligations are objective in nature**. The human rights regulatory framework has been elaborating rules of a general and universal nature. In this context, it is stressed that human rights obligations are objective. The objective nature, as Mégret[6] points out, is related to the ultimate purpose of the treaties, which is to protect the fundamental rights of human beings, and underlines the idea that the fulfilment of this purpose is not strictly dependent on the commitments of the parties (subjective). Human rights treaties, as indicated above, recognise rights for individuals - to be protected - and obligations for States - to be monitored - with international and national validity. Hence, it should be noted that adherence to human rights treaties is best understood if we think of States as making a solemn promise, an almost unilateral declaration to the international community and to individuals within their jurisdiction. Only superficially, Mégret[7] continues, can it be argued that the basis of human rights obligations lies in the consent or agreement of States.

- **Obligations are independent of the principle of reciprocity.** In contrast to the classical conception according to which international obligations arise from a relationship of reciprocity by virtue of which two or more States are mutually obliged to each other[8]. And consistently with the evolution we have been discussing, human rights obligations do not depend on or require the principle of reciprocity from other subjects (States) bound by the rules; their purpose is not to establish reciprocal rights and obligations between States Parties, but to establish a system to protect human dignity. Thus, a fundamental feature of human rights obligations is that they are not part of the type of reciprocal obligations based on a contractual model.

[6]**MÉGRET, F. (2014),** "Nature of Obligations" *International Human Rights Law* / ed. by Daniel Moeckli, Sangetta Shah, Sandesh Sivakumarian, Oxford University Press, p. 100.
[7]***Ibid.,*** *6* p. 97.
[8]**KELSEN, H.** (1943) *Law and peace in international relations*, p. 53, recognises that in international law most obligations are established by the consent of each State to adhere or not to adhere to the obligation.

**The violation of rights by one State does not justify the suspension of obligations by other States.** In the field of human rights, the suspension of rights and obligations is only appropriate, as we have seen at various times, in the context of a formal declaration of a state of alarm or emergency[9].

- **The obligations are general, they concern all States.** Each State is obliged to protect the rights of individuals within its territory and under its jurisdiction[10] and each State is obliged to promote the respect and realisation of the rights of all in every State[11]. The Human Rights Committee notes that although Article 2 of the ICCPR "is drafted in terms of the obligations of States Parties towards individuals as rights holders [...] every State Party has a legal interest in the fulfilment by all other States Parties of their obligations"[12]. This expresses the idea of a collective guarantee or collective interest in the protection of rights.

The rules regulating human rights contained in treaties are of a different nature, some of them having acquired the character of *jus cogens* (as opposed to dispositive rules). Therefore, if we consider that rules are formed by the international community and not by the individual will of States that "choose" the rules to which they are bound; **both *jus cogens* rules and *erga omnes* obligations cannot be dispositive rules for Member States of the international human rights community**, and this has effects on the legal value of the decisions of the committees and has an impact on the degree of legitimacy granted to them by States.

- **Obligations towards individuals** and non-obligations among States. The basic principle of international law that States are bound by the treaties they ratify on the basis of the **principle of *pacta sunt servanda*, the principle of good faith, and the obligation to give effect** to the provisions set out in the covenants and conventions is maintained because these obligations are binding with regard to rights holders. Much of the key State's responsibility rests on them and is applicable to the field of human rights.

This characteristic underlines the importance, the **protagonism of the individual as a subject of rights in this system of rights protection**. The perspective of obligations and not only of rights has brought about a

[9]**HUMAN RIGHTS COMMITTEE** (2001) "States of Emergency (Article 4)". General Comment No. 29, CCPR/C/21/Rev.1/Add.11, 31st January 2001.
[10]**HUMAN RIGHTS COMMITTEE** (2004) "The nature of the general legal obligation imposed on States Parties to the Covenant", General Comment No. 31, CCPR/C/21/Rev.1/Add.13, 29th March 2004.
[11]**PEZZANO, L.** (2014) "Las obligaciones de los Estados en el sistema universal de protección de los derechos humanos" (State obligations in the universal system of human rights protection), *Spanish Yearbook of International Law*, vol. 30, p. 303-346.
[12]***Ibid,*** 10

change in the position of the individual in the framework of the protection system, giving them a central place. The human rights treaties recognised the rights of individuals and thus took a quantum leap forward, since under classical international law they would not be subjects of international law. Human rights holders are not simply, as Craven[13] writes, incidental beneficiaries of a regime that concerns the promotion of the rights and interests of States.

The importance of the subject has also been reinforced through various processes, and in all of them the work of the Committees has been decisive. **The identification and establishment of obligations to respect, protect, and fulfil human rights** has contributed to this. The generalisation of the individual complaint mechanism, which not only protects the rights of individuals, but also allows them to file complaints against the State for violations of their rights. This mechanism is expressly accepted by the State through the signing and ratification of protocols, and it therefore seems unreasonable to conclude that the obligations arising from it are merely dispositive.

Another relevant aspect is the extension of State's responsibility, which also includes that derived from acts committed by all public authorities or bodies of the State that ordered the acts, and private individuals in serious violations of rights if the State has not been able to act with due diligence; foresee the risk of violation; investigate it, if necessary; repair it; and present guarantees of non-repetition.

It is precisely the thesis that there are many actors that can give rise to a State's responsibility that leads the Human Rights Committee to affirm that **the obligations of the Covenant bind the State Party "in their entirety.** All branches of government (executive, legislative, and judicial) and other governmental authorities, whatever their rank - national, regional, or local - are in a position to engage the responsibility of the State Party"[14].

Finally, a very relevant part of the legal regime of human rights lies in its **institutional architecture**, and here we are particularly interested in the mechanisms of supervision and control of the implementation of the treaties, of which the Committees form part as Human Rights Treaty Bodies, to which we will devote sections 2, 3, and 4.

[13] **CRAVEN, M.** (2000) "Legal Differentiation and the Concept of the Human Rights Treaty in International Law" *European Journal of International Law 11*, 489, 493.
[14] **Human Rights Committee**, General Comment No. 31. Nature of the general legal obligation imposed on States Parties to the Covenant, paragraph 4.

## I.2.- Spanish legal system and human rights protection system

The regulatory framework of the human rights system is laid down in the Spanish Constitution of 1978. It rests on **two basic pillars** that have remained unchanged.

**From the most substantive point of view**, **Article 10.2** stipulates: "The rules 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 matters ratified by Spain." The Spanish Constitutional Court has consistently interpreted this provision as a strictly interpretative criterion and has refused to attribute to it functions of constitutional validity control. The Spanish case-law on this point is very numerous, although it is worth mentioning Spanish Judgment of the Spanish Constitutional Court (STC, by its acronym in Spanish) 236/2007, which ruled on the unconstitutionality of certain precepts of LO 4/2000 on the rights and freedoms of foreigners in Spain and their social integration, as well as the Spanish STC 140/2018 on an appeal of unconstitutionality of certain articles relating to universal jurisdiction.

The interpretation of fundamental rights in accordance with international human rights treaties is an issue that has given rise to many doctrinal debates. **It is an obligation of results that binds both the legislator and the courts.** The disparity of positions arises in relation to some questions to which Sáiz Arnáiz draws attention. Firstly, in relation to the notion of interpretation as conformity. In this area, a preliminary aspect arises, namely, whether conform interpretation affects the texts of the treaties or also the resolutions of the Treaty Bodies and the human rights jurisdictional bodies. This question will be dealt with in this report at length. Secondly, the scope of the notion of interpretation as conformity, which in turn can be understood in two ways: as mere compatibility, that is, as non-contradiction or deductibility, or as the requirement of identity, and, in any case, the prohibition of diminishing or lowering the national standard of rights[15]. The Spanish Constitutional Court has used both arguments. In some cases, it has considered that this interpretation can be the basis for justifying the special constitutional significance of an appeal for legal protection, Spanish STC 155/2009, 2nd Legal Ground (FJ, by its Spanish acronym). Finally, the notion of interpretation as the integration of fundamental rights through international treaties. In general, the Spanish Constitutional Court has not been inclined to adopt this position. However, as Sáiz Arnaiz[16] stresses, a sharp separation between interpretation and integration is hardly compatible with the theory of interpretation and argumentation proper to a constitutional

[15]**SÁIZ ARNAIZ, A**. (2018), «Artículo 10.2: La interpretación de los derechos fundamentales y los tratados internacionales de derechos humanos» (Article 10.2: The interpretation of fundamental rights and international human rights treaties), *Commentary on the Spanish Constitution,* Coord. Mercedes Pérez Manzano, Ignacio Borrajo, Miguel Rodríguez-Piñero, Maria Emilia Casas, Enrique Arnaldo, Jesús Peñalver, Vol. 1, Part 1, p. 230-254, 24.
[16]***Ibid*.** 15**,** p. 247.

model of law, where the Spanish Constitutional Court establishes the protection and guarantees of a right, but also its content and scope. International human rights treaties can have an effect here.

Spanish Law 25/2014, of 27th November, on Treaties and other International Agreements, refers to the interpretation of treaties that must be made in good faith, in accordance with the ordinary meaning of the terms in the treaty and its context and taking into account its object and purpose. Article 35.2 sets out a guideline that may have potential in the field in which we find ourselves. It states that "in the interpretation of international treaties constituent international organisations and of treaties adopted within the framework of an international organisation, provision should be made for any relevant rules of the organisation".
It can therefore be understood that **in the field of human rights, interpretation does not only include the text of treaties and protocols, but also the decisions of their supervisory bodies.**

From the formal point of view and in relation to the position of international treaties, the regulation of Articles 93 to 96 of the EC is relevant. In particular, the provisions of Art. 96: 1. "Validly concluded international treaties, once officially published in Spain, shall form part of the domestic legal system. Their provisions may only be repealed, modified, or suspended in the manner provided for in the treaties themselves or in accordance with the general rules of international law".

The position of international treaties is outlined in Art. 31 of Spanish Law 25/2014, which states: "The legal rules contained in international treaties validly concluded and officially published shall prevail over any other rule of the domestic law system in the event of conflict with them, except for rules of constitutional rank".

Spanish Law 25/2014, of 27th November, on Treaties and other International Agreements, updated the regulation on international treaties. However, the justification for this rule, its preamble, does not contain any argument referring to the specificity of human rights treaties. Thus, both for the Constitution and subsequent legislation, human rights treaties do not have a specific treatment in any of their dimensions and are regulated like any other bilateral or multilateral treaty. The aforementioned law regulates everything related to the competence to conclude international treaties, as well as the process of conclusion, publication and registration, execution and observance, and amendment, suspension, and denunciation. It also devotes two titles to the regulation of two types of international agreements that the legislator considers to be of growing importance in international practice, although they do not have the nature of international treaties: administrative international agreements and non-regulatory international agreements.

The latter, according to Art. 43, "do not constitute a source of international obligations". However, as already noted, this legislation on international treaties does not expressly refer to human rights treaties, except for the point quoted above on the interpretation of treaties adopted within the framework of an international organisation.

## II.- Legitimacy of the United Nations Human Rights Treaty Committees

The first paragraph of Section 3 of Circular 1/2020 immediately places the traditional reservation of State's legal agents in the application of the resolutions of the Treaty Committees: *they are not judicial bodies* and, therefore, their function is only interpretative of the application of the Treaties.

However, the very Judgment of the Spanish Constitutional Court cited in this same section by the Spanish State's Legal Counsel (Spanish STC 23/2020 FJ 6) opens this traditional perspective to the new paradigm of international human rights law, as we have analysed in depth in the first Chapter of this document: *the committee is a non-jurisdictional entity for the protection of rights, a guaranteeing body*[17] *that, through opinions, resolves complaints that may be filed individually.*

- An entity that **protects rights**
- An entity that **guarantees rights**
- An entity that **resolves individual complaints about violations of the rights** contained in the treaty of which it is a committee.

Part of the doctrine considers that the fundamental or basic nature of the human rights treaties derives from the creation of a Committee for each treaty, made up of independent experts, responsible for monitoring its application[18]. The Human Rights Committee, which has received the most communications, and in relation to the largest number of States, recognises that it does not play the role of a judicial body, but affirms that "the opinions issued by the Committee in accordance with the Optional Protocol present some of the main characteristics of a judicial decision."[19] In the Committee's view, they are rendered in a judicial spirit, i.e. with impartiality and

[17]Thus, also Spanish STC 81/1989 FJ 2; Spanish STC 31/2018 FJ 4; Spanish STS of the Spanish Criminal Division no. 338/2015 in its FJ 7, and Spanish STS of the Administrative-contentious Division no. 1263/2018 FJ 24.

[18]**CARDONA, J.** (2016), «Hacia la configuración de un "sistema" de protección de los derechos humanos de Naciones Unidas» (Towards the configuration of a "system" of protection of the human rights of United Nations), *International Law and International Relations Courses in Vitoria-Gasteiz*, 2016/1, p. 135-172.

[19]**HUMAN RIGHTS COMMITTEE** (2009), *General Comment No. 33: Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights* CCPR/C/GC/33, §11.

independence of the Committee members, after a considered interpretation of the language of the Covenant.

> *11. Although the role played by the Human Rights Committee in examining individual communications is not, in itself, that of a judicial body, the opinions issued by the Committee under the Optional Protocol have some of the main characteristics of a judicial decision. They are rendered in a judicial spirit, a concept that includes the impartiality and independence of the Committee members, the considered interpretation of the language of the Covenant and the determinative nature of the decisions.*

Therefore, we believe it is relevant, as well as legally rigorous, to differentiate between the "non-jurisdictionality" of the Treaty Bodies, from their legitimacy in the fulfilment of the competences granted by each of the human rights treaties signed and ratified by their Member States; the human rights treaties are not only constituted as committees to interpret them, but also to supervise and guarantee their due compliance (including the commitments of progressiveness and investment of maximum resources in public policies and legislation that have made possible the access, enjoyment, and guarantee of each one of the human rights contained in their articles).

General Comment No. 33[20] of the Human Rights Committee establishes the **interpretative legitimacy** which the Spanish State's Legal Counsel considers to be the sole function of the Treaty Bodies: "the decisions issued by the Committee under the Optional Protocol represent an authoritative pronouncement by a body established under the Covenant itself and in charge of the interpretation of that instrument"; as does Article 40.4 of its own Covenant and Articles 21.1 of the Convention on the Elimination of All Forms of Discrimination against Women; Articles 36.1 and 39 of the Convention on the Rights of Persons with Disabilities; Article 21 of the International Covenant on Economic, Social and Cultural Rights; Article 44 of the Convention on the Rights of the Child; Article 19 of the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment; and Article 29 of the International Convention for the Protection of All Persons from Enforced Disappearance.

The **legitimacy of effective monitoring and ensuring** compliance with the human rights contained in the Treaties is reflected in Articles 30 *et seq.* of the International Convention for the Protection of All Persons from Enforced Disappearance; Article 20 *et seq.* of the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment; in the preamble to the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women: "Reaffirming its resolve to ensure the full and equal enjoyment by women of all human rights and fundamental freedoms

[20] ***Ibid*****,** 18.

and to **take effective measures** to prevent violations of those rights and freedoms"; as well as in the preamble to the Optional Protocol to the Covenant on Civil and Political Rights: "Whereas, in order to **better achieve** the purposes of the International Covenant on Civil and Political Rights (hereinafter referred to as 'the Covenant') and the implementation of its provisions, it would be desirable to enable the Human Rights Committee established in Part IV of the Covenant (hereinafter referred to as 'the Committee') to receive and consider, as provided for in the present Protocol, communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant"; in the Optional Protocol to the Covenant on Economic, Social, and Cultural Rights: "Whereas, in order to **better achieve** the purposes of the Covenant and the implementation of its provisions, it would be appropriate to enable the Committee on Economic, Social, and Cultural Rights (hereinafter referred to as 'the Committee') **to carry out the functions provided for** in the present Protocol"; of the OP of the Convention on the Rights of the Child "Whereas, in order to strengthen and complement these national mechanisms and to improve the implementation of the Convention and, where applicable, its Optional Protocols on the sale of children, child prostitution, and child pornography, and on the involvement of children in armed conflicts, it would be appropriate to empower the Committee on the Rights of the Child (hereinafter referred to as 'the Committee') to carry out the functions provided for in the present Protocol". These functions entail **receiving and considering communications**, **monitoring** implementation and compliance with the covenants, **determining whether or not there has been a violation** of the rights enumerated in the covenants, and, as we shall see in the next chapter, making **appropriate individual and general recommendations** to the State found to have violated human rights.

This has also been established in the case-law of the International Court of Justice[21] and the Inter-American Court of Human Rights[22]:

- *Greater weight should be given to the interpretation adopted by this independent body which was established specifically to **oversee the implementation of that treaty.***
- *Furthermore, Article 33 of the American Convention provides that the Inter-American Commission is a competent body, together with the Court, "**to hear matters relating to the fulfilment** of the commitments undertaken by the States Parties", so that, by ratifying the Convention, **States Parties***

[21]**INTERNATIONAL COURT OF JUSTICE** (2010) Judgment of 30th November. Case concerning Ahmadou Sadio Diallo (Republic of Guinea vs. Democratic Republic of the Congo). Retrieved from: https://www.dipublico.org/cij/doc/182.pdf.

[22]**INTER-AMERICAN COURT OF HUMAN RIGHTS** (1987) "Case Loayza Tamayo vs. Peru" Judgment of 17th September. p. 34 Retrieved from: https://www.corteidh.or.cr/docs/casos/articulos/seriec_33_esp.pdf.

***undertake to heed the recommendations adopted by the Commission in its reports.***

The Treaty Bodies are, therefore, the space legitimised by international Human Rights law to interpret their covenants/conventions; to monitor their progressive application to the maximum of the resources available to the States that have ratified them (eight[23] of the nine main ones have been ratified by the Spanish State); to carry out due supervision in the event of the violation of the human rights contained and developed by them and to guarantee compliance with the measures of reparation and non-repetition of such violations.

## III.- Legal status of the resolutions of the United Nations Human Rights Treaty Committees

Resolutions (as established by the Spanish State's Legal Counsel) or pronouncements of Treaty Bodies are variously referred to by the conventions and covenants, as well as by their Optional Protocols (OP): opinions, conclusions, observations, and recommendations (Article 22.3 of the Convention against Torture; Article 30.3 of the International Convention for the Protection of All Persons from Enforced Disappearance; Article 14.7 of the International Convention on the Elimination of All Forms of Racial Discrimination; Article 7.3.4 and 5 of the OP-CEDAW; Article 9 of the OP-ICESCR, and Article 11 of the OP-Convention on the Rights of the Child). In any case, and particularly following the content of its OPs

> "it should be sufficient to accept its binding character the fact that such a legal status is necessary to fulfil what was intended by the individual complaint procedures, i.e. the protection of the individual through the opinion of the relevant committee [...]".[24]

The question now is to respond, from the standpoint of international Human Rights standards (standards fully in force in the Spanish State in compliance with the provisions of our Magna Carta), to the assertion with which the conclusions of Circular 1/2020 of the Spanish State's Legal Counsel begin: *The opinions do not have binding legal force.*

[23]Only the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families remains to be signed and ratified. https://www.ohchr.org/SP/ProfessionalInterest/Pages/CMW.aspx.

[24]**ULFSTEIN, G.** (2014) "Law-making by Human Rights Treaty Bodies" in International Law-making: Essays in Honor of Jan Klabbers "Eds. Rain Liivoja and Jarna Petman, p. 8.

This affirmation obviously **presents, once again, a scenario of repudiation of the new paradigm of international human rights law as a supervisor and guarantor in the face of human rights violations**, leaving only symbolic, inspirational, foundational, or guiding principles, not only the so-called "soft law" (as could be the declarations of the different General Assemblies of the United Nations regarding political commitments such as the 2030 Agenda, the Urban Agenda; or as were the MDGs and are now the SDGs...) but also the "hard law" (the international human rights treaties). And not only that, but it also questions the very journey of Spain in the United Nations, even becoming a member of its Human Rights Council or participating, as in recent years, in the processing of the future human rights treaty on business, known as the "binding treaty" on business and human rights.[25]

We therefore make an assertion contrary to the one made in the Circular in question: **the pronouncements of the Treaty bodies are binding, obligatory, and effective (directly or indirectly) for the States Parties to the treaties**:

- In compliance with the **principles of good faith and *pacta sunt servanda*** of the Vienna Convention on the Law of Treaties: "every treaty in force is binding upon the parties to it and must be performed by them in good faith" (Article 26), this good faith being understood as: "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" (Article 31.1).
- Because, as the Inter-American Court of Human Rights has stated[26]: [...] *they are not multilateral treaties of the traditional type concluded on the basis of a reciprocal exchange of rights, for the mutual benefit of the Contracting States. Their object and purpose are the protection of the fundamental rights of human beings, irrespective of their nationality, both vis-à-vis their own State and vis-à-vis other contracting States. In adopting these human rights treaties,* ***States submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards the individuals under their jurisdiction.***

[25]Currently in treaty process https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOnTNC.aspx.

[26]**INTER-AMERICAN COURT OF HUMAN RIGHTS** (1982) "The effect of reservations on the entry into force of the American Convention on Human Rights (Art. 74 and 75)" Advisory Opinion OC-2/82 of 24th September, 1982. Series A No. 2, para. 29, p.7.

- Furthermore, the Venice Commission[27] recalls that: *under international law, States* ***are obliged to comply with their international legal obligations****, as set out in the treaties to which they are party and in the binding decisions of the international bodies, whose competence they have recognised*. As does the United Nations Human Rights Committee, in its General Comment No. 33: *States Parties must use all means at their disposal* ***to give effect to the Committee's opinions*** (paragraph 20).

And they do so legally (State judiciary), politically (State, autonomous, and local authorities), and legislatively (State parliament, autonomous, and local corporations). To paraphrase the main conclusion drawn by the Spanish State's Legal Counsel: **the resolutions of the Treaty Bodies have legal force, political force, and binding legislative force**. They must undoubtedly provide **effective remedy and redress to the victim of the violation of a human right.**

A different question is the degree of immediacy, urgency, extension, and economic investment that they must have depending on whether they refer to the concrete situation of the person who is the victim of the violation of the right (individual complaint), or to the State Party to the treaty for which the Committee issues its resolution: recommending, communicating, indicating, stating, or condemning it in reference to its public policies, justiciability, and legislation.

In the following chapter, we will analyse in detail the different obligations for the States Parties derived from the resolutions or pronouncements of the Treaty Bodies; all of them with a common transversality: **its binding nature. Therefore, they must be duly complied with.**

## IV.- Obligations of States to comply with the various resolutions of the Treaty Committees

### IV.1. Preliminary considerations: right to reparation and non-repetition

Since the early 1990s, the international community has made efforts to establish and entrench the need to recognise reparation or compensation

[27] **EUROPEAN COMMISSION FOR DEMOCRACY AND LAW** (2014) "On the implementation of International Human Rights Treaties in domestic law and the role of courts" Report adopted by the Venice Commission at its 100th plenary session (Rome, 10-11th October 2014) p.17.

rights for victims of Human Rights violations. It was then when what is known as **transitional justice** emerged as a mechanism to address serious Human Rights violations, a system based on the **victim's right to truth, justice, reparation, and guarantees of non-repetition**[28] .

Currently, International Law is quite clear in affirming that there is a duty of reparation to victims, as derived from various international instruments that recognise and protect Human Rights both in the international and regional spheres. Judicial institutions, as guarantors of justice, intrinsically carry with them the promise of reparation for all persons (which is derived from Article 8 of the ***Universal Declaration of Human Rights*** ), which is also the basis of the ***European Convention on Human Rights***, on the ***Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law***[29], or of the ***Rome Statute***.

According to these texts, the bodies guaranteeing justice must provide the necessary mechanisms and remedies against violations of international Human Rights rules, granting victims the right to:

*a*) Equal and effective access to justice;

*b*) ***Adequate, effective, and prompt reparation for the harm suffered;***

*c*) Access to relevant information on violations and reparation mechanisms.

The very draft articles of the United Nations Commission on International Law for Human Rights Violations indicate, in Art. 31, **the obligation of the responsible State to repair the damage caused by the internationally wrongful act, alleging, furthermore,** in Art. 32, **the impossibility of the responsible State to invoke the provisions of its domestic law** as justification for its failure to comply with its obligations under this part[30].

[28]**UNITED NATIONS** (2020) Rule of Law - Transitional Justice: https://www.ohchr.org/SP/Issues/RuleOfLaw/Pages/TransitionalJustice.aspx.

[29]**UNITED NATIONS** (2005) Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. (Resolution 2005-30, of 25th July 2005). https://www.ohchr.org/SP/ProfessionalInterest/Pages/RemedyAndReparation.aspx.

[30]**UNITED NATIONS** (2002) General Assembly Resolution Responsibility of the State for Internationally Wrongful Acts. A/RES/56/83 https://undocs.org/pdf?symbol=es/A/RES/56/83.

The right of victims to know the truth, to receive reparation, and to obtain the guarantee that they will not be subjected to the wrongdoing again is **not only a formal matter**; the case-law of the International Court of Human Rights and the monitoring institutions established by various international treaties (such as the Human Rights Committee or the United Nations Committee against Torture) have repeatedly stated that the victims of Human Rights violations have the right to receive fair and just compensation. In this sense, both the European Court of Human Rights and the Inter-American Court of Human Rights have issued very explanatory decisions on the right to reparation, as in the Velásquez Rodríguez vs. Honduras case, where it is established that *"the State has the legal duty to reasonably prevent human rights violations, to seriously investigate the violations by the means at its disposal [...] in order to identify those responsible, to impose the appropriate sanctions, and to ensure adequate reparation to the victim"*[31] *- restitutio integrum-*.

For its part, **non-repetition, as a tool to prevent the recurrence of incidents that give rise to human rights violations**, is a measure implemented by the responsible State to make itself accountable to society, as a guarantee for the purposes of prevention and compensation. These factors have an impact on actions that benefit society as a whole in the institutional, political, economic, and social spheres.

These guarantees are, therefore, an important part of comprehensive reparation, since if the State and society do not guarantee victims that the same human rights violations will never be committed again, political, material, or symbolic compensation measures of value cannot be ensured.

According to a final report of the Special Rapporteur on impunity and the principles for the protection and promotion of human rights through the fight against impunity of the United Nations by Louis Joinet, known as **the Joinet Principles**[32], the State must ensure effective protection of victims, and he divides them into four main areas:

1. Right to know.
2. Justice.
3. Compensation or Reparation.
4. Institutional reform and other guarantees of non-repetition.

[31]**INTER-AMERICAN COURT OF HUMAN RIGHTS** (1988) Velásquez Rodríguez vs. Honduras, Judgment of 29th July, 1988, Series C, No. 4, para. 174.
[32]**UNITED NATIONS** (1997) Joinet Principle: http://www.derechos.org/nizkor/doc/joinete.html.

According to principle 37 on guarantees of non-repetition, these spheres of action are recognised as preventive mechanisms ancillary to other obligations, and as elements of the right to full reparation. Therefore, the Joinet Principle states that guarantees of non-repetition need to be adopted in order to address long-term problems that may arise.

One of the **basic principles of international law is the obligation to pay damages** when an internationally wrongful act is committed.

***Internationally wrongful act → International responsibility***

We face secondary responsibilities because the primary responsibility of each country is to comply with its international legal commitments, whether these are treaty or customary commitments.

The legal consequence, therefore, when a country breaches any of its commitments/obligations must be to stop the violation itself and to provide a guarantee that such behaviour ***will not be repeated*** by assuming its ***obligation to repair the damage caused***.

The aforementioned "Draft Articles on Responsibility of States for Internationally Wrongful Acts" adopted by the United Nations International Law Commission at its 53rd session in 2001[33] clearly includes these two obligations. Subsequently, this principle has been recognised and reflected in international case-law on numerous occasions, the most recent case being the legal consequences of the construction of a separation barrier in the occupied Palestinian territory.

In an approach to the Spanish national legal spectrum, we allude to the responsibility of the Spanish State to protect the right of victims to reparation of the damage suffered by referring to Article 339 of the Spanish **Criminal Code**, according to which *"Judges or courts shall order the adoption, at the expense of the perpetrator, of the necessary measures aimed at restoring the disturbed ecological balance, as well as any other precautionary measure necessary for the protection of the goods protected in this Title".* In view of this precept, it should be pointed out that we are dealing with a precautionary measure referring to the accumulated civil proceedings and aimed at guaranteeing compliance with the civil third-party liability "*ex delicto*"[34], in such a way as **to ensure the reparation of the damage and avoid the aggravation of the same.**

[33] ***Ibid***, 29.

[34] Article 13 of the Spanish Criminal Procedure Act, which includes among the first steps in criminal proceedings the adoption of measures for the protection of the injured party, which allows any precautionary measure to be ordered in this sense, is pointed out here.

## IV.2. Different obligations of due compliance with treaties

Signing and ratifying international human rights treaties creates a series of obligations for States Parties. These human rights obligations include both minimum obligations, of an immediate nature, progressive obligations, to be fulfilled within a reasonable period of time, and general obligations.

States thus have several **obligations to fulfil with immediate effect**: 1) One obligation is that States undertake to **ensure that rights will be exercised without discrimination**. This obligation to prohibit discrimination cuts across all human rights and is a minimum and immediate obligation; 2) another obligation consists of a commitment to **take steps towards the realisation of all rights**. This obligation is recognised, for example, under paragraph 1 of Article 2 of the ICESCR, and the commitment itself is not conditioned or limited by any other consideration. However, the adoption of legislative measures does not in itself exhaust States Parties' obligations, and measures of an administrative, financial, educational, and social nature must be included, as well as the provision of judicial remedies in respect of rights that may be considered justiciable (CESCR Committee, General Comment No. 3); 3) the obligation to ensure the satisfaction of **essential levels of each of the rights**; and 4) the obligation to **protect disadvantaged or vulnerable groups as a matter of priority.**

Regarding the **obligation of progressivity**, this is an obligation that is specifically recognised in the ICESCR, for the **fulfilment of the economic, social, and cultural rights it recognises.** However, the obligations of an immediate nature detailed in the previous paragraph also apply to the recognition of these rights. Thus, according to Article 2.1 of the ICESCR, States must take "especially economic and technical measures, to the maximum of their available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures".

**The obligation of progressivity, in turn, includes the general obligations** to: a) **take steps**, b) **allocate the maximum of available resources**, and c) **obligation to progressively realise the rights**.

So-called progressivity thus consists of continuously "moving" towards the full realisation of rights. This obligation to "move forward" includes, in turn,

two implicit obligations: 1) the **obligation to continuously improve the enjoyment of rights**; and 2) the obligation to **refrain from deliberately adopting retrogressive measures**. If a State were to act contrary to these, it would be in breach of the obligations to which it is subject, and this would constitute a violation of the Covenant.

Specifically, in relation to the obligation to use the maximum of available resources, the ESCR Committee notes that **even in times of severe resource constraints, vulnerable members of society can and should in fact be protected through the adoption of relatively low-cost programmes.** The obligation of States to implement human rights development even in times of economic crisis is therefore relevant. IN 2009, the Human Rights Council called on States to "bear in mind that the global economic and financial crises do not diminish the responsibility of national authorities and the international community for the realisation of human rights"[35]. This has been highlighted, among others, by the UN Special Rapporteur on Extreme Poverty and Human Rights[36], according to whom there are various options for expanding tax space in an equitable and non-discriminatory manner, even in the context of a global economic crisis. In this sense, it is true that **the resources available to States are not necessarily economic, but also political** (for example, tax policy and according to each right, such as housing or employment policies). In addition, there is an obligation for international cooperation (in this sense, for instance, a constant exchange of information on challenges and good practices among the different countries must be guaranteed).

Moreover, the obligation of progressivity includes the **prohibition of adopting deliberately retrogressive measures**. In this regard, the case-law of the ESCR Committee provides examples of what may be considered "deliberately retrogressive" measures. For example, the formal repeal or suspension of any legislation that is necessary for the continued enjoyment of a right, or the enactment of legislation or adoption of policies that are manifestly incompatible with pre-existing national or international legal obligations[37]. In the event that deliberately retrogressive measures are adopted, there will be a strong presumption of non-compliance with the Covenant by the State in question, and it will be up to the State to prove a

[35]**UNITED NATIONS**, Human Rights Council, 'The Impact of the Global Economic and Financial Crises on the Universal Realisation and Effective Enjoyment of Human Rights', Resolution S-10/1 of the 10th Special Session, 20th February 2009.
[36]**UNITED NATIONS**, Sepúlveda, M., '*Report of the Independent Expert on the question of human rights and extreme poverty',* A/HRC/17/34, 17th Session of the Human Rights Council, 17th March 2011.
[37]**ESCR COMMITTEE**, General Comment No. 14, para. 48.

number of elements, as a simple allegation of lack of resources or the existence of an economic crisis would not constitute sufficient grounds: (a) that such measures have been implemented after the most exhaustive examination of all possible alternatives, the one finally adopted being the least prejudicial to the rights; (b) that the measure is duly justified by reference to the totality of the rights set forth in the Covenant; (c) that full use is made of the maximum of the State's available resources.

In addition to the obligation of progressivity and the prohibition of retrogression and the existence of minimum or immediate obligations, there are general obligations of a different kind. These duties of States are to recognise, to respect, to protect, and to fulfil.

**The obligation of States to *recognise* rights** includes recognition in legal systems, not only in constitutions but also through legislative measures, coupled with appropriate policies for their realisation. **The obligation to *respect* implies**, among other things, that governments must refrain from taking measures that prevent people from fulfilling rights for themselves when they are in a position to do so, as well as refrain from denying or limiting equal access to rights for all persons or from imposing discriminatory practices. In the case of the right to housing, for example, the responsibility to respect the right to adequate housing means that States must not enforce or promote arbitrary forced eviction of individuals and groups. The United Nations insists on the fact that what makes an eviction unlawful is the manner in which evictions are carried out, whether or not those affected are consulted, the failure to respect the rights of those evicted, and the absence of any attempt to find solutions that minimise the impact of the eviction and the disruption to those affected. By virtue of the **obligation to *protect***, States must prevent any possible violation of rights by "third parties", such as private entities, such as developers or pharmaceutical companies. Finally, under the **obligation to *fulfil* or *comply with*** , identifiable government strategies must be developed to secure recognised rights, with priority being given to vulnerable groups. In addition, the obligation to comply is related to the obligation to *facilitate* and *promote* rights by adopting measures that enable individuals and communities, especially those who are not in a position to exercise them by themselves with the help of available means, to do so[38].

[38] **ESCR COMMITTEE**, General Comment No. 14, para. 34-37.

## IV.3. Committee resolutions: periodic reports and individual complaints

### IV.3.1. Periodic reports to the Treaty Bodies of the United Nations human rights protection system

The periodic reporting procedure is provided for in nine international human rights treaties, eight of which have been signed and ratified by Spain:

- International Covenant on Civil and Political Rights (Human Rights Committee)
- Covenant on Economic, Social, and Cultural Rights (Committee on Economic, Social, and Cultural Rights)
- Convention on the Elimination of All Forms of Discrimination Against Women (Committee on the Elimination of Discrimination Against Women)
- Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment Torture (Committee against Torture)
- Convention on the Rights of the Child (Committee on the Rights of the Child)
- International Convention on the Rights of Persons with Disabilities (Committee on the Rights of Persons with Disabilities)
- International Convention for the Protection of All Persons from Enforced Disappearance (Committee on Enforced Disappearances)
- International Convention on the Elimination of All Forms of Racial Discrimination (Committee on the Elimination of Racial Discrimination)

As we have seen in Chapters 1 and 2, each convention establishes a Committee that will be responsible for examining the reports sent periodically by the States Parties in order to subsequently issue a series of **concluding observations with the measures that these States must expressly adopt on the basis of the obligations subscribed to in each treaty.** The aim of these procedures is to help States to bring their domestic behaviour into line with the international obligations they have acquired from each Convention.

In terms of their legal status, all States Parties are obliged to submit periodic reports to the Committee on the manner in which the rights are implemented domestically, indicating the legislative, administrative, political, judicial, or

other measures that have been taken to give effect to the obligations enshrined in the treaties.

These reports are received by the Secretary-General and transmitted to the members of the Committees, all of whom are independent experts. It is important to emphasise that the persons examining the reports are experts, impartial, and independent in order to ensure the proper functioning of this procedure. To this end, the ***Guidelines[39] on the independence and impartiality of the members of the Human Rights Treaty Bodies*** (Addis Ababa Guidelines) were adopted, which set out the criteria to be followed to ensure this independence and impartiality in the appointment procedure.

In relation to the procedure, following the submission of the State's written report to the secretariat, States are asked to respond to a list of issues that the Committee draws up on the basis of the latest concluding observations adopted from previous reports and sometimes also drawing on input from civil society organisations.

Discussions on the reports take place in Geneva (except for the Convention on the Elimination of all Forms of Discrimination Against Women Committee, whose discussions take place in New York). Although they are public hearings, only representatives of the State under review can participate. They are asked to bring representatives from various branches of government (judiciary, civil society, ombudsman's offices, etc.), not only from the executive one. However, in the practice of the Spanish State, representation before the Committee is almost exclusively by representatives of the various ministries concerned, meaning they are not accepting the practice recommended by the committees.

At the end of this debate, the Committee meets in private to discuss and approve concluding observations. The concluding observations summarise the examination of the periodic report in four parts:

(1) positive aspects;

(2) principal subjects of concern;

(3) recommendations addressed to the State; and

(4) follow-up and dissemination measures.

[39] **UNITED NATIONS** (2012) General Assembly A/67/222 https://undocs.org/es/A/67/222.

Although civil society organisations cannot participate directly in the debate, their work is very important as they submit so-called "shadow reports" or "shadow/alternative reports". These documents are published for general knowledge. In addition, the Committees also dedicate time in plenary or informal meetings to receive the latest oral briefings from these organisations and ombudspersons (or "National Human Rights Institutions") before beginning the exclusive discussion with States.

The concluding observations are not intended to accuse the State of violating an article of a Convention, but to explain why some of the obligations are not being fully implemented and to **recommend that the State adopt certain policies in its domestic practice to comply with the conventions.** In this sense, the mechanism has a **preventive nature** to prevent the repetition of future violations and, at the same time, an **advocacy function to promote respect for the obligations set out in the treaties.**

In relation to the obligation of States to comply with the concluding observations, it is necessary to specify that these procedures are a monitoring exercise for a given State, an individual exercise, and they contain an undeniably critical evaluation by the Committee in relation to the situation of each country.

**It is, ultimately, a legal control**, based on the fact that it is carried out by a body legally empowered by the corresponding treaty to ensure compliance, in the domestic sphere, with the obligations subscribed to by each State when ratifying these conventions. Therefore, the State is responsible for compliance in good faith with ratified treaty obligations, a principle enshrined in Article 26[1] of the Vienna Convention on the Law of Treaties and ratified by Spain.

Indeed, the International Court of Justice established in its opinion of 9th July 2004[40] that the concluding observations issued by the Human Rights and Economic, Social, and Cultural Rights Committees to the State of Israel have an undeniable legal value, given that the authoritative interpretation in the

[40]**INTERNATIONAL COURT OF JUSTICE** (2004), Advisory Opinion "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory", available (in English) at: https://www.icj-cij.org/public/files/case-related/131/131-20040709-ADV-01-00-EN.pdf.

framework of the periodic reports corresponds, as expressed by the States when ratifying these reports, to these committees.

### IV.3.2 Individual complaints to the Treaty Bodies of the United Nations human rights protection system

Individual complaints are **mechanisms for denouncing a violation of a human right recognised in a given treaty**.

In order to file a complaint or communication against a State Party, it is necessary for the State to have ratified both the Covenant in question and its protocol, establishing the competence of the relevant committee to hear complaints and communications. By accepting the complaint procedures, States Parties are deemed to have also agreed to respect the findings of the committees. The complaint procedure is set up as an adversarial procedure, where, once the complaint has been submitted to the relevant Committee, it is communicated to the State. Finally, if it is considered that any of the rights protected by the Covenant have been violated, the Committee issues an Opinion **with two types of recommendations: individual and general**. The State must respond within 180 days on the steps taken to comply with the recommendations.

**The individual recommendation is aimed at repairing the harm suffered by the victim.** As we have already seen in previous pages, there are different types of reparations, from the simple publication of the decision to financial reparation, including providing what the victim has been deprived of or reimbursing the legal costs of the communication.

As stated by the High Commissioner for Human Rights,[41] "*the delivery of a judgment in an individual case gives effect to international rules that might otherwise seem general and abstract. The rules contained in international human rights treaties produce their most immediate effects when applied to an individual's daily life situation. The resulting body of decisions gradually forms a body of case-law that can provide guidance to States, civil society, and individuals in interpreting the contemporary meaning of these treaties".*

[41] **UNITED NATIONS** (2013) "Individual Complaint Procedures under the United Nations Human Rights Treaties" Fact Sheet No. 7 Rev. 2. https://www.ohchr.org/Documents/Publications/FactSheet7Rev2_sp.pdf.

In this sense, the situation is clearly different in the case of Opinions that point to a particular violation in a specific case, beyond the general recommendations, as this allows the State to clearly identify which measure it must adopt to correct the situation: the annulment of the decision that has violated the right.

If, in addition, the Opinion identifies other specific measures to be taken, such as compensation or the establishment of measures of non-repetition, once again the State would have a clear definition of what **its "due diligence"** should consist of. Compliance with the recommendations in relation to the perpetrators follows the same follow-up procedure as the general recommendations. There can hardly be any leeway in the consideration of what it wants to say, in accordance with the terms used by the Spanish State's Legal Counsel itself, referring to the State's "due diligence" when considering the implications of such a conclusion for the individual communication that it resolves.

A greater margin of concreteness is usually associated with the **"general recommendations" that the opinions incorporate beyond the resolution of the specific case.** For example, the ESCR Committee, like the rest of the mechanisms of the UN Treaty Bodies, includes what it calls "guarantees of non-repetition", framed within the principles of effective reparation for human rights violations and from which the State's obligation "to prevent similar violations in the future" is derived. Thus, it refers, among others, to the obligations to:

a) Adopt relevant legislative and/or administrative measures to ensure that, in judicial proceedings for evictions of tenants, defendants may object or file an appeal in order for the judge to consider the consequences of the eviction and the compatibility of such a measure with the Covenant
b) Take the necessary measures to overcome the problems of lack of coordination between judicial decisions and the actions of social services that can lead to an evicted person being left without adequate housing
c) Take the necessary measures to ensure that evictions involving persons without the resources to secure alternative housing are only carried out after genuine and effective consultation with these persons [...]

**It is important to distinguish these general recommendations that can be established in the opinions of the Committees in the face of individual complaints from the recommendations contained in the periodic reports** of the Committees to the States referred to in the previous section because, while the former arise from a concrete and individual violation of the Covenant (or of the Treaty from which the Committee in question emanates), the latter are general and abstract recommendations, established by the Committees after subjecting the States to a general examination.

It is simply a matter of distinguishing between the assumption by the various UN Committees of powers to coercively impose the content of their opinions and the fact that these opinions may contain decisions embodying specific obligations that the State must diligently implement. The non-jurisdictional nature of such bodies does not prevent their decisions from containing specific obligations, rather than mere interpretative criteria. On the other hand, although they are formally denied such a jurisdictional nature, we must take into account the fact that **the opinions are the product of a procedure that includes central elements of what is *jurisdictional*** . In effect, the Committee reaches a conclusion regarding the violation of the rules of the Treaties in a specific case through a contradictory procedure that it resolves by applying the rules to resolve the conflict. This is precisely the reason why the Committees can go beyond general recommendations and go so far as to identify specific measures of redress which are, from any point of view, obligatory. **Another issue is that in each case, the procedure through which these obligations are to be fulfilled must be specified by the State Bodies**. Ideally, of course, a regulatory reform should be adopted to provide for a specific procedure for the implementation of the obligations arising from the opinions of the Committees in the context of individual communications.

**The purpose of precautionary or provisional measures is to prevent irreparable damage, i.e. harm to the victim that may be irreversible and for which compensation or reparation would no longer be meaningful if it were to be made.** Precautionary measures must be made explicit in the communications. Their adoption does not imply a decision on the merits of the case or on admissibility. The Committee, after adopting the measure it considers appropriate, will contact the State Party to seek

information about possible further steps to be taken, and it may lift the measures adopted when it assesses that they are no longer necessary.

The instructions of the Spanish State's Legal Counsel conclude that the precautionary measures are not binding.

In any case, it is determined that the committees may inform the State of the need to adopt an interim measure, and that the State, based on the ratification of the relevant Covenant, **must examine such a request urgently, with the aforementioned due diligence**. Whether or not such an interim measure is taken will depend, according to the instruction, on the mere will of the State Party. However, in the same way as the opinions, this was already expressed at the time of ratification of the covenant and the protocol in question, and therefore compliance by the State can be expected on the basis of the principle of good faith and *pacta sunt servanda*. In any case, it will be necessary to provide **the Committee with reasons for refusing the immediate application of the precautionary measure requested.** Being in a situation of the utmost urgency and with the possibility of impossible or due reparation for the victims when their human rights are violated merits and justifies this obligation. The previous ratification of the OPs (which develop this form of emergency protection) should be sufficient for their immediate implementation within the States Parties.

In view of the continuous questioning of the binding nature of the resolutions of the Treaty Bodies, also in the case of individual complaints, the starting point of our reflection should be placed in the Spanish Judgment of the Spanish Supreme Court (STS, by its Spanish acronym) 1263/2018 on the González Carreño case, **which expressly points out the binding nature of the Opinions for the State Party,** an obligation that derives, for the case analysed, from both the Convention and the Optional Protocol (Article 24 of the Convention and Article 7.4 of the Optional Protocol). The margin of doubt is therefore not to be found in the obligatory nature of the Opinions, but rather in the **concreteness of their particular content.**

The Spanish Division establishes, in this sense, that the CEDAW Committee has not introduced into the domestic legal system a supranational higher entity of review or direct control of domestic judicial or administrative decisions, nor has it imposed on the Member States procedural measures of an annulling or rescissory nature to ensure the reparation of the deviations that the CEDAW Committee may come to appreciate.

However, the fact that a condemnatory opinion of the Committee does not necessarily lead to the review with effects, where appropriate, directly annulling resolutions of States, does not mean, as the Spanish State's Legal Counsel states in its Note, that "the opinions do not have binding legal force", their value being merely "interpretative", that is, "an authoritative argument that should guide the interpretation and application of the treaties". Even if its intention is different, we could take as acceptable, on the other hand, the assertion that the obligation assumed by States is to "act in accordance with the rules of due diligence in taking into account the recommendations of the opinions". Indeed, due diligence can be none other than that of **assuming the binding consequences of the Opinions** that concretely prove the violation of obligations assumed by the State at the time of signing and ratifying an international legal commitment. In these cases, moreover, the decisions of the Committees are not mere "recommendations" of a generic nature, but also **indicate concrete measures to be taken.**

Indeed, with regard to resolutions or interventions consisting of general recommendations or warnings, it can be understood that a greater margin of discretion is offered when it comes to the State specifying the acts conducive to their compliance. **On this point, the principle of progressivity would point to the need to move forward with measures that improve the effectiveness of the obligations derived from the Treaties through a wider range of possible measures.**

Regarding obligatory compliance, professors such as GUTIÉRREZ ESPADA,[42] who, in an analysis of the implications of the Spanish STS 1263/2018, rhetorically asks: "[...] when a State is party to an international treaty on human rights, it has created a Committee or body with powers to interpret it and even resolve individual complaints (and that State formally and expressly accepts the competence of these Committees to carry out that task), what else can it be understood but that the State assumes that the interpretations of the rights and freedoms recognised in the treaty in question by that Committee [...] are authentic?". And he adds: "in the end, what else is there to think but that the State accepts that the interpretations of the said Committee or international bodies are nothing more than emanations which clarify, specify, and shed light on the commitments which it has freely assumed by its decision to give its final consent to that treaty?".

[42] **GUTIERREZ ESPADA, C**. (2018) "La aplicación en España de los dictámenes de comités internacionales: la STS 1263/2018, un importante punto de inflexión" (The Application in Spain of the Opinions of International Committees: Spanish STS 1263/2018, an Important Turning Point.) *Cuadernos de Derecho Transnacional (October), Vol. 10, No. 2. p. 845*.

And it is worth returning to the statements made by the Spanish Supreme Court in this Judgment (Seventh Legal Ground):

> The declaration of the international body has taken place within an expressly regulated procedure, with guarantees and with the full participation of Spain" and that, furthermore, "Article 9.3 of the Spanish Constitution affirms that the Constitution guarantees [...] the principle (...) of hierarchy of rules, such that the decisions of international bodies relating to the execution of decisions of international control bodies whose competence Spain has accepted form part of our domestic legal system".

In this sense, FERNÁNDEZ DE CASADEVANTE also proposes that they are binding, since they are decisions of the committees in the exercise **of quasi-judicial powers, adopted in a procedure of an adversarial nature, under the principle of equality of arms, and in application of the international treaties that Spain has obliged itself to respect and guarantee.**[43]

In his contribution and in the same volume referred to, Professor BOU FRANCH points out that the non-existence of a specific administrative or procedural remedy to ensure compliance with the condemnatory opinions issued by a human rights committee is not a procedural obstacle, nor an impediment of any kind, to the exercise, with possibilities of success, of a patrimonial claim against the Spanish State for malfunctioning of the Spanish Administration of Justice.

For his part, Professor VILLÁN DURÁN (with more than two decades of experience as a member of the Office of the United Nations High Commissioner for Human Rights in Geneva), without prejudice to new legislative initiatives in Spain to ensure the recognition in Spanish law "of the legal value of the decisions of the United Nations committees, **these resolutions have the same legal value as treaties**" and, "therefore, such recommendations **must be applied in good faith by the States, just like treaties**", the opposite signifying "a worrying democratic deficit, by systematically ignoring the rights of the victims of human rights violations which have obtained international recognition".

[43] **VILLAN DURAN C**. "El valor jurídico de las decisiones de los órganos establecidos en tratados de Naciones Unidas en materia de derechos humanos. *Los efectos jurídicos en España de las decisiones de los órganos internacionales de control en materia de derechos humanos de naturaleza no jurisdiccional*". *(The Legal Value of the Decisions of the United Nations Human Rights Treaty Bodies.* The Legal Effects in Spain of the Decisions of International Human Rights Monitoring Bodies of a Non-jurisdictional Nature*).* p. 99-123. Madrid, Ed. Dykinson 2019.

Professor LÓPEZ MARTÍN[44] strongly criticises the "deplorable fact [that] a person is the victim of the violation of one of their fundamental rights by the State under whose jurisdiction they were at the time the offence was committed. But it is even more deplorable that, once an international complaint has been lodged against the alleged offending State - in this case, Spain - and the supervisory body has determined that there was a violation, the latter refuses to comply with the condemnatory decision".

In turn, Professor RIPOL CARULLA[45] concludes that what the Spanish Supreme Court Judgment of 17th July 2018 indicates to us is the convenience of **establishing a channel that allows the victim to demand these decisions autonomously without forcing them to articulate new administrative or procedural procedures for this purpose.**

Finally, Professor GUTIÉRREZ ESPADA stresses again the same point, namely that when a State Party to a treaty has formally, expressly, and freely accepted the competence of the Committee to supervise respect for the human rights enshrined in that international commitment, "and in particular its Opinions on individual complaints, whether or not they are formally in the nature of judicial decisions", they can hardly be understood as manifestations of a non-authentic interpretation of the treaty in question. Therefore, the bodies of the State must abide not only by the text of the treaty, but "also by the clarifications, interpretations, and/or realisations made of it by the bodies or Committees established for that purpose and in respect of which our country has formally, expressly, and freely accepted their competence to do so".

Article 10.2 of the Spanish Constitution - adds Professor GUTIÉRREZ ESPADA - "should suffice as a specific legal basis, which does not prevent us from considering, in terms of legal certainty, **adopting legislative measures to facilitate compliance with our international commitments and being consistent with the value of the fundamental rights and freedoms that underpin a democratic State.**

[44] ***Ibid***, 43.
[45] ***Ibid***, 43.

## V.- Positioning and Proposals

### V.1. Spain's ESCR Platform positioning on Circular 1/2020 of the Spanish State's Legal Counsel

In view of:

- The **failure of the Spanish State to comply with its human rights obligations**, as highlighted by the United Nations Human Rights Treaty Bodies, both in their periodic concluding observations and in the conclusions or communications to Spain as a result of individual complaints mechanisms;

- **The lack of adoption of adequate measures by the Spanish State**, aimed at complying with the aforementioned concluding observations and individual communications; as well as the lack of an adequate and effective domestic mechanism that allows to duly comply with the conclusions and recommendations of the Treaty Bodies;

- **The considerations of the Spanish State's Legal Counsel in its Circular 1/2020, in the sense of attributing only an interpretative function to the resolutions of the Human Rights Treaty Bodies**, in order to justify their non-binding nature and the possibility of the State not to comply with these resolutions, thus calling into question the legitimacy and binding force of international human rights law;

The ESCR Platform **considers**:

- That human rights treaties recognise **rights for individuals and obligations for States** - to be monitored - with international and national validity.

- **That the interpretation of fundamental rights in accordance with international human rights treaties is an obligation of result that binds both the legislator and the courts**. This interpretation does not only include the text of treaties and protocols, but also the decisions of their supervisory bodies.

- **That consideration of the non-jurisdictional nature of the UN Human Rights Treaty Bodies does not equate to their lack of legitimacy.** On the contrary, their legitimacy for the fulfilment of their competences has been recognised by the States through their signature and ratification of the treaties, which establish them as committees, not only to interpret the treaties but also to supervise and guarantee their due compliance.

- **That States are obliged to comply with their international legal obligations and that, in compliance with the principles of good faith and *pacta sunt servanda*,** all treaties in force are binding on the parties and must be complied with by them in good faith.

- **That human rights obligations include minimum obligations, of an immediate nature; progressive obligations, to be fulfilled within a reasonable period of time; and general obligations.** Immediate obligations include the prohibition of discrimination and the protection of vulnerable groups. In addition, States have the obligation to adopt measures with the aim of continuous improvement in the enjoyment of rights; as well as the obligation to refrain from adopting deliberately harmful or retrogressive measures.

- That, by virtue of the periodic reporting procedure foreseen in nine international human rights Treaties, eight of which have been signed and ratified by Spain, **States are obliged to argue about the way in which rights are exercised domestically**, indicating all the measures that have been adopted.

- That the Treaty Body's concluding observations, which include the measures to be adopted by States on the basis of the obligations subscribed to in each treaty, **have the purpose of preventing the repetition of future violations and, at the same time, of promoting compliance with the treaties.**

- That the individual complaints are mechanisms for denouncing a violation of a human right recognised in a given treaty. The conclusions or communications from the Treaty Bodies to the States, as a result of the individual complaints mechanisms, include both individual

recommendations, aimed at repairing the harm suffered by the victim, and general recommendations, which go beyond the resolution of the specific case, **in compliance with the guarantees of non-repetition prevention of similar violations in the future.**

- **That States, in this sense, must provide an effective remedy and reparation to the victim of the violation of a human right**, as derived from international law, which recognises a duty of reparation for victims and includes the right to adequate, effective, and prompt reparation for the harm suffered, the right to fair and just compensation; and non-repetition as a tool to prevent the recurrence of incidents that give rise to human rights violations.

- **That the objective of the precautionary or provisional measures is to prevent irreparable damage from occurring, so that compliance by the State can be expected based on the principle of good faith and *pacta sunt servanda***. In any case, it will be necessary to provide the Committee with reasons for refusing the immediate application of the precautionary measure requested.

- Therefore, in line with the pronouncement of the Spanish Supreme Court in its judgment 1263/2018, of 17th July, in the González Carreño case, as well as numerous doctrinal considerations in the same sense, **we consider that the pronouncements of the Treaty Bodies are binding, are mandatory, and are effective (directly or indirectly) for the States Parties to the treaties.**

## V.2. Proposals for the implementation of international human rights law in our positive law

### V.2.1.- Urgent and transitional measures: proposals for the Spanish State's Legal Counsel -Directorate of the State Legal Service (Spanish Ministry of Justice)

The aforementioned **Circular 1/2020 of the S Spanish State's Legal Counsel - Directorate of the State Legal Service, on "the legal status of the resolutions issued by the Committees responsible for monitoring United Nations Human Rights treaties"** should be modified to adapt it to international human rights law, incorporating, to this end, the proposal to draw up **special protocols**:

- **For the processing of requests for precautionary measures** by the committees (follow-up, substantiation, and notification), establishing coordination and communication mechanisms with the judicial bodies concerned in each of the cases.
- **For the implementation of the opinions** (final decisions on individual complaints) of the committees, contemplating mechanisms for direct communication with the Spanish Council of Ministers, in which it is informed of the opinions handed down against Spain and urged to:
    - **Make an effective reparation for the victims, with the application of the individual measures** contained in the opinions, which includes both compensation for damages and other measures envisaged.
    - **Adopt guarantees of non-repetition, with application of the general measures** stipulated in the opinions to prevent similar human rights violations from recurring.

### V.2.2.- Legislative measures: proposals for the Government and the parliamentary groups represented in the Spanish Parliament.

- **Amendment of Law 25/2014, of 27th November, on Treaties and other International Agreements**, with the incorporation of a new Title, "on international human rights treaties" in which guarantees are provided for to comply with the obligations derived from the international treaties of the United Nations system signed by Spain, as well as Article 10.2 of the Constitution. In this Title, mention will be made of the role of the Monitoring Committee referred to below.
- Amendment of the **Spanish Organic Law on the Judiciary**:
    - Introduction of Article 10 of the Spanish Constitution within Article 7, also in reference to the binding of human rights treaties to judges and courts, as already stipulated in the article for the rights and freedoms recognised in Chapter Two of Title I of the Spanish Constitution.
    - Reference to the opinions of the United Nations Human Rights Treaty Bodies in Article 5 bis), provided that the already demanding requirements of relevance and persistence are met.

### V.2.3.- Political measures: proposals for the Spanish Ministry of the Presidency, Parliamentary Relations, and Democratic Memory

- Promote the approval of the **2nd Human Rights Plan**, with the participation of the competent administrations, experts and academics, and civil society organisations, containing a list of all the measures urged by the human rights protection mechanisms of the United Nations system and a road map to promote their application.

- Establishment of a **Committee for Monitoring the Resolutions of the International Human Rights Bodies, taking as a reference the** *Colombian model of the Colombian Law No. 288 of 1996,*[46] *"whereby instruments are established for the compensation of damages to victims of human rights violations by virtue of the provisions of certain international Human Rights bodies", with a specific Committee to carry out such monitoring and control).*

  This Committee should report directly to the Spanish Ministry of the Presidency, Parliamentary Relations, and Democratic Memory, and have an inter-ministerial composition, ensuring the participation of the Autonomous Communities and ensuring compliance with the resolutions of the Treaty Committees, both the concluding observations of the periodic reports and the precautionary measures and opinions issued in response to individual complaints.

  In order to ensure the correct implementation of decisions on individual complaints, this Committee will:

  - Establish channels of communication with the courts and tribunals in cases pending judicial resolution in Spain to report on the application of the precautionary measures requested by the Committees.
  - It will issue binding resolutions addressed to the different competent administrations, at all levels of administration, to comply with the different aspects of the opinion, both individual measures and general measures.

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[46] **GOVERNMENT OF COLOMBIA** (1996) Retrieved from: https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=28597.