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Committee on Economic, Social and Cultural Rights Decisions on the Right to Housing in Spain (2017–2018): *Ben Djazia et al.*, Forced Evictions and Judicial Developments

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1. Introduction

The United Nations Committee on Economic, Social and Cultural Rights (CESCR) is the treaty-monitoring body in charge of interpreting and monitoring compliance with the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹ The Covenant enshrines the right of everyone to an adequate standard of living for themselves and their family, “including adequate food, clothing and housing”, and to the continuous improvement of living conditions.² This general right to an adequate standard of living generates specific rights that can be understood independently: among others, the right to adequate housing.³

The ICESCR provides for a periodic reporting system whereby states parties present national reports on the measures they have adopted and the progress they have made in securing the rights contained in the Covenant.⁴ In practice, states submit their reports every five years. The Committee on Economic, Social and Cultural Rights examines these reports and, following a series of interactions with the state through a constructive dialogue, delivers its concluding observations. These often include recommendations to the state in order to achieve the full realization of the rights contained in the ICESCR.

Besides this periodic reporting, the Optional Protocol to the ICESCR, in force since May 2013, recognized the competence of the Committee to receive and consider communications presented by individuals under the jurisdiction of a state party claiming to be victims of a violation of the Covenant by that state.⁵ The Optional Protocol thus creates an individual complaints mechanism in case of exhaustion of domestic remedies or whenever those remedies are unreasonably delayed in time. Once a communication is presented, the Committee examines it and takes a decision (‘views’) about the potential violation, which is often accompanied by recommendations to the state of a particular or general scope. The state shall then give “due consideration to the views of the Committee, together with its recommendations, if any.”⁶

¹ GA Res. 2200 (XXI), 16 December 1966.

² Id., Art. 11, Para. 1.

³ See Committee on Economic, Social and Cultural Rights, General Comment No. 4: The Right to Adequate Housing (art. 11 (1) of the Covenant), E/1992/23, 1 January 1992.

⁴ International Covenant on Economic, Social and Cultural Rights, Arts. 16 *et seq.*

⁵ GA Res. 117 (63), 10 December 2008.

⁶ Id., Art. 9, Para. 1.

The CESCR adopted its first ‘views’ concerning the right to housing in October 2015, in the case of *I.D.G. v. Spain*.⁷ The author had fallen into arrears regarding the payments due to a banking institution on the basis of a mortgage loan agreement, and the bank initiated mortgage foreclosure proceedings against her. Given the difficulty to find her and after several unsuccessful attempts of personal notification, the court opted to notify her via public notice. As a consequence, the author found out about the proceedings only after the auction of her house was ordered. The author submitted a communication before the CESCR in the framework of the Optional Protocol, claiming that her right to adequate housing had been violated.

The author highlighted before the Committee the severe housing crisis in Spain and claimed a breach of her right to a fair trial in connection with her right to housing. She argued that the notification of the mortgage foreclosure had been made without all due safeguards and that the lack of access to an effective remedy had prevented her from denouncing the abusive character of some of the clauses included in her mortgage loan agreement. The Committee found a violation of her right to housing, considering that the court had not taken all reasonable measures to adequately notify the author.

Recent CESCR decisions in the field of housing have gained considerable relevance in Spain. The two only decisions until now on individual communications regarding the right to housing — *I.D.G. v. Spain* and *Ben Djazia et al.* — as well as the Committee’s requests for interim measures in eviction cases have been extensively reported by the media and are routinely mobilized by social movements in the housing sector.⁸ If the social and media impact of CESCR decisions has been important, it remains unclear what their legal impact in practice will be.

More specifically: Can we identify any judicial developments predicting a better compliance with CESCR decisions on the right to housing? This chapter presents an analytical summary of recent CESCR decisions regarding the right to housing in Spain, as well as an overview of two recent judgments of the Spanish Supreme Court allowing us to predict a possible shift in its approach to this issue. The chapter focuses on the Committee’s decision in the case of *Ben Djazia et al.* and on forced evictions.

2. CESCR Decisions concerning the Right to Housing in Spain (2017–2018)

Decisions taken by the CESCR can be adopted in the framework of the periodic monitoring of states parties to the ICESCR or in the framework of the individual

⁷ Committee on Economic, Social and Cultural Rights, Communication No. 2/2014, E/C.12/55/D/2/2014, 13 October 2015. For a detailed comment on this decision, see J.C. Benito Sánchez, ‘The UN Committee on Economic, Social and Cultural Rights’ Decision in *I.D.G. v. Spain: The Right to Housing and Mortgage Foreclosures*’, *European Journal of Human Rights / Journal européen des droits de l’homme*, Vol. 2016, No. 3, 2016, pp. 320–339.

⁸ See, e.g., Galaup, Laura, ‘La ONU dictamina que España violó los derechos de una familia desahuciada que acabó durmiendo en un coche’, *eldiario.es*, 5 July 2017, <www.eldiario.es/sociedad/ONU-dictamina-Espana-desahuciada-durmiendo_0_661784476.html>; ‘España violó el derecho a la vivienda de una familia con hijos menores en un desahucio’, *Público*, 5 July 2017, <www.publico.es/sociedad/vivienda-espana-violo-derecho-vivienda-familia-hijos-menores-desahucio.html>; ‘El Comité de Derechos Económicos, Sociales y Culturales de la ONU reconoce el derecho de los inquilinos a una vivienda adecuada’, *Red-DESC*, 7 July 2017, <www.escr-net.org/es/noticias/2017/comite-derechos-economicos-sociales-y-culturales-onu-reconoce-derecho-inquilinos-una>.

complaints mechanism created by the Optional Protocol. In this latter case, decisions can take the form of a request for interim measures while the Committee examines a communication, or the form of ‘views’ adopted by the Committee once its examination is concluded. This section analyses the most recent CESCER decisions regarding housing in Spain, differentiating between these three types of situations.

2.1. Concluding Observations on the Sixth Periodic Report of Spain (April 2018)

In its Concluding Observations on the sixth periodic report of Spain, published in April 2018,⁹ the Committee voiced its regret that economic, social, and cultural rights in Spain are still considered as directive principles for social and economic policy and that, in general terms, they can only be invoked once they have been developed by statute. As a central element, the Committee criticized the fact that Spain does not have an appropriate mechanism for implementing the Committee’s views and recommendations.¹⁰

Specifically with regard to housing, the Committee expressed its concern about the shortage of social housing, the increasing lack of housing affordability due to excessively high prices — particularly in the private market —, and the lack of an adequate protection of security of tenure, as well as the high number of households without adequate housing and the high number of homeless persons.¹¹

The Committee specifically focused on evictions, highlighting the absence of “an adequate legislative framework that provides statutory legal and procedural safeguards for the persons affected.”¹² In this regard, it recommended that Spain:

Adopt a legislative framework that establishes appropriate requirements and procedures to be followed for conducting evictions or forced evictions, incorporates principles of reasonableness and proportionality and provides statutory legal and procedural safeguards for the persons affected, ensuring that they have access to compensation or alternative suitable accommodation, are given a sufficient and reasonable notice period when informed of eviction orders and have access to an effective legal remedy.¹³

In summary, the Committee emphasized the need for Spain to establish adequate procedures for evictions that allow judges to evaluate their proportionality, to make adequate alternative housing available in eviction cases, and to guarantee the access to an effective judicial remedy for the persons concerned.

2.2. Requests for Interim Measures in Eviction Cases

Within the individual communications mechanism created by the Optional Protocol, the Committee can transmit to the state a request for interim measures at any time after receipt of a communication and before a determination on the merits has been reached. These measures will be those “necessary in exceptional circumstances to avoid possible

⁹ Committee on Economic, Social and Cultural Rights, Concluding Observations on the Sixth Periodic Report of Spain, E/C.12/ESP/CO/6, 25 April 2018.

¹⁰ *Id.*, para. 5.

¹¹ *Id.*, para. 35.

¹² *Id.*, para. 37.

¹³ *Id.*, para. 38.

irreparable damage to the victim or victims of the alleged violations.”¹⁴ This possibility does not imply any determination on the admissibility or merits of the communication.

In 2018, the Committee has resorted to this possibility several times, requesting the suspension of scheduled evictions in cases where there was no adequate alternative housing available. The practical effectiveness of these requests for interim measures has been mixed. According to reports by the media and social movements, these requests usually come to the judge’s attention through the defendant’s lawyer, and not directly from a public authority via an official communication channel. Moreover, these requests are not always complied with by judges: in some cases, courts have ordered to proceed with an eviction despite the Committee’s request to suspend it as an interim measure.¹⁵ On 22 February 2019, an eviction was carried out in spite of three separate requests by the Committee to suspend it until adequate alternative accommodation was found.¹⁶

In this type of requests, the Committee recalls the contents of its General Comments No. 4 and 7, stating, among others, that evictions cannot render people homeless and that, whenever those affected do not have sufficient resources, the state must adopt all necessary measures to the maximum of its available resources to provide them with alternative housing.¹⁷ Thereafter, the Committee requests the state to adopt measures to avoid irreparable damage to the authors of the communication while their case is being examined, including suspending the eviction from the home they occupy or, alternatively, ensuring that alternative housing suited to their needs is available, all this in the framework of a genuine and effective consultation with the authors.

It is problematic, therefore, that Spain lacks a specific avenue through which these requests for interim measures can be transmitted directly to the court before which the eviction case is pending, as well as an obligation to ensure that these requests are compulsory for judges as part of the procedural safeguards foreseen in Spanish law.

2.3. Views in the Case of *Ben Djazia et al.*

In June 2017, the CESCR adopted its ‘views’ in the case of *Ben Djazia et al.* (also known as *M.B.D. v. Spain*).¹⁸ This communication dealt with the issue of eviction procedures

¹⁴ GA Res. 117 (63), 10 December 2008, Art. 5, Para. 1.

¹⁵ See, e.g., Galaup, Laura, ‘España desoye un dictamen de la ONU que le insta a evitar desahucios de familias vulnerables’, *eldiario.es*, 21 November 2017, <www.eldiario.es/sociedad/desahucios-ONU_0_710429404.html>; Sanz Paratcha, Diego, ‘La lluvia fina de las órdenes de la ONU contra los desahucios en España’, *El Salto*, 18 July 2018, <www.elsaltodiario.com/vivienda/desahucios-medidas-cautelares-onu-espana>; Núñez-Villaveirán, Luis, ‘Una familia podría ser desalojada pese a un escrito contrario de Naciones Unidas’, *El Mundo*, 29 March 2018, <www.elmundo.es/madrid/2018/03/29/5abbc1a646163f142e8b4664.html>.

¹⁶ See Noriega, David, ‘Desahuciadas cuatro familias de Argumosa 11, símbolo de la especulación inmobiliaria y el derecho a la vivienda’, *eldiario.es*, 22 February 2019, <https://www.eldiario.es/madrid/Vecinos-inminentes-desahucios-Argumosa-Madrid_0_870713019.html>.

¹⁷ See Committee on Economic, Social and Cultural Rights, General Comment No. 4: The Right to Adequate Housing (art. 11 (1) of the Covenant); Committee on Economic, Social and Cultural Rights, General Comment No. 7: The Right to Adequate Housing (art. 11 (1) of the Covenant): Forced Evictions, E/1998/22, 20 May 1997.

¹⁸ Committee on Economic, Social and Cultural Rights, Communication No. 5/2015, E/C.12/61/D/5/2015, 21 July 2017. See also the analysis in J. Hohmann, ‘Resisting Dehumanising

without adequate alternative accommodation, and the responsibility of states in this context under international human rights law.

The communication concerned Mohamed Ben Djazia, Naouel Bellili, and their two minor children, who were one and three years old at the time. The authors lived with their children in a rented room in an apartment in Madrid. They had repeatedly applied for social housing during twelve years, to no avail. Once the unemployment benefits of Ben Djazia were terminated, the authors found it impossible to make their rent payments for several months. The contractual period for the lease expired in the meantime, and the owner made clear her intention of not renewing it. The authors refused to leave the room, since there was no alternative housing available for them and their children. The landlord initiated eviction proceedings against the authors. Ben Djazia requested legal aid at that point, but it was denied to him since his claim was deemed indefensible.¹⁹

The court of first instance declared that the lease had terminated due to the expiry of the contractual period, ordering that the authors be evicted. The court noted their dire economic and family situation, notifying the corresponding regional and municipal social services. The authors opposed the eviction, claiming that it would lead to a violation of their right to housing, since there was no alternative accommodation available for them. When their opposition was rejected by the court, they appealed this decision, but their appeal was dismissed. They sought an *amparo* remedy before the Constitutional Court, but no provisional measures suspending the eviction were adopted, and this remedy proved later unsuccessful.²⁰ The authors were finally evicted. They slept in a municipal shelter for ten days, period after which they had to leave the premises. Given the unavailability of alternative accommodation, the authors were forced to sleep in the family car with their two young children for four nights, until an acquaintance offered them temporary shelter.

The authors claimed before the Committee a violation of their right to adequate housing, arguing that the judicial eviction procedure did not observe the necessary safeguards, since the Spanish legislation does not allow for courts to evaluate the consequences of an eviction and the particular circumstances of each case. They recalled that Spanish law allows for evictees to oppose the eviction claiming that they have in fact paid the rent or contesting other elements like the terms of the rental agreement, but they cannot oppose it on the basis that it would entail a violation of their right to housing or would lead to other human rights violations.²¹

Housing Policy: The Case for a Right to Housing in England', *Queen Mary Human Rights Law Review*, Vol. 4, No. 1, 2017.

¹⁹ Committee on Economic, Social and Cultural Rights, Communication No. 5/2015, paras. 2.1 *et seq.*

²⁰ The *amparo* remedy seeks the direct and immediate protection of fundamental rights before the Constitutional Court, and can be introduced after all other domestic remedies have been exhausted. However, this remedy does not have suspensive effect, and, despite the possibility for the Constitutional Court to adopt provisional measures, this possibility has rarely — if ever — been used in eviction cases.

²¹ See Law 1/2000, of 7 January, of Civil Procedure [*Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil*], Boletín Oficial del Estado, 8 January 2001, No. 7, p. 575, Arts. 441.1 bis and 444.1 bis.

The intervention of the UN Special Rapporteur on adequate housing in this case was noteworthy.²² Without judging the merits of the authors' claims, the Special Rapporteur underlined the fact that they did not have an effective remedy before the domestic courts that could have prevented their homelessness. She criticized the fact that the applicable domestic legislation allows rental contracts to terminate due to the expiry of the contractual period, without there being specific legal grounds in the absence of which the lease must necessarily be renewed.²³

In its Views, the Committee recalled that the human right to adequate housing is a fundamental right that must be secured for all, regardless of their income or their access to economic resources. In the framework of the ICESCR, states must take all necessary measures to achieve the full realization of this right, to the maximum of their available resources. The right to housing implies that everyone must have a degree of security of tenure allowing them to be legally protected against evictions, and this guarantee extends to tenants, regardless of whether their landlord is a public entity or a private person.²⁴

The Committee also evoked the prohibition of forced evictions, which are *a priori* incompatible with ICESCR requirements and can only be justified in exceptional circumstances and according to international human rights law. The notion of 'forced evictions' must be understood here in an autonomous sense, and refers to evictions which do not comply with the Covenant and other applicable human rights instruments. This term is not restricted, therefore, to large-scale evictions of entire communities, and applies to cases such as the one at hand but also to situations of occupation without a legal title.²⁵

According to the Committee, public authorities must guarantee the observance of the principles of reasonableness and proportionality in these cases. They must guarantee appropriate procedural protections, including a real opportunity for genuine consultation with those concerned. Since there can be no right without an effective remedy, states must ensure that persons whose right to adequate housing might be affected have access to effective and appropriate judicial remedies.

Consequently, in order to proceed with an eviction for nonpayment of rent, the following requirements must be complied with: the eviction is provided for by law; it is carried out as a last resort; the persons concerned have had prior access to an effective judicial remedy in order to ascertain whether the measure in question is duly justified; there is a real opportunity for genuine prior consultation with the persons concerned; there are no less restrictive alternative means or measures; and the persons concerned do not remain in or are exposed to situations constituting a violation of human rights.²⁶

In particular:

²² UN Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context, Ms. Leilani Farha, Communication 5/2015: MDB [*sic*] et al. v. Spain, 31 January 2017.

²³ *Id.*, para. 26.

²⁴ Committee on Economic, Social and Cultural Rights, Communication No. 5/2015, paras. 13.1 *et seq.*

²⁵ UN Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context, Ms. Leilani Farha, Communication 5/2015: MDB [*sic*] et al. v. Spain, para. 27.

²⁶ Committee on Economic, Social and Cultural Rights, Communication No. 5/2015, para. 15.1.

Evictions should not render individuals homeless. Where those affected do not have the means to acquire alternative housing, States parties must take all appropriate measures to ensure, where possible, that adequate alternative housing, resettlement or access to productive land, as the case may be, is available. [...] The State party has a duty to take reasonable measures to provide alternative housing to persons who are left homeless as a result of eviction, irrespective of whether the eviction is initiated by its authorities or by an individual such as the lessor.²⁷

In the case of Ben Djazia, the Committee found that the eviction took place without an evaluation of the consequences this would have on the authors and especially on their minor children. It deemed that the fact that the authors were evicted without alternative housing suited to their needs entailed a violation of their right to adequate housing, since the state did not demonstrate that it had taken all necessary measures to the maximum of its available resources to this end.²⁸

The Committee then formulated a series of recommendations to Spain. With regard to the authors, Spain has an obligation, if they do not have adequate accommodation, to assess their current situation and to grant them public housing or take any other measures enabling them to enjoy adequate housing. Moreover, it must award the authors financial compensation for the violations they suffered.²⁹

With a view to preventing similar violations in the future, and as general recommendations, the Committee stated that Spain has the obligation:

To adopt appropriate legislative and/or administrative measures to ensure that in judicial proceedings in relation to the eviction of tenants, defendants are able to object or lodge an appeal so that the judge might consider the consequences of eviction and its compatibility with the Covenant; [...] [and]

To take the necessary measures to ensure that evictions involving persons who do not have the means of obtaining alternative housing are carried out only following genuine consultation with the persons concerned and once the state has taken all essential steps, to the maximum of available resources, to ensure that evicted persons have alternative housing, especially in cases involving families, older persons, children and/or other persons in vulnerable situations.³⁰

Besides the key interpretative value of this decision to determine the scope of the guarantees surrounding the right to adequate housing in international human rights law, the following elements can be highlighted: the need for observing the principles of reasonableness and proportionality before ordering an eviction, the need for an effective and appropriate judicial remedy for those at risk of being evicted, and the need for a real opportunity for genuine consultation with those concerned in the framework of eviction proceedings.³¹

²⁷ Id., para. 15.2.

²⁸ Id., para. 18.

²⁹ Id., para. 20.

³⁰ Id., para. 21.

³¹ See, for an analysis focused on European human rights law, P. Kenna, 'Housing Rights: Positive Duties and Enforceable Rights at the European Court of Human Rights', *European Human Rights Law Review*, Vol. 2008, No. 2, 2008, pp. 193–208; F. Jiménez García, 'Tomarse en serio el Derecho

After having presented this analytical summary of the most recent CESCRC decisions concerning the right to housing in Spain, the chapter now examines two judgments of the Spanish Supreme Court allowing us to predict a possible shift in its approach to this issue.

3. Two Recent Spanish Supreme Court Decisions: A Shift in Approach?

With the aim of predicting the judicial reception of these CESCRC decisions regarding the right to housing in Spain, and given the lack of case law that explicitly refers to the decisions mentioned above, this section focuses on two recent judgments of the Spanish Supreme Court: one considers the legal effects of the decisions taken by human rights treaty-monitoring bodies on individual communications; the other one confirms the need to conduct a proportionality test taking into account the rights of children in judicial eviction proceedings brought before administrative courts.

3.1. The Legal Effects of Treaty-Monitoring Bodies' Decisions on Individual Communications

To consider the legal value of the obligation to provide reparation and compensation contained in decisions of human rights treaty-monitoring bodies on individual communications — which in the *Ben Djazia et al.* case appears as a financial award plus an obligation to evaluate the authors' situation and to grant them public housing or take alternative measures —, we can refer to the judgment of the Spanish Supreme Court of 17 July 2018.³² Even though this judgment is framed in terms of state liability, the reasoning of the Supreme Court seems applicable to the general recommendations made by treaty-monitoring bodies such as the Committee on Economic, Social and Cultural Rights in their 'views' on individual communications.

The Supreme Court judgment at issue considered the legal effects of a decision taken by the CEDAW Committee in the framework of the individual complaints mechanism proper to that Convention. The CEDAW Committee is the treaty-monitoring body for the UN Convention on the Elimination of all Forms of Discrimination Against Women, whose Optional Protocol foresees an individual communications procedure similar to the one contained in the Optional Protocol to the ICESCR.³³

The communication concerned the case of a woman whose minor daughter was murdered by an abusive ex-partner due to a modification in the regime of visits determined by the judge, which went from monitored to unmonitored without the appropriate safeguards and without taking into account past instances of domestic violence.³⁴ The CEDAW

internacional de los derechos humanos: especial referencia a los derechos sociales, el derecho a la vivienda y la prohibición de los desalojos forzosos', *Revista Española de Derecho Constitucional*, Vol. 101, 2014, pp. 79–124; N. Bernard, 'Les ressources — préjudicielles notamment — qu'offre l'article 34, paragraphe 3, de la Charte des droits fondamentaux de l'Union européenne (droit à une aide au logement)', *Revue trimestrielle des droits de l'homme*, Vol. 2014, No. 97, 2014, pp. 81–125.

³² Spanish Supreme Court (Administrative jurisdiction, 4th Section) [*Tribunal Supremo (Sala de lo Contencioso-Administrativo, Sección 4^a)*], Judgment No. 1263/2018, 17 July 2018.

³³ GA Res. 180 (34), 18 December 1979; GA Res. 4 (54), 15 October 1999.

³⁴ Committee on the Elimination of Discrimination Against Women, Communication No. 47/2012, CEDAW/C/58/D/47/2012, 15 August 2014. See also K. Casla, 'Supreme Court of Spain: UN Treaty Body individual decisions are legally binding', *EJIL: Talk!*, 1 August 2018,

Committee found a violation of several of the rights protected by that Convention, ordering the state to grant an adequate reparation to the author and a comprehensive compensation commensurate with the seriousness of the infringement of her rights, and to conduct “an exhaustive and impartial investigation to determine whether there are failures in the State’s structures and practices that have caused the author and her daughter to be deprived of protection.”³⁵

The Supreme Court judgment focused on whether the recommendations formulated by the CEDAW Committee in its Views are binding for Spain. It considered the proper avenue to request the state to comply with the Committee’s decisions, and whether the lack of a specific procedure in domestic law providing for the enforcement of this kind of recommendations implied that they can be autonomously enforced.

It must be emphasized, in any case, that the Supreme Court judgment reviewed the legal effects of the recommendations formulated by the CEDAW Committee relating to the reparation and compensation to the author, and not those concerning more generally the avoidance of future human rights violations. In other words, the Supreme Court reviewed the situation wherein there are “recommendations targeted to our authorities so that they repair the damages stemming from the violation of the rights foreseen in the Convention.”³⁶ However, it is argued that its reasoning can be similarly applied to those recommendations of a general scope, as we will see.

The Supreme Court judgment at issue annulled a previous ruling of the court of appeals rejecting the existence of the necessary elements to declare the state’s liability in this case. The Supreme Court also confirmed the inexistence of a specific and autonomous procedural avenue to enforce the CEDAW Committee’s recommendations. Because of this lack of a particular procedure, it deemed that those Views can in and of themselves serve as a basis to initiate state liability proceedings. Its argumentation proceeded in several steps.

Firstly, the Supreme Court acknowledged that the CEDAW Convention does not introduce a higher supranational instance to revise or to directly control domestic administrative or judicial decisions, nor does it impose on states parties any particular procedures to enforce the reparations due to victims of human rights violations found by the CEDAW Committee.

Secondly, it confirmed that the Views of the CEDAW Committee are binding for Spain. This analysis, which seems to be applicable in its entirety to the Views of the Committee on Economic, Social and Cultural Rights, is especially valuable for our argument. The Spanish Supreme Court recalled in its judgment that the decision at issue was “taken by a body created within the ambit of an international norm which, because of the explicit provision of Article 96 of the Spanish Constitution, is part of our domestic legal order”, adding that “the norms relating to fundamental rights must be interpreted in conformity

<www.ejiltalk.org/supreme-court-of-spain-un-treaty-body-individual-decisions-are-legally-binding/>.

³⁵ Committee on the Elimination of Discrimination Against Women, Communication No. 47/2012, para. 11.a).

³⁶ Spanish Supreme Court (Administrative jurisdiction, 4th Section), Judgment No. 1263/2018, p. 7.

with the Universal Declaration of Human Rights and the international treaties and covenants on these matters ratified by Spain.”³⁷

Thirdly, since the Views were adopted within a procedure expressly regulated by an international treaty, with guarantees and the full participation of Spain, and in light of the principles of the rule of law and the hierarchy of norms, the Supreme Court stated that “international obligations concerning the enforcement of the decisions of international treaty-monitoring bodies whose competence has been accepted by Spain are part of our domestic legal order.”³⁸

Fourthly, considering the above, the Supreme Court deemed that:

Given the inexistence of a specific enforcement procedure for the CEDAW Committee’s Views, which constitutes in itself a breach of a statutory and constitutional mandate by Spain, the fact that the claimant can resort to an adequate and effective avenue to enforce the recognition of the violation of her fundamental rights before the Spanish judiciary directly concerns the respect and the compliance by the Spanish public authorities of the claimant’s fundamental rights.³⁹

Finally, it ruled that there is an obligation to repair that violation, mandating the reparation and compensation of the damage suffered by the victim.⁴⁰

There are, nevertheless, certain ambiguities regarding the possible extension of this legal reasoning to other cases. It is true that the Supreme Court restricted the scope of its review to cases where reparation and compensation had been awarded to the authors by the corresponding treaty-monitoring body. This means, for the *Ben Djazia et al.* case, that the authors can directly enforce the financial award recommended by the CESCER and presumably also the recommendation to grant them public housing or take alternative measures. However, more broadly, it seems that the legal reasoning developed by the court could be extended to any recommendations contained in decisions on individual communications — also those recommendations of a general nature —, since the Supreme Court relied on the articulation of the hierarchy of norms within the Spanish legal order and the interpretation of the international legal obligations binding for Spain by virtue of its ratification of international human rights treaties. Its decision was based on the role of treaty-monitoring bodies in international human rights law and, through the recognition of their competence to examine individual communications, on the binding status of this type of decisions in domestic law.

It could be understood, consequently, that there is a similar legal obligation for Spain to comply with those recommendations that have a general scope and seek to prevent future human rights violations. At the very least, following the text of the Optional Protocol to the ICESCR, there is a duty to give them ‘due consideration’. Moreover, the legal value of the Committee’s requests for interim measures remains unclear: Do they have the same binding legal status as ‘views’ or do their legal effects differ? And, if they differ, are

³⁷ Id., p. 24. Article 96 of the Spanish Constitution reads: “Validly concluded international treaties, once officially published in Spain, shall be part of the internal legal system [...]” All translations are by the author.

³⁸ Spanish Supreme Court (Administrative jurisdiction, 4th Section), Judgment No. 1263/2018, p. 25.

³⁹ Id., pp. 28–29.

⁴⁰ Id., p. 29

interim measures not instrumental to avoid potential human rights violations on which the Committee could eventually adopt ‘views’? Is there then a substantial difference between both types of decisions in light of international human rights law obligations? It would be desirable that future case law clarifies these ambiguities. In any case, this judgment confirms that the highest judicial court in Spain is committed to the legal effectiveness of UN Committees’ ‘views’ on individual communications, seeing them as compulsory in domestic law.

3.2. The Need to Conduct a Proportionality Test in Judicial Eviction Proceedings

The obligation to conduct a proportionality test in judicial eviction proceedings, reiterated in the aforementioned CESCER decisions, has found judicial reception to some extent in a Supreme Court Judgment of 23 November 2017.⁴¹ This judgment examined a court order adopted by an administrative judge authorizing the entry into a home to evict its occupants and recover possession of the property, which was illegally occupied. The property belonged to a public authority.

The scope of review in this Supreme Court judgment was restricted to the interpretation of the rights of children in both domestic and international law; in particular, the need for the administrative judge examining a request to authorize an entry into a home to take into account the particular situation of the concerned minors, in light of domestic statutes and the UN Convention on the Rights of the Child.⁴² The judgment sought to determine the interpretative scope of these norms, in particular to ascertain whether it is compulsory for the administrative judge to conduct a proportionality test in which they consider the situation of children before authorizing such a request.

The Supreme Court recalled the case law of the Spanish Constitutional Court to the effect that any resolution by administrative courts authorizing the entry into a home must be duly justified, thus serving as a guarantee of the inviolability of the home, “after balancing the different rights and interests that may be affected and adopting the necessary safeguards so that the limitation of a fundamental right it entails is carried out in the least restrictive manner possible.”⁴³ In this sense, the entry into a home must be absolutely indispensable in order for the administrative judge to authorize it.

The judgment of the court of appeals under review, although referring to this constitutional doctrine, had considered that “the rights of minors and the right to adequate housing are extraneous to this authorization, since the occupation of a home must be carried out and claimed according to the avenues provided for by statute and not outside of them.”⁴⁴ Moreover, regarding the defendant’s petition that the authorization of entry into her home be postponed until her economic situation improved or until the end of the school year, the court of appeals had affirmed that “the issues of a social nature put

⁴¹ Spanish Supreme Court (Administrative jurisdiction, 3rd Section) [*Tribunal Supremo (Sala de lo Contencioso-Administrativo, Sección 3ª)*], Judgment No. 1797/2017, 23 November 2017.

⁴² See Organic Law 1/1996, of 15 January, of Legal Protection of Minors [*Ley Orgánica 1/1996, de 15 de enero, de Protección Jurídica del Menor, de modificación parcial del Código Civil y de la Ley de Enjuiciamiento Civil*], Boletín Oficial del Estado, 17 January 1996, No. 15, p. 1225; AG Res. 25 (44), 20 November 1989.

⁴³ Spanish Constitutional Court (2nd Section) [*Tribunal Constitucional (Sala 2ª)*], Judgment No. 188/2013, 4 November 2013, FJ 2.

⁴⁴ Spanish Supreme Court (Administrative jurisdiction, 3rd Section), Judgment No. 1797/2017, p. 8.

forward must be resolved, in their case, by the municipal or regional administrative bodies competent in these matters, but not in the present proceedings concerning an authorization of entry into a home.”⁴⁵

The Supreme Court evoked the European Court of Human Rights case law, in particular in the *Yordanova* and *Winterstein* cases, to overrule these affirmations. These judgments confirmed that anyone at risk of losing their family home must have guarantees that the measure ordering an eviction is proportionate and reasonable, and that this proportionality and reasonableness will be assessed by a court examining the concurring factors of a social and personal nature.⁴⁶ This proportionality defense must be explicitly raised. When evictees face homelessness and have prior title to the property, the scale is more easily tipped in their favor; however, a lack of alternative accommodation alone does not generally entail a violation of the right to the home under the European Convention on Human Rights.⁴⁷

The Supreme Court concluded that the order authorizing the entry into the home in this case contravened the procedural safeguards foreseen in the Spanish legal order, “since it sustained, without a prior judgement of the concurring circumstances [...] that the presence of minors in the home whose eviction is sought [...] is an issue ‘of a social nature’, extraneous to the judicial authorization, ‘which must be resolved by the municipal or regional administrative bodies.’”⁴⁸ The Supreme Court stated that the consideration of the rights and interests of the affected children cannot be dispensed with, and, consequently, that the judicial order authorizing the entry into the home was not duly justified and was insufficient, for it did not make an evaluation of the proportionality of a measure which affected the sphere of protection of the rights and interests of minor children.

Through the angle of the rights of children and the Convention on the Rights of the Child, this case law is aligned with the requirements repeatedly mentioned by the CESCR concerning forced evictions, that is, the need for a proportionality test that allows the judge to examine the concurring circumstances in each case and the risk that the right to housing or other human rights might be violated as a consequence of the eviction. Although the Supreme Court judgment in this case is limited to the authorization of entry into a home adopted by administrative judges, it seems that there are no obstacles, as a matter of principle, to extend these guarantees to evictions based on criminal law, considering the special guarantees surrounding criminal procedures.

In this sense, a recent judgment can be cited which reversed on appeal a conviction for a crime of usurpation.⁴⁹ This judgment applied the doctrine of the ‘state of necessity’,

⁴⁵ *Id.*, p. 9.

⁴⁶ *Yordanova and Others v. Bulgaria*, No. 25446/06, 24 April 2012; *Winterstein and Others v. France*, No. 27013/07, 17 October 2013. See also A. Remiche, ‘Yordanova and Others v Bulgaria: The Influence of the Social Right to Adequate Housing on the Interpretation of the Civil Right to Respect for One’s Home’, *Human Rights Law Review*, Vol. 12, No. 4, 2012, pp. 787–800.

⁴⁷ See, for a detailed overview of the protection against evictions provided by the European Convention on Human Rights, S. Fick & M. Vols, ‘Best Protection Against Eviction? A Comparative Analysis of Protection Against Evictions in the European Convention on Human Rights and the South African Constitution’, *European Journal of Comparative Law and Governance*, Vol. 3, 2016, pp. 45–52.

⁴⁸ Spanish Supreme Court (Administrative jurisdiction, 3rd Section), Judgment No. 1797/2017, p. 14.

⁴⁹ Provincial Court of Madrid (16th Section) [*Audiencia Provincial de Madrid (Sección 16ª)*], Judgment no. 613/2018.

considering that the economic and family situation of the accused justified their occupation of an empty housing unit that previously belonged to a banking institution and was at the time the property of a company specialized in purchasing real estate assets (a ‘vulture fund’), both of which most likely knew about the occupation. The judgment stated that “if we put, as we say, both legal interests in a scale, there is no doubt that the legal interest of protecting minors, persons with disabilities, and families prevails over the legal interest of the right to possession.”⁵⁰ It deemed, therefore, that there was a state of necessity, exempting the accused of any criminal liability for their actions.

Regarding civil law evictions between private parties, the scope of these guarantees may be reduced in light of the balance of interests that must be carried out. The European Court of Human Rights has ruled that, where other private interests are at stake, the right to respect for the home does not necessarily require the possibility for defendants to raise a proportionality defense if the legislature has already prescribed by law how their respective rights are to be respected.⁵¹ However, it is difficult to see why a proportionality test should be entirely ruled out in these cases: the court could summarily assess proportionality when the result of this balancing of interests is straightforward, while leaving open the possibility to carry out a thorough assessment in more complex situations. This latter solution would be more consistent with the Committee’s and the UN Special Rapporteur’s interpretation of the right to housing under the ICESCR, which does not generally distinguish between public and private landlords in this regard.⁵²

To conclude, it can be said that the judgments considered in this section allow us to predict a possible shift in approach towards CESCER decisions concerning the right to housing. On the one hand, the Supreme Court confirmed the binding nature of treaty-monitoring bodies’ decisions in individual communications, and the recommendations contained therein, for domestic law. However, we can ask ourselves about the delimitation between those recommendations which directly concern the authors, mandating reparation or compensation, and those of a more general nature which enjoin the state to make changes to avoid future human rights violations. On the other hand, the Supreme Court endorsed the need for administrative judges to conduct a proportionality test before authorizing the entry into a home to carry out an eviction. Despite this clear statement, some doubts remain as to the extension of this guarantee to civil procedures. Again, it would be desirable that future case law of the Spanish Supreme Court clarify these points, explicitly referring to CESCER decisions in doing so.

In any case, the effect of both of these decisions combined is a net positive: if (some) judges already have a duty to conduct a proportionality test in judicial eviction proceedings and if the recommendations contained in CESCER decisions on individual

⁵⁰ *Id.*, p. 7.

⁵¹ *F.J.M. v. the United Kingdom*, No. 76202/16, 6 November 2018. *See also Vrzić v. Croatia*, No. 43777/13, 12 July 2016; *McCann v. the United Kingdom*, No. 19009/04, 13 May 2008. *See further* J.C. Benito Sánchez, ‘F.J.M. v. the United Kingdom: Judicial review of the proportionality of an eviction in private rental housing’, *Strasbourg Observers*, 15 January 2019, <<https://strasbourgobservers.com/2019/01/15/f-j-m-v-the-united-kingdom-judicial-review-of-the-proportionality-of-an-eviction-in-private-rental-housing/>>.

⁵² According to the Committee: “All persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. This guarantee also applies to persons living in rental accommodation, whether public or private; such persons should enjoy the right to housing even when the lease expires.” Committee on Economic, Social and Cultural Rights, Communication No. 5/2015, para. 13.2.

communications are binding in domestic law, this might mean that Spain is coming closer to recognizing a requirement that a proportionality test be conducted in *all* evictions. Otherwise, as we have seen in the *Ben Djazia et al.* case, this may constitute a violation of the human right to adequate housing that the state will eventually be bound to repair and compensate. This also calls strongly for the binding nature of the interim measures requested by the CESCR in the context of individual communications. Nevertheless, the protection against evictions foreseen in the Spanish legal order still has much room for improvement, and an explicit legislative recognition of these elements would be extremely welcome.⁵³

4. Conclusion

This chapter began with an analytical summary of the most recent decisions of the Committee on Economic, Social and Cultural Rights (CESCR) concerning the right to housing in Spain, both in the framework of the periodic monitoring of states parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR) and in the framework of the individual communications mechanism foreseen by the Optional Protocol to the Covenant. Within the latter, we distinguished between requests for interim measures submitted by the CESCR to the state while it examines a communication and the ‘views’ the Committee adopts once its examination is concluded. We focused on the *Ben Djazia et al.* case and on forced evictions.

The chapter then gave an overview of two recent judgments of the Spanish Supreme Court allowing us to predict a possible shift in its approach to this issue. Given the lack of case law specifically referring to the cited CESCR decisions, we took as reference, on the one hand, a judgment dealing with the binding nature in domestic law of recommendations formulated by treaty-monitoring bodies with regard to individual communications, and, on the other hand, a judgment examining the need for administrative judges to conduct a proportionality test that takes into account the rights of children prior to authorizing an eviction.

Building on this analysis, several suggestions can be made to improve the legal protection against evictions in Spain. Firstly, it is necessary to recognize the binding character of the requests for interim measures adopted by the CESCR. Secondly, in light of the Committee’s decisions, Spain should guarantee that a reasonableness and proportionality test is conducted prior to *any* eviction, allowing judges to examine the economic, social, and family circumstances in each case and to evaluate the risk that the eviction may lead to human rights violations. The state must take all necessary measures to the maximum of its available resources to ensure the availability of adequate alternative housing in the context of an eviction. Finally, the persons concerned must have access to an appropriate remedy with suspensive effect, so that their claims can be heard in the courtroom before an eviction takes place.

⁵³ See further, for a comprehensive overview of the main characteristics of the legal protection against evictions in Spain and ten other European countries, P. Kenna, ‘Introduction’, in P. Kenna *et al.* (Eds.), *Loss of Homes and Evictions across Europe: A Comparative Legal and Policy Examination*, Cheltenham, Edward Elgar, 2018, pp. 1–65.

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