THE LEGAL CAPACITY OF THE INDIVIDUAL TO INFLUENCE HUMAN RIGHTS INTERNATIONAL LAW

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Abstract

The legal capacity of the individual in international law is of a complex nature. As a subject in the legal field, the natural person has allowed to reframe the prevailing orthodoxy of the international legal order through jurisprudence. Case by case, the individual is contributing to the structural transformation the world is embedded in by standing for their fundamental rights and freedoms before international courts. Drawing on this bottom-up understanding, this article sets out to discuss whether and to what extent are individual's complaints capable of having an impact on human rights legislation through case law. For this question to be answered, this article begins by providing an overview of the evolution that the international capacity of the human person has undergone in the last decades. This is followed by a comprehensive analysis of the individual complaint procedures foreseen by international legal orders, as well as a comparative research aimed at gathering insights on the access to justice granted to natural persons by European, African and American regional human rights protection systems. Next, the paper assesses the dichotomy between monism and dualism in the particular case of Spain, a debate that is gaining ground in the ambit of the direct application of international law in the domestic legislation. Finally, this article casts doubts on the legitimacy and binding power of human rights international treaties: it is hard to perceive these legal texts as mandatory if they are subjected to national authorities' willingness to incorporate international legal dispositions and resolution into internal legislation

Keywords: *Public International Law, Human Rights, Individual's access to justice, Human Rights Treaty Bodies, International Courts.*

1. Introduction

Every human being is vested with inherent fundamental rights that can be asserted before courts and are to be respected by every political organisation including the State.[1] Yet, the acknowledgment of these rights has not been gained without prior struggle. In fact, individual's access to international courts stands out as one of the greatest accomplishments of a collective effort. The relevance of the chosen topic rests on the critical progress that has been made on the development of the 'corpus juris' with the adoption of regional and international mechanisms that grant individuals the capacity to lodge a claim for human rights' violation.[2]

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[1] Antonio Augusto Cançado Trindade, "Chapter X: The Legal Capacity of the individual as Subject of International Law", in *International Law for Humankind towards a New Jus Gentium* (Netherlands: Martinus Nijhoff Publisher, 2010), 243.

[2] Soledad García Muñoz, "La capacidad jurídico-procesal del individuo en la protección internacional de los derechos humanos", *Revista de Relaciones Internacionales* 17 (1999): 15.

Important authors such as Philip Alston[3], Dinah Shelton[4] and Stian Oby Johansen[5] have echoed the proliferation of non-state actors' and their increasing leverage capacity. Even if the bulk of these scholars' literature has been particularly devoted to international organisations, these academics' work has paved the way for other non-traditional actors, including the natural person, to access to justice in the international arena. Soundly align with this diversification of power units and bottom-up approaches, Anne F. Bayesky [6], Sarah Joseph, Katie Mitchell & Linda Gyorki[7], among others, targeted natural person with the aim of empowering individuals with the tools and knowledge required to submit their complaints directly to the international accountability mechanism for a violation of their rights.

Using a doctrinal analysis and a qualitative approach, this contribution aims to build on the previously analysed literature and strives to examine individual's effective capacity to influence international human rights law by rising complaints before international courts and committees. To that end, this paper begins by setting forth an overall assessment of the progress that individual's active legitimation has undergone in the last decades. After the general overview of the historical context, the next section addresses the means that international schemes put at natural person's disposal in order to file a human rights' breach; this is followed by a comparative analysis of individual's legal capacity to stand for their rights under European, African and American regional human rights law. The fifth section focuses attention on Spain and the conflict that revolves around the direct application of international committees' resolutions. Finally, the last section provides a summary of the main findings and conclusions of my research.

2. Historical evolution

In recent decades, important steps had been taken towards individual complaining procedures. In essence, the development of the individual's direct access to justice reaffirms the position of the natural person as a subject of international human rights law, and provides a set of mechanisms that enable an important shift from classical international law to accommodate the new reality. [8] That said, this section will be looking into the ways in which the right to individual complaints has evolved in the international legal scheme.

Since the adoption of the Universal Declaration of Human Rights in 1948, new regional and international mechanisms for human rights' protection have emerged. The European Convention of Human Rights

[3] Philip Alston, *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005).

[4] Dinah Shelton, *Committement and compliance: the role of non-binding norms in international legal system* (Oxford: Oxford University Press, 2000).

[5] Stian Oby Johansen, *The Human rights accountability mechanisms of international organizations* (Cambridge: Cambridge University Press, 2020).

[6] Anna F. Bayefsy, *How to complain to the UN human rights treaty system* (New York: Transnational Publisher, 2002).

[7] Sarah Joseph, Katie Mitchell, Linda Gyorki and Carin Benninger-Budel, "A Handbook on the Individual Complaints Procedures of the UN Treaty Bodies", *OMCT Handbook Series* Vol. 4 (November 2006): 29-238.

[8] Ana Gemma López Martin, "La reclamación individual como técnica de control del respeto a los derechos humanos: ¿Comité de Derechos Humanos de Naciones Unidas o Tribunal Europeo de Derechos Humanos?", in *Cursos de Derechos Humanos de Donostia-San Sebastián,* (Bilbao: Universidad del País Vasco, 2005), 227.

(ECHR)[9] was one of those initial attempts to ensure the collective protection of human rights in the European region, still, it must be recalled that the enforcement of the Convention lies in the willingness of the Member states of the Council of Europe to comply. After the entry into force in 1953 of the ECHR, the safeguarding of fundamental rights kept gaining ground in the international agenda and up to 11 protocols to the Convention were adopted with the only propose of envisaging an all-inclusive protection and a wider range of unalienable rights under the Council of Europe and its European Court of Human Rights (ECtHR).[10]

Classical protection mechanisms were grounded on treaty commitments to which states were subjected. This traditional observance to human rights gradually shifted from 'weak' forms of protection, such as state report submissions, to a more comprehensive judicial implementation machinery that foresees the active and direct legitimation of the individual to report a human right violation against a contracting Member state.[11] The development of human rights protection mechanisms was also evidenced by the incorporation of new actors. A decade ago, non-state actors' presence in the legal domain was essentially residual and scholars' interest on the subject low. Nevertheless, this category has become increasingly powerful in a very short time frame, and for the foreseeable future, non-state actors are here to stay.[12]

The irruption of emerging global players in the legal picture urged the international community to work towards non-treaty-based methods including customary law and general principles, to ensure a far-reaching protection of human rights.[13] An example of these non-traditional instruments specifically targeted to unalienable rights was provided by the procedure foreseen in ECOSOC resolution 1503. The complaint system developed under this resolution was aimed at putting a halt to "particular situations which appear to reveal a consistent pattern of gross and reliably attested violations of human rights requiring consideration by the Commission"[14]. To that end, the 1503 procedure stipulated a complaint mechanism characterised by the following three features: first, every State, including those States who were not parties of the UN, could be subject of a complaint submitted on the basis of a human right violation; second, a far-reaching and, therefore, flexible interpretation of the 'human right' construct was promoted; and, third, individuals alleging to be victims of a human right violation were entitled to file a complaint. [15]

[9] Council of Europe, "European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14", ETS 5 (4 November 1950).

[10] Frederik G. E. Sundberg, "Control of Execution of Decision Under the ECHR – Some Remarks on the Committee of Ministers' Control of the Proper Implementation of Decisions Finding Violations of the Convention", in *International Human Rights monitoring mechanisms: essays in honour of Jakob Th. Möller*, eds. Gudmundur Alfredsson, Jonas Grimheden, Bertrand G. Ramcharan, and Alfred Zayas (The Hague: Kluver, 2001), 561.

[11] August Reinisch, "The Changing International Legal Framework for Dealing with Non-State Actors", in *Non-State Actors and Human Rights*, ed. Philip Alston (Oxford: Oxford University Press, 2005), 37-89.

[12] Philip Alston, "The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?", in *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005), 5.

[13] Reinisch, "The Changing International", 37-89.

[14] Economic and Social Council Resolution 1503 (XLVIII), 48 U.N. ESCOR (No. 1A) at 8, U.N. Doc. E/4832/Add.1 (1970).

[15] Maxime E. Tardu, "United Nations Response to Gross Violations of Human Rights: The 1503 Procedure Syposium International Human Rights", *Santa Clara Law Review* 20 no.3 (January 1980): 561.

The 1503 procedure was only the point of departure for individual complaints. Ever since, the procedural capacity to internationally and regionally claim a violation of fundamental rights has only been strengthened. In view hereof, individual complains remain today as a key control mechanism to ensure the effective functioning of the human right protection system, since it provides to those who allege to be victims of a human right breach the entitlement to confront the State party of such violation by submitting a complaint under international law. In essence, individual direct access to justice entails a full-scale legal revolution.[16]

Individual complaints mechanism offers a unique opportunity for natural persons to stand for their rights. Yet, the excess of lawsuits filed to date has limited individual's access to international jurisdictions. The Council of Europe has attempted to address this problem through the adoption of a set of modifications included in Protocol nº 14 of May 13, 2004. Nevertheless, these measures have been subject of criticism as they may hinder individual's access to the ECtHR and therefore compromise the credibility of the European human rights protection system. Therefore, it should be born in mind that despite important advancements have been made in the field of human rights and their protection, there is still a lot to work on.[17]

3. How to file a human rights complaint through current international mechanisms

In spite of significant and positive developments in the safeguarding of fundamental rights, additional mechanisms are called for in order to guarantee a comprehensive framework that foresees the lodging of individual complaints.[18] Since the 1970s, the legal capacity of the individual has wound its way within international law to the point of being a matter of active concern among scholars in the legal field.[19] In the following, this section examines under which circumstances are natural persons entitled to formulate, directly, complaints before international and regional courts and committees.

3.1. Universal protection of human rights

The UN provides to individuals a set of mechanisms to vindicate their human rights under international law. Once national remedies have been exhausted, an individual has the legal capacity to bring a complaint before a UN Treaty Body or the UN Human Rights Council.

To begin with, the UN Human Rights Council has developed a special procedure for individuals who allege patterns of gross human rights violations to submit a complaint against a UN Member state. This procedure adopted by resolution 5/1 of 18 June 2007 is grounded on the previously analysed 1503 mechanism and is characterised by the principles of impartiality, objectivity and efficiency. This

[16] Lopez Martin, "La reclamación individual", 227.

[17] José Manuel Sanchez Padrón, "El Recurso Individual ante el Tribunal Europeo de Derechos Humanos: Evolución y Perspectiva", *Revista Europea de Derechos Fundamentales* 18, (second semester 2011): 169.

[18] García Muñoz, "La capacidad jurídico-procesal", 15.

[19] Oficina del Alto Comisionado de Naciones Unidas, "Procedimientos para presentar denuncias individuales en virtud de tratados de derechos humanos de las Naciones Unidas", *Folleto informativo* 7, no. 2. (2013): 1.

improved and victim-oriented mechanism consists of four stages. After an initial examination of the facts that allegedly constitute a human rights breach, the complaint is handed to the concerned State to respond. This first analysis is followed by a deeper examination carried out by the Working Group on Communications, which analyses if there are substantive grounds to consider a pattern of gross violations of human rights. Building on the information gathered and the recommendations made by the Working Group on Communication, the Working Group on Situations is responsible for presenting a report on the matter that will help the Council to determine how to proceed. Finally, the Council has to decide whether or not to continue considering the complaint and if further evidences or monitoring mechanisms are required. The Council may also recommend to OHCHR to lend technical assistance to the relevant Member state. [20]

A universal alternative mechanism to submit a complaint for human rights violation is the one foreseen in the UN Treaty Bodies. Provided that a country has accepted the competence of these committees to consider individual communications, a national of a State party who alleges to be a victim of a violation by a Member state, is entitled to lodge or formulate a complaint invoking the protection that these Treaty Bodies grant.

- International Covenant on Civil and Political Rights (ICCPR): This Convention foresees, in the first article of its Optional Protocol, the competence of this Treaty Body to receive communications from individuals.[21] According to 2016 data, the Committee counts with the highest number of communications received by the UN Human Rights Treaty Bodies (2,932 cases) since taking effect in 1976.[22]

- International Convention on the Elimination of all Forms of Racial Discrimination (CERD): The Committee on the Elimination of Racial Discrimination recognises in article 14 of the Convention that rules its activity, the CERD, the entitlement of this second body to consider individual communications.[23] Even if this Convention was adopted just a year after the ICCPR, it was not until the ten Member states agreed on the individual complaint procedure that the article 14 of the CERD became operative. [24] Since it went into operation in 1982, and up until 2018, the CERD had only adopted final opinions on the merits on 36 complaints.[25]

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT): In its article 22, the Convention contends that this Committee has the authority to examine complaints submitted by individuals.[26] According to the data published in the 2019 Report of the Committee against Torture, since the CAT entered into force in 1989, the

[20] UN Human Rights Council, "Frequently asked questions", accessed February 2, 2021, https://www.ohchr.org/EN/HRBodies/HRC/ComplaintProcedure/Pages/FAQ.aspx.

[21] UN General Assembly, "Optional Protocol to the International Covenant on Civil and Political Rights", *United Nations Treaty Series*, vol. 999 (19 December 1966).

[22] Marc Limon, "Part II: Where are we today?" Policy Report: Reform of the UN Human Rights Petitions System, *Universal Rights Group* (January 2018): 20.

[23] UN General Assembly, "International Convention on the Elimination of All Forms of Racial Discrimination", *United Nations Treaty Series* vol. 660, (21 December 1965).

[24] Limon, "Part II", 12.

[25] UN General Assembly, "Report of the Committee on the Elimination of Racial Discrimination", *Seventy-fourth Session* Supplement no. 18 (August 2019), 18 A/74/18.

[26] UN General Assembly, "Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", *United Nations Treaty Series* vol. 1465 (10 December 1984).

Committee has registered 1003 complaints, 192 of those complaints are pending and in 158 cases the Committee found a violation of the Convention[27].

- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW): The Optional Protocol to this Convention envisages on its article 2 a communication procedure that provides individuals the opportunity to stand for their rights via the formulation of an individual complaint to the Committee.[28] Based on the data published in 2016, with 40 more State parties than committees such as the CAT, only 110 communications have been received by the CEDAW since its entry into force in December 2000.[29]

- Convention on the Rights of Persons with Disabilities (CRPD): The first article of the Optional Protocol to the Convention recognises the competence of the Committee to receive individual communications.[30] Despite being one of the latest Committees becoming operational (2008), it is endorsed by a large number of Member states (92); yet, in its first eight years functioning it only dealt with 40 communications.[31]

- The following three committees are the last procedures brought into operation: The Committee on Enforced Disappearances (CED); the Committee on Economic, Social and Cultural Rights (CESCR) and the Committee on the Rights of the Child (CRC). Three committees may consider communications lodged by natural persons that allege to be victims of a violation. The individual complaint procedure is foreseen in article 31 of the International Convention for the Protection of All Persons from Enforced Disappearance [32]; article 2 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights[33]; and article 5 of the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure[34]. Based on the data published in 2016, these three committees received the lowest number of total communications: 20, 29 and 21 respectively. [35]

- Finally, although it has not yet entered into force, it is worth mentioning that complaints can be brought by an individual before the Committee on Migrant Workers (CMW). In this regard, article 77 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families provides the CMW the competence to consider individual communications. Yet, in order to bring the analysed provision operational, a declaration from ten States parties recognising the individual complaint proceeding is required.[36]

[27] UN General Assembly, "Report of the Committee against Torture", *Seventy-fifth Session* Supplement No. 44. (2020),11 A/75/44.

[28] UN General Assembly, "Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women", *United Nations Treaty Series* vol. 2131 (6 October 1999), 83.

[29] Limon, "Part II", 21.

[30] UN General Assembly, "Optional Protocol to the Convention on the Rights of Persons with Disabilities", *Treaty Series*, vol. 2518 (13 December 2006), A/RES/61/106.

[31] Limon, "Part II", 21.

[32] UN General Assembly, "International Convention for the Protection of All Persons from Enforced Disappearance", Treaty Series, vol. 2716 (20 December 2006), 3, A/RES/61/177.

[33] UN General Assembly, "Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: resolution / adopted by the General Assembly" (5 March 2009), A/RES/63/117.

[34] UN Human Rights Council, "Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure: resolution / adopted by the Human Rights Council" (14 July 2011), A/HRC/RES/17/18.

[35] Limon, "Part II", 21.

[36] UN General Assembly, "International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families", (18 December 1990), A/RES/45/158.

Despite the formal process that the UN Human Rights Treaty system made available to individuals, it must be noted that the decisions that emanate from the obligations contained in the UN Treaty Bodies are not legally binding. UN resolutions cannot be enforced in internal courts and there is no international enforcement police that can guarantee the implementation of the decisions. Therefore, the fulfilment of the UN resolutions lies on the willingness of each contracting State to do so.[37]

3.2. European regional protection of human rights

At the emergence of the then called European Communities, now known as the EU, the regional organisation ability to perform was limited and targeted to economic cohesion and growth. The economic driving force behind the creation of the European Communities, as well as the presumption that the belonging of its Member states to the ECHR was enough guarantee of human rights protection, explains the failure to mention any norm related to fundamental rights in the original constitutional treaties of the EU. Yet, the declaration of the principle of direct effect and the prevalence of the Union law over those domestic legislations, where, unlike in the EU legal order, fundamental rights were envisaged, casted doubts on whether this primacy could lead to human rights violations.[38] In this regard, the Court of Justice of the European Union (CJEU) ruled in the landmark case Erich Stauder v City of Ulm – Sozialamt, judgment of the Court of 12th of November 1969, that the fundamental human rights are "enshrined in the general principles of Community law and protected by the Court".[39]

In view hereof, there are two regional binding legal texts in the EU, both competent to intervene in human rights matters: ECtHR, responsible for enforcing the ECHR; and the CJEU, in charge of guaranteeing the implementation of the Charter of Fundamental Rights of the European Union (CFREU).[40]

As previously mentioned, EU Member states are contracting parties of the ECHR; yet, the EU is not a member itself. Nevertheless, the accession of the Union to the Convention of the Council of Europe has been a subject of ongoing debate and visible steps have been taken towards this accession[41]: the Lisbon Treaty included in article 6 of the TEU that "the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms." It is, however, worth drawing attention on the sentence that concludes the referred legal disposition and states that "such accession shall not affect the Union's competences as defined in the Treaties." On account of the subjection to the ECtHR's resolutions that would imply the accession of the EU to the Convention,

[37] Anne F. Bayefsky, "Chapter II. Introduction to Complaints procedures", in How to Complain to the UN Human Rights Treaty System (New York: Transnational Publisher, 2002), 37-38.

[38] Ottavio Marzocchi "The protection of fundamental rights in the EU", European Parliament, accessed January 25, 2021, https://www.europarl.europa.eu/factsheets/en/sheet/146/la-proteccion-de-los-derechos-fundamentales-en-la-union-europea.

[39] Court of Justice of the European Union, "Erich Stauder v City of Ulm - Sozialamt.", (C-29/69), judgment of 12 November, 1969, ECLI:EU:C:1969:57.

[40] CARISMAND: Culture and Risk Management in Man-made and Natural Disasters, "Report on European fundamental rights in disaster situations", Horizon 2020 Programme Secure societies – Protecting freedom and security of Europe and its citizens Collaborative and Support Action (August 2016): 23.

[41] Isiksel Turkuler, "European Exceptionalism and the EU's Accession to the ECHR", European Journal of International Law 27, no. 3, (October 2016): 566.

the relevant authorities deemed right to submit a preliminary ruling to the CJEU. The Court filed against the accession of the EU in its Opinion 2/13, arguing a set of incompabilities between the two legal texts that need to be addressed.[42]

One of the incompatibilities alleged by the CJEU to oppose the accession of the Unión to the ECHR is that contained in articles 33 of the ECHR and 344 of the Treaty on the Functioning of the European Union (TFEU)[43]. The first of the mentioned legal precepts provides that "any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party". In this regard, article 55 of the same legal body adds an "exclusion of other means of dispute settlement" and states that "the High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention."

The CJEU interprets these cited dispositions as a possibility for the ECtHR to disregard the exclusive jurisdiction that according to the article 344 of the TFUE, the CJEU holds when deciding on any dispute between Member states on subjects of EU law that may, occasionally, interfere on ECHR related matters. A possible solution of the analysed incompatibility could be contained in a legal precept directly correlated with the object matter of analysis in this paper: the active legitimation of the individual. Article 35.2.b) of the ECHR stipulates on the admissibility criteria of the individual application, and states that the Court shall not deal with any application submitted under article 34 that "is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information." This last legal precept lays out the subsidiary jurisdiction of the ECtHR, which can only be invoked once national remedies have been exhausted, and provided that the case has not been brought to another legal international proceeding. In accordance with the terms set forth in article 344 of the TFEU and the subsidiarity foreseen in article 35 of the ECHR, the disputes that arise between EU Member states could continue to be solved by the CJEU. [44]

On account of relevant authorities' inability to bring to realisation EU's accession to the ECHR, contemporary mechanisms provide individuals with the capacity to vindicate their rights before the CJEU and the ECtHR. With regard to the CJEU, the so-called Van Gend en Loos case acknowledged "that community law has an authority which can be invoked by their nationals before those courts and tribunals".[45] To do justice to this claim the EU developed a set of protection mechanisms that entitle individuals to file human right complaints, including the action

[42] Court of Justice of the European Union, "Opinion 2/13 pursuant to Article 218(11) TFEU", judgment of 18 December, 2014, ECLI:EU:C:2014:2454.

[43] European Union, "Consolidated version of the Treaty on the Functioning of the European Union" (13 December 2007), 2008/C 115/01.

[44] Alexandros-Ioannis Kargopoulos, "ECHR and the CJEU: Competing, overlapping, or Supplementary Competences?", in *Eucrim the European Criminal Law Associations' Forum*, *3*, (2015): 98.

[45] Court of Justice of the European Union, "Van Gend en Loos v. Nederlandse Administratie der Belastingen", (C-26/62), judgment of 5 February, 1963, ECLI:EU:C:1963:1.

for annulment (article 263 TFEU), the action for failure to act (article 265 TFEU) and the action for damages (article 268 TFEU). Nevertheless, it is important to underline that an individual does not have the capacity to take action neither against another natural or legal person nor a Member state of the Union before the CJEU.[46]

The fourth paragraph of the cited article 263 of the TFEU provides that any natural or legal person may "institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.". In view hereof, the Case European Union Copper Task Force v Commission states that the cited legal precept "must be interpreted in the light of the fundamental right to effective judicial protection" as it is framed within "a complete system of legal remedies and procedures designed to ensure judicial review of the legality of European Union acts, and has entrusted such review to the European Union judicature".[47] It is yet to mention that according to a study published by Takis Tridimas and Gabriel Gari, between 2001 and 2005, from a total of 340 appeals for annulment, only 30 of these actions were filed by natural persons; moreover, of these 30 actions, only 2 were successful. That said, it is worth noting that those two actions that were estimated were filed by a scholar and a former MEP. This evidences that the chance of a proceeding instituted by a natural person with no specific knowledge and previous experience in the EU being successful is very low.[48]

Opposite to article 263 of the TFEU, which demands a direct or individual concern from "non-privileged applicants", article 265 of the TFEU provides a broader locus standi by stipulating that any natural or legal person may "complain to the Court that an institution, body, office or agency of the Union has failed to address to that person any act other than a recommendation or an opinion". To conclude with the litigation before the CJEU by private parties, the judgment of the Court of 10th of July, 1985 (CMC Cooperativa muratori e cementisti and others v Commission of the European Communities) ruled that any person who claims to have been injured by acts or conducts of an EU institution must "have the possibility of bringing an action, if he is able to establish liability, that is, the existence of damage caused by an illegal act or by illegal conduct on the part of the community"[49]. Even if this right cannot be deduced from the wording of articles 268 and 340 of the TFEU, it can be derived from the manner these dispositions are foreseen in the Treaty and the CJEU case-law.[50]

As far as the ECtHR is concerned, the ECHR stipulates in its article 34 that "the Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in

[46] "Derechos fundamentales", Portal Europeo de e-Justicia, accessed January 18, 2021, https://e-justice.europa.eu/content_fundamental_rights-176-es.do.

[47] Court of Justice of the European Union. "Case European Union Copper Task Force v. Comission" (C-384/16 P), judgment of 13 March, 2018, ECLI:EU:C:2018:176.

[48] Takis Tridimas and Gabriel Gari, "Winners and Losers in Luxembourg: A Statical Analysis of Judicial Review before the European Court of First Instance (2001-2005)", *European Law Review* 2, (April 2010): 159-160.

[49] Court of Justice of the European Union, "Cooperativa muratori e cementisti and others v Commission of the European Communities" (case C-118/83), judgment of 10 July, 1985, ECLI:EU:C:1985:308.

[50] Directorate General for International Policy, "Analysis of locus standi before the CJEU", *Standing up for your right(s) in Europe. Locus Standi. European Parliament* (August 2012), 35.

the Convention or the Protocols thereto." [51] In this regard, the case-law of the ECtHR has established that complaints grounded 'in abstracto' violations of the ECHR are not admissible.[52] Yet, there may be exceptions to the general rule, this was evidenced in the case Klass and Others v. Germany, where the ECtHR accepted "that an individual may, under certain conditions, claim to be the victim of a violation occasioned by the mere existence of secret measures or of legislation permitting secret measures, without having to allege that such measures were in fact applied to him."[53]

Further limitations to individual complaints before the ECtHR are foreseen in article 35 of the Charter which enumerates a set of admissibility criteria: first, the Court requires to the domestic remedies being exhausted before bringing the case to the ECtHR; second, the Court will not deal with any application that is either anonymous or it has been already considered by the ECtHR or other international court; third, the Court must declare inadmissible an individual application if it is in breach with the Convention or the applicant has not suffered prejudice; and, finally, the ECtHR is competent to reject, at any stage of the proceeding, an application that is estimated to be objectionable under this article 35 of the ECHR.

4. Individual complaints before different regional jurisdictions

In the previous section, the evolution of the most effective human rights protection system was analysed: the European system. The effectiveness of this regional scheme is largely due to the ECtHR, a judicial body with compulsory jurisdiction. Although the ECtHR is not the only European Court that issues binding judgements, it is, without a doubt, the regional body that provides the greatest human rights protection mechanisms in the judicial domain.

In accordance with the terms set forth in previous sections, this part provides a comparative analysis of the American and African human right protection systems in relation to the European counterpart, with special attention given to the individual complaint procedure foreseen by each regional system.

4.1. American human rights protection

The American Convention on Human Rights (ACHR) is the pillar that upholds the Inter-American system for the protection of human rights. The first article of the Convention obliges every States subscribing to the Pact of San José (November 1969) to respect the rights and freedoms recognised in the Convention, and to guarantee that every human being subjected to the jurisdiction of State parties holds, without any discrimination, the ability to exercise the rights and freedoms provided therein.[54] The supervisory and surveillance bodies of the Inter-American protection system are the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights (IACtHR), both bodies share competence with respect to matters relating

[51] López Martin, "La reclamación individual", 249.

[52] European Court of Human Rights, "Practical Guide on Admissibility Criteria", *Council of Europe* (April 2020), 10.

[53] European Court of Human Rights, "Case of Klass and Others v. Germany", (Application no. 5029/71), judgment of 6 September 1978.

[54] Eduardo Ferrer Mac-Gregor Poisot and Carlos María Pelayo Möller, "Capítulo 1: Enumeración de deberes", in *Convención Americana sobre Derechos Humanos*, ed. Christian Steiner and Marie Christine Fuchs (Berlin: Konrad Adenauer Stiftung, 2019), 54-55.

to the fulfilment of the commitments made by the contracting parties of the Convention.[55]

Framed within these control mechanisms, individual complaints lie at the heart of the scheme. Article 44 of the Convention provides that any person "may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party."[56] Unlike the ECHR, the ACHR does not require to certify the status of victim in order to submit a communication; hence, this legal provision offers the opportunity to any individual to file a complaint against a contracting State party.[57] Although it provides a broader entitlement than the Convention of the Council of Europe, communications submitted under the ACHR are still subjected to the admissibility requirements of the American Convention's article 46, criterions that are very similar to the ones established in the previously anlaysed article 35 of the ECHR.

Once an individual complaint has been lodged and a decision in this regard is ruled by the IACtHR, the judgment is binding not only among the parties involved in the dispute but also 'erga omnes partes', with national authorities, ex officio, being subjected to it. The binding character of the jurisprudence responds to the role that the Court plays as the preeminent interpreter of the ACHR and guarantor of the effective protection of human rights in the American region.[58] In this regard, the IACtHR states that those judgments that have the force of res judicata "should necessarily be complied with since it entails a final decision, thus giving rise to certainty as to the right or dispute under discussion in the particular case, its binding force being one of the effects thereof."[59]

4.2. African human rights protection

The Charter of the Organization for African Unity (OAU) does not assign a primary role to the promotion and protection of human rights. Thus, on June 27, 1981, the African Charter on Human and Peoples' Rights (ACHPR) was adopted in Banjul, with the aim of guaranteeing a human rights protection framework in the African region. Almost two decades later, the OAU aimed to enhance the African Charter establishing a judicial body capable of adopting binding decisions: the African Court of Human and Peoples' Rights (ACtHPR).[60] With 31 State parties having ratified the protocol that established the ACtHPR, this judicial organ was brought into operation in 2004.[61]

As with the previously analysed two regional human rights safeguarding systems, ACPHR envisages in its article 55 an

[55] Felipe Gonzalez Morales, "La Comisión Interamericana de Derechos Humanos: antecedentes, funciones y otros aspectos", *Anuario de Derechos Humanos* (2009): 35.

[56] Organization of American States (OAS), "American Convention on Human Rights, Pact of San Jose", (22 November 1969).

[57] Michelo Hansungule, "Protection of Human Rights Under the Inter-American System", in *International Human Rights monitoring mechanisms: essays in honour of Jakob Th. Möller*, eds. Gudmundur Alfredsson, Jonas Grimheden, Bertrand G. Ramcharan, and Alfred Zayas (The Hague: Kluver, 2001), 700.

[58] Sergio García Ramírez, "The Relationship between Inter-American Jurisdiction and States (National Systems): Some Pertinent Questions", *Notre Dame Journal of International & Comparative Law, 5*: Iss. 1, Article 5. (2015): 136.

[59] Inter-American Court of Human Rights, "Case of Acevedo-Jaramillo et al. v. Peru", judgment of February 7, 2006.

[60] Lopez Martin, "La reclamación individual", 253.

[61] "The African Court in Brief", African Court on Human and People's Rights, accessed January 25, 2021, https://www.african-court.org/wpafc/basic-information/#establishment.

individual complaint proceeding by which members of the Commission may consider "communications other that those of States Party".[62] Nevertheless, the consideration of these communications is subjected to what is established in article 56 of the Charter: the communication cannot be anonymous or be written in "disparaging or insulting language"; it must be consistent with the Charter of the Organisation; it cannot be "based exclusively on news disseminated through mass media" or deal with "cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organisation of African Unity or the provisions of the present Charter"; and, finally it has to be submitted once local remedies are exhausted and within the period of time set by the Commission. In this regard, articles 6 and 34.6 of the Court's Protocol add further admissibility criteria and establish the requirement of States making a declaration agreeing on the competence of the ACtHPR to cases brought by an individual before the Court be considered. As of 2011, only 11 African countries accepted the competence of the Court to examine natural persons' complaints.[63]

To conclude with this section, it is key to analyse the compliance of the analysed regional mechanisms in order to evaluate the effective impact of individual complaints. Data evidences disparities between the three examined regions: ECtHR's decisions enjoy the highest rates of implementation, 56%; second is the IACtHR with 20% of its decisions being implemented, and, finally, in third place, is the African region, with a mere 14 %. Yet, this data cannot be fully interpretated without taking into account the flexibility that each court provides in the field of remedies. The ECtHR, for example, dispenses a wide scope of action for internal systems to redress the violation; opposite, the IACtHR lays out specific remedies that hinder the full implementation of the solution.[64]

5. Case Study: Spain - monism and dualism

Since international law broadens its scope of application, it should not come as a surprise an increase of tensions between national and international legislations.[65] As a means to address these problems, the academia has developed two major theoretical perspectives to approach the incorporation of international law into domestic legal order: monism and dualism. On the one hand, monism is grounded on the principles of unity and subordination. This first category postulates that both legal systems belong to a single body of law where legal norms are subordinated in a hierarchical order and the international law prevails. On the other hand, dualism is based on the premise that international law and domestic law are two equal, independent and separate systems. Unlike in the monist approach, there is no relationship of dependence or subordination, hence, in order to an international norm being applied

[62] Organization of African Unity (OAU), "African Charter on Human and Peoples' Rights (Banjul Charter)", 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58.

[63] "About us", African Commission on Human and Peoples' Rights, accessed January 25, 2021, https://www.achpr.org/afchpr/.

[64] Vera Shikhelman, Implementing Decisions of International Human Rights Institutions – Evidence from the United nations Human Rights Committee. *The European Journal of International Law*, 30, 3 (2019): 758.

[65] Mattias Kumm, "The Legitimacy of International Law: A Constitutionalist Framework of Analysis", *The European Journal of International Law* 15, no.5, (2004): 915.

in the domestic field, a prior incorporation is required.[66]

The Spanish Constitution foresees in the first paragraph of its article 96, that international treaties shall form part of the internal legal order on the condition that they are validly concluded and officially published.[67] Given the fact that publication of an international treaty is an essential requirement for international treaties to be directly applicable in Spain, it has been long discussed whether the system of national implementation is either monist or dualist. Professor Araceli Mangas Martin stands for a middle ground between these two models of integration and advocates a moderate monism. This approach is based upon the position that international treaties bind Spain from their entry into force in the international order and do not require transposition to be part of domestic law, only their publication.[68]

There is a constant caselaw of the Spanish courts which argues in favour of the automatic reception of international treaties.[69] A different, albeit related, matter is the internalisation of resolutions and opinions that emanate from international committees such as the Human Rights Committee. The relevance of these Committees rests on the role they play in treaty interpretation. When it comes to addressing the nature and scope of the dispositions foreseen in the treaties these Committees are grounded on, the contribution of these bodies is key. It is, thus, difficult to understand Spanish legal authorities' reluctance to frame these Committees' opinion and resolutions under article 10.2 of the Spanish Constitution.[70]

Article 10.2 of the Spanish Fundamental Norm complements the integrating role provided in article 96 of the same legal body. The tenth article of the Constitution establishes that "the principles relating to the fundamental rights and liberties recognised by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain." This disposition involves an obligation as to the result to be achieved: the meaning and extent attributed to constitutional rights and freedoms by the Spanish Public Powers must align or correspond to the ones attributed by international treaties. In this line, Cesareo Gutiérrez, Professor of International Law and International Relations in the University of Murcia, lays down the dichotomy of the obligation of result: Gutiérrez argues that this imperative relates to a negative strand or prohibition, as it bans any restricting interpretation of constitutional rights and freedoms that is not compatible with what has been stated in the international human right treaties ratified by Spain; yet, the obligation introduced by article 10 also demands public authorities to agree on the most favourable interpretation, the one that

[66]Yezic Carrillo De La Rosa and Oscar Manuel Ariza, "Teorias aplicables al derecho internacional e interamericano de derechos humanos", *Revista Jurídica* 11, no. 21 (April 2018), 116-119.

[67]Spain. Cortes Generales. "The Spanish Constitution". *BOE*, 311, 1978.

[68]Araceli Mangas Martin, "La Recepción del Derecho Internacional por los ordenamientos internos", in *Instituciones de Derecho Internacional Público*, ed. Manuel Diez de Velasco (Madrid: Tecnos, 2013), 251.

[69]Mangas Martin, "La Recepción del Derecho Internacional", 256.

[70]Maria Eugenia Torres Costas, "Nacimiento de artículo 12 de la Convención de Naciones Unidas sobre Derechos de las personas con dicapacidad: El cambio de paradigma", in *La capacidad jurídica a la luz del artículo 12 de la Convención de Naciones Unidas sobre los Derechos de las personas con Discapacidad* (Madrid: Agencia Estatal Boletín Oficial del Estado, 2020), 109.

guarantees the greatest effectiveness of international regulations.[71]

The reticence of Spanish legal authorities to assimilate under the analised article 10.2 the decisions and opinions of important international committees is evidenced in verdicts such as the Resolution number 141/2015, of February 11, of the Spanish Supreme Court, ruling that states that the UN Human Rights Committee "does not have a jurisdictional nature, so that its resolutions or opinions lack the ability to create a doctrine or precedent that could bind this Criminal Chamber of the Supreme Court". A similar line of interpretation was adopted by the Constitutional Court in its resolution number 70/2002 of the 7th of April, and by the Spanish Supreme Court among which the following judgements are noteworthy: the resolution of the 9th of March of 2011 (cassation appeal number 3862/2009), the resolution of the 25th of July of 2002 (revision appeal number 69/2001) and the resolution of the 9th of November of 2001 (cassation appeal number 28/2001). [72]

However, the 17th of July of 2018, the Supreme Court adopted the resolution number 1263/2018 and broke with the previous trend of jurisprudence by agreeing on the application of an opinion dictated by a committee of which Spain is a contracting party. The Supreme Court ruling argues that "the decisions of the international bodies that are related to the execution of the decisions of the international control bodies, whose competence Spain has accepted, once they are received in the terms of article 96 of the Fundamental Norm, form part of our internal legislation and enjoy the hierarchy that this article -supralegal rank- and article 95-infra-constitutional rank- confer on them"[73].

The Spanish court built this last resolution on the argument that the refusal to comply with the committee's opinion would entail a violation of the applicant's human rights, and added that "although neither the Convention nor the Protocol regulate the executive nature of the Opinions of the CEDAW committee, it cannot be doubted that they will be binding / mandatory for the State party that recognized the Convention and the Protocol, since Article 24 of the Convention provides that 'States Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the present Convention.' " The Supreme Court also invoked articles 1[74] and 7.4[75] of the Optional Protocol to reinforce the competence of the committee recognised by Spain.

The arbitrariness of the Spanish Supreme court regarding the assimilation of

[71]Cesáreo Gutiérrez Espada, "La Aplicación en España de los Dictámenes de Comités Internacionales: La STS 1263/2018, un Importante Punto de Inflexión", *Cuadernos de Derecho Transnacional* 10, no. 2 (September 2018): 847.

[72] Torres Costas, "Nacimiento de artículo 12", 110.

[73] Original text: "las decisiones de los órganos internacionales relativas a la ejecución de las decisiones de los órganos internacionales de control cuya competencia ha aceptado España forman parte de nuestro ordenamiento interno, una vez recibidas en los términos del artículo 96 de la Norma Fundamental, y gozan de la jerarquía que tanto este artículo -rango supralegal- como el artículo 95 -rango infraconstitucional- les confieren".

[74] Article 1 of the Optional Protocol "A State Party to the present Protocol ("State Party") recognizes the competence of the Committee on the Elimination of Discrimination against Women ("the Committee") to receive and consider communications submitted in accordance with article 2".

[75] Article 7.4 of the Optional Protocol "The State Party shall give due consideration to the views of the Committee, together with its recommendations, if any, and shall submit to the Committee, within six months, a written response, including information on any action taken in the light of the views and recommendations of the Committee.".

these committees' decisions and opinions jeopardises the right to a fair trial, and hinders the confidence of the public in the judicial system. In this regard, the ECtHR argued in the case Beian v. Romania (No. 1) that this lack of consistency "is in itself contrary to the principle of legal certainty, a principle which is implicit in all the articles of the Convention and constitutes one of the basic elements of the rule of law".[76] Further, the same court added in the case Nejdet Şahin and Perihan Şahin v. Turkey that "if justice is not to degenerate into a lottery, the scope of litigants' rights should not depend simply on which court hears their case." [77] Therefore, a clear set of guidelines is fundamental in order to guarantee a coherent approach and avoid any disassociation between State's internal and external activity. [78]

For the sake of human rights protection, these action guidelines should align with the examined last ruling of the Supreme Court, the resolution of the 17th of July of 2018. It is important to bear in mind that as analysed in a previous section (third section), most of the mechanisms provided by the UN are grounded on a group of international committees that are responsible for monitoring compliance with human rights treaties. Therefore, it can be concluded that if the Spanish legal authorities do not agree on a line of interpretation that favours first, the internalisation of Treaty Body decisions within domestic legislation, and, second, their capacity to set precedent, the individual complaint procedures lose its raison d'être.

6. Conclusions

Upon closer analysis, this paper concludes that the capacity of the individual to influence human rights international law is rather limited. Despite positive advancements in the field of human rights, the complexity that entails reporting a breach of fundamental rights and the incongruencies that arise in the assimilation of these decisions within domestic law, call for further developments in the guarantee of those inherent rights of which every human being is holder.

Building on the Universal Declaration of Human Rights (1948), the world has gradually evolved to accommodate a new era characterised by a growing awareness of the human rights field, and a greater presence of the natural person as a subject of international law. Classical schemes are progressively shifting towards comprehensive mechanisms that are better at delivering protection by envisaging the participation of the natural person in the law-making process.

That said, the UN as well as the European, American and African conventions offer to every human-being means to vindicate their rights through individual complaints, yet, all these mechanisms are subjected to the initial willingness of the State to commit to these conventions, as well as the prior exhaustion of domestic remedies. That said, it is important to bear in mind that the lack of an international enforcement body and the reluctancy of national courts to assimilate international committees' opinions weakens the strength of many international resolutions, leaving, once again, to the

[76] European Court of Human Rights, "Case of Beian v. Romania (No. 1)" (Application no. 30658/05), judgment of 6 December 2007.

[77] European Court of Human Rights, "Case Nejdet Şahin and Perihan Şahin v. Turkey" (Application no. 13279/05), judgment of 20 October 2011.

[78] Mangas Martin, "La Recepción del Derecho Internacional", 250.

discretion of nation-states the observation of the obligations that emanate from these international decisions. Thus, although significant steps have been made in favour of the natural person, much needs to be done, at both regional and global level, to improve the access to justice of every individual in line with the principle of equity of arms.

Central to meet this need of improvement is the development of a common consistent approach in the national reception of international resolutions and decisions. Spanish authorities' lack of consensus leads to inconsistencies on law-making and may lead to a breach of the right of a fair trial. Hence, the findings of this research evidence the relevance of setting a clear and stable criterion that favours the direct assimilation of international committees' opinions. This agreed line of interpretation would grant greater congruency and therefore, further protection.

The legal capacity of the individual is a matter of an active concern, therefore future research is needed to address the many questions that arise as the debate moves forwards. Will, in the future, individuals themselves be able to claim their legal capacity by vindicating their role before international courts? Or will they always be constrained by an international structure that favours the State? Given the progress that the natural person has made in the global legal scheme, will individuals be granted access to the International Court of Justice? And in a regional level, will the adhesion of the EU to the ECHR limit the discretion in the enforcement of the ECtHR's resolutions by assimilating this court's judgments within EU law, and, thus, reinforcing their binding character? If this adhesion does not occur, will the individual be entitled to bring a case against a Member state before the CJEU? All these questions that emerge from the challenging nature of the subject are issues for future research to explore.

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