ARTICLES

THE EUROPEAN SOCIAL CHARTER TURNS 60: ADVANCING ECONOMIC AND SOCIAL RIGHTS ACROSS JURISDICTIONS

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THEY ARE NOT ENFORCEABLE, BUT STATES MUST RESPECT THEM: AN ATTEMPT TO EXPLAIN THE LEGAL VALUE OF DECISIONS OF THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS

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ABSTRACT: This *Article* offers a contextual interpretation of the legal value of decisions of the European Committee of Social Rights in light of the broader debate on the binding nature of pronouncements of human rights treaty bodies. This *Article* demonstrates the utility of this latter debate in understanding the former decisions. It interprets the recent case-law of the Italian Constitutional Court on the domestic implementation of the European Social Charter from the perspective of the work of the International Law Commission, the case-law of the International Court of Justice, and some recent domestic judgments. It offers some concluding remarks on the possibility of upholding a duty to take into account the decisions of the European Committee of Social Rights.

KEYWORDS: European Committee of Social Rights – human rights treaty bodies – European Social Charter – treaty interpretation – soft law – collective complaints procedure.

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I. Introduction

The European Committee of Social Rights (ECSR) is responsible for monitoring compliance with the European Social Charter.[1] The ECSR website describes the legal value of ECSR decisions and Conclusions as follows "[they] must be respected by the States concerned; even if they are not directly enforceable in the domestic legal systems, they set out the law and can provide the basis for positive developments in social rights through legislation and case-law at national level".[2]

This description immediately appears problematic or even provocative. Indeed, it is statutory that the Conclusions and decisions of the ECSR are not, in themselves, directly enforceable in the domestic legal orders of the Member States, as the ECSR is listed among the human (social) rights monitoring bodies that have no binding power over States. However, the description found on its website according to which its pronouncements "must be respected by the States concerned"[3] gives rise to the following question: can the non-binding nature of ECSR decisions be reconciled with the duty of States to respect them?

At first glance, an affirmative answer appears unlikely due to the absence of the States Parties' consent, namely, due to the consent of the States Parties to the treaties establishing the ECSR and the two procedures of State reports and collective complaints to be bound by the output of a non-binding monitoring committee.

However, a negative answer must be tested against some recent trends in the practice concerning the domestic judicial implementation of ECSR decisions. In 2018, the Italian Constitutional Court upheld that ECSR decisions, albeit not binding as such, are authoritative, and it discussed those outputs at length.[4] New practice is also emerging in the context of the domestic judicial implementation of pronouncements of human rights treaty bodies. The Spanish Supreme Court held, also in 2018, that the State must comply with the decisions of the Committee on the Elimination of Discrimination against Women. More recently, in June 2021, Mexico's Supreme Court of Justice declared that urgent actions required by the Committee on Enforced Disappearance are legally binding.[5]

The emergence of new judicial practice justifies a fresh review of the debate on the legal value of final pronouncements of human rights treaty bodies, in general, and of the ECSR, in particular. More specifically, this *Article* offers a contextual interpretation of the judgments of the Italian Constitutional Court, in light of practice and of the main arguments advanced in literature for understanding the legal value of the findings of human rights treaties' monitoring bodies.

After providing a brief overview of the main features of human rights treaties' monitoring bodies and of the debate on the legal value of their pronouncements, this *Article*

[1] European Social Charter [1961] 529 UNTS 89, ETS n. 35 (European Social Charter).

[2] Council of Europe, *European Committee of Social Rights* www.coe.int.

[3] *Ibid*.

[4] The two judgments of the Italian Constitutional Court are analysed below in section V.

[5] The judgments of the Spanish and of the Mexican Supreme Court are discussed below in section III.

will analyse the functions of the ECSR in overseeing compliance with the European Social Charter so as to ascertain whether and to what extent the ECSR can be assimilated to a human rights treaty monitoring body. In the final part of this *Article*, some conclusions will be drawn regarding the judgments of the Italian Constitutional Court, proposing an interpretation that may assist in gaining a better understanding of the main question presented above, concerning the (non)binding nature of ECSR decisions.

II. A BRIEF OVERVIEW OF THE MAIN FEATURES OF HUMAN RIGHTS TREATY BODIES

The legal value of decisions issued by human rights treaty bodies or other expert bodies has been thoroughly debated, also due to a growing and interesting practice.

Monitoring bodies are established under several human rights treaties, particularly the so-called core UN human rights treaties.[6]

As is known, there are nine core international human rights treaties. Each of these treaties has established a treaty body – usually known as a Committee – consisting of experts who monitor the implementation of the treaty provisions by the States Parties and receive communications from individuals. The establishment of such Committees is foreseen in the treaty itself,[7] although the responsibility for addressing individual complaints may follow different paths. Some human rights treaties contain a provision stating that the States Parties may opt in for the competence of the Committee through a declaration.[8] In others, the individual complaints procedure is regulated by an additional protocol, with optional ratification.[9] In both cases, therefore, the States Parties are able to

[6] They are, notably, the International Convention on the Elimination of All Forms of Racial Discrimination [1965] 660 UNTS 195 (ICERD); the International Covenant on Economic, Social and Cultural Rights [1966] 993 UNTS 3 (ICESCR); the International Covenant on Civil and Political [1966] 999 UNTS 171 (ICCPR); the Convention on the Elimination of All Forms of Discrimination against Women [1979] 1249 UNTS 13 (CEDAW); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [1984] 1465 UNTS 85 (CAT); the Convention on the Rights of the Child [1989] 1577 UNTS 3 (CRC); the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families [1990] 2220 UNTS 3 (CMW); the Convention on the Rights of Persons with Disabilities [2006] 2515 UNTS 3 (CRPD); the International Convention for the Protection of All Persons from Enforced Disappearance [2010] 2716 UNTS 3 (CED).

[7] With the exception of the ICESCR, which gave that responsibility to the Economic and Social Council of the United Nations. It was this Council which then established the Committee on Economic, Social and Cultural Rights (CESCR) itself with resolution n. 1985/17 of the Economic and Social Council of 28 May 1985.

[8] This is the case, for instance, in relation to the Committee on the Elimination of Racial Discrimination, established pursuant to art. 8 of the CERD; art. 14 of the CERD enables the States Parties to accept the competence of the Committee for reviewing individual cases. The same can be said with reference to the CAT (see arts 17, 21 and 22), CED (see arts 26, 31 and 32), and CMW (see arts 72, 76 and 77).

[9] As an example, the Optional Protocol to the International Covenant on Civil and Political Rights [1966] 999 UNTS 171 allows the States Parties to accept the competence of the HRC for receiving individual communications. Similar protocols regulate the individual complaints procedure in the context of the following other human rights treaties: ICESCR, CEDAW, CRC, CRPD.

decide whether or not the Committees are given responsibility for addressing individual cases against the States Parties themselves.

All Committees share some common features, which can be summarised as follows (as it would be extremely time-consuming to identify the rules applicable to all of them individually).[10]

They all exercise two functions.

They receive and examine periodic reports from the States Parties to the human rights treaties in the context of which they are established. Such reports address legislative, judicial, administrative or other measures adopted by the States Parties, giving effect to the provisions of the respective treaty.

The examination of the States Parties' reports then forms part of the main report submitted by the Committees annually, through the Secretary General, to the General Assembly of the United Nations on their activities. In that report, the Committees may make suggestions and general recommendations based on the examination of the reports and on information received from the States Parties.

As for the second function, the Committees may receive communications from States and from individuals regarding (other) States Parties, if they accept – through a declaration or by adhering to the optional protocol – this competence. With particular regard to the examination of individual cases, the Committees follow pre-determined rules of procedure and issue final decisions concerning recommendations for the respondent State to implement those measures aimed at restoring the situation that existed prior to the disputed human rights violations.

The Committees consider each case in closed session, examining the complaints only on the basis of written information supplied by the complainant and the respondent States.

Once the communication is received and recorded, it is sent to the State Party concerned to allow the latter to comment, within a set time frame. The complainant is then offered an opportunity to comment on the State Party's observations, following which the case is normally ready for the Committee's considerations on its admissibility and merits.

All Committees may adopt urgent measures if the circumstances so require. The legal competence for adopting such measures is usually attributed to the Committees by their rules of procedure.[11]

Once the Committees issue a decision on the case, that decision is sent to the complainant and to the State Party at the same time. One or more Committee members may append a separate opinion to the decision if they reach a conclusion that differs from the majority or if they reach the same conclusion but for different reasons. The text of any final

[10] For a broader discussion see the chapters of the edited volumes: H Keller and G Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press 2012); P Alston and J Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press 2000).

[11] See, for instance, Human Rights Committee, Rules of Procedure of the Human Rights Committee of 4 January 2021 UN Doc. CCPR/C/3/Rev 12 rule 94.

decision on the merits of the case or a decision on inadmissibility is posted on the website of the Office of the High Commissioner of Human Rights, which acts as the Secretariat.

When the Committees conclude that the treaty has been violated, they make recommendations to the respondent States, which are then invited to provide information on the steps they have taken to implement the recommendations. The case is monitored by the Committee through a follow-up procedure.

Follow-up procedures are not set forth in the treaties establishing the Committees, with the exception of the CEDAW.[12] They are adopted by the Committees themselves to make up for the absence of a body responsible for ascertaining compliance with their findings;[13] however, not all Committees have established follow-up procedures.[14] A dialogue is thus pursued with the State Party and the case remains open until satisfactory measures are found to have been taken. More specifically, the Committees assess the States' response through pre-established criteria which ascertain the level of satisfaction of the response itself.[15]

III. The legal value of pronouncements of human rights treaty bodies

The final outcomes of human rights treaty monitoring bodies are labelled by the treaties as "views", "recommendations", or "findings". This gave rise to the opinion held by earlier commentators that those labels indicated the will of the States to exclude any binding force.[16]

As anticipated in the Introduction, however, the absence of any binding force is certainly not fully accepted, and the labels used in themselves do not incorporate the complexity of the legal value of pronouncements of human rights treaties' monitoring bodies; such complexity is well reflected in General Comment no. 33 of the Human Rights Committee (HRC) on the extent of the States Parties' obligations under the ICCPR and the Optional Protocol. The HRC took a bold position in stating that:

> "While the function of the Human Rights Committee in considering individual communications is not, as such, that of a judicial body, the views issued by the Committee under

[12] Art. 7(4) CEDAW.

[13] See, accordingly, G Ulfstein, 'The Human Rights Treaty Bodies and Legitimacy Challenges' in N Grossman and others (eds), *Legitimacy and International Courts* (Cambridge University Press 2018) 284, 298.

[14] They are the HRC, CESCR, CERD, CAT, CEDAW, CRPD and CED. For further insights, see M Schmidt, 'Follow-Up Activities by UN Human Rights Treaty Bodies and Special Procedures Mechanisms of the Human Rights Council: Recent Developments' in *International Human Rights Monitoring Mechanisms. Essays in Honor of Jakob Th. Möller* (2nd edn, Brill 2009) 25.

[15] See, for instance, the criteria used by the HRC: Human Rights Committee, Follow-up progress report on individual communications received and processed between June 2014 and January 2015 of 29 June 2015 UN Doc. CCPR/C/113/3 Annex I.

[16] See T Buergenthal, 'The UN Human Rights Committee's (2001) Max Planck Yearbook of United Nations Law 341, 397; for a broader discussion, see F Pocar, 'Legal Value of the Human Rights' Committees Views' (1991-1992) Canadian Human Rights Yearbook 119.

> the Optional Protocol exhibit some important characteristics of a judicial decision. They are arrived at in a judicial spirit, including the impartiality and independence of Committee members, the considered interpretation of the language of the Covenant, and the determinative character of the decisions.
> The term used in article 5, paragraph 4 of the Optional Protocol to describe the decisions of the Committee is "views". These decisions state the Committee's findings on the violations alleged by the author of a communication and, where a violation has been found, state a remedy for that violation.
> The views of the Committee under the Optional Protocol represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument. These views derive their character, and the importance which attaches to them, from the integral role of the Committee under both the Covenant and the Optional Protocol".[17]

The HRC based its position on two different arguments.

For the first, it cited art. 2(3) of the ICCPR, which binds States to "ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by a person acting in an official capacity".[18]

The second argument derives from general international law, as the HRC referred to the duty to apply international treaties in good faith, implying a duty to cooperate with the Committee itself.[19]

A discussion on the legal significance of pronouncements of human rights treaty bodies in international law was held in the context of the International Law Commission (ILC)'s works on subsequent agreements and subsequent practice in relation to the interpretation of treaties. The Special Rapporteur Georg Nolte investigated the matter to ascertain if and to what extent such pronouncements could be considered akin to subsequent practice.[20]

Prior to this, in 2004, the International Law Association (ILA) issued a report on the subject following the Berlin conference,[21] and in 2014 the issue of the impact of human

[17] Human Rights Committee of 5 November 2008 General Comment n. 33, The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights CCPR/C/GC/33 para. 11-13.

[18] *Ibid*. para. 14. See art. 2(3) ICCPR cit.

[19] *Ibid*. art. 15. Good faith is derived from art. 26 of the Vienna Convention on the Law of Treaties [1969] 1155 UNTS 331: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith".

[20] International Law Commission, Fourth Report on subsequent agreements and subsequent practice in relation to the interpretation of treaties of 7 March 2016 UN Doc. A/CN.4/694.

[21] International Law Association, Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies (ILA Report), in Report of the Seventy-First Conference of the International Law Association of 2004.

rights monitoring bodies – including judicial courts – in domestic legal orders was the subject of a report by the Venice Commission of the Council of Europe.[22]

The above-mentioned reports, considered together with the most relevant literature on the topic,[23] give rise to some considerations which set the stage for future thoughts on the legal value of ECSR decisions.

All documents and views are coherent in considering that the first important element to be examined is the actual wording of the treaties or protocols that establish the monitoring bodies. Indeed, it can be confirmed that terms such as "views", "recommendations", and "suggestions" are evidence that pronouncements of human rights treaties' monitoring bodies do not have legally binding effect.[24] In addition, the terms used must be interpreted in light of the context of the treaty itself.[25] For example, human rights treaties establishing judicial organs leave no doubt as to the binding force of their final decision. Importantly, art. 46 of the ECHR binds the States Parties to the Convention to abide by the judgment of the European Court of Human Rights.[26]

If the term used in human rights treaties is not that of a proper judgment and/or if there are no provisions equivalent to that enshrined in art. 46 of the ECHR, the formal binding nature of final pronouncements of expert bodies should be excluded.

Similar conclusions can be reached on urgent measures, which, as stated previously, are not even foreseen in the establishing treaties.

However, in the case of urgent measures, the rules of procedure at least cite an obligation to respect in good faith the individual complaint procedure.[27] In this regard, the

[22] European Commission for Democracy through Law (Venice Commission), Report on the implementation of international human rights treaties in domestic law and the role of courts of 8 December 2014 CDL-AD(2014)036.

[23] See *ex multis* R Van Alebeek and A Nollkaemper, 'The Legal Status of Decisions by Human Rights Treaty Bodies in National Law' in H Keller and L Grover (eds), *UN Human Rights Treaty Bodies* cit. 356 ff., and G Ulfstein, 'Individual Complaints' in H Keller and L Grover (eds), *UN Human Rights Treaty Bodies* cit. 73 ff.; C Tomuschat, *Human Rights: Between Idealism and Realism* (Oxford University Press 2014 third edition); N Rodley, 'The Role and Impact of Treaty Bodies' in D Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013) 622 ff.; M Kanetake, 'Human Rights Treaty Monitoring Bodies Before Domestic Courts' (2017) ICLQ 201 ff.

[24] See Fourth Report on subsequent agreements and subsequent practice in relation to the interpretation of treaties cit. para. 15; ILA Report cit. paras 15-27; Venice Commission Report cit. para. 48; N Rodley, 'The Role and Impact of Treaty Bodies' cit. 639; C Tomuschat, 'Human Rights: Between Idealism and Realism' cit. 267.

[25] Fourth Report on subsequent agreements and subsequent practice in relation to the interpretation of treaties cit. Indeed, this is precisely the case of the ECSR, which uses the term "decision" to refer to its pronouncements. This will be investigated further in section IV.2.

[26] See art. 46 of the European Convention of Human Rights.

[27] See, for instance, and again, art. 94 of the rules of procedure of the HRC: "Failure to implement such measures is incompatible with the obligation to respect in good faith the procedure of individual communications established under the Optional Protocol".

practice of human rights treaty bodies is consistent.[28] It must be stressed that General Comment no. 33 reiterated this position.[29]

In light of this preliminary assumption, legal scholars have identified two extreme hypotheses. According to a minority approach, the absence of legal binding force deprives the final pronouncement of the expert bodies of any significant legal value.[30] Conversely, other scholars argue that notwithstanding the textual element, such acts do possess qualities that transform them into legally binding obligations.[31] This latter position builds on the circumstance that monitoring bodies merely decide on already existing treaty obligations and reproach General Comment no. 33.[32]

Extreme positions do not, however, provide a perfect fit for the real situation in terms of States' practice. The first position does not entirely reflect States' convergence towards giving at least "considerable importance" to the pronouncements of the monitoring bodies.[33] The second position also goes too far, as attributing legal binding force to the pronouncements of expert bodies openly contradicts with the States Parties' consent to the treaty in question.[34]

Some scholars therefore took an intermediate position. While formal binding force is untenable, States Parties nevertheless have a duty to consider or, rather, an obligation to take into account the findings of the monitoring bodies.[35]

This position is laudable as it gives appropriate value to the entire process of implementing the pronouncements of the monitoring bodies. In this regard, the follow-up procedures established under human rights treaties' monitoring systems or complaint mechanisms require constant engagement by States to demonstrate that they are complying with and implementing the obligations established in human rights treaties and

[28] See M Kanetake, 'Human Rights Treaty Monitoring Bodies Before Domestic Courts' cit. 204.

[29] Human Rights Committee, General Comment n. 33 cit. para. 19.

[30] See, for instance, MJ Dennis and DP Stewart, 'Justiciability of Economic, Social and Cultural Rights: Should there be an International Complaint Mechanism to Adjudicate the Rights to Food, Water, Housing and Health?' (2004) AJIL 462, 493-495; N Ando, 'L'avenir des organes de supervision: limites et possibilités du Comité des droits de l'homme' (1991-1992) Annuaire Canadien des droits de la personne 183, 186.

[31] M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (Verlag 2005 2nd edn) 893. See also Y Kerbrat, 'Aspects de droit international général dans la pratique des comités établis au sein des Nations Unies dans le domaine des droits de l'homme' (2008-2009) AFDI 559, 561-563.

[32] See JT Moller and A de Zayas, *United Nations Human Rights Committee Case Law 1977-2008: A Handbook* (Verlag 2008) 8.

[33] Cf. ILA Report cit. para. 16; see, also and in support, Fourth Report on subsequent agreements and subsequent practice in relation to the interpretation of treaties cit. para. 23-24.

[34] See, for instance, R Van Alebeek and A Nollkaemper, 'The Legal Status of Decisions by Human Rights Treaty Bodies in National Law' cit. 385; M Kanetake, 'Human Rights Treaty Monitoring Bodies Before Domestic Courts' cit. 219-220.

[35] R Van Alebeek and A Nollkaemper, 'The Legal Status of Decisions by Human Rights Treaty Bodies in National Law' cit.

the findings of the expert or monitoring bodies. This implies that States at least have a duty to provide justification if they depart from those findings.[36]

Such a conclusion is also justifiable from the perspective of general international law for two reasons.

Firstly, it appears that this position is meritorious in giving value to the obligation to respect treaty obligations in good faith. There is some convergence in literature towards admitting that when States adopt *soft law* instruments, they agree to act in accordance with them when applying the principle of good faith.[37] This argument can be applied *a fortiori* to non-binding pronouncements of treaty bodies, as they are based upon binding treaty provisions.

The second reason focuses on the law of State responsibility. Indeed, if it is accepted that the pronouncements of human rights treaty bodies have at least declaratory value,[38] this means that the State which committed the violation has first and foremost a duty to cease its illicit conduct.[39]

It remains to be seen if and to what extent the duty to take account of the pronouncements of human rights treaty bodies also applies to national judges of all States Parties, called upon to implement the provisions of those human rights treaties as interpreted by their monitoring bodies. This question requires a brief preliminary discussion on the *res interpretata* value of the pronouncements of human rights treaty bodies.

Firstly, it should be noted that human rights treaties are subject to the rules on the interpretation of treaties. The general rule enshrined in art. 31 of the Vienna Convention on the Law of Treaties (VCLT) lists among the interpretive means the 'subsequent practice' in the application of treaties. The ILC – which, as mentioned above, has debated the issue – reached the conclusion that the pronouncements of human rights treaty bodies are not *per se* subsequent practice, as the term "practice" can only be used with regard to the conduct of States Parties to a treaty.[40] Accordingly, such pronouncements are neither listed among the interpretive means foreseen in art. 31(3)(b) of the VCLT nor included in

[36] Importantly, the follow-up procedures of human rights treaty bodies must not create new obligations (see General Assembly of 9 April 2014 Resolution 68/268 Strengthening and enhancing the effective functioning of the human rights treaty body system para. 9). For a discussion, see G Ulfstein, 'The Human Rights Treaty Bodies and Legitimacy Challenges' cit. 298.

[37] M Kotzur, 'Good Faith' (2009) Max Planck Encyclopedia of Public International Law paras 25-26; R Kolb, *La bonne foi en droit international public: contribution à l'étude des principes généraux de droit* (Graduate Institute Publication 2000) 83; O Schachter, 'Non-Conventional Concerted Acts' in M Bedjaoui (ed.), *International Law: Achievements and Prospects* (Brill 1992) 267.

[38] See, accordingly, O Delas, M Thouvenot and V Bergeron-Boutin, 'Quelques considérations entourant la portée des décisions du Comité des droits de l'Homme' (2017) Revue québécoise de droit international 1, 37; D Shelton, *Remedies in International Human Rights Law* (Oxford University Press 2005) 267.

[39] International Law Commission, Responsibility of State for Internationally Wrongful Acts of 2001 UN Doc A/56/49(Vol. I)/Corr. 4, art. 30; see, again, D Shelton, *Remedies in International Human Rights Law* cit.

[40] International Law Commission, Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties of 2018 UN Doc A/73/10 para. 51, Conclusion 4, paras 2 and 3.

the supplementary means of art. 32 of the same convention. Even the Human Rights Committee, in drafting General Comment no. 33, did not pursue this path, after severe criticism from States.[41] The pronouncements of human rights treaty bodies are nevertheless considered potential generators of subsequent practice by States.[42]

Consequently, according to the ILC, the interpreter is not required to make recourse to the jurisprudence of human rights treaty bodies for interpretation purposes.

The ILC's conclusion on this point appears to accord with the relevant domestic practice reviewed by the ILA, which confirms that national judges do not feel that they are bound by the monitoring bodies' pronouncements in the interpretation of the treaty, despite recognising their considerable importance.[43]

According to this practice, international law merely authorises, but does not bind, the national courts to apply international human rights treaties *as interpreted* by the related expert body.[44]

Albeit not a domestic court, the International Court of Justice (ICJ) took a different position on the legal value of the HRC's views. In the *Diallo* case, the ICJ held that:

> "Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled".[45]

With particular regard to its position on the views of the HRC, it concluded that it has a duty to consider them: "When the Court is called upon, as in these proceedings, to apply a regional instrument for the protection of human rights, it must take due account of the interpretation of that instrument adopted by the independent bodies which have been specifically created, if such has been the case, to monitor the sound application of the treaty in question".[46]

Although the first paragraph quoted above explains the reasons why the ICJ does not align with the practice of the domestic courts, namely to guarantee coherence in

[41] See Comments of the United States on the Human Rights Committee's 'Draft general comment 33' of 17 October 2008, quoted in Fourth Report on subsequent agreements and subsequent practice in relation to the interpretation of treaties cit. paras 18-19 footnote 57.

[42] Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties cit., conclusion 13.

[43] ILA Report cit. 43 para. 175.

[44] M Kanetake, 'Human Rights Treaty Monitoring Bodies Before Domestic Courts' cit. 220-221.

[45] ICJ *Amhadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Merits) [30 November 2010] 639, para. 67.

[46] *Ibid*. para. 68.

international law, it is interesting to note that two recent domestic decisions appear to uphold the duty to consider the HRC's views.

In 2018 the Spanish Supreme Court, ruling in a case concerning the death of a woman's daughter at the hands of her husband, held that the pronouncements of the CEDAW Committee are legally binding in the Spanish legal order.[47] The Court based this argument on two CEDAW provisions and on the Spanish Constitution. It cited art. 24 of CEDAW, which binds States to "adopt all necessary measures at national level aimed at achieving the full realisation of the rights granted", and art. 7 of the Protocol establishing the CEDAW Committee according to which States "shall give due considerations to the views of the Committee". As for domestic law, the Spanish Supreme Court based its decision on arts 96 and 10, para. 2 of the Spanish Constitution, which respectively require the constitutional bill of rights to be interpreted in accordance with international human rights law and position international treaties among the constitutional sources.[48]

In 2021, the Supreme Court of Mexico issued a similar judgment, concerning a different human rights treaty.[49] The Supreme Court affirmed that Mexican authorities are under a legal obligation to implement demands for urgent action and the corresponding measures requested by the Committee on Enforced Disappearance (CED) on the basis that the latter is the sole mechanism authorised to interpret the Convention for the Protection of all Persons against Enforced Disappearance (ICPED) and is mandated to ask the States Parties to undertake all necessary actions to search for and locate a missing person. It should be acknowledged, however, that nothing in the CED gives the ICPED such a monopoly. Indeed, the Supreme Court developed this argument independently.

Interestingly, the Supreme Court broadly discussed the application of the principle of *effet utile* in the interpretation of the ICPED, recalling an advisory opinion of the Inter-American Court of Human Rights according to which human rights treaties must be interpreted *pro persona*, as this is the only way to respect the subject and purpose of those treaties. Accordingly, denying binding nature to urgent actions would ultimately deprive the entire ICPED of any *effet utile*.[50]

The two judgments cited above appear once again to question the findings of the ILC. While it is clear that two domestic cases cannot immediately overturn the practice reviewed by the ILA and by the ILC itself, it may be the case that the approaches of the two Supreme Courts, seen also in light of ICJ case law, might reinforce the idea that a duty to take account of the pronouncements of human rights treaty bodies is justifiable under

[47] Spanish Supreme Court judgment of 17 July 2018 n. 1263/2018.

[48] For two comments on this case, see K Casla, 'Supreme Court of Spain: UN Treaty Body Individual Decisions are Legally Binding' (1 August 2018) EJIL: Talk! www.ejiltalk.org; V Engstrom, 'Spanish Supreme Court Bringing UN Treaty Bodies One Step Closer to International Courts?' (22 August 2018) I-CONnect blog www.iconnectblog.com.

[49] For a comment, see G Citroni, 'Supreme Court of Justice of Mexico: The Urgent Actions of the Committee on Enforced Disappearances Are Legally Binding' (17 August 2021) OpinioJuris opiniojuris.org.

[50] Mexican Supreme Court of Justice judgment of 16 June 2021 n. 1077.

international law as it is a reasonable compromise based upon the duty to respect treaties' obligations in good faith.

IV. The role of the European Committee of Social Rights in monitoring compliance with the European Social Charter

The ECSR, originally named "Committee of Independent Experts (CIE)", is the main monitoring body of the European Social Charter; the other body involved is the Governmental Committee, whose role has been largely downsized in practice from the original configuration of the reporting procedure, which has no role in reviewing collective complaints. The ECSR's legal bases are found in arts 24 and 25 of the 1961 Charter itself.[51] According to those legal provisions, its original mandate was limited to examining States Parties' reports on the application of the provisions they accepted under Part II of the Charter.[52]

According to its original regulation, the CIE, pursuant to art. 24 of the 1961 Charter, had no more than seven members, appointed by the Committee of Ministers of the Council of Europe. However, arts 24 and 25 of the ESC were amended by the 1991 Protocol, known as the Turin Protocol.[53] While the Turin Protocol has not yet entered into force, the Committee of Ministers asked the States Parties to the European Social Charter to apply some of the measures envisaged by the Protocol itself, prior to its entry into force.[54] According to the 1991 Protocol, the body of independent experts has a minimum of nine members, to be elected by the Parliamentary Assembly of the Council of Europe. The latter provision on election is the only amendment of the 1991 Protocol that has not been implemented in practice. In accordance with a decision of the Committee of Ministers and its own rules of procedure, the ECSR is now composed of 15 members.[55]

IV.1. Reporting system

As anticipated, from the adoption of the European Social Charter, the ECSR was tasked with the activity of monitoring compliance by the Member States of the obligations

[51] European Social Charter 529 UNTS 89, ETS No. 35.

[52] *Ibid*. art. 20(1)(b).

[53] See Protocol amending the European Social Charter [1991] (not yet in force) art. 3, amending art. 25 of the European Social Charter.

[54] See Committee of Ministers of the Council of Europe Decision of 11 December 1991 CM/AS(91)Rec1168-final.

[55] European Committee on Social Rights, Rules of 6 July 2022 rule 1; the number of Committee Members was increased by the Committee of Ministers during its 751st session, see Committee of Ministers of the Council of Europe, Increase in the number of members of the European Committee of Social Rights, Decision of 7 May 2001 CM/Del/Dec(2001)751/4.2 let A. ECSR.

assumed under the Charter. Arts 21 to 29 of the Charter still formally govern the reporting system; more specifically, arts 24 and 25 refer to the competence of the ECSR.[56]

Arts 21 and 22 of the 1961 Charter respectively bind the States Parties to submit a report, every two years, on the implementation of the Charter provisions accepted by them[57] and of the provisions they have not accepted, at appropriate intervals established by the CoE Committee of Ministers.[58]

The ECSR accordingly examines the reports submitted; according to the 1991 Protocol, the ECSR assesses from a legal standpoint the compliance of national law and practice with the obligations arising from the Charter for the Contracting Parties concerned. At the outcome of this decision process, the ECSR adopts conclusions which are published every year on its website.[59] When the Committee concludes that a reported situation is not compliant, it usually requires the State Party concerned to adopt the necessary measures to comply with the European Social Charter.

The conclusions of the European Committee of Social Rights are sent to the Committee of Ministers of the Council of Europe, which intervenes in the final stage of the reporting procedure. The work of this statutory body is prepared by the Governmental Committee of the European Social Charter and the European Code of Social Security, currently comprising representatives of the States Parties to the Charter and assisted by observers representing European employers' organisations and trade unions.

With regard to the proposals made by the Governmental Committee, the Committee of Ministers adopts a Resolution closing each supervision cycle which may contain individual recommendations to the States Parties concerned. If a State takes no action, the Committee of Ministers, after a proposal by the Governmental Committee, may address a Recommendation to that State, asking it to change the situation in law and/or in practice.

IV.2. Collective complaints procedure

The ECSR's current mandate differs greatly from its original one. This is a result of the reform process of the European Social Charter system as a whole, which took place from 1990 to 1994. At that time, the Committee of Ministers of the Council of Europe convened

[56] On the reporting system under the European Social Charter, see D Harris, 'Lessons from the Reporting System of the European Social Charter' in P Alston and J Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press 2009) 347; R Brillat, 'The Supervisory Machinery of the European Social Charter: Recent Developments and their Impact' in G de Búrca and B de Witte, *Social Rights in Europe* (Oxford University Press 2005) 31.

[57] Art. 21 of the European Social Charter.

[58] *Ibid*. art. 22.

[59] Protocol amending the European Social Charter, art. 2, amending art. 24 of the European Social Charter cit.; see also European Committee of Social Rights, Rules cit. rule 22.

an *ad hoc* committee – the Charte-Rel Committee – to make proposals for improving the effectiveness of the Charter and particularly its supervision system.[60]

One of the proposals put forward by the Charte-Rel Committee concerned the mandate of the ECSR and led to the adoption of the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints in 1995.[61] The 1995 Additional Protocol made the ECSR responsible for examining these collective complaints.

The 1995 Protocol entered into force in 1998, after five ratifications. Currently, only thirteen CoE's members and ESC's contracting parties are also bound to the collective complaints system and thus under this type of scrutiny by the ECSR.[62]

Art. 1 of the 1995 Additional Protocol immediately clarifies the meaning of collective complaints. They are complaints submitted to the Secretary General of the CoE by organisations from the categories listed in art. 1 of the Additional Protocol itself, namely international organisations of employers and trade unions, other international non-governmental organisations, and representative national organisations of employers and trade unions.[63]

Once the Secretary General sends a complaint to the ECSR, the latter is responsible for examining it, together with the explanation and information requested (as a mandatory step) from both the complainants and the Contracting Party concerned.[64] Upon completing the examination, the ECSR draws up a report illustrating the steps that the Committee has taken to review the complaint and containing its conclusions on whether the Contracting Party has satisfactorily applied the ESC obligation referred to in the complaint.[65]

At this stage of the analysis, the interpretation of the Additional Protocol must be complemented with that of the ECSR's rules of procedures. The rules clarify that when the ECSR concludes the examination of a collective complaint under this procedure it delivers a "decision". This terminological distinction is necessary as it separates this process from the conclusions delivered by the same Committee under the reporting procedure.[66]

[60] See Council of Europe, *Explanatory Report to the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints* www.coe.int.

[61] See Additional Protocol to the European Social Charter Providing for a System of Collective Complaints [1995] ETS No. 158. On this collective complaints system, see G Palmisano, *Collective Complaints as a Means for Protecting Social Rights in Europe* (Anthem Press 2022); M Jaeger, 'The Additional Protocol to the European Social Charter Providing for a System for Collective Complaints' (1997) LJIL 69; F Sudre, 'Le protocole additionnel à la Charte Sociale européenne prévoyant un systéme de reclamations collectives' (1996) RGDIP 715; P Alston, 'Assessing the Strengths and Weaknesses of the European Social Charter's Supervisory System' in G de Búrca and B de Witte, *Social Rights in Europe* cit. 45; RR Churchill and U Khaliq, 'The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?' (2004) EJIL 417.

[62] Six countries have signed the 1995 Additional Protocol, but they have not yet ratified it.

[63] Art. 1 of the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints.

[64] *Ibid*. art. 7.

[65] *Ibid*. art. 8(1).

[66] European Committee of Social Rights, Rules cit. rule 2.

The ECSR then sends its report, together with its decision, to the Committee of Ministers and to the Parliamentary Assembly of the CoE.[67] However, this is not the final step in the whole process. Based upon the ECSR report, the Committee of Ministers adopts a resolution or, by a two-thirds majority of voters, a recommendation to invite the respondent State to comply with a negative decision of the Committee.[68] It should be noted that according to the Explanatory Report of the 1995 Additional Protocol, the Committee of Ministers "[...] cannot reverse the legal assessment made by the Committee of Independent Experts. However, its decision (resolution or recommendation) may be based on social and economic policy considerations".[69]

Once the Committee of Ministers adopts its resolution, the ECSR's decision is made public.[70]

A closer look at the procedure reveals some interesting aspects for the purposes of this analysis.

The procedure involves an admissibility phase prior to the examination of the merits. The ECSR issues a decision both when the complaint is admissible and when it considers that it is not. The decision on admissibility must be reasoned and is immediately made public and notified to the litigating parties and to the Contracting Parties.

The examination of each complaint is overseen closely in both phases by a Special Rapporteur appointed by the President from the members of the ECSR.[71] The Special Rapporteur is responsible for overseeing the proceedings and preparing the draft decisions on both the admissibility and on the merits.[72]

If the complaint is considered to be admissible, the ECSR examines its merits. The decision on the merits in a given complaint follows an exchange of written briefs between the complaining organisations and the respondent States; the Committee may also decide to hold a public hearing.[73] At this stage, third parties may also have the opportunity to intervene.[74]

[67] Art. 8 of the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints.

[68] *Ibid*. art. 9.

[69] *Explanatory Report to the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints* cit. para. 46.

[70] Art. 8 of the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints. The same article envisages the possibility of the decision being made public, even in the absence of a resolution, four months after being sent to the Committee of Ministers.

[71] European Committee of Social Rights, Rules cit. rule 27.

[72] *Ibid*. rule 30.

[73] *Ibid*. rules 31 and 33.

[74] *Ibid*. rule 32. According to this rule, intervention is limited to the following categories of subjects: "The States Parties to the Protocol as well as the States having ratified the Revised Charter and having made a declaration under Article D paragraph 2 [...]" and "The international organisations of employers and trade unions referred to in Article 27 para. 2 of the Charter" in relation to "complaints lodged by national organisations of employers and trade unions or by non-governmental organisations". According to rule 32(A),

At any stage of the procedure, the ECSR may, at the request of a party or at its own initiative, adopt immediate measures to avoid irreparable injury or harm to the persons concerned.[75] Neither the 1995 Additional Protocol nor the rules of procedure clarify whether or not those immediate measures are binding upon the Parties. However, the rules clarify that "the Committee's decision on immediate measures shall be accompanied by reasons and be signed by the President, the Rapporteur and the Executive Secretary. It shall be notified to the parties. In the decision, the Committee shall fix a deadline for the respondent State to provide comprehensive information on the implementation of the immediate measures".[76]

The final decisions of the ECSR on collective complaints may be accompanied by concurring or dissenting opinions submitted by the individual members of the ECSR.[77]

At that stage, a follow-up procedure begins. Art. 10 of the 1995 Additional Protocol states that "The Contracting Party concerned shall provide information on the measures it has taken to give effect to the Committee of Ministers' recommendation, in the next report which it submits to the Secretary General under Article 21 of the Charter".[78]

Although art. 10 refers to Committee of Ministers' *recommendation*, in practice, this duty is interpreted as also referring to *resolutions* adopted by the Committee,[79] thus covering all cases where the ECSR identifies a violation of the Charter and the Committee endorses it.[80]

Furthermore, a Committee of Ministers' decision of 2014 amended the reporting system regarding the States Parties to the 1995 Additional Protocol, namely those that accepted the collective complaints procedure. In that decision, the Committee established that those States' two-year report submitted under art. 21 of the Charter must focus on the measures they have adopted to comply with (any) decisions of the ECSR under the collective complaints procedure.[81]

Such a simplified procedure allows the ECSR to monitor compliance with its decisions by the Parties involved also through its competence to review national reports. The ECSR concludes its examination of the implementation measures only when it considers that the

"Upon a proposal by the Rapporteur, the President may invite any organisation, institution or person to submit observations".

[75] European Committee of Social Rights, Rules cit. rule 36.

[76] *Ibid*.

[77] *Ibid*. rule 365.

[78] Art. 10 of the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints.

[79] See G Palmisano, *Collective Complaints as a Means for Protecting Social Rights in Europe* cit. 45.

[80] *Ibid*.

[81] Governmental Committee of the European Social Charter and the European Code of Social Security of the Committee of Ministers of the Council of Europe, decision of 19 March 2014, Ways of streamlining and improving the reporting and monitoring system of the European Social Charter CM(2014)26 Part II.

States Parties involved have finally complied with the decision. Interestingly, the conclusions adopted by the ECSR on the reports submitted by States are now called "Findings".[82]

V. The legal value of decisions of the European Committee of Social Rights

This *Article* will now focus on the legal nature of the decisions of the ECSR and, in particular, on the relationship between the Committee and the Committee of Ministers when it comes to guaranteeing compliance with the same.

V.1. The (non)binding force of decisions of the European Committee of Social Rights

As anticipated, the term "decision" was coined in the ECSR's rules of procedure.

The fact that the pronouncements of the ECSR were not labelled as decisions in the European Social Charter's texts or in the 1995 Additional Protocol perhaps reflects the signatory States' intention not to confer legally binding value on the conclusions and on the decisions of the ECSR. Indeed, there are no provisions in the Charter – or in any other subsequent additional protocols – which bind the States to comply with the pronouncements of the ECSR.[83]

As explained previously, it must be acknowledged that in the context of human rights monitoring bodies, when States decide to give legally binding value to the decisions or judgments of those bodies, they do so explicitly.

Consequently, there is no doubt that from a formalistic point of view the decisions of the ECSR are not legally binding on the States Parties. According to one Author, this conclusion implies first and foremost that States Parties are not bound to respect the decisions of the ECSR in their *inter partes* relationships. More specifically, they are not committing an internationally wrongful act if they fail to comply with those decisions. Therefore, States Parties in theory cannot adopt countermeasures against a State that is not complying with a decision of the ECSR and it appears that the Council of Europe may also not adopt any sanction against it.[84] Indeed, the absence of an inter-States complaint mechanism appears to confirm this view.

However, as already stated, the decision issued by the ECSR on a collective complaint is sent to the Committee of Ministers of the Council of Europe. The latter adopts a resolution by a majority of the attendees, or a recommendation by a two-thirds majority of the voters. The Committee of Ministers cannot reverse the decisions of the ECSR, except

[82] See, again, G Palmisano, *Collective Complaints as a Means for Protecting Social Rights in Europe* cit. 45-46.
[83] *Ibid*. 47.
[84] *Ibid*. 48.

in the presence of pressing economic and social reasons.[85] The Committee of Ministers may, however, decide not to act or to protract its intervention over time.

On paper, the Committee of Ministers should adopt a recommendation if the State concerned is found to have violated the Charter. In practice, this has happened twice.[86] In many cases, the Committee of Ministers has limited itself to adopting a resolution through which it takes note of the State's/States' willingness to return to a situation of compliance. In some other cases, it has merely acknowledged the respondent States' concerns over the ECSR decision.

Despite this, the involvement of the Committee of Ministers triggers a follow-up mechanism which, on one side, binds the States to report the measures implemented by them to comply with the ECSR decision and, on the other side, it allows the ECSR to verify this compliance.

Whereas this follow-up procedure does not alter the non-binding nature of the ECSR decision, it does confirm that the decisions at least generate an expectation that their outcomes will be respected and implemented at national level. [87]

A quick perusal of some of the ECSR's findings on the implementation of decisions ascertaining a violation of the Charter on the part of States reveals that this expectation requires the adoption of legal measures in domestic systems and the mobilisation of economic resources.

An interesting case is represented by the follow-up findings on the implementation of a 2005 decision against Italy on inadequate living conditions in camps or similar settlements for the Roma community who choose to follow an itinerant lifestyle or are forced to do so, on the adequacy of the eviction procedure and on the lack of permanent dwellings.[88] The ECSR, in its last-in-time findings, found that the Government did not invest sufficient economic resources and that the guidelines adopted by the State to regulate evictions were not sufficiently clear in terms of legal remedies available to prevent and to dispute them.[89]

The interplay between the ECSR and the Committee of Ministers of the Council of Europe was criticised; more specifically, the fact that the latter could overturn a decision made by the former on economic and social grounds was seen as a weakness of the

[85] See *supra* section IV.

[86] Recommendation RecChs(2001) 1 of the Committee of Ministers to member states on social workers of 31 January 2011 and Resolution CM/ResChS(2015)4 *European Federation of National Organisations working with the Homeless (FEANTSA) v the Netherlands* of 11 February 2015.

[87] In this regard, it can be seen that the merging of the two different monitoring procedures – reporting and collective complaints systems – might reflect the fact that these procedures are complementary and they share many common features. Accordingly, see RR Churchill and U Khaliq, 'The Collective Complaints System of the European Social Charter' cit. 451.

[88] Complaint n. 27/2004 of the European Committee of Social Rights of 7 December 2005 *European Roma Rights Centre (ERRC) v Italy*.

[89] Findings of the European Committee of Social Rights of 6 December 2018 Second Assessment of follow up: *European Roma Rights Center (ERRC) v Italy*, see, in particular, para. 3.

whole system.[90] However, in practice, it is important to understand the meaning of this caveat.[91] Indeed, as this has never happened, the system appears fit for purpose in generating compliance by the States Parties.[92]

V.2. On the *res interpretata* value of decisions of the European Committee of Social Rights: A contextual interpretation of recent case-law of the Italian Constitutional Court

It remains to be seen if and to what extent the aforementioned expectation of the ECSR's decisions being respected at national level translates into a duty by national judges to consider those pronouncements.

Firstly, it should be stressed that the ECSR itself requires the national courts to follow the interpretations provided by the ECSR. In a decision against Sweden, it stated that: "the Committee considers therefore that it is for the national courts to decide the matter in the light of the principles the Committee has laid down on this subject or, as the case may be, for the legislator to enable the courts to draw the consequences as regards the conformity with the Charter and the legality of the provisions at issue".[93]

Two recent judgments of the Italian Constitutional Court contribute to shedding some light on this issue, although they also attracted severe critiques. Judgments no. 120[94] and 194,[95] both decided in 2018, for the first time concerned the provisions of the European Social Charter, as interpreted by the ECSR, as a parameter for constitutional review in the Italian domestic legal system.[96] They respectively dealt with the right of

[90] Cf F Sudre, 'Le Protocole additionnel à la Charte Sociale européenne prévoyant un système de réclamations collectives' cit. 737.

[91] This was held by M Jaeger, 'The Additional Protocol to the European Social Charter Providing for a System for Collective Complaints' cit. 79.

[92] In this regard, see D Harris, 'Lessons from the Reporting System of the European Social Charter' cit. 359: "States take their reporting obligations seriously".

[93] Complaint n. 12/2002 of the European Committee of Social Rights, Decision of 15 May 2003 *Confederation of Swedish Enterprise v Sweden* para. 42. Cf R Brillat, 'The Supervisory Machinery of the European Social Charter' cit. 42.

[94] Italian Constitutional Court Judgment of 13 June 2018 n. 120.

[95] Italian Constitutional Court Judgment of 3 November 2018 n. 194.

[96] The judgments were analysed widely in Italian literature. For comments in English, see L Mola, 'The European Social Charter as a Parameter for Constitutional Review of Legislation' (2019) IYIL 493. For comments in Italian, see A Tancredi, 'La Carta sociale europea come parametro interposto nella recente giurisprudenza costituzionale: novità e questioni aperte' (2019) RDI 491; D Amoroso, 'Sull'obbligo della Corte Costituzionale italiana di "prendere in considerazione" le decisioni del Comitato europeo dei diritti sociali' (2018) Forum di Quaderni Costituzionali www.forumcostituzionale.it 81; L Borlini and L Crema, 'Il valore delle pronunce del Comitato europeo dei diritti sociali ai fini dell'interpretazione della Carta Sociale Europea nel diritto internazionale' (2018) Forum di Quaderni Costituzionali www.forumcostituzionale.it 86; L Mola, 'Brevissime osservazioni sull'interpretazione della carta sociale europea. A margine della sentenza n. 120/2018 della Corte costituzionale in prospettiva di una prossima pronuncia' (2018) Forum di Quaderni Costituzionali www.forumcostituzionale.it 119; D Russo, 'La definizione del parametro di costituzionalità

members of the army to form and/or join trade unions[97] and the right of workers to obtain compensation in the event of the termination of their employment.[98]

While it is impossible to cover all substantial aspects emerging from the two judgments, it should nevertheless be highlighted that the Constitutional Court presented the legal value of ECSR decisions in the Italian domestic legal system.

Firstly, the Constitutional Court stated that the European Social Charter can constitute a constitutional parameter as it is a 'special treaty' which can be assimilated to the ECHR, already considered by the Court as constituting such a parameter.[99] Furthermore, the Court held that the provisions of the European Social Charter are precise, imposing specific duties on the States Parties.[100]

However, with regard to ECSR decisions, the Court confirmed that they do not have *res iudicata* authority.[101] The Court compared the ECSR's outcomes with the ECHR's judgments, highlighting the absence, in the European Social Charter, of provisions such as arts 32 and 46 of the ECHR, which have already been discussed above.[102] Accordingly, in the most critical (and criticised) part of judgment no. 120, the Court stated that national judges are not bound by the interpretation of the European Social Charter provided by the ECSR. As a consequence, the Court did not follow a decision of the ECSR on a similar matter.[103]

Although the Constitutional Court did not elaborate further on the legal value of ECSR decisions at large,[104] the final part of judgment no. 120 attracted severe criticism and stimulated further reflections. The Court was firstly criticised for having downgraded ECSR decisions, as it had failed to recognise that the ECSR is the only body competent to interpret the European Social Charter, and that it does so following a (quasi) judicial path and judging based upon law.[105] According to another critique, the Constitutional Court missed the opportunity to give to ECSR decisions the authority of a supplementary means of interpretation, as per art. 32 of the Vienna Convention on the Law of Treaties.[106]

fondato sulla Carta sociale europea: il valore delle pronunce del Comitato europeo dei diritti sociali' (2018) Forum di Quaderni Costituzionali www.forumcostituzionale.it 128.

[97] Enshrined in art. 5 of the European Social Charter (Revised).

[98] Enshrined in art. 24 of the European Social Charter (Revised).

[99] Italian Constitutional Court Judgment of 11 April 2018 n. 120/2018 para. 10(1); the Italian Constitutional Court qualified the ECHR as a constitutional parameter in judgments of 22 October 2007 n. 348 and 349.

[100] Italian Constitutional Court Judgment n. 120/2018 cit. para. 10(2).

[101] *Ibid*. para. 13; Italian Constitutional Court Judgment of 26 September 2018 n. 194/2018 para. 14.

[102] See *supra* section III.

[103] Complaint n. 101/2013 of the European Committee of Social Rights, Judgment of 27 January 2016 *European Council of Police Trade Unions (CESP) v France*.

[104] See A Tancredi, 'La Carta sociale europea come parametro interposto nella recente giurisprudenza costituzionale: novità e questioni aperte' cit. 499.

[105] Cf D Russo, 'La definizione del parametro di costituzionalità fondato sulla Carta sociale europea' cit. 131.

[106] Cf L Mola, Brevissime osservazioni sull'interpretazione della carta sociale europea' cit. 122; L Borlini and L Crema, 'Il valore delle pronunce del Comitato europeo dei diritti sociali ai fini dell'interpretazione della Carta Sociale Europea nel diritto internazionale' cit. 104.

Another author, however, highlighted an interesting part of judgment no. 120.[107] Indeed, while the Constitutional Court did not follow the interpretation of the ECSR, it provided a "reasoned" justification for not doing so, arguing that the ECSR findings were not compatible with supreme constitutional principles.[108]

According to this view, the duty of States Parties to take account of the ECSR's decision is strengthened, albeit indirectly, by the Italian Constitutional Court.[109]

Although a comparative analysis lies beyond the scope of this *Article*, it is interesting to note that there are indications from other national courts that this might be the way forward. Although past judicial practice presented an incoherent framework,[110] more recent judgments from the Spanish lower courts and from the Spanish Constitutional Court itself confirm that the non-binding nature of ECSR decisions does not alter their authority, which cannot simply be set aside.[111]

In the field of social, economic and cultural rights, the duty to take into account was also mentioned in General Comment no. 9 of the Committee on Economic, Social and Cultural Rights (CESCR) on the domestic application of the ICESCR. Although the CESCR could specifically address the legal value of its decision,[112] it nonetheless affirmed that "within the limits of the appropriate exercise of their functions of judicial review, courts should take account of Covenant rights where this is necessary to ensure that the State's conduct is consistent with its obligations under the Covenant. Neglect by the courts of this responsibility is incompatible with the principle of the rule of law, which must always be taken to include respect for international human rights obligations".[113]

VI. Concluding remarks

The aim of this *Article* was to analyse the decisions of the ECSR in the broader context of the debate on the legal value of pronouncements of human rights treaty bodies, to ascertain the grounds on which States "must respect" those decisions. Some concluding remarks are now offered.

[107] D Amoroso, 'Sull'obbligo della Corte Costituzionale italiana di "prendere in considerazione" le decisioni del Comitato europeo dei diritti sociali' cit. 84.

[108] Italian Constitutional Court judgment n. 120/2018 cit. paras 13(2) and 13(4).

[109] See, again, D Amoroso, 'Sull'obbligo della Corte Costituzionale italiana di "prendere in considerazione" le decisioni del Comitato europeo dei diritti sociali' cit. 85.

[110] Cf accordingly, and for an overview of past cases, G Gori, 'Domestic Implementation of the European Social Charter' cit. 80.

[111] C Salcedo Beltran, 'La Charte Sociale Européenne: une arme face aux reformes anti-crise mises en place en Espagne' (2018) Lex Social. Revista juridica de los Derechos Sociales 351, 360.

[112] The complaint procedure was established in 2013, see General Assembly of 10 December 2008 Resolution A/RES/63/117 on Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR).

[113] UN Committee on Economic, Social and Cultural Rights of 3 December 1998 E/C.12/1998/24 General *Comment No. 9: The Domestic Application of the Covenant* para. 14.

The composition of the ECSR, its procedure, and the main features of the follow-up procedure allow for it to be concluded that ECSR decisions are assimilated to pronouncements of human rights treaty bodies. Accordingly, the entire debate surrounding those pronouncements is helpful for reflecting on the legal value of ECSR decisions.

On the merits, the first conclusion reached is that the ECSR can be approved from the perspective of the duty to take account of its decisions, which is confirmed in the most recent practice concerning the domestic implementation of pronouncements of human rights treaty bodies.

In this regard, it must be noted that judgments no. 120 and 194 (particularly judgment no. 120) of the Italian Constitutional Court apparently appear to reinforce the view that domestic courts must provide justification when they disregard ECSR decisions, thus confirming the existence of a duty to take account of the pronouncements of human rights treaties bodies, even if they are not binding in themselves, or, to use the words on the ECSR's website, even if they are not directly enforceable.