

ECtHR by Ukraine against the Russian Federation.²⁰ The questions about compensation and the methodology for calculating damages are likely to be raised in other international courts as well, in particular in the upcoming compensation stage in the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* before the ICJ.²¹ In the merits stage of that case, the ICJ found that Uganda was responsible for the violations of international law emanating from the protracted conflict in eastern Democratic Republic of Congo (DRC), including loss of life and suffering of the civilian population.²² Following a decade of unsuccessful negotiations between the DRC and Uganda after the merits judgment, the ICJ will be tasked with settling the question of reparation, which will give the ICJ an opportunity to provide guidance on the methodology to evaluate adequate reparation for mass violations of human rights. Whether the ICJ will affirm a flexible approach in applying evidentiary standards, similar to the ECtHR, to account for the difficulty victims often face in compiling evidence, remains to be seen. Ultimately, a number of aspects of compensation for human rights violations continue to be unsettled in international law, but the ECtHR has made its first steps in clarifying them.

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Supreme Court of Spain—Convention on the Elimination of All Forms of Discrimination Against Women—legal status of human rights treaty body views—international law in domestic courts—rule of law

MARÍA DE LOS ÁNGELES GONZÁLEZ CARREÑO V. MINISTRY OF JUSTICE, Judgment No. 1263/2018, ROJ: STS 2747/2018, ECLI: ES:TS:2018:2747. At <http://www.poderjudicial.es/search/openDocument/14eef2e1ad3680ea/20180723>.

Supreme Court of Spain, July 17, 2018.

The ruling of the Spanish Supreme Court in Judgment No. 1263/2018,¹ recognizing, for the first time, the binding character of the Views of the Committee on the Elimination of Discrimination against Women (CEDAW Committee), augmented the normative authority of the Views of the human rights treaty monitoring body, not only at the domestic level, but also within the international legal sphere. In the Judgment, the Spanish highest court held that the government must comply with the Views of the CEDAW Committee as a matter of the state's constitutional mandate as well as its international obligations. The Court's

²⁰ European Court of Human Rights, *Inter-states Applications* (Jan. 31, 2019), available at https://www.echr.coe.int/Documents/InterStates_applications_ENG.pdf.

²¹ *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Order of 1 July 2015, 2015 ICJ Rep. 580 (July 1).

²² *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 ICJ Rep. 168, para. 345 (Dec. 19). See also Stephen Mathias, *The 2005 Judicial Activity of the International Court of Justice*, 100 AJIL 629, 637–44 (2006).

¹ Judgment No. 1263/2018 of July 17, 2018, ROJ: STS 2747/2018, ECLI: ES:TS:2018:2747 (Tribunal Supremo [Sup. Ct.], Sala de lo Contencioso-Administrativo [Contentious-Administrative Chamber]) (Spain).

interpretation in this case meets the expectation of human rights treaty monitoring bodies that states are obligated to respond to their Views concerning individual communications, despite some states parties' claims to the contrary.

The appellant, González Carreño, was subject to physical and psychological violence by her partner.² In 1999, she reported the abuses to the Spanish authorities and requested that her partner's visits to their daughter, Andrea, be supervised by social services personnel.³ While the local court limited her partner's visits to Andrea,⁴ his verbal and physical abuses toward González Carreño continued. Andrea started rejecting her father, which further accelerated his harassment.⁵ González Carreño filed a number of complaints with the authorities.⁶ In 2000, a local court gave orders to protect the appellant, but the protection was not fully extended to Andrea.⁷ In January 2001, another local court drew up a provisional schedule of supervised visits by Andrea's father.⁸ In November 2001, the appellant obtained an order of marital separation, which did not refer to the history of abuse by her partner. Instead, the order authorized the use of the family dwelling by her partner.⁹ In May 2002, despite the continued violence by her ex-partner, the local court allowed him unsupervised visits to their daughter.¹⁰ On April 24, 2003, during Andrea's scheduled visit to her father, he shot his daughter and subsequently committed suicide.

After the incident, González Carreño brought a series of claims based on the pecuniary liability (*de responsabilidad patrimonial*) of the state for the "abnormal functioning of the administration of justice" (*funcionamiento anormal de la Administración de Justicia*). Her liability claims were rejected four times. First, on April 23, 2004, she filed a complaint with the Ministry of Justice for miscarriage of justice, which was denied on November 3, 2005. Second, on December 15, 2005, she brought an administrative appeal to the Ministry without success. Third, on June 14, 2007, she brought an appeal to the National High Court (*Audiencia Nacional*), claiming the abnormal functioning of the administration of justice. The Court dismissed the appeal on December 10, 2008. Finally, her appeal was rejected by the Supreme Court on October 15, 2010.¹¹ Along with these unsuccessful liability claims, her attempt to raise the violation of her constitutional rights was likewise dismissed by the Constitutional Court on April 13, 2011, due to the lack of constitutional relevance.¹²

Having exhausted domestic remedies available before Spanish courts, González Carreño petitioned the CEDAW Committee on September 19, 2012. On July 16, 2014, the

² The facts described in the present case note are based on both the Supreme Court decision and the CEDAW Committee's Views. See *Angela González Carreño v. Spain*, Communication No. 47/2012, paras. 2.1–2.1 (CEDAW Committee July 16, 2014). Formally, the Committee adopted the "Decision"; yet this case note consistently uses the term "Views" to describe the findings adopted by UN human rights treaty-monitoring bodies in response to individual communications or petitions.

³ *Id.*, para. 2.2.

⁴ *Id.*, para. 2.3.

⁵ *Id.*, para. 2.4.

⁶ *Id.*, para. 2.5.

⁷ *Id.*, para. 2.7.

⁸ *Id.*, para. 2.9.

⁹ *Id.*, para. 2.12.

¹⁰ *Id.*, para. 2.13.

¹¹ *Id.*, paras. 2.18–20.

¹² *Id.*, para. 2.21.

Committee rendered its Views largely in her favor.¹³ The Committee assessed whether the Spanish government had fulfilled its duty of due diligence in protecting the appellant and her daughter from the risks of domestic violence.¹⁴ The CEDAW Committee rejected the Spanish government's assertion that the risks were unforeseeable; there were repeated incidents of violence, the social services' reports revealed that the father was using his daughter to send hostile messages to the appellant, a psychological report pointed out the father's obsessive compulsive disorder, and the father failed to pay child support (para. 9.3). According to the CEDAW Committee, the Spanish authorities' responses were based on a "stereotyped conception of visiting rights based on formal equality" without due consideration to the domestic violence that put the appellant and her daughter in a vulnerable position (para. 9.4). The stereotypical assumption led the authorities to allow unsupervised visits without the necessary safeguards (para. 9.5). The state deprived the appellant of its protection, which amounted to discrimination and a violation of the state's obligations under Articles 2(a–f), 5(a), and 16(1)(f) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW Convention) (paras. 9.7–9, 10).¹⁵ Accordingly, the Committee recommended that Spain grant the appellant comprehensive compensation and conduct an exhaustive and impartial investigation.

Having received the favorable Views of the CEDAW Committee, González Carreño filed a series of new domestic claims, requesting that the Spanish government give effect to the Committee's findings. On October 16, 2014, an extraordinary appeal was filed against the November 3, 2005 decision of the Ministry of Justice, which, as noted above, had denied a claim for miscarriage of justice. The Ministry dismissed the request to review the decision, and the appellant appealed to the National High Court. On April 25, 2016, however, the appeal was dismissed by the Court on the basis of *res judicata*.¹⁶ On September 25, 2017, the Supreme Court also dismissed the appeal.¹⁷

Meanwhile, the appellant filed a separate claim requesting that the state comply with the CEDAW Committee's Views. The National High Court rejected that claim on November 2, 2016.¹⁸ According to the Court, there were no domestic procedures available to it to give effect to the recommendations of the CEDAW Committee.¹⁹ Furthermore, the National High Court disagreed with the Committee's conclusions, reiterating that no abnormal functioning of the administration of justice had occurred in connection with the murder of the appellant's daughter.²⁰

After this long series of administrative and judicial challenges, González Carreño argued before the Supreme Court, among other things, that the lack of procedures to give effect to the Views of the CEDAW Committee amounted to the violations of Articles 10.2 and

¹³ *Id.*, para. 10.

¹⁴ *Id.*, para. 9.2

¹⁵ Convention on the Elimination of All Forms of Discrimination against Women, Arts. 2(a–f), 5(a), 16(1)(f), Dec. 18, 1979, 1249 UNTS 13 [hereinafter CEDAW Convention].

¹⁶ SAN 1528/2016 of Apr. 25, 2016, ECLI: ES:AN:2016:1528, at 4 (Audiencia Nacional [High Ct.]) (Spain).

¹⁷ STS 1425/2017 of Sept. 25, 2017 (Tribunal Supremo [Sup. Ct.], Sala de lo Contencioso-Administrativo [Contentious-Administrative Chamber]) (Spain).

¹⁸ SAN 4195/2016 of Nov. 2, 2016, ECLI: ES:AN:2016:4195 (Audiencia Nacional [High Ct.]) (Spain).

¹⁹ *Id.* at 5–6.

²⁰ *Id.* at 6.

96 of the Spanish Constitution (pp. 7–9). In response, the government claimed that to give effect to the Committee’s Views would undermine the legal system of *res judicata* (p. 9). The government also added that the Views had no binding force over the domestic court judgments that found no abnormal functioning of the administration of justice (*id.*). The state party may be bound by the Committee’s findings, the government argued, but “only and exclusively” with regard to the obligations set forth in the Convention and the Protocol (*id.*). Article 7 of the Protocol provides the Committee only with the power to render “views” (“*opiniones*” in Spanish) and “recommendations” (p. 10).

The Spanish Supreme Court disagreed with the government’s contentions. The Court’s reasoning was based on both international and domestic law. Regarding international law, the Supreme Court acknowledged that the CEDAW Convention does not oblige states parties to adopt any specific procedures with which to give effect to the Views of the CEDAW Committee (p. 12). Nevertheless, it cannot be doubted, explained the Supreme Court, that the Views of the CEDAW Committee have a “binding/obligatory” (“*vinculante/obligatorio*”) character for the state party that recognized the Convention and the Protocol (*id.*). Such an obligatory character is derived from Article 24 of the Convention, according to which 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” (*id.*).²¹ Consideration must also be given to Article 7(4) of the Optional Protocol, which provides that the state party “shall give due consideration to the views of the Committee, together with its recommendations” and “shall submit to the Committee, within six months, a written response” (*id.*).²² Furthermore, the state party gave express recognition to the competence of the Committee under Article 1 of the Protocol (*id.*).²³

Turning to domestic law, the Supreme Court highlighted that the international treaty that provides the basis for the CEDAW Committee and its Views, “forms part of our internal legal order” under Article 96 of the Spanish Constitution (*id.*). Moreover, under Article 10(2) of the Constitution, fundamental rights ought to be interpreted in accordance with the Universal Declaration of Human Rights²⁴ and international human rights treaties ratified by Spain (*id.*). Article 9(3) of the Spanish Constitution further guarantees “the principle of legality and the normative hierarchy” (*id.*), as a result of which international obligations relating to the execution of the decisions of the CEDAW Committee form part of the Spanish internal order and enjoy a hierarchical position over ordinary domestic law.²⁵ As a consequence, explained the Supreme Court, the Convention and the Views of the CEDAW Committee “can and should be a decisive element” in proving the possible infringement of fundamental rights (*id.*).

The CEDAW Committee’s Views, “in this case and with its particularities,” must be taken into account as a “valid basis” (“*presupuesto válido*”) for bringing a claim concerning the

²¹ CEDAW Convention, *supra* note 15, Art. 24.

²² Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, Art. 7(4), Oct. 6, 1999, 2131 UNTS 83.

²³ *Id.* Art. 1.

²⁴ Universal Declaration of Human Rights, GA Res. 217 (III) A, UN Doc. A/RES/217(III) (Dec. 10, 1948).

²⁵ Normative hierarchy in Article 9(3) of the Spanish Constitution is an abstract principle and the fact that international obligations are superior to ordinary domestic law—but not above the Constitution—is based on Articles 95 and 96 of the Constitution.

pecuniary liability of the state (p. 13). The Supreme Court dismissed the relevance of the principle of *res judicata*, inasmuch as the series of actions and decisions gave rise to a different ground with which to assess the state's responsibility (*id.*). According to the Supreme Court, the "absence of a specific procedure for executing" the Committee's Views amounts to "a breach of a legal and constitutional mandate by Spain" (*id.*). The Supreme Court found violations of the appellant's fundamental rights, especially the rights of equality and non-discrimination and to effective judicial protection. The Supreme Court ordered the government to pay EUR 600,000 for moral damages suffered by the appellant (p. 14).

* * * *

The decision of the Spanish Supreme Court stands out for its clear domestic endorsement of the binding character of the Views of the CEDAW Committee in and of themselves. The Court's reasoning is different from acknowledging the substance of the Views as part of an established treaty interpretation. Namely, the Court did not examine whether the content of the CEDAW Committee's Views already reflected an interpretation accepted by states parties through "subsequent practice in the application of the treaty" (Article 31(3)(b) of the Vienna Convention on the Law of Treaties).²⁶ Instead, the Court based its decision on the obligatory nature of the Views themselves.

The Supreme Court's ruling represents a "Copernican turn"²⁷ in Spain's domestic engagement with UN human rights treaty monitoring bodies. Previous court decisions often took a dismissive stance toward the findings of such bodies. In 2002, for instance, the Spanish Constitutional Court reiterated that the Views ("*observaciones*" in Spanish) of the Human Rights Committee did not constitute judicial decisions and that they could not represent the "authentic interpretation" of the International Covenant on Civil and Political Rights (ICCPR).²⁸ The Constitutional Court's narrative was subsequently reproduced by the Spanish Supreme Court²⁹ and signaled domestic judges' reluctance to engage with the specific findings of human rights treaty monitoring bodies.

While the Spanish Supreme Court altered its course in the ruling of July 17, 2018, the manner in which the Court endorsed the Views of the CEDAW Committee is, paradoxically, consistent with the Spanish courts' former jurisprudence. Previously, the courts' reluctance appeared to be based on whether or not the Views entail binding obligations for Spain. Such a binary narrative also appears in the ruling of July 2018, although with the opposite result. The Spanish Supreme Court described the Views as "binding" for Spain (p. 12), and it was on this

²⁶ Vienna Convention on the Law of Treaties, Art. 31(3)(b), May 23, 1969, 1155 UNTS 331. See Report of the International Law Commission, UN GAOR, 73rd Sess., Supp. No. 10, at 110–12, paras. 9–15, UN Doc. A/73/10 (2018); Machiko Kanetake, *UN Human Rights Treaty Monitoring Bodies Before Domestic Courts*, 67 INT'L & COMP. L. Q. 201, 218–19 (2018).

²⁷ Concepción Escobar Hernández, *Sobre la problemática determinación de los efectos jurídicos internos de los «dictámenes» adoptados por Comités de derechos humanos. Algunas reflexiones a la luz de la STS 1263/2018, de 17 de julio*, 71 REVISTA ESPAÑOLA DE DERECHO INTERNACIONAL 241, 244 (2019).

²⁸ PM v. Criminal Chamber of the Supreme Court, Constitutional Appeal (recurso de amparo), ILDC 1794 (ES 2002), para. 7 of the section on legal foundations (Constitutional Ct. Apr. 3, 2002) (Spain). See also Asier Garrido Muñoz, *Analysis: PM v. Criminal Chamber of the Supreme Court*, ILDC 1794 (ES 2002), paras. A6–A8 (2011).

²⁹ Judgment of the Supreme Court of June 8, 2015 (Tribunal Supremo [Sup. Ct.], Sala Tercera, de lo Contencioso-Administrativo [Third Chamber, Contentious-Administrative]) (Spain), at <https://supremo.vlex.es/vid/575807258>.

basis that the Court allowed the appellant to bring a new claim, circumvented the authority of *res judicata*, and eventually found violations of her fundamental rights.

The dichotomous approach of the Supreme Court is different from the narrative of domestic courts in some other states that attach varying degrees of normativity to the Views and other findings of human rights treaty monitoring bodies.³⁰ Although domestic courts' engagement has been selective,³¹ a number of judges do consult the Views and other findings of the monitoring bodies. This is despite the fact that states parties predominantly still regard the Views as formally non-binding.³² As the International Law Association (ILA)'s Committee on International Human Rights Law and Practice (1997–2008) observed, a number of domestic courts, even if not prepared to see committee interpretations as formally binding, recognize that the treaty bodies' interpretations "deserve to be given considerable weight."³³ The Spanish Supreme Court's rather formalistic endorsement of the Views of the CEDAW Committee occupies an exceptional place.

In fact, the Spanish Supreme Court's acknowledgment of the obligatory character of the CEDAW Committee's Views resembles the *draft* version of the Human Rights Committee's General Comment No. 33. Regarding the Views as exhibiting "most" of the characteristics of a judicial decision,³⁴ the draft claimed the Committee's finding of violations "engages the legal obligation" of the state party to "reconsider the matter."³⁵ According to the draft, a duty to cooperate with the Committee leads to an "obligation to respect the views of the Committee in the given case,"³⁶ based on a state party's obligations to provide an effective remedy under Article 2(3) of the ICCPR and to act in good faith.³⁷ Although the Spanish Supreme Court did not characterize the CEDAW Committee as having judicial characteristics, the conclusion of the Court was, in part, based on the state party's obligation to take the Committee's Views seriously. Such an obligation is more explicit with regard to the CEDAW Convention than some other human rights treaties. The Court drew on Article 7(4) of the Optional Protocol of the CEDAW Convention, which explicitly obliges states parties to give due consideration to the Views and provide a follow-up report to the Committee.³⁸

While the Spanish Supreme Court's ruling opens a door to more positive interactions between domestic and international human rights mechanisms, one might nonetheless be

³⁰ Kanetake, *supra* note 26, at 219–20.

³¹ See, e.g., Jones v. Saudi Arabia, [2006] UKHL 26, [2007] 1 AC 270 (H.L.), paras. 23, 57 (June 14, 2006); Order of the First Senate of July 26, 2016, 1 BvL 8/15, paras. 90–91 (German Federal Constitutional Ct. (BVerfG)), English translation available at http://www.bverfg.de/e/ls20160726_1bvl000815en.html; Kanetake, *supra* note 26, at 212–15.

³² Rosanne van Alebeek & André Nollkaemper, *The Legal Status of Decisions by Human Rights Treaty Bodies in National Law*, in UN HUMAN RIGHTS TREATY BODIES: LAW AND LEGITIMACY 356, 372–73, 385–90 (Helen Keller & Geir Ulfstein eds., 2012); 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*, adopted by the Venice Commission at its 100th Plenary Session, at 30, para. 76 (Oct. 10–11, 2014).

³³ Int'l Law Ass'n, Berlin Conference (2004), Committee on International Human Rights Law and Practice, *Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies*, para. 175 (2004).

³⁴ Human Rights Comm., Draft General Comment No. 33 (Second Revised Version as of Aug. 18, 2008), para. 11, UN Doc. CCPR/C/GC/33/CRP.3 (Aug. 25, 2008). See Kanetake, *supra* note 26, at 204–06.

³⁵ Human Rights Comm., *supra* note 34, para. 15.

³⁶ *Id.*, para. 16.

³⁷ *Id.*, paras. 15–16.

³⁸ Optional Protocol, *supra* note 22, Art. 7(4).

cautious in considering the international implications of the Court's July 2018 ruling. First, Spanish constitutional provisions served as a legal basis for obliging the public authorities to give effect to the Views of the CEDAW Committee. Article 10(2) of the Spanish Constitution, according to which state organs are obliged to interpret constitutional rights to conform to human rights treaties, played an important role.³⁹ Second, the imperative vocabularies used in the *draft* version of General Comment No. 33 mentioned above met criticisms from several states.⁴⁰ The final version of General Comment No. 33 omitted the phrase concerning the "obligation to respect the views" and limited itself to reminding states of their "duty to cooperate with the Committee" based on the basic obligation to observe treaty provisions in good faith.⁴¹ The story behind the adoption of General Comment No. 33 illustrates that other states parties may not be open to the position adopted by the Spanish Supreme Court. Finally, in the July 2018 ruling, the Spanish Supreme Court itself considered the case's "particularities" and suggested the limited applicability of the Court's reasoning to this specific case and to cases concerning the pecuniary liability of the state (pp. 13–14).

Overall, one must be cautious not to generalize the Supreme Court's ruling. It remains to be seen whether and to what extent the Spanish courts themselves will continue to acknowledge the obligatory characteristics of the Views of the CEDAW Committee, as well as those of other human rights treaty monitoring bodies.

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South Korea—forced labor—illegality of Japan's colonial rule—treaty interpretation—individual's right to compensation claim—foreign investor protection

YEO WOON TAEK V. NEW NIPPON STEEL CORPORATION. 2013 Da 61381. Compensation for Damages (Others). At <http://www.scourt.go.kr/news/NewsViewAction2.work?pageIndex=1&searchWord=&searchOption=&gubun=4&type=0&seqnum=6391>. Supreme Court of Republic of Korea, October 30, 2018.

On October 30, 2018, the South Korean Supreme Court, in an 11–2 decision, upheld the judgment of the lower court, which ordered New Nippon Steel Corporation, a Japanese company, to provide KRW 100 million (approximately USD 84,000) in compensation to each of the four plaintiffs, who were forced to work at Japanese steel mills during World War II.¹ In

³⁹ See Cesáreo Gutiérrez Espada, *La aplicación en España de los dictámenes de comités internacionales: la STS 1263/2018, un importante punto de inflexión*, 10 CUADERNOS DE DERECHO TRANSNACIONAL 836, 847, paras. 30–31 (2018); Escobar Hernández, *supra* note 27, at 249–50.

⁴⁰ See Kanetake, *supra* note 26, at 205–06.

⁴¹ Human Rights Comm., General Comment No. 33: The Obligations of States Parties Under the Optional Protocol to the International Covenant on Civil and Political Rights, para. 15, n. 4, UN Doc. CCPR/C/GC/33 (June 25, 2009); Vienna Convention on the Law of Treaties, *supra* note 26, Art. 26.

¹ Supreme Court of Korea, 2013 Da 61381, Decided on Oct. 30, 2018 (S. Kor.). The English translation of the judgment is available at 7 KOREAN J. INT' & COMP. L. 88 (2019) (editorially noted and translated by Seokwoo Lee and Seryon Lee). Page numbers refer to the Korean version of the official judgment.