interpret domestic legal requirements, and that complexities may arise in the coordinated application of domestic and international norms.

Investment treaty practice in this area has yet to consolidate, and analysis of evolving arbitral jurisprudence provides insights for broader investment treaty policy. The approach adopted in the *Cortec* award illustrates one way to coordinate domestic and international instruments, and suggests that effective domestic legislation on issues such as environmental protection can have a direct bearing on investor-state dispute settlement.

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European Court of Human Rights—just satisfaction—interstate claims—state responsibility—reparation—compensation—non-pecuniary damage—evidentiary standard

CASE OF GEORGIA V. RUSSIA (I) (JUST SATISFACTION). App. No. 13255/07. *At* http://www.echr.coe.int/echr.
European Court of Human Rights (Grand Chamber), January 31, 2019.

In *Georgia v. Russia (I) (Just Satisfaction)*,[1] the Grand Chamber of the European Court of Human Rights (ECtHR or Court) ordered the Russian Federation to pay Georgia EUR 10 million as reparation for Russia's "coordinated policy of arresting, detaining and expelling Georgian nationals" in the autumn of 2006 (paras. 51, 80). In so doing, the Court reaffirmed its position from *Cyprus v. Turkey (IV) (Just Satisfaction)* that financial compensation for non-pecuniary damage can be awarded in interstate cases.[2] Although *Georgia v. Russia (I) (Just Satisfaction)* marks the development of a new line of ECtHR jurisprudence, it is unlikely that the decision will effectively prevent further mass violations of the European Convention on Human Rights (ECHR or Convention) by the states parties or offer fair compensation to the victims of such violations.

The Just Satisfaction Judgment concludes the compensation stage of the case, which was decided on the merits in 2014.[3] The case stems from the political confrontation between Russia and Georgia, which led to an armed conflict in Abkhazia and South Ossetia in 2008. Following the conflict, Georgia brought three applications against the Russian Federation before the ECtHR.[4] This particular case concerned the forcible removal of over 4,600 Georgian nationals by Russia from its territory, some of whom were also detained and

[1] Case of Georgia v. Russia (I), App. No. 13255/07, Just Satisfaction (Eur. Ct. H.R. Jan. 31, 2019).

[2] Cyprus v. Turkey (IV), App. No. 25781/94, Just Satisfaction (Eur. Ct. H.R. May 12, 2014). *See also* Frederike Kollmar & Jan Martin Hoffmann, *Fewer Complaints, More Satisfaction:* Cyprus v. Turkey, 3 CAMBRIDGE J. INT'L & COMP. L. 1361 (2014).

[3] Case of Georgia v. Russia (I), App. No. 13255/07, Merits (Eur. Ct. H.R. July 3, 2014).

[4] *Id.* Two other cases are pending: *Case of Georgia v. Russia (II)*, App. No. 38263/08; and *Case of Georgia v. Russia (IV)*, App. no. 39611/18. *See* OCTAVIAN ICHIM, JUST SATISFACTION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS 93 (2015).

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subjected to inhuman and degrading treatment before being removed.[5] On the merits, the Court decided that the Russian Federation had violated Article 5 (right to liberty and security), Article 3 (prohibition of inhuman or degrading treatment), Article 13 (right to an effective remedy), and Article 38 (obligation to furnish all necessary facilities for the effective conduct of an investigation) of the Convention, as well as Article 4 of Protocol No. 4 (prohibition of collective expulsion of aliens).[6] After the judgment on the merits, the parties were unable to reach an agreement about compensation. Accordingly, Georgia submitted its claims to the Court under Article 41 of the ECHR for just satisfaction for violations of the Convention committed in relation to the Georgian nationals (paras. 4, 24).

The ECHR uses the term "just satisfaction" to address the entire spectrum of reparations available to an injured party, for pecuniary or non-pecuniary damage, as well as reimbursement of costs and expenses.[7] Article 41 embodies the principle that, to the extent possible, the injured party is entitled to be restored to the situation prior to the loss[8]—a principle which reflects the logic of international law of state responsibility. Article 41 of the ECHR provides that the Court will afford just satisfaction to the injured party, if the internal law of the state concerned does not allow full reparation to be made.[9] The injured party, however, is *not entitled to* the award of just satisfaction under Article 41. It is the discretion of the Court whether to grant just satisfaction. In individual cases, in recent years, just satisfaction though has become almost automatic.[10]

The central question in this case was whether just satisfaction and Article 41 of the ECHR apply to interstate claims. In deciding this question, the Court relied heavily on *Cyprus v. Turkey (IV) (Just Satisfaction)*. In that case, the ECtHR ordered Turkey to pay EUR 90 million for the enforced disappearance of 1,456 people and numerous ECHR violations against the Greek Cypriots in the Karpas peninsula arising out of the military operations in northern Cyprus in 1974.[11] In the present case, the Court began the analysis of applicability of just satisfaction in the interstate cases by inserting a lengthy direct quotation from *Cyprus v. Turkey (IV) (Just Satisfaction)* (para. 21). Specifically, the Court reiterated the reasoning from the earlier decision, where the ECtHR observed that Article 41 of the ECHR should be read in light of the "principle of public international law relating to a State's obligation to make reparation for violation of a treaty obligation," and referred to the jurisprudence of the International Court of Justice (ICJ) (paras. 20–21). The ECtHR then applied three criteria, established in *Cyprus v. Turkey (IV) (Just Satisfaction)*, to decide whether

[5] *Case of Georgia v. Russia (I)*, App. no. 13255/07, Merits, paras. 135, 240.

[6] *Id.*, para. 240. The Court also held that there had been no violation of Article 8 (right to respect for private and family life), no violation of Article 1 of Protocol No. 7 (procedural safeguards relating to expulsion of aliens), and no violation of Articles 1 and 2 of Protocol No. 1 (protection of property and right to education).

[7] ICHIM, *supra* note 4, at 18; WILLIAM SCHABAS, THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A COMMENTARY 830 (2015).

[8] SCHABAS, *supra* note 7, at 830.

[9] "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party." European Convention on Human Rights, Art. 41, Nov. 4, 1950, 213 UNTS 221 [hereinafter ECHR].

[10] Kanstantsin Dzehtsiarou, *Compensation for Victims in Inter-state Cases. Is* Georgia v Russia (I) *Another Step Forward?*, STRASBOURG OBSERVERS (Feb. 14, 2019), *at* https://strasbourgobservers.com/2019/02/14/compensation-for-victims-in-inter-state-cases-is-georgia-v-russia-i-another-step-forward.

[11] *Cyprus v. Turkey (IV)*, App. No. 25781/94, Just Satisfaction, para. 63.

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granting just satisfaction to Georgia was justified: (1) whether the complaint of the applicant government concerns the violation of its nationals' basic human rights; (2) whether the victims of violations can be identified; and (3) the main purpose of bringing the proceedings (para. 22)[12]. The Court concluded that the case indeed met these criteria, because: (1) the complaint related to Russia's practice of forced expulsion, arrest, and detention of the Georgian nationals; (2) Georgia provided a "detailed list" of identifiable victims of violations; and (3) Georgia brought the proceedings with a view to compensating the victims, and not the state (paras. 23–28). Thus, Georgia was entitled to submit a claim under Article 41 of the ECHR.

As in *Cyprus v. Turkey (IV) (Just Satisfaction)*, the ECtHR asserted that not all interstate claims can lead to a monetary award.[13] The guiding factor in determining the appropriateness of such award under Article 41 of the ECHR is whether the state can identify a "sufficiently precise and objectively identifiable" group of people, whose rights were violated (para. 28).[14] Georgia accordingly requested just satisfaction for the 4,634 Georgian nationals, referred to in the Court's merits judgment, "of whom 2,380 had allegedly been detained and forcibly expelled" (para. 29). On the merits, the Court had only determined an approximate number of expulsions and detention orders, since the Russian Federation failed to provide monthly statistics on the number of Georgian nationals expelled in 2006 and 2007.[15] As a result, the Court asked Georgia to produce the list of the identifiable individual victims (paras. 55, 58). Georgia, in turn, submitted a list of 1,795 alleged victims, while acknowledging that the actual number of victims was much higher (paras. 35, 62). Russia submitted its comments in reply to Georgia's submission, but failed to submit all the relevant information and documents, including the expulsion orders and court decisions (para. 62). In response to Russia's omissions, the ECtHR remarkably underlined the duty to cooperate, which includes a duty to produce all relevant information and documents in the parties' possession, as prescribed by Article 38 of the ECHR[16] and Rule 44A of the ECtHR Rules of Court.[17] In fact, the ECtHR noted that the duty to cooperate is "particularly important for the proper administration of justice," when the Court awards just satisfaction under Article 41 of the ECHR (paras. 59–61).

Although the ECtHR clarified that it is not appropriate for it, as an international court, to "adjudicate on large numbers of cases which require the finding of specific facts or the

[12] In *Cyprus v. Turkey*, the Court explained that an application "may contain different types of complaints pursuing different goals." If the state complains about general issues (for example, systemic problems and shortcomings or administrative practice) in another state, the main purpose of the applicant government is to vindicate the public order of Europe within the framework of collective responsibility under the Convention. In such case, an award of just satisfaction is impermissible. *Id.*, paras. 43–44.

[13] *Id.*, para. 47.

[14] Isabella Risini, The Inter-state Application Under the European Convention on Human Rights 124 (2018).

[15] *Case of Georgia v. Russia (I)*, App. No. 13255/07, Merits, para. 129.

[16] "The Court shall examine the case together with the representatives of the parties and, if need be, undertake an investigation, for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities." ECHR, *supra* note 9, Art. 38.

[17] "The parties have a duty to cooperate fully in the conduct of the proceedings and, in particular, to take such action within their power as the Court considers necessary for the proper administration of justice. This duty shall also apply to a Contracting Party not party to the proceedings where such cooperation is necessary." European Court of Human Rights, Rules of Court, Art. 44A.

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calculation of monetary compensation," the Court nonetheless carried out a preliminary examination of the list of 1,795 alleged victims submitted by Georgia (paras. 65, 68). The Court decided that "at least 1,500 Georgian nationals" who were victims of a violation of Article 4 of Protocol No. 4 (collective expulsion) constitute a "sufficiently precise and objectively identifiable" group (para. 71). The ECtHR also indicated that among this group of people there were "a certain number" of individuals who also were victims of violations of Articles 5(1) and 3 of the ECHR, but the Court did not specify the exact number of these individuals (para. 72).

The Court used a somewhat simplified methodology to reach these numbers. Since the violations were based on events that occurred on the territory of the Russian Federation, the Court shifted the burden of proof to Russia to show that the individuals on Georgia's list were not victims (para. 69). Relying on the merits judgment, the ECtHR assumed that these individuals were indeed victims of the ECHR violations for which the Russian Federation had been held responsible. Where Russia was unable to show convincingly that a person did not belong on the list, the person remained on the list.

As a result of this preliminary examination, the ECtHR excluded 290 persons from the list, mainly for technical reasons, such as individuals who: appeared on the list more than once; had lodged individual applications before the ECtHR; did not possess Georgian nationality or acquired Russian nationality; were subject to expulsion orders that did not fall within the time limit of the merits judgment; and whose complaints were not sufficiently substantiated (para. 70).

The Court then turned to the issue of awarding non-pecuniary damage. The Court acknowledged that the Convention did not contain any express provisions for awards in respect of non-pecuniary damage. At the same time, the ECtHR has, in its case law, held that it may award compensation for non-pecuniary damage in some situations, where the impact of the violation has significantly impinged on the applicant's moral well-being (para. 73). In this case, the Court found that the group of at least 1,500 Georgian nationals, who were victims of the "coordinated policy of arresting, detaining and expelling," suffered trauma and experienced feelings of distress, anxiety, and humiliation (para. 74). Consequently, the ECtHR granted compensation on their behalf (para. 75).

Guided by the principle of equity, the Court awarded Georgia a lump sum of EUR 10 million in relation to non-pecuniary damage suffered by this group. The Court ordered the sum to be distributed to the individual victims of violations by Georgia, with EUR 2,000 payable to the Georgian nationals who were victims of a violation of Article 4 of Protocol No. 4 only and an amount ranging from EUR 10,000 to EUR 15,000 payable to those of them who were also victims of a violation of Articles 5 and 3 of the ECHR (paras. 76–77). The ECtHR directed Georgia to establish an effective mechanism for distributing the award to the identified Georgian nationals under the supervision of the Committee of Ministers (para. 79). The Judgment was adopted almost unanimously (by sixteen votes to one) with Judge Dedov from the Russian Federation alone in dissent. Dedov, in particular, criticized the Court for leaving it exclusively to Georgia to create an effective mechanism of the compensation distribution, instead of allowing the amount awarded in compensation to be distributed directly by the Russian Federation in cooperation with Georgia, "as should happen in the context of international relations between sovereign States" (diss. op., Dedov, J.).

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Georgia v. Russia (I) (Just Satisfaction) continues and confirms a new line of ECtHR jurisprudence awarding compensation for non-pecuniary damage in interstate cases, a form of just satisfaction previously only awarded in individual cases. In this way, the Court has attempted to incentivize full compliance with the ECHR in the situations of mass human rights violations. Yet, the effectiveness of this move is questionable, since both interstate cases in which the ECtHR awarded compensation are politically sensitive and involve armed conflict. The fact that the execution of the 2014 judgment on just satisfaction in *Cyprus v. Turkey (IV) (Just Satisfaction)* is still pending before the Committee of Ministers suggests that the chances of the execution of *Georgia v. Russia (I) (Just Satisfaction)* are minimal. The risk of non-execution in the latter case is exacerbated by the real possibility of Russia's withdrawal from the Council of Europe.[18]

The execution might also be hindered by the mechanism chosen for distribution of the award and the potentially problematic transfer of the Court's competence to the applicant, which has been raised by Judge Dedov in his dissent. As in *Cyprus v. Turkey (IV) (Just Satisfaction)*, the Court ordered the applicant state, in this case, Georgia, to set up an effective mechanism to distribute the sums awarded to the individual victims, under the supervision of the Committee of Ministers. The Judgment does not include the final list of victims with relevant amounts to be awarded, making it almost impossible for the Committee of Ministers to supervise the execution of this Judgment. Additionally, considering the lack of precision in the number of victims established by the Court ("*at least* 1,500 Georgian nationals" (para. 76)) and in the sums to be awarded ("*ranging* from EUR 10,000 to EUR 15,000" (para. 77)), it is unclear what would happen if the overall sum of EUR 10 million is insufficient to cover all the payments.

As mentioned above, one substantial issue addressed by the ECtHR in the present case, which was not discussed in *Cyprus v. Turkey (IV) (Just Satisfaction)*, concerns evidentiary standards. With the introduction of a new type of reparation for interstate cases, the Court had to not only assess the human rights situation in general, common in interstate cases, but also address the specific sums of compensation for individual violations. As a result, the decision had to discuss the standard of proof in more detail. Here, the Court seems to have established a lower standard of proof than in individual cases:[19] the ECtHR failed to examine every violation, the evidence substantiating the violations, and compile an exact list of victims of the violations. It is evident from the Court's reasoning that it predominantly assumed that the list submitted by Georgia was correct, unless there were glaring mistakes in the list, such as the repetitions of names. The difference in the standards of proof in interstate and individual cases is, however, difficult to justify, considering that such difference might privilege the victims of violations in interstate cases, even if the violations are comparable.

The unanswered questions from *Georgia v. Russia (I) (Just Satisfaction)* are bound to resurface in one or more pending interstate cases, including five applications brought to the

[18] Marina Aksenova & Iryna Marchuk, *Reinventing or Rediscovering International Law? The Russian Constitutional Court's Uneasy Dialogue with the European Court of Human Rights*, 16 INT'L. J. CONST. L. 1322, 1330–31 (2018); Andrew Drzemczewski & Kanstantsin Dzehtsiarou, *Painful Relations Between the Council of Europe and Russia,* EJIL:*TALK!* (Sept. 28, 2018), *at* https://www.ejiltalk.org/painful-relations-between-the-council-of-europe-and-russia.

[19] ICHIM, *supra* note 4, at 24–26 (discussing evidentiary standard in individual cases).

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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).

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