Angela Gonzalez Carreno v. Spain, Communication No. 47/2012, CEDAW

Amicus Brief
International Commission of Jurists

INTRODUCTION

1. This expert legal opinion by the International Commission of Jurists (ICJ) concerns the communication to the Committee on the Elimination of Discrimination against Women (the Committee) under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in the case of Angela Gonzalez Carreno v. Spain.

2. This case concerns the nature of a State’s international obligations under CEDAW to exercise due diligence to protect individuals from domestic violence. The applicant alleges that Spain failed to exercise adequate due diligence in regard to the domestic violence that was faced by herself and her daughter and that this failure was a contributing factor in the murder of her daughter by the child’s father.

3. The facts as presented by the application allege that: over several years the applicant suffered extensive physical domestic violence by her husband, including in the presence of their young daughter. Over a two year period the applicant filed numerous complaints concerning this violence with police and judicial authorities, initiated a range of criminal and civil proceedings and sought urgent protection measures on a number of occasions. The applicant explains that on only one occasion was the perpetrator was convicted for a misdemeanor and only one protection order was granted. However the perpetrator subsequently breached this protection order on a number of occasions without sanctions. Similarly a protection order for the applicant’s daughter was granted only once, because the judicial authorities were concerned that, it hindered his visitation rights with his daughter. Following the applicant’s legal separation from her husband a visitation schedule between him and his daughter was established. Initially the Court ordered supervised visits. After approximately eighteen months of supervised visits the Court issued an order allowing unsupervised visits, despite the recorded reluctance of the child. Approximately one year later, during one of these
unsupervised visits, the applicant’s husband killed himself and his daughter.

4. This Expert Legal Opinion is intended to provide the Committee with an overview of current jurisprudence of the European Court of Human Rights (ECtHR or ‘the Court’) on the content and scope of the obligation on States parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) to exercise due diligence to protect individuals within their jurisdiction from domestic violence. Spain is a State party to the ECHR.¹

5. In Section I below the ICJ will provide the Committee with a general overview of the obligations on States parties to the ECHR to ensure the rights to life, freedom from torture or inhuman or degrading treatment (ill-treatment), privacy and non-discrimination in the enjoyment of rights, and ECtHR application of these obligations to situations of domestic violence. In Section II it provides further detail on particular aspects of these obligations as they relate to issues relevant to Angela Gonzalez Carreno v. Spain: the requirements on States to establish effective procedures and systems for the prevention of, and protection from, domestic violence and to take reasonable operational measures to protect individuals known to be at risk from domestic violence.

I. STATES PARTIES TO THE ECHR ARE OBLIGED TO EXERCISE DUE DILIGENCE TO PROTECT INDIVIDUALS FROM DOMESTIC VIOLENCE AND TO INVESTIGATE AND proseCUTE SUCH VIOLENCE

6. The jurisprudence of the ECHR clearly establishes that States Parties to the ECHR are not only obliged to refrain from interference with the rights enshrined in the ECHR but also, in a range of circumstances, they are obliged to take positive action to secure those rights and protect against their infringement by private actors too. Among other things, these ‘positive obligations’ require that States exercise due diligence to protect individuals from violence by private individuals, and to investigate and prosecute violence, not least domestic violence.

Right to Life and Freedom from Ill-Treatment

7. The jurisprudence of the ECtHR has clarified that States bear positive obligations to secure the rights to life and freedom from ill-treatment, under

¹ Spain ratified the ECHR on 4 October 1979.
² Osman v. The United Kingdom, Application No. 23452/94, Judgment of the Grand Chamber, 28 October 1998 paras 115-117 (regarding Article 2, violation of Article 6 ECHR); Mahmut Kaya v. Turkey, Application No. 22535/93, Judgment of 28 March
8. In the words of the European Court of Human Rights, the obligation to ensure the right to life “enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction.” To this end States must, “secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions.” Additionally there is a, “positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual,” where the State knows or should have known of that risk.

9. Similarly the Court has underlined that Article 3, “requires states to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture, or inhuman or degrading treatment, including such ill-treatment administered by private individuals.” As with the right to life this necessitates that States maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals and take operational preventative steps to protect individuals at risk of violence, where the State knows or should know of that risk.

10. Moreover where incidents of violence do take place the Court has held that States’ positive obligations require them to undertake an effective official investigation capable of leading to prosecution and punishment. To this end, “the authorities must act of their own motion once the matter has come to their attention”. In order to meet the required standard the Court has

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stressed such investigations, must “be capable of establishing the cause of injury, and identifying and apprehending those responsible, with a view to their punishment”.

11. In a series of cases, the Court has repeatedly confirmed that these obligations apply to concerning domestic violence. It has highlighted that victims of domestic violence, “are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity.” The Court has underlined that in situations of domestic violence national authorities must take, “all reasonable measures to prevent the recurrence of violent attacks”.

**Right to Private and Family Life**

12. In addition, the ECtHR has also held that under Article 8 of the ECHR States bear positive obligations to secure individuals rights to private and family life, noting that, “while the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities, there may in addition be positive obligations inherent in effective “respect” for private and family life and these obligations may involve the adoption of measures in the sphere of the relations of individuals between themselves.” These obligations have a number of implications and impose requirements on States to protect individuals from acts of violence by private individuals. In the Court’s words, “as regards respect for private life, the Court has previously held, in various contexts, that the concept of private life includes a person’s physical and psychological integrity. Under Article 8 States have a duty to protect the physical and moral integrity of an individual from other persons. To that end they are to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals”.

13. The Court has confirmed that these obligations too apply in situations of domestic violence, specifying that, “the concept of private life includes a person’s physical and psychological integrity”, and outlining that the “authorities’ positive obligations – in some cases under Articles 2 or 3 and in
other instances under Article 8 taken alone or in combination with Article 3 of the Convention – may include, in certain circumstances, a duty to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals.” Moreover, the Court has also specified that, “these considerations equally apply in situations where an individual’s right to the enjoyment of his or home free of violent disturbance is at stake”. 

Non-Discrimination in the Enjoyment of Rights

14. The Court has also underlined that ensuring women’s enjoyment of the rights enshrined in the ECHR free from discrimination, as required by Article 14 of the Convention, necessitates that States take positive steps to protect women from domestic violence and investigate and prosecute such violence. In a number of cases the Court has found violations of Article 14, in conjunction with Articles 2 and 3, of the Convention, in situations of State failures to adequately deliver on positive obligations to protect individuals from domestic violence. For example in a recent case the Court held it to be, “clearly demonstrated that the authorities’ actions were not a simple failure or delay in dealing with violence (...) but amounted to repeatedly condoning such violence and reflected a discriminatory attitude towards the first applicant as a woman.”

II. THE POSITIVE OBLIGATION TO PROTECT INDIVIDUALS FROM DOMESTIC VIOLENCE REQUIRES STATES TO ESTABLISH EFFECTIVE PROCEDURES AND SYSTEMS FOR THE PREVENTION OF AND PROTECTION FROM DOMESTIC VIOLENCE AND TO TAKE OPERATIONAL MEASURES TO PROTECT INDIVIDUALS AT RISK OF DOMESTIC VIOLENCE

15. As outlined above States parties to the ECHR are obliged to maintain and apply in practice an adequate legal framework affording protection against domestic violence. This necessitates the establishment of effective criminal justice frameworks and law enforcement machinery to deal with domestic violence in a manner that can prevent, suppress and sanction such violence.

16. However the mere establishment of such frameworks and machinery is insufficient. The Court will also consider whether the frameworks and machinery are effective in practice, whether in a given case the authorities took preventative operational measures to protect the individuals at risk of domestic violence, whether effective investigations into incidents of violence were undertaken, whether the perpetrator was sanctioned.\textsuperscript{20}

17. As outlined specific and effective protective measures are required where State authorities know or ought to know of the existence of a real and immediate risk to the life or personal integrity of an identified individual or individuals from the criminal acts of a third party. In such situations the authorities must, “take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk”\textsuperscript{21}. Their failure to do so will give rise to a violation of the Convention. In considering whether or not State authorities have discharged this obligation the Court has stressed that an applicant does not need to show that “but for” the failing or omission the domestic violence would not have occurred and it’s purpose is not to determine whether the events in question would not have occurred had authorities taken a particular course of action. Instead, “it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge,”\textsuperscript{22} and “a failure to take reasonable measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the state.”\textsuperscript{23}

18. The Court has held that assessing whether a State has discharged its positive obligations to protect individuals from domestic violence, “is a question which can only be answered in the light of all the circumstances of any particular case.”\textsuperscript{24} The Court has taken a number of factors into account: the particular situation of the individual at risk, the authorities knowledge of the situation and their reaction, whether previous incidents involving the concerned persons were brought to the attention of the authorities, for instance in the form of a complaint or statement, and how they reacted to this. The Court will regularly consider whether a State should have taken

\textsuperscript{20} See for example Opuz v. Turkey, Application No. 33401/02, Judgment 9 June 2009, para. 128 et seq.
\textsuperscript{22} Opuz v. Turkey, Application No. 33401/02, Judgment 9 June 2009, para. 130
\textsuperscript{23} Opuz v. Turkey, Application No. 33401/02, Judgment 9 June 2009, para. 136; E and Others v. The United Kingdom, Judgment 26 November 2002, para. 99.
\textsuperscript{24} Opuz v. Turkey, Application No. 33401/02, Judgment 9 June 2009, para. 130.
specific policing, administrative or protective legal measures, including, but not limited to the launching of criminal investigations and injunctions, and will assess the extent to which this action took place. It will also assess the extent to which the authorities’ reaction and follow-up was timely and effective.

19. The Court has applied this approach in a series of cases concerning domestic violence where, for a variety of reasons, it has found State action to fall short of the measures required under the Convention.

Cross Cutting Failures of Response in the Individual Case

20. In E.M. v. Romania the Court considered that although the applicant had filed numerous complaints requesting assistance, and although there were procedures in place that obliged authorities to cooperate and to take non-judicial protective measures, the authorities failed to take any of these measures, concluding that “la manière dont l’enquête a été menée en l’espèce n’a pas assuré à la requérante une protection effective satisfaisant aux garanties imposées par l’article 3 de la Convention.”

21. Similarly in Kontrova v. Slovakia it considered that although under domestic law the “police had an array of specific obligations,” they “failed to ensure that these obligations were complied with.” These included responsibilities such as “inter alia, accepting and duly registering the applicant's criminal complaint; launching a criminal investigation and commencing criminal proceedings against the applicant's husband immediately; keeping a proper record of the emergency calls and advising the next shift of the situation; and taking action in respect of the allegation that the applicant’s husband had a shotgun and had made violent threats with it.”

Operational Failure to Address the Risk of Repeat Violence

22. In Tomasic v. Croatia the Court held that “no adequate measures were taken to diminish the likelihood” of the perpetrator repeating acts of domestic violence although many measures had been ordered against the perpetrator, including psychiatric examination. The Court found “such a failure particularly striking given that his threats had been taken seriously by the courts and that the prior psychiatric report expressly stated that there was a strong

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likelihood that he might repeat the same or similar offences.” 29 As a result it found “a violation of the substantive aspect of Article 2 of the Convention on account of failure of the relevant domestic authorities to take all necessary and reasonable steps in the circumstances of the present case to afford protection for the lives of the applicants”. 30

Failure to Treat Incidents as Part of an Interconnected Sequence of Events

23. In A v. Croatia the Court noted that the authorities had taken certain protective measures, but expressed its concern regarding the authorities failure to consider the situation of domestic violence confronting the applicant as a whole. In the view of the Court this failure limited the effectiveness of those individual protective measures that the authorities did take. The Court considered that although, “it is for the national authorities to organise their legal systems so as to comply with their positive obligations under the Convention, and in that respect it is of course possible to conduct separate sets of criminal proceedings against the same defendant in respect of different criminal offences involving the same victim...in a situation such as the one in the present case, where different sets of criminal and minor offences proceedings concerned a series of violent acts by the same person, namely B, and against the same victim, namely the applicant, it appears that the requirement of effective protection of the applicant's right to respect for her private life would have been better satisfied had the authorities been in a position to view the situation as a whole. That would have given them a better overview of the situation and an opportunity of addressing the need to protect the applicant from various forms of violence in the most appropriate and timely manner.” 31

Lack of Recourse to Criminal Procedures

24. In Valiuliene v. Lithuania the Court reiterated that criminal law mechanisms must be available to the victim. 32 It underscored that “one of the purposes of imposing criminal sanctions is to restrain and deter the offender from causing further harm,” 33 but that “these aims can hardly be achieved without having the facts of the case established by a competent criminal court.” 34
Systemic Contextual Failures of Investigation and Prosecution

25. In certain situations the Court will also go beyond evaluating the measures of the authorities in an individual case, and consider general circumstances at play, that may have reduced the level of protection available to the particular individual in question. In *Opuz v. Turkey* the Court addressed the way that system-wide failures to take protection measures, conduct effective investigations, and prosecute perpetrators of domestic violence, can give rise to a failure to discharge the positive obligations owed to a particular individual at risk. In this way it confirmed that an “overall unresponsiveness of the judicial system and impunity” 35 and a general lack of official “commitment to take appropriate action to address domestic violence” 36 can undermine the effectiveness of the protection available to a specific individual at risk.

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