

The “effectiveness” of CEDAW Committee Decisions: *Angela Gonzalez Carreño v. Spain*

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Abstract: The answer of Spain to the CEDAW Committee decision on *Ángela González Carreño v Spain* case show us the lack of will of Spanish to follow the recommendations of this Committee in these cases. In fact, it support the lack of enforceability of these decisions to Spain and the limited effectiveness of this mechanism to guarantee that the victims of a breach of the convention get an appropriate compensation when the State lacks the political will to do it

Keywords: CEDAW – quasi-jurisdictional mechanisms – *Ángela González Carreño* – visitation right without supervision – join custody – gender violence – domestic violence

INTRODUCTION

Even if the Committee is a major body in ensuring the applicability of the Convention on the Elimination of All Forms of Discrimination against Women¹ (CEDAW), the optional individual communications mechanism has not reached the desired effectiveness. It is not, as a matter of fact, something confined to this particular mechanism. It is a weakness that can be found in all of the UN Treaty-based bodies². Anyhow, it is necessary an increased commitment of the States in following the recommendations that the Committee adopts in this frame that require concrete and specific measures to these States according to their capabilities and deficiencies.

The General Recommendations are very useful to provide an overall perspective of a specific category of women or to show their difficulties to enjoy some rights. They are also very helpful in making visible the hidden problems to society and public agents and to close some debates on questions in which the International Community is progressing. Finally, these Recommendations are very helpful in order to clarify and interpret the CEDAW. Even so, because of their general character and the intention of their adoption, they cannot be considered as a result of a genuine mechanism of guarantee of the observance of the CEDAW.

The presentation of periodic reports by the States to the Committee and the final observations adopted by it can be regarded as a mechanism of guarantee that is compulsory to all the signatory States. We have only to look at the contents of the last reports presented by Spain, the general

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¹ Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 14

² See: N. Ochoa Ruiz, “Acerca de la eficacia de los mecanismos convencionales de protección de los derechos humanos de las Naciones Unidas” in *Los mecanismos convencionales de protección de los derechos humanos de las Naciones Unidas*, (Thomson & Civitas, Madrid), at 415-430.

observations presented about this matter by the Committee and the progress made on the elimination of all forms of discrimination in Spain, to notice the usefulness of this mechanism³.

The communications procedure provides an opportunity for women to lodge a complaint to the CEDAW Committee if they believe that the state has failed to fulfill its obligations under CEDAW. There have been three communications against Spain in the fourteen years of existence of the Communication system. The first one, *Cristina Muñoz-Vargas y Sainz de Vicuña v. Spain* was inadmissible *ratione temporis*. The second one *Maïmouna Sankhé v. Spain* was inadmissible on the ground of non-exhaustion of domestic remedies. And the last one, *Ángela Gonzalez Carreño v. Spain*⁴, decided that Spain had violated articles 2(a) and (f), 5(a) and 16(1)(d) of CEDAW read with article 1 and its General Recommendation n°19. But the real consequences of the decision of the Committee are completely disheartening.

The Committee's view was that Spain had breached the CEDAW, and recommends him some compensation measures. Some of the recommendations were addressed to the victim and others had a general scope in order to prevent recurrence of the situation that was considered illicit. Nevertheless, Spain decided not to implement the restorative recommendations and not to conduct a thorough and impartial investigation. It decided to amend some laws but the Committee states that some of those amendments not only do not improve the accomplishment of the CEDAW, but on the contrary, they breach it. To sum up, Spain confirms with its behavior the lack of efficacy of the decisions of the CEDAW Committee on individual communications⁵.

THE FACTS

Angela Gonzalez Carreño (Ángela) suffered violence at the hands of FRC during her marriage and after the divorce. This violence was reported to the authorities. Once she separated her husband, Angela got the custody and guardianship of Andrea, their daughter, and the judge ordered FRC to pay child support and a limited regime of supervised visited was also decided.

The violence continued and Andrea was often witness of those events. When visiting Andrea, FRC questioned her about her mother's private life, insulted her and had such a behavior that Andrea began to be afraid of his father and didn't want to visit him. FRC, then accused Angela of manipulating Andrea. After many complain, FRC was convicted just once on harassment and fined

³ See: C de la Vega et al., "The promotion of Economic, Social and Cultural Rights of Vulnerable Groups in Africa Pursuant to Treaty Obligations: CRC, CEDAW, CERD& CRPD", *University of San Francisco Law Research Paper* N° 2014-29.

⁴ Decision of the Committee on the Elimination of Discrimination against Women under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (fifty-eighth session) Communication No. 47/2012* *González Carreño v. Spain* (CEDAW/C/58/D/47/2012)

⁵ "...Nor can be said that the use of the Optional Protocol has had any wider impact upon policy-making..." (J. Murdoch, *The Optional Protocol to the United Nations Convention for the Elimination of all forms of Discrimination Against Women (CEDAW): The experience of the United Kingdom. An evaluation by Professor Jim Murdoch, School of Law, University of Glasgow*, p. 27, available electronically at <<http://webarchive.nationalarchives.gov.uk/20110322191207/http://www.justice.gov.uk/publications/docs/un-optional-protocol-women.pdf>>.

45€. Angela asked for protective measures before ordinary courts to keep Andrea away from her aggressor, a system of supervised visits and a child support payment. She got protective orders from FRC but not for her daughter (except once). FRC violated the protective orders but this had no legal consequences.

After the divorce sentence (that didn't take into account the gender violence suffered by Angela) a supervised system of visits was granted but gradually relaxed despite Angela's opposition and appeals, and despite many violent incidents perpetrated by FRC during the period of supervised visits. Finally, in April 2003, F.R.C. killed Andrea and committed suicide.

Angela failed to get declared F.R.C. criminal liability for the murder because, the Courts said that death extinguished on account of his suicide. She failed to get a compensation for miscarriage of justice, due to the negligent behavior in their obligation to protect Andrea, and despite they were aware of the danger Andrea was facing during non-supervised visits to her father.

THE COMMITTEE DECISION

The committee concluded that Angela's murder was foreseeable: Several situations of domestic violence were registered; the violation of protective measures had no consequences; the murderer was diagnosed with mental disorders that had consequences in his perceptions of the reality and, finally, the reports from social services regarding the need for continuous monitoring visits between the murder and the victim were ignored. As a consequence State Party's due diligence obligations were not met⁶. What is more, the State refused to investigate whether their agents failed to protect, or were negligent in protecting Angela and her daughter from suffering violence at hands of FRC.

The Committee recommended that Spain should grant Angela appropriate reparation and comprehensive compensation commensurate with the seriousness of the infringement of her rights, conduct an investigation to determine whether there existed failures in State structures and practices that caused the lack of protection to the victims. Furthermore, it recommended changes in its legislation and practices to ensure that domestic violence is taken into account in custody and visiting regime and that the best interest of the child prevails in decisions; that competent authorities exercise due diligence to respond appropriately to situations of domestic violence and that mandatory training on the legal framework concerning violence and gender stereotypes is provided to judges and administrative personnel.

THE SPANISH RESPONSE

Five months after this decision the Spanish government sent a letter to the Committee reporting about the follow-up of the decision⁷. There are two visible positions by Spanish authorities. One with

⁶ See A. Nguyen, "Through the eyes of a Women? The jurisprudence of the CEDAW Committee", 39 *Outskirt online journal*, (May 2014)

⁷ Informe del Estado Español al Comité para la Eliminación de la Discriminación contra la Mujer. Naciones Unidas, Ref. Naciones Unidas CEDAW/OP/ESP (3) 47/2012, 21st January, 2015 (herein after *Informe del Estado Español*).

regard to the recommendations related to the victim and the events that originated the communication and the subsequent decision of the Committee; and the other one regarding the recommendations aimed to prevent future situations similar to the one reported in the communication.

In respect of the first ones, Spain refused to pay any reparation since “[t]here is no legal basis to compensate the victim”⁸. This is a quite disturbing issue because it means that Spain grants no force to the Committee Decision. We could agree that there is no ordinary way (procedures for abnormal functioning of the administration has been exhausted and judicial error procedures has expired) to get that compensation, but there are extraordinary ways to do it. Indeed it is just because the judicial system didn’t give her the due compensation that Ángela presented a communication to the Committee. And all of this had already been analyzed by the Committee in the considerations of admissibility where the Committee stated that Ángela had exhausted all he internal remedies.

What is important in this kind of international mechanisms to guarantee human rights is that, once all of the legal procedures had been exhausted, this committee informs the State that the application of national provision has been incompatible with the international obligations that the State has voluntarily accepted. In fact, in Spain due to article 10.2 of The Constitution, these international conventions have a constitutional status⁹.

Of course, we can agree that the decisions of the Committee have no juridical effect. It is only a “recommendation”. But it is a recommendation that states that Spanish behaviour has been incompatible with the CEDAW and it must have some consequences. The government should settle a mechanism to give the compensation to the victim; otherwise there will be no consequence of the Spanish breach of the CEDAW and its effects on the victim. There will be, in this sense, few differences between this mechanism and the Inquiry procedure for the victims that develops in the same Committee.

The second important recommendation of the Committee is to conduct an exhaustive and impartial investigation to determine whether there are failures in the State’s structures and practices that have causes that the author and her daughter to be deprived of effective protection¹⁰. But the answer of Spain is: that there has been a previous inquiry that analyzed all of the elements of the case in detail and that is impossible to initiate, in view of the time elapsed since the crime, for a new exhaustive judicial investigation on this case. To sum up, Spanish government asserts that, in spite of what was said by the committee, there is no structural or systemic failure in the Spanish juridical order, there is not a lack of capacity or personal resources that can avoid any repetition of such events and that there is nothing to investigate¹¹.

⁸ “En este contexto, no cabe sino reiterar la vinculación de la Administración a la Ley y a las resoluciones judiciales firmes y la inexistencia de base jurídica para indemnizar a la autora” *Informe del Estado Español* at 2.

⁹ “Provisions relating to the fundamental rights and liberties recognized by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by Spain” Spanish Constitution 1978, Section 10 (2).

¹⁰ CEDAW/C/58/D/47/2012 parr.12.(a) (ii)

¹¹ “... se analizaron con todo detalle los elementos del caso. No es posible plantear, dado el tiempo transcurrido desde que tuvieron lugar los lamentables hechos, como solicita el Comité, una nueva investigación exhaustiva sobre el caso [...] no

In other words, Spain is challenging the decision of the Committee. But in fact, Optional Protocol to the CEDAW stresses that “The State Party shall give due consideration to the views of the Committee, together with its recommendations, if any, and shall submit to the Committee, within six months, a written response, including information on any action taken in the light of the views and recommendations of the Committee”. Which means that in following the recommendations the State has the right to choose what to do and how and when to do it, but it has to “give due consideration to the views” what means, from my point of view, that it cannot challenge the views, but has the right to decide only the ways in which the recommendations are followed.

Of course, we know that there is no legal force for the recommendations, but we cannot forget that it is the body that has been mandated to consider the progress made in the implementation of the CEDAW,¹² so its views and recommendations cannot be avoided, overall, when in the procedure to answer to communications the State has already had time to defend their positions.

On the other hand, we must accept, as S. Cusack reminds us, that “Where State Parties have engages in wrongful gender stereotyping [...] or failed to address gender stereotyping [...] they are required under CEDAW to remedy their violation. “Without reparation” —the Committee has explained— the obligation to provide an appropriate remedy is not discharged”¹³.

To anticipate future crimes, and even rejecting any kind of responsibility for the previous facts, and denying that there is any gap or dysfunctions in the system, Spain decided to amend some of the legislation related to visitation rights¹⁴: Domestic background should be considered when determining the custody and visitation rights of the parents in order to guarantee the rights of women and children victims of violence; the law that is governing the statute of the victim of gender violence tries to unify the previous laws on procedural and extra procedural questions applying a large concept of the victim of gender violence that can include members of the family or analogous situations and to expand the concept of information, assistance, protection, and support to the victims in order to guarantee a comprehensive security; personalized evaluation of the protection measures supporting the victims, including special protection to some victims and institutional collaboration among the different agents dealing with gender violence. It is very important to underline that all these amendments should take into account the best interest of the child as a substantive rule, as procedural rule and as a guiding principle in all of the decisions and actions¹⁵.

se aprecia que exista en la actualidad un fallo estructural o sistémico del ordenamiento jurídico español en la materia, ni tampoco la ausencia de medios materiales o personales para evitar que este caso pueda repetirse..... *Informe del Estado Español* at 2-3.

¹² Art. 17.1 CEDAW.

¹² Art. 17.1 CEDAW.

¹³ S. Cusack: *Ángela González Carreño v. Spain*. CEDAW Communication N° 47/2012: Amicus Curiae Brief. 2 February 2014 para. 42

¹⁴ “Anteproyecto sobre el ejercicio de la corresponsabilidad parental y otras medidas en casos de nulidad, separación y divorcio” (19/07/2013) (pub. at EDL 2013/180450). Other laws shall be amended as the “ley del Estatuto de la víctima del delito” (Proyecto de Ley del Estatuto de la víctima del delito (02/08/2014) (pub at BOCG 05/09/2014 (12I/000115) or the “ley de protección de la infancia”(Anteproyecto de Ley orgánica complementaria a la ley de Protección de la infancia) (25/04/2014) (pub at BOCG 17/02/2015 (12I/000130).

¹⁵ *Informe del Estado Español...*, at. 6 and 10.

Furthermore, legal aid is granted to victims of gender violence, regardless their incomes, an improvement of the police system of risk assessment, development of the institutional coordination for victims of gender violence and their children. There have been special training for judicial and police bodies intervening in gender violence cases, especially to judges is foreseen.

Women's Link Worldwide, that represented Ángela in the communication to the Committee, soon answered to this position of Spain facing the Committee views and recommendations¹⁶. On the one hand and relating to individual recommendations, because Spain does not recognize to Ángela the standing as a victim, There is no kind of communication or contact with her, and this, in spite of the Committee consideration of Angela as a victim of State failure to fulfill its obligations to CEDAW, but also because Spain has no intention to compensate her or investigate its own responsibility in the case, and finally, because the State, as a consequence of that, does not assume responsibilities for the illegitimate damage caused to Ángela.

On the other hand, and regarding the general recommendations, Women's Link Worldwide contested the report presented by Spain because it does not give numbers or statistics of what it is reported about the current system that combats gender-based violence which, according to Spain is working properly. Another reason is that some of the amendments proposed not only do not follow the recommendations, but they go on the opposite sense, the frame of visiting rights for instance. And finally because the proposals are not enough to eradicate stereotypes and discriminations in the police and judicial treatment of cases of gender violence.

From our point of view, we should make a difference between the way in which Spain has reacted to the individual recommendations and how it responded to the general ones. To the first ones, it simply refuses its responsibility and expresses its intention to disrespect it. To the second ones, there is an apathy to assume any kind of unsatisfactory functioning of Spanish systems and procedures, but there are some proposals in order to improve them and as a consequence, in order to follow the recommendations. We can debate if the proposals are adequate or not, but at least, we should accept the state is trying to improve or pretend that it is doing something on this regard.

THE COMMITTEE'S OBSERVATIONS

Despite the Spanish Seven and Eight periodic Reports¹⁷ were previous to the Committee Decision on AGC communication, and, even though nothing on the topic was said in the questions asked by this

¹⁶ Women's Link Worldwide; *Informe que presenta Women's Link Worldwide sobre la falta de cumplimiento del dictamen de la Comunicación núm 47/2012 González Carreño c. España por parte del Estado Español*, 4 de marzo de 2015.

¹⁷ Committee on the Elimination of Discrimination against Women: Consideration of reports submitted by States parties under article 18 of the Convention. Seventh and eighth periodic reports of States parties to be presented in 2013 (CEDAW/C/ESP/7-8) 17 December 2013.

Committee to Spain on November 2014¹⁸; some months later, the Committee published the Concluding Observations on these periodic reports¹⁹, and expressed its concerns on the issue.

In the section “principle areas of concern and recommendations” it is said “The Committee notes with concern the lack of understanding by the State party of the due diligence obligation and the lack of follow-up to the Committee’s Views on Communication No.47/2012, *Ángela González Carreño v. Spain*[...]The Committee recommends that the State party:[...] (b)Take appropriate measures to implement the recommendations in the Committee’s Views on Communication No.47/2012, *Ángela González Carreño v. Spain*”²⁰.

If we analyze the rest of the document we can realize that some of the other recommendations are directly linked with the topics that the Committee analyzed in the Decision on A.R.C. communication, and with the general recommendations in particular.

Firstly, it recommends “legal education and training for government officials, judges, lawyers, magistrates, prosecutors, the police and other law officers on the convention, the Optional Protocol and their application”²¹, secondly the prosecution and punishment of the perpetrators of violence against women and girls²². Finally and dealing with the questions of custody and visitation rights and challenging the amendments proposed by the Government: “The Committee is concerned that existing and upcoming legislative mechanisms do not adequately address the consideration that needs to be accorded to the existence of domestic violence within case of child custody determination. The Committee is also concerned at attempts to pass legislation that sets joint physical custody as the default rule in determining cases of child custody”²³. As a consequence, it recommends that visitation rights without supervision are no granted where the well-being of the children may be in danger, and that the joint physical custody is not set as the default rules in cases of child custody, and that specific needs of women and children in cases of domestic violence is considered when deciding child custody.

FINAL CONSIDERATIONS

The effectiveness of the communication system of the UN Treaty-based bodies depends largely on the will of the States. And this lack of willingness remains the major impediment of the effectiveness to CEDAW Committee Decisions.

Even if the CEDAW Committee determines that the State has failed to fulfill its obligations to CEDAW and recommends granting the author appropriate reparation and a comprehensive compensation, nothing can guarantee that these actions are finally implemented. As a matter of fact, this is what happened in *Angela v. Spain* case.

¹⁸ See List of issues and questions in relation to the combined seventh and eighth periodic reports of Spain (CEDAW/C/ESP/Q/7-8) 17 November 2014.

¹⁹ Committee on the Elimination of Discrimination against Women: Concluding observations on the combined seventh and eighth periodic reports of Spain (CEDAW/C/ESP/CO/7-8) 24 July 2015.

²⁰ CEDAW/C/ESP/CO/7-8, doc. cit, para. 10 and 11. (b)

²¹ *Ibid.*, para. 11. (d)

²² *Ibid.*, para. 21. (c)

²³ *Ibid.*, para. 38.

It is true that the Committee can use the concluding observations in the periodic reports of States to pressure them to comply with the decisions of the Committee. In fact, this is what the Committee did in this case. It underlined the inadequate implementation of the recommendations in the Committee's view on Communication No 47/2012. This may be a useful tool for Spain to fulfill its obligations to CEDAW. But ultimately these concluding observations are not legally binding.

Anyway, it shouldn't be ignored that NGOs and media can push the offending State to comply with its obligations in the field of human rights. Press coverage and campaigns launched by NGOs such as Women Worldwide are examples of such potential influence, even if Angela's rights as a victim were never recognized and reparations were never executed.