

Before the

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

Jessica Gonzales,
in her individual capacity and on behalf of her deceased daughters,
Katheryn, Rebecca, and Leslie Gonzales

vs.

The United States of America

Case No. 12.626

**Observations & Responses Concerning the October 22, 2008
Hearing Before the Commission**

March 2, 2009

Presented on Behalf of Jessica Gonzales, Petitioner

Caroline Bettinger-López
Peter Rosenblum
Columbia Law School
Human Rights Clinic*
435 W. 116th Street
New York, NY 10027
T:(212) 854-8364
F:(212)854-3554
E:c.lopez@law.columbia.edu

Steven Macpherson Watt
Human Rights Program
American Civil Liberties
Union
125 Broad Street
New York, NY 10004
T:(212) 519-7870
F:(212) 549-2651
E:swatt@aclu.org

Lenora M. Lapidus
Emily J. Martin
Julie B. Ehrlich
Women's Rights Project
American Civil Liberties
Union
125 Broad Street
New York, NY 10004
T:(212) 549-2668
F: (212) 549-2580
E: llapidus@aclu.org

* Counsel gratefully acknowledge the assistance of Alma Luz Beltran y Puga, Amanda Chapman, Chinyere Ezie, Aliza Hochman, Julia Neiva, Zoe Pershing-Foley, Meera Shah, Darren Sullivan, and Laura Tarvainen from the Columbia Law School Human Rights Clinic in compiling this brief.

TABLE OF CONTENTS

I. Introduction.....	4
II. The Facts of the Case.....	4
• I had a narrative in mind from the last hearing, but the information I received from the state six days ago presents a very different narrative. Why are the State representatives painting such a different narrative of the facts of the case? (Paulo Sergio Pinheiro)	4
• On what basis does the State argue that it was not obliged to act with due diligence upon the call of a citizen to protect the life of three children? (Florentín Meléndez)	6
III. The Right to Truth and the Duty to Investigate.....	8
• What is the legal basis in the American Declaration on the Rights and Duties of Man of the Petitioner's claim of a violation of the right to truth? (Florentín Meléndez)	8
• How do Petitioners evaluate the investigation undertaken by the State into the girls' deaths? (Paulo Sergio Pinheiro)	11
IV. Gender Discrimination, Children's Rights, and Domestic Violence.....	19
• Can attorneys for Petitioner detail the discrimination aspects of Ms. Gonzales' case? How does discrimination affect women of certain minorities more than others? (Paulo Sergio Pinheiro)	19
• How has the government responded to the problem of domestic violence in the United States? (Felipe González).....	25
• In this case, a restraining order was issued and a mother whose children were abducted called the police station nine times within ten hours to alert them. Yet, it seems that there was no response to the mother's calls, and no comprehensive investigation into the girls' disappearance. How are restraining orders issued? What criteria are established for these orders? What concrete measures have been adopted by the police and the government to ensure effective enforcement of restraining orders? (Luz Patricia Mejía Guerrero).....	27

<ul style="list-style-type: none"> • There seems to be a systematic practice of police authorities treating domestic violence as a low priority crime. With respect to violence against women and children, it appears that the home is a sanctuary, and that human rights protections stop at its doors. I think Professor Fagan first addressed the issue—can petitioners discuss it further? (Paulo Sergio Pinheiro)..... 	29
<ul style="list-style-type: none"> • Why is police response to domestic violence and state enforcement of protection orders so low? (Felipe González) 	29
<ul style="list-style-type: none"> • Given that the United States has the most capable police force in the hemisphere, how is it possible that Petitioner still does not know how her three girls died? (Paulo Sergio Pinheiro) 	31
V. The European Court of Human Rights’ Jurisprudence and its Influence on the Commission.....	34
<ul style="list-style-type: none"> • Should the Commission apply the European Court of Human Rights’ case law, and if so, how? (Felipe González)..... 	34
<ul style="list-style-type: none"> • Should the Commission apply the Margin of Appreciation Doctrine Developed by the European Court? (Felipe González) 	35
VI. The American Declaration on the Rights and Duties on Man.....	40
<ul style="list-style-type: none"> • Is the American Declaration Binding on Member States? (Florentín Meléndez) 	40
<ul style="list-style-type: none"> • Does the American Declaration Contain an Affirmative Obligation to Protect and to Exercise Due Diligence? (Florentín Meléndez) 	41
VII. Conclusion.....	44

I. Introduction

Petitioner Jessica Gonzales submits these Post-Hearing Observations and Responses in order to address the questions posed by Commissioners during the October 22, 2008, Merits hearing, set out below, and, where appropriate, to direct the Commissioners to relevant portions of the pleadings and briefs previously filed by Petitioner and *amici* that more fully address these questions.

II. The Facts of the Case

- **I had a narrative in mind from the last hearing, but the information I received from the state six days ago presents a very different narrative. Why are the State representatives painting such a different narrative of the facts of the case? (Paulo Sergio Pinheiro)**

As a preliminary matter, Articles 38 and 39 of the Commission's Rules of Procedure direct the Commission to reject the United States' factual allegations, since the United States failed to respond to Jessica Gonzales' merits brief in a timely manner.¹ Ms. Gonzales submitted her merits brief to the Commission on March 24, 2008. Pursuant to Article 38, the United States had two months—until May 24, 2008—to submit its observations on the merits. The United States did not submit its observations on the merits until October 17, 2008—just 3 business days before Ms. Gonzales' merits hearing. To the extent the United States disputes the statement of the facts contained in Ms. Gonzales' Merits brief, the Commission should accept her claims as the true account of how the night's events unfolded.²

¹ Inter-American Commission on Human Rights, Rules of Procedure, Arts. 38-39 (as amended, October 2002). Article 39 states, in relevant part, "the facts alleged in the petition . . . *shall be presumed to be true* if the State has not provided responsive information during the maximum period set by the Commission under the provisions of Article 38 of these Rules of Procedure. . . ." (emphasis added).

Article 38 allows States a *maximum* of two months to respond to factual allegations.

² *Id.*

Moreover, even if the Commission decides to consider the United States' version of the facts, there are only minor factual discrepancies between the parties here. Jessica Gonzales and the United States agree on the essential facts of this case. The first essential fact is that Jessica Gonzales had a valid, judicially issued restraining order against Simon Gonzales.³ This restraining order put the Castle Rock Police Department (CRPD) on legal and actual notice that Simon Gonzales posed a physical and emotional threat to Jessica Gonzales and her children.⁴

The second essential fact is that Jessica Gonzales had numerous contacts with the CRPD on June 22 and 23, 1999, including multiple phone calls to the CRPD station and 911, a brief visit by two CRPD officers to Jessica Gonzales' house, and a visit by Ms. Gonzales to the CRPD police station when her calls for help went unanswered.⁵ During these interactions with the police, Jessica Gonzales stated clearly that Simon Gonzales had taken the children, that such action was in violation of the express terms of the restraining order, and that she was worried about the children and when they would be returning home.⁶

The third essential fact, as both sides acknowledge, is that the CRPD independently knew of Mr. Gonzales' dangerous tendencies and thus knew there was a risk of violence. CRPD officers had previously detained Simon Gonzales, and Jessica

3 See Petitioner's Final Observations Regarding the Merits of the Case, *Jessica Gonzales v. The United States of America*, Case No. 12.626, at 6-89 (March 24, 2008) (hereinafter Gonzales Merits Brief); and Reply of the Government of the United States of America to the Final Observations Regarding the Merits of the Case by the Petitioners at 1-2 (October 17, 2008) (hereinafter U.S. Observations on the Merits).

4 See Jeffery Fagan, Expert Report to the Inter-American Commission on Human Rights in *Jessica Gonzales v. The United States of America*, Case No. 12.626 (Oct. 22, 2008), at 16 (hereinafter Fagan Expert Report).

5 See Gonzales Merits Brief, *supra* note 3, at 10-15; U.S. Observations on the Merits, *supra* note 3, at 2-10.

6 *Id.*; see also Response of the Government of the United States of America to the Inter-American Commission on Human Rights Regarding Jessica Gonzales Petition # P-1490-05, (Sept. 22, 2006), Attachment A at 1, at 5-6 (hereinafter U.S. Reply Brief).

Gonzales had called CRPD on several occasions before the tragic occurrences of June 22 and 23, 1999, to report Mr. Gonzales' threatening behavior and restraining order violations.⁷

As discussed in Professor Jeffrey Fagan's expert report, submitted to this Commission on October 22, 2008, these basic facts were more than sufficient to give the CRPD probable cause to believe that Mr. Gonzales violated a restraining order on June 22, 1999. This probable cause determination should have in turn set in motion a series of procedures required under Colorado law, including a thorough CRPD investigation into the restraining order violation, an effort to arrest Simon Gonzales, and an attempt to locate and secure the missing children and ensure their safety.⁸ Jessica Gonzales' calls to the police did not, however, set these procedures in motion. The result was devastating for Ms. Gonzales and fatal for her children.

Given that these essential facts are undisputed, any other factual disagreements between the United States and Ms. Gonzales are without legal import.

- **On what basis does the State argue that it was not obliged to act with due diligence upon the call of a citizen to protect the life of three children? (Florentín Meléndez)**

Under the due diligence standard established by the Inter-American Commission and Court, state responsibility for rights violations attaches when violations of rights protected by the American Declaration occur and (1) the state "knew or ought to have known of a situation presenting a real and immediate risk to the safety of an identified individual from the criminal acts of a third party," and (2) the state "failed to take

⁷ Gonzales Merits Brief, *supra* note 3, at 17-21; Petitioner's Observations Concerning the Sept. 22, 2006 Response of the United States Government, Ex. H, at 158-59 (Dec. 11, 2006) (hereinafter Dec. 11, 2006 Observations).

⁸ Fagan Expert Report, *supra* note 4, at 16-17.

reasonable steps within the scope of its powers which might have had a reasonable possibility of preventing or avoiding that risk.”⁹

The facts of this case clearly demonstrate that CRPD did not act with due diligence in responding to Jessica Gonzales’ report of the missing children and restraining order violation. Ms. Gonzales notified CRPD of the danger facing her children when she called the police repeatedly and informed them that Simon Gonzales had violated a restraining order and had taken the children. CRPD, in turn, essentially ignored her calls for help.

From the outset of this case through the Merits hearing on October 22, 2008, the United States has attempted to place the onus on Jessica Gonzales, the victim, to predict and describe the precise risks posed to her daughters by Simon Gonzales as a prerequisite to police action.¹⁰ In fact, Ms. Gonzales’ first call to report the girls missing and to relay that she suspected Simon Gonzales had taken them *alone* should have been sufficient basis for the CRPD to arrest Mr. Gonzales. As detailed in Professor Fagan’s expert report, *no more is required* of a domestic violence victim who holds a restraining order, especially in a state such as Colorado that has a mandatory arrest law.¹¹ The United States’ attempts to shift the blame for this tragedy onto the victim, and to excuse the police from following the explicit directives of Colorado law, should be rejected.¹²

9 Pueblo Bello Massacre, 2006 Inter-Am. C.H.R. ¶¶ 123-24 (citing and quoting the European Court of Human Rights’ decision in *Kiliç v. Turkey*, Eur. Ct.H.R. Application No. 22492/93); *Sawhoyamaya Indigenous Community*, Case 0322/2001, Inter-Am. C.H.R. ¶ 155.

10 *See, e.g.*, U.S. Observations on the Merits, *supra* note 3, at 5 (arguing that Jessica Gonzales did not demonstrate sufficient worry or concern over the children’s absence).

11 Fagan Expert Report, *supra* note 4, at 29-30 (articulating standards for what constitutes adequate notice to law enforcement of restraining order violations by domestic violence victims).

12 *See* Brief of Center for Justice and International Law (CEJIL) et al. as Amici Curiae in Support of Petitioner, In the Case of Jessica Ruth Gonzales, Petition No. P-1490-05 (July 6, 2007) (hereinafter CEJIL Amicus Brief); Brief of the National Centre for Domestic Violence et al. as Amici Curiae in Support of Petitioner, In the Case of Jessica Ruth Gonzales v. The United States of America, Petition No

By arguing that more is required by the victim to communicate a real and immediate risk posed by the criminal acts of a third party, the United States seeks to distract the Commission from CRPD's own failure to act. CRPD had sufficient information such that they knew or should have known of a real and immediate risk to Ms. Gonzales and her children and should have taken reasonable steps to find and arrest Mr. Gonzales and to protect the children. As discussed in the Merits brief, CRPD's missteps in responding to Ms. Gonzales' domestic violence calls are reflective of widespread law enforcement practice in the United States of dismissing and mishandling domestic violence calls and belittling the concerns of victims, thereby violating the rights of both women and children alike.¹³

III. The Right to Truth and the Duty to Investigate

- **What is the legal basis in the American Declaration on the Rights and Duties of Man of the Petitioner's claim of a violation of the right to truth? (Florentín Meléndez)**

Legal Sources of the Right to Truth

Jessica Gonzales bases her claim for the violation of her right to truth by the United States on Articles IV (right to freedom of investigation, opinion, expression and dissemination), V (right to protection of honor, personal reputation, and private and family life), VI (right to a family and to protection thereof), IX (right to inviolability of the home), XVIII (right to a fair trial), and XXIV (right of petition) of the American Declaration, as described in detail in the Petitioner's Merits Brief of March 24, 2008.¹⁴

P-1490-05 (Oct. 10, 2008) (hereinafter NCDV Brief); *see also* Brief of Women Empowered Against Violence as Amicus Curiae in Support of Petitioner, In the Case of Jessica Gonzales v. The United States of America, Case No. 12.626 (Oct. 22, 2008) (hereinafter WEAVE Amicus Brief).

¹³ *See* Gonzales Merits Brief, *supra* note 3, at Part IV(G); *see also* Part IV, *infra*, Gender Discrimination, Children's Rights & Domestic Violence.

¹⁴ *See* Gonzales Merits Brief, *supra* note 3, at 137 (providing legal and factual support for Ms. Gonzales' right to truth claim, and noting that, in Inter-American jurisprudence, "the concept of the duty to

Although no express provision in the American Declaration establishes a right to truth, the Commission has recognized that it derives from explicit provisions of the Declaration and from the general obligation imposed on states to respect and ensure the free and full enjoyment of rights enumerated therein.¹⁵

In *Moiwana Village v. Suriname*, the Inter-American Court linked the affirmative obligation of the state to investigate with the right to truth, finding that “all persons, including the family members of victims of serious human rights violations, have the right to the truth. . . . This right to truth, once recognized, constitutes an important means of reparation.”¹⁶ The right to the truth imposes an affirmative obligation on states toward victims, families, and society as a whole.¹⁷ In this case, the United States failed to meet its obligations and thus violated Jessica Gonzales’, her family’s, and the American public’s right to the truth about how, when, and where Katheryn, Rebecca, and Leslie died.

Raising Violation of the Right to Truth at the Merits Phase

By virtue of its broad jurisdiction, the Commission may examine alleged rights violations not asserted in the initial petition if such violations are “directly related” to

investigate has developed to include a right to truth and knowledge for victims, family members, and society”); *see also* Diane Orentlicher, Promotion and Protection of Human Rights: Impunity, Commission on Human Rights, U.N. Doc. E/CN.4/2004/88 ¶ 14 (2004) (describing international jurisprudence on the right to know).

¹⁵ *See* Organization of American States, *Right to the Truth*, available at:

<http://www.cidh.org/relatoria/showarticle.asp?artID=156&IID=1> (discussing development of the right to truth).

¹⁶ *Moiwana Village v. Suriname*, Inter-Am. Ct. H.R., Ser. C No. 124 ¶ 204 (2005).

¹⁷ *Id.*; *see also* María del Carmen Almeida de Quinteros et al. v. Uruguay, Human Rights Committee, Communication No. 107/1981, U.N. Doc. CCPR/C/19/D/107/1981 (July 21, 1983) (finding that a mother had a right to know the fate of her daughter); Gonzales Merits Brief, *supra* note 3, Section F. Other international human rights bodies, including the European Court of Human Rights, have also recognized the obligation of the State to investigate human rights violations committed by private actors. *See* Tanrikulu v. Turkey, App. No. 23763/94, Eur. Ct. H.R. ¶ 7 (1999) (finding the duty to investigate to extend to cases where non-state actors committed a killing).

facts detailed in that petition.¹⁸ Under the Commission’s Rules of Procedure, as “long as the petitioners set out in their original petition the facts upon which they base their claims of violations . . . and these facts are relevant to making a legal determination, they are under no legal obligation to specify precise provisions in the initial petition, nor are there impediments to the submission of additional legal arguments in subsequent pleadings based on the same facts.”¹⁹

In its Response Brief, the United States argues that Ms. Gonzales impermissibly raised a new claim—violation of her right to truth under Article IV of the American Declaration—in her merits brief. The United States bases its argument on Petitioner’s failure to raise such a claim in her initial petition.²⁰ However, international bodies, including the Inter-American Commission and Court, have “repeatedly relied” on the legal principle of *iura novit curia*, ““under which a court has the power and the duty to apply the juridical provisions relevant to a proceeding, even when the parties do not expressly invoke them.””²¹ Thus, the Commission has the power—and indeed, the obligation—to consider all issues relevant in proceedings before it, even when the parties did not expressly invoke them or invoked them after the admissibility phase of the case.

18 Michael Gayle v. Jamaica, Case 12.418, Inter-Am. C.H.R., Report No. 92/05 ¶ 70 (October 24, 2005) (permitting alleged violations of the right to personal liberty to be submitted in the merits phase of the case, even though they were not raised in the initial petition); *see also* El Aro, Ituango, Colombia, Case 12.266, Inter-Am. C.H.R., Report No. 75/01 ¶¶ 5, 33 (Oct. 10, 2001) (admitting petitioner’s legal claim raised in a later brief, but based on facts alleged in the original petition).

19 Sergio Emilio Cadena Antolinez v. Colombia, Merits, Case 12.448, Inter-Am. C.H.R., Report No. 44/08 ¶¶ 39-42 (July 23, 2008) (applying the principle of *iura novit curia* to consider petitioner’s alleged legal claims together with the facts put forth in the original petition).

20 U.S. Observations on the Merits, *supra* note 3, Part IV.C.2 at 60-66.

21 Case of Hilaire, Constantine, and Benjamin et al., Judgment, Ser. C No. 94, Inter-Am. Ct. H.R. ¶ 107 (June 21, 2002) (finding that, according to the principle of *iura novit curia*, the court could examine allegations of violations that were brought in final arguments) (internal citations omitted); *see also* Franz Britton, Guyana, Case 12.264, Inter-Am. C.H.R., Report No. 1/06 ¶ 16 (February 28, 2006); Antonio Ferreira Braga, Brazil, Admissibility and Merits, Case 12.019, Inter-Am. C.H.R., Report No. 35/08 ¶¶ 42, 45-48 (July 18, 2008) (applying the *iura novit curia* principle to consider whether the respondent state violated articles 8.1 and 25 of the American Convention, even though these claims were not specifically alleged by the petitioner).

As discussed at the merits hearing, Jessica Gonzales' right to truth claim is premised on facts as alleged in her initial petition, as well as on facts subsequently uncovered by her attorneys in the course of these proceedings. The insufficient and improper investigation into the deaths of Ms. Gonzales' daughters and the United States' continuing failure to furnish her with information necessary to establish the circumstances under which they died constitute a clear violation of her own and society's right to truth as guaranteed by Articles IV, V, VI, IX, XVIII, and XXIV of the Declaration.

- **How do Petitioners evaluate the investigation undertaken by the State into the girls' deaths? (Paulo Sergio Pinheiro)**

Right to Truth and the Failure to Investigate

The facts demonstrate that, for nearly ten years, the United States has denied Jessica Gonzales, her family, and society information regarding the death of the three girls through its failure to conduct a complete, thorough, and impartial investigation into the children's deaths. Indeed, the cursory investigations that were undertaken failed to adhere to recognized national and international standards. The United States is responsible for violation of the right to truth under the American Declaration in this case because Colorado and U.S. authorities have failed either to provide definitive answers as to how, where, and when the girls were killed, or to provide reasonable assurances that the authorities conducted an investigation to the best of their abilities.

Although the Colorado authorities conducted a formal investigation into the death of Simon Gonzales, no such inquiry was conducted into the deaths of the Gonzales children. To the extent the records indicate that any investigation was undertaken into their deaths, they demonstrate that it was cursory, inconclusive, and subsumed within the

investigation relating to the circumstances surrounding the death of Simon Gonzales. Investigators summarily concluded that Mr. Gonzales had murdered the children before the shootout at the CRPD station, yet failed to document how they made this determination.²² As discussed in detail in the merits brief,²³ the children's death certificates, their autopsy reports, and the Colorado Attorney General's report on the death of Mr. Gonzales do not identify the time and place of the children's deaths. The primary focus of the perfunctory investigation remained the CRPD officers' use of force against Simon Gonzales—not the circumstances surrounding the children's deaths.

National and international guidelines—including those issued by the International Association of Chiefs of Police (IACP), Police Assessment Resource Center (PARC), and the U.S. Department of Justice (DOJ) on proper procedures for investigating police use of force and death scenes²⁴—make clear that in situations where a person dies in the course of a law enforcement officer's use of force, multiple, simultaneous investigations should ensue, regardless of whether police force was the actual cause of death.²⁵ These

22 Gonzales Merits Brief, *supra* note 3, Ex. C (Critical Incident Team Investigation Report)), at 37 (noting the coroner's conclusion that Simon Gonzales killed the girls, even though autopsy reports fail to make such an indication).

23 See Gonzales Merits Brief, *supra* note 3, Part IV, Section F at 130-136; Gonzales Merits Brief, *supra* note 3, Ex. K (State of Colorado Certificate of Death: Rebecca Gonzales); Ex. L (State of Colorado Certificate of Death: Katheryn Gonzales); Ex. M (State of Colorado Certificate of Death: Leslie Gonzales); Ex. C (Critical Incident Team Investigation Report), at 37 (stating that "the exact location of the homicides of the children has not been determined").

24 International Association of Chiefs of Police (IACP) National Law Enforcement Policy Center, *Model Policy on Reporting Use of Force* (1998) (hereinafter IACP Model Policy); IACP, National Law Enforcement Policy Center, *Investigation of Officer-Involved Shootings Concepts and Issues Paper* (1999) (hereinafter IACP Officer-Involved Shootings Concepts Paper); Kenneth Matulia, IACP, *A Balance of Forces: Model Deadly Force Policy and Procedure* (1985); Police Assessment Resource Center (PARC), *The Denver Report on Use of Deadly Force* 63 (June 2008), available at http://www.parc.info/client_files/Denver/6-24%20The%20Denver%20Report%20final.pdf; (hereinafter PARC Denver Report); United States Department of Justice, Office of Justice Programs, National Institute of Justice, *Death Investigation: A Guide for the Scene Investigator* 31 (1999), available at <http://www.ncjrs.gov/pdffiles/167568.pdf> (hereinafter DOJ Death Investigation).

25 See IACP Model Policy, *supra* note 24, at 2; PARC Denver Report, *supra* note 24, at 63; see also IACP Officer-Involved Shootings Concepts Paper, *supra* note 24, at 4-5; Matulia, *supra* note 24, at 63.

guidelines also emphasize that if the death possibly resulted from police use of force, a more complex investigation should be conducted, including criminal, administrative, and tactical investigations of police actions.²⁶ Under these standards, a thorough investigation into the Gonzales children's deaths should have taken place, separate and apart from the investigation into police use of force against Simon Gonzales. Colorado authorities failed to conduct such an investigation, and, as a result, significant questions surrounding the girls' deaths remain unanswered.

The procedures followed in this case depart from these guidelines in significant ways. As described *supra*, authorities never identified a time or place of death of the Gonzales children, despite the local government guidance that the "determination [by the county coroner] of the time of death is critical to a criminal case, and may be extremely important with issues related to insurance and beneficiaries."²⁷ As Ms. Gonzales explained at the Merits hearing, the question of how, when, and where her daughters died haunts her and her family to this day.

According to the law enforcement guidelines described *supra*, one important step in determining cause and time of death is documenting blood on the victim(s). The U.S. Department of Justice guidelines state: "blood . . . must be photographed and documented prior to collection and transport."²⁸ The documentation that Petitioner obtained from Colorado authorities contains reports that in the immediate aftermath of the shooting, CRPD officers claimed that the girls were found in the truck with dried

27 Douglas County, Colorado Coroner website, *Statutory Responsibilities*, http://www.douglas.co.us/coroner/Statutory_Responsibilities.html, (last visited Feb. 10, 2009); Douglas County, Colorado Coroner website, *Associated Responsibilities*, http://www.douglas.co.us/coroner/Associated_Responsibilities.html (last visited Feb. 10, 2009).

blood on them.²⁹ Analyzing this dried blood and any blood found inside Simon Gonzales' truck might have proved helpful in "confirm[ing] the date, time, and location of death"³⁰ of the Gonzales children. To Petitioner's knowledge, the Colorado authorities never conducted such an analysis. While blood samples were eventually collected from the truck's interior, there is no indication, based on public records, that these blood samples were in fact analyzed. The Colorado authorities have thus far not responded to Petitioner's requests for information concerning the results of any such analysis.³¹

Witness statements are also an important source of information for investigators in determining cause, time, and place of death.³² As described in the merits brief, the accounts of several layperson witnesses who reported hearing young girls' voices immediately before the shootout diverge significantly from officer statements taken after the shootout.³³ The U.S. Department of Justice and PARC recommend that any inconsistencies in witness testimonies, such as those present in the Gonzales case, should be noted and witnesses should be re-interviewed to determine the truth.³⁴ Here, verifying such information would assist in determining whether the Gonzales children were alive

28 DOJ Death Investigation, *supra* note 24, at 31.

29 Gonzales Merits Brief, *supra* note 3, Ex. C (Critical Incident Team Investigation Report), at 10 (statement of Officer Maes, one of the officers involved in the shootout).

30 DOJ Death Investigation, *supra* note 24, at 47.

31 See Gonzales Merits Brief, *supra* note 3, Ex. B (Colorado Bureau of Investigation: Report of Investigation, Prepared by Agents J. Clayton, Jr. and D. Sollars, July 19, 1999)), at 6.

32 See DOJ Death Investigation, *supra* note 24, at 27.

33 None of the CRPD officers mentioned screams in their reports of the incident, but at least three witnesses near the police station reported hearing screams, including two who identified the voice they heard as potentially female or belonging to a young child. Rosemary Young, who heard the exchange of gunfire while on the phone with the CRPD, also heard a scream during the shootout. Gonzales Merits Brief, *supra* note 3, Ex. C (Critical Incident Team Investigation Report)), at 16-18, 23; Dec. 11, 2006 Observations, *supra* note 7, Ex. F (Progress Report by Investigator Rick Fahlstedt, July 1, 1999), at 7. The International Association of Chiefs of Police *Concepts and Issues Paper on Investigation on Officer-Involved Shootings* suggests that officers can experience perceptual distortions during a shooting, specifically warning of the frequency of officers who experience diminished hearing. IACP Officer-Involved Shootings Concepts Paper, *supra* note 24, at 2, 5-6.

34 Denver Report, *supra* note 24, at 78.

before the shootout began. However, to Petitioner's knowledge, these guidelines were not followed in this case: Colorado authorities failed to conduct any further investigation into the discrepancy between officers' and witnesses' statements, giving rise to yet another set of inconsistencies.

Additionally, standard policing guidelines call for investigators to determine the path of all bullets fired and the shooter's position with respect to each bullet.³⁵ Here, Colorado investigators failed to identify all bullets and casings collected. Moreover, the trajectories of all the bullets fired from Simon Gonzales' gun and for the twenty or more rounds fired from police guns were not determined.³⁶ Absent this information, Jessica Gonzales is left wondering where the twenty or so police bullets that entered Simon Gonzales' truck landed, and whether any of those bullets hit her three children.³⁷

Further, Colorado authorities did not match individual bullets and casings recovered from the crime scene to the wounds on the girls' bodies. Nor did they determine the location of the shooter, the caliber of the bullets, or the gun from which the bullets were fired.³⁸ The three Gonzales girls' autopsy reports indicate a total of seven gunshot wounds.³⁹ At a minimum, investigators should have searched for seven casings and conducted a firearms analysis in order to identify the trajectories of the bullets.

35 IACP, Officer-Involved Shootings Concepts Paper, *supra* note 24, at 5; IACP *Model Policy on Investigation of Officer-Involved Shootings* 4 (1998) (hereinafter IACP Officer-Involved Shootings Model Policy); PARC Denver Report, *supra* note 24, at 73.

36 Gonzales Merits Brief, *supra* note 3, Ex. C (Critical Incident Team Investigation Report), at 4-14.

37 Gonzales Merits Brief, *supra* note 3, Ex. C (Critical Incident Team Investigation Report), at 37; Ex. B (Colorado Bureau of Investigation: Report of Investigation, Prepared by Agents J. Clayton, Jr. and D. Sollars, July 19, 1999), at 3-5, 18, 22 (concluding that no police bullets hit the Gonzales girls).

38 Gonzales Merits Brief, *supra* note 3, Ex. E (Douglas County Coroner's Report: Rebecca Gonzales); Ex. F (Douglas County Coroner's Report: Katheryn Gonzales); Ex. G (Douglas County Coroner's Report: Leslie Gonzales); Ex. K (State of Colorado Certificate of Death: Rebecca Gonzales); Ex. L (State of Colorado Certificate of Death: Katheryn Gonzales); Ex. M (State of Colorado Certificate of Death: Leslie Gonzales) (noting cause of death as due to "large caliber" gunshot wound).

39 Gonzales Merits Brief, *supra* note 3, Ex. E (Douglas County Coroner's Report: Rebecca Gonzales); Ex. F (Douglas County Coroner's Report: Katheryn Gonzales); Ex. G (Douglas County Coroner's Report: Leslie Gonzales).

There is no indication this was done. The Coroner claimed that the “none of the [girls’] injuries were caused by police rounds,”⁴⁰ but all of the records of the investigation provide no basis for this conclusion.

Moreover, investigators failed to appropriately handle evidence in several key respects. The U.S. Department of Justice mandates that evidence from a crime scene be preserved and stored securely until it can be transported to an evidence storage facility, and the IACP recommends requiring investigators to “ensure thorough inspection of the scene and proper collection of all items and substances of evidentiary value.”⁴¹ Simon Gonzales’ truck was peppered with bullet holes and contained blood, clothing, and other evidence,⁴² making the truck in and of itself an important piece of evidence for the investigation. Crime scene drawings show bullet holes in the truck near at least one girl’s head.⁴³ A trajectory analysis might have helped determine which holes in the truck stemmed from Simon Gonzales’ gun.⁴⁴ However, to Petitioner’s knowledge, Colorado authorities destroyed Simon Gonzales’ truck only three weeks after the incident.⁴⁵ The truck was removed from the scene for “long term storage” and “possible further

40 Gonzales Merits Brief, *supra* note 3, Ex. C (Critical Incident Team Investigation Report), at 33-34, 37.

41 United States Department of Justice, Office of Justice Programs, National Institute of Justice, *Crime Scene Investigation: A Guide for Law Enforcement* 28 (2000), available at <http://www.ncjrs.gov/pdffiles1/nij/178280.pdf> (hereinafter DOJ Crime Scene Investigation); see also IACP Officer-Involved Shootings Model Policy, *supra* note 35, at 3.

42 Gonzales Merits Brief, *supra* note 3, Ex. I (Douglas County Sheriff: Property/Evidence Log, June 23, 1999), at 6-8 (documenting many shell casings found in the truck); see also Ex. B (Colorado Bureau of Investigation: Report of Investigation, Prepared by Agents J. Clayton, Jr. and D. Sollars, July 19, 1999), at 4 (reporting that “2 distinct entry/exit holes could be established”); *id.* at 23 (mentioning “additional bullet holes in vehicle”); *id.* at 5 (describing casings found inside and outside truck).

43 *Id.* at 38.

44 Though one report notes that a partial trajectory analysis was performed on the truck at the crime scene, there is no documentation or photographic evidence of the results of that analysis. See Gonzales Merits Brief, *supra* note 3, Ex. B (Colorado Bureau of Investigation: Report of Investigation, Prepared by Agents J. Clayton, Jr. and D. Sollars, July 19, 1999), at 5.

45 Dec. 11, 2006 Observations, *supra* note 7, Ex. E (Declaration of Jessica Ruth Lenahan (Gonzales) to Inter-American Commission on Human Rights), at 33.

examination for bullet holes.”⁴⁶ However, there is no record of this examination ever taking place.

Investigators also failed to thoroughly analyze key pieces of evidence found inside of the truck. Multiple bullet casings and fragments were found on the floor of the truck, but the Colorado Bureau of Investigation admitted that “no field identification was attempted on any of the metal fragments recovered from the vehicle.”⁴⁷ Moreover, the investigation that was later conducted was limited to tracing certain casings found inside and outside the truck to Simon Gonzales’ gun.⁴⁸ These facts clearly indicate that important evidence was not thoroughly examined by investigators involved.

Finally, Colorado authorities failed to follow proper procedures with regard to documenting evidence in the immediate aftermath of the incident. IACP and U.S. Department of Justice guidelines call for all officers involved in shootings to be separated until after they have given their statements to investigators,⁴⁹ in order to decrease the chances that they will discuss the shooting with one other or others. Here, investigators permitted officers to go to breakfast together before any of them had given their official statements.⁵⁰ The shooting occurred at approximately 3:20 a.m., but none of the officers

46 Gonzales Merits Brief, *supra* note 3, Ex. B (Colorado Bureau of Investigation: Report of Investigation, Prepared by Agents J. Clayton, Jr. and D. Sollars, July 19, 1999), at 12, 22.

47 *Id.* at 7.

48 Gonzales Merits Brief, *supra* note 3, Ex. I (Douglas County Sheriff: Property/Evidence Log); Ex. J (Colorado Bureau of Investigation: Official Request for Laboratory Examination). Police collected casings from a 9mm Lugar pistol from inside the truck in addition to metal fragments, but not all of these casings and fragments were included in the firearms analysis reports. Gonzales Merits Brief, *supra* note 3, Ex. B (Colorado Bureau of Investigation: Report of Investigation, Prepared by Agents J. Clayton, Jr. and D. Sollars, July 19, 1999), at 5-7; Ex. H (Letter to Colorado Bureau of Investigations from Agents Contos and Vanecek, June 28, 1999).

49 IACP Officer-Involved Shootings Model Policy, *supra* note 35, at 4; IACP Officer-Involved Shootings Concept Paper, *supra* note 24, at 6; DOJ Crime Scene Investigation, *supra* note 41, at 14.

50 Dec. 11, 2006 Observations, *supra* note 7, Ex. F (Progress Report by Investigator Rick Fahlstedt, July 1, 1999) at 1.

were questioned about the incident until almost six hours later.⁵¹ This time-frame gave the officers ample opportunity to discuss the case, corroborate stories, and exchange views on exactly what happened, thus potentially influencing their ability to provide an unbiased recollection of the events, and potentially casting doubt on the validity of their reports.

The Colorado authorities also waited until six hours after the shootout to collect or examine the weapons of those officers who witnessed the shootout but reported not firing their weapons.⁵² This decision contravenes basic investigation guidelines, which instruct on-scene investigators to “check the weapons of all officers present for discharge” and “locate the suspect’s weapon(s), ammunition and expended cartridges.”⁵³

An additional problem with the investigation is that adequate visual representations of the crime scene are lacking or unavailable. The only visual representations of the crime scene in Petitioner’s possession are photos from the news media⁵⁴ and investigators’ sketches of the crime scene.⁵⁵ These sketches are sub-standard and are highly difficult to interpret.⁵⁶ Such substandard sketches not only raise doubts as to their quality as representations of the actual crime scene, but also provide further evidence of the cursory nature of the investigation into the Gonzales girls’ deaths.

As previously noted, while no provision of the American Declaration expressly establishes a right to truth, both the Commission and Court have found that this right inheres in other rights explicitly protected by the Declaration and in the general

⁵¹ *Id.*

⁵² *Id.* at 1-2.

⁵³ IACP Officer-Involved Shootings Model Policy, *supra* note 35, at 2.

⁵⁴ See DENVER ROCKY MOUNTAIN NEWS (June 24, 1999), 1A (Exhibit 1)

⁵⁵ Gonzales Merits Brief, *supra* note 3, Ex. B (Colorado Bureau of Investigation: Report of Investigation, Prepared by Agents J. Clayton, Jr. and D. Sollars, July 19, 1999), at 12-22.

⁵⁶ See DOJ Crime Scene Investigation, *supra* note 41, at 25-26 (noting the importance of initial sketches in ensuring the “integrity of the investigation” and providing a “permanent record for later evaluation”).

obligation imposed on a state to respect and ensure rights guaranteed therein. The failure by law enforcement officials to effectively investigate the circumstances surrounding the deaths of Katheryn, Rebecca, and Leslie Gonzales resulted in the violation of Jessica Gonzales' right to truth. For nearly ten years, this failure has left Ms. Gonzales, her family, and the American public without definitive answers on such important issues as when, where, and how the girls died. The U.S.'s violation of this right continues until such time as the state conducts a full and impartial investigation into the children's deaths, as required by the American Declaration.

IV. Gender Discrimination, Children's Rights, and Domestic Violence

- **Can attorneys for Petitioner detail the discrimination aspects of Ms. Gonzales case? How does discrimination affect women of certain minorities more than others? (Paulo Sergio Pinheiro)**

Discrimination and violence against women are intertwined. As the U.N. Committee on the Elimination of All Forms of Discrimination Against Women ("CEDAW Committee") has explained, "the definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately."⁵⁷ Likewise, the Inter-American human rights system recognizes violence against women as a form of gender discrimination. Article 6 of the Convention of Belem do Para, for instance, states that "[t]he right of every woman to be free from violence includes, among others: the right of women to be free from all forms of discrimination."⁵⁸

⁵⁷ Committee on the Elimination of All Forms of Discrimination Against Women, General Recommendation No. 19 ¶ 6, U.N. Doc. CEDAW/C/1992/L.1/Add. 15 (1992) (hereinafter CEDAW Committee).

⁵⁸ See Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, 33 I.L.M. 1534 (1994), Art. 6, *entered into force* March 5, 1995 (hereinafter "Prevention").

In its thematic reports and case-based reports and recommendations, the Inter-American Commission, too, has highlighted the linkage between gender-based violence, discrimination, and societal inequality between men and women.⁵⁹ Analyzing the dynamics of the armed conflict and its affect on women in Colombia, the Commission noted that “[d]iscrimination against women and gender stereotypes promote, validate, increase and aggravate violence against women.”⁶⁰ Similarly, during its examination of femicide in Ciudad Juárez, Mexico, the Commission found that the climate of impunity that existed in Juárez for the perpetrators of these crimes arose from the underlying and pervasive discrimination experienced by women: “While public and official attention have focused on the brutality of and fear associated with the so-called ‘serial’ killings, insufficient attention has been devoted to the need to address the discrimination that underlies crimes of sexual or domestic violence, and that underlies the lack of effective clarification and prosecution.”⁶¹ More recently, in its report, *Access to Justice for Women Victims of Violence in the Americas*, the Commission found that “gender-based violence was a manifestation of custom and practice or evidence of a social structure that relegated women to a position of subordination and inequality and thus left them at a disadvantage.”⁶²

59 See generally Inter-Am. Comm’n on Human Rights, Special Report on Violence and Discrimination against Women in the Armed Conflict in Colombia, OEA/Ser.L/V/II. 124/Doc.6 (2006) (hereinafter IACHR Special Report on Violence against Women in Colombia); Inter-Am. Comm’n on Human Rights, Special Report on the Situation of the Rights of Women in Ciudad Juárez, Mexico: The Right to be Free from Violence and Discrimination, OEA/Ser.L/V/II.117, Doc. 44, (2003) (hereinafter IACHR Special Report on Violence against Women in Juárez).

60 IACHR Special Report on Violence against Women in Colombia, *supra* note 59, ¶ 43.

61 IACHR Special Report on Violence against Women in Juárez, *supra* note 59, ¶ 11

62 Inter-American Commission on Human Rights Access of Justice to Women Victims of Violence in the Americas, OEA/Ser.L/V/II. Doc. 68 ¶ 59 (2007) (hereinafter IACHR Report on Violence Against Women in the Americas).

In *Maria Da Penha Fernandes v. Brazil*, the Commission also explored the ties between violence against women and gender discrimination.⁶³ In that case, the Commission recognized that not only violence itself, but also the failure of a state to act with “due diligence” to protect victims of domestic violence, constitutes a discriminatory practice. The Commission found that “there was clear discrimination against women who were attacked [by intimate partners], resulting from the inefficiency of the Brazilian judicial system and inadequate application of national and international rules.”⁶⁴ As is the case in the United States, the Commission acknowledged that as compared to men, women in Brazil are disproportionately affected by domestic violence.⁶⁵

Moreover, in *María Eugenia Morales de Sierra v. Guatemala*, the Commission examined manifestations of gender discrimination in the traditional dichotomy that exists between private and public matters and the widespread perception that States should not interfere in family relations.⁶⁶ The Commission considered the provisions of Guatemala’s Civil Code that effectively established a subordinated and traditional role for married women. The Commission determined that the provisions of the Code were based on gender stereotypes and therefore discriminatory, and concluded that “far from ensuring the ‘equality of rights and adequate balancing of responsibilities’ within marriage, the cited provisions institutionalize imbalances in the rights and duties of the spouses.”⁶⁷ This analysis has important implications in the context of violence against women as

63 See *Maria da Penha Maia Fernandes v. Brazil*, Case 12.051, Inter-Am. C.H.R., Report No. 54/01, OEA/Ser.L/V/II.111 doc. 20 rev. at 704 ¶ 54 (2000).

64 *Id.* ¶ 47.

65 *Id.*

66 *María Eugenia Morales de Sierra v. Guatemala*, Case 11.625, Report No. 4/00, OEA/Ser. L/V/II.111 Doc. 20 rev. at 929 ¶ 36 (2000).

67 *Id.* ¶ 44.

well, for the notion that States should not interfere in private family life has also served to institutionalize violence against women within the family.

Thus, the Commission has consistently recognized that a state's tolerance of violence against women in the Americas, including specifically, domestic violence, constitutes a form of discrimination against women. As the Commission noted in *Maria da Penha Fernandes*: "The condoning of this situation by the entire system only serves to perpetuate the psychological, social, and historical roots and factors that sustain and encourage violence against women."⁶⁸

Like Maria da Penha Fernandes, Jessica Gonzales is a victim of gender-based discrimination. As in Brazil and throughout the Americas, domestic violence in the United States is a crime perpetrated mostly against women.⁶⁹ As noted in the Merits Brief⁷⁰ and by several *amici*, the United States has historically treated domestic violence as a private matter in which state intervention was inappropriate.⁷¹ Although U.S. criminal and civil laws now recognize that domestic violence is a matter of public concern, intimate partner violence continues to affect a disproportionately large number of women in the United States. Indeed, the most recent National Crime Victimization Survey (NCVS) reports that the incidents of domestic violence increased by forty-two

⁶⁸ *Id.* ¶ 55.

⁶⁹ The United States Department of Justice reports that between 1988 and 2002 in the United States, 73% of family violence victims were female, 84% of spousal abuse victims were female and 86% of victims of violence committed by a boyfriend or girlfriend were female. See PATRICIA TJADEN & NANCY THOENNES, NAT'L INST. OF JUST. & CTRS. FOR DISEASE CONTROL AND PREVENTION, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN 26 (2000), available at <http://www.ncjrs.gov/pdffiles1/nij/183781.pdf>.

⁷⁰ See Gonzales Merits Brief, *supra* note 3, at 48-49.

⁷¹ WEAVE Amicus Brief, *supra* note 12, at 14.

percent and sexual violence by twenty-five percent in the past two years and that women made up the vast majority of these victims.⁷²

Despite recent public discourse challenging this public/private dichotomy, police officers in the U.S. still too often ignore the power imbalance between predominately female victims and their male abusers and routinely encourage informal resolution of domestic violence complaints—a destructive dynamic that was apparent in this case.⁷³ In a 2005 interview on the television program “60 Minutes,” for example, CRPD Chief Tony Lane demonstrated his own inadequate understanding of the dynamics of domestic violence and the scope of CRPD’s obligations under Colorado law to appropriately protect victims of such violence. In that interview, Lane, referring to Simon Gonzales stated: “This is a father, he has his children. What safer place can children be than with one of their parents, the mother or the father?”⁷⁴ Chief Lane’s comments, suggesting that the police had no role in a dispute between family members, perpetuates the longstanding discriminatory belief that violence against women does not constitute a crime when it occurs within the family. Police inaction in relation to domestic violence, however, is a serious human rights concern, and one that violates women’s rights to be free from violence and non-discrimination.⁷⁵

72 See U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NATIONAL CRIME VICTIMIZATION SURVEY, CRIMINAL VICTIMIZATION (2007), available at <http://www.ojp.usdoj.gov/bjs/abstract/cv07.htm>.

73 See Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 48 (1992); see also Gonzales Merits Brief, *supra* note 3, at 49.

74 See 60 Minutes, aired March 17, 2005 (interview with Chief Tony Lane), available at <http://www.cbsnews.com/stories/2005/03/17/60minutes/main681416.shtml> A DVD of Chief Lane’s interview is included with this submission. See Exhibit 2.

75 See María Eugenia Morales de Sierra v. Guatemala, Case 11.625, Report No. 4/00, OEA/Ser. L/V/II.111 Doc. 20 rev. at 929 ¶ 36 (2000); See Maria da Penha Maia Fernandes v. Brazil, Case 12.051, Inter-Am. C.H.R., Report No. 54/01, OEA/Ser.L/V/II.111 doc. 20 rev. at 704 ¶ 54 (2000).

Native American and Latina survivors of domestic violence, like Jessica Gonzales, suffer additional forms of discrimination. The CEDAW Committee has observed:

Certain groups of women, in addition to suffering from discrimination directed against them as women, may also suffer from multiple forms of discrimination based on additional grounds such as race, ethnic or religious identity, disability, age, class, caste or other factors. Such discrimination may affect these groups of women primarily, or to a different degree or in different ways than men.⁷⁶

As the *amicus* brief of Women Empowered Against Violence (WEAVE) highlights, Native American, ethnic minority, and immigrant women are the groups most affected by gender-based violence in the United States.⁷⁷ When police fail to address the needs of domestic violence victims from historically marginalized communities, it exacerbates their experiences of race, ethnicity, and class-based vulnerability and exclusion.⁷⁸ Police inaction in the face of domestic violence, as the U.N. Committee on the Elimination of Racial Discrimination (“CERD Committee”) recently noted, “deprives victims belonging to racial, ethnic and national minorities . . . of their right to access to justice, and the right to obtain adequate reparation or satisfaction for damages suffered.”⁷⁹

Thus, gender-based and race-based discrimination intersect when police fail to protect minority women and fail to investigate and prosecute the crimes perpetrated against them.⁸⁰ The close relationship between gender discrimination and racial discrimination should be carefully considered by the Commission in its assessment of

⁷⁶ See CEDAW Committee, *supra* note 57, ¶ 12,

⁷⁷ See WEAVE Amicus Brief, *supra* note 12, at 9; *see also* CALLIE MARIE RENNISON, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, INTIMATE PARTNER VIOLENCE, 1993-2001 (2003), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv01.pdf>.

⁷⁸ See Gonzales Merits Brief, *supra* note 3, at 45.

⁷⁹ See Committee on the Elimination of Racial Discrimination, Concluding Observations, CERD/C/USA/CO/6, ¶ 26 (2008).

⁸⁰ Gonzales Merits Brief, *supra* note 3, at 43-46.

whether Jessica Gonzales' right to be free from discrimination under Article II of the American Declaration was violated.

- **How has the government responded to the problem of domestic violence in the United States? (Felipe González)**

Although domestic violence historically has been treated as a private issue in the United States, it is now criminalized in all fifty states, and in every state victims of abuse may seek civil orders of protection requiring abusers to stay away from them.⁸¹ In addition, thirty-three states, including Colorado, have responded to the problem of domestic violence by passing mandatory arrest laws requiring police to arrest persons who violate domestic violence restraining orders.⁸² The purpose of mandatory arrest laws is to curb police discretion and to ensure that women receive meaningful police assistance when a court has determined that they are threatened by domestic violence.⁸³ However, as this case demonstrates, police departments and the government regularly breach this duty to protect by failing to enforce restraining orders. Further, as the Merits Brief details at length, when a state fails in its duty to enforce the terms of restraining orders, victims are often left with no adequate and effective means of redress at the domestic level.⁸⁴

81 See American Bar Association Commission on Domestic Violence, *Domestic Violence Civil Protection Orders (CPOs) By State* (June 2007), available at <http://www.abanet.org/domviol/docs/DVCPOChartJune07.pdf>; see also Amicus Brief for Legal Momentum in support of Petitioner, Jessica Gonzales v. The United States of America, Case No. 12.626, at 37-49 (October 28, 2008) (hereinafter Legal Momentum Amicus Brief). For a historical treatment of wife battery and domestic violence, see Reva B. Siegel, *The Rule of Love: Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2130-41 (1996).

82 See American Bar Association Commission on Domestic Violence, *Domestic Violence Civil Protection Orders (CPOs) By State* (June 2007), available at <http://www.abanet.org/domviol/docs/DVCPOChartJune07.pdf>; see also Gonzales Merits Brief, *supra* note 3, at 50.

83 See ANDREW R. KLEIN, *THE CRIMINAL JUSTICE RESPONSE TO DOMESTIC VIOLENCE* 95 (2004).

84 See Gonzales Merits Brief, *supra* note 3, at 37-38.

At the federal level, the United States Congress, recognizing the gravity of domestic violence, passed the Violence Against Women Act (VAWA) in 1994, and simultaneously established the federal Office on Violence against Women.⁸⁵ However, VAWA does not discharge the United States' duty under the American Declaration and international law to "prevent, punish and investigate" human rights violations perpetrated against women.⁸⁶ VAWA addresses police responsiveness to domestic violence primarily in the form of funding to states that seek to institute programs promoting effective police response.⁸⁷ Participation in VAWA grant programs is voluntary, so there is no obligation on states to implement these programs.⁸⁸ Furthermore, VAWA does not establish a national plan of action, require specific police department protocols, or provide substantive oversight as to how the funding is used. Thus, in spite of VAWA grant programs, domestic violence training for police officers in the United States remains minimal: nationwide, police officers receive on average only 12 hours of domestic violence training, and officers in Colorado receive *just 8 hours*.⁸⁹ In many jurisdictions, ongoing or advanced domestic violence training is also unavailable.⁹⁰

VAWA also fails to fully address the special needs of immigrant women, one of the groups most affected by domestic violence in the United States.⁹¹ As discussed in the

85 Violence Against Women Act of 1994, Pub. L. No. 103-322, §40121, 108 Stat. 1796, 1910-17 (1994).

86 See Brief of New York Legal Assistance Group et al. as Amici Curiae in Support of Petitioner, Jessica Gonzales v. The United States of America, Case No. 12.626, at 7-8 (Oct. 22, 2008) (hereinafter NYLAG Amicus Brief). For a description of United States obligations under international law, see IACHR Report on Violence Against Women in the Americas, *supra* note 62; Gonzales Merits Brief, *supra* note 3, Part IV, at 56-67; see also CEJIL Amicus Brief, *supra* note 12, at 7-9.

87 See NYLAG Amicus Brief, *supra* note 86, at 10-12.

88 See *id.* (explaining that VAWA is non-binding on states).

89 See Colorado P.O.S.T. Manual, at B-82 and C-17; see also Fagan Expert Report, *supra* note 4, at 17-18, and Gonzales Merits Brief, *supra* note 3, at 55.

90 See NYLAG Amicus Brief, *supra* note 86, at 7-10 (describing STOP and ARREST grants under VAWA and their underutilization).

91 See RENNISON, *supra* note 77, at 2; see also WEAVE Amicus Brief, *supra* note 12, at 9-10, Gonzales Merits Brief, *supra* note 3, at 42-46 (providing statistics).

WEAVE amicus brief, because of the shortage of translators and foreign language resources, many immigrant women in the United States are unable to obtain orders of protection or to access essential protective services.⁹² The vulnerability of immigrant women is exacerbated by their fear of being deported or incarcerated—or having their partners, who are often the primary breadwinners of the household, deported or incarcerated—should they contact law enforcement authorities to report domestic violence. These barriers make it more challenging for immigrant victims to gain meaningful police assistance.⁹³

- **In this case, a restraining order was issued and a mother whose children were abducted called the police station nine times within ten hours to alert them. Yet, it seems that there was no response to the mother’s calls, and no comprehensive investigation into the girls’ disappearance. How are restraining orders issued? What criteria are established for these orders? What concrete measures have been adopted by the police and the government to ensure effective enforcement of restraining orders? (Luz Patricia Mejía Guerrero)**

Domestic violence restraining orders (also known as “orders of protection”) represent a prior judicial determination that an individual faces a real and immediate threat of violence by an intimate partner or family member.⁹⁴ A restraining order is proof that “[a] judge has already made the determination that the victim is at risk if the abuser does that which the order prohibits.”⁹⁵ Restraining orders typically contain a “stay away” provision that prevents an abuser from coming into contact with the holder of the order.

92 See WEAVE Amicus Brief, *supra* note 12, at 36-38 (highlighting the need for interpreters and noting that compliance with protection orders improves when translated materials are available).

93 With respect to police abuse, this is a problem that affects minority women in general. See WEAVE Amicus Brief, *supra* note 12, at 37 (explaining that minority women are reluctant to involve police, given police abuse and brutality in their communities).

94 See Gonzales Merits Brief, *supra* note 3, at 70-71; see also Dec. 11, 2006 Observations, *supra* note 7, Ex. L (Amicus Brief of National Network to End Domestic Violence in Support of Petitioner, *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005)) (hereinafter NNEDV Amicus Brief).

95 NNEDV Amicus Brief, *supra* note 94, at 30.

In addition, restraining orders can prohibit calls, emails, and other forms of communication, and can address child custody and visitation issues, division of property for joint residences, and payment of child or spousal support.⁹⁶ If batterers violate the terms of a restraining order, they are subject to civil contempt as well as criminal penalties, including arrest.⁹⁷

By the terms of her restraining order, Jessica Gonzales was granted full custody of her three children and Simon Gonzales was prohibited from coming into contact with the children except during “pre-arranged dinner visits,” and other times specified by the court and the parties.⁹⁸ Apart from these authorized visits, Mr. Gonzales was banned from coming within 100 feet of Jessica Gonzales or her children. If these terms were violated, the restraining order directed the police to seek Mr. Gonzales’ arrest.⁹⁹ Moreover, according to Colorado’s mandatory arrest law, “[a] peace officer shall arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest of a restrained person when the peace officer has information amounting to probable cause that . . . the restrained person has violated or attempted to violate any provision of a restraining order[.]”¹⁰⁰

Approximately 1.1 million women seek domestic violence restraining orders in the United States each year. When properly enforced, restraining orders are legal tools that substantially decrease the threat of violence that battered women and children

96 See Leigh Goodman, *Law Is the Answer? Do We Know That For Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 10-11 (2004).

97 Gonzales Merits Brief, *supra* note 3, at 49-51, 70.

98 See Petition Alleging Violations of the Human Rights of Jessica Gonzales by the United States of America and the State of Colorado, with request for an investigation and hearing of the merits (Dec. 23, 2005), Ex. B (June 4, 1999 Permanent Restraining Order), at 1 (hereinafter Gonzales Petition).

99 Gonzales Merits Brief, *supra* note 3, at 9, 20-21.

100 COLO. REV. STAT. § 18-6-803.5(3) (1999).

face.¹⁰¹ Braving the risk of retaliation, battered women seek protection orders based on their earnest belief that the government is offering them not a mere piece of paper, but substantive protection.¹⁰² Sadly, in Jessica Gonzales' case, the domestic violence restraining order proved to be nothing more than a sheet of paper.

- **There seems to be a systematic practice of police authorities treating domestic violence as a low priority crime. With respect to violence against women and children, it appears that the home is a sanctuary, and that human rights protections stop at its doors. I think Professor Fagan first addressed the issue—can Petitioners discuss it further? (Paulo Sergio Pinheiro)**
- **Why is police response to domestic violence and state enforcement of protection orders so low? (Felipe González)**

Despite the United States government's recognition that domestic violence is both the leading cause of injury among women in the United States,¹⁰³ and a problem of epidemic proportions,¹⁰⁴ it is nonetheless treated as a "low priority crime" by United States law enforcement.¹⁰⁵ Nationwide, police fail to respond in any way to nearly ten percent of all domestic violence calls.¹⁰⁶ When calls are not ignored completely, police

101 See CHRISTOPHER MAXWELL ET. AL, NATIONAL INSTITUTE FOR JUSTICE RESEARCH IN BRIEF, THE EFFECT OF ARREST ON INTIMATE PARTNER VIOLENCE: NEW EVIDENCE FROM THE SPOUSE ASSAULT REPLICATION PROGRAM 9 (July 2001) (reporting that risk of repeat violence decreases by almost 30%); see also NNEDV Amicus Brief, *supra* note 94, at 22-23.

102 Since abusers often feel "provoked" when restraining orders are issued against them, retaliation and heightened violence are real concerns. See Michelle R. Waul, *Civil Protection Orders: An Opportunity For Intervention With Domestic Violence Victims*, 6 GEO. PUBLIC POL'Y REV. 51, 56 (2000); Gonzales Merits Brief, *supra* note 3, at 71-72.

103 See CTRS. FOR DISEASE CONTROL AND PREVENTION, COSTS OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN IN THE UNITED STATES 18 (2003) (reporting that violence against women is the leading cause of injury among women, and that 5.3 million cases of intimate partner violence take place each year).

104 See generally Proclamation No. 7601, 67 Fed. Reg. 62,169 (Oct. 1, 2002); see also Proclamation No. 7717, 68 Fed. Reg. 59,079 (October 8, 2003).

105 See U.S. Department of Justice, Attorney's General Task Force on Domestic Violence, at 18-19 (1984); see also Legal Momentum Amicus Brief, *supra* note 81, at 37-45.

106 LAWRENCE A. GREENFELD ET AL., U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS FACTBOOK: VIOLENCE BY INTIMATES: ANALYSIS OF DATA ON CRIMES BY CURRENT OR FORMER SPOUSES, BOYFRIENDS, AND GIRLFRIENDS 20 (1998), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/vi.pdf>; see also Fagan Expert Report, *supra* note 4, at 8; WEAVE Amicus Brief, *supra* note 12, at 7-8.

frequently arrive late to the scene, fail to make arrests in the face of probable cause, or fail to make incident reports or interview witnesses—procedures that breach standard police protocol.¹⁰⁷

The enduring belief among many law enforcement officials that domestic violence is a non-criminal, non-serious and private matter, and that battered women provoke abuse, is a problem with historical roots.¹⁰⁸ As a result of this traditional and historical conception of violence against women, and of the home as a sanctuary into which the state should not intrude, police often refuse to make arrests in domestic violence cases, even when victims request, or the law mandates, that an arrest be made.¹⁰⁹ Furthermore, due to the Supreme Court's ruling in *Castle Rock v. Gonzales*,¹¹⁰ and many states' sovereign immunity laws, victims of domestic violence often have no meaningful remedy when police fail to comply with their legal obligations, creating a culture of non-accountability at some police departments, where domestic violence can be ignored with impunity.¹¹¹

107 For statistical data, see GREENFELD, *supra* note 49, at 20 (reporting that police failed to question suspects and witnesses in 29% of cases, and failed to make an incident report in 30% of cases). For international standards, see International Association of Chiefs of Police, A Law Enforcement Officers' Guide to Enforcing Orders of Protection Nationwide, *available at* <http://www.theiacp.org/research/ACF3068.pdf>; Meg Townsend et al., Law Enforcement Response to Emergency Domestic Violence Calls for Service 25-28 (2005), *available at* <http://www.ncjrs.gov/pdffiles1/nij/grants/215915.pdf> (describing written policies).

108 See Gonzales Merits Brief, *supra* note 3, at 48; Legal Momentum Amicus Brief, *supra* note 81, at 39-42 (noting that wife beating was permissible under law until the mid-nineteenth century and marital rape was authorized until a century later). Eighteen states still have marital rape exceptions, meaning that a husband may rape his wife with impunity. *Id.*

109 See Legal Momentum Amicus Brief, *supra* note 81, at 41-42.

110 *Castle Rock v. Gonzales*, 545 U.S. 748 (2005) (holding that domestic violence victims have no entitlement under the Due Process Clause of the U.S. Constitution to the enforcement of restraining orders).

111 See Gonzales Merits Brief, *supra* note 3, at 113-17 (discussing how the decision in *Castle Rock* and United States immunity laws deny women any meaningful right to a remedy, contravening Articles XVIII and XXIV of the American Declaration). For a discussion of how law fails to act as a deterrent or shape political will, see CERD Concluding Observations, CERD/C/USA/CO/6 ¶ 26 (March 7, 2008).

Ultimately, the state's failure to protect Jessica Gonzales and her children from domestic violence represents one tragic incident in what is a systemic pattern of state-based gender discrimination that persists even in the face of broad efforts to address domestic violence at the local, state, and federal level.¹¹² And as the Merits Brief and *amici* in support argue, gender stereotypes and discrimination are a primary cause of these non-enforcement problems.¹¹³

- **Given that the United States has the most capable police force in the hemisphere, how is it possible that Petitioner still does not know how her three girls died? (Paulo Sergio Pinheiro)**

The state's failure to conduct a thorough investigation into Katheryn, Rebecca, and Leslie Gonzales' deaths, as discussed *supra* Section III, is a continuation of the discriminatory treatment that Jessica Gonzales and her family experienced at the hands of the CRPD and Colorado authorities before, during, and after the kidnapping and the resulting tragedy. As described in her Declaration before the Commission in 2006, Ms. Gonzales' requests for police assistance throughout the night and early morning of June 22 and 23, 1999, were either dismissed or ignored.¹¹⁴ Had the police conducted a thorough investigation into the calls for help that Ms. Gonzales made the night of the kidnapping, the tragic deaths of the three children might have been averted.¹¹⁵ Instead, for Jessica Gonzales and her family, this discriminatory pattern resulted in the worst possible outcome—the deaths of the three children, and lingering questions about the cause, time, and date of their deaths. To this day, State authorities have not adequately

¹¹² See generally Gonzales Merits Brief, *supra* note 3, at 47-52.

¹¹³ See Gonzales Merits Brief, *supra* note 3, at 145-46 (describing victim blaming); Fagan Expert Report, *supra* note 4, at 8; Legal Momentum Amicus Brief, *supra* note 81, at 48-49.

¹¹⁴ Dec. 11, 2006 Observations, *supra* note 7, Ex. E (Declaration of Jessica Ruth Lenahan (Gonzales)), at 17-33; see also Part II, Facts and Narrative, *supra*.

¹¹⁵ See Part I, Facts and Narrative, *supra*, (describing police treatment of Ms. Gonzales prior to the events of June 22-23, 1999).

explained the circumstances surrounding the girls' deaths to Ms. Gonzales and her family.

The humiliating manner in which the authorities treated Jessica Gonzales and her family in the immediate aftermath of the shooting only compounded CRPD's discriminatory attitudes in responding to her calls. When Ms. Gonzales arrived at the Castle Rock police station in the early morning hours of June 23, 1999, upon learning that Simon Gonzales had come there earlier that morning and that there had been a shootout, the police detained, isolated, and questioned her for hours before telling her of her daughters' fates.¹¹⁶ Even after informing her of their deaths, state authorities detained Jessica Gonzales for an additional nine hours without providing her with details of the events that led up to the discovery of her daughters' bodies.¹¹⁷ On the morning of the tragedy, the news media reported many of the key details surrounding the deaths of Jessica Gonzales' children before the authorities ever communicated those details to Ms. Gonzales and her family.¹¹⁸ In the nearly ten years that have followed, despite Jessica Gonzales' repeated and consistent requests for information, Colorado authorities have failed to provide her with information on exactly how, where, and when the girls died.¹¹⁹

In many respects, the facts presented in this case are broadly similar to those in the European Court case *Nachova and Others v. Bulgaria*, a case before the European Court of Human Rights.¹²⁰ *Nachova* was brought by the families of two young Roma killed by military police, whose deaths had not been properly investigated more than ten

116 See Dec. 11, 2006 Observations, *supra* note 7, Ex. E (Declaration of Jessica Ruth Lenahan (Gonzales)), at 31-33 ¶¶ 71-76; *see also* Part II, Facts and Narrative, *supra*.

117 See Dec. 11, 2006 Observations, *supra* note 7, Ex. E (Declaration of Jessica Ruth Lenahan (Gonzales)), at 31-33.

118 *Id.* at 33 ¶ 75.

119 *Id.*

120 *Nachova and Others v. Bulgaria*, Eur. Ct. H.R., No. 43577/98 and 43579/98 (Grand Chamber) (July 6, 2005).

years after the events took place. As in the present case,¹²¹ authorities in *Nachova* failed to analyze the relevant evidence fully. For example, in *Nachova*, some of the bullet cartridges found at the crime scene had not been analyzed; the crime scene drawings were incomplete; and investigators offered conclusions about the cause of and circumstances surrounding the deaths without providing a detailed explanation of the basis for these conclusions.¹²² Based on these findings, the European Court found that many “indispensable and obvious investigative steps were not taken.”¹²³ Further, the Court found that state officials had failed to “take all possible steps to investigate whether or not discrimination may have played a role in the events.”¹²⁴

As in *Nachova*, the Colorado state authorities’ failure to investigate the deaths of Katheryn, Rebecca, and Leslie Gonzales should be viewed as a failure to address the CRPD’s discriminatory treatment of Jessica Gonzales as a domestic violence victim. Indeed, the failure to investigate also constitutes a discriminatory act in and of itself, as it continues to minimize the importance of conducting thorough, complete, and impartial investigations into domestic violence related homicides.

As discussed *supra*, the United States and the state of Colorado have a continuing obligation, pursuant to the American Declaration, to investigate the discriminatory circumstances surrounding the children’s deaths in this case and to communicate the results of such an investigation to Jessica Gonzales, her family, and the general public.¹²⁵

121 See Part III, Right to Truth, *supra* (describing in greater detail the failures of the investigation in this case).

122 *Id.* ¶¶ 38-43.

123 *Id.* ¶ 115.

124 *Id.* ¶ 168.

125 *Nachova and Others v. Bulgaria*, Eur. Ct. H.R., No. 43577/98 and 43579/98 (Grand Chamber) (July 6, 2005); *Avsar v. Turkey*, App. No. 25657/94, Eur. Ct. H.R. (2001); *Tanrikulu v. Turkey*, App. No. 23763/94, Eur. Ct. H.R. ¶ 103 (1999) (finding that the duty to investigate extended even to cases where state agents were likely not responsible). See also Gonzales Merits Brief, *supra* note 3, at 80, 133-34;

V. The European Court of Human Rights' Jurisprudence and its Influence on the Commission

- **Should the Commission apply the European Court of Human Rights' case law, and if so, how? (Felipe González)**

While the decisions of the European Court of Human Rights are not controlling precedent, they do provide powerful persuasive authority for the Commission to consider. Both the Inter-American Court and Commission consistently look to and cite decisions of the European Court,¹²⁶ as well as the decisions of other international human rights bodies.¹²⁷ In fact, in interpreting certain provisions of the American Convention and American Declaration, the Commission has placed primary reliance on European Court case law interpreting analogous provisions of the European Convention.¹²⁸

Part V, ECtHR and Other Interpretative Guidance *infra*. The United Nations has also emphasized the importance of proper investigation to achieving justice for victims of crimes. *See, e.g.*, Declaration on the Basic Principles of Justice for Victims of Crime and Abuse of Power, U.N. Doc. E/CN.15/1997/17; Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, note by Secretary-General, U.N. Doc. E/CN.15/1997/16 ¶ 1 (February 28, 1997) (cited in Gonzales Merits Brief, *supra* note 3, at 109 n.385).

¹²⁶ *See, e.g.*, Ximenes-Lopes v. Brazil, Inter-Am. Ct. H.R. (ser. C) No. 149 ¶ 51 (2006) (citing Storck v. Germany, Eur. Ct. H.R., App. No 61603/00 (2005) and other international declarations, standards and principles in order to “illuminate the reach and content” of the right to life and the right to human treatment” in the Inter-American system, and finding “these soft-law documents helpful for the adjudication of the instant case.”; Last Temptation of Christ Case, 2001 Inter-Am. C.H.R. (ser. C) No. 73 ¶¶ 69, 18 (citing Handyside v. United Kingdom, ECtHR Series A, No. 24 (1976), and later cases); Five Pensioners Case, 2003 Inter-Am. C.H.R. (ser. C) No. 98 ¶¶ 103, 50 (citing Case 39/1995/545/631, Gaygusuz v. Austria, 1996-IV ECHR 1129).

¹²⁷ Another frequent source is the Human Rights Committee, including its General Comments on the ICCPR (International Covenant on Civil and Political Rights), its views on individual communications, and its Concluding Observations on 110 country reports. *See, e.g.*, Ricardo Canese Case, 2004 Inter-Am. C.H.R. (ser. C) No. 111 ¶ 115-35 (relying on HRC General Comment 27); Velásquez Rodríguez Case (Compensatory Damages), 1989 Inter-Am. C.H.R. (ser. C) No. 7 ¶ 28 (citing HRC views); YATAMA Case, 2005 Inter-Am. C.H.R. (ser. C) No. 127 ¶ 208 (quoting from HRC General Comment 25); Raxcacó Reyes Case, 2005 Inter-Am. C.H.R., (ser. C) No. 133 ¶¶ 47, 69 (citing HRC Concluding Observations on reports of Iran and Iraq).

¹²⁸ *See, e.g.*, Lori Berenson Mejía Case, 2004 Inter-Am. C.H.R. (ser. C) No. 119 ¶¶ 159-61 (quoting the European Court for the proposition that the presumption of innocence can be violated by statements made by the police to the media asserting a defendant's guilt before trial).

Importantly, the Commission has expressly adopted the European Court's standard, first established in *Osman v. United Kingdom*,¹²⁹ for determining when a state may be held responsible for a private actor's violation of protected rights. This standard, as developed in subsequent European Court case law¹³⁰ and explained in Petitioner's December 11, 2006, and March 24, 2008, submissions to this Commission, was most notably employed by the Commission in *Pueblo Bello Massacre*.¹³¹

- **Should the Commission apply the Margin of Appreciation Doctrine Developed by the European Court? (Felipe González)**

While the doctrine of “margin of appreciation” has been developed by the European Court of Human Rights to guide its response to the restrictions placed on rights protected under the European Convention by national laws in member states, application in Ms. Gonzales' case is inappropriate. The Court has looked to the doctrine as a basis for determining when rights guaranteed by the European Convention may be restricted or limited “in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”¹³² The doctrine is meant to assess whether a restriction imposed by a state's law on a protected right under the Convention is “necessary” or whether it is overbroad and thus impermissibly violates protected rights. In cases such as Jessica Gonzales', where state law already limits the

129 *Osman v. United Kingdom*, 1998-VIII Eur. Ct. H.R. 115 (1998).

130 *Kiliç v. Turkey*, Eur. Ct. H.R., App. No. 22492/93 (2000); *E. and Others v. the United Kingdom*, Eur. Ct. H.R., App. No. 33218/96 (2002); *M.C. v. Bulgaria*, Eur. Ct. H.R., App. No. 39272/98 (2003).

131 *Pueblo Bello Massacre*, 2006 Inter-Am. C.H.R. ¶¶ 123–24 (citing and quoting the ECTHR's decision in *Kiliç v. Turkey*, Eur. Ct.H.R. Application No.22492/93). *See also* Sawhoyamaxa Indigenous Community, Case 0322/2001, Inter-Am. C.H.R. ¶ 155.

132 Eur. Conv. on H.R., Art. 8(2). The margin of appreciation doctrine has been applied to following articles: Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6 (right to a fair trial), art. 8 (right to respect for private and family life), art. 9 (freedom of thought, conscience and religion), art. 10 (freedom of expression), art. 11 (freedom of assembly and association); Protocol No. 4 to the Convention, art. 2 (freedom of movement).

amount of discretion that government actors (here, the police officers who failed to respond to Ms. Gonzales' calls for help) may exercise, the margin of appreciation doctrine is not applicable and would serve to create incoherent and unpredictable legal precedent with problematic consequences for guaranteeing the human rights articulated in the American Declaration to all individuals in the United States.

The margin of appreciation doctrine as developed by the European Court is of fairly limited application. The Court has applied it most broadly (*i.e.*, has allowed national laws the most leeway in limiting rights protected by the Convention) in cases where a state's national security interests are at issue,¹³³ and when a state seeks to protect public morality, in spite of the protections provided by Article 10 (freedom of expression).¹³⁴ The European Court has employed the doctrine with a much lighter hand in considering restrictions imposed by state laws on rights protected under Articles 5 and 6 (right to security, right to liberty, and right to a fair trial).¹³⁵ The right to liberty is of particular note, as it is among the rights that CRPD violated in its handling of Jessica Gonzales' case. It is apparent from the case law that while the European Court considers a state's interests in passing laws restricting the rights guaranteed by Articles 5 and 6, the Court gives much greater weight to the Convention's protections of these important rights than to purported state interests in adopting laws that impinge on them.

133 See *Lawless v. Ireland*, Eur. Ct. H.R. App. No. 332/57 (1961). In *Lawless*, the applicant claimed that the Republic of Ireland was improperly using preventive detention in violation of Convention articles 5 and 6. In its defense, Ireland referred to Article 15 of the Convention, claiming that preventive detention was necessary in a situation of public emergency of terrorist act by IRA. The Court, in a decision that precedes the establishment of the margin of appreciation, upheld the Irish government's decision to use preventive detention to quell violence by the IRA. The Court in *Lawless* relied on the concept of derogable and non-derogable rights—an analysis that is analogous to, and a precursor of, the margin of appreciation.

134 *Handyside v. United Kingdom*, Eur. Ct. H.R. App. No. 5493/72 (1976).

135 Steven Greer, *The Margin of Appreciation: Interpretation and Discretion Under the European Convention on Human Rights* 6 (Council of Eur., Human Rights Files No. 17, 2000) (“[the margin of appreciation doctrine] has had a very limited role in relation to Articles 5 and 6.”); Nicholas Lavender, *The Problem of the Margin of the Appreciation*, 4 EUR. HUM. RTS. L. REV. 380, 383 (1997).

The Inter-American Court and Commission have made reference to the European Court's margin of appreciation doctrine, but not actively embraced it. The Inter-American Court recognized the margin of appreciation doctrine in an advisory opinion regarding the rights of member states to regulate naturalization procedures for immigrants.¹³⁶ There, the Court narrowly applied the doctrine to the specific facts of the case in recognition of the great weight given to a state's non-discriminatory and non-arbitrary determination of citizenship standards. The Court noted: "the margin of appreciation . . . is reserved to States when it comes to the establishment of requirements for the acquisition of nationality and [the] determination [of] whether they have been complied with."¹³⁷

The Inter-American Commission has also referred to the European Court's margin of appreciation jurisprudence.¹³⁸ In finding that the residents of Washington, D.C., were entitled to representation in the U.S. Congress, the Commission noted that despite the "wide 'margin of appreciation'" enjoyed by States in matters concerning voting and representation, human rights bodies must ultimately determine whether a State has fulfilled its obligations in this regard.¹³⁹ The Commission found that because the rights at issue were fundamental, the margin of appreciation doctrine did not permit the United States to interfere with these rights through the application of its national laws. Likewise, the rights at issue for Ms. Gonzales—namely the right to be free from

136 Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, Inter-Am CtHR, Series A. No 4 ¶¶ 58, 62 (1984).

137 *Id.* at 62.

138 *Statehood Solidarity Committee v. United States*, Case 11.204, Report No. 98/03, Inter-Am. C.H.R., OEA/Ser./L/V/II.114 Doc. 70 rev. 1 at 725 (2003)

139 *Id.*

discrimination and violence—are fundamental and the margin of appreciation doctrine is inapplicable in this case.

As in the Commission’s consideration of the rights of District of Columbia residents, a wide application of the margin of appreciation doctrine is inappropriate to rights guaranteed by the American Declaration generally, and specifically to the rights at issue in this case. As a threshold matter, unlike the European Convention, which expressly allows for member states to impose restrictions on some of the rights enumerated therein, no analogous concession is made by the American Declaration. Moreover, incorporating a similar doctrine into the Inter-American human rights system would give rise to uncertainty and unpredictability in the application of human rights principles, thus undermining the protection of human rights in the Americas. The rights guaranteed in the American Declaration are absolute, and should not be impinged upon. Problems regarding uniformity have already arisen in Europe due to the European Court’s application of the margin of appreciation doctrine. These conflicts are most apparent in relation to the Court’s application of the doctrine to rights ensured by Articles 8 and 10 of the European Convention,¹⁴⁰ where the Court has been most willing to allow states to pass laws restricting the Convention’s enumerated rights.¹⁴¹

In any case, the rights that the U.S. violated in the present case do not involve concerns of public morality or national security. Even if this Commission considers that

140 Jeffrey A. Brauch, *The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law*, 11 COLUM. J. EUR. L. 113, (2004/2005); 31 EVAL BENVENISTI, MARGIN OF APPRECIATION, CONSENSUS, AND UNIVERSAL STANDARDS, INTERNATIONAL LAW AND POLITICS 843 (1999).

141 See, e.g., *Handyside v. United Kingdom*, Eur. Ct. H.R. App. No. 5493/72 (1976) (upholding an obscenity conviction because the margin of appreciation allowed the state to privilege public morality over the Petitioner’s Article 10 rights); *Dudgeon v. United Kingdom*, Eur. Ct. H.R. App. No. 7525/76 (1981) (striking down the state’s sodomy prohibition as a violation of rights protected by Article 8 of the European Convention). See also *Muller and Others v. Switzerland*, Eur. Ct. H.R. App. No. 10737/84 (1988).

some version of the European Court’s margin of appreciation doctrine should be applied in assessing the validity of restrictions imposed by U.S. laws on rights protected in the Inter-American system, the doctrine would have no application to the specific rights at issue here: Jessica Gonzales’ and her three children’s rights to life, humane treatment, truth, family life and freedom from discrimination.

Moreover, as discussed in detail in Petitioner’s Merits Brief and *supra*,¹⁴² the express terms of Jessica Gonzales’ restraining order¹⁴³ greatly limited police discretion in determining whether and how to act to protect her and her three children as soon as they were notified that the order had been violated. Because judicial authorities had, in issuing the order, previously assessed the risk Mr. Gonzales posed to Jessica Gonzales and the children, and Colorado law required that they actively pursue Simon Gonzales’ arrest if he violated the restraining order, the CRPD thus had no “margin of appreciation” to assess whether or not to act, or to determine the manner in which they should act. The law mandated the immediate actions they must take in response to Jessica Gonzales’ report that her daughters were missing and that Simon Gonzales had violated the restraining order. Applying the margin of appreciation doctrine here is thus inappropriate both from a broader doctrinal perspective, and with regard to the specific national laws and human rights implicated by the state’s treatment of Jessica Gonzales and its handling of the deaths of her three young daughters.

¹⁴² See *supra* Part II Facts and Narrative.

¹⁴³ See, e.g., Gonzales Merits Brief, *supra* note 3, at 6-9.

VI. The American Declaration on the Rights and Duties of Man

- **Is the American Declaration Binding on Member States? (Florentín Meléndez)**

As argued previously,¹⁴⁴ the Charter of the OAS binds all Signatory States to its provisions, and to other sources of law that the General Assembly of the OAS recognizes as controlling. The Inter-American Court has affirmed the General Assembly's view that the "Declaration contains and defines the fundamental human rights referred to in the Charter."¹⁴⁵ This interconnectivity between the Charter of the OAS and the American Declaration likewise long has been recognized by the Inter-American Commission, which has called the American Declaration a "source of international obligations" for OAS member states.¹⁴⁶ The American Declaration therefore provides the substance of the broad international standards to which the United States—and all other OAS member States, especially those that have not ratified the American Convention—should be held. It is exactly this dynamic that permits—indeed, requires—the Commission to apply the American Declaration to this case and to hold the United States to the standards and obligations therein.

144 See, e.g., Gonzales Petition, *supra* note 98, at 41-43; Gonzales Merits Brief, *supra* note 3, at Title IV Legal Argument; see also December 11, 2006 Observations, *supra* note 7, Sec. IV.

145 Inter-Am. C.H.R., Advisory Opinion OC-10/89 ¶¶ 43, 45 (July 1989), Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights.

146 See, e.g., Report No. 74/90, Case 9850, Hector Geronimo Lopez Aurelli (Argentina), Annual Report of the IACHR 1990 ¶ III.6 (quoting I/A Court H.R., Advisory Opinion OC-10/89 ¶ 45); see also *Mary and Carrie Dann v. United States*, Case 11.140, Report No. 75/02 ¶ 163 (Dec. 27, 2002)

- **Does the American Declaration Contain an Affirmative Obligation to Protect and to Exercise Due Diligence? (Florentín Meléndez)**

As set forth at length previously,¹⁴⁷ the United States has an affirmative obligation to protect rights guaranteed by the American Declaration from violation by the state, its agents and private actors.¹⁴⁸ The Inter-American system, including the Commission, has adopted a clear standard for determining when a state may be held responsible for violations of protected rights by private actors.¹⁴⁹ In this case, the United States failed to meet this recognized standard.¹⁵⁰ The United States and its agents—the CRPD—failed to take reasonable measures to protect Jessica Gonzales from a risk that Ms. Gonzales had made known to the state by securing a restraining order and by calling the police when that order was violated.

As argued in Ms. Gonzales’ petition and subsequent merits briefs, Inter-American and European Court jurisprudence supports the United States’ general obligation to protect individuals from known or reasonably foreseeable rights violations by private actors, and imposes a heightened obligation on the United States to protect women and children from gender-based and domestic violence.¹⁵¹

147 See, e.g., Gonzales Petition, *supra* note 98, at 71-84; Gonzales Merits Brief, *supra* note 3, at Sec. IV Legal Argument; December 11, 2006 Observations, *supra* note 7, at. 44-46; Sec. VI at 75-88.

148 Gonzales Merits Brief, *supra* note 3, at 56.

149 See Gonzales v. United States, Admissibility Petition 1490-05, Inter-Am. C.H.R., Report No. 52/07, OEA/Ser.L./V/II.128, doc. 19 (2007) (recognizing the Commission’s competence to consider a case involving the state duty to protect an individual from private acts of violence); Brazil, Case 7615, Inter-Am. C.H.R., Report No. 12/85, OEA/Ser.L./V/II.66, doc. 10 ¶¶ xi, x (1985), (finding Brazil liable “for having failed to take timely and effective measures to protect the human rights of the Yanomami [Indians] “from highway construction workers, geologists, mining prospectors, and farm workers desiring to settle in th[eir] territory”); Pueblo Bello Massacre, 2006 Inter-Am. C.H.R. ¶¶ 123-24 (citing and quoting the ECtHR’s decision in *Kiliç v. Turkey*, Eur. Ct.H.R. Application No.22492/93).

150 Gonzales Merits Brief, *supra* note 3, at 75-88.

151 Gonzales Merits Brief, *supra* note 3, at 60. In *Z and Others v. United Kingdom*, Eur. Ct. H.R. (2001), the European Court recognized the need for the State to provide heightened measures of protection when the rights of children and the other vulnerable groups are at issue and to prevent ill-treatment of which the authorities had or ought to have had knowledge. States’ heightened obligations to protect women and children are magnified where, as here, the violation results from the State’s non-compliance with its

In *Osman v. United Kingdom*, discussed *supra*, the European Court determined that state responsibility was implicated where “authorities know or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual ... and fail to take measures within the scope of their powers which, judged reasonable, might have been expected to avoid that risk.”¹⁵² And, in *E. and Others v. United Kingdom*, the Court held that the principles of state responsibility that it had earlier set forth in *Kiliç v. Turkey* apply equally in the context of a state’s failure to prevent purely private acts of violence when it is aware of a “real and immediate risk”¹⁵³ The Inter-American Court subsequently adopted these same standards in the cases *Pueblo Bello Massacre* and *Sawhoyamaya Indigenous Community*.¹⁵⁴

In addition to this general obligation imposed on states to protect against known risks of rights violations by private actors, the Commission has long recognized a heightened obligation on the part of the state to protect women and children from such violations. In this regard, this Commission, in addition to authorities set forth previously,¹⁵⁵ should take note of a recent decision of the European Court, *Bevacqua and*

duties under its domestic statutory law. *See, e.g.,* Taşkın and others v. Turkey, Eur. Ct. H.R. App. No. 46117/99 (2004) (holding that Turkey violated the European Convention on Human Rights’ guarantee of respect for private and family life by failing to comply with domestic legislation and judicial decisions and therefore depriving domestic procedural safeguards of all useful effect). *See supra*, Part II, Facts and Narrative. *See, e.g.,* Gonzales Petition, *supra* note 98, at 52; Gonzales Merits Brief, *supra* note 3, at 66.
¹⁵² *Osman v. United Kingdom*, 1998-VIII Eur. Ct. H.R. 115 (1998); *see also* Kiliç v. Turkey, Eur. Ct.H.R. App. No.22492/93 (2000) (applying *Osman*). *See generally* Gonzales Petition, *supra* note 98, at 48-49; Gonzales Merits Brief, *supra* note 3, at 60.

¹⁵³ *E. and Others v. United Kingdom*, Eur. Ct. H.R., App. No. 33218/96 (2002). *See* Gonzales Merits Brief, *supra* note 3, at 61-62. December 11 2006 Observations, *supra* note 7, at 52; *see also* M.C. v. Bulgaria, Eur. Ct. H. R., App. No. 39272/98 (2003) (holding that the State’s affirmative obligations extend beyond the right of life, to, *e.g.,* the rights to humane treatment and family life). *See* Legal Momentum Amicus Brief, *supra* note 81, at 60-61. *See, e.g.,* Gonzales Petition, *supra* note 98, at 49, 63; Gonzales Merits Brief, *supra* note 3, at 63, 96.

¹⁵⁴ *Pueblo Bello Massacre*, 2006 Inter-Am. C.H.R. ¶¶ 123-24 (citing and quoting the European Court’s decision in Kiliç, Eur. Ct.H.R. Application No. 22492/93); *Sawhoyamaya Indigenous Community*, Case 0322/2001, Inter-Am. C.H.R. ¶ 155.

¹⁵⁵ *See generally* Dec. 11, 2006 Observations, *supra* note 7; Gonzales Petition, *supra* note 98.

S. v. Bulgaria.¹⁵⁶ *Bevacqua* concerned the Bulgarian authorities' failure to ensure respect for the complainants' private and family life throughout a difficult divorce and excessively lengthy custody proceedings. The Court rejected the Bulgarian authorities' argument—reminiscent of the U.S.'s argument here—that the state had no duty to issue interim child custody measures in Ms. Bevacqua's divorce proceeding against her violent husband, as the dispute concerned a private matter. The Court found Bulgaria's argument to be incompatible with the state's positive obligation to secure the enjoyment of the Ms. Bevacqua's Article 8 rights to respect for private and family life, and awarded Ms. Bevacqua damages. The European Court emphasized that the concept of private life incorporates an individual's right to physical and psychological integrity, and that a state's affirmative obligation to protect these rights, in certain circumstances, requires that a state not only implement an adequate legal framework affording protection against acts of violence by private individuals but that it ensure, in practice, that rights are effectively protected.¹⁵⁷

As in *Bevacqua*, CRPD ignored its obligations under Colorado state law, which required the arrest of Simon Gonzales when he violated Jessica Gonzales' restraining order. In addition, even after Ms. Gonzales' daughters were killed, the state failed to undertake "some form of effective official investigation," as required to ensure that those responsible for rights violations are held accountable.¹⁵⁸ In failing to enforce its own arrest laws, and to conduct a sufficient investigation to determine key details surrounding

156 *Bevacqua and S. v. Bulgaria*, Eur. Ct. H. R., App. No.71127/01 (2008). Legal Momentum Amicus Brief, *supra* note 81, at 32-33 n.20.

157 *Bevacqua and S. v. Bulgaria*, Eur. Ct. H. R., App. No.71127/01 ¶ 65. *See also* X and Y v. the Netherlands, judgment of 26 March 1985, Series A no. 91 ¶¶ 11-13, 23-24, 27; August v. the United Kingdom Eur. Ct. H. R., App. No. 36505/02 (2003); Osman v. the United Kingdom, Eur. Ct. H. R., App. No 87/1997/871/1083 ¶¶ 128-30 (1998); M.C. v. Bulgaria, Eur. Ct. H. R., App. No 39272/98 (2003).

158 *Avsar v. Turkey*, Eur. Ct. H.R. App. No. 25657/94 (2001); *see also* Gonzales Merits Brief, *supra* note 3, at 80, 133-34.

the children's deaths and why CRPD flouted Colorado law, state authorities failed to fulfill their obligations under the American Declaration to protect Ms. Gonzales and her children from known risks to their safety and to investigate the resulting tragedy.

VII. Conclusion

Based on the above, and Petitioner's prior pleadings and briefs in this matter, Petitioner requests that this Commission declare the United States responsible for violations of the rights guaranteed by the American Declaration—specifically, Articles I, II, IV, V, VI, VII, XVIII, and XXIV. Petitioner also requests that this Commission recommend that the United States afford her adequate and effective remedies for violation of these rights and initiate legal and programmatic reform in the areas of domestic violence and violence against women. Petitioner's requests for relief are more fully articulated in her October 22, 2008, Merits Hearing Summary, March 24, 2008, Merits Brief, and December 11, 2006 Observations.¹⁵⁹

¹⁵⁹ See Summary of Hearing on the Merits Before the Inter-American Comm'n on Human Rights (Oct. 22, 2008), Part X (General Recommendations), In the Case of Jessica Ruth Gonzales v. United States of America, Case No. 12.626; Merits Brief, *supra* note 3, Sec. V (setting out Petitioner's recommendations and prayers for relief); Dec. 11, 2006 Observations, *supra* note 7, at 100-101 (same).