

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

**FINAL OBSERVATIONS REGARDING
THE MERITS OF THE CASE**

March 24, 2008

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I. INTRODUCTION

In 1999, Jessica Gonzales, a Latina and Native American victim of domestic violence living in Castle Rock, Colorado, obtained a domestic violence restraining order that limited the access of her estranged husband, Simon Gonzales, to her, their children, and the family home. On June 22, 1999, Simon Gonzales abducted their three daughters from the yard in front of the home, in violation of the restraining order. Jessica Gonzales repeatedly called and met with officers of the Castle Rock Police Department (“CRPD”) and asked them to enforce the order by locating the children and arresting her husband. Her calls went unheeded, even though the police were obligated under Colorado law to arrest any individual who violated a restraining order. Ten hours after Jessica Gonzales’s first call to the police, Simon Gonzales drove up to the police station, waited there for a short while, and then opened fire. In a barrage of gunfire, the police shot and killed Mr. Gonzales, who was standing in front of his pickup truck – the same truck that Jessica Gonzales had repeatedly described to the police that evening. When they looked inside the truck, police officers discovered the dead bodies of the Gonzales children – Leslie, 7, Katheryn, 8, and Rebecca, 10.

Despite the numerous requests of Jessica Gonzales and her family for an official investigation into the girls’ deaths, no investigation was ever conducted, to her knowledge. To this day, Ms. Gonzales does not know the time and place of her daughters’ deaths, or whether the numerous bullets found inside of their bodies came from Simon Gonzales’ gun or the guns of the police officers who fired upon the truck.

Jessica Gonzales sued the CRPD and certain individual officers¹ under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Her claims were dismissed by the District Court, reinstated by the Court of Appeals, and ultimately rejected by the United States Supreme Court on June 27, 2005.²

As discussed herein, the CRPD's failings are representative of larger failings by the United States to exercise due diligence in responding to the country's domestic violence epidemic.³ Likewise, Ms. Gonzales' plight is representative of that of countless victims of domestic violence in the United States, the vast majority of whom are women and children, and who are disproportionately poor, migrant, and racial minorities. Injured and abused by their intimate partners, many victims will turn to the police and the legal system for recourse, but only some will have their needs adequately met. Federal and state legislative and programmatic measures do not adequately address the problem of domestic violence or provide adequate legal remedies for victims of gender-based violence. As a result, victims, like Ms. Gonzales, are often denied basic protections mandated by international human rights standards. The U.S. Supreme Court's decision in *Town of Castle Rock v. Gonzales* only exacerbated this situation, leaving Jessica Gonzales and countless other domestic violence victims in the United States without a judicial remedy by which to hold police accountable for their failures to protect domestic violence victims and their children.

¹ This petition often uses the terms "police department" and "individual police officers" interchangeably. Both categories refer to State actors under international human rights law, thus making the distinction between them irrelevant.

² *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005).

³ See *infra* at Section III; see also 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) (hereinafter "Gonzales Petition"); Observations Concerning the Sept. 22, 2006 Response of the United States Government (Dec. 11, 2006) (hereinafter "Dec. 11, 2006 Observations").

The right to be free from gender-based and domestic violence like that suffered by Jessica Gonzales and her three children is a right protected by the American Declaration on the Rights and Duties of Man (“American Declaration”). The United States has an affirmative obligation to protect these rights from violation by not only the state or its agents, but also, under certain circumstances, by private actors. This responsibility is heightened in the case of particularly vulnerable populations, such as victims of domestic violence and their children. Where as here, a State fails to act with due diligence by, e.g., not effectively preventing domestic violence, not protecting women and children who are known to be at risk from such violence, and not providing a remedy when law enforcement fails to effectively respond to domestic violence, a State incurs liability for the acts of private actors under universal and regional human rights law, state practice, and customary international law.

The CRPD’s failure to protect the lives of Rebecca, Leslie, and Katheryn Gonzales directly violated the children’s fundamental right to life under Article I (the right to life and personal security) of the American Declaration. It also violated the Article I rights of Jessica Gonzales, as the mother of the deceased and as a victim of domestic violence. The police failure to provide protection for the children and for Ms. Gonzales also constituted violations of their rights to effective protection against attacks on family and private life under Article V (the right to protection against abusive attacks on family and private life) and Article VI (the right to establish a family and receive protection thereof). The CRPD’s failure to respond to Ms. Gonzales’ complaints and the refusal of the federal and Colorado governments to subsequently conduct a thorough investigation into the tragic events that took place on June 22 and 23, 1999, violated Ms.

Gonzales' right to petition the government and to receive a prompt decision thereon, under Article XXIV (the right to petition) of the American Declaration. The refusal of the lower federal courts and the U.S. Supreme Court to provide her with a remedy violated her right to resort to the courts under Article XVIII (the right to due process of law). The failure of the Colorado and federal authorities to conduct an independent, prompt, and thorough investigation into the circumstances surrounding the children's deaths violated Ms. Gonzales' and her family's right to truth and the government's duty to investigate under Articles IV, V, VI, XVIII, and XXIV. These violations were further compounded by the CRPD's and the U.S. courts' disregard for the special protections that should be accorded to mothers, children, and domestic violence victims as established in Article VII (the right to protection for mothers and children) of the American Declaration. The CRPD's failure to exercise due diligence in responding to Ms. Gonzales' complaint also highlights the department's discriminatory attitudes, laws, policies, and practices on the basis of both gender and race, in violation of Article II (the right to equality before the law) of the American Declaration. The unremedied failures of the CRPD and of the U.S. courts are directly imputable to the United States, which has an affirmative obligation to respect and ensure rights in general and particularly in the context of domestic violence

Petitioners present, herein, the final allegations on the merits of the case, including all facts and legal arguments necessary for the Inter-American Commission on Human Rights ("Inter-American Commission," "Honorable Commission," or

“Commission”) to find the United States in violation of Articles I, II, IV, V, VI, VII, XVIII, and XXIV of the American Declaration.⁴

⁴ Petitioners incorporate, by reference, the factual assertions presented in the initial Gonzales Petition; Dec. 11, 2006 Observations; Jessica Lenahan, Testimony Before the Inter-American Human Rights Commission, (March 2, 2007) (hereinafter “March 2, 2007 Testimony”); and Petitioners’ post-hearing Observations (May 14, 2007) (hereinafter, “May 14, 2007 Observations”).

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background.

Jessica Gonzales (now Jessica Lenahan)⁵ is a Latina and Native American woman born in 1966 to parents from Pueblo, Colorado. She grew up in Pueblo, where she met her future husband, Simon Gonzales, while in high school. Ms. Gonzales moved to Denver when she was 19 years old to work and attend community college. In 1990, she married Mr. Gonzales. They had three daughters together: Rebecca Lynne Gonzales (born May 20, 1989), Katheryn Nicole Gonzales (born October 12, 1990), and Leslie Olivia Gonzales (born March 20, 1992). Ms. Gonzales' son, Jessie Anthony Rivera, from a previous relationship, also lived with them. In 1998, the Gonzales family moved to Castle Rock, Colorado.

Beginning in 1996, Simon Gonzales began demonstrating increasingly unpredictable and erratic behavior. In 1999, when Mr. Gonzales tried to hang himself in the family garage, Jessica Gonzales decided that he posed too great a danger to her and her children. She filed for divorce, and Mr. Gonzales moved out of the house. Mr. Gonzales continued to display frightening behavior despite Ms. Gonzales' attempts to separate from him.

1. Jessica Gonzales Obtained Two Restraining Orders in 1999.

In May and June of 1999, Jessica Gonzales sought and obtained restraining orders against Mr. Gonzales from the Colorado courts.⁶ On May 21, 1999, she obtained a temporary restraining order that (1) directed Simon Gonzales not to “molest or disturb the

⁵ Although Jessica Gonzales has since remarried and now goes by the last name “Lenahan,” we refer to her as “Jessica Gonzales” in this brief because that is the name she used in her legal filings in the U.S. courts.

peace” of Jessica Gonzales or their children; (2) excluded Simon Gonzales from the family home; and (3) ordered that Simon Gonzales “remain at least 100 yards away from this location at all times.”⁷ The judge specifically found a risk of “irreparable injury” and found that “physical or emotional harm would result” if Mr. Gonzales were not excluded from the family home.⁸

The front page of the temporary restraining order noted in capital letters that the reverse side contained “IMPORTANT NOTICES FOR RESTRAINED PARTIES AND LAW ENFORCEMENT OFFICIALS.”⁹ The preprinted text on the back of the form included the following “**NOTICE TO LAW ENFORCEMENT OFFICIALS**” (bold in original), which read, in part:

YOU SHALL USE EVERY REASONABLE MEANS TO ENFORCE THIS RESTRAINING ORDER. YOU SHALL ARREST, OR, IF AN ARREST WOULD BE IMPRACTICAL UNDER THE CIRCUMSTANCES, SEEK A WARRANT FOR THE ARREST OF THE RESTRAINED PERSON WHEN YOU HAVE INFORMATION AMOUNTING TO PROBABLE CAUSE THAT THE RESTRAINED PERSON HAS VIOLATED OR ATTEMPTED TO VIOLATE ANY PROVISION OF THIS ORDER AND THE RESTRAINED PERSON HAS BEEN SERVED WITH A COPY OF THIS ORDER OR HAS RECEIVED ACTUAL NOTICE OF THE EXISTENCE OF THIS ORDER. YOU SHALL ENFORCE THIS ORDER EVEN IF THERE IS NO RECORD OF IT IN THE RESTRAINING ORDER CENTRAL REGISTRY. YOU SHALL TAKE THE RESTRAINED PERSON TO THE NEAREST JAIL . . . YOU ARE AUTHORIZED TO USE EVERY REASONABLE EFFORT TO PROTECT THE ALLEGED VICTIM AND THE ALLEGED VICTIM’S CHILDREN TO PREVENT FURTHER VIOLENCE. YOU MAY TRANSPORT, OR ARRANGE TRANSPORTATION FOR, THE ALLEGED VICTIM AND/OR THE ALLEGED VICTIM’S CHILDREN TO SHELTER.¹⁰

⁶ See Dec. 11, 2006 Observations, Ex. A: Jessica Ruth Gonzales, Verified Complaint for Restraining Order, May 21, 1999; Gonzales Petition, *supra* note 3, at Ex. A: May 21, 1999 Temporary Restraining Order, and Ex. B: June 4, 1999 Permanent Restraining Order.

⁷ See Gonzales Petition, *supra* note 3, at Ex. A: May 21, 1999 Temporary Restraining Order.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* (emphasis added).

In Colorado, like in other states, a restraining order represents a judicial determination that any violation of its terms represents a threat. Like Colorado's mandatory arrest law, described below, restraining orders are specifically meant to cabin police discretion in determining whether a threat exists in the face of evidence of such a violation.¹¹

The language on the back of Jessica Gonzales' temporary restraining order mirrored the language contained in Colorado's mandatory arrest law, which directs that, upon probable cause of a violation, "[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,"¹² where the restrained person has violated "any provision" of the order and has either "been properly served with a copy of the restraining order" or "has received actual notice" of its existence. Moreover, the statute provides that "[a] peace officer shall enforce a valid restraining order whether or not there is a record of the restraining order in the registry."¹³

On June 4, 1999, Jessica and Simon Gonzales appeared in court, where the judge ordered that the May 21, 1999, temporary restraining order be made permanent, together with modifications that granted Jessica Gonzales sole physical custody of their three daughters and permitted Mr. Gonzales to have occasional visitation ("parenting time") with the children.¹⁴ Upon Jessica Gonzales' request, the judge restricted Mr. Gonzales'

¹¹ When it passed mandatory arrest legislation in 1994, the Colorado General Assembly declared that "the issuance and enforcement of protection orders are of paramount importance in the state of Colorado because protection orders promote safety, reduce violence, and prevent serious harm and death." COLO. REV. STAT. § 13-14-102.

¹² COLO. REV. STAT. § 18-6-803.5(3)(b) (1999).

¹³ COLO. REV. STAT. § 18-6-803.5(3) (1999).

¹⁴ See Gonzales Petition, *supra* note 3, at Ex. B: June 4, 1999 Permanent Restraining Order.

mid-week contact with the girls to one weekly “mid-week dinner visit” that Simon and Jessica Gonzales would pre-arrange.¹⁵

Between May 21, 1999, when the court issued the temporary restraining order, and June 21, 1999, Jessica Gonzales called the CRPD on four or five separate occasions to report serious violations of her restraining order by Simon Gonzales.¹⁶ Each time, in contravention of the explicit terms of the restraining order and Colorado’s mandatory arrest law, the police dismissed her concerns and failed to arrest Simon Gonzales or to protect her and her children.¹⁷ Moreover, between January and May 1999, Simon Gonzales had several run-ins with the CRPD. On one occasion, he received a traffic citation for careless driving, and on a second, he was charged with trespassing on private property and obstructing public officials at the CRPD station. By June 22, 1999, “Simon Gonzales” was a name that the CRPD – a small police department in a small town – knew or should have known to be associated with domestic violence and erratic and reckless behavior.

2. Simon Gonzales Kidnapped the Children, in Violation of the Restraining Orders.

On Tuesday, June 22, 1999, sometime between 5:00 and 5:30 p.m.,¹⁸ Simon Gonzales abducted his three daughters, Leslie, Katheryn, Rebecca, and their friend, Rebecca Robinson, from the street in front of Jessica Gonzales’ home, in violation of Colorado law and of the restraining orders entered against him in the preceding months. Over the next ten hours, Jessica Gonzales repeatedly contacted the CRPD to report the

¹⁵ *Id.* at 1.

¹⁶ Dec. 11, 2006 Observations, *supra* note 3, at Ex. E: Gonzales Decl. ¶¶ 27, 28, 32.

¹⁷ An arrest for violating a restraining order dramatically reduces the probability of harm occurring. *See* Section III, *infra*; Gonzales Petition, *supra* note 3, at Context and Patterns Section.

children missing and to seek enforcement of her restraining order. In her conversations with various officers of the CRPD, she made clear that *(1) Simon Gonzales had abducted the children, in violation of a valid restraining order, (2) there was no pre-arranged dinner visit, and (3) she was concerned for her missing children’s safety.*¹⁹

- a. **In her first two calls to the CRPD, Jessica Gonzales told the dispatcher that she had a restraining order and that Simon Gonzales had violated it.**²⁰

Jessica Gonzales first called the police to report her daughters missing at approximately 5:50 p.m. Among the first words out of her mouth to the dispatcher were: “I filed a Restraining Order against my husband and we agreed that whatever night was best, I would let him have the dinner hour . . . and I don’t know whether he picked them up today or not. . . . [T]he girls are gone and I’m not knowing whether to . . . go search through town for them.”²¹ Later in the conversation, Jessica Gonzales again made clear to the dispatcher that the visit was not pre-arranged, as required by the restraining order: “[T]hey always call me when they’re leaving with him and you know, tonight’s not even his night to have them.”²² Jessica Gonzales expressly referred to the restraining order, because she recalled the judge who made the order emphasizing the importance of informing the police of the order if it was violated.²³ She told the CRPD dispatcher that

¹⁸ See Dec. 11, 2006 Observations, *supra* note 3, at Ex. B: Jessica Gonzales/Dispatch, Tape Transaction, CR #99-3223.

¹⁹ In order to fully contextualize Jessica Gonzales’ story, Ms. Gonzales directs the Commission to her Declaration, set forth in her Dec. 11, 2006 Observations, *supra* note 3, at Ex. E.

²⁰ Jessica Gonzales has submitted open records and FOIA requests to the State of Colorado and other governmental agencies in an effort to learn information about the events that took place on June 22-23, 1999. See Dec. 11, 2006 Observations, *supra* note 3, n. 10, 14. While important information has been obtained from these requests, this information appears to be the proverbial “tip of the iceberg.” Petitioners have been unable to obtain additional information from Colorado agencies, despite repeated requests.

²¹ U.S. Response to the Petition Alleging Violations of the Human Rights of Jessica Gonzales by the United States of America and the State of Colorado, Sept. 22, 2006 (hereinafter “U.S. Response”), Tab A: Jessica Gonzales/Dispatch, Tape Transcription, at 1 (hereinafter “U.S. Response, Tab A”).

²² *Id.* at 5.

²³ Dec. 11, 2006 Observations, *supra* note 3, at Ex. E: Gonzales Decl. ¶ 14.

she did not know where her children were, and “that’s the scary part.”²⁴ She noted that she was “wiggling out big time,”²⁵ and said apprehensively, to the dispatcher, “I just don’t know what to do.”²⁶

Jessica Gonzales again noted that she had a restraining order against Mr. Gonzales and communicated her concern about the children’s safety when she spoke to the dispatcher at about 7:40 p.m.²⁷ CRPD dispatchers noted this on the CRPD dispatch log and later told the Douglas County District Attorney that “[Jessica] Gonzales advised there was a restraining order between [her and Mr. Gonzales] and she hadn’t seen her kids since 5:30.”²⁸

b. Jessica Gonzales showed two police officers the restraining order.

At approximately 7:50 p.m., two hours after Jessica Gonzales first called the CRPD to report her children and their friend Rebecca Robinson missing, CRPD Officer Brink and Sergeant Ruisi arrived at her house.²⁹ Jessica Gonzales showed both officers a copy of the restraining order, which, as described above, directed the officers to arrest Simon Gonzales upon violation of the order.³⁰

²⁴ U.S. Response, Tab A, *supra* note 21, at 5; *see also* Dec. 11, 2006 Observations, *supra* note 3, at Ex. F: Progress Report, CR #99-26856, Report by Investigator Rick Fahlstedt, July 1, 1999 at 3 (containing statement from Jessica Gonzales’ best friend, Heather Edmunsun, who was with Jessica Gonzales when the girls disappeared and who remained with her throughout the course of the evening, that at approximately 5:00 p.m., she and Jessica Gonzales “were concerned, not knowing where the children had gone . . .”).

²⁵ “Wiggling out” is slang for distress or other behavior that indicates that an individual is seriously concerned.

²⁶ U.S. Response, Tab A at 6, 7.

²⁷ Dec. 11, 2006 Observations, *supra* note 3, at Ex. E: Gonzales Decl. ¶ 42; U.S. Response, Tab A at 1.

²⁸ Dec. 11, 2006 Observations, *supra* note 3, at Ex. G: CRPD Dispatch Log (6/22/99, 18:02 to 6/23/99, 05:41) at 19; U.S. Response, *supra* note 21, Tab E: Office of the District Attorney, Eighteenth Judicial District. Report Date: 7/1/99, Report by Karen Meskis, Date of offense: 6/23/99, at 7, 10 (hereinafter “U.S. Response, Tab E”) (containing statement from Dispatcher Cindy Dieck that “Dieck was advised that a restraining order was in effect.”).

²⁹ Dec. 11, 2006 Observations, *supra* note 3, at Ex. E: Gonzales Decl. ¶ 43; U.S. Response, Tab E, *Id.* at 10.

³⁰ *Id.*; Gonzales Petition, *supra* note 3, at Ex. A: May 21, 1999 Temporary Restraining Order.

Officer Brink held the restraining order in his hands and glanced at it briefly, but then told Jessica Gonzales that there was nothing he could do because the children were with their father.³¹ Jessica Gonzales explained to the officers that the judge had specifically noted in the order that the mid-week dinner visit was to be “pre-arranged” by the parties, that Mr. Gonzales’ normal (“pre-arranged”) visitation night was on Wednesday evenings, and that she had told her estranged husband that he could not switch nights that week, as the girls already had plans for their friend Rebecca to sleep over.³² Jessica Gonzales also explained that the judge had given his instructions in light of Mr. Gonzales’ erratic behavior and based on her explicit concerns about her husband spending time with the girls on weeknights. She stated that she was nervous that the girls had been missing at that point for over two hours.³³ She also noted her concern about Rebecca Robinson, who she presumed was with Mr. Gonzales, and stated that she never would have let one of her daughters’ friends get into a vehicle with him.³⁴ In sum, Jessica Gonzales clearly stated that she had not agreed for Mr. Gonzales to visit with the children that night.³⁵ Jessica Gonzales repeated her entreaty that the CRPD search for Mr. Gonzales and the children, and described the color and features of his truck to Officer Brink.³⁶ Officer Brink and Sergeant Ruisi promised Jessica Gonzales that they would drive by Mr. Gonzales’ apartment to see if he and the girls were there.³⁷

³¹ Dec. 11, 2006 Observations, *supra* note 3, at Ex. E: Gonzales Decl. ¶ 43.

³² *Id.*; *see also* Dec. 11, 2006 Observations, *supra* note 3, at Ex. F: Progress Report, CR #99-26856 at 3 (containing statement from Jessica Gonzales’ best friend, Heather Edmunson, who was with Jessica Gonzales when the girls disappeared and who remained with her throughout the course of the evening, that “Simon normally has the children on Wednesday nights”).

³³ Dec. 11, 2006 Observations, *supra* note 3, at Ex. E: Gonzales Decl. ¶ 43.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* ¶ 46.

c. Jessica Gonzales called the police a third, fourth, and fifth time and again referred to her restraining order.

Shortly after 8:30 p.m., Jessica Gonzales made cell phone contact with Simon Gonzales and learned that he was at Elitch Gardens, an amusement park in Denver, approximately 40 minutes from Castle Rock. Soon thereafter, Mr. Gonzales' girlfriend, Rosemary Young, began calling Jessica Gonzales and asking questions relating to Mr. Gonzales' mental health history, his capacity for harming himself or the children, and his access to firearms. Ms. Young said that Mr. Gonzales had threatened to drive off a cliff earlier that day.³⁸

After these calls, Jessica Gonzales became even more alarmed³⁹ and called the CRPD to communicate her concerns.⁴⁰ The dispatcher told Jessica Gonzales that an officer would be sent to her house, but an officer never arrived.⁴¹ Officer Brink, did however, telephone Jessica Gonzales shortly thereafter, and she explained to him again that she had a restraining order, that it was "highly unusual," "really weird," and "wrong" for Mr. Gonzales to have taken the girls to Elitch Gardens in Denver on a weeknight, and that she was "so worried," particularly because it was almost the girls' bedtime and they still were not home.⁴²

Jessica Gonzales spoke to the CRPD two more times before 10:00 p.m.,⁴³ during which time she asked Officer Brink to dispatch an officer to locate Mr. Gonzales and the

³⁸ *Id.* ¶50.

³⁹ *Id.* ¶¶ 50-55, 60-61, 63, 65, 66.

⁴⁰ *Id.* ¶ 51; U.S. Response, Tab E, *supra* note 28, at 7, 10 (statement from Dispatcher Lisk that: "At 2043 Jessica Gonzales called back on a 911 line and stated her children were at Elitches with their father," *see also* statement from Dispatcher Dieck noting the same).

⁴¹ Dec. 11, 2006 Observations, *supra* note 3, at Ex. E: Gonzales Decl. ¶ 51.

⁴² *Id.* ¶¶ 51-54; U.S. Response, *supra* note 21, Tab C: Investigator's Progress Report, CRPD, Castle Rock, Colorado, CR# 99-3226, Call from Officer Brink to Jessica Gonzales, at 1-3 (hereinafter "U.S. Response, Tab C").

⁴³ Dec. 11, 2006 Observations, *supra* note 3, at Ex. E: Gonzales Decl. ¶¶ 55-59.

children at Elitch Gardens.⁴⁴ Officer Brink refused because, he said, Elitch Gardens was outside of CRPD’s jurisdiction.⁴⁵ He then dismissed Jessica Gonzales’ suggestion that he call the Denver police and put out a statewide All Points Bulletin (an electronic dissemination of wanted-person information, also known as an “APB”) for Mr. Gonzales and the missing children because, he said, the APB would needlessly go statewide and would cost the state money.⁴⁶ Jessica Gonzales also communicated information concerning her calls with Mr. Gonzales’ girlfriend, Rosemary Young, that evening, and her hunch that Ms. Young might have important information concerning the girls’ whereabouts and welfare.⁴⁷ Officer Brink again refused to comply with her request that he contact Ms. Young, stating that the children were with their father and that Jessica Gonzales had not indicated that Ms. Young had broken any laws, so there was no reason to put out an APB.⁴⁸ Officer Brink told Jessica Gonzales to wait until 10:00 p.m. to see whether her husband returned with the children.⁴⁹

d. Jessica Gonzales again called and even visited the CRPD, but each time, the police failed to respond.

When Jessica Gonzales telephoned emergency “911” at about 10:00 p.m. to report that her children were still not home, she noted the restraining order again and said to the dispatcher, “I’m a little wiggled out, I don’t know what to do”; “I’m just a mess”; and “I’m just freaking out.”⁵⁰ Dispatcher Dieck later reported that she “could tell [Jessica]

⁴⁴ *Id.* ¶ 56.

⁴⁵ *Id.*

⁴⁶ *Id.* ¶ 57.

⁴⁷ *Id.* ¶ 55.

⁴⁸ *Id.* ¶ 57. As discussed *infra* at Part II (A)(5), there are many simple and straightforward ways for a police department to request the assistance of local law enforcement in locating missing children.

⁴⁹ *Id.*

⁵⁰ U.S. Response, Tab D: Investigator’s Progress Report, CRPD, Castle Rock, Colorado, Third Call at 21:57 hrs., CR #99-3226, at 1-3 (hereinafter “U.S. Response, Tab D”); U.S. Response, Tab E, *supra* note

Gonzales was nervous.”⁵¹ Jessica Gonzales called again after she finished work at midnight to inform the CRPD that she was at her husband’s apartment, that no one was home, and that she feared that her husband had “run off with my girls.”⁵² The dispatcher told her she would “get an officer on the way.”⁵³ An officer never arrived,⁵⁴ so Jessica Gonzales drove to the CRPD⁵⁵ where she met with Detective Ahlfinger.⁵⁶ Hysterical, Ms. Gonzales explained to Detective Ahlfinger that she had a restraining order against Mr. Gonzales and that she was afraid that he had “lost it” and might be suicidal.⁵⁷ A CRPD dispatcher subsequently interviewed about the events of the evening recalled from her conversations with Jessica Gonzales that evening that she “was very worried about her children” and noted that Jessica Gonzales was crying when she arrived at the CRPD and said that she “was scared for” her children.⁵⁸

e. The Shooting Death of Simon Gonzales

At approximately 3:15 a.m. on June 23, 1999, Mr. Gonzales parked his pickup truck across from the Castle Rock Police Station, waited there for approximately 10-15 minutes, and then began shooting at the station. The police returned fire, and shot and killed Mr. Gonzales, and then discovered the bodies of Leslie, Katheryn, and Rebecca

28, at 10 (statement from Dispatcher Dieck that Jessica Gonzales called 911 at 10:00 p.m.); *see also* Dec. 11, 2006 Observations, *supra* note 3, at Ex. E: Gonzales Decl. ¶ 60.

⁵¹ U.S. Response, Tab E, *supra* note 28, at 10.

⁵² Dec. 11, 2006 Observations, *supra* note 3, at Ex. B: Jessica Gonzales/Dispatch Tape Transcription, CR #99-3223.

⁵³ *Id.*; Dec. 11, 2006 Observations, *supra* note 3, Ex. E: Gonzales Decl. ¶ 64; *see also* U.S. Response, Tab E, *supra* note 28, at 7 (statement from Dispatcher Lisk noting that “on June 23, 1999 at 0034 hours . . . Jessica Gonzales called dispatch and stated that she was at her husband’s residence in her maroon Explorer and her ex-husband picked up their three kids and had not returned them. She was told to wait for an officer at his location.”).

⁵⁴ Dec. 11, 2006 Observations, *supra* note 3, at Ex. E: Gonzales Decl. ¶ 64 and Ex. B: Jessica Gonzales/Dispatch Tape Transcription, CR #99-3223.

⁵⁵ Dec. 11, 2006 Observations, *supra* note 3, Ex. E: Gonzales Decl. ¶¶ 65-66.

⁵⁶ *Id.* ¶¶ 67-68; U.S. Response, Tab F: CRPD Incident Report 90623004, 06/23/99, 00:06 hrs, at 2 (hereinafter “U.S. Response, Tab F”).

⁵⁷ *Id.*; U.S. Response, Tab E, *supra* note 28, at 3.

Gonzales in the cab of the truck. To date, no definitive explanation has been given to Jessica Gonzales of who killed the girls or the time and place of their deaths.

3. The CRPD Had Probable Cause To Believe That The Restraining Order Had Been Violated And Were Obligated To Arrest Or Seek A Warrant For The Arrest Of Simon Gonzales.

The CRPD was clearly aware that Simon Gonzales abducted Rebecca, Katheryn, and Leslie Gonzales on June 22, 1999, in violation of a valid restraining order and Jessica Gonzales expressed her serious concerns and distress about this situation to the CRPD.

a. Jessica Gonzales provided sufficient information for the CRPD to make a probable cause determination and to conclude that Mr. Gonzales should be arrested.

As discussed above, Jessica Gonzales handed the restraining order to two police officers at approximately 8:00 p.m. when they arrived at her home, and she described the terms of the restraining order to at least one other police officer and two dispatchers.⁵⁹ Moreover, even if she had not done so, the CRPD had an obligation, once Jessica Gonzales informed the CRPD dispatcher of the existence of the restraining order at 5:50 p.m., to access the order, either by locating it in a governmental database or by asking Jessica Gonzales for a copy of it. After Jessica Gonzales' initial contact with the CRPD, the CRPD either knew or should have known the terms of the order.⁶⁰

Had the CRPD officers complied with their obligations under law, they would have determined that there was probable cause to arrest Simon Gonzales for violating the restraining order, for three reasons: (1) From 5:50 p.m. to 8:30 p.m., Jessica Gonzales repeatedly told the police that her children had disappeared and that she did not know where they were, but that she suspected Simon Gonzales had abducted them in violation

⁵⁸ *Id.* at 2-3.

⁵⁹ *See* Dec. 11, 2006 Observations, *supra* note 3 at Part (II)(B).

of the terms of her restraining order; (2) Jessica Gonzales explained that she had not pre-arranged any dinner visit between the children and Mr. Gonzales on June 22, 1999; and (3) after Jessica Gonzales learned at approximately 8:30 p.m. that the children were definitely with Simon Gonzales, she communicated this information to the police.⁶¹ The available evidence demonstrated that it was more likely than not that Simon Gonzales had abducted the children in violation of the terms of the restraining order. After making the assessment that probable cause existed to believe that Simon Gonzales had violated the order, the CRPD had an obligation under the terms of the restraining order and Colorado's mandatory arrest law to (1) arrest or seek a warrant for Mr. Gonzales' arrest, and (2) take all reasonable steps to protect Jessica Gonzales and her children. Indeed, the restraining order and the mandatory arrest law were specifically designed to remove police discretion in these circumstances and represent a prior judicial and legislative determination that any violation of a restraining order poses a significant threat.

b. Mr. Gonzales' prior criminal history and the CRPD's specific knowledge of his recent erratic behavior provided even greater reason for the CRPD to conclude that Mr. Gonzales posed a threat to his children.

While Jessica Gonzales' explanation to the CRPD that she had a restraining order and that Simon Gonzales had abducted her children in violation of this order *in and of*

⁶⁰ *Id.* at Part (II)(B)(1-2).

⁶¹ Even if the police officers thought that Jessica Gonzales' story, on its face, did not give them probable cause to believe that the restraining order had been violated, they nevertheless had the obligation to take reasonable steps to investigate the alleged violation. The police did not undertake such an investigation, i.e., by getting Elitch Gardens security and the Denver police involved in searching for the children; by sending out a statewide APB or ATL for the missing children; by interviewing Mr. Gonzales' girlfriend, Rosemary Young, after Jessica Gonzales told Officer Brink at 8:30 p.m. that Ms. Young might have information concerning Mr. Gonzales and the children's whereabouts; by running a license plate search on Simon Gonzales; etc. Such inquiries would have revealed that Mr. Gonzales abducted the children in violation of the restraining order and that he should therefore be arrested.

itself constituted “information amounting to probable cause”⁶² that Simon Gonzales had violated the restraining order and should therefore be arrested, Mr. Gonzales’ prior criminal history and the CRPD’s specific knowledge of the erratic and threatening behavior he had exhibited in the preceding three months provided *additional cause* for the CRPD to conclude that Mr. Gonzales posed a threat to the safety of his children.

Had the CRPD officers checked their database for Mr. Gonzales’ criminal history on June 22, 1999, they would have learned – if they did not already know firsthand – that *Simon Gonzales had seven run-ins with the CRPD in the three months preceding June 22, 1999.*⁶³ Jessica Gonzales herself had called the police *on at least four occasions in the preceding months* to report the following domestic violence-related incidents: (1) that Mr. Gonzales was stalking her;⁶⁴ (2) that Mr. Gonzales had unlawfully entered her house and stolen her wedding rings;⁶⁵ (3) that Mr. Gonzales had again broken into her house and changed the locks on the doors;⁶⁶ and (4) that Mr. Gonzales had loosened the water valves on the sprinklers outside her house so that water flooded her yard and the surrounding neighborhood.⁶⁷ On each of these previous occasions that Mr. Gonzales had

⁶² See Dec. 11, 2006 Observations, *supra* note 3 at Part (II)(B)(2).

⁶³ *Id.* at Ex. H: CRPD Individual Inquiry on Simon Gonzales, June 23, 1999 at 158-59.

⁶⁴ *Id.* at Ex. E: Gonzales Decl. ¶ 13.

⁶⁵ *Id.* ¶¶ 19-20.

⁶⁶ *Id.* ¶ 21; *see also id.*, at Ex. Q: CRPD Offense Report (Violation of a Restraining Order, Domestic Violence), May 30, 1999 (documenting the incident and confirming that Jessica Gonzales showed CRPD Officer Varela a copy of her restraining order against Mr. Gonzales).

⁶⁷ *Id.* ¶ 27; *see also id.*, at Ex. I: Critical Incident Team Report, June 23, 1999 at 7 (p. 308) (containing statement from Jessica Gonzales’ babysitter, Josey Sanson, that “Jessica Ruth made previous police reports noting: Simon deliberately broke the sprinklers while Jessica and the girls were at church. Simon changed the locks on the house after he had moved out, causing Jessica and the girls to be locked out for several hours. The police found Simon in the bedroom after a restraining order had been issued ordering Simon to stay away from the home.”); *id.*, at Ex. F: Progress Report, CR #99-26856 at 6 (containing statement from Jessica Gonzales’ mother, Ernestine Rivera, that “Simon had been driving around the house, stalking her [Jessica Gonzales]. That Simon had moved out of the house, but still snuck into the house and hid so he could jump out and scare Jessica or the kids. . . . That Jessica had the locks changed on her house as soon as Simon moved out. That Jessica believes Simon stole a key from one of the kids. That several weeks ago, Jessica found Simon in Jessica’s room smoking cigarettes and drinking beer. That Simon was very compulsive and possessive.”).

violated the restraining order, the CRPD had failed to respond appropriately and arrest Mr. Gonzales. The CRPD's omission violated their legal obligation to do so under the terms of the order and Colorado's mandatory arrest law, thus heightening the ongoing threat posed by Mr. Gonzales to Jessica Gonzales and her children.

Had the CRPD officers checked their database, they also would have been reminded that as recently as May 30, 1999, the CRPD had requested that Mr. Gonzales come to the police station to discuss his efforts to change the locks on Jessica Gonzales' home, in violation of the restraining order.⁶⁸ When he arrived at the station, Mr. Gonzales had exhibited such unstable and threatening behavior *inside the CRPD station* – entering a restricted area and then attempting to flee when being served with a summons – that he had to be physically restrained by a police officer.⁶⁹ Mr. Gonzales was charged with trespassing on private property and obstructing public officials.⁷⁰ The criminal database would also have reflected a citation Mr. Gonzales received on April 18, 1999,

⁶⁸ *Id.* ¶ 21; *see also id.*, at Ex. R: CRPD Offense Report (Trespass on Private Property; Obstruction of Duties of a Public Office), May 30, 1999 (documenting CRPD's prior contact with Mr. Gonzales and requesting that he meet with the police to discuss their investigation into his alleged restraining order violation).

⁶⁹ *See id.* at 2 (noting that Mr. Gonzales “began to walk out of the lobby in an attempt to keep me from serving him the summons. I order[ed] [him] to stop and come back. He did not respond and continued to walk out. He attempted to open the door leading outside. I approached [him]. I placed my right hand on the rear of his neck and my left hand on his left elbow. I turned him around and escorted him to a chair where he was told to sit. [Other officers] sat with [Mr.] Gonzales while I completed the summons.”).

⁷⁰ *Id.* at 1, 3 (documenting an investigation by the CRPD into Mr. Gonzales' alleged violation of the restraining order, and indicating that the investigating police officers profoundly misunderstood the nature of Colorado's mandatory arrest law. In the report, Officer Varela notes that “I told [Mr.] Gonzales that if I found that the restraining order was valid and there was proof of service, I would have to take him into custody. . . . I [later] advised [Mr.] Gonzales that I had found that the restraining order had not been served and that no violation had occurred.”). In fact, as described *infra*, Part (II)(5)(b), under Colorado law, “[a] peace officer shall arrest, or . . . seek a warrant for the arrest of a restrained person when the peace officer has information amounting to probable cause that: (I) The restrained person has violated or attempted to violate any provision of a restraining order; and (II) The restrained person has been properly served with a copy of the restraining order or the restrained person *has received actual notice of the existence and substance of such order.* COLO. REV. STAT. § 18–6–803.5(3) (1999) (emphasis added). Under Colorado law, Officer Varela was *required* to arrest Mr. Gonzales for the violation of the restraining order *so long as Mr. Gonzales was aware of the existence and substance of the order.* Mr. Gonzales clearly was aware of this information; *see* Dec. 11, 2006 Observations, *supra* note 3, at Ex. E: Gonzales Decl. ¶ 18.

for careless driving after he displayed a profound loss of control in a “road rage” incident even though his daughters were sitting without seatbelts in the back of his truck,⁷¹ as well as information indicating that his drivers’ license had been suspended.⁷² Furthermore, a check of other local police databases would have revealed that in 1996, the Denver Police had taken Mr. Gonzales to a hospital psychiatric facility after he attempted suicide in front of his family,⁷³ and that a non-extraditable warrant for Mr. Gonzales’ arrest had been issued in Larimer County.⁷⁴

The CRPD was well aware of Mr. Gonzales’ history and specifically of his contacts with the police. The Supplemental Report compiled by the Douglas County District Attorney noted that Corporal (Dispatcher) Patricia Lisk, who worked the night shift and early morning shift from June 22 to 23, 1999, and who was on duty while Jessica Gonzales called the CRPD to report her missing children, told an investigator that she “knew the history between Simon and Jessica Gonzales.”⁷⁵ The same report notes that Dispatcher Cindy Dieck, who worked the afternoon to evening shift on June 22, 1999, and was on duty while Jessica Gonzales called the CRPD to report her missing children, was aware that Mr. Gonzales had recently had contact with the CRPD “where he was charged with trespassing.”⁷⁶

⁷¹ See Dec. 11, 2006 Observations, *supra* note 3, at Ex. H: CRPD Individual Inquiry on Simon Gonzales at 2; see also *id.*, at Ex. S: CRPD Municipal Summons, Apr. 18, 1999 (issued to Mr. Gonzales for careless driving and driving without seatbelts in use, noting that “Officer Brown observed Rebecca Gonzales and Leslie Gonzales sitting in the rear “jump seat” of the truck without seatbelts.”).

⁷² U.S. Response, Tab G: Statement signed by Cpl. Patricia A. Lisk, at 7 (hereinafter “U.S. Response, Tab G”).

⁷³ Dec. 11, 2006 Observations, *supra* note 3, at Ex. E: Gonzales Decl. ¶ 6; Dec. 11, 2006 Observations, *supra* note 3, Exhibit J: Police Emergency Mental Illness Report, June 16, 1999; *id.*, at Ex. F: Progress Report, CR #99-26856 at 6 (containing statement from Jessica Gonzales’ mother, Ernestine Rivera, “That around January 1997, Simon attempted to hang himself in the [family’s] garage. That Denver police department should have a report on this incident.”).

⁷⁴ U.S. Response, Tab G, *supra* note 72, at 7.

⁷⁵ U.S. Response, Tab E, *supra* note 28, at 5.

⁷⁶ *Id.* at 11.

Jessica Gonzales informed the CRPD on June 22 and 23, 1999, and on at least four other occasions in April, May, and June of 1999, about Mr. Gonzales' threatening and erratic behavior. More importantly, however, even in the absence of such information, the police were obliged to enforce Jessica Gonzales' restraining order and arrest Mr. Gonzales.

The simple fact that Jessica Gonzales communicated to the police (1) that she had a restraining order and (2) that Simon Gonzales had abducted the children in contravention of this order, obligated the police to conclude that a threat existed, and to attempt to locate the children and arrest Simon Gonzales. The fact that Jessica Gonzales gave the police additional information about her estranged husband's threatening behavior, and that the police had independent knowledge of Mr. Gonzales' instability and criminal history, constituted an additional reason for the CRPD to take her complaint especially seriously.

4. Despite Having Probable Cause to Believe that Mr. Gonzales Violated the Restraining Order, the CRPD Failed to Take Appropriate Steps to Arrest Mr. Gonzales and Protect Jessica Gonzales and the Children.

Although the police had more than sufficient reason to believe that Mr. Gonzales had violated the restraining order and posed a threat to his children, they failed to take appropriate and necessary steps to arrest Mr. Gonzales and protect Jessica Gonzales and her children. Whether the CRPD profoundly misunderstood or simply disregarded the explicit instructions on the back of the restraining order and their specific obligations under Colorado's mandatory arrest law, their failures resulted in tragedy.

Many reasonable steps were available to the CRPD that could have averted this result. First, as discussed *supra*, the CRPD apparently did not check Mr. Gonzales'

criminal history on June 22, 1999. Had officers done so, they would have discovered that Mr. Gonzales' "rap sheet" contained his license plate number, which, as Jessica Gonzales told the CRPD, was a veterans' license plate that could be transferred between vehicles.⁷⁷ This information might have facilitated the search for Mr. Gonzales and his vehicle.

An unidentified and undated statement signed by Corporal Patricia Lisk, included as an exhibit to the United States' Response brief, indicates that the CRPD only obtained limited information on Simon's criminal record *just one minute* before Simon Gonzales began shooting at the CRPD at 3:24 a.m.⁷⁸ Corporal Lisk's statement notes that at 3:23 a.m. on June 23, 1999, she was advised that Mr. Gonzales had a suspended drivers' license and a non-extraditable warrant issued against him.⁷⁹ No explanation is given for why it took nearly 10 hours for the CRPD to obtain this routine information.

Second, the CRPD failed to notify other law enforcement agencies of the kidnapping. By 3:20 a.m. on June 23, 1999, the CRPD had been aware *for over nine hours* that the Gonzales children were missing and that they likely had been abducted by Mr. Gonzales. Yet the CRPD never issued an "Attempt to Locate" (ATL) bulletin or an All Points Bulletin ("APB"), as Jessica Gonzales had requested at 8:30 p.m. Although Officer Ahlfinger requested an ATL on Mr. Gonzales and his truck at around 1:40 a.m., no ATL was issued.⁸⁰ In fact, apparently no one at the CRPD – including an experienced dispatcher – was familiar with the procedure for entering an ATL onto the computer system.⁸¹ Corporal Patricia Lisk spent nearly two hours "call[ing] the Colorado Bureau

⁷⁷ See Dec. 11, 2006 Observations, *supra* note 3, at Ex. H: CRPD Individual Inquiry on Simon Gonzales at 158-59; see also *id.* at Ex. E: Gonzales Decl. ¶ 43.

⁷⁸ See U.S. Response, Tab G, *supra* note 72, at 7.

⁷⁹ *Id.*

⁸⁰ U.S. Response, Tab E, *supra* note 28; see also *id.* at 6.

⁸¹ *Id.*

of Investigation” and “looking at CBI manuals and trying to determine how to enter the information.”⁸²

Third, the CRPD also failed to issue a simple “teletype” to local law enforcement agencies alerting them of the emergency and requesting their assistance in locating the children and arresting Mr. Gonzales.⁸³ Although Corporal Lisk later said she “intended” to send out a Teletype, she “did not have a chance to do it before the shooting occurred.”⁸⁴ Furthermore, the CRPD did not file a missing persons report until around 1:40 a.m., almost eight hours after Jessica Gonzales first reported her children missing.⁸⁵

Throughout the course of the evening, the CRPD repeatedly downplayed and dismissed the serious nature of the emergency, sent Jessica Gonzales a distinct message that she was an unjustifiably distressed mother who was wasting their time, and failed to take the reasonable steps available to them to enforce the restraining order and protect Jessica Gonzales and her children.⁸⁶ Some of the most egregious examples of this behavior are set out below.

⁸² *Id.*

⁸³ Law enforcement organizations often use teletypes and other computerized systems to quickly disseminate information to the law enforcement and the media to assist with a recovery of a child. *See Press Conference on Abducted 9-year-old*, CNN.COM (Aug. 28, 2002), available at <http://transcripts.cnn.com/TRANSCRIPTS/0208/28/bn.14.html> (discussion of methods for finding abducted children by Assistant Chief of California Highway Patrol: “One is the EAS, the emergency alert system, which goes through the media, the crawlers across the television screens, that type of thing. There is the EDIS, which is the electronic digital information system, which is basically an electronic teletype system that gets information out to the media, to law enforcement, any one who can assist with a recovery of a child. There is also the track system, which is a system where we can put out photographs of abducted children on a statewide basis -- or actually on a national basis -- and that will go to hospitals, media, law enforcement, anywhere where information getting out on a child abduction can aid in the recovery of that child. And there is also the changeable message signs that you see along in the freeway.”).

⁸⁴ U.S. Response, Tab E, *supra* note 28, at 6.

⁸⁵ *Id.* at 3; U.S. Response, Tab G, *supra* note 72, at 4.

⁸⁶ Dec. 11, 2006 Observations, *supra* note 3, at Ex. E: Gonzales Decl. ¶ 58.

a. CRPD Dispatchers failed in their duties.

Following Jessica Gonzales' 8:30 p.m. call to inform the CRPD that Mr. Gonzales had taken her children to Elitch Gardens, two counties away, Dispatcher Cindy Dieck entered into the computer that Jessica Gonzales' children "had been found,"⁸⁷ even though Jessica Gonzales had *specifically informed Ms. Dieck about her restraining order* against Mr. Gonzales.⁸⁸ Ms. Dieck apparently assumed that the children must be safe if they were with their father, even though the restraining order clearly reflected a judicial determination otherwise. In fact, when Jessica Gonzales called again at around 10 p.m. to state that Mr. Gonzales had still not returned with her children, Ms. Dieck told Jessica Gonzales to call back on a non-emergency line, indicating that she did not take Jessica Gonzales's complaint seriously.⁸⁹ Ms. Dieck then went on to scold Jessica Gonzales, stating that it was "a little ridiculous making us freak out and thinking the kids are gone."⁹⁰ She ended the call quickly, directing Jessica Gonzales to call back if the children were still missing at midnight.⁹¹ Ms. Dieck inexplicably failed to enter this 10 p.m. call into the computer even though it is CRPD practice to do so.⁹²

This general disregard for Jessica Gonzales' situation was further demonstrated by the inadequate briefing that Ms. Dieck gave to the CRPD dispatchers that came on for the next shift about Jessica Gonzales' missing children. For instance, Ms. O'Neill, one of the dispatchers who relieved Ms. Dieck, did not even have basic information regarding

⁸⁷ U.S. Response, Tab E, *supra* note 28, at 7.

⁸⁸ *Id.* at 10 (statement from Dispatcher Cindy Dieck that "Dieck was advised that a restraining order was in effect.").

⁸⁹ *See* U.S. Response, Tab D, *supra* note 50, at 1.

⁹⁰ *Id.* at 2.

⁹¹ *Id.*

⁹² U.S. Response, Tab E, *supra* note 28, at 7, 10. The CRPD also did not enter the 3:25 a.m. shooting in the computer; *see id.* at 7. These unfortunate (and apparently common) oversights may help to explain why

the situation, including the number of children missing and contact information for Jessica Gonzales.⁹³ In addition, Ms. Dieck informed only Ms. O’Neill – a trainee dispatcher who was on her second night on the job – about Jessica Gonzales’ situation, in spite of the fact that Corporal Lisk, a more experienced dispatcher, was working that night and was present when Ms. Dieck answered a call from Jessica Gonzales to the CRPD.⁹⁴

b. CRPD Officers failed in their duties.

As discussed *supra*, the CRPD officers who responded to Jessica Gonzales’ cries for help dismissed the importance of the restraining order and their legal obligation to enforce it. For example, the evidence shows that Officer Brink (1) assumed that Mr. Gonzales did not violate the restraining order on June 22, 1999 because it permitted him to have a pre-arranged mid-week dinner visit with the children,⁹⁵ and (2) surmised that the document Jessica Gonzales had shown him⁹⁶ was a divorce decree, not a restraining order.⁹⁷ When Jessica Gonzales explained that Mr. Gonzales had abducted the children in violation of the restraining order that she had shown Officer Brink, he simply advised Jessica Gonzales to petition the court for a change in the custodial agreement, because

numerous calls that Jessica Gonzales made to the police on June 22 and 23, 1999 do not show up in the CRPD call log. See, e.g., Dec. 11, 2006 Observations, *supra* note 3, at Ex. E: Gonzales Decl. ¶¶ 38, 55, 65.

⁹³ Dec. 11, 2006 Observations, *supra* note 3, at Ex. B: Jessica Gonzales/Dispatch, Tape Transaction, CR# 99-3223 (approximately midnight call on June 23, 1999); see also *Id.* at Ex. E: Gonzales Decl. ¶ 65.

⁹⁴ U.S. Response, Tab E, *supra* note 28, at 5.

⁹⁵ See Dec. 11, 2006 Observations, *supra* note 3, at Ex. E: Gonzales Decl. ¶¶ 43-44 (“Officer Brink, holding [the restraining order] in his hands, glanced briefly at it and then said to me something along the lines of, ‘It says here that the children can have a mid-week dinner visit with their father.’ . . . Officer Brink then stated that there was nothing the police could do, since the children were with their father and the restraining order stated that he had a right to see them on weeknights.”).

⁹⁶ See Gonzales Petition, *supra* note 3, at Ex. A: May 21, 1999 Temporary Restraining Order; *id.* at Ex. B: June 4, 1999 Permanent Restraining Order.

⁹⁷ See U.S. Response, Tab C, *supra* note 42, at 3 (“See, I haven’t even seen a restraining order on, on this whole thing.”); see also Dec. 11, 2006 Observations, *supra* note 3, Exhibit E: Gonzales Decl., at ¶ 52.

Mr. Gonzales had “violated the . . . divorce decree.”⁹⁸ Had Officer Brink actually read the restraining order that he held in his hands,⁹⁹ he would have seen that Mr. Gonzales had violated a restraining order and not a divorce decree.

The police officers with whom Jessica Gonzales interacted on June 22 and 23, 1999 gave her the “distinct impression that the police viewed [her] as an unjustifiably distressed mother who was simply wasting their time.”¹⁰⁰ Her cries for help were met with disrespectful and irritated reactions from the officers. When she called the police at approximately 8:30 p.m. to inform Officer Brink that her children were at Elitch Gardens, he merely responded: “At least you know where your kids are right now.”¹⁰¹ Sergeant Ruisi, Officer Brink’s supervisor, apparently played no role in following up on the emergency situation or ensuring that Officer Brink did so. Finally, when a hysterical Jessica Gonzales arrived after midnight at the police station, after the girls had been missing for *over six hours*, Officer Ahlfinger met briefly with her.¹⁰² Instead of taking immediate and diligent steps to locate the missing children, Officer Ahlfinger went to dinner.¹⁰³

The police officers’ response to Jessica Gonzales clearly failed to comply with basic principles of policing, the terms of the restraining order, and Colorado’s mandatory arrest law, discussed *infra*.

⁹⁸ U.S. Response, Tab C, *supra* note 42, at 3.

⁹⁹ Dec. 11, 2006 Observations, *supra* note 3, at Ex. E: Gonzales Decl. ¶ 43.

¹⁰⁰ *Id.* ¶ 58.

¹⁰¹ U.S. Response, Tab C, *supra* note 42, at 3.

¹⁰² Dec. 11, 2006 Observations, *supra* note 3, at Ex. E: Gonzales Decl. ¶ 67-68; U.S. Response, Tab F.

¹⁰³ Dec. 11, 2006 Observations, *supra* note 3, at Ex. E: Gonzales Decl. ¶ 68; U.S. Response, Tab G, *supra* note 72, at 3.

c. The CRPD did not have conflicting emergencies that might have justified its failure to respond appropriately.

The CRPD had no pressing emergencies throughout the course of the evening from June 22 to 23, 1999, that might have justified their failure to respond to Jessica Gonzales. CRPD documents reflect that: (1) three police officers (of five that were on duty) were sent to a call concerning a fire lane violation at 11:45 p.m.;¹⁰⁴ (2) Officer Brink came to the CRPD at 12:04 a.m. “to work on paper;”¹⁰⁵ (3) two officers were sent to an apartment building at 12:08 a.m. to write tickets;¹⁰⁶ (4) two officers went to dinner at 2:30a.m.;¹⁰⁷ (5) at least two officers were off duty but on-call throughout the late night and early morning hours of June 22 and 23 (and were later summoned to the CRPD for backup after Mr. Gonzales’ shooting at 3:25 a.m.);¹⁰⁸ and (6) two dispatchers assisted a citizen in filling out a missing dog report at 2:30 a.m. and assisted other people “with several routine type calls” throughout the course of the evening.¹⁰⁹

5. In Failing to Take Steps to Enforce the Restraining Order, the CRPD Violated Basic Principles of Policing as Well as Colorado’s Mandatory Arrest Law.

The CRPD violated basic principles of policing as well as Colorado’s mandatory arrest law when it failed to take adequate steps to enforce the restraining order and protect Jessica Gonzales and her children.

¹⁰⁴ U.S. Response, Tab G, *supra* note 72, at 2.

¹⁰⁵ *Id.* at 3.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 5.

a. Basic policing principles developed by the International Association of Chiefs of Police directed the CRPD to take immediate action and initiate safety strategies.

“A Law Enforcement Officers’ Guide to Enforcing Orders of Protection Nationwide,” (hereinafter, “IACP Guide”) published by the International Association of Chiefs of Police, provides a useful framework for the steps that the CRPD should have taken to respond to Jessica Gonzales’ calls on June 22 and 23, 1999.¹¹⁰ Among the steps that the IACP Guide recommends that police officers take in cases such as Jessica Gonzales’ are the following:

(1) Immediate Action

- Ensure the safety of all involved
- Safeguard the victim from further abuse
- Enforce custody provisions in accordance with jurisdictional law and the language of the order
- Identify whether a restraining order has been violated
- Evaluate the validity and enforceability of the order
- Arrest for violation of the order where required by the enforcing jurisdiction
- Arrest for any other criminal offenses
- Seek an arrest warrant, when required, related to the criminal conduct if the abuser is not at the scene
- Attempt to locate and arrest the abuser

(2) Initiate Safety Strategies

- Notify victim of legal rights within enforcing jurisdiction
- Assess lethality
- Conduct safety planning with the victim
- When a child has been abducted in violation of a restraining order, seek return of the child
- Follow up with law enforcement and victim advocacy program

(3) Assess Lethality

¹¹⁰ See Dec. 11, 2006 Observations, *supra* note 3, at Ex. K: “A Law Enforcement Officers’ Guide to Enforcing Orders of Protection Nationwide” (*also available at*: <http://www.theiacp.org/research/ACF3068.pdf>).

Factors to consider in determining whether a potential for serious injury/lethality include:

- Threats of homicide/suicide
- History of domestic violence and violent criminal conduct
- Separation of parties
- Stalking
- Obsessive attachment to victim
- Drug or alcohol involvement
- Possession or access to weapons
- Destruction of victim's property
- Access to victim and victim's family and other supporters

These IACP principles were developed in light of a widespread failure of police departments to respond appropriately to domestic violence calls and the tragic effects such practices had on victims and their children.¹¹¹ The CRPD should have followed these principles on June 22 and 23, 1999. The signals that Simon Gonzales posed a threat to Jessica Gonzales and their children were clear to Jessica Gonzales and should have been clear to the CRPD. Had the CRPD followed these basic principles of policing in the context of domestic violence, they may have prevented the ultimate tragedy that befell the Gonzales family.

b. Colorado's "Mandatory Arrest" Law required the CRPD to arrest Simon Gonzales or seek a warrant for his arrest.

As described *supra*, the CRPD had an obligation under Colorado's mandatory arrest law to arrest or seek an arrest warrant for Simon Gonzales.¹¹² In adopting the state's mandatory arrest law, the Colorado General Assembly joined a nationwide movement of states that sought to redress the traditional perception of domestic violence

¹¹¹ See, e.g., Gonzales Petition, *supra* note 3, at Context and Patterns Section; see also Dec. 11, 2006 Observations, *supra* note 3, at Ex. L: Amicus Brief of National Network to End Domestic Violence in *Town of Castle Rock v. Gonzales*; *Id.* at Ex. Exhibit M: Amicus Brief of National Coalition against Domestic Violence in *Town of Castle Rock v. Gonzales*.

¹¹² COLO. REV. STAT § 18-6-803.5(3) (1999).

by law enforcement as a private, “family” matter as well as the traditional practice of only arresting domestic violence perpetrators as a last resort.¹¹³ In response to these realities, and encouraged by a 1984 experiment by the Minneapolis Police Department, “many states enacted mandatory arrest statutes under which a police officer must arrest an abuser when the officer has probable cause to believe that a domestic assault has occurred or that a restraining order has been violated.”¹¹⁴ The express purpose of these statutes was to “counter police resistance to arrests in domestic violence cases by removing or restricting police officer discretion; mandatory arrest policies would increase police response and reduce batterer recidivism.”¹¹⁵ Eliminating police discretion was integral to Colorado’s and other states’ solution to the problem of under-enforcement in domestic violence cases.¹¹⁶

Under the explicit terms of Colorado’s mandatory arrest law, the CRPD was obligated to enforce Jessica Gonzales’ restraining order on June 22 and 23, 1999. As Justice Stevens asserted in his dissent in Jessica Gonzales’ Supreme Court case,

Regardless of whether the enforcement called for in this case was arrest or the seeking of an arrest warrant (the answer to that question probably changed over the course of the night as the respondent gave the police more information about the husband’s whereabouts), the crucial point is that, under the statute, the police were required to provide enforcement; *they lacked the discretion to do nothing*. Under the statute, if the police have probable cause that a violation has occurred, enforcement consists of either making an immediate arrest or seeking a warrant

¹¹³ See Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1851 (2002) (describing “call us again” response as common means of ignoring or delaying response to victims of domestic violence); Machaela M. Hctor, *Domestic Violence as a Crime Against the State: The Need for Mandatory Arrest in California*, 85 CAL. L. REV. 643, 649 (1997) (“Police treatment of domestic abuse calls has traditionally consisted of ... purposefully delaying response, even for several hours...”). This historic police practice of ignoring and putting off victims of domestic violence is well-recognized, and is precisely why enforcement statutes like Colorado's are mandatory.

¹¹⁴ *Developments in the Law: Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1537 (1993).

¹¹⁵ Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1670 (2004).

¹¹⁶ *Gonzales*, 545 U.S. at 775.

and then executing an arrest—traditional, well-defined tasks that law enforcement officers perform every day.¹¹⁷

The CRPD’s inaction violated both the explicit language of the statute as well as the legislative intent.

6. Simon Gonzales Should Not Have Been Able To Purchase A Gun On June 22, 1999.

Federal law prohibits the sale of firearms to and the possession of firearms by individuals who are subject to a domestic violence restraining order.¹¹⁸ To ensure that restrained individuals are not able to purchase firearms, the Brady Handgun Violence Prevention Act of 1994 (“the Brady Law”),¹¹⁹ requires federally-licensed firearm dealers to check with a jurisdiction’s chief law enforcement officer before selling a firearm.¹²⁰ When conducting Brady background checks, law enforcement officials determine whether the buyer is prohibited from buying or possessing a firearm under federal or state law.¹²¹

In 1998, the United States Federal Bureau of Investigations (“FBI”) instituted the National Instant Criminal Background Check (NICS) to automate the background check process on sales of firearms by federally-licensed firearm dealers. The background check process varies depending on whether a state has agreed to have a state agency serve as a point of contact (POC) for the checks. In states that agree to conduct Brady background checks, the dealer contacts the state POC for a NICS check, rather than contacting the FBI, concerning prospective gun purchasers. A state POC will access the

¹¹⁷ *Id.* at 784-785 (emphasis in original).

¹¹⁸ 18 U.S.C. § 922(g)(8) (2008).

¹¹⁹ 18 U.S.C. §§ 921, *et seq.*

¹²⁰ 18 U.S.C. § 922(s)(1) (2008).

¹²¹ 18 U.S.C. § 922(s)(2) (2008).

state's independent criminal history database as well as the federal NICS system. While NICS provides access to millions of criminal history records from all 50 states and the District of Columbia, a state's database typically contains additional records which are not part of NICS. Thus, one must search both the NICS system and state databases to obtain a complete record on a prospective firearms purchaser. In states that have not agreed to serve as state POCs, the gun dealer directly contacts NICS, via a toll-free telephone number, to request a background check.¹²²

Until 1999, Colorado voluntarily participated in the POC program and designated the Colorado Bureau of Investigation ("CBI") as the state POC. In April 1999, the Colorado legislature cut funding for the POC background check program. After this time, federally-licensed firearms dealers in the state of Colorado contacted NICS to conduct background checks on firearms purchasers.¹²³ With this new system, gun dealers received far less comprehensive information on an individual's criminal history and outstanding restraining orders than when the state POC databases were also used. In this way, one fewer mechanism existed in Colorado to safeguard against domestic violence perpetrators accessing firearms.

On the evening of June 22, 1999, at around 7:10 p.m., Simon Gonzales, in the company of his three daughters, arrived at the home of William George Palsulich, a federally-licensed firearm dealer. Mr. Gonzales intended to buy the Taurus PT-99AF 9mm semi-automatic handgun that Mr. Palsulich had previously advertised in a

¹²² See BRADY CAMPAIGN: TO PREVENT GUN VIOLENCE, *The Brady Law: Preventing Crime and Saving Lives* (July 28, 2005) available at <http://www.bradycampaign.org/facts/issues/?page=bradylaw>.

¹²³ See Jimmy Wooten, *Open Letter to all Colorado Firearms Licensees Correction Notice*, available at <http://www.atf.treas.gov/firearms/bradylaw/states/colorado2.htm>.

newspaper.¹²⁴ He presented his driver's license and Mr. Palsulich called the required FBI NICS background check phone number, received a transaction number, and was told that the clearance would be delayed. Five minutes later, the FBI called Mr. Palsulich back and approved the transaction.¹²⁵ Mr. Gonzales subsequently purchased the gun.

7. No Adequate Investigation Was Ever Conducted into the Time, Place, Manner, or Circumstances Surrounding the Gonzales Children's Deaths.

In the wake of the deaths of Simon Gonzales and Rebecca, Leslie, and Katheryn Gonzales, several governmental agencies, including the Colorado Bureau of Investigation (CBI) and the Colorado Attorney General's Office (18th Judicial District), conducted investigations into the shooting death of Simon Gonzales. However, despite Jessica Gonzales' repeated requests for an investigation into the time, place, manner, and circumstances surrounding her daughters' deaths,¹²⁶ only cursory and inconclusive investigations were conducted.¹²⁷ The investigations into Simon Gonzales' death summarily concluded that he had murdered his children before the shootout at the CRPD station,¹²⁸ yet provide little evidence to substantiate this conclusion. Moreover, the

¹²⁴ This information was provided by Mr. Palsulich to the 18th Judicial District Critical Incident Team during an interview carried out by Detectives Bobbie Garret and Christian Contos on June 23, 1999; see Dec. 11, 2006 Observations, *supra* note 3, Ex. N: Interview with William George Palsulich by 18th Judicial District Critical Incident Team Detectives Bobbie Garret and Christian Contos, June 23, 1999.

¹²⁵ *Id.*

¹²⁶ Dec. 11, 2006 Observations, *supra* note 3, Ex. E: Gonzales Decl. ¶¶ 75-78; see also Tina Rivera Decl., Ex. A at ¶¶ 8-9 (filed herewith).

¹²⁷ While Colorado officials did do some investigatory work, many basic questions remain unanswered. For example, documents show that investigators inserted trajectory rods into the truck to follow the path of the police bullets (Colorado Bureau of Investigation: Report of Investigation, prepared by Agents J. Clayton, Jr. & D. Sollars, July 19, 1999, Ex. B at 3 (hereinafter "Colorado Bureau of Investigation: Report"); investigators searched Simon's apartment and dumpster near his apartment (18th Judicial Critical Incident Team Shooting of Simon Gonzales Castle Rock PD Case #99-3226, Ex. C at 32, 34); police searched Simon's cell phone records (Parker Police Department Case Follow-Up/Continuation, July 6, 1999, Ex. D); and inconclusive autopsies were performed on the bodies of the three girls (Douglas County Coroner's Report: Rebecca Gonzales, Ex. E; Douglas County Coroner's Report: Katheryn Gonzales, Ex. F; Douglas County Coroner's Report: Leslie Gonzales, Ex. G) (filed herewith).

¹²⁸ 18th Judicial Critical Incident Team Shooting of Simon Gonzales Castle Rock PD Case #99-3226, Ex. C at 37; Letter to Colorado Bureau of Investigations from Agents Contos and Vanecek, June 28, 1999, Ex. H.

investigatory reports raise more questions than answers concerning the circumstances surrounding the death of the girls. For example, despite the documents and information obtained from Colorado authorities by Petitioner, there is insufficient evidence to determine whether CRPD bullets struck and/or killed Rebecca, Katheryn, and Leslie Gonzales.

As illustrated by the following facts, the official documents raise many unanswered questions and demonstrate the inadequate nature of the investigation into Rebecca, Katheryn, and Leslie's deaths:

- The Castle Rock County Sheriff reported on June 23, 1999, that bullet material, casings, and projectiles were found on the floor of the truck.¹²⁹ It is unclear from the documents Colorado provided to Petitioner whether all these listed items collected at the scene were examined by experts.¹³⁰ Thus, it is unclear if it was officially determined which objects came from police guns and which came from Simon Gonzales' gun.
- According to the Colorado Bureau of Investigations, though “no .45 [bullet] casings were located inside the truck, [n]o field identification was attempted on any of the metal fragments recovered from the vehicle.”¹³¹ This suggests that potentially important evidence was not thoroughly examined by officials.
- After the shooting, Simon Gonzales' truck was “removed by Tom Johanns of West Side Towing” for “long term storage” and “possible further examination for bullet holes.”¹³² However, despite Petitioner's repeated requests for this

¹²⁹ Douglas County Sheriff: Property/Evidence Log, June 23, 1999, Ex. I.

¹³⁰ Colorado Bureau of Investigation: Official Request for Laboratory Examination, June 29, 1999, Ex. J.

¹³¹ Colorado Bureau of Investigation: Report, *supra* note 127, at 5.

¹³² *Id.* at 12, 22.

information, there is no record of this examination ever taking place. Additionally, it is unclear from official documents what procedure and timeline were followed in disposing of Mr. Gonzales' truck.

- Crime scene drawings show bullet holes in the truck near at least one girl's head.¹³³ These drawings call into question the official conclusion that no police bullets hit the children.¹³⁴
- The 18th Judicial District's Report states that "the exact location of the homicides of the children has not been determined."¹³⁵ Yet none of the official documents obtained by Petitioners suggests that a vigorous investigation was conducted to ascertain this information. Jessica Gonzales continues to seek this information to this day.
- Helen Pipes, who lived in an apartment building near the police station, reported that she heard "a young girl screaming from outside the building" sometime after 3:00 a.m.¹³⁶ Immediately after, she heard "several gunshots, followed by the sound of sirens." Ellen Eloise Walls reported to police that she heard a possibly female voice say, "help me, help me" during the exchange of fire, and her mother-in-law, Jacqueline Regan, thought she heard someone yell "help me," but could not tell whether the voice was male or female.¹³⁷ Rosemary Young, who heard

¹³³ *Id.* at 36.

¹³⁴ 18th Judicial Critical Incident Team Shooting of Simon Gonzales Castle Rock PD Case #99-3226, Ex. C at 37; Letter to Colorado Bureau of Investigations from Agents Contos and Vanecek, June 28, 1999, Ex. H.

¹³⁵ 18th Judicial Critical Incident Team Shooting of Simon Gonzales Castle Rock PD Case #99-3226, *supra* note 134, at 37.

¹³⁶ *Id.* at 17 (Canvass of Reyn Rock Apartments, Interview with Helen Pipes).

¹³⁷ *Id.* at 16 (Interview with Ellen Eloise Walls); *id.* at 17 (Interview with Jacqueline Regan).

the exchange of gunfire while on the phone with the CRPD, also heard a scream during the exchange, although she did not specify who screamed.¹³⁸

- The 18th Judicial District’s Critical Incident Team report and a letter written by CRPD agents state that Simon Gonzales shot his daughters and no police bullets entered the girls.¹³⁹ However, the available information regarding the circumstances of the shooting at the police station call this assumption into question. Each girl was shot in her head and chest from multiple angles.¹⁴⁰ In particular, Rebecca had entrance wounds on both her left chest and her right temple,¹⁴¹ and Katheryn had entrance wounds on the left side of her face, her left upper chest, and her right chest.¹⁴² In addition, the coroner stated that Katheryn had a “graze wound” on the ring finger of her left hand.¹⁴³ These facts do not easily reconcile with the official conclusion that the wounds on the girls bodies all resulted from Simon shooting the sleeping girls at close range while sitting in his truck¹⁴⁴ or that the hail of police bullets directed at Simon’s truck on the morning of June 23, 1999 managed to completely miss the three girls inside Simon’s truck.¹⁴⁵

¹³⁸ *Id.* at 23 (Interview with Rosemary Ann Young).

¹³⁹ *Id.* at 37; Letter to Colorado Bureau of Investigations from Agents Contos and Vanecek, June 28, 1999, Ex. H.

¹⁴⁰ Douglas County Coroner’s Report: Rebecca Gonzales, Ex. E at 2; Douglas County Coroner’s Report: Katheryn Gonzales, Ex. F at 2; Douglas County Coroner’s Report: Leslie Gonzales, Ex. G at 2.

¹⁴¹ Douglas County Coroner’s Report: Rebecca Gonzales, Ex. E at 2.

¹⁴² Douglas County Coroner’s Report: Katheryn Gonzales, Ex. F at 2.

¹⁴³ *Id.*

¹⁴⁴ 18th Judicial Critical Incident Team Shooting of Simon Gonzales Castle Rock PD Case #99-3226, *supra* note 134, at 37.; Letter to Colorado Bureau of Investigations from Agents Contos and Vanecek, June 28, 1999, Ex. H.

¹⁴⁵ *Id.*

- The official death certificates for Rebecca, Katheryn, and Leslie state that the girls died on June 23, 1999 at an unknown time.¹⁴⁶ However, there is no evidence in the official reports that investigators attempted to or were able to ascertain whether the girls were killed on the night of June 22, 1999 or early in the morning on June 23, 1999. The ambiguities on the death certificates suggest that official investigations have not adequately probed the circumstances of the children's deaths.

In addition to the above, Colorado and Castle Rock officials have not fully complied with Jessica Gonzales' open records law and FOIL requests.¹⁴⁷ For example, officials have not provided requested photos of the autopsies and crimes scene, or information on the disposal of Simon Gonzales' truck. Moreover, officials never responded to Petitioners' repeated requests for information on the circumstances surrounding the Gonzales children's deaths.¹⁴⁸

8. Jessica Gonzales Has Experienced Great Trauma as a Result of the Tragic Deaths of her Daughters and Due to the Unanswered Questions that Remain About Their Deaths.

Jessica Gonzales and her family were and remain deeply traumatized by the deaths of Katheryn, Rebecca, and Leslie Gonzales. Had Ms. Gonzales known that the police would do nothing to locate her children or enforce the terms of her restraining order, she would have done more herself to locate the children that night and perhaps would have succeeded in averting this tragedy. Her sense of loss has been exacerbated

¹⁴⁶ State of Colorado Certificate of Death: Rebecca Gonzales, Ex. K; State of Colorado Certificate of Death: Katheryn Gonzales, Ex. L; State of Colorado Certificate of Death: Leslie Gonzales, Ex. M.

¹⁴⁷ Petitioners have requested additional information through Colorado Open Records Law requests but have received only limited information in response. See Dec. 11, 2006 Observations, *supra* note 3, at n. 10, 14.

¹⁴⁸ See Tina Rivera Decl., *supra* note 125, Ex. A at ¶¶ 8-9.

by the failure of Colorado and federal authorities to adequately investigate her daughters' deaths and provide information that she desperately seeks. Ms. Gonzales suffered and continues to suffer from the consequences of that night, and has undergone extensive counseling for her trauma. As documented in the Declaration of Ms. Gonzales' mother, Tina Rivera, the entire family has experienced great trauma, and feels that closure to their tragedy will only come once questions surrounding the girls' deaths are answered and responsibility is properly allocated.¹⁴⁹

B. Domestic Procedural Background.

As described in greater detail in her Petition, Jessica Gonzales filed a lawsuit under 42 U.S.C. § 1983 (a federal civil rights statute) against the CRPD and certain individual officers in Federal District Court in Colorado, alleging due process violations of the Fourteenth Amendment to the United States Constitution.¹⁵⁰ Before reaching discovery or trial her case was dismissed. After several appeals, her case was ultimately rejected by the United States Supreme Court, where Justice Scalia, writing for the majority, held that Ms. Gonzales had no personal entitlement under the due process clause to police enforcement of her restraining order.¹⁵¹ Despite the Colorado legislature's repeated use of the word "shall" in the mandatory arrest law, the Court explained, "[w]e do not believe that these protections of Colorado law truly made enforcement of restraining orders *mandatory*."¹⁵² The Court also refused to assume that the statute was intended to give victims "a personal entitlement to something as vague and novel as enforcement of restraining orders," rather than simply to protect the public

¹⁴⁹ *See Id.*

¹⁵⁰ Gonzales Petition, *supra* note 3, at 13-20.

¹⁵¹ *Gonzales*, 545 U.S. at 768.

¹⁵² *Id.* at 760 (emphasis in original).

interest in punishing criminal behavior.¹⁵³ After the Supreme Court's decision, Jessica Gonzales had exhausted all legal avenues in the United States court system.

C. Proceedings Before the Inter-American Commission.

Ms. Gonzales submitted a petition to the Inter-American Commission on December 23, 2005, and amended the petition on January 12, 2006. In the Petition and Amended Petition (collectively, "Gonzales Petition"), Petitioners made the following claims on Ms. Gonzales' behalf: (i) that Ms. Gonzales has exhausted domestic remedies; (ii) that the State, in failing to take reasonable measures to prevent the deaths of Ms. Gonzales' three daughters and in denying Ms. Gonzales access to U.S. courts and to a remedy for the inaction of the Castle Rock police officers, has violated the rights to life, liberty and security of the person, the right to equal protection and non-discrimination, the right to protection against abusive attacks on family life, the right to establish a family life, the right to protection for mothers and children, the right to inviolability of the home, and the right to petition the government and resort to courts, enshrined in Articles I, II, V, VI, VII, IX, XVII, and XXVI of the American Declaration.

On September 22, 2006, the United States responded to the petition. In its response, the State asserted that Ms. Gonzales' claims were inadmissible on the following grounds: (i) that the American Declaration does not create legally binding obligations on the State; (ii) that the Petitioners have failed to meet the requirement of exhaustion of domestic remedies; (iii) and that, in any event, the petition does not state facts that would amount to a violation of the Declaration. Petitioners received the U.S. Response Brief on September 27, 2006 and the accompanying exhibits the U.S. Response Brief on October 6, 2006. On December 11, 2006, Petitioners delivered a reply to the State's response.

¹⁵³ *Id.* at 766.

On December 18, 2006 Petitioners requested, and on February 2, 2007 Petitioners were granted a Hearing on the Admissibility of the Petition. On March 2, 2007 a hearing was convened before the Commission in Washington, D.C. Following oral submissions on behalf of Petitioner and the State, the Commission President requested additional Observations of the parties pertinent to exhaustion of domestic remedies. Petitioner provided this information on May 14, 2007, but the State either omitted or declined to furnish same.

By a decision dated July 24, 2007, the Commission declared Ms. Gonzales' Petition admissible on all grounds except Article IX. Counsel for Ms. Gonzales received a copy of the Admissibility Decision on October 5, 2007. The Commission, by letter dated October 4, 2007, requested both Petitioner and the United States to submit any additional observations they might have by December 4, 2007. Petitioners requested additional time to file a petition on the merits that would include additional observations relevant to the merits. Ms. Gonzales now files her written brief on the merits.

III. CONTEXT AND PATTERNS

Domestic violence is a distinctive and complex type of violence. The intimate relationship between the victim and the perpetrator is historically construed as private—beyond the scope of law—and the often hidden site of the violence buttresses this conceptualization. The victim is often financially dependent on her abuser and other contributing economic and familial factors complicate victims’ responses to abuse. Moreover, women who complain of domestic violence frequently face intimidation, retaliation and stigmatization, and thus, incidents of domestic violence are notoriously under-reported and prosecuted throughout the world, including the United States.

Any meaningful analysis of the nature and content of the United States’ obligations with respect to domestic violence must flow from a comprehensive understanding of the ubiquitous reality of the phenomenon that States are obliged to address.¹⁵⁴ Until the United States puts into place effective preventative and remedial measures to eradicate violence against women within its borders, the promise of women’s rights in the United States and the world at large will remain a dream deferred.

A. Domestic Violence in the United States Generally.

Each year between one and five million women in the United States suffer nonfatal violence at the hands of an intimate partner.¹⁵⁵ To varying degrees domestic violence affects individuals in every racial, ethnic, religious, and age group and at every

¹⁵⁴ See *Report of the Secretary-General: In Depth Study on All Forms of Violence Against Women*, §§ 112-113, delivered to the General Assembly, U.N. Doc. A/61/122/Add.1 (July 6, 2006) (the Secretary General’s Report defines domestic violence as to include a spectrum of sexually, psychologically and physically coercive acts used against women by a current or former intimate partner without her consent).

¹⁵⁵ CENTERS FOR DISEASE CONTROL AND PREVENTION (HEREINAFTER “CDC”), COSTS OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN IN THE UNITED STATES 18 (2003) (estimating 5.3 million intimate partner assaults against women in the United States each year); PATRICIA TJADEN & NANCY THOENNES,

income level, in rural, suburban, and urban communities. Notwithstanding the prevalence of domestic violence across demographic categories, it is overwhelmingly a crime perpetrated against women. In fact, women are five to eight times more likely than men to be the victims of domestic violence.¹⁵⁶ The United States Department of Justice reports that between 1998 and 2002 in the United States, 73% of family violence victims were female, 84% of spouse abuse victims were female and 86% of victims of violence committed by a boyfriend or girlfriend were female.¹⁵⁷

As discussed in the Gonzales Petition, not only are women more likely than men to experience domestic violence, but the difference in the rate of physical assault of women and men by intimate partners increases substantially as the seriousness of the assault increases.¹⁵⁸ Further, women are far more likely than men to be the victims of battering at the hands of an intimate partner resulting in death.¹⁵⁹ In 1996 alone, over 1,800 murders were attributed to intimates, and nearly 75% of those victims were women.¹⁶⁰ In the United States, more than three women are murdered by their husbands or boyfriends every day and approximately one-third of the women murdered each year are killed by an intimate partner.¹⁶¹ According to an estimate by the Centers for Disease

EXTENT, NATURE AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN STUDY 26 (2000).

¹⁵⁶ LAWRENCE A. GREENFELD, ET AL., VIOLENCE BY INTIMATES 38 (1998).

¹⁵⁷ MATTHEW R. DUROSE, ET AL., FAMILY VIOLENCE STATISTICS 1, 10 (2005) Family violence is defined as any crime in which the victim or offender are related by blood, marriage, or adoption. It thus includes violence by parents against children, violence between siblings, violence by a husband against his wife, *etc.*, but does not include violence between unmarried partners.. See also Gonzales Petition, *supra* note 3, at 21 n. 53.

¹⁵⁸ See Gonzales Petition, *supra* note 3, at 21-22.

¹⁵⁹ See COLORADO COALITION AGAINST DOMESTIC VIOLENCE, LAW ENFORCEMENT TRAINING MANUAL 1-5 (2d ed. 2003) (reporting that 42% of all female homicide victims were killed by an intimate partner); CDC, SURVEILLANCE FOR HOMICIDE AMONG INTIMATE PARTNERS (2001) (finding that domestic violence murders account for 33% of all female murder victims and only 5% of male murder victims).

¹⁶⁰ GREENFELD, *supra* note 156, at 1.

¹⁶¹ SENATOR JOSEPH R. BIDEN, JR., TEN YEARS OF EXTRAORDINARY PROGRESS: THE VIOLENCE AGAINST WOMEN ACT (2004).

Control and Prevention, from 1981 to 1998, the number of domestic violence fatalities in the United States exceeded 300,000.¹⁶²

Government sources indicate that one-third of women in the United States experience at least one physical assault at the hands of an intimate partner during the course of adulthood.¹⁶³ Due to feelings of shame and fear of retribution, this statistic may significantly underestimate the incidence of domestic violence in the United States. The historical characterization of domestic violence as a “private” or family matter may also be a contributing factor to the underreporting of the incidence of domestic violence.¹⁶⁴

Not all women in the United States experience domestic violence with the same frequency. The data suggests that although the domestic violence epidemic cuts across the lines of gender, race, and immigration status – affecting women and men, minorities and whites, and immigrants and U.S. citizens – it has a particularly pernicious effect on one group that lies at the intersection of these categories: poor immigrant and minority women.

While poor minority and immigrant battered women in the United States are among those most in need of governmental support and services, including domestic violence services, these groups are in fact those most underserved.¹⁶⁵ This greater need

¹⁶² CDC, *supra* note 155. Similar statistics in other states reveal the extent of domestic violence-related fatalities across the United States. *See, e.g.*, California Criminal Justice Statistics Center (CJSC), *Review of Domestic Violence Statistics* (recording 187 domestic violence homicides in California in 2003); Chicago Police Department, *Quarterly Domestic Violence Statistical Summary, Year-to-Date* (June 2005) (reporting 17 domestic violence homicides in the first six months of 2005 for the city of Chicago).

¹⁶³ BIDEN, *supra* note 161, at 30. According to the National Institute of Justice and the Centers for Disease Control, 26% of women, compared to 8% of men, report having been assaulted by an intimate partner in their lifetime. TJADEN & THOENNES, *supra* note 155, at 9.

¹⁶⁴ *See* KERRY MURPHY HEALEY & CHRISTINE SMITH, RESEARCH IN ACTION, BATTERER PROGRAMS: WHAT CRIMINAL JUSTICE AGENCIES NEED TO KNOW 1, 2 (1998) (noting that some researchers estimate that “as many as six in seven domestic assaults go unreported”).

¹⁶⁵ *See* Committee on the Elimination of Racial Discrimination, Concluding Observations, CERD/C/USA/CO/6 ¶ 26(March 7, 2008) (“not[ing] with concern that the alleged insufficient will of federal and state authorities to take action with regard to [gender-based] violence and abuse often deprives

for an effective government response is due, in large part, to the social, familial, and financial isolation that is a reality for so many minority and immigrant women.¹⁶⁶ Nationwide, black women victims report their victimization to the police at a higher rate (67%) than white women (50%), black men (48%), and white men (45%).¹⁶⁷ African American women account for 16% of the women reported to have been physically abused by a husband or partner in the last five years, but were the victims in more than 53% of the violent deaths that occurred in 1997.¹⁶⁸ A recent study found that 51% of intimate partner homicide victims in New York City were foreign-born.¹⁶⁹ Another study determined that 48% of Latinas reported that their partner's violence against them had increased since they immigrated to the United States.¹⁷⁰

The greater level of reported domestic violence among African-Americans, Latinos, and immigrants is attributable, in large part, to the extreme levels of poverty in

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”).

¹⁶⁶ The vast majority of New York City's Family Court's litigants are minority and immigrant individuals. Leah A. Hill, *Do You See What I See?*, 40 COLUM. J.L. & SOC. PROBS 527, 530, n. 4 (2007) (“While there are no reliable data on the demographics of Family Court users, an informal survey of self-represented Family Court litigants in all five boroughs provides a powerful depiction: of the 1857 respondents surveyed, 48% identified themselves as African-American, 4% Asian, 31% Hispanic, and as or Native American or Other.”) (citing OFF. OF THE DEPUTY CHIEF ADM’R FOR JUSTICE INITIATIVES, SELF REPRESENTED LITIGANTS: CHARACTERISTICS, NEEDS, SERVICES 3 (Dec. 2005), *available at* http://nycourts.gov/reports/AJJI_SelfRep06.pdf). Significantly, none of the users identified themselves as White. *See id.*

¹⁶⁷ C.M. RENNISON & S. WELCHANS, A SPECIAL REPORT OF THE BUREAU OF JUSTICE STATISTICS, INTIMATE PARTNER VIOLENCE (MAY 2000).

¹⁶⁸ WOMEN’S INSTITUTE FOR LEADERSHIP DEVELOPMENT FOR HUMAN RIGHTS, THE TREATMENT OF WOMEN OF COLOR UNDER U.S. LAW 1 (2001), *available at* <http://www.wildforhumanrights.org/pdfs/treatmentwomen.pdf> (*quoting* 107, 1st 147 Cong Rec H 1 s003 3/20/01).

¹⁶⁹ NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE, FEMICIDE IN NEW YORK CITY: 1995-2002 (2004), *available at* http://www.nyc.gov/html/doh/downloads/pdf/ip/femicide1995-2002_report.pdf.

¹⁷⁰ Mary Dutton, et al., *Characteristics of Help-Seeking Behaviors, Resources, and Services Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. AND POL’Y 245 (2000).

minority and immigrant communities.¹⁷¹ African Americans, Latinas, and Latinos make up 22.8% of the population, but account for 47.8% of those living in poverty.¹⁷² Poor women experience victimization by intimate partners at much higher rates than women with higher household incomes; in the United States between 1993 and 1998, women with annual household incomes of less than \$7,500 were nearly seven times as likely as women with annual household incomes over \$75,000 to experience domestic violence.¹⁷³ Data indicate that women are at much greater risk of domestic violence when their partners experience job instability or when the couple reports financial strain.¹⁷⁴ Abuse has also been found to be more common among young, unemployed urban residents – a large percentage of whom are racial minorities and immigrants.¹⁷⁵ The majority of homeless women were once victims of domestic violence,¹⁷⁶ and more than half of all women receiving public assistance were once victims of domestic violence.¹⁷⁷ Though

¹⁷¹ NATALIE J. SOKOLOFF & IDA DUPONT, *Domestic Violence at the Intersections of Race, Class, and Gender: Challenges and Contributions to Understanding Violence Against Marginalized Women in Diverse Communities*, 11 *Violence Against Women* 38, 48 (2005), available at <http://vaw.sagepub.com/cgi/content/abstract/11/1/38>.

¹⁷² ANANNYA BHATTACHARJEE, WHOSE SAFETY? WOMEN OF COLOR AND THE VIOLENCE OF LAW ENFORCEMENT 18 (2001) available at <http://www.afsc.org/community/WhoseSafety.pdf> (citing CHRISTIAN PARENTI, LOCKDOWN AMERICA: POLICE AND PRISONS IN THE AGE OF CRISIS (1999)).

¹⁷³ Tjaden & Thoennes, *supra* note 155; see also Sokoloff & Dupont, *supra* note 171, at 44 (citing Benson & Fox, 2004; *infra*; Browne & Bassuk, 1997, *infra*; Hampton, Carillo, & Kim, 1998; Raphael, 2000; Rennison & Planty, 2003; Websdale, 1999); West, C. M. (2005). Domestic violence in ethnically and racially diverse families: The “political gag order” has been lifted, in NATALIE SOKOLOFF, DOMESTIC VIOLENCE AT THE MARGINS: A READER AT THE INTERSECTIONS OF RACE, CLASS, GENDER, AND CULTURE 157-73 (2005) (discussing how the most severe and lethal domestic violence occurs disproportionately among low-income women of color).

¹⁷⁴ MICHAEL L. BENSON & GREER LITTON FOX, U.S. DEP’T OF JUSTICE, NAT’L INST. OF JUSTICE, WHEN VIOLENCE HITS HOME: HOW ECONOMICS AND NEIGHBORHOOD PLAY A ROLE 2 (2004).

¹⁷⁵ R. Hampton, et. al., *Violence in Communities of Color*, in FAMILY VIOLENCE AND MEN OF COLOR: HEALING THE WOUNDED MALE SPIRIT 1-30 (Richard Carrillo & Jerry Tello eds., 1998); West, C. M., *Domestic violence in ethnically and racially diverse families: The “political gag order” has been lifted*, in NATALIE SOKOLOFF, DOMESTIC VIOLENCE AT THE MARGINS: A READER AT THE INTERSECTIONS OF RACE, CLASS, GENDER, AND CULTURE 157-73 (2005).

¹⁷⁶ A. Browne & S. Bassuk, *Intimate Violence in the Lives of Homeless and Poor Housed Women: Prevalence and Patterns in an Ethnically Diverse Sample*, 67 *AM. J. OF ORTHOPSYCHIATRY* 261-278 (1997).

¹⁷⁷ ELEANOR LYON, POVERTY, WELFARE AND BATTERED WOMEN: WHAT DOES THE RESEARCH TELL US? (1998), available at <http://www.mincava.umn.edu/documents/welfare/welfare.pdf>.

accurate statistics on the intersection of race and gender in the homeless population and the population of those receiving public assistance in the United States are not available, statistics do demonstrate that racial minorities make up the majority of the homeless population¹⁷⁸ and that the majority of women receiving public assistance are racial minorities.¹⁷⁹

Thus, poverty, age, employment status, residence, and social position – not race or culture, per se – may combine to explain the higher rates of abuse within certain ethnic communities.¹⁸⁰ Yet race remains salient because of its inextricable connection with these other factors. Further, data suggest that women are at greater risk of domestic violence when their intimate partners are experiencing instability in the workplace or when couples report financial hardship.¹⁸¹

In 1992, the United States Supreme Court recognized that a staggering 4 million women in the U.S. suffered severe assaults at the hands of their male partners each year and that between one-fifth and one-third of all women will be the victims of domestic violence in their lifetime.¹⁸² Since at least this time, the United States government has been well aware of the scope and severity of domestic assault. Two years later, the United States Congress passed the Violence Against Women Act, reauthorizing and

¹⁷⁸ National Coalition for the Homeless, “Who is Homeless?: Fact sheet,” *available at* <http://www.nationalhomeless.org/publications/facts.html> (stating that the homeless population was 49% African-American, 35% Caucasian, 13% Hispanic, 2% Native American, and 1% Asian in 2004.)

¹⁷⁹ Poverty and Welfare Fact File, *available at* http://www.publicagenda.org/issues/factfiles_detail.cfm?issue_type=welfare&list=13 (retrieved Nov. 10, 2007) (citing “Temporary Assistance for Needy Families’ Fifth Annual Report to Congress,” February 2004, Administration for Children and Families) (reporting that, of recipients of Temporary Assistance for Needy Families, 38.3% are African-American and 24.9% are Hispanic); United States Department of Health and Human Services, “Indicators of Welfare Dependence: Annual Report to Congress 2007,” *available at* <http://aspe.hhs.gov/hsp/indicators07/ch2.htm>.

¹⁸⁰ SOKOLOFF & DUPONT, *supra* note 171, at 48.

¹⁸¹ MICHAEL L. BENSON & GREER LITTON FOX, WHEN VIOLENCE HITS HOME: HOW ECONOMICS AND NEIGHBORHOOD PLAY A ROLE 2 (2004).

¹⁸² Planned Parenthood v. Casey, 505 U.S. 833, 891 (1992).

expanding it in 2000 and again in 2005 (collectively “VAWA”). As discussed in the Gonzales Petition, VAWA funds a wide variety of important programs and victim services aimed to address domestic violence in the United States.¹⁸³

In the years prior to VAWA, Congress, through hearings, testimony, and reports, brought together a significant body of research on violence against women and its societal effects in the United States. For instance, Congress found that up to 50% of homeless women and children are homeless because they are fleeing domestic violence and that “battering ‘is the single largest cause of injury to women in the United States.’”¹⁸⁴ Congress further noted that “arrest rates may be as low as 1 for every 100 domestic assaults.”¹⁸⁵ More recently, in 2002, President George W. Bush noted that in 2000 “almost 700,000 incidents of violence between partners were documented in our Nation, and thousands more [went] unreported. And in the past quarter century, almost 57,000 Americans were murdered by a partner.”¹⁸⁶ Again and again, before and after passage of VAWA, public statements by United States officials and agencies reiterate the grievousness of domestic violence and the heavy toll it inflicts on the country.

B. Law Enforcement’s Response to Domestic Violence in the United States

¹⁸³ Gonzales Petition, *supra* note 3, at 24.

¹⁸⁴ S. Rep. No. 101-545, at 37 (1990) (quoting Van Hightower & McManus, *Limits of State Constitutional Guarantees: Lessons from Efforts to Implement Domestic Violence Policies*, 49 PUB. ADMIN. REV. 269 (1989)).

¹⁸⁵ S. Rep. No. 101-545, at 38 (citing D.G. Dutton, *Profiling of Wife Assaulters: Preliminary Evidence for Trimodal Analysis*, 3 VIOLENCE AND VICTIMS 5-30 (1988)).

¹⁸⁶ Proclamation No. 7601, 67 Fed. Reg. 62,169 (Oct. 1, 2002); *see also* Proclamation No. 7717, 68 Fed. Reg. 59,079 (October 8, 2003).

The proliferation of criminal laws against domestic violence and the enforcement of them are not alone sufficient to provide women in violent relationships with resources to escape from abuse and protect their families. Effective law enforcement responses to those victims who seek police assistance, however, are a necessary and crucial component of government efforts to ensure the human rights of victims of domestic violence and their families. To fully understand the failure of the United States to comply with its obligation to combat domestic violence through law enforcement, it is necessary to understand how discourse about family violence has developed over time, and specifically, the historical characterization of domestic violence as belonging to the “private sphere” and the consequences thereof.

In the United States, domestic violence traditionally was conceptualized as a private or family matter beyond the purview of the state. Unfortunately, normative legal frameworks historically reinforced this characterization of domestic violence as primarily a private concern, and thus further entrenched the unwillingness of police to “interfere” in domestic disputes. Mischaracterization of domestic violence within the public/private dichotomy has been consistently identified as one of the main obstacles to the effective prevention of domestic violence.¹⁸⁷

While “wifebeating” was legally prohibited by the end of the nineteenth century, because domestic violence typically took place within the confines of the home, in

¹⁸⁷ See U.N. Econ. & Soc. Council (“ECOSOC”), Comm. on Human Rights, *The Due Diligence Standard as a Tool for the Elimination of Violence Against Women: Report of the Special Rapporteur on Violence Against Women*, § 59, U.N. Doc. E/CN.4/2006/61 (January 20, 2006) (prepared by Yakin Ertürk); see also In-Depth Study of the Secretary-General, *supra* note 154, at § 95; *María Eugenia Morales de Sierra v. Guatemala*, Case 11.625, Inter-Am. C.H.R., Report No. 4/01, OEA/Ser.L/V/II.95 Doc. 7 rev. §§ 44, 45, 52, 54; *Access to Justice for Women Victims of Violence in the Americas*, Inter-Am. C.H.R., OEA/Ser.L/V/II, Doc. 68 (Jan. 20, 2007) § 60.

practice police and courts would rarely interfere.¹⁸⁸ This laissez-faire policy of noninterference was thought “to protect the privacy of the family and to promote ‘domestic harmony.’”¹⁸⁹ In the 1960s and 70s, the feminist movement brought increased attention to the problem of domestic violence.¹⁹⁰ Despite a new level of public discourse about domestic violence, however, police policy and practice continued to address domestic violence as a private matter rather than a crime. Ignoring the power imbalance between the victim and her assailant and the criminal behavior of the abuser, police officers were routinely advised to encourage informal resolutions of domestic violence complaints.¹⁹¹ In a 1984 report issued by the U.S. Attorney General’s Task Force on Family Violence, the government concluded that the failure of law enforcement to treat domestic violence as a crime was a primary impediment to addressing domestic violence in the United States effectively.¹⁹²

In an effort to require police to effectively respond to domestic violence in the face of resistance by law enforcement to treating domestic violence as a crime, beginning as early as 1970, states across the country began to adopt legislation permitting judges to issue civil restraining orders (also known as orders of protection) to victims of domestic violence who demonstrate that they fear physical harm from their abuser.¹⁹³ Today, all

¹⁸⁸ Betsy Tsai, Note, *The Trend Toward Specialized Domestic Violence: Improvements on an Effective Innovation*, 68 FORDHAM L. REV. 1285, 1289-90 (2000).

¹⁸⁹ Reva B. Siegal, *The Rule of Love: Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2118 (1996).

¹⁹⁰ See e.g., Marion Wanless, Note, *Mandatory Arrest: A Step Toward Eradicating Domestic Violence, But is It Enough?*, 1996 U. ILL. L. REV. 533, 536 (1996).

¹⁹¹ See generally Gonzales Petition, *supra* note 3 at 26-27.

¹⁹² U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S TASK FORCE ON FAMILY VIOLENCE: FINAL REPORT 16-18 (1984).

¹⁹³ See generally, 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). Protective orders typically enjoin a respondent from harming or contacting the holder of the order and can also address child custody and visitation, possession of a joint residence, payment of child or spousal support, etc.

50 states have passed such legislation.¹⁹⁴ Violators of such orders are subject to civil contempt as well as criminal penalties. In a further attempt to address the hesitance of police to treat domestic violence as a crime, twenty-one states (including Colorado) and the District of Columbia have statutes mandating arrests in specified domestic violence cases (commonly referred to as “mandatory arrest laws”) that purposefully curb police discretion.¹⁹⁵ In general, these laws require police to make an arrest when there is probable cause to believe that an individual has violated a restraining order or otherwise engaged in specified domestic violence crimes. For example, as discussed *supra*, Colorado law states that an 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 officer has probable cause to believe that the individual has violated a restraining order of which he or she had notice.¹⁹⁶ Some of these mandatory and pro-arrest policies were adopted in response to the federal VAWA, which specifically required these policies as a condition for various grants to states and local governments.¹⁹⁷

Victims of domestic violence who obtain restraining orders depend on and expect police assistance in the enforcement of these orders. As the Gonzales Petition explains in further detail, police enforcement of restraining orders through arrest and other means is crucial to protecting women’s safety, as an order alone does not guarantee that the violence will end.¹⁹⁸ Yet, despite the demonstrated utility of arrests in reducing domestic violence offenses, many police departments and police officers in the United States

¹⁹⁴ *Id.*; American Bar Association Commission on Domestic Violence, *Domestic Violence Civil Protection Orders (CPOs) By State* (June 2007), at <http://www.abanet.org/domviol/docs/DVCPOChartJune07.pdf>.

¹⁹⁵ ANDREW R. KLEIN, *THE CRIMINAL JUSTICE RESPONSE TO DOMESTIC VIOLENCE* 95 (2004).

¹⁹⁶ COLO. REV. ST. § 18-6-803.5(3) (emphasis added).

¹⁹⁷ 42 U.S.C. § 3796hh.

¹⁹⁸ Gonzales Petition, *supra* note 3, at 28-29.

continue to fail to provide meaningful enforcement of restraining orders or otherwise respond effectively to domestic violence. Due to critical breakdowns in process, too often law enforcement officers in the United States fail to adequately serve restraining orders, respond effectively to domestic violence calls, and enforce the terms of restraining orders and mandatory arrest laws.¹⁹⁹ Thus, notwithstanding official legislative policy statements and mandatory arrest laws in at least 31 states, there is a widespread and consistent pattern of police failure to enforce restraining orders in the context of domestic violence and in compliance with those laws.

When police fail to comply with mandatory arrest laws and enforce restraining orders, obtaining such an order can further endanger those domestic violence victims who believe their restraining orders will be properly and diligently enforced as the law requires.²⁰⁰ A woman who still believes herself to be endangered is more likely to seek help and take steps to prevent further violence than a woman who believes she will be protected by the state as required by her order of protection.²⁰¹ Indeed, because the act of seeking a restraining order may itself cause a batterer to retaliate, without adequate police enforcement, obtaining a restraining order may only serve to heighten the danger to victims of domestic violence.²⁰²

Where police act in accordance with mandatory arrest laws and appropriately enforce restraining orders, the risk of violence to protected persons is dramatically reduced. For instance, available data indicate that when male abusers are arrested for

¹⁹⁹ See *id* at 29-34.

²⁰⁰ U.S. DEPARTMENT OF JUSTICE, OFFICE FOR VICTIMS OF CRIME, ENFORCEMENT OF PROTECTIVE ORDERS 5 (2002).

²⁰¹ Caitlin E. Borgman, Note, *Battered Women's Substantive Due Process Claims: Can Orders of Protection Deflect DeShaney?*, 65 N.Y.U. L. REV. 1280, 1309 (1990).

²⁰² See Gonzales Petition, *supra* note 3, at 36.

assaulting their female partners, they are approximately 30% less likely to assault their partners again than are men who are not arrested.²⁰³ More broadly, jurisdictions that have low rates of arrest for domestic violence have almost 600% the rate of subsequent violations of restraining orders as jurisdictions that achieve substantial compliance with mandatory arrest laws.²⁰⁴ As the case of Jessica Gonzales demonstrates, police failure to effectively enforce restraining orders and implement mandatory arrest laws has tragic and deadly consequences for victims of domestic violence.²⁰⁵

C. The United States' Legislative and Programmatic Response Fails to Address the Epidemic of Domestic Violence in a Comprehensive Manner.

The United States has previously highlighted the enactment of VAWA as a trailblazing achievement in the efforts to combat domestic violence in the U.S. and thus attempted to position itself as a world leader in the struggle to end family violence.²⁰⁶ While the enactment of VAWA is laudable, it is insufficient to ensure compliance with the human rights obligations of the United States. As the jurisprudence of the Inter-American system has routinely affirmed, it is not the formal existence of federal laws and programs that demonstrate due diligence, but rather “that they are made *available and effective*.”²⁰⁷ Unfortunately, VAWA does not require or otherwise ensure meaningful, adequate, and effective police response to domestic violence. Notwithstanding VAWA

²⁰³ 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).

²⁰⁴ Gonzales Petition, *supra* note 3, at 30.

²⁰⁵ *Id.* at 29-30.

²⁰⁶ U.S. Response, *supra* note 21; *see also* Dec. 11, 2006 Observations, *supra* note 3.

²⁰⁷ Velásquez Rodríguez, 4 Inter-Am C. H.R. (ser. C) No. 4, at ¶ 176 (1998) (emphasis added); *see also* Report on the Situation of the Rights of Women in Ciudad Juárez, Mexico: *The Right to be Free from*

and other legislative efforts, the United States has failed to establish federal standards that guarantee rights and protections to women across the United States. Instead, the United States has outsourced its responsibilities, relied almost solely on voluntary compliance by states and localities, and failed to appropriately monitor the results or hold those states and local entities accountable.

1. VAWA is an Optional Scheme that Does Not Guarantee or Require an Adequate Police Response for Victims of Domestic Violence in the United States

While funding streams established by VAWA enable states and localities to implement policies and programmatic initiatives aimed at combating domestic violence, these allowances fall critically short of *requiring* that states undertake any course of action to meaningfully address the epidemic of domestic violence in the United States. Generally, VAWA makes funds available to states, localities, and, in some instances, non-governmental organizations that wish to establish or support programs addressing various aspects of domestic violence and thus opt in to the legislative scheme. It is important to recognize, however, that these programs are *purely voluntary*. There is simply no requirement that any State or other entity actually access these funds or undertake any other affirmative measures to address police responsiveness to family violence.²⁰⁸

Further, the United States has failed to adopt a comprehensive national Plan of Action that brings together legal measures, the provision of victim services and proactive

Violence and Discrimination, OEA/Ser.L/V/II.117, Doc. 44, ¶ 133 (March 7, 2003) (hereinafter *Report on the Rights of Women in Ciudad Juárez*).

²⁰⁸ In its Response Brief, the United States draws attention to five different programs created outside of VAWA resources designed to improve inter- and intrastate enforcement of protective orders, yet with the exception of one, these programs are once again voluntary. See Dec. 11, 2006 Observations, *supra* note 3, at 42.

strategies for prevention.²⁰⁹ Instead, local decisions and the good will of municipal actors drive the amount of training and funding received by police departments in the United States to prevent domestic violence in any particular locality. As a result, only communities that possess the political will to aid victims of domestic violence create and provide the necessary services and preventative measures, leaving women in other communities with substandard levels of protection or without any protective mechanisms at all.²¹⁰ As discussed in Petitioner’s Observations, Colorado – the state where Petitioner lived during the relevant time period and where the problem of domestic violence is particularly acute – provides a compelling example of the variable and inadequate results of a funding scheme that fails to require and ensure the creation of a holistic network of victim services.²¹¹

Moreover, though the United States has allocated funds for anti-domestic violence initiatives, it has failed to create an administrative infrastructure for oversight of existing efforts in order to ensure efficacy in the prevention of violence against women. The United States does not adequately monitor the expenditure of VAWA funds nor does it

²⁰⁹ See U. N. Division for the Advancement of Women, Expert Group Meeting, *Good Practices in Combating and Eliminating Violence Against Women*, at 31 (May 17-20, 2005).

²¹⁰ *Id.* (stating that “states and localities that care about protecting victims of domestic violence solicit funds to bolster their laudable work, while states and localities that do less in this area continue to fall behind the curve”).

²¹¹ See Dec. 11, 2006 Observations, *supra* note 3, at 40-41; Ex. P (Saucedo Decl.) ¶ 6. It is worth noting that the Colorado legislature recognizing that “the issuance and enforcement of protection orders are of paramount importance in the state of Colorado because protection orders promote safety, reduce violence, and prevent serious harm and death,” and that “domestic violence is not limited to physical threats of violence and harm but includes financial control, document control, property control, and other types of control that make a victim more likely to return to an abuser due to fear of retaliation or inability to meet basic needs,” recently amended existing legislation to enable judges to “restrain[] the defendant from ceasing to make payments for mortgage or rent, insurance, utilities or related services, transportation, medical care, or child care when the defendant has a prior existing duty or legal obligation.” See COLO. REV. STAT. ANN. § 13-14-102 (effective July 1, 2007). These legislative efforts, however, are insufficient to guarantee a victim’s human rights if law enforcement does not effectively enforce the protective order.

appropriately evaluate the overall performance of programs established by grantees.²¹² Without proper oversight of grantees, the United States cannot evaluate in any meaningful way whether funds are used as intended and whether funds are being used to support programs that ultimately have impact in the prevention of domestic violence.

In short, until the United States government implements a comprehensive legal and policy framework for VAWA implementation *and* oversight, the United States will continue to fall short of fully protecting and promoting women's human rights.

2. Colorado Law Enforcement Officials Receive Inadequate Domestic Violence Training

In Colorado, where 20% of all criminal cases filed in county courts involve domestic violence, domestic violence training of law enforcement officials is woefully inadequate. Law enforcement agents are required by Colorado law to complete 546 hours of training as a prerequisite for certification. A mere eight hours, or 1.5% of total training time, are specifically devoted to domestic violence issues.²¹³ Outside of the eight hours devoted to domestic violence training, neither Colorado law nor federal law requires Colorado peace officers to attend any additional training programs, including those offered by non-governmental organizations and previously described by the United States.²¹⁴ Colorado and the United States have thus failed to ensure adequate education and training of all law enforcement agents with respect to the technical aspects of investigations, the issue of violence against women as a violation of women's basic

²¹² *Problems with Grant Monitoring and Concerns about Evaluation Studies*: Hearing Before the S. Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary, 107th Cong. 2-3 (2002) (statement of Statement of Laurie E. Ekstrand, Director, Justice Issues, U. S. Gen. Accounting Office).

²¹³ Colorado P.O.S.T. Manual, at B-82 and C-17.

²¹⁴ Dec. 11, 2006 Observations, *supra* note 3, Ex. P, Saucedo Decl. ¶ 14.

human rights and the United States' obligation to protect and advance these very rights.²¹⁵

IV. LEGAL ARGUMENT

A. 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.

Mr. Gonzales perpetrated a premeditated and vicious act of domestic violence against Ms. Gonzales and her three children on June 22-23, 1999, and indeed on several previous occasions. The Castle Rock police officers failed to intervene to enforce the terms of her restraining order, and when Ms. Gonzales turned to the U.S. legal system seeking redress against the Castle Rock police, the U.S. courts denied her any remedy. State officials have avoided liability for these human rights violations because, in essence, the U.S. domestic legal system does not impose affirmative obligations on the State to ensure against violation of rights by the state or its agents or by private actors.

By contrast, the Inter-American system for the protection of human rights does. Specifically, the American Declaration imposes a duty on State Parties to adopt measures to respect and ensure the full and free enjoyment of human rights guaranteed therein. And, where a State fails to adequately protect these rights and violations occur, State liability is incurred for the failure to adequately protect rights. In such situations, liability is attributed to the State, not because the act itself but rather because of the failure by the State to take reasonable steps to protect rights. Moreover, when the rights of particularly vulnerable groups in society are implicated, among them women and children, the responsibility on the State to ensure rights protection is heightened.

²¹⁵ *Id.* The Secretary-General, *supra* note 153.

Long established, these principles were first elaborated by the Inter-American Court in the case of *Velásquez Rodríguez*, where the Court held that States have an affirmative obligation to investigate, prosecute, and punish human rights violators, and that this duty must be implemented through the state's judicial tribunals.²¹⁶ Specifically, the Court found that the State had an obligation “to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights.”²¹⁷ In establishing this principle, the Court set forth a reasonableness standard for the general positive obligation on States to prevent human rights violations.²¹⁸ Significantly, the Court also held that a State's obligation to take reasonable steps to prevent human rights violations extends not only to the actions of agents of the State, but also, in circumstances such as those present here, to actions perpetrated by private actors, a principle now long recognized in the Inter-American and European systems for the protection of human rights as well as under universal human rights standards, including the International Covenant on Civil and Political Rights (“ICCPR”).

In the *Velásquez* case, the Inter-American Court held that “when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention ... the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction.”²¹⁹ As the Court found, a State is held responsible for the acts of private actors “not because of the act itself, but because of the lack of due diligence to prevent the violation or respond to it

²¹⁶ *Velasquez Rodríguez*, 1988 Inter-Am.C.H.R. (Ser. C) No. 4 (July 29, 1988).

²¹⁷ *Id.* at ¶ 166.

²¹⁸ *Id.* at ¶ 174.

²¹⁹ *Id.* at ¶ 176.

....”²²⁰ According to the Court, state responsibility for the acts of private persons attaches either when the violation of an individual’s rights “has occurred with the support or acquiescence of the government, or when the State has allowed the act to take place without taking measures to prevent it or to punish those responsible.”²²¹ In three recent cases, *Ximenes Lopes*, *Pueblo Bello Massacre*, and *Mapiripán Massacre* cases, the Court reaffirmed these principles.²²² As the Court explained in *Ximenes Lopes*:

The *erga omnes* obligations of States to respect and ensure the norms of protection, and to guarantee the effectiveness of the rights, project their effect beyond the relationship between its agents and the persons subject to its jurisdiction, since they exist in the affirmative obligation of the State to adopt the measures necessary to ensure the effective protection of human rights in interpersonal relations.²²³

According to the Court, in furtherance of this duty, a State is responsible not only for implementing an appropriate legal framework to dissuade any threat to the right to life, it must also take all necessary measures to prevent and punish serious deprivations of all rights as a consequence of the criminal acts of other individuals.²²⁴ While, as an initial

²²⁰ *Id.* at ¶ 172.

²²¹ *Id.* at ¶ 173. The Commission too has recognized affirmative obligations of a state to protect the right to life, both from violations by state and non-state actors. For example, in *Mendes v. Brazil*, Case 11.405, Inter-Am. C.H.R., Report N° 59/99, OEA/Ser.L/V/II.95, doc. 7 rev. at 399 (1998), the Commission held Brazil responsible for failure to investigate and punish murders committed by private agents.

²²² *Damião Ximenes Lopes v. Brazil*, Case 12.237, Inter-Am. C.H.R., Report No. 38/02, doc. 5 rev. 1 at ¶¶ 124-25 (2002); *Pueblo Bello Massacre v. Colombia*, 2006 Inter-Am. C.H.R. (ser. C) No. 140, at ¶ 120 (Jan. 31, 2006); *Mapiripán Massacre*, Case 12.250, Inter-Am. C.H.R., Report No. 34/01 ¶ 232 (2000); *see also* *Sawhoyamaya Indigenous Community of the Enxet People v. Paraguay*, Case 0322/2001, Inter-Am. C.H.R., Report No. 12/03, OEA/Ser.L/V/II.118 Doc. 70 rev. ¶ 153 (2003); *Juan Humberto Sánchez Case*, 2003 Inter-Am. C.H.R., (Ser. C) No. 99, at ¶ 110 (June 7, 2003); *Street Children case (Villagrán Morales et al.)*, 1999 Inter-Am. C.H.R. (ser. C) No. 63, at ¶ 144 (Nov. 19, 1999).

²²³ *Ximenes Lopes*, Case 12.237, Inter-Am. C.H.R., (unofficial English translation of “Las obligaciones erga omnes que tienen los Estados de respetar y garantizar las normas de protección, y de asegurar la efectividad de los derechos, proyectan sus efectos más allá de la relación entre sus agentes y las personas sometidas a su jurisdicción, pues se manifiestan en la obligación positiva del Estado de adoptar las medidas necesarias para asegurar la efectiva protección de los derechos humanos en las relaciones inter-individuales.”). *Cf. Pueblo Bello Massacre*, 2006 Inter-Am. C.H.R., at ¶ 113; *Mapiripán Massacre*, Case 12.250, Inter-Am. C.H.R., at ¶ 111; Inter-Am. C.H.R., Advisory Opinion OC-18/03, at ¶ 140 (Jan. 1984).

²²⁴ *Pueblo Bello Massacre*, 2006 Inter-Am. C.H.R., at ¶ 120 (stating that “los Estados deben adoptar las medidas necesarias, no sólo a nivel legislativo, administrativo y judicial, mediante la emisión de normas penales y el establecimiento de un sistema de justicia para prevenir, suprimir y castigar la privación de la vida como consecuencia de actos criminales, sino también para prevenir y proteger a los individuos de

matter, the acts of purely private individuals are not imputable to the State, the State may be held responsible if it fails to take reasonable measures to prevent the injurious acts.²²⁵

The Court explained that, as a result of the *erga omnes* obligation of the State to respect and ensure the norms of protection, the State must take the measures necessary to ensure the effective protection of human rights in private relationships.²²⁶

Similarly, in Advisory Opinion OC-18/03, concerning the rights of undocumented migrant workers, the Court unequivocally stated that “the positive obligation of the State to ensure the effectiveness of the protected human rights gives rise to effects in relation to third parties (*erga omnes*).”²²⁷ The Court observed that, because the State determines the laws that regulate the private employment relations between individuals and because migrant workers must resort to State mechanisms for the protection of their rights, the State may be held responsible if it does not “ensure that human rights are respected in these private relationships between third parties.”²²⁸

actos criminales de otros individuos e investigar efectivamente estas situaciones.”); *Ximenes Lopes*, Case 12.237, Inter-Am. C.H.R., at ¶¶ 124-25; *Sawhoyamaya Indigenous Community*, Case 0322/2001, Inter-Am. C.H.R., at ¶ 153; *Mapiripán Massacre*, Case 12.250, Inter-Am. C.H.R., at ¶ 232; *Juan Humberto Sánchez*, Case, 2003 Inter-Am. C.H.R., at ¶ 110; and *Street Children*, 1999 Inter-Am. C.H.R., at ¶ 144. Cf. Kiliç, E.C.H.R. Application No. 22492/93, ¶ 62 (recalling that the State must “take appropriate steps to safeguard the lives of those within its jurisdiction ... by putting in place effective criminal-law provisions ..., backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions.” The European Court of Human Rights observed that the State’s duty “also extends in appropriate circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual or individuals whose life is at risk from the criminal acts of another individual.”); *Osman v. United Kingdom*, 1998-VIII Eur. Ct. H.R. 115 (1998).

²²⁵ *Pueblo Bello Massacre*, 2006 Inter-Am. C.H.R., at ¶ 113; *Ximenes Lopes*, Case 12.237, Inter-Am. C.H.R., at ¶ 85; *Mapiripán Massacre*, Case 12.250, Inter-Am. C.H.R., at ¶ 111; *Velásquez Rodríguez*, Case, Inter-Am Ct. H.R., at ¶ 172.

²²⁶ *Pueblo Bello Massacre*, 2006 Inter-Am. C.H.R., at ¶ 113; *Ximenes Lopes*, Case 12.237, Inter-Am. C.H.R., at ¶ 85; *Mapiripán Massacre*, Case 12.250, Inter-Am. C.H.R., at ¶ 111.

²²⁷ *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, Inter-Am. C.H.R. (ser. A) No. 18, ¶ 140 (Sep. 27, 2003).

²²⁸ *Id.* ¶¶ 147, 150. The Commission too has recognized the affirmative obligations of a state to protect the right to life, both from violations by state and non-state actors. For example, in *Mendes v. Brazil*, Case 11.405, Inter-Am. C.H.R., the Commission held Brazil responsible for failure to investigate and punish murders committed by private agents.

The European Court of Human Rights (“European Court”) has likewise found that in certain circumstances states assume affirmative obligations to protect the right to life. For example, in *Osman v. United Kingdom*,²²⁹ the Court noted that the right to life implies “in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.”²³⁰ Finally, the U.N. Human Rights Committee (“HRC”) has interpreted article 2 of the ICCPR²³¹ to impose affirmative obligations on States to take necessary steps to prevent violations of rights protected by the Convention by State and private actors.²³²

The Inter-American system has also adopted a clear standard for determining when a State may be held responsible for violations of protected rights by private actors. Under this standard, State responsibility is engaged when (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 reasonable steps within the scope of its powers which might have had a reasonable possibility of preventing or avoiding that risk.”²³³

This standard was first adopted by the European Court in *Osman*, when the 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

²²⁹ *Osman v. United Kingdom*, Reports of Judgments and Decisions 1998-VIII (Oct. 28, 1998); *Osman*, 1998-VIII Eur. Ct. H.R. 1998-VIII Eur. Ct. H.R. (1998).

²³⁰ *Id.* at ¶ 115.

²³¹ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976 (hereinafter “ICCPR”).

²³² Human Rights Committee, General Cmt. 31, U.N. Doc. CCPR/C/21/Rev.1/Add.13, ¶ 8 (2004).

identified individual [and fail] to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.”²³⁴

Two years after *Osman*, the European Court applied this same standard in the case of *Kiliç v. Turkey*.²³⁵ In *Kiliç*, the Court found that Turkish authorities failed to take adequate measures to protect the life of Kermal Kiliç, a journalist for a Kurdish newspaper who had requested State protection. Taking note of a “significant number of serious incidents involving killings of journalists,” the European Court found that Kiliç was “at particular risk of falling to an unlawful attack.”²³⁶ The Court highlighted that even in the absence of evidence of any specific or particular instance where Kiliç was at risk of violence, the risk could be generally regarded as “real and immediate.”²³⁷ As a result of Kiliç’s petition for protective measures, the Court found, the authorities were aware of this risk. While the Court noted the possibility in *Kiliç* that State authorities had acquiesced in these attacks against journalists, in a subsequent case, *E. and Others v. United Kingdom*,²³⁸ the European Court specifically held that the principles of State responsibility set forth in *Kiliç* 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.”

²³³ *Pueblo Bello Massacre*, 2006 Inter-Am. C.H.R., at ¶¶ 123-24 (citing and quoting the European Court of Human Rights’ decision in *Kiliç*, Eur. Ct.H.R. Application No. 22492/93); *Sawhoyamaya Indigenous Community*, Case 0322/2001, Inter-Am. C.H.R., at ¶ 155.

²³⁴ *Osman v. United Kingdom*, Reports of Judgments and Decisions 1998-VIII (Oct. 28, 1998), *Id.* at ¶ 116., 118-121 *Cf.* *Younger v. United Kingdom*, Eur. Ct. H.R. 22 (2000) (decision on admissibility) (finding no violation of positive obligation to protect against prison suicide when authorities had no knowledge of mental health problems or suicidal tendencies); *Osman*, 1998-VIII Eur. Ct. H.R., at ¶¶ 118-121 (finding no violation of positive obligation when police had no knowledge that killer was mentally ill or prone to violence, and no proof that killer was responsible for prior non-violent incidents of harassment).

²³⁵ *Kiliç*, Eur.Ct.H.R. Application No. 22492/93.

²³⁶ *Id.* ¶ 66

²³⁷ The *Kiliç* standard was subsequently adopted by the Inter-American Court. *See Sawhoyamaya Indigenous Community*, Case 0322/2001, Inter-Am. C.H.R. (finding violations of indigenous community members’ right to life after the State had knowledge of the special vulnerability of the community and notice of real health risks to the community, but failed to exercise due diligence to prevent problems related to these risks).

In *E. and Others*, the European Court determined that the United Kingdom had failed to exercise due diligence to prevent violence by a private actor, where the applicants, four children, alleged that the authorities had failed to protect them from abuse by their stepfather. As a consequence of having indecently assaulted two of the girls, the stepfather entered a guilty plea for acts of indecency and was sentenced to two years' probation in January 1977, during which time he was supervised by a social services officer. The terms of his probation order stipulated that he cease to reside at the home.²³⁹ The Court found that the State's ensuing failure, over an extended period, to protect the children from serious neglect and abuse *of which the authorities should have been aware, in part due to the fact that the stepfather continued to have close contact with the children despite the probation order*, constituted a violation of the prohibition of torture or inhumane and degrading treatment, which was attributable to the State.²⁴⁰ The Court also emphasized that measures designed to prevent private violence "should provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities *had or ought to have had knowledge*."²⁴¹ Importantly, the Court determined, "*Even if the social services were not aware [that the stepfather] was inflicting abuse at this time, they should have been aware that the children remained at potential risk*" and thus had a particular "obligation to monitor the offender's conduct."²⁴²

Although in *Velásquez* the focus was on the State's affirmative obligation to protect the right to life, the principle of State responsibility elaborated therein extends

²³⁸ *E. and Others v. the United Kingdom*, Eur. Ct. H.R., App. No 33218/96 (2002).

²³⁹ *Id.* ¶ 20.

²⁴⁰ *Id.* ¶¶ 96-101.

²⁴¹ *Id.* ¶ 88.

beyond the right to life to all rights protected under the American Declaration. As the *Velásquez* Court itself noted, the State has a duty to ensure the “full and free exercise and enjoyment of human rights.”²⁴³ The Commission has also consistently articulated positive governmental obligations to protect individuals from third party harm, under both the Declaration and the Convention. For example, in the *Ache* and *Coulter* cases in the 1970s, the Commission affirmed, under the Declaration, the obligation of the State to take appropriate measures to protect indigenous communities from third party harm caused by (private) miners and prospectors in Brazil and Paraguay.²⁴⁴ Although the state had initially built a highway through the territory that aided the entrance of private third parties (and thus their disease vectors and cultural influences), the Commission’s decision focused on the State’s failure to take appropriate measures to protect the indigenous community from the private harms.

Other international bodies have similarly held that the State’s affirmative obligations extend beyond the right to life, to, for example, the rights to humane treatment and private and family life. In *M.C. v. Bulgaria*,²⁴⁵ for instance, the European Court held that Bulgaria had violated the rights of a 14-year-old alleged rape victim to be free from inhumane or degrading treatment and to privacy guaranteed under Articles 3 and 8 of the European Convention by failing to fully and effectively investigate the rape

²⁴² *Id.* ¶ 96; *See also, Kiliç*, Eur.Ct.H.R. Application No. 22492/93, at ¶¶ 66-68.

²⁴³ *See Velásquez Rodríguez*, 4 Inter-Am. C. H.R.

²⁴⁴ *Ache Tribe*, Case 1802: Inter-Am. C.H.R. 151, (1977); *Coulter et al. v. Brazil*, Case 7615, Inter-Am. C.H.R., Report No. 12/85, Inter-Am. C.H.R., OEA/Ser.L/V/II.66, doc. 10 rev. 1 (1985). *See also* *Maya Indigenous Community of the Toledo District v. Belize*, Case 12.053, Inter-Am. C.H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 at 727 (2004); *Aloeboetoe et al.*, Judgment of December 4, 1991, Inter-Am. C.H.R. (Ser. C) No.11 (1994); *La Comunidad Moiwana vs. Suriname*, Sentencia de 15 de junio de 2005, Corte I.D.H., (Ser. C) No. 124 2005); *Sarayaku Indigenous People*, Order of the Court of July 6, 2004, Inter-Am. C.H.R. (Ser. E) (2003); *Mayagna (Sumo) Awas Tingni Community*, Judgment of August 31, 2001.(Ser. C) No. 79 (2001).

²⁴⁵ *M.C. v. Bulgaria*, 2003-I Eur. Ct. H. R. 646.

allegations. The Court concluded that “[w]hile the choice of the means to secure compliance with [international human rights] law ... is in principle within the State’s margin of appreciation, effective deterrence against grave acts such as rape, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions.”²⁴⁶ Specifically in relation to the right to humane treatment, the Court found that the general obligation on states to protect human rights “requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to ill-treatment, including ill-treatment administered by private individuals.”²⁴⁷

1. The American Declaration Imposes a Heightened Obligation on States to Protect Women and Children From Gender-Based Violence, Including Domestic Violence.

While the American Declaration imposes a general obligation on States to protect rights from violation by the State and private actors, Article VII imposes a *specific* obligation on States to take additional measures to affirmatively protect the rights of women and children.²⁴⁸ This obligation extends to preventing violations both by the State itself and by private actors. Article VII of the American Declaration identifies women and children as individuals whose rights, because of their status, are in need of heightened protection by the State.²⁴⁹ In relation to children, both the Commission and

²⁴⁶ *Id* at 150.

²⁴⁷ *Id*; see also Human Rights Committee, *supra* note 233, at ¶ 8 (noting states’ obligation to protect against violations of the right to privacy, torture and other cruel, inhumane or degrading treatment by state as well as private persons).

²⁴⁸ Article VII establishes the right of “[a]ll women, during pregnancy and the nursing period, and all children . . . to special protection, care and aid.” As discussed *infra*, a contemporary interpretation of Article VII requires the State to provide special protections for vulnerable groups – not only women during the nursing period.

²⁴⁹ See, e.g., Michael Domingues v. United States, Case 12.285, Inter-Am. C.H.R., Report No. 62/02, doc. 5 rev. 1 at 913 ¶ 83 (2002) (noting that Article 19 of the American Convention (rights of the child) and Article VII of the American Declaration reflect “the broadly-recognized international obligation of states to provide enhanced protection to children”).

the Court, consistent with their interpretative mandates,²⁵⁰ repeatedly have analyzed the rights of the child protected under the American Declaration by reference to the U.N. Convention on the Rights of the Child,²⁵¹ a treaty that highlights the particular vulnerability of children and imposes additional obligations on State parties to take additional measures to ensure their right to life and physical integrity.²⁵² The Committee on the Rights of the Child has said that State Parties must “ensur[e] that all domestic legislation is fully compatible with the Convention and that the Convention’s principles and provisions can be directly applied and appropriately enforced.”²⁵³

The HRC as well as the European Court have also recognized the need for States to provide heightened measures of protection when the rights of children and other vulnerable groups are at issue. For instance, in its General Comment 17, to Article 24 of the International Covenant on Civil and Political Rights (rights of the child) the Committee states that “the implementation of this provision entails the adoption of

²⁵⁰ See, e.g., Inter-Am. C.H.R., Advisory Opinion OC-1/82, September 24, 1982 (Ser. A) No.1 at ¶ 43.

²⁵¹ G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force* Sept. 2, 1990 (CRC).

²⁵² See Convention on the Rights of the Child, art. 6(1), G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989) (hereinafter “CRC”) art. 6 (requiring States Parties to ensure “the survival and development of the child”); art. 19 (states Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse while in the care of parent(s), legal guardian(s) or any other person who has care of the child”).

²⁵³ See Committee on the Rights of the Child, General Cmt. No. 5, General measures of implementation of the Convention on the Rights of the Child (Thirty-fourth session, 2003), U.N. Doc. CRC/GC/2003/5 (2003); see also Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System, OEA/Ser.L/V/II.106, Inter-Am. C.H.R. (Feb. 28, 2000); Flor de Maria Hernandez Rivas, Case 10.911, Inter-Am. C.H.R. 188, OEA/ser. L/V/II.85, doc. 9 rev., at 191 and ff (1994) (Annual Report 1993); Julio Ernesto Fuentes Perez, William Fernandez Rivera, and Raquel Fernandez Rivera v. El Salvador, Case 10.227 and 10.333, Report No. 8/92, Inter-Am.C.H.R., OEA/Ser.L/V/II.81 rev.1 Doc. 6 at 110, 119 (1992) (referencing CRC); *Street Children*, 1999 Inter-Am. C.H.R.; Juridical status and human rights of the child, Advisory Opinion OC-17/02, Inter-Am. C.H.R. (Ser. A) No. 17 (Aug. 28, 2002,) (interpreting Convention in the light of CRC, at ¶ 54 noting that “children have the same rights as all human beings – minors or adults – and also special rights derived from their condition, and these are accompanied by specific duties of the family, society and the State,” and at ¶ 88 noting also that “children’s rights require that the State not only abstain from unduly interfering in the child’s private or family

special measures to protect children, in addition to the measures that States are required to take under article 2 to ensure that everyone enjoys the rights provided for in the Covenant.”²⁵⁴ Similarly, in *Z and Others v. United Kingdom*,²⁵⁵ a case in which social workers had failed to intervene to protect children from an abusive parent notwithstanding their awareness that the children had been subjected to severe abuse and neglect in the past, the European Court held that States are responsible for taking measures to “provide effective protection, in particular, of children and other vulnerable persons to prevent ill-treatment of which the authorities had or ought to have had knowledge.”²⁵⁶ Specifically in relation to acts of gender-based violence, the Inter-American system, including the American Declaration, also recognizes that women, especially victims of domestic violence, are in need of additional measures of protection by the state. For example, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, which defines and prohibits violence against women, reaffirms the right of every woman to have her physical, mental, and moral integrity respected, and the right to personal security.²⁵⁷ Article VII requires that states “agree to pursue, by all appropriate means and without delay, policies to prevent, punish, and eradicate” violence against women and imposes on them a specific obligation to “adopt legal measures to require the perpetrator to refrain from harassing, intimidating or threatening the woman or using any method that harms or endangers her life or

relations, but also that, according to the circumstances, it take positive steps to ensure exercise and full enjoyment of those rights”).

²⁵⁴ Human Rights Committee, General Cmt. 17, art. 24, U.N. Doc. HRI/GEN/1/Rev.6 at 144 at ¶1 (2003).

²⁵⁵ *Id.* ¶ 73.

²⁵⁶ *See also*, *Z and Others v. United Kingdom*, Eur. Ct. H.R. (2001), ¶¶ 74-75; *A v. United Kingdom*, 1998-VI Eur. Ct. H.R. ¶ 22 (1998).

²⁵⁷ Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, 33 I.L.M. 1534 (1994), *entered into force* March 5, 1995 (hereinafter “Prevention”).

integrity.”²⁵⁸ Numerous other international treaties and agreements impose similar such obligations on states to ensure that women are effectively protected from domestic violence.²⁵⁹

Accordingly, under the American Declaration, affirmative obligations are imposed on the United States to protect women and children from acts of gender-based violence, including domestic violence. And, the United States may be held responsible for the violation of their protected rights, whether perpetrated by the state, its agents or private actors, when the state knows 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 private party and failed to take reasonable steps within the scope of its powers that might have had a reasonable possibility of preventing or avoiding that risk.²⁶⁰

2. The United States Failed to Act With Due Diligence to Ensure the Rights of Jessica Gonzales and Her Children

As discussed in detail in Petitioner’s December 11, 2006 Observations, the United States should be held responsible for the domestic violence perpetrated by Mr. Gonzales, because, by virtue of the issuance of a restraining order, relevant authorities knew of the immediate risk Mr. Gonzales posed to Ms. Gonzales and her children in the circumstances, yet, despite this knowledge, failed to take reasonable and necessary

²⁵⁸ *Id.* at 7(d).

²⁵⁹ *See e.g.*, Vienna Declaration and Programme of Action, 1993 World Conference on Human Rights, U.N. Doc. A/Conf. 157/24 (1993), 32 I.L.M. 1661 (1993), art. 18; Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1979) (hereinafter “CEDAW”); *Implementation of the Nairobi Forward-Looking Strategies for the Advancement of Women*, G.A. Res. 161, U.N. GAOR, 49th Sess., Agenda Item 97, U.N. Doc. A/Res/49/161 (1995). *See also*, Dec. 11, 2006 Observations, *supra* note 3, at 58-67

²⁶⁰ *See also*, Dec. 11, 2006 Observations, *supra* note 3, at 47-57 (detailing the nature of affirmative obligations on the U.S. under the American Declaration generally and the heightened obligation when the rights of women and children are at issue.).

measures that would have effectively averted that risk and protected their rights.²⁶¹ The United States should also be held responsible for the authorities' failure to conduct an investigation into the circumstances surrounding the deaths of the Gonzales children.

As established *supra*, in Part IV (A)(1), the State bears an enhanced duty to take effective protective and preventive measures to safeguard women and children from domestic violence. Therefore, the risk that a particular threat poses to the safety of domestic violence victims, as well as the adequacy of the State's response, must be evaluated in light of the special diligence required on the part of the State. Applying this standard, the Commission should find that (1) the United States should have known that the events of June 22 and 23, 1999, posed a real and immediate risk to the safety of Jessica Gonzales and her children, and (2) the State failed to act with the diligence required by the circumstances.

Here, Jessica Gonzales and her children had a right to protection by the State of Colorado for several reasons. First, the State actively intervened in the lives of Jessica Gonzales and her children, by issuing two restraining orders that required police to seek to arrest Mr. Gonzales if he violated the orders, and by undertaking to protect their physical safety. Second, the State had probable cause to believe that the order was violated. Prior to June 22, 1999, Jessica Gonzales notified the CRPD on three separate occasions that Mr. Gonzales had violated the restraining order,²⁶² and the CRPD and other local law enforcement agencies had independent knowledge of Mr. Gonzales'

²⁶¹ See *id.* at 75-88 (detailing the standard for assessing and the specific failures on the part of U.S. authorities that give rise to state responsibility for violation of the rights of Jessica Gonzales and her three children).

²⁶² See *id.* at Part (II)(B); *id.* at Gonzales Decl. ¶¶ 19-22, 27.

threatening history.²⁶³ Given this history and prior knowledge, the police should have taken Jessica Gonzales' concerns more seriously. Third, Jessica Gonzales relied on CRPD officers to fulfill their legal obligations to protect her and her children by arresting Mr. Gonzales.²⁶⁴ This reliance heightened the danger that the State's failure to fulfill its obligations posed to her and her children. Despite the special vulnerability of Jessica Gonzales and her children, the State's awareness that Mr. Gonzales had violated a restraining order, the State's specific knowledge of an actual danger that Mr. Gonzales posed to the family's safety, and the State's representations that it would provide certain protections, neither the CRPD nor the State of Colorado acted with due diligence to ensure the rights of Jessica Gonzales or her children. Sadly, the State ignored, and thus heightened, the very harm it had promised to prevent.

The State revictimized Ms. Gonzales and her family after the tragedy, when, despite the Gonzales family's repeated requests, state and federal authorities failed to conduct an independent, prompt, and thorough investigation into the time, place, and circumstances surrounding the children's deaths. To this day, it remains unclear whose bullets killed Rebecca, Katheryn, and Leslie Gonzales.

a. The United States And The State Of Colorado Failed To Recognize A "Real And Immediate Risk To The Safety Of An Identified Individual."

As a result of Jessica Gonzales' nine contacts with the police on June 22 and 23, 1999, the State had adequate reason to know of a situation presenting a real and immediate risk to the safety of an identified individual from the criminal acts of a third party. The abduction of the children by Simon Gonzales in violation of a restraining

²⁶³ See *id.* at Part (II)(C)(2).

²⁶⁴ See *id.* at Part (II)(E); *id.* at Gonzales Decl. ¶¶ 15-16.

order presented this real and immediate risk to the safety of those individuals identified in the restraining order both as a matter of law and a matter of fact. CRPD's awareness of this real and immediate risk was or should have been heightened by its knowledge of Mr. Gonzales' prior erratic and threatening behavior, including multiple prior violations of Jessica Gonzales' restraining order.

Established human rights principles support the conclusion that any purposeful violation of a domestic violence restraining order should be considered to pose a real and immediate risk to those individuals protected by the order. With respect to members of a particularly vulnerable class of persons, such as domestic violence victims and their children, a heightened standard of review requires that the threshold for finding a "real and immediate risk" be construed so as to require effective protection.²⁶⁵ Domestic violence restraining orders and mandatory arrest laws were specifically created to provide enhanced protections to domestic violence victims by restricting police officer discretion, increasing police response, and reducing batterer recidivism.²⁶⁶ Restraining orders represent a prior judicial determination of a threat, and the violation of such orders thus subjects batterers to arrest. This system of restraining orders is premised on the proposition that any violation must be viewed as an illegal act giving rise to a real and immediate risk to the safety of the protected persons.

In many respects, the duties created by restraining orders can be analogized to those provided by the precautionary measures issued by the Commissioner and the Inter-American Court. Restraining orders – which, like precautionary measures, are also

²⁶⁵ *E. and Others*, Eur. Ct. H.R., App. No 33218/96, at ¶ 88; *Osman*, 1998-VIII Eur. Ct. H.R., at ¶ 116.

²⁶⁶ See COLO. REV. STAT. § 13-14-102 (2006) (declaration of Colorado General Assembly that "the issuance and enforcement of protection orders are of paramount importance in the State of Colorado because protection orders promote safety, reduce violence, and prevent serious harm and death.").

addressed to the police/State – are the domestic equivalent of precautionary measures issued by the Court directing a State to take certain actions to prevent abuses directed at specific individuals. In this sense, protection orders independently create special duties on the part of the State to protect identified individuals. A violation of a restraining order thus automatically creates a situation where the protected persons are identified as subject to a real and immediate risk of harm. If the Commission were to hold that restraining orders do not create a duty to protect, this would implicitly undermine the normative force of all systems of such precautionary and preventive mechanisms of protection.²⁶⁷

Here, like in *E. and Others*, the judicial authorities of a State issued a restraining order for the benefit of victims of domestic violence; State authorities were aware of continued contact between the restrained individual and the subjects of the restraining order; and State authorities were aware of previous violations of the restraining order by the respondent. Like in *E. and Others*, the State of Colorado and the CRPD “should have been aware that the children remained at potential risk,” and thus the State had a particular “obligation to monitor the offender’s conduct.”²⁶⁸

In the absence of effective mechanisms of protection in the face of such demonstrated risk, the issuance of restraining orders actually heightens the danger to the protected persons. The failure to enforce orders not only means that the protection afforded loses its potency, but can actually exacerbate the danger that drives women to seek such orders in the first place. Unfortunately, “the issuance of a restraining order results in a high likelihood of retaliation by the batterer.”²⁶⁹ Indeed, the mere fact that a

²⁶⁷ *E. and Others*, Eur. Ct. H.R., App. No 33218/96, at ¶¶ 20, 88, 96-101; see also *Sawhoyamaya Indigenous Community*, Case 0322/2001, Inter-Am. C.H.R.

²⁶⁸ *Id.*

²⁶⁹ Borgman, *supra* note 202, at 1308.

woman seeks the assistance of the courts may well motivate her batterer to retaliate.²⁷⁰ Accordingly, the restraining order granted by the State exposed Jessica Gonzales to a risk of retaliatory violence against herself and her children, and the order, pursuant to state statute, appropriately tasked the police with mitigating that risk. Moreover, the guarantee of police enforcement led Jessica Gonzales to rely on the order, rather than to take self-help measures. As set out below, she turned to the police to address the rapidly unfolding events on the night of June 22, 1999, consistent with their legal obligations, rather than pursuing Mr. Gonzales or the children herself, as she might have done had she known that no police assistance would be forthcoming. The CRPD's failure to enforce the order thus heightened the danger to which she and her children were exposed.

b. The United States Failed To Take “Reasonable Steps” To Prevent Or Avoid Risk To The Safety Of Jessica Gonzales And Her Children.

A State's international responsibility is engaged if it fails to take reasonable and effective preventive measures to protect the safety of identified vulnerable persons from private violence, where the State's actions would have had a reasonable possibility of preventing that risk.²⁷¹ As detailed in Petitioner's December 11, 2006 Observations,²⁷² the State must take preventive measures that “provide effective protection, in particular, of children and other vulnerable persons.”²⁷³ Such measures include training on how to

²⁷⁰ See Michelle R. Waul, *Civil Protection Orders: An Opportunity For Intervention With Domestic Violence Victims*, 6 GEO. PUBLIC POL'Y REV. 51, 56 (2000).

²⁷¹ See *Osman*, 1998-VIII Eur. Ct. H.R., at ¶ 115; *Kiliç*, E.C.H.R. Application No. 22492/93, at ¶ 62 (holding that, under the European Convention, the State has an affirmative obligation to “take appropriate steps to safeguard the lives of those within its jurisdiction,” which “extends in appropriate circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual or individuals whose life is at risk from the criminal acts of another individual.”).

²⁷² Dec. 11, 2006 Observations, *supra* note 3, at Parts (IV) & (V).

²⁷³ *E. and Others*, Eur. Ct. H.R., App. No 33218/96, at ¶ 88.

respond to domestic violence calls, and responding appropriately when a victim calls to report a violation of a restraining order.

The European Court has determined that the State should be held responsible for the failure to perceive a risk to the safety of an identified individual or to take preventive measures to avoid that risk where “the applicant [shows] that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge.”²⁷⁴ In *Osman*, the Court expressly rejected the United Kingdom’s view that the State’s actions or omissions must amount to “gross negligence or willful disregard of the duty to protect life” in order to find a violation, stating that “[s]uch a rigid standard must be considered to be incompatible with . . . the obligations of Contracting States . . . to secure the practical and effective protection of the rights and freedoms.”²⁷⁵ In *E. and Others*, the Court explained that the test for State responsibility “does not require it to be shown that ‘but for’ the failing or omission of the public authority ill-treatment would have happened. A failure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State.”²⁷⁶

The sole purpose of the Colorado mandatory arrest law and system for the issuance of restraining orders is to protect victims of gender-based violence, including, domestic violence, from future physical and emotional harm inflicted by the persons subject to such orders.²⁷⁷ The statute placed an obligation on the State actually to take the promised steps to ensure victims’ continuing safety, particularly in light of the

²⁷⁴ *Osman*, 1998-VIII Eur. Ct. H.R. at ¶ 116.

²⁷⁵ *Id.*

²⁷⁶ *See, e.g., E. and Others*, Eur. Ct. H.R., App. No 33218/96, at ¶ 99.

²⁷⁷ *See* Dec. 11, 2006 Observations, *supra* note 3, at Part (II)(E)(2)(ii).

historical under-enforcement of domestic violence restraining orders by law enforcement.²⁷⁸ Here, the State failed to perform the basic and nondiscretionary first steps essential to the protective and preventative functions and duties mandated under the law of Colorado. The United States may be held liable when law enforcement does not take adequate steps to reasonably ensure the safety of protected persons and act as required by statute.

Furthermore, through the enactment of mandatory arrest statutes and the creation of restraining orders, Colorado and other states have discouraged and displaced traditional methods of self-help and private sources of aid. By their very nature, mandatory arrest jurisdictions create reliance on the *effective* machinery of the State: vulnerable persons, faced with a threat to their safety, might ordinarily be expected to act to protect their fundamental interests in the absence of a comprehensive and mandatory State framework. The extensive and detailed protections promised by the State, including the mandatory arrest of any person who violates a restraining order, displaces private sources of aid.

The tragedy of Jessica Gonzales' reliance on the State to take the promised steps to protect the life and physical integrity of her children is compounded by the fact that she and others could have personally intervened to protect the safety of her children had Colorado not asserted its authority over their protection. Instead, Jessica Gonzales relied on the State to fulfill its mandatory duties pursuant to the judicial order to take effective steps to protect her life and the lives of her children.

Rather than admitting that they would not enforce the order, the police repeatedly told Jessica Gonzales to wait for the return of her daughters, to call back later, or to wait

²⁷⁸ See *id.* at Part (II)(E)(2)(iii).

for further police action that never materialized. Had they forthrightly refused to help her at the outset, Ms. Gonzales may well have taken other steps to protect her children, such as personally attempting to locate her children, enlisting the aid of friends and family members, and perhaps even purchasing a firearm for protection.²⁷⁹ In inducing Jessica Gonzales to rely on State protection and then failing to provide it, the State created a danger that may not have otherwise existed. Laws intended to protect children and victims of domestic violence are meaningless if they are not enforced, and have the perverse effect of endangering victims.

The United States is responsible for the State's failure to take those reasonable and effective preventive measures to protect the safety of Jessica Gonzales and her children that would have created a reasonable possibility of ameliorating the risk that Mr. Gonzales posed. As in *Kiliç v. Turkey*, the European Court found that the State failed to take any operational measures of protection to safeguard the life of Kiliç, even though "[a] wide range of preventive measures were available which would have assisted in minimising the risk to Kermal Kiliç's life and which would not have involved an impractical diversion of resources,"²⁸⁰ and concluded that "the authorities failed to take reasonable measures available to them to prevent a real and immediate risk" to his safety. Here too the State failed to take those reasonable steps available to it that might well have averted this tragedy.

Specifically, after Jessica Gonzales' first call to the CRPD at 5:50 p.m., CRPD officers and dispatchers should have automatically looked up the restraining order and Mr. Gonzales' criminal history. Had they done so, they would have discovered that Mr.

²⁷⁹ See Dec. 11, 2006 Observations, *supra* note 3, at Ex. E: Gonzales Decl. ¶ 79.

²⁸⁰ *Kiliç*, Eur.Ct.H.R. Application No. 22492/93, at ¶ 76.

Gonzales had recently been cited for careless driving and that he was to appear in court for this charge on June 23, 1999 – the day the girls would be killed.²⁸¹ The CRPD would have similarly discovered that Jessica Gonzales had called the police numerous times in the recent weeks because of Mr. Gonzales’ disturbing behavior in violation of the restraining order, for which he should have been – but was not – arrested.²⁸² Through this record, officers could have located Mr. Gonzales’ license plate information, thus making it much easier to locate him on the road with his children. When Jessica Gonzales informed the CRPD of the whereabouts of Mr. Gonzales and the children, CRPD officers could have worked with other local law enforcement agencies or Elitch Gardens security to find and arrest him. Additionally, had CRPD officers and dispatchers been familiar with the procedures for disseminating an Attempt to Locate, they would have issued such a notice or an All Points Bulletin or other communication to local law enforcement agencies and Elitch Gardens early in the evening and continued to follow up on it throughout the course of the night. The CRPD could also have spoken with Rosemary Young, who was in contact with Mr. Gonzales throughout the evening, in an attempt to gain additional information that would permit them to locate and promptly arrest Mr. Gonzales and recover the children. Any of these steps might have made a crucial difference.

²⁸¹ See Dec. 11, 2006 Observations, *supra* note 3, at Part (II)(C)(2).

²⁸² Dec. 11, 2006 Observations, *supra* note 3, at Ex. E: Gonzales Decl. ¶¶ 19-22, 27. An arrest for violating a restraining order dramatically reduces the probability of harm occurring. See Dec. 11, 2006 Observations, *supra* note 3, at Part (III)(A).

c. The CRPD Did Not Act With Due Diligence To Locate and Arrest Mr. Gonzales, in Accordance With Basic Policing Practices.

As documented in Jessica Gonzales’ Petition, the Declaration of Randy Saucedo, and Petitioner’s December 11, 2006 Observations,²⁸³ proper training of the CRPD in how to effectively respond to domestic violence may have averted the Gonzales tragedy.²⁸⁴ Had CRPD officers been properly trained on approaches to domestic violence, they would have immediately recognized that Mr. Gonzales’ abduction of the children in violation of a restraining order presented “a real and immediate risk” to the children’s safety, as previously determined by a court. The dispatchers and officers would have known that by law, they did not have discretion to determine the level of threat posed to individuals protected by a restraining order; they would never have wrongly assumed that Leslie, Rebecca, and Katheryn Gonzales were safe because they were with their father; and Officer Brink would have recognized that Ms. Gonzales had a restraining order, not a divorce decree.²⁸⁵ By following these basic policing practices, the CRPD may well have averted the Gonzales tragedy.

d. No Prudential Factors Exist In This Case Counseling In Favor Of Judicial Restraint.

The affirmative obligation imposed on law enforcement here, to prevent private acts of violence did not impose an impossible or disproportionate burden on the officers.²⁸⁶ None of the prudential limitations that counseled in favor of judicial restraint in the *Osman* case exist in the present case. In *Osman*, the European Court was not

²⁸³ See Dec. 11, 2006 Observations, *supra* note 3, at Part (III)(B)(3).

²⁸⁴ See Gonzales Petition, *supra* note 3, at Context and Patterns Section; Dec. 11, 2006 Observations, *supra* note 3, at Ex. P, Saucedo Decl. See also A Law Enforcement Officers’ Guide to Enforcing Orders of Protection Nationwide, published by the International Association of Chiefs of Police.

²⁸⁵ See Dec. 11, 2006 Observations, *supra* note 3, at Part (II)(B)(3).

persuaded that English police officers knew or ought to have known at any decisive stage that a school teacher had an irrational and dangerous obsession with the applicants' family that posed a real and immediate risk of violence. The factual circumstances presented in this case, however, stand in stark contrast to those in *Osman*.

First, the court-issued restraining order and the statutory provisions for mandatory arrest in the present case, clearly reflected in capital letters in the order's notice, are markedly different from the *Osman* situation. In that case, the Court noted that with little concrete evidence indicating that the perpetrator constituted a threat to the victims' safety, "the police must discharge their duties in a manner which is compatible with the rights and freedoms of individuals," including the presumption of innocence and due process guarantees.²⁸⁷ In this case, however, the restraining order and the legal mandate to seek an arrest if the terms of the order were violated were predicated on a judicial determination that Mr. Gonzales represented a threat of physical or emotional harm to his family.²⁸⁸ Failure to use the powers of arrest in this circumstance cannot be said to be founded on the police's reasonably-held view that they lacked the required standard of suspicion, consistent with due process, to use these powers.²⁸⁹ The powers of the police to control and prevent the threat to the safety of Jessica Gonzales' three daughters were specifically provided for by the court order and mandatory arrest statute.

Second, whereas in *Osman*, the police enjoyed wide discretion to decide that a more vigorous investigation into the school teacher's behavior was not warranted, particularly in light of three psychiatric examinations that revealed no signs of mental

²⁸⁶ *Osman*, 1998-VIII Eur. Ct. H.R. at ¶ 116; U.S. Response, *supra* note 21, at 32.

²⁸⁷ *Osman*, 1998-VIII Eur. Ct. H.R. at ¶ 121.

²⁸⁸ Gonzales Petition, Exhibit A: May 21, 1999 Temporary Restraining Order; *see* Dec. 11, 2006 Observations, *supra* note 3, at Sec. II(D)(1).

illness or propensity to violence, here the restraining order prescribed specific duties that left nothing to the discretion of the police. Upon a showing of probable cause to believe that Mr. Gonzales had breached the terms of the order, the police officers were required to arrest him, or if arrest were impractical, to seek a warrant for his arrest.²⁹⁰ The police simply had no discretion to ignore Jessica Gonzales's repeated calls for help, a court's prior findings that Mr. Gonzales posed a threat to his wife and family, the clear language printed on the restraining order, or their obligations under the Colorado statute.

Finally, the United States here may not be heard to argue that effective measures of protection would have resulted in an "impractical diversion of resources," rising to the level of "an impossible or disproportionate burden on the authorities." Jessica Gonzales merely insists that the State comply with the enforcement of the mandatory arrest provisions of domestic violence restraining orders, a system of protection that the State itself devised and which it represented as providing an effective measure of protection against the threat posed by domestic violence.

Applying the standards detailed above and in Petitioner's December 11, 2006 Observations, this Commission should find the United States responsible for the violation of Jessica, Rebecca, Katheryn and Leslie Gonzales' rights to life and personal security under Article I of the American Declaration and their rights to privacy and family life under Articles V and VI.

²⁸⁹ *Cf. id.* ¶ 121.

²⁹⁰ Dec. 11, 2006 Observations, *supra* note 3, at Part (II)(C); COLO. REV. STAT § 18-6-803.5(3)(b) (1999). *See also* Gonzales Petition, *supra* note 3, at Ex. A.

e. The United States Failed to Conduct an Investigation That Comports with the Due Diligence Standard.

As part of the United States' general responsibility to ensure effective human rights protection "[t]he State is obligated to investigate every situation involving a violation of the rights protected" by the American Declaration.²⁹¹ As the *Velasquez* court observed, although "[i]n certain circumstances[,] it may be difficult to investigate acts that violate an individual's rights [n]evertheless, it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective."²⁹² Although a Government may conduct various judicial proceedings relating to the facts, it may still be in violation of its due diligence obligation to investigate crime. Thus, in the *Street Children* case, for example, the State was held responsible for the abduction and killing of the children, because the persons responsible for these violations had not been punished and had "not been identified or penalized by judicial decisions that [had] been executed."²⁹³ This fact alone was sufficient in that case to find a violation of the State obligation to ensure effective human rights protections.

Likewise, under the European Convention, the obligation on States to ensure human rights protection "requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force."²⁹⁴ As the European Court notes in *Avsar*, "The essential purpose of such an investigation is to secure the effective implementation of the domestic laws which protect the right to life" and to ensure accountability of those involved in the violation.²⁹⁵ In

²⁹¹ *Velasquez Rodríguez*, 4 Inter-Am. C.H.R., at ¶ 176.

²⁹² *Id.* at ¶ 177.

²⁹³ *Street Children*, 1999 Inter-Am. C.H.R., at ¶ 228.

²⁹⁴ *Avsar v. Turkey*, App. No. 25657/94, Eur. Ct. H.R., at ¶ 393 (2001).

²⁹⁵ *Id.*

Avsar, the Court also elaborated on the level of investigation required to satisfy the due diligence standard: “The authorities must have take the reasonable steps available to them to secure the evidence concerning the incident, including *inter alia* eye witness testimony, forensic evidence, and where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death”²⁹⁶

Finally, the due diligence standard also requires the involvement of the victims or their next-of-kin during the investigations into, and court proceedings regarding, human rights violations. Such involvement is particularly important in inquiries into killings and other forms of violence, including gender-based violence. State officials must ensure, therefore, that affected persons are heard at all appropriate times during the investigation. The Inter-American Court emphasized this facet of the process in the *Street Children* case, noting that “victims of human rights violations or their next of kin should have substantial possibilities of being heard and acting in the respective proceedings, both in order to clarify the facts and punish those responsible, and to seek due reparation.”²⁹⁷

Here, the investigation conducted by the Colorado authorities into the deaths of the three Gonzales children failed to meet this due diligence standard. First, no form of effective official investigation was conducted into the girls’ deaths. Instead, the investigations concerning the police shooting of Simon Gonzales summarily conclude, with no evidentiary basis, that Mr. Gonzales killed the girls earlier that night.²⁹⁸ For

²⁹⁶ *Id.* ¶ 394.

²⁹⁷ *Street Children*, 1999 Inter-Am. C.H.R., at ¶ 227.

²⁹⁸ 18th Judicial Critical Incident Team Shooting of Simon Gonzales Castle Rock PD Case #99-3226, Ex. C at 37 (concluding girls were killed by Simon Gonzales); *see also* Letter to CBI from Detective Contos and Agent Vanecek, June 28, 1999, Ex. H (reporting that Simon Gonzales killed the girls). Note that although these sources both base their conclusions on the girls’ autopsies, the autopsy reports state no evidentiary

instance, reasonable steps to secure all available eye-witness testimony and forensic evidence were not taken and the autopsy reports produced are inconclusive as to the nature and extent of the injuries sustained by the girls and the actual cause of death. Second, the clear objective of the investigations was to assess the police use of force that ultimately resulted in Simon Gonzales' death.²⁹⁹ No investigative report ever purports to have as its purpose an assessment of the girls' deaths. Finally, despite their numerous requests to State and federal authorities to conduct a full and impartial investigation into the girls' deaths, neither Jessica Gonzales nor any of her family members were involved in any informed manner in the cursory investigations that were conducted.³⁰⁰

B. The United States Is Responsible For the Violation of Rebecca, Katheryn, Leslie, and Jessica Gonzales' Rights to Life and Personal Security Protected Under Article I of the American Declaration.

Article I of the American Declaration guarantees the right to life. It provides that “[e]very human being has the right to life, liberty and the security of his person.” In the Inter-American system, the right to life is the most fundamental right, as without it the enjoyment of other rights cannot be fulfilled.³⁰¹ The Commission has defined the right to

basis for concluding that Simon Gonzales killed the girls. *See also* Ex. E (Coroner's Report Rebecca Gonzales); Ex. F (Coroner's Report Katheryn Gonzales); Ex. G (Coroner's Report Leslie Gonzales).

²⁹⁹ Letter to CBI from Detective Contos and Agent Vanecek, June 28, 1999, Ex. H (requesting analysis of evidence relating to the “shooting in front of the Castle Rock Police Department” and later stating “The 18th Judicial District Critical Incident Team is investigating the Officer-Involved shooting. The homicide of the three girls is being handled by the Castle Rock Police Department.”); Summary of Investigation, 18th Judicial Critical Incident Team, Ex. C (“As a result of [the exchange of gunfire between police and Simon Gonzales]..., the 18th Judicial Critical Incident Team was called out to investigate the circumstances surrounding the shooting.” Context makes it clear that “the shooting” refers to the shooting of Simon Gonzales by police.); CBI Official Request for Lab Exam, Ex. J (listing offense on form as “officer involved shooting death” and listing Simon Gonzales as the victim).

³⁰⁰ *See* Dec. 11, 2006 Observations, *supra* note 3, at Ex. E, ¶¶ 75-78 (detailing requests for information that went ignored and stating “I never learned how, when, and where the girls died, and whether any CRPD bullets had hit them in the course of the shootout with Simon. I continue to seek this information to this day.”); Tina Rivera Decl., *supra* note 126, at Ex. A, ¶¶ 7-11.

³⁰¹ *See, e.g.*, Gary T. Graham (Shaka Sankofa) v. United States, Case 11.193, Inter-Am. C.H.R., Report No. 97/03, OEA/Ser./L/V/II.114 Doc. 70 rev. 1 at 705 ¶ 26 (2003) (“[T]he right to life is widely recognized as the supreme right of the human being, respect for which the enjoyment of other rights depends.”).

include “a person’s legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.”³⁰²

The importance of the right to life is reflected by its incorporation in every major international human rights instrument.³⁰³ The United States has an affirmative obligation to protect this right. As the Inter-American Court notes in the *Velásquez* case, the Court held that states must protect those persons within their jurisdiction from violations of the right to life by both State and private actors.³⁰⁴

1. Rebecca, Katheryn, and Leslie Gonzales’ Right to Life was Violated.

The failure of the Castle Rock police to take reasonable steps that might have prevented the deaths of Rebecca, Katheryn, and Leslie Gonzales constitutes a violation of their right to life for which the United States is responsible. As discussed above, the police were aware of a “real and immediate risk” to the lives, safety, and well-being of the Gonzales children, but failed to take “reasonable steps” to prevent or avoid this risk and protect them. The police were required, pursuant to the terms of the restraining order and Colorado’s mandatory arrest law and in accordance with basic policing principles, to take immediate steps to locate and arrest Simon Gonzales. Instead, they did nothing. There were no other pressing emergencies that night that may have explained this failure.

³⁰² The Haitian Centre for Human Rights et al. v. United States, Case 10.675, Inter-Am. C.H.R., Report No. 51/96OEA/Ser.L/V/II.95 Doc. 7 rev. at 550 ¶ 170 (1997).

³⁰³ Universal Declaration of Human Rights, art. 3; ICCPR, *supra* note 232, at art. 6; African [Banjul] Charter on Human and Peoples’ Rights, *supra*, at art. 4; American Convention on Human Rights, *supra*, at art. 4; [European] Convention for the Protection of Human Rights and Fundamental Freedoms, at art. 2.

³⁰⁴ *Velásquez Rodríguez*, 4 Inter-Am C. H.R., at ¶ 166. *See also Osman*, 1998-VIII Eur. Ct. H.R.; *Z and Others*, Eur. Ct. H.R.; *Ximenes Lopes*, Case 12.237, Inter-Am. C.H.R., at ¶¶ 124-25; *Pueblo Bello Massacre*, 2006 Inter-Am. C.H.R., at ¶ 120; *Mapiripán Massacre*, Case 12.250, Inter-Am. C.H.R., at ¶ 232. *See also Sawhoyamaya Indigenous Community*, Case 0322/2001, Inter-Am. C.H.R., at ¶ 153; *Juan Humberto Sánchez Case*, 2003 Inter-Am. C.H.R., at ¶ 110; *Street Children*, 1999 Inter-Am. C.H.R.

For the reasons described *supra* and *infra*, the United States is responsible for the grave and unremedied human rights violations of the Castle Rock Police Department that resulted in the deprivations of Rebecca, Katheryn, and Leslie Gonzales' right to life under Article I.

2. Jessica Gonzales' Right to Life Was Violated.

The abduction of Jessica Gonzales' three children on June 22, 1999, by her estranged husband was an act of domestic violence intended by him to punish her personally, to intimidate her, and to cause her severe mental anguish and distress. As discussed *supra*, the abduction was the culmination of years of emotional, financial, physical, and sexual abuse and terror by her estranged husband. These acts of gender-based violence violated Jessica Gonzales' fundamental human rights as a woman, including, significantly, her own right to life protected under Article I of the American Declaration.

Although the right to life is principally aimed at protecting against arbitrary deprivations of life by the state or its agents, the Commission has found the right implicated in a broad range of situations, which do not necessarily result in death, including detentions, forcible repatriations, and environmental pollution.³⁰⁵ As the Inter-American Court has recently concluded, the right "includes, not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence."³⁰⁶

³⁰⁵ See, e.g., *Parque São Lucas v. Brasil*, Case 10.301, Inter-Am. C.H.R., Report No. 40/03, OEA/Ser.L/V/II.114, doc. 70 rev. 1 at 677 (2003) (detention of prisoners); *The Haitian Centre for Human Rights et al.*, Case 10.675, Inter-Am. C.H.R. (forcible repatriation of Mariel Cubans); *Report on the Situation of Human Rights in Ecuador 1996*, Inter-Am. C.H.R., OEA/Ser.L/V/II.96, doc. 10 rev.1, at 88 (1997) (environmental pollution).

³⁰⁶ *Street Children*, 1999 Inter-Am. C.H.R., at ¶144.

The Commission as well as other international bodies have come to similar conclusions.³⁰⁷

This definition would include the guarantee to be free from domestic violence. Indeed, Article 4 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women explicitly provides that the right to life is implicated by acts of domestic violence. The Commission, too, has found that acts of violence against women “constitute human rights violations [under the Convention], including violations of the right to life.”³⁰⁸

International human rights bodies have also consistently reaffirmed that domestic violence impacts the right to life of women. For example, in General Comment 19, the U.N. Committee on the Elimination of All Forms of Discrimination Against Women has recognized that gender-based violence is an extreme form of discrimination that “impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under specific human rights conventions,” including the right to life.³⁰⁹ Even the United States itself has publicly conceded that “violence against women implicates already existing human rights, and is already covered by existing

³⁰⁷ See e.g., Status of Human Rights in Several Countries: Guatemala, in Annual Report of the Inter-American Commission of Human Rights 1991, O.A.S. Doc. OEA/Ser.L/V/III.25 doc.7, at 213 (1992) (finding that “respect for rights linked to life and integrity should go hand in hand with improvements in the population’s living standards”); Human Rights Committee, General Cmt. No. 6, U.N. Doc. A/37/40, ¶ 5 (1982).

³⁰⁸ Report on the Situation of Human Rights in Brazil, Inter-Am. C.H.R., OEA/Ser.L/V/II.97, doc. 29 rev., Ch. VIII, ¶ 30 (1997); see also *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).

³⁰⁹ Committee on the Elimination of All Forms of Discrimination Against Women, General Recommendation No. 19, at. ¶ 8, U.N. Doc. CEDAW/C/1992/L.1/Add. 15 (1992); see also Human Rights Committee, General Cmt. 28, at ¶¶ 10,11, 14, 16, 21, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000); G.A., Res. A/Res/58/147 (2004) (collating international treaties and other instruments that recognize violations of women’s rights as violations of human rights norms, including the right to life).

human rights instruments, particularly the Convention on the Elimination of All Forms of Discrimination Against Women.”³¹⁰

The gender-based violence experienced by Ms. Gonzales violated her right “to live her life in dignity” in violation of Article I. In the circumstances, the State is responsible for the violation. While the State went some way towards affirmatively protecting her right to life through the issuance of the domestic violence restraining order, it did not go far enough to avoid responsibility for Mr. Gonzales’ actions. The Castle Rock police had affirmative obligations to take effective measures to prevent Mr. Gonzales from subjecting her to acts of violence both on and before June 22-23, 1999. The police failed to do so and thus the United States assumes responsibility for the violation of Ms. Gonzales’ right to life under Article I.

3. Jessica Gonzales’ Right to Humane Treatment was Violated.

The United States’ inaction also violated Ms. Gonzales’ right to humane treatment also protected under Article I of the Declaration. Although this right is not explicitly recognized under Article I, the Commission has interpreted this provision to include similar protections to those rights protected under Article 5 of the American Convention.³¹¹ Article 5, sections (1) and (2) respectively, establish the right of every person to respect for their “physical, mental and moral” integrity and to be free from “cruel, inhuman or degrading treatment.” Article I guarantees analogous rights.

³¹⁰ *Reply of the Government of the United States of America*, OEA/ser.L/II.2.26, CIM/doc.5/92 add. 1, at 3 (Sept. 21, 1992).

³¹¹ *Report on Terrorism and Human Rights*, Inter-American C.H.R. OEA/Ser.L/V/II.116, doc. 5 rev. 1 ¶ 155 (Oct. 22 2002) (noting that while the American Declaration lacks a general provision on the right to humane treatment, the Commission has interpreted Article I as containing a prohibition similar to that of Article 5 of the American Convention) (citing Juan Antonio Aguirre Ballesteros (Chile), Case 9437, Inter-Am. C.H.R., Report N° 5/85, OEA/Ser.L/V/II.66, doc.17 (1985)).

Significantly, the protections encompassed by Article 5 of the American Convention – and hence Article I of the American Declaration – are much broader in scope than mere protection from physical mistreatment; rather they extend to any act that is “clearly contrary to respect for the inherent dignity of the human person” and specifically include acts that cause psychological and emotional damage.³¹²

a. Article I of the American Declaration Recognizes the Right to be Free from Physical Mistreatment as Well as Psychological and Emotional Damage.

Although the substance of the Article 5 right to be free from “cruel, inhuman or degrading treatment” is not defined in the two Inter-American treaties that specifically refer to it, namely the American Convention and the Inter-American Convention to Prevent and Punish Torture, certain guiding principles as to its content can be derived from the jurisprudence of the Inter-American Court and this Commission for the purpose of determining relevant proscribed conduct. Consistent with its interpretative mandate, the Commission and the Court have drawn on other international instruments as well as the decisions of other international bodies interpreting them to define the content of the norm. Significantly, both the Commission and the Court have found that proscribed conduct need not necessarily be physical in nature but rather may include conduct that causes psychological and moral suffering.³¹³ Accordingly, the Commission and the Court have found that acts resulting in “emotional trauma,”³¹⁴ “trauma and anxiety,”³¹⁵

³¹² Castillo Paez, Inter-Am. Ct. H. R., (Ser. C) No. 35, at ¶¶ 63, 66 (Nov. 3, 1997).

³¹³ See *Luis Lizardo Cabrera v. Dominican Republic*, Case 10.832, Inter-Am.C.H.R., Report N° 35/96, OEA/Ser.L/V/II.95, doc. 7 rev. at 821, ¶ 77 (1997) (citing *The Greek Case*, 12 Y. B. Eur. Conv. on H.R. 12 (1969)); Loayza Tamayo, Reparations, 1998 Inter-Am. C.H.R. (ser. C) No. 42, 169, at ¶57 (Nov. 27, 1998).

³¹⁴ See e.g., *Victims of the Tugboat "13 de Marzo" v. Cuba*, Case 11.436, Inter-Am. C.H.R., Report No. 47/96, OEA/Ser.L/V/II.95, doc. 7 rev. at 127, ¶ 106 (1997) (finding Cuba responsible for violating the personal integrity of 31 survivors of a refugee boat fleeing to U.S. as a consequence of the emotional trauma resulting from the shipwreck caused by Cuba).

and “intimidation” or “panic”³¹⁶ violate Article 5. The Commission has also found that acts affecting an individual’s “personal self-esteem ... translate[] into important damage to moral integrity.”³¹⁷ Furthermore, as the Human Rights Committee has found, any act that “affects the normal development of daily life and causes great tumult and perturbation to [an individual and his] family ... [and] seriously damages his mental and moral integrity,” violates an individual’s right to respect for his or her physical, mental and moral integrity and right to be free from cruel, inhuman or degrading treatment.³¹⁸

b. Ms. Gonzales’ Status as a Woman, a Latina and Native American, and a Survivor of Domestic Violence Should Be Taken into Consideration in the Commission’s Assessment of her Allegations of Inhumane Treatment.

Both the Commission and Court have held that each allegation of “cruel, inhuman or degrading” treatment should be assessed on a case-by-case basis, taking into consideration the particular circumstances of the petitioner. Significantly, the Commission and Court have found that the sex of the alleged victim will have an important bearing on whether alleged conduct constitutes “cruel, inhuman or degrading” treatment.³¹⁹ An individual’s racial or ethnic background, as well as her status as a domestic violence victim, are also recognized as special considerations.

³¹⁵ See, e.g., *María Mejía v. Guatemala*, Case 10.553, Inter-Am. C.H.R. Report No. 32/96, OEA/Ser.L/V/II.95, doc. 7 rev. at 370, ¶ 60 (1997) (Guatemalan military officials found liable for causing “trauma and anxiety to the victims [constraining] their ability to lead their lives as they desire”).

³¹⁶ See, e.g., *id.* at ¶ 61 (finding Guatemalan military responsible for actions designed to “intimidate” and “panic” among community members).

³¹⁷ *Gallardo Rodríguez v. Mexico*, Case 11.430, Report No. 43/96, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 485, ¶ 79 (1997).

³¹⁸ See also Human Rights Committee, General Cmt. 20, art. 7, U.N. Doc. HRI/GEN/1/Rev.6, at ¶ 2 (1992) (noting that the purpose of the ICCPR’s prohibition of torture and other cruel, inhuman or degrading treatment is to protect both the dignity and the physical and mental integrity of the individual).

³¹⁹ *Luis Lizardo Cabrera v. Dominican Republic*, Case 10.832, Inter-Am.C.H.R., at ¶ 78, citing *Ireland v. United Kingdom*, 5310/71 Eur.Ct. H.R. 1, 162-163 (1978); see also *Tyrer v. United Kingdom*, 5856/72 Eur.Ct. H.R. (ser. A) at ¶ 28 ff (1978).

The “sex” factor was considered by the Commission in the case of *Ms. X v. Argentina*.³²⁰ The case involved a practice in Argentina of subjecting women wishing to have personal contact visits with an inmate to vaginal inspections. In their assessment as to whether these inspections amounted to a violation of Article 5 of the American Convention, or rather were justified as a legitimate security measure by the State, the Commission stated that in balancing the competing interests, the State would be held to a “higher standard,” given that the measures were specifically directed against women. Taking both sides into account, the Commission found that the practice violated Article 5.

Taking into consideration Ms. Gonzales’ status as a Latina and Native American woman and a victim of domestic violence, this Commission in its assessment of her allegations of inhumane treatment must also interpret Article I in light of Inter-American and universal human rights instruments that relate to these specific issues. Foremost among the relevant Inter-American human rights instruments in this regard is the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women.³²¹

Article 1 of the Convention provides that “[v]iolence against women shall be understood to include physical, sexual, and psychological violence ... (a) that occurs within the family or domestic unit” Subsection (c) of this article also notes that violence against women includes physical, sexual and, psychological violence “that is perpetrated or condoned by the state or its agents” Article 9, recognizing that certain women are in need of greater protection than others, requires that States “take special

³²⁰ *Ms. X v. Argentina*, Case 10.506, Inter-Am.C.H.R., Report No. 38/96, OEA/Ser.L/V/II.95 Doc. 7 rev. at 50, ¶¶ 54-71 (1997).

account of the vulnerability of women to violence by reason of, among others, their race or ethnic background ... [or] women subjected to violence while pregnant”³²²

The Commission has noted the provisions of this Convention in its consideration of cases involving female domestic violence victims, including those cases raising allegations of inhumane treatment.³²³ Finally, the Commission has found that the right to humane treatment protected under Article I implicitly prohibits a variety of physical and dignitary harms specifically directed towards women.³²⁴ Specifically, the Commission has noted that Article I protections include the right to personal integrity and protection against violence against women.³²⁵

As well as Ms. Gonzales’ status as a Latina and Native American woman and a victim of domestic violence, this Commission must also take into consideration her relationship to the other victims of the human rights violations. Significantly, in this regard the Commission has recognized that the mental suffering imposed on close relatives of victims of serious human rights violations *in and of itself* may constitute a separate and distinct violation of the right of such persons to humane treatment.³²⁶ For

³²¹ See *Prevention*, *supra* note 258.

³²² See also CEDAW, Art. 1.

³²³ See *Maria da Penha*, Case 12.051, Inter-Am. C.H.R.

³²⁴ See, e.g., *Ana, Beatriz and Celia Gonzalez Perez v. Mexico*, Case 11.565, Inter-Am.C.H.R., Report N° 129/99, OEA/Ser.L/V/II.106, doc. 3 rev. at 232, ¶ 94 (1999) (holding that rape by soldiers violated the right to humane treatment); *Raquel Martí de Mejía v. Perú*, Case 10.970, Inter-Am.C.H.R., Report No. 5/96, OEA/Ser.L/V/II.91 Doc. 7 at 157 (1996) (holding that sexual abuse by members of security forces violated right to physical and mental integrity); *María Mamérita Mestanza Chavez v. Peru*, Case 12.191, Inter-Am.C.H.R., Report No. 66/00, OEA/Ser.L/v/II.111 Doc. 20 rev. at 350 ¶ 1 (2000) (holding case of forced sterilization of women admissible under Article 4 right to life and Article 5 right to humane treatment); *Ms. X v. Argentina*, Case 10.506, Inter-Am.C.H.R., at ¶ 116 (holding that requirement of vaginal inspections as a condition of prison visits without judicial and appropriate medical guarantees violated, among others, Article 5 right to humane treatment).

³²⁵ See Report of the Inter-American Commission on Human Rights on the Status of Women in the Americas, Inter-Am.C.H.R., OEA/Ser.L/V/II.100 doc. 17, at Chapter III(C)(2) (1998).

³²⁶ See also *Street Children*, 1999 Inter-Am. C.H.R., at ¶¶ 174-176.

example, in the *Pérez* case,³²⁷ the Commission found that “the treatment extended to the petitioner, Delia Pérez de González, who had to stand by helplessly and witness the abuse of her three daughters by members of the Mexican Armed Forces and then to experience, along with them, ostracism by her community, constitutes a form of humiliation and degradation that is a violation of the right to humane treatment guaranteed by the American Convention.”³²⁸

Both the United Nations Human Rights Committee and the European Court of Human Rights have also found that close relatives of human rights victims, such as mothers, could themselves be victims of human rights violations by virtue of the mental suffering they experience. In *Quinteros v. Uruguay*,³²⁹ for example, the HRC found that “it underst[ood] the deep sadness and anxiety that the author of the communication suffer[ed] owing to the disappearance of her daughter and the continuing uncertainty about her fate and her whereabouts. The author had the right to know what had happened to her daughter. In this respect, she is also a victim of the violations of the [International] Covenant [on Civil and Political Rights], in particular of [ICCPR] Article 7 [prohibition of torture and other inhumane treatment], suffered by her daughter.”³³⁰

Similarly, in *Kurt v. Turkey*,³³¹ the European Court held that a mother whose daughter was detained and disappeared by agents of the Turkish government was herself a victim of inhuman treatment in violation of Article 3 (prohibition on torture) of the European Convention.

³²⁷ *Ana, Beatriz and Celia Gonzalez Perez*, Case 11.565, Inter-Am.C.H.R., at ¶ 53.

³²⁸ *Id.*

³²⁹ Human Rights Committee, Communication No. 107/1981, U.N. Doc. CCPR/C/19/D/107/1981 (July 21, 1983).

³³⁰ *Id.* at ¶14.

³³¹ *Kurt v. Turkey*, 24276/94 Eur. Ct. H.R. 44, 1187, §§ 130-134 (1998).

Here, Ms. Gonzales was subjected to severe fear and anguish when she had to stand by helplessly, knowing that that her children were in grave danger. As a victim of the abductor's violence in the past and the mother of the abducted children, Ms. Gonzales was especially vulnerable to such psychological trauma. The history of inadequate police response to women and minorities³³² (and correspondingly, Ms. Gonzales' sex and ethnicity) must also be considered here, as directed by Article 9 of the Convention Belem do Para. In light of the explicit terms of the restraining order and Ms. Gonzales' repeated requests for the CRPD to intervene, the harm Ms. Gonzales suffered constitutes inhumane treatment in violation of Article I of the American Declaration. The Colorado police knew or ought to have known at the time of the existence of a real and immediate risk of psychological harm to Ms. Gonzales and her children and yet failed to "take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk."³³³ Accordingly, the violation of Ms. Gonzales' right to humane treatment under Article I of the Declaration is attributable to the United States.

C. The United States Deprived Jessica, Rebecca, Katheryn and Leslie Gonzales of Their Rights to Family and Private Life in Violation of Articles V and VI of the American Declaration.

The CRPD violated Articles V and VI of the American Declaration when its officers failed to take reasonable steps to protect Jessica Gonzales and her children from Simon Gonzales' dangerous and threatening behavior. Moreover, as a consequence of the United States' failure to conduct a full and impartial investigation into the

³³² See, e.g., Race Realities in New York City, Shadow Report to the CERD Committee, available at <http://www.hrpjuc.org/documents/NYCCERDSRWeb.pdf>; Response to the Periodic Report of the United States to the United Nations Committee on the Elimination of Racial Discrimination, Ch. 15, Domestic Violence, available at http://www.ushrnetwork.org/cerd_shadow_2008.

³³³ *Osman*, 1998-VIII Eur. Ct. H.R., at ¶ 116.

circumstances surrounding the deaths of her three children, violations of Ms. Gonzales' family rights continue to this day.

Article V of the American Declaration provides: "Every person has the right to the protection of the law against abusive attacks upon his . . . private and family life." Article VI provides that: "Every person has the right to establish a family, the basic element of society, and to receive protection therefore."

Taken together, these provisions, read in light of the corresponding provisions of the American Convention (Articles 11 and 17),³³⁴ recognize "the central role of the family and family-life in the individual's existence and society."³³⁵ Indeed, the Commission has found that the right to establish and receive protection for the family "is a right so basic to the Convention that it is considered to be non-derogable even in extreme circumstances."³³⁶ In relation to Article 11 of the Convention, the Commission has interpreted family and privacy rights broadly, finding that they "guarantee a sphere that nobody can invade, an area that belongs entirely to each individual."³³⁷

Although the Commission has previously found that the object of Article 11 of the Convention is "essentially to protect the individual against arbitrary interference by public officials,"³³⁸ under certain circumstances States may be obliged to ensure the right to private or family life from violations by private actors. For instance, in *Ms. X v. Argentina*, the Commission found that although there are certain inherent limitations to the right to family life under Article 17 of the Convention, such as incarceration or

³³⁴ Article 11.2 of the American Convention establishes: "No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation." Article 17.1 establishes: "The family is a natural and fundamental group unit of society and is entitled to protection by society and the state."

³³⁵ *Ms. X v. Argentina*, Case 10.506, Inter-Am.C.H.R., at ¶ 96.

³³⁶ *Id.*

³³⁷ *Id.* at ¶ 91.

military service, the State “must establish positive provisions to effectively guarantee the right to maintain and develop family relations.”³³⁹ Similarly, in *Oscar Elías Biscet et al. v. Cuba*, the Commission found that the State must “take steps to effectively ensure the right to maintain and cultivate family relationships.”³⁴⁰

The affirmative obligation to protect family life is heightened in the case of children, who, as discussed *supra* and *infra*, are guaranteed special protections under the American Declaration.³⁴¹ When a State interferes with a family with children, the rights of the child are implicated and the best interest of the child must be considered.³⁴² In this vein, the Inter-American Court has established that it is a fundamental responsibility of States, pursuant to Articles 19 (Rights of the Child) and 17 (Rights of the Family), in combination with Article 1(1) of the American Convention, “to adopt all positive measures required to ensure protection of children against mistreatment, whether in their relations with public authorities, or in relations among individuals or with non-governmental entities.”³⁴³ Thus, the Commission and Court have interpreted State duties under the American Declaration and American Convention broadly, to create strong protections against interference with family life and to include affirmative duties on the part of the State to ensure the maintenance of family life.

The right to family life is also embodied in a significant number of universal legal instruments. For example, Article 16(3) of the Universal Declaration of Human Rights

³³⁸ *Id.*

³³⁹ *Id.* at ¶ 98.

³⁴⁰ Oscar Elías Biscet et al. v. Cuba, Case 12.476, Inter-Am.C.H.R., Report No. 67/06, ¶ 237 (2006).

³⁴¹ See *infra*, at Section IV(D); see also *Street Children*, 1999 Inter-Am. C.H.R.

³⁴² See Juridical Condition on the Human Rights of the Child, Advisory Opinion OC-17/2002, Inter-Am.C.H.R., ¶¶56- 61 (2002).

³⁴³ *Id.* at ¶ 87; see also *Ms. X v. Argentina*, Case 10.506, Inter-Am.C.H.R. (finding states have an affirmative duty to ensure the protection and wellbeing of children); *The Yean and Bosico Children v. Dominican Republic*, Inter-Am C.H.R., (Ser. C) No. 130 (Sept. 8, 2005).

and Article 23(1) of the ICCPR recognize that “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State.” Article 10(1) of the International Covenant on Economic, Social and Cultural Rights establishes that “[t]he widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society.” Article 16 of the Convention on the Rights of the Child establishes that “[n]o child shall be subjected to arbitrary or unlawful interference with his or her privacy, family [or] home,” and that “[t]he child has the right to the protection of the law against such interference or attacks.” Article 8(1) of the European Convention on Human Rights states that “[e]veryone has the right to respect for his private and family life, his home and his correspondence,” and Article 8(2) sets forth limited exceptions to this rule.

The European Court has developed a substantial body of jurisprudence on the right to privacy and family life that can provide guidance for the Inter-American Commission in this case. For example, the European Court has found that “the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life, even if the relationship between the parents has broken down.”³⁴⁴ Of particular relevance to the present case, the Court held in *X and Y v. The Netherlands* that:

there may be positive obligations inherent in an effective respect for private or family life These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.³⁴⁵

³⁴⁴ *Kosmopoulou v. Greece*, App. No. 60457/00, Eur.Ct. H.R. ¶ 47 (2004); *Haase v. Germany*, App. No. 11057/02, Eur.Ct. H.R. ¶ 82, (2004); *Hoppe v. Germany*, App. No. 28422/95, Eur.Ct. H.R., §44 (2002); *Venema v. The Netherlands*, App. No. 35731/97, Eur.Ct. H.R. ¶ 71 (2002).

The European Court reiterated this approach in *M.C. v Bulgaria*, where it found that the State's failure to adequately investigate and prosecute rape and other sexual abuse amounted *inter alia* to a violation of the petitioner's right to privacy guaranteed by Article 8 of the European Convention. The European Court referred to the State's positive obligations in the following terms:

Positive obligations on the State are inherent in the right to effective respect for private life under Article 8 [of the ECHR]; these obligations may involve the adoption of measures even in the sphere of the relations of individuals between themselves. While the choice of the means to secure compliance with Article 8 in the sphere of protection against acts of individuals is in principle within the State's margin of appreciation, effective deterrence against grave acts such as rape, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions. Children and other vulnerable individuals, in particular, are entitled to effective protection.³⁴⁶

The violation of Ms. Gonzales' and her children's rights to privacy and family by the CRPD occurred on multiple occasions, described *supra* at Section II(A), including during the months prior to June 1999, when Ms. Gonzales called the police repeatedly to report Mr. Gonzales' threatening behavior toward her and the children; on June 22-23, when the police refused to respond to Ms. Gonzales' repeated pleas for assistance by securing her children's safety and arresting Mr. Gonzales; and from June 23 to the present, during which time Colorado authorities have failed to adequately investigate the deaths of Rebecca, Katheryn, and Leslie Gonzales. The State's failure to respect these basic rights resulted in the ultimate tragedy that could befall a family: the loss of three little girls, and a mother left with unanswered questions about the time, place, and manner of her children's deaths.

³⁴⁵ X and Y v. The Netherlands, App. No. 8978/80, Eur.Ct. H.R. ¶ 23 (1985).

³⁴⁶ M.C. v Bulgaria, App. No. 39272/98, Eur.Ct. H.R. ¶ 150 (2003).

The impact on Jessica Gonzales and her family of the CRPD's repeated failure to respond to Ms. Gonzales' requests for help, the resulting deaths of Rebecca, Katheryn, and Leslie, and the unanswered questions that remain about the girls' deaths are apparent in the declarations of Jessica Gonzales and her mother, Tina Rivera. As Ms. Gonzales has described, since the deaths of the girls, she has suffered strained relations with her son, family, friends, and community:

This tragedy has devastated my life. After the girls' deaths, I was treated like a leper in my community. . . . The tragedy also damaged my relationship with my son, my family, and my friends. I have moved away from Colorado to try to escape the painful memories. I've left my old job and founded an organization called the Three Peas Foundation in my three daughters' memory. I've lost all faith in my government, in the law, and in humanity. I suffer many health problems that are directly related to the stress and grief from losing my girls. My psychologist says that the trauma of having my three daughters killed and my problems with the legal system have impacted in ALL areas of my life, especially psychologically and physically.³⁴⁷

The girls' death impacted the Gonzales family more broadly as well, as described in the Declaration of Tina Rivera, Ms. Gonzales' mother and grandmother of the girls:

I was very close with my daughter and was very close with my granddaughters. We spent a lot of time together as a family. All my children and I celebrated every birthday and holiday together. . . . I have never gotten used to having my granddaughters torn out of my life. . . . The loss of my granddaughters has been deeply traumatizing. . . . The death of my granddaughters has strained Jessica's and my relationship with the rest of our family. Although we are still close, the painful loss of my granddaughters has made it difficult for me to communicate with the rest of my children and my brothers and sisters. The tragedy affected my brother, who lived with me before he passed away last year. He had to undergo

³⁴⁷ Statement of Jessica Gonzales, Hearing before Inter-Am.C.H.R., at 5 (Mar. 2, 2007) (available at https://www.law.columbia.edu/null/Jessica+Statement+-+IACHR+hrg?exclusive=filemgr.download&file_id=1391&showthumb=0); *see also* Dec. 2006 Observations, *supra* note 3, at Ex. E, Gonzales Decl. ¶ 80.

psychological counseling for many years because of the loss of Kathryn, Rebecca, and Leslie.³⁴⁸

The statements of Jessica Gonzales and Tina Rivera reflect a family that has been shaken to its core, in violation of articles V and VI of the American Declaration. The failure of the CRPD to take positive measures to respond appropriately to Ms. Gonzales' calls for help, and the subsequent failure on the part of Colorado authorities to conduct a full and impartial investigation into the deaths of the Gonzales children, has resulted in a continuing violation of sacrosanct rights: the rights to family and privacy.

D. By Failing to Provide Special Protections to Ms. Gonzales and Her Children, the United States Violated its Obligations under Article VII.

As set out above, in recognition of their particular vulnerabilities, Article VII of the American Declaration explicitly obligates States to provide women and children with “special protection, care and aid.” Read in light of the principles of international human rights law, Article VII provides that the State has enhanced obligations to affirmatively ensure the safety of women and children and specifically to protect them from domestic and gender-based violence.

1. Children Are Entitled to Special Protections from Violence and Other Rights Violations Under Article VII.

Article VII of the American Declaration explicitly recognizes children's entitlement to and need for special protections from the State, providing “all children have the right to special protection, care and aid.” In addition, Article 19 of the American Convention, stipulates that “[e]very minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and

³⁴⁸ Tina Rivera Decl., *supra* note 126, at Ex. A, ¶¶ 12, 14, 20, 21.

the state.” The Commission has recognized that these provisions mean that “in the case of children the highest standard must be applied” in protecting the rights set out in the Declaration.³⁴⁹

The content and scope of the right to special protection set out in Article VII is defined by reference to the “very comprehensive international *corpus juris* for the protection of the child,” including the Convention on the Rights of the Child (“CRC”) and the ICCPR.³⁵⁰ In particular, the CRC, which enjoys near universal ratification, codifies customary international law regarding the rights of children, and sheds light on the obligations of all States.³⁵¹ The CRC incorporates multiple provisions requiring State Parties to adopt effective measures to protect children from family violence. Article 19(1), for example, provides that “State Parties shall take all appropriate . . . measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment . . . while in the care of parent(s).” Article 19(2) requires that “[s]uch protective measures should, as appropriate, include effective procedures for . . . [the] prevention . . . of instances of child maltreatment . . . and, as appropriate, for judicial involvement.”³⁵² The right of children to State protection from private violence is a norm

³⁴⁹ See, e.g., *Jailton Neri Da Fonseca v. Brazil*, Case 11.634, Inter-Am. C.H.R., Report No. 33/04, OEA/Ser.L/V/II.122 doc. 5 rev. 1 at 845 (2004); *Michael Domingues*, Case 12.285, Inter-Am. C.H.R., at ¶ 83 (noting that Article 19 of the American Convention (rights of the child) and Article VII of the American Declaration reflect “the broadly-recognized international obligation of states to provide enhanced protection to children”).

³⁵⁰ *Street Children*, 1999 Inter-Am. C.H.R., at ¶ 194; Convention on the Rights of the Child, art. 6(1), G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989) (hereinafter “CRC”) (“States Parties shall ensure to the maximum extent possible the survival and development of the child.”); ICCPR, *supra* note 232, at art. 23 (“Every child shall have . . . the right to such measures of special protection as are required by his status as a minor.”).

³⁵¹ See also CEDAW art. 23 (mandating special protection for children).

³⁵² CRC art. 19(1).

of customary international law, as set out in detail in Ms. Gonzales' December 11, 2006 Observations.³⁵³

Specifically, children have a right to special protections and aid in the face of domestic violence, given that such violence poses an important threat to children's safety and security. As a comprehensive 2006 United Nations study on violence against women recently emphasized, "Children are often present during episodes of domestic violence" and "[d]omestic or intimate partner violence can . . . be fatal for children."³⁵⁴ The State thus bears an enhanced duty to take effective protective and preventive measures to safeguard children, including children in the care of a parent, from family violence.

2. Article VII Recognizes the State's Special Obligation to Provide Affirmative Protections to Those Most Vulnerable to Private Violence, Including Women Threatened by Domestic Violence.

Article VII of the American Declaration recognizes, "All women, during pregnancy and the nursing period, and all children have the right to special protection, care, and aid." The language of Article VII is properly read as an affirmation of the broader, contextual approach to the protection of human rights recognized by the Inter-American Court—namely, that "every person in a situation of vulnerability is entitled to special protection, as a result of the special duties that the State must fulfill in order to satisfy its general obligations to respect and guarantee human rights."³⁵⁵ Article VII

³⁵³ Dec. 11, 2006 Observations, *supra* note 3, at, 68-76.

³⁵⁴ The Secretary-General, *supra* note 154, at ¶ 169.

³⁵⁵ *Ximenes Lopes*, Case 12.237, Inter-Am. C.H.R., at ¶ 103 (unofficial English translation of "toda persona que se encuentre en una situación de vulnerabilidad es titular de una protección especial, en razón de los deberes especiales cuyo cumplimiento por parte del Estado es necesario para satisfacer las obligaciones generales de respeto y garantía de los derechos humanos. . . es imperativa la adopción de medidas positivas, determinables en función de las particulares necesidades de protección del sujeto de derecho, ya sea por su condición personal o por la situación específica en que se encuentre, como la discapacidad."); *see also Pueblo Bello Massacre*, 2006 Inter-Am. C.H.R., at ¶ 123; *Sawhoyamaya Indigenous Community*,

reflects the State's obligation to provide affirmative protections for those whose human rights are most imperiled, whether this peril stems from the State itself or private actors. Accordingly, the Court has previously recognized the State's special duties pursuant to this obligation, to protect, *inter alia*, undocumented migrant workers,³⁵⁶ street children,³⁵⁷ indigenous communities,³⁵⁸ and persons suffering from mental disorders from private acts of violence.³⁵⁹ Moreover, as set out in detail in Ms. Gonzales' December 11, 2006 Observations, protection from and compensation for private acts of gender-based violence is a norm of customary international law.³⁶⁰ Consistent with these principles and this jurisprudence, the State also shoulders a special obligation to protect victims of domestic violence and other gender-based violence from the acts of their abusers.

As described *supra*, women are uniquely vulnerable to violence in the "private" sphere.³⁶¹ Such gender-based violence is now recognized as a "pervasive violation of human rights . . . whether perpetrated by the State and its agents or by family members or strangers."³⁶² Domestic violence, which primarily targets women, has "consequences for women's health and well-being, carries a heavy human and economic cost, hinders

Case 0322/2001, Inter-Am. C.H.R., at ¶ 154; *Mapiripán Massacre*, Case 12.250, Inter-Am. C.H.R., at ¶ 117.

³⁵⁶ Inter-Am. C.H.R., Advisory Opinion OC-18/03.

³⁵⁷ *Street Children*, 1999 Inter-Am. C.H.R.

³⁵⁸ *Sawhoyamaya Indigenous Community*, Case 0322/2001, Inter-Am. C.H.R., at ¶¶ 83, 168; *Yakye Axa Indigenous Community* case, 2005 Inter-Am. C.H.R. (ser. C) No. 125, ¶ 63 (June 17, 2005). For examples of cases applying the American Declaration, see *Maya Indigenous Community of the Toledo District*, Case 12.053, Inter-Am. C.H.R., at ¶¶ 169-70; *Mary and Carrie Dann v. United States*, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, doc. 5 rev. 1 at 860, ¶ 126 (2002).

³⁵⁹ Damião Ximenes Lopes, Case 12.237, Inter-Am. C.H.R., at ¶¶ 103, 123-49 (interpreting the right to life and personal integrity, as well as the right to respect for the inherent dignity of the human person, in the context of persons with disabilities, and holding the State to a more exacting duty to prevent human rights violations and protect potential victims).

³⁶⁰ Dec. 11, 2006 Observations, *supra* note 3, at 68-74.

³⁶¹ See *supra*, Section II(A) AND (B).

³⁶² The Secretary-General, *supra* note 154, ¶ 1; see also Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, *Violence Against Women in the Family*, U.N. Doc.

development and can also lead to displacement.”³⁶³ “[E]nforcement [of laws prohibiting such violence] remains a pervasive challenge, as social norms and legal culture often protect privacy and male dominance within the family at the expense of the safety of women and girls.”³⁶⁴ The historical and ongoing pattern of inadequate State responsiveness to this violence thus enhances women’s vulnerability, encouraging further violence against women, and reinforces women’s subordination.³⁶⁵ Consequently, special mechanisms for the protection of women by the State are essential to their effective protection from violence committed by non-State actors in private relations.

This Commission has specifically explained the meaning of such special protections in the context of domestic and gender-based violence. Declaring that an “energetic State response” is required to address situations of gender-based violence,³⁶⁶ the Commission stressed that “[w]omen victims of violence, or women who are at risk of repeated acts of violence in the home, should have immediate means of redress and protection, including protection or restraining orders.”³⁶⁷ The Commission further observed that:

In some instances, the duty of due diligence to prevent a violation requires an urgent response, for example in the case of women in need of measures to protect against an imminent threat of violence, or in response to reports of a disappearance.³⁶⁸

E/CN.4/1999/68 G.A. Res. S-23/3, at Annex, ¶ 13 (1999) (hereinafter *Violence Against Women in the Family*); *Report on the Rights of Women in Ciudad Juárez*, *supra* note 208, at ¶ 7 (2003).

³⁶³ Secretary-General, *supra* note 154, at ¶ 153.

³⁶⁴ *Id.* at ¶ 95.

³⁶⁵ *See supra* Section III; *see also* Gonzales Petition, *supra* note 3, Context and Patterns Section, Part (B).

³⁶⁶ *See Report on the Rights of Women in Ciudad Juárez*, *supra* note 208, at ¶ 9.

³⁶⁷ *Id.*

³⁶⁸ *Id.* at ¶ 155.

The need for and right of women to special measures of protection from gender-based violence finds further articulation in the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belém do Pará).³⁶⁹ As the Commission has stated, “[t]he Convention of Belém do Pará is an essential instrument that reflects the great effort made to identify specific measures to protect the right of women to a life free of aggression and violence, both outside and within the family circle,” whether or not such violence has been affirmatively condoned by the State.³⁷⁰ Specifically, the Convention requires States Parties to “apply due diligence to prevent, investigate and impose penalties for violence against women”;³⁷¹ “adopt legal measures to require the perpetrator to refrain from harassing, intimidating or threatening the woman or using any method that harms or endangers her life or integrity, or damages her property”;³⁷² and ensure “fair and effective legal procedures for women who have been subjected to violence which include, among others, protective measures, a timely hearing and effective access to such procedures.”³⁷³ The broad hemispheric adherence to the Convention of Belém do Pará constitutes compelling evidence that the basic principles reflected in the Convention, recognizing a specific and affirmative State obligation to undertake necessary steps to protect women from private acts of violence, reflect general principles of international law. Therefore, all OAS Member States, even those not party to the American Convention or the Convention of Belém do Pará, have a

³⁶⁹ *Prevention*, *supra* note 258.

³⁷⁰ *Report on the Rights of Women in Ciudad Juárez*, *supra* note 208, ¶ 53.

³⁷¹ *Prevention*, *supra* note 258, at art. 7(b).

³⁷² *Id.* art. 7(d).

³⁷³ *Id.* art. 7(f) (emphasis added).

duty to provide special protections to those uniquely vulnerable to domestic and other gender-based violence, pursuant to the principles set out in Article VII.³⁷⁴

This conclusion is strengthened by the recognition in other international human rights treaties and authoritative agreements of the right of women to special measures of protection from domestic and gender-based violence. Most notably, the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”) requires parties to “ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination,”³⁷⁵ which encompasses all forms of gender-based violence.³⁷⁶

Finally, resolutions of the U.N. General Assembly and reports by treaty bodies give additional specific content to the special protections that States must afford victims of domestic violence. For example, in 2004 the U.N. General Assembly adopted by consensus a detailed Resolution that recognized that the problem of domestic violence “requires States to take serious action to protect victims and prevent domestic violence.”³⁷⁷ The Resolution called upon States to “establish[] adequate legal protection against domestic violence”; “adopt and/or strengthen policies and legislation in order to strengthen preventive measures”; “ensure greater protection for women, *inter alia*, by means of, where appropriate, orders restraining violent spouses from entering the family home”; “establish and/or strengthen police response protocols and procedures”; and “take

³⁷⁴ Cf. *Michael Domingues*, Case 12.285, Inter-Am. C.H.R., at ¶ 64; Violence And Discrimination Against Women In The Armed Conflict In Colombia, ¶¶ 28-30 (Oct. 2006) available at <http://www.cidh.org/women/colombia06eng/part1co.htm>.

³⁷⁵ CEDAW art. 2(c).

³⁷⁶ Committee on the Elimination of Discrimination Against Women at ¶ 1.

³⁷⁷ G.A. Res.58/147, ¶ 1(d), U.N. Doc. A/Res/58/147 (Feb 19, 2004). *Id.* ¶¶ 7(a), (e), (i), (j).

measures to ensure the protection of women subjected to violence [and] access to just and effective remedies.”

3. The United States Failed to Provide Such Special Protections to Ms. Gonzales and her Children.

While Ms. Gonzales sought and obtained a domestic violence restraining order prohibiting her estranged husband from contacting or harming her and her daughters, with a narrow exception for one pre-arranged visit a week, the failure of Castle Rock police to enforce the provisions set out in the order and required under Colorado law rendered this protection essentially meaningless. In the face of specific recognition by the judiciary of the heightened vulnerability of Ms. Gonzales and her daughters and Ms. Gonzales’s repeated pleas for police intervention and assistance when her daughters disappeared, the police refused to respond. They did so notwithstanding the fact that domestic violence constitutes a significant threat to the safety and lives of those it touches. In so doing, the police ignored their duty to provide an urgent response in the face of a threat of imminent private harm and to adopt procedures reasonably designed to protect women and children threatened by domestic violence. The United States thus failed to apply due diligence to investigate the kidnapping of Ms. Gonzales’s children or to prevent their deaths, in violation of the Article VII rights of Ms. Gonzales and her daughters.

E. The Failure of Law Enforcement to Respond to Ms. Gonzales' Complaints and the Failure of the Courts to Provide Her with a Remedy Violated Her Rights to Resort to the Courts Under Article XVIII and to Petition the Government and Receive a Prompt Decision Under Article XXIV.

Despite Ms. Gonzales' repeated and urgent entreaties to the CRPD to enforce her restraining order and locate her children, and despite the police department's obligation under state law to arrest any individual who violates a restraining order, the police did nothing. Although Ms. Gonzales' three children were killed and she suffered severe psychological and emotional trauma as a direct result of the State's failure to enforce her domestic violence restraining order, the courts refused to consider the merits of her case or to provide her with compensation or other relief for the violation of her own and her children's rights. These actions violated Articles XVIII and XXIV of the American Declaration.

Article XVIII of the Declaration provides: "Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available [] a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights." Article XXIV provides: "Every person has the right to submit respectful petitions to any competent authority, for reasons of either general or private interest, and the right to obtain a prompt decision thereon."

Consistent with its interpretative mandate, the Commission should interpret Articles XVIII and XXIV in light of the more specific but analogous terms of Article 25 and Article 8 of the American Convention.³⁷⁸ Article 25 provides: "Everyone has the

³⁷⁸ The Inter-American Court has found that the right to a remedy under the Declaration (Articles XVIII and XXIV) and the Convention (Articles 8 and 25) are similar in scope. *See* Maya Indigenous Community of the Toledo District, Case 12.053, Inter-Am. C.H.R., at ¶ 174 (2004); *Maria da Penha*, Case 12.051, Inter-Am. C.H.R., at ¶ 37. This right has long been recognized under international law. *See, e.g.*, UDHR,

right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights”³⁷⁹ Article 8 provides: “Every person has the right to a hearing with due guarantees . . . for the determination of his rights”

The Commission has found that Article 25, taken together with Articles 1(1) and 2 of the Convention,³⁸⁰ must be understood to encompass three separate but related elements: first, “the right of every individual to go to a tribunal when any of his rights have been violated,” second, the right “to obtain a judicial investigation conducted by a competent, impartial and independent tribunal that will establish whether or not the violation has taken place,” and third, the right to have remedies enforced when granted.³⁸¹

Both the Commission and the Court have repeatedly determined that a tribunal should be available to all persons who allege violations of their fundamental rights and

supra note 304, art. 8; International Covenant on Economic, Social and Cultural Rights, art. 2(3), G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976 (hereinafter “ICESCR”); Human Rights Committee, *supra* note 233; American Convention on Human Rights, *supra* note 304, at art. 8, 25, 63(1). The Inter American Court has stated that this principle is a norm of customary international law. *See, e.g., Street Children*, 1999 Inter-Am. C.H.R.; *Aloeboetoe et al. Case*, 1993 Inter-Am. C.H.R. (ser. C) No.11, at 43 (Sep. 10, 1993) (noting that the principle of right to a remedy has been recognized by other international tribunals, including the International Court of Justice and that it forms part of customary international law); *Caballero Delgado and Santana Case*, 1995 Inter-Am. C.H.R. (ser. C) No. 22, at 15 (Dec. 8, 1995) (characterizing the right to a remedy as “uno de los principios fundamentales del derecho internacional general”); *Castillo Paez*, Inter-Am. C. H. R., at 82-83 (finding “the right to effective recourse to a competent national court or tribunal is one of the fundamental pillars . . . of the very rule of law in a democratic society . . .”); *Suárez Rosero Case*, 1997 Inter-Am. C.H.R. (ser. C) No. 31, at 65 (Nov. 12, 1997). *See also Paniagua Morales et. al. Case*, 1998 Inter-Am. C.H.R. (ser. C) No. 37, at 164 (Mar. 8, 1998); *Loayza Tamayo*, 1998 Inter-Am. C.H.R. at ¶ 106; *Blake, Reparations*, 1999 Inter-Am. C.H.R., (ser. C) No. 48 (Jan. 22, 1999). The Court of First Instance of the European Communities likewise has held that the right to a remedy for human rights violations is a peremptory norm of international law. *See Kadi v Council of the European Union and Commission of the European Communities*, Case T-315/01, Judgment of the Court of First Instance, ¶¶ 277-292 (Sept. 21, 2005); *Yusuf v. Council of the European Union and Commission of the European Communities*, Case T-306/01, Judgment of the Court of First Instance, ¶¶ 332-346 (Sept. 21, 2005).

³⁷⁹ American Convention on Human Rights, art. 25.

³⁸⁰ Article 1(1) of the Convention requires States to “to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms.” Article 2 requires States to “adopt . . . such legislative or other measures as may be necessary to give effect to those rights or freedoms.”

³⁸¹ *Martí de Mejía*, Case 10.970, Inter-Am.C.H.R., at 157, 190-1.

that the tribunal in question be one capable of granting a remedy that effectively and adequately addresses the infringement of the right alleged.³⁸² Importantly, the right to a remedy requires that a State do more than simply ensure that the door of the courthouse is open to aggrieved individuals. Rather, it must also ensure that available remedies are “effective” in affording the individual whose rights have been violated adequate redress for the harm suffered.³⁸³ In the *Constitutional Court Case*, for instance, the Court found that:

The inexistence of an effective recourse against the violation . . . constitutes a transgression of the Convention [F]or such a recourse to exist, it is not enough that it is established in the Constitution or in the law or that it should be formally admissible, but it must be truly appropriate to establish whether there has been a violation of human rights and to provide everything necessary to remedy it. Those recourses that are illusory, owing to the general conditions in the country or to the particular circumstances of a specific case, shall not be considered effective.³⁸⁴

Accordingly, Articles XVIII and XXIV of the Declaration should be understood to include not only the right to a thorough judicial consideration of the merits of a case alleging the violation of fundamental human rights, but also the right to receive an adequate and prompt investigation of a complaint by the police. This is especially important for victims of crime, and more so for victims of domestic violence, who may depend on the police as their first line of defense against their batterers’ attacks and on

³⁸² See, e.g., *Velásquez Rodríguez Case*, 4 Inter-Am Ct. H.R., at ¶ 64; see also Report on Terrorism and Human Rights, Inter-Am. C.H.R., OEA/Ser.L/V/II.116, doc. 5 rev. 1 corr., ¶ 334 (Oct. 22, 2002).

³⁸³ *Mayagna (Sumo) Awas Tingni Community*, 2000 Inter-Am. C.H.R., (ser. C) No. 66, at 113-114 (Feb. 1, 2000); *Constitutional Court Case*, 2001 Inter-Am. C.H.R., (ser. C) No. 71 ¶ 89 (Jan. 31, 2001); *Ivcher Bronstein*, 2001 Inter-Am. C.H.R. (ser. C) No. 74, at 136-137 (Feb. 6, 2001); *Gustavo Carranza v. Argentina*, Case 10.087, Inter-Am. C.H.R., Report No. 30/97, OEA/Ser.L/V/II.9, doc. 7 rev. ¶ 72 (1997); *Judicial Guarantees in States of Emergency*, Advisory Opinion OC-9/1987, Inter-Am. C.H.R. (ser. A) No. 9, ¶ 24 (Oct. 6, 1987). See also, *Velásquez Rodríguez*, 4 Inter-Am Ct. H.R.; *Godinez Cruz*, 1989 Inter-Am. C.H.R. (ser. C) No. 5, at 67 (Jan. 20, 1989).

³⁸⁴ *Constitutional Court Case*, 2001 Inter-Am. C.H.R. See also *Duran & Ugarte*, 2001 Inter-Am. C.H.R. (ser. C) No. 68, at 118, ¶ 62 (Aug. 16, 2001); *Cantoral-Benavides*, 2001 Inter-Am. C.H.R. (ser. C) No. 88, at 164 (Dec. 3, 2001).

the judiciary to subsequently consider whether or not law enforcement's response was adequate.³⁸⁵

The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power has reaffirmed the importance of providing both “[j]udicial and administrative mechanisms” to “enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive, and accessible.”³⁸⁶ Such procedures should include law enforcement investigations and judicial considerations that “[a]llow[] the views and concerns of victims to be presented and considered,”³⁸⁷ “[i]nform[] victims of their role and the scope, timing, and progress of the proceedings and the disposition of their cases,”³⁸⁸ “[p]rovid[e] proper assistance to [victims] . . . ,”³⁸⁹ “[t]ak[e] measures to . . . ensure [victims’] safety, as well as that of their families,”³⁹⁰ and “[a]void[] unnecessary delay.”³⁹¹

Furthermore, the Inter-American Court and Commission have found that amnesty laws granting immunity to government actors and their civilian counterparts violate Articles 8(1) and 25 of the American Convention because they deny victims the opportunity to litigate before a court and deny them the right to judicial protection.³⁹² Moreover, the Court has concluded that laws that do not explicitly confer immunity, but

³⁸⁵ 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, ¶1; European Convention on the Compensation of Victims of Violent Crimes, ETS No. 116, available at <http://conventions.ce.int> (last visited March 18, 2008).

³⁸⁶ G.A. Res. 40/34, annex, 40, ¶ 5, U.N. Doc. A/40/53 (Nov. 29, 1985).

³⁸⁷ *Id.* at ¶ 6(b).

³⁸⁸ *Id.* at ¶ 6(a).

³⁸⁹ *Id.* at ¶ 6(c).

³⁹⁰ *Id.* at ¶ 6(d).

³⁹¹ *Id.* at ¶ 6(e).

³⁹² Report on the Situation of Human Rights in El Salvador, Inter-Am. C.H.R., OEA/Ser.L/II.85 doc. 28, at 69-77 (Feb. 11, 1994); Barrios Altos, 2001 Inter-Am. C.H.R. ¶ 42 (ser. C) No. 75 (Mar. 14, 2001).

effectively preclude victims' access to a court, also violate Articles 8 and 25 of the Convention.³⁹³ For these reasons, immunity laws also violate Articles XVIII and XXIV of the American Declaration.

Here, Ms. Gonzales was denied an effective response by law enforcement, recourse to U.S. courts, a judicial investigation into the facts of her case, and compensation for the violation of her own and her three children's fundamental rights. Federal law failed to provide Ms. Gonzales with a legal remedy and state immunity laws further precluded her from obtaining relief through a civil tort suit. This denial constituted a violation of Articles XVIII and XXIV of the American Declaration.

1. Jessica Gonzales Was Entitled to an Effective Remedy for the CPRD'S Failure to Enforce the Express Terms of the Restraining Order.

The CRPD's failure to enforce the terms of Ms. Gonzales' restraining order violated the express terms of the order, Colorado's mandatory arrest law, and basic policing principles, including the United Nations Code of Conduct for Law Enforcement Officials, which mandates police officers to "protect[] all persons against illegal acts" and "respect and protect human dignity and maintain and uphold the human rights of all persons."³⁹⁴ The United States was obligated to provide Jessica Gonzales with a judicial forum and appropriate remedy to compensate her for the CRPD's failure to take reasonable measures to protect her rights and those of her children from Mr. Gonzales' violence, but failed to do so.

Ms. Gonzales was denied such a remedy because in most instances, including those presented here, U.S. courts do not recognize as remediable the State's failure to

³⁹³ Cantos v. Argentina, Sentencia de 28 de noviembre de 2002, Corte I.D.H. (Ser. C) No. 97, ¶ 54 (2002).

adopt reasonable measures to protect individuals from private violence.³⁹⁵ Moreover, Colorado’s governmental immunity laws preclude individuals from a hearing in court and thus violate the right to an effective remedy.³⁹⁶ A State incurs international responsibility whenever, “for any reason, the alleged victim is denied access to a judicial remedy,”³⁹⁷ for example, where, as here, courts fail to recognize a particular cause of action and laws immunize officials regardless of whether they have committed human rights violations. Thus, while Jessica Gonzales was afforded formal access to state and federal courts, neither system was capable of furnishing her with a remedy that could effectively address the violations of her or her daughters’ rights.

2. Effective Remedies Under Colorado State Law Were Not Available to Jessica Gonzales

Under the American Declaration the judiciary had an obligation to provide a remedy for the police officers’ failure to enforce Ms. Gonzales’ restraining order in violation of state law and international human rights principles. The judiciary failed to provide any such remedy. Accordingly, the United States is responsible for violation of Articles XVIII and XXIV of the American Declaration

a. No administrative channels were available to Ms. Gonzales in 1999 that would have afforded her adequate and effective remedies.

Petitioners have thoroughly searched the Town of Castle Rock and CRPD websites; reviewed relevant Colorado statutes, Colorado regulations, the Castle Rock Town Charter, the Castle Rock Municipal Code, and Colorado case law; and spoken

³⁹⁴ G.A.Res. 34/169, annex, ¶ 34, U.N. Doc. A/34/46 (1979).

³⁹⁵ See generally Dec. 11, 2006 Observations, *supra* note 3, at Section VII; *DeShaney v. Winnebago Dep’t of Soc. Servs.*, 489 U.S. 189 (1989).

³⁹⁶ *Barríos Altos*, 2001 Inter-Am. C.H.R. at ¶ 42; *Caso Cantos*, Corte I.D.H. (Ser. C) No. 97; *Osman*, 1998-VIII Eur. Ct. H.R.; *E. and Others*, Eur. Ct. H.R., App. No 33218/96,

directly with the Castle Rock Police Chief, Attorney for the Town of Castle Rock, and the Douglas County District Attorney and Coroner, but have not located any information revealing mechanisms for filing administrative complaints against the CRPD or Town of Castle Rock. Even if such a complaint mechanism existed, its obscurity alone rendered it unavailable to Ms. Gonzales. The CRPD and the Town of Castle Rock never informed Jessica Gonzales of any administrative complaint mechanisms that might have enabled her to request administrative review of the CRPD's actions on June 22 and 23, 1999.

Moreover, even if "administrative complaint mechanisms" within the CRPD were available in 1999, such non-judicial mechanisms would not have constituted an adequate and effective remedy for Ms. Gonzales because any investigation and discipline of CRPD officer behavior would have been a wholly discretionary, unreviewable exercise of executive authority by CRPD.

Indeed, when internal police department complaint mechanisms exist, they seldom provide the procedural protections necessary to constitute adequate and effective remedies for complainants. "Historically, the police [in the United States] have been extremely hostile to complaints, denying that the alleged misconduct occurred, often rebuffing citizens attempting to file complaints, failing to investigate complaints in a thorough and fair manner, and not disciplining officers who are in fact guilty of misconduct."³⁹⁸ Internal investigations of police officer misconduct are conducted by other officers in the department; as a result, "[t]raditionally, police internal investigations have automatically accepted the statements of the officer over those of the complainant or witnesses, in some cases despite the fact that the officer's statement is filled with

³⁹⁷ Inter-Am. Ct. H. R., *Judicial Guarantees in States of Emergency* (Arts. 27(2), 25 and 28 of the American Convention on Human Rights), Advisory Opinion OC-9/87 of Oct. 6, 1987 (Ser. A) No. 9 (1987), at ¶ 9.

inconsistencies or simply not believable.”³⁹⁹ Even when an investigation *is* initiated, complainants often are given little information about the investigation, “[a]t best . . . receiv[ing] a form letter indicating the final disposition of their complaint but with little explanatory detail.”⁴⁰⁰ Such a form letter tersely reporting the results of a discretionary, unreviewable investigation cannot be understood to constitute an administrative remedy, as it does not shine a public light on the police department’s failings, does not compensate the complainant for her injuries, and does not provide the complainant with additional information or explanation regarding the incident.

Under Colorado law a civil tort suit would not have afforded Jessica Gonzales an effective remedy.

A civil tort suit under Colorado law against either the Town of Castle Rock or the individual officers involved, although technically available to Jessica Gonzales, would almost certainly ultimately have proven futile. The Colorado Governmental Immunity Act (“CGIA”) barred Jessica Gonzales from bringing suit against the Town of Castle Rock. Section 24-10-108 of the Act provides:

Except as provided in sections 24-10-104 to 24-10-106, sovereign immunity shall be a bar to any action against a public entity for injury which lies in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by a claimant.⁴⁰¹

Moreover, any state law claims against the individual police officers under Colorado state law would have met a similar fate because of the immunity for agents of the state established by the CGIA. For Jessica Gonzales to have prevailed in such a suit,

³⁹⁸ SAM WALKER, *THE NEW WORLD OF POLICE ACCOUNTABILITY* 72 (2005).

³⁹⁹ *Id.* at 87.

⁴⁰⁰ *Id.* at 93.

she would have had to prove that the omissions on the part of the police officers concerned that led to her daughters' deaths were both "willful and wanton."⁴⁰²

Specifically, § 24-10-118(2)(a) of the Act states:

A public employee shall be immune from liability in any claim for injury ... which lies in tort or could lie in tort ... and which arises out of an act or omission of such employee occurring during the performance of his duties and within the scope of his employment unless the act or omission causing such injury was *willful and wanton*...⁴⁰³

The highest state court in Colorado has interpreted this provision in an extremely restrictive manner, holding that the term "willful and wanton" for purposes of CGIA liability entails: "conduct purposefully committed which the actor must have realized as dangerous, done heedlessly and recklessly, without regard to consequences, or of the rights and safety of others, particularly the plaintiff."⁴⁰⁴ In other words, a Colorado plaintiff cannot recover in a tort suit against a police officer unless she can show that the officer purposefully acted or failed to act with the *conscious* belief that this would probably cause harm to her. Consequently, the "willful and wanton" standard renders it extraordinarily difficult for a plaintiff to prevail in a civil action against an individual agent of the state where that agent fails to take reasonable measures to protect and ensure a citizen's rights, as required under the American Declaration.⁴⁰⁵ Because Colorado state law allows recovery only where the state agent willfully or wantonly failed to act, Jessica

⁴⁰¹ COL. REV. STAT. § 24-10-108. None of the exceptions enumerated in §§ 24-10-104 to 24-10-106 applied in this case.

⁴⁰² COL. REV. STAT. § 24-10-118(2)(a).

⁴⁰³ *Id.* (emphasis added).

⁴⁰⁴ *Moody v. Ungerer*, 885 P.2d 200, 205 (Colo. 1994). The *Moody* court's definition has been applied by U.S. federal courts as well. *See, e.g.*, *Katz v. City of Aurora*, 85 F. Supp. 2d 1012 (D. Colo. 2000); *Cossio v. City & County of Denver*, 986 F. Supp. 1340, 1349 (D. Colo. 1997); *Rivers v. Alderden*, 2006 U.S. Dist. LEXIS 14763 (D. Colo. Mar. 17, 2006).

⁴⁰⁵ *See, e.g.*, *Rohrbough v. Stone*, 189 F. Supp. 2d 1088, 1096-1098 (D. Colo. 2001) (finding that police failure to attempt rescue of besieged students who placed a 911 call was not willful and wanton);

Gonzales was effectively barred from seeking a remedy in state court for the CRPD's failure to take reasonable steps to protect and ensure the rights of her and her daughters.

3. The Colorado Governmental Immunity Act (CGIA) Violates Victims' Right to be Heard by a Judicial Body and the Right to a Judicial Remedy.

The CGIA, like the Peruvian amnesty law declared incompatible with the American Convention by the Inter-American Court in *Barrios Altos*, "prevent[s] the victims [...] from being heard by a judge ..."⁴⁰⁶ and thus violates Article XVIII and XXIV of the American Declaration.

In *Barrios Altos*, the Court addressed an amnesty law that exonerated members of the army, police officers and civilians who had violated human rights or taken part in such violations. The Court found that amnesty provisions adopted by the Peruvian government to protect government officials from all legal responsibility "prevented the victims' next of kin and the surviving victims in this case from being heard by a judge, as established in Article 8(1) of the Convention [and] violated the right to judicial protection embodied in Article 25 of the Convention."⁴⁰⁷ Even though in *Barrios Altos* the Court addressed the question of immunities in the context of an amnesty for criminal prosecution, nothing in the Court's decision suggests that immunities precluding civil suits are any less problematic under the American Convention. The primary concern of the Court is that the application of immunities "lead to the defenselessness of victims and perpetuate impunity"⁴⁰⁸ – effects that are of concern in civil as well as criminal suits.

Ruegsegger v. Jefferson County Board of County Commissioners, 197 F. Supp. 2d 1247, 1265 (D. Colo. 2001) (same); Whitcomb v. City and County of Denver, 731 P.2d 749 (Colo. App. 1986).

⁴⁰⁶ *Barrios Altos*, 2001 Inter-Am. C.H.R. at ¶ 42.

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.* at ¶ 43.

The Commission has expressed similar concern over immunity laws that negatively impact civil suits. For example, in a 1994 report on the human rights situation in El Salvador, the Commission expressed concern that the amnesty law adopted by El Salvador precluded civil liability for government actors and therefore directly affected the rights of victims of human rights abuses.⁴⁰⁹ The Commission concluded that the amnesty law violated the American Convention because it precluded criminal prosecution of actors involved in serious human rights violations, and because it “eliminate[d] any possibility of obtaining adequate pecuniary compensation ... for victims.”⁴¹⁰ In other words, the amnesty law eliminated the victims’ opportunity to litigate before a court and hence violated the victim’s right “to a competent court ... for protection against acts that violate his fundamental rights ... even though such violation may have been committed by persons acting in the course of their official duties.”⁴¹¹ Regardless of whether the immunity given by the law is for a criminal or civil suit, the impact on the victim is the same: denial of the right to a trial and judicial remedy for violations of her fundamental rights.

The European Court’s analysis of immunity laws in the context of civil litigation also indicate that the grant of immunities from suit to government actors necessarily leads to a violation of the obligation of the State to provide “a fair public hearing” and an “effective remedy.”⁴¹² For instance, in *Osman v. the United Kingdom*, the European Court addressed standards applied by the United Kingdom in civil suits against the

⁴⁰⁹ Report on the Situation of Human Rights in El Salvador, *supra* note 393, at 69-77.

⁴¹⁰ *Id.*

⁴¹¹ American Convention of Human Rights, art. 25.

⁴¹² See European Convention on Human Rights, arts. 6, 13 (requiring a “fair and public hearing” for determinations of civil rights and establishing the right to an “effective remedy” for violation of rights) which closely parallels the American Convention of Human Rights; art. 1, 25 (requiring State Parties to “ensure” rights and establishing the right to “effective recourse” for violations of rights).

police, which, in the view of the European Court, provided “immunity on the police” for facts and omissions related to their law enforcement activities.⁴¹³ In *Osman*, a school teacher shot and wounded one of his students, Osman, and killed the student’s father.⁴¹⁴ Prior to the incident, the police had been informed on several occasions that the teacher presented a danger to Osman. The police, however, failed to act upon this information. Osman’s claims of negligence before the courts in England were rejected at the very outset without any consideration of the merits of his case because the doctrine of police immunity established under English law only permitted recovery where an officer’s act or omission had been grossly negligent or the officer had acted with willful disregard of the duty to protect.⁴¹⁵

Before the European Court, Osman alleged violations of several provisions of the European Convention, including Article 6(1). This article provides, *inter alia*, that “[i]n determination of his civil rights and obligations ..., everyone is entitled to a ... hearing ... by [a] tribunal” In its analysis of whether the restrictions the police immunity doctrine imposed on Osman’s right to a remedy were permissible under the European Convention, the Court applied a two-part test.⁴¹⁶ First, the Court assessed whether the restrictions imposed furthered a legitimate government objective. Second, the Court considered whether, in the circumstances, that restriction was proportionate to this objective. Applying this test, the Court found that although English law affording police immunity from negligence actions furthered the legitimate objective of maintaining “the effectiveness of the police service,” and therefore preventing disorder and crime, the law

⁴¹³ *Osman*, 1998-VIII Eur. Ct. H.R.

⁴¹⁴ *Id.*

⁴¹⁵ *Id.*, ¶¶ 63-66,148

⁴¹⁶ *Id.* ¶ 147.

was not proportionate to this aim because it “serve[d] to confer a blanket immunity on the police for their acts and omissions during the investigation and suppression of crime and amount[ed] to an unjustifiable restriction on an applicant’s right to have a determination on the merits of his or her claim against the police in deserving cases.”⁴¹⁷ The ruling in *Osman* established that regardless of the government objective, laws that preclude a determination on the merits of the case violate the right to a hearing by a tribunal codified in Article 6(1) of the European Convention as well as other human rights legal instruments.⁴¹⁸

The European Court refrained from a discussion of violations of the “right to an effective remedy” under Article 13 of the European Convention in the *Osman* case arguing that the requirements of Article 13 were less strict than and thus absorbed by those of Article 6 with respect to the violation found.⁴¹⁹ In a subsequent case, *E. and Others v. the United Kingdom*, however, the Court explicitly held that State immunity laws violate an applicant’s right to an effective remedy.⁴²⁰ In *E. and Others*, applicants who had suffered sexual and physical abuse argued that “Article 13 required that they have available to them a means for establishing the liability of State officials for acts or omissions involving a breach of their rights and the possibility of obtaining compensation for the wrong suffered.”⁴²¹ The means available to the applicants, such as the ombudsman and the CICB, could not attribute blame to the local authority or hold them to account. Furthermore, prior precedent precluded the applicants from suing the local authority in

⁴¹⁷ *Id.* ¶ 151.

⁴¹⁸ Compare European Convention on Human Rights, *supra* (requiring a “fair and public hearing” for determinations of civil rights) and the American Convention of Human Rights, art. 8 (establishing the “right to a hearing with due guarantees...for the determination of his rights”).

⁴¹⁹ *Osman*, 1998-VIII Eur. Ct. H.R.

⁴²⁰ *E. and Others*, Eur. Ct. H.R., App. No 33218/96.

⁴²¹ *Id.* at ¶107

domestic courts for damages in negligence.⁴²² The European Court found the applicants did not have at their disposal the means of establishing liability of the local authority for failure to take reasonable measures to protect them.⁴²³ The Court reasoned, “the remedy required by Article 13 must be ‘effective’ in practice as well as in law. In particular its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State.”⁴²⁴ It thus concluded the immunity given to State authorities violated the applicant’s right to an effective remedy.⁴²⁵

In 2002, the Inter-American Court applied the *Osman* proportionality standard in a case that considered whether an Argentinean law and the resulting determination of excessive and exorbitant court filing fees violated Articles 8 and 25 of the American Convention concerning the right of access to the courts and a simple and prompt recourse.⁴²⁶ The Argentine law imposed a filing fee⁴²⁷ of three percent (3%) of the total amount of relief being claimed. In the *Cantos* case, the filing fee amounted to 83,400,459.10 pesos (the equivalent of the same amount in United States dollars). The state argued that the purpose of the Argentine law was to discourage reckless lawsuits.⁴²⁸ However, the court found that the amount the law set in the form of filing fees and the corresponding fine constituted an obstruction to access to the courts. Citing to *Osman* the court held “that while the right of access to a court is not an absolute and therefore may be subject to certain discretion and limitations set by the State, the fact remains that the

⁴²² *X. and Others v. Bedfordshire County Council*, App. No. 29392/95, Eur. Ct. H.R. (2001) (holding that no duty of care existed in respect of the child applicants’ claims that the local authority in that case had been negligent in failing to remove them from their home where they were victims of abuse and neglect).

⁴²³ *E. and Others*, Eur. Ct. H.R., App. No 33218/96, at ¶116

⁴²⁴ *Id.* at ¶109

⁴²⁵ *Id.* at ¶116

⁴²⁶ *See Caso Cantos*, Corte I.D.H. (Ser. C) No. 97.

⁴²⁷ The filing fee is the sum of money that every person filing suit in court must pay to have access to the courts. *Id.* at ¶ 54

means used must be proportional to the aim sought. Consequently, with the amount charged in the case *sub judice*, there is no relationship of proportionality between the means employed and the aim being sought by Argentine law.”⁴²⁹ The Argentine law did not necessarily discourage reckless lawsuits, but denied individuals without the financial means to pay the 3% filing fee their right to a trial and judicial remedy. Therefore, the Court held the law violated Articles 8 and 25 of the Convention.⁴³⁰

It is consistent for this Commission to apply the *Osman* standard in the context of immunity laws because like exorbitant court filing fees, such laws preclude access to the court. Regardless of whether immunity laws further a government objective, they “prohibit suits against the government altogether and ... require dismissal of suits against individual officers.”⁴³¹ Thus, immunity laws preclude litigation of the individual facts of each case and thereby violate victims’ right to be heard by a judicial body.⁴³² This conclusion parallels the Court’s findings in *Barrios Altos*. Furthermore, as the Commission has noted with regard to immunity laws in El Salvador and as established by *E. and Others*, immunity laws establish a virtual bar against recovery and thus violate the right to judicial remedy.⁴³³

Under the Court’s analysis in *Barrios Altos* and the *Osman* standard adopted in the *Cantos* case, the Colorado Governmental Immunity Act (CGIA) violates Article 8(1)

⁴²⁸ *Id.*

⁴²⁹ *Id.*

⁴³⁰ *Id.*

⁴³¹ Denise Gilman, *Calling the United States Bluff: How Sovereign Immunity Undermines the United States Claim to an Effective Domestic Human Rights System*, 95 GEO. L.J. 591, 634 (2007).

⁴³² European Convention on Human Rights, art. 6 (requiring a “fair and public hearing” for determinations of civil rights) and American Convention on Human Rights at art. 1, 8(1) (requiring “right to a hearing with due guarantees”).

⁴³³ European Convention on Human Rights, art.13 (establishing the right to an “effective remedy” for violation of rights) and American Convention on Human Rights, art. 1, 25 (requiring State Parties to “ensure” rights and establishing the right to “effective recourse” for violations of rights).

and Article 25 of the American Convention. As discussed above,⁴³⁴ the CGIA effectively barred Jessica Gonzales from bringing a tort suit against the Town of Castle Rock. As in *Osman*, the standards imposed by the CGIA confer a form of “blanket immunity” on police officers in the state of Colorado for their acts or omissions and thus imposed an “unjustifiable restriction” on Jessica Gonzales’ right to a determination on the merits of her claim. Consequently, the governmental immunity law also precludes her right to an effective remedy in this case.

4. Effective Remedies Under Federal Law Were Not Available to Jessica Gonzales.

Jessica Gonzales was also precluded from accessing effective judicial redress at the federal level for the CRPD’s violations of her rights and those of her children. As detailed in her initial pleading, Jessica Gonzales pursued a due process challenge against the Town of Castle Rock under the Fourteenth Amendment to the U.S. Constitution. This federal claim was ultimately rejected by the highest appellate court in the United States, the U.S. Supreme Court.⁴³⁵ The Supreme Court’s reasoning in Ms. Gonzales’ case and in prior cases demonstrates that in most instances and in the present circumstances, the Due Process Clause of the Fourteenth Amendment does not provide a remedy when state actors fail to take reasonable measures to protect and ensure a citizen’s rights against violation by private actors, including in the domestic violence context.⁴³⁶

Although federal courts have on occasion provided remedies to victims of domestic violence under the Equal Protection Clause in cases where victims have shown

⁴³⁴ Sec. IV(E)(4).

⁴³⁵ See Gonzales Petition, *supra* note 3, at 13-20.

⁴³⁶ See *Gonzales*, 545 U.S. at 775; *DeShaney*, 489 U.S. at 189.

that police failure to protect the victim was the result of intentional discrimination on the basis of sex,⁴³⁷ such an avenue of redress was likely closed to Jessica Gonzales here. To prevail in a claim of sex discrimination in violation of the Equal Protection Clause, a litigant would have to demonstrate far more than discriminatory impact on women. Rather, a litigant would have to show that a particular police response to domestic violence was chosen with the invidious *intent* to harm women – in other words, that a decisionmaker “selected or reaffirmed a particular course of action at least in part ‘because of’ not merely ‘in spite of’ its adverse effect on [women].”⁴³⁸ Because neither evidence of a policy’s adverse impact on women nor evidence of a decisionmaker’s awareness of this impact is typically sufficient standing alone to establish intentional discrimination, sex discrimination claims challenging a police department’s response to domestic violence have usually failed in the absence of “smoking gun” evidence in the form of discriminatory statements by law enforcement personnel.⁴³⁹

If a litigant cannot show that purposeful sex discrimination motivated police in their failure to afford sufficient protection to domestic violence victims, she will only succeed in an equal protection claim if she proves that the police had a policy or practice of treating domestic violence differently from other crimes and that this policy had no

⁴³⁷ *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984); *Fajardo v. County of Los Angeles*, 179 F.3d 698 (9th Cir. 1999).

⁴³⁸ *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256 (1979); *See also Eagleston v. Guido*, 41 F.3d 865, (2d Cir. 1994) (finding that a victim of domestic violence could not prove an equal protection violation where they failed to demonstrate that discrimination against one sex was a motivating factor); *Ricketts v. City of Columbia, Mo.*, 36 F.3d 775, 781-82 (8th Cir. 1994) (concluding that a victim of domestic violence had no equal protection claim because there was no evidence that male victims of domestic abuse were treated differently than female victims of domestic abuse, and there was no other admissible evidence of discriminatory intent).

⁴³⁹ *Eckert v. Town of Silverthorne*, 25 F. Appx. 679, (10th Cir. Colo. 2001); *Watson v. City of Kansas City*, 857 F.2d 690, at 694 (10th Cir 1988); *cf. Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 701 (9th Cir. 1990) (finding police officer’s statement to a domestic violence victim that he did not blame her husband for hitting her because of the way she was carrying on likely sufficient to support a claim of sex discrimination under the Equal Protection Clause).

rational basis. Because *any* rational explanation for treating domestic violence differently from other forms of assault is sufficient to rebut a showing of discriminatory treatment of domestic violence victims as compared to victims of other assaults under the Equal Protection Clause, such claims are also very difficult to establish, even assuming that evidence demonstrates a consistent police policy or practice of treating domestic violence less seriously than other forms of violence.⁴⁴⁰

In Jessica Gonzales' case, police made no statements to her on the night that her daughters were kidnapped and murdered that clearly indicate sex-based animus toward her or her daughters. A showing that a failure to respond effectively to violence in the family or gender-based violence necessarily and predictably has a discriminatory impact on women would have been insufficient, standing alone, to allow her to succeed in a sex discrimination claim against the CRPD brought under the Equal Protection Clause. Nor would the toothless standard of rational basis review have been likely to provide Jessica Gonzales with a remedy, as courts deem any basis in reason sufficient for rebutting a showing of discrimination between domestic violence crimes and other crimes under that standard, even if the articulated reason was not the one actually motivating the state actor. For instance, if Jessica Gonzales successfully showed that the CRPD treated the kidnapping of her daughters by Simon Gonzales differently from how they treated stranger kidnappings, the CRPD might well have successfully rebutted this claim under rational basis review simply by arguing that because the children were with their father,

⁴⁴⁰ See, e.g., *U.S. R.R. Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (holding that where there is *any* plausible reason for a state policy, courts inquire no further, even if the reason articulated is not the actual reason for the policy); See also *Ricketts*, 36 F.3d at 781-82 (“Because of the inherent differences between domestic disputes and non-domestic disputes, legitimately different factors may affect a police officer’s decision to arrest or not to arrest in any given situation.”).

there was some basis in reason to assume that they were safe.⁴⁴¹ For these reasons, she did not raise an equal protection claim in her federal case.

More fundamentally, the Equal Protection Clause, as it has been interpreted and applied in the U.S. Supreme Court and lower courts, does not address many of the particular harms that are alleged in this Petition. The Equal Protection Clause protects against actions by the State that intentionally treat women worse than men without an exceedingly persuasive justification for doing so or that intentionally harm one group in comparison to another without rational basis. Thus, success on such a claim turns on a showing that the State has treated some other class of persons better than the class in which the litigant claims membership. Jessica Gonzales here alleges that *regardless* of the treatment afforded to other classes, her treatment by the CRPD failed to protect and ensure those rights affirmatively guaranteed by the American Declaration. This failure is of equal gravity whether the CRPD has more successfully protected and ensured the rights of other individuals or not.⁴⁴²

5. Criminal Prosecution or Contempt Proceedings Against Simon Gonzales, Had He Lived, Would Not Have Constituted an Available, Adequate, or Effective Remedy for the Violations Alleged.

No effective remedy was available to Ms. Gonzales by means of a judicial proceedings against Simon Gonzales. First, Simon Gonzales did not survive, and thus remedies such as criminal prosecution and criminal or civil contempt proceedings against

⁴⁴¹ See, e.g., *Sullivan v Stroop*, 496 U.S. 478 (1990) (concluding that distinction subject to rational basis scrutiny will not be overruled “if any state of facts reasonably may be conceived to justify it”) (quoting *Bowen v Gilliard*, 483 U.S. 587 (1987)).

⁴⁴² However, Petitioner also alleges that her rights to equal protection under the American Declaration have been violated and that the CRPD’s failure to respond appropriately to her complaint reflects the discriminatory attitudes and practices of police departments nationwide. See *Gonzales Petition*, *supra* note 3, at Section IV The equal protection standards under the Constitution differ markedly from their counterpart in the American Declaration. *Id.*

him were not in fact available. Second and equally important, Ms. Gonzales is not seeking a remedy for the misdeeds of Simon Gonzales. Rather, she seeks to hold the United States accountable for human rights violations committed by the CRPD, and the inadequacy of the U.S. administrative and legal system to remedy those violations. Even if Simon Gonzales had lived, any prosecution or contempt of court proceeding against him for his wrongs is entirely different from a remedy for the failure of the police to effectively respond with due diligence to Ms. Gonzales' calls.

The European Court dismissed a similarly misplaced argument in *Osman*, finding that legal proceedings brought by victims and their families against individuals who committed criminal acts did not “mitigate the loss of their right to take legal proceedings against the police in negligence and to argue the justice of their case.”⁴⁴³ The *Osman* Court reasoned that the petitioners “were entitled to have the police account for their actions and omissions in adversarial proceedings” that were separate and apart from any legal proceedings against the individuals who committed the acts.⁴⁴⁴ The same is true in this case.

Moreover, in the United States' criminal justice system, criminal prosecutions and contempt proceedings are not designed to function as remedies for victims of crime. Criminal law is a matter between defendants, who stand accused of committing a crime, and prosecutors, who represent the interests of the State and seek remedies on behalf of the public for the violation of the State's laws.⁴⁴⁵ Crime victims do not participate as parties or otherwise direct the process; rather, they are relegated to the role of

⁴⁴³ *Osman*, 1998-VIII Eur. Ct. H.R.

⁴⁴⁴ *Id.*

⁴⁴⁵ E.g., Karen L. Kennard, Comment, *The Victim's Veto: A Way to Increase Victim Impact on Criminal Case Dispositions*, 77 CAL. L. REV. 417, 417 (1989).

government witnesses who participate at the government's behest and are otherwise left on the periphery of a criminal prosecution.⁴⁴⁶ In fact, prosecutions can and in some instances do take place without the knowledge, consent, or participation of the victim.⁴⁴⁷

Indeed, the U.S Supreme Court recognized these very principles in its decision in *Town of Castle Rock v. Gonzales*, Ms. Gonzales' case against the CRPD. The Court found that Ms. Gonzales did not have a personal entitlement to enforcement of her restraining order, noting that "[t]he serving of public rather than private ends is the normal course of the criminal law because criminal acts, 'besides the injury they do to individuals, . . . strike at the very being of society; which cannot possibly subsist, where actions of this sort are suffered to escape with impunity.'"⁴⁴⁸ In light of these principles, the Court noted, "a Colorado district attorney [has] discretion to prosecute a domestic assault, even though the victim withdraws her charge."⁴⁴⁹

Any criminal prosecution or contempt of court proceeding against Simon Gonzales could therefore never constitute an appropriate remedy for Jessica Gonzales, even had such proceedings been available, which they were not. Such proceedings against Simon Gonzales would not have compensated Ms. Gonzales for the CRPD's blatant disregard for her rights.

Under the American Declaration, the United States was required, at a bare minimum, to ensure that Jessica Gonzales was afforded "*a judicial process ... aimed at*

⁴⁴⁶ See, e.g., Erin Ann O'Hara, *Victim Participation in the Criminal Process*, 13 J.L. & POL'Y 229, 229 (2005); Kennard, *supra* note 446, at 417. See also Guridi v. Spain, Communication No. 212/2002, U.N. Doc. CAT/C/34/D/212/2002, ¶ 6.3 (2005) (excusing petitioner from requirement that he seek judicial review of royal decrees of 1999 that granted pardons to his torturers because "the injured party may not be a party to pardon proceedings in a material sense.").

⁴⁴⁷ *Gonzales*, 545 U.S. 765 (citing *People v. Cunefare*, 102 P.3d 302, 312 (Colo. 2004)).

⁴⁴⁸ *Id.* (citing 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 5 (1769); *Huntington v. Attrill*, 146 U.S. 657, 668 (1892)).

⁴⁴⁹ *Id.* at 765.

*the elucidation of the facts...*⁴⁵⁰ This was particularly important when the denial of fundamental rights – including the right to life – was at issue. While Jessica Gonzales had access to an independent and impartial tribunal, and indeed was permitted to appeal her case all the way to the highest court of appeal in the United States – the U.S. Supreme Court – her case was dismissed without consideration on the merits.⁴⁵¹ This deprived Jessica Gonzales of a judicial finding of fact as to the acts and omissions that led to the deaths of her children.

Furthermore, in dismissing Jessica Gonzales’ claim without providing her a hearing on the merits, the United States deprived her of a ‘day in court,’ in which to seek judicial determination of the facts in her case as required under the American Declaration.⁴⁵² Colorado state courts also failed to provide Jessica Gonzales with meaningful remedies for the CRPD’s failure to respect and ensure her fundamental rights, and therefore did not provide the effective remedy required under the American Declaration. Consequently, she never received a legal remedy that should have included both monetary compensation and, more importantly, a legal declaration that her own rights and those of her children had been violated.

In sum, by failing to adequately investigate Ms. Gonzales’ complaint, to ensure enforcement of Ms. Gonzales’ restraining order, provide her with access to a tribunal, and

⁴⁵⁰ *Ximenes Lopes*, Case 12.237, Inter-Am. C.H.R., at ¶ 194. See also *Bámaca Velásquez*, Inter-Am. C.H.R., (Ser. C) No. 91¶¶ 75-76 (2002); *Maria da Penha*, Case 12.051, Inter-Am. C.H.R., at ¶ 37; *Osman*, 1998-VIII Eur. Ct. H.R., at ¶ 153.

⁴⁵¹ See *Gonzales Petition*, *supra* note 3, at 69; U.S. Response at 10.

⁴⁵² *Ximenes Lopes*, Case 12.237, Inter-Am. C.H.R., at ¶148; *Carranza*, Case 10.087, Inter-Am. C.H.R., at ¶¶ 71-75; See also, Beth Stephens, *Conceptualizing Violence: Recent and Future Developments in International Law: Panel I: Human Rights & Civil Wrongs at Home and Abroad: Old Problems and New Paradigms: Conceptualizing Violence Under International Law: Do Tort Remedies Fit the Crime?*, 60 ALB. L. REV. 579, 602 (1997).

provide a remedy to address the lack of enforcement, the United States has violated Articles XVIII and XXIV of the American Declaration.

F. By Failing To Conduct an Independent, Prompt, and Thorough Investigation Into the Circumstances Surrounding the Children’s Deaths, the United States Has Violated its Duty to Investigate and Ms. Gonzales’ and her Family’s Right To Truth Guaranteed Under Articles IV, V, VI, XVIII, and XXIV of the American Declaration.

As noted, *supra*, stemming from the affirmative obligation to ensure the free and full enjoyment of human rights, the State must “prevent, investigate, and punish any violation of the rights”⁴⁵³ recognized by the American Declaration. In the *Velásquez Rodríguez* case, the Court emphasized that the duty to investigate extends to alleged violations committed both by agents of the state as well as private actors:

The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty. . . . The same is true when it allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention.⁴⁵⁴

The Inter-American Commission and Court have repeatedly reaffirmed the obligation of the State to investigate alleged human rights abuses, whether state-sponsored or of a private nature, and regardless of the substantive nature of the violation. Thus, the Commission and Court have found violations, *inter alia*, of Article 1,⁴⁵⁵ Article 5,⁴⁵⁶ Articles 8 and 25,⁴⁵⁷ and Article 13⁴⁵⁸ of the American Convention where the State

⁴⁵³ *Velásquez Rodríguez*, 4 Inter-Am C. H.R. *supra*, at ¶ 166.

⁴⁵⁴ *Id.* at ¶ 176.

⁴⁵⁵ Manuel Stalin Bolaños Quiñones v. Ecuador, Case 10.580, Inter-Am.C.H.R., Report No. 10/95, OEA/Ser.L/V/II.91 Doc. 7 at 76, ¶ 32 (1996).

⁴⁵⁶ *Comunidad Moiwana*, Inter-Am. C.H.R., at ¶ 43, 92; *Bamaca Velásquez v. Guatemala*, Judgment of Merits, Inter-Am. C.H.R., ¶ 165 (Nov. 25, 2000).

⁴⁵⁷ *Castillo Paez*, Inter-Am. C. H. R., at ¶¶ 86, 90; *Velásquez Rodríguez*, 4 Inter-Am C. H.R., at ¶ 166; *Bolanos*, *supra*, at ¶ 45; *Comunidad Moiwana*, Inter-Am. C.H.R. , at ¶ 136(h); *Barrios Altos*, 2001 Inter-Am. C.H.R., at ¶¶ 45, 48.

⁴⁵⁸ *Barrios Altos*, 2001 Inter-Am. C.H.R., at ¶ 45. (“With regard to [article 13], the Commission [arguing before the Court] added that the State has the positive obligation to guarantee essential information to preserve the rights of the victims, to ensure transparency in public administration and the protection of human rights.”); see also 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

has failed to adequately investigate alleged human rights violations. Indeed, in the Inter-American human rights system, “the State is unequivocally required to investigate every context involving a rights violation of the American Convention, even in situations where the perpetrator of the act is a private person.”⁴⁵⁹

The obligation to investigate violations committed by non-State actors has also been recognized by other international human rights bodies, including the European Court. For example, *Tanrikulu v. Turkey* involved the killing of the petitioner’s husband allegedly at the hands of “State security forces or with their connivance”⁴⁶⁰ and what the European Commission characterized as an inadequate investigation into the allegations.⁴⁶¹ In that case, the European Court found that:

[The duty to investigate] is not confined to cases where it has been established that the killing was caused by an agent of the State. . . . The mere fact that the authorities were informed of the murder of the applicant's husband gave rise ipso facto to an obligation under Article 2 to carry out an effective investigation into the circumstances surrounding the death.⁴⁶²

Although most Inter-American caselaw about the duty to investigate has taken place in the context of State-sponsored disappearances and extrajudicial killings, these principles are nevertheless applicable to the case at hand. As described *supra*, the CRPD and Simon Gonzales engaged in a shootout where Simon Gonzales was positioned directly in front of a truck that contained his three daughters. Dozens of bullet holes created from police gunfire were found in the side of Mr. Gonzales’ truck subsequent to

truth). Note that Art. 13 of the American Convention has as its corollary Art. IV of the American Declaration.

⁴⁵⁹ Thomas M. Antkowiak, *Truth as Right and Remedy in International Human Rights Experience*, *Michigan Journal of International Law*, 23 MICH. J. INT’L L. 977, 986 (2002).

⁴⁶⁰ *Tanrikulu v. Turkey*, App. No. 23763/94, Eur. Ct. H.R. ¶ 7 (1999).

⁴⁶¹ *Id.* at ¶¶ 47-48.

⁴⁶² *Id.* at ¶ 103.

the shooting.⁴⁶³ Yet to Petitioners' knowledge, a full and impartial investigation was never conducted with respect to the death of the children, and Simon Gonzales' truck was never examined to determine whether any bullets entered the cabin. Moreover, the children's death certificates, their autopsy reports, the Colorado Attorney General's report focusing on the death of Simon Gonzales, and other documents obtained through open records requests to the CRPD and Colorado State authorities never identify the gun(s) that killed the children.⁴⁶⁴ Indeed, these reports raise more questions than answers about who was ultimately responsible for the girls' deaths. The Colorado authorities have refused to cooperate with the family in its attempts to learn more about the circumstances surrounding the tragedy. As described *supra*, the authorities did not respond to several of Petitioners' open records requests, so Petitioners do not know whether information regarding an investigation into the girls' deaths exists elsewhere but is not being made publicly available. To this day, it remains unclear whether the bullets that killed the Gonzales girls came from the gun of Simon Gonzales, a private actor, or the Castle Rock Police officers who shot multiple rounds of bullets while the girls were inside the vehicle.

Regardless of whose bullets ultimately killed the children, it is clear under international law, including the American Declaration, that the State had an obligation to investigate the circumstances surrounding their deaths and communicate the results of such an investigation to the Gonzales family as well as the general public. This duty to investigate was arguably heightened after Jessica Gonzales and the girls' grandmother

⁴⁶³ Douglas County Sheriff: Property/Evidence Log, June 23, 1999, Ex. I (see p. 6-8 documenting many shell casings found in the truck); *see also* Ex. B 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.).

repeatedly requested information concerning the time, place, and circumstances surrounding the girls' deaths. The fact that no investigation into their deaths ever took place amounts to a violation of Articles IV, V, VI, XVIII, and XXIV of the American Declaration as well as the United States' overarching obligation to respect and ensure rights guaranteed under the Declaration.

1. The State Must Conduct an Investigation in Accordance with Principles of Due Diligence.

In the *Velásquez Rodríguez* case and its progeny, the Court described the nature and scope of the investigation that States must conduct when addressing alleged human rights violations. Most importantly, the Court found,

[the investigation] must be undertaken in a *serious manner* and *not as a mere formality* preordained to be ineffective. An investigation *must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family* or upon their offer of proof, without an effective search for the truth by the government.⁴⁶⁵

Thus, the key features of the duty to investigate include: (1) a serious investigation, not undertaken as a mere formality; (2) that is undertaken as part of a search for truth; (3) that has a clear objective; and (4) that the State assumes as its own legal duty, irrespective of private interests or solicitations from the victim's family.

In the *Bulacio* case, the Court discussed the components of the duty to investigate in its examination of the Argentine Federal Police's arrest and assault on a seventeen-year-old that ultimately resulted in his death. At issue were a prolonged and unproductive investigation into the circumstances surrounding the teenager's death and a delayed and ineffective prosecution of those individuals who were ultimately responsible.

⁴⁶⁴ See *supra* at Sec. II(A)(7).

The Court, adopting and expanding upon its findings in *Velásquez*, noted that a State investigation “[m]ust have a purpose and be undertaken by [the State] as a juridical obligation of its own and not as a mere processing of private interests, subject to procedural initiative of the victim or his or her next of kin or to evidence privately supplied, without the public authorities effectively seeking the truth.”⁴⁶⁶

Notably, in the *Bulacio* case some investigation had been conducted by the State, but the incomplete and years-long nature of the effort in combination with continuing impunity for those apparently responsible led the Court to determine that harm to family members continued.⁴⁶⁷ Thus, the Court required the State “to continue and conclude the investigation of the facts and to punish those responsible for them.”⁴⁶⁸ The Court also awarded compensation to the next-of-kin for non-pecuniary damages.⁴⁶⁹

In *Avsar v. Turkey*,⁴⁷⁰ the European Court set forth a similar standard for the scope and nature of investigations into alleged human rights violations. First, the Court determined that the investigation must be “official” and “independent from those implicated in the events ...”⁴⁷¹ Second, the “authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge formal complaint or to take responsibility of any investigatory procedures ...”⁴⁷² Third, “the authorities must have taken reasonable steps available to them to secure the evidence concerning the incident, including *inter alia* eye witness

⁴⁶⁵ *Velásquez Rodríguez*, 4 Inter-Am C. H.R., at ¶ 177 (emphasis added); see also *Bamaca Velásquez*, Judgment of Merits, Inter-Am. C.H.R., at ¶ 212; *Comunidad Moiwana*, Inter-Am. C.H.R.; *Martí de Mejía*, Case 10.970, Inter-Am.C.H.R. at 157.

⁴⁶⁶ *Bulacio*, Judgment, Inter-Am. C.H.R., (ser. C) No. 100, at ¶ 112 (Sept. 18, 2003).

⁴⁶⁷ *Id.* at ¶ 119-120.

⁴⁶⁸ *Id.* at ¶ 121.

⁴⁶⁹ *Id.* at ¶¶ 101-102.

⁴⁷⁰ *Avsar v. Turkey*, App. No. 25657/94, Eur. Ct. H.R., at ¶¶ 393-395 (2001).

⁴⁷¹ *Id.* ¶ 393.

testimony, forensic evidence, and where appropriate an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death ...”⁴⁷³ Finally, the Court found that any investigation must be conducted promptly so as to maintain “public confidence in their maintenance of the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.”⁴⁷⁴

In the present case, the State has failed adopt this standard to conduct an independent and appropriate investigation into the circumstances surrounding the Gonzales girls’ deaths. First, no governmental body ever conducted a serious, truth-seeking investigation into the girls’ deaths. Instead, the extensive investigations concerning the police shooting of Simon Gonzales summarily conclude, with no evidentiary basis, that Mr. Gonzales killed the girls earlier that night.⁴⁷⁵ Additionally, the clear objective of these investigations was to assess the police use of force that ultimately resulted in Simon Gonzales’ death.⁴⁷⁶ No investigative report ever purports to have as its purpose an assessment of the girls’ deaths. Moreover, the State never conducted such an investigation of its own volition. While the State has an independent obligation to investigate, irrespective of private interests or solicitations from the victim’s family, its

⁴⁷² *Id.*

⁴⁷³ *Id.* ¶ 394.

⁴⁷⁴ *Id.* ¶ 395.

⁴⁷⁵ 18th Judicial Critical Incident Team Shooting of Simon Gonzales Castle Rock PD Case #99-3226, Exhibit C at 37 (concluding girls were killed by Simon Gonzales); *see also* Letter to CBI from Detective Contos and Agent Vanecek, June 28, 1999, Exhibit H (reporting that Simon Gonzales killed the girls).

⁴⁷⁶ Letter to CBI from Detective Contos and Agent Vanecek, June 28, 1999, Exhibit H (requesting analysis of evidence relating to the “shooting in front of the Castle Rock Police Department” and later stating “The 18th Judicial District Critical Incident Team is investigating the Officer-Involved shooting. The homicide of the three girls is being handled by the Castle Rock Police Department.”); Summary of Investigation, 18th Judicial Critical Incident Team, Exhibit C (“As a result of [the exchange of gunfire between police and Simon Gonzales]..., the 18th Judicial Critical Incident Team was called out to investigate the circumstances surrounding the shooting.” Context makes it clear that “the shooting” refers to the shooting of Simon

obligation was heightened here, where Jessica Gonzales and her family made repeated entreaties to state and federal authorities to conduct a thorough and independent investigation into the girls' deaths.⁴⁷⁷

Importantly, the Court has found that the State must independently investigate unresolved questions of a fundamentally important nature, regardless of whether or not the violation occurred in the context of a forced disappearance and regardless of whether or not governmental officers or private actors are directly responsible for the violation. In *Bolanos v. Ecuador*, for example, the Court found in a forced disappearance case that the State, in accordance with Ecuadorian law, should have photographed all surfaces of the corpse of an individual who died of unexplained causes while in state custody.⁴⁷⁸

Here too the State is not absolved from its duty to investigate the Gonzales children's deaths amid the highly ambiguous circumstances of this case and especially in light of the significant possibility that police bullets entered the children's bodies during the shootout with Simon Gonzales.⁴⁷⁹

Finally, the duty to investigate continues so long as uncertainty exists about an individual's fate. "Even in the hypothetical case that those individually responsible for crimes . . . cannot be legally punished," the Court has found, "the State is obligated to use the means at its disposal to inform the relatives of the fate of the victims"⁴⁸⁰

Gonzales by police.); CBI Official Request for Lab Exam, Exhibit J (listing offense on form as "officer involved shooting death" and listing Simon Gonzales as the victim).

⁴⁷⁷ See Dec. 11, 2006 Observations, *supra*, note 3, at Ex. E, ¶¶ 75-78 (detailing requests for information that went ignored and stating "I never learned how, when, and where the girls died, and whether any CRPD bullets had hit them in the course of the shootout with Simon. I continue to seek this information to this day."); Tina Rivera Declaration, *supra* note 126, Ex. A, ¶¶ 7-11.

⁴⁷⁸ *Manuel Stalin Bolaños Quiñones*, *supra* 456, at ¶ 32.

⁴⁷⁹ The autopsies of the Gonzales girls, a letter, and various news reports state that Simon Gonzales shot his daughters and no police bullets entered the girls. However, as noted *supra*, the circumstances of the shooting at the police station call this assumption into question.

⁴⁸⁰ *Velásquez Rodríguez*, 4 Inter-Am Ct. H.R., at ¶ 181.

Thus, the United States' obligation to conduct a full and impartial investigation into the Gonzales children's deaths is not at all lessened by the fact that Simon Gonzales is no longer alive. Even if it were clear that Simon Gonzales killed the children that night – and it is not – the State authorities, at a minimum, would have had an obligation to investigate the time, place, and circumstances of their deaths. However, because it remains unclear who was ultimately responsible for the girls' deaths, a heightened responsibility is imposed on the State to investigate.

In sum, the state's obligation to investigate applies equally in cases involving alleged human rights violations by state or private actors. This is because the duty to investigate is rooted in the need to uncover the truth behind how the human rights violations occurred and to dispel uncertainty over the fate of the victims.⁴⁸¹

2. Victims, Family Members, and Society Collectively Have a Right to Know the Truth.

Since the Court in *Velásquez Rodríguez* first laid out the State's obligation to investigate human rights abuses, the concept of the duty to investigate has developed to include a right to truth and knowledge for victims, family members, and society.⁴⁸² In *Moiwana Village v. Suriname*, the Court described the essence of the right to truth:

All persons, including the family members of victims of serious human rights violations, have the right to the truth. In consequence, the family members of victims and society as a whole must be informed regarding the circumstances of such violations. This right to the truth, once recognized, constitutes an important means of reparation. Therefore, in the instant case, the right to the truth creates an expectation that the State must fulfill to the benefit of the victims.⁴⁸³

The Court has developed the scope and nature of the right to truth in several recent cases, finding that this right “is subsumed in the right of the victim or his next of

⁴⁸¹ *Id.* at ¶ 181.

⁴⁸² See *Antkowiak*, *supra*, at 989-96.

kin to obtain clarification of the events that violated human rights and the corresponding responsibilities from the competent organs of the State,” pursuant to, *inter alia*, Articles 8 and 25 of the Convention.⁴⁸⁴

The United Nations Human Rights Committee (HRC) has also found that family members have a right to learn the truth of the fate of their loved ones. For example, in *Quinteros v. Uruguay*,⁴⁸⁵ the HRC found that a mother whose daughter had allegedly been disappeared by Uruguayan military personnel suffered from “anguish and stress caused . . . by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts.”⁴⁸⁶ The HRC determined that the mother had “the right to know what . . . happened to her daughter,” and that “she too is a victim of the violations of the Covenant suffered by her daughter in particular, of article 7 [of the ICCPR – i.e. the right to be free of cruel, inhuman, or degrading punishment or treatment].”⁴⁸⁷ The HRC concluded that Uruguay needed to take “immediate and effective steps” to establish key facts surrounding the daughter’s disappearance, secure the daughter’s release, bring those deemed responsible to justice, and prevent the repetition of similar violations.⁴⁸⁸

While the specific contours of the right to truth are still evolving,⁴⁸⁹ the core of the right is now firmly established. The Inter-American Court recently found in *Bulacio*

⁴⁸³ *Moiwana Village*, *supra* note 457, at ¶ 204.

⁴⁸⁴ *Bamaca Velasquez*, Judgment of Merits, Inter-Am. C.H.R., at ¶ 201; *Barrios Altos*, 2001 Inter-Am. C.H.R. at ¶¶ 47-49; *Almonacid Arellano and Others v. Chile*, sentencia de 26 de septiembre de 2006, ¶ 148 (2006), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_154_esp_pdf (same).

⁴⁸⁵ *María del Carmen Almeida de Quinteros et al. v. Uruguay*, Communication No. 107/1981, U.N. Doc. CCPR/C/OP/2 at 138, (1990).

⁴⁸⁶ *Id.* at ¶ 14.

⁴⁸⁷ *Id.*

⁴⁸⁸ *Id.* at ¶ 16.

⁴⁸⁹ *See, e.g., Castillo Paez*, Inter-Am. C. H. R., (Ser. C), at ¶¶ 85-86 (finding that the violation of the right to truth and investigation urged by the Commission “refers to . . . a right that does not exist in the American

that judicial bodies “must . . . ensure, within a reasonable time, the right of the victim and his or her next of kin to learn the truth about what happened and for those responsible to be punished.”⁴⁹⁰ After determining that both immediate and extended family members of the Bulacio family had experienced “deep suffering”⁴⁹¹ in light of the unending judicial process and prevailing impunity, the Court further ordered that “[t]he next of kin of the victim must have full access and the capacity to act at all stages and levels of said investigations.”⁴⁹² The Court also found in *Bulacio* that “[t]he results of the aforementioned investigations must be made known publicly, for Argentinean society to know the truth about the facts.”⁴⁹³ This finding represents a final hallmark of the recent jurisprudence on the right to truth: the notion that the right is not only a “private right for relatives of victims,” but also “a collective right that ensures society access to information that is essential for the workings of democratic systems . . .”⁴⁹⁴

In the present case, the United States has denied Jessica Gonzales, her family, and society at large the right to truth. Nearly nine years have passed since the death of Katheryn, Rebecca, and Leslie Gonzales, and Jessica Gonzales continues to seek answers to basic questions surrounding her three daughters’ deaths. As she told this Commission in March 2007,

My daughters’ death certificates and the coroners’ reports state no place, date, or time of death. It saddened me not to be able to put this information on their gravestones. The authorities also never let my family and I examine Simon’s truck. They disposed of the truck within three weeks of the girls’ death. I have yet to read any investigation into my girls’ deaths. Castle Rock has denied my

Convention, although it may correspond to a concept that is being developed in doctrine and case law” related to a state’s obligation to investigate).

⁴⁹⁰ *Bulacio*, Inter-Am. C.H.R., (ser. C) No. 100, at ¶ 114.

⁴⁹¹ *Id.* at ¶¶ 98-99.

⁴⁹² *Id.* at ¶ 121.

⁴⁹³ *Id.*

⁴⁹⁴ *See, e.g., Ellacuria v. El Salvador*, Case 10.488, Inter-Am. C.H.R., Report No. 136/99, OEA/Ser.L/V/II.106 doc. 3 rev. at 608, ¶ 224 (1999).

request for this information. I don't believe it exists. . . . Today, nearly eight years after my tragedy, I continue to seek a thorough investigation into my babies' deaths. I see nothing being done in Castle Rock or nationwide to make police accountable to domestic violence victims. It's like rubbing salt in my wounds.⁴⁹⁵

As made clear in *Moiwana Village*, Ms. Gonzales and her family cannot be made whole unless and until they receive this basic information concerning the human rights violations that resulted in the Gonzales children's deaths. Ms. Gonzales lives in a state of continuing uncertainty surrounding her daughters' deaths and, like the mother in *Quinteros*, not knowing the truth gives her great anguish and stress.⁴⁹⁶ Moreover, the State's refusal to conduct an investigation into the Gonzales children's deaths or to provide documents that might shed light on this issue violates society's "collective right" to access information, and thus undermines fundamental democratic principles.⁴⁹⁷

As in *Quinteros*, the United States must take "immediate and effective steps"⁴⁹⁸ to inform the Gonzales family, within a "reasonable time,"⁴⁹⁹ of the "circumstances"⁵⁰⁰ of the human rights violations committed against the Gonzales children. The right of the girls' next of kin "to learn the truth about what happened"⁵⁰¹ has been violated. As a result, those responsible for the deaths remain unidentified. Regardless of whether Simon Gonzales or the police were responsible for the shooting deaths of the girls, Jessica Gonzales should know the truth of her daughters' fate.

⁴⁹⁵ Jessica Gonzales, March 2, 2007 Testimony, *supra* note 4.

⁴⁹⁶ See Dec. 2006 Observations, *supra* note 3, at Ex. E, ¶ 84 ("Because my case was dismissed on legal grounds, no factual discovery ever took place. My lawyer never had the opportunity to depose the CRPD officers who failed me or obtain many documents and materials related to my case."); ¶ 80 ("I was and remain deeply traumatized.").

⁴⁹⁷ See *Ellacuria*, *supra* note 495, at ¶ 224.

⁴⁹⁸ *Quinteros*, *supra* 486, at ¶ 16.

⁴⁹⁹ *Bulacio*, Inter-Am. C.H.R., (ser. C) No. 100, at ¶ 114.

⁵⁰⁰ *Moiwana Village*, *supra* note 457, at ¶ 204.

G. The United States' Failure to Respect and Ensure Ms. Gonzales' Rights Protected Under the American Declaration Violated her Right to Equality Under Article II.

Article II of the American Declaration provides that “[a]ll persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex . . . or any other factor.”⁵⁰² Any measure adopted by a State that intentionally disadvantages an individual or group on grounds of race, sex, or other enumerated grounds, or that has a negative disparate impact on such a group, constitutes impermissible discrimination. Importantly, “the right to equality before the law means not that the substantive protections of the law will be the same for everyone, but that the application of the law should be equal for all persons without prejudice or discrimination.”⁵⁰³ Similarly, the Human Rights Committee has noted that “the term ‘discrimination’ as used in the [ICCPR] should be understood to imply any distinction, exclusion, restriction or preference . . . which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”⁵⁰⁴

As the Commission has observed, the principle of non-discrimination established in Article II “is a particularly significant protection that permeates the guarantee of all other rights and freedoms under domestic and international law.”⁵⁰⁵ The protections

⁵⁰¹ *Bulacio*, Inter-Am. C.H.R., (ser. C) No. 100, at ¶ 114.

⁵⁰² American Declaration, art. II.

⁵⁰³ *William Andrews v. United States*, Case 11.139, Inter-Am. C.H.R., Report N 57/96, OEA/Ser.L/V/II.95, doc. 7 rev. at 570, 173 (1997).

⁵⁰⁴ Human Rights Committee, General Cmt. 18, U.N. Doc. HRI/GEN/1/Rev.1, ¶ 7 (1994). *See also*, ICERD art. 1, CEDAW art. 1.

⁵⁰⁵ *Maya Indigenous Community of the Toledo District*, Case 12.053, Inter-Am. C.H.R., at ¶ 163. *See also* *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 (2000), ¶ 36 (“the guarantees of equality and non-discrimination underpinning the American

contained in Articles II and VII, discussed *supra*, arose in recognition of the unequal ways in which society has historically treated certain groups, including women and racial and ethnic minorities, and the detrimental effects of such unequal treatment on these groups.⁵⁰⁶ Indeed, the right to be free from discrimination on the basis of race, sex, and other enumerated grounds is contained in nearly every major international human rights treaty.⁵⁰⁷ More recently, human rights bodies have considered the unique character of “intersectional” discrimination – including discrimination against women of color – and the ways in which such discrimination differs from discrimination on compartmentalized enumerated grounds.⁵⁰⁸

The Commission has interpreted the right to be free from discrimination contained in Article II of the American Declaration to be analogous to the guarantees of equal protection of the law contained in Articles 1(1) and 24 of the American Convention

Convention and American Declaration of the Rights and Duties of Man reflect the essential bases for the very concept of human rights”).

⁵⁰⁶ See *supra*, Context and Patterns section. As the Inter-American Commission has stated, “It is a fact that permeates all sectors of society that violence essentially occurs as a consequence of the unequal relations between men and women. . . . The fundamental cause is attributed to the patriarchal system, which imposes hierarchy, domination, and authoritarian relations, and which assigns different roles to men and women.” I.A. Comm. H.R., Conclusions and Recommendations of the Inter-American Consultation on Women and Violence, at 4-5, OEA/ser. L/II.2.25, CIM/RECOVI/doc. 26/90 rev. 1 (1990).

⁵⁰⁷ See American Convention, arts. 1(1), 2, 19, and 24; Universal Declaration of Human Rights, arts. 1, 2, and 7; International Covenant on Civil and Political Rights, arts. 2, 3, 24, and 26; International Covenant on Economic, Social and Cultural Rights, arts. 2 and 3; Convention on the Elimination of All Forms of Discrimination against Women, arts. 1-5 and 15; United Nations Declaration on the Elimination of Violence Against Women, Article 3; Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (“Convention of Belém do Pará”), arts. 4, 6; and European Convention on Human Rights, art. 14. See also OAS Charter, art. 3(I) (“the American States proclaim the fundamental rights of the individual without distinction as to . . . sex”).

⁵⁰⁸ The CERD Committee, for example, has “recognize[ed] that some forms of racial discrimination have a unique and specific impact on women.” Committee on the Elimination of Racial Discrimination, General Recommendation 25, Gender Related Dimensions of Racial Discrimination (2000) ¶ 3. Additionally, Article 9 of the Convention Belém do Para directs “States Parties [to] take special account of the vulnerability of women to violence by reason of, among others, their race or ethnic background or their status as migrants, refugees or displaced persons.”

and Article 4(f) of the Convention of Belém do Pará.⁵⁰⁹ It has also required States to ensure that this right is affirmatively protected.⁵¹⁰ As the Commission stated in the case of *Maria da Penha Maia Fernandes*, a case involving the failure of the Brazilian state to prosecute a domestic violence perpetrator, “[e]nsuring that women can freely and fully exercise their human rights is a priority in the Americas. The fundamental obligations of equality and nondiscrimination serve as the backbone for the regional human rights system.”⁵¹¹

As discussed throughout this Petition and prior submissions, the inadequate protections for and remedies available to victims of domestic violence in the United States have a disproportionate effect on women, and more specifically women of color.⁵¹² The United States’ failure to provide Jessica Gonzales, a Latina and Native American victim of domestic violence, adequate protection from domestic violence, the subsequent failure of the U.S. legal system to supply her with a remedy, and the refusal of the Colorado and federal authorities to conduct an independent, prompt, and thorough investigation violated her rights to equality and to be free from discrimination on the basis of both sex and race under Article II of the American Declaration.

1. An Effects-Based Discrimination Standard is Applicable in this Case.

The Inter-American Court and Commission have emphasized that discrimination can take place in two forms: as intentional discrimination and as effects-based, facially-neutral discrimination (also known as “disparate impact”). Both of these forms of

⁵⁰⁹ See *Maria da Penha*, Case 12.051, Inter-Am. C.H.R. at ¶¶ 45-50 and 120; *Report on the Rights of Women in Ciudad Juárez*, *supra* note 208, at ¶ 103 (noting that the Convention of Belém do Pará “reflect[s] a hemispheric consensus on the need to recognize the gravity of the problem of violence against women and take concrete steps to eradicate it.”) (emphasis added).

⁵¹⁰ *Maria da Penha*, Case 12.051, Inter-Am. C.H.R.

discrimination condone and perpetuate inequality, thereby denying equal protection of the law to individuals belonging to protected classes. Thus, the Court has recognized that “States must abstain from carrying out any action that, in any way, directly or indirectly, is aimed at creating situations of *de jure or de facto* discrimination” (emphasis added).⁵¹³ Recently, in the case of *Yean and Bosico Children v. Dominican Republic*, the Court reaffirmed the application of this standard: “[T]he peremptory legal principle of the equal and effective protection of the law and non-discrimination determines that . . . States must abstain from producing regulations that are discriminatory or have discriminatory effects on certain groups of the population when exercising their rights.”⁵¹⁴

Universal and other regional human rights laws also recognize an effects-based standard for discrimination. Article 1 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), for instance, explains that “the term ‘discrimination against women’ shall mean any distinction, exclusion or restriction made on the basis of sex *which has the effect or purpose* of impairing or nullifying the recognition, enjoyment or exercise by women . . . on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”⁵¹⁵ The Human Rights Committee found that Article 26 of the ICCPR, which requires States to guarantee equal protection of the law, “prohibits discrimination in law or in fact in any field regulated and protected by public

⁵¹¹ *Id.* at ¶ 99.

⁵¹² See Context and Patterns, *supra*.

⁵¹³ See, e.g., Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion, OC-18/03, Inter-Am. C.H.R. (ser. A) No. 18, ¶103 (Sept. 17, 2003).

⁵¹⁴ *The Yean and Bosico Children v. Dominican Republic*, Judgment, Inter-Am C. H.R., (ser. C) No. 130, ¶ 141 (Sept. 8, 2005).

⁵¹⁵ CEDAW Art. 1.

authorities.”⁵¹⁶ Similarly, Article 1 of CERD defines discrimination as “any distinction, exclusion, restriction or preference based on race, color, descent or national ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms.”⁵¹⁷

Recent jurisprudence from the European Court also supports an effects-based standard for assessing allegations of discrimination. For example, in *D.H. and Others v. Czech Republic*, the European Court found a violation of the non-discrimination/equal protection guarantees contained in Article 14 of the European Convention where Roma students were disproportionately (twenty-seven times more likely than non-Roma students) placed in special schools for students with disabilities.⁵¹⁸ Because these school-selection policies have a discriminatory impact on Roma people, the Court held, they violated the European Convention’s explicit prohibition against discrimination.

International and regional human rights bodies clearly recognize that government policies and practices that have a negative impact on protected classes should be deemed discriminatory. As discussed *supra* and *infra*, facially-neutral U.S. legislation and policies on domestic violence have a negative impact on women and especially women of color. The Commission should consider Jessica Gonzales’ case in light of this stark American reality and should employ an effects-based standard as it considers whether the United States violated Article II of the American Declaration.

⁵¹⁶ Human Rights Committee, General Cmt. 18, U.N. Doc. HRI/GEN/1/Rev.1, at 26 (1994).

⁵¹⁷ International Convention on the Elimination of All Form of Racial Discrimination, G.A. Res. 2106 (XX), Annex 20, art 1 (1), U.N. Doc. A/6014 (1966), entered into force Jan. 4, 1969.

⁵¹⁸ *D.H. and Others v. the Czech Republic*, App. No. 57325/00, Eur. Ct. H.R. (2006).

2. U.S. Domestic Violence Laws, Policies, and Practices Violate Article II's Prohibition on Sex and Race Discrimination.

Discrimination against victims of domestic violence by government officials in the United States usually stems from one of two sources. First, State officials often harbor negative gender stereotypes that cause them to respond to victims of domestic violence either inadequately or not at all. Second, State officials enact laws and implement policies and practices that, even if formally gender and race neutral, have an adverse impact on women and people of color as compared to similarly-situated men and whites, and that have the effect of limiting the enjoyment of fundamental human rights by women and people of color. Both forms of discrimination condone and perpetuate domestic violence, thereby denying women – especially women of color – equal protection of the law in violation of Article II of the American Declaration.

As discussed in the Context and Patterns section, *supra*, social science evidence illustrates the many ways in which executive, law enforcement, judicial, and legislative structures throughout the United States systemically marginalize, re-victimize, and thereby discriminate against women, and particularly women of color, who are victims of domestic violence. Because the vast majority of domestic violence victims are women,⁵¹⁹ because domestic violence is “a function of the belief . . . that men are superior and that the women they live with are their possessions or chattels that they can treat as they wish . . . ,”⁵²⁰ because U.S. authorities’ failure “to take action with regard to [gender-motivated] violence and abuse often deprives victims belonging to racial, ethnic and

⁵¹⁹ See *supra*, Context and Patterns (highlighting the vastly disproportionate number of female versus male domestic violence victims).

⁵²⁰ U.N. Ctr. For Social Dev. & Humanitarian Affairs, *Violence Against Women in the Family*, U.N. Doc. ST/CSDHA/2, U.N. Sales No. E.89.IV.5 (1989).

national minorities . . . of their right to access to justice,”⁵²¹ and because domestic violence serves to deny and destroy women’s power and agency, perpetuate women’s dependence on men, and increase women’s vulnerability to violence,⁵²² human rights bodies have found the rights to equality, non-discrimination, and special protection for women generally, and women of color specifically, to be implicated in cases involving the State’s failure to adequately respond to domestic violence.⁵²³

Courts, legal academics, and social scientists have recognized that often battered women are blamed for the acts of their abuser and that gender stereotypes underlie placement of blame. “The stereotypes associated with domestic violence victims include that the victim precipitates her own assault, that she is masochistic and either ‘likes’ or ‘deserves’ to be beaten, that she is ‘crazy,’ that even if she leaves one abusive relationship she will just find another, and that she is free to end her victimization at any time without assistance.”⁵²⁴ Such victim-blaming attitudes have been found to be closely associated with traditional, stereotypic beliefs about gender roles. For instance, studies have found that individuals who endorsed traditional gender role attitudes were both more supportive of the use of violence against women⁵²⁵ and more likely to blame female

⁵²¹ Committee on the Elimination of Racial Discrimination, Concluding Observations, CERD/C/USA/CO/6, ¶26 (March 7, 2008).

⁵²² See Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291, 305, 339 (1994).

⁵²³ See, e.g., Committee on the Elimination of Discrimination Against Women, at ¶¶ 4,6, 7, 9; *Maria da Penha*, Case 12.051, Inter-Am. C.H.R.; *Report on the Rights of Women in Ciudad Juárez*, *supra* note 208.

⁵²⁴ Zanita E. Fenton, *Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence*, 8 COLUM. J. GENDER & L. 1, 22 (1998). See also *The Report on the Rights of Women in Ciudad Juárez*, *supra* note 208, ¶ 125 (“There remains a significant tendency on the part of some officials to either blame the victim for placing herself in a situation of danger, or to seek solutions that emphasize requiring the victim to defend her own rights.”).

⁵²⁵ LaVerne A. Berkel *et al.*, *Gender Role Attitudes, Religion, and Spirituality as Predictors of Domestic Violence Attitudes in White College Students*, 45 *Journal of College Student Development* 119 (2004).

victims of violence for the abuse against them.⁵²⁶ International human rights bodies have called on States to “eliminate[] . . . practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.”⁵²⁷

These gender stereotypes and victim-blaming attitudes lead many, including the police and the courts, to dismiss female victims of domestic violence as irrational, dishonest, and manipulative and to feel justified in ignoring or condoning the violence perpetrated against them.⁵²⁸ Moreover, even when police departments and the judiciary are not engaging in conscious stereotyping, they may engage in conduct historically rooted in such gender stereotypes that has a disparate effect on victims. For example, a police department’s policy or practice of assigning a low priority to calls alleging violations of domestic violence restraining orders has a disparate impact on women because women are the vast majority of restraining order holders. Women are also disproportionately affected by judicial procedures and practices that deny an open forum or an adequate remedy to compensate victims of domestic violence for the harms from which they suffer, even though these procedures and practices may not be consciously discriminatory. Indeed, such policies and practices marginalize and endanger women and thus prevent them from enjoying their right to be free from gender-based violence, a fundamental component of the non-discrimination guarantees of Article II of the

⁵²⁶ Cynthia E. Willis *et al.*, *Effects of Sex Role Stereotyping among European American Students on Domestic Violence Culpability Attributions*, 34 *Sex Roles* 475 (1996).

⁵²⁷ Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, *entered into force* Sept. 3, 1981, art. 3; Convention of Belém do Pará, art. 6(b); Report Of The Special Rapporteur On Violence Against Women, Its Causes And Consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 1995/85, E/CN.4/1996/53, ¶ 27 (6 Feb. 1996).

⁵²⁸ See George S. Rigakos, *Constructing the Symbolic Complainant: Police Subculture and the Nonenforcement of Protection Orders for Battered Women*, 10 *Violence and Victims* 227, 233 (1995) (noting that sexism in some police departments “contributes to negative stereotypes of women [victims of domestic violence] as liars, manipulators, and unreliable witnesses”); Sally F. Goldfarb, *Applying the*

Declaration and other international law.⁵²⁹ By “affect[ing] women disproportionately,”⁵³⁰ they foster the unequal protection of women and thus constitute impermissible discrimination.

3. The United States Discriminated Against Jessica Gonzales when It Failed to Adequately Respond to Ms. Gonzales’ Complaints and to Afford Her a Remedy.

Gender and race discrimination is a common thread running through the violations by the United States of Jessica Gonzales’ rights under Articles I, IV, V, VI, VII, XVIII, and XXIV of the American Declaration. The United States violated Ms. Gonzales’ Article II rights when it failed to extend these other rights to her, as a Latina and Native American victim of domestic violence, in a non-discriminatory fashion. Specifically, the State should have exercised due diligence by responding to Ms. Gonzales’ complaints; protecting Ms. Gonzales, her children, and her home; providing Ms. Gonzales with an appropriate remedy for these police failures; and conducting an investigation into the children’s deaths. Instead, the United States simply reinforced the pre-existing discriminatory structures that perpetuate domestic violence and deprive women – especially women of color – of their right to equality.

As discussed *supra*, the CRPD failed, in violation of Article XXIV of the American Declaration, to properly investigate the disappearance of Ms. Gonzales’ children, even after she learned where her husband had taken the children, notified the police of this information, and repeatedly stressed the emergency nature of the situation. Furthermore, by ignoring Ms. Gonzales’ pleas for assistance, the police department also

Discrimination Model to Violence Against Women: Some Reflections on Theory and Practice, 11 AM. U. J. GENDER SOC. POL’Y & L. 251, 255-56 (2003).

⁵²⁹ See, e.g., Committee on the Elimination of Discrimination Against Women, at ¶¶ 4, 6.

⁵³⁰ *Id.* at ¶ 6.

violated Articles I, V, and VI because it failed to protect the children's lives and Ms. Gonzales' rights to dignity and humane treatment, and failed to guarantee their fundamental rights to the protection of privacy, the family, and the home. Through their response, the police engaged in a widespread, systemic, and longstanding practice of treating domestic violence as a less serious crime than other crimes and marginalizing domestic violence victims on the basis of their gender. Ms. Gonzales and her family were revictimized and denied their right to truth when Colorado and federal authorities declined to conduct an independent, thorough, and prompt investigation into the circumstances surrounding the children's deaths, pursuant to Articles IV, V, VI, XVIII, and XXIV. The police also violated Article VII of the Declaration by failing to afford Jessica Gonzales and her children special measures of protection. These discriminatory responses violated Article II of the Declaration.

The police department's failure to respond to Ms. Gonzales was likely rooted in a common and facially-neutral police department policy of assigning lower priority to domestic violence calls, the negative stereotypes of domestic violence victims that the officers embraced, or some combination of the two. Throughout the evening, the officers repeated to Ms. Gonzales their belief that her husband had a right to spend time with his children.⁵³¹ One of the dispatchers, Cindy Dieck, scolded Jessica Gonzales, saying it was "a little ridiculous making us freak out and thinking the kids are gone."⁵³² In making these statements, the CRPD revealed discriminatory biases that utterly disregarded the emergency nature of the situation and instead embraced a view of Mr. Gonzales'

⁵³¹ See Dec. 11, 2006 Observations, *supra* note 3, at Ex. E (Jessica Gonzales Declaration), ¶44 (recalling Officer Brink telling Ms Gonzales that there was "nothing the police could do, since the children were with their father.").

⁵³² U.S. Response, Tab D, *supra* note 50, at 2.

abduction as “parenting time.” A State actor who acts upon such discriminatory stereotypes in responding to a domestic violence victim violates Article II of the Declaration.

The police department’s lack of response may have also stemmed from a departmental policy or practice that assigned a low priority to responding to calls alleging violations of restraining orders – a common practice among police departments nationwide.⁵³³ As the literature demonstrates, the vast majority of holders of restraining orders in the United States are women fleeing domestic violence. Thus, even if such a policy or practice were gender-neutral on its face, it would still constitute discrimination in violation of Article II because it has a greater negative impact on women than on men.

Additionally, the Supreme Court’s rejection of Ms. Gonzales’ due process claims and Colorado’s strict sovereign immunity laws, which denied Ms. Gonzales a remedy for the harms she and her children suffered, condones and even promotes the widespread non-enforcement of domestic violence restraining orders by the police as well as the culture of impunity that exists for law enforcement in the domestic violence context. Thus, the State’s failure to provide Ms. Gonzales with a remedy also violates the prohibition on discrimination guaranteed her by Article II.

4. Inaction by Agents of the State Had a Particular Effect on Jessica Gonzales as a Woman of Color.

In recent years, the CERD Committee, “[r]ecognizing that some forms of racial discrimination have a unique and specific impact on women,” has begun to examine the

⁵³³ *See supra*, Context and Patterns. Because this case was dismissed prior to trial, counsel for Petitioners have little information on the Castle Rock Police Department’s general policies and practices for responding to alleged violations of restraining orders and other domestic violence calls. In November 2005, counsel submitted an open records request to the Castle Rock Police Department requesting information on departmental policies, practices, and domestic violence statistics. To date, the police

interlinkages between race and sex discrimination.⁵³⁴ Recently, in its periodic review of the United States' compliance with ICERD, the Committee raised specific concerns about the disparate impact of gender-based violence on minority and immigrant women in the United States. In its Concluding Observations, the Committee found that this disparate impact was, in part, due to the United States' failure to afford these women adequate access to justice and remedies, stating: "The Committee also notes with concern that the . . . insufficient will of federal and state authorities to take action with regard to [such] violence and abuse often 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." Among its recommendations, the Committee urged the United States to ensure that "reports of . . . violence against women belonging to racial, ethnic and national minorities . . . are independently, promptly and thoroughly investigated"⁵³⁵

As detailed above, the domestic violence epidemic in the United States has a particularly grave impact upon women of color. While women of color face a relatively higher likelihood of violence because of their gender, they face additional barriers to accessing police protection and administrative and judicial processes because they are members of a racial or ethnic minority.⁵³⁶ Statistics suggest that communities of color are afforded less protection by public institutions such as the police and local judicial

department has not responded with the requested information. Should the Commission undertake an investigation of the facts alleged in this Petition, it may gain access to such information.

⁵³⁴ Committee on the Elimination of Racial Discrimination, General Recommendation 25, Gender Related Dimensions of Racial Discrimination ¶2 (2000).

⁵³⁵ See Committee on the Elimination of Racial Discrimination, Concluding Observations, CERD/C/USA/CO/6 (March 7, 2008).

⁵³⁶ See Context and Patterns, *supra* note 3, at 43-46.

proceedings.⁵³⁷ Because women in these communities are in particular need of effective recourse from public institutions, police and judicial action (or inaction) that is discriminatory in effect toward women has a particularly detrimental consequence for racial and ethnic minority communities.⁵³⁸ The United States has an obligation to ensure that groups that are especially vulnerable to discrimination are not being disparately impacted by actions or inactions of the State or its agents.

Here, Ms. Gonzales, as a woman, is negatively impacted by laws, policies and practices that have a discriminatory impact on all victims of domestic violence, but she is also negatively impacted by such laws policies and practices as a consequence of her status as a woman of color.⁵³⁹ In other words, she is impacted on the basis of her race as well as her sex. Jessica Gonzales was among the most vulnerable to domestic violence and consequently in most need of effective protection from the State.

In sum, the inaction on the part of law enforcement and the failure of the judiciary to provide Jessica Gonzales with a remedy in this case denied Ms. Gonzales her rights under Articles I, IV, V, VI, VII, XVIII, and XXIV of the American Declaration. Because these failures took place in a context of reinforced discrimination against women of color and domestic violence victims, the United States has violated the guarantees of equal protection and non-discrimination contained in Article II.

⁵³⁷ *See id.*

⁵³⁸ *See id.*

⁵³⁹ *See* Jessica Gonzales, March 2, 2007 Testimony, *supra* note 4, available at https://www.law.columbia.edu/null/Jessica+Statement+-+IACHR+hrg?exclusive=filemgr.download&file_id=1391&showthumb=0.

5. Because Jessica Gonzales Has Established a *Prima Facie* Case of Gender and Race Discrimination, the Burden Rests on the United States to Justify the Discrimination.

Once a complainant has established a *prima facie* case that domestic laws, policies or practices discriminate on the basis of sex, race, or other status, the burden of proving that the measures are not in fact discriminatory rests on the State. What will amount to a *prima facie* case depends on the facts of the case. This burden-shifting standard had been adopted by courts and tribunals throughout the world, at the national, regional, and international levels.⁵⁴⁰

Moreover, a victim's race or gender need not be shown to be the only or even the main reason for the less favorable treatment: it is sufficient if it had a "significant influence on the outcome."⁵⁴¹ Rather, several courts around the world have held that evidence of "a general picture" of disadvantage, or "common knowledge" of

⁵⁴⁰ The shifting burden of proof in discrimination cases is also well-established practice before the United Nations treaty bodies, the Court of Justice of the European Communities, and domestic law in several countries. For examples from the U.N. Treaty Bodies, *see, e.g., Chedi Ben Ahmed Karoui v. Sweden*, Case No. 185/2001 of 25 May 2002, § 10 (Human Rights Committee stating that "substantive reliable documentation" will shift the burden of proof to the Respondent State); Conclusions of the Committee of Economic, Social and Cultural Rights on Luxembourg, U.N.Doc. E/C.12/1/Add.86 (2003) § 10, and Poland, U.N.Doc. E/C.12/1/Add.82 (2002) § 7; United Kingdom of Great Britain and Northern Ireland, U.N.Doc. CERD/C/63/CO/11 (2003) § 4). For examples from the European Communities, *see, e.g., Burden of Proof Directive*, EC Directive 97/80/EC of 15 December 1997 (explicitly requiring a shift in the burden of proof in cases alleging discrimination); Directive 2000/43/2000 of 29 June 2000 implementing the principles of equal treatment of persons irrespective of race or ethnic origin (Race Directive) (stating that where an individual establishes "facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment"); Directive 2000/78/2000 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Framework Directive) (same); Case 170/84, *Bilka-Kaufhaus*, n. 7, § 31, Case C-33/89 *Kowalska* [1990] ECR I-2591, § 16, and C-184/89 *Nimz* [1991] ECR I-297, § 15; Case 109/88 *Danfoss* [1989] ECR 3199, § 16). For examples from national courts, *see, e.g., the Netherlands (RK Woningbouwvereniging Binderen vs. S. Kaya*, 10 December 1982, NJ 1983/687); Canadian Human Rights Act, section 15; South African Promotion of Equality and Prevention of Unfair Discrimination Act of 2000, section 13; section 54A; New Zealand Human Rights Act 1993, section 92F; United States (section 105(a) of the Civil Rights Act 1991 and *McDonnell Douglas Corp. v. Green*, 411 U.S. 492 (1973)). In certain jurisdictions, such as Australia and England, the burden does not generally shift but courts evaluate cases through the establishment of rebuttable presumptions and inferences of discrimination, which are similar in effect. For the approach in English cases see Neill LJ in *King v. Great British-China Centre* (1992) ICR, 528, 516, cited with approval by Lord Brown-Wilkinson in *Glasgow City Council v. Zafar* (1998) ICR 120.

discrimination might be enough to establish a *prima facie* case.⁵⁴² Subsequently, if the respondent State is unable to adequately explain the treatment, the *prima facie* case stands and discrimination is found.

As noted in the Context and Patterns section, *supra*, data and statistics demonstrate that U.S. laws, policies, and practices with regard to domestic violence are systematically failing victims of domestic violence. The United States' failure to adequately protect individuals from domestic violence and provide effective remedies when acts of domestic violence occur disproportionately affects women, and in particular, women of color. Accordingly, Jessica Gonzales has made out a *prima facie* case of discrimination under the Article II of the Declaration, and the United States now bears the burden of either proving that the laws, policies and practices at issue are not in fact discriminatory or otherwise justifying the discrimination.

⁵⁴¹ *Nagarajan v. London Regional Transport*, [2001] 1 AC 513, 502 (per Lord Birkenhead)

⁵⁴² *See, e.g.*, *London Underground v. Edwards*, (1999) ICR 494 [England]; *Mayer v. Australian Nuclear Science and Technology Organisation* (2003) EOC 93-285 [Australia].

V. CONCLUSION AND PETITION

In consideration of the foregoing, Petitioners request that this Honorable Commission provide the following relief:

1. Declare the United States internationally responsible for violations of the rights enshrined in the following provisions of the American Declaration: Article I (right to life and to be free from inhumane treatment), Article II (right to equality/freedom from discrimination), Article IV (right to truth), Articles V and VI (right to family life and protection), Article VII (right to special protection for mothers and children), Article XVIII (right to resort to the courts), and Article XXIV (right to due process of law and an adequate and effective remedy); and
2. Issue a report in accordance with Article 43.2 of the Commission's Rules of Procedure in the most expedited manner possible, incorporate into that report the findings in point (1) of this section, and recommend that the United States provide proper remedies for the violations of human rights committed in this case, including, but not limited to the following (described in more detail below):
 - a. Individual relief, including financial compensation and an investigation into the children's deaths, and
 - b. Legal and programmatic reform to comport with standards of international human rights law on violence against women, private and family life, special protections of children, due process and effective remedies.

A. Individual Compensatory and Equitable Relief

The Commission should recommend that the United States:

- a. Grant Ms. Gonzales appropriate symbolic and actual compensation for the violations of her rights and the rights of her children.
- b. Conduct a serious, impartial, and exhaustive investigation into the deaths of Leslie, Katheryn and Rebecca Gonzales to determine the circumstances (including date, time, and place) surrounding their deaths.
- c. Conduct a serious, impartial, and exhaustive investigation into the Castle Rock Police Department's failure to provide a rapid and effective response to Ms. Gonzales' repeated emergency calls throughout May and June 1999, and especially on June 22 and 23, 1999.
- d. Provide Ms. Gonzales with all documents, tapes, photographs, and other documentary evidence related to past and future state and federal government investigations into her daughters' deaths, so that she can better understand what happened to her daughters on June 22 and 23, 1999.

B. Legal & Programmatic Reform

The Commission should:

- a. Authorize the Special Rapporteurship on the Rights of Women to conduct an on-site visit to Colorado to assess the efficacy of measures adopted by the state to address domestic violence and to protect victims. The Rapporteur should consider whether these measures adhere to the due diligence standards prescribed under the American Declaration, as interpreted in light of universal and regional human rights law.
- b. Request the Inter-American Court to deliver an advisory opinion on the nature and full extent of States' obligations under both the American Declaration on the Rights and Duties of Man and the American Convention to address violence against women, in light of the Convention of Belém do Pará, CEDAW, and other human rights instruments.
- c. Recommend that the United States ratify, without reservation, the American Convention on Human Rights, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women ("Convention of Belém do Pará"), and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and its Optional Protocol.

The United States should:

- a. Publicly recognize that its current laws, policies, and practices too often condone domestic violence, promote discriminatory treatment of victims, and have a particularly detrimental effect on poor, minority, and immigrant women. The United States should take meaningful steps to rectify this situation by:
 - i. Sending an unequivocal message that it is a national priority to curb violence against women and protect women and children from acts of domestic violence.
 - ii. Initiating public education campaigns that condemn violence in the home; programs to educate men and women, boys and girls, about women's human rights; and initiatives that promote domestic violence survivors' knowledge of their rights and the legal remedies available to them.
- b. Promote and protect the human rights of women and children and exercise due diligence in responding to domestic violence, including *inter alia*:

Improved Domestic Violence Restraining Orders and Police Powers

- i. Providing guidance on how to make restraining orders more specific, to better secure the safety of victims.

- ii. Protecting victims and their children by ensuring that the terms of domestic violence restraining orders are effectively enforced in accordance with state law by establishing meaningful standards for enforcement and imposing consequences for a failure to enforce.

Training for Police and Judges and Prosecutors

- i. Requiring and mainstreaming the provision of effective annual domestic violence training sessions to all entities that provide direct governmental services, including the legal, judicial, law enforcement, health, and education fields.

Legislative Reform

- i. Enacting and, where necessary, reinforcing or amending domestic legislation, at the federal and state level, in accordance with international standards, including measures that recognize that it is a State priority and obligation to protect women and children from domestic violence, measures that further develop and strengthen support services, and measures that ensure that remedies are available to domestic violence victims, at the federal and state level, where state actors have failed to respond with due diligence.

Respect for Victims

- i. Providing access to adequate redress – financial and otherwise – for victims, including, inter alia, redress for injuries, physical and psychological, stemming from the United States’ failure to address domestic violence appropriately.
- ii. Establishing, strengthening, and facilitating support services to respond to the needs of individuals threatened by or experiencing domestic violence, including: safe and adequate shelter, including transitional and long-term housing; financial assistance; legal assistance; employment; psychological and health care services; and child care.
- iii. Ensuring the rights of victims to access criminal and civil remedies, including financial compensation, rehabilitation, and support services.

Adopting a Holistic Strategy in Responding to Domestic Violence

- i. Integrating efforts to prevent and reduce violence against women into a wide range of program areas, including urban planning, immigration, poverty reduction, HIV/AIDS, and reproductive health.
- ii. Requiring police departments to enter into collaborations with domestic violence, women's and children's rights advocates to develop initiatives to address domestic violence that are tailored to the needs of particular communities, including domestic violence

- arrest policies that protect the safety of victims of domestic violence and their families.
- iii. Strengthening governmental response to domestic violence by facilitating regular meetings between federal and state officials; educating the 50 states about the United States' obligations to victims and their children under international human rights law; assisting states and localities in developing pilot programs and in "best practice" sharing; and setting quantifiable benchmarks and timetables for state compliance with international obligations.
- c. Adopt affirmative measures to effectively address the structural causes of domestic violence – including poverty, gender and race discrimination, and underdevelopment – and to strengthen efforts to empower women, including *inter alia*:
- i. Holding up to public scrutiny and eliminating those institutional and cultural attitudes that foster, justify, or tolerate private and state violence against women;
 - ii. Engaging in intensified efforts to develop and/or utilize effective legislative, educational, social, and other measures aimed at the prevention of violence; and
 - iii. Taking steps to ensure equal remuneration for equal work and increased job opportunities and housing options for women; supporting affirmative action programs to promote women's education, development, and leadership; facilitating increased access by women to economic resources such as credit, land, and savings.
- d. Provide funding for further research to strengthen domestic violence prevention by:
- i. Providing full funding for federal and state programs that seek to eradicate violence against women, including, but not limited to fully funding those programs authorized under the Violence Against Women Act (VAWA) and the Office on Violence against Women (OVW).
 - ii. Instituting effective mechanisms employing methodologically sound strategies to measure the success of programs funded under domestic violence prevention initiatives (including the Violence Against Women Act) and making this analysis available for public review.
 - iii. Ensuring meaningful oversight of grantees funded through domestic violence prevention initiatives (including the Violence Against Women Act). Overseers should include members of both government and civil society.

- iv. Improving data collection on domestic violence and violence against women, including, *inter alia*, information on police response to domestic violence and the impact of interactions with the criminal justice system on victim safety and batterer recidivism, and assessing the disproportionate impact that such violence has on poor, minority, and immigrant women. Such data should be disaggregated by sex, race, age, and disability. National statistical offices and other bodies involved in the collection of data on violence against women must receive necessary training for undertaking this work.

Dated: March 24, 2008

Respectfully Submitted,


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