Before the

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

ORGANIZATION OF AMERICAN STATES

Jessica Ruth Gonzales

vs.

The United States of America

Petition No. P-1490-05

OBSERVATIONS CONCERNING THE SEPTEMBER 22, 2006

RESPONSE OF THE UNITED STATES GOVERNMENT

December 11, 2006

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I. INTRODUCTION

Petitioner Jessica Lenahan (Gonzales) submits these observations in reply to the United States' Response to her Petition to the Commission, dated December 23, 2005. The United States contends that the American Declaration on the Rights and Duties of Man (hereinafter, "American Declaration" or "Declaration") is a non-binding instrument that does not impose an affirmative obligation on the United States to respect and ensure rights in general or specifically in the case of domestic violence victims like Jessica Gonzales. Further, the United States contends that despite the tragic death of Jessica Gonzales' three children, there is no widespread and systemic failure at the national or state levels to respond to domestic violence, and that federal and state legal systems provide sufficient remedies to domestic violence victims. Specifically, with respect to this case, the United States asserts that Jessica Gonzales did not have a right to protection by the State of Colorado or the Castle Rock Police Department ("CRPD") from her estranged husband's violent acts on June 22 and 23, 1999. Such a position is profoundly misplaced and is not even supported by the incomplete, misinterpreted, and decontextualized evidence presented by the United States.

The facts of this case are those set out in Jessica Gonzales' original Petition. Jessica Gonzales had a valid restraining order that protected her and her children from Simon Gonzales, upon a finding by the Colorado District Court that (1) "irreparable injury would result" to Jessica Gonzales if the order were not issued, and (2) "physical and emotional harm would result" if Mr. Gonzales was not "excluded from the family home." A restraining order represents a judicial determination of a threat, and is specifically meant to cabin police discretion in determining whether a threat exists.

Simon Gonzales abducted his three daughters – Rebecca, Katheryn, and Leslie – on June 22, 1999, in contravention of the restraining order. Mr. Gonzales and the children were missing for nearly ten hours – from approximately 5:30 p.m. on June 22 to 3:20 a.m. on June 23, 1999.

Jessica Gonzales repeatedly informed the CRPD of the existence of her restraining order, and that Mr. Gonzales had violated the order when he abducted the children on June 22, 1999. Jessica Gonzales communicated this information to the dispatcher during her initial call to the CRPD, and repeated it to several officers and dispatchers throughout the course of the evening. She even showed the restraining order to at least two police officers.

The CRPD had an obligation, once informed of the existence of the order, to (1) access the order, either by locating it in a governmental database or by asking Jessica Gonzales for a copy of it, and (2) thoroughly read terms of the order, and (3) upon a determination that there was probable cause to believe that Mr. Gonzales had violated the order, (a) arrest or seek a warrant for the arrest of Mr. Gonzales, and (b) protect Jessica Gonzales and her children. This obligation arose from the terms of the restraining order, Colorado's mandatory arrest law, and international human rights law.

The CRPD wholly failed to comply with its legal obligations when it failed to respond appropriately to Jessica Gonzales on June 22 and 23, 1999. Jessica Gonzales' direct, insistent and increasingly desperate communications with the police, standing alone, were clearly sufficient to establish probable cause that Mr. Gonzales had violated the restraining order, thus obligating the police to affect his arrest. Mr. Gonzales' prior criminal history and the CRPD's specific knowledge of the erratic and threatening

behavior he exhibited in the preceding two months gave the police even greater reason to believe that Mr. Gonzales posed a potential threat to the well-being of the children. In failing to respond accordingly, the police shirked their obligations under the terms of the restraining order and under Colorado law to protect Jessica Gonzales and her children and to seek to arrest Mr. Gonzales.

In addition to the CRPD's failure to act with due diligence to locate and arrest Simon Gonzales on June 22 and 23, the United States failed to exercise due diligence when Mr. Gonzales was allowed to purchase a gun on June 22, 1999. As the subject of a protective order, Mr. Gonzales was prohibited by law from buying or possessing a firearm. Yet, in violation of the law, the FBI's National Instant Criminal Background Check (NICS) system gave Mr. Gonzales clearance to purchase the gun that he likely used to kill Leslie, Katheryn, and Rebecca that same night.

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. At present, federal and state legislative and programmatic measures do not adequately prevent acts of domestic violence or provide adequate legal remedies for victims of gender-based violence. As a result, victims are often denied basic protections mandated by international human rights standards.

Following the CRPD's failure to act with due diligence, Jessica Gonzales was also denied her right to an adequate and effective remedy under Articles XVIII and XXIV of the American Declaration when the Supreme Court affirmed the dismissal of her case against the CRPD based on a legal standard that does not recognize the State's affirmative obligation to protect and ensure fundamental rights. As a result, Jessica

Gonzales and countless other domestic violence victims in the United States now have no effective judicial remedy by which to hold police accountable for their failures to protect domestic violence victims and their children.

The failures of the CRPD to enforce Jessica Gonzales' restraining order, and of United States courts to recognize a remedy for the CRPD's failings, 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. As a result, the United States has fallen far short of fulfilling its obligations under Articles I, II, V, VI, VII, IX, XVIII, and XXIV of the American Declaration toward Jessica Gonzales and other domestic violence victims and their children.

Jessica Gonzales seeks redress from the Commission for these grave violations of her human rights. She asks for the following relief: an investigation into the events of June 22 and June 23, 1999 that resulted in the deaths of Leslie, Katheryn, and Rebecca Gonzales; the opportunity to testify before the Commission about the events of that night; monetary compensation for the violation of her rights and the rights of her children; and a change in the laws, policies, and practices of the United States and the State of Colorado in order to ensure protection and support for domestic violence victims and their children.

Indeed, it is essential that the Commission articulate the importance of States acknowledging their affirmative obligations to protect human rights in the domestic violence context. Without precise language from the Commission on these obligations, the United States will continue to deny its clear obligation to protect victims and prevent domestic violence, thus putting thousands of women and children at risk of some of the most pervasive human rights violations in the world.

II. FACTUAL BACKGROUND

A. The Facts Of This Case Are Those Set Out In The Original Petition.

As set out in her original Petition, in May 1999, Jessica Gonzales, a victim of domestic violence, turned to the State of Colorado to help her escape her husband's abusive, controlling, and unpredictable behavior, which had worsened in the preceding months. Jessica Gonzales decided that the best way to protect herself and her children was to obtain a court-issued domestic violence restraining order. In May and June of 1999, Jessica Gonzales sought and obtained a restraining order against Mr. Gonzales from the Colorado courts.[1]

Jessica Gonzales first obtained a temporary restraining order that directed Simon Gonzales not to "molest or disturb the peace" of Jessica Gonzales or their children; excluded Simon Gonzales from the family home; and ordered that Simon Gonzales "remain at least 100 yards away from this location at all times."[2] The judge specifically found a risk of "irreparable injury" and found that that "physical or emotional harm would result" if Mr. Gonzales were not excluded from the family home.[3]

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."[4] The preprinted text on the back of the form included the following "**NOTICE TO LAW ENFORCEMENT OFFICIALS**" (bold in original), which read, in part:

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[1] *See* Jessica Ruth Gonzales, Verified Complaint for Restraining Order, May 21, 1999, Exhibit A; 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 (hereinafter "Gonzales Petition"), Ex. A: May 21, 1999 Temporary Restraining Order, and Ex. B: June 4, 1999 Permanent Restraining Order.
[2] *See* Gonzales Petition, Ex. A: May 21, 1999 Temporary Restraining Order.
[3] *Id.*
[4] *Id.*

> 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.[5]

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.[6] Upon Jessica Gonzales' request, the judge restricted Mr. Gonzales' mid-week contact with the girls to one weekly "mid-week dinner visit" that Simon and Jessica Gonzales would pre-arrange.[7]

Between May 21, 1999, when the court issued the temporary restraining order, and June 21, 1999, Jessica Gonzales called the Castle Rock Police Department ("CRPD") on at least three separate occasions to report serious violations of her restraining order by Simon Gonzales. 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

[5] *Id.* (emphasis added).
[6] *See* Gonzales Petition, Ex. B: June 4, 1999 Permanent Restraining Order.
[7] *Id* at 1.

to arrest Simon Gonzales or to protect her and her children.[8] Moreover, between January and May 1999, Simon Gonzales had several additional run-ins with the CRPD, including a traffic citation for careless driving, and 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 – should have known and associated with domestic violence and erratic and reckless behavior.

On June 22, 1999, sometime between 5:00 and 5:30 p.m.,[9] Simon Gonzales abducted his three daughters – Leslie, 7; Katheryn, 8; and Rebecca, 10 – and their friend, Rebecca Robinson, from the street in front of Jessica Gonzales' home, in violation of Colorado law and of the restraining order against him in the preceding months. Jessica Gonzales repeatedly called the CRPD to report the children missing and to seek enforcement of her restraining order, to no avail.

This time, however, the CRPD's inaction had tragic consequences. At approximately 3:25 a.m. on June 23, 1999, Mr. Gonzales parked his pickup truck across from the Castle Rock Police Station and began shooting at the station. The police shot and killed Mr. Gonzales, and then discovered the murdered bodies of Leslie, Katheryn, and Rebecca Gonzales in the cab of his truck.

The Government of the United States of America ("the United States" or "the Government") attempts to distract the Commission from these clear facts by presenting a distorted and incomplete factual record and relying on vague and selective documentary

[8] As discussed *infra*, Section II, and in the Gonzales Petition, Background and Patterns Section, an arrest for violating a restraining order dramatically reduces the probability of harm occurring.
[9] *See* Jessica Gonzales/Dispatch, Tape Transaction, CR# 99-3223, Exhibit B.

evidence.[10] The result is a misleading and inaccurate depiction of the tragic events of June 22 and 23, 1999. In order to fully understand the context of such evidence in Jessica Gonzales' story, Ms. Gonzales directs the Commission to her Declaration, set forth as Exhibit E.[11]

As will be illustrated in greater detail below, Jessica Gonzales' story is accurate, verifiable, and well-established. Even if the facts of this case are understood in the light most favorable to the Government, Jessica Gonzales has asserted clear violations by the United States and the State of Colorado of the American Declaration.

B. **Throughout the Course of the Evening, Jessica Gonzales Made Clear to the CRPD that Simon Gonzales Had Abducted the Children, in Violation of a Valid Restraining Order.**

The United States does not dispute that Jessica Gonzales sought and obtained a temporary restraining order from the Colorado District Court on May 21, 1999, that the Court made that order permanent, with the modifications described above, on June 4, 1999, or that the June 4 order was duly served on Simon Gonzales. The United States does, however, contend that the CRPD had no reason to believe that Mr. Gonzales had violated the restraining order because Jessica Gonzales informed the CRPD that "she had

[10] There are hundreds, if not thousands, of pages of documents missing from the Government's exhibits. *See* Freedom of Information Law Requests to Colorado State and Local Agencies, November 20, 2006, Exhibit C. *See also* Letter to Inter-American Commission on Human Rights, November 7, 2006, Exhibit D.

[11] Petitioners note that certain segments of the evidence presented by the Government, considered in isolation, may initially appear to conflict with Jessica Gonzales' vivid recollection of the facts in this case. *See* Declaration of Jessica Ruth Lenahan (Gonzales) (hereinafter "Gonzales Decl."), Exhibit E. In several places, this is because the United States has misinterpreted its own evidence or has taken this often-vague and ambiguous evidence out of context. In any event, it is unnecessary to examine these disparities in detail, as they do not impact negatively on this Petition.

For instance, Jessica Gonzales asserts that she placed her initial call to the CRPD on June 22, 1999 at approximately 5:50 p.m., whereas the United States insists that Jessica Gonzales did not place this call until approximately 7:40 p.m. (*See* Response of the Government of the United States of America to the Inter-American Commission on Human Rights Regarding Jessica Gonzales Petition, # P-1490-05 (hereinafter "U.S. Response") at 4). In the larger context of this case, this discrepancy is trivial. Even if Jessica Gonzales did not first call the CRPD until 7:40 p.m. – an assertion of the United States that Jessica Gonzales vigorously denies – the CRPD still failed to comply with its obligations under the restraining order, Colorado law, and the American Declaration on the Rights and Duties of Man.

agreed that Mr. Gonzales could see their three daughters" on June 22 and 23, 1999 and that such a visit "was consistent with the restraining order."[12] Furthermore, the United States asserts that "at no point did [Jessica Gonzales] show the officers a restraining order."[13] The evidence directly contradicts these assertions.

1. 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.

The limited evidence in Petitioner's possession makes clear that even in her initial conversations with the CRPD, Jessica Gonzales clearly communicated that she had a restraining order, that Mr. Gonzales had violated it, and that she was unsure of the children's whereabouts and concerned about their welfare.[14] 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."[15] 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."[16] 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

[12] U.S. Response at 3.
[13] U.S. Response at 5.
[14] Petitioner has requested additional information through FOIA requests and from the United States government concerning this case. *See* Ex. C, D. Petitioner requests the opportunity to supplement the observations contained in this brief upon receipt of this additional information.
[15] U.S. Response, Tab A: Jessica Gonzales/Dispatch, Tape Transcription ("Tab A") at 1.
[16] U.S. Response, Tab A at 5.

order if it was violated.[17] She told the CRPD dispatcher that she did not know where her children were, and "that's the scary part."[18] She noted that she was "wigging out big time,"[19] and said apprehensively, to the dispatcher, "I just don't know what to do."[20]

Thus, in her initial contact with CRPD, Jessica Gonzales made clear that Simon Gonzales had not prearranged any visit with the girls and that any contact he had with them would thus have been in violation of the retraining order.

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.[21] 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."[22]

2. 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 Rebecca Robinson missing, CRPD Officer Brink and Sergeant Ruisi arrived at her house.[23] Jessica Gonzales showed both officers a copy of the restraining order, which directed the officers to "USE EVERY REASONABLE

[17] Exhibit E, Gonzales Decl. ¶ 14.
[18] U.S. Response, Tab A at 5. *See also* Progress Report, CR #99-26856, Report by Investigator Rick Fahlstedt, July 1, 1999, Exhibit F 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 . . .").
[19] "Wigging out" is slang for distress or other behavior that indicates that an individual is seriously concerned.
[20] U.S. Response, Tab A at 6, 7.
[21] Exhibit E, Gonzales Decl. ¶ 42; U.S. Response, Tab A at 1.
[22] Castle Rock Police Department Dispatch Log (6/22/99, 18:02 to 6/23/99, 05:41), Exhibit G at 19; U.S. Response, 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 ("Tab E") at 7, 10 (Statement from Dispatcher Cindy Dieck that "Dieck was advised that a restraining order was in effect.").
[23] Exhibit E, Gonzales Decl. ¶ 43; U.S. Response, Tab E at 10.

MEANS TO ENFORCE TH[E] RESTRAINING ORDER" and to "ARREST, OR, IF AN ARREST WOULD BE IMPRACTICAL UNDER THE CIRCUMSTANCES, SEEK A WARRANT FOR THE ARREST OF" Simon Gonzales, upon being given "INFORMATION AMOUNTING TO PROBABLE CAUSE THAT [Mr. Gonzales] VIOLATED OR ATTEMPTED TO VIOLATE ANY PROVISION OF TH[E] ORDER."[24]

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.[25] Jessica Gonzales explained to the officers that the judge had specifically noted in the order that the mid-week dinner visit was to be "prearranged" by the parties, that Mr. Gonzales' normal ("prearranged") 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.[26] Jessica Gonzales also explained that the judge had given his instructions in light of Mr. Gonzales' erratic, destructive, and suicidal 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.[27] 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 in a

[24] *Id.;* Gonzales Petition, Ex. A: May 21, 1999 Temporary Restraining Order.
[25] Exhibit E, Gonzales Decl. ¶ 43.
[26] *Id.; see also* Exhibit F, Progress Report, CR #99-26856 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 "Simon normally has the children on Wednesday nights.")
[27] Exhibit E, Gonzales Decl. ¶ 43.

car with him.[28] In sum, Jessica Gonzales clearly stated that she had not agreed for Mr. Gonzales to visit with the children that night.[29] 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.[30] 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.[31]

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

After Jessica Gonzales learned that the children were with Mr. Gonzales at Elitch Gardens in Denver, she became even more alarmed.[32] She called the CRPD to communicate her concerns.[33] The dispatcher told Jessica Gonzales that an officer would be sent to her house, but no officer ever arrived.[34] Officer Brink, did however, telephone Jessica Gonzales shortly thereafter, and she explained to him 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.[35]

The transcript of this conversation clearly illustrates that Officer Brink was aware of the existence of the restraining order.[36] He refers to "your divorce decree, or

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[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.* ¶ 46.
[32] *Id.* ¶¶ 50-55, 60-61, 63, 65, 66
[33] *Id.* ¶ 51; U.S. Response, Tab E 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;" statement from Dispatcher Dieck).
[34] Exhibit E, Gonzales Decl. ¶ 51.
[35] *Id. ¶¶* 51-54; U.S. Response, Tab C: Investigator's Progress Report, Castle Rock Police Department, Castle Rock, Colorado, CR# 99-3226, Call from Officer Brink to Jessica Gonzales ("Tab C") at 1-3.
[36] U.S. Response, Tab C at 2-3

whatever,"[37] and Jessica Gonzales clarifies to him that "right now it's just a restraining order."[38] These statements confirm Jessica Gonzales' recollection that she had previously shown Officer Brink the restraining order when he first arrived at her house, and that she twice told the CRPD dispatcher that she had a restraining order.[39]

Jessica Gonzales spoke to the CRPD two more times before 10:00 p.m.,[40] during which time she asked Officer Brink to dispatch an officer to locate Mr. Gonzales and the children at Elitch Gardens.[41] Officer Brink refused because, he said, Elitch Gardens was outside of CRPD's jurisdiction.[42] 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

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[37] *Id.* at 2.
[38] *Id.*
[39] *See* Exhibit E, Gonzales Decl. ¶¶ 39, 42. Officer Brink's comment, "See, I haven't even seen a restraining order on, on this whole thing" and Jessica Gonzales' response, "Yeah" (U.S. Response, Tab C at 3), must be understood in context. First, Officer Brink appeared confused over whether he had been shown a restraining order or a divorce decree. Officer Brink's failure to identify the document that Jessica Gonzales had shown him as a restraining order illustrates the inadequacy of his training and the inappropriateness of his response. Second, it must be understood that Jessica Gonzales was vulnerable and scared. The transcript illustrates that Jessica Gonzales was trying to convey that the situation was serious and required action ("G: This is not um, no, this is wrong. There's something that's really weird.") U.S. Response, Tab C at 2), but that she was also trying to be courteous and respectful, as she realized that she needed the CRPD's assistance in finding her children, and felt that the police were more experienced in these kinds of situations so she should accept Officer Brink's guidance. (*See* Exhibit E, Gonzales Decl. ¶ 58.) Third, the transcript indicates that Officer Brink was asking Jessica Gonzales almost exclusively leading and closed questions; he did not give Jessica Gonzales the opportunity to tell him about her call with Mr. Gonzales at 8:30 p.m., or to reiterate her concerns, in her own words and uninterrupted, about the violation of the restraining order and the welfare of her children. Officer Brink's irritation at being contacted by Jessica Gonzales is illustrated by his initial comment, "I was just up there. What's the deal?" (U.S. Response, Tab C at 1; *see also* Exhibit E, Gonzales Decl. ¶¶ 52-54.) Jessica Gonzales' response cannot be construed to indicate that she agreed with Officer Brink's statement. Due to the dynamics of the power relationship and the officer's leading questions, Jessica Gonzales unwilling deferred to his authority. Furthermore, her monosyllabic "Yeah" was merely conversation filler, as she sought a gap in the conversation to interject and explain her side of the story.
[40] Exhibit E, Gonzales Decl. ¶¶ 55-59.
[41] *Id.* ¶ 56.
[42] *Id*.

would cost the state money.[43] 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.[44] 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.[45] His only response to Jessica Gonzales' urgent pleas for assistance was to tell her to wait until 10:00 p.m. to see whether her husband returned with the children.[46]

4. Jessica Gonzales again called and even visited the CRPD and referenced Mr. Gonzales' violation of the restraining order, but each time, the police failed to respond.

When Jessica Gonzales telephoned "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 wigged out, I don't know what to do"; "I'm just a mess"; and "I'm just freaking out".[47] Dispatcher Dieck later reported that she "could tell [Jessica] Gonzales was nervous."[48] 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."[49] The dispatcher

[43] *Id.* ¶ 57.
[44] *Id.* ¶ 55.
[45] *Id.* ¶ 57. As discussed *infra* at Part II(D), there are many simple and straightforward ways for a police department to request the assistance of local law enforcement in locating missing children.
[46] *Id*.
[47] U.S. Response, Tab D: Investigator's Progress Report, Castle Rock Police Department, Castle Rock, Colorado, Third Call at 21:57 hrs., CR# 99-3226 ("Tab D") at 1-3; U.S. Response, Tab E at 10 (Statement from Dispatcher Dieck that Jessica Gonzales called 911 at 10:00 p.m.). *See also* Exhibit E, Gonzales Decl. ¶ 60.
[48] U.S. Response, Tab E at 10.
[49] Exhibit B, Gonzales/Dispatch Tape Transcription.

told her she would "get an officer on the way."[50] No officer ever arrived,[51] so Jessica Gonzales drove to the CRPD.[52] At the CRPD, Jessica Gonzales met with Detective Ahlfinger.[53] Hysterical, Jessica 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.[54] 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.[55]

C. 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.

Contrary to the United States' assertions, the evidence set out above, demonstrates that the CRPD was 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. The United States dismisses these nine calls and in-person communications with the CRPD as not indicative of any particular distress or concern on the part of Jessica Gonzales, and asserts that Jessica Gonzales never made clear that Mr. Gonzales had violated the restraining order.[56] Such a position is patently absurd.

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[50] Exhibit E, Gonzales Decl. ¶ 64; Exhibit B, Gonzales/Dispatch Tape Transaction; *see also* U.S. Response, Tab E 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.")

[51] Exhibit E, Gonzales Decl. ¶ 64; Exhibit B, Gonzales/Dispatch Tape Transcription.

[52] Exhibit E, Gonzales Decl. ¶¶ 65-66.

[53] *Id.* ¶¶ 67-68; U.S. Response, Tab F: Castle Rock Police Department Incident Report 90623004, 06/23/99, 00:06 hrs ("Tab F") at 2.

[54] *Id.*; U.S. Response, Tab E at 3.

[55] U.S. Response, Tab E at 2-3.

[56] U.S. Response at 3-7.

1. 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.[57] 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.[58]

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 of the terms of her restraining order; (2) Jessica Gonzales explained that she had not prearranged 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.[59] The

[57] *See supra* at Part II.B.
[58] *See supra* at Part II.B.1-2.
[59] 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 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 she might have information concerning Mr. Gonzales and the children's whereabouts (*see* Exhibit E, Gonzales Decl. ¶ 55); by running a license

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.

2. 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 itself* constituted "information amounting to probable cause"[60] 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 from firsthand knowledge – that *Simon Gonzales had seven run-ins with the CRPD in the three months*

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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.

[60] *See supra* at Part II.B.2.

preceding June 22, 1999.[61] 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;[62] (2) that Mr. Gonzales had unlawfully entered her house and stolen her wedding rings;[63] (3) that Mr. Gonzales had again broken into her house and changed the locks on the doors;[64] 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.[65] On each of these previous occasions that Mr. Gonzales had violated the restraining order, the CRPD had failed to make an arrest, in violation of 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 came to the police station to discuss his efforts to change the locks on Jessica Gonzales'

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[61] *See* Castle Rock Police Department Individual Inquiry on Simon Gonzales, June 23, 1999, Exhibit H, at 158-59.
[62] Exhibit E, Gonzales Decl. ¶ 13.
[63] *Id*. ¶¶ 19-20.
[64] *Id.* ¶ 21; see also Exhibit Q (police report dated May 30, 1999 documenting the incident and confirming that Jessica Gonzales showed CRPD Officer Varela a copy of her restraining order against Mr. Gonzales).
[65] *Id.* ¶ 27. *See also* Critical Incident Team Report, June 23, 1999, Exhibit I 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."); Exhibit 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.").

home, in violation of the restraining order.[66] 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.[67] Mr. Gonzales was charged with trespassing on private property and obstructing public officials.[68] The criminal database would also have reflected a citation Mr. Gonzales received on April 18, 1999 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,[69] as well as information indicating that his drivers' license had been suspended.[70] 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

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[66] *Id.* ¶ 21; *see also* Exhibit R (police report 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).

[67] *See* Exhibit R at 2 (police report 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.")

[68] *Id.* at 1, 3. Exhibit R, a police report dated May 30, 1999 documenting an investigation by the CRPD into Mr. Gonzales' alleged violation of the restraining order, indicates that the investigating police officers profoundly misunderstood the nature of Colorado's mandatory arrest law. In that 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." *See* Exhibit R at 1, 2. In fact, as described *infra*, Part II.E., 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) (Lexis 1999) (emphases 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* Exhibit E, Gonzales Decl. ¶ 18.

[69] *See* Exhibit H, CRPD Individual Inquiry, at 2; see also Exhibit S (municipal summons issued to Mr. Gonzales on April 18, 1999 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").

[70] U.S. Response, Tab G: Statement signed by Cpl. Patricia A. Lisk ("Tab G") at 7.

front of his family,[71] and that a non-extraditable warrant for Mr. Gonzales' arrest had been issued in Larimer County.[72]

The United States' own exhibits indicate that 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."[73] 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."[74]

3. The United States' suggestion that the CRPD had no obligation to respond until Jessica Gonzales vocalized a specific threat that she thought Mr. Gonzales posed to the children is inapposite.

The United States further attempts to justify the profound failures of the CRPD on June 22 and 23, 1999 by asserting that Jessica Gonzales did not inform the CRPD that Mr. Gonzales had demonstrated threatening behavior towards her and the children.[75] In fact, as documented below, Jessica Gonzales *did* inform 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

[71] Exhibit E, Gonzales Decl. ¶ 6; Exhibit J, Police Emergency Mental Illness Report, June 16, 1999; Exhibit 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.")
[72] U.S. Response, Tab G at 7.
[73] U.S. Response, Tab E at 5.
[74] *Id.* at 11.
[75] U.S. Response at 7-8.

absence of such information, the police were obliged to enforce Jessica Gonzales' restraining order and arrest Mr. Gonzales. A restraining order represents a judicial determination that any violation of its terms represents a threat, and like the state of Colorado's mandatory arrest law, it is specifically meant to cabin police discretion in determining whether a threat exists in the face of evidence of such a violation.[76]

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.

D. 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.

[76] The Colorado General Assembly has 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." C.R.S.A. § 13-14-102, 2006.

Many reasonable steps were available to the CRPD that could have averted this result. First, as discussed *supra*, Part II.C.2, the CRPD apparently did not check Mr. Gonzales' criminal history on June 22, 1999. Had they 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 greatly 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, indicates that the CRPD 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 this information was not obtained until 3:23 a.m.

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. The records supplied to Petitioner by the United States indicate that although Officer Ahlfinger requested an ATL on Mr. Gonzales and his truck at around 1:40 a.m., no ATL was

[77] *See* Exhibit H, CRPD Individual Inquiry, at 158-59*; See also* Exhibit E, Gonzales Decl. ¶ 43.
[78] *See* U.S. Response, Tab G at 7.
[79] *Id.*

issued.[80] In fact, as the United States' exhibits highlight, 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 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 the 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

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[80] U.S. Response, 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 ("Tab E") at 6.
[81] *Id.*
[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, August 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 at 6.
[85] *Id.* at 3; U.S. Response, Tab G at 4.

Gonzales and her children.[86] Some of the most notable examples of this behavior are set out below.

1. CRPD Dispatchers

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, demonstrating 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]

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[86] Exhibit E, Gonzales Decl. ¶ 58.
[87] U.S. Response, Tab E, at 7.
[88] U.S. Response, Tab E 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 at 1.
[90] U.S. Response, Tab D at 2.
[91] *Id.*
[92] U.S. Response, Tab E 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 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.*, Exhibit E, Gonzales Decl. ¶¶ 38, 55, 65.

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 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]

2. CRPD Officers

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 him[96] was a divorce decree, not a restraining

[93] Dispatch Tape Transcripts, (approximately) midnight call on June 23, 1999. Ex. B.; *see also* Exhibit E Gonzales Decl. ¶65.
[94] U.S. Response, Tab E at 5.
[95] *See* Exhibit 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, Ex. A: May 21, 1999 Temporary Restraining Order, and Ex. B: June 4, 1999 Permanent Restraining Order.

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 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]

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[97] *See* U.S. Response, Tab C at 3 ("See, I haven't even seen a restraining order on, on this whole thing.") *See also* Exhibit E, Gonzales Decl. ¶ 52.
[98] U.S. Response, Tab C at 3.
[99] Exhibit E, Gonzales Decl. ¶ 43.
[100] *Id.* ¶ 58.
[101] U.S. Response, Tab C at 3.
[102] Exhibit E, Gonzales Decl. ¶ 67-68; U.S. Response, Tab F.
[103] Exhibit E, Gonzales Decl. ¶ 68; U.S. Response, Tab G at 3.

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*.

3. The CRPD did not have conflicting emergencies that might have justified their failure to respond appropriately.

The documents supplied to Petitioner by the United States indicate that 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. These 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] Thus, the United States' attempt to justify the CRPD's inaction by suggesting that the station was overloaded is misplaced. The United States argues that when Jessica Gonzales called around midnight, the police were dealing with three pending calls, one of which "involved a domestic disturbance in

[104] U.S. Response, Tab G at 2.
[105] *Id.* at 3.
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] *Id.* at 5.

progress with an injured child."[110] In fact, the statement of Dispatcher Patricia Lisk indicates that the "injured child" call involved a two-year old locked in a vehicle, and that all three officers that had been dispatched to that call had moved on to other matters by midnight.[111] If the station had been too overloaded to respond to Jessica Gonzales's calls, the CRPD should have dispatched one of the on-call police officers who were later summoned to help respond to the 3:25 a.m. shooting.

E. 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 evidence presented above belies the United States' unsubstantiated assertion that "the information at the time revealed no indication that Mr. Gonzales was likely to commit this tragic crime against his own children."[112] Jessica Gonzales informed the CRPD that she had a valid restraining order and explained that Simon Gonzales had taken the children in violation of the order. She showed two officers that order. Furthermore, the CRPD was or should have been aware that Mr. Gonzales posed a threat to the children, based not only on his violation of the order, but on his criminal history and his previous threatening behavior in the police's presence. As discussed below, 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.

1. Basic policing principles – IACP

A consideration of "A Law Enforcement Officers' Guide to Enforcing Orders of Protection Nationwide," (hereinafter, "IACP Guide") published by the International

[110] U.S. Response at 8.
[111] U.S. Response, Tab G at 2.
[112] U.S. Response at 3-4.

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.[113] 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 an order of protection 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 an order of protection, seek return of the child
- ⁄# Follow up with law enforcement and victim advocacy program

(3) Assess Lethality

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
- ⁄# Stalking3
- ⁄# Obsessive attachment to victim
- ⁄# Drug or alcohol involvement
- ⁄# Possession or access to weapons

[113] *See* Ex. K (*also available at*: http://www.theiacp.org/research/ACF3068.pdf).

- 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.[114] 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 even before June 22, 1999. Had the CRPD followed these basic principles of policing in the context of domestic violence, they may have prevented the ultimate tragedy which befell the Gonzales family.

2. Colorado law requires police to enforce restraining orders when they have probable cause to believe they have been violated.

i. Statutory language

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,"[115] 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

[114] *See*, e.g., Gonzales Petition, Background and Patterns Section; *see also* Amicus Brief of National Network to End Domestic Violence in *Town of Castle Rock v. Gonzales*, Exhibit L; Amicus Brief of National Coalition against Domestic Violence in *Town of Castle Rock v. Gonzales*, Exhibit M.
[115] Colo. Rev. Stat. § 18–6–803.5(3)(b) (1999).

enforce a valid restraining order whether or not there is a record of the restraining order in the registry."[116]

ii. Statutory purpose

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 by law enforcement as a private, "family" matter as well as the traditional practice of only arresting domestic violence perpetrators as a last resort.[117] 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 protection order has been violated."[118] 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."[119] Eliminating police discretion was integral to Colorado and other states' solution to the problem of underenforcement in domestic violence cases.[120]

iii. Under Colorado's mandatory arrest law, the CRPD did not have discretion to deny enforcement to Jessica Gonzales.

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[116] *Id*. § 18–6–803.5(3).

[117] *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. Hoctor,, 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.

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

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

[120] *Town of Castle Rock, Colo. v. Gonzales*, 125 S. Ct. 2796 (2005) (Stevens, J., slip-op at 11) (dissent).

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 and then executing an arrest—traditional, well-defined tasks that law enforcement officers perform every day."[121]

F. 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.[122] To ensure that restrained individuals are not able to purchase firearms, the Brady Handgun Violence Prevention Act of 1994, 18 U.S.C. §§ 921 *et seq.* ("the Brady Law") requires federally-licensed firearm dealers to check with a jurisdiction's chief law enforcement officer before selling a firearm.[123] 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.[124]

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

[121] *Id.* slip-op at 13-14. (emphasis in original).
[122] 18 U.S.C. § 922(g)(8).
[123] 18 U.S.C. § 922(s)(1).
[124] 18 U.S.C. § 922(s)(2).

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 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.[125]

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.[126] 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.

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[125] *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.
[126] *See* Jimmy Wooten, *Open Letter to all Colorado Firearms Licensees Correction Notice, available at:* http://www.atf.treas.gov/firearms/bradylaw/states/colorado2.htm.

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 newspaper.[127] 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.[128] Mr. Gonzales subsequently purchased the gun.

Although the Douglas County Court had issued a restraining order against Mr. Gonzales on May 21, 1999, and again on June 4, 1999, Mr. Gonzales still was able to purchase a gun on June 22, 1999, from a federally-licensed firearm dealer. This breakdown in the system had tragic consequences: the gun that Mr. Gonzales purchased that evening was likely the weapon that killed the Gonzales children.[129]

After the Gonzales tragedy, Colorado state lawmakers decided to resume the state's POC status and reinstate the state background check program. The program started functioning again on August 1, 1999.[130]

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[127] 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* Interview with William George Palsulich by 18th Judicial District Critical Incident Team Detectives Bobbie Garret and Christian Contos, June 23, 1999, Exhibit N.

[128] *Id.*

[129] Colorado authorities never informed Jessica Gonzales of how, when, and where her daughters died, and whether any CRPD bullets hit them in the course of the shootout with Mr. Gonzales. Exhibit E, Gonzales Decl. ¶ 75.

[130] See Jimmy Wooten, *Colorado – Correction Notice*, *available at:* http://www.atf.treas.gov/firearms/bradylaw/states/colorado.htm; *See also Return to State Background Checks Results in 8 Denials on First Day,* THE GAZETTE, AUGUST 3, 1999, Exhibit O.

III. THE LEGISLATIVE AND PROGRAMMATIC RESPONSE OF THE UNITED STATES TO DOMESTIC VIOLENCE DOES NOT GUARANTEE BASIC STANDARDS OF PROTECTION TO ALL WOMEN AND CHILDREN.

The United States is obligated to make women's rights a reality by taking effective steps to prevent and respond to violence against women.[131] Specifically, the United States must enact and implement legislative and programmatic measures designed to prevent violent acts directed against women, as well as provide adequate legal remedies for victims of gender-based violence when these measures fail. Despite the laudable federal and state legislation, programs, and other measures described in Part II of the United States' Response, the United States does not adequately ensure that basic protections are given effect across the domestic legal system. The United States relies almost exclusively on voluntary measures that make funding available to states and localities to institute programs addressing domestic violence, but do not require that these entities meet minimum standards of protection. Moreover, the United States does not effectively monitor the implementation of necessary services. As the Gonzales case tragically illustrates, the piecemeal system that results falls far short of fulfilling the United States' obligations under the American Declaration towards domestic violence victims and their children.

A. Extensive Data Demonstrates that Police Often Fail to Enforce Restraining Orders.

Victims of domestic violence who obtain restraining orders depend on and expect police assistance in the enforcement of these orders. The United States' Response attempts to reframe the discussion by pointing to successful prosecutions of perpetrators

[131] *See infra* Part III. *See also Velasquez Rodríguez Case*, 1988 Inter-Am.Ct.H.R. (Ser. C) No. 4 (July 29, 1988); U.N. Division for the Advancement of Women, *Violence against Women: Good Practices in Combating and Eliminating Violence Against Women*, May 17–20 2005, at 4.

of domestic violence and the long sentences that perpetrators may receive.[132] It is important to note, however, that the United States does not contest data cited by Petitioner that illustrates the widespread and systematic pattern in the United States of inadequate implementation of measures designed to proactively prevent serious harm to women and children at risk of domestic abuse.[133] Indeed, by and large, law enforcement in the United States fails to adequately serve protection orders, respond effectively to domestic violence calls, and enforce the terms of protection orders and mandatory arrest laws.

First, law enforcement officials in many jurisdictions in the United States fail to adequately serve emergency *ex parte* protection orders.[134] Second, as many as 60% of all protection orders are violated in the year that they are issued and nearly a third of all women with protective orders report violations that involve severe violence.[135] Third, law enforcement officials in many jurisdictions fail to respond when domestic violence victims call for assistance.[136] For example, studies indicate that in certain states, police respond in only one-third of situations where a battered woman calls for help.[137] Moreover, when police officers do respond to a domestic violence call, their responses are often inadequate.[138] In many jurisdictions, domestic violence-related calls for service are routinely accorded a low priority.[139] Police response times are often slow, reflecting the fact that "[p]olice treatment of domestic abuse calls has traditionally

[132] U.S. Response at 12-13.
[133] *See generally* Gonzales Petition, Background and Patterns Section, Part A.
[134] *Id.* at 29 (citing studies demonstrating high rates of non-service of *ex parte* protection orders).
[135] *Id.* at 28.
[136] *Id.* at 29.
[137] *Id.* at 30.
[138] *Id.*
[139] *Id.*

consisted of . . . purposefully delaying response, even for several hours."[140] In fact, the "call us again" response of police – the response that Jessica Gonzales received from the CRPD – is a common means of ignoring or delaying the State's response to the victims of domestic violence.[141] Furthermore, at least in some jurisdictions, police fail to inquire about a prior history of abuse, ascertain whether the victim had a protection order, or conduct a follow-up investigation in an overwhelming majority of domestic violence cases.[142] The well-recognized police practice of ignoring and putting off victims of domestic violence is precisely why states like Colorado decided to adopt mandatory enforcement statutes.

Despite official legislative policy statements and "mandatory arrest" laws in at least 31 states, police fail to actually make arrests in compliance with those laws. As indicated in the Petition, police in the United States routinely do not give effect to mandatory arrest laws. Arrests are made only half the time in mandatory arrest jurisdictions and the rate of domestic violence arrests in these jurisdictions is only 5% higher as compared to jurisdictions without mandatory arrest policies.[143] In Colorado, police made arrests in only 29% of domestic violence calls from October 1, 1999, through September 30, 2000.[144] In another mandatory arrest jurisdiction, even where the victim had suffered physical injuries and the assailant was present when the police arrived, arrests were effected in only 50% of cases.[145] Thus, there is a widespread and

[140] *Domestic Violence as a Crime Against the State: The Need for Mandatory Arrest in California* at 649.
[141] *See Procedural Justice: Tempering the State's Response to Domestic Violence*, at 1851.
[142] Gonzales Petition at 30.
[143] *Id.* at 31-32.
[144] *Id.* at 32.
[145] *Id.* at 33.

consistent pattern of police failure to enforce protection orders in the context of domestic violence.

The failure to effectively enforce protection orders and implement mandatory arrest laws has tragic consequences for victims of domestic violence, as the case of Jessica Gonzales vividly demonstrates.[146] Where police actually arrest offenders who violate protection orders, as required by mandatory arrest laws, the risk of violence to protected persons is dramatically reduced. Jurisdictions that have a low arrest rate have almost 600% the rate of subsequent violations as jurisdictions that achieve substantial compliance with mandatory arrest laws.[147]

These compelling statistics – none of which is contested by the United States – highlight the urgent need for a comprehensive legislative and programmatic response by the United States to end the domestic violence epidemic in this country. The current system, which leaves the protection of domestic violence victims and their children in the hands of individual states and municipal actors, is clearly inadequate under international human rights law standards.

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

In its Response, the United States highlights the enactment of the Violence Against Women Act of 1994, the Violence Against Women Act of 2000, and the Violence Against Women and Department of Justice Reauthorization Act of 2005 (collectively "VAWA"), as the crowning achievements of its efforts to combat domestic violence. While the enactment of VAWA is laudable, the mere existence of a legislative

[146] *Id.* at 29-30.
[147] *Id.* at 30.

scheme is insufficient to satisfy the human rights obligations of the United States. As the jurisprudence of the Inter-American system has consistently affirmed, it is not the formal existence of federal laws and programs that demonstrates due diligence, but rather "that they are made available and effective."[148] Unfortunately, VAWA does not require or ensure real, adequate and effective police response to gender-based violence. The United States has failed, either through VAWA or other legislation, to establish federal standards that guarantee rights and protections to women across the United States. Instead, the United States has outsourced its responsibilities, relied on voluntary compliance by states and localities, and then failed to monitor the results or hold those states and local entities accountable. The programs highlighted in the United States' Response illuminate these points.

1. VAWA is an optional scheme that does not guarantee or require an adequate police response for all victims of domestic violence in the United States.

VAWA establishes funding streams that permit states and localities to implement programs and policies aimed at combating domestic violence, but falls critically short of requiring that states or localities undertake *any* course of action to address the problem. VAWA generally sets aside funds that states, localities, and, in some cases, non-governmental organizations may, if they so choose, access to support programs addressing various aspects of domestic violence. The United States' Response focuses on two of those grant programs: the STOP Violence Against Women Formula Grant ("STOP") and Grants to Encourage Arrest Policies and Enforcement of Protection Orders

[148] *See, e.g.*, *The Situation of the Rights of Women in Ciudad Juárez*, OEA/Ser.L/V/II.117, Doc. 44 (Mar. 7, 2003), ¶ 133; *Velásquez Rodríguez Case*, Inter-Am Ct. H.R., (ser. C) No. 4, ¶ 176 (1988).

Program ("ARREST").[149] It cannot be overemphasized, however, that *these programs are purely voluntary*. While all States are eligible for STOP and ARREST grants, there is simply no requirement that any State or other entity actually access or use these funds, or even undertake any other steps to address police responsiveness to domestic violence.[150]

The United States has not adopted a comprehensive national Plan of Action that combines legal measures, the provision of services, and prevention strategies.[151] Instead, the amount of training and funding received by police departments to prevent domestic violence in any particular city or county in the United States is almost entirely determined by the local decisions of municipal actors. Only communities that already possess the political will to aid victims of domestic violence craft and provide the needed services. Women in other communities are left with substandard levels of protection.[152]

The situation in Colorado provides a concrete and compelling example of the uneven and inadequate results of a funding scheme that fails to ensure the creation of a comprehensive network of services. In its Response, the United States draws attention to the fact that 816 ARREST grants were awarded nationally during fiscal years 2001 through 2004. In Colorado, however, only four entities received all twenty-five ARREST grants issued in the state from 2004 through 2006. Of the twenty-two judicial

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[149] U.S. Response at 16-18. Because the United States' Response describes the purposes of these grants, Petitioners do not duplicate those descriptions here.

[150] While the United States recently amended VAWA to allow STOP grants to be used to fund "Jessica Gonzales Victim Assistants," *See* U.S. Response at 17. VAWA by no means guarantees that jurisdictions will opt to use STOP funding in this manner. Moreover, there is no additional provision of funds for Assistants, so that funding for this program would likely come from other domestic violence funding programs.

[151] *See* Division for the Advancement of Women, *Good Practices in Combating and Eliminating Violence Against Women*, 17 to 20, at 31 (2005).

[152] *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").

districts in Colorado, only one has applied for funding, and only two cities (Colorado Springs and Denver), and one county (Jefferson County), have accessed ARREST funds. The fact that a small number of actual grantees receive a disproportionate share of the grants demonstrates a fundamental flaw in the United States' approach to domestic violence: *optional programs lead to law enforcement's uneven compliance with basic standards of protection.*[153]

Moreover, while the United States has allocated funds for programs related to domestic violence, it has made no effort to oversee and administer existing efforts in order to ensure the prevention of violence against women. Monitoring and evaluating grants is crucial in order to identify whether funds are used as intended, whether they are reaching the populations that the grants were intended to serve, and ultimately whether the federally-funded programs have an impact. The United States does not adequately monitor how VAWA grant money is spent or assess the overall performance of grantees.[154] Without proper oversight, the United States cannot ensure that the funds are being used to support programs that ultimately prevent violence against women.

By outsourcing its general duty to develop and effectively implement a legal and policy framework for the full protection and promotion of women's human rights, and then failing to oversee its effective and consistent implementation, the United States has taken inadequate steps to ensure adequate law enforcement efforts to protect the rights of women from violence committed by non-State actors: "[v]ictims of domestic violence and their children suffer the often-tragic consequences of this hodgepodge approach that refuses to set a minimum standard of protection for victims, regardless of where they live

[153] Exhibit P, Saucedo Decl. ¶ 6. The problem of domestic violence is particularly acute in Colorado.
[154] General Accounting Office, Testimony, Violence Against Women Office, Problems with Grant Monitoring and Concerns about Evaluation Studies, at 2-3 (April 16, 2002) (GAO-02-641T).

in the country."[155] As a consequence of the United States' uneven and sporadic programmatic and legislative effort to address police responsiveness to domestic violence, the Commission should conclude that the United States has failed to exercise due diligence in promoting and protecting women's human rights. Economically advanced nations such as the United States must ensure the protection of all women in order to guarantee the rights expressed in the American Declaration.[156]

2. Other U.S. programs are also optional and do not adequately address the problem of violence against women

The United States draws attention to five different programs designed to improve both inter- and intrastate enforcement of protection orders. With the exception of Project Passport, the programs cited by the United States once again are merely voluntary. For example, although the National Center for Full Faith and Credit provides nationwide technical assistance and training to law enforcement officers on the enforcement of protection orders issued in other jurisdictions, the United States does not require law enforcement personnel actually to participate in the training offered. Similarly, while the United States distributes information (the "Burgundy Book" and the International Association for Chiefs of Police booklet) – sometimes for a fee – on the protection of women's human rights, it does not require that police departments and localities use this information to implement effective standards of protection or monitor the results. In addition, while federal training sessions for judges exist, the United States again does not require that any judges participate in these programs, and priority is given to judges who serve in jurisdictions that currently receive certain federal grants.

[155] Exhibit P, Saucedo Decl. ¶ 4.
[156] *See supra.*

3. Colorado law enforcement officials receive inadequate domestic violence awareness training.

The domestic violence training of law enforcement official in Colorado is grossly inadequate, especially in view of the fact that over 20% of all criminal cases filed in Colorado county courts involved domestic violence.[157] The United States incorrectly asserts in its Response that Colorado peace officers receive 80 hours of total training, of which 10% is devoted to domestic violence awareness.[158] In fact, Colorado law requires its peace officers to complete 546 training hours for certification, of which only 8 hours, or 1.5%, are devoted to domestic violence issues.[159] Perhaps more disheartening, neither Colorado law nor federal law requires Colorado peace officers to attend any of the additional training programs offered by non-governmental organizations and described at length in the Government's Response.[160] In practice, optional additional training is rarely requested by Colorado peace officers, and non-governmental organizations, such as the Colorado Coalition Against Domestic Violence and Project Safeguard, often must convince police departments and academies to allow them to provide additional training sessions.[161]

The United States has failed to ensure the adequate education and training of all law enforcement officials regarding both the issue of violence against women as a violation of women's human rights and the technical aspects of investigations.[162] Where, as here, police officers fail to respond in the proper manner to a report of domestic

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[157] Exhibit P, Saucedo Decl. ¶ 6.
[158] U.S. Response at 23.
[159] Colorado P.O.S.T. Manual, at pages B-82 and C-17.
[160] Exhibit P, Saucedo Decl. ¶ 14.
[161] *Id.*
[162] United Nations General Assembly, Report of the Secretary General, *In-depth Study on All Forms of Violence Against Women*, U.N. Doc. A/61/122/Add.1 (2006) [hereinafter *"In-depth Study"*], ¶ 77.

violence, and the United States has failed to set or guarantee minimum training standards that protect victims' human rights, the United States must be held accountable.

C. There Is No Federal Civil Remedy For Violence Against Women.

The United States also does not provide effective civil remedies to victims of domestic violence. In *United States v. Morrison*, the United States Supreme Court found that issues such as the suppression of violent crime and family law—some of the issues that are central to the problem of violence against women—are "local," rather than "national," and struck down as unconstitutional the private right of action that Congress had created under VAWA for victims of gender-motivated crimes against their attackers.[163] *Morrison* represented an additional blow to victims of domestic violence, who already lacked important legal remedies against negligent law enforcement officials who failed to protect them from abusers' violent acts, *discussed infra* at Section VII, and sent a clear message to the public that protecting women and children from domestic violence was not a federal priority.

D. The Due Diligence Standard Provides Clear Guidance To States in the Domestic Violence Context.

In its Response, the United States asserts that the meaning of the due diligence standard "in the context of domestic violence is subject to debate."[164] The United States directs the Commission's attention to a U.N. report on "good practices" to substantiate the United States' theory that no definition exists of what constitutes good practices in preventing domestic violence. As a result, the United States concludes that the due

[163] 42 U.S.C. § 13981.
[164] U.S. Response at 35.

diligence standard is too vague to constitute a justiciable norm in the domestic violence context and that the Commission should therefore abstain from enforcing any norms related to law enforcement's obligation to protect women from violence. The United States misinterprets the U.N. report and, more fundamentally, the nature of the United States' legal obligations to protect and promote human rights.

The United States' argument that the due diligence standard is somehow nonjusticiably vague and impossible to apply in the context of domestic violence is frivolous. It flies in the face of the established practice of the Inter-American Commission.[165] More generally, it is rejected by the three Special Rapporteurs on the Rights of Women at the United Nations, the Inter-American Commission, and the African Commission. In a joint declaration, the Rapporteurs specifically emphasized that "States are obliged to apply due diligence to prevent violence against women," calling on States to take immediate "action to bring their laws and practices into conformity with these standards."[166]

Moreover, the very report that the United States cites sets forth recommendations for effective practices in combating violence against women in the areas of law, prevention, and the provision of services. While the report notes that what constitutes "best" practices necessarily depends on the social, cultural, and economic context, the U.N. report does not hesitate in recommending "good" practices and by no means suggests that States do not have concrete legal obligations to address violence against women effectively and to ensure that all victims of gender-based violence have access to

[165] *See, e.g.*, *The Situation of the Rights of Women in Ciudad Juárez*, ¶¶ 153-60, OEA/Ser.L/V/II.117, Doc. 44 (Mar. 7, 2003).
[166] *See* Press Release, The Three Rapporteurs on the Rights of Women Express Their Concern for the Situation of Violence and Discrimination Against Women (Mar. 8, 2002), *available at* http://www.cidh.org/comunicados/english/2002/press10.02.htm.

basic protections, support and redress.[167] Indeed, the due diligence standard requires a contextual analysis whereby States must take effective steps that are reasonable under the circumstances toward achieving the protection of all human rights.

[167] *See*, e.g., International Association of Chiefs of Police, *Family Violence Summit Recommendations*, which discusses effective police responses to domestic violence and notes that "National guidelines can suggest general intervention approaches based on knowledge of effective practices, while leaving room for local creativity and fine-tuning." *Available at:* http://www.theiacp.org/documents/index.cfm?fuseaction=document&document_type_id=1&document_id=159#clarify

IV. THE UNITED STATES HAS AN AFFIRMATIVE OBLIGATION TO PROTECT THE RIGHTS GUARANTEED IN THE AMERICAN DECLARATION FROM VIOLATION BY PRIVATE ACTORS.

In its Response, the United States asserts that the American Declaration is "a non-binding instrument," the provisions of which are merely "aspirational."[168] In addition, the government argues that the Declaration imposes no affirmative obligations on OAS member States to protect the rights of persons under their jurisdiction.[169] As elaborated in Ms. Gonzales' Petition, these assertions fly in the face of long established Inter-American jurisprudence and are manifestly incompatible with the object and purpose of the OAS Charter, the text of the American Declaration, the jurisprudence and practice of the Commission, and evolving human rights standards relative to the protection of human rights in the Americas.[170] Consistent with its interpretive mandate and those evolving standards, this Commission should interpret the Declaration to impose obligations on member States to respect and ensure the rights guaranteed therein from violations by state as well as private actors. Moreover, even if the Declaration cannot be so interpreted generally, this Commission should interpret the Declaration to incorporate such affirmative obligations in the circumstances here, because of the particular vulnerability of women and children to private violence.

A. The United States Has an Affirmative Obligation to Ensure the Fundamental Human Rights Expressed in the American Declaration.

The primary obligation on the United States to affirmatively guarantee the human rights protected by the American Declaration stems from the OAS Charter's recognition of human dignity and the essential rights of man as read in conjunction with the

[168] U.S. Response at 26.
[169] *Id.* (stating that "no other provision of the Declaration contains language that even addresses implementation of the enumerated rights, let alone imposes an affirmative duty to prevent crimes").
[170] *See generally* Gonzales Petition, Part I.D.

American Declaration.[171] As a member of the OAS, the United States owes a general obligation to other member States as well as all persons under its jurisdiction and control to respect and ensure these fundamental rights. The *erga omnes* nature of this duty may be inferred from the Preamble to the OAS Charter, whereby States parties express their commitment "that the true significance of American solidarity and good neighborliness can only mean the consolidation . . . of a system of individual liberty and social justice based on respect for the essential rights of man."[172] The settled jurisprudence of the Inter-American Court confirms that due to the universal and undeniable interest in the promotion and protection of human rights, the obligation to respect and ensure rights is owed by each State to the community of inter-American States as a whole.[173] Moreover, in ratifying the OAS Charter and signing the American Declaration, the United States undertook to faithfully fulfill "obligations derived from treaties and other sources of international law," art. 3(b), and promote the "fundamental rights of the individual."

The text of the American Declaration, albeit in general terms, also contemplates that States must take affirmative steps to protect the rights guaranteed therein. For instance, the rights to "the protection of the law against abusive attacks upon … [an

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[171] *See* OAS Charter, Pmbl, Arts.3(l) & 17; American Declaration prml. *See also* L'ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL: RESOLUTIONS 1957-1991, at 206 (declaration of the International Law Institute of December 1969 affirming that the obligation on States to guarantee respect for human rights flows from the recognition of human dignity in the U.N. Charter and the Universal Declaration of Human Rights).

[172] OAS Charter, prml. *See Barcelona Traction, Light and Power Company, Limited, Second Phase*, 1970 I.C.J. Reports 3, (July 24), ¶¶ 33-34 (concluding that every State, by virtue of its membership in the international community, has a legal interest in the protection and fulfillment of certain basic rights and essential obligations, including "the principles and rules concerning the basic rights of the human person").

[173] *See, e.g.*, *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶ 140 (Sep. 27, 2003); *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. (ser. A) No. 10, ¶ 38; *Ximenes Lopes v. Brazil*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 149, ¶ 85 (July 4, 2006); *Mapiripán Massacre case*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 134 (Sep. 15, 2005); *Pueblo Bello Massacre case*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 140 (Jan. 31, 2006).

individual's] private and family life" (art. V) and to "a simple, brief procedure whereby the courts will protect [an individual] from acts of authority that . . . violate any fundamental constitutional rights" (art. XVIII) would be meaningless if the State was not required to take effective measures to provide mechanisms for their realization. Similarly, the right to "receive protection" for the family (art. VI) and the right of women and children "to special protection, care and aid" (art. VII) specifically contemplate that the State must act positively to ensure generally the rights set forth in the American Declaration.

In contentious cases brought under the American Declaration as well as in its general practice, the Commission recognizes that "the obligation of respecting and protecting human rights is an obligation *erga omnes* . . . toward the inter-American community as a whole, and toward all individuals subject to its jurisdiction, as direct beneficiaries of the human rights recognized by the American Declaration."[174] The Commission has found that OAS member States "must assume" the obligation to guarantee human rights "whether or not they are signatories of the American Convention on Human Rights."[175] And, the Commission has concluded that States have affirmative obligations to respect and ensure the human rights expressed in the Declaration:

> Member States of the OAS such as Canada have undertaken to respect and ensure the fundamental rights of all persons subject to their jurisdiction. Respect for human rights is a fundamental principle of the Organization, guiding the actions of each member State.[176]

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[174] *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, ¶¶ 77-78 (1997); *Armando Alejandre Jr., Carlos Costa, Mario de la Pena y Pablo Morales v. Republica de Cuba,* Case 11.589, Inter-Am. C.H.R., Report No. 86/99, OEA/Ser.L/V/II.106 doc. 3 rev. at 586 ¶ 39 (1999).

[175] *Id.*

[176] *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, Inter-Am. C.H.R., OEA/Ser.L/V/II.106, Doc. 40 rev. ¶ 29 (Feb. 28, 2000). *See also Armando*

Thus, the Commission has found that States, such as Canada and the United States, whose legal obligations are defined by the American Declaration rather than the Convention, have an obligation to "respect and ensure" the fundamental rights protected in the Declaration.

Applying this general principle, the Commission has interpreted the American Declaration on numerous occasions to require that States take effective steps through the enactment of laws and adoption of policies to guarantee human rights. For example, in *Dann v. United States*, a case involving a claim to indigenous property rights, the Commission interpreted the Declaration "so as to *safeguard*" personal and cultural integrity "*through the effective protection* of their individual and collective human rights."[177] Likewise, in *Maya Indigenous Communities of the Toledo District v. Belize*, another case brought solely under the American Declaration, the Commission found that the State violated the right to property of the Mayan people "*by failing to take effective measures* to recognize their communal property right[s]," violated the right to equality before the law "*by failing to provide them with the protections necessary* to exercise their property rights fully and equally," and violated the right to judicial protection "*by rendering domestic judicial proceedings brought by them ineffective* through unreasonable delay."[178] These cases demonstrate that the Declaration does not merely restrict the exercise of State power but rather obligates States to take effective steps where necessary to guarantee the full and free exercise of human rights.

Alejandre v. Cuba, *supra* note 174, ¶ 39; *Victims of the Tugboat "13 de Marzo" v. Cuba*, *supra* note 174, ¶¶ 77-78.

[177] Report No. 75/02, Case 11.140, ¶ 131 (emphasis added).

[178] Report No. 40/04, Case 12.053, ¶¶ 193-96 (emphasis added).

A restrictive interpretation of the American Declaration that fails to require States to affirmatively protect rights would be fundamentally at odds with evolving standards relative to the protection of human rights. As elaborated in Jessica Gonzales' Petition, the Commission considers petitions brought under the American Declaration "in the context of the evolving rules and principles of human rights law in the Americas and in the international community more broadly, as reflected in treaties, custom and other sources of international law."[179] The provisions of other universal and regional human rights instruments, which reflect developments in international human rights law, are thus relevant to interpreting and applying the American Declaration.

Other regional instruments for the promotion and protection of human rights impose similar affirmative obligations to those required by the American Declaration. For instance, the African Charter of Human and Peoples Rights obligates member States to "recognize" the Charter provisions and to "adopt . . . measures to give effect to them." Citing to this provision, the African Commission of Human and Peoples Rights concluded in Comm. No. 74/92, ¶¶ 19-23 that under certain circumstances, Article 1 establishes duties to protect the rights of individuals from violations by private actors. Adopting this rationale, the African Commission found Chad had violated Article 1 for its failure to secure the safety and the liberty of its citizens, and to conduct investigations into murders occurring in the State.[180] Likewise, the European Convention for the Protection of Human Rights and Fundamental Freedoms[181] ("European Convention") requires states parties to "secure" the Convention rights to all individuals within their

[179] *Mary and Carrie Dann v. United States*, Case 11.140, Report No. 75/02, Inter-Am. C.H.R., Doc. 5 rev. 1 at 860 (2002), ¶ 124. *See also* Gonzales Petition, Part I.E.
[180] Comm. No. 74/92, ¶¶ 19-23.
[181] European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

jurisdiction. The European Court of Human Rights has interpreted this term to embrace both negative and positive duties, including obligations to protect against private violence.[182]

Finally, to be consistent with its interpretative mandate this Commission must interpret provisions of the Declaration "with due regard to other relevant rules of international law applicable to member states against which complaints of violations of the Declaration are properly lodged."[183] Every major human rights treaty signed or ratified by the United States imposes affirmative obligations to respect and ensure the rights guaranteed therein, including against violations by private actors. Most notably, the United States is party to the International Covenant on Civil and Political Rights ("ICCPR"), which provides that States shall not only undertake to "respect" the rights in the ICCPR but also that they must "ensure" those rights to all persons within their territory and subject to their jurisdiction.[184] In its most recent General Comment No. 31, the U.N. Human Rights Committee observed that "the 'rules concerning the basic rights of the human person' are *erga omnes* obligations and that . . . there is a United Nations Charter obligation to promote universal respect for, and observance of, human rights and fundamental freedoms."[185] The Committee also determined that the positive obligations

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[182] *See, e.g.*, *E. and Others v. United Kingdom*, App. No. 33218/96, Eur. Comm'n. H.R. (2002); *Kiliç v. Turkey*, App. No. 22492/93, Eur. Comm'n. H.R. (2000); *Osman v. United Kingdom*, 1998-VIII Eur. Ct. H.R. (1998).

[183] *Juan Raúl Garza v. United States*, Case 12.243, Inter-Am. C.H.R., Report No. 52/01, ¶ 88. *See also Ramón Martinez Villareal v. United States*, Case 11.753, Inter-Am. C.H.R., Report No. 52/02, Doc. 5 rev. 1 at 821, ¶ 60 (2002); *Maya Indigenous Communities 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, ¶ 86-88 (2004); *Dann*, *supra* note 179, ¶¶ 96-97.

[184] International Covenant on Civil and Political Rights art. 2(1), Dec. 19, 1966, 999 U.N.T.S. 171. *See, e.g.*, *Delgado Páez v. Colombia*, Comm. 195/85, U.N. GAOR, Human Rights. Comm., 39th Sess., Supp. No. 40, at 43, ¶ 5.6, U.N. Doc. A/45/40 (1990) (finding that petitioner's right to security had been violated because Colombia had failed to ensure effective protection in the face of death threats and physical attacks by non-state actors).

[185] Hum. Rts. Comm., General Comment No. 31, U.N. Doc. CCPR/C/74/CRP.4/Rev.6 (2004) ¶ 2.

on States parties to ensure human rights set forth in the ICCPR "will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities" and that a State may violate the ICCPR by "failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm."[186]

As a Party to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, the United States also undertook to "take effective legislative, administrative, judicial or other measures to prevent acts of torture."[187] And, following ratification of the International Convention on the Elimination of All Forms of Racial Discrimination, the United States agreed to "bring to an end, by all appropriate means, . . . racial discrimination by any persons, group or organization" and take "special and concrete measures to ensure the . . . protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms."[188] The due diligence standard in these widely ratified human rights treaties obligates State parties to adopt appropriate measures to respect and ensure the rights enumerated therein both from violation by the State and its agents as well as by private actors. The consistent incorporation of this obligation by the international community since 1948 demonstrates that a contemporary interpretation of human rights instruments, including the American Declaration, must incorporate a duty to respect and ensure rights.

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[186] *Id.* ¶ 8. Significantly, the United States ratified the ICCPR without entering a reservation to the affirmative responsibility assumed under Article 2(1) to respect and ensure rights.
[187] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2(1), Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85.
[188] International Convention on the Elimination of All Forms of Racial Discrimination art. 2, (1966), 660 U.N.T.S. 195.

B. Violations Committed By Private Actors May Be Imputed to the State Where It Failed to Take Reasonable Measures Under the Circumstances to Prevent Criminal Acts.

The Government attacks a straw man when it argues that "no provision of the [American] Declaration [] imposes an affirmative duty on States to *actually prevent* the commission of individual crimes by private parties."[189] Jessica Gonzales at no point claims that the United States had a categorical obligation "to have *successfully prevented* Mr. Gonzales from murdering his three daughters." *Id.* at 26 (emphasis added). Instead, consistent with established Inter-American case law, Ms. Gonzales asserts that the United States violated its obligations under the American Declaration by failing to take reasonable measures in the circumstances to respect and ensure the safety of her and her children.

As noted in Ms. Gonzales' Petition, the *Velásquez Rodríguez* case sets forth the basic principles under which human rights violations can be imputed to a State.[190] In *Velásquez Rodríguez*, the Court explained that, as a general matter, "[a]ny impairment of those rights which can be attributed under the rules of international law to the action or omission of any public authority constitutes an act imputable to the State."[191] The Court determined that state responsibility is engaged whenever an organ of the State, a State official or public entity violates the protected rights, because public power is used to infringe rights.[192] However, the Court then defined ways by which State responsibility

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[189] U.S. Response at 25 (emphasis added).
[190] *See* Gonzales Petition, Part II.A; *Velásquez Rodriguez*, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 160 (July 29, 1988). These principles have more recently been cited by the Court in the *Pueblo Bello Massacre* case, *supra* note 173, ¶ 120, *Ximenes Lopes*, *supra* note 173, ¶¶ 124-25, *Mapiripán Massacre*, *supra* note173, ¶ 232, and the *Sawhoyamaxa Indigenous Community* case, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 153 (Mar. 29, 2006).
[191] *Id.* ¶ 164. *See also Ximenes Lopes*, *supra* note 173, at ¶ 83; *Draft articles on Responsibility of Status for internationally wrongful acts* art. 2, Report of the International Law Commission, U.N. Doc. Supp. No. 10 (A/56/10), Ch. IV.E.1
[192] *Id.* ¶ 172.

for the acts of private actors may be engaged. First, the State may be held responsible when private actors commit human rights violations with the support or acquiescence of the government.[193] Second, an act of a purely private person "can lead to international responsibility of the State, not because of the act itself, but because of the *lack of due diligence to prevent the violation* or to respond to it" in a manner appropriate under the circumstances.[194] In this scenario, the "State has a legal duty to take reasonable steps to prevent human rights violations" and to use the means at its disposal to investigate the violations, punish the perpetrators, and ensure the victims adequate compensation.[195]

Three recent decisions by the Inter-American Court fully support the Ms. Gonzales' argument. In the *Ximenes Lopes*, *Pueblo Bello Massacre*, and *Mapiripán Massacre* cases, the Court reaffirmed in each instance that the State is obligated to protect against violations committed by non-State actors.[196] 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 inter-personal relations.[197]

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[193] *Id.* ¶ 173.
[194] *Id.* ¶ 172 (emphasis added).
[195] *Id.* ¶ 174.
[196] *Ximenes Lopes*, *supra* note 173, ¶¶ 124-25; *Pueblo Bello Massacre* case, *supra* note 173, ¶ 120; *Mapiripán Massacre* case, *supra* note 173, at ¶ 232. *See also Sawhoyamaxa Indigenous Community* case, *supra* note 190, ¶ 153; *Juan Humberto Sánchez* case, 2003 Inter-Am. Ct. H.R. (ser. C) No. 99, ¶ 110 (June 7, 2003); *Street Children* case (Villagrán Morales et al.), 1999 Inter-Am. Ct. H.R. (ser. C) No. 63, ¶ 144 (Nov. 19, 1999).
[197] *Ximenes Lopes*, *supra* note 173, ¶ 85 (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.*

In furtherance of this duty, States must not only create an appropriate legal framework to dissuade any threat to the right to life but must also take all necessary measures to prevent and punish serious deprivations of rights as a consequence of the criminal acts of other individuals.[198] While, as an initial 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.[199] 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.[200]

Similarly, in Advisory Opinion OC-18/03, concerning the rights of undocumented migrant workers, the Inter-American 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*)."[201] The Court observed that, because

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Pueblo Bello Massacre case, *supra* note 173, ¶ 113; *Mapiripán Massacre case*, *supra* note 173, ¶ 111; Advisory Opinion OC-18/03, *supra* note 173, ¶ 140.

[198] *Pueblo Bello Massacre* case, *supra* note 173, ¶ 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 actos criminales de otros individuos e investigar efectivamente estas situaciones."); *Ximenes Lopes*, *supra* note 173, ¶¶ 124-25; *Sawhoyamaxa Indigenous Community* case, *supra* note 190, ¶ 153; *Mapiripán Massacre* case, *supra* note 173, ¶ 232; *Juan Humberto Sánchez* case, 2003 Inter-Am. Ct. H.R. (ser. C) No. 99 (June 7, 2003), ¶ 110; and *"Street Children"* case (Villagrán Morales et al.), 1999 Inter-Am. Ct. H.R. (ser. C) No. 63 (Nov. 19, 1999) ¶ 144. *Cf. Kiliç v. Turkey*, E.C.H.R. Application No. 22492/93 (Mar. 28, 2000), ¶ 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*, Reports of Judgments and Decisions 1998-VIII (Oct. 28, 1998), ¶ 115.

[199] *Pueblo Bello Massacre* case, *supra* note 173, ¶ 113; *Ximenes Lopes*, *supra* note 173, ¶ 85; *Mapiripán Massacre* case, *supra* note 173, ¶ 111; *Velásquez Rodríguez*, *supra* note 131, ¶ 172.

[200] *Pueblo Bello Massacre* case, *supra* note 173, ¶ 113; *Ximenes Lopes*, *supra* note 173, ¶ 85; *Mapiripán Massacre* case, *supra* note 173, ¶ 111.

[201] *Id.* ¶ 140.

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."[202]

The United States attempts to dismiss the relevance of the principles of State responsibility established in the *Velásquez Rodriguez* case by focusing on the particular facts of that case. The Government correctly observes that, unlike the case at hand, the disappearance of Manfredo Velásquez occurred under color, support, or acquiescence of State authority in a climate of total impunity for the perpetrators.[203] The Government's argument, however, is irrelevant. Jessica Gonzales does not allege that the perpetrator of the murders of her three daughters was acting under color of State authority or that the State of Colorado would not have prosecuted him for these crimes had he lived. Rather, Ms. Gonzales argues that the United States must be held responsible, not for the murders themselves, but for the "lack of due diligence" to prevent the violatory acts of a private person where the State had knowledge of both the vulnerable state of the victims and the potential threat to their safety, and had previously assured them that it would provide the necessary protections. In light of these circumstances, the State failed to take adequate measures to protect, *inter alia*, the rights of Jessica Gonzales and her children to life, liberty, and personal security; to the protection of the law against abusive attacks; and to the special protection, care, and aid to which mothers and children are entitled.

[202] *Id.* ¶¶ 147, 150.
[203] U.S. Response at 30-31.

V. BECAUSE OF THE PARTICULAR VULNERABILITY OF WOMEN AND CHILDREN TO DOMESTIC VIOLENCE, STATES HAVE A SPECIAL OBLIGATION TO PROTECT WOMEN AND CHILDREN FROM THIS VIOLENCE.

In evaluating the scope and content of the State's obligation to ensure the rights of Jessica Gonzales and her children against violations by private actors, the Commission should consider the nature of domestic violence and women and children's particular susceptibility to private acts of violence. Article VII of the American Declaration explicitly recognizes this vulnerability and obligates States to provide women and children with "special protection, care and aid." Read in light of the principles of international human rights law, the State has enhanced obligations to ensure the safety of women and children and specifically to protect them from domestic and gender-based violence.

A. The Inter-American System Recognizes the Duty to Provide Special Protections to Vulnerable Groups.

The Inter-American Court has expressly endorsed a contextual approach to prevention and protection of human rights, stating 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."[204] To this end, the State must adopt "positive measures, determined according to the particular needs of protection of the individual, be it the personal condition or specific

[204] *Ximenes Lopes*, *supra* note 173, ¶ 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* case, *supra* note 173, ¶ 123; *Sawhoyamaxa Indigenous Community case*, *supra* note 190, ¶ 154; *Mapiripán Massacre* case, *supra* note 173 ¶ 117.

situation of the individual."[205] The Court has previously recognized the existence of special duties to protect, *inter alia*, undocumented migrant workers,[206] street children,[207] indigenous communities,[208] and persons suffering from mental disorders from private acts of violence.[209] The recognition of a special obligation to protect victims of domestic violence is fully consonant with Inter-American jurisprudence and practice in regards of the State's enhanced duty to protect certain vulnerable groups.

B. States Have Special Duties to Protect Women From Acts of Domestic Violence.

In view of the particular vulnerability of women to violence in the "private" sphere, States have a duty to provide women with special protection from domestic and other forms of gender-based violence. As a textual matter, Article VII of the American Declaration only recognizes the right of women to special protection "during pregnancy and the nursing period." The Commission, however, must construe this provision in light of a contemporary understanding of the rights of women as reflected in international standards governing the protection of women.[210] Accordingly, the American Declaration should be interpreted to require that the State has an enhanced obligation to ensure the safety of all women from domestic and gender-based violence.

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[205] *Id.*
[206] Advisory Opinion OC-18/03, *supra* note 173.
[207] *Street Children* case, *supra* note 196.
[208] *Sawhoyamaxa Indigenous Community* case, *supra* note 190, ¶¶ 83, 168; *Yakye Axa Indigenous Community* case, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 63 (June 17, 2005). For examples of cases applying the American Declaration, see *Maya Indigenous Communities of the Toledo District*, *supra* note 183, ¶¶ 169-70; *Dann*, *supra* note 179, ¶ 126.
[209] *Ximenes Lopes*, *supra* note 173, ¶ 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).
[210] *See Street Children* case, *supra* note 196, ¶¶ 192-94; Advisory Opinion OC-10/89, *supra* note 173, ¶ 43; *Dann v. United States*, *supra* note 179, ¶ 124.

The Inter-American system requires that the State provide every vulnerable person or class of persons with special protections sufficient to ensure the free exercise of their rights.[211] In recent decades, international experts have underscored the systemic and grave nature of violence directed against women and the particular vulnerability that results.[212] Indeed, domestic and 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."[213] Violence against women is not only a direct violation of specific provisions of the American Declaration, it is also an impediment to the full enjoyment by women of all human rights: "[t]he effect of such violence on the physical and mental integrity of women is to deprive them of the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms."[214] Such violence leads to devastating individual and social costs, as it "has consequences for women's health and well-being, carries a heavy human and economic cost, hinders development and can also lead to displacement."[215]

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[211] *Ximenes Lopes*, *supra* note 173, ¶ 103; *Pueblo Bello Massacre* case, *supra* note 173, ¶ 123; *Sawhoyamaxa Indigenous Community* case, *supra* note 190, ¶ 154; *Mapiripán Massacre* case, *supra* note 173, ¶ 117.

[212] *See generally* Petition, Background and Patterns, Part A; *In-depth Study*, *supra* note 162; Report of the Special Rapporteur on Violence Against Women, its causes and consequences, *Violence Against Women in the Family*, U.N. Doc. E/CN.4/1999/68 (1999); G.A. Res. S-23/3, at Annex, ¶ 13 [hereinafter *Violence Against Women in the Family*].

[213] *In-depth Study*, *supra* note 162, ¶ 1. *See also Report on the Situation of the Rights of Women in Ciudad Juárez, Mexico: The Right to be Free from Violence and Discrimination*, ¶ 7, OEA/Ser.L/V/II.117, Doc. 44 (Mar. 7, 2003) [hereinafter *Report on the Rights of Women in Ciudad Juárez*].

[214] CEDAW Committee, General Recommendation No. 19, ¶ 11, U.N. Doc A/47/38 (1992). See also *Report of the Fourth World Conference on Women*, Beijing, Sept. 4–15, 1995 (United Nations publication, Sales No. DE.96.IV.13).

[215] Report of the Secretary General, *In-depth Study on All Forms of Violence Against Women*, ¶ 156, U.N. Doc. A/61/122/Add.1 (2006).

Victims of domestic violence "operate under pressures not felt by other crime victims."[216] Because of ongoing ties to their assailants, it may be impossible to ensure their safety or accommodate the application of general criminal laws.[217] These problems are exacerbated by State inaction in the enforcement of preventive measures, which in turn is compounded by limited awareness and sensitivity on the part of law enforcement officers;[218] "enforcement 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."[219] The lack of an effective State response has a particularly corrosive effect, as it encourages further violence against women and reinforces women's subordination. 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.

Through the establishment of the Special Rapporteurship on the Rights of Women in 1994 and the adoption of numerous country reports, the Commission has recognized that "[v]iolence against women is, first and foremost, a human rights problem" cognizable under the American Declaration and the American Convention.[220] The Commission and the Special Rapporteurship are committed to "ensuring that the rights of women are fully respected and ensured in each member State,"[221] reflecting the priority that OAS Member States have accorded the development of "policies and practices to combat violence

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[216] Joan Fitzpatrick, *The Use of International Human Rights Norms to Combat Violence Against Women*, *in* HUMAN RIGHTS OF WOMEN 532, 539 (Rebecca Cook ed., 1994).
[217] *Id.*
[218] *See* Gonzales Petition, Background and Patterns Section, Part B.
[219] *In-depth Study*, *supra* note 162, ¶ 95.
[220] *Report on the Rights of Women in Ciudad Juárez*, *supra* note 148, ¶ 122.
[221] Special Rapporteurship on the Rights of Women of the Inter-American Commission on Human Rights, Background and Mandate, *available at* http://www.cidh.oas.org/women/mandate.htm.

against women, including domestic violence."[222] Most recently, on November 15, 2006, the Commission issued a press release highlighting the grave situation of violence and discrimination suffered by women in the region, as well as the obstacles that women face in accessing effective and adequate judicial resources.[223]

In the Inter-American system, the need for and right of women to special measures of protection finds its maximum expression in the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belém do Pará).[224] The Convention of Belém do Pará "reflect[s] a hemispheric consensus" as to the gravity of the problem of violence against women and expresses the fundamental commitment of the American States to take concrete steps to address this issue.[225] 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."[226] The Convention addresses acts of gender-based violence even where the violence has not been perpetrated or condoned by the State.[227] The Convention further requires States Parties to "apply due diligence to prevent, investigate

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[222] *See, e.g.*, Plan of Action adopted by the Heads of State and Government during the Third Summit of the Americas (2001), *available at* http://www.summit-americas.org/Documents%20for%20Quebec%20City%20Summit/planofaction-template-eng.htm.
[223] *CIDH expresa preocupación por persistencia de graves y sistemáticas violaciones a los derechos de* la mujer, Inter-Am. C.H.R., Press Release No. 45/06 (Nov. 15, 2006).
[224] Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, June 9, 1994, 33 I.L.M. 1535 [*hereinafter* "Convention of Belém do Pará"].
[225] *See Report on the Rights of Women in Ciudad Juárez*, *supra* note 148, ¶ 103; *Maria da Penha 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, (2000), ¶ 51.
[226] *Id.* ¶ 53.
[227] The Convention protects, *inter alia*, the right to a life free of violence (Article 3), the right to respect for life, physical, mental, and moral integrity, personal safety, and personal dignity (Article 4), and the right to a simple and prompt recourse to a competent court for protection against acts that violate those rights (Articles 4 (g)).

and impose penalties for violence against women";[228] "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";[229] 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."[230] The broad hemispheric adherence to the Convention of Belém do Pará[231] constitutes compelling evidence that the basic principles reflected in the Convention, focused on protecting 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, have a duty to act with special diligence in ensuring that women may exercise and enjoy the rights articulated in the American Declaration.[232]

International human rights treaties and other authoritative agreements also recognize 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"), an international treaty broadly focused on the rights of women, requires parties to "ensure through competent national tribunals and

[228] *Id.* art. 7(b).
[229] *Id.* art. 7(d).
[230] *Id.* art. 7(f) (emphasis added).
[231] Only three States, the United States, Canada and Jamaica, are not party to the treaty. *See* Inter-American Commission on Women, Status of Signing and Ratification of the Convention of Belém do Pará, *available at* http://www.oas.org/cim/English/Laws.Rat.Belem.htm.
[232] *Cf. Michael Domingues v. United States*, Case 12.285, Inter-Am. C.H.R., Report No. 62/02, doc. 5 rev. 1 at 913, ¶ 64 (2002).

other public institutions the effective protection of women against any act of discrimination,"[233] which encompasses all forms of gender-based violence.[234]

Finally, resolutions of the U.N. General Assembly and reports by treaty bodies have given 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."[235] 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 measures to ensure the protection of women subjected to violence, access to just and effective remedies."

The Inter-American Commission has likewise explained the meaning of special protections in the context of domestic and gender-based violence. Declaring that an "energetic State response" is required to address situations of such violence,[236] 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

[233] Convention on the Elimination of All Forms of Discrimination Against Women art. 2(c), Dec. 18, 1979, 1249 U.N.T.S. 14 [hereinafter CEDAW].
[234] CEDAW Comm., General Recommendation No. 19: *Violence Against Women*, ¶ 1, U.N. Doc A/47/38 (11th Sess. 1992).
[235] Resolution adopted by the General Assembly, Elimination of Domestic Violence Against Women, U.N. GAOR, 58th Sess., ¶ 1(d), U.N. Doc. A/Res/58/147 (2004). *Id.* ¶¶ 7(a), (e), (i), (j).
[236] *See, e.g.*, *Report on the Rights of Women in Ciudad Juárez*, *supra* note 148, ¶ 9.

protection, including protection or restraining orders."[237] 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.[238]

The concept of special protection inherent in Article VII of the American Declaration thus requires that the State take whatever measures are necessary and practical to protect women from acts of gender-based violence: "[t]he purposes of the regional human rights system and the principle of efficacy require that [rights guaranteed to women] be implemented in practice."[239] The Commission should therefore apply the highest standard in assessing whether women's rights to protection from, prevention of and remedies for gender-based and domestic violence have been violated.

C. States Have Special Duties to Protect Children From Acts of Domestic Violence.

The Inter-American System also recognizes the duty of States to provide special protection when the rights of children are at risk.[240] The child's need and right to special measures of protection by the State is explicitly recognized in Article VII of the American Declaration, which provides in pertinent part that "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 the state." The Commission has recognized that this right to special protection means that "in the case of

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[237] *Id.*
[238] *Report on the Rights of Women in Ciudad Juárez*, *supra* note 148, ¶ 155.
[239] *Id.* ¶ 102.
[240] *See* Gonzales Petition, Part II.A at 50–52.

children the highest standard must be applied" in determining whether other articles of the Declaration have been violated.[241] As the Inter-American Court has explained, the special protection of children derives "from the special situation of children, taking into account their weakness, immaturity or experience."[242]

Moreover, the content and scope of the general right to special protection can be established with reference to the "very comprehensive international *corpus juris* for the protection of the child."[243] The right to special protection is a well-established principle of international law and is reflected in all major human rights treaties concerning the rights of the child, including the Convention on the Rights of the Child ("CRC") and the ICCPR.[244] In particular, the CRC, which enjoys near universal ratification, should be viewed as a codification of the general principles of international law regarding the rights of children, and throws light on the obligations of all States.[245] The CRC incorporates numerous provisions requiring States Parties to adopt effective measures to protect children from the effects of domestic violence. Article 19(1), for example, provides that "States 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)." And Article 19(2) requires that "[s]uch protective measures

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[241] *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 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").

[242] *Juridical Condition and Human Rights of the Child*, Advisory Opinion OC-17/02, Inter-Am. Ct. H.R. (ser A) No. 17, ¶ 194 (Aug. 28, 2002) ¶ 60.

[243] *Street Children* case, *supra* note 196, ¶ 194.

[244] *See* Convention on the Rights of the Child ("CRC") 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) ("States Parties shall ensure to the maximum extent possible the survival and development of the child."); ICCPR art. 23 ("Every child shall have . . . the right to such measures of special protection as are required by his status as a minor.").

[245] *See also* CEDAW art. 23 (mandating special protection for children).

should, as appropriate, include effective procedures for . . . [the] prevention . . . of instances of child maltreatment . . ., and, as appropriate, for judicial involvement."[246]

The State's obligations to prevent private acts of violence, including gender-based violence and violence in the family, are intimately bound up by the obligation on States to afford special protections for children. A comprehensive 2006 United Nations study on violence against women recently emphasized that "[c]hildren are often present during episodes of domestic violence" and that "[d]omestic or intimate partner violence can . . . be fatal for children."[247] Indeed, as discussed in the Petition, empirical data has shown that children of women who are victims of domestic violence suffer from a much higher rate of mortality.[248] In this respect, the Commission has recommended that States "ensure that special measures of protection are available for children threatened with gender-based violence, and that the response to gender-based violence against girl children take into account their special vulnerability."[249] Thus, when considering whether the state breached its duty to protect Rebecca, Katheryn, and Leslie Gonzales, Ms. Gonzales urges this Commission to consider the inter-connectivity of domestic violence and the rights of the child, as well as the special status and vulnerability of children. In such circumstances, the State bears an enhanced duty to take effective protective and preventive measures to safeguard children, including while in the care of a parent, from all forms of violence.

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[246] Convention on the Rights of the Child ("CRC") 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), *entered into force* Sept. 2, 1990.
[247] *In-depth Study*, *supra* note 162, ¶ 169.
[248] *See* Gonzales Petition at 23. Throughout the Americas, children in homes where domestic violence occurs face greater risks. For example, a study in Nicaragua found that children of women who were physically abused by a partner were six times more likely than other children to die before the age of five. *See* K. Asling-Monemi *et. al.*, *Violence Against Women Increases the Risk of Infant and Child Mortality: a Case-Referent Study from Nicaragua*, 81 BULLETIN OF THE WORLD HEALTH ORGANIZATION 1, 10-16 (2003).
[249] *Report on the Rights of Women in Ciudad Juárez*, *supra* note 148, at Recommendations ¶ 9.

D. The Right of Women and Children to Protection from and Effective Remedies for Domestic Violence is a Customary Norm of International Law.

In addition to the protections afforded by the American Declaration, the right of persons, particularly women and children, to protection from and compensation for private acts of gender-based violence is a norm of customary international law. When interpreting and applying the American Declaration, the Commission may give due regard to all relevant rules of international law applicable to member states,[250] including "international custom, as evidence of a general practice accepted as law."[251] Accordingly, the Commission should interpret the Declaration in a manner consistent with this customary norm and find that the United States had an obligation to protect the rights of Jessica Gonzalez and her children, and compensate Jessica Gonzales for her tragic loss.

Customary international law arises from the "settled practice" of States "carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."[252] The elements required to establish a norm of customary international law are: (a) a concordant practice by a number of states with reference to a type of situation falling within the domain of international relations; (b) a continuation or repetition of the practice over a considerable period of time; (c) a

[250] *Juan Raúl Garza v. United States*, Case 12.243, Inter-Am. C.H.R., Report No. 52/01, OEA/Ser.L/V/II.111, doc. 20 rev. at 1255, ¶ 88 (2000). *See also Martinez Villareal*, *supra* note 183, ¶ 60; *Maya Indigenous Community of the Toledo District*, *supra* note 183, ¶¶ 86-88; *Dann*, *supra* note 179, ¶¶ 96-97.
[251] Statute of the International Court of Justice art. 38(1)(b), 59 Stat. 1055, 3 Bevans 1179 (1945).
[252] North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark and Netherlands), Judgment, 1969 I.C.J. 2 (Feb. 20, 1969) ¶ 77.

conception that the practice is required by or consistent with prevailing international law; and (d) general acquiescence in the practice by other states.[253]

Under established principles, evidence of concordant state practice and *opinio juris* tending to show customary international human rights law includes:

> [1] virtually universal participation of states in the preparation and adoption of international agreements recognizing human rights principles generally, or particular rights;
>
> [2] the adoption of human rights principles by states and in regional organizations in Europe, Latin America, and Africa;
>
> [3] general support by states for United Nations resolutions declaring, recognizing, invoking, and applying international human rights principles as international law;
>
> [4] action by states to conform their national law or practice to standards or principles declared by international bodies;
>
> [and] [5] invocation of human rights principles in national policy, in diplomatic practice, in international organization activities and actions. . . .[254]

The first category, near universal participation of states in international human rights instruments, may alone be sufficient evidence of the ripening of a customary rule of international law. The International Court of Justice has affirmed that "to have become a general rule of international law, . . . a very widespread and representative participation in [a] convention might suffice of itself, provided that it included that of States whose interests were specially affected,"[255] especially where state practice has been "both extensive and virtually uniform in the sense of the provision invoked" and has

[253] YEARBOOK OF THE INTERNATIONAL LAW COMMISSION II, 26, ¶ 11, U.N. Doc. A/CN.4/SER.A/1950/Add.1 (1950). *See also Miguel Domingues v. United States*, Case 12.285, Report No. 62/02, ¶ 36.
[254] RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (THIRD) (1987) § 701, Reporter's Notes ¶ 2. *See also* YEARBOOK OF THE INTERNATIONAL LAW COMMISSION II, *supra* note 253, at 26–30.
[255] North Sea Continental Shelf Cases, *supra* note 252, ¶ 73.

"occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved."[256]

The ICCPR, CEDAW and the CRC,[257] which all evidence the requisite widespread and representative participation in terms of signatories, ratifications and accessions for the norms contained therein to have achieved customary status, recognize the right to state protection from and remedies for domestic and gender-based violence.[258] Applying the ICCPR, the Human Rights Committee has concluded that the right to protection from domestic and gender-based violence is inherent in various articles of the ICCPR.[259] Moreover, the General Assembly's Declaration on the Elimination of Violence Against Women reflects a universally accepted interpretation of the ICCPR as a source of States' obligation to prohibit and prevent gender-based violence in public and private life.[260] Furthermore, through the inclusion of domestic violence in the monitoring and reporting process, State Parties have accepted that the ICCPR requires both prevention and remedies for gender and domestic violence.[261] The CEDAW Committee has also interpreted CEDAW to require States to act with due diligence to effectively prevent, investigate, punish, and provide compensation for private acts of gender-based

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[256] *Id.* ¶ 74.

[257] The CRC, which imposes a due diligence obligation to protect children from violence, is discussed *supra* in Part II.C.

[258] *See* Office of the H.C.H.R., http://www.ohchr.org/english/countries/ratification/4.htm. There are presently 160 Parties to the ICCPR, including the United States, which ratified the Covenant on June 8, 1992. CEDAW had 173 States Parties as of June 1999 when the events at issue in this case occurred. Although the United States signed CEDAW in 1980, it is one of the few States not to ratify the Convention. The CRC, which entered into force on September 2, 1990, had 191 states parties, and no State had entered reservations affecting the rights under Articles 2, 6, and 19 at issue in this case. The United States signed the CRC in February 1995, but, along with only Somalia, is one of only two countries that have not yet ratified the Convention.

[259] *See, e.g.*, Article 6 (rights to life), Article 7 (freedom from torture or cruel, inhuman or degrading treatment or punishment), and Article 24 (right of children to protection).

[260] Declaration on the Elimination of Violence Against Women: Resolution, G.A. Res. 104, U.N. GAOR, 48th Sess., Agenda Item 111, at prml., art. 3, U.N. Doc. A/Res/48/104 20 (1993).

[261] *See, e.g.*, Hum. Rts. Comm., *Concluding Observations/Comments*, *available at* http://www.unhchr.ch/tbs/doc.nsf.

violence: "States may [] be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation."[262] The practice of States in reporting on domestic and other types of violence against women to the CEDAW Committee, in order to assess State compliance with Articles 7 and 23 of the Covenant,[263] confirms that States accept that the right to be free from violence is protected under the Convention.[264] The consistent recognition of the right to effective protection by the State from domestic violence in the ICCPR, CEDAW, and CRC constitutes compelling evidence of the development of a customary international norm.

Second, regional treaties and declarations also provide evidence of the development of a universal consensus that states must adopt measures to ensure women and children are effectively protected from gender-based violence, including domestic violence. Several regional treaties, including the Convention of Belém do Pará, the European Convention on Human Rights, the Protocol on the Rights of Women in Africa to the African Charter on Human and Peoples' Rights ("African Protocol"),[265] and the Dhaka Declaration for Eliminating Violence against Women in South Asia,[266] recognize women's right to be free from gender-based violence, including domestic violence. These treaties further recognize that States must undertake "due diligence" to prevent,

[262] *Id.* ¶ 9.
[263] *Id.* ¶ 11.
[264] *In-depth Study*, *supra* note 162, ¶ 247.
[265] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, July 11-August 13, 2003, 2d Ord. Sess. of the Assemb. of the Union (*hereinafter*, "African Protocol").
[266] Dhaka Declaration for Eliminating Violence Against Women in South Asia (2003), *available at* http://cst.kathmandu.unfpa.org/docs/np_vaw_dhaka.pdf.

investigate, and punish such acts of violence, whether perpetrated by a state or private actor, and to provide compensation and legal recourse for victims of such violence.[267]

Third, the "general assent of nations" to the right to protection against family violence, is demonstrated by widely accepted General Assembly Declarations and Resolutions, which may constitute authoritative statements of the opinion of the world community. In particular, the aforementioned Declaration on the Elimination of Violence Against Women, adopted by consensus, is specific and comprehensive, not only recognizing the right to protection from family violence, but also calling upon states, in specific terms, to exercise due diligence.[268] Moreover, United Nations World Conferences, including the 1993 Vienna World Conference on Human Rights[269] and the 1995 Fourth World Conference on Women in Beijing,[270] have condemned gender violence as a human rights violation and called for international and national remedies. Most recently, the world community resolved at the Millennium Summit of 2000 to combat all forms of violence against women[271] and underscored at the 2005 World Summit the urgency of eliminating all forms of violence against women and girls.[272]

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[267] *See* Convention of Belém do Pará, *supra* note 224, arts. 3, 4, and 7; European Convention, *supra* note 181, arts. 1, 8, and 13; African Protocol, *supra* note 265, arts. 4 and 8.

[268] Declaration on the Elimination of Violence Against Women, *supra* note 260, arts. 1, 2 (recognizing the right to be free from violence, including "[p]hysical, sexual and psychological violence occurring in the family"); art. 4 (calling upon states to "exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or private persons").

[269] Vienna Declaration and Programme of Action, World Conference on Human Rights, ¶ 18, U.N. Doc. A/CONF. 157/24 (Part I) (1993) (recognizing gender violence as a human rights violation).

[270] Beijing Declaration and Platform for Action, Fourth World Conference on Women, at Annex I, ch. IV ¶¶ 125-30, U.N. Doc. A/CONF.177/20 and A/CONF.177/20/Add.1 (1995) (including the elimination of all forms of violence against women as one of its twelve strategic objectives and calling for states to ensure the right of women to be free from violence).

[271] United Nations Millennium Declaration, G.A. Res. 55/2, ¶ 25 (2000).

[272] G.A. Res. 60/1, ¶ 58. United Nations Millennium Project, *Taking Action: Achieving Gender Equality and Empowering Women*, Task Force on Education and Gender Equality (London 2005).

Fourth, the rapid, worldwide reform of national laws and practices to provide protection against gender and domestic violence supplies further evidence of the emergence of a customary international norm. Over the past decade, many States have adopted laws addressing violence against women. Eighty-nine States currently have legislative provisions on domestic violence, and twenty-four States have either elaborated draft legislation or have expressed an intention to develop specific legislation to address the issue.[273] Recent international surveys indicate that States are adopting a range of protective measures, including orders of protection, to prevent domestic violence,[274] and that there is increasing recognition of the importance of effective enforcement of restraining orders.[275]

Finally, the decisions of both national and international human rights courts and commissions determining that women's international human rights were violated by state failure to provide or enforce fair and effective protections against gender-based violence, including domestic violence, provide the fifth type of evidence for this customary human rights norm. For example, in the *Maria da Penha Maia Fernandes* case, the Inter-American Commission found that the failure of the State to effectively prosecute and punish perpetrators of violence against women contradicted the State's international legal obligations.[276] Similarly, municipal courts have also applied international legal standards

[273] *In-depth Study*, *supra* note 162, p. 89, Box 11 (compiling, *inter alia*, State reports under CEDAW, U.N. Member States' responses to the questionnaire for the ten-year review of the Beijing Platform for Action, and reports of the U.N Special Rapporteur on violence against women, its causes and consequences, and information directly provided by Member States.)
[274] *See generally* Report of the Secretary General, *Violence against Women*, U.N., GAOR, 59th Sess., U.N. Doc. A/59/281 (2004).
[275] *See, e.g.*, *id.* ¶ 65.
[276] *Maria da Penha Fernandes*, *supra* note 225, ¶ 55. *See also X and Y v. Netherlands*, E.C.H.R. Application No. 8978/80 (1985); *Aydin v. Turkey*, E.C.H.R. 23178/94 (1997); *Algür v. Turkey*, E.C.H.R. 32574/96 (2002); *MC v. Bulgaria*, E.C.H.R. 39272/98 (2003); *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T-2, 1998, I.C.T.R.; *The Prosecutor v. Dragoljub Kunarac, Radomir Kovac, and Zoran*

governing violence against women. For instance, in 1999, the Constitutional Court of South Africa held that the South African Constitution imposed an obligation on the State to provide protection from domestic violence, as an essential component of the right to equality and non-discrimination.[277]

Taken together, these international, regional, and national sources evidence an international consensus that State failure to provide effective protection from and compensation for domestic violence is a violation of human rights. Under this customary norm, "States' responsibility and obligations to address violence against women are *concrete and clear* and encompass violence committed both by State agents and non-State actors."[278] Pursuant to this obligation, States must prevent acts of violence against women, investigate and prosecute such acts when they occur, punish the perpetrators, and provide remedies and redress to the victims of acts of violence.

Vukovic, Case No. IT-96-23&23/1, 2002, I.C.T.Y.; *Karen Noelia Llantoy Huamán v. Peru, Communc'n* No. 1153/2003, Hum. Rts. Comm.; *AT v. Hungary*, Communc'n No. 2/2003, 2005, Committee on the Elimination of Discrimination against Women; *Inquiry under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women in regard to Mexico, and reply from the Government of Mexico*, Committee on the Elimination of Discrimination against Women (2005).

[277] *State v. Baloyi*, Constitutional Court of South Africa, Case CCT 29/99, p. 13 (footnotes omitted). *See also Carmichele v. Minster of Safety and Security 2001* (10) BCLR 995 (CC), ¶ 62 (holding that, where a woman was attacked by a man on bail on a rape charge, the police and prosecutors had failed to comply with the State's duty to protect women from violence).

[278] *In-depth Study*, *supra* note 162, ¶ 367 (emphasis added).

VI. THE UNITED STATES FAILED TO ACT WITH DUE DILIGENCE TO ENSURE THE RIGHTS OF JESSICA GONZALES AND HER CHILDREN.

The Inter-American system has adopted a clear standard for determining when a State may be held responsible for violations by private actors. The international responsibility of the State 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."[279] As established *supra*, Part IV, 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 and, by issuing two restraining orders that required police to seek to arrest Mr. Gonzales if he violated the orders, undertook to protect their physical

[279] *Pueblo Bello Massacre* case, *supra* note 173, ¶¶ 123-24 (quoting the European Court of Human Rights' decision in *Kiliç v. Turkey, supra* note 182); *Sawhoyamaxa Indigenous Community* case, *supra* note 190, ¶ 155. This standard was first elaborated by the European Court of Human Rights in the *Osman* case, *supra* note 182.

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,[280] and the CRPD and other local law enforcement agencies had independent knowledge of Mr. Gonzales' threatening history.[281] Third, Jessica Gonzales relied on CRPD officers to fulfill their legal obligations to protect her and her children by arresting Mr. Gonzales.[282] 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.

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

The Government claims that there was "no information available to CRPD relating to any risk of danger" to the safety of the three children.[283] This assertion is wholly unsupported by the facts. As discussed in detail *supra*, Part II, 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

[280] *See supra*, Part II.B.; Gonzales Decl. ¶¶ 19-22, 27.
[281] *See supra*, Part II.C.2.
[282] *See supra*,Part II.E; Gonzales Decl. ¶¶ 15-16.
[283] U.S. Response at 32.

children by Simon Gonzales in violation of a restraining 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.[284] As discussed *supra*, Part III.A., 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.[285] Restraining orders represent a prior judicial determination of a threat, and the violation of such orders thus subjects batterers to arrest. This system of protection 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 Inter-American Court.

[284] *E. and Others, supra* note 182, ¶ 88; *Osman v. United Kingdom, supra* note 182, ¶ 116.
[285] *See* C.R.S. 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.")

Restraining orders – which, like precautionary measures, are also 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, restraining 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 protective 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.

The European Court of Human Rights has recently emphasized the importance of providing particularly "effective protection" to vulnerable groups in the context of family violence. In *E. and Others v. United Kingdom*, the European Court of Human Rights found that the State failed to exercise due diligence to prevent violence by a third party, 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 by the domestic court to two years' probation in January 1977. The terms of his probation order stipulated that he cease to reside at the home.[286] The Court found that the State's ensuing failure, over an extended period of time, 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*

[286] *See E. and Others*, *supra* note 182, ¶ 20.

order, constituted a violation of the prohibition of torture or inhuman and degrading treatment.[287]

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."[288] Importantly, the Court found, "*[e]ven 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 had a particular "obligation to monitor the offender's conduct."[289]

Here, like in *E. and Others,* the judicial authorities of a State issued a protection 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 protection order; and State authorities were aware of previous violations of the protection 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."[290]

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[287] *Id.* ¶ 96-101.
[288] *Id.* ¶ 88.
[289] *Id.* ¶ 96.
[290] *Id. See also Sawhoyamaxa Indigenous Community case, supra* note 190 (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); *Kiliç v. Turkey*, *supra* note 182, ¶¶ 66-68. In *Kiliç*, the Court found that State 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." *Id.* ¶ 66. 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." 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, the basic principles of the case apply equally in the

In its response, the United States asserts that "the information at the time revealed no indication that Mr. Gonzales was likely to commit this tragic crime against his own children,"[291] and suggests that it was the responsibility of Jessica Gonzales, a mother distraught by the abduction of her three daughters, to rebut the presumption that the children were safe because they were with their father. Along similar lines, the United States contends that, while Mr. Gonzales had "demonstrated threatening behavior towards Jessica Gonzales and her children, Jessica Gonzales did not make this information available to the CRPD."[292] Such claims are misplaced. As discussed *supra,* Part II.C.1, the restraining order itself represented a judicial determination of a "real and immediate risk" to the children's safety; the police were required to seek arrest of Mr. Gonzales regardless of additional information they had concerning his threatening behavior. Nevertheless, information regarding Mr. Gonzales' erratic and threatening behavior was readily available, but the CRPD did not take adequate steps to find it.[293]

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

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context of a State's failure to prevent purely private acts of violence when it is aware of a "real and immediate risk."

[291] U.S. Response at 3-4.

[292] U.S. Response at 7.

[293] For instance, if the CRPD had accessed Jessica Gonzales' application for the order of protection, they would have discovered that Mr. Gonzales's recent threatening behavior was directed both at the children and Ms. Gonzales. *See* Application for Restraining Order, Ex. __. If the CRPD had given Jessica Gonzales the opportunity to discuss her concerns with them, they might have learned that on Mr. Gonzales' most recent parenting visit he caused the children physical pain and that the girls did not want to spend more time with their father. *See* Gonzales Decl. ¶¶ 29, 44 ("I protested, again emphasizing that the restraining order did not permit Simon to have contact with the children that night, but the officers kept interrupting me, putting words in my mouth, and not letting me voice my concerns to them. I could barely even complete a sentence.") The CRPD did not use any of these methods to evaluate the risk that Mr. Gonzales posed to his children.

seek such orders in the first place. Unfortunately, "the issuance of an order of protection results in a high likelihood of retaliation by the batterer."[294] Indeed, the mere fact that a woman seeks the assistance of the courts may well motivate her batterer to retaliate.[295] Accordingly, the protection 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.[296] As established *supra*, Parts IV and V, the State must take preventive measures that "provide effective protection, in particular, of children and other

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[294] Caitlyn E. Borgman, Note: *Battered Women's Substantive Due Process Claims: Can Orders of Protection Deflect DeShaney?*, 65 NYU L. Rev. 1280, 1308 (1990).
[295] *See* Michelle R. Waul, *Civil Protection Orders: An Opportunity for Intervention with Domestic Violence Victims*, 6 Geo. Public Pol'y Rev. 51, 56 (2000).
[296] *See Osman, supra* note 182, ¶ 115; *Kiliç v. Turkey*, *supra* note 182, ¶ 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.").

vulnerable persons."[297] Such measures include training on how to 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."[298] 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."[299] 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 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."[300]

The Government asserts that here, the CRPD acted "diligently and responsibly" in light of the perceived risks to Jessica Gonzales and her children.[301] Again, this claim is misplaced. In the first place, the CRPD failed to abide by the explicit requirements of Colorado's mandatory arrest law. The statute contains minimum requirements governing

[297] *E. and Others*, *supra* note 182, ¶ 88.
[298] *Osman*, *supra* note 182, ¶ 116.
[299] *Osman*, *supra* note 182, ¶ 116.
[300] *See, e.g.*, *E. and Others*, *supra* note 182, ¶ 99.
[301] U.S. Response at 32.

State conduct and is clear and specific as to how to protect vulnerable persons following a judicial determination of risk. The mandatory arrest law is evidence of the degree of responsibility that the State has assumed for protecting specific vulnerable individuals.[302] The sole purpose of the Colorado mandatory arrest law and system for the issuance of protective orders is to protect victims of gender-based and domestic violence from future physical and emotional harm inflicted by the objects of such orders.[303] The statute placed an obligation on the State actually to take the promised steps to ensure victims' continuing safety, particularly in light of the historical underenforcement of domestic violence restraining orders by law enforcement.[304] 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

[302] The United States represented, in the Second and Third Periodic Report of the United States of America to the U.N. Committee on Human Rights Concerning the International Covenant on Civil and Political Rights, that "[a]ll states have laws allowing victims of domestic violence to apply to a court for a protection order against their abuser" and that "VAWA requires states, territories, and Indian tribes to enforce protection orders issued by other jurisdictions if certain statutory requirements are met." U.N. Doc. CCPR/C/USA/3 (Nov. 28, 2005), at Annex II, at117.
[303] *See supra*, Part II.E.2.ii.
[304] *See supra*, Part II.E.2.iii.

the mandatory arrest of any person who violates a protective 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 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.[305] 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.

Here, 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. Just 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,

[305] *See* Gonzales Decl. ¶ 79.

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,"[306] and thereby 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. 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.[307] 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.[308] Through this record, officers would 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

[306] *Kiliç v. Turkey*, *supra* note 182, ¶ 76.
[307] *See supra*, Part II.C.2.
[308] Gonzales Decl. ¶¶ 19-22, 27. An arrest for violating a restraining order dramatically reduces the probability of harm occurring. *See supra*, Part III.A.

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.

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 attached Declaration of Randy Saucedo, and *supra*, Part III.B.3, proper training of the CRPD in adequate responses to domestic violence may have averted the Gonzales tragedy.[309] Had CRPD officers had been properly trained on 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. Officer Brink would have recognized that Ms. Gonzales had a restraining order, not a divorce decree.[310] Following these basic policing practices may have averted the Gonzales tragedy.

[309] *See* Gonzales Petition, Background and Patterns Section; Exhibit 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.
[310] *See supra* at Part II.B.3. .

D. No Prudential Factors Exist In This Case Counseling In Favor Of Judicial Hesitation.

The Government cites *Osman* for the proposition that the positive obligation to prevent private acts of violence must be interpreted in a manner "which does not impose an impossible or disproportionate burden on the authorities."[311] In that case, the European Court on Human Rights was not persuaded that police 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. Several of the prudential limitations that counseled in favor of judicial restraint in the *Osman* case, however, simply do not exist in the present case.

First, the court-issued restraining order and the statutory provisions for mandatory arrest, clearly reflected in capital letters in the order's notice, stand in stark contrast to the situation considered in *Osman*. 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.[312] 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.[313] 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

[311] U.S. Response at 32; *Osman*, *supra* note 182, ¶ 116.
[312] *Osman*, *supra* note 182, ¶ 121.
[313] Gonzales Petition, Exhibit A: May 21, 1999 Temporary Restraining Order; *see supra* at *Part II.D.1*.

suspicion, consistent with due process, to use these powers.[314] 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 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.[315] 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.

Third, the United States 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 protective orders, a system of protection which the State itself devised and which it represented as providing an effective measure of protection against the threat posed by domestic violence.

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[314] *Cf. id.* ¶ 121.
[315] *Supra* Part II.C.; Colo. Rev. Stat § 18-6-803.5(3)(b) (1999). *See also* Petition, Ex. A.

VII. THE UNITED STATES HAS DENIED JESSICA GONZALES THE RIGHT TO AN EFFECTIVE REMEDY.

The United States asserts that its judicial system provides persons such as Jessica Gonzales with access to justice and effective remedies in circumstances where, as here, failures by the State result in violation of rights protected under the American Declaration.[316] In support of this proposition, the United States lists an array of judicial remedies potentially available to victims of domestic violence and summarily concludes that the only reason Jessica Gonzales could not avail herself of any federal judicial remedies is because the facts she alleged did not represent a violation of her rights.[317] The United States also suggests that Jessica Gonzales's own negligence prevented her from availing herself of state judicial remedies.[318] As detailed below, in fact, neither the state nor the federal judicial system provided Jessica Gonzales with access to an effective remedy for the CRPD's failure to take reasonable measures to protect against the violation of her rights and those of her children by her estranged husband, Simon Gonzales.

A. Jessica Gonzales Was Entitled to an Effective Remedy for the State's Failure to Exercise Due Diligence In Protecting Her and Her Children's Rights.

Articles XVIII and XXIV of the American Declaration require that a State provide a remedy whenever rights protected by the Declaration are violated.[319] As the

[316] U.S. Response at 14-16, 21-23.
[317] U.S. Response at 37.
[318] U.S. Response at 21-23.
[319] 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 Communities 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, ¶ 174 (2004); *Maria da Penha 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, ¶ 37 (2000). This right has long been recognized under international law. *See e.g.* Universal Declaration of Human Rights, Article 8, G.A. Res. 217A (III), U.N.

Inter-American Court has repeatedly stated, 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.[320] 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.[321]

GAOR, 3d Sess. Supp. No. 49, U.N. Doc. A/810 (1948); International Covenant on Economic, Social and Cultural Rights, 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, Art. 2(3); United Nations Human Rights Committee General Comment 31[80] *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004); American Convention on Human Rights, O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123, *entered into force* July 18, 1978, Arts. 8, 25 and 63(1). The Inter American Court has stated that this principle is a norm of customary international law. *See, e.g., Villagran Morales et. al. Case (the "Street Children" Case*), 2001 Inter-Am. Ct. H.R.(ser. C) No. 77, at 62 (May 26, 2001); *Aloeboetoe et al. Case*, 1993 Inter-Am. Ct. 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. Ct. 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 Páez Case*, *Reparations,* 1997 Inter-Am. Ct. H.R. (ser. C) No. 34, at 82-83 (Nov. 3, 1997) (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. Ct. H.R. (ser. C) No. 31, at 65 (Nov. 12, 1997). *See also Paniagua Morales et. al. Case*, 1998 Inter-Am. Ct. H.R. (ser. C) No. 37, at 164 (Mar. 8, 1998); *Loayza Tamayo Case, Reparations*, 1998 Inter-Am. Ct. H.R. (ser. C) No. 42, 169 (Nov. 27, 1998), *supra* 31; and *Castillo Páez Case, Reparations*, *supra* 31, ¶ 106; *Blake Case, Reparations*, 1999 Inter-Am. Ct. 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 of 21 September 2005, at ¶¶ 277-292; *Yusuf v Council of the European Union and Commission of the European Communities*, Case T-306/01, Judgment of the Court of First Instance of 21 September 2005, ¶¶ 332-346.

[320] *See Constitutional Court Case*, 2001 Inter-Am. Ct. H.R., (ser. C) No. 71 ¶ 89 (Jan. 31, 2001): "The inexistence of an effective recourse against the violation of the rights recognized by the Convention constitutes a transgression of the Convention by the State Party in which such a situation occurs. In that respect, it should be emphasized that, for 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." *See also Duran & Ugarte Case*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 68, at 118, ¶ 62 (Aug. 16, 2001); *Cantoral-Benavides Case*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 88, at 164 (Dec. 3, 2001. In the *Gonzales* case, it is clear that this standard was not met and that the recourses offered were illusory.

[321] *The Mayagna (Sumo) Awas Tingni Community Case*, 2000 Inter-Am. Ct. H.R., (ser. C) No. 66, at 113-114 (Feb. 1, 2000); *Constitutional Court Case*; *Ivcher Bronstein Case,* 2001 Inter-Am. Ct. 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, (Arts. 27(2), 25 and 8 of the American Convention on Human Rights),* Advisory Opinion OC-9/1987, Inter-Am. Ct. H.R. (ser. A) No. 9, ¶ 24 (Oct. 6, 1987). *See also, Velasquz Rodriguez Case*, 1988 Inter-Am. Ct. H.R.

The United States was obligated to provide Jessica Gonzales with a remedy to compensate her for its failure to take reasonable measures to protect her rights and those of her children from violence at the hands of Mr. Gonzales, but failed to do so. Ms. Gonzales was denied such a remedy because in most instances, courts in the United States do not recognize as remediable the State's failure to adopt reasonable measures to protect individuals from private violence.[322] Thus, while Jessica Gonzales was afforded access to state and federal courts, neither system was capable of furnishing her with a remedy that could effectively address the violation of her or her daughters' rights.

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

The United States suggests that Jessica Gonzales simply neglected to pursue a civil tort suit under Colorado law against either the Town of Castle Rock or the individual officers involved, although such a cause of action was available to her.[323] This is not the case. Rather, she determined that such claims would ultimately prove 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.[324]

(ser. C) No. 4, at 64 (Jul. 29, 1988); *Godinez Cruz Case*, 1989 Inter-Am. Ct. H.R. (ser. C) No. 5, at 67 (Jan. 20, 1989)

[322] *See generally Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005); *DeShaney v. Winnebago Dep't of Soc. Servs.*, 489 U.S. 189 (1989).

[323] U.S. Response at 21-22.

[324] Col. Rev. Stat. § 24-10-108. None of the exceptions enumerated in §§ 24-10-104 to 24-10-106 applied in this case.

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.[325] For Jessica Gonzales to have prevailed in such a suit, 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."[326] 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…*"[327]

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."[328] 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

[325] Aside from the immunity bar, doctrinal hurdles in Colorado tort law render recovery extraordinarily difficult in domestic violence cases. To take one example, the causation requirement is such that even if a state actor has acted wrongly, no liability attaches unless the plaintiff shows that the injury suffered could have been reasonably foreseen by the state actor. See e.g., *Smith v. State Comp. Ins. Fund*, 749 P.2d 462, 464 (Colo. App. 1987). To the extent doctrinal hurdles such as the causation requirement prevent a remedy from being granted where state actors fail to take reasonable measures to protect and ensure rights, tort law cannot be considered an effective remedy.

[326] Col. Rev. Stat. § 24-10-118(2)(a).

[327] *Id.* (emphasis added).

[328] *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) and *Rivers v. Alderden*, 2006 U.S. Dist. LEXIS 14763 (D. Colo. Mar. 17, 2006).

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.[329] Because Colorado state law allows recovery only where the state agent willfully or wantonly failed to act, Jessica 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. In *Osman v. the United Kingdom*, the European Court of Human Rights ("the European Court") was faced with a similar situation where domestic law imposed a more restrictive standard for state liability than standards imposed under international law (in this case the European Convention). In *Osman*, a school teacher shot and wounded one of his students, Osman, and killed the student's father.[330] 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 sought and was denied a remedy against the police for their negligence in the English courts before eventually filing his claim with the European Court. 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 …."

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

[329] *E.g.*, *Rohrbough v. Stone*, 189 Fed. 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); *Ruegsegger v. Jefferson County Board of County Commissioners*, 197 Fed. Supp. 2d 1247, 1265 (D. Colo. 2001) (same); *Whitcomb v. City and County of Denver,* 731 P.2d 749, (Colo. App. 1986).
[330] *Osman v. The United Kingdom*, 23452/94 Eur. C H.R. Dec. & Rep. CHR 101 (1998).

disregard of the duty to protect. [331] 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.[332] 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 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."[333]

As in *Osman*, the standards imposed by the CGIA confers a similar 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 remedy in this case. [334]

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[331] *Id*., ¶¶ 63-66 and 148.,.
[332] *Id*. ¶ 147.
[333] *Id*. ¶ 151.
[334] *See also*, *E and Others v. the United Kingdom*, 33218/96 Eur. Ct. H.R., (2002) ¶¶ 109-117 (holding that the applicants right to a remedy under the European Convention had been violated because State immunity laws established a virtual bar against recovery in negligence which denied the applicants a means of obtaining a declaration that the local authority had failed to take reasonable measures to protect them.)

Citing to *Osman*, the Inter-American Court applied the proportionality standard in the *Cantos* case, involving excessive and exorbitant Argentinean court filing fees of 3% of the amount of relief being claimed: "[t]his Court considers 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 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

C. 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. As noted, this federal claim was ultimately rejected by the highest appellate court in the United States, the U.S. Supreme Court.[335] The Supreme Court's reasoning in Ms. Gonzales' case and in previous jurisprudence 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.[336] The United States does not argue to the contrary.

In its Response, the United States asserts that Jessica Gonzales could instead have sought effective remedies under the Equal Protection Clause of the United States Constitution.[337] Specifically, the United States points out that in some federal cases, victims of domestic violence have "established liability of police for failure to protect when they have successfully demonstrated that . . . a police policy of failing to protect domestic violence or stalking victims had a discriminatory impact on women because they are most often the victims of such crimes."[338] The United States misstates the standard applied in such cases. Although federal courts have on occasion provided

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Argentine law. In this regard, *See also*, *Osman v. the United Kingdom*, 23452/94 [1998] Eur. Comm'n H.R. Dec. & Rep. 101, (1998) ¶¶ 147, 148, 152.

[335] *See* Gonzales Petition at 13-20.

[336] *See Gonzales v. City of Castle Rock*, 125 S. Ct. 2796 (2005); *DeShaney v. Winnebago County Department of Social Services,* 489 U.S. 189.

[337] U.S. Response at 14-15, 37.

[338] U.S. Response at 14.

remedies to victims of domestic violence under the Equal Protection Clause in cases where victims have shown that police failure to protect the victim was the result of discriminatory intent,[339] contrary to the United States' contention, 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 the "discriminatory impact on women" outlined by the United States. 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]."[340] Because neither evidence of a policy's adverse impact on women nor evidence of a decisionmaker's awareness of this impact is sufficient standing alone to establish intentional discrimination, sex discrimination claims challenging a police department's response to domestic violence have typically failed in the absence of "smoking gun" evidence in the form of discriminatory statements by law enforcement personnel. [341]

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[339] *Id*. (citing *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Ct. 1984) and *Fajardo v. County of Los Angeles*, 179 F.3d 698 (9th Cir. 1999)).

[340] *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 victim of domestic violence could not prove equal protection violation where she 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 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).

[341] *Eckert v. Town of Silverthorne*, 25 Fed. 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).

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 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.[342]

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. For instance, if Jessica Gonzales successfully showed that the CRPD treated the kidnapping of her daughters by Simon Gonzales differently than they treated stranger

[342] *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); S*ee also*, *Ricketts v. City of Columbia, Mo.*, 36 F.3d 775, 781-82 (8th Cir. 1994) ("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.").

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, there was some basis in reason to assume that they were safe.[343] 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.[344]

Finally, in the context of possible federal remedies, Jessica Gonzales' fundamental right to a hearing should be considered. Her federal court challenge was dismissed without consideration of the substance of her claims.[345] Not only did this deny her a substantive remedy, it also deprived her of a judicial finding of fact as to the acts

[343] *See*, *e.g.*, *Sullivan v Stroop*, 496 U.S. 478 (1990) (concluding that distinctions 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)).
[344] As discussed in the Gonzales Petition, Section IV 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.
[345] *See* Gonzales Petition at 69; U.S. Response at 10.

and omissions that led to the deaths of her children. 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 the elucidation of the facts…*"[346] This was particularly important when the denial of fundamental rights – including the right to life – were at issue. 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.[347]

In sum, because the state and federal courts failed to provide Jessica Gonzales with meaningful remedies for the CRPD's failure to respect and ensure her fundamental rights, her access to the federal judicial system did not constitute the effective remedy required under the American Declaration.[348]

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[346] *Ximenes Lopez v. Brazil*, ¶ 194. *See also Bámaca Velásquez Case*, Inter-Am. Ct. H.R., (Ser. C) No. 91 (2002) ¶¶ 75 & 76; *Maria da Penha Fernandes v. Brazil*, Case 12.051, Report No. 54/01, OEA/Ser.L/V/II.111 Doc. 20 rev. at 704 (2000) ¶ 37; *Osman v. the United Kingdom*, 23452/94 [1998] Eur. Comm'n H.R. Dec. & Rep. 101, (1998) ¶ 153.

[347] *Ximenes Lopez v. Brazil*, at ¶148; *Gustavo Carranza v. Argentina*, Case 10.087, Report Nº 30/97, Inter-Am. C.H.R., OEA/Ser.L/V/II.9 Doc. 7 rev. (1997) 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 at page 602.

[348] Also in relation to Petitioner's right to a remedy, the United States' requests this Commission to consider relevant Mr. Gonzales' death. *See* U.S. Response at 39. *See also,* U.S. Response at 22 & 37 ("…the Commission should not lose sight of the fact that had Petitioner's husband not been killed…additional remedies would have been available..."). Incredibly, the United States advances the argument that had Mr. Gonzales lived, "*a whole range of more straight forward remedies*" would have been available to Petitioner such as, for example, contempt of court proceedings for violation of the restraining order. This argument is misplaced as it misconstrues the conduct for which Petitioner seeks redress. Petitioner does not seek a remedy for Mr. Gonzales' violations of her rights and those of her children. Rather, she seeks a remedy for the failure of the State to act with due diligence to ensure that those rights were adequately protected from violation by her estranged husband. Mr. Gonzales' subsequent death has no bearing whatsoever on the issue of remedies available for the misconduct of the State and the United States' suggestion that it is somehow relevant on the issue of Petitioner's right to a remedy simply clouds the issue. Cf. *Osman v. the United Kingdom*, 23452/94 [1998] Eur. Comm'n H.R. Dec. & Rep. 101, (1998), ¶ 153, where the European Court dismissed a similarly misplaced argument.

VIII. CONCLUSION AND PRAYER FOR RELIEF

In consideration of the foregoing, Petitioner Jessica Ruth Lenahan (Gonzales) requests that the Commission provide the following relief:

1. Declare the Petition of Jessica Gonzales admissible;

2. Investigate, with hearings and witnesses as necessary, the facts alleged by Jessica Gonzales in the Petition and the Observations contained herein;

3. Specifically, provide Jessica Gonzales the opportunity to testify before this Commission;

4. Declare the United States of America to be in violation of Articles I, II, V, VI, VII, IX, XVIII, and XXIV of the American Declaration;

5. Issue a report in accordance with Article 43.2 of the Commission's Rules of Procedure in the most expedited manner possible, and incorporate into that report the following findings and recommendations:

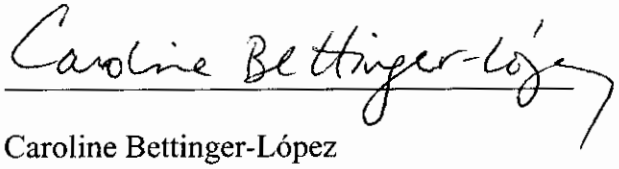
(a) The United States should financially compensate Ms. Gonzales for the violation of her rights and the rights of her children; and

(b) The United States should adopt measures aimed at eradicating domestic violence in the State of Colorado and throughout the country, including, *inter alia*, legal reform to ensure that the terms of domestic violence restraining orders are effectively enforced in accordance with the law; the provision of legal remedies for victims who fail to receive such enforcement; the creation of support services for victims of domestic violence; and projects aimed at educating and sensitizing police officers on the root causes of domestic violence and its effects on its victims.

6. Request the Inter-American Court of Human Rights to deliver an advisory opinion on the nature and full extent of United States obligations under the American Declaration in light of 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).

Dated: December 11, 2006

Respectfully submitted:



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