

## HUMAN RIGHTS AT HOME: DOMESTIC VIOLENCE AS A HUMAN RIGHTS VIOLATION

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On March 2, 2007, Jessica Lenahan (formerly Gonzales)<sup>1</sup> spoke at the Inter-American Commission on Human Rights in Washington, D.C. about why she thought the United States was responsible for human rights violations against her and her deceased children. Before four commissioners, a U.S. State Department delegation, and members of the general public, she testified about how local police in Colorado refused to enforce a domestic violence restraining order against her estranged husband in 1999, and how her three daughters were tragically killed as a result. She discussed how her federal lawsuit against the police wound its way to the U.S. Supreme Court, which held in 2005 that she had no constitutional right to police enforcement of her restraining order. And she asked the Commission to investigate the disconcerting circumstances

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1. Ms. Gonzales has since remarried and now goes by "Jessica Lenahan." For consistency reasons, I refer to her here as "Jessica Gonzales," the name used in her legal filings.

surrounding her daughters' deaths and to help her locate forensics and investigatory information that Colorado authorities had thus far refused to provide. This was Ms. Gonzales's first opportunity to tell her story to a tribunal since her constitutional claims had been rejected by U.S. courts prior to discovery. The audience sat transfixed as she spoke.

*Jessica Gonzales v. United States*, currently pending before the Commission, has already had a profound impact on Ms. Gonzales and her family. It has allowed Ms. Gonzales to keep alive public discussion about law enforcement's responsibility to her as a domestic violence victim, the legal remedies she was denied in the wake of her tragedy, and the Colorado authorities' obligation to provide the Gonzales family with answers to lingering questions about the girls' deaths.

But the *Gonzales* case also stands for something larger. Domestic violence is among the most dangerous and common forms of gender-based violence in the United States. As her petition highlights, the challenges confronted by Ms. Gonzales—a Colorado native of Hispanic and Native American origin—were representative of those of countless victims, especially women of color. Black, Hispanic, Native American, and immigrant domestic violence victims—the vast majority of whom are women—experience egregious discrimination at the intersections of race, ethnicity, class, and gender, and are among those at greatest risk of being underserved or inappropriately served by the police and other governmental agencies. In addition to seeking an individual remedy in the form of financial compensation and equitable relief, Ms. Gonzales's petition urges legal and programmatic reform in the domestic violence arena in the United States, in order to address the larger systemic problems that her case represents.

*Jessica Gonzales v. United States* marks the first time the Commission has been asked to consider the nature and extent of the U.S. Government's affirmative obligations to protect individuals from private acts of discriminatory violence. The case gives the Commission the opportunity to hold the United States to well-established international standards on state responsibility to exercise "due diligence" to prevent, investigate, and punish human rights violations and protect and compensate victims.<sup>2</sup> The *Gonzales*

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2. See United Nations Convention on the Elimination of All Forms of

case offers advocates the opportunity to contrast existing U.S. law and policy in the civil rights arena with international human rights principles. While the former provides only limited opportunities for private relief against governmental officers and has suffered a significant rollback in recent years, the latter holds federal, state, and local government actors to a higher and more expansive standard. Indeed, international human rights principles—in contrast to U.S. constitutional jurisprudence—make clear that the government has an affirmative obligation to protect individuals from private acts of violence, to investigate alleged violations and publicly report the results, and to provide an adequate and effective remedy when these duties are breached.

*Gonzales* has also facilitated the mobilization of new coalitions among women's rights and domestic violence advocacy groups. By framing domestic violence as a human rights violation, the case challenges advocates and policymakers to re-think our country's current approach to domestic violence, and asks whether fundamental rights—to life, security, family, due process, equality, truth, and freedom from torture and cruel, inhuman, and degrading treatment—are being respected and fulfilled. This holistic approach has the potential to spur development of new legal theories of governmental accountability for failure to protect domestic violence victims. The human rights framework pushes us to consider whether our country's current response to domestic violence, based largely upon a criminal justice model, is really a one-size-fits-all solution for protecting victims, especially those from communities that have troubled histories with law enforcement.

This article tells the story of Jessica Gonzales's international quest for justice, her initiation of the first international legal action

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Discrimination against Women, art. 2, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 14 (declaring states' obligation to eliminate discrimination against women and give them effective legal protections against discrimination); *see also* The Secretary-General, *Report of the Secretary-General on the In-depth Study on All Forms of Violence Against Women*, ¶¶ 255–57, *delivered to the General Assembly*, U.N. Doc. A/16/122/Add.1 (July 6, 2006) (discussing states' due diligence responsibilities under international law to address acts of violence against women and provide a remedy, including against non-State actors, when the State has failed its duty); Dinah L. Shelton, *Private Violence, Public Wrongs, and the Responsibilities of States*, 13 *Fordham Int'l L.J.* 1, 21–23 (1990) (discussing states' due diligence responsibility in regards to the protection of aliens, including providing effective remedies when that duty is breached).

against the United States for violating the human rights of a domestic violence victim, and the impact of her journey on domestic violence and human rights advocacy in the United States and abroad. While her story could not have unfolded without Ms. Gonzales' very personal drive and commitment, it holds the potential to reshape domestic violence advocacy in the United States, and more broadly, the role of human rights standards in the domestic legal landscape.

### I. THE *GONZALES* CASE: FACTUAL BACKGROUND AND THE U.S. FEDERAL COURTS

The details of the *Gonzales* case are gruesome and tragic, and occur against the backdrop of a national problem of enormous proportions. In 1999, Jessica Gonzales, her husband Simon Gonzales, and their four children were working class residents of Castle Rock, Colorado—a largely white, upper middle class town about 35 miles from Denver whose population in 2000 numbered approximately 20,000.<sup>3</sup> Simon Gonzales had a history of abusive and erratic behavior, and by early 1999 he was growing increasingly unpredictable and threatening toward his family. In May and June 1999, Jessica Gonzales obtained two domestic violence restraining orders (one temporary, one permanent) against Simon Gonzales as part of a divorce action.<sup>4</sup> The orders required Mr. Gonzales to stay away from Jessica Gonzales and their children. The permanent order, dated June 4, 1999, allowed for Simon Gonzales's visitation with the children on alternate weekends and for one dinner a week at

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3. See City-Data.com, Castle-Rock, Colorado, <http://www.city-data.com/city/Castle-Rock-Colorado.html> (last visited Oct. 9, 2008).

4. Temporary Restraining Order, 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 on the Merits Ex. A, *Gonzales v. United States*, Petition No. 1490-05, Inter-Am. C.H.R., Report No. 52/07, OEA/Ser.L./V/II.128, doc. 19 (2007), available at [http://www.law.columbia.edu/center\\_program/human\\_rights/InterAmer/GonzalesvUS](http://www.law.columbia.edu/center_program/human_rights/InterAmer/GonzalesvUS) (follow hyperlink to Exhibits, Dec. 2005, "Temporary Restraining Order") [hereinafter Temporary Restraining Order]; Permanent Restraining Order, 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 on the Merits Ex. B, *Gonzales v. United States*, Petition No. 1490-05, Inter-Am. C.H.R., Report No. 52/07, OEA/Ser.L./V/II.128, doc. 19 (2007), available at [http://www.law.columbia.edu/center\\_program/human\\_rights/InterAmer/GonzalesvUS](http://www.law.columbia.edu/center_program/human_rights/InterAmer/GonzalesvUS) (follow hyperlink to Exhibits, Dec. 2005, "Permanent Restraining Order") [hereinafter Permanent Restraining Order].

a time prearranged by the parties.<sup>5</sup> A preprinted notice to law enforcement on the back of the restraining order quoted Colorado's mandatory arrest law, which states that "[a] peace officer shall use every reasonable means to enforce a restraining order," and that upon finding probable cause of a violation of the restraining order, "[a] peace officer shall arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest of [the] restrained person."<sup>6</sup> Pursuant to the terms of the order, Jessica and Simon Gonzales agreed that he could visit with the girls for dinner each Wednesday night.<sup>7</sup>

Several weeks later, on Tuesday, June 22, 1999 at approximately 6:00 p.m., Simon Gonzales abducted their three daughters—Leslie, 7, Katheryn, 8, and Rebecca, 10—while they were playing in their front yard.<sup>8</sup> Ms. Gonzales contacted the Castle Rock Police Department ("CRPD") nine times over the course of nearly ten hours to report the abduction and restraining order violation and to seek help in locating her children and arresting Mr. Gonzales.<sup>9</sup> Her increasingly desperate calls and in-person pleas went unheeded, despite Colorado's "mandatory arrest" law and the fact that Mr. Gonzales had seven run-ins with the CRPD—many domestic violence-related—in the preceding three months.<sup>10</sup> At 8:30 p.m., Jessica Gonzales made cell phone contact with Simon Gonzales and learned that he was with the children at Elitch Gardens Amusement Park in Denver, approximately forty miles from Castle Rock. When she communicated this information to the CRPD, the officers told her that Denver was outside of their jurisdiction, that there was nothing

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5. Permanent Restraining Order, *supra* note 4.

6. *Id.*; see also Colo. Rev. Stat. § 18-6-803.5(3)(a)–(b) (1999).

7. Declaration of Jessica Ruth Lenahan (Gonzales), Observations Concerning the Sept. 22, 2006 Response of the United States Government Ex. E, ¶ 34, *Gonzales v. United States*, Petition No. 1490-05, Inter-Am. C.H.R., Report No. 52/07, OEA/Ser.L/V/II.128, doc. 19 (2007), available at [http://www.law.columbia.edu/center\\_program/human\\_rights/InterAmer/GonzalesvUS](http://www.law.columbia.edu/center_program/human_rights/InterAmer/GonzalesvUS) (follow hyperlink to Exhibits, Dec. 2006, "Declaration of Jessica Ruth Lenahan Gonzales") [hereinafter *Gonzales Declaration*].

8. Final Observations Regarding the Merits of the Case 6–39, *Gonzales v. United States*, Petition No. 1490-05, Inter-Am. C.H.R., Report No. 52/07, OEA/Ser.L/V/II.128, doc. 19 (2007), available at [http://www.law.columbia.edu/center\\_program/human\\_rights/InterAmer/GonzalesvUS](http://www.law.columbia.edu/center_program/human_rights/InterAmer/GonzalesvUS) (follow hyperlink to "3.24.08 Merits Brief") [hereinafter *Merits Brief*].

9. *Id.*

10. *Id.*

they could do, and that she should simply wait for her husband to return home with the children.<sup>11</sup>

Nearly ten hours after Jessica Gonzales's first call to the police, Simon Gonzales, armed with a gun he had purchased that evening, arrived at the police station, got out of his truck, and opened fire. The police shot and killed him, and then discovered the bodies of the three Gonzales children inside the truck.<sup>12</sup> Their bodies contained numerous bullet holes that autopsy reports later indicated were of different sizes and came from that bullets had entered their bodies from multiple angles. Importantly, Simon Gonzales was positioned next to the truck during the shootout, and photos from local newspapers indicate that the truck's doors and windows were riddled with police bullets during the exchange of gunfire.<sup>13</sup>

The Colorado authorities conducted an investigation into the police officers' use of deadly force upon Simon Gonzales.<sup>14</sup> Their

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11. A subsequent review of police records revealed that after this incident, the CRPD Dispatcher entered into the computer that Jessica Gonzales's children "had been found," and that there was "NCA" (no criminal activity), even though Mr. Gonzales had clearly violated a restraining order and was prohibited by law from being with the children. *See* Merits Brief, *supra* note 8, at 33–35.

12. *See* Petition Alleging Violations of the Human Rights of Jessica Gonzales by the United States of America and the State of Colorado, with Request for an Investigation and Hearing on the Merits 7–20, *Gonzales v. United States*, Petition No. 1490-05, Inter-Am. C.H.R., Report No. 52/07, OEA/Ser.L/V/II.128, doc. 19 (2007), available at [http://www.law.columbia.edu/center\\_program/human\\_rights/InterAmer/GonzalesvUS](http://www.law.columbia.edu/center_program/human_rights/InterAmer/GonzalesvUS) (follow hyperlink to "Petition to Inter-American Commission on Human Rights, Dec. 2005") [hereinafter *Gonzales Petition*]; *see also* Merits Brief, *supra* note 8; Observations Concerning the September 22, 2006 Response of the United States Government 5–34, *Gonzales v. United States*, Petition No. 1490-05, Inter-Am. C.H.R., Report No. 52/07, OEA/Ser.L/V/II.128, doc. 19 (2007), available at [http://www.law.columbia.edu/center\\_program/human\\_rights/InterAmer/GonzalesvUS](http://www.law.columbia.edu/center_program/human_rights/InterAmer/GonzalesvUS) (follow hyperlink to "Brief to Inter-American Commission on Human Rights, Dec. 2006") [hereinafter *Observations Concerning U.S. Response*].

13. *See Police Near Denver Kill Man in Shootout; Find Daughters Dead in Truck*, CNN.com, June 24, 1999, <http://www.cnn.com/US/9906/24/colorado.gonzales.01/>; Jason Blevins, *Dad Attacks Police, dies; 3 Daughters Found Slain in Pickup*, Denver Post, June 24, 1999, at A-01.

14. Eighteenth Judicial District Critical Incident Team Shooting of Simon Gonzales Castle Rock PD Case #99-3326, Final Observations Regarding the Merits of the Case Ex. C, *Gonzales v. United States*, Petition No. 1490-05, Inter-Am. C.H.R., Report No. 52/07, OEA/Ser.L/V/II.128, doc. 19 (2007), available at [http://www.law.columbia.edu/center\\_program/human\\_rights/InterAmer/GonzalesvUS](http://www.law.columbia.edu/center_program/human_rights/InterAmer/GonzalesvUS) (follow hyperlink to "3.24.08 Merits Brief") [hereinafter *Critical Incident*].

investigatory report summarily concluded, without supporting evidence, that the children had been murdered by their father with a gun he had purchased earlier that evening. Despite Ms. Gonzales's repeated requests, no subsequent investigation into the girls' deaths took place. It appears that the Colorado authorities never examined the truck or investigated whether police bullets had penetrated the truck's interior and whether the bullets found inside the girls' bodies came from Simon Gonzales's gun, the officers' guns, or both.<sup>15</sup>

Jessica Gonzales filed a § 1983 lawsuit<sup>16</sup> against the police in federal court, alleging violations of the procedural and substantive components of the Fourteenth Amendment's Due Process Clause. Her procedural due process claim rested on the assertion that the restraining order, coupled with Colorado's mandatory arrest law, entitled her to a response from the police—in essence, a property right that could not be denied her without fair procedure. She also argued that the police violated her children's substantive due process rights when they failed to take reasonable steps to protect her children from the real and immediate risk posed by their father.<sup>17</sup> Before reaching discovery, the district court dismissed both claims.<sup>18</sup>

On appeal, the Tenth Circuit Court of Appeals, sitting *en banc*, reversed the district court's dismissal of the procedural due process claim, but affirmed the dismissal of the substantive due process claim. In rejecting the substantive due process claim, the Tenth Circuit relied on *DeShaney v. Winnebago City Department of Social Services*,<sup>19</sup> a U.S. Supreme Court case holding that the government, in most circumstances, has no duty to protect individuals from private acts of violence.<sup>20</sup> *DeShaney* concerned the

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Team Shooting].

15. See Merits Brief, *supra* note 8, at 33–37.

16. Section 1983 creates a federal remedy against a state official for the violation of federal rights. See 42 U.S.C. § 1983 (2000).

17. See *Gonzales v. City of Castle Rock*, No. Civ.A.00 D 1285, 2001 WL 35973820, at \*1 (Jan. 23, 2001) (dismissing plaintiff's due process claims under 42 U.S.C. § 1983 for failure to establish the existence of a protectable due process interest created by the restraining order).

18. See *id.* at \*5.

19. *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989) (holding that the Due Process Clause does not impose an affirmative obligation on the state to “guarantee . . . certain minimal levels of safety and security” for individuals at risk of private, third-party violence).

20. See *Gonzales v. Town of Castle Rock*, 366 F.3d 1093 (10th Cir. 2004) (finding that the Colorado Police's refusal to enforce the Gonzales restraining

failure of child protection services to respond to calls from a child's mother expressing concern over potential abuse by the child's father. Ultimately, the father in *DeShaney* inflicted grave injury upon his son Joshua.

The Supreme Court granted certiorari on the procedural due process claim. In June 2005, Justice Scalia, writing for the 7–2 majority, reversed the Tenth Circuit and held that Ms. Gonzales had no personal entitlement under the Due Process Clause to police enforcement of her restraining order.<sup>21</sup> Despite the Colorado legislature's repeated use of the word "shall" in the mandatory arrest law, the Court explained, "[w]e do not believe that these protections of Colorado law truly made enforcement of restraining orders *mandatory*."<sup>22</sup> It was also unclear, the Court thought, whether the preprinted notice on the back of Ms. Gonzales's restraining order required the police to arrest Mr. Gonzales, seek a warrant for his arrest, or enforce the order in some other way. This uncertainty, according to the majority, was further evidence of police discretion over enforcement.<sup>23</sup> The Court also refused to assume that the statute was intended to give victims "a personal entitlement to something as vague and novel as enforcement of restraining orders," rather than simply protect the public interest in punishing criminal behavior.<sup>24</sup> Finally, the Court reasoned that even assuming Ms. Gonzales had overcome these obstacles, "it is by no means clear that an individual entitlement to enforcement of a restraining order could constitute a 'property' interest for purposes of the Due Process Clause."<sup>25</sup> "In light of today's decision and that in *DeShaney*," the

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order violated procedural due process).

21. See *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005) (reversing the 10th Circuit's holding that the enforcement of a restraining order constituted a property interest sufficient to trigger a procedural due process claim).

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

23. See *id.* at 763 ("Such indeterminacy is not the hallmark of a duty that is mandatory. Nor can someone be safely deemed 'entitled' to something when the identity of the alleged entitlement is vague.").

24. See *id.* at 766.

25. *Id.* While nontraditional property such as civil service jobs or entitlements to welfare benefits have previously been recognized as property under the Due Process Clause, enforcement of a restraining order was fundamentally different because, the Court reasoned, arresting someone who violated a restraining order had no ascertainable monetary value to the victim and thus provided only an "indirect or incidental" benefit to the holder of the restraining order. *Id.* at 767.

Court concluded, “the benefit that a third party may receive from having someone else arrested for a crime generally does not trigger protections under the Due Process Clause, neither in its procedural nor in its ‘substantive’ manifestations.”<sup>26</sup> Rather, aggrieved individuals in such situations must seek relief via state common-law or statutory tort claims.<sup>27</sup>

In his dissent, Justice Stevens, joined by Justice Ginsburg chided the majority for ignoring the clear language and intent of the Colorado statute, which, like other domestic violence mandatory arrest statutes nationwide, was passed in response to a persistent pattern of non-enforcement of domestic violence laws. The express language of the statute, they asserted, was “unmistakabl[y]” intended to remove police discretion over whether to arrest perpetrators:

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.<sup>28</sup>

The statute’s mandate, the dissent concluded, “undeniably create[d] an entitlement to police enforcement of restraining orders”<sup>29</sup> and required enforcement for the benefit of “‘a specific class of people’—namely, recipients of [such] orders.”<sup>30</sup> In concluding that arrest was mandated for the benefit of the community at large, the dissent reasoned, the majority had divorced the statute from its obvious context in an overly formalistic analysis.<sup>31</sup>

Finally, the dissent opined, the majority drew a false distinction between an entitlement to police protection and

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26. *Id.* at 768.

27. *See id.* at 769.

28. *Id.* at 784–85. (Stevens, J., dissenting) (emphasis in original).

29. *Id.* at 785 (Stevens, J., dissenting).

30. *Id.* at 786 (Stevens, J., dissenting).

31. *Id.* at 779 (Stevens, J., dissenting).

entitlements to other government services protected by the Due Process Clause, such as public education and utility services, when it suggested that an entitlement to police enforcement of a restraining order is simply not the sort of “concrete” and “valuable” property that the Due Process Clause protects.<sup>32</sup> The dissenters concluded that Ms. Gonzales had an entitlement to police enforcement of her protective order, and because the state had failed to give her any process whatsoever in depriving her of this entitlement, she had “clearly allege[d] a due process violation” under the Fourteenth Amendment of the United States Constitution.<sup>33</sup>

In reversing the Tenth Circuit’s decision, the Supreme Court denied Jessica Gonzales the opportunity to engage in a meaningful discovery process. She never had the opportunity to collect evidence from Castle Rock, depose witnesses, or present evidence at trial. Crucially, for Ms. Gonzales, this meant that she might never uncover information pertaining to the time and place of her daughters’ deaths, including information identifying the bullets found inside Simon Gonzales’s truck and inside the girls’ bodies.

The Supreme Court’s decision in *Castle Rock v. Gonzales* prompted a swift, intense, and united reaction across a range of sectors. Domestic violence advocates and women’s and civil rights lawyers decried the decision as misinterpreting the Constitution and lamented its potential to remove needed legal protections for victims.<sup>34</sup> The decision, they said, sent the wrong message to batterers and law enforcement, and risked creating a culture of impunity for lazy, rogue, or misguided officers. Advocates expressed outrage that the Supreme Court would characterize an individual’s entitlement to enforcement of her restraining order as “vague and novel,” considering the prevalence of legal protections for victims in the United States, and the express language of and clear legislative

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32. *Id.* at 790 (Stevens, J., dissenting).

33. *Id.* at 792 (Stevens, J., dissenting).

34. See American Civil Liberties Union, *Dimming the Beacon of Freedom: U.S. Violations of the International Covenant on Civil and Political Rights* 25–26 (2006); see also Linda Greenhouse, *Justices Rule Police Do Not Have Constitutional Duty to Protect Someone*, N.Y. Times, June 28, 2005, at A17 (“Organizations concerned with domestic violence had watched the case closely and expressed disappointment at the outcome. Fernando LaGuarda, counsel for the National Network to End Domestic Violence, said in a statement that Congress and the states should now act to give greater protection.”).

history behind mandatory arrest laws, including that of Colorado.<sup>35</sup> Meetings were scheduled to discuss legislative, litigation, and public policy strategies, as well as plans for engagement with state and local officials about *Castle Rock's* implications.<sup>36</sup>

Advocates generally agreed, however, that legally speaking, *Castle Rock* marked the end of the line for Jessica Gonzales. After a Supreme Court decision rejecting her claims, what other remedy could she have?

## II. THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS: AN ALTERNATE LEGAL AVENUE

In fact, a little-known but promising legal avenue was available to Jessica Gonzales. The Washington D.C. based Inter-American Commission on Human Rights is an autonomous organ of the Organization of American States (“OAS”) created in 1959 “to promote the observance and defense of human rights” in OAS Member States.<sup>37</sup> These include all countries in North, South, and Central America and the Caribbean. Composed of seven independent human rights experts, the Inter-American Commission, along with the Inter-American Court of Human Rights (a panel of seven judges based in San José, Costa Rica), considers claims of human rights violations and issues written decisions on state responsibility. The Commission and Court, which together form the Inter-American human rights system, are largely unfamiliar to U.S. lawyers and advocates. In other parts of the Western Hemisphere, however, civil society and lawyers regularly use the system to hold governments accountable for corruption, abuse, negligence, and violence committed by both state actors and private individuals. Having exhausted her domestic remedies, Ms. Gonzales could petition the Commission for relief, claiming that the United States was responsible for human rights violations resulting from the CRPD’s inaction and the Supreme Court’s decision.<sup>38</sup>

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35. See discussion *infra* Part III (discussing protections available for victims of domestic violence).

36. See *supra* note 34.

37. Statute of the Inter-Am. C.H.R., O.A.S. Res. 447 (IX-0/79), art. 1(1), 9th Sess., O.A.S. Official Rec., OEA/Ser.P/IX.0.2/80, vol. 1 at 88 (1979) (establishing the Inter-American Commission on Human Rights and setting forth its nature and purposes).

38. The Inter-American human rights system requires that petitioners

Because the federal government has not ratified any Inter-American human rights treaties, human rights complaints against the United States are brought before the Commission under the American Declaration and the OAS Charter.<sup>39</sup> Unlike contemporary human rights treaties, the Declaration, drafted in 1948, does not contain a “general obligations” clause, which requires states to respect, ensure, and promote guaranteed rights and freedoms through the adoption of appropriate or necessary measures.<sup>40</sup> However, signatories to the Charter (including the United States) are legally bound by the Declaration’s provisions,<sup>41</sup> and the Commission

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“exhaust domestic remedies” before appealing to the Inter-American Commission for relief. Petitioners must exhaust all legal remedies available to them or show why certain legal avenues, while technically available, would have been futile. Rules of Procedure of the Inter-Am. C.H.R., art. 31, OAS/Ser.L/V/II.4 rev.12 (2008). The Inter-American Court of Human Rights is not a venue available to Ms. Gonzales, because the U.S. has not acceded to the jurisdiction of the Inter-American Court. See Optional Protocol, Statute of the Inter-Am. C.H.R., *supra* note 37.

39. See generally American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, 9th Int’l Conference of American States, O.A.S. Off. Rec., OEA/Ser.L/V/II.23 doc.21 rev.6 (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992) [hereinafter American Declaration] (affirming and enumerating basic human rights and protections); Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3 (entered into force December 13, 1951) (founding the Organization of American States on principles of liberty, equality, justice, and continental cooperation); Statute of the Inter-Am. C.H.R., *supra* note 37, art. 1(2)(b) (defining human rights as those set forth in the American Declaration of the Rights and Duties of Man).

40. Cf., e.g., American Convention on Human Rights, opened for signature Nov. 22, 1969, art. 1, O.A.S.T.S. No. 36, 1144 U.N.T.S. 143, 145 (entered into force July 18, 1978) [hereinafter American Convention] (providing that State Parties will respect and ensure the rights recognized therein, by new legislation if needed); International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, art. 2, S. Exec. Doc. E, 95-2, at 24, 999 U.N.T.S. 171, 173 (1978) [hereinafter ICCPR] (binding State Parties to respect and ensure the rights recognized therein, including a right to and enforcement of remedies for rights violations); United Nations Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, art. 4, U.N. Doc. A/RES/61/106 (entered into force Apr. 3, 2008) (confirming that State Parties will ensure and promote the human rights of persons with disabilities via, *inter alia*, appropriate affirmative measures).

41. 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, 1989 Inter-Am. Ct. H.R. (ser. A) No. 10, ¶¶ 43, 45, 47 (July 14, 1989) [hereinafter *Advisory Opinion OC-10/89*] (explaining

has consistently applied “general obligations” principles when interpreting the wide spectrum of civil, political, economic, social, and cultural rights set forth in the Declaration.<sup>42</sup> Moreover, Inter-American jurisprudence directs governments to provide special protections to particularly vulnerable groups, such as children,<sup>43</sup> the mentally ill,<sup>44</sup> undocumented migrant workers,<sup>45</sup> indigenous communities,<sup>46</sup> and domestic violence victims.<sup>47</sup>

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that the *American Declaration* defines the rights to which the OAS Charter refers and may therefore be of legal effect, because the OAS Charter must be interpreted consistent with the *American Declaration* where human rights are concerned); *Gonzales v. United States*, Petition No. 1490-05, Inter-Am. C.H.R., Report No. 52/07, OEA/Ser.L/V/II.128, doc. 19 ¶ 56 (2007) [hereinafter Admissibility Decision] (finding that the Declaration “constitut[es] a source of legal obligation for OAS member states, including in particular those states that are not parties to the American Convention”); *Roach & Pinkerton v. United States*, Case 9647, Inter-Am. C.H.R. Report No. 147, OEA/Ser.L/V/II.71, doc. 9 rev. 1 ¶ 46 (1987) (“The international obligation of the United States of America, as a member of the Organization of American States (OAS), under the jurisdiction of the Inter-American Commission on Human Rights is governed by the Charter of the OAS.”).

42. See *Mary & Carrie Dann v. United States*, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 ¶ 124 (2002) (explaining that the Commission considers the evolving body of international human rights laws when deciding a case brought under the American Declaration); see also *Advisory Opinion OC-10/89*, 1989 Inter-Am. Ct. H.R. (ser. A) No. 10, ¶ 37 (“[T]o determine the legal status of the American Declaration it is appropriate to look to the inter-American system of today in light of the evolution it has undergone since the adoption of the Declaration.”).

43. See *Case of the Street Children (Villagrán-Morales et al.) v. Guatemala*, 1999 Inter-Am. Ct. H.R. (ser. C) No. 63, ¶¶ 195, 196 (Nov. 19, 1999).

44. See *Ximenes Lopes v. Brazil*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 149, ¶¶ 123–49 (July 4, 2006).

45. See *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18 (Sept. 27, 2003).

46. See *Sawhoyamaxa Indigenous Community v. Paraguay*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146, ¶¶ 83, 168 (Mar. 29, 2006); see also *Yakye Axa Indigenous Community v. Paraguay*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 63 (June 17, 2005) (similarly asserting that the state must effectively protect the rights of indigenous peoples in light of their special vulnerabilities); *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 ¶¶ 169-70 (2004) (finding that the state must provide special safeguards to ensure that indigenous groups can meaningfully participate in the state’s legal system); *Mary & Carrie Dann*, Inter-Am. C.H.R., Report No. 75/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 ¶ 126 (recognizing that states have a sacred commitment to protect indigenous peoples because of historical discrimination and humanitarian principles).

47. See *Maria da Penha Maia Fernandes v. Brazil*, Case 12.051, Inter-Am.

When an aggrieved individual has exhausted her domestic legal remedies or has nowhere to turn for relief in her home country, she may submit a human rights petition to the Inter-American Commission on Human Rights.<sup>48</sup> The petitioner can ask the Commission to consider whether the alleged harm and the denial of a domestic remedy constitutes a violation of international human rights law, as articulated in the American Declaration, the American Convention on Human Rights, and other human rights instruments.<sup>49</sup>

There are two phases in the evolution of a case before the Inter-American Commission. During the first phase, the “admissibility” phase, the Commission decides whether the petitioner has met certain procedural requirements and whether the Commission has competence (akin to jurisdiction) to examine the human rights claims contained in the original Petition.<sup>50</sup> If the Commission deems a case admissible, it moves on to the second phase, the “merits” phase, to determine whether a human rights violation took place.<sup>51</sup> At the merits phase, the Commission considers evidence presented before it<sup>52</sup> and may conduct hearings<sup>53</sup> or even engage in field visits.<sup>54</sup>

In most cases, the Commission ultimately issues a written report on state culpability. If it deems the state responsible for a human rights violation, the Commission outlines the general contours of a remedy that will both make a victim whole and create legal and policy reforms to prevent future repetition of the harm.<sup>55</sup>

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C.H.R., Report No. 54/01, OEA/Ser.L/V/II.111, doc. 20 rev. ¶¶ 54-56 (2001) (determining that Brazil failed in its obligation to protect women by not prosecuting perpetrators of domestic violence).

48. Rules of Procedure of the Inter-Am. C.H.R., *supra* note 38, art. 31.

49. *Id.* art. 28.

50. *Id.* art. 33-34.

51. *Id.* art. 37.2.

52. *Id.* art. 42.1.

53. *Id.* art. 38.5.

54. *Id.* art. 40.

55. *See, e.g.*, Derrick Tracy v. Jamaica, Case 12.447, Inter-Am. C.H.R., Report No. 61/06, OEA/Ser.L/V/II.127, doc. 4 rev. 1 ¶ 52 (2006) (recommending a re-trial of the charges against Mr. Tracey in accordance with the fair trial protections under the American Convention and the adoption of legislation to ensure that indigent criminal defendants are afforded their right to legal counsel and are not coerced into confessions of guilt); *see also* Tomas Lares Cipriano v. Guatemala, Case 11.171, Inter-Am. C.H.R., Report No. 69/06,

This remedy is presented at the end of a merits report in the form of a recommendation to the state. While no enforcement mechanism exists to ensure state compliance with Commission decisions, these reports do carry significant moral and political weight and contribute to international standard setting.<sup>56</sup> Indeed, the Commission is becoming an increasingly important player on both the domestic and international human rights scene. However, its low profile within the United States and enforcement limitations make the Commission far less desirable than a domestic decision-making body in the eyes of many U.S. advocates.

After the Commission issues its report on the merits and proceedings end at the Commission level, the Commission can submit a case to the Inter-American Court on Human Rights. However, the case must be against a state party to the American Convention on Human Rights that has also acceded, through the Optional Protocol to the Convention, to the jurisdiction of the Inter-American Court on Human Rights.<sup>57</sup> The Court will consider the case and ultimately issue an order that is legally binding and directly enforceable. Because the United States is not a party to these treaties, however, the Inter-American Court of Human Rights is not an available venue to petitioners in cases against the U.S. Instead, the Commission is the end of the line for U.S. petitioners.

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OEA/Ser.L/V/II.127, doc. 4 rev. 1 ¶ 132 (2006) (listing four remedies, ranging from domestic prosecution of the individual perpetrators to systemic reforms to avoid future recurrences); Simone Andre Diniz v. Brazil, Case 12.001, Inter-Am. C.H.R., Report No. 66/06, OEA/Ser.L/V/II.127, doc. 4 rev. 1 ¶ 47 (2006) (recommending that Brazil fully compensate the victim in both moral and material terms, by publicly acknowledging responsibility for violating her human rights, by granting her financial assistance to begin or complete higher education, by providing a monetary sum to compensate the victim for moral damages, and by making the legislative and administrative changes needed to create effective anti-racism laws).

56. See generally Tara J. Melish, *The Inter-American Commission on Human Rights: Defending Social Rights Through Case-Based Petitions*, in *Social Rights Jurisprudence: Emerging Trends in Comparative and International Law* (Malcom Langford ed., forthcoming 2008) (summarizing the Commission's organization, procedures, and jurisprudence); Dinah L. Shelton, *The Inter-American Human Rights System*, in *Guide to International Human Rights Practice* 127, 127–142 (Hurst Hannum ed., 4th ed. 2004) (providing an overview of the Inter-American system, including the Inter-American Court of Human Rights).

57. *Id.*

When Jessica Gonzales learned of the Inter-American human rights system, she was hopeful that framing her case as a human rights violation could give her a forum to seek redress for her personal tragedy and initiate important legislative and policy reforms in the United States. Yet she and her lawyers, including this author, were wary of a system that has fewer “teeth” and far less credibility in the United States than a domestic court.

A. Jessica Gonzales v. United States: The Petition

Ms. Gonzales filed a petition before the Commission in 2005, alleging violations of fundamental rights protected by the American Declaration: the rights to life and freedom from inhumane treatment (Article I); equal protection/non-discrimination (Article II); special protections for women and children (Article VII); privacy, family unity, and safety in the home (Articles V, VI, and IX); and an adequate and effective remedy (Articles XVIII and XXIV).<sup>58</sup> The petition located her story within a larger pattern of non-response to domestic violence by police and courts in the United States, both to support her “disparate effect” discrimination claim and to shine a light on desperately needed policy reforms in the domestic violence arena.<sup>59</sup>

Ms. Gonzales’s petition highlighted the gulf between international human rights law and U.S. Supreme Court jurisprudence on due process, civil remedies for gender-motivated violence, and equal protection. It directly challenged the Supreme Court’s decision in *DeShaney*, which held that the government has no constitutional duty to protect individuals from private acts of violence,<sup>60</sup> and questioned the Court’s decision in *United States v. Morrison*,<sup>61</sup> which struck down as unconstitutional a private right of action for victims of gender-motivated crimes such as domestic and sexual violence against their abusers. Congress had created this private right of action under the Violence Against Women Act (VAWA) on the premise that suppression of violent crime and family

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58. Gonzales Petition, *supra* note 12.

59. *Id.* at 21–39.

60. See 489 U.S. 189, 195–97 (1989) (finding that the Due Process Clause grants no affirmative right to government protection in most cases); Gonzales Petition, *supra* note 12, at 40; Observations Concerning U.S. Response, *supra* note 12, at 96, 100.

61. 529 U.S. 598, 602 (2000).

law are “national,” rather than “local,” concerns.<sup>62</sup> Ms. Gonzales’s petition also asserted that the Fourteenth Amendment’s equal protection doctrine, which requires a showing of intent in order for a discrimination claim to pass muster,<sup>63</sup> was insufficient under international standards, which permit a finding of discrimination upon a showing that a policy or practice has a disparate effect on a protected class.<sup>64</sup> Moreover, the petition disputed Justice Scalia’s suggestion that a tort remedy may have been available to Ms. Gonzales under Colorado law. Rather, as Ms. Gonzales emphasized, any tort claims she might have had against the Castle Rock police would have been dismissed under Colorado’s strict governmental immunity doctrine.<sup>65</sup>

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62. 42 U.S.C. § 13981 (2000).

63. *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (finding that Massachusetts veterans’ preference statute, in spite of its disparate negative impact on women, did not constitute an equal protection violation because its intent was to establish a preference for veterans over non-veterans, rather than men over women); *see also* *Eagleston v. Guido*, 41 F.3d 865, 878 (2d Cir. 1994) (rejecting domestic violence victim’s equal protection claim due to lack of evidence beyond statistical evidence of low arrest rates for domestic violence calls); *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); *McKee v. City of Rockwall*, 877 F.2d 409, 416 (5th Cir. 1989) (finding insufficient evidence of a police department’s policy of differential treatment of domestic violence victims versus other similarly situated victims).

64. *See, e.g.*, *The Girls Yean & Bosico v. Dominican Republic Case*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 130, ¶ 141 (Sept. 8, 2005) (“The Court considers that the peremptory legal principle of the equal and effective protection of the law and non-discrimination determines that . . . [s]tates must abstain from producing regulations that are discriminatory or have discriminatory effects on certain groups of population when exercising their rights.”) (emphasis added); *see also* Human Rights Committee, General Comment 18, *Non-discrimination, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, ¶ 7, U.N. Doc. HRI/GEN/1/Rev.1 (July 29, 1994) (“[T]he Committee believes that the term ‘discrimination’ as used in the [ICCPR] should be understood to imply any distinction, exclusion, restriction or preference . . . which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”).

65. For Jessica Gonzales to have prevailed in a state tort lawsuit in Colorado, she would have needed to prove that the omissions on the part of the CRPD were both “willful and wanton”—in essence, that the officers *purposefully* acted, or failed to act, with the *conscious* belief that this would *likely* cause harm to her. *See* Colo. Rev. Stat. § 24-10-108 (1989); Colo. Rev. Stat. § 24-10-118(2)(a)

Rejecting the constraints posed by these legal paradigms, the petition asserted that the United States has an affirmative obligation to act with “due diligence” to protect the rights guaranteed in the American Declaration. Under basic principles of human rights law and specifically the historic *Velásquez-Rodríguez* case<sup>66</sup> before the Inter-American Court, Ms. Gonzales argued, States should protect individuals from violations committed not only by the State or its agents, but also by private actors.<sup>67</sup> Where a State fails to effectively prevent domestic violence, protect women and children it knows are at risk, and provide a remedy for these failures, the State incurs international liability for the violent acts of private individuals.<sup>68</sup> As discussed in more detail below,<sup>69</sup> Ms. Gonzales sought relief from the United States in the form of financial compensation, equitable relief, and legal and programmatic reform.<sup>70</sup>

#### B. The State Department’s Response

In September 2006, the State Department, representing the United States, submitted a 40-page response brief to Ms. Gonzales’s petition, in what observers have characterized as the most comprehensive U.S. response to an Inter-American petition to date.<sup>71</sup>

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(1989); *Rohrbough v. Stone*, 189 F. Supp. 2d 1088, 1096–1098 (D. Colo. 2001) (finding that police failure to attempt rescue of besieged students who placed a 911 call was not willful and wanton); *Rueggsegger v. Jefferson County Bd. of County Comm’rs*, 197 F. Supp. 2d 1247, 1265 (D. Colo. 2001) (finding that the behavior of the Sheriff’s Department in not preventing a school shooting did not amount to willful and wanton conduct); *Whitcomb v. City and County of Denver*, 731 P.2d 749, 752 (Colo. App. 1986) (holding that a civil official is immune unless his conduct is willful, malicious, or intended to cause harm).

66. *Velásquez-Rodríguez v. Honduras Case*, 1989 Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 172 (July 29, 1988) (finding that a private act “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).

67. *Gonzales Petition*, *supra* note 12, at 73–75; *Observations Concerning U.S. Response*, *supra* note 12, at 75–88.

68. *Gonzales Petition*, *supra* note 12, at 73–75; *Observations Concerning U.S. Response*, *supra* note 12, at 75–88.

69. *See infra* notes 130–39 and accompanying text.

70. *Gonzales Petition*, *supra* note 12, at 85–86.

71. Opinions of scholars and advocates expressed to the author in private discussion (on file with author); Response of the Government of the United States of America to the Inter-American Commission on Human Rights Regarding Jessica Gonzales, *Gonzales v. United States*, Petition No. 1490-05, Inter-Am.

Even assuming the Declaration was binding on OAS member states, the government argued, Ms. Gonzales's petition should be dismissed. According to the State Department, the case was premised on a faulty interpretation of the American Declaration that construed it to impose affirmative obligations on States to protect individuals from private acts of violence.<sup>72</sup> In fact, the government asserted, the Declaration contains no provisions imposing such affirmative duties. The government's brief went on to argue that Ms. Gonzales had not exhausted domestic remedies because she had not raised equal protection or state tort law claims in the U.S. courts.<sup>73</sup> Then, in a rare and unexpected move, the United States challenged Ms. Gonzales's version of the facts of the case, arguing that the police had responded appropriately to her in light of the information they had available to them.<sup>74</sup> Finally, the government contested Ms. Gonzales's claim that her case was reflective of a larger pattern and practice of inappropriate police response to domestic violence in the United States. Instead, the State Department portrayed the United States as a world leader in decreasing violence against women, and highlighted laws such as the VAWA as best practice models.<sup>75</sup>

As described in the beginning of this Article, the Inter-American Commission granted a hearing in the *Gonzales* case in March 2007. At that public hearing, which was simultaneously webcasted, Jessica Gonzales testified for the first time before any tribunal about her experiences as a domestic violence victim with the Castle Rock police, the Colorado authorities, and the U.S. courts.<sup>76</sup> After Ms. Gonzales and her lawyers set forth their case, the United States, represented by the State Department, presented many of the same arguments contained in its response brief. The commissioners

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C.H.R., Report No. 52/07, OEA/Ser.L.V/II.128, doc. 19 (Sept. 25, 2006) (on file with author), available at [http://www.aclu.org/pdfs/womensrights/gonzales\\_govtresponse20060925.pdf](http://www.aclu.org/pdfs/womensrights/gonzales_govtresponse20060925.pdf) [hereinafter U.S. Response].

72. See U.S. Response, *supra* note 71, at 26.

73. *Id.* at 21–22.

74. This challenge on the merits was unexpected, because the petition was merely at the admissibility phase. The merits phase, the second phase of the proceeding, is the stage at which a State usually sets forth its version of the facts. The United States may have made this argument for reasons relating to international embarrassment or political fallout from the gruesome facts of the case.

75. U.S. Response, *supra* note 71, at 14–20.

76. A video of the hearing can be found at [http://www.oas.org/OASpage/videosondemand/home\\_eng/videos\\_query.asp?sCodigo=07-0041](http://www.oas.org/OASpage/videosondemand/home_eng/videos_query.asp?sCodigo=07-0041).

then asked both sides questions, many of which focused on the nexus between the state's awareness of risk to an individual and its responsibility to protect. Several of the questions directed at the United States delegation required familiarity with Colorado law, which the State Department representatives confessed not to have.<sup>77</sup>

In May 2007, Ms. Gonzales filed a post-hearing brief that clarified certain points of law and fact, and responded to the questions posed by commissioners at the hearing.<sup>78</sup> Neither the United States nor the Colorado Attorney General's office subsequently responded to the commissioner's questions about Colorado law and the point at which government has the responsibility to protect individuals it knows are at risk of harm.

### C. The Admissibility Decision

On October 5, 2007, the Commission declared in a landmark "admissibility" decision that it had competence to examine the human rights claims of Jessica Gonzales.<sup>79</sup> Ms. Gonzales, the Commission found, had "exhausted all domestic remedies available within the United States legal system,"<sup>80</sup> and the "alternative remedies" invoked by the government, including equal protection and state tort claims, "appear[ed] to have no reasonable prospect of success."<sup>81</sup> The admissibility decision rejected the U.S. State Department's position that the Declaration, which does not explicitly articulate state obligations *vis-à-vis* the rights contained therein, does not create positive governmental obligations.<sup>82</sup> Instead, the decision held the United States to well-established international standards on state responsibility to exercise "due diligence" to prevent, investigate, and punish human rights violations and protect and compensate victims.<sup>83</sup> The facts alleged by Ms. Gonzales, the

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77. *Id.*

78. Observations Concerning the March 2, 2007 Hearing Before the Commission, *Gonzales v. United States*, Petition No. 1490-05, Inter-Am. C.H.R., Report No. 52/07, OEA/Ser.L./VII.128, doc. 19 (2007), available at [http://www.law.columbia.edu/center\\_program/human\\_rights/InterAmer/GonzalesvUS](http://www.law.columbia.edu/center_program/human_rights/InterAmer/GonzalesvUS) (follow hyperlink to "Post-Hearing Brief").

79. Admissibility Decision, *supra* note 41.

80. *Id.* ¶ 50.

81. *Id.* ¶ 49.

82. *Id.* ¶¶ 55–56.

83. *Id.* ¶ 56 (finding that the American Declaration "constitute[s] a source of legal obligations on OAS member States, including in particular those states

Commission concluded, “could tend to establish violations” by the U.S. Government of Articles I, II, V, VI, VII, XVIII, and XXIV of the American Declaration.<sup>84</sup>

Many petitions linger for years before the Inter-American Commission with little or no action, yet Ms. Gonzales’s petition has moved quickly and smoothly, to the delight of many of her supporters. The reasons for this fast-tracking are unclear. Perhaps the Commission saw a thematic congruence between the case and a recent report of the Inter-American Rapporteurship on the Rights of Women, *Access to Justice for Women Victims of Violence in the Americas*,<sup>85</sup> which considered domestic violence on a hemispheric level. Perhaps the United States, fearing negative political fallout lest it appear indifferent to the horrific and shocking facts of the case, felt compelled to respond quickly and comprehensively.<sup>86</sup> And, perhaps the Commission wanted to make clear that shocking human rights violations, or at least allegations thereof, can happen in the “first world” too.

The Commission’s admissibility decision pushed the case forward to the next phase—the merits phase. This is the phase in which the parties delve deeply into the factual record and brief the merits of a case.

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[such as the United States] that are not parties to the American Convention on Human Rights”); *see also* U.N. Convention on the Elimination of All Forms of Discrimination against Women *supra* note 2, art. 2; The Secretary-General, *supra* note 2, ¶¶ 255–57 (affirming that “States must [not only] refrain from committing human rights violations [but] also have a duty to prevent human rights violations by non-State actors”); Shelton, *supra* note 2, at 21–23 (asserting that the “due diligence standard establishes that a state is not responsible for purely private harm” but that a state may become responsible if it fails to take the “reasonable measures of prevention” expected of “a well-administered government”).

84. Admissibility Decision, *supra* note 41, ¶¶ 57–58. The Commission rejected, without comment, Ms. Gonzales’s Article IX (inviolability of the home) claim. *Id.* ¶ 59.

85. Organization of American States, *Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser.L/V/II., doc. 68 (Jan. 20, 2007), *available at* <http://www.cidh.org/women/Access07/tocaccess.htm>.

86. The United States often takes longer than nine months to respond to petitions, and its ultimate response is often a simple repetition of past jurisdictional arguments.

#### D. The Merits Brief

In March 2008, Ms. Gonzales set forth her final legal and factual arguments in her merits brief to the Commission.<sup>87</sup> The brief described Jessica Gonzales's repeated contact with the police during the night in question and substantiated her allegations with police reports, 911 transcripts, and other detailed evidence.<sup>88</sup> In addition, it underscored the CRPD's prior knowledge of Mr. Gonzales's erratic and menacing behavior, his criminal history, and the danger he posed to his family. Simon Gonzales had seven run-ins with the CRPD in the three months preceding June 22, 1999.<sup>89</sup> Jessica Gonzales herself had called the police on at least four occasions in the preceding months to report his domestic violence.<sup>90</sup> On none of these occasions did the CRPD make an arrest, although officers were required to do so under Colorado law.<sup>91</sup>

Under these circumstances, the brief argued, the CRPD clearly failed to take appropriate steps to protect Jessica Gonzales and the children. When Ms. Gonzales called the police to report that she had located her husband by cell phone and that he was at an amusement park with the girls,<sup>92</sup> the police dispatcher entered into the computer that the girls "had been found" because they were with their father.<sup>93</sup> At 10 p.m., five hours after the girls first disappeared, the dispatcher scolded Jessica Gonzales for calling again, saying that it was "a little ridiculous making us freak out and thinking the kids are gone."<sup>94</sup> The CRPD did not file a missing persons report until

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87. See Merits Brief, *supra* note 8.

88. *Id.* at 3–39.

89. *Id.* at 18; CRPD Individual Inquiry on Simon Gonzales, June 23, 1999 at 158–59; Observations Concerning U.S. Response, *supra* note 12, at Exhibit H, available at [http://www.law.columbia.edu/center\\_program/human\\_rights/InterAmer/GonzalesvUS](http://www.law.columbia.edu/center_program/human_rights/InterAmer/GonzalesvUS) (follow hyperlink to "H: Castlerock Police Dep't Individual Inquiry on Simon Gonzales").  
[hereinafter Dec. 11, 2006 Observations].

90. Merits Brief, *supra* note 8, at 18; Gonzales Declaration, *supra* note 7, ¶¶ 27, 28, 32.

91. Merits Brief, *supra* note 8, at 17–19.

92. Merits Brief, *supra* note 8, at 13; Gonzales Declaration, *supra* note 7, ¶ 51; Office of the District Attorney, Eighteenth Judicial District, Report Date: 7/1/99, Report by Karen Meskis, Date of Offense: 6/23/99, at 7, 10; U.S. Response, *supra* note 71, at Tab E [hereinafter U.S. Response Tab E].

93. Merits Brief, *supra* note 8, at 24; U.S. Response Tab E, *supra* note 92, at 7.

94. Merits Brief, *supra* note 8, at 24; Investigator's Progress Report, CRPD,

around 1:40 a.m., almost eight hours after Jessica Gonzales first reported her children missing.<sup>95</sup> Moreover, the CRPD had no pressing emergencies that might have justified their failure to respond to Jessica Gonzales throughout the course of the evening.<sup>96</sup> Instead of responding to Ms. Gonzales's emergency calls, the police went to dinner,<sup>97</sup> responded to a fire lane violation,<sup>98</sup> "work[ed] on paper,"<sup>99</sup> and assisted someone in filling out a missing dog report.<sup>100</sup>

Finally, the brief set forth new evidence uncovered through open records requests to establish that Colorado authorities never adequately investigated the time, place, manner, or circumstances surrounding the Gonzales children's deaths.<sup>101</sup> Several Colorado governmental agencies had conducted investigations into the shooting of Simon Gonzales, since state authorities must conduct an investigation whenever police use deadly force on a civilian.<sup>102</sup> No similar investigations were performed into the girls' deaths, however. The investigatory reports into Simon Gonzales's death summarily concluded that he had murdered his children before the shootout at the CRPD station.<sup>103</sup> Yet, as Ms. Gonzales argued, little evidence exists to substantiate this conclusion. The authorities' cursory inquiries into the girls' deaths never conclusively linked the bullets found in the girls' bodies with those in Simon Gonzales's gun, and

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Castle Rock, Colorado, Third Call at 21:57 hrs., CR #99-3226, at 2, U.S. Response, *supra* note 71, at Tab D [hereinafter U.S. Response Tab D].

95. Merits Brief, *supra* note 8, at 30; U.S. Response Tab E, *supra* note 92, at 3; Statement signed by Cpl. Patricia A. Lisk, at 7, U.S. Response, *supra* note 71, at Tab G [hereinafter U.S. Response Tab G].

96. Merits Brief, *supra* note 8, at 27.

97. *Id.*; U.S. Response Tab G, *supra* note 95, at 2.

98. Merits Brief, *supra* note 8, at 27; U.S. Response Tab G, *supra* note 95, at 2.

99. Merits Brief, *supra* note 8, at 27; U.S. Response Tab G, *supra* note 95, at 3.

100. Merits Brief, *supra* note 8, at 27; U.S. Response Tab G, *supra* note 95, at 5.

101. *See* Merits Brief, *supra* note 8, at 129–36.

102. *Id.*

103. *Id.* at 33; Critical Incident Team Shooting, *supra* note 14, at 37; Letter to Colorado Bureau of Investigation from Agents Contos and Venecek, June 28, 1999, Merits Brief, *supra* note 8, at Ex. H, available at [http://www.law.columbia.edu/center\\_program/human\\_rights/InterAmer/GonzalesvUS](http://www.law.columbia.edu/center_program/human_rights/InterAmer/GonzalesvUS) (follow hyperlink to "3.24.08 Merits Brief Exhibits") [hereinafter Letter from Agents Contos and Venecek].

raised more questions than answers about their cause of death.<sup>104</sup> Ms. Gonzales recounted, in a declaration, how the open question as to whether police bullets struck and/or killed Rebecca, Katheryn, and Leslie Gonzales continues to plague her to this day.<sup>105</sup> She highlighted several troubling facts concerning her daughters' deaths, including that:

- Although the police fired rounds of bullets that penetrated the sides and windows of the truck, and the Castle Rock County Sheriff reported on June 23, 1999 that bullet material, casings, and projectiles were found on the floor of the truck,<sup>106</sup> “[n]o field identification was attempted on any of the metal fragments recovered from the vehicle.”<sup>107</sup> This suggests that potentially important evidence was not thoroughly examined by officials.<sup>108</sup>
- After the shooting, Simon Gonzales's truck, riddled with bullet holes from police guns, was removed by a towing company for “long term storage” and “possible further examination for bullet holes.”<sup>109</sup> No record exists of this examination ever taking place. To Ms. Gonzales's knowledge, the truck was destroyed several weeks after the incident.<sup>110</sup>
- Investigators' records indicate that immediately before the shooting, neighbors reported hearing “a young girl screaming from outside the [CRPD] building” and a possibly female voice say, “help me, help me” during the exchange of fire.<sup>111</sup>
- Each girl was shot in her head and chest from multiple angles.<sup>112</sup> Rebecca had entrance wounds on both her left chest

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104. See Merits Brief, *supra* note 8, at 34–37, 131.

105. Gonzales Declaration, *supra* note 7, ¶ 75.

106. Merits Brief, *supra* note 8, at 34; Douglas County Sheriff: Property/Evidence Log, June 23, 1999, Merits Brief, *supra* note 8, at Ex. I, available at [http://www.law.columbia.edu/center\\_program/human\\_rights/InterAmer/GonzalesvUS](http://www.law.columbia.edu/center_program/human_rights/InterAmer/GonzalesvUS) (follow hyperlink to “3.24.08 Merits Brief Exhibits”).

107. Merits Brief, *supra* note 8, at 34; Colorado Bureau of Investigation, Report of Investigation 5 (1999), Merits Brief, *supra* note 8, at Ex. B, available at [http://www.law.columbia.edu/center\\_program/human\\_rights/InterAmer/GonzalesvUS](http://www.law.columbia.edu/center_program/human_rights/InterAmer/GonzalesvUS) (follow hyperlink to “3.24.08 Merits Brief Exhibits”).

108. Merits Brief, *supra* note 8, at 34.

109. *Id.*

110. *Id.* at 34–35.

111. *Id.* at 35; Critical Incident Team Shooting, *supra* note 14, at 18–19.

112. Merits Brief, *supra* note 8, at 36; Douglas County Coroner, Report: Rebecca Gonzales 2 (1999), Merits Brief, *supra* note 8, at Ex. E, available at [http://www.law.columbia.edu/center\\_program/human\\_rights/InterAmer/Gonzales](http://www.law.columbia.edu/center_program/human_rights/InterAmer/Gonzales)

and her right temple,<sup>113</sup> and Katheryn had entrance wounds on the left side of her face, her left upper chest, and her right chest, as well as a “graze wound” on the ring finger of her left hand.<sup>114</sup> These facts are not easily reconciled with the official conclusion that the wounds on the girls’ bodies all resulted from Simon shooting the sleeping girls at close range while sitting in his truck<sup>115</sup> or that the hail of police bullets directed at Simon’s truck on June 23, 1999 completely missed the three girls inside the vehicle.<sup>116</sup>

Colorado and Castle Rock officials have not responded to all of Jessica Gonzales’s open records law and FOIA requests<sup>117</sup> for photos of the autopsies and crime scene, or information on the disposal of Simon Gonzales’s truck. Moreover, officials never responded to Petitioners’ repeated requests for information on the circumstances surrounding the Gonzales children’s deaths.<sup>118</sup>

After developing this extensive factual argument, the merits brief went on to discuss the context of the case—in particular, the pervasiveness of domestic violence in the United States and the particularly pernicious effect it has on poor immigrant and minority

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vUS (follow hyperlink to “3.24.08 Merits Brief Exhibits”) [hereinafter Rebecca Gonzales Coroner’s Report]; Douglas County Coroner, Report: Katheryn Gonzales 2 (1999), Merits Brief, *supra* note 8, at Ex. F *available at* [http://www.law.columbia.edu/center\\_program/human\\_rights/InterAmer/GonzalesvUS](http://www.law.columbia.edu/center_program/human_rights/InterAmer/GonzalesvUS) (follow hyperlink to “3.24.08 Merits Brief Exhibits”) [hereinafter Katheryn Gonzales Coroner’s Report]; Douglas County Coroner, Report: Leslie Gonzales 2 (1999), Merits Brief, *supra* note 8, at Ex. G, *available at* [http://www.law.columbia.edu/center\\_program/human\\_rights/InterAmer/GonzalesvUS](http://www.law.columbia.edu/center_program/human_rights/InterAmer/GonzalesvUS) (follow hyperlink to “3.24.08 Merits Brief Exhibits”) [hereinafter Leslie Gonzales Coroner’s Report].

113. Merits Brief, *supra* note 8, at 36; Rebecca Gonzales Coroner’s Report, *supra* note 112, at 2.

114. Merits Brief, *supra* note 8, at 36; Katheryn Gonzales Coroner’s Report, *supra* note 112, at 2.

115. Merits Brief, *supra* note 8, at 36; Critical Incident Team Shooting, *supra* note 14, at 37; Letter from Agents Contos and Vanecek, *supra* note 103.

116. Merits Brief, *supra* note 8, at 36; Critical Incident Team Shooting, *supra* note 14, at 37; Letter from Agents Contos and Vanecek, *supra* note 103.

117. Merits Brief, *supra* note 8, at 37.

118. Merits Brief, *supra* note 8, at 37; *see also* Declaration of Tina Rivera ¶¶ 8–9, Merits Brief, *supra* note 8, at Ex. A (discussing efforts made by the Gonzales family to obtain information regarding the girls’ deaths, and the Colorado authorities’ refusal to respond), *available at* [http://www.law.columbia.edu/center\\_program/human\\_rights/InterAmer/GonzalesvUS](http://www.law.columbia.edu/center_program/human_rights/InterAmer/GonzalesvUS) (follow hyperlink to “3.24.08 Merits Brief Exhibits”).

women.<sup>119</sup> It addressed the historical characterization of domestic violence as belonging to the “private sphere”<sup>120</sup> and the consequences in terms of how law enforcement responds (or fails to respond) to domestic violence. While criminal laws against domestic violence have proliferated in the past two decades in response to blasé attitudes of law enforcement, the brief emphasized these alone are not sufficient to provide women in violent relationships with resources to escape from abuse and protect their families.<sup>121</sup> Federal and state legislative and programmatic measures, such as VAWA and its numerous associated programs, have also fallen short of adequately addressing domestic violence or providing sufficient legal remedies for victims.<sup>122</sup> The U.S. Supreme Court’s decision in *Town of Castle Rock v. Gonzales* only exacerbated this situation, weakening the incentives for police to respond appropriately to domestic violence victims.

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119. Merits Brief, *supra* note 8, at 41–47; *see also* Committee on the Elimination of Racial Discrimination, *Concluding Observations*, CERD/C/USA/CO/6 ¶ 26 (March 7, 2008) (noting “with concern that the alleged insufficient will of federal and state authorities to take action with regard to [gender-based] violence and abuse often deprives victims belonging to racial, ethnic and national minorities . . . of their right to access to justice [sic] and the right to obtain adequate reparation or satisfaction for damages suffered”).

120. Merits Brief, *supra* note 8, at 43, 48; *see also* U.N. Econ. & Soc. Council [ECOSOC], Comm. on Human Rights, *The Due Diligence Standard as a Tool for the Elimination of Violence Against Women: Report of the Special Rapporteur on Violence Against Women*, § 59, U.N. Doc. E/CN.4/2006/61 (January 20, 2006) (*prepared by* Yakin Ertürk) (discussing ways to use the due diligence standard to address violence against women at all levels, including the home).

121. Merits Brief, *supra* note 8, at 47–56.

122. *Id.* at 52–53; *see also* Christopher Maxwell, et al., Nat’l Inst. for Justice, Research in Brief: The Effect of Arrest on Intimate Partner Violence: New Evidence From the Spouse Assault Replication Program (2001) (discussing findings that arrest of male batterers can reduce subsequent domestic violence). In its response brief, the United States drew attention to five different programs created outside of VAWA resources designed to improve inter- and intra-state enforcement of protective orders, yet with the exception of one, these programs are once again voluntary. *See* Merits Brief, *supra* note 8, at 42; *see also* U. N. Division for the Advancement of Women & U.N. Office on Drugs and Crime, Expert Group Meeting: Good Practices in Combating and Eliminating Violence Against Women 31 (2005) (detailing needed actions from national governments to combat violence against women), *available at* <http://www.un.org/womenwatch/daw/egm/vaw-gp-2005/docs/FINALREPORT.goodpractices.pdf> [hereinafter Good Practices].

While the U.S. domestic legal system does not impose affirmative obligations on the government to ensure against violation of rights by private actors, the brief argued,<sup>123</sup> the American Declaration imposes a duty on States to adopt measures to respect and ensure the full and free enjoyment of human rights guaranteed therein. Where a State fails to adequately protect these rights and violations occur, a State incurs liability for the acts of private actors under universal and regional human rights law, state practice, and customary international law.<sup>124</sup>

Given this international jurisprudential backdrop, the legal argument section of the brief began by setting forth in detail the “due diligence” framework first established by the Inter-American Court in *Velásquez-Rodríguez* and now a fundamental precept of international human rights law. In *Velásquez-Rodríguez*, the Inter-American Court found that:

An illegal act which violated human rights and which is initially not directly imputable to a State (for example, because it is the act of a 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 as required by the Convention.<sup>125</sup>

Thus, if a State knew or should have known about the commission of third-party violence and failed to use due diligence—to prevent the violent act, to protect potential victims, to conduct subsequent investigations into the act, to punish the person who committed it, or to compensate its victims—the State may be held

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123. Merits Brief, *supra* note 8, at 56; *see also* Good Practices, *supra* note 122 (identifying practices and strategies that the United Nations, inter-governmental organizations, the international community, and national governments can adopt to combat violence against women).

124. Merits Brief, *supra* note 8, at 56; *see also* *Violence Against Women Office Problems with Grant Monitoring and Concerns about Evaluation Studies: Hearing Before the S. Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 107th Cong. 2–3 (2002) (statement of Laurie E. Ekstrand, Director, Justice Issues, U. S. Gen. Accounting Office) (reporting on the need for improvement in Violence Against Women Office (VAWO) grant monitoring and evaluations assessing the impacts of VAWO programs which are intended to improve the criminal justice system’s response to violence against women).

125. *Velásquez-Rodríguez v. Honduras* Case, 1989 Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 172 (July 29, 1988) (outlining the legislative and other measures state parties are obligated to undertake in accordance with the American Convention on Human Rights).

liable for both the initial violation and for the subsequent denial of justice.<sup>126</sup> Since 1988, when the *Velásquez-Rodríguez* case was decided, these principles concerning affirmative obligations have become widely accepted by both international tribunals and many domestic legal systems.<sup>127</sup> In fact, they have since been extended beyond the right to life to encompass, for example, the right to humane treatment and the right to private and family life.<sup>128</sup>

The Inter-American system has adopted a clear standard for determining when a State may be held responsible for violations of protected rights by private actors. Under this standard, which itself was borrowed from the European Court of Human Rights, State responsibility is engaged when (1) the State “knew or ought to have known of a situation presenting a real and immediate risk to the safety of an identified individual from the criminal acts of a third party,” and (2) the State “failed to take reasonable steps within the scope of its powers, which might have had a reasonable possibility of preventing or avoiding that risk.”<sup>129</sup> Following this standard, Ms. Gonzales asserted that the government was aware of a real and

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126. *Id.* ¶ 174 (“The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.”); *see also* Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* 225 (2003).

127. *See Osman v. United Kingdom* (No. 98), 1998-VIII Eur. Ct. H.R. 3124 (finding that the right to life implies “in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual”); *see also* U.N. Hum. Rts. Comm., *Gen. Comment No. 31: Nature of the General Legal Obligation Imposed on State Parties to the Covenant*, ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 29, 2004) (interpreting Article 2 of the ICCPR to impose affirmative obligations on States to take necessary steps to prevent violations of rights protected by the Convention by State and private actors).

128. *See, e.g., M.C. v. Bulgaria*, 2003-I Eur. Ct. H.R. 646 (finding that Bulgaria had violated the rights of a 14-year-old alleged rape victim to be free from inhumane or degrading treatment and to privacy under the European Convention by failing to fully and effectively investigate rape allegations).

129. *Pueblo Bello Massacre*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 140, ¶¶ 123–24 (Jan. 31, 2006) (citing and quoting *Osman*, 1998-VIII Eur. Ct. H.R. 3124); *see also Sawhoyamaya Indigenous Community v. Paraguay*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 155 (Mar. 29, 2006) (stating that a State should not be held to an impossible standard, but that it does have an affirmative obligation where the risk is foreseeable and the preventative measures are within the scope of its authority).

immediate risk to identified individuals, and was thus obligated to take reasonable steps to protect them.<sup>130</sup> The responsibility on the State to ensure rights protection was heightened, she argued, because international human rights law affords special protections to victims of domestic violence—an identified vulnerable group composed primarily of women and children.<sup>131</sup> Ms. Gonzales contended that the local police had failed in their duties to protect her and her children. The Colorado authorities and federal judiciary, respectively, had failed in their duties to subsequently investigate and provide a remedy for these failures.<sup>132</sup> As a result, she argued, the U.S. government was responsible for five separate substantive rights violations: (1) the right to life and personal security;<sup>133</sup> (2) the right to family life;<sup>134</sup> (3) the right to due process and a remedy;<sup>135</sup> (4) the right to truth and the government's duty to investigate;<sup>136</sup> and (5) the right to equal protection and nondiscrimination.<sup>137</sup>

First, Ms. Gonzales asserted the CRPD's failure to protect the lives of her and her daughters directly violated their fundamental right to life and personal security under Article I,<sup>138</sup> and their rights to effective protection against attacks on family and private life under Articles V and VI.<sup>139</sup> Second, the CRPD's failure to respond to her complaints and the federal and Colorado governments' failure to conduct a thorough investigation into the girls' deaths violated Ms. Gonzales's right to petition the government and to receive a prompt decision thereon, under Article XXIV.<sup>140</sup> The denial of a judicial remedy violated her right to resort to the courts under Article XVIII.<sup>141</sup> Additionally, the failure of the Colorado and federal authorities to conduct an independent, expedient, and thorough investigation into the circumstances surrounding the children's deaths violated the Gonzales family's right to truth and the government's duty to investigate under Articles IV, V, VI, XVIII, and

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130. Merits Brief, *supra* note 8, at 68.

131. *Id.* at 64, 68–69.

132. *Id.* at 129–36.

133. *Id.* at 3.

134. *Id.*

135. *Id.* at 4.

136. *Id.*

137. *Id.*

138. *Id.* at 82–92.

139. *Id.* at 92–98.

140. *Id.* at 106–28.

141. *Id.*

XXIV.<sup>142</sup> These violations were further compounded by the CRPD's and the U.S. courts' disregard for the special protections that should be accorded to domestic violence victims and their children, as established in Article VII.<sup>143</sup> The CRPD's failure to exercise due diligence in responding to Ms. Gonzales's complaint also highlights the CRPD's discriminatory attitudes, laws, policies, and practices on the basis of both gender and race, in violation of Article II.<sup>144</sup> The unremedied failures of the CRPD and of the U.S. courts are directly imputable to the United States, she argued, which has an affirmative obligation to ensure that federal, state, and local authorities are acting in compliance with international human rights obligations.

Ms. Gonzales sought a comprehensive remedy from the United States. She requested individual relief that included financial compensation, an exhaustive and impartial investigation into the failures of the CRPD, as well as any documents, tapes, photographs, and records concerning her daughters' deaths.<sup>145</sup> She also sought legal and social improvements that would bring the United States in line with international human rights standards on violence against women, private and family life, protections for domestic violence victims, due process, and effective remedy.<sup>146</sup> Such reforms, Ms. Gonzales suggested, must involve: improving domestic violence training for law enforcement, judges, and prosecutors;<sup>147</sup> enacting legislative reform;<sup>148</sup> increasing funding for existing programs (including those that are VAWA-funded) to enhance victims' safety and remedies;<sup>149</sup> strengthening support services to ensure victims' economic and social rights;<sup>150</sup> adopting a holistic strategy to respond to domestic violence;<sup>151</sup> developing public education campaigns to condemn violence in the home and to share information about victims' rights and remedies;<sup>152</sup> ensuring meaningful oversight of grantees funded through domestic violence prevention initiatives;<sup>153</sup>

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142. *Id.* at 128–39.

143. *Id.* at 98–105.

144. *Id.* at 140–54.

145. *Id.* at 155.

146. *Id.* at 156–59.

147. *Id.* at 157.

148. *Id.*

149. *Id.* at 158.

150. *Id.* at 157.

151. *Id.* at 157–58.

152. *Id.* at 156.

153. *Id.* at 158.

and improving disaggregated data collection on domestic violence, particularly information on police response to domestic violence, victim safety, batterer recidivism, and the experience of poor, minority, and immigrant women victims.<sup>154</sup>

According to the Rules of Procedure of the Inter-American Commission, States have two months to respond to a petitioner's merits brief.<sup>155</sup> In practice, many States flout this requirement and respond months, if not years, late. Seven months after Ms. Gonzales submitted her merits brief to the Commission, the federal government submitted a response brief on the merits.

The Commission held a merits hearing on October 22, 2008 in Washington D.C. The hearing offered Jessica Gonzales an opportunity to testify again, this time before a new panel of commissioners that included a new female commissioner, Luz Patricia Mejía. Jeffrey Fagan, a professor of law and criminologist, testified as an expert witness about the contours of an appropriate law enforcement response to domestic violence. Ms. Gonzales's lawyers summarized the legal arguments on the merits and highlighted newly-uncovered information demonstrating serious inconsistencies in the Colorado authorities' investigation.<sup>156</sup>

The Commission is expected to issue a decision on the merits in early 2009. If the Commission finds the United States responsible for human rights violations against Ms. Gonzales and her children, it will issue recommendations for how the government can provide a remedy to Ms. Gonzales individually and address domestic violence at a systemic level nationwide.

Although the merits decision has the potential to prompt law and policy reform domestically, such reforms will not be automatic. In the past, the federal government has largely ignored Commission recommendations, arguing that it is not bound to comply with the decisions of such international human rights bodies.<sup>157</sup> Effective

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154. *Id.* at 159.

155. Rules of Procedure of the Inter-Am. C.H.R., *supra* note 38, art. 38(1).

156. A video of the hearing can be found at [http://www.law.columbia.edu/center\\_program/human\\_rights/InterAmer/GonzalesvUS](http://www.law.columbia.edu/center_program/human_rights/InterAmer/GonzalesvUS).

157. *See* Mary & Carrie Dann v. United States, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Serv.L./V/II.117, doc. 1 rev. 1 ¶ 150 (2002) (noting that the United States rejected the Inter-American Commission on Human Rights's conclusions and recommendations on the basis that the American Declaration is not a legally binding instrument and thus cannot subject the

domestic implementation of a positive Commission decision (or even something less ambitious, such as incorporation of thematic elements of the decision into legislation or case law) will require creative advocacy at the international, national, state, and local levels. Potential avenues for such advocacy are further explored below.

### III. DOMESTIC VIOLENCE, CIVIL RIGHTS, AND HUMAN RIGHTS ADVOCACY IN THE UNITED STATES

I have previously written about the unique challenges posed by Jessica Gonzales's human rights case, and how her case contributes to the "bringing human rights home" project in the United States.<sup>158</sup> In this section, I first summarize those observations and then move on to explore opportunities for future advocacy related to the case.

Domestic violence is among the most dangerous and common forms of gender-based violence in American society,<sup>159</sup> yet is widely viewed as a private, family matter—worthy of minimal law enforcement or judicial attention.<sup>160</sup> While important strides have

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United States to liability).

158. Caroline Bettinger-Lopez, *Jessica Gonzales v. United States: An Emerging Model for Domestic Violence & Human Rights Advocacy in the United States*, 21 Harv. Hum. Rts. J. 183 (2008) (arguing that, despite the obstacles to enforcement within the United States, taking Ms. Gonzales's case to the Inter-American Commission presents opportunities for expanding human rights in the U.S.); see also *Bringing Human Rights Home* vols. 1–3 (Cynthia Soohoo, Catherine Albisa & Martha F. Davis eds., 2008) (three-volume set chronicling the history and current manifestations of human rights in the United States from the perspective of domestic social justice activism).

159. See, e.g., Nat'l Ctr. for Injury Prevention & Control, Ctr. for Disease Control & Prevention, *Costs of Intimate Partner Violence Against Women in the United States 1–4* (2003), (characterizing domestic violence as a "substantial public health problem" in the United States), available at [http://www.cdc.gov/ncipc/pub-res/ipv\\_cost/IPVBook-Final-Feb18.pdf](http://www.cdc.gov/ncipc/pub-res/ipv_cost/IPVBook-Final-Feb18.pdf); Patricia Tjaden & Nancy Thoennes, U.S. Dep't of Justice, *Extent, Nature, and Consequences of Intimate Partner Violence: Findings from the National Violence Against Women Study 9–11* (2000), <http://www.ncjrs.gov/pdffiles1/nij/181867.pdf> (reporting the prevalence and incidence of intimate partner violence in the United States); Joseph R. Biden, Jr., *Ten Years of Extraordinary Progress: The Violence Against Women Act 30–32* (2004), available at [http://biden.senate.gov/documents/VAWA\\_Report.pdf](http://biden.senate.gov/documents/VAWA_Report.pdf).

160. See generally Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 Yale L.J. 2117 (1996) (arguing that, despite the abolition of chastisement laws that permitted wife beating, the legal system is still unwilling to interfere in domestic violence, basing its inaction on protecting

been made in this area in the past twenty years, the statistics remain staggering.<sup>161</sup> Between one and five million women in this country suffer nonfatal violence at the hands of an intimate partner each year.<sup>162</sup> Approximately 26% of women, compared to 8% of men, report being assaulted by an intimate partner in their lifetime.<sup>163</sup> Nationally, victims report that law enforcement responds within five minutes of a call for service in only 25% of cases.<sup>164</sup> In New York City, out of 233,617 domestic incidents reported in 2001, only 23,905 (around 10%) resulted in arrests, despite New York's mandatory arrest law.<sup>165</sup>

The international human rights framework concentrates on governmental accountability for State acts and omissions that violate basic notions of dignity, civility, and citizenship. Reframing the issue as a public matter highlights the State's role in perpetuating violence against women when it fails to respond appropriately to victims.

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marital privacy and promoting domestic harmony).

161. See, e.g., Nat'l Ctr. for Injury Prevention & Control, *supra* note 159, (estimating that nearly 5.3 million intimate partner victimizations occur among U.S. women ages 18 and older each year); see also Patricia Tjaden & Nancy Thoennes, *supra* note 159 (finding that 7.7% of surveyed women and 0.3% of surveyed men reported being raped, 22.1% of surveyed women and 7.4% of surveyed men reported being physically assaulted, and 4.8% of surveyed women and 0.6% of surveyed men reported being stalked by a current or former partner over the course of their lifetimes); available at <http://www.ncjrs.gov/pdffiles1/nij/181867.pdf>; Biden, *supra* note 159.

162. Nat'l Ctr. for Injury Prevention & Control, *supra* note 159, at 1, 19, 43 (estimating 5.3 million intimate partner victimizations against women ages 18 and older in the United States each year); see also Patricia Tjaden & Nancy Thoennes, *supra* note 159, at iii (estimating 4.8 million intimate partner rapes and physical assaults are perpetrated against U.S. women annually).

163. Patricia Tjaden & Nancy Thoennes, *supra* note 159, at 9. Because many domestic violence survivors do not report their traumas because of shame, fear of retaliation, or a belief that the violence is a private matter, these statistics likely understate the incidence of domestic violence. See Kerry Murphy Healey & Christine Smith, Nat'l Inst. of Justice, U.S. Dep't of Justice, Research in Action, *Batterer Programs: What Criminal Justice Agencies Need to Know 2* (1998) (noting that "as many as six in seven domestic assaults go unreported").

164. Lawrence A. Greenfeld, et al., U.S. Dep't of Justice, *Violence by Intimates: Analysis of Data on Crimes by Current or Former Spouses, Boyfriends, and Girlfriends 20* (1998).

165. Columbia Law School, Conference Booklet, *Mandatory Arrest: Original Intentions, Outcomes in Our Communities, and Future Directions 17* (Jun. 17, 2005).

Despite the great promise of the human rights framework for domestic advocacy, U.S.-based advocates have tended to rely upon human rights principles and instruments for work directed abroad—not at home. The United States has declined to ratify most international human rights treaties, and has undermined the few treaties it has ratified by attaching broad reservations, understandings, and declarations (“RUDs”).<sup>166</sup> Moreover, international and domestic non-governmental organizations (“NGOs”) have only recently begun to classify as “human rights” violations what were traditionally (and still are) deemed infringements on “civil rights” by U.S. lawyers.<sup>167</sup>

Domestic violence advocacy occupies a different arena altogether. A massive effort in the 1990s to recognize domestic violence as a civil rights violation gave rise to a short-lived victory in the form of VAWA’s civil remedy. In response to the Supreme Court’s pronouncement in *Morrison v. United States*<sup>168</sup> that gender-motivated violence is a local rather than national issue, eleven states and the District of Columbia have passed legislation that authorizes civil recovery for crimes such as domestic or sexual violence as a civil rights violation.<sup>169</sup> However, as Julie Goldscheid has discussed, these civil rights remedy statutes “are not widely publicized and remain underutilized” by domestic violence and civil rights advocates in the U.S.<sup>170</sup> Other states and municipalities have passed legislation to ensure employment protections for domestic violence victims,<sup>171</sup> but

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166. RUDs are qualifying statements attached to treaties added by State Parties upon signing and ratification. The United States’ attachment of significant RUD “packages” renders these treaties severely compromised, if not completely unenforceable, at the domestic level.

167. See Cynthia Soohoo, *Human Rights and the Transformation of the ‘Civil Rights’ and ‘Civil Liberties’ Lawyer*, in 2 *Bringing Human Rights Home* 71, 72, 78–93 (Cynthia Soohoo, Catherine Albisa & Martha F. Davis eds., 2008) (discussing the possibility of framing civil rights concerns as human rights issues).

168. 529 U.S. 598 (2000).

169. See Julie Goldscheid, *Domestic And Sexual Violence As Sex Discrimination: Comparing American and International Approaches*, 28 *T. Jefferson L. Rev.* 355, 372 (2006).

170. *Id.*; see also Julie Goldscheid, *The Civil Rights Remedy of the 1994 Violence Against Women Act: Struck Down But Not Ruled Out*, 39 *Fam. L.Q.* 157, 166 (2005) (considering alternative civil rights approaches to violence against women).

171. See 820 Ill. Comp. Stat. 180/30 (2004); N.Y.C. Admin. Code § 8-107 (2001); see also Md. Exec. Order No. 01.01.1998.25 (1998) (prohibiting unfair

overall, many domestic violence advocates have shifted away from a civil rights approach over the past eight years. These days, domestic violence advocacy takes place primarily through local legal service providers offering direct services to victims, and national public policy organizations initiating funding and public education programs to address domestic violence and engaging in legislative advocacy at the state and national levels. U.S.-based organizations have primarily focused on passing and strengthening mandatory arrest legislation, obtaining civil and criminal orders of protection for victims and their children, representing victims in family law matters (e.g., divorce, custody), and ensuring short-term solutions for victims fleeing their abusers.<sup>172</sup> This advocacy stands in sharp contrast to the work of major civil rights organizations such as the American Civil Liberties Union and NAACP Legal Defense Fund (traditionally focused on civil rights impact litigation), and Human Rights Watch and Amnesty International (traditionally focused on issuing reports that publicly “name and shame” governments that violate basic human rights).<sup>173</sup>

Yet even in the international arena, where the human rights discourse is more familiar, gender-based violence—including domestic violence—has often been treated as outside the core of

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treatment of state employees on the basis of their status as domestic violence victims).

172. See Julie Goldscheid, *supra* note 169, at 355, 363 (2006) (categorizing recent advances in U.S. legal and social services responses to domestic violence and rape victims into four categories: “eliminating formal inequalities, enhancing criminal and criminal justice-related penalties, expanding social services, and enhancing civil law responses,” and describing recent setbacks in the last category).

173. See, e.g., American Civil Liberties Union, About Us, <http://www.aclu.org/about/index.html> (last visited Oct. 6, 2008) (publicizing its “work . . . to extend rights to segments of our population that have been traditionally denied their rights”); NAACP Legal Defense and Education Fund, Inc., Mission Statement, <http://www.naacpldf.org/content.aspx?article=1133> (last visited Oct. 6, 2008) (advertising itself as “America’s legal counsel on issues of race,” by “focusing on education, voter protection, economic justice, and criminal justice”); Human Rights Watch, About HRW, <http://www.hrw.org/about/> (last visited Oct. 6, 2008) (noting its commitment to “enlist the public and international community to support the cause of human rights for all”); Amnesty Int’l, Our Mission, <http://www.amnestyusa.org/our-mission-and-the-movement/page.do?id=1101178> (last visited Oct. 6, 2008) (pledging to stand up for human rights across the world by “investigat[ing] and expos[ing] abuses, [and] educat[ing] and mobiliz[ing] the public”).

advocacy. The human rights paradigm has traditionally focused on those civil and political rights belonging to public life, and thus considered worthy of state protection. Governments have not been held accountable for protecting individual rights in the private sphere.<sup>174</sup> As the international women's rights scholar and advocate Rhonda Copelon has noted, "[t]he egregiousness of gender-based violence has been matched only by its absence from human rights discourse."<sup>175</sup>

#### IV. THE UTILITY OF FRAMING DOMESTIC VIOLENCE AS A HUMAN RIGHTS VIOLATION

Jessica Gonzales's tragic story had all the makings of a good test case: a horrific set of facts, a widely-criticized U.S. Supreme Court decision, an international standard that directly conflicted with domestic precedent, a community of advocates and supporters asking "what can we do?" and a petitioner who would not rest until justice was done. Never before had a domestic violence survivor filed an international legal claim against the U.S. government. Nor had anyone ever squarely tied the U.S. government's obligation to address "private" violence to legal challenges to *DeShaney*, *Morrison*, and the Supreme Court's equal protection jurisprudence under international law. And, while the Supreme Court case had focused solely on the police failures to protect the girls' lives, and indeed had taken for granted that Simon Gonzales killed his daughters, the Inter-American process went far beyond this inquiry.

The Inter-American approach allowed Ms. Gonzales's case to be presented as representative of a larger, nationwide, problem: the

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174. See Celina Romany, *State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*, in *Human Rights of Women: National and International Perspectives* 85, 85-86 (Rebecca J. Cook ed., 1994) (criticizing the international human rights discourse for its failure to recognize violence against women as a human rights violation); Shelton, *supra* note 2, at 22.

175. Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 Colum. Hum. Rts. L. Rev. 291, 292 (1994) (noting the exclusion of domestic violence from the human rights framework and arguing for its inclusion in the framework as a form of torture); see also Alice Miller, *Sexuality, Violence Against Women, and Human Rights: Women Make Demands and Ladies Get Protection*, 7 Health and Hum. Rts. 16, 20 (2004) (discussing transformations in the U.N. and the mainstream human rights movement that led to the recognition of women's rights as human rights).

inappropriate response of police to women, especially women of color, who are victims of domestic violence.<sup>176</sup> Moreover, although the Inter-American system does not have a formalized fact-gathering process, the Commission is generally a forum that supports victims' efforts to uncover the truth about alleged human rights violations. This atmosphere prompted Ms. Gonzales to submit open records requests to Colorado agencies seeking evidence concerning the time, place, and circumstances of her children's deaths. This process allowed her to highlight, for the first time, the ways in which her family's rights had been violated not only by the police actions on the night in question, but also by the Colorado authorities' failure to investigate the cause of the girls' deaths and provide the family with this information.<sup>177</sup>

Yet many have asked why, given U.S. exceptionalism and the traditional relegation of domestic violence to the private sphere, a domestic violence survivor and her advocates would turn to an international human rights tribunal to seek justice from the U.S. government. What is the value of an internationally recognized right without a judicially-enforceable remedy? U.S.-trained lawyers have been skeptical about engaging in litigation that, even if successful, has no formal enforcement mechanism.

In fact, there are good reasons for pursuing Ms. Gonzales's case at the international level. *Gonzales v. United States* has already made important inroads on two fronts—for Jessica Gonzales personally and for coalition/movement building—and has the potential to spur important normative developments, generate international and domestic political pressure, and change public opinion. The case has suggested new approaches to human rights, civil rights, and domestic violence advocacy in the United States.<sup>178</sup> It has piqued the interest of members of Congress anxious to do more to address violence against women. It has also crossed borders and contributed to an emerging transnational dialogue on domestic violence as a human rights violation.<sup>179</sup> Yet lurking in the background of this exciting process are legitimate concerns over how

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176. See Merits Brief, *supra* note 8, at 41–42.

177. See Merits Brief, *supra* note 8, at 33–37.

178. See, e.g., Pamela Brown, *Commission on Domestic Violence Report to the House of Delegates*, 2008 A.B.A. Sec. Int'l L. 4–5, available at [http://www.abanet.org/domviol/ABA\\_Policies/133\\_2\\_1.PDF](http://www.abanet.org/domviol/ABA_Policies/133_2_1.PDF) (last visited Sept. 29, 2008).

179. Bettinger-Lopez, *supra* note 158, at 191.

(and whether) the U.S. government will respond to the Commission's ultimate merits decision. Thus, while the case holds great promise for inducing systemic legal and policy shifts at the federal, state, local, and even international levels, advocates recognize that the nature and timing of such change remain uncertain.

#### A. Importance of the Case for Jessica Gonzales

Jessica Gonzales counts the Inter-American experience as the most meaningful chapter, to date, in her struggle for justice.<sup>180</sup> In March 2007, she testified before the Commission in the first Commission hearing session made available via webcast. This marked the first time that a domestic violence victim from the United States ever testified before the Commission. This was also Ms. Gonzales's first opportunity—nearly eight years after her daughters' deaths—to tell her story to a decision-making body and in a public forum. She later described it as a moment of “true catharsis.”<sup>181</sup>

The Commission's admissibility decision marked another milestone for Ms. Gonzales. Finally, she told the press, a tribunal was taking her tragedy seriously.<sup>182</sup> “I was not heard in my own country and I had to go to an outer body to be heard,” she told a Colorado radio station, “to help the United States understand where they failed me and my children.”<sup>183</sup>

Jessica Gonzales also pursued parallel international strategies to complement her Inter-American appeal. In May 2006, she told her story in Geneva to members of the United Nations Human Rights Committee as part of a panel called “Victims of

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180. Telephone Interview with Jessica Gonzales Lenahan (Oct. 20, 2007).

181. Interview with Jessica Gonzales Lenahan, in New York, N.Y. (Mar. 3, 2007).

182. See, e.g., *Human Rights Panel Investigates Deaths in Shootout* (CBS-4 Evening News television broadcast Oct. 8, 2007), (featuring Ms. Gonzales's explanation that she wanted her government and society held responsible for allowing such tragedies to occur), available at <http://cbs4denver.com/seenon/lenahan.castle.rock.2.562557.html> [hereinafter *CBS-4 Evening News*].

183. *In-Depth News: International Commission Will Hear Castle Rock Murder Case* (KCFR Colorado Public Radio broadcast Oct. 22, 2007), [http://www.kcfr.org/index.php?option=com\\_content&task=view&id=94&Itemid=234&target\\_pg=com\\_day&date=10/22/2007](http://www.kcfr.org/index.php?option=com_content&task=view&id=94&Itemid=234&target_pg=com_day&date=10/22/2007) (featuring Ms. Gonzales explaining that the domestic legal system did not adequately address her loss).

Human Rights Abuses.”<sup>184</sup> She also met with the United Nations Special Rapporteur on Violence Against Women, who agreed to investigate her case and make an official inquiry to the U.S. government regarding the tragedy.<sup>185</sup> The United States responded to the inquiry with the same argument it had previously made to the Inter-American Commission: that Jessica Gonzales had not adequately communicated the restraining order violation to the police throughout the course of the night; that the CRPD had handled the situation appropriately; that “the United States’ conduct in this case was fully consistent with [international human rights law]”; and that the United States is “among the world’s strongest protectors of victims of domestic abuse.”<sup>186</sup> With the government’s response, the Special Rapporteur’s official inquiry ended. However, the Special Rapporteur noted in her report that she will “follow with interest the deliberation of the Inter-American Commission on Human Rights on this case.”<sup>187</sup>

When reporters have asked Ms. Gonzales why she has pursued an international process that offers no enforceable remedy, she has reminded them that the Inter-American petition is her most viable option for holding her government accountable and ensuring that her tragedy is not repeated. “It’s no longer about me,” she told the Denver press after the Commission’s admissibility decision.<sup>188</sup>

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184. See Press Release, American Civil Liberties Union, Victims of U.S. Human Rights Violations Tell Their Stories at U.N. Meeting in Geneva (July 14, 2006), <http://www.aclu.org/intlhumanrights/gen/26157prs20060714.html> (announcing that Jessica Gonzales, along with several other activists and victims of human rights abuses, would speak on a panel presented by the ACLU) (last visited Oct. 10, 2008).

185. The Special Rapporteur on Violence Against Women, *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences: Communications to and from Governments*, ¶¶ 549-564, delivered to the UN Human Rights Council and the General Assembly, U.N. Doc. A/HRC/7/6/Add.1 (Feb. 27, 2008) [hereinafter Report of Special Rapporteur]. This information was also communicated to the author through various conversations with Jessica Gonzales during the course of her representation.

186. *Id.*

187. Report of Special Rapporteur, *supra* note 185, ¶ 565.

188. Ivan Moreno, *International Tribunal to Hear Castle Rock Case*, Rocky Mountain News, Oct. 8, 2007, at A4, available at [http://www.rockymountainnews.com/drmn/local/article/0,1299,DRMN\\_15\\_5717272,0\\_0.html](http://www.rockymountainnews.com/drmn/local/article/0,1299,DRMN_15_5717272,0_0.html); see also CBS-4 Evening News, *supra* note 182 (featuring Ms. Gonzales explaining that her children died “for a cause,” insofar as their deaths would prevent this from happening to anyone else).

“The only thing about me that it involves is that our human rights were violated and that they continue to be violated.”<sup>189</sup>

These days, Jessica Gonzales regularly speaks at domestic violence conferences and police trainings about the importance of legislative and policy protections for battered women.<sup>190</sup> As discussed below, the Inter-American system has clearly emerged as a new forum for U.S. victims such as Ms. Gonzales to mobilize change, feel empowered, and attain some sense of closure in the wake of tragedy.

#### B. Importance of the Case for Coalition and Movement Building

Jessica Gonzales’s case has spurred domestic violence advocates at home and abroad to expand the scope of their traditional advocacy and cast their work in human rights terms. In 2007 and 2008, U.S.-based advocates—many of whom were new to the human rights field—contributed to shadow reports for the U.N. Committee on the Elimination of Racial Discrimination (“CERD Committee”) on a variety of subjects, including domestic violence.<sup>191</sup> The chapters relating to domestic violence discuss “intersectional” race and gender discrimination experienced by minority, immigrant, and Native American domestic violence victims in New York City and nationwide.<sup>192</sup>

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189. Moreno, *supra* note 188.

190. This information was conveyed to the author through various conversations with Jessica Gonzales. The author also conducted several conferences with Ms. Gonzales during which this information was communicated.

191. Shadow Reports supplement reports by governments to human rights bodies by calling attention to the government’s progress and setbacks on particular human rights issues. Participants in the domestic violence CERD shadow report initiatives included the Urban Justice Center, Domestic Violence Project (NY); Queens Legal Services (NY); Sanctuary for Families (NY); Voices of Women Organizing Project (NY); South Brooklyn Legal Services (NY); University of Texas, Austin, Domestic Violence Clinic; Human Rights Initiative of North Texas; WEAVE (Washington, D.C.); Indian Law Resource Center (MT); Mending The Sacred Hoop (MN); Wellesley Centers for Women (MA); Amnesty International; Columbia Law School’s Human Rights Clinic and Sexuality and Gender Clinic (NY); CUNY Law School’s International Women’s Human Rights Clinic (NY).

192. See Urban Justice Center Human Rights Project, *Race Realities in New York City* 75–89 (2007), available at <http://www.hrpujc.org/documents/NYCCERDSRWeb.pdf> (documenting extensively the disparate impact, available resource, and systemic responses to domestic violence felt by minority

A delegation of over 140 members of civil society in the United States traveled to Geneva in February 2008 to participate in the CERD Committee's review of U.S. compliance with its obligations under the Convention on the Elimination of all Forms of Racial Discrimination ("CERD"). Included among this group was a "Violence Against Women Caucus,"<sup>193</sup> whose members emphasized four major points to the CERD Committee. First, they stressed that immigrant victims of domestic violence face unique obstacles to accessing services: language and cultural barriers, ineligibility for public benefits, and fear of deportation. The Department of Homeland Security's post-9/11 policy of encouraging local law enforcement agencies to enforce federal immigration laws has had a particularly chilling effect on battered immigrant women. They fear that a call to police will lead to deportation for themselves or their partners, often the primary breadwinners in the household.<sup>194</sup>

Second, the advocates used the *Gonzales* case to demonstrate how police in the United States systematically fail to protect victims of domestic violence, or assist them with escaping abuse. They noted the disproportionate effect this practice has on women of color and immigrant women.<sup>195</sup> In many cases, police will "under-respond" by ignoring women of color who call them for assistance. In other instances, police will "over-respond," re-victimizing women of color by arresting them instead of the perpetrators.<sup>196</sup> Federal and state courts have increasingly foreclosed many legal avenues available to domestic violence victims seeking to enforce their right to protection and hold police accountable. *Castle Rock v. Gonzales* was the most recent manifestation of this rollback in judicial remedies.

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communities); *see also* U.S. Human Rights Network, 2008 National CERD Shadow Report, at chapter 15 (2007), *available at* <http://www.ushrnetwork.org/projects/cerd> (documenting that the dual discrimination of race and gender results in women of color receiving inferior responses to domestic violence situations).

193. The Violence Against Women Caucus included members from Columbia Law School's Human Rights Institute (NY); CUNY Law School's International Women's Human Rights Clinic (NY); the National Congress of American Indians (NCAI) Task Force on Violence Against Native Women; the Navajo Nation; and the American Civil Liberties Union Women's Rights Project.

194. *See* Urban Justice Center, Human Rights Project, Race Realities in NYC, A CERD Shadow Report 75–77 (2007).

195. *Id.*

196. *Id.*

Third, the advocates decried the exploitation, abuse, and trafficking of domestic workers by diplomats in the United States, and the State Department's interpretation of the Vienna Convention on Diplomatic Relations so as to render diplomats immune to the criminal and civil jurisdiction of U.S. courts.<sup>197</sup>

And finally, participants pointed out to the CERD Committee that the provisions of the tribal title of VAWA 2005 have not been fully realized. Full implementation of Title IX, the advocates argued, would permit Native American Tribal Nations to create unique approaches to protecting women and children according to tribal customs and beliefs, within the context of their tribal justice system.<sup>198</sup>

In March 2008, the CERD Committee released its Concluding Observations, in which it:

[N]ote[d] with concern that the alleged insufficient will of federal and state authorities to take action with regard to violence and abuse often deprives victims belonging to racial, ethnic and national minorities, and in particular Native American women, of their right to access to justice and the right to obtain adequate reparation or satisfaction for damages suffered.<sup>199</sup>

The Committee recommended that the United States increase support for counseling services and temporary shelters; provide domestic violence training for those working within the criminal justice system; initiate public education campaigns; ensure prompt and thorough investigation of reports of rape and sexual violence against women belonging to racial, ethnic, and national minorities; and appropriately prosecute and punish perpetrators.<sup>200</sup> It was the first time the CERD Committee had made recommendations concerning discrimination against domestic violence victims in the United States.

Several U.S.-based advocates, many of whom were part of the CERD coalition and all of whom were newcomers to the human

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197. *Id.*

198. Comm. on the Elimination of all Forms of Racial Discrimination, Violence Against Women Caucus Response to Question 19 (2008) (on file with author).

199. Comm. on the Elimination of all Forms of Racial Discrimination, Concluding Observations, ¶ 26, U.N. Doc. CERD/C/USA/CO/6 (2008), available at <http://www1.umn.edu/humanrts/CERDConcludingComments2008.pdf>.

200. *Id.*

rights scene, drafted amicus briefs and participated as amici in support of Ms. Gonzales's case before the Commission. The themes in their amicus briefs included: the children's rights implications of domestic violence; domestic violence as a form of torture; a comparative analysis of domestic violence laws and policies in other common law countries (including the United Kingdom, Canada, Australia, and New Zealand); VAWA's limitations in holistically addressing domestic violence in the United States; and a consideration of "intersectional discrimination against domestic violence survivors on the basis of race, gender, class, and/or immigration status."<sup>201</sup> Several of these briefs picked up on themes contained in the CERD shadow reports and in the prior briefing of Ms. Gonzales's case before the Commission.<sup>202</sup>

Jessica Gonzales's case has inspired similar efforts among women seeking vindication of their civil and human rights. Energized by Ms. Gonzales's efforts, a group of U.S. mothers who lost custody of their children submitted a petition to the Inter-American Commission in May 2007 alleging bias against women, especially domestic violence victims in child custody determinations.<sup>203</sup> Domestic violence advocacy groups are also beginning to integrate a human rights element into conferences and trainings. The New York State Coalition Against Domestic Violence, for example, hosted a 30<sup>th</sup> Anniversary conference called "Mosaic of Movements: An Assembly on Human Rights" in April 2008, which was premised on the notion that domestic violence is a human rights violation and included a workshop on domestic violence and human rights.<sup>204</sup> In 2007 and 2008, the New York City Lawyers' Committee Against Domestic Violence, Legal Services of New York, and New Haven Legal Services hosted human rights trainings for domestic violence attorneys.<sup>205</sup> In 2008, the National Coalition Against Domestic Violence and the New

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201. Amicus Briefs Filed in Support of Jessica Gonzales, *Gonzales v. United States*, Petition No. 1490-05, Inter-Am. C.H.R., Report No. 52/07, OEA/Ser.L.V/II.128, doc. 19 (2007), available at [http://www.law.columbia.edu/center\\_program/human\\_rights/InterAmer/GonzalesvUS](http://www.law.columbia.edu/center_program/human_rights/InterAmer/GonzalesvUS).

202. *Id.*

203. Petition to Inter-American Commission on Human Rights on Behalf of Battered Mothers (May 11, 2007), available at <http://stopfamilyviolence.org/ocean/host.php?folder=124&page=468&T>.

204. See New York State Coalition Against Domestic Violence, Conference Agenda, *Mosaic of Movements: An Assembly on Human Rights* (2008), <http://www.nyscadv.org/30thagenda.htm>.

205. This information was gleaned from meetings conducted by the author.

York State Bar Association Legal Assistance Partnership Conference offered workshops on domestic violence and human rights at their annual conferences.<sup>206</sup>

Additionally, activists are considering implementing a general interest hearing before the Inter-American Commission, which, following the lead of the New York City-based CERD domestic violence coalition, would address intersections between race, gender, immigration status, and domestic violence in the United States.<sup>207</sup>

These human rights initiatives mark a new, international foray for grassroots domestic violence organizations whose mandate is typically local. Spurred by an increasingly conservative judiciary and a nationwide rollback in civil rights, advocates have sought new alternatives for mobilization and accountability in the domestic violence arena.<sup>208</sup>

### C. Importance of the Case for Normative Development

The *Gonzales* case offers opportunities for important normative developments at the state, federal, and international levels. For years, scholars and advocates have criticized *DeShaney v. Winnebago County* as contravening U.S. constitutional tradition and international human rights law. They point to Europe and Latin America as locations where affirmative governmental obligations are familiar and well-accepted.<sup>209</sup> *Gonzales v. United States* presents the

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206. See Nat'l Coalition Against Domestic Violence, 30<sup>th</sup> Anniversary Conference, "Conference At a Glance," <https://www.confmanager.com/main.cfm?cid=1107&nid=8179> (last visited Oct. 9, 2008); New York State Bar Association, Legal Assistance Partnership Conference, <http://www.nysba.org/AM/Template.cfm?Section=Events1&Template=/Conference/ConferenceDescByRegClass.cfm&ConferenceID=2782> (last visited Oct. 9, 2008).

207. The Inter-American Commission's mandate allows it to examine individual petitions or complaints; hold general interest, or thematic, hearings on human rights matters in the Americas; and issue precautionary measures. In the case of individual petitions (such as that of Jessica Gonzales) or precautionary measures requests, an individual or organizational complainant must allege a specific harm that violates the human rights of an individual. In the case of general/thematic hearings, an organization requests a short hearing to discuss a specific human rights concern with respect to a specific issue area or geographic region.

208. See Cynthia Sohoo et al., *Preface to Bringing Human Rights Home*, *supra* note 167, at x-xi (describing the general civil rights rollback of the 1990s).

209. See Winfried Brugger, *May Government Ever Use Torture? Two Responses from German Law*, 48 Am. J. Comp. L. 661, 674-75 (2000) (contrasting

Commission with an opportunity to articulate standards for an appropriate and reasonable governmental response to victims of third-party violence and to provide guidance for implementing international legal norms at the domestic level.<sup>210</sup>

An amicus brief submitted by twenty-nine amici from Latin America, the Caribbean, and Canada underscored the normative potential of *Gonzales*.<sup>211</sup> The brief argued that the Commission's articulation of due diligence standards in the domestic violence context would provide victims throughout the Americas with both tangible and intangible benefits. The Commission's decision would serve as a model for legislation and policies geared towards combatting domestic violence. It would also convey to victims that they have an international right to the State's protection, and that abuse is not merely a private, family matter.<sup>212</sup> By elaborating concrete standards on due diligence in the domestic violence arena, the Commission has the potential to examine the findings in its recent report, *Access to Justice for Women Victims of Violence in the Americas*,<sup>213</sup> and "move beyond the realm of formal recognition into

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*DeShaney* with German constitutional law which envisions constitutional rights as positive values which the state should strive to ensure and to strengthen); Rhonda Copelon, *International Human Rights Dimensions of Intimate Violence: Another Strand in the Dialectic of Feminist Lawmaking*, 11 Am. U. J. Gender Soc. Pol'y & L. 865, 872–73 (2003) (noting that the international human rights system, unlike American constitutional law as set out in *DeShaney*, imposes positive duties on states); Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 Duke L.J. 507, 570–71 (1991) (arguing that an original intention of the 14th Amendment was to impose a duty to protect citizens on the states); Bonita C. Meyersfeld, *Reconceptualizing Domestic Violence in International Law*, 67 Alb. L. Rev. 371, 418–19 (2003) (discussing the holding in *DeShaney* and arguing that judicial reluctance to prevent violence against women is in part a product of entrenched social hierarchy); Shelton, *supra* note 2, at 3, 26–33.

210. See The Secretary-General, *supra* note 2, ¶ 4 (calling for progress in domestic implementation of established international norms on violence against women).

211. See Brief for the Ctr. of Justice and Int'l Law et. al. as Amici Curiae Supporting Petitioner, ¶ 1, *Gonzales v. United States*, Petition No. 1490-05, Inter-Am. C.H.R., Report No. 52/07, OEA/Ser.L/V/II.128, doc. 19 (2007), [http://www.law.columbia.edu/center\\_program/human\\_rights/InterAmer/GonzalesvUS](http://www.law.columbia.edu/center_program/human_rights/InterAmer/GonzalesvUS) (follow hyperlink to "Amicus Brief Filed in Support of Jessica Gonzales (on the pervasive and severe nature of domestic violence throughout the America)").

212. *Id.* ¶ 66.

213. Inter-Am. C.H.R., OEA/Ser.L/V/II, doc. 68, ¶ 18 (Jan. 20, 2007) [hereinafter *Access to Justice*].

the sphere of creating guarantees for its real and effective practice.”<sup>214</sup>

While the decisions of foreign and international tribunals are not legally binding, they have powerful persuasive authority. In 2004, the U.S. Supreme Court invoked world opinion to support its holding in *Roper v. Simmons*<sup>215</sup> that the death penalty for juvenile offenders constituted disproportionate punishment and was therefore unconstitutional. The Court considered the overwhelming number of countries that have passed laws and ratified treaties prohibiting the juvenile death penalty, and concluded: “The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.”<sup>216</sup>

The turn to comparative and international law seems, at this point, irreversible. As our world has become increasingly interconnected, the international community frequently calls upon governments to account for their actions. As ACLU Legal Director Steven Shapiro has predicted, “in another 20 years, civil rights law in the U.S. is going to be deeply engaged in international human rights issues, and it will not be possible to be a civil rights lawyer without knowing about international human rights.”<sup>217</sup> Jessica Gonzales’s case contributes to this normative trend.

#### D. Importance of the Case as a Tool for Political Pressure

The *Gonzales* case places the United States in an uncomfortable political position. Normally we shine the spotlight on other countries’ human rights violations. As one Congressman told Jessica Gonzales, “do you know how embarrassing it would be for an international body to call the United States a violator of the rights of women and children?”<sup>218</sup> Indeed, as discussed above, the State Department appears particularly attuned to the case.

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214. *Id.* ¶ 294.

215. 543 U.S. 551 (2005).

216. *Id.* at 578.

217. Interview by Cynthia Soohoo with Steven Shapiro, Legal Director, American Civil Liberties Union, in New York, N.Y. (Apr. 18, 2007), reprinted in Soohoo, *supra* note 167, at 98 (generally discussing the beginning of a transition towards using international human rights strategies domestically).

218. Anonymous to Jessica Gonzales Lenahan, Capitol Hill, Washington, D.C. (Mar. 2007) (name withheld for confidentiality).

“To the extent an authoritative body finds violations by the United States and it does not comply, it resonates,” Professor Robert Goldman, a former Inter-American Commissioner, recently told the *National Law Journal*, commenting specifically on Ms. Gonzales’s case.<sup>219</sup> Indeed, advocates can use the case and the normative standards it may generate to place political pressure on the federal government to ratify CEDAW and pass legislation that better protects victims of gender-based violence.

#### E. Importance of the Case for Influencing Public Opinion

Jessica Gonzales’s trail-blazing efforts to name her tragedy a human rights violation and seek international recourse have set off a storm of enthusiasm from advocates and supporters at home and abroad. Domestic violence and women’s rights advocates have lauded the *Gonzales* case as a “colossal” development.<sup>220</sup> The Colombian National Human Rights Moot Court Competition modeled its 2007 fact pattern on the case.<sup>221</sup> Twenty-nine amici from Latin America, the Caribbean, and Canada submitted an amicus brief to the Commission arguing that the case would “bear significantly upon the wider protection of human rights and the rights of women and children within the Americas and beyond.”<sup>222</sup> The amicus initiative is particularly interesting in light of the fact that the traditional direction of human rights advocacy has been “North” to “South.” Through the brief, “Southern” activists from Latin America and the Caribbean have turned that paradigm on its head and examined the responsibility of their neighbor to the North for committing human rights violations on its home turf.

Critics, on the other hand, have publicly attacked Ms. Gonzales’s international appeals, expressing concern that airing the United States’ “dirty laundry” before international tribunals exposes

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219. Marcia Coyle, *U.S. Domestic Violence Case Goes to Rights Panel*, Nat’l L. J., Mar. 19, 2007 (quoting Robert Goldman).

220. See, e.g., Alison Bowen, *U.S. Violence Case to Get Human Rights Review*, Women’s E-News, Oct. 26, 2007, <http://www.womensenews.org/article.cfm/dyn/aid/3364> (last visited Sept. 22, 2008) (quoting Christina Falck, Director of Development at the Boston-based R.O.S.E. Fund (“[T]he commission’s [sic] decision highlights a ‘colossal’ case that rightfully propels it into conversation.”)).

221. Interview with Arturo Carrillo, Assoc. Professor of Clinical Law, George Washington Univ. Law School, in Washington, D.C. (July 31, 2007).

222. Brief for the Ctr. of Justice and Int’l Law, *supra* note 211, ¶ 1.

Americans to unwelcome criticism from outsiders and may even infringe upon national sovereignty. CRPD Chief Tony Lane condemned her allegations as “absolutely absurd” and charged that her Inter-American petition is “about money, politics, [and] people using other people.”<sup>223</sup> The *Rocky Mountain News* published two editorials criticizing the case. One rejected the notion that “international agencies that have adopted expansive theories of what count as violations of basic human rights” should judge the United States.<sup>224</sup> “It doesn’t particularly matter what you think of the police’s performance on that tragic day,” the Editor of the Editorial section asserted. “Maybe police should have such obligations (although it would open them up to nightmarish second-guessing), but if so, that’s a decision that Americans and U.S. courts should decide for themselves.”<sup>225</sup> The second editorial, published after the Commission’s admissibility decision, argued that human rights cases involving arbitrary detention, repression of speech, and state-sanctioned murder in other countries “are a far cry from inspecting how a local police department responded to a domestic situation in which a restraining order had been issued.”<sup>226</sup>

Despite the skeptics, Jessica Gonzales has already changed hearts and minds in the United States and throughout the world. Her case places in sharp focus, and then chips away at, the notion that domestic violence is not a “human rights” matter because it involves intimate relationships. That idea, the case makes clear, misses the point that an alarming number of women in America experience grievous harm due to domestic violence, and that our government is not responding effectively to this crisis. The case is also a vehicle for internal critique of social justice advocacy in this country, another example of the crumbling wall between domestic social justice and international human rights work.

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223. Rhonda Moore, *Mother Haunted by Daughters’ Deaths*, Colorado Community Newspapers Online, Oct. 18, 2007, [http://www.dnewspress.com/site/index.cfm?newsid=18932855&BRD=2713&PAG=461&dept\\_id=559878&rfti=8](http://www.dnewspress.com/site/index.cfm?newsid=18932855&BRD=2713&PAG=461&dept_id=559878&rfti=8) (last visited Sept. 22, 2008).

224. Vincent Carroll, Op-Ed., *Usurping Justice*, Rocky Mountain News, Mar. 2, 2007, <http://www.rockymountainnews.com/news/2007/mar/02/bcarrollb-usurping-justice/> (last visited Sept. 22, 2008).

225. *Id.*

226. *A Phony Human Rights Case*, Rocky Mountain News, Oct. 14, 2007, [http://www.rockymountainnews.com/drmn/editorials/article/0,2777,DRMN\\_23964\\_5722730,00.html](http://www.rockymountainnews.com/drmn/editorials/article/0,2777,DRMN_23964_5722730,00.html) (last visited Sept. 22, 2008).

#### V. OPPORTUNITIES FOR FUTURE HUMAN RIGHTS ADVOCACY AND POLICY CHANGE

In this section, I consider various approaches that U.S. policymakers and advocates could take to promote human rights, especially the rights of domestic violence survivors. Such approaches include incorporating international standards into local, state, and federal laws and policies, rethinking traditional approaches to domestic violence advocacy, and articulating a vision of and plan for structural equality that takes into account the multiple and complex forms of discrimination that domestic violence victims have always suffered.

A proactive, good-faith effort by government to respect and protect the human rights of domestic violence survivors in the United States could take several directions. The federal government took an important step to recognize the serious impact of violence against women in the United States through the enactment of the Violence Against Women Act (VAWA), passed in 1994 and most recently reauthorized in 2005.<sup>227</sup> While VAWA establishes funding streams that permit states and localities to apply for grants to support programs aimed at combating domestic violence, it falls critically short of *requiring* states or localities to undertake action to address the problem. Moreover, while Congress in December 2005 unanimously authorized spending \$1 billion per year on VAWA programs, which include a national domestic violence hotline, training for law enforcement, and legal assistance for victims, the President's 2006 budget only requested \$546 million in funding for continuing and new programs.<sup>228</sup>

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227. 42 U.S.C. § 13981 (2000).

228. See StopFamilyViolence.org, Full Funding for VAWA, <http://www.stopfamilyviolence.org/ocean/host.php?folder=66> (last visited Oct. 9, 2008). Indeed, many states do not even receive VAWA funding. In 2007, 19 of the 56 participating states and U.S. territories did not receive grants through VAWA's "ARREST" Program (which distributes grants to encourage arrest policies and enforcement of protection orders). See Office on Violence Against Women, Dep't of Justice, Grant Activity by State Fiscal Year 2007, <http://www.ovw.usdoj.gov/grant-activities2007.htm> (last visited Oct. 11, 2009). Further, in 2007, the median total of grants made by the Office on Violence Against Women (OVW) to programs within a single state or territory was approximately \$4.5 million. See *id.* Alaska, with a population of 683,478, received \$15.9 million in funding from OVW; New York, population 19,297,729, received \$18.8 million; and Wyoming, population 522,830, received \$2.3 million. See *id.*;

As Ms. Gonzales argued in her merits brief, this federal response to violence against women is inadequate to address the overwhelming need. The cost of intimate partner violence exceeds \$5.8 billion each year, \$4.1 billion of which is spent on direct medical and mental health care services.<sup>229</sup> The total annual cost of domestic violence grows to \$67 billion dollars when property loss, police response, ambulance services and the criminal justice process are taken into account.<sup>230</sup>

A comprehensive overhaul of the federal government's response to domestic violence (primarily contained within VAWA) to appropriately respond to this epidemic would involve increasing funding and improving data collection in the domestic violence arena; requiring judges, prosecutors, and police to undergo annual domestic violence training sessions; and setting quantifiable benchmarks and timetables for states' compliance with international obligations.<sup>231</sup>

On a separate level, the federal government could also take a meaningful step toward promoting women's rights by ratifying, without RUDs, those international human and women's rights treaties that it has historically refused to accept. These include the American Convention on Human Rights, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, the Convention on the Elimination of All Forms of Discrimination against Women and its Optional Protocol, and the International Covenant on Economic, Social, and Cultural Rights. Ratification of these treaties will bring the United States in line with the world community, contribute to standard-setting on violence against women at the domestic level, and send an international message that the United States takes its own human rights obligations seriously.

The federal government is not the only entity responsible for ensuring that human rights are promoted in the United States, however. State and local actors also play important roles as agents of international change. Under the Supremacy Clause of the U.S.

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U.S. Census Bureau, Dep't of Commerce, Census Bureau Homepage, <http://www.census.gov/> (last visited Oct. 11, 2008) (In "population finder," select state from drop-down menu to obtain 2007 population estimates).

229. Ctr. for Disease Control and Prevention, *supra* note 159.

230. Ted R. Miller et al., Nat'l Institute of Justice, U.S. Dep't of Justice, *Victim Costs and Consequences: A New Look* (1996).

231. *See* Merits Brief, *supra* note 8, at 155–58.

Constitution, international treaties are on par with the Constitution and federal statutes as the law of the land.<sup>232</sup> Under international law, state and local governments, in addition to the federal government, must comply with the terms of treaties to which the United States is a party.<sup>233</sup> Although such treaties are not self-executing,<sup>234</sup> and although the federal government is ultimately responsible for ensuring state and local compliance, state and local actors can take a leading role in pushing forward a human rights agenda at the local level. Local authorities can work in tandem with the federal government in proposing best practice models and cooperative initiatives.<sup>235</sup>

Such local activity might take place in several ways. Policymakers could propose state or local legislation that exceeds baseline federal standards concerning violence against women. For example, in April 1998, San Francisco became the first city in the United States to adopt an ordinance implementing CEDAW locally.

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232. The Supremacy Clause is the common name given to Article VI, Clause 2 of the United States Constitution, which reads: "This Constitution, and the Laws of the United States . . . and all Treaties made . . . under the authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

233. See Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 Yale L.J. 1236 (2008) for a discussion of the binding effect of treaties on state governments in the wake of recent Supreme Court decisions.

234. The Supreme Court has defined a "self-executing" treaty as one for which "no domestic legislation is required to give [it] the force of law in the United States." *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (reasoning that a self-executing treaty remains enforceable in the United States until the political branches take definitive steps towards its express abrogation). The United States attaches "non self-executing" reservations to most treaties it signs, including the ICCPR, CAT, and CERD. Thus, despite the fact that the U.S. has an international legal obligation to comply with the treaties to which it is a party, not all international law obligations are binding federal law enforceable in United States courts. See *Medellin v. Texas*, 128 S. Ct. 1346 (2008) (holding that non-self-executing treaties cannot be made enforceable in the courts of the United States by the executive branch acting alone nor by the decisions of international judicial bodies).

235. See *Medellin*, 128 S. Ct. 1346, 1372 (Stevens, J., concurring); Cynthia Soohoo, *Human Rights and the Transformation of the 'Civil Rights' and 'Civil Liberties' Lawyer*, in 2 *Bringing Human Rights Home* (Cynthia Soohoo, Catherine Albisa & Martha F. Davis eds., 2008) (providing examples of state and local human rights implementation).

The San Francisco ordinance, which was amended in 2000 to reflect the principles of CERD, articulated “local principles” that were normatively grounded in CEDAW in the areas of violence against women, economic development, and health care.<sup>236</sup> The ordinance requires the local Commission on the Status of Women to train selected city agencies in human rights so that the agencies can themselves perform gender analyses and develop action plans that incorporate human rights into city operations.<sup>237</sup> This system of monitoring, reporting, and public participation has institutionalized a proactive community response to gender and race discrimination and local compliance with treaty obligations.<sup>238</sup> Los Angeles has since followed suit and passed a local ordinance implementing CEDAW<sup>239</sup> and in New York City, legislation which would implement CEDAW and CERD has been introduced before the New York City Council.<sup>240</sup> The New York City legislation, called the Human Rights in Government Operations Audit Law (“Human Rights GOAL”), was originally proposed by the New York City Human Rights Initiative, a citywide coalition of community-based organizations, advocacy groups, and policymakers working to strengthen human rights standards in New York City.<sup>241</sup>

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236. See S.F., Cal., Admin. Code ch. 12K, 12K.1-6 (2001); see also Gaylynn Burroughs, *Realizing Social Justice Through International Human Rights: Part 1: More Than Incidental Effect On Foreign Affairs: Implementation of Human Rights By State and Local Governments*, 30 N.Y.U. Rev. L. & Soc. Change 411, 416 (2006) (portraying the San Francisco statute as a reaction of local citizens to their frustration with the federal government’s failure to adopt the “universal norms” of human rights at the national level).

237. Burroughs, *supra* note 236, at 416.

238. *Id.*; Stacy Laura Lozner, Note, *Diffusion of Local Regulatory Innovations: The San Francisco CEDAW Ordinance and the New York City Human Rights Initiative*, 104 Colum. L. Rev. 768 (2004) (contending that San Francisco’s CEDAW ordinance represents a promising example of policy implementation occurring through broad public participation).

239. L.A., Cal., Ordinance 175,735 (Dec. 19, 2003). Other municipalities have passed resolutions urging the United States to ratify CEDAW. See, e.g., Cook County, Ill., Resolution 04-R-117 (Mar. 23, 2004).

240. New York City Human Rights Initiative, New York City GOAL Fact Sheet, <http://nychri.org/documents/NYCHRGOAL.pdf> (last visited Oct. 8, 2008).

241. New York City Human Rights Initiative, <http://www.nychri.org/> (last visited Sept. 22, 2008) (describing the proposed human rights legislation as an effort to increase participation in the city government and address the underlying causes of discrimination).

Local treaty implementation strategies have been applauded for exposing human rights violations in the United States, providing new ways to think about social problems, and developing more concrete human rights norms. They also connect local activists with international networks, and provide ways for local governments to counteract inertia at the federal level and express the policy preferences of citizens within their jurisdictions.<sup>242</sup> Such ordinances could be tremendously helpful for prompting police departments to put human rights norms that promote the rights of domestic violence victims into practice.

While local human rights initiatives represent an exciting new avenue for human rights advocacy in the U.S., some might question whether these initiatives will have the same fate as the post-*Morrison* efforts to implement state and local versions of VAWA, which have met with only moderate success.<sup>243</sup> I see distinctions between two efforts, however. First, human rights shaming strategies can place pressure on local governments in the areas of trade and tourism, and can also motivate local governments to take the moral high ground, as was the case in San Francisco. Additionally, the language of human rights appeals to a broader constituency and, as I discussed earlier, has the ability to cut across the thematic (e.g., housing, employment, criminal justice) and identity-based (e.g., race, gender) silos that have traditionally separated different advocacy groups doing social justice work. One of the strengths of the human rights framework is its ability to place different stakeholders together under one umbrella.<sup>244</sup>

Another form of local human rights activity could involve enlisting state and city human rights commissions, whose traditional

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242. Burroughs, *supra* note 236, at 420–33 (depicting the CEDAW ordinances as democratically established mechanisms that increase the relevance of human rights to the lives of the cities' residents).

243. See *supra* notes 170–71 and accompanying text.

244. One idea that has also been suggested in the wake of *Castle Rock* to remedy the problem of inappropriate police response to domestic violence is to expand state and local post-*Morrison* legislation to specifically provide a civil rights remedy to victims of gender-motivated violence against not only their abusers, but also against police officers who respond inappropriately to victims' emergency calls. See generally Emily J. Martin & Caroline Bettinger-Lopez, *Castle Rock v. Gonzales and the Future of Police Protection for Victims of Domestic Violence*, Domestic Violence Report, Oct.–Nov. 2005, at 1. However, it is unlikely that local and state governments would be willing to accept enhanced liability when they are not required to do so under federal law.

focus has been on anti-discrimination legislation, to broaden their mandates to incorporate human rights standards into their work. In a shadow report to the CERD Committee, U.S. advocates noted that state and city human rights commissions:

[T]end to operate exclusively by reference to municipal law, in the form of statutory and constitutional non-discrimination provisions, unmediated by the CERD and often substantially narrower and more restricted than those provided for in the Convention. Indeed, state and local human rights commissioners often lack even a basic knowledge of CERD provisions and are reticent to refer to them at all in their work.<sup>245</sup>

Knowledge of human rights standards could substantially expand local governments' responses to discrimination and other human rights violations.

Police departments could likewise integrate human rights standards into their trainings, manuals, guidelines, and protocols, as some corrections departments have done in recent years—albeit in an uneven and often non-explicit manner. The Michigan Department of Corrections has recently incorporated human rights standards into its procedures as part of a lawsuit settlement involving sexual abuse of women prisoners.<sup>246</sup> After the Attica Prison riots in New York in the early 1970s, a special board of citizens whose mandate was to review conditions in the New York City jails proposed legislation modeled on the United Nations Standard Minimum Rules for the Treatment of Prisoners.<sup>247</sup> If the Inter-American Commission on Human Rights issues a decision in Jessica Gonzales's favor that clarifies the relevant human rights standards and sets forth

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245. See U.S. Human Rights Network, 2008 U.S. CERD Obligations and Domestic Implementation—Article 2 (2008), available at, <http://www.ushrnetwork.org/files/ushrn/images/linkfiles/CERD/4%20Domestic%20Implications%20Article%202.pdf> (commenting on the absence of permanent domestic institutions that monitor compliance with the convention's provisions).

246. See Deborah Labelle, *Ensuring Rights for All: Realizing Human Rights for Prisoners*, in 3 *Bringing Human Rights Home* 121 (Cynthia Soohoo et al. eds., 2008) (documenting the dramatic growth of the prison population and the reactions of human rights groups to the rights violations resulting therein).

247. Vanita Gupta, *Blazing a Path From Civil Rights to Human Rights: The Pioneering Career of Gay McDougall*, in 1 *Bringing Human Rights Home* 145, 149 (Cynthia Soohoo et al. eds., 2008) (describing how human rights standards were incorporated into New York legislation designed to address the horrendous conditions in New York City jails).

guidelines for an appropriate police response to domestic violence, police departments can integrate those standards and guidelines into their trainings and procedures. The Office on Violence Against Women, the federal agency which administers VAWA grants and is charged with implementation, can provide financial and technical support for such initiatives.

Judges might also look to international human rights law to interpret underdeveloped or ambiguous state constitutional provisions, including substantive and procedural due process and social and economic rights provisions.<sup>248</sup> For states who have long recognized the need for police accountability and that have historically sought to address domestic violence through legislation, international law could be a powerful source of persuasive authority for finding a governmental duty to protect domestic violence victims from the violent acts of their abusers under a state constitutional substantive due process theory. Likewise, state constitutional due process arguments are more likely to be successful in states whose courts have found that the police have a mandatory duty under domestic violence statutes to provide a particular benefit to victims.<sup>249</sup> These state due process arguments remain untested.

Sarah Cleveland, in considering the ways in which U.S. constitutional jurisprudence has been deeply influenced by international and comparative law, has written that “[t]he search for substantive due process . . . is a search for fundamental ‘human rights’... [that] invites consideration of international values—at least those of ‘free’ societies—and the Court has invoked such authorities.”<sup>250</sup> Indeed, Justice Kennedy, in overturning a Texas law that criminalized sodomy on substantive due process grounds, concluded in *Lawrence v. Texas* that “the right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries.”<sup>251</sup>

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248. See Martha Davis, *The Spirit of Our Times: State Constitutions and International Human Rights*, 30 N.Y.U. Rev. L. & Soc. Change 359 (2006) (arguing that state courts should consider international sources when interpreting their constitutions).

249. See Emily J. Martin & Caroline Bettinger-Lopez, *supra* note 244, at 14.

250. Sarah Cleveland, *Our International Constitution*, 31 Yale J. Int'l L. 1, 81 (2006) (likening the “liberty” rights of the Fourteenth Amendment’s Due Process Clause to fundamental international human rights).

251. *Lawrence v. Texas*, 539 U.S. 558, 577 (2003).

International standards could prove similarly persuasive in the domestic violence arena. As Cleveland has observed, “[i]f the international democratic community does not recognize . . . [the] claimed governmental interest, the burden is that much greater on the U.S. government or the several states to demonstrate that their own interest is compelling.”<sup>252</sup> In the case of a state substantive due process claim brought against a police department by a domestic violence victim, the police department would need to prove that its interest in maintaining police discretion was sufficiently compelling so as to permit the officers to ignore a victim’s calls for help.

Similarly, advocates might consider using the human rights framework to advocate for social and economic rights of domestic violence victims in states whose constitutions contain economic and social rights provisions. Some state constitutions include language such as “human dignity,” “public or general welfare,” or “aid to the needy.”<sup>253</sup> According to a recent manual on the use of state constitutions in human rights-at-home work:

Many state constitutions are more akin to human rights law than they are to the federal Constitution, in that they explicitly incorporate “positive” rights to health, education, welfare, and housing. While advocates, scholars, and courts have historically focused on these provisions in attempting to develop independent state-level jurisprudence, rarely have they considered the role that transnational law, which consists of international human rights law and foreign law, might play in judicial review of these constitutional provisions. Likewise, little attention has been paid to the idea that state law, and specifically state constitutions and legislation, might play a valuable role in developing a cogent, fair, and rational framework for enforcing internationally-recognized social and economic rights in the context of our federal system.<sup>254</sup>

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252. Cleveland, *Our International Constitution*, *supra* note 250, at 85.

253. See, e.g., Mont. Const. art. II § 4 (“The dignity of the human being is inviolable.”); Alaska Const. art. VII § 5 (“The legislature shall provide for public welfare”); N.Y. Const. art. XVII § 1 (“[T]he aid, care and support of the needy are public concerns and shall be provided by the state.”).

254. Human Rights Institute, Columbia Law School, Human Rights, Social Justice, and State Law: A Manual for Creative Lawyering (2008), available at [http://www.nesri.org/fact\\_sheets\\_pubs/legal\\_training%20manual.pdf](http://www.nesri.org/fact_sheets_pubs/legal_training%20manual.pdf)

(considering the potential of international law as a source of persuasive authority in interpreting state constitutions); see also Davis, *supra* note 248, at 360 (observing that state courts are structurally freer to look to international human

Key economic and social rights include the rights to health, shelter, food, work, education, and social security. Jessica Gonzales's story highlights the economic and social "rights deficit" that exists for so many domestic violence victims who seek holistic protection for the long-haul: safe and secure housing, physical and mental health care, job security, and child care, amongst other things.

In addition to providing needed benefits to victims, a reframing of domestic violence issues to focus on economic and social rights could make important strides toward addressing concerns about the differential impact of mandatory domestic violence policies (including mandatory arrest laws and prosecutors' "no-drop" policies) on women and men of color.<sup>255</sup> Research suggests that arrests in domestic violence cases involve disproportionately high numbers of low-income, African American, and Latino men.<sup>256</sup> As Donna Coker has noted, "[t]he negative effects of mandatory policies on some poor women, and particularly on poor women of color, may be significant."<sup>257</sup> Indeed, while many domestic violence activists advocate a strong criminal justice response to domestic violence to protect victims and punish batterers, many civil rights advocates express great concern over the ways in which a criminal approach impacts communities of color, exacerbating tensions that have historically existed between these communities and law enforcement.<sup>258</sup> The human rights framework, with its focus on governmental accountability and non-discrimination in the areas of economic, social, civil, and political rights, pushes us to focus on long-term, comprehensive solutions that ensure the security of victims and their children and appropriately censure batterers, but do not risk creating separate human rights violations as an unintended consequence.

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rights law when interpreting their constitutions than are federal courts).

255. Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 *Buff. Crim. L.R.* 801, 808 (2001) (identifying the need to address the widespread and deeply systemic problems that cause women of color to suffer disproportionately from violence and abuse).

256. *Id.* at 801 n.31.

257. *Id.* at 810–11.

258. I will further explore the theme of so-called "conflicting rights" and propose a human rights framework for considering the impact of a criminal justice approach to domestic violence on communities of color in a forthcoming article.

Finally, Ms. Gonzales's efforts to hold the U.S. government accountable for the failure of the Colorado authorities to investigate her daughters' deaths have important implications for U.S. advocacy concerning governmental oversight. In recent years, Civilian Complaint Review Boards (CCRBs) and similar institutions have come under fire for lacking transparency and maintaining compromised procedures that prevent public accountability for infractions by law enforcement and other governmental authorities.<sup>259</sup> A human rights analysis emphasizes these inadequacies and highlights the State's obligation to ensure prompt and adequate investigation.

## VI. CONCLUSION

International tribunals such as the Inter-American Commission on Human Rights, which has explicit authority to investigate human rights allegations and carry out field missions, can play a key role in uncovering the how/what/where/when/why/who in human rights inquiries and in providing redress and guidance to victims of rights abuses in the United States. One advantage of using the international framework at home is that it gets past procedural compromises in our domestic legal system, which leave such questions unresolved, and instead places a premium on the quest for truth and justice. Jessica Gonzales's case was dismissed by the federal district court on a motion to dismiss and never entered discovery or went to trial. The Inter-American Commission, in contrast, has already given Ms. Gonzales her "day in court." Having agreed to hear her case on the merits, the Commission will now delve into the evidence and make an uncompromised determination as to international responsibility.

Ms. Gonzales's Inter-American petition and her related advocacy in the U.S. and at the United Nations have triggered a reframing of domestic violence in the United States as a human rights violation. Domestic violence and human rights advocates who have previously occupied separate spheres are increasingly interacting and engaging in constructive and meaningful dialogue,

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259. See New York Civil Liberties Union, *Mission Failure: Civilian Review of Policing in New York City, 1994–2006* (2007), available at [http://www.nyclu.org/files/ccrb\\_failing\\_report\\_090507.pdf](http://www.nyclu.org/files/ccrb_failing_report_090507.pdf) (arguing that the low rate of investigation into police misconduct coupled with the rising frequency of such complaints are evidence of the Civilian Complaint Review Board's failures).

both in the United States and abroad. International scrutiny is being paid to a U.S. legal doctrine that contravenes international law. And, for a change, the United States is in the hot seat for failing to safeguard women's rights.

This new configuration can have reverberating effects on how our legal and political framework addresses, and how the public perceives, violence against women. A positive decision from the Inter-American Commission on Human Rights in *Jessica Gonzales v. United States* has the potential to shift the focus and practice of both domestic violence and human rights advocacy in the United States. The *Gonzales* case may refocus our collective lens on governmental accountability for domestic violence as a human rights violation. The result could ultimately have an important political dimension, becoming the flashpoint for legislative and policy changes at the local, state, national, and international levels.