

Before the

**INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,
ORGANIZATION OF AMERICAN STATES**

Jessica Ruth Gonzales

vs.

The United States of America

Petition No. P-1490-05

OBSERVATIONS CONCERNING THE MARCH 2, 2007

HEARING BEFORE THE COMMISSION

May 14, 2007

Presented on Behalf of Jessica Gonzales by Counsel:

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Following oral hearing before this Honorable Commission on March 2, 2007, Counsel for Petitioner Jessica Gonzales submit the following additional Observations.

I. JESSICA GONZALES HAS EXHAUSTED ALL AVAILABLE, ADEQUATE, AND EFFECTIVE DOMESTIC REMEDIES, AND HER PETITION SHOULD THUS BE DEEMED ADMISSIBLE.

The United States argues that Jessica Gonzales' petition should be deemed inadmissible because she did not pursue a range of legal and administrative remedies that were available to her.¹ In fact, no such remedies existed. As counsel for Petitioner have previously described,² none of the state and federal judicial remedies proffered by the United States were viable legal avenues for Ms. Gonzales. Moreover, no administrative channels were available to Ms. Gonzales in 1999 that would have afforded her adequate and effective redress. Ms. Gonzales pursued her only available domestic remedy – a due process claim – all the way to the United States' highest court. When the U.S. Supreme Court rejected her claim, she was left with no other alternatives for redress. Accordingly, as set forth in Ms. Gonzales' Petition and subsequent Observations, Jessica Gonzales exhausted all available, adequate, and effective remedies. Her Petition should therefore be deemed admissible.

¹ See Response of the Government of the United States of America to the Inter-American Commission on Human Rights Regarding Jessica Gonzales Petition, # P-1490-05 at 14-15 (hereinafter "U.S. Response"), 21-23, 36-38; Video of March 2, 2007, Hearing, *Jessica Gonzales v. United States*, before Inter-American Commission on Human Rights, available at http://www.oas.org/OASpage/videosondemand/home_eng/videos_query.asp?sCodigo=07-0041, (hereinafter, "Hearing Video").

² See Observations Concerning the September 22, 2006 Response of the United States Government (Dec. 11, 2006) (hereinafter, "Observations"), at 89-99.

A. Jessica Gonzales Only Needed to Exhaust Those Domestic Remedies That Were Available, Adequate, and Effective.

Article 31 of the Rules of Procedure of the Inter-American Commission generally requires that remedies of the domestic legal system be “pursued and exhausted” for a petition to be deemed admissible.³ The purpose of this requirement is to ensure the respondent State the opportunity to resolve disputes within its own legal framework.⁴ Domestic remedies, however, must be “formally in place [and] adequate to protect the rights allegedly infringed and effective in securing the results envisaged in establishing them.”⁵ “When domestic remedies are unavailable as a matter of fact or law, the requirement that they be exhausted is excused.”⁶ Specifically, under Article 31(2) of the Commission’s Rules of Procedure the exhaustion requirement does not apply when: (a) a State’s domestic legislation does not afford due process of law for protection of the right or rights alleged to have been violated; (b) the party alleging a rights violation has been denied access to the remedies under domestic law or has been prevented from exhausting

³ Rules of Procedure of the Inter-American Commission on Human Rights, approved 4-8 Dec. 2000, amended 7-25 Oct., 2002 and 7-24 Oct., 2003, art. 31(1); *see also* American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, *entered into force* July 18, 1978, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25, art. 46(3) (1992) (setting forth an identical standard for exceptions to the exhaustion requirement).

⁴ *Christian Daniel Dominguez Domenichetti v. Argentina*, Case 11.819, Inter-Am. C.H.R., Report No. 51/03, OEA/Ser.L/V/II.118 Doc. 70 rev. 2 at 117, ¶38 (2003); *Velásquez Rodríguez Case*, Inter-Am. Ct. H.R., at 61 (1988) (July 28, 1988); *In the matter of Viviana Gallardo et al.*, 1984 Inter-Am. Ct. H.R. (ser. A) Advisory Opinion No. G 101/81, at 28 (1984); *c.f. Aksoy v. Turkey*, 23 Eur. H.R. Rep. 553, 51 (1997) (“the machinery of protection established by the [European] Convention is subsidiary to the national systems safeguarding human rights”).

⁵ *El Mozote Massacre v. El Salvador*, Case 10.720, Inter-Am. C.H.R., Report No. 24/06, OEA/Ser.L/V/II.124, doc. 5 ¶ 33 (2006) (citing *Velásquez Rodríguez Case*, Inter-Am. Ct. H.R., at 64-66 (1988); *Fairén Garbi and Solís Corrales Case*, 1994 Inter-Am. Ct. H.R. (ser. D) No. 2, at 86-90 (Mar. 15, 1989); *Godínez Cruz Case*, 1989 Inter-Am. Ct. H.R. (ser. C) No. 5, at 65-69 (Jan. 20, 1989)).

⁶ *Christian Daniel Dominguez Domenichetti*, Inter-Am. Ct. H.R., ¶38 (2003) (citing Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights), 1990 Inter-Am. Ct. H.R. (ser. A) No. 11, Advisory Opinion OC-11/90, at 17 (Aug. 10, 1990). This rule on exhaustion, generally applicable in the Inter-American system, also applies in other regional human rights systems. *See e.g., Aksoy v. Turkey*, 23 E.H.R.R. 553, 54 (1997) (excusing exhaustion where an “applicant did everything that could reasonably be expected of him to exhaust the national channels of redress”).

them; or (c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.⁷

The Commission has noted that “as a general rule the only remedies that need be exhausted are those whose function within the domestic legal system is appropriate for providing protection to remedy an infringement of a given legal right.”⁸ Thus, while “[a] number of remedies exist in the legal system of every country, . . . not all are applicable in every circumstance.”⁹ The exhaustion rule does not require the invocation of remedies which are inadequate,¹⁰ ineffective,¹¹ “obviously futile,”¹² or that “offer[] no possibility of success.”¹³

In the Inter-American system, “[w]here a State claims that a petitioner has failed to discharge the requirement of exhaustion, the former bears the burden of indicating the specific remedies which [were] available and effective” at the relevant time.¹⁴ When the

⁷ Rules of Procedure of the Inter-American Commission on Human Rights, approved 4-8 Dec. 2000, amended 7-25 Oct., 2002 and 7-24 Oct., 2003, art. 31(2).

⁸ *Christian Daniel Dominguez Domenichetti*, Inter-Am. Ct. H.R., ¶45 (2003). See also *Santos Soto Ramirez and Sergio Cerón Hernández*, Case 12.117, Inter-Am. C.H.R., Report No. 68/01, OEA/Ser.L/V/II.114 Doc. 5 rev. at 216 (2001) (noting that the exhaustion requirement “refers to available, appropriate, and effective judicial proceedings to remedy the alleged violation of human rights. As the Inter-American Court has stated time and time again, if in a given case an appeal is inappropriate for providing protection in order to remedy a legal situation and is not capable of producing the intended result, then clearly, it does not have to be exhausted.”) (citation omitted).

⁹ *Velásquez Rodríguez Case*, Inter-Am. Ct. H.R., at 64 (1988); *Zulema Tarazona Arriate et al v. Peru*, Case 11.581, Inter-Am. C.H.R., Report No. 83/01, OEA/Ser.L/V/II.114, doc. 5 rev. at 254, ¶24 (2001), *citing Velásquez*.

¹⁰ *Velásquez Rodríguez Case*, Inter-Am. Ct. H.R., at 64 (1988) (“Adequate domestic remedies are those which are suitable to address an infringement of a legal right”).

¹¹ *Velásquez Rodríguez Case*, Inter-Am. Ct. H.R., at 66 (1988) (“A remedy must also be effective—that is, capable of producing the result for which it was designed.” (emphasis added)).

¹² *Mario Lares-Reyes et al. v. United States*, Case 12.379, Inter-Am. C.H.R., Report No. 19/02, doc. 5 rev. 1 at 493, ¶ 61 (2002) (*citing, inter alia, Ramón Martínez Villareal v. United States*, Case 11.753, Inter-Am. C.H.R., Report No. 108/00, OEA/Ser.L/V/II.111, doc. 20 rev. at 409, ¶ 70 (2000)).

¹³ *Plan de Sánchez Massacre*, Case 11.763, Inter-Am. C.H.R., Report No. 31/99, ¶ 27 (1999); *Velásquez Rodríguez Case*, Inter-Am. Ct. H.R., at 68 (1988).

¹⁴ *Maria Eugenia Morales De Sierra v. Guatemala*, Case 11.625, Inter-Am. C.H.R., Report No. 28/98, OEA/Ser.L/V/II.95, doc. 7 rev. at 144, ¶28 (1997); *Velásquez Rodríguez Case*, 1994 Inter-Am.Ct. H.R. (ser. C) No. 1, at 88 (Jun. 26, 1989) (“the State claiming non-exhaustion has an obligation to prove that domestic remedies remain to be exhausted and that they are effective”); *Corumbiara v. Brazil*, Case 11.556, Inter-Am. C.H.R., Report No. 77/98, OEA/Ser.L/V/II.95, doc. 7 rev. at 62 (1998) (same); *Akdivar &*

State points to specific remedies under domestic law that exist and should have been used, it is for the petitioners to show “that those remedies were exhausted or that the case comes within one of the exceptions to the exhaustion requirement.”¹⁵

The Inter-American Commission and the U.N. Human Rights Committee (“HRC”), which considers similar exhaustion provisions applicable under the Optional Protocol to the International Covenant on Civil and Political Rights, both waive the exhaustion requirement, for example, where appeals would undoubtedly fail under legal precedent in a common law system,¹⁶ or where the highest court in the land has already made a ruling on the same issue.¹⁷ The HRC also waives exhaustion requirements for so-called “administrative remedies” that depend on the discretionary authority of an official in the executive or legislative branch of the government and that do not provide individual relief.¹⁸

Others v. Turkey, 1996-IV, Eur. Ct. H.R., 68 (specifying that the government carries the burden of proof to demonstrate that “the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success”).

¹⁵ *Velásquez Rodríguez Case*, Inter-Am. Ct. H.R., at 60 (1988); *Christian Daniel Dominguez Domenichetti*, Inter-Am. Ct. H.R., ¶43 (2003). *See also Case of Cyprus v. Turkey*, 2001-IV Eur. Ct. H.R., 116 (“it is incumbent on the respondent Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the aggrieved individuals’ complaints and offered reasonable prospects of success. However, once this burden of proof has been satisfied it falls to the applicant [] to establish that the remedy advanced by the respondent Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving the persons concerned from the requirement of exhausting that remedy.”).

¹⁶ *See, e.g., Earl Pratt and Ivan Morgan v. Jamaica*, Communication No. 210/1986 and 225/1987, U.N. Doc. Supp. No. 40 (A/44/40) at 222, ¶12.5 (1989).

¹⁷ *See, e.g., Maria Eugenia Morales De Sierra v. Guatemala*, Inter-Am. C.H.R., ¶28 (1997).

¹⁸ *See, e.g., Falcon Rios v. Canada*, U.N. CAT/C/33/D/133/1999, ¶7.3 (2004) (finding that an asylum seeker’s appeal to the executive is not a “remedy under the law” because such a decision is “discretionary” and “not [made] on a legal basis,” and that such appeal was therefore not required for exhaustion); *Robert W. Gauthier v. Canada*, Communication No 633/1995, U.N. Doc. CCPR/C/65/D/633/1995, ¶¶8.3, 9.2 (5 May 1999) (waiving exhaustion requirement where applicant did not appeal the discretionary decision of a legislator).

a. Jessica Gonzales exhausted all viable domestic legal remedies.

The United States bears the burden of indicating the specific legal remedies that were available, adequate, and effective in 1999, when Ms. Gonzales' daughters were killed.¹⁹ The United States asserts that Ms. Gonzales could have pursued equal protection claims before the federal courts or state tort claims in the Colorado courts. However, the United States misstates the standard applied in several of the cases to which it cites and demonstrates a clear misunderstanding of domestic legal precedent.²⁰

For example, the United States contends that Ms. Gonzales could prevail on an equal protection claim if she demonstrated that “the police treated domestic violence and stalking cases differently than other assault cases or that a police policy of failing to protect domestic violence or stalking victims had a discriminatory impact on women.”²¹ In fact, to obtain heightened judicial scrutiny of CRPD's response to domestic violence cases and prevail on a claim of sex discrimination in violation of the Equal Protection Clause, Ms. Gonzales would have needed to demonstrate that the CRPD's response to domestic violence was chosen with the invidious *intent* to harm women – in other words, that a decisionmaker “selected or reaffirmed a particular course of action at least in part ‘because of’ not merely ‘in spite of’ its adverse effect on [women].”²² In the absence of such proof of intentional sex discrimination, Ms. Gonzales could only have succeeded on an equal protection claim if she proved that there was *no rational basis* for a CRPD

¹⁹ See *supra* note 14.

²⁰ U.S. Response at 14-15, 21-22, 37. Petitioners note that in response to several questions by Commissioner Victor Abromovitch at the March 2, 2007 hearing, Kevin Baumert, on behalf of the United States, acknowledged that he was “not familiar with” Colorado law and therefore could not answer several questions related to it.

²¹ U.S. Response at 14.

²² *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979), see also Observations at 95-98.

policy or practice of treating domestic violence differently from other crimes, a test that is nearly impossible to meet under current judicial precedent.²³

Alternatively, the United States claims that Ms. Gonzales “could have filed a civil suit against [the police] in state court,” had she been able to meet the willful and wanton misconduct standard required for a plaintiff to overcome immunity for public entities or state agents under the Colorado Governmental Immunity Act (CGIA).²⁴ Yet the United States *cites to no case* in which a similarly-situated plaintiff has overcome the near-blanket immunity provided by CGIA.²⁵ That is because, to counsel for Petitioner’s knowledge, no such case exists, and because, as Petitioner contends, any state tort lawsuit would have been barred by the CGIA.²⁶

As indicated above, the United States’ assertion that additional legal remedies under state and federal law were available to Ms. Gonzales is manifestly wrong. Accordingly, the United States has failed to fulfill its burden of describing specific adequate and effective remedies that would have been available to Ms. Gonzales in 1999.

Petitioner, on the other hand, has satisfied the burden of proving that the remedies proffered by the United States come within one of the exceptions to the exhaustion requirement.²⁷ As described in Petitioner’s Observations, remedies under the Equal Protection Clause of the United States Constitution would have been unavailable to Ms.

²³ See Observations at 97-98.

²⁴ U.S. Response at 21-22.

²⁵ Observations at 91-94.

²⁶ The facts of Ms. Gonzales’ case largely mirror those in the case of *Osman v. United Kingdom*, in which the European Court of Human Rights upheld the decision of the European Commission that the existence of an immunity for negligence actions against police officers operates as a procedural bar to a proceeding in negligence, and as such amounts to a restriction on petitioner’s access to the courts. *Osman v. the United Kingdom*, 23452/94, Eur. Comm’n H.R. Dec. & Rep. 101, 153 (1998).

²⁷ See Observations at 89-99; see also *supra* note 15.

Gonzales under Supreme Court precedent,²⁸ and the Colorado Governmental Immunity Act barred Ms. Gonzales from bringing a civil tort suit against the Town of Castle Rock and individual police officers.²⁹ Accordingly, it would have been futile for Jessica Gonzales to pursue such remedies where there was no basis for believing that these prior decisions would be overruled.

Ms. Gonzales pursued the only legal remedy that was available to her – a constitutional due process claim – to the U.S. Supreme Court, the highest court in the land.³⁰ She therefore exhausted all available, adequate, and effective legal remedies, and should be excused from exhausting remedies that are inadequate, ineffective, and “offer[] no possibility of success.”³¹

b. Criminal Prosecution of or Contempt Proceedings Against Simon Gonzales, Had He Lived, Would Never Have Constituted an Available, Adequate, or Effective Remedy for the Violations Alleged.

Misunderstanding the nature of Ms. Gonzales’ Petition, the United States baldly asserts – without citing to any jurisprudence or treatise – that had Simon Gonzales survived, “an additional range of available remedies,” such as criminal prosecution and criminal or civil contempt proceedings, would have been available to Ms. Gonzales.³² First, of course, Simon Gonzales did not survive, and thus any such remedies against Simon Gonzales were not in fact available to Ms. Gonzales.

²⁸ Observations at 95-98.

²⁹ Observations at 91-94.

³⁰ This case is similar to the case of *Maria Eugenia Morales De Sierra v. Guatemala*, where the Commission found that “[g]iven that the claims at issue before the Commission were placed before the Court of Constitutionality, thereby enabling the highest tribunal with jurisdiction to monitor and interpret the constitutionality of laws to render a determination of the rights at issue under domestic law, the Commission considers the requirement that domestic remedies be exhausted to have been satisfied.”

³¹ *Plan de Sánchez Massacre*, Inter-Am. C.H.R., at 27 (1999); *Velásquez Rodríguez Case*, Inter-Am. Ct. H.R., at 64 (1988) (“if a remedy is not adequate in a particular case, it obviously need not be exhausted”).

³² U.S. Response at 22-23, 37.

Second and equally important, Ms. Gonzales is not seeking a remedy for the misdeeds of Simon Gonzales. Rather, she seeks to hold the United States accountable for human rights violations committed by the CRPD and for the U.S. Supreme Court's failure to remedy those violations. Even if Simon Gonzales had lived, any prosecution or contempt of court proceeding against him for his wrongs is entirely different from a remedy for the failure of the police to respond with due diligence to Ms. Gonzales' calls. The United States points to a remedy for wrongs (kidnapping, murder, contempt of court) that are separate and apart from the wrongs (failure to protect and compensate a victim of domestic violence, indifference to domestic violence) that are the subject of this Petition and the previous domestic litigation. It is inappropriate for the United States to conflate these issues.

The European Court of Human Rights dismissed a similarly misplaced argument in *Osman v. United Kingdom*, finding that legal proceedings brought by victims and their families against individuals who committed criminal acts did not "mitigate the loss of their right to take legal proceedings against the police in negligence and to argue the justice of their case."³³ The *Osman* Court reasoned that the petitioners "were entitled to have the police account for their actions and omissions in adversarial proceedings" that were separate and apart from any legal proceedings against the individuals who committed the acts.³⁴ The same is true in this case.

Moreover, in the United States' criminal justice system, criminal prosecutions and contempt proceedings are not designed to function as remedies for victims of crime. Criminal law is a matter between defendants, who stand accused of committing a crime,

³³ *Osman v. the United Kingdom*, 23452/94, Eur. Comm'n H.R. Dec. & Rep. 101, 153 (1998)

³⁴ *Id.*

and prosecutors, who represent the interests of the State and seek remedies on behalf of the public for the violation of the State's laws.³⁵ Crime victims do not participate as parties or otherwise direct the process; rather, they are relegated to the role of government witnesses who participate at the government's behest and are otherwise left on the periphery of a criminal prosecution.³⁶ In fact, prosecutions can and in some instances do take place without the knowledge, consent, or participation of the victim.³⁷

The U.S Supreme Court recognized these very principles in its decision in *Town of Castle Rock v. Gonzales*, Ms. Gonzales' case against the CRPD. The Court found that Ms. Gonzales did not have a personal entitlement to enforcement of her restraining order, noting that "[t]he serving of public rather than private ends is the normal course of the criminal law because criminal acts, 'besides the injury they do to individuals, . . . strike at the very being of society; which cannot possibly subsist, where actions of this sort are suffered to escape with impunity.'"³⁸ In light of these principles, the Court noted, "a Colorado district attorney [has] discretion to prosecute a domestic assault, even though the victim withdraws her charge."³⁹

Any criminal prosecution or contempt of court proceeding against Simon Gonzales could therefore never constitute an appropriate remedy for Jessica Gonzales, even had such proceedings been available, which they were not. Such prosecutions of

³⁵ E.g., Karen L. Kennard, Comment, *The Victim's Veto: A Way to Increase Victim Impact on Criminal Case Dispositions*, 77 CAL. L. REV. 417, 417 (1989).

³⁶ E.g., Erin Ann O'Hara, *Victim Participation in the Criminal Process*, 13 J.L. & POL'Y 229, 229 (2005); Kennard, *supra* note 35 at 417. See also *Guridi v. Spain*, Communication No. 212/2002, U.N. Doc. CAT/C/34/D/212/2002, ¶6.3 (2005) (excusing petitioner from requirement that he seek judicial review of royal decrees of 1999 that granted pardons to his torturers because "the injured party may not be a party to pardon proceedings in a material sense.")

³⁷ *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 765 (2005) (citing *People v. Cunefare*, 102 P.3d 302, 312 (Colo. 2004).

³⁸ *Id.* at 765 (citing 4 W. Blackstone, *Commentaries on the Laws of England* 5 (1769)); *Huntington v. Attrill*, 146 U.S. 657, 668 (1892)).

³⁹ *Castle Rock*, 545 U.S. at 765.

Simon Gonzales would not have compensated Ms. Gonzales for the CRPD's blatant disregard for her rights.

c. No Administrative Channels Were Available to Ms. Gonzales in 1999 That Would Have Afforded Her Adequate and Effective Remedies.

The United States bears the burden of identifying specific administrative channels available to Petitioner that could have afforded her an adequate and effective remedy.⁴⁰ The United States asserts that “administrative remedies” were available to Ms. Gonzales and that she should have filed an administrative complaint with the CRPD or the Town of Castle Rock, “which would have prompted an investigation.”⁴¹ The United States does not, however, provide any information concerning this purported administrative complaint mechanism. Counsel for Petitioner has thoroughly searched the Town of Castle Rock and CRPD websites; reviewed relevant Colorado statutes, Colorado regulations, the Castle Rock Town Charter, the Castle Rock Municipal Code, and Colorado case law; and spoken directly with the Castle Rock Police Chief, Attorney for the Town of Castle Rock, and the Douglas County District Attorney and Coroner, but have not located any information revealing mechanisms for filing administrative complaints against the CRPD or Town of Castle Rock. The CRPD and the Town of Castle Rock never informed Jessica Gonzales of any administrative complaint mechanisms that might have enabled her to request administrative review of the CRPD's actions on June 22 and 23, 1999. Even if such a complaint mechanism existed, and again

⁴⁰ See *supra* note 14. *Maria Eugenia Morales De Sierra v. Guatemala*, Inter-Am. C.H.R., ¶28 (1997); *Felix Roman Esparragoza Gonzalez et al. v. Venezuela*, Case 12.210, Report No. 48/04, Inter-Am. C.H.R., OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 667, ¶52 (2004) (“if the State claims that they have not all been exhausted, the State must identify the remedies that should be exhausted and their effectiveness.”); *Corumbiara v. Brazil*, Inter-Am. C.H.R. (1998) (same); *Velasquez Rodriguez Case*, Preliminary Objections, Judgment of June 26, 1989, Inter-Am.Ct.H.R. (Ser. C) No. 1 (1994); *Velasquez Rodriguez Case*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4, ¶¶63-64, 88 (1988).

⁴¹ U.S. Response at 37; see also U.S. Response at 22; Hearing Video.

Petitioner's counsel have been unable to find any evidence of such a mechanism after diligent investigation, its obscurity alone rendered it unavailable to Ms. Gonzales. Thus, the United States has failed to fulfill its burden of proving that administrative channels existed in 1999 that could have provided Ms. Gonzales with adequate and effective redress.

Moreover, even if "administrative complaint mechanisms" within the CRPD were available in 1999 and even if the United States had met its burden of identifying those mechanisms in its Response, such non-judicial mechanisms would not have constituted an adequate and effective remedy for Ms. Gonzales because any investigation and discipline of CRPD officer behavior would have been a wholly discretionary, unreviewable exercise of executive authority by CRPD.⁴²

Other international human rights bodies that have considered this very issue have waived exhaustion requirements after determining that such administrative, executive, or legislative mechanisms did not constitute adequate and effective remedies. In *Rios v. Canada*, for instance, the U.N. Committee Against Torture ("CAT Committee") excused a Mexican citizen seeking asylum in Canada from pursuing an administrative appeal of

⁴² When internal police department complaint mechanisms exist, they seldom provide the procedural protections necessary to constitute adequate and effective remedies for complainants. "Historically, the police [in the United States] have been extremely hostile to complaints, denying that the alleged misconduct occurred, often rebuffing citizens attempting to file complaints, failing to investigate complaints in a thorough and fair manner, and not disciplining officers who are in fact guilty of misconduct." SAM WALKER, *THE NEW WORLD OF POLICE ACCOUNTABILITY* 72 (2005). Internal investigations of police officer misconduct are conducted by other officers in the department; as a result, "[t]raditionally, police internal investigations have automatically accepted the statements of the officer over those of the complainant or witnesses, in some cases despite the fact that the officer's statement is filled with inconsistencies or simply not believable." *Id.* at 87. Even when an investigation is initiated, complainants often are given little information about the investigation, "[a]t best . . . receiv[ing] a form letter indicating the final disposition of their complaint but with little explanatory detail." *Id.* at 93. Such a form letter tersely reporting the results of a discretionary, unreviewable investigation cannot be understood to constitute an administrative remedy, as it does not shine a public light on the police department's failings, does not compensate the complainant for her injuries, and does not provide the complainant with additional information or explanation regarding the incident.

an “ex gratia” ministerial refusal to grant him humanitarian status. Because “the decision depends . . . on the discretionary authority of a minister and thus of the executive,” the Committee found, “it is not a remedy which must be exhausted to satisfy the requirement for exhaustion of domestic remedies.”⁴³ In *Maria Eugenia Morales De Sierra v. Guatemala*, the Inter-American Commission distinguished “executive and legislative” action from judicial remedies, emphasizing that “the remedies generally required to be exhausted are those the judicial system offers to address the infringement of a legal right.”⁴⁴ And, in *Gauthier v. Canada*, the HRC similarly found that a discretionary remedy such as an appeal of the discretionary decision of a Parliamentary official to be ineffective.⁴⁵

Because the United States failed to point to specific “administrative remedies” that existed in 1999 in the Town of Castle Rock or the State of Colorado, Petitioner carries no additional burden of proof.⁴⁶ Moreover, even if a CRPD internal complaint procedure existed, this would not have provided an adequate and available remedy for Ms. Gonzales. Like its criminal prosecution argument, the United States’ administrative mechanism argument is a red herring that distracts from the central issues in this case. Ms. Gonzales’ petition should be deemed admissible.

⁴³ *Falcon Rios v. Canada*, U.N. Doc. CAT/C/33/D/133/1999, ¶7.3 (2004).

⁴⁴ *Maria Eugenia Morales De Sierra v. Guatemala*, Inter-Am. C.H.R., ¶28 (1997).

⁴⁵ *Robert W. Gauthier v. Canada*, Communication No 633/1995, U.N. Doc. CCPR/C/65/D/633/1995, ¶¶8.3, 9.2 (5 May 1999).

⁴⁶ *Felix Roman Esparragoza Gonzalez et al. v. Venezuela*, Inter-Am. C.H.R., ¶52 (2004).

II. THE CRPD KNEW OR SHOULD HAVE KNOWN THE RISK THAT SIMON GONZALES PRESENTED TO JESSICA GONZALES AND HER DAUGHTERS AND SHOULD HAVE ENFORCED HER RESTRAINING ORDER.

In its oral submissions at the March 2, 2007, hearing, as well as in its written Response, the United States argues that the CRPD had no reason to conclude that Simon Gonzales posed a risk to his daughters when Ms. Gonzales sought police assistance on June 22 and 23, 1999. These assertions demonstrate a profound misunderstanding of the police officers' role in assessing the risk Simon Gonzales posed to Ms. Gonzales and her daughters. Because a judge had issued Ms. Gonzales a restraining order based on a previous judicial finding of risk, the police only need have determined whether that order was violated. The existence of a protective order sufficiently put the officers on notice of a possible danger to Ms. Gonzales and her daughters.

Moreover, even if it were appropriate for the police officers to have engaged in their own independent threat assessment on June 22, 1999, the CRPD was well aware of Simon Gonzales' erratic and dangerous behavior, and violated Ms. Gonzales' rights by failing to diligently enforce Ms. Gonzales' restraining order in the face of that knowledge. The night of June 22, 1999, was merely the culmination of a repeatedly ineffective police response to Ms. Gonzales throughout the previous month.

A. A Judge Had Already Determined that Simon Gonzales Presented a Threat to Jessica Gonzales and Her Daughters.

The United States' contention that the CRPD lacked sufficient information to ascertain the threat that Simon Gonzales posed to Ms. Gonzales and her three daughters displays a lack of familiarity with the dictates of Colorado law, as well as an ignorance of or disregard for sociological data regarding domestic violence and officers' attitudes

toward domestic violence. By issuing the restraining order, a judge had concluded – based on evidence presented at a hearing of which Simon Gonzales had notice and in which he participated – that Simon Gonzales constituted a threat to Ms. Gonzales and their children. The police should not have second-guessed that finding.

As acknowledged by the United States, judges receive specialized training on restraining order issuance.⁴⁷ Judges are often aware, therefore, that most women seek restraining orders after experiencing serious levels of victimization, such as physical assault, threats of harm or death, sexual abuse, threats with a weapon, stalking, harassment, or assault of their children.⁴⁸ Indeed, studies indicate that civil restraining orders are most often sought not for the first violent act, but after lengthy exposure to abuse.⁴⁹

It is the role of the judge to whom an application for a restraining order is submitted, as a detached arbiter, to determine whether a risk runs to the applicant. The judge is well-positioned to make this finding, given that the hearing process allows the judge to hear from all interested parties, as well as from other witnesses, and to consider the relevant evidence in a non-emergency situation. In contrast, a police officer responding to an emergency domestic violence call is far less able to gather and weigh the relevant evidence and measure the precise risk to the complainant, given a lack of time and available information. Thus, it is inappropriate for a police officer to reassess the threat of risk to the holder of the restraining order, in effect overruling the judge's prior determination. For this very reason, under Colorado's mandatory arrest laws, a

⁴⁷ U.S. Response at 20.

⁴⁸ Carol E. Jordan, *Intimate Partner Violence and The Justice System: an Examination of the Interface*, 19 J. INTERPERS. VIOLENCE 1412, 1423 (2004).

⁴⁹ *Id.* at 1424.

police officer's duty is to determine if the order has been violated, *not whether that violation poses a risk*. A restraining order represents a judicial determination of just such a risk.

Allowing police officers to engage in independent risk assessment in the face of a protective order not only runs afoul of mandatory arrest laws, but also leaves an officer's analysis open to any prejudices harbored by the officer. For example, data show that officers tend to believe that treatment, rather than arrest, is the appropriate and effective response to domestic violence.⁵⁰ The more time that an officer serves on the police force, the more likely the officer is to believe that treatment rather than arrest is the appropriate response when a police officer must deal with a perpetrator of domestic violence.⁵¹ The attitudes, comments, opinions, or assumptions of officers and others in the criminal justice system can be and often are harmful and demoralizing to victims, because they communicate that the violence perpetrated by their abusers is tolerated by society.⁵² In fact, the prevalence of such attitudes among police officers was the very reason behind many states' adoption and implementation of mandatory arrest laws like that in effect in Colorado.⁵³

As set out in her Petition and subsequent Observations, a judge granted Ms. Gonzales a temporary restraining order against Simon Gonzales on May 21, 1999. After

⁵⁰ TK Logan, Lisa Shannon, and Robert Walker, *Police Attitudes Toward Domestic Violence Offenders*, 21 J INTERPERS. VIOLENCE 1365, 1368 (2006).

⁵¹ *Id.* at 1369.

⁵² *Id.* at 1370.

⁵³ Observations at 31 (citing Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1851 (2002) (describing "call us again" response as common means of ignoring or delaying response to victims of domestic violence); Machaela M. Hctor., *Domestic Violence as a Crime Against the State: The Need for Mandatory Arrest in California*, 85 CAL. L. REV. 643, 649 (1997) ("Police treatment of domestic abuse calls has traditionally consisted of ... purposefully delaying response, even for several hours..."); Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1670.

a hearing before another judge, in which Simon Gonzales participated, the judge made that restraining order permanent on June 4, 1999. The judge thus determined that Simon Gonzales posed a risk to Ms. Gonzales and her children and that compliance with the terms of the protective order was necessary to cabin that risk. On June 22, 1999, when Simon Gonzales abducted Leslie, Katheryn, and Rebecca, Ms. Gonzales notified the CRPD that she had a restraining order and that Simon Gonzales had abducted her children in violation of this order. This fact *in and of itself* constituted “information amounting to probable cause” that Mr. Gonzales had violated the restraining order and that the children were at risk.

During the March 2, 2007, hearing, the United States suggested that, because Ms. Gonzales had checked a box on the application for a restraining order indicating that she was concerned about the *emotional* safety of her children, there was no way for the police to anticipate that Mr. Gonzales would cause *physical* harm to the children.⁵⁴ The United States ignores that the application for a restraining order was presented to the court, not to the CRPD, and that the judge who issued the restraining order on the basis of the application specifically found that “*physical or emotional harm would result*” if Mr. Gonzales were not excluded from the family home.⁵⁵ Moreover, on the evening of June 22, 1999, the CRPD did not have access to Ms. Gonzales’ application for a restraining order and therefore could not have made an assumption about the type of risk the Gonzales children faced on the basis of which boxes were checked. Instead, CRPD officers were presented with the actual restraining order, which does not so limit the risk

⁵⁴ Hearing Video.

⁵⁵ See Gonzales Petition, Ex. A (emphasis added).

that Simon Gonzales posed to Ms. Gonzales or her children. The CRPD should not have second-guessed the judge's determination in violation of Colorado law.

B. Ms. Gonzales' Calls and the CRPD's Prior Contact with Simon Gonzales Provided the CRPD More Than Sufficient Reason to Conclude that Simon Gonzales Posed a Threat to the Children.

Even if it were proper for the CRPD to engage in an independent reassessment of the risk that Simon Gonzales posed to Ms. Gonzales and their children in the face of a judicial order finding such a risk, the officers had more than enough information to appreciate that the children were in danger.

Over a *ten hour period*, Ms. Gonzales repeatedly made clear to the CRPD that (1) Simon Gonzales had abducted the children, in violation of a valid restraining order, (2) there was no prearranged dinner visit between Simon Gonzales and the children, and (3) she was concerned for her missing children's safety. Police transcripts confirm the following:

- In her first conversation with the police at 5:50 p.m., Ms. Gonzales said: "*I filed a Restraining Order against my husband.*"⁵⁶ She continued to refer to the restraining order in subsequent conversations with the police.⁵⁷
- When Ms. Gonzales first discovered the children missing, she told the CRPD dispatcher: "[T]hey always call me when they're leaving with him [Simon Gonzales] and you know, *tonight's not even his night to have them.*" She explained that "the girls are gone and I'm not knowing whether to . . . go search through town for them." She continued: "I just don't know what to do," *reiterated that she did not know where her children were, and said "that's the scary part."*⁵⁸
- When Ms. Gonzales learned the children were with Simon Gonzales at Elitch Gardens in Denver at 8:30 p.m. on a school night, she called the police again and explained that it was "*highly unusual,*" "*really weird,*" and "*wrong*" for Mr. Gonzales to have taken the girls to Elitch Gardens, 40 minutes away from Castle

⁵⁶ U.S. Response, Tab A: Jessica Gonzales/Dispatch, Tape Transcription ("Tab A") at 1.

⁵⁷ *Id.*

⁵⁸ *Id.*

Rock, and that she was “*so worried*,” – particularly because it was almost the girls’ bedtime and they still were not home.⁵⁹

- When Ms. Gonzales telephoned “911” at 10 p.m. to report that her children were still not home, she noted the restraining order again and said to the dispatcher, “*I’m a little wiggled out, I don’t know what to do*”; “*I’m just a mess*”; and “*I’m just freaking out*”. The dispatcher later reported that *she “could tell [Jessica] Gonzales was nervous.*”⁶⁰
- Ms. Gonzales called again after she finished work at midnight to inform the CRPD that she was at her husband’s apartment, that no one was home, and that *she feared that her husband had “run off with my girls.”* The dispatcher told her she would “get an officer on the way.” No officer ever arrived.⁶¹
- Ms. Gonzales drove to the CRPD after midnight. Hysterical, Ms. Gonzales explained to a detective that she had a restraining order against Simon Gonzales and that *she was afraid that he had “lost it” and might be suicidal.*⁶²
- A CRPD dispatcher subsequently interviewed about the events of the evening recalled from her conversations with Ms. Gonzales that evening that she “*was very worried about her children*” and noted that Ms. Gonzales was crying when she arrived at the CRPD and *appeared “scared for” her children.*⁶³

Additionally, the CRPD were intimately familiar with Simon Gonzales’ erratic and threatening behavior, and knew the danger he posed to others, including his children. Indeed, the CRPD should have arrested Simon Gonzales long before June 22, 1999, for violating the restraining order. Police reports confirm the following:

- Simon Gonzales had *seven run-ins with the CRPD in the three months preceding June 22, 1999.* Ms. Gonzales herself had called the police on at least four occasions in the preceding months to report his domestic violence in violation of a protective order. On none of these occasions did the CRPD make an arrest, even though they were legally obligated to do so under Colorado’s mandatory arrest law.⁶⁴

⁵⁹ U.S. Response, Tab C: Investigator’s Progress Report, Castle Rock Police Department, Castle Rock, Colorado, CR# 99-3226, Call from Officer Brink to Jessica Gonzales (“Tab C”) at 1-3.

⁶⁰ U.S. Response, Tab E: Office of the District Attorney, Eighteenth Judicial District. Report Date: 7/1/99. Report by Karen Meskis, Date of offense: 6/23/99 (“Tab E”) at 10.

⁶¹ *Id.* at 7.

⁶² *Id.* at 3.

⁶³ *Id.* at 2-3.

⁶⁴ Observations, Exhibit H at 158-59; *see also* Observations, Exhibit E, Gonzales Decl. ¶ 13; 19-21, 27; Observations, Exhibit Q; Observations, Exhibit I at 7 (p. 308) (containing statement from Jessica Gonzales’ babysitter, Josey Sanson, that “Jessica Ruth made previous police reports noting: Simon deliberately broke

- Three weeks before, on May 30, 1999, Simon Gonzales was charged with trespassing on private property and obstructing public officials after *he entered a restricted area of the CRPD station*, attempted to flee when being served with a summons, and had to be physically restrained by a CRPD officer.⁶⁵
- Simon Gonzales received a *citation from the CRPD on April 18, 1999, for careless driving* after he displayed a profound loss of control in a “road rage” incident while his *daughters were sitting without seatbelts in the back of his truck*.⁶⁶
- In 1996, the police had taken Simon Gonzales to a hospital psychiatric facility after he *attempted suicide* in front of his family.⁶⁷
- A *non-extraditable warrant for Simon Gonzales’ arrest* had been issued in Larimer County in Colorado.⁶⁸
- The CRPD dispatchers who answered Jessica Gonzales’ calls on June 22 and 23 acknowledged that they “knew the history between Simon and Jessica Gonzales” and were aware of the recent contact between Simon Gonzales and the CRPD.⁶⁹

In the face of this knowledge, the CRPD failed to take appropriate steps to arrest Simon Gonzales and protect Ms. Gonzales and the children. Police reports confirm the following:

- The CRPD had no pressing emergencies throughout the course of the evening from June 22 to 23, 1999, that might have justified their failure to respond to Ms. Gonzales. Instead of responding to Ms. Gonzales’ emergency calls, the police went to dinner, responded to a fire lane violation, “work[ed] on paper,” and assisted a citizen in filling out a missing dog report.⁷⁰

the sprinklers while Jessica and the girls were at church. Simon changed the locks on the house after he had moved out, causing Jessica and the girls to be locked out for several hours. The police found Simon in the bedroom after a restraining order had been issued ordering Simon to stay away from the home.”); Observations Exhibit F, CR #99-26856 at 6 (containing statement from Jessica Gonzales’ mother, Ernestine Rivera, that “Simon had been driving around the house, stalking her [Jessica Gonzales]. That Simon had moved out of the house, but still snuck into the house and hid so he could jump out and scare Jessica or the kids. . . . That Jessica had the locks changed on her house as soon as Simon moved out. That Jessica believes Simon stole a key from one of the kids. That several weeks ago, Jessica found Simon in Jessica’s room smoking cigarettes and drinking beer. That Simon was very compulsive and possessive.”).

⁶⁵ Observations, Exhibit R at 2.

⁶⁶ Observations, Exhibit H, CRPD Individual Inquiry at 2; *see also* Observations Exhibit S.

⁶⁷ Observations, Exhibit E, Gonzales Decl. ¶ 6; Observations, Exhibit J, Police Emergency Mental Illness Report, June 16, 1999.

⁶⁸ U.S. Response, Tab G: Statement signed by Cpl. Patricia A. Lisk (“Tab G”) at 7.

⁶⁹ U.S. Response, Tab E at 5.

⁷⁰ U.S. Response, Tab G at 2, 3, 5.

- Following Ms. Gonzales' 8:30 p.m. call informing the CRPD that Simon Gonzales had taken her children to Elitch Gardens, two counties away, Dispatcher Cindy Dieck entered into the computer that Ms. Gonzales' children "*had been found,*" and that there was "NCA" (no criminal activity), even though Simon Gonzales had clearly violated a restraining order and was prohibited by law from being with the children.⁷¹
- The CRPD failed to notify other law enforcement agencies of the kidnapping. By 3:20 a.m. on June 23, 1999, *the CRPD had been aware for over nine hours that the Gonzales children were missing* and that they likely had been abducted by Simon Gonzales. Yet the CRPD never issued an "Attempt to Locate" (ATL) bulletin or an All Points Bulletin ("APB"), as Ms. Gonzales had requested at 8:30 p.m.⁷²
- The CRPD did not file a missing persons report until around 1:40 a.m., almost *eight hours after Ms. Gonzales first reported her children missing.*⁷³

In failing to take steps to enforce the restraining order, the CRPD violated basic principles of policing,⁷⁴ as well as Colorado's mandatory arrest law, which requires police to arrest domestic violence perpetrators when probable cause exists to believe they have violated a restraining order.⁷⁵ Whether the CRPD profoundly misunderstood or simply disregarded the explicit instructions on the back of Jessica Gonzales' restraining order and their specific obligations under Colorado's mandatory arrest law, their failures resulted in tragedy.

III. JESSICA GONZALES' EXPERIENCE IS EXEMPLARY OF THE PREVALENCE OF DOMESTIC VIOLENCE IN COLORADO

By suggesting that CRPD officers had no reason to suspect that Simon Gonzales posed a danger to Ms. Gonzales and her daughters, the United States casts Simon

⁷¹ U.S. Response, Tab E at 7, 10.

⁷² *Id.* at 6.

⁷³ *Id.* at 3; U.S. Response, Tab G at 4.

⁷⁴ See, e.g., Gonzales Petition, Ex. K: *Protecting Victims of Domestic Violence: A Law Enforcement Officer's Guide to Enforcing Orders of Protection Nationwide* (also available at: <http://www.theiacp.org/research/ACF3068.pdf>).

⁷⁵ Colo. Rev. Stat. §18-6-803.5(3) (1999).

Gonzales' actions as aberrational. This is not the case. The CRPD's failure to respond to Ms. Gonzales' calls for help is particularly inexcusable given the broader context in which these calls occurred.⁷⁶ Ms. Gonzales' case is but one example of the problem of domestic violence homicides in Colorado.

The Denver Metro Domestic Violence Fatality Committee ("the Denver Committee") identified 54 domestic violence-related fatalities in Colorado for 1996; 52 for 1997; 55 for 1998; and 69 for 1999.⁷⁷ An analysis of these figures reveals that from 1996 to 1999, intimate partner homicide, excluding any collateral homicides, accounted for 14 percent to 20 percent of the total homicide rate in the state. The inclusion of murders of a former partner's new intimate partners, and intervening friends, family, or responding police officers bumps this figure up to 19 to 37 percent. Indeed, averaged over the three years, 45 percent of female homicide victims statewide were killed by an intimate partner.⁷⁸ This epidemic occurrence of domestic violence-related homicide should have informed the police response to Ms. Gonzales' calls for help, and should have increased the level of urgency assigned to her case.

Recent newspaper coverage indicates that domestic-violence-related fatalities continue in Colorado with alarming frequency. From December 2005 to September

⁷⁶ See Gonzales Petition at 21-40.

⁷⁷ MARGARET L. ABRAMS, JOANNE BELKNAP, & HEATHER C. MELTON, PROJECT SAFEGUARD, WHEN DOMESTIC VIOLENCE KILLS: THE FORMATION AND FINDING OF THE DENVER METRO DOMESTIC VIOLENCE FATALITY REVIEW COMMITTEE 13 (2001), available at <http://www.members.aol.com/projectsafeguard/frcmanual.pdf>. Precise, official accountings of the number of domestic-violence-related homicides in Colorado do not exist. While the Colorado Bureau of Investigation ("CBI") is mandated to track crime statistics in Colorado, including a break out of domestic violence homicides statewide, due to differing definitions of relationships tracked and a lack of consistent reporting by local law enforcement jurisdictions, not even the figures reported by CBI give an accurate reflection of the deaths related to domestic violence. *Id.* at 14. Indeed, 28 of the 237 jurisdictions in Colorado did not even report any statistics to CBI in 1998. *Id.* CBI's 1998 Annual Report identified 9 domestic violence homicides in Colorado, as compared to the 35 identified statewide during 1998 by the Denver Committee. *Id.* Thus, the Colorado data collected by the Denver Committee are the most comprehensive available.

⁷⁸ *Id.* at 14.

2006, five domestic-violence-related murders were reported in Colorado, two of which occurred in Castle Rock, Colorado. In December 2005, Ana Elisa Goncalves-Toledo was stabbed to death in Denver, Colorado, by her ex-boyfriend.⁷⁹ In April 2006, in Pueblo, Colorado, Jennifer Behling was found shot dead by her boyfriend, who had been previously arrested twice for domestic violence and aggravated assault, and had four restraining orders against him.⁸⁰ In early September 2006, in Castle Rock, Colorado, Jacqueline Blecha and her daughter, Ashley Martin, were killed by Joseph Blecha.⁸¹ Ten days before the family disappeared, Castle Rock police officers had been out to their home to investigate a call the CRPD had received from a motorist who had witnessed the driver of a green car owned by Joseph Blecha hitting a female passenger twice.⁸² Later that month in Castle Rock, Luz Marie Franco Fierros was killed when her boyfriend dragged her behind a vehicle for more than a mile.⁸³ Such violence is not isolated to Colorado. Rather, these murders are illustrative of the sort of violence perpetrated against women by intimates throughout the United States and must inform police response to domestic violence calls.⁸⁴

IV. A FINDING IN FAVOR OF MS. GONZALES WOULD NOT OPEN THE “FLOODGATES” TO PETITIONS ALLEGING A STATE FAILURE TO PREVENT CRIMINAL ACTIVITY.

At the March 2, 2007, hearing, the Government asserted that a finding in favor of Ms. Gonzales would open the “floodgates” to numerous Commission petitions alleging

⁷⁹ *Scorned Czech Boyfriend Confesses Killing Brazilian Au Pair Ex-Girlfriend in US*, ASSOCIATED PRESS, December 15, 2005.

⁸⁰ Nick Bonham, *Police Label Homicide ‘Fatal-Attraction’ Killing*, THE PUEBLO CHIEFTAN, April 4, 2006.

⁸¹ John C. Ensslin & Tillie Fong, *Police Think Man Killed Spouse, Stepdaughter*, ROCKY MOUNTAIN NEWS, Sep. 14, 2006, available at

http://www.rockymountainnews.com/drmn/local/article/0,1299,DRMN_15_4991805,00.html.

⁸² *Id.*

⁸³ Don Mitchell, *Murder, Kidnap Charges Filed in Colo. Dragging Death, Suspect Accused of Killing Girlfriend*, ASSOCIATED PRESS, Sep. 26, 2006.

⁸⁴ See Gonzales Petition at 21-40.

the State's failure to prevent criminal activity. The Government's fears are misplaced for three reasons.

First, a State does not become subject to this Commission's jurisdiction whenever it fails to protect against private violence, or even whenever it fails to take reasonable steps that "could have had a real prospect of altering the outcome or mitigating"⁸⁵ a real and immediate risk of which the State had or ought to have had knowledge. In order for this Commission to hear any claim based upon these failures, the State must also subsequently fail to provide an adequate remedy within its domestic legal order. That is, States may generally avoid international responsibility by providing a remedy at law or equity adequate to redress its failure to ensure the rights of the person aggrieved. Should such remedies be provided, this Commission would have no role in hearing the underlying violation. In the instant case, however, the United States plainly asserts that it had no duty, as a matter of law, to protect against private violence or to provide remedies for state failure to take reasonable measures therefor.⁸⁶

Second, as discussed in Ms. Gonzales' Observations, the instant Petition must be read in the context of a claim raised by (a) persons deserving of the special protection of the State, as a result of both Ms. Gonzales' status as a victim of domestic violence and the special vulnerability of her children; and (b) the existence of a court order of protection, whereby the State, through judicial and law enforcement mechanisms, affirmatively undertook an obligation to respond diligently to any and all threats to the

⁸⁵ *E. and Others v. United Kingdom*, App. No. 33218/96, Eur. Comm'n. H.R. ¶ 99 (2002).

⁸⁶ See U.S. Response at 25-26. While the United States may be correct that it has no duty under the U.S. Constitution to provide a remedy for private acts of violence, see *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989); *Castle Rock*, 545 U.S. at 768, the Inter-American Court's jurisprudence is clear that the acts of a purely private person "can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it" in a manner appropriate under the circumstance. *Ximenes Lopes v. Brazil*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 149, ¶ 172 (July 4, 2006).

safety of Ms. Gonzales and her children. While these two circumstances are not necessary to a finding of state failure to protect, they should have bearing on the Commission's assessment of the scope of the state's duty and its failure to provide effective protections and remedies.

Finally, the experience of the European Court of Human Rights demonstrates that the adjudication of "failure to protect" claims poses no threat to this Commission's docket. Since the European Court's 1998 decision in *Osman v. United Kingdom*, setting forth the legal standard urged by Jessica Gonzales,⁸⁷ the European Court has adjudicated fifteen cases involving a State's failure to fulfill the positive obligation to protect the applicant's rights. Indeed, instead of producing a flood of claims, the *Osman* standard has had a salutary effect on the domestic jurisprudence of European Union states, including the United Kingdom, which have adapted their domestic legal regime to hear claims on behalf of victims of private violence.⁸⁸ Moreover, the Inter-American Court on Human Rights has expressed its considered approval of the European Court's approach, citing the *Osman* standard at length in the *Pueblo Bello Massacre Case*.⁸⁹ In consonance with this approach, Ms. Gonzales asks that this Commission apply established human rights standards to her claim that the United States failed to exercise due diligence in protecting her rights and the lives of her children against private violence and in providing a remedy for the violation of these rights.

⁸⁷ *Osman* held that a State has a "positive obligation . . . to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual." *Osman v. the United Kingdom*, 23452/94, Eur. Comm'n H.R. Dec. & Rep. 101, 115 (1998).

⁸⁸ See, e.g., Richard Mullender, *Tort, Human Rights, and Common Law Culture*, 23 OXFORD J. LEGAL STUD. 301, 306-07 (2003) (stating that "[i]n the more recent case of *Phelps v. Hillingdon London Borough Council*, the House of Lords has . . . emphasized *Osman's* broad applicability").

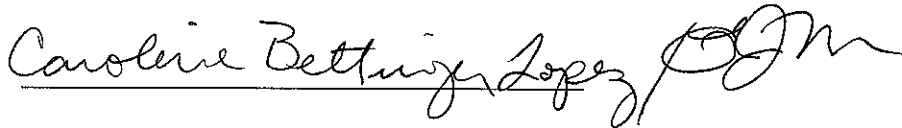
⁸⁹ *Case of the Pueblo Bello Massacre v. Colombia*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 140, at 124 (Jan. 31, 2006). *Case of Baldeón-García v. Peru*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 147, at 85 (Apr. 6, 2006).

V. CONCLUSION

For the reasons stated above Petitioner requests this Honorable Commission to declare the Petition admissible and, pursuant to Article 37(2) of the Commission's Rules of Procedure, consolidate and expedite its decision on admissibility and the merits.

Dated: May 14, 2007

Respectfully submitted:

A handwritten signature in cursive script, reading "Caroline Bettinger-López", followed by a stylized monogram or initials "PJM".

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