

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

JESSICA RUTH GONZALES
in her individual capacity and on behalf of her deceased daughters,
KATHERYN, REBECCA, AND LESLIE GONZALES

vs.

THE UNITED STATES OF AMERICA

Case No. 12.626
Petition No. P-1490-05

**BRIEF *AMICI CURIAE* OF THE
INTERNATIONAL WOMEN'S HUMAN RIGHTS LAW CLINIC AND
THE CENTER FOR CONSTITUTIONAL RIGHTS
IN SUPPORT OF PETITIONERS
RESPECTING THE
APPLICABILITY OF TORTURE**

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Jessica Gonzales et al., v. The United States of America

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BRIEF AMICUS CURIAE

INTEREST OF THE AMICI

The **INTERNATIONAL WOMEN'S HUMAN RIGHTS LAW CLINIC (IWHR)**, based in New York City, is a program of the City University of New York School of Law and is part of Main Street Legal Services, Inc. a non-profit corporation of the Law School. Founded in 1992, IWHR works *pro bono* on behalf of clients who are indigent and/or who present human rights claims in litigation as well as collaborates with feminist groups, lawyers and scholars in the United States and abroad in advocacy projects to advance women's human rights in theory and practice. IWHR has contributed, through scholarship, amicus curiae briefs, shadow reports, participation in international litigation, negotiations, and judicial seminars with human rights bodies and experts, to the international recognition that gender and sexualized violence are torture under international humanitarian, criminal, and human rights law. IWHR submitted the Communication in 1994 that led to this Commission being the first international treaty body to recognize rape as torture, now settled in international law.

The **CENTER FOR CONSTITUTIONAL RIGHTS (CCR)** is a national non-profit legal, educational and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and international law. Founded in 1966 during the Civil Rights Movement, CCR has a long history of litigating cases on behalf of victims of gender-based violence and discrimination. Pioneering work done by CCR has included defense of battered women and challenging "marital rape" exemptions that were enacted into law, and human rights claims on behalf of survivors of torture, including rape and other sexual violence. *See e.g., Kadić v. Karadžić*, 70 F.3d 232 (2d Cir. 1995), *Doe v. Constant*, 04 Civ. 10108 (S.D.N.Y.), Slip. Op'n Oct. 24, 2006; *Doe v. Unocal*, 963 F. Supp. 880 (C.D. Cal. 1997); 395 F.3d 932 (9th Cir. 2002) *Vacated by, Rehearing, en banc, granted by Doe v. Unocal Corp.*, 395 F.3d 978, 2003 U.S. App. LEXIS 2716 (9th Cir., 2003)(case successful settled before ruling on rehearing was issued). In the mid-1990s CCR, working with a coalition of Haitian and U.S. women's organizations, went before the Organization of American States' Inter-American Commission on Human Rights, which resulted in the condemnation of mass rape in Haiti by military and paramilitary forces including FRAPH. The 1995 OAS report found the rape to be a form of torture and a crime against humanity.

INTRODUCTION

The purpose of this *Amicus Curiae* is to demonstrate that the indifference of the Castle Rock Police Department ("CRPD") to the domestic violence suffered by Jessica Ruth Gonzales (now Lenahan) ("Ms. Gonzales"¹ or "Petitioners") and her three daughters constitutes torture and other cruel, inhuman or degrading treatment ("ill-treatment") in

¹ In this *amici*, Ms. Jessica Lenahan is referred to as "Ms. Gonzales" as that is the name she used in her legal filings in the U.S. courts and this Commission, except when referring to the present.

violation of the American Declaration of the Rights and Duties of Man (“American Declaration”)² and international law.³ Accordingly, the United States must be held responsible for the commission and acquiescence in torture and ill-treatment by the Town of Castle Rock, Colorado and for the failure to provide either a state or federal judicial remedy in the form of compensation and reparations. The failure to exercise due diligence here thus includes failure to prevent such violence, protect the victims, investigate the deaths of her daughters and the police failure to intervene, and provide reparations in accordance with applicable regional and international law.

The Petitioners’ final observations on the merits of the case (“Merits Brief”)⁴ ably presents and we support, without repeating here, the many bases for holding the United States responsible under the American Declaration and relevant international law. Our purpose is to emphasize that by likewise recognizing the treatment of Ms. Gonzales as torture and ill-treatment in violation of Article I of the American Declaration, the Commission would appropriately underscore the gravity and non-derogability of domestic violence as well as the urgency of firm response from the United States and the American States in general to prevent and redress this epidemic violence against women and thereby the elimination of one of the cornerstones of the long-standing subordination and discrimination against women. By making clear that state acquiescence in severe domestic violence constitutes a *jus cogens* norm, this Commission will provide justice to the Petitioner as well as enhance the possibility of effective State response to end impunity of perpetrators and the complicity States as well as providing Ms. Gonzales with reparations and potential healing that justice for torture requires.

This brief is structured as follows. Part I identifies the applicable regional and international instruments that prohibit torture and other cruel, inhuman or degrading treatment or punishment (“ill-treatment”) as well as customary international law and the applicability of the norm against torture to privately inflicted violence. Part II analyzes the elements of torture and their application to domestic violence generally and in relation to the facts of this case. Part III examines violations by the United States’ of its acquiescence to torture or its failure to exercise due diligence in this case. The Conclusion contains recommendations for the judgement in this case.

STATEMENT OF THE CASE

Ms. Jessica Gonzales (now Lenahan) is a U.S. national of Latina and Native American ethnicity and a resident of the Town of Castle Rock, Colorado. Her Petition claims that on June 22, 1999 the police failed to implement a judicial order of protection and take reasonable and necessary measures to respond to her repeated and urgent calls over *ten*

² American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (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).

³ Petition Alleging Violations of the Human Rights of Jessica Gonzales by the United States of America and the State of Colorado, with request for an investigation and hearing of the merits (Dec. 23, 2005) (“Gonzales Petition”); Observations Concerning the Sept. 22, 2006 Response of the United States Government (Dec. 11, 2006) (“Dec. 11, 2006 Observations”).

⁴ Final Observations regarding the merits of the case (Mar. 24, 2008) (“Petitioners’ merits brief”).

hours informing them that her estranged husband, Simon Gonzales, had abducted their three daughters – Leslie, 7, Katheryn, 8, and Rebecca, 10—which resulted in their death. Subsequently, the police failed to investigate their deaths, and the United States Supreme Court failed to provide her compensation and redress for which there was no other available judicial remedy. In its decision dated July 24, 2007, the Commission found that the allegations in the petition “could tend to establish violations of Articles I, V, VI, VII, XVIII and XXIV of the rights of Ms. Gonzales and her daughters under the American Declaration”⁵ and declared Ms. Gonzales’ Petition admissible on all grounds except Article IX. It also recognized that the Petitioners’ claim that “the failures in the police response [to domestic violence] affect women disproportionately” and that “the deficiencies in the state response allegedly have a particularly alarming effect on women.”⁶

Amici incorporate the facts as relevant to the legal argument presented here from the admissibility decision of the Inter-American Commission on Human Rights (“IACHR” or “Inter-American Commission”) and the Petitioners’ Merits Brief. The Petitioners’ merits brief fully sets forth the pertinent facts respecting the domestic violence and intimidation leading to the murder of Ms. Gonzales’ three daughters; the background, issuance, terms, and disregard by the Castle Rock police, of the judicial protective order; other information known to the Castle Rock police indicating her former husband’s violent and erratic behavior, instability, including information relating to his recent arrests and dangerousness; the disproportionate effect of police failure to respond to domestic violence on women; and the failure of the U.S. to exercise due diligence in this case, including throughout her exhaustion of available and non-futile domestic remedies.

ARGUMENT

I. The Commission has jurisdiction to adjudge the United States’ Obligation to Prevent Torture and ill-treatment under the American Declaration, read in light of pertinent regional and international law

A. United States’ obligation under the American Declaration of the Rights and Duties of Man

In its admissibility decision in this case, the Commission established its jurisdiction over the United States based on the latter’s ratification of the Charter of the Organization of American States (OAS) and by virtue of its adherence to the American Declaration.⁷ The Commission also dismissed the United States’ claim that the Petition is inadmissible as the American Declaration does not impose an affirmative duty on OAS Member States to prevent the commission of crimes by private parties as those in the Petition by Ms.

⁵ *Jessica 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 (“*Gonzales v. U.S.*, Admissibility Decision”), ¶ 57 (2007).

⁶ *Id.*, ¶ 58.

⁷ *Id.*, ¶ 56.

Gonzales.⁸ The Commission concluded the Petition is admissible for the alleged violations of Articles I, II, V, VI, VII, XVIII and XXIV of the American Declaration.⁹

As set forth below, the United States' obligations to exercise due diligence to prevent torture is likewise rooted in the American Declaration in Article I.

B. There are no additional domestic remedies available to Ms. Gonzales with respect to torture and ill-treatment

There is no additional remedy for torture and ill-treatment available for Ms. Gonzales at the domestic level. For example, the Alien Tort Claims Act¹⁰ does not apply in this case as Ms. Gonzales is a U.S. citizen. Similarly, Ms. Gonzales cannot receive remedy for torture under Torture Victim Protection Act of 1991 (TVPA),¹¹ as it only applies to claims of torture against individuals “under actual or apparent authority, or color of law, of any foreign nation.” Military provisions that prohibit torture, such as the Military Commissions Act of 2006,¹² do not apply to this case either.

C. Regional and other International Law establish the U.S.’s obligation to protect exercise due diligence to prevent torture, including domestic violence

As the Commission has indicated in its admissibility decision, the United States' obligations under the American Declaration should be analyzed in light of “the jurisprudence of the Inter-American system of human rights and its application to countries which have not ratified the American Convention,” as well as “the customary legal status of the rights protected under many of the Declaration’s core provisions.”¹³ The United States obligation to prevent torture and ill-treatment in respect of domestic violence should be similarly examined.

1. Regional law prohibits torture and ill-treatment

Though Article I of the Declaration does not specifically mention the word torture,¹⁴ the Inter-American Commission and Court have consistently recognized this article as having a direct bearing on torture or ill-treatment.¹⁵ Article 5(2) of the American Convention has

⁸ Id., ¶¶ 55-59.

⁹ Id., ¶ 60.

¹⁰ 28 U.S.C. §1350.

¹¹ Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. §1350).

¹² Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006).

¹³ *Gonzales v. U.S.*, Admissibility Decision, ¶ 56.

¹⁴ Art. I of the American Declaration provides that “[e]very human being has the right to life, liberty and the security of his person.”

¹⁵ See e.g., *Patrick Rice & Fatima Edelmira Cabrera v. Argentina*, Case 2450, Inter-Am. C.H.R. 33, OEA/ser. L/V/II.47, doc. 13 rev. 1 (1978); *Vladimir Sattori Benquique v. Bolivia*, Case 2760, Inter-Am. C.H.R. 75, OEA/ser. L/V/II.47, doc. 13 rev. 1 (1979); *Rubén Luis Romero Eguino v. Bolivia*, Case 2720, Inter-Am. C.H.R. 56, OEA/ser. L/V/II.47, doc. 13 rev. 1 (1979); *Gustavo Westerkamp v. Argentina*, Case 2127, Inter-Am. C.H.R. 75, OEA/ser. L/V/II.50, Doc. 13 rev. 1 (1980); *Raul Lopez Peralta*, Case 4665, Inter-Am. C.H.R. 56, OEA/ser. L/V/II.57, doc. 6 rev. 1 (1981); *Mario Fernandez Lopez v. Chile*, Case

been used as one of the bases for the prohibition on against torture and ill-treatment in the Inter-American system.¹⁶

The Inter-American Convention to Prevent and Punish Torture (IACPPT)¹⁷ also provides the standard for application of the prohibition of torture and ill-treatment in the Inter-American system.¹⁸ Since the only definition of torture in the Inter-American treaties is found in Article 2 of the IACPPT, both the Commission¹⁹ and the Court²⁰ have relied on the definition, which provides that torture is

any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose” or with the aim “to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.

It also specifies that the crime of torture may be perpetrated by: “who *directly commits it or who, being able to prevent it, fails to do so*” (emphasis supplied).²¹

The IACPPT provides that prohibition of torture is non-derogable²² and that all acts of torture and ill-treatment constitute “a denial” of the principles set forth in the charters of the OAS and the United Nations as well as the American Declaration and the Universal

9474, Inter-Am. C.H.R. 48, OEA/ser. L/V/II.66, doc. 10 rev. 1 (1985); *Miguel Angel Rojas Abarca v. Chile*, Case 4666, Inter-Am. C.H.R. 50, OEA/ser. L/V/II.57, doc. 6 rev. 1 (1981); *Juan Antonio Aguirre Ballesteros v. Chile*, Case 9437, Inter-Am. C.H.R. 43, OEA/ser. L/V/II.66, doc. 10 rev. 1 (1985); *Ovelario Tames v. Brazil*, Case 11.516, Report No. 60/99, Inter-Am. C.H.R., Annual Report 1998, OEA/Ser. L/V/II.102 Doc. 6 rev., ¶ 39 (1998). The Court’s decision: *Paniagua Morales et al. v. Guatemala*, Inter-Am. Ct. H.R. (Ser. C) No. 37 (1998).

¹⁶ Art. 5(2) establishes that “no one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment”. Art. 27(2) of the American Convention provides that the right to be free from torture and ill-treatment is non-derogable.

¹⁷ Inter-American Convention to Prevent and Punish Torture, O.A.S.T.S. 67, G.A. Doc. OEA/Ser.P, AG/doc.2023/85 rev. I (1986), 25 I.L.M. 519, entered into force Feb. 28, 1987.

¹⁸ The Inter-American Court has declared that the IACPPT is “part of the inter-American *corpus iuris* that this Court must resort to in establishing the content and scope of the general provision contained in Art. 5(2) of the American Convention.” *See, Tibi v. Ecuador*, Inter-Am. Ct. H. R. (Ser.C) No. 114, ¶145 (2004). The Court has found violations of States’ obligations with regard to torture under the IACPPT and the American Convention in various cases: *Paniagua Morales et al.*, Inter-Am. Ct. H.R. (Ser. C) No. 37 (1998); *Villagrán Morales et al. v. Guatemala* (the “Street Children” Case), Inter-Am. Ct. H.R. (Ser. C) No. 63 (1999); *Cantoral Benavides v. Peru*, Inter-Am. Ct. H.R., (Ser. C) No. 69 (2000); *Bámaca Velásquez v. Guatemala*, Inter-Am. Ct. H.R. (Ser. C) No. 70 (2000); *Gutiérrez-Soler v. Colombia*, Inter-Am. Ct. H.R. (Ser. C), No. 132 (2005); *the Miguel Castro Castro Prison v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 160 (2006). Similar decisions are made by this Commission. *See, Raquel Martín de Mejía v. Perú* Case 10.970, Report No. 5/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.91 Doc. 7 at 157 (1996); *Report on the Situation of Human Rights in Haiti 1995*, OEA/Ser.L/v/II.88, Doc. 10 rev., ¶ 130 (1995).

¹⁹ *Raquel Martín de Mejía v. Peru*, p. 185.

²⁰ *Tibi v. Ecuador*, ¶ 145; “*Gómez-Paquiyaui Brothers*” vs. *Peru*, Inter-Am. Ct. H.R. (Ser. C) No. 110, ¶ 105 (2004).

²¹ IACPPT, Art.3.

²² *Id.*, Art. 5.

Declaration of Human Rights (UDHR),²³ all of which the United States has either adopted or ratified. Thus, despite the fact that United States has neither signed nor acceded to that Convention, the United States has obligated itself to prevent torture pursuant to these underlying instruments.

The Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (“Convention of Belém do Pará”)²⁴ prohibits violence against women in both the public and private spheres and expressly recognizes that such violence can amount to torture.²⁵ As this Convention is likewise based on the rights articulated in the American Declaration and the UDHR,²⁶ the United States’ obligations under these instruments should also be read in conjunction with the Convention of Belém do Pará. In its final written argument on the merits on the case of *Castro-Castro Prison v. Peru* before the Inter-American Court, the IACHR has already noted relevance of that the States’ obligation under the Convention of Belém do Pará to prevent and protect against violence against women are to application of the American Convention likewise in effect even where the State has not ratified the Belém do Pará Convention.²⁷ The Court in response confirmed that the Convention of Belém do Pará “complement[s] the international *corpus juris* in matters of protection of women’s right to humane treatment, of which the American Convention forms part.”²⁸

2. International treaties, to which the U.S. is a party, prohibit domestic violence as torture and ill-treatment

Pursuant to the Inter-American Court’s Advisory Opinion 1, the Commission is authorized to look to international treaties for guidance in interpreting human rights protected by the Inter-American instruments and States’ obligation to protect them.²⁹ The fact that United States has ratified pertinent international treaties strengthens the authority of the Commission to apply them, in particular, the provisions against torture and ill-treatment found in the UDHR,³⁰ the Convention Against Torture and Other Cruel,

²³ Universal Declaration of Human Rights, G.A.Res. 217, U.N. GAOR, at 71, U.N.Doc. A/III/10 (1948), Preamble.

²⁴ Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, opened for signature June 9, 1994, 33 I.L.M. 1534. (“Convention of Belém do Pará”).

²⁵ Art. 4(d). Art. 3 prohibits violence against women in the private sphere.

²⁶ In its Preamble, the Convention reaffirms human rights enshrined in the American Declaration, UDHR, the Declaration on the Elimination of Violence against Women, and “other international and regional instruments.”

²⁷ This is expressed in the IACHR’ final written argument submitted to the Court on Aug.2, 2006 (*see* ¶ 103). *The Miguel Castro Castro Prison v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 160, ¶ 228(q)-(r), ¶ 369(f) (2006).

²⁸ *Id.*, ¶ 276.

²⁹ Advisory Opinion OC-1/82, Inter-Am. Ct. H.R. (Ser. A) No. 1 (1982).

³⁰ UDHR in art. 5 states: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

Inhuman or Degrading Treatment or Punishment (CAT)³¹ and Article 7 of the International Covenant on Civil and Political Rights (ICCPR).³²

Both the CAT and the ICCPR state that the prohibition against torture is non-derogable.³³ The United Nations expert bodies that monitor States parties' compliance with these treaties – the Committee Against Torture (“CAT Committee”) and the Human Rights Committee (“CCPR”), respectively – have underscored the non-derogable nature of the obligation to prevent torture or ill-treatment by officials and non-state actors.³⁴

The CAT provides the most widely endorsed definition of torture³⁵ as follows:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.³⁶

In its General Comment No. 2, the CAT Committee emphasized the non-derogability of both torture and ill-treatment³⁷ and noted that the obligation to prevent ill-treatment is essential to the prevention of torture.³⁸ This understanding of the slippery slope between torture and ill-treatment is nowhere more applicable than in the context of domestic violence.

³¹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article I, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)]. The U.S. ratified the CAT on Nov. 20, 1994.

³² International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), UN Doc. A/6316 (Dec. 16, 1966). The United States ratified the ICCPR on Sep. 8, 1992.

³³ CAT, Art. 2(2) and ICCPR, Art. 4(2). ICCPR does not differentiate torture and ill-treatment, thus ill-treatment is also non-derogable in ICCPR.

³⁴ CAT, General Comment No.2, Implementation of article 2 by States parties, CAT/C/GC/2 (2008), ¶ 1 and ¶ 5 (torture) and ¶ 3 (on ill-treatment); Human Rights Committee, General Comment 29, States of Emergency (art. 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), ¶11.

³⁵ The International Criminal Tribunal for the Former Yugoslavia (ICTY) has noted that the CAT's definition of torture reflects “a consensus [...] representative of customary international law.” *Prosecutor v. Furundija*, ICTY, Case No. IT-95-17/1-T, ¶ 160 (1998).

³⁶ CAT, Art. 1. The CAT's definition of torture differs slightly from that in the IACPPT, which does not require that the physical and mental suffering harm be severe (art.2). In some cases, the Inter-American Court has relied on Art. 1 of the CAT. *See, Maritza Urrutia v. Guatemala*, Inter-Am. Ct. H.R., (Ser. C) No. 103, ¶ 90 (2003); *Bámaca Velásquez v. Guatemala*, Inter-Am. Ct. H.R. (Ser. C) No. 70, ¶ 156 (2000); *Cantoral Benavides v. Peru*, Inter-Am. Ct. H.R. (Ser. C) No. 40, ¶ 183 (1998).

³⁷ CAT Committee, General Comment 2, ¶¶ 5-7, and ¶ 3 (confirming that the obligation to prohibition of ill-treatment is “likewise nonderogable under the Convention and its prevention to be an effective and non-derogable measure”).

³⁸ The CAT Committee's General Comment 2 stresses that “[t]he obligation to prevent ill-treatment in practice overlaps with and is largely congruent with the obligation to prevent torture” (¶ 3).

The ICCPR does not define torture nor differentiate torture and ill-treatment.³⁹ According to the CCPR, the distinction depends “the nature, purpose and severity of the treatment applied”⁴⁰ and the aim of Article 7 of the covenant is “to protect both the dignity and physical and mental integrity of the individual.”⁴¹

Both Committees have made clear that torture and ill-treatment are applicable to domestic violence. In General Comment No. 2, the CAT Committee discusses the obligation of the State Party not to acquiesce or fail to exercise due diligence in response to private action meeting the intent, severity and purpose elements of torture,⁴² and includes as examples, domestic violence. The General Comment crystallized its recognition in the examination of country reports since 2001 that domestic violence is within the purview of the CAT.⁴³ The United States has complied with the Committee’s request for information respecting domestic violence.⁴⁴ In the hearing before the CAT Committee in May 2006, the United States retracted its original statement that measures to prevent domestic violence were outside the scope of the CAT and admitted that domestic violence may constitute torture if “there is the requisite involvement of public officials or persons acting in an official capacity.”⁴⁵

Similarly, the CCPR has interpreted Article 7 of the Covenant to include domestic violence,⁴⁶ based on the understanding that the article applies to privately inflicted

³⁹ The CCPR has said that it does not consider “it is necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment.” CCPR, General Comment No.20, ¶ 4.

⁴⁰ *Id.*, ¶ 4.

⁴¹ *Id.*, ¶ 5.

⁴² CAT Committee, General Comment 2, ¶ 18. *See also*, ¶ 15, ¶ 22, and ¶ 25.

⁴³ CAT, Conclusions and recommendations: Zambia, CAT/C/XXVII/Concl.4, ¶ 8(h) (2001); Bahrain, CAT/C/CR/34/BHR, ¶ 7(i) (2005); Greece, CAT/C/CR/33/2, ¶ 6(1) (2004); Republic of Korea, CAT/C/KOR/CO/2, ¶ 17 (2006); Qatar, CAT/C/QAT/CO/1, ¶ 22 (2006); Guyana, CAT/C/GUY/CO/1, ¶ 20 (2006); Russian Federation, CAT/C/RUS/CO/4, ¶ 11(b) (2007); Ukraine, CAT/C/UKR/CO/5, ¶ 14 (2007); Japan, CAT/C/JPN/CO/1, ¶24 (2007); Estonia, CAT/C/EST/CO/4, ¶ 21 (2007); Italy, CAT/C/ITA/CO/4, ¶23-24 (2007); Latvia, CAT/C/LVA/CO/2, ¶ 20 and 22 (2008); the former Yugoslav Republic of Macedonia, CAT/C/MKD/CO/2, ¶ 3, ¶ 19 (2008); Algeria, CAT/C/DZA/CO/3, ¶ 19 (2008); Indonesia, CAT/C/IDN/CO/2, ¶ 5(d), ¶ 16 (2008); Costa Rica, CAT/C/CRI/CO/2, ¶¶ 24-25 (2008); and, Portugal, CAT/C/PRT/CO/4/Add.1, ¶ 15 (2008).

⁴⁴ CAT Committee, *List of issues to be considered during the examination of the second periodic report of the United States of America* (CAT/C/48/Add.3), CAT/C/USA/Q/2, ¶59 (2006). In response, the U.S. reported on programs assisting victims of domestic violence in relation to Art. 13 (Right to complain) of the CAT. CAT/C/48/Add.3/Rev.1, ¶ 68 (2006).

⁴⁵ The U.S. delegate stated that “the United States does not believe that all acts of domestic violence are necessarily beyond the scope of the Convention,” in response to an inquiry by a committee member, Dr. Nora Sveaass (Norway), who opposed to the U.S.’ view. Summary Record of the 73rd Meeting held on May 5, 2006, CAT/C/SR.703, ¶ 75 (2006). Verbatim text of the oral statements by the United States Delegation to the Committee Against Torture, [John Bellinger III, Legal Advisor, U.S. Department of State], May 8, 2006, at p.16.

⁴⁶ CCPR, General Comment No. 28: Equality of rights between men and women (art. 3), CCPR/C/21/Rev.1/Add.10, ¶ 11 (2000).

violence.⁴⁷ In this context, the CCPR has consistently addressed domestic violence with reference to Article 7 in a number of concluding observations.⁴⁸

Both Conventions create a two-fold duty: the negative duty to abstain and the positive duty to exercise due diligence to prevent and protect. The CAT in Article 2(1) obliges States to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.” For example, States’ parties are obligated to prevent both commission and acquiescence to torture by having allegations of torture and ill-treatment promptly investigated (art.12) and judicially examined (art.13), and by providing compensation and redress (art.14). The CAT Committee’s General Comment No. 2 underscores these positive obligations with regard to domestic violence,⁴⁹ emphasizing as well that the specific articles do not exhaust the over-arching responsibility to prevent such violence.⁵⁰ The ICCPR likewise sets forth the affirmative obligation of States parties to “ensure and respect” the prevention and protection against torture and ill-treatment.⁵¹ The CCPR has underscored that “it is not sufficient [...] to prohibit [torture and ill-treatment] or to make it a crime”, calling upon States parties to take “legislative, administrative, judicial and other measures [...] to prevent and punish acts” of torture and ill-treatment.⁵²

⁴⁷ The CCPR’s General Comment 20 confirms that the States Parties’ duty to “afford everyone protection through legislative and other measures as may be necessary against ... [torture and ill-treatment], whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.” CCPR, General Comment No.20, ¶ 2.

⁴⁸ See e.g., CCPR, Concluding observations on: Yemen, UN Doc. CCPR/CO/75/YEM, ¶ 6 (2002); El Salvador, UN Doc. CCPR/CO/78/SLV, ¶ 15 (2003); Slovakia, UN Doc. CCPR/CO/78/SVK, ¶ 9 (2003); Russian Federation, UN Doc. CCPR/CO/79/RUS, ¶ 9 (2003); Poland, UN Doc. CCPR/CO/82/POL/Rev. 1, ¶11 (2004); Thailand, UN Doc. CCPR/CO/84/THA, ¶12 (2005); Slovenia, UN Doc. CCPR/CO/84/SVN, ¶7 (2005); Yemen, UN Doc. CCPR/CO/84/YEM, ¶ 12 (2005); Ukraine, UN Doc. CCPR/C/UKR/CO/6, ¶ 10 (2006); Republic of Korea, UN Doc. CCPR/C/KOR/CO/3, ¶11 (2006); Paraguay, UN doc. CCPR/C/PRY/CO/2, ¶ 9 (2006); Italy, UN Doc. CCPR/C/ITA/CO/5, ¶ 9 (2006); Norway, UN doc. CCPR/C/NOR/CO/5, ¶ 10 (2006); and, Georgia, UN Doc. CCPR/C/GEO/CO/3/CRP.1, ¶ 8 (2007).

⁴⁹ The General Comment stresses that: “Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State’s indifference or inaction provides a form of encouragement and/or de facto permission. The Committee has applied this principle to States parties’ failure to prevent and protect victims from gender-based violence, such as rape, domestic violence [...]” CAT Committee, General Comment No.2, ¶ 18.

⁵⁰ The General Comment No.2 underscores that “the obligation to prevent torture in article 2 is wide-ranging” (¶ 3). Further, paragraph 25 of the General Comment states: “Articles 3 to 15 of the Convention constitute specific preventive measures that the States parties deemed essential to prevent torture and ill-treatment, particularly in custody or detention. The Committee emphasizes that the obligation to take effective preventive measures transcends the items enumerated specifically in the Convention or the demands of this general comment.”

⁵¹ Art. 2 of the ICCPR obliges States parties to “respect and ensure” the rights protected by the Covenant “without distinction [...] such as [...] sex”.

⁵² CCPR, General Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7), HRI\GEN\1\Rev.1 at 30 (1994), ¶ 8 (Mar.10, 1992).

Pursuant to the Vienna Convention on the Law of Treaties (“Vienna Convention”),⁵³ the applicability of the regional and international provisions against torture and ill-treatment to domestic violence is further supported by the prohibition of torture and ill-treatment of children and women in the treaties the United States has signed but not yet ratified.

Article 37 of the Convention on the Rights of the Child (CRC) explicitly prohibits torture and ill-treatment of children which clearly applies to domestic violence and abuse.⁵⁴ The Inter-American Commission has recognized that the extent of ratification of the CRC by all but two states (including the U.S.) constitutes a broad consensus of the international community of the rights of children and the obligations of all states.⁵⁵

The Committee on the Elimination of Discrimination Against Women (CEDAW) in its General Recommendation No. 19⁵⁶ confirmed that the women’s right to be free of domestic violence, based in part on the norm against torture or ill-treatment, is protected under the Convention on the Elimination of All Forms of Discrimination against Women,⁵⁷ which the United States has signed. Accordingly, the CEDAW has given major attention to the issue of domestic violence in its monitoring of State reports as a routine matter,⁵⁸ which, coupled with the fact that the overwhelming majority of the States parties provide information on domestic violence in their reports, indicate that it is an accepted interpretation of the Convention. The Inter-American Court has recognized that this Convention, along with the Convention of Belém do Pará, “complement the international *corpus juris* in matters of protection of women’s right to humane treatment, of which the American Convention forms part.”⁵⁹

⁵³ Art. 18 of the Vienna Convention provides that states should “refrain from acts which would defeat the object and purpose” of the treaties they have signed. Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, entered into force Jan. 27, 1980. The U.S. signed the convention on April 24, 1970.

⁵⁴ Art. 37(a) of the CRC provides that: “No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.” Art. 19(1) provides that “States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment [...]. Art. 19(2) stipulates that such protective measures should include “prevention,” “investigation,” and “follow-up of instances of child maltreatment.”

⁵⁵ *Michael Domingues v. United States*, Case 12.285, Report No. 62/02, Inter-Am. C.H.R., Doc. 5 rev. 1 at 913, ¶ 57 (2002).

⁵⁶ CEDAW General Recommendation No.19 confirms that the right to be free from gender-based violence, including the “right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment”, is protected under the Convention (¶ 7). It also recommends states to “take appropriate and effective measures to overcome all forms of gender-based violence, whether by public or private act” (¶ 24 (a)). Further, it requires states parties to report on domestic violence (¶ 24(d)). CEDAW, General Recommendation No. 19: Violence against women, (11th Sess. 1992) U.N. Doc. A/47/38 at 1, (1993).

⁵⁷ Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (1979). The U.S. signed the Convention on Jul 17, 1980, but has not ratified it yet. 185 member states of the UN are states parties as of March 2008.

⁵⁸ In recent years, the CEDAW made reference to domestic violence in almost all county reports it examined, with the following few exceptions: 2005 (Israel); 2006 (Chile, Democratic Republic of Congo, Denmark, and Mexico); 2007 (Peru, Liechtenstein). See, Annual Reports of the CEDAW: A/60/38 (2005); A/61/38 (2006); A/62/38 (2007).

⁵⁹ *Castro-Castro Prison v. Peru*, ¶ 276.

In addition, the UN Declaration on the Elimination of Violence against Women identifies the right to be free from torture and ill-treatment as one of women's fundamental rights that underpins the prohibition on violence against women, which is based, in turn, on the UDHR, the CAT and the ICCPR,⁶⁰ all of which are binding on the United States.

3. The Commission has authority to consider customary international law

The IACHR is authorized to interpret the regional instruments in light of customary international law as well.⁶¹ In practice, the Commission has applied customary international law and *jus cogens* norms in interpreting the American Declaration.⁶²

Widespread recognition of torture and ill-treatment by international, regional,⁶³ and national law and practice illustrates that the prohibition of torture and ill-treatment is accepted not only as a norm of customary international law,⁶⁴ but also *jus cogens*.⁶⁵

⁶⁰ Declaration on the Elimination of Violence against Women G.A. res. 48/104, 48 U.N. GAOR Supp. (No. 49) at 217, U.N. Doc. A/48/49 (1993), Art. 3(h). In spelling out the right to be free from torture and ill-treatment (art.3(h)), the Declaration identifies in the footnote that these rights are based on UDHR (art.5), ICCPR (art.7), and CAT. It provides an expansive list of prohibited gender-violence, including physical, sexual or psychological harm as well as threats and coercion, occurring in both public and private spheres (art.1). It emphasizes the states' obligation to exercise due diligence to prevent, investigate, and punish perpetrators, whether public or private actors (art.4(c)).

⁶¹ "Other Treaties" Subject to the Advisory Jurisdiction of the Court (art. 64 American Convention on Human Rights), Advisory Opinion OC-1/82, Inter-Am. Ct. H.R. (Ser. A) No. 1, ¶ 43(1982); *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. (Ser. A) No. 10, ¶ 37 (1989).

⁶² For example, in *Michael Domingues v United States*, the IACHR found the United States' violation of *jus cogens* in light of the CRC, the ICCPR, and the American Convention. *Michael Domingues v. United States*, Case 12.285, Report No. 62/02, Inter-Am. C.H.R., Doc. 5 rev. 1 at 913, ¶ 112 (2002). For similar decisions by the Commission, see also *Gary T. Graham (Shaka Sankofa) v. United States*, Case 11.193, Report No. 97/03, Inter-Am. C.H.R., OEA/Ser./L/V/II.114 Doc. 70 rev. 2 at 705 (2003), *Douglas Christopher Thomas v. United States*, Case 12.240, Report No. 100/03, Inter-Am. C.H.R., OEA/Ser./L/V/II.114 Doc. 70 rev. 2 at 790 (2003).

⁶³ Besides the Inter-American system, other regional human rights instruments also prohibit torture and ill-treatment in terms similar to those of Art. 7 of the ICCPR. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 3, Europ. T.S. No. 5, 213 U.N.T.S. 221; European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, adopted Jun. 26, 1987. African Charter on Human and Peoples' Rights, adopted June 27, 1981, art. 5, O.A.U. Doc. CAB/LEG/67/3 rev. 5.

⁶⁴ Numerous countries have ratified the ICCPR (71 Signatories and 162 states parties, as of Sep.26, 2008) and the CAT (75 Signatories and 145 states parties as of Apr. 18, 2008) as well as prohibited in their domestic law torture and ill-treatment, explicitly or implicitly. See, *Report of the Special Rapporteur on Torture*, E/CN.4/1986/15, ¶¶ 72, 74, 83 (1996).

⁶⁵ The General Comment No.2 (¶ 1) stresses that the prohibition of torture has not only become "accepted as a matter of customary international law" but also "*jus cogens*". See also: Commission on Human Rights, Resolution 2002/38, ¶ 1; Report of the UN Special Rapporteur on Torture, E/CN.4/2002/137, ¶ 15; *Prosecutor v. Kunarac et al.*, ICTY, Case No. IT-96-23-T & IT-96-23/1/T, ¶ 465 (Feb. 22, 2001). The Inter-American Court has repeatedly underlined that the prohibition of torture and ill-treatment is "absolute and non-derogable." See e.g., *Maritza Urrutia v. Guatemala*. Inter-Am Ct.H.R. (Ser. C) No.103 (2003), ¶ 89; *Lori Berenson-Mejía v. Peru*, Inter-Am Ct.H.R. (Ser. C) No. 119, ¶ 100 (2004); *Cantoral Benavides v Peru*, Inter-Am Ct.H.R. (Ser. C) No. 69, ¶ 95 (2000).

While *jus cogens* bind all nations under international law, it is notable that the U.S. courts have found that customary international law is directly applicable to the U.S. through the Constitution,⁶⁶ and the Federal Courts since 1980 have recognized torture as a violation of customary international law.⁶⁷

D. United States' reservations are not inconsistent with the international understandings and the Commission can ignore them otherwise

Reservations that are inconsistent with treaties are null for the purposes of assessing international obligations of a State Party.⁶⁸ Further, any treaty that is inconsistent with *jus cogens* is void.⁶⁹ Specifically,⁷⁰ reservations to the right to be free from torture or ill-treatment are not acceptable.

Nonetheless, the United States has tried to narrow the definition of the rights recognized and protected by the CAT and the ICCPR. The United States "Understandings," treated as reservations according to international law,⁷¹ provide a number of interpretations, which tend to narrow the international norm against torture and are thus contrary to the object and purpose of the Convention. For the most part, however, the character of the violence and state failure to exercise due diligence in this case meet even the United States' crabbed interpretations.

First, the United States purports to limit the definition of torture in Article 1 of the CAT to "acts directed against persons in the offender's custody or physical control."⁷² The effort is ambiguous because it does not identify whether the "offender" is the state

⁶⁶ From the earliest days of the Republic to the present, U.S. Law has recognized customary international law as automatically incorporated into U.S. law as part of the "Laws of the United States." See *The Paquete Habana*, 175 U.S. 677, 20 S.Ct. 290, 44 L.Ed. 320 (1900); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), June 30, 1980, on remand, 577 F. Supp. 860 (E.D.N.Y. 1984), Jan. 10, 1984; and, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). In *Sosa*, while the Supreme Court held that the Alien Tort Claims Act's intention was that "that federal courts could entertain claims once the jurisdictional grant was on the books, because torts in violation of the law of nations would have been recognized within the common law of the time" (at 714).

⁶⁷ In 1980, the Second Circuit Court of Appeals in *Filartiga* determined that an act of torture violates customary international law (at 880), declaring "the torturer has become [...] an enemy of all mankind" (890). It held that "[t]he constitutional basis for the Alien Tort Statute is the law of nations, which has always been part of the federal common law" (at 885), and that, accordingly, "[f]ederal jurisdiction over cases involving international law is clear" (at 887). *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), June 30, 1980, on remand, 577 F. Supp. 860 (E.D.N.Y. 1984), January 10, 1984.

⁶⁸ The 1969 Vienna Convention requires that reservations should not be incompatible with the object and purpose of the treaty (art. 19(c)).

⁶⁹ The 1969 Vienna Convention, articles 53 and 64.

⁷⁰ The CCPR has affirmed that customary international law including the right to be free from torture or ill-treatment should not be subject to reservations. CCPR, General Comment No. 24, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994), ¶ 8.

⁷¹ The 1969 Vienna Convention in Art. 2.1(d) provided that "'reservation' means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State."

⁷² U.S. Reservations, Declaration, Understandings, CAT, § I(1), Cong. Rec. S17486-01 (1990) ("U.S. Reservations: CAT"). CAT, U.S. Reservations, Pt. II, 1(b).

official or the perpetrator of the violence. In its 2006 Report to the CAT Committee, the United States further narrows the “custody or control” provision to require custody or control by an official despite the Understanding’s reference to custody or physical control by “the offender.”⁷³ The U.S. accepts that torture must be “inflicted by or with the acquiescence of a public official or other person acting in an official capacity.”⁷⁴ The proper interpretation is simple, however. Given the obligation not to acquiesce to violence constituting torture, the term “offender” has to refer to the direct perpetrator. Otherwise, the United States would wipe out the responsibility not to acquiesce, which is fundamental to the norm of torture.⁷⁵

The United States’ understandings of both the CAT and the ICCPR also limit ill treatment to state action, eliminating responsibility for failing to stop or redress privately inflicted torture and ill-treatment.⁷⁶ As just noted, the CAT and the norm against torture clearly apply to private acts to which State officials acquiesce, discussed in Section II. D hereinafter. Thus such a limitation violates the object and purpose of the Convention.

Second, the United States’ Understandings also interpret “acquiescence” to require that “the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity.”⁷⁷ It is notable that the word “awareness,” with respect to acquiescence, is less than knowledge at the same time as it avoids imposing strict liability on officials. The CAT General Comment 2 recognizes acquiescence when the officials or persons acting in official capacity “know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors.”⁷⁸ The ambiguity in this Understanding lies in the term “activity constituting torture.” If this is an effort to require knowledge of specific action as opposed to knowledge of a general problem such as the prevalence of domestic violence that overwhelmingly affects women, then it is inconsistent with the CAT as well as the IACPPT and the customary norm that require preventive action by the State. Here there was not only awareness and knowledge of the general problem but also specific notice of the danger to Ms. Gonzales’ children.

⁷³ *Second Period Report of the United States of America to the Committee Against Torture*, (“U.S. Second Periodic Report to CAT Committee”), U.N. DOC. CAT/C/48/Add.3, ¶ 36 (2005).

⁷⁴ *Id.*

⁷⁵ J.H. BURGERS AND H. DANELIUS, *THE UNITED NATIONS CONVENTION AGAINST TORTURE. A HANDBOOK ON THE CONVENTION AGAINST TORTURE, AND OTHER CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT*, 117 (1988) [“BURGERS & DANELIUS”], at 121.

⁷⁶ The U.S. Reservations claim that the U.S. is obliged to prevent ill-treatment only to the extent such treatment is prohibited by the “the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution” of the U.S.. US Reservations: CAT, I(1); U.S. Reservations, Declaration, Understandings, and Proviso, ICCPR, 138 Cong. Rec. S4781-01 (1992) (“US Reservations: ICCPR”), (3). *U.S. Second Periodic Report to Committee* claimed that because of its understanding as noted above, “protection does not extend to persons who fear private entities that a government is unable to control.” *See, U.S. Second Periodic Report to CAT Committee*, ¶ 36.

⁷⁷ CAT, U.S. Reservations, II(d).

⁷⁸ CAT, General Comment 2, ¶18.

Third, the United States would impose a narrow definition of mental harm or suffering requiring that mental harm must be “prolonged” and result only from the predicate acts it specified.⁷⁹ This is clearly inconsistent with the international norm against torture, accepted as well by this Commission.⁸⁰ At the same time, even this narrow reading clearly applies to this case.

Furthermore, the United States has made a restricted interpretation of its obligation to implement the conventions,⁸¹ which is limited to “only the most extreme forms of physical and mental harm” and “only the worst forms” of ill-treatment.⁸² These understandings are inconsistent with the object or purpose of the conventions because they restrict the application of the Conventions.⁸³ But again here, the acts of the offender and the involvement of State officials all resulting in the terrorization and death of Ms. Gonzales’s three daughters and her extreme suffering do qualify as extreme.

We note again that notwithstanding these “Understandings,” the United States did agree before the CAT Committee that “all acts of domestic violence are [not] necessarily beyond the scope of the Convention.”⁸⁴ Further, the United States’ Understandings do not limit the United States’ international obligations where they are inconsistent with the applicable international and regional law. Indeed, to the extent that the United States would rely on narrow interpretations to justify violations of the Conventions, such interpretations would be a part of the violation itself. This is in line with the understanding of the Inter-American Court, which has repeatedly held that an “internationally unlawful act” may be attributed to a State due to “acts or omissions by any authorities or bodies of the State” that violate the American Convention.⁸⁵

⁷⁹ U.S. Dep’t of Justice, Memorandum for James B. Comey, Deputy Attorney General from Daniel Levin, Acting Ass’t Atty General, Office of Legal Counsel, Re: Legal Standards Applicable Under 18 U.S.C. §§2340-2340(A), ¶ 13 (Dec. 30, 2004).

⁸⁰ See the discussion on mental harm of torture, in Section II.A of this *amici*.

⁸¹ Its Understanding of the CAT declared to “take appropriate measures” to fulfil the CAT as far as such measures are appropriate to the “Federal system.” US Reservations: CAT, I(5).

⁸² *Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel to Alberto Gonzales, Counsel to the President and William J. Haynes II, General Counsel, Dep’t of Defense, Re: Application of treaties and laws to al Qaeda and Taliban detainees* (Jan. 22, 2002), p.16, and p.22.

⁸³ The CCPR has underscored that the U.S. reservations to Art. 7 of the ICCPR are “incompatible with the object and purpose of the Covenant”, and urged the U.S. to “withdraw them” (See, CCPR, *Concluding Observations: United States*, U.N. Doc. CCPR/C/79/Add.50, A/50/40 (1995), ¶ 279, ¶¶ 266-304). Likewise, the CAT Committee has repeatedly requested the U.S. to withdraw its reservations to the CAT (See, Conclusions and recommendations on the United States, CAT/C/USA/CO/2 (2006), ¶ 40, and U.N. Doc. No. A/55/44 (2000), ¶ 180(a)).

⁸⁴ Summary Record of the 73rd Meeting held on May 5, 2006, CAT/C/SR.703, ¶ 75 (2006).

⁸⁵ *Case of the “Mapiripán Massacre” v. Colombia*, Inter-Am. Ct. H.R., (Series C) No. 134, ¶ 111 (2005). The Court explained that to establish the states’ responsibility for a violation, it is enough to prove that “there has been support or tolerance by public authorities in the infringement of the rights embodied in the Convention, or omissions that enabled these violations to take place” (¶110). See also, *Case of 19 Tradersmen vs. Colombia*, Inter-Am. Ct. H.R., (Ser. C) No. 109, ¶ 141(2004); *Case of Juan Humberto Sánchez v. Honduras*, Inter-Am. Ct. H.R., (Ser. C) No. 99, ¶ 44 (2003).

II. Domestic violence constitutes torture when the state fails to respond to notice of and to otherwise exercise due diligence with respect to threatened or actual domestic that satisfies the elements of torture and/or ill-treatment in violation of Article I of the American Declaration

As noted earlier, domestic violence has been recognized as torture by the CAT Committee and the CCPR as well as the Special Rapporteur on violence against women, its causes and consequences (VAW)⁸⁶ and the Special Rapporteur on Torture.⁸⁷ This case thus provides the Commission with the opportunity to scrutinize domestic violence through the lens of torture and join the growing voices in the international human rights system that underscore the gravity and urgency of redressing domestic violence.

Domestic violence constitutes torture under the international and regional treaties that prohibit torture, when it meets four basic elements: (a) severe physical or mental pain or suffering; (b) intentional infliction; (c) impermissible purposes; and, (d) state involvement – including by commission and omission.⁸⁸ While there are differences between the CAT and the IACPPT, these are the elements of torture identified and elaborated by both the Inter-American Commission⁸⁹ and Court.⁹⁰

The following element-by-element analysis demonstrates that domestic violence can constitute torture and that the failure of the state to respond to notice of threatened or actual severe domestic and to exercise due diligence satisfies the elements of torture.

⁸⁶ The UN Special Rapporteur on VAW signaled this relationship in 1996, stating that “depending on its severity and the circumstances giving rise to State responsibility, domestic violence can constitute torture or ill-treatment under [... the ICCPR and CAT,] challeng[ing] the assumption that intimate violence is a less severe or terrible form of violence than that perpetuated directly by the state.” *Report of the Special Rapporteur on violence against women, its causes and consequences*, U.N. ESOR, 52d Sess., U.N. Doc. E/CN.4/1996/53, ¶ 42 (1996). More recently, the Special Rapporteur underlined that “the mere fact that the perpetrator is a private individual rather than a state official should not automatically lead to the exclusion of this type of violence from the scope of the Convention.” *Report of the Special Rapporteur on VAW*, E/CN.4/2003/75/Add. 1, ¶ 7 (2003).

⁸⁷ *Report of the Special Rapporteur on Torture* (Mr. Manfred Nowak), A/HRC/7/3, ¶¶ 44-49 (2008). See also, *UN Press Release*, “United Nations Independent Experts Call on States to Strengthen the Protection of Women from Violence, 23 November 2007.” In November 2007, the Special Rapporteurs on Torture, (Mr. Manfred Nowak) and on VAW (Ms. Yakin Ertürk) issued a press release which notes: “In recent years, there have been an increased and explicit recognition of some forms of violence against women in international and national courts as amounting to torture and ill-treatment, the best known examples being rape by private or public actors in conflict or in custodial settings.”

⁸⁸ CAT, Art.1(1) and IACPPT Art.3(a).

⁸⁹ The IACHR identified the following elements of torture in the case of *Raquel Martín de Mejía*, in which it addressed the question of rape as torture under both the American Convention and the IACPPT: (a) “physical and mental pain and suffering”; (b) “inflicted intentionally; (c) “committed with a purpose”; and (d) “committed by a public official or by a private person acting at the instigation of the former.”

⁹⁰ See e.g., *Cantoral Benavides Case*, Inter-Am. Ct. H.R., (Ser. C) No. 69, ¶¶ 90-94 (2000); *Maritza Urrutia v. Guatemala*, Inter-Am. Ct. H.R. (Ser. C) No. 103, ¶ 93; *Case of Tibi*, Inter-Am. Ct. H.R. (Ser. C) No. 114, ¶ 149 (2004); *Gómez-Paquiyaui Brothers v. Peru*, Inter-Am. Ct. H.R. (Ser. C) No. 110, ¶¶ 116-17 (2004). See also, *Loayza Tamayo*, Inter-Am. Ct. H.R. (Ser. C) No. 33, ¶ 57 (1997), (The Court did not find torture in this case); *Tibi v Ecuador*, ¶¶ 148-49; *Paniagua Morales et al. v. Guatemala*, Inter-Am. Ct. H.R. (Ser. C) No. 37, ¶ 134 (1998); *Juan Humberto Sánchez v. Chile*, Inter-Am. Ct. H.R., (Ser. C) No. 99, ¶¶ 99-103 (2003); *Baldeón-García v. Peru*, Inter-Am. Ct. H.R., (Ser. C) No. 147, ¶¶ 115-25 (2006).

Furthermore, the facts involving the police failure to intervene to prevent threatened violence to Ms. Gonzales' daughters meet all elements of acquiescence in torture and summary execution against the daughters and Ms. Gonzales, as the survivor, in violation of Article I of the American Declaration. Additionally, the police disrespect of Ms. Gonzales' anxiety and efforts to obtain their assistance in rescuing her daughter's amounts, at the least, to ill-treatment.

A. Severe physical and/or mental pain or suffering inflicted by domestic violence

According to the case law of the regional and international bodies, one essential criterion for distinguishing torture from other ill-treatment is the severity or degree of the suffering,⁹¹ which depends on the circumstances such as the nature and context of the treatment as well as sex, age and state of health of the victim.⁹² The Inter-American Court has taken a similar approach to the distinction between torture and ill-treatment.⁹³ In particular, both the Inter-American and European bodies have underscored that children should be given a higher standard of scrutiny in determining the degree of suffering.⁹⁴ Further, while an act may constitute ill-treatment when the severity or requirement is not met, the line between torture and ill-treatment is not a sharp one and is evolving. The European Court of Human Rights ("European Court") has acknowledged that acts which were classified in the past as ill-treatment as opposed to torture could be "classified differently in future" to reflect "the increasingly high standard [...] for the protection of human rights and fundamental liberties."⁹⁵ The Inter-American Court has adopted this interpretation.⁹⁶

With regard to mental pain or suffering, while the United States' reservations to the CAT adopted a narrow view that mental harm or suffering must be "prolonged" and caused or

⁹¹ The CAT Committee in its General Comment No.2, at paragraph 3 noted that the obligation to prevent torture is directly linked to the obligation to prevent ill-treatment. The European Court has maintained that torture as prohibited under Art. 3 of the European Convention is characterized by "a special stigma" attached to "deliberate inhuman treatment causing very serious and cruel suffering" (*Ireland v. the United Kingdom*, [1978] Eur. Ct. HR 5310/71, at ¶167). The European Court has since affirmed this standard in a number of cases. See for example, *Selmouni v. France*, 1999-V Eur. Ct. H.R. 149, ¶ 96; *İlhan v. Turkey* no. 22277/93, ECHR. 2000-VII, ¶ 85; *Akkoç v. Turkey* 2000, No. 22947 & 8/93, ECHR 2000-X, ¶ 115.

⁹² Case of the "Street Children", ¶ 74 (1999); CCPR, *Antti Vuolanne v. Finland*, Communication No. 265/1987, U.N. Doc. Supp. No. 40 (A/44/40) at 311 (1989), ¶ 9.2; CCPR, General Comment 20, Art. 7; European Court, *Aydin v. Turkey*, 25 Eur. Ct. H.R. 251 (1997); *Soering v. the United Kingdom*, 11 Eur. Ct. H.R. (ser. A) (1989) ¶ 100; *A. v. United Kingdom*, 1998-VI Eur. Ct. H.R. 2692, ¶ 20.

⁹³ See e.g., *Caesar v. Trinidad and Tobago*, Inter-Am Ct. H.R., (Ser. C) No. 123, ¶ 50 (2005).

⁹⁴ See Inter-American Court's decisions: *Children's Rehabilitation v. Paraguay*, Inter-Am. Ct. H.R. (Ser. C) No. 112, ¶ 162 (2004); *Gómez-Paquiyaúri*, Inter-Am. Ct. H.R. (Ser. C) No. 153, ¶117 (2006); *Bulacio v. Argentina*, Inter-Am. Ct. H.R., (Ser. C) No. 100, ¶ 98 (2003). IACHR's decisions in: *Jailton Neri Da Fonseca v. Brazil*, Case 11.634, Report No. 33/04, Inter-Am. C.H.R., Annual Report 2004, OEA/Ser.L/V/II.122 Doc. 5 rev. 1, ¶ 64 (2004). European Court's decision: *A. v. United Kingdom*, 1998-VI Eur. Ct. H.R. 2692, ¶ 22.

⁹⁵ *Selmouni v. France*, 1999-V Eur. Ct. H.R. 149, ¶ 101.

⁹⁶ *Cantoral Benavides*, ¶ 99 (referring to *Selmouni v. France*, ¶ 101).

result only from specific acts,⁹⁷ the international definition does not require duration or limit the acts of the mental pain or suffering, so long as it is severe.⁹⁸ Further, international jurisprudence on torture and ill-treatment has underscored the inseparability of the physical and mental elements of torture as well as the sufficiency of psychological abuse alone.⁹⁹ This approach has been applied by the Inter-American Commission and Court in recognizing the severity of physical and psychological pain or suffering in rape and gender-based violence as well as domestic violence.¹⁰⁰

Domestic violence will often meet the severity requirement of torture. Like torture in detention, domestic violence includes a range of physical and psychological acts, which often escalate over time. Physical violence involves common methods of torture – such as beating, biting, spitting, punching, kicking, stabbing, strangling, scalding, burning and attempted drowning, and sexual violence.¹⁰¹ Psychological violence in domestic violence,

⁹⁷ 18 U.S.C. § 2340(2)(A)-(D) (2006) [“U.S. RUDs”] It restricts mental torture to: “(1) the intentional [...] and threatened infliction of severe physical pain or suffering; (2) the administration or application, or [...]such threat] of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.” Recently, the CAT Committee requested the U.S. to “ensure that acts of psychological torture, prohibited by the Convention, are not limited to ‘prolonged mental harm’ but constitute a wider category of acts, which cause severe mental suffering, irrespective of their prolongation or its duration.” CAT/C/USA/CO/2 (2006).

⁹⁸ For example, the ICTY has held that acts amounting to torture need not necessarily cause a permanent injury or physical injury, and mental harm alone will qualify as torture. *Prosecutor v. Kvočka et al.*, ICTY, Case No. IT-98-30/1-T, ¶ 148- 149 (Nov.2, 2001); *Prosecutor v. Limaj et al.*, ICTY, IT-03-66-T, ¶ 236 (Nov.30, 2005). In *Kvočka*, it observed that “abuse amounting to torture need not necessarily involve physical injury, as mental harm is a prevalent form of inflicting torture” (¶149).

⁹⁹ The UN Special Rapporteur on Torture has also pointed out that torture is the violation of “the physical and mental integrity — in their indissoluble interdependence,” noting that “[a]lmost invariably the effect of torture” is “physical and psychological.” *Report of the Special Rapporteur on Torture*, A/59/324 (2004), ¶ 45 [Quoting the first Special Rapporteur on Torture, Prof. Peter Kooijmans, his first report to the Commission on Human Rights (E/CN.4/1986/15)].

¹⁰⁰ In the case of *Raquel Mejía v Peru*, who was raped by military officials, the Commission found that rape caused “physical and mental suffering in the victim” or “a psychological trauma that results, on the one hand, from having been humiliated and victimized, and on the other, from suffering the condemnation of the members of their community if they report what has been done to them.” *Raquel Martin de Mejia v. Peru*, Case 10.970, Report No. 5/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.91 Doc. 7 at 157 (1996). See also, *Report on the Situation of Human Rights in Haiti*, OEA/Ser.L/V/II.88, ¶ 134 (1995). The Court has found that vaginal inspection violates the Inter-American provisions against torture and ill-treatment. See, *Ms. X v. Argentina*, Case 10.506, Report No. 38/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 50 (1997), ¶ 89 (1996) and *Castro-Castro Prison v. Peru*, ¶ 312.

¹⁰¹ Rhonda Copelon, “Recognizing the Egregious in the Everyday: Domestic Violence as Torture”, 25 *Columbia Human Rights Law Review* 291-367 (1994), p.311-12 (“Domestic Violence as Torture”); *Report of the Special Rapporteur on VAW*, E/CN.4/1996/53, ¶ 44 (1996); *Report of the Secretary-General, In-depth study on all forms of violence against women, on Violence in the family*, (“SG Report: In-depth study on VAW”), A/61/122/Add.1, ¶¶ 113-114 (2006); World Health Organization (WHO), *Multi-country Study on Women’s Health and Domestic Violence against Women*, (“WHO Multi-country Study”), Chapter 4 (2005); Jewkes, R., “Editorials: Preventing Domestic Violence”, *British Medical Journal*, vol. 324 (2002), pp. 253-254.

as with torture,¹⁰² includes controlling, isolating, insulting, humiliating, embarrassing, intimidating on purpose, or threatening to harm her or someone she cares about.¹⁰³ In domestic violence, psychological abuse is intertwined with physical abuse such as battering and sexual assault as well as economic dependence.¹⁰⁴

The consequences of physical and physiological abuse by intimate partners include physical and mental pain and suffering, bodily injuries, disfigurement, miscarriage, maiming and even death.¹⁰⁵ In the United States, on average, more than three women are murdered by their husbands or boyfriends each day, and approximately one third of the women murdered each year are killed by an intimate partner.¹⁰⁶ The mental suffering caused by a battering relationship is also profound. Due to the control established by systematic, repetitive infliction of physical and/or psychological trauma, battered women may suffer from the same intense symptoms that comprise the post-traumatic stress disorders identified in victims of torture in detention.¹⁰⁷

Recently, the analogy of torture and domestic violence in terms of the severity of harm is highlighted in the report by the Special Rapporteur on Torture as follows:

As with female detainees who experience torture, battered wives may be beaten with hands and objects, kicked, strangled, stabbed or burned. Rape and other forms of sexual abuse are used by intimate partners as well as by prison guards or police officers. In both scenarios, physical violence is usually accompanied by insults, various forms of humiliation, and threats to kill or harm the victim or her family members (often children).

¹⁰² *Break Them Down*, Physicians for Human Rights (hereinafter PHR Report), Washington, D.C., May 2005, p.48. On psychological torture, see also, e.g., Hernan Reyes, "The worst scars are in the mind: psychological torture," *International Review of the Red Cross*, Volume 89 Number 867, September 2007.

¹⁰³ The WHO multi-country study found that between 20 per cent and 75 per cent of women had experienced one or more emotionally abusive acts. *WHO Multi-country Study*, p.35. See also, Copelon, "Domestic Violence as Torture," p.316-19; *SG Report: In-depth study on VAW*, ¶113.

¹⁰⁴ CEDAW in its General Recommendation 19 has recognized that "[l]ack of economic independence forces many women to stay in violent relationships." CEDAW General Recommendation 19, ¶ 23.

¹⁰⁵ *Report of the Special Rapporteur on Torture* (Mr. Manfred Nowak), A/HRC/7/3 ¶ 45; *WHO Multi-country Study*, p.35; Copelon, "Domestic Violence as Torture," pp.316-19; *SG Report: In-depth study on VAW*, ¶ 113.

¹⁰⁶ These figures are noted in the Petition of this instance case. Gonzales Petition.

¹⁰⁷ Process of battering – whether physical, psychological or both – places battered women in extreme state of fear, anxiety, depression sleepiness, shame, guilt, dependency, debility and dread, which frequently make such women see themselves as incompetent, unworthy, unlovable and deserving of abuse. Copelon, "Domestic Violence as Torture," p.316. Judith Lewis Herman, a leading researcher in the field of Post-Traumatic Stress Disorder and the sexual abuse of women and children, argues that this is because the methods used to enable human beings to exercise control over one another are remarkably consistent whether the victim is a hostage, political prisoner, concentration camp survivor, or victim of violence within the home. See, Judith Lewis Herman, *Trauma and Recovery: The Aftermath of Violence - from Domestic Abuse to Political Terror* (New York, NY, US: Basic Books, Inc; 1992, (xi, 276), pp.76-78. The WHO has reported that around the world, mental health problems, emotional distress, such as depression and anxiety disorders, and suicidal behavior are common among women who have suffered partner violence. *WHO multi-country study*, Chapter 4 (web) or Chapter 7 in PDF file. Bradley et al show strong associations between domestic violence and anxiety and depression. Bradley F, Smith M, Long J, O'Dowd T. "Reported frequency of domestic violence: cross sectional survey of women attending general practice," p.324, in *British Medical Journal* 2002; pp.271-274.

Domestic violence, as well as torture, tends to escalate over time, sometimes resulting in death or leaving women's bodies mutilated or permanently disfigured. Women who experience such violence, whether in their homes or in a prison, suffer depression, anxiety, loss of self-esteem and a feeling of isolation. Indeed, battered women may suffer from the same intense symptoms that comprise the post-traumatic stress disorder identified in victims of official torture as well as by victims of rape.¹⁰⁸

Moreover, a number of cases before international and regional human rights bodies support the recognition that domestic violence may cause serious physical and mental harms amounting to torture or ill-treatment. In *A.T. v. Hungary*, the CEDAW found that the victim of domestic violence perpetrated by her former husband, including severe beating and threat to murder her and rape the children, had suffered a "serious risk to her physical integrity, physical and mental health, and life."¹⁰⁹ Similarly, it held in *Şahide Goekce v. Austria* that the acts of threats, intimidation and battering of the victim by her estranged husband had "crossed a high threshold of violence."¹¹⁰ The European Court has also recognized the severity of physical and psychological harms of violence against women,¹¹¹ including domestic violence, in light of the prohibition of torture and of ill-treatment under Article 3 of the European Convention of Human Rights ("European Convention").¹¹²

1. Ms. Gonzales suffered severe psychological suffering

It is clear from the Petition that Ms. Gonzales has suffered severe psychological suffering due to the abduction and murder of her children on the night of June 22, 1999, the incidents of domestic violence preceding that night, as well as the failure of the police and the judiciary to provide her with adequate protection and remedies for the abuse.

According to the Petition, the history of domestic violence by Simon Gonzales involved "emotionally abusive" and "frightening" behaviors,¹¹³ which Ms. Gonzales described as "controlling, unpredictable, and violent."¹¹⁴ Mr. Gonzales used to "verbally, physically, and sexually abuse" Ms. Gonzales.¹¹⁵ He would threaten her that he would kidnap the children, repeatedly break into her house after they were separated, tampering with her belongings, and display road rage when he was allowed to spend time with their children.

¹⁰⁸ *Report of the Special Rapporteur on Torture* (Manfred Nowak), A/HRC/7/3, ¶ 45.

¹⁰⁹ *A.T. v. Hungary*, CEDAW Communication No. 2/2003, U.N. Doc. CEDAW/C/32/D/2/2003, ¶ 9.2 (2005).

¹¹⁰ *Şahide Goekce (deceased) v. Austria*, CEDAW Communication No. 5/2005, U.N. Doc. CEDAW/C/39/D/5/2005, ¶ 12.1.5 (2007).

¹¹¹ For example, the European Court has noted that "rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence." *Aydin v. Turkey*, 25 Eur. Ct. H.R. 251, ¶ 83 (1997).

¹¹² European Convention for the Protection of Human Rights and Fundamental Freedoms, also known as the European Convention on Human Rights, Nov. 4, 1950, 213 U.N.T.S. 222 ("European Convention").

¹¹³ Gonzales Petition, p.7.

¹¹⁴ Jessica Lenahan, Testimony Before the Inter-American Human Rights Commission, (Jessica Lenahan's Mar. 2, 2007 Testimony), at 1 (March 2, 2007).

¹¹⁵ Gonzales Petition, pp.7-8, Jessica Lenahan's Mar.2, 2007 Testimony, at p.1.

The Petition also states that these behaviors became worse after Mr. Gonzales found his estranged wife had begun dating someone else.¹¹⁶

The final evening and night was filled with trepidation as it was a violation of the order that should have involved arrest and punishment for him; he had her daughters and she feared that he would place them in danger or might harm them. Ms. Gonzales' fear and suspicion were confirmed when Mr. Gonzales called her from an amusement park around three hours after he abducted the children to tell her that he was with the children and threatened to harm the children. Her terror was exacerbated by the do-nothing, dismissive attitude of the police. As hours passed, her pleas were ignored, and even after the call from him at the amusement park, which provided a clear chance for the police to arrest him and rescue the children, the police did nothing! According to the Petition, the police's indifference gave her "the distinct impression that the police viewed her as an unjustifiably distressed mother who was simply wasting their time," leaving her "deeply distressed"¹¹⁷ Ms. Jessica Lenahan (Gonzales) has stated that she was "[f]ighting panic and frustration" during that night.¹¹⁸

The regional and international human rights bodies' case law on torture supports recognition that the mental suffering experienced by Ms. Gonzales — that night and for the rest of her life — satisfies the severity element of torture. The European Court has made clear that threats of torture and ill-treatment against a mother's children can cause the mother "psychological pressure" and "intense fear and apprehension."¹¹⁹

The psychological impact Ms. Gonzales has suffered can be gleaned by analogy to that of the relatives of a person disappeared. There is a clear trend towards recognizing that an act of 'disappearance' causes "severe suffering" on their families, amounting to torture or ill-treatment.¹²⁰ The CCPR has recognized "the anguish and stress caused [to a mother] by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts"¹²¹ which qualified as torture and ill-treatment under Article 7 of the ICCPR. Similarly, the Inter-American Court has found "harmful psychological impacts" of an act of disappearances on the victim's family members such as "symptoms of fright, anguish, depression and withdrawal."¹²² In the case of *Maritza Urrutia*, the

¹¹⁶ Gonzales Petition, p.8.

¹¹⁷ Id, p.11. The Petition notes that "the police officers' inaction only exacerbated her anxiety" (pp.11-12).

¹¹⁸ Jessica Lenahan's Mar.2, 2007 Testimony, p.3.

¹¹⁹ *Akkoç v. Turkey*, Eur.Ct.H.R., No. 22947 & 8/93, ¶¶116-17 (Oct. 10, 2000).

¹²⁰ The UN Declaration on the Protection of all Persons from Enforced Disappearance, General Assembly resolution 47/133 of Dec.18, 1992, Art.1. The former UN Special Rapporteur on Torture Nigel Rodley has noted that an act of disappearance is "a form of prohibited torture or ill-treatment" for the relatives of the 'disappeared' person. Nigel Rodley, *The Treatment of Prisoners in International Law*, second edition, Oxford, Oxford University Press 1999, p. 26.

¹²¹ *Maria del Carme Almeida Quinteros on behalf of her daughter, Elena Quinteros Almeida, and on her own behalf v. Uruguay*, Communication No. 107/1981 (1983) at 14. In *Schedko v. Belarus*, it similarly qualified as ill-treatment "the continued anguish and mental stress caused to [...] the mother of a condemned prisoner, by the persisting uncertainty of the circumstances that led to his execution, as well as the location of his gravesite." *Natalia Schedko v. Belarus*, Communication No. 886/1999, U.N. Doc. CCPR/C/77/D/886/1999, ¶10.2 (1999).

¹²² *Velásquez-Rodríguez v. Honduras*. Inter-Am Ct. H.R. (Ser. C) No. 4, ¶ 51 (1988).

Court extended this understanding to hold that a threat of violent acts against one's family or of having one's child being abducted constitutes psychological torture.¹²³

The Inter-American Court has further recognized the additional suffering of the family members of disappeared persons – “suffering, anguish, insecurity, frustration, and a feeling of powerlessness [...] vis-à-vis the State authorities” – caused by the subsequent acts and omissions of the State authorities in responding to the case, such as in search for the victim, investigation, and punishment.¹²⁴ In the “*Street Children*” case, the Court found that the mothers of the youths who had been abducted, tortured and murdered suffered ill-treatment due to the “negligence of the State” in failing to locate their children and notify them of their children's death and delivering the bodies to them.¹²⁵ The Court found that these omissions exacerbated the decaying of the bodies, “which were sacred to their families and particularly their mothers,” and “therefore, increased their suffering.”¹²⁶ The Court also noted the added “feeling of insecurity and impotence” caused to the victims' mothers due to the failure of the public authority to fully investigate the case and punish those responsible.¹²⁷

The case law of other human rights bodies also supports the recognition that the States' failure to investigate and account for disappearance of an individual constitutes a violation of the rights of the family members to be free from torture and ill-treatment.¹²⁸ In *Kurt v. Turkey*, for example, the European Court qualified as ill-treatment the “anguish and distress” a mother of a disappeared son had experienced as the result of the lack of serious consideration by the public prosecutor of her complain about her son's disappearance.¹²⁹ It has underscored that “the essence of [a violation of Article 3] does

¹²³ *Maritza Urrutia v Guatemala*, Inter-Am. Ct. H.R., (Ser. C) No. 103 (2003).

¹²⁴ See e.g., the Inter-American Court's decisions in: *Bámaca-Velásquez v. Guatemala*, Inter-Am. Ct. H.R., (Ser. C) No. 91, ¶¶ 162-166 (2002); *Juan Humberto Sánchez*, ¶¶ 101-103 (2003); *Case of the 19 Tradersmen*, Inter-Am. Ct. H.R., (Ser. C) No. 109, ¶¶ 210-18 (2004); “*Mapiripán Massacre*” Inter-Am. Ct. H.R., (Series C) No. 134, ¶144 and ¶146 (2005); *Gómez-Palomino v. Peru*, Inter-Am. Ct. H.R. (Ser. C) No. 136, ¶¶ 60-68 (2005); *Baldeón-García v. Peru*, ¶¶ 129-30; *Castro-Castro*, Inter-Am. Ct. H.R. (Ser. C) No. 160, ¶¶ 335-42 (2006); *Goiburú et al. v. Paraguay*, Inter-Am. Ct. H.R. (Ser. C) No. 153, ¶¶ 96-103 (2006); *Vargas-Areco v. Paraguay*, Inter-Am. Ct. H.R. (Ser. C) No. 155 (2006), ¶¶ 96-97; *Gutiérrez-Soler v. Colombia*, Inter-Am. Ct. H.R., (Ser. C) No. 132, ¶ 118 (2005); and *Vargas-Areco v. Paraguay*, Inter-Am. Ct. H.R. (Ser. C) No. 155, ¶ 96 (2006).

¹²⁵ “*Street Children*” case, ¶ 173.

¹²⁶ *Id.*, ¶ 174.

¹²⁷ *Id.*, ¶ 173.

¹²⁸ In *Sankara et al v. Burkina Faso*, it found that the family members of a disappeared person suffered “the anguish and psychological pressure” as a consequence of the state's failure to properly investigate the assassination of the victim to inform the family of the circumstances of the death. *Sankara et al. v. Burkina Faso*, Communication No. 1159/2003, U.N. Doc. CCPR/C/86/D/1159/2003, ¶ 12.2 (2006). The European Court has held that whether a family member of a “disappeared person” is a victim of torture or ill-treatment contrary to Article 3 depends on such factors as: “the proximity of the family tie – in that context, a certain weight will attach to the parent-child bond, [...] the involvement of the family member in the attempts to obtain information about the disappeared person and the way in which the authorities responded to those enquiries.” *Çakici v. Turkey*, no. 23657/94, ECHR 1999-IV, ¶ 98; *Timurtas v. Turkey*, no. 23531/94, ECHR 2000-VI, ¶ 95. In *Çakici*, the Court did not find the applicant, who was the brother of the disappeared person, was a victim of ill-treatment under Art. 3, while in *Timurtas* the Court found that the father of a disappeared son was the victim of ill-treatment.

¹²⁹ *Kurt v Turkey* (1998) III Eur. Ct. H.R 1152, ¶ 134.

not so much lie in the fact of the “disappearance” of the family member but rather concerns the authorities’ reactions and attitudes to the situation when it is brought to their attention.”¹³⁰

These cases suggest the severity of mental harm Ms. Gonzales suffered due to violations found in the Petitioners’ case: the disappearance and death of her children; the lack of information regarding the children’s whereabouts; the State’s failure to respond to Ms. Gonzales’ repeated requests to look for her children after they were abducted; the State’s trivializing attitudes to her concern for the safety of her children; and the lack of appropriate investigation into their deaths. The fact that she knew where they were and that immediate and proper police intervention would most likely have averted their deaths is a searing reality.

Although the fatal events in this case were telescoped into terrible one night, there is no requirement that psychological suffering be prolonged¹³¹; even had the children been returned physically unharmed, the terror of that night would make their lives. Here, however, for Ms. Gonzales, the fact that her children were murdered, and that she was powerless vis-à-vis the state powers to avert that horrendous result, produces life-long, excruciating suffering. Further, the lack of information regarding her daughters’ deaths—did her husband kill them or did they die as a result of police fire – has provided her a prolonged suffering. She has stated that it has “saddened” her not even to be able to put information as to place, date or time of the death, of her daughters on their gravestones.¹³²

Therefore, the cumulative effects of the severe anguish, stress, frustration and feeling of powerlessness that she experienced during the ten hours in the evening and night of June 22, 1999, compounded by the unimaginable grief and suffering over their deaths clearly meets the severity threshold for torture.¹³³ Ms. Gonzales (Lenahan) expressed her physical and psychological suffering as follows:

I suffer many health problems that are directly related to the stress and grief from losing my girls. My psychologist says that the trauma of having my three daughters killed and my problems with the legal system have impacted me in ALL areas of my life, especially psychologically and physically.¹³⁴

¹³⁰ *Çakici v. Turkey*, no. 23657/94, ECHR 1999-IV, ¶ 98.

¹³¹ CAT Committee, Conclusions and recommendations on the United States, CAT/C/USA/CO/2, ¶ 13 (2006). Hernan Reyes said that the “prolong” duration requirement for mental torture “constitutes an unnecessary barrier to the classification of certain psychological effects as amounting to torture,” “The worst scars are in the mind: psychological torture,” *International Review of the Red Cross*, Volume 89 Number 867, September 2007, p.597.

¹³² Jessica Lenahan’s Mar.2, 2007 Testimony, p.4.

¹³³ See e.g., Hernan Reyes, “The worst scars are in the mind: psychological torture,” pp.612-16. Reyes notes that non-physical methods which do not constitute torture on their own if merely considered in isolation are “part and parcel of the torture process and constitute a ‘background environment’ of harassment and duress for detainees under interrogation who are subjected to them for prolonged periods.” He said that that “their combined use and cumulative effects over time must therefore be considered as part of a system of psychological torture.” (p.615)

¹³⁴ Jessica Lenahan’s Mar.2, 2007 Testimony, p.5.

2. Leslie, Katheryn, and Rebecca Gonzales suffered severe psychological suffering prior to their death

With regard to Ms. Gonzales's children, Leslie, aged 7, Katheryn, 8, and Rebecca, 10, it is inferable that they were subject to psychological torture or ill-treatment while alive in the control of their father, in addition to excruciating pain and summary execution. According to the Petition, the children were abducted by Mr. Gonzales on June 22, 1999 without any prior arrangement.¹³⁵

Ms. Gonzales' daughters were effectively subject to illegal and arbitrary detention by their father to the extent that their right to personal liberty and security was severely restricted and the State allowed that situation to continue. The Petition demonstrates that they already feared their father's erratic behavior¹³⁶ and we need only imagine his craziness and their terror during the period of abduction. Thus, the psychological impact of being abducted by Mr. Gonzales and deprived of liberty to escape can be inferred by analogy to that of a person whose right to liberty and security is violated.

The Inter-American Court has held that even a brief detention is sufficient to constitute a violation of physical, mental and moral integrity.¹³⁷ It has also noted that the mere fact of being placed in the trunk of a car violates "the inherent dignity of human person" and thus constitutes ill-treatment, even if no other physical or other maltreatment occurred.¹³⁸ The European Court has similarly found that the mere threat of a behavior prohibited by Article 3 of the European Convention, when it is "sufficiently real and immediate," may constitute torture or ill-treatment.¹³⁹ In addition, as noted already, the Inter-American and the European case law on torture and ill-treatment has placed particular weight on the protection of children's physical and mental integrity in evaluating the severity of harm inflicted on minors.¹⁴⁰

These cases indicate that Ms. Gonzales' children, who were found dead in the trunk of Mr. Gonzales' car, suffered severe mental suffering amounting torture while they were

¹³⁵ Gonzales Petition, p.9.

¹³⁶ The Petition notes that prior to the night, the children would return home scared when they had to spend time with Mr. Gonzales and tell Ms. Gonzales that they did not like spending time with their father. *See, Gonzales Petition*, p.8. It also notes that on one occasion, Mr. Gonzales was arrested for road rage after he had sped down the highway, chasing and threatening another driver with his children riding along in the car without the protection of their seatbelts.

¹³⁷ The Court held that even if a detention lasted for short time, it is a violation of physical, mental and moral integrity "according to the standards of international human rights law." *See Case of Maritza Urrutia*, ¶ 87; *Case of Juan Humberto Sánchez*, ¶ 98; *Gómez Paquiyauri Brothers*, ¶ 108.

¹³⁸ The Court considered that being placed in the trunk of a vehicle as "an infringement of Art. 5 of the Convention relating to humane treatment, inasmuch as, even if no other physical or other maltreatment occurred, that action alone must be clearly considered to contravene the respect due to the inherent dignity of the human person." *Castillo Páez v. Peru*, Inter-Am Ct. H.R., (Ser. C) No. 34, ¶ 66 (1997).

¹³⁹ In *Campbell and Cosans v the United Kingdom*, it held that "threaten[ing] an individual with torture might in some circumstances constitute at least 'inhuman treatment'." *Campbell and Cosans v the United Kingdom*, (1982) ECHR (Series A), No.48 ¶ 26.

¹⁴⁰ *See, Case of the "Street Children"*, ¶ 74; *Case of the Gómez Paquiyauri Brothers*, ¶ 117. *Ireland v. The United Kingdom*, ¶ 162; *Soering v. The United Kingdom*, ¶ 100; *Aydin v. Turkey*, ¶ 84; *A. v. the United Kingdom*, 1998-VI Eur. Ct. H.R. 2692, ¶ 22.

abducted and deprived of their liberty. Their death—their summary execution – by gunshot wounds was likely preceded as well by extreme pain and suffering.

B. Intentional infliction

The second element of intentionality requires that the person voluntarily do an act that foreseeably could result in severe physical or mental pain or suffering; it does not require that the perpetrator specifically intend to commit torture or to inflict severe pain or suffering, so long as the act is such as to make severe suffering “a likely or logical consequence.”¹⁴¹ In the travaux préparatoires of the CAT, the United States proposed that the intent should be specific and not general and this was soundly rejected.¹⁴² The ICTY has held that the commission of an act of torture itself provides the presumption of intent.¹⁴³ Recently the current UN Special Rapporteur on Torture confirmed that “if it can be shown that an act had a specific purpose, the intent can be implied.”¹⁴⁴ This understanding confirms with the jurisprudence of the Inter-American¹⁴⁵ and European bodies.¹⁴⁶

Acts of domestic violence satisfy the required intent element. Contrary to claims that domestic violence is the product of loss of impulse control, domestic violence is usually not an impulsive behavior but a “purposeful behaviour which is perpetrated intentionally,”¹⁴⁷ as men who abuse women partners “commonly exhibit control over their impulses in other settings and their targets are often limited to their partners and/or children.”¹⁴⁸ Battering, whether or not it is premeditated, is purposeful behavior.¹⁴⁹ Thus in the contexts of both official torture and domestic battering, loss of control is not exculpatory. Instead, in both contexts intent can be presumed by the act of violence. Indeed, the notion that battering is simply an impulsive letting-off of steam reflects the confinement of domestic violence to the private sphere, which obscures the underlying and purposive gender dynamic of domination and subordination.¹⁵⁰

¹⁴¹ Prosecutor v. Kunarac et. al, ICTY Case No. IT-96-23/1A, ¶ 153 (June 12, 2002). (“Kunarac Appeal Judgment”)

¹⁴² See, BURGERS & DANIELIUS, at 41; Rhonda Copelon, “Intimate Terror: Understanding Domestic Violence as Torture,” Human Rights of Women. National and International Perspectives, ed. Rebecca J. Cook (Philadelphia: University of Pennsylvania Press, 1994), 121-139; and Copelon, “Domestic Violence as Torture,” p.325.

¹⁴³ The ICTY clarified that an intent to commit the crime of torture depends on “whether a perpetrator intended to act in a way which, in the normal course of events, would cause severe pain or suffering, whether physical or mental, to his victims.” *Prosecutor v. Kunarac et. al.*, ICTY, Case No. IT-96-23, ¶153 (June 12, 2002).

¹⁴⁴ Report of the Special Rapporteur on Torture (Mr. Manfred Nowak), A/HRC/7/3, ¶ 30 (2008).

¹⁴⁵ See e.g., *Luis Lizardo Cabrera v. Dominican Republic*, Case 10.832, Inter-Am. C.H.R., OEA/Ser.L/V/II.98 (1998), ¶¶ 85-86; *Paniagua Morales v. Guatemala*, Inter-Am. Ct. H.R. (Ser.C) No.37 (1998), ¶ 134; and, *Cantoral Benavides v. Peru*, ¶ 104.

¹⁴⁶ *Aksoy v. Turkey* ECHR 1996-VI, no. 26, ¶ 64; *Selmouni v France*, ¶ 91.

¹⁴⁷ Report of the Special Rapporteur on violence on family (Feb 1996), ¶ 44.

¹⁴⁸ *Id.* ¶47, see also Copelon, “Domestic Violence as Torture,” pp.327-329.

¹⁴⁹ Susan Schechter, *Women and Male Violence* 215 (1982), at 17.

¹⁵⁰ For further discussion, see Copelon, “Domestic Violence as Torture,” pp.328-29.

In the Petitioners' case, there is no question that the precedent violence, the abduction of the children and their murder were committed intentionally by Mr. Gonzales. This was not an accident; he planned the abduction; he had in his possession a gun. It is clear that he intended to do the acts that resulted in the devastating events of June 22-23, 1999. Whether or not he should be held criminally liable is not the issue here. The issue is the State failure to intervene and apprehend him when there was a clear opportunity to take reasonable and necessary measures to prevent the carnage.

C. Prohibited purposes

The purpose element is not equivalent to a specific intent or subjective motivation requirement but rather requires "objective determinations under the circumstances."¹⁵¹ The IACPPT lists as prohibited purposes: "intimidation," "personal punishment," "a preventive measure," "a penalty," or "any other purpose"; as well as purposes to "obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish."¹⁵² It is accordingly somewhat broader than the CAT which lists the following impermissible purposes: "obtaining [...] information or a confession," "punishing," "intimidat[ion] or coerci[on]," or "for any reason based on discrimination of any kind."¹⁵³ The language makes clear, however, through the use of the term "such as," that the listing of purposes in the CAT is not "an exhaustive list, and should be regarded as merely representative."¹⁵⁴ Moreover, the ICTY has ruled that prohibited purpose need not be predominating or sole purpose, but "simply be part of the motivation behind the conduct and need not be the predominating or sole purpose."¹⁵⁵

The CAT Committee's General Comment 2 underscores that discrimination based on gender is a clear impermissible purpose of discrimination.¹⁵⁶ It develops the relationship between gender and torture in ways applicable here as follows:

The Committee emphasizes that gender is a key factor. *Being female intersects with other identifying characteristics or status of the person* such as race, nationality, religion, sexual orientation, age, immigrant status etc. to determine the ways that women and girls are subject to or at risk of torture or ill-treatment and the consequences thereof. The contexts in which females are at risk include deprivation of liberty, medical treatment, particularly involving reproductive decisions, *and violence by private actors in communities and homes*. Men are also subject to certain gendered violations of the Convention such as rape or sexual violence and abuse. Both men and women and boys and girls may be subject to violations of the Convention *on the basis of their actual or perceived non-conformity with socially determined gender roles*. States parties are

¹⁵¹ CAT Committee, General Comment 2, ¶ 9.

¹⁵² IACPPT, Art.2.

¹⁵³ CAT, Art. 1.

¹⁵⁴ *Prosecutor v. Delalic et al.*, ("Delalic Trial Judgment") ICTY Case No. IT-96-21-T, ¶ 470 (Nov.16, 1998); *Prosecutor v. Kvočka et al.*, ("Kvočka Trial Judgment") ICTY, Case No. IT-98-30/1-T, ¶ 140 (Nov. 16, 1998).

¹⁵⁵ *Delalic Trial Judgment*, ¶ 470; *Prosecutor v. Kunarac et al.*, ICTY, Case No. IT-96-23-T & IT-96-23/1/T, Trial Judgment, ¶ 486 (Feb. 22, 2001).

¹⁵⁶ CAT Committee, General Comment 2, ¶¶ 20-22.

requested to identify these situations and the measures taken to punish and prevent them in their reports (emphasis supplied).¹⁵⁷

The Special Rapporteur on Torture has likewise emphasized that gender based discrimination is, by definition, impermissible. The Special Rapporteur said that *gender-based violence is “inherently discriminatory* and one of the possible purposes enumerated in the Convention is discrimination” (emphasis supplied).¹⁵⁸

The UN Special Rapporteur on VAW has underlined that as with torture in detention, domestic violence is generally committed for such purposes as punishment, humiliation, intimidation, control, and obliterating the personality and diminishing the capacities of the targets who are disproportionately women.¹⁵⁹ Moreover, where a woman is the target, domestic violence is also an act of discrimination as it targets women disproportionately and is based on and perpetuates the subordination of women. Indeed, when dealing with violence against women, the impermissible purpose of discrimination—here discrimination based on gender—will almost invariably be present. The UN Special Rapporteur on Torture confirmed that in violence against women “the purpose element [of torture] is always fulfilled, if the acts can be shown to be gender-specific, since discrimination is one of the elements mentioned in the CAT definition.”¹⁶⁰

The CEDAW has clarified that “violence that is directed against women because she is a woman or that affects women disproportionately” represents a form of discrimination against women.¹⁶¹ Against this backdrop, it has explicitly stated that domestic violence is “a form of discrimination,”¹⁶² which is in line with the IACHR’s understanding.¹⁶³

¹⁵⁷ *Id.*, ¶ 22.

¹⁵⁸ *Report of the Special Rapporteur on Torture* (Mr. Manfred Nowak), A/HRC/7/3, ¶ 30 (2008).

¹⁵⁹ *Report of the Special Rapporteur on VAW* (Ms. Radhika Coomaraswamy), E/CN.4/1996/53, ¶¶ 44, 47; *Report of the Special Rapporteur on VAW* (Ms. Yakin Ertürk) E/CN.4/2006/61/ (2006); UN Press Release, “UN Independent Experts Call on States to Strengthen the Protection of Women from Violence,” Nov.23, 2007. Copelon, “Domestic Violence as Torture,” pp.335-41.

¹⁶⁰ *Report of the Special Rapporteur on Torture* (Manfred Nowak), A/HRC/7/3, ¶ 30 (2008).

¹⁶¹ CEDAW, General Recommendation No.19, ¶6. *See also*, ¶ 7 and ¶ 11. The 1993 UN Declaration on the Elimination of Violence Against Women in Preamble likewise emphasizes violence as “one of the crucial social mechanisms by which women are forced into a subordinate position compared with men.”

¹⁶² CEDAW, Concluding observations of: Vanuatu, CEDAW/C/VUT/CO/3, ¶ 25 (2007); and, Cook Islands, CEDAW/C/COK/CO/1, ¶ 25 (2007). Similarly, the 1996 report by the UN Special Rapporteur on violence against women underscores that domestic violence is “an expression and act of gender discrimination.” *Report of the Special Rapporteur on VAW*, Ms. Radhika Coomaraswamy E/CN.4/1996/53, ¶ 47 (1996). *See also: Report of the Special Rapporteur on Torture*, U.N.Doc. E/CN.4/1995/34, ¶¶ 15-18; *Report of the Special Rapporteur on systematic rape, sexual slavery and slavery-like practices during armed conflict*, U.N. Doc. E/CN.4/Sub.2/1998/13, ¶ 55 (1998); *Prosecutor v. Delalic*, ICTY, Case No. IT-96-21-T, ¶ 941 (Nov.16, 1998); CCPR, General Comment No. 28: Equality of rights between men and women (article 3), CCPR/C/21/Rev.1/Add.10, ¶ 11 (2000).

¹⁶³ The Committee has noted that gender discrimination underlies violence against women, including domestic violence. *The Situation of the Rights of Women in Ciudad Juárez*, OEA/Ser.L/V/II.117, Doc. 44, ¶ 7 (2003); *María Eugenia Morales de Sierra v. Guatemala*, Case 11.625, Report No. 4/00, OEA/Ser.L/V/II.111 Doc. 20 rev. at 929, ¶ 52 (2000).

In the instant case, Mr. Gonzales' prior treatment of Ms. Gonzales and her children, and his abduction and murder of the children were committed for many of the recognized purposes, in particular, to intimidate, to threaten, and to punish. According to the Petition, Mr. Gonzales called Ms. Gonzales from an amusement park to make her the last request to rekindle their relationship, and when she refused, he threatened her by saying that "well then I know what I need to do."¹⁶⁴ The resultant murder of her daughters was designed to and did exact the ultimate, lifelong punishment on Ms. Gonzales while the children who paid with their lives were her daughters. And thus, the precedent violence, the threats and the deaths of her daughters represent as well the most brutal gender-discrimination. As will be discussed below, the police failure to intervene and dismissive, trivializing response to Ms. Gonzales's anguished calls for help also reflect an all too common and dangerous discrimination by police officials.

D. State involvement – consent or acquiescence

The final element – state involvement – is met not only when directly committed or instigated by a public official but also when committed by non-officials with the acquiescence of a state official. The applicability of acquiescence to privately inflicted violence is also recognized in the Inter-American instruments. In its landmark decision in *Velásquez-Rodríguez*, the Inter-American Court established State responsibility for non-state violence in the context of a failure of due diligence, stating that "[w]here the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible."¹⁶⁵ The Court has later established that the obligation of States to adopt measures of protection for private acts of violence is based on whether State authorities' "awareness of a situation of real and imminent danger for a specific individual or group of individuals and to the reasonable possibilities of preventing or avoiding that danger."¹⁶⁶ More recently, in *Baldeón-García v. Peru*, the Court confirmed that the acquiescence of the State to an act that violates of Article 5 of the American Convention constitutes "a positive contribution" to such act.¹⁶⁷ In line with the Court's decisions, the IACHR has already found the complicity of states in domestic violence.¹⁶⁸

¹⁶⁴ Gonzales Petition, p.10.

¹⁶⁵ *Velásquez Rodríguez v. Honduras*, Inter-Am Ct. H.R. (Ser. C) No. 4 ¶ 177 (1988). Since this decision, the Court has repeatedly affirmed that the State's responsibility for privately acts of violence is found in "omissions by any authorities or bodies of the State." *Gómez Paquiyauri Brothers*, ¶ 71; *Humberto Sánchez*, ¶ 142; *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-Am. Ct. H.R., (Ser. C) No. 79, ¶ 154 (2001); *Case of the Constitutional Court*, Inter-Am. Ct. H.R., (Ser. C) No. 71, ¶ 109 (2001); *Bámaca Velásquez v. Honduras*, Inter-Am. Ct. H.R., (Ser. C) No. 91, ¶ 210 (2002); *Mapiripán Massacre* v. Colombia, Inter-Am. Ct. H.R., (Ser. C) No. 134, ¶ 110 (2005); *"Pueblo Bello Massacre"* v. Colombia, Inter-Am. Ct. H.R., (Ser. C) No. 140, ¶140 (2006); and *"Street Children"* case, ¶ 220.

¹⁶⁶ *Pueblo Bello Massacre*, ¶ 123.

¹⁶⁷ *Baldeón-García v. Peru*, ¶ 115.

¹⁶⁸ In the *Maria da Penha Fernandes* case, it found the state's direct responsibility for the consequence of domestic violence by having failed to prosecute and convict the abusive ex-husband for over 15 years after the start of an investigation, which it called "an indication that the State condones" and state's inaction "exacerbate[d] the direct consequences of the aggression by her ex-husband." *Maria da Penha Fernandes v. Brazil*, Case 12.051, Report No. 54/01, OEA/Ser.L/V/II.111 Doc. 20 rev. at 704, ¶ 55 (2000) . In its 2003 report on the situation of women in Mexico, the Commission reaffirmed that the failure of States to

The CAT Committee's General Comment 2 clarifies that consent and acquiescence under the Convention is equivalent to the failure to exercise due diligence. It provides:

[W]here State authorities or others acting in official capacity or under colour of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts.¹⁶⁹

Emphasizing that the failure to exercise due diligence results in impunity, “the State’s indifference or inaction provides a form of encouragement and/or *de facto* permission.”¹⁷⁰ In its jurisprudence, the CAT Committee has explicitly recognized the state’s complicity in non-state acts of ill treatment.¹⁷¹ Similarly, the CCPR has declared that those who “tolerate” acts of torture or ill-treatment “must be held responsible”¹⁷² for such conducts, including those committed by “people acting [...] in a private capacity” (emphasis supplied).¹⁷³

Likewise, the European Court has established that the state’s responsibility for non-state acts of violence arises when “the authorities knew or ought to have known at the time of the existence of a real and immediate risk” and “they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.”¹⁷⁴ It has further explained that it not necessary to show that the public authority, if had taken adequate measures, would have either uncovered the abuse or prevented it, confirming that “[a] failure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State.”¹⁷⁵ The European Court has applied this standard in finding the state’s acquiescence in domestic violence. For example, in *Z. and Others v. the United Kingdom*, it found that the local authorities were complicit in the ill-treatment of

“effectively prosecute and punish” domestic violence indicates that “the State in effect condones it.” *The Situation of the Rights of Women in Ciudad Juárez*, Inter-Am. C.H.R., OEA/Ser.L/V/II.117, Doc. 44, ¶ 129 (2003). See also, *Access to justice for women victims of violence in the Americas*, Inter-Am. C.H.R., OEA/Ser.L/V/II, Doc. 68, ¶¶ 26-122 (2007).

¹⁶⁹ CAT Committee, General Comment 2, ¶ 18.

¹⁷⁰ *Id.*, ¶ 18.

¹⁷¹ The CAT Committee held that the police’ failure to provide adequate protection against the racially motivated attacks constituted their “acquiescence” in the ill-treatment.” CAT Committee, Communication No. 161/2000, *Hajrizi Dzemajl et al. v. Yugoslavia*, U.N. Doc. CAT/C/29/D/161/2000, ¶ 9.2 (1999).

¹⁷² CCPR, General Comment 20, ¶13. The General Comment was expanded from the Committee’s original comment on Art. 7 made in 1982, which noted that the states are required to ensure protection against torture and ill-treatment “even when committed by persons acting outside or without any official authority.” CCPR, General Comment 7, ¶2 (1982).

¹⁷³ CCPR, General Comment 20, ¶ 2 (emphasis supplied).

¹⁷⁴ *Osman v. the United Kingdom*, ECHR 1998, 87/1997/871/1083, ¶ 116; *Kiliç v. Turkey*, no. 22492/93, ECHR 2000-III, at ¶63.

¹⁷⁵ *E. and Others v. United Kingdom*, 2002-II Eur. Ct. H.R. 763 (2003), ¶ 99.

the children by their parents as they did not protect them against the abuse, which had been brought to the local authority's attention.¹⁷⁶

As these developments clearly indicate, the failure of the state authorities to react to domestic violence, when they are aware or should be aware of the danger, amounts to State acquiescence or "tacit involvement."¹⁷⁷ This link has been highlighted by the CEDAW in *A.T. v. Hungary*, where it held the State responsible for "passively neglect[ing] its 'positive' obligations" to prevent domestic violence and thus "support[ing] the continuation of a situation of domestic violence."¹⁷⁸

In the Petitioners' case, the police failure to respond to Ms. Gonzales' increasingly desperate pleas for intervention renders them complicit in Mr. Gonzales' threatening and ultimately murderous behavior. Here, a guide is found in the CEDAW's decision in a case similar to the Petitioners': the murder by estranged husband (of wife in this case) in violation of a temporary restraining order, after a long history of domestic violence, which had been noted to the police.¹⁷⁹ In *Şahide Goekce v Austria*, taking into account the frequent calls she had made to the police about the battering, the issuance of restraining order against her husband, and the fact that the interim restraining order was in effect at the time of her death, the CEDAW held that "the police knew or should have known" that the victim was in serious danger and should have responded to the last call from her as an emergency.¹⁸⁰

The jurisprudence of the European Court is also helpful in establishing the state's acquiescence in Petitioners' case. In the cases involving torture and murder of pro-Kurdish victims by unidentified perpetrators, the Court has found that a request for a protective order against threats of violence or the existence of widely recognized general knowledge of a threat against a particular group of people may be sufficient to conclude that "the [state] authorities were aware, or ought to have be aware" of an immediate danger faced by a person in such circumstances.¹⁸¹

¹⁷⁶ *Z. and Others v. the United Kingdom*, no. 29392/95, ECHR 2001-V, ¶¶ 74-75. See also, *E. and Others v. United Kingdom*, 2002-II Eur. Ct. H.R. 763, ¶ 96 (2003).

¹⁷⁷ *Report of the Special Rapporteur on VAW* (Ms. Radhika Coomaraswamy), E/CN.4/1996/53, ¶ 48. The CEDAW has also affirmed that States parties can be held accountable for private acts of violence against women, "if they fail to act with due diligence to prevent violations of rights, or to investigate and punish acts of violence, and for providing compensation" (See, CEDAW, General Recommendation No.19, ¶ 9). The UN Special Rapporteur on Torture has addressed state acquiescence or complicity in domestic violence when "domestic laws fail to provide adequate protection against any form of torture and ill-treatment in the home." *Report of the Special Rapporteur on Torture*, A/HRC/7/3, ¶ 33 and ¶ 46.

¹⁷⁸ *A.T. v. Hungary*, CEDAW Communication No. 2/2003, U.N. Doc. CEDAW/C/32/D/2/2003, ¶ 3.1.

¹⁷⁹ *Şahide Goekce v Austria*, ¶ 2.7; *Fatma Yildirim v Austria*, ¶ 2.12.

¹⁸⁰ *Şahide Goekce v Austria*, ¶ 12.1.4. Similarly, the CEDAW, in *Fatma Yildirima v Austria*, concluded that the Public Prosecutor should not have denied the previous requests by the Police to arrest the perpetrator and place him in detention as he had made "a criminal dangerous threat" against the victim. See, *Fatma Yildirim v Austria*, ¶ 12.1.4.

¹⁸¹ *Kiliç v. Turkey*, ¶¶ 66-67, ¶ 77; *Kaya v. Turkey*, App. No. 22535/93, Eur. Ct. H.R. 129, ¶ 89, ¶ 91, ¶101 (2000); *Akkoç v. Turkey*, No. 22947 & 8/93, ECHR 2000-X, ¶ 81, ¶ 83, ¶ 94.

In the Petitioners' case, the Castle Rock Police Department failed to protect Ms Gonzales and her children despite: the mandatory protective order, which she mentioned to the police, requiring them to arrest the husband for violations;¹⁸² Ms Gonzales' repeated requests, by telephone and in person, to apprehend him; her reminder to the police officers of the existence of the restraining order; the CRPD's data of his other erratic behaviors, including his prior criminal history, involving at least "seven run-ins with the police" as confirmed by the police¹⁸³; her notice to the police that Mr. Gonzales had called her from an amusement park and threatened to harm the children; and a clear opportunity to apprehend him at the amusement park.

These facts indicate that that the police officers were or should have been aware of the immediate danger faced by Ms. Gonzales and her children. Moreover, their treating of Mr. Gonzales' behavior as acceptable despite the mandatory order, and their failure repeatedly to respond rendered them complicit in the intimidation and punishment of Ms. Gonzales. Further, by not taking her calls for help seriously, they not only endorsed his behavior; their nonchalance in the face of a judicial order and their patronizing and dismissive responses to her repeated and increasingly desperate calls for help also reflect their discriminatory attitude that trivializes domestic violence and exacerbates its danger. This acquiescence in torturous conduct plus the Supreme Court's refusal to recognize a remedy (and a deterrent) in these circumstances violate Article I of the Declaration.¹⁸⁴

In sum, it is consistent with the regional and international case law for the IACHR to declare that, based on the facts alleged, the mental suffering Ms. Gonzales has endured during and after her children's abduction, and the physical and mental suffering experienced by her daughters prior to their deaths amount to torture. It is, accordingly, clearly a violation of the obligation of the United States under Article I of the American Declaration to prohibit torture or ill-treatment in light of relevant regional, international and customary international law. *Amici* submit that a finding of torture is not only deserved; it is necessary to underscore gravity and non-derogability of domestic violence.

III. The United States has breached its affirmative obligations to ensure the rights guaranteed in the American Declaration

As the Petitioners has indicated,¹⁸⁵ the United States has an affirmative obligation to protect the rights protected under the American Declaration, which obligation this Commission has confirmed in its admissibility decision of the Petitioners' case.¹⁸⁶

¹⁸² Restraining order. Ex A. of the Gonzales Petition.

¹⁸³ *Gonzales v. United States*, Observations concerning the March 2, 2007 Hearing before the Commission, presented by the Petitioners, p.18.

¹⁸⁴ The UN Special Rapporteur on Torture, in reference to the language "with the consent or acquiescence of a public official" in Art. 1 of the CAT, has also noted that "[u]nder international law, this element of the definition makes the State responsible for acts committed by private individuals which it did not prevent from occurring or, if need be, for which it did not provide appropriate remedies." *Report of the Special Rapporteur, Sir Nigel Rodley, Visit to Azerbaijan*, U.N. Doc. E/CN.4/2001/66/Add.1, ¶ 73.

¹⁸⁵ Petition, ACLU Observations concerning the September 22, 2006 Response of the United States Government, December 11, 2006. (hereafter "*ACLU Reply in Gonzales v. United States*"), and Merits Brief, *Gonzales v United States*, March 24, 2008 ("Petitioners' Merits Brief")

Thus, we will analyze below the alleged violations of the United States’ responsibilities under American Declarations in light of the provisions against torture and ill-treatment found in relevant regional and international law to underscore the state’s obligation to prevent and redress this epidemic violence in the United States and in Americas in general. The regional and international human rights bodies have confirmed that the due diligence standard is essential to ensure the right to be free from torture and ill-treatment applies to domestic violence. This Commission and the Inter-American Court¹⁸⁷ as well as the CAT Committee and the CCPR have made clear that the states have “positive” obligations to prevent, prosecute and punish or redress private acts of torture and ill-treatment.¹⁸⁸

A. The United States has breached its obligation to prevent and protect Ms. Gonzales and her daughters

In the present case, the United States failed to act with due diligence to protect the right of Ms. Gonzales and her children to be free from torture and ill-treatment in a violation of Article I of the American Declaration.

1. The United States has breached its obligations under Articles I, V, VI and VII of the American Declaration by having failed to act with due diligence to prevent and provide protection from torture and ill-treatment to Ms. Gonzales and her children

In the Petitioners’ case, the CRPD failed to provide Ms. Gonzales and her daughters with adequate prevention and protection against the violence by Mr. Gonzales despite the mandatory restraining order and her repeated pleas for help. This is a violation by the United States of its obligation under the American Declaration and relevant regional and international law to prevent torture and ill-treatment.

The obligation to prevent torture and ill-treatment is implicitly recognized in Article I of the American Declaration and Article 5 of the American Convention, read together with Article 1(1), and explicitly addressed in the IACPPT¹⁸⁹ and the Convention of Belém do Pará.¹⁹⁰ Further, articles V and VI of the American Declaration, in light of Article I, indicate that the States’ obligation to prevent torture and ill-treatment extends to the

¹⁸⁶ *Gonzales v United States*, Admissibility decision, ¶¶ 56-57.

¹⁸⁷ See, e.g., *Maria da Penha Fernandes* case; *Velásquez Rodríguez v. Honduras*; the “Mapiripán Massacre” v. *Colombia*, Inter-Am. Ct. H.R., (Series C) No. 134, ¶ 111 (2005); *Case of 19 Tradersmen*, ¶ 141; *Case of Juan Humberto Sánchez*, ¶ 44. For discussion on “acquiescence,” see also Section II.D of this *amici*.

¹⁸⁸ CAT Committee, General Comment, No.2, ¶ 18, ¶ 21, and ¶ 24. The CCPR’s General Comment No.31 stresses that the obligation under the ICCPR is “both negative and positive in nature” (¶ 7) and such positive obligations “will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons” (¶ 8). CCPR, General Comment 31 (replacing No.3) CCPR/C/21/Rev.1/Add.13 (2004).

¹⁸⁹ IACPPT, articles 1 and 6.

¹⁹⁰ Art. 7(b) of the Convention of Belém do Pará, in light of the prohibition of torture (Articles 2(b) and 4(d)) and the personal liberty and security (Art. 4(c)).

sphere of private and family life.¹⁹¹ Besides, under Article VII, the States are explicitly obligated to provide special protections to women and children.¹⁹² These provisions indicate that the OAS states have the duty to prevent intra-family torture and ill-treatment.

In addition, there is a substantial interpretative authority in regional and international law recognizing the applicability of the states' obligation to prevent torture and ill-treatment to domestic violence in accordance with due diligence standard. This Commission has highlighted the importance of enforcing legislation to prevent domestic violence and protect victims, including urgent response when necessary.¹⁹³

The European Court has likewise confirmed that a breach of the state parties' duty under Article 3 of the European Convention to prevent torture and ill-treatment may arise with regard to domestic violence. In *Z. and Others v. UK* it found the State's failure to protect children from ill-treatment by their parents, which had been brought to the local authority's attention.¹⁹⁴ Additionally, the case law of the European Court is insistent on the states' duty to provide women and children with special protection from torture and ill-treatment.¹⁹⁵

The CAT Committee has also made clear that the duty to prevent torture and ill-treatment under articles 2 and 16 of the CAT applies to domestic violence.¹⁹⁶ The CAT Committee

¹⁹¹ American Declaration, articles V ("Right to protection of honor, personal reputation, and private and family life") and VI (Right to a family and to protection thereof").

¹⁹² In this regard, both the Inter-American Court and Commission have underscored that in the context of torture and ill-treatment children are entitled to enhanced special protection. Advisory Opinion OC-17/02, Inter-Am. Ct. H.R. (Ser. A) No. 17, ¶ 60 (2002). See also, *Gómez-Paquiyaqui Brothers v. Peru*, ¶¶ 168-171 and, the Commission's decisions in: *Michael Domingues v. United States*, Case 12.285, Report No. 62/02, Inter-Am. C.H.R., Doc. 5 rev. 1 at 913, ¶ 83 (2002); *Jailton Neri Da Fonseca v. Brazil*, Case 11.634, Report No. 33/04, Inter-Am. C.H.R., OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 845, ¶ 64 (2004).

¹⁹³ It held that: "the duty of due diligence to prevent a violation [as in domestic violence] requires an urgent response, for example in the case of women in need of measures to protect against an imminent threat of violence, or in response to reports of a disappearance." *The Situation of the Rights of Women in Ciudad Juárez*, ¶ 155. See also, *Maria da Penha Fernandes*.

¹⁹⁴ *Z. and Others v. the United Kingdom*, [GC] no. 29392/95 ECHR 2001-V, ¶¶ 74-75. See also, *A. v. the UK*, concerning a nine-year-old boy whose stepfather had repeatedly beaten him with a garden cane as a punishment.

¹⁹⁵ In *E. and Others v. UK*, it held that the states must take measures to protect individuals, particularly "children and other vulnerable persons," from privately inflicted torture and ill-treatment, of which "the authorities had or ought to have had knowledge." *E and Others v. the UK*, ¶ 88. See also, *Ireland v. The United Kingdom*, Series A, No. 25 (1978) 2 ECHR 25, ¶ 162; *Soering v. the UK*, 11 Eur. Ct. H.R. (ser. A) (1989) ¶ 100; *A. v. the UK*, ¶ 20; *Z. and Others v. the UK*, ¶¶ 74-75.

¹⁹⁶ See e.g., the CAT Committee, Conclusions and recommendations on: Zambia, CAT/C/XXVII/Concl.4, ¶ 8(h) (2001); Bahrain, CAT/C/CR/34/BHR, ¶ 7(i) (2005); Greece, CAT/C/CR/33/2, ¶ 6(l) (2004); Republic of Korea, CAT/C/KOR/CO/2, ¶ 17 (2006); Qatar, CAT/C/QAT/CO/1, ¶ 22 (2006); Guyana, CAT/C/GUY/CO/1, ¶ 20 (2006); Russian Federation, CAT/C/RUS/CO/4, ¶ 11(b) (2007); Ukraine, CAT/C/UKR/CO/5, ¶ 14 (2007); Japan, CAT/C/JPN/CO/1, ¶24 (2007); Estonia, CAT/C/EST/CO/4, ¶ 21 (2007); Italy, CAT/C/ITA/CO/4, ¶¶23-24 (2007); Latvia, CAT/C/LVA/CO/2, ¶ 20 and 22 (2008); the former Yugoslav Republic of Macedonia, CAT/C/MKD/CO/2, ¶ 3, ¶ 19 (2008); Algeria, CAT/C/DZA/CO/3, ¶ 19 (2008); Indonesia, CAT/C/IDN/CO/2, ¶ 5(d), ¶ 16 (2008); Portugal, CAT/C/PRT/CO/4/Add.1, ¶15 (2008); Costa Rica, CAT/C/CRI/CO/2, ¶¶ 24-25 (2008) (talks about domestic violence in same sex couples). See also, *List of issues to be considered during the examination of the second periodic report of the United States of America* (CAT/C/48/Add.3), CAT/C/USA/Q/2, ¶ 59 (2006).

has also underlined that the protection of vulnerable groups, such as women, is “a part of the obligation to prevent torture or ill-treatment,”¹⁹⁷ stressing that “gender is a key factor” in implementing the CAT.¹⁹⁸ Similarly, the CCPR has affirmed that the states’ duties under the ICCPR extend to privately inflicted torture and ill-treatment.¹⁹⁹ Further, the Committee has made clear that prevention of domestic violence requires the existence or enactment of effective law provisions and adequate application of those provisions by the police and the judiciary.²⁰⁰

Recent decisions of the CEDAW provide further guidance. In *Şahide Goekce v. Austria* and *Fatma Yildirim v. Austria*, involving domestic violence that ended in the death of the victims at the hands of their estranged husbands despite restraining orders, the CEDAW held that the failure of the police to respond immediately to the last call from the victim²⁰¹ and the failure of the Public Prosecutor’s office to detain the victim’s abusive husband²⁰² were both in breach of the State’s due diligence obligation to protect the deceased victims.

Consistent with these developments, the Commission should find that the United States’ failure to provide effective prevention and protection to Ms. Gonzales and her children from torture and ill-treatment violates Articles I, V, VI and VII of the American Declaration. This failure, on the immediate level is attributable to the Castle Rock police’s trivialization of the danger and dismissive response to Ms. Gonzales’ repeated pleas for help as well as their outrageous failure to take advantage of the clear chance of apprehending Mr. Gonzales in the amusement park. *Amici* rely in this regard on the detailed treatment of this matter in the Petitioners’ merits brief.

2. The United States has breached Article II of the American Declaration through its failure to provide effective prevention and protection from torture and ill-treatment to Ms. Gonzales and her children

The Petition makes clear that the failure of the police to provide adequate protection to Ms. Gonzales and her children through enforcing the terms of the restraining order is not unique to this case before the Commission. Instead, there is a widespread pattern on non-protection in the United States: many police departments and police officers fail to provide meaningful enforcement of protective orders or otherwise respond effectively to domestic violence or respond to a domestic violence at all.²⁰³ Moreover, as the CRPD

¹⁹⁷ CAT Committee, General Comment No.2, ¶ 21, *see also* ¶¶ 20-24.

¹⁹⁸ CAT Committee, General Comment No.2, ¶ 22.

¹⁹⁹ CCPR, General Comment 20, ¶ 2.1, and ¶ 8. The CCPR’s General Comment 31 also stress the states parties’ duty to protect individuals against violations committed by “private persons or entities” and to “take appropriate measures or to exercise due diligence to prevent” violations caused by “private persons or entities.” CCPR, General Comment 31, ¶ 8.

²⁰⁰ *See* CCPR’s concluding observations on Yemen: CCPR/C/79/Add.51 reprinted in A/50/40 (¶¶ 242-265), ¶ 255 (1995); CCPR/CO/75/YEM, ¶ 6 (2002) and CCPR/CO/84/YEM, ¶ 12 (2005).

²⁰¹ *Şahide Goekce v. Austria*, ¶ 12.1.4; *Fatma Yildirim v. Austria*, ¶¶ 12.1.4-12.1.5.

²⁰² *Fatma Yildirim v. Austria*, ¶ 12.1.5.

²⁰³ Gonzales Petition, pp.29-31.

responded to Ms. Gonzales' requests for help with utter indifference, domestic violence-related calls for service are routinely treated as a low priority in some jurisdictions.²⁰⁴ Further, the police across the United States fail to make arrest in response to complaints of domestic violence, in breach of mandatory arrest laws.²⁰⁵

At root, the police failure to adequately respond to Ms. Gonzales' repeated calls for help reflects a general discriminatory attitude of the police to domestic violence. By not taking her calls for help seriously, the police not only endorsed Mr. Gonzales' abusive and violent behavior; their nonchalance in the face of a judicial order and their patronizing and dismissive responses to Petitioners' repeated and increasingly desperate calls for help trivialized domestic violence and exacerbated the danger to the victims.

As suggested in the IACHR's admissibility decision in this case, the State's trivialization of domestic violence should constitute violations of Article II of the American Declaration on the right to equality based on sex before law, as the failures in the police response to domestic violence affect women disproportionately and are rooted in stereotypical attitudes toward the victims of domestic violence.²⁰⁶

This Commission has made clear that the principle of non-discrimination is "a particularly significant protection that permeates the guarantee of all other rights and freedoms under domestic and international law."²⁰⁷ The duty to provide protection against private torture and ill-treatment without discrimination is explicitly established by the CAT Committee,²⁰⁸ as well as the CCPR and the CEDAW.²⁰⁹

Amici urge the Commission to confirm its indication in the admissibility decision that it might find the United States' violation of Article II and apply it as well to the conduct as torture and ill treatment.

B. The United States has breached its obligation under the American Declaration in light of relevant regional and international law to investigate and prosecute torture and ill-treatment

²⁰⁴ Gonzales Petition, p.30.

²⁰⁵ Gonzales Petition, p.31.

²⁰⁶ *Gonzales v. U.S.* Admissibility decision, ¶ 58.

²⁰⁷ *Maya indigenous community of the Toledo District v. Belize*, Case 12.053, Report No. 40/04, Inter-Am. C.H.R., OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 727 (2004), ¶ 165. Here, the IAHCRC consulted the Inter-American Court's Advisory Opinion OC-4/84, which says that "[t]he notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual" (¶ 55) and that "equality and nondiscrimination are inherent in the idea of the oneness in dignity and worth of all human beings" (¶ 56). *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84, Inter-Am. Ct. H.R. (Ser. A) No. 4 (1984).

²⁰⁸ CAT Committee, General Comment No.2, ¶ 20, see also ¶¶ 21-24.

²⁰⁹ ICCPR, Art. 26 provides the principle of non-discrimination in ensuring the rights and freedoms protected in the Covenant, including torture and ill-treatment (art.7). The CEDAW, in its General Recommendation No.19, which recognizes violence against women as discrimination, recommends the states to overcome all forms of gender-based violence (¶ 24).

The facts alleged in the Petition clearly demonstrate the lack of prompt and impartial investigation by the police and the denial of any meaningful domestic judicial remedy by the courts. In particular, the Colorado authorities failed to adequately investigate both the breach of her restraining order and the deaths of Rebecca, Katheryn, and Leslie Gonzales and inform the results to Ms. Gonzales. Moreover, the Colorado authority failed to investigate and sanction official's misconduct. The Supreme Court has also refused to consider the merits of her complaint. These constitute the United States' violation of Articles XVIII and XXIV of the American Declaration.

1. The United States breached Article XVII and XXIV of the American Declaration by failing to effectively investigate and prosecute the facts surrounding the event occurred to Ms Gonzales' children on June 22-23, 1999

In the Petitioners' case, the Commission should interpret the states' obligations under Articles XIII and XXIV of the American Declaration entail the duty to investigate and prosecute human rights violations, in consistent with the Inter-American bodies' analysis of the analogous articles of the American Convention – Articles 8 and 25. Both this Commission and the Court have consistently held that Articles 8 and 25, read in conjunction with Articles 1(1) and 2, entails the duty of the State to conduct “effective” investigation into human rights violations.²¹⁰

This Commission has already confirmed the applicability of Article XVIII of the Declaration and Article 25 of the American Convention in relation to Article 1(1) to domestic violence.²¹¹ This is further reinforced by other international interpretations of States' obligations, such as the CEDAW, which has underscored the States' duty to “investigate promptly, thoroughly, impartially and seriously all allegations of domestic violence.”²¹²

The Inter-American Court has made clear that the duty to investigate should be undertaken in “a serious manner and not as a mere formality preordained to be

²¹⁰ See, *Raquel Martín de Mejía*, p. 190; *Ana, Beatriz, and Cecilia González Pérez v. Mexico*, Report No. 53/01, OEA/Ser.L/V/II.111 Doc. 20 rev. at 1097, ¶ 83 (2000); *Consuelo et al. v. Argentina*, Case 10.147, Report No. 28/92, Inter-Am.C.H.R., OEA/Ser.L/V/II.83 Doc. 14 at 41, ¶ 40 (1993); *Mendoza v. Uruguay*, Report No. 29/92, Inter-Am.C.H.R., OEA/Ser.L/V/II.83 Doc. 14 at 154, ¶ 50 (1993), “*Street Children*” case, ¶ 225-227; *Loayza Tamayo v. Peru*, (Reparations). Inter-Am. Ct. H.R. (Ser. C) No. 42, ¶¶ 169-70 (1998). In cases where the State is a party to both the American Convention and the IACPPT, the Inter-American Court has found a violation of the State's obligation under both Conventions to investigate and prosecute acts of torture or ill-treatment. See, e.g., “*Street Children*” case ¶¶ 249-520; *Tibi*, ¶¶ 159-162; *Maritza Urrutia*, ¶¶ 126-130; *Bámaca-Velásquez*, ¶¶ 221-223.

²¹¹ *Maia Fernandes v. Brazil*, ¶ 55; *Report on the Situation of Human Rights in Brazil*, OEA/Ser.L/V/II.97, Doc. 29 rev.1 (1997), ¶ 26; *The Situation of the Rights of Women in Ciudad Juárez*, ¶ 129.

²¹² *AT v. Hungary*, CEDAW, ¶ 9.6.I (f). The CEDAW confirmed its General Recommendation No.19, ¶ 9, which says that: “Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.”

ineffective,”²¹³ and that investigation should “give results or responses to the violations of rights established in the [American] Convention.”²¹⁴ It held that:

[a]n investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government.²¹⁵

This is in line with the understanding of the IACHR²¹⁶ as well as the CAT Committee,²¹⁷ the CCPR,²¹⁸ and the European Court.²¹⁹ The CAT Committee has maintained the obligation to investigate acts of torture and ill-treatment is independent from whether the allegation of torture or ill-treatment is sustained.²²⁰ It has further stressed that the result of an investigation should be informed to the alleged victim to ensure the right to redress.²²¹

²¹³ *Velásquez-Rodríguez*, ¶ 177. The Court has repeatedly stressed that investigation should be “effective”. See, e.g., *Juan Humberto Sánchez* case, ¶ 127; *Bámaca Velásquez* Case, ¶ 191; *Godínez Cruz* Case, ¶ 66; *The Constitutional Court v. Peru*, Inter-Am. Ct. H.R., (Ser. C) No. 71, ¶ 89 (2001), and, *Advisory Opinion OC-9/87 Inter-Am. Ct. H.R. (Ser. A) A No. 9*, ¶ 24 (1987).

²¹⁴ *Bámaca Velásquez* Case, ¶ 191; *Las Palmeras v. Colombia*, Inter-Am. Ct. H.R., (Ser. C) No. 90, ¶ 58 (2001).

²¹⁵ *Velásquez-Rodríguez*, ¶ 177.

²¹⁶ See, e.g., *Raquel Martín de Mejía, Consuelo et al. v. Argentina*, Case 10.147, 10.181, 10.240, 10.262, 10.309, 10.311 Report No. 28/92, Inter-Am.C.H.R., OEA/Ser.L/V/II.83 Doc. 14 at 41, ¶ 40 (1993).

²¹⁷ Under articles 12 and 13 of the CAT the States parties are obliged to “promptly and impartially” investigate allegation of torture and ill-treatment “wherever there is reasonable ground to believe” that such act has been committed.” The CAT Committee held that the States Parties have the independent obligation to promptly and impartially investigate acts of torture or ill-treatment, “whatever the origin of the suspicion.” CAT Committee, Communication No. 59/1996, *Encarnación Blanco Abad v. Spain*, CAT/C/20/D/59/1996, ¶ 8.2 (1997). In this case, the CAT Committee explained that Art. 13 does not require a formal lodging of a complaint of torture and that it is enough for a victim simply to bring the facts to the attention of an authority for the State to be obliged to promptly and impartially investigate such allegation (¶ 8.6). See also, *Henri Unai Parot v. Spain*, Communication No. 6/1990, U.N. Doc. A/50/44 at 62, ¶ 10.4 (1995). The CAT Committee confirmed that these articles apply in the context of ill-treatment. See, *Hajrizi Dzemajl et al. v. Yugoslavia*, ¶¶ 9.4-9.5.

²¹⁸ The obligation to investigate and prosecute is not explicitly set forth in the ICCPR. The CCPR has confirmed that Art. 7 of the ICCPR in light of Art. 2(3) imposes the obligation on the states to investigate allegations of acts of torture and ill-treatment “promptly and impartially.” CCPR, General Comment 20, ¶ 14.

²¹⁹ While the European Convention has no provision that explicitly establishes the duty to investigate, the European Court has interpreted Art. 13 of the European Convention, which mirrors Article 25(1) of the American Convention, to impose an obligation on the states to conduct “a thorough and effective investigation” into alleged violations. See, e.g., *Aksoy v. Turkey*, ¶ 98; *Kurt v. Turkey*, (1998) III Eur. Ct. H.R. 1152, ¶ 140; *Aydın v. Turkey*, ¶ 103; *Kaya v. Turkey*, App. No. 22535/93, Eur. Ct. H.R. 129 (2000), ¶¶ 106 and 107; *Ilhan v. Turkey* [GC], (application no. 22494/93), ¶ 121 (Nov.9, 2004); *Corsacov v. Moldova*, no. 18944/02, ¶¶ 68-82 (Apr.4,2006).

²²⁰ In *Halimi-Nedzibi v. Austria*, the CAT Committee found that a delay of 15 months before an investigation of allegations of ill-treatment was initiated is “unreasonably long and not in compliance with the requirement of art. 12 of the Convention” (¶ 13.5). The Committee found a violation of Art. 12 even though it did not find the allegation is sustained. *Halimi-Nedzibi v. Austria*, Communication No. 8/1991, U.N. Doc. A/49/44 at 40, ¶¶ 13.4-13.6 (1993).

²²¹ *Dragan Dimitrijevic v. Serbia and Montenegro*, Communication No. 207/2002, U.N. Doc. CAT/C/33/D/207/2002, ¶ 5.4 (2004).

According to the Inter-American Court, the duty to investigate violations of the right to be free from torture or ill-treatment is “an imperative obligation of the state that derives from international law and cannot be disregarded or conditioned by domestic acts or legal provisions of any nature.”²²² The Court has stated that the failure to comply with this obligation brings about the State’s “international responsibility” for the violation.²²³ The Court has underlined that the obligation to carry out an effective investigation into allegations of torture and ill-treatment is a part of the positive obligations to prohibit torture and ill-treatment,²²⁴ as the lack of effective investigation and possible prosecution of acts of torture or ill-treatment not only violates the rights of the victims’ immediate family members the right to be free from torture or ill-treatment²²⁵ and the right to know the truth of what happened,²²⁶ but also leads to impunity.²²⁷

Support for the recognition of the direct link between the States’ duty to investigate torture and the right of victims’ family to be free from torture and ill-treatment is also found in the jurisprudence of the international and European bodies. The CCPR held that the failure by the Government to conduct a full investigation into the disappearance of a daughter had violated the mother’s right to be free from torture and ill-treatment.²²⁸ Similarly, the European Court has ruled that the lack of effective investigation into forced disappearance was a breach of Article 3 of the European Convention on behalf of the victims’ family, as it caused them additional suffering amounting to ill-treatment.²²⁹

Here, Ms. Gonzales was denied the right to a full investigation of the police failure to respond as well as the death of her children. As there has been no investigation, she does not know whether her children were murdered by her husband or killed by police bullets

²²² *Castro Castro Prison*, ¶ 347; *Vargas-Areco v. Paraguay*, ¶ 81. See also, *the Ituango Massacres v. Colombia*, Inter-Am. Ct. H.R. (Ser. C) No. 148, ¶ 402 (2006); *Baldeón-García v. Peru*, ¶ 201; and, *Blanco-Romero et al v. Venezuela*, ¶ 98.

²²³ *Castro-Castro Prison*, ¶ 347. See also, *Vargas Areco*, ¶ 81. In *Vergas Areco*, the Court uses “international liability” instead of “responsibility.”

²²⁴ *Sevtap Venedaroglu v. Turkey*, ECHR no. 32357/96, ¶ 35, Apr.11, 2000; *Corsacov v. Moldova*, ECHR no. 18944/02, ¶¶ 68-82 (Apr.4, 2006). The Court is insistent that the obligation to investigate violations of Art. 3 “is not an obligation of result, but of means.” *Paul and Audrey Edwards v. the United Kingdom*, ECHR no. 46477/99, ¶ 71 (2002). See also, *Mikheyev v. Russia*, no. 77617/01, ¶107 (Jan.26, 2006).

²²⁵ See, e.g., *Tibi*, ¶¶ 159-162; “*Street Children*,” ¶ 173; *Gómez Paquiyauri Brothers*, ¶¶ 146-56; *Castro-Castro Prison*, ¶ 346-50; *Case of the 19 Tradesmen*, ¶¶ 215-217.

²²⁶ See, e.g., *Bámaca-Velásquez*, ¶¶ 190, 197-202; *Vargas Areco*, ¶ 81; *Castro-Castro Prison*, ¶ 347; *Baldeón-García*, ¶¶ 196-99; *Pueblo Bello Massacre*, ¶ 146, 267; *Goiburú et al. v. Paraguay*, Inter-Am. Ct. H.R. (Ser. C) No. 153, ¶ 164 (2006); and, *Blanco-Romero et al v. Venezuela*, Inter-Am. Ct. H.R. (Ser. C) No. 13, ¶ 97 (2005).

²²⁷ See e.g., *Case of Urrutia*, ¶ 176; *Case of Vargas Areco*, ¶ 81; *Case of Baldeón García*, ¶195; *Ituango Massacres” v. Colombia*, Inter-Am. Ct. H.R. (Ser. C) No. 148, ¶ 299 (2006); *Pueblo Bello Massacre*, ¶ 146.

²²⁸ *María del Carmen Almeida de Quinteros et al. v. Uruguay*, Communication No. 107/1981, U.N. Doc. CCPR/C/OP/2 at 138, ¶¶ 14-15 (1990). The CCPR also held in *Sankara et al v. Burkina Faso* that the State party’s failure to properly investigate the assassination of the victim was in breach of Art. 7 of the Covenant, and stressed that the victim’s family – his wife and sons – have “the right to know the circumstances of his death.” See, *Mariam Sankara et al. v. Burkina Faso*, Communication No. 1159/2003, U.N. Doc. CCPR/C/86/D/1159/2003, ¶ 12.2 (2006).

²²⁹ *Kurt v. Turkey*, ¶¶ 130-134; *Timurtas v. Turkey*, no. 23531/94, ECHR 2000-VI, ¶¶ 95-97.

during the shoot-out.²³⁰ She is entitled to knowledge of the truth surrounding the death of her children, access to adequate compensation and other remedy for the violation, and to have the violations officially acknowledged through legal declarations. First, Colorado failed to conduct a prompt investigation of Ms. Gonzales' allegations that her children's lives were in imminent danger. Second, there has been no investigation of how they died and no available state remedy; Third, U.S. Supreme Court denied jurisdiction to examine the merits of her complaint and thus closed another critical avenue to determining the facts surrounding the violation. Thus, the police inaction, the Colorado law granting immunity to police officers, and the Supreme Court's decision in *Castle Rock v. Gonzales* all denied her access to effective investigation, and thus to the possibility of learning the truth and of obtaining a judicial remedy.

The Inter-American Court has made clear that the States cannot invoke existing provisions of domestic law, such as the Colorado law granting immunity to police officers, to avoid complying with their international obligation to investigate violations.²³¹ Therefore, the United States has breached its obligation under Articles XVIII and XXIV of the American Declaration. Moreover, as discussed earlier, by its failure to investigate the United States violations of its obligation under Article I of the American Declaration to protect Ms. Gonzales' and her daughters' right to be free from ill-treatment. She continues suffer as the consequence of her inability to know the truth about the deaths of her daughters.²³² Additionally, as the Inter-American Court has held, the Commission should hold that the duty to investigate continues "as long as there is uncertainty of the fate"²³³ of the children.

2. By failing to investigate the violation, the United States has also violated its duty to prevent impunity under Articles I, XVII and XXIV of the American Declaration as well as its obligation to ensure equal protection under Article II

In failing to provide either a state or federal remedy, the United States has left Ms. Gonzales with no recourse for the violations of her and her children's rights. The denial of her right to be afforded a remedy for the violations, in particular, investigation and prosecution, condones and even promotes the widespread non-enforcement of restraining orders by the police as well as the culture of impunity that exists for law enforcement in the domestic violence context. Thus, in denying Ms. Gonzales a remedy for the wrongs she has suffered, the United States violated Articles I, II, VII, and XXIV of the American Declaration.

This Commission is consistent on the direct link between the lack of fair and adequate investigation and prosecution in domestic violence and a culture of impunity, including

²³⁰ The Petitioners' merits brief states that "[t]o this day, Ms. Gonzales does not know the time and place of her daughters' deaths, or whether the numerous bullets found inside of their bodies came from Simon Gonzales' gun or the guns of the police officers who fired upon the truck" (p.1).

²³¹ *Loayza Tamayo* Case, ¶168.

²³² Jessica Lenahan's Mar. 2, 2007 Testimony.

²³³ *Velásquez-Rodríguez*, ¶ 181. See also, *Bámaca-Velásquez v. Guatemala*, ¶ 197.

discrimination in the police, law, and practice. In the *Maria da Penha Fernandes* case, it highlighted the underlying impunity for domestic violence, noting that:

general and discriminatory judicial ineffectiveness creates a climate that is conducive to domestic violence, since society sees no evidence of willingness by the State, as the representative of the society, to take effective action to sanction such acts.²³⁴

This understanding is echoed in its Report on violence against women in Ciudad Juárez, which found that the failure to investigate, prosecute and punish the perpetrators of domestic violence “contributes to a climate of impunity that perpetuates such violence.”²³⁵ It concluded that elimination of violence against women requires “attention to the root causes of violence against women – in all of its principal manifestations.”²³⁶

In the Petitioners’ case, the failure of the United States to effectively investigate the allegations of Ms. Gonzales’ provides impunity, both locally and nationally, and encourages the indifference of the police, the legislatures, and the judiciary toward domestic torture and ill treatment.²³⁷ The Commission should confirm that the lack of effective investigation and prosecution of domestic violence by Castle Rock officials is a violation of Article II of the American Declaration. Likewise, the United States’ failure to effectively monitor and sanction (through withholding funds and through federal judicial sanction at least) local discrimination in handling domestic violence is also a violation by the United States of Article II of the American Declaration. As in the *Maria da Penha Fernandes* case, the Commission should reiterate that “the lack of commitment [of the Government] to take appropriate action to address domestic violence”²³⁸ has “perpetuat[ed] the psychological, social, and historical roots and factors that sustain and encourage violence against women.”²³⁹ Further, as in its *Report on violence against women in Ciudad Juárez, Mexico*,²⁴⁰ the Commission should also call for elimination of gender discrimination in the handling of domestic violence and stress the urgency of eliminating impunity.

C. The United States has obligation under Article XVIII and XXIV of the American Declaration to provide remedy to Ms Gonzales

In the Petitioners’ case, the United States violated its obligation under Articles XVIII and XXIV of the American Declaration to provide adequate and effective remedies for the

²³⁴ *Maria da Penha Fernandes*, ¶ 56. The Commission held that the failure of the state for over 15 years to prosecute the abusive husband of the petitioner for attempted murder represents a pattern of condoning by the State of domestic violence, which it considered as discrimination (¶ 3, ¶ 55, and ¶ 61.4). It said that the case is “the tip of the iceberg” of “ineffective judicial action, impunity, and the inability of victims to obtain compensation” (¶ 56).

²³⁵ *Report on violence against women in Ciudad Juárez*, ¶ 166.

²³⁶ *Report on violence against women in Ciudad Juárez*, ¶ 11. The Commission noted that: insufficient attention has been devoted to the need to address the discrimination that underlies crimes of sexual or domestic violence, and that underlies the lack of effective clarification and prosecution (¶ 11).

²³⁷ See Gonzales Petition, pp.29-39; and pp.72-84.

²³⁸ *Maria da Penha Fernandes* case, at ¶57.

²³⁹ *Id.*, ¶55.

²⁴⁰ *Report on violence against women in Ciudad Juárez, Mexico* ¶ 11.

violations of the rights protected by the Declaration. While Jessica Gonzales was afforded access to state and federal courts, neither system was capable of providing her with a remedy that could effectively address the violation of her or her daughters' rights.

1. The United States has breached its obligation under Article XVIII and XXIV of the American Declaration to provide remedy to Ms Gonzales

Articles XVIII and XXIV of the American Declaration provide that the State must provide adequate judicial remedy for a violation of the rights protected. Article XVIII sets out the right to “resort to the courts to *ensure* respect for his legal rights” (emphasis supplied). The Inter-American Court has determined that State responsibility to “ensure” the rights provided in the American Convention entails an obligation to provide adequate reparations where appropriate.²⁴¹ The duty to provide reparations is specifically provided in Article 63(1) of the American Convention, as well as Article 9 of the IACPPT and the Convention of Belém do Pará.²⁴² According to the Inter-American Court, the obligation of reparations is a one of “the fundamental principles of contemporary international law on State responsibility,” which cannot be modified or evaded by domestic legal provisions.²⁴³ The Court has also repeatedly indicated that “it is not sufficient that such recourses [to judicial remedies] exist formally, but that “they must be effective.”²⁴⁴

Both the Inter-American Commission and the Court have established the link between the prohibition of torture and ill-treatment and the duty to provide effective remedies on behalf of both direct and indirect victims.²⁴⁵ For example, in *Velasquez-Rodriguez (reparations)*, the Court held that the disappearance of Manfredo Velásquez had caused the wife and children “harmful psychological impacts [...] which should be indemnified as moral damages.”²⁴⁶ According to the Court, the obligation of reparations is a one of “the fundamental principles of contemporary international law on State responsibility,” which cannot be modified or evaded by domestic legal provisions.²⁴⁷ The Court has also repeatedly indicated that “it is not sufficient that such recourses [to judicial remedies] exist formally, but that “they must be effective.”²⁴⁸

²⁴¹ *Velásquez-Rodríguez*, ¶ 166; *Godínez Cruz*, ¶ 175.

²⁴² Art. 7.5 of the Convention of Belém do Pará stipulates that women victim of violence are entitled to “effective access to restitution, reparations or other just and effective remedies.”

²⁴³ See e.g., *Maritza Urrutia*, ¶ 143; *Mapiripán Massacre*, ¶ 244; and, *Juan Humberto Sánchez*, ¶ 149

²⁴⁴ See e.g., *Godínez Cruz*, ¶¶ 66, 71 and 88; *Velásquez Rodríguez*, ¶¶ 63, 68 and 81; and, *Bámaca Velásquez*, ¶ 191.

²⁴⁵ *Maritza Urrutia*, ¶97. See also, *Cantoral-Benavides*, ¶105.

²⁴⁶ *Velásquez-Rodríguez (Reparations)*, ¶ 51.

²⁴⁷ See, e.g., *Maritza Urrutia*, ¶ 143; *Bámaca Velásquez v. Guatemala*, (Reparations), Inter-Am. Ct. H.R. (Ser. C) No. 91, ¶ 39 (2002); *Cantoral Benavides v. Peru*, (Reparations), Inter-Am. Ct. H.R., (Ser. C) No. 88, ¶ 41 (2001); “*Street Children*” case (*Villagrán Morales et al.*). (Reparations), Inter-Am. Ct. H.R., (Ser. C) No. 77, ¶ 61 (2001); and, *Las Palmeras* Case, (Reparations), Inter-Am. Ct. H.R., (Ser. C) No. 96, ¶ 38 (2002).

²⁴⁸ See, e.g., *Godínez Cruz* Case, ¶¶ 66, 71 and 88; *Velásquez Rodríguez* Case, ¶¶ 63, 68 and 81; and, *Bámaca Velásquez*, ¶ 191.

This Commission has held that the State obligation to provide remedies for violations extends to domestic violence.²⁴⁹ Support for this understanding is found in various international and regional instruments. This is explicit in the CEDAW General Recommendation No.19.²⁵⁰ The CAT Committee has held that the States are required under Articles 14²⁵¹ and 16²⁵² to provide remedy for privately inflicted acts of torture or ill-treatment when they fail to prevent such acts,²⁵³ including domestic violence.²⁵⁴ Likewise, Article 2(3) of the ICCPR,²⁵⁵ read together with Article 7, guarantees the right to remedy to the victims of torture or ill-treatment perpetrated by private actor.²⁵⁶ The European Court has similarly held that the European Convention's Article 13 requirement of an effective remedy applies to intra-family acts of ill-treatment in the context of a State's breach of its positive obligations. In *Z. and Others v. UK*, for example, the Court ordered the government to provide compensation to the children who had suffered serious neglect and violence by their parents for several years for the failure of the local authorities to carry out their duties under Article 3 of the European Convention to protect them.²⁵⁷

It is clear under regional and international law that the United States denial of effective remedies for domestic violence here constitutes a failure of due diligence. As a result of the Supreme Court's dismissal of her case, Ms. Gonzales was denied her right to receive a legal remedy that would have provided Ms. Gonzales with discovery of facts from the relevant authorities as well as monetary compensation, and more importantly, a legal declaration that her rights and the rights of her children had been violated and that the practices of the Castle Rock police must be revised. The impact of the Supreme Court's refusal to take jurisdiction over cases involving official failure to intervene to protect against private violence is of national impact. In violation of both regional and international law, it removes the possibility of a judicial remedy for other victims of such official failures as well as the deterrent effect that potential federal liability in damages and injunctive relief would exercise on police departments and other officials dealing

²⁴⁹ *Maria da Penha Fernandes*, ¶ 61.3.

²⁵⁰ The CEDAW's General Recommendation No.19, ¶¶ 23-24.

²⁵¹ Art. 14(1) of the CAT specifically establishes the states' duty to ensure victims of torture to obtain "redress" and "fair and adequate compensation, including the means for as full rehabilitation as possible

²⁵² While Art. 14 does not refer to ill-treatment, the CAT Committee has confirmed that the State obligations under Art. 16 of the CAT include the duty to "grant redress and compensate" the victims of ill-treatment as well. *Hajrizi Dzemajl et al. v. Yugoslavia*, ¶ 9.6.

²⁵³ *Hajrizi Dzemajl et al. v. Yugoslavia*, ¶ 9.2. See also, *Dragan Dimitrijevic v. Serbia and Montenegro*, Communication No. 207/2002, U.N. Doc. CAT/C/33/D/207/2002, ¶ 5.5 (2004).

²⁵⁴ CAT Conclusion and recommendation, Republic of Korea, CAT/C/KOR/CO/2, ¶ 17 (2006).

²⁵⁵ Art. 2(3) imposes on State obligation to make reparation to violations committed by both state and non-state actors. CCPR General Comment 31 (¶ 8) has reaffirmed that this applies to violations perpetrated by "private persons or entities."

²⁵⁶ In its General Comments 20 and 21, the CCPR has established the obligations of the States parties to provide effective and appropriate redress to victims of torture and ill-treatment. CCPR, General Comments No.20, ¶ 14 and No.21, ¶ 7 (ill-treatment).

²⁵⁷ *Z. and Others v. the UK*, ¶¶ 121-27, 130-31, 135-36. In *E. and Others v. the UK*, the European Court requested the Government to provide compensation for the domestic violence inflicted by their stepfather, while unlike in the case of *Z and Others*, the Court could not determine the direct link between the damage and the omission (¶¶ 123-24, 127-28). See also, *A. v. the UK*, ¶¶ 23-24, ¶ 28.

with domestic violence throughout the country.²⁵⁸ Consequently, the United States has violated its obligations under XVIII and XXIV of the American Declarations.

2. The United States has to fulfill its obligations under Article XVIII and XXIV of the American Declaration to provide effective remedies to Ms Gonzales

Based on the legal obligation of the United States under the American Declaration and other relevant law, the Commission should request the Government of the United States to provide reparations for the terrible harm resulting from the violation of Ms. Gonzales' and her children's rights as discussed above. The United States has to fulfill its obligation to provide Ms. Gonzales with remedies for the consequences of the failure of the public authority to enforce her restraining order, adequately investigate Ms. Gonzales' complaint, and provide judicial remedy to address the lack of enforcement and to ensure effective reparations. Specifically, the Commission should request the United States to provide reparations to Ms. Gonzales in the form of monetary compensation, full investigation, and guarantees of no-repetition.

a. Monetary compensation

First, inadequate as it is, monetary compensation should be paid to Jessica Gonzales for the violation of her own and her children's rights, both for the loss of her children and for the mental suffering she had to endure during the abduction of her children, in the aftermath of their death as well as what she will endure for the rest of her life due to the failure of the State to prevent, protect, investigate and provide remedies.

The Inter-American case law on torture has established that monetary compensation is the most common form of redress for human rights violations.²⁵⁹ In cases of disappearance, the Court has established that the immediate family members of a disappeared should be provided with monetary compensation for psychological harm caused and aggravated by the failure of a state in its obligation to prevent and investigate

²⁵⁸ The U.S.' federalism understanding (U.S. RUDs. 18 U.S.C. § 2340(2)(A)-(D) (2006)) is not inconsistent as federal judicial supervision through civil rights cases is a standard mechanism for ensuring that states and localities obey federal constitutional and statutory rules. In its 2000 Initial Report to the CAT, the U.S. stated that duly ratified treaties are "equivalent in legal stature to enacted federal statutes" and accordingly "[w]here they touch on matters previously within the purview of state and local government, they may also serve to 'federalize' the issue, thus affecting the allocation of authority between the states and the central government." See, *Initial Report of the U.S.*, U.N. DOC. CAT/C/28/Add. 5, ¶ 55 (Feb.9, 2000). Similarly, the response of the CCPR to the 1994 Presentation of the U.S. Report noted "the assurances of the [United States] Government that its declaration regarding the federal system is not a reservation and is not intended to affect the international obligations of the United States." CCPR, Concluding Observations: United States of America, U.N. Doc. A/50/40, CCPR/C/79/Add.50, ¶¶ 266-304 (1995).

²⁵⁹ The Court in its decision on reparations in the case of *Velásquez-Rodríguez* stated in its initial jurisprudence that compensation was "the most usual" form of redress for human rights violations. *Velásquez-Rodríguez (Reparations)*, ¶ 25

torture and provide adequate remedies.²⁶⁰ This Commission has confirmed the States' responsibility to provide monetary compensation for the lack of due diligence in responding to privately inflicted violence.²⁶¹ Further support is found in the European Court's decisions that ordered the state before it to pay compensation to the intra-family acts of ill-treatment, based on a breach of the State's positive obligations under the Convention.²⁶²

b. Full investigation

The Inter-American Court has established that “the guiding principle [of providing remedies] is that reparation must seek to remove the effects of the violation(s).”²⁶³ In the present case, Ms. Gonzales (Lenahan) continues to seek a thorough investigation into the deaths of her daughters with no avail, and she suffers as consequence.²⁶⁴ Therefore, a thorough investigation into the facts surrounding the death of her daughter is indispensable to remove the effects of the violation in this case.

The Inter-American Court has made clear the link between the right of the victims' family members to be free from torture and ill-treatment and their right to access the knowledge of the truth of what happened.²⁶⁵ This is in line with the international and European bodies' understanding on reparations in cases involving disappearances.²⁶⁶ For example, the CCPR held in *Quinteros v. Uruguay* that the mother of a disappeared daughter “has the right to know what has happened to her daughter” and requested the Government to conduct an “immediate and effective” investigation into the case.²⁶⁷

As in the case of *Quinteros v. Uruguay*, Ms. Gonzales still suffers from “the anguish and stressed” caused by the abduction and the death of her daughters and “by the continuing uncertainty concerning” what had happened to her daughter.²⁶⁸ The Commission should request the United States to conduct effective investigation into the circumstances of the deaths of her daughters and inform her of what had happened to her daughters.

²⁶⁰ *Velásquez-Rodríguez (Reparations)*, ¶ 52. Similarly, the European Court has made clear that the family members of a disappeared persons is entitled to monetary compensation for the consequence of the failure of a state to investigate the disappearance of persons. *See, Kurt v. Turkey*, ¶ 175.

²⁶¹ *María da Penha Maia Fernandes*, ¶ 61.3.

²⁶² *A v. the UK*, ¶ 38; *Z. and Others v. the UK*, ¶¶ 121-27, 130-31, 135-36; *E. and Others v. the UK*, ¶¶ 123-24, 127-28.

²⁶³ *Maritza Urrutia*, ¶ 143. *See also, 19 Merchants*, ¶ 223; *Mapiripán Massacre*, ¶ 245; *Pueblo Bello Massacre*, ¶ 229.

²⁶⁴ Jessica Lenahan's Mar. 2, 2007 Testimony.

²⁶⁵ *Case of Tibi*, ¶ 257; *Velásquez-Rodríguez* ¶ 181; *Velásquez-Rodríguez (Reparations)*, ¶ 34-35; and, the *Moiwana Community v. Suriname*. Inter-Am. Ct. H.R., (Ser. C) No.124, ¶ 204 (2005).

²⁶⁶ *See, e.g., Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr. Bacre Waly Ndiaye*, E/CN.4/1998/68 (1997), Chapter II, Section K. European Court decisions in *Aksoy v. Turkey* ECHR 1996-VI, no. 26, ¶ 98, *Kurt v. Turkey*, ¶ 140; *Aydin v. Turkey*, ¶ 103; *Kaya v Turkey*, ¶¶ 106 and 107;

²⁶⁷ *María del Carmen Almeida de Quinteros et al. v. Uruguay*, Communication No. 107/1981, U.N. Doc. CCPR/C/OP/2 at 138 (1990), ¶ 14. CCPR made a similar decision in *Sankara. v. Burkina Faso* (¶ 14).

²⁶⁸ *Quinteros v. Uruguay*, ¶ 14.

c. Guarantee of no repetition

Finally, the Commission should recommend that the United States do everything possible to ensure the no repetition of similar violations. The Inter-American²⁶⁹ and international bodies²⁷⁰ have recognized that measures to prevent and deter similar violations in the future are recognized as an important measure of reparations, particularly in cases of violations of fundamental human rights, such as the right to life and the right to be free from torture or ill-treatment.²⁷¹

This Commission has already made clear the direct link between the principle of non-repetition of violence against women and the underlying causes of such violence. In the case of the *González Pérez Sisters*, in which the victims had been detained, raped and tortured.²⁷² The Commission emphasized that “the State must combat impunity, since this encourages the chronic repetition of human rights violations and strips the victims and relatives of the ability to defend themselves.”²⁷³ It confirmed that under Article 25 of the American Convention, read together with Article 1(1), the State has the duty to “avoid impunity.”²⁷⁴ Similarly, in *María da Penha Maia Fernandes*, the IAHCR recommended the State to adopt a number of measures to “eliminate tolerance by the State of domestic violence against women,”²⁷⁵ based on the finding that “[t]he condoning of this situation [of domestic violence] by the entire system only serves to perpetuate the psychological, social, and historical roots and factors that sustain and encourage violence against women.”²⁷⁶

²⁶⁹ See, e.g., *Bulacio* case, ¶ 612; *Juan Humberto Sánchez* Case, ¶150; and *Bámaca Velásquez* (Reparations) ¶ 40; *Urrutia*, ¶ 176; *Vargas Areco*, ¶ 81; *Baldeón García*, ¶195; *Ituango Massacres*, ¶ 299; *Pueblo Bello Massacre*, ¶ 146; and, *Goiburú et al.*, ¶ 165.

²⁷⁰ The CAT Committee and the CCPR have underlined the link between the obligation to provide reparation for torture or ill-treatment and the positive obligation to prevent and deter such violence in the future. See, *Kepa Urria Guridi v. Spain*, Communication No. 212/2002, U.N. Doc. CAT/C/34/D/212/2002 (2005) ¶ 6.8; and, CCPR, *Karen Noelia Llantoy Huamán v. Peru*, Communication No. 1153/2003, U.N. Doc. CCPR/C/85/D/1153/2003 (2005), ¶ 8; *Quinteros v. Uruguay*, ¶ 16; and, *Sankara v. Burkina Faso*, ¶ 14. See also, *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms Final report submitted by Mr. Theo van Boven, Special Rapporteur*, E/CN.4/Sub.2/1993/8 (1993), ¶ 137, Sections 3.

²⁷¹ See also, *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms Final report submitted by Mr. Theo van Boven, Special Rapporteur*, E/CN.4/Sub.2/1993/8 (1993), ¶ 137, Sections 3.

²⁷² The Commission found that this case was “characterized by complete impunity” as the State had failed for over six years after the commission and report of the alleged detention, rape and torture to fulfil its duty to prosecute and sanction those responsible for the violation compensate to the victims. *Ana, Beatriz, and Cecilia González Pérez v. Mexico* [“González Pérez Sisters”], Case 11.565, Inter-Am. C.H.R., Report No. 53/01, OEA/Ser.L/V/II.111 Doc. 20 rev. at 1097, 88 (2000).

²⁷³ *González Pérez Sisters*, at ¶ 84. Here, the IACHR was referring to its decision in *Paniagua Morales v. Guatemala*, which held that “since impunity fosters chronic recidivism of human rights violations, and total defenselessness of victims and their relatives.” *María Eugenia Morales De Sierra v. Guatemala*, Case 11.625, Report N° 28/98, Inter-Am. C. H. R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 144, ¶ 173 (1997).

²⁷⁴ *González Pérez Sisters*, ¶¶ 83-84.

²⁷⁵ *María da Penha Maia Fernandes*, ¶ 3.

²⁷⁶ *Id.*, ¶ 55. Likewise, in its inquiry into the situation of women’s rights in Ciudad Juárez, Mexico, the Commission stressed State’s obligation to “overcome impunity” for violence against women. *The Situation of the Rights of Women in Ciudad Juárez*, at Recommendations.

Amici urge the Commission to take up the recommendations made by the Petitioners to call on the government of the United State to adopt measures aimed at eradicating domestic violence in the State of Colorado and throughout the country.²⁷⁷ Specifically, measures to combat domestic violence should include: reform of state laws to ensure that the terms of domestic violence restraining orders are effectively enforced in accordance with the law; the provision of legal remedies for victims who fail to receive such enforcement; the creation of support services for victims of domestic violence; and projects aimed at educating and sensitizing police officers on the root causes of domestic violence and its effects on its victims.²⁷⁸

The Commission should declare the United States' complicity in domestic violence as torture in this case and emphasize the urgency of legislative, administrative and judicial changes so as to prevent such violence from happening in the future and to enhance the likelihood that victims of domestic violence will obtain effective protection in the future.

CONCLUSION: DECLARATIONS AND RECOMMENDATIONS

In sum, amici ask the Commission to include in its declarations and recommendations the following:

1. That where the state fails to exercise due diligence with respect to domestic violence meeting the intent, severity and purpose elements of torture, it is responsible for consenting or acquiescing to torture.
2. That, as a result of police inaction, the violence threatened and suffered by Ms. Gonzales and her daughters constituted physical and psychological torture for which the United States is responsible.
3. That the failure of police in this case and generally to respond promptly, effectively and respectfully to calls for assistance against domestic violence constitutes complicity in gender discrimination and violence, rooted in gender-discriminatory stereotypes and having disproportionate impact on women.
4. That, police failure to intervene to prevent and to investigate the abduction and death of Ms. Gonzales' daughter plus the absence of a judicial remedy constitute violation of the United States' obligation of due diligence to prevent torture.

²⁷⁷ The Petition demands that: (b) "The United States should adopt measures aimed at eradicating domestic violence in the State of Colorado and throughout the country, including, inter alia, legal reform to ensure that the terms of domestic violence restraining orders are effectively enforced in accordance with the law; the provision of legal remedies for victims who fail to receive such enforcement; the creation of support services for victims of domestic violence; and projects aimed at educating and sensitizing police officers on the root causes of domestic violence and its effects on its victims."

²⁷⁸ Gonzales Petition, pp.85-86.

5. That the United States must take positive measures to ensure that police departments and other local officials respond effectively and promptly to calls for assistance involving domestic violence and that the victims of their failures have effective judicial remedies against them to obtain compensation, investigation, prosecution and non-repetition.
6. That the United States in violation of Articles I, II, V, VI, VII, XVIII, and XXIV of the American Declaration.
7. That the United States should provide reparations to Petitioners in the form of
 - (a) Monetary compensation for the violation of her own and her children's rights;
 - (b) Investigation of the facts alleged by Ms. Gonzales in the Petition to surrounding the abduction, failure of police intervention, and cause and circumstances of the death of her daughters;
 - (c) Adoption by the United States of legislative, administrative and judicial measures aimed at eradicating domestic violence in the State of Colorado and throughout the country through consistent exercise of due diligence by all branches and levels of the United States' government.

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Respectfully submitted,

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