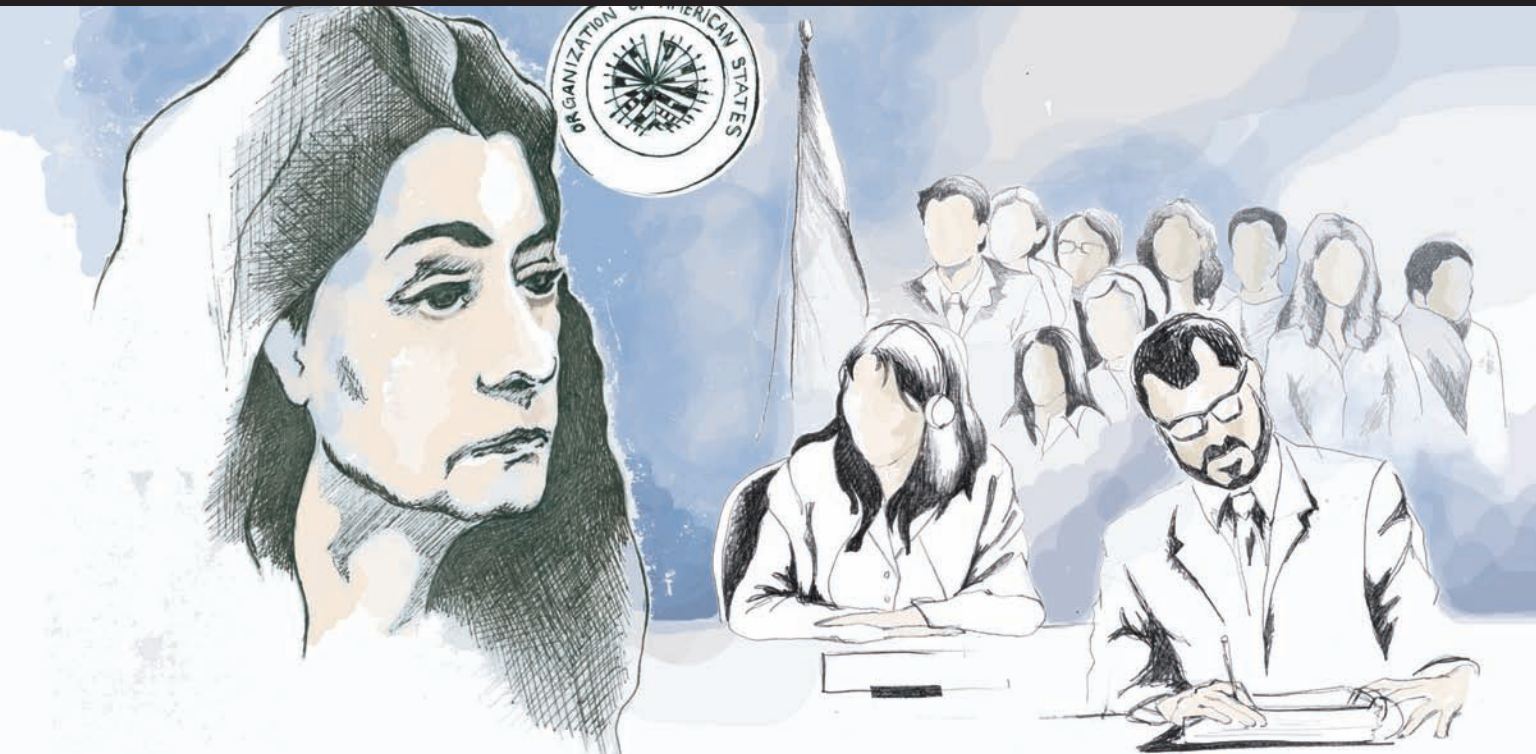


Advancing Equality

*Using International Human Rights Strategies
to Further Women's Rights at Home*



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December 10, 2008, marks the 60th anniversary of the Universal Declaration of Human Rights (UDHR). The UDHR sets forth the “highest aspirations” for a world in which peace, equality, and respect for human rights and dignity of all people is the norm. Unfortunately, 60 years later, we are still striving to attain these aspirations. But a new day is on the rise.

During the 1960s and 1970s, civil rights lawyers began using the federal courts to challenge state governments that continued to treat African Americans and women as second-class citizens. The U.S. Constitution and the Supreme Court were seen as tools that could enshrine in law the public’s changing attitudes resulting from the

civil rights and women’s rights movements.

For many decades the Supreme Court served as the final arbiter in compelling states and private actors to treat all people in the United States as equals. However, in recent years, the Court has rolled back many of these protections and has taken a sharp about-face with regard to providing remedies to individuals for civil rights violations.

In light of this turn-around and in recognition of the United States as part of the broader international family of nations around the world, U.S.-based advocates have in recent years embraced international human rights norms and mechanisms as a new

strategy for achieving true equality. These norms and mechanisms provide opportunities for holding the government accountable in ways that are no longer available in domestic courts.

The efforts of Jessica Gonzales (now Lenahan) to hold the U.S. government accountable for failing to protect her and her children from a vicious act of domestic violence provides an excellent case study of the ways in which U.S. constitutional law and domestic court litigation fall short while international human rights norms and mechanisms can provide far greater protection of individual rights.

Jessica Gonzales lived in Castle Rock, Colorado. In May 1999, she ob-

A few weeks after Jessica Gonzales had obtained the order, Simon Gonzales kidnapped the three girls. At about 5:30 p.m., Jessica Gonzales called the Castle Rock Police Department to inform them that she believed her ex-husband had taken the children in violation of her protective order and requested that the police search for the children and bring them home. Over the next ten hours, Jessica Gonzales repeatedly contacted the police, by phone and in person, and begged them to enforce her protective order. Each time the police told her they could not do anything and that she should call them back later if Simon Gonzales had not brought the children home.

the Castle Rock Police Department had no duty to protect her or her children from harm caused by Simon Gonzales.

On appeal, the U.S. Court of Appeals for the Tenth Circuit affirmed the District Court's dismissal of Jessica Gonzales's substantive due process claim but reversed with regard to her procedural due process claim. The Tenth Circuit held that the mandatory arrest provisions of Colorado state law gave Jessica Gonzales an entitlement to police enforcement of her protective order, as a form of property right, and that the Constitution prohibited the State from depriving her of this right without some fair procedure. The Town of Castle Rock sought review by the full Tenth Circuit, which affirmed the panel's decision en banc. The Town of Castle Rock then sought certiorari by the U.S. Supreme Court. On June 27, 2005, the U.S. Supreme Court in *Town of Castle Rock v. Gonzales*, reversed the Tenth Circuit's decision and found that Jessica Gonzales had no procedural due process right to police enforcement of her protective order.

In most circumstances, this ruling by the Supreme Court would be viewed as the final step in challenging the police malfeasance. However, Jessica Gonzales was not willing to accept defeat and neither were her attorneys at the ACLU. Instead, we decided to pursue international human rights strategies to raise the visibility of this problem and to force the United States to engage in a dialogue about violence against women and police accountability. We raised claims of human rights violations before both regional and global human rights bodies.

In December 2005, just six months after the Supreme Court issued its decision, the ACLU filed a petition on behalf of Jessica Gonzales before the Inter-American Commission on Human Rights (IACHR or "the Commission").

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tained a domestic violence order of protection against her estranged husband, Simon Gonzales. The order required him to stay away from her and their three daughters, Leslie, who was seven, Katheryn, eight, and Rebecca, ten. The protective order reiterated Colorado law, which mandates that an "officer shall arrest, or . . . seek a warrant for the arrest" of an individual when probable cause exists to believe that the individual has violated a protective order. Colorado's law, like mandatory arrest laws around the country, was adopted specifically to address the longstanding problem of police failure to treat domestic violence seriously and in order to remove police discretion in such circumstances.

At 3:30 a.m., Simon Gonzales drove up to the police station and opened fire. The police shot back and killed him. When they looked in the cab of his truck, the police found the bodies of the three dead girls. The girls may have been killed by Simon Gonzales with a gun purchased that day, or it is also possible that the girls were killed by gun fire from the police barrage of bullets.

In June 2000, Jessica Gonzales filed a lawsuit against the Castle Rock Police Department alleging that the police failure to enforce her protective order violated her substantive and procedural due process rights. The U.S. District Court for the District of Colorado dismissed the action holding that

Jessica Gonzales is currently represented by the ACLU and the Columbia Human Rights Clinic in proceedings before the Commission. The IACHR is responsible for the protection and promotion of human rights in the Americas. The Commission hears individual petitions, holds general hearings on thematic human rights violations, investigates abuses and issues country and thematic reports on a range of human rights violations.

Under the individual petition procedures, anyone in the Americas can file a petition alleging human rights violations by a member state of the Organization of American States (OAS). Although the Commission cannot issue binding judgments, it can issue findings and observations setting out its conclusions, suggestions for changes in practices, and recommendations to States Parties.

In her petition, Jessica Gonzales alleged that the police's failure to enforce her order of protection, Castle Rock's failure to conduct a full investigation into the deaths of her three children, and the U.S. courts' failure to provide a remedy for this police malfeasance constituted violations of the American Declaration on the Rights and Duties of Man.

Two of the most significant differences between the American Declaration, like other international human rights law, and the U.S. Constitution are: first, that a State Party has an affirmative obligation to provide protection from harm and is not merely precluded from interfering with a woman's safety (a "negative right"); and second, that the State Party must act with due diligence to protect individuals from harm caused by third parties, not simply ensure that no harm is committed by the government itself. These two basic premises of international human rights law provide far greater protection for

victims of gender-based violence than does U.S. law, as it has been interpreted by the Supreme Court.

The relief sought in the IACHR petition includes: a thorough investi-

it was the first time that the Commission had held an individual hearing on a petition alleging human rights violations against the U.S. for policies and practices related to domestic violence.

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gation into the events that resulted in the deaths of Jessica Gonzales' three daughters; state legislative reform to ensure that the terms of domestic violence orders of protection are properly and effectively enforced; the provision of civil remedies for victims who fail to receive such protection; funding for and proper oversight of prevention and support services for victims of domestic violence; and the creation of training programs for law enforcement officers aimed at educating police officers about the complexities of domestic violence as well as training on gender-sensitive responses.

The U.S. responded to Jessica Gonzales' petition in December 2006, arguing that the Commission lacked jurisdiction to consider the petition. The government asserted that the American Declaration is a non-binding instrument, that its provisions are aspirational only, and that it imposes no affirmative obligations on States Parties to prevent violence committed by private actors. However, the U.S. then went on to engage the arguments and dispute the facts raised in the petition which demonstrated its acceptance, at least tacitly, of these proceedings and ultimately to the Commission's findings and recommendations.

On March 2, 2007, the IACHR held a hearing on Jessica Gonzales' petition. This hearing was historic because

It was also significant because it was the first time in the seven years that Jessica Gonzales had been pursuing justice through legal channels that she was provided an opportunity to testify in a legal proceeding before a full tribunal and finally have her "day in court." Although the U.S. disputed the jurisdiction of the Commission to hear the petition, it engaged fully in the process.

In July 2007, the Commission declared in a landmark "admissibility" decision that Jessica Gonzales' case could proceed, rejecting the U.S.' position that the American Declaration does not create positive governmental obligations. Instead, the decision holds the U.S. to international standards of state responsibility to exercise "due diligence" to prevent, investigate, and punish human rights violations and protect and compensate victims of domestic violence.

On October 22, 2008, Jessica Gonzales, her counsel, and an expert on police practices argued the merits of her case before the IACHR. The U.S. again sent a high level delegation. The hearing, which lasted an hour and a half, was packed with standing-room only crowds of supporters for Jessica Gonzales and was broadcast live on the internet. We expect the Commission to issue its recommendations in 2009.

Parallel to the proceedings before the IACHR, the ACLU also raised



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Jessica Gonzales' case with the United Nations Special Rapporteur on Violence Against Women, Prof. Yakin Ertürk, who submitted a confidential communication to the United States inquiring about the human rights violations suffered by Jessica Gonzales. After the United States refused to respond, the Special Rapporteur documented her communication in a report to the United Nations Human Rights Council. For Jessica Gonzales, the process of telling her story to an international human rights expert and having the expert agree to take up her case and communicate with the United States about its policies provid-

ed some sense of justice. This process also gave us, her attorneys, an opportunity to push the United States to answer for its failures, rather than having the issue simply end with the Supreme Court's ruling dismissing her lawsuit.

The ACLU also raised the issue of violence against women, including the abuses suffered by Jessica Gonzales, before two treaty-based bodies: the United Nations Human Rights Committee, which oversees compliance with the International Covenant on Civil and Political Rights (ICCPR), and the Committee on the Elimination of Racial Discrimination (CERD Committee), which

monitors compliance with the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

The ICCPR provides for equal application of rights and effective remedies for violations of those rights. In contrast to U.S. constitutional law, the ICCPR requires the government to not only refrain from interfering with individuals' rights, but also to take affirmative measures to ensure that individuals can exercise their rights. In June 2006, the ACLU submitted a report to the U.N. Human Rights Committee describing the various ways in which the U.S. has failed to comply with the ICCPR. The report cited the Supreme Court's decision in *Castle Rock v. Gonzales*, as an example of the way in which the United States has imperiled both the equal application of rights and the availability of effective (or in some cases, any) remedies—in violation of the ICCPR. *Gonzales* is one of many cases decided by the Supreme Court in recent years that has sharply limited the ability of individuals to sue for civil rights violations. As a result, the only civil legal recourse for individual victims of gender-based violence under U.S. law is through state courts, which often minimize the importance of violence against women and generally provide state officials with immunity from suit for failing to protect women from private violence.

In July 2006, the United States appeared before the Human Rights Committee in Geneva, Switzerland as part of the periodic review process for its compliance with the ICCPR. The ACLU sent a delegation to Geneva to participate in the review process. Jessica Gonzales accompanied the delegation and took part in a Victims' Testimony Panel. This gave her the opportunity to testify publicly in an international forum about the failings of the Castle Rock Police Department that led to the deaths of her

three young daughters. This experience was gratifying and also forced the U.S. to provide answers for its failures, thereby adding pressure on the government to alter its policies with regard to ending violence against women.

The ACLU also raised the case of Jessica Gonzales and violence against minority women in a report detailing U.S. violations of ICERD. The report cited the Supreme Court's decision in *Gonzales* noting that additional factors in the government's failure to protect women are: the interpretation of the U.S. constitutional guarantee to protection from violence as a "negative" right rather than a "positive" right, and the government's denial of its obligation to protect women from harm by private parties.

In its Concluding Observations, the CERD Committee noted as a "Positive Aspect" the 2005 re-authorization of the Violence Against Women Act (VAWA). However, the CERD Committee also recommended that the U.S. "increase its efforts to prevent and punish violence and abuse against women belonging to racial, ethnic and national minorities [by,] *inter alia*, . . . providing specific training for those working within the criminal justice system, including police officers . . . prosecutors and judges." Further, the CERD Com-

mittee requested that the U.S. "include information on the results of these measures and on the number of victims, perpetrators, convictions, and the types of sanctions imposed, in its next periodic report."

The tragedy suffered by Jessica Gonzales poignantly illustrates the ongoing problem of police failure to protect women, particularly women of color, from intimate partner violence, in violation of ICERD. The fact that the CERD Committee commented on this violation in its Concluding Observations marked another victory in gaining international recognition of the widespread problem of domestic violence in the U.S. and of the government's failure to adequately address this problem.

The advocacy in which we have engaged on behalf of Jessica Gonzales illustrates the range of international human rights mechanisms that can be employed to influence U.S. policy to end violence against women. By engaging these various mechanisms, advocates are able to shine a spotlight on the widespread problems of violence against women and the police's lack of accountability for preventing such violence.

Further, as international bodies issue observations, recommendations, and reports on U.S. abuses and viola-

tions of international law in the *Gonzales* case specifically, and with regard to the problem of domestic violence and the police's lack of accountability more generally, it will become increasingly difficult for the U.S. to continue to disavow governmental responsibility for protecting women from intimate violence.

These changes will not come easily or quickly, especially given the United States' oft-espoused disdain for international human rights mechanisms. Yet advocates must engage in this struggle as it is the most promising avenue available at this moment in history to bring about meaningful policy changes with regard to violence against women and many other human rights abuses. Only through such efforts will we achieve the aspirations set forth in the Universal Declaration of Human Rights and ensure equality and dignity for all.

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