

Before the
INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

Jessica 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

Written Comments of Amici Curiae

November 7, 2008

PRESENTED BY:

Lucy Simpson
Kirsten Matoy Carlson
Indian Law Resource Center
602 North Ewing
Helena, MT 59601
Tel: (406) 449-2006

Jacqueline Agtuca
Terri Henry
Sacred Circle National Resource Center to End Violence Against Native Women
722 St. Joseph Street
Rapid City, SD 57701
Tel: 1-877-733-7623

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I. Interest of Amicus Curiae

Amici are non-profit organizations and tribal governments actively working to end the epidemic of violence against American Indian and Alaska Native women (“Indian women”)¹ in the United States. Amici support the brief of Jessica Gonzales because all women and children, Indian and non-Indian alike, in the United States have the right to be protected from violence and to have protection orders enforced by law enforcement officials.² Under United States decisional law, women are denied the right to have protection orders enforced by the police.³ Left with great discretionary power, law enforcement officials may, and frequently do, disregard violations of protection orders. This failure to enforce protection orders leaves women unprotected and vulnerable to ongoing violence.

United States law undermining the integrity of domestic violence protections order has far reaching effects beyond the *Gonzales* case. Even though this case did not arise on Indian lands or involve a tribal protection order, it has vast implications for Indian women and the enforcement of tribal protection orders by state law enforcement officials. Amici write in support of the arguments made by the petitioner to provide additional evidence of the consistent and widespread pattern of police failure to enforce domestic violence protection orders. Amici reiterate that the United States has failed to act with due diligence to fulfill its obligations under the American Declaration on the Rights and Duties of Man and to prevent violence against women. More specifically, Amici write to educate the Commission about the epidemic of domestic violence and sexual assault against Indian women in the United States and the

¹ In this brief, the term “Indian” is used to include members of the 562 federally recognized Indian nations and Alaska Native villages.

² Jessica Gonzales identifies as Native American, but even if she did not, the rule established by the U.S. Supreme Court in *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748 (2005), extends to all women in the United States, including Indian women.

³ See *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748 (2005).

particularly devastating effect of United States laws on Indian women. The Commission must be aware of this particular impact of the *Gonzales* decision in the United States because it endangers the lives of Indian women and leaves them without judicial recourse against their abusers.

II. Summary of Argument

Indian women face greater rates of domestic violence and sexual assault than any other group in the United States.⁴ Despite this horrific fact, United States law has diminished the authority of Indian nations to safeguard the lives of Indian women. The jurisdictional limitations placed by the United States on Indian nations have created a systemic barrier that denies Indian women access to justice and prevents them from living free of violence or the threat of violence. As a result, civil protection orders are of increased importance to Indian women because often the only recourse an Indian woman has against her abuser is a civil protection order. United States law undermining the enforcement of civil protection orders leave Indian women vulnerable to violence and violate their rights to life, security, and effective judicial remedies under international law.

Protection orders are a critical component of the civil legal remedies available to protect Indian women from future violence. Protection orders are of heightened importance to Indian women seeking protection from violence because the United States has left Indian women without adequate criminal remedies to the violence committed against them. While the United States has diminished tribal criminal authority, Indian nations can issue civil protection orders to prevent future violence, evict perpetrators from their homes, award temporary custody of children, and resolve other urgent issues. Tribal protection orders have the potential to save the lives of Indian women, and often do so, when they are enforced by local law enforcement. Because Indian women enter and leave tribal jurisdiction continuously to work, bank, go to

⁴ See, e.g., P.L. No. 109-162 § 901 (2006).

school, and for many other reasons, a woman's life may depend on her tribal court order of protection being enforced by state courts.

The *Gonzales* decision undermining the integrity of civil protection orders is especially pernicious to Indian women because of the limitations placed by the United States upon tribal criminal authority to protect women from perpetrators of domestic and sexual violence. The *Gonzales* decision allows law enforcement the discretion to choose not to enforce domestic violence protection orders. This decision limiting the enforceability of protection orders strengthens the systemic barriers preventing Indian women from accessing legal remedies essential to preventing abuse and living free of violence. The decision furthers the legal barriers that violate the rights of Indian women to life, security, and effective judicial remedies under international law and thus, leaves them vulnerable to violence.

III. Argument

a. Domestic and Sexual Violence Committed Against Indian Women Is a National Crisis in the United States.

Violence against Indian women in the United States has reached epidemic proportions. Violence against Indian women greatly exceeds that of any other population in the United States.⁵ Every hour of every day an Indian woman is the victim of sexual and physical abuse.⁶ Indian women are 2 ½ times more likely to experience violence than other women in the United States.⁷ The statistics of the United States Department of Justice report that 1 in 3 Indian women

⁵ *Id.*

⁶ Brief of Amici Curiae The National Network to End Domestic Violence, Sacred Circle, National Resource Center to End Violence Against Native Women, et al. in Support of Respondents at 4, *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc., et al.*, No. 07-411 (2008) [hereinafter "Long Brief"].

⁷ See Steven W. Perry, U.S. Dep't of Justice, *American Indians and Crime* 8 (2004).

will be raped⁸ and that 3 in 5 will be physically assaulted.⁹ Indian women are also stalked at a rate more than double that of any other population.¹⁰

Indicative of the severity of the violence committed on a daily basis against Indian women is that in 2004 homicide was one of the leading causes of death for Indian women, outranking heart disease, cancer, diabetes and other such illnesses.¹¹ Intentional homicide is the third leading cause of death for Indian girls and women between the ages of ten and 24. Suicide is the second leading cause of death for Indian women and girls between the ages of 10 and 34. Many such suicides may be in reality cases of unresolved homicides. Some counties within the United States have rates of murder against Indian women that are over ten times the national average.¹²

Indian women were not traditionally the victims of such violence. As a coalition of women's organizations recently explained to the United States Supreme Court,

This extraordinarily high rate of violence against Native women has no roots in the traditional cultures of Indian nations. To the contrary, written historical records documenting Europeans' first impressions of relationships between Indian women and men indicate that women enjoyed great authority and respect in Indian societies. Traditional teachings handed down by oral historians of Indian nations confirm these reports—unlike their European counterparts, Indian women frequently had greater authority than men over the home, activities associated with trade, and property. Many Indian nations held the mother's role to be culturally and structurally central to their societies. Reflecting these social norms and the spiritual beliefs underlying them, Native women traditionally experienced a high degree of safety.¹³

⁸ See Patricia Tjaden & Nancy Thoennes, U.S. Dep't of Justice, Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women: Findings From the National Violence Against Women Survey 22 ex. 7 (2000).

⁹ See *id.*

¹⁰ See U.S. Dep't of Justice, Domestic Violence and Stalking, The Second Annual Report to Congress Under the Violence Against Women Act (1997); U.S. Dep't of Justice, Stalking and Domestic Violence, The Third Annual Report to Congress Under the Violence Against Women Act (1998).

¹¹ See Melonie Heron, Center for Disease Control, Deaths: Leading Causes for 2004, National Vital Statistics Reports, Vol. 56, Number 5 (2004).

¹² Ronet Bachman, *et al*, *Violence Against American Indian and Alaska Native Women and the Criminal Justice Response: What is Known* (National Institute of Justice 2007).

¹³ Long Brief, *supra* note 6, at 4-5 (citing Jacqueline Agtuca, *Beloved Women: Life Givers, Caretakers, Teachers of Future Generations* 5-6 in *Sharing Our Stories of Survival, Native Women Surviving Violence* (2007)). See also

The national crisis in violence against Indian women is widely recognized and since 2003 the National Congress of American Indians has prioritized addressing this issue.¹⁴ The violence is understood as an outcome of the lived experience of Indigenous women where colonization continues in a contemporary context.¹⁵ The United States Congress also recognized the epidemic of violence against Indian women by including a specific title within the Violence Against Women Act of 2005 (“VAWA”) named Safety for Indian Women.¹⁶ The crisis is systemic in nature and is the product of United States law and policies preventing access to justice and safety for Indian women.

- a. United States Law Systematically Denies Indian Women Sexually or Physically Assaulted on Indian Lands the Full Protection of Legal Remedies from Domestic and Sexual Violence.

There are 562 federally recognized Indian nations in the United States, including more than 200 Alaska Native villages that retain sovereign authority over their lands and peoples.¹⁷ “Indian tribes have long been recognized as sovereign entities, ‘possessing attributes of sovereignty over both their members and their territory.’”¹⁸ Indian nations possess inherent power “necessary to protect tribal self-government [and] to control internal relations.”¹⁹ Indian

Office on Violence Against Native Women and the National Center on Full Faith and Credit, *Violence Against Native Women: A Guide for Practitioner Action 1* (2006) [hereinafter “Guide for Practitioners”].

¹⁴ The National Congress of American Indians is the oldest and largest member organization of Indian Nations in the United States. During the national conventions of 2003 and again 2008 it recognized the frequency and severity of violence committed against Indian women by the adoption of resolutions supporting reauthorization of the Violence Against Women Act (PHX-03-034 and PHX-08-15). It further adopted a resolution requesting a full United States Congressional hearing on the incidence of sex offenses and the medical response to these crimes committed against Native women (DEN-07-039).

¹⁵ Roe Bubar, *Native Women Left Behind, Sexual Assault in Tribal Communities: Results from a National Pilot Study of Sexual Assault* (2006).

¹⁶ P.L. No. 109-162 § 901 (2006).

¹⁷ Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 73 Fed. Reg. 18,553 (Apr. 4, 2008).

¹⁸ *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 591 (9th Cir. 1983) (quoting *United States v. Wheeler*, 435 U.S. 313, 323 (1978)).

¹⁹ *Montana v. United States*, 450 U.S. 544, 564 (1981).

nations also possess such additional authority as Congress may expressly delegate.²⁰ The basis for tribal authority is their inherent need to determine tribal citizenship, to regulate relations among their citizens, and to legislate and to tax activities on Indian lands, including certain activities by non-citizens.²¹

The limitations placed by United States law on the inherent jurisdictional authority Indian nations have over their own territory are a key factor creating and perpetuating the disproportionate violence against Indian women.²² The United States has imposed a jurisdictional maze on Indian nations that leaves Indian women without recourse for the violence committed against them.²³ Unlike other women in the United States, Indian women often do not have the choice to pursue criminal relief against their perpetrators. United States law has made criminal relief either unavailable or inadequate.

i. United States Law Denies Indian Women Criminal Legal Recourse.

Under United States law, criminal jurisdiction on Indian lands is divided among federal, tribal, and state governments. Which government has jurisdiction depends on the location of the crime, the type of crime, the race of the perpetrator, and the race of the victim. These legally created jurisdictional determinants restrict the ability of Indian nations to provide a meaningful remedy for women seeking safety within the jurisdiction of an Indian nation. Further, these limitations prevent Indian women from accessing protection and remedies under Indigenous justice from their respective tribal governments.

²⁰ *Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

²¹ *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.* 554 U.S. ____ (2008), *available at* [<http://supreme.justia.com/us/554/07-411/>].

²² Indian tribal governments are pre-existing sovereigns with their own inherent authority, including jurisdictional authority over their territory. Cohen's Handbook on Federal Indian Law §4.01[1][a] (Nell Newton ed. 2005). They exist independent of the United States Constitution, and the Constitution does not apply to them. *See, e.g.,* Vine Deloria, Jr. & David E. Wilkins, *Tribes, Treaties, and Constitutional Tribulations* 26 (1999).

²³ For jurisdictional purposes, United States law defines an "Indian" as any individual who is a member of an Indian tribe, or is an Alaska Native and a member of an Alaska Native Regional Corporation. *See, e.g.,* 25 U.S.C. § 1903.

1. United States Law Denies Indian Women the Protection of Tribal Criminal Prosecution of Non-Indian Perpetrators of Violence.

United States laws greatly restrict the ability of Indian nations to provide a meaningful remedy when women are physically and sexual assaulted within tribal lands. Indian nations have no criminal jurisdiction over non-Indians, and may not prosecute or punish non-Indians committing crimes on their lands.²⁴ These United States imposed restrictions on tribal criminal jurisdiction have grave consequences for the safety of Indian women, and leave them without criminal recourse when abused by non-Indians.

United States Department of Justice reports reflect a high number of inter-racial crimes, with white or black offenders committing 88% of all violent victimizations of Indian women from 1992 to 2001.²⁵ Nearly 4 of 5 Indian victims of sexual assault described the offender as white.²⁶ Three out of 4 Indian victims of intimate violence identified the offender as a person of a different race.²⁷

Non-Indians marry and enter into consensual relationships with Indian women. As a result of these intimate consensual relationships, non-Indians live, work, father children, and use medical and other services within the jurisdiction of Indian nations. These non-Indian perpetrators knowingly enter and leave tribal jurisdiction often with the intent of committing acts of violence against Indian women. Indian nations, however, do not have criminal jurisdiction over non-Indians.

²⁴ *Oliphant v. Suquamish*, 435 U.S. 191 (1978); *United States v. McBratney*, 104 U.S. 621 (1881) (implying courts should acknowledge the decline of tribal nations and the doctrine of tribal sovereignty).

²⁵ Patricia Tjaden & Nancy Thoenne, U.S. Dep't of Justice, *Prevalence, Incidence, and Consequences of Violence Against Women: Findings From the National Violence Against Women Survey* 22 (2000).

²⁶ *See id.* at 9.

²⁷ Lawrence A. Greenfield & Steven K. Smith, U.S. Dep't of Justice, *American Indians and Crime* 8 (1999) (noting that among American Indian victims, "75% of the intimate victimizations and 25% of the family victimizations involved an offender of a different race," a much higher percentage than among victims of all races as a whole.).

Indian women are raped, beaten, stalked, kidnapped, murdered, and victims of other crimes by non-Indian offenders. Many of these crimes are the result of a pattern of violent victimization due to domestic violence. Non-Indians that are strangers also prey upon and commit violent crimes against Indian women. These offenders are aware of the lack of tribal jurisdiction and the vulnerability of Indian women.²⁸ As citizens of tribal nations victimized by non-Indians, these Indian women have no criminal recourse under tribal law from their tribal government.

Tribal criminal jurisdiction over such crimes is denied due to a limitation imposed by the United States Supreme Court on tribal courts in 1978.²⁹ The Court ruled that Indian nations lack the authority to impose criminal sanctions on non-Indian citizens of the United States that commit crimes on Indian lands.³⁰ For the last thirty years Indian nations have been denied criminal jurisdiction over non-Indians and the authority to prosecute non-Indians committing crimes on Indian lands. When a non-Indian commits physical or sexual violence against an Indian woman on Indian lands, the Indian nation does not have the authority to prosecute the offender.

Either the United States, or in cases where the United States has delegated this authority to the state, the state government has the authority to prosecute non-Indian offenders committing crimes on Indian lands. As the United States Civil Rights Commission pointed out, the problem is that the *Oliphant* decision did not place any responsibility on the United States government or

²⁸ United States Civil Rights Commission, *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country* 67 (July 2003) (“According to one legal expert, the federal government has not always honored this responsibility seriously, and Native Americans have become easy crime targets. Many offenders know that they can get away with committing minor offenses against Native Americans because the federal government is not likely to spend resources pursuing these crimes.”) (citing Victor H. Holcomb, *Prosecution of Non-Indians for Non-Serious Offenses Committed Against Indians in Indian Country*, 75 N.D. L. Rev. 766 (1999)), available at [<http://www.usccr.gov/pubs/na0703/na0204.pdf>] [hereinafter “A Quiet Crisis”].

²⁹ *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978).

³⁰ *Id.*

its delegates to prosecute non-Indian offenders on Indian lands. In the words of the Commission, “[T]he decision only dealt with limitations to tribal power, not the federal responsibility to compensate for those limitations based on the trust relationship. The Court did not *require* the federal government to protect tribes or prosecute non-Indian offenders who commit crimes on tribal lands.”³¹ Even though the United States has a trust responsibility to prosecute offenders on Indian lands, it does not have a legal obligation to do so and cannot be held legally accountable for not doing so. If the United States or the state government does not prosecute the non-Indian offender, then the offender goes free without facing any legal consequences for his actions, and the Indian woman is denied any criminal recourse against her abuser.

2. United States Law Denies Indian Women Appropriate Criminal Recourse by Limiting the Sentencing Authority of Indian Nations.

United States laws also limit tribal authority over Indian perpetrators on their own lands.³² Indian nations may prosecute crimes committed by Indians,³³ but United States law restricts tribal criminal penalties to one year in prison and a fine of no more than \$5000.³⁴ When an Indian commits violence against an Indian woman, the Indian nation can prosecute the offender, but the woman is still denied an effective remedy because the tribal court can only sentence the offender to a maximum of one year in prison.

This sentencing limitation is unjust given the serious nature of violent crimes against Indian women. The sentencing limitation on tribal courts for serious violent offenses stands in stark contrast to that of such crimes occurring in non-tribal jurisdictions. A congressional

³¹ A Quiet Crisis, *supra* note 28, at 67 (italics in original).

³² 18 U.S.C. §§ 1152, 1162 (providing for federal jurisdiction over crimes in Indian country).

³³ 18 U.S.C.A. §§ 1152, 1153; *see also* United States v. Kagama, 118 U.S. 375 (1886) (upholding the constitutionality of the Major Crimes Act).

³⁴ Indian Civil Rights Act of 1968, 25 U.S.C. § 1301 *et seq.*

Sentencing Commission comparing federal and state penalties for sexual assault found the following:

Of the 50 states, two territories, and the District of Columbia surveyed, 20 (37.0%) provide for a maximum term of life imprisonment for rape. Twenty-four (45.3%) have a maximum penalty of 20 years or more. The federal system provides for a maximum punishment of life imprisonment without possibility of parole for offenders convicted of aggravated sexual assault.

Several states enhance rape sentences for defendants with prior convictions. States that do not have habitual or repeat sex offender provisions often have a general habitual offender statute that enhances the available term of imprisonment depending on the number of prior felony or violent felony convictions.³⁵

The disparate contrast in the sentencing authority of tribal court for sexual assault of one year per offense from that of state or federal courts is a contributing factor to the public myth that rape of Indian women is not a serious offense. The societal impact of this inequality contributes to the increased risk level Indian women must live with everyday. The one year per offense sentencing limitation denies Indian women appropriate remedies under criminal law.

3. United States Federal Prosecutors Deny Indian Women Criminal Recourse By Declining to Prosecute Cases Arising on Indian Lands.

In the United States, government research indicates that the violent victimization of Indian women occurs at more than double the rate of any other population of women; the federal rate for prosecution of such crimes, however, is far lower.³⁶ United States federal prosecutors

³⁵ United States Sentencing Commission, Report to Congress: Analysis of Penalties for Federal Rape Cases 7-8 (March 1995), available at [http://www.ussc.gov/r_congress/FEDRAPE.PDF].

³⁶ See, e.g., Amnesty International, Maze of Injustice: The Failure to Protect Indigenous Women from Sexual Violence in the USA (April 2007), available at [[www.amnesty.org.ru/library/pdf/AMR510352007ENGLISH/\\$File/AMR5103507.pdf](http://www.amnesty.org.ru/library/pdf/AMR510352007ENGLISH/$File/AMR5103507.pdf)] (finding that there is a clear pattern of discriminatory and inadequate law enforcement in cases of violence against Indian women) [hereinafter "Maze of Injustice"]; *The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force: The Quality of Justice*, 67 S. Cal. L. Rev. 745, 906-911 (1994) (concluding that crimes against women are under-prosecuted in Indian country as the difficulties of prosecution in general, coupled with traditions of non-involvement by law enforcement in spousal abuse, make federal and state enforcement more difficult); Gavin Clarkson, *Reservations Beyond the Law*, Los Angeles Times (August 3, 2007), at [<http://www.latimes.com/news/opinion/la-oe-clarkson3aug03,0,1867347.story>] (explaining that United States Attorneys decline to prosecute crimes in Indian country nearly twice as often as those committed outside Indian country).

share concurrent criminal jurisdiction with approximately one-half of all Indian nations.³⁷ In these jurisdictions, only United States prosecutors have felony jurisdiction to impose a sentence of more than one year per offense.³⁸ Unfortunately, the limited data available shows that more often than not United States federal prosecutors fail to prosecute violent crimes committed against Indian women on Indian lands. This failure to prosecute denies Indian women appropriate criminal recourse against their abusers.³⁹

United States federal prosecutors do not release official reports detailing the crimes they choose not to prosecute.⁴⁰ The only public data on the federal prosecution of sexual assaults occurring within Indian reservations is found in a 1993 report mandated by Congress on federal sentencing guidelines. That report found that only 69 of the 42,013 federal cases sentenced under the guidelines that year involved rape conduct.⁴¹ These statistics reflect that the vast majority of sexual assault cases occurring on Indian lands were not federally prosecuted in 1993. No information is available that the rate of prosecution of such crimes increased in other years.

Federal and state governments also “provide significantly fewer resources for policing in Indian Country and Alaska Native villages than are provided to comparable non-Native communities.” Maze of Injustice, *supra*, at 42.

³⁷ Carol Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 Conn. L. Rev. 697, 697 (2006).

³⁸ 18 U.S.C. § 1152.

³⁹ The US Attorney General has the authority to increase the priority given to address violence against women in the US Department of Justice. The application of this authority is inconsistent from Presidential administration to Presidential administration. For instance, a plan to address sexual assault, developed in consultation with Indian tribes was shelved by the Bush Administration. Moreover, seven of the United States federal prosecutors, with large numbers of Indian tribes in their districts, were fired due to addressing crime within Indian nations.

⁴⁰ The United States Senate Committee on Indian Affairs conducted an “Oversight Hearing to Examine Federal Declinations to Prosecute Crimes in Indian Country” on September 18, 2008. Federal United States Attorney for North Dakota Drew Wrigley refused to provide data about the crimes it fails to prosecute. He stated that providing the information would mislead the public and jeopardize criminal investigations. United States Attorney General Michael Mukasey affirmed Wrigley’s reasons for not providing the information. Mary Claire Jalonick, *DOJ Will Not Provide Indian Crime Data*, News From Indian Country (Sept. 2008), available at [http://indiancountrynews.net/index.php?option=com_content&task=view&id=4641&Itemid=33].

⁴¹ Report to Congress: Analysis of Penalties for Federal Rape Cases, *supra* note 35, at 3.

A recent university study indicates that United States prosecutors fail to prosecute 62% of criminal cases and 75% of rape and sexual assault cases occurring on Indian lands.⁴² The study reports that from 2005 to 2007 United States Attorneys failed to prosecute 50% of murder and manslaughter cases, 58% percent of serious assaults, and 76% percent of sex crimes involving adults committed on Indian lands.⁴³ These statistics reflect the reality that even when Indian women report domestic or sexual violence to law enforcement agencies, it is highly unlikely that these crimes will be prosecuted.

This failure to prosecute has devastating consequences for women seeking safety from violent perpetrators. Reporting such a crime increases the risk of retaliation by the offender. Many Indian women know that federal prosecutors decline the majority of cases from Indian lands and thus, decide not to report physical and sexual violence. Because Indian women cannot rely on the criminal justice system to prosecute and punish their abusers, many carry the tremendous burden of securing safety for themselves and their children. These women often are forced to flee their tribal lands for urban areas that are unfamiliar and lack any tribal support mechanisms.⁴⁴

In cases of domestic violence, the criminal justice system's failure to provide Indian women with appropriate recourse against their abusers is particularly atrocious in that violence is known to increase in both frequency and severity over time. Indian and non-Indian abusers quickly learn that this systemic failure means that they will face no criminal consequences for their violent behavior. Abusers are thus free to terrorize and Indian women are forced to live in

⁴² Tribal Law and Order Act of 2008, S. 3320, 110th Cong. (2008); Mary Claire Jalonick, *DOJ Will Not Provide Indian Crime Data*, News From Indian Country (Sept. 2008), available at [http://indiancountrynews.net/index.php?option=com_content&task=view&id=4641&Itemid=33].

⁴³ Mary Claire Jalonick, *DOJ Will Not Provide Indian Crime Data*, News From Indian Country (Sept. 2008), available at [http://indiancountrynews.net/index.php?option=com_content&task=view&id=4641&Itemid=33].

⁴⁴ Many of these urban centers are dangerous and have high rates of violence against Indian women.

on-going fear of continued violence. While every state and territory within the United States has enacted laws making domestic violence a crime, the federal government has not.

The United States' failure to prosecute perpetrators of violent crimes has grave consequences for Indian women. This failure to prosecute cases functionally locks Indian women out of the judicial system and the appropriate felony level sentencing for such crimes. According to Dr. Lisak, a leading researcher on sexual assault predators in the United States, "Predators attack the unprotected. The failure to prosecute sex crimes against American Indian women is an invitation to prey with impunity."⁴⁵

4. United States State Prosecutors Deny Indian Women Criminal Recourse By Declining to Prosecute Cases Arising on Indian Lands.

Under the United States Constitution, governmental relations with Indian nations are the function of the federal government.⁴⁶ In violation of this responsibility and without consultation with Indian nations, the United States Congress has delegated criminal jurisdiction over Indians on Indian lands to some states.⁴⁷ While this delegation of authority did not alter the authority of Indian nations in those states, it has had a devastating impact on the development of tribal justice systems and the safety of Indian women.⁴⁸

In these states, the state government has the criminal jurisdiction normally exercised by the federal government over crimes on Indian lands. The state government has exclusive jurisdiction over non-Indians and felony jurisdiction over Indians. Accordingly, when a non-Indian commits physical or sexual violence against an Indian woman on Indian lands, the state

⁴⁵ David Lisak & P.M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 *Violence and Victims* 1 (2002).

⁴⁶ U.S. Const. Art. 1 § 8.

⁴⁷ P.L. 280, § 7, 67 Stat. 588, 590 (1953). For information on jurisdiction under P.L. 280, see Carole E. Goldberg-Ambrose, *Public Law 280: State Jurisdiction Over Reservation Indians*, 22 *U.C.L.A. Law Review* 535-94 (1975).

⁴⁸ Goldberg & Champagne, *supra* note 37, at 697.

has exclusive jurisdiction over the offender. When an Indian commits physical or sexual violence against an Indian women on Indian lands, only the state government has the criminal authority to impose a sentence of more than one year.

Like the United States federal government, states often fail to prosecute criminal cases occurring within Indian lands.⁴⁹ The criticisms of United States prosecutors and their failure to prosecute violent crimes, thus, also apply to state prosecutors. The failure to prosecute crimes occurring on Indian lands, however, is often more acute in these states because they do not receive any additional funding from the United States to handle these cases.⁵⁰ This often results in the understaffing of police on Indian lands and reluctance on the part of state prosecutors to take cases.

The Alaska state government is a glaring example of state failure to protect Native women.⁵¹ The rate of violence against Alaska Native women is much higher than the rate of violence in the United States as a whole. Despite this level of violence over one-third of the 229 Native villages in Alaska have no form of local law enforcement present in their community. According to the United States Human Rights Commission, this lack of local law enforcement renders these Alaska villages ““virtually defenseless to lawbreakers.””⁵² Despite the full faith and credit provision under VAWA,⁵³ the State and State Troopers have resisted recognizing and enforcing village orders of protection. In this hostile environment villages have turned to

⁴⁹ *Id.*

⁵⁰ Goldberg & Champagne, *supra* note 37.

⁵¹ *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998). The United States Supreme Court further complicated felony and territorial jurisdiction in Alaska by finding that, with limited exceptions, Indian Country has largely been extinguished in Alaska. Public Law 280 delegated federal criminal jurisdiction over Indians in Indian country to certain states governments. The extent to which Indian Country does not exist in Alaska concurrent jurisdiction of the state also does not exist.

⁵² A Quiet Crisis, *supra* note 28, at 76.

⁵³ 18 U.S.C. § 2265(a).

traditional tribal justice remedies such as banishment.⁵⁴ The Alaska State Supreme Court affirmed the right of the villages to banish one of its members for violent behavior and to have the state court and state troopers' assist in enforcing its orders.⁵⁵ The state has not and will not ensure the safety of women in the villages.

Further complicating the lack of response by state governments is the denial of access to resources by the United States to Indian nations within these states. As a result, the majority of Indian nations within these states lack the resources to develop tribal criminal justice departments. The combined result of the transfer of federal jurisdiction and the denial of resources has created a vacuum of available law enforcement services.⁵⁶ Thus, many women in need of emergency assistance live in tribal jurisdictions where law enforcement services do not exist.⁵⁷ When a woman is raped or beaten she must defend herself or rely on her family and community for safety.

ii. United States Law Denies Indian Women Civil Legal Recourse by Failing to Require the Enforcement of Protection Orders.

The criminal jurisdictional scheme imposed by the United States on Indian nations leaves Indian women with civil protection orders from tribal courts as their primary recourse against

⁵⁴ Alaska Native villages traditional dealt with violent offenders by banishing them.

⁵⁵ Native Village of Perryville Case, No. 3AN-00-12245 (Alaska Super. Ct. Nov. 19, 2003).

⁵⁶ Goldberg & Champagne, *supra* note 37, at 704.

⁵⁷ A Quiet Crisis, *supra* note 28, at 76 (noting that "80 percent of the population that received limited or no local police protection are Native.").

The United States Civil Rights Commission detailed the problem of inadequate law enforcement on Indian lands in the United States. It explained,

Lack of adequate law enforcement has other serious outcomes; Native individuals and communities do not derive the deterrence benefit of an adequate police presence, and the result has been increased criminal behavior and victimization of residents in areas known for inadequate policing. The failure of the federal government to fully acknowledge and remedy policies that have a disproportionately negative effect on a group of people, and to continue following such policies, jeopardizes the safety of the group compared with other Americans and constitutes discrimination.

Id.

their abusers. United States laws also restrict tribal civil jurisdiction,⁵⁸ but Indian nations exercise limited civil jurisdiction, including the authority to issue civil protection orders. Indian nations have the inherent authority to issue civil protection orders to protect both Indian and non-Indian women from domestic abusers on Indian lands.⁵⁹

Protection orders are critical legal mechanisms that have the ability to save the lives of Indian women. Tribal civil protection orders are of increased importance because the United States has greatly diminished tribal criminal jurisdiction and the primary way that Indian nations can protect Indian and non-Indian women is by issuing civil protection orders against perpetrators of violence in tribal courts. These protection orders, however, are largely useless if they are not enforced by local law enforcement officials.

The United States Congress recognized the importance of tribal court protection orders by requiring that all other courts give these orders full faith and credit in the Violence Against Women Act.⁶⁰ Congress has also recognized the civil authority of tribal courts to enforce domestic violence protection orders, and impose civil contempt penalties and exclusionary orders over all persons (Indians and non-Indians) who violate civil domestic violence protection orders within their jurisdiction.⁶¹

To the limited extent that Indian nations have jurisdiction over perpetrators, they are trying to protect their women from violence. In the past decade, Indian nations have developed

⁵⁸ See, e.g., *Montana v. United States*, 450 U.S. 544 (1980). In general, “the inherent sovereign powers of an Indian Tribe do not extend to the activities of non-members of the tribe.” *Id.* at 565. This principle is “subject to two exceptions: The first exception relates to non-members who enter consensual relationships with the tribe or its members; the second concerns activity that directly affects the tribe’s political integrity, economic security, health, or welfare.” *Strate v. A-1 Contractors*, 520 U.S. 438, 446 (1997). Domestic relationships are one of the most common “consensual relations” between Indians and non-Indians.

⁵⁹ Tribal courts can issue domestic violence protection orders for non-Indian women, and several reasons exist for why a non-Indian woman may seek a tribal protection order. For example, the Hopi Indian Tribe is located in two large counties in northeastern Arizona. Non-Indian women living there may seek a domestic violence from the Hopi Tribal Court because the nearest state court is over one hundred miles away.

⁶⁰ 18 U.S.C. § 2265(a).

⁶¹ *Id.*

the infrastructure for tribal justice system components to provide safety to women within their jurisdiction. Many Indian nations have developed domestic violence codes.⁶² They have supported personnel and training of tribal law enforcement, tribal courts, prosecutors, and probation officers. Tribal courts have also ordered that offenders enroll in re-education programs, and tribes have supported programs to encourage boys and young men to respect women.⁶³ According to Indian women's organizations working to end domestic violence against Indian women, "At the tribal level, efforts are coordinated to create a system of safety for women seeking safety and protection within the tribal jurisdiction."⁶⁴ Tribal courts regularly enter civil protection orders against domestic violence perpetrators.⁶⁵ Tribal law enforcement enforces tribal protection orders on Indian lands.

Efforts by Indian nations, however, are diluted by a lack of essential resources.⁶⁶ States spends an average of one hundred thirty one dollars per year on each person in providing law enforcement services.⁶⁷ The United States spends considerably less per year per individual on

⁶² See, e.g., Guide for Practitioners, *supra* note 13, at 15; Melissa Tatum, *Law Enforcement Authority in Indian Country*, 4 Tribal L.J. 2 (2003/2004). For an example of a tribal domestic violence code, see the Navajo Nation Domestic Abuse Protection Act, IX Navajo Trib. Code § 1601 *et seq.* (1993).

⁶³ See, e.g., Cangleska Inc. Men's Re-Education Program, at [<http://www.cangleska.org/Mens%20program.htm>].

⁶⁴ Long Brief, *supra* note 6, at 5a.

⁶⁵ The Crow Tribe helped to pilot the Hope Card Project, which is "attempt to couple law enforcement's need for information about protection orders during incidents involving violations of the orders and the victim's need for police intervention and streamlined services during times of crisis." Guide for Practitioners, *supra* note 13, at 16. The Hope Card is a small, durable card containing the vital information of the protection order that women can easily carry in a purse or pocket. *Id.*

Historically, Indian Nations honored and respected their women. Physical or sexual abuse against women was not acceptable. When such violence occurred, legal, social and cultural institutions dealt with it immediately and usually through harsh actions such as the banishment of the offender from the community. Some Indian Nations have returned to the practice of banishment as a way to deal with abusers and other violent offenders. See, e.g., Mille Lacs Band Banishes Four Over Violence, at [<http://www.indianz.com/News/2008/011208.asp>].

⁶⁶ Indian women are also greatly disadvantaged by the lack of basic services for victims of sexual and physical violence within tribal jurisdictions. There is an acute need for basic education on domestic violence and sexual assault among law enforcement personnel. See, e.g., Guide for Practitioners, *supra* note 13, at 23-24. Further many health clinics and hospitals on Indian lands do not have rape kits or Sexual Assault Nurse Examiners. Maze of Injustice, *supra* note 36, at 53-58.

⁶⁷ A Quiet Crisis, *supra* note 28, at 75.

law enforcement within tribal jurisdictions.⁶⁸ Many Indian nations have only a few police officers to cover their vast territories.⁶⁹ For example, within the state of Alaska, eighty Alaska Native Villages lack any form of law enforcement services. An acute lack of resources often limits tribal enforcement of protection orders.⁷⁰ This public safety crisis confronting Indian nations is well documented,⁷¹ and often attributed to the United States government's failure to provide adequate resources for essential criminal justice services.⁷²

Once Indian women leave tribal lands, they must rely on other jurisdictions for the enforcement of their tribal protection orders. If these jurisdictions do not enforce tribal protection orders, then Indian women are left unprotected because no other law enforcement has the authority to enforce the orders. States are primarily responsible for the enforcement of protection orders outside of tribal jurisdictions. Many states, however, do not recognize and enforce tribal protection orders. For example, in 2003, the state of Alaska instructed state troopers to disobey a state court order recognizing a tribal court protection order and claimed that both orders were illegal.⁷³ The Office on Violence Against Women's *Violence Against Native*

⁶⁸ *Id.* ("It is estimated that tribes have been 55 and 75 percent of the resources available to non-Indian communities, a figure that is even more exaggerated considering the higher crime rates.").

⁶⁹ *Id.* at 75-76; Law and Order in Indian Country: Hearing Before the Senate Committee on Indian Affairs, 110th Cong. 8 (June 21, 2007) (statement of Chairman Marcus Wells, Jr., Three Affiliated Tribes of the Fort Berthold Reservation) (noting the "catastrophic shortage of law enforcement personnel" on the Reservation due to unfilled Bureau of Indian Affairs police positions).

⁷⁰ Maze of Injustice, *supra* note 36, at 42 ("According to the US Department of Justice, available data suggests that tribes have between 55 and 75 per cent of the law enforcement resources available to comparative non-Native rural communities.").

⁷¹ See, e.g., Maze of Injustice, *supra* note 36, at 42; Examining the Prevalence of and Solutions to Stopping Violence Against Indian Women: Hearing Before the Senate Committee on Indian Affairs, 110th Cong. (Sept. 27, 2007); Law and Order in Indian Country: Field Hearing Before the Senate Committee on Indian Affairs, 110th Cong. (March 17, 2008); Law and Order in Indian Country: Hearing Before the Senate Committee on Indian Affairs, 110th Cong. (May 17, 2007); Law and Order in Indian Country: Hearing Before the Senate Committee on Indian Affairs, 110th Cong. (June 21, 2007).

⁷² See generally A Quiet Crisis, *supra* note 28.

⁷³ Sheila Tomey, *Trouble in Perryville*, Anchorage Daily News (Nov. 3, 2003), available at <http://dwb.adn.com/front/story/4325477p-4335352c.html>.

Women: A Guide for Practitioner Action explains the many barriers that states have erected to the enforcement of tribal protection orders. It states,

Courts may impose requirements for certification or special seals before a foreign order may be given full faith and credit. Such requirements create additional steps that a battered woman must take for full enforcement of her protection order, erecting additional barriers to her safety. Said requirements for certification or registration are not required by [the Violence Against Women Act]. In fact, to the contrary, VAWA specifically prohibits requirements that create impediments to enforcement outside of the issuing jurisdiction.

Another challenge to the full enforcement of tribal protection orders is the requirement of some states that protection orders be registered with the court in the new jurisdiction before the state will enforce the order. Registration of orders creates barriers for victims. For example, on one reservation in the northern part of the country, it is not uncommon for a survivor to obtain a temporary protection order from her tribal court, and then have to drive to the county courthouse, which is a half-hour away, to have the order registered.⁷⁴

Hostility from state or county law enforcement may also impede the enforcement of tribal protection orders.⁷⁵ Some state agents refuse to enforce protection orders issued by Indian nations because they stereotype Indian women as uncredible and unreliable.

Indian women, unlike other women in the United States, cannot rely on the judicial system to punish their abusers. Effectively left without criminal relief, Indian women frequently must rely on tribal civil protection orders to protect them from continuing violence. Tribal civil protection orders, however, are only good as long as they can be enforced. If an Indian woman cannot get a state to enforce a tribal protection order when her attacker has violated it, she is left without judicial recourse because no other entity can enforce the order in that jurisdiction. In effect, she is unprotected and vulnerable to further attack.

The *Gonzales* decision undermines the limited legal protection that Indian women have under United States law by placing the enforcement of protection orders within the discretion of law enforcement officers. Under the *Gonzales* decision, United States law does not require state

⁷⁴ Guide for Practitioners, *supra* note 13, at 21.

⁷⁵ *Id.*

law enforcement to investigate or enforce alleged violations of domestic violence protection orders. Thus, state law enforcement choose whether to enforce these orders, and may always choose not to.⁷⁶ They often choose not to enforce these orders because they face no consequences for not enforcing them. Decisions by local law enforcement leave Indian women vulnerable to ongoing violence by domestic abusers.

1. The United States' Failure to Fully Implement the Violence Against Women Act Leaves Indian Women Without Judicial Recourse.

Congress is acutely aware of the epidemic of violence against Indian women,⁷⁷ and enacted Title IX of the Violence Against Women Act, which specifically addresses Safety for Indian Women, in response to this national crisis in 2005.⁷⁸ In Title IX, Congress made a specific finding that “Indian tribes require additional criminal justice and victim services resources to respond to violent assaults against women; and the unique legal relationship of the United States to Indian tribes creates a federal trust responsibility to assist tribal governments in safeguarding the lives of Indian women.”⁷⁹ These are laudable efforts, but the United States’ failure to fully implement VAWA undermines its ability to address adequately the epidemic of sexual and physical violence against Indian women.

Congress has explicitly recognized the authority and responsibility of both Indian nations and states to hold offenders accountable in addressing the high rates of violence against Indian

⁷⁶ *Gonzales*, 545 U.S. at 748.

⁷⁷ The 110th Congress has held multiple hearings on the crisis in law enforcement in Indian Country, Law and Order in Indian Country: Field Hearing Before the Senate Committee on Indian Affairs, 110th Cong. (March 17, 2008); Law and Order in Indian Country: Hearing Before the Senate Committee on Indian Affairs, 110th Cong. (May 17, 2007); Law and Order in Indian Country: Hearing Before the Senate Committee on Indian Affairs, 110th Cong. (June 21, 2007), and one specifically on violence against Indian women. Examining the Prevalence of and Solutions to Stopping Violence Against Indian Women: Hearing Before the Senate Committee on Indian Affairs, 110th Cong. (Sept. 27, 2007).

⁷⁸ P.L. No. 109-162 § 901 (2006).

⁷⁹ *Id.*

women in VAWA.⁸⁰ Congress explicitly addressed the enforcement of protection orders in VAWA. First, it mandated the enforcement of tribal protection orders. VAWA unambiguously recognizes Indian nations' civil jurisdiction to issue protection orders in cases of domestic violence, dating violence, sexual assault, and stalking.⁸¹ It mandates that state authorities enforce these orders as if they were their own.⁸² VAWA also seeks to enhance state enforcement of tribal protection orders by permitting Indian law enforcement agencies access to enter and obtain information, including information on protection orders, from the federal crime data systems and by creating a National Tribal Registry for protection orders.⁸³

Second, under VAWA, the issuance and enforcement of tribal protection orders gives rise to legal remedies not otherwise available to Indian women. Once a tribal protection order is issued, three federal firearm offenses govern the behavior of the restrained party.⁸⁴ It is a federal crime to possess a firearm and/or ammunition while subject to a qualifying protection order⁸⁵ or after conviction of a domestic violence misdemeanor offense in a state, federal, or tribal court.⁸⁶ The penalties for violation of this provision of the federal criminal code is substantial and provides for a maximum sentence of ten years.⁸⁷ In 2005, VAWA was amended and now “provides misdemeanor arrest authority for federal officers and tribal specialized officers with

⁸⁰ Congress further acknowledged the acute problem of violence against Indian women when it held hearings on the matter in September 2007. Examining the Prevalence of and Solutions to Stopping Violence Against Indian Women: Hearing Before the Senate Committee on Indian Affairs, 110th Cong. (Sept. 27, 2007).

⁸¹ 18 U.S.C.A. § 2265(e).

⁸² 18 U.S.C. § 2265(a) (2000) (“Any protection order issued that is consistent with subsection (b) of this section by the court of one State or Indian tribe (the issuing State or Indian tribe) shall be accorded full faith and credit by the court of another State or Indian tribe (the enforcing State or Indian tribe) and enforced as if it were the order of the enforcing State or tribe.”).

Because Congress referred to the enforcement of tribal protection orders by state law enforcement as a matter of full faith and credit, this brief will use that language. This does not mean, however, that Amici concede that full faith and credit rather than principles of comity mandate that states enforce tribal court judgments and orders.

⁸³ P.L. No. 109-162 § 905(a).

⁸⁴ Gun Control Act, 18 U.S.C. 922(g)(8)(9).

⁸⁵ 18 U.S.C. 922(g)(8).

⁸⁶ 18 U.S.C. 922(g)(9).

⁸⁷ 18 U.S.C. 922(g).

reasonable grounds to believe that the person to be arrested has committed or is committing domestic violence, dating violence, stalking, or violation of a protection order and has as an element of the use or attempted use of physical force, or the threatened use of a deadly weapon.”⁸⁸ This increased authority is significant to the everyday safety of Indian women.

In addition, VAWA’s habitual offender provision amends the federal criminal code to impose enhanced criminal penalties on a repeat offender who commits a domestic assault within Indian lands and has a final conviction on at least two separate prior occasions in federal, state, or tribal court for offenses that would be, if subject to federal jurisdiction, an assault, sexual abuse, or serious violent felony against a spouse or intimate partner, or a domestic violence offense.⁸⁹ Thus, when the violation of a tribal protection order involves an assault, the perpetrator faces enhanced penalties under VAWA.

The United States has failed to fully implement VAWA to the detriment of Indian women. Despite VAWA’s mandate that tribal protection orders be enforced, Indian women still face tremendous obstacles in having their protection orders enforced.⁹⁰ VAWA’s full faith and credit provisions rely on voluntary compliance. States face no consequences for not following VAWA’s mandates regarding tribal court protection orders, and the United States provides little, if any, oversight of VAWA compliance by states regarding full faith and credit. While VAWA’s mandates appear straightforward, they “conceal a wealth of complexity” and different states have

⁸⁸ Sacred Circle, *Restoration of Native Sovereignty*, Vol. V at 19 (Sept. 2006); *see also* P.L. No. 109-162 § 908.

⁸⁹ *Id.* at § 909.

⁹⁰ Melissa Tatum, *A Jurisdictional Quandary: Challenges Facing Tribal Governments in Implementing the Full Faith and Credit Provisions of the Violence Against Women Acts*, 90 Ky. L.J. 123 (2002); Kevin K. Washburn, *A Different Kind of Symmetry*, 24 N.M. L. Rev. 263 (Spring 2004) (discussing different state approaches to the enforcement of tribal court judgments). For a general discussion of the difficulty of getting domestic violence protection orders enforced in the United States, *see* Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 Cardozo L. Rev. 1487, 1516 (2008).

interpreted them in different ways.⁹¹ As a result, many state laws do not incorporate the federal mandate in VAWA requiring state law enforcement to enforce tribal protection orders.⁹²

Additionally, the United States Department of Justice has yet to issue any training, guidelines, or information on the number of cases being prosecuted under the habitual offender and firearms provisions.⁹³

Nor have Indian nations been provided access to the national registries for protection orders and sex offenders.⁹⁴ The NCAI Taskforce on Violence Against Indian Women and Sacred Circle report

Tribal law enforcement still cannot access the national federal system without the permission of the state in which the tribe is located. Many state governments refuse tribes access through their state systems. . . . some state governments in conflict with federal law do not allow tribal court orders of protection to be entered into their state registry.⁹⁵

The United States' failure to implement this section of VAWA is devastating for Indian women. Many state law enforcement officials continue to refuse to enforce tribal protection orders because they view them as suspect and cannot verify them through the National registry.⁹⁶

The only study conducted to date on state enforcement of tribal protection orders found that 27% of the tribal courts that reported instances of non-recognition involved domestic violence orders after the enactment of VAWA.⁹⁷ These numbers indicate that the full faith and credit provisions of VAWA are not being implemented, and that state law enforcement officials are not enforcing tribal protection orders. This lack of enforcement undermines the habitual offender and firearms provisions of VAWA because these remedies do not apply unless tribal

⁹¹ Tatum, *supra* note 90, at 136.

⁹² Stacy Leeds, *Cross-Jurisdictional Recognition and Enforcement of Judgments: A Tribal Court Perspective*, 76 N.D. L. Rev. 311, 354 (2000).

⁹³ *Id.*

⁹⁴ Sacred Circle, *Restoration of Native Sovereignty*, Vol. IX (Sept. 2008).

⁹⁵ *Id.*

⁹⁶ Guide for Practitioners, *supra* note 13, at 21.

⁹⁷ Leeds, *supra* note 92, at 349-350.

protection orders are enforced. Despite its intent, VAWA does not appear to be protecting Indian women from ongoing domestic abuse. Rather as the study on state enforcement of tribal orders concluded, “Although Indian women are more likely to experience domestic violence than any other category of citizen, they are not receiving the protection envisioned in Violence Against Women Act.”⁹⁸

2. The United States Supreme Court’s Decision in *Gonzales* Denies Indian Women Legal Recourse.

The United States Supreme Court decision in *Town of Castle Rock, Col. v. Gonzales*⁹⁹ exacerbates the under-enforcement of domestic violence protection orders in the United States and impedes the ability of Indian women to obtain enforcement of protection orders across jurisdictional boundaries. In *Gonzales*, the Court held that an individual who has obtained a state-law restraining order does not have a constitutionally protected property interest in having the police enforce the restraining order when they have probable cause to believe it has been violated.¹⁰⁰

The Court’s decision in *Gonzales* has a particularly pernicious impact on Indian women whose primary recourse against their attackers is a civil protection order and who often must rely on state law enforcement to enforce these protection orders against non-Indian perpetrators of domestic violence. As discussed in Part III.b, Indian women do not have the same access to criminal recourse against their abusers as all other women in the United States. Due to the United States’ denial of adequate judicial recourse to Indian women survivors of sexual and physical violence, in many instances, protection orders become the sole legal mechanism intervening between an Indian woman and a violent perpetrator. The enforcement of protection

⁹⁸ *Id.* at 355.

⁹⁹ 545 U.S. 748 (2005).

¹⁰⁰ *Id.* at 768.

orders is, thus, essential to preventing violence against Indian women, and should not be considered discretionary. An order of protection is issued by a court that has considered all of the factors prior to issuance. It is a court and not law enforcement officers that have the authority to deny the order. Allowing law enforcement the discretion to enforce an order jeopardizes the lives of Indian women that may have no other legal recourse. Because state law enforcement apparently will not be held accountable for not enforcing protection orders, they do not have to enforce them. Often, state law enforcement officials do not enforce tribal protection orders. This means the safety of Indian women depends on the unregulated discretion of law enforcement officers and not the rule of law.

The *Gonzales* decision clearly contradicts federal, state, and tribal laws aimed at reducing violence against women. The decision greatly weakens the already under-implemented full faith and credit provisions of VAWA, by giving state law enforcement the discretion to ignore rather than enforce protection orders. The *Gonzales* decision gives state law enforcement the discretion and thus authority over the enforcement of tribal and federal law. This tremendous discretion over the enforcement of domestic violence protection orders allows state law enforcement to disrespect the sovereignty of both Indian nations and the United States.

The *Gonzales* decision also undermines several state and tribal laws, which mandate the arrest of violators of domestic violence protection orders.¹⁰¹ The mandatory nature of these laws addresses historical inaction and bias on the part of law enforcement in responding to domestic violence calls.¹⁰² The Court's interpretation of these laws as not mandatory condones these

¹⁰¹ For a discussion of state laws requiring mandatory arrest for violators of domestic violence protection orders, see Final Observations Regarding the Merits of the Case for the Petitioner Jessica Gonzales to the Inter-American Commission on Human Rights, *Jessica Gonzales, et al. v. United States*, Case No. 12.626, at 51 (March 24, 2008).

¹⁰² 545 U.S. at 780 (Stevens, dissenting) (explaining that the Colorado statute that mandates the enforcement of domestic restraining orders upon probable cause of a violation responds to a "crisis of police underenforcement in the domestic violence sphere.") .

historically discriminatory practices and allows perpetrators of violence to act with impunity. As the Inter-American Commission on Human Rights has pointed out on several occasions, states have an obligation to use all legal means at their disposal to combat human rights violations because “impunity fosters chronic recidivism of human rights violations, and total defenselessness of victims and their relatives.”¹⁰³

The United States’ presentation of the *Gonzales* case as an isolated case limited to its facts misrepresents its domestic jurisprudence on the enforceability of domestic violence protection orders.¹⁰⁴ The United States relies on two cases to suggest that remedies are available to domestic violence victims who allege a failure to protect by police officers.¹⁰⁵ Not only are these lower court cases distinguishable on the facts because they deal with equal protection rather than due process claims,¹⁰⁶ but one of them has been widely discredited and rarely followed.¹⁰⁷ While the United States may believe that constitutional claims are interchangeable, the evidentiary requirements and legal tests for due process and equal protection claims differ substantially.¹⁰⁸ An equal protection claim can only be brought in cases where the state agent treats domestic violence victims as a class differently from other victims. In cases where the state agent simply refuses to enforce a domestic violence protection order, victims are left without judicial recourse. Neither of these cases refute the fact that the highest court in the United States has held that women do not have a constitutional right to have domestic violence

¹⁰³ IACHR, *Report on Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser.L/VIII, Jan. 20, 2007, p. 12 (citing Inter-Am. Ct. H.R., *Loayza Tamayo Case. Reparations* (Art. 63(1) American Convention on Human Rights), Judgment of November 27, 1998, para. 170, citing Inter-Am. Ct. H.R., *The “Panel Blanca” Case* (Paniagua Morales et al.), Judgment of March 8, 1998, para. 173) [hereinafter “*Report on Access to Justice for Women Victims of Violence in the Americas*”].

¹⁰⁴ Response of the Government of the United States of America to the Inter-American Commission on Human Rights Regarding Jessica Gonzales, No. p-1490-05, at p. 14-15.

¹⁰⁵ *Id.*

¹⁰⁶ *Compare* *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D.Ct. 1984) and *Fajardo v. County of Los Angeles*, 179 F.3d 698 (9th Cir. 1999) with *Gonzales*, 545 U.S. 748 (2005).

¹⁰⁷ Keyciting *Thurman* on Westlaw indicated that most courts have either distinguished that case or declined to follow it.

¹⁰⁸ *See generally* Erwin Chemerinsky, *Constitutional Law Principles and Policies* (2d. ed. 2002).

protection orders enforced when there is probable cause to believe that the order has been violated.

The Supreme Court in *Gonzales* has functionally enabled law enforcement to continue discriminatory practices against women and ignore domestic violence protection orders. The *Gonzales* case shows that law enforcement will not be held accountable for not enforcing protection orders. The Court has undermined the security of Indian women provided by civil protection orders and has sanctioned ongoing domestic violence because perpetrators know that police officers do not have to enforce protection orders.

b. The United States' Failure to Protect Indian Women from Violence Violates their Rights under the American Declaration.

The United States has an affirmative obligation to protect the human rights of Indian women. Within the Inter-American system, member states, including the United States, have a legal obligation to protect, promote, and ensure the human rights in the American Declaration.¹⁰⁹ When states fail to act with due diligence in response to acts of violence, they can be held responsible for human rights violations perpetrated by non-state actors.¹¹⁰ The Inter-American Commission on Human Rights considers the American Declaration's provisions in the context of the international and inter-American human rights systems more broadly. The Commission considers developments in international human rights law since the Declaration was first composed and other relevant rules of international law applicable to member states against which complaints of violations of the Declaration are properly lodged.¹¹¹

¹⁰⁹ See Inter-Am. Ct. H.R., Advisory Opinion OC-10/89 "Interpretation of the Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights", July 14, 1989, paras. 35-45.

¹¹⁰ *Report on Access to Justice for Women Victims of Violence in the Americas*, *supra* note 104, at paras. 29-30 (citing Inter-Am. Ct. H.R., Case of the "Mapiripan Massacre," Judgment of September 15, 2005, para. 111).

¹¹¹ IACHR, *Mary & Carrie Dann v. United States*, Report No. 75/02, December 27, 2002 pp. 24-25.

The American Declaration obligates the United States to protect Indian women's rights to life, security of the person, and an effective judicial remedy.¹¹² It also explicitly provides special protection for women and children. In addition to these protections for women and children under the American Declaration, the Inter-American Commission on Human Rights has recognized Indigenous women as a population particularly vulnerable to violence.¹¹³

The Commission should consider the relevant provisions of the recently adopted U.N. Declaration on the Rights of Indigenous Peoples in interpreting the American Declaration. International human rights law "has advanced substantially by the evolutive interpretation of international protection instruments."¹¹⁴ The U.N. Declaration on the Rights of Indigenous Peoples represents the most recent statement by the international community on the human rights of Indigenous peoples, and its consideration by the Commission would further the evolution of human rights law within the Inter-American System.

The U.N. Declaration on the Rights of Indigenous Peoples places additional obligations on states to protect Indian women from violence. Article 22 states,

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.
2. States shall take measures, in conjunction with indigenous peoples, to ensure that all indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.¹¹⁵

As the most recent statement of international customary law on the rights of Indigenous peoples, the Declaration reflects growing international consensus that Indian women have a right to be free from violence and that states must take special precautions to ensure the safety of Indian

¹¹² American Declaration, Art. I, XVIII.

¹¹³ *Report on Access to Justice for Women Victims of Violence in the Americas*, *supra* note 104, at 82-85.

¹¹⁴ Inter-Am. Ct. H.R., Case of the Street Children (Villagran Morales *et al.*) v. Guatemala, Judgment of November 19, 1999, para.193.

¹¹⁵ U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/47/1, Art. 22 (2007) [hereinafter "U.N. Declaration on the Rights of Indigenous Peoples"].

women from violence. The Commission should ensure these explicit protections for Indian women in the United States.

- i. The United States is Responsible for the Epidemic of Violence Against Indian Women because It Has Failed to Prevent such Violence and Act with Due Diligence to Protect Them.

The United States is responsible for the epidemic of violence against Indian women because it has failed to prevent this violence and act with due diligence to protect them. The American Declaration on the Rights and Duties of Man places legal obligations on the United States to protect, promote, and ensure human rights.¹¹⁶ The Commission has explained that states must meet the due diligence standard in preventing violence against women.¹¹⁷ Within the Inter-American system, states can be held responsible for human rights violations perpetrated by non-state actors when they do not act with due diligence in response to acts of violence.¹¹⁸

International human rights law has widely accepted that states must act with due diligence to prevent human rights violations, including violence against women. Several international human rights courts, including the Inter-American Court of Human Rights, have repeatedly held that states must exercise due diligence to prevent human rights violations.¹¹⁹ The Court has clearly established that a violation of rights occurs if the government supports or acquiesces in the act, or if the State has allowed the act to take place without taking measures to prevent it or to punish those responsible.¹²⁰ Article 7 of the Inter-American Convention on the

¹¹⁶ See Inter-Am. Ct. H.R., Advisory Opinion OC-10/89 “Interpretation of the Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights”, July 14, 1989, paras. 35-45.

¹¹⁷ *Report on Access to Justice for Women Victims of Violence in the Americas*, *supra* note 104, at paras. 29-30.

¹¹⁸ *Report on Access to Justice for Women Victims of Violence in the Americas*, *supra* note 104, at paras. 29-30 (citing Inter-Am. Ct H.R., Case of the “Mapiripan Massacre,” Judgment of September 15, 2005, para. 111).

¹¹⁹ See, e.g., Inter-Am. Ct H.R., Velasquez Rodriguez Case, Judgment of July 29, 1988.; Inter-Am. Ct H.R., Case of the Massacre of Pueblo Bello, Judgment of January 31, 2006, para. 124. See also European Ct H.R., Kilic v. Turkey, Judgment of March 28, 2000, paras. 62-63; European Ct H.R., Osman v. United Kingdom, Judgment of October 28, 1998.

¹²⁰ Inter-Am. Ct. H.R., Case of Velásquez-Rodríguez v. Honduras, Judgment of July 29, 1988, para. 173.

Prevention, Punishment and Eradication of Violence Against Women imposes the duty of due diligence on States Parties.¹²¹ Customary international law also “obligates states to prevent and respond to acts of violence against women with due diligence.”¹²²

The United States has failed to act with due diligence because despite its knowledge of the epidemic of violence against Indian women,¹²³ it has left Indian women and Indian nations with little to no recourse against perpetrators of domestic violence. In this enforcement environment, perpetrators can act with impunity on Indian lands. The United States’ restriction of tribal jurisdiction combined with its failure to effectively police and prosecute these violent crimes violates its obligation to act with due diligence to protect, promote, and ensure human rights under the American Declaration. Further, these actions by the United States negatively impact entire Indian nations, which already suffer from the worst socio-economic status of any population in the United States.¹²⁴ United States laws have allowed state actors to create a law enforcement void, that condones violence against Indian women and permits perpetrators to act with impunity on Indian lands.

Because of this law enforcement void, the primary recourse that Indian nations and Indian women have against non-Indian perpetrators of domestic violence is civil protection orders. The United States Supreme Court’s decision in *Gonzales* undermines the protection of Indian women by giving state law enforcement officials the discretion not to enforce valid protection orders against domestic violence perpetrators when there is probable cause to believe the order is being violated. This decision leaves Indian women largely unprotected from

¹²¹ Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, Art. 7 (1994), available at [<http://www.oas.org/cim/english/Convention%20Violence%20Against%20Women.htm>].

¹²² Report of the Special Rapporteur on violence against women, its causes and consequences, The Due Diligence Standard as a Tool for the Elimination of Violence Against Women, E/CN.4/2006/61 (20 Jan. 2006) at para. 29.

¹²³ See *supra* Part II.b.

¹²⁴ Guide for Practitioners, *supra* note 13, at 11 (stating that “American Indian and Alaska Natives are 2.5 times more likely than the rest of the population to live in poverty” and that “45 percent of Native persons live at or below the poverty level”).

continuing domestic violence and shows that the United States has failed to act with due diligence to remedy this dire situation.

ii. The United States Violates Indian Women’s Rights to Life and Security of Person under Article I of the American Declaration.

The right to life is universally recognized as one of the most important human rights, and is included in almost every international human rights document. The full exercise of the right to life is essential for the exercise of all other human rights.¹²⁵ Article I of the American Declaration protects the right of every human being “to life, liberty, and the security of his person.”¹²⁶ Both the Commission and the Inter-American Court have interpreted the right to extend beyond arbitrary deprivations of life by the state or its agents.¹²⁷ The right to life may be implicated in situations that do not necessarily result in death because it places a positive obligation on states to create conditions that “discourage any threat to the right to life” and ensure a dignified existence.¹²⁸ For example, in the *Sawhoyamaya* case, the Inter-American Court found that Paraguay had violated the right to life of members of an Indigenous community because of the inadequate living conditions faced by the community and the failure of the state to adopt necessary measures to remedy those conditions.¹²⁹

Other international human rights instruments, including the Universal Declaration of Human Rights¹³⁰ and the American Convention on Human Rights,¹³¹ also protect the right to life. The right to life has consistently been interpreted as including the guarantee to be free from

¹²⁵ Inter-Am. Ct. H.R., Case of the Street Children (Villagran Morales *et al.*) v. Guatemala, Judgment of November 19, 1999, para. 144.

¹²⁶ American Declaration on the Rights and Duties of Man, Art. I.

¹²⁷ See, e.g., IACHR, Parque São Lucas v. Brasil, Case 10.301, Report No. 40/03 (2003).

¹²⁸ Inter-Am. Ct. H.R., Case of the Street Children (Villagran Morales *et al.*) v. Guatemala, Judgment of November 19, 1999, para. 144.

¹²⁹ Inter-Am. Ct. H.R., Case of the Sawhoyamaya Indigenous Community v. Paraguay, Judgment of March 29, 2006, para. 156, 166.

¹³⁰ Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 Art. 3. (1948).

¹³¹ American Convention on Human Rights, O.A.S. Treaty Series No. 36,1144, U.N.T.S. 123, entered into force July 18, 1978, Art. 4 [hereinafter “American Convention on Human Rights”].

violence.¹³² Further, Article 4 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women includes the rights to life and security of the person as rights to be protected.¹³³

The U.N. Declaration on the Rights of Indigenous Peoples expressly extends the right to a life free from violence to Indian women. Article 7 specifically protects the rights to life and personal security of Indigenous persons. It states,

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of the person.
2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence.¹³⁴

Under international human rights law, the right to life includes the right to be free from violence. Thus, the United States has an affirmative obligation to protect the rights to life and personal security of Indian women.

An Indian woman is the victim of sexual and physical abuse every hour of every day.¹³⁵ The vast majority of Indian women will have their lives interrupted by violence. The United States condones this violence by unilaterally maintaining jurisdictional constraints on tribal criminal prosecutions and by refusing to ensure the enforcement of civil protection orders by state law enforcement.¹³⁶

The United States' failure to enforce civil protection orders undermines the rights to life and personal security of the holder of the protection order because it subjects her to the constant threat of ongoing violence. If her attacker approaches her, she has no guarantee that the state

¹³² See, e.g., Committee on the Elimination of All Forms of Racial Discrimination Against Women, General Recommendation No. 19, at ¶ 8, U.N. Doc. CCPR/C/21/Rev. 1/Add.10 (2000); G.A., Res. A/Res/58/147 (2004).

¹³³ Inter-American Convention on the Prevention, Punishment and Eradiction of Violence Against Women, Art. 4 (1994), available at [<http://www.oas.org/cim/english/Convention%20Violence%20Against%20Women.htm>].

¹³⁴ U.N. Declaration on the Rights of Indigenous Peoples, Art. 7.

¹³⁵ Long Brief, *supra* note 6, at 4.

¹³⁶ Goldfarb, *supra* note 90, at 1516 (“Even though obtaining a protection order may be valuable in and of itself, the fact remains that to achieve their full potential, orders must be properly enforced.”).

will prevent another attack. Her rights to life and personal security are constantly in jeopardy; she lives in fear of another attack and cannot enjoy her life. Further, the United States' failure to ensure the enforcement of civil protection orders allows perpetrators of violence to act with impunity. Because state law enforcement is not required to enforce protection orders and often does not, perpetrators know that they are free to victimize and revictimize Indian women. Often perpetrators escalate their attacks after a woman obtains a protection order, and the attacks become lethal. When the United States does not require law enforcement officials to enforce protection orders, Indian women can be lethally harmed.

iii. The United States Does Not Provide Indian Women with an Effective Judicial Remedy as Required by the American Declaration.

Article XVIII of the American Declaration on the Rights and Duties of Man states, “Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.”¹³⁷ Article 25 of the American Convention on Human Rights also ensures the right to an effective judicial remedy,¹³⁸ and Article 7 of the American Convention on the Prevention, Punishment, and Eradication of Violence Against Women lists the establishment of “fair and effective legal procedures,” including protective measures, for women that have been subjected to violence among the duties of States Parties.¹³⁹

The U.N. Declaration on the Rights of Indigenous Peoples explicitly protects the rights of Indian women to effective judicial remedies in Article 40. Article 40 states,

¹³⁷ American Declaration on the Rights and Duties of Man, Art. XVII.

¹³⁸ American Convention on Human Rights, Art. 25.

¹³⁹ Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, Art. 7 (1994), available at [<http://www.oas.org/cim/english/Convention%20Violence%20Against%20Women.htm>].

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parities, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.¹⁴⁰

Under international law, the United States has a legal obligation to provide Indian women with an effective judicial remedy when their rights are violated.

The Inter-American Court has a well-established jurisprudence on the right to an effective judicial remedy.¹⁴¹ In *Velasquez Rodriguez v. Honduras*, the Court stated that an adequate, effective judicial remedy must suitably address the infringement of a legal right and effectively protect the right.¹⁴² The Court has also found that the effective remedy must be provided on a non-discriminatory basis.¹⁴³ A remedy must be effective in practice, and may become ineffective when practice has shown the ineffectiveness of the remedy.¹⁴⁴

The Inter-American Commission adopted the Inter-American Court's jurisprudence on effective judicial remedies in the case of *Maria da Penha Maia Fernandes v. Brasil*.¹⁴⁵ In that case, the Commission interpreted Article XVIII of the American Declaration in conjunction with Articles 8 (right to fair trial) and 25 (judicial protection) of the American Convention.¹⁴⁶ The

¹⁴⁰ The United States violates not only the rights of Indian women to an effective remedy as protected under the American Declaration and the UN Declaration on the Rights of Indigenous peoples but also fails to give due consideration to the legal systems of tribes in limiting their criminal jurisdiction and restricting their ability to protect Indian women. These limitations violate Article 34, as well as Article 40, of the U.N. Declaration on Indigenous rights. Article 34 declares, "Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards."

¹⁴¹ See, e.g., Inter-Am. Ct. H.R., Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgment of August 31, 2001, para. 112 (calling the right to an effective remedy "one of the basic mainstays, not only of the American Convention, but also of the Rule of Law in a democratic society".)

¹⁴² Inter-Am. Ct. H.R., Case of Velasquez-Rodriguez v. Honduras, Judgment of July 29, 1988, para. 64, 66.

¹⁴³ Inter-Am. Ct. H.R., Juridical Condition and Rights of Undocumented Workers, Advisory Opinion, Sept. 13, 2003, para. 107.

¹⁴⁴ Inter-Am. Ct. H.R., Judicial Guarantees in States of Emergency, Advisory Opinion, Oct. 6, 1987 para. 24.

¹⁴⁵ IACHR, *Maria da Penha v. Brasil*, Case 12.051, Report No. 54/01, OEA/Ser.L/V/II.111 Doc. 20 rev. at 704 (April 16, 2001).

¹⁴⁶ *Id.*

Commission incorporated the jurisprudence of the Inter-American Court in explaining the obligations of States, including the obligation to take measures to prevent violations of rights.¹⁴⁷

The Commission then found that Brasil had violated the petitioner's right to justice under Article XVIII of the American Declaration because it had failed to properly investigate and prosecute Maria da Penha Maia Fernandes' husband after he tried to kill her and left her paralyzed.¹⁴⁸ The Commission explained,

The failure to prosecute and convict the perpetrator under these circumstances is an indication that the State condones the violence suffered by Maria da Penha, and this failure by the Brazilian courts to take action is exacerbating the direct consequences of the aggression by her ex-husband. Furthermore, as has been demonstrated earlier, that tolerance by the State organs is not limited to this case; rather, it is a pattern. The condoning of this situation by the entire system only serves to perpetuate the psychological, social, and historical roots and factors that sustain and encourage violence against women.¹⁴⁹

It continued, "That general and discriminatory judicial ineffectiveness also 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."¹⁵⁰

The United States, like Brasil in the *Maria da Penha* case, condones violence against women, particularly violence against Indian women. The criminal jurisdictional scheme created by the United States leaves Indian women without meaningful recourse against their abusers. Indian women are effectively denied justice because the United States, which has sole jurisdiction over non-Indian abusers, refuses to prosecute them, and its laws prevent Indian nations from adequately punishing Indian abusers. The United States perpetrates further injustice on Indian women by not requiring states to enforce tribal protection orders when there

¹⁴⁷ *Id.* at para. 42.

¹⁴⁸ *Id.* at para. 60.

¹⁴⁹ *Id.* at para. 55.

¹⁵⁰ IACHR, *Maria da Penha v. Brasil*, Case 12.051, Report No. 54/01, OEA/Ser.L/V/II.111 Doc. 20 rev. at 704, para. 56 (April 16, 2001).

is probable cause of a violation. The Supreme Court's decision in *Gonzales* enables law enforcement to ignore protection orders, and allows perpetrators of domestic violence to revictimize their victims with impunity.

While the *Maria da Penha* case did not address the obligations of states to engage in precautionary measures as such, the Inter-American Commission has interpreted the right to judicial protection to include the right to seek effective precautionary protection. According to the Commission, "the right to judicial protection creates an obligation for the states to establish and guarantee appropriate and effective judicial remedies for the precautionary protection of rights, including life and physical integrity, at the local level."¹⁵¹ It further explained, "while in criminal law a threat against life only constitutes an offense upon initiation of the execution of the crime, in a precautionary situation, the protection of the right to life should include protection against any act that threatens that right, regardless of the magnitude or degree of probability of the threat, so long as it is genuine."¹⁵²

The United States is not ensuring Indian women's rights to effective judicial protection. Earlier this year, the United Nations Committee on the Elimination of Racial Discrimination (CERD) expressed grave concerns about the United States' response to violence against women in its Concluding Observations and Report.¹⁵³ The Report stated,

The Committee also notes with concern that the alleged insufficient will of federal and state authorities to take action with regard to such violence and abuse often deprives victims belonging to racial, ethnic and national minorities, and in particular Native American women, of their right to access to justice and the right

¹⁵¹ IACHR, *Report on Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser.L/VIII, Jan. 20, 2007, p. 24 (citing IACHR, *Report on the Situation of Human Rights Defenders in the Americas*, OEA/Ser.L/V/II.124, March 7, 2006, pp. 35-36.)

¹⁵² *Id.* at p. 25.

¹⁵³ Committee on the Elimination of Racial Discrimination, Concluding Observations United States of America, CERD/C/USA/CO/6 (February 2008) at para. 26, *available at* [<http://www.indianlaw.org/sites/indianlaw.org/files/CERD-recommendations.pdf>].

to obtain adequate reparation or satisfaction for damages suffered. (Articles 5(b) and 6).¹⁵⁴

CERD also recommended that the United States increase its efforts to prevent and prosecute perpetrators of violence against women.¹⁵⁵ The United States has yet to comply with CERD's recommendations.

The United States has a duty to take appropriate precautionary measures to protect Indian women from violence. If the United States is not going to prosecute domestic abusers committing offenses on Indian lands or allow Indian nations to do so adequately, the very least it can do is ensure that tribal protection orders are enforced by state law enforcement. But under *Gonzales*, the United States has refused to even do that. The United States Supreme Court's decision in *Gonzales* renders domestic violence protection orders ineffective because it does not require the enforcement of these orders. The situation of Indian women in the United States is especially grave because often the only recourse they have is a civil protection order. The lack of enforcement of these orders makes them useless. It leaves Indian women vulnerable to further attack and without any judicial remedy against their abusers.

IV. Conclusion and Recommendations

Domestic violence is an acute problem in the United States. Despite this, as the *Gonzales* case demonstrates, United States laws fail to protect domestic violence victims from ongoing violence. Because of *Gonzales*, law enforcement can always choose not to enforce domestic violence protection orders and leave women vulnerable to future abuse. This decision has a particularly pernicious impact on Indian women because the problem of domestic violence has reached epidemic proportions and many times, the primary recourse that Indian women have against their attackers is a protection order.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

The United States has failed to fulfill its international legal obligations to women, particularly Indian women. It has failed to protect their rights to life, security of the person, freedom from violence, and an effective judicial remedy by not requiring that protection orders be enforced against domestic violence perpetrators. United States laws disproportionately affect Indian women because the United States' limitations on tribal jurisdiction leave them with limited legal remedies heightening the importance of civil protection orders. United States laws undermine the integrity of these protection orders and promote violence against Indian women by not ensuring their enforcement by law enforcement when there is probable cause to believe that they have been violated.

In consideration of the foregoing, amici curiae request that this Honorable Commission:

1. Declare that the United States is internationally responsible for a widespread and consistent pattern of human rights violations based on the perpetuation of domestic violence against women, particularly Indian women, and continues to violate the rights of women, including their rights under Articles I and XVII of the American Declaration.
2. Issue a report in accordance with Article 43.2 of the Commission's Rules of Procedure in the most expedited manner possible, incorporating into that report the findings in point (1) of this section, and recommend that the United States provide legal and programmatic reform to comport with the standards of international human rights law on violence against women, due process, and effective remedies.
3. Recommend that the United States, in consultation and cooperation with Indian nations, increase its efforts to prevent and punish violence and abuse against women by:
 - a. assisting Indian nations in their efforts to respond to, prevent, prosecute, and punish sexual and physical violence against women within Indian lands;
 - b. implementing fully the Violence Against Women Act by following the recommendations of tribal leaders at the annual consultation as mandated by section 903 of Title IX of the Violence Against Women Act, and
 - i. ensuring that state authorities comply with the full faith and credit provision of the Violence Against Women Act by recognizing and effectively enforcing tribal court protection orders;
 - ii. permitting Indian law enforcement agencies, in cases of domestic violence, dating violence, sexual assault, and stalking, to enter information into, and obtain information from federal criminal data bases;
 - iii. ensuring enforcement of the firearms possession prohibition that includes tribal law convictions under section 908; and

- iv. ensuring enforcement of the domestic assault by an habitual offender under section 909;
- c. requiring personnel of the Department of Justice, including law enforcement and U.S. Attorneys, to submit declination reports to tribal justice officials and to coordinate the prosecution of sexual and domestic assault cases on Indian lands;
- d. establishing state accountability for the prevention, investigation, prosecution, and punishment of sexual and physical violence against Indian women in states where the state has jurisdiction over these crimes, and in particular, addressing the unique circumstances of Alaska Native women;
- e. working in consultation and cooperation with Indian nations to establish appropriate tribal criminal jurisdiction and sentencing authority over all persons for crimes of sexual and domestic violence committed against Indian women;
AND
- f. establishing in consultation and cooperation with Indian nations a national reporting system to investigate and prosecute cases of missing and murdered Indian women.

Dated: November 7, 2008

Respectfully Submitted:

Lucy Simpson
Kirsten Matoy Carlson
Indian Law Resource Center
602 North Ewing Avenue
Helena, MT 59601

Jacqueline Agtuca
Terri Henry
Sacred Circle National Resource Center to End Violence Against Native Women
722 St. Joseph Street
Rapid City, SD 57701

Counsel for Amici Curiae