

The denunciation is *ratione materiae*.

481. The denunciation complains of three different types of actions that violate the applicable instruments and of violations of Articles I, II, IV, V, VI, VII, XVIII, XXIV, XXV and XXX. The facts illustrate discrimination against women in general in violation of the Declaration of the Rights and Duties of Man and is therefore admissible. 1

482. Secondly, it complains that the behavior of the State forms a pattern of discrimination evidenced by the condoning of domestic violence against women and children in the U.S. through ineffective judicial action, lack of due diligence in investigation and *per se* violations under existing law. The Commission concluded in a case against Brazil 2 that such facts formed a pattern of discrimination against women and was a violation of Declaration Articles II and XVIII. “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.” 3 “Given the fact that the violence suffered by Maria da Penha is part of a general pattern of negligence and lack of effective action by the State in prosecuting and convicting aggressors, it is the view of the Commission that this case involves not only failure to fulfill the obligation with respect to prosecute and convict, but also the obligation to prevent these degrading practices. 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.” 4 The facts of these petitioners along with the studies outline without a doubt that this is a general pattern of neglect and lack of judicial effectiveness.

483. Third, it complains about the violation of individual rights in specific cases. The denunciation is not asking the Commission to determine whether domestic law was properly interpreted or applied. That is not the purview of the Commission. Rather, the petition is asking the Commission to ascertain whether the state, through its judicial authorities, acted in conformity with the rights outlined in the Declaration or the Rights and Responsibilities of Man. 5

484. The Commission is competent *ratione materiae* to hear the case at hand since it involves violations of rights enshrined in the American Declaration of the Rights and Duties of Man. Its competence stems from provisions of its Statute and Regulations

1 REPORT N° 28/98 , CASE 11.625 , MARÍA EUGENIA MORALES DE SIERRA , GUATEMALA , March 6, 1998.

2 REPORT N° 54/01* , CASE 12.051 , MARIA DA PENHA MAIA FERNANDES , BRAZIL , April 16, 2001, ¶ 3.

3 *ibid*, ¶ 55.

4 *ibid*, ¶ 56.

5 REPORT N° 71/00* , CASE 11.676, "X" and "Z" , ARGENTINA, October 3, 2000, ¶ 43.

and of the OAS Charter. Under the Charter, all member states pledge to respect the essential rights of individuals. In the case of states not parties to the Convention, the rights in question are those established in the American Declaration, which is a source of international obligations. 6

The denunciation is *ratione personae*

485. The petition is filed jointly by persons and organizations all of whom have legal authority to file a petition with the Commission pursuant to Article 23 of the Rules of Procedure and whose rights under the Declaration of the Rights and Responsibilities of Man have been violated. While in most instances, issues of child custody are within the exclusive jurisdiction of the states in the U.S. and not the jurisdiction of federal courts, the federal courts also deal with the issues and have failed as well. Child custody cases have been brought to the federal courts as civil rights violations and in connection with the Hague Convention but the court has found there is no duty to protect abused children. When a federative State is involved, as is the case for the U.S., the national government is answerable in the international sphere for its own acts and for those taken by the agents of the entities that compose the member State. 7

The denunciation is *ratione temporis*

486. The acts and omissions complained of in the above factual paragraphs took place after the United States became a member of the OAS and continue to this date. Therefore the denunciation is *ratione temporis*.

The denunciation is *ratione loci*

487. The acts and omissions complained of in the above factual paragraphs took place on the territory of the United States and therefore the denunciation is *ratione loci*.

THE PETITION COMPLIES WITH THE TIME PERIOD PROVIDED FOR IN ARTICLE 32 OF THE RULES OF PROCEDURE

488. Article 32 requires that a petition be lodged within six-months following the date on which the alleged victim was notified of the decision that exhausted the domestic remedies. However, in a case such as this, where the violation is systemic and on-going, the six-month rule is therefore met. 8

6 REPORT N° 86/99, CASE 11.589 ARMANDO ALEJANDRE JR., CARLOS COSTA, MARIO DE LA PEÑA, AND PABLO MORALES CUBA September 29, 1999 (¶ 18)

7 REPORT N° 54/01, CASE 12.051, MARIA DA PENHA MAIA FERNANDES, BRAZIL, April 16, 2001, ¶ 29.

8 REPORT N° 99/99, CASE 11.140 MARY AND CARRIE DANN UNITED STATES, September 27, 1999, ¶. 87-88.

NECESSARY STEPS HAVE BEEN TAKEN TO EXHAUST DOMESTIC REMEDIES
AS PROVIDED IN ARTICLE 31 OF THE RULES OF PROCEDURE

489. This is a continuing situation and the doctrine of exhaustion of remedies does not apply when the allegations concern a continuing situation.⁹ In this case, the petitioners have tried multiple remedies for years but yet the situation continues unabated. Domestic remedies are clearly ineffective.

490. When the state refuses to meet its due diligence obligation and investigate the facts, the petitioner has met the exhaustion requirement by bringing the facts to the attention of the government because the petitioner cannot do more. ¹⁰ In this case, the petitioners have repeatedly brought this issue to states attention with no appropriate resolution.

491. When it is apparent that further proceedings would be to no avail because there is no reasonable prospect of success, the petitioner has in fact exhausted domestic remedies. ¹¹ The highest court in the U.S has made it clear in DeSheney that contrary to Article VII, the state has no obligation to protect children or battered women. Therefore, there is no prospect of success in the U.S. courts.

492. The Commission has said it is not required to demand exhaustion of domestic remedies when the State has an obligation to maintain public order. The State has an obligation to set the criminal law system into motion and process the matter. “In other words, the obligation to investigate, prosecute, and punish the persons liable for human rights violations is a non-delegable duty of the state. One consequence is that public employees, unlike private persons, have a legal obligation to denounce all crimes of public action that they come to learn of in performing their duties” ¹² In the cases of the petitioners, the judges came to learn of many crimes against the mothers and the children. However, rather than take action to protect their rights, they did the opposite and ordered the children into harms way. The women individually and collectively have appealed, legislated, educated, protested – all to no avail. There is no further domestic remedy.

⁹ REPORT N° 72/03, PETITION 12.159, ADMISSIBILITY, GABRIEL EGISTO SANTILLAN , ARGENTINA, October 22, 2003, ¶ 59.

¹⁰ REPORT N° 72/03, PETITION 12.159, ADMISSIBILITY, GABRIEL EGISTO SANTILLAN , ARGENTINA, October 22, 2003, ¶ 54.

¹¹ REPORT N° 16/04, PETITION 129/02, ADMISSIBILITY, TRACY LEE HOUSEL, UNITED STATES OF AMERICA, February 27, 2004, ¶ 36.

¹² REPORT N° 86/99, CASE 11.589 ARMANDO ALEJANDRE JR., CARLOS COSTA, MARIO DE LA PEÑA, AND PABLO MORALES CUBA September 29, 1999 ¶ 47.

493. The Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the United Nations Commission on Human Rights, Theo Van Boven, analyzed the question of impunity in the following terms:

Perpetrators of human rights violations, whether civilian or military, become all the more irresponsible if they are not held to account before a court of law.... It may therefore be concluded that in a social and political climate where impunity prevails, the right to reparation for victims of gross violations of human rights and fundamental freedoms is likely to become illusory. It is hard to perceive that a system of justice that cares for the rights of victims can remain at the same time indifferent and inert towards gross misconduct of perpetrators. 13

494. Here it is the judges who not only are failing to protect human rights, but they are collaborating with the perpetrator to perpetuate gross violations of human rights and fundamental freedoms of the protective mothers and children. Attempting to remedy the problem by complaining about the judges has proved futile. The issue of judicial accountability for bias and prejudice has been addressed and studied at length with distressing results as outlined above.

495. Petitioners have attempted to remedy the problem with litigation. But many cases have been litigated across the nation and appealed through the complete system with no resolution of the problem. 14 Appellate courts rarely reverse custody decisions because they place great weight on the trial court opinions, reversing only when the trial court abuses its broad discretion. 15 While some litigants have been able to take their cases to the highest court, many have not had the financial resources to do so – even to have attorneys at the first level – to their disadvantage. The judge in the Shockome case refused twice to put his ruling in writing. Thus they could not be appealed. (See paragraphs 167, 173) The judge in Titelman did likewise. (Exhibit 2, page 155) While indigence alone is insufficient to waive the exhaustion rule, combined with the pattern of discrimination evidenced from the bottom to the top of the system, and the fruitlessness of such attempts (See Exhibits 6-11 and 16), those petitioners have exhausted all potential effective remedies. 16 As the submission by United States NGO's to the United Nations Human Rights Committee 17 illustrates, state courts are so riddled with sexual

13 *ibid.*, ¶49

14 See footnote 52.

15 Nicholson, *Child Sexual Abuse Allegations in Family Court Proceedings: A Survey of Legal Issues*, in *SEXUAL ABUSE*, *supra* note 10, at 258; see also *Lehman v. Billman*, 178 Mont. 367, 373, 584 P.2d 662, 665 (1978) (deferring to district court on issue of custody and child's best interest).

16 REPORT N° 6/97 On Inadmissibility CASE 11.071 UNITED STATES (*) March 12, 1997, ¶ 43.

17 United Nations Human Rights Committee, Eighty-seventh Session, July 2006, Geneva Switzerland

discrimination they are unable to deliver justice to women, especially battered women. Often times the women are denied access to the courts by explicit or implicit statements that if they continue to voice these issues, they will suffer even more and lose all contact with their children completely. In many cases, though the procedures exist on paper, there is no due process in reality as women do not have competent lawyers available that they can afford, are not allowed to submit evidence or cross examine, are given only 30 minutes to resolve an issue as important as a child's future, are forced to have psychological exams and submit to evaluations by completely unqualified or biased evaluators, and are forced to put themselves and their children in danger to exercise visitation rights. One of the problems is the immunity of the courts. While in theory this is an essential part of an independent judiciary, when the courts themselves violate the law, and the political process does not hold them accountable, the victim is left with no remedy and no access to justice in violation of international law. 18

496. In addition to the plaintiff's appeals to federal court, two 42 USC 1983 civil rights actions were filed regarding conspiracy by state courts to deprive the protective mother of custody. Both were dismissed by the federal court as frivolous. 19 Not only were they dismissed but the litigants were punished by awarding large attorney fees, some that were upheld in an appeal in another example of punishing the attorney who speaks out for the victims. 20

497. Alanna Krause is one of those victims who took her case to federal court seeking a remedy. At 16, she wrote the following article: 21

“Hundreds of years of legal history have lead the United States to implement a system that ensures that every party in a legal proceeding gets a voice. We rest assured that, unlike in other nations, we can not be incarcerated without our day in court, lawyer by our side. What a country we live in: so civilized, so well thought out. God bless America.

But there is a forgotten minority that is not afforded these basic rights. They are not criminals or foreign aliens. In contrast, they are a group we all hold dear - one innocent and well meaning, with no hidden agendas or twisted motives - children.”

Report on Women's Rights in the United States under International Covenant on Civil and Political Rights in response to the Second and Third Periodic Report of the United States of America, July 2006. Exhibit 16.

18 REPORT N° 11,8/01, CASE 12.230, ZOILAMÉRICA NARVÁEZ MURILLO, NICARAGUA, October 15, 2001.

19 Elwood v. Morin, 84 Fed. App's 964, (9th Cir 2004); Elwood v. Morin, 87 Fed App's 617 (9th Cir, 2004); Elwood v. Drescher, 90 Fed. App's 501 (9th Cir 2004).

20 Elwood v Drescher, CV 02-04656LGB, July 28, 2006.

21 A Youth in Court Need Attorneys Who Represent Their Interests Fairly, Strongly, By Alanna Krause (age 16), Monday, July 17, 2000, *San Francisco Daily Journal*.

498. These are the words of a 16-year-old girl whose parents divorced when she was five. She tried to tell the judge, her lawyer, the guardian *ad litem*, and the counselor that she was abused by her father, a well known attorney. She was not allowed to address the court and no one listened but her mother. When she was 11, her father made a mistake and threw her against at wall at school and a teacher reported it. He then had her committed to an out of state institution where she was mistreated by the other inmates. When she returned, he sent her to boarding school. At 13, she was to return to him but instead ran away and sought the help of the juvenile protection system in Los Angeles that returned her to her mother two years later. Her father pleaded no contest to charges of child abuse and endangerment in Los Angeles juvenile court. At 18, Alanna filed a malpractice action with the State Bar against the attorney who represented her. In 2002, she filed a federal law suit against her father, her lawyer and the counselor based in tort because of suffering years of serious abuse. She was able to file in federal court because of diversity of citizenship and a claim exceeding \$75,000. She claimed a violation of her right of access to court and tortious interference with the mother-child relationship in addition to the torts and malpractice. In 2003, she settled the federal law suit for an undisclosed amount.

499. Nicholson v. Williams and Scopetta was a class action for mothers in New York who had been victims of domestic violence and whose children were removed solely on the basis that the mother had failed to protect or neglected the child because of exposure to domestic violence. The district court held that the practice violated both substantive and procedural due process. ²² On appeal, the lower court decision was upheld. ²³ Ultimately the case was settled. The actions by the child protection agency illustrated the extreme prejudice against battered women who are blamed for their own abuse and blamed for putting children in danger. Unfortunately the case only applies in juvenile court when the state is seeking to remove the child. In the family courts, the actual abusers are favored over their victims, not held accountable for the abuse, and receive custody more often than the mother who has been trying to protect the child.

500. Advocates have urged and gotten passed legislation in many states in an attempt to address this problem. Legislation in many states now mandates consideration of domestic violence in custody decisions and in some prohibits custody or unsupervised visitation to an abuser. However, as pointed out in the Battered Mothers Testimony Projects, California Protective Parents Survey and other research, the judges are simply ignoring the law. (See paragraphs 325-329, 343-368 and Exhibits)

501. Advocates have done significant research and influenced policy, written bench books, recommendations and law review articles to provide protection to the victims – all to little avail. The discrimination against women and children is so strong that litigation, legislation and policy recommendations continue to be ignored in favor of maintaining the status quo based on women’s inequality.

²² 203 F Supp 2d, 153, E.D NY March 18, 2002.

²³ 344 F 3rd 154, 164 2nd Cir. (2003).

502. As in the Yama case, 24 the parties have pursued a variety of different remedies including litigation, legislation, education, administrative and political all without success. When it is clear that further attempts would be futile, the requirement of exhaustion has been met. The petitioners and others have struggled for years to remedy this problem facing excruciating agony as they see the harm done to their children. The Battered Mother's Custody Conference held a Truth Commission in New York in January 2007. Sixteen women testified before the Commission. The findings and recommendations are attached as Exhibit 20. The Battered Women's Resource from New York presented examples of continuing injustices in the New York courts. Exhibit 21. The petitioners and the organizations representing them have gone above and beyond the requirement of exhaustion of domestic remedies. As stated in X and Z v. Argentina: 25

30. For the Commission to admit a petition, Article 46(1)(a) of the Convention stipulates that the remedies under domestic law shall have been exhausted, in accordance with generally recognized principles of international law. The Commission considers that the only domestic remedies that must be exhausted under Article 46(1)(a) of the Convention are those related to the alleged violations of the Convention. At the same time, those remedies must be adequate; in other words, they must be able to provide an effective and sufficient remedy for the violations. All internal legal systems have multiple remedies, but not all remedies apply in all circumstances. Therefore, those remedies that, although remedies in theory, offer no chance of remedying the alleged violations need not be exhausted.

503. Theoretically, multiple remedies exist. Logistically, all of them have been tried. Realistically, none of them have proven to be effective and sufficient with a reasonable prospect of success. Therefore, the requirements of Article 31 are met.

THE COMPLAINT HAS NOT BEEN SUBMITTED TO ANOTHER INTERNATIONAL SETTLEMENT PROCEEDING AS PROVIDED IN ARTICLE 33.

504. The matter has not been submitted to another international settlement proceeding as provided in Article 33 of the Rules of Procedure.

24 REPORT N° 26/06, PETITION 434-03 ADMISSIBILITY ISAMU CARLOS SHIBAYAMA *ET AL.* UNITED STATES, March 16, 2006, ¶ 48-51.

25 REPORT N° 71/00*, CASE 11.676, "X" and "Z", ARGENTINA, October 3, 2000, ¶ 30.