

INTERNATIONAL HUMAN
RIGHTS MECHANISMS, CHILD
CUSTODY AND DOMESTIC
VIOLENCE:
DO THEY WALK THE TALK?

Prof. Ruth Halperin-Kaddari



**IACHR REPORT No. 80/11; CASE 12.626
JESSICA LENAHAN (GONZALES) ET AL. v. UNITED STATES (July 21, 2011)**



CEDAW Communication No. 47/2012
Angela González Carreño v. Spain (July 16, 2014)

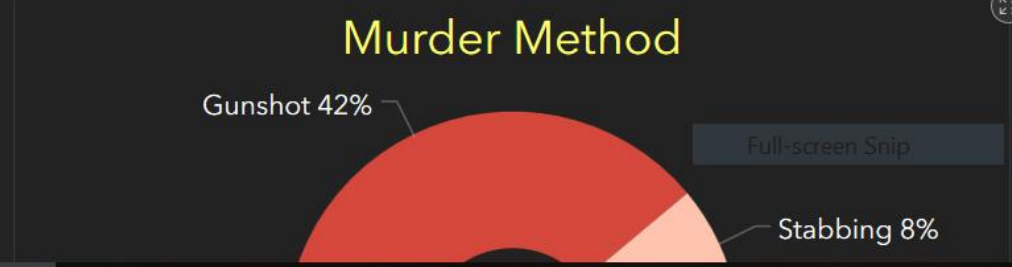
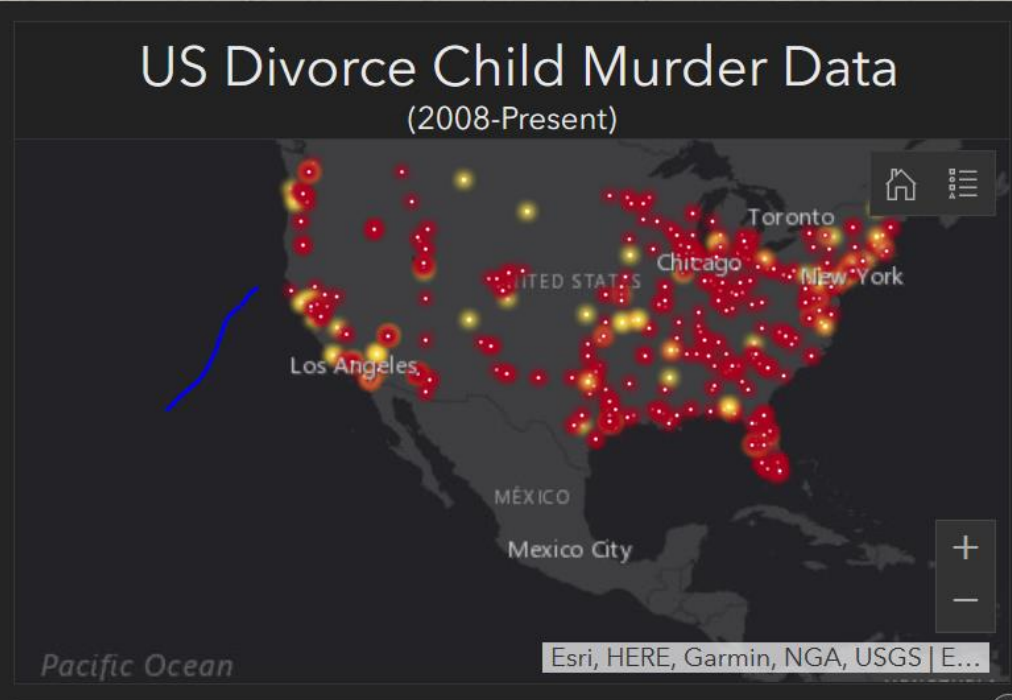


682

children murdered
by a divorcing/separating parent

Last update: 3 minutes ago

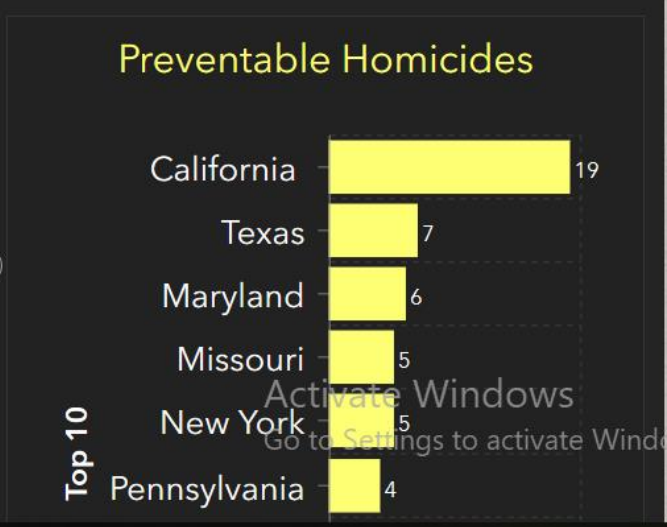
- Lauren McConnel (5) Starved to death by father. Delaware, March 2010.
- Chad (C.J.) Johnson (3) Blunt force trauma by father. Montgomery, May 2008.
- Juliana Shannon (9 mos) Killed in arson fire allegedly set by father. Marion, September 2010.
- Robert "Bobby" Beaty (11) Shot...



Reported System Failures:

92

children in 69 preventable cases

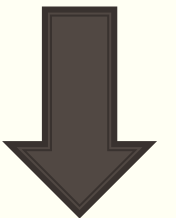


Do international institutes offer recourse?

What can be expected of the various international HR bodies?

- Searching for language that reflects awareness of the intricate relationship between disputes over the custody of children and DV, and recognizes the State's duty to protect the safety of children in such cases, whether as direct victims or indirect witnesses
- The need to balance between women's right to non-discrimination and to life free of violence, the best interest of the child and children's right to be protected from violence, and men's rights as fathers
- Common to all mechanisms examined is the relevance of their functioning to the issue of DV and child custody, as well as to the broader issue of child custody in general, such as shared physical custody, parental alienation, and more





CEDAW Article 16

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

.....

(d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;

.....

(f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;



CRC Article 18

- 1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.



Istanbul Convention Article 31

Article 31 – Custody, visitation rights and safety

1. Parties shall take the necessary legislative or other measures to ensure that, in the determination of custody and visitation rights of children, incidents of violence covered by the scope of this Convention are taken into account.
2. Parties shall take the necessary legislative or other measures to ensure that the exercise of any visitation or custody rights does not jeopardise the rights and safety of the victim or children.



Convention of Belém do Pará Article 8

- The States Parties agree to undertake progressively specific measures, including programs:

.....

d. to provide appropriate specialized services for women who have been subjected to violence, through public and private sector agencies, including shelters, counseling services for ail family members where appropriate, and care and custody of the affected children:



Some preliminary observations regarding the mechanisms

- Different scope and jurisdiction
- Distinction between courts; quazi-judicial bodies; and treaty-bodies monitoring mechanism
- In terms of substantive norms-development under international law – all are considered as “soft law”
- A closer look at the Convention of Belém do Pará and the Istanbul Convention

CEDAW – analysis of 107 COBs (2014-2017)

- In 17 of the 107 COBs (16%), the Committee addressed some aspect of child custody in relation to DV, and the recurring recommendation would be:
 - Adopt measures to ensure that domestic violence is a factor to be systematically considered in child custody decisions. (Finland)
 - (a) Ensure that visitation rights without supervision are not granted to fathers in cases in which the rights, well-being and safety of children may be jeopardized;(b) Ensure that legislation that sets joint physical custody as the default rule in determining cases of child custody is not adopted and take measures to adequately address the consideration of the specific needs of women and children to determine child custody in cases of domestic violence. (Spain)
- Parental Alienation in five dialogues (Spain 2015; Croatia 2015; Italy 2017; Costa Rica 2017; Montenegro 2017)
 - Take all measures necessary to discourage the use of “parental alienation syndrome” by experts and by courts in custody cases (Italy)
- Shared custody in six dialogues (Spain 2015; Croatia 2015; Sweden 2016; Canada 2016; Switzerland 2016; Australia 2018):
 - “Establish a monitoring mechanism to ensure that shared custody is practised and that child maintenance orders reflect the reality in relation to the time and cost allocation between parents” (Switzerland)
 - “State party to employ means to closely monitor the economic welfare of children following divorce, so as to prevent strategic or opportunistic claims for shared custody and ensure that child support payments are not inappropriately reduced.” (Canada)

CEDAW General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19

Protection

- 40. (b) Perpetrators or alleged perpetrators' rights or claims during and after judicial proceedings, including with respect to property, privacy, child custody, access, contact and visitation, should be determined in the light of women's and children's human rights to life and physical, sexual and psychological integrity, and guided by the principle of the best interests of the child.

CRC

- Between 2017-2019 CRC addressed the issue of equality with respect to child custody in the context of divorce only 5 times
- In four of them the Committee used the following language:
 - ... recommends that the SP “[e]nsure that mothers and fathers equally share the legal responsibility for their children in accordance with article 18 (1) of the Convention”
- And then came Japan, 2019:
 - "Revise the legislation regulating parent-child relations after divorce in order to allow for shared custody of children when it is in the child’s best interests, including for foreign parents, and ensure that the right of the child to maintain personal relations and direct contact with his or her non-resident parent can be exercised on a regular basis“
- Of the 87 SPs examined between 2014-2017, NO CONNECTION is made between DV and child custody
- In none of the PA is mentioned

GREVIO

- Denmark 2017:
the safety of the parent and child must be a central factor when deciding if it is in the best interest of the child for there to be visitation or a change of custody; whether this is by agreement between parents or on a decision by the State Administration.
Where parents are able to agree on custody and visitation with the assistance of the State Administration, despite a history of violence and abuse, the State Administration must carry out a risk assessment of the current dangers of domestic violence to both parent and child in light of all the circumstances of the case. This will ensure that the agreed arrangements are in the best interest of the child and in particular that the safety of the parent and the child are protected.
- Portugal 2019:
GREVIO therefore points to the urgent need to ensure that all statutory agencies involved, including family judges, follow a unified approach which prioritises the need for protection and safety of the victims of domestic violence and which recognizes that children witnessing abuse by one parent can be as affected as much as if they had experienced it themselves.
all applications to family courts should include a mandatory question on whether violence has been an issue in the relationship and whether it has been reported to

MESECVI

- Regrettably, the MESECVI website is very much not updated, and the most recent Annual Report is that of 2012, which mentions the enhanced website, which will give more visibility to the convention and the MESECVI
- We searched ALL published Reports in English, both Hemispheric and thematic Reports, and found NO references at all to the issue of child custody upon divorce
- Concern with indicators, less with substantive norms development?

ECHR; IACtHR

- Both courts' contributed significantly to the establishment of internationally recognized **due diligence** standard of States' duty to prevent, investigate, prosecute and punish the perpetrators of violence against women and girl-children, and invoked the due diligence principle as a benchmark to rule on cases and situations of violence against women perpetrated by private actors

From the Lenahan (Gonzales) decision:

- “[t]here is also a high correlation between the problem of wife battering and child abuse, exacerbated when the parties in a marriage separate...”
- “In this case, the police appear to have assumed that Jessica Lenahan’s daughters and their friend would be safe with Simon Gonzales because he was Leslie, Katheryn and Rebecca’s father. There is broad international recognition of the connection between domestic violence and fatal violence against children perpetrated by parents, and the CRPD officers should have been trained regarding this link. The police officers should also have been aware that the children were at an increased risk of violence due to the separation of their parents, Simon Gonzales’ efforts to maintain contact with Jessica Lenahan, and his criminal background. Moreover, the Commission knows of no protocols and/or directives that were in place to guide the police officers at hand on how to respond to reports of missing children in the context of domestic violence and

Cont.

- “the Commission holds that the systemic failure of the United States to offer a coordinated and effective response to protect Jessica Lenahan and her daughters from domestic violence, constituted an act of discrimination, a breach of their obligation not to discriminate, and a violation of their right to equality before the law under Article II of the American Declaration. The Commission also finds that the State failure to undertake reasonable measures to protect the life of Leslie, Katheryn and Rebecca Gonzales, and that this failure constituted a violation of their right to life established in Article I of the American Declaration, in relation to their right to special protection contained in Article VII of the American Declaration.”

The Lenahan (Gonzales) Decision as a case-study

- The Commission found the US to have violated its DD duty, but it focused on the CRPD's failures to enforce the restraining order
- “Restraining orders are critical in the guarantee of the due diligence obligation in cases of domestic violence. They are often the only remedy available to women victims and their children to protect them from imminent harm. They are only effective, however, if they are diligently enforced.”
- But the failure of the State started much earlier, with the judiciary: where is the critique of the court’s failure to order supervised visitation only?
- Why do CEDAW’s and GREVIO’s recommendations stop short of providing concrete proposals to SPs on how exactly they should “take into consideration” existing DV in determining child custody; or on how precisely to handle the gender neutrality trend calling for equal parenting time and shared physical custody; or just how to confront the PA movement?

Are we fighting yesterday's battles?

- Most pressing issues:
 - Shared physical custody
 - The concept of parental alienation (WHO's incorporation into the ICD11)
 - The “false complaints” movement