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Christianity Today. Avail-
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)ter—the national call to
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)y Catholic priests in the
m/archives/2011/11-105.

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From International to Domestic Approaches: Battling Domestic Violence in the United States

by Averil Andrews, J.D., and Jenny Khavinson, J.D.*

Editorial Note: *Authors Averil Andrews and Jenny Khavinson describe an array of strategies that have been used to arouse greater public and official concern at both national and international levels over the plague of domestic violence (DV) and its mishandling by authorities in this country. Among other approaches, they describe a lawsuit that was filed with the Inter-American Court of Human Rights against the U.S. for its violation of the human rights of DV victims, Jessica Lenahan, whose three children were murdered by their battering father, did just that, and she won.*

INTRODUCTION

In the United States, human rights (HR) violations are often associated with serious and widespread abuses that occur in faraway countries. However, HR violations happen every day in our communities on American soil, often in the form of domestic violence (DV). Though rampant in the U.S., many Americans—including the general public and state actors such as law enforcement (LE)—see DV as a family matter to be resolved within the home and not as an HR violation. However, in **Jessica Lenahan (Gonzales) v. United States,** the Inter-American Commission on Human Rights (IACHR), an international human rights (IHR) body, considered for the first time the

*Averil Andrews and Jenny Khavinson are both law school graduates of the University of Miami and have interned at the Human Rights Clinic. They wish to thank Caroline Bettinger Lopez, director, and Christina Zampas, supervising attorney, of the Human Rights Clinic at the University of Miami, Julie Goldscheid, Lisalyn Jacobs, and Joan Zorza.

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obligations of the U.S. to prevent DV and protect victims under HR standards. It found that the U.S. had violated IHR standards by failing to take reasonable measures to prevent the deaths of three girls who were victims of DV.[1] In its groundbreaking report issued on August 17, 2011, the IACHR made recommendations to the U.S. regarding its laws and policies on DV. This decision not only highlights the need for Americans to see DV as a societal problem and as an HR violation, but also highlights the need for reform within U.S. LE systems. Moreover, the decision illustrates that IHR standards can be used to advocate for greater protection of DV victims and survivors in the U.S.

Though somewhat unfamiliar in the U.S., framing DV as an HR violation is not a novel way of thinking for advocates and victims in some other countries. Indeed, IHR challenges have been brought, with varied success, against several governments for poor responses to DV. Some of these challenges resulted in significant law and policy changes.[2] Further, IHR standards, such as those recommended by the Committee on the Elimination of Discrimination Against Women (CEDAW),[3] a UN treaty body, for example, recognize that "states may be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation."[4] Often this "due diligence" standard applies to a government's responsibility to protect its citizens from violent acts of private individuals. Further, international and regional case law, including from the Inter-American Court of Human Rights, the European Court of Human Rights, and CEDAW, have required countries to abide by this standard.[5] U.S. federal and state governments could reform deficiencies in their LE systems using this IHR standard of "due diligence."

By contrast, with certain exceptions, domestic legal frameworks in the U.S. do not create affirmative duties for police officers to protect individuals from DV.[6] Without accountability mechanisms in place requiring police

[1] **Jessica Lenahan (Gonzales) v. United States**, Case 12.626, Inter-Am Comm'n H.R., Report No. 80/11, ¶ 199 (2011). Available at *http://www.law.miami.edu/hrc/pdf/USPU12626EN.pdf.*

[2] See *infra*, pp. 25-26.

[3] UN Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation No. 19, 1992, A/47/38 Supp. [hereinafter *Gen. Rec. 19*].

[4] Id.

[5] See *infra*, pp. 25-27.

[6] The Supreme Court of the United States in *Deshaney v. Winnebago Cty. Dept. of Social Services*, 489 U.S. 189, 195 (1989), held that the substantive component of the Due Process Clause does not generally require a State to protect the life, liberty, and property of its citizens against invasion by private actors. However, one exception requires State actors to affirmatively protect individuals from private acts of violence if they have initiated a "Special Relationship" between the State actor and the individual, for example, in a custodial setting. Another exception, the "State-created danger doctrine," makes a State actor liable for private acts of violence if the State actor did something affirmative to increase the danger of violence that would shock the conscience. See, e.g., **Okin v. Village of Cornwall**, 577 F. 3d 415, 430-2 (2d Cir. 2009) (holding that that police officers' conduct, "such as discussing football with [the alleged abuser] during their response to [the victim's] complaint" or communicating to the alleged abuser that his violence would go unpunished, could constitute affirmative conduct that increased the risk of violence to the victim.) This case illustrates how, under certain narrow circumstances, State actors may be held responsible for failing to protect individuals from private acts of domestic violence.

to affirmatively and appropriately respond to DV complaints, they are often ignored. Frequently the police do not respond because (1) they think that the matter should be resolved in the home;[7] (2) they do not take the victim seriously;[8] (3) they do not know how to approach the situation based on lack of experience, training or guidelines;[9] and/or (4) they want to avoid situations that could implicate civil liability for themselves,[10] among other reasons. Each of these reasons stresses the need to foster awareness, preparedness, and responsibility in LE agencies.

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This article will discuss why consideration of DV from an international HR perspective may prove a useful tool for encouraging both the American public and state actors to address DV as a public pandemic instead of as a private matter. Further, this article describes ways in which DV advocates and community members can use this perspective, including by using HR language in advocacy, encouraging police accountability through departmental investigations and policy reform, building political pressure on federal and state governments, and encouraging awareness through community participation. The recent **Lenahan** case before the IACHR makes clear that the U.S. LE systems have room for improvement in protecting citizens who are victims and survivors of DV. **Lenahan** can be a helpful tool to advocate for these changes.

Town of Castle Rock v. Jessica Gonzales

On June 22, 1999, Ms. Lenahan's estranged husband, Simon Gonzales ("Gonzales"), kidnapped his (and her) three daughters, Leslie (7), Katheryn (8), and Rebecca (10), from outside Ms. Lenahan's Castle Rock, Colorado, home one

[7] U.S. Department of Justice, *Final Report: Attorney General's Task Force on Family Violence*, 3 (noting a "traditional position, universal until this century, that what goes on within the home is exempt from public scrutiny or jurisdiction. If a husband beats his wife or if parents abuse their children, that is a private matter. This view is still widely held by the public and, although decreasingly, by some law enforcement officers, prosecutors, and judges.").

[8] Emily Sack, "Battered Women and the State: The Struggle for the Future of Domestic Violence Policy," 2004 Wis. L.Rev. 1657, 1669 (noting some officers "feel strongly that police should not interfere in family arguments or lovers' quarrels," which indicates a lack of seriousness in some officers' approaches to domestic violence complaints).

[9] Marion Wanless, "Mandatory Arrest: A Step Toward Eradicating Domestic Violence, But is It Enough?" 1996 U. Ill. L. Rev. 553, 554-546 (noting that a study conducted by the National Institute of Justice (NIJ) in Minneapolis, Minnesota, regarding police responses to domestic abuse, found that police often use "irrelevant criteria" when deciding whether to make an arrest, such as looking at the severity of abuse or the reason for the abuse before acting).

[10] See Carole Moore, (2011). *The Last Place You'd Look: True Stories of Missing Persons and the People Who Search For Them*, 43 (noting, as a former police officer, that "one of the greatest fears of police" is that of civil liability).

evening in violation of a restraining order Ms. Lenahan had against him.[11] Ms. Lenahan repeatedly urged the Castle Rock Police Department to investigate the kidnapping, indicating that she was worried about her daughters' safety. The police told Ms. Lenahan to wait and see if her husband would return the children and, if he did not, to call back. Over the course of nearly 10 hours, Ms. Lenahan called the station seven times, spoke with an officer who came to her home, and drove to the police station to submit an incident report. On one of her calls, an officer told Ms. Lenahan that she needed to take the matter to divorce court. Instead of searching for Gonzales, the Castle Rock police investigated a fire lane violation, looked for a lost dog, and took a 2:30 a.m. dinner break.[12] At 3:20 a.m. the next morning, Gonzales drove his pick-up truck to the Castle Rock police station and opened fire at the building.[13] The Castle Rock police returned fire and fatally shot Gonzales. Tragically, the police found all three daughters dead in the cab of Gonzales's truck. All three girls had been shot.[14] To this day, Ms. Lenahan's daughters' murders have not been investigated.[15] Ms. Lenahan continues to wonder how her daughters were killed and why the police failed to protect them.

Ms. Lenahan sued the town of Castle Rock, claiming that its police department had an official policy or custom of "failing to respond properly to complaints of restraining order violations" and for tolerating the "non-enforcement of restraining orders by its police officers."[16] The case ultimately went before the U.S. Supreme Court, and, in June 2005, the Court issued a 7-2 opinion, which held that Ms. Lenahan was not entitled to enforcement of her restraining order as a property interest under the Fourteenth Amendment to the U.S. Constitution, which protects citizens from being deprived of their property without due process of law. The Court reasoned that the order was "not a protected entitlement" because "government officials may grant or deny it at their discretion."[17] Further, reversing the Tenth Circuit Court of Appeals, the Supreme Court held that Colorado's mandatory arrest law, which instructed police "to use every reasonable means to enforce the restraining order,"[18] was not mandatory.[19]

Justice Stevens, joined by Justice Ginsburg, dissented. They noted that the Court should have deferred to Colorado's interpretation of its own state laws and argued that under Colorado's mandatory arrest law, the "police were *required* to provide enforcement" and "*lacked the discretion to do nothing.*"[20]

[11] **Lenahan (Gonzales) v. U.S.**, Case 12.626 at 1, 5-6. Lanham, MD: Rowman & Littlefield.
[12] Brief of Petitioners, **Gonzales v. United States**, Case 12.626, Inter-Am Comm'n H.R., 25 (Mar. 24, 2008).
[13] **Lenahan**, *supra*, n. 1 at 7.
[14] Id.
[15] Id. at 8.
[16] **Castle Rock v. Gonzales**, 545 U.S. 748, 754 (2005).
[17] Id. at 756.
[18] **Lenahan**, *supra*, n. 1 at 39.
[19] **Castle Rock**, 545 U.S. at 760-761.
[20] Id. at 784 (emphasis in the original).

This Supreme Court decision was Ms. Lenahan's final avenue for seeking a domestic remedy in U.S. courts.

Unsatisfied with the U.S. court system, in December 2005, Ms. Lenahan took her case to the Inter-American Commission on Human Rights (IACHR).[21] The IACHR, among other things, functions to investigate individual complaints of HR violations. If it finds a state in violation, it will recommend that the state implement certain measures to comply with HR standards. The IACHR is a body of the Organization of American States (OAS), which was founded under the OAS Charter in 1948 to promote peace, security, democracy, and the fundamental rights of individuals, among other principles, between American States.[22]

The U.S. is a member state of the OAS Charter[23] and is subject to the review of the IACHR. Unlike a court, the recommendations of the IACHR are non-binding, although they are a source of moral and political pressure on the U.S. and other member states.[24] A petitioner may be heard by the IACHR once she has exhausted all domestic remedies. IACHR decisions give activists an opportunity to highlight the lack of remedy within a domestic legal system.[25] It can be embarrassing for an international body to report that a country has violated international standards by failing to protect the HR of its citizens. As a result, IACHR decisions can be a powerful way to pressure the government to reconsider its own laws, policies, and customs.

Ms. Lenahan argued to the IACHR that the U.S. failed to protect her and her daughters' rights to free enjoyment of HR guaranteed by the American Declaration of the Rights and Duties of Man (American Declaration).[26] Specifically, she argued that the U.S. had violated: her daughters' right to life and personal security under Article I; her daughters' rights to family and private life under Articles V and VI; and her and her daughters' rights to special protection from violence under Article VII.[27] Further, Ms. Lenahan argued that

[21] Ms. Lenahan's case was taken to the IA-CHR by attorneys from the University of Miami School of Law, Columbia Law School, and the American Civil Liberties Union. (*Castle Rock v. Gonzales* was argued before the U.S. Supreme Court by separate attorneys.) See Press Release of Petitioners, "International Commission Finds United Stated Denied Justice to Domestic Violence Survivor" (August, 2011). Available at *http://www.law.mi-ami.edu/hrc/pdf/Lenahan_IACHR_Report_PR_081711.pdf*. See also Emily J. Martin & Caroline Bettinger-Lopez, "**Castle Rock v. Gonzales** and the Future of Police Protection for Victims of Domestic Violence," *Domestic Violence Report, 11*(1), Oct/Nov 2005.
[22] Charter of the Organization of the Organization of American States, Ch. I, Art. 2, Dec. 13, 1951, 119 U.N.T.S. 3.
[23] *Member States*, The Organization of American States (accessed Oct. 10, 011). Available at *http://www.oas.org/en/member_states/default.asp*.
[24] The OAS also has a second component called the Inter-American Court of Human Rights; however, the U.S., unlike most OAS parties, is not subject to its jurisdiction because it did not ratify the treaty that created it, the American Convention on Human Rights. See Margaret Huang, "Going Global: Appeals to International and Regional Human Rights Bodies," 2 Bringing Human Rights Home 99, 112-114 (2007).
[25] Id. at 118.
[26] Brief of Petitioners, **Gonzales v. United States**, Case 12.626, *supra*, n. 12 at 56.
[27] Id. at v.

the failure of the police to respond to her complaints and the failure of the court to provide her with an effective remedy violated her and her family's rights to judicial protections.[28] She also argued that the U.S.'s failure to conduct an investigation into her daughters' deaths violated her and her family's right to truth.[29] Lastly, Ms. Lenahan argued that she had not been afforded the equal protection of the law to which she was entitled under Article II, because the "inadequate protections for and remedies available to victims of DV in the [U.S.] have a disproportionate effect on women . . . "[30] Ms. Lenahan complained that where a state fails to take reasonable steps to protect these rights, liability is incurred; and that this responsibility is heightened when vulnerable groups within a society, such as women and children, are implicated.[31]

The IACHR agreed with Ms. Lenahan's arguments, and on August 17, 2011, found the U.S. in violation of Articles I, II, VII, and XVIII of the American Declaration.[32] It determined that the failure of the U.S. to protect women from gender-based violence constitutes a form of discrimination, and denies women their right to equality.[33] Further, the IACHR found that Ms. Lenahan's rights had been violated because the U.S. had a duty to protect her and her children from DV under its obligation to provide her equal protection before the law.[34]

Based on these findings, the IACHR recommended that the U.S. provide both individual and general remedies. In terms of individual measures, it recommended that Ms. Lenahan be given reparations resulting from the incident, an investigation into her children's deaths, and an investigation into the failures of the Castle Rock police department to enforce her restraining order. Further, the IACHR proposed that the U.S. address the systemic failures of its police departments in responding to DV complaints. It recommended that the U.S.'s local, state, and federal governments initiate legislative and policy changes to protect women from imminent threats of violence. Additionally, it recommended that steps be taken to determine the responsibilities of public officials for violating state and federal laws, that training programs be instituted to train public officials on how to execute the laws, and that protocols be designed for proper investigations of missing children.[35] These recommendations can add pressure for domestic policy and law changes in the U.S.[36]

[28] Id. at v-vi.
[29] Id. at v-vi.
[30] Id. at 142.
[31] Id. at 56.
[32] **Lenahan**, *supra*, n.1 at 53.
[33] Id. at 43.
[34] Id. at 52-53.
[35] Id. at 53.
[36] Huang, *supra*, note 24, at 114.

INTERNATIONAL HUMAN RIGHTS CASES

In coming to its conclusions, the IACHR emphasized that Colorado itself, through passing a mandatory arrest law to respond to the serious problem of DV in the state, had acknowledged the government's responsibility to protect DV victims and their children.[37] As discussed above, this notion of governmental responsibility is essential to the concept of "due diligence" in IHR law. Many other countries agree (at least in theory) to be held to a due diligence standard regarding the prevention of DV through their participation in HR agreements, including the European Commission on Human Rights,[38] a regional European treaty; recommendations of CEDAW, a UN body created by a UN treaty;[39] and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belém do Pará), a regional Inter-American treaty.[40] Examining specific ways in which regional and IHR systems, through individual complaints, have held States accountable for the due diligence standard, may serve as a model to the U.S. to implement the recommendations of the IACHR.[41]

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Furthermore, the U.S., as a member of the United Nations, is subject to the evaluation of Special Rapporteurs, who act as experts and spokespersons for a particular country or a HR topic. Rashida Manjoo, the Special Rapporteur on Violence Against Women, responded to the **Lenahan** decision, by stressing that "[v]iolence against women is the most pervasive human rights violation which continues to challenge every country in the world, and

[37] **Lenahan**, *supra*, n.1 at 40.
[38] [European] Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 3, 1953, 213 U.N.T.S. 222 (the due diligence standard has been interpreted from this treaty under art. III, the right to be free from inhumane and degrading treatment; art. II, the right to life; and art. VIII, the right to private life.) See also *infra*, pp. 11-12.
[39] Gen. Rec. 19, *supra*, note 3 (discusses how the CEDAW Committee defines due diligence). The CEDAW Committee was created by the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), art. 17-30, Dec. 18, 1979, 1249 UNTS 13.
[40] Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women "Convention of Belem Do Para," art. 7, June 9. 1994, 33 I.L.M. 1534 (stating that "[t]he States Parties condemn all forms of violence against women and agree to pursue by all appropriate means and without delay, policies to prevent, punish and eradicate such violence," including application of "due diligence to prevent, investigate and impose penalties for violence against women . . . ").
[41] Discussing due diligence, the IACHR noted that ". . . while the organs of the Inter-American System [like the U.S.] are not bound to follow the judgments of international supervisory bodies, their jurisprudence can provide constructive insights into the interpretation and application of rights that are common to regional and international human rights systems." See Lenahan, *supra*, n. 1 at 38.

the U.S. is no exception."[42] Further, she added that "[t]he U.S. Government should reassess existing mechanisms for protecting victims and punishing offenders, and establish meaningful standards for enforcement of protection orders and impose consequences for a failure to enforce them."[43] Ms. Manjoo placed further pressure on the U.S. government to protect its citizens from DV using HR standards. Advocates might use Ms. Manjoo's report and the **Lehahan** decision to advocate for the U.S. to implement increased protection and to design effective and appropriate remedies for DV victims. Beyond these sources, advocates may look to regional and IHR case law as a guide for developing these human rights standards, both in and out of a DV context.

THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

The Inter-American Court of Human Rights considered the due diligence standard in the seminal case of **Velásquez Rodríguez v. Honduras.**[44] Recognizing a State's obligation to prevent, investigate, and punish HR violations committed by private actors under the American Convention on Human Rights (ACHR), the Court held that a State had a duty to take:

> reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.[45]

The Court clarified that, regardless of the result, as long as the State attempts to prevent or investigate the violation "in a serious manner and not as a mere formality" it fulfills its obligation.[46]

In another IACHR case, **Maria da Penha v. Brazil,**[47] a woman challenged Brazil's failure to take effective measures to prosecute her perpetrator, which may have contributed to her permanent paraplegia.[48] This case was based on an incident in which the victim's husband shot her in her sleep. When the victim returned from her visit to the hospital to treat her gunshot injuries, her husband tried to electrocute her while she was in the bathtub.[49] The victim alleged that despite knowledge of the husband's extremely violent tendencies, the State failed to take effective measures to prosecute or

[42] *Violence Against Women: UN Expert Urges Full Policy Review After Regional Body Finds the U.S. Responsible for Rights Violations*, United Nations Human Rights, Office of the High Commissioner for Human Rights (last visited, Oct. 6, 2011). Aavailable at *http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11325&LangID=E.*
[43] Id.
[44] **Velásquez Rodríguez,** 1989 Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 172 (July 29, 1998).
[45] Id. at ¶ 174.
[46] Id. at 177.
[47] **Maria da Penha Maia Fernandes v. Brazil,** Case 12.051, Inter-Am Comm'n H.R., Report No. 54/01 (2001).
[48] Id. at ¶ 2.
[49] Id. at ¶ 9.

punish him.[50] The Commission found that the State violated its obligation to "prosecute and convict . . . and to prevent" these practices of abuse.[51] Based on the Commission's decision, the Brazilian government enacted the Maria da Penha Law on Domestic and Family Violence, which established "special courts and stricter sentences for offenders, but also other instruments for the prevention and relief in cities of more than 60,000 inhabitants, such as police stations and shelters for women."[52]

The overall results of the implementation of the Maria da Penha Law remain undetermined.[53] Amnesty International, for example, indicated that "[a]lthough the law was a major advance, lack of resources, difficulties in enforcing exclusion orders and poor support services hampered effective implementation."[54] According the U.S. State Department:

> The Maria da Penha law increased the penalty from one to three years in prison and created special courts. There was no information available on the numbers of prosecutions or convictions for domestic violence, although in July CNN reported 10 women were killed in domestic violence each day.[55]

It may be too soon to tell what kind of headway the Maria de Penha Law has made, but some reports on its progress make it seem promising. UN Women recently released a study on gender justice that commented on the law's progress, mentioning that Brazil's police have broader responsibilities for securing protective measures and providing assistance to survivors.[56] Brazil has increased its women's police stations, which have been given leading roles in initiating legal proceedings in cases of violence against women. A study indicated that 70% of women who used these stations felt welcome and that 75% were given guidance, information, and referrals to supportive agencies. The study also identified areas for improvement, including disseminating information regarding the law and providing training to the staff in these women's police stations, improving data collection, and providing specialized help to specific groups like young girls and teenagers.[57] Though its

[50] Id. at ¶ 56.
[51] Id.
[52] *Maria da Penha Law: A Name that Changed Society,* UN Women. Available at *http://www.unwomen.org/2011/08/espanol-ley-maria-da-penha/.*
[53] See *Brazil: Domestic Violence* (including information on the Maria da Penha law on domestic and family violence and its implementation) (2006 - October 2008), Refworld, UNHCR: The UN Refugee Agency. Available at *http://www.unhcr.org/refworld/country,IRBC,BRA,49913b6123,0.html.*
[54] *Brazil: Amnesty International Report* (2008). Amnesty International. Available at *http://www.amnesty.org/en/region/brazil/report-2008.*
[55] 2010 Human Rights Report: Brazil, 2010. Country Reports on Human Rights Practices, U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, April 8, 2011. Available at *http://www.state.gov/documents/organization/160156.pdf.*
[56] Progress of the World's Women in Pursuit of Justice, UN Women Gender Justice Study 58 (2011-2012). Available at *http://progress.unwomen.org/pdfs/EN-Report-Progress. pdf.*
[57] Id.

implementation may have room for improvement, advocate groups such as UN Women consider the Maria da Penha decision a landmark for DV advocates.[58] It is an example of an affirmative step taken by a State to reform its LE system based on an IACHR decision regarding DV.

In 2009, the Inter-American Court reiterated the due diligence standard articulated in **Velasquez** in a gender-based violence context.[59] In the case of **González et al. (Cotton Fields) v. Mexico**, the court considered Mexico's responsibilities for protecting its citizens from HR violations committed by private actors, specifically its responsibilities to protect its women from the mass rapes and murders that occurred on the U.S.-Mexico border.[60] The Court found that these violent crimes amounted to systematic discrimination against women[61] and that Mexico violated its women's HR by failing to prevent, investigate, and punish the perpetrators.[62] Guided by the American Convention on Human Rights and the Convention Belém do Pará, the Court held:

> States should adopt comprehensive measures to comply with due diligence in cases of violence against women. In particular, they should have an appropriate legal framework for protection that is enforced effectively, and prevention policies and practices that allow effective measures to be taken in response to the respective complaints. The prevention strategy . . . should prevent the risk factors and . . . strengthen the institutions that can provide an effective response in cases of violence against women.[63]

Beyond recommending changes in Mexico's legal framework, the Court required Mexico to provide reparations to the individual victims. These included: (1) investigations to identify and prosecute the victims' murderers; (2) investigations, prosecutions, and sanctions of state officials who committed irregularities, omissions, and negligence when investigating the crimes; and (3) a support fund that provided monetary compensation to the victims or their families.[64]

UNITED NATIONS AND EUROPEAN HUMAN RIGHTS SYSTEMS

Beyond the Inter-American System, other international and regional systems have implemented similar standards. **A.T. v. Hungary** was a case that went before CEDAW, a U.N. treaty body, in which the petitioner had been subjected to repeated acts of violence and severe threats by her common law

[58] Id. at 18.
[59] *Case of González et al. ("Cotton Fields") v. Mexico*, Inter-Am. Ct. H.R., ¶ 231 (Nov. 16 2009). Available at *http://www.corteidh.or.cr/docs/casos/articulos/seriec_205_ing.pdf*.
[60] Id.
[61] Id. at ¶ 133.
[62] Id. at ¶ 338.
[63] Id. at ¶ 258.
[64] Id. at ¶ 449, 457, 552.

husband.[65] The petitioner argued to CEDAW that she had no avenue to escape from her husband because (1) there was no law in place for her to seek a restraining or protective order against him and (2) no shelter would take her in with her disabled child.[66] She complained that Hungary violated her rights to be free from discrimination by failing in its duty to provide her with effective protection from the risk of violations to her physical integrity, physical and mental health, and her life from her former common law husband.[67] CEDAW agreed and found numerous violations of law, pointing out that the government did not provide the petitioner with any means to protect herself from her abuser.[68] It held that the State failed its obligations under the CEDAW law to prevent and protect women from violence.[69] It highlighted the need for increased judicial protection, for access to exclusion orders and for the creation of shelters.[70] Further, it recommended that Hungary take effective measures to protect the petitioner and to implement legislation and programs to provide short- and long-term protection to DV victims and survivors.[71]

Opuz v. Turkey was a similar case filed in the European Court of Human Rights, which is part of the regional European HR system. The petitioner argued that she was entitled to "the enjoyment of the rights and freedoms" without discrimination of the Convention for the Protection of Human Rights, including on the grounds of sex.[72] The petitioner's husband repeatedly violently abused her; his violent acts included running her over with a car and stabbing her mother. Although prosecuting authorities in Turkey knew of the husband's criminal activities, they failed to prosecute or detain him, leaving him free to return and murder the wife's mother. The petitioner therefore argued that Turkey's failure to use due diligence to investigate and prosecute her husband's acts had violated her right to freedom from torture and the right to life under the European Convention.[73] After considering CEDAW, the European Convention, **Velasquez Rodriguez v. Honduras, Maria da Penha v. Brazil**, and comparative law sources,[74] the Court agreed with the petitioner, finding that Turkey's "failure to take reasonable measures that could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the state."[75] In other words, because Turkish officials knew of the husband's violent propensity, Turkey had a responsibility to take reasonable measures to prevent him from committing further violent acts.

[65] **A.T. v. Hungary**, Communication No. 2/2003 (Jan 26, 2005).
[66] Id. at ¶ 9.4.
[67] Id. at ¶ 9.2.
[68] Id. at ¶ 9.3.
[69] Id. at ¶ 9.2.
[70] Id. at ¶ 9.3.
[71] Id. at I and II.
[72] **Opuz v Turkey**, 33401/02 Eur. Ct. H.R. 177 (2009) (citing art. 14 of the Convention for the Protection of Human Rights, 1953, 213 U.N.T.S. 222).
[73] Id. at ¶ 125.
[74] Id. at 15-20.
[75] Id. at ¶ 136.

While the Court was not bound by Inter-American regional standards, it used these standards for guidance when applying its own regional standards.[76]

USING THE *LENAHAN* DECISION

Decisions from international HR bodies, such as **Lenahan**, can be used to pressure U.S. federal and state governments to change their laws and policies. Public and political pressure encourages the implementation of the IACHR recommendations and the development of international HR standards in the U.S. Although the IACHR did not explicitly criticize the U.S. Supreme Court's decision in **Castle Rock**, it clearly found the U.S. government in violation of its HR obligations, which brings a host of pressures to bear. For example, after this decision, the Commission may choose to adopt various follow-up measures, such as requesting information or holding hearings to monitor U.S. compliance with the recommendations.[77] DV advocates could consider using this decision to pressure the U.S. government to adhere to the IACHR's recommendations.

Joan Zorza has identified various ways in which DV advocates can apply such political pressure, e.g., by drafting letters to members of the press, legislators, police, and courts advising them to consider the **Lenahan** case and other international cases in their fields of work or encouraging police, lawyers, judges, and child protection workers to teach the **Lenahan** case in job trainings.[78] Additionally, although it is difficult to introduce international decisions into the U.S. legal system, the **Lenahan** decision and other international decisions could be used as persuasive authority in legal arguments. Generally, judges may not be familiar with IHR standards, and therefore may be disinclined to hearing about international cases in arguments.[79] However, there is a slowly growing recognition in the courts of such decisions, and although rare, U.S. courts have looked to international cases in the past. For example, in **Roper v. Simmons**, the U.S. Supreme Court cited to IHR standards to support its finding that the death penalty for juvenile offenders was unconstitutionally disproportionate punishment.[80] The Supreme Court also

[76] Id. at 15-20.

[77] Article 48 of the IACHR Rules of Procedure establishes: Follow-up. 1. Once the Commission has published a report on a friendly settlement or on the merits in which it has made recommendations, it may adopt the follow-up measures it deems appropriate, such as requesting information from the parties and holding hearings in order to verify compliance with friendly settlement agreements and its recommendations; 2. The Commission shall report on progress in complying with those agreements and recommendations as it deems appropriate.

[78] Joan Zorza, Jewish Women International Webinar: "International Commission Finds United States Denied Justice to Domestic Violence Survivor." (September 15, 2011) [hereinafter, Webinar]. Available at *http://www.law.miami.edu/hrc/hrc_gonzalez_usa.php*; Joan Zorza, "Things We Can Still Do After the *Castle Rock v. Gonzales* Decision," *Domestic Violence Report*, *11*(1), Oct/Nov 2005.

[79] Columbia Law School, *Human Rights & Domestic Violence: An Advocacy Manual* 14, (2010). Available at *http://www.law.columbia.edu/null/download?&exclusive=filemgr.download&file_id=164338*.

[80] **Roper v. Simmons**, 543 U.S. 551 (2005).

noted that "[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."[81] Although using international decisions can be controversial, attorneys should note that strategic uses of international decisions could be fruitful as supporting law.[82] Advocates and legal service providers can become familiar with these international arguments and, when appropriate, use them as persuasive authority.

FEDERAL LEGISLATION

In addition, the recommendations from the IACHR may be useful for federal level advocacy. The Violence Against Women Act of 1994 (VAWA) was the first piece of federal legislation designed to end violence against women in various aspects, including DV.[83] In 2005, VAWA's already existing programs were reauthorized and many new programs were created.[84] Whenever VAWA is up for reauthorization, as it was this year, the DV community must press for renewal of its various programs. Furthermore, as the government struggles with a tight federal budget, the DV community should urge Congress not to make any funding cuts when appropriating their federal funds.[85]

Although using international decisions can be controversial, attorneys should note that strategic uses of international decisions could be fruitful as supporting law. Advocates and legal service providers can become familiar with these international arguments and, when appropriate, use them as persuasive authority.

Moreover, the DV community could include the **Lenahan** decision as an additional tool in their law reform advocacy. For example, Joan Zorza has urged that mandatory arrest laws might be amended to include unambiguous mandatory language such as: "police *will arrest without discretion*" if a protective order is violated. Not only should these laws be explicit, but LE should be better trained on the importance of these laws and the effects of not following them.[86] This suggestion is just one of many perspectives on how DV advocates can support changes in VAWA and other relevant federal legislation.

[81] Id. at 578.

[82] *Human Rights & Domestic Violence: An Advocacy Manual*, *supra*, note 79, at 14.

[83] Pub. L. 103-322, Tit. IV, 108 Stat. 1796 (1994).

[84] Garrine P. Laney, *Violence Against Women Act: History and Federal Funding* 3. Congressional Research Service Report for Congress (2010). Available at *http://www.ilw.com/immigrationdaily/news/2010,0525-crs.pdf*.

[85] For example, the Campaign for Funding to End Domestic and Sexual Violence, which is chaired by the National Network to End Domestic Violence, presses for strategic increase in the VAWA yearly budget. *Public Policy: Funding and Appropriations*, National Network to End Domestic Violence. Available at *http://www.nnedv.org/policy/issues/funding.html*.

[86] Zorza, Webinar, *supra*, note 78.

POLICE ACCOUNTABILITY: DEPARTMENT OF JUSTICE INVESTIGATIONS

An additional mechanism for holding police accountable for appropriately responding to incidents of DV is an investigatory mechanism that allows the U.S. Department of Justice (DOJ) to investigate LE agencies and suggest reforms when their standards and practices are found to be inadequate. The Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141 (Section 14141), and the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3789d (Section 3789d), are two valuable provisions that the DOJ can utilize to address a pattern or practice of misconduct in LE agencies. Section 14141 authorizes the Attorney General (AG) to conduct investigations and initiate civil actions when there is *reasonable cause* to believe that LE is engaged in a pattern or practice that "deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.[87] Moreover, Section 3789d authorizes the AG to conduct investigations and to initiate civil actions against any department or program that receives federal financial assistance from the Office of Justice Programs (OJP), to eliminate a pattern or practice of discrimination on the "basis of race, color, religion, national origin or sex."[88] Furthermore, Section 3789d allows an individual who was aggrieved by the pattern or practice to sue the LE agency in certain circumstances.[89]

On March 16, 2011, the DOJ announced a finding of gender-biased policing in the New Orleans Police Department (NOPD) regarding its failures to investigate sexual assault and DV. Specifically, the DOJ found systemic deficiencies in responding to, handling, and investigating DV cases. The official report stated that even in the Domestic Violence Unit's manual, there was no specific guidance regarding "protocols for 911 operators taking DV calls; initial entry and preliminary investigation of DV scenes; identifying and documenting victim injuries; or procedures for follow-up investigations."[90] Furthermore, as of July 2010, there had been 6,200 calls for DV assistance since the beginning of the year. There were only three detectives employed in the Domestic Violence Unit at the time of the investigation. Due to the great volume of cases, only 1,200 of these cases were taken by the detectives, whereas another 2,700 were handled by officers in the individual districts, and at least another "1,500 were reported 'missing' due to the recent transition to a new reporting system." Specially trained DV detectives handled less than a third of the DV cases under investigation. The remaining DV cases, the DOJ found, were not properly investigated or documented. For instance, follow-up interviews with witnesses, reviews of communication tapes, and

[87] 42 U.S.C. § 14141 (2006).
[88] 42 U.S.C. § 3789d (2006).
[89] 42 U.S.C. § 3789d(c)(4)(A) (2006).
[90] U.S. Dep't of Justice, Civil Rights Division, Investigation of the New Orleans Police Department (2011). Available at *http://www.justice.gov/crt/about/spl/nopd_report.pdf.*

follow-up photographing were not conducted by the NOPD, all of which are crucial to a DV investigation. This was the first time the DOJ investigated a U.S. police department's gender-biased policing. In response to the findings, the NOPD has already taken steps towards addressing their deficiencies. For example, officers have attended special trainings on DV; and there is a new commander for the unit, who, hopefully, will work with the community to improve his unit's performance.[91]

A few months later, under similar auspices, the DOJ investigated the Puerto Rico Police Department (PRPD). On September 5, 2011, the DOJ reported that the PRPD failed in many ways to address DV and sexual assault. Although the DOJ did not identify these failures as a pattern or practice of misconduct, it found these deficiencies to be a serious concern. Further, the DOJ reported that PRPD has a "longstanding failure to effectively address DV and rape," and along with its institutional deficiencies, this "may rise to the level of a pattern and practice of violations of the Fourteenth Amendment and the Safe Streets Act." In 2006, there were 23 reports of women who were murdered at the hands of their domestic partners in Puerto Rico.[92] In 2008, there were 26.[93] The DOJ referenced a report which placed Puerto Rico as the number one territory in which women over the age of 14 are killed by their partners.[94]

The DOJ explained that these statistics, along with the low number of protection and arrest orders, show that women are not using the legal resources available to them for protection against DV.[95] Furthermore, the DOJ found that PRPD officers committed these DV crimes themselves and were not disciplined. The DOJ reported that, from 2005 to 2010, the PRPD received 1,459 civilian complaints alleging DV by officers. Additionally, the DOJ identified 98 officers who, between 2007 and 2010, had been arrested between two and four times on DV charges. Of these 98, nine were terminated, five left, and 84 still remain active. All of these problems regarding DV within the PRPD may amount to a pattern or practice that can be challenged under Section 14141 and Section 3789d, the DOJ noted.[96]

The outcomes of these investigations show that under Section 14141 and Section 3789d, DV advocates and service providers can take steps to encourage increased accountability of LE agencies for their policing practices. Any individual or group can file a complaint with the DOJ requesting an

[91] Id.
[92] Id.
[93] U.S. Dep't of Justice, Civil Rights Division, Investigation of the Puerto Rico Police Department (2011). Available at *http://www.justice.gov/crt/about/spl/documents/prpd_letter.pdf.*
[94] José Sanmartín Esplugues, Isabel Iborra Marmolejo, Yolanda García Esteve, and Pilar Martínez Sánchez, *Third International Report Partner Violence Against Women Statistics and Legislation.* Instituto Centro Reina Sofia, Valencia International University (2010). Available at *http://www.malostratos.org/images/pdf/010%20informe%20reina%20sofia.pdf.*
[95] Investigation of the Puerto Rico Police Department *supra*, n. 93.
[96] Id.

investigation under these two statutes. The DOJ examines these requests to identify whether there might be violations of a federal law and whether these violations could constitute a pattern or practice.[97] Advocates and service providers should feel encouraged to submit information they may already have from their work to the DOJ. The Special Litigation Section of the Civil Rights Division relies on DV organizations, advocacy groups, attorneys, and prosecutors to submit credible documented information in order to initiate these investigations.[98] In light of the IACHR decision in the **Lenahan** case, advocates in Castle Rock, Colorado, for example, may consider requesting that the DOJ investigate the Castle Rock Police Department's policies in responding to DV crimes. A DOJ investigation could lead to the implementation of the IACHR's recommendation to investigate the death of Ms. Lenahan's daughters.

POLICE ACCOUNTABILITY: PRIVATE RIGHT OF ACTION USING 42 U.S.C. § 3789D

Besides the Attorney General, an individual can also file a claim against an LE agency under Section 3789d for a pattern or practice that violates statutory or constitutional requirements. To succeed on this claim, the individual must show that: (1) the LE agency receives federal funding under the Omnibus Crime Control and Safe Streets Act;[99] and (2) administrative remedies have been exhausted.[100] The exhaustion of administrative remedies is presumed "upon the expiration of 60 days after the date the administrative complaint was filed with the Office of Justice Programs or any other administrative enforcement agency" or unless within that time period "there has been a determination . . . on the merits of the complaint, in which case such remedies shall be deemed exhausted at the time the determination becomes final."[101] The DOJ is an example of an administrative enforcement agency with which a complaint can be filed in order to exhaust the administrative remedies before an individual can file a claim under Section 3789d.

Of the few attempts that have been made by individuals to file a private right of action using Section 3789d, they either failed to show that federal funding existed or to show that they have exhausted administrative remedies.[102] Scarce case law and other literature surrounding Section 3789d indicates

[97] U.S. Dep't of Justice, Civil Rights Division, "Special Litigation Section Frequently Asked Questions." Available at *http://www.justice.gov/crt/about/spl/faq.php*.
[98] Id.
[99] **Nash v. City of Oakwood**, 541 F.Supp. 220, 223 (S.D.Ohio 1982).
[100] 42 U.S.C. § 3789d(c)(4)(A) (2006).
[101] Id.
[102] See, e.g., **Aguirre v. San Leandro Police Dep't.**, No. 10-04364, 2011 WL 738292 (N.D. Cal. Feb. 22, 2011) (*Pro se* case where the plaintiff failed to allege that the police department was receiving federal funding or that he exhausted his administrative remedies before filing the civil complaint); **Nash v. City of Oakwood**, 541 F.Supp. 220, 223 (S.D. Ohio 1982) (dismissing plaintiff's claim because she could not bring suit under the Omnibus Crime Control and Safe Streets Act if she did not exhaust her administrative remedies).

that it may not be used much, and lawyers may want to further explore the use of this private right of action.[103] Successful litigation of these claims could increase police accountability, which in turn might promote better police policies to protect victims and survivors of DV.

COMMUNITY AWARENESS AND INVOLVEMENT

Further collaboration with communities can be a powerful approach to confronting the problem of violence against women. Community awareness and involvement are important factors in promoting protection of women from DV violations. For instance, October is national Domestic Violence Awareness Month, and April is Sexual Assault Awareness Month. These labels create a basis for DV advocates to promote community interaction about these issues. One way to go about this is to browse the website (*http://dvam.vawnet.org*) of the Domestic Violence Awareness Project, which is one of many groups across the country that support public and prevention education efforts. The website has a page specifically dedicated to event ideas, which illustrates examples of events and various ways to plan them.[104]

Although domestic violence is a difficult issue to address in a public setting because of its unpleasant and private content, openly speaking about it is a crucial step in having the public understand, respond, and work towards preventing it.

Another important basis for community involvement may be local legislative vehicles. For example, Vice Mayor Quall, of Cincinnati, Ohio, submitted a resolution to the Cincinnati City Council on July 28, 2011, declaring that "freedom from domestic violence is a fundamental human right" and "that local governments have a responsibility to continue securing this right on behalf of their citizens."[105] Community leaders and activists can further foster legislative initiatives such as this one and urge groups such as police and the judiciary to promote statements like these through their lines of work.

Furthermore, although DV is a difficult issue to address in a public setting because of its unpleasant and private content, openly speaking about it is a crucial step in having the public understand, respond, and work towards preventing it. Everyone, including young children, college-aged young men and women, and even elderly grandparents, should feel encouraged to talk about DV in their schools, homes, and work places. For instance, throughout April 2011, many high profile individuals from the Office on Violence Against

[103] Id.
[104] *Events*, The Domestic Violence Awareness Project (last visited Oct. 4, 2011). Available at *http://dvam.vawnet.org/materials/events.php*.
[105] Cincinnati City Council Res. 0047-2011 (2011) (Submitted by Vice Mayor Qualms). Available at *http://city-egov.cincinnati-oh.gov/Webtop/ws/council/public/child/Blob/33497.pdf;jsessionid=29F32575A142D399B4BDDAA85FC5F1rpp=-10&m=2&w=doc_no%3D'201101139'*.

Women team visited nine different states, speaking with the general public, to discuss sexual assault prevention and awareness.[106] These kinds of discussions should be developed not only for the specially-designated months, nor only with public figures, but with community leaders all throughout the year.

Lastly, there is a growing recognition of the importance of the active role of men in combating DV and promoting women's rights. Men can act as "agents of change" by merely speaking out against DV, encouraging other men to do so, and by being role models of non-violent behavior for the younger generations.[107] Advocates in the U.S. have a new outlet to include men in the forefront of promoting safety against DV. In April of this year, the Office of Violence Against Women granted $6.9 million in awards to projects in the Engaging Men Grant Program.[108] Applying for grants under this program can be one way to include men in the fight against DV.

These are just some examples of potential ways to get the community involved, but there are many more to be explored. In light of the IACHR recommendations in the **Lenahan** case, community mobilization functions as a supplement to the changes that the U.S. government is supposed to be making to protect women from violence. As a whole, the public needs to put aside the idea that DV is a private matter that happens behind closed doors. When the subject of DV comes out into the public arena, it becomes an HR issue. DV changes from being only a family issue, or only a women's issue, and it becomes a *human* issue. Jessica Lenahan's tragic story and many others like it are unacceptable violations of various HR. When DV becomes an HR issue, it becomes everyone's responsibility, including the government and public, to protect others from it.

CONCLUSION

Afforneys and advocates should familiarize themselves with the IHR standards regarding DV and consider where these standards can be a useful advocacy tool for legal action and policy reform. Let us all challenge our country's current outlook on DV, and urge changes that will protect more victims from DV.

[106] U.S. Dep't of Justice, Office of Public Affairs, *Justice and Education Departments Commemorate Sexual Assault Awareness Month with Students at Banneker High School* (2011). Available at *http://www.justice.gov/opa/pr/2011/April/11-asg-547.html*.

[107] Council of Europe, Campaign to Combat Violence against Women, including Domestic Violence, *Men's Active Participation in Combating Domestic Violence 8*, (2007). Available at *http://www.coe.int/t/dg2/equality/domesticviolencecampaign/Source/EG-VAW-SEM2_Zagreb.pdf*. (The Council of Europe launched this campaign to eradicate violence against women. The seminar on men's active participation was one of the five regional seminars where 70 governmental and NGO representatives discussed the active role of men to combat domestic violence).

[108] U.S. Dep't of Justice, Office of Public Affairs, *Justice Department Announces $6.9 Million in Grants to Engage Men in Preventing Crimes Against Women* (2011). Available at *http://www.justice.gov/opa/pr/2011/April/11-ovw-521.html*.

Fighting False Allegations of Parental Alienation Raised as Defenses to Valid Claims of Abuse

by Nancy S. Erickson, J.D., L.L.M., M.A.*

Editor's Note: In this piece, Nancy Erickson provides a compendium for challenging the typical allegations made against domestic violence victims by batterers and their attorneys during child custody litigation. She dissects the circular reasoning and gender-biased thinking inherent in charges like "parental alienation," a legal strategy often used against protective mothers claiming child or intimate partner abuse.

[E]mphasis on child safety must be a much larger focus and much more attention must be paid to the gender bias that has led to the widespread acceptance of myths that mothers are more likely to make false allegations and that children who resist visitation have [Parental Alienation Syndrome or parental alienation].[1]

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[1] Geraldine B. Stahly, "Domestic Violence and Child Custody: A Critique of Recent [*Journal of Child Custody*] Articles," 4(3/4) *J. Child Custody* 1, 11 (2007).