

*Lenahan (Gonzales) v. United States of America:*  
Defining Due Diligence?

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INTRODUCTION

The United Nations reports that the most common form of violence experienced by women around the world is physical violence inflicted by an intimate partner.<sup>1</sup> On a global average, at least one in three women is beaten, coerced into sex, or otherwise abused by an intimate partner in the course of her lifetime.<sup>2</sup> Thus, it is all the more significant that in August 2011, the Inter-American Commission on Human Rights (“the Commission”) found that the United States violated the human rights of Jessica Lenahan and her three daughters in the first domestic violence case brought against the United States in an international human rights tribunal.<sup>3</sup> The Commission’s decision confirmed the application of the due diligence standard to interpret the obligation of non-discrimination under the American Declaration on the Rights and Duties of Man. That obligation requires states to prevent, prosecute, and sanction acts of violence against women, including, in certain circumstances, acts of violence by private actors.<sup>4</sup> The Commission found that the United States’ failure to meet this standard resulted in violations of Lenahan and her daughters’ right to equality, right to life, and right to special protection as women and children.<sup>5</sup> The decision stands in stark contrast to the U.S. Supreme Court’s 2005 ruling on the same facts in *Town of Castle Rock, Colo. v. Gonzales*,<sup>6</sup> in which the Court held that the state generally has no duty to protect individuals from private acts of violence.<sup>7</sup> This comment explores the effectiveness of the due diligence standard in the Commission’s merits report.

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1. UNITED NATIONS DEP’T OF PUBLIC INFORMATION, U.N. SECRETARY-GENERAL’S CAMPAIGN, UNITE TO END VIOLENCE, FACTSHEET, DPI/2498 (Feb. 2008), available at <http://www.un.org/en/women/endviolence/pdf/VAW.pdf>.

2. *Id.*

3. *Lenahan (Gonzales) v. United States of America*, Case 12.626, Inter-Am. Comm’n. H.R., Report No. 80/11 (2011).

4. *Id.* ¶ 126.

5. *Id.* ¶¶ 160, 170.

6. 545 U.S. 748 (2005).

7. *Id.* at 755 (citing *DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189, 195 (1989)).

## I. FACTUAL AND DOMESTIC BACKGROUND

Lenahan's three minor daughters, Leslie, Katheryn and Rebecca, were killed after being taken by their father and Lenahan's ex-husband, Simon Gonzales.<sup>8</sup> Early on the morning of June 23, 1999, Gonzales drove into the Castle Rock, Colorado Police Department ("CRPD") parking lot and exchanged gunfire with police.<sup>9</sup> After Gonzales was killed, the dead bodies of his three daughters were found inside his truck.

To provide context to the facts of the case, the Commission's report recognized "the gravity and prevalence of the problem of domestic violence in the United States"<sup>10</sup> and Colorado specifically.<sup>11</sup> The Commission also heard evidence that in some cases, domestic violence was viewed as "a 'private matter,' and therefore, undeserving of protection measures" by state authorities.<sup>12</sup> In this case, according to the record developed by the Commission, Lenahan had made eight contacts with the CRPD on the evening of her daughters' deaths, fearing for their safety and complaining of a violation of the restraining order that she held against Gonzales.<sup>13</sup> Colorado's mandatory arrest law, detailed on the back of the restraining order, required arrest for probable cause of any violation.<sup>14</sup> Nevertheless, CRPD dispatchers initially encouraged Lenahan to call Gonzales herself to inquire about her daughters' whereabouts.<sup>15</sup> An officer was later dispatched to meet Lenahan at her husband's apartment but never arrived.<sup>16</sup> Only after Lenahan visited the CRPD station several hours after their disappearance did a dispatcher finally investigate how to send an "attempt to locate" bulletin for Gonzales and the girls.<sup>17</sup> The subsequent investigation into the girls' deaths never determined whether they were killed by Gonzales or the CRPD.<sup>18</sup>

Lenahan filed suit in the U.S. District Court for the District of Colorado, alleging that the City of Castle Rock and several police officers had violated her due process rights under the Fourteenth Amendment of the U.S. Consti-

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8. See *Lenahan (Gonzales) v. United States of America*, Case 12.626, Inter-Am. Comm'n. H.R., Report No. 80/11, ¶¶ 74, 81 (2011).

9. *Id.*

10. *Id.* ¶ 93.

11. *Id.* ¶ 99.

12. *Id.* ¶ 96 (citing U.S. Department of Justice, *Final Report: Attorney General's Task Force on Family Violence* 3 (1984); *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984) (In this case, police refused to respond to woman's repeated requests for protection. Police watched as estranged husband stabbed and kicked victim in her neck, throat, and chest, paralyzing her from the neck down and causing permanent disfigurement.), cited in, Supplemental Amicus Curiae Brief submitted by Maya Raghu from Legal Momentum and others on behalf of petitioners on October 15, 2008, p. 40, note 22).

13. *Id.* ¶ 71.

14. *Id.* ¶¶ 62, 140.

15. *Id.* ¶ 77.

16. *Id.* ¶ 78.

17. *Id.* ¶ 80.

18. *Id.* ¶ 82.

tution.<sup>19</sup> Lenahan argued that she and her daughters had a substantive due process right to police protection against harm from her ex-husband.<sup>20</sup> She also argued that she possessed a constitutionally protected property interest in the enforcement of the terms of her restraining order.<sup>21</sup> As will be discussed later in this note, Lenahan did not advance a sex-based equal protection claim for the CRPD's failure to enforce a restraining order held by a woman in the context of a domestic dispute. The District Court dismissed both of Lenahan's claims.<sup>22</sup> The Tenth Circuit affirmed the substantive due process claim, but reversed on procedural due process grounds.<sup>23</sup>

On appeal, the U.S. Supreme Court rejected both of Lenahan's due process claims.<sup>24</sup> Relying on its holding in *DeShaney v. Winnebago County Department of Social Services*,<sup>25</sup> the Court rejected the notion of substantive due process and held that the Due Process Clause does not "requir[e] the State to protect the life, liberty and property of its citizens against invasion by private actors"<sup>26</sup>—even where it had previously intervened by taking temporary custody of a child<sup>27</sup> or in this case where it had issued a permanent restraining order.<sup>28</sup> With regards to the procedural due process claim, the Supreme Court held that despite Colorado's mandatory arrest law, Lenahan had no personal entitlement to police enforcement of the restraining order.<sup>29</sup>

## II. INTERNATIONAL PROCEEDINGS AND THE IACTHR DECISION

In December 2005, having exhausted her domestic remedies, Lenahan petitioned the Commission to hear her case, arguing that the United States had committed a series of violations under the American Declaration on the Rights and Duties of Man.<sup>30</sup> including (1) violations of the right to equality

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19. *Gonzales v. City of Castle Rock*, No. Civ.A.00 D 1285, 2001 WL 35973820, at \*1 (D. Colo. Jan. 23, 2001).

20. *Id.* at \*3.

21. *Id.* at \*4.

22. *Id.* at \*5.

23. *Gonzales v. City of Castle Rock*, 307 F. 3d 1258, 1263, 1266–67 (10th Cir. 2002), *aff'd en banc*, 366 F. 3d 1093 (10th Cir. 2004).

24. *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 768 (2005).

25. 489 U.S. 189, 195 (1989).

26. *Town of Castle Rock, Colo.*, 545 U.S. at 748(citing *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 195 (1989)).

27. *DeShaney*, 489 U.S. at 201 (1989) (declining to apply a special relationships theory that by once removing the child from his father's care, the State assumed an ongoing affirmative duty to provide competent protection).

28. *Lenahan (Gonzales) v. United States of America*, Case 12.626, Inter-Am. Comm'n. H.R., Report No. 80/11, ¶ 62 (2011).

29. *Town of Castle Rock, Colo.*, 545 U.S. at 768. The majority also stated that even if the statute could be said to make enforcement "mandatory," it was not clear that an individual entitlement to enforcement of a restraining order would constitute a "property" interest for due process purposes as it would arise out of a function that government actors have always performed—making arrests for probable cause. *Id.* at 749.

30. *Lenahan (Gonzales) v. United States of America*, Petition 1490-05, Inter-Am. Comm'n. H.R., Report No. 52/07, ¶ 1–2 (2007).

before the law and the obligation not to discriminate (Article II),<sup>31</sup> the right to life (Article I),<sup>32</sup> and the right to special protection as women and children (Article VII),<sup>33</sup> and (2) violations of the right to judicial protection (Article XVIII).<sup>34</sup> Lenahan claimed that the failure of the United States to effectively respond to her requests for enforcement of the restraining order and the subsequent lack of judicial remedy for that failure comprised acts of discrimination and breaches of the right to equality before the law.<sup>35</sup> Lenahan also alleged that the state duty to adopt measures to ensure the full and free exercise of the human rights protected under the American Declaration encompassed a duty, under certain circumstances, to prevent and respond to private action.<sup>36</sup> In the context of violence against women, she applied the diligence standard to interpret the substance of that duty.<sup>37</sup>

The United States rejected Lenahan's arguments, claiming that the American Declaration was a non-binding document without any such duty to prevent private violence.<sup>38</sup> Moreover, the United States contended that the content of the due diligence standard was "substantively unclear," providing states with little guidance "other than the need to be 'effective.'"<sup>39</sup> Describing the deaths of the three Gonzales girls as unforeseen, the United States nevertheless claimed it had acted with due diligence to protect them.<sup>40</sup>

The Commission ultimately found that the United States "failed to act with due diligence to protect Jessica Lenahan and her daughters from domestic violence, which violated the State's obligation not to discriminate and to provide for equal protection before the law under Article II of the American Declaration."<sup>41</sup> After determining that violence against women was a form of discrimination,<sup>42</sup> the Commission observed "a broad international consensus" that state legal obligations regarding violence against wo-

31. American Declaration on the Rights and Duties of Man, art. 2, April 1948.

32. *Id.* art. 1.

33. *Id.* art. 7.

34. *Id.* art. 18. The Commission later found that failures of the state in this case to adequately and effectively organize its apparatus to ensure the implementation of the restraining order violated her three daughters' right to judicial protection. *Lenahan (Gonzales) v. United States of America*, Case 12.626, Inter-Am. Comm'n. H.R., Report No. 80/11, ¶ 177 (2011). Given the space constraints of this note, this part of the report will not be discussed in further detail. In addition, the Commission did not consider that it had sufficient information to find violations of Articles V and VI of the American Declaration. It also considered Lenahan's claims under Articles XXIV and IV of the American Declaration to have been addressed under Article XVIII of the American Declaration. *Id.* ¶ 5.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* ¶ 106.

39. *Id.* ¶¶ 58, 106.

40. *Id.*

41. *Id.* ¶ 199. The Commission also found that the state's failure to undertake reasonable measures to protect the lives of Leslie, Katheryn and Rebecca Gonzales constituted a violation of their right to life in relation to their right to special protection contained in Articles I and VII of the American Declaration, respectively. *Id.* ¶ 164.

42. *Id.* ¶ 120.

men, including domestic violence, should be interpreted under the due diligence principle.<sup>43</sup> More specifically, the Commission found that the due diligence standard as applied to Articles I, II, and VII of the American Declaration requires states to “prevent, prosecute and sanction acts of domestic violence” committed by either state or non-state actors,<sup>44</sup> and that the failure to meet the due diligence standard in this context constitutes a form of discrimination.<sup>45</sup>

The Commission relied on international jurisprudence to define further the contents of the obligation to prevent domestic violence under the due diligence standard. The Commission reviewed rulings by the European Court of Human Rights (“ECtHR”) and the Convention on the Elimination of Discrimination Against Women (“CEDAW”) Committee, which found states responsible for failures to prevent domestic violence under the due diligence standard where (1) “the authorities knew of a situation of real and immediate risk” to the victim and (2) “the authorities failed to undertake reasonable measures to protect them from harm.”<sup>46</sup> The Commission found that in these cases the issuance of protection orders,<sup>47</sup> prior detention of the aggressor,<sup>48</sup> assistance to the victim or family members in the filing of complaints,<sup>49</sup> and initiation of criminal proceedings<sup>50</sup> were sufficient evidence of the state’s knowledge of risk.<sup>51</sup> In addition, under ECtHR jurisprudence, the obligation to protect the victim required “reasonable means, and not results.”<sup>52</sup>

Given this framework, the Commission analyzed the state’s efforts to prevent violence in Lenahan’s case, looking specifically at whether the authorities involved “should have known that the victims were in a situation of imminent risk of domestic violence” and “whether the authorities under-

43. *Id.* ¶¶ 123–24 (citing CEDAW Committee, *A.T. v. Hungary*, Comm. No. 2/2003, U.N. Doc. CEDAW/C/32/D/2/2003 (2005); *Opuz v. Turkey*, App. No. 33401/02, Eur. Ct. H.R. (2009); *Claudia Ivette González and Others v. Mexico*, Judgments, Case 12.496-12.498, Inter-Am. Comm’n. H.R., Report No. 28/07 (2011); *Case of González et al. (“Cotton Field”) v. Mexico*, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205 (November 16, 2009)).

44. *Id.* ¶¶ 119, 130.

45. *Id.* ¶ 111 (citing CEDAW Committee, *A.T. v. Hungary*, Comm. No. 2/2003, U.N. Doc. CEDAW/C/32/D/2/2003 (2005); *Opuz v. Turkey*, App. No. 33401/02, Eur. Ct. H.R. (2009); *Claudia Ivette González and Others v. Mexico*, Judgments, Case 12.496-12.498, Inter-Am. Comm’n. H.R., Report No. 28/07 (2011); *Case of González et al. (“Cotton Field”) v. Mexico*, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205 (November 16, 2009)).

46. *Id.* ¶¶ 132–34.

47. See CEDAW Committee, *Sahide Goekce v. Austria*, Comm. No. 5/2005, U.N. Doc. CEDAW/C/39/D/5/2005 (2004); CEDAW Committee, *Fatma Yildirim v. Austria*, Comm. No. 6/2005, U.N. Doc. CEDAW/C/39/D/6/2005 (2004).

48. See *Branko Tomasic and Others v. Croatia*, App. No. 46598/06, Eur. Ct. H.R. (2009).

49. See *Kontrová v. Slovakia*, App. No. 7510/04, Eur. Ct. H.R. (2007).

50. See *Opuz v. Turkey*, App. No. 33401/02, Eur. Ct. H.R. (2009).

51. *Lenahan (Gonzales) v. United States of America*, Case 12.626, Inter-Am. Comm’n. H.R., Report No. 80/11, ¶ 132 (2011).

52. *Id.* ¶ 134; *E. and Others v. the United Kingdom*, App. No. 33218/96, Eur. Ct. H.R. ¶ 99 (2002)).

took reasonable measures to protect them from these acts.”<sup>53</sup> As to the first prong, the Commission considered Colorado’s issuance of the restraining order an implicit recognition of the risk of the harm posed by Gonzales to Lenahan and her daughters.<sup>54</sup> As for measures undertaken to protect the victims, the Commission noted that the restraining order required the CRPD to investigate promptly whether there was probable cause to arrest Gonzales for a violation.<sup>55</sup> The Commission also cited Guidelines from the International Association of Chiefs of Police and the Law Enforcement Training Manual published by the Colorado Coalition against Domestic Violence for protocols that should have been in place at the CRPD under a due diligence standard. These included locating and reading the protection order in its entirety upon receiving an enforcement request, arresting and seizing firearms from the abuser if the order cannot be located, and requiring domestic violence sensitivity training for all officers.<sup>56</sup>

### III. THE DUE DILIGENCE STANDARD IN THE CONTEXT OF VIOLENCE AGAINST WOMEN

The due diligence standard has a long history in international law<sup>57</sup> but its contents remain context-dependent and case-specific.<sup>58</sup> In the human rights context, the application of the due diligence standard to find state responsibility for non-state acts was first developed by the Inter-American Court of Human Rights (“IACtHR”) in *Velásquez Rodríguez v. Honduras*, a case regarding forced disappearances.<sup>59</sup> The IACtHR found that a human rights violation can lead to state responsibility “not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the [American Convention on Human Rights].”<sup>60</sup> Attributing state responsibility in the *Velásquez Rodríguez* case was made somewhat easier by the IACtHR finding that the responsible agents had

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53. *Lenahan (Gonzales) v. United States of America*, Case 12.626, Inter-Am. Comm’n. H.R., Report No. 80/11, ¶ 137 (2011).

54. *Id.* ¶¶ 141–42.

55. *Id.* ¶ 147.

56. *Id.* ¶¶ 148–49.

57. Since the seventeenth century, jurists have referenced the responsibility of the sovereign to prevent injury to foreign nationals, punish private persons who commit acts of violence against foreigners, and ensure that reparations are made. J. Hessbruegge, *The Historical Development of the Doctrines of Attribution and Due Diligence in International Law*, 36 N.Y.U. J. INT’L L. & POL. 265 (2004).

58. *Id.* Even by 2001, the International Law Commission’s Articles on State Responsibility stated that standards such as due diligence “vary from one context to another for reasons which essentially relate to the object and purpose of the treaty provision or other rule giving rise to the primary obligation.” Rep. of the Int’l Law Comm’n, 53th Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2), at 35.

59. *Velásquez Rodríguez v. Honduras*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4 ¶ 172 (July 29, 1988).

60. *Id.* ¶ 172.

connections to the Honduran government.<sup>61</sup> However, even without that fact, the Court concluded that the failure of the Honduran government to investigate Velásquez Rodríguez disappearance constituted a failure to fulfill its duties under the American Convention on Human Rights.<sup>62</sup> These duties created a positive obligation to ensure Velásquez Rodríguez's human rights,<sup>63</sup> and as a consequence, "[s]tates must prevent, investigate and punish any violation."<sup>64</sup>

In 1993, two major developments solidified the application of the due diligence standard in the domestic violence context: the issuance of the Declaration on the Elimination of Violence Against Women ("DEVAW") by the U.N. General Assembly and the appointment of a Special Rapporteur on Violence Against Women. DEVAW incorporated the principles of the CEDAW Committee's General Recommendation 19<sup>65</sup> and formally adopted the due diligence standard as a tool to assess a state's obligations with regard to all forms of violence against women.<sup>66</sup> DEVAW declared that all U.N. member states have a duty of "due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women" regardless of the perpetrator.<sup>67</sup> Shortly thereafter, the first Special Rapporteur on Violence Against Women, Radhika Coomaraswamy, authored a report arguing for the due diligence standard and describing a state that fails to address crimes of violence against women "as guilty as the perpetrators."<sup>68</sup> Coomaraswamy's report provided suggestions for the elements of model domestic violence legislation and detailed the duties of police officers in preventing and responding to domestic violence.<sup>69</sup> These duties included responding to every request for assistance in cases of domestic violence,<sup>70</sup> assigning equal priority to calls concerning abuse by family and household members as to calls alleging similar abuse by strangers,<sup>71</sup> providing protection to the reporter of violence, and arranging for the removal of the offender from the home or arresting the offender if the victim is in danger.<sup>72</sup>

61. *Id.* ¶ 182.

62. *Id.*

63. *Id.*

64. *Id.* ¶ 166.

65. CEDAW Committee, *General Recommendation 19: Violence against Women*, U.N. Doc. A/47/38 (1993).

66. United Nations Declaration on the Elimination of Violence against Women, G.A. Res. 48/104, art. 4, U.N. Doc. A/RES/48/104 (February 23, 1994).

67. *Id.*

68. U.N. Economic & Social Council, Commission on Human Rights, Special Rapporteur on Violence Against Women, Framework for Model Legislation on Domestic Violence, ¶ 39, U.N. Doc. E/CN.4/1996/53/Add.2 (Feb. 2, 1996) (prepared by Radhika Coomaraswamy, in accordance with Commission on Human Rights Resolution 1995/85).

69. *Id.* ¶ 12.

70. *Id.* ¶ 13.

71. *Id.* ¶ 14.

72. *Id.* ¶ 17.

More than ten years later, in 2006, the second Special Rapporteur on Violence Against Women, Yakin Ertürk, followed with a landmark report titled "The Due Diligence Standard as a Tool for the Elimination of Violence Against Women."<sup>73</sup> In this report she provided a comprehensive survey of international law and declared the obligation to prevent and respond with due diligence to violence against women a rule of customary international law.<sup>74</sup> Ertürk called for states to "prevent, protect, prosecute and provide compensation and map out the parameters of responsibility for State and non-State actors alike in responding to violence."<sup>75</sup> She also attempted to clarify the state's obligations but noted that the application of the due diligence standard in international tribunals would continue to shape the practical dimensions of these obligations.<sup>76</sup>

#### IV. THE ROLE OF THE DUE DILIGENCE STANDARD IN THIS CASE

The Commission's merits report follows on this increasingly well-developed understanding of the due diligence standard. The Commission's report clearly articulates the two prongs of the obligation to prevent private violence under the due diligence standard and provides clarification of their context. The Commission found that in this case the issuance of the restraining order, even prior to the particular night in question, provided sufficient knowledge of the immediate risk to the victims. The Commission also applied many of the requirements of police action articulated by Special Rapporteur Coomaraswamy to determine whether the state had taken reasonable measures to protect the victims. However, whether a particular state has acted with the required level of diligence in a given context remains a case-by-case determination.

The Commission's report also bares special significance because the finding of liability against the United States for the first time directly contradicts the U.S. Supreme Court's holding in *DeShaney v. Winnebago County Department of Social Services*<sup>77</sup> that "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due

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73. U.N. Econ. & Soc. Council, Comm'n on Human Rights, Special Rapporteur on Violence Against Women, its Causes and Consequences, Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women: The Due Diligence Standard as a Tool for the Elimination of Violence Against Women, ¶ 29 (Jan. 20, 2006) (prepared by Yakin Ertürk in accordance with Commission on Human Rights Resolution 2005/41).

74. *Id.* ¶ 29.

75. *Id.* ¶ 103 ("The due diligence obligation of protection requires States to ensure that women and girls who are victims or at risk of violence have access to justice as well as to health care and support services that respond to their immediate needs, protect against further harm and continue to address the ongoing consequences of violence for individual woman."); *id.* ¶ 82.

76. Subsequently the ECtHR issued two landmark decisions, *Bevacqua and S. v. Bulgaria*, App. No. 71127/01, Eur. Ct. H.R. (June 12, 2008), and *Opuz v. Turkey*, App. No. 33401/02, Eur. Ct. H.R. (2009), which acknowledged and applied the emerging due diligence standard in the context of domestic violence.

77. 489 U.S. 189, 195 (1989).



Process Clause.<sup>78</sup> The distinction between public and private violence has been criticized widely in feminist theory as systemically disadvantaging women, since women are more likely to be in the private sphere and thus outside the scope of state protection.<sup>79</sup> The Commission's application of the due diligence principle attempts to bridge the public-private divide by implying state liability for failure to prevent private actions of violence where the relevant state authorities should have known that the victims were in a situation of real and imminent risk of harm and the authorities failed to undertake reasonable measures to protect them from this risk.<sup>80</sup>

Ultimately, however, the due diligence standard maintains a fictional and potentially invidious public-private distinction in the conceptualization of acts of violence. Under it, states are not directly or indirectly responsible for private acts of violence, but rather they are responsible for their own failure to protect, prosecute and sanction these private acts.<sup>81</sup> In reality, most actions fall on a spectrum between public and private. The Commission's report noted that the state's issuance of a protective order has safety implications for the women and children it protects, because a restraining order may in fact aggravate the problem of reprisals, an example of private violence resulting from state action.<sup>82</sup> In addition, state intervention, such as temporary child custody in *DeShaney*<sup>83</sup> and the issuance of a permanent restraining order in this case,<sup>84</sup> effectively crowds out private intervention. Where state action has been taken, the private sphere refrains from further action.<sup>85</sup> Indeed, Lenahan told the Commission that she refrained from more aggressive actions to find her daughters that evening, thinking the state would do more to protect them since she held a restraining order.<sup>86</sup>

Therefore, given the context-dependent substance of the due diligence standard and its retention of the conception of separate public and private

78. *Id.*

79. See, e.g., Beate Rudolf & Andrea Eriksson, *Women's Rights Under International Human Rights Treaties: Issues of Rape, Domestic Slavery, Abortion, and Domestic Violence*, 5 INT'L. J. CONST. L. 507, 522–523 (2007). See Dinah Shelton, *Private Violence, Public Wrongs, and the Responsibility of States*, 13 FORDHAM INT'L L.J. 1 (1990).

80. *Lenahan (Gonzales) v. United States of America*, Case 12.626, Inter-Am. Comm'n. H.R., Report No. 80/11, ¶ 105 (2011).

81. See *Velásquez Rodríguez v. Honduras*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4 ¶ 162 (July 29, 1988).

82. *Id.* ¶ 166.

83. 489 U.S. 189, 195 (1989).

84. *Lenahan (Gonzales) v. United States of America*, Case 12.626, Inter-Am. Comm'n. H.R., Report No. 80/11, ¶ 62 (2011).

85. See *DeShaney*, 489 U.S. 189, at 208–12 (Brennan, J., dissenting) (“Wisconsin has established a child-welfare system specifically designed to help children like Joshua . . . . Wisconsin law invites—indeed, directs—citizens and other governmental entities to depend on local departments of social services such as respondent to protect children from abuse . . . . Today's opinion construes the Due Process Clause to permit a State to displace private sources of protection and then, at the critical moment, to shrug its shoulders. . . .”).

86. *Lenahan (Gonzales) v. United States of America*, Case 12.626, Inter-Am. Comm'n. H.R., Report No. 80/11, ¶ 166 (2011).

spheres of action, it must be asked whether there are viable alternatives to the due diligence standard in both international domestic violence jurisprudence and in this specific case. In general, an articulation of the substance of the obligation to prevent and respond to violence against women might be better achieved by simply requiring that states effectively implement their positive obligations in good faith.<sup>87</sup> In this case, Lenahan could have advanced a human rights claim to equality and non-discrimination based not on the due diligence standard, but instead on a right to equal enforcement of her restraining order. More specifically, she could have claimed sex-based discrimination by the police in their response to requests for enforcement of restraining orders held by women against intimate male partners as opposed to restraining orders held by men against women or women against women. This same legal claim was suggested, but ultimately not utilized, in Lenahan's domestic legal case, likely due to uncertainty about the substance of the standard of review for sex-based equal protection claims in the U.S. Supreme Court's jurisprudence.<sup>88</sup> In the international context, where the right to gender equality and non-discrimination is far more secure,<sup>89</sup> focusing her claim on the denial of equal police enforcement of the restraining order risks excluding some of the real substance of Lenahan's grievances, but it also presents the possibility for a more straightforward legal analysis. The Commission's decision potentially could rely less on the context-dependent, case-specific requirements of the due diligence standard, and more on an equal protection analysis of the sufficiency of the state rationale for any sex-based distinction in enforcement. This approach has the benefit of providing states with more prior notice as to their legal obligations. Anything less than a precise and reliable standard for state obligations potentially allows states to avoid liability on the grounds of insufficient notice.

## V. CONCLUSION

Lenahan's case centers on a horrific act of domestic violence and the lack of reasonable measures taken by the United States to protect Lenahan and her children, despite knowledge of the risk posed by Gonzales. The Inter-American Commission on Human Rights concluded that this failure to prevent domestic violence under the due diligence standard constituted a violation of Lenahan and her daughters' rights under the American Declaration on the Rights and Duties of Man. The decision is significant not only because it is the first time the United States has been found guilty of human

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87. See Joanna Bourke-Martignoni, *The History and Development of the Due Diligence Standard in International Law and Its Role in the Protection of Women against Violence*, in *DUE DILIGENCE AND ITS APPLICATION TO PROTECT WOMEN FROM VIOLENCE* 47, 57–58 (C. Benninger-Budel, ed., 2008).

88. The U.S. Supreme Court examines sex-based distinctions under a kind of "intermediate scrutiny" under which the State's justification for the deferential treatment must be "exceedingly persuasive." *United States v. Virginia*, 518 U.S. 515, 533 (1996).

89. See, e.g., American Declaration on the Rights and Duties of Man, art. 2, April 1948.

rights violations in the domestic violence context by an international tribunal, but also because the finding of liability contradicts U.S. domestic legal precedent on state responsibility for private violence. Building on an increasingly developed standard of due diligence, the merits report provides some greater clarity on the obligation to protect rights holders, particularly as to what constitutes an adequate state response in the context of an ongoing domestic violence emergency. Nevertheless, the continued arguments by states like the United States that the due diligence standard lacks clear substance leaves open a means for states to escape responsibility. In addition, the standard does little to break down the public-private distinction that continues to leave women in the private sphere and outside the scope of state protection from domestic violence.

