

State Responsibility for Protection against Domestic Violence: The Case of Jessica Lenahan (Gonzales)

By Jennifer Koshan

Cases Considered:

[*Jessica Lenahan \(Gonzales\) et al v. United States, Case 12.626, Report No. 80/11 \(Inter-American Commission on Human Rights, August 17, 2011\)*](#)

On August 17, 2011, the Inter-American Commission on Human Rights (IACHR) released its merits report in the case of Jessica Lenahan (Gonzales) and the United States. The case concerns states' positive obligations to use due diligence in responding to situations of domestic violence, and is the first such case involving the U.S. to be considered by the IACHR. In what many are calling a landmark decision, the IACHR found that the United States had breached several Articles of the *American Declaration of the Rights and Duties of Man* in relation to its obligations to Lenahan and her children. This post will summarize the IACHR decision and analyze the implications of the case in Canada, particularly in provinces such as Alberta which have civil domestic violence legislation.

The Facts

Jessica Lenahan, a woman of Native-American and Latin-American descent, married Simon Gonzales in 1990, and they lived with their daughters Leslie, Katheryn and Rebecca in Castle Rock, Colorado. Beginning in 1996, Lenahan and the girls experienced several incidents of abusive behaviour at the hands of Gonzales, leading Lenahan to file for divorce and obtain a temporary restraining order against him in May, 1999. The restraining order provided that Gonzales was "not to molest or disturb the peace of the other party or any child" and required him to remain at least 100 yards away from the family home at all times. The order was made permanent in June 1999 and Lenahan was granted sole temporary custody of the girls, aged 7, 8 and 10. Gonzales was given access to the girls by way of a "mid-week dinner visit" that was to be arranged by him and Lenahan ahead of time, as well as parenting time on alternate weekends and during the summer. The restraining order included details of Colorado's mandatory arrest law on its reverse side, as well as instructions for the restrained party (Gonzales) and the police. The order was entered into Colorado's computerized central registry of restraining orders and was accessible to state and local police (IACHR merits report at paras 18, 62-64).

During the early evening of June 22, 1999 Lenahan discovered that her daughters were missing, and over the next several hours she contacted the Castle Rock Police Department (CRPD) multiple times. She advised them that she held a restraining order against Gonzales and asked the police to help her locate her daughters, whom she thought might be with their father (although no arrangements had been made for access that night). During one of the contacts

Lenahan advised the police that she had learned from Gonzales' girlfriend that he had taken the girls to a park in Denver. The police did little to respond, originally suggesting that Gonzales had a right to be with the girls because he was their father, then advising that Lenahan should try to contact Gonzales herself, and at one point, asking that she call back on a non-emergency line as it was "a little ridiculous making us freak out and thinking the kids are gone..." (at para 76). Eventually Lenahan attended at the CRPD with her 13 year old son at 12.30 a.m. This led to an officer making a request for an attempt to locate bulletin, but the bulletin was never sent as the dispatcher could not find guidelines for how to do so. At 3:25 a.m. on June 23, Gonzales drove to the CRPD station and fired shots through the window, leading to an exchange of gunfire with officers. Gonzales was fatally wounded and killed, and the deceased bodies of the 3 girls were found in his truck. There was never an investigation into the cause of death of the girls, and their autopsies did not conclusively identify whether they were killed by their father or in the crossfire of the CRPD (IACHR merits report at paras 71-85).

The IACHR also made findings with respect to the "gravity and prevalence of the problem of domestic violence in the United States, at the time of the events and the present" (at para 93). Women were recognized to constitute the majority of domestic violence victims, and the IACHR indicated that some women are at particular risk, including Native-American and low income women. The IACHR noted the phenomenon of separation violence, where abuse often escalates following separation and children are at particular risk and in need of protection, and it recognized the significance of restraining orders as an attempt by states to take domestic violence seriously. However, the IACHR also noted that "one of the most serious historical limitations of civil restraining orders has been their widespread lack of enforcement by the police," which was often based on stereotypes about gender roles (at para. 97).

Lenahan's claims in the United States courts

In 2001, Lenahan brought an action against the City of Castle Rock and several individual police officers in the United States District Court for the District of Colorado (a court of federal jurisdiction), claiming that the City and police officers had violated her rights under the due process clause of the Fourteenth Amendment of the United States Constitution. This clause provides that a State shall not "deprive any person of life, liberty, or property, without due process of law" (US Const, Amdt 14, §1). Lenahan also relied on [42 U. S. C. §1983](#), under which Congress created a federal cause of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." Although the U.S. also has a federal [Violence Against Women Act](#), this statute only permitted claims against perpetrators of gender-based violence (see 42 U.S.C. § 13981), and the U.S. Supreme Court ruled that provision to be unconstitutional on federalism grounds (see *United States v Morrison*, 529 U.S. 598 (2000)).

In her claim against the City and police officers, Lenahan argued that (1) she and her daughters had a right to police protection against harm from Gonzales, (2) she had a protected property interest in the enforcement of the restraining order, which was arbitrarily denied by the actions of the police, and (3) the City had failed to properly train its police officers regarding the enforcement of restraining orders, and had recklessly disregarded her right to police protection.

The [District Court](#) summarily dismissed Lenahan's claim (Civil Action No. 00-D-1285, 2001). On appeal, the Tenth Circuit Court of Appeals affirmed the rejection of Lenahan's substantive due process claim, but held that she had put forward a cognizable procedural due process claim ([307 F. 3d 1258](#) (CA10 2002), affirmed *en banc* [366 F. 3d 1101](#)(CA10 2004)). On a *certiorari* application to the United States Supreme Court, Lenahan's claims were all rejected, with a majority of the Court holding that she had no entitlement to police enforcement of the restraining order under the due process clause ([Castle Rock v Gonzales](#), 545 U.S. 748, 125 S Ct 2796

(2005), Stevens and Ginsburg JJ. dissenting). According to Justice Scalia's judgment for the majority, Colorado's omnibus domestic violence law, passed in 2004, did not make enforcement of restraining orders mandatory (125 S Ct at 2805). Although this law included provisions for mandatory arrest of domestic violence suspects, previous case law established that police continued to have discretion in the enforcement of restraining orders (*Chicago v Morales*, 527 U. S. 41 (1999)), and the majority noted that the Colorado law only required that police must "use every reasonable means to enforce a restraining order" (at 2805-6, citing Colo. Rev. Stat. §18-6-803.5(3)(a), although see §18-6-803.5(3)(b), cited by the dissent, which provides that upon probable cause of a violation, "a peace officer shall arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest of a restrained person."). Further, even if the statute did make enforcement mandatory, this did not imply that Lenahan had a personal entitlement to enforcement, as this was not clear in the statute (at 2808-9). Finally, even if Lenahan did have such an entitlement, the majority held that it was not sufficiently clear that it constituted a property interest for the purposes of the due process clause (at 2809).

IACHR decision

(a) General Principles

The IACHR is an autonomous body of the Organization of American States (OAS), of which the United States is a member, and obtains its mandate from both the *Charter of the Organization of American States*, 119 U.N.T.S. 3 (1948), Article 106 (as amended) and the *American Convention on Human Rights*, OAS Treaty Series No. 36; 1144 UNTS 123; 9 ILM 99, Article 33 (1969). Because the U.S. is not a party to the *American Convention*, human rights claims against it are brought under the [American Declaration of the Rights and Duties of Man](#), O.A.S. Res. XXX (1948) (*American Declaration*). There is also an [Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women](#) (*Convention of Belém do Pará*, 9 June 1994) that gives the IACHR certain powers, but the United States is not a party to that Convention. Claims under the *American Declaration* are admissible when domestic remedies have been exhausted and there is no duplication of the complaint elsewhere. In the *Lenahan* case, the IACHR decided that the claim was admissible under several Articles of the *Declaration* in IACHR Report No. 52/07 (July 24, 2007), and proceeded to hear the case on its merits.

The IACHR's merits report focuses on Articles I, II, and VII of the *American Declaration*, which provide as follows:

- I. Every human being has the right to life, liberty and the security of his person.
- II. All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor. ...
- VII. All women, during pregnancy and the nursing period, and all children, have the right to special protection, care and aid.

The IACHR's report began by setting out several general principles. The right to equality and non-discrimination goes beyond requiring the equal protection of the law, and mandates states to "adopt the legislative, policy and other measures necessary to guarantee the effective enjoyment of the rights protected under Article II of the *American Declaration*" (at para. 108). Gender based violence, including domestic violence, "is one of the most extreme and pervasive forms of discrimination, severely impairing and nullifying the enforcement of women's rights" (at para. 110). Accordingly, "a State's failure to act with due diligence to protect women from violence constitutes a form of discrimination, and denies women their right to equality before the law" (at

para. 111). Moreover, it must be recognized that “certain groups of women [also] face discrimination on the basis of ... their young age, race and ethnic origin, among others, which increases their exposure to acts of violence” (at para. 113).

Given these principles and the submissions of the parties, the IACHR stated that there were 3 issues for it to consider pertaining to Articles I, II and VII of the *American Declaration*. First, does Article II require member States to protect women from domestic violence? Second, what is the content and scope of the obligation, considering due diligence principles as well as the obligations in Articles I and VII of the *American Declaration*? Third, was the obligation violated by the State in the circumstances of the case?

(b) The legal obligation to protect women from domestic violence

The IACHR noted that the *American Declaration* is a source of legal obligations for all OAS member states, including those that have not ratified the *American Convention*. This point, likely made in response to the argument of the U.S. that the *American Declaration* is a non-binding, aspirational instrument (at para 106), was said to be based on the OAS *Charter*, which “is contained in and defined by the *American Declaration*, as well as the customary legal status of the rights protected under many of the *Declaration’s* core provisions” (at para 115, citations omitted). The IACHR also noted that international instruments more generally, which are an important part of the context for interpreting the *American Declaration*, recognize that “the continuum of human rights obligations is not only negative in nature; it also requires positive action from States” (at paras 117, 118). Further, it indicated that under Article II of the *Declaration*, States may be found responsible for acts and omissions related to the conduct of non-state actors as well as state actors. This may include responsibility for the failure “to prevent, prosecute and sanction acts of domestic violence perpetrated by private individuals” as part of the State’s obligations to combat discrimination, both direct and indirect (at paras 119, 120, citing Report N° 54/01, Case 12.051, *Maria Da Penha Maia Fernandes* (Brazil), Annual Report of the IACHR 2001, paras 3, 37-44).

(c) The content and scope of the obligation

The IACHR noted that due diligence is a long-standing principle when considering state responsibility under international law, and that there is “broad international consensus” in terms of how this principle should be applied in cases involving violence against women, reflected in “General Assembly resolutions adopted by consensus, broadly-approved declarations and platforms, treaties, views from treaty bodies, custom, jurisprudence from the universal and regional systems, and other sources of international law” (at paras 123,124, citations omitted). The IACHR laid out 4 agreed upon principles for the application of the due diligence principle in this context. First, States “may incur international responsibility for failing to act with due diligence to prevent, investigate, sanction and offer reparations for acts of violence against women”, including acts perpetrated by private actors (at para 126). Second, “States’ duty to address violence against women also involves measures to prevent and respond to the discrimination that perpetuates this problem” (at para 126). Third, there is a link “between the duty to act with due diligence and the obligation of States to guarantee access to adequate and effective judicial remedies for victims and their family members when they suffer acts of violence” (at para 127). Fourth, some women face a particular risk of violence because they face multiple forms of discrimination, including girl-children and women of certain ethnic, racial, and minority groups, and this risk “must be considered by States in the adoption of measures to prevent all forms of violence” (at para 127).

The IACHR also explained the relevance of Articles I and VII in this context. The right to life was said to be “a critical component of a State’s due diligence obligation”, and to include “the actions of those entrusted with safeguarding the security of the State, such as the police forces” (at para. 128). This duty is “especially rigorous in the case of girl-children,” implicating Article VII of the *American Declaration* (at para. 129, citing IACHR, Report N° 28/07, Cases 12.496-12.498, *Claudia Ivette Gonzalez and Others* (Mexico), March 9, 2007, paras 247-255; I/A Court H.R., *Case of González et al. (“Cotton Field”) v Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 16, 2009. Series C No. 205, para 245).

In its discussion of due diligence, the IACHR referred to its earlier decision in *Maria Da Penha Maia Fernandes v Brazil*, *supra*, where it interpreted States’ due diligence obligations towards domestic violence broadly. The IACHR in that case found that there was “a general pattern of State tolerance and judicial inefficiency towards cases of domestic violence, which promoted their repetition, and reaffirmed the inextricable link between the problem of violence against women and discrimination in the domestic setting” (IACHR merits report in *Lenahan* at para 131).

The IACHR also noted the importance of establishing knowledge on the part of the State in order for its duty to prevent violence to be engaged. It cited as instructive rulings from the European Court of Human Rights and the Committee established under the *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*, GA res. 34/180, 34 UN GAOR Supp. (No. 46) at 193, UN Doc. A/34/46; 1249 UNTS 13; 19 ILM 33 (1980), which provide that State responsibility for failing to protect victims from domestic violence arises when the authorities had knowledge of “a situation of real and immediate risk” to the victims presented by the perpetrator, and “the authorities failed to undertake reasonable measures to protect them from harm” (at para 132). These rulings involved scenarios where the State had already recognized a risk of harm to the victims (evidenced by, for example, issuing restraining orders, detaining the perpetrator, assisting the victims in filing complaints, and instituting criminal and child protection proceedings) and then failed to protect the victims in spite of this knowledge of risk (at para 132). The duty to protect is one of “reasonable means, and not results,” requiring the State “to take reasonable measures that [have] a real prospect of altering the outcome or mitigating the harm” (at para 134, citing European Court of Human Rights, *Case of Opuz v Turkey*, Application No. 33401/02, 9 June 2009, para 136; *E. and Others v. the United Kingdom*, no. 33218/96, para 99.) The European Court has also stated that authorities should consider the broader context of domestic violence, including its prevalence, its hidden nature, and the possibility that the victim’s withdrawal of a complaint may be due to threats by the aggressor, and require investigation. The State’s failure to protect does not need to be intentional to constitute a breach of its obligations (at para 134, citing *Case of Opuz v Turkey*, para 191).

(d) Application to the Facts

From the materials it cited, the IACHR effectively synthesized a two-part test for state responsibility in cases of domestic violence (at para 137): “i) whether the state authorities at issue should have known that the victims were in a situation of imminent risk of domestic violence; and ii) whether the authorities undertook reasonable measures to protect them from these acts.” It noted that the activities of the police as well as other state actors were relevant, and proceeded to apply this test to the facts.

On the issue of the authorities' knowledge of the risk faced by the victims, the IACHR pointed to the restraining order granted by a Colorado court, which named both Lenahan and her daughters as beneficiaries and expressly indicated that "physical or emotional harm" would result if Gonzales was not restrained. It also noted that the order included directions for Gonzales and law enforcement officers, in line with Colorado's mandatory arrest legislation, and that the order could only be varied by the court. According to the IACHR, "the issuance of a restraining order signals a State's recognition of risk that the beneficiaries would suffer harm from domestic violence on the part of the restrained party, and need State protection" (at para 142). The restraining order was "a key component in determining whether the State authorities should have known that the victims were in a situation of imminent risk of domestic violence upon breach of the terms of the order", as well as "an indicator of which actions could have been reasonably expected from the authorities" (at para 143).

Turning to the second issue, and in contrast to the U.S. Supreme Court's majority ruling, the IACHR noted that the terms of the restraining order dealing with enforcement were strict, using the word "shall". This language "expressly mandates law enforcement officials ... to act diligently to either arrest or to seek a warrant for the arrest of the aggressor in the presence of information amounting to probable cause of a violation" (at para 144). Further, "the State was obligated to ensure that its apparatus responded effectively and in a coordinated fashion to enforce the terms of this order to protect the victims from harm" (at para 145). More specifically, the State should have ensured that the authorities responsible for enforcement were aware of the restraining order and its terms, that they understood their duties around enforcement, that they understood the dynamics of domestic violence, and that they were trained to respond to reports of potential violations of the restraining order. The IACHR stated that "[a] proper response would have required the existence of protocols or directives and training on how to implement restraining orders, and how to respond to calls such as those placed by Jessica Lenahan" (at para 145).

The IACHR found that these duties were not met in the circumstances. Through Lenahan's numerous contacts with the CRPD, in which she informed them of the restraining order and that she was afraid Gonzales had the girls without her permission, the CRPD was made aware of the existence of the order. The CRPD was therefore reasonably expected to review the order, to investigate whether the order had been breached, and finding probable cause, to arrest or issue a warrant for the arrest of Gonzales (at paras 146-7). The IACHR noted the existence of national law enforcement guidelines available to the CRPD that provide factors and red flags to consider in determining the level of risk flowing from a potential restraining order violation, some of which were present in this case (e.g. threats of suicide, a history of domestic violence, separation of the parties, and access to weapons). However, the IACHR found that the CRPD "failed to undertake the mentioned investigation actions with the required diligence and without delay," and that "[i]ts response can be at best characterized as fragmented, uncoordinated and unprepared; consisting of actions that did not produce a thorough determination of whether the terms of the restraining order at issue had been violated" (at para 150). There was no evidence that Lenahan's restraining order had ever been thoroughly reviewed by the police, there was a lack of communication between police dispatchers and officers, the CRPD had not contacted the Denver police in spite of the information provided by Lenahan, there was no check of Gonzales' criminal background or contacts with police (which showed a pattern of emotional problems and unpredictable behavior), and there appeared to be no protocols, directives or training in place to guide the police response (at paras 152-7). The IACHR repudiated the State's argument that Lenahan had not informed the police that the restraining order had been violated, noting its concern that "States mistakenly take the position that victims are themselves responsible for

monitoring the preventive measures, which leaves them defenseless and in danger of becoming the victims of the assailant's reprisals" (at para 158, citing its report *Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser. L/V/II. doc. 68, January 20, 2007, para 170). In addition to these "systemic failures" on the part of the police, the IACHR also found that the FBI had breached its obligations by approving the purchase of a gun by Gonzales on June 22, 1999, in spite of his criminal record and the existence of the restraining order (at para 159).

These failures to act with due diligence in spite of the recognized risk to Lenahan and her daughters were found to amount to discrimination contrary to Article II of the *American Declaration*. Although the IACHR recognized "the legislation and programmatic efforts of the United States to address the problem of domestic violence," it found that "these measures had not been sufficiently put into practice in the present case" (at para 161). The IACHR also stated that "the failure of the United States to adequately organize its state structure" to protect Lenahan's daughters amounted to a violation of their rights under Articles I and VII of the *American Declaration* (at para 164). These articles imposed on the State a "positive obligation to protect and prevent violations" of the right to life, and a "reinforced duty of due diligence to protect them from harm and from deprivations of their life due to their age and sex" (at para 164). The IACHR noted the false assumption of the police that the girls were safe because they were with the father, the lack of evidence of any protocols or training with respect to the risks to children in these circumstances, and the insensitive response of the police to Lenahan. On a systemic level, "this form of mistreatment results in a mistrust that the State structure can really protect women and girl-children from harm, which reproduces the social tolerance toward these acts" (at para 167, citing *Access to Justice for Women Victims of Violence in the Americas*, paras 172-180). Put another way, "State inaction towards ... violence against women fosters an environment of impunity and promotes the repetition of violence "since society sees no evidence of willingness by the State, as the representative of the society, to take effective action to sanction such acts"" (at para 168, quoting *Maria Da Penha Fernandes*, para 56).

(e) Other Relevant Articles

The IACHR also considered Article XVIII of the *American Declaration*, which provides:

XVIII. Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.

As with the other articles it considered, the IACHR noted that Article XVIII is to be interpreted through the lens of due diligence, which is to be demonstrated by the State not only by the formal existence of laws, but also by their implementation. In the context of domestic violence, where state actors have failed to protect women from imminent acts of violence,

the State also has the obligation to investigate systemic failures to prevent their repetition in the future. This involves an impartial, serious and exhaustive investigation of the State structures that were involved in the enforcement of a protection order, including a thorough inquiry into the individual actions of the public officials involved. ... The State should undertake this systemic inquiry on its own motion and promptly. A delay in this inquiry constitutes a form of impunity in the face of acts of violence against women and promotes their repetition (at paras 178-9).

Again, the State's duties in this context were said to be heightened in the case of girl-children given their right to special protection under the *American Declaration*. According to the IACHR, "Compliance with this State obligation is critical to sending a social message in the United States that violence against girl-children will not be tolerated, and will not remain in impunity, even when perpetrated by private actors" (at para 195).

Applying these principles to the facts of the case, the IACHR found that the State had breached Article XVIII in its failure to investigate the circumstances surrounding the non-enforcement of the restraining order, as well as its failure to investigate the time, place and circumstances surrounding the deaths of Lenahan's daughters and its failure to communicate the results of such an investigation to her (at para 196). The IACHR noted that it did not have sufficient information to rule on Lenahan's claim that there was also a breach of her right to access to the courts under Article XVIII, and it ruled that her claims under Article XXIV (the right to submit petitions to a competent authority) and Article IV (the right to freedom of investigation, opinion, and expression) had already been addressed under Article XVIII.

(f) Recommendations

The IACHR made several recommendations to the United States. Some concerned specific duties towards Jessica Lenahan regarding investigation and reparations. Other recommendations were more systemic in nature, and concerned, for example, the obligation to adopt or reform existing legislation to make the enforcement of restraining orders mandatory and to provide protection measures for children in the domestic violence context, and to properly implement such laws through adequate resources, including training, protocols and directives. Even more broadly, the IACHR recommended that the United States

continue adopting public policies and institutional programs aimed at restructuring the stereotypes of domestic violence victims, and to promote the eradication of discriminatory socio-cultural patterns that impede women and children's full protection from domestic violence acts, including programs to train public officials in all branches of the administration of justice and police, and comprehensive prevention programs (at para 201).

The IACHR closed by noting that it would monitor the steps taken by the United States to comply with its recommendations until there has been full compliance (at para 216).

Implications of *Lenahan* in Canada

The IACHR decision in *Lenahan* is significant for its synthesis of principles surrounding state responsibility for domestic violence under the Inter-American system of human rights (and indeed under international human rights law more broadly). Most significant in my opinion are the connections the IACHR draws between domestic violence and discrimination against women and girl-children, as well as the link between a state's failure to adequately respond to domestic violence and the ways in which this culture of tolerance and impunity may perpetuate further acts of violence. To make these findings in the context of a developed nation that has domestic violence laws on the books is highly significant.

The IACHR's connection between systemic state inaction and the perpetuation of violence against women suggests a causal link, something that has been a thorny issue domestically. For example, in *B.M. v British Columbia (Attorney General)*, 2001 BCSC 419, a woman's claim in

negligence against the RCMP for failing to protect herself and her daughters from domestic violence was dismissed on the basis of lack of causation. B.M. had complained to the RCMP about threatening actions by her estranged and abusive common law husband R.K., and was told to contact a lawyer to get a restraining order and to “stay in public places in the future” (although she lived in a rural area) (at para 22). A few weeks later, R.K. broke into B.M.’s home, shot and killed her best friend (who had urged B.M. to escape through a window), shot and wounded her 12 year old daughter, set the house on fire, and fatally shot himself. A second daughter (aged 6) witnessed the aftermath of the shooting. The B.C. Supreme Court dismissed B.M.’s action in negligence, finding that while the RCMP had a duty of care, the actions of the officer in question did not cause or materially contribute to the shootings (at para 61). This finding was made even though the officer was aware of and failed to comply with investigative policies for relationship violence in B.C. According to the court, the police were “guardians, not guarantors, of public wellbeing” (at para 64). An appeal to the B.C. Court of Appeal was dismissed, as was leave to appeal to the Supreme Court (*B.M. v British Columbia (Attorney General)*, 2004 BCCA 402 (Donald, J.A. dissenting); *Mooney v Canada (Attorney General)*, [2004] SCCA No. 428).

Could B.M. have brought a complaint against Canada to the IACHR following her failure to obtain relief from the Canadian courts? Canada is in a similar position to the United States in that it is not a party to the *American Convention* or the *Convention of Belém do Pará*, but as a member of the OAS, it is subject to the *American Declaration* and the jurisdiction of the IACHR. However, B.M. did not claim that the state had breached any of her *Charter* rights, so she may not have exhausted her domestic remedies. It may be that the outcome in *B.M.* would have been different had she mounted a claim of discrimination under section 15 of the *Charter*, as there is precedent in Canada for state liability for inaction on violence against women under the *Charter* (see *Jane Doe v Metropolitan Toronto (Municipality) Commissioners of Police*, [1998] OJ No 2681, 74 OR (2d) 225 (Div Ct), leave to appeal dismissed [1991] OJ No 3673 (CA), and see Elizabeth Sheehy, “Causation, Common Sense, and the Common Law: Replacing Unexamined Assumptions with What We Know About Male Violence Against Women or from *Jane Doe* to *Bonnie Mooney*” (2006) 17 CJWL 97).

What are the implications of the IACHR merits report in *Lenahan* outside the litigation context? Following *Lenahan*, the principles that govern state obligations for domestic violence in Canada should be seen to include the following (keeping in mind that the implementation of these obligations may be federal or provincial, depending on the constitutional division of powers):

- governments may be responsible for failing to act with due diligence to prevent, investigate, sanction and remedy acts of domestic violence, including acts perpetrated by private actors
- the duty of governments to respond to domestic violence mandates a contextual approach as well as measures to prevent and respond to the underlying discrimination against women that is inherent in this problem
- the duty to act with due diligence includes an obligation to guarantee access to adequate and effective judicial remedies for victims and their families when they experience acts of domestic violence
- in their adoption of measures to prevent domestic violence, governments must recognize that some women face a particular risk of violence because they face multiple forms of discrimination

- government responsibility for failing to protect victims from domestic violence arises when the authorities knew or should have known of a situation of real and immediate risk to the victims created by the perpetrator, and failed to undertake reasonable measures that had a real prospect of altering the outcome or mitigating the harm to the victims
- a government's failure to protect victims of domestic violence need not be intentional to constitute a breach of its obligations
- restraining orders indicate a government's recognition that the beneficiaries may experience domestic violence at the hands of the restrained party and require state protection
- governments must ensure that those responsible for enforcing restraining orders are aware of the orders' terms, understand their duties around enforcement and the dynamics of domestic violence, and are trained to respond to potential breaches
- a failure to meet these duties may amount to violations of the victims' rights, including the right to life and the right against discrimination.

In Alberta, the government has responded to domestic violence through the enactment of civil protection legislation, the [Protection Against Family Violence Act](#), RSA 2000, c P-27 (*PAFVA*). As noted in previous ABlawg posts (see e.g. [here](#)), the *PAFVA* allows family members to apply for emergency protection orders (EPOs) in cases of family violence on an *ex parte* basis, as well as for longer term Queen's Bench Protection Orders (QBPOs). This legislation was enacted largely to deal with problems related to the inaccessibility of restraining orders, which require an underlying court action and are only available through the Court of Queen's Bench during regular sittings (see Alberta Law Reform Institute, [Domestic Abuse: Toward an Effective Legal Response](#), Report for Discussion No 15 (Edmonton: ALRI, 1995) at 14 – 18). Based on *Lenahan*, it would be reasonable to say that the *PAFVA* constitutes recognition by the Alberta government that family violence is a problem requiring a specialized legislative solution.

However, the police obligation to enforce protection orders under Alberta law is unclear. As of November 1, 2011, when [amendments](#) to the *PAFVA* take effect, section 13.1 will create the offence of failing to comply with a protection order. As I noted in a [post](#) on this and the other amendments, no specific arrest powers have been added to the *PAFVA* *in relation to this offence*. Although EPOs and QBPOs often set out powers of arrest for breaches, this may not always be the case. Section 3 of the *Provincial Offences Procedure Act*, RSA 2000, c P-34, incorporates the *Criminal Code* provisions on summary conviction matters for provincial offences such as section 13.1 of the *PAFVA*, and under section 495(1) (b) of the *Criminal Code*, peace officers may only make warrantless arrests for such offences where they find the person in question committing the offence. Before the addition of section 13.1, breaches of EPOs could be charged under section 127 of the *Criminal Code*, an indictable offence allowing for arrests without a warrant where the officer has reasonable grounds to believe a lawful court order has been breached (*Criminal Code*, section 495(1)(a)). Police arrest powers for violations of protection orders under the *PAFVA* thus appear to be restricted by the addition of section 13.1, which was likely not intended.

Alberta has a [Domestic Violence Handbook For Police and Crown Prosecutors in Alberta](#) (Alberta Justice, 2008), which is a laudable effort towards achieving its responsibilities around domestic violence. The “Best Practices for Police” section of the Handbook indicates that procedures should be established for “The mandatory laying of charges where there are reasonable grounds to do so, including cases where there is a breach of bail condition, probation, parole, or protection order” (at 47). The Handbook also states that “if the suspect is not present

when officers arrive, and reasonable grounds exist to lay a charge, a warrant for the arrest of the suspect should be obtained as soon as possible. ... Every reasonable effort should be made to locate and apprehend the suspect” (at 54). It is unclear whether the “charges” referred to in the Handbook will be interpreted to include section 13.1 of the *PAFVA* or whether the Handbook will require revision to have this effect.

As I have argued previously, I believe the *PAFVA* should be amended to clarify that police have the power to arrest respondents without a warrant where there are reasonable and probable grounds to believe they have breached a protection order. The principles on state responsibility articulated by the IACHR in *Lenahan* suggest that an amendment setting out clear powers of arrest for breaches, coupled with a revision to the Handbook stipulating when those powers should be exercised, would be consonant with the government’s duties around the prevention of domestic violence. States are required to act not only formally through the creation of domestic violence laws, but also have an obligation to ensure the effective enforcement of those laws. Other provinces have recognized this obligation by including specific powers of arrest for breaches of protection orders in their family violence legislation (see e.g. Nova Scotia’s *Domestic Violence Intervention Act*, SNS 2001, c 29, s 19).

The IACHR decision in *Lenahan* undoubtedly has other implications in Canada (for example, in relation to state responsibility for missing and murdered Aboriginal women, which is the subject of an [inquiry](#) currently underway in BC). It is to be hoped that the federal government and provinces will closely review *Lenahan* to determine whether they are in compliance with this very important ruling on state responsibility for preventing violence against women and girls.