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Duty to Ensure Human Rights and its Evolution in the Inter-American System: Comparing Maria de Pengha v. Brazil with Jessica Lenagan (Gonzales) v. United States

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THE DUTY TO ENSURE HUMAN RIGHTS AND ITS EVOLUTION IN THE INTER-AMERICAN SYSTEM: COMPARING *MARIA DA PENHA V. BRAZIL* WITH *JESSICA LENAHAN (GONZALES) V. UNITED STATES*

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INTRODUCTION

The possibility of holding a State responsible for acts of domestic violence has been recognized in the Inter-American system since the first decision of the Inter-American Court of Human Rights, *Velásquez-Rodríguez v. Honduras*.[1] *Velásquez-Rodríguez*, as with most cases in the Inter-American system, concerned actions perpetrated by State agents. Nonetheless, since *Velásquez-Rodriguez*, the court has consistently held that States may be held responsible for acts perpetrated by private individuals when the State does not comply with its duty to ensure human rights.[2] Regarding this duty, the court held that "[s]tates must prevent,

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1. Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 194 (Jul. 29, 1988).

2. *Id.* ¶ 164; *see also, e.g.*, Perozo v. Venezuela, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 195, ¶ 298 (Jan. 28, 2009); Ximenes Lopes v. Brazil, Merits, Inter-Am. Ct. H.R. (ser. C) No. 149, ¶ 125 (Jul. 4, 2006); Pueblo Bello Massacer v. Colombia, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶ 113

investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation."[3] The court further affirmed that these obligations also apply to "illegal act[s] [that] violate human rights and [that are] initially not directly imputable to a State."[4] Domestic violence, as an act that potentially violates the right to personal integrity and the right to life, under certain circumstances, falls within this category. Consequently, the State has international obligations associated with the occurrence of domestic violence within its borders; the duty to prevent, investigate, punish, and, when possible, repair the harm. All of these duties may be referred to as the general duty to ensure human rights.

Unfortunately, State responsibility for failure to comply with the duty to ensure human rights is not clearly applied in many cases; one of the principal reasons for this is because few cases in the Inter-American system have concerned acts initially committed by private individuals. However, this is not the only reason. Even though the possibility of holding a State responsible for acts initially perpetrated by private individuals was alluded to in the first case ever decided by the court in *Velazquez-Rodriguez*, a concrete case within the Inter-American jurisprudence has not applied the implications of the *Velazquez-Rodriguez* decision until recently.[5] The best examples of this evolution are two cases of domestic violence: *Maria da Penha Maia Fernandes v. Brazil* and *Jessica Lenahan (Gonzales) v. United States*.[6]

In both cases of domestic violence, the Inter-American Commission found the State responsible for violating human rights.[7] Interestingly, the analysis utilized to attribute responsibility to the State for the private acts was completely different between both cases. In *Maria da Penha*, the Commission only explored how the lack of an official investigation violated the victim's right to judicial remedy and to a fair trial.[8] In contrast, the Commission in *Lenahan* analyzed the State's obligation to prevent the severe domestic violence that was at issue and to investigate the facts; consequently, the Commission concluded that the State's failure to

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(Jan. 31, 2006).

3. *Velásquez-Rodríguez*, Inter-Am. Ct. H.R. (ser C) No. 4, ¶ 166.

4. *Id.* ¶ 172.

5. *Id.* ¶ 176; *see, e.g.*, Lenahan v. United States, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, ¶ 119 (2011); Maria da Penha v. Brazil, Case 12.051, Inter-Am. Comm'n H.R., Report No. 54/01, OEA/Ser.L./V/II.111 doc. 20 rev. ¶ 27 (2001).

6. *Maria da Penha*, Case 12.051, Report No. 54/01, ¶ 26; *Lenahan*, Case 12.626, Report No. 80/11, ¶ 119 & n.201

7. *See Lenahan*, Case 12.626, Report No. 80/11, ¶ 199; *Maria da Penha*, Case 12.051, Report No. 54/01, ¶ 60.

8. *Maria da Penha*, Case 12.051, Report No. 54/01, ¶ 60.

prevent and investigate violated the victim's right to life.[9] The Commission's analysis in *Lenahan* regarding the duty to prevent also shows the evolution in case law regarding the standard used for the duty to prevent since it uses the theory of foreseeable risk.[10] The objective of this Article is to analyze the different reasoning used in *Maria da Penha* and *Lenahan*, and explain the significance of this variance in an analysis for future cases of domestic violence within the Inter-American System.

First, this Article explains the facts and the Commission's legal analysis in *Maria da Penha* and *Lenahan* and briefly describes the different approach taken by the Commission in each case. Second, this Article analyzes the evolution in the case law that led to the recognition that a State's failure to prevent and investigate could constitute a violation of substantive rights. Third, this Article examines the standard the Commission utilized in analyzing the duty to prevent in *Lenahan* and describes the theory of foreseeable risk, how it has been used, and the role it played in the *Lenahan* case. Finally, this Article discusses the theory of foreseeable risk, its application to cases of domestic violence, and the significance of this development in the jurisprudence of the Inter-American system.

This Article concludes that the recognition of substantive rights may be violated by the failure of the State to prevent and investigate, and that the use of the theory of foreseeable risk constitutes a significant step forward in clarifying the obligation of States to fight domestic violence. Finding a State responsible for failing to prevent, pursuant to the theory of foreseeable risk, implies that the State knew or ought to have known there was an imminent risk of domestic violence, and in the face of this foreseeable risk, the State failed to take action. This lack of prevention might be considered the equivalent of acquiescence pursuant to the definition of torture in the United Nations Convention Against Torture (UNCAT).[11] Consequently, this evolution could, and hopefully will, result in a recognition in the Inter-American System that in certain circumstances domestic violence constitutes torture.

I. THE TWO CASES

The Commission decided the case of *Maria da Penha* in 2001.[12] The case concerned the attempted murder of the victim and other aggressions

9. *See Lenahan*, Case 12.626, Report No. 80/11, ¶ 164.

10. *See id.* ¶ 147.

11. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/RES/39/46, at 197 (Dec. 10, 1984) (stating torture means intentional infliction of pain and suffering as a form of punishment, interrogation, or coercion).

12. *Maria da Penha*, Case 12.051, Report No. 54/01, ¶ 60.

by her husband, which resulted in the victim becoming paraplegic.[13] At the moment of the Commission's decision, seventeen years after the crime, the State had still not sentenced Maria's husband.[14] The Commission analyzed whether this period of time was reasonable and determined that it was not.[15] The Commission held that "the judicial delay and long wait for decisions on appeals reveal conduct on the part of the judicial authorities that violates the right to prompt and effective remedies provided for in the Declaration and the Convention."[16] The Commission concluded that this was a violation of the Convention, specifically article 8 concerning the right to fair trial, and article 25 concerning judicial protection, in relation to article 1(1).[17] Additionally, the Commission determined that Brazil's actions in this case were "part of a general pattern of negligence and lack of effective action by the State in prosecuting and convicting aggressors" of domestic violence.[18] The Commission held that the existence of this pattern of tolerance of domestic violence constituted a violation of the duty to "condemn all forms of violence against women" established in article 7 of the Convention of Belém do Pará.[19]

Although the petitioners mentioned State tolerance of the aggression and failure to prevent the actions, they did not demand a declaration of the violation of their right to personal integrity pursuant to article 5 of the Convention.[20] Nevertheless, even though the petitioners were not obliged to declare which of their rights were violated, the Commission decided issues of law beyond what the parties alleged.[21] Thus, the Commission

13. *Id.* ¶ 2.

14. *Id.* ¶ 38.

15. *Id.* ¶¶ 39-44.

16. *Id.* ¶ 41 (referring to the American Convention on Human Rights (Convention) and American Declaration of the Rights and Duties of Man (Declaration), respectively). A prompt remedy must take place within a reasonable time. *Id.* ¶¶ 38-39. To determine whether the time period within which proceedings take place is reasonable, four elements must be taken into account: the complexity of the matter, the procedural activity of the interested party, the conduct of the judicial authorities, and "the adverse effect of the duration of the proceedings on the judicial situation of the person involved in it". *See* Valle-Jaramillo v. Colombia, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 192, ¶ 155 (Nov. 27, 2008). On the other hand, an effective remedy is a remedy that is "capable of producing the result for which it was designed." Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 66 (Jul. 29, 1988).

17. *Maria da Penha*, Case 12.051, ¶ 44.

18. *Id.* ¶ 56.

19. *Id.* ¶¶ 54, 58.

20. *Id.* ¶¶ 2, 26.

21. *Id.* ¶¶ 56-58. *See generally* L.M. v. Paraguay, Petition 1474-10, Inter-Am. Comm'n H.R., Report No. 162/11, OEA/Ser.L./V/II., doc. 69 rev. ¶ 38 (2011) ("Neither the American Convention nor the IACHR Rules of Procedure require a petitioner to identify the specific rights allegedly violated by the State in the matter brought before the Commission, although petitioners may do so. It is for the Commission, based on the system's jurisprudence, to determine in its admissibility

could have examined a possible violation of Maria's right to personal integrity. The Commission did conclude that there was a general obligation to prevent, investigate, and punish acts of domestic violence.[22] Nonetheless, since the Commission did not examine these obligations as part of the duty to ensure the right to personal integrity, it did not determine that the lack of compliance with these obligations violated Maria's right to personal integrity.

On the other hand, in *Jessica Lenahan (Gonzales) v. United States*, the Commission referred to the killings of three girls, Leslie, Katheryn, and Rebecca Gonzalez.[23] The girls' parents had divorced, and the mother, Jessica Lenahan, had a restraining order against her ex-husband.[24] Ms. Lenahan contacted the police on several occasions to report that her daughters were missing, that she thought the girls' father took the girls, and that this was a violation of the restraining order.[25] Hours later, the father drove to the police station, and there was a shootout between him and the police.[26] Immediately after, the police found the corpses of the three girls in their father's car.[27]

The subsequent investigations did not completely clarify whether the girls were killed before or during the shooting at the police station.[28] Ms. Lenahan filed a suit against the City of Castle Rock and several police officers for failing to enforce the restraining order.[29] The case reached the United States Supreme Court.[30] The United States Supreme Court held that the police had no specific obligation to enforce a restraining order, reasoning that a "well established tradition of police discretion has long co-existed with apparently mandatory arrest statutes."[31]

Since the United States has not ratified the American Convention on

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report which provisions of the relevant Inter-American instruments are applicable and could be found to have been violated if the alleged facts are proven by sufficient elements."). Previously, the Commission analyzed this situation considering the *iura novit curia* ("the court knows the law") principle. *See, e.g.*, Moisés v. Peru, Case 11.016, Inter-Am. Comm'n H. R., Report No. 44/01, OEA/Ser.L./V/II.111, doc. 20 rev. ¶ 36 (2001); José do Egito Romão Diniz v. Brazil, Petition 262-05, Inter-Am. Comm'n H.R., Report No. 6/10, OEA/Ser.L/V/II, Doc. 69 rev. ¶ 4 (2010).

22. *Maria da Penha*, Case 12.051, Report No. 54/01, ¶¶ 55-56.

23. Lenahan v. United States, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, ¶¶ 24, 32 (2011).

24. *Id.* ¶ 62.

25. *Id.* ¶ 71.

26. *Id.* ¶ 81.

27. *Id.*

28. *Id.* ¶¶ 82-85 (noting that the autopsy failed to "identify which bullets, those of the [police] or Simon Gonzales, struck Leslie, Katheryn, and Rebecca Gonzales").

29. *Id.* ¶¶ 37, 86.

30. *See* Town of Castle Rock v. Gonzales (*Gonzales IV*), 545 U.S. 748 (2005).

31. *Id.* at 760; *see also Lenahan*, Case 12.626, Report No. 80/11, ¶ 90.

Human Rights, the obligations examined by the Commission in *Lenahan* were those found in the American Declaration of the Rights and Duties of Man.[32] The Commission examined whether the State had the state apparatus necessary to prevent domestic violence and whether it had exercised due diligence in preventing the killings.[33] The Commission determined that "[t]he state apparatus was not duly organized, coordinated, and ready to protect these victims from domestic violence," and that the State had not acted diligently in this case in particular.[34] Thus, the Commission found that the United States violated its obligation to protect the victims from discriminatory acts as well as violated the victims' right to life.[35]

Under the right to judicial protection, the Commission analyzed the obligation to clarify the cause, time, and place of the deaths of Leslie, Katheryn, and Rebecca Gonzales, as well as communicating the findings of the investigation to their families. As a result, the Commission determined that the United States failed to comply with those obligations.[36] The Commission also held that the United States violated the right to judicial protection since "the State authorities have [not] undertaken any inquiry into the response actions of the Castle Rock police officers in their contacts with Jessica Lenahan."[37] The main difference between the two cases is that the Commission in *Lenahan* analyzed the substantive right affected, the right to life, while the Commission in *Maria da Penha* did not analyze the right to physical integrity, the substantive right affected in that case. Consequently, while the Commission in *Lenahan* analyzed the duty to prevent domestic violence as part of the duty to ensure the right to life, the Commission in *Maria da Penha* did not. Neither of the two cases examined the duty to investigate and punish as part of the duty to ensure the right to life and the right to physical integrity.

II. PROCEDURAL OBLIGATIONS

The first case of the Inter-American Court, *Velásquez-Rodríguez*, established that there is a general duty to "prevent, investigate, and punish any violation of the rights recognized by the [American Convention on Human Rights] and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting

32. *See Lenahan*, Case 12.626, Report No. 80/11, ¶ 4.
33. *Id.* ¶¶ 138, 140, 159.
34. *Id.* ¶ 160.
35. *Id.* ¶¶ 160, 170.
36. *Id.* ¶ 196.
37. *Id.* ¶ 180.

from the violation."[38] In that same case, the court determined that this general duty applied to all the rights included in the Convention.[39] Nonetheless, as described in a prior section, this theory was not concretely applied right away. Instead, as seen in *Maria da Penha*, a case of State failure to investigate or punish those responsible for domestic violence, the Commission and the court only declared a violation of the right to judicial protection and the right to a fair trial for failure to investigate.

The Inter-American Court first applied the court's reasoning in *Velásquez-Rodríguez* in a 2003 case, *Sánchez v. Honduras*.[40] The case concerned the extrajudicial execution of the victim and the subsequent lack of investigation. The court determined that Honduras violated the victim's right to life by the extrajudicial execution itself as well as by the subsequent lack of investigation.[41] The court based its analysis on a previous decision of the European Court of Human Rights.[42] In *Sánchez v. Honduras*, the court analyzed the lack of investigation of the killing as an additional factor to the violation of the right to life and not as the only action or omission causing state responsibility regarding the right to life, as reflected in cases concerning deprivation of a victim's life by private action.

Procedural obligations include the obligations to prevent, investigate, punish, and, if possible, repair.[43] The theory and term is borrowed from the European Court of Human Rights (hereinafter the European Court).[44] In both systems, the procedural obligations were first recognized in cases where state agents committed the violation of the substantive rights.[45] Nevertheless, the European Court has since clarified that procedural obligations exist even when the perpetrators are not state agents.[46] "Nor is

38. Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 166 (Jul. 29, 1988).

39. *Id.*

40. Sánchez v. Honduras, Preliminary Objections, Merits, and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 99, ¶ 112 (Jun. 7, 2003).

41. *Id.* ¶ 113.

42. *See* Jordan v. United Kingdom, App. No. 24746/94, Eur. Ct. H.R., ¶ 105 (2001), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59450.

43. *See, e.g.*, Garibaldi v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 203, ¶ 23 (Sep. 23, 2009); Ergi v. Turkey, App. No. 23818/94, Eur. Ct. H.R., ¶ 82 (1998), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58200.

44. *See* McCann v. United Kingdom, App. No. 18984/91, Eur. Ct. H.R., ¶ 161 (1995), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57943.

45. *See* Valle Jaramillo v. Colombia, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 192, ¶ 97 (Nov. 27, 2008); *Sánchez*, Inter-Am. Ct. H.R. (ser. C) No. 99, ¶ 112. In the case of the European Court, *see Jordan,* App. No. 24746/94, ¶ 105; *McCann*, App. No. 18984/91, ¶ 161.

46. *See* Akkoç v. Turkey, App. No 22947/93 & 22948/93, Eur. Ct. H.R. ¶ 97 (2000), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58905; *Ergi*, App. No. 23818/94, ¶ 82 (holding that this obligation is not confined to cases

it decisive whether members of the deceased's family or others have lodged a formal complaint about the killing with the relevant investigatory authority."[47] In addition, the Inter-American Court expressly recognized that procedural obligations applied to actions initially committed by private actors in *Gonzáles v. Mexico (In re Cotton Field)*.[48] Nonetheless, there is still confusion surrounding the application of the procedural obligation. As seen in *Lenahan*, for example, the duty to prevent was the only procedural obligation applied, as the other obligations were treated as violations of the right to judicial protection.[49]

The express recognition of the procedural obligations represents a major improvement in the jurisprudence of the Inter-American System, particularly for cases of domestic violence. Thanks to this recognition there is a more clearly established duty to prevent domestic violence. Additionally, this now means that the failure to investigate cases of domestic violence constitutes a violation of the victim's right to personal integrity.

III. THEORY OF FORESEEABLE RISK

The application of procedural obligations to private acts, and the recognition of the duty to prevent in particular, has served to more clearly define for the Inter-American system what the State must prevent.[50] After all, the State cannot be responsible for all crime committed in its territory; instead, the duty to prevent is an obligation of conduct and not of result.[51]

The analysis used by the Inter-American and the European Human Rights System in relation to the duty to prevent is known as the theory of foreseeable risk.[52] The theory of foreseeable risk establishes that for a State to be responsible for a crime committed in its territory, four elements

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where it has been established that the killing was caused by an agent of the State).

47. *See Ergi*, App. No. 23818/94, ¶ 82.

48. González v. Mexico (*In re* Cotton Field), Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶ 294 (Nov. 16, 2009).

49. Lenahan v. United States, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, ¶¶ 181, 196, 209 (2011).

50. *See* Rosa M. Celorio, *The Rights of Women in the Inter-American System of Human Rights: Current Opportunities and Challenges in Standard-Setting*, 65 U. MIAMI L. REV. 819, 847 (2011) (indicating that the *Cotton Field* judgment, in particular, "greatly contributes to the clarification of the scope and content of the concrete responsibilities of states in individual cases of violence and discrimination against women, especially when these acts are presumably perpetrated by private individuals").

51. *See, e.g.*, *In re Cotton Field*, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶ 280.

52. *See* Víctor Abramovich, *Responsabilidad Estatal por Violencia de Género: Comentarios Sobre el Caso "Campo Algodonero" en la Corte Interamericana de Derechos Humanos*, ANUARIO DE DERECHOS HUMANOS 167, 168 (2010), *available at* http://www.feminicidio.cl/jspui3/bitstream/123456789/425/1/Abramovich.pdf.

must be present: (1) there must be a situation of real and immediate risk, (2) this situation must threaten a specific individual or group, (3) the State must know or ought to have known of the risk, and (4) the State could have reasonably prevented or avoided the materialization of the risk.[53]

The Inter-American Court used the theory of foreseeable risk in relation to the obligation to prevent private actions for the first time in the case of *Gonzales v. Mexico (In re Cotton Field)*.[54] The case concerned the disappearance of three women in Ciudad Juarez, Mexico.[55] The disappearances occurred within a context of kidnappings and murders of young women in Ciudad Juarez.[56] The bodies of the three victims in the case were found in the same field some days or weeks after their disappearance with marks of sexual abuse and inhuman treatment.[57]

To analyze whether Mexico was responsible for the failure to prevent the deaths of these victims, the court separated the events into two phases.[58] First, the court examined the duty to prevent the kidnappings of the victims.[59] Considering the existing pattern of disappearances and killings of young women, the court established that the State was obliged to take measures to prevent the kidnappings of women and violence against women in general.[60] The court recognized that Mexico had already taken some of these measures; however, it failed to prove their efficacy.[61] Notwithstanding, the court concluded that it was impossible for the State to

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53. *Id.* at 174.

54. *See In re Cotton Field*, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶¶ 171-73. Before this case, the court used the theory of the foreseeable risk in cases concerning massacres executed by paramilitary groups in Colombia. Though paramilitary groups were initially created by the State, by the time the massacres were examined, the paramilitary groups were already considered illegal groups; thus, the theory of the foreseeable risk was used to consider if there was an "accentuated responsibility." *See, e.g.*, Ituango Massacres v. Colombia, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 14, ¶ 134 (Jul. 1, 2006); Pueblo Bello Massacre v. Colombia, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶ 126 (Jan. 31, 2006). The theory of the foreseeable risk was also used in cases of indigenous communities to examine the alleged violation of the right to life. For those cases, the violation of the right to life occurred as a result of lack of medical care, among others, but not by private actors. *See, e.g.*, Sawhoyamaxa Indigenous Community v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶¶ 155-180 (Mar. 29, 2006).

55. *In re Cotton Field*, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶¶ 171-73.

56. *Id.* ¶¶ 122-23, 165-68.

57. *Id.* ¶¶ 209, 212.

58. *Id.* ¶ 281.

59. *Id.* ¶¶ 249-96.

60. *Id.* ¶¶ 252-58.

61. *Id.* ¶¶ 262-79 ("Although the obligation of prevention is one of means and not of results . . . , the State has not demonstrated that the [measures taken], although necessary and revealing a commitment by the State, were sufficient and effective to prevent the serious manifestations of violence against women that occurred in Ciudad Juárez at the time of this case.").

prevent the kidnappings of these three women specifically.[62]

The second phase concerned the obligation to prevent the inhuman treatment and killing of victims after their families denounced their disappearances. The court ruled that "given the context of the case, the State was aware that there was a real and imminent risk that the victims would be sexually abused, subjected to ill-treatment and killed."[63] This, the court said, transformed the obligation into one of "strict due diligence."[64] Since the State failed to comply with that obligation, it violated the victims' rights to life, personal integrity, and personal liberty.[65]

The difference between the two phases in *Cotton Field* demonstrates the importance of the specification of the group in danger. In the first phase, all unprivileged young women in Ciudad Juarez were at risk.[66] The State even had knowledge of the existence of the general risk and had started taking preventing measures.[67] This may not mean, however, that the State can be held responsible for all actions that fit within that pattern.[68] In this first phase, the general risk is not specific enough, making it impossible for the State to prevent all harm caused. While in the second phase, the immediate risk to the specific victims was higher and the contextual evidence demonstrated that the said risk was real.[69] Hence, state action was obligatory.

In *Lenahan*, the Commission also used the theory of foreseeable risk.[70] The Commission first determined that "the issuance of this restraining order and its terms reflect that the judicial authorities knew that Jessica Lenahan and her daughters were at risk of harm by Simon Gonzales."[71] Consequently, when Jessica Lenahan told the police that her three daughters were missing, three out of the four elements of the theory of foreseeable risk were met; specifically, there was a situation of real and immediate risk, the situation threatened a specific individual or group, and the State knew or should have known of the risk. Thus, the only element missing was whether the State could have reasonably prevented or avoided the materialization of the risk. This last element, as is suggested by the word "reasonably," is a due diligence obligation.

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62. *Id.* ¶ 282.
63. *Id.* ¶ 283.
64. *Id.*
65. *Id.* ¶ 286.
66. *Id.* ¶ 282.
67. *Id.*
68. *Id.*
69. *Id.* ¶ 283.
70. Lenahan v. United States, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, ¶ 137 (2011).
71. *Id.* ¶ 141.

To analyze this issue, the Commission examined the terms of the restraining order since the Commission considered that the order was "an indicator of which actions could have been reasonably expected from the authorities."[72] Subsequently, the Commission stated:

> With respect to the question of which actions could have reasonably been expected, the justice system included language in this order indicating that its enforcement terms were strict; and that law enforcement authorities were responsible for implementing this order when needed. The order expressly mandates law enforcement officials—by employing the word "shall"—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. The order authorizes and requires law enforcement officials to use every reasonable effort to protect the alleged victim and her children from violence.[73]

Accordingly, the Commission indicated that the state agents should have "understood that a protection order represents a judicial determination of risk."[74] Thus, the Commission established that the state agents should have known what their responsibilities were under the circumstances; should have considered "the characteristics of the problem of domestic violence; and [should have been] trained to respond to reports of potential violations."[75] The Commission then proceeded to analyze whether the actions taken by the police amounted to a lack of due diligence and determined that they did.[76]

On the other hand, in *Maria da Penha* there is not enough information to know whether the State should have prevented the attacks.[77] The Commission did state that there was a general pattern of violence against women.[78] Nonetheless, as shown by *Cotton Field*, it is necessary for the State to have knowledge of the particular risk.[79] Since there is no information on this issue in *Maria da Penha*, it is not possible to conclude whether Brazil should have prevented the aggressions to Maria da Penha. However, Brazil could still have been found responsible for violating the right to personal integrity for the lack of investigation alone.[80]

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72. *Id.* ¶ 143.

73. *Id.* ¶ 144.

74. *Id.* ¶ 145.

75. *Id.*

76. *Id.* ¶¶ 146-60.

77. *See* Maria da Penha v. Brazil, Case 12.051, Inter-Am. Comm'n H.R., Report No. 54/01, OEA/Ser.L./V/II.111, doc. 20 rev. ¶¶ 2-3 (2001).

78. *See id.* ¶ 56.

79. *In re Cotton Field*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶¶ 280 (Nov. 16, 2009).

80. The Inter-American Court has not yet declared the violation of a substantive right for lack of investigation alone. Nonetheless, it is expected for the Court to do so in *González v. Venezuela*, which is currently being analyzed by the Court and where the

IV. THE CONSEQUENCES OF THIS EVOLUTION

The recognition of the duty to prevent domestic violence and the application of the theory of foreseeable risk have created a standard that States must meet and clarify as to what mechanisms should be in place to prevent domestic violence. Even though investigation of domestic violence is also necessary, the main objective should be towards preventing domestic violence and human rights violations in general. This Article, however, focuses on one specific legal consequence: recognizing domestic violence as torture in the Inter-American System.

In the American Convention on Human Rights (American Convention), the article referring to personal integrity establishes that "[n]o one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment."[81] As stated above, the Inter-American system has already declared the violation of the right to personal integrity by actions initially committed by private actors.[82] Nonetheless, in those cases, both the court and the Commission have failed to distinguish whether the acts amounted to torture or not.

No definition of torture is included in the American Convention or the American Declaration of the Rights and Duties of Man (American Declaration).[83] Nonetheless, the Inter-American system has a convention specifically dealing with torture: the Inter-American Convention to Prevent and Punish Torture (ICPPT).[84] The ICPPT was adopted in 1985, just one year after the United Nations' adoption of the UNCAT.[85] Both the Inter-American Commission and Court have jurisdiction to examine a violation of the ICPPT.[86] Article 2 of the ICCT establishes that

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Commission found a violation of the right to life for lack of investigation. *See* González v. Venezuela, Case 12.605, Inter-Am. Comm'n H.R., Report No. 120/10, ¶ 159 (2011).

81. Organization of American States, American Convention on Human Rights art. 5(2), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

82. *See, e.g.*, *In re Cotton Field*, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶¶ 413, 602(8); Ximenes Lopes v. Brazil, Merits, Inter-Am. Ct. H.R. (ser. C) No. 149, ¶¶ 163, 262(2) (Jul. 4, 2006).

83. *See* Organization of American States, American Convention on Human Rights art. 5, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; American Declaration of the Rights and Duties of Man art. XXV, Apr. 30, 1948, O.A.S. Res. XXX.

84. Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, O.A.S. Treaty Series No. 67.

85. *Id.*; *see also* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

86. Inter-American Convention to Prevent and Punish Torture art. 8, Dec. 9, 1985, O.A.S. Treaty Series No. 67 (establishing that "[a]fter all the domestic legal procedures of the respective State and the corresponding appeals have been exhausted, the case may be submitted to the International Fora whose competence has been recognized by that State"). This has been interpreted to mean that both the court and the Commission have jurisdiction over the ICPPT. *See* Villagrán-Morales v. Guatemala (Case of the Street Children), Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 63, ¶¶ 247-48

> torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.[87]

To consider an act as torture, according to article 2, State involvement is not required. Nonetheless, article 3 of the ICPPT states that

> [t]he following shall be held guilty of the crime of torture: a. A public servant or employee who acting in that capacity orders, instigates or induces the use of torture, or who directly commits it or who, being able to prevent it, fails to do so. b. A person who at the instigation of a public servant or employee mentioned in subparagraph (a) orders, instigates or induces the use of torture, directly commits it or is an accomplice thereto.[88]

After some back and forth on whether state involvement was required to consider an act as torture,[89] the court clearly determined the elements of torture in the case of *Bueno Alves v. Argentina*, decided in 2007.[90] In that case, the court stated that "the elements of torture are as follows: a) an intentional act b) which causes severe physical or mental suffering c)

(Nov. 19, 1999). *See also* Rules of Procedure of the Inter-American Commission on Human Rights art. 23, approved by the Commission at its 137th regular period of sessions Oct. 28-Nov. 13, 2009 (providing information regarding the jurisdiction of the Inter-American Commission).

87. Inter-American Convention to Prevent and Punish Torture art. 2, Dec. 9, 1985, O.A.S. Treaty Series No. 67.

88. *Id.* art. 3.

89. The Commission first considered that State involvement was necessary to consider an act as torture under the ICPPT. *See* Raquel Martí de Mejía v. Peru, Case 10.970, Inter-Am. Comm'n H.R., Report No. 5/96, OEA/Ser.L./V/II.91 § V(B)(3)(a) (1996). Then, the Commission eliminated the state involvement requirement. It is necessary to mention, however, that all the cases where the Commission has done so have also only concerned acts committed by state agents. *See, e.g.*, Alfonso Martín Del Campo Dodd v. Mexico, Case 12.228, Inter-Am. Comm'n H.R., Report No. 117/09, OEA/Ser.L./V/II, doc. 51 rev. ¶¶ 35, 77 (2009); Ferreira Braga v. Brazil, Case 12.019, Inter-Am. Comm'n H.R., Report No. 35/08, OEA/Ser.L./V/II.134, doc. 5 rev. 1, ¶¶ 80, 84 (2008); Finca "La Exacta" v. Guatemala, Case 11.382, Inter-Am. Comm'n H.R., Report No. 57/02, OEA/Ser.L./V/II.117, doc. 1 rev. 1, ¶ 70 (2002); Jalton Neri Da Fonseca v. Brazil, Case 11.634, Inter-Am. Comm'n H.R., Report No. 33/04, OEA/Ser.L./V/II.122, doc. 5 rev. 1, ¶¶ 63, 65 (2004); Abella v. Argentina, Case 11.137, Inter-Am. Comm'n H.R., OEA/Ser.L./V/II.98, doc. 6 rev. ¶¶ 232-33 (1997); Gómez v. Mexico, Case 11.411, Inter-Am. Comm'n H.R., Report No. 48/97, OEA/Ser.L./V/II.98, doc. 6 rev. ¶¶ 62-63 (1997); Hernandez v. Mexico, Case 11.543, Inter-Am. Comm'n H.R., Report No. 1/98, OEA/Ser.L./V/II.102, doc. 6 rev. ¶¶ 34, 56 (1998).

90. Bueno-Alves v. Argentina, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 164, ¶ 79 (May 11, 2007).

committed with a given purpose or aim."[91] In the footnote to this statement, the court explained how this definition is in accordance with precedent.[92] The Court's enumeration of the elements of torture in the case of *Bueno Alves* is reiterated in subsequent cases decided by the court.[93] Noticeably, there is no element of State involvement.

Severe domestic violence meets all the required elements elaborated in *Bueno Alves*.[94] Consequently, the Inter-American System could simply disregard the issue of State involvement without further consideration, as has occurred in the area of International Criminal Law.[95] In this way, the Inter-American system could consider severe domestic violence to be torture without considering the element of State involvement at all. This is unlikely and probably unwise. If a violation of a State obligation is found by a human rights court, it has to be as a result of a State action or omission; courts do not have jurisdiction to rule on issues that are not attributable to the respondent, a State party. This is a factor that is not present in the area of International Criminal Law because liability is at issue only for individuals, not States.

Accordingly, this Article examines how domestic violence might be considered to be torture using the most internationally accepted definition of torture, which does require state involvement. In this sense, the definition of torture found in the UNCAT establishes that the act must be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[96] While analyzing the meaning of this phrase, the Committee Against Torture (CAT) stated in General Comment No. 2 to the UNCAT that

> where State authorities . . . know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State

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91. *Id.*

92. *See id.* at ¶ 79 n.45; *see also* Cantoral-Benavides v. Peru, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 69, ¶ 97 (Aug. 18, 2000); Urrutia v. Guatemala, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 103, ¶¶ 91, 93 (Nov. 27, 2003); Tibi v. Ecuador, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 114, ¶ 149 (Sept. 7, 2004).

93. *See, e.g.*, Bayarri v. Argentina, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 187, ¶ 81 (Oct. 30, 2008); Ortega v. Mexico, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 215, ¶ 120 (Aug. 30, 2010).

94. *See* Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291, 325-31 (1994).

95. *See* David Kretzmer, *Prohibition of Torture*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, ¶ 14 (Rüdiger Wolfrum et al. eds., online ed., 2008), *available at* http://www.mpepil.com.

96. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1.1, Dec. 10, 1984, 1465 U.N.T.S. 85.

> officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts. Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State's indifference or inaction provides a form of encouragement and/or de facto permission.[97]

General Comments constitute non-binding interpretations made by a committee of experts named by the State parties to the UNCAT.[98] While not binding, their opinions are valuable for the interpretation and development of international law.[99] General Comment 2 is also supported on similar grounds by different Special Rapporteurs,[100] as well as scholars.[101]

The interpretation of the CAT implies that a State has not acquiesced in torture where it has complied with the obligation to prevent the act of torture, the obligation to investigate the act, the obligation to prosecute the act, and the obligation to punish the perpetrators.[102] The existence of these obligations is conditioned by whether the State has "reasonable grounds to

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97. Committee Against Torture, *General Comment No. 2: Implementation of Article 2 by States Parties*, ¶ 18, U.N. Doc. CAT/C/CG/2 (Jan. 24, 2008).

98. CHRIS INGELSE, THE UN COMMITTEE AGAINST TORTURE: AN ASSESSMENT 150-51 (2001).

99. *See id.* For example, the manner the International Court of Justice treated interpretations made by the Human Rights Committee of the application of the International Covenant on Civil and Political Rights. *See* Report of the Int'l Court of Justice, ¶¶ 107-11, U.N. Doc. A/59/4 (Aug. 9, 2004); *see also* Human Rights Committee, *General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 11, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

100. *See* Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, ¶ 68, Human Rights Council, U.N. Doc. A/HRC/7/3 (Jan. 15, 2008) (by Manfred Nowak, Special Rapporteur); *see also* Special Rapporteur on Violence against Women, Its Causes and Consequences, *Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of Work of the Commission; Alternative Approaches and Ways and Means Within the United Nations System from Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms*, ¶ 95, Commission on Human Rights, U.N. Doc. E/CN.4/1996/53 (1996) (by Radhika Coomaraswamy, Special Rapporteur).

101. *See, e.g.*, INGELSE, *supra* note 98, at 225; Bonita C. Meyersfeld, *Reconceptualizing Domestic Violence in International Law*, 67 ALB. L. REV. 371, 400-01 (2003).

102. Committee Against Torture, *General Comment No. 2: Implementation of Article 2 by States Parties*, ¶ 18, U.N. Doc. CAT/C/CG/2 (Jan. 24, 2008); *see also, e.g.*, INGELSE, *supra* note 98, at 225; Meyersfeld, *supra* note 101, at 409-11.

believe that acts of torture or ill-treatment are being committed by non-State officials."[103] Consequently, when the State knowingly fails to prevent, investigate, prosecute, and punish, its failure to act may amount to acquiescence in torture, as long as the elements of severity and intentionality are present.

The obligations included in the CAT's interpretation are nearly identical to the obligations included within the duty to ensure or secure human rights that have already been recognized by the Inter-American System by way of the theory of foreseeable risk. To accept CAT's interpretation would not impose any new obligations on the States beyond those already found in *Lehanan* and *Cotton Field.* For example, the European Court, in the case of *Opuz*, even though it has not yet recognized that domestic violence may constitute torture, held that the decision of a court to merely impose a small fine on the husband and perpetrator of the violence "reveal[ed] a lack of efficacy and a certain degree of tolerance."[104] It is now necessary for the courts to move one step further and finally recognize that domestic violence may constitute torture in certain instances.

That this approach holds a State responsible when it has acquiesced in an act of torture does not necessarily mean that the State is responsible for the actions of the private actor; rather, it means that the State is responsible for its inactions as regards the private torture because the State was or should have been aware of the severe case of domestic violence and did not act reasonably to prevent it. Finally, this approach correctly signifies that the only difference between torture and other inhuman and degrading treatment is the severity of the act and serves to recognize that "private violence," often perpetrated against women, is no less deserving of international judicial attention than the political violence in the public sphere typically perpetrated against men.

CONCLUSION

The cases of *Maria da Penha* and *Lenahan* are just the tip of the iceberg in the development of women's rights standards in the Inter-American System.[105] This development first occurred within the Commission and was evidenced in decisions of individual cases as well as "by the Commission's publication of country reports, country chapters, and thematic reports delving into priority themes for women in the Americas, and the issuance of precautionary measures with a bearing on the rights of

103. Committee Against Torture, *General Comment No. 2: Implementation of Article 2 by States Parties*, ¶ 18, U.N. Doc. CAT/C/CG/2 (Jan. 24, 2008).

104. Opuz v. Turkey, App. No. 33401/02, Eur. Ct. H.R., ¶¶ 169-70 (2009).

105. Celorio, *supra* note 50, at 823.

women."[106] The height of the progress of this evolution, so far, can be found in the standards developed in the *Cotton Field* case.[107] These standards include the two principal differences between the analysis in *Maria da Penha* and *Lenahan*: (1) the procedural obligations, and (2) the theory of the foreseeable risk.

The application of the procedural obligations and of the theory of foreseeable risk helped to reinforce the importance of State action in preventing domestic violence. In addition, the case of *Lenahan*, in particular, strengthened the importance of restraining orders and State responsibility in enforcing them. There still are, however, some loose ends that need to be resolved.[108] For example, what happens if there is a restraining order, but the victim does not call the police to inform them there is a violation of that order? Does the restraining order itself constitute sufficient notice to the State of the potential for severe domestic violence? In most cases, it will not, but an analysis will need to be made in each case.

Furthermore, as previously elaborated, the application of the theory of foreseeable risk signifies that when a State fails to prevent severe cases of domestic violence, the lack of State action may amount to acquiescence to torture. This recognition, in turn, implies that domestic violence, under certain circumstances, rises to the level of a *jus cogens* violation and carries with it the corresponding international obligations. Such a judicial recognition might increase public awareness around the issue of domestic violence and lead to a stronger condemnation of this type of violence. Such social condemnation would serve to provide support to victims of domestic violence and to empower victims to assert their legal rights. Additionally, the qualification of domestic violence as torture lends support to women's rights by proclaiming that the private sphere is as important as the public sphere, and women's rights are as important as men's rights as they are all human rights. Such an interpretation would serve to further destroy the false dichotomy that relegates women to the private sphere, unreachable by State and international judicial processes. As well, this interpretation would go a long way towards eliminating the existing gender bias in the traditional interpretation of the torture definition.

106. *See id.*
107. *Id.* at 819.
108. *Id.* at 854.